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Indiana Law Journal

Volume 57 | Issue 4

Article 1

Fall 1982

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Lawrence H. Tribe
Harvard Law School

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Recommended Citation

Tribe, Lawrence H. (1982) "Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence," *Indiana Law Journal*: Vol. 57 : Iss. 4 , Article 1.
Available at: <http://www.repository.law.indiana.edu/ilj/vol57/iss4/1>

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Toward a Syntax of the Unsaid: Construing
the Sounds of Congressional and
Constitutional Silence†

LAURENCE H. TRIBE*

And in the naked light I saw
Ten thousand people, maybe more
People talking without speaking
People hearing without listening
People writing songs that voices never shared
No one dared disturb
the sound of silence.

P. Simon, "The Sounds of Silence"¹

The temptation to leave my thoughts about silence unspoken has been considerable; as Calvin Coolidge once observed, "I have noticed that nothing I never said ever did me any harm."² But the invitation to deliver the Harris Lecture provided an irresistible opportunity to venture these speculations, tentative though they may be, on the elusive and vital topics of congressional and constitutional silence. Eight years ago, Reed Dickerson of the Indiana law faculty perceptively addressed a related set of issues in his classic work on statutory interpretation.³ And three years ago, the Indiana University Press published an elaborate meditation on the nature of silence by Bernard Dauenhauer.⁴ As Dauenhauer observed,

† Copyright 1983 by Laurence H. Tribe. All rights reserved. This article consists substantially of the text of the Harris Lecture delivered by Professor Tribe on March 21, 1983, at the Indiana University Law School in Bloomington, Indiana. I owe much to several research associates and assistants—among them, Kathleen Sullivan, J.D. 1981; John M. Bredehoff, William C. Foutz, Jr., and James A. Kirkland.

* A.B., 1962, Harvard; J.D., 1966, Harvard; (Hon.) LL.D., 1980. Tyler Professor of Constitutional Law, Harvard University.

¹ Copyright 1964 by Paul Simon. Used by permission of author.

² 91 CONG. REC. 2627 (March 22, 1945). My colleague Terry Martin deserves credit for bringing this Coolidgism to my attention.

³ R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975).

⁴ B. DAUENHAUER, *SILENCE: THE PHENOMENON AND ITS ONTOLOGICAL SIGNIFICANCE* (1980).

silence surely is "a rich and complex phenomenon."⁵ At times, indeed, silence can be genuinely eloquent—as when the accused stand mute before their tormentors in Arthur Miller's play *The Crucible*,⁶ or when civil rights protesters conduct a voiceless vigil in a segregated public library, searing the community's conscience with what the Supreme Court called their "silent and reproachful presence."⁷

The arts of silence and inaction are no strangers to lawmakers. Vermonters recall a tale about Reid Lefevre, one of the giants—literally and figuratively—of the Vermont Legislature in the 1960's. Lefevre, nicknamed "King Reid" partly because of his size and partly because of his role in running a traveling small-town circus in the legislative off-season, had a winning argument against docking state legislators' pay for days when they were away from the capitol. "As I look around this chamber," King Reid would say, "it occurs to me that many of our members make their greatest contribution to the legislative process on days when they aren't here."⁸

However right King Reid may have been as a matter of fact, there has been a longstanding resistance, as a matter of law, to the idea that legislative inaction or silence, filtered through a judicial stethoscope, can be made to sound out changes in the law's lyrics—altering the prevailing patterns of rights, powers, or privileges that collectively constitute the message of our laws. I wish to explore first, the nature and sources of that resistance; second, the reasons for the failure of that resistance as reflected in the persistent willingness to hear legal music in the sounds of silence; and, finally, an approach that I believe better reflects both the objections to hearing sounds in legal silence and the necessity of doing just that from time to time—both with respect to the silences of Congress, and with respect to what Justice Jackson once called "[the] great silences of the Constitution."⁹

THE RESISTANCE

With the demise of the notion that legislators merely "discover" and "declare" eternal legal truths—and that courts merely apply legal principles that emanate from the "brooding omnipresence" of a background of common law¹⁰—it would naturally be thought crucial to ground each

⁵ *Id.* at 3.

⁶ A. MILLER, *THE CRUCIBLE* 97 (1971).

⁷ *Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

⁸ Traditional story reported by former Vermont Representative Will Hunter (D. Weathersfield).

⁹ *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 535 (1949).

¹⁰ This was the notion underlying the divination of supposed "general principles of commercial law" in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and of supposed contours of "natural rights" of property and contract in the era of *Lochner v. New York*, 198 U.S. 45 (1905).

law's moral force largely in the positive process by which the law came to be. And, under any view of law that thus traces the legitimacy of legislation in significant part to what may be called "due process of lawmaking"¹¹—and that regards "legislative determination [as] provid[ing] all the process that is due" when government is "*creat[ing]* substantive [law]"¹²—legislative omissions necessarily offer no substitute for duly enacted provisions. For insofar as a law's claim to obedience hinges on that law's *promulgation* pursuant to agreed-upon processes for the making of laws, it becomes decisive that those processes do not include *fail-
ing* to enact a legal measure.

Under any such approach, it seems axiomatic that the *words* of a statute—and *not* the legislators' intent as such—must be the crucial elements both in the statute's legal force and in its proper interpretation.¹³ As Justice Jackson put the matter in his concurrence in *Schwegmann Brothers v. Calvert Distillers Corp.*,¹⁴ since "it is only the words of the bill" that the House and Senate pass and that the President endorses, and since all other materials are outside the enactment process proper and are only haphazardly available to the general public, it seems difficult to justify even giving legal effect to "legislative history."¹⁵ Thus, as Jackson wrote in another concurrence two years later, the Supreme Court must proceed "by analysis of the *statute* instead of by *psychoanalysis* of Congress."¹⁶ "Never having been a Congressman," Justice Jackson said, he would feel hopelessly "handicapped in that weird endeavor."¹⁷

If legislative intent is of problematic relevance, legislative inaction—*whatever* intent it might signal—is *a fortiori* a forbidden source of law. Justice Rutledge, concurring in *Cleveland v. United States*,¹⁸ had no doubt that, "in view of the specific . . . constitutional procedures required for the enactment of legislation," an "action *or nonaction* not taken in accordance with the prescribed procedures," should be given no "legislative effect."¹⁹ For him the "vast differences between legislating by *doing*

¹¹ See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 17-3, at 1144 (1978); Linde *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). Compare Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 290-91, 300-01 (1975).

¹² Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) (emphasis added); see also Bi-Metallic Inv. Co. v. State Board, 239 U.S. 441, 445-46 (1915).

¹³ See generally H. Hart & A. Sacks, *The Legal Process* 1410-11 (tent. ed. 1985) (unpublished manuscript in Harvard Law School Library) (a court's function in interpreting a statute is to decide what the *words* of the statute mean so as best to carry out its *purpose*—"not . . . to ascertain the *intent* of the legislature").

