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The Hypocrisy of the Acquiescence Canon

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Blair Warner*

The Court applies the acquiescence canon to infer that an agency or judicial statutory interpretation is correct when followed by Congressional inaction. This Article will argue that this practice is based on a number of faulty assumptions. Moreover, the canon is applied inconsistently and creates perverse incentives for the legislature. The Article will then explore the Court’s guidance to lower courts against deriving similar inferences from the denial of certiorari, a similar form of inaction. Drawing parallels between Congress and the Court, and noting the many reasons why conclusions should not be drawn from apparent inactivity, this Article will conclude that the acquiescence canon should be abandoned. Using the Supreme Court’s approach to interpreting its own inaction as a foil, the acquiescence canon appears to be more harmful and potentially misleading than it is beneficial. While in some cases the denial of certiorari or the failure to amend a statute given a statutory construction would be enlightening, this Article maintains that the danger of misinterpreting such inactivity is great enough to support a general prohibition against their consideration.

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INTRODUCTION

In cases of statutory interpretation, courts look to the action, or inaction, of Congress in order to determine if a prior reading of a statute by a court or agency was valid and should therefore be upheld. When a legislature does not override a statutory interpretation decision, courts use this fact as evidence that the prior reading was correct. While this approach has come under heavy attack for its inconsistent application and inherent speculative nature, there is an additional reason why the acquiescence canon should be viewed critically. The Supreme Court’s own agenda-setting practices and expectations of how its inaction will be construed by lower courts run counter to the theory behind the acquiescence canon. When the Court decides not to grant certiorari in a given case, this can not be viewed by the lower courts as suggesting that the lower court’s opinion is correct and therefore more persuasive going forward. Rather, the Court notes that there are many factors underlying the decision of whether certiorari will be granted going far beyond the correctness of the opinion below.

This Article finds that the Court’s own practice and expectations shed light on an important flaw of the acquiescence canon and suggests that it should rarely, if ever, be relied upon in a statutory interpretation case. The Article begins in Part I by discussing the acquiescence canon, the rationale for its application, and some of the flaws of this interpretive approach. Part II discusses the interpretive significance of the Court’s denial of certiorari, outlining how and why cases are accepted for hearing by the Court and the restrictions against drawing inferences from a denial of certiorari. Part III compares Congressional inaction to the denial of certiorari by the Court, drawing parallels between the two situations and calling out the

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inconsistency behind the Court’s interpretation of these events. The Article concludes that the Court should apply its own restriction against drawing conclusions based on the Court’s inaction when considering legislative inaction.

I THE ACQUIESCENCE CANON

Courts interpret statutes by considering the text of the statute, prior readings of the statute by the courts or agencies, and action by the legislature both before and after the statute was enacted. One particular source of insight into the meaning of a statute used by the courts is the action or inaction of a legislature following a court’s or agency’s interpretation of the statute. This practice is presumed to help derive the intent of the legislature, as well as to encourage the legislature to intervene should the interpretation be out of line with legislative intent. However, the acquiescence rule is based on a number of faulty assumptions and is applied inconsistently and narrowly. As such, it should no longer be employed.

A. Application of the Acquiescence Canon

One tool courts use to interpret statutory language is the acquiescence rule. If a legislature is aware of a court or agency’s interpretation of a statute and does nothing to clarify or change that interpretation through subsequent legislation or amendment, courts sometimes presume that the legislature agrees with the interpretation, and will therefore be reluctant to change that reading in the future.²

² See, e.g., Apex Hosiery Co. v. Leader, 310 U.S. 469, 488-489 (1940) (interpreting Congress’ failure to alter the Sherman Act after it had been judicially construed as a legislative recognition that the judicial construction was correct). See also WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1020 (3d ed. 2001).
Courts apply this rule when interpreting a statute that has been interpreted by a court in the past. For example, in *Flood v. Kuhn*, the Court was asked to consider whether antitrust laws prevented baseball teams from including a reserve clause in a contract with a player. The reserve clause allows the contracting team to trade players to a new team without consulting the player. In *Flood*, the Court reaffirmed its own prior interpretations of the antitrust laws in *Federal Baseball Club v. National League* and *Toolson v. New York Yankees, Inc.*, providing baseball’s reserve system with an exemption from antitrust laws. In *Flood*, the Court found four reasons to reaffirm the same interpretation in spite of changing legal and factual conditions, such as the application of the antitrust laws to other sports and the growing interstate nature of baseball. Among them was the fact that Congress had shown awareness of the holding in *Federal Baseball* and had done nothing to extend antitrust provisions. In *Toolson*, the court concluded:

> [T]he orderly way to eliminate error discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike.

