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Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis

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In the law school tradition of "suspending belief," Professor Eskridge has created a hypothetical in which I, in my first case as Chief Justice of the United States,[1] must decide whether to adhere to various antiquated and seemingly erroneous precedents interpreting the Mann Act.[2] Eskridge assumes that I will feel compelled to adhere to these decisions, for to do otherwise, he contends, would force me to abandon the proposal for an absolute rule of statutory stare decisis that I advanced recently in this Law Review.[3] Eskridge then offers a variety of critiques of my thesis, coming from perspectives as diverse as the critical legal studies and law-and-economics movements. The hypothetical that Eskridge has created is not a particularly difficult one for me to grapple with, as the absolute rule of statutory stare decisis is not as wooden as Eskridge might think. I shall briefly deal with his Mann Act hypothetical in Part I of this reply. In the remaining three Parts, I respond to the each of the three concurrences Eskridge has drafted.

I. THE MANN ACT

As enacted in 1910, the Mann Act prohibited the interstate transportation of "any woman or girl for the purpose of prostitution or debauchery, *or for any other immoral purpose.*"[4] The last six words of this clause have been the subject of a number of Supreme Court decisions. Shortly after the statute was enacted, for example, the Court held in *Caminetti v. United States*[5] that a man violated the "immoral purposes" clause of the Mann Act when he transported a woman across state lines so that she could become his mistress and concubine.

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1. It is worth noting that with my supposed appointment the name Marshall becomes the only name shared by three justices. Currently it is tied with Chase, Harlan, Jackson, Johnson, Lamar, Rutledge, and White at two apiece.

2. Eskridge, *The Case of The Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases,* 88 MICH. L. REV. 2450 (1990).

3. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis,* 88 MICH. L. REV. 177 (1989).

4. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (emphasis added).

5. 242 U.S. 470 (1917).

The Court rejected the argument that the statute was restricted to the transport of women for the purpose of furnishing them as prostitutes.[6] Three decades later the Court reaffirmed this holding in *Cleveland v. United States,*[7] in which it upheld the conviction of a man who, consistent with his religious beliefs, had engaged in polygamy, and had transported a woman across state lines for this purpose. Although four justices expressed the view that *Caminetti* had been wrongly decided,[8] the Court adhered to the holding in *Caminetti* "which has been in force for almost thirty years, that the Act, while primarily aimed at the use of interstate commerce for the purposes of commercialized sex, is not restricted to that end."[9]

If the question posed by Eskridge's hypothetical required a decision on whether petitioner violated the Mann Act as enacted in 1910 and as interpreted by *Caminetti* and *Cleveland,* it is not clear to me what the proper answer would be. Surely, adherence to a strong rule of stare decisis would preclude a holding that the Mann Act applies to commercialized sex alone, even if that may appear to be a better reading of the statute as an original matter. But even a strong adherent of statutory stare decisis need not conclude that the decisions in *Caminetti* and *Cleveland* froze the definition of "immoral purpose" for all time. Neither *Caminetti* nor *Cleveland* suggested that what constitutes an immoral purpose is a static determination that is governed by the intent of the Congress that enacted the Mann Act in 1910. Assuming that the Mann Act requires a court to determine whether a purpose is immoral under contemporary morality, the precedents of *Caminetti* and *Cleveland* are not very informative.[10] There is a critical

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6. Justice Day explained that while the immorality of the purpose

> would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine from being the execution of purposes within the meaning of this law. To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations.

242 U.S. at 486.

7. 329 U.S. 14 (1946). For a detailed discussion of the Mann Act and the *Caminetti-Cleveland* line of cases, see E. LEVI, AN INTRODUCTION TO LEGAL REASONING 24-58 (1949).

8. 329 U.S. at 20 (Black, J., with whom Jackson, J., joined, dissenting); 329 U.S. at 21 (Rutledge, J., concurring); 329 U.S. at 24 (Murphy, J., dissenting).

9. 329 U.S. at 18.

10. As Judge Posner has written:

> This country's sexual mores have changed in the last thirty years and it may be questioned whether today a purpose to engage in adultery or fornication, when these acts are committed without aggravating circumstances, such as force, misrepresentation, or taking advantage of a minor, is immoral within the meaning of the Mann Act (assuming it was not the intention of the framers of the Act to freeze the meaning of "immoral" as of 1910, when the Act was passed).

