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"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis

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"LET CONGRESS DO IT": THE CASE FOR AN ABSOLUTE RULE OF STATUTORY STARE DECISIS†

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The sporadic way that various members of the Supreme Court and the legal community treat the principle of stare decisis is increasingly striking.[1] At times, the rule of stare decisis appears to be trotted out in defense of decisions that were actually reached on quite independent grounds. At other times, the dictates of the rule appear to be casually ignored when other factors call for the overruling of a precedent. It is tempting, therefore, to dismiss the rule of stare decisis as a mere rhetorical device, much like the question of whether a Supreme Court nominee's judicial philosophy is an appropriate subject of senatorial inquiry.[2] For example, in the 1960s, when the Warren Court was in

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1. As used in this article, stare decisis refers to the concept of horizontal stare decisis, rather than vertical stare decisis. *See* Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis,* in PRECEDENT IN LAW 81-82 (L. Goldstein ed. 1987). Vertical stare decisis is the rule binding a lower court to adhere to the decisions of higher courts in its jurisdiction. For example, a federal district court is generally considered duty bound to attempt faithfully to apply the precedents of the Supreme Court and of the court of appeals for the circuit in which it sits. Horizontal stare decisis — the rule followed by a court in dealing with its own prior decisions — is quite different. In this country, there has been no unbending rule obliging a court to adhere to its earlier precedents. Instead, it is the recognized authority of a court to overrule its earlier rulings. The "[Supreme] Court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction." Helvering v. Hallock, 309 U.S. 106, 121 (1940) (footnote omitted). *See generally* Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case,* 21 TEXAS L. REV. 514, 523 (1943).

2. *See* Califano, *The '68 Version of the Bork Debate,* N.Y. Times, Sept. 14, 1987, at A19, col. 2 (describing Republican opposition to the nomination of Justice Fortas to be Chief Justice); *A Side-Bar Battle,* N.Y. Times, Sept. 4, 1987, at A14, col. 1 (describing partisan attempts to discredit positions taken by Senators Strom Thurmond and Edward Kennedy regarding the Bork nomination, by comparing those positions with the ones they had taken previously with respect to the nominations of Abe Fortas and Abner Mikva); *see also* Tushnet, *Principles, Politics, and Constitutional Law,* 88 MICH. L. REV. 49 (1989).

its most activist stage, conservative critics routinely attacked the Court's willingness to overrule or ignore precedent.[3] In the 1980s, by contrast, it is the liberal critics who tend to attack conservative majorities of the Court for failing to adhere to stare decisis,[4] accusing them of abandoning their conservatism.[5] A recent assistant attorney general of the United States went so far as to claim that "stare decisis has always been a doctrine of convenience, to both conservatives and liberals. Its friends, for the most part, are determined by the needs of the moment."[6] The spate of recent overrulings[7] adds support to this depiction of the rule.

Sometimes, though, the Court actually seems to consider itself bound to adhere to a precedent because of the stare decisis principle. In *Patterson v. McLean Credit Union,* [8] for example, the Court shocked the legal community by unanimously reaffirming *Runyon v. McCrary,* [9] a case extending the reach of an important civil rights statute to private acts of discrimination. Although five Justices earlier had announced their intention to reconsider *Runyon,* [10] the Court's ultimate decision was a hearty endorsement of stare decisis. The Court extolled the values the rule serves, and the role it plays in helping the courts in the "difficult task of fashioning and preserving a jurisprudential sys-

3. *See, e.g.,* Israel, Gideon v. Wainwright, *The "Art" of Overruling,* 1963 SUP. CT. REV. 211; Kurland, *The Supreme Court, 1963 Term — Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government",* 78 HARV. L. REV. 143, 169-75 (1964).

4. "The Court's determination now to reach out to reconsider [Runyon v. McCrary, 427 U.S. 160 (1976)] and everything that has been built upon it, is neither restrained, nor judicious, nor consistent with the accepted doctrine of *stare decisis.*" Patterson v. McLean Credit Union, 108 S. Ct. 1419, 1421 (1988) (Blackmun, J., with whom Brennan, Marshall, and Stevens, JJ., joined, dissenting from order that case be reargued); *see also* Kennedy, *Justices to Hear Challenge to Bias Ruling,* Boston Globe, Oct. 12, 1988, at 3 (describing liberal reaction to Court's decision to reconsider *Runyon*).

5. Charles Cooper rhetorically asks whether it is not "amusing that liberals, who only recently have perceived the profound value of 'stability of the law,' have taken to lecturing conservatives on what it takes to be a true conservative?" Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication,* 73 CORNELL L. REV. 401, 401 (1988).

Such labels ignore the difficulty of defining what is a "judicial conservative" or what constitutes "judicial restraint." Some define a judge as conservative or restrained if she "adheres to a very strict doctrine of stare decisis." Wasserstrom, *The Empire's New Clothes* (Book Review), 75 GEO. L.J. 199, 294 (1986). Others, such as Judge Richard Posner, argue that judicial restraint describes a judge's unwillingness to reject decisions of the political branches, and has little, or nothing, to do with adherence to precedent. *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 207-10 (1985).

6. Cooper, *supra* note 5, at 402 (footnote omitted).

7. *See infra* notes 26 & 36.

8. 109 S. Ct. 2363 (1989).

9. 427 U.S. 160 (1976).

10. *See* Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988) (ordering parties to brief and argue "[w]hether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary* . . . should be reconsidered").

tem that is not based upon 'an arbitrary discretion.' "[11] What makes the case so meaningful is the Court's concession that some of its Justices continued to believe that "*Runyon* was decided incorrectly,"[12] and the strong sense that the decision reached was inconsistent with many of the Justices' political philosophies. At least as applied in *Patterson,* stare decisis was far more than a post-hoc rationalization for the Court's decision.

The uncertainty about the current status of stare decisis can be attributed, at least in part, to the fuzziness of the stare decisis principle itself. Because the current rule allows the Court to overrule precedents where there is some "special justification,"[13] a term which the Court has never clearly defined, it is often impossible to assess whether a decision has or has not been faithful to the stare decisis principle.[14] In any event, the perception that stare decisis is being eroded is a matter of considerable consequence. Once some members of the Court begin to treat precedent lightly, other members of the Court are increasingly likely to refuse to conform to the dictates of precedent.[15] On a larger scale, once one majority overrules some of a previous majority's decisions, it is difficult to demand that successor majorities respect *their* predecessors' precedents.[16]

In some respects, these problems are inevitable in a system that attempts delicately to balance the stability of the law with the obvious need occasionally to overrule some pernicious precedents. Unless we

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11. *Patterson,* 109 S. Ct. at 2370 (quoting THE FEDERALIST No. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888)).

12. 109 S. Ct. at 2370. Perhaps an argument can be made that the decision to reaffirm *Runyon* was not really based on stare decisis, but was a response to the remarkable public outcry accompanying the Court's announcement that it would reconsider *Runyon.* But the public outcry was itself connected to the special concerns surrounding the overruling of precedent. It seems clear, then, that stare decisis played a critical decisional role in the *Patterson* case. *See* Marshall, *In One Case, a Positive Development the Critics Shouldn't Ignore,* Chicago Tribune, June 21, 1989, at C19.

13. 109 S. Ct. at 2370 (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

14. Judge Easterbrook describes the rule as "a grand balancing test, with neither a maximand nor weights to produce a decision when the criteria conflict, as they always do." Easterbrook, *Stability and Reliability in Judicial Decisions,* 73 CORNELL L. REV. 422, 422 (1988).

15. *See generally* R. AXELROD, THE EVOLUTION OF COOPERATION 8-9, 206-09 (1984) (perception that other party will not cooperate, or is "defecting," will cause rational actor to defect in order to avoid complete loss, a "sucker's payoff"). For an exceptionally candid admission in this regard, see Atascadero State Hospital v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting) (attributing his willingness to overrule certain eleventh amendment precedents to the fact that a majority of the Court had "not felt constrained by stare decisis" in deciding another eleventh amendment case one Term earlier).

16. *See* Easterbrook, *supra* note 14, at 429. James Boyle describes "a kind of *angst* experienced by liberals who can find no formal, qualitative distinction between the attitude towards constitutional precedent shown by today's Supreme Court and that shown by the Warren Court." Boyle, *Legal Fiction* (Book Review), 38 HASTINGS L.J. 1013, 1019 (1987).

are willing to live with decisions such as *Plessy v. Ferguson,* [17] or are willing to rely on constitutional amendment to overrule them, stare decisis cannot be cast in absolute terms. Once an absolute rule of stare decisis is rejected, however, there is no objective test for gauging adherence to the rule of precedent. The identical constitutional precedent, say *Roe v. Wade,* [18] can be one Justice's *Plessy v. Ferguson* and another's *Brown v. Board of Education.* [19] Can the Justice who takes the former view be criticized for ignoring the role of precedent if he or she votes to overrule *Roe?*[20]

Based on this realization about the need for change in some areas of the law, the Supreme Court has repeatedly demonstrated its willingness to overrule decisions construing the Constitution.[21] The most notable recent example is the Court's dramatic triple flip-flop in deciding whether the tenth amendment imposes any justiciable constraints on Congress' commerce power. In its 1976 decision in *National League of Cities v. Usery,* [22] a 5-4 majority overruled a number of precedents construing that amendment, including *Maryland v. Wirtz,* [23] a case that had been decided by a 6-2 vote only eight years earlier. The Court did not even consider itself compelled to grapple with the issue of stare decisis. Later, in 1985, a 5-4 Court in *Garcia v. San Antonio Metropolitan Transit Authority* [24] reversed *Usery,* dismissing the need to adhere to precedent in a terse penultimate paragraph.[25] There are many other examples of this rather casual treatment of constitutional precedent.[26] Taken together they demonstrate that the Court has

17. 163 U.S. 537 (1896) (holding that "separate but equal" treatment of blacks did not violate the fourteenth amendment).

18. 410 U.S. 113 (1973) (establishing woman's fundamental right to abortion).

19. 347 U.S. 483 (1954) (overruling *Plessy* with respect to public education).

20. *Cf.* Webster v. Reproductive Health Servs., 109 S.Ct. 3040, 3064-67 (1989) (Scalia, J., concurring in part and concurring in the judgment) (calling on Court to reconsider *Roe*).

21. *See generally* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law,* 1980 WIS. L. REV. 467.

22. 426 U.S. 833 (1976).

23. 392 U.S. 183 (1968).

24. 469 U.S. 528 (1985).

25. The relevant language was:

> We do not lightly overrule recent precedent. We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. *See United States v. Darby,* 312 U.S. 100, 116-17 (1941). Due respect for the reach of congressional power within the federal system mandates that we do so now.

469 U.S. at 557.

26. *See, e.g.,* Thornburgh v. Abbott, 109 S. Ct. 1874 (1989) (overruling Procunier v. Martinez, 416 U.S. 396 (1974)); Solorio v. United States, 483 U.S. 435 (1987) (overruling O'Callahan v. Parker, 395 U.S. 258 (1969)); Batson v. Kentucky, 476 U.S. 79 (1986) (overruling Swain v. Alabama, 380 U.S. 202 (1965)); Daniels v. Williams, 474 U.S. 327 (1986) (overruling Parratt v. Taylor, 451 U.S. 527 (1981)); Davidson v. Cannon, 474 U.S. 344 (1986) (same).

tended to adhere to Justice Brandeis' classic proclamation that

> in cases involving the Federal Constitution, where correction through legislative action is practically impossible, th[e] court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.[27]

When the precedent in question involves an issue of statutory interpretation, as opposed to constitutional interpretation, however, the Court has traditionally articulated and followed a different approach. The flip side of the Court's readiness to overrule constitutional precedents has been its general reticence to overrule precedents construing statutes. In no less significant a case than *Erie Railroad v. Tompkins,*[28] the Court indicated that it would have been unwilling to overrule *Swift v. Tyson*[29] "[i]f only a question of statutory construction were involved."[30] The Court reached its landmark decision changing the course of the federal judiciary's role only because it believed, or at least claimed, that the *Swift* rule was unconstitutional. *Flood v. Kuhn*[31] is another notable example of the Court's hesitance to overrule statutory precedents. The Court's asserted justification for not extending antitrust principles to professional baseball, and therefore treating baseball differently from football, basketball, and other professional leagues, was the existence of two precedents — one from the 1920s[32] and one from 1950s[33] — that Congress had never reversed through legislation. In recent times, the Court frequently has relied on a heightened rule of statutory stare decisis to explain why it declined to overrule a statutory precedent,[34] most recently in the *Patter-*

27. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting) (footnotes omitted).

28. 304 U.S. 64 (1937).

29. 41 U.S. 1 (1842).

30. *Erie,* 304 U.S. at 77. Interestingly, it appears that this language may not have been Justice Brandeis' own, but rather was proposed by Justice Harlan Fiske Stone as a condition of his joining the opinion. *See* R. SHNAYERSON, THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES 48 (1987) (photograph of letter from Justice Stone to Justice Brandeis, dated March 25, 1938). Justice Stone's condition is not surprising given his strong adherence to a heightened rule of statutory stare decisis. *See, e.g.,* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Girouard v. United States, 328 U.S. 61, 70 (1946) (Stone, C.J., dissenting).

31. 407 U.S. 258 (1972).

32. Federal Baseball Club v. National League, 259 U.S. 200 (1922).

33. Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).

34. *See, e.g.,* Square D. Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 424 n.34 (1986); NLRB v. International Longshoremen Assn., 473 U.S. 61, 84 (1985); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977); Edelman v. Jordan, 415 U.S. 651, 671 (1974); *see also* Teague v. Lane, 109 S. Ct. 1060, 1075 n.2 (1989) (plurality opinion of O'Connor, J.) (distinguishing case as not implicating "our practice of according special weight to statutory precedents").

son decision.[35] Although there are also a great many cases where the Court appears to ignore this doctrine,[36] the rule continues to be invoked frequently, and appears to exert substantial weight with some members of the Court.

This article analyzes whether the Court is justified in invoking a more forceful rule of stare decisis in statutory cases than in other instances.[37] The article begins by analyzing some of the conventional justifications that have been offered for the rule.[38] Part I evaluates the retrospective theory of congressional acquiescence, which posits that Congress, by not enacting legislation to reverse the Court's construction of a statute, demonstrates its approval of that earlier precedent.

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35. "Considerations of *stare decisis* have special force in the area of statutory interpretation . . . ." Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2370 (1989).

36. Some recent examples include Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)) and Gulfstream Aerospace Corp. v. Mayacamas Corp, 108 S. Ct. 1133 (1988) (overruling Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935) and Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942)). For a list of cases between 1961 and 1987 in which the Supreme Court explicitly overruled statutory precedents, see Eskridge, *Overruling Statutory Precedents,* 76 GEO. L.J. 1361, 1427-29 (1988).

37. If the only available comparison were between constitutional and statutory precedents, it would be necessary to consider whether the difference between the two is attributable to the rather fluid way in which American courts have interpreted the Constitution, compared to their more rigid approach to statutory interpretation. One reason, no doubt, that the Supreme Court has not "adhered rigidly to *stare decisis*" in constitutional cases is because "constitutional law is thought to be a living instrument of public policy adaptable to changing circumstances." Frickey, Stare Decisis *in Constitutional Cases: Reconsidering* National League of Cities, 2 CONST. COMMENTARY 123, 127 (1985); *see also* W.O. DOUGLAS, STARE DECISIS 9 (1949) ("So far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history."). Although this special attribute of constitutional law surely explains some of the difference between the treatment of constitutional and statutory precedents, it does not explain it all. For it seems clear that the respect the Supreme Court accords its statutory precedents is unusually strong compared to stare decisis as generally employed by federal and state courts — not just constitutional stare decisis.

For example, the Court appears to place federal common law precedents somewhere in between the two extremes of constitutional and statutory precedents. In Moragne v. States Marine Lines, 398 U.S. 375 (1970), the Court overruled an 84-year-old precedent limiting recovery for wrongful death under federal admiralty law. *See The Harrisburg,* 119 U.S. 199 (1886). Although the Court dealt with the stare decisis principle at length, *see Moragne,* 398 U.S. at 403-05, it explicitly rejected an argument, often made in the context of cases interpreting statutes, that any change in the law should come exclusively from Congress, *see* 398 U.S. at 405 n.17. *Moragne* and a few other federal common law cases have led William Eskridge to conclude that the Court accords common law precedents a stronger presumption of correctness than constitutional precedents, but is not as unwilling to reconsider precedents involving common law as it is precedents interpreting acts of Congress. *See* Eskridge, *supra* note 36, at 1368.

38. The article does not question or endorse any of the traditional goals of stare decisis, which include promoting certainty, respecting reliance on earlier decisions, honoring settled expectations, promoting efficient adjudication, affording uniform treatment to all litigants, and preserving the integrity of the courts in the public's view. *See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); L. GOLDSTEIN, PRECEDENT IN LAW (1987); E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION (1961); Pound, *What of Stare Decisis?,* 10 FORDHAM L. REV. 1 (1948).

Part I argues that this rationale is unable to support a heightened rule of statutory stare decisis because it fails to reflect the realities of the legislative process and is inconsistent with the established goals of statutory interpretation. Part II considers two resource allocation principles that have been advanced in defense of a heightened rule of statutory stare decisis. These principles posit that the Court need not expend its resources on revisiting statutory precedents either because Congress is available to serve that role, or, alternatively, because Congress is indifferent to the accuracy of judicial interpretations of statutes. Although these theories attempt to allocate resources efficiently between Congress and the Court, this Part argues that they do not succeed, and that a heightened or absolute rule of statutory stare decisis can be supported only by some normative theory that puts the job of revisiting judicial construction of statutes on Congress' shoulders.

Part III develops such a normative theory based on a vision of constitutional separation of powers. Examining the role that the courts have fashioned for themselves in statutory interpretation, this article suggests that the dominant role courts play in the development of statutory law poses significant countermajoritarian difficulties. In light of these difficulties, this article asserts that it is critical to reinvolve Congress as an active participant in this ongoing process of statutory lawmaking. One way to do this is to let Congress know that it, and only it, is responsible for reviewing the Court's statutory decisions, and that it, and only it, has the power to overrule the Court's interpretations of federal statutes. Beyond defending the traditional heightened rule of statutory stare decisis, this article concludes that the Supreme Court should adopt an absolute rule of stare decisis for all of its statutory and federal common law decisions.[39] Finally, Parts

39. Discussing the contours of the stare decisis principle may not seem particularly meaningful to those who believe that courts are not actually constrained by rules of decision such as stare decisis or canons of statutory construction. *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND 148-59 (1930). This type of cynicism (or realism) is not hard to come by. Reading through a volume of the *United States Reports* is bound to convince a reader that the Court is either being routinely unfaithful to precedent, or that precedents are so vague and directionless that they offer little meaningful guidance in deciding the kinds of cases with which the Supreme Court typically deals. It seems quite clear that both of these phenomena occur quite regularly. But that does not mean that it is useless to think and talk about precedent, for there are a great many cases where courts are willing to be bound by their readings of earlier decisions, and where those decisions provide a relatively clear and undisputable rule of decision. *See* Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 367 (1988) ("even a cursory reading of the reports reveals that reliance on precedent is one of the distinctive features of the American judicial system"). For example, it seems impossible to argue that the Court in *Patterson* could have held that 42 U.S.C. § 1981 did not apply to any private acts of discrimination unless the Court was willing to overrule *Runyon*. *See infra* note 44.

