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Statutory Stare Decisis in the Courts of Appeals

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Introduction

The Supreme Court has long given its cases interpreting statutes special protection from overruling. The Court is relatively willing to overrule its constitutional precedents, because in that context, the Court reasons that "correction through legislative action is practically impossible."[1] But the Supreme Court insists that a party advocating the abandonment of a statutory precedent bears a greater burden. In that context, the Court claims that stare decisis has "special force."[2] It gains this special force from the principle of legislative supremacy—the belief that Congress, rather than the Supreme Court, bears primary responsibility for shaping policy through statutory law.

The Supreme Court's cases and the literature discussing them offer two explanations for how the Supreme Court's statutory stare decisis practice honors the supremacy of the legislature. One line of thought interprets Congress's silence following the Supreme Court's interpretation of a statute as approval of that interpretation. If Congress had disagreed with the Supreme Court's interpretation, the argument goes, Congress would have amended the statute to reflect its disagreement. By failing to amend the statute, Congress signals its acquiescence in the Supreme Court's approach. According to this way of thinking, the Court's practice of giving its statutory precedent particularly forceful effect reflects its reluctance to abandon statutory interpretations that Congress, through its silence, has effectively approved. Statutory stare decisis, in other words, reflects deference to Congress's wishes.

A second line of thought eschews the notion that congressional silence following a Supreme Court statutory interpretation reflects acquiescence in it, but still advocates heightened stare decisis in statutory cases as a means of honoring legislative supremacy. Those who subscribe to this second school of thought emphasize that in our Constitution's separation of powers, policymaking is an aspect of legislative, rather than judicial, power. Because statutory interpretation inevitably involves policymaking, it risks infringing upon legislative power, and consequently, the Supreme Court should approach the task with caution. The Court cannot avoid interpreting a statute—and the attendant policymaking—the first time a statutory ambiguity is presented to it. Thereafter, however, the Supreme Court's refusal to revisit a statutory interpretation is a means of shifting policymaking responsibility back to Congress, where it belongs. "Were we to alter our statutory interpretations from

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1 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

2 Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

case to case," the Supreme Court explains, "Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."[3] In other words, super-strong statutory stare decisis lets Congress know that changes in statutory interpretations ought to come from it.[4] As a result, the argument goes, Congress (and other interested parties) will be more likely to use the democratic rather than the judicial process to resolve the policy questions that lie at the heart of interpretive disputes.

A robust literature exists debating the wisdom of the Supreme Court's statutory stare decisis doctrine. That robust literature, however, has wholly overlooked a curious aspect of super-strong statutory stare decisis: the courts of appeals have adopted it too. Scholars of statutory interpretation have not noticed the appearance of this doctrine in the lower courts, and the logic of its presence there is not immediately apparent. It is one thing to claim that congressional silence signals approval of a decision from the Supreme Court; it is another thing to claim that congressional silence signals approval of a decision from any of the courts of appeals. Similarly, it is one thing to assert that Congress ought to correct the Supreme Court's statutory mistakes; it is another thing to assert that Congress ought to correct mistakes from each of the thirteen circuits.

This Article explores whether statutory stare decisis is an example of an interpretive practice in which the Supreme Court and the lower courts should diverge. Part I briefly describes the doctrine of statutory stare decisis and the rationales advanced for that doctrine in the Supreme Court. Part II analyzes whether a theory of congressional acquiescence supports statutory stare decisis in the circuits, and Part III analyzes whether the doctrine can be justified by reference to the Constitution's separation-of-powers principle. I conclude that in the courts of appeals, as in the Supreme Court, the theory emphasizing the connection between statutory stare decisis and the separation of powers provides far more credible support for the doctrine than does a theory of congressional acquiescence. Nevertheless, even the separation-of-powers theory does not justify super-strong statutory stare decisis in the courts of appeals. To the extent that statutory stare decisis operates as a restraint on judicial policymaking, it does so based on assumptions about how Congress will react to the Supreme Court. It is both impractical and inconsistent with the system of appellate review that Congress has designed for the inferior courts to assume that Congress will respond to them in the same way. Whatever the merits of statutory stare decisis in the Supreme Court, the inferior courts have no sound basis for following the Supreme Court's practice.

Although my specific focus here appears narrow, the subject in fact has larger implications. For one thing, statutory stare decisis has become part of the methodology that the courts of appeals apply in interpreting statutes. Because the courts of appeals resolve more interpretive disputes than does the

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3 Neal v. United States, 516 U.S. 284, 295–96 (1996).

4 I have borrowed the modifier "super-strong" from William Eskridge. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) [hereinafter Eskridge, *Overruling Statutory Precedents*] (describing the Supreme Court's statutory stare decisis practice as the application of a "super-strong presumption of correctness" to statutory precedents).

Supreme Court, ensuring a sound interpretive theory for the courts of appeals is in some respects more important than doing the same for the Supreme Court. Abandoning statutory stare decisis in the courts of appeals is a step in that direction. Even beyond the limited doctrinal impact of this insight, however, the question whether the courts of appeals ought to be applying statutory stare decisis is a question worth asking. This Article's conclusion illuminates the neglect that scholars and courts have shown toward the structural differences between the Supreme Court and the inferior courts in questions of interpretation, and it underscores the importance and potential fruitfulness of focusing attention on those differences.

I. Statutory Stare Decisis in the Supreme Court

A. The Doctrine

The Supreme Court has accorded heightened deference to its statutory precedent for roughly a century.[5] The classic illustration of this heightened deference is the line of Supreme Court cases addressing the question whether the Sherman Act, which renders illegal "every contract . . . in restraint of trade or commerce among the several States,"[6] applies to organized baseball. In 1922, the Supreme Court held in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs* that it did not because the Court considered baseball to be a purely intrastate affair.[7] Over the next thirty years, both the business of baseball and the Court's understanding of "interstate commerce" so expanded that the Court almost surely would have applied the Sherman Act to organized baseball if it had considered the question as an original matter.[8] Nonetheless, in *Toolson v. New York Yankees, Inc.*, decided in 1953, the Court reaffirmed baseball's exemption from federal antitrust law on the ground that the precedent exempting it was statutory.[9] The Court insisted that any change in statutory precedent ought to come from Congress, and Congress, though aware of *Federal Baseball*, had left it undisturbed.[10]

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5 Thomas Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 731 (1999) (asserting that the Supreme Court's heightened deference toward statutory precedent first surfaced in the late nineteenth century and "crystallized in a series of opinions in the Hughes Court"). William Eskridge, Philip Frickey, and Elizabeth Garrett have observed that state courts are even more emphatic in their belief that statutory precedent should be overruled only rarely. WILLIAM ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION 612 (3d ed. 2001).

6 *See* 15 U.S.C. § 1 (2000).

7 Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208–09 (1922).

8 Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357–60 (1953) (Burton, J., dissenting) (describing ways in which organized baseball had increasingly affected interstate commerce through, *inter alia*, interstate travel, interstate advertising, and interstate purchases); *see also* Flood v. Kuhn, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting) (noting that when *Federal Baseball* was decided, the Court had a "narrow, parochial view of commerce" that had been undermined by subsequent decisions giving "interstate commerce" an expansive interpretation for purposes of the Commerce Clause).

9 *Toolson*, 346 U.S. at 357.

10 *Id.*

The Court confronted the baseball exemption again in *Flood v. Kuhn*,[11] and by this time, baseball's exemption had become a downright anomaly. *Flood* reached the Supreme Court in 1972. By then, the Court had interpreted the Sherman Act to apply to boxing, football, and basketball.[12] Baseball appeared to be the only organized sport beyond the Sherman Act's reach. Nonetheless, the Supreme Court again affirmed its original interpretation, again on the ground of statutory stare decisis.[13] Had *Federal Baseball* and *Toolson* been constitutional or common law cases, the change in case law and circumstances would have justified overruling them.[14] But these cases interpreted a statute. While acknowledging that the baseball exemption was illogical and inconsistent with other case law, the Court asserted that statutory precedent deserves particularly strong stare decisis effect, and it left the baseball exemption in place.[15]

While *Toolson* and *Flood* may represent an anomaly in federal antitrust law, they do not represent an anomaly in statutory interpretation. Instead, these cases illustrate a principle well ingrained in the Supreme Court's jurisprudence: Cases interpreting statutes are rarely overruled. As the Court often explains, "Considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."[16] Because statutory precedents are nearly sacrosanct, "the burden borne by the party advocating abandonment of a precedent is greater where the Court is asked to overrule a point of statutory construction" than when the Court is asked to overrule another point of law.[17] Indeed, the force of the Supreme Court's statutory stare decisis doc-

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11 *Flood*, 407 U.S. at 258.

12 Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1205 (1971) (Douglas, J.) (asserting that basketball enjoys no exemption from the antitrust laws); Radovich v. Nat'l Football League, 352 U.S. 445, 447–48 (1957) (holding that antitrust laws apply to football); United States v. Int'l Boxing Club of N.Y., 348 U.S. 236, 242–43 (1955) (holding that antitrust laws apply to boxing).

13 *Flood*, 407 U.S. at 283–84. While the Supreme Court has not retreated from its position that statutory precedent deserves super-strong effect, it has begun to relax that presumption in cases arising under the Sherman Act. Recently, the Court has begun to reason that since the Sherman Act authorizes the creation of federal common law, cases interpreting the Sherman Act ought be treated like common law cases, rather than statutory cases, for purposes of stare decisis effect. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 20–21 (1997); *see also* Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1376–81 (describing the Court's practice with respect to "common law" statutes like the Sherman Act). For a discussion of how the Supreme Court treats its common law precedent, see *infra* note 21 and accompanying text.

14 Both changed circumstances and developments in the law are established grounds for overruling constitutional and common law precedents, assuming that reliance interests do not cut strongly the other way. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 855 (1992) (considering both the workability of prior constitutional interpretation and "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"); United States v. Reliable Transfer Co., 421 U.S. 397, 403 (1975) (overruling common law precedent because "subsequent history and experience have conspicuously eroded the rule's foundations").

15 *Flood*, 407 U.S. at 283–84. Some change in this area recently has come from Congress. The Curt Flood Act of 1998 subjects organized baseball to the antitrust laws, at least with respect to matters relating to the employment of major league baseball players. 15 U.S.C. § 26b (2000).

16 Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977).

17 Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

trine is so strong that it prevails over other interpretive principles, including otherwise weighty interpretive principles like "clear statement" rules.[18] The Supreme Court repeatedly asserts that statutory cases are special and call for special application of stare decisis.[19]

This special treatment of statutory precedent fits into a system in which the Supreme Court varies the strength of the precedent according to the source of law that the precedent interprets. Cases interpreting statutes, as we have been discussing, receive stronger-than-normal stare decisis effect. Cases interpreting the Constitution, by contrast, receive weaker-than-normal stare decisis effect. The Supreme Court frequently explains that it will more readily overrule a constitutional decision than any other kind of decision, because when it erroneously interprets the Constitution, "correction through legislative action is practically impossible."[20] The baseline of normal stare decisis effect is apparently reserved for cases developing the federal common law.[21] This variety of approaches means that stare decisis effectively comes in three different strengths in the Supreme Court: "statutory strong," "common law normal," and "constitutional weak."[22] The next part describes the rationales that have been advanced to justify the Supreme Court's application of a super-strong presumption against overruling statutory precedent.

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18 Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 206–07 (1991) ("In the case before us the clear statement inquiry need not be made and we need not decide whether FELA satisfies that standard, for the rule in any event does not prevail over the doctrine of stare decisis as applied to a longstanding statutory construction implicating important reliance interests."); *see also id.* at 209–14 (O'Connor, J., dissenting) (protesting that the clear statement rule is more important than statutory stare decisis). The clear statement rule at issue in *Hilton* was the rule that the Court will not construe a federal statute to abrogate a State's sovereign immunity unless Congress makes clear its intention to do so.

19 Of course, as with any interpretive principle, the Court is susceptible to being criticized for applying it inconsistently. *See, e.g.*, Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1427–39 (listing twenty-six Supreme Court decisions explicitly overruling statutory precedents between 1961 and 1987, another twenty-four implicitly overruling statutory precedents, and another thirty-five significantly curtailing statutory precedents or overruling their reasoning). Even assuming that these are examples of occasional unfaithfulness rather than legitimate overruling, statutory stare decisis remains an important force in the Court's jurisprudence, as Eskridge himself recognizes. *Id.* at 1368; *see also* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 182–83 (1989) (noting the continuing force of the principle despite the Court's occasional unfaithfulness to it).

20 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting). John Manning argues that the Court's different treatment of statutory and constitutional cases for purposes of stare decisis is part of an "important intellectual tradition" in which the Court calls for greater flexibility in interpreting the Constitution than in interpreting statutes. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1692–93, 1697–99 & n.138 (2004).

21 Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1366; *see, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403–05 (1970) (discussing four factors underlying the value of stare decisis in the common law context).