United States v. Wolf, 787 F.2d 1094, 1101 (7th Cir. 1986).

difference between the precedential import of a *legal standard* articulated by a court and the *specific application* of the standard to the set of facts before the court. An absolute rule of statutory stare decisis does not claim to govern applications of law to changing factual patterns, or, in this case, to determine views of contemporary morality from cases of previous generations.[11]

Congress, however, has not allowed the holdings in *Caminetti* and *Cleveland* to stand unaltered. Just as might be predicted with regard to matters on which the Court has declined to overrule outdated precedents, Congress has confronted and addressed the issue. In 1986, Congress deleted the "immoral purpose" clause of the Mann Act, inserting in its place a prohibition of transporting a person for "sexual activity for which any person can be charged with a criminal offense."[12] Frankly Amorous very probably has violated the Mann Act as it is now written, as a Virginia statute prohibits sexual intercourse between unmarried persons.[13]

One might have thought that the statutory interpretation inquiry would end with the determination that Amorous' conduct fell within the plain language of the statute, and that Amorous' only hope of overturning his conviction would rest with his constitutional challenge to the statute. But Eskridge has created a fictitious 1993 Supreme Court decision, *Squalid v. United States,* in which the Supreme Court held that not all sexual conduct that violates state law can serve as a predicate to a Mann Act violation. Rather, the activity must be immoral, in the way that the term was used in the original Mann Act, and in the way that the Court interpreted it in *Caminetti* and *Cleve-*

11. I should stress here that the courts' authority to "update" the application of the "immoral purposes" clause is derived from the statutory formulation itself, and not from any broad judicial power to reverse or ignore specific value choices that Congress *has* made which may have since become obsolete. For example, the "prostitution" clause of the Mann Act is not subject to the same flexible application that the "immoral purposes" clause is, for it embodies a declaration of Congress' intent to prohibit a specific type of conduct without regard to changing moral views. Whether this prohibition ought to be struck down as an unconstitutional invasion of sexual autonomy is a different question.

12. Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5, 100 Stat. 3510, 3511 (codified as amended at 18 U.S.C. § 2421 (1988)).

13. VA. CODE ANN. § 18.2-344 (1988). Perhaps an argument can be made that notwithstanding this Virginia statute petitioner cannot "be charged with a criminal offense" under Virginia law, either because the Constitution prohibits Virginia from prosecuting him for this consensual sexual conduct, *see* Doe v. Duling, 603 F. Supp. 960 (E.D. Va. 1985), *vacated for lack of standing,* 782 F.2d 1202 (4th Cir. 1986), or because Virginia's cohabitation statute has fallen into desuetude. *Cf.* Doe v. Duling, 782 F.2d 1202, 1204 (4th Cir. 1986) (observing that Virginia's "last recorded conviction for private, consensual cohabitation occurred in 1883"); Fort v. Fort, 12 Mass. App. Ct. 411, 417, 425 N.E.2d 754, 758 (1981) ("It seems beyond dispute that the statutes defining or punishing the crimes of fornication, adultery, and lewd and lascivious cohabitation have fallen into a very comprehensive desuetude."). I will assume for purposes of argument that neither of these conditions apply.

land. I personally find *Squalid* to be an implausible and indeed "clearly wrong" precedent, considering the plain language and legislative history of the 1986 amendment.[14] But a precedent it is, and under the doctrine of absolute statutory stare decisis that I have espoused I would be compelled to adhere to it.

Based on the "immoral purpose" limitation adopted by *Squalid* I would conclude that Amorous did not violate the Mann Act. In view of contemporary sexual mores, I do not believe that unmarried cohabitation between lovers can be classified as immoral in the sense the Mann Act appears to have used that term.[15] The *Caminetti* Court may well have reached a different conclusion had this case arisen in its time; but it is that Court's articulation of the proper legal standard — not its application of the standard to any specific set of facts — that creates the precedent that a court should follow.

My approach to statutory construction appears to be a bit more "dynamic" than Eskridge anticipated,[16] and it no doubt opens me up to attack as weaseling out of the dictates of my rule by "distinguishing" indistinguishables. But nothing in my proposal removes the need for justices to define the proper scope of a precedent. And it seems clear to me that recognizing changed sexual mores is not at all inconsistent with the holdings of *Cleveland* or *Caminetti.*

The bulk of Eskridge's criticism does not, however, focus on the specific statutes involved here. Rather he offers a variety of theoretical and practical attacks on the absolute rule of statutory stare decisis that I have proposed. Because the nature of their attacks are so varied, I respond to each of the three opinions separately below.

