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Congressional Silence in the Supreme Court

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ESSAY

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I. INTRODUCTION

Silence is a problem whether it means something or nothing. Whenever silence has meaning, or whenever an effort is made to assign a meaning to it, there is an intrinsic difficulty: ambiguity. Ambiguity results because silence does not define itself. Speech or writing, on the other hand, has imposed a limit on itself by what has been said or written. The observation has been made that speech has unlimited content, whereas silence has singular content—one can say anything but be silent in only "one way."[1] This comparison is not helpful. The silence that pre-exists speech has unlimited potential.

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1. Lawrence A. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 534 (1982). As I understand the point, silence is "one way" because society's rules, especially the duty to speak, make its meaning determinate. Notwithstanding the fact that there are instances where there is no duty, deciding when and what duty shall apply is not self-evident. Furthermore, even assuming the applicability of a duty, hard cases exist. For example, what if the silence is because the "speaker" is a mute, or because she is so terrified she cannot speak, or because she

After speech, a built-in limitation exists. The relevant comparison is between speech and silence. Both are ambiguous, but the perceiver can more easily fathom speech than silence. Both may be called single events, but with silence, meanings range from nothing to anything. Although a reader may find this paragraph ambiguous, it is closer to saying something than a paragraph of blank space. But blank space as a paragraph of nothing presents a problem as well because it allows the reader to write the paragraph or fill the space. Perhaps silence is never really silent.

The purpose of this essay is to identify, categorize, and evaluate various congressional silences that appear before the United States Supreme Court.

II. MISUSES OF SILENCE

A. *Silence as Law*

One could argue that whatever the array of meanings silence has in the lay world, congressional silence has a special meaning. The Constitution prescribes the method that must be followed for Congress to enact laws. A failure to follow the method results in no law. Congressional silence, by constitutional mandate, means nothing. If prior law or thinking did not make this clear, the *Chadha*[2] case did. If Congress is the source of authority or the source of the denial of authority of, for example, certain action by the President, then it seems beyond doubt that congressional silence does not suffice to provide or deny authority for action. Matters, however, are not so simple in the Supreme Court. Two cases illustrate this complexity.

In the famous *Steel Seizure Case, Youngstown Sheet and Tube Co. v. Sawyer*,[3] President Truman seized the steel mills in order to keep them operating during the Korean conflict. He could have enjoined the ongoing strike by using the authority given him by Congress in the recently passed Taft-Hartley Act.[4] He chose not to go that route because enjoining the workers and forcing them to continue working for management would have been a serious anti-labor slap.[5] The seizure seemed to be a perfect response. With the government in control, the workers could return to their jobs, avoid working for

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decides that although most persons would scream in the situation, the better and more thoughtful response is silence?

2. Immigration & and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (holding unconstitutional the "legislative veto" as a congressional management technique because it does not follow constitutional procedures for law-making).

3. 343 U.S. 579 (1952).

4. 29 U.S.C. § 178 (1978).

5. President Truman earlier had vetoed the Taft-Hartley Act and tried to get it repealed.

their management adversaries, and demonstrate their patriotism. The difficult problem for the Supreme Court was to find a constitutional power source for the President's action. No single express source applied.[6] The argument that the President had an aggregate power derived from his specific authority as Commander in Chief and his unspecific authority as Chief Executive was not sound. Then, as now, the President had extensive power in foreign affairs, but neither counsel nor the Court contended that the President's power in foreign affairs would support the domestic application in question. The dissent found support for the President in a litany of comparable actions taken by several Presidents over the years.[7] However, the majority apparently was not convinced that a parade of illegal, questionable, or unchallenged decisions would support the current action. Thus, the President's seizure was either invalid or questionable under the Constitution—depending on how one reads the concurring Justices' opinions.[8]

Resolution of this question was unnecessary, however, because the majority discovered an alternative argument they could more easily accept: Congress had spoken and had denied the President the remedy he had attempted.[9] But had it? If Congress not only had provided a remedy for dealing with emergency labor problems, but also had expressly forbidden all alternatives, then the Court's conclusion would be beyond dispute (except for a separation of powers problem that has ripened in the last few years). In fact, Congress had not expressly negated the range of power options that the President may have had. Thus, to the extent the President possessed a constitutionally-based power source authorizing his action, Congress had not spoken. The Supreme Court in *Sawyer*, as I read it, assumed presidential power but then found a negative implication in congressional silence.

Several reasons suggest that this approach by the Court is unwise. Practically, can the Court determine the significance of legislative silence or inaction? The Supreme Court consistently and insistently asserts that a denial of certiorari means nothing because

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6. In the lower courts, the government argued that the President had an "unlimited inherent" power. See the transcript quoted in ALAN F. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE 62 (1958). Later the government dropped the "unlimited" power argument and emphasized "inherent emergency" power. *See id.* at 95-109.

7. *Sawyer*, 343 U.S. at 683-700.

