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Edward O. Correia

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ARTICLES

A LEGISLATIVE CONCEPTION OF LEGISLATIVE SUPREMACY

*Edward O Correia**

I. INTRODUCTION

This article explores the principle of legislative supremacy and the obligations it imposes on courts in interpreting and applying statutes. The proposition that courts should respect legislative supremacy is so often stated that it seems self-evident. But what is legislative supremacy and why should courts respect it? Although a number of different conceptions of legislative supremacy have been suggested,¹ the concept remains elusive.² Depending on how the

* Professor of Law, Northeastern University School of Law; former Chief Counsel and Staff Director, Senate Subcommittee on Antitrust Monopolies and Business Rights. The author wishes to thank Stephen Subrin, Wendy Parmet, Stephen Ross and Richard Daynard for helpful comments on earlier drafts of this article and Elsie Kappler, Megan Hayes, Ellen Bach, Michael Smith, and Marjorie Boone for helpful research assistance.

1. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-93 (1985) [hereinafter *FEDERAL COURTS*] (suggesting that the judiciary should put themselves in the legislature's shoes when interpreting a statute); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) [hereinafter *Original Intent*] (arguing that the intent of the legislature is the law and the judiciary's job is to decipher the mentality of the legislature); Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) [hereinafter *1983 Term*] (characterizing judges as agents of the legislative branch); William N. Eskridge, *Spinning Legislative Supremacy*, 78 GEO. L.J.

principle is articulated, legislative supremacy can function as a broad constraint on courts or a very narrow one. A court that views this constraint narrowly is likely to view its policymaking authority broadly.

This article proposes a conception of legislative supremacy based on the way in which legislators might formulate the principle. In particular, this article explains how legislators would likely characterize their own legislative commands, and it suggests the interpretive rules they would want courts to follow. Because there is no "representative" legislator, constructing legislators' views about legislative supremacy necessarily involves speculation. However, the exercise will, nevertheless, be helpful if the reader accepts certain assumptions about legislators' values and about the way legislators' view their role in the constitutional scheme. These assumptions are that legislators want statutes to be effective, that they want to maximize the policymaking authority of the legislature, and that they want to minimize the policymaking authority of the judiciary.³

The essentials of my argument are these. Looking at statutory interpretation from the legislative perspective has a powerful justification. If legislators have the authority to decide policy, they also have the authority to determine how their statements of policy will be interpreted. Thus, the legislative perspective provides some useful insights about principles of statutory interpretation. First, the legislative process suggests how legislators view the legislative command. In particular, the extent to which legislators rely on committee reports, floor debates and other formal memorializations of the process of enactment, shows that they expect courts to consider these same resources in interpreting legislative commands.

319, 343 (1989) (urging legislative supremacy to encompass deference to both the drafting and current legislatures); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) (asserting that legislatures are not exclusive lawmakers but their supremacy enables them to modify common law doctrines); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189-90 (1986) [hereinafter *Legal Formalism*] (comparing judges to platoon commanders accepting orders from legislators).

2. See, e.g., Eskridge, *supra* note 1, at 343 ("The more deeply one considers legislative supremacy, the more complex and ambiguous it becomes . . .").

3. See *infra* text accompanying notes 47-51 for a discussion of these assumptions. Sometimes these goals may be in conflict. For example, some statutes are ineffective as written and require executive or judicial policymaking to make them work. In these cases legislators want judicial policymaking to occur, as long as it is confined to the scope of the legislature's authorization. See *infra* text accompanying notes 53-64.

Second, the legislative process also suggests the weight legislators want courts to place on different sources of information. For example, legislators want statements made during the legislative process to command substantial weight if the legislature as a whole has had the opportunity to review and challenge them.⁴

Because legislators jealously guard their policymaking authority, they want courts to carry out clear commands with the minimum policymaking judgments necessary. If legislative commands were always clear, statutory interpretation would be (relatively) easy. However, like any speaker who relies on the imprecise medium of language, legislators' statements are frequently unclear. Nevertheless, legislators want courts to give effect even to somewhat unclear commands. If courts did not interpret unclear commands, much legislation would go unenforced, and the legislature would be faced with the continual need to revise and clarify legislative enactments.

The notion of an "unclear" command is itself difficult to pin down. From the legislators' perspective, a limited degree of uncertainty is not a license for judicial policymaking. Like any speaker, legislators want listeners to be cautious and to take into account the legislators' prior actions when interpreting their statements. Reliance on presumptions can help avoid erroneous interpretations because it allows the interpreter to evaluate the meaning of legislative commands in light of the interpreter's subjective "prior probability" that the legislature would adopt a particular policy. These "prior probabilities" can be based on a variety of considerations, but they must be faithful to legislative values and preferences. The justification for relying on presumptions is strongest when they are based on a well-established pattern of legislative behavior. If legislators have acted consistently, they will probably continue to act that way.

Some legislative commands remain genuinely unclear to the judiciary even after they have considered valid presumptions and attempted to clarify the legislators' intent. In these cases, a court may fairly question what the legislators want done. This article argues that legislators want courts to implement ambiguous legislative command by considering extra-legislative values. To guard against unrestrained and subjective judicial policymaking, however, legislators want courts to confine their reliance on extra-legislative

4. See *infra* text accompanying notes 94-108.

values to those that have been validated by a majoritarian process. Thus, legislators only want courts to rely on extra-legislative values that have a claim to being "law".

The article proceeds this way: Part II summarizes the justification for the principle of legislative supremacy. Part III discusses the relationship between legislative supremacy and statutory interpretation. Part IV introduces the idea of a legislative conception of legislative supremacy. Part V discusses the relationship between legislative values and statutory interpretation. Part VI considers how legislators are likely to view legislative commands. Part VII addresses the general problem of uncertain legislative commands and discusses the relationship between probability theory and the use of presumptions. Finally, Part VIII discusses judicial reliance on extra-legislative values in cases of "true ambiguity" — when legislative commands remain unclear even after a broad inquiry about meaning and reliance on appropriate presumptions. The Appendix explains how probability theory, particularly the Bayes theorem, can be used to illustrate some of the issues raised by unclear commands.

II. THE RATIONALE FOR LEGISLATIVE SUPREMACY

Although there are difficulties in defining legislative supremacy, the core of the principle dictates that courts should respect and apply policy decisions of the legislature. There are two bases that justify such a principle. The first is positivist in form — courts should respect legislative supremacy because this respect is required by the Constitution.⁵ The second is normative in form — courts should respect legislative supremacy because society will be better off if they do.

A. The Positivist Argument

At least a certain conception of legislative supremacy is inherent in the constitutional scheme.⁶ Within limits, Congress may

5. "Positivism" is used here to mean a belief in law as a set of rules to be obeyed apart from the morality of the rules. See Wolfgang Friedmann, *LEGAL THEORY* 257 (5th ed. 1967) ("The separation, in principle, of the law as it is, and the law as it ought to be, is the most fundamental philosophical assumption of legal positivism."); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 599 (1958) (asserting positivists would agree that a rule which violates moral standards is still a valid rule).

6. See *TVA v. Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its dele-

delegate its policymaking power to the other branches,⁷ but the judicial branch may not usurp the policymaking power on its own.⁸

The positivist argument, based on the Constitution's allocation of powers among the branches, only goes so far. Congress has the power to make social policy in many areas, but its constitutional grant is neither unlimited⁹ nor exclusive¹⁰ in most areas. Yet, when Congress exercises its Article I "legislative powers,"¹¹ the text of the Constitution,¹² the intent of the Framers¹³ and the Supreme Court's interpretation of the role of Congress all support the conclusion that the Constitution requires courts to defer to Congress's supreme policymaking authority.¹⁴

gated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought."); Farber, *supra* note 1, at 283; Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *YALE L.J.* 71, 76 (1984) (suggesting that the judicial branch will not openly ignore a law except in the infrequent circumstance where the law is unconstitutional). *Cf.* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 *U. CHI. L. REV.* 1, 9 (1985) (discussing the Supreme Court's role in determining how much a legislature's lawmaking ability can be exercised by the federal courts).

7. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("We also have recognized . . . that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches.").

8. See Felix W. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527, 533 (1947) (admonishing judges to serve the limited function of interpreting the laws that the legislative has created); Max Radin, *A Short Way With Statutes*, 56 *HARV. L. REV.* 388, 395-96 (1942) (asserting that while courts sometimes disregard common law or custom, they do not openly ignore a valid statute).

9. Of course, the most significant check on congressional supremacy is the Constitution itself. This article discusses only the exercise of Constitutionally-authorized legislative power and the interpretation of constitutional statutes.

10. Congress probably has exclusive authority to act only in a narrow range of decisions, such as exercise of the impeachment power and, perhaps, the power to tax. See JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 85-88 (1978) (positing that the Framers gave legislative powers exclusively to the most representative of the three branches because they thought that Congress' political responsiveness would assure fairness and legitimacy); see also Farber, *supra* note 1, at 283.

11. U.S. Const. art I, § 1.

12. See Farber, *supra* note 1, at 293 n.57 ("At the federal level, the supremacy principle gains added authority from the supremacy clause, which makes valid statute 'the supreme law of the land.'").

13. See *THE FEDERALIST* No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (asserting that court should avoid exercising its own "WILL instead of JUDGMENT" and "substitut[ing] [its own] pleasure to that of the legislative body"), cited in *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in the judgment).

14. This article discusses principally the United States Congress and its relationship to

B. The Normative Argument

The second argument for legislative supremacy is a normative one, based on a realistic understanding of the political process. Elected representatives are politically accountable. Judges with life tenure are not. Members of the legislature are chosen in a highly political process in which the public has an opportunity to hear the policy positions they support and the general social values they will attempt to advance. If the public is dissatisfied with their elected representatives, they can remove them at the next election. Judges, at least federal judges, are chosen in a much less political way, and the public has no direct role in their selection or removal.

The public's indirect role in selecting judges — voting for a President who nominates judges they prefer or voting for a Senator who refuses to confirm judges they do not prefer — is highly attenuated. Judicial nominees rarely make their views known to any significant degree, even on their approach to constitutional interpretation, and almost never on general social policy. On rare occasions, a prospective judge's views on matters of constitutional interpretation have become widely known and have played a role in confirmation.¹⁵ Though rare, these occasions can be highly significant, and they allow for some political accountability in the selection process, but only very indirectly.¹⁶ Even if there is some

the federal court system. Most state constitutional schemes are similar and, thus, analogous principals typically (though not necessarily) apply. In some respects, the different procedures of state legislatures suggest different considerations in regard to some of the arguments. See *infra* note 87 and accompanying text.

15. The nomination of Judge Robert Bork to the Supreme Court led to extraordinarily probing hearings regarding the nominee's substantive views on constitutional theory. The historical tradition has been quite different. See, e.g., Ronald D. Rotunda, *The Confirmation Process of Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 559-62 (1988). The unusual circumstances of the nomination, particularly Bork's extensive written exposition of his views prior to the hearings, facilitated a more substantive inquiry. The subsequent hearings on the nominations of Anthony Kennedy, David Souter and Clarence Thomas suggest that the Bork hearings may have been unique.

16. The accountability is indirect because the President, who nominates, and the Senators, who confirm, are held accountable at the polls, not the judge. Professor Ackerman has argued that the judicial nomination and confirmation process itself can represent a form of popular law-making which can even serve to justify a reinterpretation of the Constitution. See Bruce A. Ackerman, *Essays on the Supreme Court Appointment Process Transformative Appointments*, 101 Harv. L. Rev. 1164, 1172-73 (1988). Whatever the legitimacy and significance of such transformative moments, they are far too infrequent to serve as a basis for a conclusion that judges are politically accountable in a direct and

accountability in the selection process, the absence of political accountability in removal puts judges in a far different posture from elected representatives.

Political accountability is only the first step in the argument, of course. Judges might be less politically accountable, yet better at making social policy.¹⁷ While the normative argument for legislative policymaking is based on formidable notions of accountability and majoritarianism, the argument for judicial policymaking is based on disturbing observations about how the political process really works.¹⁸ While there are well-recognized flaws in legislative policymaking,¹⁹ there are two fundamental risks in judicial policymaking. First, judicially-derived policies may be anti-majoritarian, that is, at odds with the values of the majority. Second, judicially-derived policies lack the legitimacy that comes from majoritarian control. While judicial policies are not necessarily anti-majoritarian, they are at least non-majoritarian and, therefore, their

substantial way.

17. It can be argued that judges have some advantages in making policy. See, e.g., William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PENN. L. REV. 1007 (1989). According to Professor Eskridge:

Public values thinkers believe that the dialogue by which public values are articulated is best performed by the courts, not just by the legislature. This belief reflects disappointment in the legislature's ability to carry on a sustained dialogue as much as it reflects faith in the courts. Modern political science scholarship depicts the legislature as typically paralyzed and unable to take constructive action; when it does bestir itself to enact laws, they are typically feeble compromises or worse, unprincipled doles to special interest groups Courts have the ability to contribute more substantially to the politics of values because their independence reduces the inertia and interest group pressure of everyday politics, and because their open, reasoned and incremental decisionmaking assures a more rational discussion of public issues.

Id. at 1016 (citations omitted).

18. There are several different critiques of the legislative process. Public choice theorists point to the irrational results of decision rules and the effects of economic incentives on political outcomes. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1965); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCIENCE (1971). A more traditional criticism focuses on the power of special interests and the unseemly aspects of lobbying. For a summary of criticisms of the political process, see William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 334-35 (1990).

19. Legislatures provide a good vehicle for exploring abuses. Campaign contributions, special interest lobbying and irrational decision rules are largely open to public scrutiny. Judicial decision-making, by its nature, is more closed to public view and assessment. Personal biases and unseemly intra-judicial bargaining, to the extent they affect opinions, are hidden from view. The openness of the legislature's flaws is part of the reason it suffers by comparison.

legitimacy is suspect.

An extensive body of scholarship argues for the frank incorporation of extra-legislative or "public" values in judicial interpretation.²⁰ By incorporating public values into their interpretation of a legislative command not communicated clearly by the legislature, courts can eliminate the worst excesses of the legislative process. Raw pluralism can be remolded to reach results which more closely resemble the Madisonian ideal of policies that advance the broad public interest.²¹ There is a powerful appeal in the notion that unjust, special interest and irrational legislation can be reformed by courts. The great weakness in all public values analysis, however, is that values not communicated by the enacting legislature do not have the imprimatur of majoritarian approval.²² Public values are open to the criticism that, depending on their source, they rest on a lower plane of legitimacy.²³ Public values may appear to have majoritarian approval if they reflect a broad social consensus, but there is often more than one public value implicated in resolving any interpretive problem. If they point in different directions (which they often do), judges must balance one against the other, assigning weights to each.²⁴ Like the values themselves, the

20. See, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 24-27 (1988); Eskridge, *supra* note 17; William N. Eskridge & Philip R. Frickey, *Legislation Scholarship & Pedagogy in the Post Legal Process Era*, 48 U. PITT. L. REV. 691, 694-701 (1987); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 454 (1989).

21. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 30-31 (1985) [hereinafter *Interest Groups*]; Eskridge, *supra* note 17, at 1072-73.

22. Public values scholars themselves recognize this weakness. See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 910 (1987) ("The chances are all too great that 'public values' would simply correspond with the judge's favored political program."); Eskridge, *supra* note 17, at 1083-84 (discussing cases that suggest "the greatest danger of public values analysis in statutory interpretation is that it will be decisively influenced by the political preferences of the Justices, who are subject to biases that are hard to defend in a modern democracy." (citations omitted)).

23. See *infra* notes 223-30 and accompanying text.

24. As an illustration of the difficulty, Professor Eskridge lists 25 different extra-legislative "values," (by my count), which were incorporated into the statutory interpretation in a small sampling of cases. Eskridge, *supra* note 17, at 1095-1104. Professor Sunstein suggest 29 basic public values (as well as five over-arching principles for reconciling conflicts among them) for interpreting modern regulatory statutes. Sunstein, *supra* note 20, at 507-08. Just as the old canons of statutory interpretation were shown to be contradictory, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950), a laundry list of public values inevitably contains values that, although worthwhile in themselves, point in opposite directions in particular cases.

weights they apply, which are frequently critical to the result, will still have no majoritarian approval.

The case for turning to extra-legislative values is most persuasive when the legislative command is unclear.²⁵ When legislative commands are unclear, public values can function as a "tiebreaker," tipping the scales to a more desirable result.²⁶ However, the notion of an "unclear" command is itself an aspect of a complete conception of legislative supremacy.²⁷ In particular, if a court too easily concludes that a command is unclear, it may turn to public values without really trying to discern the legislature's policy.

Courts that rely on extra-legislative values cannot depend upon the legislature to specifically approve of and legitimate their decisions. Thus, they must turn elsewhere to legitimate these values, but where? The law itself — the Constitution, other statutes and the common law — provides the most reliable source.²⁸ However, when a statute is constitutional, the circumstances under which courts should turn to values derived from other laws are unclear.²⁹ A search for "inherently" legitimate values beyond the Constitution or other laws provides even less help.³⁰ Values derived from the

25. See Eskridge, *supra* note 17, at 1065 ("While public values can readily be defended in those cases where the text and legislative history are ambiguous, their invocation to trump a clear text and supportive legislative history would be inconsistent with legislative supremacy.")

26. *Id.*

27. See *infra* text accompanying notes 126-45.

28. See Eskridge, *supra* note 17, at 1018-61; see also *infra* text accompanying notes 223-30.

29. See *infra* text accompanying notes 223-30.

30. The search for fundamental values almost inevitably begins with an attempt to answer the shortcomings of utilitarianism. See H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 829, 830, 829-31 (1979) (suggesting that the utilitarian ideal of the greatest good for the greatest number denigrates the individual and her pleasure to that of the aggregate, and thus "may license the grossest form of inequality in the actual treatment of individuals"). Ambitious attempts to construct theories of fundamental rights and values tend to fall into three categories depending upon whether the principal emphasis is placed on liberty, equality, or the free market values of wealth maximization and efficient allocation of resources. For an example of a liberty-based system, see ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 333-34 (1974) (positing that the utopian minimal state respects individual rights and allows individuals to choose their own life and realize their own ends, aided by the cooperation of others). For an example of an equality-based system, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180-82, 271-78 (1977) (asserting that men and women possess a fundamental right to "equal concern and respect."). Both of these systems are evaluated in Hart, *supra*. Scholars emphasizing the benefits of market outcomes claim that a freely functioning market not only enhances liberty but is superior to utilitarianism in advancing social welfare. See, e.g., RICHARD A. POSNER, *ECONOMICS OF JUSTICE* 48-115 (1981) (arguing that acts and institutions are good if "they maximize

legislative process have a strong claim to legitimacy, if only because no other source of values has a stronger one.

C. Summary

Taken together the positivist and the normative arguments for legislative supremacy are powerful, but they are not unassailable. Even if the claim that the Constitution grants supreme policymaking authority to the legislature is accepted, the validity of a positivist claim to command respect for the Constitution is not self-evident. One must also make the underlying normative assumption that the legal system generating the law is itself legitimate.³¹ Even if majoritarian values have a stronger claim to legitimacy than non-majoritarian values, "legitimacy" might not matter, or at least might not be dispositive. Religious traditions, the common law, the free market, and even wise judges' personal moral views might lead to a fairer, or happier or "better" society. Like positivism, majoritarianism is not self-validating.

Since neither the positivist nor the normative claims for legislative supremacy can be proved conclusively, at least not soon enough for judges with a backlog of opinions to write, it is impossible to prove whether legislators or judges are better policy makers. The whole exercise of defining legislative supremacy threatens to collapse into a debate over the morality of the American legal system or the inherent values of a good society. To develop a conception of legislative supremacy, some working assumptions must be accepted. For purposes of this article there are two. The first assumption is that as a nation we are bound by the Constitutional grant of policymaking authority to Congress. This policymaking au-

the wealth of society"). Some versions of utilitarianism however, advance welfare in a way that is superior to market outcomes. See e.g., Herbert Hovenkamp, *Legislation, Well-Being and Public Choice*, 57 U.CHI. L. REV. 63, 68-74 (1990) (suggesting that while the market approach examines a policy's effects in society's wealth, money is an inadequate surrogate for determining social utility, individual satisfaction, and consumers' well being). Of course, no consensus exists concerning any of these systems of values. Even if a consensus emerged, each system offers only the most general answers to particular problems of statutory interpretation.