22 Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1362, 1364–66 (describing the Court's three-tiered approach to stare decisis, which accords super-strong effect to statutory precedents, normal effect to common law precedents, and weak effect to constitutional precedents).

B. Rationales for Statutory Stare Decisis

1. Congressional Acquiescence

The Supreme Court's statutory stare decisis opinions reveal two rationales, both rooted in legislative supremacy, for giving statutory precedent particularly strong effect. The rationale that has been discussed most widely in both the cases and commentary is the one I will call "congressional acquiescence"—the belief that congressional inaction following the Supreme Court's interpretation of a statute reflects congressional acquiescence in it.[23] While this rationale is misguided, as I will explain in Part II, it is fairly easy to describe. It proceeds from the premise that the Supreme Court ought to function as Congress's faithful agent in interpreting statutes, and it treats Congress's silence following a Supreme Court opinion as indicating what Congress, as principal, desires.[24] Guido Calabresi has explained the logic of the acquiescence rationale this way: "When a court says to a legislature, 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'"[25] If Congress does not correct the Court's interpretation by amending the statute, the Court should assume that Congress approves of its

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23 *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 792 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 763–64 (1998); Ankenbrandt v. Richards, 504 U.S. 689, 700–01 (1992); *Hilton*, 502 U.S. at 202; United States v. Johnson, 481 U.S. 681, 686, 687 n.6 (1987); Johnson v. Transp. Agency, 480 U.S. 616, 629 n.7 (1987); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 421–22, 424 (1986); S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 55 n.18 (1985); Flood v. Kuhn, 407 U.S. 258, 281–84 (1972); Apex Hosiery Co. v. Leader, 310 U.S. 469, 488–89 (1940). *See generally* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71–78 (1988) [hereinafter Eskridge, *Interpreting Legislative Inaction*]; Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1402–08; Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 8–14 (1988); John Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U. L. REV. 737, 741–54 (1985); Marshall, *supra* note 19, at 184–96; Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).

24 *See, e.g.*, *Flood*, 407 U.S. at 283–84 ("Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."); *see also* Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 93–95 (recognizing that in the congressional acquiescence cases, the Supreme Court takes Congress's silence as a sign of its actual intent); Marshall, *supra* note 19, at 185–86 (same). William Eskridge has argued that although the cases use acquiescence as an indication of actual intent, they are more defensible if rerationalized as an attempt to give Congress "the institutional burden of responding" to statutory interpretations. Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 108. They create this "institutional burden of response" by adopting a rebuttable presumption that Congress agrees unless it says otherwise. *Id.* This argument is a variant of the separation-of-powers rationale, which I discuss in the next section. *See id.* at 118–19 (characterizing the "rebuttable presumption" argument as an attempt to shift responsibility for error correction to Congress, "the better forum").

25 GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 32 (1982); *cf.* WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 220 (1994) (analogizing the significance of legislative silence to Sherlock Holmes's "dog that did not bark").

interpretation.[26] And if Congress approves, the Court, as its faithful agent, should not change course.[27]

2. *Separation of Powers*

The Court's opinions reflect a second rationale for statutory stare decisis, which I will call the "separation-of-powers" rationale. This rationale rests on concerns about institutional competence rather than on inferences from congressional silence.[28] The Supreme Court often justifies statutory stare decisis by explaining that "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here . . . Congress remains free to alter what we have done."[29] Unfortunately, however, the Supreme Court does not usually go on to explain why change is better left to Congress. It thus takes a more detailed account to unpack the potential connection between separation of powers and statutory stare decisis.

Sometimes, the Supreme Court seems to justify its claim that changes in statutory interpretation are better left to Congress by comparing statutory interpretation to constitutional interpretation.[30] The Court frequently notes that because the Constitution is difficult to amend, the Court is the only one that can effectively fix its interpretive errors in constitutional law.[31] With respect to statutory errors, however, the Court notes that change can come from Congress (and the President) through the normal legislative process.[32]

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26 *See, e.g.*, *Johnson*, 480 U.S. at 629 n.7 ("Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.").

27 *See id.*

28 *See* Neal v. United States, 516 U.S. 284, 295–96 (1996); Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 255–61 (1970) (Black, J., dissenting); Francis v. S. Pac. Co., 333 U.S. 445, 450 (1948); Douglass v. County of Pike, 101 U.S. 677, 687 (1879).

29 Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989). The Court has repeatedly quoted *Patterson* for this proposition. *See, e.g.*, Hohn v. United States, 524 U.S. 236, 251 (1998); Hubbard v. United States, 514 U.S. 695, 712 n.11 (1995); Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 284 (1995) (O'Connor, J., concurring); Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992); Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 479 n.29 (1992); Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991); California v. FERC, 495 U.S. 490, 499 (1990). The Court has identified Congress as the appropriate actor on other occasions as well. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 736–37 (1977) (asserting that respect for precedent ought to be strongest "in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").

30 For example, the most frequently cited statement of the difference between constitutional and statutory stare decisis puts it this way:

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting).

31 *See, e.g.*, *id.*; *see also* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996); Harmelin v. Michigan, 501 U.S. 957, 965 (1991); Payne v. Tennessee, 501 U.S. 808, 827–30 (1991).

32 *See, e.g.*, *Burnet*, 285 U.S. at 406–07 (Brandeis, J., dissenting); *see also Patterson*, 491 U.S. at 172–73; *Ill. Brick Co.*, 431 U.S. at 736–37.

Thus, the Court appears to reason, it should be exceedingly reluctant to revisit statutory precedent.

The Constitution is indisputably difficult to amend, and that might be a reason for the Court to more readily reconsider its constitutional interpretations—in other words, to give them weaker-than-normal precedential effect.[33] But the difficulty of amending the Constitution does not explain why the Court ought to give *stronger*-than-normal precedential effect to statutory interpretations, as opposed to the normal precedential effect it gives to common law precedents.[34] Indeed, there is no connection whatever between the conclusion that constitutional precedent should receive weak stare decisis effect and the claim that statutory precedent should be effectively immune from reconsideration. The validity of the Supreme Court's—and, for that matter, any federal court's—assertion that Congress is the appropriate actor in this context should be assessed not by reference to the relative difficulties of constitutional and statutory amendment, but by comparing the institutional capabilities of Congress and the courts with respect to statutory interpretation.

When it comes to the institutional capabilities of Congress and the Court, the Supreme Court's opinions suggest two explanations for its belief that change is better left to Congress.[35] Congress may be the appropriate actor as a matter of resource allocation: given congressional availability for the task, perhaps the Court's resources are better spent elsewhere.[36] Or, Congress may be the appropriate actor as a matter of constitutional structure: given that the resolution of statutory ambiguity involves policymaking, perhaps that task is better left to the legislative branch.

A resource-allocation argument based on efficiency is unsatisfying, because it is far from clear that it is more efficient for Congress, rather than the Court, to correct the Court's statutory mistakes. For one thing, the structural barriers to change are higher in Congress than in the Court. The Court can effect change with five votes; a legislative amendment must garner the support of a majority in both houses and the President. For another, the Court has easier access to evidence of its own statutory mistakes. The Court continually deals with many of the statutes it interprets; the very process of applying precedent (or, through certiorari petitions, seeing how the lower courts are applying its precedent) gives the Court an opportunity to evaluate whether a prior statutory interpretation was misguided. Congress, however, must either make a special effort to monitor Supreme Court interpretations,

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33 *But see* Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 429 (1988) (arguing against weak stare decisis in constitutional cases).

34 *See supra* note 21 and accompanying text.

35 *Cf.* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part) (arguing that "after a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies, it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself. This position reflects both respect for Congress's role and the compelling need to preserve the courts' limited resources." (citations omitted)).

36 Lawrence Marshall characterizes this argument as the "task-splitting" argument, one that "allocate[s] the Court's resources (for revisiting precedent) according to the perceived need for the Court's involvement." Marshall, *supra* note 19, at 197.

or rely on others to bring the Court's decisions to its attention. The space on the Court's agenda is undeniably limited—but that is also true of Congress, which has a limited amount of time to address a panoply of policy issues. Getting the attention of either body is an arduous task. If efficiency is the only consideration, statutory stare decisis has the feel of one busy institution shifting part of its workload to another.[37] And this is all the more true for the courts upon which this Article focuses, the courts of appeals. It is difficult to imagine that it is more efficient for Congress to take responsibility for the thousands of circuit-level statutory interpretations, rather than leaving any necessary changes to either the circuits themselves or the Supreme Court.

That is not to say that some other, normative consideration cannot justify the shift. Instead of asking which institution can more efficiently accomplish the task of error correction—an inquiry that could begin an endless cycle of point-counterpoint—a better question is which body *should* assume this task. Even if the Supreme Court is not justified in believing that Congress has more resources to devote to monitoring and fixing its statutory mistakes, the Court may be justified in believing that the legislative branch is better suited for the job.

This is where the separation-of-powers rationale comes in. The most compelling explanation for statutory stare decisis casts it as a means of respecting the Constitution's division of power between the legislative and judicial branches. The Supreme Court itself has not itself fully elaborated the separation-of-powers theme that is implicit in its cases.[38] But others have attempted to do so. Two leading versions of the separation-of-powers rationale have been proposed, one by Justice Hugo Black and one by Professor Lawrence Marshall. These two theories are the primary articulations of the separation-of-powers rationale. I will describe each in turn.

First, Justice Black's theory: Justice Black is closely associated with the Supreme Court's statutory stare decisis doctrine, for he was one of its most vocal advocates.[39] He recognized that statutory interpretation inevitably requires the resolution of statutory ambiguity, and that the resolution of statutory ambiguity inevitably requires some degree of policymaking.[40] He was deeply uncomfortable, however, with the Supreme Court's undertaking any policymaking role.[41] He grudgingly acknowledged that when the Supreme Court first interprets a statute, the resolution of statutory ambiguity—and the attendant policymaking—is "unavoidable in the decision of the case before it."[42] In subsequent cases, however, Justice Black insisted that the Supreme Court ought to avoid judicial policymaking by observing statutory

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37 *See id.* at 198 (making similar point).

38 For examples of cases in which this theme is implicit, see *supra* note 29.

39 *See* Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1397–98 (identifying Justice Black's iteration of the separation-of-powers rationale as the "most celebrated, and forceful, articulation" of that theory); Marshall, *supra* note 19, at 208 (calling Justice Black "perhaps the Court's strongest advocate of a strong rule of statutory stare decisis").

40 Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 236, 257 (1970) (Black, J., dissenting).

41 *Id.* at 256–57.

42 *Id.* at 258.

stare decisis.[43] His position in this regard is rather extreme. He went so far as to claim that "[w]hen 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 in effect from a judicial alteration of language that Congress itself placed in the statute."[44] Thus, Justice Black believed that the Supreme Court's deviation from statutory precedent literally violates the Constitution by usurping legislative power.[45] Adherence to statutory precedent, in his view, is a way "to avoid encroaching on the power of Congress to determine policies and make laws to carry them out."[46]

To the extent that Justice Black perceived a constitutional violation in the Supreme Court's reinterpretation of a statute, his theory suffers from logical flaws that I will detail in Part III. But his basic discomfort with the policymaking inherent in the resolution of statutory ambiguity, and his perception of statutory stare decisis as a means of curbing such policymaking, have proven influential, particularly among those scholars and judges who adopt a textualist approach to statutory interpretation.[47] Modern textualists refuse to attribute any significance to congressional inaction following the Supreme Court's interpretation of a statute.[48] Despite this refusal, many textualists—including those on the Supreme Court—still embrace statutory stare decisis.[49] Lawrence Marshall is the scholar who has advanced the most sustained explanation why.[50]

Lawrence Marshall builds on Justice Black's basic position, but he casts statutory stare decisis as a constitutionally based policy rather than a constitutional mandate. Like Justice Black, Marshall views the resolution of statutory ambiguity as an exercise in policymaking, and policymaking as the

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43 *Id.* at 256–58.

44 *Id.* at 257–58.

45 *Id.* at 258.

46 *Id.* at 256–57.

47 For a description of the textualist approach, see ANTONIN SCALIA, A MATTER OF INTERPRETATION 14–37 (1997). A hallmark of this approach is the belief that interpretive techniques ought to limit judicial lawmaking. *Id.* at 17–23.

48 *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) (rejecting the "congressional acquiescence" theory). It is worth noting that the "congressional acquiescence" theory is a relative of the "purposive approach" to statutory interpretation that textualists emphatically reject. *See* Manning, *supra* note 20, at 1689–92 (2004) (describing textualist rejection of purposive approach). The purposive approach assumes that congressional intent or purpose, even though unexpressed in the enacted statutory language, can be a reliable guide to interpreting statutory text. *Id.* at 1684. The "congressional acquiescence" theory, which purports to interpret a statute in light of Congress's unexpressed assent to a prior interpretation, *see supra* notes 23–27 and accompanying text, proceeds from the same basic assumption.