Of course, because of the nature of cases that the Supreme Court decides to review, the presence of a clear, on-point precedent is apt to be rarer in Supreme Court cases than in cases decided by lower federal courts. *Cf.* Priest & Klein, *The Selection of Disputes for Litigation*, 13 J.

IV and V consider and reject a variety of potential challenges to the separation-of-powers model and proposal this article sets forth.

I. CONGRESSIONAL ACQUIESCENCE

The conventional explanation for the heightened role of stare decisis in statutory cases is that congressional failure to enact legislation reversing a judicial decision indicates Congress' approval of the Court's interpretation of an earlier statute. As the Court recently expressed it, "When a court says to a legislature: 'You (or your predecessor) meant *X*,' it almost invites the legislature to answer: 'We did not.' "[40] This argument has often appeared in Supreme Court decisions and dissents, although for just about "every case where the Court rhapsodizes about deliberative inaction, there is a counter-case subjecting such inferences to scathing critique."[41] Without attempting to reconcile all of the Court's treatments of this issue,[42] it is worth

LEGAL STUD. 1 (1984) (describing the skewed conclusions that may result from focusing on certain types of cases); Schauer, *Easy Cases,* 58 S. CAL. L. REV. 399, 409-10 (1985) (discussing fallacy of relying on Supreme Court decisions in assessing nature of legal problems).

40. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 630 n.7 (1987) (quoting G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-32 (1982)).

41. Eskridge, *Interpreting Legislative Inaction,* 87 MICH. L. REV. 67, 91 (1988). Cases cited from the past few Terms are not unique in their dramatically divergent views about the relevance of congressional inaction; the inconsistencies date back much further. *Compare* Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.") *with* Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.") *and* Girouard v. United States, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."). These cases surely confirm Justice Jackson's classic understatement that in ascribing meaning to statutes, courts lack "really effective guidance from consistently accepted principles of interpretation." Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says,* A.B.A. J., July 1948, at 535, 537.

42. The Court has been a bit more consistent in dealing with cases where Congress has reenacted a statute but has not changed the language in order to modify an earlier decision construing the statute. Reenactments are often treated as ratifications of the courts' earlier construction of the statute. *See, e.g.,* Lorillard v. Pons, 434 U.S. 575, 580-81 (1978); Don E. Williams Co. v. Commissioner of Internal Revenue, 429 U.S. 569, 576-77 (1977); United States v. Hermanos Y Compania, 209 U.S. 337, 339 (1908). Even in this area, however, there have been instances where the Court has refused to be bound by the notion of ratification and has attacked it as a rule of construction. *See, e.g.,* Leary v. United States, 395 U.S. 6, 24-25 (1969); United States v. Calamaro, 354 U.S. 351, 359 (1957); Commissioner of Internal Revenue v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

This article does not independently address the reenactment issue because the issue does not involve stare decisis — rather, it is a pure matter of interpreting a statute by reference to congressional intent. Once Congress reenacts a statute it is the reenacted statute that courts must interpret, and the intent or purpose of the reenacting Congress is the relevant intent or purpose (if the intent or purpose of any Congress is relevant). Prior decisions interpreting an earlier version of the statute are not binding as a matter of stare decisis, for they interpreted a different statute. The relevance of the earlier decisions, therefore, is limited to informing the court about how the reenacting Congress may have understood the words it used. *See* Cannon v. University of Chi-

noting that some of the Court's apparently conflicting rulings on the subject of acquiescence can be harmonized by taking into account the Court's assessment of the probability that members of Congress were actually aware of the decision in question.[43] The great majority of cases invoking a strong rule of statutory stare decisis have either pointed to actual evidence that members of Congress were aware of the earlier decision,[44] or have presumed that the matter decided was so newsworthy that it is inconceivable that Congress was unaware of it.[45]

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cago, 441 U.S. 677, 696-98 (1979); Brown v. General Servs. Admin., 425 U.S. 820, 828 (1976). That reenactment is not truly a rule of stare decisis can be seen by the Court's use of the reenactment rule in cases where Congress has reenacted statutory language after it has been construed by lower federal courts or by an administrative agency. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) (reenactment after interpretation by lower courts). Stare decisis would certainly not compel the Court to adhere to such decisions, but a rule that viewed reenactment as a tool of construing legislative intent might. Of course, even in the absence of reenactment the Court may find significance in Congress' non-response to lower court rulings and administrative interpretations. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 600 (1983) (relying on Congress' failure to overrule Internal Revenue Service rulings); McNally v. United States, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting) (arguing for adherence to lower court rulings given Congress' lack of response to prior interpretations of federal mail fraud statutes). But this, too, is not a concept of stare decisis and is therefore beyond the scope of this article.

The reenactment rule is itself quite controversial and is subject to some, but not all, of the criticisms that have been directed at the silent-acquiescence argument. For critical treatments of the rule, see Brown, *Regulations, Reenactment, and the Revenue Acts,* 54 HARV. L. REV. 377 (1941); Feller, *Addendum to the Regulations Problem,* 54 HARV. L. REV. 1311 (1941); Grabow, *Congressional Silence and the Search into Legislative Intent: A Venture into "Speculative Unrealities",* 64 B.U. L. REV. 737, 754-64 (1984); Griswold, *A Summary of The Regulations Problem,* 54 HARV. L. REV. 398 (1941); Note, *The Effect of Prior Judicial and Administrative Constructions on Codification of Pre-Existing Federal Statutes: The Case of the Federal Securities Code,* 15 HARV. J. ON LEGIS. 367 (1978).

43. *See* Eskridge, *supra* note 41, at 75-76.

44. In United States v. Johnson, 481 U.S. 681 (1987), the Court reaffirmed the much-vilified *Feres* doctrine, attributing significance to the fact that Congress had "recently considered, but not enacted, legislation" that would have at least partially overruled Feres v. United States, 340 U.S. 135 (1950). *Johnson,* 481 U.S. at 686 n.6.

The Court generally attributes even more significance to cases where one or both bodies of Congress has actually defeated legislation proposed in response to the Court's earlier construction of the statute. Runyon v. McCrary, 427 U.S. 160 (1976), is a good example. There, the Court declined to revisit the question of whether 42 U.S.C. §§ 1981 and 1982 extended to private actors, which had been decided in four earlier cases, most notably in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The Court considered it "noteworthy" that after the *Jones* decision Congress had enacted a statute on a somewhat related matter, and that Congress had "specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted by this Court in *Jones,* insofar as it affords private-sector employees a right of action based on racial discrimination in employment." *Runyon,* 427 U.S. at 174. "There could hardly be a clearer indication of congressional agreement with the view that § 1981 *does* reach private acts of racial discrimination." 427 U.S. at 174-75; *see also* Flood v. Kuhn, 407 U.S. 258 (1972); Apex Hosiery Co. v. Leader, 310 U.S. 469, 487-88 (1940).

45. In Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987), for example, the Court attributed substantial significance to Congress' failure to overrule United Steelworkers v. Weber, 443 U.S. 193 (1979), which interpreted Title VII of the Civil Rights Act of 1964 as not forbidding all race-based affirmative action in employment. The Court acknowledged that there had never been any proposal to overrule *Weber* in Congress, a factor that ordinarily might lead the Court to question whether members of Congress were even aware of the decision. But, because the Court believed that *Weber* "was a widely publicized decision that

The notion of silent acquiescence has long been condemned as based on unrealistic and irrelevant assumptions about the legislative process.[46] This article addresses four major grounds for this condemnation: ignorance, inertia, interpretational ambiguity, and irrelevance. Before dissecting each of these specific points, though, it is worthwhile to clarify how a heightened rule of statutory stare decisis operates. In the rule's purest form, a court invoking stare decisis refuses to reverse a statutory precedent even though the court is quite convinced that the earlier decision was wrongly decided. Under the conventional approach to statutory interpretation, where the courts seek to discern the intent of the legislature that enacted the statute,[47] this means that the court will ignore its current understanding of the enacting Congress' intent in favor of adhering to what it now considers to have been an erroneously decided precedent. Of course, the principle of statutory stare decisis often plays a more limited role than this; but in analyzing the propriety of the doctrine it is useful to examine it in its starkest form.

A. *Ignorance*

One obvious problem with interpreting Congress' inaction as evidence of congressional acquiescence is that members of Congress are often unaware of Supreme Court decisions, particularly on relatively obscure issues. Judge Abner Mikva, who served in the House of Representatives for five terms prior to his appointment to the United States Court of Appeals for the District of Columbia Circuit, has observed that, "[w]hile it is true . . . that a majority of the members of Congress are lawyers, they have not kept up-to-date on recent legal developments. In fact, most Supreme Court decisions never come to the attention of Congress."[48] This may not have been a major prob-

addressed a prominent issue of public debate," *Johnson*, 480 U.S. at 629 n.7, the Court assumed that members of Congress did know about the decision, and that the lack of any attempt to overrule it was based on acquiescence — not ignorance.

46. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 179-83 (1975); H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1393-1401 (tentative ed. 1958) (unpublished manuscript) (questioning doctrine); Eskridge, *supra* note 36, at 1402-09; Grabow, *supra* note 42, at 741-54; Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).

47. This and other approaches to statutory interpretation are discussed *infra* at notes 77-106 and accompanying text.

48. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983); *see also* Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 384 ("most of the time Congress does not read judicial opinions and does not know whether courts properly interpreted the statute"); W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 420 (5th ed. 1981) ("legislative bodies rarely concern themselves with activities of the courts"); S. KRISLOV, THE SUPREME COURT AND THE POLITICAL

lem many years ago, when the Court began to talk about silent acquiescence. "Life was simpler then."[49] The number of statutes being interpreted was small as compared with the post-New Deal age.[50] Today, however, it seems quite unrealistic to assume that a substantial number of congressional actors are routinely made aware of most court decisions on statutory matters. This being the case, how can a court possibly find acquiescence in Congress' silence?

One might respond by arguing that it is wrong to focus on whether all or most members of Congress are aware of a given decision. Rather, the focus ought to be on the members of specific committees and subcommittees who have the practical power to decide whether proposed legislation in their subject areas will be passed, and who tend to be quite involved in monitoring the areas over which their committees have jurisdiction.[51] These committees and subcommittees have staffs with the capacity, and often the responsibility, to monitor legal developments in their areas of specialization.[52] Moreover, it is silly to think that any members of Congress or their staffs have to read *United States Law Week* in order to be apprised of Supreme Court decisions. Untold numbers of lobbyists make their livings by informing members of Congress and their staffs of new developments and convincing them to support or oppose change.[53] In short, the argument goes, although it is unrealistic to imagine that *all members of Congress* spend significant time monitoring and reflecting upon court decisions interpreting statutes, it is also unrealistic to think that relevant members of Congress, and hence *Congress, as an institution,* are oblivious to court decisions.

It is, of course, hard to contest the fact that Congress is, in some important respects, run by committees, and that these committees

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PROCESS 144 (1965) ("No study has been undertaken to estimate the number of Court decisions heavily criticized in Congress, but these would surely constitute a small fraction of the total number. Most never come to the attention of Congress at all.").

49. Griswold, *supra* note 42, at 401-02 n.16.

50. *See generally* G. CALABRESI, *supra* note 40, at 1; G. GILMORE, THE AGES OF AMERICAN LAW 68-98 (1977); Note, *supra* note 42, at 386.

51. *See generally* R. FENNO, CONGRESSMEN IN COMMITTEES (1973); G. GOODWIN, THE LITTLE LEGISLATURES (1970). It is not clear, however, to what extent committee members actually do monitor judicial developments. Judge Mikva has written that "[m]embers of Congress do not even closely follow cases directly involving or interpreting statutes that they have sponsored or in which they have an interest." Mikva, *Reading and Writing Statutes,* 48 U. PITT. L. REV. 627, 630 (1987).

52. *See generally* H. FOX & S. HAMMOND, CONGRESSIONAL STAFFS: THE INVISIBLE FORCE IN AMERICAN LAWMAKING (1977); K. KOFMEHL, PROFESSIONAL STAFFS OF CONGRESS (1977); T. REESE, THE POLITICS OF TAXATION 61-89 (1980).

53. *See generally* R. FENNO, *supra* note 51, at 22-41; D. HALL, COOPERATIVE LOBBYING: THE POWER OF PRESSURE (1969); M. HAYES, LOBBYISTS AND LEGISLATORS (1981).

have the capacity to monitor judicial decisions. But does it follow that courts should attribute significance to these committees' inaction? Does it make sense for a court to ignore what it thinks was the intent of the entire Congress that enacted a statute in 1870, just because various powerful members of today's Congress have not taken measures to reverse a 1976 court decision interpreting the 1870 enactment?[54]

In a sense, these questions go to the heart of the legislative process, where immense power is exerted by a very few members of Congress. But it is unnecessary to challenge this general system in order to denounce reliance on congressional acquiescence. Leaving aside the political pressure they can exert on their colleagues, the power of congressional leaders is largely a *negative* power; they often can control the agenda in a manner that effectively kills certain proposed legislation.[55] They do not alone possess the *affirmative* power to pass legislation, which continues to require the votes of at least a majority of a quorum of each body of Congress.[56] There is a world of difference between affirmative and negative powers in this respect. A great many provisions of the Constitution (including bicameralism, the executive veto, and judicial review) present impediments to the passage of legislation, reflecting the essentially conservative bias of our system of government.[57] The negative power that congressional leaders wield is just another countermajoritarian obstacle that must be avoided en route to enacting legislation.

This distinction between negative and affirmative powers is critical to the question of congressional acquiescence. A court that relies on acquiescence does far more than give a veto power to a minority of the legislature. The court, in essence, treats Congress' silence as the functional equivalent of an affirmative congressional enactment endorsing the court's earlier (now recognized as erroneous) decision. Aside from

54. The years used here relate to the issue before the Court in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

55. *See* R. FENNO, *supra* note 51, at 172; M. FIORINA, CONGRESS — KEYSTONE OF THE WASHINGTON ESTABLISHMENT 62-67 (1977); M. HAYES, *supra* note 53, at 36; A. MIKVA & P. SARIS, THE AMERICAN CONGRESS: THE FIRST BRANCH 120 (1983). The power of the current leadership is, however, nowhere near as strong as it once was. *See generally* L. DODD & R. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 106-29 (1979); Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process,* 136 U. PA. L. REV. 1567, 1628-33 (1988).

56. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 279, 99th Cong., 2d Sess. § 508 (1987).

57. "[M]ost of the antimajoritarian elements that have been found in the American legislative process — both quantitatively and qualitatively — are negative ones, *i.e.,* they work to *prevent* the translation of popular wishes into governing rules rather than to *produce* laws that are contrary to majority sentiment." J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 26 (1980).

creating significant constitutional quandaries,[58] attributing significance to congressional silence surely fails to reflect the reality that a majority of Congress frequently was never even made aware of the Court decision in question.

The Court's response to the possibility that Congress' silence was a result of ignorance rather than considered acquiescence has been to attribute more significance to inaction when there is some evidence, or at least strong reason to believe, that a large number of members of Congress were made aware of the decision.[59] This methodology has serious flaws, however. To begin with, it assumes that just because a speech is made or a bill is proposed, a great many members of Congress are aware of the issue. There is no evidence that this is true, and strong reason to believe it is not.[60] In the absence of an actual vote by an entire body, it seems unrealistic to assume that members of Congress are made more knowledgeable about a decision simply because some committee holds a hearing or some members make speeches about it.[61]

Moreover, the Court's incremental approach can lead to perverse results. If there has been complete congressional silence on an issue, the Court is likely to attribute only minimal significance to Congress' inaction, at least as long as it is not convinced that members of Congress must have known about the decision.[62] It is possible, however, that Congress' complete silence might actually indicate unanimous agreement with the decision — a factor that would be expected to command substantial respect from a Court looking for evidence of acquiescence. On the other hand, if a large group of senators sponsor an

58. *See infra* notes 77-100 and accompanying text.

59. *See supra* notes 43-45 and accompanying text.

60. *See* D. VOGLER & S. WALDMAN, CONGRESS AND DEMOCRACY 112 (1985) (discussing sources of information that legislators tend to rely on); Mikva, *supra* note 51, at 631-32 (decrying judicial reliance on created legislative history); Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 IOWA L. REV. 195, 200-03 (1983) (surveying probative value of different types of legislative history). *See generally* W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 709-52 (1988) (discussing uses and misuses of legislative history).

61. Of course, even when votes are taken and Congress passes a measure, it is far-fetched to assume that all voting members have read the committee reports and sponsors' statements — the type of legislative history on which the courts routinely rely in statutory interpretation. *See* Hirschey v. Federal Energy Reg. Commn., 777 F.2d 1, 6-8 (D.C. Cir. 1985) (Scalia, J., concurring); *see also supra* note 60. But when a member of Congress has voted on a bill, she has presumably had access to the legislative history, and an opportunity to contradict any implications with which she disagrees. Moreover, there is an important distinction between using committee reports and the like as evidentiary factors in statutory interpretation, and using such materials to support a superpresumption of stare decisis that would bar the court from changing the construction of a statute even when all other pieces of evidence point to the conclusion that the result reached by an earlier court was wrong.

62. *See supra* note 45.

amendment to overrule a decision, and that amendment is never passed, the Court is likely to attribute great significance to Congress' inaction. Unanimous agreement with a decision may thus command less respect from the Court than a sharply divided Congress' failure to overrule a precedent. This paradox can create a strong disincentive for legislators to do what legislators should do when they want to express their intent — attempt to pass laws.

B. *Inertia*

The possibility of ignorance is not the only, or necessarily the most severe, problem of interpreting congressional inaction. Varied explanations of legislative inaction apply even to a Congress full of legislators who are acutely aware of, and strongly disagree with, a court decision construing an act of Congress. For example, as Hart and Sacks suggest, a legislator who believes that a decision should be overruled might decline to support legislation overruling the decision because of a "[b]elief that other measures have a stronger claim on the limited time and energy of the [legislative] body."[63] Public choice theory forcefully drives this point home. There is an active market for the commodity of legislation, and congressional inaction on a given issue often means merely that some group outbid those who wanted Congress to expend energy overruling a particular judicial decision.[64] Moreover, it has long been recognized that proposed legislative action frequently can be killed by a powerful minority of one legislative body, a party leader, or a chairman of a key committee.[65]

Many other factors related to the intricacies of the legislative process are also potentially relevant in trying to understand why Congress might decline to overrule a decision with which most members disagree. A few more selections from Hart and Sack's classic list should suffice here: "[b]elief that the bill is sound in principle but politically inexpedient to be connected with"; "[u]nwillingness to have the bill's sponsors get credits for its enactment"; "[b]elief that the bill is sound in principle but defective in material particulars"; or "[t]entative approval, but belief that action should be withheld until the problem can be attacked on a broader front".[66] Perhaps the most important item

63. H. Hart & A. Sacks, *supra* note 46, at 1395; *see also* Cleveland v. United States, 329 U.S. 14, 23 (1946) (Rutledge, J., concurring) ("the sheer pressure of other and more important business" may prevent Congress from correcting misconstructions of statutes).

