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ARTICLES

Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011
Matthew R. Christiansen & William N. Eskridge, Jr. 1317

Justice at Work: Minimum Wage Laws and Social Equality
Brishen Rogers 1543

BOOK REVIEW

Confidence Breach: A Breakdown in Professional Self-Regulation
Dana A. Remus 1599

reviewing Tanina Rostain & Milton C. Regan, Jr.'s CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY

RESPONSES

How the Obamacare Case Defined Deviancy Down
Andrew Koppelman 1617

Still Free to Harm: A Response to Professor Farber
Thomas O. McGarity 1629

The Stylized Critique of Mismatch
Richard Sander 1637

The Mounting Evidence Against the "Formalist Age"
Brian Z. Tamanaha 1667

NOTES

Dirty Harriet: The *Restatement (Third) of Torts* and the Causal Relevance of Intent
John Morris 1685

Archangel Problems: The SEC and Corporate Liability
Spencer P. Patton 1717

Articles

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

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

Once upon a time, law professors and political scientists assumed that the Supreme Court was, as a practical matter, the final word on matters of statutory interpretation. Although Congress as a formal matter could alter a judicial construction with a statutory amendment, the conventional wisdom was that it rarely did so. In 1991, that conventional wisdom was shattered by one of our's empirical study demonstrating that congressional *overrides* of Supreme Court statutory interpretation decisions blossomed in the period between 1967 and 1990.[1] Later that year, Congress enacted the Civil Rights Act (CRA) of 1991, overriding as many as twelve Supreme Court decisions that had significantly cut back on workplace antidiscrimination protections.[2]

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

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

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

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

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

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

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

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

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

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

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

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

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

Contrary to the *New York Times* and to a 2013 override study by Richard Hasen[10] (which was the basis for the *Times*'s claim),[11] Part II of the current study finds that the 1990s was actually the golden age of overrides, with an unprecedented explosion of statutes resetting statutory policy in important ways. After 1998, however, we found that overrides declined as dramatically as they had ascended, though they have not (yet) "fallen to almost none."

Overrides never went away, but the climate for overrides has changed. To appreciate the new era, Part III suggests an important distinction. The most-publicized overrides, such as the 1991 CRA, are what we call *restorative* overrides: maintaining that the Supreme Court has reneged on historic legislative commitments, Congress "restores" what it considers the correct understanding of the statutory scheme, often the understanding that an agency had implemented before being rejected by the Court. Restorative overrides such as the 1991 CRA are an important phenomenon and include other landmark statutes, such as the Pregnancy Discrimination Act of 1978,[12] the Voting Rights Act Amendments of 1982[13] and the Voting

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Our study demonstrates the importance of the Executive Branch to the legislative process, generally, and to the override process in particular. Article I, Section 7 of the Constitution gives the President a formal role in the legislative process,[26] and commentators have pointed to the President's power that flows from his or her leadership of a political party[27]—but our study reveals the deeper involvement of the Executive Branch in legislative updates and overrides of landmark statutes. Federal agencies, especially the Department of Justice, play a critically important role in the override process—bringing issues to the attention of Congress, working with legislative staff to draft override legislation, and lobbying for such legislation (as well as implementing it). The Executive Branch process is both deliberative and effective.

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

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26. U.S. CONST. art. 1, § 7.

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

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

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

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

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

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

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

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

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

I. Methodology: Counting and Coding Overrides

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

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

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

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

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

A. *Finding the Overrides*

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

The methodology of the 1991 Eskridge study was simple but laborious: the author and his research assistants[37] identified all references to Supreme Court statutory interpretation opinions contained in the House and Senate committee reports published in the *U.S. Code Congressional and Administrative News* for each Congress and then determined whether the final statute included a provision significantly altering either the point of law, the result in the Supreme Court's opinion, or both.[38] This previous study did *not* identify as an override a statute containing legislative history critical of a Supreme Court decision *unless* there was a specific statutory provision that created a different point of law.[39] Nor did that study count as

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

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

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

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

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

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

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

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

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

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

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

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

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

Strongly at odds with the assumptions of the post-1991 studies,[44] legal scholar Richard Hasen deployed the committee-report methodology of the 1991 Eskridge study[45] and reported that, after 1991, statutory overrides plummeted and, since 2009, have "slowed to a trickle."[46] We have found more overrides than the 2013 Hasen study did, especially for the 1990s. The paucity of overrides in his study is, in large part, the result of the radical decline of committee reports as a useful source of information for major legislation.

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

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

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

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

46. *Id.* at 217–18.

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

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

B. *Coding the Overridden Supreme Court Cases*

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

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

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

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

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

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

C. *Coding the Overrides*

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

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

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

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

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

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

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

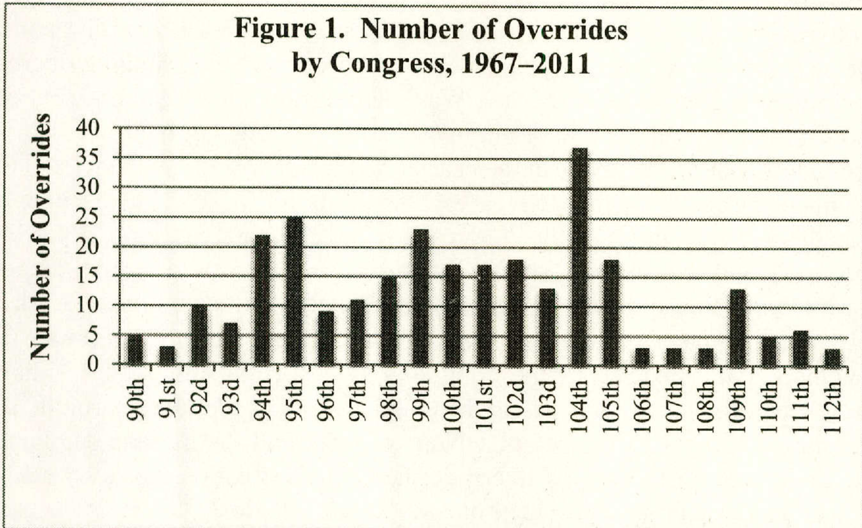
To help determine how much the override "mattered," we coded the judicial response to each override: Were there reported cases interpreting or applying the new override provision? If so, did the override yield judicial consensus—or did it yield significant disagreement among judges? Relatedly, did judges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

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

II. Rise and Decline of Overrides, 1967–2011

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

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



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

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

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

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

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

A. *The Override Boom, 1975–1990*

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

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

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

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

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

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

57. *Id.* at 399–401.

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

overrides but, instead, in comprehensive landmark legislation that overrode several Supreme Court decisions in the process of comprehensive reform and updating of statutory law. Major legislation overriding multiple Court decisions included the Tax Reform Act of 1976[59] and the Copyright Act of 1976.[60] In an important departure from the pattern of these and prior overrides, Congress rebuked as well as overrode the Supreme Court in The Civil Rights Attorney's Fees Awards Act of 1976.[61]

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

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

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

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

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

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

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

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

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

Air Act Amendments of 1977,[66] the Foreign Intelligence Surveillance Act of 1978,[67] and the Contract Disputes Act of 1978.[68] All of these superstatutes overrode multiple Supreme Court decisions.

Additionally, the 95th Congress strongly rebuked the Court for its stingy interpretation of the jobs title of the Civil Rights Act of 1964 when it overrode *General Electric Co. v. Gilbert*,[69] and it directed that pregnancy-based discrimination is unlawful, via the Pregnancy Discrimination Act (PDA) of 1978.[70] Before the 1991 CRA, the 1978 PDA was probably the most politically charged statutory override in the nation's political history.[71] With only a little less heat, the Age Discrimination in Employment Act (ADEA) Amendments of 1978 overrode the Supreme Court's stingy interpretation of the 1967 ADEA.[72]

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

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

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

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

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

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

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

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

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

project[74] and amended substantive federal criminal law after more than a decade of deliberation;[75] the Tax Reform Acts of 1984[76] and of 1986,[77] which were important revisions of the Internal Revenue Code of 1954; the Immigration Reform and Control Act of 1986,[78] updating the Immigration and Nationality Act of 1952; and the Sexual Abuse Act of 1986,[79] which updated the Mann Act of 1910 and other federal regulations of sexual abuse.

Another significant pattern involved overrides of Supreme Court statutory decisions that Congress considered not just poor policy, but serious judicial misreadings of statutory texts and legislative expectations. These were the restorative overrides described in the introduction: never more than a fraction of overrides in any given decade, the restorative overrides have received the lion's share of press attention. Bipartisan majorities in Congress rebuked the Court in a number of high-visibility civil rights statutes. Thus, the Voting Rights Act (VRA) Amendments of 1982[80] not only overrode *City of Mobile v. Bolden*,[81] but subjected the Court's interpretation to severe criticism.[82] The most aggressive, and perhaps the most angry, overrides were those found in the 1991 CRA, which kicked off what we consider the golden age of statutory overrides.

B. The Golden Age of Overrides, 1991–1999

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

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

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

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

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

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

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

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

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

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

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

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

This was the golden age, both quantitatively and qualitatively. As a matter of pure counting, the 102nd through 105th Congresses (1991–1999) overrode eighty-six Supreme Court statutory decisions, an average of more than twenty per Congress.[84] That eight-year period accounted for twenty-eight percent of the total overrides identified in our study. Two of the biggest jumbo override statutes (the 1991 CRA[85] and the 1996 AEDPA[86]) were enacted during this period. The 1991 CRA not only overrode twelve Supreme Court decisions, including the Court's landmark effort to reset disparate impact liability for employment discrimination in *Wards Cove Packing Co. v. Atonio*,[87] but also recast the statutory rules governing workplace affirmative action.[88] While the 1991 CRA is the leading "liberal" override of the last two generations, the 1996 AEDPA is the leading "conservative" override.[89] Most of the fourteen Supreme Court decisions overridden by AEDPA had set relatively high hurdles barring many habeas petitions—and the new statute raised the bar even higher.[90]

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84. *See infra* Appendix 1.

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

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

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

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

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

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

During this golden age, overrides flourished in a variety of subject areas, not just civil rights and habeas. Among the other important override statutes adopted were the Rehabilitation Act Amendments of 1992,[91] the Bankruptcy Reform Act of 1994,[92] the Private Securities Litigation Reform Act of 1995,[93] the ICC Termination Act of 1995,[94] the Small Business Job Protection Act of 1996,[95] the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[96] the Federal Courts Improvement Act of 1996,[97] the Prison Litigation Reform Act (PLRA) of 1995,[98] the Telecommunications Act of 1996,[99] the Individuals with Disabilities Education Act Amendments of 1997,[100] the Taxpayer Relief Act of 1997,[101] the Internal Revenue Service Restructuring and Reform Act of 1998,[102] the Digital Millennium Copyright Act of 1998,[103] and an act to throttle the criminal use of guns in 1998.[104] Not only did Congress reverse or adjust the results or reasoning of many Supreme Court decisions, but legislators revamped major areas of federal law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In addition, both Democrats and Republicans campaigned on platforms geared towards reforming and revitalizing the role of the federal government. Whether it was Vice President Al Gore's campaign to "reinvent" government through the National Performance Review[107] or the Contract with America advanced by House Speaker Newt Gingrich,[108] both parties believed that the road to political success lay in altering fundamentally the image and substance of federal government regulation.

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

106. *See, e.g.*, Andrew Rosenthal, *Bush Now Concedes a Need for 'Tax Revenue Increases' to Reduce Deficit in Budget*, N.Y. TIMES, June 27, 1990, http://www.nytimes.com/1990/06/27/us/bush-now-concedes-a-need-for-tax-revenue-increases-to-reduce-deficit-in-budget.html (discussing President George H.W. Bush's compromise with congressional Democrats to raise taxes); Carolyn Skorneck, *Clinton Says He Will Sign Welfare Overhaul; House Passes It*, ASSOCIATED PRESS (July 31, 1996), http://www .apnewsarchive.com/1996/Clinton-Says-He-Will-Sign-Welfare-Overhaul-House-Passes-It/id-f11a3d867b896908c6c598e31fb94ff8 (reporting on Clinton's willingness to compromise with congressional Republicans on welfare reform). Our impression, from leading historians as well as from popular accounts, is that previous Presidents Carter and Reagan were not nearly as happy to compromise core beliefs as Presidents Clinton and Bush 41—and that subsequent Presidents Obama and Bush 43 are and were ideological throwbacks to Presidents Carter and Reagan. *See, e.g.*, Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 411–12 (2009) (discussing the Bush 43 Administration's efforts to expand presidential initiative); Martin A. Levin et al., *Getting Past No: Building Coalitions and Making Policy from Clinton to Bush to Obama*, *in* BUILDING COALITIONS, MAKING POLICY: THE POLITICS OF THE CLINTON, BUSH & OBAMA PRESIDENCIES 1 (Martin A. Levin et al. eds., 2012) (surveying the increasingly unilateral direction of the presidency since Bush 43). In the new millennium there is even less political space to reach deals.

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

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

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

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

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

More important, Congress during this "down" period still enacted a fair number of overrides, including landmark statutes such as the Gramm-Leach-Bliley Act,[111] the Sarbanes-Oxley Act of 2002,[112] the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[113] the Class Action Fairness Act of 2005,[114] the Detainee Treatment Act of 2005[115] and the Military Commissions Act of 2006,[116] the Voting Rights Act Reauthorization and Amendments Act of 2006,[117] the ADA Amendments of 2008,[118] the Lilly Ledbetter Fair Pay Act of 2009,[119] the Fraud Enforcement and Recovery Act of 2009,[120] the Family Smoking Prevention and Tobacco Control Act of 2009,[121] and the Dodd-Frank Wall Street Reform and

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

110. *See supra* Figure 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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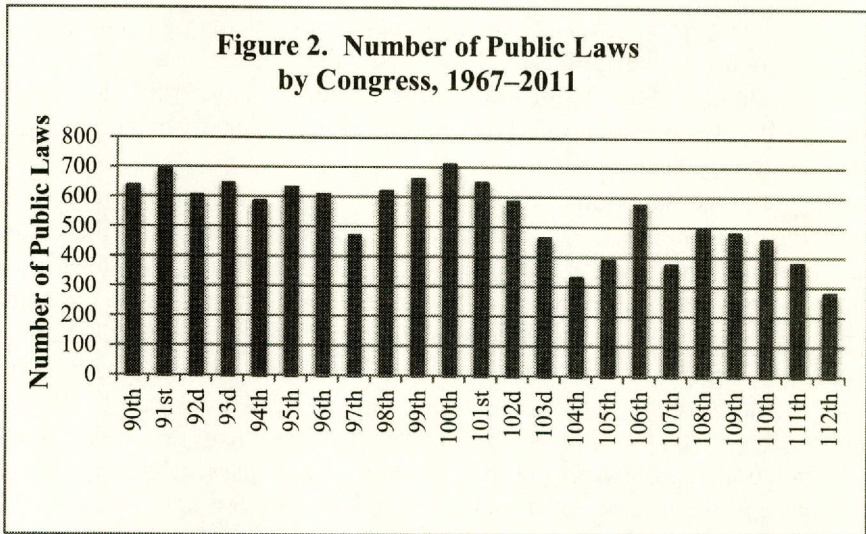
122. Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered titles of U.S.C.) (overriding one statutory decision).

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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130. *Id.* at 238–42.

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

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

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

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

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

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

To examine the activity by the two judiciary committees we studied three potential measures of committee activity: (1) the number of bills referred to the committee, (2) the number of bills reported from the committee, and (3) the number of reported bills that eventually became law.[136] Figures 3 and 4 present the normalized[137] activity for these three variables for both the House and Senate Judiciary Committees. These figures reveal that although there was considerable variation in these measures among the various Congresses, this variation does not appear correlated with the decline in overrides. That is, if the reason for the decline in overrides lies with the judiciary committees, it is not because they simply ceased considering and reporting bills, or even that Congress stopped passing the bills that they did report.

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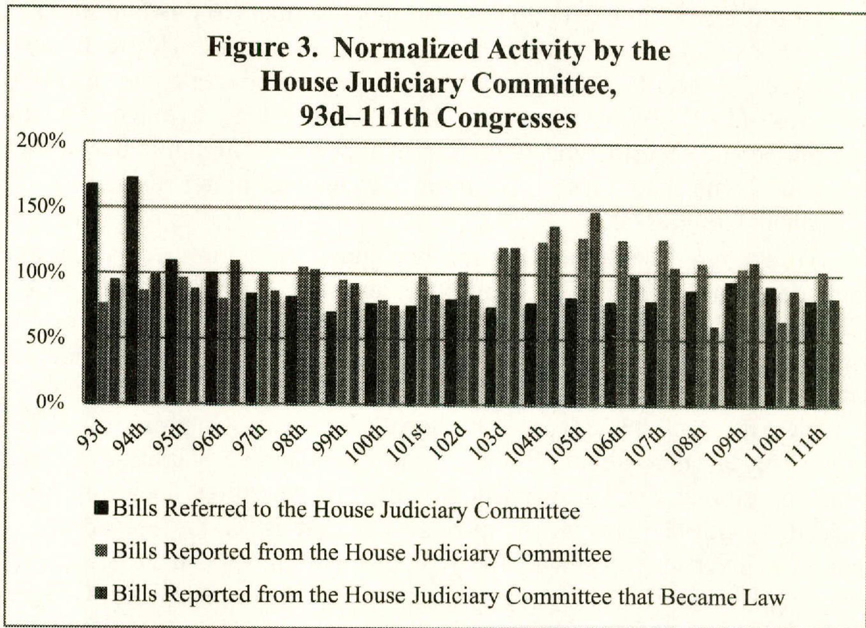
vision of Hyde or his predecessor as chair, Representative Jack Brooks (1989–1995), *see id.* (indicating that Brooks preceded Hyde), and each of the post-2001 chairs was occupied with controversies distracting the Committee from substantive legislation, such as Sensenbrenner's tiffs with the minority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

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

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

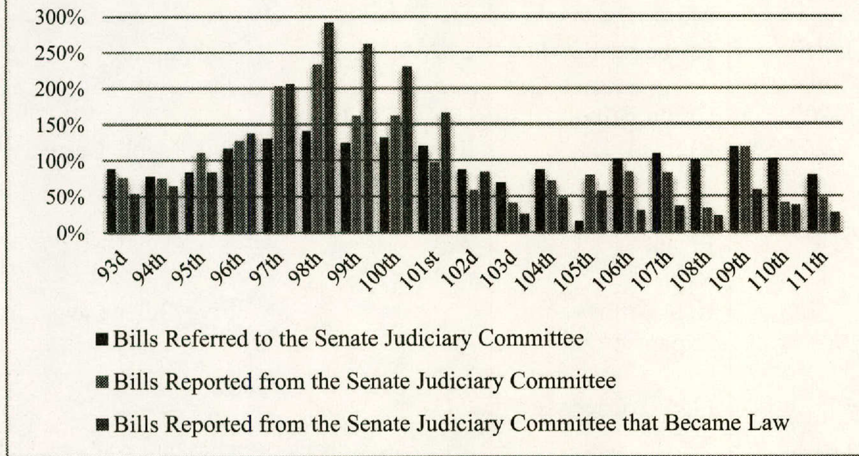


The record of the Senate Judiciary Committee, chaired by highly competent lawmakers (e.g., Senators Biden, Hatch, Leahy, and Specter) during this period,[138] is even more perplexing. Figure 4 below reveals that the Senate Judiciary Committee was, relatively speaking, most productive during the 97th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

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

139. *See supra* Figure 2.

Figure 4. Normalized Activity by the Senate Judiciary Committee, 93d–111th Congresses



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

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

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

Table 1. Categories of Major Legislation, 1987–2010

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

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

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

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

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

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

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

those concerns. Two of the signature achievements of the Bush–Cheney Administration—the PATRIOT Act of 2001[142] and the Military Commissions Act of 2006[143]— were directed at this perceived new, almost existential, threat. Yet those statutes, together, contained just one override. The legislative shift may also be responsive to underlying structural developments. The rolling retirement of the baby boom generation has generated increasing interest in the scope and sustainability of the entitlement programs.[144] Thus, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003[145] and President Bush's failed attempt to partially privatize social security[146] reflect this concern. Those efforts, together, produced zero overrides. The shift may also be the result of a changed political debate. Rather than seeking to update the superstatutes of the New Deal, the Great Society, and the Nixon–Ford Administration, the post-9/11 GOP Congresses and the Bush–Cheney Administration were skeptical of significant government regulation, including regulation advancing "conservative" values, and were not eager to pursue superstatute deals with Democrats. This is a marked change from the 1990s, when the Gingrich-led Congress was eager to work with—and even compromise with—President Clinton to achieve its goal of reforming major areas of federal regulation.[147]

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

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

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

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

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

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

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

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

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

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

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

For the short term, the combination of the new legislative agenda and the continuing partisan polarization will depress Congress's inclination and capacity to enact override laws. In the longer term, however, countervailing pressures from interest groups, agencies, and the states ought to press Congress to update aging superstatutes, with the result being a resurgence of overrides. Moreover, the Obama Administration has produced a pair of laws that appear to have the potential to become superstatutes in their own right. As the Court interprets the (vast) expanse of statutory provisions contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[152] and the Patient Protection and Affordable Care Act of 2010,[153] it will no doubt produce new decisions with the potential to be overridden.

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

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

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

Take the 1991 CRA, for example. This is the best known override statute—and it could not have been more dramatic. Notwithstanding a presidential veto in 1990 and threatened veto in 1991, an engaged Congress angrily overrode twelve or more prominent Supreme Court interpretations of important job discrimination laws,[154] and did so swiftly after the decisions had been handed down—eight of the twelve decisions were handed down between 1989 and 1991.[155] As symbolically and practically

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

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

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

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

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

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

A. *Timing and Focus of Overrides*

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

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

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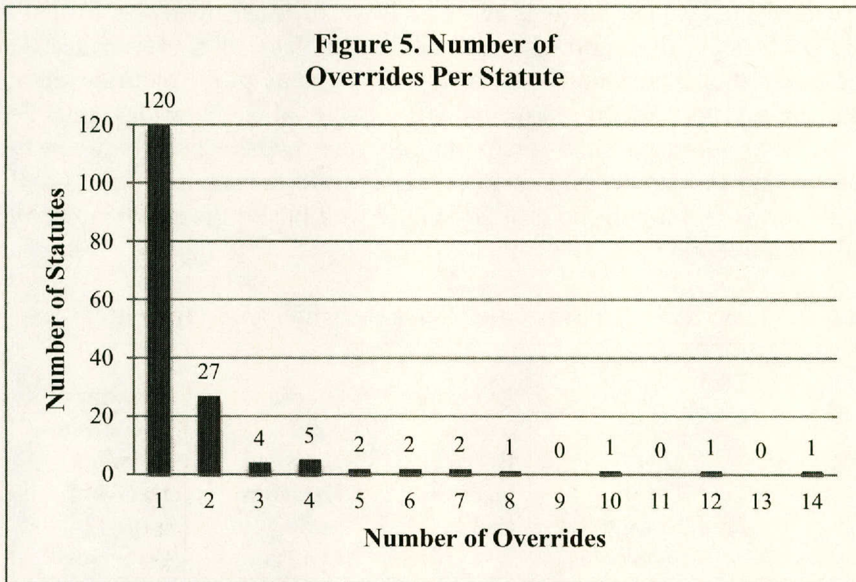
supra note 3, app.1 at 255. Through our Westlaw approach, we identified four decisions not identified by the 2013 Hasen study—offset somewhat by our not including two decisions that study identified. For example, the 2013 Hasen study includes *Marek v. Chesny*, 473 U.S. 1 (1985), as an overridden decision,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

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



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

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

157. *See infra* Appendix 1.
158. 129 U.S. 677 (1889).
159. 7 U.S. (3 Cranch) 267 (1806).

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

Table 2. Time Between Supreme Court Decisions and Overrides

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

B. Subject Matter of Overrides

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

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

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

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

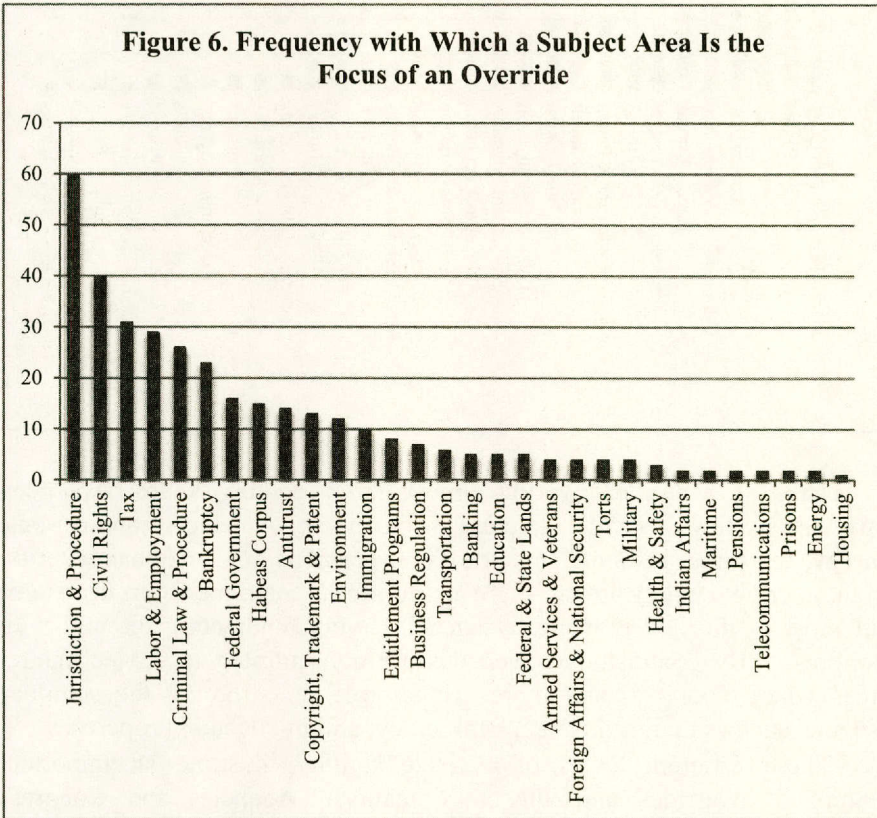


Figure 6. Frequency with Which a Subject Area Is the Focus of an Override

162. *See id.* at 621.

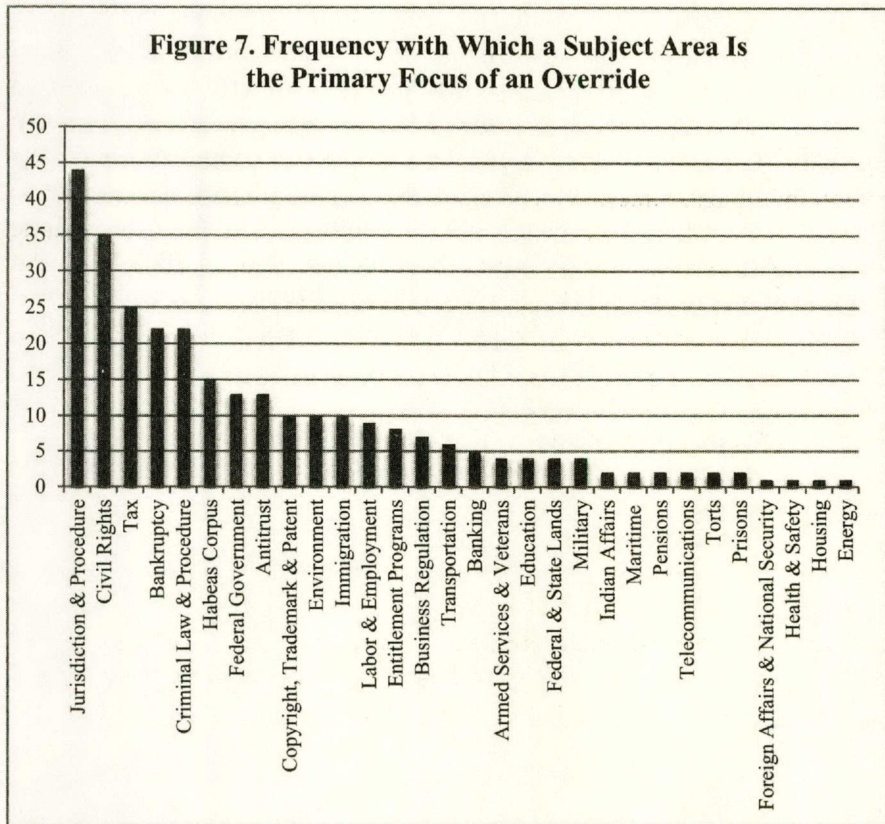


Figure 7. Frequency with Which a Subject Area Is the Primary Focus of an Override

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1978 overrides, Congress again significantly revised the Bankruptcy Code in 1994.[177]

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

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

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

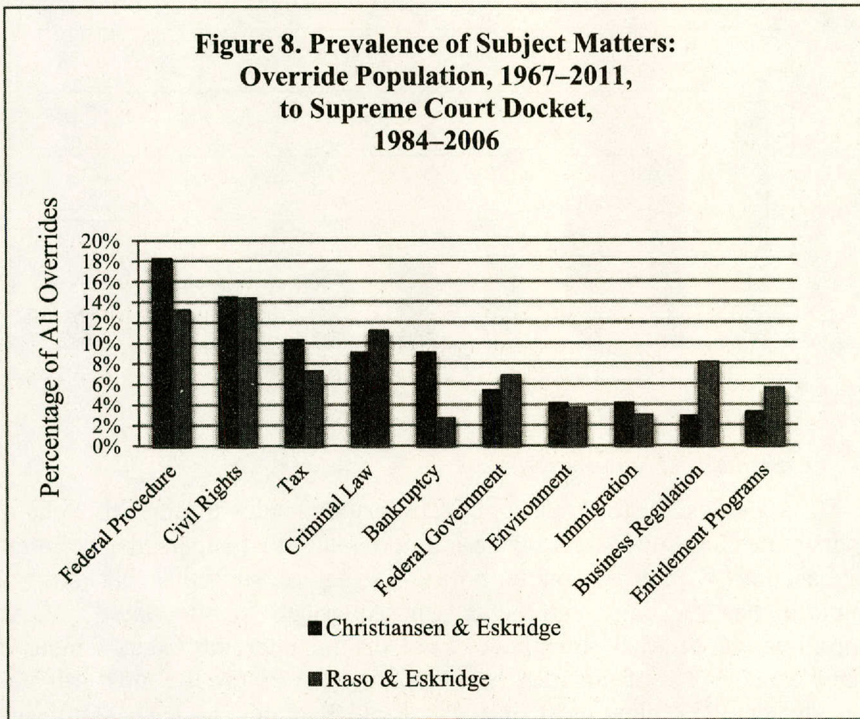
178. *See About the Committee*, *supra* note 172; *Jurisdiction*, *supra* note 172.

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

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

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

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



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

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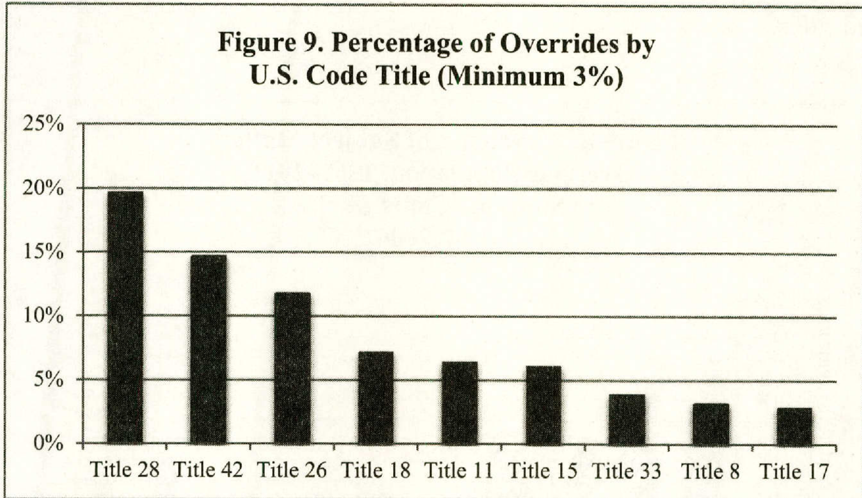
by the number of overrides for which both studies coded—i.e., excluding the habeas overrides. Consequently, the Christiansen & Eskridge numbers for a particular subject matter in Figure 8 are higher than they would be for the entire override population.

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

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



C. *Overrides and Superstatutes*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Relatedly, the nineteen most litigated statutes in the Supreme Court might tell us something about the post-1998 fall-off in override activity. These nineteen superstatutes were the situs for seven override laws, reversing twelve Supreme Court decisions, in the dozen years after 1998.[189] Compare the output of the last pre-Clinton impeachment Congress (1995–1996), which amended the same nineteen statutes with six override laws that reversed or modified a whopping twenty-three Supreme Court decisions.[190] In other words, in a two-year period right before the impeachment drama, *one Congress* amended the most litigated superstatutes to override twice as many Supreme Court decisions as did the *six Congresses* after the Clinton impeachment.

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

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

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

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

D. *Purposes of Overrides*

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

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

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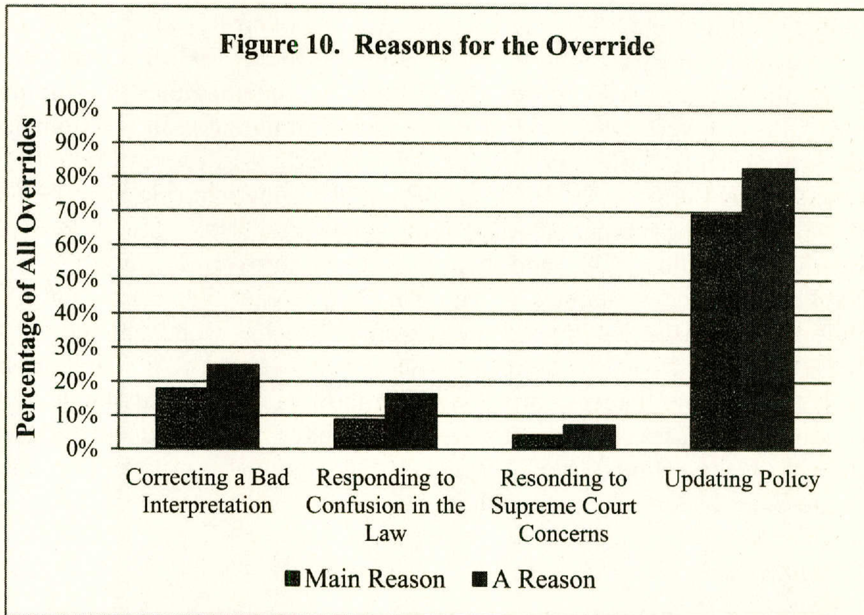
191. *See infra* Appendix 1.

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

Altogether, two-thirds of the overrides are policy-updating overrides. Almost all of the Court's overridden bankruptcy, tax, intellectual property, habeas, federal jurisdiction, and civil procedure decisions are policy updates—often reflecting new political values, responses to practical problems, or both. In each of these areas, Congress administers a coherent body of law (indeed, Congress administers the only bankruptcy law), and the Supreme Court is the court of last resort on a statute's meaning. And in almost all of these areas, the circumstances have changed significantly over the course of our study. For instance, copyright laws designed for books and recorded music have evolved to account for the challenges of cable broadcasting[204] and digital technologies.[205] It should thus come as no

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

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

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

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

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

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

On other occasions, the Court delivers a complete decision on the merits that Congress finds problematic because it does not provide an understandable rule of law. Thus, the Court in *United States v. Santos*[210] interpreted the money laundering statute narrowly[211]—but there was no majority opinion, leaving the lower courts with difficulty figuring out how to treat pending prosecutions. To provide a rule of law that the Court could

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

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

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

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

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

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

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

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

not, Congress overrode *Santos* with a clear command in the Fraud Enforcement and Recovery Act of 2009.[212]

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

3. Restorative Overrides.—Congress sometimes goes beyond tweaking statutes to reflect recent congressional values or to clean up confusing legal rules and adopts overrides in response to what it considers a bad interpretation by the Supreme Court. Frequently, but not always, these overrides restore the policy Congress vested in the original statute or as implemented by an agency and lower courts before a dust-clearing Supreme Court decision. About one-fifth of the overridden Supreme Court decisions fall under this category. These overrides generally correspond to the leftmost pair of columns in Figure 10.[213] Appendix 1 marks the overrides that restore the previous rule of law in italics because these are the overrides that garner the most attention and most obviously reflect institutional conflict.

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

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

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

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

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

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

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

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

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

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

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

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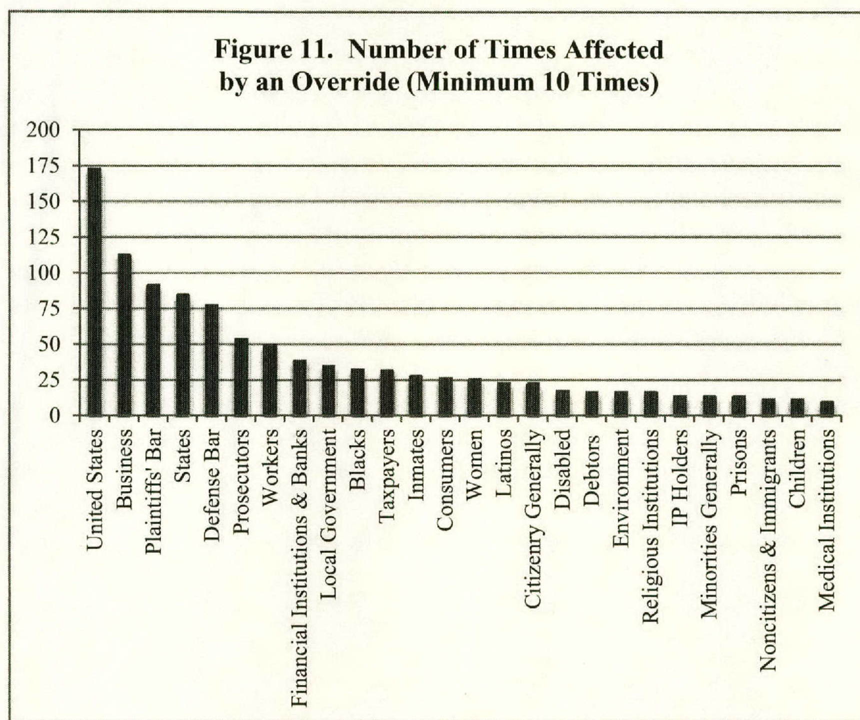
217. 136 CONG. REC. 1,657 (1990) (statement of Sen. Jeffords); *see also id.* at 1,653 (statement of Sen. Kennedy) ("The fabric of justice has been torn.").

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

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

220. *See infra* Appendix 1.

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



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

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

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

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

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

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

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

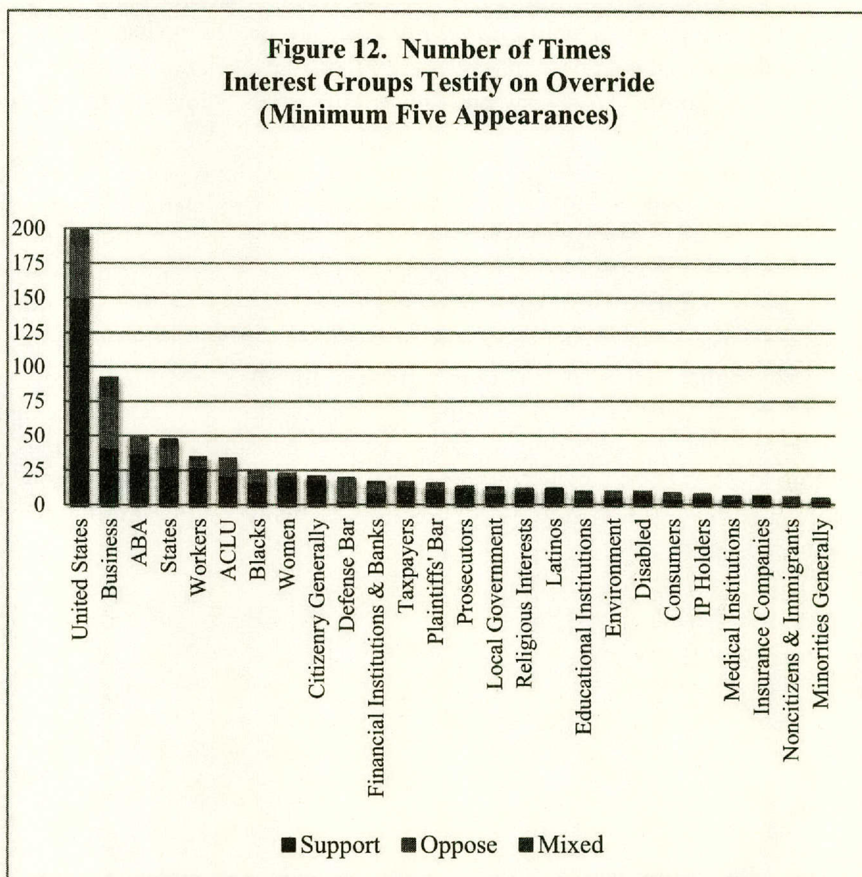
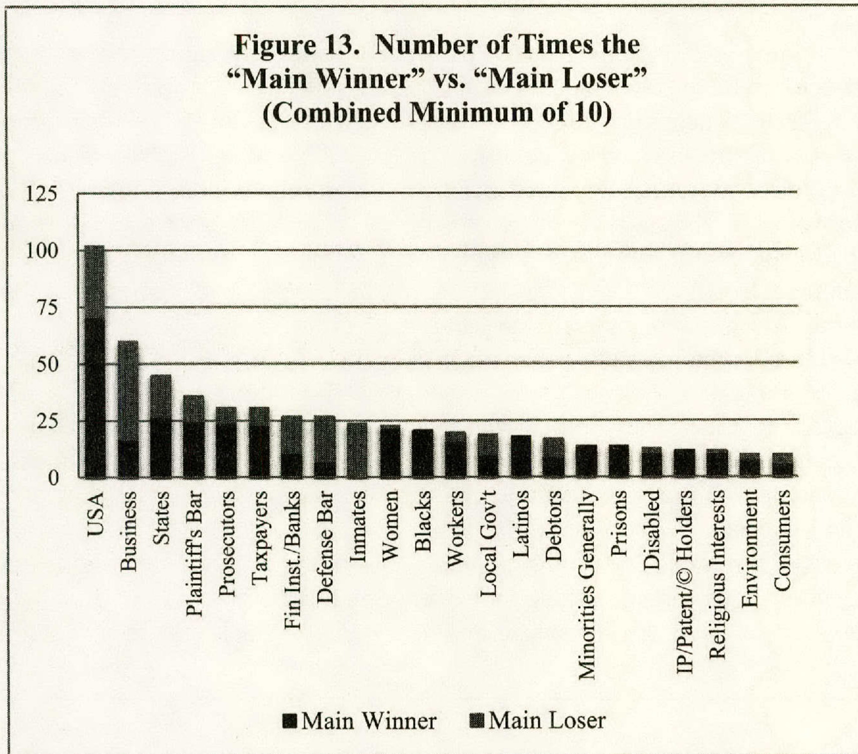


Figure 13 below offers a dramatic graphic demonstrating which institutions prevail in the override process. As suggested by the foregoing analysis, the United States leads the pack by a huge margin: the Department of Justice, the Internal Revenue Service, the Department of Health and Human Services,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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Contrary to the 2007 Staudt study, which found congressional overrides of tax decisions unrelated to general law reform,[238] we find a strong correlation. The large majority of tax overrides came in comprehensive reform statutes that were not focused on the Supreme Court but that overrode its decisions as part of a larger revision in the 1954 IRC or in the operation of the IRS. The leading measures were the Tax Reform Acts of 1976,[239] 1984,[240] and 1986;[241] the Small Business Job Protection Act of 1996;[242] the Internal Revenue Service Restructuring and Reform Act of 1998;[243] and the Job Creation and Worker Assistance Act of 2002.[244] These five law-reform statutes overrode more than twenty Supreme Court tax decisions, the large majority of which had confirmed the IRS position. Interestingly, the United States, either through the Treasury Department or the IRS itself, supported roughly half of these overrides and opposed only one-fifth, even though most tax-related overrides resulted in a victory for the taxpayer. This result likely reflects the peculiar politics of the tax code: Congress and the Executive Branch are both eager to show their support for the taxpayer even while the federal government litigates against the taxpayer in order to enforce the IRC. No other area of overrides exhibits as much federal government support for overrides that would appear to make the federal government's job more difficult.

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

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

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

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

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

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

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

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

statutory policy the way the IRS does in the field of tax, the politics of bankruptcy decision overrides are strikingly similar to the politics of tax decision overrides. Like the 1954 IRC, the 1978 BRA forms the rock-solid foundation for bankruptcy policy, but both superstatutes have been periodically updated with comprehensive and balanced revisions that provide some relief to creditors and some rules favoring debtors. Those laws include the Bankruptcy Reform Act of 1994,[245] the Bankruptcy Amendments and Federal Judgeship Act of 1984,[246] and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[247] The politics of bankruptcy overrides are surprisingly balanced. Both financial institutions (the main group we assigned as creditors) and debtors win a significant number of cases, although debtors do slightly better as a result of the generally liberal 1978 BRA.

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

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

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

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

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

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

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

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

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

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

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

the override of *Exxon Corp. v. Hunt*,[255] which corrected a narrow preemption holding, was part of the sweeping Superfund Amendments and Reauthorization Act of 1986.[256] The few instances in which Congress did intervene to make a piecemeal change to one of these areas are notable primarily for the override's limited application and predictable effects.[257] Notably, there have been no overrides in any of these subject areas since 1996.[258]

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

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

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

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

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

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

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

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

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

IV. Supreme Court Opinions Overridden

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

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

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

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

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

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

264. *See id.* at 19–21.

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

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

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

- Division in the Court. Existing studies make it clear that nonunanimous decisions are significantly more likely to generate overrides, but results are less conclusive beyond that finding. *Hypothesis 1: Closely divided decisions (five- or six-Justice majority or four-Justice plurality) are significantly more likely to be overridden than unanimous or even lopsided decisions.*

- United States Loses. The 1991 Eskridge study finding that the Court's rejection of an interpretation set forth by the United States made an override more likely is treated as the conventional wisdom[269] but has not been tested for the period after 1990. *Hypothesis 2: Decisions rejecting the statutory interpretation offered*

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Closely Divided Court: Red Flag

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

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

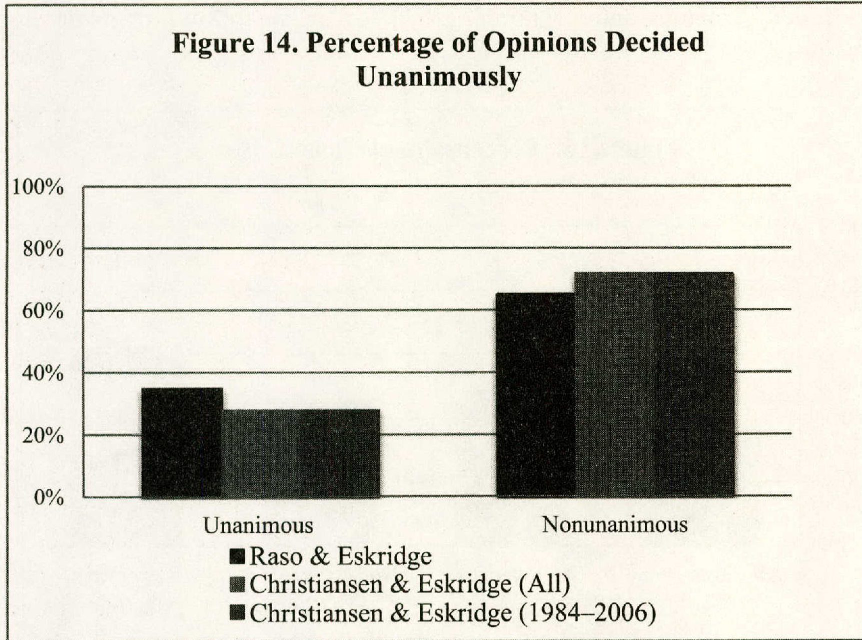
272. *See id.* at 249–50, 258.

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

274. *See id.* at 102.

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

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



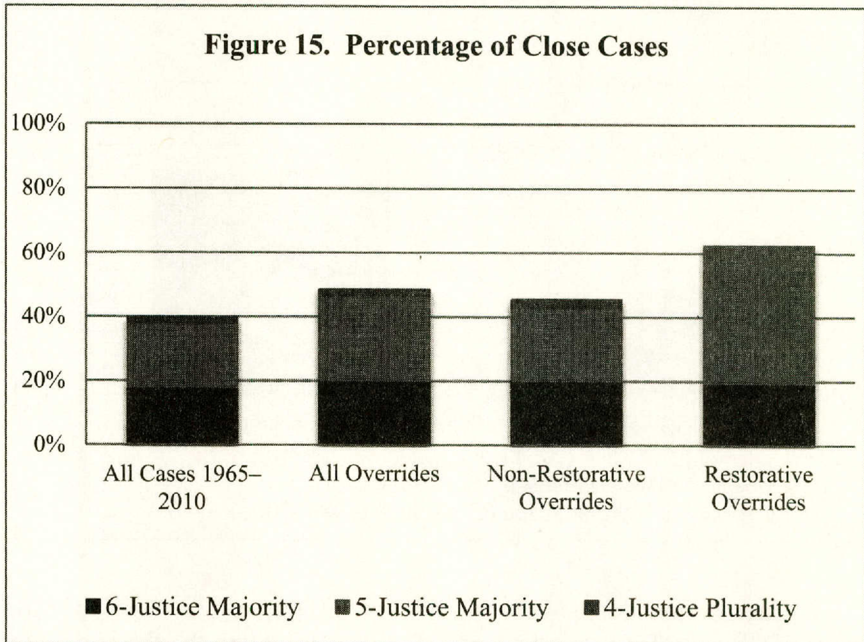
We also expected to see a significant difference for closely divided Courts. *Silkwood*, for example, was a 5–4 decision, with the four dissenters arguing that the regulatory scheme of the Atomic Energy Act preempts state punitive damages because they are inconsistent with the liability cap for nuclear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

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

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

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

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



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

Table 5. Time Between Decision and Override for Restorative Overrides

Average Time Elapsed (years)	
All Overrides	11.39
Restorative Overrides	3.52
Non-Restorative Overrides	13.18

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

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

B. Significant Amicus Brief Activity: No Red Flag

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

Can the *Silkwood* point be generalized? There is no dataset for amicus briefs filed before the Court, though everyone knows that such briefs have proliferated like wildfire in the last generation. So we assembled our own dataset of amicus briefs filed in every Supreme Court statutory case for every fifth Term after 1965. Overall, the average case attracted 5.3 amicus briefs while the overridden decisions averaged 3.5 amicus briefs. Of course this reflects the fact that the overridden decisions were clustered in the 1970s and 1980s and the filing of amicus briefs has grown tremendously throughout the 1990s and 2000s. To adjust for this phenomenon, we created a weighted average[282] of our baseline data to reflect the distribution

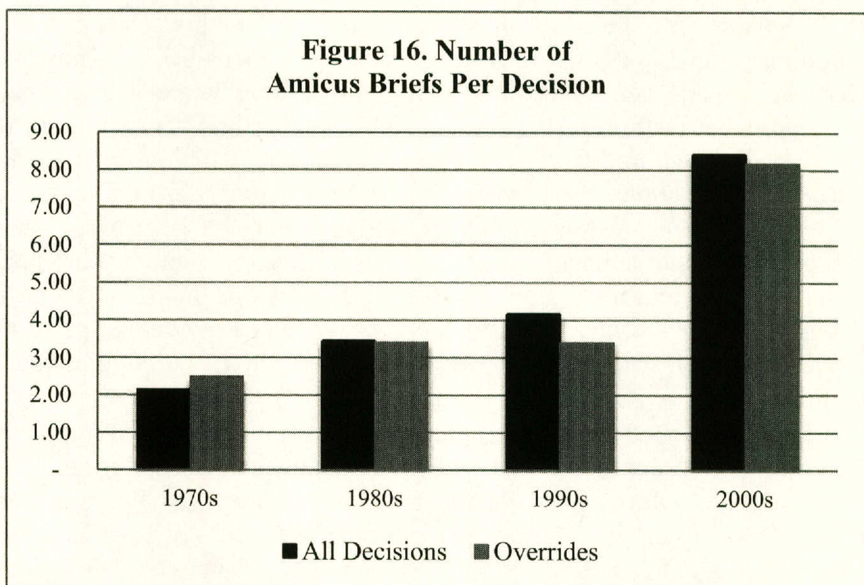
279. Recall, for example, the consensus that eventually developed around the 1978 BRA. *See supra* notes 193–97 and accompanying text.

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

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

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

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



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

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

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

C. *Federal Agency Position Loses: Red Flag*

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

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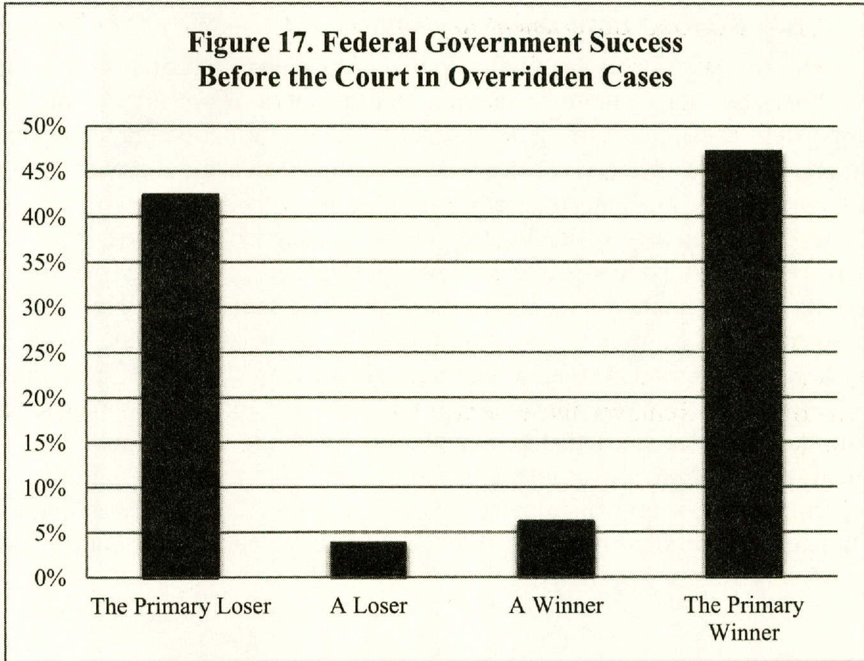
284. *See* Brief for the United States as Amicus Curiae, *Silkwood*, 464 U.S. 283 (No. 81-2159), 1982 U.S. S. Ct. Briefs LEXIS 969.

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



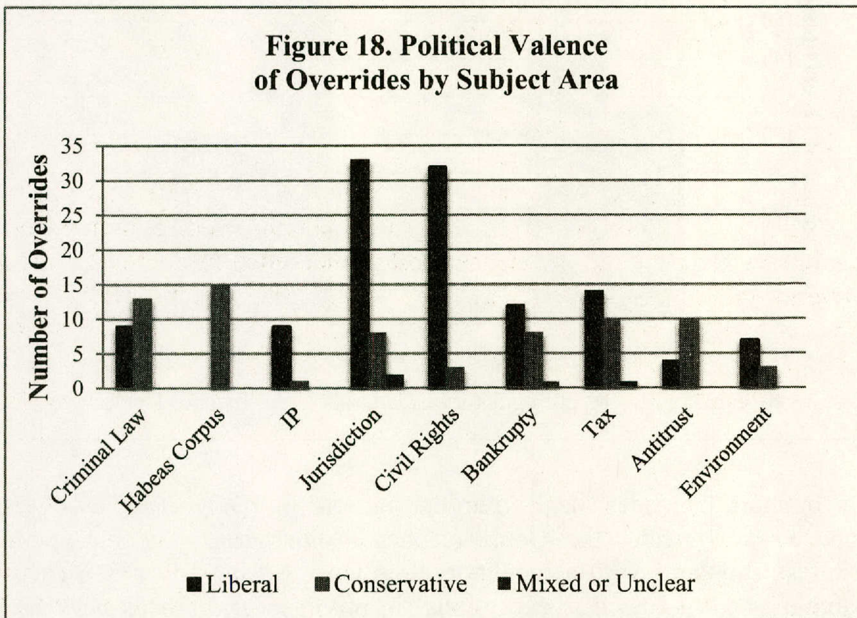
The federal government thus fared far worse before the Court in the cases that led to overrides than in the general population of Supreme Court statutory cases. And the government often succeeded in getting Congress to overturn these disfavored results through the legislative process. Recall Figure 13,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

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

286. *See supra* Figure 12.

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

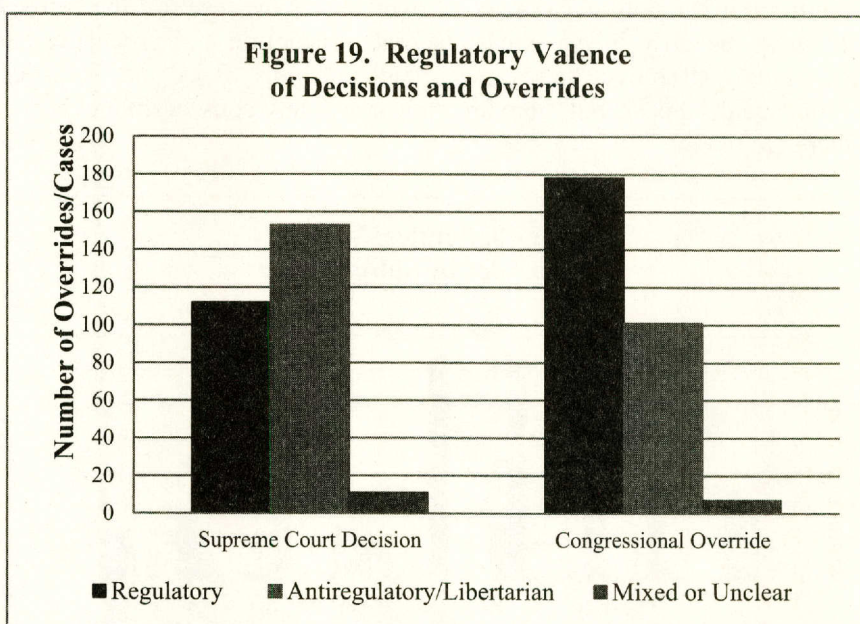
Previous studies have not found an ideological component to overrides. As Congress did in the 1991 CRA, which overrode *Casey*,[287] most overrides do in fact move policy in a politically liberal direction. This difference is slight, but statistically significant. The ideological split is much more striking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



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

287. *See infra* Appendix 1.

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



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

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

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

2. Civil Rights and Workplace: Congress Expands Employer Liability.—Recall from Figure 8 that civil rights decisions are about the same portion of overridden decisions as they are of the Court's statutory docket—but when they are overridden, they too follow a predictable pattern: overrides are disproportionately more likely to involve civil rights and workplace decisions favoring defendant employers and state institutions, such as *Casey*, than decisions favoring racial minorities, women, and people with disabilities (the primary complainants). This is the reverse-*Carolene* effect discussed earlier.[288] Whether controlled by conservative Republicans or liberal Democrats, or whether control is split, Congress is more responsive to *Carolene* groups and women than the Supreme Court is. One reason for this responsiveness is that the Department of Justice and the EEOC tend to be supportive of minority groups and women, but Congress is even more supportive over the long haul, and the support has been bipartisan. The Civil Rights Act of 1991, easily the most sweeping civil rights legislation covered in our study, passed by a vote of 93 to 5 in the Senate[289] and 381 to 38 in the House,[290] despite much more balanced numbers of Democrats and Republicans in both chambers of Congress.[291] We surmise that our political culture has reached a consensus that racial and disability minorities must be treated fairly. And the culture seems to have reached a similar consensus with respect to women, although that consensus is also supported by the obvious

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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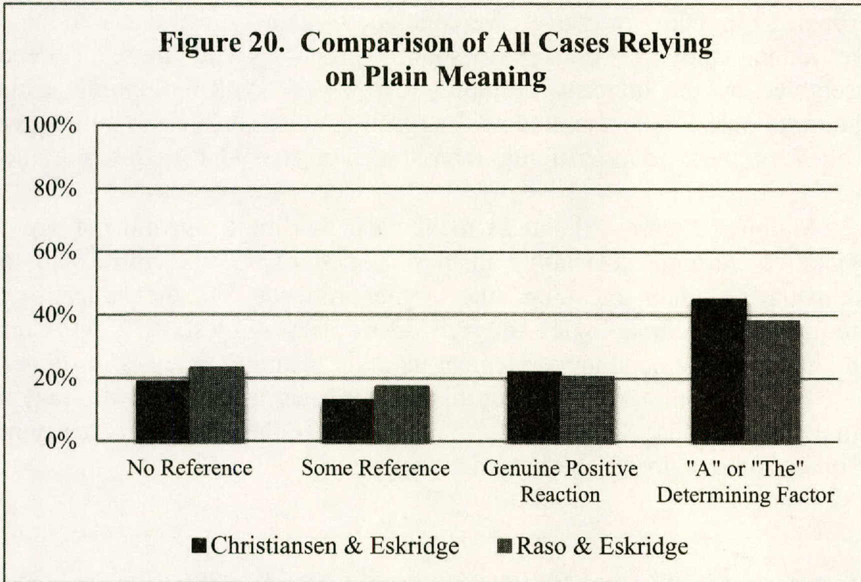
297. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 113–15 (1991) (Stevens, J., dissenting).

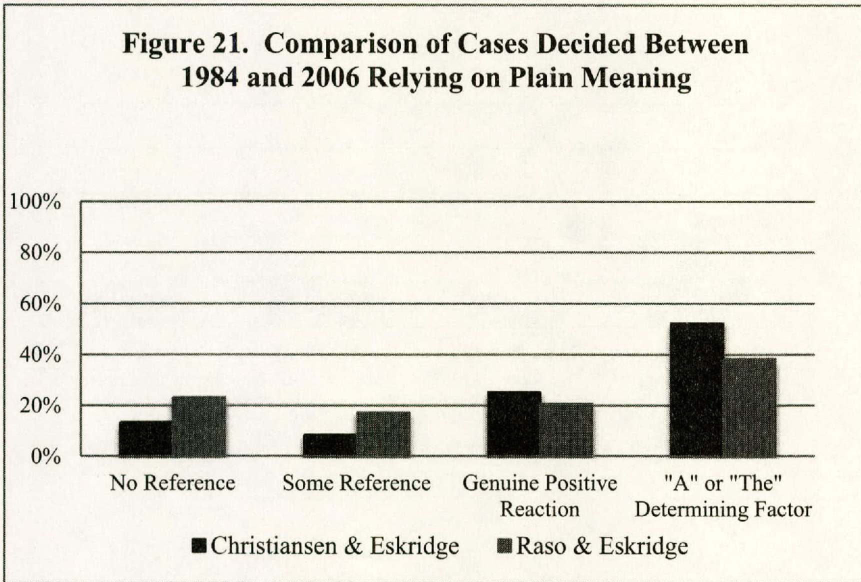
298. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248–50 (1984) (analyzing Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983)); *see also id.* at 252 n.14 (relying on dicta in a landmark precedent, Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59 (1978),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

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

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

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

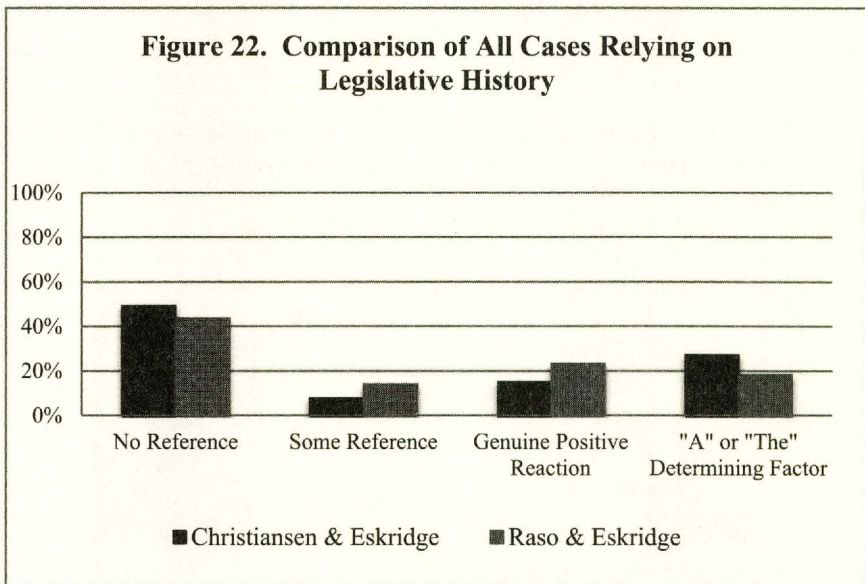


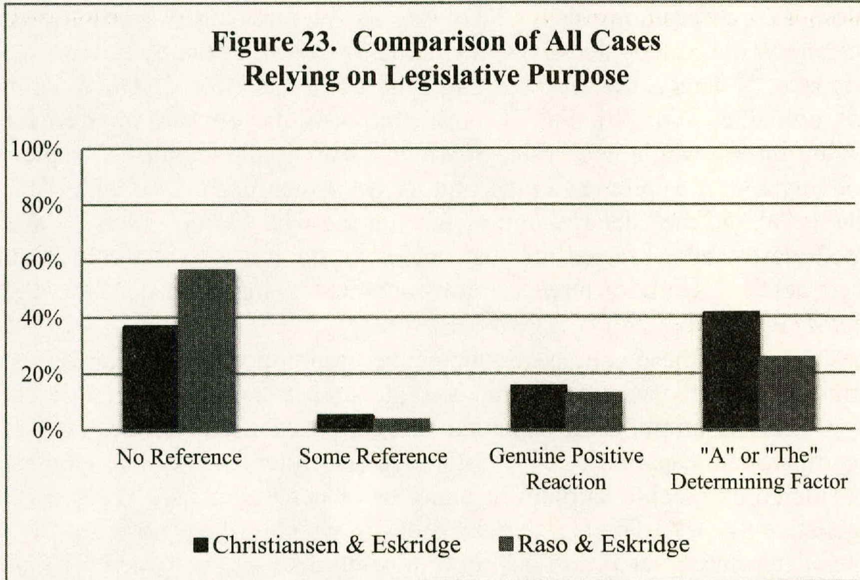


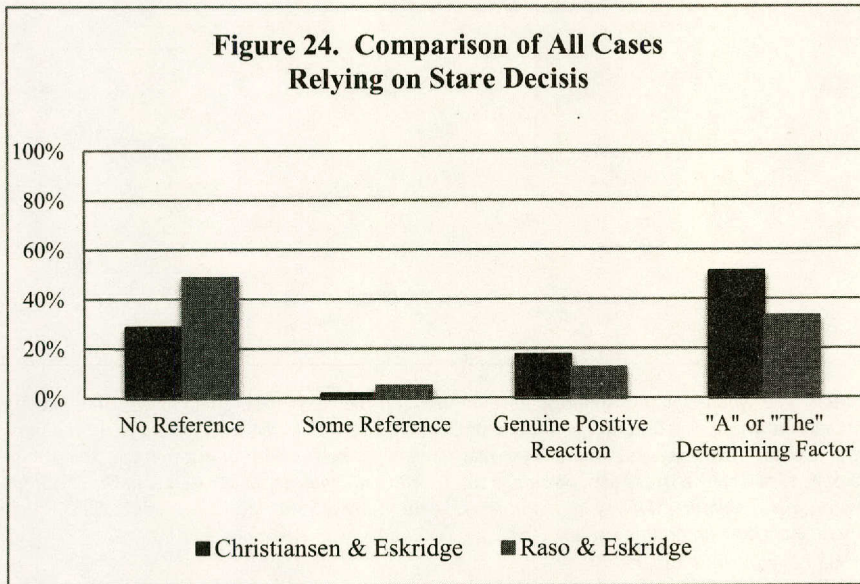
Figures 22, 23, and 24 below report similar comparisons for Supreme Court decisions, like *Silkwood*, that critically relied on legislative history, statutory purpose, and stare decisis. We were particularly interested in the cases in which a particular methodology was "a" or "the" determining factor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

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

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







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

rule[302] as a determining factor justifying an interpretation—but more than four in ten overridden decisions, including *Silkwood*, critically rely on such evidence.[303] This is the most striking contrast we discovered. Only slightly less dramatic, and still highly significant, was the contrast in decisions relying on the whole code rule, of which *Casey* is the leading example.[304] Roughly 8% of Supreme Court statutory decisions rely on the whole code rule as "a" or "the" determining factor, but the whole code canon is "a" or "the" determining factor in just under a quarter of Supreme Court overrides.[305] Both differences are statistically significant at the 99% confidence level.

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

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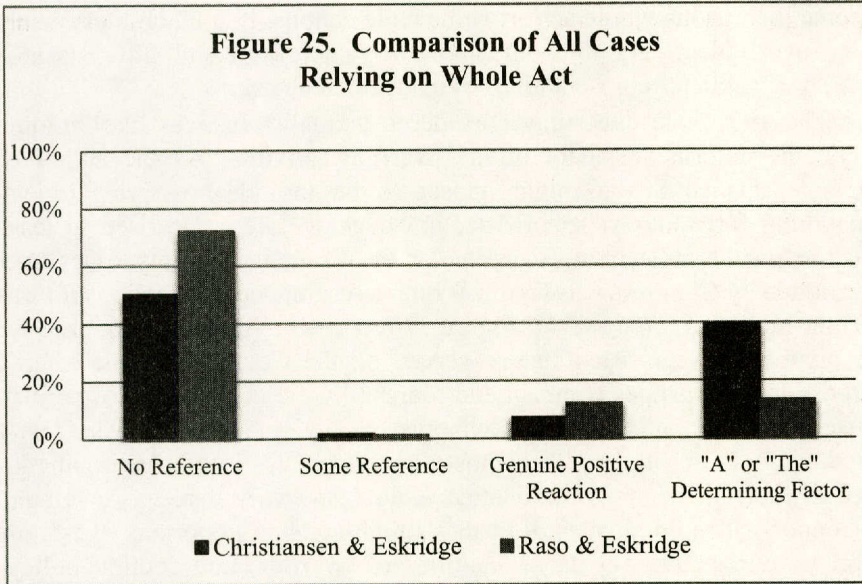
302. The whole act rule supports an interpretation that is more consistent with the statutory scheme as a whole or with other parts of a statute. Thus, if the Court interprets a term in one part of the statute, it will pay attention to how that term is used elsewhere in the statute. *See* Abbe R. Gluck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

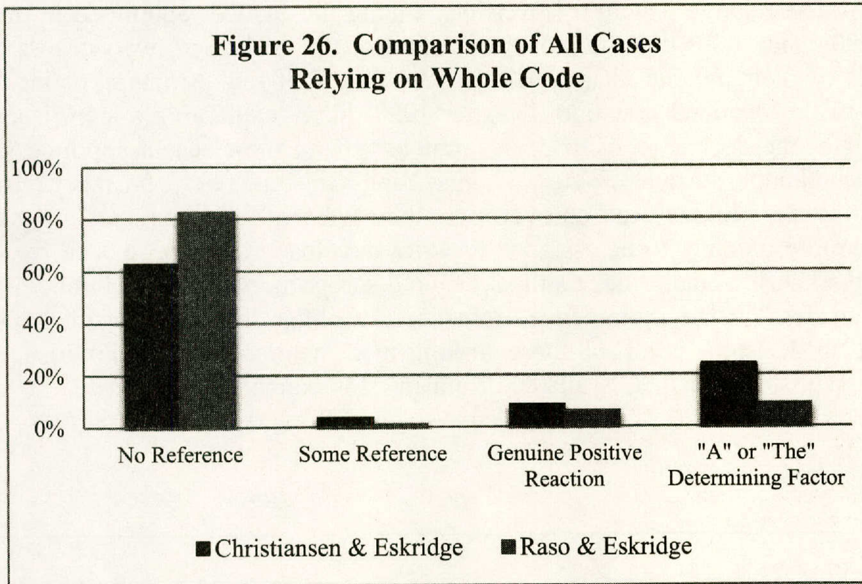
303. *See infra* Figure 25.

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

305. *See infra* Figure 26.

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





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

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

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

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

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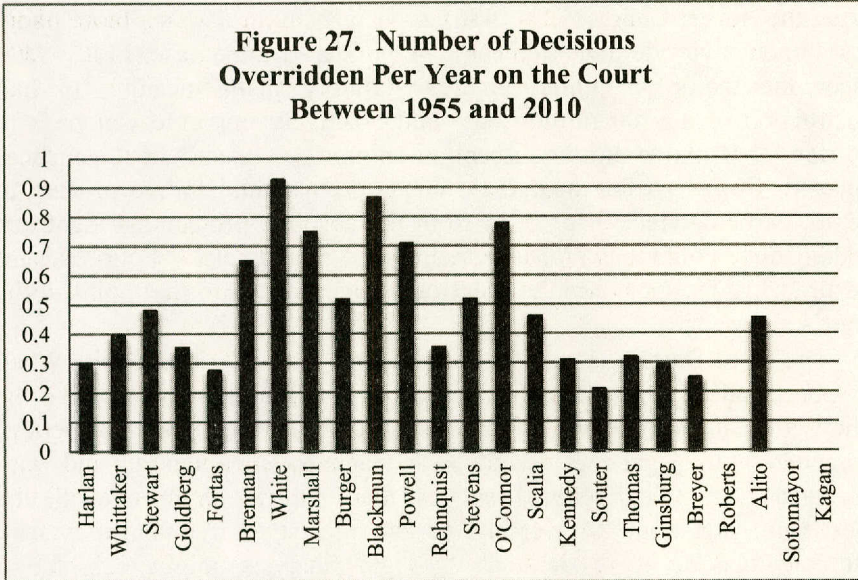
307. 499 U.S. at 84.

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

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

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



F. Invitation to Override: Red Flag

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

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

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

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

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

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

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

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

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

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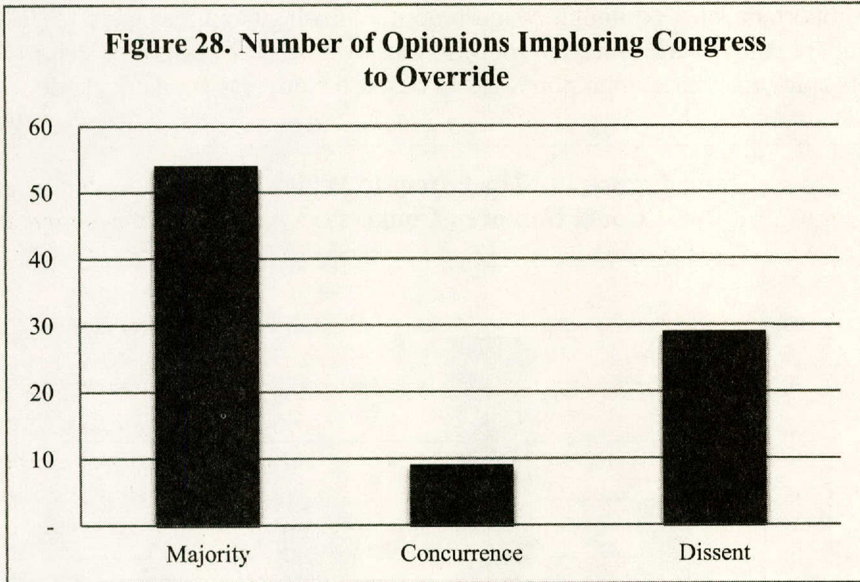
315. 437 U.S. 153, 194–95 (1978); *id.* at 196 (Powell, J., dissenting).

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

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

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

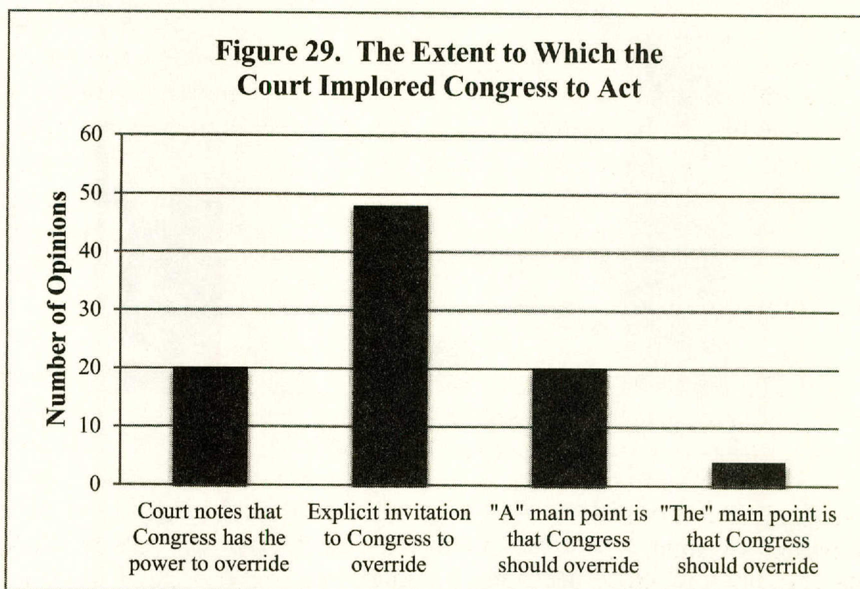


We were impressed as well as surprised by these high numbers. But the critical question is how they compare with the typical Supreme Court statutory interpretation decision. Again, we created a dataset for comparison purposes. We followed a sampling methodology, examining all statutory decisions for seven Supreme Court Terms, between 1960 and 2005.[319] The difference is striking. Whereas 30% of the overridden decisions either invited an override or discussed the possibility, less than 10% of the Court's statutory decisions in those seven Terms did so. More important, one in five of the majority or concurring opinions in our population of overridden decisions explicitly invited an override (i.e., they did more than simply mention the possibility), while only one in fifty of the nonoverridden decisions had an explicit invitation in a majority or concurring opinion in the seven Terms that we surveyed. Stated another way, there were very few override invitations (and almost none by a majority opinion) among the Court's decisions in those seven Terms that did *not* yield an override.

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

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

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



An intriguing payoff of this approach comes when we compare our "imploring" data with the time between the decision and the override. When the majority or a concurrence issues a strong invitation for Congress to override its decision (i.e., the three rightmost columns in Figure 29), the average time between the decision and override is roughly 8.5 years[320] as opposed to nearly 11 years without an equivalent opinion imploring Congress. When the dissent issues a similarly strong opinion the difference is somewhat starker: 5.5 years versus just under 11. Although both differences fell just shy of being statistically significant, they tend to reinforce our intuition that a strong opinion from the Court beseeching Congress to act tends to prod the Legislature into motion. Further confirmation comes when we consider the *median* time to override. When the majority or concurrence strongly implores Congress to act there is almost no difference in the median time between the decision and the override: roughly 4.5 years with such an opinion and without. But a very different story emerges when the dissent strongly implores Congress to act.

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

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

Of course, there may be other explanations here, and we stop short of proclaiming a causal relationship. It may be that topics that produce strong imploring dissents are high-salience issues that are already on the congressional docket—although we note that the strong imploring dissents are in a diverse set of subject areas[321] and not concentrated among a few prompt congressional responses, such as the 1991 CRA (one of our initial hypotheses). Nonetheless, we can confidently say that the story painted by the time between the decision and the override is highly consistent with the hypothesis that a dissent that strongly implores Congress to act (such as Justice Ginsburg's dissent in *Ledbetter*) may catalyze a speedier congressional response.

* * *

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

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

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

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

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

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

Perhaps no override better encapsulates these values than the Family Smoking Prevention and Tobacco Control Act of 2009.[322] Nine years earlier, the Supreme Court had ruled that the Food and Drug Administration (FDA) did not have the authority to regulate tobacco or tobacco products and so invalidated the agency's rule barring the sale of tobacco products to minors.[323] Although many academics, as well as ordinary citizens, supported the FDA's move to protect public health generally and young people in particular,[324] the 2009 Tobacco Control Act was, in our view, an even better regulatory regime. It was more democratically legitimate, advanced a better mix of policies, and even created a clearer and more workable legal regime than the one contemplated by the FDA. Those considerable benefits suggest that many overrides represent an important political contribution, both in theory and in practice.

A. Democratic Legitimacy

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

As a formal matter, Article I, Section 7 of the Constitution provides a process whereby Congress, with the President, creates federal statutes[327] that are entitled to supremacy under Article VI.[328] That formal supremacy has a functional feature as well. Article I, Section 7 requires that any override legislation satisfy the House of Representatives, whose members represent small districts and face the voters every two years, *and* the Senate,

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

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

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

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

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

327. U.S. CONST. art. I, § 7.

328. *Id.* art. VI.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

338. *See id.* at 282–85.

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

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

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

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

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

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

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

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

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

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

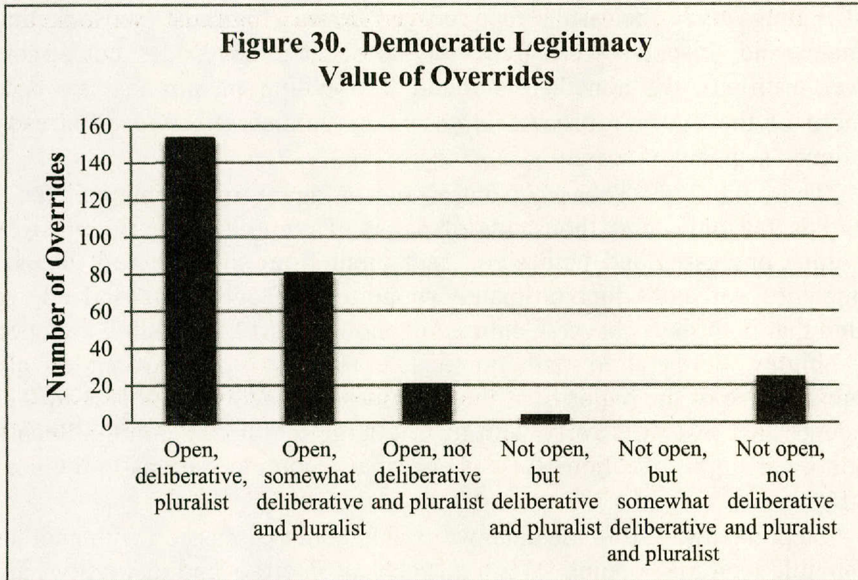
345. BARNES, *supra* note 4, at 187.

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

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

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

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



Unsurprisingly, the most high-profile overrides were also among the most open, deliberative, and pluralist. In these instances, committee reports clearly identified the override as a response to a specific Supreme Court holding, and most, if not all, interested groups discussed the pros and cons of the override at the hearings. Every override in the 1991 CRA, for example, was open and all but two were also highly deliberative and pluralist. But this category also included much lower profile overrides scattered across subject areas such as civil procedure, tax, and bankruptcy. At the other end of the spectrum, overrides involving crime control and prisoners were disproportionately represented among the overrides we found to be not open, deliberative, and pluralist. These included overrides in AEDPA,[348] the Crime Control Act of 1990,[349] the Controlled Substance Act amendments of 1974,[350] and all three overrides contained in the Prison Litigation Reform Act of 1995.[351] Although we were not surprised by this

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

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

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

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

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

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

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

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

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

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

B. Policy-Updating Values

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

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

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

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

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

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

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

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

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

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

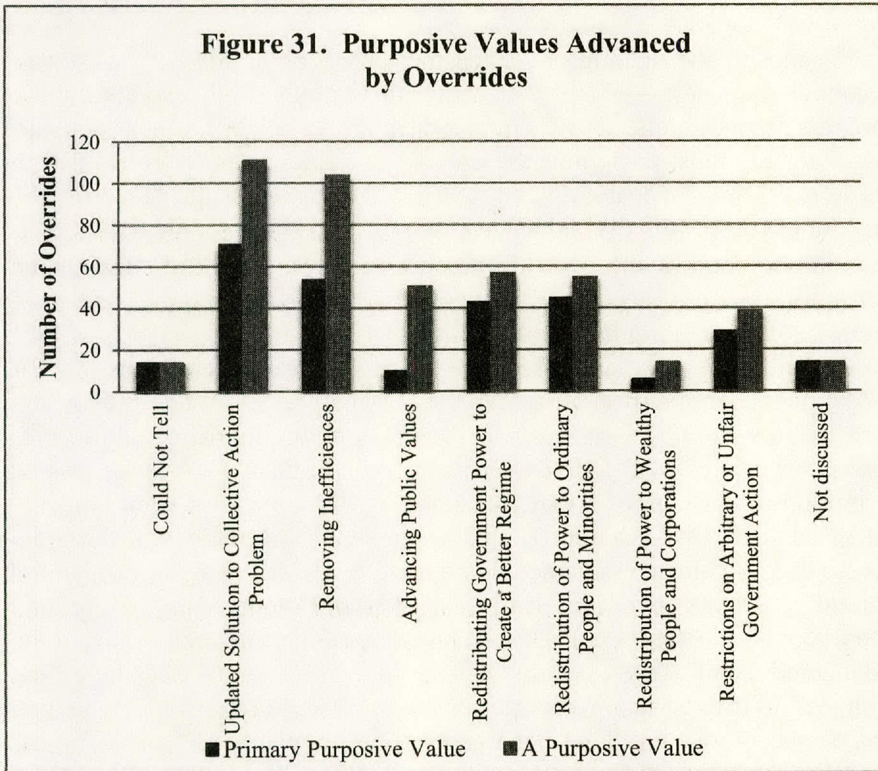
359. For background of the 1978 BRA and its reforms, see SKEEL, *supra* note 196, at 131–59.

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

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

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

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



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

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

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

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

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

C. Rule of Law Values

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

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

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

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

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

367. *Id.* at 88–89.

368. *Id.* at 89–90.

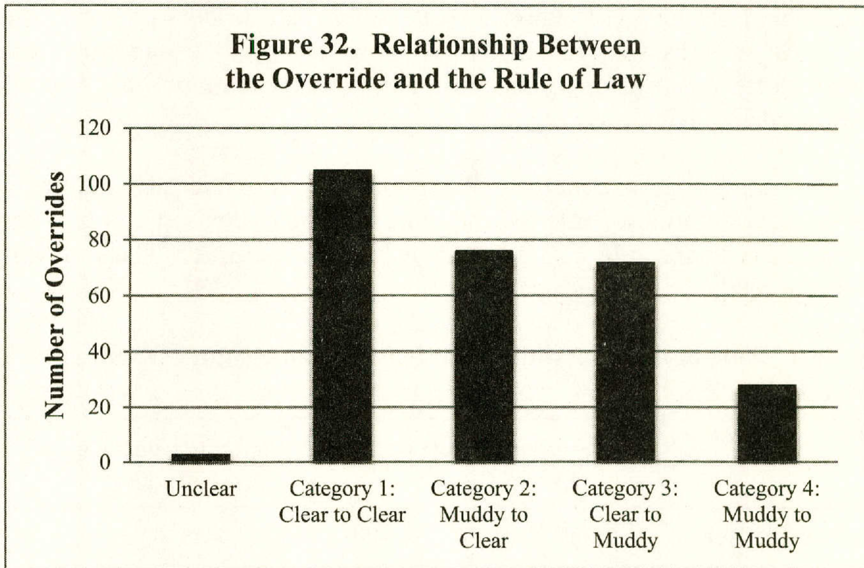
rides would on the whole impose costs rather than benefits on the rule of law. As it turns out, the matter is more complicated—and overrides actually offer positive opportunities for the orderly evolution of clear and helpful rules of law.

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

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

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

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



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

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

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

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

372. *Id.* at 514–19.

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

374. *See id.* at 522–24.

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

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

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

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

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

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

378. *Id.* at 56.

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

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

Administration must determine whether the child's disability is comparable to one that would prevent an adult from gainful economic activity.[381] In *Sullivan v. Zebley*,[382] the Court invalidated agency regulations that streamlined the determination along categorical lines; the Court ruled that the Administration had to make individualized determinations.[383] This was a fair point, but Congress reinstated the agency's categorical approach in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.[384] Although one might debate Congress's policy choice, making it harder for the most vulnerable group in our society (i.e., disabled children) to secure federal assistance, the override reduced the costs of administration and instantiated a regime of rules that was easier for the agency to apply and families to predict.

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

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

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

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

383. *Id.* at 539–41.

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

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

386. *Id.* at 352–54.

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

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

process arose out of the Bush–Cheney Administration's constitutional activism in the post-9/11 War on Terror. The Administration's detention of suspected terrorists in Guantanamo Bay, Cuba, without hearings or reliable determinations of enemy status, was subjected to habeas review by the Court in *Rasul v. Bush*.[389] Congress responded with the Detainee Treatment Act of 2005, which cut off habeas review for Guantanamo detainees.[390] In *Hamdan v. Rumsfeld*,[391] the Court interpreted the habeas cutoff not to apply to pending habeas petitions, which Congress immediately rejected in the Military Commissions Act of 2006.[392] Finally, in *Boumediene v. Bush*,[393] the Court invalidated the abrogation of habeas corpus on the ground that Congress acted outside the Suspension Clause authorization found in the Constitution.[394] The War on Terror habeas overrides imposed some of the most important rule of law costs upon our system of any set of overrides in this study.

Consider another example of the rule of law costs sometimes posed by overrides. A regular, even if small, portion of the Supreme Court's docket in the last generation has involved the Voting Rights Act (VRA) of 1965.[395] Most of its provisions apply nationwide, but § 4(b) identifies a subset of mostly southern states with traditions of low minority voting, and § 5 requires those jurisdictions to preclear any changes in their voting rules or jurisdictions.[396] Because the VRA has a sunset feature, Congress regularly revisits the law, always reauthorizing it and expanding its ambit in some

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

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

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

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

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

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

394. *Id.* at 732–33.

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

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

way.[397] The most recent renewal came in 2006.[398] Witnesses told Congress that minority voting in § 5 jurisdictions had approached or exceeded national averages, yet Congress reauthorized § 4(b) without change and, instead, expanded § 5,[399] overriding a few mildly restrictive Supreme Court decisions in the process.[400] In *Shelby County v. Holder*,[401] a closely divided Supreme Court invalidated § 4(b) on constitutional grounds and essentially left § 5 unenforceable.[402] One reason advanced by the Court for striking down § 4(b) was Congress's unwillingness to revisit its long-outdated formula, even as Congress eagerly overrode the Court's efforts to trim back § 5:

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

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

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

398. *Id.* at 2621.

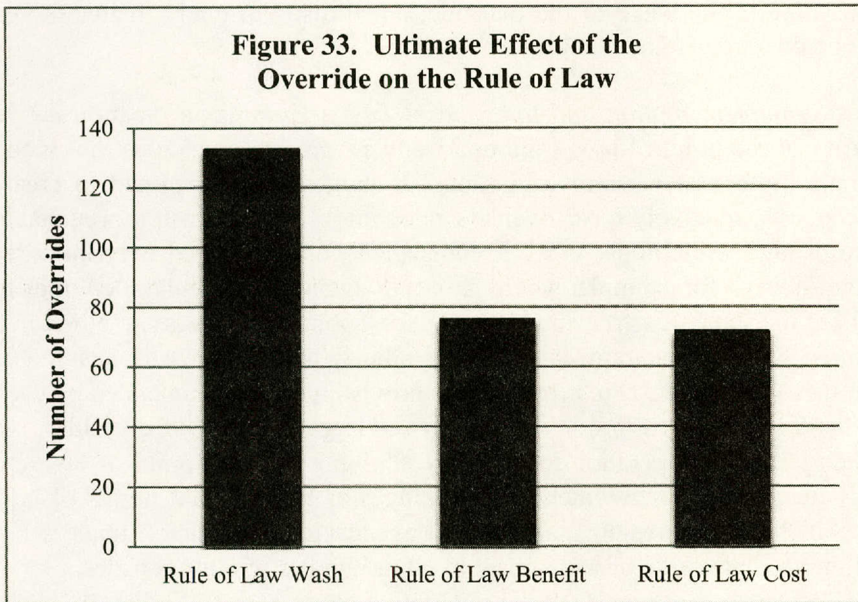
399. *See id.* at 2625–26 (summarizing the information garnered from witness testimony during hearings in the House and explaining Congress's strengthening of the Act's remedies).

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

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

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

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



Although the overrides we studied generally produced clear rules,[404] they did not as a whole improve the clarity of the law. Indeed, as Figure 33 demonstrates, overrides imposed rule of law costs as often as they created rule of law benefits. But while predictably it is an important feature, it is not an end in itself. After all, the override of *Zebley* clarified the rule of law, but at a high, and arguably unacceptable, social cost.[405] And half of the decisions overridden by the 1991 CRA replaced the Court's efforts to establish clear legal rules with muddier standards, but ones that Congress believed would more effectively remedy employment discrimination. For example, it overrode the Court's clear holding in *Patterson v. McLean Credit Union*[406] that 42 U.S.C. § 1981, which provides all persons the right to "make and enforce contracts,"[407] does not prohibit racial discrimination during the performance of the contract[408] with a rule that applies § 1981 to "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[409] The new extent of § 1981 may be harder to

404. *See supra* Figure 32.

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

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

407. 42 U.S.C. § 1981(a) (2006).

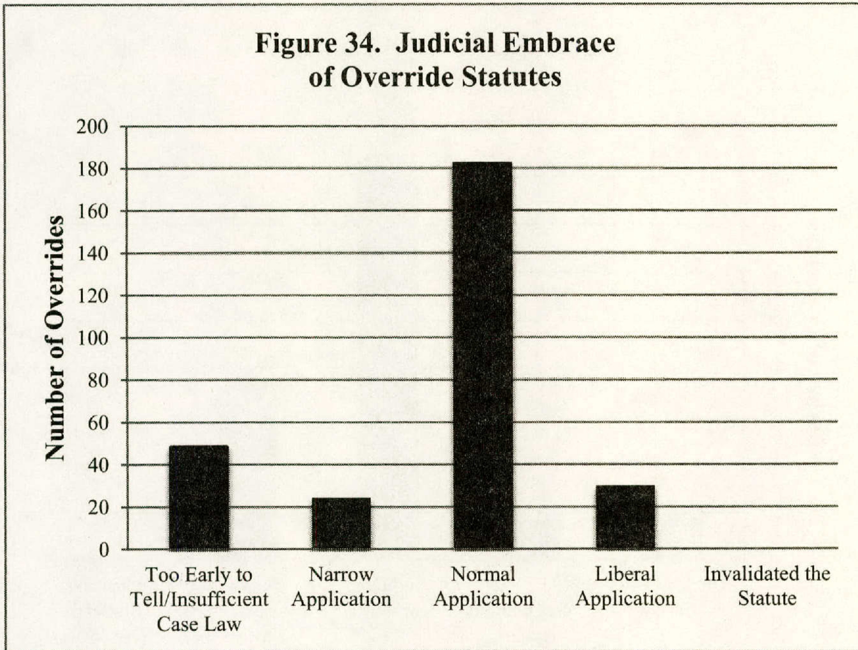
408. 491 U.S. at 176–78.

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

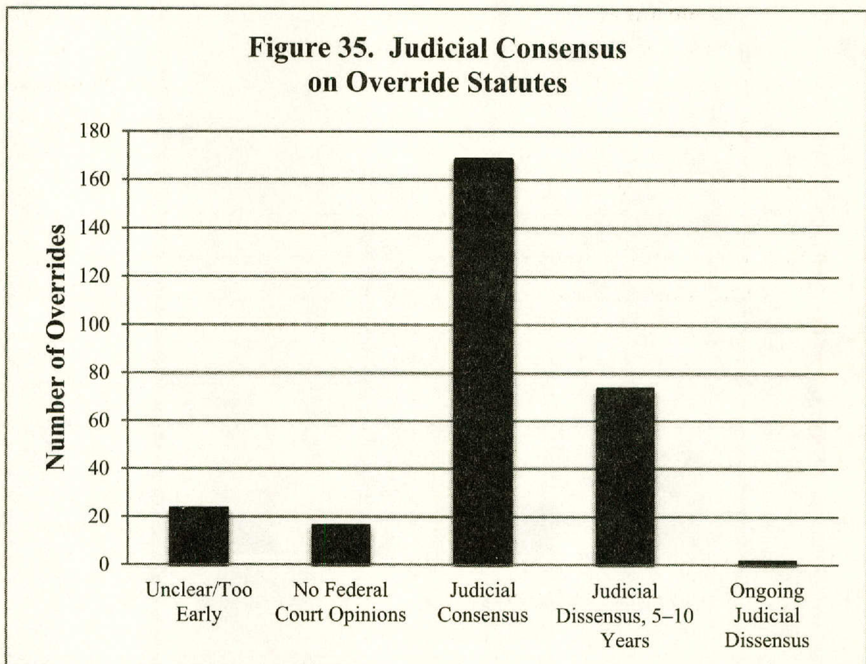
determine in the wake of the override, but it also, no doubt, better served the goals of the 102nd Congress.