31. See H.L.A. HART, A CONCEPT OF LAW 195-206 (1961) (discussing the imposition of morality into the determination of legal validity). "What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny." *Id.* at 206.

thority is not exclusive but, when Congress is acting within constitutional bounds, it is supreme. The second assumption is that values derived by the majoritarian institution of a legislature are presumptively more legitimate than values derived in a non-majoritarian way by courts. Once these unverifiable assumptions are made, the positivist and normative arguments make a powerful case for legislative supremacy. While these rationales for legislative supremacy illuminate the principle's meaning, they do not settle the question of what legislative supremacy is.

III. STATUTORY INTERPRETATION AND LEGISLATIVE SUPREMACY

There are three basic modes of statutory interpretation: 1) textual interpretation; 2) analysis of legislative intent; and 3) incorporation of extra-legislative values. This categorization emphasizes the differences among complete theories of interpretation advocated by individual jurists or scholars. In fact, any complete theory of interpretation relies on all three modes of interpretation at one time or another.³² However, competing theories of interpretation do tend to emphasize a particular mode: 1) textualism emphasizes an analysis of the statutory text;³³ 2) intentionalism emphasizes inquiry into the intent of the enacting legislature;³⁴ and 3)

32. Even a committed textualist like Justice Scalia occasionally relies on extra-legislative values. *See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529 (1989) (Scalia, J., concurring in the judgment) (turning to "the policy of the law in general and the Rules of Evidence in particular" to help justify an interpretation of Rule 609(a)(1)); *see also infra* text accompanying notes 234-49 (discussing the Court's analysis of *Bock Laundry*).

33. Textualism here is used synonymously with reliance on a "plain meaning rule." One of the leading advocates of textualism, and certainly the most influential, is Justice Scalia. His approach to interpretation is developed in a series of opinions. *See, e.g., Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment) (criticizing the Court's "exhaustive investigation of the legislative history" in light of the plain meaning and structure of the Immigration and Nationality Act); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, J., concurring in part and concurring in the judgment) (criticizing the Court's method of interpreting "pattern of racketeering activity" in a RICO action); *Green v. Bock Laundry Mach. Co.*, 490 U.S. at 528 (Scalia, J., concurring in the judgment) (resorting to extraneous materials, including the background and legislative history of the rule, to avoid an "absurd, and perhaps unconstitutional, result"). Another advocate of textualism, though in a somewhat modified version, is Judge Easterbrook. *See* Frank H. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533 (1983). For a general discussion of textualism, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

34. A leading proponent of intentionalism is Judge Posner. *See, e.g., POSNER, FEDERAL COURTS*, *supra* note 1, at 286-93. Posner suggests a version of intentionalism that at-

public values analysis emphasizes incorporation of values into the interpretive process, even if these values were not communicated by the enacting legislature.³⁵

There is little dispute that textualism, or reliance on the "plain meaning" of the statutory text, constitutes a distinct and identifiable approach to interpretation. Though somewhat less clearly, intentionalism is also distinct and identifiable. But a problem remains characterizing the wide variety of other systems of interpretation. For purposes of this article all approaches that emphasize substantial reliance on values other than those communicated by the enacting legislature are combined into a broad category of "public values analysis."³⁶ "Purposivism" falls more naturally into intentionalism or public values analysis depending on whether the legislative purpose to guide courts in interpretation is viewed as the

tempts "imaginary reconstruction," or recreation of the legislators' attitudes and desires at the time of enactment. *Id.* at 286. Posner's is not the only version of intentionalism. *See, e.g.,* Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988) (arguing that only a theory of interpretation based on intentionalism is consistent with legislative supremacy, but that modifications are necessary to resolve the ambiguities of intentionalist analysis).

35. Others have suggested a different categorization of systems of interpretation. Professors Eskridge and Frickey say that the modern "foundationalist" theories of interpretation have been: 1) intentionalism ("the actual or presumed intent of the legislature enacting the statute"); 2) purposivism or modified intentionalism ("the actual or presumed purpose of the statute") and 3) textualism ("the literal commands of the statutory text"). *See* Eskridge & Frickey, *supra* note 18, at 324. They reject these three approaches and propose a fourth, which they call "practical reasoning." *Id.* at 345-83. Professor Shreve identifies three traditional approaches: intentionalism, plain meaning and political interpretation. Gene R. Shreve, *Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and Will*, 66 IND. L.J. 1, 3 (1990). He rejects these approaches and proposes a fourth, which he calls "pragmatism." *Id.* at 37.

36. The practical reasoning of Eskridge and Frickey surely fits this definition. *See* Eskridge & Frickey, *supra* note 18, at 383-84 ("We do believe that the Court's approach to resolving issues of statutory interpretation is largely grounded in practical reasoning, and thus that the Court's technique is consistent with other twentieth century trends, such as pragmatism." *Id.* at 383.) Shreve's pragmatism also fits this definition. *See* Shreve, *supra* note 35, at 37 ("Pragmatism concerns itself with results, with the instrumental effectiveness and interaction of . . . [intentionalism, plain meaning, and political interpretation] . . . in particular applications."). Other scholars also emphasize the incorporation of public values into statutory interpretation to one degree or another. *See, e.g.,* Sunstein, *supra* note 20, at 476-93 (suggesting that, to counteract statutory failure, courts should interpret statutes to take into account "certain general goals, which include, above all, the effort to promote accountability and deliberation in government, to furnish surrogates when both are absent, to limit factionalism and self-interested representation, and to further political equality."); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 590 (1988) (positing that statutory interpretation is a collaborative effort between the legislature and the courts).

actual purpose of the legislature, or as a judicially-constructed purpose based on extra-legislative values.³⁷

Central to the differences among alternative approaches to statutory interpretation is the meaning and significance they ascribe to legislative supremacy. Textualists, intentionalists and public values advocates, in fact, might agree that Congress has supreme policymaking authority in the areas in which Article I authorizes Congress to act. Yet this common starting point conceals radically different conceptions of legislative supremacy. An expansive conception of legislative supremacy, for example, would preclude courts construing statutes from relying on any values other than those endorsed by the enacting legislature.³⁸ Such a broad conception of legislative supremacy appears highly deferential to legislative authority. However, such an expansive conception of legislative supremacy is too rigid and impractical since it could preclude judicial policymaking even where the legislature attempted to delegate such authority to the courts.³⁹ It might also prevent courts from relying on presumptions about legislative policies, even if legislators would favor courts taking them into account.⁴⁰ Finally, a broad conception of legislative supremacy might force courts to declare statutes unenforceable even if the statutes were only slightly unclear.⁴¹ One vision of the narrowly constrained court, con-

37. Under the traditional formulation of the legal process approach, courts turn to the purpose of the statute when the legislative command is unclear and assume that the legislature had a reasonable purpose in mind. See 1 WILLIAM BLACKSTONE COMMENTARIES 60. Blackstone advised:

As to the *subject matter*, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his directions to that end As to the *effects and consequences*, the rule is, that where words bear either none, or a very absurd signification, if literally understood we must a little deviate from the received sense of them.

See also William N. Eskridge, *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 282 (1988) ("The public statements of legislatures . . . are clues to the rational consensus produced in the deliberative process.").

38. Professor Farber suggests a "strong conception" of legislative supremacy that precludes the judge from considering even noncontroversial values, such as stare decisis, "unless the enacting legislature has endorsed [the use of] those values." Farber, *supra* note 1, at 284.

39. See *infra* text accompanying notes 53-64.

40. For example, a court might be precluded from relying on well-established presumptions, such as a presumption against implied repeals of prior statutes or a presumption that a statute should be interpreted to be constitutional, unless the enacting legislature had specifically endorsed the principles. See Farber, *supra* note 1, at 286.

41. See *infra* text accompanying notes 124-35.

forming to a strong conception of legislative supremacy, portrays the court as the "honest agent" of the legislature, obliged to carry out legislative commands faithfully.⁴²

The broad conception of legislative supremacy is contrasted with a very narrow one: courts must not disregard a clear legislative command that is constitutional, i.e., a command that Congress has power to make and that does not violate any other provision of the Constitution.⁴³ However, the court has authority to interpret the meaning and application of unclear statutes. Thus, unlike the "honest agent," the court is a "relational agent," with at least some discretion when dealing with unforeseen contingencies.⁴⁴ The frequency with which the legislature's command is unclear makes a certain amount of judicial discretion inevitable. But how much judicial discretion can be justified because legislative commands are unclear? If courts are free to ignore any ambiguous legislative commands, the weak conception of legislative supremacy would free courts of any obligation to follow the legislature's policymaking authority whenever a command is even slightly "unclear."

One implication of these radically different meanings of legislative supremacy is that strikingly different modes of interpretation can still claim fidelity to the legislative supremacy principle. In fact, few scholars⁴⁵ and virtually no court opinion ever claims (openly) to favor violating legislative supremacy.⁴⁶ While legislative supremacy is central to interpretation, however, none of the

42. See Easterbrook, *1983 Term*, *supra* note 1, at 60 ("Judges must be honest agents of the political branches. They carry out decisions they do not make.").

43. Professor Farber suggests a "weak conception" of legislative supremacy under which "a judge may not contravene [constitutional] statutory directives." Farber, *supra* note 1, at 287.

44. See Eskridge, *supra* note 1, at 326-30. A relational agent is guided primarily by the objectives of the principal, not by the principal's specific directions. "A relational contract is one that establishes an ongoing relationship between the parties over time; it is characterized by open-ended clauses requiring all parties to use their 'best efforts' to accomplish common objectives." *Id.* at 326 (citations omitted). See also Posner, *Legal Formalism*, *supra* note 1, at 189-90 (elaborating on the concept of an honest agent and analogizing courts to a platoon commander in battle who has discretion to deal with unexpected or unspecified contingencies).

45. Professor Dworkin may be an example. Describing an ideal judge, Dworkin writes: "[The judge] interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment. He aims to make the best he can of this continuing story, and his interpretation therefore changes as the story develops." RONALD DWORKIN, *LAW'S EMPIRE* 348 (1986).

46. See *infra* text accompanying notes 53-71.

conceptions described above are adequate. A broad conception of legislative supremacy, precludes policymaking by the courts, risks severe disruption of the legal system, and undermines legislative authority by forcing judges to declare all unclear statutes unenforceable. A weak conception of legislative supremacy leads to expansive policymaking by the courts and introduces extensive reliance on extra-legislative, non-majoritarian values, in the development of social policy. A better view of the judiciary's role in making policy needs a different principle of legislative supremacy, one that is faithful to the supreme policymaking role of the legislature, that reflects, to the extent possible, democratically-derived values, and yet avoids the rigidities and dangers that follow from precluding judicial policymaking. This conception of legislative supremacy will have significant implications for statutory interpretation.

IV. A LEGISLATIVE CONCEPTION OF LEGISLATIVE SUPREMACY

One way to construct a conception of legislative supremacy is to ask, "how would legislators view legislative supremacy and its relationship to statutory interpretation?" The policy-makers' authority to specify how their commands are to be interpreted forms a strong basis for a legislative conception of legislative supremacy. If legislators, acting within constitutional constraints, have supreme policymaking authority, they also have supreme authority to decide how their commands are to be understood. The authority to make the command implies the authority to specify rules of interpretation. A legislative conception of legislative supremacy provides one way to test alternative approaches to interpretation. If a particular approach to interpretation appears clearly inconsistent with what a court could reasonably assume legislators would want, skepticism of the technique rests on solid ground.

It might seem that legislators would favor intentionalism rather than textualism or public values analysis since intentionalism claims to be most respectful of legislative intent. However, there are some competing considerations. Legislators might oppose an approach that elevated selected nuggets of legislative history, unearthed in an "archaeological dig"⁴⁷ of voluminous historical doc-

47. See William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PENN. L. REV. 1479, 1482 n.12 (1987) (attributing the "archaeological" metaphor to Professor T. Alexan-

uments, over a statutory text formally approved by the entire legislature. These considerations might lead legislators to favor some version of textualism. On the other hand, legislators might favor courts incorporating public values into the interpretive process if doing so makes statutes more effective over the long term and avoids forcing repeated reconsideration and elaboration of policy by the legislature. In short, it is not obvious whether legislators would choose textualism, intentionalism, public values analysis or some combination.

An initial problem in devising a legislative conception of legislative supremacy occurs because the legislature does not communicate its general understanding of the Constitution or other general legal principles. In contrast, the Supreme Court can, and frequently does, communicate broad principles of legal theory, including principles of statutory interpretation.⁴⁸ However, the Court's inconsistency in applying the principles it announces detracts from the clarity of the message.⁴⁹ Nevertheless, the Court may communicate principles of interpretation through judicial opinions if it so desires.

Congress, on the other hand, speaks through specific legislation. The official pronouncements it makes are largely embodied in the text of statutes and explanatory materials. It periodically enacts statutes with provisions prescribing specific modes of interpretation,⁵⁰ but it rarely makes an express declaration of its general conception of legislative supremacy or its general preferences regarding modes of interpretation. Moreover, even if one Congress communicated its understanding of legislative supremacy, that con-

der Aleinikoff).

48. The Justices have recently engaged in a vigorous and open debate about principles of interpretation. *See, e.g.,* West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1148 (1991) (defending their holding that "reasonable attorney's fee" does not include expert witness fees and construing the language to fit "most logically and most comfortably into the body of both previously and subsequently enacted law"); Rust v. Sullivan, 111 S. Ct. 1759, 1767 (1991) (agreeing that the language of the statute at issue was ambiguous, the Court deferred to the interpretation of the agency responsible for administering); Public Citizen v. United States Dep't. of Justice, 491 U.S. 440 (1989) (avoiding a literal interpretation of the statutory language in question, the Court sidestepped the constitutional issue in favor of statutory construction based on congressional intent).

49. There is no consensus on the Court about methods of interpretation. Professor Eskridge suggests the Court's membership can be divided by general approach to interpretation. *See* Eskridge, *supra* note 17, at 1074-76.

50. *See, e.g.,* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1991) (providing rules of construction).

ception might be difficult to attribute to other Congresses as well. In short, understanding how legislators view legislative supremacy is largely a matter of making reasonable inferences, rather than conducting an historical analysis of legislative statements.

Deciding which inferences are "reasonable" depends on how we assume legislators view the legislative process and the legislation they enact. In order to avoid an unduly speculative exercise, interpretative assumptions should be made cautiously. The assumptions should be based on a hypothetical neutral legislator who does not have any particular political ideology (other than a healthy respect for democracy and the constitutional system). The ideal legislator would not have any specific legislative goals in mind.⁵¹ Within these constraints, the following assumptions can be made: 1) legislators want statutes to be effective, that is, they want their policies to be implemented in the real world and to have an effect on how society conducts itself; and 2) they want to maximize their policymaking authority and minimize the policymaking authority of the courts. This last assumption also means that legislators want courts to rely to the extent possible on values that the legislature itself would favor, rather than values derived from other sources. Similarly, if courts must weigh competing values, legislators want courts to weigh them in the way preferred by the legislature, rather than some other way. These assumptions point toward an expansive conception of legislative supremacy, but one that does not preclude judicial policymaking.

V. LEGISLATIVE VALUES AND STATUTORY INTERPRETATION

Since legislatures typically do not communicate meaningful rules of interpretation, a legislative conception of legislative supremacy requires courts to make reasonable inferences about rules of interpretation that legislators prefer.⁵² The remainder of this

51. There is a rough analogy to the individuals in Professor Rawls' "original position" who must decide, in advance of knowing their eventual place in society, rules for distributing social wealth. JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1971). Our hypothetical legislator must decide, in advance of knowing his policy preferences, rules for interpreting statutes.

52. See Farber, *supra* note 1, at 318. Professor Farber suggests that courts "can read 'off-the-rack' rules of interpretation into congressional enactments, provided those rules would be favored by rational enacting legislators." *Id.* My argument goes beyond "off-the-rack" rules of interpretation but, like Professor Farber's suggestion, it is based on assumptions about what rational legislators want.

article deals with a few important aspects of statutory interpretation from the legislative perspective. Throughout, the argument depends on the assumption that legislators have two basic values — creating an effective statutory scheme and maximizing the policymaking authority of the legislature. Legislators have other values, in particular, more specific political values, but recognizing these values requires development of a more and more artificial construct of legislative “meta-intent.” Much can be said about legislative preferences for rules of interpretation based on the more cautious assumption that legislators have only these two basic values.

A. Judicial Policymaking

If legislators want courts to minimize judicial policymaking, they must communicate this conception of legislative supremacy clearly. The necessity of this command might seem obvious at first, but it is subject to questions. First, the premise that legislators want courts to minimize policymaking might itself be wrong. Legislators often want courts to engage in policymaking. Legislators often delegate policymaking authority to the courts or to an administrative agency rather than resolve the policy problem themselves.⁵³ The delegation may be driven by political considerations, lack of expertise, or lack of time to resolve specific questions. Whatever the reason, a fair reading of the legislative command shows a policy of delegating a certain degree of decision-making authority to the courts.

The legislature delegates policymaking authority to the courts in a wide range of situations. The delegation may be narrow, as it was in the development of evidentiary rules, or it may be quite broad, as in the case of a “common law” statute.⁵⁴ In the federal courts, Congress legislates with an assumption that the Federal Rules of Evidence will be applied.⁵⁵ However, if no specific rule

53. See *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (“[T]he Court’s opinion demonstrates that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself.”); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (“[P]erhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.”).

54. See *infra* text accompanying notes 60-64.

55. The Rules themselves, approved by Congress, state that they apply generally, with a few specific exceptions. Fed. R. Evid. 101, 1101.

is codified, legislators expect courts to engage in a certain degree of judicial policymaking to establish procedures.⁵⁶ The Supreme Court has frequently developed special procedures to carry out specific statutory schemes. One example is the elaborate array of procedural devices developed by the Court to implement the civil rights laws.⁵⁷ The history of special evidentiary rules in civil rights cases shows that the Court has felt justified engaging in policymaking in this area.⁵⁸ The Court has acted freely to develop specially tailored evidentiary devices for other statutory schemes as well.⁵⁹

Unlike a delegation to an administrative agency, a delegation

56. Even in the absence of statutory authorization, the Supreme Court has stated the courts have certain inherent powers to carry out their responsibilities. *See, e.g.,* *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763 (1980) (impose contempt sanctions on counsel); *see also* *Mediterranean Enters., Inc. v. Sangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (control and manage court dockets); *Ainsworth v. Vasquez*, 759 F.Supp. 1467, 1474 (E.D.Cal. 1991) ("The Court finds the proposed hearings to be well within the magistrate judges discretion under existing authority and practice. Courts possess substantial inherent powers to control and manage their dockets.").

57. The process for proving employment discrimination in different situations has been developed in a series of cases decided over two decades. *See, e.g.,* *Patterson v. McLean Credit Union*, 491 U.S. 164, 186-88 (1989) (proving prima facie case of discrimination and non-pretextual basis for hiring in suits under § 1981); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 645-52 (1989) (establishing prima facie case of discrimination in disparate impact cases under Title VII of the Civil Rights Act of 1964); *General Bldg. Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982) (proving intentional discrimination in suits under 42 U.S.C. § 1981 (1988)); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579-80 (1978) (proving non-pretextual basis for hiring in disparate treatment cases under Title VII); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973) (proving prima facie case of discriminatory animus under Title VII).

58. The Court has sometimes said that conventional rules of civil litigation are to be applied in civil rights cases, *see* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253, (1989), and that the "ultimate" determination of discrimination is not to be treated differently from other ultimate questions of fact. *See* *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983). However, to facilitate the fact-finding process necessary for determining ultimate liability, the Court has repeatedly developed specially tailored procedures as the examples, *supra* note 57, show. *See also* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) ("In order to facilitate the orderly consideration of relevant evidence, we have devised a series of shifting evidentiary burdens that are 'intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.'" (citations omitted)). These special procedures have evolved to deal with the particular problems inherent in proving discrimination, a task the Court recognizes to be "sensitive and difficult." *Aikens*, 460 U.S. at 716.

59. *See, e.g.,* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) (noting that when government seeks "unusual coercive action," special evidentiary rules have been applied in a variety of cases); *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988) (recognizing evidentiary presumption that fraud on the market causes injury to seller or purchaser of securities).

of policymaking authority to the courts is usually implied. Yet, the delegation can be quite broad. Several scholars have suggested that very general, "open-textured" statutes such as Section 1983, the Sherman Act⁶⁰ and the Taft-Hartley Act⁶¹ should be viewed as "common law" statutes, or as statutes requiring judicial "gap-filling."⁶² The broad policymaking authority exercised by the courts to implement these statutes is similar to the authority they exercise to establish and develop the common law. Section 1983, for example, can be viewed as a general tort remedy, which Congress intended the courts to develop as they had developed other common law tort remedies.⁶³

The broad delegation that follows from "open-textured" statutes does not undercut the claim that legislators want courts to follow "clear" commands. Statutes that delegate broad policymaking authority are not clear commands. Instead, they are directives to the courts to resolve some policy questions within the policy parameters set out by the legislature. The duty of a court in these instances consists of identifying the scope of authorization and ensuring that the court's policy decisions are consistent with its authorization. No conflict with legislative supremacy exists in these cases, even if a court engages in broad policymaking. In fact, a refusal by courts to make policy decisions would constitute a violation of legislative supremacy because the court's refusal could undermine the effectiveness of the statute.⁶⁴

60. Sherman Antitrust Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (codified as amended at 16 U.S.C. §§ 1-7 (1988)).

61. Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 62 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-87 (1988)).

62. See, e.g., WILLIAM N. ESKRIDGE, JR. & PAUL P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 291 (1988) (describing the Sherman Act as a common law statute which "may be the occasion for judicial evolution in the common law tradition"); Posner, *Legal Formalism*, *supra* note 1, at 209-12 ("The Sherman Act is a standard instance of a statute that is poorly thought through, that is delivered to the courts in a severely incomplete state, that begs — though it doesn't actually ask — the courts to do they can to make it reasonable."); Sunstein, *supra* note 20, at 421-22 ("courts have inevitably taken the [Sherman] Act as a delegation of policymaking power").

63. The Court has characterized Section 1983 as a "species of tort liability" in favor of persons deprived of federally secured rights. *Carey v. Phipus*, 435 U.S. 247, 253 (1978).

64. A court could refuse to make policy decisions on the ground that the legislature had unconstitutionally delegated its power, but the power of the Congress to ask, even demand, that courts assist it in making policy is now well-established. See *supra* note 7 and accompanying text. The non-delegation doctrine may have some vitality. See *infra*

B. Legislators' Values and the Effect of Statutes

A second basis for disputing the proposition that legislators want courts to follow clear commands is that legislators care only about constituent approval, not about the actual effects of the statutes they enact. Once the legislation is enacted, and the credit for it claimed, the legislators' goal has been satisfied.⁶⁵ In the extreme case, legislators might even benefit politically from passing a statute but benefit personally if the statute is ignored by the courts.⁶⁶ Similarly, they might benefit politically from passing a statute but suffer politically if it is implemented by the courts.⁶⁷ This analysis casts doubt on both the basic legislative goals I asserted earlier — that legislators want to maximize their policymaking authority and make their statutes effective. Constituency approval as a primary value suggests that legislators prefer prestige, job security and the perquisites of high office to the opportunity to shape national policy.

This view of legislators is surely too harsh. Yet, even if it were true, it does not undercut the claim that legislators want statutes to be effective. Ultimately, legislators must care about the actual effects of the statutes they enact because they are held politically accountable for them.⁶⁸ Moreover, legislators do not want

text accompanying notes 182-191 (discussing *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980)). However, the doctrine has only been applied in the context of a supposedly excessive delegation to an administrative agency, not to the courts. Alternatively, a court might claim that a statute is so devoid of standards that it is unconstitutionally vague. This doctrine, applied almost exclusively in the context of a criminal statute, would be applicable, if ever, only in extreme circumstances. See *infra* note 212 and accompanying text.

65. There are competing theories about why legislators do what they do. A single-minded pursuit of re-election is only one possibility. Some political science literature suggests a model that is more complex and more sympathetic to legislators. See the discussion and citations cited in Sunstein, *supra* note 20, at 448. The point of the argument in the text is that the assumption that legislators want their statutes to be effective does not turn on whether their motives are altruistic or selfish.

66. For example, legislators might want courts to ignore a statute reducing salaries for Members of Congress.

67. For example, the legislature might make exaggerated claims that a tax reduction plan will actually raise revenue when they know that, if it is implemented, it will reduce revenues. Legislators would like to get the credit for the tax reduction without the political costs that follow from reduced revenue.

68. For example, even if the courts ignored the salary reduction statute or the tax reduction statute, the public is not likely to forget the legislature's claims. The public is likely to remind the legislators of their claims and demand that they try to accomplish the objectives. On the other hand, if the courts implement the statutes and the effects are

courts consistently "rescuing" them from bad policy decisions. If courts routinely ignored or modified clear legislative commands the role of the legislature would be undermined, perhaps even trivialized. Even if the public was pleased with the revised policy, constituents would not give credit for the policy to the legislators. The legislators' claim that it is important that they be re-elected would be undermined.

Moreover, when a legislature speaks clearly, it expects its commands to be followed. This expectation is solidly grounded on the historical relationship between the legislature and courts since courts virtually never (openly) ignore a clear command. Even opinions which arguably have ignored clear commands,⁶⁹ pay homage to legislative supremacy and claim to be faithful to legislative intent. Decisions that ignore clear legislative text do so with the explanation that the text does not reflect legislative intent.⁷⁰ A court that openly ignored a clear legislative command would be viewed as simply "lawless."⁷¹ In short, as a general matter, legislators are jealously protective of their policymaking authority. They exercise it expecting that their policies will be carried out and that they will be held accountable for the effects of those policies.

VI. WHAT IS THE LEGISLATIVE COMMAND?

A. Introduction

The principle that courts should follow clear legislative commands provides a little help with problems of statutory interpreta-

harmful, the political benefits following passage will quickly be replaced by resentment toward the actual effects.

69. Some cases are cited frequently as examples of the court ignoring relatively clear legislative commands. See, e.g., the discussion of *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), where the Court upheld an Internal Revenue Service regulation denying tax-exempt status to racially discriminatory institutions, in *Eskridge*, *supra* note 17, at 1034-36, and the discussion of *United Steelworkers v. Weber*, 443 U.S. 193 (1979), where the Court upheld a voluntary affirmative action program under the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 703(a), (d), 78 Stat. 241, 255-56 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2(a), (d) (1988)), in *Farber*, *supra* note 1, at 302-06. Nevertheless, the majority opinions in both *Bob Jones*, 461 U.S. at 596-602, and *Weber*, 443 U.S. at 207, claimed to be carrying out congressional intent. The Court in those cases was not necessarily carrying out the intent of the enacting Congress, but claiming that they were.

70. See *infra* note 110 and accompanying text.

71. *Farber*, *supra* note 1, at 293.

tion, but only a little. Even a weak conception of legislative supremacy incorporates the principle that courts should follow a clear legislative command.⁷² An initial problem, however, is how to characterize the legislative command. A textualist would assert that a command is the statutory text.⁷³ The text determines the interpretation even if the legislative history points clearly toward a different result.⁷⁴ The meaning of the words is determined by their use at the time of enactment.⁷⁵ The criticisms of textualism are familiar. Because the words of the text alone can be highly ambiguous, particularly if the interpreter attempts to give them a long outdated meaning, a textualist interpretation can be highly speculative. A court's claim that it is simply carrying out the clear text of a statute can be a subterfuge for the court furthering its own political agenda.⁷⁶

An intentionalist, willing to conduct an inquiry regarding the legislature's intent, would consider reliable indications of intent, such as committee reports and other authoritative legislative materials, in addition to the statutory text. The critiques of intentionalism are also familiar. "Intent" is an artificial construct since the collective intent of all the members of the legislature is meaningless.⁷⁷

72. See *supra* note 43 and accompanying text.

73. See *supra* note 33 and accompanying text.

74. See, e.g., Aleinikoff, *supra* note 20, at 38 (discussing Justice Scalia's "anti-intentionalism"); Easterbrook, *supra* note 33, at 534 (discussing statutory construction and interpretation).

75. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989). (Scalia, J., concurring in judgment). In *Bock Laundry* Scalia wrote:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a different result from the one that these factors suggest.

Id. (emphasis supplied).

76. See Eskridge, *supra* note 33, at 688 (warning against the use of a clear statement rule).

77. See, e.g., Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 87 (1984) ("The meaning of words is not the same as the 'intent' of the writers. Often writers have no pertinent intent or have several intents."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-70 (1930) ("If

The search for the legislature's intent, as a whole, may turn out to be no more than the "archeological excavation of some long-departed historical understanding" with little relevance to current problems.⁷⁸ The search for "intent," no matter how exhaustive, may still fail to resolve the interpretive problem because no clear intent emerges.

Public values advocates are willing to conduct a broad search for meaning. The search takes place in an

ever-widening circle of material — the shared conceptions of how particular words are used at the time a statute is passed, the historical mischief animating (or prompting) the passage of a law, legislative intent to solve a specific problem, more general purposes underlying the statute, and, finally, the background considerations (such as traditional social and political values) affecting the legislature's action.⁷⁹

Public values advocates may remain (or at least attempt to remain) within the outer boundaries of intentionalism by advocating that courts rely on certain values that, although not expressed by the legislature, are, nevertheless, consistent with the unexpressed intent of the legislature, or its "meta-intent."⁸⁰ Alternatively, public values analysis may abandon intentionalism without expressly advocating that courts ignore legislative intent by claiming that historical intent, standing alone, is meaningless⁸¹ or indeterminate.⁸²

has frequently been declared that the most approved method [of interpretation] is to discover the intent of the legislator On this transparent and absurd fiction it ought not be necessary to dwell.").

78. Eskridge, *supra* note 17, at 1072.

79. William D. Popkin, *A Common Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1139 (1989); *see also* Shreve, *supra* note 35, at 9.

80. *See, e.g.*, Eskridge, *supra* note 1, at 332-33.

81. *See* Eskridge & Frickey, *supra* note 18, at 346. ("Hermeneutics suggests that the text lacks meaning *until* it is interpreted A text . . . is not meaningful 'in itself' apart from possible interpreters and their historical contexts."); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 Colum. L. Rev. 609, 664-66 (1990); Popkin, *supra* note 36, at 579.

82. *See, e.g.*, JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 123-24 (1982) ("Context is boundless in two senses. First, any given context is open to further description [Second] any attempt to codify context can always be grafted onto the context it sought to describe, yielding a context which escapes the previous formulation."). For a critique of the indeterminacy thesis, *see* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

B. The Legislative Command and the Legislative Process

A legislative conception of legislative supremacy asks: how do legislators view legislative commands. What information would legislators expect courts to consider in construing them? Legislators would certainly expect courts to begin their inquiry with the legislative text. The enactment process, including the elaborate drafting and amendment procedures, the limitation of legislature-wide approval to the formal text, and the necessity of complying with constitutional requirements to insure validity⁸³ all elevate text to a special and lofty position.

While the text occupies the central position in the overall legislative statement of policy, the legislative process itself shows that legislators want courts to consider other reliable indicators of the legislature's policy. That legislatures spend considerable time and effort in preparing extra-textual statements, explaining the meaning of statutory texts, demonstrates that they want courts to consider them. Legislators prepare these statements not simply to explain statutory meaning to each other, but to explain it to the courts and the public. Committee reports are a historically well-established device for communicating the meaning of statutes.⁸⁴ Similarly, floor debates provide an elaborate record of extra-textual statements.⁸⁵

83. In particular, enactment must comply with the bicameralism requirement of the U.S. Const. art I, § 1, and the presentment requirement of art. I § 7. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (stating that Congress may legislate only through passage of a bill approved by both Houses and signed by the President).

84. See CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 412 (3rd ed. 1982) (describing the contents of the reports as the purposes and scope of the bill, explanations of committee amendments, proposed changes, etc.); ROBERT GOEHLERT, CONGRESS AND LAW-MAKING: RESEARCHING THE LEGISLATIVE PROCESS 412 (1979); NATIONAL ARCHIVES & RECORDS ADMINISTRATION, GUIDE TO THE RECORDS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AT THE NATIONAL ARCHIVES 16 (1989) [hereinafter, GUIDE TO RECORDS]. The report states:

As Congress evolved during the 19th and 20th centuries, increasingly more of the workload was transferred from the floor of Congress to its committees and subcommittees. Published records of committee activity include hearings, both published and unpublished, reports, other documents that committees thought deserved wider circulation, and staff studies.

85. The Constitution requires only that "[e]ach House shall keep a Journal of its Proceedings." U.S. Const. art I, § 5 cl. 3. These journals simply record actions taken, they are not explanations of policy. GUIDE TO RECORDS, *supra* note 84, at 16. In 1833, Congress authorized what appeared to be a verbatim transcription of proceedings. *Id.* at 15. In

Sponsors of bills and amendments routinely introduce their textual proposals with lengthy explanations, which become part of the historical record of the enactment process.⁸⁶ Where a legislature does not rely upon committee reports or recorded debate, its actions suggest legislative support for textualism.⁸⁷ The legislators themselves have chosen to communicate their legislative commands principally through the text of statutes. However, where the legislature formalizes the committee report and debate process, as in the case of Congress, their actions point in the other direction.⁸⁸ A legislative conception of legislative supremacy, then, rejects a textualist approach to interpretation.

A related problem is identifying a legislative conception of "legislative intent." The concept of the subjective intent of all or a majority of a legislative body is both non-sensical and misleading.⁸⁹ Legislators' extensive use of extra-textual statements shows that they do not view "legislative intent" as meaningless. But how do they view it? The legislative process also helps answer this question.

In the case of any particular statute, some members of the

1968, Congress required that the Congressional Record "shall be substantially a verbatim report of proceedings" of Congress. 44 U.S.C. § 901 (1988). In March 1978, Congress provided that remarks not actually delivered on the floor be accompanied by a "bullet" in the margin. GUIDE TO RECORDS, *supra* note 84, at 16. While the record of legislative history can still be misleading (e.g., Members of Congress can edit their remarks and circumvent the "bullet" requirement by delivering only the first sentence of their remarks on the floor), the steps taken by Congress to document its own proceedings are elaborate. Moreover, the clear trend has been toward more complete documentation, not less.

86. For an example of the effects of these explanations, see the extensive discussion of the floor statements explaining the Civil Rights Act of 1964 in *United Steelworkers of America v. Weber*, 443 U.S. 193, 202-03 (1979) (Justice Brennan's majority opinion discussing the statements of Senator Humphrey), and 443 U.S. at 236-38 (Justice Rehnquist's dissenting opinion discussing Senator Humphrey's statements). Although Senator Humphrey was the floor manager, not the sponsor of the bill, he was the principal spokesperson and advocate for the bill in the Senate and, thus, played the same role as the sponsor. See also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523-31 (1982) (extensively discussing the statements of Senator Bayh, sponsor of Title IX of the Education Amendments of 1972).

87. State legislatures vary in the way they record committee action and floor debate and in the significance that state courts are to accord them. See AMERICAN SOCIETY OF LEGISLATIVE CLERKS AND SECRETARIES AND THE NATIONAL CONFERENCE OF STATE LEGISLATURES, *INSIDE THE LEGISLATIVE PROCESS* 63-76 (1985).

88. Both the House and Senate have formal rules regarding committee reports. See Rule XI(1) of the Standing Rules of the House of Representatives and Rule XXVI(7)(b) of the Standing Rules of the Senate.

89. See *supra* note 77 and accompanying text.

legislature will have special responsibility for its development and passage. These members might be the sponsors of the legislation, the committee chairmen, the floor managers or all of these. The other legislators necessarily rely on those members who have special responsibility for drafting and explaining statutory language. Typically, those members who are delegated special responsibility must attempt to reach compromises on disputed points with leaders of the opposition. Failing a compromise, leaders on both sides are responsible for articulating and explaining the meaning of competing proposals prior to a vote by the entire body.

Members who do not take special responsibility for a statute have less familiarity with the specific meaning of provisions of the legislation than the legislative leaders. In fact, the members who are not specifically responsible for a bill may never have read the statutory text or committee reports at all.⁹⁰ Instead, they must rely on the explanations of the members with special responsibility.⁹¹ Members who are even further removed from the development of a specific bill may lack familiarity with some of the specific policies included in the bill. In effect, there are usually a number of categories or "rings" of legislators, ranging from those in the first ring, who have special responsibility for passage of or opposition to an entire bill, to those who become deeply involved in specific aspects of the bill, to those in the outer rings, who are only generally familiar with the basic policies and political dynamics of the bill.⁹² Members less familiar with a bill must have confidence that legislative leaders are fairly representing to them the nature and

90. There is evidence that legislators outside the committee with jurisdiction over a bill, or their staff, focus primarily on the report rather than on the text of the bill itself. WALTER V. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 94 (2d ed. 1984). Even when staff aides read the report, the members themselves may not.

91. See Farber, *supra* note 1, at 290.

92. In the course of enactment of a particular bill, many members of a legislature may become deeply involved in the development of specific aspects of the bill, for example through offering amendments. It is not unusual for dozens of amendments to be offered to a single complex bill. To take a recent example, as the Senate considered the Clean Air Act Amendments of 1989, S. 1630, 101st Cong., 2d Sess. (1990), 60 different Senators offered 131 amendments to the bill. See Daily Digest, 136 CONG. REC. Nos. 20-39 (Mar.-Apr. 3, 1990). While it is likely that only some of these Senators were familiar with the details of the entire bill, each was undoubtedly familiar with his or her own amendment. See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 274-75 (1982) (explaining that if one "assume[s] some unknown fraction of all bills are passed at the behest of politically powerful interest groups, it is not so clear that each member of the legislative majority behind a particular bill has studied the details of the bill he voted for").

parameters of any compromise and, failing a compromise, the political interests who support various positions.⁹³

The process of enacting legislation by relying on members with specialized responsibility suggests that legislators view the legislative "intent" as the policies represented in the statutory text and explained by the legislative leaders for any particular bill. In this sense, legislative "intent" is an objective manifestation of policy.⁹⁴ One might object that the constitutional scheme does not contemplate granting certain members of the legislature relatively greater influence than others. However, there are strong justifications for this result. First, the practical difficulties of developing and enacting complex legislation require that certain members have specialized responsibility.⁹⁵ Second, the members with specialized responsibility tend to change from bill to bill. Over time, a large proportion of the legislature will be extensively involved in taking responsibility for articulating the meaning of statutes.⁹⁶ Sharing leadership makes the delegation of specialized responsibility to individual members more acceptable to the legislature and tends to

93. One argument that legislators will report accurately the terms of the bill, including any compromises, is that the sponsors will have difficulty reaching deals in the future unless the compromise is fairly stated. Posner, *supra* note 92, at 275. A consistent failure to represent accurately the policies of a bill, or a compromise, would undermine a legislator's effectiveness and lead to her replacement as a legislative leader. Committee leaders apparently have built up a reputation of being reliable; the reality seems to be that legislators depend heavily on them. See Farber, *supra* note 1, at 290-91; Farber & Frickey, *supra* note 22, at 950 (noting that public choice scholarship and "longstanding political science understandings of committee power" support the presumption that legislators adopt the intent of committee members on the details of the bill).

94. There seems to be a broad consensus that a search for the meaning of statute should be a search for an objective manifestation of policy, not the subjective understanding of the enacting legislators. See, e.g., Lawrence H. Tribe, *Judicial Interpretation of Statutes: Three Axioms*, 11 HARV. J.L. & PUB. POL'Y 51, 51 (1988) ("I begin by expressing my agreement with Justice Scalia that our search in statutory interpretation, as in constitutional interpretation, must be not for a subjective, unenacted intent but for an objective, enacted meaning of a legal text.").

95. See STEVEN S. SMITH & CHRISTOPHER H. DEERING, *COMMITTEES IN CONGRESS* 225-27 (1990). The committees provide an avenue for decentralization of decisionmaking in Congress that is necessary for Congress' well-being as a decisionmaking authority. The committee system divides issues into reasonable size and scope, providing the opportunity for specialization. *Id.* at 225-26. See also Ronald D. Hedlund, *Organizational Attributes of Legislatures: Structure, Rules, Norms, Resources*, 9 LEGIS. STUD. Q. 51, 80-81 (1984) (discussing specialization).

96. For example, during July 1991, nine significant bills passed the Senate. In addition to the involvement of the Senators who sponsored the bills, a total of 221 amendments were offered to these bills by 73 different Senators. See Daily Digest, 137 CONG. REC. Nos. 103-117 (daily eds. July 8, 1991 through July 29, 1991).

equalize the influence of all members.⁹⁷

The process of enactment shows that legislators want courts to consider extra-textual statements in deriving the meaning of a statute. But what information would legislators want courts to consider? As the interpretive process moves from the text to other indicators of intent — committee reports, statements of sponsors, post-enactment history, historical context of enactment, the broad legislative purpose — the weight accorded these indicators by courts changes. Such a process obviously has great potential for arbitrariness and inconsistency.⁹⁸ Legislators, like courts, are wary of free-wheeling uses of legislative history. We should assume that legislators want courts to consider primarily statements that are adopted by the majority or that represent explanations by legislators with specialized responsibility for enactment. From the legislative perspective, these statements are reliable because the legislature as a whole has had an opportunity to review and respond to them.⁹⁹

Reliable statements certainly include reports by committees with formal delegated responsibility for legislation. Congress, like any complex institution, can function efficiently only by dividing tasks among subgroups and delegating authority to them in specialized areas.¹⁰⁰ These subgroups, the congressional committees, are essential for Congress' formulation and consideration of complex legislation. One function of the committee system is to prepare written statements explaining legislation. Committee chairs from the majority party and ranking members from the minority party are responsible for preparing reports about legislation that represent the views of both the majority and minority.¹⁰¹ These committee

97. Even so, there is no doubt that some members have more influence than others, even over the long run. To the extent that this greater influence is based on formal delegation of authority, e.g., a committee chairmanship, the members of the legislature have themselves approved the delegation. See SMITH & DEERING, *supra* note 95, at 119-20, discussing methods of choosing committee leaders and the influence of leadership posts.

98. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 200-06 (1983) (reflecting on her experience as a former congressional liaison).

99. See Eskridge, *supra* note 33, at 681 (arguing that the traditional approach to consideration of legislative history has some legitimacy since legislative history is "created within the legislative process, and subject to legislative reaction and correction").

100. See *supra* note 95 and accompanying text. See also WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 146-47 (7th ed. 1989) (discussing the importance of congressional committees as a matter of administrative necessity stemming from the complexity variation of legislation and the need for policy specialization).

101. See, e.g., Rule XXVI(7)(b)-(c), Standing Rules of the United States Senate, 102nd

leaders are accountable to the Congress as a whole. A regular failure to explain legislation correctly or to misrepresent its meaning would undermine the committee system and presumably result in a replacement of the committee leaders.

While the legislature as a whole is ordinarily willing to accept the meaning attributed to legislation by committee leaders, the legislature relies on a number of additional safeguards of the reliability of these reports. For example, leaders of the opposition are responsible for reviewing the report of the majority and for calling attention to any points in the report that conflict with or weaken the majority's argument. Frequently, during floor debate, opponents of a bill point to passages in a report that are arguably inconsistent with the text of the bill or with the sponsor's statements.¹⁰² Committee leaders must defend the report or risk either losing votes or having the legislation amended on the floor.

Frequently, in order to build a majority, proponents of legislation will engage in explanatory colloquies negotiated with potential opponents of a bill to assuage concerns about statements in the report.¹⁰³ These techniques help insure the reliability of a report by allowing legislators to review and respond to the statements in the report before the floor debate.

There are similar safeguards of reliability in the statements of sponsors, which are viewed as authoritative and which are susceptible to attack on the floor by opponents.¹⁰⁴ Opponents of legisla-

Congress (requiring each committee to keep a record of committee action and to provide the minority and individual members the opportunity to include separate views).

102. See, e.g., 135 CONG. REC. S10,768 (1989) ("[Senator Harkin] better read his committee report, because it says [persons who are HIV positive] are covered.") (statement of Senator Helms in debate regarding who is covered by the Americans with Disabilities Act); 135 CONG. REC. S10,765-85 (reporting extensive discussion of the definition of "individuals with disabilities" with frequent reference to committee report).

103. A colloquy negotiated with a potential opponent of legislation has a higher degree of reliability than a "friendly" colloquy between two supporters of a bill. In the case of the negotiated colloquy, the potential opponent has challenged the proponent's position and a revised explanation of policy may be necessary to achieve a majority. For an interesting example where a key Senator responded to a colloquy of House members when he watched the House proceedings on television, see Steven F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 423 n.136. In contrast, the "friendly" colloquy occurs between two supporters of a bill, each of whom has an incentive to extend the reach of the bill. If other legislators have no practical way to challenge the explanation, it is less reliable. For example, a friendly colloquy may be inserted into the record without having been read on the floor. See William S. Moorehead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A. J. 1314 (1959).

104. Sponsors' statements traditionally have been accorded weight in statutory interpre-

tion frequently point to statements by the sponsors to clarify certain matters or to point out inconsistencies or weaknesses in the proponents' case for the legislation. Similarly, debates on specific amendments are highly reliable since leading opponents and proponents of legislation will normally participate in the debate. Of course, there are times amendments are passed when the normal safeguards do not hold, e.g., amendments adopted by voice votes when only a few members of the legislative body are aware of the amendment.¹⁰⁵ However, in these cases, the failure of any safeguards accompanies the enactment of the text as well as the legislative history. Thus, the claim that a particular meaning reflects the views of the legislature as a whole is no stronger for the text than for the legislative history. In short, legislatures have self-regulatory procedures for insuring reliability of extra-textual explanations of statutory text. When these explanatory statements meet Congress's own standards for insuring reliability, a court has a strong basis for relying on the statements.

Conversely, legislators would not want courts to rely on statements that are unreliable because the legislature has had no opportunity to review them. Post-enactment statements by individual members are the most obvious example,¹⁰⁶ but even statements made prior to enactment, such as statements by individual members whose opinions are not viewed as authoritative, would be seen as

tation because other legislators view the sponsors as knowledgeable, and because other legislators rely on the sponsor's explanations of the legislation's policies. *ESKRIDGE & FRICKEY, supra* note 62, at 735. In *International Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987), Judge Buckley wrote a forceful concurrence arguing that legislative history should be given little weight. *Id.* at 715-20 (Buckley, J., concurring). The text addresses one of his more persuasive arguments — that legislative history should be given little weight if it is "never subjected to the hazard of rebuttal." *Id.* at 717.

105. Congress traditionally delegates authority to review non-controversial amendments to the "floor managers" of the bill, e.g., the relevant committee chair and ranking member. If these floor managers, who typically represent both parties and, at least nominally, the opponents and proponents of the bill, endorse an amendment, it is put to a voice vote and chamber passage is virtually assured. *See, e.g., Church of Scientology v. IRS*, 484 U.S. 9, 16-17 (1987), where this process is discussed in connection with an amendment to the Tax Reform Act of 1976. The Court declined to give a broader meaning to the amendment than was stated by the sponsor of the amendment on the grounds that, had a different meaning been intended, floor debate and a roll call vote would have occurred. *Id.* at 17.

106. The Court has occasionally given weight to post-enactment statements by individual members. *See, e.g., Bankamerica Corp. v. United States*, 462 U.S. 122, 132 (1983) (statement by Representative Patman); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 531 (1982) (statement by Senator Bayh).

unreliable by legislators.¹⁰⁷ In these cases, the legislature has no procedure for challenging the accuracy of the statements except in time-consuming, largely extraneous debate. To a limited extent, Congress has adopted a procedure for precluding these unreliable statements from having weight in the interpretive process.¹⁰⁸ In general, however, it is impractical for Congress to prevent individual members from making statements that purport to be authoritative, both before or after enactment, or to communicate to the courts what weight such statements should have. Courts must infer what weight the legislature as a whole wants them to place on such statements.

C. The Role of Purpose

Justifying the use of legislative history when the legislature has clearly attempted to explain the meaning of an ambiguous term in the statutory text is straightforward. The relevance of broad statements of purpose is more perplexing. A statement of the "purpose" of the legislation, i.e., the policy objective, is not necessarily tied to any text. The purpose of a particular statute can be stated very generally and can reflect a number of objectives that seem to point in opposite directions. Nevertheless, courts conventionally take purpose into account in interpreting a textually ambiguous statute,¹⁰⁹ and, in some instances, when the text appears clear.¹¹⁰

107. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. at 526-27, for a traditional formulation of the weight to be given statements by individual members. "Although the statements of one legislator made during debate may not be controlling . . . , Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *Id.* (citations omitted).

108. In 1978 the Government Printing Office, at the direction of the House and Senate, began using black dots or bullets to mark statements not made in person on the floor. See *supra* note 85.

109. A traditional formulation is stated in *United States v. Public Util. Comm'n of California*, 345 U.S. 295, 315 (1953) (citations omitted):

Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion. And that method of determining congressional purpose is likewise applicable when the literal words would bring about an end completely at variance with the purpose of the statute.

110. The Court explained the use of purpose where the text seems unambiguous in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (citations omitted):

[I]n rare cases the literal application of a statute will produce a result demon-

How would legislators view the use of purpose in statutory interpretation? In particular, how would legislators view the elevation of a purpose over a clearly stated text?

The textualist argument that the "words of the statute, and not the intent of the drafters, are the law"¹¹¹ would not be convincing to legislators. Just as any speaker elevates her intended meaning over the literal words she utters, legislators would elevate their intended meaning over the words of a statute. In the simplest case, for example, legislators would insist that their policy not be determined by an obvious mistake in drafting.¹¹² However, legislators might have a competing concern. To the extent courts felt justified in ignoring clear legislative text in favor of a purpose the court had found in the statute, the result might be less respect for legislative intent, not more. Therefore, legislators might gladly accept occasional enforcement of a drafting error over free-wheeling use of purpose by courts.

Despite the risks that follow from courts turning to purpose, there are a number of factors that suggest legislators still want courts to do so. This may be true, even to the point of elevating the purpose of legislation over the most obvious meaning of the statutory text. First, the atmosphere in which legislation is drafted is often "harried and hurried."¹¹³ In the frequent case of last-minute compromises, the actual drafting of text may take place in a highly condensed time period, compared to the lengthy period during which the legislative history has developed. A realistic view of the legislative process suggests that the text will frequently not capture the policy a legislative majority has adopted. Legislators would insist — "Consider the process!" — if a court was determined to enforce the literal language of a provision even when the record of the provision's development pointed clearly toward another

strably at odds with the intentions of its drafters, and those intentions must be controlling. We have reserved some "scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute.

111. Easterbrook, *Original Intent*, *supra* note 1, at 65.

112. In fact, courts generally do not implement a statute so as to give effect to an obvious drafting error. See *In re Adamo*, 619 F.2d 216, 222 (2d. Cir. 1980), *cert. denied*, 449 U.S. 843 (1980) ("The result of an obvious mistake should not be enforced, particularly when it overrides common sense and evident statutory purpose." (quoting *United States v. Brown*, 333 U.S. 18, 25 (1948))).

113. See *Shine v. Shine*, 802 F.2d 583, 587 (1st Cir. 1986) (commenting on the atmosphere in which the final version of a statute was drafted).

er meaning.

Second, it is no comfort to legislators that the courts would adopt the literal meaning of a text over inconsistent statements of purpose on the grounds that the text is more likely to be faithful to legislative intent.¹¹⁴ Courts can be free-wheeling in use of text, too, perhaps even more than if they are obligated to take extra-textual statements into account. A suspicion that courts will exploit the ambiguity of the textual language to advance a particular political agenda only heightens the fear.¹¹⁵ Third, a refusal by courts to examine legislative purpose, or more broadly, any legislative history, makes legislating very difficult. A refusal of courts to turn to extra-textual statements of purpose imposes additional costs on the legislature, forcing legislatures to spend substantial time correcting and clarifying legislation.¹¹⁶ No speaker wants to spend all day clarifying her statements because the listener refuses to consider any information that bears on meaning other than the words of the speaker at that moment.

Even though legislators want courts to look to purpose, they want courts to be cautious. Broad statements of purpose, like other extra-textual statements, are more reliable when made by members with specialized responsibility for enactment. First, they are subject to challenge and revision since they become part of the enactment debate. Second, because legislators know that courts will consider the asserted purpose when they interpret the statute, the legislators have a strong incentive to challenge or revise asserted purposes that conflict with the policies they support. A judicially inferred legislative purpose is inherently less reliable because it is not conveyed by express statements. Legislators cannot rebut or review an unstated, theoretically implied purpose because it does not become part of the legislative debate surrounding enactment.

D. Post-Enactment Developments

How would legislators want courts to take account of post-enactment history in interpreting legislative commands — for example, the failure of the legislature to reverse an administrative

114. See Aleinikoff, *supra* note 20, at 31-32.

115. There is no particular reason to suspect that textualism facilitates bending text in the direction of any political philosophy. The ambiguity of text does suggest that it facilitates bending.

116. See Farber, *supra* note 1, at 291; Farber & Frickey, *supra* note 22, at 925-37.

determination? The Supreme Court has frequently considered the failure of Congress to reverse an administrative determination or judicial opinion to be an indication that Congress has "acquiesced" in the interpretation.¹¹⁷ From the legislative perspective, there are three strong arguments against placing too much weight on post-enactment failures to act. First, no legislation is cost-free. Any time the legislature devotes to a particular issue necessarily detracts from attention to be allocated to other issues. A legislator does not want to be in the position of the speaker held to acquiesce to a proposition because she failed to object affirmatively. Thus, the meaning of a failure to reverse an administrative interpretation or judicial interpretation is at best highly ambiguous.¹¹⁸

Second, interpreting a failure to act as an expression of legislative policy tends to equate the significance of inaction with the significance of the original enactment. Yet, the "action" of failing to reverse an administrative interpretation or court decision requires far less time and effort than the elaborate procedures Congress has established to enact legislation, e.g. rules for debate, opportunities for floor amendments, the need for time-consuming hearings, and so on.¹¹⁹ A truncated and unrepresentative process involving a

117. See, e.g., *Grove City College v. Bell*, 465 U.S. 555, 567-68 (1984); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 533-535 (1982); see also Wald, *supra* note 98, at 205 (expressing the author's discomfort with "[t]he Court's extensive use of postenactment legislative history").

118. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); see also Easterbrook, *supra* note 33, at 538-39. But see *Johnson v. Transportation Agency*, 480 U.S. 616, 672 (1986) (Scalia, J. dissenting). In *Johnson*, Justice Scalia noted:

The 'complicated check on legislation,' [citing *The Federalist* No. 62, p. 378 (C. Rossiter ed. 1961)], erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

Id.

119. Often, the only affirmative effort that occurs in the case of a failure to act is that, once members of Congress become aware of the interpretation, an informal decision is made, e.g., by the leadership of the relevant committees, that no action is required. *Patterson*, 491 U.S. at 202-04 (discussing an amendment by Senator Hruska to what eventually became the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending Title VII of the Civil Rights Act of 1964)). The Hruska amendment would have made Title VII the exclusive remedy for employment discrimination, thus precluding an action based on 42 U.S.C. § 1981, the post-Civil War statute under review in *Patterson*. Justice Brennan argued that the failure of Congress to adopt the Hruska amendment, which was passed by the House but defeated by an even vote in the Senate, showed congressional agreement with the view that § 1981 reaches private conduct. *Id.* at 203. Even in the case of such an extensive affirmative effort, however, the legislative

few members, which usually underlies failures to act, falls short of the elaborate and formal process required for enactment. Legislators would oppose the notion that courts allow a subsequent Congress to undo or revise prior actions without complying with the formalities required for enactment.¹²⁰

Third, legislators want to maximize their own policymaking authority, not only in relation to the courts but in relation to future legislatures.¹²¹ From the perspective of any particular Congress, legislators do not want a future Congress to be able to undo their work easily.¹²² Similarly, individual legislators are jealous of their

actions in defeating the Hruska amendment fell short of the requirements for adoption of policy that Congress, or the Constitution, has established.

120. "Congressional inaction cannot amend a duly enacted statute." Patterson, 491 U.S. at 175 n.1. Congress periodically revises its rules for formal enactment. For example, from 1917 to 1975, the Senate rules generally provided for cloture by a vote of two-thirds of the Senators present and voting. In March 1975, the Senate modified the rule to allow cloture based on a vote of three-fifths of the membership. RANDALL B. RIPLEY, CONGRESS: PROCESS AND POLICY 148 (1983). Rule XXII of the Standing Rules of the Senate was modified again in 1986 to reduce the period of post-cloture debate from 100 hours to 30 hours. 132 Cong. Rec. S5367-68 (May 6, 1986). While the process of enactment is still cumbersome, these changes show that Congress can make legislating a less cumbersome task if it wants.

121. No doubt legislators are influenced by the time horizon over which they view subsequent actions. Legislation approved by a substantial majority is unlikely to be viewed much differently by a majority of the immediately succeeding Congress because of the commonality of members. But the Congress of ten years in the future might view things very differently. Occasionally, Congress incorporates a truncated review process to allow a future Congress to undo more easily what the current Congress has done. *See, e.g.*, the Immigration Reform and Control Act of 1986 §§ 101(a)(1)(m)-(n), 100 Stat. 3359, 3370-72 (codified as amended at 8 U.S.C. §§ 1324a(m)-(n) (1988)) (providing for expedited congressional review of policy imposing sanctions on employers depending on findings of discrimination). The rarity of rules allowing a future Congress to take procedural shortcuts, however, is evidence that Congress guards its policymaking prerogatives from modification by future Congresses.

122. *See* Farber, *supra* note 1, at 308 ("[T]he agenda rules and institutional structures that create legislative inertia are themselves fundamental to the workings of legislatures Our legislative process is designed so that laws will outlive the political coalitions that enact them." (citations omitted)). Courts frequently say that a legislature is free to reverse a decision if it disagrees with the court's interpretation. The opportunity for a legislature to correct an erroneous interpretation is a principal rationale for respecting *stare decisis* in the case of statutory interpretation. *See, e.g.*, *Patterson*, 491 U.S. at 172-73 (concluding no justification, such as "growth of judicial or further action taken by Congress" had been shown to overrule precedent). However, it is fair to assume that legislators place a higher value on enacting a policy consistent with their current values than in "correcting" an interpretation to ensure it is consistent with the values of an earlier Congress. Thus, a statutory "correction" most clearly shows that a current legislature disagrees with the policies reflected in the decision, but not necessarily that the interpretation was wrong. The enacting legislature's policy may be just as cloudy to the legisla-

policymaking authority in relation to other legislators or groups of legislators in the same legislative body. While they must accept the authority of the full legislature to undo their work, they generally do not authorize individual members or even key committees to amend a previously enacted statutes.¹²³

VII. UNCERTAIN COMMANDS AND THE ROLE OF PRESUMPTIONS

A. Introduction

Part IV discussed the type of inquiry legislators want courts to make to determine the legislative command. Following such an inquiry, legislative supremacy, as it is conceived by the legislature, requires the court to follow a clear command derived.

However, the notion of a "clear" command remains unclear. No matter how broad or narrow the inquiry into the meaning of the legislative command, a great degree of subjectivity is inherent in deciding when a command is clearly stated. While judges almost never claim that it is appropriate to ignore a clear legislative command, they often disagree as to when a command is clear; what is clear to one judge is unclear to another.

Under a weak conception of legislative supremacy, the existence of genuine uncertainty might be said to "release" the judge

ture reversing the court's interpretation as it was to the court making the "erroneous" interpretation. *See Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1986) (Scalia, J., dissenting).

123. If Congress wants to make such a delegation, it can attempt to do so formally. Of course, its attempts to delegate to a subgroup may be unconstitutional. *See, e.g., Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 957-58 (1983) (delegating legislative veto power to one house of Congress violates bicameralism and presentment requirements of Constitution). At the time of the *Chadha* decision, Justice White asserted that there were about 200 statutes with legislative veto provisions. *Id.* at 967. The express nature of these delegations and their anti-majoritarian, indeed unconstitutional, nature weigh heavily against inferring an implied delegation. In *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), the Court reviewed a claim that construction of the Tellico Dam should be halted because it threatened extinction of the snail darter, a tiny fish, and therefore would violate the Endangered Species Act. *Id.* at 164. One of the arguments against halting construction was that the Appropriations Committee continued to approve funding for the Tellico Dam and believed that the dam could be completed without violating federal law. *Id.* at 189-91. The majority rejected the funding argument on the grounds that the committees with substantive jurisdiction would object if their understanding of statutory policy were undermined by the position of the Appropriations Committee. *Id.* at 189. A broader proposition is that the legislature as a whole would object if its position were undermined by the policy of a single committee.

from any obligation to the legislative supremacy principle.¹²⁴ The case for turning to extra-legislative values is weakest when the legislative command is clear.¹²⁵ Identifying when a legislative command is "unclear" is a crucial part of the interpretive exercise, but it is hard to define precisely when a command is "unclear." Perhaps examining the way legislators view unclear commands will help shed some light on this problem.

B. Indeterminate Legislative Commands

Some scholars would justify broad judicial policymaking on the grounds that the meaning of statutes are often, perhaps always, indeterminate.¹²⁶ The extreme version of the indeterminacy argument undermines even the weak conception of legislative supremacy altogether. If legislative commands are inherently unclear, the obligation of the courts to follow a clear command never arises.

Legislators would, of course, insist that their commands do have determinative content. Otherwise, their policymaking authority would be forfeited at the outset. Legislators must rely on a shared understanding of language and the cultural context of legislative statements for their statements to have meaning.¹²⁷ While judges will play a role in giving meaning to legislative statements,¹²⁸

124. A weak conception of legislative supremacy requires only that courts follow clear legislative commands. See *supra* notes 43-44 and accompanying text. An unclear command, thus, imposes no obligations on courts at all.