49 Most commentators consider Justices Scalia and Thomas the Court's most committed textualists. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2418 n.114 (2003). Both Justice Scalia and Justice Thomas embrace statutory stare decisis. *See, e.g.*, Rasul v. Bush, 124 S. Ct. 2686, 2704 (2004) (Scalia, J., dissenting) (acknowledging special force of statutory precedents); Fogerty v. Fantasty, 510 U.S. 517, 538–39 (1994) (Thomas, J., concurring) (same). Other justices, to be sure, also embrace statutory stare decisis. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 792, 804 n.4 (1998) (Souter, J.). I emphasize textualists here because, having explicitly rejected the congressional acquiescence theory, their adherence to the doctrine necessarily rests on some other ground.

50 *See generally* Marshall, *supra* note 19.

province of the legislature.[51] Like Justice Black, Marshall thinks it inevitable that the Supreme Court makes policy when it first interprets a statute.[52] But unlike Justice Black, Marshall does not view the Supreme Court's deviation from statutory precedent as a literal transgression upon the legislative power. Instead, Marshall argues that statutory stare decisis is an interpretive principle derived from, but not required by, the Constitution's separation of powers.[53]

In Marshall's iteration of it, statutory stare decisis functions as a democracy-forcing measure. He sees statutory stare decisis as a way for the Supreme Court to spur Congress to take responsibility for difficult policy calls left open by statutory language.[54] In fact, to better serve that end, Marshall proposes that the Supreme Court upgrade its statutory presumption from "super strong" to "absolute" on the theory that if Congress knows that change can come only from it—i.e., that the Supreme Court will *never* overrule its statutory precedents—Congress will be more likely to override statutory interpretations that it does not like.[55] The Supreme Court, perhaps influenced by Marshall's scholarship, has on at least one occasion advanced a theory for the statutory presumption similar to his. In *Neal v. United States*,[56] the Court, refusing to depart from a prior statutory interpretation, explained that "[w]ere we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair."[57] This version of the separation-of-powers rationale is about creating an incentive for congressional action.

C. Statutory Stare Decisis in the Courts of Appeals

To this point, my focus has been the Supreme Court. I have described the super-strong stare decisis effect that the Supreme Court accords its statutory precedent, as well as the rationales—congressional acquiescence and separation of powers—that the Supreme Court has given for that practice. I now turn to the point that has been overlooked by the otherwise robust literature on this topic: the courts of appeals apply this doctrine too. A majority of the circuits has explicitly adopted the super-strong presumption against overruling statutory precedents,[58] and in those circuits that have never explic-

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51 *Id.* at 201–06.

52 *Id.* at 206–07.

53 *Id.* at 219–20.

54 *Id.* at 208–15.

55 *Id.* at 209–15.

56 Neal v. United States, 516 U.S. 284 (1996).

57 *Id.* at 296; *see also* Comm'r v. Fink, 483 U.S. 89, 104 (1987) (Stevens, J., dissenting) (arguing that "if Congress understands that as long as a statute is interpreted in a consistent manner, it will not be reexamined by courts except in the most extraordinary circumstances, Congress will be encouraged to give close scrutiny to judicial interpretations of its work product").

58 *See, e.g.*, *In re* Zurko, 142 F.3d 1447, 1457–58 (Fed. Cir. 1998) (en banc), *rev'd on other grounds sub nom.* Dickinson v. Zurko, 527 U.S. 150, 165 (1999); Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs, 136 F.3d 34, 42 (1st Cir. 1998); Chi. Truck Drivers v. Steinberg, 32 F.3d 269, 272 (7th Cir. 1994); Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 875–76 (D.C. Cir. 1992) (en banc); Owen v. Comm'r, No. 78-1341, 1981

itly applied the rule, separate opinions assume that it applies.[59] Only the Tenth Circuit has remained silent with respect to the super-strong statutory presumption, and no court of appeals has declined to follow it.

Neither those who support nor those who criticize the Supreme Court's statutory stare doctrine have noticed, much less questioned, this phenomenon. Nor have the courts of appeals given much thought to whether the doctrine makes sense for them. Instead, there appears to be a widespread assumption that statutory stare decisis is simply part of our interpretive doctrine—generally applicable to all federal courts—much like the plain meaning rule or the canons of statutory construction.[60]

To be sure, the statutory presumption operates differently in the courts of appeals than in the Supreme Court. The most important stare decisis principle in the courts of appeals is that one panel cannot overrule another.[61] When an existing panel decision is on point, the no-panel-overruling rule disposes of the case at hand without the need to consider other stare decisis principles.[62] Panels that cite the statutory presumption approvingly, therefore, are simply giving an additional reason why they will not overturn precedent. The statutory presumption, however, has real bite when a court of appeals sits en banc. In that context, the no-panel-overruling rule does not apply; thus, other principles of stare decisis, including the statutory presumption, determine whether an en banc court will adhere to precedent. Not surprisingly, many of the appellate opinions that discuss statutory stare decisis have been written in en banc cases.[63]

WL 16570, at *9 (6th Cir. June 23, 1981); Cottrell v. Comm'r, 628 F.2d 1127, 1131 (8th Cir. 1980) (en banc); Gen. Dynamics Corp. v. Benefits Review Bd., 565 F.2d 208, 212 (2d Cir. 1977); *see also* United States v. Rorie, 58 M.J. 399, 406 (C.A.A.F. 2003) (recognizing that the stare decisis doctrine is "most compelling" where courts undertake statutory construction).

59 CSX Transp., Inc. v. Bhd. of Maint. of Way Employees, 327 F.3d 1309, 1331 (11th Cir. 2003) (Black, J., concurring) (citing statutory presumption as an additional reason why court should not overrule precedent); United States v. Coleman, 158 F.3d 199, 204–05 (4th Cir. 1998) (en banc) (Widener, J., dissenting) (criticizing majority for failing to apply heightened statutory presumption); United States v. Anderson, 885 F.2d 1248, 1262–66 (5th Cir. 1989) (en banc) (Smith, J., dissenting) (same); United States v. Aguon, 851 F.2d 1158, 1177–78, 1181–84 (9th Cir. 1988) (en banc) (Wallace, J., dissenting) (same), *overruled on other grounds by* Evans v. United States, 504 U.S. 255, 265 (1992); Frilette v. Kimberlin, 508 F.2d 205, 219–23 (3d Cir. 1974) (Adams, J., dissenting) (same).

60 The leading Legislation casebook, for example, presents statutory stare decisis this way. ESKRIDGE ET AL., *supra* note 5, at 599–617. The rule is presented as simply part of our statutory doctrine, with no discussion of which federal courts do apply, or should apply, the "super-strong" presumption of statutory stare decisis. *Id.*

61 *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1017–18 (2003) (describing the impact of the rule, followed in every circuit, that one panel cannot overrule another).

62 *See, e.g.*, Abdulai v. Ashcroft, 239 F.3d 543, 553 (3d Cir. 2001) (acknowledging that absent intervening authority, an on-point panel decision is dispositive in subsequent cases); Woodling v. Garrett Corp., 813 F.2d 543, 557 (2d Cir. 1987) (same).

63 *See Coleman*, 158 F.3d at 204 (Widener, J., dissenting); *In re Zurko*, 142 F.3d at 1457–58; Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1556, 1558 (Fed. Cir. 1994) (en banc) (Mayer, J., dissenting); *Critical Mass*, 975 F.2d at 875–77; *Anderson*, 885 F.2d at 1256 (Smith, J., dissenting); *Aguon*, 851 F.2d at 1172–76 (Reinhardt, J., concurring); *id.* at 1177 (Wallace, J., concurring in part and dissenting in part); Fast v. Sch. Dist. of Ladue, 728 F.2d 1030, 1034 (8th Cir. 1984) (en banc); *Cottrell*, 628 F.2d at 1131.

Generally speaking, the circuits that have adopted the presumption have simply assumed without question that since the presumption applies in the Supreme Court, it must apply in the courts of appeals as well. For example, in quoting Supreme Court precedent regarding the presumption, the First Circuit simply substituted "the courts'" for "this Court's" as if the two were interchangeable.[64] In accusing a majority of the en banc court of disregarding the presumption, Judge Jerry Smith asserted without analysis that "[the Fifth Circuit] should adhere generally to the same constraints of stare decisis which the [Supreme] Court acknowledges."[65] Most opinions simply cite Supreme Court cases as if they control in this context.[66]

On two occasions, judges sitting in en banc cases have at least raised the issue whether the Supreme Court's statutory stare decisis principle transfers automatically to the lower courts. The D.C. Circuit, sitting en banc, has cautioned that although the Supreme Court's statutory stare decisis rule applies in the courts of appeals, it applies with modifications.[67] Because no single court of appeals establishes the "ultimate judicial precedent" interpreting a particular statute, the D.C. Circuit reasoned, a court of appeals must be willing to reconsider a statutory interpretation when a circuit split develops, or when the en banc court decides that the precedent is "fundamentally flawed."[68] Similarly, concurring in *United States v. Aguon*,[69] Judge Reinhardt cautioned that the Ninth Circuit should not adopt the Supreme Court's statutory stare decisis doctrine wholesale, because "there is a substantial difference between the role of this court and that of the Supreme Court."[70]

Even in those instances in which differences between the Supreme Court and the courts of appeals have been acknowledged, however, the fundamental point that statutory stare decisis should have substantially more bite than constitutional stare decisis has not been questioned.[71] This is a startling over-

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64 Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs, 136 F.3d 34, 42 (1st Cir. 1998) (asserting that "'considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change [*the courts'*] interpretation of its legislation'" (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (emphasis added))).

65 *Anderson*, 885 F.2d at 1264 (Smith, J., dissenting).

66 *See Coleman*, 158 F.3d at 204 (Widener, J., dissenting); *In re Zurko*, 142 F.3d at 1457–58; Chi. Truck Drivers v. Steinberg, 32 F.3d 269, 272 (7th Cir. 1994); *Loveladies Harbor*, 27 F.3d at 1556, 1558 (Mayer, J., dissenting); Tradewinds, Inc. v. Citibank, No. 81-1424, 1981 U.S. App. LEXIS 11046, at *16–21 (3d Cir. July 27, 1981) (Adams, J., dissenting); Owen v. Comm'r, No. 78-1341, 1981 WL 16570, at *25 (6th Cir. June 23, 1981); *Cottrell*, 628 F.2d at 1131; Gen. Dynamics Corp. v. Benefits Review Bd., 565 F.2d 208, 212 (2d Cir. 1977); Frilette v. Kimberlin, 508 F.2d 205, 219–23 (3d Cir. 1974) (Adams, J., concurring).

67 *Critical Mass*, 975 F.2d at 876; *see also id.* at 881 (Randolph, J., concurring) (emphasizing that the different position of federal appellate courts requires modifications in the statutory stare decisis rule); Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the* National Parks *Test*, 61 GEO. WASH. L. REV. 1430, 1460–68 (1993) (discussing application of statutory stare decisis in *Critical Mass*).

68 *Critical Mass*, 975 F.2d. at 876.

69 United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988).

70 *Id.* at 1173 (Reinhardt, J., concurring).

71 Judge Reinhardt's concurring opinion in *Aguon* comes close to questioning this point, but stops short of actually doing it. In *Aguon*, Judge Reinhardt argued that the courts of appeals generally have more freedom to overrule precedents than does the Supreme Court. *Id.* at 1173–76. But he did not dispute that the statutory nature of a precedent is an additional factor

sight. The statutory presumption is grounded in judgments about how Congress reacts to the Supreme Court. Even assuming that these judgments are sound, the courts of appeals should not presume that Congress reacts to them in the same way.

In the next two parts of this Article, I address the question that has been ignored by both courts and scholars writing in the area: Does it make sense for the courts of appeals to give statutory precedents a more forceful presumption against overruling? To analyze this question, I will consider whether either the acquiescence rationale or the separation-of-powers rationale supports the doctrine of statutory stare decisis in the courts of appeals. While I cover both rationales, the separation-of-powers analysis is the heart of the analysis. The separation-of-powers rationale is the more compelling of the two rationales for statutory stare decisis in the Supreme Court; thus, statutory stare decisis in the courts of appeals must stand or fall upon it.

It is important to emphasize that in considering each of these rationales, I will neither add to nor exhaustively describe the extensive literature debating the question whether these rationales justify statutory stare decisis in the Supreme Court. That ground is well traveled, and my focus here is different. I am particularly interested in the question of how a federal court's position in the judicial hierarchy might affect its choice to employ an interpretive doctrine like statutory stare decisis. In light of that interest, I assume the basic validity of the doctrine in the Supreme Court and pursue only the question whether it works in the courts of appeals. I conclude that at least with respect to this interpretive doctrine, an inferior court ought to pause before simply adopting the Supreme Court's practice as its own.

