



Georgetown University Law Center  
Scholarship @ GEORGETOWN LAW

---

2014

## Overrides: The Super-Study

Victoria Nourse


*Georgetown Law Center*, [vfn@law.georgetown.edu](mailto:vfn@law.georgetown.edu)

This paper can be downloaded free of charge from:  
<https://scholarship.law.georgetown.edu/facpub/1363>  
<http://ssrn.com/abstract=2472111>

---

92 Texas L. Rev. 205-216 (2014)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.  
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Legal History Commons](#), and the [Legislation Commons](#)

# Texas Law Review

## *See Also*

Volume 92

### Response

#### Overrides: The Super-Study

Victoria F. Nourse\*

Statutory interpretation has gone empirical in a big, big way. Earlier this year, the second in the mammoth Gluck–Bressman studies on statutory drafting was published by the *Stanford Law Review*.<sup>1</sup> Now we have the equally mammoth Eskridge–Christiansen overrides study in the *Texas Law Review*.<sup>2</sup> Whether or not one agrees with these studies’ findings, the very idea of supplementing the standard statutory interpretation debates with something more than “big theory” is a delightful move in a pragmatic direction. Rather than debating “law as integrity”<sup>3</sup> or even “textualism,”<sup>4</sup> these authors have jumped in the trenches, labored mightily, and tried to unearth the facts of the matter. As Jerry Mashaw once wrote, without a positive theory of lawmaking institutions, all our normative claims may be fairy tales.<sup>5</sup> One might as well throw all manner of brilliant theories in the trash, if their factual assumptions are wrong.

---

\* Victoria F. Nourse, Professor of Law, Georgetown University Law Center and Director of the Center of Congressional Studies at Georgetown Law.

1. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014) [hereinafter Gluck & Bressman, *Part II*]. For the first part of the study, 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) [hereinafter Gluck & Bressman, *Part I*].

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

3. RONALD DWORCKIN, *LAW’S EMPIRE* 185 (Fontana Press 1986).

4. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1288 (2010).

5. MICHAEL J. GRAETZ & JERRY L. MASHAW, *TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE* 152 (1999).

In 2012, the *New York Times* reported that congressional overrides of judicial decisions had withered to almost nothing in the midst of hyper-partisan crisis.<sup>6</sup> This claim was based on a study by law professor and political scientist Richard Hasen.<sup>7</sup> Professor Eskridge, who had written an earlier study showing far more override activity,<sup>8</sup> questioned the findings. With Christiansen, he embarked on the most ambitious study of overrides ever undertaken. Not only is this study far more comprehensive than any of the others—spanning 275 decisions and 44 years—it uses significantly improved methodology (see below).<sup>9</sup> Because of this methodological advance, it should now be considered the definitive study, the best effort so far to obtain a universe (rather than a sample) of congressional overrides of Supreme Court decisions.

What does the study tell us? There are a number of significant findings, but the following stand out. First, overrides of Supreme Court decisions are not the rare birds one might imagine and some positive theory has predicted;<sup>10</sup> they are, however, declining in numbers.<sup>11</sup> The 1990s was the golden age of overrides, in part because of two super-overrides, the Civil Rights Act of 1991 and the Antiterrorism and Effective Death Penalty Act of 1996, which struck down multiple Supreme Court decisions. Second, overrides are bipartisan, occurring during periods of divided government and high partisanship. The super-overrides are a good example: the Civil Rights Act of 1991 moved in the liberal direction,<sup>12</sup> the Antiterrorism and Effective Death Penalty Act of 1996 in the conservative direction.<sup>13</sup> Third, Congress

---

6. Adam Liptak, *In Congress's Paralysis, a Mightier Supreme Court*, N.Y. TIMES, Aug. 20, 2012, [http://www.nytimes.com/2012/08/21/us/politics/supreme-court-gains-power-from-paralysis-of-congress.html?\\_r=0](http://www.nytimes.com/2012/08/21/us/politics/supreme-court-gains-power-from-paralysis-of-congress.html?_r=0) (quoting Professor Richard L. Hasen).

7. *Id.*

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

9. Christiansen & Eskridge, *supra* note 2, at 1329.

10. *See id.* at 1458 (stating that the 1990s was the “golden age” for overrides). For example, some positive theory suggests that there should be no overrides because, as a strategic actor, the Court will manipulate its doctrine to avoid override. Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT’L REV. L. & ECON. 503, 505 (1996).