125. See, e.g., *supra* notes 25-26; Farber, *supra* note 1, at 292 ("When statutory language and legislative intent are unambiguous, courts may not take action to the contrary. In other words, when legislation clearly embodies a collective legislative understanding, the court must give way, even if its own view of public policy is quite different.")

126. See *supra* note 82 and accompanying text.

127. See STANLEY E. FISH, IS THERE A TEXT IN THIS CLASS? 304 (1980); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 87 (1984) ("Words have meaning only to the extent there is some agreement among a community of users of language.")

128. Professor Fish has developed the idea of a community of interpreters and the importance of the shared understanding of language. See Fish, *supra* note 127, at 304-21. The question is how much "determined" content exists in the statement leaving the speaker. The less "determined" the content, the greater the interpreter's role in giving meaning to the speaker's statement and vice versa. For contrasting views on the significance of the interpreter's role, compare Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982) (arguing for a middle path, in which the interpreter's role falls between a "wholly discretionary" and a "wholly mechanical" role) and Stanley E. Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1326, 1328-29 (1984) (arguing that Fiss' "disciplining rules" designed to guide an interpreter down the middle path, fail because they themselves are in need of interpretation and cannot themselves serve as constraining interpretation).

legislators would claim that the problem of indeterminacy is manageable. The argument against the claim that legislative commands are inherently unclear is based on the assumption that the legislator-speaker and the community of interpreters share the same general understanding of language and values. If this assumption is true, then a text can convey the meaning of the speaker.¹²⁹ Legislators have a strong claim, by virtue of their representative role in the political process, that they are within the political mainstream¹³⁰ and, thus, that they share the broad values and understanding of the community. Moreover, legislators would argue that judges are typically drawn from the same community and, therefore, understand the legislators' language and values. This commonality of values buttresses legislators' insistence that their commands have determinative content.

C. Subjective Determination of Uncertainty

While legislators would insist that their commands have determinative content, it is not easy for a judicial community to agree that a command is clear. If two listeners agree on a single most likely meaning, we know only that they both attach their highest subjective probability to the same possible meaning. If they agree that the meaning is "clear," however, the listeners attach a very low probability to all possible discarded meanings. It is much more likely that two listeners will be able to agree on a single most likely meaning than it is likely that they will agree there is no significant probability attached to any other possible meaning.¹³¹

The traditional intentionalist response to uncertainty about the legislative text is to derive the legislature's intended meaning from legislative history. An intentionalist judge is not likely to declare the statute "unclear" without consulting these additional legislative materials. However, as the interpretive exercise moves from the text itself to other indicators of intent, such as committee reports and floor statements, the problem of uncertainty may recur and

129. This proposition is not particularly susceptible to proof one way or the other, but for a good argument against critics of this assertion, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462, 476-84 (1987) (suggesting that those who attack language for not being up to the task of formulating rules that have determinate applications rely on flawed philosophical and linguistic arguments).

130. Farber, *supra* note 1, at 292 n.54.

131. See Appendix, Analysis I.

actually grow. First, the extra-textual materials themselves may be unclear.¹³² Committee reports can be ambiguous, and reports of Senate and House committees may be inconsistent. Statements of individual members of Congress may be ambiguous or inconsistent with statements of other members. The purpose of the legislature may be unclear, or there may be conflicting purposes. As the interpretive exercise moves to consider other indicators of intent, the potential for judges to disagree about whether these other sources of information produce a "clear" meaning may only increase.

The second reason these extra-textual materials may not solve the problem of clarity is that there may be disagreement on how much reliance or weight should be attached to them. A textualist may place no weight on legislative history. Another judge may give some to weight to committee reports but little weight to contemporaneous statements by individual members or post-enactment developments, and so on. A simple example illustrates the problem of judges trying to reach agreement on clarity. Assume that each of two interpreters has the same minimum threshold for clarity of eighty percent, i.e., each is willing to state that the meaning is clear if she believes there is an eighty percent chance that one meaning is the "true" meaning. Assume also that, after consulting the statutory text, the judges agree on the most likely meaning but further agree that this most probable meaning is only seventy percent likely based on the text alone. They decide to consult the legislative history, including the committee reports and statements of the sponsors. They then agree that the legislative history supports the most likely meaning and that there is a ninety percent probability that they are interpreting the legislative history correctly. Yet, they may still disagree that the interpretation supported by the legislative history is "clear" if they place a different weight on these secondary legislative materials.¹³³

Agreeing about uncertainty is difficult because subjective judg-

132. See *United Steelworkers of America v. Weber*, 443 U.S. 193, 229-30 (1979) (Rehnquist, J., dissenting) ("In most cases, [l]egislative history is . . . more vague than the statute we are called upon to interpret." (citing *United States v. Public Util. Comm'n*, 345 U.S. 295, 320 (1953) (Jackson, J., concurring))).

133. For example, if the first judge decides that the legislative history should be given equal weight with the text, the judge would conclude that there is an 80% chance that the most likely meaning is true: $.5(70\%) + .5(90\%) = 80\%$. However, if the second judge believes that the legislative history deserves only half as much weight as the text, she may conclude that there is now a 76.7% probability that the most likely meaning is true: $(2/3)(70\%) + (1/3)(90\%) = 76.7\%$.

ments are occurring at several different points in the interpretive process — assigning probabilities to a meaning based on the text alone, assigning probabilities to the meaning reflected in the legislative history alone, and assigning some weight to different sources of information about meaning.¹³⁴ As the sources relied upon to determine meaning expand, even more subjective judgments are involved and the chances for disagreement increase.

The general problem of uncertainty and the significant role of subjective assessment suggest two propositions. First, there is no prospect for devising specific rules to guide judges in their determination of uncertainty.¹³⁵ The inherent subjectivity in determining when a statute, or a statute and its explanatory extraneous material, are “clear” means there must be a powerful element of good faith in judicial interpretation if legislative supremacy is not to be undermined. Second, there is almost always some degree of uncertainty in the meaning of a legislative command. Legislators would insist that courts carry out their commands in the face of some uncertainty about them. If courts insisted on a very high degree of certainty, few legislative commands would meet the test because there is *some* inherent ambiguity in all statutory language and contextual explanations. Legislative authority would be undermined by the futile search for absolute certainty. Thus, from the legislative perspective, a “clear” command need only meet some reasonable level of certainty. If courts respect legislative supremacy only when they are “certain” about the legislature’s policies — i.e., the court believes that there is virtually a 100% probability that a particular meaning is the “true” meaning — legislative supremacy will be largely undermined.

D. Probability Theory and Unclear Commands

When courts declare that a statute is unclear, they sometimes

134. See, e.g., *Regan v. Wald*, 468 U.S. 222, 237-39 (1984). In *Regan*, a five member majority of the Supreme Court interpreted the plain language of the Trading with the Enemy Act to allow the President to bar travel to Cuba. *Id.* Four dissenters (Justices Blackmun, Brennan, Marshall and Powell) believed the language was not “plain.” *Id.* at 255 (Blackmun, J., dissenting). A unanimous court of appeals had found the language was plain, but they had reached the opposite result of the Supreme Court majority. *Wald v. Regan*, 708 F.2d 794, 796 (1st Cir. 1983) (invalidating presidential ban on travel to Cuba), *rev’d*, 468 U.S. 222 (1984).

135. See Farber, *supra* note 1, at 291. (“[I]t is hard to state a mechanical rule to determine disobedience. The ultimate question is whether genuine doubt exists about the meaning of the legislative command.”).

mean that, even if the legislative statements seem reasonably clear, their inconsistency with prior assumptions about the legislature's likely policy reduces the probability that the statements' most obvious meanings are the intended meanings. The concept of interpreting statements in light of prior assumptions is a very common one. For example, it applies in everyday conversation when listeners interpret statements in light of their knowledge of the speaker. It applies when courts interpret statutory text in light of the actual purpose of the legislature.¹³⁶ It applies when courts interpret a legislative command in light of prior assumptions about the likelihood that the legislature would adopt a certain policy.¹³⁷

It is helpful to use a simple analytical model to see how the probability of one meaning is related to a prior assumption that a speaker intends that particular meaning. Bayesian probability theory provides a method to adjust a prior subjective probability that a sample observation is drawn from a particular population by taking into account a sample observation drawn from that population.¹³⁸ In the table below, we assume that the most obvious meaning of a statement points toward meaning A. For example, the statement might be statutory text alone or the statutory text as explained by the legislative history. We also assume that there are grounds for a prior assumption that the legislature would probably intend something different, meaning B. For example, meaning B might be a well-established policy that the legislature would presumably follow. The table shows how the probability of meaning A or B depends upon the clarity or strength of the statement pointing toward meaning A as well as the strength of the prior assumption pointing toward meaning B.¹³⁹

136. See *supra* note 109 and accompanying text.

137. See *infra* notes 150-54 and accompanying text.

138. Bayesian reasoning and the formulas for adjusting prior probabilities are discussed in the Appendix, *infra*.

139. The table and the probabilities used in calculating the odds shown in each cell are explained more fully in the Appendix, Analysis III, *infra*.

Table I. Posterior Odds of Meaning A or B
Clarity of Statements
Pointing Toward Meaning A

Prior Odds of Meaning B	Weak	Moderately Clear	Very Clear
Weak	Even	Moderate for A	Strong for A
Strong	Weak for B	Even	Moderate for A
Very strong	Moderate for B	Even	Weak for A

Table I can be used to illustrate how the odds that the most obvious meaning of a legislative command is the intended meaning should be adjusted in light of prior subjective probabilities about legislative policy.¹⁴⁰ It can also be used to illustrate how the odds that the most obvious meaning of a statutory text is the intended meaning should be adjusted in light of other indications of legislative intent, including legislative history and the actual legislative purpose. A number of general principles emerge from the table. If a legislative statement points in the same direction as the prior assumption, the court can have a high degree of confidence that its prior assumption is correct. A very strong prior assumption leads to the conclusion that a weak or only moderately strong statement pointing in the opposite direction should still be interpreted consistently with the prior assumption. Under certain circumstances, the resulting odds do not point clearly in either direction, i.e., the result is ambiguous. The reference to "even" odds in the table means odds which are less than 2:1 in favor of either mean-

140. The Table shows relationships, not precise quantitative measurements. Changing the probabilistic assumptions, which are arbitrarily chosen in the first place, shifts the odds toward A or B in every cell in the matrix. See Appendix, Comments, *infra*. For example, using the same formula for revising prior probabilities, the assumption of a super-strong command, e.g., a sample in which 10 of 10 observations point toward meaning A, leads to the conclusion that the odds are strong for A even if the prior odds in favor of B are very strong. Any reasonable set of probabilities, however, produces the same basic relationships. In some cases, a prior presumption that is sufficiently strong will offset a legislative statement pointing in the opposite direction. A sufficiently strong legislative command will offset a strong prior presumption. In some situations, the meaning of the legislative command will be ambiguous.

ing. For example, if the prior odds of B are strong and the legislative statement pointing toward A is moderately clear, the result is ambiguous.¹⁴¹

Basic notions of probabilities are frequently employed by courts (though, of course, without any explicit reference to probability theory). The relationship of a weak statement and a strong prior probability of purpose is reflected in the notion that a very clear purpose can justify ignoring the most obvious meaning in favor of a meaning that is consistent with the legislature's actual purpose.¹⁴² The relationship of a weak statement and a strong prior probability about the legislature's likely policy is reflected in the notion that the legislature will be presumed to have retained a well-established policy unless it speaks particularly clearly in reversing it.¹⁴³ The relationship of a strong statement pointing toward one meaning and a very strong prior probability that the legislature would not intend such a meaning is the underlying rationale for the idea that a clear text should be ignored if the resulting policy is "bizarre" or "absurd."¹⁴⁴ A legislative conception of supremacy supports such contextualized interpretations because they avoid erroneous interpretations and distortions of the legislature's meaning, which would undermine legislators' authority. Like any speaker, legislators hope listeners will be cautious, i.e., take prior probabilities into account, before concluding that a legislature has taken an unexpected or unusual action.

It follows from Table I that courts can make two kinds of errors using prior probabilities — incorrectly estimating the

141. The actual posterior odds favor B by a ratio of 1.33 to 1. See Appendix, Analysis III.

142. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, and those intentions must be controlling."); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941)).

143. See *infra* notes 150-54 and accompanying text.

144. See *Public Citizen v. United States Dep't. of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring) ("There is, of course, a legitimate exception to this rule, [that a clear statute binds courts] which the Court invokes, and with which I have no quarrel [w]here the plain language of the statute would lead to 'patently absurd consequences' . . ."); *United States v. American Trucking Ass'n., Inc.*, 310 U.S. 534, 542-43 (1940) (rejecting literal definition of "employee" which would lead to absurdly narrow application of the statute); see also *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) (every member of the Court agreeing that a rule of evidence enacted by Congress meant something other than the most obvious meaning of the words of the rule). The case is discussed *infra* notes 234-49 and accompanying text.

strength of the prior probability and incorrectly evaluating the "strength" or clarity of the legislative command. If the prior probability is so strong that the legislature cannot "draft around" it no matter how clear the legislative command, the court risks distorting the legislature's policies.¹⁴⁵ As suggested by Table I, a strong prior assumption should be rejected if the legislative command is clear enough. When the court rejects a clear command based only on a weak or moderately strong presumption that the legislature would act differently, the court abandons the effort to advance legislative policies and substitutes its own policies in their place.

E. The Role of Presumptions

Judicial reliance on presumptions is analogous to the use of prior probabilities. Use of presumptions can be consistent with legislative supremacy by reducing the risk of erroneous interpretations. However, some typical presumptions are consistent with legislative supremacy; some are not. From the legislative perspective, one of the most justifiable uses of presumptions is that the legislature is likely to continue a well-established policy. For example, the court may presume that Congress would not preempt state law,¹⁴⁶ create an antitrust exemption,¹⁴⁷ or provide that support

145. For example, the Court in *Johnson v. Robison*, 415 U.S. 361 (1974), interpreted a 1970 amendment to the Veterans' Benefits Act of 1957 (codified at 38 U.S.C. § 211(a) (1988)). The Court found that the amendment did not preclude judicial review of veterans' disability cases despite the fact that the language of the amendment seemed to convey a policy clearly precluding review. "[The] decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision." *Id.* at 369. Nevertheless, the Court relied on a presumption that Congress would not preclude review to conclude that the legislative command was ambiguous. *Id.* at 373. Congress had not provided the "clear and convincing" evidence necessary to reverse this presumption. *Id.*

An alternative rationale for the decision was that such an interpretation might be required in order to preserve the constitutionality of the statute. *Id.* at 373. However, the Court has never decided whether Congress may constitutionally preclude all judicial review of administrative actions. See GLEN O. ROBINSON ET AL., *THE ADMINISTRATIVE PROCESS* 241 (3d ed. 1986).

146. See *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) ("start[ing] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

147. See *United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321, 350 (1962) (enjoining the proposed consolidation of appellee banks since the consolidation was in violation of §

payments are dischargeable in bankruptcy.¹⁴⁸ The traditional judicial use of presumptions in these situations is to interpret a statute to be consistent with an established policy unless the legislative command is very clear in reversing it.¹⁴⁹

To the extent that these presumptions are based on the likelihood that the legislature will continue a well-established policy, a legislative supremacy justification for reliance on these presumptions stems from the general problem of uncertain legislative commands. Just as any speaker wants a listener to use certain prior assumptions to avoid an erroneous interpretation, legislators want courts to take into account "customary" or "established" policy in interpreting a command. Thus, the use of a presumption about likely legislative policy must be grounded on some pattern of legislative actions well enough established to indicate that the legislature is unlikely to change it.¹⁵⁰ Such an assumption may be justified in particular cases because legislative action is typically "conservative." It adjusts social policies incrementally and in discrete areas.¹⁵¹

7 of the Clayton Act); *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962) ("Immunity from the antitrust laws is not rightly implied.").

148. See *Shine v. Shine*, 802 F.2d 583, 588 (1st Cir. 1986) (holding that support obligations are not dischargeable in bankruptcy).

149. See, e.g., *Philadelphia Nat'l. Bank*, 374 U.S. at 350-51 ("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."); see also *United States v. Bass*, 404 U.S. 336, 349 (1971), (assuming Congress would not disturb the federal-state balance unless "Congress conveys its purpose clearly"). The Court explained in *Bass*, "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* (citations omitted).

150. A more generic traditional presumption is that legislators do not often enact "absurd" or "bizarre" policy. See *Public Citizen v. United States Dep't. of Justice*, 491 U.S. 440, 470 (1989) ("Where the plain language of the statute would lead to 'patently absurd consequences' . . . that 'Congress could not possibly have intended' . . . we need not apply the language in such a fashion. When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for a coequal Legislative Branch, which we assume would not act in an absurd way." (Kennedy, J., concurring in judgment) (citations omitted)). Even if one has a harsh view of legislators, this modest assumption seems fair enough.

151. See WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS* 375 (1989) ("[T]he inherent complexity of some subjects defies exhaustive statutory treatment."); DUANE LOCKHARD, *THE PERVERTED PRIORITIES OF AMERICAN POLITICS* 123 (1971) ("Congress, through its formal rules and its informal practices, is an institution devoted inordinately to the prevention of action."); cf. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law

F. Presumptions that Favor Legislative Authority

Certain other presumptions are consistent with a legislative conception of legislative supremacy because they tend to expand, rather than contract, legislative authority. This notion provides a legislative supremacy rationale for several non-controversial presumptions. For example, legislators want courts to interpret a statute in a way that makes it constitutional.¹⁵² If a court, faced with two possible interpretations, chooses the one that results in striking down the statute, the legislature's policies become completely ineffective. Similarly, legislators want courts to presume that previously enacted statutes are not repealed unless the legislative command to do so is clear.¹⁵³ A court that is too quick to find an implied repeal limits legislative authority exercised in enacting the prior statute. Similarly, legislators want courts to preserve as much of a statutory scheme as possible, even if one section is held unconstitutional, unless the legislature intends that the whole statute be voided.¹⁵⁴ Preserving a part of the statutory scheme allows some of the legislature's policies to become effective.

G. Presumptions as Rules For Interpreting Language

Sometimes courts rely on presumptions that take the form of rules for interpreting language. These may amount to formulas for interpreting words in statutory text, as in the case of the hodgepodge of maxims of interpretation.¹⁵⁵ For example, the principle "expressio unius est exclusio alterius" holds that a statutory provision referring to a series of specific things is intended to exclude

has the burden of showing that the legislature intended such a change." (citations omitted)).

152. This is the traditional presumption. See *e.g.*, *United States v. Harriss*, 347 U.S. 612, 618 (1954); *United States v. Rumely*, 345 U.S. 41, 45-6 (1952); *Screws v. United States*, 325 U.S. 91, 98 (1945).

153. This is the traditional presumption. See, *e.g.*, *Jones v. Mayer Co.*, 392 U.S. 409-10, 416-17 n.20 (1968); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) ("The cardinal rule is that repeals by implication are not favored.").

154. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.").

155. For a discussion of the canons of interpretation, see *ESKRIDGE & FRICKEY, supra* note 62, at 639-646.

alternatives not listed.¹⁵⁶ To the extent that the maxims of interpretation are simply formal statements of common sense devices for understanding language, they may be helpful. Moreover, they can be consistent with legislative supremacy since they reduce the risk of erroneous interpretations. The problem is that the maxims of interpretation may have little relationship to actual legislative practice in drafting statutes.¹⁵⁷ If the legislature's actual behavior is not really consistent with such shorthand formulations, they provide no help and can even be misleading.

H. Presumptions Based on Judicial Policy

Some policy-based presumptions have little or no relationship to prior legislative actions. Instead, they are justified as advancing what the court considers important extra-legislative policy. For example, the presumption that Congress has not abrogated state immunity is based on notions of federalism, the policy of the Eleventh Amendment and the special role of the states in the constitutional system.¹⁵⁸ Such a presumption has the same practical effect on interpretation as a presumption based on a pattern of legislative actions. The court assumes that the legislature acted consistently with the presumption unless the legislature speaks clearly.¹⁵⁹ Another example is the rule of lenity, which can operate as a judicial presumption that criminal statutes should be interpreted narrowly.¹⁶⁰ Again, it operates in the same way as other pre-

156. 2A NORMAN J. SINGER, SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.23, at 194 (4th ed. 1984); ESKRIDGE & FRICKEY, *supra* note 62, at 641.