II. RESPONSE TO POSNERBROOK *ET AL.*

Justice Posnerbrook, joined by Justices Samuelson and Schwartz, begins his attack on my proposal by contending that although its goals are salutary, there is no empirical basis for assuming that it will actually stimulate more congressional activity. I readily acknowledge the lack of empirical data to support my thesis. Because the absolute rule

14. The goal of the amendment was to eliminate the need for an assessment of immorality. *See* H.R. REP. NO. 910, 99th Cong., 2d Sess. 8, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5952, 5958. It is quite telling that Eskridge has had to resort to his imagination in order to find a precedent as obviously wrong as *Squalid. See* Marshall, *supra* note 3, at 231-35 (questioning the assumption that there are many "clearly wrong precedents" at Supreme Court level).

15. *See* Marvin v. Marvin, 18 Cal. 3d 660, 683, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976) (recognizing changes in moral and social status of cohabitation). *See generally* Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-marital Cohabitation,* 1981 WIS. L. REV. 275; Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life,* 75 GEO. L.J. 1829 (1987).

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

of statutory stare decisis has never been implemented on the federal level, there is simply no probative evidence of how Congress actually reacts to such a system. True, some states seem to adhere to a more absolute form of stare decisis than the federal courts do, but the dramatic differences between the state and federal systems (and the differences between various state systems themselves) foreclose any meaningful comparisons. For what it may be worth though, the English system may offer some empirical support for my proposal. Until 1966 the House of Lords refused to overrule precedents, and, even since then, it has been extremely reticent to overrule statutory precedents.[17] Parliament, in turn, has been quite active in reviewing and overturning statutory precedents.[18] I hesitate to rely on this evidence, however, because I recognize the vast differences between our systems of government and legal cultures.

Beyond demanding empirical data, Posnerbrook disputes part of the theoretical framework I have relied upon in predicting the effects of an absolute rule of statutory stare decisis. Specifically, he questions my suggestion that in a world without a strong or absolute rule of statutory stare decisis Congress would have the opportunity to pass the buck to the courts by telling constituents that the Court may overrule itself and that congressional action therefore is not essential.[19] Posnerbrook asserts that "legislators cannot credibly pass the buck under current Supreme Court practice" because "[i]t takes decades for the Court to overrule virtually any statutory . . . precedent."[20]

To respond to this important point, I must review briefly what I attempted to do in my earlier article. My primary goal there was to explore whether the Court's articulated (and generally followed) adherence to a *heightened* form of statutory stare decisis is justifiable. After reviewing and rejecting a variety of justifications that have been offered in support of the Court's current practice, I concluded that the only reasonable defense of the Court's heightened rule of statutory

17. *See* A. PATERSON, THE LAW LORDS 156 (1982); L. BLOM-COOPER & G. DREWRY, FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY 361 (1972); Maher, *Statutory Interpretation and Overruling in the House of Lords,* 1981 STATUTE L. REV. 85.

18. Blom-Cooper and Drewry explain that "[t]here is a mutual understanding that courts and Parliament must harmonize and dovetail their respective law-making functions. . . . [Parliament] has on the whole responded to the invitation from the House of Lords to sponsor remedial legislation reversing court decisions." L. BLOM-COOPER & G. DREWRY, *supra* note 17, at 365; *see also* R. STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976, at 615 (1978).

19. This argument to constituents may often be accompanied with a warning that if Congress were to consider the matter it would likely reconsider other aspects of the legislative scheme, and that the constituents might well lose far more than they gain.

20. Eskridge, *supra* note 2, at 2454.

stare decisis is a normative theory that puts the job of revisiting statutory decisions in Congress' hands. I then suggested that the goals of this normative approach would be served more faithfully if the Court were to adopt an *absolute* rule of statutory stare decisis.[21]

It does not surprise me, then, to hear that legislators cannot typically pass the buck under the Court's current approach, which, after all, is a relatively heightened form of stare decisis. Indeed, this realization about Congress' current inability to convince constituents to wait for the Court to reverse itself supports my hypothesis that as the prospects for judicial reversal of a decision become more remote (both with regard to time and probability), the pressure on Congress to respond increases.

