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### The Sherlock Holmes Canon

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# The Sherlock Holmes Canon

Anita S. Krishnakumar\*

## ABSTRACT

Many of the Supreme Court’s statutory interpretation cases infer meaning from Congress’s failure to comment in the legislative record. Colorfully referred to as the “dog that did not bark” canon, after a Sherlock Holmes story involving a watchdog that failed to bark while a racehorse was being stolen, the interpretive presumption holds as follows: if a new law or statutory amendment would significantly change the existing legal landscape, Congress can be expected to comment on that change in the legislative record; thus, a lack of congressional comment regarding a significant change can be taken as evidence that Congress did not intend a change in the law. “Failure to comment” arguments typically arise when the Supreme Court considers the meaning of a statutory provision that has been amended and an interpretation of the statute is advanced that arguably would change the status quo. Surprisingly, this canine canon of construction has received little theoretical attention—and what little attention it has received has tended to be positive, assuming that the canon leads courts to follow congressional intent. But there are several practical and theoretical problems with the assumptions underlying the canon.

This Article first examines how courts employ the Sherlock Holmes canon in practice. It then evaluates the canon’s normative and theoretical implications in detail. Ultimately, it argues that the Sherlock Holmes canon is a “clear statement” rule in disguise, in that it allows judges to freeze certain legal rules in place and to shift the institutional burden to Congress to be exceptionally clear when it wishes to effect certain kinds of legal change. The Article concludes that this clear statement effect is problematic and that the canon should be invoked only in rare cases, when there is special reason for courts to expect or require Congress to comment on a change in the law.

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## INTRODUCTION

There is a little-studied practice in the United States Supreme Court's statutory interpretation cases of inferring meaning from Congress's failure to comment, in the legislative record, on a substantial change effected by a law it is enacting. Colorfully referred to as the "dog that did not bark" canon after a Sherlock Holmes story in which a watchdog failed to bark while a racehorse was stolen,<sup>1</sup> the interpretive presumption made by the Court in such cases is as follows: if a statutory interpretation would significantly change the existing legal landscape, Congress can be expected to comment on that change in the legislative record; thus, a lack of congressional comment regarding a significant change can be taken as evidence that Congress did not

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<sup>1</sup> See ARTHUR CONAN DOYLE, *Silver Blaze*, in *SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES* 521, 540 (2003). In *Silver Blaze*, the fact that the watchdog did not bark while the racehorse was being stolen led the detective to deduce that the thief was someone the dog knew—namely, his trainer. This plotline is sometimes referred to as "the curious incident of the dog in the night-time":

Gregory (Scotland Yard detective): "Is there any other point to which you would wish to draw my attention?"

Holmes: "To the curious incident of the dog in the night-time."

Gregory: "The dog did nothing in the night-time."

Holmes: "That was the curious incident."

*Id.* at 540.

intend that interpretation.<sup>2</sup> In the Sherlock Holmes story, *Silver Blaze*, the inference drawn from the dog's silence was that nothing unusual had happened during the night; similarly, in the Court's jurisprudence, the inference drawn from Congress's silence is that nothing unusual has occurred with respect to the relevant legal rule. "Failure to comment" or "dog that did not bark" arguments typically arise when the Supreme Court considers the meaning of a statutory provision that has been amended and an interpretation is advanced that arguably would change the status quo.

This interpretive canon has been invoked with increasing frequency in recent years,<sup>3</sup> rearing its head, for example, in Justice Ginsburg's dissenting opinion this past Term in *Burwell v. Hobby Lobby Stores, Inc.*<sup>4</sup> In *Burwell*, Justice Ginsburg criticized the majority for interpreting the Religious Freedom Restoration Act ("RFRA") to extend religion-based exemptions to for-profit corporations, arguing that such a rule worked a significant change in First Amendment law and precedents.<sup>5</sup> If Congress had intended "a change so huge," she argued, it would have made a "clarion statement to that effect" in RFRA.<sup>6</sup> Yet "[t]he text of RFRA makes no such statement and the legislative history *does not so much as mention* for-profit corporations."<sup>7</sup> A few Terms earlier, Justice Breyer's majority opinion in *Zuni Public School District No. 89 v. Department of Education*<sup>8</sup> invoked a more forceful version of the Sherlock Holmes canon, insisting that a statutory amendment did not repudiate the Department of Education's longstanding interpretation of the relevant statute because, among other reasons:

No one at the time—no Member of Congress, no Department of Education official, no school district or State—expressed the view that this statutory language (which, after all, was supplied by the Secretary) was intended to require, or did require, the Secretary to change the Department's system of calculation, a system that the Department and school

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<sup>2</sup> See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 634 (1990).

<sup>3</sup> Prior to 1980, the Court had explicitly invoked the canon only four times. See *infra* Appendix. Since then, members of the Court have advanced arguments of this type in at least twenty-seven different cases. *Id.*

<sup>4</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2795–96 (2014) (Ginsburg, J., dissenting).

<sup>5</sup> See *id.* at 2795–97.

<sup>6</sup> *Id.* at 2796.

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81 (2007).

districts across the Nation had followed for nearly 20 years . . . .<sup>9</sup>

As these two recent Roberts Court cases highlight, inferences based on congressional failure to comment can be elaborate, explaining in detail why Congress should have been expected to comment—and why its failure to do so should be taken as significant; or they can be succinct, merely noting that the legislative record is silent and that Congress would not have imposed a substantial change without discussion. Failure to comment arguments date back at least to the 1940s, but have been employed much more frequently by the Roberts and Rehnquist Courts than by their predecessors.<sup>10</sup> Yet despite its increasing popularity, the Sherlock Holmes canon has generated surprisingly little debate or theoretical attention from members of the Court or scholars.<sup>11</sup> This lack of scrutiny is curious, particularly because, as Part III of this Article explains, the canon effectively creates a “clear statement” rule of unprecedented form—shifting the institutional burden to Congress to make statements about a statute’s scope, and to do so in the legislative history.

The purpose of this Article is to contribute to the doctrinal and theoretical understanding of the role that “failure to comment” arguments play in statutory interpretation. The Article proceeds in three parts. Part I presents a doctrinal framework for understanding judi-

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<sup>9</sup> *Id.* at 91.

<sup>10</sup> Other recent Supreme Court invocations of the “dog that did not bark” canon include *Freeman v. United States*, 131 S. Ct. 2685, 2696 (2011) (Sotomayor, J., concurring) (refusing to interpret statute to effect change “[i]n the absence of any indication from the statutory text or legislative history that § 3582(c)(2) was meant to fundamentally alter the way in which Rule 11(c)(1)(C) operates”), *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 311 (2010) (Sotomayor, J., dissenting) (“[N]either the initial bills reported by the Senate and House Committees nor statements by individual Members of Congress about subsequent versions of the legislation suggest any consideration or debate about expanding the pre-1986 bar to apply to state or local government sources.”), and *United States v. Ressam*, 553 U.S. 272, 282 (2008) (Breyer, J., dissenting) (“If Congress, in neglecting to add the words ‘in relation to,’ sought to create a meaningful distinction between the explosives and firearms statutes, one would think that someone somewhere would have mentioned this objective.”). For references by the Rehnquist and earlier Courts, see *infra* Appendix (non-exhaustive list of dog that did not bark cases).

<sup>11</sup> A handful of scholars have discussed the canon in passing, but none has examined it closely or critically. See, e.g., Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 89–94 (1999); Eskridge, *supra* note 2, at 634–35; Anita S. Krishnakumar, *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*, 51 WM. & MARY. L. REV. 1053, 1096 n.202 (2009); Rebecca M. Kysar, *Penalty Default Interpretive Canons*, 76 BROOK. L. REV. 953, 962–64 (2011); John M. DeStefano III, Note, *On Literature as Legal Authority*, 49 ARIZ. L. REV. 521, 548–49 (2007).

cial inferences based on Congress's failure to comment. Three forms of dog that did not bark arguments emerge from the Court's caselaw: (1) the "no mention" form, which merely notes that the legislative history does not mention a substantial change in the law;<sup>12</sup> (2) the "silence-is-telling" form, which makes a detailed argument that if Congress had intended a substantial change in the law, someone would have commented on it in the legislative record;<sup>13</sup> and (3) the "bankruptcy rule," which establishes a presumption that Congress intends to preserve pre-Bankruptcy Code practice unless the legislative history indicates otherwise.<sup>14</sup>

Although increasingly common, "failure to comment" arguments are not necessarily successful in all cases. A number have been made in dissenting opinions, such as Justice Ginsburg's in *Hobby Lobby*.<sup>15</sup> And while the Court often infers great meaning from Congress's failure to comment in the legislative record, it also sometimes rejects inferences based on legislative silence, noting at times that "a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."<sup>16</sup> Part I seeks to analyze and categorize the Sherlock Holmes canon cases, identifying factors that tend to contribute to the Court's willingness to infer meaning from legislative silence and factors that tend to lead the Court to discount such silence. Part I is largely descriptive, seeking to illuminate the Court's interpretive

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<sup>12</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2795–97 (2014) (Ginsburg, J., dissenting); *Freeman v. United States*, 131 S. Ct. 2685, 2696–97 (2011) (Sotomayor, J., concurring); *INS v. St. Cyr*, 533 U.S. 289, 320 n.44 (2001); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 586–89 (1982) (Stevens, J., dissenting).

<sup>13</sup> See, e.g., *Graham Cty.*, 559 U.S. at 311 (Sotomayor, J., dissenting); *Ressam*, 553 U.S. at 282 (Breyer, J., dissenting); *Zuni Pub. Sch. Dist.*, 550 U.S. at 90–93; *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 131–32 (2005) (Stevens, J., concurring); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342–43 (1999); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176–77 (1993).

<sup>14</sup> See *Lamie v. U.S. Tr.*, 540 U.S. 526, 539 (2004); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990), *superseded by statute*, Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, § 3, 104 Stat. 2865, *as recognized in* *Johnson v. Home State Bank*, 501 U.S. 78, 83 n.4 (1991); *United States v. Ron Pair Enters.*, 489 U.S. 235, 251–52 (1989) (O'Connor, J., dissenting); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 381–82 (1988).

<sup>15</sup> See *Hobby Lobby*, 134 S. Ct. at 2796 (Ginsburg, J., dissenting); *see also, e.g., Graham Cty.*, 559 U.S. at 311 (Sotomayor, J., dissenting); *United States v. Gonzales*, 520 U.S. 1, 13–14 (1997) (Stevens, J., dissenting); *Davenport*, 495 U.S. at 564 (Blackmun, J., dissenting); *Ron Pair*, 489 U.S. at 251–54 (O'Connor, J., dissenting); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 600–01 (1980) (Rehnquist, J., dissenting).

<sup>16</sup> *Harrison*, 446 U.S. at 592; *see also* *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73–74 (2004) (Scalia, J., dissenting) ("The Canon of Canine Silence that the Court invokes today introduces a . . . phenomenon [ ] under which courts may refuse to believe Congress's *own* words unless they can see the lips of others moving in unison.").

practices. Overall, it concludes that there is little coherence or consistency in the Court's application of the Sherlock Holmes canon.

Part II turns to the jurisprudential question whether Congress's failure to comment on an interpretive change really tells judges anything meaningful about congressional intent in these cases—and whether inferences based on such failure are a justifiable or reliable interpretive tool. This Part explores several theoretical and practical problems with inferences based on Congress's failure to comment, agreeing with and elaborating upon the relatively thin judicial criticism of this form of interpretive argument. Ultimately, Part II argues that inferences based on legislative silence are dubious if interpreters mean them literally, as an actual expectation that Congress *could not have intended* to make a substantial change without noting that in the legislative record.

Part III moves beyond the Court's surface rhetoric and posits that rather than seeking to reflect true legislative intent, the dog that did not bark canon effectively operates as a clear statement rule. That is, the canon assumes a baseline state of the law, and requires that changes from that baseline be accompanied by explicit legislative acknowledgment. In one sense, then, the dog that did not bark or failure to comment rule is simply a continuity canon, similar to many other canons and doctrines that seek to ensure predictability and stability in the law.<sup>17</sup> On the other hand, however, the canon is an extraordinary institutional burden-shifting device, in that it requires legislators to say something specific in the *legislative history*, rather than the statutory text—and in that it leaves identification of the baseline state of the law almost entirely to the discretion of the interpreter. As a result, I argue that although the Justices view attentiveness to congressional silence as part of their duty as faithful agents of the legislature, they often end up using the dog that did not bark canon to guard against changes they find normatively problematic. Given this reality, it is worth asking whether the dog that did not bark canon should be abandoned, or whether it serves any useful role in statutory interpretation. Part III argues that there are a few limited circumstances in which the canon does serve a useful role, such as where Congress can be expected to comment in order to let an agency know that it is overturning an established administrative interpretation or where significant reliance interests will be upset by a change in the law and it thus makes sense to ensure that Congress intends such a result.

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<sup>17</sup> See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 943–45 (1992).

Part III concludes by proposing a very limited, narrow application of the dog that did not bark canon in only such cases.

### I. THE DOG THAT DID NOT BARK CANON IN PRACTICE

The Supreme Court's Sherlock Holmes or dog that did not bark cases generally can be divided into three categories: (1) the "no mention" cases, in which the Court posits that the rejected interpretation would work a drastic change in the law, and simply notes that there was no mention of such a change in the legislative history (or, in some cases, in the statutory text);<sup>18</sup> (2) the "silence-is-telling" cases, in which the Court posits that the rejected interpretation would work a drastic change in the law, emphasizes that no one discussed such change in the legislative record, and insists that if Congress had intended the change, someone surely would have commented on it;<sup>19</sup> and (3) the bankruptcy cases, in which the Court invokes a bankruptcy-law-specific presumption that Congress does not intend to effect changes to pre-Code practice, unless the legislative history indicates otherwise.<sup>20</sup>

#### A. *The "No Mention" Cases*

In a number of cases, the Court barely invokes the dog that did not bark rule, making only passing reference to Congress's silence about a significant change in the law. Justice Ginsburg's dissenting opinion in *Hobby Lobby*, discussed in the Introduction, is a good example.<sup>21</sup> Another example is Justice Sotomayor's concurring opinion in *Freeman v. United States*.<sup>22</sup> *Freeman* held that a criminal defendant who is sentenced pursuant to a plea agreement is eligible to petition for a sentence reduction if the Sentencing Commission later retroactively amends the recommended sentencing range for his offense.<sup>23</sup> Justice Sotomayor agreed with the Court's ruling as applied to defendant Freeman, but disagreed with the plurality's categorical conclusion that all sentences imposed pursuant to a plea agreement are based on the Sentencing Guidelines, and therefore eligible for reduction.<sup>24</sup> Rather, she argued, sentences imposed under a plea agreement

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<sup>18</sup> *Supra* note 12.

<sup>19</sup> *Supra* note 13.

<sup>20</sup> *Supra* note 14.

<sup>21</sup> *See supra* text accompanying notes 4–7.

<sup>22</sup> *Freeman v. United States*, 131 S. Ct. 2685 (2011).

<sup>23</sup> *Id.* at 2695.