8. Justices Burton, Clark, Douglas, Frankfurter, and Jackson all wrote concurring opinions.

9. Justice Black's opinion for the Court is ambiguous regarding whether the holding is that Congress denied the President the power or that in the absence of congressional authorization the President lacked the power. Except for Justice Douglas, the concurring opinions seem to stress the argument that Congress had taken away the President's power.

practically it means nothing. So too with the legislative process. There is no realistic way to identify the rationale behind individual participants' failure to affirmatively act when they act in a group decision-making format. A second practical consideration concerns the judicial role of interpreting legislative history. Any review of Supreme Court decisions will reveal numerous cases in which the Justices disagreed about the meaning of what appeared on the surface to be simple legislative language. Ambiguities in legislation obviously abound. A search for clarity in legislative records often proves difficult and sometimes futile. Application of this process to what Congress has *not* said in order to turn nothing into something that is attributable to Congress would assure a result based on either error or fiction.

Aside from the practical, there are two related constitutional considerations. Building on Justice Stevens' rationale that was incorporated into law in *Hampton v. Mow Sun Wong*,[10] any effort to find law based on what Congress has not officially enacted into law seems to violate the due process of lawmaking concept.[11] Similarly, as mentioned earlier, if Congress can make laws only by following the constitutionally prescribed procedures, such that a legislative veto provision in a valid law cannot stand because a legislative veto violates the presentment mandate of the Constitution, it follows that Congress cannot make laws by inaction, for inaction obviously does not conform with constitutional lawmaking requirements.

More recently, the Court has supplied a clearer picture of its judicial technique for transforming congressional silence into law.[12] To free Iranian-held American hostages, President Carter, on behalf of the United States, made an executive agreement with Iran. In exchange for the release of American hostages held by Iran, the United States promised, among other things, "to terminate all legal proceedings in United States courts"[13] brought by persons against Iran. President Reagan subsequently issued an executive order to carry out President Carter's agreement. Dames & Moore had a claim pending in federal court against Iran and its atomic energy organization for money owed on work done under a contract with the defendants. The executive order had its intended effect and Dames & Moore brought a separate action in federal court to challenge the constitu-

10. 426 U.S. 88 (1976).

11. This idea is also discussed in Justice Stevens' dissent in Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 96-98 (1977).

12. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

13. *Id.* at 665.

tionality of the Presidents' actions. In *Dames & Moore v. Regan*,[14] the Supreme Court, in a unanimous opinion written by then Justice Rehnquist, upheld the Presidents' agreement and order. Although the case is complex and the analysis fascinating for the way it manages to sidestep several sensitive-issue pitfalls, the opinion clearly reveals that the Court's validation of the suspension of Dames & Moore's claim required it to find—which it did—that Congress participated in the presidential decisions. Congressional silence enters the picture here. After conceding that Congress had passed no law—or other comparable measure—before the fact to authorize President Carter's agreement, or after the fact to ratify his decision, the Court nevertheless concluded that Congress, without ever complying with constitutionally prescribed procedures for making official decisions, had done something that transformed an executive act of trembling constitutionality into a firm act the Justices could unanimously accept. What did Congress do?

Although Congress had enacted two laws that related closely to the subject—the International Emergency Economic Powers Act and the so-called "Hostage Act" —neither one, according to the Court, authorized the President's action.[15] Nevertheless, the statutes were not "entirely irrelevant."[16] In fact they were "highly relevant,"[17] the Court said, "in the *looser sense* of indicating congressional *acceptance* of a broad scope for executive action in circumstances such as those presented in this case."[18] This reasoning is not easy to grasp. If the Court had held one or both of the laws to be applicable by stretching them through a process of either interpretation or construction, the Court's reasoning would be understandable. If the Court, on the other hand, had reached its result by finding that Congress had entered the general field of international hostage-taking by passing the two laws, that Congress knew how to legislate in the area, and that the two laws did not authorize the President's action, the result would still be understandable. After all, the usual interpretation maxim tells us that what is expressed excludes all matter not expressed.

The Court explained that when Congress enacts authorizing legislation "closely related"[19] to a questioned presidential decision, Congress "invite[s]"[20] the President to act as he did. The opinion also

14. 453 U.S. 654 (1981).
15. *Id.* at 677-78.
16. *Id.* at 677.
17. *Id.*
18. *Id.* (emphasis added).
19. *Id.* at 678.
20. *Id.*

supported the idea that a long term "acquiescence"[21] by Congress during an on-going presidential practice such as making executive agreements with foreign nations to settle claims "authorize[s]"[22] a President's decision that would have been initially subject to judicial challenge. On this point, the Court quoted from Justice Frankfurter's concurrence in the *Steel Seizure Case* which stated that one can view congressional acquiescence as a "gloss"[23] of validation and that acquiescence raises a "presumption"[24] of congressional consent.[25]

The Court's analysis leads to a strange consequence. Notwithstanding that two Presidents and a unanimous Supreme Court provided the beginning and the ending to the contest with Iran, it was a non-player, Congress, that got the discredit for the result. The result is only a discredit because it is nothing short of an extortionate agreement imposed on the United States by Iran and cloaked with the Supreme Court's imprimatur of constitutionality based, supposedly, on what Congress did. Poor Congress.

