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CONGRESSIONAL SILENCE:
A TOOL OF JUDICIAL SUPREMACY

FRANK E. HORACK, JR.*

From the start, the Supreme Court of the United States has considered the interpretation of the Constitution as "the very essence of judicial duty." The authoritative character of its constitutional interpretation is no longer questioned seriously. And this is as it should be in a government founded upon the principles of a written constitution; not only because of the need of finality, but also because of the impracticability of constitutional amendment.

Wise as were the framers of the Constitution they were unable to visualize most of the problems of the middle nineteenth century—much less those of the twentieth. Thus, with constitutional change a necessity and amendatory machinery cumbersome, the choice of informal amending machinery rested between the Court and Congress. Logically, to have chosen Congress—the policy-determining branch—would have been the more appropriate; but to have selected the legislature as the amending agency would have done violence to the concept of the supremacy of a written constitution. Marshall wisely counselled against following the dictates of logic, for, he said: "This doctrine would subvert the very foundation of all written constitutions. . . . It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers. . . ."

Thus, the Court assumed the role of amender through the role of constitutional interpretation. Beginning in Marbury v. Madison, the Court assumed the fixity of constitutional principle and conceived of the interpretative function as merely the application of constitutional doctrine. Within 13 years, however, the Court was admitting that reasonable difference of opinion could exist as to the meaning of the Constitution and that therefore more than one interpretation of the

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1Marbury v. Madison, 1 Cr. 137, 178 (U.S. 1803).


3Marbury v. Madison, 1 Cr. 137, 178 (U.S. 1803).
Constitution could be "correct." If the Constitution could be interpreted in more than one way it was obvious that more than one source of interpretation was also valid, but primary reliance was placed upon historical sources.

Time and change, however, made the framers' intention less compelling and the historical approach was soon validly questioned as denying to the Constitution "every quality except its age." Since that date, varying philosophical, ethical, social, and economic interpretations have glossed the original instrument. Judges have held different postulates, the character and tempo of society has shifted, and conflicting interpretations and decisions have mounted until many now assert that the Court has abandoned all regard for stare decisis and precedent. Disturbing as this may be to many persons, it is inevitable that prior constitutional decisions must on occasions be reversed if the Constitution itself is to remain a dynamic charter of government. The Court's power to reverse a former decision is clear; the only question open is the wisdom of its action.

Today, however, only a small part of the Court's function involves constitutional interpretation. The construction of congressional enactments, administrative regulations, and executive orders occupies a far larger area of judicial activity. Indeed, the need for constitutional interpretation seldom arises without the correlative need of statutory construction, for as Marshall said, "the Court must determine which of these conflicting rules governs the case." The interpretation of statutes, however, is founded on postulates different from those underlying constitutional interpretation. Statutory enactment is usually more nearly contemporaneous with litigation. The sources of legislative intent are more readily available. The capacity of Congress to change legislative policy is real. On questions

4Martin v. Hunter's Lessee, 1 Wheat. 304, 348 (U.S. 1816) "Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself."

5Hurtado v. United States, 110 U.S. 516, 530 (1884): "...it is better not to go too far back into antiquity for the best securities for our 'ancient liberties.' It is more consonant to the true philosophy of our historical institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations."

6Willis, The Constitution of the United States at the End of One Hundred Fifty Years (1939).

7Moore and Oglebay, The Supreme Court, Stare Decisis and the Law of the Case (1943) 21 Texas Law Review 514; Small, Stare Decisis on Two Continents (1946) 18 Rocky Mt. L. Rev. 97.

8Marbury v. Madison, 1 Cr. 137, 178 (U.S. 1803).
of policy the Court is subordinate to the Congress, or at all events should be.

If the doctrine of separation of power is valid, and judicial supremacy is essential to its preservation, then legislative supremacy in matters of legislative policy is equally necessary. Otherwise under the guise of law enforcement and interpretation, the Court in fact dominates the legislative function.9

Congress is capable of expressing itself on matters of policy and is forever charged with the obligation of adjusting the statutes to the wishes of the majority of the people. Thus, there is no need for the Court to interpret a statute in the same manner as the Constitution and there is also strong reason why it should not. For if the Court’s interpretation becomes a substitute for the determination of policy by the legislature, then the Congress is in part relieved of its function and its responsibility. This is not to say that the Court must accept every congressional enactment as valid; but rather that if it finds the statute valid it is bound by the legislative declaration of policy and must interpret the statute as Congress intended it to be interpreted.10

This, of course, is not a simple process. The Court is properly hesitant to declare statutes unconstitutional and will therefore seek such legislative intent as will eliminate the constitutional question. But to avoid one evil is hardly a justification for the formulation of another. And those of us who view the legislature as a primary source of all policy formulation cannot help but look askance upon a practice which is inevitably leading the Court into a position where it not only becomes supreme within the constitutional realm but also potentially dominant over legislative policy determination.