Applying the acquiescence rule in this way, the Court holds Congress responsible for fixing any error it may have made, and finds the Congressional failure to do so as evidence of the absence of error.

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4 *Id.* at 259.
5 259 U.S. 200 (1922).
7 407 U.S. at 282 (1972).
8 *Id.* at 274.
9 346 U.S. at 452. *See also* *Flood v. Kuhn*, 407 U.S. at 284, reaffirming this position by stating, “If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress, and not by this Court.”
In other cases, the Court applies the acquiescence rule when Congress has not intervened to alter an established agency interpretation of the statute. In such a case, the Court reads this failure as an indication that the agency’s interpretation is in line with legislative intent. In *Bob Jones University v. United States*, the Court upheld the IRS interpretation of the charitable deduction allowance in large part because Congress was aware of the agency’s interpretation and did nothing to change it. Persuasive to the Court in that case was the fact that Congress was aware of the IRS’s interpretation but proposals to amend that subsection of the code never made it out of committee, while many other amendments were passed addressing other provisions of the same section.

In either scenario, the acquiescence canon is used as a tool for vetting past court or agency interpretations against current legislative intent. Legislative inaction as interpreted as assent to the statutory construction. Because the legislature is aware of the potential impact of their inaction, some argue that the canon is “preference-eliciting” and will ultimately lead to superior outcomes. By its nature, the acquiescence canon places responsibility on the shoulders of Congress to correct erroneous judicial statutory interpretations. Not only would Congressional inaction fail to immediately address the error, it would actively perpetuate the error through subsequent cases relying on that very inaction to justify upholding the precedent in spite of any reasons favoring its abandonment. This indeed creates an incentive for Congress to intervene and correct what it sees as misreadings of its statutes.

B. Problems with the acquiescence canon

The Court’s reliance on legislative inaction risks undermining the Court’s decisions. As Justice Rehnquist notes in his dissent in *Bob Jones*, “[W]e have said before, and it is equally

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11 *Id.* at 600-601.
applicable here, that this type of congressional inaction is of virtually no weight in determining legislative intent.”

13 This view of the acquiescence canon is appropriate for many reasons.

A common argument against using the acquiescence canon is that the canon presumes that the legislature was aware of the prior interpretation, which may not always be a fair assumption. When the legislature at issue is Congress, however, the argument that Congress does not pay attention to judicial constructions of its statutes has been largely debunked. Theorists of statutory interpretation have shown that Congress and its committees are aware of the Court’s statutory decisions and will override those decisions.

14 The Court also limits the invocation of this canon to cases where Congress seems to have at least been aware of the judicial interpretation of the statute.

15 Narrowing the application of the canon to cases where there is demonstrated awareness of the agency or judicial ruling counters this problem.

However, even where it can be shown that Congress knew about the judicial ruling, the logic behind the acquiescence canon is based on a number of potentially faulty assumptions. It will likely be the case that due to time constraints and other political factors, erroneous rulings will survive legislative scrutiny in spite of sufficient majorities disagreeing with them. The acquiescence rule is a clear example of the logical fallacy that the absence of evidence is evidence of absence. The determination that there was no error in the judicial or agency interpretation does not necessarily follow from a lack of evidence that Congress found error in the prior ruling. Suppose a majority of Congress had actually disagreed with the holding in

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Federal Baseball and Toolson discussed in Subpart A. It is quite possible that a busy legislative agenda and an apathetic constituency would prevent a Congress person from placing the issue on the agenda. Or, suppose it did receive some attention, but other issues took precedence and therefore the antitrust laws were never amended to reflect the disagreement with the Court’s ruling. Additionally, it could be the case that the legislature—when first made aware of the holding—agreed with it, but as factual circumstances changed, Congress might have thought it appropriate for baseball to be treated like other sports but by that time had forgotten about the Court’s ruling. Without lobbying from the players, it is quite possible to see how such an issue would not be sufficiently pressing to maintain congressional attention over the decades. However, the Court interpreted congressional inactivity as a clear indicator that Congress approved of the rule to the extent that it intended for baseball to be treated differently than many other professional sports.\(^{16}\) The Court therefore felt compelled to adhere to precedent, even when doing so stretched the doctrine to the point of irrationality. In this way, it is quite possible and even likely that giving added weight to a precedent because Congress has not overridden it is an extremely poor indicator of legislative intent.