Alternatively, the Court could have followed Justice Jackson's thinking as expressed in his dissent in the *Korematsu*[26] case. In *Korematsu*, Justice Jackson conceded that the Commanding General of the Western Command of the United States Army had made a valid "military"[27] decision, based on an exigency, to exclude American citizens of Japanese ancestry from the West Coast; but Jackson, nevertheless, believed that the decision violated the Constitution.[28] Jackson would have allowed the Supreme Court to refuse to hear the case and let the military judgment stand on its own, but the Court could not take the case and approve it under law and thus, clothe the decision in constitutionality. In *Dames & Moore*, the Court could have recognized that President Carter's decision to enter into the extortionate agreement with Iran was a "political" decision based on exigency. The decision was necessary to free the hostages. The Court could then have recognized that Congress had not taken any constitutionally valid action in the matter—that it had not legally participated or acquiesced in international extortion. Finally, as for the Court's role, it could have refused to enforce the executive order derived from a legally and constitutionally invalid executive agreement. As things

21. *Id.*
22. *Id.* at 686.
23. *Id.*
24. *Id.* (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)).
25. *Id.* at 686.
26. Korematsu v. United States, 323 U.S. 214 (1944).
27. *Id.* at 245.
28. *Id.*

now stand, the same danger that Justice Jackson feared in *Korematsu* lives on in *Dames & Moore*. To paraphrase his warning:

> A [political] order, however unconstitutional, is not apt to last longer than the [political] emergency. . . . [Once] a judicial opinion [,however,] rationalizes such an order to show that it conforms to the Constitution . . . the Court for all time has validated the principle. . . . The principle then lies about like a loaded weapon.[29]

In effect, the Court supported extortion against the United States even when it might disrupt domestic processes within the United States. Perhaps, if the Court had not placed responsibility on Congress and instead had accepted responsibility, *Dames & Moore* might have sent a different message.

B. *Silence as Policy*

A series of cases concerning the recurring power battles between states and Indian tribes illustrate the Supreme Court's variation on its "silence as law" approach.

The Court, from the beginning, has had difficulty deciding when a state may exercise jurisdiction—both judicial and legislative—over Indian and even non-Indian affairs that occur on an Indian reservation located within a state. Traditionally, the Court precluded states from interfering with Indian tribal governance by focusing on the "sovereignty" of the tribes. In the early 1960s, in the *Kake*[30] case, Justice Frankfurter attempted to change the analysis from sovereignty to pre-emption—unless Congress had pre-empted the states, they could apply their laws to the reservation. The Court moved from a pro-Indian stance to a pro-state stance in one easy case. However, this posture did not last. In the 1970s—and continuing beyond—in opinions written primarily by Justice Marshall, the Court fashioned a multi-variable approach to resolving state-tribe disputes. For lack of an official designation from the Court, I call it "policy pre-emption."

Policy pre-emption began in 1973 in *McClanahan v. Arizona Tax Commission*.[31] Justice Marshall, for a unanimous Court, wrote that a state could not impose its personal income tax on a reservation Indian who derived her entire income from sources on the reservation. The Court's decision was not based solely and simply on the ground that the Indian tribe was a separate sovereign nation. Instead, the Court blended Indian sovereignty, which it called a "backdrop,"[32] with fed-

29. *Id.* at 246.
30. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).
31. 411 U.S. 164 (1973).
32. *Id.* at 172.

eral statutes and treaties; to this mixture it added the maxim that the Court should construe doubtful law in favor of the Indians.[33] The Court developed this new recipe for pre-emption because the old one had failed. The Court did discuss treaties and laws that skirted the issues but were not directly on point.[34] The Court based pre-emption on congressional "non-law." In lieu of law, the Court relied on congressional policy. Once again, Congress received credit or blame for actions that it had never taken when, in fact, the Court was responsible for both the creation of the policy and its implementation.

In 1983, in *Rice v. Rehner*,[35] the Court modified its approach. California had applied its licensing law to a liquor seller who sold liquor on an Indian reservation, even though the seller was both a tribal Indian and a federally licensed Indian trader. Justice O'Connor, writing for the majority, refused to apply policy pre-emption to the case by finding that the "backdrop" of Indian sovereignty was missing[36]—that Congress had not only removed Indian authority over liquor but had given it to the states. In other words, the Court substituted legal pre-emption for policy pre-emption.[37] The dissent argued, however, that the majority's legal pre-emption approach was impermissible "activism."[38] Congress had not accomplished by law what the majority claimed. Accepting the dissent's view, arguendo, the majority pulled off a reverse policy pre-emption argument: congressional policy, and not law, ousted the tribes, not the states, from exercising sovereignty.

At the same time that *Rice* was muddying the waters, the Court decided *New Mexico v. Mescalero Apache Tribe*.[39] Justice Marshall, for a unanimous Court, reaffirmed policy pre-emption and precluded a state from regulating hunting and fishing by non-members of an Indian tribe on an Indian reservation.[40] The decision demonstrated that although the doctrine of policy pre-emption had survived, the *Rice* decision modified the doctrine. Instead of relying on a general, broad-based, policy pre-emption, the Court had narrowed the focus; the Court now relied upon the specific federal policy.[41]

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33. *Id.* at 174 (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930)).

34. *Id.* at 174-80.

35. 463 U.S. 713 (1983).

36. *Id.* at 724-25.

37. "The goal of any pre-emption inquiry is 'to determine the congressional plan'. . . ." *Id.* at 718 (quoting Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956)). *Nelson* is a leading legal pre-emption case.