II. The Acquiescence Rationale in the Courts of Appeals

Even with respect to Supreme Court decisions, the notion that congressional silence following a judicial interpretation constitutes congressional acquiescence in it has been subject to a great deal of scholarly and judicial criticism.[72] This criticism has been persuasive, and the thrust of the contemporary cases and scholarship is that the separation-of-powers rationale offers a more promising justification than does congressional acquiescence for the Supreme Court's statutory stare decisis doctrine.[73] Notwithstanding this state

militating against overruling it, particularly in the absence of conflict among the circuits. *Id.* at 1173–74.

72 *See, e.g.*, Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1402–09; Marshall, *supra* note 19, at 184–96. It is worth noting that the topic of legislative inaction spans more broadly than statutory stare decisis. For example, the Court sometimes interprets congressional silence in the face of an administrative or lower court statutory interpretation as congressional acceptance of that interpretation. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 596–692 (1983). It sometimes interprets congressional rejection of particular statutory language as a sign that Congress did not intend for the statute to cover such a situation. *See* Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 84–89 (discussing the "rejected proposal" cases). And, when Congress reenacts a statute without changing a judicial interpretation, the Court sometimes interprets reenactment as approval of the existing interpretation. *See, e.g.*, Holder v. Hall, 512 U.S. 874, 961–62 (1994) (Stevens, J., dissenting) (collecting cases).

73 *See* Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1402 (noting that commentators more often defend statutory stare decisis with rationales that resonate with the sepa-

of affairs, the acquiescence rationale continues to garner at least some scholarly and judicial support. Daniel Farber, among other commentators, has defended it.[74] The Supreme Court, while in some cases disparaging the acquiescence rationale, continues in other cases to rely upon it.[75] And the courts of appeals also occasionally invoke the inference of congressional acquiescence from congressional silence in refusing to overrule circuit-level statutory interpretations.[76] Given that the acquiescence rationale continues to enjoy some support in the cases and literature, an analysis of statutory stare decisis in the courts of appeals would be incomplete without consideration of this rationale. Thus, I will begin by discussing whether a theory of congressional acquiescence justifies statutory stare decisis in the courts of appeals.

The traditional critiques of the Supreme Court's use of the acquiescence rationale can be synthesized under four general headings: ignorance, ambiguity, relevance, and constitutionality. The courts of appeals' use of the acquiescence rationale is subject to these same general criticisms. Indeed, these criticisms have even more force when considered at the circuit level.

A. Ignorance

The acquiescence rationale, which assumes that a majority of Congress supports a particular statutory interpretation, only works if a majority of Congress knows about the statutory interpretation at issue. Empirical research shows fairly conclusively, however, that Congress is generally unaware of circuit-level statutory interpretations. Stefanie A. Lindquist and David A.

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ration-of-powers principle than with the congressional acquiescence theory); *id.* at 1397–1402 (describing separation-of-powers arguments); Marshall, *supra* note 19, at 200 (observing that the Constitution's separation of powers is the only viable explanation for the doctrine).

74 *See* Farber, *supra* note 23, at 8–14 (defending acquiescence); *The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 122, 269 (1998) (calling the acquiescence rationale "perhaps [the] most persuasive" argument for heightened statutory stare decisis).

75 For cases in which the Supreme Court criticizes the acquiescence rationale, see, for example, *Alexander v. Sandoval*, 532 U.S. 275, 292–93 (2001); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970); *Girouard v. United States*, 328 U.S. 61, 69–70 (1946); *Cleveland v. United States*, 329 U.S. 14, 22–24 (1946) (Rutledge, J., concurring); *Helvering v. Hallock*, 309 U.S. 106, 119–20 (1940). For cases in which the Supreme Court relies on acquiescence, see, for example, *supra* note 23. *See also Cent. Bank of Denver*, 511 U.S. at 187 (admitting that the Court's cases regarding the significance of congressional inaction have not been consistent).

76 *See, e.g.*, Gen. Dynamics Corp. v. Benefits Review Bd., 565 F.2d 208, 212 (2d Cir. 1977) (refusing to overturn precedent because, *inter alia*, "Congress has not amended the Act to provide for a different rule"); Tradewinds, Inc. v. Citibank, No. 81-1424, 1981 U.S. App. LEXIS 11046, at *15 (3d Cir. July 27, 1981) (same); *Aguon*, 851 F.2d at 1178 (Wallace, J., dissenting) (arguing that the heightened presumption should control, because "[n]either Congress nor the Supreme Court has ever seen fit . . . to overturn the line of authority developed nearly unanimously by the circuits"); *see also* United States v. Rorie, 58 M.J. 399, 411 (C.A.A.F. 2003) (Effron, J., dissenting) (arguing that where Congress had not disturbed a prior statutory interpretation of the United States Court of Appeals for the Armed Forces, that court should not depart from precedent).

Yalof have performed the most comprehensive study.[77] They reviewed all bills reported out of committee between 1990 and 1998 that proposed to override, clarify, or codify statutory interpretations made by the intermediate federal appellate courts.[78] In that time period, the courts of appeals issued more than 26,332 opinions.[79] Congress proposed to respond to only 187 of them and actually responded to only 65 of them.[80] Lindquist and Yalof conclude that "members of Congress are much less likely to stay informed about the thousands of statutory decisions rendered by lower federal courts" than they are about Supreme Court precedents, "which receive relatively full media coverage."[81] Lindquist and Yalof's findings echo those made by William Eskridge a decade earlier in his well-known study of congressional responses to the statutory interpretation decisions of the federal courts.[82] Eskridge found that while Congress was surprisingly responsive to the Supreme Court, it was surprisingly unresponsive to the courts of appeals.[83] He asserted that his study showed "impressive congressional activity in connection with Supreme Court decisions," but "unimpressive knowledge of and response to the far more numerous lower federal court statutory interpretation decisions."[84]

Because Congress lacks actual knowledge of circuit-level statutory interpretations, the acquiescence rationale could only work if the courts of appeals grounded it in a theory of constructive rather than actual knowledge. In other words, the courts of appeals could try to ground the acquiescence rationale in the belief that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law," including case law.[85]

Constructive knowledge, however, sits uneasily in this context. Courts typically impute constructive knowledge of the law before someone acts or violates a duty to act. Thus, citizens are expected to inquire about the relevant law before they undertake some action, or fail to undertake some action, in violation of it.[86] On this same principle, courts assume that Congress

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77 *See* Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61 (2001).

78 *Id.* at 63.

79 *Id.* tbl.1.

80 *Id.* at 64–65, 68 & tbl.1.

81 *Id.* at 62; *see also id.* at 68 (asserting that "any textual theory of statutory interpretation suggesting that Congress will respond to absurd or incorrect judicial interpretations has little empirical foundation, at least in the courts of appeals").

82 *See generally* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Overriding Statutory Interpretation Decisions*].

83 *Id.* at 337 n.12, 338, 415–16.

84 *Id.* at 416; *see also* Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge of Positive Political Theory*, 80 GEO. L.J. 635, 661–62 (1992) (concluding, after a survey, that congressional staff are generally unaware of the D.C. Circuit's statutory interpretation opinions).

85 Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979). *Contra* Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 742 (7th Cir. 1986) ("We do not think it realistic 'to assume that our elected representatives, like other citizens, know the law,' when 'law' is defined to mean every judicial gloss, however recherché, on a technical statute." (citations omitted)).

86 *See* Lambert v. California, 355 U.S. 225, 228 (1957) (noting that constructive knowledge of the law is imposed on citizens who undertake some activity or who, though passive, find

acquaints itself with judicial interpretations of a statute before Congress reenacts or amends that statute; in these circumstances, congressional action provides an occasion for inquiry.[87] By definition, however, Congress does not "act" if it simply does not respond to a judicial opinion; nor does Congress have a *duty* to enact legislation in response to judicial opinions with which it disagrees.[88] Use of the constructive knowledge principle in this context would assume that elected representatives have a freestanding knowledge of the law—i.e., knowledge of the law in the absence of any impetus for informing themselves of it. This would be a truly unusual use of the concept of constructive knowledge.

The Supreme Court, while apparently willing to impute freestanding constructive knowledge of its own statutory interpretations to Congress,[89] has

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themselves in circumstances that give them reason to inquire about a law imposing a duty on them).

87 For a case relying on the reenactment rule, see, for example, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). For cases dealing with congressional amendment, see, for example, *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) ("And the force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding."); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782–88 (1985) (asserting that Congress's amendment of a statute without explicit repudiation of a lower court's interpretation of the statute indicates that Congress accepted the lower court's interpretation); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384–86 (1983) (similar); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378–82 (1982) (similar); *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 81 nn.6 & 9 (1980) (similar); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731–33 (1975) (similar); and *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200–01 (1974) (similar). Of course, if an amendment addresses a different part of the statute, amendment does not provide an occasion for Congress's acquainting itself with the courts' interpretation of unrelated language.

88 William Eskridge casts legislative inaction cases (a category broader than, but including, reliance on legislative inaction to justify statutory stare decisis) as actually creating a congressional duty to act in the event of disagreement with a Supreme Court statutory interpretation. ESKRIDGE, *supra* note 25, at 249. It would be extraordinary, however, for the judiciary to impose a duty on Congress that the Constitution does not itself require. Now, it is possible to unhinge statutory stare decisis from intent. The Court could say that regardless of what Congress intends by its silence, the more prudent course (for reasons of stability or separation of powers, for example) is for the Court to adhere to precedent unless it hears otherwise from Congress. But that is not what the Court says when it invokes the acquiescence rationale. In these cases, the Court adheres to precedent on the specific ground that Congress has effectively told it do so. *See supra* notes 23–27 and accompanying text. Insofar as Eskridge understands the presumption as giving Congress the institutional burden of response, as he has elsewhere argued, *see supra* note 24, his argument is a variant of the separation-of-powers rationale that I will address shortly.

89 The Supreme Court's invocation of the acquiescence rationale to support statutory stare decisis appears to bear little relationship to the likelihood that Congress actually knows about the relevant decision, suggesting that it might rest its own use of the acquiescence rationale on an inference of constructive knowledge. I have found no decision in which the Court refuses to apply the heightened stare decisis presumption on the ground that Congress likely lacked actual knowledge of the Court's prior statutory interpretation. When affirmative evidence of congressional knowledge exists, however, the Court sometimes uses it to bolster the case for using the presumption. *See* Johnson v. Transp. Agency, 480 U.S. 616, 629 n.7 (1987) (arguing that "legislative inattention . . . is not a plausible explanation for congressional inaction" because the precedent "was a widely publicized decision that addressed a prominent issue of public debate"); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986) (stating that "[w]e are especially reluctant to reject this presumption in an area that has seen careful, intense, and

apparently refused to impute constructive knowledge of lower court statutory interpretations to Congress. When the Court interprets a statute, it sometimes attributes significance to congressional inaction in the face of lower court interpretations of the same statute—but only when circumstances make it likely that Congress was actually aware of those decisions.[90] When an inference of actual knowledge is unlikely, the Court typically refuses to give any significance to legislative inaction.[91]

The Court's apparent reluctance to impute constructive knowledge in this context makes sense. Even assuming that the Supreme Court can fairly impute constructive knowledge of its opinions to Congress, intermediate appellate opinions pose special difficulties. A court of appeals opinion does not represent settled law; it represents developing law. Other circuits might go a different way. Or, the Supreme Court might go a different way if it ultimately takes up the issue. To be sure, one might view the law as *relatively* settled if all or most circuits have adopted the same position. But even then, it is not settled in the way a Supreme Court settles the law. Imposing constructive knowledge of circuit-level statutory interpretations effectively requires Congress to stay abreast of the law not only in its relatively final form, but also in its various stages of development.

Granted, situations do exist in which courts have imputed constructive knowledge of circuit opinions, despite their relative fluidity. For example, courts have generally held that circuit-level opinions can "clearly establish" the law for purposes of qualified immunity, and courts have imputed knowledge of that "clearly established" circuit level law to government officials who act or violate a duty to act in violation of the Constitution.[92] Even in the qualified immunity context, though, deciding when a court of appeals opinion

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sustained congressional attention"); Flood v. Kuhn, 407 U.S. 258, 281–84 (1972) (finding heightened deference especially appropriate where Congress had considered and rejected proposals to "overturn" Court's interpretation); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (same).

90 *See* Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 338 (1988) (inferring acquiescence when "federal and state courts have held with virtual unanimity over more than seven decades" that a statute should be interpreted a particular way); *Lindahl*, 470 U.S. at 782–90 (inferring acquiescence in a lower court case when legislative history cited it); *Bloomer*, 445 U.S. at 84 (inferring acquiescence when witnesses at hearings brought lower court decisions to Congress's attention); *Blue Chip Stamps*, 421 U.S. at 731–33 (inferring congressional acquiescence when hundreds of lower court cases shared same interpretation); *Gulf Oil Corp.*, 419 U.S. at 200–01 (inferring congressional acquiescence when lower courts interpreted a statute consistently for four decades); Blau v. Lehman, 368 U.S. 403, 412–13 & n.13 (1962) (inferring acquiescence where Congress received a report of the relevant lower court decision); *cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) (inferring acquiescence in IRS rules when Congress was "aware—acutely aware" of those rulings). None of these cases, of course, is an instance of statutory stare decisis, because none is a case in which the Court relies on acquiescence to decide whether to adhere to its own precedent.