The acquiescence canon is also capriciously applied. There seems to be little inherent rationale for why the Court invokes the doctrine in one case and not the next.\(^ {17}\) Many cases refuse to invoke this canon, and when they do invoke it, give it limited weight. In Bob Jones, Justice Rehnquist notes that there is no reason for the successful amendment of the bill in some sections to be given more attention by the Court than its failure to do so in others.\(^ {18}\) In Helvering v. Hallock, the Court refused to invoke this canon when asked to consider whether


\(^{18}\) 461 U.S. at 620-621 (Rhenquist, J. dissenting).
transfers of property *inter vivos* made in trust are within the provisions of Section 302(c) of the Revenue Act of 1926. 19 The Court was faced with three recent, contradictory precedents, 20 and no action by Congress to indicate which interpretation was in line with congressional intent. 21 The Court overruled a statutory precedent in spite of congressional inaction following the prior rulings, finding that “[i]t would require very persuasive circumstances enveloping congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.” 22 In this instance, therefore, the Court rejected the application of the canon. However, the Court applies it in other instances, precluding the very re-examination of its own doctrines it sought to protect in *Helvering*.

Finally, the acquiescence canon creates perverse incentives for Congress to avoid attempting a legislative override, even when a majority may disagree with a judicial or agency interpretation. The acquiescence canon places an added penalty on legislative debate or proposed amendments that end up not being adopted because the debate itself can then be used as evidence that Congress was aware of the interpretation and failed to override it. In effect, the debate in opposition of the interpretation is proof that the interpretation must stand. For example, as noted above regarding *Bob Jones*, Congress demonstrated awareness of the IRS reading of the code by making proposals to amend the code, which never reached the floor. 23 In the end, opponents to the IRS reading would have been better off not even attempting to have bills passed amending the IRS interpretation. By remaining silent, the Court would not have

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21 309 U.S. at 119-120.
22 Id.
23 461 U.S. at 600-601.
been able to make the acquiescence argument because it would not have been as clear that Congress was aware of the reading and had failed to amend the subsection. This is curious since submitting bills to amend that provision is a clearer indication of disagreement with the IRS interpretation than having no debate at all.

Congress demonstrates its willingness and ability to write comprehensive legislation, capturing its intent on the face of its statutes. Ignoring this evidence and relying on bills that are stuck in committee to prove legislative intent opens the door to misinterpretation. It creates perverse incentives for a Congress person, who may be afraid that her proposal will not be adopted, to feign ignorance of judicial and agency interpretations so as to avoid her failure being read as an indication of acquiescence. Congress faces real time limitations and other pressures that might make such constant clarification and amendment impossible. As such, the “preference-eliciting” function allegedly served by the canon may actually be thwarted by the application of this rule. Rather than acting as a motivator for Congress to draft more carefully ex ante or clarify its intent ex post, the acquiescence canon may often ossify erroneous rulings. It also makes it more difficult for courts to look at the legislation anew in light of horizontal coherence interests or other altered circumstances.

In light of the above challenges, some would simply limit the acquiescence canon, applying it as a rebuttable presumption, arguing that the evidentiary weight is still somewhat useful in assessing the presumed intent of Congress. However, even a rebuttable presumption of correctness for cases that Congress does not overrule has limitations, including the tendency for such presumptions to exacerbate dysfunctions in the legislative process, preserve obsolescent statutory interpretation, and even slight actual legislative intent. Limiting the acquiescence

\[24\] Eskridge, supra note 17 at 90-95.
\[25\] Id. at 114-118.
doctrine in order to save it would require applying it only when a court is absolutely certain that Congress was aware of the rule, that the rule was important enough to deserve its attention, and that amendment was not avoided for other strategic reasons—an extremely difficult determination for courts to make.

Furthermore, if this presumption can be rebutted by other evidence, it is not clear what the presumption would add to a court’s analysis. For example, one could argue that there was a presumption that Congress agreed with the Court’s rulings in Federal Baseball and Toolson as discussed in Subpart A, but that the presumption could be countered by other developments in the law demonstrating intent to the contrary. Under these circumstances, the presumption could be rebutted by evidence that Congress did nothing to override the Court’s later decisions, which applied the antitrust provisions to other sports. This later inaction could be interpreted as indicating that Congress agrees that antitrust provisions should apply to organized sports. With the presumption so easy to abandon, the canon loses its interpretive usefulness. When the canon is limited enough to remain valid it ceases to be instructive.