9“...In any case it is not lightly to be implied that Congress has ... delegated to this Court the responsibility of giving new content to language deliberately readopted. ... For us to make this assumption is to discourage, if not to deny, legislative responsibility.” Stone, C. J., dissenting in Girouard v. United States, 66 S.Ct. 826, 833 (1946). See Chicago & A. R. Co. v. United States, 49 Ct.Cls. 463, 500 (1914); United States v. National Ass’n Window Glass Manufacturers, 287 Fed. 228 (N.D. Ohio, 1923) for cases where interpretation becomes purely policy determination. In Alco-Zander v. Amalgamated Clothing Workers of America, 35 F.(2d) 203 (E.D.Penn. 1929) the court ignored the statute with the same effect.

10“...If a law is plain, and within the legislative power, it declares itself, and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh would make the judicial superior to the legislative branch of the government, and practically invest it with law-making powers. The remedy for a harsh law is not in interpretation but in amendment or repeal.” State v. Duggan, 15 R.I. 403, 409, 6 Atl. 787, 788 (1886).
A major premise of a representative democracy is that the people may through their elected representatives determine the character of their society, government and laws. By our Constitution, the representatives of the people organized in the Congress are charged with the legislative responsibility of formulating policies of social organization and conduct. Thus, a statute becomes a rule of law by which the members of society must conduct their lives subject to the penalties society imposes upon them through its law-enforcing agencies. When enforcement results in a case in a court of law then the Court, the same as the members of society, must comply with the law and policy fixed by Congress. Inevitably this policy may be general or precise, clear or ambiguous, and it is the obligation of the Court to determine whether the case before it falls within the policy of the statute or not.11

Thus, when we speak of determining legislative intent we are saying that we are trying to determine from both intrinsic and extrinsic sources the exact limits of the rule of conduct which Congress has established.12 Difficult as this inquiry may be it is not, in most cases, a fictional thing—an inquiry into the minds of individual congressmen or the search for a "composite congressional mind"13—but rather a determination from the action which Congress took or refused to take, of the rules of conduct Congress actually fixed.

This inquiry is beset with many uncertainties and the ultimate result may appear doubtful even to the Court, which is bound, at the risk of being wrong, to make a decision. But when the decision is made the statute to that extent becomes more determinate,14 or, if you will, amended to the extent of the Court's decision. The decision and the attendant change in the law is a necessary consequence of law enforcement. If it results in the exercise of certain legislative

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11Note that this inquiry does not determine the exact decision of the court. Once the policy is determined, the instant case may be determined to fall within or without the coverage of the act, and if within it the court may still have considerable latitude in determining the consequences attributable to the particular facts of the case. See Pennsylvania R. R. v. United States Railroad Labor Board, 261 U.S. 72 (1923).

12Sutherland, Statutory Construction (3d ed. 1943) §§4501-4506.

13But see Radin, Statutory Interpretation (1930) 43 Harv. L. Rev. 863: "... the intention of the legislature is undiscoverable in any real sense..." Cf. Landis, A Note on "Statutory Interpretation" (1930) 43 Harv. L. Rev. 886.

14Radin, supra note 13 at 869.
functions by the Court it is the inescapable product of the judicial process.\(^{15}\)

The decision changes the rule of conduct under which society lives.\(^{16}\) The decision is neither formal nor theoretical—it is law. Men must order their affairs by the new law. All the sanctions of society—civil, criminal, administrative—will be marshaled to insure its vitality.

Thus, if the Court in a second case changes its former interpretation the functional consequences of the change are legislative rather than judicial. At the time of the first decision a statute existed which some asserted (and some denied) applied to a particular fact situation. The exercise of the judicial function made it necessary for the Court to determine the applicability of the statute. This required a determination and interpretation of the policy fixed by Congress.