<sup>24</sup> *See id.* (Sotomayor, J., concurring).



are “based on” the agreement itself.<sup>25</sup> The plurality’s contrary construction, Justice Sotomayor insisted, would fundamentally alter the Federal Rules of Criminal Procedure governing plea agreements.<sup>26</sup> Invoking the Sherlock Holmes canon, she then declared that “[i]n the absence of any indication from the statutory text or legislative history that [the Sentencing Guidelines amendment] was meant to fundamentally alter the way in which [the Federal Rules] operate[ ],” she could not endorse the plurality’s statutory reading.<sup>27</sup>

*Freeman* and *Hobby Lobby* are typical of “no mention” cases in that they spend very little space talking about the legislative record.<sup>28</sup> Instead, the opinions emphasize the magnitude of the legal change that an interpretation would effect—and then note, almost as an aside, that the legislative history says nothing about such significant change.<sup>29</sup> Interestingly, while the “no mention” cases certainly imply that if Congress intended to make a significant change in the law, the legislative history would reflect this, they do not always make this logical connection explicitly.<sup>30</sup> Further, as both *Freeman* and *Hobby Lobby* illustrate, some “no mention” cases reference the statutory text in tandem with the legislative history—focusing not so much on Congress’s failure to discuss the supposed change in the *legislative record* per se, but on the fact that there is “scant indication” of *any* kind that Congress intended to change the law.<sup>31</sup>

Still other “no mention” cases rely heavily on a separate substantive canon or presumption and invoke the Sherlock Holmes canon only as a secondary argument that lends support to the construction

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<sup>25</sup> *Id.* at 2695–96.

<sup>26</sup> *Id.* at 2696.

<sup>27</sup> *Id.* at 2696.

<sup>28</sup> See, e.g., *id.*; *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791–93, 96 (2014) (Ginsburg, J., dissenting) (briefly reviewing legislative history in context of another argument and later asserting that Congress did “not so much as mention” change majority read into statute).

<sup>29</sup> See, e.g., *Burwell*, 134 S. Ct. at 2796 (“Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. The text of RFRA makes no such statement and the legislative history does not so much as mention for-profit corporations.” (citations omitted)).

<sup>30</sup> See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 320 n.44 (2001) (“The legislative history is significant because, despite its comprehensive character, it contains no evidence that Congress specifically considered the question of the applicability IIRIRA § 304(b) to pre-IIRIRA convictions.”).

<sup>31</sup> *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 53 (2004); see *Hobby Lobby*, 134 S. Ct. at 2796 (Ginsburg, J., dissenting); *Freeman*, 131 S. Ct. at 2696–97 (Sotomayor, J., concurring); see also *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 588–89 (1982) (Stevens, J., dissenting) (“This sort of unremarkable change is consistent with the purpose of the statute, as well as with a legislative history that fails to make any comment on its significance.”).

dictated by the other substantive canon. Consider, for example, *INS v. St. Cyr*,<sup>32</sup> in which the Supreme Court held that provisions in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) that repealed the Attorney General’s power to grant aliens discretionary relief from deportation did not apply retroactively to an alien who was convicted of a crime before those statutes took effect, even though the alien’s removal proceedings did not occur until after AEDPA’s and IIRIRA’s effective dates.<sup>33</sup> In so ruling, the Court relied primarily on the presumption against retroactive application of statutes and a canon dictating that ambiguities in deportation statutes should be construed in favor of aliens.<sup>34</sup> It also dropped a footnote that referenced the dog that did not bark canon in passing, noting that the legislative history “contains no evidence that Congress specifically considered the question of the applicability of IIRIRA § 304(b) to pre-IIRIRA convictions.”<sup>35</sup>

In short, the “no mention” cases treat Congress’s failure to comment in the legislative record as a side note, or ancillary fact that lends support to a statutory construction reached primarily through other interpretive tools. Some of the cases do not even reference the dog that did not bark canon or Sherlock Holmes by name, though the presumption they subtly invoke is very much the one embodied in the canon.<sup>36</sup>

### B. The “Silence-is-Telling” Cases

The “silence-is-telling” cases are by far the most numerous form of dog that did not bark cases.<sup>37</sup> In these cases, the Court argues that the rejected interpretation would effect a sea change in the law and, in contrast to the “no mention” cases, emphasizes that there was no discussion of the change in the legislative record. The Court does not merely note in passing that the legislative record is silent but, rather, insists that if Congress had intended the change at issue, that change

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<sup>32</sup> *INS v. St. Cyr*, 533 U.S. 289 (2001).

<sup>33</sup> *Id.* at 326.

<sup>34</sup> *Id.* at 320.

<sup>35</sup> *Id.* at 320 n.44.

<sup>36</sup> See, e.g., *Hobby Lobby*, 134 S. Ct. 2791–93, 2796 (Ginsburg, J., dissenting); *Freeman*, 131 S. Ct. at 2696–97 (Sotomayor, J., concurring).

<sup>37</sup> See *infra* Appendix (listing cases by category).

“would have surely drawn more explicit statutory language and legislative comment.”<sup>38</sup>

The “silence-is-telling” cases differ from each other in the extent to which they discuss Congress’s failure to comment, but all of the cases place significant weight on the fact that Congress said nothing about the contemplated change. A leading case is *Church of Scientology of California v. IRS*,<sup>39</sup> which involved interpretation of an Internal Revenue Code provision that protects the confidentiality of tax “returns” and “return information.”<sup>40</sup> The question raised was whether Church of Scientology could obtain certain documents from the IRS under the Freedom of Information Act (“FOIA”) if those documents were redacted to delete the parts that would identify a particular taxpayer.<sup>41</sup> The Court held that redaction of identifying material did not suffice to make the documents accessible under FOIA.<sup>42</sup> It rested this ruling, in part, on an argument that Congress would not so quietly have adopted an amendment that would permit the disclosure of all “return information.”<sup>43</sup> Such a change, the Court maintained, “would have, it seems to us, at a minimum *engendered some debate in the Senate and resulted in a rollcall vote.*”<sup>44</sup> The Court went on to argue that:

All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle’s ‘dog that didn’t bark,’ that an amendment having the effect petitioner ascribes to it *would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.*<sup>45</sup>

These are extraordinarily specific assumptions about what the legislative process would have looked like if Congress had intended the interpretation advanced by the Church of Scientology. The Court is not merely expecting some kind of comment, but is predicting particular responses that should have come from particular legislative actors. Most of the “silence-is-telling” cases do not make such detailed claims, although some do reference specific places in the legislative

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<sup>38</sup> *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)).

<sup>39</sup> *Church of Scientology of Cal. v. IRS*, 484 U.S. 9 (1987).

<sup>40</sup> *Id.* at 13–14; see 26 U.S.C. § 6103 (2012).

<sup>41</sup> *Church of Scientology*, 484 U.S. at 10–11, 13–14.

<sup>42</sup> *Id.* at 17–18.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 17 (emphasis added).

<sup>45</sup> *Id.* at 17–18 (emphasis added).

record where one might expect to see Congress discuss the change at issue.<sup>46</sup>

Another leading example of a lengthy discussion and strong inference from legislative silence is *Department of Commerce v. U.S. House of Representatives*,<sup>47</sup> which raised the question whether the 1976 revisions to the Census Act prohibit statistical sampling for apportionment purposes.<sup>48</sup> A plurality of the Court held that the Act does prohibit sampling, and relied significantly on dog that did not bark inferences to support this reading.<sup>49</sup> Specifically, Justice O'Connor's plurality opinion stressed the fact that, "[a]t no point during the debates over these amendments did a single Member of Congress suggest that the amendments would so fundamentally change the manner in which the Bureau could calculate the population for purposes of apportionment."<sup>50</sup>

The opinion went on to note that:

This is true despite the fact that such a change would profoundly affect Congress by likely shifting the number of seats apportioned to some States and altering district lines in many others. Indeed, it tests the limits of reason to suggest that despite such silence, Members of Congress voting for those amendments intended to enact what would arguably be the single most significant change in the method of conducting the decennial census since its inception. That the 1976 changes to §§ 141 and 195 were not the focus of partisan debate is almost certainly due to the fact that the Members of Congress voting on the bill read the text of the statute, as do we, to prohibit the use of sampling in determining the population for apportionment purposes.<sup>51</sup>

*Church of Scientology* and *Department of Commerce v. U.S. House of Representatives* contain particularly strong inferences from congressional failure to comment but, significantly, neither case relies on Congress's silence as the primary basis for its construction. Rather, *Church of Scientology* relies primarily on the purpose behind the relevant Tax Code provision,<sup>52</sup> and *Department of Commerce* stresses the

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<sup>46</sup> See, e.g., *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 311 (2010) (Sotomayor, J., dissenting) (noting absence of statements in "initial bills reported by the Senate and House Committees" and "by individual Members of Congress").

<sup>47</sup> *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

<sup>48</sup> *Id.* at 320.

<sup>49</sup> *Id.* at 334.

<sup>50</sup> *Id.* at 342.

<sup>51</sup> *Id.* at 343 (citations omitted).

<sup>52</sup> See *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 16–17 (1987).

history and contemporaneous agency interpretation of the 1976 amendment before arguing that the plurality's reading "finds support" in the lack of congressional debate and discussion about sampling.<sup>53</sup> Most other "silence-is-telling" cases similarly invoke the dog that did not bark canon in a corroborative fashion, as one of many interpretive tools pointing toward a particular construction of the statute.

Consider, for example, *Sale v. Haitian Centers Council, Inc.*,<sup>54</sup> which involved interpretation of the Immigration Nationality Act ("INA").<sup>55</sup> At the time, section 243(h)(1) of the INA prohibited the Attorney General from deporting an alien to a country where his life or freedom might be threatened.<sup>56</sup> *Sale* presented the question whether section 243(h)(1) applied only within the United States, or also to actions taken by the U.S. Coast Guard on the High Seas, beyond the territorial sea of the United States.<sup>57</sup> An amendment to the INA had removed the phrase "within the United States" from section 243(h)(1) and added the word "return"<sup>58</sup> so that the provision read, "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country."<sup>59</sup> The Supreme Court held that the amendment was designed to eliminate section 243(h)(1)'s distinction between deportable and excludable aliens, not to make the section applicable outside the territorial limits of the United States.<sup>60</sup> In so ruling, the Court invoked a canon of construction known as the "presumption against extraterritorial application of domestic laws" and argued that the default understanding should be that the 1980 amendment did not make the INA applicable outside the United States.<sup>61</sup> In support of its conclusion, the Court also noted that Congress's intent to make section 243(h)(1) apply to exclusion as well as deportation proceedings was "plainly identified in the legislative history" of the 1980 amendment—and that the legislative history contained no indication that the amendment intended to provide for the statute's extraterritorial application.<sup>62</sup> "It would have been ex-

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<sup>53</sup> See *Dep't of Commerce*, 525 U.S. at 335–42.

<sup>54</sup> *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

<sup>55</sup> *Id.* at 158.

<sup>56</sup> 8 U.S.C. § 1253(h)(1) (1988).

<sup>57</sup> *Sale*, 509 U.S. 158–59.

<sup>58</sup> *Id.* at 175–76.

<sup>59</sup> 8 U.S.C. § 1253(h)(1).

<sup>60</sup> *Sale*, 509 U.S. at 176–77.

<sup>61</sup> See *id.* at 173.

<sup>62</sup> *Id.* at 176.

traordinary for Congress to make such an important change in the law without any mention of that possible effect,” the Court observed, yet “[n]ot a scintilla of evidence of such an intent can be found in the legislative history.”<sup>63</sup>

Few “silence-is-telling” cases discuss Congress’s failure to comment in as much detail as *Church of Scientology* or the *Department of Commerce* case but several, like *Sale*, give specific reasons why congressional comment should have been particularly expected with respect to the change at issue—and why congressional silence regarding the change should be treated as particularly meaningful. The list below spotlights some of those reasons:

- The debates or other legislative history surrounding enactment of the amendment at issue were “unusually extensive” or “lengthy,” yet did not contain any discussion of the contemplated change in the law.<sup>64</sup>
- The interpretive change not discussed in the legislative history would produce an “absurd” or “incoherent” result.<sup>65</sup>
- The rejected interpretation would change the implementing agency’s longstanding interpretation of the statute.<sup>66</sup>
- The rejected interpretation runs afoul of other canons of construction that impose default rules that typically can be overcome only by clear congressional expression of a contrary intent.<sup>67</sup>
- The rejected interpretation would overturn Supreme Court precedent.<sup>68</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> See, e.g., *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 131–32 (2005) (Stevens, J., concurring) (“prolonged” and “lengthy”); *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (“unusually extensive”).

<sup>65</sup> See, e.g., *United States v. Ressam*, 553 U.S. 272, 282 (2008) (Breyer, J., dissenting) (“incoherent results”); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 586 (1982) (Stevens, J., dissenting) (“absurd”).

<sup>66</sup> See *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 90–91 (2007); *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 340–41 (1999); *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 403–07 (1987).

<sup>67</sup> See, e.g., *Bryan v. Itasca Cty.*, 426 U.S. 373, 381, 392–93 (1976) (canons calling for clear manifestation to remove Indian tribal immunities and for construction in favor of Indians when statute is ambiguous).

<sup>68</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791–93 (2014) (Ginsburg, J., dissenting) (pre-*Smith* Free Exercise Clause precedents); *Clarke*, 479 U.S. at 407 (1987) (“If we took literally Representative McFadden’s view of § 36(f), we would have to conclude that Congress intended to overturn the Attorney General’s opinion . . . which this Court has previously approved in *First National Bank in St. Louis* [v. *Missouri*, 263 U.S. 640 (1924)]”).

- The rejected interpretation is inconsistent with the statute's (or amendment's) purpose or other concerns Congress voiced during the legislative process.<sup>69</sup>

The difference between the “no mention” and the “silence-is-telling” cases thus is one of degree. The Court is drawing the same basic inference in both sets of cases—i.e., that Congress's failure to comment in the legislative record about a substantial change worked by the law means that change was not intended. But in the latter set of cases, the Court spends more time and space—sometimes considerably more time and space—discussing the lack of legislative debate about the supposed change. Moreover, as the above list shows, in the “silence-is-telling” cases the Court often ties its dog that did not bark argument to other interpretive canons or tools or to specific facts about the legislative process that leads to the statute's enactment which lend support to the inference that Congress's failure to comment was significant.

### C. *Bankruptcy Cases*

Finally, in a series of bankruptcy decisions, the Supreme Court has established a bankruptcy-law-specific presumption that Congress does not intend to make significant changes to pre-Code bankruptcy practice—unless a statute's legislative history clearly indicates an intent to make such a change. This Bankruptcy Code version of the dog that did not bark rule seems to have evolved out of a continuity norm requiring clear indication of congressional intent before the bankruptcy laws are read to change, or create exemptions from, existing legal rules. In *Midatlantic National Bank v. New Jersey Department of Environmental Protection*,<sup>70</sup> for example, the Court held that the 1978 revisions to the Bankruptcy Code did not eliminate a preexisting exception to the bankruptcy trustee's abandonment power.<sup>71</sup> Before the 1978 revisions, a bankruptcy “trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state or federal interests.”<sup>72</sup> The *Midatlantic* Court held that the

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<sup>69</sup> See *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 16–18 (1987) (primary purpose of tightening restrictions on access to tax information); *Watt v. Alaska*, 451 U.S. 259, 270–71 (1981) (concern that Department of Interior might not have sufficient funds to make required payments).