The only question Posnerbrook can raise therefore is whether the marginal utility of invoking an absolute rule of statutory stare decisis outweighs its costs. Because one cannot quantify the precise difference an absolute rule — as opposed to the current heightened rule — would have on Congress' reactions to judicial decisions, the focus should turn to the costs side of the equation. If the costs of the absolute rule are nonexistent or minimal, then a theoretically plausible marginal increase in congressional reaction ought to be welcomed. On the other hand, if the costs are significant, then incurring them for the sake of an unproved theoretical hypothesis would probably be a mistake.

It is with respect to defining what constitutes a "cost" of my proposal that Posnerbrook and I diverge most dramatically. Sounding surprisingly like William Eskridge,[22] Posnerbrook argues that the Court's role *qua* statutory interpreter includes the job of altering prior interpretations of congressional intent in order to adjust a statute's practical fit with statutory, common law, and constitutional developments.[23] As my discussion of the Mann Act's "immoral purpose" clause demonstrates, I agree that some statutes call on the courts to apply a statutory phrase in light of modern developments (including statutory and common law developments). In such cases, a later court does not reverse a previous court's interpretation of a statute when it reaches a conclusion different from its predecessor's. But in the more typical case, it is Congress' job — not the Court's — to decide whether a statute ought to be updated. Far from counting as a cost of the absolute rule, diverting courts from this legislative task is one of the primary goals of the thesis I have advanced.

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21. Marshall, *supra* note 3, at 215.

22. *Cf.* Eskridge, *Overruling Statutory Precedents,* 76 GEO. L.J. 1361 (1988); Eskridge, *supra* note 16, at 1479.

23. Eskridge, *supra* note 2, at 2456-57.

Of course, Posnerbrook is correct in asserting that judicial refusal to revisit interpretation of statutes may mean that courts will have to decide more cases on constitutional grounds. Posnerbrook writes that the "Court often avoids difficult constitutional issues by reinterpreting statutes," but that under the absolute rule of stare decisis the Court would be forced to confront these questions, which "might tempt [it] toward constitutional activism, which is of course countermajoritarian."[24] I am not at all convinced, though, that the reinterpretation of statutes to avoid possible constitutional impediments is any less countermajoritarian than judicial review itself. Indeed, reinterpretation may be even more intrusive of the legislature's proper authority, for, as Judge Richard Posner has written, it expands the scope of the Constitution's restrictions by creating "a judge-made 'penumbra' that has much the same prohibitory effect as the . . . Constitution itself."[25] Moreover, when a court strikes down a statute on constitutional grounds it typically exercises only the negative power of invalidating an enactment.[26] It is then up to the legislature to decide whether to enact a new statute, and if so, what kind of statute to enact. By contrast, when a court construes a statute to avoid constitutional doubts it engages in the activist task of actually rewriting the statutory provision to its liking.

There is a flip side of these arguments as well. A court that construes a statute to avoid constitutional questions arguably engages in a form of colloquy with Congress, inviting Congress to overturn the court's interpretation if Congress is not satisfied with it. This conversation with Congress might be considered somewhat less interventionist than outright judicial invalidation. But it is only less interventionist as compared with judicial invalidation; who knows in how many cases the court might ultimately uphold the statute if it were forced to pass upon it as a matter of pure constitutionality.

Whatever conclusion one reaches on the merits of the avoidance doctrine it seems clear that it is not of such obvious value to cast any broad doctrine of stare decisis into question. In any event, to the extent one is particularly whetted to the values served by the avoidance doctrine, it would be quite simple to carve a narrow exception to the generally applicable stare decisis rule in order to accommodate it.

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24. *Id.* at 2457.

25. R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 285 (1985). I discuss the avoidance doctrine more fully in Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation,* 66 CHI.-KENT L. REV. (forthcoming 1990).

26. In some cases it might find the unconstitutional segment of the statute severable, in which case it would leave the remainder of the statute in force. *See, e.g.,* Alaska Airline, Inc. v. Brock, 480 U.S. 678 (1987).