91 *See* Rodriguez v. Compass Shipping Co., 451 U.S. 596, 614–17 (1981) (refusing to infer congressional acquiescence in the statutory interpretation of one circuit); United States v. Powell, 379 U.S. 48, 55 n.13 (1964) (similar).

92 *See, e.g.*, Marsh v. Butler County, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc) (asserting that the Eleventh Circuit cases can clearly establish the law in the Eleventh Circuit). *But see* Schlothauer v. Robinson, 757 F.2d 196, 197–98 (8th Cir. 1985) (strongly implying that only Supreme Court decisions, not decisions from the Eighth Circuit, clearly establish the law).

clearly establishes the law is not without difficulty, and courts struggle with the question.[93] While courts are sometimes willing to impute constructive knowledge of lower court opinions, constructive knowledge in this context is certainly a heavier burden to impose. And it bears repeating that courts only impose constructive knowledge on someone who acts or violates a duty to act. Congress has no duty to "overrule" legislatively those statutory interpretations with which it disagrees; nor, of course, does Congress have any duty to stay abreast of court of appeals decisions.[94]

In sum, Congress's general lack of actual knowledge of circuit opinions and the unreasonableness of imposing constructive knowledge in this context drastically limit the number of cases in which the inference of congressional approval from congressional silence is at all plausible in the court of appeals context.

B. Ambiguity

For the acquiescence rationale to work, Congress must not only know about the relevant judicial opinion, but it must be reasonable for the court to interpret Congress's post-opinion silence as satisfaction with the opinion. The very unreasonableness of this inference is the primary reason that commentators have criticized the Supreme Court's reliance on legislative inaction. Their criticism, persuasive in the context of the Supreme Court, only gains more force when applied to the courts of appeals.

Congressional silence is meaningless. Does it signal acquiescence in a judicial interpretation or an unwillingness to expend political capital to fix the error?[95] A host of explanations other than congressional approval of an opinion may account for legislative inaction. For example, Congress may fail to legislate on the topic in question because other measures "have a stronger claim on the limited time and energy of the [legislative] body."[96] Or, legislators may believe that a "bill is sound in principle but politically inexpedient

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93 For example, the Eleventh Circuit refuses to consider cases from other circuits in determining whether the law was "clearly established." *Marsh*, 268 F.3d at 1033 n.10 (asserting that cases from other circuits cannot "clearly establish" the law for officials acting in the Eleventh Circuit because "[w]e do not expect public officials to sort out the law of every jurisdiction in the country"). Other circuits, however, will take out-of-circuit case law into account. *See, e.g.*, Sallier v. Brooks, 343 F.3d 868, 879 (6th Cir. 2003); McClendon v. Columbia, 305 F.3d 314, 329–30 (5th Cir. 2002). The courts also struggle to define the effect of a circuit split on the state of the law. *Compare* Rivero v. San Francisco, 316 F.3d 857, 865 (9th Cir. 2002) (strongly asserting that the existence of a circuit split does not undermine the clarity of the law in the Ninth Circuit when the Ninth Circuit has taken sides in the split), *with* Burgess v. Lowery, 201 F.3d 942, 944 (7th Cir. 2000) (observing that a circuit split might undermine the clarity of the law in the Seventh Circuit even when the Seventh Circuit had taken sides in the split).

94 *See supra* note 88.

95 *See* Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 98–99; Marshall, *supra* note 19, at 190–91 (discussing numerous explanations for inaction that may 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").

96 Marshall, *supra* note 19, at 190 (quoting H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1393–1401 (tentative ed. 1958) (unpublished manuscript)).

to be connected with."[97] Or, legislators may tentatively approve, but believe that "action should be withheld until the problem can be attacked on a broader front."[98] The list of possible explanations goes on. Numerous obstacles, both procedural and practical, hinder the passage of legislation, and, as a result, even a legislature with a majority that vehemently disagrees with a judicial decision may fail to act on its disagreement. Equating the failure to act with agreement reflects a simple and complete misunderstanding of the legislative process.[99]

This misunderstanding undercuts reliance on acquiescence for either the Supreme Court or a court of appeals. For a court of appeals, though, the unsettled nature of intermediate appellate opinions further exacerbates the problem. Does congressional silence in the face of an Eighth Circuit opinion signal agreement with that decision? Or does it mean that Congress is waiting to see what other circuits do or whether the Supreme Court takes the issue? Or does it mean that Congress does not think that a decision of the Eighth Circuit, even one incorrectly interpreting a statute, is worth spending political capital to fix? Worse, what is a court to make of congressional silence in the face of circuit conflict?[100] In short, the argument that congressional silence raises an inference of acquiescence in a court of appeals decision is simply unsustainable.

C. Relevance

In addition to the problems of ignorance and ambiguity, commentators have raised a relevancy objection to the Supreme Court's use of the acquiescence rationale that is equally applicable to the courts of appeals.[101] Both the Supreme Court and the courts of appeals have asserted repeatedly that the intent of the Congress that enacted a statute controls the interpretation of

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97 *Id.*

98 *Id.*

99 *Cf.* Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) ("The 'complicated check on legislation' erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." (citations omitted)); Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 538 (1983) (noting that "[t]here are a hundred ways in which a bill can die even though there is no opposition to it").

100 Even where they otherwise follow the presumption, some circuits have noted that the existence of a circuit split complicates its application. *See* United States v. Anderson, 885 F.2d 1248, 1255 n.12 (5th Cir. 1989) (en banc) (asserting that "congressional silence is not of great significance, given the split in the circuits"); Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc) (arguing that a circuit split eliminates the basis for applying the statutory presumption); *id.* at 881 (Randolph, J., concurring) (same); United States v. Aguon, 851 F.2d 1158, 1173–74 (9th Cir. 1988) (en banc) (Reinhardt, J., concurring) (same); EEOC v. Metro. Educ. Enters., 60 F.3d 1225, 1230 (7th Cir. 1995) (Ripple, J., concurring) (same).

101 Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 95–96 (noting the inconsistency between the Court's disapproval of subsequent legislative history and its acceptance of subsequent legislative inaction); Marshall, *supra* note 19, at 193–95 (same).

the statute.[102] For this reason, the federal courts will not consider post-enactment legislative history when they interpret a statute.[103] As the Supreme Court has explained, "'[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'"[104] Yet the acquiescence rationale relies not on the intent of the enacting Congress, but on the intent of subsequent Congresses whose inaction may ratify the Court's statutory gloss. If the intent of the enacting Congress is what counts, why should a court take account of what later Congresses think or whether they decline to act?[105] The supposed acquiescence of a later Congress is simply irrelevant.

D. Daniel Farber's Alternative Way

To avoid, or at least soften, the problems of ignorance, ambiguity, and irrelevance that plague the acquiescence rationale, Daniel Farber has advanced a creative "veil of ignorance" argument to defend the Supreme Court's reliance on congressional inaction.[106] He argues that if asked at the time of enactment, legislators would express a preference for a rule of statutory interpretation that attributes significance to legislative inaction—a category broader than, but including, statutory stare decisis.[107] *Ex ante*, legislators cannot know whether judicial interpretations will unduly benefit or unduly hurt their side of the legislative bargain.[108] Because they can expect as many errors to benefit as hurt their policy preferences over time and across many statutes, legislators would not be particularly concerned about leaving statutory misinterpretations on the books.[109] They would be concerned, however, about the social costs imposed by a weak form of stare decisis—one permitting corrections despite evidence of legislative acquiescence in the supposed error.[110] Uncertainty breeds difficulty in planning

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102 *See, e.g.*, Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980); United States v. Price, 361 U.S. 304, 313 (1960); European Cmty. v. RJR Nabisco, Inc., 355 F.3d 123, 136 (2d Cir. 2004) (holding that "expressions of legislative intent made years after the statute's initial enactment are entitled to limited weight under any circumstances, even when the post-enactment views of Congress as a whole are evident"); Tax & Accounting Software Corp. v. United States, 301 F.3d 1254, 1266 (10th Cir. 2002) (holding that "Congress cannot retroactively change the meaning and intent of previously enacted statutory language through the introduction of legislative history which purports to state what the original meaning of that statutory language was"); N. Broward Hosp. Dist. v. Shalala, 172 F.3d 90, 98 (D.C. Cir. 1999) (holding that "subsequent legislative history is an 'unreliable guide to legislative intent'") (citations omitted).

103 *See supra* note 102.

104 *Consumer Prod. Safety Comm'n*, 447 U.S. at 118 (quoting United States v. Price, 361 U.S. 304, 313 (1960)).

105 *Cf.* Johnson v. Transp. Agency, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (asserting that the acquiescence rationale is "based . . . on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant"); *see also* Easterbrook, *supra* note 33, at 427 (asserting that "think[ing] of Congress as a discontinuous body . . . affects the theory of precedent").

106 Farber, *supra* note 23, at 8–14.

107 *Id.* at 11–14.

108 *Id.* at 11–12.

109 *Id.*

110 *Id.* at 12–13.

transactions as well as increased litigation.[111] In addition, the Court's failure to take future congressional approval of statutory interpretations into account increases the resources that Congress may have to devote to considering and perhaps enacting legislative overrides.[112] Because legislators would prefer a rule that reduces uncertainty to a rule that permits the Court to resurrect and enforce the original legislative bargain, the argument goes, treating congressional silence as acquiescence does advance congressional desires.[113]

Even assuming that Farber accurately predicts legislative preferences vis-à-vis the Supreme Court, his argument has no apparent application to statutory stare decisis at the court of appeals level. (Nor, importantly, does Farber argue that it does.) First, Farber's argument rests on his assertion that congressional silence, even if not conclusive, is at least probative of congressional approval.[114] As others have argued, however, that is simply not the case—inaction could mean *anything*, perhaps including approval, but certainly not necessarily or even likely so.[115] Given that alternative explanations for congressional silence are even more forceful vis-à-vis the courts of appeals than the Supreme Court,[116] the probative value of silence is so weak as to be useless at the inferior court level. Second, it is not clear that legislators would have the same *ex ante* preference in favor of strong, acquiescence-based stare decisis, because they do not receive the same benefit in return for relinquishing their attachment to the original legislative deal. Strong stare decisis in a court of appeals does not provide the same overall certainty in planning or reduced litigation, because the possibility always exists that other circuits—or the Supreme Court—could decide the case differently. Nor does strong stare decisis in a court of appeals greatly reduce the risk that Congress will have to devote legislative resources to considering an override, because the risk that Congress would step in to override an intermediate court's interpretation is already low.[117] Given that the benefits are reduced in this context, legislators behind Farber's veil of ignorance may well reach a different calculus. Even if they would prefer that the Supreme Court adopt super-strong stare decisis, it is far from certain that they would choose a similar course for the courts of appeals.

E. Constitutional Impediments

Finally, commentators have raised a constitutional objection to the Supreme Court's use of the acquiescence rationale that also applies to its use by

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111 *Id.* at 12.

112 *Id.* at 13.

113 *Id.* at 13. *But see* Marshall, *supra* note 19, at 198–200 (pointing out flaws in Farber's theory, even as applied to the Supreme Court); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 73–76 (2001) (same).

114 Farber, *supra* note 23, at 10.

115 *See* Marshall, *supra* note 19, at 191 (arguing that even in the Supreme Court context, "logical relevance does not demonstrate that the probability of congressional agreement is sufficient to support any form of a presumption of congressional acquiescence").

116 *See supra* notes 95–100 and accompanying text.

117 *See supra* note 80 and accompanying text (asserting that Congress responds to relatively few circuit opinions).

the courts of appeals.[118] On the one hand, when a court interprets a statute to mean "X," the acquiescence rationale permits Congress, through its silence, to respond "Yes, we meant 'X.'" (For present purposes, I am putting aside all other objections to the acquiescence rationale, including the relevance of what a later Congress thinks.) On the other hand, the acquiescence rationale also permits Congress, by legislatively "overruling" a statutory interpretation, to respond "We did not mean 'X' at the time, but 'X' sounds good to us now." With only silence to go on, a court cannot know which message Congress is sending, and the latter message runs headlong into the Constitution. As commentators have repeatedly emphasized and I will briefly describe here, permitting the inaction of a current Congress to ratify a potential departure from the statutory scheme circumvents the constitutional limits on the legislative process.

Congress can only legislate through the constitutionally prescribed process of bicameralism and presentment.[119] Silence cannot satisfy the requirement of bicameralism. Without a vote, it is impossible to tell whether a majority of both houses supports a measure. And even assuming that silence could somehow satisfy the requirement of bicameralism, ratification by inaction circumvents the requirement of presentment. If Congress's silence is given legal effect, Congress effectively can amend an existing statute without ever giving the President the opportunity to veto the amendment.[120] The acquiescence rationale assumes that Congress's view about the meaning of a statute is the only relevant view; Congress, however, is not the only body with a role in making or amending statutes. The acquiescence rationale wholly overlooks the Executive's role in the legislative process.