More recently, the Court has expressed some hesitance in the application of the canon. Justice Scalia has been particularly averse to relying on legislative inaction, going as far as to say that it is a “canard.” In Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, the Court was asked to determine whether Section 404(a) of the Clean Water Act provided federal authority over an abandoned sand and gravel pit in northern Illinois which provided a habitat for migratory birds. The Corps pointed to the failure of Congress to pass legislation that would have overturned their prior assertion of jurisdiction as evidence that

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27 531 U.S. 159, 162 (2001)
Congress acquiesced to their interpretation.\textsuperscript{28} The Court refused to use this evidence to find that Congress had acquiesced with the Corps’ regulations that effectively applied the Clean Water Act to the sand pit. The Court stated: “Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care. Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.”\textsuperscript{29} Nevertheless, the Court continued to recognize the acquiescence canon as a useful interpretive tool. In the very same decision, it defended the use of the canon in \textit{Bob Jones}, citing that there was “overwhelming evidence of acquiescence” in that case, absent which they would be “loath to replace the plain text and original understanding of a statute with an amended agency interpretation.”\textsuperscript{30} This indicates that the Court believes that the canon continues to have a place in statutory interpretation, even though its use could effectively eviscerate the plain text and original understanding of a statute.

Congressional inaction has no formal significance under Article I and no functional significance given the many difficulties in determining why Congress did not act.\textsuperscript{31} Because this canon is either applied strictly, running the risk of perverting legislative intent and leading to horizontal incoherence in the doctrine, or is weakened sufficiently so as to accommodate these interests but then adds little to the courts’ analysis, the acquiescence canon should be abandoned.

II \textbf{INTERPRETIVE SIGNIFICANCE OF THE DENIAL OF CERTIORARI}

\textsuperscript{28} \textit{Id.} at 169.
\textsuperscript{30} \textit{Id.} at 169-170, n5.
\textsuperscript{31} ESKRIDGE, ET AL. \textit{supra} note 2, at 1034.
The Court provides a different line of guidance to other courts regarding its own inactivity. The certiorari process involves consideration of general guidelines and a vote to determine which cases will be heard by the Court each year. Hearing a case generally suggests one of three things: (1) that a given rule was misapplied; (2) that the rule itself may be invalid; or (3) that there is a conflict amongst lower courts as to the appropriate rule that should govern such a case. As such, it would seem that the denial of certiorari could provide guidance to lower courts regarding the underlying decision. However, such an inference is not permitted.

A. The agenda-setting process for the Supreme Court

When it comes to the persuasiveness of the Supreme Court’s own inactivity, the Court has made it clear that no weight should be given to the denial of certiorari. Justice Stevens and Justice Frankfurter stated repeatedly that the orders of the Court denying certiorari have no precedential significance at all.\(^\text{32}\) The wisdom behind this guidance becomes clear given the complexity of the decision-making process.

Given limited capacity to hear cases each year, the Court must make decisions as to which cases it will hear. The overall rate for granted certiorari is falling over time, currently hovering at near one percent.\(^\text{33}\) There is very little compelling the Court to hear a given case, however. Supreme Court Rule 10, which outlines the considerations governing the Court’s review of a case by a writ of certiorari, provides: “[C]ertiorari will be granted only when there

\(^\text{32}\) Jeff Bleich & Deborah Pearlstein, *Dissenting From Not Deciding: Clues About What the Law Might Become—and How It Will Get There*, 63 OR. ST. B. BULL. 13, 16 (2002).

\(^\text{33}\) This rate has fallen over time. Reviewing cases from 1980 through 1995, 6% of cases were granted certiorari. Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 Mo. L. Rev. 101, 117 (1997). Of the 8,517 petitions filed in the Court’s 2005-06 Term (“October Term 2005”), only 78 were granted argument (0.9%). Journal of the Supreme Court of the United States, October Term 2005, at II (2006), http://www.supremecourtus.gov/orders/journal/jnl05.pdf. Similarly, of the 7,738 petitions filed in the Court’s October Term 2008, only 87 cases were granted plenary review (1.1%). Journal of the Supreme Court of the United States, October Term 2008, at II (2009), http://www.supremecourtus.gov/orders/journal/jnl08.pdf.
are special and important reasons therefore.”