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

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



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



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

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

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

411. *Id.* at 111–14.

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

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

Of course, implementation has also sometimes had the opposite effect, undermining the rule of law clarity and predictability of Category 2 overrides. An example comes from AEDPA, the 1996 habeas reform law. In *Vasquez v. Hillery*,[416] the Supreme Court had taken an equitable approach to the timing of state habeas petitions,[417] to which Congress responded with a provision in AEDPA that set a limitations period of one year, with a minor exception, for such petitions.[418] In the next fifteen years, almost every court of appeals recognized an equitable tolling exception to the limitations period, an interpretation ratified by the Supreme Court in 2010.[419] Although the override rule remained the presumptive limitation period, the judiciary, for standard due process reasons, transformed a clear bright-line rule into a presumptive rule with a hard-to-determine equitable exception.[420] While Congress enacted AEDPA in order to substitute stricter congressional rules for softer Supreme Court rules or standards, the

413. *See* 9 C.F.R. § 201 (2014).

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

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

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

417. *See id.* at 264–65.

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

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

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

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

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

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

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

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

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

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

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

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

VI. Doctrinal and Institutional Implications

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

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

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

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

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

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

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

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

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

428. *Id.* at 114.

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

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

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

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

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

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

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

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

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

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

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

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

435. *See* 550 U.S. 618, 623–24, 628–29 (2007).
436. 490 U.S. 900 (1989).
437. *See Ledbetter*, 550 U.S. at 626–27 (summarizing *Lorance*).
438. *Id.* at 652–54 (Ginsburg, J., dissenting).
439. *Id.* at 627 n.2 (majority opinion).
440. *Id.*

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

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

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

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

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

443. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

452. *Id.* at 247.

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

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

Id. (citations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What these canons (consistent usage, no surplusage, meaningful variation) *also* have in common is that they often cannot, as a practical matter, be taken into account even when staff are aware of the canons and have an opportunity to seek input from Legislative Counsel and CRS. Professors Gluck and Bressman report that many congressional staff dismiss the presumption against surplusage because repetition (i.e., surplusage) is typically what supporting institutions and groups want from the legislative process.[466] The presumptions of consistency and meaningful variation, even when congressional staff are aware of those canons, are hard to apply because different congressional committees are involved for multiple statutes and even for individual statutes.[467]

3. Delegation of Lawmaking or Adjudicatory Authority to Administrators, and Away from Courts.—The Lilly Ledbetter problem is part of a larger conflict between a libertarian Court and a proregulatory Congress. If Congress is serious about creating a strong and dynamic regulatory program for workplace diversity and other issues, it ought consider restructuring the process of statutory interpretation for particular statutes. The most successful congressional override in recent years was the 2009 Tobacco Control Act, which was backed up by public opinion and an electoral mandate.[468] One of the big virtues of that override was that it vested implementation in a purposive, proregulatory agency (the FDA) and not in the foot-dragging, libertarian judiciary. This is a model that Congress might consider implementing more often.

For Title VII issues, the EEOC has been a more reliable barometer of congressional values and policy than the Supreme Court has been—and this cannot be much of a surprise. As Judge Katzmann has documented, agencies tend to be quite responsive to Congress because of commitments agency heads make to secure confirmation for their limited terms; formal and informal legislative history (including subsequent deliberations); the

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464. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 88–92 (1991).

465. *See supra* Figures 25 and 26.

466. Gluck & Bressman, *supra* note 302, at 934–35.

467. *See id.* at 936–37.

468. *See supra* notes 325–30 and accompanying text.

yearly campaign to secure appropriations; and oversight hearings as well as informal pressure through phone calls and e-mails.[469]

Most of the big restorative overrides of the Court's conservative Title VII jurisprudence have occurred for issues where the Court was rejecting the EEOC's interpretations—from *General Electric Co. v. Gilbert*, which triggered the 1978 Pregnancy Discrimination Act, to *Ledbetter v. Goodyear Tire & Rubber Co.*, which triggered the 2009 Ledbetter Act.[470] In most of these Title VII cases, dissenting Justices have invoked the EEOC's interpretive stance—but the Court majorities responded that the EEOC's views are not entitled to strong deference from the Court because Title VII does not delegate lawmaking authority to the EEOC.[471]

If Congress wants to reduce the Lilly Ledbetter problem in Title VII cases, one option would be to grant the EEOC the lawmaking authority Congress withheld when enacting Title VII exactly fifty years ago. Thus, the EEOC might be given the authority to issue substantive rules, after notice and comment, or to adjudicate at least some claims administratively, with EEOC orders being directly enforceable as a matter of law. While the Supreme Court would still have the authority to trump EEOC rules and orders if inconsistent with what the Court majority thought was the plain meaning of Title VII, as the Court claimed to be doing in both *Gilbert* and *Ledbetter*, the five-Justice majority might not hold firm in cases where the EEOC is making law rather than just stating its opinion.

A more drastic option would be to shift the situs of Title VII litigation. For example, Congress has the authority to remove Title VII cases from federal courts altogether—and refer them to EEOC adjudication, constituted as an Article I "court."[472] Although Congress cannot preclude the Supreme Court from engaging in constitutional review of an Article I court's rulings, Congress does have the power to preclude the Court from reviewing such a court's judgments for consistency with the statutory scheme.[473]

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469. Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 656–61 (2012). For leading political science accounts, see LAWRENCE C. DODD & RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 155-211 (1979); JOSEPH P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964); Charles R. Shipan, *Congress and the Bureaucracy*, *in* THE LEGISLATIVE BRANCH 432 (Paul J. Quirk & Sarah A. Binder eds., 2005).

470. *See infra* Appendix 1.

471. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642 n.11 (2007) (declining to extend *Chevron* deference to EEOC regulations); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) ("Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations . . . ." (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976))); *id.* at 259–60 (Scalia, J., concurring in part and concurring in the judgment) (assuming EEOC regulations, as opposed to *guidelines*, deserve deference but still concurring with the majority's opinion on other principles of statutory construction).

472. *See* U.S. CONST. art. I, § 8, cl. 9.

473. *Cf.* Crowell v. Benson, 285 U.S. 22, 87–89 (1932) (Brandeis, J., dissenting) (opining that the requirement of due process, not any other "prohibition against the diminution of the

B. *The Role of the Executive Branch: Administrative Overrides and Workarounds*

Our study demonstrates the importance of the Executive Branch to the legislative process generally and to the override process in particular. The Department of Justice and other agencies already do a good job identifying and lobbying for overrides, as we document in Figures 11–13. This is one reason we do not follow Judge Cardozo in advocating for a new administrative officer or department focusing on legislative proposals and overrides. What we do highlight and support (especially in light of the decline of overrides) is *agency workarounds* and *administrative overrides* as a means of keeping statutory policy up to date.

The idea of an agency workaround is simple and commonplace. Through their narrowing constructions, judges may deny agencies regulatory options—but typically those agencies can rely on other grants of authority to advance their regulatory agendas. Recall *TVA v. Hill*. The Court's ruling that the Interior Department could stop a costly public works project based upon its threat to an endangered species's critical habitat left enforcement of the ESA with that department.[474] Thus, President Carter could have directed the Department to review the project's threat to the snail darter and to explore possibilities for saving the critter.[475] Indeed, the President might have replicated the initial congressional override by requiring interdepartmental consultation before a "major" public project could be terminated to protect an endangered species.[476]

For an example where the Executive Branch promptly worked around a Supreme Court decision, consider 18 U.S.C. § 924(c)(1), which "enhances" a sentence for drug convictions if the defendant "uses or carries" a firearm in furtherance of the crime.[477] In *Bailey v. United States*,[478] the Supreme Court ruled that a drug dealer with guns in the trunk of his car does not "use" the guns.[479] The Department of Justice had no problem working around this decision, by seeking the same enhancement on the ground that a defendant with guns in his trunk was "carrying"

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jurisdiction of the federal district courts as such," is what may prevent controversies from being subject to "conclusive determination of administrative bodies or federal legislative courts").

474. *See* TVA v. Hill, 437 U.S. 153, 159–63 (1978) (describing the statutory scheme and the authority of the Interior Department).

475. *See id.* at 162, 163 & n.13 (describing efforts of the Department to find a suitable habitat for relocation of the snail darter population).

476. Indeed, after Congress directly legislated for the Tellico Dam to be completed, it was discovered that the TVA's previous efforts at relocating the snail darter had been successful and that the fish enjoyed a habitat elsewhere that no one knew about. Garrett, *supra* note 316, at 89–90.

477. 18 U.S.C. § 924(c)(1) (2012).

478. 516 U.S. 137 (1995).

479. *Id.* at 139, 142–43.

firearms.[480] Workarounds may not be perfect substitutes for overrides, but they are one way that agencies deal with adverse Supreme Court decisions in the absence of an override.[481]

Our novel idea is that agencies can engage in *administrative overrides* as well as workarounds. Unlike a workaround, an administrative override modifies a point of law accepted in a Supreme Court decision. One of the high-profile Supreme Court cases of the 2013 Term, *Utility Air Regulatory Group v. EPA* (*UARG*),[482] provides an excellent example of the process we are describing. In *Massachusetts v. EPA*,[483] the Supreme Court held that greenhouse gases fit within the Clean Air Act's broad definition of "air pollutant," at least with respect to some parts of the Act.[484] On remand from that decision, the EPA issued an "endangerment finding," which required the agency to regulate greenhouse gases from mobile sources.[485] Several rulemakings ensued, through which the EPA used various provisions of the Clean Air Act to limit different sources of greenhouse gases.[486] In issuing these regulations, however, the EPA faced a challenge. One of the provisions it invoked was the Prevention of Significant Deterioration (PSD) program—itself the product of an override[487]—which requires permits for certain new or significantly modified emissions sources.[488] The statute, as interpreted and applied by the Supreme Court in *Alaska Department of Environmental Conservation v. EPA*,[489] requires a

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480. Muscarello v. United States, 524 U.S. 125, 131–32 (1998) (upholding the Department's interpretation). Ironically, Congress overrode both decisions shortly afterwards. *See* Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469, 3469–70 (codified as amended at 18 U.S.C. § 924(c)) (rewriting § 924(c)(1) to include possession of firearms).

481. For more on the Executive Branch's ability to respond to Supreme Court decisions, specifically in the tax context, see Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185 (2004).

482. 82 U.S.L.W. 3206 (U.S. Oct. 15, 2013) (No. 12-1146).

483. 549 U.S. 497 (2007).

484. *See id.* at 528–29.

485. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

486. Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012), *cert. granted in part sub nom.* Util. Air Regulatory Grp. v. EPA, 82 U.S.L.W. 3206 (U.S. Oct. 15, 2013) (No. 12-1146).

487. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 127, 91 Stat. 685, 731–42 (codified as amended at 42 U.S.C. §§ 7472–7479 (2006)) (overriding Fri v. Sierra Club, 412 U.S. 541 (1973), *aff'g by an equally divided Court* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972)).

488. *See* Clean Air Act, 42 U.S.C. § 7475 (requiring permits for certain emitters); *Coal. for Responsible Regulation*, 684 F.3d at 115–16 (stating that the EPA was acting pursuant to the PSD program).

489. 540 U.S. 461 (2004).

permit for any source that emits more than 100 or 250 tons of the pollutant at issue, depending on the source.[490]

The dilemma facing administrators was that the PSD program, as originally enacted in 1977, surely did not contemplate the possibility of carbon dioxide as a statutory "air pollutant."[491] Because carbon dioxide is a much more ubiquitous pollutant than those for which the program was originally intended, a staggering number of sources would have exceeded the thresholds and, therefore, would have required permits, sweeping large apartment buildings and hospitals into a regime meant for power plants and other industrial facilities. So the EPA decided to "tailor" the Clean Air Act's applicability to these sources by limiting the permitting requirement to sources that emit over 75,000 or 100,000 tons of carbon dioxide, or its equivalent, per year[492]—several hundred times the thresholds that a straightforward reading would have required. Had this rule been enacted through legislation, it would have qualified as an override because it carved out an exception from the 100- and 250-ton limitations that the Court had previously applied.[493] But with no legislative solution to climate change on the horizon, the EPA chose to act unilaterally, justifying its departure from the statutory text and judicial precedent based on the "absurd results" that would have followed had permitting authorities been forced to regulate all these sources.[494]

The "Tailoring Rule" illustrates both the potential benefits and the pitfalls of administrative overrides. On the one hand, the endangerment finding and the EPA's subsequent regulations, including the Tailoring Rule, have allowed the EPA to address a major environmental priority despite congressional inaction. When the Supreme Court granted certiorari to review parts of the EPA's greenhouse gas regulations in *UARG*, it notably left untouched the question whether the EPA had the authority to treat greenhouse gases as a pollutant and to regulate them under the Clean Air Act—for all intents and purposes approving of the agency's exercise of that authority.[495] The Tailoring Rule's administrative override has thus allowed

490. 42 U.S.C. § 7475(a) (requiring permits); *id.* § 7479(1) (defining the sources that fall within the statute's ambit); *see also Alaska Dep't of Envtl. Conservation*, 540 U.S. at 472 (construing the statute).

491. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71) (stating that the EPA would be imposing control requirements on carbon dioxide for the first time in 2011).

492. *Id.*

493. *See Alaska Dep't of Envtl. Conservation*, 540 U.S. at 472.

494. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. at 31,516.

495. *See* Util. Air Regulatory Grp. v. EPA, 82 U.S.L.W. 3206 (U.S. Oct. 15, 2013) (No. 12-1146) (limiting its review to only "[w]hether EPA permissibly determined that its regulation of

the EPA to address the issue of greenhouse gases with regulations considerably less burdensome than the statute's plain text would have produced. But at the same time, the administrative override is on much shakier footing than a legislative override would have been. A legislative override can change a statute's text; an administrative one cannot. And while it remains to be seen whether the Supreme Court reaches the validity of the Tailoring Rule in *UARG*, at oral argument several Justices were skeptical or hostile to the interpretive moves underlying the Tailoring Rule.[496] Even if the Tailoring Rule survives *UARG* intact, the point is clear: administrative overrides are limited by the text of the statute and an attempt to stretch that text too far may undo the entire administrative override.

As the example of the EPA's Tailoring Rule illustrates, delegated authority and the ambiguity that usually accompanies it can provide the Executive Branch with considerable leeway to update policy. That leeway empowers an agency or the White House to step into the policy-updating gap left by the post-1998 Congresses. But delegated authority comes with limitations. Most obviously, any administrative override must conform to the policy architecture already in place; as the FDA Tobacco Case and other precedents make clear, the Court will not tolerate major policy shifts undertaken by agencies. For this reason, in the greenhouse gas example, a carbon tax and a cap-and-trade program—the two approaches to greenhouse gas regulation favored by most economists and policymakers—were off the table for the EPA. Its only option was to pursue a program originally designed to require pollution control devices for pollutants like sulfur dioxide and lead. And, as the Tailoring Rule illustrates, the assumptions that underlay the original statute may complicate any administrative override. The Tailoring Rule had to rely on the absurd results canon to avoid a program that would have proved unmanageable. Because the current Court is not friendly to the project of rewriting clear statutory text to avoid absurd results, the Agency faces an uphill battle to protect this particular interpretation.[497]

greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases").

496. We went to press before the Court decided *UARG*, but oral argument in that case revealed strong resistance on the part of five or more Justices to the EPA's absurd results argument. *See* Transcript of Oral Argument, Util. Air Regulatory Grp. v. EPA, No. 12-1146 (U.S. Feb. 24, 2014).

497. Of course, consistent with the D.C. Circuit decision below, the Court may not reach the merits of the Tailoring Rule. *See* Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 146 (D.C. Cir. 2012), *cert. granted in part sub nom.* Util. Air Regulatory Grp. v. EPA, 82 U.S.L.W. 3206 (U.S. Oct. 15, 2013) (No. 12-1146). We express no opinion on whether it should or will.

A comparison with the override of *Brown & Williamson* makes the point even clearer. After the Court struck down the FDA's attempt to regulate tobacco, Congress (eventually) responded with an override that included several policy compromises and trade-offs that neither the FDA nor the Court could have shoehorned in under the text of the statute—including treating tobacco differently than a "drug" as that term is used in the FDCA.[498] The FDA must ensure that drugs are actually "safe and effective," a requirement that was central to the *Brown & Williamson* majority's decision that the Act was never intended to regulate tobacco products.[499] This compromise—giving the FDA jurisdiction over tobacco, but exempting it from the safe and effective standard—was a more artful, and surely more efficient, compromise than anything an administrative override could have legitimately produced in this case. In short, while we believe that administrative overrides can help address the decline in legislative overrides, they are no substitute for the real thing.

But in some cases they can come close. If there is one area where administrative overrides are nearly identical to legislative overrides, it is with respect to agency interpretations rendered within the policymaking space left by Congress—namely, decisions made at what the Court deems "*Chevron* Step Two." The Supreme Court laid the doctrinal foundation for this type of override in *National Cable & Telecommunciations Service, Inc. v. Brand X Internet Services*, where it held that an agency may reinterpret—and replace entirely—a policy that a court upheld as reasonable—i.e., at *Chevron* Step Two. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[500] *Brand X*'s interpretation of *Chevron* explicitly gives agencies room to update their rules, guidance, and adjudications to reflect new circumstances that otherwise might require legislative overrides.

Brand X can be understood to vest the Executive with formal override authority for a limited subset of cases. This is most commonly understood in the context *Brand X* presented, namely, where a court upholds one interpretation as reasonable under *Chevron* Step Two. Subsequently, the agency (often after a change in presidential administration) decides to change its interpretation. *Brand X* thus gives the Executive Branch the authority to make such changes when the rule is made pursuant to an

498. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101(a), 123 Stat. 1776, 1783–84 (2009) (codified at 21 U.S.C. § 321(rr)).

499. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133–37, 161 (2000).

500. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

ambiguous statute. By itself, that is a significant power. And it might be even broader. In an earlier decision, the Court had suggested that even when an agency prevails under *Chevron* Step One, there might be some room for agency updating within the statutory scheme.[501] In other words, even where the text compels one option rather than another, the agency may nonetheless retain some flexibility to reinterpret the margins of the statutorily compelled policy. As Justice Scalia's *Brand X* dissent demonstrated, the Communications Act and other regulatory statutes create a huge policy space for agencies to update statutes in ways that are the functional equivalent to policy-updating overrides by Congress.[502]

Because many cases are resolved at *Chevron* Step Two, *Brand X* has the potential to counteract statutory ossification in a number of important areas. The treatment of the Internet as an information service in *Brand X* is perhaps the best example.[503] But there are also many narrower potential overrides that could prove excellent candidates for updating. Consider a recent example in a different area of law. In *Astrue v. Capato*,[504] the Supreme Court upheld the Social Security Administration (SSA)'s interpretation of the Social Security Act that precluded survivor benefits for posthumously conceived children who could not inherit under state intestacy law.[505] The groups most adversely affected by this decision—veterans, cancer patients (two groups that frequently utilize sperm banks), and children—would appear to be sympathetic parties capable of garnering Congress's attention and securing an override. But in the absence of an override, a new interpretation by the SSA that reflects the evolving norms associated with assisted reproduction could achieve many of the policy benefits associated with overrides. Because *Capato* found the statute ambiguous and therefore deferred to the agency under *Chevron* Step

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501. *See* Edelman v. Lynchburg College, 535 U.S. 106, 114 & n.8 (2002).

502. *See Brand X*, 545 U.S. at 1005, 1016–17 (Scalia, J., dissenting) (objecting to the Court's roadmap for agencies to override judicial decisions, laid out in *Brand X* and suggested in *Edelman*). The Court rejected Justice Scalia's alarm that allowing the FCC's regulatory revolution was a deep sacrifice of judicial integrity. *See id.* at 983–84 (majority opinion).

503. *See id.* at 977–78, 989, 997 (indicating that the FCC classified the Internet as an information service and that its classification was reasonable). This example continues to have a lasting effect. Earlier this year, the D.C. Circuit struck down the FCC's "net neutrality" regulations because they effectively imposed common carrier status on regulated cable companies, a status prohibited by the Communications Act. Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014). Although not a Supreme Court case, we note that this case could be considered a candidate for a second administrative override—undoing the rule at issue in *Brand X*. The FCC has indicated that it will not appeal the decision to the Supreme Court, instead focusing on rewriting its rules and potentially reclassifying Internet providers. *See* Statement of Tom Wheeler, FCC Chairman, on the FCC's Open Internet Rules (Feb. 19, 2014), *available at* http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules.

504. 132 S. Ct. 2021 (2012).

505. *Id.* at 2033–34.

Two,[506] the SSA has the discretion under *Brand X* to override its own interpretation.

The potential drawback for this option—as with all administrative overrides—is that it lacks the full legitimacy bonus of congressional overrides. But it can approximate that legitimacy bonus under some circumstances. An administrative override adopted through notice-and-comment rulemaking can involve the regulated community and interested parties in a way that parallels or echoes the legitimacy bounce of a congressional override. Notice-and-comment rulemaking possesses many of the attributes of the open, deliberative, and pluralistic process that we find so admirable for most congressional overrides.[507] Through their statement of basis and purpose, agencies administering the process identify the goals of the statute and the impact of the new rule. In this respect, they function similarly to the committee reports and hearings that Congress uses to inform the public.

The notice-and-comment process also requires the agency to engage in a conversation with affected parties, responding to the comments and concerns that they place in the record. And the rulemaking process frequently draws in numerous supporters and opponents of the proposed rule, endowing it with a pluralistic character. Indeed, because it is so much easier to submit comments than to secure precious time before a congressional committee (especially for opponents of the override), the rulemaking may provide superior access for some of the groups that we find underrepresented in the override process—consumers, prisoners, etc.[508] And although critics complain that notice and comment may not deeply affect final rules, and thus provides a forum without effect,[509] these are problems with the legislative process as well. We are skeptical that the notice-and-comment process is less responsive than the process by which legislation is drafted. If it is less responsive, we doubt that it is significantly so.

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506. *See id.* at 2026.

507. *See* HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 219–20 (2002) (acknowledging that notice-and-comment rulemaking allows "interested members of the public [to] make their voices heard" but arguing that this process in and of itself does not go far enough in enhancing democratic participation); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1559–62 (1992) (expressing a similar theoretical optimism about the democratic benefits of notice-and-comment rulemaking and a similar skepticism with regard to its actual benefits).

508. *See supra* Figure 12.

509. *See, e.g.*, RICHARDSON, *supra* note 507, at 220 ("The interested members of the public can certainly make their voices heard through [the notice-and-comment] process. What is less clear is how their voices will then influence the revision of proposed rules.").

But the notice-and-comment process has its limits, and regulations are not a perfect substitute for congressional overrides. An agency cannot adopt an interpretation that the Court has rejected as a matter of law, nor can it adopt a new interpretation that conflicts with the statute's text. And in many of the principal override-generating areas, there is no agency with rulemaking authority. Recall that the EEOC lacks rulemaking authority for Title VII issues,[510] and the Department of Justice cannot change the criminal code by regulation. Importantly, there is no agency administering federal jurisdiction and procedure statutes (the single most fertile source of overrides), bankruptcy, or the habeas corpus statutes. The rulemaking route is only a partial fix.

The Executive Branch might also help reinvigorate congressional overrides. As the foregoing discussion makes clear, the Executive Branch is the single most important outside player in the legislative process.[511] Officials from the Executive Branch testify more than any other group of persons or representatives. Departments and agencies play an influential role, both in submitting legislation and in shaping bills already under consideration. Thus, the Executive Branch might leverage this position to coordinate priorities for an override, thereby helping to spur the override process. As suggested above, the Department of Justice already has a process for identifying cases that no longer embody wise policy and should be candidates for an override.[512] Consider a more ambitious Executive Branch approach to overrides. The White House is already a force to be reckoned with on this front, by means of the Office of Information and Regulatory Affairs (OIRA), located within the Office of Management and Budget. OIRA's primary function is to engage in cost–benefit analysis of agency rulemaking—but the office also serves as a policy clearinghouse.[513] In 2011, for example, President Obama asked all federal agencies to submit to OIRA proposals for trimming existing regulations.[514] OIRA then cooperated with the agencies to reduce regulatory burdens. The President might run a similar process for overrides, asking agencies to identify areas of the law where policy priorities were stymied by statutory decisions by the federal judiciary. The office might then come up with a list of override priorities that could inform the President's legislative agenda that might

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510. *See supra* notes 471–73 and accompanying text.

511. *See also, e.g.*, *supra* Figure 12 and accompanying text.

512. *See supra* pp. 1441–42.

513. *See* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEXAS L. REV. 1139, 1164 (2014) (describing OIRA's position within the Executive Branch).

514. *See* Exec. Order No. 13,579, 3 C.F.R. 256 (2012), *reprinted in* 5 U.S.C. § 601 app. at 103 (2012) (requiring federal agencies to develop and release plans for periodic review of existing regulations and implying that OIRA would have input in their development).

become priorities for overrides through executive orders. A renewed focus by the most important nonlegislative player (the President) thus might help to reinvigorate the override process, even marginally.

C. *The Role of the Supreme Court and Implications for Statutory Interpretation Doctrine*

The foregoing data and analysis upend the major models political scientists and many law professors have used to ground their thinking about the Supreme Court and its role in our system of separated powers. To begin with, many positive political theory models are inconsistent with our study. Most such models assume the Supreme Court is primarily a strategic actor, seeking to impose its political and institutional preferences onto statutes and to avoid overrides through crafty dodges.[515] These models have been the basis for much legal scholarship.[516] As Pablo Spiller and Emerson Tiller first demonstrated, even positive political theory has adjusted its strategic actor approach to account for the occasions where the Court invites an override[517]—a phenomenon the current study documents as an important and common occurrence.[518]

Thus, positive political theory needs to consider the Supreme Court as an institution that cooperates with as much as (or more than) competes with Congress and the President in developing the contours of American statutory law.[519] Nevertheless, as this study documents, there is a significant range of statutory issues, reflected in the restorative overrides such as the 1991 CRA and the 2009 Ledbetter Act, where competition and conflict between the libertarian Court and the regulatory Congress is the dominant motif.[520]

Among law professors, a much more popular (and more explicitly normative) model of Court–Congress relations is the precept that, for statutory interpretation, Congress is the principal and the Court is the "faithful agent," carrying out the directives that have successfully passed through the Article I, Section 7 process.[521] The faithful agent model is

515. *See, e.g.*, John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992) (providing an overview of such a model).

516. *See, e.g.*, Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992). For an especially helpful survey of the field, see Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457 (1992).

517. Spiller & Tiller, *supra* note 3, at 504–05; *accord* Staudt et al., *supra* note 3, at 1364–65.

518. *See supra* subpart IV(F).

519. This idea is prominently associated with HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS, and has been recently articulated in BREYER, *supra* note 192, at 80–87, and Eskridge & Frickey, *supra* note 192, at 27–29.

520. *See supra* text accompanying notes 154–55, 216–17.

521. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–72 (2006) ("In our constitutional system, federal courts act as faithful agents of

consistent with the cooperative model of Court–Congress interactions—but is strongly inconsistent with the Court's behavior in the many cases that yielded restorative overrides. For example, in the cases overridden by the 1991 CRA, the Court was not being a "faithful agent" of Congress; the Justices were applying their own understanding of what the rule of law requires and/or their own policy preferences upon Title VII and § 1981, which protect employees against workplace discrimination.[522] Professors Brudney and Ditslear have demonstrated that these decisions are not explicable under neutral rule of law precepts.[523] Professor Widiss has demonstrated that, in the arena of restorative overrides, the Court continues to obstruct congressional goals or slow down Congress's regulatory agendas.[524]

Most important, the current study documents a more realistic picture of the institutional interaction in the federal government: the principal–agent dyad is the wrong way to look at an institutional interaction that is triadic and where each institution brings something different to the evolution of statutory policy. When there is a simple principal–agent relationship implicated in federal statutes, it is in the large majority of cases one where Congress is the principal and an executive or independent agency (rather than the Court) is the agent.[525] Where federal courts are even relevant to the elaboration of statutory policy, they are more like monitors of agent actions rather than agents themselves. Within this triadic network, consider some implications of our study of congressional overrides for Supreme Court statutory interpretation doctrine.

Congress; accordingly, they must ascertain and enforce Congress's commands as accurately as possible."); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 102–05 (2001) (arguing that the faithful agent model is encoded into the original meaning of the judicial power in Article III).

522. As the analysis in this study makes clear, to say that the Justices impose their "policy preferences" onto statutes is not the same as saying that partisan GOP Justices are trying to thwart liberal Democrat statutes, though they might be doing that subconsciously. The main point is that Justices who are super-libertarian for institutional as well as other reasons are imposing that perspective on broadly written antidiscrimination laws.

523. *See* James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1205–10 (2010) (discussing the Court's use of substantive canons and recognizing that these canons lack interpretive neutrality); Brudney & Ditslear, *supra* note 49, at 78–95, 108–11 (noting the ideological coloring of the Justices' use of canons of construction and legislative history); James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 227 (2006) [hereinafter Brudney & Ditslear, *Decline and Fall*] (finding that the Justices' use of legislative history breaks down along ideological lines).

524. *See* Widiss, *supra* note 42; Widiss, *supra* note 4.

525. *See* Farber & O'Connell, *supra* note 513, at 1146–49 (discussing the widely held assumption that agencies are agents of Congress).

1. Super-Strong Presumption of Correctness of Statutory Precedents.—The Supreme Court has long held that statutory precedents are entitled to a super-strong stare decisis effect, stronger than either constitutional or common law precedents.[526] As suggested by Justice Brandeis, an important foundation for this doctrine is that Congress ought to have primary responsibility for correcting the Court's erroneous or outdated statutory decisions.[527] Most scholars have rejected the strong stare decisis effect for statutory precedents because they believe Congress is not capable of following the Court's legisprudence and responding with overrides.[528] This argument is undermined by the current study, which demonstrates that congressional committees devote enormous effort to evaluating Supreme Court statutory decisions in a wide range of subject areas and that Congress does override a lot of those decisions. Notwithstanding the formidable veto gates that render legislation quite difficult, for the most part, Congress is capable of policy responses even in periods of divided government and partisan acrimony. Recall that the golden age of overrides was the period of bitterly divided government between 1991 and 1999.

More important, the current study provides important support for Justice Brandeis's institutional judgment. Not only is Congress capable of responding to Supreme Court statutory constructions, but this study demonstrates the many ways in which a congressional resolution is superior to a judicial one. Recall *Flood v. Kuhn*, one of the Court's most universally criticized decisions and a piñata for critics of the super-strong presumption of correctness for statutory precedents.[529] Refusing to overrule the Court's precedents exempting baseball, but no other sport, from the Sherman Antitrust Act, *Flood v. Kuhn* is defensible along several dimensions. Because professional baseball had matured under the umbrella of Sherman Act immunity, the Court was concerned about reliance interests that would

526. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938) ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century."); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) ("Statutory precedents . . . often enjoy a super-strong presumption of correctness.").

527. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–07 (1932) (Brandeis, J., dissenting) (noting that the Court adheres to stare decisis "even where the error is a matter of serious concern, provided correction can be had by legislation").

528. *E.g.*, Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 425–29 (1988); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 388–89 (1988); *see also* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 252–55 (1975) (suggesting that courts should at least be willing to correct clear prior misreadings).

529. *See supra* text accompanying notes 334–42.

be unsettled by an overruling. Congress was the institution that could best deal with the reliance interest problem—and do so in a legitimate manner, through its open, deliberative, and pluralist process. When Congress did override the decision in the 1998 Curt Flood Act, it overrode antitrust immunity only for challenges to the reserve clause and not for other kinds of challenges (such as collusion among the team owners to set rules and restrict entry, for example). Because the reserve clause had already been abrogated through private arbitration, the benefit of the override was quite small. But so were the costs because Congress left in place baseball's insulation from other forms of antitrust liability (such as price-fixing and market segmentation), a move that the Court would not have been able to make in 1972.

Flood v. Kuhn is instructive in another sense as well. One reason the Court gave for declining to overrule the baseball antitrust immunity precedents was Congress's "positive inaction."[530] Far from ignoring the issue, Congress had devoted thousands of hours of attention to antitrust immunity for professional athletics and had considered many proposals—almost all of which sought to expand immunity to other sports rather than take it away from baseball.[531] Many scholars and Justices have expressed disdain for this kind of evidence, what its critics call "subsequent legislative history" or "legislative inaction."[532] Our view is that this kind of terminology obstructs a proper understanding of a well-functioning interbranch dynamic. When the Court has interpreted a statute and Congress has engaged in an open, deliberative, and pluralistic appraisal of the Court's decision without overriding it, that ought to be an additional reason for the Court to be reluctant to overrule its statutory precedent. And when the congressional deliberations reveal legislative approval for the Court's decision, that ought to close the door on reconsideration of that precedent.

Contrast *Patterson v. McLean Credit Union*. The issue was whether the Civil Rights Act of 1866 provided a claim for relief to an employee who was allegedly harassed and fired because of her race.[533] In 1976, the Supreme Court had interpreted the law to provide a cause of action against

530. Flood v. Kuhn, 407 U.S. 258, 283–84 (1972).

531. *Id.* at 281–83.

532. *See, e.g.*, Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1092 (2011) (Sotomayor, J., dissenting) ("[P]ostenactment legislative history created by a subsequent Congress is ordinarily a hazardous basis from which to infer the intent of the enacting Congress."); Sullivan v. Finkelstein, 496 U.S. 617, 631–32 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote."); Maltz, *supra* note 522 (stating that relying on "legislative inaction" is not always appropriate because such inaction may not reflect conscious congressional choice but instead might be the result of political forces).

533. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 169–71, 176 (1989).

private institutions for contract-based discrimination because of race.[534] The *Patterson* Court, on its own, asked the parties to file briefs to determine whether the Court should overrule the precedent,[535] which had arguably stretched the statute beyond its most obvious target of state actors. Invoking the super-strong presumption of correctness, the Court unanimously reaffirmed the 1976 precedent[536]—but the five-to-four majority opinion ignored evidence that the precedent had been ratified by Congress after 1976.[537] The same slender majority then interpreted the precedent and the statute narrowly, to deny claims to employees with whom firms entered into contracts but then harassed and terminated because of their race.[538]

Patterson was inconsistent with stare decisis, whether super-strong or not, because a logical implication of the prior precedent was that institutions could not deny normal contractual rights because of race.[539] The Solicitor General recognized this and had urged a more liberal application of the 1866 CRA—and the Bush Administration joined civil rights and other groups in urging Congress to override *Patterson*,[540] which Congress did in the 1991 CRA.[541] As noted above, the 1991 CRA override of *Patterson* was restorative—indeed, one of the most lopsided and outraged political repudiations of a Supreme Court opinion in American history.[542] A positive lesson of the *Patterson* debacle is that the Court should be super-leery of overruling or drastically narrowing statutory precedents when both the Legislative *and* Executive Branches have taken positions supporting normal readings of statutory precedents. That Democrat Congresses and a GOP President joined in support of reaffirming the 1976 precedent and applying it in a normal manner should have been red flags cautioning the Supreme Court against the course that it took.

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534. Runyon v. McCrary, 427 U.S. 160, 166–68, 186 (1976).

535. *Patterson*, 491 U.S. at 171.

536. *Id.* at 167, 171–75 (acknowledging that some Justices believed *Runyon* was wrongly decided but finding no justification for overruling it).

537. *Id.* at 190–95 (Brennan, J., concurring) (agreeing that *Runyon* should be reaffirmed but adding that Congress after 1976 ratified the Court's decision).

538. *See id.* at 178–89 (majority opinion).

539. Specifically, *Runyon* ruled that private schools violated § 1981 if they refused to admit children because of their race. 427 U.S. at 167–68, 172. A clear implication of this holding is that a school could not admit such children and then drive them out with racial harassment and race-motivated expulsions. *See Patterson*, 491 U.S. at 219–22 (Stevens, J., concurring in the judgment in part and dissenting in part) (discussing implications of *Runyon* for § 1981).

540. H.R. REP. NO. 102-40, pt. 2, at 53 (1991) ("[T]he Department of Justice recommended corrective legislation to overturn two of the [Supreme Court's] decisions: *Patterson v. McLean Credit Union* and *Lorance v. AT&T*.").

541. *See infra* Appendix 1.

542. *See supra* text accompanying notes 216–17.

2. Representation-Reinforcing Statutory Interpretation: Deference to Agency Interpretations and Deliberation-Encouraging Canons.—The current study also has interesting implications for the Supreme Court's jurisprudence of deference to agency interpretations. As a practical matter, the Supreme Court has traditionally followed agency interpretations almost 70% of the time,[543] an astounding record of success by the Solicitor General, who presents most of these interpretations to the Court. The actual record of cases before the Court refutes the notion that the Court defers only when an agency interprets a statute pursuant to congressionally delegated authority.[544]

Indeed, the leading case, *Chevron U.S.A. Inc. v. NRDC, Inc.*,[545] relied on congressional delegation of lawmaking authority to the EPA as only *one* reason for deferring to the agency when Congress had not directly addressed an issue.[546] *Chevron*'s distinctive rationale was that when a policy choice must be made to fill in a statutory gap, an agency connected with the President is a more democratically legitimate policymaker than the Supreme Court, whose members are not connected to the electorate in any formal way.[547] One point that the current study adds to the *Chevron* analysis is that the democratic legitimacy of agency interpretations owes as much to administrators' ongoing connections with *Congress* as to their connections with the President. As we have seen, the Department of Justice and other agencies are the most important nonlegislative players, by far, when Congress considers legislation overriding the Court's statutory decisions.[548]

To the extent that the Supreme Court wants to advance the cooperative features of institutional interaction, the current study supports the Court's attentiveness to agency views; indeed, we would advise the Court to be more deferential in cases like *Patterson*, where the Justices ignored the

543. Eskridge & Baer, *supra* note 49, at 1129 tbl.7.

544. The conventional wisdom is that the basis for deference is congressional delegation. *See* United States v. Mead Corp., 533 U.S. 218, 230 & n.11 (2001) (following Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 872 (2001)). But the Court's actual practice is all over the map. In most cases where there is lawmaking delegation, the Court has ignored *Chevron*. Eskridge & Baer, *supra* note 49, at 1123–29. The agency win rate is actually higher for cases where the Court follows a more informal deference regime. *Id.* at 1099 tbl.1, 1111–15.

545. 467 U.S. 837 (1984).

546. *See id.* at 859–66.

547. *See id.* at 865–66; *see also* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 312 (1986) (summarizing the implications of *Chevron*).

548. The key role played by agencies drafting legislation, lobbying Congress to enact it, interpreting such legislation, and then selling their interpretations to the Court is a phenomenon that dates back to the New Deal. Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 338–42 (2013).

Solicitor General's sage advice. Thus, we endorse Justice Scalia's campaign within the Court to expand formal deference to agencies beyond the category of cases where Congress has delegated lawmaking authority to the agencies.[549]

As the restorative overrides teach us, however, the Supreme Court is also sometimes at odds with the Legislative and Executive Branches—and so has incentives *not* to defer to the political branches. There are (at least) three kinds of potentially legitimate reasons, inherent in the Court's important role in our system, why the Court ought to push back against agencies.

The first are rule of law reasons: the Court has a systemic obligation to enforce statutory plain meanings consistently and honestly; when an agency interpretation deviates from the plain meaning of the text, the Court should usually trump the agency's view with its own insistence on clear statutory texts. If clarity is required, Congress can override the Court with the requisite language, a possibility that this study has demonstrated to be a tangible one (until recently). *Casey*, the expert witness fees case, is an example of this phenomenon, *if* one agrees with Justice Scalia that the Civil Rights Attorneys' Fees Act of 1976 is crystal clear against fee shifting for expert witnesses as well as for attorneys.[550] Congress speedily provided the requisite statutory language.[551] Recall that most of the overridden Supreme Court decisions relied on statutory plain meaning; an important and legitimate role for congressional overrides is to supply clear statutory texts when the Court finds them lacking.

A second important role for the Court is enforcement of constitutional rules and values. The Court more often enforces due process, federalism, and separation-of-powers norms through narrowing statutory interpretations than through outright invalidations. Although the Court sometimes strikes down congressional efforts to subject the states to federal programs and rules, its most common strategy is to require explicit congressional deliberation and targeted language before the Court will find that Congress has abrogated state immunity from regulation or from private lawsuits.[552] Many of those narrow interpretations are then overridden by Congress,[553] an

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549. *See Mead*, 533 U.S. at 239–61 (Scalia, J., dissenting); *accord* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 S. CT. REV. 201, 258.

550. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 88–92 (1991).

551. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (codified as amended at 42 U.S.C. § 1988 (2006)).

552. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 608–09 (1992).

553. *See, e.g.*, Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 103, 104 Stat. 1103, 1106 (codified at 20 U.S.C. § 1403 (2012)) (overriding Dellmuth v. Muth, 491 U.S. 223 (1989)).

excellent set of examples where the Court in its thwarting mode is insisting that important constitutional values be considered by Congress, which our study has shown to be capable of open, deliberative, and pluralist consideration. The broader point to be drawn from these examples is that constitutional judicial review in this country is more often accomplished through deliberation-encouraging clear-statement rules than through direct invalidation. This bears a striking similarity to proportionality review that is the norm throughout the industrial world[554] and is on the whole a more democratic and deliberative approach to the enforcement of constitutional values.

Third, the Court plays an important representation-reinforcing role in American governance.[555] Underappreciated examples of this role are the cases where the Court enforces nondelegation values by requiring clearer statements from Congress when agencies are overreaching their statutory mandates. Thus, a central rationale of the FDA Tobacco Case was that the FDA was making a big policy move not contemplated by Congress when it enacted the FDCA in 1938 and contrary to the tobacco-regulatory laws adopted from 1965 onward.[556] As the Court put it, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[557] Rather than strike down the statute as unconstitutional as applied based upon the nondelegation doctrine, the Court interpreted the broad statutory authorization narrowly—and invited Congress to respond,[558] which it did in the 2009 Tobacco Control Act.[559] Our study lends some support to the canon that "[Congress] does not . . . hide elephants in mouseholes."[560] The canon not only enforces democratic values, but it places the burden of inertia upon institutions (agencies and sometimes the White House) that have political clout and can secure congressional consideration of serious override proposals.[561]

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554. *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008) (providing a large-scale account of the rise of proportionality review by courts and other tribunals all over the world).

555. See generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980), for an explication and justification of democracy-enhancing judicial review.

556. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–60 (2000).

557. *Id.* at 160.

558. *See id.* at 161 (noting that regardless of the importance and severity of the issue at hand, grants of administrative power "must always be grounded in a valid grant of authority from Congress" and finding that it was "plain that Congress [had] not given the FDA the authority" it sought in the case).

559. *See supra* note 498.

560. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001). *Whitman* was followed in *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

561. Thus, in two of the four leading no-elephants-in-mouseholes precedents—namely, the FDA Tobacco Case, *Brown & Williamson*, and *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218,

As the 1991 Eskridge study maintained, the rule of lenity is the substantive canon that gains the most representation-reinforcing traction from any serious study of congressional overrides because the rule of lenity gently enforces important constitutional values in ways that encourage congressional deliberation and response *and* because the politics of lenity ensures that such deliberation will actually occur most of the time, as the Department of Justice (the typical loser in lenity cases) is usually able to secure a congressional hearing and often an override.[562] Thus, the rule of lenity gently enforces the due process idea that criminal statutes ought to be particularly clear[563] and the nondelegation idea that punitive sanctions ought be enforced against alleged wrongdoers only when the deliberative and pluralist legislative process has authorized those sanctions.[564]

In 1994, one of us proposed a representation-reinforcing meta-canon for allocating the burden of legislative inertia in cases where the legal arguments are evenly balanced: "In close cases, the . . . interpreter ought to consider, as a tiebreaker, which party or group representing its interests will have effective access to the legislative process if it loses its case, and to decide the case *against* the party (if any) with significantly more effective access."[565] Subsequently, Professor Elhauge advanced pretty much the same idea, but with the further suggestion that such a canon ought to weigh in favor of *Carolene* groups, namely, discrete and insular minorities.[566] We agree with the general idea (as it was ours) but caution against Professor Elhauge's effort to refocus it. Based upon our data, this tiebreaker is not a good representation-reinforcing justification for interpreting civil rights laws liberally because *Carolene* groups and women now have better override success than many of the traditional powerhouses in Washington, D.C. As documented above, women, racial and ethnic minorities, people with disabilities, religious minorities, and even sexual minorities and their allies have won impressive overrides of rights-denying Supreme Court decisions in workplace discrimination cases, for example.[567]

231 (1994)—the Court's stingy renditions of delegated authority were overridden by statutes providing the needed authorization, after open, deliberative, and pluralist consideration in Congress. *See infra* Appendix 1.

562. *See* Eskridge, *supra* note 1, at 413–14; Elhauge, *supra* note 4, at 2193–96.

563. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 296–99 (2012) (contending that the rule of lenity, properly applied, is simply a mechanism for reinforcing the beyond a reasonable doubt standard).

564. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S. CT. REV. 345 (arguing for the retirement of the rule of lenity and acknowledging that the nondelegation rationale is the best support for lenity in criminal cases).

565. ESKRIDGE, *supra* note 331, at 153; *see also id.* at 151–61 (explaining, applying, and justifying this meta-canon).

566. Elhauge, *supra* note 4, at 2209–11.

567. *See supra* Figure 13. Sexual minorities have been much less salient on Congress's agenda, until recently, when they secured an important repeal of their exclusion from the armed

Our list of groups lacking relative clout in the legislative process is a shorter one: consumers and other diffuse citizenry, criminal defendants and prisoners, and the poor and the dependent.[568] For example, recall our finding in subpart V(A) that overrides affecting prisoners and those on the wrong end of criminal statutes were disproportionately likely *not* to be open, deliberative, and pluralist.[569] An excellent example of representation-reinforcing statutory interpretation is *Brown v. Plata*,[570] where the Supreme Court interpreted the PLRA of 1995,[571] one of the most important override statutes in the current study. The PLRA sought to curtail class action lawsuits seeking court-enforced reform of unconstitutional prison conditions by imposing more stringent procedural requirements in such lawsuits.[572] Following the letter of the law, the lower courts had imposed an order directing the release of prisoners until conditions could reach a constitutional floor, and the Supreme Court affirmed.[573] In dissent, Justice Scalia propounded an antiprisoner interpretive rule, couched as a subsidiary of the absurd results canon, namely, that the Justices ought to "bend every effort to read the law in such a way as to avoid [the] outrageous result" of releasing prisoners.[574] The majority opinion enjoyed the virtue of enforcing the reasonable meaning of the statutory text without undue "bending" of the law. To the extent that the majority read the text liberally, it did so to avoid constitutional difficulties—and our meta-canon strongly supports the majority's reading.[575] If dissenting Justices are concerned about state prisoners having "too many" statutory rights, the current study demonstrates that Congress is an eager audience for their concerns, and it might be a good thing for legislators to consider whether documented prison conditions are consistent with American constitutional values.

3. Apply the Plain Meaning Rule in Light of Congressional Deliberations.—The plain meaning rule has made a great comeback at the

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forces (the nation's most important employer). *See* Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES, July 22, 2011, http://www.nytimes.com/2011/07/23/us/23military.html?_r=0; *see also* Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067–77 (codified as amended at 8 U.S.C. § 1182 (2012)) (overriding the most antigay Supreme Court decision in our history, Boutilier v. INS, 387 U.S. 118 (1967)).

568. ESKRIDGE, *supra* note 331, at 153; *accord* Elhauge, *supra* note 4, at 2207–09 (identifying consumers and taxpayers as also lacking in political clout).

569. *See supra* notes 348–51 and accompanying text.

570. 131 S. Ct. 1910 (2011). None of the three overrides in the PLRA was open, deliberative, or pluralist; hence, those overrides lacked the important legitimacy bonus of the override process. *See supra* note 351 and accompanying text.

571. *Plata*, 131 S. Ct. at 1922–23.

572. *See id.* at 1929–31 (describing the procedural requirements set forth in the PLRA).

573. *Id.* at 1922–23.

574. *Id.* at 1950 (Scalia, J., dissenting).

575. *See id.* at 1937 (majority opinion).

Supreme Court in the last generation, as the Justices have devoted more of their opinions to textual and structural analysis and less often rely on legislative history and purpose as decisive evidence of statutory meaning.[576] This development has encountered a chilly academic reception. For example, Professor Brudney and his political science coauthor have demonstrated that conservative Justices have deployed the plain meaning rule and various textual canons in a partisan manner to trump proworker legislative expectations.[577] Nevertheless, Justice Scalia has continued a vigorous public relations offensive in support of his new textualist philosophy, with the publication of his book, with Professor Garner, on *Reading Law*.[578] The current study lends potential support to the Supreme Court's insistence on plain meaning. Recall that Congress in the last five decades has responded to many such decisions by supplying statutory language that satisfied the Court's rule of law concerns.

We do sound a note of caution, however. Recall that Supreme Court decisions relying centrally on whole act and whole code arguments were much, *much* more likely to be overridden than decisions not critically relying on those text-based structural arguments.[579] As *Casey* illustrates, whole act and whole code arguments assume consistent usage throughout the statute and the U.S. Code.[580] Hence, the Court will assume that a term used in one part of a statute will have exactly the same meaning in another part, and sometimes in another statute altogether. Conversely, when a statute uses different terminology, the Court often presumes different

576. *See* Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 395 (1999) (observing that since Justice Scalia's appointment to the Court, opinions written by Justices Rehnquist and Stevens contained significantly fewer citations to legislative history); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1655 (2010) (concluding that the decline in the use of legislative history by Justices is due to "a rightward shift in the ideological composition of the Court").

577. Brudney & Ditslear, *supra* note 49, at 79–95 (examining specific cases that put language and substantive canons ahead of "legislatively expressed preferences" and noting that the use of canons in the majority and legislative history in the dissent reflected ideological differences in the Court); Brudney & Ditslear, *Decline and Fall*, *supra* note 523 (recognizing that both liberal and conservative Justices used legislative history in a way that cut away from Congress's proemployee purpose); *cf.* Brudney, *supra* note 523, at 1229–32 (criticizing the imprecise nature of canons of construction).

578. *See* SCALIA & GARNER, *supra* note 557. *But see* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing SCALIA & GARNER, *supra* note 563) (questioning the viability of the Scalia and Garner project of establishing a canons-based regime for neutral and predictable statutory interpretation).

579. *See supra* Figures 25 and 26.

580. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 91–92 (1991) (arguing that since attorney's fees and witness fees are referred to separately multiple times in the statute, they should be referred to separately when determining court costs).

meanings.[581] Relatedly, the Court likes to say that every term, phrase, or provision adds something to a statute and is not "surplusage" or "redundant."[582]

Holistic canons such as these are now under heavy attack. Congress does not draft statutes with these holistic canons in mind, and a recent study documents that the process of enactment assures that these canons, especially the rule against surplusage, cannot be carefully adhered to even if legislative drafters focused on them.[583] Hence, these canons are antidemocratic in a serious way, and our study demonstrates that their deployment burdens the legislative agenda more than any other kind of interpretive canon. Do the holistic canons have a compensating utility, such as assuring a reliable rule of law regime? We doubt it. Even some devout textualists maintain that the whole act and whole code canons detract from rather than contribute to a rule of law regime.[584]

Our study supports that conclusion. We found that, in the cases in which the Court relies on the whole act canon, it also relies on plain meaning nearly two-thirds of the time—a higher amount than even the baseline number for overrides in the last twenty-five years.[585] By contrast, in the same cases, the Court relies on legislative history and congressional purpose only slightly more than one-third of the time. Although these numbers are roughly in line with the general population of overrides,[586] we interpret our findings as evidence that the Court would be well-served to expand its interpretive toolbox in those cases in which it might be tempted to apply the whole act canon.[587] Hence, our friendly suggestion to textualists is to follow a plain meaning rule that is not dogmatic about importing strong presumptions from elsewhere in the statute, much less from elsewhere in the Code, as the Court did in *Casey*.[588]

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581. *See id.* at 99 (focusing on Congress's choice to use restrictive language in the statute at issue instead of the more expansive language it employed in other statutes and using that difference to justify its strict application of the term "attorney's fees").

582. *See supra* notes 463–67 and accompanying text.

583. *See* Gluck & Bressman, *supra* note 302, at 934–35 (finding that a certain level of surplusage might be politically necessary); *see also* Eskridge, *supra* note 578 (criticizing Scalia and Garner for investing so much significance in textual canons that Congress does not know about or cannot easily anticipate when it drafts statutes).

584. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 202–04 (2006) (urging courts to follow a strict plain meaning approach to statutory interpretation and rejecting as wasteful reliance on whole act and whole code evidence).

585. *See supra* Figure 21.

586. *See supra* Figures 22 and 23.

587. We found a similar pattern for the whole code canon, although the Court did rely on plain meaning less often in those decisions than in decisions relying on the whole act canon.

588. Along these same lines, Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS

Our overrides study also has a broader lesson for the Court's deployment of the plain meaning rule, namely, that plain meaning ought not to be determined without reference to the ongoing congressional deliberations that produced the text. Perhaps the largest normative point to emerge from our study is the legitimacy power of the override process. Consistent with the work of political scientist Jeb Barnes,[589] we found that the override process was typically open and well-publicized, deliberative and fact-oriented, and pluralistic, considering the perspectives of most relevant groups and interests. This is also a process that produces compromises that ought to be respected by judges. We shall illustrate this point with perhaps the most-taught statutory case of the last generation, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, where the Court confronted a superstatute, as amended to override both the Supreme Court and an agency rule (in part).[590]

The Endangered Species Act of 1973 was enacted for biodiversity purposes—to protect endangered species from becoming extinct.[591] Section 9(a)(1)(B) of the Act makes it an offense for any person to "*take* any [endangered] species within the United States or the territorial sea of the United States."[592] Section 3(14) defines the statutory term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[593] The Department of the Interior's 1975 regulation, as revised in 1981, defines "harm" in the statutory definition of "take" as any activity that "actually kills or injures" endangered species, including an activity that results in "significant habitat modification or degradation," and includes acts that "significantly impair[] essential behavioral patterns, including breeding, feeding or sheltering."[594] Under that definition of "harm," private landowners that disrupt breeding patterns by destroying a significant habitat for an endangered species are in violation of § 9(a)(1)(B).

In *Sweet Home*, the Supreme Court upheld the Department's regulation, based in part upon the plain meaning of "harm," one of the terms included in the statutory definition of "take."[595] This would appear to

L. REV. 961 (2013), provides an excellent analysis of the perverse interaction of two liberal override statutes.

589. *See* BARNES, *supra* note 4, at 103–13.

590. *See* 515 U.S. 687, 690–92. For more information, see the discussion of the case in William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J., 865, 875–84 (2013).

591. Pub. L. No. 93-205, § 2(b), 87 Stat. 884, 885 (codified at 16 U.S.C. § 1531(b) (2012)).

592. *Id.* § 9(a)(1)(B), 87 Stat. at 893 (codified at 16 U.S.C. § 1538(a)(1)(B)) (emphasis added).

593. *Id.* § 3(14), 87 Stat. at 886 (codified at 16 U.S.C. § 1532(19)).

594. 50 C.F.R. § 17.3 (1982).

595. *Sweet Home*, 515 U.S. at 708.

be a routine plain meaning case; but, regardless of whether the language was ambiguous, the Court should have upheld the agency rule under Step Two of *Chevron* (which all Justices agreed was the governing framework).[596] Yet Justice Scalia dissented.[597] His best legal argument was that two other provisions, and not § 9, of the 1973 Act were Congress's exclusive response to habitat threats: Section 7 explicitly barred federal projects from harming the habitat of endangered species,[598] and § 5 authorized the Department to use its eminent domain power to secure needed habitat from private landowners,[599] thereby leaving § 9's antitake regulation probably concerned with more targeted activities.[600]

This was a good structural argument, but, as is often the case for structural arguments, it should not have been dogmatically asserted without more contextual evidence. Reading nothing but the text of the statute, it is reasonable to say that §§ 5 and 7 are the primary mechanisms for protecting habitat, with § 9 being an ancillary but important mechanism as well. Ever going for the analytical jugular, however, Justice Scalia supported his structural argument with floor speeches by both Senate and House sponsors articulating the protection-of-habitat purpose with greater precision and, probably, reflecting the compromises reached among the coalition of legislators supporting the statute.[601] As the House manager put it,

> [T]he principal threat to animals stems from destruction of their habitat. . . . [*The bill*] *will meet this problem by providing funds for acquisition of critical habitat*. . . . It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, *but who are understandably unwilling to do so at excessive cost to themselves*.[602]

The sponsor then noted, "Another hazard to endangered species arises from those who would *capture or kill them for pleasure or profit*,"[603] which the bill prohibited in § 9. The Senate floor manager made a similar speech

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596. *See id.* at 715 (Scalia, J., dissenting).

597. *Id.* at 714.

598. Endangered Species Act § 7, 87 Stat. at 892 (codified as amended at 16 U.S.C. § 1536(a)); *see also* TVA v. Hill, 437 U.S. 153, 172, 193–95 (1978) (enforcing, dramatically, § 7's habitat-protective rule by requiring TVA to halt construction of a $100 million dam that would, allegedly, have destroyed a necessary habitat for an endangered species).

599. Endangered Species Act § 5, 87 Stat. at 889 (codified as amended at 16 U.S.C. § 1534).

600. *Sweet Home*, 515 U.S. at 727–30 (Scalia, J., dissenting).

601. *See id.* at 727–28 (preferring the "*direct* evidence" from Senate and House floor managers of the bill over the majority's reliance on "various pre-enactment actions and inactions").

602. *Id.* at 728 (alterations in original) (quoting 119 CONG. REC. 30,162 (1973) (statement of Rep. Sullivan)).

603. *Id.* (alterations in original) (quoting 119 CONG. REC. 30,162 (1973) (statement of Rep. Sullivan)).

before his chamber.[604] Completing his analysis of statutory structure, Justice Scalia's analysis of legislative history persuades us that the 1973 Act did not require private property owners to avoid any harm to the habitat of endangered species. Thus, the Department went too far in 1975 when it originally adopted the habitat-protecting interpretation of "harm" for purposes of § 9(a)(1).

Good for Justice Scalia, but a central lesson of our study of congressional overrides is that the enactment of a major statute is never the end of Congress's deliberations. They continue as the statute is applied, and the statutory interpreter needs to consider the statute's ongoing deliberations, amendments, and overrides as well as the story of its birth. After the Department issued its broad habitat-protection regulation in 1975, Congress heard testimony from ranchers and farmers objecting to the Department's broad regulation and considered bills to override that regulation's statutory definition.[605] Not only did Congress refuse to override the Department, but the 1978 ESA Amendments adopted to override *TVA v. Hill* included provisions premised upon the assumption that § 9(a)(1)(B) barred everyone from harming endangered species by destroying needed habitats.[606] That, alone, should have caused judges like Scalia to consider whether the structure of the statute had changed in ways that undermined his argument.

In 1982, a more serious challenge to the 1975 regulation emerged. The Reagan Administration and the Republican-controlled Senate were sympathetic audiences for an override of the Department's habitat regulation—but the Democrat-controlled House was not. The ESA Amendments of 1982 represented a compromise between the proenvironmental forces in the House and the profarmer and prorancher forces in the Senate. The ESA Amendments partially overrode the Department's interpretation of § 9(a)(1)(B)—not by negating its definition of "harm" (and therefore "take"), but instead by providing for a broader exemption mechanism in new § 10(a)(1)(B), which authorized the

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604. *Id.* at 727.

605. Brief for Petitioners at 31 & n.18, 32–36, *Sweet Home*, 515 U.S. 687 (No. 94-859) [hereinafter *Sweet Home* Brief] (indicating that Congress considered and rejected proposed measures to amend the Act and providing a list of congressional hearings on the subject).

606. When Congress enacted the Endangered Species Act Amendments, in part to override *TVA v. Hill*, not only did Congress reject serious proposals to override the Department's harm regulation, but the Amendments added § 7(o) to the ESA. Section 7(o) exempts from § 9 federal habitat-threatening projects (like the *TVA* dam) if they are granted an exemption from § 7(a)'s rules for federal projects through a new procedure Congress created in 1978. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3759 (codified as amended at 16 U.S.C. § 1536(o) (2012)); *see also Sweet Home* Brief, *supra* note 605, at 31–33 (recounting the legislative history of § 7(o)). Section 7(o) would have been superfluous if § 9(a) did not prohibit interference with the habitat of an endangered species.

Department to grant permits allowing incidental and cost-justified habitat "takings" by private enterprises.[607] As the committee reports demonstrated, Congress was *both* accepting the Department's reading of "harm" *and* ameliorating its potentially harsh application through the liberal exemption process.[608] Although Justice Scalia had relied on floor statements to support his view of the 1973 Act, he refused to credit committee reports that went against his view of the 1982 Amendments, purportedly because the text of revised § 10 did not, in his view, codify the Department's 1975 regulation.[609] This is precisely the kind of structural reasoning that the Justices should eschew, for reasons of democratic legitimacy as well as the orderly rule of law.

Conclusion: What If Overrides Are Drying Up?

Recall Professor Hasen's warning about the eclipse of statutory overrides and the *New York Times*'s alarm that congressional overrides in the new millennium have "fallen to almost none."[610] Although these warnings are overstated, we also demonstrate that overrides have fallen off dramatically since the Clinton impeachment. Moreover, the invaluable policy-updating overrides have declined much more than the contentious restorative overrides. Finally, there is no relief in sight. The first year of the current 113th Congress has been one of the most unproductive sessions in decades,[611] and divisions among Republicans in the House of Representatives have greatly reduced the already slim possibility of dealmaking among the House, the Senate, and the President.

A long-term decline in policy-updating overrides is very bad for the country, for reasons we have developed in this Article. Even during periods of divided government and partisan acrimony (such as the 1990s),

607. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 6, 96 Stat. 1411, 1422 (codified at 16 U.S.C. § 1539(a)(1)(B)) (establishing a permit system for takings incidental to lawful activities and not for the purpose of threatening endangered species); *see also Sweet Home* Brief, *supra* note 605, at 34–38 (providing the legislative history of § 10).

608. *See* H.R. REP. NO. 97-835, at 29 (1982) (Conf. Rep.) (stating that the new § 10(a) addresses "concerns of private landowners who are faced with having otherwise lawful actions . . . prevented by section 9 prohibitions against taking[s]"); S. REP. NO. 97-418, at 10 (1982) (same). The § 10 permit process was described in the Senate report as being modeled after the response to a specific situation in San Mateo County, California, in which the "taking" of endangered butterflies was incidental to "the development of some 3000 dwelling units" on a site inhabited by the species—i.e., was incidental to habitat modification. *Id.*; *see also* H.R. REP. NO. 97-835, at 30–32 (comparing a conservation plan under § 10(a) to habitat conservation plans in Northern California counties).

609. *See Sweet Home*, 515 U.S. at 730 (Scalia, J., dissenting).

610. Liptak, *supra* note 8.

611. Jonathan Weisman, *Underachieving Congress Appears in No Hurry to Change Things Now*, N.Y. TIMES, Dec. 2, 2013, http://www.nytimes.com/2013/12/03/us/politics/least-productive-congress-on-record-appears-in-no-hurry-to-produce.html.

congressional overrides have been an important part of a vigorous federal government. Overrides have kept the U.S. Code current with rapidly changing technologies in areas such as intellectual property. They reflected a changing consensus on important public norms, such as the importance of economic efficiency in bankruptcy and tax laws and the status of homosexuals in immigration law. And the legitimacy bonus, alone, of an override process that is open, deliberative, and pluralist is a boon to the country. Because we think the decline in overrides is a consequence of both Congress's post-9/11 agenda and its hyperpartisan divisions, we have no solution. Perhaps the political debate will shift away from entitlement programs and terrorism and back to the superstatutes that disproportionately generate overrides. But how to engineer such a shift is certainly well beyond our scope here.

Even if we cannot solve the problem, we should like to point out some of the consequences of the dry spell for overrides, especially if it turns out to be a longer-term phenomenon. The most obvious consequence is a reduction in the power of Congress to direct public policy in America. With declining relevance, Congress cannot serve the legitimating and policy-advancing role vested in it by the Constitution. And as Congress declines, other institutions will fill the power void.

A. *The Supreme Court: More Power to Narrow Statutory Directives*

Professor Hasen worries that the lower level of overrides shifts more power to slender Supreme Court majorities,[612] and we agree. With fewer overrides, five Justices on the Supreme Court have more freedom to impose their values—which for the last four decades have been much more libertarian or antiregulatory than the values of Congress (whichever political party is in control)—and this increases Professor Widiss's concern that the Supreme Court undermines statutory overrides by reading them narrowly and even counterproductively. The 2012 Term of the Court saw this phenomenon at work in Title VII cases. Recall *Vance v. Ball State University*, where the Court made it harder for victims of sexual harassment to sue employers.[613] But *Vance* was not the most dramatic example of this process at work last Term.

The issue in *University of Texas Southwestern Medical Center v. Nassar*[614] was the standard of proof a plaintiff had to adduce to prevail upon a claim that she was subject to retaliation for complaining about race discrimination and illegal harassment under Title VII.[615] If Dr. Naiel

612. Hasen, *supra* note 3, at 224–27.
613. *See* 133 S. Ct. 2434, 2439 (2013).
614. 133 S. Ct. 2517 (2013).
615. *Id.* at 2522–23.

Nassar had made a claim of outright race discrimination, he would have enjoyed a burden of proving that discrimination was "a motivating factor," as required by the 1991 CRA, which overrode the Supreme Court's view in *Price Waterhouse v. Hopkins*[616] that plaintiffs needed to show the discriminatory motive was a "substantial factor."[617] But Dr. Nassar's claim was one sounding in retaliation, and a 5–4 majority of the Court ruled that he had to meet a much more demanding standard: that his complaints of discrimination were the "but-for cause" of the employer's retaliation against him.[618] As in *Vance*, the EEOC had long viewed the matter the way Dr. Nassar did, and Justice Ginsburg again wrote for the four-Justice dissent, explaining how Congress had decisively rejected the Court's approach in the 1991 override and how Congress's rule was consistent with the Court's precedents and the statutory structure.[619] As in *Vance*, the majority dismissed the EEOC's views and invoked the 1991 override as a key reason in favor of applying a stricter standard for retaliation cases.[620] Unlike *Vance*, however, the Court in *Nassar* did not treat the overridden Supreme Court decision as a precedent to be followed. Instead, the *Nassar* Court adopted the "but-for cause" standard advocated in the *Price Waterhouse* dissenting opinion—the standard which a 6–3 Court had decisively rejected in 1989 and that overwhelming majorities in Congress had even more decisively rejected in 1991.[621]

The Court delivered *Vance* and *Nassar* in the last week of the Term, when their holdings were overshadowed by the Court's big decisions striking down part of the Voting Rights Act and the Defense of Marriage Act.[622] But *Vance* and *Nassar* are important decisions that, as a practical

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616. 490 U.S. 228 (1989).

617. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (2006)) (overriding *Price Waterhouse*, 490 U.S. 228). In *Price Waterhouse*, the plurality opinion would have allowed plaintiffs to state a claim that discriminatory intent was a motivating factor, *see* 490 U.S. at 249–50 (plurality opinion), but two Justices concurring only in the judgment required that the discriminatory intent be a "substantial" motivating factor, *see id.* at 259 (White, J., concurring); *id.* at 265 (O'Connor, J., concurring). The dissenters would have required the plaintiff to show but-for causation. *Id.* at 281 (Kennedy, J., dissenting).

618. *See Nassar*, 133 S. Ct. at 2534.

619. *Id.* at 2538–40 (Ginsburg, J., dissenting).

620. Specifically, the majority Justices ruled that, because the 1991 CRA only changed the burden of proof for discriminatory intent cases, the presumption of meaningful variation kicked in, creating strong textual evidence that the default rule in tort cases (but-for cause) should be the standard for retaliation claims. *Id.* at 2524–29 (majority opinion).

621. Justice Kennedy, the author of *Nassar*, wrote the dissenting opinion in *Price Waterhouse*. When Congress overrode *Price Waterhouse*, it was rejecting the more plaintiff-friendly standard of the majority Justices.

622. *See 2012 Term Opinions of the Court*, U.S. SUP. CT., http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=12 (indicating that *Vance* and *Nassar* were decided the day before their more newsworthy counterparts).

matter, make it hard for Title VII plaintiffs to sue discriminating employers. The boldness of the five-Justice majority in those cases, especially in *Nassar*, suggests that the sting of the 1991 CRA rebuke has worn off and that the majority does not fear a congressional response. Nor should it, so long as it marginalizes and isolates the 1991 congressional pushback in a polite and orderly manner.

A similar paring back has occurred in the context of the Voting Rights Act and may operate in ADA cases as well, if the Court treats the 2008 ADA Amendments with the same limiting approach strategy that it has used to interpret Title VII. If Congress remains paralyzed from pushing back against the Court and if Justice Kennedy remains the median Justice in these kinds of cases, the Court's antiregulatory tendencies may become more pronounced in other areas, such as environmental law.[623] Also worrisome is the Court's potential for disrupting law and policy in areas of law that are not as charged with partisan politics as Title VII. In those areas, however, the Court is prone to follow federal agency guidance (in contrast to the Court's dismissive treatment of the EEOC in recent cases). This brings us to the second big consequence of Congress's torpor on the override front: As overrides recede, the power of the White House and of the Executive Branch increases.

B. The President and Agencies: Much More Power Through Administrative Overrides and Workarounds

If regulatory liberals ought to be concerned that a conservative, antiregulatory majority of the Supreme Court is left less constrained by a paralyzed or disengaged Congress, regulatory conservatives ought to be concerned that a liberal, proregulatory White House and agencies are left less constrained as well. The Solicitor General and federal agencies already win most Supreme Court statutory cases, and they have had continued success in securing overrides after 1998.[624] Moreover, even for most areas of law where the Supreme Court plays a major role (tax, energy, communications, transportation, environmental law, etc.), policy is largely

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623. Consider *Rapanos v. United States*, 547 U.S. 715 (2006), a 4–1–4 decision in which Justice Kennedy cast the deciding vote to invalidate the government's expansive (and long relied upon) interpretation but proposed his own test for narrowing the application of the Clean Water Act. *Id.* at 759–87 (Kennedy, J., concurring); *see also* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009) (employing another restrictive interpretation of the Clean Water Act that Congress has proposed overriding, Clean Water Protection Act, H.R. 1310, 111th Cong. (2009), but on which it has not taken much action).

624. Recall that the biggest decline is with policy-updating overrides contained in legislation that comprehensively revises the law in a particular field. Restorative overrides have remained prominent in the post-1999 period, and restorative overrides championed by the Bush–Cheney (2001–2009) and Obama (2009–2017) Administrations have been particularly salient. *See supra* section III(D)(3).

set by agencies, with courts serving as monitoring or corrective checks. Because much of the Court's role in these cases is limited by the Administrative Procedure Act, and its own deference holdings,[625] agencies enjoy considerable freedom in construing statutes to fulfill the priorities of the Executive Branch. Whatever policy void is left by a torpid Congress is more likely to be filled by agencies than by judges.

If policy-updating overrides continue to languish, the biggest challenge for national governance will be how to update ossified statutory policies—and Executive Branch officials are the first movers for such measures. Indeed, the OIRA might become a situs for the White House to take up some of the slack left by Congress. By executive order, President Obama in July 2011 requested that independent as well as executive agencies update their regulations to save money.[626] As the policy consequences of congressional inaction accumulate, the White House ought to be inclined to press agencies toward other forms of substantive updating—and in our view the judiciary will probably accommodate the White House in areas of law where the Justices do not have strong political preferences.

The doctrinal structure is already in place—namely, the Court's various deference regimes, especially *Chevron*, as elaborated in the Court's important decision in *Brand X*. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[627] *Brand X* explicitly gives agencies room to update their rules, guidance, and adjudications to reflect new circumstances that otherwise might be appropriate for overrides and other forms of legislation. And we predict that agencies, perhaps prodded by the White House, will take this opportunity.

To be sure, the Supreme Court can be expected to exercise its power to veto agency moves it considers too aggressive.[628] But most agency innovations are not subject to lawsuits, few lawsuits reach the Supreme

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625. These holdings have been largely reaffirmed, or in some views expanded, in this Term alone. *See* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013).

626. Exec. Order No. 13,579, 3 C.F.R. 256 (2012), *reprinted in* 5 U.S.C. § 601 app. at 103 (2012). Congress is considering legislation extending White House/OIRA jurisdiction to independent as well as executive agencies, Independent Agency Regulatory Analysis Act of 2013, S. 1173, 113th Cong. (2013), but President Obama's action, a request rather than a directive, is clearly legal. In our view, the President also exercises some supervisory authority over independent agencies, which are probably part of the Executive Branch of government.

627. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

628. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1843 (2012) (ruling that *Brand X* did not protect an agency update that contravened the outer boundary of agency discretion established by precedent).

Court, and the Justices do not have strong views on the merits in most areas of law. Regulatory agencies such as FERC, the FCC, the FDA, the EPA, and the Patent Office have radically updated regulatory policies without explicit congressional authorization or judicial disapproval for the last several decades.[629] The EPA's regulation of greenhouse gases and the FCC's "net neutrality" regulations are examples of expansive, policy-driven interpretations that might at another time have gone through the legislative process. This kind of sweeping Executive Branch reinterpretation will probably increase, especially if the decline in overrides proves long-lasting. If the Executive Branch cannot secure its agenda through legislation, it will have every incentive to come as close to that agenda as possible through aggressive statutory (re)interpretation, often via the rulemaking process.

C. *State Regulation: More Federalism Workarounds*

While we believe the big institutional winners in a declining-role-of-Congress scenario are the President and federal agencies, there is also room for state entrepreneurship. Although many fertile areas for overrides are exclusively federal—e.g., bankruptcy, intellectual property, immigration, tax, and federal procedure—in others, such as labor and employment, business regulation, antitrust, and environmental law, the states may play an important role in responding to the Court. In all four areas, the Supreme Court has become increasingly libertarian and antiregulatory during the second half of our study. In the absence of overrides, states may fill the substantive gaps opened up in these regimes by the Court while also asserting a more forceful posture in enforcing state statutes already on the books. At the very least, it is a trend to keep an eye on and an avenue for future study.

Workplace antidiscrimination rules are the best example. Since 1991, Congress has struggled to update Title VII and other job discrimination laws to respond to narrow judicial constructions that allow a fair amount of workplace harassment and discrimination based upon race, sex, pregnancy, age, and disability, and a lot of harassment and discrimination based upon gender and sexual orientation. Because the Supreme Court is vigilant in policing what its majority views as the limits of these statutes, congressional overrides are narrowly construed and administrative overrides are highly unlikely. All the states have workplace antidiscrim-

629. In other words, the FDA Tobacco Case, where agency updating received a rebuke from the Supreme Court, is not the norm. More typical is the revolutionary revision of the wholesale electricity sector by FERC in the last 30 years, which transformed the sector almost beyond recognition (with little congressional supervision) and was completely undisturbed by the courts. *See* Matthew R. Christiansen, The Administrative Constitutionalism of Electricity Restructuring: A Case Study in Statutory Reinterpretation (2014) (unpublished manuscript) (on file with authors).

ination laws, and many states have copied features of the federal statutes. But state legislatures, judges, and administrators have often refused to follow narrow Supreme Court constructions when they face the same issues under state laws. For example, federal courts have declined to hold that federal job discrimination laws protect lesbians and gay men from open discrimination.[630] In contrast, state courts have been more willing to outlaw that form of discrimination, through dynamic readings of their statutes and state constitutions.[631] And many state legislatures have explicitly added protections against sexual orientation discrimination.[632] These are what might be called *federalism workarounds* of federal court decisions.

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A sustained decline in overrides will create winners and losers throughout the polity at large. Certain groups, such as those singled out in *Carolene Products*, may continue to secure the restorative overrides that have persisted even during the last decade's decline in overrides. Or perhaps these overrides too will diminish. Other groups that have recently fared poorly before the Court, such as debtors, environmental groups, and even the federal government during the 2012 Term, will likely suffer if they cannot secure overrides of adverse decisions. This may be a good thing or a bad thing depending on one's political stripe—though, of course, a single retirement or election could upend the relative regulatory leanings of the three branches.

But one of the most important conclusions of this Article is that overrides usually are not a zero-sum game in which rent-seeking groups expend their political capital for favorable but generally inefficient treatment by Congress. Instead, the majority of overrides update the U.S. Code to meet changed circumstances, to address largely uncontroversial changes in the public consensus, and to correct problems in the administration of the rule articulated by the Court. These overrides usually garner broad bipartisan support. And they achieve these results through a political process that better reflects the values of republican democracy than change driven by the other branches ever could. A sustained loss of these overrides would be an unfortunate result for the rule of law in this country.

630. I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991) (surveying early case law); *cf.* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–81 (1998) (evincing a strictly textual approach to Title VII and limiting discrimination claims to those strictly "because of sex").

631. *See, e.g.*, Tanner v. Or. Health Scis. Univ., 971 P.2d 435 (Or. Ct. App. 1998). *See generally* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 557–661 (3d ed. 2011) (summarizing and digesting state cases).

632. *See In Your State*, LAMBDA LEGAL, http://www.lambdalegal.org/states-regions (summarizing statutory protections for LGBT persons for all 50 states and the District of Columbia).

Appendix 1: Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011

Override Statute (Restoratives in *Italics*)	**Supreme Court Statutory Decisions Overridden**	**Subject Area**
	112th Congress (2011)	
Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758		
§ 202	Denver & Rio Grande W. R.R. Co. v. Bhd. of R.R. Trainmen, 387 U.S. 556 (1967)	Federal Jurisdiction & Procedure
§ 204	Hoffman v. Blaski, 363 U.S. 335 (1960)	Federal Jurisdiction & Procedure
Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 19(b), 125 Stat. 284, 331–32 (2011)	Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002)	Federal Jurisdiction & Procedure; Intellectual Property
	111th Congress (2009–2010)	
Act of Jan. 4, 2011, Pub. L. No. 111-378, § 1, 124 Stat. 4128, 4128–29 (amending the Federal Water Pollution Control Act)	EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. 200 (1976) (2d override)	Environmental

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2077–79 (2010)	Graham Cnty. Soil & Water Conservation Dist. v. U.S. *ex rel.* Wilson, 545 U.S. 409 (2005)	Federal Jurisdiction & Procedure; Criminal Law
Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101, 123 Stat. 1776, 1783–1830 (2009)	FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)	Public Health & Safety
Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617		
§ 2(f)(1)(B)	United States v. Santos, 553 U.S. 507 (2008)	Criminal Law
§ 4(a)	Allison Engine Co. v. U.S. *ex rel.* Sanders, 553 U.S. 662 (2008)	Federal Government
Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6	Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)	Federal Jurisdiction & Procedure; Civil Rights; Labor & Workplace
110th Congress (2007–2008)		
ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555–56	Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)	Civil Rights; Labor & Workplace

109th Congress (2005–2006)		
Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36	Hamdan v. Rumsfeld, 548 U.S. 557 (2006)	National Security
Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, § 2(1), 120 Stat. 1730, 1730–32	Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003)	Intellectual Property
Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81	Georgia v. Ashcroft, 539 U.S. 461 (2003); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000)	Civil Rights (Voting)
Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. 10, § 1005(e), 119 Stat. 2739, 2741–43	Rasul v. Bush, 542 U.S. 466 (2004)	National Security; Habeas Corpus
REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a), 119 Stat. 302, 310–11	INS v. St. Cyr, 533 U.S. 289 (2001)	Immigration
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 327, 119 Stat. 23, 99–100	Till v. SCS Credit Corp., 541 U.S. 465 (2004); Assocs. Commercial Corp. v. Rash, 520 U.S. 953 (1997)	Bankruptcy

Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–12	Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) (2d override); Snyder v. Harris, 394 U.S. 332 (1969); United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc., 382 U.S. 145 (1965); Chapman v. Barney, 129 U.S. 677 (1889); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)	Federal Jurisdiction & Procedure
108th Congress (2003–2004)		
Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, § 104, 118 Stat. 661, 663	Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982)	Antitrust Law
Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667–95	Koon v. United States, 518 U.S. 81 (1996)	Criminal Law
107th Congress (2001–2002)		
Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337–40	First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983)	Federal Jurisdiction & Procedure; Foreign Affairs

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804(a), 116 Stat. 745, 801	Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) (2d override)	Federal Jurisdiction & Procedure; Business Regulation
Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 402(a), 116 Stat. 21, 40	Gitlitz v. Comm'r, 531 U.S. 206 (2001)	Taxation
106th Congress (1999–2000)		
Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1464, 1486–90	United States v. Kozminski, 487 U.S. 931 (1988)	Criminal Law
Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999)		
§ 104(c)–(d)	Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25 (1996)	Banking & Financial Regulation
§ 302(a)	Nationsbank of N.C., N. A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995)	Banking & Financial Regulation
105th Congress (1997–1998)		
Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469, 3469–70	Muscarello v. United States, 524 U.S. 125 (1998); Bailey v. United States, 516 U.S. 137 (1995)	Criminal Law

Digital Millennium Copyright Act, Pub. L. No. 105-304, § 103(a), 112 Stat. 2860, 2863–76 (1998)	Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)	Intellectual Property
Curt Flood Act of 1998, Pub. L. No. 105-297, § 3, 112 Stat. 2824, 2824	Flood v. Kuhn, 407 U.S. 258 (1972)	Antitrust
Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, tit. 5, § 523, 112 Stat. 2518, 2565–67	Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987)	Housing
Credit Union Membership Access Act, Pub. L. No. 105-219, § 101, 112 Stat. 913, 914–17 (1998)	Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998)	Banking & Financial Regulation
Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685		
§ 3001(a)	United States v. Janis, 428 U.S. 433 (1976); Welch v. Helvering, 290 U.S. 111 (1933)	Federal Jurisdiction & Procedure; Taxation
§ 3106(b)(1)	United States v. Williams, 514 U.S. 527 (1995)	Federal Jurisdiction & Procedure; Taxation
§ 3202(a)	United States v. Brockamp, 519 U.S. 347 (1997)	Taxation
§ 3401(a)	Comm'r v. Shapiro, 424 U.S. 614 (1976) (2d override); Laing v. United States, 423 U.S. 161 (1976) (2d override)	Federal Jurisdiction & Procedure; Taxation

§ 3411(a)	United States v. Arthur Young & Co., 465 U.S. 805 (1984)	Taxation
Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788		
§ 932(a)	Comm'r v. Soliman, 506 U.S. 168 (1993)	Taxation
§ 1282(a)	Comm'r v. Lundy, 516 U.S. 235 (1996)	Taxation
Balanced Budget Act of 1997, Pub. L. No. 105-33, tit. IV, subtit. H, 111 Stat. 251, 489–528 (1997)	Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990)	Entitlement Programs
Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37		
§ 101	Florence Cnty. Sch. Dist. Four v. Carter *ex rel.* Carter, 510 U.S. 7 (1993)	Civil Rights; Education
§ 617	Honig v. Students of the Cal. Sch. for the Blind, 471 U.S. 148 (1985)	Civil Rights; Education
104th Congress (1995–1996)		
Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847		
§ 206(a)	Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72 (1991)	Federal Jurisdiction & Procedure

§ 309	Pulliam v. Allen, 466 U.S. 522 (1984); Supreme Court of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719 (1980)	Civil Rights; Federal Jurisdiction & Procedure
False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459, 3459	Hubbard v. United States, 514 U.S. 695 (1995)	Criminal Law
Act of Oct. 1, 1996, Pub. L. No. 104-219, § 1, 110 Stat. 3022, 3022 (clarifying the rules governing removal of cases to federal court)	Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996)	Federal Jurisdiction & Procedure
Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, tit. 2, § 2305(a), 110 Stat. 3009–394, 3009–425	Heintz v. Jenkins, 514 U.S. 291 (1995)	Business Regulation
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009–546		
§ 304	Landon v. Plasencia, 459 U.S. 21 (1982)	Immigration
§ 301(a)	Rosenberg v. Fleuti, 374 U.S. 449 (1963)	Immigration
§ 604(a)	Rosenberg v. Yee Chien Woo, 402 U.S. 49 (1971)	Immigration

Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 104-204, § 422(a), 110 Stat. 2874, 2926–27 (1996)	Brown v. Gardner, 513 U.S. 115 (1994)	Veterans Affairs
Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211(c), 110 Stat. 2105, 2189–90	Sullivan v. Zebley, 493 U.S. 521 (1990)	Entitlement Programs
Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838–39	Comm'r v. Schleier, 515 U.S. 323 (1995); United States v. Burke, 504 U.S. 229 (1992)	Taxation
Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. 8, 110 Stat. 1321–66		
§ 803	McCarthy v. Madigan, 503 U.S. 140 (1992)	Federal Jurisdiction & Procedure; Prisons
§ 804(a)(5)	Denton v. Hernandez, 504 U.S. 25 (1992); Neitzke v. Williams, 490 U.S. 319 (1989)	Federal Jurisdiction & Procedure; Prisons
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214		
§ 101	Vasquez v. Hillery, 474 U.S. 254 (1986)	Habeas Corpus

§ 102	Barefoot v. Estelle, 463 U.S. 880 (1983); Nowakowski v. Maroney, 386 U.S. 542 (1967)	Habeas Corpus
§ 104	Thompson v. Keohane, 516 U.S. 99 (1995); Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Teague v. Lane, 489 U.S. 288 (1989); Granberry v. Greer, 481 U.S. 129 (1987); Rose v. Lundy, 455 U.S. 509 (1982); Jackson v. Virginia, 443 U.S. 307 (1979); Brown v. Allen, 344 U.S. 443 (1953)	Habeas Corpus
§ 105	Sanders v. United States, 373 U.S. 1 (1963)	Habeas Corpus
§ 106	Schlup v. Delo, 513 U.S. 298 (1995); McCleskey v. Zant, 499 U.S. 467 (1991); Kuhlmann v. Wilson, 477 U.S. 436 (1986)	Habeas Corpus
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56		
§ 101	La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986)	Telecommunications
§ 401	MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994)	Telecommunications
ICC Termination Act of 1995, Pub. L. No. 104-88, § 102, 109 Stat. 803, 804–52	Hayfield N. R.R. Co. v. Chi. & N.W. Transp. Co., 467 U.S. 622 (1984)	Transportation

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101, 109 Stat. 737, 737–49	Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)	Business Regulation
Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, § 3(9)–(10), 109 Stat. 691, 694–95	United States v. Harriss, 347 U.S. 612 (1954)	Government & Administration
Act of Nov. 15, 1995, Pub. L. No. 104-49, 109 Stat. 432	Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990)	Labor & Workplace
Paperwork Reduction Act of 1995, Pub. L. No. 104-13, § 2, 109 Stat. 163, 163–84	Dole v. United Steelworkers of Am., 494 U.S. 26 (1990)	Government & Administration
103d Congress (1993–1994)		
Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106		
§§ 113, 702(b)(2)(B)	United States v. Nordic Vill., Inc., 503 U.S. 30 (1992); Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989)	Bankruptcy; Government & Administration
§ 301	Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993)	Bankruptcy
§ 305(c)	Rake v. Wade, 508 U.S. 464 (1993)	Bankruptcy
§ 310	Owen v. Owen, 500 U.S. 305 (1991)	Bankruptcy

Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 555(a), 108 Stat. 3518, 4057–58	Suter v. Artist M., 503 U.S. 347 (1992)	Entitlement Programs
Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2(a), 108 Stat. 3149, 3149–69	King v. St. Vincent's Hosp., 502 U.S. 215 (1991); Monroe v. Standard Oil Co., 452 U.S. 549 (1981)	Veterans Affairs
Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411(c)(1), 108 Stat. 2160, 2253	Ratzlaf v. United States, 510 U.S. 135 (1994)	Criminal Law
Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 3, 108 Stat. 694, 694–97	Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993)	Civil Rights
Negotiated Rates Act of 1993, Pub. L. No. 103-180, § 2(e), 107 Stat. 2044, 2047–48	Maislin Indus., U.S., Inc., v. Primary Steel, Inc., 497 U.S. 116 (1990)	Transportation
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 103-121, § 111(d)(3), 107 Stat. 1153, 1165 (1993)	United States v. Kras, 409 U.S. 434 (1973)	Bankruptcy
Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13261(a), 107 Stat. 312, 532–38	Newark Morning Ledger Co. *ex rel.* Harald Co. v. United States, 507 U.S. 546 (1993)	Taxation

102d Congress (1991–1992)		
Rehabilitation Act Amendments of 1992, Pub. L. 102-569, §§ 102(p)(32), 506 (1992)	Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273 (1987)	Civil Rights; Labor Relations & Workplace
Futures Trading Practices Act of 1992, Pub. L. No. 102-546, § 211, 106 Stat. 3590, 3607–08	Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97 (1987)	Federal Jurisdiction & Procedure
Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102, 106 Stat. 1505, 1505–07	U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992)	Environmental Law; Government & Administration
Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387	Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) (1st override)	Business Regulation; Federal Jurisdiction & Procedure
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071		
§ 101	Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701 (1989); Patterson v. Mclean Credit Union, 491 U.S. 164 (1989)	Civil Rights; Labor Relations & Workplace
§ 102	Lehman v. Nakshian, 453 U.S. 156 (1981); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)	Civil Rights; Federal Jurisdiction & Procedure; Labor Relations & Workplace

§ 105	Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)	Civil Rights; Labor Relations & Workplace
§ 107	Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	Civil Rights; Labor Relations & Workplace
§ 108	Martin v. Wilks, 490 U.S. 755 (1989)	Civil Rights; Federal Jurisdiction & Procedure; Labor Relations & Workplace
§ 109	EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991)	Civil Rights; Labor Relations & Workplace
§ 112	Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989)	Civil Rights; Federal Jurisdiction & Procedure; Labor Relations & Workplace
§ 113	W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987)	Civil Rights; Federal Jurisdiction & Procedure
§ 114	Library of Cong. v. Shaw, 478 U.S. 310 (1986)	Civil Rights; Labor Relations & Workplace
Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646, 646 (granting Indian tribes permanent criminal jurisdiction over Indians)	Duro v. Reina, 495 U.S. 676 (1990)	Criminal Law; Indian Law

Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, § 102, 105 Stat. 130, 136–39	Demarest v. Manspeaker, 498 U.S. 184 (1991)	Federal Jurisdiction & Procedure
101st Congress (1989–1990)		
Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089		
§ 310	Finley v. United States, 490 U.S. 545 (1989); Aldinger v. Howard, 427 U.S. 1 (1976); Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) (1st override); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939)	Federal Jurisdiction & Procedure
§ 311	Leroy v. Great W. United Corp., 443 U.S. 173 (1979)	Federal Jurisdiction & Procedure
§ 313	Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); Wilson v. Garcia, 471 U.S. 261 (1985)	Federal Jurisdiction & Procedure

Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067–77	Boutilier v. INS, 387 U.S. 118 (1967)	Immigration
Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789		
§ 2509	Hughey v. United States, 495 U.S. 411 (1990)	Criminal Law
§ 3103	Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990)	Bankruptcy; Criminal Law
Copyright Remedy Clarification Act, Pub. L. No. 101-553, § 2(a)(2), 104 Stat. 2749, 2749–50 (1990)	Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (2d override)	Intellectual Property
Act of Nov. 15, 1990, Pub. L. No. 101-580, § 1(a), 104 Stat. 2863, 2863	Deepsouth Packing Co., v. Laitram Corp., 406 U.S. 518 (1972) (2d override)	Intellectual Property
Clean Air Act Amendments, Pub. L. No. 101-549, § 707(g), 104 Stat. 2399, 2683 (1990)	Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987)	Environmental Law; Federal Jurisdiction & Procedure
Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6208, 104 Stat. 1388, 1388-307 to -08	Sec'y v. California, 464 U.S. 312 (1984)	Energy Policy; Federal Jurisdiction & Procedure; Federal Lands
Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 103, 104 Stat. 1103, 1106–10	Dellmuth v. Muth, 491 U.S. 223 (1989)	Civil Rights; Education

Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 103, 104 Stat. 978, 978–81 (1990)	Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989)	Civil Rights; Labor Relations & Workplace
Civil Service Due Process Amendments, Pub. L. No. 101-376, § 2(a), 104 Stat. 461, 461–62 (1990)	United States v. Fausto, 484 U.S. 439 (1988)	Government & Administration; Labor Relations & Workplace
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 212, 103 Stat. 183, 222–43	Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp. *ex rel.* First S., F.A., 489 U.S. 561 (1989)	Business Regulation
100th Congress (1987–1988)		
Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 3(b)(2), 102 Stat. 4677, 4680	Carpenter v. United States, 484 U.S. 19 (1987)	Criminal Law
Act of Nov. 19, 1988, Pub. L. No. 100-703, § 201, 102 Stat. 4674, 4676 (1988)	Int'l Salt Co. v. United States, 332 U.S. 392 (1947); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942)	Antitrust; Intellectual Property
Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988)		

§ 1016(c)	Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988); Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938)	Federal Jurisdiction & Procedure
§ 1019(a)	Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	Federal Jurisdiction & Procedure
Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, §§ 5–6, 102 Stat. 4563, 4564–65	Franchise Tax Bd. v. U.S. Postal Serv., 467 U.S. 512 (1984)	Government & Administration
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181		
§ 6470(a)	Bifulco v. United States, 447 U.S. 381 (1980)	Criminal Law
§ 7603	McNally v. United States, 483 U.S. 350 (1987)	Criminal Law
Veterans' Judicial Review Act, Pub. L. No. 100-687, §§ 201–303, 102 Stat. 4105, 4109–22 (1988)	Traynor v. Turnage, 485 U.S. 535 (1988); Johnson v. Robison, 415 U.S. 361 (1974)	Federal Jurisdiction & Procedure; Veterans Affairs
Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 11, 102 Stat. 2467, 2472–79 (1988)	California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)	Indian Law

Prompt Payment Act Amendments of 1988, Pub. L. No. 100-496, § 9(a)(2), 102 Stat. 2455, 2460–63	F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116 (1974)	Government & Administration
Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 14, 102 Stat. 1066, 1078	Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	Energy Policy
Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28–29	Grove City Coll. v. Bell, 465 U.S. 555 (1984)	Civil Rights; Education
Water Quality Act of 1987, Pub. L. No. 100-4, § 306, 101 Stat. 7, 35–37	Chem. Mfrs. Ass'n v. NRDC, Inc., 470 U.S. 116 (1985)	Environmental Law
99th Congress (1985–1986)		
Sexual Abuse Act of 1986, Pub. L. No. 99-654, § 2, 100 Stat. 3660, 3660–63	Williams v. United States, 327 U.S. 711 (1946)	Criminal Law
Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5(b)(1), 100 Stat. 3510, 3511	Cleveland v. United States, 329 U.S. 14 (1946); Caminetti v. United States, 242 U.S. 470 (1917)	Criminal Law
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359		
§ 101(a)	De Canas v. Bica, 424 U.S. 351 (1976); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973)	Criminal Law; Immigration

§ 103(a)	United States v. Campos-Serrano, 404 U.S. 293 (1971)	Immigration
§ 315(b)	INS v. Phinpathya, 464 U.S. 183 (1984)	Immigration
Act of Nov. 4, 1986, Pub. L. No. 99-598, 100 Stat. 3351 (amending Title 28, which relates to quiet title actions against the United States)	Block v. N.D. *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273 (1983)	Federal Lands
Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 3, 100 Stat. 3342, 3342	Johnson v. Mayor & City Council, 472 U.S. 353 (1985)	Civil Rights; Labor Relations & Workplace
False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 6, 100 Stat. 3153, 3158–68	United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983)	Criminal Law
Tax Reform Act of 1986, Pub. L. No. 99-514, § 631(c), 100 Stat. 2085, 2272	Gen. Utils. & Operating Co. v. Helvering, 296 U.S. 200 (1935)	Taxation
Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341, 100 Stat. 1874, 2037–38	Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667 (1986); United States v. Erika, Inc., 456 U.S. 201 (1982)	Entitlement Programs; Federal Jurisdiction & Procedure
Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 301(a), 100 Stat. 1848, 1868–72	United States v. N.Y. Tel. Co., 434 U.S. 159 (1977)	Criminal Law

Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845	Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (1st override)	Civil Rights; Government & Administration; Labor Relations & Workplace
Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 114(a), 100 Stat. 1613, 1652	Exxon Corp. v. Hunt, 475 U.S. 355 (1986)	Environmental Law
Air Carrier Access Act of 1986, Pub. L. No. 99-435, § 2(a), 100 Stat. 1080, 1080	U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986)	Civil Rights; Transportation
Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796, 796–97	Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984); Smith v. Robinson, 468 U.S. 992 (1984)	Civil Rights; Education
Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 633, 637	Lambert Run Coal Co. v. Balt. & Ohio R.R. Co., 258 U.S. 377 (1922)	Federal Jurisdiction & Procedure
Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986)		
§ 101(5)	Dickerson v. New Banner Inst., Inc., 460 U.S. 103 (1983)	Criminal Law
§ 104(a)(3)	United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)	Criminal Law
Act of Dec. 23, 1985, Pub. L. No. 99-200, 99 Stat. 1663	California v. Nevada, 447 U.S. 125 (1980)	Federal Lands

98th Congress (1983–1984)		
Patent Law Amendments Act of 1984, Pub. L. No. 98-622, § 101, 98 Stat. 3383, 3383	Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972) (1st override)	Intellectual Property
Local Government Antitrust Act of 1984, Pub. L. No. 98-544, § 3, 98 Stat. 2750, 2750	Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. La. Power & Light Co., 435 U.S. 389 (1978)	Antitrust
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. 2, 98 Stat. 1976		
§ 1005(a)	Busic v. United States, 446 U.S. 398 (1980)	Criminal Law
§ 1107	Williams v. United States, 458 U.S. 279 (1982)	Criminal Law
§ 1602	United States v. Maze, 414 U.S. 395 (1974)	Criminal Law
Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639		
§ 4	Wash. Metro. Area Transit Auth. v. Johnson, 467 U.S. 925 (1984)	Labor Relations & Workplace; Maritime
§ 21(c)	Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74 (1980)	Health & Safety; Labor Relations & Workplace; Maritime

Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494		
§ 211	Comm'r v. Standard Life & Accident Ins. Co., 433 U.S. 148 (1977)	Taxation
§ 421(a)	United States v. Davis, 370 U.S. 65 (1962)	Taxation
§ 422(a)	Comm'r v. Lester, 366 U.S. 299 (1961)	Taxation
§ 1026	Diedrich v. Comm'r, 457 U.S. 191 (1982)	Taxation
Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333, 390–91	NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984)	Bankruptcy; Labor Relations & Workplace
Railroad Retirement Solvency Act of 1983, Pub. L. No. 98-76, § 419(a), 97 Stat. 411, 438	Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979)	Pensions
Social Security Amendments of 1983, Pub. L. No. 98-21, § 327, 97 Stat. 65, 126–27	Rowan Cos. v. United States, 452 U.S. 247 (1981)	Taxation
97th Congress (1981–1982)		
Act of Jan. 14, 1983, Pub. L. No. 97-473, § 301, 96 Stat. 2605, 2611–12 (amending ERISA)	Agsalud v. Standard Oil Co. of Cal., 454 U.S. 801 (1981)	Pensions

Futures Trading Act of 1982, Pub. L. No. 97-444, § 235, 96 Stat. 2294, 2322–24	Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)	Business Regulation
Act of Dec. 29, 1982, Pub. L. No. 97-393, 96 Stat. 1964 (amending the Clayton Act)	Pfizer Inc. v. Gov't of India, 434 U.S. 308 (1978)	Antitrust
Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 702(a), 96 Stat. 1469, 1538	Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981)	Business Regulation
Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. 10, § 1002(a), 96 Stat. 730, 730–35 (1982)	McCarty v. McCarty, 453 U.S. 210 (1981)	Armed Forces
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 333(a), 96 Stat. 324, 622	United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978)	Taxation
Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134	City of Mobile, Ala. v. Bolden, 446 U.S. 55 (1980)	Civil Rights (Voting)
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 39–40	United States v. King, 395 U.S. 1 (1969)	Federal Jurisdiction & Procedure; Government & Administration
Act of Dec. 29, 1981, Pub. L. No. 97-124, 95 Stat. 1666 (extending federal tort claims provisions to acts or omissions by members of the National Guard)	Maryland *ex rel.* Levin v. United States, 381 U.S. 41 (1965)	Armed Forces; Veterans Affairs

Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 8, 95 Stat. 1611, 1616	Reid v. INS, 420 U.S. 619 (1975)	Immigration
Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2312(a), 95 Stat. 357, 853	Burns v. Alcala, 420 U.S. 575 (1975)	Entitlement Programs
96th Congress (1979–1980)		
Miscellaneous Revenue Act of 1980, Pub. L. No. 96-605, § 107, 94 Stat. 3521, 3524	Comm'r v. Kowalski, 434 U.S. 77 (1977) (2d override)	Taxation
Equal Access to Justice Act, Pub. L. No. 96-481, tit. 2, § 204, 94 Stat. 2325, 2327–29 (1980)	Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (2d override)	Federal Jurisdiction & Procedure; Government & Administration
Installment Sales Revision Act of 1980, Pub. L. No. 96-471, § 2(a), 94 Stat. 2247, 2247–53	Pac. Nat'l Co. v. Welch, 304 U.S. 191 (1938)	Taxation
Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154		
§ 3	Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)	Federal Jurisdiction & Procedure
§ 6	United States v. Am. Bldg. Maint. Indus., 422 U.S. 271 (1975)	Antitrust

Soft Drink Interbrand Competition Act, Pub. L. No. 96-308, § 2, 94 Stat. 939, 939 (1980)	Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)	Antitrust
Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7, 94 Stat. 349, 352–53 (1980)	Wilwording v. Swenson, 404 U.S. 249 (1971)	Civil Rights
Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (extending the protections of 42 U.S.C. § 1983 to rights violations occurring under color of the laws of the District of Columbia)	Dist. of Columbia v. Carter, 409 U.S. 418 (1973)	Civil Rights
Energy and Water Development Appropriations Act of 1980, Pub. L. No. 96-69, tit. 4, 93 Stat. 437, 449–50 (authorizing and directing the Tennessee Valley Authority to "complete construction, operate and maintain the Tellico Dam and Reservoir project")	TVA v. Hill, 437 U.S. 153 (1978) (2d override)	Environmental Law; Federal Lands
95th Congress (1977–1978)		
Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 7, 92 Stat. 3751, 3762	TVA v. Hill, 437 U.S. 153 (1978) (1st override)	Environmental Law; Federal Lands
Revenue Act of 1978, Pub. L. No. 95-600, § 701(z), 92 Stat. 2763, 2921	United States v. W.M. Webb, Inc., 397 U.S. 179 (1970) (2d override)	Taxation

Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (making bankruptcy law uniform and enacting Title 11 of the U.S. Code)		
§ 101, new § 507(a)(4)	Joint Indus. Bd. of the Elec. Indus. v. United States, 391 U.S. 224 (1968); United States v. Embassy Rest., Inc., 359 U.S. 29 (1959)	Bankruptcy
§ 101, new § 523(a)(3)	Birkett v. Columbia Bank, 195 U.S. 345 (1904)	Bankruptcy
§ 101, new § 523(a)(6)	Tinker v. Colwell, 193 U.S. 473 (1904)	Bankruptcy
§ 101, new § 541(a)(1)	Lines v. Frederick, 400 U.S. 18 (1970); Lockwood v. Exch. Bank, 190 U.S. 294 (1903)	Bankruptcy
§ 101, new § 547(b)	United States v. Randall, 401 U.S. 513 (1971); Segal v. Rochelle, 382 U.S. 375 (1966)	Bankruptcy
§ 241, new § 1471	Phelps v. United States, 421 U.S. 330 (1975)	Bankruptcy; Federal Jurisdiction & Procedure; Taxation
§ 401, new § 101	Am. United Mut. Life Ins. Co. v. City of Avon Park, Fla., 311 U.S. 138 (1940)	Bankruptcy

Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383		
§ 7	Crown Coat Front Co. v. United States, 386 U.S. 503 (1967); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966)	Federal Jurisdiction & Procedure; Government & Administration
§§ 8(g), 14(h)	S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972)	Government & Administration
§ 10(b)	United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963)	Federal Jurisdiction & Procedure; Government & Administration
Act of Oct. 31, 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (amending title VII of the Civil Rights Act of 1964 to prohibit pregnancy-based sex discrimination)	Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976)	Civil Rights; Labor Relations & Workplace
Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 102, 92 Stat. 1783, 1786–88	United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972)	National Security
Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 30, 92 Stat. 1705, 1731	Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973)	Transportation
Act of Oct. 7, 1978, Pub. L. No. 95-427, § 4, 92 Stat. 996, 997–98 (amending the Internal Revenue Code to disallow regulation of fringe benefits)	Comm'r v. Kowalski, 434 U.S. 77 (1977) (1st override)	Taxation

Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189, 189	United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977)	Civil Rights; Labor Relations & Workplace
Clean Water Act of 1977, Pub. L. No. 95-217, § 61, 91 Stat. 1566, 1598	EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. 200 (1976) (1st override)	Environmental Law
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685		
§ 116	Hancock v. Train, 426 U.S. 167 (1976)	Environmental Law
§ 127	Fri v. Sierra Club, 412 U.S. 541 (1973)	Environmental Law
94th Congress (1975–1976)		
Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792	United States v. Midwest Oil Co., 236 U.S. 459 (1915)	Federal Lands
Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (defining the jurisdiction of United States magistrates)	Wingo v. Wedding, 418 U.S. 461 (1974)	Federal Jurisdiction & Procedure
Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 507(a)(2), 90 Stat. 2667, 2688	Philbrook v. Glodgett, 421 U.S. 707 (1975)	Entitlement Programs

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641	Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (1st override)	Civil Rights; Federal Jurisdiction & Procedure
Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (amending Title 17 of the U.S. Code, dealing with copyrights)		
§ 101	Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975); White–Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908)	Intellectual Property
§ 108	Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975)	Intellectual Property
§ 111	Teleprompter Corp. v. CBS, 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)	Intellectual Property
§ 301	Goldstein v. California, 412 U.S. 546 (1973)	Intellectual Property
Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520		
§ 1204(a)	Comm'r v. Shapiro, 424 U.S. 614 (1976) (1st override); Laing v. United States, 423 U.S. 161 (1976) (1st override)	Federal Jurisdiction & Procedure; Taxation

§ 1205(a)	United States v. Bisceglia, 420 U.S. 141 (1975); Donaldson v. United States, 400 U.S. 517 (1971)	Federal Jurisdiction & Procedure; Taxation
§ 1207(e)	United States v. W.M. Webb, Inc., 397 U.S. 179 (1970) (1st override)	Taxation
§ 1306(a)	Bob Jones Univ. v. Simon, 416 U.S. 725 (1974); Alexander v. "Ams. United" Inc., 416 U.S. 752 (1974)	Federal Jurisdiction & Procedure; Taxation
§ 2009(a)	United States v. Byrum, 408 U.S. 125 (1972)	Taxation
Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394–96	Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972)	Antitrust
Act of Sept. 13, 1976, Pub. L. No. 94-410, § 8, 90 Stat. 1249, 1251–52 (amending the Packers and Stockyards Act of 1921)	Mahon v. Stowers, 416 U.S. 100 (1974)	Bankruptcy
Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1241, 1247–48 (1976)	Adm'r v. Robertson, 422 U.S. 255 (1975)	Government & Administration
Act of Aug. 12, 1976, Pub. L. No. 94-381, § 3, 90 Stat. 1119, 1119 (amending the requirement for a three-judge court in certain cases)	Hagans v. Lavine, 415 U.S. 528 (1974)	Federal Jurisdiction & Procedure

93d Congress (1973–1974)		
Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 201, 88 Stat. 2183, 2193 (1975)	FTC v. Bunte Bros., Inc., 312 U.S. 349 (1941)	Antitrust
Act of Jan. 2, 1975, Pub. L. No. 93-600, 88 Stat. 1955 (amending the Trademark Act by extending the time to file oppositions, eliminating certain filing requirements, and providing for the award of attorney fees)	Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967)	Federal Jurisdiction & Procedure; Intellectual Property
Act of Nov. 21, 1974, Pub. L. No. 93-502, §§ 1(b)(2), 2(a), 88 Stat. 1561, 1561–63 (amending the Freedom of Information Act)	EPA v. Mink, 410 U.S. 73 (1973)	Government & Administration; National Security
Act of Oct. 26, 1974, Pub. L. No. 93-481, § 2, 88 Stat. 1455, 1455 (amending the Controlled Substance Act)	Warden v. Marrero, 417 U.S. 653 (1974)	Criminal Law
Act of Aug. 7, 1974, Pub. L. No. 93-368, § 5, 88 Stat. 420, 420–21 (amending the statute regarding employment compensation relating to individuals and vessels operated by or for any United States agency)	Emps. of the Dep't of Philpott v. Essex Cnty. Welfare Bd., 409 U.S. 413 (1973)	Entitlement Programs

Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 55, 61	Pub. Health & Welfare of Mo. v. Dep't of Pub. Health & Welfare of Mo., 411 U.S. 279 (1973)	Federal Jurisdiction & Procedure; Labor Relations & Workplace
Act of Dec. 27, 1973, Pub. L. No. 93-201, 87 Stat. 838 (amending the Interstate Commerce Act)	Gulf-Canal Lines, Inc. v. United States, 386 U.S. 348 (1967)	Transportation
92d Congress (1971–1972)		
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251		
§ 18(a), new 33 U.S.C. § 905(a)	Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969)	Labor Relations & Workplace; Maritime
§ 18(a), new 33 U.S.C. § 905(b)	Jackson v. Lykes Bros. S.S. Co., 386 U.S. 731 (1967); Reed v. The Yaka, 373 U.S. 410 (1963); Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp., 350 U.S. 124 (1956); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)	Labor Relations & Workplace; Maritime
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103	Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971)	Civil Rights; Labor Relations & Workplace

Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(31), 85 Stat. 348, 352–53 (amending the Military Selective Service Act of 1967)	Toussie v. United States, 397 U.S. 112 (1970)	Armed Forces; National Security
Act of Aug. 10, 1971, Pub. L. No. 92-79, 85 Stat. 285 (amending the Ship Mortgage Act of 1920)	Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of Cal., 310 U.S. 268 (1940); United States v. Carver, 260 U.S. 482 (1923)	Government & Administration; Maritime
91st Congress (1969–1970)		
Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 702(a), 84 Stat. 922, 935–36	Alderman v. United States, 394 U.S. 165 (1969)	Criminal Law
Newspaper Preservation Act, Pub. L. No. 91-353, § 4, 84 Stat. 466, 467 (1970)	Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969)	Antitrust
Tax Reform Act of 1969, Pub. L. No. 91-172, § 121(b), 83 Stat. 487, 537–45	Comm'r v. Brown, 380 U.S. 563 (1965)	Taxation
90th Congress (1967–1968)		
Act of Oct. 17, 1968, Pub. L. No. 90-590, 82 Stat. 1153 (making amendments relating to false representation by mail)	Reilly v. Pinkus, 338 U.S. 269 (1949)	Government & Administration; Health & Safety

Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (1968)	Arizona v. California, 373 U.S. 546 (1963)	Federal Lands
Act of Sept. 26, 1968, Pub. L. No. 90-514, 82 Stat. 867 (amending the Federal Aviation Act of 1958)	World Airways, Inc. v. Pan Am. World Airways, Inc., 391 U.S. 461 (1968)	Transportation
Act of July 31, 1968, Pub. L. No. 90-446, 82 Stat. 474 (amending Title III of the Packers and Stockyards Act of 1921)	Denver Union Stock Yard Co. v. Producers Livestock Mktg. Ass'n, 356 U.S. 282 (1958)	Antitrust; Business Regulation
Act of Apr. 11, 1968, Pub. L. No. 90-284, § 101, 82 Stat. 73, 73–75 (amending the Civil Rights Act of 1968)	United States v. Guest, 383 U.S. 745 (1966)	Civil Rights

Appendix 2: Coding Overridden Supreme Court Statutory Interpretation Decisions

This Appendix elaborates on the coding methodology we followed for each of the 275 Supreme Court statutory interpretation decisions overridden by Congress, 1967–2011.

I. Basic Facts

Biographical Information

We listed the full case name, the official U.S. Reports citation, and the exact date for each case.

For cases decided after the 1946 Term, we listed the Spaeth number for each case (available at http://scdb.wustl.edu/data.php). We also assigned every case a unique "override case number" that extends to cover the cases excluded from the Spaeth database.

Subject Matter of the Issue Before the Court

Antitrust = 1	Federal Lands = 16
Armed Forces = 2	Health & Safety = 17
Banking & Finance = 3	Housing = 18
Bankruptcy = 4	Immigration = 19
Business Regulation = 5	Indian Affairs = 20
Civil Rights = 6	Labor Relations & Workplace = 21
Intellectual Property = 7	Maritime = 22
Criminal Law = 8	Pensions = 23
Education = 9	Taxation = 24
Energy = 10	Telecommunications = 25
Entitlement Programs = 11	Transportation = 26
Environment = 12	Veterans Affairs = 27
Federal Government = 13	National Security = 28
Foreign Affairs = 14	Habeas Corpus = 29
Federal Jurisdiction & Procedure = 15	Prisons = 30

Note: A case can have more than one subject matter. For example, a Title VII case posing a procedural issue would earn three subject-matter numbers, 6 + 15 + 21. See, for example, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

Was the Court's Decision Unanimous?

No = 0

Yes = 1

Note: Some cases included both statutory and constitutional issues, and a number of cases included more than one statutory issue; this study focused only on the statutory points of law overridden by Congress. Thus, a decision was coded as unanimous if there was no dissent from the disposition of the relevant statutory issue, even if there was nonunanimity as to a constitutional issue or another statutory issue in the case.

Number of Concurring Opinions?

Note: We noted only concurring opinions relevant to the statutory issue that was overridden. We considered opinions concurring in the judgment almost always relevant and also coded for most (but not all) concurring opinions.

Number of Dissenting Opinions?

Note: As above, only dissents as to statutory issues are noted.

Authors of Opinions

We coded for authors of majority, plurality, concurring, and dissenting opinions. The numbers for each Justice were as follows:

Kagan = 1	Marshall = 17	Burton = 34
Sotomayor = 2	White = 18	Rutledge = 35
Alito = 3	Brennan = 19	Murphy = 36
Roberts = 4	Goldberg = 21	Stone = 37
Breyer = 5	Stewart = 22	Butler = 38
Ginsburg = 6	Whitaker = 23	McKenna = 39
Thomas = 7	Harlan = 24	Cardozo = 40
Souter = 8	Warren = 25	Hughes = 41
Kennedy = 9	Burton = 26	J. Lamar = 42
Scalia = 10	Clark = 27	McReynolds = 43
O'Connor = 11	Minton = 28	Peckham = 46
Stevens = 12	Vinson = 29	L. Lamar = 47
Powell = 13	Frankfurter = 30	Marshall = 48
Rehnquist = 14	Jackson = 31	Per Curiam = 999
Blackmun = 15	Douglas = 32	
Burger = 16	Black = 33	

Votes of Individual Justices

The vote of each Justice on the Court at the time of the Court's decision in the case is recorded based upon the following code numbers:

Joined Majority Opinion = 1

Concurring Opinion = 2

Dissented = 3

Did Not Participate = 999

II. Interpretive Reasoning

Every opinion in every case was coded according to standard modes of statutory argumentation; the modes of argument are outlined below. For each opinion, each method of interpretation was coded with one of the following numbers:

Author (of the opinion) does not refer to this kind of argument = 999

Author refers to this kind of argument but does not rely on it = 1

Author relies on this kind of argument to support the result reached = 2

Author relies on this kind of argument as a central justification = 3

Author relies on this kind of argument as the central justification = 4

Plain Meaning

The author considers how an ordinary speaker would interpret the relevant statutory language, how words are defined in dictionaries, and what ordinary rules of grammar and syntax would suggest, as well as linguistic canons. If an opinion discussed the text and found it ambiguous, it was coded as 1; if the opinion found a textual "plain meaning," it was coded 2 or 3 depending on the reliance on this plain meaning in the opinion; if the opinion rested almost entirely on plain meaning, it was coded as 4. We also coded for the primary textual canons, to wit:

Dictionary Canon, asking how dictionaries or thesauruses define words and phrases;

Grammar Canon, considering the meaning of phrases and clauses parsed according to accepted precepts of grammar and syntax;

Inclusio unius est exclusio alterius, a presumption of negative implication, i.e., including one item suggests the exclusion of all others;

Noscitur a sociis and ejusdem generis, presumptions of similarity, i.e., a general word in a list should be understood in light of the similarity among the other words in a list (*noscitur*);

Common Law Canon, a presumption favoring the common law meaning of legal terms of art;

Absurd Results Canon, allowing departure from the plain meaning rule when it would generate absurd results.

Whole Act and Whole Code

This method of analysis asks which interpretation is most consistent with the entire statute (i.e., the whole act) or with other provisions of law (i.e., the whole code). We also coded for the primary holistic canons, to wit:

Consistent Usage Canon, presuming that a key term has the same meaning every time it is used in a statute or in the code, unless there is a specific definition or other evidence to the contrary;

Canon Against Surplusage, presuming that every statutory word or phrase adds something to the statute, and therefore presuming against interpretations that would leave some language superfluous or redundant;

Canon of Meaningful Variation, presuming that different terms have different meanings;

Principle of Analogy, whereby the author extends one statutory provision to resolve an ambiguity elsewhere;

Canon Against Implied Repeals, strongly presuming that new statutes do not implicitly repeal existing statutory provisions and rules.

Stare Decisis

The author considers whether an interpretation is required by, consistent with, or prohibited by authoritative binding statutory precedents. If an opinion only mentioned precedents but declined to find any that were dispositive or even persuasive, it was coded 1. If the author relied on precedent, including the reasoning found in precedent, it was coded 2. If the opinion relied critically or almost exclusively on statutory precedents, it was coded 3 or 4.

Legislative History

The author considers the history of legislative study, discussion, and voting prior to the enactment of a statute, consulting such materials as committee reports, public statements by sponsors of legislation, and formal votes and enactment. We followed the 1–4 coding method described above. We also coded for the primary canons dealing with special kinds of legislative history, to wit:

Statutory History, or the formal progression of enacted laws, including laws repealed or displaced by a new statute as well as amendments to that statute;

Legislative Acquiescence, where the author infers from legislative deliberations (or lack thereof) as well as formal action (such as amending a statute) a general legislative willingness to accept an agency or court interpretation;

Subsequent Legislative History, or the history of legislative study, discussion, and voting after the enactment of a statute.

Legislative Purpose

The author considers which interpretation will best advance the purposes and goals of the congressional project—that will eliminate or ameliorate the mischief that called forth the statute. We followed the 1–4 coding method described above.

Avoidance Canon

When a statute is susceptible of two readings, one of which raises "serious constitutional questions," the author favors the reading that "avoids" those questions. We followed the 1–4 coding method described above. There are a number of other canons, or cluster of canons, that are also founded upon constitutional values:

Due Process Canons, especially the rule of lenity, which requires a clear statement of the elements of a crime before the government can impose criminal penalties on a person;

Federalism Canons, presuming that Congress does not normally intend to preempt states' use of their traditional police powers, that Congress does not abrogate state Eleventh Amendment immunity without a super-clear statement, or that Congress does not intend to impose conditions on grants to the states without a clear description of the condition;

Sovereign Immunity Canons, strongly presuming against waiver or abrogation of sovereign immunity from lawsuits and liability.

Practicality and Other Substantive Canons

The author considers the practical effects of one interpretation as opposed to another: Which interpretation is easier to administer? Which imposes fewer costs on society? Likewise, there are many other substantive canons, such as the presumption against the extraterritorial reach of statutes.

Invitation to Override

The author lends rather indirect support to her or his result by observing that any policy problems or unfairness in the result demanded by the application of legal principles can be corrected by Congress—through a statutory override.

1 = opinion mentioned the possibility that Congress can pass a new statute

2 = opinion more explicitly "invited" Congress to intervene or even "correct" the Court's result

3 = opinion made the plea for intervention a major point concluding its legal discussion

4 = the plea for intervention was the only point of the opinion (all 4s were concurrences)

In addition to the strength of the override invitation, we coded for whether there was invitation in the majority, the dissent, or a concurring opinion.

Political Valence of Decision

Liberal = 0

Conservative = 1

Mixed or Unclear = 2

Note: Interpretations were coded as liberal if the Court's decision favored the interests of bankruptcy debtors, antitrust and securities plaintiffs, civil rights plaintiffs and other victims of discrimination, criminal defendants, energy consumers, claimants seeking information or entitlement benefits from the government, citizens demanding environmental protection, plaintiffs seeking access to federal courts, governmental and private employees, persons benefiting from health/safety protections, immigrants, Native Americans, claimants opposing intellectual property interests, pension beneficiaries and state regulators of pension funds, taxpayers, telecommunications and transportation consumers, students and their parents seeking educational benefits, and tenants.

Interpretations were coded as conservative if the Court's decision favored the interests of bankruptcy creditors, antitrust and securities defendants, alleged discriminators in civil rights cases, criminal prosecutors, energy companies, agencies withholding information, government institutions paying for statutory entitlements, companies accused of polluting the environment, defendants opposing access to federal courts, governmental and private employers, defendants charged with violating health/safety rules, officials opposing the rights of immigrants, state and federal entities denying claims by Native Americans, holders of intellectual property interests, pension funds and their managers, tax collectors, telecommunications and transportation companies, schools and school boards, and landlords.

Interpretations were coded as neutral or mixed if the agency interpretation was liberal on one issue and conservative on another.

Regulatory Valence of the Decision

The political valence is only half the story. We were interested not only in which side of the political spectrum "won," but also whether the decision was libertarian (i.e., reducing regulation of the subject-matter area) or proregulatory (increasing such regulation). Generally a liberal political outcome corresponded with a decision that upheld a regulation of the relevant subject-matter area. But not always. Each side of the political spectrum favors more regulation in some areas and less in others. For example, in habeas we coded the political valence of a decision restricting habeas petitions as "conservative," but we gave this outcome a proregulatory valence because it increased the regulation governing habeas petitions and cut back on the freedom with which judges could grant these petitions.

0 = Proregulatory

1 = Libertarian/antiregulatory

Did Majority and Dissent Clash on Plain Meaning?

Neither Majority nor Dissent Found Plain Meaning = 0

Majority Plain Meaning, Dissent Not = 1

Dissent Plain Meaning, Majority Not = 2

Both Majority and Dissent Found Plain meaning = 3

III. Agency Interpretations

In most of the cases that provoked overrides, the Court had before it the interpretation favored by a federal department or agency. Typically, the agency's position was presented to the Court through a brief prepared by the Office of the Solicitor General, which presents a united Executive Branch voice to the Justices.

Was There an Agency Interpretation Before the Court?

No = 0

Yes = 1

Decision with Respect to Agency

Case decided in favor of agency's interpretation = 0

Case decided against agency's interpretation = 1

Neutral or Mixed decision = 2

No agency interpretation on which to decide = 999

Was the Agency Acting Pursuant to Congressional Delegation of Lawmaking Authority?

No = 0

Yes = 1

Note: To make this determination, the coder examined the underlying statutory authorization under which the agency was rendering the interpretation in suit. Agencies were coded as *acting pursuant to congressional delegation of lawmaking authority* if they were acting pursuant to a statutory authorization that met *either* the strict Merrill–Watts criterion (explained in the next Note) or the more lenient criterion developed by the federal courts in the 1970s. The Supreme Court's opinion in *United States v. Mead Corp.*, 533 U.S. 218 (2001), includes all the cases that would be coded "yes" under Merrill–Watts and probably includes all or almost all of the cases that would be coded "yes" under the more liberal approach. *Mead* also theoretically includes some cases falling outside both categories, namely, those where there has been an "implicit" delegation of lawmaking authority, considering the broad context of the legislation. *Mead* did not supply sufficient guidance for this study to use in coding statutory delegations, and the lower courts have not been able to derive predictable standards, either. Hence, cases are not coded for *Mead*'s residual category, and delegated lawmaking authority under *Mead* might include some cases, but probably very few if any, that are not so coded under this study's standards.

Type of Delegation

Delegation according to strict (Merrill–Watts) approach = 0

Delegation according to lenient approach = 1

Not Applicable = 999

Note: An agency rule or order was coded as falling under the *strict approach* if the statutory delegation met the rigorous standard set forth in Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002). For statutes enacted before 1973, the Merrill–Watts standard requires that the statute vest an agency with the authority to issue rules or orders whose violation carries with it the possibility of immediate sanctions. Statutory delegations that *do* meet the Merrill–Watts standard include the Federal Water Pollution Control Act (as amended) § 307 (EPA) and § 403 et al. (Army Corps); the Longshore and Harbor Workers' Compensation Act, delegating adjudication authority to OWCP within the Department of Labor; the Securities and Exchange Act § 10(b) (SEC); the Federal Power Act § 824e (FPC, now FERC). Statutory authorizations to the INS to detain, adjudicate, and deport noncitizens have the same lawmaking-

delegation feature. Some agencies, such as the IRS (under the IRC) and the DOL (under the FLSA) do not have lawmaking authority under their general delegations, but their authorizing statutes have been amended to provide specific lawmaking authority (i.e., meeting Merrill–Watts) to address certain problems.

Agency Format

Legislative Rule or Executive Order = 0

Formal Adjudication = 1

Informal Agency Interpretation = 2

Informal Interpretation

Agency Litigating Position = 1

Interpretative Rule/Guidance = 2

Agency Manual or Letter = 3

Agency/Solicitor General Amicus Brief = 4

Not Applicable = 999

Notice-and-Comment Rulemaking

Did the agency's interpretation go through notice-and-comment rulemaking?

No = 0

Yes = 1

Continuity (Agency position is . . .)

Longstanding and Fairly Stable = 0

Evolving = 1

Recent = 2

Not applicable = 999

Note: An agency position was coded as *longstanding and fairly stable* if the agency had publicly and stably adhered to that same interpretation for a number of years before the Supreme Court took the case. The coding did *not* rely on a bright-line cut-off point, such as any interpretation that was ten years old counted as longstanding. The main reason is that the category is "longstanding *and* fairly stable," so time is not determinative without a judgment of stability. For recent statutes, therefore, a longstanding and fairly stable interpretation could be embodied in a formal declaration that was less than a decade old; if the agency had taken the same position since the early days of its enforcement of the statute, the position was coded as longstanding and fairly stable. For older statutes, an interpretation was not

coded as longstanding and fairly stable unless the relevant agency had adhered to it, without wobbling, for a somewhat longer period of time. As before, the coding was attentive to whether the agency's position was consistent with its prior ones.

Evidence of a continuing agency interpretation was culled from the briefs in the case and from the Court's opinion. The agency position did not have to be reflected in a formal rule or adjudication but did need to have repeated (quasi-)public expression over a period of time. In criminal cases, a pattern of lower court opinions accepting or rejecting the Department of Justice's interpretation over a period of five years or more was sufficient evidence of a longstanding and fairly stable interpretation on the part of the DOJ (which of course rarely engages in national rulemaking to announce its interpretations of the criminal code).

If Recent, Because. . .

New Issue for Agency = 0

New Administration = 1

New Statute = 2

Practical Experience = 3

Litigating Position = 4

Not Applicable = 999

Note: An issue was coded as a *new issue for the agency* when the agency addressed the precise issue only recently, based on the evidence outlined in the previous Note. Often agencies will take positions on new issues when the Supreme Court requests an amicus brief from the Solicitor General; often the whole point of the Court's request is probably to get the Solicitor General or the agency to think about an issue it has not taken a public position on, and so many of these cases will be coded as new issue for the agency. This is especially true in bankruptcy cases, where there is no agency in charge of bankruptcy policy, but the Court frequently asks for Solicitor General briefs on Bankruptcy Act issues.

Briefs Filed by State Attorneys General

0 = No state filed a brief on the statutory question

1 = At least one state filed a brief on the statutory question

Note: When a state did file a brief, we also recorded the number of states that signed on to the brief.

Deference Regime Invoked

No Regime Indicated, Directly or Indirectly = 0

Antideference (Lenity) = 1

Consultative (*Skidmore*-Lite) Deference = 2

Skidmore or similar = 3

Beth Israel et al. = 4

Chevron = 5

Seminole Rock = 6

Curtiss-Wright (Foreign Affairs and National Security) = 7

Note: "Deference regime invoked" captures the approach the Court takes towards agency deference. It does not measure whether the Court opinion was ultimately in favor of the agency interpretation, which is captured by the "decision with respect to agency" variable. Indeed, every deference regime includes both cases in which the agency interpretation is upheld and others in which it is rejected by the Court. There are *six* possible deference regimes, listed below in reverse order (highest to lowest):

***Curtiss-Wright* Super-Deference** to Executive Branch interpretations touching upon foreign affairs or national security.

***Seminole Rock* (or *Auer*) Strong Deference**, applicable to agency interpretations of their own valid rules. *See* Auer v. Robbins, 519 U.S. 452 (1997). If the Court said nothing or announced the applicability of another deference regime, the coding will not invoke *Seminole Rock.* In *Christensen v. Harris County*, 529 U.S. 576 (2000), for example, the agency claimed to have been interpreting its own regulation, but the Court only applied *Skidmore* deference because the regulation was clear and did not require interpretation.

***Chevron* Deference**, a strong presumption of validity for agency interpretations grounded upon the agency's delegated lawmaking authority. If Congress has not "directly addressed" the statutory issue, the courts are supposed to ratify the agency interpretation unless manifestly against the law.

***Beth Israel* Deference**, again, a strong presumption of validity for agency interpretations grounded upon the agency's delegated lawmaking authority.

***Skidmore* Deference**. Decisions were coded as applying *Skidmore* deference if the Court announced that it would give deferential weight to agency views based upon considerations of expertise, continuity, and other functional, good government factors.

Consultative (*Skidmore*-Lite) Deference. This category arose from the coder's perception that there were many cases where the Court's statutory interpretation was significantly influenced by agency-generated factual materials, interpretations, and recommendations—

but where the rhetoric of "deference" or interpretive "weight" was absent.

Perhaps surprisingly, most of the Supreme Court decisions were coded "0" because the Court was applying no discernible deference regime. (In many cases because there was no federal agency interpretation.) We coded as **Antideference** those cases where the Court put the burden on the government to rebut a presumption against its interpretation, as the rule of lenity requires in criminal cases and the avoidance canon suggests in cases where one or more of the Justices believe there are "serious constitutional difficulties" with the government's position.

Reasons Cited for Reliance on Agency Interpretation

No Reliance = 0

Agency Expertise = 1

Delegation of Lawmaking Authority = 2

Longstanding Interpretation = 3

Contemporaneous Interpretation = 4

Public Reliance = 5

Rulemaking Authority = 6

Congressional Acquiescence = 7

Administrability = 8

Political Question = 9

Legal Language = 10

Unclear = 11

Note: For each reason-category above, decisions are coded as *no* reliance on the reason if the Court says nothing explanatory and just cites and follows *Chevron* or another deference regime.

IV. Winners and Losers in the Supreme Court Case

There are winners and losers in every Supreme Court case. The parties and the groups whose interests they represent are the obvious winners and losers. In most Supreme Court cases nowadays, amicus briefs suggest a broader array of winners and losers. For example, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Supreme Court ruled that the nuclear energy regulatory scheme at the federal level did not preempt state tort law. The winning parties were not just the estate of Karen Silkwood but also its attorneys and plaintiffs' tort lawyers everywhere. The losing parties were not just Kerr-McGee but the nuclear power industry, which filed an excellent amicus brief in the effort. Another loser at the Supreme Court level was the "United States," for the Solicitor General filed an

amicus brief supporting the industry's preemption claim. Although they did not file briefs, the states were winners, in that the ruling obviously allowed them greater regulatory latitude.

Based upon this kind of analysis, we coded every Supreme Court case for winners and losers, along the following lines:

Direct Winner = 4

Indirect Winner = 3

Indirect Loser = 2

Direct Loser = 1

Not Strongly Affected = 0

Our coding included the following kinds of institutions, interests, and groups:

Governmental Institutions/Players, including the United States, the states, local governments, foreign governments, prosecutors, schools, universities, and prisons;

Private Institutions, including the organized business, financial institutions, labor unions, religious institutions, environmental groups, medical institutions, educational institutions, IP holders, the plaintiffs' bar, the defense bar, and the ACLU;

Women and Minority Groups, including groups representing the interests of women, blacks, Latinos, sexual and gender minorities, immigrants, Native Americans, inmates, the poor, the elderly, people with disabilities, and children; and

General Citizenry, including taxpayers, consumers, debtors, patients, investors, landlords, tenants, and prisoners.

Appendix 3: Coding Congressional Overrides of Supreme Court Statutory Interpretation Decisions

This Appendix elaborates on the coding methodology we followed for each of the 286 statutory overrides enacted by Congress between 1967 and 2011 (inclusive) that overrode one or more Supreme Court statutory interpretation decisions.

I. Basic Facts

As part of the coding process we recorded several pieces of "biographical" data on the override. These data included:

Case name

Date on which the case was decided

Override statute name

Congress enacting the override

Override public law number

Section of the public law containing the override

Statutes at Large citation

U.S. Code title in which the override was codified

U.S. Code provision at which the override was codified

Year the override was enacted

Years between the date the case was decided and the override enacted
Whether the override was enacted within five years of the decision overridden:

0 = Yes

1 = No

Whether the override has been recognized on Westlaw

If the override has been recognized on Westlaw, the date on which it was first recognized

The number of years between the override and the date it was first recognized on Westlaw

Number of amendments to the U.S. Code provision at which the override was codified. 999 was entered where the override was not codified or the statutory provision had been renumbered since the override was enacted.

President at the time the override was enacted:

0 = Johnson

1 = Nixon

2 = Ford

3 = Carter

4 = Reagan

5 = H.W. Bush

6 = Clinton

7 = W. Bush

8 = Obama

Political orientation of the President

0 = Liberal

1 = Conservative

Political orientation of the Senate

0 = Liberal

1 = Conservative

Senate sponsor

Political orientation of the Senate sponsor

0 = Liberal

1 = Conservative

With regard to votes for and against the override in the Senate, 999 indicates that no roll call vote was recorded (e.g., the bill was passed by voice vote, unanimous consent, etc.). When multiple votes were taken (e.g., when a vote was taken on the original bill and the bill produced by a conference committee) the last-in-time vote was recorded.

Political orientation of the House

0 = Liberal

1 = Conservative

House sponsor

Political orientation of the House sponsor

0 = Liberal

1 = Conservative

With regard to votes for and against the override in the House, 999 indicates that no roll call vote was recorded (e.g., the bill was passed by voice vote, unanimous consent, etc.). When multiple votes were taken

(e.g., when a vote was taken on the original bill and the bill produced by a conference committee) the last-in-time vote was recorded.

Subject Matter of the Override

Antitrust = 1	Federal Lands = 16
Armed Forces = 2	Health & Safety = 17
Banking & Finance = 3	Housing = 18
Bankruptcy = 4	Immigration = 19
Business Regulation = 5	Indian Affairs = 20
Civil Rights = 6	Labor Relations & Workplace = 21
Intellectual Property = 7	Maritime = 22
Criminal Law = 8	Pensions = 23
Education = 9	Taxation = 24
Energy = 10	Telecommunications = 25
Entitlement Programs = 11	Transportation = 26
Environment = 12	Veterans Affairs = 27
Federal Government = 13	National Security = 28
Foreign Affairs = 14	Habeas Corpus = 29
Federal Jurisdiction & Procedure = 15	Prisons = 30

A case can have more than one subject matter. For example, a Title VII case posing a procedural issue would earn three subject-matter numbers, 6 + 15 + 21. See, for example, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). For these cases we identified the *primary* subject matter as well as the secondary areas implicated by the decision. Thus we coded the *Ledbetter* override as primarily being a civil rights case, even though it also involved federal civil procedure and labor relations and workplace laws.

Supreme Court Decision Vote

For every overridden decision, we included the number of Justices in the majority based on the figures in the Spaeth database (available at http://scdb.wustl.edu/data.php).

Based on these figures we coded for whether the decision represented a "close case."

0 = 7-, 8-, or 9-Justice majority and not a close case

1 = plurality opinion, equally divided Court, or 5- or 6-Justice majority and a close case.

Political Valence of Override

Liberal = 0

Conservative = 1

Mixed or Unclear = 2

Note: The political valence of the override was determined by which direction the override moved public policy away from the Supreme Court's point of law. Thus, an override adopted by a conservative Republican Congress might be coded as "liberal" if it codified a very conservative Supreme Court habeas corpus or criminal procedure decision but created an equitable exception not found in the Court's jurisprudence. Conventionally liberal Democratic Congresses enacted many "conservative" overrides of the Court's rule of lenity decisions because they expanded the regulatory regime of criminal statutes.

Overrides were coded as *liberal* if the override favored the interests of bankruptcy debtors, antitrust and securities plaintiffs, civil rights plaintiffs and other victims of discrimination, criminal defendants, energy consumers, claimants seeking information or entitlement benefits from the government, citizens demanding environmental protection, plaintiffs seeking access to federal courts, governmental and private employees, persons benefiting from health/safety protections, immigrants, Native Americans, claimants opposing intellectual property interests, pension beneficiaries and state regulators of pension funds, taxpayers, telecommunication and transportation consumers, students and their parents seeking educational benefits, and tenants.

Overrides were coded as *conservative* if the override favored the interests of bankruptcy creditors, antitrust and securities defendants, alleged discriminators in civil rights cases, criminal prosecutors, energy companies, agencies withholding information, government institutions paying for statutory entitlements, companies accused of polluting the environment, defendants opposing access to federal courts, governmental and private employers, defendants charged with violating health/safety rules, officials opposing the rights of immigrants, state and federal entities denying claims by Native Americans, holders of intellectual property interests, pension funds and their managers, tax collectors, telecommunication and transportation companies, schools and school boards, and landlords.

Overrides were coded as *neutral* or *mixed* if the agency interpretation was liberal on one issue and conservative on another.

Regulatory Valence of the Override

Of course the political valence is only half the story. We were interested not only in which side of the political spectrum "won" but also whether the override enhanced or expanded regulation compared to the post-decision law or instead paired back regulation. Generally a liberal political outcome corresponded with an override that increased the regulation of the relevant subject area. But not always. Each side of the

political spectrum favors more regulation in some areas and less in others. For example, in habeas we coded the political valence of an override that restricts habeas petitions as "conservative," but we gave this outcome a proregulatory valence because it increased the regulation governing habeas petitions and cut back on the freedom with which judges could grant these petitions.

0 = Proregulatory

1 = Libertarian/antiregulatory

II. Characteristics of the Overrides

For each override, we located the relevant legislative history for the particular issue on which Congress overrode the Court. Using ProQuest Congressional, we identified the compiled legislative history for the statute, which included all related hearings, reports, and committee prints—frequently including documents from several Congresses. We limited our legislative history research to the reports and hearings produced by the Congress that enacted the override, unless there was a compelling reason to include materials from the prior Congress (e.g., where a law was passed early in a Congress and the reports referenced testimony from hearings conducted during the prior Congress). Based on these documents alone, we made determinations about the nature of the process by which Congress adopted the provision, and ultimately the legislation, that overrode the Court on a point of law. Thus, we did not delve beneath the public record through interviews or even newspaper accounts that might have revealed more knowledge, deliberation, and pluralist involvement than we found in the legislative record.

Using these documents, we coded for the following basic characteristics of the override statute.

Was the main focus of the override a response to the Supreme Court?

The Supreme Court was the main focus of the override when the report(s) framed the provision as a response to a particular Supreme Court precedent or where the report(s) discussed the need to modify Supreme Court precedent. Where Supreme Court decision received only ancillary discussion or no mention at all, the override was treated as primarily a response to the Court.

No = 0

Yes = 1

Was the override part of a comprehensive revision of the subject area?

Many of the overrides were part of a much broader revision to the law. These included the Tax Reform Act of 1976, and the Internal Revenue

Service Restructuring and Reform Act of 1998. Others contained only minor corrections to the law, such as the Installment Sales Revision Act of 1980. The distinction between the two was necessarily qualitative and some statutes could have gone either way. We treated a statute as a comprehensive revision where it provided a new rule or set of rules for a significant subsection of the area being regulated. Thus the Tax Reform Act of 1976 and the Internal Revenue Service Restructuring and Reform Act of 1998 were coded as comprehensive overrides because they provided new rules on overarching issues of the tax code, such as the burden of proof in deficiency litigation and the IRS's use of administrative summons, while also changing the tax treatment of many items. The Installment Sales Revision Act of 1980, by contrast, changed the tax treatment of only a small section of the tax code and thus was not treated as a comprehensive revision.

No = 0

Yes = 1

How deep was the override's response to the Supreme Court decision?

We also coded for the extent to which the override displaced the prior decision. In some cases the override made a minor change designed to affect only a limited set of individuals and cases. The override of *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), provides an excellent example of a marginal change to the law. At the other end of the spectrum, the restorative overrides not only replaced the decision's logic but also retroactively changed the legal regime prevailing prior to the override.

0 = Unclear

1 = Override made a marginal change to the law

2 = Override overrules the point of law but leaves the prior decision intact

3 = Override overrules the point of law and the outcome in the prior decision

4 = Override renounces the reasoning (often indicates a restorative override)

5 = Override renounces the reasoning and the outcome

Was the override "restorative"?

Did Congress state that it was putting back in place the legal regime predating the Supreme Court decision? Restorative overrides are indicated with italics in Appendix 1.

0 = No

1 = Yes

What was the override's effect on the rule of law?

To measure the override's effect on the clarity and predictability of the legal regime, we coded both for the type of rule articulated in the Supreme Court decision overridden and in the override statute. We then compared these standards to determine the override's effect on the law and whether the new statute helped or hindered the predictable application of the law.

0 = Unclear

1 = Override replaces a muddy Supreme Court standard with a clear rule (rule of law benefit)

2 = Override replaces a muddy Supreme Court standard a with different, but still muddy standard (rule of law wash)

3 = Override replaces clear Supreme Court rule with a different, but still clear rule of law (rule of law wash)

4 = Override replaces clear Supreme Court rule with a muddy standard (rule of law cost)

Did the override receive an explicit mention in hearings and reports?

Not all overrides were discussed in the legislative history leading to the override. We treated an override as being "explicitly considered" where the legislative history discussed the effect of the override or the problems with the Supreme Court decision to be overridden.

0 = Explicit mention in the override process

1 = No explicit mention

In addition we coded for two numeric variables about the statute's life in the U.S. Code.

How long was the statute?

To determine the size of the statute containing the override, we counted the number of pages it occupied in the *Statutes at Large*.

Override was the whole statute = 0

Short Override (<10 pages) = 1

Medium Override (10–25 pages) = 2

Long Override (>25 pages)= 3

Override was part of omnibus legislation = 4

III. Main Purpose for the Override

The committee reports usually provide a discussion about the background and need for the legislation as well as the intended effects of the override provision. We categorized the main purpose of each override into one of four categories based on these discussions:

0 = Bad Interpretation

1 = Confusion in the Law

2 = Response to Supreme Court Concerns

3 = Bad Policy

Bad Interpretation—The primary reason for the override was to correct a disfavored Supreme Court interpretation. In order to qualify, Congress must have stated expressly that the Court misinterpreted a statute, not just that the interpretation produced bad results. Many of the overrides in the Civil Rights Act of 1991 are excellent examples of these overrides.

Confusion in the Law—The primary reason for the override was to correct confusion created by a Supreme Court decision that lacked a clear majority or failed to provide a rule that the lower courts could apply effectively. The override of *United States v. Santos*, 553 U.S. 507 (2008), in the Fraud Enforcement and Recovery Act of 2009 is a prime example.

Response to Supreme Court Concerns—The primary reason for the override was to respond to a concern noted by the Court in interpreting the statute. Often, but not always, the concern related to the constitutionality of the provision or its application to a particular set of facts. Congress responded to such concerns in the override of *United States v. Maze*, 414 U.S. 395 (1974), by the Comprehensive Crime Control Act of 1984.

Bad Policy—The primary reason for the override was to replace the Supreme Court precedent with a new rule, but without suggesting that the Supreme Court misinterpreted the statute. The numerous overrides in the Bankruptcy Act of 1978 are the best examples of these overrides.

As with the subject area coding discussed above, the reports often identified multiple purposes for an override. For example, in overriding *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), with the Civil Rights Act of 1991, Congress focused on what it viewed as the Court's misinterpretation of the statute but also noted the negative policy effects of the Court's interpretation. In these instances, we identified the *primary* reason for the override (correcting the disfavored interpretation in both examples) and also the additional reasons for the override (remedying the policy consequences).

IV. What Goals and Values Do Overrides Promote?

The problems identified with the decision, and thus the need for an override, are only one side of the coin when it comes to justifying an override. In addition to identifying problems with the prevailing legal

regime, Congress frequently identifies the goals and values that it seeks to further through the override. These stated values are important in that they shed light on whether the override process is a public-regarding and utility-maximizing endeavor or instead a forum for rent-seeking by the well-connected. To test this consideration we categorized the different reasons commonly given for an override into the rough taxonomy below. As with the subject matter and purpose of the override, we coded for the main goals and values advanced by the override as well as secondary and ancillary ones.

0 = Could not tell what values and goals the override was intended to advance

1 = Updated Solution to Collective Action Problems (i.e., legal rules that standardize and preempt other confusing sources of guidance, deploy public resources to create positive projects the market would not provide, create proper incentives for institutions and persons, or penalize or lock up persons who harm others)

2 = Removing Inefficiencies in the Market and Other Institutions (i.e., legal rules that bar inefficient forms of discrimination, anticompetitive conduct and structures, etc.)

3 = Advancing Public Values (i.e., barring unfair discrimination and exclusions, advancing norms, etc.)

4 = Redistributing Governmental Power to Create a Better Regulatory Regime (i.e., overrides preempting state law or devolving authority to the states, delegating new authority to federal agencies, etc.)

5 = Redistribution of Resources or Power Toward Ordinary Persons or Minorities (i.e., consumer protection measures, creditor protections, protection of persons with disabilities, etc.)

6 = Redistribution of Resources or Power Toward Rich Persons and Corporations (i.e., tax breaks, creditor protections against debtors, rent-seeking exceptions to major public-regarding statutes, etc.)

7 = Restrictions on Arbitrary or Unfair Government Action (i.e., standards with which the government must comply before beginning prosecutions or issuing subpoenas or elimination of irrational or unfair categories and rules)

8 = Goals and values not discussed

V. Congressional Enactment Process

Again relying on the reports and hearings gathered through the process described above, we looked to three features of the enactment process to assess the representative values associated with the override process.

Was the Process Open?

To determine whether the legislative process was open with regard to a particular issue, we reviewed the committee hearings and committee reports to see whether the override's purpose and effects were clearly articulated by the relevant committee(s). An override was coded as "open" when the members of Congress and other interested parties were put on notice that Congress was contemplating a substantive change to Supreme Court precedent, even when the reports do not portray the law as a response to a decision by the Court. An override was coded as "not open" if the reports did not give observers notice, perhaps because the real deliberations were occurring behind closed doors in a party caucus or in summit sessions with party leaders and/or the White House.

0 = Not open

1 = Open

Was the Process Deliberative?

To determine whether an override was deliberative, we examined the committee hearings and committee reports to see how thoroughly members of the Legislature, the Executive Branch, and private parties identified and debated the costs and benefits of the proposed override. Based on the level of debate and the concerns mentioned in the hearings and reports, we coded for whether the process represented a deliberative process.

1 = Reports did not address the pros and cons or the counterarguments; the override also was not addressed in the hearings

2 = The override was mentioned only in the reports, but those reports provided a meaningful discussion of the pros and cons and/or the override received significant attention in the dissenting views attached to the reports

3 = Override received meaningful discussion in the hearings, but its merits were not addressed in the reports

4 = Override received meaningful discussion in the hearings and reports

Was the Process Pluralist?

To determine whether an override was pluralist, we looked at which affected institutions and groups took positions or testified about the override. Where only one side participated in the process (i.e., proponents or opponents of the override) we assigned a higher pluralist value to the instances in which opponents showed up, reasoning that proponents views were likely already well-represented through informal channels.

1 = No parties show up

2 = Proponents show up

3 = Opponents show up

4 = Parties on both sides

Was the Process Open, Deliberative, and Pluralist?

To answer this question, we calculated each override's composite score for the last three variables and then characterized the various combinations as listed in the table below.

Open, Deliberative, and Pluralist	144, 143, 134
Open and Somewhat Deliberative and Pluralist	142, 124, 133, 114, 141
Open but Not Deliberative and Pluralist	111, 112, 113, 121, 122, 123, 132, 131
Not Open but Deliberative and Pluralist	044, 043, 034
Not Open but Somewhat Deliberative and Pluralist	042, 024, 033, 014, 041
Not Open, Not Deliberative, and Not Pluralist	011, 012, 013, 021, 022, 023, 032, 031

VI. Winners and Losers from the Override

There are winners and losers in every congressional statute. Some institutions or groups are obviously affected by the very terms of a statute. Thus, the 2009 Tobacco Control Act imposed costs on the tobacco industry; although some tobacco companies supported the legislation, those business interests were the obvious "losers" for this override. Conversely, the override reinstated FDA regulations designed to protect minors against tobacco addiction, and so it would be obvious to find that children are "winners" in the override process. And the United States was a "winner," because an executive agency (the FDA) was given regulatory authority it had been denied by the Supreme Court.

Beyond the obvious winners and losers, and to confirm our intuitions, we and our research assistants examined the committee hearings and other legislative history to determine where particular institutions, groups, and interests lined up with regard to the *particular issue* on which Congress would ultimately override a Supreme Court statutory decision.

Based upon this kind of analysis, we coded every override provision for winners and losers, along the following lines:

Direct Winner = 4

Indirect Winner = 3

Indirect Loser = 2

Direct Loser = 1

Not Strongly Affected = 999

Our coding included the following kinds of institutions, interests, and groups:

Governmental Institutions/Players, including the United States, the states, local governments, foreign governments, prosecutors, schools, and prisons;

Private Institutions, including organized business, financial institutions, labor unions, religious institutions, environmental groups, medical institutions, educational institutions, the shipping industry, the plaintiffs' bar, the defense bar, and the ACLU;

Women and Minority Groups, including groups representing the interests of women, blacks, Latinos, sexual and gender minorities, immigrants, Native Americans, inmates, the poor, the elderly, people with disabilities, and children; and

General Citizenry, including taxpayers, consumers, debtors, patients, investors, landlords, tenants, and prisoners.

VII. Hearings and Testimony

In addition to the winners and losers, we also tracked which of these groups testified at the hearings that led to the override statute and whether they supported the override, opposed the override, or took positions on both sides. Although interest groups were generally united in their support or opposition of an override, there were a number of instances were members of the same group testified on both sides. For example, telecommunications companies took positions on both sides of the override of *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) in the 1996 Telecommunications Act, which replaced some regulation of intrastate calling with market competition. For the most frequent witness, the United States, we also recorded which departments or agencies testified on its behalf.

0 = Supported the Override

1 = Opposed the Override

2 = Took Positions on Both Sides of the Override

VIII. Post-Override Judicial Response

How did courts respond to the override? The ultimate effect of an override depends, in part, on the gloss agencies and/or judges place on the new statutory language. Did judicial opinions reveal resistance or even hostility to the override, which after all was displacing a judge-made point of law with a legislator-made point of law? Was there judicial consensus?

We tackled this issue by calling forth all judicial decisions identified in WestlawNext and dated after the override had amended or added a new provision to the U.S. Code. We read the digest of those decisions provided by WestlawNext and read the entire text of decisions that seemed most relevant to the questions below.

Was There Judicial Consensus in Interpreting the Override?

In the wake of the large majority of overrides, district and circuit courts did all the work of applying the override; Supreme Court involvement was not the norm. We examined whatever judicial decisions that were available to make the following determinations. An override was coded "too early to tell" or "insufficient case law" if there were not enough WestlawNext cases to justify an opinion. An override was coded "consensus" if the judicial opinions revealed no significant disagreement in applying the override provision. An override was coded "short-term dissensus" if lower courts went different ways on one or more significant issues in the first 5–10 years after the override went into effect. (Sometimes, the short-term dissensus would ultimately be terminated by a Supreme Court opinion resolving it.) An override was coded as "long-term dissensus" if disagreement among judges persisted for a longer period.

Too Early to Tell = 0

Insufficient Case Law to Determine Consensus = 1

Judicial Consensus = 2

Short-Term Judicial Dissensus = 3

Long-Term Judicial Dissensus = 4

Was There Judicial Resistance to the Override?

A different question is how enthusiastically judges implemented the override. An override was coded as "too early to tell" or "insufficient case law" if there were not enough WestlawNext cases to justify an opinion. An override was coded "narrow" if judges interpreted it more narrowly than we would have expected from reading the new statutory language and "broad" if judges interpreted it more liberally than expected. An override was coded as "normal" if judges applied it pretty much as one would have expected. An override was coded as "invalidated" if judges (usually the Supreme Court) nullified it on constitutional grounds.

Too Early to Tell = 0

Insufficient Case Law to Determine Consensus = 1

Narrow Interpretation = 2

Normal Interpretation = 3

Broad Interpretation = 4

Invalidated on Constitutional Grounds = 5

* * *

Justice at Work: Minimum Wage Laws and Social Equality

Brishen Rogers*

Are minimum wage laws just? Existing legal academic debate implies that they are not. Drawing on neoclassical labor-market models, various legal scholars have argued that minimum wage laws increase unemployment and cause other inefficiencies, and therefore that legal scholars have argued that direct transfers to the working poor are a superior means of ensuring distributive justice. Accepting for the sake of argument that minimum wage laws have such economic effects, this Article nevertheless defends them on grounds of justice. It builds on well-worn arguments that a just state will not just redistribute resources but will also enable citizens to relate to one another as equals. This ideal of "social equality" is most commonly associated with republican and communitarian theories of justice, but it is also central to major strands of egalitarian liberalism. Minimum wage laws advance social equality, and do so better than direct transfers, in several ways. They increase workers' wages, which are a primary measure of the social value of work; they alter workplace power relationships by giving workers rights vis-à-vis employers; and they require employers and consumers to internalize costs of higher wages rather than mediating all distribution through the state. In short, minimum wage laws help ensure decent work, work that enhances rather than undermines workers' self-respect. Reduced demand for extremely low-wage labor is a cost worth bearing to ensure decent work—and may even be an affirmative social good.

INTRODUCTION 1544
I. EXISTING DEBATE: MINIMUM WAGE LAWS AND DISTRIBUTION 1549
A. Utilitarian Critiques 1550
B. Egalitarian Liberalism and Minimum Wage Laws 1552
1. *Justice as Fairness and Basics of Egalitarian Liberalism* 1552
2. *Egalitarian Liberals' Criticisms of* the *Minimum Wage*. 1554
C. Extant Defenses of the Minimum Wage 1559
II. SOCIAL EQUALITY DEFINED AND DEFENDED 1562

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III. MINIMUM WAGE LAWS AND SOCIAL EQUALITY 1570
A. Effects of Minimum Wage Laws on Workers' Self-Respect 1571
1. Wage Rates and Self-Respect 1571
2. Formal Legal Entitlements and Self-Respect 1574
B. Incentive Effects of Minimum Wage Laws and Transfers ... 1576
1. Effects of Minimum Wage Laws on Employers' Incentives 1577
2. Incentive Effects of Transfers 1583
3. Further Refining and Extending the Argument 1586
IV. COUNTERARGUMENTS 1588
A. Limits of the Minimum Wage as a Means to Social Equality 1588
B. Revisiting the Relationship Between Social Equality and Egalitarian Liberalism 1592
1. How Strong Is the Liberal Case for Social Equality? 1592
2. Is There an Alternative Liberal Case for Minimum Wages? 1595
CONCLUSION 1597

Introduction

In 1935, as minimum wage provisions established by President Roosevelt's National Recovery Administration came into effect, a journalist asked a New England textile worker for his reaction. The response was telling:

> You can guess that the money is handy. . . . But there is something more than the money. There is knowing that the working man don't stand alone against the bosses and their smart lawyers and all their tricks. There is a government now that cares whether things is fair for us.[1]

The sentiment remains remarkably common: low-wage workers often describe the minimum wage as a matter of respect and fairness, not just resources.[2] President Obama has framed his push to raise the minimum wage in similar terms, calling income inequality "the defining challenge of our time" and a violation of "middle-class America's basic bargain that if you work hard, you have a chance to get ahead."[3] The overwhelming political popularity of the minimum wage—which transcends income

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1. M.D. Vincent & Beulah Amidon, *NRA: A Trial Balance*, SURV. GRAPHIC, July 1935, at 333, 337, *reprinted in* THE NEW DEAL AND THE AMERICAN PEOPLE 34, 40–41 (Frank Freidel ed., 1964).

2. *See infra* section II(A)(1).

3. President Barack Obama, Remarks on the Economy (Dec. 4, 2013), *in* WASH. POST (Dec. 4, 2013), http://www.washingtonpost.com/politics/running-transcript-president-obamas-december-4-remarks-on-the-economy/2013/12/04/7cec31ba-5cff-11e3-be07-006c776266ed_story.html.

groups, political affiliation, and racial identity—may likewise reflect an intuitive sense that a just state will promote decent wages and decent work.[4]

Legal academic and policy debates around the minimum wage are bloodless in comparison, focusing almost entirely on the minimum wage's efficacy at redistributing wealth. For example, law and economics scholar Daniel Shaviro has argued that the minimum wage is a perverse redistributive tool, for it not only reduces overall efficiency but also "destroys jobs in the low-wage sector of the economy and thus hurts many of the people it is intended to help."[5] Shaviro therefore advocated repealing the minimum wage and instead assisting low-wage workers through negative income taxes or other transfers funded out of general revenues.

It is of course unsurprising that legal economists would focus upon questions of efficiency rather than justice. What may be more surprising is that the minimum wage has also troubled legal scholars within another major branch of Anglo–American normative legal theory, the "egalitarian liberalism" of heirs to John Rawls.[6] (While philosophical liberalism is of course far broader than Rawls et al., for ease of exposition this Article will use the term "liberals" to denote Rawls and his heirs and "liberalism" to denote their thought.[7]) Liberals insist that justice is a matter of fairness,

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4. *See* JEROLD WALTMAN, THE POLITICS OF THE MINIMUM WAGE 50 tbls.2 & 3 (2000) (summarizing public opinion data from 1945–1996); *id.* at 48 ("[The public] usually favor[s] setting the wage level higher than whatever Congress is considering at the moment."); *see also* ROBERT POLLIN ET AL., A MEASURE OF FAIRNESS: THE ECONOMICS OF LIVING WAGES AND MINIMUM WAGES IN THE UNITED STATES 4 (2008) (noting the popularity of state- and local-level minimum wages set above the national level); *2011 American Values Survey*, PUB. RELIGION RES. INST. (Nov. 8, 2011), http://publicreligion.org/research/2011/11/2011-american-values-survey/ (providing the results of a 2010 national poll in which two-thirds of individuals supported raising the minimum wage to at least $10 per hour, well above the current rate of $7.25).

5. Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 406 (1997); *see also* EDMUND S. PHELPS, REWARDING WORK: HOW TO RESTORE PARTICIPATION AND SELF-SUPPORT TO FREE ENTERPRISE 147 (reprt. 2007) ("[I]t is impossible to understand the lingering appeal of the statutory minimum wage as a way to widen self-support, social cohesion, and so on among the disadvantaged.").

6. "Egalitarian liberalism" is the name commonly given to the works of John Rawls, Ronald Dworkin, and others who seek to combine traditional liberalism's focus on a neutral and minimal state with an egalitarian distribution of wealth, typically defined via a "maximin" or similar criterion that seeks to maximize the well-being or social position of the worst off in society. *See generally* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001) [hereinafter RAWLS, FAIRNESS]; JOHN RAWLS, POLITICAL LIBERALISM (expanded ed. 2005) [hereinafter RAWLS, LIBERALISM]; RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000) [hereinafter DWORKIN, SOVEREIGN VIRTUE]; JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, THEORY]; Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981). Since Dworkin's *What is Equality?* articles were reprinted as Chapters 1 and 2 of *Sovereign Virtue*, future citations will be to that book rather than the articles.

7. Liberalism also includes, for example, contemporary libertarianism which rejects Rawls's commitment to an egalitarian distribution of social goods. *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

especially for society's worst off.[8] But some prominent liberals—including Rawls himself—have implied that tax-and-transfer policies are preferable to minimum wage laws as means of achieving distributive justice.[9] Indeed, liberals' priority concern for society's worst off may render the minimum wage especially problematic since those with few skills or marginal labor-market connections face the greatest likelihood of job loss after a mandated wage increase.[10] A leading liberal tax scholar has, therefore, proposed a system of unconditional cash transfers to poor citizens in part on the grounds that doing so would "help clear the way for repealing minimum-wage" laws.[11]

Minimum wage advocates, for their part, typically respond to such critiques in several ways. Often they simply assume minimum wage laws are desirable and ask how best to ensure their enforcement.[12] At other times, they draw on growing—yet still disputed—empirical evidence that minimum wage laws do not in fact increase unemployment.[13] Such arguments turn what might be a question of first principles into an evidentiary contest. Other advocates appeal to the dignitary values of workplace regulations highlighted by the New England garment worker. But they have only rarely linked those values to broader theories of justice,[14] leaving the minimum wage a bit of an academic orphan. Policy debate around the minimum wage, which has recently become more urgent due to President Obama's proposal and due to recent growth in the low-wage sector,[15] likewise revolves around questions of unemployment.[16]

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8. *See infra* subpart I(B).

9. *See infra* subpart I(B).

10. *See* Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 1004–09 (1999) (arguing that the minimum wage keeps wages "artificially" high for unskilled workers and thus reduces employment opportunities).

11. *Id.* at 1008–09.

12. *See infra* subpart I(C) and section III(B)(3).

13. *See infra* subpart I(C) and section III(B)(3).

14. *See infra* subpart I(C). Professor Samuel Bagenstos is exploring similar questions in his current work, and has defended a similar conception of equality, but does not consider its application to the minimum wage. *See* Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013); *see also* Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 4–5 (considering the relationship between egalitarian liberalism and minimum wage laws); *infra* section IV(B)(2) (discussing Zatz's argument).

15. *See* Ben Casselman, *Low Pay Clouds Job Growth: Unemployment Rate Falls but Hiring Rate Slows; Quality of Positions a Concern*, WALL ST. J., Aug. 3, 2013, http://online.wsj.com/news/articles/SB10001424127887324635904578643654030630378 ("[M]ore than half the job gains [in July 2013] were in the restaurant and retail sectors, both of which pay well under $20 an hour on average."); Editorial, *Fast-Food Fight*, N.Y. TIMES, Aug. 7, 2013, http://www.nytimes.com/2013/08/08/opinion/fast-food-fight.html (observing that "lower-wage occupations have proliferated in the past several years"); James Surowiecki, *The Pay Is Too Damn Low*, NEW YORKER, Aug. 12, 2013, http://www.newyorker.com/talk/financial/2013/08/12/130812ta_talk_surowiecki (reporting that today's low-wage workers are on average better educated, older, and responsible for a larger proportion of their family's income than in the past).

This is a problem for minimum wage advocates. If intuitions that the minimum wage is a matter of justice are simply wrong or merely conventional, then advocates should take such critiques far more seriously. Moreover, even if minimum wage laws are here to stay, this underlying debate has implications for a host of subsidiary questions. Those include the level at which minimum wages should be set; whether particular workers deserve coverage under such laws; how much states should invest in enforcement; and which entities should be liable for violations. Lawmakers, executives, and judges often confront such questions, and the answers will differ depending on the underlying defensibility of the minimum wage itself.

To focus its analysis, and to begin to move beyond existing debates, this Article accepts for the sake of argument that minimum wage laws tend to reduce demand for low-wage labor. To be clear, this assumption may be counterfactual: there is significant evidence that past minimum wage increases have not led to job losses.[17] But arguments based on such evidence are essentially empirical, and as Paul Samuelson once wrote, "it takes a theory to kill a theory; facts can only dent a theorist's hide."[18] Moreover, even if minimum wages will not increase unemployment if set within traditional limits, at a certain wage rate they would undoubtedly do so. Clarifying the social goods advanced by minimum wage laws will help in assessing whether their costs are worth bearing. What is needed is a nonutilitarian defense of minimum wage laws, one that holds even if they reduce demand for low-wage labor.

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16. *See* Jared Bernstein, *The Minimum Wage and the Laws of Economics*, ECONOMIX, N.Y. TIMES (Dec. 4, 2013, 12:01 AM), http://economix.blogs.nytimes.com/2013/12/04/the-minimum-wage-and-the-laws-of-economics/ (noting that if the minimum wage increased unemployment, "we'd probably know"); Laura D'Andrea Tyson, *Raising the Minimum Wage: Old Shibboleths, New Evidence*, ECONOMIX, N.Y. TIMES (Dec. 13, 2013, 12:01 AM), http://economix.blogs.nytimes.com/2013/12/13/raising-the-minimum-wage-old-shibboleths-new-evidence/ (summarizing research finding no substantial link between increased minimum wages and unemployment); Arindrajit Dube, *The Minimum We Can Do*, OPINIONATOR, N.Y. TIMES (Nov. 30, 2013, 2:25 PM), http://opinionator.blogs.nytimes.com/2013/11/30/the-minimum-we-can-do/ (same). Minimum wage opponents have continued to sound alarms over President Obama's proposal to raise the minimum wage, and even some prominent Democratic economists have urged caution. *See* Damian Paletta & Jon Hilsenrath, *Bid on Minimum Wage Revives Issue that Has Divided Economists*, WALL ST. J., Feb. 12, 2013, http://online.wsj.com/news/articles/SB10001424127887323511804578300702588937498 ("President Barack Obama's proposal . . . is likely to rekindle debates over whether the measure helps or hurts low-income workers."); Christina D. Romer, *The Business of the Minimum Wage*, N.Y. TIMES, Mar. 2, 2013, http://www.nytimes.com/2013/03/03/business/the-minimum-wage-employment-and-income-distribution.html?pagewanted=all ("The economics of the minimum wage are complicated, and it's far from obvious what an increase would accomplish.").

17. *See infra* subpart I(C).

18. Shaviro, *supra* note 5, at 449 (quoting DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 355 (1995)).

This Article takes up that mantle, defending the minimum wage as a matter of justice.[19] It builds on well-established arguments that a just state must not just redistribute resources but also ensure that "people stand in relations of equality to others."[20] This requires combatting status inequalities that result from gender, race, and class differentiation. This ideal of "social equality" is most commonly associated with left-communitarian and republican theories of justice, but it is also central to certain strands of egalitarian liberalism, with Rawls himself arguably a leading proponent.[21] Among other things, a society committed to social equality will seek to ensure decent work—work that enhances rather than undermines workers' self-respect and social standing.

Minimum wage laws advance this goal in several interrelated ways.[22] First and foremost, minimum wage laws increase workers' hourly pay; this enhances workers' self-respect by improving their material lives and by increasing the social value attached to their labor. Second, minimum wage laws alter workplace power relationships. Such laws enable workers to call upon the state to protect them against certain employer demands and require employers *themselves* to bear duties toward workers rather than mediating all distribution through the state. These rights and duties are meaningful independent of their effects on distribution for reasons captured nicely by

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19. Three notes on the role of justice in this Article are in order. First, as will be clear, this Article uses the term "justice" in the Rawlsian sense, even if its overall analysis is not necessarily Rawlsian. It understands justice as a characteristic of social institutions, not individual morality, and views the basic structure of society as the primary subject of justice. *See* RAWLS, THEORY, *supra* note 6, at 7 ("The basic structure [of society] is the primary subject of justice because its effects are so profound and present from the start [of our lives]."). Second, this Article's argument is limited to relatively advanced industrial or post-industrial economies characterized by wage labor; I take no position on whether minimum wage laws are just in preindustrial economies, for example, or in future economies that do not rely upon employment relationships. Finally, it is possible that a set of alternative labor-market regulations could render minimum wage laws superfluous. One can imagine, for example, a country that need not adopt a formal minimum wage because robust labor laws enabled all workers to bargain for relatively high wages and to prevent employers from exerting undue power over them. This Article assumes, then, a society in which other background legal institutions render minimum wage laws structurally necessary to achieve decent wages and formal legal entitlements for some class of unskilled workers.

20. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 288–89 (1999); *see also* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY xii–iii (1983) ("The aim of political egalitarianism is a society free from domination."). *See generally* Anderson, *supra*; Joshua Cohen, *Democratic Equality*, 99 ETHICS 727 (1989); Norman Daniels, *Democratic Equality: Rawls's Complex Egalitarianism*, *in* THE CAMBRIDGE COMPANION TO RAWLS 241 (Samuel Freeman ed., 2003); Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5 (2003); Iris Marion Young, *Taking the Basic Structure Seriously*, 4 PERSP. ON POL. 91 (2006).

21. *See infra* Part II and subpart IV(A); *see also* RAWLS, FAIRNESS, *supra* note 6, at 131 (arguing that material redistribution is important because "[s]ignificant political and economic inequalities are often associated with inequalities of social status that encourage those of lower status to be viewed both by themselves and by others as inferior").

22. Assuming, as will generally be done for purposes of argument, that businesses follow the law. *But see infra* subpart IV(A).

the textile-worker quote above. Third, minimum wage laws alter the economics of low-wage employment. They deliver additional resources to low-wage workers as a group, and they force employers and consumers to internalize some of the social costs of low-wage work.[23]

Minimum wage laws, in short, help ensure more egalitarian work-based social structures. This analysis thus turns one common line of critique on its head: rather than a tax on low-wage work, the minimum wage can be analogized to a tax on the class and status benefits of employing or consuming the products of low-wage labor. Minimum wage laws' effects on unemployment should therefore no longer give rise to a presumption against them but rather should be seen as a collateral cost to be managed—perhaps through transfers, or perhaps through other policies that enhance employment opportunities.[24] In fact, marginally reduced demand for extremely low-wage labor may be an affirmative good insofar as it ensures more egalitarian social relationships.

Part I, below, summarizes the existing legal academic debate around minimum wage laws, unpacking certain utilitarian and liberal scholars' skepticism. Part II defines and defends social equality as an alternative metric of justice. Part III traces the relationship between minimum wage laws and social equality. Part IV then takes up various important counterarguments.

I. Existing Debate: Minimum Wage Laws and Distribution

Legal academic debate on minimum wage laws is largely framed around a simple question: what policy or policies will best increase the resources available to the working poor?[25] While the menu of policy options is wide, the most important alternatives to minimum wages all involve taxation and transfer of funds directly to the working poor. These include employment subsidies, in which the government would pay a portion of a low-wage worker's salary;[26] the earned income tax credits (EITCs) or other negative income taxes, which deliver additional means-tested resources to the working poor and are gradually phased out via

23. *See infra* Part III.

24. *See infra* section III(B)(3).

25. *See* DAVID NEUMARK & WILLIAM A. WASCHER, MINIMUM WAGES 3 (2008) ("[W]e see the principal intent of the minimum wage as helping to raise incomes of low-income families."); Shaviro, *supra* note 5, at 407, 457–61 (arguing that three objectives of "low-wage subsidies," including minimum wages, are progressive redistribution, encouraging work by the poor, and reducing the transfer system's discouragement of work at the margins); Zatz, *supra* note 14 (noting that both critics and advocates of the minimum wage "basically agree that the minimum wage should be evaluated as an antipoverty program").

26. *See* Phelps, *supra* note 5.

positive tax rates;[27] and "demogrant,"[28] "basic income"[29] or "stakeholder"[30] programs, under which all citizens would receive a cash grant either annually or at some point during their lives. While the differences among these proposals are important, and will be noted in places, they will generally be treated together because all have a similar institutional form (tax-and-transfer rather than regulate), and because all have advantages over the minimum wage as means of redistributing resources.

Subpart I(A) summarizes the utilitarian case against minimum wage laws and for direct transfers, as reflected in law and economics scholarship. Subpart I(B) summarizes liberal scholars' arguments for the same policy choice. Subpart I(C) discusses minimum wage defenders' extant responses.

A. *Utilitarian Critiques*

The most important critiques of the minimum wage arise from neoclassical economics[31] and have been incorporated most prominently into legal academic debates around the minimum wage by Daniel Shaviro.[32] Shaviro's analysis is basically utilitarian: he seeks to maximize overall utility within a society and takes material resources to be the basic measure thereof.[33] In a utilitarian framework, even if redistributing wealth to the working poor is a good idea—due, for example, to the social costs of poverty or the declining marginal utility of resources—the minimum wage is a suboptimal way of doing so for two interrelated reasons.

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27. *See* Shaviro, *supra* note 5, at 408 (discussing the EITC); *id.* at 410 (discussing other negative income taxes).

28. *See* Alstott, *supra* note 10, at 1056–58 (proposing the EITC or a demogrant); Shaviro, *supra* note 5, at 469–73 (discussing 1970s proposals for a demogrant in the United States and comparing the EITC and negative income tax).

29. *See generally* PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM (1995) (proposing a basic income program).

30. *See generally* BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999) (proposing a one-time "stakeholder" grant).

31. *See, e.g.*, George J. Stigler, *The Economics of Minimum Wage Legislation*, 36 AM. ECON. REV. 358 (1946) (examining the economic effects of minimum wage legislation and reviewing alternative policies).

32. Shaviro, *supra* note 5, at 407–08.

33. While Shaviro does not specifically identify himself as a utilitarian, this is certainly the overall tenor of his argument, and others have specifically described his analysis as utilitarian. *See* Alstott, *supra* note 10, at 973 & n.24 (describing Shaviro as utilitarian); *see also* Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463, 463–64 (1979) ("[A]ll variants of utilitarianism . . . identif[y] the goodness of a *state of affairs* (or outcome) with the sum total of individual utilities in that state . . . ."). Shaviro's approach is also largely consistent with welfarist approaches to policy analysis, *see* Louis Kaplow & Stephen Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331, 332 (2003) ("Under a welfarist approach . . . one first determines how a policy affects each individual's well-being and then makes an aggregate (distributive) judgment based exclusively on this information pertaining to individuals' welfare."), and differences between these approaches are irrelevant for present purposes.

First, the minimum wage is not well targeted at the working poor in the first place. It applies to covered workers regardless of their background family wealth, their annual income (including whether their work is seasonal or year-round), the extent to which they work overtime, whether they have a second job, their family status and wealth, and myriad other factors.[34] If policymakers aim to increase the resources available to the working poor, targeted transfers are clearly a superior policy choice.

Second, economically speaking, the minimum wage is "equivalent to a wage subsidy to low-wage employees, financed by a tax on low-wage employers."[35] Its perversity is thus apparent: even if a wage subsidy is a good idea, a tax on low-wage employers will reduce demand for low-wage labor. Granted, the reduction in employment or work hours may be less than the increase in wages due to demand elasticity for low-wage labor, such that the minimum wage may enable low-wage workers to capture a greater proportion of surplus.[36] But this only highlights another perversity of the minimum wage: it will always be Kaldor–Hicks inefficient. By creating a cartel among low-wage employees, minimum wage laws—like all price controls—"impos[e] a deadweight loss on society."[37] Net social product will be lower. To maximize the resources available to the working poor, in this view, it is best to set private law and market rules so as to create the maximum wealth possible and then to redistribute as desired through taxation and transfers.[38]

Granted, it is unclear whether the perversity critiques accurately reflect the effects of the minimum wage in real labor markets.[39] Nevertheless, to

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34. *See* Zatz, *supra* note 14, at 9–12; *see also* Shaviro, *supra* note 5, at 434 (citing Stigler, *supra* note 31, at 362–63) (summarizing the factors that lead to divergence between minimum wage workers and individuals living in poverty).

35. Shaviro, *supra* note 5, at 407.

36. This will depend upon market conditions. As an example, however, Shaviro cites a long-held consensus among economists that a 10% hike would decrease total work hours by 1%–3% and that a 25% hike would reduce such hours by 3.5%–5.5%. *Id.* at 436–37.

37. *Id.* at 416 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 287 (4th ed. 1992)).

38. *Id.* at 474 ("The earned income tax credit . . . is considerably better than the minimum wage as a device for both progressive redistribution and encouraging workforce participation among the poor."); Stigler, *supra* note 31, at 365 (advocating negative income taxes and cash or in-kind grants to the poor). *See generally* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

39. *See infra* subpart III(B) (discussing incentive effects of minimum wage laws). *Compare* CARD & KRUEGER, *supra* note 19, at 13–17 (finding that employment tended either to remain stable or even to *increase*, at least within studied industries, following minimum wage increases), *and* Arindrajit Dube et al., *Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties*, 92 REV. ECON. & STAT. 945, 962 (2010) (finding that higher minimum wages do not have a detectable effect upon low-wage employment in the restaurant industry), *with* NEUMARK & WASCHER, *supra* note 25, at 39 (arguing that a review of studies of the minimum wage's effects confirms the standard model's predictions), *and* Shaviro, *supra* note 5, at 435–59 (criticizing Card and Krueger's methodology, their models, and their conclusions). *See generally*

focus the argument, this Article will assume that the neoclassical model is essentially correct—though it will highlight certain idiosyncrasies of labor markets that complicate, but do not undermine, that basic account.[40]

B. Egalitarian Liberalism and Minimum Wage Laws

Legal scholars operating within egalitarian liberalism have also often been skeptical toward the minimum wage. This subpart summarizes their arguments.

1. Justice as Fairness and Basics of Egalitarian Liberalism.—Since the 1971 publication of John Rawls's *A Theory of Justice* (*Theory*), egalitarian liberalism (again, "liberalism" for ease of exposition) has become the dominant left-leaning Anglo–American normative political philosophy.[41] Rawls argued that classical liberalism and utilitarianism are unconvincing theories of justice, in part because both tolerate economic inequalities that unfairly limit citizens' autonomy.[42] His own theory, which he called "justice as fairness," would require the state first to ensure equal basic liberties, then to ensure distributive justice, and only then to consider questions of aggregate utility or efficiency.[43]

CONG. BUDGET OFFICE, PUB. NO. 4856, THE EFFECTS OF A MINIMUM-WAGE INCREASE ON EMPLOYMENT AND FAMILY INCOME app. B (2014), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/44995-MinimumWage.pdf (providing a bibliography of recent empirical research on the effects of minimum wage laws on employment levels).

40. Those include the role of fairness norms in labor-market behavior and businesses' differential responses to a minimum wage mandate. *See infra* Part II.

41. Summarizing Rawls's theory is impossible, and the account *infra* disregards certain influential elements thereof. Those include: his decisional process from behind a "veil of ignorance," which, Rawls emphasized, is "a purely hypothetical situation," designed to "account for our moral judgments and . . . to explain our having a sense of justice," RAWLS, THEORY, *supra* note 6, at 118, 120; and his argument that liberty and equality are both elements of deeper Kantian commitments to individual autonomy and therefore that his overall theory is nonconsequentialist, *see generally* John Rawls, *Kantian Constructivism in Moral Theory: Rational and Full Autonomy*, 77 J. PHIL. 515 (1980).

42. *See* RAWLS, FAIRNESS, *supra* note 6, at 95–96 (comparing two principles of justice to the principle of average or aggregate utility); RAWLS, THEORY, *supra* note 6, at 65, 75 (arguing that the difference principle requires a system of "democratic equality" rather than the system of "natural liberty" (classical or laissez-faire liberalism) or "liberal equality" (akin to welfare-state capitalism)). Utilitarianism had the added fault—less important for present purposes—of allowing infringements of individual liberties if doing so would increase net utility. *See* RAWLS, THEORY, *supra* note 6, at 27 ("Utilitarianism does not take seriously the distinction between persons.").

43. Rawls explains:

> *First Principle* [(the liberty principle):]
>
> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> *Second Principle* [(the equality principle):]
>
> Social and economic inequalities are to be arranged so that they are both:
>
> (a) to the greatest benefit of the least advantaged [the "difference principle"] . . . and

Rawls's focus upon distributive justice, as encapsulated in his "difference principle," is for present purposes the most important aspect of his theory. That principle permits inequalities in what Rawls called "primary social goods" only if such inequalities benefit the worst off in society, for example by incentivizing talented individuals to develop and deploy their own skills. Primary social goods are things that "normally have a use whatever a person's rational plan of life,"[44] including income and wealth; positions of responsibility; and—likely most important, according to Rawls—"[t]he social bases of self-respect."[45] The difference principle is therefore similar to a "maximin" criterion of distributive justice, so called because it requires maximizing the amount of some good possessed by the social group with the least of it.[46] Nevertheless, Rawls emphasized that the difference principle did not necessarily instantiate a maximin criterion.[47] It is more fundamentally "a principle of reciprocity," an injunction to organize basic institutions so as to ensure self-respect and autonomy for all.[48]

Rawls held that two forms of society could satisfy these principles: market socialism and what he called "property-owning democracy," a radical form of capitalism that would place in each citizen's hands "sufficient productive means for them to be fully cooperating members of society on a footing of equality."[49] But Rawls did not describe what property-owning democracy would look like in practice nor how to implement it.[50] In fact, aside from endorsing "a social minimum covering at least the basic human needs," such as public education, social insurance,

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> (b) attached to offices and positions open to all under conditions of fair equality of opportunity [the "fair equality of opportunity principle"].

RAWLS, THEORY, *supra* note 6, at 302. Rawls ranked the principles in lexical order, such that a principle does not come into play until those before it are satisfied. *Id.* at 302–03. Thus, the first principle is prior to the second principle; within the second principle, fair equality of opportunity is prior to the difference principle; and the second principle is prior to considerations of efficiency, utility, or welfare maximization.

44. *Id.* at 62.

45. RAWLS, FAIRNESS, *supra* note 6, at 58–59 (defining and enumerating primary social goods); *see also* RAWLS, THEORY, *supra* note 6, at 440 ("[P]erhaps the most important primary good is that of self-respect.").

46. *See* WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 66–67 (2d ed. 2002) (interpreting the difference principle as maximin). This argument brackets alternative formulations of liberal principles of distributive justice such as prioritarianism, "which would attach greater weight to the interests of the less well off, but would still allow major gains to the affluent to outweigh minor losses to the poor." *Id.* at 66.

47. RAWLS, FAIRNESS, *supra* note 6, at 94–95 (clarifying that "the reasoning for the difference principle does not rely on [the maximin] rule").

48. *Id.* at 64.

49. *Id.* at 140; *see also id.* at 114 (clarifying that the basic right to property does not require a right to the means of production or to participate in the control of the means of production).

50. *See* KYMLICKA, *supra* note 46, at 90–91 (noting that aside from inheritance taxation, "Rawls gives us no idea of how to implement such a property-owning democracy").

and cash supports for the poor,[51] Rawls gave few details regarding optimal institutions of distributive justice or other matters of public policy. This is in part a structural element of his theory: he did not seek to provide a blueprint for social justice, but rather to formalize a view of justice that could be embraced by "opposing religious, philosophical and moral doctrines likely to thrive over generations in a . . . constitutional democracy, where the criterion of justice is that political conception itself."[52] Rawls therefore focused upon "ideal" or "strict compliance" theory, on the view that describing a perfectly just society was a necessary first step to addressing present-day injustices.[53] The laws and regulations required to satisfy the difference principle, he held, would need to be worked out in individual societies based upon their own traditions and degrees of economic development.[54]

2. Egalitarian Liberals' Criticisms of the *Minimum Wage*.—Rawls's *Theory* has profoundly influenced legal scholarship in myriad fields including tax,[55] welfare and poverty law,[56] family law,[57] constitutional law,[58] and private law.[59] Yet relatively little has been written about liberalism's implications for the minimum wage and other basic labor-

51. RAWLS, FAIRNESS, *supra* note 6, at 162–63.

52. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1 (1987).

53. *See* RAWLS, THEORY, *supra* note 6, at 8–9 (distinguishing ideal or "strict compliance" theory from nonideal or "partial compliance" theory).

54. For example, while Rawls argued that a social minimum covering basic needs would be a constitutional essential, he held that the difference principle should not be accorded constitutional status since individuals could disagree in good faith regarding what it required. RAWLS, FAIRNESS, *supra* note 6, at 47–49.

55. *See* Alstott, *supra* note 10, at 980–81 (including Rawls on a short list of liberal scholars supporting a basic income). *Compare* Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 51 TAX L. REV. 363, 364 (1996) (summarizing Rawls's justifications for the estate tax and progressive income taxation), *with* Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 291–97 (1994) (critiquing Rawls's justifications for the estate tax).

56. *See generally* Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

57. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 89–109 (1989) (examining the implications of Rawls's theory for gender, women, and the family).

58. *See generally* Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 FORDHAM L. REV. 1407 (2004).

59. *See infra* notes 72–78 and accompanying text.

market regulations,[60] and various liberals who have treated the minimum wage have tended to join utilitarians in criticizing it.[61]

Rawls himself set the template. In *Theory* he stated that once a robust social minimum is in place, "it may be perfectly fair that the rest of total income be settled by the price system" and that addressing needs through transfers would generally "be more effective than trying to regulate income by minimum wage standards, and the like."[62] This implies that, once the difference principle is satisfied, utilitarian critiques of the minimum wage may properly influence subsequent policy analysis. Yet the argument is stated offhandedly, akin to dicta, making its precise contours unclear. For example, Rawls does not assert that the minimum wage is inconsistent with liberal principles, just that it is less "effective" than transfers at ensuring a fair distribution, and he only states that eliminating the minimum wage "may" be fair, leaving open the possibility that it is defensible, whether to equalize resources or on other grounds.[63]

A passage in Rawls's later work has led some to ask whether minimum wage laws are inconsistent with liberal commitments to individual liberty.[64] Responding to Nozick's arguments that any effort to

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60. *See* Seanna Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 FORDHAM L. REV. 1643, 1643 (2004) (arguing that "the precarious presence of race and labor in Rawls's theory has not generated the same attention" as the question of gender); Zatz, *supra* note 14, at 4–6 (noting, tacitly, liberalism's failure to influence debates over the minimum wage).

61. *See infra* notes 63, 73, 88 and accompanying text.

62. RAWLS, THEORY, *supra* note 6, at 245.

63. Ronald Dworkin's influential interpretation of Rawls's theory, which holds that a liberal egalitarian state must correct for accidents of birth but not for individuals' own bad choices, DWORKIN, SOVEREIGN VIRTUE, *supra* note 6, at 5, is also ambiguous regarding such questions. On the one hand, Dworkin criticizes the "laissez-faire labor market" for ignoring human needs, *id.* at 90, and argues that liberals need not always prefer to redistribute via taxation rather than regulation, Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113, 133 (Stuart Hampshire ed., 1978). On the other, Dworkin does not consider labor-market regulations in any detail, focusing instead on developing the case for classical forms of social insurance, and his proposal for job "auctions" to ensure an equitable distribution of job-related rents seems to encapsulate a preference for labor-market deregulation. *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 6, at 94–95. Dworkin's theory has sparked a wide debate on "responsibility-catering egalitarianism." *See* G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 908 (1989) ("I believe that the primary egalitarian impulse is to extinguish the influence on distribution of both exploitation and brute luck."); John E. Roemer, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, 22 PHIL. & PUB. AFF. 146, 147 (1993) (characterizing the "egalitarian ethic" as holding "that society should indemnify people against poor outcomes that are the consequences of causes that are beyond their control, but not against outcomes that are the consequences of causes that are within their control" (emphasis omitted)).

64. *See, e.g.*, Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598, 598–99 (2005) (arguing that the "conventional view of Rawlsian political philosophy is that the private law lies outside the scope of the two principles of justice—it is not part of the 'basic structure' of society, which, in this view, is limited to basic constitutional liberties and the state's system of tax and transfer" (citing) CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 17, and Arthur Ripstein, *The Division of*

maintain distributive justice over time would require constant interference with individual conduct,[65] Rawls proposed an institutional "division of labor" between rules of the basic structure—comprising mainly constitutional law and redistributive taxation—and "another set of rules that govern the transactions and agreements between individuals and associations (the law of contract, and so on)," which "are framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints."[66] Various scholars have interpreted this as an argument that private law should be insulated from distributive questions, on the grounds that a liberal state should not make individual citizens responsible for other citizens' distributive outcomes.[67]

Applied to minimum wage laws, however, such concerns are exaggerated for at least two reasons. First, while some commentators treat the minimum wage as a rule of contract akin to unconscionability,[68] the analogy is not entirely apt. The minimum wage applies to all covered labor contracts, not just contracts that offend a court's sense of fairness, and it requires employers to pay standard wages, not wages that are "fair" under the circumstances.[69] As a result, the minimum wage is *not* agent-specific in a manner that triggers concerns about predictable contracting.

Second, regardless of whether requiring all transactions to advance distributive justice would thwart individual liberty, it is appropriate to ensure that the background legal rules governing those transactions advance

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Responsibility and the Law of Tort, 72 FORDHAM L. REV. 1811, 1813 (2004) (1981))); *id.* at 600 (classifying minimum wage laws among private law rules including unconscionability that would, on the conventional view, fall outside the Rawlsian basic structure); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 473 (1980) (citing the minimum wage as one example of a contract law rule "deliberately intended to promote a distributional end").

65. *Compare* NOZICK, *supra* note 7, at 163 (developing a libertarian argument), *with* RAWLS, FAIRNESS, *supra* note 6, at 52 & n.18, 53–54 (clarifying that his "division of labor" argument is a response to Nozick).

66. RAWLS, LIBERALISM, *supra* note 6, at 268.

67. *See* Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 105 (2008) ("[P]revailing academic opinion is that distributive justice is irrelevant to private law."); Kronman, *supra* note 64, at 473 & n.9 (interpreting Rawls himself to hold that while "some compulsory redistribution of wealth is morally acceptable . . . [or] even required," the "legal rules that govern the process of private exchange [should] be fashioned without regard to their impact on the distribution of wealth in society"). *But see* Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391 (2006) (arguing that Rawls's division of labor accommodates corrective and distributive justice within broader Kantian commitments to autonomy); *id.* at 1432 (arguing that this Kantian approach may cast "severe inequalities of bargaining power between employers and workers . . . as forms of dependence" incompatible with the social responsibility to enable the conditions of individual autonomy).

68. *See* Kordana & Tabachnick, *supra* note 64, at 600; Kronman, *supra* note 64.

69. Put differently, the minimum wage is a rule, while unconscionability is a standard. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.").

distributive justice.[70] After all, an egalitarian liberalism that forbade *all* statutory regulations of private conduct would seem indistinguishable from libertarianism; and in fact, Rawls made clear several pages later in the same text that the difference principle "applies to the announced system of public law and statutes and not to particular transactions,"[71] presumably including the labor-market regulations. Within a liberal framework, the question therefore becomes whether minimum wage laws violate the first principle of justice by infringing individual liberty in some way other than through effects on private ordering—or, alternatively, whether such laws tend to undermine or thwart the difference principle.

Liberal advocates of basic income policies have developed both ideas. For example, during 1990s debates over welfare reform and its aftermath, the tax law scholar Anne Alstott advocated repealing minimum wage laws.[72] Alstott's argument draws explicitly on Rawls, Dworkin, and other liberals who "defend the core values of equality of resources, neutrality toward visions of the good life, and individual freedom."[73] To maximize the freedom of the worst off, Alstott argues, the social minimum must be severed entirely from work requirements through unconditional cash grants.[74] Such grants would reduce women's economic reliance on men[75] and would enable the poor to reject bad jobs, to invest in their own education, to start a business, or to engage in caregiving or community service.[76] In this view, wage subsidies and other work-linked benefits such

70. *See* Kronman, *supra* note 64, at 500–01 (arguing that Rawls's division of labor permits rules governing transactions to be evaluated under metrics of distributive justice, even if individual transactions cannot); *see also* Kordana & Tabachnick, *supra* note 64, at 621 (arguing that it is "the complete scheme of all legal and political institutions," rather than, say, "the rules of contract law," that "is directly answerable to the difference principle"); Stephen Perry, *Ripstein, Rawls, and Responsibility*, 72 FORDHAM L. REV. 1845, 1854 (2004) (arguing that Rawls's division of labor reflects pragmatic concern that private law rules be simple and easily understood).

71. RAWLS, LIBERALISM, *supra* note 6, at 283.

72. Alstott, *supra* note 10, at 972 ("If the poor were guaranteed a modest income, the government could more readily reduce or eliminate the minimum wage and other market regulations adopted in the name of fairness."); *see also id.* at 1007 (arguing the minimum wage is one of "the most entrenched barriers to the operation of a free labor market" and thus is a "labor-market obstacle[]" for low-skilled workers); *id.* at 1005 (arguing for a set of policies that include cash grants, measures to combat employment discrimination, welfare reform, and "reduc[ing] regulation of the labor market").