11. There is some dispute about why we have seen this decline; Hasen has argued hyper-partisanship, Eskridge and Christensen posit a shift in subject matter area—Congress is focused on matters that are not the bread and butter of judicial interpretation. Eskridge & Christiansen, *supra* note 2, at 1347–53. Another interpretation for which I have only anecdotal evidence is simply that, after 2000, members were elected to the Senate to “destroy the institution” (the words of a staffer in my 2000 study of judiciary committee staffers). *See* Victoria Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 605–10 (2002). There is a difference between large policy differences on a party scale and members who use individual prerogatives to block any action.

12. *See* Christiansen & Eskridge, *supra* note 2, at 1319–20 (providing “examples of broad bipartisan laws that ambitiously reset statutory policies, and in the process, override bushels of Supreme Court opinions”).

13. *Id.*

*does not override because of statutory method* (e.g. textualism or purposivism). The only exception to that rule is the finding that decisions based on the “whole code” doctrine—which presumes Congress uses words consistently throughout the United States Code—are statistically more likely to be overridden.<sup>14</sup>

Overrides should be of interest to a far larger group of scholars than statutory interpretation enthusiasts. We have, in overrides, open interbranch encounters between Congress and the Courts far more typically found in the shadows of everyday Washington politics. Interestingly, Christiansen and Eskridge posit the court-congress relationship as more triadic than dyadic given the role played by agencies. One of their more interesting conclusions is that *agencie are the big winners* in the override game: agencies were present in seventy percent of the override cases and the agency view prevailed with Congress and against the Supreme Court in three-quarters of those overrides.<sup>15</sup> When the Supreme Court rejects the statutory interpretations of agencies, supported by the Solicitor General, it does so at its peril. This suggests that the common wisdom—that agencies often have a better handle than courts on Congress’s meaning because of their closer connections with Congress (through oversight, expertise about the statute, informal communications, etc.)—is true. It also suggests that broad congressional delegation to agencies—traditionally viewed with suspicion by lawyers—may come with a silver interpretive lining.

In this response, I make no attempt to survey the richness of this gargantuan study nor the extraordinary effort it must have taken. It should be of interest to readers of court–congress interaction, students of agency action, scholars of statutory interpretation, and the separation of powers. My aim is not to repeat the study, or even to summarize it, but to provide a parsimonious and helpful lens through which we may understand its intellectual assumptions and accomplishments. In Part I, I address its methodological virtues and vices. In Part II, I posit a fairly parsimonious model that helps to explain the rich Christiansen and Eskridge findings. In Part III, I provide a brief comment on the authors’ recommendations for future action.

## I. The Method: Virtues and Vices

Every empirical study comes with implicit intellectual assumptions. This is nowhere more true than in the empirical methods used to collect data. Christiansen and Eskridge have done something *very important* on the methodological side that may go unnoticed by the average reader: it may sound basic, but counting overrides is actually very difficult and needs to be

---

14. See *id.* at 1405–08 (finding that “[w]here the Court relies significantly on the statutory scheme, or various whole act or whole code canons, it is much more likely to be overridden”).

15. *Id.* at 1321.

responsive to how Congress actually legislates.<sup>16</sup> At the same time, the Christiansen and Eskridge findings, like most other studies in this area, are necessarily limited by their focus—Supreme Court decisions. This raises some questions about whether their findings reflect the larger field of *all* federal statutory interpretation decisions, even if they provide some cautionary lessons for federal courts.

#### A. *Virtues: Understanding the Basics About Congress*

Today, law schools teach a kind of civic illiteracy; they are full of courses on the minutiae of civil and administrative procedure, but none on the very basic congressional procedures by which law is made. The common law, all but dead to members of the Supreme Court, is nevertheless alive and well in law schools. By contrast, the vast lawmaking institutions of our democracy—Congress and the Executive Branch—are studied through the “rear view” mirror, through cases rather than from the “inside.” Empiricism, for all of its potential problems, is a necessary step forward in the battle to remedy this radical gap in law school education. One cannot study Congress, or its actions (such as overrides), without some basic understanding of how Congress operates.