¹⁴ 341 U.S. 384 (1951) (Jackson, J., concurring).

¹⁵ *Id.* at 395-97 (Jackson, J., concurring).

¹⁶ *United States v. Public Utilities Comm'n*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) (emphasis added).

¹⁷ *Id.* (Jackson, J., concurring).

¹⁸ 329 U.S. 14 (1946) (Rutledge, J., concurring).

¹⁹ *Id.* at 22 n.4. (Rutledge, J., concurring) (emphasis added). Justice Rutledge also noted that "negative inferences" of legislative intent from legislative silence lack the sort of eviden-

nothing and legislating by positive enactment" weighed heavily against giving legislative effect to the former.²⁰ As Justice Frankfurter had written for the Court six years earlier, in *Helvering v. Hallock*,²¹ the Court "walk[s] on quicksand when [it tries] to find in the *absence* of . . . legislation a controlling legal principle."²²

Nor is this resistance to imputing meaning to congressional silence mere post-*Lochner* era mimicry of a classically English and European insistence on just "reading" the enacted law. For the resistance has American roots reaching at least as far back as the landmark case of *Murdock v. Memphis*.²³ Section 25 of the Judiciary Act of 1789 had conferred on the Supreme Court appellate jurisdiction over certain state judgments but expressly excepted those supported by independent state grounds. The 1867 Act of Congress amending the Judiciary Act reenacted section 25 but omitted the sentence containing that express exception. At issue in *Murdock* was whether Congress' omission to re-enact the exception should be

tiary basis that supports positive inferences from the enactment of legislation "pursuant to prescribed procedures, including reduction of bills to writing, committee reports, debates, . . . voting records and executive approval." *Id.* at 22 n.5. (Rutledge, J., concurring).

²⁰ *Id.* at 22 (Rutledge, J., concurring) (emphasis added). See also, e.g., R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 181 (1975) ("The first question is whether legislative silence can constitute effective legislative action. It seems obvious that a legislature cannot legislate effectively by not legislating at all.")

²¹ 309 U.S. 106 (1940).

²² *Id.* at 121 (emphasis added); see also *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942) ("The search for significance in the silence of Congress is too often the pursuit of a mirage."). The particular sort of legislative silence discussed both by Justice Rutledge in *Cleveland* and by Justice Frankfurter in *Hallock* was Congress' failure to repudiate prior judicial constructions of its acts. Both wrote that that sort of silence could not be read as tantamount to congressional acquiescence in those constructions. Justice Frankfurter distinguished such *silence* from Congress' *re-enactment* of a statute, from which legislative adoption of settled judicial constructions might fairly be implied. See *Hallock*, 309 U.S. at 120-21 n.7.

Both justices emphasized that the meaning of Congress' failure to repudiate such constructions was ambiguous, for "[v]arious considerations of parliamentary tactics and strategy," *id.* at 121, or other reasons indicating no approval of what the courts had done—such as the "sheer pressure of other and more important business," *Cleveland*, 329 U.S. at 23 (Rutledge, J., concurring)—might account for Congress' inaction. Professors Hart and Sacks summarize a dozen such possible reasons, suggesting that a court—necessarily uncertain which ones explained a given legislative failure to act—cannot infer from legislative silence " 'sanction and approval' of an outstanding decision." H. Hart & A. Sacks, *supra* note 13, at 1155-56. Cf. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting) ("Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the [Federal] Rules [of Civil Procedure] were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality.").

The upshot of refusal to read approval in this sort of congressional silence is to leave courts free to reconsider and overrule their earlier constructions of the relevant statutes, thus avoiding what Justice Rutledge described as improper buck-passing: "shift[ing] to Congress the responsibility for perpetuating the Court's error," *Cleveland*, 329 U.S. at 22 (Rutledge, J., concurring); see also *United States v. South Buffalo Ry.*, 333 U.S. 771, 792 (1948) (Rutledge, J., dissenting).

²³ 87 U.S. (20 Wall.) 590 (1875).

treated as de facto enactment of the *opposite* principle—namely, that the Court could exercise jurisdiction over state decisions resting on nonfederal grounds. The Court held that the omission by Congress should not be so treated, noting that it was impossible to tell why various members of Congress had chosen not to re-enact the express exception,²⁴ and stressing that, had Congress intended to do an about-face on such an important subject, it could—and hence should—have said as much “in positive terms; . . . [in] plain, unmistakable language.”²⁵

If the resistance to according legislative effect to anything short of express enactments thus has old roots, so do the seeds of its failure, for it has long seemed plain that certain kinds of congressional silence simply cannot be ignored. In *Murdock* itself, for instance, although the Court refused to treat the omission of the last sentence of section 25 as an *enactment*, it did treat that omission as a *repeal* by implication.²⁶ How else, after all, could the omission have been viewed? I turn, then, to the failure of the resistance.

THE FAILURE

That the battle to resist giving any effect at all to legislative silence was destined to be a losing one is perhaps best illustrated by the opinions of five Justices—including Frankfurter and Jackson—in the 1952 *Steel Seizure* case.²⁷ That case arose from a major wage dispute between the steel companies and their employees in late 1951, during the Korean War. The union announced a strike to begin April 9, 1952, on the eve of which President Truman told his Secretary of Commerce, Charles Sawyer, that he was going to give him the “dirtiest job” he’d ever given anyone—namely, supervising a national takeover of the steel mills.²⁸

Truman had considered and rejected five other options: (1) doing nothing and letting the steel mills close, which would interrupt the flow of materials to United States troops in Korea; (2) invoking section 18 of the Selective Service Act of 1948, which applied only to seizures of plants failing to fill certain defense orders; (3) invoking the condemnation provisions of section 201(b) of the Defense Production Act of 1950, which were slow, cumbersome, and costly; (4) invoking the “cooling-off” provisions of the Taft-Hartley Act of 1947, which risked antagonizing labor and causing wildcat strikes; and (5) trying, with the help of federal contract money, to pressure the steel companies into acceding to the union’s wage demands, which risked accelerating inflation and disrupting Congress’ price stabilization program.

²⁴ *Id.* at 618.

²⁵ *Id.* at 619.

²⁶ *Id.* at 617.

²⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²⁸ C. SAWYER, CONCERNS OF A CONSERVATIVE DEMOCRAT 257 (1968).