<sup>70</sup> *Midatlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494 (1986).

<sup>71</sup> *Id.* at 506–07.

<sup>72</sup> *Id.* at 500. Specifically, the Court had held that a bankruptcy trustee who decided to liquidate the estate of a barge company could not abandon several of the barges if abandonment would obstruct a navigable passage in violation of federal law. *Id.*

Bankruptcy Code must be presumed to incorporate this established limitation on a trustee's abandonment power.<sup>73</sup> In so doing, it noted that "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.*"<sup>74</sup> Although the *Midatlantic* Court said nothing about whether Congress made its intent clear in the legislative record, the Court took the rule in that direction in another bankruptcy case decided in that same term.

That case, *Kelly v. Robinson*,<sup>75</sup> invoked the continuity norm cited in *Midatlantic*, and this time emphasized the lack of comment in the legislative record as evidence that Congress did not intend to change pre-Bankruptcy Code practice.<sup>76</sup> *Robinson* raised the question whether a bankruptcy filing discharges a debtor's obligations under a restitution order payable to a state welfare agency.<sup>77</sup> Respondent Robinson had pleaded guilty to the crime of larceny for the wrongful receipt of welfare benefits from the Connecticut Department of Income Maintenance.<sup>78</sup> As part of her sentence, she had been ordered to make restitution payments to the Connecticut Office of Adult Probation.<sup>79</sup> The next year, Robinson filed for bankruptcy and sought to discharge her restitution payments as part of her bankruptcy filing.<sup>80</sup> The Court held that Robinson's restitution obligations were not dischargeable, quoting *Midatlantic's* presumption that the Bankruptcy Code does not work significant changes in surrounding law and noting that the House and Senate committee reports contained no indication of congressional intent that bankruptcy filings would void restitution payments ordered as part of a criminal sentence.<sup>81</sup> "If Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, *'we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so*

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<sup>73</sup> *Id.* at 501.

<sup>74</sup> *Id.* (emphasis added) (citation omitted).

<sup>75</sup> *Kelly v. Robinson*, 479 U.S. 36 (1986).

<sup>76</sup> *Id.* at 49–51.

<sup>77</sup> *Id.* at 38.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 38–39.

<sup>80</sup> *Id.* at 39.

<sup>81</sup> *Id.* at 46–47, 51.



inimical to purposes previously deemed important, and so likely to arouse public outrage.’”<sup>82</sup>

Later bankruptcy cases inevitably cite *Kelly* or *Midatlantic* when making dog that did not bark inferences. A typical example is *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*,<sup>83</sup> which held that the Bankruptcy Code does not entitle undersecured creditors to compensation for the delay caused by an automatic stay in foreclosing on their collateral.<sup>84</sup> The Court’s opinion relied primarily on the plain meaning of the statute’s text,<sup>85</sup> but it also noted in passing that the legislative history supported its construction “since it contains not a hint that [the Code provision] entitles the undersecured creditor to postpetition interest.”<sup>86</sup> The Court insisted that “[s]uch a major change in the existing rules would not likely have been made without specific provision in the text of the statute; it is most improbable that it would have been made *without even any mention in the legislative history*”—citing *Kelly v. Robinson*.<sup>87</sup> Interestingly, the majority opinion in *United Savings Association* was written by Justice Scalia, who elsewhere has harshly criticized the Sherlock Holmes canon!<sup>88</sup>

While there are many cases in which the Court follows some form of the Sherlock Holmes canon, there also are a number that expressly refuse to apply the canon. Still other cases ignore the canon silently, over dissenting opinions arguing for its application. The leading express-refusal case is *Harrison v. PPG Industries, Inc.*<sup>89</sup> *Harrison* involved a provision of the Clean Air Act that was amended to provide for direct review in the Court of Appeals of certain locally applicable actions taken by the Environmental Protection Agency (“EPA”) Administrator under specifically enumerated provisions, as well as “any other final action of the Administrator under [the Act] . . . which is locally or regionally applicable.”<sup>90</sup> The statutory question presented was whether “*any other* final action” meant all other final actions taken by the EPA Administrator or only those “*other* final actions”

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<sup>82</sup> *Id.* at 51 (emphasis added) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 209 (1978) (Powell, J., dissenting)).

<sup>83</sup> *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988).

<sup>84</sup> *Id.* at 382.

<sup>85</sup> *See id.* at 369–76.

<sup>86</sup> *Id.* at 380.

<sup>87</sup> *Id.* (emphasis added).

<sup>88</sup> *See infra* notes 114–16 and accompanying text.

<sup>89</sup> *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980).

<sup>90</sup> *Id.* at 579.

that were similar to those actions described in the Act's specifically enumerated provisions.<sup>91</sup> The Supreme Court read the statute broadly, to include all other final actions and, in the process, criticized PPG's attempt to invoke the dog that did not bark canon.<sup>92</sup> The Court stated:

The respondents also rely on what the Committee and the Congress did *not* say about the 1977 amendments to § 307(b)(1). It is unlikely, the respondents assert, that Congress would have expanded so radically the jurisdiction of the courts of appeals, and divested the district courts of jurisdiction, without some consideration and discussion of the matter. We cannot accept this argument. First, although the number of actions comprehended by a literal interpretation of 'any other final action' is no doubt substantial, the number would not appear so large as ineluctably to have provoked comment in Congress. Secondly, it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations *that which is obvious on the face of a statute*. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.<sup>93</sup>

When the Court declines to apply the Sherlock Holmes canon, it generally argues, as in *Harrison*, that there was no reason to expect Congress to comment in the legislative record. The Court's most common line of argument is that the statute's meaning is plain and clearly effects the change at issue, so that legislative comment highlighting the change is not necessary.<sup>94</sup> The Court also sometimes silently declines to apply the Sherlock Holmes canon, ignoring failure to com-

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<sup>91</sup> See *id.* at 586.

<sup>92</sup> *Id.* at 589, 591–92.

<sup>93</sup> *Id.* at 591–92 (second emphasis added).

<sup>94</sup> Another bankruptcy case, *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990), *superseded by statute*, Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, § 3, 104 Stat. 2865, *as recognized in Johnson v. Home State Bank*, 501 U.S. 78, 83 n.4 (1991), is illustrative. Like *Kelly*, *Davenport* concerned the dischargeability of restitution obligations, but under a different provision of the Bankruptcy Code. *Id.* at 555. This time, however, the Court did not follow the dog that did not bark rule. The Court did acknowledge the Sherlock Holmes canon in principle, affirming that “[w]e will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.” *Id.* at 563. But it went on to find that in the provision at issue, “the statutory language plainly reveals Congress’ intent not to except restitution orders from discharge,” and held itself bound by that plain intent, pre-Code practice notwithstanding. *Id.*

ment arguments made by dissenting opinions.<sup>95</sup> In such cases, as well, the Court's reasoning tends to focus on the clarity of the statutory text, insisting that its meaning is "obvious"<sup>96</sup> and "leave[s] no room" for an alternate construction.<sup>97</sup>

A second strategy the Court has used to openly reject failure to comment arguments is to insist that Congress must have been aware of the change when it enacted the statute or amendment at issue, even if legislators did not discuss those changes expressly in the legislative record. For example, in *Sorenson v. Secretary of the Treasury*,<sup>98</sup> the Court considered what effect an amendment to the Internal Revenue Code ("IRC") should have on certain taxpayers' eligibility for the earned income tax credit ("EIC").<sup>99</sup> The Court noted that the "Petitioner and the Government agree that Congress never mentioned the earned-income credit in enacting" the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), the statute that amended the IRC.<sup>100</sup> Nevertheless, the Court concluded that "it defies belief that Congress was unaware, when it provided in § 6402(c) that 'any overpayment to be refunded . . . shall be reduced by the amount of any past-due support' . . . that this would include refunds attributable to excess earned-income credits."<sup>101</sup> The Court went on to point out that "Congress had previously expressly defined an excess earned-income credit as an

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<sup>95</sup> See, e.g., *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 311 (2010) (Sotomayor, J., dissenting); *United States v. Gonzales*, 520 U.S. 1, 13 (1997) (Stevens, J., dissenting); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 586–89 (1982) (Stevens, J., dissenting).

<sup>96</sup> *Harrison*, 446 U.S. at 591–92.

<sup>97</sup> *Griffin*, 458 U.S. at 570.

<sup>98</sup> *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851 (1986).

<sup>99</sup> *Id.* at 852–53. The Internal Revenue Code ("IRC") allows an individual responsible for the support of a child living with him a credit against income taxes (the "earned income tax credit" or "EIC"). *Id.* at 854. If the credit exceeds tax liability, the excess is considered an "overpayment" of tax and the taxpayer is eligible for a refund of the "overpayment." *Id.* at 854–55. Section 6402(a) of the IRC provides for a refund of "any overpayment" to the person who made it. *Id.* An amendment to the IRC, enacted as part of the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), requires the amount of "any overpayment" to be reduced by the amount of any past-due child-support payments assigned to a state. *Id.* at 856–57. The Social Security Act ("SSA") directs the Secretary of the Treasury to "intercept" tax refunds payable to persons who have failed to meet child-support obligations that have been assigned to a state. *Id.* *Sorenson* was entitled to receive an earned income tax credit, but he also was in arrears on child support payments to his former spouse, who had assigned her rights to child support to the State of Washington as a condition of receiving public benefits. *Id.* at 853–54. The statutory interpretation question presented was whether the Treasury Secretary was required to "intercept" *Sorenson's* refund (an overpayment under the EIC) and pay it to the State of Washington. *Id.* at 853.

<sup>100</sup> *Id.* at 863.

<sup>101</sup> *Id.* at 863–64 (first alteration in original) (first emphasis added).

‘overpayment,’ in § 6401(b) of the Internal Revenue Code—the *section immediately preceding the section to which Congress added the intercept provision.*”<sup>102</sup> In other words, the Court reasoned that when amending one provision of the IRC, Congress must have paid attention to adjacent statutory provisions that made clear that the term “overpayment” applied to the earned income credit. Justice Stevens’s dissenting opinion disagreed sharply, finding it significant that “Congress did not even mention this important change at any point in the legislative history of OBRA.”<sup>103</sup> Justice Stevens also pointed out that OBRA was a “vast” piece of legislation that had been enacted in a “hurried” fashion and argued that the more logical inference from legislative silence should be that members of Congress did not “realize that somewhere in that vast piece of hurriedly enacted legislation there was a provision that changed the 6-year-old Earned Income Credit Program.”<sup>104</sup>

A third line of reasoning the Court has used to rebuff the dog that did not bark canon is that the relevant changes in statutory language must have been made for *some* reason and must have intended *some* new effect, even if there is no discussion in the legislative record of that change. In *Weiss v. United States*,<sup>105</sup> for example, the Court reasoned that, “[i]n making the alterations in the phraseology of the similar section of the earlier act the Congress *must have had some purpose*. We cannot conclude that the change in the wording of two of the four clauses of the section was inadvertent.”<sup>106</sup> Thus, despite the legislative record’s silence, the Court concluded that the Act’s prohibitions applied to both intrastate and interstate communications.<sup>107</sup>

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<sup>102</sup> *Id.* at 864 (emphasis added).

<sup>103</sup> *Id.* at 867 (Stevens, J., dissenting).

<sup>104</sup> *Id.*

<sup>105</sup> *Weiss v. United States*, 308 U.S. 321 (1939).

<sup>106</sup> *Id.* at 329 (emphasis added).

<sup>107</sup> *Id.* *Weiss* raised the question whether the Communications Act of 1934 prohibited the use in federal court of evidence obtained through federal wiretapping of intrastate communications. *See id.* at 326. All parties agreed that the Act prohibited the use of evidence obtained from wiretapping of *interstate* communications, but the Government argued that the Act should not be read also to cover *intrastate* communications, relying in part on the fact that nothing in the legislative history or the wording of the statute indicated a congressional intent to regulate *intrastate* communications. *See id.* at 326–29. The Government pointed out that the main purpose of the Communications Act was to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications as well as those by radio. *See id.* at 328. It argued that “if Congress had intended to make so drastic a change as to regulate intrastate as well as interstate communication, both the legislative history of the Act and its phraseology would so indicate, whereas there is nothing in either to emphasize any such extension of

A fourth reason the Court sometimes gives for rejecting Sherlock Holmes canon inferences is that the relevant legal rule is not actually settled, so that the interpretation at issue would not in fact work a dramatic change in the law. *United Savings Association* is again instructive here. Recall that in *United Savings Association* the Court held that undersecured creditors are not entitled to compensation for the delay caused by an automatic stay in foreclosing on their collateral.<sup>108</sup> After the Court noted the legislative history's silence regarding postpetition interest for the period of delay, it went on to reject a failure to comment argument made by the creditor: The creditor contended that established pre-Code practice gave creditors in his position relief from an automatic stay by permitting them to foreclose, and insisted that Congress would not have withdrawn this protection without any indication of an intent to do so in the legislative record—unless it was providing substitute relief in the form of interest on the collateral during the stay period.<sup>109</sup> The Court quickly rebuffed this dog that did not bark argument on the ground that “it is far from clear that there was a distinctive . . . [prior] rule of absolute entitlement to foreclosure.”<sup>110</sup>

As these examples illustrate, the Court's overall treatment of congressional failure to comment or dog that did not bark inferences—whether so labeled or not—has been inconsistent. This Part has sought to identify some themes in the circumstances that tend to lead the Court to reject application of the Sherlock Holmes canon—e.g., a clear text, the use of different language in parallel provisions, an unsettled status quo—but the Court's approach to dog that did not bark inferences remains unpredictable. The next two Parts turn from the descriptive to the normative, illuminating several theoretical problems with this under-examined canon and advocating that it be applied only in certain, very limited, circumstances.

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authority.” *Id.* at 328–29. The Court, however, declined to accept this dog that did not bark argument. *See id.* at 329. First, the Court insisted that the text of the Act clearly prohibited intercepting “any communication” and was not limited to interstate communications. *Id.* at 327. The Court then went on to discuss the evolution of the statute, noting that the Communications Act provision at issue was based on a similar provision of the Radio Act of 1927, which uniformly used the term “communication” or “message”—“and nowhere qualified the designation by the use of the phrase ‘in interstate or foreign commerce.’” *Id.* at 328. The Communications Act, by contrast, contained the qualifying phrase “in interstate or foreign commerce” in two of its four clauses—though not in the clause at issue. *Id.* at 327–28.

<sup>108</sup> *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 381–82 (1988); *see also supra* notes 83–88 and accompanying text

<sup>109</sup> *Id.* at 380.

<sup>110</sup> *Id.* at 381.