73. *Id.* at 980; *see also id.* at 981 (arguing that Ronald Dworkin's refinement of Rawls "offers a distinctive liberal justification for cash grants to low-earners, financed by a progressive income tax").

74. *Id.* at 983 (arguing that "[c]ompared to an employment subsidy, a cash payment enhances the opportunities of the person with low earnings capacity" by enabling them to choose whether or not to accept work); *see also id.* at 971 (arguing that a "program of unconditional cash grants would enhance the freedom and economic security of the least advantaged").

75. ACKERMAN & ALSTOTT, *supra* note 30, at 207–08.

76. Alstott, *supra* note 10, at 971.

as the EITC are illiberal insofar as they rest on "mistaken or morally dubious claims about the intrinsic or instrumental value of paid work."[77]

But Alstott does not just argue that liberal principles tend to favor unconditional cash grants—she also argues that liberals should disfavor labor-market policies that tend to contract the low-wage job market, including minimum wages.[78] Her arguments draw in part on basic liberal commitments to neutrality, in particular a worry that the liberal state cannot link redistribution solely to employment regulations without violating the liberal state's injunction not to promote a vision of the good.[79] But the thrust of her argument combines an empirical claim about the employment-level effects of minimum wages with a liberal commitment to maximizing the economic position of the worst off. Accepting the neoclassical account of labor markets,[80] Alstott describes "regulatory barriers to employment, like the minimum wage" as one of the major reasons why the poor have difficulty finding work.[81] Maximizing their freedom requires maximizing their employment opportunities, she argues, and, therefore, repealing the minimum wage along with "other regulation that artificially raises wages at the low end" and therefore reduces labor demand.[82] Indeed, one of Alstott's

77. *Id.*; *see also* ACKERMAN & ALSTOTT, *supra* note 30, at 206 (criticizing Edmund Phelps for "locat[ing] the sense of justice in the workplace" rather than the broader society); *infra* Part IV(B).

78. *See infra* notes 76–80 and accompanying text. Alstott has moderated this stance in more recent work. *See* Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, LAW & CONTEMP. PROBS., Winter 2010, at 285, 298–99 (discussing the declining purchasing power of the minimum wage but not criticizing the minimum wage per se).

79. *See, e.g.*, Bruce Ackerman & Anne Alstott, *Why Stakeholding?*, *in* REDESIGNING DISTRIBUTION 43, 44 (Erik Olin Wright ed., 2006) ("[R]espect for the individual requires respect for her choices—to work in the home, at a paid job, or not at all."). Such statements imply that liberal state neutrality disfavors labor-market regulations per se on the grounds that such regulations inevitably valorize work over other sorts of activity; at other times, however, Alstott implies that state neutrality disfavors labor-market regulations only relative to transfers that are not linked to work. *See* ACKERMAN & ALSTOTT, *supra* note 30, at 205 (arguing that "modest [minimum wage] hikes might not be too harmful," but that "the big increase needed to make a real difference . . . could have catastrophic consequences").

80. *See* Alstott, *supra* note 10, at 1009 (noting her general acceptance of the neoclassical model).

81. *Id.* at 1004. While Alstott draws on William Julius Wilson's work in support of this argument, Wilson does not actually make that argument. *See id.* at 1004, 1007 (listing the "four labor market obstacles that Wilson identifies," including "labor-market regulation," and suggesting that "one might add" the minimum wage to the examples of such regulation that Wilson supplies).

82. *Id.* at 1008–09. In making this argument, she implicitly defines poor, urban, unskilled workers as the worst off, a definition narrower than Rawls's definition of the worst off as either a social group with limited talents such as "unskilled worker[s]," or as a discrete stratum based on "relative income and wealth." RAWLS, THEORY, *supra* note 6, at 98. This difference might be consequential in certain instances: if the worst off are defined more broadly, improving the lot of unskilled workers as a whole may be the best means of ensuring justice even if doing so harms some subgroup of workers. But Alstott's (and Rawls's) adoption of the neoclassical critique of minimum wage laws renders the distinction irrelevant—even if defined broadly, the

affirmative arguments for unconditional cash grants is that their implementation might "help clear the way" for such deregulation.[83]

Alstott is not alone. In a series of prominent works, the philosopher and political economist Philippe Van Parijs has defended an unconditional basic income as the optimal means of implementing liberal principles[84] and has argued that such an income be set at the highest sustainable level—not the most efficient level—in order to maximize the resources available to the worst off.[85] Yet Van Parijs criticizes unionization and minimum wages as partial barriers to equality[86] and even proposes taxes to eliminate job-related rents.[87]

Utilitarians and (certain) liberal egalitarians therefore converge in rejecting the minimum wage as a mechanism of wealth redistribution.[88] These are powerful arguments. Part II will not seek to fully rebut them, but rather to indicate their shortcomings. Before treating such issues, however, subpart I(C) discusses extant defenses of the minimum wage.

C. *Extant Defenses of the Minimum Wage*

Labor and employment law scholars have rarely defended the minimum wage with the sort of intellectual firepower deployed to critique it. As one scholar observed recently, theorizing about the minimum wage is "tragically moribund," with arguments such as Shaviro's "hegemonic, in the sense that counterarguments largely remain within the same terms of debate while seeking to eke out a victory nonetheless."[89] This is

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macroeconomic costs that result from cartelizing the low-wage labor market would reduce unskilled workers' net utility.

83. Alstott, *supra* note 10, at 1008–09.

84. Philippe Van Parijs, *Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income*, 20 PHIL. & PUB. AFF. 101, 102 (1991) ("[A] defensible *liberal* theory of justice, that is, one that is truly committed to an equal concern for all and to nondiscrimination among conceptions of the good life, does justify . . . a substantial *unconditional basic income*.").

85. VAN PARIJS, *supra* note 29, at 30–40.

86. *See id.* at 107, 188–89, 211–13.

87. *Id.* at 113–14 (discussing job-related rents); Philippe Van Parijs, *Basic Income: A Simple and Powerful Idea for the 21st Century, in* REDESIGNING DISTRIBUTION, *supra* note 79, at 16 (arguing that "employment rents" should be taxed to provide for basic income).

88. In fact, some of Shaviro's criticisms of the minimum wage echo egalitarian liberal ideals of justice. *See* Shaviro, *supra* note 5, at 458 (stating that "[o]ne need not be a Rawlsian to be uncomfortable with the tradeoff of helping the relatively poorly-off in exchange for hurting the worst-off," i.e., those left unemployed by the minimum wage); *id.* at 417 (observing that burdens of job loss, underemployment, and black-market employment will fall disproportionately on women, persons of color, and undocumented immigrants or others "who can credibly commit against turning the employer in"); *see also* PHELPS, *supra* note 5, at 138 (arguing that the fairest way to divide the surplus from productive activity is a version of maximin—"delivering the maximum amount possible to the least advantaged").

89. Zatz, *supra* note 14, at 3–4; *see also* Oren M. Levin-Waldman, *The Rhetorical Evolution of the Minimum Wage*, 3 RHETORIC & PUB. AFF. 131, 131 (2000) ("In recent years, the rhetoric

particularly striking given the minimum wage's ongoing political popularity, as well as its centrality to recent campaigns for economic justice among low-wage and immigrant workers.[90] Federal wage-and-hour litigation is also an important book of business for employment law firms, and state and federal authorities have often increased resources devoted to wage-and-hour enforcement in recent years.[91] If utilitarian and liberal critics are correct, these efforts are misguided. This subpart analyzes existing defenses of the minimum wage and then lays the groundwork for a new defense.

Two prominent arguments for the minimum wage can be set aside quickly. First, some minimum wage defenders dispute the empirics of utilitarian (and liberal) critiques, drawing on evidence that minimum wage laws do not noticeably increase unemployment.[92] As noted above, this Article will generally assume for the sake of argument that the minimum wage reduces demand for unskilled labor. Second, much scholarship simply assumes the normative validity of the minimum wage and focuses on how best to enforce the law.[93] Such efforts are valuable given the

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[around the minimum wage] has narrowed to a debate that revolves around a youth disemployment effect on the one hand and assisting the poor on the other.").

90. Zatz, *supra* note 14, at 3–4 (citing, *inter alia*, JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005) (describing use of minimum wage litigation as part of immigrant-worker organizing); Benjamin Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2725–26 (2008) (same)).

91. *See* Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 728 (2010) ("Claims by workers that they are not being paid lawfully have quadrupled over the last ten years."); Allen Smith, *DOL Ramps Up Wage and Hour Enforcement*, SOC'Y FOR HUM. RESOURCE MGMT. (May 11, 2012), www.shrm.org/legalissues/federalresources/pages/dolwageandhour.aspx (citing a former Bush Administration official for the statistic that "[t]here are 50 percent more federal wage and hour investigators now [in 2012] than in 2008").

92. *See* PAUL K. SONN ET AL., NAT'L EMP'T LAW PROJECT, FAIR PAY FOR HOME CARE WORKERS: REFORMING THE U.S. DEPARTMENT OF LABOR'S COMPANIONSHIP REGULATIONS UNDER THE FAIR LABOR STANDARDS ACT 2 (2001), *available at* http://www.nelp.org/page/-/Justice/2011/FairPayforHomeCareWorkers.pdf (arguing that extending full wage-and-hour protections to home-care workers will "vindicate the FLSA's goals of fighting poverty, spreading work and creating jobs across our economy"); Jared Bernstein, *Raising the Minimum Wage: The Debate Begins . . . Again*, HUFF POST POLITICS (Feb. 14, 2013, 3:16 PM), http://www.huffingtonpost.com/jared-bernstein/raising-the-minimum-wage_b_2688688.html (defending the minimum wage in terms of resource distribution); T. William Lester et al., *Raising the Minimum Wage Would Help, Not Hurt, Our Economy*, CENTER FOR AM. PROGRESS, http://www.americanprogress.org/issues/labor/news/2013/12/03/80228/raising-the-minimum-wage-would-help-not-hurt-our-economy-2/ (last updated Jan. 2, 2014) (focusing on economic effects of the minimum wage, including lack of negative employment effects).

93. This is the approach of the leading article in the field, Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 988 (1999) (calling for a new approach to joint liability because those "most in need of minimum-wage protection . . . are frequently left with legal recourse only against itinerant, judgment-proof labor contractors when they are not paid the $5.15 per hour to which they are entitled"). *See generally* Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise*

complexities of legal institutional design but they beg the question why minimum wage laws in particular cry out for enforcement.

A third approach does draw on concerns of justice, in particular the widespread intuition that good wages are a matter of basic fairness.[94] But arguments about fairness in the wage bargain are ambiguous "as to whether the offense lies in the low value placed on another's labor or in the low purchasing power that results."[95] If the offense is low purchasing power, then Shaviro et al. have the upper hand: targeted transfers would be a more effective means of delivering additional resources to low-wage workers.

Increasing the social value attached to unskilled workers' labor is a more compelling normative basis for the minimum wage and, as argued in Part II, is a powerful rejoinder to utilitarian and liberal critiques. But that goal alone does not explain why employers rather than society as a whole should bear the associated economic burdens. After all, individual employers do not violate any classical moral duty to individual workers simply by paying market wages that fall below the statutory minimum. Such employers do not "victimize" or "exploit" or "coerce" workers in a moral sense,[96] nor do they "steal" from such workers. Rather, the wage bargain takes place at the end of a long and complex causal chain. Low-wage workers have few marketable skills and must compete with many other workers; employers face imperatives to keep wages low due to capital and product market conditions. Moreover, underenforcement of such laws may also lead to pervasive noncompliance within an industry, creating incentives for individual employers not to comply. It is therefore normal for workers to have no choice but to accept immiserating employment without any individual employer acting coercively, as noted by diverse scholars including libertarians, legal realists, and Analytical Marxists.[97]

Disaggregation, 5 EMP. RTS. & EMP. POL'Y J. 101 (2011) (focusing on questions of enforcement rather than normative desirability); Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523 (2012) (same); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010) (same); Ruan, *supra* note 91 (same); Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373 (2007) (same).

94. *See, e.g.*, Levin-Waldman, *supra* note 89, at 132 ("[P]eople who work are entitled to an income that enables them to live in dignity and out of poverty because it is a matter of fairness."); *see also* POLLIN ET AL., *supra* note 4, at 21 (defining a living wage as "a wage level that offers workers the ability to support families to maintain self respect and to have both the means and the leisure to participate in the civic life of the nation"); Glynn, *supra* note 93, at 101–02 (discussing the role of wages in the International Labor Organization's "decent work" agenda).

95. Zatz, *supra* note 14, at 6.

96. *Contra* Goldstein et al., *supra* note 93 ("Garment workers, too, have long been victimized by employers who have sought to hide behind judgment-proof middlemen."); Ruckelshaus, *supra* note 93, at 373 ("Almost every growing sector in the bottom half of our economy—health care, child care, retail, building services, construction, and hospitality—is plagued by penurious employers who drag down working conditions for everyone.").

97. *See* NOZICK, *supra* note 7, at 263–64 (claiming that there is no need for employers to use coercion for employees to have limited options); Robert L. Hale, *Coercion and Distribution in a*

Arguments based on individual moral fault therefore do not offer a coherent or convincing justification for the minimum wage.

As argued in Parts II and III, employer duties can nevertheless be grounded in considerations of justice—on the fairness of institutions that determine the division of advantages from social cooperation—once the social effects of the division of labor are taken into account. The seed lies in another classic defense of the minimum wage: that it corrects for unequal bargaining power between employers and employees.[98] Granted, since power inequality is pervasive in market economies, its mere existence does not identify outcomes that cry out for regulation.[99] But employers' power over workers is an undeniable and pervasive fact, particularly in the low-wage labor market. That power asymmetry is important due to its systemic effects: innumerable transactions shaped by that unequal power can lead to both individual and social harms without any particular employer acting immorally.[100]

Developing the case for an employer duty nevertheless requires a more detailed account of the connection between extremely low wages and dignitary harms, and an account of why such harms trigger concerns of justice. Part II now turns to such questions.

II. Social Equality Defined and Defended

Minimum wage laws help ensure that low-wage workers stand in relations of equality to others. This Article will call this ideal "social equality," and will call those who emphasize it "social egalitarians."[101] As Professor Samuel Bagenstos argues in a recent article, the core social egalitarian goal is to create "a society in which people regard and treat one

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Supposedly Non-Coercive State, 38 POL. SCI. Q. 470, 472–73 (1923) (observing that the background structure of property law forces individuals to work in order to survive); John E. Roemer, *Should Marxists Be Interested in Exploitation?*, 14 PHIL. & PUB. AFF. 30, 30–33 (1985) (arguing that low wages and bad working conditions are, economically speaking, a result of property entitlements, not labor exploitation per se).

98. *See* Zatz, *supra* note 14, at 19 (discussing the pervasiveness of such arguments).

99. *Id.* at 19–21; *see also* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 615–20 (critiquing arguments based on unequal bargaining power).

100. *See* THOMAS W. POGGE, REALIZING RAWLS 11 (1989) (arguing that Rawls's focus on the basic structure demonstrates how "injustice can be systemic . . . without being traceable to any manifestly unjust actions by individuals or groups"). *See generally* Bagenstos, *supra* note 14 (discussing the relationship between social equality and employment-at-will, employee privacy, and employee political speech).

101. *See* Bagenstos, *supra* note 14, at 232–35 (summarizing others' descriptions of social equality). Other terms for the same or very similar ideals include "social citizenship," William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999), and "democratic equality," DANIELS, *supra* note 20, at 241; Anderson, *supra* note 20, at 289; Cohen, *supra* note 20, at 728. *See also* RAWLS, THEORY, *supra* note 6, at 75–83 (discussing the relationship between democratic equality and the difference principle).

another as equals . . . a society that is not marked by status divisions such that one can place different people in hierarchically ranked categories."[102] For social egalitarians, a fair distribution of material resources is extremely important. But "the subject of social justice is wider than distribution."[103] It includes forms of private power within the workplace, the family, and elsewhere; differentiations based on class, race, sex, gender, and disability; and pernicious social norms that mark particular groups as morally deficient.[104] Indeed, for some prominent social egalitarians, the fundamental goal of establishing "a community in which people stand in relations of equality to others" helps explain why a fair distribution of resources is important in the first place.[105]

Social equality can be defended within several different philosophical traditions. Its most prominent proponent is likely the left communitarian Michael Walzer, who describes democratic citizenship as "a status radically disconnected from every kind of hierarchy" and argues that equal relations among citizens define a just society.[106] In such a society, he writes, there will be "no more bowing and scraping, fawning and toadying; no more fearful trembling; no more high-and-mightiness; no more masters, no more slaves."[107] The republicanism of Philip Pettit draws on similar ideals.[108] Pettit defends a conception of freedom as nondomination or independence from arbitrary power—including both public and private power—that distinguishes it from what he describes as liberalism's focus on freedom as

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102. Bagenstos, *supra* note 14, at 227 (quoting David Miller, *Equality and Justice*, 10 RATIO 222, 224 (1997)); *see also* Scheffler, *supra* note 20, at 31 ("[T]he core of the value is a normative conception of human relations, and the relevant question . . . is what social, political, and economic arrangements are compatible with that conception.").

103. Young, *supra* note 20, at 91.

104. *See* Anderson, *supra* note 20, at 312 (describing how within inegalitarian social systems, "[t]hose of superior rank were thought entitled to inflict violence on inferiors, to exclude or segregate them from social life, to treat them with contempt, to force them to obey, work without reciprocation, and abandon their own cultures"); Young, *supra* note 20, at 96 (arguing that the most fruitful egalitarian approach to policy analysis may be "to supplement Rawls's normative political philosophy" with "social theorizing" that elucidates the effect of social structures upon individuals' life chances and autonomy).

105. Anderson, *supra* note 20; *id.* at 326 (noting that while the difference principle "might require considerable sacrifices in the lower middle ranks for trifling gains at the lowest levels," social equality (which Anderson terms "democratic equality") is concerned more with whether income inequalities can be converted into "status inequality—differences in the social bases of self-respect, influence over elections, and the like").

106. WALZER, *supra* note 20, at 277; *accord* David Miller, *Equality and Market Socialism*, *in* MARKET SOCIALISM: THE CURRENT DEBATE 298, 298–312 (Pranab K. Bardhan & John E. Roemer eds., 1993) (describing a similar ideal of social equality).

107. WALZER, *supra* note 20, at xiii.

108. *See* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163, 165 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (positing that one enjoys freedom to the extent that no other person or group has "the capacity to interfere in their affairs on an arbitrary basis"). *See generally* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997) [hereinafter PETTIT, REPUBLICANISM].

noninterference.[109] In his telling, republican freedom "requires the capacity to stand eye to eye with your fellow citizens, in a shared awareness that none of you has a power of arbitrary interference over another."[110] Commitments to social equality can also be rooted in the more philosophical aspects of Marx's thought. G.A. Cohen's critique of Rawlsian liberalism, for example, draws upon Marx's argument that earlier (nonegalitarian) liberalism provided a false vision of human emancipation insofar as it only required that citizens be equal in their relationship to the state—"an alien superstructural power"—rather than in their everyday lives with one another.[111] In a truly egalitarian society, Cohen argues, each individual's "freedom and equality [would be] expressed 'in his everyday life, his individual work, and his individual relationships.'"[112]

Yet while Walzer, Pettit, and Cohen are critics of liberalism, Rawls himself was a powerful advocate of social equality, and many of its most influential contemporary proponents—including Elizabeth Anderson, Iris Marion Young, and Samuel Scheffler—are liberals.[113] Rawls's explanation of the underlying normative bases of the difference principle is illustrative. That principle is not a mechanical test for the validity of any particular distributive outcome, nor does it require charity.[114] Rather, it is "a principle of reciprocity."[115] It is the only appropriate distributive criterion in a democracy, Rawls argued, for it will limit class inequalities and hierarchies of social status across generations.[116] Doing so is critically important, moreover, not just because material inequality may threaten social stability, nor even because the worst off will be unable to exercise their basic liberties.[117] Rather, Rawls argued, a "confident sense of their own worth should be sought for the least favored and this limits the forms of hierarchy

109. PETTIT, REPUBLICANISM, *supra* note 108, at 7–11.

110. *Id.* at 5; *see also* Nien-hê Hsieh, *Rawlsian Justice and Workplace Republicanism*, 31 SOC. THEORY & PRAC. 115, 116 (2005) (proposing that justice at work requires "workplace republicanism" informed by both Rawls's justice-as-fairness and Pettit's theory of republican freedom as nondomination).

111. G.A. COHEN, RESCUING JUSTICE AND EQUALITY 1 (2008) (drawing on KARL MARX, *On the Jewish Question*, *in* WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY, 216, 221 (D. Easton & Kurt H. Guddat eds., 1967)).

112. *Id.* (quoting MARX, *supra* note 111).

113. *See generally, e.g.*, Anderson, *supra* note 20; Cohen, *supra* note 20; Daniels, *supra* note 20; Scheffler, *supra* note 20; Young, *supra* note 20.

114. *See* RAWLS, FAIRNESS, *supra* note 6, at 139 (arguing that the worst off "are not . . . the unfortunate and unlucky—objects of our charity and compassion, much less our pity—but those to whom reciprocity is owed as a matter of political justice").

115. *Id.* at 64.

116. RAWLS, THEORY, *supra* note 6, at 158.

117. *See* RAWLS, FAIRNESS, *supra* note 6, at 130–32 (discussing equal citizenship and the difference principle).

and the degrees of inequality that justice permits."[118] This helps explain why Rawls viewed the "social bases of self-respect" as likely the most important of the primary social goods: severe inequalities can lead "those of lower status to be viewed both by themselves and by others as inferior."[119] While deeper tensions between social equality and liberal egalitarian thought remain, and will be taken up again in Part IV, there is clearly a sort of "overlapping consensus" among Walzer's left communitarianism, Pettit's neorepublicanism, Cohen's liberal-inflected Marxism, and Rawls's own thought: all view equalities of social status as paramount in a democratic society.[120]

Agent-specific duties, in the broad sense of regulations that shape "private" behavior rather than simply transfer resources, are often key to ensuring social equality. This is clear from the historic demands and achievements of the labor, feminist, civil rights, disability, and LGBT movements. Such movements seek not just wealth redistribution but also changes in workplace relations, norms regarding sexual behavior, and the construction of public spaces to better enable members to participate as equals in social, economic, and political life.[121]

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118. RAWLS, THEORY, *supra* note 6, at 107; *cf.* Cohen, *supra* note 20, at 728–29 (identifying as a key element of Rawls's theory "the [democratic] ideal that, as citizens, we are free and equal, however much our social class, our talents, our aspirations, or our fortune may distinguish us and that our institutions should respect our freedom and equality").

119. RAWLS, FAIRNESS, *supra* note 6, at 59, 131; *see also id.* at 131 (arguing that severe economic inequalities are problematic because they "may arouse widespread attitudes of deference and servility on one side and a will to dominate and arrogance on the other"); KYMLICKA, *supra* note 46, at 90 (arguing that Rawls's focus on social roles embedded within particular jobs indicates his sense that distributive justice is not just a matter of resource distribution).

120. From yet another perspective, William Forbath has argued that the social-citizenship tradition's commitments to decent work are consistent with both civic-republican ideals of "mutual respect or equal standing" and Rawlsian efforts to "secure the social bases of self-respect." William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1876 (2001); *see also* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 165–67 (2003) (describing the role of decent work in creating norms of citizenship); Linda Bosniak, *Citizenship and Work*, 27 N.C. J. INT'L L. & COM. REG. 497 (2002) (laying out a conception of citizenship in which "the relationship of work to citizenship is one of necessity; a person needs to have access to decent work in order to enjoy equal citizenship").

121. Anderson, *supra* note 20, at 319–20. This is true even within the labor movement, the social movement most clearly associated with pecuniary gains. The slogan "Bread and Roses," for example, has long been shorthand for the dignitary and other nonpecuniary goals of workers' movements. *Bread and Roses*, WIKIPEDIA, http://en.wikipedia.org/wiki/Bread_and_Roses (last modified Apr. 11, 2014); *see also* Forbath, *supra* note 120, at 1831–38 (discussing the influence of social-citizenship ideals on New Deal policies); *id.* at 1829 (arguing that the Populist movement "envisioned a 'Reconstructed' political economy as the vehicle for securing the constitutional norms of decent livelihoods, independence, responsibility and dignifying work"); *id.* at 1842 (outlining the role of social citizenship in 1960s civil-rights-movement demands for antidiscrimination laws and full employment policies).

Debates between Rawls and certain left-liberal feminists are illustrative. In later work, responding to criticism that *Theory* basically ignored gender equality, Rawls argued that justice within the family required that women who perform unpaid care work should have some legal entitlement to part of their husbands' earnings.[122] But this "solution" to the problem of the gendered division of labor "leaves unquestioned . . . the structural division between private domestic care work and public wage and salaried work."[123] Gender inequality often depends upon such structures. Some feminists have thus argued for more extensive changes to background rules, such as significantly greater public support for caregiving, as well as employment regulations to better enable both men and women to engage in caregiving.[124] Others have argued that gender equality "may require a change in social norms, by which men as well as women would be expected to share in caretaking responsibilities."[125]

Another salient example comes from disability-rights activism and law. Since individuals with disabilities may require extremely high subsidies to enjoy an average quality of life, they pose a problem for liberal efforts to eliminate contingencies of birth.[126] Regrettably, this led Rawls to disregard those with serious disabilities and has sparked debate among subsequent liberals around how to balance their resource needs with other distributive claims.[127] Such debates may miss the importance of the broader social construction of disability. Individuals with mobility restrictions, for example, confront a physical world that is not natural but rather designed around the needs and abilities of some normative group of nonelderly, "able-bodied" persons.[128] Fair treatment for those with disabilities thus would take the form not of cash transfers justified on the grounds of a purported inability to live fulfilling lives but of regulation and redesign of the social world so that the disabled can participate in it as equals.[129]

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122. RAWLS, FAIRNESS, *supra* note 6, at 167; *see also* OKIN, *supra* note 57 (critiquing Rawls's *Theory* from a feminist perspective).

123. Young, *supra* note 20, at 93.

124. *See id.*

125. Anderson, *supra* note 20, at 324.

126. *See* KYMLICKA, *supra* note 46, at 70–72 (summarizing the problem of natural inequalities).

127. *See* RAWLS, LIBERALISM, *supra* note 6, at 20 (setting outside the scope of his theory those with "temporary disabilities and also permanent disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense"); DWORKIN, SOVEREIGN VIRTUE, *supra* note 6, at 14, 59 (arguing that people with disabilities may "need more resources to achieve equal welfare" mainly "because they are able to achieve less enjoyment or relative or overall success"); KYMLICKA, *supra* note 46, at 76–79 (discussing Dworkin's attempt to address the problem of natural disadvantages).

128. *See generally* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (2009).

129. *See* Young, *supra* note 20, at 95–96 (arguing that Rawls's conception of the "'usual sense' in which people are cooperating members of society harbors" both pernicious prejudices

Existing disability law accordingly holds private parties such as employers and landlords to agent-specific duties of reasonable accommodation, in part on the theory that this will assist in the social integration of those with disabilities.[130]

The organization of work raises similar issues.[131] Part of the reason is that labor is not a true commodity, but what the political economist Karl Polanyi called a fictitious commodity.[132] "Labor is only another name for a human activity which goes with life itself," Polanyi wrote, "which in its turn is not produced for sale but for entirely different reasons."[133] Understood as the capacity to work, labor is an intrinsic characteristic of human life. It may be deployed for pay, as in wage work; it may be utilized to ensure the reproduction of human society, as in (generally unpaid) care work; or it may be deployed to build human institutions outside of the paid labor market, as in volunteer work for charities. But it cannot be stored or stockpiled, nor is it fungible—one worker's effort and skill will rarely be identical to another's.[134]

As a result, labor markets and labor processes are necessarily co-embedded with social relationships and institutions. Several examples should suffice to illustrate the point. For example, since employers must ensure that workers actually deliver a serious effort rather than shirking, "social relations in the workplace . . . involve negotiating a fragile balance between control and consent," between workplace discipline and incentives that motivate workers to perform well.[135] This insight is common to

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about the abilities and moral standing of "people with differing physical or mental impairments" and "often presupposes contingent physical structures . . . that make some people appear less capable than they would appear within altered structures and expectations").

130. 42 U.S.C. § 12112(b)(5)(A) (2006) (requiring reasonable accommodation in employment); *id.* § 12182(b)(2)(A) (requiring that landlords and other owners of places of public accommodation make "reasonable modifications in policies, practices, or procedures" to ensure access for the disabled).

131. *See* Young, *supra* note 20, at 93 (discussing the role of work and the division of labor in an egalitarian society); *see also* WALZER, *supra* note 20, at 165–83 (arguing that those who perform hard and dirty work must not become a permanent caste); Anderson, *supra* note 20, at 321 (discussing the role of work in democratic equality).

132. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 75–76 (Beacon Press 2001) (1944).

133. *Id.* at 75.

134. *Id.* at 75–76; *see also* Judy Fudge, *Labour as a Fictive Commodity: Radically Reconceptualizing Labour Law*, *in* THE IDEA OF LABOUR LAW 120, 129 (Guy Davidov & Brian Langille eds., 2011) (noting that "[p]olitical economists and sociologists have long described labour as a 'fictive commodity'" because it is "neither produced as a commodity, nor is its production governed by an assessment of its realization on the market," and it "cannot physically be separated from its owner," among other distinguishing attributes).

135. JAMIE PECK, WORK-PLACE, THE SOCIAL REGULATION OF LABOR MARKETS 23–24 (1996); *see also id.* at 23–45 (giving an overview of the differences between labor and standard commodities, as well as the literature on labor control and management problems within contemporary production).

Polanyi's work, to heterodox theories of managerial behavior,[136] and to theories of the firm that seek to explain the emergence and persistence of managerial power as a solution to the problem of shirking.[137] The social embedding of labor markets also underlies the vast literature on fairness norms on workers' and employers' behavior, which demonstrates among other things that employees' "effort depends upon the norms determining a fair day's work."[138]

The relationship between the economic and the social is also central to contemporary class theory.[139] While class and material inequality are often discussed together, they are analytically distinct concepts.[140] In some ways, economic inequality is to class as sex is to gender: on one side stands an economic or biological fact, on the other a set of norms that give that fact a social meaning.[141] Class does not emerge automatically out of an unequal

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136. *See* MICHAEL BURAWOY, MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM 4 (1979) (outlining his thesis that the balance between conflict and consent transcends "structural" considerations and is tethered both to the "culture" of the "shop floor" as well as the political and ideological considerations that underpin this "culture"); PECK, *supra* note 135, at 23–24 (arguing that the balance between control and consent illustrates that "managerial despotism" is rarely conducive to securing and reproducing a work force and how this balance practically influences firms' hiring and firing behavior).

137. *See* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 794 (1972) ("Monitoring or metering the productivities to match marginal productivities to costs of inputs and thereby to reduce shirking can be achieved more economically . . . in a firm.").

138. George Akerloff, *Labor Contracts as Partial Gift-Exchange*, 97 Q.J. ECON. 543, 543 (1982); *see also* ROBERT M. SOLOW, THE LABOR MARKET AS A SOCIAL INSTITUTION 22 (1990) (noting the relationship between wage rates and social status); Ernst Fehr et al., *Reciprocal Fairness and Noncompensating Wage Differentials*, 152 J. INSTITUTIONAL & THEORETICAL ECON. 608, 610 (1996) (supporting the "gift exchange" theory of wage determination by showing that there tends to be a positive correlation between a firm's profitability and the wage it offers its workers); Christine Jolls, *Fairness, Minimum Wage Law, and Employee Benefits*, 77 N.Y.U. L. REV. 47, 48 (2002) (emphasizing the role of bounded self-interest as it pertains to reciprocal fair behavior and employment relationships); Mark G. Kelman, *Progressive Vacuums*, 48 STAN. L. REV. 975, 986 n.21 (1996) (reviewing MICHAEL J. PIORE, BEYOND INDIVIDUALISM (1995)) (discussing behavioral economics of the "efficiency wage" theory); Albert Rees, *The Role of Fairness in Wage Determination*, 11 J. LAB. ECON. 243, 243–44 (1993) (arguing that wages are not always determined by markets alone and that "fairness" factors into wage determination as a significant qualitative variable); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 206 (2001) ("Workers care a great deal about being treated fairly, and are willing to punish employers who have treated them unfairly, even at the workers' own expense[] . . . .").

139. Rawls frequently discussed justice in terms of class divisions. *See, e.g.*, RAWLS, THEORY, *supra* note 6, at 158 (discussing the effects of the difference principle upon class over time).

140. *See* Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEXAS L. REV. 1847, 1854–55 (1996) (defining "class" as "a structured system of inequality (as opposed to a simple unequal distribution of economic outcomes among individuals) that is intrinsic to the economic realm and that is not fundamentally altered by the economic mobility of individuals").

141. *See* Roemer, *supra* note 97, at 39, 63 (differentiating between "domination$_1$," "the maintenance and enforcement of private property in the means of production," and "domination$_2$," "the hierarchical and autocratic structure of work," the latter of which is central to class theory but

distribution of resources but rather is rooted in the micropolitics of everyday interactions; others' behavior helps individuals to intuitively grasp their own class position and thus help reproduce class divisions over time.[142] While many fields are important to this process, particularly the family,[143] labor markets and workplace experiences are utterly central to it. Employment provides the bulk of most individuals' resources, and power relationships within employment help shape individuals' and their children's senses of self-worth: as a leading class theorist argued, in the contemporary division of labor, the working class and poor become "imbued with a sense of their [own] cultural unworthiness."[144]

Finally, the relationship between workplace practices and hierarchical social divisions is clear in low-wage worker narratives, which refer often to the indignities of low-wage work.[145] A case in point is *Nickel and Dimed: On (Not) Getting by in America*, in which the investigative journalist Barbara Ehrenreich spent a year trying to survive on jobs paying around $6 or $7 an hour: "What surprised and offended me most about the low-wage workplace," Ehrenreich reflected, "was the extent to which one is required to surrender one's basic civil rights and—what boils down to the same thing—self-respect."[146] She confronted rules against "gossip" or even against talking to coworkers, mandated drug testing for menial positions,

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unimportant for resource distribution, and also distinguishing exploitation from domination (footnotes omitted)).

142. *See* PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE 177 (Richard Nice trans., 1984) ("The . . . economy of means is found in body language: here too, agitation and haste, grimaces and gesticulation are opposed . . . to the restraint and impassivity which signify elevation.").

143. *See, e.g.*, Malamud, *supra* note 140, at 1880–81 ("In the home environment one internalizes a set of understandings based at their core on the family's economic position—understandings about time, about the body, about what it is proper to want and what it is possible to achieve, about what it means to understand the world.").

144. BOURDIEU, *supra* note 142, at 251. Bourdieu's work resonates with ethnographic accounts of workers' identity formation; see, for example, RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS (1988), as well as the "labor process" literature, which considers the relationship between workers' experiences on the job and their class identification, for example, HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1974).

145. *See* STUDS TERKEL, WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO xxxi–ii (New Press 2004) (1974) ("It's not just the work . . . . It's the not-recognition by other people." (quoting Mike Lefevre, steelworker)); *id.* at 112–13 ("When it come to housework, I can't do it now. I can't stand it, cause it do somethin' to my mind. . . . My God, if I had somebody come and do my floors, clean up for me, I'd appreciate it. [But homeowners] don't say nothin' about it." (quoting Maggie Holmes, domestic)); *see also* WALZER, *supra* note 20, at 176 ("When a garbageman feels stigmatized by the work he does . . . the stigma shows in his eyes. He enters into collusion with us to avoid contaminating us with his lowly self. . . . Our eyes do not meet. He becomes a non-person." (internal quotation marks omitted)).

146. BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 1, 208 (2001).

searches of her person or property, and capricious punishment for trivial violations of workplace rules.[147] Such actions were particularly surprising, Ehrenreich writes, because they often seemed economically irrational: drug testing, for example, is quite expensive, particularly for restaurant servers who will be paid around $3 an hour. But they made sense, Ehrenreich postulates, as a means of imposing social distance: "If you are constantly reminded of your lowly position in the social hierarchy," she writes, "whether by individual managers or by a plethora of impersonal rules, you begin to accept that unfortunate status."[148]

To be clear, the sorts of generous redistributions that liberals have defended would be essential in a society committed to social equality; individuals who cannot satisfy their basic needs can hardly "stand eye to eye"[149] with the wealthy and powerful. Nevertheless, ensuring decent relations among individuals—and therefore decent work—has traditionally been less of a priority for post-Rawlsian liberals.[150] Social egalitarian theorists suffer from a reciprocal weakness: they have endorsed various labor-market regulations to address workplace status harms,[151] but have not considered in detail the possible costs of those regulations.[152] Part III now turns to such questions in the context of the minimum wage.

III. Minimum Wage Laws and Social Equality

This Part argues that minimum wage laws help ensure decent work and social equality for low-wage workers. Subpart III(A) addresses the effects of such laws on workers' self-respect. Minimum wage laws

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147. *Id.* at 208–13.

148. *Id.* at 210; *see also* WALZER, *supra* note 20, at 176 (discussing such "routines of distancing" as threats to social equality).

149. PETTIT, REPUBLICANISM, *supra* note 108, at 5.

150. *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 6, at 114–16 (making no mention of the social bases of self-respect as being among the primary goods and not discussing the difference principle as representing ideals of reciprocity); KYMLICKA, *supra* note 46, at 197 (asserting that both egalitarian liberals and analytical Marxists tend to focus on determining the "just claims of individuals" rather than social equality); VAN PARIJS, *supra* note 29, at 27 ("Perhaps one should depart from strict or maximal justice, for example, if doing so would enable us to make social relations more fraternal.").

151. *See, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 142 (1993) (arguing that the "[p]rotection of autonomy may sometimes require prohibiting the commodification of some things," including, most importantly, "goods embodied in the person, such as . . . the powers of productive and reproductive labor"); WALZER, *supra* note 20, at 174–83 (characterizing "hard" and "dirty" work as a "negative good" that must be distributed somehow and suggesting that reforms to enable more time off and democratic control of such work can alleviate the status harms associated with it); Anderson, *supra* note 20, at 326 (arguing that "[i]n performing routine, low-skill tasks, [low-wage] workers free other people to make more productive use of their talents," such that interventions such as the minimum wage may reflect a social "appreciation for the roles that low-wage workers fill").

152. *See* Anderson, *supra* note 20, at 325 (suggesting that the minimum wage "need not raise unemployment" where workers' productivity is also enhanced).

primarily enhance low-wage workers' self-respect by increasing their wages. This enacts basic moral imperatives that all work has value, that all employees deserve decent wages, and that employers rightly bear most of the associated costs. Minimum wage laws also enhance workers' self-respect by granting them formal legal entitlements against employers. Subpart III(B) then considers the economic costs and benefits of minimum wage laws and transfers. Minimum wage laws tend to deliver additional resources to low-wage workers as a group and to force employers and consumers to internalize some of the costs of extremely low-wage labor. While this may reduce demand for low-wage labor, that is generally a cost worth bearing to reduce work-based class and status divisions—particularly since direct transfers may exacerbate such divisions. Subpart III(B) closes by considering the proper balance among minimum wage laws, transfers, and other regulations in promoting decent work and social equality.

A. Effects of Minimum Wage Laws on Workers' Self-Respect

1. Wage Rates and Self-Respect.—Wages matter to our self-respect. This point is straightforward, even commonsensical. As the Nobel Laureate economist Robert Solow wrote in an influential study, "Wage rates and jobs are not exactly like other prices and quantities. They are much more deeply involved in the way people see themselves, think about their social status, and evaluate whether they are getting a fair shake out of society."[153] Wages are, of course, a primary means through which individuals meet their material needs. But the relationship between wages and respect runs deeper than resources per se since money is a dominant primary good in our society, one "readily converted into prestige and power."[154] Wages measure the value of our work, and signify our place within the class and status structure.[155]

At one extreme, societies have long dealt with the worst sorts of hard and dirty work by assigning it to "degraded people," ranging from slaves, to "'inside' aliens like the Indian untouchables," to racial minorities, and, of course, to women, all of whom have been understood not to deserve decent wages, or even any wages at all.[156] Given the all-too-recent historical context of slavery and serfdom, the very payment of wages is a powerful indication of workers' moral equality. Outside such extreme examples, low-wage employment is often painful, involving "violence—to the spirit

153. SOLOW, *supra* note 138.

154. WALZER, *supra* note 20, at 11; *see also id.* at 96–97 (noting the universality of money in capitalist societies).

155. *But see infra* subpart IV(B) (discussing threats to social equality that stem from our society's strong association of work with self-respect).

156. WALZER, *supra* note 20, at 165–66.

as well as to the body."[157] While not all workers risk physical injury, most still must submit to their employer's unilateral direction, often in jobs that carry little creativity and little hope of advancement.

Minimum wage laws compensate workers, however partially, for the difficulties and indignities of such work. Granted, money is an imperfect compensation for nonpecuniary harms, but it is important nevertheless. Higher wages enable workers to enjoy a higher material standard of living and perhaps to work less and spend more time on leisure. They also give tangible form to the moral equality between workers and employers. Every pay period, minimum wage workers receive a check from their employer for an amount greater than they would otherwise have received. This can have a profound effect on workers' view of their place in society: for example, after a 1999 living wage ordinance raised his wage nearly $2 per hour, a janitor at the Los Angeles airport remarked that, while he and his coworkers still did not make much money, "at least now with the living wage, we can hold our heads up high."[158]

The fact that employment is a bilateral and reciprocal relationship justifies the institutional form of minimum wage laws, i.e., the requirement that employers themselves pay higher wages. The harsh conditions and status harms of low-wage employment do not occur in a vacuum: employers and managers enjoy individualized and institutional benefits from workers' efforts, benefits that are not always shared with the rest of society. Those include profits as well as the higher social esteem and occupational autonomy that accompany entrepreneurship and management. Given such agent-specific benefits, and given that such benefits occur within social structures that impose reciprocal harms on employees, it seems entirely appropriate for employers to shoulder the bulk of the redistributive burdens imposed by minimum wage laws, rather than mediating all redistribution through the state.

Transfers simply have a different valence: they alter power relationships between workers and employers indirectly, if at all. While a robust basic income would enable workers to reject truly undignified work, it would not alter the legal rules that undergird the division of labor.[159] Employers would still enjoy the legal right to issue orders and low-wage workers would still need to obey. Altering parties' bilateral entitlements is therefore an appropriate policy response. Minimum wages are also far

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157. TERKEL, *supra* note 145, at xi.

158. Nancy Cleeland, *Lives Get a Little Better on a Living Wage*, L.A. TIMES, Feb. 7, 1999, at 1.

159. *See* VAN PARIJS, *supra* note 29, at 95 (arguing that unconditional basic income will "confer[] upon the weakest more bargaining power in their dealings with . . . potential employers," enabling them to reject the worst sorts of work).

more salient to workers than transfers.[160] As noted above, wages are paid weekly or biweekly by the employer, reflecting the employer's reciprocal duties toward workers; in contrast transfers come from the state, an abstract entity that typically exerts power over workers only indirectly. Wage subsidies would avoid some of these difficulties since workers receive money directly from their employer, but wage subsidies have other drawbacks, as discussed below.[161]

To be clear, this is not an argument that minimum wage laws require employers to personally express respect for workers. Since respect is an aspect of social relationships, it simply cannot be mandated by the state.[162] But the state often does forbid practices and behaviors that tend to undermine individuals' self-respect, or, in Rawls's evocative phrasing, practices that encourage "attitudes of deference and servility on one side [and] a will to dominate and arrogance on the other."[163] Rules against sexual and racial harassment are a powerful and clear example.[164] Minimum wage laws are another. They prohibit a certain class of employment relationships that lead to pervasive status harms. Moreover, even if employers pay minimum wages grudgingly, doing so may well reinforce workers' self-respect by demonstrating that the law protects them against certain employer actions.

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160. Tax scholars have explored this phenomenon in detail. *See, e.g.*, Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1745 (2005) (reporting the results of studies suggesting how psychological factors cause individuals to react to the purely formal means by which social policies are implemented and thereby overlook important substantive qualities such as efficiency); Gillian Lester, "Keep Government Out of My Medicare": The Elusive Search for Popular Support of Taxes and Social Spending (Dec. 14, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245122 (analyzing how policy makers should react to people's often conflicting attitudes about distributive justice and taxes); *see also* Jon Elster, *Is There (or Should There Be) a Right to Work?*, *in* DEMOCRACY AND THE WELFARE STATE 53, 75 (Amy Gutmann ed., 1988) (arguing that even in robust European social democracies, workers and farmers have tended to prefer indirect rather than direct subsidies despite the latter's superior efficiency).

161. *See infra* section III(B)(2).

162. *See* Elster, *supra* note 162, at 74 (reasoning that just as creating a right to a spouse for the purpose of promoting love would fail because love must be freely given, neither would creating a right to work promote self-esteem since esteem also must be freely given); *see also* JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 43–108 (1983) (cataloguing a number of mental and social states that by nature "can only come about as the by-product of actions undertaken for other ends" because the very attempt to bring them about intelligently or intentionally "precludes the state one is trying to bring about").

163. RAWLS, FAIRNESS, *supra* note 6, at 131.

164. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (holding that "hostile environment" sexual harassment violates Title VII); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 7 (1979) (arguing that recognition of workplace sexual harassment as sex discrimination "would support and legitimize women's economic equality and sexual self-determination").

2. *Formal Legal Entitlements and Self-Respect.*—Minimum wage laws also enhance workers' self-respect by granting them formal legal entitlements vis-à-vis employers. This is in part an expressive effect of minimum wage laws, which are an easily grasped policy "that symbolizes the political system's commitment to working people."[165] Such laws signal that the state and broader society view workers as worthy of legal protection, even when doing so imposes costs upon more powerful social groups, as captured well in the textile worker quote in this Article's introduction. But the legal entitlements provided by minimum wage laws are not merely symbolic. Under such laws, workers can hale employers into court to prevent enforcement of labor contracts that pay less than the minimum, employers owe workers correlative duties, and state agencies stand ready to intervene on behalf of workers.

The relationship between formal rights and self-respect is an enormous topic, but a few notes on that relationship within political and social theory should suffice to develop this point. Within liberalism, this idea seems to have animated Rawls's argument that in a just society "self-respect is secured by the public affirmation of the status of equal citizenship for all" through protection of equal liberties,[166] as well as through the fact that "everyone endorses the difference principle, itself a form of reciprocity."[167] Public affirmation of such rights helps demonstrate that rights-bearing individuals are moral equals of other citizens. Once that moral equality is clear, employers will not as readily subject such workers to abuses, and workers will more readily contest unfair treatment by employers and other private actors.

The relationship between rights and self-respect is also clear in Pettit's republicanism. An "employee who dare not raise a complaint against an employer," Pettit writes, is in the sort of relationship of domination that neorepublicans condemn.[168] While the most straightforward implication of Pettit's argument may be that employees deserve general rights to contest employer decisions, or rights against arbitrary dismissal,[169] substantive entitlements such as the minimum wage have a similar effect insofar as they enable employees to block employer efforts to pay below a certain point. This rights-granting aspect means that minimum wage laws are actually *not* equivalent to a wage subsidy funded by a tax on low-wage labor, because

165. WALTMAN, *supra* note 4, at 24.

166. RAWLS, THEORY, *supra* note 6, at 545.

167. RAWLS, FAIRNESS, *supra* note 6, at 60.

168. PETTIT, REPUBLICANISM, *supra* note 108, at 5.

169. *See, e.g.*, Alan Bogg & Cynthia Estlund, *Freedom of Association and the Right to Contest* (N.Y. Univ. Sch. of Law, Working Paper No. 13-81, 2013), *available at* http://ssrn.com/abstract=2364586 (outlining a neorepublican theory of just work rooted in a right to contest in the workplace).

this entitlement and its accompanying private right of action alter the power dynamics between employer and employee.

The literature on law and social movements also helps elucidate the relationship between legal rights and self-respect. Much of this literature explores the relationship between legal rights and collective mobilization, an issue less central to this Article.[170] But the very existence of such a link demonstrates that legal rights, particularly rights against private parties, can be an important social basis of self-respect. Per Stuart Scheingold's influential account of the "politics of rights," for example, marginalized groups can "capitalize on the perceptions of entitlement associated with [legal] rights to initiate and to nurture political mobilization."[171] This process can have effects on workers' self-consciousness and self-respect that extend well beyond immediate campaigns. As two other sociologists argue in a leading study of social movements among the poor, after the assertion of legal rights as part of a demand for social change, "people who ordinarily consider themselves helpless come to believe that they have some capacity to alter their lot."[172] Similarly, I have argued elsewhere that the experience of contesting managerial decisions during union organizing can greatly enhance workers' autonomy by giving them a concrete experience of agency.[173]

In fact, organizers have often mobilized workers around the rights-endowing aspect of minimum wage laws. For example, Jennifer Gordon, founder of the Long Island-based Workplace Project and now a professor of law, developed an innovative workers-rights curriculum that elucidated the gaps among workers' rights to safety and minimum wages, workers' lived experience of unsafe workplaces and sub-minimum wages, and a broader vision of justice that would involve even greater legal protections than those currently enjoyed.[174] Where standard "know your rights" presentations began by listing a set of formal entitlements, Gordon instead flipped the class: she first asked workers to describe their own experiences in detail and

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170. *See* Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI. 17, 22 (2006) (summarizing scholarship on the "constitutive role of legal rights both as a strategic resource and as a constraint" in social movements).

171. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 131 (1974), *cited in* McCann, *supra* note 172, at 25.

172. FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 4 (Vintage Books 1979) (1977); *see also* McCann, *supra* note 172, at 34 (discussing studies of wage equity reported in MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994) that found women who had participated in such efforts afterward "testified that their individual sense of efficacy as citizens was greatly enhanced").

173. Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 355–58 (2012) (discussing the effect of workers' exertion of power against employers upon workers' self-consciousness and self-respect).

174. *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 3, 148–84 (2005).

then pointed out that their employers were in fact violating the law.[175] This was a transformative experience: "rights stood for the possibility of government support in a context where government was otherwise notably absent, in an underground economy ruled by the market and by personal relationships in a situation of unmitigated power imbalance."[176] The fact that working conditions had been *illegal* rather than merely unfortunate altered workers' perceptions of their work lives and even their selves. Workers began to view themselves as entitled to decent treatment, as having a right to have rights.[177]

Gordon's account resonates with a strand in the social-psychological literature on "collective action framing," which explores how social-movement leaders and participants describe particular actions or conditions in ways that motivate social groups to take collective action.[178] As legal scholar Benjamin Sachs has argued, efforts such as Gordon's "deploy employment rights statutes as diagnostic frames," utilizing those statutes to describe extremely low wages as an injustice.[179] "The fact that it is the law—rather than merely the ideology of a union organizer or other activist—that diagnoses these problems as injustice invests the frame with substantially increased power."[180]

To summarize, minimum wage laws directly enhance workers' self-respect in two ways. They increase workers' wages by requiring employers to bear financial burdens. They also grant workers binding legal entitlements against employers and hold employers to legal duties toward workers. Transfers may enhance workers' net resources, but they do so without altering the fundamental terms of the employment relationship. Granted, minimum wage laws may be a relatively minor alteration to employment-at-will rules—a point to be discussed in subpart IV(A). But insofar as private power in the employment relationship itself undermines workers' self-respect, minimum wage laws help ensure social equality.

B. *Incentive Effects of Minimum Wage Laws and Transfers*

The above argument is incomplete in an important respect. Even if minimum wage laws significantly enhance individual workers' self-respect, they may decrease demand for low-wage labor. Those committed to social

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175. *Id.* at 152–53.

176. *Id.* at 172.

177. *Id.* at 172–73; *see also id.* at 168–69 (discussing individual workers' changes upon viewing themselves as having rights); Sachs, *supra* note 90, at 2708–15, 2723 (discussing Gordon's efforts and other, similar campaigns that relied upon FLSA rights).

178. *See* Sachs, *supra* note 90, at 2723–25 (discussing collective action frames). *See generally* Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000).

179. Sachs, *supra* note 90, at 2724.

180. *Id.*

equality cannot overlook this possibility; as an economist once quipped, "the misery of being exploited by capitalists is nothing compared to the misery of not being exploited at all."[181] This subpart responds to such concerns. It compares the effects of minimum wage laws and transfers on employers and consumers' incentives, and therefore on the distribution of resources and on social equality more generally.

Section III(B)(1) considers minimum wage laws. Even assuming that such laws reduce demand for low-wage labor, commitments to social equality suggest this is a cost worth bearing. Some jobs lost may not be worth saving; reduced demand for others may be an affirmative social good insofar as firms and consumers internalize higher labor costs and treat low-wage workers more as equals. Section III(B)(2) then argues that transfers are no panacea. Among other reasons, transfers can actively *encourage* pervasive use of extremely low-wage labor, thereby subsidizing employers and consumers and encouraging work-based class and status divisions. Some combination of minimum wage laws and transfers is therefore required to ensure justice for low-wage workers. Finally, section III(B)(3) relaxes the assumption that minimum wage laws reduce demand and discusses the implications, and then considers other policy tools to address unemployment and work-based social inequalities.

1. Effects of Minimum Wage Laws on Employers' Incentives.— Minimum wage laws affect the economics of low-wage work in various ways that will tend to enhance social equality. At the macro level, a higher minimum wage will tend to deliver additional resources to low-wage workers *as a group*. This is because any given increase in the minimum wage will generally lead to a proportionately smaller reduction in demand,[182] the magnitude of which will depend on the demand elasticity of labor in the relevant market.[183] For example, the Congressional Budget

181. JOAN ROBINSON, ECONOMIC PHILOSOPHY 45 (1962); *see also Psychological Effects of Unemployment and Underemployment*, AM. PSYCHOL. ASS'N, http://www.apa.org/about/gr/issues/socioeconomic/unemployment.aspx ("Unemployed workers are twice as likely as their employed counterparts to experience psychological problems such as depression, anxiety, psychosomatic symptoms, low subjective well-being and poor self-esteem." (citing Karsten I. Paul & Klaus Moser, *Unemployment Impairs Mental Health: Meta-Analyses*, 74 J. VOCATIONAL BEHAV. 264 (2009))). The unemployed also appear to face job-market discrimination. *See* Rand Ghayad, The Jobless Trap 3, 7 (2013) (unpublished manuscript) (on file with author) (discussing the results of a study mailing approximately 3,360 fictional resumes, identical except for current employment status, and finding that employers have a marked preference for employed workers); *see also* Matthew Yglesias, *The Long-Term Unemployed Are Doomed*, MONEYBOX BLOG, SLATE (Apr. 15, 2013, 9:31 AM), http://www.slate.com/blogs/moneybox/2013/04/15/rand_ghayad_on_long_term_unemployment_the_long_term_unemployed_are_discriminated.html (discussing Ghayad's work).

182. Shaviro, *supra* note 5, at 406–07.

183. *See generally* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 94–125 (11th ed. 2012) (discussing the impact of demand elasticity of labor on employment levels under minimum wage law).

Office (CBO) recently estimated that raising the federal minimum to $10.10 per hour would boost wages for 16.5 million workers while reducing employment by around one-half-million jobs.[184] The CBO also predicted that a higher minimum would generally increase the net income of poor and middle-class families, while reducing the net income of wealthy families.[185] The minimum wage can therefore reduce class divisions in a straightforward way: workers as a group will capture more wealth, and will enjoy greater purchasing power, than they would in a laissez-faire labor market.

Of course, a subsidy to the poor financed by a progressive income tax could have similar effects on the distribution of wealth and would not cartelize the labor market. But the costs of such cartelization—including higher consumer costs and reduced demand for low-wage labor—may be worth bearing in order to ensure greater social equality.

This requires some unpacking. Assuming that states invest in compliance,[186] and that a wage mandate is not quickly eroded by inflation, employers will respond to a minimum wage in a variety of ways. Some industries will, frankly, struggle to survive or will fail, with garment manufacturing perhaps the paradigmatic case. But policymakers may well decide that this is no great loss: sub-minimum wage jobs may simply be too punishing for a wealthy society to tolerate, much less to encourage.[187] After all, even in the United States the garment sector continues to have a sweatshop problem, with frequent allegations of unpaid wages, excessive overtime, and unsafe working conditions, in large part because garment

184. CONG. BUDGET OFFICE, *supra* note 39, at 2 tbl.1.

185. *Id.* at 2 & tbl.1, 3 (finding that an increase to $10.10 per hour would deliver $12 billion annually to families whose income is less than three times the federal poverty threshold, while reducing by $17 billion the annual income of families at six times the federal poverty threshold); *id.* at 11 (attributing lost income among wealthier families to the likelihood that "losses in business income and in real income from price increases would be concentrated" in such families); *accord* Arindrajit Dube, Minimum Wages and the Distribution of Family Incomes 1 (Dec. 30, 2013) (unpublished manuscript), *available at* https://dl.dropboxusercontent.com/u/15038936/Dube_MinimumWagesFamilyIncomes.pdf (finding "robust evidence that higher minimum wages moderately reduce the share of individuals with incomes below 50, 75 and 100 percent of the federal poverty line").

186. *But see* subpart IV(A) (discussing the challenges of noncompliance).

187. *See* POLLIN ET AL., *supra* note 4, at 16 (quoting President Roosevelt's statement, while pressing for the FLSA, that "[n]o business which depends for its existence on paying less than living wages to its workers has any right to continue in this country"); WALTMAN, *supra* note 4, at 16 (quoting Progressive advocate Arthur Holcombe saying, "Such industries as these, the country is better without"); Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. 151, 151 (1990) ("Any employer so inefficient that he could stay in business only by paying sweatshop wages—like the employer who could stay in business only by operating an unsafe plant—was told [in the 1938 FLSA] that he did not belong in business." (quoting *Amendment of the Fair Labor Standards Act: Hearings Before the Subcomm. of the S. Comm. on Educ. & Labor*, 79th Cong. 847 (1945) (statement of Chester Bowles, Administrator of the Office of Price Administration))).

manufacture itself is so labor-intensive and so globally competitive.[188] To ensure social equality, it may be best to price such firms out of the market and to compensate unemployed workers through generous unconditional transfers. Notably, outside of the garment sector, the net effect of a minimum wage increase on manufacturing is likely to be relatively small: according to the Bureau of Labor Statistics, very few manufacturing jobs pay at or below the minimum wage.[189] This likely reflects the higher capital/labor mix required for most contemporary manufacturing.[190]

Instead, the vast majority of today's minimum wage workers are in service sectors, including retail, leisure and hospitality, building services, and education and health care.[191] While there is little data on such industries' responses to minimum wage laws in the United States,[192] a

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188. *See* ANNETTE BERNHARDT ET AL., BRENNAN CTR. FOR JUSTICE, UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 49, 77–78 (2007) (reporting workplace violations in the retail and apparel-manufacturing industries in New York City); NAT'L EMP'T LAW PROJECT, WINNING WAGE JUSTICE: A SUMMARY OF RESEARCH ON WAGE AND HOUR VIOLATIONS IN THE UNITED STATES 1, 3–4 (2012), *available at* nelp.3cdn.net/509a6e8a1b8f2a64f0_y2m6bhlf6.pdf (describing a "broad and worsening wage theft crisis" in a variety of industries, including garment production); *see also* Mark Anner et al., *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL'Y J. 1, 1–5 (2013) (noting the prevalence of sweatshop-like conditions in global apparel production).

189. *See Characteristics of Minimum Wage Workers: 2011, Tables 1-10*, BUREAU LAB. STAT., http://www.bls.gov/cps/minwage2011tbls.htm (last modified Mar. 2, 2012) (showing that less than 2% of production workers were paid minimum wage or less, compared to 13% in service occupations, including close to 25% in food service occupations); *see also* Daron Acemoglu, *Good Jobs Versus Bad Jobs*, 19 J. LAB. ECON. 1 (2001) (presenting a theoretical model of the labor market in which "minimum wages . . . shift the composition of employment toward high-wage jobs" by making industries that rely on extensive low-skilled labor unprofitable); Arindrajit Dube, *Minimum Wages and Aggregate Job Growth: Causal Effect or Statistical Artifact?* (Inst. for the Study of Labor Discussion Paper No. 7674, 2013), *available at* http://ftp.iza.org/dp7674.pdf (noting a lack of evidence that higher minimum wages impact the manufacturing sector).

190. *See* NEUMARK & WASCHER, *supra* note 25, at 39 (arguing that the degree of the "substitution effect" of capital for labor is determined by the "responsiveness of product demand to the change in price, labor's share of total production costs, the ease of substitutability between labor and capital, and the difference between the minimum wage and the equilibrium competitive wage").

191. *See Characteristics of Minimum Wage Workers: 2011*, BUREAU LAB. STAT., http://www.bls.gov/cps/minwage2011.htm (last modified Mar. 2, 2012) (stating that "[a]bout 6 in 10 workers earning the minimum wage or less in 2011 were employed in service occupations, mostly in food preparation and serving related jobs," and "[t]he industry with the highest proportion of workers with hourly wages at or below the Federal minimum wage was leisure and hospitality (22 percent)"); *see also* BERNHARDT ET AL., *supra* note 190, at 21 tbl.3 (identifying industries and industry segments with high proportions of low-wage workers and violations).

192. *See, e.g.*, NEUMARK & WASCHER, *supra* note 25, at 232–41 (2008) (providing an index to recent research on the economic effects of minimum wages and noting case studies exist for only the fast-food and low-wage retail sectors); Jonathan Meer & Jeremy West, Effects of the Minimum Wage on Employment Dynamics 1 (Dec. 2013) (unpublished manuscript), *available at* http://econweb.tamu.edu/jmeer/Meer_West_Minimum_Wage.pdf ("To date, nearly all studies of the minimum wage and employment have focused on how a legal wage floor affects the

recent U.K. study found that hotels and catering firms responded by cutting profits, passing costs on to consumers and clients, apparently because there is just no way to alter the changing of beds or serving of food.[193] Many of today's largest low-wage employers are profitable retail and hospitality chains who could certainly absorb some additional labor costs;[194] in some other sectors, like commercial office cleaning, clients include real estate and professional firms that could similarly absorb higher costs.[195]

Of course, individual consumers will also bear some of the burden—particularly for food services, hospitality, and retail goods—which will ultimately reduce demand for low-wage labor. But both higher consumer costs and marginally reduced demand will often be justified on grounds of social equality. Since consumers benefit quite directly from low prices on particular goods and services, forcing them to internalize higher labor costs is a matter of basic reciprocity. Indeed, the CBO predicted that wealthier families would bear the bulk of higher prices from President Obama's proposed increase, making the overall effect of increased consumer prices relatively progressive.[196]

The normative case for higher consumer costs is particularly strong as applied to luxury goods or markers of class position.[197] For example, increasing prices for restaurant meals seems eminently reasonable, amid evidence that wage and hour violations remain common even within high-

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employment *level*, either for the entire labor force or a specific employee subgroup (e.g., teenagers or food service workers).").

193. James Arrowsmith et al., *The Impact of the National Minimum Wage in Small Firms*, 41 BRIT. J. INDUS. REL. 435, 442 (2003); *see also* Sara Lemos, *The Effect of the Minimum Wage on Prices* 1 (Inst. for the Study of Labor Discussion Paper No. 1072, 2004), *available at* http://ftp.iza.org/dp1072.pdf ("With employment and profits not significantly affected, higher prices [are] an obvious response to a minimum wage increase."). *But see* David Metcalf, *Why Has the British National Minimum Wage Had Little or No Impact on Employment?*, 50 J. INDUS. REL. 489, 506–07 (2008) (noting evidence that employers "intensified effort," which would tend to erode social equality).

194. NAT'L EMP'T LAW PROJECT, BIG BUSINESS, CORPORATE PROFITS, AND THE MINIMUM WAGE 34 (2012), *available at* http://nelp.3cdn.net/e555b2e361f8f734f4_sim6btdzo.pdf (discussing the profitability of the nation's fifty largest low-wage employers).

195. Passing increased labor costs onto consumers is part of the model of the Service Employees International Union's "Justice for Janitors" campaign. *See generally* John Howley, *Justice for Janitors: The Challenge of Organizing in Contract Services*, 1 LAB. RES. REV., no. 15, 1990, at 61 (describing the goals and structure of the Justice for Janitors campaign); Roger Waldinger et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, *in* ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 102, 102–06 (Kate Bronfenbrenner et al. eds., 1998) (describing the history of the campaign).

196. CONG. BUDGET OFFICE, *supra* note 39, at 11.

197. *Cf.* BOURDIEU, *supra* note 142, at 55 ("Economic power is first and foremost a power to keep economic necessity at arm's length. This is why it universally asserts itself by . . . *gratuitous* luxury."); THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS (Penguin Books 1979) (1899).

end establishments.[198] Restaurant workers have also argued that the culture of tipping actively undermines social equality by leaving servers' wages subject to customers' discretion and generosity, rather than requiring restaurants to pay servers decently in the first place.[199] A similar analysis may apply to many other low-wage personal services such as nail salons, valet parking services, car washes, taxi or other drivers, and the like. In all such sectors, marginally reduced demand may be a price worth paying to ensure greater self-respect and autonomy for workers.

A just society may also conclude that domestic work and child care should be quite well compensated, even if doing so will marginally reduce employment.[200] As George Bernard Shaw once wrote, "When domestic servants are treated as human beings, it is not worthwhile to keep them."[201] Many domestic workers of course take pride in their work, but their narratives also highlight the degrading effect of providing services to a wealthier family for low wages.[202] Given this context, it is no accident that the FLSA originally excluded domestic workers, many of whom were African-American at the time, and thus helped perpetuate a caste-like domestic labor system.[203]

These are important examples of how minimum wage laws can encourage social equality between consumers and workers, but counterexamples can of course be found. For one thing, the relationship between wages and consumer costs may be more complicated in retail and fast food. Employers in those sectors may be able to mechanize more

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198. *See* REST. OPPORTUNITIES CTR. UNITED, NATIONAL EXECUTIVE SUMMARY: BEHIND THE KITCHEN DOOR: A MULTI-SITE STUDY OF THE RESTAURANT INDUSTRY (2011), *available at* http://rocunited.org/wp-content/uploads/2013/04/reports_bkd-multisite.pdf (summarizing the prevalence of overtime violations and working off the clock without pay within restaurant industry).

199. *See* Paul Wachter, *Why Tip?*, N.Y. TIMES MAG., Oct. 9, 2008, at 56 (claiming that "[t]ipping began as an aristocratic practice, a sprinkle of change for social inferiors," and was opposed by the labor movement in the early twentieth century and by other progressives who "deplored tipping for creating a class of workers who relied on 'fawning for favors'").

200. *See* WALZER, *supra* note 20, at 174–77 (proposing greater compensation for domestic work and other "dirty work" as a symbolic means of sharing its burdens).

201. GEORGE BERNARD SHAW, *Man and Superman*, *in* SEVEN PLAYS 517, 736 (1951), *cited in* WALZER, *supra* note 20, at 180.

202. *See* TERKEL, *supra* note 145, at 113 (recounting an interview with a domestic worker).

203. *See* Forbath, *supra* note 120, at 1835–38 (tracing how "Dixiecrats" ensured the FLSA and other New Deal legislation did not cover various forms of labor often performed by African-Americans); Eileen Boris & Jennifer Klein, Op-Ed., *Home-Care Workers Aren't Just 'Companions,'* N.Y. TIMES, July 1, 2012, http://www.nytimes.com/2012/ 07/02/opinion/fairness-for-home-care-workers.html (criticizing the (now-repealed) exclusion of home-care workers from overtime protections on grounds that exclusion can "consign" such workers "to perpetual second-class status"); *see also* Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269, 269 (2013) (raising concerns about exploitation in the U.S. au pair program).

easily, for example by adding self-service ordering or checkout lanes.[204] Granted, the effect of minimum wage increases on the fast-food sector has been extensively studied by empirical economists, and leading studies have found few employment effects or even increases in employment.[205] This may indicate that mechanization is not (yet) the most cost-effective means of offsetting a mandated wage increase. But at a higher mandated wage, and once technology develops further, one could certainly imagine greater mechanization of those jobs.

Moreover, the minimum wage may encourage some firms to alter practices in ways that undermine rather than enhance social equality. For example, some firms may reduce labor costs by delaying hiring or expansion, reducing hours, or reducing low-wage workers' benefits.[206] Employers may also make up costs by deferring capital investment or repairs, cutting investments in workplace safety, supervising workers more intensively, or hiring skilled rather than unskilled workers, any of which may undermine social equality. Finally, increasing unemployment and raising consumer costs will create distributive conflicts among workers and between poor consumers and poor workers, and increasing the cost of child care and domestic services may also have complicated effects on gender equality.

All such challenges point to the need for trade-offs and perhaps to a multi-pronged approach to helping the working poor. For example, unconditional cash grants could alleviate the burdens of unemployment and of higher consumer costs; child-care subsidies could benefit both the working poor and parents more generally. Such limitations of minimum wage laws should therefore not undermine the basic normative points that a society should encourage decent work and that consumers and employers often *should* bear the burden of higher labor costs. Minimum wage laws are a relatively effective means of achieving both goals.

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204. *See* Steven Greenhouse, *$15 Wage in Fast Food Stirs Debate on Effects*, N.Y. TIMES, Dec. 4, 2013, http://www.nytimes.com/2013/12/05/business/15-wage-in-fast-food-stirs-debate-on-effects.html ("[S]ome [fast-food] restaurants have begun replacing counter workers with computer screens that greet customers and ask them to tap in their orders.").

205. *See* CARD & KRUEGER, *supra* note 19, at 20–77 (summarizing evidence from the fast-food sector).

206. Unsurprisingly, the empirical evidence on reduced or deferred hiring appears inconclusive. *Compare* Meer & West, *supra* note 192 (arguing that deferred or reduced hiring after minimum wage increases explains lack of uptick in unemployment), *with* Dube, *supra* note 189 (arguing that Meer and West's conclusions of lower employment growth in low-wage sectors are not supported by their own statistics), *and* John Schmitt, *More on Meer and West's Minimum Wage Study*, CENTER FOR ECON. & POL'Y RES. BLOG (Jan. 24, 2014, 4:18 PM), http://www.cepr.net/index.php/blogs/cepr-blog/more-on-meer-and-wests-minimum-wage-study (criticizing further Meer and West's statistical analysis).

2. *Incentive Effects of Transfers*.—While transfers can help alleviate the burdens of unemployment and poverty more generally, they cannot substitute entirely for labor-market regulations. For one thing, while transfers do not cartelize the labor market, income and wealth taxation do reduce talented individuals' incentives to work hard or create jobs and may encourage entrepreneurs to relocate into lower tax jurisdictions.[207]

More importantly, transfers can incentivize the use of extremely low-wage labor, which will in turn encourage class and status differentiation. For example, the EITC tends to draw additional individuals into the labor market, but not all workers are able to take advantage of the EITC; the net effect is downward pressure on wages, and a subsidy to employers or consumers.[208] Wage subsidies can also have perverse distributive effects. They must either be generally available to low-wage employers, in which case many employers will capture a windfall, or they can be targeted to particular groups of workers, in which case employers may favor that group over another, with morally arbitrary distributive consequences.[209] Subsidies targeted at particular social groups may also require workers to report their disadvantages to a potential employer, a sort of "shameful revelation" that can actively undermine workers' self-respect.[210]

Ultimately, transfers that are not accompanied by wage regulations can substantially undermine social equality even as they create employment opportunities. For example, consider the effects on low-wage labor markets if the minimum wage were repealed altogether and replaced with the EITC or a general wage subsidy. At a certain market wage—say, $2 an hour—even middle-class families would have lives of luxury. Food would be cheap. Few such families would mow their own lawn or clean their own

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207. *See, e.g.*, Alstott, *supra* note 10, at 985–86 (discussing disincentives caused by wealth and income taxation); Kaplow & Shavell, *supra* note 38, at 667–68 (noting this effect resulting from income taxes).

208. *See* Jesse Rothstein, *The Unintended Consequences of Encouraging Work: Tax Incidence and the EITC* 1 (Ctr. for Econ. Pol'y Stud., Working Paper No. 165, 2008) ("In the standard model, EITC-induced labor supply increases lead to lower wages."); *see also* John Schmitt, *Having Your Minimum Wage and EITC, Too*, CENTER FOR ECON. & POL'Y RESEARCH BLOG (Jan. 8, 2013, 9:45 AM), http://www.cepr.net/index.php/blogs/cepr-blog/having-your-minimum-wage-and-eitc-too (noting the EITC "can also drive down the wages of workers"); *cf.* David Lee & Emmanuel Saez, *Optimal Minimum Wage Policy in Competitive Labor Markets*, 96 J. PUB. ECON. 739, 739–40 (2012) (discussing incidence effects). The EITC also carries administrative costs: employees must realize they are eligible and apply, and the IRS itself estimates that one in five eligible taxpayers fails to do so. *Check Your Eligibility for the Earned Income Tax Credit*, IRS (Jan. 25, 2013), http://www.irs.gov/uac/Check-Your-Eligibility-for-the-Earned-Income-Tax-Credit.

209. Alstott, *supra* note 10, at 1025–27; *see also id.* at 1026 ("[I]t is impossible to eliminate all distributional benefit to employers."); *id.* at 1041 (citing the Organisation for Economic Co-operation and Development's finding that "[g]eneral employment subsidies tend to have significant windfalls, while targeted subsidies tend to displace").

210. *See* Jonathan Wolff, *Fairness, Respect, and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 97, 107–15 (discussing "respect-standing" and "shameful revelation").

house anymore. Many could even hire a butler, or a chef, or perhaps a chauffeur to make long commutes more tolerable. Notably, those workers might even have a decent standard of living if the EITC or wage subsidy were high enough. But history strongly suggests that many would treat all those $2-an-hour servants poorly, reasoning that their low wages must be due to some moral failing and consumers' lives of leisure due to some moral virtue.

While basic income programs would avoid some of these perversities, they are not a panacea. Since a basic income would be universal, proponents argue convincingly that it would not carry the stigma attached to means-tested programs—it would be more akin to Social Security than to "welfare."[211] A basic income would also enable recipients to reject undignified work. But as argued above, rights against the state cannot entirely substitute for rights against employers.[212] Moreover, the basic utilitarian critique of wealth taxes returns here with a vengeance: if guaranteed a basic income, many individuals would choose not to work at all. Funding such a program would also require high levels of wealth and income taxation, creating incentives for capital flight and reduced effort among the wealthy and talented.[213]

Finally, the implications of a robust basic income could be strongly dystopian unless it was offered to noncitizen residents, and policymakers have little incentive to do so.[214] In a basic income state, menial work would still need to be performed; with citizens effectively "excused," is there any reason to think that guest workers and other irregular migrants from the

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211. *See, e.g.*, ACKERMAN & ALSTOTT, *supra* note 30, at 204–10 (proposing stakeholding as the foundation for a new culture of citizenship).

212. *See supra* notes 212–15 and accompanying text.

213. *See* William A. Galston, *What About Reciprocity?*, *in* WHAT'S WRONG WITH A FREE LUNCH? 29, 29 (Joshua Cohen & Joel Rogers eds., 2001) (registering "suspicion that a significant [basic income] would be unaffordable and would have labor-supply effects that even its advocates would deem perverse"). For a discussion of some economics of basic income programs, see VAN PARIJS, *supra* note 29, at 38–41.

214. *See* Michael W. Howard, *Basic Income and Migration Policy: A Moral Dilemma?*, 1 BASIC INCOME STUD. 1, 1 (2006) ("[Basic income] may have a welfare magnet effect that generates pressure for tightening of borders or restricting [basic income] to citizens only."); Jeffrey S. Lehman & Deborah C. Malamud, *Saying No to Stakeholding*, 98 MICH. L. REV. 1482, 1484, 1489 (2000) (criticizing Ackerman and Alstott's proposal for not covering immigrants); Hillel Steiner, *Compatriot Priority and Justice Among Thieves*, *in* REAL LIBERTARIANISM ASSESSED: POLITICAL THEORY AFTER VAN PARIJS 161, 161–62 (Andrew Reeve & Andrew Williams eds., 2003) (calling national basic income programs "justice among thieves"). Van Parijs seems to endorse a global basic income in principle, but as a second best supports a national basic income open to "all legal permanent residents" coupled with restrictions on economic migration. *See* Van Parijs, *supra* note 87, at 11, 30 (acknowledging migration policy as a potential obstacle to global basic income becoming a widespread reality); *see also* Howard, *supra*, at 9–10 (discussing Van Parijs's arguments for restrictions on economic migration).

Global South would not be imported for that purpose?[215] This is not a criticism of immigration or labor migration, but rather an argument that guest-worker programs, particularly insofar as they offer no path to citizenship, may actively undermine social equality by creating a permanent underclass of degraded workers.[216]

Ultimately, a combination of policies is likely necessary to ensure both equality of resources and social equality. A number of economists have recommended combining a minimum wage increase with a more generous EITC since the policies will have complementary effects: the EITC will encourage employment, while the minimum wage will reduce wage inequality.[217] If and when a basic income becomes politically feasible, it would also be an attractive policy option alongside minimum wages, particularly if it were generous enough to enable individuals to engage in caregiving or other unpaid work rather than needing to work to survive. In fact, so long as transfers are politically saleable, ideals of social equality may counsel for setting minimum wages at the highest sustainable level, so as to make a substantial difference in workers' ability to live a decent material life, then compensating the unemployed through generous unconditional transfers. Those ideals also counsel for indexing the mandated minimum to inflation: while doing so would likely lead to greater employment effects over time, the resulting gains in social equality would also be more stable.[218]

215. *See* Galston, *supra* note 218, at 29–30 ("One may restrict [a universal basic income], as Van Parijs does, to permanent residents, but this will only increase the propensity of recipient nations to favor temporary workers over new permanent residents.").

216. *See* Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 221–30 (claiming there is a need for social integration of guest workers, as well as a path to citizenship). Certain Gulf States are a case in point: some have implemented a generous citizens' income funded out of oil and gas revenues, while utilizing migrant workers with no opportunity for citizenship to perform virtually all labor; in some such states, migrant workers substantially outnumber citizens, and allegations of substantial human rights abuses including forced labor are common. *See* HUMAN RIGHTS WATCH, BUILDING A BETTER WORLD CUP: PROTECTING MIGRANT WORKERS IN QATAR AHEAD OF FIFA 2022, at 2–13 (2012) (detailing the abuses of migrant workers in Qatar and proposing solutions).

217. *See, e.g.*, JEANNETTE WICKS-LIM & JEFFREY THOMPSON, POLITICAL ECON. RESEARCH INST., COMBINING MINIMUM WAGE AND EARNED INCOME TAX CREDIT POLICIES TO GUARANTEE A DECENT LIVING STANDARD TO ALL U.S. WORKERS 2 (2010) ("[P]olicymakers must target two goals: insuring that workers have both adequate pay *and* adequate amounts of work."); *accord* Lee & Saez, *supra* note 213 (stating that "[a] binding minimum wage enhances the effectiveness of transfers to low-skilled workers as it prevents low-skilled wages from falling through incidence effects" of transfers); Schmitt, *supra* note 213 (calling the EITC and minimum wage "complements"); *see also* Alstott, *supra* note 10, at 1050–51 (claiming that a minimum wage combined with a wage subsidy may increase wages without increasing unemployment).

218. *See* Isaac Sorkin, Are There Long-Run Effects of the Minimum Wage? 22 (2013) (unpublished manuscript), *available at* https://sites.google.com/site/isaacsorkin/papers (suggesting that failure to index minimum wages to inflation may explain lack of significant employment effects in past empirical studies).

3. Further Refining and Extending the Argument.—At the same time, perhaps policymakers do not face tragic choices after all. The analysis above has assumed that minimum wage laws decrease demand for low-wage labor. But this may be untrue, at least for minimum wage levels within their historic limits. Without going deeply into the research, in recent years an increasing number of economists have spoken in favor of increasing the minimum wage.[219] For example, in a recent poll of thirty-eight prominent academic economists, a plurality felt that increasing the minimum to around $9 an hour would not have serious detrimental effects upon the low-wage labor market.[220]

There are various reasons why minimum wage laws might not reduce demand for low-wage labor. Minimum wages might force employers to pay "efficiency wages," or above-market wages that tend to encourage greater effort by employees and greater attachment between employers and employees, which may also reduce turnover.[221] Minimum wage laws may boost aggregate demand, leading in turn to job creation or at least stabilization.[222] Other theories have also been proposed,[223] but the details are unimportant for present purposes. If the empirical evidence begins to show more decisively that minimum wage laws do not force much increase in unemployment in the first place—even once indexed to inflation—then the social egalitarian case for such laws is that much stronger. In that case, minimum wage laws can redistribute to the working poor and help ensure decent work without having perverse effects on the low-wage labor market.

The above argument has also assumed that minimum wage laws and transfers are the only two sets of policies that impact employment levels and the quality of jobs. This was helpful to better understand the comparative merits of those policies. But the assumption is obviously false. If concerned about unemployment, policymakers could institute industrial policies that incentivize job-creation strategies, or even implement a right to

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219. *See Over 600 Economists Sign Letter in Support of $10.10 Minimum Wage*, ECON. POL'Y INST., http://www.epi.org/minimum-wage-statement/ (presenting a letter from over 600 economists, including seven Nobel Laureates, supporting an increase of the minimum wage to $10.10 per hour).

220. *Minimum Wage*, IGM F. (Feb. 26, 2013, 10:56 AM), http://www.igmchicago.org/ igm-economic-experts-panel/poll-results?SurveyID=SV_br0IEq5a9E77NMV.

221. *See, e.g.*, CARD & KRUEGER, *supra* note 19, at 8–13 (discussing efficiency-wage theory). As Shaviro points out, it is unclear why paying efficiency wages would lead to greater employment anyway since employers would then be able to make do with fewer workers. Shaviro, *supra* note 5, at 454–56.

222. JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, WHY DOES THE MINIMUM WAGE HAVE NO DISCERNABLE EFFECT ON EMPLOYMENT 20–21 (2013), *available at* http://www .cepr.net/documents/publications/min-wage-2013-02.pdf.

223. *See id.* at 15–22 (summarizing such theories).

work of some sort.[224] There are various challenges to large-scale state work-creation programs—including a tendency to create "make work" jobs that may do little to enhance individuals' self-respect—though smaller scale and more targeted programs may avoid that perversity.[225] Such programs may be particularly necessary insofar as a higher minimum encourages employers to hire workers with marginally greater skills, shutting the least skilled out of the market.[226]

A state concerned about unemployment might also consider reforming monetary policy, fiscal policy, and trade rules, all of which have substantial effects on employment.[227]

Finally, a state concerned about social equality might consider far more ambitious reforms to workplace and labor-market governance. For example, a state could guarantee participatory rights within the enterprise or at least "rights to contest" of the sort protected by laws governing unionization and collective bargaining.[228] Such reforms could offset another potential cost of minimum wage laws: that they may encourage employers to increase productivity by *increasing* workloads and supervision.[229] Widespread unionization would also likely help ensure a greater degree of wage compression than minimum wage laws alone. In fact, social equality may even support reforms to corporate structures and to the basic structure of capitalism, for example by granting workers capacious democratic rights over economic governance.[230]

While full consideration of such matters is well beyond the scope of this Article, getting a handle on the justice of minimum wages should help set the stage for defenses of these more far-reaching reforms. Economically speaking, unionization creates a cartel among unionized workers, and laws encouraging unionization are therefore subject to similar critiques as laws

224. *See* Zatz, *supra* note 14, at 45–46 ("Taking the perversity argument [about unemployment] seriously might well lead us toward more robust . . . policies that include job creation . . . rather than toward deregulation.").

225. Elster, *supra* note 162, at 62–78 (discussing this and other problems associated with implementing a right to work).

226. *See* Stigler, *supra* note 31, at 359 (predicting that minimum wage laws may have this effect).

227. *See, e.g.*, John Schmitt, *CBO and the Minimum Wage, Pt. 2*, NO APPARENT MOTIVE (Feb. 20, 2014, 10:36 PM), http://noapparentmotive.org/blog/2014/02/20/cbo-and-the-minimum-wage-pt-2/ ("To a first approximation, labor-market institutions such as the minimum wage . . . determine the distribution of wages, benefits, and incomes, while macroeconomic policy determines the level of employment.").

228. *See* Bogg & Estlund, *supra* note 171 (describing the neorepublican case for the right to contest); Hsieh, *supra* note 110 (asserting that "[u]nder . . . plausible assumptions about the nature of economic production, protection against arbitrary interference requires . . . workers to be able to contest managerial directives").

229. Metcalf, *supra* note 193.

230. *See, e.g.*, Joshua Cohen, *The Economic Basis of Deliberative Democracy*, SOC. PHIL. & POL'Y, Spring 1989, at 25, 26 (proposing democratic governance of the economy).

establishing minimum wages, including that they cause inefficiency and tend to increase unemployment.[231] Moreover, because their success generally depends upon a sense of solidarity among workers, unions can create in-group/out-group dynamics that are in tension with commitments to individual liberty.[232] How to balance such concerns against the goods that unions deliver—which include both wealth redistribution and greater workplace equality for represented workers—is a question I hope to address in future work.[233]

IV. Counterarguments

With the primary case for minimum wage laws squarely on the table, this final Part takes up several important counterarguments. Subpart IV(A) considers the potential weaknesses of minimum wage laws as means of advancing social equality. Subpart IV(B) then revisits the relationship between egalitarian liberalism and social equality.

A. Limits of the Minimum Wage as a Means to Social Equality

Several important counterarguments question whether the minimum wage is an especially effective means of promoting social equality. For example, it is possible that a higher minimum wage may not force much cost-internalization or other changes to workplace relationships because firms will avoid compliance. Some firms will simply ignore the higher mandate, hoping not to be caught.[234] Others will deformalize working

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231. *E.g.*, Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 999–1004 (1984).

232. Walzer's endorsement of the San Francisco scavengers' membership process, which seems to discriminate in favor of Italian-Americans, is thus quite problematic. *See* WALZER, *supra* note 20, at 179; *see also* Rogers, *supra* note 175, at 356–59 (discussing contemporary unions' efforts to foment solidarity among workers).

233. Of course, minimum wage critics tend not to endorse such reforms in any event. *See* ACKERMAN & ALSTOTT, *supra* note 30, at 206–07 (claiming that "Americans . . . are notoriously skeptical of worker solidarity," and that those who wish "to organize for social justice" do not ordinarily "join their fellow workers in a union"); *id.* at 206 (criticizing Phelps for seeking to implement a "workplace intuition" of interpersonal fairness); VAN PARIJS, *supra* note 29, at 211–13 (criticizing unionization as a barrier to equality for low-skilled workers). Contrast Ackerman and Alstott's historical claims about Americans' preferences regarding unionization with Joel Rogers, *Divide and Conquer: "Further Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 99–145, which claims that the 1947 Labor Management Relations Act effectively stopped new union organizing. *See also id.* at 138 ("[U]ntil quite recently American workers engaged in one of the highest levels of strike activity in the advanced industrial capitalist world."); *accord* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769–74 (1983) (arguing that the National Labor Relations Act representation-elections process has systematically tilted against unions and pro-union workers, such that lack of unionization does not reflect workers' uncoerced preferences).

234. *See* Rogers, *supra* note 93, at 19–21 (discussing employers' incentives to comply with or violate the FLSA).

relationships by outsourcing unskilled labor to uncapitalized subcontractors, hiring under the table, hiring more family members, or hiring irregular immigrants who will be unlikely to enforce their rights.[235] While many low-wage employees work for large companies in relatively standard employment relationships,[236] such judgment-proofing strategies are a major impediment to enforcement of minimum wage laws today.

Yet if social equality is a major social priority, a society should not just pass a minimum wage at a reasonably high level but should also invest sufficient resources in enforcement, and perhaps implement forms of third-party liability that will better ensure cost-internalization.[237] Such strategies will of course carry costs, which must be weighed in the balance. But insofar as policymakers aim to actually alter employers' behavior, greater investment in enforcement will generally be justifiable on the same normative grounds as are minimum wage laws per se.

A second objection cuts deeper. The U.S. tradition of linking redistribution to paid work is problematic in many ways,[238] and strengthening minimum wage laws may continue the perversities of that tradition. For example, efforts to achieve social equality through higher wages may reinforce family-wage ideology—the view that paid employment, which has been traditionally performed by men, is somehow of greater social value than unpaid care work, which has traditionally been performed by women.[239] Similarly, efforts to enhance the dignity of work may reinforce pernicious stereotypes about the unemployed and those who receive forms of public assistance.[240] As sociologists and anthropologists have demonstrated, employed workers often draw moral distinctions between themselves and those on public assistance, holding that their work ethic explains their relative success and entitles them to greater respect.[241]

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235. *See* Monder Ram et al., *The Dynamics of Informality: Employment Relations in Small Firms and the Effects of Regulatory Change*, 15 WORK, EMP. & SOC'Y 845, 845 (2001) (noting that in response to the U.K. national minimum wage, some firms moved upmarket and utilized more formal employment and management systems, while others moved downmarket and increased reliance on illicit or familial labor); Shaviro, *supra* note 5, at 417 (asserting that increased enforcement may create incentives to employ undocumented immigrants who will not report violations).

236. NAT'L EMP'T LAW PROJECT, *supra* note 198.

237. *See* Rogers, *supra* note 93, at 47–60 (proposing a regime of third-party liability for FLSA violations).

238. Forbath, *supra* note 120, at 1824 (describing the New Deal tradition as "coercive, caste-ridden, and gendered").

239. *See* Zatz, *supra* note 14, at 11, 41–42 (noting the problem of family-wage ideology).

240. *See, e.g.*, Forbath, *supra* note 120, at 1877 n.252 ("[T]he most salient border between minimum respect and degradation in [contemporary] class structure falls along the line between those who are recognized . . . as working and providing a decent living for themselves and their families, and those . . . who are not.").

241. *See* MICHÈLLE LAMONT, THE DIGNITY OF WORKING MEN 3 (2000) (suggesting based on ethnographic research that white working class men draw "strong[] boundaries against blacks

Welfare-rights advocates and their descendants—including basic income advocates—have accordingly criticized the view that employment is a *precondition* of equal citizenship, particularly given the risk that work requirements will be used to discipline the poor.[242]

But this Article advocates no such thing: it instead argues that labor-market regulations are one among other tools that policymakers should utilize to ensure social equality. Even if promoting decent work has the collateral consequence of marginally reinforcing family-wage ideology or divisions between workers and nonworkers, this does not mean efforts to promote decent work should be abandoned—particularly when low-wage work delivers asymmetric benefits to more powerful social groups and classes.[243] While egalitarians should not seek to solve all distributive problems through labor-market regulations, nor should they ignore the workplace as a site where social inequalities are produced and reinforced. Even the National Welfare Rights Organization, the leading advocate for a system of public assistance wholly delinked from work requirements, argued that those who worked deserve "decent jobs with adequate wages."[244]

Moreover, given the deep relationship between legal rights against private parties and citizens' self-respect and autonomy, it seems highly unlikely that even the most generous basic income could fully displace labor-market regulations as means of promoting and sustaining a culture of egalitarian citizenship.[245] Robust welfare states have typically been built in conjunction with or upon a foundation of robust labor-market institutions such as wage regulation and unions—not as an alternative to such institutions.[246] Removing such protections may then undermine the very

and the poor on the basis of a universal morality organized around the 'disciplined self,' particularly their work ethic and sense of responsibility"); KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 98 (1999) ("[P]ointing to the essential virtues of the gainfully employed, [black fast-food] workers align themselves with the great mass of men and women who work for a living" and against the jobless).

242. *See, e.g.*, Alstott, *supra* note 10, at 989–90 (outlining and criticizing a "communitarian" case for work requirements that "hard work [in the form of paid employment] is morally required" for equal citizenship).

243. *See supra* Part III.

244. Forbath, *supra* note 120, at 1852 (quoting Felicia Kornbluh, *The Goals of the National Welfare Rights Movement: Why We Need Them Thirty Years Later*, 24 FEMINIST STUD. 65, 68 (1998)); *accord* Vicki Schultz, Essay, *Life's Work*, 100 COLUM. L. REV. 1881, 1883 (2000) ("[A] robust conception of equality [for women] can be best achieved *through* paid work, rather than *despite* it.").

245. *But see* Ackerman & Alstott, *supra* note 79, at 50 ("We expect [stakeholding] to serve as the institutional focus for a dynamic culture of citizenship."); ACKERMAN & ALSTOTT, *supra* note 30, at 197 ("Stakeholding is not a poverty program. It is a citizenship program.").

246. *See generally* GØSTA ESPING-ANDERSEN, POLITICS AGAINST MARKETS: THE SOCIAL DEMOCRATIC ROAD TO POWER (1985) (attributing the success of social democracy in Scandinavia in part to the early alliance of the peasantry with organized labor); Wolfgang Streeck, *The Sociology of Labor Markets and Trade Unions*, *in* THE HANDBOOK OF ECONOMIC

solidaristic politics required to pass and sustain a basic income program in the first instance. This is true on an individual level, as low-wage workers and the poor may feel less allegiance to a state that fails to protect them against domination by other private actors.[247] It is also true on a structural level, as the sorts of intermediate institutions promoted by the welfare state—again, unions, social security schemes, and certain other basic social regulations—may provide the baseline political support necessary for a basic income program in the first instance.[248]

The third objection holds that the link between minimum wage laws and social equality can be both over- and underinclusive. Such laws are overinclusive insofar as they apply both to the working poor and to temporarily employed wealthy teenagers. There is little reason to think that the latter group needs particular *wages* to ensure that they see themselves as moral equals, nor to ensure that they are treated fairly. Minimum wage laws are underinclusive insofar as many forms of unpaid work are an important source of self-esteem. Parents and relatives clearly find fulfillment in unpaid care work; others find fulfillment by volunteering for religious, nonprofit, or charitable organizations. But it does not follow that minimum wage laws are unimportant to social equality—only that they are not a complete means of achieving social equality. Indeed, the fact that volunteer work can enhance self-respect may actually bolster this Article's argument, for volunteers—unlike employees—are not directed on pain of termination, nor does their work typically provide asymmetrical benefits to other individuals.

The final objection holds that arguments from social equality may prove too much. Namely, if policymakers accept that work is an important site for social equality, then how "good" or "equal" must work or work relationships be? Must policymakers ensure that work is a site for workers' self-realization more generally? There are important reasons not to do so. While work can be a form of self-realization, this often involves such high costs and such investments of time that it may be a realistic goal only for a few—with "the artisan, the artist, and the scientist" as classic exemplars.[249] An economy that sought to ensure that all workers could achieve self-realization may end up with a much lower social product and would risk becoming illiberal insofar as it prevented individuals from seeking self-realization outside of work. More to the point, however, commitments to social equality need not make the perfect the enemy of the good. Even if

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SOCIOLOGY 254 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005) (describing the role of industrial unions in pressing for a social-welfare state).

247. In a way captured well, once again, by the textile worker's remarks quoted in the introduction. *See supra* note 1 and accompanying text.

248. *See* Streeck, *supra* note 251, at 269–71 (discussing the relationship between industrial unions and welfare states in Scandinavia, Continental Europe, the United States, and Japan).

249. Elster, *supra* note 162, at 66.

tens of millions of menial jobs cannot be rendered more interesting, they can receive better pay and fairer working conditions; workers affected would then have greater self-respect as well as more time for leisure, caregiving, or other activities through which to achieve self-realization.

B. *Revisiting the Relationship Between Social Equality and Egalitarian Liberalism*

1. How Strong Is the Liberal Case for Social Equality?—While the argument above relies heavily upon Rawls's work, the place of social equality within Rawls's theory is somewhat ambiguous. On the one hand, Rawls's difference principle requires maximizing the primary social goods of the worst off group, and Rawls argued that the social bases of self-respect are the most important of the primary social goods.[250] Rawls also recognized that a theory of justice could not ignore the workplace or the division of labor. Under justice as fairness, he argued, "no one need be servilely dependent on others and made to choose between monotonous and routine occupations which are deadening to human thought and sensibility."[251] He also noted in later work that *Theory* had paid insufficient attention to questions of work and that the "long-run prospects of a just constitutional regime may depend" upon the emergence of firms owned and managed by workers.[252] All such passages imply a concern with social equality, including decent work.