64. For accessible introductions to this material, see *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988). The classic work in the area is J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962).

65. *See supra* note 55 and accompanying text.

66. H. Hart & A. Sacks, *supra* note 46, at 1395-96. For similar lists of possible reasons for

on Hart and Sacks' list is their thirteenth entry: "Etc., etc., etc., etc., etc.",[67] which hints at the innumerable facets of inertia that the legislature must overcome to enact a law.

As a general matter, courts must live with these realities of the legislative process. The Constitution surely would not allow federal judges routinely to institute regulatory measures and public interest provisions, even though judges might confidently conclude that only time pressure or interest group politics has prevented the legislature from enacting such measures. When it comes to enacting legislation, the courts have no choice but to wait for Congress to act. As discussed previously, this state of affairs is consistent with the general conservative bias implicit in the Constitution's peculiar system of separated powers.[68] But this bias does not justify ignoring the effect of inertia when attempting to understand the meaning of Congress' silence. Allowing inertia to exert a veto power over proposed legislation is far different from giving inertia-induced silence the power of trumping earlier congressional enactments as the court now understands them.

In sum, besides the possibility of "unawareness," "[c]ongressional inaction frequently betokens . . . preoccupation[ ] or paralysis."[69] That a bill was never introduced, died in committee, or was defeated in a vote therefore fails to identify the intent of Congress. The point here is not that inaction is wholly non-probative of legislative intent; as a matter of logic it is relevant.[70] But this logical relevance does not demonstrate that the probability of congressional agreement is sufficient to support any form of a presumption of congressional acquiescence.

C. *Interpretational Ambiguity*

The collective action problems described above clearly can keep a measure from being enacted into law even if a majority theoretically

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congressional inaction, see Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 672 (1987) (Scalia, J., dissenting); M. HAYES, *supra* note 53, at 35; Eskridge, *supra* note 36, at 1405.

67. H. Hart & A. Sacks, *supra* note 46, at 1396.

68. *See supra* notes 55-58 and accompanying text.

69. Zuber v. Allen, 396 U.S. 168, 185 n.21 (1969).

70. Because Congress will virtually never vote to overturn an interpretation it agrees with, its failure to overturn the statute increases the likelihood that Congress in fact agreed. Indeed, so long as silence is a more likely response when Congress affirmatively approves of the Court's interpretation than otherwise, probability theory indicates that, no matter how many other causes of congressional silence may exist, silence is still a signal of congressional approval.

Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights,* 87 MICH. L. REV. 1, 10 (1988) (footnote omitted).

would prefer the change the bill would effectuate over the interpretation the Court has adopted. But even if one ignores concerns of ignorance and inertia, or dismisses them as part of the political process, it remains difficult to construe Congress' inaction as acquiescence. For how is the Court to define what Congress intended to acquiesce to? Did Congress agree with the Court's decision? Or did it simply agree that the Courts should be accorded considerable flexibility in interpreting the statute?

In *Snyder v. Harris,*[71] for example, the Court held that separate claims presented by different plaintiffs in a class action may not be added together to satisfy the jurisdictional amount for diversity jurisdiction. The statute governing diversity jurisdiction provided that the "matter in controversy" must exceed the sum or value of $10,000,[72] and the Court purported to rely on early precedents interpreting that phrase as requiring that this amount be in controversy between a single plaintiff and a single defendant.[73] Refusing to reconsider the "judicial interpretation of congressional language that has stood for more than a century and a half,"[74] the Court emphasized that Congress had repeatedly amended the diversity statute, specifically the amount in controversy provision, but had never changed the Court's construction on this narrow issue.[75]

Snyder's analysis, however, fails to explain why Congress' inaction should be interpreted as acquiescence in the specific result that the Court reached, as opposed to acquiescence to the Court exercising wide flexibility in relatively mundane procedural matters.[76] Much as

71. 394 U.S. 332 (1969).

72. 28 U.S.C. § 1332 (1982). The jurisdictional amount has since been elevated to $50,000. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, Title II, § 201, 102 Stat. 4646 (1988).

73. *See, e.g.,* Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911).

74. *Snyder,* 394 U.S. at 338. Among the many oddities in the area of stare decisis are the divergent effects attributed to the passage of time. Many opinions stress the recency of the precedent when explaining why it must be obeyed; other opinions emphasize the age of the decision in demanding that it be afforded respect. *Compare* Runyon v. McCrary, 427 U.S. 160, 186 (1976) (Powell, J., concurring) (stare decisis is more forceful when matter was "recently" decided) *with Snyder,* 394 U.S. at 338 (emphasizing long pedigree of rule) *and* Washington v. W.C. Dawson & Co., 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting) (Stare decisis less forceful where "[t]he decisions are recent ones. They have not been acquiesced in.").

75. Given the many reenactments of the statute, *Snyder* does not actually fit the pure inaction model. *See supra* note 42. Nonetheless, what it demonstrates about the problem of ambiguity applies forcefully to both inaction and reenactment cases.

76. This argument is different from Hart and Sack's suggestion that votes may be withheld out of "[c]omplete disinterest." H. Hart & A. Sacks, *supra* note 46, at 1395. The point here is that Congress may deliberately desire to afford the courts flexibility. *See* Eskridge, *supra* note 36, at 1424-25; Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on* Sinclair v. Atkinson, 72 YALE L.J. 1547, 1552 n.12 (1963).

Congress has delegated the job of formulating rules of procedures to the courts, it might plausibly be unwilling to interfere with judicial constructions of specific jurisdictional statutes. The mere fact of congressional inaction does not give the court any guidance as to which of these significantly divergent messages Congress has sent.

D. *Irrelevance*

Ultimately, the most significant problem facing the silent acquiescence argument is its inconsistency with the Court's own theory of statutory interpretation, that "[i]t is the intent of the Congress that enacted" the statute in question "that controls."[77] Although there is some academic support for a more "dynamic" approach to statutory interpretation,[78] the Court has adhered to a basically originalist model of statutory construction — attempting to understand what the legislature that enacted the statute intended to accomplish by the words it chose.[79]

No one has ever explained how a court attempting to understand the intent of a Congress that passed a statute in 1866 or 1870 can find any guidance in the views of a Congress sitting in the 1970s.[80] Indeed, the irony of the matter is that the Court appears willing to find significance in Congress' silence, while generally declining to rely on far more explicit post-enactment legislative history — even of the Congress that passed the statute being interpreted! According to the Court, "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage."[81] It is downright silly for a court that takes this stand

77. Mackey v. Lanier Collections Agency, 108 S. Ct. 2182, 2191 (1988) (quoting Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977)).

78. *See infra* notes 90-100 and accompanying text.

79. There is, of course, considerable debate about the level of abstraction judges should use in interpreting legislative intent or purpose. *Compare, e.g.* K Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811, 1830 (1988) (Brennan, J., concurring in part and dissenting in part) *with* 108 S. Ct. at 1834-35 (Scalia, J., concurring in part and dissenting in part); *compare also* R. POSNER, *supra* note 5, at 267-72 *with* Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533 (1983). But all of these approaches work within the framework of a search for the intent or purpose of the enacting Congress.

80. *See* Runyon v. McCrary, 427 U.S. 160, 174 & n.11 (1976). *See generally* Easterbrook, *supra* note 14, at 427; Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 40-41 (1988).

81. Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974); *see also* TVA v. Hill, 437 U.S. 153, 192-93 (1978); Easterbrook, *supra* note 79, at 538 ("Despite the information it conveys about the meaning of Congress, [post-enactment legislative history] neither adds to nor detracts from the meaning of the legislation actually enacted."). For a striking example of the Court's refusal to look at post-enactment history, see Grove City College v. Bell, 465 U.S. 555 (1984), where the Court attributed no significance to a House Resolution passed by a 414-8 vote shortly before the case was argued in the Court. 465 U.S. at 598 n.12 (Brennan, J., concurring in part and dissenting in part). Congress did, eventually, get its way when it overruled the Court's

with respect to rather contemporaneous and explicit post-enactment history to afford extraordinary significance to far removed and ambiguous inaction.

Indeed, it is more than silly; it is contrary to fundamental constitutional principles.[82] A law can be enacted only by being passed in both houses of the Congress and being presented to the President for possible veto.[83] Each of these three institutions — the House, the Senate, and the President — therefore has the constitutional authority to prevent the other two from enacting their will into law.[84] Attributing significance to congressional silence subverts this scheme considerably, as a simple example will reveal. Suppose that the House and Senate had both responded to the Court's rehearing order in *Patterson v. McClean Credit Union*[85] by passing legislation explicitly ratifying *Runyon v. McCrary.*[86] Suppose further that the President vetoed the bill, and that the bill's supporters were unable to gather the necessary votes for a veto override. Could the Court attribute interpretational significance to this frustrated congressional action? Only at the expense of freezing the President out of his constitutionally authorized role. Recent decisions such as *Chadha v. INS*[87] and *Bowsher v. Synar,*[88] which affirm the importance of following the constitutionally prescribed procedures for enacting legislation, make it highly unlikely that the Court would seriously entertain such an idea. Yet affording significance to congressional inaction can have this very effect. Inaction enables Congress to effectuate its will without ever risking presidential veto (not to mention public scrutiny or pressure). A court concerned with the in-

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decision in *Grove City* by enacting the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

As with most rules of statutory construction, a great many cases can be found for the opposite proposition — that some degree of significance should be accorded post-enactment history. *See, e.g.,* Anderson Bros. Ford v. Valencia, 452 U.S. 205, 218-19 (1981); New York Dept. of Social Servs. v. Dublino, 413 U.S. 405, 416 n.19 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969). Indeed, Robert Weisberg observes that "the Court has been utterly inconsistent in this area," and that its use of post-enactment history in some cases can be understood as encouraging an "underground railroad across the separation of powers line." Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process,* 35 STAN. L. REV. 213, 246-48 (1983).

82. *See* Cleveland v. United States, 329 U.S. 14, 22 n.4 (1946) (Rutledge, J., concurring).

83. U.S. CONST. art. I, § 7.

84. Because of the potential for congressional override of a presidential veto, the executive's power is a bit more limited in this respect than that of the two bodies of Congress.

85. 108 S. Ct. 1419 (1988) (ordering parties to brief whether Court should overrule its holding in Runyon v. McCrary, 427 U.S. 160 (1976), that 42 U.S.C. § 1981 prohibits certain private acts of racial discrimination).

86. 427 U.S. 160 (1976).

87. 462 U.S. 919 (1983).

88. 478 U.S. 714 (1986).

tent of the Congress that drafted a statute should not pay attention to the action, much less the inaction, of a later Congress, unless that Congress succeeds in enacting a new law.[89]

For those who take a less originalist approach to statutory interpretation, the relevance of a later Congress' intent or understanding of a statute presents a more interesting issue. These dynamic theories reject the "assumption of a canonical moment at which a statute is born and has all and only the meaning it will ever have."[90] Under these theories, a later Congress' intent cannot be summarily dismissed as irrelevant, as it should be under conventional canons of statutory interpretation. But even without regard to the interpretational difficulties already mentioned (ignorance, ambiguity, and inertia), analysis of these dynamic or evolutive approaches to statutory interpretation indicates that their proponents should be unwilling to have congressional inaction serve as a surrogate for the type of inquiry into current norms and legal conventions that they believe the courts should undertake.

Dean Guido Calabresi, for example, who urges that courts repeal statutes that are obsolete,[91] justifies this authority by claiming that the courts have a unique institutional ability "to treat like cases alike, to adapt to changed technologies and ideologies, and to reflect the evolving values of a people."[92] Calabresi certainly must be unwilling to allow the intent of a recent Congress, a body that lacks such capacities and whose institutional character gives rise to the problem of obsolete statutes in the first place, to bind judges as they carry out this judicial function. So, too, Ronald Dworkin, whose Hercules figure disowns a purely historical approach to understanding statutes, would appear unwilling to embrace a strong rule of statutory stare decisis based on legislative inaction. Although Dworkin considers post-enactment history relevant,[93] his theory does not tolerate affording that single factor the extraordinary power that a superstrong presumption of stare decisis based on legislative acquiescence would give it.[94]

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89. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2372 n.1 (1989) ("Congressional inaction cannot amend a duly enacted statute.").

90. R. DWORKIN, LAW'S EMPIRE 348 (1986).

91. Calabresi defines "obsolete" statutes as ones that are no longer consistent with "a new social or legal topography." G. CALABRESI, *supra* note 40, at 6.

92. *Id.* at 98. *See generally id.* at 96-100.

93. In interpreting a statute, Hercules "asks which interpretation provides the best account of a political history that now includes not only the act but the failure to repeal or amend it later, and he will therefore look not to public opinion at the beginning . . . but now." R. DWORKIN, *supra* note 90, at 349.

94. T. Alexander Aleinikoff's treatment of a heightened rule of statutory stare decisis explains the problem with a presumption of acquiescence. Aleinikoff, who advocates a "nautical"

Similarly, William Eskridge, who advocates what he calls "dynamic statutory interpretation,"[95] should also be expected to find no extraordinary significance in the intention of a later Congress. The unconventional aspect of Eskridge's model is that, at least in cases where the statutory language is unclear,[96] he is willing to subordinate the enacting legislature's intention or purpose to the interpreting judge's view of "current policies and societal conditions."[97] But even if current congressional silence were a perfect indicator of current congressional intent it appears unlikely that Eskridge would be willing to have courts use that intent as a proxy for meaningful analysis of "the ways in which the societal and legal environment of the statute have materially changed over time."[98] The judiciary's unique contributions to statutory development, in Eskridge's view, are its distance from the political marketplace that tends to slant legislators' views,[99] and the slow and deliberative method through which judges develop statutory law.[100] Neither of these features would be used to advantage were courts to give nigh dispositive deference to a subsequent Congress' intention, evinced through its silence or otherwise.

It thus appears that no one along the interpretive spectrum from strict originalists to dynamic interpreters should support the notion that Congress' inaction is a terribly significant factor in the interpretive process. If the superstrong presumption of statutory stare decisis is justified, therefore, it must be for some reason other than any messages that can realistically be gleaned from Congress' inaction.

II. ALLOCATION OF RESOURCES

The acquiescence argument just described is a retrospective one; it attributes legal significance to Congress' failure to react to a judicial decision. The acquiescence principle is not to be confused with theories that fall under the "resource allocation" rubric. Two such theories advanced in support of a heightened rule of statutory stare decisis

approach to statutory interpretation that emphasizes the courts' role in updating statutes, explains that his "approach would not accord statutory precedents the current 'superstrong presumption.' The value that a nautical approach places on current coherence in the law would inform its stance towards precedent." Aleinikoff, *supra* note 80, at 52 (footnote omitted).

95. Eskridge, *Dynamic Statutory Interpretation,* 135 U. PA. L. REV. 1479 (1987).

96. Eskridge repeatedly asserts that an interpreting court is bound by the clear language of a statute. *Id.* at 1483, 1484, 1496. But this limitation cannot be a terribly significant one for Eskridge, who appears to agree with the "body of modern aesthetic theory [that] rejects the concept that a text has a single 'true' meaning." *Id.* at 1509.

97. *Id.* at 1484.

98. *Id.* at 1483.

99. *Id.* at 1534.

100. *Id.* at 1537.

need to be considered here. First, it has often been asserted that the Court need not bother with revisiting statutory precedents because Congress is available to overrule statutory decisions. Second, a leading scholar has recently suggested that Congress is relatively indifferent to whether courts interpret statutes accurately, and that it is therefore unnecessary for courts to spend time trying to correct misinterpretations. I will address these arguments in turn.

A. *Congress' Prospective Ability To Overrule Statutory Precedents*

One resource-allocation argument justifies the Court's abstention from revisiting statutory decisions by pointing out that no great harm is bound to arise from the Court's abstention because Congress is authorized to overrule statutory precedents with which it is unhappy. In contrast, a relatively weak form of constitutional stare decisis is appropriate, the argument goes, since the Court is the only body practically able to remedy its own mistakes in interpreting the Constitution.[101] The argument is a pragmatic one, allocating the Court's resources (for revisiting precedent) according to the perceived need for the Court's involvement. I shall call this the "task-splitting" argument.

The task-splitting theory avoids some, but not all, of the difficulties that pervade the acquiescence argument. Interpretational ambiguity[102] is no objection, of course, for no congressional action or inaction is being interpreted. Nor would the attack of irrelevance,[103] which seemed so powerful with respect to acquiescence, appear to stick here, for the task-splitting theory does not attempt to attribute legal significance to anything Congress has done. The task-splitting theory does, however, have to struggle with the realities of ignorance and inertia. As described earlier,[104] these two attributes of the legislative process compel the conclusion that Congress cannot be counted upon to overrule all decisions that are widely considered bad or wrong. Even if a substantial number of congresspersons are made aware of, and disagree with, such decisions, the strong gravitational force of the status quo will often stand in the way of legislative action. These realities cast doubt on whether, all other things being equal, making the legisla-

101. The process of constitutional amendment is generally considered far too onerous to serve as a meaningful corrective force. *See* United States v. Scott, 437 U.S. 82, 101 (1978); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting); Stone, *Precedent, The Amendment Process, and Evolution in Constitutional Doctrine,* 11 HARV. J. L. & PUB. POLY. 67, 68 (1988).

102. *See supra* notes 71-76 and accompanying text.

103. *See supra* notes 77-100 and accompanying text.

104. *See supra* notes 48-100 and accompanying text.

ture the exclusive forum for overruling statutory precedents is a sensible allocation of resources.

The problems with the task-splitting argument go well beyond these questions about Congress' ability to respond to judicial decisions, however. Even if these barriers to legislative reaction did not exist, it would still be necessary to explain why Congress, and not the Court, ought to be the institution to overrule statutory precedents. That Congress is *available* for the task does not mean that it is *advisable* to assign the job to Congress. The Court is, after all, also available. Although many students of the judicial process contend that the courts (particularly the Supreme Court) are overworked, and should be spared whatever tasks can be assigned to some other branch,[105] students of the legislative process have identical arguments about Congress' burdens.[106] Husbands and wives may find it sensible to take a "you wash the dishes, I'll dry them" approach to chores, but dividing functions between Congress and the courts surely calls for a more refined analysis.

To the extent the task-splitting argument is merely a pragmatic one, it must come to terms with these objections. It is far from clear that it can. Yet failure of this rationale does not mean that a heightened or absolute rule of statutory stare decisis, which assigns to Congress the task of overruling statutory precedents, must necessarily fail. Such a rule may be based on more fundamental principles than efficient allocation of resources. Part III of this article proposes and defends the position that there are strong, normative reasons for assigning the task of revisiting statutory interpretations to Congress. If that is the case, pragmatic objections concerning Congress' responsiveness and workload need not, and cannot, be dispositive.[107]

B. *There's More to Life Than Getting It Right*

Daniel Farber recently advanced a distinctive rationale in support

105. *See* Burger, *The Time is Now for the Intercircuit Tribunal,* A.B.A. J., Apr. 1985, at 86, 88 ("[W]e need something more to deal with the avalanche of cases coming to the Supreme Court."); Marcotte, *Rehnquist: Cut Jurisdiction,* A.B.A. J., Apr. 1989, at 22 ("[T]he federal court system is like a city in the arid part of this country which is using every bit of its water to supply current needs."). *See generally* S. ESTREICHER & J. SEXTON, REDEFINING THE SUPREME COURT'S ROLE 15-24 (1986) (discussing perception of Supreme Court's workload); R. POSNER, *supra* note 5, at 59-93 (discussing the "extent and causes of the caseload explosion" in the federal courts).