III. RESPONSE TO FISSERMAN *ET AL.*

Justices Fisserman, Michaelminow, and Guidobresi define the role of the courts in two words: do justice. It is hard to argue with such a noble pursuit. The arguments only start once it is realized that these individuals' conception of justice is quite often likely to be fundamentally different from the conception many other individuals, perhaps even most Americans, share. When this happens, whose conception should govern? Our system of government has an answer to these sorts of problems: we call it constitutional democracy. Under this system the electorally accountable branches are entitled to enact laws that, subject to *constitutional* limitations, will be applied by the executive and judicial branches. It is hard to believe that Fisserman contests this model, or really contends that "we fought the Revolution" in order to have unelected and unaccountable judges routinely impose their views of "justice" in place of legislative enactments. The battle cry of the revolution was against "taxation without representation" — a label that applies with substantial force to the view of statutory interpretation that Fisserman posits for the courts.

I am not so naive as to pretend that our democracy works perfectly, or that Congress' work product always, or even frequently, reflects the views and values of a majority of citizens. But the cure to these flaws in our representational system is not to divert the decision-making authority to an even *less* accountable body. Fisserman rightly proclaims that the "courts owe their complete fealty to 'We The People,' "[27] but she never explains how this principle translates into judges subverting legislative policy choices based on the judges' idiosyncratic, aconstitutional conceptions of "justice."

Fisserman further contends that even if the courts properly are viewed as agents of the legislature when it comes to statutory interpretation, agents may make decisions. As "relational agents," she argues, judges are expected to exercise significant discretion in shaping statutory developments, even "bending the old directives beyond recognition"[28] when that seems appropriate. The difference between Fisserman and me on this point may be one of degree. Although I agree that agents are typically left with the discretion to make routine decisions, I also believe that principals typically retain the authority to make the important policy-oriented decisions that come up from time to time. Decisions to reverse earlier interpretations of statutes seem to fall into this latter category. As has been suggested, it is changes in

27. Eskridge, *supra* note 2, at 2459.

28. *Id.* at 2460.

the social and legal climate that often provide the impetus for the call to overrule a statutory precedent.[29] In many cases, the dissatisfaction is not so much with the court's earlier interpretation of statutory ambiguity, as it is dissatisfaction with the statute itself. To use Fisserman's words again, the Court is being asked to "[bend] the old directives beyond recognition."[30] It seems quite reasonable to assume that in most agencies the principal will retain the sole authority to make these kinds of direction-shifting decisions.

Even if my characterization of the typical agency relationship is accurate however, Fisserman asserts that it is internally inconsistent for me to suggest that the Court — as opposed to Congress — ought to be the one to initiate the absolute rule of statutory stare decisis. This is a difficult point for me, for although I would certainly prefer that Congress be the body to promulgate this type of rule, I recognize that this is not about to happen. Congress is no doubt delighted to enjoy the option of leaving certain divisive issues — even fundamental ones — to the courts. If Congress were the ultimate principal in this agency relationship then Congress' wishes on this point would be decisive. But, as Fisserman proclaims, the People are the ultimate principals here. If the Court becomes convinced that its role in revisiting statutory decisions is an inherently legislative one, then the constitutional structure of separation of powers should be enough to justify the Court's invocation of the rule without congressional directive.[31]

IV. RESPONSE TO MACFINLEY *ET AL.*

Justices MacFinley and Kennedy raise a variety of objections to the absolute rule of statutory stare decisis, suggesting that it is trivial as a practical matter and "[e]ven as an intellectual exercise . . . [it] goes nowhere."[32] Echoing one of the themes touched on by Justice Posnerbrook, MacFinley first argues that the small number of judicial overrulings of statutory decisions makes the question of an absolute rule trivial. The validity of this point depends on one's baseline however. If it is assumed that the current heightened rule is justifiable and ought to be preserved, then the absolute rule may not make a dramatic difference in the way courts and Congress look at statutory reinterpretation. If this baseline is accepted as the appropriate one, then my article's

29. *Id.* at 2456-57.

30. *Id.* at 2460.

31. For those who remain unconvinced by this quasi-constitutional point, I am more than willing to have my proposal considered a petition to Congress as opposed to a brief to the Court. The functional merits of the approach do not depend on who initiates its adoption.

32. Eskridge, *supra* note 2, at 2461.

primary mission has been accomplished. Providing a coherent theoretical justification for the current approach to statutory precedents was the meat of my article. The suggestion that the rule be made absolute was, so to speak, gravy.