38. *Id.* at 744 (Blackmun, J., dissenting).

39. 462 U.S. 324 (1983).

40. *Id.* at 325.

41. *Id.* at 337-38.

In 1989, the Court maintained this more specific policy pre-emption approach in *Cotton Petroleum Corp. v. New Mexico*,[42] although this time with an unusual reverse result. The Court held that a state could tax oil and gas production by non-Indians on an Indian reservation even where the tribe also taxed the same production. The Court stated its philosophy:

> [In considering pre-emption] . . . we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case 'requires a particularized examination of the relevant state, federal, and tribal interests.' . . . Moreover, in examining the pre-emptive force of the relevant federal legislation, we are cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue.[43]

In a concluding paragraph, the Court disposed of two pre-emptions: "We thus conclude that federal law . . . does not pre-empt New Mexico's oil and gas severance taxes. . . . Any impairment to the federal policy . . . is simply too indirect and too insubstantial to support Cotton's claim of pre-emption."[44] The Court in this case, as in earlier ones, slips back and forth between legal and policy pre-emption, yet policy pre-emption clearly remains a separate, independent ground of analysis.

While the Court's search for, and use of, real congressional or federal policy as the source of "law" is preferable to the Court's use of "pretend policy," this approach still results in the Court's shifting decisionmaking responsibility away from itself. Although wars, treaties, and congressional laws have played roles in the United States' efforts to govern American Indians, the Supreme Court has, from the beginning, been a major participant in making decisions for their governance. It is odd that the Court today hides behind phantom decisions by others. In the absence of congressional law, the Court's method of resolving state power in a state-tribe context could take the same form as is used for state-state conflicts: the creation and application of federal common law.

Two smaller misuse-of-silence issues need brief mention.

C. *Subsequent Silence*

When the Supreme Court decided in 1988 to reconsider the interpretation of 42 U.S.C. § 1981 that it had adopted in *Runyon v.*

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42. 490 U.S. 163 (1989).

43. *Id.* at 176 (citing Ranch Navajo Sch. Bd. Inc. v. Bureau of Revenue of N. M., 458 U.S. 832, 838 (1982)).

44. *Id.* at 186-87.

McCrary,[45] a "subsequent silence" problem moved to center stage. "Subsequent silence" arises when, after the Court has interpreted or construed a congressional law, the Congress is silent—there is neither ratification of the Court's approach nor rejection of it. What is the relevance of this "subsequent silence"? The issue provoked and inspired commentators, but the Court majority seemed unmoved, and disposed of it in a footnote.[46] Justice Kennedy, writing for a majority in *Patterson v. McLean Credit Union*,[47] stated "It does not follow, however, that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it."[48] In contrast, Justice Brennan, writing for the three dissenters, argued that "[Congress'] failure to enact legislation to overturn *Runyon appears at least to some extent indicative* of a congressional *belief* that *Runyon* was correctly decided."[49] This phrasing "appears at least to some extent" to be "indicative" of the dissent's tepid "belief" in its argument. The majority's position seems sound.

D. Chadha *Silence*

Assuming the *Chadha*[50] restriction on Congress, which prevents either house alone or both together from playing an executive role by monitoring enforcement of a law, is still valid today,[51] the question arises: how does the *Chadha* restriction apply to congressional silence? Answer: the restriction applies with full vigor. If Congress cannot override an administrative or executive decision by a joint or concurrent resolution (without presidential involvement) or by separate House vote, then the failure of Congress to act cannot be viewed as having that effect.

III. THE USES OF SILENCE

Although congressional silence cannot, or should not, provide a

45. 427 U.S. 160 (1976).

46. *Id.* at 168 n.8.

47. 491 U.S. 164 (1989).

48. *Id.* at 175 n.1.

49. *Id.* at 200-01 (Brennan, J., dissenting) (emphasis added).

50. Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983).

51. The question is raised because when *Chadha* was decided in 1983, the Court was pursuing a rigid structuralist approach to separation of powers, which meant that the Court permitted very little power to cross over from one branch to another. Thus, the Court did not permit a congressional effort to maintain management of executive or administrative functions. Bowsher v. Synar, 478 U.S. 714 (1986), is a case similar to *Chadha*. With Morrison v. Olson, 487 U.S. 654 (1988), and Mistretta v. United States, 488 U.S. 361 (1989), the Court, over Justice Scalia's protests, seems to have switched to a more flexible, functional approach. Arguably this new thinking will produce a reevaluation of *Chadha*.

source of law or policy and cannot, or should not, provide a source of subsequent ratification or a valid method of legislative monitoring, congressional silence does not imply an absence of meaning. Silence has several uses.

A. *Silence as an Aid to Interpretation*

Silence may serve as an important aid to understanding. If the reader concedes that ambiguity exists in legislative law, that the Supreme Court has a legitimate role to play in interpreting and clarifying the ambiguity,[52] and that Court's use of language[53] is an honest effort to ascertain what Congress meant,[54] then the question is raised: what place does silence have? Let us assume an ambiguous group of words (a phrase, sentence, paragraph, definition, or section) in a congressional law. Other words used in the law, for example, either in the same section of the law as the ambiguity, or in other sections of the same law, or in other laws on the same or similar subjects, would provide the obvious source for clarification.[55] If this method proves unsatisfactory, the temptation is great to seek reference outside congressional law. But this presents a problem—actually, a twin problem. Anything not in the law or laws can be called silence, no matter how loud it may sound. In other words, silence—perhaps it should be called something like "official silence"[56] to distinguish it from its twin "actual silence"—is simply part of the real world context out of

52. The premise of this essay rejects both original intent and textualism, although they are currently popular with some judges and scholars. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415-24 (1989).