157. *See, e.g.*, *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 676 (D.C. Cir. 1973) ("This maxim is increasingly considered unreliable . . . for it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen." (citations omitted)).

158. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985) (holding that in order to abrogate the Eleventh Amendment, Congress must express its intention to do so in unmistakable language in the statute itself and discussing the reasons underlying this requirement); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system.").

159. *See, e.g.*, *Atascadero*, 473 U.S. at 242 ("[The requirement is] well established in our cases . . . that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court." (citations omitted)).

160. *See McNally v. United States*, 483 U.S. 350, 359-60 (1987) ("The court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are able to choose the harsher only when Congress has spoken in clear and definite language."); *United States v. Campos-Serrano*, 404 U.S. 293, 298-99 (1971) (when

sumptions, forcing Congress to speak particularly clearly.¹⁶¹ There are a host of similar policy-related presumptions.¹⁶²

A similar principle holds that courts should interpret a statute so that it does not "approach the limits" of Constitutional authority. This notion can have very different meanings. One non-controversial construction of this rule suggests that a court faced with two possible interpretations of a statute, one of which would result in statute being declared unconstitutional, will adopt the interpretation that renders the statute constitutional.¹⁶³ This rule of interpretation is consistent with a legislative conception of legislative supremacy because it preserves the effectiveness of the statute.¹⁶⁴

A very different construction of this principle, however, is that a court will avoid an interpretation that borders on the outer reaches of Congress's constitutional authority even if the statute is constitutional.¹⁶⁵ It is difficult, perhaps impossible, to reconcile this second meaning with a legislative conception of legislative supremacy.¹⁶⁶ Sometimes the Court speaks in terms similar to those used

interpreting criminal statutes, the purpose of the statute must be considered in order to place limits on the actual words of the statute); *Ladner v. United States*, 358 U.S. 169, 177-78 (1958) (stating that when neither the wording of the statute nor its legislative history points clearly to one of two possible meanings, the court applies a policy of lenity); *Eskridge*, *supra* note 17, at 1029-30 (discussing the presumption created by the rule of lenity that criminal statutes should be interpreted to avoid constitutional questions, and in general, should be narrowly construed).

161. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). *See also* *Lewis v. United States*, 445 U.S. 55, 65 (1980) (stating that the touchstone of the principle of lenity is statutory ambiguity).

162. *See* *ESKRIDGE & FRICKEY*, *supra* note 62, at 655-58 (noting many other specific policy presumptions, including the those against finding that Congress violated international law, withdrew all remedies or judicial avenues, or intended to unnecessarily intrude in traditional state responsibilities).

163. Justice Marshall made the original statement of the principle in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

164. *See supra* note 152 and accompanying text.

165. *See* *Eskridge*, *supra* note 17, at 1021-22.

166. The rule has its critics. *See, e.g.*, HENRY J. FRIENDLY, *BENCHMARKS* 211 (1967) (arguing that despite the backing of many eminent Justices, including Holmes, Taft, Brandeis, Hughes and Frankfurter, the rule has "almost as many dangers as advantages" and is "one of those rules that courts apply when they want and conveniently forget when they don't"); Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) ("The practical effect of interpreting statutes to avoid raising constitutional questions is . . . to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Con-

with other policy-based presumptions. Congress must speak clearly if the statute is to be interpreted in a way that "gives rise to serious constitutional questions."¹⁶⁷ The Court assumes that Congress did not intend to enact a policy that encroaches upon constitutionally protected rights in the absence of a clearly expressed "affirmative intention."¹⁶⁸ This analysis ignores the plausible, even likely, possibility that Congress intended to exercise the full reach of its authority, thus pressing against the "limits" of the Constitution. If there were a well-established congressional policy of avoiding legislation that bordered on constitutional infringement, such a presumption might be justified on the grounds that it avoided erroneous interpretations. In the cases where this presumption has been applied, however, it makes little sense to say that there was a well-established policy of any kind.¹⁶⁹

One public values justification for narrowly construing statutes that "approach the limits" of the Constitution is to facilitate a dialogue between the courts and the legislature regarding the Court's understanding of constitutional parameters.¹⁷⁰ In effect,

stitution . . .").

167. *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (citing "cardinal principle" to avoid statutory construction which would render act constitutionally invalid).

168. *Catholic Bishop*, 440 U.S. at 501 ("The absence of an 'affirmative intention of the Congress clearly expressed' fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers."); see also *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) (Blackmun, J., dissenting) (positing that a statute barring use of federal funds for abortion counseling should have been construed to avoid difficult First Amendment issues).

169. It is difficult to claim that there is a well-established policy of congressional concern about pressing against the limits of its authority when Congress does not seem to be concerned by such a policy very often. The more frequently Congress legislates to the limits of its authority, the weaker is the argument that there is any well-established policy. The Court has frequently identified statutes that press against the limits of the First Amendment. See cases cited *supra* note 167; see also *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 574 (1988) (construing the National Labor Relations Act narrowly to avoid considering whether prohibition against handbilling by union workers would violate First Amendment). The presumption that potentially unconstitutional statutory constructions should be avoided has also been applied in other contexts. See *United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982) (interpreting Bankruptcy Reform Act of 1978 narrowly to avoid retroactive application of the law and possible violation of the Takings Clause); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (avoiding Constitutional questions under Fifth Amendment by narrowly interpreting authority granted Secretary of State to prohibit foreign travel).

170. See Eskridge, *supra* note 17, at 1020-22 ("Public values analysis suggests more substantive rationales for the meta-rule: The [sic] Court should assume that Congress is sensitive to constitutional concerns and presumably would not pass an unconstitutional

the argument views the Court as teacher and Congress as the (involuntary) student. While the Court has a legitimate interest in communicating constitutional principles, it is not authorized by Article III to limit Congress's Article I power simply to teach Congress a lesson. This rationale is, therefore, unconvincing.

Another possible way to reconcile the rule with legislative supremacy is to say that the rule advances the values of legislators themselves. For example, it can be argued that legislators, like other citizens, value basic principles such as federalism, participation in the political process, stability in the legal system, and clear notice of criminal offenses. Thus legislators may be presumed to want courts to proceed from the premise that statutes do not conflict with these broader values, even if they are not expressed in connection with specific legislation. Incorporating these presumptions into statutory interpretation, then, is consistent with legislators' "meta-intent." Public values analysis sometimes proceeds this way, perhaps in an effort to avoid an open break with legislative supremacy.¹⁷¹

Identifying legislators' unexpressed values has an intrinsic speculative quality (as this article shows). Cautious assumptions underlie the argument here — legislators want their statutes to become effective and they are protective of their own policymaking authority. One can extend the argument about legislative "meta-intent" much further, of course, but it quickly requires even more speculative assumptions about legislators' particular political values. Moreover, even if we could identify values that seem to command a near consensus, such as stability of the legal system, promotion of equality and enhancement of individual liberty, a number of these values often conflict in any individual case. Thus, constructing a legislative "meta-intent" that includes particular political values poses an increasing risk of simply incorporating judicial values. The weakness of public values analysis — that courts can then justify incorporating their own values¹⁷² — emerges in the form of an artificial construct of legislative meta-intent. From the

statute; by narrowly construing statutes venturing close to the constitutional periphery, the Court can signal its concerns to Congress When Congress fails to proceed in a manner cognizant and protective of such fundamental values, the Court will give the statute a narrowing interpretation, leaving it to Congress to rethink the issue.").

171. See Eskridge, *supra* note 17, at 1065 (stating that public value presumptions can operate as "tiebreakers" in close cases where there are equally good textual and legislative history arguments for different interpretations).

172. See *supra* notes 17-30 and accompanying text.

legislative perspective, then, judicial reliance on policy-based presumptions is much more easily reconciled with legislative supremacy when they reduce the risk of erroneous interpretations or they expand legislative authority.

The justification for a rule of interpretation that avoids difficult constitutional questions ultimately rises or falls based on a judicial value. By avoiding difficult questions, the court can more confidently, and more easily, reach a narrower ground of decision. First, the court has less chance of making a mistake. Second, even though there is still a chance of error, the stakes are correspondingly smaller. Yet, such a rule does not advance any legislative value and it can be used to disregard a reasonably clear legislative command.¹⁷³ Hence, legislative conception of legislative supremacy requires courts to implement clear legislative commands, even if the policies they convey are close to the limits of legislative authority.

I. Some Applications of Presumptions

It is useful to see how courts use presumptions to both interpret legislative commands and, in particular, to adjust the probability that the most obvious meaning of the legislative command is the intended one. For example, the statute reviewed in *United States v. Albertini*,¹⁷⁴ made it unlawful for a person to enter a military base after having been ordered not to reenter by an officer in charge.¹⁷⁵ An officer ordered Albertini not to reenter a base because he and a friend had destroyed government property on the base on a previous occasion. Nine years after the order, he reentered the base during an annual open house and took part in a peaceful demonstration. Albertini was charged with and convicted of violating the statute barring reentry. The Court affirmed the conviction.¹⁷⁶

As I argued above, legislators want courts to do their best to deal with the general problem of uncertain commands by taking appropriate presumptions into account. In this case, the Court was

173. The dissent complained of this result in *NLRB v. Catholic Bishop*, 440 U.S. 490, 511 (1979) (Brennan, J., dissenting), arguing that the majority, in avoiding the constitutional question, had adopted a reading that was not "fairly possible."

174. 472 U.S. 675 (1985).

175. *Id.* at 677.

176. *Id.* at 691.

faced with a relatively clear command criminalizing reentry. However, the most obvious meaning suggested may still be incorrect. The case might be analyzed so as to conclude that interpreting the statute to allow Albertini's prosecution would violate an established congressional policy of protecting freedom of speech.¹⁷⁷ A court might be justified, therefore, in relying on a prior presumption that Congress would retain this policy. In order to test the confidence a court should have in the most obvious meaning of the command — to allow prosecution — the court must evaluate the strength or clarity of the command and the strength of the presumption. Reliance on a presumption in favor of free speech might be enough to overcome a fairly clear statutory text pointing toward barring reentry.

There are two problems with this analysis. First, it is possible to argue that another well-established policy — granting broad discretion to the military to control its own facilities — points in the other direction. Which presumption should be given more weight?¹⁷⁸ Second, even if a *general* policy in favor of free speech or a *general* policy in favor of discretion to the military could be said to be well-established, neither might apply in this *particular* case. There simply is no well-established congressional policy addressing this unique fact situation. The problem is not so much a clash of established policies, but the absence of any established policy under the circumstances.¹⁷⁹

Albertini, thus, fits the category of cases in which there is no (or at most a weak) presumption in favor of a policy favoring freedom of speech and a clear command pointing in the other direction.¹⁸⁰ As shown in Table I, the posterior odds are at least

177. There are other arguments against allowing the prosecution. First, it might be inconsistent with the rule of lenity. Second, interpreting the statute to allow a prosecution might violate the principle of avoiding difficult constitutional questions. Eskridge, *supra* note 17, at 1074.

178. A public values analysis confronts an analogous problem in the *Albertini* scenario. Professor Eskridge points out that "judicial deference to executive decisions on national security matters might be said to be a public value itself" in competition with the value of peaceful protest. Eskridge, *supra* note 17, at 1078.

179. A public values analysis reaches the same dead end. Even if there is both a public value of preserving free speech and a public value in favor of discretion for military commanders, it is difficult to make out any established public value regarding the discretion of military commanders to limit peaceful protest on military installations. *But see id.* (arguing that *Albertini* was decided by pitting two competing public values, free speech and military discretion, against one another).

180. *See Albertini*, 472 U.S. at 689 (allowing speech to be impinged if the burden is

moderately good that the most obvious meaning of the legislative command is the correct one. In the absence of any strong reason to believe that the most obvious meaning of the statute is not correct, the odds are that the obvious meaning is the correct one. This is, in fact, the reasoning Justice O'Connor expounded in reaching the conclusion that Albertini's conviction should be upheld.¹⁸¹

In *Industrial Union Department AFL-CIO v. American Petroleum Institute* ("API"),¹⁸² the statute at issue required the Secretary of Labor to promulgate standards for exposure to toxic materials "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee suffer material impairment of health or functional capacity"¹⁸³ The Secretary was able to conclude that there was a causal connection between benzene and leukemia.¹⁸⁴ Because the secretary could not quantify the risk of any specific exposure level, however, therefore, the Secretary set a standard as low as technologically possible without threatening the "financial welfare of the affected firms or the general economy."¹⁸⁵ On pre-enforcement review, the Court of Appeals "held that the secretary was under a duty to determine whether the benefits expected from the new standard bore a reasonable relationship to the costs that it imposed."¹⁸⁶ The Supreme Court majority found such a cost-benefit analysis unnecessary in this case because no threshold determination of the necessity of the regulation had been made and the Court rejected a construction of the statute that would have given the Secretary "power to impose enormous costs that might produce little, if any discernible benefit"¹⁸⁷

incidental and the regulation is neutral and "promotes a substantial governmental interest"). The *Albertini* Court found not only that the statutory text was clear, but the legislative history, including the relevant committee reports and floor debate, were consistent with the most obvious meaning of the text. *Id.* at 681-82.

181. *Id.* at 680 ("Proper respect for [congressional] powers implies that '[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" (citations omitted)). The Court also rejected the argument that the statute should be construed to avoid difficult constitutional questions because this "interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *Id.* (citations omitted).

182. 448 U.S. 607 (1980).

183. *Id.* at 612 (citations omitted).

184. *Id.* at 618-19.

185. *See id.* at 619, 637 (quoting 43 Fed. Reg. 5939 (1978)).

186. *Id.* at 614.

187. *Id.* at 615, 645.

A legal process approach to analyzing the Court's decision in *API* would explain that the Court assumed Congress' purpose must be "reasonable" and that it would be simply unreasonable to not balance the costs imposed on an industry against the gains in safety.¹⁸⁸ Yet, the statute itself provided a clear statement that the Secretary was to set a standard that minimized risk "to the extent feasible."¹⁸⁹ One could argue that precluding the administrative agency from balancing risk and costs to the industry is wrong-headed legislative policy and, ultimately, more harmful to workers than a standard based on weighing costs and benefits. Nevertheless, the legislative command seems clear.

An approach to interpretation that is more consistent with legislative supremacy assesses whether or not there a basis exists for presuming that Congress would actually implement such a policy, and then to adjust it in light of the clarity of the command. As in *Albertini*, it is difficult to claim that there is any well-established policy that would favor balancing costs to industry and safety. Moreover, a policy to bar balancing is not "absurd" or "bizarre" in the sense in which these terms have traditionally been used.¹⁹⁰ Thus, a presumption that Congress would not intend to force such high costs on an industry is weak at best. The text of the statute in *API* was reasonably clear though not completely unambiguous. Moreover, reliable legislative history showed that minimizing risk

188. Justice Stevens argued for the majority that another more general provision of the statute required some form of cost-benefit analysis before any standard was promulgated. *Id.* at 643-44. This argument would have been more convincing if the specific provision regarding exposure levels had endorsed this analysis. In the end, the majority relied on their own interpretation of how a reasonable Congress would act. "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of [the provisions]." *Id.* at 645.

189. See *supra* text accompanying note 183.

190. The majority found the government's construction of the statute incorrect because it would have made such a "'sweeping delegation of legislative power' that it might be unconstitutional under the [non-delegation doctrine stated in] *A.L.A. Schechter Poultry Corp. v. United States* [and] *Panama Refining Co. v. Ryan*." 448 U.S. at 646 (citations omitted). According to the majority, "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.* Avoiding an interpretation that would result in declaring the statute unconstitutional is consistent with a legislative conception of legislative supremacy. See *supra* note 152 and accompanying text. However, it is difficult to reconcile the claim that such an interpretation would constitute an unconstitutional delegation with the statute's command since a requirement that the Secretary minimize risk grants less discretion than a requirement that the Secretary balance the risks against costs to the industry. Congress might well have wanted to confine, rather than broaden, the Secretary's discretion by imposing such a standard.

was precisely the legislature's goal.¹⁹¹ Overall, the strength of the command probably deserved to be in the clear category. As reflected Table I, a weak presumption and a moderately clear command pointing in the opposite direction leads to a moderately strong conclusion that the most obvious meaning of the legislative statements reflected Congress's actual intent.

The use of presumptions is helpful in determining when a statute should be interpreted to authorize an implied private right of action.¹⁹² The Court has taken different approaches in addressing this problem. In *J.I. Case Co. v. Borak*,¹⁹³ the Court recognized an implied private right of action to enforce section 14(a) of the Securities Exchange Act of 1934.¹⁹⁴ The Court reasoned that private enforcement would supplement the SEC's enforcement authority.¹⁹⁵ Therefore, recognizing a private cause of action could only further the congressional purpose of enacting a strong statute.¹⁹⁶ In effect, the Court equated stronger remedies with a more effective statute. The Court weakened this strong presumption in favor of an implied right of action in *Cort v. Ash*,¹⁹⁷ where it adopted a four-part test for determining whether Congress "intended" that private parties could enforce the statute.¹⁹⁸ Although Jus-

191. In particular, the legislative history reflected a recognition that the Secretary might not be certain which substances were harmful. See 448 U.S. at 691-95 (Marshall, J., dissenting). To mitigate this concern, the statute required that the standard be as low as "feasible." See *id.* at 693-94.

192. The Court has recognized an implied private right of action in numerous opinions. Perhaps the most prominent examples involve civil rights decisions, *see, e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (recognizing private right of action under Title IX of the Education Amendments of 1972, codified as amended at 20 U.S.C. § 1681 (1988)), and interpretation of the securities laws, *see, e.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426, 430-31 (1964) (recognizing private right of action under § 27 of the Securities Exchange Act of 1934 for violations of § 14(a) of the Act); *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971) (recognizing "established" private right of action under § 10(b) of the Securities Exchange Act of 1934).

193. *Borak*, 377 U.S. at 430-32 (denial of a right of action would be tantamount to a denial of a deserved right of private relief).

194. 15 U.S.C. § 78n(a) (1988) (barring solicitation of proxies in violation of the rules of the Securities and Exchange Commission).

195. *Borak*, 377 U.S. at 432.

196. *Id.* at 433.

197. 422 U.S. 66 (1975).

198. *Id.* at 78. The *Cort* test asks (1) if the plaintiff in the class the statute was intended to benefit, (2) whether there is any explicit or implicit indication of legislative intent to create or deny the remedy, (3) if it would be consistent with the underlying purposes of the legislature to imply such a remedy, and (4) whether the cause of action is traditionally relegated to state law so that it would be inappropriate to infer a cause of action

tice Stevens claimed in *Cannon v. University of Chicago*,¹⁹⁹ that the four-part test of *Cort v. Ash* can determine Congressional intent,²⁰⁰ at least three of the *Cort* factors seem to be the Court's own assumptions about what "reasonable" legislators would do.²⁰¹ For a time the Court veered away from *Cort v. Ash* toward a more focused search for "congressional intent."²⁰²

Legislators would agree that the court should go beyond the text of the statute in determining whether a private right of action should be recognized. A clear indication of a legislative purpose to allow private suits would require that courts carry it out even if the text were inconsistent. In the absence of a clear indication of actual purpose, a presumption in favor of a private right of action might help avoid an erroneous interpretation if the presumption reflected a well-established pattern of congressional action. A consistent policy of authorizing private suits to enforce the securities laws might justify a strong presumption that Congress intended to continue such a policy in light of a weak command to refuse to allow private suits. One problem in relying on such a presumption is that there is no well-established pattern of congressional policy. The securities laws vary widely in their remedial provisions; some provide for private actions while others, such as section 10(b) of the 1934 Act, do not.²⁰³ Second, the more frequently a policy is

based solely on federal law?

199. 441 U.S. 677 (1979).

200. *Id.* at 688.

201. Only the second factor, which looks to the legislative history, directly addresses congressional intent.

202. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."); see also *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 812 (1986); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 377-78 (1982). More recently, however, the *Cort/Cannon* analysis has had something of a revival. See *Thompson v. Thompson*, 484 U.S. 174, 179-187 (1988) and *Suter v. Artist M*, 112 S. Ct. 1360, 1370 (1992).