On the other hand, if MacFinley intends to suggest that no doctrine of stare decisis ever really matters to judges' decisions, I cannot agree. Notwithstanding the flexibility inherent in interpreting and applying precedents, rules of stare decisis often create significant constraints on the range of acceptable decisions. For example, I continue to maintain that the Court in *Patterson v. McLean Credit Union*[33] could not have "pretended to distinguish away" *Runyon v. McCrary*[34] and "announce a new rule limiting 42 U.S.C. § 1981 to private acts of discrimination without explicitly overruling *Runyon.*"[35] MacFinley asserts that I am "quite wrong" on this point, and that the Court's decision in *Patterson* actually demonstrates just how flexible precedent can be, because the five Justices in the majority seemed able to pass the "red-faced" test with impunity.[36] But nothing the majority did in *Patterson* concerning *Runyon's* interpretation of section 1981 should have caused the Justices' faces to flush. *Runyon* did not decide whether on-the-job harassment constitutes discrimination in the "making and enforcement" of contracts as forbidden by section 1981. The relevant part of *Runyon* was its holding that section 1981 applied to private action as well as state action, a conclusion the Court unanimously reaffirmed in *Patterson,* notwithstanding the Court's declaration that "[s]ome Members of this Court believe that *Runyon* was decided incorrectly."[37] As Justice Kennedy wrote: "Our conclusion that we should adhere to our decision in *Runyon* that § 1981 applies to private conduct is not enough to decide this case. We must decide also whether the conduct of which petitioner complains falls within one of the enumerated rights protected by § 1981."[38] One can easily disagree with *Patterson's* narrow definition of making and enforcing contracts, but there is no basis for accusing the Court of infidelity to precedent, or using *Patterson* to demonstrate the pliability of precedent.

Aside from her claim that my proposal is trivial and futile, MacFinley argues that it is internally incoherent. To begin with, she claims that to adopt my proposal the Court would be required to over-

33. 109 S. Ct. 2363 (1989).

34. 427 U.S. 160 (1976).

35. Marshall, *supra* note 3, at 218.

36. *See* Eskridge, *supra* note 2, at 2463 n.34.

37. 109 S. Ct. at 2370.

38. 109 S. Ct. at 2372.

rule scores of previous cases in which it declared that statutory precedents may be overruled under some vaguely defined circumstances. The easiest way for me to avoid this paradox is, of course, to call for Congress to enact a law imposing an absolute rule of statutory stare decisis on the Court.[39] I recognize that Congress is not likely to enact any such law anytime soon, however,[40] and I am intent therefore on defending my proposal as one directed to the Court.

Two factors relieve some of the paradox of overruling earlier cases in order to adopt a rule against overruling cases: first, the constitutional underpinnings of the proposal[41] make this something more than a pure matter of statutory (or even common law) construction; second, the lack of any clear binding precedent on how to deal with precedents makes the adoption of my proposal less than a clear overruling.[42] As MacFinley demonstrates, however, neither of these answers provides a wholly coherent solution to the paradox my proposal has created.[43] To the extent that they are unsatisfying, the solution to this conundrum may rest in the notion of prospectivity. In its decision to adopt an absolute rule of statutory stare decisis the Court could, consistent with the old rule which allows for the repudiation of some old precedents, prospectively repudiate the old rule and announce that this is the last nonconstitutional precedent it would overrule. This solution might seem a bit artificial, and I offer it only for those who are unsatisfied with the previously advanced justifications.

Another argument MacFinley raises is that my proposal does not go far enough on its own terms. Logically, she claims, the rule against overruling precedents ought not be limited to the Supreme Court's statutory interpretation decisions, but should be extended to matters upon which the lower courts have reached a clear consensus. I do not believe, however, that the doctrine need be, or should be, extended this far. To begin with, MacFinley has not explained how one would go about identifying a "consensus" of lower court decisions, and this difficulty constitutes a significant distinction between a decision of the Supreme Court and a consensus among lower courts. Moreover, extending the absolute rule of stare decisis to lower court decisions would put extreme pressure on the Supreme Court to alter its certiorari practice. In many cases the Court would have to grant review in

39. Perhaps Congress could include this provision within a Statutory Construction Act, which would set forth some general rules of statutory construction for courts to follow.

40. *See supra* note 31 and accompanying text.

41. *See supra* note 31 and accompanying text.

42. *See* Marshall, *supra* note 3, at 220 n.199.