106. *See, e.g.,* D. VOGLER & S. WALDMAN, *supra* note 60, at 105; Davidson, *Subcommittee Government: New Channels for Policy Making,* in THE NEW CONGRESS 110 (T. Mann & N. Ornstein eds. 1981).

107. *See infra* notes 284-87 and accompanying text.

of a heightened rule of statutory stare decisis.[108] He suggests that the majority coalition of legislators at the time of the original enactment of a statute is not overly concerned with having courts correct future mistaken judicial interpretations of the statute:

> At the time of enactment, members of the winning coalition have no way of knowing whether judicial mistakes will favor them (giving them more than the original "bargain") or injure them (giving them less than they bargained for). Provided courts make a good faith effort to interpret statutes correctly, legislators can expect both kinds of mistakes to happen with equal likelihood, so the expected cost of incorrect decisions as such is zero.[109]

On the other hand, he argues, legislators do have reasons to be concerned about uncertainty in judicial interpretation and the accompanying social costs.[110] Therefore, Farber concludes, "enacting legislators would prefer that courts give strong weight to stare decisis in statutory cases, even at the expense of fidelity to the original legislative deal."[111]

Farber's attempt to tie a heightened rule of statutory stare decisis into supposed legislative intent fails to account for the multitude of factors that must go into assessing Congress' likely *ex ante* approach to such a rule. Fundamentally, Farber fails to consider the anticipated reactions of the interest groups that will suffer from a court decision giving them less than they believe they bargained for in the statute. Congress knows, as an *ex ante* matter, that these interest groups will not sit back and be satisfied with a judicial decision that they believe has cheated them out of what they bargained for in the initial enactment. No theory about *ex ante* bargains made behind a veil of ignorance is going to keep the losers from trying to obtain a reversal of an adverse decision. The question then is not *whether* overruling judicial decisions should be considered, but rather *which forum* — Congress or the courts — should consider the losing group's pleas for overruling.

Put this way, it is not at all apparent that Congress would prefer that the Court give strong weight to stare decisis in statutory cases. The effect of such a rule is to direct the losing faction's attention to Congress, and to require Congress to deal with the issue by overruling the judicial decision, by rebuffing the interest group, or by buying the faction off with some other legislative prize. All of these options can

108. Farber, *supra* note 70, at 11-13.

109. *Id.* at 12.

110. *Id.*

111. *Id.* at 12-13.

carry substantial political costs[112] that members of Congress will often prefer to avoid.[113] Aside from these political costs, there are obvious opportunity costs that Congress incurs when it spends time addressing one particular issue as opposed to another.[114] On the other hand, there are some cases in which Congress would be expected to welcome the opportunity to tune up legislation as a favor to a particularly influential or wealthy group.

These factors will weigh differently in each case, and it is hard to imagine any method of predicting accurately how they will interact. This uncertainty precludes any blanket characterization that Congress, as a general rule, prefers that courts accord heightened deference to statutory precedents. If a heightened or absolute rule of statutory stare decisis is to be the rule, it must have stronger justification than these questionable appraisals of Congress' *ex ante,* unarticulated, wishes.

III. THE SEPARATION-OF-POWERS APPROACH TO STATUTORY STARE DECISIS

If the only justification for a heightened rule of statutory stare decisis were the belief that Congress necessarily agrees with the decisions which it fails to overrule, or that it is efficient to allocate the job of overruling precedents to Congress, it seems clear the rule would have to be abandoned. But there is another explanation for the doctrine that has to be addressed before a heightened rule of statutory stare decisis can be rejected. This theory relies on a normative vision of the judicial and legislative functions that considers the federal judiciary's hesitance to overrule statutory precedents an important element in the proper division of responsibility between Congress and the courts.

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112. Indeed, initial ambiguity in a statute often results from Congress' unwillingness to make hard political choices. *See infra* note 156 and accompanying text.

113. Farber predicates his analysis on the idealistic assumption that after the statute is initially construed "the enacting legislator's main interest is in minimizing social costs." Farber, *supra* note 70, at 13. Although this article shares some of Farber's concern with exaggerating the import of public choice theory, *see* Farber & Frickey, *The Jurisprudence of Public Choice,* 65 TEXAS L. REV. 873 (1987), the public interest model that this characterization of legislators' interest appears to adopt also seems exaggerated.

114. This was the thrust of the amicus brief filed by 66 senators and 116 congresspersons in support of the petitioner in *Patterson:* "Any congressional effort to change a decision of this Court could prove divisive and time consuming, could well be delayed by disagreement over collateral issues, and could confront grave difficulties in addressing the nuances that have arisen from case-by-case elaboration of the statute." Brief of 66 Members of the United States Senate and 118 Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner at 6, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (No. 87-107).

A. *Lawmaking by the Judiciary*

One of the central premises of the Constitution's division of powers, and the American system of government, is that the primary federal lawmaking authority belongs to Congress. If separation of powers means anything, it means that the task of creating law falls upon the legislature, and that courts must obey and enforce the constitutionally legitimate enactments of the legislative branch.[115] It is the legislative branch which, to some degree or another,[116] is answerable to the people, "the only legitimate fountain of power."[117]

It is this doctrine of legislative supremacy that fuels the conventional approach to statutory interpretation — in which courts seek to implement the value choices and decisions arrived at by the representative branch.[118] In a perfect world there would be no tension between this judicial function and the notion of legislative supremacy. For in a perfect world, the legislature would be able to contemplate and provide for all contingencies in advance, settle all disputes about the effect

115. *See* Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989) (arguing that this aspect of separation of powers is based on the "ultimate normative political premise" of a "fundamentally democratic society"); *see also* Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. (forthcoming 1989) ("When a court refuses to follow an admittedly constitutional statute, it is arrogating to itself the ultimate power to make public policy."); Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 9 (1988) (describing the "deeply-embedded premise of the American political system" that the legislature "has authority to prescribe rules of law that, until changed legislatively, bind all other governmental actors within the system"). For a discussion of some historical and political writings that support this principle, see Redish, *supra*, at n.2. For an argument that this principle finds its source in the Constitution's supremacy clause, see Farber, *supra*. On the other hand, for a jurisprudential attack on the premise of legislative supremacy that takes little account of separation of powers, see Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113 (1988) (rejecting positivist view that judges are bound to enforce constitutional laws that a legislature passes).

116. To be sure, the Congress is far from a bastion of pure democratic decisionmaking. To begin with, the Constitution imposes a variety of procedural rules on Congress — rules whose design and effect are to make the legislative process something far different than a national plebiscite. Bicameralism and the presidential veto power virtually guarantee that not all legislation supported by a majority of citizens at a given time will be enacted into law. *See supra* notes 55-57 and accompanying text. Other aspects of the legislative process, such as log-rolling, lobbying, the committee system, and cyclical voting, although not constitutionally mandated, also contribute to the somewhat nonmajoritarian nature of the Congress. But these phenomena are not enough to displace the legislature's claim to being the most representative branch of government. For a more detailed discussion of these points, see J. CHOPER, *supra* note 57, at 29-45.

117. THE FEDERALIST NO. 49, at 339 (Madison) (J. Cooke ed. 1961).

118. "As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979). *See generally* J. HURST, DEALING WITH STATUTES 32 (1982) ("The standard criterion for proper interpretation of a statute is to find the 'intention of the legislature.' "); R. POSNER, LAW AND LITERATURE 240 (1988) (legislature gives "commands to its subordinates in our government system, the judges who apply legislation in specific cases"); Maltz, *supra* note 115, at 3 ("The Supreme Court has generally proclaimed that ascertaining legislative intent is the touchstone of statutory interpretation.").

of the statute, and overcome all ambiguity in transmitting its decisions to the judiciary and the public.[119] If a legislature were able to accomplish all of these goals, the judicial function in statutory interpretation would be relatively passive. The court would discover what the legislature said about the case before it, and would apply its discovery to the case at hand.

Alas, our world is far from perfect. Language is frequently ambiguous,[120] and it is often impossible to discover any legislative intent about an issue which a court needs to decide.[121] In many instances, the generality of the statutory language seems to be a purposeful invitation to the courts to develop a body of law,[122] reflecting Congress' inability or unwillingness to make certain hard political choices.[123] When faced with statutes whose language and context admit of differing interpretations, a court must necessarily become creative. The conventional view is that at this point the court must try to determine what approach to the question before it fits best with the vision that the enacting legislature (or some relevant portion of it) appeared to share.[124] Some advocate, however, that the court should take a more dynamic approach, updating the statute to reflect current values, and perhaps trying to integrate those values with those articulated by the statute's framers and ratifiers.[125] Even if a judge adopts one of the

119. I leave aside the possibility that in a perfect world there would be no need for legislation, or, for that matter, legislators.

120. Recognizing the ambiguity of *much* language is not inconsistent with the position I took with respect to the plain meaning of the eleventh amendment's words in a previous article, Marshall, *Fighting the Words of The Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989). In arguing that the amendment's words leave little room for flexible interpretation, that article stressed the "unusual determinacy" of those provisions. *Id.* at 1349.

121. This statement seems uncontroversial. The arguments begin when one tries to make claims about just how often language and context can or cannot compel certain results. *See generally* D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561 (1989); *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

122. The Sherman Act, 15 U.S.C. §§ 1-7 (1982), is perhaps the most prominent example. As Wellington and Albert put it: "The only thing that can realistically be called the legislative purpose underlying such delegations is that the courts are to fashion law in accordance with their own notions of sound policy." Wellington & Albert, *supra* note 76, at 1561. For an argument that the Sherman Act need not (as a matter of legislative history), and should not (as a matter of constitutional theory), be treated as so open-ended, see Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 266 (1986).

123. *See infra* note 156 and accompanying text.

124. There is considerable debate about the level of abstraction this inquiry should take. *See generally* Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894-98 (1982). No matter what view is adopted, however, there arises the necessity of considerable guesswork about the legislature's unarticulated goals and understandings.

125. *See* G. CALABRESI, *supra* note 40; R. DWORKIN, *supra* note 90; Eskridge, *supra* note 95. For an approach that attempts to blend originalism with the updating function, see Farber &

more originalist methodologies, she is left with little choice but to rely on her own guesses about legislative intent or purpose, colored as they are by her own value judgments.[126] As for the more dynamic approaches, they openly give the judge substantial leeway in surveying the legal and social culture as part of the interpretive process. Under either model, "interpretation is inescapably a kind of legislation."[127]

The frequency of disagreement among judges and Justices in statutory cases illustrates this point.[128] Different readers frequently reach different conclusions about what statutes mean, and unless the readers are outright dishonest, these differences can likely be attributed to the personality traits and political values these readers bring to their perception of the statute.[129] As then-Justice Rehnquist observed:

> What can explain five to four or four to three decisions of appellate courts by judges all sworn to faithfully uphold the same laws and the same Constitution, other than a difference in attitude or outlook, which

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Frickey, *Legislative Intent and Public Choice,* 74 VA. L. REV. 423, 461-65 (1988) (suggesting that the court should make its best guess about the views of the Congress that passed the statute, but should also take into account current norms in assessing the potential dangers of making an interpretational mistake in one direction or another).

126. The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purposes will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body.

United States v. American Trucking Assn., 310 U.S. 534, 544 (1940).

127. Frank, *Words and Music: Some Remarks on Statutory Interpretation,* 47 COLUM. L. REV. 1259, 1269 (1947); *see also* R. DICKERSON, *supra* note 46, at 252 ("American courts now accept the fact that in interpreting and applying statutes they are regularly involved, however incidentally, in making law."). Robert Weisberg explains that "although discussing a statute's larger purpose may be an attractive and necessary approach where the court cannot discern the 'specific intent' of the legislature, this interpretive tool always verges on 'spurious interpretation' — a barely disguised form of judicial legislation." Weisberg, *supra* note 81, at 215 (footnote omitted).

128. An analysis of the Supreme Court's signed opinions for its October 1986 Term showed that 31% (20 out of 64) of its cases primarily involving statutory interpretation were decided by unanimous votes, as compared to 15% (11 out of 71) of its cases primarily involving constitutional interpretation. Thirteen of the statutory decisions that divided the Court were decided by 5-4 votes, meaning that 20% (13 out of 64) of the Court's statutory decisions were decided by a margin of one vote. By way of comparison, 38% of the Court's constitutional decisions (27 out of 71) were decided by 5-4 votes. A full understanding of these figures would require subtle analysis of the Court's certiorari practice and the willingness of Justices to dissent on various issues. Even standing alone, however, the figures give some sense of the practical indefiniteness of many statutes (especially those that the Supreme Court addresses, *cf.* Schauer, *supra* note 39, at 409-10). Among the lower federal courts, the frequency of circuit splits on statutory matters has spawned repeated calls for the establishment of an intercircuit tribunal. *See* Meador, *A Comment on the Chief Justice's Proposal,* A.B.A. J., April 1983, at 447, 449.

129. *See generally* D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING 134-71 (1976) (analyzing predictability of individual Justices' decisions); Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution,* 70 JUDICATURE 48 (1986) (describing voting propensities of federal judges appointed by Democratic and Republican presidents); Grossman, *Social Backgrounds and Judicial Decision-Making,* 79 HARV. L. REV. 1551 (1966) (evaluating efforts to relate background variables of judges to their decisions).

> leads to the ascription of different meanings to the same words of a statute or of a constitutional provision?[130]

These individuals' views and preconceptions are, in turn, the product of "'the political, economic and moral prejudices' of the judge."[131] Nonunanimous results do not necessarily demonstrate that some Justices are being unfaithful to their best reading of the statute. They simply reflect the flexibility of language and the inevitability that readers will view language through their own always-tinted lenses.[132]

By what right does the judiciary exercise this creative power?[133] In explaining why they have devoted so much attention to this fundamental question with respect to the nondemocratic aspects of judicial review for constitutionality, but so little attention to this question as it relates to statutory interpretation, commentators have pointed repeatedly to the conditional nature of statutory, but not constitutional, decisions.[134] Michael Perry, for one example, dismisses any countermajoritarian concern about statutory interpretation by declaring that "whatever policy choices the judiciary makes in nonconstitutional cases are subject to revision by the ordinary processes of electorally accountable policymaking. In that sense, nonconstitutional policymaking by the judiciary is electorally accountable, even if the judges themselves are not."[135]

There is no doubt that the potential for congressional override significantly mitigates the countermajoritarian difficulty of statutory interpretation; but it is wrong to treat this potential as a solution to the problem altogether. As the earlier discussion of Congress' prospective ability to overrule precedents demonstrates, there are difficulties in relying too heavily on the congressional power to overrule decisions as a

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130. Rehnquist, *Sense and Nonsense About Judicial Ethics,* 28 REC. A.B. CITY N.Y. 694, 709 (1973).

131. J. FRANK, *supra* note 39, at 105; *see also* Posner, *The Jurisprudence of Skepticism,* 86 MICH. L. REV. 827, 828 (1988) (many decisions depend on the "policy judgments, political preferences and ethical values of the judges").

132. *See* Brest, *Interpretation and Interest,* 34 STAN. L. REV. 765, 771 (1982). *See generally* S. FISH, IS THERE A TEXT IN THIS CLASS? (1980).

133. Any reader tempted to dismiss this challenge as trivial is asked to consider the decision in United Steelworkers v. Weber, 443 U.S. 193 (1979), where the Court was forced to determine whether Congress' prohibition of racial discrimination in Title VII of the Civil Rights Act of 1964 included a prohibition on a race-based affirmative action plan agreed upon by an employer and a union. It is widely recognized both that there is very little guidance from Congress on the point, and that the question is one of the most politically divisive and sensitive that America has faced in this generation. Surely a system that allows a non-accountable judiciary to make a decision such as this demands justification.

134. *See, e.g.,* A. BICKEL, THE LEAST DANGEROUS BRANCH 20 (1962); J. CHOPER, *supra* note 57, at 132; J. ELY, DEMOCRACY AND DISTRUST 4 (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 28 n.* (1982).

135. *See* M. PERRY, *supra* note 134, at 28 n.*.

primary tool of legitimization.[136] The serious problems of ignorance and inertia confirm that "[w]hat Congress can do theoretically may not be in fact practicable."[137] Even if the power of statutory interpretation is simply the "power to make temporary rules and thereby to assign the burden of overcoming inertia and of getting those rules revised,"[138] it is a substantial power and requires justification.[139]

We return, therefore, to the basic question: By what right does the judiciary exercise the power to make political choices in the course of statutory interpretation? When a similar challenge is posed with respect to the countermajoritarian nature of judicial review, commentators typically respond by focusing on the basically nonmajoritarian nature of the Constitution itself.[140] An important function of the Con-

136. "The theoretical possibility of congressional override cannot disguise the fact that lawmaking by federal courts would in most cases give the last word to the federal courts rather than to Congress." Merrill, *The Common Law Powers of Federal Courts,* 52 U. CHI. L. REV. 1, 23 (1985); *see also* A. BICKEL, *supra* note 134, at 206; G. CALABRESI, *supra* note 40, at 6.

137. McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion,* 3 HOUS. L. REV. 354, 364 (1966). For example, one observer found "the relative infrequency of Congressional response" to Supreme Court antitrust and labor law opinions decided between 1950 and 1972 to be "striking." Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response,* 11 AM. POL. Q. 441, 453 (1983).

138. G. CALABRESI, *supra* note 40, at 93.

139. Some might argue that these observations about the practical barriers to overruling judicial decisions should be ignored in determining whether the potential for congressional override legitimizes judicial lawmaking. Perry, for example, recognizes the force of inertia, but argues that

> [t]he burden of legislative inertia operates throughout our governmental system to give legislative minorities more (negative) power than they would otherwise enjoy. (That state of affairs is certainly not inconsistent with the principle of electorally accountable policymaking — unless we are now to pronounce policymaking by the United States Congress as electorally unaccountable!)

M. PERRY, *supra* note 134, at 134. The quoted passage is from Perry's defense of his argument that Congress' power to control federal jurisdiction has a legitimizing effect on constitutional review. But he also appears to apply this reasoning to Congress' power to overrule statutory and common law decisions, and hence dismisses any countermajoritarian difficulty in these contexts. *See id.* at 126.

The problem with applying Perry's argument to the process of statutory interpretation is that doing so ignores Perry's characterization of the minority's power as a "negative" one. The many constitutional and institutional impediments to enacting legislation reflect strong societal biases against legislative action and in favor of the status quo. *See supra* notes 55-58 and accompanying text. Thus, Perry is correct in concluding that Congress' failure to legislate in a specific area cannot be condemned as illegitimate even if it is clear that Congress would have acted but for the burden of inertia. *See supra* notes 63-70 and accompanying text. But it is far different to conclude that affirmative legislative decisions by unaccountable actors (the courts) can be fully legitimized by Congress' inertia-induced failure to respond. Judicial interpretations of statutes often have the effect of extending the scope or force of an enactment. For example, in the *Runyon* line of cases, *see supra* note 45, the Court extended the force of 42 U.S.C. § 1981 to a wide range of private discriminatory activity. If it is a small minority of congresspersons that has prevented Congress from overruling the Court's construction of the statute, then a minority of Congress has been wielding far more than the "negative" effect that is purposely built into the system. The combination of an unaccountable court and a minority of the legislature will have effectively legislated, which is a very different function from simply acting as a check on, or possessing veto authority over, the majority's attempts to legislate.