Yet due to Rawls's emphasis on the priority of liberty, and due to his attention to matters of ideal rather than nonideal theory, his theory focused almost entirely on relationships between citizens and the state and relationships among citizens in the political sphere, devoting far less attention to interpersonal relationships. Rawls also made clear that a just basic structure "most likely permits significant social and economic inequalities in the life prospects of citizens," due in part to "the need for incentives."[253] Thomas Pogge has accordingly criticized Rawls's *Theory* for failing to specify whether extreme poverty violates the liberty principle's requirement "that social institutions protect the freedom and integrity of the person" and has argued that egalitarian justice requires that the difference principle condemn "abridgements of self-respect that are due to a significantly inferior share of . . . goods" other than basic liberties, including income and wealth, and the powers and prerogatives of office.[254] G.A. Cohen has criticized Rawls's project from a different direction,

250. *See supra* subpart I(B).

251. RAWLS, THEORY, *supra* note 6, at 529.

252. RAWLS, FAIRNESS, *supra* note 6, at 178–79.

253. RAWLS, LIBERALISM, *supra* note 6, at 270.

254. POGGE, *supra* note 100, at 6–7, 163 & n.4.

holding that Rawls's theory, by excusing or even endorsing rampant self-interested behavior in markets, fails to respond to Marx's critique of liberal rights.[255]

Rawls's ambiguities regarding such matters may also reflect a basic tension between social equality and liberals' primary definition of freedom as noninterference. As Philip Pettit writes, liberalism's "relative indifference to power or domination has made liberalism tolerant of relationships in the home, in the workplace . . . and elsewhere, that the republican must denounce as paradigms of domination and unfreedom."[256] While liberals do often manifest a concern with poverty and inequality, Pettit argues that this is typically because of independent commitments, such as "the realization of a certain equality between people."[257] Neorepublican and left-communitarian approaches to such questions, neither of which rely upon a lexical ordering of principles, capture the normative impulse more directly: a just society cannot disregard private forms of power that systematically limit groups' and individuals' life opportunities.

Social equality therefore occupies an ambiguous position within liberalism. It is a baseline value, but may trigger concerns at the level of ideal theory only where groups or individuals suffer *formal* inequalities of status—denial of basic civil and political rights and the like—such that the threat of a caste-like social structure is acute.[258] The status harms that emerge from workplace inequalities are relatively minor in comparison, and remedying them requires the sorts of interferences with individual liberties that liberals disfavor.

In my view, the notion of social equality, particularly as grounded in liberalism's baseline commitments to individual autonomy, nevertheless captures why agent-specific employer duties are important independent of their effects upon material distribution. There is ample support in Rawls's own writings for the idea that in an egalitarian society autonomy and equality should animate our everyday lives. Rawls was clear, for example, that standard welfare state redistributive institutions were insufficient to ensure justice because welfare state capitalism did not incorporate "a principle of reciprocity to regulate economic and social inequalities."[259]

255. *See* COHEN, *supra* note 111 (explaining that his disagreement with Rawls is rooted in "the nonliberal socialist/anarchist conviction that Karl Marx expressed . . . that human emancipation would be complete only when the actual individual man . . . has recognized and organized his own powers as *social* powers so that social force is no longer separated from him as a *political* power" (second omission in original) (internal quotation marks omitted)).

256. PETTIT, REPUBLICANISM, *supra* note 108, at 9.

257. *Id.*

258. This helps explain Rawls's emphasis on the priority of liberty as a main guarantee of the social bases of self-respect. RAWLS, THEORY, *supra* note 6, at 544.

259. RAWLS, FAIRNESS, *supra* note 6, at 138.

Rawls also held that a just society must satisfy the "Publicity Condition," the idea that "in a well-ordered society, citizens accept the principles of justice as well as their major justifications."[260]

Various liberals have subsequently argued that, in a just society, individuals would feel themselves constrained to act in accordance with egalitarian principles—this seems to be the upshot of arguments that an egalitarian society must inculcate an "egalitarian ethos."[261] While a complete defense of the minimum wage on liberal grounds is beyond the scope of this Article, the basic liberal impulse—that social institutions should work together to ensure equality and self-respect for all—would certainly support efforts to reform labor markets so as to reduce work-based social inequalities, so long as such efforts do not themselves cause greater social or economic inequalities.

Moreover, the most prominent alternative normative theories—republicanism and left communitarianism—suffer their own weaknesses. Both theories condemn subordination above all, including subordination resulting from private power,[262] and therefore indict hierarchical workplace practices more directly than this more interstitial argument for social equality within liberalism.[263] But both define domination and subordination ostensively: they know it when they see it.[264] Pettit, for example, condemns private interferences that are "arbitrary," in the sense that they do not "track the interests and ideas of the person suffering the interference."[265] Labor scholars have drawn on this idea to indict workplace practices and background rules that leave workers subject to managers' whims.[266] But this raises its own challenges of administrability: how, for example, are workers' interests to be defined, so as to separate arbitrary from nonarbitrary interference? Which external criteria are appropriately brought to bear on such questions? Walzer, meanwhile, condemns the *systematic*

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260. Seana Valentine Shiffrin, *Incentives, Motives, and Talents*, 38 PHIL. & PUB. AFF. 111, 113 (2010); *see also* RAWLS, THEORY, *supra* note 6, at 453–54 (discussing the role of a "public conception of justice").

261. Daniels, *supra* note 20, at 244 (discussing the need for an egalitarian ethos); *see also* Wolff, *supra* note 215, at 118 (describing the egalitarian ethos as "a collection of possibly competing values, including both fairness and respect," which structures decision making in an egalitarian society); Scheffler, *supra* note 20, at 37 n.77 (arguing that G.A. Cohen's "emphasis on the importance of a choice-constraining egalitarian ethos is quite congenial to" Scheffler's own liberal formulation of democratic equality (i.e., "the social and political ideal of equality")).

262. *See* PETTIT, REPUBLICANISM, *supra* note 108, at 51–52; WALZER, *supra* note 20, at 17–20.

263. *See* PETTIT, REPUBLICANISM, *supra* note 108, at 5, 57 (discussing threat of arbitrary interference in employment); WALZER, *supra* note 20, at 165–83 (discussing work).

264. *See* PETTIT, REPUBLICANISM, *supra* note 108, at 57–58; WALZER, *supra* note 20, at 10–11.

265. PETTIT, REPUBLICANISM, *supra* note 108, at 55; *see also* Hsieh, *supra* note 110, at 117 (defining a just workplace as one without arbitrary interferences).

266. *See, e.g.*, Bogg & Estlund, *supra* note 171.

translation of power in one social sphere into power in another social sphere but does not clarify when such translations are systematic rather than partial.[267] Compared to Rawls's egalitarian liberalism, such theories trade a degree of analytical clarity for greater moral clarity and greater traction on everyday matters of justice. As Walzer and certain republicans acknowledge, they are perhaps best viewed as complementary rather than opposing approaches to justice.[268]

2. Is There an Alternative Liberal Case for Minimum Wages?— Finally, to the extent that a theory of just work is to be built on a roughly Rawlsian foundation, perhaps social equality—a relatively malleable, context-specific value—is not the optimal centerpiece. After all, the very term "social equality" may be a misnomer: it does not actually mandate *equality* in social position and status but rather places a floor beneath inequalities of status. Would another interpretation of liberal principles better ground such a project?

Professor Noah Zatz has recently developed a different case for the minimum wage rooted in Ronald Dworkin's influential argument that a just society will indemnify individuals against accidents of birth but not against the consequences of their own bad choices.[269] Many, if not most, people who end up working at or below the minimum wage, Zatz argues, have suffered hardships traceable to accidents of birth—including race, gender, relative lack of marketable abilities, being born into poverty, and the like.[270] Proving that one's low wages are traceable to such disadvantages is of course incredibly difficult, but "[a]t some point," Zatz writes, "wages become low enough that we can infer unfairness from the brute fact of the poor outcome. . . . [I]f someone is making $2 per hour, it probably is because she has gotten the short end of the stick in some fashion, probably in many. *Res ipsa loquitor*."[271] Minimum wages are thus somewhat akin to accommodation mandates in employment discrimination: they force employers to pay higher-than-market costs for particular labor in part to undo historical patterns of injustice.[272]

267. *See* WALZER, *supra* note 20, at 20 ("*No social good* x *should be distributed to men and women who possess some other good* y *merely because they possess* y *and without regard to the meaning of* x.").

268. *See* Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 6 (1990) (arguing that the so-called "communitarian" critique is not so much a refutation of liberalism as "a consistently intermittent feature of liberal politics and social organization"); *see also* Hsieh, *supra* note 110 (drawing from both Rawls's liberalism and Pettit's republicanism to develop a theory of workplace justice).

269. *See* Zatz, *supra* note 14, at 33–37.

270. *Id.* at 38–40.

271. *Id.* at 38–39 (footnote omitted).

272. *Id.* at 7.

While this Article has benefitted enormously from Zatz's analysis, he and I are attracted to different positions in a broader debate over the role of individual responsibility in egalitarian liberalism. Crudely put, Dworkin and his ilk worry that Rawls's *Theory* overdistributes, excusing many individual failures of responsibility and raising the specter of talent-slavery; Elizabeth Anderson and her ilk worry that placing too much emphasis upon individual choice undermines the self-respect of the poor and thus undermines the moral force of egalitarian liberalism.[273] I further worry that the choice/circumstance distinction is an unstable foundation for the minimum wage, for it may counsel for leaving workers to bear the costs of their own bad choices, including failures to take advantage of educational opportunities, failures to stay within the job market and to improve one's skills, and failures to avoid criminal conduct and conviction, all of which make it more difficult to find and maintain any work, much less decent work.[274]

Moreover, Dworkin's basic goal was to defend social insurance against libertarian attack by demonstrating how autonomous individuals would agree to social insurance from behind a sort of veil of ignorance; his focus is upon distributive justice, fairly narrowly defined, rather than the relationship between private actions and social equality.[275] He paid even less attention to the division of labor or employment relationships than Rawls, grounding his theory on a thought experiment that posits a society of Robinson Crusoes seeking to determine how best to distribute resources on a desert island.[276] This is not a criticism of the hypothetical per se—which nicely demonstrates some of the intuitions behind social insurance—but rather an effort to highlight its limits. Dworkin's theory simply says little about the social division of labor.[277]

I am therefore skeptical that a choice/circumstance distinction itself would justify minimum wage laws. It strikes me as more promising to first ask how existing work relationships contribute to injustice by substantially limiting individuals' life chances and then to consider which combination of regulations and other distributive institutions will best alleviate such harms. At the same time, Zatz and I do end up in much the same place,

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273. *See generally* Anderson, *supra* note 20 (criticizing responsibility-catering egalitarianism); Scheffler, *supra* note 20 (same).

274. *See* Anderson, *supra* note 20, at 296–301 (discussing certain luck egalitarians' abandonment of these and other seemingly deserving individuals).

275. *See* DWORKIN, SOVEREIGN VIRTUE, *supra* note 6, at 65–119.

276. *See id*; *id.* at 94–95 (offering a proposal for job auctions but not discussing questions of the division of labor).

277. *See* KYMLICKA, *supra* note 46, at 90–92 (criticizing Dworkin on such grounds, including his failure to challenge the "civilization of productivity" that has "perpetuat[ed] entrenched inequalities of race, class, and gender").

perhaps reflecting that these are complementary rather than competing approaches to the question of how a just society should govern work.

Conclusion

A just society will both redistribute resources and ensure that citizens confront one another as equals. Even if transfers are a more effective means of redistribution, minimum wage laws are more effective at ensuring decent work and social equality. Such laws directly increase workers' wages; they grant workers agent-specific rights against employers; and they force employers and consumers to internalize some of the social costs of low-wage labor. As a result, minimum wage laws mitigate work-based class and status distinctions and enhance low-wage workers' self-respect. By unpacking the common intuition that minimum wage laws are a matter of basic fairness, this Article aims to place those laws on a more sound philosophical footing and to enrich the increasingly urgent public debate surrounding them. In this age of increased inequality, minimum wage laws help ensure justice at work.

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Book Review

Confidence Breach: A Breakdown in Professional Self-Regulation

CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY. By Tanina Rostain & Milton C. Regan, Jr. Cambridge, Massachusetts: The MIT Press, 2014. 424 pages. $29.95.

Dana A. Remus*

At the turn of the twenty-first century, lawyers at several of the country's most prestigious law and accounting firms participated in a fraudulent tax shelter scandal that cost the U.S. Treasury billions of dollars.[1] It was not the first time lawyers had participated in a high-profile corporate scandal, nor would it be the last. What was unique was the extent and nature of the lawyers' involvement. As Mitt Regan and Tanina Rostain explain in their new book, *Confidence Games: Lawyers, Accountants, and the Tax Shelter Industry*, "[lawyers'] fingerprints were everywhere: on the shelters they designed, the promotional materials they prepared, the client pitches they made, and the opinion letters they drafted and signed."[2] The resulting scandal, the authors argue, "likely represents the most serious episode of lawyer wrongdoing in the history of the American bar."[3]

In *Confidence Games*, Regan and Rostain set out to explain how and why such widespread and pervasive wrongdoing occurred. They challenge the narratives that laid blame on a finite number of bad actors[4] and seek to offer a more comprehensive account of the actors and events that gave rise to the scandal.[5] One of their core insights is that a complete understanding must account for institutional factors and not just individual actors.[6] The authors focus on three factors in particular—a lax regulatory environment, a competitive global economy, and intense organizational pressures within

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1. TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY 25 (2014).

2. *Id.* at 4.

3. *Id.*

4. *See id.* at 329 (describing how the government only prosecuted individuals despite the clear link to an organizational structure that promoted the use of these abusive shelters).

5. *See id.* at 6–7 (putting forth their main theory that institutional structures also played an important role).

6. *See id.*

law and accounting firms.[7] In exploring these related causes, Regan and Rostain offer valuable insights on how the structures and cultures of the implicated law and accounting firms undermined and distorted lawyers' professional judgment. They conclude *Confidence Games* with promising proposals for improving the regulation of tax practice.[8]

This Review builds on Regan and Rostain's work by showing that their insights have relevance that extends far beyond tax lawyers. All lawyers in large law firms and corporate settings are subject to intensified competitive pressures, which are magnified rather than buffered by the organizations in which they work. But as Regan and Rostain suggest, these pressures differ by work setting. In combining these two insights—that all lawyers feel the intensified competitive pressures Regan and Rostain identify but that the nature of these pressures varies by work setting—I challenge the scholarly consensus that "context-specific regulation" should be tailored to practice area. I argue that it should instead be tailored to work setting.

I begin in Part I by reviewing Regan and Rostain's argument that responsibility for the tax shelter scandal lies with institutional and organizational pressures as much as with individual actors. I also review their suggestions for reform. In Part II, I argue that the problems Regan and Rostain identify are not limited to tax practice. We should therefore incorporate their insights into the regulation of all lawyers through regulatory structures that account for the institutional pressures of different organizational work settings.

I. The Institutional and Organizational Pressures of Tax Practice

In retrospect, the professional wrongdoing that gave rise to the tax shelter scandal seems blatant. In the late 1990s, however, participation and enthusiasm for the new and aggressive tax shelters pervaded the industry. In this Part, I summarize Regan and Rostain's argument as to how "such a widespread and systemic episode of professional wrongdoing occur[ed]."[9] They identify three principal institutional causes: (1) a lax regulatory environment, (2) a competitive global economy, and (3) intense organizational pressures within law and accounting firms.[10] I then review their suggestions for reform.

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7. *Id.*

8. *See, e.g.*, *id.* at 344–47.

9. *Id.* at 4.

10. *Id.* at 6–7.

A. *Institutional Causes*

1. Weak Regulatory Regime.—The authors begin their account in September 1997 with Senate Finance Committee hearings on the Internal Revenue Service (IRS). These highly critical hearings, they contend, "both reflected and contributed to the fact that the IRS was a beleaguered institution in the 1990s."[11] The IRS lacked public and congressional support at the time and was operating under the burden of outdated collection and enforcement systems. The authors conclude that it was therefore poorly positioned to police the activities of savvy tax professionals who were developing new abusive tax shelters.[12]

The IRS's struggles were rooted in the widespread anti-tax sentiment that had been building since the Reagan Administration and that translated into constant criticism and severe resource constraints.[13] Insufficient resources, in turn, exacerbated existing deficiencies in the IRS's data-collection and analysis systems.[14]

These deficiencies were extensive. Well into the 1990s, the IRS relied nearly exclusively on paper returns, hiring seasonal employees to input taxpayer information into its computers.[15] This time-intensive process left minimal resources for analysis of data and detection of tax evasion. It also led to high error rates—for transcription alone, errors occurred 20% of the time.[16] The IRS's periodic attempts to modernize its methods were impeded by Congress's refusal to appropriate funds for a system overhaul.[17]

Resource shortages were compounded by personnel issues. Regan and Rostain explain that because IRS employment at the time entailed low compensation and little prestige, the most competent and talented agents sought employment elsewhere, leading to "significant brain drain at the agency."[18] For those who remained, there was little incentive to audit taxpayers to detect evasion, as job performance was evaluated by the number of cases resolved rather than the amount of revenue collected.[19]

Desperate to avoid continued scrutiny and negative publicity, IRS officials were reluctant to engage in aggressive enforcement efforts. Instead, they focused on the mandate of the 1998 Restructuring and Reform

11. *Id.* at 12.
12. *Id.* at 13, 331.
13. *Id.* at 12–13.
14. *Id.* at 17–19.
15. *Id.* at 17.
16. *Id.*
17. *See id.* at 17, 19.
18. *Id.* at 18–19.
19. *Id.* at 19.

Act to create a more "user friendly agency."[20] Regan and Rostain argue that although this may have helped with customer relations and public perceptions, it left the IRS poorly positioned to identify and address the growing tax shelter industry.[21]

2. *Increasing Global Economic Competition.*—While the IRS was struggling, the global economy of the 1990s was booming. Regan and Rostain identify this as the second institutional factor driving the tax shelter boom.[22] They explain that intensified economic competition led many corporations to pressure their tax departments to minimize tax liability as a means of improving their bottom lines. Tax departments, in turn, began looking for new and aggressive ways to shelter income.[23]

As increased competition was fueling demand, changes in the market for legal services was fueling supply. Regan and Rostain emphasize two shifts in particular that created an increasingly fluid and competitive practice environment. First, whereas law firms had historically enjoyed long term relationships with clients, clients began shopping around for the best and most cost-efficient legal services. Second, whereas lawyers had traditionally spent their entire careers at the firms they joined out of law school, many successful lawyers began lateralling mid-career. As a result, law firms were forced to compete for both lucrative client engagements and lawyers with impressive books of business.[24]

These firms competed not only with other law firms but also with accounting firms.[25] With revenues from traditional audit services flattening out, accounting firms were working to identify new products and services that would increase revenues and growth.[26] They were also recruiting talented tax lawyers to develop new products and services. Given that the 1998 IRS Restructuring and Reform Act had afforded accountant–taxpayer communications the same confidentiality protections as attorney–client communications,[27] clients would (and did) give their business to accounting firms rather than law firms if the former were offering more attractive products and services.[28]

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20. *Id.* at 21–23 (discussing the effects of the act, including its effect on straining agency resources, and its effect, in practice, of reducing the amount of auditors available for enforcement).

21. *See id.* at 13, 23–24.

22. *Id.* at 24.

23. *Id.* at 45–46. New sources and concentration of personal wealth led to demand by sophisticated individuals as well. *Id.* at 45.

24. *Id.* at 66.

25. *Id.* at 71.

26. *Id.* at 45–46.

27. *Id.* at 21.

28. *Id.*

Against this background, Regan and Rostain describe how tax professionals at both types of firms looked to standardized tax products as a means of fueling growth, increasing profits, and staying competitive.[29] Firms that developed these products could market and sell them to countless clients for a percentage of the taxes saved. They therefore viewed these products as the key to breaking free from the constraints of hourly billing and dramatically increasing revenues.[30]

3. Organizational Structures.—The third factor that Regan and Rostain identify as fueling the tax shelter boom—new organizational structures and pressures—was itself a product of the second.[31] The authors explain that although accounting and law firms responded to the increased economic competition in distinct ways, their responses had a common consequence. In both cases, the responses directed attention away from the delivery of individualized professional services and towards profit maximization.[32]

a. Accounting Firms.—Regan and Rostain argue that the implicated accounting firms (including KPMG, Ernst & Young, PriceWaterhouseCoopers (PwC), Arthur Andersen, and BDO Seidman) actively and intentionally institutionalized tax shelter practice.[33] By this, they mean two things: First, these firms devoted significant resources to encouraging and rewarding the development of new and aggressive shelters.[34] Among other things, they recruited elite tax lawyers away from law firms and directly out of law school to design shelters,[35] and they began aligning compensation and advancement with revenue generation.[36] Given that tax shelters were vastly more lucrative than any other type of work these firms performed, this directly incentivized shelter work.[37]

Second, the implicated accounting firms declined to institute rigorous internal review mechanisms.[38] At some firms, review was conducted by the individuals who had designed the shelters.[39] At other firms, it was highly fractured, with individual reviewers responsible only for the validity and

29. *See id.* at 24.

30. *Id.* at 56–57, 78.

31. *See supra* note 7 and accompanying text.

32. *See* ROSTAIN & REGAN, *supra* note 1, at 52 (discussing the transformation of a law firm's tax practice); *id.* at 53–57 (discussing the parallel transformation in accounting firms).

33. *See id.* at 326 (concluding that it was the firms' internal cultures that valorized tax shelters and sales). *See generally id.* at 77–176.

34. *Id.* at 332.

35. *Id.* at 57.

36. *Id.* at 332.

37. *See id.* at 332–33.

38. *See, e.g.*, *id.* at 153–54 (outlining the weak internal review structure at PwC).

39. *See id.* at 333 (noting this occurrence at Ernst & Young).

legality of one particular aspect of a shelter.[40] Few individuals paused to ask whether the shelter as a whole had sufficient economic substance to be valid.[41] Those that did voice concerns—even repeatedly—were ignored or marginalized.[42]

Regan and Rostain conclude that by the late 1990s, shelter activity had gained momentum within accounting firms that no single individual could stop.[43] But tax professionals at accounting firms were not acting alone. They had realized early on that if they could obtain a favorable opinion as to a shelter's validity and legality from an (allegedly) independent law firm, they could significantly strengthen the shelter's marketability.[44]

b. Law Firms.—Regan and Rostain contend that prior to the 1990s, most elite tax lawyers would have refused to provide such an opinion because of a long-standing consensus disfavoring excessively aggressive tax strategies.[45] The authors further contend that as the increasingly fluid market for legal services led to an overwhelming focus on profits per partner, this consensus among the elite tax bar broke down.[46] The result, they argue, was shelter activity in law firms that was just as robust as in accounting firms but of a different character. While accounting firms actively institutionalized aggressive shelter practice, law firms facilitated it more passively—frequently, by looking the other way.[47]

Regan and Rostain acknowledge that initially some law firms took active roles in encouraging shelter activity.[48] The Dallas-based firm of Jenkens & Gilchrist, for example, hired a lateral partner, Paul Daugerdas, to open a Chicago office devoted exclusively to shelter work.[49] The firm's management did so notwithstanding concerns expressed by existing tax partners and other warning signs.[50] After hiring Daugerdas, however, the

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40. *See id.* at 333–34 (exploring this deficiency with the KPMG approval process).

41. *See, e.g.*, *id.* at 109–13 (describing the "review" process of BLIPS, which consisted of multiple actors who continuously punted important questions of legality and shirked responsibility for making final decisions).

42. *Id.*

43. *Id.* at 97.

44. At the time, a taxpayer could avoid penalties for an arrangement later deemed invalid if the taxpayer had relied in good faith on an opinion from an independent, professional tax advisor. *Id.* at 37.

45. *Id.* at 61, 65.

46. *Id.* at 73.

47. *See id.* at 217–18 (noting how law firms turned a "blind eye" toward shelter activity, which was a result, in part, of the firms' loose oversight structures).

48. *See, e.g.*, *id.* at 183–84 (explaining that Paul Daugerdas's practice would be valuable to Jenkens & Gilchrist because it would boost the firm's prestige and profits per partner).

49. *See generally id.* at 177–216 (detailing the birth of a tax shelter practice at Jenkens & Gilchrist).

50. *See id.* at 186–87 (discussing the concerns raised among partners about Daugerdas's tax shelter practice and business model and the reservations that accompanied his hiring).

firm's role was much more passive. The partnership allowed Daugerdas to practice thousands of miles away from the Dallas office and free from any meaningful system of monitoring and review.[51] Daugerdas brought in staggering amounts of income—$28 million in 1999 alone, representing more than 13% of the firm's total revenues[52]—making it easy for other partners to turn a blind eye to signs of trouble.[53]

Shelter practices at other law firms grew up from within, often without the full partnership's awareness or understanding. At Brown & Wood, for example, long-standing partner R.J. Ruble began working closely with both KPMG and Ernst & Young in developing aggressive tax shelters.[54] Ruble then wrote favorable opinion letters, falsely representing to clients that he could offer an independent opinion that would shield them against penalties if the IRS ultimately characterized the arrangement as invalid.[55] Ruble, who diverted many of his fees straight to his own pocket rather than to the firm's coffers, was later described by lawyers in his firm as a rogue partner and bad actor.[56] But in overlooking numerous and frequent warning signs, the firm's partnership was complicit.[57]

Ruble is an extreme example, but countless other lawyers succumbed to organizational pressures within their law firms to accept new and more aggressive norms of practice, or to look the other way when their partners did so, in the name of increased revenues.[58] Regan and Rostain explain that at the height of the shelter boom, many tax lawyers believed that if they declined to write a favorable opinion letter, their clients would quickly and easily find another lawyer who would. Based on this belief, and in the face of intense competition for clients, more and more lawyers began providing such letters, even in support of excessively aggressive and abusive transactions.[59] Far too often, they issued these opinions without sufficient—or sometimes even any—investigation or personal knowledge.[60]

51. *See id.* at 336–37.

52. *Id.* at 208.

53. *See id.* at 217–18.

54. *See id.* at 220–22.

55. *Id.* at 223; *see also id.* at 139–40, 199, 203 (describing Ernst & Young's development of the COBRA, with which Daugerdas and Ruble were similarly involved from the beginning).

56. *Id.* at 281.

57. *See id.* at 228 ("At a minimum, Ruble's involvement in the shelter design process should have raised a serious question about whether any investor could reasonably rely on his opinion to avoid a penalty.").

58. *See id.* at 52–53 ("Many individuals swept up in the shelter market were highly regarded tax professionals with lengthy experience in practice.").

59. *Id.* at 70.

60. *See, e.g.*, *id.* at 206 ("Jenkens lawyers never received any representations from purchasers about their particular circumstances or their purpose in engaging in the transactions. . . . Indeed, sometimes the firm had no contact with the client at all.").

In this way, Regan and Rostain illustrate how law and accounting firms magnify "the competitive forces to which they are prey."[61] In the late 1990s, these competitive forces led lawyers within both types of firms to push aside their previous views of professionalism and to pursue, or to allow their colleagues and firms to pursue, fraudulent tax shelters.[62] Based on this, Regan and Rostain conclude that the accounting and law firms in which tax lawyers practice can no longer be trusted to instill professional norms or to buffer lawyers from competitive market forces.

B. Proposals for Reform

Regan and Rostain conclude *Confidence Games* by suggesting strategies for reducing the likelihood of a repeat wave of fraudulent tax shelters. These include continued bar corporatism and new efforts to lessen organizational pressures.

Citing Professor Ted Schneyer, Regan and Rostain define "bar corporatism" as follows: "[u]nder this approach, a regulatory agency with expertise in the field oversees practice in a specialized area, guided by dialogue and negotiation with practitioners."[63] As the authors note, bar corporatism has existed in tax practice for years.[64] The IRS has long sought feedback and participation from the bar in its regulation of tax lawyers who practice before it.[65] Regan and Rostain endorse this general approach but argue that these efforts need to be broadened to address not only the conduct of individual tax professionals but also the institutional and organizational pressures under which they work.[66]

To address these pressures, Regan and Rostain suggest that the tax bar and IRS should "focus on developing approaches that limit professional organizations' incentives to engage in tax shelter activity."[67] Circular 230, which contains the standards governing tax practitioners appearing before the IRS,[68] requires the writer of a tax opinion to inquire into all relevant facts and to address all relevant judicial doctrines.[69] Regan and Rostain contend that the prospect of vicarious liability would create a strong incentive for firms to address the institutional and organizational pressures that encouraged shelter activity in the first place.[70] To mitigate excessive

61. *Id.* at 339.
62. *Id.* at 52–53.
63. *Id.* at 344.
64. *Id.* at 344–45.
65. *Id.* at 345.
66. *Id.* at 346.
67. *Id.* 345.
68. *Id.* at 263.
69. *Id.*
70. *Id.* at 345–47.

harshness, the authors suggest a safe harbor defense of adequate internal compliance measures.[71]

Confidence Games suggests a number of productive directions for reform, but the authors are explicit that their principal goal is to understand how the tax shelter wave of the late '90s arose, not to determine how a repeat wave can be prevented.[72] Accordingly, after offering a number of discrete suggestions, they invite tax lawyers and the profession more generally to build upon their descriptive account in order to strengthen the regulatory regime and improve organizational work environments.[73] I take up this invitation in the next Part.

II. Looking Beyond Tax Practice

In this Part, I argue that the relevance of Regan and Rostain's insights extends far beyond tax practice. The authors' core insight—that market pressures are expressed through organizational structures and that organizational structures influence lawyers' conduct—should therefore be incorporated into the professional regulation of all lawyers. But it should be done so in a way that accounts for differences among work settings. Together, these insights challenge the scholarly consensus that "context-specific regulation" should be tailored to practice area, suggesting instead that it should be tailored to work setting.

A. The Organizational Work Settings of Today's Lawyers

As Regan and Rostain's account reveals, lawyers working in law firms face different challenges and constraints than those working in accounting firms and other business settings. Lawyers working in corporate in-house counsel offices face a third set of distinct challenges. In this subpart, I review the specific challenges faced in each context. I argue that these challenges are not limited to tax practice. They reverberate through each work setting, affecting a broad range of practice areas.

71. *Id.* at 345.
72. *Id.* at 7.
73. *Id.*

1. Law Firms.—As Regan and Rostain describe, the challenges faced by and within law firms stem from the increasingly fluid and competitive market for legal services. Historically, long-term client relationships insulated firms from the competitive pressures of the market and allowed them to foster cultures that prioritized professional judgment. But the need to compete for clients and lawyers and to increase revenues led to an erosion of traditional practice norms and informal peer controls.

Although Regan and Rostain focus on tax practice, their own account suggests that tax lawyers were not uniquely susceptible to these pressures.[74] *Confidence Games* document how lawyers in a variety of practice areas and throughout firm management structures overlooked warning signs and condoned shelter work as a valid and desirable means of increasing revenue and spurring firm growth.[75]

A substantial and growing literature on large firm practice supports the conclusion that firm lawyers in a variety of practice areas feel the pressures that Regan and Rostain describe.[76] Scholars and commentators have documented how and why the growing focus on profit maximization has led many firm lawyers, in a variety of practice areas, to make unethical choices and to engage in unethical conduct.[77] The choices may begin with

74. *See id.* at 52–53 (revealing how the non-tax partners in law firms turned a blind eye and succumbed to the pressures of making more profit).

75. *See supra* notes 43–47 and accompanying text.

76. *See, e.g.*, John M. Conley & Scott Baker, *Fall from Grace or Business As Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 LAW & SOC. INQUIRY 783, 817 (2005) (concluding from a survey of forty years of empirical studies that lawyers in large firms cope with demanding clients and intense competition, which may lead to unethical behavior); Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 263, 267, 269, 273, 279, 291 (2000) (finding that the increase in billable hour requirements for lawyers has created a pressured work environment, is a significant cause of dissatisfaction with work, increases stress, lowers work quality, harms ethical standards, and damages lawyers' reputations and client relationships); Marianne M. Jennings, *The Disconnect Between and Among Legal Ethics, Business Ethics, Law, and Virtue: Learning Not to Make Ethics So Complex*, 1 U. ST. THOMAS L.J. 995, 997 (2004) (discussing scandals that have occurred since 2001 and asserting that the individuals involved were fully aware that they were engaging in unethical behavior); Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession*, 96 MINN. L. REV. 1482, 1482–83 (2012) (stating that lawyers work in a high-pressure environment that can lead not only to dissatisfaction but also to ethical breaches); Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms*, 9 U. ST. THOMAS L.J. 619, 619 (2011) (arguing that even without demanding billable hour requirements, lawyers will still be prone to engaging in unethical business practices if they believe such behavior is required for success and employed by others at the firm).

77. *See, e.g.*, James M. Altman, *Trouble with the Bottom Line*, N.Y. ST. B.J., Nov. 1996, at 6, 6 (arguing that many firms' "unbridled pursuit of profits" leads attorneys to make questionable ethical decisions); Conley & Baker, *supra* note 76, at 784 (surveying forty years of empirical research about the pressures faced by small- and large-firm attorneys to make questionable ethical decisions); Mortazavi, *supra* note 76, at 1483 (arguing that the emerging profit-driven business models in law firms creates a system that "marginalizes professional responsibility").

questionable practices, such as rounding up in recording time[78] before moving to more blatant forms of wrongdoing.[79] In a now familiar example, Vinson & Elkins lawyers conducted a company-wide investigation of Enron and, notwithstanding serious and specific concerns raised by a vice president, concluded that further investigation by independent counsel and auditors was not necessary.[80]

2. *Quasi-Legal Roles.*—Regan and Rostain observed that the pressures and tensions lawyers faced in accounting firms were more direct than those in law firms. Many of the lawyers working in these firms had been recruited from law firms for the specific purpose of developing standardized tax products that could generate significant profits.[81] The traditional model of individualized services had been fully discarded in both theory and practice, and the profit motive was more explicitly at the forefront. The lawyers were not technically practicing law and, thus, had no countervailing commitments to an independent profession. Nor did they have the support and protection of an independent profession if and when they voiced concerns.

The competitive pressures that Regan and Rostain identify in the business sector are not limited to tax practice, nor to accounting firms. Lawyers in many other areas of law occupy quasi-legal roles in investment banks, trust companies, private equity firms, and large corporations.[82] They were hired for their legal expertise, but they do not technically practice law.

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78. *See* Fortney, *supra* note 76, at 279–81 (noting how the pressure to lie about billable hours may cause the most ethical attorneys to leave the profession); Parker & Ruschena, *supra* note 76 (arguing that "billable hour pressure is merely the face of more fundamental pressures stemming from the way that lawyers in private practice perceive their work environments").

79. *See, e.g.*, Jennings, *supra* note 76, at 997–1017 (reviewing the corporate scandals of recent years and determining that those scandals were not even a close ethical call); *see also* Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1089 (2004) (referring to Enron's duplicitous methods of hiding its true financial state and presenting itself as a profitable company).

80. *See* Jennings, *supra* note 76, at 1005 (describing an incident at Vinson & Elkins where the lawyers should have realized what was going on, but, "they were not inclined to raise the flag in the beginning days of the spin-offs and by the time of the extensive spin-offs, fear of collapse consumed them and their better judgment in halting the bizarre financial empire").

81. *See* ROSTAIN & REGAN, *supra* note 1, at 57, 71.

82. Dana A. Remus, *Out of Practice: The Twenty-First Century Legal Profession*, 63 DUKE L.J. 1243, 1259–60, 1265–66 (2014). For example, many trust companies regularly recruit trusts and estates lawyers to serve as trust officers. *Id.* at 1264–65. A law license is not a prerequisite of the job, but it is considered valuable, both for the legal knowledge it represents and for the confidence it inspires among clients. *Id.* Another example, provided by Rostain herself in a 2006 article, is the role of law consultants. Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORDHAM L. REV. 1397, 1397 (2006). By design, these lawyers work outside of the scope of professional regulation. *Id.* at 1398. Their appeal to corporations lies in the fact that they can engage in conduct that is otherwise prohibited by the rules of professional conduct. *Id.* at 1409–10. They can, for example, interview employees without explaining their relationship to management and offer expert testimony at trial. *Id.* at 1420–21, 1423.

Like the tax professionals working at accounting firms in Regan and Rostain's account, they are untethered from the profession's regulatory regime and vulnerable to enormous pressures to elevate profit-maximization above all else.[83]

3. In-House Counsel.—A third distinct work setting occupied by many lawyers today—in-house counsel offices at corporations and other organizations—is not central to Regan and Rostain's account. The authors gesture towards these roles, however, in discussing the increasing demand for aggressive shelters from within corporate tax departments. Presumably, lawyers working in tax departments and within general counsel offices participated in the growth of shelter activity.[84] At the very least, they did not stop it. They do not appear to have voiced strong concerns about the shelters' legality or the validity of the legal opinions approving them.[85] To the extent they did, they must have been dissuaded from pressing their concerns.

This highlights a problem, long noted by commentators and scholars of the legal profession, which extends far beyond tax practice—insufficient autonomy and independence among in-house counsel. Nearly forty years ago, as part of their groundbreaking study of the Chicago bar, John Heinz and Edward Laumann questioned the ability of in-house lawyers to exercise independent judgment when doing so could require them to "bite the hand that feeds them every day."[86] Since then, many scholars have suggested that the problem might run deeper than a fear of voicing opposition.[87] In-house lawyers may become so involved in management's decision-making processes and enmeshed in corporate culture that they identify more closely with the company than with the legal profession.[88] Their perspective may

83. *See* Remus, *supra* note 82, at 1271–72.

84. *See* ROSTAIN & REGAN, *supra* note 1, at 49.

85. At the very least, Regan and Rostain do not mention them doing so. Given the meticulously detailed account that the authors offer of all involved actors, entities, and events, this suggests that in-house counsel did not vocalize any concerns. In fact, in one account given by Regan and Rostain, a King & Spalding partner tried to rely on the fact that he had lengthy discussions with a corporation's in-house counsel, but the court found the testimony to be uncreditable, believing that the in-house lawyer played little role in assessing the merits of the shelter. *Id.* at 237–38.

86. John P. Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891, 900 (1983).

87. *See, e.g.*, Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 958–60 (2005) (tracing the history of the role of in-house counsel and the counsel's increasing role in the direction of the business); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 466–68 (2000) (discussing entrepreneurial lawyers and using as an example the general counsel to a holding company who is motivated by business interests rather than by his legal responsibilities and whose responsibilities in general went "well beyond" giving legal advice).

88. *See* DeMott, *supra* note 87, at 967–69 (discussing the possibility that general counsels' close relationships with their companies limit their ability to act impartially).

become entirely aligned with corporate management, precluding the possibility of independent judgment.[89]

As with pressures within law firms and business settings, the pressures within in-house counsel offices are not unique to tax lawyers. In all three contexts, the institutional and organizational pressures that Regan and Rostain describe are felt by lawyers working in all areas of law. Accordingly, the profession's failure to recognize and address these pressures is not just a shortcoming in the regulation of tax lawyers; it points to system-wide problems with the professional regulation of all lawyers.

B. Proposals for Reform

In this final subpart, I argue that the profession should incorporate Regan and Rostain's insights into new regulatory structures. These new structures should acknowledge and account for the financial and competitive pressures that interfere with lawyers' independent professional judgment in all areas of law, but that vary by work setting. I offer examples of the types of new regulatory structures that the profession should consider, which address the specific pressures and tensions of: (1) law firm practice, (2) quasi-legal work, and (3) in-house practice.

1. Law Firms.—As an initial matter, the profession should impose more stringent regulation on law firm lawyers in an effort to counteract the competitive pressures that are currently distorting professional judgment. This regulation could take many forms, including allowing for the professional discipline of law firms as well as lawyers, and establishing a constructive knowledge standard for legal opinions.

As described above, Regan and Rostain suggest the first of these proposals for tax practice. They suggest imposing vicarious liability on all firms for the Circular 230 violations of their tax professionals. Their proposal is appropriate and desirable for law firms generally. Two states—New York and New Jersey—have already implemented such rules. Both impose an affirmative duty on law firms to make "reasonable efforts" to ensure ethical compliance by a firm's lawyers.[90] Law firms that fail to do so can be disciplined for their lawyers' ethical violations.[91] The result, as

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89. *See id.* (describing the challenge for a company's general counsel of remaining impartial when he or she is involved closely in the affairs of the business).

90. N.Y. RULES OF PROF'L CONDUCT R. 5.1 (2014); N.J. RULES OF PROF'L CONDUCT R. 5.1(a) (2012).

91. N.Y. RULES OF PROF'L CONDUCT R. 5.1 (2014); N.J. RULES OF PROF'L CONDUCT R. 5.1(a) (2012). Despite the advancements made in New York and New Jersey, the ABA, in its *Model Rules of Professional Conduct*, declined to impose liability on the entire firm. *See* Margaret Colgate Love, *The Revised ABA* Model Rules of Professional Conduct*: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 470–71 (2002) ("The Commission initially proposed to extend the duties in Rules 5.1 and 5.3 to law firms as well as individual lawyers.

Regan and Rostain predict in the tax context, is a powerful incentive for firms to develop effective compliance programs.[92] Effective compliance programs, in turn, could lessen organizational pressures to engage in aggressive and questionable conduct.

A second measure to improve the practices of law firm lawyers would be a constructive-knowledge standard for legal opinions. A frequent criticism, supported by Regan and Rostain's account, is that lawyers engage in insufficient investigation before making representations in opinion letters,[93] sometimes relying exclusively on statements made by their clients.[94] These practices could be changed by a constructive-knowledge standard, which would hold a lawyer responsible for any information she knew, had reason to know, or should have known concerning flaws and misrepresentations in an opinion. Relying on a client's statements and representations would not constitute a defense.[95]

However, it became persuaded that any possible benefit . . . was small when compared to the potential cost of de-emphasizing the personal accountability of partners and supervisors.").

92. The incentives would be even stronger under a proposal advanced by Ted Schneyer over two decades ago to impose vicarious liability on the firm under a respondeat superior standard for the misconduct of firm personnel. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 28–29 (1991). Additional and potentially problematic incentives would be created by this standard, however. Given that firms could be held liable even with reasonable assurances of ethical compliance, firms would have to devote significant resources to overseeing and evaluating the work of all firm employees. *Id.* at 29–30. This could significantly increase the cost of legal services.

93. *See supra* note 60 and accompanying text; *see also* Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1247 (2003) (noting, in connection with the Enron scandal, that the "knowing" requirement in ethical cannons fails to capture even the most egregious conduct because lawyers are trained to zealously represent their clients, which shades their reasoning into thinking that their clients are not violating the law); Mike France, *What About the Lawyers?*, BUS. WK., Dec. 23, 2002, at 58, 59 ("Whether [Enron's lawyers] worked inside or outside the company, they all mount the same defenses: that the deals they worked on were legal, they had nothing to do with the company's accounting, and they didn't have enough facts to grasp the big picture . . . .").

94. In most contexts, governing standards do not require a lawyer to investigate each fact personally rather than relying on statements of their client. For example, an ABA formal opinion states that in rendering an opinion concerning the sale of unregistered securities, although counsel "should not accept as true that which he should not reasonably believe to be true, he does not have the responsibility to 'audit' the affairs of [the] client[] or to assume, without reasonable cause, that [the] client's statement of the facts cannot be relied upon." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 335 (1974).

95. This standard should also be adopted by various regulatory bodies, such as the IRS and SEC, which have disciplinary authority over lawyers who issue particular types of opinion letters. *See, e.g.*, Press Release, Internal Revenue Serv., KPMG to Pay $456 Million for Criminal Violations (Aug. 29, 2005), *available at* http://www.irs.gov/uac/KPMG-to-Pay-$456-Million-for-Criminal-Violations (forcing KPMG to pay criminal sanctions for issuing fraudulent opinion letters); Press Release, Sec. & Exch. Comm'n, SEC Charges California-Based Lawyer with Issuing Fraudulent Legal Opinion Letters (Mar. 7, 2013), *available at* http://www.investor.gov/news-alerts/press-releases/sec-charges-california-based-lawyer-issuing-fraudulent-legal-opinion-lett#.Ux8xWfldXTo (charging a lawyer with issuing baseless opinion letters).

This change would go a long way in addressing a central concern of commentators and reformers seeking to encourage lawyer gatekeeping. As Sung Hui Kim observes, effective gatekeeping entails two distinct functions: (1) the ability and willingness to stand up to corporate management, and (2) the ability and willingness to monitor corporate activity and gather relevant information.[96] Conventional wisdom holds that outside counsel are better positioned to act as effective gatekeepers because their increased independence facilitates the first of these functions.[97] As Kim points out, however, in-house counsel are better suited for the second function by virtue of being embedded within the structures and cultures of their clients.[98] Kim observes an additional factor complicating the conventional wisdom—it is unlikely that outside counsel will perform tasks for which they cannot bill and unlikely that clients will pay outside counsel to perform tasks, such as monitoring corporate affairs, that inside counsel can perform more efficiently.[99]

Holding outside counsel to a constructive-knowledge standard would leverage the respective strengths of each role, recognizing that we need not locate gatekeeping responsibilities exclusively with one or the other. Outside counsel would be required to spend the necessary resources to gather relevant information. Given that they would face pressure to do so in a cost-effective manner, they would likely team with inside counsel, tapping into inside counsel's heightened access to information regarding corporate affairs. This, in turn, would combine the benefits of inside counsel's ability to monitor with outside counsel's heightened independence.

2. *Quasi-Legal Roles.*—Addressing the challenges faced by lawyers in quasi-legal roles is a harder task. These lawyers are not practicing law and, accordingly, are not subject to the strictures of professional regulation. This is a core difficulty in insulating them from competitive pressures—they have no ethical duties imposed by and no ethical guidance offered by a professional body independent from their employer.

It is important to recognize that although the profession's codes of conduct are frequently viewed as a means of constraining poor behaviors, they serve an equally important function in compelling good behaviors.[100] By requiring lawyers to act in certain ways and threatening a loss of

96. Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 413–14 (2008). Kim does not conclude that in-house counsel are necessarily better suited to act as gatekeepers, but that the question is far more complicated than conventional wisdom holds. *Id.* at 460–61.

97. *See, e.g.*, JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 195 (2006); DeMott, *supra* note 87, at 967–68.

98. Kim, *supra* note 96, at 452–54.

99. *Id.* at 447.

100. Remus, *supra* note 82, at t 1275–76.

licensure if they do not, the codes of conduct (backed by enforcement mechanisms) can both empower and incentivize lawyers to check unethical business strategies.[101] Lacking this source of empowerment and incentive, lawyers in quasi-legal roles have diminished ability and motivation to adopt a remedial orientation towards their employers.

Elsewhere, I have argued that the profession should remedy this situation by extending baseline conduct regulations to lawyers working in all settings, regardless of whether they are practicing law.[102] These rules would create a unifying superstructure over context-specific practice rules. They could include, for example, baseline duties of candor and fair dealing in business interactions.[103]

3. In-House Counsel.—As discussed above, new forms of regulation have the potential to bolster lawyers' independence in law firms. They may be powerless, however, where lawyers are employed by, and embedded within, their sole client. For these reasons, many European countries do not view in-house lawyers as members of the bar and do not afford them the protections of the attorney–client privilege.[104]

The American bar should similarly regulate in-house lawyers differently than lawyers working at law firms, subjecting them to different obligations and affording them different protections. A full discussion of such potential changes is a subject for future work. Here, I offer two representative examples. First, we should not afford the legal opinions and advice of in-house counsel the same weight as opinions and advice from law firm lawyers. Just as in-house counsel opinions regarding the legality

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101. Empirical research indicates that lawyers are able to (and sometimes do) dissuade businesses from unwise or unethical practices. For example, lawyers can counsel businesses to be cautious about tolerating risk and ensure that businesses properly disclose information. *See* Christine E. Parker et al., *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201, 240 (2009) (finding through empirical evidence that some lawyers do act as compliance monitors); *see also* Nelson & Nielsen, *supra* note 87, at 463–64 (analogizing the role of a lawyer to that of a cop, where the lawyer "polic[es] the conduct of [his] business clients").

102. Remus, *supra* note 82, at 1282–84.

103. *Id.* at 1282.

104. *See* Case C-550/07P, Akzo Nobel Chems. v. Comm'n, 2010 E.C.R. I-8309, I-8325, at I-8382 ("[A]n enrolled in-house lawyer . . . does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his clients." (emphasis omitted)); Case T-125/03 & T-253/03, Akzo Nobel Chems. Ltd. v. Comm'n 2007 E.C.R. II-3532, II-3587 ("The Commission concludes that, in their great majority, the Member States do not grant LPP [privilege] to in-house lawyers, even where they can be members of a Bar or Law Society."); *see also* Andrew R. Nash, *In-House but out in the Cold: A Comparison of the Attorney–Client Privilege in the United States and European Union*, 43 ST. MARY'S L.J. 453, 477 (2012) ("According to the Court of Justice's interpretation, the varied nature of exact services provided, the close ties that in-house counsel maintains with the business entity, and the counsel's knowledge of commercial strategies negatively impact the attorney's professional independence.").

of a tax strategy cannot be used in a subsequent defense for underpayment of taxes based on good faith reliance on the advice of a tax professional,[105] in-house counsel opinions and advice should not be available for advice-of-counsel defenses in lawsuits generally. In addition, in-house counsel should be precluded from issuing third party opinion letters to validate and endorse business dealings between their clients and third parties.[106]

Second, following the European model,[107] communications with in-house counsel should not be protected by the attorney–client privilege. Notwithstanding the privilege's traditional position at the foundation of the attorney–client relationship, this change would not be as drastic as it first sounds. In recent years, the privilege has been weakened significantly in the corporate context, as government investigations are routinely premised on its waiver.[108] Given that corporate management often uses the privilege in troubling ways, to protect itself at the cost of individual employees, this may be appropriate.[109] Moreover, the traditional rationale of the privilege—facilitating the lawyer's role in mediating between the client and the state to persuade the client to pursue legal courses of action—has lost meaning in the corporate context.[110] As commentators have long suspected, and as research now confirms, most in-house counsel do not inhabit this mediating role.[111] They are intimately involved in their companies'

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105. Mortensen v. Comm'r, 440 F.3d 375, 387 (6th Cir. 2006).

106. *See* 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 cmt. b (1998) (noting that such opinions are currently permissible).

107. *See supra* note 104 and accompanying text.

108. See William R. McLucas et al., The Decline of the Attorney-Client Privilege in the Corporate Setting, 96 J. CRIM. L. & CRIMINOLOGY 621, 621 (2006) (illustrating how agencies seeking to "restore public confidence in our capital markets" tend to measure corporation cooperation by whether a corporation has waived attorney–client privilege); Report of the American Bar Association's Task Force on the Attorney-Client Privilege, 60 BUS. LAW. 1029, 1043 (2005) (noting that many corporations disclose otherwise privileged documents and information lest agencies exercise discretionary authority to bring costly actions under civil or criminal law); David M. Zornow & Keith D. Krakaur, On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations, 37 AM. CRIM. L. REV. 147, 148, 154 (2000) ("Federal prosecutors are no longer content to build criminal cases by relying on the powerful tools of grants of immunity and grand jury subpoenas . . . . Instead, they now often insist, even at the outset of an investigation, that corporations turn over privileged communications . . . .").

109. *See* George M. Cohen, *Of Coerced Waiver, Government Leverage, and Corporate Loyalty: The Holder, Thompson, and McNulty Memos and Their Critics*, 93 VA. L. REV. IN BRIEF 153, 160–61 (2007) ("Long before the government's waiver policy was ever dreamed up, corporations were exercising this right to waive the privilege and put the blame for illicit conduct (rightly or wrongly) on their employees.").

110. *See* Rostain, *supra* note 82, at 1426 ("The privilege not only exists to assist counsel in formulating legal advice; it is also intended to create a zone of privacy that lawyers are supposed to use to convince corporate clients to abide by the law.").

111. *See supra* notes 86–89 and accompanying text.

business as well as legal strategies, and they identify much more closely with their clients than with the legal profession.[112]

* * *

Regan and Rostain conclude that "the organizations in which tax lawyers practice can no longer be trusted to buffer lawyers from competitive market forces or instill professional norms."[113] Currently, their conclusion is relevant not only to tax lawyers but to all lawyers working in the business sector. There is reason for optimism, however. If the profession incorporates the insights of *Confidence Games* into new regulatory structures that account for the particular challenges of various work settings, organizational influences may bolster rather than undermine lawyers' professional norms and ethical standards.

112. *See supra* notes 88–89 and accompanying text.

113. ROSTAIN & REGAN, *supra* note 1, at 343.

Responses

How the Obamacare Case Defined Deviancy Down

Andrew Koppelman*

Michael Dorf, in his review of my book, *The Tough Luck Constitution and the Assault on Health Care Reform*, agrees with me that what I call "Tough Luck Libertarianism"—the idea that if you get sick and can't pay for it, the state has no right to help you—played a large role in the Court's decision in *National Federation of Independent Business v. Sebelius*,[1] the *Health Care Case*.[2] Dorf, however, thinks I have not given enough weight to two other factors: federalism and "nonpartisan framing."[3] When these are taken into account, the constitutional challenge no longer seems to him as frivolous as he once thought (and I still think) it to be.

It is important to consider, as sympathetically as you can, arguments with which you do not agree. But there are dangers. Dorf's generous spirit has led him to expand—really to explode—the bounds of the frivolous.

I. Implementing Federalism

The Tough Luck Constitution tells the story of the Supreme Court litigation over the Affordable Care Act (ACA). Chapter One examines the history of health care reform in America and shows how the logic of reform led Congress to choose the mandate over other, functionally equivalent, but politically impossible, ways of delivering near-universal health care. Chapter Two, the focus of Dorf's critique, describes the appropriate constitutional limitations on congressional power. Chapter Three shows how the constitutional objections were invented, for the first time, as the bill neared passage. Chapter Four examines the Court's decision. Chapter Five considers the decision's aftermath.

Dorf thinks that I am poorly positioned to criticize the Court's federalism reasoning:

> Koppelman rejects the entire framework within which the Supreme Court's conservative majority has implemented the Constitution's

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1. 132 S. Ct. 2566 (2012).

2. *See* Michael C. Dorf, *What Really Happened in the Affordable Care Act Case*, 92 TEXAS L. REV. 133, 135 (2013) (book review).

3. *See id.* at 136.

> federalism limits; thus, like other liberal constitutional scholars, he was not and is not well positioned to say what questions that majority would regard as settled and what questions it would regard as open.[4]

Actually, I share the Court's interest in limits on congressional power, though I conclude (and Dorf agrees) that the Court has made a mess of the job.

I argue in the book that the most sensible understanding of constitutional limits on congressional power is the principle of subsidiarity, which holds that central authority should perform only those tasks which cannot be performed at a more local level.[5] At Philadelphia in 1787, the Convention resolved that Congress could "legislate in all cases . . . to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[6] This was then translated by the Committee of Detail into the present enumeration of powers in Article I, Section Eight,[7] which was accepted as a functional equivalent by the Convention without much discussion.[8] I argue that ambiguities in the enumeration should be resolved by reference to the general purpose of the Constitution. That purpose is revealed not only by these then-secret deliberations but also by the widely shared understanding that the Articles of Confederation were defective and had to be replaced precisely because they created a state of affairs where some problems could be solved neither by the states nor by the federal government.[9] Specifically with respect to the commerce power, I follow Robert Stern, who observed in 1934 that "no hiatus between the powers of the state and federal governments to control commerce effectively was intended to exist"[10] and that the Framers did not intend that the people of the United States "be entirely unable to help themselves through any existing social or governmental agency."[11]

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4. *Id.* at 145 (footnote omitted).

5. ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 41–43, 58–59 (2013).

6. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911); *see also* 1 *id.* at 21 (referring to Resolution VI of the Virginia Plan).

7. U.S. CONST. art. I, § 8.

8. "Though it has been argued that this action marked a crucial, even subversive shift in the deliberations, the fact that it went unchallenged suggests that the committee was only complying with the general expectations of the Convention." JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 178 (1996) (footnote omitted); *accord* Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1340 (1934).

9. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 1–12 (1913) (detailing the inadequacies of the Articles of Confederation).

10. Stern, *supra* note 8, at 1365.

11. *See id.* at 1335.

Dorf objects that the principle of subsidiarity is not in the Constitution as finally enacted. "Where specific language implements some general principle, the specific language controls."[12] He is right in part: perhaps subsidiarity does not justify a federal bankruptcy law, but that is specifically authorized by the text.[13] But he's not right in *pertinent* part. The language of the Commerce Clause is not specific at all. It is compatible with many different interpretations. The limitations on the commerce power that the Court has devised are judge-made law, connected to the text only by the imperative to craft rules in order to implement vague constitutional provisions.[14]

Given that there must be judge-made law, what should the rule be? As Dorf notes, I'm torn between absolute judicial abstention and a subsidiarity rule. The problem with subsidiarity is that it is a standard that cannot be administered without a lot of discretion. There are clear violations, and perhaps the courts can remedy them without collateral mischief. The statute invalidated in *United States v. Lopez*,[15] criminalizing possession of handguns near schools,[16] was pure congressional grandstanding. There was no reason to think that the states could not handle the problem. As I acknowledge in the book,[17] however, the *Lopez* Court did not rely on subsidiarity.[18]

The clearest of the limits stated in *Lopez* is the notion that Congress can regulate economic, but not noneconomic, activity.[19] *Gonzales v. Raich*[20] clarified that even noneconomic activity could be regulated if the statute as a whole clearly did regulate interstate commerce and regulating the noneconomic activity "was an essential part of the larger regulatory scheme."[21]

I dislike this rule because it means "Congress would be deprived of authority over such nontrivial matters as the spoliation of the environment

12. Dorf, *supra* note 2, at 143.

13. U.S. CONST. art I, § 8.

14. *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 98–101 (2001) (describing the Court's creation of those limitations).

15. 514 U.S. 549 (1995).

16. *Id.* at 551.

17. KOPPELMAN, *supra* note 5, at 59.

18. Dorf claims that "Koppelman writes as though the pre-*Health Care Case* doctrine *already* endorsed subsidiarity. Yet the Court has never treated subsidiarity as a directly enforceable principle of federalism." Dorf, *supra* note 2, at 144. I never claim that subsidiarity is now the law. Readers can reasonably ask me whether I think that there should be no limits at all on congressional power. In the context of the *Health Care Case*, that question is an urgent one. Subsidiarity is my answer. The Court, as I acknowledge, has gone in another direction.

19. *See Lopez*, 514 U.S. at 561 (refusing to uphold the Act because it is not "an essential part of a larger regulation of economic activity"). On the vacuity of the other stated limits, see KOPPELMAN, *supra* note 5, at 59–60.

20. 545 U.S. 1 (2005).

21. *Id.* at 26–27.

or the spread of contagious diseases across state lines."[22] Maybe those results would have to be accepted if the Constitution's commands were clear. But we are talking about judge-made law. Dorf writes that "these formal tests are also made up by the courts; however, if genuinely rule-like, in future cases they may be more constraining than open-ended standards."[23] But look at the ordering of priorities: we risk epidemic diseases and the disappearance of irreplaceable species in order to get marginally greater constraint. You can believe in judicially enforced federalism without believing that.

Nonetheless, the rule, flawed as it is, is sufficient to sustain the mandate. The health care law is clearly an economic regulation.[24] The mandate is just as clearly useful to carrying it out and so is authorized under the Necessary and Proper Clause. Either *Lopez* as based on an economic–noneconomic distinction or *Lopez* as based on subsidiarity will sustain the mandate.

I do not devote a lot of space in *The Tough Luck Constitution* to the argument under existing law. I do not have to.

> Under settled law at the time that the ACA was enacted, the mandate is obviously constitutional. That is why the Democrats paid so little attention to the constitutional objections. Here is the case for its constitutionality under existing precedent, in four sentences. *Insurance is commerce. Congress can regulate it. Therefore, Congress can ban discrimination on the basis of preexisting conditions. Under the Necessary and Proper Clause, it gets to decide what means it may employ to make that regulation effective.*[25]

That also answers the claim that sustaining the mandate would call all limits into question. If there is any limit at all laid down in *Lopez*—whatever that may be—then it logically follows that accepting the mandate would not abandon all limits.[26]

The ACA's constitutionality under existing law is thus clear—unless, of course, you introduce a new, previously-unheard-of rule: the action–

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22. KOPPELMAN, *supra* note 5, at 60.

23. Dorf, *supra* note 2, at 144.

24. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609–15 (2012) (Ginsberg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (discussing the economics of health care).

25. KOPPELMAN, *supra* note 5, at 67.

26. *Id.* at 77–78. This precise argument was made in the lower courts by acting Solicitor General Neal Katyal but unfortunately was deliberately abandoned in the Supreme Court by his successor, Donald Verrilli. JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 136–37, 143–44, 151–52, 162 (2013). Dorf speculates that sustaining the mandate might have called *Lopez* into question because even the law invalidated there might have been reframed as a mandate. Dorf, *supra* note 2, at 147–48. But he immediately concedes that if the economic–noneconomic activity line is accepted, then it logically applies to such mandates so that this work-around would be defeated. *Id.* at 148.

inaction distinction. I write: "That limit has nothing to do either with the purposes for which federal power is being exercised or with the reasons for which anyone would reasonably want to constrain it. It is a limit just for the sake of having a limit."[27]

Dorf thinks that I do not fully appreciate "that the conservative Justices could have sincerely regarded the mandate as a threat to the Constitution's state–federal balance."[28] It is true that, if the Court wants a judicially enforceable federalism, it must devise "a test that is sufficiently capacious to satisfy the Hamiltonian concern that the government must have latitude to choose effective means to accomplish its legitimate ends, but sufficiently constraining to satisfy the Jeffersonian concern that the federal government's affirmative powers remain limited."[29] The action–inaction distinction is not that test.

The Court concededly is in love with the idea of limits on Congress. Every couple of years it has been necessary to lay some federal law onto the altar and rip its heart out. The ritual is satisfied even if, as in *Lopez*, neither Congress nor the lower courts can tell afterward what the rule is.[30] Judicial decision should not, however, rest on the premise, "we didn't necessarily mean to hit you; we just needed to hit somebody."

The other federalism doctrines the Court has invented in recent years—"an anticommandeering rule; a state sovereign immunity doctrine that goes well beyond the text of the Eleventh Amendment; [and] a distinction between economic and noneconomic activity as a predicate for the exercise of the Commerce Clause power"[31]—at least bear some relation to the underlying concern for state autonomy or the meaning of "commerce." Dorf doubts that the action–inaction distinction "is less defensible than the other state-protective doctrinal innovations."[32] But this one is unmoored from *any* value in the constitutional text, and it does not significantly limit the commerce power.

> It allows Congress to act in every case in which the citizen has voluntarily taken some action. Most of us can't realistically avoid having jobs and buying things, and it's not much consolation to be told that I can avoid oppression if I live in the woods and eat berries. This limitation is unlikely to have any application after the ACA litigation and is patently tailored to bring about a desired result in a single case.[33]

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27. KOPPELMAN, *supra* note 5, at 62.
28. Dorf, *supra* note 2, at 136.
29. *Id.* at 140.
30. *See* KOPPELMAN, *supra* note 5, at 59–62.
31. Dorf, *supra* note 2, at 153 (footnotes omitted).
32. *Id.*
33. KOPPELMAN, *supra* note 5, at 77.

Randy Barnett, the mastermind behind the case against the ACA,[34] implicitly recognizes this difficulty. He has defended the Court's holding on the commerce power, but on a different basis than he argued or than the Court relied on. He thinks that the expansion of federal power since the New Deal is too entrenched to roll back but that the approach the Court now follows "can be summarized as 'this far and no further'—provided 'no further' is not taken as an absolute, but merely as establishing a baseline beyond which serious justification is needed."[35]

This is not doctrine at all. It is a generalized suspicion of federal power. Barnett understands that this way of drawing the lines is arbitrary but thinks that it is an appropriate response to the expansion of federal power, which "violated the original meaning of the Constitution."[36] Thus, the work begins of rewriting the case—a task that implicitly concedes that the Court did a poor job and needs help.[37] But Barnett has here relegated the action–inaction distinction to a subsidiary inquiry in which the real question is whether Congress is doing anything new. Everything will then turn on whether a new regulation is an expansion of federal power. After reviewing the argument over whether the mandate was novel, "with various analogies offered and refuted along the way," Charles Fried concludes that "the very scholasticism of this debate shows how irrelevant the sobriquet 'novel' is to the question of validity."[38] If this is the Court's new paradigm for constitutional law,[39] then judges' pretheoretical intuitions, and advocates' skills at manipulating those intuitions, will define the limits of federal power.

II. How Nonpartisan Framing Unleashes Partisanship

Dorf's other explanation for the Court's acceptance of the action–inaction distinction is "nonpartisan framing," which he defines as "the

34. *See id.* at 80–90 (describing Barnett's role).

35. Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (And Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331, 1348 (2013).

36. *Id.* at 1350.

37. Sometimes that kind of work is unavoidable because the Court sometimes reaches the right result for the wrong reasons. *See, e.g.*, Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 481–83 (1990) (describing attempts to rewrite *Roe v. Wade*, 410 U.S. 113 (1973)). Barnett's approach, however, is an originalist argument with weak originalist credentials. *See* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1082–83 (2005) (reviewing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004)).

38. Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 51, 55 (Nathaniel Persily et al. eds., 2013).

39. And it very well may be. For a purely descriptive analysis upon which Barnett relies, see Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1 (2013).

process by which lawyers persuade judges—and by which judges persuade themselves—that the law requires results that the judges favor for low political reasons."[40] This is certainly part of what drove the Court. Dorf does not claim that nonpartisan framing can make a legal argument nonfrivolous. It does not constrain legal argument at all. It is like Herbert Wechsler's neutral principles. Wechsler made a great fuss of insisting that cases be decided by "standards that transcend the case at hand."[41] But you can always come up with a principle that satisfies this criterion and justifies what you want to do. The only limit is your own cleverness, which is why especially clever lawyers make the big bucks.[42]

For just that reason, nonpartisan framing cannot explain any result because it will always be present. It is just a routine part of minimally competent lawyering, like remembering to show up for trial.

Dorf observes that "conservatives are especially good at framing partisan claims in nonpartisan terms because they view alternative methodologies as not merely inferior but as fundamentally illegitimate."[43] But originalist methodology, which conservatives love to cite, is irrelevant here because the judges in the *Health Care Case* made no attempt to justify their position in originalist terms. The arguments that were made—for instance, the ringing claim that a regime that empowers Congress to enact the mandate is "not the country the Framers of our Constitution envisioned"[44]—are specimens of what we can call Maximally Degraded Originalism: *The Framers were very wise men. Therefore it follows that they would have agreed with me.* The casual reliance on a support that is really no support at all bespeaks another pathology, which I'll call Maximal Rationalization: *Whatever I'm doing cannot possibly be wrong, because it's me that's doing it.*[45]

If nonpartisan framing was enough to persuade the Court that it was innocent of political motivation, that bespeaks a distinctive kind of culpable self-deception. I agree with Dorf that it is very improbable that any of the judges "would allow himself or herself to believe that he or she was voting based on partisan motives."[46] As it happens, every single judge who joined

40. Dorf, *supra* note 2, at 137.

41. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17 (1959).

42. Wechsler was strangely unclever in justifying *Brown v. Board of Education*, 347 U.S. 483 (1954): he despaired of its justification after rejecting a couple of weak arguments. Wechsler, *supra* note 41, at 31–34.

43. Dorf, *supra* note 2, at 157.

44. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012) (Roberts, C.J.).

45. On that pathology, see Andrew Koppelman, *Reading Lolita at Guantánamo: Or, This Page Cannot Be Displayed*, DISSENT, Spring 2006, at 64.

46. Dorf, *supra* note 2, at 155.

the Commerce Clause holding is Catholic.[47] They ought to reflect on the wisdom of the venerable moral tradition in which they participate. Aquinas observed that ignorance is not an excuse "when somebody chooses not to be informed, in order to find some excuse for sin or for not avoiding it" or "when a person does not actually attend to what he could and should consider."[48] If the judges were unaware of the politically convenient character of their reasoning, it is likely that this unawareness was the object of the will, consented to as such.

III. Whose Tough Luck?

Dorf asks: "Does Tough Luck Libertarianism explain how the conservative Justices voted in the *Health Care Case*?"[49] But that's not my question. Neither Tough Luck Libertarianism, federalism, nor nonpartisan framing explains why the Court did what it did. I offer some guesses, but I do not try to psychoanalyze the Justices.[50] I am not offering a "causal account" of the result in the case. My claim is that causation moves in the other direction: in order to reach the conclusions they did (and you will have to figure out for yourself why they wanted them), the judges found it necessary to introduce Tough Luck Libertarianism into constitutional law. Dorf thinks "the conservatives used Tough Luck Libertarianism opportunistically in the *Health Care Case*."[51] But the opportunism runs in both directions. This case gave Barnett, whose libertarianism approaches anarchism,[52] the chance to shape constitutional doctrine.

The power of the challenge came from a set of rhetorical moves that depended on unstated Tough Luck Libertarian assumptions. My claim is that these assumptions were necessary for the rhetoric to work:

> [P]eople . . . who were not [themselves] Tough Luck Libertarians . . . nonetheless found themselves saying Tough Luck Libertarian things and . . . making claims based on a Tough Luck *Constitution*—a constitution in which there is no realistic path to universal health care. That Constitution won't be attractive unless Tough Luck

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47. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2591 (Roberts, C.J.); *id.* at 2642 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting)); Barbara A. Perry, *Catholics and the Supreme Court: From the "Catholic Seat" to the New Majority*, *in* CATHOLICS AND POLITICS: THE DYNAMIC TENSION BETWEEN FAITH & POWER 155, 157 tbl.9.1 (Kristin E. Heyer et al. eds., 2008) (noting that Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito are all Catholic).

48. 17 ST. THOMAS AQUINAS, SUMMA THEOLOGIÆ pt. I-II q. 6, art. 8, at 32 (Cambridge: Blackfriars, 1970).

49. Dorf, *supra* note 2.

50. The most impressive, informed speculations I've seen are by Charles Fried and Linda Greenhouse. *See* Fried, *supra* note 38; Linda Greenhouse, *Is It the Roberts Court?*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS, *supra* note 38, at 186.

51. Dorf, *supra* note 2.

52. KOPPELMAN, *supra* note 5, at 81.

> Libertarianism is right that it is acceptable to deny people the medical care they need. The challengers to the ACA talked a lot about slippery slopes—at the bottom of this one was a law requiring you to buy broccoli—but there's a slope in the other direction as well. Once you decide that it's acceptable to hold your nose and make this kind of argument, it will be easier next time.[53]

Here I can only offer one illustration. In *United States v. Comstock*,[54] the Court upheld a law authorizing civil commitment of mentally ill sexual predators that remain dangerous after completing their federal prison sentences—an appropriate federal role, Congress found, because no state may be willing to take custody and the federal imprisonment had created that problem.[55]

In his opinion in the *Health Care Case*, Roberts quoted a declaration in *McCulloch v. Maryland*[56] that the Necessary and Proper Clause did not authorize the use of any "'great substantive and independent power' of the sort at issue here."[57] That raises a puzzle. How do you tell the difference between a "great substantive and independent power" and lesser powers? Roberts tries to distinguish *Comstock* because the law it upheld permitted "continued confinement of those *already in federal custody* when they could not be safely released."[58] It thus "involved exercises of authority derivative of, and in service to, a granted power."[59] But this is a pretty broad understanding of what constitutes a derivative power. If, in the course of exercising an enumerated power, the federal marshals ever take you into custody, they have a derivative power to keep you locked up, forever if necessary.

What actually determines what counts as a "great substantive and independent power," as I argue in the book, is "the interpreter's pretheoretical intuitions about which government powers are particularly scary."[60] The mandate, an obligation to pay money if you impose risks on

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53. *Id.* at 16. Ilya Somin similarly objects that the challengers to the ACA did not rule out all redistributionist measures and concludes that Tough Luck Libertarianism had nothing to do with the challenge. Ilya Somin, *New Books on the Obamacare Case*, VOLOKH CONSPIRACY (Aug. 12, 2013, 11:40 AM), http://www.volokh.com/2013/08/12/new-books-on-the-obamacare-case/. But the specific arguments they did make rested in Tough Luck Libertarian premises. (In the same post, Somin himself reads a presumption against redistribution into the Constitution, without specifying any textual basis for it. *See id.*) I do not complain that they did not follow those premises to their logical conclusions. In fact, I am relieved.

54. 560 U.S. 126 (2010).

55. *Id.* at 129, 133, 142.

56. 17 U.S. (4 Wheat.) 316 (1819).

57. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593 (2012) (Roberts, C.J.) (citation omitted) (quoting *McCulloch*, 17 U.S. at 411).

58. *Id.* at 2592.

59. *Id.*

60. KOPPELMAN, *supra* note 5, at 116–17. This argument has been challenged by David Kopel, who claims that the point is not scariness at all. Rather, he claims that compelling

other people, is an extraordinary power. Locking someone up indefinitely is a mere incident. Here we come to the dark heart of the case against the ACA: the notion that the law's trivial burden on individuals was an intolerable, outrageous invasion of liberty, even when the alternative was *really* tough luck for anyone who cannot afford medical care.[61]

Paul Clement, who led the litigation against the ACA, declared that he was defending a crucial element of liberty: "[F]or the most part, if you want to avoid federal regulatory power, all you can do is simply exercise your right not to engage in commerce. If the mandate is constitutional, however, then you would not have that right either."[62] This depends on two dubious premises: that citizens have an important interest in avoiding federal regulatory power and that it is realistically feasible to avoid engaging in commerce. The fantasy of regulation-free life is starkly presented in the description of two of the ACA's challengers in their complaint:

> [Mary] Brown has not had healthcare insurance for the last four years, and devotes her resources to maintaining her business and paying her employees.
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> . . . [Kaj] Ahlburg has not had healthcare insurance for more than six years, does not have healthcare insurance now, and has no intention or desire to have healthcare insurance in the future. Mr. Ahlburg is and reasonably expects to remain financially able to pay for his own healthcare services if and as needed.[63]

By the time the case was decided, Brown had gone bankrupt, and her medical bills were passed on to her creditors and so to the public at large.[64]

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involuntary commerce is "larger, greater, and more 'awesome'" than the power to regulate existing commerce, and so cannot be subsidiary to it. David B. Kopel, *Postscript and Concluding Thoughts*, *in* A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE 261, 264–65 (Trevor Burrus ed., 2013). Look at this concretely: the power to make people buy policies, it is claimed, is larger and greater than the power (which Kopel concedes) to forbid them from receiving medical care if they are uninsured. It remains mysterious how one determines that one power is greater than another.

61. The analysis here is developed in greater detail in Andrew Koppelman, *"Necessary," "Proper," and Health Care Reform*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS, *supra* note 38, at 105.

62. Paul Clement, *The Patient Protection and Affordable Care Act and the Breadth and Depth of Federal Power*, 35 HARV. J.L. & PUB. POL'Y 887, 889 (2012). He concluded his oral argument with the same claim. *See* BLACKMAN, *supra* note 26, at 213. If you're so keen to avoid federal regulation, then the ACA does permit you to avoid it by declining to engage in commerce. The penalty for going without insurance is a tax on income, and "you cannot generate income without engaging in commerce." KOPPELMAN, *supra* note 5, at 111.

63. Amended Complaint at 8, Florida v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. May 14, 2010) (No. 3:10-cv-91-RV, EMT).

64. Jonathan Cohn, *New Twist in the Obamacare Lawsuits*, NEW REPUBLIC (Dec. 5, 2011), http://www.newrepublic.com/blog/jonathan-cohn/98145/affordable-care-act-mandate-lawsuit-nfib-mary-brown-bankruptcy-court-standing.

Ahlburg, a retired investment banker,[65] may be rich enough to handle his own medical bills, but it is hard to be sure. If you get really sick, you can burn through a lot of money very quickly. People who self-insure are also likely to make medical decisions in a relatively inefficient and ineffective way.[66]

How can the interest in avoiding regulation be more important than the interest in avoiding illness? This premise has to be that there is something uniquely pernicious about government regulation, whatever its purpose. Regulation by government is oppression. Disaster from some source other than government is merely tough luck.

IV. Defining Deviancy Down

If a legal argument is nonfrivolous so long as it satisfies these two parameters, then no argument for invalidating a federal statute is frivolous. Any rule will satisfy the craving to invent constraints on congressional power, and it would have to be a pretty feeble lawyer who could not frame his proposed limit in nominally nonpartisan terms.

In 1993, Senator Daniel Patrick Moynihan's famous article, *Defining Deviancy Down*, argued that American society was "re-defining deviancy so as to exempt much conduct previously stigmatized, and also quietly raising the 'normal' level in categories where behavior is now abnormal by any earlier standard."[67] In 1929, the killing of seven gangsters became notorious as the "St. Valentine's Day Massacre," but in the 1990s such violence had become relatively unremarkable.[68]

In constitutional law, too, the standards evidently have sunk. The opinions of Roberts and the Scalia group are a new landmark in bad judicial craftsmanship. The non sequiturs keep coming, like boulders in an avalanche.[69] Dorf writes that when we read these opinions, "we need to grade on a curve."[70] Here, though, the curve means that everyone gets a passing grade, no matter how badly they perform.

Given the Court's behavior in recent years, the impulse to adjust our expectations is probably irresistible. Moynihan, following Emile Durkheim and Kai Erikson, thought that there is a limit to the amount of behavior that

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65. Paul Gottlieb, *Port Angeles Man Plaintiff in National Health Care Lawsuit That Also Includes 26 States*, PENINSULA DAILY NEWS, http://www.peninsuladailynews.com/article/20110121/NEWS/301219981/port-angeles-man-plaintiff-in-national-health-care-lawsuit-that-also (last updated Jan. 20, 2011, 11:37 PM).

66. Abigail R. Moncrieff, *The Individual Mandate as Healthcare Regulation: What the Obama Administration Should Have Said in* NFIB v. Sebelius, 39 AM. J.L. & MED. 539, 557 (2013).

67. Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17, 19 (1993).

68. *Id.* at 26–28.

69. *See* KOPPELMAN, *supra* note 5, at 109–32.

70. Dorf, *supra* note 2, at 156.

any society can regard as deviant. As the level of previously deviant behavior increases, the imperative to renormalize gets stronger. In *The Tough Luck Constitution*, I criticize many of the ways the Court exercised power, but perhaps I should have said more about the way in which it has redefined the boundaries of what can count as a legal argument. American lawyers must work within those boundaries. But part of law professors' jobs is grading the work product of the judiciary. The Supreme Court is not well served by the soft bigotry of low expectations.[71]

71. Another even more direct path to the same result is to regard the law as whatever the Court says it is, and so implicitly to deem the Court infallible. It would follow that the only function of the professoriate is to predict what the courts will do—a job they will botch if they let their predictions get contaminated by legal principles. *See* Andrew Koppelman, *Did the Law Professors Blow It in the Health Care Case?*, 2014 U. ILL. L. REV. (forthcoming 2014) (on file with author) (critiquing, on this basis, David A. Hyman, *Why Did Law Professors Mis-underestimate the Lawsuits Against the PPACA?*, 2014 U. ILL. L. REV. (forthcoming 2014) (on file with author)).

Still Free to Harm: A Response to Professor Farber

Thomas O. McGarity*

Professor Farber has written a painstakingly fair review of my book, *Freedom to Harm*. I am gratified that he found the book to be an important addition to the administrative law literature, and I find little in his review with which to take issue. One aspect of the review, however, inspired me to think more carefully about the book's primary thesis and the implications that it has for the future of health, safety, and environmental protection in the United States.

Professor Farber's review begins with a concise, thumbnail sketch of the chapters of the book devoted to the origins of the Laissez Faire Revival in the Chicago School, early think tanks, and a now-famous memorandum[1] written by soon-to-be Justice Lewis Powell to his friend and neighbor, the regulatory affairs director for the U.S. Chamber of Commerce.[2] That document laid out a strategy for the business community's response to the landmark health, safety, and environmental legislation enacted during what I call the "Public Interest Era," the period of great social ferment spanning from the mid-1960s to the late 1970s.[3] The result was the creation of an "idea infrastructure" of think tanks, sponsored university research, and institutions like the Federalist Society that aggressively advanced what I call a "laissez faire minimalist"[4] (and Professor Farber calls a "libertarian"[5]) agenda.

The review then turns to the four assaults on the federal regulatory programs during the last two years of the Carter Administration and the first three years of the Reagan Administration, the 104th ("Gingrich") Congress, the George W. Bush Administration, and the last two years of the first Obama Administration.[6] Rather than focusing on the history of the four waves of deregulatory fervor as they played out in each of the regulatory

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1. Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), *available at* http://law.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf.

2. Daniel A. Farber, *The Thirty Years War over Federal Regulation*, 92 TEXAS L. REV. 413, 414–18 (2013) (book review).

3. THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL 6, 22–26 (2013).

4. *See id.* at 41–56.

5. Farber, *supra* note 2, at 416.

6. *Id.* at 419–21.

agencies as described in the book, Professor Farber directs the reader's attention to the institutional contexts in which all four assaults on regulation played out—Congress, the rulemaking process in federal agencies, and the enforcement process in the federal agencies and the states.[7]

That approach allows Professor Farber to highlight a phenomenon that the book may obscure—the fact that while the assaults on agency rulemaking and enforcement achieved some impressive successes (especially with respect to reduced agency budgets and resources), the assaults on the bedrock health, safety, and environmental laws in Congress failed miserably.[8] His overall conclusion is that "the regulatory footprint of the government has grown rather than shrunk over the three decades since Ronald Reagan took office."[9] And this, he concludes,[10] was not a welcome development for the libertarians whose goal was to shrink government regulation to the size that it could, in Grover Norquist's trenchant metaphor, be dragged into the bathroom and drowned in the bathtub.[11] In this Response, I will follow Professor Farber's organizational scheme because it highlights our differences and facilitates my attempt to clarify the book's major thesis.

I. The Assaults on Legislation in Congress

Professor Farber accurately relies on the book's historical description of the four assaults for the propositions that Congress failed to gut the major health, safety, and environmental statutes and, in fact, enacted some protective statutes that empowered regulatory agencies to promulgate new rules imposing additional regulatory requirements on the relevant industries.[12] These developments were deeply disappointing to the libertarians who occupied the business community's idea infrastructure.[13]

It is at this point that Professor Farber's review inspired me to think more deeply about the thesis of my book. Although the book began with a

7. *Id.* (Congress); *id.* at 422–28 (the rulemaking process); *id.* at 428–37 (the enforcement process).

8. *See id.* at 421.

9. *Id.* at 428.

10. *See id.* at 437.

11. Jeremy W. Peters, *For Tax Pledge and Its Author, a Test of Time*, N.Y. TIMES, Nov. 19, 2012, http://www.nytimes.com/2012/11/20/us/politics/grover-norquist-author-of-antitax-pledge-faces-big-test.html (quoting Grover Norquist).

12. *See* Farber, *supra* note 2, at 419–21. In the area of financial regulation, by contrast, Congress did gut some of the important regulatory statutes like the Glass-Steagall Act, which Congress repealed during the second term of the Clinton Administration. MCGARITY, *supra* note 3, at 171–72.

13. *See* MCGARITY, *supra* note 3, at 283–84 (noting that by mid-2008, the "opulent citadels of laissez faire minimalism" had to finally concede—in the face of powerful evidence such as the growing body of regulation—that the core theory of the business community's idea infrastructure had failed).

description of the business community's careful nurturing of libertarian thinkers like Friedrich Hayek and Milton Friedman and featured a description of modern-day libertarians like Grover Norquist and the scholars associated with the Cato Institute, I did not mean to suggest the successes and failures of the assaults on regulation were primarily attributable to their efforts. The conservative think tanks and academic centers that I describe in the book were responsible for the ideological "air war" that paved the way for the business community's attempts to relieve itself of the federal government's regulatory burdens.[14] The business community played only a secondary role in establishing and supporting these institutions, most of which received the bulk of their early support from a few wealthy individuals and foundations with antigovernment agendas that I referred to as the "founding funders."[15]

The business community played a much more profound role in the "ground war," where lobbyists and Astroturf grassroots organizations attempted to derail protective regulatory legislation and to persuade Congress to enact deregulatory legislation.[16] When it came to repealing existing regulatory legislation, the business community's interest was more ambiguous.[17] Unlike the libertarians, who have no use for regulatory legislation of any kind, the business community needs to preserve the façade of regulatory protections to maintain public confidence in its products and services.[18] My guess is that Tom Delay's attempt to repeal the Clean Air Act[19] was a nonstarter in the business community not just because the chances of passing such radical legislation were extremely low, but because the business community needed for members of the public to believe that EPA was there to protect them and their children from the adverse effects of air pollution. Thus, the general lack of statutory

14. *Id.* at 55.

15. *Id.* at 37–40.

16. *Id.* at 59–64, 68.

17. I recognize, of course, that there is considerable overlap between "libertarians" and the "business community." Many libertarians are prominent businesspersons and vice versa. MURRAY N. ROTHBARD, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO 389–90 (2d ed. 2006). But the business community has frequently rejected libertarian prescriptions when they run counter to its economic interests. *See id.* at 388–90. For example, in addition to its ambivalence on whether health, safety, and environmental statutes should be repealed, the business community can be downright hostile to libertarian attempts to reduce subsidies to particular industries and barriers to foreign imports. *See* Timothy P. Carney, *The Case Against Cronies: Libertarians Must Stand Up to Corporate Greed*, ATLANTIC (Apr. 30, 2013), http://www.theatlantic.com/business/archive/2013/04/the-case-against-cronies-libertarians-must-stand-up-to-corporate-greed/275404 (noting a pattern of government regulation that benefits big business but should be "worrisome to free-marketeers").

18. MCGARITY, *supra* note 3, at 288–89 (noting that some in the business community applauded the efforts of Obama to balance "freedom of commerce" with "protect[ing] the public against threats to our health and safety." (alteration in original)).

19. CHRISTOPHER J. BAILEY, CONGRESS AND AIR POLLUTION: ENVIRONMENTAL POLITICS IN THE US 258–59 (1998).

retrenchment was not necessarily unwelcome in the business community, even if it profoundly disappointed the libertarians in the think tanks and academia.

A better measure of the impact of the four assaults on regulation in Congress is the extent to which Congress enacted new and more restrictive legislation. To answer this question, we must address the counterfactual. What would the health, safety, and environmental statutes have looked like had the four assaults not taken place? Professor Farber acknowledges that in the area of health, safety, and environmental regulation (though perhaps not in the areas of consumer and financial regulation) there have been few "major regulatory breakthroughs."[20] It is, of course, difficult to speculate about what legislation Congress would have passed if the business community's armies of lobbyists had not descended upon Washington every time a crisis induced Congress to consider protective legislation. But one of the points I try to make in the book is that the familiar pattern of congressional enactment of legislation in response to crises that highlight the failures of existing statutes has, to some degree, been disrupted during the Laissez Faire Revival of the past thirty years.[21] Congress enacted the Food Safety Modernization Act in response to a confluence of crises resulting from foodborne disease outbreaks of the late 2000s,[22] but it failed to enact significant legislation in response to the Upper Big Branch mine disaster,[23] the *Deepwater Horizon* oil spill,[24] and the ongoing crisis of global warming and associated climate change.[25] Had the business community's idea and influence infrastructures not been fully resourced to beat back legislative attempts to respond to these crises, it is certainly likely that Congress would have enacted protective legislation to fill in the gaps left open by past legislative efforts. Thus, the business community can be pleased with this aspect of its thirty-year war on regulation in Congress.

II. The Assaults on Rulemaking

The business community can also be pleased with the results of its assaults on agency implementation of regulatory statutes through rulemaking. Indeed, when the business community failed to prevent

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20. Farber, *supra* note 2, at 419.

21. *See* McGarity, *supra* note 3, at 68 (comparing the proactive approach to regulation of the Public Interest Era to the approach taken in the past thirty years where few protective regulations were promulgated or enforced).

22. *Id.* at 252–53.

23. *Id.* at 263.

24. *See id.* at 249–50 (noting that after the *Deepwater Horizon* disaster, the Administration continued to rely heavily on private certifications instead of strengthening agency enforcement and regulations).

25. *See id.* at 117 (recounting Congress's inability to enact legislation to address emerging environmental problems after the third assault on regulation).

Congress from enacting modest expansions in regulatory authority, it often prevented the regulatory agencies from implementing those statutes in a way that posed serious threats to the economic interests of the regulated companies.[26] Congress may have required the Food and Drug Administration (FDA) to promulgate implementing regulations within strict statutory deadlines in the Food Safety Modernization Act,[27] but the FDA has thus far not been able to surmount the considerable analytical hurdles and White House-imposed review requirements that now make high-stakes rulemaking exceedingly difficult. Nearly four years after the statute was enacted, the agency has not finalized any of the regulations necessary to implement the statute's requirements for growers, processors, and importers of the foods that we all eat,[28] and foodborne illness outbreaks continue unabated.[29]

In analyzing what the book has to say about rulemaking, Professor Farber focuses heavily on the role of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget. Although Congress assigned to that office the quite modest task of implementing the Paperwork Reduction Act,[30] presidents since President Reagan have elevated that office to the role of general overseer of the regulatory process.[31] Farber acknowledges that "OIRA has unquestionably impacted the rulemaking process" and that the "OIRA process has also undoubtedly slowed the regulatory process."[32] But he takes away from the book "the impression that presidential selection of agency heads has been a more important factor along with influence by higher-level White House staff."[33] The business community derailed or slowed down regulations by lobbying OIRA officials, but it also accomplished that goal by lobbying agency leaders in connection with major rulemaking initiatives, inundating the agencies with blunderbuss comments on particular proposals, and challenging final rules in court.[34] The overall effect of the four assaults on rulemaking was to slow down the progress of rulemaking, prevent or derail

26. *See, e.g.*, *id.* at 136–38 (describing some of the hurdles to actually writing the rules in the context of the FDA).

27. *See id.* at 253–54 (noting that the FDA had already missed some implementation deadlines after sixteen months).

28. *See* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEXAS L. REV. 1139, 1140–42 (2014) (discussing the continuous delay at the FDA and some of its factors).

29. *Id.* at 254 (referring to cantaloupes infected with salmonella that infected other people and honeydew melons that were recalled due to contamination with listeria).

30. *See* 44 U.S.C. § 3503 (2006) (establishing OIRA to implement the Paperwork Reduction Act).

31. MCGARITY, *supra* note 3, at 69.

32. Farber, *supra* note 2, at 427–28.

33. *Id.* at 428.

34. *See* MCGARITY, *supra* note 3, at 67–68.

many rulemaking initiatives that were not required by statute, and reduce the stringency of the rules that the agencies did promulgate.

Professor Farber agrees with me that "[e]fforts to stall or block rulemaking entirely have been more successful" than the attempts to roll back health, safety, and environmental legislation and that, consequently, "the regulatory statutes have never been fully implemented."[35] But he maintains that the libertarians cannot be happy about the fact that the agencies have enacted more new regulations than they have repealed existing regulations.[36] This is undoubtedly true, but the business community should take some pleasure in the fact that the process for promulgating high-stakes rules has become so bogged down with procedural and analytical accretions, and so vulnerable to lobbyist-inspired political overtures from congresspersons and White House officials, that agencies rarely employ it when not compelled to do so by a statute or judicial order. For example, the Occupational Safety and Health Administration (OSHA) promulgated no regulations of any significance during the entire George W. Bush Administration and the first term of the Obama Administration.[37] When compared to the counterfactual world in which the four assaults on rulemaking did not take place, the current state of federal rulemaking is no doubt far more desirable to the business community.

III. The Assaults on Enforcement

It does not matter how stringent and comprehensive the regulations that an agency promulgates are if those regulations are not enforced. Referring to enforcement as the "Achilles' [h]eel"[38] of regulation, Professor Farber agrees with me that the absence of effective enforcement may be the area in which the impact of the four assaults on regulation has been the most profound.[39] He distills from the book descriptions of the debilitation of the offices responsible for enforcement in each of the health, safety, and environmental agencies described there and highlights the light hand with which upper-level agency enforcement officials treated violators in some administrations, often over the objections of the inspectors in the field.[40]

Professor Farber agrees with me that the overall evidence "demonstrates that agency enforcement budgets have not kept up with the scope of their responsibilities and that presidents unfavorable to regulation

35. Farber, *supra* note 2, at 428.

36. *Id.*

37. *See* McGARITY, *supra* note 3, at 89–90 (noting that the only regulation passed by OSHA during the second Bush administration was a long-delayed standard that came in response to a direct court order and that inaction continued into Obama's first term).

38. Farber, *supra* note 2, at 428.

39. *See id.* at 436.

40. *Id.* at 429–36.

have used enforcement budgets as one way to deregulate without attracting public notice."[41] But he argues that this evidence may not tell the whole story. He correctly points out that state agency enforcers and citizen enforcement lawsuits can fill the gaps in the federal enforcement presence.[42] This is only true, however, in the limited areas in which states have been delegated the power to enforce federal regulations and in which the relevant statutes provide for direct citizen enforcement against violators. While virtually all states have empowered their own environmental and food and drug agencies to enforce the relevant federal laws, not every state has the equivalent of the Consumer Product Safety Commission, and state enforcers play virtually no role in enforcing the regulations governing airline safety and offshore drilling for oil and gas.[43] Only a very few federal statutes, concentrated in the area of environmental protection, empower private citizens to sue in federal court to enforce federal regulations.[44]

Professor Farber also mentions the role that state tort law can play in providing an incentive to comply with federal regulations,[45] pursuant to the "negligence per se" doctrine under which a defendant's violation of a statute or regulation gives rise to a presumption that the defendant's conduct was negligent.[46] Here it may have been useful for Professor Farber to draw on the chapter in *Freedom to Harm* that describes four similar assaults by the business community and its allies in the idea infrastructure against the civil justice system in the states.[47] As a result of these protracted assaults, in many states, legislators and elected judges (both assisted by generous campaign contributions from the business community[48]) erected barriers to liability that prevented juries from holding defendants accountable for their irresponsible conduct.[49] In any event, Professor Farber would probably agree that after-the-fact jury awards for conduct that

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41. *Id.* at 436.

42. *Id.*

43. MCGARITY, *supra* note 2, at 15 (discussing state implementation of environmental, food, and drug agencies to monitor those areas at the state level); *id.* at 183–96 (examining the goals and limitations of the Consumer Product Safety Commission); *id.* at 148, 150, 158 (describing the establishment of the Federal Aviation Administration (FAA) and later cuts in the FAA's funding for inspectors that could only be filled with inspectors hired by the airlines themselves); *id.* at 114–15, 117 (describing the *Deepwater Horizon* oil spill and the limited national response and concluding that few significant measures have been taken to promote long-term safety).

44. *Id.* at 279–80.

45. Farber, *supra* note 2, at 436.

46. *See id.* at 436 & n.214.

47. *See* MCGARITY, *supra* note 3, at 197–214.

48. *See, e.g.*, at 206–09 (noting how Karl Rove, a tobacco-industry lobbyist at the time, picked Texas as a battleground state for tort reform, where he funneled $10 million in business-community funds into the campaigns for new judges who would promote his cause). Chapter Fifteen, titled "Civil Justice," provides more details about these assaults on the civil justice system.

49. *Id.* at 208–09.

crippled innocent victims are no substitute for before-the-fact enforcement of rules designed to prevent death and injury.

Conclusion

Professor Farber is persuaded that "the major regulatory statutes have never been fully implemented" and that this is not a good thing from the perspective of advocates for strong regulatory protections against irresponsible corporate conduct that poses risks to others.[50] At the same time, he suspects that "libertarians may also be dismayed by the facts that, despite everything, the statutes are still there and the body of regulations implementing them seems to get larger every year."[51] He notes that observers with an economic bent might also be disappointed by a "slow and erratic" regulatory process that does not expeditiously put into place rules with positive benefit–cost ratios and an enforcement regime that does not insist that companies subject to those rules comply with them.[52] I do not expect that many members of the business community are in the first group. I suspect that the second group contains a much larger number of corporate officials than the first. To the many business leaders who are in the third category, I can only echo Professor Farber's observation that a broken regulatory system may not ultimately be in their best interest and urge them to call for an end to the ongoing assault on the protective governmental infrastructure that Congress has created to protect consumers, workers, public health, and the environment.

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50. Farber, *supra* note 2, at 437.
51. *Id.*
52. *Id.*

The Stylized Critique of Mismatch

Richard Sander*

Perhaps I'm biased, but I think the debate over "mismatch" in higher education has an importance beyond its immediate concern with the efficacy of large admissions preferences as a matter of college and university admissions policy. There are few areas, I think, where basic academic values of honesty, openness, academic freedom, and free inquiry are so much at stake. The Kidder–Onwuachi-Willig (KOW) review, published a few months ago in the *Texas Law Review*, inadvertently but rather cleanly raises some of these questions. In this Response, I will discuss the nature of the meta-debate on mismatch as well as the specifics in KOW's review and, I hope, put both into a useful perspective. My goal is threefold: first, to rebut KOW's main arguments, second, to illustrate how the KOW critique follows a stylized pattern of ideological attack, where the structure of the argument proceeds predictably regardless of the accuracy or falsehood of any particular assertion, and third, to suggest sources to consult, and questions to ask, that can help disinterested readers make up their own mind about the mismatch issue.