When Truman instead took the course of having Secretary Sawyer order the steel mills to keep operating—but under the United States flag, prepared to take all future orders from the President—he triggered a now legendary struggle. Fourteen impeachment resolutions were introduced in Congress,²⁹ and when the steel companies sought an injunction against the Secretary of Commerce in *Youngstown Sheet & Tube Co. v. Sawyer*, the Solicitor General refused even to let Sawyer see the government's brief.³⁰ On June 2, 1952, the Supreme Court held the President's steel seizure an unconstitutional arrogation of legislative authority.³¹

Justice Black's opinion for the majority reasoned that

the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only *unauthorized* by any congressional enactment; prior to this controversy, Congress had *refused to adopt* that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress *rejected an amendment* which would have authorized such governmental seizures in cases of emergency.³²

Since "the Constitution is [not] silent" about "who shall make laws,"³³ Congress' *omission* left the President powerless to act as he did. Despite what he had said twelve years earlier in *Hallock*, Justice Frankfurter stressed in his concurring opinion that "Congress chose not to lodge this power in the President."³⁴ True, Congress could have *forbidden* presidential exercise of the seizure power—something Chief Justice Vinson, joined by Justices Reed and Minton, stressed that Congress had *not* done.³⁵ But to do so explicitly, Justice Frankfurter reasoned, "would be not merely infelicitous draftsmanship but almost offensive *gaucherie*."³⁶ Justices Burton³⁷ and Clark³⁸ evidently agreed—as did Justice Jackson, who, despite his pronouncements both a year earlier (in *Schwegmann Brothers*) and a year later (in *United States v. Public Utilities Commission*), found Truman's seizure "incompatible with the . . . *implied will* of Congress."³⁹

Thus a decisive majority of five Justices treated Congress' silence as speech—its *nonenactment of authorizing legislation* as a legally binding expression of *intent to forbid* the seizure at issue.⁴⁰ Judges who, *in prin-*

²⁹ *Id.* at 260.

³⁰ *Id.* at 267.

³¹ 343 U.S. 579 (1952).

³² *Id.* at 586 (emphasis added).

³³ *Id.* at 587.

³⁴ *Id.* at 601 (Frankfurter, J., concurring).

³⁵ *Id.* at 700-03 (Vinson, C.J., dissenting).

³⁶ *Id.* at 603 (Frankfurter, J., concurring).

³⁷ *Id.* at 657 (Burton, J., dissenting).

³⁸ *Id.* at 662 (Clark, J., concurring in judgment).

³⁹ *Id.* at 637 (Jackson, J., concurring) (emphasis added).

⁴⁰ Explicit rejection of legislation might appear different from mere congressional inaction, such as the omission to repudiate judicial interpretations of statutes discussed *supra*

ciple, resist giving legal effect to Congress' silence thus come out differently when they hear a "negative pregnant" in that silence—and, perhaps, when the public acceptability of their intended holding is bolstered by the illusion that the power they wield traces to *Congress'* will rather than to *their own*.

Fostering that illusion is an especially easy temptation in adjudicating "constitutional common law"⁴¹—those areas of law in which the Supreme Court imposes on state and local government, or on the federal executive, but a tentative vision of the Constitution's commands—a vision that Congress is left free to override and replace with its own. In such cases, reading in the "silence of Congress" an indication of *its* "will" represents an attempt by judges to disclaim responsibility for altering the legal landscape by passing the buck to Congress—and thus is, as Clarence Shenton wrote, "an especially palpable attempt to make it appear that the power exercised by the Supreme Court proceeds from Congress."⁴² Worse still, Congress itself may well conspire in this buck-passing—for, having said nothing, its members are free in turn to point right back to the courts when called upon to defend what courts claim Congress has, by its silence, brought to pass.

Such Alphonse-and-Gaston constructions of congressional silence have been frequent in adjudication of one of the Constitution's own most conspicuous silences—the "dormant" commerce clause. The *words* of the commerce clause say only that "Congress shall have power . . . to regulate Commerce . . . among the several states . . ." ⁴³ But courts have long heard in the very silence those words delimit an implied negative against unduly burdensome or discriminatory state or local interferences with free trade across state lines—even in areas where Congress has not expressly legislated pre-emptively. In deciding whether to uphold state regulations under this implied limitation, judges have purported to "hear" in congressional silence both tacit veto and tacit consent. In *Leisy v. Hardin*,⁴⁴ for example, Justice Fuller wrote for the majority that Con-

note 22, and is in some respects closer to speech than silence. This is a difference that both Justice Frankfurter, *Youngstown*, 343 U.S. at 602 (Frankfurter, J., concurring) (Congress "clearly and emphatically" withheld authority for executive seizures) and Justice Jackson, *id.* at 637 (Jackson, J., concurring) (result might have been different had Congress' omission reflected only "inertia, indifference, or quiescence"), sketched in their *Steel Seizure* concurrences. But under the view that, at least in such cases as this, only the *positive enactments* of Congress may form the touchstone of legislative legitimacy, see *infra* note 60 and accompanying text, the silence left in the law by a failed proposal is little different from that left by a nonproposal. Contrast the use of failed proposals as part of the context that gives meaning to subsequent enactments, see *infra* text accompanying notes 82-92.

⁴¹ See H. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

⁴² Shenton, *Interstate Commerce During the Silence of Congress*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 842 (Association of American Law Schools 1938).

⁴³ U.S. CONST. art. I, § 8, cl. 3.

⁴⁴ 135 U.S. 100 (1890) (striking down Iowa statute prohibiting sale of intoxicating liquor).

gress' silence with respect to an area of interstate commerce—that is, its nonenactment of any law either regulating that area or allowing the states to do so—“indicates its will that such commerce shall be free and untrammelled.”⁴⁵ The dissenters to that ruling, on the other hand, read in Congress' long “silence and inaction” in the face of judicially sustained state restrictions⁴⁶ precisely the opposite will—namely, congressional “in-ten[t] that the law should remain” as it had been.⁴⁷

Such judicial discovery of ambivalent meanings in Congress' silence was captured with lovely irony by Thomas Reed Powell in a 1938 essay:

[C]ongress has a wonderful power that only judges and lawyers know about. Congress has a power to keep silent. Congress can regulate interstate commerce just by not doing anything about it. Of course when congress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that congress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking. If congress keeps silent about the interstate commerce that is not national in character and that may just as well be regulated by the states, then congress is silently silent, and the states may regulate. But if congress keeps silent about the kind of commerce that is national in character and ought to be regulated only by congress, then congress is silently vocal and says that the commerce must be free from state regulation.⁴⁸

Yet *not* to attribute such different meanings to congressional silence risked either imposing an unjustifiably inflexible unitary regime on the states, or leaving the states free to strangle the national economy while Congress slept or attended to other concerns.⁴⁹

Whether inspired by a desire to avoid such doctrinal dead ends, by a wish to disclaim responsibility, or by a “realism”-based appreciation for the necessary indeterminacy of any enacted text, the persistent judicial

⁴⁵ *Id.* at 109-10.

⁴⁶ See *The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding authority of states to license and regulate the importation of liquor).

⁴⁷ 135 U.S. at 160 (Gray, J., dissenting) (joined in dissent by Justices Harlan and Brewer). Accord *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 428 (1947) (majority treats Congress' inaction as “acquiescence in [Court's] former rulings”).