III. The Separation-of-Powers Rationale in the Courts of Appeals

Congressional acquiescence—a theory on shaky ground in the Supreme Court—runs into even more trouble in the courts of appeals. With the underbrush of the acquiescence rationale cleared away, we can consider the more promising justification for statutory stare decisis in the courts of appeals: the separation-of-powers rationale. The idea that the constitutional separation of powers requires or at least militates in favor of statutory stare decisis runs through Supreme Court opinions, and the courts of appeals echo it. If statutory stare decisis can be justified in the courts of appeals, it must stand or fall on this ground.

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118 *See* Eskridge, *Interpreting Legislative Inaction*, *supra* note 23, at 96–97 (identifying constitutional difficulties with attributing legal significance to legislative inaction); Marshall, *supra* note 19, at 194 (same).

119 U.S. CONST. art. IV, § 7, cl. 2; INS v. Chadha, 462 U.S. 919, 945–59 (1983).

120 *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 186 (1994); Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989) (refusing to give effect to congressional acquiescence because, *inter alia*, "Congress may legislate . . . only through the passage of a bill which is approved by both Houses and signed by the President" (citations omitted)); Cleveland v. United States, 329 U.S. 14, 22 n.4 (1946) (Rutledge, J., concurring) (stating that "in view of the specific and constitutional procedures required for the enactment of legislation, it would seem hardly justifiable to treat as having legislative effect any action or nonaction not taken in accordance with the prescribed procedures"); Nelson, *supra* note 113, at 76–77.

As explained in Part I, existing case law and commentary offer two different versions of the separation-of-powers rationale, one advanced by Justice Hugo Black and the other advanced by Professor Lawrence Marshall. In this section, I consider whether either Justice Black's or Lawrence Marshall's understanding justifies statutory stare decisis in the courts of appeals. After concluding that neither does, I then consider the possibility of a third version of the separation-of-powers rationale, one not articulated in existing scholarship or case law. I argue that statutory stare decisis is best understood not as a constitutional mandate, as Justice Black described it; nor as a means of spurring congressional action, as Professor Marshall describes it; but instead, as a simple restraint on judicial policymaking derived from, but not required by, the Constitution's separation of powers. I find this explanation of statutory stare decisis more compelling, but conclude that it also ultimately fails to justify statutory stare decisis in the courts of appeals.

A. Justice Black's Theory

Recall that Justice Black, the justice who has most clearly articulated a separation-of-powers theory for statutory stare decisis, insisted that the Constitution gives the legislative branch the exclusive authority to correct statutory mistakes. According to Justice Black, "[W]hen this Court first interprets a statute, then the statute becomes what this Court has said it is."[121] Justice Black believed that to alter that language is a legislative function, a task that Article I vests in Congress.[122] Congress, unlike the Court, is an elected body, and Congress, unlike the Court, is capable of responding to political pressure and of performing the investigation required to develop policy.[123] Thus, the Court "should interject itself as little as possible into the law-making and law-changing process."[124] Justice Black's argument has been persuasive to some circuit judges, who have invoked it in asserting the statutory presumption.[125]

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121 Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 257 (1970) (Black, J., dissenting). The Court has sounded a similar theme in other cases. *See* Francis v. S. Pac. Co., 333 U.S. 445, 450 (1948) (stating that "[w]e find the long and well-settled construction of the Act plus reenactment of the free-pass provision without change of the established interpretation most persuasive indications that the . . . [judicial interpretation] has become part of the warp and woof of the legislation"); Douglass v. County of Pike, 101 U.S. 677, 687 (1879) (holding that "[a]fter a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment").

122 *Boys Mkts.*, 398 U.S. at 258 (Black, J., dissenting).

123 *Id.*

124 *Id.*; *see also* Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 250–51 (1947) (making a similar "judicial amendment" argument to support statutory stare decisis).

125 *See* Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1558 (Fed. Cir. 1994) (en banc) (Mayer, J., dissenting) (asserting that "[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end" (quotation omitted)); United States v. Anderson, 885 F.2d 1248, 1265 & n.11 (5th Cir. 1989) (en banc) (Smith, J., dissenting) (noting the "colorable argument" that altering a prior statutory interpretation violates the separation-of-powers principle, "as any subsequent change of position has the practical effect of amending the statute, an act that is legislative rather than judicial in nature"); Tradewinds, Inc. v. Citibank, No. 81-1424, 1981 U.S. App. LEXIS 11046, at *20 (3d Cir. July 27,

Justice Black's analysis, however, is patently flawed.[126] He does not identify the force that transforms an initial judicial interpretation into statutory text; nor does he explain why the very same act of judicial interpretation violates Article I in one context but not another. As William Eskridge asks: "Why should an errant initial interpretation of legislative expectations be considered acceptable judicial lawmaking, and a later, corrective interpretation be considered usurpation?"[127]

The premise that an initial judicial interpretation of statutory language becomes an actual part of the statute itself is particularly strained in the court of appeals context, where different circuits can interpret the same language differently. Does the interpretation of a single circuit become temporarily part of the statute subject to the development of a conflict? When there is a conflict, does the statute revert to its "original form" until the Supreme Court steps in to resolve the conflict? Or, do court of appeals statutory interpretations become part of the "warp and woof" of a statute only once some number of circuits weighs in and agrees? If so, what is the tipping point?

The court of appeals context also underscores the logical difficulties of distinguishing between "initial interpretations," which are "unavoidable" and therefore permissible in Justice Black's view, and "reinterpretations," which are avoidable and therefore impermissible.[128] Once one circuit has interpreted an ambiguity, are not *all* later interpretations, even those from other circuits, unnecessary? Indeed, once any federal court at any level of the judicial hierarchy fills a gap, are not all interpretations in later cases, even from a superior court, strictly speaking, "unnecessary?" The longstanding stare decisis structure of the federal courts provides that one circuit does not bind another, and that vertical stare decisis is a one-way obligation running from superior to inferior courts.[129] Adopting Justice Black's strong separation-of-powers view would require the federal courts either to define "necessity" artificially (e.g., by saying that it is "necessary" for each precedential component of the federal court system to define a statutory term for itself) or to depart radically from the existing stare decisis structure. In short, Justice Black's position cannot justify statutory stare decisis in the courts of appeals.

1981) (Adams, J., concurring) (arguing that "we should abstain from usurping the congressional power of altering or amending legislation"); Frilette v. Kimberlin, 508 F.2d 205, 219–20 (3d Cir. 1975) (Adams, J., dissenting) (asserting that "a court, in altering its interpretation of the meaning to be derived from the words of the statute, encroaches on the power of Congress to enact or amend legislation").

126 Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1398–1400; Marshall, *supra* note 19, at 209 (stating that "[t]aken alone, Justice Black's position appears to be a bit shallow").

127 Eskridge, *Overruling Statutory Precedents*, *supra* note 4, at 1399.

128 *Boys Mkts.*, 398 U.S. at 257–58 (Black, J., dissenting).

129 *See, e.g.*, Northwest Forest Res. Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997) (describing horizontal stare decisis in the federal courts); Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) (describing vertical stare decisis in the federal courts).

B. Statutory Stare Decisis as a Spur to Legislative Action

Recall Lawrence Marshall's more convincing account of the separation-of-powers reason for the statutory presumption.[130] Marshall recognizes that some policymaking is an inevitable part of statutory interpretation, both because it is impossible to completely eliminate ambiguity from language and because ambiguity is the inevitable result of legislative bargaining.[131] He argues that it should be as small a part as possible, however, because any judicial policymaking is necessarily countermajoritarian.[132] While it may not violate any express constitutional command, such policymaking is in serious tension with the constitutional structure, and the Court should seek to limit it.[133] Marshall's proposed way of limiting it is for the Supreme Court to shift the policymaking responsibility back to Congress by making statutory stare decisis an absolute rule.[134] According to Marshall, if the Court makes clear that it is absolutely unwilling to revisit statutory interpretations, both Congress and other parties interested in an issue will know that change can only come from the legislature.[135] Marshall claims that such line-drawing will make it more likely that Congress will rely on the democratic rather than the judicial process to resolve statutory ambiguities.

But Marshall limits his proposal to the Supreme Court, and it is easy to see why.[136] In Marshall's view, statutory stare decisis aims to evoke a congressional response; at the intermediate appellate level, a number of factors sap the likelihood of a meaningful congressional response. That is not to say that Congress never responds to statutory interpretations of the courts of appeals. Sometimes, it does.[137] But a theory of statutory stare decisis that assumes a norm of congressional response to the courts of appeals is deeply flawed.

For one thing, an information deficit exists. As discussed above, Congress tends not to know about the courts of appeals' statutory interpreta-

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130 *See* Marshall, *supra* note 19, at 200–19; *see also* William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450, 2453–66 (1990) [hereinafter Eskridge, *Amorous Defendant*] (criticizing Marshall's theory); Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467 (1990) (responding to Eskridge).

131 Marshall, *supra* note 19, at 206–07.

132 *Id.* at 207.

133 *Id.* at 201–08, 220–21 (arguing that "the nonmajoritarian aspect of judicial lawmaking should have a 'conditioning influence' in the Court's formulation of stare decisis rules" (footnotes omitted)); *cf.* Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948) (asserting that statutory stare decisis "places the responsibility where it belongs"). *But see* Eskridge, *Amorous Defendant*, *supra* note 130, at 2458–66 (disputing both that policymaking is reserved for the legislature and that judicial involvement is democracy-enhancing).

134 Marshall, *supra* note 19, at 208.

135 *Id.* at 209–15. *But see* Eskridge, *Amorous Defendant*, *supra* note 130, at 2453–58 (disputing that the Supreme Court's adoption of an absolute rule would succeed in spurring congressional response).

136 Marshall, *supra* note 19, at 216. Marshall does not say whether the Court's current version of statutory stare decisis (as opposed to the absolute statutory stare decisis that Marshall advocates) has any role in the lower courts.

137 *See supra* note 80 and accompanying text.

tions.[138] A prerequisite to congressional action, therefore, is missing—Congress cannot respond to errors about which it is unaware. Defenders of the "congressional incentive" theory might respond that actual knowledge does not matter. Unlike the acquiescence theory, the "congressional incentive" theory does not rely on what Congress already knows; instead, it relies on what the courts hope to inspire Congress to learn. Part and parcel of motivating Congress to respond to the statutory interpretations of the courts of appeals is motivating Congress to monitor these decisions.

Motivating Congress to monitor and respond to the statutory interpretations of the courts of appeals, however, is an uphill battle. Congress's current unawareness of circuit opinions suggests at the very least that affirmative steps must be taken to inform Congress if this factor is to support statutory stare decisis; the knowledge obviously is not present in Congress as a matter of course.[139] It might be reasonable for the Supreme Court to attempt to spur Congress to monitor the relatively few statutory interpretation opinions it publishes each term.[140] Together, however, the courts of appeals issue thousands of statutory interpretations a year.[141] It is simply not manageable for Congress to stay on top of this many opinions.[142]

Even if Congress could manage the circuit caseload, other factors decrease Congress's incentive to monitor and respond. Most important is the relatively small impact that any single court of appeals can have on the national scene. When the Supreme Court interprets a statute, Marshall's "congressional incentive" theory assumes that Congress will act because Congress knows that change can only come from it.[143] When a court of appeals issues a decision, however, Congress knows that change may also originate from another source: the Supreme Court. I do not take a position here on whether it is appropriate for the Supreme Court to "discipline" the democratic process by forcing Congress to resolve statutory interpretation disputes through legislation.[144] Assuming, however, that it is appropriate for the Supreme Court to perform this sort of disciplining function, it is hard to see how a court of appeals could effectively play this role. The Supreme Court can hope to elicit a congressional response because it has the last word. The courts of appeals lack the ability to elicit a congressional response because they do not. If

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138 *See supra* notes 77–84 and accompanying text.

139 *See supra* notes 77–84 and accompanying text.

140 *See* Eskridge, *Overriding Statutory Interpretation Decisions*, *supra* note 82, at 339 n.15 (noting that the Supreme Court issued about eighty statutory interpretations per year during the period covered by Eskridge's study); Marshall, *supra* note 19, at 216 n.181 (noting that the Court decided sixty-four statutory cases in its 1986 Term).

141 *See supra* note 79 and accompanying text.

142 *Cf.* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 7 (1994) (stating that "Congress could not possibly modify or reject in text each statutory interpretation decision with which it has serious concerns and still have time to transact any other legislative business").

143 *See supra* note 135 and accompanying text.