203. Private actions are expressly authorized for several violations of the Act, including § 9(e), 15 U.S.C.S. § 78i(e) (authorizing private actions against manipulators of security prices); § 16(b), 15 U.S.C. § 78p(b) (authorizing a private action by the issuer against an insider who profited from short-term trading); and, § 18(a), 15 U.S.C.S. § 78r(a) (authorizing private actions against any person who files a misleading statement with the SEC). Other sections have no express cause of action, including § 10(b) of the 1934 Act, 15 U.S.C. 378(j), the provision at issue in *Borak*, 377 U.S. 426 (1964), and § 17(a), 15 U.S.C.S. § 78q(a), which requires broker-dealers and others to keep records and file reports with the SEC, the provision at issue in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 562 (1979). This disparity in congressional treatment of various provisions was a factor in the Court's decision not to recognize a private cause of action under § 17(a), 15

contested in Congress, the less likely there is a well-established policy. Congress has been occupied with increasingly political controversies arising over remedial provisions.²⁰⁴

The lack of a well-established policy means there is no legislative supremacy justification for a strong presumption of a policy of private causes of action. At best a weak presumption in favor of private enforcement is warranted. Moreover, a legislative command that does not expressly include a private authorization to sue is at least a moderately clear statement of congressional policy to limit remedies to those set out in the text.²⁰⁵ An express private remedy provided in other provisions of the same statute would result in an even clearer statement. Table I suggests that a weak prior presumption and a moderately clear legislative statement pointing in the opposite direction means that the court can be reasonably confident that the most obvious meaning of the legislative command reflects the true purpose.

There is an inevitable political dimension to this rule of interpretation. Just as those who oppose a regulatory scheme will want the court to construe the scheme narrowly, those who favor the regulatory scheme will want the courts to make the scheme stronger by inferring additional remedies.²⁰⁶ If Congress consistently authorized private actions in a particular area or if concern about the costs of private enforcement were not such an important concern of Congress, a stronger prior presumption in favor of private enforcement might be warranted. Alternatively, if reliable legislative history showed Congress's actual purpose was to authorize private actions, the courts would be justified in interpreting the legislative command in light of the legislative history. In the face of a moder-

U.S.C.S. § 78q(a). *Id.* at 571-72.

204. Three recent examples make the point. See Frank P. Grad, *Remedies for Injuries Caused by Hazardous Waste: the Report and Recommendations of the Superfund 301(e) Study Group*, 14 *Env'tl. L. Rep.* 10,105, 10,105 (1984); Kerry E. Krobelsdorff, *The Fight over New Limits on Damages for Financial Fraud*, *CHRISTIAN SCI. MONITOR*, April 21, 1988, at 10; Cindy Skrzycki, *Civil Rights and Corporations: Executives Fear Hugh Damage Awards as Result of Hiring Bill*, *WASH. POST*, June 13, 1991, at B-11.

205. As a general principle, congressional silence about a policy issue is at least a weak statement that Congress has taken no affirmative action with regard to the policy. Thus, congressional silence about private enforcement is at least a weak statement against a private cause of action since affirmative congressional action is required to create any cause of action. Similarly, congressional silence about preemption of state law probably counts as at least a weak statement against preemption since affirmative congressional action is required to displace state law.

206. See Posner, *Federal Courts*, *supra* note 1, at 293 (1985).

ately clear command against private enforcement and a weak or no presumption favoring it, there is no legislative supremacy justification for courts to go beyond the remedies set out in the legislative command.

J. Summary: Legislative Supremacy and Presumptions

There is an appropriate role for policy presumptions in statutory interpretation under a legislative conception of legislative supremacy. In particular, courts may rely on presumptions to reduce the problem of erroneous interpretation. Like any speaker, legislators want listeners to be cautious before assuming the legislators mean to act dramatically differently from the way they have acted before. The use of presumptions in these cases is justified because it allows courts to revise the probability that the most obvious meaning of a statute is the intended meaning.

A more explicit focus on the use of presumptions is helpful in two ways. First, it illustrates what errors courts can make in interpreting unclear legislative commands. They can place too much or too little weight on a presumption about the legislature's likely policies. They can understate or overstate the strength or clarity of the legislative command. Second, it provides a justification for reliance on extra-legislative values consistent with a legislative conception of legislative supremacy when the command, after considering presumptions, is genuinely unclear. These cases of true ambiguity, where the legislative command is unclear even after a thorough inquiry, and even after the appropriate use of presumptions, is the subject of the next part of the article.

VIII. EXTRA-LEGISLATIVE VALUES AND UNCERTAIN LEGISLATIVE COMMANDS

This part of the article discusses how legislators might view genuinely ambiguous legislative commands. The term "genuinely ambiguous" does not include legislative commands that leave policy decisions to the courts or to an administrative agency to resolve.²⁰⁷ When the legislature enacts a statute delegating policymaking authority, courts exercising that authority do not violate legislative supremacy. Moreover, a court's policymaking can be quite expansive, as in a case applying a common law statute. It

207. See *supra* notes 53-64 and accompanying text.

is possible to characterize this policymaking as “interpretation,” but it is interpretation in the sense that the interpretive task of the court is to identify the parameters within which it can exercise its policymaking authority. The legislative command conveys only the policy parameters within which the courts must make policy; it does not dictate the policy itself. For purposes of this discussion, the category of “genuinely ambiguous” commands also excludes textual statements that are clear only after readers turn to reliable legislative history or the actual purposes of the statute. As argued above, legislators want courts to conduct a thorough inquiry to determine meaning. After such an inquiry, including the appropriate use of presumptions, legislative commands can become clear.

“Genuinely ambiguous” commands are those that fail to resolve certain issues even after a broad inquiry about legislative intent and even after relying on appropriate presumptions. The command can be ambiguous because the legislature failed to foresee a policy question²⁰⁸ or because the legislature did not communicate the resolution clearly. In Table I, for example, we can associate ambiguous legislative commands with the cells in the matrix where the odds pointing in either direction are weak.²⁰⁹ The court has no strong ground for deciding that the statute favors one policy or another based on values communicated by the legislature. This indeterminacy occurs not only in a case where the legislative command is unclear but in situations when a strong prior presumption renders a relatively clear command ambiguous.²¹⁰

How would legislators want courts to go about dealing with genuinely ambiguous commands? One possibility is that legislators are indifferent as to how courts resolve the problem. They put forth their best effort toward resolving all the policy questions that were raised during consideration of the legislation. Now, their policymaking has ended. At the other extreme, the legislature might

208. Like the legislature that is viewed as having a subjective “legislative intent,” the anthropomorphic legislature that “foresees” or fails to foresee a potential policy question is in some way nonsensical and misleading. On the other hand, the notion that a policy question was “unforeseen” is useful shorthand for the idea that no resolution of the policy question can be found based on policies communicated by the legislature.

209. See *supra* notes 139-41 and accompanying text.

210. Table I suggests the result is indeterminate in situations when the prior presumption and the command are of the same strength or relatively close in strength, e.g., a weak presumption and a weak command and a moderately strong presumption and a moderately clear command. In these cases, the strength of the presumption tends to offset the strength of the command, leaving the legislative policy ambiguous.

want courts to refrain from giving the statute effect at all, at least in the case where the legislature failed to foresee that certain questions would arise. This part of the article argues that legislators want courts to give effect to these statutes, but to do so by incorporating, to the extent possible, "reliable" extra-legislative values. These are values that have the status of "law."²¹¹

A. Legislative Preferences and Unclear Legislative Commands

When legislative commands are genuinely unclear, a court has only two alternatives. First, it could refuse to apply the statute.²¹² Alternatively, it must derive at least some of the values from an extra-legislative source and decide what weight to give them. Deciding which values are to be considered and what weight to give to them will typically determine the outcome of the case. Thus, it is a fair question whether the legislature wants the statute to be implemented at all. One way of answering the question is a common sense argument based on legislative motive. Why would the legislature have enacted the statute unless it wanted the courts to

211. Professors Farber and Frickey discuss the problem facing the judge who must decide between various interpretations when the probability of one meaning is very close to the probability of another meaning. See Farber & Frickey, *supra* note 22, at 961-65. This is, of course, another way of saying that the "true" meaning is genuinely unclear. They suggest one way for the judge to proceed: a rational judge should pick the interpretation that maximizes the "payoff," the probability of a particular interpretation multiplied by the consequences. *Id.* at 964. But, what is the payoff? And how is the judge to put a value on the consequences? The argument in the following text relates to this notion in that it suggests legislators want judges to proceed to implement statutes even in the face of substantial uncertainty. A more persistent argument is that legislators want judges to constrain their determination of the "payoff" by relying on values with the legitimacy of majoritarian approval.

212. The grounds on which a court would refuse to apply a statute are not obvious. A court might declare a statute unconstitutionally vague and, thus, violative of due process, but this notion has been applied almost exclusively in the context of criminal statutes. See *Guzzardo v. Bengston*, 643 F.2d 1300, 1304 (7th Cir. 1981) ("No man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."); see also *United States v. Harriss*, 347 U.S. 612, 617 (1954) (declaring statute void for vagueness on due process grounds). Nonetheless, the void for vagueness doctrine applies in the case of civil statutes under some circumstances. "It is true that this Court has held the 'void for vagueness' doctrine applicable to civil as well as criminal actions. However, this is where 'the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all . . .'" *Boutillier v. Immigration & Naturalization Service*, 387 U.S. 118, 123 (1967) (quoting *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239 (1925)). The Court went on to hold that the petitioner's deportation due to his homosexuality pursuant to the federal law was proper. *Id.* at 123. The court reasoned that the statute did not regulate conduct and, as a result, "no necessity exists for guidance so that one may avoid the application of the law." *Id.*

find some way by which the statute could be implemented? If a fair reading of the legislative command is that the court is authorized to resolve the policy issue, that answer has substantial weight. For example, the open-texture nature of common law statutes conveys a broad policymaking authority to the courts.²¹³

In the case where the legislative command does not appear to authorize broad policymaking,²¹⁴ a plausible argument exists that legislators would prefer courts not attempt to resolve ambiguity in order to avoid extensive judicial policymaking.²¹⁵ One problem with this result is that it is decidedly asymmetrical. A refusal by the courts to apply a statute systematically disadvantages those who want to enforce it, or those who are protected by it, while it advantages those who are regulated by the statute. Thus, the effect of refusing to apply statutes is consistently pro-defendant. Nevertheless, legislators might still favor a systematically pro-defendant rule on the grounds that, a priori, there is no way of determining what parties are likely to be favored or disfavored by such a rule of interpretation for statutes in general.²¹⁶

From the legislative perspective, however, there remains a more fundamental problem. While a rule foregoing the implementation of unclear statutes²¹⁷ would preserve legislative policymaking from encroachment by the courts, it also would force the legislature continually to revise and clarify legislative commands in order to address even minor policy questions.²¹⁸ Practical experience with the implementation of legislation shows how frequently truly am-

213. See *supra* notes 60-63 and accompanying text. Examples of "open-textured" statutes include § 1983, the Sherman Act, and the Taft-Hartley Act.

214. For example, the legislative command might specify detailed resolutions of a series of complex policy issues but simply fail to specify a resolution of one particular issue.

215. See Easterbrook, *supra* note 33, at 543-44. Under Judge Easterbrook's rule of interpretation, statutes would not be applied unless the particular dispute arising under the statute is either addressed by the statute directly or the statute creates a "common law power of revision." *Id.* at 544.

216. It *probably* is the case that segments of society whose conduct is regulated, e.g., private business interests, are more likely to be defendants, while groups who have been traditionally disadvantaged, e.g., the poor, the elderly and minority groups, are more likely to benefit from the enforcement of statutes. Such a conclusion is not particularly easy to prove empirically, however. Fortunately, the argument made here does not depend on proving or disproving that conclusion.

217. See Farber & Frickey, *supra* note 22, at 488 (labelling such a rule the "four corners" rule).

218. *Id.* at 488-89 (noting that Congress currently can rely on the courts to resolve any interpretation problems).

biguous commands occur.²¹⁹ Thus, the added burden on legislatures would tend to undermine their effectiveness in general.²²⁰ Taking time to revise previously enacted statutes diverts attention from currently pressing policy issues.²²¹ It drives up the costs of legislating by making the actual task of enacting legislative policy more time-consuming, perhaps impossible in some cases.²²² It precludes a statute having any effect in the meantime, even if the statute was intended to address a pressing social problem.

A more plausible assumption, then, is that legislators want courts to find a way to implement the statute as long as the courts have engaged in a good faith effort to interpret the command. If the interpretation is incorrect, the legislature retains the remedy of revising the statute. Legislative supremacy does not conflict with reliance on extra-legislative values in these cases because the court has tried to resolve the problem by relying on values communicated by the legislature. A court can put the statute into effect only by turning to extra-legislative values as a "last resort."

B. Reliable Extra-Legislative Values

Even at this stage of expansive policymaking by the courts, however, we can assume legislators want courts to be constrained in choosing values upon which to rely. The assumption is that legislators want courts to turn to values that are most "reliable," that is, most likely to command a social consensus, or at least the support of a broad majority. Even though legislative policymaking has, in a sense, been exhausted, legislators are wary of unconstrained and subjective policymaking by judges. Three sources of values, in particular, have a strong claim to reliability: (1) the Constitution itself, including values inherent in the constitutional scheme, such as separation of powers, the stability of the legal system, participation in the political process, and liberty and equality under the law; (2) legislative policies established by other statutes; and, (3) the policies of the common law.

These three sources of values have a strong claim to reliability because they are "law," authoritative declarations of policy by

219. *Id.* at 488.

220. *Id.* (noting that "the 'four corners' rule would have undesirable practical effects").

221. *Id.* at 458.

222. See Farber & Frickey, *supra* note 22, at 958-59 (costs include transaction and monetary costs).

institutions legitimated by the nation to issue them.²²³ Such values do not have the legitimacy of institutionalized majoritarian approval that occurs when a specific statute is enacted. However, they rest on a higher plane of legitimacy than simply the personal values of judges or even broad social values since each of these categories of "law" can claim some aspect of formal majoritarian approval.

Constitutional values in general, of course, have a high degree of legitimacy, superior in a sense even to specific statutes.²²⁴ There are two difficulties in relying on them, however. First, there is inevitable uncertainty in deciding which of the broad range of constitutional values is applicable in a particular case. Second, it is difficult to determine the applicability of a constitutional "value" to a legislative policy that does not actually violate a constitutional provision.²²⁵ Legislators would insist that they have the authority to enact statutes, even if the statute approaches the "limits" of their constitutional authority.²²⁶ Therefore, legislators might insist that no constitutional value is implicated even if a court might view the statute as "encroaching" upon such values.

Legislative policies have legitimacy because a legislature — though not necessarily the one that has enacted the statute that must be interpreted — has affirmatively endorsed them. Thus, the policies have a stamp of formal majoritarian approval.²²⁷ Legislative policies are suspect, however, since there is genuine doubt about how an enacting legislature would want a court to apply legislative policies that might be derived in part by reference to a separate statute, addressed to somewhat different policy issues, and typically enacted by different legislators. Finally, long-standing

223. For an extensive discussion of the justification for incorporating these three sources of values into statutory interpretation, see Eskridge, *supra* note 17, at 1019-61.

224. *See id.* at 1019. According to Eskridge, "[p]ublic values developed from the Constitution have the greatest effect on statutory interpretation. This power partly results from the special coercive force of constitutional values Also, constitutional values have been articulated through a rich tradition of Supreme Court cases and extensive academic . . . theorizing." *Id.*

225. Enforcing a constitutional value beyond the terms of the Constitution itself has the effect of expanding the range of constitutional protections. *See* Posner, *supra* note 166, at 816. Thus, the Constitution itself offers no guidance as to when this "expanded" protection should come into play.

226. *See supra* notes 169-73 and accompanying text.

227. *See* Eskridge, *supra* note 17, at 1036 ("While many statutes are not much more than ad hoc deals, as the economists teach us, other statutes are sources for more enduring values.").

common law values have a certain degree of legitimacy from the legislative perspective since the legislature has not reversed the court-created doctrine.²²⁸ Common law principles present the weakest claim of legitimacy, however, as a result of their non-majoritarian origins. Moreover, the imprimatur of majoritarian approval that might be inferred from legislative inaction is weaker than affirmative legislative endorsement.²²⁹

Thus, while all three of these sources of extra-legislative values have weaker claims to legitimacy than specifically legislative policies specifically endorsed in a statute, these sources are clearly more legitimate than others that do not rise to the level of law. In particular, they are more legitimate than a judge's own personal values of justice. It is a fair assumption that legislators, blind to their own political values,²³⁰ would prefer that courts limit their search for appropriate values to law. Legislators' aversion to expansive judicial policymaking would lead them to oppose a free-wheeling search for values based on the courts' own sense of priorities.

C. Applying Extra-Legislative Values

Assume *arguendo* that the courts in *Albertini* were entitled to rely on a strong presumption that Congress would not limit Albertini's freedom to re-enter the military base years later to engage in peaceful protest. If the assumption were correct, any legislative command pointing in the opposite direction creates ambiguity. In that situation a court may, consistent with legislative supremacy, rely on the strong First Amendment value of peaceful protest to resolve the interpretive problem in favor of precluding prosecution. Alternatively, the court could decide that the most obvious meaning of the command allowing the prosecution should be implemented. Regardless of the court's decision, there can be no violation of legislative supremacy because the legislature has effectively given no guidance at all. In a very real sense, the statute

228. See *id.* at 1051 ("[T]he common law can be used to fill in . . . statutory gaps, unless it is inconsistent with statutory policy.").

229. As a practical matter, many long-standing common law values have been codified. Often a court referring to common law principles would be able to point to affirmative legislative enactments supporting the same policies.

230. Recall the assumption that our hypothetical legislator must decide on rules of interpretation in advance of knowing her political ideology. See *supra* note 51 and accompanying text.

means what the court decides it means.²³¹

A theory of interpretation that justifies this use of extra-legislative values grants enormous discretion to courts. Though expansive, the policymaking is nevertheless constrained by legislative values. First and most importantly, the legislative command, including the actual purpose of the legislature must be "genuinely ambiguous." Second, if the court relies on a presumption, the presumption must be justified based on a legislative value, such as avoiding erroneous interpretations by relying on established patterns of legislative actions. Third, if a court turns to extra-legislative values, the values must be reliable in the sense that they have been legitimated as law. If this theory were applied in *Albertini*, the Court would have reached the same conclusion that the most obvious meaning of the legislative command should prevail.²³² This conclusion results because one or more of the conditions justifying reference to extra-legislative values was not satisfied in *Albertini*. First, since the statutory text was clear and the legislative history was consistent with the most obvious meaning of the text, the legislative command was clear. Second, no well-established policy exists that would justify a strong presumption in favor of peaceful protest in this particular case.²³³

Another recent Supreme Court decision offers an illustration of the legitimate use of extra-legislative values in the case of a truly ambiguous legislative command. *Green v. Bock Laundry Machine Company*,²³⁴ required the Supreme Court to interpret Federal Rule of Evidence 609(a), dealing with the circumstances under which testimony can be impeached by use of the prior criminal conviction of the witness.²³⁵ The text of the rule seemed to allow courts to

231. Similarly, if the court believed that no presumption in either direction was warranted and the legislative command remained ambiguous, the court could look to extra-legislative values to resolve the problem. As a result, the court addressing the *Albertini* facts would be free to rely on either a First Amendment value of peaceful protest or a policy of discretion for military commanders to resolve the ambiguity. Whether the court takes the step of attributing the policy to the legislature as a presumption underlying its command or applies the value without referring back to the legislature, the statute ultimately means what the court decides it means.

232. See *supra* note 183 and accompanying text.

233. See *supra* notes 178-79 and accompanying text.

234. 490 U.S. 504 (1989).

235. *Id.* at 504. See also Randolph N. Jora Kait, *The Supreme Court, Plain Meaning and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 758-59 (1990) (discussing *Bock Laundry* as an example of a court rejecting a literal reading of a statute to avoid an "irrational result").

balance the prejudicial effect of admitting a prior conviction to impeach the testimony of a defendant, but not to impeach the testimony of a plaintiff.²³⁶ In *Bock Laundry*, the defendant used the criminal conviction of the plaintiff, a prisoner on a work-release program, to impeach the plaintiff's testimony in his products liability suit. The trial court allowed the conviction to be admitted, and the jury returned a verdict for the defendant.²³⁷ The Court of Appeals affirmed on the grounds that the rule required admission.²³⁸

The Supreme Court also affirmed the judgment.²³⁹ However, all the Justices concluded that the text of Rule 609(a) did not reflect the rule's meaning.²⁴⁰ Justice Stevens concluded that the rule's actual purpose was to protect criminal defendants, but not the prosecution, from unfair prejudice.²⁴¹ Justice Blackmun argued that the actual purpose was to allow judicial balancing whenever any party could be harmed by the effect of admitting the conviction on the outcome of the litigation.²⁴²

The majority and the dissent turned to extra-legislative values to interpret the rule. Justice Stevens relied upon the settled law of evidence at the time of the adoption of Rule 609, which he con-

236. *Bock Laundry*, 490 U.S. at 509. At the time of the case, the rule provided:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

The rule has now been modified to provide expressly that the court has no discretion to exclude the evidence described in subsection (1) for purposes of impeaching a witness "other than an accused." Fed. R. Evid. 609.