53. Thus, this essay also rejects deconstruction to the extent that it is taken to mean that the reader (the Court) may take out of a text what it wishes while ignoring what the writer (Congress) put in. Deconstruction, however, need not be viewed as nihilistic. *See generally* J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

54. This is the traditional view, although it may be stated in varying ways. *See* HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1411 (manuscript 1958) ("In interpreting a statute a court should: 1. Decide what purpose ought to be attributed to the statute and to any subordinate provision . . .; and then 2. Interpret the words of the statute . . . so as to carry out the purpose as best it can."); Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1126 (1983) ("The concept of legislative intent is a hardy one and . . . it is basic to maintaining an appropriately deferential judicial attitude."); Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 249 (1947) ("[The Court] is bound by the legislative declaration of policy and must interpret the statute as Congress intended it to be interpreted.").

55. Looking beyond the immediate context of an ambiguity raises problems even if the inquiry is kept within the confines of the same section of the law, or the same law, or a similar law because the reference itself or its relation to the ambiguity may be ambiguous. This problem is always present, however, whenever an analyst tries to clarify an ambiguous word by referring to other words.

56. All words not part of a congressional law constitute official silence, so to speak.

which Congress carved the law. All "official silence," however, does not bear equal weight. Committee reports, house debates, early drafts of the law, and proposals that Congress rejected, ignored, or modified, all constitute types of "official silence" that, along with "actual silence," constitute the context that may be useful to a court trying to straighten the ripples of ambiguity. Actual silence, as part of official silence, can mean at one extreme that during the legislative process no one thought of the issue and thus no one spoke of it or at the other extreme that Congress so obviously included the issue in the law that no comment was called for. In both senses silence has meaning in the interpretive process, but what it means will vary from case to case.[57] In all instances, however, of using official silence and actual silence, the Court aims to determine what Congress meant when it "spoke the law" in question.[58] In the interpretation context, silence, whether official or actual, is no different than speech, whether official or unofficial—with one exception: those associated with the legislative process who want to influence future interpretations will less likely manufacture actual silence.[59]

B. *Silence and Duty*

Occasionally Congress has a constitutional duty to speak. Rarely will this congressional duty be expressed and at times it may be viewed as a quasi-duty. In any event, if Congress is silent, the Supreme Court may sense a gap that needs filling. For example, if

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57. Commentators trying to provide order to "interpretive chaos" acknowledge that as helpful as principles, approaches, and formulae may be, no simple solution can be applied to all situations. As one analyst put it:

> Although a fact-finding model of statutory interpretation [the approach suggested by the analyst] provides no overarching theory for yielding predictable results in all cases, it is doubtful that any theory could or, even if it could, that it would be desirable to have all cases decided under some preexisting formula.

Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1374 (1990).

58. I do not mean to suggest that the process is simple. Because words have no intrinsic meaning but are mere symbols for real world referents, because words often have several meanings, and because even where they have only one meaning, the scope of the meaning is often accordion-like, a search for purpose becomes important. But purpose, too, is slippery. A broad purpose or a narrow one? Whose purpose? The statute's, Congress', those who voted for it, a majority of those who voted for it? I mention a few basic variables as a reminder of the complexity of the interpretation task. It is not the purpose of this essay to try to identify a proper theory or approach to interpretation. A court always should consider reductionism, though, when it undertakes interpretation. *See infra* text at note 94.

59. For example, it is easy to imagine two congressional factions, unable to agree on a law, passing a deliberately ambiguous statute in hopes that in the future courts would interpret the ambiguity the "correct" way and then "assisting" the courts by padding the legislative history, official silence, with comments regarding the law's meaning. A clever advocate could, perhaps, accomplish the same thing by manipulating actual silence, but it would be more difficult.

Congress had not created federal trial courts and given them jurisdiction to try matters that fell within the scope of Article III's judicial power and if states had closed their courts to those same matters, the Supreme Court probably would have filled this gap. The Court might have established "temporary equity courts" to sit until Congress acted. Similarly, suppose the federal government had a negative duty, such as an obligation to refrain from violating certain constitutional civil rights, and Congress had failed to legislate any remedies. The Court probably would have created a remedy such as civil damages. *Bivens*[60] and its progeny are relevant.[61] A third illustration arises from the dormant Commerce Clause. In instances where Congress has the power to regulate interstate commerce but chooses to remain silent and states act instead, what should the Court do? Congressional silence is not an official congressional pronouncement that the states may freely regulate or that they cannot act. The Court has filled this power void by allowing states some authority.[62] In these situations, the Constitution clearly allots power to Congress. The Constitution, however, seems to speak to the Court, at least as far as the Court hears that it should exercise an inherent "protective power" while Congress dozes. Just as the President has an inherent power to protect the country in extreme emergencies from armed attack in the absence of a law giving the President such power, the Court has an inherent power to protect the Constitution "from attack" in the absence of a law from Congress.