Prior studies in this area, including Eskridge’s own (as he admits),<sup>17</sup> were based on rudimentary, and faulty, assumptions about Congress. Following the ancient, now outmoded Wilsonian wisdom that all things in Congress happen in committee,<sup>18</sup> prior studies (even ones done by political scientists) were based on identifying overrides by looking at committee reports. This will systematically undercount overrides since, in the past 30 years, bills increasingly bypass committee. What Barbara Sinclair once called “unorthodox lawmaking,” has become “orthodox.”<sup>19</sup> As Gluck and Bressman show in their study of the recent Congress many bills simply bypass committee today.<sup>20</sup> Rectifying that here, Christiansen and Eskridge realize that if they are to “find” statutory overrides, they cannot rely, as did the original study, on committee reports to provide them with such information. Instead, they engage in a heroic effort to wade through debates, hearings, and a variety of other congressional sources to locate

---

16. *Id.* at 1331.

17. *Id.* at 1326–28; cf. Richard L. Hasen, *End of the Dialogue? Political Polarization, The Supreme Court, and Congress*, 86 S. CALIF. L. REV. 205, 214–24 (2013) (using the committee report methodology).

18. THOMAS WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 79 (1885) (“Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work.”).

19. Gluck & Bressman, *Part I*, *supra* note 1, at 918, 936, 979, 1022 (explaining “how the ‘textbook’ legislative process no longer exists”).

20. Gluck & Bressman, *Part II*, *supra* note 1, at 756–57 (describing how leadership involvement in statutory drafting allows legislators to remove statutes from the committee process).

overrides. To the extent earlier studies have not used this methodology, they have been superseded by Christiansen and Eskridge.

*B. Vices: All Interpretive Overrides?*

Having hurdled one rather important methodological barrier does not mean, however, that the study solves all methodological problems. What can we really know, many will say, from a study focusing on that oh-so-atypical body, the Supreme Court? Christiansen and Eskridge's universe does not include Congress's track record of overriding lower court decisions. Such overrides do happen. There are celebrated anecdotal examples of appellate cases that the Congress has chosen to override as fast as you can call the roll: notice how quickly Congress overrode a decision from a federal court of appeals branding plea bargaining a bribe!<sup>21</sup> Thus, we do not know from this study the proportion of *all statutory interpretation cases*, decided by the Supreme Court *and the federal courts*, which are overridden. If we expand the denominator, increasing the number of cases from the fraction heard by the Supreme Court to all federal cases, the incidence of overrides is likely to drop dramatically.

Christiansen and Eskridge might respond as follows: we recognize that we have studied the universe of Supreme Court cases, but our findings are generalizable as a sample of all federal court decisions. The problem here is that Supreme Court decisions are unlikely to be a representative sample; they differ from standard appellate decisions along a number of dimensions. First, Supreme Court decisions are skewed toward the politically imperative because the Court chooses its decisions; appellate courts do not have the certiorari discretion accorded to the Supreme Court. Second, Supreme Court decisions are also visible to the public—and voters—in a way that appellate decisions generally are not. How is Congress to override a decision that it does not know about? There are significant barriers to communication between courts and Congress, as Judge Katzmann has explained.<sup>22</sup> These factors will systematically skew the number of Supreme Court overrides relative to lower court overrides. Bottom line: one generalizes from the Supreme Court to lower court behavior, and Congressional response to that behavior, at one's peril.

This scope question provides an important caution about how judges and lawyers should read the Christiansen and Eskridge study. In my first year classes, it is often queried by students, "well, can't Congress just change the law if the court makes a bad statutory interpretation decision?" So, too, judges are increasingly, according to Eskridge and Christenson, signaling to Congress that it should override its statutory decisions if they are wrong.

---

21. *United States v. Singleton*, 144 F.3d 1343, 1343 (10th Cir. 1998), *vacated*, 165 F.3d 1297 (10th Cir. 1999) (en banc).

22. Robert A. Katzmann, *Madison Lecture: Statutes*, 87 N.Y.U. L. REV. 637, 666 (2012).

Lawyers and judges should not confuse findings of overrides, or even a judicial call for an override, with the notion that Congress will in fact respond. Any view that assumes it is easy to pass a statute is wildly uninformed about the difficulty of legislation. It is a bit like comparing running up a hill with running up the Alps, or perhaps in a case of a super-override, running up Everest. Almost by definition (the numbers) one can predict that the average man-hours spent getting the agreement of 535 members, representing a country of 300 million, far exceeds the effort for any Supreme Court decision that has ever been written (9 Justices plus 36 clerks versus 535 members and 30,000 staff). The courts are a tiny institution compared to Congress, and no one should forget that basic fact, else one commit the kind of legally solipsistic error of thinking that the earth (i.e. the judiciary) is the center of the universe.