237. *Bock Laundry*, 490 U.S. at 506.

238. *Id.* at 507.

239. *Id.* at 527.

240. Justice Stevens concluded in his opinion for the majority that "[n]o matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to impeach a civil defendant Rule 609(a)(1) 'can't mean what it says.'" *Id.* at 510-11 (quoting *Campbell v. Greer*, 831 F.2d 700, 703 (1987)). Justice Scalia opined that the statute, "if interpreted literally, produces an absurd and perhaps unconstitutional result." *Id.* at 527. (Scalia, J., concurring in the judgment). The dissenters agreed that the rule could not mean what it said. *Id.* at 530 (Blackmun, J., dissenting).

241. *Id.* at 523-24.

242. *Id.* at 532-33 (Blackmun, J., dissenting).

strued to require admission of the conviction.²⁴³ Justice Blackmun turned to a number of extra-legislative values, including the unfairness of permitting an interpretation that would serve as a trap for counsel who relied upon the text of the rule²⁴⁴ and the importance of avoiding "unnecessary hardship," a value which he argued was advanced by extending the protection of the rule to all parties.²⁴⁵ Justice Scalia's concurrence turned to the extra-legislative values of the "policy of the law in general and the Rules of Evidence in particular"²⁴⁶

Bock Laundry is interesting from a number of perspectives. First, it conforms with the result illustrated in Table I for the case in which a very strong prior presumption offsets a moderately clear command; the meaning of what appeared to be clear text was ambiguous. Second, the majority opinion by Justice Stevens and the dissenting opinion of Justice Blackmun relied upon a number of different principles of interpretation. In effect, both opinions discussed methods for resolving the interpretive problem employing minimal judicial policymaking. Consistent with a legislative conception of legislative supremacy, both opinions turned first to the Congress' actual purpose in enacting the rule. If the actual purpose could confidently be identified, a legislative conception of legislative supremacy would require that the Court rely upon it to resolve the interpretive problem.

In fact, the congressional intent in *Bock Laundry* was somewhat unclear as shown by both the majority and dissent's interpretation of key language in the report of the Conference Committee.²⁴⁷ As a result, the majority and the dissent felt obliged to turn to other techniques of interpretation. Justice Stevens' final argument for the majority relied upon an extra-legislative value — the established law of evidence.²⁴⁸ Justice Blackmun's dissent and

243. *Id.* at 521-22.

244. *Id.* at 533-34.

245. *Id.* at 534-35.

246. *Id.* at 529.

247. *Id.* at 520 (concluding that the language reflected a policy of granting discretion in the case of the impeachment of a criminal defendant only); *id.* at 532-33 (Blackmun, J., dissenting) (concluding that the language reflected a policy of granting discretion in the case of the impeachment of the testimony of all parties).

248. *Id.* at 521-22. Another way of looking at Justice Stevens' reliance on the law of evidence would be to view his analysis as presuming that Congress would retain a well-established policy. In fact, the majority opinion uses the language of presumptions. "A party contending that legislative action changed settled law has the burden of showing

Justice Scalia's concurrence both relied on extra-legislative values.

In my view, no opinion in *Bock Laundry* is particularly satisfying. The most troubling aspect of Justice Stevens' opinion is that the persons who appear to be protected by the text of the rule, defendants in civil cases, are not. This result conflicts with the value of fair notice to future litigants who must rely on the rule. One of the most troubling aspects of Justice Blackmun's opinion is his reliance on extremely general extra-legislative values of avoiding "unnecessary hardship" and reaching a "sensible result."²⁴⁹ It is difficult to imagine more subjective and open-ended standards. Nevertheless, the absence of a convincing analysis is understandable. The Court faced a particularly hard case — a statutory text that produced a bizarre result and legislative history that showed no obvious actual purpose. Each of the Justices in *Bock Laundry*, even the most committed textualist, Justice Scalia, turned to extra-legislative values to resolve the ambiguity Congress created. In cases like this, courts do not violate the legislative conception of legislative supremacy by turning to such values in crafting their decisions

VII. CONCLUSION

It is misleading to frame the question of the proper approach to statutory interpretation as a choice between respect for legislative supremacy and the freedom of the judiciary to engage in policymaking. First, judicial policymaking is consistent with a legislative conception of legislative supremacy when it is authorized by the legislature, as long as the extent of the policymaking is confined to the scope of the authorization. Second, when legislative commands are "genuinely ambiguous," a court has no alternative except to turn to extra-legislative values to resolve the interpretive problem. The choice of extra-legislative values and the decision about what weight to give them are important forms of judicial policymaking.

The conception of legislative supremacy described here has much in common with the public values analysis suggested by others. Public values scholars emphasize reliance on extra-

that the legislature intended such a change." *Id.* at 521 (citations omitted). However, it is difficult to say that Congress itself, as opposed to the federal and state courts, had any established policy since its first significant involvement with these issues occurred in connection with the approval of Rule 609.

249. See *id.* at 534-35.

legislative values that have acquired the legitimacy of formal incorporation into law.²⁵⁰ Public values analysis also may limit reliance on these values only to cases where the legislative command is ambiguous. Nevertheless, there are some important differences between a public values analysis and the approach argued here. A legislative conception of legislative supremacy justifies reliance on extra-legislative values only as a last resort in statutory interpretation. In most cases, a legislative command can be interpreted by relying on a technique that involves less expansive policymaking by courts. If judges move too quickly to incorporate extra-legislative values, they violate legislative supremacy by unnecessarily exercising their own policymaking authority at the expense of the legislature's. In particular, overstating the strength of a public policy presumption or understating the clarity of a legislative command can lead to a violation of legislative supremacy.

The use of presumptions can be very similar to the incorporation of extra-legislative values when legislative commands are unclear. A presumption that the legislature would not preempt state law, for example, can have the same effect as the incorporation of a federalism value into interpretation. Moreover, the strength attributed to a presumption can simply reflect the weight that the court chooses to place upon the presumption. By giving some presumptions little weight and others substantial weight, the court can engage in judicial policymaking under the guise of relying on presumptions about the legislature's "intended" policies.

There is a clear difference, however, between a public values reliance on extra-legislative values and the use of presumptions under a legislative conception of legislative supremacy. Some presumptions are consistent with legislative supremacy; some are not. While public values analysis must justify reliance on presumptions because the presumptions reflect desirable social norms, a legislative conception of legislative supremacy requires courts to rely only on presumptions that legislators would favor, particularly those grounded in a well-established legislative policy. Moreover, courts must give appropriate weight to presumptions. If the legislative command is clear enough, even a strong presumption cannot justify courts' refusal to implement the most obvious meaning of the command.

That courts almost never openly disregard the principle of

250. In particular, see the discussion by Professor Eskridge, *supra* note 17, at 1017-61.

legislative supremacy suggests a deep respect for the legislature's policymaking authority. Even textualists ultimately argue that courts should rely on the text of statutes because it is the most reliable statement of the legislature's policy. It seems doubtful that an approach to interpretation that openly ignored legislative commands or that cavalierly disregarded at least some version of "legislative intent" could ever take root. Respect for legislative supremacy is likely to remain at the core of statutory interpretation no matter how powerful the critiques of the political process. My argument is that a legislative conception of legislative supremacy creates a framework for identifying principles of interpretation consistent with what we can assume legislators would want. Such a framework preserves an expansive role for judicial policymaking and, in some aspects of interpretation, e.g., determining when a command is "uncertain," it provides some guidance for courts to determine when reliance on extra-legislative values is consistent with legislative supremacy. Yet the framework preserves legislative policymaking authority to the extent possible consistent with giving effect to statutes.

There are some obvious objections to the basic conception of legislative supremacy argued throughout the article. First, the assumptions about legislators' basic values may be incorrect. However, the assumptions seem cautious enough — legislators want statutes to be given effect in the real world and they jealously guard their own policymaking authority. Contrary assumptions, for example, that legislators care little about whether their statutes have an effect, are far more difficult to justify. Critics might also argue that courts have no particular obligation to comply with the legislature's preferred rules of interpretation. This argument fails, however, because if the legislature has supreme policymaking authority, it also has the authority to determine how its commands are to be interpreted. A contrary assumption would mean that legislators have the authority to set policy, but not the authority to oversee interpretation of its directives.

A final objection might be that the task of identifying legislators' preferences regarding principles of interpretation is too speculative to be useful. In other words, even though courts should not ignore legislators' preferred principles of interpretation, it is impossible to identify those principles. Such an objection does have some validity since there is no way of confirming what principles of interpretation legislators really do favor. Nevertheless, it is useful to ask the question — is a particular technique of interpretation

likely to be inconsistent with what legislators would want? If so, there are strong grounds viewing that technique with skepticism.

Appendix — Applications of Probability Theory

Introduction

Probability theory is useful in illustrating some aspects of the problem of unclear legislative statements. In order to take advantage of probability theory, we can analogize statements about a policy that the legislature communicates to a “population” of events. The statement that the legislature communicates about a policy does not always correctly reflect the legislature’s actual meaning, just as the results of a testing procedure do not always accurately reflect the “true” state of the world.

In the case of a testing procedure, there is some probability that the results of a test, e.g., a laboratory analysis, will be positive for the presence of disease when there is no disease (i.e., a false positive) and some probability that the results will be negative when disease is actually present (i.e., a false negative). Similarly, we can assume that, whatever policy the legislature is attempting to enact, there is always some probability that the legislature communicates the policy incorrectly. As a result, a “population” that corresponds to statements about a particular policy includes a variety of different possible statements. Most of the statements drawn from this population will reflect the actual policy, but some will not.

Assume, for example, that the legislature is attempting to communicate policy *A*. There is less than 100 percent probability, e.g., eighty percent, that the legislative statement will actually communicate policy *A*. There is a twenty percent probability that policy *B* will be communicated. Similarly, if the legislature is attempting to communicate policy *B*, there is only an eighty percent probability that policy *B* will be communicated and a twenty percent probability that policy *A* will be communicated. The two policies — *A* and *B* — correspond to two different populations from which sample observations are drawn. These sample observations are the public record statements made by the legislature, such as the statutory text, legislative history, and other bits of information relevant to determining the meaning. The problem in the case of any particular statement or set of statements is to determine whether they were drawn from population *A* or *B*. If we assume that the legislature speaks clearly about eighty percent of the time, a statement pointing toward meaning *A* will still have a twenty percent probability that the legislature is actually attempting to communicate meaning *B*, and vice versa.

Analysis I

This article asserts that it is more likely two listeners will agree that a certain meaning is the most likely meaning than that they will agree that a particular meaning is clear. It is possible to illustrate this point by analogizing the policies that the legislature is attempting to communicate with populations from which sample observations are drawn. Assume that the legislature wants to communicate meaning *A* and that eighty percent of the time the meaning is correctly conveyed, i.e., eighty percent of the "events" or bits of information in the underlying population point toward meaning *A* and twenty percent point toward meaning *B*. Assume that a small sample of ten observations is drawn from the population. Assume further that a person reviewing the sample will conclude that meaning *A* is most likely if most of the sample observations (i.e., at least six) point in that direction. Finally, assume that the person will conclude that meaning *A* is "clear" only if at least eighty percent (i.e., at least eight of ten) observations point in that direction.

The odds that at least r of n sample observations will point toward meaning *A* can be derived by adding the probabilities of exactly x observations of *A* where x ranges from r to n . Where the probability of x observations of *A* in n trials is P , the probability of at least r observations of *A* is:

$$\sum_{x=r}^n \binom{n}{x} p^x (1-p)^{n-x}$$

Fortunately, we can find this probability from a table of cumulative values for the binomial distribution.²⁵¹ In the example above, the odds that at least six of ten observations will point toward meaning *A* is .967. However, the odds that at least eight of ten observations will point toward meaning *A* is only .678. Thus, based on a single sample of ten observations, it is about forty-three percent more likely that *A* will be viewed as the most obvious meaning than that it will be viewed as "clearly" the meaning — (.967/.678 = 1.43). If each of two evaluators, say two judges,

251. See FREDERICK MOSTELLER ET AL., PROBABILITY WITH STATISTICAL APPLICATIONS 474 (1970).

draws a different sample of bits of information, they will agree that the *A* is the most likely meaning ninety-four percent of the time — $(.967)(.967) = .94$. However, they will agree that meaning *A* is clear only forty-six percent of the time — $(.678)(.678) = .46$.

Analysis II

The analogy of an underlying population and the meaning communicated by the legislature is also helpful in understanding the relationship of presumptions about meaning and the clarity of statements of policy communicated by the legislature. Again, assume that the underlying population from which the observed information is drawn is either *A* or *B*, corresponding to meaning *A* or *B*. Also, assume that the legislature communicates its meaning clearly about eighty percent of the time. Thus, for example, even if the information communicated by the legislature appears to point toward meaning *A*, there is a twenty percent chance that the legislature's actual meaning is *B*.

Bayesian inference provides a way of taking into account a prior probability in evaluating the chance that an observed event was drawn from a particular population.²⁵² Thus, it provides a technique for taking into account a presumption about the legislature's likely actions in evaluating the likely meaning of the statement actually conveyed by the legislature. One can place some personal probabilities on the "prior" presumption, i.e., the subjective probability before observing the legislature's actual statement, that the legislature would act in a certain way. For example, one could assume that there is a ninety percent chance that the legislature would not preempt state law. Where *Prior-P(R)* is the subjective prior probability that the legislature will act in a certain way, e.g., to retain an established policy, *P(C/R)* is the probability that the legislative statement would indicate a desire to retain the policy even if the legislature intended to change the policy and *P(R/R)* is the probability that the legislative statement would indicate a desire to retain the policy if, in fact, the legislature did intend to retain the policy. *Post-P(R)* is the posterior probability that the legislature intends to retain the policy given that the command indicates an intent to retain it, and this probability can be determined by the

252. For a straightforward discussion of the techniques of Bayesian inference, see WILLIAM MENDENHALL, *INTRODUCTION TO PROBABILITY AND STATISTICS* 80-82 (1975).

following formula:

$$\text{Post-P(R)} = \frac{[\text{Prior-P(R)}\text{P(R/R)}]}{[\text{Prior-P(R)}\text{P(R/R)} + (1-\text{Prior-P(R)})\text{P(C/R)}]}$$

For example, assume Congress rarely preempts state law and, thus, there is a strong subjective prior probability, say ninety percent, that the Congress will not do so in any particular case. Assume further that, if the legislature intends to retain this policy, there is an eighty percent likelihood that this policy will be reflected in the legislative command, and, conversely, that if the legislature intends to change the policy, there is still a twenty percent chance that the statement will point toward retaining the policy. The probability that Congress did not intend to preempt state law given that the command does not reflect an intent to preempt state law is:

$$(.9)(.8)/[(.9)(.8) + (.1)(.2)] = (.72)/(.74) = 97.3\%$$

On the other hand, if the legislative statement points toward revising the policy, i.e., preempting state law, the posterior probability that the legislature is actually preempting state law is:

$$(.2)(.8)/[(.2)(.8) + (.9)(.2)] = .16/.34 = 47\%.$$

The very strong prior presumption means that the legislative command is still uncertain even though it points toward preempting state law.

Analysis III

A somewhat more complex analysis takes into account the clarity of the legislative command. Rather than assume that a legislative statement simply points in one direction or another, as was assumed in Analysis II, we can rank the clarity of commands from "weak" (slightly pointing in one direction but fairly ambiguous) to "very strong" (quite clearly pointing in one direction). If the statements of the legislature, including the statutory text, legislative history and other relevant indications of legislative intent are viewed as bits of information, we can draw an analogy between these bits of information and a set of sample observations drawn from one of the underlying populations. Bayesian inference pro-

vides a way to adjust the prior probability that the legislature would take a certain action based on observing a certain number of observations out of a sample that point toward a particular meaning. The clarity or "strength" of the command increases as the number of observations in a particular sample pointing in a certain direction increases.

Another more realistic assumption is that the likelihood of the legislature speaking in an incorrect or ambiguous way depends on the policies it intends to convey. If the legislature is adopting a newly developed or untraditional policy — meaning *A* — we retain the assumption described above, i.e., there is an eighty percent chance that *A* will be communicated. However, when the legislature is simply retaining a well-established policy — meaning *B* — the legislature is more likely to be ambiguous. It may say little about the policy issue at all or its statements may seem to point equally toward *A* or *B*. We can incorporate this idea into Bayesian inference by assuming that in the case where the legislature is simply retaining a well-established policy — meaning *B* — we assume that there is a fifty percent chance that any sample observation will point toward meaning *A* and a fifty percent chance it will point toward meaning *B*.

Where $Prior(B)/Prior(A)$ are the prior odds that the legislature will act in a certain way (i.e., policy or meaning *B*), $Post(B)/Post(A)$ are the posterior odds that the legislature is acting consistently with meaning *B*, $P(A/B)$ is the probability that a sample observation will reflect meaning *A* if the legislature is attempting to communicate meaning *B*, $P(B/B)$ is the probability that a sample observation will reflect meaning *B* if the legislature is attempting to communicate meaning *B*, $P(A/A)$ is the probability that a sample observation will reflect meaning *A* if the legislature is attempting to communicate meaning *A*, and $P(A/B)$ is the probability that a sample observation will reflect meaning *A* if the legislature is attempting to communicate meaning *B*, x is the number of observations in the sample pointing toward meaning *A*, and n is the total number of sample observations, $Post(B)/Post(A)$ can be calculated based on the following formula:

$$Post(B)/Post(A) = \frac{[Prior(B)/Prior(A)]^x [P(A/B)^x P(B/B)^{n-x}]}{[P(A/A)^x P(B/A)^{n-x}]}$$

It is possible to construct a table of prior and posterior probabilities, based on different assumptions about prior probabilities and sample observations to get some sense of how they are related.

The assumptions are these:

- 1) the sample size in each case is ten;
- 2) there are two possible meanings — "A" and "B." The number of observations pointing toward meaning "A" is x and the number pointing toward "B" is $10-x$;
- 3) if the legislature's policy is A, there is an eighty percent chance that any single observation will point toward A and twenty percent chance it will point toward B; on the other hand, if the legislature's policy is B, there is a fifty percent chance B will be communicated and a fifty percent chance that B will be communicated (i.e., there is an equal chance the statement will point in either direction);
- 4) there are three categories of prior odds:
 - Weak — 2:1
 - Strong — 5:1
 - Very Strong — 10:1
- 5) we group the possible sample observations (i.e., the number of observations pointing toward meaning A out of a sample of ten) into four categories, corresponding to the strength of the statement pointing toward meaning A:
 - Weak — $x = 7$
 - Moderately Clear — $x = 8$
 - Very Clear — $x = 9$

Table I-A. Posterior Odds of A or B
Clarity of Command
Pointing Toward A

Prior Odds of B	Weak (7 of 10)	Moderately Clear (8 of 10)	Very Clear (9 of 10)
Weak (2:1)	"Even" (for B 1.16:1)	Moderate for A 3.33:1	Strong for A 12.5:1
Strong (5:1)	Weak for B 2.9:1	"Even" (for A 1.33:1)	Moderate for A 5:1
Very Strong (10:1)	Moderate for B 5.9:1	"Even" (for B 1.5:1)	Weak for A 2.5:1

NOTE: In cases where the posterior odds of policy *A* or *B* are less than 2:1, the table describes the resulting odds as "even." (The actual odds are shown in parentheses.)

Comments

The table reflects some intuitively reasonable conclusions. For example, a moderately clear statement pointing toward *A* remains ambiguous in the face of a strong prior assumption in favor of *B*. However, a very clear command reverses strong odds toward *B* to moderate odds toward *A*. These results illustrate the proposition that the legislature must speak clearly in order to reverse a well-established policy. When the prior odds are very strong, the odds continue to be moderately strong that *B* is correct even when the command points weakly toward *A*. This result is an illustration of the proposition that even a clear command will not be applied if the result is "bizarre." Several combinations lead to very ambiguous results. If we define ambiguous results as those where neither the odds of *A* or *B* are greater than 2:1, the resulting odds are even in the cases of (1) weak prior odds and a weak command, (2) strong prior odds and a moderately clear command, and (3) very strong prior odds and a moderately clear command.

The results achieved here are not meant to be precise indicators of odds. They are only meant to illustrate the essential relationship of certain probabilistic assumptions. In particular, they show that probability theory confirms the intuitive notions that judges often use.