C. *Silence as Cover-up*

In some instances, the Supreme Court has interpreted the Constitution as outlawing congressional legislation that intends to achieve unconstitutional results, such as "invidious racial discrimination"[63] or aid to religion.[64] What happens when Congress enacts a law that produces one of these "suspicious" results but has on its face a neutral purpose? The Supreme Court has held that a court may examine this silence because it may be that (1) no legislators considered an impermissible purpose; (2) some considered the purpose, but silently

60. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

61. *See* Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979).

62. As long as a state does not discriminate against commerce, it may regulate a local matter unless the regulation's impact on commerce is excessive when balanced against the state's interest. Pike v. Bruce Church, 397 U.S. 137, 142 (1970). Even some discrimination against commerce is allowed. *See* Wyoming v. Oklahoma, 112 S. Ct. 789, 800 (1992).

63. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976).

64. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

adopted it; or (3) the legislators used this silence as a cover-up—a massive conspiracy of silence.[65] Although judicial probing into the meaning of silence in this context produces procedural and evidentiary problems, the Court allows the probe.[66]

In the past, administrative and executive decisionmakers overtly showed discriminatory intent because they thought they could get away with purposes that are now forbidden. Today, society prohibits such purposes; therefore, overt evidence is not usually available. The danger is that the intent has gone underground. The nod, the wink, the silence—communicate the same message. Moreover, this subtle method of "intending" may operate at the legislative level. For example, in *Edwards v. Aguillard*,[67] the Court found that the stated secular purpose, academic freedom, of a Louisiana statute that required schools to teach "creation science" equally with the "theory of evolution" was a "sham."[68] The Court concluded that the silent "primary purpose" was to endorse a particular religious doctrine in violation of the Establishment Clause.[69]

IV. SILENCE AS NOTHING

When the Court confronts congressional silence that does not help it interpret an ambiguity, trigger fulfillment of a duty, or prompt inquiry into an impermissible congressional purpose, then the Court faces a silence of nothing—a blank space. In such cases, the Court may leave the matter alone or act to fill the void.

A. *Construction/Reconstruction*

At times, an issue of congressional silence that resembles but yet differs from ambiguity faces the Court. To illustrate, in 1972 Congress passed a law in response to an earlier failure of the government to abide by a treaty made with several Indian tribes. In *Delaware Tribal Business Committee v. Weeks*,[70] a small tribe not listed as a statutory beneficiary brought suit claiming entitlement to benefits under the statute. Apparently, in preparing the bill, the congressional staff simply erred in identifying the proper recipients. Before the Supreme Court, the government conceded that the omission was inad-

65. *Arlington Heights*, 429 U.S. at 264-68.

66. *Id.* at 268 ("In some extraordinary instances the members [of the legislature] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.").

67. 482 U.S. 578 (1987).

68. *Id.* at 586-87.

69. *Id.* at 593.

70. 430 U.S. 73 (1977).

vertent. This posed a problem for the Court because it could not merely "interpret" the law to include the tribe. Could it reconstruct the statute's coverage to include the grievants? The Court concluded that Congress, not the Court, must make this type of corrective surgery.[71]

The line between interpretation and construction is difficult to draw and maintain.[72] Courts often use construction in contract disputes. When the parties litigate an omitted term, the question is whether to supply a term and, if so, what term to supply. If both parties want a missing term supplied but differ on its content, the court, guided by equity, may provide relief without either upsetting the litigants or transcending its authority. On the other hand, if the parties dispute whether a term should be added, should the court side with one party and fill the gap? The court may find that it should supply a term because the alternative is to declare the contract unenforceable. The court may find it better to rework the agreement than to void it. Similarly, in congressional legislation, when the court must choose between declaring a law unconstitutional or adding a term, it may be better to construct than to void the law. In *Weeks*, Justice Stevens argued this position.[73] Congress' inadvertent omission of the small tribe violated the due process of lawmaking. Congress may have a broad range of available valid options, but decisionmaking by mistake is not one of them. Where the issue is not one of constitutional dimension, but merely an obvious legislative error, the Court should correct the error rather than enforce the law as written.

This discussion does not purport to resolve the dispute regarding when, whether, or from whose perspective the Supreme Court should engage in construction, but rather suggests that at times construction is a sensible option. If the Court does construct terms to give congressional law meaning or to keep it alive, it should acknowledge its creative judicial rule and not attribute its decision to Congress. It is important to accurately identify the decisionmakers in the lawmaking process. Moreover, if the Court admits its role in these decisions, the Court will more likely construct with care.

B. *The Common Law Solution*

In *Boyle v. United Technologies Corp.*,[74] the Court decided that

71. *Id.* at 90.

72. Generally, courts ignore the distinction between interpretation and construction. Nevertheless, these two principles address different issues.

73. 430 U.S. at 91 (Stevens, J., dissenting).