I. The State of the Mismatch Debate

When my first article on law school mismatch[1] appeared in the *Stanford Law Review* in late 2004, the public reception was decidedly hostile. Law reviews published over a dozen critiques that appeared over the ensuing eighteen months;[2] not a single one of these articles even conceded that I had identified an important and potentially serious problem (aside from a response to critics written by me[3]). Virtually all of this work

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1. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

2. Some of these critiques attempted their own empirical analyses of mismatch issues and were thus more influential in the debate. *See* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); David L. Chambers, Timothy T. Clydesdale, William C. Kidder & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005); *see also* Katherine Y. Barnes, Essay, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759 (2007); Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649 (2008).

3. Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005).

was published in law journals; most of it was sneeringly dismissive of mismatch. Many journalists wrote about "mismatch," but almost none agreed with it, and some implied that I was not-quite-all-there mentally.[4] During this same period, the remarkable work by several other social scientists studying mismatch in other parts of higher education was completely ignored, both by other academics and by journalists.[5]

The landscape nearly a decade later is quite different. Dozens of scholars have now published peer-reviewed articles finding compelling evidence of various mismatch effects.[6] A whole series of academic conferences on affirmative action have devoted a substantial portion of their proceedings to the mismatch question.[7] The United States Commission on Civil Rights has issued not one, but two reports on mismatch topics, concluding both times that mismatch is a sufficiently serious potential problem to require action, not just by higher education, but by Congress.[8] The response of public intellectuals to *Mismatch* (the book) was overwhelmingly favorable.[9] The *Economist* magazine, in a cover story and editorial on affirmative action in April 2013, cited the mismatch effect as a leading reason for scaling back the use of racial preferences by colleges and

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4. *See, e.g.*, Emily Bazelon, *Sanding Down Sander*, SLATE (Apr. 29, 2005, 11:25 AM) http://www.slate.com/articles/news_and_politics/jurisprudence/2005/04/sanding_down_sander.html; Katherine S. Mangan, *New Issue of* 'Stanford Law Review' *Will Rebut a Critic of Affirmative Action*, CHRON. HIGHER EDUC. (Apr. 22, 2005), http://chronicle.com/article/New-Issue-of-Stanford-Law/35121.

5. I will return to these works *infra*. But for a discussion of much of this early work and the academic and media neglect of it, see RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 33–48 (2012).

6. For example, in September of 2012, the Brookings Institution held a conference on affirmative action titled "The Effects of Racial Preferences in Higher Education on Student Outcomes," where peer-reviewed papers were discussed. *See The Effects of Racial Preferences in Higher Education on Student Outcomes*, BROOKINGS, http://www.brookings.edu/events/2012/09/21-race-education. Peter Arcidiacono has also written extensively on the subject and has published a number of peer-reviewed papers. For a list of his publications, see *Peter Arcidiacono*, DUKE U., http://public.econ.duke.edu/~psarcidi/. Project SEAPHE maintains an archive of a number of peer-reviewed papers and studies on mismatch. For a list of those publications, see *Papers & Studies*, PROJECT SEAPHE, http://seaphe.org/?page_id=24.

7. These include the September conference at the Brookings Institute, discussed *supra* note 6, as well as an April 2009 conference at Duke University, a January 2014 conference at the University of Pennsylvania, and a February 2014 conference at the University of Michigan.

8. *See* U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS, 141–46 (2007) (discussing the mismatch hypothesis and concluding that Congress should take at least some action); U.S. COMM'N ON CIVIL RIGHTS, ENCOURAGING MINORITY STUDENTS TO PURSUE SCIENCE, TECHNOLOGY, ENGINEERING AND MATH CAREERS, 3–5 (2010) (discussing the mismatch hypothesis and concluding that schools should be required to disclose more information on STEM programs to students).

9. For example, note the number of positive editorial blurbs that were received when the book was published, including reviews submitted by Judge Posner, the *Wall Street Journal*, the *Washington Times*, the *New York Journal of Books*, and many more. *See Reviews:* Mismatch, PERSEUS BOOKS GROUP, http://www.pbgtoolkit.com/reviews.php?isbn=9780465029969.

universities.[10] Malcolm Gladwell, our preeminent popularizer of social science, devoted a chapter of his most recent book, *David and Goliath*, to the mismatch effect, concluding, "I am now a good deal more skeptical of affirmative action programs."[11] Journalistic accounts of the mismatch issue, even those appearing in liberal publications, are thoughtful and usually sympathetic.[12]

In December 2013, the California Supreme Court ruled unanimously in favor of me and my co-plaintiffs in *Sander et al. v. State Bar of California*,[13] holding that even government entities (like the State Bar) that were exempt from the state's FOIA-type laws were nonetheless subject to a common law right of access.[14] The opinion represents a landmark in public-access law because no court of the California Supreme Court's stature had ever explicitly endorsed the common law right of access before—and certainly not so emphatically or in such clear detail.[15] An important part of the Court's test goes to the public interest in the data sought, and here the Court weighed in on the mismatch issue itself:

> The public does have a legitimate interest in the activities of the State Bar in administering the bar exam and the admissions process. In particular, it seems beyond dispute that the public has a legitimate interest in whether different groups of applicants, based on race, sex or ethnicity, perform differently on the bar examination and whether any disparities in performance are the result of the admissions process or of other factors.[16]

Intelligence Squared, the leading forum for important public debates in the United States,[17] decided in the fall of 2013 to sponsor a debate on affirmative action. It was initially inclined towards a traditional "for" or "against" debate on the moral case for affirmative action, but after further investigation of current work on the issue, decided rather to focus on the *effectiveness* of current preference strategies.[18] The actual debate, on the

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10. *Time to Scrap Affirmative Action*, ECONOMIST (Apr. 27, 2013), http://www.economist.com/news/leaders/21576662-governments-should-be-colour-blind-time-scrap-affirmative-action; *see also Unequal Protection*, ECONOMIST (Apr. 27, 2013), http://www.economist.com/news/briefing/21576658-first-three-pieces-race-based-preferences-around-world-we-look-americas.

11. MALCOLM GLADWELL, DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS 287 (2013); *see also id.* at 96 (discussing mismatch).

12. *See, e.g.*, Dan Slater, Op-Ed., *Does Affirmative Action Do What It Should?*, N.Y. TIMES, Mar. 16, 2013, http://www.nytimes.com/2013/03/17/opinion/sunday/does-affirmative-action-do-what-it-should.html?pagewanted=all.

13. 314 P.3d 488 (Cal. 2013).

14. *Id.* at 505–07.

15. *See id.* at 504 (discussing whether California's common law recognized the presumptive right of public access and concluding that, previously, it had not).

16. *Id.* at 505.

17. *See About*, INTELLIGENCE SQUARED DEBATES, http://intelligencesquaredus.org/about.

18. *See Affirmative Action on Campus Does More Harm than Good*, INTELLIGENCE SQUARED DEBATES, http://intelligencesquaredus.org/debates/past-debates/item/1054-affirmative-action-on-

proposition, "Affirmative action on campuses does more harm than good"—in effect, a debate on mismatch—was hosted by Harvard Law School, featured U.S. Civil Rights Commissioner Gail Heriot and me on the affirmative, and Randall Kennedy and Ted Shaw on the negative.[19] Although much of the audience was plainly strongly sympathetic to affirmative action (Harvard professor Kennedy was lustily cheered when he was introduced), the affirmative argument carried the debate.[20]

None of this is to say that "mismatch" has become a new orthodoxy; as we shall see, there are both analytic and data-access reasons for why a great deal is still unknown about mismatch.[21] The point, rather, is that the sets of issues collectively referred to as "mismatch" are not only legitimate issues but properly belong near the center of any discussion of affirmative action policies. When thoughtful people from any part of the political spectrum think honestly about the evidence on the mismatch issue, they generally agree that there is something there.

Why is the current debate on mismatch so dramatically different from the one that occurred in 2004–2005? This will perhaps become an interesting topic when future scholars write about the intellectual history of our era. As Chapter 5 of *Mismatch* discusses, the 2004–2005 debate was almost entirely confined to the legal academy.[22] Within that academy, a relatively small group of professors and activists—of whom William Kidder was a minor but very energetic part—assembled a coordinated attack that did its very best to kill discussion of mismatch.[23] Some of those within this group urged scholarly journals not to publish my work, on the grounds that it was manifestly incompetent and incorrect.[24] Some accused me of "stealing" embarrassing data while others accused me of suppressing or hiding the data I did have (both claims were ridiculous and eventually withdrawn).[25] Still others went to considerable lengths to make sure that the official bodies of legal education did not release further data relevant to studying mismatch. And a fair number of scholars wrote law review

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campus-does-more-harm-than-good (asking, "But is [affirmative action] achieving its stated goals and helping the population it was created to support?").

19. *Id.*

20. In these debates, the audience votes on the proposition at the beginning of the debate, and then votes again at the end of the debate. The winner is determined based on which side changed the most minds during the debate. In this case, net gain in votes "for" the proposition was twice as great as the net gain "against. Those watching the debate online were more than 2-to-1 for the proposition. For the results, see *id.*

21. *See infra* Part II.

22. *See* SANDER & TAYLOR, *supra* note 5, at 76–85 (discussing the critics—all of whom are professors—that published critiques of the original article).

23. *See* sources cited *supra* note 2.

24. *See, e.g.*, Mangan, *supra* note 4 (quoting Michele Landis Dauber, an associate professor at Stanford Law School, as saying, "[Sander's article] never should have been published and has no merit of any sort").

25. SANDER & TAYLOR, *supra* note 5, at 73–75.

articles that claimed to show that the "mismatch" argument was wrong—and indeed, often contended that the entire theory was a great hoax I was attempting to perpetrate on law professors and law students.[26]

These attacks were in some ways remarkably effective. Discussion of mismatch virtually ceased, for a while. A national study on whose board I served asked me, with considerable embarrassment, if I would resign, on the grounds that my presence would preclude their receiving funding from major organizations like the Law School Admissions Council.[27] The California State Bar, despite the strong interest of its psychometricians in studying mismatch, decided to refuse access to its data for that purpose.[28]

This history is very much relevant to a discussion of KOW's review of *Mismatch*. Because although the debate on these issues has, in many ways, changed dramatically, and although there is little doubt that mismatch-related issues will remain a central part of the affirmative action debate, those who were part of the early attacks on mismatch are still around, and the legal academy still seems particularly susceptible to their influence.

KOW's review has very much the tone of the bad, old attacks of the 2004–2005 debate. There is no hint anywhere in the review that any idea connected with mismatch is a serious one. Rather, mismatch is presented as a form of sublimated racism that has been overwhelmingly rejected by respected scholars. In Parts IV through VI of this Response, I will answer specific criticisms of *Mismatch* made by KOW and explain why their arguments are not simply wrong, but pretty clearly made in bad faith. More broadly, however, I would like to show that there are really two mismatch debates: one based on genuine intellectual inquiry, illustrated by the examples above and elaborated in Part VII, below, and one marked by ideological Zealots who cling to conventional affirmative action policies with almost religious fervor and see their attacks on mismatch as a sort of holy war. The Zealots have become increasingly marginalized, especially as data-driven labor economists have assumed a larger role in the issue. But since most readers of this law review do not have the empirical training to evaluate many of the relevant arguments, a response that focused only on point-by-point rejoinders[29] might be unpersuasive. The question I ultimately attempt to answer in this Response is this: How can an interested non-social scientist evaluate the mismatch debate?

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26. *See, e.g.*, Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1899–901, 1914 (2005).

27. SANDER & TAYLOR, *supra* note 5, at 73.

28. *Id.* at 242.

29. *See* discussion *infra* Parts IV–VII.

II. The Mismatch Issue

Before going further, it is important to be more specific about what we mean by "mismatch" and about the general claims of mismatch scholars. The mismatch idea, as applied to education, is not a single hypothesis but rather a family of hypotheses, which have in common an interest in the peer effects of learning: does a given student benefit or suffer from a learning environment where the student's academic preparation is far below, or far above, his or her median peer? One can usefully distinguish three very distinct mismatch ideas:[30]

(a) "Learning mismatch" occurs if a student actually learns less in class because that student's level of academic preparation is far below, or far above, the average level of her peers.[31] This might happen if teachers aim instruction at the middle of the class, covering material in a way that is boring to a student with exceptionally strong preparation, or that is too fast and confusing to a student with weak preparation.[32] The direct test of learning mismatch is whether actual measured student learning goes up when a student is among similar peers.[33]

(b) "Competition mismatch" occurs if a student gets bad grades and becomes discouraged because her academic preparation puts her at a competitive disadvantage with her classmates.[34] This is illustrated by so-called science mismatch, which can happen when a student interested in pursuing a "STEM" field (Sciences, Technology, Engineering, and Math) receives a large preference and finds herself surrounded by students with higher test scores or more

30. The general schema of mismatch ideas discussed in the following paragraphs arose in conversations between the author and Peter Arcidiacono. For an elaboration of the principles, see Richard H. Sander & Aaron Danielson, *Thinking Hard About Race-Neutral Affirmative Action*, 47 MICH. J.L. REFORM (forthcoming 2014).

31. For valuable introductions, see Esther Duflo et al., *Peer Effects, Teaching Incentives, and the Impact of Tracking: Evidence from a Randomized Evaluation in Kenya*, 101 AM. ECON. REV. 1739 (2011), and Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools*, 10 J. EMPIRICAL LEGAL STUD. 171 (2013).

32. Williams, *supra* note 31, at 176–77.

33. *See id.* at 178–79 (discussing how to measure the effects of mismatch and concluding that a direct test would measure the acquired knowledge of the mismatched students).

34. This idea has been around in some form for decades. James A. Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men*, 72 AM. J. SOC. 17, 21, 25–27 (1966) (presenting findings that support the notion that "feelings of success in relevant courses are a factor in" deciding whether to pursue a "high-academic performance career field," even more so than whether the student chose to attend an elite institution). For the book that made the Davis idea (and others) far more tangible and applied it to the affirmative action context, see STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 100–38 (2003).

advanced preparation.[35] A little bit of "competition mismatch" might actually be a good thing, stimulating a student to push herself and truly excel. But severe competition mismatch is likely to produce poor grades and discouragement. In the case of science mismatch, it seems to cause the vast majority of science-interested students (if they receive large preferences) to abandon STEM fields.[36]

(c) "Social mismatch" is a hypothesis about the academic links to social interaction on campus.[37] Some very careful, peer-reviewed studies have found that students at college are significantly more likely to make friends with other students who have similar levels of academic preparation and academic performance.[38] Creating, through the use of admissions preferences, large gaps in academic preparation across distinct ethnic groups on campus can thus directly undermine the specific benefits campus diversity is supposed to achieve.[39]

These three hypotheses concern "first-order effects" of large preferences. If they occur, they may lead to "second-order effects," such as lower graduation rates or lower wages for students experiencing mismatch. Students who learn less because of learning mismatch or who get lower grades because of competition mismatch may then be less likely to graduate from college. But not necessarily. If a selective, elite college decides as a matter of policy to come as close as possible to a 100% graduation rate, then one is unlikely to observe graduation mismatch at that college. Similarly, if an employer tends to hire from selective schools and has

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35. *See* Frederick L. Smyth & John J. McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 RES. HIGHER EDUC. 353, 373 (2004) (finding that underprepared applicants are more likely to have a lower class rank, which in turns leads them to drop out of science, math, and engineering majors).

36. *See* Rogers Elliot et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. HIGHER EDUC. 681, 682 (1996) (showing through a variety of analyses the effect of peer achievement on persistence in science and the negative effect of having levels of academic preparation well below those of one's peers); Smyth & McArdle, *supra* note 35, at 373 (finding that if all the underrepresented minority students had enrolled in colleges where their high school grades and academic achievements were median with the institution, 45% more women and 35% more men would have persisted in science, math, and engineering majors);

37. *See generally* Peter Arcidiacono et al., *Representation Versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?*, 95 J. PUB. ECON. 1 (2011) (studying the question of mismatch in the social context).

38. *Id.* at 2 (noting their finding that interracial interaction depends on similar academic backgrounds); *see also* Peter Arcidiacono et al., *Racial Segregation Patterns in Selective Universities*, 56 J.L. & ECON. 1039, 1040–41 (2013) (same).

39. Arcidiacono et al., *supra* note 37, at 13 (noting their finding that because students tend to form friendships with those who are academically similar, large race preferences may exacerbate social mismatch and cause more discrimination); *see also* Arcidiacono et al., *supra* note 38, at 1058–59 ("[R]ace-based admissions preferences may limit interracial friendships by increasing racial differentials in academic background.").

specific diversity goals, then graduates from selective colleges who have received large preferences might do well in the job market—at least in the short term—even if they have worse grades and have learned less than they would have if they had attended a less selective school.[40]

It is well understood in the empirical literature that mismatch is hard to measure. There are a couple of reasons for this. One is the problem of "selection bias."[41] Proper mismatch studies need to compare students with similar academic preparation who are in different peer environments, which usually means trying to find comparable students attending schools with sharply differing levels of eliteness.[42] Comparability is usually determined by matching on a few measures that are in available datasets, such as SAT scores and high school grades.[43] But university admissions offices use many more variables in selecting students, such as written essays, courses taken, high school quality, AP scores, and many other factors.[44] It is almost invariably the case that between two students with similar "observed" characteristics (the ones, like SAT scores, that are used for comparison), the student at the more elite school will have stronger "unobserved" characteristics when these can actually be measured.[45] This means that nearly all mismatch comparisons are stacked in favor of the more elite school and, therefore, stacked against a finding of mismatch.

A second challenge in mismatch studies is the blurriness of available data. Studies to date of law school mismatch have had to rely on data collected by the Law School Admission Council (LSAC) in the 1990s, assembled in a database that measured such things as school eliteness and bar performance quite crudely.[46] Studies of college performance tend not to take into account the radical differences between grading in most science fields compared with humanities fields; studies of college graduation often fail to differentiate between on-time (four-year) attainment of a bachelor's degree and delayed graduation.[47] It is straightforward to show that

40. For a showing that although African-Americans receive large preferences in the hiring process by law firms, significant evidence suggests that it backfires upon them through disproportionately low promotion to partnership, very possibly through a mismatch process inside the firms, see Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1756, 1758–59 (2006). *See also* Jee-Yeon K. Lehmann, *Job Assignment and Promotion Under Statistical Discrimination: Evidence from the Early Careers of Lawyers* 1–2 (Munich Pers. Research Papers in Econ. Archive, Paper No. 33,466, 2011).

41. Williams, *supra* note 31, at 174.

42. *See id.* (noting that the selection-on-unobservables bias makes it hard to determine if students have similar academic preparation).

43. *See id.* at 178.

44. *See id.* at 174, 189.

45. *See* Sander, *supra* note 3, at 1971–73.

46. Williams, *supra* note 31, at 178; *see also* Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Tradeoff*, J. ECON. LIT. (forthcoming 2014) (manuscript at 14 & n.12, 18) (on file with author).

47. *See* Arcidiacono & Lovenheim, *supra* note 46 (manuscript at 37–38).

mismatch is harder to demonstrate with blurry, inexact data than with precise data. That is part of the reason why finding better data is a high priority for mismatch scholars.

Given these challenges, there is a remarkable pattern in mismatch research. *Every study I have encountered of the three first-order mismatch hypotheses has found strong evidence of mismatch.* I do not know of a single peer-reviewed critique—and almost no critiques of any kind—of these first-order mismatch findings. In other words, research on the fundamental mechanisms of mismatch is virtually unanimous and undisputed.

The actual debate over mismatch concerns two other matters. First, the second-order effects of mismatch, such as the effect of mismatch on graduation rates, are genuinely (and often in good faith) disputed. This is not surprising because (as noted above) there are additional confounding factors in studying second-order effects, and institutions can counter-program against the first-order effects of mismatch by, for example, raising the graduation rate of all students. Second, no one really knows how large an admissions preference must be to cause mismatch problems. It is clear that students admitted with very big preferences (i.e., comparable to 200 SAT points or 10 LSAT points) are very vulnerable to first-order mismatch effects.[48] But relatively small preferences might be benign or even have positive effects—by challenging students without overwhelming them. Here again, better data are needed to measure these important distinctions.

III. The Indicia of Zealotry

There are a number of thoughtful critics of mismatch. Scholars like Thomas Espenshade (a sociologist/economist at Princeton) and Jeffrey Smith (a labor economist at the University of Michigan) have published justly admired works[49] that find evidence of the positive effect of admissions preferences and are skeptical about broad mismatch claims. A defining characteristic of good scholarship and honest inquiry is that they lead toward consensus over time. I think Espenshade, Smith, and other honest mismatch critics would find much to agree with in the overview I presented in Part II because that overview helps explain the pattern of findings in the field over the past decade.

The sort of work represented by KOW's review of *Mismatch* is quite different. I contend that this is not a serious work of scholarship, but is

48. *See id.* (manuscript at 53) ("The literature clearly shows positive average effects of college quality on a host of outcomes. This suggests that mild racial preferences will have a positive impact on minority outcomes. The issue is whether racial preferences in their current form are so strong that mismatch effects may arise.").

49. *See generally* THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 226–62 (2009); Dan A. Black & Jeffery A. Smith, *Estimating the Returns to College Quality with Multiple Proxies for Quality*, 24 J. LAB. ECON. 701 (2006).

instead a polemic authored by Zealots. But how can one substantiate such a charge? How do we know zealotry when we see it?

First, the Zealots are not interested in shades of gray. They paint the debate about mismatch as a contest between good and evil, truth and falsehood. They are not interested in whether some mismatch hypotheses are strongly supported, while others are weaker—they insist that the mismatch argument is wrong from beginning to end.[50] This sort of absolutism is typical of zealotry, but it is also strategically important to the anti-mismatch Zealots. If they concede that there is anything at all to mismatch, that raises immediate implications that they consider unacceptable. After all, if mismatch is partly right, then shouldn't there be a high-status, well-balanced commission to investigate it? Shouldn't universities and foundations support efforts to produce more and better data to evaluate the mismatch issue? No, acknowledging any truth to the mismatch argument is, to the Zealots, the same as opening Pandora's Box just a crack.

Second—and this follows from the first point—the Zealots studiously avoid direct engagement with the strongest evidence supporting the mismatch hypothesis. Of course, if one really has intellectual confidence in one's position, one should be eager to deal with the strongest argument and evidence of the "opposition." Certainly, this is what I and other mismatch defenders have done in the law-school-mismatch debate: we have taken apart the specific findings of the strongest empirical critics of law school mismatch, such as Ian Ayres and Richard Brooks, Jesse Rothstein and Albert Yoon, and Katherine Barnes, reanalyzed the exact data and models they use, and shown exactly where errors of analysis or interpretation occurred.[51] Our conclusions are readily available for anyone to dispute; and tellingly, the authors themselves have not even attempted to rebut us. In contrast, one looks in vain through the work of the Zealots for engagement

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50. *See* William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind "Mismatch,"* 92 TEXAS L. REV. 895, 940–41 (2014) (book review) (attempting to dismantle the entire mismatch theory); *see also* Lee C. Bollinger, *The Real Mismatch*, SLATE (May 30, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/supreme_court_and_affirmative_action_don_t_make_schools_trade_race_for_class.html (contending that the mismatch theory is nothing but an argument "cloaked in new data and rhetoric"); Erwin Chemerinsky, Op-Ed., *Why Affirmative Action Matters to Minorities*, ORANGE COUNTY REG., Nov. 1, 2013, http://www.ocregister.com/articles/students-534224-affirmative-action.html (stating that the mismatch theory is "nothing but a rationalization for denying African-American and Latino students admission to the nation's elite college and universities").

51. *See, e.g.*, SANDER & TAYLOR, *supra* note 5, at 67–90 (responding, point-by-point, to various critics of mismatch); Sander, *supra* note 3, at 1978–2013 (same); Williams, *supra* note 31, at 173–76 (reviewing and critiquing the literature by Ayres & Brooks, *supra* note 2, and Rothstein & Yoon, *supra* note 2). *See generally* Doug Williams, Richard Sander, Marc Luppino & Roger Bolus, *Revisiting Law School Mismatch: A Comment on Barnes (2007, 2011)*, 105 NW. U. L. REV. 813 (2011) (conducting an in-depth critique of Barnes, *supra* note 2).

with any of the work of Peter Arcidiacono, the Duke economist whose scholarship is preeminent in the field; Frederick Smyth and John McArdle, who used one of the best available datasets to study science mismatch; or Stephen Cole and Elinor Barber, authors of a landmark study on the role of academic mismatch in depleting the pipeline of African-American professors.[52] These scholars, whose work is the gold standard of mismatch research, are virtually ignored by the Zealots.

Third, Zealots generally oppose the release of data. This is of course rather damning, since observers often correctly infer that the Zealots are afraid of what better data will show.[53] To a Zealot, however, more data simply empower the critics. As noted above, Zealots lack intellectual confidence in what the data will show; what they do have is emotional confidence that their cause is just. This combination means that Zealots have an ambivalent attitude towards data and certainly—in the context of the mismatch debate—oppose broad transparency in higher education.

Fourth, Zealots consistently impugn the motives behind those finding evidence of mismatch. In particular, they often allege, with varying degrees of directness, that those who believe mismatch to be a problem are simply racists, eager to shut minorities out of elite institutions and return to a system of de facto segregation.[54]

Last, but certainly not least, Zealots have a problem with accuracy. Because they see themselves as serving a righteous cause in which facts are merely instruments of war, they tend not to be careful with factual claims. Sometimes this involves inventing claims out of whole cloth. More often, it means that arguments and evidence are distorted, sometimes a full one hundred eighty degrees. The Zealots are so misleading and selective in the evidence they present that they rarely provide a reliable guide to any topic they discuss.[55]

Both Kidder and Onwuachi-Willig are certainly Zealots in good standing. Both have repeatedly engaged in reckless attacks on mismatch, filled with wildly misleading and often factually erroneous claims.[56] Their

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52. *See* sources cited *supra* note 6.

53. SANDER & TAYLOR, *supra* note 5, at 233.

54. *See* Chemerinsky, *supra* note 50 ("The mismatch theory is patronizing. It is advanced by conservative opponents of affirmative action, most of whom are white, to justify denying admission to elite colleges and universities to minority students on the ground that it is not good for them.").

55. *See, e.g.*, Richard Sander, Angela Onwuachi-Willig: The Shotgun Approach to Scholarly Exchange (February 2014) (unpublished handout) (on file with author) (providing factual comment on a series of claims Onwuachi-Willig made about mismatch at the 2013 Association of American Law Schools meetings in New Orleans); Richard H. Sander, Polemics Without Data: A Response to the Chambers et al. Critique (Jan. 14, 2005) (unpublished manuscript) (on file with author) (giving a point-by-point analysis of an early critique of law school mismatch written largely by Kidder).

56. *See* sources cited *supra* note 55.

collaboration in reviewing *Mismatch* pretty much guarantees that their review will be high on ideological fervor and very low on factual accuracy and social-scientific competence. The three Parts that follow examine, in reverse order, what I take to be the three main points of the KOW review.

IV. Are Mismatch Hypotheses Racist?

An example of Zealot characteristic number 4—impugning the motives of mismatch scholars—comes near the end of KOW's review:

> [T]he one-sided nature of Sander and Taylor's arguments—the very way in which the two authors seem to pay no attention to white students with grades and scores that are comparable to those of allegedly "mismatched" students of color—exposes a fatal flaw about claims in their research. After all, if mismatch were such a problem, why would Sander and Taylor specifically link their analyses predominantly to race and affirmative action? . . . [For example,] they could make broader claims that include legacies—nearly all white students who find themselves "mismatched" at their institutions.
>
> For many of [the critics of affirmative action], their concerns are not so much about merit and consistency but rather about whom they view (whether consciously or unconsciously) as belonging and not belonging at selective institutions . . . .[57]

If one had never read *Mismatch*, or other work by mismatch scholars, this might sound like a persuasive argument. Someone familiar with my work, however, would know that KOW are as wrong as they can be. For example, early in *Mismatch*, Stuart Taylor and I address this issue squarely:

> How do racial preferences compare with other sorts of preferences used by colleges, such as those for athletes and legacies?
>
> Liberal arts colleges extend admissions preferences to all sorts of applicants for a wide variety of reasons. At least some scholars have argued that athletic and legacy preferences are comparable in size to racial preferences. If preferences cause mismatch, why are we focusing on *racial* preferences?
>
> The reasons include the long-standing visibility of racial preferences as a hotly contested political and legal issue that has roiled state and national politics and repeatedly engaged the Supreme Court, the nation's tortured history on issues of race, plus the unavailability of much reliable data on legacy and athletic preferences. The vast majority of datasets about higher education and college students—including nearly all those we draw from for this book—identify the race of students but do not identify whether a

57. Kidder & Onwuachi-Willig, *supra* note 50, at 936–38 (footnotes omitted).

> student is a legacy or received an athletic preference. We therefore know a great deal about the operation and effects of racial preferences but relatively little about athletic and legacy preferences. The limited data we have seen and the secondary sources that discuss legacy and athletic preferences often tell contradictory stories as to the size and pervasiveness of these preferences. Such data as we have seen plus much anecdotal evidence suggest, if inconclusively, that legacy preferences and many athletic preferences affect many fewer students, and are on average significantly smaller than racial preferences.
>
> What does seem true is that the mismatch operates in much the same way across racial lines. Whenever we have documented a specific mismatch effect, we have found that it applies to all students who have much lower academic indices than their classmates. One can imagine reasons why mismatch might be mitigated in the case of some athletes (because the school provides them with targeted academic support) or some legacies (because they received a stronger secondary education than their numerical indices suggest), but our limited evidence suggests that these groups, when they receive large preferences, are vulnerable to the same mismatch effects we document for racial minorities.[58]

Given this prominent passage in the book, how could KOW make the argument they do? One possibility is that neither of these authors actually read *Mismatch*, even though they wrote a lengthy review of the book. Another possibility is that they simply do not care whether what they write is accurate—that they are writing to the converted, to people who want to hear their preexisting attitudes about affirmative action and mismatch confirmed and will not question the source of confirmation too carefully. In either case, KOW's willingness to make such a toxic claim in the face of contrary evidence pretty much sums up why they should be dismissed as Zealots.

Although nothing more need be said to dispose of KOW's claim on this point, it is worth lingering for a moment on the broader subject of the underlying racial implications of mismatch. In my view, the thrust of mismatch research is racially progressive. Education scholars have puzzled for decades over large racial disparities in such things as college grades, bar passage, and STEM degree attainment.[59] A basic finding of much

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58. SANDER & TAYLOR, *supra* note 5, at 27.

59. *See, e.g.*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 77 (1998) (discussing "a troubling phenomenon often called 'underperformance.' Black students with the same SAT scores as whites tend to earn lower grades"). For a similar discussion in Kidder's own work, see Chambers, Clydesdale, Kidder & Lempert, *supra* note 2, at 1877–81, stating: "Sander is wrong when he concludes that the current lower performance by African Americans in law school is 'a simple and direct consequence of the disparity in entering credentials between blacks and whites.' It is not. Exactly why African Americans perform somewhat less well in law school than

mismatch research is that these differences can be *completely* explained in nonracial terms, as consequences of the operation of admissions preferences. My original article on law school mismatch stressed that racial differences in both law school grades and bar passage fully disappeared, or at least became trivial, when one controlled for preferences.[60] Smyth and McArdle showed that black, Hispanic, and white rates of STEM degree attainment similarly vanished when one controlled for preferences.[61] Arcidiacono and his colleagues showed that when one took into account both preferences and the attrition from technical majors that often accompanies large preferences, racial differences in undergraduate grades at Duke vanished.[62] In every case, these works have *emphasized* these findings about racial equality. All this work powerfully rebuts the idea that racial differences in academic performance are mysterious or inexplicable.

Similarly, when sufficiently good data can be found to study mismatch among white students, the underlying dynamics are strikingly similar. Jane Bambauer and I wrote an entire, well-known article about the career tradeoff between attending a more elite law school and attending a less elite school where one gets better grades.[63] Bambauer and I limited much of our analysis to whites—specifically to avoid confounding race and mismatch—and found strong and consistent evidence that students attending more elite schools at the price of performing well academically had worse job-market outcomes.[64]

V. KOW as Empiricists

Much of KOW's review engages with very little of the actual empirical work presented in *Mismatch*. When they do, KOW's discussions are either deliberately misleading or completely clueless—and sometimes both at the same time. In this Part, I will examine in detail KOW's most extensive and specific critique of my scholarship: the debate over whether affirmative action bans "chill" or "warm" minority interest in the affected schools.[65]

their credentials would predict remains unclear." Interested readers should see my response, Sander, *supra* note 3, at 1967–69.

60. *See* Sander, *supra* note 1, at 429, 444–45.

61. Smyth & McArdle, *supra* note 35, at 371–74.

62. Peter Arcidiacono et al., *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice*, 1 IZA J. LAB. ECON., Oct. 9, 2012, no. 5, at 1, 19–20.

63. *See* Richard Sander & Jane Bambauer, *The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers*, 9 J. EMPIRICAL LEGAL STUD. 893, 894 (2012).

64. *Id.* at 896–97, 925.

65. This is not only the subject of Chapter 8 of *Mismatch* but also of a separate article. *See generally* SANDER & TAYLOR, *supra* note 5, at 131–42; Kate L. Antonovics & Richard H. Sander, *Affirmative Action Bans and the "Chilling Effect,"* 15 AM. L. & ECON. REV. 252 (2013). For KOW's critique, see Kidder & Onwuachi-Willig, *supra* note 50, at 921–35.

For over a decade, many of the staunchest defenders of affirmative action have argued that the reduction or elimination of racial preferences would have a "chilling effect" on minority students—that black and Hispanic students would tend not to apply to schools where they were present in smaller numbers and, if they did apply, would be less likely to enroll even if they were offered admission.[66] California's adoption of Proposition 209 (Prop. 209) provided a unique opportunity to test this theory rigorously, since, in 1998, undergraduate admissions at the University of California (UC) abruptly changed from a system that used large racial preferences to one that officially did not consider race.[67] In 2008, a group of labor economists (including me) obtained detailed data from UC on admissions and enrollment before and after 1998. Kate Antonovics, a labor economist at the University of California, San Diego, undertook a series of studies of the "chilling effect"; I coauthored the first of these studies, which appeared in the *American Law and Economics Review* in the summer of 2012. Antonovics and I found that, contrary to the chilling effect hypothesis, Prop. 209 seemed to create a "warming effect"—that is, *ceteris paribus*, minority applicants were substantially *more* likely to accept an offer of admission from a given UC school after Prop. 209 than before.[68] This was especially true at the most elite campuses that had, before Prop. 209, used the largest preferences.[69] An implication of our research is that black and Hispanic high school students might actually prefer to go to college on a campus where it was known (or at least believed) that preferences had not been used in admissions.[70]

Part of what made our study important, and credible to economists who reviewed the manuscript,[71] was the data we had and our study design. We had information on essentially all freshman applicants to all eight of the University of California campuses for the three years before and the three years after the implementation of Prop. 209.[72] We knew all the campuses to which students applied, which campuses had offered them admission, and which ones they had accepted and attended.[73] On the other hand, we did not know (because the university would not disclose) whether the students labeled "underrepresented minorities" in our data were blacks, Hispanics, or

66. Antonovics & Sander, *supra* note 65, at 252–53.

67. *Id.*

68. *Id.* at 253–54, 295.

69. *See id.* at 272, 278.

70. SANDER & TAYLOR, *supra* note 5, at 156.

71. The *American Law and Economics Review* is considered a leading peer-reviewed journal in legal academics; peer reviewers closely scrutinize the logic of the argument to make sure the conclusions are well-supported, both conceptually and empirically. *See About the Journal*, AM. L. & ECON. REV., http://www.oxfordjournals.org/our_journals/alecon/about.html.

72. Antonovics & Sander, *supra* note 65, at 253–54.

73. *Id.*

Native Americans, and our data were grouped into three-year cohorts rather than single years.[74] We could not, therefore, estimate warming effects for individual minority groups or individual years.

KOW's discussion of our warming effect work begins with a breathless unmasking of our work:

> Sander and Taylor claim that, under Prop. 209 at UC campuses, . . . ["]race-neutrality attracted many, many more black and Hispanic students than it repelled." However, the Antonovics and Sander data show that URM yield rates to the *UC system* went down (in absolute and relative terms) after Prop. 209 *even though* URM yield rates purportedly *went up on individual UC campuses*. Thus, as a claim about numbers, Sander and Taylor's claims make little sense . . . .[75]

This is a classic Zealot passage, managing to convey in just a couple of sentences the ideas that mismatch scholars are tricky (note the use of the word "purportedly"), inept ("makes little sense") and wrong (UC yield rates actually went up after Prop. 209!). Once again, KOW are clearly counting on readers not doing any homework. KOW "discovered" that UC yield rates went up by reading our article, but they neglected to quote what we say about it, near the very beginning of our discussion of our results:

> [W]e see that yield rates for URMs [after Prop. 209] increased at each of the eight [UC] campuses, but decreased for the UC system as a whole. This apparent paradox is easily explained. If URMs are admitted to a smaller number of UC schools after Prop[.] 209, they may be less likely to attend any UC school, but more likely to attend each school to which they are accepted.[76]

Because of the general increase in applications after Prop. 209's enactment, acceptance rates for all students went down after 1997, but they (of course) went down especially sharply for the URMs who had received significant admissions preferences before Prop. 209. Thus, imagine two otherwise similar students who applied to the University of California, Los Angeles (UCLA, a top national university), and the University of California, Santa Barbara (UCSB, an excellent school but significantly less elite than UCLA), in 1996 (in our "before" period) and in 1998 (in our "after" period). To understand the chilling/warming effect on enrollment, we are interested in whether that student became more likely or less likely to enroll in a UC school if offered admission. To do so, we of course want to hold the student's selection set within the UC system constant. Consider four possible outcomes:

74. *Id.* at 266.

75. Kidder & Onwuachi-Willig, *supra* note 50, at 923 (footnotes omitted).

76. Antonovics & Sander, *supra* note 65, at 270–72.

Table 1

Scenario	Students and Successful Applications		Relevance
1	Student A 1996	UCLA, UCSB	Match relevant for evaluating chilling effect
	Student B 1998	UCLA, UCSB	
2	Student A 1996	UCLA, UCSB	Not a direct match
	Student B 1998	UCSB	
3	Student A 1996	UCSB	Match relevant for evaluating chilling effect
	Student B 1998	UCSB	
4	Student A 1996	UCSB	Not a direct match
	Student B 1998	UCSA, UCLB	

The nature of our analysis, then, is to compare students who had the same UC choice set before and after Prop. 209 and who were otherwise comparable in their academic, socioeconomic, racial, and other characteristics that we could control in the dataset.[77] The data show that post-Prop. 209, enrollment rates in general went up, but they went up most for URM students, especially at the most elite campuses.[78]

It is not possible that KOW saw our table (where we document the discrepancy between UC-wide and individual-campus yield rates) but did not see our explanation of the "apparent paradox" and why the numbers we use are the appropriate ones for our warming effect analysis. So two things follow. First, KOW realize that their basic criticisms of the warming effect research are wrong; and second, KOW deliberately mislead their readers by

77. *Id.* at 263–65. Any other method would create obvious misleading inferences that would, for example, preclude publication of the analysis in a competent peer-reviewed journal. Suppose, for example, that one compared a student admitted to UCLA and UCSB in the "before Prop. 209" period with an otherwise similar student who was admitted only to UCSB in the "after Prop. 209" period. The "after" student is much less likely to attend *some* UC school because her UC choice set is much less desirable. If she also has a scholarship offer from, say Pomona College, the "before" student may quite likely turn down Pomona to attend UCLA, but the "after" student will probably choose Pomona over UCSB. Now consider, with the same hypothetical, what happens to UCSB take-up rates. These will certainly be higher in the "after" period because some of the students rejected by UCLA will go to the best alternative UC school that admits them (for financial, geographic, or other reasons). So in this comparison, our "warming" estimate for UC as a whole would be distorted downward and our "warming" estimate for UCSB alone would be distorted upward. A correct analysis of the warming effect excludes both of these scenarios and only compares students who faced the same UC choice set before and after.

78. *Id.* at 270–72.

suggesting that Antonovics, Taylor, and I were unaware of the dual sets of numbers.

But there's more. KOW further suggest that we mislead readers by ignoring or concealing a pattern within the data: the strongest URM students were, they suggest, less likely to enroll at higher rates; for these strong students enrollment rates went down, and the enrollment increase occurred only for students in the bottom third of the acceptance pool.[79] As Kidder wrote in an earlier review of our book:

> [The warming effect claim] is based on methodologically questionable statistical adjustments that obfuscate this stubborn fact about freshmen admitted to UCLA: in the four years prior to Proposition 209, 24 percent of the African Americans in the top third of the admit pool chose to come to UCLA. In the first four years after Prop 209 the yield rate plummeted to 8 percent. There were less extreme drops in the middle-third of UCLA's admit pool, and in the top third of black admits at the other UC campuses. In short, after Proposition 209 a larger share of top black students admitted to UC campuses chose to reject offers from UC in favor of selective private universities . . . .[80]

The "methodologically questionable statistical adjustments" are not elaborated upon; this presumably is another reference to Kidder's confusion about (or obfuscation of) the difference between UC-wide and individual school-level enrollment rates. But let us examine his claim about the loss of top students:

First, Kidder's use of "thirds" of the admit pool is highly misleading. He is not referring to "thirds" of black admits, but "thirds" of all students. During the years in question, only about 5% of admitted blacks fell in his definition of the "top" of the pool, while something like 75%–80% of admitted blacks fell into the "bottom third."[81] One might reasonably conclude that whatever the internal patterns might be, what happens to the bottom third of admitted blacks is especially important. But in any event, the huge size of the bottom third relative to the top third is at least a relevant fact to lay before the reader! Kidder deliberately conceals this information, again in classic Zealot fashion.

Second, Antonovics and I attempted to replicate Kidder's numbers, but we could not. In our data (which, recall, combined blacks, Hispanics, and

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79. *See* Kidder & Onwuachi-Willig, *supra* note 50, at 926.

80. William Kidder, *A High Target for "Mismatch": Bogus Arguments about Affirmative Action*, L.A. REV. BOOKS (Feb. 7, 2013), http://lareviewofbooks.org/review/a-high-target-for-mismatch-bogus-arguments-about-affirmative-action#.

81. According to the data Kidder provided, 3,428 blacks are admitted to UCLA during the period he examines (1994 through 2001), of whom 177 are in the "top third" (the term used in his data), and 2,805 were in the "bottom third." *See* Reply Memorandum from William Kidder, Univ. of Cal., Riverside, to author (July 29, 2013) (on file with author).

American Indians into one "URM" category at the insistence of UC administrators), the change in yield rates at UCLA before and after Prop. 209 are as follows:

Table 2

Tercile (thirds of all admits) of UCLA URM Admits	**UCLA URM Yield Rate, 1995–1997**	**UCLA URM Yield Rate, 1998–2000**
Bottom (9,297)*	42%	54%
Middle (1,806)*	24%	28%
Top (692)*	13%	17%

*The total number of URM students in each tercile is shown in parentheses.

Our data show *increases* in URM yield rates across the spectrum, though the increase is largest for the academically weakest students. We asked Kidder for the data he claimed to have for all eight campuses. He sent us his UCLA data but refused to send his data for the other seven campuses. His data were similar to ours, but did not quite match. We then looked at a third source—the data on freshmen that were posted on a website maintained by UC's Office of the President (UCOP).[82] It matched our data but not Kidder's data. Our data came directly from UCOP (indeed, we paid UCOP for it), has been publicly available for years to any researcher who asks for it, and has been used in several published, peer-reviewed studies and reports.[83] Kidder may be right about a decrease in yield rates at UCLA for a handful[84] of the very top blacks—but if so, there was a far more than offsetting for top Hispanics, and I'm confident there were increases for top blacks at other campuses (the ones for which Kidder will not share his data).

Another point is worth making. Antonovics and I emphasized in our paper that the warming effect *was* strongest for students with lower academic credentials.[85] We thought this suggested that such students might particularly value attending a school with professedly race-neutral policies since students with lower credentials might be more concerned about being

82. Which are apparently no longer available due to budget constraints. Kidder & Onwuachi-Willig, *supra* note 50, at 913 n.82.

83. *See* Antonovics & Sander, *supra* note 65, at 265–66; Kate Antonovics & Ben Backes, *Were Minority Students Discouraged from Applying to University of California Campuses After the Affirmative Action Ban?*, 8 EDUC. & FIN. POL'Y 208 (2013).

84. If, arguendo, Kidder is correct about his alleged decline in yield rates for top blacks at UCLA, this translates (by his numbers) into the loss of *three* black students per year. In contrast, the broader warming effect we measured for UCLA translates into *close to one hundred* additional underrepresented minority students enrolling each year.

85. Antonovics & Sander, *supra* note 65, at 293.

stereotyped as a "preference recipient."[86] KOW's implication that this pattern somehow undermines our conclusion is sheer nonsense.

In fact, I hope readers see that KOW's discussion of the warming effect is much worse than nonsense—it is a series of deliberately misleading distortions of both the data and our (Antonovics's and my) analysis. Once again, KOW are engaged in zealotry, not reasoned discussion.

VI. Ignoring the Literature

The bulk of KOW's review is dedicated to the claim that *Mismatch* simply cherry-picks data and studies to fit its arguments: "Sander and Taylor failed throughout their book to look beyond the miniscule number of studies that support their claims and, in so doing, neglected to respond to mountains of research by many of the world's top social scientists that have found such claims about mismatch to be empirically groundless."[87] If true, this would be a powerful critique indeed. But here again, KOW write as Zealots, not as academics. Their "cherry-picking" argument is based on a breathtaking exercise of their own in cherry-picking and irresponsibly distorting the arguments made in a broad swath of mismatch-related research.

A good place to begin is the caveat with which KOW open their review: "We were assigned a word limit for our Review, . . . so we have narrowed our Review to a few areas in Parts II and III of *Mismatch* . . . ."[88] Yes, indeed. *Mismatch* has eighteen chapters, and KOW focus on half of Chapter 6, parts of Chapter 8 (the "warming effect" issue discussed above), and parts of Chapter 9. How can they then make a claim of what we do "throughout [the] book"? If they really believe that we ignore critics of mismatch, why did they completely ignore Chapter 5, for example, which is titled "The Debate on Law School Mismatch" and is largely devoted to a point-by-point analysis of the major critiques of law school mismatch?[89] In fact, throughout the book we discuss scholars who have either criticized mismatch or have found contrary evidence, from Ian Ayres to William Bowen to Marta Tienda.[90] I would guess that for every three scholars we discuss who have found mismatch effects in their research, we discuss two who have critiqued it. Aside from the warming effect and racism issues discussed above, KOW's review focuses on two types of mismatch effects:

86. *Id.* at 288–90.

87. Kidder & Onwuachi-Willig, *supra* note 50, at 935–36.

88. *Id.* at 896.

89. SANDER & TAYLOR, *supra* note 5, at 67–90.

90. *See, e.g.*, *id.* at 77–87 (discussing Ayres); *id.* at 106–08, 236 (Bowen); *id.* at 107 (Tienda).

graduation rates and post-graduation earnings.[91] This was not an accidental selection. Recall the distinction I drew in Part II between the first-order, direct types of mismatch effect and the second-order, less direct consequences. As I observed, there is an extensive literature on these first-order effects (learning mismatch, competition mismatch, and social mismatch), and it is virtually unanimous in concluding that these various types of mismatch are real and substantial. If KOW wish to argue that mismatch is a chimera, why do they *exclusively* focus on second-order effects? Presumably because only here can they find any support *at all* for their views. Cherry-picking indeed.

It is important to emphasize this fundamental point: the anti-mismatch Zealots are uniform in avoiding any discussion or acknowledgement of the various first-order mismatch effects. For example, in the wave of supposed law-school-mismatch rebuttals published by a variety of scholars in 2004 through 2007, none of the critics engaged with the key mismatch issue: that law school mismatch caused students to learn less and thus to be more likely to fail the bar on their first attempt. As Doug Williams explained in his 2013 peer-reviewed study of law school mismatch, this fundamental learning question was curiously neglected, and yet the evidence for it was overwhelming.[92]

So, in similar fashion, KOW ignore the vast first-order literature—and the bulk of *Mismatch* itself—to argue that the evidence on such second-order effects as college graduation and post-graduate earnings is mixed. Here, at least, we are in a sort of agreement. As Taylor and I note in *Mismatch*, at the very beginning of our discussion of this literature: "Do black and Hispanic students end up flourishing [at elite] college[s] and graduating at high rates despite whatever mismatch problems may exist? Are the benefits of getting a preference into a more elite school in the end worth the costs? These are big questions—and honestly contested ones."[93]

Readers of KOW's review will, I think, be taken aback by this quote because it is completely at odds with their characterization of our book. Yet it captures the spirit of our discussion of these issues and my own attitude towards them. Indeed, I am happy to report that there has been striking progress over the past year in bringing higher education leaders, science-education specialists, and mismatch critics into a significantly more candid and productive discussion of mismatch, trying to distinguish where it is a

91. *See* Kidder & Onwuachi-Willig, *supra* note 50, at 897–916 (discussing graduation rates); *id.* at 916–21 (discussing post-graduation earnings).

92. Williams, *supra* note 31, at 176. Another example of the Zealots avoiding any of the first-order mismatch issues, or the literature finding compelling evidence of them, is the Empirical Scholars Brief, discussed *infra* Part VII.

93. SANDER & TAYLOR, *supra* note 5, at 93.

greater or lesser problem and how—short of the complete elimination of admissions preferences—it can be countered.[94]

On the question of graduation mismatch, for example, I think the weight of evidence tilts toward the conclusion that this is not a significant problem at elite private schools or at elite law schools in general. In both cases, graduation rates (and grading scales) are now so high that there is virtually no margin at which mismatch can affect school completion. Yet one must also point out that the problems of learning mismatch and competition mismatch can still make preferences at such institutions quite harmful.

So, we see that this part of KOW's argument starts with two distortions: first, by completely ignoring the overwhelming literature on first-order mismatch effects, and second, by ignoring the nuanced way we view the evidence on second-order effects.

KOW then go on to distort virtually all of the literature on second-order effects. As one might expect of Zealots, they seem incapable of fairly summarizing what any piece of mismatch scholarship shows. There are three types of misrepresentations: they imply weaknesses in work that finds evidence of mismatch; they characterize essentially neutral work as being anti-mismatch; and they ignore deficiencies in works that really do critique mismatch. Let me give a couple of examples of each phenomenon.

Two of the most powerful studies showing mismatch effects in college graduation or earnings are those by Audrey Light and David Strayer (published in the *Journal of Human Resources* in 2000[95]) and by Linda Loury and David Garman (published in the *Journal of Labor Economics* in 1995[96]). KOW suggest that these two studies are too dated to be relevant anymore, on the grounds that the Loury–Garman article is based on "1972 high school seniors" and the Light–Strayer article is based on a "1979 survey."[97] This is fatuous. These studies are powerful in part because they are major longitudinal surveys, which follow national panels of young people into adulthood. Longitudinal studies necessarily cover a long period from inception to completion. The "1972" in the Loury–Garman source refers to the year when participants in the "National Longitudinal Study 1972" (known as the "NLS72") graduated from high school.[98] This major, federally funded study tracked these students through college and the first stages of their working careers, ending in the late 1980s.[99] At the time

94. *See supra* notes 6–7 and accompanying text.

95. Audrey Light & Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?*, 35 J. HUM. RESOURCES 299 (2000).

96. Linda Datcher Loury & David Garman, *College Selectivity and Earnings*, 13 J. LAB. ECON. 289 (1995).

97. Kidder & Onwuachi-Willig, *supra* note 50, at 898, 899 & n.20.

98. Loury & Garman, *supra* note 96, at 294.

99. *Id.*

Loury and Garman did their work, in the mid-1990s, the National Center for Education Statistics called the NLS72 "probably the richest archive ever assembled on a single generation of Americans."[100] The Light and Strayer work is based on the National Longitudinal Survey of Youth 1979, another major federal study which began in 1979 and is still ongoing.[101] Light and Strayer drew on data from 1979 through *1993* in their analyses.[102]

Thus, KOW are intentionally misleading readers when they imply that these economists were somehow selectively using very old data;[103] the scholars in each case were using relatively recent data from highly respected, state-of-the-art sources. KOW go on to argue that the studies should be discounted because "[u]ndeniably, there have been significant shifts in education and, more so, college admissions, since 1972 and 1979."[104] But KOW offer no specific reason to think there has been any change that would make these studies no longer germane. Is there any reason at all to think that the basic mechanisms of mismatch have changed in the past thirty years?

The Light and Strayer article remains an important study of graduation mismatch effects in large part because of the care with which the authors handled some of the crucial methodological problems involved in studying mismatch. They had good data for measuring a wide variety of student skills, they estimated individual student levels of mismatch, and they distinguished among many levels of college selectivity.[105] In contrast, most if not all of the most prominent critiques of mismatch do one or more of these things so poorly that I do not believe they could be published today in a well-respected economics journal. For example, the Alon and Tienda article[106] (much-admired by KOW) uses an extraordinarily crude metric for mismatch; most of the analysis is based on a division of all American colleges into two categories, "selective" and "nonselective."[107] Since nonselective institutions have low graduation rates for a whole host of reasons, this analytic choice essentially guarantees that Alon and Tienda

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100. *National Longitudinal Study of 1972: Overview*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/surveys/nls72/.

101. *See* Light & Strayer, *supra* note 95, at 306; *National Longitudinal Surveys: The NLSY79*, NAT'L LONGITUDINAL SURVEYS, http://www.bls.gov/nls/nlsy79.htm.

102. Light & Strayer, *supra* note 95, at 306.

103. *See* Kidder & Onwuachi-Willig, *supra* note 50, at 898 ("In fact, the two studies examining 'broader swaths of American higher education' that Sander and Taylor use to support their argument about lower graduation rates give the impression of being stuck in a timewarp from ten or fifteen years ago." (footnote omitted)).

104. *Id.* at 898–99.

105. *See* Light & Strayer, *supra* note 95, at 308–12 (dividing colleges into "quality quartiles" and using Armed Forces Quality Test scores to measure skill).

106. Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 SOC. EDUC. 294 (2005).

107. *See id.* at 303 tbl.2.

will generate results showing that attending the "selective" institutions is preferable. But it in fact tells us nothing about the actual tradeoffs involved in real-world affirmative action policy. The Fischer and Massey study of mismatch[108] is also often cited (including by KOW) as a work providing strong evidence against mismatch. But this piece is riddled with analytic flaws: it uses samples too small to fairly distinguish well-matched from potentially mismatched minority students;[109] it relies on self-reported data for key academic measures;[110] and it attempts to include measures of both "individual" affirmative action and "institutional" affirmative action in the same model.[111] This creates a mathematical problem in their equations that probably means their measure of "mismatch" is really just a measure of institutional selectivity. This would explain why Fischer and Massey come up with results—such as their finding that minorities who receive affirmative action get better grades than students who don't[112]—which are both nonsensical and contradicted by dozens of other studies.[113]

In many ways, the two major recent studies by Arcidiacono and several collaborators on the effects of mismatch and Prop. 209 upon student outcomes at the University of California break new ground.[114] They are based on data on many tens of thousands of students—the full population of students enrolled at the University of California[115]—rather than a mere sample (as most other mismatch studies are). The studies control for many institutional characteristics (since the students are all enrolled at campuses of differing selectivity within the same larger university) as well as a wide range of individual academic characteristics, and one of the studies takes advantage of the natural experiment (the reduction in racial preferences) created by Prop 209.[116] KOW only comments on one of these pathbreaking studies to note that is that it does not attribute all of the dramatic improvements in student outcomes after Prop. 209 to declines in "graduation" mismatch.[117] But across both studies, the authors do find that

108. Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 SOC. SCI. 531 (2007).

109. *See id.* at 534 (noting their data come from only 3,924 surveys).

110. *Id.* at 536.

111. *Id.* at 532.

112. *Id.* at 531.

113. *See* sources cited *supra* note 6 and accompanying text.

114. Peter Arcidiacono et al., *Affirmative Action and University Fit: Evidence from Proposition 209* (Aug. 23, 2013) [hereinafter Arcidiacono et al., *University Fit*] (unpublished manuscript), *available at* http://public.econ.duke.edu/~psarcidi/; Peter Arcidiacono et al., *University Differences in the Graduation of Minorities in STEM Fields: Evidence from California* (May 13, 2013) [hereinafter Arcidiacono et al., *STEM Fields*] (unpublished manuscript), *available at* http://public.econ.duke.edu/~psarcidi/.

115. *See* Arcidiacono et al., *University Fit*, *supra* note 114, at 1–2; Arcidiacono et al., *STEM Fields*, *supra* note 114, at 4–5.

116. *See* Arcidiacono et al., *University Fit*, *supra* note 114, at 2–3.

117. *See* Kidder & Onwuachi-Willig, *supra* note 50, at 914–15.

graduation mismatch occurs at significant levels; that minority graduation rates would have improved further had UC authorities used Prop. 209 to decrease levels of individual mismatch further; and that science mismatch effects were quite large.[118]

KOW prefer to focus on a different study of University of California students, in which Grodsky and Kurleander take advantage of a much smaller natural experiment to compare student outcomes.[119] This study, however, involves a tiny fraction of the number of students examined in the Arcidiacono studies, groups all the UC schools into two categories (shades of Alon and Tienda), and has a far less rich set of outcomes to observe.[120]

As I have noted, KOW also distort the work of scholars who are essentially neutral on mismatch issues. For example, they cite Peter Hinrichs for the proposition that "affirmative action bans have modest negative effects . . . on URMs' graduation prospects, particularly at the most selective universities."[121] Hinrichs actually says just the opposite, if we let him speak for himself:

> [T]he results [of regressions on six-year college graduation rates] suggest that there may be a quite sizable effect of affirmative action bans, particularly on the graduation rate of Hispanics. For instance, affirmative action bans are associated with a statistically significant 2.36 percentage point increase in the graduation rate of Hispanics attending public universities in the top two tiers of the *U.S. News* rankings. This effect is reasonably large compared to the base of 66.65% shown [below]. The estimated effect on Hispanic graduation rates at public universities in the top 50 of the *U.S. News* rankings is 3.83 percentage points, although this narrowly fails to be significant at the 5% level. None of the coefficients for blacks [shown below] is significant, although the signs generally point to a positive effect of affirmative action bans on college graduation rates and the magnitudes are larger at more selective colleges.[122]

The essence of KOW's distortion here is that they confuse (probably deliberately) the tendency of affirmative action bans to reduce URM *enrollment* at the most selective schools (which logically follows as at least a short-term response to the end of preferences) with the overall success of

118. *See* Arcidiacono et al., *University Fit, supra* note 114, at 23–24, 26–27, 31 tbl.9.

119. *See* Kidder & Onwuachi-Willig, *supra* note 50, at 915.

120. *See* Michal Kurlaender & Eric Grodsky, *Mismatch and the Paternalistic Justification for Selective College Admissions*, 86 SOC. EDUC. 297–98 (2013) (designating schools as either "highly selective" or "moderately selective" and looking only at data from the fall of 2004 through the spring of 2008).

121. Kidder & Onwuachi-Willig, *supra* note 50, at 916 & n.95.

122. Peter Hinrichs, Affirmative Action Bans and College Graduation Rates 14–15 (Nov. 21, 2012) (unpublished manuscript), *available at* http://www9.georgetown.edu/faculty/plh24/affactionbans-collegegradrates_112112.pdf.

URMs in achieving bachelor degrees. KOW purport to be discussing the second question, and here Hinrichs' work directly undermines, not supports, their conclusion.

The point of this Part is not to adjudicate the question of graduation and earnings mismatch—those questions are too complex to be fairly resolved here. Rather, I have tried in this Part to make some smaller points. First, both graduation mismatch and earnings mismatch are second-order mismatch effects, intrinsically likelier to be smaller and more manipulable than the first-order effects discussed in Part II and overwhelmingly supported by the extant literature. Second, KOW's account of the literature is consistently deceptive; it is an ideological diatribe, not a literature review. And third, one does not resolve social-science questions by simply counting studies on each side of the dispute. All studies are not created equal. In general, studies that use crude controls, broad categories, and imprecise measures of mismatch will not find it; those that avoid these problems generally do find it. As zealotry fades from prominence in the mismatch debate, the strong studies will tend to carry the day.

VII. The Empirical Scholars Brief: A Brief Case Study of Zealotry

In their peroration on the weaknesses of *Mismatch*, KOW sum up their argument by invoking what has become known as the "Empirical Scholars Brief" (ESB), a brief submitted by a group of eminent social scientists in *Fisher v. University of Texas*[123] as a critique of the mismatch hypothesis.[124] This is highly appropriate because the ESB episode (a better word might be *scandal*) captures so much about what I've been trying to say about KOW's review. I have told the story at length elsewhere;[125] here I will provide a short summary.

Supreme Court amicus briefs are routinely submitted by large numbers of organizations or individuals;[126] typically there are one or two key authors, and the other signatories are friends, colleagues, or collaborators of the key authors. Because the main goal of most briefs is to make some fairly simple point in the context of a high-profile legal or policy debate, they are more akin to petitions than to academic works, even though they

123. 133 S. Ct. 2411 (2013).

124. *See* Brief of Empirical Scholars as *Amici Curiae* in Support of Respondents, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (Aug. 13, 2012) (No. 11-345) [hereinafter Brief of Empirical Scholars]. The brief is discussed in Kidder & Onwuachi-Willig, *supra* note 50, at 920–21.

125. Richard Sander, *Mismatch and the Empirical Scholars Brief*, 47 VAL. U. L. REV. (forthcoming 2014).

126. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 752–54 (2000) (discussing the rise in the number of amicus briefs submitted per Supreme Court cases).

have footnotes, references, and much of the other superficial paraphernalia of scholarship.[127]

The core of the ESB was three specific critiques of the law-school-mismatch research conducted by me and (independently) by economist E. Douglass Williams, a labor economist who is chair of the economics department at Sewanee University.[128] But here's the thing: *all three of these critiques were factually false.*[129] I don't mean that they were "false" in the sense of "misleading" or "unfair"; they were just wrong, in the same way that KOW's claim that mismatch scholars only focus on blacks as the victims of mismatch is just plainly, demonstrably, wrong.[130]

When I realized how completely the ESB argument disintegrated on close examination, and just how bald were the falsehoods at its core, I contacted the lawyer who was counsel of record for the ESB, Thomas Leatherbury, and asked whether he could transmit to the authors of the brief some comments I had prepared. Leatherbury was quite affable, and though he refused to tell me who the lead author of the brief had been, he was quite willing to pass on any letter I might write. I sent a courteous letter, documenting the errors in detail and requesting an apology.[131] Leatherbury acknowledged receiving and distributing the letter, but there was no further response.[132] Leatherbury made no response to follow-up emails from me. I reached by email out to one of the authors, Richard Berk, who I knew slightly and who I considered a basically honest academic.[133] Berk agreed to talk, but then postponed the conversation, pleading health reasons and a variety of other excuses.[134] After half-a-dozen postponements, I gave up. A colleague of mine approached two other signatories of the brief, who declined to make any comment. I invited still another signatory, Kevin

127. Briefs are also subject to special rules that essentially immunize their signatories from libel suits, further reducing the costs of signing onto briefs without checking out their factual accuracy. *See* Eric M. Jacobs, Comment, *Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions Through Application of the* Noerr-Pennington *Doctrine*, 31 AM. U. L. REV. 147, 147–48 (1981).

128. *See* Brief of Empirical Scholars, *supra* note 124, at 17, 20–25.

129. Letter from author to Thomas S. Leatherbury, Vinson & Elkins, LLP (July 19, 2013) [hereinafter Letter from author] (on file with author) (laying out, briefly, the problems with the ESB's three critiques).

130. Like KOW, the ESB also purports to discredit all of mismatch research, *see* Brief of Empirical Scholars, *supra* note 122, at 20–25, but never addresses first-order mismatch effects or the enormous body of research that demonstrate their existence and seriousness.

131. *See* Letter from author, *supra* note 129.

132. *See* Reply E-mail from Thomas S. Leatherbury, Vinson & Elkins, LLP, to author (July 19, 2013) (on file with author).

133. *See* E-mail from author to Richard Berk, Professor, UCLA (Mar. 22, 2013) (on file with author).

134. *See* Reply E-mail from Richard Berk, Professor, UCLA, to author (Mar. 22, 2013) (on file with author); *see, e.g.*, Reply E-mail from Richard Berk, Professor, UCLA, to author (June 18, 2013) (on file with author); Reply E-mail from Richard Berk, Professor, UCLA to author (June 22, 2013) (on file with author).

Quinn of Berkeley, to a public debate; *he* declined as well.[135] To date, I know of no effort by any of the ESB signatories either to rebut my findings or to apologize for the brief's falsehoods. Tellingly, this group has also (so far as I am aware) made no effort to publish its claims in an academic journal, and (again, so far as I am aware) of the original signatories, only Richard Lempert has continued to participate in the broader debate over mismatch.[136]

I infer from these events that most of the signatories of the ESB were not involved in its actual drafting, signed on as a favor to friends who happened to be mismatch critics, and are now deeply embarrassed to have been associated with it. The principal author was, in all likelihood, Richard Lempert, the most zealous of the Zealots and the author of five other mismatch-related critiques around the same time.[137] And since Lempert regularly collaborates with William Kidder,[138] it is quite plausible that Kidder contributed to the ESB as well. It will be interesting, in the course of time, to learn just how the ESB came about. But what we know now is that this document, which is cited by Kidder as the summation of the case against mismatch, is fraudulent to its core.

VIII. What's an Onlooker To Do?

A wise colleague, in discussing with me the behavior of the Zealots, once offered this advice: "Never get in a pissing match with a skunk." It is a good point, and one reason (the other being time) that I ignore many Zealot attacks. It is easy to the point of tediousness to document instances where KOW make dishonest arguments, either do not understand or deliberately misrepresent the literature, and are guided by ideology rather

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135. *See* Reply E-mail from author to Alexander Smith, Berkeley Federalist Soc'y (Nov. 22, 2013) (suggesting a debate with Kevin Quinn for the author's visit to Berkeley); Reply E-mail from Alexander Smith, Berkeley Federalist Soc'y, to author (Nov. 25, 2013) (on file with author) (quoting Quinn as replying, "[T]hat is not something I am interested in participating in").

136. *See* sources cited *infra* note 137.

137. *See* William C. Kidder & Richard O. Lempert, *The Mismatch Myth in U.S. Higher Education: A Synthesis of the Empirical Evidence at the Law School and Undergraduate Levels*, *in* AFFIRMATIVE ACTION AND RACIAL EQUITY: CONSIDERING THE EVIDENCE IN FISHER TO FORGE THE PATH AHEAD (Uma M. Jayakumar & Liliana M. Garces eds., forthcoming 2014) [hereinafter Kidder & Lempert, *The Mismatch Myth*]; Richard Lempert, *Reflections on* Class in American Legal Education, 88 DENV. U. L. REV. 683 (2011); Richard O. Lempert & William C. Kidder, *State Should Clarify Argument in Affirmative Action Case*, DETROIT FREE PRESS, Nov. 3, 2013, http://www.freep.com/article/20131104/OPINION05/311040010/Michigan%20Affirmative%20Action%20University%20of%20Michigan%20Supreme%20Court%20U-M; Richard O. Lempert, *University of Michigan Bar Passage 2004-2006: A Failure to Replicate Professor Sander's Results, With Implications for Affirmative Action* (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 12-013, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2120063; Richard Lempert, Observations on Professor Sander's Analysis of the UCLA Holistic Admissions System (2013) (unpublished manuscript), *available at* http://www.newsroom .ucla.edu/portal/UCLA/document/Lempert_Review-Sander.pdf.

138. *See, e.g.*, Kidder & Lempert, *The Mismatch Myth*, *supra* note 137.

than by an actual interest in the underlying question of improving the minority pipeline through higher education. But for readers who do not study the underlying literature—and most readers will either lack the training or the time to do so—the underlying impression may simply be of two irreconcilable viewpoints, with nothing to choose between them. Let me suggest a few ways that readers can make an informed evaluation of the mismatch debate without becoming experts.

First, readers should ask themselves whether my account of Kidder and Onwuachi-Willig as Zealots rings true. Most readers, I assume, are not Zealots and will discount the arguments of Zealots. If one rereads the KOW review, or other things these authors have written on the mismatch debate, I think the degree to which they fit the Zealot profile will jump out—in particular, their insistence on never conceding the existence of *any* mismatch effect, ever, and their attribution of evil motives to mismatch scholars.[139]

In contrast, I think that even a casual reading of the work of scholars—as opposed to affirmative action opponents—who believe mismatch to be a problem is enlightening. Most of these scholars (including myself) are not opposed to affirmative action but rather are concerned about its excesses. Smyth and McArdle end their work by urging college counselors to not glibly urge minority students to attend the most elite school that will have them.[140] Arcidiacono frequently returns, in his work, to the themes that mismatch is a cross-racial phenomenon and that the key issue in this research is not whether students go to college but which school best facilitates students' achievements of their own objectives.[141] In recent essays (which I have written with input from higher education leaders), I try to emphasize the importance of finding pragmatic ways that higher-

139. *See* Kidder & Onwuachi-Willig, *supra* note 50, at 936 (accusing this author of focusing only on black students and not addressing how mismatch would affect white students); *see also* Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, J. BLACKS HIGHER EDUC., Winter 2004/2005, at 102, 103–04 (describing parts of this author's paper as inept, with "unsound" and "unrealistic" assumptions).

140. *See* Smyth & McArdle, *supra* note 35, at 374 (agreeing with other studies and finding that preferences should not be altogether abandoned but, instead, that secondary school education should help URM students become more qualified to pursue STEM fields).

141. *See, e.g.*, Peter Arcidiacono et al., *Does Affirmative Action Lead to Mismatch? A New Test and Evidence*, 2 QUANTITATIVE ECON. 303, 327–28 (2011) (concluding that letting students know where they sit in the class rank can help them make better choices about achieving their objectives); Arcidiacono et al., *supra* note 37, at 13 (suggesting that current racial-preference practices may have a positive effect but probably exceed what is necessary to increase positive interracial interactions between students); Arcidiacono et al., *supra* note 62, at 19 (finding that black students have more interest in science, math, and engineering majors at the start of college and that this interest will persist through graduation if those students choose a school that best fits their academic background).

education institutions can increase diversity while avoiding self-defeating cycles of mismatch.[142] None of this work has the marks of zealotry.

Second, one can sample the public discussion of mismatch. Watching the Harvard debate on mismatch,[143] or reading Malcolm Gladwell's discussion of it,[144] are ways to see nuance in the discussion and get a nontechnical sense of the underlying realities in the debate.

Third, one can read more in-depth discussions where mismatch scholars and constructive skeptics directly engage. The *Journal of Economic Literature* (JEL) recently commissioned Peter Arcidiacono and Michael Lovenheim of Cornell to review and assess the mismatch literature.[145] JEL's specific goal in pairing Lovenheim with Arcidiacono was to include, in Lovenheim, a respected labor economist who studies higher education but has not been involved in any way in the mismatch debate.[146] At a less technical level, two mismatch skeptics (Tom Espenshade of Princeton and Stacy Hawkins of Rutgers) are collaborating with two mismatch scholars (Arcidiacono and myself) on a written "conversation" about the mismatch debate.[147] These point-by-point discussions of the substantive issues in the mismatch debate not only leave many issues unresolved but also suggest many areas where real consensus is emerging.

Third, if one dips into the literature, I think the reader will find the distinction between first-order and second-order effects compelling. All the first-order effects are intrinsically logical, even intuitively obvious. The literature exploring them is very nearly unanimous. The battle is over the second-order effects. But it really should not be a battle. We should instead agree that the first-order problems are real, and the task is to make reforms that preserve what is good about current policies while fixing those parts of the policies that directly contribute to the first-order effects. Figuring out a sensible path forward is not really so hard; it just requires a little imagination and a large dose of intellectual honesty.

142. *See, e.g.*, Richard Sander, *A Collective Path Upward: Working Smarter and Cooperatively to Improve Opportunity and Outcomes*, *in* NEW PATHS TO AFFIRMATIVE ACTION AFTER *FISHER* (Richard Kahlenberg ed., forthcoming 2014).

143. *See Affirmative Action on Campus Does More Harm than Good*, *supra* note 18.

144. *See supra* note 11 and accompanying text.

145. *See* Arcidiacono & Lovenheim, *supra* note 46. The JEL essay examines several key mismatch debates and tries to distinguish between questions that seem largely settled and those that are not, and in the latter cases, to understand the key reasons the questions are still contested. *See id.*

146. JEL asked me and a mismatch skeptic to review Arcidiacono's original proposal for an essay and decided to include Lovenheim as a coauthor to allay any concerns about balance in the resulting article. For Lovenheim's past bibliography see *Michael Lovenheim*, CORNELL U., http://www.human.cornell.edu/bio.cfm?netid=MFL55 (follow "Curriculum Vitae").

147. This essay resulted from the involvement of the four of us on a January 2014 panel at the University of Pennsylvania and is scheduled to be published in Volume 17 of the *Journal of Constitutional Law*.

The Mounting Evidence Against the "Formalist Age"

Brian Z. Tamanaha*

In *Beyond the Formalist-Realist Divide*,[1] I challenge the widely held view that the American legal culture at the turn of the twentieth century was dominated by belief in legal formalism, which the legal realists came on the scene to shatter. This narrative has been repeated innumerable times by jurisprudents, political scientists, legal historians, and jurists generally. Several political scientists write,

> Until the twentieth century, most lawyers and scholars believed that judging was a mechanistic enterprise in which judges applied the law and rendered decisions without recourse to their own ideological or policy preferences. . . . In the 1920s, however, a group of jurists and legal philosophers, known collectively as "legal realists," recognized that judicial discretion was quite broad and that often the law did not mandate a particular result.[2]

A legal historian observes, "Formalist judges of the 1895–1937 period assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics. . . . Legal Realists of the 1920s and [19]30s, tutored by Holmes, Pound, and Cardozo, devastated these assumptions . . . ."[3]

My book argues that the standard image of the so-called formalist age is largely untrue. Professor Brophy, a legal historian, argues in *Did Formalism Never Exist?* that I am wrong.[4] To engage we must first have a conception of "legal formalism."

I. What Was "Legal Formalism"?

Although characterizations of legal formalism vary, they share a defining core of propositions about the nature of law and judicial decision making. To put it concisely, law is logically ordered, autonomous, and

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1. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010). This Response pulls together key parts of a more extensive argument and body of evidence presented in Chapters One through Five of the book.

2. VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT 30 (2006).

3. WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 187 (1988).

4. Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEXAS L. REV. 383, 385 (2013) (book review).

gapless, and judges render decisions through mechanical rule application. The following is an account of legal formalism by Hanoch Dagan, a legal theorist who has written extensively on legal realism:

> Classical formalism – culturally personified in the figure of Christopher Columbus Langdell of Harvard Law School – stands for the understanding of law as an autonomous, comprehensive, and rigorously structured doctrinal science. On this view, law is governed by a set of fundamental and logically demonstrable scientific-like principles. Two interrelated features of the formalist conception of law bear emphasis: the purported autonomy and closure of the legal world, and the predominance of formal logic within this autonomous universe.
>
> In formalism, law is 'an internally valid, autonomous, and self-justifying science' in which right answers are 'derived from the autonomous, logical working out of the system.' Law is composed of concepts and rules. With respect to legal concepts, formalism endorses 'a Platonic or Aristotelian theory,' according to which 'a concept delineates the essence of a species or natural kind.' Legal rules, in turn, embedded either in statutes or in case law, are also capable of determining logically necessary legal answers: induction can reduce the amalgam of statutes and case law to a limited number of principles, and legal scientists can then provide right answers to every case that may arise using syllogistic reasoning – classifying the new case into one of these fundamental pigeonholes and deducing correct outcomes.
>
> Because legal reasoning is characterized by these logical terms, internal to it and independent of concrete subject matter, formalism perceives legal reasoners as technicians whose task and expertise is mechanical: to find the law, declare what it says, and apply its pre-existing prescriptions. Because these doctrinal means generate determinate and *internally* valid right answers, lawyers need not – indeed, should not – address social goals or human values.[5]

"The realist project begins with a critique of this formalist conception of law," Dagan adds.[6]

This is an elaborate theoretical reconstruction of what legal formalism held, rather than a statement of the beliefs of any jurists in particular. As a theoretical construction, it cannot itself be empirically falsified. However, it is based upon actually held beliefs about law that purportedly were dominant at the turn of the twentieth century, and Dagan cites historical

5. Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 611–12 (2007) (footnotes omitted).

6. *Id.* at 612.

sources to back his representations.[7] Thus, if it turns out that beliefs along these lines were not widespread among jurists of the day, then doubt is cast on the standard story about the formalist age.

A crucial factor in the entrenchment of this narrative is that the conventional image of the formalist age crossed over different disciplines. The story originated in legal history in the 1970s, as I will elaborate, and then quickly spread to legal theory, political science, and throughout the legal culture. Once the story went outside legal history, it took on a life of its own, shorn of nuance and untouched by subsequent refinements in legal history. As a jurisprudent investigating the formalist–realist antithesis, the inquiry I pursued in the book was whether the conventional image of the formalist age is correct: Did jurists at the time believe law is logically ordered, autonomous, and gapless and judging is mechanical?

II. The Origins of the "Formalist Age" Narrative

Grant Gilmore's *The Ages of American Law* was an immensely influential account of the formalist age, cited over a thousand times in law reviews.[8] He divided American legal thought into three periods.[9] Running from the Revolution to the Civil War, the first period was as an "Age of Discovery," during which courts flexibly applied rules and principles in a "Grand Style" to adjust law to changing circumstances and meet social needs.[10] In the second period, which began "at about the time of the Civil War," the "Grand Style lost out to a Formal Style."[11] The 1920s then witnessed "a root-and-branch rejection of the formalism or . . . the conceptualism of the proceeding period,"[12] giving way to a more realistic approach. Gilmore characterized the formal style as follows:

> The post-Civil War judicial product seems to start from the assumption that the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been. Past error can be exposed and in that way minor

7. *See, e.g.*, *id.* at 611–12 (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960 (1992); Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493 (1977) (book review); D. Kennedy, *Legal Formalism*, *in* 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8634 (Neil J. Smelser & Paul B. Baltes eds., 2001)).

8. TAMANAHA, *supra* note 1, at 17–18.

9. GRANT GILMORE, THE AGES OF AMERICAN LAW 11 (1977).

10. *See id.* at 12, 19–22 (discussing the "Grand Style" and titling Chapter Two the "Age of Discovery" while discussing the period before the Civil War).

11. *Id.* at 12.

12. *Id.*

> corrections can be made, but the truth, once arrived at, is immutable and eternal.[13]

These were the defining faiths of the formalist age, according to Gilmore.

Another influential, early formulation was Morty Horwitz's 1975 essay, *The Rise of Legal Formalism.* Similar to Gilmore, Horwitz argued that early in the nineteenth century, judges developed private law in a utilitarian and instrumentalist fashion to facilitate economic growth; after the mid-century, courts shifted to a strictly formalistic style to entrench legal benefits for commercial interests and prevent the use of law for redistributive purposes.[14] "There were, in short, major advantages in creating an intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable, and which, by making 'legal reasoning seem like mathematics,' conveyed 'an air . . . of . . . inevitability' about legal decisions."[15]

That decade saw a burst of pieces about legal formalism by prominent legal theorists and historians. Duncan Kennedy published a theoretical analysis of "Legal Formality."[16] William Nelson elaborated on the rise of legal formalism in relation to antislavery cases.[17] Legal formalism was a central theme in *Justice Accused*, Robert Cover's book on judicial treatment of slavery cases.[18] These scholars were politically on the left, with Kennedy and Horwitz as founding members of Critical Legal Studies.[19] Several of these works had an openly presentist bent, with the authors

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13. *Id.* at 62.

14. Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 251–52 (1975).

15. *Id.* at 252 (omission in original).

16. *See* Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 355 (1973) (describing legal formality as a "system . . . that takes it as a premise that there are only two processes of decision a theorist need take into account when he sets out to build a theory of social order. These are rule application and decision according to purposes, or substantive rationality"). Although circulated among historians and theorists at the time, Duncan Kennedy's influential book on this topic, *The Rise & Fall of Classical Legal Thought*, was not published until 2006. A piece of this book was published at the time in Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980), *reprinted in* DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT 1–30 (2006).

17. William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 518, 548 (1974) (describing how judging in the mid-nineteenth century turned from instrumentalism to formalism when dealing with issues of slavery).

18. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 149–91 (1975) (comparing the history of formalism and the transition to positivism).

19. *See* Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516, 1523 (1991); *see also* John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 392, 396 (1984) (discussing Kennedy's and Horwitz's roles in establishing Critical Legal Studies).

expressing alarm about what they saw as a modern reemergence of legal formalism among conservative judges and legal thinkers.[20]

Their account of the formalist age, which linked back to preexisting arguments by Oliver Wendell Holmes, Roscoe Pound, and the legal realists, quickly gained acceptance. As Gilmore triumphantly declared in 1979,

> [Recent historical research] has produced one proposition, which, so far as I know, had never been heard of before World War II, but which has, with extraordinary speed, become one of the received ideas of the 1970s. That is the proposition that the fifty year period from the Civil War to World War I was one of *legal formalism*.[21]

This broad consensus was swiftly achieved despite an odd absence in the historical record. If it was indeed the dominant view, one would expect to see many declarations by jurists that law is logically ordered, autonomous, and gapless and that judging is mechanical. But such statements are hard to find. Every theory of law that one can point to has a host of advocates who explicitly articulate and justify its core propositions—with the striking exception of legal formalism. As legal theorist Tony Sebok noted, "Formalism, so to speak, does not really have an identity of its own: As a theory of law, it exists only as a reflection of scholars like Holmes, Pound, Llewellyn and Frank."[22] Statements about formalism almost invariably come from the pens of critics attacking judicial decisions.[23] Historical accounts of the dominance of formalism, it turns out, are theoretical constructions nearly devoid of supportive avowals from the jurists of the day.

In response to this contention, Professor Brophy insists that the formalists "certainly speak for themselves,"[24] yet he does not supply any statements from jurists affirming that law is logically ordered, autonomous, and gapless and that judging is mechanical. Ironically, Brophy inadvertently confirms my argument, when he sets out to show the dominance of formalism, by relying on extended quotes from Harriet Beecher Stowe and Roscoe Pound criticizing judicial reasoning.[25] This is how the image of the formalist age was constructed: built on progressive objections to conservative court decisions.

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20. *See* TAMANAHA, *supra* note 1, at 50–62 (drawing a connection between criticism of legal formalism by politically left-leaning legal scholars and the civil rights and antiwar protests during the 1960s and 1970s).

21. Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 441 (1979) (emphasis added).

22. ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 57 (1998).

23. *See,* TAMANAHA, *supra* note 1, at *id.* at 62–63 (discussing how formalists such as Langdell and Joseph Beale attacked several judicial opinions using formalist principles).

24. Brophy, *supra* note 4, at 395.

25. *See id.* at 402, 407–09.

Legal historians also point to legal decisions as proof of the formalist age. As Lawrence Friedman worried, however, "'Formalism' is hard to measure; and there is always a nagging doubt whether or not this is a useful way to characterize the work of the judges."[26] Lacking clear criteria, what makes a decision "formalistic" is in the eye of the beholder—and it is always a critic who levels the charge.[27] A study of written decisions of the turn-of-the-century Supreme Court, furthermore, found that different justices used different styles of analysis, making it dubious to lump them under a single "formalist" label.[28] Another reason to be cautious is that judicial opinions are stylized presentations that justify rulings and provide legal guidance; hence one cannot extrapolate theories of law or judicial decision making from modes of opinion writing.[29] Nor can the full panoply of supposed formalist beliefs about law be derived solely from written opinions. To establish that, we must know in greater detail what they actually thought about law and judging.

III. The Evidence Against the "Formalist Age"

Many jurists at the turn of the century expressed consummately realistic accounts of law and judging. Even jurists who supposedly were leading legal formalists said surprisingly realistic things. Legal historian William LaPiana writes:

> The [historical-school-of-thought] legal theories of thinkers like Hammond, Cooley, Bliss, Tiedeman, Phelps, Dillon, and Carter provide the basis for a "formalistic" view of law and judging. As long as the ultimate repository of law is declared to be a body of principles beyond the reach of political processes, especially legislative processes, and once the guarantees of the Constitution are proclaimed to embody these unwritten principles, the decision of cases can become the mechanical application of transcendent rules.[30]

To test LaPiana's assertions, I will let the formalists he identified speak for themselves.

William G. Hammond, on the occasion of his installation as Dean and Professor at St. Louis Law School in 1881, said,

> It is useless for judges to quote a score of cases from the digest to sustain almost every sentence, when *every one knows* that another

26. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 623 n.39 (2d ed. 1985).

27. *See* TAMANAHA, *supra* note 1, at 56–57.

28. *Id.* at 56 & 215 n.92 (citing Walter F. Pratt, *Rhetorical Styles on the Fuller Court*, 24 AM. J. LEGAL HIST. 189 (1990), which studies a sample of Supreme Court terms from 1895 to 1905 and reaches the same conclusion).

29. *Id.* at 56, 57 & 215 n.93 (citing John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24 (1924)).

30. William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L.J. 519, 557 (1992).

> score might be collected to support the opposite ruling. The perverse habit of qualifying and distinguishing has been carried so far that all fixed lines are obliterated, and a little ingenuity in stating the facts of a case is enough to bring it under a rule that will warrant the desired conclusion. . . . *[T]he most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the court—perhaps have only been looked up after that decision was reached upon the general equities of the case. . . .* He writes, it may be, a beautiful essay upon the law of the case, but the real grounds of decision lie concealed under the statement of facts with which it is prefaced. It is this power of stating the facts as he himself views them which preserves the superficial consistency and certainty of the law, and hides from careless eyes its utter lack of definiteness and precision.[31]

This is as skeptical as anything the legal realists would say five decades later. And notice that Hammond assumed his audience would agree about the ubiquity of conflicting precedents ("every one knows").

Christopher Tiedeman was similarly blunt in 1896:

> If the Court is to be considered as a body of individuals, standing far above the people, out of reach of their passions and opinions, in an atmosphere of cold reason, deciding every question that is brought before them according to the principles of eternal and never-varying Justice, then and then only may we consider the opinion of the Court as the ultimate source of the law. This, however, is not the real evolution of municipal law. *The bias and peculiar views of the individual judge do certainly exert a considerable influence over the development of the law. . . .* The opinion of the court, in which the reasons for its judgment are set forth, is a most valuable guide to a knowledge of the law on a given proposition, *but we cannot obtain a reliable conception of the effect of the decision by merely reading this opinion. This thorough knowledge is to be acquired only by studying the social and political environment of the parties and the subject matter of the suit, the present temper of public opinion and the scope and character of the popular demands, as they bear upon the particular question at issue.*[32]

Law is not autonomous, in Tiedeman's view; nor is judging mechanical.

In 1890 James C. Carter recognized gaps, uncertainty, and the necessity to meet social needs:

> It is in *new cases* that nearly all the difficulty in ascertaining and applying the law arises. The great mass of the transactions of life are

31. W.G. Hammond, *American Law Schools, Past and Future*, 7 S. L. REV. 400, 412–13 (1881) (emphasis added).

32. Christopher G. Tiedeman, *The Doctrine of Stare Decisis*, 3 U. L. REV. 11, 19–20 (1896) (emphasis added).

> indeed repetitions of what has before happened—not exact repetitions, for such never occur—but repetitions of all substantial features. They have once or oftener been subjected to judicial scrutiny and the rules which govern them are known. They arise and pass away without engaging the attention of lawyers or the courts. The great bulk of controversy and litigation springs out of transactions which present material features never before exhibited, or new combinations and groupings of facts. It is here that doubt and difficulty make their appearance .... Several different rules—all just in their proper sphere—are competing with each other for supremacy.[33]

In new situations, "[t]he standard of justice .... must be *adapted* to human affairs .... Systems of law must be shaped in accordance with the actual usages of men."[34] Legal uncertainty cannot be eliminated, Carter observed, because new facts arise and society continually changes. In these situations, the law is not known until it "has been subjected to judicial decision."[35]

Judge Thomas Cooley wrote in 1886 that legal uncertainty is inevitable:

> [T]he law is uncertain in its administration because in the infinite variety of human transactions it becomes uncertain which of the opposing rules the respective parties contend for should be applied in a case having no exact parallel, and because it cannot possibly be known in advance what view a court or jury will take of questions upon which there is room for difference of opinion.[36]

Even with respect to the interpretation of clear legal rules, the cases can be "numerous and variant;"[37] "just and well-instructed minds" can differ on how to interpret statutes.[38] These difficulties in the judicial application of law "must always exist so long as there is variety in human minds, human standards, and human transactions."[39] Cooley also acknowledged that judges make law: "The decisions continue to accumulate as causes arise which present aspects differing at all from any which preceded; and a great body of laws being made under the statute which is and can be nothing but

33. James C. Carter, *The Provinces of the Written and the Unwritten Law*, 24 AM. L. REV. 1, 15 (1890) [hereinafter Carter, *Provinces*]; *see also* JAMES COOLIDGE CARTER, LAW: ITS ORIGIN GROWTH AND FUNCTION 69–72 (1907) [hereinafter CARTER, LAW] (making similar statements by way of a concrete example).

34. Carter, *Provinces*, *supra* note 33.

35. CARTER, LAW, *supra* note 33, at 279.

36. Thomas M. Cooley, *Codification*, 20 AM. L. REV. 331, 334 (1886), *as excerpted in Another View of Codification*, 2 COLUM. JURIST 464, 465 (1886).

37. *Id.*

38. *Id.*

39. *Id.* at 465–66.

'*judge-made law*.'"[40] When unanticipated situations arise, Cooley candidly stated, "[I]t is evident that what the law was to be could not have been known in advance of decisions, and it is also evident that when declared by the court its effect must be retroactive."[41]

Judge John Dillon, in 1886, portrayed the law as messy:

> It is manifest from the foregoing discussion, that the Judges from the very nature of their functions, can not develop the general principles of the law so as to take in the entire subject, or do anything except (if you will pardon the expression) automatically (that is depending upon the accident of cases arising for judicial action) towards giving anything like completeness to the law, or any branch of it. Not only is the case law incomplete, but the MULTIPLICITY AND CONFLICT OF DECISIONS is one of the most fruitful causes of the unnecessary uncertainty, which characterizes the jurisprudence of England and America. Thousands of decisions are reported every year. An almost unlimited number can be found upon almost any subject. What any given case decides, must be deduced from a careful examination of the exact facts, and of the positive legislation, if any, applicable thereto. A general principle will be found adjudged by certain courts. Other courts deny or doubt the soundness of the principle. Exceptions are gradually but certainly introduced. Almost every subject is overrun by a more than tropical redundancy of decisions, leaving the most patient investigator entangled in doubt.[42]

Like Judge Cooley, Dillon acknowledged that judges make law: "[S]tupendous work of *judicial legislation* has been silently going on" for a "long period."[43]

The jurists quoted above have been identified as seminal purveyors of legal formalism. Yet their actual statements about law and judging are directly contrary to the standard image of the formalist age.

To explain away the many realistic depictions of law and judging I quote in the book, Professor Brophy suggests that I merely uncovered more examples of early realism, which does not refute legal formalism because there are always exceptions to a dominant view.[44] Others have raised this critique. Professor Frederick Schauer objects, "[A]s with any distinction, even multiple counterexamples on one or the other side do not undercut the plausibility of a probabilistically accurate distinction. It is sometimes warm

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40. *Id.* at 465 (emphasis added).

41. *Id.*

42. John F. Dillon, *Codification*, 20 AM. L. REV. 29, 36 (1886) (first emphasis omitted).

43. *Id.* at 32.

44. *See* Brophy, *supra* note 4, at 398–99 (claiming that behind my examples of realist-sounding work were similar thinkers to Holmes, Pound, and Cardozo that provided the foundation for latter generations to build their ideas upon).

in January (in the northern hemisphere) and cold in June, but January is still, in general, colder than June."[45]

A few counterexamples undoubtedly would not suffice. But that begs the essential question: What would be enough to falsify the conventional view of the formalist age? If every showing—no matter how plentiful—is dismissed as a counterexample, the story is impervious to refutation; immune from the evidence.

I quote *dozens* of jurists—including many judges—in leading law journals and speeches before the bar uttering remarkably realistic statements about law and judging.[46] I will repeat just two examples here, from among many in the book, to reveal awareness on par with views today. Columbia law professor Munroe Smith, in 1887, frankly described how judges alter law while claiming to adhere to stare decisis:

> [W]hen new law is needed, the courts are obliged to "find" it, and to find it in old cases. This can commonly be done by re-examination and re-interpretation, or, at the worst, by "distinction." By a combination of these means, it is even possible to abrogate an old rule and to set a new one in its place. When the old rule is sufficiently wormholed with "distinctions," a very slight re-examination will reduce it to dust, and a re-interpretation of the "distinguishing" cases will produce the rule that is desired.[47]

Or consider an article published in the leading *American Law Review* in 1893 with the transparently skeptical title, *Politics and the Supreme Court of the United States*: "Viewing the history of the Supreme Court at large, and stating conclusions somewhat broadly," the author wrote, "it may be said that its adjudications on constitutional questions have in their general tendencies conformed, in a greater or lesser degree, to the maxims and traditions of the political party whose appointees have, for the time being, dominated the court."[48] The author criticized several Supreme Court opinions as "vague[]," "weak, incoherent, and uncandid,"[49] better explained not by the stated legal reasoning but by the political views of the judges. "[T]o say that no political prejudices have swayed the court[] is to maintain that its members have been exempt from the known weaknesses of human nature, and above those influences which operate most powerfully in

45. Frederick Schauer, *Legal Realism Untamed*, 91 TEXAS L. REV. 749, 753 n.18 (2013) (book review).

46. *See* TAMANAHA, *supra* note 1, at 32–33 (quoting jurists and judges including Wilbur Larremore, Edward Whitney, and Judge Emlin McClain); *id.* at 34–35 (quoting various jurists including Judges Oscar Fellows and Seymour Thompson); *id.* at 71–79, 125–31, 143–45, 183–86 (providing many more examples).

47. Munroe Smith, *State Statute and Common Law*, 2 POL. SCI. Q. 105, 121 (1887).

48. Walter D. Coles, *Politics and the Supreme Court of the United States*, 27 AM. L. REV. 182, 207 (1893).

49. *Id.* at 204–05.

determining the opinions of other men."[50] Especially when no clear precedent exists, he asserted, a judge's conclusions "will be largely controlled by the influences, opinions and prejudices to which he happens to have been subjected."[51]

Many realistic observations about law and judging from the period were left out of the book because it seemed redundant to pile example upon example (or so I thought). Let me now add a set of observations from 1906, not included in the book, by Chief Judge Walter Clark of the North Carolina Supreme Court, a progressive critic of conservative courts:

> But the passage of a judge from the bar to the bench does not necessarily destroy his prejudices or his predilections. . . . [A]nd usually with a natural and perhaps unconscious bias from having spent their lives at the bar in advocacy of corporate claims, this will unconsciously, but effectively, be reflected in the decisions they make. Having attempted as lawyers to persuade courts to view debated questions from the standpoint of aggregated wealth, they often end by believing sincerely in the correctness of such views, and not unnaturally put them in force when in turn they themselves ascend the bench.[52]

The due process and equal protection clauses, Clark said, "are very elastic and mean just whatever the court passing upon the statute thinks most effective for its destruction."[53] He continued, "This, of course, makes of vital importance the inquiry, 'What are the beliefs of the majority of the court on economic questions, and what happens to be their opinion of a sound public policy?'"[54]

In addition to citing *many* realistic statements along these lines, in the book I also directly refute key claims Gilmore made about beliefs in the formalist age,[55] like his assertion that it "became an article of faith, for lawyers and non-lawyers alike," that "courts never legislate."[56] I cite over a dozen articles and statements from the 1870s through the turn of the century indicating that judicial legislation was widely acknowledged,[57] including a *Harvard Law Review* article published in 1891 entitled, *Judicial*

50. *Id.* at 182.