⁴⁸ Powell, *The Still Small Voice of the Commerce Clause*, in 3 *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 931, 932 (Association of American Law Schools 1938).

⁴⁹ The former regime might have followed from the Madisonian view, see *THE FEDERAI*ST Nos. 41, 42 (J. Madison), that power over interstate commerce having been reposed exclusively in Congress, the states are powerless to regulate in that area even when Congress is silent, see, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) (Marshall, C. J.; dictum), while the latter might have followed from the view of Chief Justice Marshall's successor Roger Taney that, so long as Congress did *not* speak affirmatively through federal legislation to pre-empt them, the states were free to regulate commerce, see, e.g., *The License Cases*, 46 U.S. (5 How.) 504, 573 (1847) (opinion of Taney, C.J.). The reconciliation of these two poles of early commerce clause jurisprudence in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (distinguishing commerce local in character from that national in character and therefore regulable solely by Congress), created the norm around which judicial interpretations of congressional silence vacillated as Professor Powell describes.

focus on what Congress might have *wanted*, as revealed by its words or its silences, represents a seemingly decisive defeat for the longstanding resistance to giving legislative effect to anything short of positive enactments. As Justice Holmes wrote over half a century ago, “[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.”⁵⁰ From seeing that words—including the words appearing in statutes and constitutions—communicate only in cultural, social, and political context, it has been only a short (if misguided) step to treating what those words say and what they omit as merely *signs* of the ideas and desires that inspired their use—as windows into the thoughts of the time in which they emerged.

Such treatment obviously inverts the positive-enactment view by describing the *words* of a statute—or the gaps in those words—as only “the best evidence of what Congress *wanted*,”⁵¹ making what Congress wanted the very object of our search rather than merely the frame for our understanding of what Congress *said*.⁵² In its most extreme form, such treatment subsumes statutes within the common law model, viewing legislative enactments as mere pieces of a legal puzzle—pieces judges may feel free to rearrange as they “discern” that what lawmakers once assumed or wanted has since grown obsolete.⁵³

Resistance to giving weight to silence in the understanding of legislative or constitutional messages thus gives way before two overriding temptations: the judicial—indeed, universally human—temptation to pass responsibility on to others by saying one is *describing* their will when one is, in truth, *prescribing* what is to be; and the temptation to look not just to text but to *context*, of which silence—the very *boundary* of speech—is necessarily a part. Indeed, to decree that we must ignore legal silences

⁵⁰ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

⁵¹ *Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 584 (1982). See generally Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894-95 (1982) (modern touchstone of statutory interpretation is literalist reading of words as surrogates for legislative intent).

⁵² Such an inversion finds parallels in many other areas of the law: for example, when the “will” theory of contracts prevails over the so-called “objective” theory.

⁵³ For a recent example of the magnetism of the common law mentality, see G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). The author, in effect, overrides the Constitution’s separation of powers, suggesting that if the legislature remains silent toward statutes that courts perceive as no longer “fitting” the evolving legal landscape, courts should themselves revise or abandon those statutes, even if they are perfectly constitutional. See Mikva, *The Shifting Sands of Legal Topography*, 96 HARV. L. REV. 534, 542-43 (1982) (reviewing Calabresi’s book) (cautioning that the virtually unlimited legislative updating power that Calabresi proposes for judges could undermine the independence of the judiciary). See, in partial accord with Calabresi, Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 308-12 (1975). This approach avoids attributing responsibility to the silent Congress, but nonetheless disclaims judicial responsibility for reworking the legal landscape by passing off that activity as merely astute, judicially “expert” observation.

altogether is no more plausible than to command that we ignore the uncovered parts of a canvas or the pauses in a sonata. As Susan Sontag reminds us, "[t]o look at something which is 'empty' is still to be looking, still to be seeing something—if only the ghosts of one's own expectations. . . . Silence remains, inescapably, a form of speech . . . and an element in a dialogue."⁵⁴

THE RESOLUTION

We must therefore reformulate, and reduce to more plausible dimensions, the resistance to silence as a source of law if the failure of that resistance is to be replaced with even a modest success. Without a more explicit grammar of how silences may and may not operate in the interpretation of law—a syntax of the unsaid—we may *say* that law cannot be made by silence, but the echo will return: "Oh yes it can: just watch!"

In such a grammar, I believe that silences can properly have only two sorts of significance: (A) a significance as *operative legal facts* that is derived not from the internal states of mind that various silences may be thought to manifest, but from external constitutional norms;⁵⁵ and (B) a significance as parts of the historical *context* of actual enactments.⁵⁶

Silences as Operative Legal Facts

The search for external criteria to give operative legal effect to congressional silence can profitably begin by revisiting *Youngstown Sheet & Tube Co. v. Sawyer* (the *Steel Seizure* case).⁵⁷ Justice Douglas' concurrence in that case rested on an analysis of Congress' silence quite different from that of the Justices in the majority who treated Congress' silence as an indication of its *will* that the President be barred from unilaterally seizing national industries.⁵⁸ Justice Douglas reasoned:

The power of the Federal Government to condemn property is well established But there is a duty to pay for all property taken by the Government. The command of the Fifth Amendment is that no "private property be taken for public use, without just compensation." That constitutional requirement has an important bearing on the present case.

The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure. *But until and unless Congress acted, no condemnation would*

⁵⁴ S. SONTAG, *The Aesthetics of Silence*, in *STYLES OF RADICAL WILL* 310-11 (1969).

⁵⁵ Cf. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* I, § 580 (1958 ed.) ("An 'inner process' stands in need of outward criteria").

⁵⁶ Cf. S. CAVELL, *MUST WE MEAN WHAT WE SAY?* 16-18 (1976) (defending heavy reliance on context for meaning of language).

⁵⁷ 343 U.S. 579 (1952).

⁵⁸ See *supra* notes 32-40 and accompanying text.

be lawful. The branch of government that has the power to *pay compensation* for a seizure is *the only one able to authorize a seizure or make lawful one that the President has effected.* That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment. It squares with the theory of checks and balances expounded by Mr. Justice Black in the opinion of the Court in which I join.⁵⁹

Justice Douglas' theory of *Executive-Legislative* relations perhaps "squares" with Justice Black's, but the theory of *Judicial-Legislative* relations Douglas here propounds does *not*: for Justice Douglas, Congress' silence bars the challenged action by President Truman *not* because it signals a *desire* by Congress that Truman act otherwise, but because the *underlying constitutional rule*, as Douglas would have the Supreme Court announce it, makes the sort of thing Truman did *void absent explicit prior consent by Congress.* On Justice Douglas' view, the Executive must not be free to confront Congress with a *fait accompli*—a situation in which Congress is duty-bound to raise revenues for compensation payments that it might have chosen *not* to raise. In light of that constitutional rule, Congress' silence is a *fact* operating to bar unilateral executive seizure, *not* mere *evidence* that Congress did not want to authorize such seizures, or that it wanted to forbid them.