74. 487 U.S. 500 (1988).

federal common law provided a private contractor who did business with the federal government an immunity from liability under a state tort action.[75] Although Congress had been silent on the issue—"conspicuously so"[76]—the majority found that the imposition of a duty of care on the contractor under state law presented a "significant conflict with federal policy or interests."[77] Although the Court referred to the Federal Tort Claims Act, it used federal common law as the source of law for its decision. Clearly, as the dissent pointed out, "[t]his time the injustice is of this Court's own making."[78] Whatever one may think of the result in *Boyle*, at least the Court did not pretend that Congress through its silence legislated the outcome. A commendable forthrightness, however has its own problems. As the dissent stated, the *Boyle* majority usurped the congressional legislative role.[79] What should the Court do when faced with a situation where state substantive law clearly does not apply and Congress is silent? When, for example, a state sues a state, or a tribe claims power as a sovereign, should the Court simply deny the claim? Although the Court has denied the existence of a "general" federal common law, it has used it in specific instances.[80]

V. CREATED SILENCE AS NOTHING

The Supreme Court recently developed a three-part process of analysis that creates ambiguity out of congressional clarity, classifies the ambiguity as a silence that means nothing, and then gives meaning to the nothing by reference to a policy presumption of its own making. *Gregory v. Ashcroft*[81] is the case in point. The issue concerned whether a mandatory retirement provision for state judges in the Missouri Constitution violated the federal Age Discrimination in Employment Act ("ADEA"). The law contained exceptions from its coverage for certain high-ranking government officials, but the exclu-

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75. *Id.* at 511. The majority's opinion is narrow.

> But we have held that a few areas, involving 'uniquely federal interests' . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'

Id. at 504 (citations omitted). Actually, the Court remanded the case to the Court of Appeals to clarify an ambiguity in its opinion. *Id.* at 514.

76. *Id.* at 515 (Brennan, J., dissenting).

77. *Id.* at 509, 511.

78. *Id.* at 516.

79. *Id.*

80. See the discussion in ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 6.1-6.3 (1989).

81. 111 S. Ct. 2395 (1991).

sions did not clearly apply to state judges appointed by a governor. The language in the statute that most closely applied to the judges referred to "an appointee on the policy-making level."[82] The Supreme Court majority conceded that that language "is an odd way for Congress to exclude judges."[83] One might think that if the exception did not include the judges, then the Act covered the judges and thus protected them from discharge because of age. However, the Court said, "we are not looking for a plain statement that judges, are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*."[84] The Court concluded, "[i]t is at least ambiguous whether a state judge is an 'appointee on the policy-making level.' "[85] The Court, however, did not then try to resolve the ambiguity using the usual means, such as legislative history. As the dissent pointed out, the legislative record proved that the statute did not exclude the judges from coverage.[86] Thus, the majority's reasoning created ambiguity from clarity and silence from ambiguity, and redefined the silence with a policy of its own creation: "federalism." As a result, the Court avoided "a potential constitutional problem"[87] that would arise if Congress' exercise of the commerce power interfered with the "authority of the people of the States to determine the qualifications of their government officials."[88] In effect, the Court, while expressly acknowledging the limitations on its power to declare unconstitutional Congress' exercise of its commerce power established in *Garcia*,[89] resurrected *Usery*[90] without citing it as a basis for limiting Congress through "interpretation," resulting in a remarkable deconstruction and reconstruction.

VI. STATUTORY SILENCE

To what extent may Congress, through its legislation, make affirmative use of its silence? Where Congress' actions do not violate

82. *Id.* at 2403.
83. *Id.* at 2404.
84. *Id.*
85. *Id.*
86. *Id.* at 2416.
87. *Id.* at 2403.
88. *Id.*
89. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding constitutional the application of minimum-wage and overtime requirements of Fair Labor Standards Act to public mass-transit authority).
90. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (holding the 1974 amendments to the Fair Labor Standards Act, which extended minimum-wage and maximum-hours provisions to employees of states and their political subdivisions, exceeded congressional power under the Commerce Clause).

Chadha, affirmative use of silence by Congress would not seem to present a problem. But, in such instances, Congress is, in one important sense, not silent at all.

A. *Conditions*

Congress obviously may condition the operational effect of its laws. It may indicate what *events* shall mean. For example, Congress may condition money grants on the occurrence of certain events, such as approval by the state legislature or the economy falling to a certain level as determined by statistical facts. Similarly, the non-occurrence of an event may serve as a condition. It simply does not matter whether Congress phrases the condition in terms of an act or a non-act.

B. *Interpretation*

Congress may also address the meaning of its silence in other ways. It may expressly indicate how courts should interpret its silence. For example, in the McCarran Act,[91] Congress instructed the courts that, "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the insurance] business by the several States."[92] Because the Act also contained affirmative authority for the states to apply their laws, the Court upheld the law without discussing the consequence of the silence provision alone.[93]

C. *Delegation*

Where Congress delegates authority to administrative agencies, executive officials or the courts, it forgoes, by definition, its power to speak to the substantive issues; Congress' silence allows others to speak in its stead. At least two related reasons explain the use of such silence by Congress. First, it increases the wisdom of resulting laws by delegating authority to administrative agencies or executive officials to make rules during the life span of a complex, regulatory law. Such an approach recognizes that Congress is not prescient and cannot always determine the best law in one sitting. In addition, such congressional silence enhances the accuracy and fairness of the law in individual instances by delegating authority to the courts to provide a needed specificity. Making law and applying law are two altogether different processes. Treating them alike runs the risk of "reduction-

91. 15 U.S.C.A. §§ 1011-15 (West 1976).
92. § 1011.
93. Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

ism."[94] A legislature cannot or should not decide what the full range of fact patterns will be that will fall within the law's coverage.