140. If it be said that the legislative body are themselves the constitutional judges of their

stitution is to bind the majority to certain procedures and to preclude the majority from certain activities. It is quite understandable, therefore, that the insulated judiciary is given the task of interpreting and applying the Constitution. Giving the job to any other body, the argument goes, is akin to arming Ulysses with a knife to loosen his bonds in the event that he decides to approach the Sirens after all.[141] Legislative supremacy is not an effective objection to judicial review because the legislature does not have supreme authority to violate the Constitution. Along with their authority to enforce the Constitution, judges necessarily have the responsibility of interpreting the Constitution, for what other branch could possibly possess that authority without calling into question the countermajoritarian force of the Constitution?[142]

It is a bit more difficult to tell a convincing story about the legitimacy of lawmaking through statutory interpretation. Unlike constitutional interpretation, the creative aspects of statutory interpretation cannot be justified by the need for a check on the validity of legislative enactments. Except in the rare case where one reading of a statute would raise doubts about the statute's constitutionality,[143] courts engaged in statutory interpretation perform no reviewing function.[144] Rather, the courts, the most electorally non-accountable body of government, routinely choose between a variety of possible constructions of a legislative act, any one of which the legislature could have legitimately chosen.

The answer to the legitimacy challenge is, ultimately, a pragmatic one. In the course of adjudicating cases it is often essential for courts

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own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the constitution. . . . It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.

THE FEDERALIST NO. 78, at 524-25 (Hamilton) (J. Cooke ed. 1961).

141. As the story goes, Ulysses instructed his sailors: "if I beg you to release me, you must tighten and add to my bonds." HOMER, THE ODYSSEY 193 (Penguin Classics ed. 1946).

142. "[N]o constitutional theorist contends that the legislative or the executive branch of the federal government has as great an institutional capacity as the judicial branch, much less a greater capacity, to exercise interpretive review, to enforce the framers' value judgments." M. PERRY, *supra* note 134, at 16 (emphasis omitted).

143. *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1984).

144. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," . . . it is equally — and emphatically — the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the executive to administer the laws and for the courts to enforce them when enforcement is sought.

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

to decide how an act of Congress applies.[145] There is no option of deferring consideration of the question — a decision has to be reached for the sake of the parties and for the sake of establishing a reasonable level of certainty so interested observers may plan their conduct.[146] To be sure, there are substantial values served by having courts, rather than Congress or the Executive, exercise the judicial power. These values include procedural fairness, protection against ex post laws, separation of prosecutorial and judicial functions, and general goals of principled decisionmaking. Judicial policymaking, however, is not one of the functions which ought to be extolled as part of the courts' ideal role in adjudicating cases involving federal statutes.[147] The judiciary's practice of making difficult value choices in the course of interpreting statutes does not find its justification in the intrinsic value of judicial involvement in that process. It is, rather, an inevitable and perhaps unfortunate byproduct of the need to adjudicate actual cases. As Justice Hugo Black asserted: "The Court undertakes the task of interpretation . . . not because the Court has any special ability to fathom the intent of Congress, but rather because interpretation is unavoidable in the decision of the case before it."[148]

That *some* level of judicial lawmaking is inevitable does not provide an excuse for *totally* ignoring the countermajoritarian difficulty with statutory interpretation, however. To the extent that the lawmaking role of the judiciary can be reduced or eliminated without impairing the courts' adjudicative function, there is no excuse for not proceeding in that direction. Corresponding to the two major factors that cause the problem with statutory interpretation — judicial creativity and congressional passivity — there are two complementary approaches to reducing the concern over the judiciary's lawmaking function.

First, one could focus on the judicial role, and try to reduce the creativity that judges exercise in interpreting statutes. It is important

145. *See* Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society,* 67 IOWA L. REV. 711, 717-21 (1982); Smith, *Courts, Creativity, and the Duty to Decide a Case,* 1985 U. ILL. L. REV. 573, 579-87.

146. "Inevitably our resolution of cases or controversies requires us to close interstices in federal law from time to time . . . ." West v. Conrail, 481 U.S. 35, 39 (1987). *See generally* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. PA. L. REV. 797, 799-800 (1957).

147. "Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences." Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984).

148. Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 257 (1970) (Black, J., dissenting).

to recognize, though, that it will never be possible to eliminate the necessity for judicial policy choices in the course of interpreting statutes. As William Popkin recently noted in defending his "collaborative model of statutory interpretation," there simply "is no such thing as a noncollaborative way for courts to approach statutes."[149]

The second way of approaching the problem is to examine Congress' role in the enterprise of statutory interpretation. Recall that much of the countermajoritarian difficulty with modern statutory interpretation is attributed to the perception that Congress' oversight of the courts' statutory decisions is not as energetic as it might be. Although legal scholars have tended to ignore the congressional side of the equation, it seems reasonable to conclude that if the level of congressional involvement can be increased (thus making the courts' decisions look much more like conditional decisions) then at least some of the countermajoritarian difficulty will be reduced. Hence, one way to deal with the problem of judicial lawmaking is to adopt measures that will make congressional oversight a more realistically legitimizing element in statutory interpretation. As the next section describes, invoking a heightened rule, or better yet an absolute rule, of statutory stare decisis is a step in this direction.

B. *The Role of an Absolute Rule of Statutory Stare Decisis*

The tension between the lawmaking aspects of statutory interpretation and principles of democratic self-governance forms the core of the separation-of-powers-based approach to a heightened or absolute rule of statutory stare decisis. Justice Black, perhaps the Court's strongest advocate of a strong rule of statutory stare decisis, sketched out one way in which uneasiness with judicial creativity relates to stare decisis:

> When the law has been settled by an earlier case[,] then any subsequent "reinterpretation" of the statute is gratuitous and neither more nor less than an amendment: it is no different from a judicial alteration of language that Congress itself placed in the statute.
>
> Altering the important provisions of a statute is a legislative function. And the Constitution states simply and unequivocally: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[150]

According to Black, because the absolute need to fill a gap in a statute occurs just once, any subsequent revisitations of the issue cannot find legitimacy under the banner of adjudicative necessity. The court

149. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 627 (1988). Popkin's collaborative model views courts as participating "through case law decisions in the process of public deliberation to develop political values." *Id.* at 591.

150. *Boys Markets*, 398 U.S. at 257-58 (Black, J., dissenting) (citation omitted).

might believe that the statute was interpreted wrongly, and that the interpretation ought to be changed; but these are basically legislative, rather than adjudicative, concerns.[151] Once the statute has been interpreted, any change in direction can be left for Congress.

Taken alone, Justice Black's position appears to be a bit shallow. He is, of course, correct that an absolute rule of statutory stare decisis is bound to limit the number of cases in which judges make policy choices. It is obvious that if courts are willing to decide each statutory issue just once, the number of times that the courts decide statutory issues will be smaller than if the courts are willing to reconsider the issue after an initial decision. But limiting the numerical incidence of judicial lawmaking episodes in that narrow sense is not obviously consistent with the goal of limiting the lawmaking role of the courts in statutory interpretation. Indeed, one might persuasively argue that the lawmaking character of statutory interpretation is intensified by a strong rule of stare decisis for the rule gives statute-like permanence to judge-made law. To those concerned with lawmaking by the judiciary, therefore, it makes little sense to talk quantitatively, without considering the effects that a heightened or absolute rule of statutory stare decisis is likely to have on the relationship between Congress and the courts.

Analyzing those effects suggests that aside from decreasing the *incidence* of judicial lawmaking, adopting a heightened or absolute rule of statutory stare decisis could reduce the *significance* of judicial lawmaking. If the relationship between Congress and the courts could be changed so as to make the specter of congressional oversight of statutory precedents more of a reality, the legitimacy of judicial involvement in initially interpreting statutes would become far less difficult to justify. If a more active colloquy between the branches could be stimulated, the potential for congressional override then could be realistically treated as a meaningful legitimizing factor in the interpretive process. The courts' interpretations then could be treated more like conditional rules, and there would be less need to be concerned with the unaccountable nature of the courts.[152]

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151. In the final analysis, a Justice's vote in a case like this depends more on his or her views about the respective lawmaking responsibilities of Congress and this Court than on conflicting policy interests. Judges who have confidence in their own ability to fashion public policy are less hesitant to change law than those of us who are inclined to give wide latitude to the views of the voters' representatives on nonconstitutional matters.

Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917, 1923 (1989) (Stevens, J., with whom Brennan, Marshall & Blackmun, JJ., joined, dissenting) (majority opinion overruled Wilko v. Swan, 346 U.S. 427 (1953)).

152. Of course, making the prospect for judicial overrule more meaningful does not necessarily legitimize the enterprise of unnecessarily creative statutory interpretation. That "the legisla-

How, though, could a heightened or absolute rule of statutory stare decisis stimulate increased congressional involvement in monitoring statutory interpretation? It would do so by articulating a clear and unyielding division of responsibility. As Dean Edward Levi explained:

> Legislatures and courts are cooperative law-making bodies. It is important to know where the responsibility lies. If legislation which is disfavored can be interpreted away from time to time, then it is not to be expected, particularly if controversy is high, that the legislature will ever act. It will always be possible to say that new legislation is not needed because the court in the future will make a more appropriate interpretation. If the court is to have freedom to reinterpret legislation, the result will be to relieve the legislature from pressure. . . . Therefore it seems better to say that once a decisive interpretation of legislative intent has been made, and in that sense a direction has been fixed within the gap of ambiguity, the courts should take that direction as given.[153]

Seen in this light, judicial overruling of statutory precedents is not only unnecessary to the adjudicative process, but it serves to lessen the level of congressional involvement in overseeing and overruling the courts' statutory decisions. If Congress and interested parties believe that statutory decisions can be overruled either by Congress *or* by the courts, the pressure on Congress to become involved is reduced.[154]

Because the Court has never consistently applied a heightened or absolute rule of statutory stare decisis, there is no empirical data available to prove or disprove the hypothesis that such a rule would trigger increased congressional oversight of statutory interpretation. Nonetheless, there are a number of models that may help predict the consequences of such a rule. Imagine two legal systems that are identical except in one respect. One deals with statutory precedents as it does other kinds of precedents: it is willing to overrule them. The other system, by contrast, steadfastly refuses to reconsider any statu-

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ture can protect itself against judicial invasion of its sphere does not justify that invasion in the first place." Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1128 (1978); *see also* Merrill, *supra* note 136, at 22. Whether the "dynamic" forms of statutory interpretation referred to in this article represent such invasions is a difficult question and is beyond the scope of this article.

153. E. LEVI, *supra* note 38, at 32.

154. Justice Stevens has made a similar point, dissenting in Commissioner of Internal Revenue v. Fink, 483 U.S. 89 (1987):

> Moreover, if Congress understands that as long as a statute is interpreted in a consistent manner, it will not be reexamined by the courts except in the most extraordinary circumstances, Congress will be encouraged to give close scrutiny to judicial interpretations of its work product. We should structure our principles of statutory construction to invite continuing congressional oversight of the interpretive process.

483 U.S. at 104; *see also Rodriguez*, 109 S. Ct. at 1923 (Stevens, J., dissenting); McNally v. United States, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting).

tory precedents. In which system can Congress be expected to pay more attention to a judicial decision interpreting a statute?

There should be a marginally higher level of congressional oversight in the system in which courts apply a heightened or absolute rule of statutory stare decisis. For in that system the legislators, lobbyists, and public all know that any changes in the interpretation of statutes can come only through legislative action — not through a judicial reversal of the announced interpretation. Thus, legislators will not have the luxury of putting off action in anticipation of a judicial decision, or perhaps more importantly, placating their constituents or those who exert pressure upon them by convincing them that there remains the prospect for judicial self-correction.[155] By the same token, groups and individuals interested in changing the rule will focus all of their attention on the legislature, rather than diluting their energy by continuing their attempts to effectuate change in the courts through litigation as well.

Public choice theory teaches that legislators have strong incentives to avoid alienating interest groups whenever possible. When there are strong competing factions on an issue, the legislature will often pass the buck to an agency, or to the courts, by enacting a vaguely worded statute that offers each side of the controversy some hope of ultimately prevailing.[156] This same desire to avoid controversy or to "shift responsibility"[157] helps explain congressional inaction where judicial decisions have stimulated strong negative sentiment. By pointing to the possibility that the courts will revisit the issue, or by otherwise suggesting that the issue is best dealt with by the judiciary, a legislator can avoid the political heat that sponsoring or voting for legislation to overrule the decision may spark. An absolute rule of statutory stare decisis takes away that opportunity, and at least a marginal increase in congressional reaction and attention should be expected to accompany its adoption.

In addition to reducing the pressure on Congress to confront thorny political issues, the possibility of judicial reversal deters congressional action in another respect. There is a limited number of is-

155. *Cf.* Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation,* 74 VA. L. REV. 275, 288 (1988) (the "dilemma of the ungrateful electorate" tends to hold legislators more accountable for their actions than for their passiveness).

156. *See* T. LOWI, THE END OF LIBERALISM (2d ed. 1979); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation,* 68 CORNELL L. REV. 1 (1982); Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?,* 39 PUB. CHOICE 33 (1982); Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition,* 66 AM. POL. SCI. REV. 555 (1972); *see also* M. HAYES, *supra* note 53.

157. Aranson, Gellhorn & Robinson, *supra* note 156, at 60.

sues with which any Congress can deal.[158] In choosing among potential subjects for attention, reasonable legislators should be expected to take into account the possibility that the problem will solve itself, or that someone else may solve it. All other things being equal, therefore, the utility-maximizing decision under these circumstances is to press for the legislation on the subject over which the legislature has exclusive control, while hoping that the other problem (reversing judicial interpretation) will be solved by the courts.[159] If the possibility of judicial overruling is eliminated, legislative consideration of court decisions will be put on a par with other items on the legislative agenda.[160]

This prediction is consistent with basic principles of organizational design theory. Diffusion of responsibility and authority has been shown to pose significant barriers to responsive action within an organization. Henry Fayol wrote of the need to define clearly the scope of actors' responsibility and authority, and to make sure that the scope of responsibility is commensurate with the scope of authority.[161] One of the essential principles of delegation is to avoid "overlaps" and "splits" of responsibility that tend to reduce any one individual's sense that she must be the one to act.[162] To help facilitate decisionmaking, one author advocates that a specific person be designated the decisionmaker for every decision area.[163] "He *alone* would be empowered to make the decision. His responsibility to decide would be nontransferable; it could not be delegated. The areas for which he would have decision-making authority would be clear to him and, equally important, clear to everyone else in the company."[164]

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158. *See supra* note 63-64 and accompanying text.

159. If *V1* and *V2* are the values of enacting two pieces of legislation (issues 1 and 2), and *P2* is the probability that courts will change the rule with respect to issue 2, then a legislature with limited resources will choose to deal with issue 1 as long as $V1 + P2\ V2 > V2$.

160. In that event, Congress will choose option 1 only if $V1 > V2$. The effect should be to increase the likelihood of congressional reversal of decisions. It must be noted, however, that under this model some other legislation will be crowded out by Congress' devoting more time to reconsidering statutory interpretations. Whether this cost is tolerable depends on one's normative views on the importance of legislative involvement in the interpretive process. *See infra* note 288 and accompanying text.

161. *See* H. FAYOL, GENERAL AND INDUSTRIAL MANAGEMENT 21 (1949).

162. "An 'overlap' occurs when responsibilities fall under the accountability of two or more executives. A responsibility is 'split' when it is carried out by more than one organizational unit." R. ALBANESE, MANAGING TOWARD ACCOUNTABILITY FOR PERFORMANCE 542 (1978).

163. Ford & Bursk, *Organizing for Faster Decisions,* MGMT. REV., April 1971, at 5. *See generally* D. MCCONKEY, NO NONSENSE DELEGATION 169-70 (1974); J. MOONEY & A. REILEY, THE PRINCIPLES OF ORGANIZATION 29-30 (1939); L. URWICK, THE ELEMENTS OF ADMINISTRATION (1947).

164. Ford & Bursk, *supra* note 163, at 9. An old Scottish ballad captures the diffusion of responsibility point in this way:

The Wind sae cauld blew south and north,

Studies in the area of social psychology, spawned by the famed Kitty Genevese murder case in New York City,[165] confirm the effects that unitary responsibility can have in triggering individual action. A series of studies have tested bystander reaction to emergency situations, comparing the reactions of subjects who believe they are the only ones in a position to help with the reactions of subjects who believe there are others in a position to help as well. Those who thought that they were the lone hope of the victim were considerably more likely to act.[166] Of course, tort law has long recognized this phenomenon. Although a bystander generally has no duty to act, one who creates the impression that she is responding to the emergency has a duty to carry through, because "the belief that a rescue [is] in process may lead superior rescuers to pass by, making the victim worse off than he would have been had the first rescuer not chanced on the scene."[167] When the court appears to be a potential rescuer (whose work is continuously in progress), the victim (society suffering from the poor initial decision) might be worse off than if the court took a hands-off approach. For as between the courts and Congress, no one would argue that the courts may play as active a role in reconsidering and updating statutes as Congress may play.[168]

The effect that anticipated court involvement can have on congressional willingness to deal with issues has been noted in the area of constitutional decisionmaking. Writing in 1893, James Thayer argued that the specter of judicial review tends to dissipate Congress' feeling

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And blew into the floor;
Quoth our goodman to our goodwife,
"Gae out and bar the door."
"My hand is in my hussyfskap.
Good man, as ye may see;
An it should nae be barred this hundred year,
t s' no be barred for me."

Get Up and Bar the Door, in THE NORTON ANTHOLOGY OF POETRY 102 (A. Eastman 2d ed. 1970). The poem goes on to relate a series of tragic events caused by the refusal of each to be the one to get up and bar the door.

165. Gansberg, *37 Who Saw Murder Didn't Call the Police,* N.Y. Times, Mar. 27, 1964, at 1, col. 4.

166. *See* B. LATANÉ & J. DARLEY, THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP? (1970); Darley & Latané, *Bystander Intervention in Emergencies,* 8 J. PERS. & SOC. PSYCHOLOGY 377 (1968).

167. Archie v. City of Racine, 847 F.2d 1211, 1213 (7th Cir. 1988) (en banc), *cert. denied,* 109 S. Ct. 1338 (1989). *See generally* RESTATEMENT (SECOND) OF TORTS §§ 314, 323 (1965); W. PROSSER & R. KEETON, THE LAW OF TORTS 378-82 (5th ed. 1984); M. SHAPO, THE DUTY TO ACT (1977).