I would agree with the view I take to be at least implicit in Justice Douglas' opinion—namely, that the guide to the meaning of certain congressional silences is the Constitution itself. Where constitutional clauses—in the *Steel Seizure* case, the just compensation clause read in juxtaposition with the revenue raising clause—require the *consent* of Congress, Congress' *silence* has legal significance as a controlling operative fact.⁶⁰ The several clauses providing that only the consent of Congress, or of the Senate, can authorize certain steps—such as a state's entry into an interstate compact⁶¹ or the President's making of a treaty or appointment of a Supreme Court justice⁶²—provide paradigmatic examples. Although the Court has at times purported to discern congressional consent under such clauses where such "consent" was at best *implicit*,⁶³ I would read those clauses to render any congressional silence (or major ambiguity) in these areas a bar to the corresponding state or executive action. And the doctrines developed under the "dormant" commerce

⁵⁹ *Steel Seizure*, 343 U.S. at 631-32 (Douglas, J., concurring) (emphasis added) (footnotes and citations omitted). Cf. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) (no federal common law of crimes).

⁶⁰ Where constitutional principles require such consent, the *type* of legislative silence—whether or not it follows speech and debate and whether it is omission or rejection—does not matter, for anything short of clearly expressed consent must have similar operative effect. Cf. *supra* note 40.

⁶¹ U.S. CONST. art. I, § 10, cl. 3.

⁶² *Id.* art. II, § 2, cl. 2.

⁶³ *See, e.g., Virginia v. West Virginia*, 78 U.S. (11 Wallace) 39, 59-60 (1870).

clause⁶⁴ can similarly be recast as constitutional rules that determine when Congress' clear and affirmative authorization is needed for state or local interference in the national market—and thus when Congress' silence (or ambiguity) must be read not as an acquiescence in, but as a bar to, such interference.

Under this approach to congressional silence, courts cannot properly avoid the necessary first step of articulating and defining the relevant constitutional norm that determines what effect silence as such is to have.⁶⁵ In the *Iran Hostage* case,⁶⁶ the Court wrongly sidestepped that articulation when it purported to hear a different sound than the *Steel Seizure* Court had heard in a similar congressional silence decades earlier.

Dames & Moore, a private contractor, claimed that Iran's Atomic Energy Organization owed it some \$3.5 million for services performed. In December 1979, the contractor sued Iran, the Atomic Energy Organization of Iran, and several Iranian banks in a United States District Court to recover the money. To secure whatever judgment might ultimately be forthcoming, the district court attached some of the bank's property.⁶⁷

The President's Hostage Settlement Agreement⁶⁸ nullified all such attachments—all such attempts to tie the assets down—and suspended the underlying claims, relegating them to an Iran-United States claims tribunal in exchange for release of all our hostages the next day. This was not a moment for fainthearted jurists to express misgivings, and few observers could have been genuinely surprised when the Supreme Court unanimously upheld the President's action.⁶⁹

The attachments, according to the Supreme Court, were not really "property" because they had all been executed pursuant to a conditional license issued by the President shortly after the hostages were taken in November, 1979. The President had frozen the assets and had said, in effect, that, until further notice, certain attachments were going to be allowed. So the interest anyone subsequently acquired in those attachments was itself subject to what one might call defeasance by the fulfillment of a condition subsequent.⁷⁰

The problem of *pre-existing claims* was harder. The suspension of a pre-existing claim looked very much like a taking of property. And if it was a taking of property, there would presumably have to be some form of just compensation if, ultimately, there were not enough funds or not

⁶⁴ See *supra* notes 43-49 and accompanying text.

⁶⁵ Note that, at least on those occasions when Congress' silence must be conceded to express neither a "yes" nor a "no," a situation which all must acknowledge sometimes obtains, there is no way for a court to *avoid* deciding what the background constitutional norm—*i.e.*, the rule that governs when Congress is *silently* silent—is to be.

⁶⁶ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

⁶⁷ *Id.* at 663-64. Cf. Persian Proverb (date unknown) ("Trust in God, but tie your camel").

⁶⁸ See Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981) (implementing the Hostage Agreement).

⁶⁹ *Dames*, 453 U.S. at 674, 686.

⁷⁰ *Id.* at 673.

a fair enough process in the international claims tribunal to make the claims reasonably whole. As to that risk, the Court said it was premature to worry—because, if and when compensation would be due, there would be time enough for companies like Dames & Moore to sue the United States in the Court of Claims and collect their money.⁷¹

But that would present Congress with the very sort of *fait accompli* that the *Steel Seizure* precedent, in the Douglas version endorsed here, rules out absent explicit prior authorization by Congress: only the branch that *holds the purse strings* may constitutionally trigger action that could *drain the purse*. Congressional silence would thus be a bar to such action.

In *Dames & Moore v. Regan*, however, the Court treated Congress' silence as *non-silence*. Unlike those members of the *Steel Seizure* majority who viewed Congress' failure to enact *explicit* authorization of executive seizure as signalling its intent to forbid such actions, the Court in *Dames* found implicit congressional authorization of executive suspension of claims in three not-quite-applicable pieces of legislation⁷²—plus, perhaps, the national mood of celebration. Although the Court recognized the absence of actual congressional authorization, it found that Congress had “indicat[ed] [its] acceptance of a broad scope for executive action in circumstances such as those presented in this case.”⁷³

Purporting to “hear” a different intent in congressional silence in the *Iran Hostage* case than in the *Steel Seizure* case amounted to an attempt to disclaim direct judicial responsibility for the result. The Court might instead have upheld President Carter's action by itself taking responsibility for articulating a different underlying *constitutional* rule that, unlike the one deemed to control the *Steel Seizure* case, left the President free in such circumstances to seize the property at issue first and go to Congress for approval later. Had the Court taken this first step, it would have been required to distinguish the *Steel Seizure* case by explaining why, in its view, the congressional silence in the two cases had *not* a different *sound*, but rather a different *significance* in light of what the Court took to be the governing constitutional norm. Alternatively, if painfully, the Court might have held that the governing norms rendered President Carter's action no more valid, even if more popular, than President Truman's had been. In either event, the outcome would flow from the Court's own reading of the Constitution: the buck would stop with the Justices themselves.

Once the Court has defined and defended a constitutional norm that

⁷¹ *Id.* at 688-89.

⁷² International Emergency Economic Powers Act, 50 U.S.C. § 1702 (1976) (which the Court said authorized nullification of the attachments, but not—although it came close—the suspension of the claims); Hostage Act of 1868, 22 U.S.C. § 1732 (1976) (so named only for purposes of this litigation, and not directly applicable in any event); International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1627 (1976) (not directly applicable). *See Dames*, 453 U.S. at 669-88.