## II. SOME PROBLEMS WITH DOGS THAT DON'T BARK

As the analysis in Part I shows, the Court is not always persuaded to reject status-quo-changing interpretations based on Congress's failure to comment in the legislative record. Indeed, many of the dog that did not bark cases listed in the Appendix invoke the canon in *dissent*.<sup>111</sup> This means that the Court often does adopt interpretations that effect significant changes in the law, despite congressional failure to comment—and despite briefs and opposing opinions pointing out the lack of legislative debate.<sup>112</sup> Further, the Court's rhetoric regarding the meaning of Congress's failure to comment is woefully inconsistent from case to case. Many cases invoke the canon and some—like *Church of Scientology* and *Department of Commerce*—place significant weight on it, but several other cases ignore the canon or explicitly reject it.<sup>113</sup>

Notably, even when the Justices split internally over whether to apply the canon, they do not engage in significant discussion or debate about the canon's merits. Only Justice Scalia has openly criticized the canon, and even his criticism has been occasional and inconsistent.<sup>114</sup> In fact, he sometimes has quietly gone along with a majority opinion that cites Congress's failure to comment as support for a particular construction.<sup>115</sup> Further, the little criticism that Justice Scalia has offered has been cursory and short on political theory, in contrast to his highly specific and theoretical criticism of other forms of judicial reliance on legislative history.<sup>116</sup> This is surprising because the dog that

<sup>111</sup> See *infra* Appendix (showing that thirteen of thirty-one listed cases referenced the canon in dissenting opinions).

<sup>112</sup> See, e.g., *United Sav. Ass'n*, 484 U.S. at 380.

<sup>113</sup> Compare *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 338–41 (1999), and *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17 (1987), with *United Sav. Ass'n*, 484 U.S. at 380–81.

<sup>114</sup> See *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 120–21 (2007) (Scalia, J., dissenting) (refusing to draw inference from congressional silence); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) (“I also disagree with the Court's reliance on things that the sponsors and floor managers of the 1995 amendment *failed* to say.”); *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (rejecting “questionable wisdom of assuming that dogs will bark when something important is happening”).

<sup>115</sup> See *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993).

<sup>116</sup> In *Chisom v. Roemer*, 501 U.S. 380 (1991), for example, Justice Scalia raises his familiar objection that courts should not credit the legislative history over the ordinary language of the statute and then makes a comment about “the questionable wisdom of assuming that dogs will bark when something important is happening”—citing a book titled *The History of Rome!* *Chisom*, 501 U.S. at 406 (Scalia, J., dissenting) (citing 1 TITUS LIVIUS, *THE HISTORY OF ROME* 411–13 (D. Spillan trans., George Bell & Sons 1906) (1892)). This somewhat opaque reference

did not bark canon is a potentially powerful interpretive trump card—and one that poses a number of practical and theoretical problems. First, the canon makes several improbable assumptions about how the legislative process works. Second, the canon is conceptually loose, lacking any clear limits or boundaries for defining problematic levels of change. Moreover, it is somewhat circular in its logic. Third, and related to the second, the canon provides inadequate notice to legislators about when they need to highlight a change created by a new law or amendment, and how specific they need to be about such change. Fourth, the canon sometimes favors statutory constructions that would treat like entities differently, and thus causes horizontal coherence problems. Fifth, the canon elevates congressional inaction above duly enacted statutory text. This Part explores each of these problems in detail, elaborating on the relatively thin criticism of the canon that has been articulated thus far.

#### A. *Legislative Process Problems*

One significant problem with the Sherlock Holmes canon is that it rests on unrealistic assumptions about the legislative process. First, the canon presumes a level of legislative omniscience and detail that is highly impractical.<sup>117</sup> The canon expects members of Congress both to predict all of the changes that a new law or amendment will effect *and* to comment on those changes while enacting the law.<sup>118</sup> It does not account for the fact that legislators confront thousands of bills each year,<sup>119</sup> and cannot pay close attention to more than a few of these; thus, legislators are unlikely to anticipate all the potential consequences of all the statutes they enact.<sup>120</sup> Nor does the canon acknowl-

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to the burning of Rome is a far cry from the detailed political-theory-based critique Justice Scalia elsewhere has provided to explain his general disdain for judicial reliance on legislative history or his specific disdain for legislative acquiescence arguments. *See, e.g., Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) (arguing that congressional inaction is ambiguous because Constitution was designed to make legislation difficult to enact).

<sup>117</sup> *See supra* note 35 and accompanying text.

<sup>118</sup> *See supra* note 33 and accompanying text (describing effect of changes to deportation laws on pre-amendment criminal convictions).

<sup>119</sup> *See* ROBERT A. KATZMANN, *JUDGING STATUTES* 18 (2014); *List of Bills Introduced in the 110th Congress*, LIBR. CONGRESS, <http://thomas.loc.gov/home/Browse.php?n=Bills;c=110> (listing all the bills considered by the 110th Congress in 2007–08).

<sup>120</sup> *See, e.g.,* Craig D. Margolis, *House Out of Order: Committee Reform in the Modern House of Representatives*, 11 J.L. & POL. 273, 302–03 (1995) (discussing the problem of subcommittee proliferation as a burdensome demand on Members' time); Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 142–43 (2011) (detailing competing demands on legislators' time).

edge that legislative staffers, rather than members of Congress, draft much of the legislative record (e.g., committee reports) and even the legislation itself.<sup>121</sup> Moreover, legislation is sometimes enacted in a hurry, with little time or opportunity for Members to read, let alone comment on, all of its intended consequences.<sup>122</sup> Thus, even when members of Congress do anticipate a particular change in the law, their understanding of the statute's effect may not be reflected in the legislative record because they may not take part in preparing the committee report describing the proposed legislation, or may not be present when the legislation is debated on the House or Senate floor. Justice Scalia touched on this problem in his dissenting opinion in *Zuni* where he argued that it is nonsensical for a case to turn on "whether a freshman Congressman from New Mexico gave a floor speech that only late-night C-SPAN junkies would witness."<sup>123</sup>

Second, the dog that did not bark canon misunderstands legislators' objectives when they do make comments in the legislative record. The legislative process is highly political and tactical, and

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<sup>121</sup> Two recent empirical studies confirm this. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *STAN. L. REV.* 901, 967–68 (2013); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. REV.* 575, 583 (2002).

<sup>122</sup> See, e.g., Volokh, *supra* note 120, at 135–38 (decrying rushed enactment process for the American Clean Energy and Security Act of 2009, also known as the Waxman-Markey cap-and-trade bill). Volokh excerpted a *National Review* article that described legislators' lack of familiarity with the statute's provisions and effects as follows:

When Waxman-Markey finally hit the floor, there was no actual bill. Not one single copy of the full legislation that would, hours later, be subject to a final vote was available to members of the House. The text made available to some members of Congress still had "placeholders"—blank provisions to be filled in by subsequent language—including one for the regulation of climate derivatives. The last-minute amendments, too, had yet to be incorporated. Even the House Clerk's office lacked a complete copy of the legislation, and was forced to place a copy of the 1,200-page draft side by side with the 300-page amendments.

Jonathan H. Adler, *Betting Blind on ACES*, *NAT'L REV.*, June 29, 2009, <http://www.nationalreview.com/node/227791/print>; see Volokh, *supra* note 120, at 136. Volokh continued:

Without a copy of the bill to examine, how could the Representatives understand what they were voting on? All they had to go on were assurances—from party leaders, from lobbyists for interest groups who had negotiated the bill and amendments, and from staffers who had been frantically reading the parts of the legislation that were available. Even if a Representative had managed to read through all 1,500 pages of text and amendments during the single day before the vote, there would not have been time to even begin to understand the implications of the proposed law and its interaction with statutes already on the books.

Volokh, *supra* note 120, at 136.

<sup>123</sup> *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 121 (2007) (Scalia, J., dissenting).



legislators often act or speak with the goal of influencing other legislators or grandstanding to the voting public, rather than recording their own intent about how a new law will affect prior legal rules.<sup>124</sup> It is not uncommon for legislators who oppose a proposed law or amendment to argue, during floor debates, that the proposed bill will change the status quo in unfavorable ways—not because they believe this to be true, but as part of a strategic effort to discourage adoption of the new law or amendment.<sup>125</sup> An uncontroversial change in the status quo, by contrast, might go unmentioned precisely because everyone accepts and understands that the proposal will effect the change. Moreover, an unpopular, but intended, change might receive no comment because legislators wish to avoid highlighting the change to their constituents. As Victoria Nourse has reminded us, legislators speak primarily to their constituents and to each other when making statements on the House and Senate floor—and they tend to focus on the broad goals of the statute they are enacting and the societal needs it will fulfill, not on chronicling all of the statute’s potential applications and consequences.<sup>126</sup> Even committee reports, which describe proposed legislation section-by-section, are written for members of Congress, to explain the proposed law and help members decide how to vote—not with the lawyerly objective of describing how a proposed law will fit into the larger legal landscape.<sup>127</sup> When a court reasons that a particular reading of a statute will change pre-existing law in *X* way, and that such change could not have been intended because no member of Congress noted the change in the legislative record, it is

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<sup>124</sup> See Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1132 (2011) (“Statutes, like congressional debates, are exercises in communication between representatives and citizens (the vertical dimension) as much as between legislatures and other government branches (the horizontal dimension).”).

<sup>125</sup> For example, “[d]uring debates on the Violence Against Women Act, opponents claimed that the bill would cover every act of violence between a man and a woman, leading to massive numbers of cases brought to federal court.” *Id.* at 1130–31 (citing FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 309–444 (2009)); see also 158 CONG. REC. H5777 (2012) (statement of Rep. Holt) (charging Government Spending Accountability Act with making “significant changes to Federal employees’ ability to travel to conferences and meetings” that would hinder American scientists’ ability to communicate and collaborate with other scientists); 144 CONG. REC. 20,339 (1998) (statement of Rep. Markey) (arguing that rider to appropriations bill allowing helicopter landings in remote Alaskan wilderness areas would work “a significant change in national wilderness policy”); KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 173 (1999) (“[O]pponents often attribute undesirable or highly controversial meaning to language, in order to emphasize the danger of proposed legislation.”).

<sup>126</sup> See Nourse, *supra* note 124, at 1131–33.

<sup>127</sup> See GREENAWALT, *supra* note 125, at 173 (chronicling purposes of committee reports).

expecting Congress to act like a court rather than a legislature—or at least to pay attention to the kinds of concerns that courts, rather than legislatures, pay attention to.<sup>128</sup>

Reconsider, in this light, *INS v. St. Cyr*, which held that AEDPA and the IIRIRA did not repeal the Attorney General’s power to grant discretionary relief from deportation to an alien who was convicted of a crime before those statutes took effect.<sup>129</sup> The legislative history of both statutes is rife with broad statements extolling the proposed bills for taking a hard stance against illegal immigrants and immigrants who commit crimes while in the United States.<sup>130</sup> Congress either did not think about how AEDPA and the IIRIRA would affect immigrants convicted of crimes before these statutes took effect or, if it did, did not discuss this in the legislative history—perhaps because it was more concerned with grandstanding and persuading fellow legislators than with explaining the details of how these laws would operate in interim cases.<sup>131</sup> Members of Congress were not directing their comments in the Congressional Record at judges or lawyers, or focusing on questions of legal procedure; rather, they were busy taking credit for addressing important societal problems.<sup>132</sup>

A third problem with the dog that did not bark canon is that it could have the paradoxical effect of *counteracting* congressional intent by limiting the scope of new statutes or amendments. The whole point of statutory amendments and new laws is to effect *some* change in the status quo—if Congress wished for everything to remain the same, it

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<sup>128</sup> See Nourse, *supra* note 124, at 1131–33.

<sup>129</sup> See *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

<sup>130</sup> See, e.g., 142 CONG. REC. 23,251 (1996) (statement of Sen. Simpson) (praising IIRIRA because it would “ensure that aliens who commit serious crimes are detained upon their release from prison until they can be deported, and then they will be deported under expedited procedures,” would “strengthen the border enforcement,” would “create an expedited removal process” for “those who seek to enter the United States surreptitiously,” and would “ensure that the sponsor and not the U.S. taxpayer will be primarily responsible for providing financial support to new immigrants in need”); 142 CONG. REC. 7970 (1996) (statement of Rep. Poshard) (praising AEDPA for providing “a meaningful response to the threat of terrorism” by, among other things, including a provisions that “will allow deportation of immigrants who are or may be engaged in terrorist activity”); 142 CONG. REC. 7954 (1996) (statement of Rep. Pryce) (listing as one of AEDPA’s virtues: “improved procedures for deporting criminal aliens are included which allow judges to order the deportation of aliens convicted of Federal crimes at the completion of their sentence”).

<sup>131</sup> See *supra* notes 124–25.

<sup>132</sup> E.g., 142 CONG. REC. 7954 (1996) (statement of Rep. Pryce) (touting the “long overdue victory” of instating “mandatory victim restitution” and ending the suffering of victims “at the hands of . . . an inadequate, insensitive, inattentive justice system”).

would not go through the difficult process of enacting a new law.<sup>133</sup> The only question, then, is *how much* change Congress intends for a new statute or amendment to effect. The Sherlock Holmes canon imposes a default rule that, when in doubt, Congress should be presumed not to have intended significant changes in the law—unless there is specific discussion of a change in the legislative record. For the reasons described above, however, Congress may not necessarily discuss in the legislative record all changes that it intends or understands a new law to effect.<sup>134</sup> The Sherlock Holmes canon thus could have the unintended consequence of straight-jacketing new laws and amendments by limiting their reach to the narrow set of circumstances explicitly—and perhaps somewhat arbitrarily—discussed in the legislative history.

An example may help to illustrate. Consider *Griffin v. Oceanic Contractors, Inc.*,<sup>135</sup> which involved a provision of the Jones Act that required certain maritime vessel owners to pay seamen promptly upon their discharge and authorized seamen to recover double wages for each day that payment was delayed without cause.<sup>136</sup> An earlier version of the statute had given judges discretion to award payment of up to two times the seamen's daily wages for a maximum of ten days; later amendments had replaced the discretionary language with a requirement that vessel owners "shall pay" seamen two days' pay "for each and every day" during which payment is delayed.<sup>137</sup> *Griffin* was

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<sup>133</sup> McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS., 3, 23 (1994). It is no secret that the legislative process is filled with numerous "veto-gates," or "negative legislative checkpoints," that make it exceptionally difficult for proposed legislation to become law. See, e.g., *id.* at 6–7; Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 408 n.137 (1992) (defining "negative legislative checkpoints" as "the various loci at which an individual legislator or a group of legislators representing minority interests can slow down or stop a bill or, alternatively, at which minority interests can focus their lobbying efforts to procure legislative benefits"). Indeed, during the past ten years (the 109th to 113th Congresses), no more than four percent of the bills introduced in any given Congress have been enacted into law. See *Bills by Final Status*, GOVTRACK.US <https://www.govtrack.us/congress/bills/statistics> (last visited Jan. 7, 2016) (table listing numbers and percentages of proposed legislation, resolutions, and enacted laws); Josh Tauberer, *Kill Bill: How Many Bills Are There? How Many Are Enacted?*, GOVTRACK.US (Aug. 4, 2011), <http://www.govtrack.us/blog/2011/08/04/kill-bill-how-many-bills-are-there-how-many-are-enacted/> (noting that the 111th Congress enacted only three percent of legislation introduced).

