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In Congress's Paralysis, a Mightier Supreme Court

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Lilly Ledbetter, third from left, with members of Congress. A measure bearing her name is an example of a legislative override of a court decision.

WASHINGTON — The [Supreme Court](#) does not always have the last word. Sure, its interpretation of the Constitution is the one that counts, and only a constitutional amendment can change things after the justices have acted in a constitutional case.

But much of the court's work involves the interpretation of laws enacted by Congress. In those cases, the court is, in theory at least, engaged in a dialogue with lawmakers.

Lately, though, that conversation has become pretty one-sided, thanks to the legislative paralysis brought on by Congressional polarization. The upshot is that the Supreme Court is becoming even more powerful.

Here is the way things are supposed to work. In cases concerning the interpretation of ambiguous federal statutes, the justices give their best sense of what the words of the law mean and how they apply in the case before them. If Congress disagrees, all it needs to do is say so in a new law.

The most prominent recent example of this dynamic was [Ledbetter v. Goodyear Tire and Rubber Company](#), the 2007 ruling that said Title VII of the Civil Rights Act of 1964 imposed strict time limits for bringing workplace discrimination suits.

[In her dissent](#), Justice Ruth Bader Ginsburg reminded lawmakers that on earlier occasions they had overridden what she called “a cramped interpretation of Title VII.”

“Once again,” she wrote, “the ball is in Congress's court.”

Congress responded with the [Lilly Ledbetter Fair Pay Act of 2009](#), which overrode the 2007 decision.

This sort of back and forth works only if Congress is not paralyzed. An overlooked consequence of the current polarization and gridlock in Congress, [a new study found](#), has been a huge transfer of power to the Supreme Court. It now almost always has the last word, even in decisions that theoretically invite a Congressional response.

“Congress is overriding the Supreme Court much less frequently in the last decade,” Richard L. Hasen, the author of the study, said in an interview. “I didn’t expect to see such a dramatic decline. The number of overrides has fallen to almost none.”

The few recent overrides of major decisions, including the one responding to the Ledbetter case, were by partisan majorities. “In the past, when Congress overturned a Supreme Court decision, it was usually on a nonpartisan basis,” said Professor Hasen, who teaches at the University of California, Irvine.

In each two-year Congressional term from 1975 to 1990, he found, Congress overrode an average of 12 Supreme Court decisions. The corresponding number fell to 4.8 in the decade ending in 2000 and to just 2.7 in the last dozen years.

“Congressional overruling of Supreme Court cases,” Professor Hasen wrote, “slowed down dramatically since 1991 and essentially halted in January 2009.”

Tracking legislative overrides is not an exact science, as some fixes may be technical and trivial. And there may be other reasons for the decline, including drops in legislative activity generally and in the Supreme Court’s docket.

But scholars who follow the issue say that Professor Hasen has discovered something important. “Particularly since the 2000 elections, there has been a big falloff in overrides,” said William N. Eskridge Jr., a law professor at Yale and the author of [a seminal 1991 study](#) on which Professor Hasen built his own. “It gives the Supreme Court significantly more power and Congress significantly less power.”

Richard H. Pildes, a law professor at New York University, said the findings were further proof that “the hyperpolarization of Congress is the single most important fact about American governance today.” It is, he said, a phenomenon that has “been building steadily over the last 30 years and is almost certainly likely to be enduring for the foreseeable future.”

“The assumption,” he added, “has long been that when the court interprets a federal statute, Congress can always come back in and fix the statute if it disagrees with the court. Now, however, the court’s decisions are likely to be the last word, not the first word, on what a statute means.”

The justices are alert to their increasing power. In arguments in March over the constitutionality of the centerpiece of President Obama's health care law, Justice Antonin Scalia mused about what should happen if the key provision were struck down. (It wasn't, of course.)

Leaving the balance of the law in place so that Congress could revise it as it saw fit would not work, he said. "You can't repeal the rest of the act," he said, "because you're not going to get 60 votes in the Senate to repeal the rest."

If Congress is incapable of responding to Supreme Court decisions with overrides, it may react in other ways, notably through the confirmation process. "The big question," Professor Hasen wrote, "is whether the increasing partisan opposition to Supreme Court nominees on ideological grounds will lead senators to begin to consider filibustering Supreme Court nominees from the other party."