After the decision, whether the Court correctly or incorrectly interpreted the statute, the law consists of the statute plus the decision of the Court. Thus, at the time a second case comes before the Court, the law on the particular point is both clear and determinate. The only undetermined question is whether the facts of the second case bring it within the rule of the prior decision.

Even assuming that the prior interpretation was incorrect, if the Court now reverses the position it took in the first case it is affirmatively changing an established rule of law under which society has been operating. This is explicitly and unquestionably the exercise of a legislative function. The correctness or incorrectness of the prior rule is less important than the fact that the members of society have acted upon it.

The judicial change of a legislative rule occurs without any of the safeguards normally surrounding legislative action. The change is not made by elected representatives. It is not formulated into a written proposal upon which interested persons can express their opinion formally before the committees of Congress or informally by petition and through the press and on the air. There is no compliance with the bicameral principle of equal state representation in the upper

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\(^{15}\)This situation should be clearly distinguished from the case where the Court changes its interpretation after a prior decision. In the latter case the result is not a necessary consequence of the judicial process. The burden of change can be left to the legislative body.

\(^{16}\)"The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one." Stone, J. in Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940).
house and popular representation in the lower. There is no opportunity for executive veto.\textsuperscript{27}

These objections seem far more important than the objection that the Court may have erred in its first decision. Unless Congress has acted, neither the Court nor anyone else can determine whether or not its interpretation was inconsistent with the intent of Congress. When the second case arises the question is whether the Court made a mistake in the first instance. And if it did, the question is whether a subsequent Congress has concurred in the change of policy erroneously made by the Court. If in these circumstances the Court reverses its prior decision it assumes the complete responsibility for establishing a new and changed rule of law.\textsuperscript{18} It is exercising a legislative function. And to this extent is asserting supremacy in the legislative field subject only to the power of Congress to change the judge-made law by statutory enactment.\textsuperscript{19}

But it may be objected that this is exactly what a court of law does when it reverses a long line of decisions in a purely common-law situation. That situation, however, is distinguishable. In the first place, the common law is judge-made law. Secondly, the legislature by custom and tradition has not generally exercised its admitted supremacy in the common-law areas. Likewise, courts have held the doctrine of precedent in higher regard in this than in the public law domain. Indeed, when courts are called upon to change a common-law rule they usually decide in accordance with precedent and observe that if there is need for remedy the proper forum is the legislature and not the court.\textsuperscript{20} In other words, by self-limitation the

\textsuperscript{17}The noncompliance of judicial action seems much more substantial than the noncompliance resulting from congressional silence because it results in a change in the rules of conduct of society. But see Rutledge, J., concurring in Cleveland v. United States, 67 S.Ct. 13, 17, n. 5 (1946): "Legislative intent derived from nonaction or 'silence' lacks all the supporting evidence of legislation enacted pursuant to prescribed procedures including reduction of bills to writing, committee reports, debates, and reduction to final written form as well as voting records and executive approval."

\textsuperscript{18}See note 9 supra.

\textsuperscript{19}Note that it is not unreasonable for some congressmen to believe that after an interpretation the legislature cannot change the meaning, some state courts having held that a subsequent enactment redefining policy amounts to the exercise of the judicial function of interpretation. Titusville Iron Works v. Keystone Oil Co., 122 Pa. 627, 15 Atl. 917 (1888). \textit{Contra:} Koshkonong v. Burton, 104 U.S. 668 (1881).

\textsuperscript{20}The same concept is reflected in the policy against changing the interpretation of a statute. See Brandeis, J. in Erie R. R. v. Tompkins, 304 U.S. 64, 77 (1938): "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But
The judiciary has recognized that the change of those rules, under which men have conducted their affairs and have assessed their rights and liabilities, is a legislative function to be exercised by the elected representatives of the people. And it is an insufficient answer that the representatives have not changed or will not change the existing policy of the law. So long as policy determination is their responsibility, it is their privilege to act wisely or unwisely or not to act at all.

II.

The general problem was recently raised in the case of *Girouard v. United States*. There a majority of the Court determined that congressional inaction after judicial interpretation of congressional enactment did not prevent the reversal of earlier decisions and the establishment of a new policy. The problem arises in three reasonably distinct situations:

1. Where after a Supreme Court decision the original act has had no further legislative history.
2. Where after a prior decision the original act is re-enacted without change.
3. Where after a prior decision the original act is amended by Congress.