⁷³ *Id.* at 677.

would say "no" to certain actions unless Congress has actually *legislated* a "yes," there must be a heavy burden on anyone seeking to find a "yes" in Congress' silence on the matter. Only if convinced that due process of lawmaking under the structure created by article I *permits* Congress to "say" yes without enacting it—a burden I doubt could be met often, if ever—could one properly find actual authorization in silence or, indeed, even in ambivalent speech.

The Supreme Court in effect found such a burden unmet in *Kent v. Dulles*,⁷⁴ in which the Court held that the Secretary of State was not authorized to deny passports on the basis of Communist Party affiliation. While claiming not to reach the "question of constitutionality,"⁷⁵ the Court in fact held that the sort of liberty the Secretary claimed authority to restrict could not be abridged without at least a clearly enabling exercise of Congress' "law-making functions"⁷⁶—and that such authority could not be "*silently* granted by Congress."⁷⁷

In contrast, the Court skirted the burden of showing that such "structural due process" would permit silent lawmaking in *Haig v. Agee*,⁷⁸ in which the Court read in Congress' silence implicit approval of executive power to withhold or revoke passports on similarly troublesome grounds. The Court in *Agee* attempted to transform *Kent* from a determination about constitutional authority to a mere effort at mindreading in the face of congressional silence.⁷⁹ But *Kent* made sense *only* as a constitutional ruling about the operative significance of the absence of any expressly applicable authorizing statute, *not* as a ruling about Congress' state of mind—for Congress there had actually passed a law that specifically barred passports for Communists; that law simply *had not* "*yet become effective*."⁸⁰

Finally, it should be noted that Congress may, if engaged in an otherwise valid exercise of its lawmaking power, *itself* confer operative legal significance on future congressional inaction. "Sunset" provisions and one-house vetoes provide two such techniques for fixing in advance norms—here, legislative rather than constitutional—for ascribing meaning to congressional silence. Sunset provisions do so by creating situations in which *inaction* by a future Congress will lead a law to *lapse* when it would otherwise have survived. And the one-house veto technique whose validity is

⁷⁴ 357 U.S. 116 (1958).

⁷⁵ *Id.* at 129.

⁷⁶ *Id.*

⁷⁷ *Id.* at 130 (emphasis added). See also *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); *id.* at 718 (Black, J., concurring); *id.* at 720 (Douglas, J., concurring); *id.* at 742 (Marshall, J., concurring).

⁷⁸ 453 U.S. 280 (1981).

⁷⁹ *Id.* at 303-06; see also *id.* at 315-18 (Brennan, J., dissenting) (protesting only that the Court might have *misread* Congress' intent).

⁸⁰ *Kent*, 357 U.S. at 130.

now pending before the Supreme Court⁸¹ does so by making the fact of *joint inaction* by both houses for a specified period the *condition precedent* for an agency's action under its delegated authority to become final. Once authority has been delegated in this special way, such inaction by Congress functions *not* as a "sign" of unenacted "intent," but rather as an operative fact giving final effect to an otherwise incomplete exercise of delegated power.

Silence as Historical Context

What Congress has legislated necessarily takes its meaning in part from the context in which Congress chose the words it did, and Congress' silence or inaction may—and sometimes must—be treated as *part* of that context for purposes of faithfully construing contemporaneous and subsequent enactments. Contextual silences that may well be relevant to statutory construction include: (1) Congress' silence respecting extant *decisional law* that had construed the very statutory language Congress has chosen to re-enact—a silence which, coupled with re-enactment, may be read to imply adoption of that law;⁸² and (2) Congress' prior or contemporaneous rejection of proposed *amending language* or other legislation that would have enacted the very interpretation of a statute that a litigant later claims a statute *did* enact.⁸³

⁸¹ *Chadha v. Immigration & Naturalization Serv., reargued*, 51 U.S.L.W. 3459 (U.S. Dec. 14, 1981). My own conclusion is that, whatever other constitutional infirmities the one-house veto may have—and one can enumerate several—it need *not* be regarded as impermissibly authorizing "lawmaking" by a single house, or by the inaction of both houses.

⁸² See, e.g., *Merrill Lynch v. Curran*, 102 S. Ct. 1825, 1841 (1982) (finding implied private rights of action under Commodities Exchange Act, in part because several courts had found such a right under the precursor statute). To say that such silence may be contextually relevant is *not* to say that re-enactment is always to be rigidly construed as adoption of existing judicial interpretations, or that silence toward such interpretations in the context of re-enactment necessarily carries the same legal significance as if those very interpretations had been originally enacted. Those constructions were urged by Chief Justice Stone in his well-known dissent to *Girouard v. United States*, 328 U.S. 61, 75-76 (1946) (Stone, C.J., dissenting) (in re-enacting provisions of the naturalization law that had been subject to controversial judicial interpretation, Congress must be presumed to be "*adopting and confirming*" that interpretation). Professors Hart and Sacks persuasively criticize such a flat adoption rule as a disincentive to amendment and codification, inasmuch as it in effect instructs a legislature that it has a duty to review all controversial interpretations of its prior statutes before re-enacting them—at the peril of having committed itself to existing interpretations for having failed to do so. See H. Hart & A. Sacks, *supra* note 13, at 1162-64. They do not rule out, however, that re-enactment may *sometimes* justify an inference of legislative approval. See *id.* at 1164-65.

⁸³ A unanimous Supreme Court found significance in just such a congressional rejection of proposed legislation in *Pacific Gas & Elec. Co. v. State Energy Resources Comm'n*, 51 U.S.L.W. 4449 (U.S. Apr. 20, 1983), which involved a pre-emption challenge to California's moratorium on construction of new nuclear power plants so long as the federal government has not developed viable methods and facilities for the ultimate disposal of nuclear waste. In passing the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425 (1982), Congress in the end rejected an amendment proposed by Senator McClure, and initially in-

When and how far to treat such silences as part of the context of any given statute pose questions no different in kind from those presented whenever the historical setting in which a legislature spoke must be described; those questions cannot be answered by recourse to separation-of-powers limits. For, in regarding such silences as contextual, the Court is neither giving legal force to *inaction itself* nor "find[ing] in congressional *silence alone* the adoption of a controlling rule of law."⁸⁴ Thus judicial protest that giving such factors *any* weight involves judicial legislation⁸⁵ seems to cry wolf.

Not *all* silences may legitimately be read as part of statutory context, however. In particular, justifying an interpretation of a prior enactment by pointing to what a *subsequent* Congress did *not* enact seems incompatible with our constitutional structure. While silence contemporary with, or antecedent to, the legislative speech one is construing adheres to and

cluded in the Senate bill, that would have provided that passage of the Act "should be construed in any federal, state, and local administrative or judicial proceeding to satisfy any legal or statutory requirement" for the existence of a federally approved technology for the disposal of nuclear waste or for assurance of the safe storage and disposal of such waste. See 128 CONG. REC. S4310 (daily ed. Apr. 29, 1982).