<sup>134</sup> E.g., McNollgast, *supra* note 133, at 23 ("Rational actors would not expend effort and resources to enact vacuous legislation that does not affect the status quo. Hence, the status quo is certain not to be the intent of the legislation.").

<sup>135</sup> *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).

<sup>136</sup> *Id.* at 565–66.

<sup>137</sup> See *id.* at 572–74.

a seamen whose employer failed to pay him some \$412.50 for more than four years after he was discharged; based on the double wages provision, this subjected the employer to over \$300,000 in penalty damages.<sup>138</sup> The Supreme Court held that the statutory language was clear and that the vessel owner must pay the full amount.<sup>139</sup> But a dissenting opinion by Justice Stevens would have allowed the district court discretion to limit the damages period, relying in part on the fact that the amendment's legislative history said nothing about the "drastic and dramatic" change of removing all judicial discretion over the damages amount.<sup>140</sup> This reading, by the strongly intentionalist Justice Stevens, was potentially quite subversive of congressional intent. The evidence indicated that Congress's purpose in amending the damages provision was "to secure prompt payment of seamen's wages" and to protect seamen from "arbitrary and unscrupulous action" by their employers through "the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages."<sup>141</sup> Yet the default rule imposed by the Sherlock Holmes canon—that courts should retain discretion to reduce a damages award absent explicit mention in the legislative record of an intent to eliminate judicial discretion—would have severely *limited* the protections for seamen afforded by the amendment and provided significantly less encouragement to employers to pay seamen promptly. Accordingly, application of the canon very possibly would have led the Court to a result that flew in the face of Congress's meta-intent.

Finally, the dog that did not bark canon could create perverse incentives in the Court-Congress dialogue. If the Court were to endorse the canon full-throatedly, it would send an odd signal to members of Congress. On the one hand, full-throated adoption of the canon could encourage legislators to plant strategic statements in the legislative record describing changes in legal rules that they wish to see effected. Conversely, the canon could create perverse incentives for members of Congress to stay silent about potential changes in a legal rule that they do not like, for fear that any legislative discussion will later be taken as a sign that the change *was* intended. These are not problems with the manner in which the canon operates but,

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<sup>138</sup> *See id.* at 567, 574–75.

<sup>139</sup> *Id.* at 574–77.

<sup>140</sup> *Id.* at 588–89 (Stevens, J., dissenting).

<sup>141</sup> *Id.* at 572 (majority opinion) (quoting *Collie v. Fergusson*, 281 U.S. 52, 55–56 (1930)).

rather, dangerous collateral consequences that the canon could encourage.

*B. Circularity and Looseness*

In addition to legislative process problems, the Sherlock Holmes canon also suffers from problems of logic. First, the logical inference drawn by the canon is circular. The canon operates in two steps: First, the Court declares that a particular statutory interpretation would effect a massive change in the legal status quo. Next, it declares that if Congress intended such a significant legal change, it would have commented on that change in the legislative record. There is a lot of rhetorical looseness and *ipse-dixitism* to this kind of argument. The Court is basically announcing that, “X interpretation creates an enormous change!” and insisting that, “if Congress intended such enormous change, it would have said so in the legislative history!” But we have to take the Court’s word for both of these propositions; the change is enormous because the Court says it is, and Congress would have commented on such enormous change because the Court declares it to be so. To be sure, the Court sometimes provides additional reasons why Congress should be expected to comment on a particular change—e.g., inconsistency with the statute’s purpose, another substantive canon that calls for explicit mention of the kind of change at issue, absurd results that would follow from the change.<sup>142</sup> But such supporting factors are not present in all cases, and even when they are, we still have to take the Court’s word that a particular change is significant or “enormous.”

Worse yet, the Court does not have to follow any guidelines when declaring a legal change to be so significant as to require congressional comment. The canon does not establish, nor does it require the Court to follow, any standards regarding how much change a new law or statute can accomplish without specific comment in the legislative record. After all, what constitutes enormous, versus ordinary—or average—change? Are all changes forbidden unless specifically commented upon? (Note that this would severely hamper the effectiveness of new laws.) If not, where does the line fall separating acceptable changes from changes that require express legislative discussion? Without any such standards, judges are left to use their own intuitions to guide them in deciding whether a particular legal change goes too far to be implemented without express evidence of

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<sup>142</sup> See *supra* Part I.B.

legislative intent—and the canon lacks any limiting features. The canon thus suffers from problems of looseness as well as circularity.

The Sherlock Homes canon also makes several logical leaps. Most prominently, the canon takes for granted that members of Congress necessarily will comment in the legislative record when they intend for a new law to effect significant changes in the legal status quo. But there are many reasons why Congress might fail to comment on an intended change in the law. For example, Congress could intend a particular change, but not consider it as large or significant a change as the Court does—and therefore may not consider it necessary to highlight the change during the process of enactment. This kind of mismatch between Congress's and the Court's views of a particular change could result because: (1) Congress underestimates the extent of change worked by the statute; (2) the Court overestimates the extent of change worked by the statute; or (3) Congress holds a different view of the baseline, current state of the law than does the Court. All of this, of course, assumes that members of Congress are even paying attention to the statute at more than a cursory level.<sup>143</sup>

Alternately, Congress might not comment on a change that it intends for a statute to produce because it fails to foresee the precise statutory application that later arises, although that application may be a natural consequence of Congress's broader meta-intent in enacting the statute—and one that it would have approved if it *had* anticipated the application. Finally, Congress might see no need to highlight a particular change in the legislative record because it believes the statutory language to clearly require the change. Justice Scalia has made this point when criticizing the Sherlock Holmes canon, arguing that “[t]he only fair inference from Congress's silence is that Congress had nothing further to say, its statutory text doing all of the talking.”<sup>144</sup> This explanation is particularly plausible because, as Part I shows, the Supreme Court has applied the dog that did not bark canon in an utterly inconsistent manner—sending conflicting messages to Congress about the necessity of highlighting intended changes to the status quo in the legislative history.<sup>145</sup> The next Section discusses this signaling problem in greater detail.

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<sup>143</sup> See *supra* notes 120–23 and accompanying text.

<sup>144</sup> *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 121 (2007) (Scalia, J., dissenting).

<sup>145</sup> See *supra* Part I.

### C. Notice Problems

A further problem with the Sherlock Holmes canon is that it provides inadequate notice to Congress about what it must say and do when it does intend to make significant changes in the status quo. The canon is not invoked with great frequency and, when invoked, has been rejected by a majority of the Court in several cases.<sup>146</sup> On the other hand, the canon seems to have gained in popularity over the last thirty or so years.<sup>147</sup> This puts Congress on uncertain ground, as the Court essentially lulls Congress into believing that it is enough to state a statute's effect clearly in the statute's text—but then upsets this expectation with sporadic cases declaring that a statute cannot apply to a situation seemingly covered by its text because such application would work a significant change in the law, about which there was no legislative discussion.<sup>148</sup>

Perhaps more troubling than the Court's inconsistency, however, is the post hoc nature of the requirement that the canon places on Congress. Administrative lawyers and courts long have recognized a "Monday morning quarterbacking" problem that occurs when courts review an agency's rulemaking process years after the fact and decide that there was something lacking in that process.<sup>149</sup> Agencies have little way of predicting which aspects of their rulemaking process a court might find fault with, especially since the court will be making its decision after several years of lived experience under the legal rule at issue, and with the benefit of hindsight and a record that the agency did not have before it when it made the rule.<sup>150</sup> A similar problem plagues the dog that did not bark canon. With statutes as well as agency rulemakings, courts often revisit the process of enactment years after Congress has acted.<sup>151</sup> Like agencies, members of Congress have little way of predicting which changes worked by a statute—and all statutes work some changes in the status quo—a court

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<sup>146</sup> See *infra* Appendix (listing thirty-one cases, including thirteen in which a failure to comment argument was invoked in dissent).

<sup>147</sup> See *infra* Appendix (listing cases referencing congressional failure to comment, only four out of thirty-one of which were decided before 1980).

<sup>148</sup> See, e.g., *Zuni Pub. Sch. Dist.*, 550 U.S. at 90–91; *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176–77 (1993).

<sup>149</sup> See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 547 (1978); FLORENCE A. HEFFRON & NEIL MCFEELEY, *THE ADMINISTRATIVE REGULATORY PROCESS* 314 (1983).

<sup>150</sup> See *Vt. Yankee*, 435 U.S. at 547.

<sup>151</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (interpreting Religious Freedom Restoration Act of 1993 twenty-one years after its passage).

will later find to be substantial and discount in the absence of specific legislative comment.

Consider two examples from the Court's recent history. In *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*,<sup>152</sup> the Court evaluated the scope of the False Claim Act's "public disclosure" bar, which deprives courts of jurisdiction over qui tam suits when relevant information has already entered the public domain through disclosure in "a congressional, administrative, or General Accounting Office (GAO) report, hearing, audit or investigation."<sup>153</sup> The statutory question was whether the term "administrative" applied to state and local administrative reports, hearings, audits, and investigations, or only to federal ones.<sup>154</sup> Justice Sotomayor's dissenting opinion argued that the bar should apply only to federal administrative reports, because that had been the prior practice and there was no discussion in the legislative history about expanding the bar to cover state reports as well.<sup>155</sup> The majority opinion stressed that the statute's language did not limit itself to federal administrative reports and held that state reports therefore also should be included.<sup>156</sup>

Assume for a moment that Congress intended for the bar to apply to all disclosures in all government reports, both state and federal. Under the dissent's reasoning, how were members of Congress to know that they needed to discuss the inclusion of state administrative reports in the legislative history? Legislators very reasonably could have believed that the statutory text, which plainly lists "administrative . . . report[s], hearing[s], audit[s,] or investigation[s]" without any limiting adjectives, was enough.<sup>157</sup> Even if the Court's recent affinity for invoking the Sherlock Holmes canon can be said to have provided some constructive notice that the Court would consult the legislative history for evidence of an intent to effect significant changes in the status quo, such notice is of little help for statutes like the False Claims

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<sup>152</sup> *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010).

<sup>153</sup> *Id.* at 286 (quoting 31 U.S.C. § 3730(e)(4)(A) (2000)).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 303, 311 (Sotomayor, J., dissenting).

<sup>156</sup> *See id.* at 287 (majority opinion).

<sup>157</sup> *Id.* at 286 (quoting § 3730(e)(4)(A)).



Act, which was enacted in 1863 and amended in 1986<sup>158</sup>—well before the Court’s recent surge in dog that did not bark references.<sup>159</sup>

Similarly, in *United States v. Ressam*,<sup>160</sup> the Court considered whether a sentencing enhancement applicable when a defendant “carries an explosive during the commission of any felony” should be applied to a defendant who made false statements about his identity to U.S. Customs officials (a felony) while carrying explosives in the trunk of his car.<sup>161</sup> Ressam argued that the sentencing enhancement should not apply because he had not carried explosives during *and in relation to* the crime of making of false statements.<sup>162</sup> The Court disagreed,<sup>163</sup> despite a vigorous dissenting opinion that invoked the dog that did not bark canon.<sup>164</sup> The canon came into play because the explosives statute was modeled on a firearms enhancement statute and originally contained the same language as that statute.<sup>165</sup> Both statutes later were amended; the amendments to the firearms statutes added the words “and in relation to” immediately after the word “during,” but the amendments to the explosives statute did not do so.<sup>166</sup> The dissenting opinion argued that “[i]f Congress, in neglecting to add the words ‘in relation to,’ sought to create a meaningful distinction between the explosives and firearms statutes, one would think that someone somewhere would have mentioned this objective.”<sup>167</sup> The majority opinion rejected this argument, concluding that the differences in the statute’s language must reflect differences in legislative intent.<sup>168</sup>

Again, assume that Congress intended for the explosives enhancement to apply whenever a defendant carries an explosive while committing a felony, and did not want the “in relation to” limitation in the firearms statute to carry over to the explosives statute. How were members of Congress supposed to be on notice that they should have discussed, in the legislative history of the explosives statute, their un-

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158 See *id.* at 298 (discussing 1986 amendments to the FCA).

159 Seventeen of the Justices’ thirty-one invocations of the canon were made in opinions written after the year 1990. See *infra* Appendix.

160 *United States v. Ressam*, 553 U.S. 272 (2008).

161 *Id.* at 273–74 (quoting 18 U.S.C. § 844(h) (1994)).

162 *Id.* at 273.

163 *Id.* at 274 (“The most natural reading of the relevant statutory text provides a sufficient basis for reversal [of the lower court’s ruling in favor of Ressam].”).

164 *Id.* at 281–82 (Breyer, J., dissenting).

165 *Id.* at 275 (majority opinion).

166 *Id.* at 275–77.

167 *Id.* at 282 (Breyer, J., dissenting).

168 *Id.* at 277 (majority opinion).

derstanding that that statute should be treated differently from the firearms statute? Again, legislators might reasonably have believed that the disparate language of the two statutes spoke for itself. Moreover, it is somewhat odd to expect Congress to explain, in the legislative history of one statute, why it did *not* include a qualifying phrase contained in another, separate statute. If Congress were going to explain its failure to replicate one particular qualifying phrase contained in one analogous statute, then why not also explain its reasons for not including other qualifications drawn from other analogous statutes? There is no logical end to this requirement, and thus no way for Congress to predict how specific the Court, construing statutes with the benefit of hindsight, will expect it to be.

#### D. *Horizontal Coherence Problems*

A fourth problem with the dog that did not bark canon is that it can be used to create exceptions from a general rule for one particular category of people or institutions affected by a statute. That is, the canon can be employed in a manner that treats like entities disparately. *Sorenson v. Secretary of the Treasury*, discussed in Part I, provides a good example.<sup>169</sup> Recall that *Sorenson* raised the question whether a provision of OBRA (the omnibus budget statute) requiring the IRS to “intercept” refunds owed to taxpayers who are delinquent on their child support payments applied to refunds due under the EIC (the earned income tax credit).<sup>170</sup> Recall also that Justice Stevens’s dissenting opinion invoked the dog that did not bark canon to argue against presuming that Congress intended for the child support intercept provision to undo the EIC.<sup>171</sup> Justice Stevens’ Sherlock Holmes reading would have treated EIC recipients differently from all other taxpayers, giving them a break that other taxpayers with unfulfilled child support payments do not receive.<sup>172</sup> Moreover, that reading would have applied OBRA unevenly to similar situations, directing the IRS to withhold refunds owed to some child support avoiders but not those owed to others.<sup>173</sup>

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<sup>169</sup> *Sorenson v. Sec’y of the Treasury*, 475 U.S. 851 (1986); see also *supra* Part I.C.

<sup>170</sup> See *supra* note 99. As discussed, the budget statute, OBRA, only intercepts refunds if the child support payments have been assigned to the state (which happens, for example, when the child owed support goes on public assistance). *Id.*

<sup>171</sup> *Sorenson*, 475 U.S. at 867 (Stevens, J., dissenting); see also *supra* notes 103–04 and accompanying text.