In the first place it should be quite clear that no formal dialectic—amendment v. non-amendment, action v. non-action—should be determinative of the question. The only valid inquiry is, what was the legislative intent? Did the Court in the prior decision properly interpret the congressional intent? If not, has there been subsequent congressional acceptance of the Court’s interpretation which amounts to an amendment of the policy and the statute?

the unconstitutionality of the course pursued has now been made clear and compels us to do so.”

2166 S.Ct. 826 (1946). Girouard, a Seventh Day Adventist applied for citizenship; he answered “no” to the question “If necessary, are you willing to take up arms in defense of this country?” By decisions of the Court in United States v. Schwimmer, 279 U.S. 644 (1929); United States v. Macintosh, 283 U.S. 605 (1931); and United States v. Bland, 283 U.S. 636 (1931) the applicant was not entitled to citizenship. The Circuit Court of Appeals reversed an order admitting the applicant. On certiorari, the Supreme Court reversed, holding the prior decisions and subsequent inaction of Congress not binding, Justices Stone, Reed and Frankfurter, dissenting.

22Cf. Rutledge, J., concurring in *Cleveland v. United States*, 67 S.Ct. 13, 17, n. 4 (1946): “As an original matter in view of the specific and constitutional procedures required for the enactment of legislation, it would seem hardly justified to treat as having legislative effect any action or nonaction not taken in accordance with the prescribed procedures.”
The answers to these several questions will depend, in part, upon principles of statutory interpretation, but more upon the relation between the Court and Congress.

For example, those who support the decision in the *Girouard* case argue in this fashion: after congressional enactment the Court in a given case must determine whether the statute is applicable and, if so, its meaning. In determining its meaning the Court must follow the intent of Congress. If, after the Court has determined the legislative intent, Congress takes no further action, there is no formal congressional expression of approval or disapproval of the first interpretation. Therefore, in a subsequent case there is no additional legislative intent which the court need consider binding. Consequently, so far as the principles of statutory construction are concerned, the Court is as free in the second case as it was in the first to determine congressional intent. Thus, it is entirely appropriate for the Court to change its interpretation and reverse the prior decision if it decides that that decision was erroneous.

This proposition is carried one step further in the *Girouard* case to include the situation where there has been re-enactment of the original statute without any change in the act directly affecting the question previously decided. It is argued that in this situation there is likewise no indication of legislative intent beyond that expressed in the first enactment and that therefore the re-enactment has no greater significance than the silence or inaction of Congress considered in the first example.\(^2\)

The proposition obscures a more significant postulate which may be stated thus: that in case of doubt the Court is accepting its own determination of policy in preference to any interpretation which may be drawn from subsequent congressional action.\(^2\) The result is that an affirmative duty is placed on Congress to express itself in such positive and compelling language subsequent to a judicial interpretation of the statute that the Court would be unable to escape the

\(^2\)Caminetti v. United States, 242 U.S. 470 (1917); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). But note that the Court in the *Girouard* case reversed its prior holding, while the same Court with Douglas, J., writing both opinions refused to change the rule of Caminetti v. United States, 242 U.S. 470 (1916) in Cleveland v. United States, 67 S.Ct. 13 (1946).

\(^2\)Action" should include "inaction" for it has the same result. "Inaction" continues the rule of law as originally interpreted. The rule is enforced during the period of "legislative inaction" so that if enforcement is contrary to the legislative intent it should be anticipated that demands would arise for a change in the rule.
effect of its statement. In short, the *Girouard* case extends judicial supremacy into the field of legislative policy except in those instances where Congress affirmatively and explicitly acts.

Those who find difficulty with the judicial method of the *Girouard* decision emphasize the fact that the Court's function is not to determine policy but to apply it and that as a consequence until Congress indicates *affirmatively* that it is not satisfied with the result achieved by prior judicial interpretation it must be presumed that the prior interpretation is consistent with the original intent of Congress or at least with the intent of subsequent Congresses.

Thus, unless there is evidence of change in congressional policy, it must be assumed that the original decision reflects the intent of Congress.25 A reversal of the original decision by the Court then amounts to an amendment of the original act contrary to the intent of Congress, with the result that the Court has asserted supremacy in the field of legislative policy subject only to the ability of Congress to change the interpretation by affirmative legislative action.