51. *Id.* at 189–90.

52. Walter Clark, Some Defects of the Constitution of the United States, Address to the Law Dep't of the Univ. of Pa. (Apr. 27, 1906), *in* 2 THE PAPERS OF WALTER CLARK 553, 569–70 (Aubrey Lee Brooks & Hugh Talmage Lefler eds., 1950).

53. *Id.* at 577.

54. *Id.*

55. *See* TAMANAHA, *supra* note 1, at 17–22.

56. GILMORE, *supra* note 9, at 15.

57. *See* TAMANAHA, *supra* note 1, at 19–20.

Legislation: Its Legitimate Function In Developing the Common Law.[58] A commentator in 1884 stated that courts for a long time "have pretended that they simply declared the law, and did not make the law; yet *we all know that this pretense is a mere fiction.*"[59] Prominent judges also admitted this, as stated earlier with quotes from Cooley and Dillon.[60] In a 1903 Address to the American Bar Association, Federal Circuit Judge LeBaron Colt forthrightly stated judges "have carried on judicial legislation from the infancy of the law in order that it might advance with society."[61]

My case is much stronger than producing dozens of realistic statements and refuting core claims about purportedly dominant formalistic beliefs. As I showed, the very jurists that historians have identified as *leading legal formalists*, themselves, offered realistic accounts of law and judging—Hammond, Tiedeman, Carter, Cooley, and Dillon. They acknowledged gaps and inconsistencies in the law, that law could point to different outcomes, that judges make law, that law should serve social needs, that social views of justice and policy influence the development of law, and even (as Tiedeman stated) that the personal biases of judges have an impact on their decisions.[62] These jurists did not agree among themselves on all points, and several expressed highly idealized views of law as something to strive toward, but none of them described law as logically ordered, autonomous, and gapless and or judging as mechanical. Their depictions of law and judging bear no resemblance to Dagan's characterization of legal formalism.

In light of this, the proper way to frame Schauer's analogy is not to presuppose it is January and discount the occasional warm days, but to start with a clean slate and try to determine what month it is by tallying cold (formalism) and warm (realism) days. What the evidence shows is a great deal of explicit realism about law and judging and a scarcity of statements embracing legal formalism. Judging from the evidence, it looks like June.

A final piece of circumstantial evidence bears mention. There are multiple references in this period to significant advances the legal system had recently made in overcoming its earlier formalism.[63] An 1876 article observed that "the archaic period . . . is the period of rigid formalism" and

58. *See* Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172, 172 (1891) (arguing that judicial legislation is a necessary feature of the legal system).

59. *Current Topics*, 29 ALB. L.J. 481, 481 (1884) (emphasis added) (quoting Mr. C.B. Seymour).

60. *See supra* notes 36, 41–42 and accompanying text.

61. LeBaron B. Colt, United States Circuit Judge for the First Circuit, Address at the Am. Bar Ass'n Meeting at Hot Springs, Va.: Law and Reasonableness, *in* 37 AM. L. REV. 657, 674 (1903).

62. *See* TAMANAHA, *supra* note 1 at 84–89 (discussing the views of multiple legal realists who acknowledge that law is a reflection of social processes and serves social needs).

63. *See id.* at 45–48 (outlining some historical criticism of formalism and a transition away from formalism).

optimistically opined that the U.S. common law system had progressed beyond the formalist stage.[64] A jurist in 1895 identified several instances of "a triumph of the spirit of the law over its early formalism."[65] A jurist in 1893 noted "the *Zeitgeist* and its dislike of formalism."[66] These comments came in the heart of what we now think of as the formalist age.

IV. What Brophy's Response Ignores

Brophy offers several "examples of formalism" to counter my evidence. He discusses the *State v. Mann*[67] opinion written by Judge Thomas Ruffin around 1830, Thomas Cobb's critique of slavery law published in 1858, the *Jackson v. Bulloch*[68] case of 1837, and an 1854 Address by John Randolph Tucker.[69] Nothing in what he says shows that jurists at the time believed law was logically ordered, autonomous, and gapless and judges rendered decisions mechanically. Most of what he conveys involves objections by critics of slavery decisions.

More to the point, his examples are from the wrong period. Horwitz identified legal formalism with the second half of the twentieth century, describing "extremely deep and powerful currents which moved American law to formalism *after* 1850."[70] According to Gilmore, "the fifty year period from the Civil War to World War I was one of legal formalism."[71] Another legal historian who has written about legal formalism, William Wiecek, titles a chapter, "The Formalist Era, 1873–1937."[72] That was the time period I examined in the book. Even if I were to accept Brophy's contention that judges in antebellum slavery cases were formalistic, that does not tell us legal formalism was the dominant view of law at the turn of the century.

Brophy's second main evidence for formalism, in the section "Defining Formalism," relies on Roscoe Pound's criticisms of courts in *Mechanical Jurisprudence* and other articles.[73] Pound is indeed a crucial figure, and Brophy's argument exemplifies why. The uncritical acceptance of Pound's representations by historians and theorists lies at the heart of the story of the formalist age. Pound claimed that the legal culture had

64. *Reform in Legal Education*, 10 AM. L. REV. 626, 626 (1876).

65. Alex Thomson, *The Historical and Philosophical Methods in Jurisprudence*, 7 JURID. REV. 66, 69–70 (1895).

66. Edward Jenks, *On the Early History of Negotiable Instruments*, 9 L.Q. REV. 70, 76 (1893).

67. 13 N.C. (2 Dev.) 263 (1829).

68. 12 Conn. 38 (1837).

69. Brophy, *supra* note 4, at 401–06.

70. Horwitz, *supra* note 14, at 264 (emphasis added).

71. Gilmore, *supra* note 21.

72. WIECEK, *supra* note 3, at 110.

73. Brophy, *supra* note 4, at 406–09.

embraced the idea of scientific law. "[T]he marks of a scientific law are, conformity to reason, uniformity, and certainty."[74] The danger of scientific law is a "petrifaction."[75] Contemporary U.S. law was mired in this state, failing to adequately adjust at a time of rapid social change.[76] Pound argued that historical jurisprudence and analytical jurisprudence, the main legal theories of the day, exacerbated stultification by emphasizing abstract concepts and logical analysis.[77]

Mechanical Jurisprudence, I assert in the book, "was seminal in creating the image of judging as an exercise in mechanical, deductive reasoning."[78] In a chapter entitled "The Myth About 'Mechanical Jurisprudence,'" and across two additional chapters, I make four arguments about the unreliability of Pound's characterizations.[79]

The first problem is that, when elaborating legal science and mechanical jurisprudence, Pound extensively referred to German sources and views of law and judging.[80] "The elementary error made by Pound, Frank, and others who drew liberally from German discussions when constructing the image of the formalist age is that these two systems were dissimilar in design, construction, and orientation."[81] To show this error, I quote a passage from Max Weber setting forth the tenets of present day legal science in Germany—"a logically clear, internally consistent, and, at least in theory, gapless system of rules"[82]—which resembles Dagan's depiction of U.S. legal formalism. Weber noted, however, "not every body of law (e.g., English law) claims that it possesses the features of a system as defined above."[83] The unsystematic state of U.S. law was captured in 1907 by James Bryce, author of *American Commonwealth*:

> The Common Law is admittedly unsymmetrical. Some people might call it confused . . . . There are general principles running through it, but these are often hard to follow, so numerous are the exceptions.

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74. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

75. *Id.* at 606.

76. *See id.* at 611–12 (arguing that the United States was not reexamining the conceptions behind the common law and that the law had become a "body of rules").

77. *See id.* at 607–13 (outlining factors that should be considered in applying the law rather than following mechanical rules).

78. TAMANAHA, *supra* note 1, at 27.

79. These arguments are set forth in *Beyond the Formalist-Realist Divide* in Chapters Two, Three, and Four. *See id.* at 24–26 (arguing that Pound relied on an idealized version of civil code legal theories); *id.* at 27–43 (arguing that Pound was arguing against a position that nobody at the time held); *id.* at 44–63 (arguing that a mischaracterization of formalist views was inspired by political concerns).

80. *See* Pound, *supra* note 74, at 606, 610, 612.

81. TAMANAHA, *supra* note 1, at 26.

82. 2 MAX WEBER, ECONOMY AND SOCIETY 656 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1922). The full passage I quote is from WEBER, *supra*, at 657–58. *See* TAMANAHA, *supra* note 1, at 25 & 208 n.100.

83. WEBER, *supra* note 82.

> There are inconsistencies in the Common Law, where decisions have been given at different times and have not been settled by the highest Court of Appeal or by the Legislature. There are gaps in it.[84]

The second problem is that Pound interpreted historical jurisprudence through its German sources, giving it a metaphysical cast that was absent in the Anglo–American version. Pound asserted that this metaphysical–historical jurisprudence had a substantial influence on judges in the final quarter of the nineteenth century.[85] The eminent English historical jurisprudent Frederick Pollock expressed incredulity at these claims: "So, when I am confronted with Professor Pound's unqualified assertion that a historical-metaphysical doctrine 'was dominant in the science of law throughout the [nineteenth] century,' I feel tempted to ask which of us is standing on his head."[86]

Pound's claim that jurists believed law is a science was a third problem. While jurisprudence scholars might have been enamored with this idea, practitioners demurred. The editors of the *Albany Law Journal* noted the contrast in 1874: "This view[—law is a science—]is now taken by all theoretical legists; but it has not come down to the professional level, and for the most part, the jurist and the practitioner do not stop to inquire whether their system is a science."[87] A commentator put it more colorfully in 1895: "Much debate has been expended on this question[—Is law a science?]. The assertion that it is, by jurists having high ideals, has provoked no little repugnance among practical lawyers."[88]

The fourth and most profound problem with Pound's claim that judges reasoned mechanically is that many jurists at the time said the opposite, owing to the proliferation of inconsistent precedents.[89] An article published in the *Yale Law Journal* observed, "The truth is that, much in the same manner that expert witnesses are procurable to give almost any opinions that are desired, judicial precedents may be found for any proposition that a counsel, or a court, wishes established, or to establish."[90] To "a large degree," the author continued, "courts do what they think is just in the case at bar and cite the nearest favorable previous decisions as pretexts."[91] An article in the *Michigan Law Review* similarly contended, "[T]he courts in general tend more and more to decide each case according to their own

84. James Bryce, *The Influence of National Character and Historical Environment on the Development of the Common Law*, 19 GREEN BAG 569, 571 (1907).

85. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 34 (1923).

86. Frederick Pollock, *A Plea for Historical Interpretation*, 39 L.Q. REV. 163, 164 (1923).

87. *Is the Law a Philosophy, a Science, or an Art?*, 10 ALB. L.J. 371, 371 (1874).

88. *Is Law a Science?*, 2 U. L. REV. 257, 257 (1895).

89. *See* TAMANAHA, *supra* note 1, at 32–36 (examining contemporaneous articles and jurists' comments).

90. Wilbur Larremore, *Judicial Legislation in New York*, 14 YALE L.J. 312, 317–18 (1905).

91. *Id.* at 318.

ideas of fairness as between the parties to that case, and to pass the previous authorities by in silence, or dispose of them with the general remark . . . that they are not in conflict."[92] This is not mechanical reasoning.

Professor Brophy cites Pound's arguments as authority without responding to any of the questions I raise about their reliability. Brophy also fails to address the evidence presented in Professor David Rabban's recent book, *Law's History*. "[I]n many significant respects," Rabban asserts, "Pound was misleading or inaccurate in characterizing his predecessors."[93] Rabban continues:

> His views about the judicial decisions might have contributed to his assumption of a pervasive deductive formalism that extended to legal scholarship as well, even though the legal scholarship itself did not support that conclusion.
>
> Generations of scholars perpetuated Pound's association of deductive formalism with late nineteenth-century American legal thought. In his own analysis of deductive formalism, Pound focused on European rather than American scholars, treating the Americans as derivative imitators. Scholars after Pound barely explored nineteenth-century thought at all, invoking deductive formalism mostly as an epithet against which to define their own thought as anti-formalist.[94]

Exactly right. Rabban's showing, which is far more detailed than mine, prompted legal historian Robert Gordon to comment, "[T]he standard picture of this era's legal scholars as political reactionaries and abstract deductive 'formalists' cannot possibly survive this splendid and important book."[95]

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92. Edward B. Whitney, *The Doctrine of Stare Decisis*, 3 MICH. L. REV. 89, 100 (1904).

93. DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 430 (2013). I was startled to read Brophy's assertion that my review of Rabban's book had a "hyperbolic tone." Brophy, *supra* note 4, at 390 n.63. As evidence, Brophy points out that I use the terms "unpersuasive," "deeply problematic," and "dubious." *Id.* I apologize if those terms appear excessively harsh to legal historians. That was not my intention. In jurisprudence discussions, which typically are blunt, using terms like "unpersuasive" or "dubious" is not considered hyperbole. The book, in my view, was powerful and convincing. My objections were narrow. I disagreed with Rabban's claim that Pound's advocacy of sociological jurisprudence was a major factor in the demise of historical jurisprudence. *See* Brian Z. Tamanaha, *The Unrecognized Triumph of Historical Jurisprudence*, 91 TEXAS L. REV. 615, 618–24 (2013).

94. RABBAN, *supra* note 93, at 525. Rabban bases his findings on a review of the scholarship, not a study of legal decisions. As I argued, legal decisions alone cannot be a basis for demonstrating the formalist age.

95. Robert W. Gordon, Review of *Law's History: American Legal Thought and the Transatlantic Turn to History*, CAMBRIDGE UNIVERSITY PRESS, http://www.cambridge.org/us/academic/subjects/history/american-history-1861-1900/laws-history-american-legal-thought-and-transatlantic-turn-history.

Legal historians and theorists who continue to hold the story of the formalist age, like Professors Brophy and Schauer, cannot make their case with a few skeptical objections to my book. Now they must answer Rabban. And they must address other recent showings by historians that question the standard image of the formalist age, including Bruce Kimball's demonstration that Langdell has been distorted[96] and Lewis Grossman's showing that Carter expressed realistic views of law.[97]

V. The Politics of the Formalist Age

My argument raises a puzzle: if the formalist age never was, what were the legal realists challenging? Schauer objects, "[T]o claim that Arnold, Cook, Douglas, Frank, Llewellyn, Oliphant, Sturges, Yntema, and many others were all aiming at a phantom target seems a stretch."[98] Their targets were not phantoms, but very real. They criticized law as too individualistic in orientation and common law-centered at a time when legislation and administrative regulations were becoming predominant, and they objected that (conservative) judges were too focused on the application of rules without attention to modern social circumstances.[99] Their target was not, however, the full blown "formalist age" that we think of today (per Dagan). As Gilmore noted, that image was not formulated by the legal realists and was not established until the 1970s.[100]

I argue in the book that the standard image of the formalist age is the product of several generations of progressive critics of law and courts building on the objections of their predecessors. "A group of leftist scholars deeply disaffected with the law in the 1970s thus reached back to the work of the previous episode of disaffection (Pound and the legal realists) to resurrect a portrait of what was perceived to be a common enemy."[101] "The particular agenda of each generation differed, but across

96. *See* Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345, 373–94 (2007) (attacking Holmes's characterization of Langdell as a formalist); Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 LAW & HIST. REV. 277, 329 (2004) (criticizing the "deeply sedimented mound of [Langdell] scholarship" for neglecting and consequently obscuring the original source material).

97. For Grossman's challenges to the portrayal of James Carter, see Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149, 183–87 (2007). *Cf.* Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151, 216–23 (1998) (showing that throughout the nineteenth century the creative aspects of judging were well recognized).

98. Schauer, *supra* note 45.

99. I elaborate on what the realists were criticizing in TAMANAHA, *supra* note 1, at 93–106.

100. Frank is the lone exception because he did construct a phantom: "The Basic Legal Myth." As I detail in the book, in addition to distorting Beale's position, when constructing this image Frank excised key passages from Henry Maine's *Ancient Law* in a way that reversed Maine's meaning. *Id.* at 14–17.

101. *Id.* at 61.

these differences they shared a critical, reformist orientation that was served by attacking aspects of rule-oriented judging."[102] Pound's "mechanical jurisprudence" morphed into the "formalist age," thereby entrenching the formalist–realist narrative.

Brophy calls my position "political," saying, "The book is a critique of the academic left."[103] This ignores that my claim is descriptive. It is either true or false that the standard image of the formalist age was constructed in the 1970s by leftist historians and theorists who built on earlier progressives critical of law and judges. Brophy does not confirm or deny the truth of this contention. Instead, he suggests that I was politically motivated, as if that discredits my position.

What Brophy does not indicate is that I too am a member of the academic left. On several prior occasions, I too have repeated the formalist–realist narrative, citing the very historical and theoretical accounts I now doubt.[104] One day while learning how to use an electronic research engine, I stumbled across Hammond's remarkably skeptical statements about judging. That accidental discovery prompted me to investigate whether the standard image of the formalist age is correct.

Brophy's overall complaint appears to be that my study is flat and narrow, lacking historical nuance, and does an injustice to the rich accounts of the period produced by legal historians. This misses what the book is about. It is a work in jurisprudence on how best to frame debates about the nature of judging. My limited historical exploration in the first part of the book focused on a narrow target. In jurisprudence circles, and more generally, it is widely thought that the turn of the century was the formalist age when the dominant view saw law as logically ordered, autonomous, and gapless and judging as mechanical. The evidence I discovered strongly indicates that this image is a distortion of what jurists actually believed.

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102. *Id.* at 200.

103. Brophy, *supra* note 4, at 409.

104. *See, e.g.*, BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 24–28, 47–52, 60–70 (2006) (stating that the formalist view held sway through the twentieth century and citing, among others, Horwitz, Llewellyn, and Pound).

Notes

Dirty Harriet: The *Restatement (Third) of Torts* and the Causal Relevance of Intent*

I. INTRODUCTION TO HARRIET'S CASE 1685
II. THE *RESTATEMENT THIRD* FRAMEWORK 1686
  A. Section 26—Counterfactual Causation 1687
  B. Section 27—Multiple Causation 1687
  C. Comment *f*—Causal Sets 1690
  D. Section 36—The Scope of Liability Constraint 1692
III. REAL WORLD DIRTY HARRIETS 1693
  A. Terrorist Financiers and Harborers 1693
  B. Possessors and Distributors of Child Pornography 1701
  C. Polluters 1705
IV. MUTUAL AGENCY—THE CAUSAL RELEVANCE OF INTENT 1708
  A. Liability for Concerted Action 1709
  B. Applying Concerted Action to Dirty Harriet Cases 1711
V. CONCLUSION 1714

I. Introduction to Harriet's Case

> Eight tortfeasors, acting independently but simultaneously, negligently lean on a car, which is parked at a scenic overlook in the mountains. Their combined forces result in the car rolling over the edge of the mountain and plummeting to its destruction. The force exerted by each of *A* through *G* constituted thirty-three percent of the force necessary to propel the [car] over the edge. The force exerted by the eighth tortfeasor, Harriet, because of her slight build, was only one percent of the force necessary to propel the car over the edge.[1]

By virtue of her contribution, is Harriet a cause-in-fact of the harm? Professor David Robertson—who created the Harriet hypothetical based on an illustration from an early draft of the *Restatement (Third) of Torts*—answers no because "no ordinary thinker could bring himself to say that she did any harm."[2] But imagine if Harriet had played dirty.

* I am grateful to Professor David Robertson for his enthusiastic and careful feedback, to the editors of the *Texas Law Review*—especially Elizabeth Stafki and Spencer Patton—for their hard work editing this Note, and to my family and friends for their constant support.

1. David W. Robertson, *Causation in the* Restatement (Third) of Torts*: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1022 (2009); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29 cmt. q, illus. 12 (Tentative Draft No. 2, 2002) (providing the basis for Robertson's hypothetical).

2. Robertson, *supra* note 1, at 1024.

Dirty Harriet pulls into a scenic overlook and parks her car, which she alone knows is a lemon. She and her seven passengers get out to stretch their legs. Admiring the view, Harriet's passengers independently but simultaneously lean back on Harriet's car; delighted at her fortune, Harriet also simultaneously gives an extra nudge with the back of her foot to a tire. Harriet contributes only one percent of the force necessary to propel the car over the edge, while her passengers each contribute thirty-three percent. Harriet's car is totaled, she collects the insurance money, and sues her passengers for the market value of the make and model of the vehicle.

By virtue of her contribution, is Harriet now a cause-in-fact of the harm? If Professor Robertson is right that the answer to Harriet's case is that Harriet should go free, then a principled answer to the Dirty Harriet hypothetical should likewise allow Harriet to escape liability. However, recent case law employing the relatively new *Restatement (Third) of Torts* suggests that Harriet's state of mind may have some relevance to the causal question.[3] If so, the Dirty Harriet hypothetical carries implications for any tort case involving parallel tortious action, such as familiar asbestos and pollution litigation as well as certain less familiar but increasingly important statutory tort cases, including cyber-torts.

This Note proposes that, in Dirty Harriet-type cases, courts unwilling to faithfully apply the *Restatement Third*'s factual causation framework should instead apply traditional concerted action doctrine. I define "Dirty Harriet-type cases" as those in which the defendant's causal contribution is individually insufficient, insubstantial, and unnecessary to the tortious outcome, but whose wrongful conduct is intentional or reckless instead of merely negligent. To make this case, Part II outlines the rules and rationales comprising the *Restatement Third*'s factual causation framework, focusing particularly on its endorsement of causal set theory. Using this analysis as a baseline, Part III discusses sets of cases that deploy the *Restatement*'s framework, if only in part. After exposing these cases' misunderstanding or distrust of the *Restatement*'s framework, Part IV posits that the mutual agency theory underlying concerted action doctrine would permit courts to reach their desired liability determinations without sacrificing coherence in their causal attributions.

II. The *Restatement Third* Framework

The *Restatement (Third) of Torts*'s recent installment discussing liability for physical and emotional harm treats factual causation in §§ 26 through 28. In this Part, I highlight its most relevant rules, rationales, and

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3. *See infra* Part III. *The Restatement (Second) of Torts* also indicates that, at least under certain circumstances, an actor's recklessness "is a factor of importance . . . in determining whether the jury shall be permitted to find that the actor's conduct bears a sufficient causal relation to the other's harm." RESTATEMENT (SECOND) OF TORTS § 501 cmt. a (1965).

external constraints and conclude by recapitulating its essential cause-in-fact framework.

A. *Section 26—Counterfactual Causation*

Section 26 of the *Restatement Third* recognizes the orthodox tort principle that the essence of cause-in-fact rests in counterfactuals. Tort law has expressed this theory through the classic but-for, or sine qua non, test: If *X* had not done *Y*, then *Z* would not have happened, so *X* caused *Z*. Section 26 states the test as follows:

> Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.[4]

The burden is on the plaintiff to show by a preponderance of the evidence that the defendant's putatively wrongful conduct was a factual cause of the plaintiff's harm.[5] Importantly, § 26 makes no claim that factual causation exists only when harm would not have occurred absent the defendant's wrongful conduct.[6] While from a practical standpoint it is unassailable that the but-for test yields an acceptably clear answer to the cause-in-fact question in most cases,[7] counterfactual causation is an incomplete theory. For if cause-in-fact were really only about counterfactual conditionals, the theory would underrepresent our intuitive notions of causal relationships.[8]

B. *Section 27—Multiple Causation*

Because the but-for test is underinclusive, counterfactual theory must at least cede to a limited-purpose substitute capable of handling multiple causation. Accordingly, the *Restatement Second* adopted the "substantial factor" test long ago:

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4. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (2010); *see also id.* § 26 cmts. c, e (explaining that wrongful conduct need only be one of the factual causes of harm and that the test requires a counterfactual inquiry).

5. *Id.* §§ 26 cmt. *l*, 28(a).

6. *See id.* § 26.

7. DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 117 (4th ed. 2011).

8. The implicit goal of theories of causation is to systematically explain commonly held beliefs about cause-in-fact. *See, e.g.*, Robertson, *supra* note 1, at 1024 (disapproving of § 27's cause-in-fact finding in Harriet's case because "*no ordinary thinker* could bring himself to say that [Harriet] did any harm" (emphasis added)). Counterfactual theory is also arguably *over*inclusive insofar as it treats as causes certain necessary background conditions to the commission of a tort. *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 11–12 (2d ed. 1985) (critiquing counterfactual theory by explaining that one does not say that the cause of a fire is "the presence of oxygen"). But because attempting to provide criteria that would enable courts to "distinguish causes from conditions" would "inevitably entail[] ambiguity and uncertainty," the *Restatement Third* asks us to accept these necessary background conditions as "background causes." *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. d (2010).

> If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.[9]

This test evolved to protect plaintiffs in overdetermined harm cases where but-for causation could not be proved.[10] It applies most obviously to cases such as *Sanders v. American Body Armor & Equipment, Inc.*,[11] in which a police officer was fatally shot when two bullets struck his abdomen and chest split seconds apart.[12] Either bullet would have been sufficient to kill Officer Sanders.[13] In the suit against the manufacturer of the ineffective bulletproof vest, which was only a cause-in-fact of Sanders's chest wound, the appellate court rejected the argument that Sanders would have died anyway from the bullet to his abdomen, instead adopting the reasoning that "each cause has in fact played so important a part in producing the result that responsibility should be imposed upon it."[14] The two fatal bullets, the court held, were "concurrent causes of a single injury—Sanders' death."[15]

Some but-for purists object that factual causation ineluctably insists on necessity. Justice Kennedy, for example, has taken the position that "[a]ny standard less than but-for . . . represents a decision to impose liability without causation."[16] Perhaps Justice Kennedy would feel differently if he held an elected position because it is difficult to have a serious discussion about the causes of an election's outcome without an alternative to but-for causation.[17] I do not seem to be alone in this intuition.[18] To be sure though, neither is Justice Kennedy alone in his position.[19]

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9. RESTATEMENT (SECOND) OF TORTS § 432(2) (1965).

10. *See* David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEXAS L. REV. 1765, 1776 (1997) (claiming the "only fully legitimate usage" of the substantial factor vocabulary is in a limited category of combined force or overdetermined cause cases).

11. 652 So. 2d 883 (Fla. Dist. Ct. App. 1995).

12. *Id.* at 884.

13. *Id.*

14. *Id.* at 884–85 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 267 (5th ed. 1984)).

15. *Id.* at 885.

16. Price Waterhouse v. Hopkins, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting); *see also* Paroline v. United States, No. 12–8561, slip op. at 15 (U.S. Apr. 23, 2014) (Kennedy, J.) ("[A]ltnernative causal tests [to but-for] are a kind of legal fiction or construct. If the conduct of a wrongdoer is neither necessary nor sufficient to produce an outcome, that conduct cannot in a strict sense be said to have caused the outcome."); *infra* note 113 (discussing *Paroline* briefly).

17. For example, in the 2004 U.S. presidential election, then-President Bush and then-Senator Kerry split the vast majority of individual votes cast, with Bush ultimately winning the electoral college 286–251. *2004 Electoral College Results*, U.S. ELECTORAL COLL., http://www.archives.gov/federal-register/electoral-college/2004/election_results.html. The votes cast in each state and in the electoral college all overdetermined their respective state and national outcomes. Assuming a but-for theory, to what person or group can we attribute responsibility for Bush's reelection? Certainly no individual Bush voter because her input was insufficient and unnecessary to produce

Over such absolutist objections, and like the *Restatement Second* before it, § 27 of the *Restatement Third* unambiguously embraces the possibility of multiple causation:

> If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.[20]

The black letter of § 27 is written in the passive voice, so at least initially it appears not to answer whether courts impose liability in multiple-cause cases because causation exists or despite its absence. Fortunately, the Reporters explained their rationale for § 27.[21] The Reporters suggest that one "not entirely satisfactory" justification for § 27 is that a tortious defendant "should not escape liability merely because of the fortuity of another sufficient cause."[22] Prosser and Keeton took this position, and maybe it is one good reason.[23] But the "most significant" rationale, the Reporters tell us, is something else:

> [W]hile the but-for standard provided in § 26 is a helpful method for identifying causes, it is not the exclusive means for determining a factual cause. Multiple sufficient causes are also factual causes

the result. Not any red state with sixteen or fewer electors either, for even if those states had flipped, Bush still would have reached the 270 votes necessary for reelection. Only a large red state like Texas, without which Bush would have lost, would seem a good but-for candidate. I dispute, however, that simply mentally turning Texas into a blue state meets the modesty maxim required for a proper counterfactual hypothesis. *See* Robertson, *supra* note 10, at 1770 ("[T]he mental operation performed at this . . . step must be careful, conservative, and modest; the hypothesis must be counterfactual only to the extent necessary to ask the but-for question."). The mental operation required to turn Texas blue would involve a million changed ballots. If that had been possible, preelection polling would have revealed it and candidate Kerry surely would have refocused time and money on Texas voters at the expense of other state electorates. It is likewise unclear whether a Democrat victory in a tightly fought, large red state like Florida would have necessarily influenced voter turnout or recounts in other swing states. Therefore, to those inclined to call Texas and Florida factual causes of Bush's reelection, I suggest that one cannot modestly rewrite a pivotal moment in United States history.

18. *See* Jane Stapleton, *Unnecessary Causes*, 129 L.Q. REV. 39, 43, 44 & n.23 (2013) (citing with approval the German federal supreme court's decision to affirm criminal liability for each of several executives who had voted unanimously to knowingly market a toxic leather spray when a mere majority vote would have sufficed to bring the product to market).

19. Then-Chief Justice Rehnquist and Justice Scalia joined Justice Kennedy's opinion in which he stated that factual causation requires a but-for showing. *Price Waterhouse*, 490 U.S. at 279, 282; *see also infra* notes 58–59 and accompanying text (discussing Judge Posner's apparent view that cause-in-fact requires but-for causation).

20. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (2010).

21. *See id.* § 27 cmt. c.

22. *Id.*

23. *See* KEETON ET AL., *supra* note 14, at 266–67 (hypothesizing that where two tortfeasors separately inflict fatal injuries on a third person, "it is quite clear that each cause has in fact played so important a part in producing the result that *responsibility should be imposed upon it*" (emphasis added)).

> because *we recognize them as such* in our *common understanding* of causation, even if the but-for standard does not. Thus, the standard for causation in this Section comports with *deep-seated intuitions* about causation and fairness in attributing responsibility.[24]

As I understand the Reporters, § 27 supplies causation, not a mere substitute.

C. *Comment* f—*Causal Sets*

Comment *f* to § 27, captioned "Multiple sufficient causal sets,"[25] usurps the black letter of § 27. The basic innovation of comment *f* is to shift the focus from potential individual actors acting alone to plural actors acting together.[26] As it explains, "[i]n some cases, tortious conduct by one actor is insufficient, even with other background causes, to cause the plaintiff's harm."[27] This insufficiency is not fatal to the plaintiff's cause-in-fact showing where, "combined with conduct by other persons, the conduct overdetermines the harm, i.e., is more than sufficient to cause the harm."[28] Thus, comment *f* resolves that "[t]he fact that an actor's conduct requires other conduct to be sufficient to cause another's harm does not obviate the applicability" of § 27.[29]

Sparse precedent supports the inclusion of comment *f* into the *Restatement Third*. The Reporters' Note to comment *f* cites only a handful of law review articles by a select group of academics and a general reference to asbestos cases as exemplars.[30] Most prominent among the theorists cited is Richard Wright, who has written extensively about the Necessary Element of a Sufficient Set (NESS) test for factual causation.[31] The NESS test posits that "a particular condition was a cause of . . . a specific consequence if and only if it was a necessary element of a set of

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24. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. c (2010) (emphasis added); *see also* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 111 (3d ed. 2007) ("[B]oth the but-for and substantial-factor tests are not definitions of the concept of causation, but merely useful proxies for the concept.").

25. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (2010).

26. This observation is implicit in the language of comment *f*, which discusses the causal insufficiency of a singular "actor" as compared to the causal sufficiency of the combined conduct of plural "persons." *See id.*; *accord id.* § 26 cmt. d (clarifying that "all necessary elements for an outcome are described as causes" in the *Restatement Third* and referring to causal sets, of which tortious conduct was one necessary component, as "*the* cause of harm").

27. *Id.* § 27 cmt. f.

28. *Id.*

29. *Id.*

30. *Id.* § 27 reporters' note cmt. f.

31. *See, e.g.*, Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1788–803 (1985) [hereinafter Wright, *Causation in Tort Law*]; Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1106–07 (2001) [hereinafter Wright, *Causal Contribution*].

antecedent actual conditions that was sufficient for the occurrence of the consequence."[32] The import of this test to Wright is that it "incorporates the indispensible notion of necessity, but subordinates it to the notion of sufficiency."[33] The end result is a causal set theory that, at least according to Wright, "captures the essential meaning of the concept of causation."[34] If Wright is right, then NESS accurately attributes cause-in-fact to an important swath of potential tortfeasors. For example, in a "merged-fires" case wherein the defendant negligently sets a fire that combines with two other fires of unknown origin before destroying the plaintiff's property, NESS attributes cause-in-fact to the defendant whether or not her fire alone would have produced the tortious result, regardless of the size of her contribution, and even if only two of the three fires were necessary.[35] Similarly, in familiar pollution cases, NESS attributes factual causation to each of seven individual polluters contributing to the fouling of a stream.[36] I suspect NESS would likewise attribute factual causation to individual voters in analogous voting cases.[37]

Skeptics argue the NESS test finds factual causation where none exists.[38] However that may be, it is indisputable that comment *f* approves of a causal set theory.[39] Furthermore, this development cannot be treated as just another in a line of limited-purpose exceptions to the general rule of but-for causality because NESS fundamentally challenges the traditional insistence on counterfactual causation in the first place.[40] It is probably for this reason that the Reporters thought it wise to structurally restrain § 27, and particularly comment *f*.[41]

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32. Wright, *Causation in Tort Law*, *supra* note 31, at 1790 (emphasis omitted).

33. *Id.* at 1788.

34. *Id.* at 1789.

35. *See id.* at 1793 (applying NESS to a merged-fires case in which "two of three fires were sufficient for the injury, but none by itself was sufficient" and concluding that "each was a cause of the injury since each was necessary for the sufficiency of a set of actual antecedent conditions that included only one of the other fires").

36. *Id.*

37. *See* Stapleton, *supra* note 18, at 43–44 (declaring individual voters causes-in-fact of their unanimous majority decision without using the NESS test).

38. *See* Robertson, *supra* note 1, at 1021–23 (arguing that the omission from § 27 of the requirements that a defendant's "conduct be alone *sufficient* and itself *substantial*" is a mistake).

39. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (2010); *see also* Robertson, *supra* note 1, at 1021 (calling comment *f* a "'causal-set' approach").

40. *See* Wright, *Causation in Tort Law*, *supra* note 31, at 1792 (stating that NESS is a "more accurate and comprehensive" theory than counterfactual causation in the same way that theories of relativity and quantum mechanics improve upon Newtonian mechanics).

41. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. g (2010) (explaining that "de minimis" causal contributions are to be dealt with as a matter of policy as "addressed in § 36").

D. *Section 36—The Scope of Liability Constraint*

Section 36, entitled "Trivial Contributions to Multiple Sufficient Causes," is part of the *Restatement Third*'s chapter on proximate cause. It provides:

> When an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm under § 27, the harm is not within the scope of the actor's liability.[42]

The Reporters leave no doubt that § 36 is intended to correct for comment *f*'s arguable overinclusiveness; § 36 addresses actors whose contribution "pales by comparison to the other contributions to that causal set."[43] Comment *b* to § 36 indicates that its scope of liability exception applies "only when there are multiple sufficient causes and the [actor's] tortious conduct . . . constitutes a trivial contribution to any sufficient causal set."[44] Therefore, while the black letter of § 36 absolves only "negligent" trivial contributors, comment *b* suggests that § 36 contemplates "tortious conduct" more generally; evidently, § 36 might also absolve intentional or reckless trivial contributors.[45]

The Reporters fashioned § 36 as a rule of "fairness, equitable-loss distribution, and administrative cost,"[46] again relying heavily on asbestos precedents.[47] Others have challenged this rationale, however, alleging the precedents on which the Reporters relied really stood for the proposition

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42. *Id.* § 36.

43. *See id.* § 36 cmt. a (explaining that while a *de minimis* contribution "still constitutes a factual cause under § 27 and Comment *f*, this Section preserves the limitation on liability that the substantial-factor requirement in the prior Restatements might have played"); *accord id.* § 27 cmts. g, i (signaling that *de minimis* contributions are to be treated under § 36).

44. *Id.* § 36 cmt. b.

45. *See id.* § 36 & cmt. b; *see also id.* §§ 1–3 (identifying three classes of tortious conduct: intentional, reckless, and negligent). Additional support for this point lies in the fact that the *Restatement Third* expressly replaced and superseded *Restatement Second* § 501, which had indicated that certain intentional and reckless tortfeasors may not escape liability for their conduct whereas actors whose equivalent conduct was merely negligent should escape liability. *See id.* intro. (providing that the first three installments of the *Restatement Third* "replace and supersede Divisions 2 and 3 of the Restatement Second of Torts, with only one exception"); RESTATEMENT (SECOND) OF TORTS § 501 cmt. a (1965) (explaining that conduct in reckless disregard of another's safety is a factor "court[s] . . . consider in determining whether the jury shall be permitted to find that the actor's conduct" is sufficiently related to the injury to support a finding of liability). Although the *Restatement Third* concededly does not address "specific intentional physical-harm torts or their elements" at common law, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM intro. (2010), it nevertheless includes a general rule of liability for intentional physical harm, and there is nothing to suggest its causation framework would be inapplicable to statutory causes of action for intentional or reckless malfeasance that incorporate tort causation principles, *see id.* § 5 (providing the *Restatement Third*'s rule of liability for intentional physical harm); *infra* subparts III(A)–(B) (pointing to cases arising under statutes implicating the *Restatement Third*'s causation framework).

46. *Id.* § 36 cmt. b.

47. *Id.* § 36 reporters' note cmt. b.

that trivial contributors were not factual causes under the old substantial-factor test.[48] Yet the § 36 exception should not be discounted just because it fits oddly with the *Restatement Third*'s more general causation framework because we cannot reasonably expect *Restatements* to be perfectly coherent.[49] It makes more sense to heed the warning that *Restatements* should be read for their essential meaning.[50]

Accordingly, I take the *Restatement Third*'s framework for factual causation to mean essentially this: An actor's conduct is a cause-in-fact of a harm if and only if it is either a but-for cause or a necessary element of at least one sufficient causal set. However, the actor escapes liability if her causal contribution is trivial. On this account, both Harriet and Dirty Harriet are causes-in-fact, yet both may escape liability under the trivial-contributor exception.

III. Real World Dirty Harriets

Fact patterns mirroring Harriet's are more common than one might suppose, and although the *Restatement Third* is still relatively new, courts increasingly deploy it. However highly stylized Harriet's problem may seem, it has significant real-world import. Surveying the cases that cite § 27, which I assumed are those cases most likely to present Dirty Harriet-type fact sets, I observed three primary classes of potential tortfeasors that fit the mold. Therefore, in succession, I here turn to describe sets of Dirty Harriet-type cases involving contributors to terrorism, child pornography, and pollution. The first two sets of cases in particular have produced holdings both incongruous with the *Restatement Third*'s factual causation framework and incompatible with each other.

A. Terrorist Financiers and Harborers

One critical set of cases producing a mess of factual causation opinions involves suits arising from intentional or reckless contributions to terrorism. Consider the case of *Boim v. Holy Land Foundation for Relief & Development*,[51] where the parents of David Boim—a Jewish teenager and dual Israeli–American citizen who was shot and killed in 1996 near

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48. Robertson, *supra* note 1, at 1024–25.

49. Indeed, the Reporters concede that certain cases involving *de minimis* causal contributors produce court decisions that "seem to depend on intuitions that are not captured in the purely conceptual general rule that each of two sufficient sets of conditions to bring about an injury is treated as a cause." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. i (2010).

50. *See* Robertson, *supra* note 1, at 1020 ("Despite their black-letter format, restatement sections are not statutes, and they should be read like any other treatise. Extraneous words can and should be ignored. Essential meaning can and should be gleaned from language, context, and common sense.").

51. 549 F.3d 685 (7th Cir. 2008) (en banc).

Jerusalem, allegedly by Hamas gunmen—sued several organizations that had allegedly provided financial support to Hamas.[52] The Boims accused the defendants of having violated 18 U.S.C. § 2333(a),[53] which provides a civil cause of action to any U.S. national injured "by reason of an act of international terrorism."[54] On rehearing en banc by the Seventh Circuit, the court found, through a chain of explicit statutory incorporations, that "a donation to a terrorist group that targets Americans outside the United States may violate section 2333."[55] Judge Posner reasoned that "[g]iving money to Hamas, like giving a loaded gun to a child . . . , is an act dangerous to human life," and therefore wrongful conduct within the meaning of the statute.[56] The court therefore found two of the three defendant organizations had violated the statute.[57]

Turning to the issue of factual causation, Judge Posner determined that because the statute created primary liability, "the ordinary tort requirement[] relating to . . . causation . . . must be satisfied for the plaintiff to obtain a judgment."[58] However, Judge Posner treated the "'black letter' law that tort liability requires proof of causation" as similar to mere "legal shorthand" that should not be "treated as exceptionless."[59] He concluded that the causation requirement in § 2333 cases, like in merged-fire cases, is "relaxed because otherwise there would be a wrong and an injury but no

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52. *Id.* at 687–88.

53. *Id.* at 688.

54. 18 U.S.C. § 2333(a) (2012).

55. *Boim*, 549 F.3d at 690. Judge Posner called attention first to the statutory definition for international terrorism:

> The first link in the chain is the statutory definition of "international terrorism" as "activities that . . . involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States," that "appear to be intended . . . to intimidate or coerce a civilian population" or "affect the conduct of a government by . . . assassination," and that "transcend national boundaries in terms of the means by which they are accomplished" or "the persons they appear intended to intimidate or coerce."

Id. (alteration in original) (quoting 18 U.S.C. § 2331(1)). Second, Judge Posner determined that donating money to Hamas violated a criminal statute:

> [I]t violates a federal criminal statute . . . which provides that "whoever provides material support or resources . . . , knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [18 U.S.C. § 2332]," shall be guilty of a federal crime. So we go to 18 U.S.C. § 2332 and discover that it criminalizes the killing . . . , conspiring to kill, or inflicting bodily injury on, any American citizen outside the United States.

Id. (second omission and second alteration in original) (quoting 18 U.S.C. § 2339A(a)).

56. *Id.* (internal quotation marks omitted).

57. *See id.* at 701.

58. *Id.* at 692.

59. *Id.* at 695.

remedy because the court would be unable to determine which wrongdoer inflicted the injury."[60]

Judge Posner found additional support for his "relaxed" causation standard in *Keel v. Hainline*,[61] where a junior high student, Burge, lost the use of one eye when she was struck by an eraser thrown during classroom horseplay.[62] Defendant Keel, who was not one of the several students actually throwing erasers at each other, was held liable with them for Burge's injury because by retrieving erasers for the throwers he had aided and abetted their tortious acts.[63] "It was enough to make him liable that [Keel] had helped to create a danger," Posner concluded, finding it immaterial "that his acts could not be found to be either a necessary or a sufficient condition of the injury."[64] Like the naughty eraser-fetcher, then, a contributor to terrorism ought not escape liability according to Posner:

> [C]onsider an organization solely involved in committing terrorist acts and a hundred people all of whom know the character of the organization and each of whom contributes $1,000 to it, for a total of $100,000. The organization has additional resources from other, unknown contributors of $200,000 and it uses its total resources of $300,000 to recruit, train, equip, and deploy terrorists who commit a variety of terrorist acts one of which kills an American citizen. His estate brings a suit under section 2333 against one of the knowing contributors of $1,000. [The contributor is liable even if] no defendant's contribution was a sufficient condition of [the] death.[65]

Even an individually insufficient and insignificant contribution would meet Posner's relaxed causation standard where the contribution is made knowingly.[66] Furthermore, even though Hamas "provid[ed] health, educational, and other social welfare services," the court would not allow a contributor to escape liability simply by earmarking its donation for Hamas's humanitarian wing.[67] Evidently Judge Posner was convinced that Hamas's humanitarian endeavors reinforced its terrorist projects and that its accountants would happily transfer funds between its "social services 'account'" and its "terrorism 'account.'"[68] Thus, for the purposes of the causal inquiry, Judge Posner would not permit disaggregating money

60. *See id.* at 695–97 (agreeing with Prosser and Keeton that liability exists in multiple causation cases without cause-in-fact).

61. 331 P.2d 397 (Okla. 1958).

62. *Id.* at 398–99.

63. *Id.* at 400–01.

64. *Boim*, 549 F.3d at 697.

65. *Id.* at 698.

66. *See id.*

67. *Id.*

68. *See id.* (noting this fungibility and positing that Hamas's humanitarian activities support its terrorist activities by making it costly for the beneficiaries of its social welfare to defect and by enhancing Hamas's popularity, especially among Palestinian youths).

donations into separate pools for humanitarian and terrorist activities and deeming only the terrorist money pool causally connected to plaintiff's injury.[69] Instead, the court found categorically that "[a]nyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."[70]

Multiple judges dissented from Judge Posner's handling of the causation standard. Judge Rovner characterized the decision as creating false choice between requiring causation and providing plaintiffs with a remedy.[71] While the majority "simply deem[ed] it a given" that donations knowingly given to terrorist organizations cause terrorist activity, Judge Rovner doubted whether this was true in all cases.[72] Bemoaning how the majority's standard would impose liability for even a "small donation to help buy an x-ray machine for a Hamas hospital," Rovner instead would have left to the factfinder the question of whether the defendants' donations "actually cause" terrorism.[73] Judge Rovner, however, failed to specify the legal standard by which he would have adjudged actual causation.[74] Judge Diane Wood, writing separately, agreed that "[a]ssumptions and generalizations are no substitute for proof."[75] She objected as well to the causal theory endorsed by the en banc majority, correctly responding that § 27 is "a far cry" from dispensing with factual causation in multiple causation cases.[76] Judge Wood admonished the majority for omitting individual sufficiency as a prerequisite for cause-in-fact, apparently unconcerned that comment *f* likewise discards individual sufficiency in overdetermined harm cases.[77]

A similar mess has been made under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA). FSIA codified a general rule that a foreign state is immune from civil suit in the United States.[78] However, the statute excepts state-sponsored terrorism, lifting immunity in civil damages actions against foreign states for personal injury or death "caused by . . . the provision of material support or resources" for

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69. *Id.* at 698–99.

70. *Id.* at 698.

71. *Id.* at 705 (Rovner, J., concurring in part and dissenting in part).

72. *See id.*

73. *Id.* at 710.

74. *See id.*

75. *Id.* at 719 (Wood, J., concurring in part and dissenting in part).

76. *Id.* at 722.

77. *See id.* at 723 (arguing that even *Hainline* had not gone so far as to dispense with the sufficiency analysis because there was a "readily observable causal link between the collective action" of the tortious students and the resultant eye injury of their classmate).

78. 28 U.S.C. § 1604 (2012) ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

"an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking."[79] In *Kilburn v. Socialist People's Libyan Arab Jamahiriya*,[80] the estate of Peter Kilburn—an American citizen who was kidnapped by Hizbollah and sold to the Arab Revolutionary Cells (ARC), a terrorist organization that subsequently tortured and killed him—brought a tort action against Libya, charging it with funding and directing ARC actions.[81] Judge Garland, writing for a unanimous court, affirmed the denial of Libya's motion to dismiss the case, "concluding that the 'terrorism exception' of the Foreign Sovereign Immunities Act . . . strips Libya of the shield of sovereign immunity."[82] The court summarily rejected Libya's argument that causation under FSIA's terrorism exception required a but-for showing, finding in FSIA "no textual warrant for this claim: the words 'but for' simply do not appear; only 'caused by' do."[83] Relying on Supreme Court admiralty precedent in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,[84] Judge Garland found instead that FSIA required "*only* a showing of proximate cause."[85]

Judge Garland's observation regarding FSIA's text is confounding, and upon closer inspection, the *Kilburn* court mistook *Grubart*'s proximate cause test as a sufficient condition for causation when it ought to have been read as a necessary condition. To invoke the federal courts' admiralty jurisdiction, one must show damage to property or persons "caused by a vessel on navigable waters."[86] In cases like *Grubart*—where the defendants negligently drove piles into a riverbed and thereby weakened a tunnel that flooded and caused property damage[87]—disputes arise over how far admiralty jurisdiction extends to injuries sustained on land, which of course are not traditionally covered under maritime law.[88] Thus, after the *Grubart* court expressly found that "the injuries suffered by Grubart and the other flood victims were caused by a vessel on navigable water," it further explained that causation includes the notion of "proximate caus[e]," which

79. *Id.* § 1605A.

80. 376 F.3d 1123 (D.C. Cir. 2004).

81. *Id.* at 1125, 1130.

82. *Id.* at 1124–25.

83. *Id.* at 1127–28 (quoting 28 U.S.C. § 1605(a)(7) (2006)).

84. 513 U.S. 527 (1995).

85. *Kilburn*, 376 F.3d at 1128 (emphasis added) (internal quotation marks omitted) (following *Grubart*'s interpretation of a similar jurisdictional causation requirement in the Extension of Admiralty Jurisdiction Act).

86. 46 U.S.C. § 30101(a) (2006).

87. *Grubart*, 513 U.S. at 529.

88. *See id.* at 531–32 (documenting that historic admiralty jurisdiction had been based on whether "the tort occurred on navigable waters" but noting the statutory revision expanded this jurisdiction to address confusion as to when admiralty jurisdiction extended to injuries that occurred on land).

imposes a limiting principle on factual causation.[89] This, to borrow words from Judge Wood's *Boim* dissent, is a far cry from dispensing with factual causation.[90] Some insight into the *Kilburn* court's decision might be divined from Judge Garland's citation to Prosser and Keeton's torts treatise, which he quoted for the proposition that an "essential element" of a tort action "is that there be some reasonable connection" between the wrongful conduct and the plaintiff's injury.[91] But this seems more to punt the issue of causation than to circumscribe it. Whatever Judge Garland thought proximate cause entailed, however, it is plain that the term as he used it spurned the but-for test. That is, Libya could be stripped of its sovereign immunity even if Peter Kilburn might have been purchased, tortured, and killed without Libya's help.

However, not two years later, in *Owens v. Republic of Sudan*[92] (*Owens I*), the District Court for the District of Columbia held that *Kilburn*'s proximate cause hurdle contained "two distinct requirements," adopting § 26 (but-for causation) and § 29 (scope of liability, or, in the *Restatement Second*'s terms, "legal cause").[93] Therefore, though purporting to follow *Kilburn*, the district court actually spurned it and reinserted cause-in-fact into the FSIA. *Owens I* arose out of the 1998 U.S. Embassy bombings in Tanzania and Kenya.[94] Victims of the tragedy sued the Republic of Sudan, claiming FSIA jurisdiction on the theory that Sudan had provided "shelter, security, [and] financial and logistical support (including the movement of weapons into and out of the country)" for al Qaeda and Hezbollah, the organizations claiming responsibility for the attacks.[95] The court elected not to treat the Sudan defendants as "*de minimis*" contributors but instead denied Sudan's motion to dismiss on the grounds that it would be reasonable for a factfinder to conclude that Sudan's support was a "necessary condition for the bombing, and therefore a factual cause of plaintiff's damages."[96] On appeal (*Owens II*),[97] the D.C. Circuit agreed that

89. *Id.* at 535–37.

90. *Cf.* Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 722 (7th Cir. 2008) (en banc) (Wood, J., concurring in part and dissenting in part) ("[Section 27] is a far cry from saying that cause need not be proven if there are multiple sufficient causes . . . .").

91. *See* Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1128 (D.C. Cir. 2004) (quoting KEETON ET AL., *supra* note 14, at 263). Judge Garland also seems to have been moved by the fact that FSIA's causation standard merely raises a "jurisdictional" question rather than a substantive issue. *See id.* at 1129 (stressing that "§ 1605(a)(7) is solely a jurisdictional provision" and that the plaintiff's ultimate cause of action would carry "its own rules of causation"). However, this observation adds rather than removes ambiguity from *Kilburn*'s proximate cause standard.

92. (*Owens I*), 412 F. Supp. 2d 99 (D.D.C. 2006), *aff'd*, 531 F.3d 884 (D.C. Cir. 2008).

93. *Id.* at 111; *see also* RESTATEMENT (SECOND) OF TORTS § 431 (1965) (setting out the requirements to establish legal cause).

94. *Owens I*, 412 F. Supp. 2d at 102–03.

95. *Id.* at 103, 114.

96. *Id.* at 113–14.

the plaintiffs had sufficiently pled but-for causation, leading Chief Judge Sentelle to posit "[w]e need not decide whether § 1605(a)(7) requires but-for causation."[98] But on remand (*Owens III*),[99] the court reached a judgment for the plaintiffs after finding that causation within the meaning of FSIA's state-sponsor exception required merely a "'reasonable connection' between the material support provided and the ultimate act of terrorism."[100]

Together, *Kilburn* and the *Owens* trilogy draw an impossible image. Each decision allegedly follows its precedent, yet collectively they retreat to the initial question of how to handle causation under the FSIA's state-sponsored terrorism exception. Such circular jurisprudence, which gives the illusion of decisiveness, may at least be understandable in light of the serious pitfalls that attend applying opposite causal poles in civil suits against contributors to terrorism. At one extreme, a judge can elect not to require cause-in-fact, either overtly, like in *Boim*,[101] or covertly, like in *Kilburn*.[102] Either way, the court is necessarily telling Congress that it does not mean what it says when it writes causation into its terrorist tort statutes because there is no such thing as causation without cause-in-fact.[103] On the other hand, insisting upon individual necessity works poorly because answering the counterfactual question—what would have happened had the defendant country not provided material support to culpable terrorists—reduces the factfinder to a soothsayer.[104] First, a lot of time may have passed between the point at which the defendant country began providing material assistance to the group responsible for the act of terrorism.[105] *Owens III*, for example, found as fact that Sudan had provided al Qaeda safe harbor and financial, military, and intelligence services as early as

97. Owens v. Republic of Sudan (*Owens II*), 531 F.3d 884 (D.C. Cir. 2008).

98. *Id.* at 894. Indeed, the court need not have decided the issue of but-for causation because *Kilburn* had already decided it. *See supra* note 83 and accompanying text; *accord* United States v. Monzel (*Monzel I*), 746 F. Supp. 2d 76, 87 (D.D.C. 2010) ("The Court in *Kilburn* concluded that the same showing of proximate cause, but not but-for causation, was required under the FSIA.").

99. Owens v. Republic of Sudan (*Owens III*), 826 F. Supp. 2d 128 (D.D.C. 2011).

100. *Id.* at 151.

101. *See supra* notes 58–66 and accompanying text (discussing Judge Posner's relaxed causation standard for overdetermined harm cases).

102. *See supra* notes 83–85 and accompanying text (describing Judge Garland's indeterminate "proximate cause" substitute for cause-in-fact).

103. Courts may be especially inclined to read out Congress's words where, as with FSIA's state-sponsor exception, causation implicates a mere jurisdictional issue rather than a liability question. *See supra* note 91.

104. Here, I reiterate my earlier position, *supra* note 17, that one does not modestly rewrite momentous history.

105. *See, e.g.*, *Owens I*, 412 F. Supp. 2d 99, 111–12 (D.D.C. 2006) ("[The] counterfactual question becomes more difficult where—as in this case—substantial time passes between the wrongful conduct and the injurious event.").

1991.[106] Second, over long periods, the multiple tortious actors in such cases do not operate in a vacuum.[107] After the Soviet withdrawal from Afghanistan, al Qaeda faced pressure to relocate from the Afghan mujahedeen and the Pakistani government, and it found in Sudan an "eager host."[108] But while Sudan for a term of years "provided several kinds of material support to al Qaeda without which it could not have carried out the 1998 bombings,"[109] it was the *support* that was necessary to the plaintiffs' injuries, not the *supporters*.[110] Therefore, an insistence on applying individual necessity as the standard for cause-in-fact in cases like the *Owens* trilogy tells the factfinder that it must decisively imagine whether another country would not have provided al Qaeda with similar safe harbor had Sudan rebuffed it. To be sure, all attributions of factual causation are inferential, but a counterfactual inquiry in this context may demand factfinders to cross "the line between permissible inference and prohibited speculation."[111] Furthermore, while it would seem that comment *f* could offer a useful middle ground between requiring a but-for showing and dispensing with cause-in-fact entirely, besides Judge Wood,[112] nobody has thought to give even the black letter of § 27 meaningful attention in the terrorism context. Courts thus far simply have not agreed upon much beyond the conclusion that state and individual knowing contributors to terrorism should not escape liability.

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106. *Owens III*, 826 F. Supp. 2d 128, 139–46 (D.D.C. 2011).

107. *See, e.g.*, *Owens I*, 412 F. Supp. 2d at 112–13 ("[T]he Sudan defendants' actions very well may have helped bring about . . . other factors [that] contributed to the embassy bombings.").

108. *Owens III*, 826 F. Supp. 2d at 139–40.

109. *Id.* at 150.

110. Iran likewise provided support critical to al Qaeda's execution of the embassy bombings. *Id.* at 136–39.

111. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. b (2010).

112. Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 722 (7th Cir. 2008) (Wood, J., concurring in part and dissenting in part) (invoking the language of § 27 as an already existing substitute for literal but-for causation not considered by the majority).

B. *Possessors and Distributors of Child Pornography*[113]

Other important Dirty Harriet-type cases involve defendants whose wrongful conduct involves reckless distribution or use of child pornography. In 1982 the Supreme Court decided *New York v. Ferber.*[114] The Court rejected a First Amendment challenge to a New York statute criminalizing the knowing distribution of materials depicting sexual performances by children under age sixteen.[115] In support of its finding that stopping child pornography constituted a compelling state interest, the Court determined that all child sexual abuse victims suffer from physiological, emotional, and mental health problems as a result of their injuries.[116] It found that the knowledge that anonymous individuals view and disseminate images of their abuse exacerbates victims' feelings of fear, anxiety, and powerlessness.[117] Furthermore, the Court, in another instance, has recognized that "[t]he pornography's continued existence causes . . . continuing harm [for] years to come,"[118] each new publication of the images causing harm to the child's reputation and emotional health. Not only that,

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113. This Note was published only a few days after the U.S. Supreme Court decided *Paroline v. United States*, No. 12–8561 (U.S. Apr. 23, 2014). In *Paroline*, the Court decided that a criminal defendant, Paroline, who was convicted of possessing child porn could not be held liable in restitution for the full amount of the victim's damages attributable to the victim's emotional injuries relating to her knowledge of the market in her child porn. *Id.*, slip op. at 1, 16. Although the Court recognized the applicability of aggregate causation in child porn restitution cases, citing comment *f* favorably, the majority warned that in the context of criminal restitution, "aggregate causation logic [should not be adopted] in an incautious manner." *Id.*, slip op. at 16. Additionally, the majority refused to apply concerted action doctrine because "Paroline had no contact with the overwhelming majority of the offenders for whose actions the victim would hold him accountable." *Id.* In dissent, Justice Sotomayor indicated that she would have held that Paroline factually caused all of the victim's losses and would have found concerted action satisfied despite Paroline's limited contact with other offenders. *Id.*, slip op. at 1–2 (Sotomayor, J., dissenting). The timing of the Court's decision unfortunately does not permit me to comment meaningfully on *Paroline*'s impact for child-porn restitution cases or its import for Dirty Harriet-type cases more generally. However, I note that *Paroline* raises at least two important questions. First, insofar as *Paroline* relied upon multiple causation principles, one important question will be whether the majority erred by incorporating blameworthiness assignments into its cause-in-fact analysis. *See* ROBERTSON ET AL., *supra* note 7, at 372–73 (explaining how courts in multiple tortfeasor cases frequently and mistakenly "treat[] percentage-fault assignments as reflecting cause-in-fact shares"). Second, insofar as the majority commented on the general applicability of concerted action to child-porn restitution cases, another important question will be what further factual showing the Court would require to satisfy concerted action.

114. 458 U.S. 747 (1982).

115. *Id.* at 750–51, 774.

116. *See id.* at 758 ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

117. *See id.* at 759 & n.10 (describing the unique harm that pornography inflicts on child victims).

118. Osborne v. Ohio, 495 U.S. 103, 111 (1990).

the *Ferber* Court had found that demand by consumers creates incentives for the continued exploitation of children.[119]

Decades later, in 2009, Michael Monzel pleaded guilty to one count each of distribution and possession of child pornography, federal crimes which together earned him a lengthy prison sentence followed by ten years of supervised release.[120] Another federal statute enacted as part of the Violence Against Women Act made restitution mandatory to victims "harmed as a result of" child sexual abuse and exploitation for "any . . . losses suffered . . . as a proximate result of the offense."[121] Based on this language, the federal courts have concluded that the government must establish a causal connection between the defendant's criminal conduct and the victim's alleged losses.[122] Three of Monzel's victims—whose pornographic images Monzel never distributed—moved for an order of restitution for present and future physical, psychiatric, and psychological therapy and related expenses.[123] Following the Supreme Court's lead in *Ferber*, the district court in *Monzel*[124] located harm to the victims in a source independent of their physical abuse and the initial distribution of their pornographic images.[125] Each notification of a new third-party possessor of the child images, the court predicted, would traumatize the victim yet again.[126] This observation was sufficient for the trial court simply to deem Monzel's mere possession of the victims' images a cause-in-fact of their harms within the meaning of § 27.[127]

However, upon the government's appeal on behalf of one of the child victims, Amy, the D.C. Circuit clarified that restitution was limited to the harms Monzel's possession of child images proximately caused.[128] Judge

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119. *See Ferber*, 458 U.S. at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials . . . .").

120. *See Monzel I*, 746 F. Supp. 2d 76, 78–79 (D.D.C. 2010). *See generally* 18 U.S.C. § 2252 (2012) (criminalizing, *inter alia*, the knowing possession, transportation, and distribution of child pornography).

121. *See* 18 U.S.C. § 2259; *Monzel I*, 746 F. Supp. 2d at 78 (describing, briefly, § 2259's origins).

122. *See* United States v. Hardy, 707 F. Supp. 2d 597, 605–06 (W.D. Pa. 2010) (collecting cases).

123. *Monzel I*, 746 F. Supp. 2d at 78 n.2, 84.

124. *Monzel I*, 746 F. Supp. 2d 76 (D.D.C. 2010).

125. *Id.* at 86.

126. *Id.*

127. *See id.*

128. United States v. Monzel (*Monzel II*), 641 F.3d 528, 537 (D.C. Cir. 2011). The district court left it ambiguous whether it considered Monzel a necessary condition to the victims' harm or rather one of multiple sufficient causes within the meaning of § 27. *See Monzel I*, 746 F. Supp. 2d at 86–88. Only one of the three victims appealed from the trial court's order of restitution, seeking $3,263,758, a number she claimed reflected her total losses from the creation, distribution, and possession of pornographic images depicting her childhood victimization. *Monzel II*, 641 F.3d at 530–31.

Griffith acknowledged that while the district court had found Monzel's possession of pornographic images added to the victim's injuries, such possession was neither sufficient nor necessary to produce all of her injuries.[129] "Amy's profound suffering," Judge Griffith wrote, was largely due to her "knowledge that . . . untold numbers of people across the world are viewing and distributing images of her sexual abuse."[130] "Monzel's possession of a single image of Amy was [therefore] neither a necessary nor a sufficient cause of all of [Amy's] losses."[131]

Amy's plight underscores a common problem with defining the harm in child-porn restitution cases. Child sexual abuse has repeatedly been linked to psychological trauma, addiction, and violent relationships in adulthood, yet there is a surprising dearth of research measuring the aggravation of harm to such victims from the proliferation of the pictures and videos documenting the abuse.[132] *Ferber* told us that child porn generally causes its victims additional harm, which finding sufficed for constitutional purposes.[133] But tort law (and civil restitution statutes incorporating tort principles) is interested not with predictions of causation but attributions of causation with respect to particular harms.[134] Even when attributing causation is particularly difficult, tort law nonetheless rejects that merely showing "general causation" proves factual causation.[135] Instead, a child-porn victim must prove up a resulting harm from which a causal connection with the defendant could be reasonably inferred from the facts.[136] And there is ample evidence that these victims *do* in fact suffer legally cognizable harms based solely on the proliferation and possession of pornography in which they appear.[137]

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129. *See Monzel II*, 641 F.3d at 538–39 (finding a failure of individual sufficiency and therefore rejecting the victim's request for joint and several liability for an indivisible injury).

130. *Id.* at 538.

131. *Id.*

132. Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. TIMES MAG., Jan. 24, 2013, *available at* http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html.

133. *See supra* notes 115–17 and accompanying text.

134. *See* Robertson, *supra* note 1, at 1010 ("In torts cases, the cause-in-fact inquiry is always an attribution question, never a predictive one . . . .").

135. *See* Bonner v. ISP Techs., Inc., 259 F.3d 924, 928 (8th Cir. 2001) (stating that a toxic tort plaintiff must show not only "that the alleged toxin is capable of causing injuries like that suffered by the plaintiff" but also "that the toxin was the cause of the plaintiff's injury"); *see also* Terry v. Caputo, 875 N.E.2d 72, 76–80 (Ohio 2007) (adopting the "two-step process" to establishing causation and further stipulating that "[w]ithout expert testimony to establish both general causation and specific causation, a claimant cannot establish a prima facie case").

136. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. a (2010) (detailing the plaintiff's burden of proof with regard to factual causation under the *Restatement Third*).

137. *See* Bazelon, *supra* note 132 (discussing the post-abuse life of several victims and the victims' attempts to sue persons that possess child pornography that includes the victims' images for restitution).

However, the *Monzel* courts failed to examine an important factual wrinkle. Victims like those in *Monzel* resoundingly affirm that mental and physical harm attaches to their *knowledge* that adult consumers worldwide have seen pornographic images of them.[138] Consider in this respect the First Circuit's recent handling of another restitution case, *United States v. Kearney*.[139] Expert and victim reports demonstrated that the victim, Vicky, suffered harms including anxiety, depression, and insomnia from the knowledge that "copious amounts" of pornographic images of her had been viewed by "multiple individuals on a continuing basis."[140] The expert report attested that the "[d]iscovery of the distribution of her images on the internet and viewing by persons interested in child pornography . . . contributed to a profound sense of sadness, despair and grief."[141] But victims often do not discover that pornographic images depicting them were published until years after the abuse was filmed or photographed, by which time the images may have been widely distributed and consumed. One characteristic victim, Nicole, was raped, abused, and photographed by her father from ages nine to thirteen.[142] At age sixteen Nicole revealed the abuse to her mother, mistakenly believing that the pictures had not been shown to anyone.[143] Nicole was not informed until age seventeen by a local detective that she was a victim of child pornography.[144] By that time, her pictures had been downloaded by thousands of computers and were among the most circulated child pornography on the internet.[145]

If a case were brought against only one of the many users or distributors of pornographic images of Nicole, its fact pattern would resemble that of Dirty Harriet's case. But the victim suffers cognizable harm distinct from the incident of sexual abuse, due instead to a critical mass of independent, wrongful, and effectively simultaneous acts of child-porn possession and circulation. The *Kearney* court recognized this point when it found that "Kearney's conduct contributed to a state of affairs in which Vicky's emotional harm was worse than would have otherwise been the case."[146] Referencing comment *f* and Richard Wright's scholarship, the court determined that causation "exists on the aggregate level, and there is

138. *See supra* note 126 and accompanying text; *see also* United States v. Kennedy, 643 F.3d 1251, 1256 (9th Cir. 2011) (distinguishing harms attributable to the creation of child-porn images from harms attributable to later possession of such images).

139. 672 F.3d 81 (1st Cir. 2012).

140. *Id.* at 86.

141. *Id.* (alteration in original).

142. Bazelon, *supra* note 132.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Kearney*, 672 F.3d at 98.

no reason to find it lacking on the individual level."[147] Chief Judge Lynch therefore held the causation standard met on account of the expert reports and victim impact statements, unambiguously "reject[ing] the theory that the victim of child pornography could only show causation if she focused on a specific defendant's viewing and redistribution of her images and then attributed specific losses to that defendant's actions."[148]

C. Polluters

Still other case applications of the *Restatement Third*'s causation framework to this point involve polluters negligently dirtying the environment. From the 1940s to 1984, operations at a 680-acre Colorado uranium and vanadium plant "left a large volume of wastes [that] contaminat[ed] air, soil and groundwater near the plant and the San Miguel River."[149] Contaminants at the "Uravan" site included "radioactive products such as raffinates, raffinate crystals and mill tailings," which contained other harmful chemicals, including heavy metals like lead and arsenic.[150] In 1986, the EPA added Uravan to the National Priorities List (NPL) and commenced environmental clean-up efforts.[151] Years later, Uravan was entirely razed.[152]

The Price-Anderson Act asserts federal court jurisdiction over suits "arising out of or resulting from a nuclear incident,"[153] further providing that state law supplies the substantive law for claims under the Act.[154] It therefore applied to *June v. Union Carbide*,[155] where former Uravan residents sought damages for their nonthyroid cancer and thyroid disease allegedly caused by the defendants' milling operations on the theory that the plaintiffs' exposure to radioactive milling materials caused or increased the risk of their illnesses.[156] Applying Colorado law, the court affirmed

147. *Id.* at 98 & n.14. In plain fact, the *Kearney* court did not cite directly to comment *f*, but rather to the Reporters' Note to comment *g*. *Id.* at 98. However, the portion of this Reporters' Note excerpted by the *Kearney* court is in truth a cross reference to comment *f* causal sets, so I have elected to characterize *Kearney* as standing in part on comment *f*. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 reporters' note cmt. g (2010) ("These cases thus reflect an application of the principles of this Section and Comment *f* to a situation in which none of the alternative causes is sufficient by itself, but together they are sufficient and perhaps necessary elements of multiple sufficient causal chains.").

148. *Kearney*, 672 F.3d at 99–100.

149. *Uravan Uranium Project (Union Carbide)*, EPA, http://www2.epa.gov/region8/uravan-uranium-project-union-carbide (last updated Apr. 2, 2014).

150. *Id.*

151. *Id.*

152. *See* June v. Union Carbide Corp., 577 F.3d 1234, 1237 (10th Cir. 2009).

153. 42 U.S.C. § 2210(n)(2) (2006).

154. *Id.* § 2014(hh).

155. 577 F.3d 1234 (10th Cir. 2009).

156. *Id.* at 1237.

summary judgment for Union Carbide.[157] Although the court endorsed the § 27 and comment *f* approach, it held that the plaintiffs had waived any argument that Uravan radiation was a necessary component of a causal set that probably caused their injuries by not raising it at the district court.[158] Additionally, the court was not persuaded that the plaintiffs' experts had raised even a triable issue of fact on causation.[159] With respect to the plaintiffs claiming thyroid diseases, one expert estimated that at least some of the plaintiffs' radiation exposure resulted from atomic weapons testing conducted at a Nevada Test Site (NTS) between 1959 and 1970.[160] Other experts testified that "at least 5% of the radiation exposure for each [thyroid] Plaintiff came from Uravan" and also that "there is greater than a 10% likelihood [that a] Plaintiff's [nonthyroid] cancer was contributed to by the additional radiation exposure from Defendants' uranium operations."[161] The court also noted that "none of the 16 thyroid-disease Plaintiffs was exposed to more than 105 rads total from Uravan and NTS radiation," eleven of those sixteen suffered only hypothyroidism, and the primary expert's "report states that '[little] data are available on the occurrence of hypothyroidism in persons exposed to low or moderate doses of radiation (750 rads).'"[162]

Radiation is ubiquitous throughout the environment in air, water, food, and soil.[163] It has both natural and artificial sources.[164] Man-made sources of radiation include nuclear power generation and X-ray machines, as well as other "medical uses of radiation diagnosis or treatment."[165] Yet a large proportion of the average annual background radiation dose received by people results from environmental sources, most prominently radon gas emanations from rock and soil and natural radiation from cosmic rays.[166] According to the World Health Organization, "[B]ackground radiation levels vary due to geological differences," such that "[e]xposure in certain areas can be more than 200 times higher than the global average."[167] That people will continue to suffer from radiation damage is a seemingly intractable problem.

157. *See id.* at 1247.

158. *Id.* at 1242–43, 1247.

159. *Id.* at 1245–47.

160. *Id.* at 1246.

161. *Id.* (second alteration in original) (internal quotation marks omitted).

162. *Id.* at 1247 n.7 (alteration in original).

163. *Ionizing Radiation, Health Effects and Protective Measures*, WORLD HEALTH ORG. (Nov. 2012), http://www.who.int/mediacentre/factsheets/fs371/en/index.html.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

Nevertheless, tort law has long found ways around problems posed by background causes in pollution cases.[168] In comment *f*, the Reporters offered a potentially helpful illustration for plaintiffs dealing with a confluence of environmental and human contaminants:

> Jonathan raises salmon in a pond on his property. Due to an unusual rainfall, a chemical, potentially toxic to salmon, leaks into the pond from natural deposits some distance from Jonathan's property. However, the chemical concentration in the pond remains below the threshold that causes harm to salmon. Shelley and Mia, who engage in industrial operations near Jonathan's property, each negligently allow the escape of the same chemical from their operations. Shelley's and Mia's chemical is deposited in Jonathan's pond at the same time; each is sufficient with the existing contamination to raise the chemical concentration of the pond to a level that kills all of the salmon. Each of Shelley's and Mia's negligence is a factual cause of Jonathan's loss of salmon.[169]

For causal set theory, the illustration is intended to show that causal sets may contain common elements.[170] For potential polluters, including producers of artificial radiation, the illustration signals that background radiation should be included in set construction. In jurisdictions adopting the § 27 and comment *f* approach, then, a polluter who contributes a merely nominal amount could be considered a cause-in-fact of a plaintiff's harm if the plaintiff could prove her harm was not solely attributable to background causes.

Thus far, plaintiffs have not pleaded their cases in this way. In the only other pollution case applying § 27, and on substantially similar facts and claims as *June*, the Tenth Circuit again affirmed summary judgment in favor of a uranium milling facility in *Wilcox v. Homestake Mining Co.*[171] The plaintiffs alleged they suffered from liver, thyroid, and bladder cancers due to radiation exposure from the defendants' mill.[172] Despite expert

168. *See, e.g.*, Warren v. Parkhurst, 92 N.Y.S. 725 (Sup. Ct. 1904) (holding that equity grants relief against individual mill owners who each discharged into a stream nominal amounts of refuse which cumulatively harmed a downstream plaintiff), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906); *see also* Wright, *Causation in Tort Law*, *supra* note 31, at 1792 ("[I]n . . . pollution cases [like *Parkhurst*], the courts have allowed the plaintiff to recover from each defendant who contributed to the pollution that caused the injury, even though none of the defendants' individual contributions was either necessary or sufficient by itself for the occurrence of the injury.").

169. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f, illus. 4 (2010).

170. *See id.* § 27 cmt. f (introducing illustration four with the proposition that "common elements in each of the sufficient causal sets do[] not prevent each of the sets from being a factual cause").

171. 619 F.3d 1165 (10th Cir. 2010). The only significant factual difference with *June* is that in *Wilcox* there is no mention of any third causal candidate such as the NTS. *See id.* at 1169–70.

172. *Id.* at 1166, 1169–70.

testimony to the effect that "a medical expert could consider radiation exposures from the Homestake mill to be a substantial contribution" and further expert testimony that "exposure to ionizing radiations as a consequence of Defendants' operations was a substantial factor contributing to each plaintiff developing cancer," the court found the plaintiffs' evidence "simply insufficient" for a causal set showing.[173] Therefore, the plaintiffs in both *June* and *Wilcox* lost at least partly for failure to prove that their injuries were not produced solely by natural causes. Had they made such a showing, the Tenth Circuit likely would have attributed cause-in-fact status to defendants contributing only trivial amounts of the radiological pollution to which the plaintiffs were exposed.[174] If this is in fact the case, unless the Tenth Circuit also adopts § 36's scope of liability constraint, it risks imposing tort liability on exactly the type of negligent trivial contributor the *Restatement Third*'s Reporters hoped to absolve.

IV. Mutual Agency—The Causal Relevance of Intent

Regardless of whether Harriet's conduct is merely negligent or something dirtier, the *Restatement Third*'s causal set framework gives courts authority to attribute factual causation to Harriet for individually insufficient, insubstantial, and unnecessary causal conduct.[175] But its method for attribution is merely aggregative, asking only whether Harriet's conduct "overdetermines" harm when "combined" together with the conduct of others.[176] It seems unlikely that intelligent judges using the *Restatement Third*'s framework would struggle so mightily to attribute causation if cause-in-fact determinations were simply a matter of addition; the contributions of multiple actors either would or would not add up to a tort. Instead, the Dirty Harriet-type cases suggest that not all courts buy into comment *f*'s causal set theory, despite that these same courts sometimes impose liability on trivial, unnecessary causal contributors. Perhaps these courts simply err by failing to wholeheartedly endorse the *Restatement Third*'s position. Another plausible explanation, however, is that the Dirty Harriet-type cases locate causal relevance in a trivial contributor's intent. To support this hypothesis, I introduce traditional concerted action doctrine, followed by an application of its principles to Dirty Harriet-type cases.

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173. *See id.* at 1169–70 (citing *June* and characterizing the plaintiffs' causal set burden as an obligation to show that the defendants' mill "alone or as a necessary part of a combination of different factors" was a but-for cause of the plaintiffs' cancers).

174. *See* June v. Union Carbide Corp., 577 F.3d 1234, 1242, 1245 (10th Cir. 2009) (explaining and choosing to apply § 27 and comment *f* in the absence of Colorado law to the contrary).

175. *See supra* notes 26–29 and accompanying text.

176. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (2010).

A. *Liability for Concerted Action*

One curious omission from the *Restatement Third*'s causation framework is the Reporters' failure to include a theory of concerted action.[177] The *Restatement (Third) of Torts: Apportionment of Liability* addresses the application of comparative fault regimes to concerted action cases, but it concededly "does not address the rules regarding when concerted activity exists."[178] Importantly, however, none of the three installments thus far promulgated by the American Law Institute (ALI) displaces traditional rules of concerted action.[179] The *Restatement (Second) of Torts* § 876 stated its concerted action rules as follows:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[180]

Concerted action is therefore properly understood as a "unitization" theory, similar to but conceptually distinct from vicarious liability, such that multiple defendants who are not necessarily subject to full vicarious liability for one another's conduct may still be treated as one causal unit.[181]

The subsections of § 876 are themselves conceptually distinct. Subsection (a) relates to concerted action by *agreement*, sometimes referred

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177. One might have expected the *Restatement Third* to take up concerted action in its causation framework because concerted action is understood as a substitute for standard but-for causation in applicable cases. *See* ROBERTSON ET AL., *supra* note 7, at 127 (characterizing concerted action as a "limited-purpose substitute[] for the standard but-for approach" (emphasis omitted)).

178. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 15 cmt. a (2000).

179. The ALI has promulgated three installments of the *Restatement of Torts*: *Products Liability* (1998), *Apportionment of Liability* (2000), and *Liability for Physical and Emotional Harm* (2010). RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM intro. (2010). The Reporters for the latest installment indicate that, "[t]aken together, these three installments replace and supersede Divisions 2 and 3 of the Restatement Second of Torts." *Id.* The *Restatement Second*'s treatment of concerted action, however, appeared in its Division 11 covering "Miscellaneous Rules." *See* RESTATEMENT (SECOND) OF TORTS § 876 (1979).

180. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

181. *See* Robertson, *supra* note 1, at 1011–12.

to as "conspiracy."[182] "The agreement need not be expressed in words and may be implied" from the defendants' conduct,[183] however mere "extensive parallel [tortious] conduct" is itself insufficient to establish an agreement, tacit or otherwise.[184] For instance, in the case of two motorists dangerously speeding abreast of one another down a public highway, one attempting to pass and the other blocking the pass, each driver is subject to liability to a third motorist struck and injured by one of the speeding vehicles.[185] Similarly, tacit-agreement-based concerted action may justify holding all participants in a drag race "equally liable for any injury resulting from such a race."[186] The theory has been used to uphold civil liability against the live-in companion of a burglar who murdered a homeowner in the course of the burglary where the live-in companion neither planned nor knew of the killing but partook in the "illegal enterprise to acquire stolen property," making the murder a "reasonably foreseeable consequence of the scheme."[187] In one century-old case, *Warren v. Parkhurst*,[188] the court located a possible tacit agreement between twenty-six upstream-riparian mill owners who each discharged "merely nominal" amounts of pollution into a creek, thereby damaging the plaintiff's downstream riparian property.[189] The court did not doubt that each mill owner would be liable "[i]f the [mill owners] had by agreement or concerted action united in fouling th[e] stream" and that a court of equity might exercise its discretion on the merits to "infer a unity of action, design, and understanding" so to find that "each defendant is deliberately acting with the others" in harming the plaintiff's property.[190]

Subsections (b) and (c) correspond to concerted action via *substantial assistance*, sometimes referred to as "aiding and abetting."[191] The authors of the *Restatement Second* explained that "[a]dvice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is

182. *See* RESTATEMENT (SECOND) OF TORTS § 876 cmt. a (1979) ("Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result."); *see also* Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983) (distinguishing "conspiracy" as "concerted action by agreement" from "aiding-abetting" as "concerted action by substantial assistance" (emphasis omitted)).

183. RESTATEMENT (SECOND) OF TORTS § 876 cmt. a (1979).

184. *See, e.g.*, Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1074 (N.Y. 1989) (rejecting the application of the theory of concerted action in a suit against DES manufacturers).

185. RESTATEMENT (SECOND) OF TORTS § 876 cmt. a, illus. 2 (1979).

186. *See* Clausen v. Carroll, 684 N.E.2d 167, 171 (Ill. App. Ct. 1997).

187. *Halberstam*, 705 F.2d at 475, 478.

188. 92 N.Y.S. 725 (Sup. Ct. 1904), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906).

189. *Id.* at 725, 727.

190. *Id.* at 727.

191. *See* RESTATEMENT (SECOND) OF TORTS § 876(b), (c) (1979); *see also Halberstam*, 705 F.2d at 477–78 (explaining that the aiding and abetting basis of liability corresponds to subsection (b) of § 876).

known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance."[192] In practice, liability for aiding and abetting usually turns on how much encouragement is substantial,[193] and a defendant's assistance "may be so slight that he is not liable for the act of the other."[194] In assessing the substantiality of a defendant's assistance, a court may consider "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind."[195] Under subsection (c) specifically, in a "large undertaking to which . . . many persons contribute, the contribution to the enterprise of one individual may be so small as not to constitute substantial assistance."[196] Despite these limitations, courts applying a substantial-assistance, concerted action theory have held, for example, that a passenger in the driver's vehicle may be jointly liable to a third party where the passenger verbally encourages the driver to exceed the posted speed limit and the driver thereby fatally injures a third party.[197] *Hainline*, discussed in the context of Judge Posner's majority decision for the court in *Boim*, is another example; by procuring and supplying erasers for the other children to throw, Keel substantially encouraged the wrongful activity that resulted in injury to Hainline.[198]

B. *Applying Concerted Action to Dirty Harriet Cases*

For courts adopting the *Restatement Third*'s causation framework, § 36's scope of liability answer to § 27 and comment *f*'s overinclusiveness problem could work to exculpate *de minimis* intentional tortfeasors in the same breath as *de minimis* negligent tortfeasors. The *Restatement Second*, however, had recognized that an actor's reckless or intentional wrongdoing influences the causal question.[199] A court's piecemeal adoption, unwitting misapplication, or willful brushoff of the *Restatement Third*'s causation framework might still be worse. Judge Posner's *Boim* majority and Judge Garland's *Kilburn* decision each cited the *Restatement Third* only en route

192. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979).

193. *See Halberstam*, 705 F.2d at 478.

194. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979).

195. *Id.*

196. *Id.* § 876 cmt. e.

197. Sanke v. Bechina, 576 N.E.2d 1212, 1213 (Ill. App. Ct. 1991).

198. *See supra* notes 61–64 and accompanying text.

199. *Compare* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 36 cmt. b (2010) (stating that the § 36 exception applies to multiple causation cases where "the tortious conduct at issue constitutes a trivial contribution"), *with* RESTATEMENT (SECOND) OF TORTS § 501(2) & cmt. a (1965) (indicating that an actor's reckless disregard of another's safety "is a factor of importance . . . in determining whether the jury shall be permitted to find that the actor's conduct bears a sufficient causal relation to the other's harm"), *and id.* § 433 cmt. c ("The extent to which the intentional or reckless character of the other's conduct is material in determining whether it is a cause of another's harm is dealt with in § 501(2).").

to substituting its cause-in-fact framework with relaxed standards inviting normative decision making.[200] On the other hand, the courts' insistence on individual necessity in *Owens I* and *II*, where Sudan's provision of safe harbor for terrorists lasted many years, would require a factfinder to reimagine a decade of history, necessarily inviting an immodest and unprincipled causal attribution.[201] Or, taking perhaps the worst course, a court may do like the district court in *Monzel* and invoke § 27 only to ignore its meaning entirely, electing instead to presume causation based on population-wide predictive data instead of requiring its proof with respect to each defendant individually.[202]

It should be immediately apparent, however, that concerted action is tailor-made for the Dirty Harriet-type cases. In the case of a mere money donation to a terrorist organization, such as that laying at the heart of the plaintiffs' 18 U.S.C. § 2333(a) suit in *Boim*, concerted action based on tacit agreement could do useful work. Judge Posner perhaps wrongly determined that, under the statute, giving money to Hamas is wrongful conduct under any circumstance.[203] Rather than drolly assuming the defendants' dangerous donation funded the shooting of David Boim because the terrorist-donee would necessarily have transferred funds between its "social services 'account'" and its "terrorism 'account,'"[204] concerted action would permit a causal inquiry that makes the donator's intent pivotal.[205] The *Boim* defendants would be akin to the companion of a burglar who murdered a homeowner in course of the burglary, if the *Boim* defendants similarly intended to participate in a tortious enterprise that made the murder a "foreseeable consequence" of the scheme.[206] Such a unitizing theory would have at least allowed the dissenting judges the opportunity they desired to consider whether the defendants intended their

200. *See supra* subpart III(A); *see also* Robertson, *supra* note 1, at 1023 (agreeing with the argument that factual causation is properly a nonnormative inquiry (quoting Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 688 n.55 (2006))).

201. *See supra* subpart III(A); *see also* Robertson, *supra* note 10, at 1770 (stressing that the factfinder's "mental operation" performed during the counterfactual inquiry "must be careful, conservative, and modest").

202. *See supra* note 126 and accompanying text.

203. *See supra* notes 55–56 and accompanying text.

204. *See* Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 698 (7th Cir. 2008) (en banc) (assuming Hamas conflated its so-called social services and terrorist "accounts").

205. *Cf.* Clausen v. Carroll, 684 N.E.2d 167, 171–74 (Ill. App. Ct. 1997) (finding that all drag race participants may be held liable for injury caused by only one of them if they were engaged in joint tortious activity).

206. *Compare Boim*, 549 F.3d at 687–705 (finding liability for organizations donating money to terrorist groups that target Americans outside of the United States), *with* Halberstam v. Welch, 705 F.2d 472, 477–87 (D.C. Cir. 1983) (finding liability for the defendant-coconspirator of a burglar who, without the *knowledge* of the defendant, killed a third party during the course of a burglary).

donations to be used for humanitarian or terrorist purposes.[207] If a factfinder could attribute to the *Boim* defendants an ill, terroristic motive, then it would be reasonable for the court to uphold a factual causation finding on the basis of a tortious act (the donation) and a common design (for terrorist purposes).[208]

In a *Kilburn*- or *Owens*-like suit against foreign, sovereign, material supporters of terrorism falling under FSIA's state-sponsor exception, the causation showing required to strip the defendant-nation of its foreign sovereign immunity could readily be demonstrated as concerted action via substantial assistance.[209] If true, the allegations in *Owens I* that the Sudanese government provided al Qaeda and Hizbollah with shelter, security, and financial and logistical support including the movement of weapons through the country would be more than sufficient to meet § 876's test of substantiality.[210] The causal inquiry would turn again on whether the Sudanese government knew that al Qaeda and Hizbollah's "conduct constitute[d] a breach of duty"[211] to the plaintiffs, which it hardly could have failed to recognize.

Suits under 18 U.S.C. § 2259 for restitution to child pornography victims harmed "as a result of" continued exploitation by distribution or possession of their images could arguably fit under either a tacit agreement or substantial assistance form of concerted action. Where the defendant actively distributes the child-victim's images, the case against it could proceed analogously to the suit in *Hainline*; just like fetching erasers to be used as projectiles by a group of schoolroom tortfeasors suffices for factual causation, so too could fetching child pornographic images for the use of adult tortfeasors suffice to prove factual causation.[212] Though the concerted action case is harder to make where the defendant merely possesses the child-victim's images, a court willing to stretch tacit agreements as far as the court in *Parkhurst* might still infer a common design.[213] However, it is important to note that in *Parkhurst* the plaintiff sued *all* of the mill owners

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207. *See supra* notes 73–77 and accompanying text.

208. *See* RESTATEMENT (SECOND) OF TORTS § 876(a) (1979).

209. *See id.* § 876(b); *see also* 28 U.S.C. § 1605A (2012) (lifting immunity in civil damages actions against foreign states for personal injury "caused by . . . the provision of material support or resources" for "an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking").

210. *See Owens I*, 412 F. Supp. 2d 99, 103 (D.D.C. 2006) (setting out the plaintiffs' complaint).

211. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

212. *Compare Monzel I*, 746 F. Supp. 2d 76, 78–79 (D.D.C. 2010) (sketching a case for liability against a defendant who distributed child pornography), *with* Keel v. Hainline, 331 P.2d 397, 400 (Okla. 1958) (sketching the case for liability against a defendant who merely retrieved erasers to be thrown by other students).

213. *See* Warren v. Parkhurst, 92 N.Y.S. 725, 727–28 (Sup. Ct. 1904) (permitting recovery against sawmill owners jointly on the basis of an implied tacit agreement for each mill's independent pollution of a stream), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906).

who putatively damaged his riparian interest in the creek,[214] so a § 2259 suit against a mere possessor of child pornography might not successfully invoke a *Parkhurst* theory of deemed concerted action unless the suit was brought against several such possessors of the victim's images.

Importantly, no concerted action theory could plausibly be used to hold liable the defendant in either *June* or *Wilcox* because both cases involved hazardous conduct by only one entity.[215] In fact, because concerted action is a unitization-based rather than an aggregation-based substitute for traditional but-for causation, it is arguably less susceptible to abuse than the causal set theory endorsed by § 27 and comment *f* and adopted by the Tenth Circuit.[216] That is, in a suit based in tortious pollution, concerted action would at least force the plaintiff to identify multiple potential tortfeasors rather than asserting a claim against just one potential tortfeasor and attempting to use vague expert testimony to cover up weak cause-in-fact proof.[217]

V. Conclusion

Comparing Professor Robertson's Harriet hypothetical to my Dirty Harriet variant, I suggest that Harriet's intent may be relevant to evaluating her causal input. Whether or not her intent should have any causal relevance, courts may be more willing to attribute cause-in-fact to the insignificant, insubstantial, and unnecessary input of a potential tortfeasor whose conduct is particularly malicious. However, courts deciding Dirty Harriet-type cases have not fully or faithfully adopted the *Restatement Third*'s causation framework, possibly because they do not yet believe comment *f*'s causal set theory. Instead judges invoke the *Restatement Third*'s causation framework inaccurately to insist upon individual necessity or as a smokescreen to cover up normative attributions of ordinarily descriptive cause-in-fact. Moreover, even if courts did faithfully apply the *Restatement*'s causation framework, they might exculpate Harriet and Dirty Harriet alike under § 36's trivial-contributor exception.

Courts could avoid these pitfalls by viewing Dirty Harriet-type cases through the lens of concerted action. That is not to say courts should replace the *Restatement Third*'s framework entirely, but merely that they could use concerted action as a unitization framework supplementing the *Restatement*'s aggregation framework. Asking whether Dirty Harriet's

214. *See id.* at 725.

215. *See supra* notes 156–57, 171 and accompanying text.

216. *See* Robertson, *supra* note 1, at 1021–22 (arguing against the notion that § 27 would be an improvement on *Warren*'s treatment of multiple-polluter cases).

217. *See, e.g.*, Wilcox v. Homstake Mining Co., 619 F.3d 1165, 1169–70 (10th Cir. 2010) (shrouding its cause-in-fact evidence in ambiguous expert testimony couched in "substantial factor" terms); June v. Union Carbide Corp., 577 F.3d 1234, 1245–47 (10th Cir. 2009) (same).

individually insufficient, insubstantial, and unnecessary contribution was part of a culpable concerted unit would allow judges and factfinders more flexibility to consider whether Dirty Harriet's mental state justifies liability above that imposed for Harriet's equivalent negligent conduct. Framing Dirty Harriet problems in this fashion would ultimately lend coherence to the courts' liability determinations without sacrificing the *Restatement Third*'s causation framework.

—*John Morris*

* * *

Archangel Problems: The SEC and Corporate Liability*

Much ink has been spilled about the so-called "London Whale" scandal involving JPMorgan Chase & Co. that occurred in 2012—not surprisingly, given that the scandal is an accessible reference point in the leitmotif of corporate law and finance post-2008. But the London Whale case is more than that. It is a timely and illustrative example of some challenging and important problems facing government regulators in today's financial markets. In particular, the London Whale case demonstrates that the Securities and Exchange Commission, the United States' chief regulator of the nation's financial markets, is increasingly a part of the problem rather than the solution. This Note examines the London Whale case in this light by taking a closer look at the implications the case has for America's changing financial markets and for the Securities and Exchange Commission's role in those markets.

INTRODUCTION 1718
I. TWO BANKS 1721
  A. Or, The Whale 1721
  B. The Jungle 1724
II. SEC MISSION CREEP AND THE SUBSTITUTABILITY PHENOMENON . 1726
  A. The SEC's Mission Creep 1728
  B. The Substitutability of the Public and Private Securities Markets 1732
III. THE PROBLEMATIC STATUS QUO AND A PATH FORWARD 1734
  A. Problems with Ad Hoc SEC Enforcement 1735
    1. *Inefficient Compliance Spending* 1735
    2. *Inefficient Share Price Reductions* 1737
    3. *Unpredictable SEC Enforcement and Company-Level Penalties Frustrate the Achievement of the SEC's Normative Goals.* 1738
  B. What Private-Party Enforcement Patterns Can Tell Us About the Future 1740
    1. *Substitutability and Private-Party Lawsuits* 1741
    2. *Substitutability and SEC Enforcement* 1746
IV. INTERNAL CONTROLS, MARKET CERTAINTY, AND EFFICIENCY: A POTENTIAL SOLUTION 1748
  A. An End to Corporate Liability 1748

* This Note is for three people. First, for Kelsie Krueger, whose unwavering support in every aspect of my life over the last year is more than I could have ever asked for or hoped to receive from a friend. Second, for my mom, who taught me the importance of never giving up on the things and people I believe in. And finally, for my dad, who showed me the true meaning of strength.

B. Benefits 1749
1. *Increased Certainty* 1749
2. *Normative Consistency* 1751
3. *Policy Prescription* 1752
C. Drawbacks 1754
CONCLUSION 1755

Introduction

October 15, 2013, seemingly marked the end of the mounting civil monetary penalties against JPMorgan Chase & Co. (JPM) in the wake of what has come to be known as the "London Whale" trading scandal. On that day, JPM agreed to a $100 million settlement with the Commodity Futures Trading Commission in connection with the debacle, bringing the total that the bank has had to pay to a number of U.S. and U.K. regulators to over $1 billion.[1] Of course, the bank's woes are likely far from over,[2] and the fates of the traders personally involved have yet to be determined (though their prospects are not great).[3] The penalties come on top of trading losses stemming from the scandal that potentially exceed $7 billion.[4] Given the roughly $8 billion price tag (which includes half of JPM CEO Jamie Dimon's personal salary[5]), it is safe to assume that JPM is happy to put this particular matter to rest.

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1. Silla Brush, *JPMorgan Said to Settle CFTC London Whale Trading Probe*, BLOOMBERG (Oct. 15, 2013), http://www.bloomberg.com/news/2013-10-15/jpmorgan-said-to-settle-cftc-london-whale-probe-for-100-million.html.