<sup>172</sup> See *Sorenson*, 475 U.S. at 860, 867.

<sup>173</sup> *Id.* at 862, 867.

Such disparate treatment raises a horizontal coherence problem, and violates the generality principle. In the statutory interpretation context, horizontal coherence refers to efforts to ensure that the meaning given to one statutory provision is consistent with the whole statute in which the provision is found, with analogous statutory texts and their current judicial interpretations, and with other parts of the legal framework, including canons of statutory construction.<sup>174</sup> Horizontal coherence is highly concerned with treating like situations and entities consistently.<sup>175</sup> The Sherlock Homes canon, by contrast, is concerned almost entirely with vertical coherence—that is, with treating a particular group or entity consistently across time.<sup>176</sup> But in arguing that certain applications of a statute go too far to implement without specific legislative comment, the canon perhaps unwittingly opens the door to judicial privileging of certain groups over other similarly situated groups. This in turn violates the generality principle, which dictates that a nation’s civil and criminal laws should be applied equally to all of its citizens.<sup>177</sup> The generality principle has been described as a crucial safeguard against abuse and arbitrariness in a constitutionally limited government,<sup>178</sup> and political scientists have argued that it helps prevent rent-seeking by special interests.<sup>179</sup> Failure to follow the principle, scholars have warned, would result in a government of men, rather than of laws—in which citizens are ruled by the will of government officials rather than by neutral principles.<sup>180</sup> There is a real danger that the Sherlock Holmes canon, in allowing judges to carve out exceptions for statutory applications they believe work “too much” change in the law, empowers judges to favor those interests

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<sup>174</sup> See, e.g., Eskridge, *supra* note 2, at 678. Horizontal coherence is often associated with the textualist methodology of statutory interpretation. See *id.*; Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 547 n.81 (1992).

<sup>175</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 239 (1994) (noting that, under horizontal coherence, the “interpreter demonstrates that her interpretation is coherent with authorities or norms located in the present: the statute’s contemporary purposes, other statutes now in effect and their statutory policies, and current values”).

<sup>176</sup> See, e.g., *id.* (noting that, under vertical coherence, “the interpreter demonstrates that her interpretation is coherent with authoritative sources situated in the past: the original intent of the enacting legislature, previous administrative or judicial precedents interpreting the statute, and traditional or customary norms”).

<sup>177</sup> See, e.g., F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 153 (1960).

<sup>178</sup> *Id.*

<sup>179</sup> See *id.* at 154 (recognizing that certain laws will sometimes “privilege” certain classes of people).

<sup>180</sup> See *id.* at 153.

that they like or are sympathetic to—in precisely the manner scholars have feared.

A related problem is that the canon's status quo bias almost inevitably tends to favor powerful, well-organized groups—as these are the groups most likely to be benefited by status quo legal rules. Recall *Griffin v. Oceanic Contractors, Inc.*, the maritime damages case.<sup>181</sup> Notably, the statute at issue in *Griffin* was revised several times, each time increasing the severity of the penalty imposed on employers and making the law more favorable to seamen.<sup>182</sup> The dissent's dog that did not bark reading, however, would have limited the scope of the then-most recent Jones Act amendment, preserving judicial discretion to reduce damages awards below the statutorily-prescribed amount.<sup>183</sup> That limitation would have benefitted vessel-owning employers—a wealthy, powerful group—over seamen who, as a class, tend to be significantly poorer and to possess less political clout.<sup>184</sup> This seems exactly backwards. Indeed, one might argue that any interpretive presumption should push in the opposite direction, towards benefiting the politically weaker litigant, or at least towards treating all citizens the same.<sup>185</sup>

### E. Formalist Concerns

There are several formal problems with inferring statutory meaning from Congress's failure to say something in the legislative record. Many of these problems have been elaborated in detail as part of the general textualist critique against judicial reliance on legislative history, so I will provide only a summary here. Fundamentally, formalism stresses that federal statutes derive their authority from the detailed procedural requirements that must be followed to enact them.<sup>186</sup> Article I, Section 7 of the U.S. Constitution provides that proposed bills must be adopted by both chambers of Congress, in identical form, and signed by the President in order to become law.<sup>187</sup> These are known as the bicameralism and presentment require-

<sup>181</sup> *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); see also *supra* Part II.A.

<sup>182</sup> *Griffin*, 458 U.S. at 572–74.

<sup>183</sup> See *id.* at 584–86 (Stevens, J., dissenting).

<sup>184</sup> See *id.* at 572 (majority opinion) (noting statutory purpose “to protect [seamen] from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed” (quoting *Collie v. Fergusson*, 281 U.S. 52, 55 (1930))).

<sup>185</sup> See ESKRIDGE, *supra* note 175, at 153, 158–59; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471–73, 486–87 (1989).

<sup>186</sup> See John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2027–28 (2006).

<sup>187</sup> See U.S. CONST. art. I, § 7.

ments.<sup>188</sup> Legislative history, which is neither voted upon by Congress nor presented to the President for his signature, fails to meet these constitutional requirements and thus, in the formalist view, cannot be authoritative.<sup>189</sup> In addition to procedural objections, formalism also takes issue with legislative history on the ground that such history reflects the comments and views of only one legislator, or at best a subset of legislators—not of the entire House or the entire Senate, let alone both houses of Congress and the President together, as the Constitution requires.<sup>190</sup> Indeed, some legislative history does not reflect the views of legislators at all, but only those of congressional staff or lobbyists.<sup>191</sup>

These basic formalist problems are heightened when courts invoke the dog that did not bark canon. If *statements* made in the legislative record during enactment of a statute—that directly support a statutory reading—are not valid interpretive aids, then how can Con-

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<sup>188</sup> See *INS. v. Chadha*, 462 U.S. 919, 946–47, 948 (1983).

<sup>189</sup> See, e.g., *Begier v. IRS*, 496 U.S. 53, 68 (1990) (Scalia, J., concurring in judgment) (“Congress conveys its directions in the Statutes at Large, not in excerpts from the Congressional Record.”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring in judgment) (arguing that enacted text always trumps “unenacted legislative intent”); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment) (“We are governed by laws, not by the intentions of legislators. . . . ‘The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.’” (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845))); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68–69 (1994) (“No matter how well we can know the wishes and desires of legislators, the only way the legislature issues binding commands is to embed them in a law.”); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 695 (1997).

<sup>190</sup> See, e.g., *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring) (“Congress cannot leave the formation of that intent to a small band of its number, but must, as the Constitution says, form an intent of the Congress. There is no escaping the point: Legislative history that does not represent the intent of the whole Congress is nonprobative; and legislative history that does represent the intent of the whole Congress is fanciful.”); *United States v. O’Brien*, 391 U.S. 367, 384 (1968) (“What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.”).

<sup>191</sup> See *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) (charging that committee reports are often drafted by staff members at their own initiative or at the suggestion of lawyer-lobbyists); *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) (“[L]egislative history is a poor guide to legislators’ intent because it is written by the staff rather than members of Congress . . . .”); see also ESKRIDGE, *supra* note 175, at 220, 222 (identifying opportunities for strategic behavior on part of both legislators and “nonlegislator drafters”); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 397 (1992) (noting that members of Congress “manufacture” legislative history); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1302–03 (1990) (discussing claim that committee staff write biased legislative history).

gress's *failure* to comment in the legislative record be entitled to any interpretive weight? When courts rely on statements in the legislative record as evidence of statutory meaning, there is at least some room for argument that those statements reflect the understanding held by legislators who voted for the law—an implicit approval or agreement about the statute's meaning that is based on other legislators' awareness, or constructive awareness, of statements made in the legislative record.<sup>192</sup> By contrast, when members of Congress fail to comment in the legislative record, there is no legislative process convention that holds other legislators to any understanding. Nor is there any "meeting of the minds" of the kind required by the bicameralism and presentment clauses. Thus taking Congress's failure to comment on a supposed change in the law as evidence of collective agreement or intent *not to change the law* is an extraordinary inference.

Worse still from a formalist perspective, the Court sometimes draws inferences from Congress's failure to comment that contradict the statute's plain language. Justice Stevens's dissenting opinion in *United States v. Gonzales*<sup>193</sup> is illustrative. *Gonzales* involved the interpretation of a federal firearms enhancement statute that imposes a mandatory five-year sentence enhancement upon persons who carry or use a firearm in relation to a drug trafficking crime, and directs that the enhancement may not be imposed concurrently with "any other term of imprisonment."<sup>194</sup> The question before the Court was whether the bar against concurrent sentences applies to state sentences, or is limited to federal sentences.<sup>195</sup> The language of the enhancement statute is broad, and in no way confines the ban against concurrent sentences to federal sentences,<sup>196</sup> but Justice Stevens invoked the dog that did not bark canon to argue that the evolution of the statutory provision suggested a lack of congressional intention to apply the ban to state sentences.<sup>197</sup> To formalists, such reasoning borders on blasphemy. The text of the statute plainly sweeps in all

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<sup>192</sup> See *Bank One Chicago*, 516 U.S. at 276 (Stevens, J., concurring) ("Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities.").

<sup>193</sup> *United States v. Gonzales*, 520 U.S. 1 (1997).

<sup>194</sup> *Id.* at 2–3 (quoting 18 U.S.C. § 924(c)(1)(A) (2012)).

<sup>195</sup> *Id.* at 3–4.

<sup>196</sup> See *id.* at 3.

<sup>197</sup> *Id.* at 13 (Stevens, J., dissenting). The provision prohibiting concurrent sentences was adopted in 1970 and initially applied only to the federal sentence imposed for the underlying offense. *Id.* "When Congress amended the statute in 1984 to broaden the prohibition beyond the underlying offense," by adding the words "other term of imprisonment," "it said nothing about state sentences." *Id.* Justice Stevens argued that, "if Congress had intended the amend-

“other” terms of imprisonment, including state sentences.<sup>198</sup> To read it otherwise, based on an absence of commentary expressing congressional intent to include one specific application, contravenes both constitutional requirements and common sense.<sup>199</sup>

Unsurprisingly, Justice Scalia has raised formalist objections to the Sherlock Holmes canon in two recent cases, although he has done so without elaborating the theoretical underpinnings for his criticism. In *Zuni Public School District No. 89*, for example, Justice Scalia’s dissenting opinion criticized the majority<sup>200</sup> for relying on the fact that “no Member of Congress” had commented on the change seemingly worked by the amendment at issue.<sup>201</sup> “It is bad enough for this Court to consider legislative materials beyond the statutory text in aid of resolving ambiguity,” Justice Scalia argued, “but it is truly unreasonable to *require* such extratextual evidence as a precondition for enforcing an *unambiguous* congressional mandate.”<sup>202</sup> Similarly, in his dissenting opinion in *Koons Buick Pontiac GMC, Inc. v. Nigh*,<sup>203</sup> Justice Scalia objected that “[t]he Canon of Canine Silence that the Court invokes today introduces a reverse—and at least equally dangerous—phenomenon, under which courts may refuse to believe Congress’s *own* words [the text] unless they can see the lips of others moving in unison.”<sup>204</sup>

Justice Scalia’s hand-wringing aside, only a handful of cases have involved judicial use of the Sherlock Holmes canon to contradict broad statutory language that unambiguously seems to cover the situation at issue.<sup>205</sup> Moreover, most such invocations have occurred in dissenting opinions, perhaps providing some comfort to formalists that

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ment to apply to state as well as federal sentences, I think there would have been some mention of this important change in the legislative history.” *Id.*

<sup>198</sup> *Id.* at 11 (majority opinion).

<sup>199</sup> See *id.* at 10 (“Given this clear legislative directive, it is not for the courts to carve out statutory exceptions based on judicial perceptions of good sentencing policy.”).

<sup>200</sup> *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 120–21 (2007) (Scalia, J., dissenting).

<sup>201</sup> *Id.* at 90–91 (majority opinion).

<sup>202</sup> *Id.* at 121 (Scalia, J., dissenting).

<sup>203</sup> *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50 (2004).

<sup>204</sup> *Id.* at 73–74 (Scalia, J., dissenting).

<sup>205</sup> See *United States v. Ressam*, 553 U.S. 272, 281–82 (2008) (Breyer, J., dissenting); *Zuni Pub. Sch. Dist.*, 550 U.S. at 100 (“The upshot is that the language of the statute is broad enough to permit the Secretary’s reading. That fact requires us to look beyond the language to determine whether the Secretary’s interpretation is a reasonable, hence permissible, implementation of the statute. . . . [W]e conclude that the Secretary’s reading is a reasonable reading.”); *Sorenson v. Sec’y of the Treasury*, 475 U.S. 851, 867 (1986) (Stevens, J., dissenting); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 586 (1982) (Stevens, J., dissenting).

the most egregious form of the canon has been unsuccessful in persuading a majority of the Court most of the time.<sup>206</sup> Of course for formalists, the dog that did not bark canon remains problematic even when applied to unclear statutory language—both because the canon goes beyond the four corners of the duly-enacted text and because it imputes meaning to the absence of action.

In light of the above theoretical and practical problems, inferences based on legislative silence seem suspect if courts mean them literally—that is, to convey a concrete conviction that Congress could not have intended to make a substantial change in the law without noting so in the legislative record. The next Part posits that this is not, at bottom, how the Supreme Court employs the Sherlock Holmes canon, and evaluates the normative implications of the Court’s actual use of this interpretive presumption.

### III. A CLEAR STATEMENT RULE IN DISGUISE

For the reasons elaborated in Part II, I believe that Congress’s failure to comment in the legislative record reveals very little about actual congressional intent regarding substantial changes in the law. If this skepticism is on target, then what is behind the numerous Supreme Court cases that infer meaning from congressional failure to comment? Indeed, why does the Supreme Court seem increasingly inclined to invoke the Sherlock Holmes canon in recent years, with most of its references occurring since 1980?<sup>207</sup> This Article argues that the answer lies in this hidden interpretive reality: Despite the Court’s rhetoric about legislative intent, its references to the dog that did not bark are not actually about *Congress’s* expectations regarding a particular change in the law; rather, they are about institutional burden-shifting—i.e., a *judicial* attempt to impose a default rule on Congress. That is, when the Court invokes the Sherlock Holmes canon, it effectively creates a clear statement rule that guards against legal changes and protects the status quo. The canon thus makes more sense if viewed not as a guide that aids judges in uncovering legislative intent, but as a tool that judges employ to place the institutional burden on Congress to identify significant changes effected by a new law.

Clear statement rules are a common interpretive device.<sup>208</sup> During the Rehnquist and Roberts Courts, they typically have been in-

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<sup>206</sup> See *supra* note 205.

<sup>207</sup> See *infra* Appendix.