The supremacy of Congress is not completely defeated but it is seriously limited. Many members of Congress feel that they are bound by the Supreme Court's decisions even on questions of construction. At all events the Court's decisions receive great weight.26 The result is a functional supremacy of the Court if not a philosophical one. If Congress is supreme in the realm of policy the view of Congress and not that of the Court should prevail in cases of doubt. If Congress is supreme on matters of policy the burden of going forward should not be placed on its shoulders.

25Jackson, J. in Helvering v. Griffiths, 318 U.S. 371, 389 (1942): “We think if Congress had passed or intended to pass an act challenging a well known constitutional decision of this Court there would appear at least one clear statement of that purpose either from its proponents or its adversaries.” See also *Id.* at 395, 400–401.

26For example, the same problem of change in rule arises in the case of administrative agencies. See 2 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed. 1943) §§5109; Brown, *Regulations, Re-enactment, and the Revenue Acts* (1941) 54 Harv. L. Rev. 377; Griswold, *A Summary of the Regulations Problem* (1941) 54 Harv. L. Rev. 398. The administrative situation may be distinguished from the judicial in several respects. First, Congress confers legislative functions on the agencies to make rules and regulations. Thus, even if the agency exercised a legislative power in its decisional capacity the exercise as a matter of substance though not of procedure was within the power conferred. Secondly, an administrative agency is popularly treated as an enforcement agency and its decisions are not considered “law” in the same way as are those of the courts. Third, where the rule, be it legislative or administrative, is of long standing the agencies have not been considered free to change them at least retroactively. A similar policy should be appropriate for the Court.
Viewed in this light the decision in the *Girouard* case is not defensible. But it must be recognized that in an operating government the powers of the several departments never remain separate nor do the departments completely check and balance one another. Thus, a practical and not a theoretical supremacy of either Court or Congress is at issue.

Even those who support the *Girouard* opinion recognize that the power there assumed should be cautiously exercised. The standards of cautious exercise, however, cannot be easily defined. Some think, for example, that it would be proper for the Court to reverse its prior decision if the Court later concludes that the prior interpretation produces an unconstitutional result. There is some suggestion of this view running through the majority opinion in the *Girouard* case.

But *quaere* whether the constitutional question should be resolved through statutory interpretation? It is, of course, generally conceded that the Court should, where two or more interpretations are open to it, choose that interpretation which sustains the validity of the congressional enactment. There is both advantage and disadvantage to the application of this rule in the instant problem. It permits the Court to arrive at a *result* which to many is more attractive than the result which the congressional legislation reached. It avoids the necessity of declaring a statute unconstitutional; but the constitutional question remains undecided. It leaves undetermined whether an amendment by Congress reasserting the view of earlier cases, could be reasserted constitutionally by Congress. And thus the decision provides little guidance on basic questions and amounts to little more than a decision that *Girouard* was entitled to citizenship.

The final area of difficulty in which the majority opinion in the *Girouard* case offers some administrative advantage is in that area

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27But see, for example, Rutledge, J., concurring in *Cleveland v. United States*, 67 S.Ct. 13, 17 (1946): "Notwithstanding recent tendency, the idea cannot always be accepted that Congress, by remaining silent and taking no affirmative action in repudiation, gives approval to judicial misconstruction of its enactments."

28"The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. . . . Freedom of religion guaranteed by the First Amendment is the product of that struggle. . . . The test oath is abhorrent to our tradition. Over the years Congress has meticulously respected that tradition and even in times of war has sought to accommodate the military requirements to the religious scruples of the individual. We do not believe that Congress intended to reverse that policy when it came to draft the naturalization oath. Such an abrupt and radical departure from our traditions should not be implied." *Douglas, J.*, 66 S.Ct. 826, 829 (1946).

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where the legislative intent is so uncertain as to provide no guidance for the Court at all. The void-for-vagueness rule,29 defensible as it may be in some criminal cases, is certainly resting in well-deserved disuse at the present time. And yet, implicit in any criticism of the Girouard decision, is the suggestion that the Court should not act in those areas where the congressional intent is in doubt either as a matter of original enactment, subsequent silence, or subsequent re-enactment without further particularized intent.