Let us not diminish, however, what the Christiansen and Eskridge study does say to judges and courts. After all, one of the most important roles of the Supreme Court is to provide guidance to lower courts. Judges and lawyers should now be on notice—for the second time<sup>23</sup>—that some outlier interpretive methods are likely to yield results contrary to Congress's aims. As they explain it, decisions are more likely to be overridden when they are based on "reliance on plain meaning of statutory text, especially when such reliance depends critically on whole act and whole code arguments or flies in the face of strong legislative history."<sup>24</sup> To those of us who study Congress, there is little surprise in this conclusion; after all, empirical studies on Congress tend to suggest that the "whole code" rule is wildly unrealistic<sup>25</sup> and that Congress cannot act without the use of what lawyers call "legislative history"—ergo that Congress uses reports and debate to coordinate meaning. Lower courts, as well as the Supreme Court, should now know that, if their aim is to avoid override, it is wise to confirm their "plain" meanings by reference to actual congressional context—as opposed to hypothesized "whole code" rule or mere assertions that text is "plain."

## II. Congressional Overrides from the Inside

Every empirical study makes intellectual commitments and this one is no different. Overrides require at least two institutions and focusing on the Supreme Court causes one to ask questions one might not ask, as we will see, if one focused on Congress from the inside. Christiansen and Eskridge use what I would call a legal methodology, one which aims to discover why Congress overruled the Supreme Court through the common law method—for example, looking at the subject matters and interpretive methods used in particular Supreme Court opinions. In compiling this information,

---

23. See Eskridge, *supra* note 7, at 335–36.

24. Christiansen & Eskridge, *supra* note 2, at 1321.

25. See Gluck & Bressman, *Part I*, at 933–39; Gluck & Bressman, *Part II*, at 760–761; Nourse & Schacter, *supra* note 10.

Christensen and Eskridge have expended extraordinary effort, providing lengthy and detailed accounts of particular subject matter areas and individual overrides and compiling legislative histories of enormous complexity. The effort is almost mind-boggling when one imagines the review not only of the Supreme Court's cases, the overriding bills, and the debates of about 286 bills.<sup>26</sup> Consistent with this approach, Christiansen and Eskridge argue that there are some subject matter areas far more likely to yield overrides than others. From this, they offer a long list of normative conclusions about court–congress–administration dialogue.

This normative approach leaves one wondering about a very basic question: *why Congress ever overrides*, given the press of business in Congress and seemingly ever-present hyperpartisanship. Positive political theory suggests that overrides should be rare, if not nonexistent (as a strategic player, the Supreme Court will insulate its decisions from override). That invites us to ask: What are Congress's incentives for overriding? And, if we consider those factors, is it possible to obtain a more parsimonious predictive tool? Loosely borrowing from a very famous diagram offered by the political scientist James Q. Wilson to describe the likelihood of different kinds of legislation,<sup>27</sup> I offer a diagrammatic hypothesis about overrides. The diagram below suggests that, from the congressional perspective, there are two major influences: first, whether the decision or the override passes the agenda threshold—meaning that Congress is paying attention;<sup>28</sup> the second is whether the decision to override can be resolved in a bipartisan manner.<sup>29</sup>

	No Override	No Override
AGENDA threshold	YES	NO
BIPARTISAN threshold	NO	YES

I posit that if the issue does not pass the agenda threshold then there is no significant likelihood of an override. Issues for which there is no call for change—whether from a mass public or an interest group—will not motivate

26. See Christiansen & Eskridge, *supra* note 2, at 1330 (describing the methodology employed by Christiansen & Eskridge).

27. JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (1973).

28. DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 36–62 (2004); see also Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 *GEO. L.J.* 1119, 1153–62 (2011).