<sup>208</sup> Three prominent forms of clear statement rules include: federalism rules (which presume that, “absent a clear statement to the contrary, acts of Congress do not intrude upon the



voked to protect background norms dictated by the Constitution, such as federalism or state sovereign immunity.<sup>209</sup> I believe that there are normative problems with using such rules in the manner that the Sherlock Holmes canon does—i.e., to protect a status quo legal rule that reflects a policy choice made by the legislature at one point in time, rather than a fundamental, enduring constitutional principle.<sup>210</sup> Accordingly, this Article argues that the canon should be applied in a far more limited fashion than it has been in the past. This Part first explores the clear statement effect of the Sherlock Holmes canon and its strong normative edge. It then suggests a more limited application of the dog that did not bark canon that accounts for the canon's theoretical and practical limitations.

A. *Reconsidering the Sherlock Holmes Canon: Continuity and Institutional Burden*

The rhetoric of the dog that did not bark cases typically sounds in legislative intent—insisting that Congress would not mutely effect a dramatic change in the law.<sup>211</sup> But on closer examination, the Court in these cases seems far less concerned with discerning Congress's intent than it does with preserving continuity and the status quo legal rule. The emphasis in the cases always is on the extent of legal change that a proposed interpretation would effect.<sup>212</sup> Congressional intent comes only second, as a logical inference or corollary that follows from the sheer enormity of the change that otherwise would be effected *and from* an assumed institutional practice of highlighting significant legal changes in the legislative record. Legislative intent is presumed,

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states by regulating state functions or displacing state law”), retroactivity rules (which presume “that Congress intends to impose new liability prospectively unless the statute clearly indicates the contrary”), and the presumption of reviewability of agency action (which “presumes that judicial review of agency action is available, unless there is ‘clear and convincing’ evidence of a legislative intent to preclude such review”). See John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 407, 410, 412 (2010).

<sup>209</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611–12 (1992).

<sup>210</sup> There are also institutional problems, and even perhaps constitutional problems, with many traditional clear statement rules. See Manning, *supra* note 208, at 427–28. But imposing a clear statement presumption against legal change is even *more* problematic, in my view.

<sup>211</sup> See, e.g., *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005); *Chisom v. Roemer*, 501 U.S. 380, 396 (1991); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 490 (1985).

<sup>212</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751, 2796 (2014) (Ginsburg, J., dissenting); *Freeman v. United States*, 131 S. Ct. 2685, 2696–97 (2011) (Sotomayor, J., concurring); *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342–43 (1999); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993).

rather than discovered, and it is presumed because continuity in the law and a legislative duty to acknowledge change are presumed.

One reading of the dog that did not bark cases, then, is that unless Congress takes the unusual step of expressly noting a particular kind of legal change in the legislative history of a statute, courts are free to read the resulting statute or amendment narrowly, to effect as little change in the legal scheme as they deem acceptable. That is, absent some extraordinarily specific congressional discussion noting that a particular consequence was intended to be covered by a new law, courts may limit the reach of the new law if they deem the contemplated application to depart too much from the status quo.

In this sense, the Sherlock Holmes canon operates like a clear statement rule, dictating that *X* (status quo ante) is the established, background legal norm and that if Congress intends to contradict that norm, it must state so clearly in the legislative record or be *presumed not* to intend the change.<sup>213</sup> This reading of the dog that did not bark canon is consistent with the rhetoric of the cases. For example, the Court sometimes states the canon as follows: “For over 100 years debtors’ attorneys have been considered by Congress and the courts to be an integral part of the bankruptcy process. It is fair to doubt that Congress would so rework their longstanding role without announcing the change in the congressional record.”<sup>214</sup> Courts will also sometimes state:

[T]his [previous] prohibition applied only to the federal sentence imposed for the underlying offense. When Congress amended the statute . . . it said nothing about state sentences; if Congress had intended the amendment to apply to state as well as federal sentences, I think there would have been some mention of this important change in the legislative history.<sup>215</sup>

If the Sherlock Holmes canon is effectively a clear statement rule, based on a presumed institutional practice or responsibility to highlight significant legal changes in the legislative record, what is the source of that responsibility? Its apparent basis seems to be our legal system’s preference for continuity in the law. Continuity in legal rules

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<sup>213</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1376 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (observing that clear statement rules “constitute conditions on the effectual exercise of legislative power” and “promote objectives of the legal system which transcend the wishes of any particular session of the legislature”).

<sup>214</sup> *Lamie v. U.S. Tr.*, 540 U.S. 526, 539 (2004) (citation omitted).

<sup>215</sup> *United States v. Gonzales*, 520 U.S. 1, 13 (1997) (Stevens, J., dissenting).

is favored for a number of reasons. Among other benefits, continuity promotes predictability, which lends legitimacy to the law as a stable set of rules that do not change frequently.<sup>216</sup> A presumption of continuity also protects the reliance interests of private individuals and public decisionmakers who have structured their behavior around existing legal rules, by guarding against sudden shifts in the law and requiring notice before legal rules change.<sup>217</sup> In addition, a continuity presumption can help ensure that the legislature deliberates before adopting significant legal changes.<sup>218</sup> The principle of *stare decisis* is based on the need for continuity, and many canons of statutory construction seek to preserve continuity.<sup>219</sup> Indeed, David Shapiro has gone so far as to argue that “the dominant theme running through *most* interpretive guides . . . is that close questions of construction should be resolved in favor of continuity and against change.”<sup>220</sup> Shapiro defined continuity canons as “those that emphasize the importance of not changing existing understandings any more than is needed to implement the statutory objective” and included within his list such canons as: *inclusio unius est exclusio alterius* and *ejusdem generis*, the maxim that statutes in derogation of the common law should be strictly construed, the rule of lenity, the presumption against implied repeals, and most clear statement rules.<sup>221</sup>

But the Sherlock Holmes canon is not just an ordinary continuity canon. Continuity canons typically impose presumptions that favor legal consistency and tip the scales in favor of the status quo *in close cases*.<sup>222</sup> The dog that did not bark canon goes further than this, in that it not only presumes in favor of the status quo, but also imposes on Congress the institutional burden, or duty, to comment on any intended legal changes in the legislative record in order for those changes to become effective. In addition, while other continuity canons and presumptions can be rebutted by traditional tools of statutory construction, including statutory text,<sup>223</sup> the dog that did not bark canon expects—and in effect requires—that Congress make statements in the legislative history in order to effect significant legal change. Compare, for example, the “elephants in mouseholes” canon,

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216 See Shapiro, *supra* note 17, at 943–45.

217 See *id.* at 943–44.

218 See *id.* at 944.

219 See *id.* at 925.

220 *Id.* (emphasis added).

221 *Id.*

222 See, e.g., *id.* at 943.

223 See Eskridge & Frickey, *supra* note 209, at 597.

which presumes that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions”—i.e., that Congress does not “hide elephants in mouseholes.”<sup>224</sup> This canon is a close cousin of the dog that did not bark canon, as both canons require legislative clarity in order to effect significant, “elephant-sized,” changes in the legal regime.<sup>225</sup> But while the elephants in mouseholes canon looks for that clarity in the statutory text, emphasizing that Congress must express any intended change unambiguously and in the operative, rather than subsidiary, provisions of the statute, the dog that did not bark canon looks to the legislative history for Congress’s expression of intended change.<sup>226</sup> In this sense, the canon not only allows, but requires, notice of significant changes in the law to be buried in a legislative resource that merely supplements the statute’s text.<sup>227</sup>

The Sherlock Holmes canon also differs from traditional continuity canons, including clear statement rules, in that it lacks any substantive grounding in the U.S. Constitution or even the common law.<sup>228</sup> As William Eskridge and Philip Frickey have demonstrated, most clear statement rules derive from constitutional norms, such as federalism limitations on the national government, state sovereignty, the nondelegation doctrine, or the separation of powers between branches.<sup>229</sup> The Sherlock Holmes canon, by contrast, is untethered to any constitutional or other meta- or background norms, resting instead on an ad hoc judicial estimation of the status quo legal rule in a particular subject area. As a result, each application of the canon is *sui generis* and lacks consistency from case to case. Judges invoking the canon are not protecting legal principles rooted in our nation’s founding charter; rather, they are protecting a policy choice reflected in a previous version of a statute enacted by Congress or a judicial practice established over several years—and they are doing so without articulating any special reason to insulate such policy choices from change by a later statute or amendment. As the next Section dis-

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<sup>224</sup> *Whitman v. Am. Trucking Ass’ns, Inc.* 531 U.S. 457, 468 (2001).

<sup>225</sup> *See Kysar, supra* note 11, at 962–63 (discussing these two “related” canons together).

<sup>226</sup> *See id.*

<sup>227</sup> A few of the dog that did not bark cases reference statutory text, indicating that one would expect Congress to note the contemplated change in the text or the legislative history, but most of the cases point exclusively to the lack of comment in the legislative record. *See supra* note 31 and accompanying text.

<sup>228</sup> *See* articles cited *supra* note 189.

<sup>229</sup> *See generally* Eskridge & Frickey, *supra* note 209.

cusses, the canon thus opens the door to significant normative biases in application.

*B. A Default Rule with Normative Edge*

As the discussion in Part II and Section III.A above suggests, there is significant room for normative bias in judicial application of the Sherlock Holmes canon. Rather than proceeding from a predetermined policy regarding a particular subject or constitutional norm, the canon allows judges to make case-specific policy judgments about particular applications of the canon and to insist that Congress could not have intended certain applications that the Court finds normatively undesirable. And, in fact, we often see the Court making policy arguments in tandem with failure to comment or dog that did not bark arguments. That is, the Justices' conclusion in a particular case that congressional failure to comment is significant often rests on their normative disapproval of the change that otherwise would be worked. Thus, in *City of Rancho Palos Verdes v. Abrams*,<sup>230</sup> Justice Stevens's concurring opinion argued that "[c]ongressional silence is surely probative in this case because, despite the fact that awards of damages and attorney's fees *could have potentially disastrous consequences* for the likely defendants in most private actions under the [Telecommunications Act of 1996], nowhere in the course of Congress' lengthy deliberations is there any hint that Congress wanted damages or attorney's fees to be available."<sup>231</sup> Similarly, a number of the "bankruptcy rule" cases make the following observation: "If Congress had intended, by § 523(a)(7) or by any other provision, to discharge state criminal sentences, 'we can be certain that there would have been hearings, testimony, and debate concerning *consequences so wasteful, so inimical to purposes previously deemed important, and so likely to arouse public outrage.*'"<sup>232</sup> Still other dog that did not bark cases openly suggest that the contemplated legal change would work an absurd or irrational result.<sup>233</sup>

In such cases, it does not seem that the Court, or individual dissenting or concurring Justices, are consciously trying to effectuate policy judgments; rather, the looseness of the dog that did not bark canon

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<sup>230</sup> *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005).

<sup>231</sup> *Id.* at 132 (Stevens, J., concurring in judgment) (emphasis added) (citation omitted).

<sup>232</sup> *Kelly v. Robinson*, 479 U.S. 36, 51 (1986) (emphasis added) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 209 (1978) (Powell, J., dissenting)); see also *United States v. Ron Pair Enters.*, 489 U.S. 235, 252 (1989) (O'Connor, J., dissenting) (quoting *Kelly*, 479 U.S. at 50–51).

<sup>233</sup> See *supra* note 65.

allows this to occur unintentionally. That is, the Court (or an individual Justice) considers a particular statutory construction normatively undesirable and then finds confirmation for its judgment in the Sherlock Holmes canon. The Justices' reasoning might proceed as follows: "This interpretation would have terrible consequences and works a change in the law. Congress could not possibly have intended such a horrendous rule change. The dog that did not bark canon presumes that significant changes in the law will be mentioned in the legislative record; if Congress had intended this horrible change in the legal rule, someone surely would have discussed it or complained about it somewhere in the legislative record."

Interestingly, although in my view the canon does a poor job of approximating legislative intent, it seems to appeal most to—and to be invoked most often by—those Justices who are most intentionalist in their approach to statutory interpretation. As the Appendix demonstrates, Justice Stevens was by far the canon's most frequent invoker, followed by Justice Rehnquist, also a strong intentionalist.<sup>234</sup> Thus, it does not seem that the Justices are citing legislative intent as a smokescreen for their policy judgments in these cases, at least not on purpose. Rather, it appears that they are attempting to act as "faithful agents" of the legislature, but that in doing so, they are bringing their normative biases into the calculus—because the looseness of the dog that did not bark canon allows them to do so. That is, the canon provides an escape hatch through which judges can protect norms or status quo legal rules with which they agree, while citing legislative intent, rather than their own policy preferences, as the authority for their statutory constructions. In this sense, the Sherlock Holmes canon again has much in common with clear statement rules, which sometimes serve as a "safety valve" through which textualist judges can protect legal principles that are important to them.<sup>235</sup>

### C. *A More Limited Dog that Did Not Bark Canon*

Given the problems detailed in Parts II and III.B, it is worth asking whether inferences based on congressional failure to comment are a justifiable, or reliable, interpretive aid. I think the answer is no—

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<sup>234</sup> See *infra* Appendix.

<sup>235</sup> See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 935 (4th ed. 2007) ("For conservative textualists who care about federalism, the safety valve when textualism gets them boxed in, as in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), is the creation of a super-strong clear statement rule that trumps the result suggested by ordinary meaning.").

most of the time. The canon often serves as a poor proxy for legislative intent, as legislators may fail to comment on an intended change for many legitimate reasons, including a belief that the change is obvious.<sup>236</sup> Further, when considered in light of the values traditionally served by continuity norms—e.g., predictability, protection of reliance interests, forcing legislative deliberation—the canon fares poorly. First, because the canon contains no baseline for measuring legal change and no subject-matter boundaries, and because courts have invoked it inconsistently, it is questionable whether the canon serves to enhance predictability and legitimacy in the manner that continuity norms are meant to.<sup>237</sup> Second, many of the cases in which the canon is invoked involve little or no reliance interests that would be upset by the contemplated statutory interpretation.<sup>238</sup> Third, insofar as the canon calls for legislative specificity about narrow, precise applications of a new law or amendment, it imposes a duty that Congress cannot realistically follow through on, and thus seems incapable of forcing legislative deliberation and clarity.<sup>239</sup>

For these reasons, this Article urges the following revised approach to the Sherlock Holmes canon: The canon should be applied only in those limited circumstances in which there is strong reason either to *expect* Congress to announce a change in the law or to *require* that Congress announce anticipated changes in the law. More specifically, those limited circumstances should be defined as ones in which (1) significant reliance interests would be unsettled by the contemplated interpretation; (2) the contemplated interpretation would upset a longstanding agency interpretation of a statute without adequate notice; or (3) there is a subject-matter-specific, settled understanding such that Congress must announce a change in the law if it intends one. In addition, it may make sense to limit the canon's appli-

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<sup>236</sup> See *supra* Part II.A.

<sup>237</sup> See *supra* Part III.A.

<sup>238</sup> See generally *Freeman v. United States*, 131 S. Ct. 2685 (2011) (effect of amendment to sentencing guidelines on previously entered plea deals); *United States v. Ressam*, 553 U.S. 272 (2008) (carrying explosives “during the commission of” felony of making false statements to U.S. Customs official); *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (use of statistical sampling to determine population for congressional apportionment); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249 (1992) (appealability of interlocutory orders by bankruptcy courts); *Chisom v. Roemer*, 501 U.S. 380 (1991) (application of Voting Rights Act of 1965 to state judicial elections); *Sorenson v. Sec’y of the Treasury*, 475 U.S. 851 (1986) (reduction of EIT credit for past-due child-support payments); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (“racketeering injury” requirement in RICO); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980) (reviewability of EPA decision under statutory catchall).