168. As Justice Douglas, who was hardly timid in defending an active judicial role, recognized: "The truth is that the reach of a law may never be appreciated by the enacting body until it has been passed and put into practice . . . . That is why constant legislative reappraisal of statutes as construed by the courts . . . is a healthy practice." Douglas, *Legal Institutions in America,* in LEGAL INSTITUTIONS TODAY AND TOMORROW 274, 292 (M. Paulsen ed. 1959).

of obligation to deal with constitutional issues.[169] There are countless examples of an act being passed and signed based on the expectation that the courts would strike down the resulting statute if it contained any constitutional defect.[170] This "abdication of [Congress'] role as a constitutional guardian and . . . abnegation of its duty of responsible lawmaking"[171] is hard to remedy in the constitutional setting, for few would argue that the judiciary should abandon its essential role of constitutional adjudicator.[172] But the problem is not as intractable in the area of statutory reinterpretation — the kingdom would not collapse if only Congress could reverse the Supreme Court's constructions of statutes. In any event, the factors described above, and the phenomenon that occurs in the constitutional area, confirm Dean Levi's assertion that "[i]f the Court is to have freedom to reinterpret legislation, the result will be to relieve the legislature from pressure."[173]

Judge Frank Easterbrook makes a similar point about the effect that the "[r]eady overruling of constitutional cases" has on the amendment process.[174] He explains that the practice

> saps the drive for change in the constitutional text. People who seek amendment know that the Court may change the rules at any moment, making their campaign unnecessary or even counterproductive . . . . Legislators may explain their inattention to the proposed amendments

169. J. THAYER, JOHN MARSHALL 64-67 (1901); *see also* A. BICKEL, *supra* note 134, at 21-22; Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 19-20.

170. *See, e.g.*, President Ronald Reagan's Statement on Signing the Bill Increasing the Public Debt Limit, II PUB. PAPERS 1471-72 (Dec. 12, 1985) (questioning constitutionality of Gramm-Rudman-Hollings deficit reduction bill, but signing it nonetheless); 1938 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297-98 (1941) (relying on courts to cure unconstitutional legislation); *see also* Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 313 n.10 (1987) (citing examples of congressional reliance on judicial review). Donald Morgan reported that 31% of the 187 members of Congress who responded to his questionnaire in 1959 answered "yes" to the following question: "Generally speaking, should Congress pass constitutional questions along to the courts rather than form its own considered judgment on them?" D. MORGAN, THE CONGRESS AND THE CONSTITUTION 8 (1966). For a more recent, but less formal, survey of some members' views on the issue, see Greenhouse, *What's a Lawmaker To Do About the Constitution?*, N.Y. Times, June 3, 1988, at B6, col. 3. The legislature's and executive's callousness toward constitutional questions casts serious doubt on the extent to which courts should accord a strong presumption of constitutionality to legislation. *See* Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 212 n.44 (1985) ("Amidst such reciprocal deference it is quite possible that no branch ever takes the opportunity to meaningfully apply the dictates of the constitution.").

171. Mikva, *How Well Does Congress Support and Defend the Constitution?*, *supra* note 48, at 610.

172. For some proposals to relieve the problem in this area, see A. BICKEL, *supra* note 134; J. THAYER, *supra* note 169, at 68-70; Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Ross, *supra* note 170.

173. E. LEVI, *supra* note 38, at 32.

174. *See* Easterbrook, *supra* note 14, at 430.

> with the refrain that the proposal may be unnecessary. . . . Proponents of the amendment perceive the gains of change as less when the Court may come 'round, so they work less hard. The Court's emphasis on the difficulty of amending the Constitution therefore may lead, paradoxically, to an increased difficulty in securing a change.[175]

The flaw, then, in the current system of shared authority to overrule statutory precedents is that no one body is given the ultimate job of reviewing interpretations of statutes and deciding whether they represent currently acceptable renditions of the statute's goals, or for that matter, whether the statute is worth keeping around at all. This diffusion of authority lessens the probability of statutory development. It is far from clear, therefore, that C. Paul Rogers was correct when he asserted that "judicial unwillingness to reevaluate prior statutory interpretations impedes rather than assists the development and refinement of the law."[176] Rogers argues that a heightened rule of statutory stare decisis is problematic because, "[i]nstead of having two interdependent bodies responsible for improving and advancing statutory law, only the legislature has responsibility after a court has once spoken on the subject."[177] As anyone who has ever let a ball pass down the middle of the tennis court untouched while playing doubles knows, two heads are not always better than one.[178]

C. *Defining the Contours of the Rule*

This understanding of how the Court's approach to stare decisis can affect Congress' behavior serves to justify the general approach the Court has articulated with respect to a *heightened* rule of statutory stare decisis. But in order to be truly effective, the rule should be transformed into an *absolute* rule of statutory stare decisis. As long as there is some uncertainty about whether the Court might find a specific case to be an exception to its general principle against overruling a statutory precedents, Congress has the opportunity and incentive to avoid acting. Only an absolute rule can avoid this.[179] When Brandeis declared that it is often "more important that the applicable rule of

175. *Id.* at 430-31. Judge Easterbrook ignores the fact that this same paradox plagues his own arguments about the difficulty of legislative overruling of statutory precedents: the Court's increased readiness to overrule statutory precedents may lead "to an increased difficulty in securing a change" through the legislative branch.

176. Rogers, *Judicial Interpretation of Statutes: The Example of Baseball and the Antitrust Laws,* 14 HOUS. L. REV. 611, 625-26 (1977).

177. *Id.*

178. *See* UNITED STATES PROFESSIONAL TENNIS ASSOCIATION, TENNIS: A PROFESSIONAL GUIDE, 143-45 (1984) (imperative that players define responsibility by calling the shot, for it is impossible to play doubles in silence).

179. For a discussion of some of the advantages and disadvantages of adopting absolute rules, see Rose, *Crystals and Mud in Property Law,* 40 STAN. L. REV. 577 (1988).

law be settled than that it be settled right,"[180] he apparently was referring to the public's need for certainty in planning activities. But Congress must also be able to determine the current state of the law with certainty and to ascertain a nonmoving target at which to take aim.

This absolute rule must have limits, however. If the burden that an absolute rule of statutory stare decisis casts on Congress is so substantial that Congress cannot realistically manage it, then the goals of the proposal will be thwarted. Thus, it seems necessary to limit the rule's scope to Supreme Court decisions, in order to ensure that the number of decisions that Congress will be charged with monitoring is relatively small.[181] An argument can be made that a long line of unquestioned lower court decisions should also be treated as fixed in order to induce congressional scrutiny of such patterns of decisions.[182] But there will inevitably be great uncertainty in determining whether there is in fact a "long line" of cases, and whether it has been "unquestioned." Moreover, there is no obvious mechanism through which Congress can be easily apprised of a long line of lower court cases. By contrast, it is not difficult to devise a simple method through which Congress could receive copies of Supreme Court opinions. The trip across First Street cannot be more than 200 yards.

Of course, even with an absolute rule limited to Supreme Court decisions, no one can ensure that every congressperson will pay attention to every Supreme Court decision, and will carefully consider whether each ought to be overruled. Indeed, one can safely guarantee that universal scrutiny will never be achieved. But this article argues that it is important to look for steps that can be taken to remove some of the factors that lead Congress to be inert with respect to judicial decisions,[183] and an absolute rule of statutory stare decisis is one such step.

Whether or not the adoption of a heightened or absolute rule of statutory stare decisis will actually have its potential salutary effects

180. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

181. In its October 1986 Term, the Supreme Court decided 64 statutory cases. Surely, it does not overly tax the capacity of Congress to ask that it be responsible for monitoring this modest number of decisions. *See infra* notes 284-87.

182. *See* McNally v. United States, 483 U.S. 89, 362-65 nn.1-5 (1987) (Stevens, J., dissenting) (citing dozens of circuit court opinions interpreting a statute over 20-year period); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Stevens, J., dissenting) (discussing 32-year period in which eight circuits interpreted a statute similarly).

183. Justice Cardozo, for example, advocated the establishment of a Ministry of Justice, whose job it would be to monitor the interpretation of statutes and propose legislative amendments. *See* Cardozo, *A Ministry of Justice,* 35 HARV. L. REV. 113 (1921). More recently, Judge Ruth Bader Ginsburg of the United States Court of Appeals for the District of Columbia Circuit has made a number of proposals aimed at improving the discourse between the branches. *See* Ginsburg, *A Plea for Legislative Review,* 60 S. CAL. L. REV. 995 (1987).

on Congress will depend, ultimately, on how faithfully justices can be expected to adhere to the spirit of the proposed rule. We are all too familiar with the spurious "distinction" of a precedent, through which the Court strips a precedent of its import without actually "overruling" it. It is fair to ask whether it is worthwhile to adopt a proposal eliminating the possibility of overruling statutory precedents if the primary effect of the new rule will be simply to foster increased "distinguishing" of statutory precedents.

There seems to be little doubt that invoking an absolute rule of statutory stare decisis will stimulate some disingenuous judges to practically overrule cases through "distinguishing" them. No system of precedent can fully avoid this danger. It is wrong, though, to exaggerate the risk. First, one would hope that most judges are not all that intent on manipulating accepted legal rules to reach results they desire. Second, even if a significant number of judges are so inclined, there are a variety of social and cultural restraints that limit a judge's ability to ignore freely the dictates of legal rules.

Writing in the realist tradition, Karl Llewellyn described the great variety of ways judges can treat precedent,[184] but also stressed that, given the "correct range for action which our American system has afforded to our appellate courts from the beginnings of the nation," this flexibility does not produce "an undue reckonability of results."[185] Llewellyn presented a list of fourteen "[m]ajor [s]teadying [f]actors in our [a]ppellate [c]ourts" that help account for our relatively stable system for administering justice.[186] Similarly, Duncan Kennedy, writing in the Critical Legal Studies mode, has identified a number of factors that constrain judges in their uses of legal rules.[187] Two items on his list deserve special note, for they apply as strongly to the judge who is willing to consider ignoring the rules as they do to the judge who genuinely seeks to follow legal rules. Assuming the voice of a liberal judge who is unhappily constrained by adverse precedent, Kennedy explains the effect of community reaction:

> [V]arious people in my community will sanction me severely if I do not

184. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 77-91 (1960) (list of 64 "Available Impeccable Precedent Techniques").

185. *Id.* at 5 (emphasis omitted).

186. "(1) Law-conditioned Officials (2) Legal Doctrine (3) Known Doctrinal Techniques (4) Responsibility for Justice (5) The Tradition of One Single Right Answer (6) An Opinion of the Court (7) A Frozen Record from Below (8) Issues Limited, Sharpened, Phrased (9) Adversary Argument by Counsel (10) Group Decision (11) Judicial Security and Honesty (12) A Known Bench (13) The General Period-Style and its Promise (14) Professional Judicial Office." *Id.* at 19.

187. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology,* 36 J. LEGAL ED. 518, 527-28 (1986).

> offer a good legal argument for my action. It is not just that I may be reversed and will have broken my promise. It is also that both friends and enemies will see me as having violated a role constraint that they approve of (for the most part), and they will make me feel their disapproval.[188]

Kennedy also goes on to describe the effect that callous treatment of the legal rule would have on his hypothetical judge's long-term agenda. "[E]very case is part of my life-project of being a liberal activist judge. What I do in this case will affect my ability to do things in other cases, enhancing or diminishing my legal and political credibility as well as my technical reputation with the various constituencies that will notice."[189]

These observations about the judicial culture and incentive structure support the conclusion that judges' arguments, just like other lawyers', must pass the red face test. There are undoubtedly many cases at the margin where spurious distinctions will pass this test (causing the judge's face to become a bit flush, but not actually turn red). But there are also a great many cases where any effort to cast a decision as simply "distinguishing" a precedent will be subject to wide ridicule and contempt. This is particularly so when the precedent in question provides a verbal formulation interpreting a statute, as opposed to a fact-based determination in deciding particular case.[190] It is hard to imagine, for example, that any member of the Court in *Patterson*, much less a majority of the Court, could have pretended to distinguish away *Runyon* and announce a new rule limiting 42 U.S.C. § 1981 to private acts of discrimination without explicitly overruling *Runyon.* [191] Although there will surely be some room for evading an absolute rule of heightened rule of statutory stare decisis, adopting such a rule *will* have actual effects in the *practice* of dealing with precedents, not just in the *labels* that are used.

Even if one agrees that an absolute rule of statutory stare decisis can be successful in triggering increased congressional monitoring of statutory interpretation, there may still be reasons to reject the proposal. First, some may argue that the underlying goal of the proposal — minimizing the judiciary's role in making statutory law — is ill-conceived. Second, it might be argued that although the goal is salutary,

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188. *Id.* at 527.

189. *Id.* at 528; *see also* W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 31 (1964) (even a judge who has little respect for technical law-court rules would find it prudent to assume such respect before some of the popular, bureaucratic, or political checks were applied against his tribunal).

190. *See* J. STONE, PRECEDENT AND LAW: DYNAMICS OF COMMON LAW GROWTH 32 (1985).

191. *See supra* notes 39 & 44.

the costs of the proposal are too high. The next sections of this article deal with these points.

IV. The Countermajoritarian Problem Revisited

Perhaps the most controversial aspect of the proposal advanced in this article is its underlying premise that there is a significant concern, constitutional or otherwise, with the judiciary's creative role in statutory interpretation.[192] Many recent commentators have taken quite the opposite position, extolling and encouraging judicial creativity in statutory interpretation. This section addresses some of the arguments these scholars have made; for if they are correct in dismissing any difficulties with lawmaking by the judiciary, the proposal for an absolute rule, or the defense of a heightened rule, cannot be maintained on separation-of-powers grounds.

A. *Constitutional Foundations for Concern*

In rejecting a separation-of-powers justification for what he calls a "superstrong presumption of statutory stare decisis," William Eskridge attacks the view that the Constitution has something to say about the degree to which judges may make law in the course of interpreting statutes.[193] As a preliminary matter, he argues that the judicial legislation argument is a very weak "formalist" approach that has no basis in the constitutional text.[194] The argument is certainly too weak, in Eskridge's view, to support a "radical transformation in the Court's stare decisis practice," a transformation he believes would be necessary because anything close to an absolute rule of statutory stare decisis would be "inconsistent with the Court's actual practice of overruling statutory precedents quite frequently."[195]

The theory Eskridge attacks is a straw man. The call for an absolute rule of statutory stare decisis is not an absolute "formalist" claim that the Constitution strictly compels such an approach or condemns all others. Eskridge's truism that the Constitution "does not set forth any standards for stare decisis"[196] is quite beside the point. To the extent that the Constitution speaks to the issue, it speaks not to the

192. "Even though the Constitution explicitly puts the legislative power in Congress, judicial legislation is so deeply established that the legal profession takes it for granted, as though nature provided it." Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court,* 71 Minn. L. Rev. 1, 1 (1986).

193. Eskridge, *supra* note 36, at 1397-400.

194. *Id.* at 1398; *see also* Eskridge, *supra* note 95, at 1498-501.

195. Eskridge, *supra* note 36, at 1398.

196. *Id.*

narrow principle of statutory stare decisis, but to the broader principle of discouraging judicial lawmaking. Constitutional arguments relating to separation of powers often deal with structural themes in the Constitution, as opposed to individual clauses that prohibit or require specific practices.[197] Moreover, the proposal for an absolute rule of statutory stare decisis does not call for courts to strike down popularly enacted measures as unconstitutional, in which case the demand for specific textual support in the constitution would be reasonable. It simply urges that the nonmajoritarian aspect of judicial lawmaking should have a "conditioning influence"[198] in the Court's formulation of stare decisis rules.[199] Such a proposition surely does not need a specific text upon which to base its legitimacy.

Seen in this light, there is little force to the argument that the courts have no right to develop a rule of statutory interpretation designed to induce Congress to review statutory interpretations. Hart and Sacks seem to condemn a heightened rule of statutory stare decisis as "a statement from one coordinate branch of the Federal Government to another about how the other shall perform its official functions."[200] Similarly, Aleinikoff argues that such efforts to shape legislative behavior are "at war" with the desire to avoid the judicial activism that fuels them in the first place.[201] These attacks miss the mark. In crafting canons of interpretation, it is wholly legitimate for courts to seek to ensure the legitimacy of their own role in the legislative/interpretive process.[202] No one is forcing Congress to do any-

197. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986); Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); Myers v. United States, 272 U.S. 52 (1926).

198. Merrill, *supra* note 136, at 70.

199. One interesting question is why the very proposal advanced here is not foreclosed, on its own terms, by the Court's earlier decisions in this area. In other words, why aren't the Court's earlier statutory stare decisis decisions immune from change under an absolute rule of statutory stare decisis? There are two responses. First, the lack of a consistent approach to stare decisis makes it impossible to tell exactly what approach the Court has taken (although it *is* clear that the Court has not adopted an absolute rule). Second, and more important, the question of an appropriate approach to statutory stare decisis is not simply a matter of statutory interpretation — it implicates the role of the federal courts in the constitutional system. As such, it should not be subject to the rule proposed for matters of pure statutory interpretation.

200. H. Hart & A. Sacks, *supra* note 46, at 1402 (referring to reenactment cases); *see also* Grabow, *supra* note 42.

201. Aleinikoff, *supra* note 80, at 32.

202. The notion that canons of construction ought to be designed to put pressure on Congress to do its job is not unprecedented. Justice Frankfurter, for example, recognized the frailties of the legislative process, but nonetheless objected to "loose judicial reading" of statutes: "The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible and undisciplined use of language." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545-46 (1947).

thing — the courts are simply announcing how they will continue to interpret the statute in Congress' silence.

If explicit constitutional language is needed to support this approach, however, the first words of article I provide it. "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[203] Eskridge dismisses the import of this edict by arguing that although the section restricts "legislative powers" to Congress, "[n]owhere does the Constitution say that Congress shall have all lawmaking power."[204] What is one to make of this semantic argument? Is it possible that the Constitution merely precludes judges from making law through formally passing statutes, but presents no restriction to judges making law through other less formal means? Granted, there is some question about just how strictly this constitutional language should be construed.[205] It is quite mistaken, though, to construe it in such a narrow and artificial sense that it loses all significance as a meaningful grant of exclusive authority to the legislature, and as a material restraint on the power of the other branches.

Eskridge's more powerful point moves away from his demand for chapter and verse and argues that nothing about the constitutional system of separation of powers disapproves of judicial involvement in the lawmaking process. He points out that the federal courts have long engaged in the creation of a federal common law, and that the Constitution itself has been interpreted to assign this role to the judiciary in some areas. Obviously, any theory questioning the legitimacy of subtle judicial lawmaking through statutory interpretation must come to terms with the explicit lawmaking that federal judges engage in when crafting a federal common law.[206]

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203. U.S. CONST. art. 1, cl. 1.

204. Eskridge, *supra* note 95, at 1499. In support of this crabbed view of the words, Eskridge asserts that the "commonly accepted meaning of 'legislative Powers' — in 1789 as well as of today — is the power to enact statutes." *Id.*

205. *Compare id.* at 1499-500 *with* Merrill, *supra* note 140.