144 *Cf.* Jane Schacter, *Metademocracy*, 108 HARV. L. REV. 593, 609, 642–46 (1995) (using the phrase "disciplinarian approach" to describe approaches to statutory interpretation designed to influence or modify legislative behavior).

statutory stare decisis is a task-shifting mechanism, the courts of appeals generally lack the leverage to shift the task effectively.[145]

An individual circuit's leverage over Congress is also decreased by the limited geographical reach of its opinions. A Supreme Court statutory interpretation binds the whole nation; thus, incentives potentially exist for *any* member of Congress (not to mention the President and interest groups) to support legislation overriding a Supreme Court opinion that undercuts that legislator's (or the President's or the interest groups') preferred statutory policy. When the First Circuit interprets a statute, however, what incentive does a senator from California have to introduce or support legislation to override a judicial opinion that affects a small portion of the East Coast and Puerto Rico? Common sense dictates that decisions not affecting a legislator's constituents are not likely to be at the top of her agenda; nor will the President or a national interest group necessarily take an interest in a decision with parochial effect. And even when a legislator has real concerns about one circuit's position, the limited geographical impact of the decision may dissuade her from acting, or inhibit her efforts to convince her colleagues to act. When one circuit speaks, Congress may well prefer to wait and see what other circuits say before devoting resources to an override.[146]

To be sure, it would be an overstatement to say that Congress never has an incentive to respond to the lower courts, for Congress does override some lower court decisions.[147] Given that Congress is less likely to know about, much less respond to, lower court decisions than Supreme Court decisions, however, the incentive to override a lower court decision is necessarily limited.[148] Congress may have an incentive to act when a number of circuits

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145 *Cf.* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2225 (2002) (noting that "[t]he Supreme Court is far more likely to provoke congressional overrides than lower courts").

146 The data compiled by Lindquist and Yalof offers some support for the notion that Congress is likely to wait to see what other circuits do. Lindquist and Yalof found that Congress proposed to respond, either positively or negatively, to 187 appeals court cases. Lindquist & Yalof, *supra* note 77, at 63–64. Of those 187 cases, 66 were instances of circuit conflict that Congress introduced legislation to resolve. *Id.* Lindquist and Yalof do not isolate whether congressional overrides in the remaining cases were aimed at the decision of a single circuit, or a position on which several circuits concurred. Eskridge's data regarding lower court overrides is also silent with respect to this distinction. *See generally* Eskridge, *Overriding Statutory Interpretation Decisions*, *supra* note 82.

147 *See generally* Lindquist & Yalof, *supra* note 77 (studying the frequency and type of congressional responses, including overrides, to the decisions of the courts of appeals). *See also* Eskridge, *supra* note 82, at 338 & tbl.1 (noting that Congress overrides or modifies statutory decisions by lower courts as well as decisions by the Supreme Court).

148 Lindquist and Yalof argue that the speed and relative infrequency of congressional reactions to the courts of appeals' decisions suggest that Congress relies on a system of "fire-alarm monitoring" of judicial statutory interpretations. Lindquist & Yalof, *supra* note 77, at 67 (citations omitted). That is, rather than systematically watching all judicial decisions, Congress relies on "complaints ('alarms') by lobbyists from organized groups to trigger oversight." *Id.* As the term "fire-alarm monitoring" implies, interest groups are not likely to press for an override of every lower court loss, only of those perceived to be "fires." *Cf.* Eskridge, *Overriding Statutory Interpretation Decisions*, *supra* note 82, at 363 ("[An interest] group's ability to place an issue on the legislative agenda does not ensure that the group will do so. There are many reasons endogenous to the political process why a group might not press a statutory issue that it lost in court.").

have either joined in or divided over a particular statutory interpretation.[149] In that case, Congress might speak to express its disagreement with what has become a well-established judicial position, or to resolve the uncertainty created by a circuit split.[150] Congress may also have an incentive to act when a "specialty" circuit speaks—for example, when the Second Circuit decides an important securities case, the D.C. Circuit an important administrative law case, or the Federal Circuit an important patent case.[151] Because "specialty" circuits tend to have the last word on issues arising within their fields, such decisions have influence beyond the borders of the circuit and may more easily command congressional attention and response.[152] Or, Congress may have an incentive to act when a particular statutory interpretation, though isolated, is of enough strategic or symbolic importance to rile an influential interest group.[153]

The fact that Congress has an incentive to respond to a subset of lower court decisions, however, does not justify the presumption that Congress has an incentive to respond to all, or even most, of them. A "presumption" applicable in only a few circumstances is not a generally applicable "presump-

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149 *See* Comm'r v. Fink, 483 U.S. 89, 104 (1987) (Stevens, J., dissenting) (asserting that a long, consistent line of lower court decisions should give Congress an incentive to act if it disagrees); Lindquist & Yalof, *supra* note 77, at 66 (noting instances of congressional overrides to resolve circuit conflicts).

150 *See supra* note 149.

151 A circuit's "specialty" may be jurisdictional. For example, statutes frequently grant the D.C. Circuit exclusive jurisdiction over various administrative matters, and the Federal Circuit has exclusive jurisdiction over various patent matters. Or, a specialty might be an accident of geography. For example, the Second Circuit decides relatively more securities cases simply because the New York Stock Exchange is located within that circuit. For this reason, Justice Blackmun called the Second Circuit "the 'Mother Court' of securities law." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

152 Lindquist and Yalof's data shows that Congress responded to more opinions from the D.C. Circuit than any other. Congress overrode, clarified, or codified roughly eighteen percent of the D.C. Circuit's opinions. Lindquist & Yalof, *supra* note 77, at 64. The numbers from the Ninth Circuit are not far behind: Congress responded to fifteen percent of the Ninth Circuit's opinions. *Id.* The closest percentage after the Ninth Circuit is the nine percent to which Congress responded from both the Second and the Seventh Circuits. *Id.* Contrast these numbers with the four percent of opinions to which Congress responded from the Fourth, Tenth, and Eleventh Circuits. *Id.* Lindquist and Yalof opine that Congress responds to a high percentage of D.C. Circuit opinions because the D.C. Circuit "renders most of its decisions in regulatory matters of central concern to important legislative programs." *Id.* That may be. Another explanation, though, is that regulatory statutes often grant exclusive review to the D.C. Circuit; thus, the D.C. Circuit has the first and, subject to Supreme Court review, the last judicial word on many, if not most, administrative matters. *See* Patricia Wald, *Regulation at Risk: Are Courts Part of the Solution, or Most of the Problem?*, 67 S. CAL. L. REV. 621, 647 (1994) (noting that Congress typically designates the D.C. Circuit as the exclusive forum for review of administrative rules). Lindquist and Yalof explain the high percentage of responses to the Ninth Circuit by pointing to the fact that the Ninth Circuit issues more opinions than any other circuit. Lindquist & Yalof, *supra* note 77, at 64. That may be. But another explanation is that because the Ninth Circuit is the largest circuit, its decisions tend to affect more people than the decisions of most circuits. Thus, members of Congress should have more interest in responding to these decisions.

153 For example, Lindquist and Yalof observe that Congress overrides a relatively high percentage of the interpretations of environmental statutes issued by the courts of appeals, and they speculate that it does so because of the influence of interest groups like the Sierra Club and the Natural Resources Defense Council. Lindquist & Yalof, *supra* note 77, at 65.

tion." It may be a factor that courts consider when circumstances suggest it, but it is not a principle justifying an across-the-board doctrinal approach.

Another factor worth considering is whether Congress should be primarily responsible for monitoring and changing wayward court of appeals statutory interpretations. Institutionally, it makes more sense for the Supreme Court to assume this role. By virtue of its appellate jurisdiction, the Supreme Court supervises the judgments of the lower federal courts; its primary function is to monitor and correct errors that lower courts (and state courts) make in interpreting federal law.[154] Congress, which creates the lower courts and defines the Supreme Court's appellate jurisdiction, is the body that designed this system. Accordingly, it would be at least reasonable to infer that Congress expects the Supreme Court to bear the burden of monitoring and response vis-à-vis the lower courts, leaving Congress free to monitor and respond to only the Supreme Court's relatively small docket. Of course, Congress may override lower court interpretations to the extent Congress is interested in particular issues or the opinions otherwise come to its attention. The courts of appeals should not, however, expect Congress to perform a job that Congress has structurally allocated to the Supreme Court through the appellate review process.

If this description adequately captures Congress's expectations, one might then wonder whether the Supreme Court is performing—or, given resource limitations, is even capable of performing—the job that Congress has apparently allocated to it. Congress is presumably concerned about whether the lower courts are interpreting its statutes correctly; the Supreme Court is generally concerned about resolving splits rather than merely correcting errors.[155] If Congress primarily monitors the Supreme Court's docket, and the Supreme Court does not take up statutory errors, then those errors will likely escape congressional attention. Perhaps, then, the courts of appeals should try to get Congress to react directly to them.

This response has some surface appeal, but upon analysis becomes less persuasive. One way to understand the Court's certiorari practice is that it uses disagreement among the circuits as proxies for interpretive error. If only one or two courts have addressed a statutory ambiguity, and if they have interpreted that ambiguity the same way, the Court has to engage in relatively close scrutiny to detect errors in the lower courts' reasoning. Performing that scrutiny for every certiorari petition would be time consuming and, with limited lower court input on the issue and the press of other work, the Court would be at greater risk of making interpretive errors itself. For efficiency's sake, it relies on the process of "percolation" to separate cases that

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154 *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65 (1998) (noting that the Supreme Court sees "its role as principally one of promoting uniformity in the interpretation of federal law").

155 *See* SUP. CT. R. 10.1(a) (noting that a conflict between one court of appeals and another, or between a court of appeals and a state supreme court, is a reason for the Court's exercise of its certiorari jurisdiction); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 193 (7th ed. 1993) (explaining that the Supreme Court will not typically grant certiorari simply because the decision below is wrong).

merit review from those that do not.[156] The emergence of a circuit split signals a need for the Court's intervention, for when a split exists, so does error: in resolving a split, the Court necessarily declares some courts on the wrong side of the interpretive divide. By contrast, if the circuits agree, error—while certainly not impossible—is at least less likely. The fact that the circuits are arriving at the same conclusion suggests that they are arriving at the right conclusion.

Given the volume of circuit opinions, and the press of its other business, Congress is no more capable than the Supreme Court of engaging in close scrutiny of every single statutory interpretation released by a court of appeals.[157] If Congress took primary responsibility for monitoring lower court statutory interpretations, it too would have to rely on proxies for error. Indeed, the most comprehensive study of congressional responses to circuit opinions indicates that to the extent that Congress currently monitors the circuits at all, it already relies on proxies rather than case-by-case study.[158] For example, Congress is more likely to respond to the courts of appeals when a split exists, or when interest groups sound the alarm about a particular circuit opinion.[159] In light of the limitations that any monitoring institution would face, the Supreme Court's choice of selective rather than systematic monitoring is not itself reason for the lower courts to circumvent the congressionally designed appellate structure.

In sum, the "congressional incentive" version of the separation-of-powers rationale does not justify statutory stare decisis in the courts of appeals. For one thing, Congress has significantly less incentive to respond to a decision from a court of appeals than it does to a decision from the Supreme Court. For another, the way Congress has designed the appellate structure suggests that it expects the Supreme Court to function as the body primarily responsible for monitoring and responding to the inferior federal courts. The congressional incentive theory may well justify statutory stare decisis in the Supreme Court. But it does not provide a foundation for the doctrine in the lower courts.

C. *Statutory Stare Decisis as Judicial Restraint*

Considering how separation-of-powers principles might justify statutory stare decisis in the courts of appeals prompts reflection on another way of understanding the separation-of-powers rationale. Currently, the best articulated justification of statutory stare decisis in case law or commentary is Professor Marshall's.[160] Perhaps, though, it is possible to articulate a new

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156 "Percolation" describes the Supreme Court's practice of waiting for several federal and state courts to address an issue before granting certiorari and deciding an issue itself. *See* Dorf, *supra* note 154, at 65–66.

157 *See supra* notes 139–42 and accompanying text (arguing that it is not realistic to expect Congress to monitor the thousands of statutory interpretations that the courts of appeals issue annually, as opposed to the relatively small number of statutory interpretations that the Supreme Court issues each term).

158 Lindquist & Yalof, *supra* note 77, at 66–69.

159 *See supra* notes 148–53 and accompanying text.

160 *See generally* Marshall, *supra* note 19.

justification that does not focus on creating congressional incentives to act. Another separation-of-powers theme runs implicitly through the statutory stare decisis decisions of both the Supreme Court and the courts of appeals but has not been drawn out by the literature. One could state the principle this way: courts ought generally to refuse to revisit statutory precedents *regardless* of whether their refusal prompts congressional action. This rationale blends aspects of Justice Black's theory with aspects of Professor Marshall's. Like Justice Black's theory, this rationale focuses on limiting judicial behavior rather than on influencing congressional behavior.[161] Like Professor Marshall's, this rationale is grounded in constitutional policy rather than constitutional proscription.[162]

This explanation fits better both with what the circuits and the Supreme Court actually say about statutory stare decisis. The courts of appeals never show any concern, and the Supreme Court only rarely shows any concern, about the likelihood that Congress actually will override statutory interpretations with which it disagrees.[163] The courts most often assert simply that if a prior judicial interpretation does not capture the statute's meaning, Congress can—and therefore should—be the one to fix it.[164] The theme running through their opinions is that a preference for legislative modification of stat-

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161 *See supra* notes 43–46 and accompanying text.