43. *See* Eskridge, *supra* note 2, at 2462-63.

order to review an issue before a consensus of lower court decisions develops, even if the case presenting the issue is not a good candidate for review or other more pressing issues need to be decided by the Court. A proposal that makes Supreme Court decisions binding interpretations (as I have suggested) is in no way equivalent to one that would foreclose the Supreme Court from ever addressing some issues of statutory interpretation (as would happen under MacFinley's modification of my proposal). Although an argument can be made for extending the absolute rule to lower court decisions, there is surely nothing incoherent about a proposal that recognizes the distinctions between the Supreme Court's and lower courts' decisions.

Nor is it at all incoherent to limit the proposal to statutory decisions, and not to advocate an absolute rule of stare decisis with respect to constitutional decisions as well. The typical role of the courts in interpreting the Constitution is substantially different from their normal role in statutory interpretation. The Constitution is replete with clauses that call on the courts to apply norms to ever changing political and social circumstances. Consistent with the notion of the Constitution as a living document, definitions and applications of terms like "due process," "cruel and unusual punishment," and "unreasonable search and seizure" evolve over time. The specter of judges inserting content into these phrases is not an unfortunate or inevitable by-product of the framers' poor drafting or lack of foresight; it is a critical part of the process of breathing life into a document originated by those long dead.[44] Of course, the amendment process as set forth in article V is available as a mechanism of change, but it surely is not the design of the Constitution to require the support of a modern supermajority before the judiciary may declare a prior constitutional decision no longer valid.[45] To require such supermajority support for implementation of a constitutional provision flouts the countermajoritarian nature of the Constitution itself.

The courts' role in statutory interpretation is quite different. Here, there is a living Congress capable of making new policy choices that need to be made. Nothing about our political system makes resort to Congress the same kind of exceptional and dangerous enterprise that

44. *See* Marshall, *supra* note 3, at 206.

45. Although I do not advocate an absolute rule of stare decisis in constitutional cases, I do believe that the Court has become far too inclined to consider overruling its constitutional decisions. With respect to the flag-burning issue, for example, if a supermajority of the United States wishes to amend the Constitution to overrule Texas v. Johnson, 109 S. Ct. 2533 (1989), and United States v. Eichman, 58 U.S.L.W. 4744 (1990), they should not have to contend with the argument that the appointment of Justice Brennan's successor will, no doubt, enable the Court to reverse itself anyway.

resort to a constitutional amendment is. Government by the electorally accountable branch is the norm of our constitutional system — a process that ought to be encouraged, not feared and avoided.

It is clear, though, that MacFinley and Kennedy are not enamored of the political branches. They point out that minorities and women are severely underrepresented in Congress and suggest that only well-to-do, white, and I suppose heterosexual, males are likely to see Congress as occupying the top of the democracy continuum. They accuse me of ignoring these dysfunctions in our political system, and suggest that I probably think that "things are significantly 'better' now" than they were in 1910, "for women and blacks are at least able to vote."[46] MacFinley and Kennedy are right: I do think things are much better now, although I also believe that there still is a long road ahead to travel. But I don't see how we improve our democracy by shifting policy choices away from the legislature and toward the courts. No matter how unrepresentative Congress may be, it will never come close to the unrepresentative status of federal judges, who, by the way, are not much more diverse than the body that confirms them.[47]

CONCLUSION

The dominant theme that seems to run through the Professor Eskridge's objections to my proposal to "Let Congress Do It" is his rather powerful contempt of Congress. Based on his distaste for congressional decisionmaking, Eskridge is pleased to have the courts, in which he seems to have such unyielding trust, continue to make important policy choices in the course of their interpretations of statutes. I share many of Eskridge's concerns about the dysfunctions of our political system. Reform clearly is needed. But that reform should take the form of reflecting upon how we elect our representatives and how we monitor their work, not throwing up our hands and opting for government by the judiciary.

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46. Eskridge, *supra* note 2, at 2464.

47. If recent legislative enactments reversing Supreme Court decisions are any indicator, Congress may, in fact, be far more protective than the courts of some of the groups McFinley has identified. *See, e.g.*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (responding to Grove City College v. Bell, 465 U.S. 555 (1984)); Civil Rights Act of 1990, S2140, 101st Cong., 2d Sess. (1990) (bill to reverse a number of "conservative" Supreme Court decisions issued in the October 1988 Term).