2. *See id.* (noting that the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) investigations remain ongoing); *cf.* Bess Levin, *Jamie Dimon Loves the Thrill of Running a Large Corporation that Faces Daily Threats of Multi-Billion Dollar Fines, and He's Excited About the Prospect of Doing It Somewhere Else Someday*, DEALBREAKER (Oct. 15, 2013, 3:40 PM), http://dealbreaker.com/2013/10/jamie-dimon-loves-the-thrill-of-running-a-large-corporation-that-faces-daily-threats-of-multi-billion-dollar-fines-and-hes-excited-to-doing-it-somewhere-else-some-day/ (quipping about JPM's role as financial regulators' perennial whipping boy). The level of public outrage suggests that JPM's trial in the court of public opinion stands to become a fixture of corporate reportage. *See, e.g.*, Claudia Zeisberger & Andrew Chen, *Perspective: The 'London Whale,'* INSEAD KNOWLEDGE (Oct. 4, 2013), http://knowledge.insead.edu/business-finance/banking-insurance/perspective-the-london-whale-2867 (announcing a forthcoming case study of the London Whale scandal).

3. *See* Complaint at 1, SEC v. Martin-Artajo, No. 13 CV 5677 (S.D.N.Y. Aug. 14, 2013) [hereinafter SEC Complaint] (bringing civil charges against two traders involved); Sealed Complaint at 1, United States v. Grout, No. 13 MAG 1976 (S.D.N.Y. Aug. 9, 2013) [hereinafter DOJ Indictment, Grout] (indicting a trader involved); Sealed Complaint at 1, United States v. Martin-Artajo, No. 13 MAG 1975 (S.D.N.Y. Aug. 9, 2013) [hereinafter DOJ Indictment, Martin-Artajo] (same); *see also* Matt Levine, *The London Whale Hated All the Lying About How Much Money He Was Losing*, DEALBREAKER (Aug. 14, 2013, 12:00 PM), http://dealbreaker.com/2013/08/the-london-whale-hated-all-the-lying-about-how-much-money-he-was-losing/.

4. Jessica Silver-Greenberg, *New Fraud Inquiry as JPMorgan's Loss Mounts*, DEALBOOK, N.Y. TIMES (July 13, 2012, 11:49 AM), http://dealbook.nytimes.com/2012/07/13/jpmorgan-says-traders-obscured-losses-in-first-quarter/.

5. Christina Rexrode, *JPMorgan CEO Jamie Dimon's Pay Slashed in Half over London Whale Loss; Bank's Profits Spike*, HUFFINGTON POST (Jan. 16, 2013, 9:45 PM), http://www

At $1 billion, one would be remiss to fail to point out that the London Whale penalties pale in comparison to amounts that JPM has recently agreed to pay out in connection with other, unrelated events.[6] But the London Whale penalties are troubling not because of their amount but because they exist at all. One segment of the penalties is particularly worrisome: the Securities and Exchange Commission (SEC)'s extraction of $200 million in a settlement related to JPM's alleged violation of the Securities Exchange Act of 1934 (Exchange Act)'s internal control provisions. Implemented in 1977 as part of the Foreign Corrupt Practices Act (FCPA), the SEC initially wanted little to do with enforcing the internal control provisions.[7] However, since the 2008 financial crisis, the SEC has taken a more liberal enforcement approach that has proved somewhat controversial.[8] To the extent that the London Whale settlement indicates the SEC's intent to continue to expansively construe its regulatory authority under the internal control provisions, it is troubling because it represents an expansion of liability with no concomitant expansion of policy-implementation certainty for companies subject to the provisions.

Liability represents a cost to companies subject to it. And increasingly, the SEC's enforcement of the Exchange Act's internal control provisions makes enforcement penalties simply a cost of doing business. Companies can find little guidance—and even less comfort—in the SEC's various attempts to clarify the scope of its enforcement priorities under these provisions. And comparing the SEC's stated priorities with its actual pattern of enforcement only increases the uncertain scope of liability. Accordingly, it has become cheaper and more efficient for individual companies to simply settle with the SEC when it brings an enforcement action rather than for those companies to attempt to convince a court that their actions were appropriate under the current regulatory framework. The cost-of-doing-business nature of SEC enforcement is particularly apparent in the context of its enforcement of the Exchange Act's internal control provisions. As the London Whale settlement and other recent SEC

.huffingtonpost.com/2013/01/16/jamie-dimon-pay-cut_n_2485990.html.

6. *See, e.g.*, Tom Schoenberg et al., *JPMorgan Said to Reach Record $13 Billion U.S. Settlement*, BLOOMBERG (Oct. 20, 2013), http://www.bloomberg.com/news/2013-10-19/jpmorgan-said-to-have-reached-13-billion-u-s-accord.html (reporting on JPM's $13 billion settlement with the DOJ related to its mortgage-bond business); Jessica Silver-Greenberg, *For JPMorgan, $4.5 Billion to Settle Mortgage Claims*, DEALBOOK, N.Y. TIMES (Nov. 15, 2013, 6:20 PM), http://dealbook.nytimes.com/2013/11/15/jpmorgan-reaches-4-5-billion-settlement-with-investors/ (reporting on JPM's $4.5 billion settlement with a group of investors related to its sale of mortgage-backed securities).

7. *See* William J. Stuckwisch & Matthew J. Alexander, *The FCPA's Internal Controls Provision: Is* Oracle *an Oracle for the Future of SEC Enforcement?*, CRIM. JUST., Fall 2013, at 10, 11.

8. *See, e.g.*, *id.* at 14–16 (discussing a recent SEC enforcement action under the Exchange Act's internal control provisions, which introduced a new level of uncertainty with regard to complying with those provisions).

enforcement actions demonstrate, companies seem to believe that they have little choice but to comply with the SEC's edicts under these provisions.

But the internal control provisions represent more than just a cost of doing business because they allow the SEC to impose substantive corporate governance requirements on companies subject to them. Although the proper scope of government involvement in the marketplace is fiercely debated,[9] I take no position in this normative (and empirical) debate. Instead, in this Note I assume that government has a role to play in setting corporate governance polices and argue that the way the SEC currently imposes these policies is fraught with uncertainty. This Note seeks to use the London Whale settlement and the SEC's enforcement of the Exchange Act's internal control provisions to illustrate that the SEC's unpredictable approach is increasingly problematic. This Note also proposes a potential solution that could serve as a model for other areas of enforcement that raise similar concerns regarding the SEC's ad hoc approach. Specifically, I propose that the Exchange Act should be amended to eliminate corporate liability for internal control violations and to make clear that the SEC can only impose liability on individuals within a company for these violations.

This Note proceeds in five Parts. Part I provides the specifics of the London Whale trading scandal and subsequent SEC enforcement action and compares the London Whale enforcement action to a similar action in which the SEC declined to impose corporate penalties. Part II articulates some reasons for the unpredictable pattern of SEC enforcement and locates this discussion in the context of the increasing substitutability of the public and private securities markets. Part III details some specific problems caused by unpredictable SEC enforcement and explains why those problems frustrate the SEC's stated normative goals. Part III also compares the current pattern of SEC enforcement with private-party enforcement under the securities laws in order to identify the proper foundation for a potential solution. Part IV then proposes an amendment to the Exchange Act's internal control provisions as a solution to the problem of unpredictable SEC enforcement. Specifically, Part IV recommends that the SEC should only be allowed to impose liability for violations of the internal control provisions on those individuals who actually violate a company's internal controls. This solution would insulate companies from pro forma

9. Particularly in the context of mandatory disclosure rules. *Compare, e.g.*, John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 721–23 (1984) (advancing arguments in favor of mandatory disclosure rules), *and* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 755–66 (2006) (same), *with* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 687 (1984) (suggesting that mandatory disclosure rules may be unnecessary), *and* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2373–81 (1998) ("There is little tangible proof of the claim that corporate information is 'underproduced' in the absence of mandatory disclosure . . . .").

and unpredictable enforcement of those provisions because the companies themselves would not be liable. Crucially, this solution would increase policy-implementation certainty for companies, reintroduce normative consistency into SEC enforcement practice, and still leave the SEC with room to prescribe governance requirements in appropriate instances. This solution would also recalibrate the efficiency calculus for companies choosing between the public and private markets when issuing securities. Part V concludes.

I. Two Banks

A. Or, The Whale

Bruno Iksil was an honest man who was thwarted by the lies of others.[10] Or at least that's the story according to the SEC.[11] Iksil, known in the banking industry as the London Whale because of the size of his trading positions,[12] stands at the center of the trading scandal that has become synonymous with his industry nickname. Though Iksil was the trader primarily in charge of the day-to-day activities of one of JPM's investment divisions, headquartered in London,[13] he was not alone in controlling its actions. His superior, Javier Martin-Artajo, with the help of Iksil's junior trader, Julien Grout, began to take a more active role in the division in early 2012, when the value of its investment positions began to decline due to a number of market movements.[14] During that time, Martin-Artajo told both Iksil and Grout to stop reporting the division's losses unless they were easily explained by some major market event.[15] This instruction directly contravened JPM's stated valuation-reporting policy, which, in addition to incorporating U.S. Generally Accepted Accounting Principles (GAAP), established a number of investment-pricing steps for JPM traders to follow when valuing their positions.[16] While Grout began, in March, to take steps

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10. *See* Levine, *supra* note 3.

11. *See id.*; *see also* SEC Complaint, *supra* note 3, at 10–16 (portraying Iksil, who is identified in the complaint as "CW-1," in a favorable light).

12. Azam Ahmed, *The Hunch, the Pounce and the Kill: How Boaz Weinstein and Hedge Funds Outsmarted JPMorgan*, N.Y. TIMES, May 26, 2012, http://www.nytimes.com/2012/05/27/business/how-boaz-weinstein-and-hedge-funds-outsmarted-jpmorgan.html.

13. *See* Zeisberger & Chen, *supra* note 2.

14. *See* SEC Complaint, *supra* note 3, at 2.

15. *See id.* at 10.

16. *See id.* at 7–8. The alleged reasons for Martin-Artajo and Grout's flouting JPM's policy are somewhat unsavory: "Both Martin-Artajo and Grout engaged in this scheme to enhance the SCP's apparent performance, and thereby curry favor with their supervisors and enhance their promotion prospects and bonuses at JPMorgan." *Id.* at 9–10. Such allegations have formed a constant refrain in American media and in law-enforcement actions since 2008, and they undoubtedly increase the settlement value of enforcement actions for the SEC by threatening banks with trial in the court of public opinion. Yet, as is discussed below, it is not clear that even the best internal control policies could curb the harm caused by individuals with these

to comply with Martin-Artajo's wishes,[17] Iksil was not comfortable with this approach and continually voiced his displeasure to both Martin-Artajo and Grout.[18] Despite Iksil's protestations,[19] Martin-Artajo and Grout continued to misstate the division's losses until the end of April 2012, when JPM took control of the division away from Martin-Artajo, Iksil, and Grout because it had been alerted to the possibility that the division's positions were not being priced appropriately.[20]

When JPM's senior management learned of the possible violations in Iksil's division, it began an internal review of the division. This review consisted of four distinct evaluations—by JPM's investment banking valuation-control group, JPM's internal audit department, JPM's controller, and an outside law firm.[21] Each review revealed that Iksil's division had consistently understated its losses when valuing its positions.[22] While JPM's senior management was consistently kept abreast of the progress of each investigation, it requested that the members of the respective investigations keep their findings close to the chest.[23] In response to what it had learned, JPM's senior management implemented a number of new policies designed to improve its internal-valuation review methods.[24] With these new policies in place, JPM filed its quarterly results with the SEC on May 10, 2012; these results, because of the improper valuation activities in Iksil's division, overstated JPM's quarterly revenue by $660 million.[25]

The SEC instituted cease-and-desist proceedings against JPM as a result of its misstated quarterly revenues.[26] Among other things, the SEC took umbrage with JPM senior management's insistence on silence amongst those conducting the four internal investigations, claiming that the information-sharing restrictions contributed to a culture of silence that prevented senior management from receiving all of the pertinent information and precluded some involved in the investigations from appreciating the gravity of certain facts.[27] Nonetheless, the SEC conceded that JPM's senior management had learned most of the pertinent facts

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motivations, and the SEC's use of this archetypal story to extract penalties from banks only damages the economy as a whole. *See infra* sections III(A)(1)–(2).

17. SEC Complaint, *supra* note 3, at 10; JPMorgan Chase & Co., Exchange Act Release No. 70,458, 107 SEC Docket 1, at 6–7 (Sept. 19, 2013) [hereinafter SEC Enforcement Action].

18. *See* SEC Complaint, *supra* note 3, at 10–18.

19. For a detailed description of Iksil's complaints, see *id.*, where Iksil is identified as "CW-1."

20. *See* SEC Enforcement Action, *supra* note 17.

21. *See id.* at 11–14.

22. *See id.*

23. *Id.* at 14–15.

24. *See id.* at 15–17.

25. *See* SEC Complaint, *supra* note 3, at 18–19.

26. SEC Enforcement Action, *supra* note 17, at 1–4.

27. *See id.* at 14–15.

surrounding the inadequate valuations.[28] It appears that the core of the SEC's dissatisfaction with JPM's internal controls stemmed from JPM senior management's failure to inform the Audit Committee of JPM's board of directors of what it knew about the deficient valuations. As the SEC noted in its cease-and-desist order:

> [JPM's] Audit Committee's Charter requires [JPM] management to provide updates to the Committee on all "significant operating and control issues in internal audit reports," the "initiation and status of significant special investigations," the "identification and resolution status of material weaknesses" in controls, and any "reportable conditions in the internal control environment, including any significant deficiencies."[29]

The SEC charged that, despite these stated policies, JPM's senior management failed to conduct any inquiry into whether the situation in Iksil's division was such that it was required to inform the Audit Committee.[30] It also charged that JPM's senior management failed to inform the Audit Committee about its concerns regarding its internal review policies for valuation reports.[31] In particular, the SEC faulted JPM's senior management for failing to inform the Audit Committee, at a meeting on May 2, 2012, concerning the situation in Iksil's division, that investigations were underway.[32] While JPM's senior management did inform the Audit Committee of the investigations on May 10, 2012, the SEC claimed that this disclosure was insufficient because it did not allow the Audit Committee to participate in the investigations or in the remedial measures subsequently taken.[33] Because of these failures, the SEC charged JPM with violating the Exchange Act's internal control provisions.[34]

In addition to the SEC action against JPM as an entity, the SEC has filed a civil complaint against Martin-Artajo and Grout,[35] and the Department of Justice (DOJ) has indicted them.[36] Both actions aim to appropriately punish the traders responsible for the London Whale debacle, and both civil penalties and jail time seem almost certain for the two men. Iksil, the London Whale himself, appears to have escaped relatively unscathed—while he was fired from JPM, the SEC and DOJ have agreed not to pursue him in return for his cooperation as a witness.[37] JPM itself

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28. *See id.* at 15–16.
29. *Id.* at 17.
30. *Id.*
31. *Id.*
32. *Id.*
33. *See id.* at 17–18.
34. *See id.* at 19.
35. SEC Complaint, *supra* note 3.
36. DOJ Indictment, Grout, *supra* note 3; DOJ Indictment, Martin-Artajo, *supra* note 3.
37. *See* Dan Fitzpatrick & Gregory Zuckerman, *At J.P. Morgan, Whale & Co. Go*, WALL ST.

was not so lucky; on September 19, 2013, it agreed to pay the SEC a $200 million penalty for its allegedly ineffective internal controls.[38] While the government's decision to pursue Martin-Artajo and Grout is laudable, and while shareholder suits against JPM resulting from the misstatements in its May 10 report may also be warranted, the SEC's imposition of a penalty against JPM, as an entity, for failure to implement adequate internal controls was not appropriate. Comparing the London Whale case with a similar SEC enforcement action helps demonstrate why this is so.

B. *The Jungle*

The London Whale penalty becomes more problematic when compared to a similar SEC enforcement action. Troublingly, the SEC seemed to require less stringent internal controls of a different bank, Morgan Stanley, just months before it imposed its London Whale penalty on JPM. The enforcement action in the Morgan Stanley case was brought against Garth Peterson, a Morgan Stanley employee in China who allegedly made fraudulent payments to a Chinese official, thereby violating the Exchange Act internal control provision applicable to individuals.[39] The SEC declined to charge Morgan Stanley with any violation in connection with the matter,[40] presumably because it was satisfied with Morgan Stanley's internal control policies. In its complaint against Peterson, the SEC specifically listed with approval several aspects of Morgan Stanley's internal control policies, including that Morgan Stanley had given Peterson various compliance materials on a number of different occasions, had given him thirty-five compliance reminders, and had required him to certify both

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J., July, 13, 2012, http://online.wsj.com/news/articles/ SB10001424052702303644004577523284135460686; Levine, *supra* note 3.

38. SEC Enforcement Action, *supra* note 17, at 19. And remember, this $200 million is only a portion of the larger $1 billion in total penalties in connection with the London Whale scandal. *See supra* note 1 and accompanying text. And perhaps most surprisingly, JPM also agreed to admit fault, at least with regard to a portion of the penalties it paid. *See JPMorgan Admits Traders Acted 'Recklessly,' in London Whale, Will Pay $100 Million in Deal with CFTC*, HUFFINGTON POST (Oct. 15, 2013, 10:20 PM), http://www.huffingtonpost.com/2013/10/16/jpmorgan-london-whale-cftc_n_4104970.html.

39. Complaint at 1, 14–15, SEC v. Peterson, No. 12-CV-02033 (E.D.N.Y. Apr. 25, 2012) [hereinafter Peterson Complaint]. The internal control provision that is applicable to individuals is contained in § 13(b)(5), which states:

> No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in [§ 13(b)(2)].

15 U.S.C. § 78m(b)(5) (2012).

40. Press Release, Sec. & Exch. Comm'n, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Apr. 25, 2012), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488702#.Uv6bQfZkLDA.

his compliance with Morgan Stanley's Code of Conduct and with the FCPA.[41] Further, the SEC noted:

> Morgan Stanley had policies to conduct due diligence on its foreign business partners, conducted due diligence on the [foreign official and state-owned entity involved] before initially conducting business with them, and generally imposed an approval process for payments made in the course of its real estate investments. Both were meant to ensure, among other things, that transactions were conducted in accordance with management's authorization and to prevent improper payments, including the transfer of things of value to officials of foreign governments.[42]

Three things are particularly noteworthy about the SEC's seeming approval of these aspects of Morgan Stanley's internal control policies, at least as this approval compares to the London Whale case. First, notwithstanding the fact that the SEC's enforcement action against Peterson hews closer to the original purpose of the Exchange Act's internal control provisions,[43] it is unclear why the SEC should be satisfied with policies that essentially do no more than repeatedly subject an employee to reminders of his promise to be honest. I am not convinced that if an employee bribes a foreign official—or misreports an investment value—the fact that he was reminded thirty-five (as opposed to one, ten, or thirty) times is any meaningful reason to absolve his employer of liability for his actions.

Second, the Morgan Stanley case involved the bribery of a foreign official, whereas the London Whale case involved a company's internal trading loss. Given the different factual underpinnings, it is not entirely clear how many of the policies that the SEC approved of in the Morgan Stanley case would apply in the London Whale context. Would the SEC be satisfied if JPM continually reminded its employees to mark the value of their investments according to company policies? Does the SEC wish to see some sort of internal due diligence done on a company's employees? To the extent that these are policies that the SEC is looking for, JPM did have comparable ones in place—remember that its internal control policy required its traders to price investments in accordance with GAAP and that senior management conducted *four* independent evaluations when irregularities in Iksil's division began to come to light.

Finally, in the Morgan Stanley case, the SEC specifically lauded Morgan Stanley for having policies in place to ensure that transactions only

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41. Peterson Complaint, *supra* note 39, at 12–13.

42. *Id.* at 13.

43. *See* U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 40 (2012) (couching its definition of effective compliance programs in terms of being able to avoid or limit exposure to corruption).

took place with "management's authorization."[44] Yet what the SEC required in the London Whale case, by penalizing JPM for failing to communicate the nature of its investigations to the Audit Committee, was *board* approval. One would be hard pressed to fault JPM for satisfying itself with management approval in the London Whale case when such approval was apparently satisfactory in the Morgan Stanley case.[45]

There is one difference between the two enforcement actions that could be seen as legitimizing the SEC's different approach: in the London Whale case, the violations caused JPM to misstate its financials in a quarterly report, while there is no explicit indication that Morgan Stanley misstated its financials as a result of the violation in that case. However, as I discuss further below, distinguishing between the two cases on this ground is unsatisfying for a number of reasons.[46] Perhaps the most salient reason is that while there was no *explicit* allegation that Morgan Stanley misstated its financials in its quarterly reports, its reports would have incorporated gains from its employee's illicit bribery activities,[47] thereby misstating Morgan Stanley's positions. The fact that the SEC refused to call Morgan Stanley out on its misstated financials provides no legitimate ground for distinction.[48] As this discussion illustrates, comparing the SEC's enforcement actions in these two cases illuminates the inherent inconsistency of the SEC's current enforcement paradigm. In the remainder of this Note, I seek to identify the source of this inconsistency, I identify some problems that stem from inconsistent and unpredictable SEC enforcement, and I suggest a potential solution.

II. SEC Mission Creep and the Substitutability Phenomenon

The Securities Act of 1933 (Securities Act) fundamentally altered the organizational framework for U.S. companies by creating a distinction between the public and private ownership of those companies. The Act

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44. Peterson Complaint, *supra* note 39, at 13.

45. And what is expressly required by the terms of the statute. *See* 15 U.S.C. § 78m(b)(2)(B)(i) (2012) (requiring "management's general or specific authorization"). Although it is true that JPM's policies did require its senior management to disclose certain issues to the Audit Committee, *see supra* note 29 and accompanying text, it is unclear why the SEC considered itself to be the proper entity for determining what JPM senior management's obligations to the Audit Committee were under the terms of JPM's own policy.

46. *See infra* notes 111–13 and accompanying text.

47. *See* Peterson Complaint, *supra* note 39, at 4–12 (detailing Peterson's bribery schemes and the various benefits to both him and Morgan Stanley stemming from them).

48. An even more troubling aspect of the SEC's failure to fault Morgan Stanley for its misstated financials emerges from the comparison of the two cases. In the London Whale case, JPM restated its May financials, thereby providing the SEC ammunition with which to prove that JPM had in fact misstated those financials, while Morgan Stanley did not issue a restatement and was not penalized. Thus it would seem that the SEC, by punishing JPM but not Morgan Stanley, tacitly encourages companies to not correct their misstated reports lest they should be penalized for having misstated them in the first place.

accomplished this division by implementing a series of disclosure requirements for companies wishing to sell their securities to the public at-large. Specifically, the Act requires companies making public offerings of their securities to file a registration statement covering those securities,[49] and the Act also prescribes the methods that companies can use when soliciting potential buyers of those securities.[50] At the same time, the Act establishes a number of exemptions for certain transactions, the most important of which exempt transactions not involving a public offering[51] and those not by an issuer, underwriter, or dealer.[52] Exempted transactions, as the name implies, are not subject to many of the Act's registration requirements.[53] In 1933, when the Act was passed, the rationale behind this division was clear: the small, individual, unsophisticated investors burned by the stock market crash of 1929 needed protecting, and it was believed that this protection could be achieved by requiring companies seeking to sell securities to these unsophisticated investors to disclose certain information pertaining to those securities.[54] Given this rationale, the exemption of certain securities from the Act's scope made sense; sophisticated investors—i.e., those to whom companies could sell without exposing themselves to the regulatory requirements of the Act[55]—were presumably without need of the Act's protection. The distinction between nonexempt and exempt securities created by the Act, and the differing regulatory requirements applicable to each category, has led to the evolution of two types of markets for securities in the United States: the public markets and the private markets.

The subsequent development of the Exchange Act has solidified this distinction. That Act created the SEC[56] and located it at the center of the realm of federal securities regulation by investing it with a mandate to regulate in the name of investor protection, market efficiency, and capital formation;[57] in so doing, the Exchange Act provided the foundation for

49. 15 U.S.C. §§ 77e–77g.

50. *Id.* § 77e.

51. *See id.* § 77d(a)(2).

52. *See id.* § 77d(a)(1).

53. THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 4.1[1] (6th ed. 2009).

54. *See* LARRY D. SODERQUIST & THERESA A. GABALDON, SECURITIES REGULATION: CASES AND MATERIALS 2 (7th ed. 2010); Luigi Zingales, *The Future of Securities Regulation*, 47 J. ACCT. RES. 391, 391 (2009). Louis Brandeis succinctly summed up the disclosure ideology: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

55. *See* 17 C.F.R. § 230.506 (2013) (providing an exemption for both sophisticated and accredited investors).

56. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 4, 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78d).

57. *See* 15 U.S.C. § 78c(f); *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/whatwedo.shtml ("The mission of the U.S. Securities and

extensive regulation of the public securities markets. The SEC is the arbiter of the divide between the public and private securities markets, and it has been integral in the implementation of this increasingly detailed, substantive, and complex regulatory regime. The SEC uses the threat (and imposition) of liability to ensure that its regulatory will be done, so companies utilizing the public markets must look to SEC enforcement actions for guidance on what steps they must take to comply with its mandates.[58] As a result, the years have seen entry into the public markets conditioned on compliance with an increasing number of substantive governance requirements[59]—such as those pertaining to internal controls and insider trading—all done in the name of investor protection, market efficiency, and capital formation. But it is no longer clear that the stated rationales for the SEC's regulation of public markets are still the guiding lights behind its actions. Instead, it seems that a number of factors have caused the SEC to lose sight of its purpose, thereby causing it to harm investors, foster the creation of inefficient markets, and impede the growth of capital formation.

Because the SEC is not acting according to the terms of its mandate, the public markets have become increasingly hostile to companies seeking to raise capital in them. This hostility is more problematic now than ever, as the private securities markets are becoming better substitutes for the public markets. This Part identifies some of the potential factors that have caused the SEC to stray from its regulatory mission and briefly details the increasing substitutability of the public and private securities markets in the United States.

A. *The SEC's Mission Creep*

As noted above, the SEC is tasked with protecting investors, fostering efficient markets, and facilitating capital formation. Yet it is not clear that these goals guide SEC decision making. Instead, the SEC appears to be suffering from a kind of mission creep, and a number of political-economic factors may more readily explain recent SEC regulatory activity. Professor Zachary Gubler offers an updated public-choice-theory account that suggests that the SEC is incentivized by a desire to increase its ability to extract regulatory rents by increasing its "political slack."[60] Gubler agrees

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Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.").

58. *See* Stuckwisch & Alexander, *supra* note 7 (commenting that the FCPA's internal control provision "means whatever the SEC says it means" in its enforcement actions).

59. James J. Park, *Two Trends in the Regulation of the Public Corporation*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 429, 434 (2012).

60. Zachary J. Gubler, *Public Choice Theory and the Private Securities Market*, 91 N.C. L. REV. 745, 750 (2013). Gubler defines political slack as "the space within which regulators are left to hand out regulatory rents to particular interest groups, free from the scrutiny of the public." *Id.*

with the underlying assumptions of the traditional public-choice-theory account of the SEC, according to which individuals at the SEC make regulatory decisions that are favorable to particular interest groups in exchange for career support from those interest groups.[61] These decisions often involve adopting regulations whose costs fall disproportionately on smaller companies, thereby increasing the competitive advantage of larger companies in the public markets, where regulation is most prevalent.[62] The traditional account also predicts that the SEC will, through "bureaucratic imperialism," seek to increase its regulatory reach by taking over certain aspects of financial regulation from other agencies.[63] Thus, according to the traditional account, we should expect to see continued growth of the regulated public markets because such growth provides an expanded basis for the SEC to create "regulatory rents" for interest groups.[64]

But the expansion of the public markets has not occurred. Contrary to the predictions of the traditional account, it is the private markets that are expanding.[65] Gubler attempts to reconcile this phenomenon with the traditional public-choice account by suggesting that regulators can only hand out regulatory rents in the absence of public scrutiny and that, in the post-2008 world, avoiding public scrutiny means expanding the private securities markets.[66] Gubler places his analysis in the context of the SEC's approach to the shrinking U.S. initial public offering (IPO) market and argues that the complexity of the problem, the uncertainty as to the correct solution, and the potential for a large amount of public scrutiny should the SEC attempt to bolster the IPO market and fail tacitly encourage the SEC to look to the private markets for a solution that avoids these problems while still providing some measure of market access.[67] As Gubler would put it, the SEC is encouraged to foster the expansion of the private markets because doing so meets the demand for increased security-market access while avoiding the uncertainty and potential public scrutiny surrounding a public-market solution.[68] As evidence for his thesis, Gubler points to recent SEC rulemaking activity, where the SEC has made resales of restricted securities under the Securities Act easier and has refused to make it more difficult to avoid the public markets.[69] This analysis suggests that the

61. *See id.* at 748–50.

62. *See id.* at 748–49.

63. *Id.* at 749.

64. *Id.*

65. *Id.* at 750.

66. *See id.* at 750–51 (detailing the conditions under which a regulator would be incentivized to implement a private-market solution as opposed to a public-market one).

67. *Id.* at 751–52.

68. *Id.* at 752.

69. *Id.* at 765–66. Gubler suggests that one way in which the SEC has refused to make it more difficult to avoid the public markets is its consistent refusal to construe the Exchange Act's "held of record" requirement—the metric under which a company's shareholders are counted in

current thrust of SEC regulatory activity may not be guided by the SEC's stated goals of investor protection, market efficiency, and capital formation but instead may be driven by a desire to increase regulatory rents in an environment devoid of public scrutiny.

Adding to the confusion surrounding the SEC's current enforcement approach is the SEC's post-2008 emphasis on controlling systemic risk. In the wake of the 2008 financial crisis, regulators' chief concern has been understanding and controlling systemic risk.[70] Those in charge of reforming the regulatory system to meet the challenges created by systemic risk have, understandably, conceived of the SEC as having a role in the new regulatory environment.[71] Several commentators have recognized the SEC's new role of systemic-risk regulator by calling attention to the problems inherent in this new role. One such commentator, Professor Steven Schwarcz, has recognized that a comprehensive approach to regulating systemic risk requires attending to a more nuanced set of concerns than the SEC is currently equipped to address. Schwarcz distinguishes systemic risk from other types of financial risk: systemic risk concerns risks "*to* the financial system," not simply risks "*within* the financial system."[72] As such, regulating systemic risk requires taking certain social costs, such as poverty and unemployment, into account.[73] Other commentators have recognized that the SEC is not ideally suited to grapple with these social costs. First, the SEC's normative goals are at odds with the regulation of systemic risk.[74] Accordingly, any role that the SEC could play in such regulation would necessarily be fraught with uncertainty, which would in turn implicate the problems commonly associated with mission creep such as ineffective and expansive policy making that is

determining whether it will be considered to be a public company under that Act—expansively. *Id.* at 766–67.

70. *See, e.g.*, Iman Anabtawi & Steven L. Schwarcz, *Regulating Systemic Risk: Towards an Analytical Framework*, 86 NOTRE DAME L. REV. 1349, 1380–410 (2011) (discussing the need for a comprehensive approach to the regulation of systemic risk, articulating some of the components of such an approach, and applying it to specific financial crises); Hal S. Scott, *The Reduction of Systemic Risk in the United States Financial System*, 33 HARV. J.L. & PUB. POL'Y 671, 672 (2010) (describing systemic risk as "the central problem for financial regulation that has emerged from the 2007–2009 financial crisis"). *See generally* Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193 (2008).

71. *See* DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 43 (2009) (identifying the growth of the derivatives market as a new source of regulatory concern and highlighting the SEC's role in crafting a solution); Scott, *supra* note 70, at 728 (recognizing that certain regulatory proposals have evidenced a fragmented approach whereby the SEC and other regulators have overlapping authority).

72. Schwarcz, *supra* note 70, at 207.

73. *Id.*

74. *See* Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC's Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975, 999 ("The SEC is not charged with managing systemic risk in financial markets . . . ."); Schwarcz, *supra* note 70, at 212.

doomed to failure because it is beholden to too many constituents.[75] Second, the SEC lacks the necessary expertise to properly address systemic risk.[76] This lack of expertise is not surprising given that the SEC is tasked with ensuring investor confidence through efficient markets.[77] As such, the SEC is primarily skilled in the implementation and enforcement of mandatory disclosure rules and antifraud actions—what one commentator has called "lemons problem[s]"[78]—not in managing leverage or otherwise addressing systemic risk.[79]

Nevertheless, one can see the SEC's actions in the London Whale case as indicative of the fact that it has embraced its new role as a regulator of systemic risk—how else to explain the fact that it used the Exchange Act's internal control provisions, initially conceptualized to ensure that companies weren't bribing foreign officials,[80] to impose penalties for JPM's failure to catch trading losses? Indeed, such a conception is consistent with the traditional public-choice theorists' prediction that the SEC will act as a bureaucratic imperialist. The fact that this conception cannot readily be reconciled with Gubler's account demonstrates that the SEC's enforcement priorities have strayed from their stated normative justifications. It is hard to imagine that the SEC's seeking to increase regulatory rents in the absence of public scrutiny, as Gubler suggests is sometimes the case, and its also acting as a regulator of systemic risk are serving the interests of investors, market efficiency, or capital formation. Yet it is just these sorts of problems that the SEC is being called upon to address, and its limited ability to do so has led to unpredictable enforcement, which frustrates the SEC's stated aims.[81] This unpredictable enforcement is particularly problematic now because public and private securities markets are becoming increasingly substitutable.

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75. The problematic nature of this kind of overreaching has been well documented in the case of certain multinational institutions, such as the World Bank. *See* Jessica Einhorn, *The World Bank's Mission Creep*, FOREIGN AFF., Sept./Oct. 2001, at 22, 30 ("The bank embraces an unachievable vision instead of an operational mission because it is under pressure from many different constituencies.").

76. Paredes, *supra* note 74 ("[T]he SEC's expertise does not extend to managing systemic risk.").

77. *See id.* at 999–1000.

78. *Id.*

79. *Id.* at 1000.

80. *See supra* note 43 and accompanying text.

81. *See* Schwarcz, *supra* note 70, at 209 (recognizing that improper government regulation can "disrupt the efficient evolution of markets" and can result in the "loss of economic welfare caused by firms performing fewer transactions"). For an interesting discussion of some of the systemic-risk issues facing the SEC, see Nicholas Lemann, *Street Cop*, NEW YORKER (Nov. 11, 2013), http://www.newyorker.com/reporting/2013/11/11/131111fa_fact_lemann ?currentPage=all.

B. The Substitutability of the Public and Private Securities Markets

The private securities markets in the United States have been expanding.[82] The evidence for this expansion is both anecdotal and empirical,[83] though the reasons for the expansion are not clear. One frequently cited reason for the growth is the Sarbanes-Oxley Act (SOX),[84] passed in 2002, which made the public securities markets much less attractive to companies by imposing a number of governance requirements on companies using those markets; those requirements in turn increased both compliance and liability costs for those companies.[85] In addition to the private-market expansion that SOX's regulatory framework facilitated, some commentators have focused on specific SEC actions that have encouraged the growth of private markets. Professor William Sjostrom, Jr., points to the SEC's adoption, in 1990, of Rule 144A[86] as a significant driver of private-market growth in the United States.[87] Sjostrom argues that the primary benefit of Rule 144A is that it increases the liquidity of the private markets by providing holders of private securities with an avenue for immediate resale.[88] This reduction of the "illiquidity discount"[89] frequently encountered in the private markets was further augmented by the development of a trading market for Rule 144A equity securities.[90] Sjostrom characterizes the development of Rule 144A equity offerings as a response to an increasingly harsh regulatory and litigation environment[91] in

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82. Gubler, *supra* note 60, at 764.

83. *Id.* at 764–65.

84. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered titles of U.S.C.).

85. *See* William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of "Going Private,"* 55 EMORY L.J. 141, 141 (2006) ("The relevant question today is whether regulation has gone so far as to force honest businesses, at least those of modest size, to consider abandoning public markets for less regulated private markets."); Gubler, *supra* note 60, at 763 & n.87 (citing numerous such criticisms); William K. Sjostrom, Jr., *The Birth of Rule 144A Equity Offerings*, 56 UCLA L. REV. 409, 412 (2008).

86. 17 C.F.R. § 230.144A (2013).

87. Sjostrom, *supra* note 85, at 410–11.

88. *Id.* at 411.

89. An illiquidity discount is a reduction in the price of a security that must be made in order for the price to reflect the fact that the security cannot be sold as easily as other securities. *See* RICHARD A. BREALEY ET AL., PRINCIPLES OF CORPORATE FINANCE 873–74 (10th ed. 2011) (discussing the value of liquidity).

90. Sjostrom, *supra* note 85, at 411–12.

91. The harshness of the private-party litigation environment was alluded to in the previous Part, and Professor Sjostrom is not the only commentator to have recognized its potentially adverse effect on the vibrancy of U.S. capital markets. *See, e.g.*, Paul G. Mahoney, *The Development of Securities Law in the United States*, 47 J. ACCT. RES. 325, 326 (2009) ("Market participants often argue that private securities fraud litigation is the single largest factor deterring foreign companies from accessing the U.S. markets . . . .").

the public markets, and he argues for a regulatory regime that further encourages their use.[92]

Indeed, the SEC is a primary driver of the growth of the private securities markets in the United States. And if Professor Gubler is correct, the SEC may be institutionally incentivized to encourage this growth when it is faced with problems that it does not understand or know how to solve. The growth of the private securities markets is not intrinsically concerning. It becomes so when we acknowledge that private securities markets are attractive substitutes for public ones. If the markets were not substitutes, companies would simply bear the additional costs of the public markets, and while this would implicate efficiency concerns, it would not implicate the problems with SEC enforcement patterns that are the focus of this Note.[93] There is evidence that these types of markets are in fact suitable substitutes and that they are becoming increasingly more so, a phenomenon that Gubler and others have recognized.[94] Gubler compares the two types of markets along three metrics: (1) capital raising, (2) capital liquidity, and (3) market price efficiency.[95] In each, he concludes that private markets are becoming increasingly viable substitutes for public ones,[96] and he also highlights the fact that private markets allow their participants to avoid potentially substantial compliance and liability costs.[97]

Of course, the two types of markets are not perfect substitutes. First, despite the existence of mechanisms such as Rule 144A, the private markets are still less liquid than the public ones.[98] This is so because resales of securities in the private markets are hampered by legal restraints, which generally require purchasers to hold their securities for a specified amount of time,[99] and because, at least until recently, developed securities exchanges did not exist in the private markets, making it more difficult for an efficient trading market to emerge.[100] Second, the private markets are largely inaccessible to retail investors—many of whom invest through mutual funds and other similar intermediaries that are effectively prohibited

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92. *See* Sjostrom, *supra* note 85, at 442–48.

93. For a discussion of the substitutability phenomenon, although in a different context, see Daniel A. Crane, *Bargaining over Loyalty*, 92 TEXAS L. REV. 253, 280–84 (2013).

94. *See* Gubler, *supra* note 60, at 757–68 (comparing the two types of securities markets along three metrics and concluding that the private markets are unquestionably expanding); Sjostrom, *supra* note 85, at 432–42 (comparing Rule 144A equity offerings and IPOs and concluding that "a Rule 144A equity offering is now a bona fide alternative to an IPO for a domestic private company").

95. Gubler, *supra* note 60, at 757–58.

96. *Id.* at 758, 761–62.

97. *See id.* at 762–63. Professor Sjostrom has also recognized that these avoided costs are a benefit of the private markets. *See* Sjostrom, *supra* note 85, at 436–39.

98. Gubler, *supra* note 60, at 759.

99. *Id.* at 759–60.

100. *See id.* at 760.

from accessing the private markets.[101] The fact that mutual funds and other market intermediaries have limited access to the private markets is not necessarily a bad thing from the perspective of the companies using those markets because those companies can escape the scrutiny—and increased potential for harmful shareholder litigation[102]—that comes with market-intermediary shareholders, who are among the nation's largest investors.[103] But it is easy to see how shutting off a segment of the securities markets from retail investors does not mesh with the SEC's stated normative purposes: investors are harmed because they are not as diversified as they would otherwise be, markets are less efficient because companies in the private markets are not subject to the monitoring provided by market intermediaries, and capital formation is hindered because companies using private markets don't have access to retail-investor capital. As this discussion suggests, the fact that the private markets can perform many of the functions of the public markets, but at lower cost to companies using those markets, amplifies the problems caused by the SEC's current enforcement paradigm. I now turn to these problems.

III. The Problematic Status Quo and a Path Forward

As discussed in the previous Part, a number of factors may explain the SEC's inconsistent enforcement approach, and this inconsistent approach is particularly problematic given the increasing substitutability of the public and private securities markets. In this Part, I explore the problem of unpredictable SEC enforcement in more detail. First, I focus on SEC enforcement of the Exchange Act's internal control provisions and demonstrate that the current pattern of this enforcement is divorced from the SEC's stated normative goals. Specifically, I illustrate how the SEC's ad hoc enforcement harms investors and companies alike because its unpredictable nature causes companies to act inefficiently. After detailing two of the harms stemming from this inefficiency, I discuss how the current pattern of private-party, as compared to SEC, enforcement under the securities laws suggests a potential solution, and I locate this analysis in the context of the increasing substitutability of the public and private securities markets.

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101. *See id.* at 790, 800 (recognizing the growing importance of mutual funds and related intermediaries as conduits for retail-investor market access and acknowledging that SEC regulations discourage such intermediaries from accessing the private markets).

102. *See* C.S. Agnes Cheng et al., *Institutional Monitoring Through Shareholder Litigation*, 95 J. FIN. ECON. 356, 358 (2010) (finding that "lawsuits with an institutional lead plaintiff are less likely to be dismissed and have significantly larger settlements").

103. Or in some cases, the world's largest. *See BlackRock: The Monolith and the Markets*, ECONOMIST (Dec. 7, 2013), http://www.economist.com/news/briefing/21591164-getting-15-trillion-assets-single-risk-management-system-huge-achievement (detailing the risk-management strategies of BlackRock, the world's largest investor and asset manager, with over $4 trillion in assets under management).

A. Problems with Ad Hoc SEC Enforcement

While the types of harm stemming from inefficient arrangements are many—they include all harms implicated by inefficiency, generally[104]—and their degree is necessarily dependent on context, I will detail two harms that are particularly salient in the context of SEC enforcement actions. First, unpredictable SEC enforcement causes companies to be overly cautious, resulting in inefficient compliance spending. Second, when the SEC imposes penalties on companies themselves, rather than on companies' individual employees, it harms shareholders by decreasing the overall value of the company. After discussing these inefficiencies, I explain how they frustrate the SEC's achievement of its normative goals.

1. Inefficient Compliance Spending.—Because liability is costly in a number of ways, companies are often willing to pay big to avoid it.[105] Participants in U.S. public markets repeatedly demonstrate this willingness.[106] However, willingness to pay should not be mistaken for evidence that compliance costs are optimally set. Instead, unpredictable SEC enforcement increases the likelihood that a company will pay more in order to ensure compliance than that compliance is actually worth. This is so because the imposition of liability, particularly for large companies, carries with it a number of reputational costs, costs that could far exceed any actual liability imposed.[107] Accordingly, in an unpredictable SEC enforcement

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104. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 284–87 (7th ed. 2007) (identifying deadweight loss and rent-seeking behavior as consequences of monopolies).

105. Although, admittedly, the costs of compliance under SOX are somewhat unclear. *Compare* HENRY N. BUTLER & LARRY E. RIBSTEIN, THE SARBANES-OXLEY DEBACLE: WHAT WE'VE LEARNED; HOW TO FIX IT 37–42 (2006) (citing an estimate of the average per-company cost of compliance with SOX as $4.36 million in 2005), *with* PROTIVITI, BUILDING VALUE IN YOUR SOX COMPLIANCE PROGRAM: HIGHLIGHTS FROM PROTIVITI'S 2013 SARBANES-OXLEY COMPLIANCE SURVEY 8 (2013) (finding that 75% of surveyed companies subject to SOX plan to spend less than $1 million on compliance in fiscal year 2013).

106. The study of the London Whale case that began this Note is one example, but others abound. *See, e.g.*, Press Release, Sec. & Exch. Comm'n, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780#.Uuwit_1i499 (announcing the SEC's agreement with Ralph Lauren whereby the clothier would disgorge $700,000 in illicit profits); Press Release, Sec. & Exch. Comm'n, SEC Charges Weatherford International with FCPA Violations (Nov. 26, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540415694#.Uuwh7P1i499 (describing the oilfield services company's agreement to pay the SEC more than $250 million in penalties related to alleged FCPA violations).

107. *See* Donald C. Langevoort, *Deconstructing Section 11: Public Offering Liability in a Continuous Disclosure Environment*, LAW & CONTEMP. PROBS., Summer 2000, at 45, 53–54 (recognizing the potential for reputation effects stemming from liability). *See generally* JENNY RAYNER, MANAGING REPUTATIONAL RISK: CURBING THREATS, LEVERAGING OPPORTUNITIES 135 (2003) ("One compelling reason to ensure that you are complying with relevant laws and regulations is to avoid the reputational damage that almost always ensues when there is a long drawn-out investigation by a regulator or a high-profile court case.").

environment, companies will be willing to pay up to the amount of their perceived reputational costs in order to avoid an enforcement penalty. Indeed, one set of commentators has already recommended that companies follow just such a practice when seeking to comply with the Exchange Act's internal control provisions.[108] However, when the likelihood of liability is known, companies will be able to discount their reputational costs by the likelihood of a penalty, thereby reducing their compliance costs.

The SEC has made compliance with the Exchange Act's internal control provisions particularly difficult,[109] as the London Whale case demonstrates. While it is not entirely clear, it appears that the SEC's primary concern with JPM's internal controls in that case was that JPM's senior management failed to report the existence and status of investigations pertaining to the potential mismarking in Iksil's division to the Audit Committee.[110] Yet requiring JPM's senior management to report its investigation to the Audit Committee raises more questions with regard to compliance than it provides answers. If the Audit Committee had known about the status of the investigations, what would it have needed to do? Would it have been required to add additional disclosure to JPM's quarterly report detailing the risk of inadequate valuations in Iksil's division? This seems unlikely given the fact that JPM and other similar companies already include a number of such disclosures in their periodic reports,[111] so additional disclosure to the same effect hardly seems warranted. Would the Audit Committee have been required to delay the filing of JPM's quarterly report? Again, such a requirement is questionable because a delay would have exposed JPM to late penalties[112] and would have held up other aspects of JPM's business dependent upon the release of its quarterly report. Delaying the quarterly filing raises additional issues: If such a delay is in fact the result that the SEC wanted, what level of certainty with regard to the correctness of the financials did JPM need to have when the report was ultimately released, and who within JPM needed to have that certainty? None of this is to suggest that the SEC should not be imposing these types of requirements on companies—not only would such an argument far exceed the scope of this Note, but it is a normative and empirical claim that

108. *See* Stuckwisch & Alexander, *supra* note 7, at 15–16.

109. *See id.* at 14–16.

110. *See supra* notes 29–32 and accompanying text.

111. *See, e.g.*, JPMorgan Chase & Co., Annual Report (Form 10-K) 17 (Feb. 28, 2013) (describing the risk that it could suffer losses from its employees' violations of internal controls); Morgan Stanley, Annual Report (Form 10-K) 24–25 (Feb. 26, 2013) (same). Indeed, JPM has included a description of this risk in its annual reports since before the London Whale scandal. *See* JPMorgan Chase & Co., Annual Report (Form 10-K) 10 (Feb. 28, 2011).

112. *See* SEC. & EXCH. COMM'N, FORM 10-Q GENERAL INSTRUCTIONS 1 (requiring companies to file quarterly reports within 40 or 45 days after the end of the most recent quarter, depending on the nature of the filer).

few, if any, are equipped to answer. Instead, I simply suggest that the SEC's current enforcement actions raise questions for companies with regard to what is required of them but do not provide answers. My comparison of the London Whale case to the Morgan Stanley case, above, puts the unpredictable nature of liability under the internal control provisions in context and suggests that a change is necessary.[113]

2. *Inefficient Share Price Reductions.*—A further inefficiency arises from the structure of corporate ownership. A company is owned by its shareholders; as equity investors, they are its residual claimants.[114] As residual claimants, shareholders are entitled only to whatever is left of a company after its other claimants, such as its creditors and employees, have been paid off.[115] The SEC was formed largely to protect shareholders; yet when it penalizes a company, it hurts shareholders by decreasing the value of the firm. Penalties imposed at the company level must be paid out of the company's assets, and because the shareholders are the owners of the company, its assets are their assets. And often, these penalties come on top of losses already sustained by the company, as the London Whale case demonstrates,[116] so an SEC penalty has the effect of kicking shareholders when they are already down.

Yet in addition to harming shareholders in this direct sense, such penalties also hurt shareholders indirectly. This indirect damage is most likely to be incurred in those cases in which the absolute harm to shareholders from a penalty may seem minimal (as in the London Whale case, where the penalty was $200 million; a sum that pales in comparison to JPM's market capitalization of just over $210 billion[117]). The potential for indirect harm stems from the fact that diversified shareholders are efficient risk bearers. Specifically, diversification eliminates shareholders' exposure to specific risk[118] because stock prices of different companies (or, at least,

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113. *See supra* notes 43–48 and accompanying text.

114. REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 28 (2d ed. 2009). Recently, a number of commentators have taken aim at the characterization of a company's shareholders as its residual claimants. *See* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1926–30 (2013) (recognizing that when managers' and shareholders' incentives are aligned, creditors bear more risk because managers are encouraged to shift that risk to creditors); Lynn A. Stout, Response, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2013 (2013) ("[I]t is not accurate to treat shareholders as the sole residual claimants in a company that is not insolvent."). While these scholars raise interesting points about the correctness of the residual claimant characterization in certain circumstances, their arguments do not change the theoretical underpinnings of the basic efficiency analysis that I have presented here.

115. *See* KRAAKMAN ET AL., *supra* note 114 at 28 & n.80.

116. *See supra* notes 4–5 and accompanying text.

117. *JPMorgan Chase & Co*, BLOOMBERG, http://www.bloomberg.com/quote/JPM:US (last updated Apr. 25, 2014, 8:04 PM).

118. BREALEY ET AL., *supra* note 89, at 170. Specific risk, which is the risk that a particular

of companies in different industries) rarely move perfectly in tandem, thereby allowing shareholders to minimize the impact of firm-specific losses from one company by offsetting them with the gains that a different company is likely to be experiencing at the same time.[119] The Exchange Act's internal control provisions protect against specific risk—the risk that a particular company's deficient internal controls will cause it to engage in some prohibited conduct, thereby exposing it to liability for violation of those prohibitions (or, in JPM's case in the London Whale scandal, a trading loss of around $7 billion *and* liability). The fact that shareholders can offload specific risk is problematic given the SEC's current pattern of internal control enforcement. Although SEC penalties will harm shareholders of a particular company's stock, those shareholders are presumably diversified and thus will care little about their losses from an SEC penalty. This is so because those losses will be offset elsewhere in their portfolios. Because they will not care, the SEC may feel free to impose penalties on companies, without determining if such penalties are warranted, simply because it can. Indeed, the SEC's willingness to impose these types of penalties has only increased since the 2008 financial crisis because it has been able to use the public's scorn for the banking industry to pressure companies into accepting large penalties to avoid further opprobrium.[120] This rent-seeking behavior is harmful both to investors and to the economy as a whole, and it has the added effect of depressing securities prices in the public markets.

3. Unpredictable SEC Enforcement and Company-Level Penalties Frustrate the Achievement of the SEC's Normative Goals.—The SEC's stated normative goals are frustrated when companies spend inefficiently on compliance and are subjected to rents in the form of unpredictable penalties. And, as the above discussion suggests, the current pattern of SEC enforcement has only exacerbated those inefficiencies. Unpredictable

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company's share price will decline on the basis of some factor specific to that company (such as the commission of securities fraud or losses stemming from inadequate internal controls), can be contrasted with market risk, which is the risk that a company's share price will decline because of some broad-based market factor that affects all companies (such as a central bank's decision to change interest rates). *See id.* Specific risk, unlike market risk, can potentially be eliminated through diversification. *Id.*

119. *See id.* at 169 & fig.7.10, 170 & fig.7.11 (illustrating the moderating effect that diversification has on portfolio values).

120. *See Year-by-Year SEC Enforcement Statistics*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/news/newsroom/images/enfstats.pdf [hereinafter *SEC Enforcement Statistics*] (indicating that the number of SEC enforcement actions has generally increased since 2008). The public's disdain for banks and bankers was perhaps most iconically stated by Matt Taibbi in a 2009 article for *Rolling Stone*, in which he called Goldman Sachs "a great vampire squid wrapped around the face of humanity, relentlessly jamming its blood funnel into anything that smells like money." Matt Taibbi, *The Great American Bubble Machine*, ROLLING STONE (July 9, 2009), http://www.rollingstone.com/politics/news/the-great-american-bubble-machine-20100405.

enforcement harms investors, efficient markets, and capital formation because it increases inefficient compliance spending, thereby reducing the funds that a company has to distribute to its investors as dividends or to reinvest in itself. And company-level penalties that resemble rents also disserve these interests, again by reducing the overall wealth of the company. But these inefficiencies also cause the SEC to lose legitimacy in the eyes of those it regulates,[121] thereby reducing its ability to regulate in the name of its stated normative goals—the more SEC enforcement looks like rent-seeking, the less believable its normative justifications for its actions. I have assumed throughout this Note that government has a role to play in regulating the marketplace, so the prospect of the SEC losing its legitimacy is worrisome. It may be true that the SEC's stated normative goals are no longer appropriate. If so, an explicit change to its mission and agenda needs to be made and articulated; companies cannot be left to glean a change in regulatory mission from unpredictable enforcement. If, however, the SEC still believes that it exists to achieve its currently articulated normative goals, then more rigorous adherence to those normative goals is warranted. As discussed above, this problem is particularly salient now because private securities markets are becoming better substitutes for public ones, which means that companies can better avoid SEC enforcement without sacrificing capital-raising ability.[122] Of course, JPM is unlikely to leave the public markets over $200 million, but this fact only highlights the efficiency concerns implicated by unpredictable SEC enforcement because JPM will remain in the public markets and thus will remain subject to heightened compliance costs and periodic penalties.

More predictable SEC enforcement under the Exchange Act's internal control provisions would ameliorate many of the concerns arising from the inefficiencies detailed above. And while I have not intended to provide a complete discussion of the inefficiencies stemming from the unpredictable enforcement of the internal control provisions, I have located my discussion of the need for a closer look at current enforcement patterns in the broader discussion of SEC mission creep and the growth of the private securities markets, thereby demonstrating the particular urgency of this discussion post-2008. Before offering a potential solution, I examine what the pattern of private-party securities-law enforcement can tell us about where to go from here.

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121. *See, e.g.*, John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 708 (2009) ("[T]he credibility of the SEC as a financial regulator has never been lower."); Joan MacLeod Heminway, *Reframing and Reforming the Securities and Exchange Commission: Lessons from Literature on Change Leadership*, 55 VILL. L. REV. 627, 627 (2010) ("Faith in the SEC's power to regulate has been low.").

122. *See supra* subpart II(B).

B. *What Private-Party Enforcement Patterns Can Tell Us About the Future*

The disclosure principle currently guiding federal securities regulation recognizes that markets are at least somewhat efficient, and thus that the proper regulatory approach is necessarily limited to ensuring that all material information is available to market participants and to policing fraud.[123] Compliance incentives are particularly important under this disclosure-based system because universal participation is a key assumption upon which the system is based.[124] Accordingly, compliance under the Securities Act and the Exchange Act is premised upon two broad liability features: (1) liability for misreporting[125] and (2) liability for fraud.[126] The Acts provide two vehicles for imposing these liability features: (1) lawsuits by private parties[127] and (2) lawsuits and other enforcement actions by the SEC.[128] However, the increasing substitutability of the public and private securities markets suggests that a reexamination of the interplay between the Acts' liability features and the vehicles for the imposition of those features is necessary. This is so because while the public and private securities markets have become increasingly substitutable in terms of capital raising, they have not become substitutable in terms of liability. Specifically, companies' liability costs in the private markets are much lower than in the public markets.[129] This cost differential has the potential to frustrate the SEC's achievement of its stated normative goals because it may induce companies that would otherwise use the public markets, and thus be subject to more extensive SEC regulation, to choose the private markets instead. In the following sections I discuss what the current patterns of securities-law enforcement suggests about the nature of a new enforcement paradigm in the context of increasingly substitutable public and private securities markets. I do so by first focusing on private-party lawsuits under the Acts before turning to SEC enforcement actions.

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123. *See* Mahoney, *supra* note 91, at 328 ("The initial securities laws of 1933 to 1934 focused on mandatory disclosures and antifraud rules, both of which plausibly facilitate contracting in a setting in which buyers rely on better-informed agents.").

124. *See* Goshen & Parchomovsky, *supra* note 9, at 756 (summarizing the various arguments that proponents of mandatory disclosure advance, many of which recognize that the unequal provision of information creates a free-rider problem); *cf.* Luigi Zingales, *The Costs and Benefits of Financial Market Regulation* 19 (European Corporate Governance Inst., Law Working Paper No. 21/2004, 2004), *available at* http://ssrn.com/abstract=536682 (recognizing that one company's disclosure helps investors analyze its competitors but that the disclosing company is not able to internalize this benefit).

125. *See, e.g.*, 15 U.S.C. §§ 77k, 77*l*(a), 78m(a), 78o(d) (2012).

126. *See, e.g.*, *id.* §§ 77q, 78j(b).

127. *See id.* §§ 77k(a), 77*l*(a); Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983).

128. *See, e.g.*, 15 U.S.C. §§ 78u(d), 78u-2, 78u-3. SEC enforcement actions have taken on increased importance given the Supreme Court's trend in narrowing the existence and scope of implied private rights of action. *See* HAZEN, *supra* note 53, § 12.2[1].

129. *See* Gubler, *supra* note 60, at 763.

1. Substitutability and Private-Party Lawsuits.—Private parties can bring lawsuits against companies under both the Securities Act and the Exchange Act. The scope of private-party lawsuits differs somewhat under the two Acts, however. This is because the Securities Act's purpose is to regulate specific securities offerings,[130] while the Exchange Act is designed to regulate particular companies.[131] Accordingly, while the Securities Act's private-party causes of action aim to ensure that all material information pertaining to a specific transaction is provided,[132] private parties can impose much broader liability under the Exchange Act because companies, unlike transactions, engage in a wide variety of activities that implicate the securities markets.[133] Accordingly, private-party lawsuits under the Exchange Act have taken on greater importance than those under the Securities Act.

Further, the *type* of liability that private parties can impose under the respective Acts is also quite different. Under the Securities Act, private parties are limited to imposing strict liability on companies that make material misstatements in the documents they use to offer and sell securities or that omit facts necessary to make the statements made in those documents not materially misleading—private parties cannot enforce the Securities Act's antifraud provision.[134] The Securities Act establishes three main avenues for relief for private plaintiffs. Section 11 allows a plaintiff to recover if a registration statement contains "an untrue statement of a material fact or [omits] a material fact required to be stated therein or necessary to make the statements therein not misleading."[135] Section 12(a)(1) allows recovery against those who offer or sell a security in violation of the prospectus requirements laid out in § 5 of the Act,[136] and § 12(a)(2) allows recovery against anyone who offers or sells a security

130. *See* SODERQUIST & GABALDON, *supra* note 54, at 339 (recognizing that under the Securities Act "it is only technically incorrect to say that the transaction itself is what is registered").

131. *See id.* ("In the case of the Exchange Act, it is only technically incorrect to say that the issuer is what is registered.").

132. *See* HAZEN, *supra* note 53, § 7.1.

133. *See id.* § 9.1.

134. While the issue is somewhat muddled, the consensus seems to be that no private right of action exists under § 17(a) of the Securities Act. *See, e.g.*, Maldonado v. Dominguez, 137 F.3d 1, 6–8 (1st Cir. 1998); Finkel v. Stratton Corp., 962 F.2d 169, 174–75 (2d Cir. 1992); Crookham v. Crookham, 914 F.2d 1027, 1028 n.2 (8th Cir. 1990); Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817, 819–20 (10th Cir. 1990), *abrogated on other grounds by* Rotella v. Wood, 528 U.S. 549 (2000); Sears v. Likens, 912 F.2d 889, 893 (7th Cir. 1990); Newcome v. Esrey, 862 F.2d 1099, 1107 (4th Cir. 1988) (en banc); *In re* Wash. Pub. Power Supply Sys. Sec. Litig., 823 F.2d 1349, 1350–58 (9th Cir. 1987) (en banc); Corwin v. Marney, Orton Invs., 788 F.2d 1063, 1066 (5th Cir. 1986). *But see* Craighead v. E.F. Hutton & Co., 899 F.2d 485, 492 (6th Cir. 1990) (noting that a private right of action under § 17(a) exists in limited circumstances).

135. 15 U.S.C. § 77k(a) (2012).

136. *Id.* § 77*l*(a)(1).

through the use of any prospectus or oral communication that contains an untrue statement of material fact or that omits a material fact necessary to make the statements not misleading.[137]

Private-party enforcement under the Exchange Act plays a decidedly different role than private-party enforcement under the Securities Act. While there is no private right of action under the Securities Act's antifraud provision,[138] the Exchange Act's antifraud provision is the cornerstone of securities-law enforcement. Contained in § 10(b) of the Exchange Act (and fleshed out by Exchange Act Rule 10b-5[139]), the Exchange Act's antifraud provision allows both private investors and the SEC to impose liability on companies in a large number of circumstances.[140] Section 10(b) and Rule 10b-5's expansive scope have given the SEC and private investors substantial influence over corporate decision making, influence not present under the Securities Act. Much of this influence is due to the Supreme Court's adoption, in *Basic Inc. v. Levinson*,[141] of the so-called fraud-on-the-market theory of liability under § 10(b). This theory allows Rule 10b-5 plaintiffs to prove reliance simply by showing that they purchased a security traded in an efficient market—the underlying assumption being that prices in an efficient market reflect all available information, including fraudulent information.[142] While originally articulated simply as a method for proving reliance, the fraud-on-the-market theory has greatly expanded the scope of companies' liability for securities fraud by increasing the likelihood that they will be sued for such fraud.[143] Many justifications have

137. *Id.* § 77*l*(a)(2).

138. *See supra* note 134 and accompanying text.

139. *See* 17 C.F.R. § 240.10b-5 (2013).

140. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) (holding that private parties may sue under § 10(b) of the Exchange Act); *see also* PAUL VIZCARRONDO, JR., WACHTELL, LIPTON, ROSEN & KATZ, LIABILITIES UNDER THE FEDERAL SECURITIES LAWS 51–52 (2012) (calling Rule 10b-5 "by far the most important civil liability provision of the securities laws" and recognizing that an essential element of its importance "has been the early and continued recognition of a private right of action"). The expansiveness of Rule 10b-5 has drawn much ire from critics. *See, e.g.*, Jill E. Fisch, *The Trouble with* Basic: *Price Distortion After* Halliburton, 90 WASH. U. L. REV. 895, 896 & nn.2–3 (2013) (recognizing that the fraud-on-the-market theory adopted by the Supreme Court has been criticized because of the expansive corporate liability it allows and citing commentators who hold this view); A.C. Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 VA. L. REV. 925, 948 (1999) (criticizing the fraud-on-the-market theory for "produc[ing] an enormous increase in liability exposure for corporate issuers"). *But see* William A. Birdthistle, *The Supreme Court's Theory of the Fund*, 37 J. CORP. L. 771, 785 (2012) (arguing that some of the Supreme Court's recent attempts to narrow the scope of the Exchange Act's antifraud provision "damage[] the very structure of private deterrence of wrongdoing in the financial markets").

141. 485 U.S. 224 (1988).

142. *See id.* at 246–47.

143. *See* Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 818 (2009) (recognizing that "*Basic* dramatically facilitated the use of class action litigation in securities fraud cases").

been advanced for *Basic*'s fraud-on-the-market theory, including that it provides compensation for defrauded plaintiffs, that it is a useful deterrent, and that it is a positive governance mechanism, though these justifications have been questioned.[144]

Despite the differing scope of private-party causes of action under the Acts, companies utilizing the private markets can largely escape private-party lawsuits. Liability under §§ 11, 12(a)(1), and 12(a)(2) of the Securities Act can essentially be avoided by issuing securities in the private markets. Section 11, by its terms, only applies to misstatements and omissions contained in registration statements. Because, as discussed above,[145] companies issuing securities in the private markets do not need to file registration statements, they will not be subject to § 11 liability. Similarly, § 12(a)(1) applies to those who offer or sell securities in violation of § 5's prospectus requirements. However, § 5's requirements are also not applicable to those using the private markets to issue securities.[146]

The applicability of § 12(a)(2) is a closer question. By its terms, it applies to any person who offers or sells a security by means of a prospectus or oral communication that contains a material misstatement or omission. The Act defines "prospectus" as "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security."[147] Under this definition, it would seem that communications made by companies issuing in the private markets that meet the Act's definition of "prospectus" would subject those companies to liability under § 12(a)(2). However, the Supreme Court, in *Gustafson v. Alloyd Co.*,[148] mandated a different result. The Court read the Act's broad definition of "prospectus" in conjunction with the Act's provision that requires certain information to be included in certain prospectuses, which is contained in § 10 of the Act.[149] Thus, the language in §10 limited the Act's seemingly broad definition of "prospectus" such that, according to the Court, "the word 'prospectus' is a term of art referring to a document that describes a *public offering* of securities by an issuer or controlling shareholder."[150] By construing the term "prospectus" as applying only to public offerings, the

144. *See* William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 82–132 (2011) (acknowledging these justifications and rejecting each in turn).

145. *See supra* notes 51–55 and accompanying text.

146. *See* 15 U.S.C. § 77d (2012).

147. *Id.* § 77b(a)(10).

148. 513 U.S. 561 (1995).

149. *Id.* at 568–73.

150. *Id.* at 584 (emphasis added). This definition has been the subject of harsh criticism amongst commentators. *See, e.g.*, HAZEN, *supra* note 53, § 7.6[2] (calling the result "unfortunate and erroneous").

Court essentially exempted companies issuing in the private markets from liability under § 12(a)(2).

Similarly, private-party lawsuits under the Exchange Act can largely be avoided by using the private markets. Other than under §§ 10(b) and 14(a), courts have continually refused to recognize implied private rights of action under the Exchange Act,[151] which means that private parties are largely limited to suing for fraud under that Act. But because the fraud-on-the-market theory articulated in *Basic* requires class action plaintiffs to show that a security was traded in an efficient market in order to establish reliance, companies that utilize private markets are essentially immune to private class actions because their securities are, generally, not traded in an efficient market.[152] So, although the Exchange Act's antifraud provisions are technically applicable to companies using the private markets, the need to prove reliance takes much of the bite out of those provisions for companies using those markets. Further, managers of companies utilizing the private markets can also avoid insider trading charges because securities must be publicly traded for insider trading to occur.[153]

A number of commentators, and arguably Congress, have recognized the need to recalibrate the liability calculus for companies choosing between the public and private markets. Congress seemingly recognized the need to reduce the incentive for companies to choose the private markets solely to avoid liability by providing for liability under § 12(a)(2).[154] While, because of the Supreme Court's holding in *Gustafson*, § 12(a)(2) has not been the vehicle for changing incentives that it was perhaps intended to be,[155] commentators have long recognized the need for limits to liability under the Securities Act.[156] Accordingly, other measures have been implemented that serve this purpose, and these measures were taken at least partly in recognition of the potential for inefficient capital raising caused by a company's ability to avoid private-party liability in the private markets.[157] The result has been that certainty under the Securities

151. *See* HAZEN, *supra* note 53, § 12.2[1]; SODERQUIST & GABALDON, *supra* note 54, at 342–44 (providing cases where courts refused to find private rights of action under §§ 12(b)(1) and 13(a) of the Exchange Act). Express private rights of action are available under §§ 9(e), 16(b), and 18(a) of the Exchange Act. HAZEN, *supra* note 53, § 12.2[1] & n.1.

152. *Cf.* HAZEN, *supra* note 53, § 12.10, at 474 ("Actively traded public markets are generally efficient markets.").

153. *See* Elizabeth Pollman, *Information Issues on Wall Street 2.0*, 161 U. PA. L. REV. 179, 217 (2012) (remarking that although the language of Rule 10b-5 reaches private markets, "insider trading actions against private securities traders have been nearly nonexistent to date").

154. *See supra* note 147 and accompanying text; *see also, e.g.*, HAZEN, *supra* note 53, § 7.6[2] (criticizing the Supreme Court's holding in *Gustafson*).

155. *See supra* notes 147–50 and accompanying text.

156. *See, e.g.*, Michael P. Dooley, *The Effects of Civil Liability on Investment Banking and the New Issues Market*, 58 VA. L. REV. 776, 842–43 (1972).

157. *See* Langevoort, *supra* note 107, at 45–46 (detailing a number of measures that the SEC implemented in the 1970s and 1980s in response to certain issuers moving their capital-raising

Act has steadily increased and that the costs of entering the public markets have decreased.[158]

Similarly, efforts have been made to limit the impact of Exchange Act antifraud liability. Most notably, Congress passed, in 1995 and 1998, respectively, the Private Securities Litigation Reform Act[159] (PSLRA) and the Securities Litigation Uniform Standards Act[160] (SLUSA). PSLRA limited Exchange Act antifraud liability by raising the pleading standards for 10b-5 actions,[161] and SLUSA similarly limited liability by preempting intrastate class actions under 10b-5 with more than fifty members.[162] Both acts were designed to reduce companies' exposure to private-party antifraud lawsuits. Further, courts have been narrowing the scope of § 10(b)'s implied right of action,[163] and commentators have repeatedly suggested that the theoretical underpinnings of expansive securities fraud liability are flawed.[164] While I acknowledge that there may be many reasons for the courts' narrowing of the scope of securities fraud liability, I suggest here that it is at least plausible to believe that courts are responding to the efficiency concerns implicated by the ease with which private investors are currently able to hold companies utilizing the public markets liable for alleged violations of the Exchange Act's substantive provisions. Because Exchange Act antifraud liability is disproportionately imposed on companies utilizing the public markets, lowering the likelihood of such liability decreases the expected costs of using the public markets, thereby recalibrating the cost–benefit analysis for companies choosing between the two types of markets. But while such measures have been implemented, or at least called for, in the context of private-party lawsuits, similar measures

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activities offshore). Indeed, some liability costs can be enormous. *See* Scott J. Davis, *Would Changes in the Rules for Director Selection and Liability Help Public Companies Gain Some of Private Equity's Advantages?*, 76 U. CHI. L. REV. 83, 105 (2009) (noting that outside directors of both WorldCom and Enron paid $24.75 million and $13 million respectively to settle § 11 claims and stating that the lack of a scienter requirement and the possibility of even larger damages under § 11 were thought to be factors in those settlement decisions).

158. *See* Langevoort, *supra* note 107, at 46; Park, *supra* note 59, at 436–40.

159. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. (2012)).

160. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.).

161. § 101(b), 109 Stat. at 747.

162. § 101(a)–(b), 112 Stat. at 3227–33.

163. *See* HAZEN, *supra* note 53, § 12.3[3]. A more fundamental narrowing of Rule 10b-5 liability may be on the way. *See* Lyle Denniston, *Court Grants Two Cases (UPDATED)*, SCOTUSBLOG (Nov. 15, 2013, 1:27 PM), http://www.scotusblog.com/2013/11/court-grants-two-cases-7/ (reporting that the Supreme Court has granted certiorari in a case challenging the fraud-on-the-market presumption).

164. *See, e.g.*, Bratton & Wachter, *supra* note 144, at 72 ("The fraud-on-the-market . . . cause of action just doesn't work."); Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207, 209 (2009) (listing failings of private securities litigation).

have not been implemented in the context of SEC enforcement, where they are arguably even more necessary.

2. *Substitutability and SEC Enforcement.*—Like private parties, but to a much greater extent, the SEC has the ability to punish those who violate the securities laws. The SEC's enforcement powers are largely the same under both the Securities Act and the Exchange Act and fall into seven main categories: investigations,[165] the ability to issue cease-and-desist orders,[166] the ability to seek civil penalties in court,[167] the ability to seek injunctive relief,[168] the ability to institute administrative proceedings,[169] the ability to prohibit certain individuals from acting as officers of public companies,[170] and the ability to seek other equitable relief in court.[171] It appears that most SEC enforcement actions are taken pursuant to the Exchange Act because the broad scope of that Act's antifraud provision and its extensive governance provisions give the SEC more latitude in its enforcement decisions and greater leverage when seeking penalties than it would otherwise have under the Securities Act.[172] While SEC enforcement under the Securities Act is far from a dead letter,[173] its incentive effect on companies choosing between public and private markets is small because it applies equally to public and private transactions. Because companies will not be able to escape SEC enforcement under the Securities Act by choosing between markets, its scope will have little effect on their choice.

Unlike under the Securities Act, however, SEC enforcement authority under the Exchange Act does not extend equally to public and private companies. This unequal applicability of SEC enforcement under the Exchange Act stems from the fact that it regulates more conduct than the Securities Act. Because the Securities Act, by its very terms, only regulates those *transactions* involving securities in interstate commerce,[174] SEC enforcement under that Act can only reach securities to which that Act

165. 15 U.S.C. § 78u(a).

166. *Id.* § 78u-3.

167. *Id.* § 78u(d)(3)(A). Under the Exchange Act, the SEC also has the ability to impose civil penalties against certain entities without court approval. *See id.* § 78u-2.

168. *Id.* § 78u(d)(1).

169. *See id.* § 78u-2.

170. *Id.* § 78u(d)(2).

171. *Id.* § 78u(d)(5).

172. *See SEC Enforcement Statistics*, *supra* note 120 (breaking down SEC enforcement actions for the years 2003–2012 and indicating that, in 2012, only 89 enforcement actions pertained to securities offerings, out of a total of 734 enforcement actions).

173. *See supra* note 172 (indicating that the SEC still brings enforcement actions under the Securities Act).

174. *See, e.g.*, 15 U.S.C. § 77e(a)(1) (making it unlawful to use a prospectus to sell any unregistered security through "any means or instruments of transportation or communication in interstate commerce or of the mails").

applies. The Exchange Act, however, regulates a whole host of activities—bribery of foreign officials,[175] internal controls,[176] proxy solicitations,[177] etc.—that do not directly implicate the jurisdiction of the federal securities laws. The SEC can only enforce violations of these more expansive regulations to the extent that it has jurisdiction over them, and the Exchange Act bases that jurisdiction on the fact that a company has securities registered under that Act.[178] It follows that a company without securities registered under the Exchange Act will not be subject to that Act's more expansive regulatory requirements. Further, penalties stemming from these requirements are relatively easy to impose because liability is often strict[179] and because, for a variety of reasons, companies frequently choose to settle disputes rather than bother with drawn-out litigation.[180]

It is easy to see how this unequal applicability potentially distorts incentives for those choosing between the public and private securities markets. A company choosing between the two types of markets will still choose based on which type of market provides cheaper access to capital—however, when evaluating the public markets, it will factor in the potential of SEC penalties for a violation of any one of the various substantive requirements that the Exchange Act imposes on registered companies. Rightly or wrongly, the private markets will look that much better to a company because they do not include the cost of potential SEC penalties for violations of these substantive requirements. Of course, many companies have demonstrated their willingness to bear the costs of more expansive SEC enforcement[181]—which is why much of the SEC's enforcement occurs under its Exchange Act authority. However, this willingness should not be mistaken as evidence of efficient SEC enforcement under the Exchange Act. Instead, the measures taken, or called for, in the private-party lawsuit context to recalibrate the cost–benefit analysis for companies choosing between the public and private securities markets should be used as a model for a similar solution in the context of SEC enforcement. Specifically, any solution should seek to recalibrate the cost–benefit analysis for companies by reducing the costs of utilizing the public markets. The next Part details such a solution.

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175. *Id.* § 78dd-1(a).

176. *Id.* § 78m(a)–(b).

177. *Id.* § 78n(a)(1).

178. *See, e.g.*, *id.* § 78m(a) (imposing internal control requirements on "[e]very issuer of a security registered pursuant to section 78*l* of this title").

179. *See, e.g.*, *id.* § 78u-3(a) (vesting the SEC with the power to seek cease-and-desist orders against anyone who "is violating, has violated, or is about to violate" any of the Exchange Act's provisions and not requiring a showing of scienter).

180. MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW § 15.01 (5th ed. 2009).

181. *See supra* notes 105–08 and accompanying text.

IV. Internal Controls, Market Certainty, and Efficiency: A Potential Solution

Criticisms of SEC enforcement standards are myriad, as are proposed solutions.[182] This Note addresses only one area of SEC enforcement—internal controls—though the solution offered here may find purchase in other enforcement contexts. My solution is as follows: the SEC should restrict its imposition of penalties for internal control violations to those individuals within a company who cause the harm that the internal controls were designed to prevent. This solution has a number of benefits. First, it increases certainty for companies issuing securities in the public markets because they know that they will not be liable for implementing internal controls that fail to find blessing at the SEC. This increased certainty eases many of the efficiency concerns detailed earlier in this Note. Second, this solution makes SEC enforcement more consistent with its stated normative aims, and it also dovetails with the individual liability contemplated by the internal control provisions added by SOX. Finally, this solution leaves the SEC an avenue for prescribing specific internal control mechanisms. Such a solution is particularly pertinent now, after the 2008 financial crisis, because the SEC's mission creep and its institutional incentive to expand the private markets when faced with challenging problems mean that the potential for harm stemming from the inefficiencies detailed above has only increased.

A. An End to Corporate Liability

The Exchange Act's internal control provisions should not subject companies to liability but instead should focus on the individuals who commit internal control violations. While there are many ways in which this solution could be implemented, ranging from informal SEC guidance or interpretive releases to statutory amendment, I suggest that an Exchange Act amendment is the most appropriate way to implement such a solution; an amendment provides the most certainty for companies while still allowing the SEC considerable latitude to pursue necessary enforcement actions. Accordingly, I suggest that the following new subsection be inserted into the Exchange Act immediately following § 13(b)(7)[183]:

> (c) For the purpose of subsections (a) and (b) of this section, no penalty shall be imposed upon any issuer of a security registered pursuant to section 78*l* of this title. All penalties imposed for violations of the requirements contained in subsections (a) and (b) of

182. *See, e.g.*, Stuckwisch & Alexander, *supra* note 7, at 16–17 (discussing the unpredictable nature of SEC enforcement under the Exchange Act's internal control provisions).

183. Because a § 13(c) already exists, my amendment would also contain a conforming amendment renumbering subsections (c)–(r) as subsections (d)–(s).

this section shall be confined to those imposed pursuant to paragraph (5) of subsection (b) of this section.

The benefits and some drawbacks of this solution are detailed below.

B. Benefits

1. Increased Certainty.—Companies choose between the public and private securities markets on the basis of a number of factors, of which the likelihood of liability is one. The SEC's assurance that a company will not be subject to liability under the Exchange Act's internal control provisions allows that company to more efficiently choose between the two types of markets because a company will not choose the private markets simply to avoid liability under those provisions. The steps that have been taken to reform private-party enforcement under the Securities Act and the Exchange Act, discussed above, indicate that such an approach is warranted in the context of SEC enforcement as well, particularly because SEC enforcement is even more unpredictable than private-party enforcement.[184]

Professor James Park has suggested that this phenomenon—more predictable private-party enforcement coupled with less predictable SEC enforcement—may have a regulatory rationale.[185] Park argues that the costs of public offerings, which are largely represented by private-party lawsuits, and the costs of governance reforms, which are largely represented by SEC enforcement actions, are inversely proportional—i.e., regulators may lower the costs of public offerings in order to give themselves more room to implement costlier governance reforms, or vice versa.[186] According to Park, the trend has made public offerings increasingly dependent on the implementation of federally mandated governance measures.[187] But as Park rightly points out, conditioning public offerings on governance reforms is problematic for a number of reasons.[188] Chief among them is the difficulty inherent in comparing the costs of public offerings with the costs of governance reforms.[189] As Park puts it, "[i]t is difficult, if not impossible, to accurately measure the costs, benefits and net effects, of many regulatory changes."[190] This difficulty supports the call for increased certainty that I have made throughout this Note, and my solution provides just such increased certainty by making the costs of the governance reform I have

184. *See supra* subpart III(B).
185. *See* Park, *supra* note 59, at 446–47.
186. *See id.*
187. *See id.* at 431–32.
188. *Id.* at 447.
189. *Id.*
190. *Id.*

focused on—the Exchange Act's internal control requirements—easier to identify.[191]

Because uncertainty is a primary source of inefficiency, the increased certainty that my solution provides will reduce the inefficiency costs that I detailed above.[192] Specifically, my solution would reduce inefficient compliance costs and would result in fewer unnecessary share-price reductions and less rent-seeking. The reduction in inefficient compliance costs is particularly relevant in the current atmosphere of SEC enforcement of the internal control provisions, as my comparison of the London Whale case with the Morgan Stanley case demonstrates.[193] While the two banks had similar compliance procedures, in the Morgan Stanley case the SEC declined to hold Morgan Stanley responsible as an entity, while in the London Whale case, the SEC imposed a $200 million penalty on JPM. Any attempt to reconcile these two cases leaves only one conclusion: adequate compliance means only what the SEC says it means, and there is no way to know what the SEC means *ex ante*. Eradicating corporate liability for internal control failures eliminates the irreconcilable distinction created by comparing the London Whale and the Morgan Stanley enforcement actions because companies will know that they won't face liability for failing to discern and implement a particular internal control. Similarly, but with regard to the effects that unpredictable SEC enforcement has on share prices, my solution would eliminate SEC rent-seeking by making it impossible for the SEC to impose penalties on a company's shareholders for internal control violations by the company's employees. This solution thus recalibrates the efficiency calculus for companies choosing between the public and private securities markets.

A final note with regard to reduced compliance costs is warranted. Others have recognized the need to protect companies from excessive internal control liability, particularly in the context of criminal enforcement. To this end, some commentators have suggested the implementation of an affirmative defense for companies faced with charges of violating the Exchange Act's internal control provisions.[194] One benefit that has been articulated in favor of such a compliance defense is that it would help reduce enforcement uncertainty.[195] My proposed solution goes one step

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191. My solution is also supported by the fact that regulatory reform should generally be incremental. *See* Charles K. Whitehead, *The Goldilocks Approach: Financial Risk and Staged Regulation*, 97 CORNELL L. REV. 1267, 1273–74 (2012).

192. *See supra* subpart III(A).

193. *See supra* notes 43–48 and accompanying text.

194. *See, e.g.*, Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 618; Marcia Narine, *Whistleblowers and Rogues: An Urgent Call for an Affirmative Defense to Corporate Criminal Liability*, 62 CATH. U. L. REV. 41, 79 (2012).

195. *See* Koehler, *supra* note 194, at 629–30.

further by completely precluding corporate liability, thus maximizing certainty. By providing companies with maximum enforcement certainty, my proposed solution eliminates the opaque line-drawing problems that would exist under any less strict regime and that would, at least in the area of SEC enforcement, where strict liability is the name of the game, reduce any putative defense to nothing more than a nominal barrier against penalties.

2. *Normative Consistency.*—My solution also has the benefit of bringing the SEC's enforcement actions into closer alignment with its normative mission. As stated above, the SEC exists to protect investors, maintain efficient markets, and facilitate capital formation.[196] The SEC's current enforcement approach does not achieve any of these goals because the costs of corporate penalties are borne by companies' investors[197]—the very people the SEC was designed to protect—and the uncertainty caused by its approach does not facilitate either efficient markets or capital formation, for the reasons already discussed.[198] Eliminating corporate liability as an option in SEC enforcement of internal control violations will force the SEC to adhere more closely to its stated mission. This is particularly important in the wake of the 2008 financial crisis, as Professor Gubler's arguments[199] concerning the SEC's institutional incentives in the face of uncertainty and as my discussion of the SEC's dubious role in regulating systemic risk[200] demonstrate. My solution would steer the SEC away from the problems that attend all cases of mission creep, such as ineffective and expansive policy making that fails to address specific goals because it is guided by a desire to meet too many ends.[201] My solution would also curtail some of the SEC's institutional-incentive problems by eliminating a method by which it could surreptitiously expand the private markets when faced with the prospect of increased scrutiny because of a public-market failure—such as a failure to adequately control systemic risk.

Further, my solution is in keeping with the increased individual liability that Congress contemplated when it passed SOX. Two of SOX's most well-known provisions require corporate officers to certify that internal controls have been implemented to ensure that financial disclosures are accurate[202] and that those internal controls are adequate.[203] These provisions explicitly vest responsibility for appropriate internal controls in

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196. *See supra* note 57 and accompanying text.
197. *See supra* section III(A)(2).
198. *See supra* section III(A)(3).
199. *See supra* notes 60–69 and accompanying text.
200. *See supra* notes 70–81 and accompanying text.
201. *See supra* note 75 and accompanying text.
202. 15 U.S.C. § 7241 (2012).
203. *Id.* § 7262.

corporate officers, and it is not clear why corporate liability is needed to supplement them. Viewing SOX as establishing a preference for individual rather than corporate liability makes intuitive sense, as the London Whale case also demonstrates. In that case, it is arguable that, absent JPM's discovery of the incorrect valuations in Iksil's division (which was made possible by its existing internal controls), neither the SEC nor JPM shareholders would have ever known about the improper activities that led to JPM's misstated financials. Thus, perversely, by imposing a penalty at the corporate level for inadequate internal controls based on activities that would never have been known but for those controls, the SEC is actually encouraging companies to have internal controls that are worse than what they would otherwise have in order to avoid potential regulatory penalties. Under the current regime, companies will implement internal controls designed to uncover only those individual-employee harms that still hurt the company after having been discounted by the expected regulatory penalty. If an employee's behavior, while still harmful, is less harmful to the company than the expected regulatory penalty, the company will have an incentive to not discover the bad behavior.[204] But individual, rather than corporate, liability avoids such a result because companies know that they will not be liable at an entity level and will be incentivized to implement internal controls designed to effectively uncover all individual-employee harms that hurt the company. Accordingly, it makes sense for the SEC to approach enforcement under SOX with these incentives in mind and to tailor its enforcement practices appropriately.

3. Policy Prescription.—I have assumed throughout this Note that there are benefits stemming from federal corporate-governance mandates,[205] and my solution still allows for the recognition of these benefits. This is so because my proposed statutory amendment requires that all penalties for internal control violations be imposed pursuant to § 13(b)(5) of the Exchange Act. That provision allows for liability not only against persons who violate a company's internal controls, but also against persons who "knowingly fail to *implement* a system of internal accounting controls . . . described in paragraph (2)."[206] Section 13(b)(2) requires every company subject to its requirements to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer" and to "devise and maintain a system of internal . . . controls sufficient to provide reasonable assurances" that management has provided a number of authorizations concerning transactions and assets.[207] These two provisions, read in tandem, vest the SEC with broad latitude to mandate particular internal controls because

204. Or to not disclose it if discovered, which, again perversely, simply leads to more wrongful behavior.

they allow for individual liability for failing to implement any system that the SEC determines is necessary to meet the "reasonable detail" and "reasonable assurances" provisions of the Exchange Act.

Additionally, commentators have recognized the desirability of measured regulatory reform,[208] and policy prescription along the lines suggested by my solution promises to be more measured than its current iteration. The requirement that an individual *knowingly* fail to implement particular internal controls provides a brake against ad hoc prescription of particular internal controls by raising the standard of proof required for liability. By making it harder for the SEC to prove that a particular internal control policy was warranted, and thus increasing the costs of imposing liability, the new statutory scheme requires the SEC to think twice before deciding whether a particular internal control is worth the increased difficulty of imposing it. Further, implicit in the phrase "fail to implement" is the requirement that anyone held liable under this portion of § 13(b)(5) actually has the authority to implement internal controls. This language limits liability in a way that lets companies know *ex ante* who will be on the hook for failures to implement proper internal controls, thereby supplanting the need for SEC policy prescription by ensuring that companies place internal control policy making authority appropriately.

Finally, to the extent that the SEC is concerned with being able to hold individuals liable, it should be relatively clear from the facts of the London Whale case[209] that showing that the responsible individuals acted with the requisite level of culpability will not be difficult in the appropriate case. Recall that in the London Whale case, the senior trader, Martin-Artajo, repeatedly instructed his subordinates to flout JPM's internal policies in order to hide losses, and as the SEC complaint and the DOJ indictments allege, there is plenty of evidence against both Martin-Artajo and Grout.[210] Further, the SEC had similar evidence against Peterson in the Morgan Stanley case.[211] These cases demonstrate that, under my solution, the fact that the SEC has to prove scienter in every case should not be a prohibitive hurdle.

205. *See generally* Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793 (2006) (arguing that federal intervention in state corporate lawmaking may be necessary to provide an adequate level of investor protection).

206. 15 U.S.C. § 78m(b)(5) (emphasis added).

207. *Id.* § 78m(b)(2)(A)–(B).

208. *See, e.g.*, Whitehead, *supra* note 191.

209. *See supra* subpart I(A).

210. *See* SEC Complaint, *supra* note 3, at 8–18; DOJ Indictment, Grout, *supra* note 3, at 6–14; DOJ Indictment, Martin-Artajo, *supra* note 3, at 6–14.

211. *See* Peterson Complaint, *supra* note 39, *passim*.

C. *Drawbacks*

Of course, my solution is not without flaws, two of which I briefly discuss here. First, director and officer insurance and corporate indemnity agreements could ameliorate much of the pain of individual liability, thereby reducing its deterrent effect.[212] Second, settlements will be harder to achieve under my solution because they will reference specific individuals, and individuals have more acute reputational concerns than companies, causing them to fight harder to avoid those reputational costs.[213] While these problems are, at least to some extent, unavoidable, they do not nullify the usefulness of my solution.

With regard to director and officer insurance, it is true that, to the extent that a particular company officer will be insured against liability for an internal control violation, there will exist the moral hazard that he will not fully internalize the risks that attend his actions.[214] However, even officers who are indemnified against liability will suffer the reputational effects of litigation, and thus some incentive will exist for them to avoid engaging in conduct that potentially violates their company's internal controls.[215] Further, the tort principles of vicarious liability still apply, so companies will still have an incentive to ensure that their agents act appropriately to avoid liability through that avenue.[216]

With regard to reduced settlement rates, it is not clear that this is even a problem from an efficiency standpoint. True enough, the SEC relies on a high settlement rate in its enforcement actions,[217] but this does not mean that a high settlement rate is desirable. Indeed, the number of SEC settlements has been very visibly criticized of late,[218] and there is at least some evidence that SEC settlements are simply political expedients rather than intrinsically valuable enforcement tools.[219] Given the uncertainty

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212. Langevoort, *supra* note 107, at 54–55.

213. *See id.* ("Settlements are much easier to achieve when they do not adversely implicate the company's senior executives.").

214. *See generally* JOSEPH WARREN BISHOP, JR., THE LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNIFICATION AND INSURANCE (2011-2012 ed.).

215. James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, LAW & CONTEMP. PROBS., Autumn 1997, at 1, 35–36.

216. *Id.* at 36.

217. Langevoort, *supra* note 107, at 55. The London Whale case is but one of many examples of such settlements. *See supra* note 106.

218. *See* U.S. SEC v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011). In this increasingly infamous order, Judge Rakoff declined to approve an SEC consent order between the agency and Citigroup and reprimanded the SEC accordingly:

> Here, the S.E.C.'s long-standing policy—hallowed by history, but not by reason—of allowing defendants to enter into Consent Judgments without admitting or denying the underlying allegations, deprives the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact.

Id. at 332 (footnote omitted).

219. *See* Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and*

surrounding the efficacy of SEC settlements, the fact that they may be harder to obtain should hardly count against the solution I have proposed here.

Conclusion

Angels are the messengers of the gods. And while comparing Congress to the deities may risk hyperbole, it isn't a stretch to characterize the federal agencies as its messengers.[220] One could even call the SEC an archangel—it is the chief regulator of the nation's financial markets, and it is primarily responsible for ensuring that congressional messages about how to act in those markets are delivered to the markets' constituents. Congress's financial archangel has run into some problems. For the moment, JPM's regulatory woes stemming from the London Whale case may be over. Yet the concerns with the current patterns of SEC enforcement implicated by the London Whale settlement are still very much alive. A reexamination of those enforcement patterns is necessary.

First, the current enforcement structure of the Exchange Act imposes inefficiencies that harm investors, companies, and markets alike because unpredictable SEC enforcement subjects companies using public markets to unnecessarily high compliance costs, reduced share prices, and regulatory rents. Second, the evidence suggests that the current pattern of SEC enforcement is divorced from the stated justifications for that enforcement, and I have suggested that the fact that the SEC's actions are not guided by its stated normative goals is particularly problematic given the increasing substitutability of the public and private securities markets. Because the SEC is no longer guided by its stated normative aims, it suffers from mission creep that harms those within its regulatory ambit. Specifically, the potentially perverse institutional incentives that the SEC faces when confronting difficult regulatory issues, as well as its expansion into the realm of systemic risk, demonstrate that the time for a reexamination of its enforcement approach is now. A possible solution to the problems I have set forth in this Note is to eliminate corporate liability for violations of the

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Exchange Commission, 33 HARV. J.L. & PUB. POL'Y 639, 646 (2010) ("The SEC has rationally pursued this policy of opting for quick settlements because the agency is largely judged on the basis of the number of cases it wins.").

220. *See* Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEXAS L. REV. 1317, 1458–59 (2014) ("When there is a simple principal–agent relationship implicated in federal statutes, it is in the large majority of cases one where Congress is the principal and an executive or independent agency (rather than the Court) is the agent."); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEXAS L. REV. 1137, 1146–47 (2014) ("Statutes are commonly thought to be not only the source of the agency's power but also the primary basis for how the agency exercises its discretion. Thus, the vision of the agency as the maker of decisions is closely tied to an assumption that the agency will act as an agent of the enacting Congress." (footnote omitted)).

Exchange Act's internal control provisions, instead confining such liability to individuals within companies. Such a solution, though not without flaws, eliminates many of the efficiency concerns generated by current SEC enforcement actions, realigns SEC enforcement activity with its stated normative justifications, and still allows the SEC a meaningful avenue for policy prescription. One final point is in order: my hope in this Note has not been to provide a full-fledged articulation and defense of the solution I have proposed—such an analysis would far exceed my limited scope here. Instead, I simply suggest that the solution I have proposed is justified on efficiency grounds and reiterate the need for a serious examination of SEC enforcement principles by locating my analysis within a broader discussion concerning the growth of private markets and the SEC's institutional incentives. My ultimate hope is that the SEC's archangel problems do not continue forever.

—Spencer P. Patton

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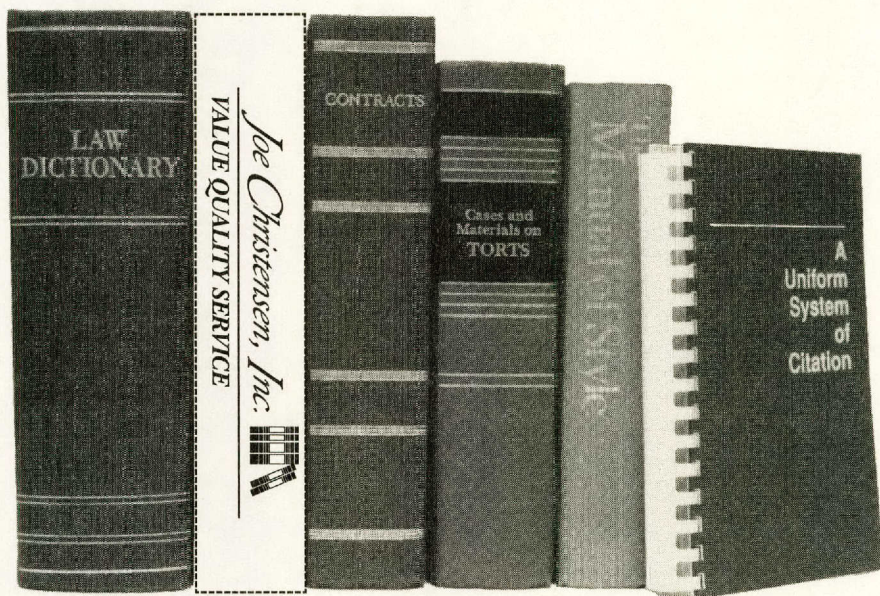

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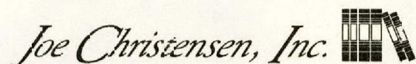

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