<sup>239</sup> See *supra* notes 211–14 and accompanying text.

cability based on the type of legislation being interpreted—that is, to have different rules for omnibus legislation versus legislation dealing with only one subject, or for legislation that was uncontroversial and spawned little legislative discussion versus legislation that was controversial and generated lengthy legislative debates, and so on. Each of these proposed limitations is discussed in turn below.

### 1. *Reliance Interests*

If a preexisting legal rule has generated significant reliance interests that would be upset by an unannounced, effectively *sub silentio*, change in the law, that fact can and should justify application of the dog that did not bark canon. *INS v. St Cyr*, discussed earlier, provides a good example of reliance interests important enough to justify judicial imposition of a requirement that Congress announce changes to those interests during the enactment process. St. Cyr was a lawful permanent resident of the United States who pleaded guilty in March 1996 to a controlled substances charge.<sup>240</sup> Under the law applicable at the time of his guilty pleading, St. Cyr was eligible for a waiver of deportation at the discretion of the Attorney General, who could take into account various factors including St. Cyr's ties to the community.<sup>241</sup> However, in April and September of 1996, Congress enacted AEDPA and IIRIRA, both of which eliminated the Attorney General's discretion to grant waivers to persons convicted of crimes.<sup>242</sup> Removal proceedings against St. Cyr were not commenced until April 10, 1997, after the effective dates of both statutes.<sup>243</sup> St. Cyr and other aliens in a position similar to his had substantial reliance interests in not having the status quo legal rule about discretionary waivers change on them midstream.<sup>244</sup> The Supreme Court correctly refused to apply AEDPA's and IIRIRA's discretion-stripping provisions to St. Cyr's conviction, relying, in part, on the Sherlock Holmes canon—citing the absence of any discussion in the legislative record about pending cases.<sup>245</sup> There was strong reason to invoke the canon in this

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<sup>240</sup> *INS v. St. Cyr*, 533 U.S. 289, 293 (2001).

<sup>241</sup> *Id.*

<sup>242</sup> See Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277; Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, § 240A(a), 110 Stat. 3009-546, 3009-594; *St. Cyr*, 533 U.S. at 293.

<sup>243</sup> *St. Cyr*, 533 U.S. at 293.

<sup>244</sup> See *id.* at 325 (noting that aliens “almost certainly relied upon” likelihood of discretionary relief by Attorney General when deciding whether to contest criminal charges at trial).

<sup>245</sup> See *id.* at 320 n.44, 326.



case, for if the Court had allowed the new AEDPA and IIRIRA provisions to apply to pending cases, without any indication of congressional intent to so apply them, it would have upset the reasonable expectations of a number of aliens regarding an exceptionally important matter—their personal liberty.

## 2. *Established Agency Interpretations*

Another, related circumstance that should justify application of the Sherlock Holmes canon is where an established agency interpretation of a statute is involved. When an administrative agency has put in place a particular reading of a statute, and has implemented that reading for years, both the agency and those regulated by it rely on that reading in structuring their behavior and in crafting collateral legal rules. If Congress, in adopting a new statute or amendment, intends to invalidate the agency's reading of the statute, then we should expect Congress to make that intent clear to the agency, either in the text or the legislative history of the statute. Moreover, even if we anticipate that Congress might sometimes be negligent in fulfilling this expected duty, it makes sense for courts to impose an institutional burden on Congress requiring it to make such abrogations of established agency interpretations clear—for signaling and notice purposes. Without such notice, the agency may not realize that a new law has overturned its settled interpretation of a statute, and may continue its business as usual. Moreover, absent a clear signal from Congress, courts can be expected to defer to the agency's interpretation.<sup>246</sup> Read in this light, cases such as *Zuni Public School District No. 89 v. Department of Education*—in which the Court took note that the agency head responsible for the established interpretation helped draft the new amendment at issue, that neither he nor any legislator observed that the amendment would require a change in the established agency reading, and that the agency continued to apply the regulation without change after the amendment was enacted—are correct to infer that Congress did not intend for the amendment to undo the agency's longstanding interpretation.<sup>247</sup>

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<sup>246</sup> See, e.g., *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 481 (2001) (“[I]f the statute is ‘silent or ambiguous’ with respect to the issue, then we must defer to a ‘reasonable interpretation made by the administrator of an agency.’” (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984))).

<sup>247</sup> See *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90–91 (2007). *Zuni* also could qualify as a “reliance interests” case, as school districts likely relied on the Department of Education's established calculation formula (the statutory interpretation at issue) in anticipating how any federal aid they received would impact their other funding.

### 3. *Subject-Matter-Specific Presumptions*

In addition, it makes sense to impose a presumption, or institutional burden, that Congress point out when it intends or understands a new law to change the status quo legal rule in a subject area for which there is an established, special requirement such that Congress must announce changes in the law. That is, where there is a settled, subject-matter-specific presumption that Congress does not intend to change preexisting law when it enacts a new law or amendment, as there is in bankruptcy law, then the legislative process and notice problems that plague the Sherlock Holmes canon are diminished. In the bankruptcy context, for example, because the Court long has recognized a presumption that changes in pre-Code practice will be clearly announced, Congress is on notice that it needs to highlight any intended changes in the legislative history if it wishes for them to be acknowledged by the Court.<sup>248</sup> There may still be looseness problems with identifying the baseline from which to measure pre-Code practice, as Keith Sharfman has observed,<sup>249</sup> but application of the canon makes more sense when it reinforces background understandings in the subject area. Moreover, in the bankruptcy context, there also are likely to be significant reliance interests in maintaining the status quo legal rule, as companies are likely to structure their dealings around existing bankruptcy rules.<sup>250</sup> Indeed, the very existence of the background norm that changes in pre-Code practice are to be presumed against, absent clear congressional signaling to the contrary, increases the likelihood that companies will rely on pre-existing rules.

Another example of where a subject-matter specific dog that did not bark rule might make sense is with respect to the taxation of Native Americans—where the Court has recognized a background understanding that Native Americans are to enjoy special status under the tax laws and has adopted a rule requiring an express legislative statement in order to impose taxes on Native Americans.<sup>251</sup> Because the law long has treated Native Americans uniquely, the usual horizontal coherence problems that can attend the Sherlock Homes canon

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<sup>248</sup> See Keith Sharfman, *Derivative Suits in Bankruptcy*, 10 STAN. J.L. BUS. & FIN. 1, 14 (2004).

<sup>249</sup> *Id.* at 13; see also Keith Sharfman, *Creditor(s' Committee) Derivative Suits: A Reply to Professor Bussel*, 10 STAN. J.L. BUS. & FIN. 38, 39 n.13, 40 (2004).

<sup>250</sup> See Sharfman, *supra* note 248, at 13.

<sup>251</sup> See *Bryan v. Itasca Cty.*, 426 U.S. 373, 381 (1976); see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (“[S]tate laws may be applied to tribal Indians on their reservations if Congress has *expressly* so provided.” (emphasis added)).

are not at issue here.<sup>252</sup> (Put differently, because background norms dictate that Native Americans are unique, no other groups are “similarly situated” to them.) Moreover, notice and legislative process problems are significantly reduced because of the expectations created by the longstanding rule requiring explicit announcement of any decision to tax Native Americans.

#### 4. *Different Rules for Different Kinds of Statutes*

In addition, it might make sense to limit application of the Sherlock Holmes canon to certain kinds of legislation. Political scientists have shown that not all laws are created equally—and that many are enacted through “unorthodox” procedures involving heavy involvement from party leaders or the bundling of numerous unrelated subjects into one bill, rather than the traditional committee drafting process described in textbooks.<sup>253</sup> Recent work by Abbe Gluck and Lisa Bressman has highlighted how such differences in the process of statutory enactment can affect the reliability of a statute’s legislative history.<sup>254</sup> The most obvious distinction is that between omnibus legislation and ordinary legislation. “Omnibus” is a term given to laws that cover a number of diverse and unrelated subjects.<sup>255</sup> Omnibus legislation often is voluminous, running several hundreds or even thousands of pages, and is enacted in hurried fashion, with little time for debate.<sup>256</sup> Gluck and Bressman found, among other things, that omnibus laws tend to generate less, and more “confused,” legislative history than do other kinds of statutes, usually because omnibus statutes involve the “throwing together” of different bills from various committees.<sup>257</sup> Conversely, Gluck and Bressman found that Congress

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<sup>252</sup> See *Bryan*, 426 U.S. at 375–79; *Cabazon Band*, 480 U.S. at 207–09.

<sup>253</sup> See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 111 (4th ed. 2012).

<sup>254</sup> See Gluck & Bressman, *supra* note 121, at 979–82.

<sup>255</sup> SINCLAIR, *supra* note 253, at 111. “Omnibus” is an old term for a horse-drawn enclosed bus, designed to carry a large number of passengers. Webster’s defines “omnibus” to mean “providing for many things at once; having a variety of purposes or uses.” WEBSTER’S NEW WORLD DICTIONARY 993 (2d Collegiate ed. 1982).

<sup>256</sup> See ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 238 (2000) (describing 950-page omnibus appropriations act that contained “eight regular appropriations acts, dozens of ‘emergency supplemental’ appropriations, and a substantial amount of unrelated legislation”); Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 660 (2006); Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 476 (1997); Katharine Q. Seelye, *Spending Bill, Laden with Pork, Is Signed into Law*, N.Y. TIMES, Oct. 22, 1998, at A24.

<sup>257</sup> Gluck & Bressman, *supra* note 121, at 979.

takes more care with the legislative history of appropriations bills than it does with other kinds of statutes, and that the legislative history often contains the “meat” of appropriations statutes, with the text serving only to convey dollar amounts.<sup>258</sup>

Such findings beg the question whether courts should treat omnibus laws and appropriations laws differently, when it comes to application of the Sherlock Homes canon, than they treat other kinds of statutes. One might argue, for example, that the canon should not be applied to omnibus legislation, as Congress does not tend to comment very much during the process of enacting such legislation and as comments made during the enactment process are not very reliable, given the “thrown together” nature of such laws. Conversely, one might argue that appropriations bills are good candidates for application of the Sherlock Holmes canon, as members of Congress, or at least their staff, take pains to ensure that the legislative history of such statutes explains what the statute means.

For purposes of this Article, I do not make any firm recommendations regarding how courts should apply the Sherlock Holmes canon to different kinds of statutes, or to statutes that have undergone different enactment processes. Our understanding of differences that arise in the process of enacting different kinds of statutes and what those differences mean for the legislative history produced is only beginning to emerge. For now, it is enough to flag that courts should pay attention to what kind of statute they are interpreting when contemplating inferring meaning from congressional failure to comment, and should consider applying the Sherlock Holmes canon only when there is reason to believe that Congress was likely to comment on any intended changes in the legislative history.

#### CONCLUSION

The Sherlock Homes canon has played a curious and inconsistent role in many of the Supreme Court’s statutory interpretation cases. To date, scholars have largely ignored the canon, or assumed without examination that it serves a benevolent—or at least harmless—function.<sup>259</sup> This Article has examined how the Supreme Court employs the canon in practice, seeking to bring some coherence to the Court’s eclectic and unpredictable use of dog that did not bark arguments. It has argued that the Sherlock Holmes canon suffers from several prac-

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<sup>258</sup> *Id.* at 980–82.

<sup>259</sup> *See, e.g.*, Kysar, *supra* note 11, at 963–64.

tical and theoretical problems and, contrary to conventional wisdom, serves as a poor proxy for actual congressional intent. Given these limitations, the Article argues for a more circumscribed judicial approach to inferences based on congressional failure to comment in the legislative record. Throughout, its aim has been to bring theoretical attention to this understudied interpretive canon—so that lawyers, judges, and scholars can appreciate and evaluate critically the role that the canon plays, and should play, in statutory interpretation.

APPENDIX<sup>260</sup>

Case Name*	Opinion Type	Authoring Justice
<b>“No Mention” Cases</b>		
Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).	Dissenting	Ginsburg
Freeman v. United States, 131 S. Ct. 2685 (2011).	Concurring	Sotomayor
Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50 (2004).	Majority	Ginsburg
INS v. St. Cyr, 533 U.S. 289 (2001).	Majority	Stevens
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982).	Dissenting	Stevens
<b>“Silence-Is-Telling” Cases</b>		
Graham Cty. Soil & Water Conservation Dist. v. United States <i>ex rel.</i> Wilson, 559 U.S. 280 (2010).	Dissenting	Sotomayor
United States v. Ressam, 553 U.S. 272 (2008).	Dissenting	Breyer
Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ., 550 U.S. 81 (2007).	Majority	Breyer
City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).	Concurring	Stevens
Martin v. Franklin Capital Corp., 546 U.S. 132 (2005).	Majority	Roberts
Dep’t of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999).	Plurality	O’Connor
United States v. Gonzales, 520 U.S. 1 (1997).	Dissenting	Stevens
Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).	Majority	Rehnquist
Sale v. Haitian Ctrs. Council, <i>Inc.</i> , 509 U.S. 155 (1993).	Majority	Stevens
Conn. Nat’l Bank v. Germain, 503 U.S. 249 (1992).	Concurring	Stevens
Chisom v. Roemer, 501 U.S. 380 (1991).	Majority	Stevens
Church of Scientology of Cal. v. IRS, 484 U.S. 9 (1987).	Majority	Rehnquist
Clarke v. Sec. Indus. Ass’n, 479 U.S. 388 (1987).	Majority	White
Sorenson v. Sec’y of Treasury, 475 U.S. 851 (1986).	Dissenting	Stevens
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).	Majority	White

<sup>260</sup> The cases listed in this Appendix were compiled by using a word search in Westlaw for “sherlock ‘conan doyle’ dog & (legislative /s history record) congress!” The resulting cases were examined closely to determine whether they employed some form of the dog that did not bark argument. The list also was supplemented with cases I independently knew contained a failure to comment argument.

Watt v. Alaska, 451 U.S. 259 (1981).	Majority	Powell
Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980).	Dissenting	Rehnquist
Maine v. Thiboutot, 448 U.S. 1 (1980).	Dissenting	Powell
Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).	Dissenting	Powell
Bryan v. Itasca Cty., 426 U.S. 373 (1976).	Majority	Brennan
State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).	Dissenting	Douglas
Williams v. Austrian, 331 U.S. 642 (1947).	Dissenting	Frankfurter
<b><i>Bankruptcy Cases</i></b>		
Lamie v. U.S. Trustee, 540 U.S. 526 (2004).	Majority	Kennedy
Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990), <i>superseded by statute</i> , Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, § 3, 104 Stat. 2865, 2865, <i>as recognized in Johnson v. Home State Bank</i> , 501 U.S. 78, 83 n.4 (1991).	Dissenting	Blackmun
United States v. Ron Pair Enters., 489 U.S. 235 (1989).	Dissenting	O'Connor
United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988).	Majority	Scalia