Notwithstanding Congress' omission of that amendment from the House version of the bill that was ultimately signed into law 10 days before oral argument in *Pacific Gas & Elec.*, the utility petitioners and the Solicitor General urged the Court in that case to interpret the Act as declaring a federal solution to the nuclear waste disposal problem and thereby effectively pre-empting the challenged state requirement by decreeing it to have been met as a matter of federal law. See Transcript of Oral Argument in *Pacific Gas & Elec.* at 4-10 (argument of petitioners); *id.* at 20-21 (argument of the Office of the Solicitor General of the United States as amicus curiae in support of reversal).

The author of this article, as counsel for the respondents in *Pacific Gas & Elec.*, countered at oral argument that the deletion of the McClure Amendment from the Act demonstrated, on the contrary, that the Act was not intended to pre-empt state regulation by declaring the nuclear waste problem solved. See *id.* at 33. In response to Justice Rehnquist's query whether "bills that Congress didn't pass" should carry weight with the Court, the author argued that, while in the ordinary case congressional inaction should not carry such weight, Congress' previous explicit deletion from legislation of the very outcome a litigant seeks from the federal judiciary has clear significance: "the provisions that were specifically deleted in [this bill] at least suggest that what the petitioners asked the federal judiciary to do is something that the industry has repeatedly asked Congress to do and Congress has repeatedly refused to do. . . ." *Id.* at 33-34. In his opinion for the Court, Justice White agreed: "While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected." *Pacific Gas & Elec.*, 51 U.S.L.W. at 4457.

See also, e.g., *United States v. Security Indus. Bank*, 103 S. Ct. 407, 413 (1982) (construing provision of Bankruptcy Reform Act of 1978 to be non-retroactive, in part because earlier proposed version would have been explicitly retroactive).

⁸⁴ *Girouard*, 328 U.S. at 69 (1946) (emphasis added) (overruling three prior judicial interpretations of the naturalization statutes despite Congress' intervening re-enactment of those statutes without any changes repudiating those interpretations). This opinion has been much praised. See, e.g., R. DICKERSON, *supra* note 3, at 254. But *Girouard's* rejection of an inference of congressional *intent* from congressional silence should *not* be equated with a denial that such silence deserves any weight as part of statutory context.

⁸⁵ See, e.g., *Merrill Lynch*, 102 S.Ct. at 1848-49, 1851, 1855 (Powell, Rehnquist, O'Connor, JJ., & Burger, C.J., dissenting).

delimits that speech⁸⁶—thus furnishing potentially relevant context—a *later* silence shares no such boundary with that speech. A recent District of Columbia Circuit Court opinion upholding the authority of the Secretary of Labor to fire members of the Department of Labor Review Board at will⁸⁷ is guilty of confusing these two kinds of silence: the circuit court read such authority into a 1972 Act of Congress based partly on proposed protection for Board members that Congress considered but did not adopt earlier in 1972⁸⁸—which is fine—but *also* partly on proposed protection that Congress declined to adopt *in 1981*⁸⁹—which is unacceptable. And the Supreme Court, despite its own repeated warnings that uses of *post-enactment* history can be dangerous,⁹⁰ keeps making just such uses.⁹¹

In my view, then, our tasks in formulating a syntax for legislative silence are twofold: first, to articulate constitutional rules that give legislative silence or inaction operative legal effect independent of any state of mind that might be thought to lurk behind and thus to explain that silence; and second, to propound practices and principles of statutory construction, consistent with those constitutional rules, that treat prior and contemporary (but not subsequent) silence or inaction as part of the context for construing legislative enactments. No other ways of plumbing such silence appear to me compatible with our constitutional structure of lawmaking and its implicit safeguards for political accountability.

Of course, nothing in the Constitution *says* any of this in so many words. Not even article I, section 7, expressly *states* that *only* duly enacted bills may have the force of law, any more than the commerce clause expressly *says* that certain state or local intrusions into the national market are void (while others are valid) when Congress fails to speak. In a sense, then, it is *constitutional* silence, as a necessary part of the constitutional structure,⁹² to which we ascribe significance whenever we elaborate norms for construing what Congress has not said.

⁸⁶ Cf. R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 615 (1981) (describing the boundaries “in those intriguing drawings (two profiles and vase, old woman and young woman, duck and rabbit)” and asking, “Are not both patterns equally there?”).

⁸⁷ *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983).

⁸⁸ *Id.* at 390.

⁸⁹ *Id.* at 392-93.

⁹⁰ See, e.g., *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980).

⁹¹ See, e.g., *Bob Jones University v. United States*, 51 U.S.L.W. 4593, 4600-01 (U.S. May 24, 1983) (invoking failure of Congress to act on proposed bills that would have overturned Internal Revenue Service ruling as evidence of congressional ratification of that ruling); *Patsy v. Board of Regents*, 102 S. Ct. 2557, 2564 (1982) (invoking evidence of Congress' perception in 1980 that 1871 Civil Rights Act, 42 U.S.C. § 1983, had not required exhaustion of state remedies); *Baldrige v. Shapiro*, 455 U.S. 345, 358 (1982) (invoking 1977 rejection by Congress of proposals to make census data accessible to local officials as evidence that Congress in 1929 intended data to be confidential); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 35-56 & n.12 (1981).

⁹² See generally C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

CONSTITUTIONAL SILENCE

In deciding *how* to give meaning to what Justice Jackson called the "great silences" of the Constitution,⁹³ the issue is typically how to construe not constitutional silence *alone*, but rather the juxtaposition of constitutional statement in one realm with the *absence* of statement in an adjacent field. Although they have not previously, to my knowledge, been so viewed, two of the Constitution's most enigmatic but crucial provisions—included as the capstones of the Bill of Rights—specifically address how certain constitutional silences, or juxtapositions of silence with statement, are to be read. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁹⁴

This amendment, in addressing the powers "*not* delegated," is best understood as an instruction on how to read the Constitution's silences with respect to national governmental authority: on that subject, we are told, *silence* means *prohibition*.

But just as statutory amendments may be read against the background context of what they displaced,⁹⁵ so constitutional amendments may, and perhaps must, be read against such a context as well.⁹⁶ The tenth amendment, read in light of its own omission of the language that had been used in the Articles of Confederation—which reserved to the states all national powers "*not expressly* delegated"—appears a less than complete prohibition. The result of *that* reading, indeed, is *McCulloch v. Maryland*⁹⁷—which held that, notwithstanding the absence of *express* constitutional delegation to Congress of power to create a national bank, such a power was *implicitly* delegated by the Constitution, within the meaning of the tenth amendment, through the entire edifice of national powers read in conjunction with the necessary and proper clause. In the same

⁹³ See *supra* text accompanying notes 9, 43.

⁹⁴ U.S. CONST. amend. X.

⁹⁵ See *supra* note 23 and accompanying text.