29. I don't mean that the parties have to agree at a general level, but that at the particular level of the override they have to obtain at least 60 votes to surmount the filibuster barrier in the Senate, which typically involves moving some votes across party lines. See KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998).



legislative action. *Issues must cross a salience or agenda threshold*, given that there is limited time for legislative action. As Christiansen and Eskridge's examples suggest, there may be many statutory interpretation decisions in need of override (in theory, those decisions could vastly outnumber the actual overrides by hundreds or even thousands of statutes), but if the judicial decisions do not catch anyone's attention in Congress, and are not put on the agenda, there will be no override—even if there would be bipartisan support had it risen to the agenda. An override can hurdle the agenda threshold in many ways, by individual action, interest group pressure, major public outcry, or crisis, but it has to hurdle that barrier to be considered.

Even if the potential override passes the agenda threshold, overrides must *also cross a bipartisanship threshold*. Once the issue is on the agenda, the greater the bipartisan support for override, the greater the chance for actual override legislation. Bipartisanship of some degree is necessary to hurdle the filibuster barrier in the Senate (60 votes) and may be necessary to bridge party differences between the House and the Senate. By contrast, if the Congress is hopelessly divided even on a high agenda issue (gun control or the death penalty) there is far less likelihood of override unless the bipartisanship threshold can be hurdled. Based on this metric, I hypothesize the following: that high agenda and high bipartisanship are most likely to yield an override. By contrast, low agenda (no one cares) and low bipartisanship (high internal conflict) are likely not to produce an override.

This model helps to explain a number of the Christiansen and Eskridge findings. First, it explains their principal finding about the *types of overrides*. Christiansen and Eskridge conclude that “overrides are usually not the contentious process that characterized the 1991 [Civil Rights Act] and other dramatic overrides of great interest to the media, law students, and many academics.”<sup>30</sup> Two-thirds of the overrides were what Christiansen and Eskridge characterize as “policy updating,” where there is not a “great deal of negative judgment about the Court's performance,” but the Congress considers its policy judgment, rather than the Supreme Court's, more efficient or wise or popular.<sup>31</sup> Another significant portion of overrides were “clarifying overrides,” even less important in policy terms, but “responding to confusion in the law” or “fine-tuning statutes in ways that have few policy consequences.”<sup>32</sup>

If this is correct, it supports the view that the vast majority of overrides are, just as Christiansen and Eskridge find, capable of bipartisan resolution without tremendous effort—they are not “dramatic,” there is no newsworthy court–congress battle. Only 20 percent of the overrides in their sample dealt

---

30. Christiansen & Eskridge, *supra* note 2, at 1369.

31. *Id.* at 1370.

32. *Id.* at 1373.

with the kind of issues they dubbed contentious or dramatic.<sup>33</sup> To spin this out a bit, consider the outlier case, where there is drama and the issue easily passes the agenda hurdle but is highly contentious and definitely not bipartisan. Christiansen and Eskridge acknowledge that the Civil Rights Act (CRA) of 1991 is the prime example of a major court–congress battle about “restoring” the law to its prior position before Supreme Court interpretation.<sup>34</sup> Anyone who knows even a smidgen about the legislative battle over the CRA of 1991 knows that it was contentious, took years to accomplish, and was the subject of major party battles. It was only passed in the end by overriding the President, which means, by definition, that there is supermajoritarian support for the override.<sup>35</sup>

By contrast, the vast majority of overrides (the 80% defined by Christiansen and Eskridge as “policy-updating” and “clarifying”)<sup>36</sup> are precisely the kind of nondramatic, nonpublicly divisive issues susceptible to bipartisan compromise. Consider the second area Christiansen and Eskridge find yielding a significant number of overrides: federal jurisdiction and civil procedure. Like tax and bankruptcy, the third and fourth areas with a significant number of overrides respectively, one might think these subjects would not even hurdle the agenda barrier—the arcana of tax, jurisdiction, and bankruptcy are hardly dinner table conversation or the subject of voting placards (I “voted for him because of his position on civil procedure?!”). However, interest groups can propel an issue onto the agenda. And, indeed, in the jurisdiction case, as Christiansen and Eskridge explain, it was the plaintiffs’ bar in one case and the business bar in another, that made an “issue” of these jurisdictional questions.<sup>37</sup> Once over the agenda hurdle, the question was whether one could find a bipartisan solution. As Christiansen and Eskridge explain, in the Judicial Improvements Act of 1990, the plaintiffs’ bar managed to find support from President George H.W. Bush;<sup>38</sup> with the bipartisanship hurdle overcome, the override was accomplished. Put in other words, the kinds of issues this study found yielding overrides were not do or die political issues, but instead issues capable of bipartisan compromise once on the agenda.