206. The specification of federal judges and federal common law is purposeful, for it is imperative to distinguish between the broad role state courts have in shaping their state's common law and the far more limited role the federal courts may legitimately occupy. The Constitution's structure of separated powers that limits the federal courts' lawmaking authority does not control the functions of state courts. *Cf.* Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). Indeed, many state constitutions explicitly contemplate that state courts will share considerable power with state legislatures. Moreover, the fact that so many state judges are accountable to the electorate substantially mitigates some of the countermajoritarian difficulties that plague the federal courts. (Of course, state court accountability creates some difficulties as well. *See* Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986)). Calabresi ignores these fundamental distinctions between state and federal judges when he claims that the traditional

The theory advanced here — that judicial lawmaking is appropriate only when necessary to the function of adjudicating cases — does not necessarily condemn judicial involvement in shaping federal common law. Federal common law serves to fill gaps left in the body of laws that the legislature has enacted,[207] and in this sense, is similar to the process of filling the gaps in statutes Congress has passed. "The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind."[208] In both cases, Congress often has not spoken to the issue in any discernible manner, and it is not feasible to proceed to adjudicate a case without formulating an appropriate rule to govern. A theory that expresses *concern* about the judicial lawmaking inherent in much statutory interpretation is surely *concerned* about the legitimacy of federal common law, but unless that theory *condemns* all lawmaking through interpretation, consistency does not demand that it *condemn* all lawmaking through common law.[209]

The comparison between statutory interpretation and federal common law is important, though, for it demonstrates the inconsistency of demanding an absolute rule of stare decisis in statutory cases while not insisting upon a similar rule with respect to federal common-law precedents. If the type of judicial choice between alternative constructions that occurs in statutory interpretation is a function that the judiciary ought to perform as seldom as possible, and in a way that best promotes legislative oversight, then open-ended judicial creation of federal common law certainly ought to be carried out within these same limitations.[210]

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model of common-law lawmaking justifies federal courts' ignoring legislative enactments. *See* G. CALABRESI, *supra* note 40, at ch. 4.

207. As Merrill defines it: " 'Federal common law[ ]'. . . means any federal rule of decision that is not mandated on the face of some authoritative federal text — whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense." Merrill, *supra* note 140, at 5 (emphasis omitted); *see also* Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890-96 (1986).

208. Westen & Lehman, *Is There Life for* Erie *After the Death of Diversity*, 78 MICH. L. REV. 311, 332 (1980). *But see* Redish, *Federal Common Law*, *supra* note 115 (rejecting argument that development of federal common law and statutory interpretation are similar in this regard).

209. Moreover, even if Eskridge is correct in arguing that article III specifically envisions that federal courts will make common law in some subject areas, such as admiralty and disputes between states, it has little relevance to the power of the courts in other areas. Nor does it justify dismissing all concern about the courts' role even in these specific subject matters. That courts may have the power does not define the way, or the areas, in which they should exercise it.

210. This proposal to extend the absolute rule of stare decisis to the Supreme Court's federal common-law decisions might seem a bit drastic until it is recognized how few cases this class includes. It is surely not unrealistic to expect Congress to monitor the handful of federal common-law decisions the Supreme Court issues each year.

Similarly, there is no room to vary the weight of stare decisis according to different types of legislative enactments. Justice Stevens, for example, has drawn a distinction between typical statutes and statutes that are phrased in "sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common law tradition."[211] In these common law-like statutes, Justice Stevens, and perhaps other Members of the Court,[212] believes that the typical rule of heightened statutory stare decisis should be relaxed. But the judicial legislation argument in favor of an absolute rule of statutory stare decisis admits no exception for common law-like statutes. As with federal common law itself, the lack of strict standards to govern the courts' decisions interpreting these kinds of statutes serves to heighten — not to lessen — the concern with judicial lawmaking. It is with respect to federal common law and common law-like statutes that the lawmaking role of the court is at its pinnacle.

B. *Mini-Delegations*

Dean Guido Calabresi also argues that there are no constitutional impediments to judicial creativity in statutory interpretation. This is certainly true, he argues, where there is an explicit delegation of authority from the legislature, and perhaps even where there is not.[213] Indeed, in defending his "common-law" approach to statutory interpretation, which allows judges to ignore statutes they consider obsolete,[214] Calabresi boasts that he "cannot take a constitutional objection very seriously."[215] This casual dismissal of the constitutional difficulties inherent in judicial lawmaking is made possible only by Calabresi's broad view of Congress' authority to delegate legislative power. He suggests that the only impermissible delegations are those that occur when the legislature diminishes its "ultimate responsibility to the people for the enactment of constitutionally dubious laws."[216]

This characterization of the appropriate nondelegation standard seems odd in light of Calabresi's own explanation that the "limits the Constitution has imposed on . . . delegation have been those deemed

211. Guardian's Assn. v. Civil Serv. Commn., 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting); *see also* Rogers, *supra* note 176, at 630-32.

212. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1, 33 (1980) (Powell, J., dissenting). Eskridge lists a number of cases in which the Court appears to have taken a similar approach. *See* Eskridge, *supra* note 36, at 1376-81.

213. G. CALABRESI, *supra* note 40, at 114-17.

214. *See supra* note 91.

215. G. CALABRESI, *supra* note 40, at 114.

216. *Id.* at 115.

necessary to keep legislatures from ducking the responsibility of answering to the people."[217] It is difficult to understand why proximity to a substantive constitutional matter should be the only relevant factor in assessing whether the legislature has abdicated its responsibility to govern. There are certainly hard political choices in other areas that Congress and the President would prefer to delegate as well. As one member of Congress stated in an oft-quoted remark: "When hard decisions have to be made, we pass the buck to the agencies with vaguely worded statutes."[218] That the legislature and President may willingly agree to delegate their authority is no surprise and does not counsel in favor of allowing delegations. The natural temptation to abdicate responsibility and "accountability is precisely the reason *for* a nondelegation doctrine."[219]

Even if one accepts Calabresi's toothless delegation doctrine with respect to administrative delegations, however, it does not follow that the Constitution tolerates similar delegations to the judiciary. As Thomas Merrill has argued, part of the saving grace of a delegation to an agency whose officials are answerable to the President is the indirect electoral accountability of these decisionmakers.[220] Federal judges, on the other hand, are not answerable in this manner. Accordingly, "the example of wholesale lawmaking by independent and executive-branch agencies is distinguishable on grounds both of federalism and of electoral accountability."[221]

Merrill suggests that this electoral accountability extends to agency officials who "are either appointed or removable by the President."[222] Although it is clear that removability amounts to some degree of accountability,[223] it is doubtful that the fact of presidential appointment independently achieves any degree of accountability. If it did, then article III judges might also be considered electorally accountable since they, too, are appointed by the President. As a general matter, it appears reasonable to conclude that "[o]nce an officer is appointed, it is only the authority that can remove him, and not the au-

217. *Id.* at 114-15.

218. 122 CONG. REC. H10,685 (daily ed. Sept. 21, 1976) (Statement of Rep. Elliott Levitas), *quoted in* J. ELY, *supra* note 134, at 132.

219. J. ELY, *supra* note 134, at 133 (emphasis in original). *See generally supra* note 156 and accompanying text.

220. Merrill, *supra* note 136, at 21-22.

221. *Id.* at 21.

222. *Id.* at 21-22.

223. For an argument that the degree of accountability created by the presidential removal power is largely exaggerated, see Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence,* 75 KY. L.J. 699, 766-81 (1987).

thority that appointed him, that he must fear and, in the performance of his functions, obey."[224]

Nonetheless, under a sliding scale of accountability, federal courts surely must be deemed less accountable than independent agencies.[225] To begin with, agencies are far more subservient to the congressional budget process than are federal courts. Moreover, even unremovable agency commissioners enjoy only limited tenure (typically five to seven years), and are thus somewhat accountable to the body possessing reappointment authority (which is practically quite similar to the removal authority).[226] Federal judges, by contrast, are appointed for life.[227] Similarly, the short term of appointment, combined with the practice of frequent resignations,[228] means that most commissioners have been more recently appointed than most federal judges (assuming the number of judicial positions does not increase disproportionately). The commissioners might then be assumed to be responsive, although not accountable, to the policies of more recently elected administrations than are judges.[229]

To the extent these distinctions between courts and agencies are unconvincing, they serve to highlight the cause for concern with expansive delegations of legislative authority to the independent agencies. They certainly do not support Calabresi's assertion that the Constitution is neutral to the prospect of legislation by the

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224. Bowsher v. Synar, 478 U.S. 714, 726 (1986) (quoting Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C. 1986)).

225. Judge Friendly argued that this factor contributes to the attractiveness of lawmaking by the judiciary. Writing about Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), which interpreted a jurisdictional statute to afford federal courts the power to develop a body of federal labor law, Judge Friendly explained:

> One of the beauties of the *Lincoln Mills* doctrine for our day and age is that it permits overworked federal legislators, who must vote with one eye on the clock and the other on the next election, so easily to transfer a part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic law-making function — with Congress always able to set matters right if they go too far off the desired beam.

Friendly, *In Praise of* Erie — *And of the New Federal Common Law,* 39 N.Y.U. L. REV. 383, 419 (1964) (footnote omitted). Surprisingly absent from this discussion is any concern with separation of powers.

226. *See* L. KOHLMEIER, THE REGULATORS 38 (1969): "The [independent] regulators thus occupy an ill-defined and varying position in relation to the President, somewhere between the subordinate status of cabinet officers and the independence of judges."

227. U.S. CONST. art. III, § 1. Even so, they too may have some incentive to shape their behavior to increase the probability of elevation or appointment to some other office. *See* Redish & Marshall, *supra* note 206, at 498-99.

228. *See* Goodsell & Gayo, *Appointive Control of Federal Regulatory Commissions,* 23 ADMIN. L. REV. 291, 300-02 (1971); B. SHWARTZ, THE PROFESSOR AND THE COMMISSIONS 188 (1959).

229. *See generally* Posner, *Theories of Economic Regulation,* 5 BELL J. ECON. & MGMT. SCI. 335, 351 (1974).

judiciary.[230]

V. CONSIDERING THE COSTS

If an absolute rule of statutory stare decisis would have the beneficial effect of increasing Congress' involvement in the process of statutory interpretation, then it deserves to be considered as a method of minimizing, and even as part of the solution to, the countermajoritarian aspects of judicial lawmaking. Of course, even a doctrine that serves exemplary purposes may be unwelcome if its expected costs outweigh its expected benefits. This section of the article addresses some of those potential costs.

A. *Exacerbating Dysfunctions*

The theme of this article is that developing a colloquy between Congress and the courts on matters of statutory interpretation is an important goal, consistent with our democratic tradition of legislative supremacy. William Eskridge has argued, though, that getting Congress more involved is bound to "exacerbat[e] dysfunctions that exist in the legislative process."[231] Relying on public choice and institutional process theory, he argues that a heightened rule of statutory stare decisis

> might overprotect interpretations benefiting well-organized interests, too often at the expense of the general welfare. That is, once an organized interest wrests a favorable interpretation from the courts . . . Congress is unlikely to express disapproval, given the interest group's ability to mobilize opposition to any effort to change the interpretation legislatively. Conversely, if a judicial . . . interpretation hurts the interests of the same well-organized group, the group will often have a fighting chance to obtain a legislative overruling.[232]

To avoid this, he advocates that the Court's determination of whether to give significance to Congress' inaction should "consider whether the 'losers' in the initial interpretation had [and have] effective access to the political process to urge reconsideration."[233]

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230. Moreover, even if the Court is correct in declining to use the nondelegation doctrine actually to strike down statutes, it does not follow that there is no general principle of lawmaking by the legislature that the court should seek to implement in formulating its rules of decision. *See supra* notes 196-202 and accompanying text.

231. Eskridge, *supra* note 41, at 104.

232. *Id.* at 114. Although this passage comes from a discussion of acquiescence, Eskridge has made the same point with respect to statutory stare decisis. Eskridge, *supra* note 36, at 1406-08. For discussions of some (dated) empirical evidence supporting Eskridge's conclusion, see Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377, 391-92 (1965); Note, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324, 1336-37 (1958).

233. Eskridge, *supra* note 41, at 107-08.

Eskridge's argument is based on the very objectionable premise that it is legitimate for courts to shape doctrines of statutory interpretation in ways that either mitigate the effects of Congress' actual decisions, or try to keep issues out of the congressional arena altogether. In his most recent work, Eskridge concedes the tension between his view of the courts' role and the principle of legislative supremacy, but rejects the strong, formalist view of legislative supremacy as growing out of pluralist political theory.[234] Such a view of government, he argues, ignores the fact that "our constitutional history contains elements that derive both from the republican, public values tradition and from the liberal, pluralist tradition."[235] Eskridge then proceeds to describe how ugly a pluralist world would be, and suggests that we would all enjoy living in a "community of principle" more than a community built on the "transactional ideal."[236] To help bring about this "community of principle," Eskridge advocates that judges "bend" statutes to comport with "public values," even if this means "displac[ing] an apparent expectation of the enacting Congress."[237]

The most controversial aspect of Eskridge's theme is not his call for courts to recognize their role in promoting republican values. Many agree that judicial review of legislative enactments for procedural and substantive constitutionality is designed, at least in part, to serve this function.[238] The novelty is that Eskridge wants courts to use their positions as statutory interpreters to instill these values into legislative enactments.[239] Even though the legislature clearly acted

234. Eskridge, *Public Values in Statutory Interpretation,* 137 U. PA. L. REV. 1007, 1009 (1989).

235. *Id.* at 1070 (emphasis omitted).

236. *Id.* at 1070-73.

237. *Id.* at 1065. Without explaining why, Eskridge concedes that judges cannot invoke public values "to trump a clear [statutory] text and supportive legislative history." *Id.* at 1066. But he believes that only a small fraction of statutes fit that description.

238. Cass Sunstein has written extensively on this theme. *See, e.g.,* Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV. 29 (1985); Sunstein, *Naked Preferences and the Constitution,* 84 COLUM. L. REV. 1689 (1984); *see also* Ackerman, *The Storrs Lectures: Discovering the Constitution,* 93 YALE L.J. 1013, 1035 (1984). This approach is not without its critics, however, a number of whose articles appear in *Symposium: The Republican Civic Tradition,* 97 YALE L.J. 1493 (1988).

239. There is no *per se* problem in developing canons of statutory interpretation that are other than intent-seeking in the narrow sense. A plain meaning rule, for example, can be intent-frustrating on the short term but might make sense as a long-term mechanism for promoting increased legislative accountability and democratic decisionmaking. *See generally* Aleinikoff, *supra* note 80, at 22-32 (discussing ways that a plain meaning rule can promote and frustrate intentionalist goals); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,* 86 COLUM. L. REV. 223, 225 (1986) (outlining ways in which courts can promote legislative accountability). Indeed, an absolute rule of statutory stare decisis works this way as well. The difference with Eskridge's scheme is that it is not designed to promote open decisionmaking by the legislature; it is designed to embellish the judiciary's lawmaking role at the expense of the legislature.

constitutionally in enacting a statute, Eskridge's proposals would allow the courts consciously to manipulate congressional intent and to mold the statute in a way that furthers the judges' perception of the public interest.[240]

On one level, "one can only respond by asking whether the Constitution as it now stands envisions such sweeping rule by judges."[241] Eskridge's model cannot be defended simply by pointing out that the Constitution embodies some republican values. To be sure, some constitutional provisions, such as bicameralism and the executive veto, represent attempts to decrease the influence of special interests.[242] These provisions tell us that the Constitution exhibits concern with the effect of factions on the legislative process, and that the Constitution subordinates some of the values of pure representative lawmaking to the goal of limiting factional influence. But these provisions do not tell us that the Constitution adopts the public-interest maximizing principle as its general theme, and that all other values, such as lawmaking by the representative legislature, should (or may) be subordinated to it. Given the recognized tension between these two principles, the explicit provisions of the Constitution must be regarded as outer limits of the barriers to representative democracy that the Constitution tolerates, rather than as mere examples of the kinds of countermajoritarian devices that later generations might see fit to establish. There is such a thing as over-enforcing a principle,[243] and this is particularly harmful when the effect is to erode yet another principle — legislative supremacy — which has such strong foundations in our political heritage, not to mention the constitutional text.

The argument that an absolute rule of stare decisis gives too much power and responsibility to Congress is therefore quite unpersuasive. It is certainly mistaken to forget that legislative supremacy has its limits within a constitutional democracy.[244] But it is equally mistaken to

240. Even aside from any "formalist" claims about the respective roles of the legislature and the courts, there are serious defects in the kind of statutory interpretation that Eskridge envisions. As Eskridge himself documents, allowing judges to impose their views of "public values" opens the door for judges to implement values that many of us, or many other Americans, consider abhorrent, without any claim to democratic or constitutional authority. *See* Eskridge, *supra* note 234, at 1083-91.

241. Froomkin, *Climbing The Most Dangerous Branch: Legisprudence and the New Legal Process* (Book Review), 66 TEXAS L. REV. 1071, 1094 (1988).

242. Macey, *supra* note 239, at 225.

243. *Cf.* Marshall, *supra* note 120, at 1352-53 (discussing the fallacy of over-enforcing a single constitutional principle to the detriment of other, equally important ones).

244. *See* Ackerman, *supra* note 238, at 1035 (attacking modern lawyers' implicit belief that "there is only one place in which the political will of the American people is to be found: the Congress of the United States").

ignore our fundamental commitment to accountable government within those specified constitutional limits.

But even if one were sympathetic to the notion that the Court should develop an approach to stare decisis that would be cognizant of who the losers and winners under an earlier precedent were, and how much influence each wields, how would the court make such evaluations? One of Eskridge's examples illustrates the problem. He posits that the reason Congress has not overruled the Court's decisions holding baseball exempt from the antitrust laws is that baseball owners are a "small, homogenous, and wealthy" group, the kind of group that public choice theorist tell us is most likely to organize.[245] On the other hand, "[t]hose hurt by baseball's exemption — the millions who bought overpriced tickets each year and watched the sport on television — were unlikely to organize because they were generally ignorant of their injury and because individual stakes were very small."[246] Up to this point, the analysis is not overly complicated, and it might be anticipated that a judge reasonably educated in economic theory would and could reach this conclusion.

But the analysis cannot stop there, for there may be other losers besides the consumer. Indeed, the most obvious group of losers were the players, one of whom challenged baseball's reserve clause in *Flood v. Kuhn.*[247] Are baseball players not a rather "small, homogenous, and wealthy" group as well? Indeed, one might think that their hero stature in the eyes of so many Americans might give them added lobbying power.[248] Professor Eskridge concedes that public choice theory would have predicted that baseball players could effectively form an interest group, but he informs us of the empirical fact that although the Major League Player's Association was formed in 1954, it did not become a major force until after 1966.[249] Eskridge even attempts to give reasons for the players' ineffectiveness: "they were just not politically alert and had substantially more allegiance to their teams (and hence to the owners of their teams) than to their group."[250] By this point, there is reason to question a judge's, or a professional economist's, ability to gauge the power of losing groups. Not only must the

245. Eskridge, *supra* note 41, at 106.

246. *Id.*

247. 407 U.S. 258 (1972).

248. *Cf. Flood,* 407 U.S. at 262-63 (listing eighty-eight great baseball players who, Justice Blackmun wrote, "have sparked the diamond and its environs and . . . have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season").