Administrative rule-making adds dimensions of scope and depth to congressional law; and judicial lawmaking, through interpretation and construction, custom fits the law to make it apply to cases. Criticisms of these practices, perhaps, would be softened by the realization that such delegations are often creative uses of silence by Congress in order to make more meaningful the legislative process. According to a "structuralist" philosophy of constitutional separation of powers, intentional delegations of power to the executive or the judicial branch from the legislative branch may be improper. Under the current "functional" approach, any purposeful enlisting of help by Congress from the other branches should usually be acceptable.

Of course, Congress does not intend all silence. Where Congress inadvertently remains silent, for example, different considerations apply. Intentional silences will vary.[95] Sometimes the law will be elaborate, allowing only a small amount of silence for an agency or court to modify into words. Other times, the silence may be deafening. If the silence is too "standardless" for agencies or too "vague" for courts, constitutional due process may be violated.

VII. CONCLUSION

However difficult it may be to understand words, it is far more challenging to make good sense out of silence. When a speaker lines words up into a purported communication, the arrangement of the words serves, to some degree, to identify both a communication and to whom the speaker directs the words; the arrangement also identifies the content; and where that content remains ambiguous, it helps to clarify the message. Silence, on the other hand, does none of these things. The perceiver must construct the silence.

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94. One aspect of the reductionist fallacy is the use of reasons that support general conclusions to resolve particular ones. For example, the reasons why people support freedom of choice for pregnant women does not explain why in any given instance a person will send a contribution to a national organization supporting the same cause. To go from sociological explanations to psychological ones requires a different analysis. So, too, the legislative process of problem-solving and the judicial process of problem-solving—even when both are speaking to the same law—are not the same. The judicial variables are more fact specific. They include, even aside from constitutional restrictions, what might be called *legislative* fairness, equality, common sense and the like.

95. An intriguing case containing "double silence" is McCarthy v. Madigan, 112 S. Ct 1081 (1992). Because Congress was silent in its delegation to the Federal Bureau of Prisons, and the Bureau in turn was silent concerning the "exhaustion" requirement, the Supreme Court balanced considerations in deciding that exhaustion is not required in a money damages claim brought under the authority of *Bivens*.

The Supreme Court, as ultimate perceiver of congressional silence, decides whether Congress has said anything through its silence, and if so, what. The silence situation is obviously opaque. The risks of error and manipulation remain ever present. This essay has tried to identify and evaluate the use of several categories of silence.

The Supreme Court in *Sawyer* and *Dames & Moore* perceived congressional law in congressional silence. In a litany of cases dealing with state power over Indian reservations, the Court discovered congressional policy in silence. This perception results in faulty process or poor substantive law or both, molded by the United States Supreme Court into a precedent for other courts to emulate—not only for procedural and substantive law, but for methodology in reading legislative silence. Institutionally, neither the Court nor Congress gains from this type of decisionmaking. Such decisionmaking makes the Court look manipulative and the Congress impotent. A similar criticism applies to the Court's decision to create silence out of a congressional meaning and then to recreate a meaning of its own making.

Understandably, the Court hesitates on sensitive issues. Several court-created prudential doctrines, such as political question, standing, and ripeness, give the Court avenues of avoidance. When the Court takes a case, however, it should be, as this essay suggests, reasonably open and clear in its approach to the decision. Ironically, issues that fall within the prudential limitations or that the Court resolves on the merits through one of its techniques of obfuscation or casuistry, most need a sensible solution. Of course, the Court embraces the vision that it should decide no constitutional question before its time. The wisdom of this policy, although not self-evident, does not apply when the time has come. Thus, when a legitimate issue arises concerning, for example, the scope of presidential power or the power of states over Indian territory and Congress has been silent, if the Court takes the case, why does it not resolve the issues by reference to its own thinking and reasoning? Where issues have constitutional dimension, the Court need not resort to congressional law or policy. In related areas of silence as well, the Court functions, or could function, solo. Recall the categories discussed in this essay. Where a gap exists in a law, the Court may fill it through judicial construction. In some instances, where Congress has been silent, the Court may fall back on a specific federal common law. Where congressional silences fails to meet a duty (or quasi-duty), the Court may provide a temporary solution.

In other situations, the Court may find congressional silence has

meaning. When interpreting, the Court may consider silence along with other relevant matters to ascertain what Congress did when it spoke. In other instances, the Court may consider silence as it searches for any impermissible congressional purpose. Further, the Court may understand silence as a purposeful delegation of authority to agencies or courts.

Silence is difficult to categorize. The Supreme Court and others should try to identify and cabin silence—to control it—so that they may use it accurately and meaningfully and avoid misuse and manipulation.

A final metaphor as this essay reaches its own silence: Congressional silence may not be an art form—it is certainly not "that perfect moment"[96] at the end of great music, or a wag might add, at the end of certain legal writing—but it is a delicate instrument which courts and, especially, the Court, should play with care.

96. SCOTT TUROW, THE BURDEN OF PROOF 550 (paper edition 1990).