This metric also helps to explain the “winners” Christiansen and Eskridge find in this process. They conclude that the federal government

---

33. *Id.* at 1369–75.

34. *Id.* at 1374.

35. See Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1464–1469 (1994) (relating the process by which the 1991 Civil Rights Act was eventually signed into law, including an original veto and many subsequent re-negotiations); Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 53 (1993) (characterizing the Civil Rights Act that President Bush signed into law as “hotly debated”).

36. Christiansen & Eskridge, *supra* note 2, at 1370–74.

37. *Id.* at 1382.

38. *Id.*

and, to a lesser extent, state and local governments are “big” winners in the override process.<sup>39</sup> Again this should not be surprising from the perspective of the agenda–bipartisanship model. Winners like the federal and state governments have significant clout to get items on the congressional agenda.<sup>40</sup> Members of the federal government deal with members of Congress on a regular basis through letters, at cocktail parties, and more importantly at oversight hearings. The Attorney General can easily send up a list of his favorite Supreme Court override candidates. Members of the Senate and the House also typically have ties to local government officials—both “ties of representation” (they are representing the same voters) and “ties of party” (they may have party affiliations). Because of these ties, state and local politicians are also capable of hurdling the agenda threshold. Finally, in one of the most striking findings, Christiansen and Eskridge conclude that agencies are the biggest winners.<sup>41</sup> It should be no surprise that agencies can have, and have had, a strong interest in getting an issue on the congressional agenda, particularly when their views have effectively been “dissed” in the Supreme Court.

Finally, this metric explains the converse phenomenon: no override. For example, it explains why Congress does not override particular methods of statutory interpretation. No one ever lost an election by saying “I’m for purposivism.” Methods of statutory interpretation are the arcana of a lawyerly elite and are unlikely to hurdle the agenda bar. Although law professors repeatedly call on Congress to do something about interpretive regimes, the only way this will happen is if “interpretation” hurdles the agenda threshold, and there is no reason in votes or interest groups to suggest that is the case outside a particular controversy of public import. That some state legislatures have enacted interpretive rules does not suggest to the contrary—no single state is the leader of the free world, with lots of other things to do than to adopt a “plain meaning” rule the courts have already adopted. Less obviously, it also explains why statutes sorely in need of override, that affect millions of people, never yield a congressional response. Christiansen and Eskridge decry the failure to override decisions interpreting ERISA, a law affecting a pension network covering millions of citizens.<sup>42</sup> On both the agenda and bipartisanship scores, however, ERISA overrides are not likely. Dispersed majorities often suffer without interest groups to bring their issues onto the agenda, and here, as Christiansen and Eskridge

---

39. *Id.* at 1376.

40. See George Tsebelis & Bjørn Erik Rasch, *Government and Legislative Agenda Setting: An Introduction*, in *THE ROLE OF GOVERNMENTS IN LEGISLATIVE AGENDA SETTING* 2, 5 (George Tsebelis & Bjørn Erik Rasch eds., 2011) (explaining legislative agenda setting as a function of “institutional” power, which are constitutional entitlements or procedural rules that allow governments to control what issues make it on the agenda, and describing the legislative process as a “scarce resource” that the government can control through its own agenda-setting).

41. Christiansen & Eskridge, *supra* note 2, at 1377–79.

42. *Id.* at 1366–67.

themselves note, the relevant interest groups (unions and business) are locked in a combat unlikely to reach bipartisan solution.

To conclude, consider an example showing how an override can move from the unlikely category to the super-override category along the lines I have described. Christiansen and Eskridge classify the habeas reform of 1995 as a “super-override.”<sup>43</sup> On the other hand, they argue that most of the law was in fact “policy-updating.” Given that I was involved with this statute while working as a congressional staffer, I can report the following: In fact, there was substantial contention (and debate) about habeas in large part because Supreme Court Justices put habeas on the legislative agenda;<sup>44</sup> but it went nowhere. From 1991–1993, the Senate debated, and redebated, habeas, including items such as whether to overrule the *Teague v. Lane* habeas retroactivity rule (arcane to most lawyers, but highly important to death penalty litigators).<sup>45</sup> Nothing happened, despite year after year of debate (the issue was first broached in bills introduced in the Reagan administration in the 1980s), because there was no bipartisan solution.<sup>46</sup>