162 *See supra* note 53 and accompanying text.

163 *Neal v. United States*, 516 U.S. 284, 295 (1996), is one of the rare cases in which the Supreme Court shows concern about affecting congressional behavior.

164 *See* United States v. Coleman, 158 F.3d 199, 204 (4th Cir. 1998) (Widener, J., dissenting) (insisting that "change of an authoritative construction of a statute by a court should almost always be accomplished by Congress rather than by a court"); *In re* Zurko, 142 F.3d 1447, 1457–58 (Fed. Cir. 1998) (en banc) (explaining that the court is particularly reluctant to overrule a statutory interpretation because in this circumstance, "Congress remains free to alter what we have done" (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989))), *rev'd on other grounds sub nom.* Dickinson v. Zurko, 527 U.S. 150, 165 (1999); Bath Iron Works Corp. v. Dir., Office of Worker's Comp. Programs, 136 F.3d 34, 42 (1st Cir. 1998) (claiming that "a settled construction of an important federal statute should not be disturbed unless and until Congress so decides" (quoting Reves v. Ernst & Young, 494 U.S. 56, 74 (1990) (Stevens, J., concurring))); Chi. Truck Drivers v. Steinberg, 32 F.3d 269, 271 (7th Cir. 1994) (explaining that the court is particularly reluctant to overrule a statutory interpretation because in this circumstance, "Congress remains free to alter what we have done" (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989))); Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 875 (D.C. Cir. 1992) (same); *id.* at 881 (Randolph, J., concurring) (claiming that "[i]t is just the possibility of a congressional override that the Supreme Court has deemed important" for purposes of the statutory presumption); United States v. Aguon, 851 F.2d 1158, 1177 (9th Cir. 1988) (en banc) (Wallace, J., concurring in part and dissenting in part) (asserting that "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation" (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977))); Fast v. City of Ladue, 728 F.2d 1030, 1034 (8th Cir. 1984) (cautioning that the power to overrule should be sparingly exercised in a matter of "statutory construction, the kind of question on which Congress can easily correct us if it wishes"); Miller v. Comm'r, 733 F.2d 399, 409 (6th Cir. 1984) (en banc) (Contie, J., dissenting) (asserting that Congress should amend a statute "if Congress dislikes the construction which the courts . . . have traditionally placed upon it"); Owen v. Comm'r, No. 78-1341, 1981 U.S. App. LEXIS 12069, at *25 (6th Cir. June 23, 1981) (similar); *id.* at *27 (Kennedy, J., concurring) (claiming that if precedent "is to be changed that change should be made by the Congress"); Cottrell v. Comm'r, 628 F.2d 1127, 1131 (6th Cir. 1980) (similar); Gen. Dynamics Corp. v. Benefits Review Bd., 565 F.2d 208, 212 (2d Cir. 1977) (similar).

utory interpretations counsels against judicial modification, whether or not Congress is likely to step in.[165]

The preference for legislative modification of statutory interpretations reflects a basic discomfort with the role of the federal courts in interpreting statutes. This third version of the separation-of-powers rationale, like the well-known versions advanced by Justice Black and Professor Marshall, rests on discomfort with Congress's delegating policymaking authority to the courts in the form of statutory ambiguity.[166] This assumption stands in sharp contrast to the way the courts treat similar delegations to administrative agencies.[167] The *Chevron* doctrine interprets statutory ambiguity as an implicit delegation of policymaking authority from Congress to administrative agencies.[168] The ambiguity is the agency's to fill, and, so long as they give an adequate explanation for a policy shift, agencies are free to shift from one reasonable interpretation of statutory ambiguity to another.[169] Statutory stare decisis, however, views similar statutory ambiguity in statutes entrusted primarily to judicial interpretation as cause for concern.[170] While courts cannot wholly avoid the resolution of statutory ambiguity, neither should they feel free to shift among reasonable interpretations of that ambiguity as they might if they viewed the gap as truly theirs to fill.

Resolving the question of whether *Chevron*-style delegations to the judiciary are constitutionally suspect would take a full-length article in itself. For

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165 This understanding of the separation-of-powers rationale is particularly clear in Judge Randolph's dissent in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, where he asserts that "[i]t is just the possibility of a congressional override," rather than the likelihood of one, that is important for purposes of statutory stare decisis. *Critical Mass*, 975 F.2d at 881 (Randolph, J., dissenting); *cf.* John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1316 (1996) (stating that "[t]he mere possibility of [a procedure by which Congress can correct mistakes], whether or not Congress chooses to employ it, points toward a reduced judicial and administrative role in correcting statutory mistakes").

166 *See* Marshall, *supra* note 19, at 223–25 (arguing that congressional delegations to the judiciary are constitutionally suspect).

167 It also stands in contrast to the way that the Court treats delegations to the judiciary in other contexts. *See* Mistretta v. United States, 488 U.S. 361, 380–81, 386–87, 390 (1989) (approving delegation to the judicial branch of authority to promulgate sentencing guidelines); Sibbach v. Wilson, 312 U.S. 1, 9–10 (1941) (approving delegation to the Supreme Court of authority to promulgate procedural rules).

168 Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1984).

169 *See id.* at 865–66.

170 *See, e.g.*, Neal v. United States, 516 U.S. 284, 295 (1996) (noting that an agency "[e]ntrusted within its sphere to make policy judgments," may abandon old interpretations in favor of new ones, but the Court "do[es] not have the same latitude to forsake prior interpretations of a statute"). In this respect, the statutory stare decisis doctrine is internally inconsistent. While it treats *Chevron*-like delegations with suspicion, it views more blatant delegations like the Sherman Act as unproblematic; indeed, the Supreme Court relaxes the stare decisis presumption in the latter context on the theory that the judiciary is freer to shift among interpretations in the case of a "common-law statute." *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 20–21 (1997) (asserting that statutory stare decisis is relaxed in the context of the Sherman Act because of that statute's broad delegation of policymaking authority to the courts). Professor Lawrence Marshall avoids this inconsistency by arguing that his rule of absolute statutory stare decisis ought also to apply to federal common law decisions and interpretations of common-law-like statutes, for it is in these instances when "the lawmaking role of the court is at its pinnacle." Marshall, *supra* note 19, at 223.

now, it is enough to say that even assuming that such delegations are suspect—an assumption that is open to question—it is doubtful that any individual circuit ought to adopt the super-strong statutory presumption to address that concern.

It is again a matter of the structural position of the thirteen circuits within the judicial hierarchy. Compared to the Supreme Court, an individual circuit has a very limited ability to confine the boundaries of a policymaking delegation by observing statutory stare decisis. When the Supreme Court fills a statutory gap, it speaks on behalf of the entire judicial department by virtue of the obligation that inferior federal courts have to follow Supreme Court precedent. The Supreme Court's doctrine of statutory stare decisis presumptively ends the exercise of delegated authority because unless the Court itself revisits the interpretation, that interpretation stands as the judiciary's final word. No single circuit, however, speaks on behalf of the entire judicial department. When a single circuit fills a statutory gap, it is still possible that other circuits or the Supreme Court could interpret the statute differently; the delegation is still in play. Thus, a single circuit's observation of statutory stare decisis does not put a department-wide halt to the exercise of that delegated authority; it presumptively ends it in only one limited part of the federal judiciary. Because judicial modification of the statutory interpretation is still possible from other corners of the department, holding out for legislative modification seems like a hopeless gesture. In this context, court of appeals decisions are more like the decisions of district courts than the Supreme Court.

One might respond that perhaps even a very limited restraint is better than no restraint at all. An individual circuit's observance of statutory stare decisis will reduce judicial policymaking by concluding the delegation at least within that circuit, and even a limited reduction of judicial policymaking might be a benefit worth achieving.

Yet achieving that benefit is in tension with the role that the courts of appeals otherwise play in the federal court system. By virtue of both their internal structure and position in the judicial hierarchy, the courts of appeals should be more open than the Supreme Court to departing from precedent. For example, the purpose of an en banc sitting is to provide a full-court check on a three-judge decision.[171] Attributing nearly conclusive weight to the panel's decision—which is what circuit judges who support statutory stare decisis find themselves advocating—undermines the very purpose of the en banc mechanism. In addition, a circuit should be willing to reconsider precedent, including statutory interpretations, based on what its sister circuits do. Although a circuit is not obligated to follow its peers, decisions from coequal courts provide the opportunity both to check reasoning and to advance uniformity. Statutory stare decisis focuses a court on its relationship with Congress to the exclusion of its intra- and intercircuit relationships. The Supreme Court, which does not sit in panels and has no coequal courts, need not take such factors into account.[172]

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171 *See generally* FED. R. APP. P. 35.

172 *See* Evan Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior*

Even if statutory stare decisis does not primarily aim to influence congressional behavior, the relationship between Congress and the acting court is relevant. A preference for legislative modification rather than judicial modification of a statutory interpretation sets up a dichotomy between the relevant court and Congress: either the court can change a statutory interpretation, or Congress can, and it is better for Congress to perform that job. For a court of appeals, however, this is a false dichotomy: change can also come from the Supreme Court. As already discussed, Congress's allocation of appellate jurisdiction to the Supreme Court can reasonably be interpreted to reflect a congressional preference that the Supreme Court, rather than Congress, assume primary responsibility for supervising lower court statutory interpretations.[173] And Congress's relatively low rate of response to the courts of appeals, as opposed to the Supreme Court, may well reflect a reality that to the extent that Congress engages in an inter-branch dialogue with the courts, it is only interested in (or able to) deal with the Supreme Court.[174] Thus, when a court of appeals refuses to change a prior statutory interpretation, it can be viewed as restraining its policymaking role in favor of the Supreme Court doing the job rather than in favor of Congress doing the job. There is no particular separation-of-powers benefit in having one federal court, rather than another, perform a policymaking function. And given the Supreme Court's choice of selective rather than systematic lower court monitoring,[175] it makes little sense as a matter of intra-branch practice for a circuit to adopt a blanket preference for Supreme Court error correction. To the contrary, having the courts of appeals more freely correct errors in statutory interpretation would encourage efficiency and uniformity within the judicial branch. If a court of appeals concludes that it is on the wrong side of a circuit split, it is more efficient for the court of appeals to rectify the statutory interpretation itself than to force the Supreme Court (and litigants) to expend resources to resolve the split.

Conclusion

The Supreme Court has long given its statutory precedent super-strong effect, and the courts of appeals have followed suit. As the courts of appeals apply it, statutory stare decisis is probably best justified neither as a nod to congressional acquiescence, nor as an attempt to spur congressional action, but as a simple restraint on judicial policymaking. Even on this different rationale, however, the doctrine is an ill fit in the inferior courts. Refusing to revisit statutory interpretations as a means of restraining judicial policymaking may or may not be appropriate in the Supreme Court, which settles the

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Court Decisionmaking, 73 TEX. L. REV. 1, 6 (1994). Caminker describes conventional wisdom as holding that the "judicial function is identical for courts of all levels and that lower courts therefore should expound the law in the same way that the Supreme Court does." *Id.* But, as Caminker observes, "this latter assumption fails to consider the possibility that different courts ought to play different roles in order to best promote the values served by a hierarchical judiciary." *Id.*

173 *See supra* p. 346.

174 *See supra* notes 80–84 and accompanying text.

175 *See supra* pp. 346–47.

meaning of statutes on behalf of the entire judicial department. But it certainly does not make sense in the courts of appeals, which, by virtue of their position in the judicial hierarchy, have different considerations to take into account when deciding whether to overrule precedent.

That is not to say, of course, that the courts of appeals should attribute *no* stare decisis effect to their statutory interpretations. Most of the time, simple reliance interests counsel against a circuit's departure from a prior, reasonable statutory interpretation. Courts account for reliance interests, though, with the doctrine of stare decisis as practiced through the centuries. It is hard to see why the precedential effect of statutory interpretations in the courts of appeals should be anything more than the simple presumption against overruling that all opinions enjoy.

This conclusion challenges the conventional approach to interpretive theory. We tend to take a one-size-fits-all approach to federal court decision-making, assuming that the same interpretive practices should apply throughout the federal courts. The example of statutory stare decisis shows, however, that at least with respect to some interpretive practices, a more customized approach is in order. As we assess interpretive doctrines, we ought to pay attention to the relative institutional positions of the courts applying them. Practices that make sense for the Supreme Court do not necessarily make sense for courts at other levels of the federal judiciary.