The doctrine of vagueness, however, results in a judicial decision—a decision which determines that the statute does not apply to the case before the Court. Thus the decision of the Court, no matter how expressed, amounts to a holding that the legislature did not intend to cover the instant situation. This is interpretation. And so here, whatever decision the Court reaches amounts to the application or non-application of the statute and to that extent an interpretation of the intent of the legislature. Thus a determination that the subsequent silence of Congress or its ambiguous inaction, amounts to a reaffirmation of the Court's interpretation in the original case, is as objectionable as the void-for-vagueness rule in that it purports not to interpret while in fact it does. Thus if the question is one of statutory construction alone it would be clear that the Court should use all the evidence available in order to determine the exact way in which Congress intended the statute to be applied.30 And, if the Court, having made this inquiry, arrived at a decision different there should be no objection to it. The difficulty with the position, however, is that it once again requires the Court to change the existing rules of society and throws the burden on the legislature of going forward affirmatively if its policy is to control the Court.

Implicit in the argument of the majority is the proposition that Congress would often desire to change the Court's interpretation but hesitates to do so for political reasons.31 There are two difficulties


30And in the first instance the court should go even so far as to apply the intent of "a reasonable legislature." Horack, The Common Law of Legislation (1937) 23 Iowa L. Rev. 1941; 2 Sutherland, Statutory Construction (3d ed. 1943) §4608.

31Cf. Rutledge, J., in Cleveland v. United States, 67 S.Ct. 13, 17-18 (1946): "At times political considerations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency to trust to the courts to correct their own errors... as they ought to do
with this proposition. If there are political obstacles they should be
given great weight, for regardless of motive\textsuperscript{32} it means that the pro-
posed policy is not one which Congress is prepared to support and
that the Court is changing the law when the elected representatives
would not.

The second difficulty with the argument is that it applies equally
to support the proposition that the Court should not change its prior
interpretation. If silence is something less than concurrence in the
first decision then it is also less than concurrence in the changed
policy announced in the second case. In other words, the silence is
ambiguous and you can argue as satisfactorily in support of the first
decision as you can in support of the second. Thus, as a matter of
statutory construction, silence alone or ambiguous re-enactment does
not support the second interpretation.\textsuperscript{33} The argument goes further,
however, and runs to the effect that in the case of silence the Court
should be in a position to correct its own error.\textsuperscript{34} This argument
assumes the very point at issue—that is, that the first interpretation
was erroneous.

If the determination of policy is a question for the Court, then
clearly if the Court changes its mind it may appropriately say its
first decision was erroneous. But if the determination of policy is
for Congress then an independent determination by the Court that
its first determination was unwise is not the same thing as saying
that it was erroneous. For the policy of the legislature may have
been unwise and so long as it is not unconstitutional the Court must
apply the policy. And in this situation a reversal of the prior decision
would be the erroneous action if Congress had not changed its policy.

\textsuperscript{32}"Not only may the reasons which prompted the various members to enact
the law be varied and conflicting and difficult to determine, but they may be un-
related to any consideration of the meaning of the statute." 2 SUTHERLAND, STATU-
TORY CONSTRUCTION (3d ed. 1943) §5014.

\textsuperscript{33}Cf. Fletcher v. Peck, 6 Cr. 87, 130 (U.S. 1810): "... if less than a majority
act from impure motives, the principle by which judicial interference would be
regulated, is not clearly discerned."

\textsuperscript{34}"Moreover ... this legislation and the problems presented by the cases arising
under it are of such a character as does not allow this Court properly to shift to
Congress the responsibility for perpetuating the Court's error." Rutledge, J., con-
Thus, the doctrine of the majority in the Girouard case certainly cannot be approved categorically. But neither can that of the minority if its position is that re-enactment per se binds the Court to its first interpretation. The need for nice adjustment in the complicated machinery of government does not permit of an exact rule. Little more than a broad policy can be announced; that policy appears to be best expressed in the proposition that in case of doubt the Court should not reverse a prior decision interpreting a congressional enactment. In the Girouard case the minority found sufficient evidence to dispel doubt. It also found a reaffirmation of the policy announced in the earlier cases.

III.

Without discussion of the policy questions above raised, the minority reached its conclusions by the application of standard rules of statutory construction. This process, of course, offers no clear and simple path to a certain legislative intent. But inasmuch as all legislative intent in the end becomes more than the sum of all its parts, it should be recognized that the lack of evidence alone or the lack of action alone does not necessarily preclude the existence of a legislative intent or its discovery. This is apparently recognized by both majority and minority.