With so much contention, why did habeas reform ultimately yield a super-override? It hurdled the bipartisanship barrier. Major public events can push an item over the agenda threshold to “must pass” category. By “must pass” I mean a bill that has an effect upon members’ electoral future. In the habeas case, it took the Oklahoma City Bombing to yield a super-override statute.<sup>47</sup> Why? Because of the implications of habeas for terrorists subject to the death penalty. These implications had electoral consequences. The question to the public would be whether the legislator coddled terrorists. Once the electorate was perceived as imposing bipartisan costs at the next election, the legislators cobbled together an override bill that few lawyers might have recommended—by pasting republican and democratic bills together, yielding what many statutory interpreters term a mess, but a mess capable of hurdling the bipartisanship barrier.<sup>48</sup>

If I am correct, then a rather parsimonious matrix can, in theory at least (it is subject to empirical verification), increase the likelihood of an override,

---

43. *Id.* at 1371–72.

44. *Violent Crime Control Act of 1991: Hearing on S. 618 and S. 635 Before the S. Comm. on the Judiciary*, 102d Cong. 14 (1991) (statement of Hon. Richard L. Thornburgh, Att’y Gen. of the United States).

45. *See, e.g.* 137 CONG. REC. S18,235 (July 15, 1991) (statement of Sen. Spector) (discussing habeas corpus reform).

46. *See* Charles Doyle, *Antiterrorism and Effective Death Penalty Act of 1996: A Summary* (June 3, 1996), <http://www.fas.org/irp/crs/96-499.htm> (stating that the Antiterrorism and Effective Death Penalty Act of 1996 is the product of legislative efforts stretching back well over a decade).

47. *See* CHARLES DOYLE, CONG. RESEARCH SERV., 96-499A, ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: A SUMMARY (1996), *available at* <http://www.fas.org/irp/crs/96-499.htm> (stating that the Antiterrorism and Effective Death Penalty Act of 1996 was passed in response to the Oklahoma City bombing)

48. Larry Yackle describes this in a lengthy article. Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

the likelihood of no override, and the likelihood that a bill will move from one category to another. I hope that, in future work, students of overrides will take the extraordinary cornucopia of information provided in the Christiansen and Eskridge super-override study to test this hypothesis.

### III. Normative Implications

Christiansen and Eskridge conclude their study with a variety of normative recommendations largely sympathetic to overrides.<sup>49</sup> They, like others before them, find a court–congress dialogue something to be encouraged.<sup>50</sup> They argue that overrides serve a number of values, including the rule of law and democratic transparency.<sup>51</sup> The last fourth of the article is a lengthy exegesis of the virtues of overrides as a part of our system of government.<sup>52</sup> Of particular interest are their conclusions as they apply to the “triadic” relationship to agencies, which turn out to be big winners here. I leave it to the readers to determine whether in fact they agree with these normative claims about the virtues of overrides. I would simply caution scholars to remember the transaction costs of the override enterprise and the relative size of the institutions. We are talking about the Supreme Court, with 9 Justices, 36 clerks, and maybe a few hundred employees, against 535 members and 30,000 staffers, representing 300 million people. Whose time do we want to waste on matters that Christiansen and Eskridge acknowledge are not the major political issues of our time? Overrides can be enormously costly, requiring decades of efforts to achieve the agreement of 535 members and the President. This is time taken away from war, poverty, budgets monetary policy, and climate change in the greatest free nation on earth.

Christiansen and Eskridge are correct, in my view, to begin to imagine a way in which the vast bulk of the quotidian overrides (and they themselves suggest the vast majority of overrides are quotidian from a political perspective) can be accomplished more easily. They propose a variety of institutional solutions. My response is this: any real solution will require an institution that can put the issue on the agenda, and force a bipartisan solution. It is not a matter for technocrats inside any department (e.g. the Justice Department) or within the Congress (e.g. professional legislation drafters). The only way out of override politics is through it, which will require an institution with significant stature and political background to respond to Congress’s institutional realities—to force an issue on the override agenda, and cobble together a bipartisan group to pass the override.

---

49. Christiansen & Eskridge, *supra* note 2, at 1439–79.

50. *Id.* at 1439–40.

51. *Id.* at 1464–65.

52. *Id.* at 1439–79