249. Eskridge, *supra* note 41, at 106 & n.208.

250. *Id.*

judge adopt a model to define losers and assess their political clout, but she must account for the possibility that some among us are "just not politically alert" and for other anomalies such as team loyalty. Can a judge be expected to undertake such a political, economic, sociological, psychological, and historical inquiry with any reasonable degree of accuracy?[251] There is reason to doubt that anyone can.[252] The idea of a court assessing which litigants Congress can be trusted with is as unworkable as it is counterdemocratic.

B. *The Deep Freeze*

Another theme of the opposition to an absolute rule of statutory stare decisis rests on the premise that Congress is incapable of taking over the task of reviewing and reversing statutory precedents. For example, Dean Guido Calabresi argues that permitting only legislative change under our current system would send "the cornucopia of modern statutes . . . into the legislative deep freeze."[253] The only way that the legislature could be given the task without causing this "extraordinary conservatism," he asserts, would be to loosen the many procedural "checks and balances that create that freeze" within the halls of Congress. Such a move, he asserts, would represent an "extraordinary shift toward full majoritarianism."[254]

Calabresi surely is correct in rejecting the option of modifying the constitutional system of checks and balances. That system, as he explains elsewhere in his book,[255] is part of the delicate constitutional balance between conservatism and change. Bicameralism and presentment, to take two examples, are not historical anomalies. They are prominent features of our constitutional democracy. To modify them would be to alter aspects of the separation of powers that are central to our system of government. But as long as one is committed to maintaining the various checks and balances that contribute to legislative inertia and the bias toward conservatism implicit in the system, it is absurd to make an end run around these very limitations by allowing judges to effectuate changes that the Congress cannot. The fact, then, that an absolute rule of statutory stare decisis might lead to decreased overall review (by courts and Congress combined) of statutory deci-

251. There can also be difficulties in assessing who *are* the losers and winners of a particular piece of legislation. *See* Farber & Frickey, *supra* note 113, at 896 (citing disagreement among economic theorists on whether drivers or owners benefited from trucking regulation).

252. *Cf.* Weisberg, *supra* note 194, at 225-26, 256-57 (discussing the extraordinary expectations that Calabresi's proposal has for judges).

253. G. CALABRESI, *supra* note 40, at 104.

254. *Id.*

255. *Id.* at 3-5.

sions,[256] must be attributed to our general institutional conservatism. It ought not be condemned unless that general predisposition is abandoned.

C. *Clearly Wrong Decisions*

A less politically controversial objection to an absolute rule of statutory stare decisis is that such a rule "would actually undermine, rather than subserve, legislative supremacy."[257] Reed Dickerson makes the point this way: "The original interpretation, which by hypothesis thwarted legislative intent, did not invade the legislature's prerogative, whereas later correction, which by hypothesis supports the result originally intended by the legislature, would invade it. Does this make sense?"[258]

The concern that courts will be barred from overruling clearly wrong or unworkable precedent is valid, and it this concern that makes the doctrine suggested here "a hard one."[259] But recognizing the problem does not establish whether the expected costs of courts' not overruling clearly wrong statutory precedents outweighs the values served by an absolute rule of statutory stare decisis. Although there is no scientific answer to the question, the danger described may be less dramatic than it appears at first glance.

Initially, it is far from clear that there are many instances of "clearly wrong" precedents. Before the Supreme Court rules on a matter of statutory interpretation it generally has already had the benefit of at least two lower court decisions[260] and exhaustive briefing by the parties and possibly amici. Indeed, because of the Court's general practice of awaiting circuit splits before granting certiorari on statutory matters,[261] there are typically far more than two decisions by lower courts before the Supreme Court construes a statute. Any interpretation of the statute must then command a majority of the Court (usually five votes, but never less than four) before it triggers the absolute rule of statutory stare decisis. The thoroughness of this deliberative process would seem to be a significant protection against statutory

256. It is not clear that this would be the result of an absolute rule of statutory stare decisis, for the goal is that the courts' noninvolvement in revisiting statutory precedents will trigger increased legislative involvement.

257. Eskridge, *supra* note 36, at 1399.

258. R. DICKERSON, *supra* note 46, at 253; *see also* Eskridge, *supra* note 36, at 1399; Rogers, *supra* note 176, at 624-25.

259. E. LEVI, *supra* note 36, at 32.

260. Unless the case arises on direct appeal, *see* 28 U.S.C. § 1253 (1982), or the statutory issue was not raised in the initial court that decided the case.

261. *See* S. ESTREICHER & J. SEXTON, *supra* note 105, at 53-59.

constructions that can later be deemed to be objectively and decisively wrong.

Indeed, it is difficult to imagine any such case, notwithstanding the Court's rhetoric when overruling some precedents. For example, the Court has at times unearthed new legislative history and claimed that this evidence proved that the earlier interpretation of a statute was conclusively wrong.[262] Eskridge's observation that this claim "is sometimes a makeweight for other reasons for overruling a statutory precedent,"[263] appears accurate. The Court's current methodology of interpreting precedents is not the type by which any one new piece of evidence is likely to prove conclusively that a precedent is wrong.[264] There appears to be a consensus that the majority of statutory interpretation cases the Supreme Court deals with yield no objectively correct answers. Many of these cases require the Court to apply a statute to a scenario that Congress either was unable to, or chose not to, anticipate.[265] Although one can dream up hypothetical cases in which the Court might misread the plain language, legislative history, and all other indicia of the enacting legislature's purpose or intent, the probability of this occurring is so small that the risk can easily be dismissed as inconsequential.

In all likelihood, then, the claim that a decision is truly "wrong," does not turn on one objective, undisputable criteria. Instead, a decisionmaker is more likely to consider a decision "clearly wrong" because it is based on, and depends upon, a particular method of statutory construction that she does not accept. This claim can only be made, however, if the decisionmaker is exceedingly confident that her own single theory of statutory interpretation is the correct one, or that some other theory is "clearly wrong." Justice Scalia, for example, has repeatedly argued that courts should look to legislative history only if the language of a statute is unclear, but should otherwise rest their decisions on the literal statutory language.[266] Does this mean that Justice Scalia must believe that every decision that relies on legislative history to reach a result in tension with the statutory language is

262. *See, e.g.,* Monell v. Department of Social Servs., 436 U.S. 658 (1978) (overruling Monroe v. Pape, 365 U.S. 167 (1961)); Griffin v. Breckenridge, 403 U.S. 88 (1971) (overruling Collins v. Hardyman, 341 U.S. 651 (1951)).

263. Eskridge, *supra* note 36, at 1375.

264. "[T]he key to legislative history is that while many elements represent pieces in the puzzle, no one piece — no matter how clear and unequivocal — is alone dispositive." Population Inst. v. McPherson, 797 F.2d 1062, 1080 (D.C. Cir. 1986).

265. *See supra* notes 120-32 and accompanying text.

266. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring); Hirschey v. Fed. Energy Reg. Commn., 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

"clearly wrong"? He could take this position only if he believed that the theory of interpretation that relied on legislative history is not only erroneous, but is "clearly wrong." It would be terribly arrogant for him to take such a position, accusing almost all of his colleagues and recent predecessors of having adopted a wholly senseless approach to statutory interpretation. But assuming hypothetically that he would take that position, is this the kind of clearly wrong precedent we are concerned about? If it is, then the door is opened for statutory precedents to be overruled whenever a majority of the Court has a philosophy of statutory interpretation that differs from an earlier Court's.

Once the specter of throngs of "clearly wrong" precedents is rejected, it becomes apparent that a far more plausible explanation for the uneasiness with an absolute rule of statutory stare decisis is the desire that the judiciary react to changing views about the continued desirability (not objective correctness) of earlier decisions. Changing times and the value of experience are, of course, good reasons for overruling statutory decisions. But it should be apparent that the task of evaluating them is one for the representative Congress, not for the judiciary.

In this regard, it is important to recognize that the more dated and outlandish a precedent is, the easier it should be to trigger a congressional response. Indeed, this expectation of a prompt legislative response has inspired an approach which may be called judicial blackmail.[267] The best recent example of this is Justice Scalia's concurring opinion in *Agency Holding Corp. v. Malley-Duff Associates,*[268] where the Court selected a statute of limitations for civil RICO actions. As with many statutes, Congress passed the Act without ever declaring what its statute of limitations should be. Consistent with its recent practice in these situations, the Court sought out an appropriate limitations period from some other statute to "borrow" for use in RICO. It chose the four-year period from the civil enforcement section of the Clayton Act.[269] Justice Scalia argued that the Court had no right to pick and choose among analogous federal statutes, and argued that "if state codes do not furnish an 'appropriate' limitations

267. *See, e.g.,* Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 538-40 (1957) (Frankfurter J., dissenting); *see generally* W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 129-31 (1964) (discussing "trap-pass" through which Justice interprets statutes "so narrowly as to render them ineffective in the hopes of forcing fresh legislative action").

268. 483 U.S. 143 (1987).

269. 15 U.S.C. § 15b (1987). In Wilson v. Garcia, 471 U.S. 261 (1985), by contrast, the Court followed the more typical path of choosing a limitations period by reference to relevant state statutes of limitations. *See generally* DelCostello v. Teamsters, 462 U.S. 151, 163-72 (1983).

period, there is none to apply."[270] Obviously recognizing the extraordinary nature of that result, he concluded his separate opinion with the quite understated speculation that his approach "might even prompt Congress to enact a limitations period that *it* believes 'appropriate,' a judgment far more within its competence than ours."[271] The extreme character of the proposed position was exactly what would guarantee a congressional response.[272] The same reaction can be anticipated if the statutory precedent that the Court declines to overrule is sufficiently extreme.[273]

Indeed, those who attempt to draw a morbid picture of a legal system incapable of responding to social and scientific change often seem to ignore Congress' role altogether. For example, in his recent article suggesting that courts should routinely "update" statutes through their statutory interpretations,[274] T. Alexander Aleinikoff describes the Supreme Court's decision in *Boutilier v. INS.*[275] He accepts that the Court properly read the McCarran-Walter Act's legislative history, which rather emphatically demonstrated that Congress intended to exclude homosexual aliens as part of a class that it described as "[a]liens afflicted with psychopathic personality."[276] Nonetheless, he argues that a Court faced with the issue today should overrule *Boutilier.* But why isn't it Congress' role to change the statute if our societal vision of homosexuality has changed? And if our societal vision has not changed, what right does the Court have to

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270. 483 U.S. at 170 (Scalia, J., concurring).

271. 438 U.S. at 170 (Scalia, J., concurring) (emphasis added).

272. *See* Ayres & Gertner, *Filling the Gaps in Incomplete Contracts: An Economic Theory of Default Rules,* 99 YALE L.J. 87 (1989) (evaluating the role of "penalty default rules").

273. There is, of course, nothing wrong with the Court letting Congress know that it considers a precedent wrong. *See* W. MURPHY, *supra* note 189 ("Dicta in an opinion can be used not only to persuade Congress to act or to help establish a climate of opinion in which Congress can act, but can also be used to try to guide the action which Congress will take."). Moreover, a major aspect of creating a system that uses an absolute rule of statutory stare decisis should be to create a congressional mechanism, such as special committees, to receive such messages from the Court, and otherwise to monitor judicial decisions. *See supra* note 183.

274. Aleinikoff, *supra* note 80, at 47-54.

275. 387 U.S. 118 (1967) (holding that homosexuals are excludable aliens under Immigration and Nationality Act of 1952).

276. 8 U.S.C. § 1182(a)(4) (1982). An earlier version of the bill explicitly excluded aliens who were "homosexuals" or "sex perverts". S. REP. No. 1515, 81st Cong., 2d Sess. 345 (1950). That phrase was omitted before passage, but the Judiciary Committee Report explained that this was done because homosexual aliens were already covered by the "psychopathic personality" clause. The Committee emphasized that "[t]his change of nomenclature [wa]s not to be construed in any way as modifying the intent to exclude all aliens who [we]re sexual deviates." S. REP. No. 1137, 82d Cong., 2d Sess. 9, *quoted in Boutilier,* 387 U.S. at 121. The Court concluded that this and other similar history "indicate[d] beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals." *Boutilier,* 387 U.S. at 120. Justice Douglas' lone dissent did not challenge this reading of the statute. 387 U.S. at 125 (Douglas, J. dissenting).

ignore what Congress clearly intended to accomplish with this statute, unless it is willing to recognize that the Constitution protects an individual's right to choose a homosexual lifestyle?[277] It is hard to believe that the Supreme Court could reaffirm *Boutilier* in 1988 without triggering rather instant congressional attention to the issue. Indeed, even if an absolute rule of statutory stare decisis would not trigger congressional scrutiny of routine statutory interpretation decisions, it would put pressure on Congress to consider cases, such as one which reaffirmed *Boutilier,* that raise such vital issues of social policy.

The risks of permanently perpetuating objectively "wrong" precedents seems quite slight, then. And even if "the immediate objectives of Congress may be temporarily frustrated" in some cases, "the protection to the integrity of judicial [and legislative] institutions which dictates such a result will often be of far more enduring significance."[278] But if the risk of creating a permanent body of clearly wrong precedents is considered intolerably high under an absolute rule of statutory stare decisis, one could craft an approach whereby the Court would adhere to a heightened rule of stare decisis that allowed for reversals only in the exceptional case of a universally recognized, clearly wrong precedent. This rule, quite similar to the Court's current rhetoric (but not its practice), could avoid perpetuating clear mistakes. But unless it is defined by strict and clear guidelines, it threatens to subvert some of the values that the absolute or heightened rule of statutory stare decisis is intended to serve.[279]

D. *The Effects on the Parties*

What of the actual parties to the judicial decision, however? Blackmailing Congress may successfully bring about legislative change, but it will often not help the individual litigants who will lose their cases simply because the Court wants Congress to be the body that overrules undesirable statutory precedents. In light of these costs, the heightened rule of statutory stare decisis has been attacked as

277. This might require the overruling of Bowers v. Hardwick, 478 U.S. 186 (1986), as strong a proof as any that the heightened rule of statutory stare decisis advanced in the article should not be extended to constitutional decisions.

278. Wellington & Albert, *supra* note 76, at 1561-62.

279. One possible procedural mechanism for enforcing a somewhat relaxed rule could be to require the votes of a supermajority of the Court (or even unanimity) before a statutory precedent could be overruled. The Court could probably adopt such an internal rule without congressional action, just as it has adopted its majority rule for decisions, its "rule of four" for certiorari jurisdiction, and its "rule of three" for holding petitions for disposition in light of another pending case. *See* Revesz & Karlan, *Nonmajority Rules and the Supreme Court,* 136 U. PA. L. REV. 1067 (1988) (discussing various voting rules that the Court uses); Stevens, *The Life Span of a Judge Made Rule,* 58 N.Y.U. L. REV. 1, 10-11 (1983) (discussing origins of the "rule of four").

holding the "temporary losers hostage until such a response [from the legislature] is obtained."[280] This result seems especially unsettling when a losing party will suffer severe harm as a result of the decision, or where a party may lack sufficient political power to push Congress to bring about the result that the Court anticipates.[281]

The human costs of withholding a just decision for institutional reasons is a tragic cost of separation of powers. Any student of the law can cite multiple cases where judges have bemoaned the result they were compelled to reach based on their reading of a statutory or constitutional text. The subordination of a judge's individual sense of justice to institutional constraints is far from a rare phenomenon, and will continue frequently to surface as long as we are committed to a system of divided powers.[282] As Alexander Bickel put it, "It will not do to exalt an individual claim to particular justice over all other problems that adjudication may have to solve and over all other consequences that it entails."[283]

E. *Time Pressures on Congress*

One final cost needs to be addressed. Considering and sometimes overruling statutory precedents takes time, especially when it is Congress that is doing the reconsidering and overruling. Hence, it has been argued that the absolute rule of statutory stare decisis saddles Congress with too time-consuming an obligation, diverting its attention from other tasks that only Congress can carry out.[284] The time-pressure argument may well be exaggerated. To begin with, no one contemplates that all members of Congress will actively review all or even many decisions of the courts. Like almost all other legislative functions, committees will be heavily utilized to ease the time pressures on individual members.[285] Moreover, in evaluating the extra burdens that an absolute rule of statutory stare decisis will impose upon Congress, it is critical to consider the ways that rule would conserve congressional energy. For example, if Congress, and perhaps

280. G. CALABRESI, *supra* note 40, at 155.

281. *Id.*

282. *See* A. BICKEL, *supra* note 134, at 173. These constraints are not limited to separation-of-powers concerns. The Supreme Court, for example, must often refuse to hear cases even though a majority of the Justices believe that the result the lower court reached was wrong, and even unjust. *See Rules of the Supreme Court of the United States,* Rule 17, *cited in* R. STEIN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 881 (6th ed. 1986) (describing some relevant factors in deciding whether Court should grant certiorari).

283. A. BICKEL, *supra* note 134, at 173.

284. Eskridge, *supra* note 36, at 1408.

285. *See supra* note 53.

more importantly, interest groups, could be confident that the Court would not go back on its statutory interpretation, the legislature would never have "to go through the trouble of enacting a statute that does nothing more than reiterate the judicial interpretation."[286] Additionally, any real analysis of the burdens that rule would create needs to consider the burdens that the court system, especially the Supreme Court, would be spared under a system in which it had no opportunity ever to reconsider statutory precedents.[287]

In any event, the time-pressure argument, to use a now worn-out phrase, proves too much. If it is the legislature's role to revise statutes and to review the courts' interpretations of statutes, time pressures are certainly no excuse for the legislature to abdicate its responsibility.[288] It hardly seems unreasonable to conclude that part of the obligation in passing a statute is the commitment to devote the time necessary to oversee its interpretation and application.

CONCLUSION

The notion that judges "find" law when interpreting statutes has long been considered a fictional account of the process. The truth is that even the most intentionalist of judges frequently "makes" law when she interprets acts of Congress. For judges who engage in some of the less originalist — more dynamic — approaches to statutory interpretation, this lawmaking aspect of their roles is all the more obvious. Despite recognition of this reality, scant attention has been paid to the legitimacy of the courts' engaging in this function.

This article's proposal for an absolute rule of statutory stare decisis will not solve all of the problems respecting the legitimacy of the courts' role. The pattern of congressional lethargy is too well established to expect any single rule of statutory construction to change the relationship between the courts and the Congress. But invoking an absolute rule of statutory stare decisis is a step in the right direction,

286. *The Supreme Court — 1986 Term, Leading Cases,* 101 HARV. L. REV. 119, 287 (1987).

287. Avoiding this type of burden is, of course, one of the classic justifications for stare decisis. *See* B. CARDOZO, *supra* note 38, at 149: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . ."

288. Similar pragmatic objections have been raised with respect to Congress' inability to deal effectively with the impeachment process of federal judges. *See* McConnell, *Reflections on the Senate's Role in the Impeachment Process and Proposals for Change,* 76 KY. L.J. 739 (1987-1988); Heflin & Mathias, *Is Congress Up to Its Constitutional Job of Judging Judges?,* N.Y. Times, July 31, 1988, at E5, col. 1. Yet, these pragmatic considerations obviously must be subordinated to Congress' constitutional duties and to the values served by legislative involvement in the impeachment process.

and if accompanied by other steps stimulating colloquy between the branches, can help restore the concept of practical, not just theoretical, legislative supremacy.