There was substantial agreement in the Girouard case upon the facts. After the original decisions, strong representations were made to Congress and its committees by persons of prominence both within and without the government. These representations continued over a period of years and the committee finally reported out a bill which became the Nationality Act of 1940. The provisions of the Act involved in the Girouard litigation were the provisions of the 1906 Act reenacted without substantial change.

It is clear that this is not the intent of the minority. "It is the responsibility of Congress, in reenacting a statute to make known its purpose in a controversial matter of interpretation of its former language, at least when the matter has, for over a decade, been persistently brought to its attention. In light of this legislative history it is abundantly clear that Congress has performed that duty." Stone, C. J., dissenting in Girouard v. United States, 66 S.Ct. 826, 833 (1946).

If legislative intent has meaning for the interpretative process it means not a collection of subjective wishes, hopes and prejudices of individuals, but rather the objective footprints left on the trail of legislative enactment. Legislative intent can't be 'dreamed up.' It may be speculated about; but it can be discovered only by factual inquiry into the history of the enactment of the statute. . . ." 2 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed. 1943) §4506.

See dissenting opinion, Girouard v. United States, 66 S.Ct. 826, 832 (1946).
The committee reports did not disclose the controversy that followed the decisions in the *Macintosh, Schwimmer and Bland* cases; indeed, they did not disclose that the committee had even considered the question. The committee hearings, however, made it clear that the issue was before the committee. When the proposed act was presented on the floor of Congress the provisions at issue were in substantially the same form that they were in in the Act of 1906. No objection was made on the floor of Congress. There were no champions to insist that the nature of the oath be changed. The act passed and the reënacted portions added nothing to the evidence available at the time of the *Macintosh, Schwimmer and Bland* cases.

What did the reënactment mean? It is submitted that if anyone could tell what it meant there would have been little difficulty in the *Girouard* case. If the reënactment meant the rejection of the requirements of the oath it seems clear that the dissenters would have eagerly joined the majority. If it had been clear that the reënactment affirmed the requirements of the original act it may be premised that the majority would have joined with the dissenters unless they found a constitutional issue had been raised. Thus, the rules of statutory construction are not helpful unless the rule that congressional inaction after prior interpretation is treated as a presumption that the law remains unchanged until affirmative action of Congress is established. This, in reality, is another way of speaking of legislative supremacy when there is doubt as to legislative policy. It may, of course, be argued, and has been, that the very inaction itself is evidence of legislative intent, but for most purposes this seems unsatisfactory.

The majority in the *Girouard* case advanced the proposition that the necessary evidence of a change in policy was discoverable from the other statutes which could be applied by analogy. This is a well accepted concept of statutory interpretation and if the analogous statutes do provide evidence of legislative policy affecting the situation in litigation the policy should be followed. The difficulty in the instant case is that there is nothing to indicate that the policy of one statute was necessarily the policy of the other. Certainly there is no requirement that Congress be consistent and even if there was it would be difficult in the instant case to establish that the situations were not distinguishable, as an effective argument could be made excluding

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39 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed. 1943) §§6101–6105.
the relevance of the 1942 amendments of the Nationality Act as was made in establishing their analogy. The fact that they were amendments does not entitle them to a higher priority in determining the policy which Congress followed. The difficulty in applying amendments is simply this: Congress could have applied one policy to persons in the armed forces and another one to those who did not participate in military service. The wisdom of such a distinction was for Congress and not for the Court. The important question remains unanswered, did Congress intend in 1942 to reverse the prior policy for all persons or only for those in the armed forces? Again on this question there is silence. The Court is faced with the extremely difficult task of deciding a case where it is aware that strong sympathies run contra to the announced policy of its prior decision, which decision it believes to be erroneous, where there is no evidence determinative of the policy which Congress has fixed and where because a case is before it the Court must act. Whatever decision the Court makes results, as Radin said, in making the statute more determinate. To that extent the Court's decision becomes a part of the statute. To change the decision is to amend the statute. The issue then is, whether the Court should assume the responsibility in non-constitutional cases of making a decision which will change the policy and law under which the people live or whether they should leave this legislative function to the Congress. The assertion of this power is not necessary to the exercise of the judicial function and results in at least a temporary supremacy of the Court over purely legislative policy issues.

401 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed. 1943) §§1929-1935.
41 See Radin, supra note 13, at 869.