⁹⁶ For example, the eleventh amendment must be read in the context of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which it overruled. It thus has not been read literally to bar only federal suits by citizens of *other* states, or to bar *all* federal suits by a state's (or another state's) citizens, but rather—in keeping with the concepts of sovereign immunity which it restored in the wake of *Chisholm*—as barring federal judicial derivation from article III of power to entertain citizen suits as to which the defendant state does not waive immunity. See generally Field, *The Eleventh Amendment And Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); Field, *The Eleventh Amendment And Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978). Likewise, the fourteenth amendment must be read in the context of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which it implicitly overruled, and the twenty-first amendment in the context of the eighteenth amendment, which it expressly repealed.

⁹⁷ 17 U.S. (4 Wheat.) 316 (1819).

tradition, *United States v. Nixon*⁹⁸ found in the Constitution's silence respecting executive privilege⁹⁹ no prohibition against judicial inference of such a privilege from unenumerated principles with constitutional underpinnings.¹⁰⁰

In illuminating contrast to the tenth amendment, the ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁰¹ Unlike the tenth amendment's direction as to the Constitution's silences bearing on national powers, the ninth amendment's instruction is that *rights-related* silences do not mean prohibition: they "*shall not* be [so] construed."¹⁰² Silence here is *not* the fence it is under the tenth amendment, but an invitation to identify unenumerated rights.¹⁰³ Again, the background context helps explain this instruction about silence: Madison introduced the ninth amendment as a specific response to the arguments of Hamilton and others that those rights not enumerated in the Bill of Rights would otherwise be given up to the government.¹⁰⁴

Here, as elsewhere, the rule of construction we articulate in attributing specific meaning to the ninth or any other amendment or constitutional provision will necessarily be both *indeterminate* and *incomplete*. It will be *indeterminate* in that we have had to make choices (as to the role of history, for example) not *themselves* fully specified by the Constitution in deciding *how to construe* the constitutional rule in question. And it will be *incomplete* in that we have emerged with instructions that cannot themselves be *applied* without making still *further* choices (choices regarding *which* unenumerated rights to recognize, for instance) that the Constitution itself may *constrain* but does not *dictate* in any conclusive way.

Throughout this process, it is crucial that we resist the temptation to treat *either* text or silence as mere *evidence* of unenacted *ideas* or *desires* on the part of others: whatever the sources and limits of its moral force, the Constitution—ratified under the processes specified in articles V and VII—surely does *not* bind us directly to the unmediated "*intentions*" of its framers or ratifiers, any more than we can be bound by the unlegislated "*intentions*" of Congressmen.¹⁰⁵

⁹⁸ 418 U.S. 683, 705-06 n.16 (1974) ("the silence of the Constitution on this score is not dispositive").

⁹⁹ This silence as to *executive* privilege contrasts, for example, with the express immunity conferred on members of *Congress* by the speech and debate clause.

¹⁰⁰ Specifically, the Court noted "the supremacy of each branch within its own assigned area of constitutional duties" and the separation of powers doctrine. *See Nixon*, 418 U.S. at 705-06.

¹⁰¹ U.S. CONST. amend. IX.

¹⁰² *See generally* J. ELY, *DEMOCRACY AND DISTRUST* 34-41 (1980).

¹⁰³ The Court most recently expressly took up that invitation in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 & n.15 (1980) (plurality opinion).

¹⁰⁴ *See* 1 ANNALS OF CONGRESS 439 (Gales & Seaton ed. 1834).

¹⁰⁵ It is difficult to take literally the Supreme Court's recent assertion that "when we

It is also crucial to observe that the Constitution itself expressly suggests rules of construction such as those of the ninth and tenth amendments—rules that are indeterminate and incomplete but nonetheless powerful—almost exclusively with respect to *omissions* and *silences*, rather than with respect to *statements* as such. At a few points—as with the presidential oath of office in article II, section 1, clause 8—the Constitution specifies by rule the legal significance to be given the official utterance of certain words. Almost always, though, no such specification is provided. For with respect to *words*—whether as included in the Constitution or as enacted by Congress—any adequate rule of construction must, of necessity, reach outside the system in order to incorporate by reference something akin to a community of shared understandings, without which such words could convey no reasonably fixed meaning. But with respect to *silences*—omissions of words in the Constitution or in congressional enactments—reference to such external pointers seems inherently unavailing: as potential carriers of ideas that a speaker may share with an audience, silences resist convincing translation even with the generous aid of all available cultural and social cues to meaning.

Yet silences enjoy a compensating feature: that feature is their potential *determinacy*. On any given occasion and with respect to any given subject, after all, there are *many* ways to speak, and much that may be *said*, but only *one* way to be *silent*.¹⁰⁶ The potentially infinite regress of rules of construction—and of *meta*-rules for construing *those* rules¹⁰⁷—can thus come to a rapid halt when (and perhaps only when) we deal with *silence*—provided we *accept responsibility* for stating explicit rules that specify the legal effects we will deem such silences to have, independent of the shared (or unshared) understandings or intentions those silences might be conjectured to reflect.

. . . have evidence that a particular law *would have offended the Framers*, we have not hesitated to invalidate it *on that ground alone*." *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 51 U.S.L.W. 4315, 4317 n.6 (U.S. March 29, 1983) (emphasis added). Cf. T.S. ELIOT, *THE FOUR QUARTETS* (1941) ("we cannot revive old factions/ we cannot restore old policies/ or follow an antique drum./ These men, and those who opposed them/ and those whom they opposed/ accept the constitution of silence/ and are folded into a single party").

¹⁰⁶ I am indebted to David Sklansky, a second year student at Harvard Law School, for helping me see the importance of this distinction. Close structural analogies may be found in the distinctions between acts and omissions, and between state action and state inaction. For while there are many things that an individual or the state might *do* about a given matter, the option of failing to do *anything at all* need not itself bespeak a rejection of any *particular* affirmative option. Yet, although we must therefore articulate background norms— notions of affirmative duties—to determine *when* individuals' omissions or the state's failures to act are culpable, such an articulation is potentially determinate, as articulating rules about acts and actions is not. Cf. C. FRIED, *RIGHT AND WRONG* 19-20 (1978) (on acts versus omissions).

¹⁰⁷ See generally D. HOFSTADTER, *GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID* (1979) (on paradoxes of self-reference).

Having accepted such responsibility—not by ascribing it passively to what we say the framers or others may have intended or supposed, but by admitting that we are actively proclaiming through the Constitution’s language the principles for which *we* believe it stands—not under its compulsion but for reasons we are prepared to defend in the Constitution’s terms as best we can—we will have gone as far as legal discourse allows. Beyond that point, we must seek what solace we can from Wittgenstein’s reprieve: “Whereof one cannot speak, thereof one must be silent.”¹⁰⁸

¹⁰⁸ L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS § 7 (1921).