Rule 17, the “official” statement of criteria for granting certiorari, states that review is not a matter of right and then lists a number of considerations, “neither controlling nor fully measuring the Court’s discretion.” Among these considerations are conflict among circuits, conflicts between federal and state courts, and a state court’s decision regarding an important federal question either not settled by the Court or in conflict with prior Court holdings. The formal list of criteria in Rule 17 provides some guidance, but because it is not binding, it is not as illuminating as one might hope. Chief Justice Taft once explained that review by the Supreme Court is not primarily to preserve the rights of the litigants so much as to expound and stabilize principles of law, pass on constitutional questions and other important questions of law for the public benefit, and to preserve uniformity of decision among the intermediate courts of appeals.

Important under Rule 10 is the presence of intercircuit conflict. Conflict must be resolved to maintain uniformity and predictability in the law. However, the presence of conflict does not automatically lead to review. The concept of “percolation” suggests that in many instances, it is beneficial to allow different rules to develop in different circuits before the Court will intervene to resolve the conflict. Providing a time frame for percolation permits the lower courts to develop well-reasoned opinions and perhaps even resolve the conflict on their own. For these reasons, the Court may deny certiorari to allow percolation to occur. This is

34 SUP. CT. R. 10.
35 SUP. CT. R. 17.
36 Id.
39 Lawless & Murray, supra note 33, at 105.
40 Id.
particularly true when the issue is procedural or administrative and the circuits can operate as laboratories for testing the different rules. 41

Other factors that come into play in the decision to grant a writ of certiorari include the policy preferences of the Justices, 42 the originating circuit, 43 the Solicitor General as a party, 44 the importance of the question up for review, 45 the presence of experienced lawyers, 46 and amicus curiae participation. 47 There is even evidence that the Court will manipulate its docket so as to avoid a legislative override when the Court is ideologically dissimilar to Congress. 48 Similar considerations come into play in state supreme courts. 49 Due to the multi-factor approach discretionary courts take when deciding to hear a case, the persuasive weight behind a decision not to hear a case is limited. Were the rule as simple as “grant certiorari when the lower court seems to have gotten it wrong,” it would be a different situation entirely.

The voting norms behind granting a writ of certiorari further complicate matters. The Supreme Court decides to hear a case based on the “Rule of Four” — if four Justices vote to hear a case, it will generally be heard. 50 Although there is little on public record regarding the operation of this rule, this rule did receive public attention surrounding passage of the Judiciary

41 Id.
43 Lawless & Murray, supra note 33, at 127.
45 Id.
50 Bleich & Pearlstein, supra note 32, at 13.
Act of 1925, which turned much of the Court’s jurisdiction from mandatory to discretionary.\textsuperscript{51} According to Justice Brennan, the reason for such a non-majority rule is to “give the four an opportunity to change at least one mind.”\textsuperscript{52} This statement can be taken in two different ways: the ability to change one Justice’s mind as to the certworthiness of the case, or to change one’s mind on the merits.\textsuperscript{53} The former explanation would only make sense if general practice were to grant certiorari upon the support of four Justices, and if after briefing and oral argument a fifth Justice were still not persuaded as to the certworthiness of the case, the certiorari would be dismissed as improvidently granted.\textsuperscript{54} This is not commonly the case, however, making the latter explanation the much more likely interpretation of his comment. As such, his comment suggests that the four justices voting to grant certiorari must also have at least a tentative perspective on the merits of the case in mind when voting to grant certiorari.\textsuperscript{55}

Making it difficult to assess the meaning behind the denial of certiorari is the fact that the votes are not typically made public, nor are the reasons for deciding to hear that case released. The Court has never required that Justices explain the reasons underlying their votes on certiorari petitions. Justice Frankfurter explained that practical considerations preclude Justices from giving reasons for denial, and that “different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable.”\textsuperscript{56} Others have stressed that such opinions would be improvident as they could compel Justices to make arguments without the benefit of full briefing, oral argument, access to the record, and

\begin{footnotesize}
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\item \textsuperscript{52} Straight v. Wainwright, 476 U.S. 1132, 1134 (1986) (Brennan, J., dissenting).
\item \textsuperscript{54} \textit{Id.} at 1100-01.
\item \textsuperscript{55} \textit{Id.} at 1101.
\item \textsuperscript{56} Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950).
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discussion of the issues with other members of the Court.\textsuperscript{57} Because reasons are not generally given and the voting is done in secret, it is particularly difficult for litigants and lower courts to derive meaning from the final outcome of the certiorari process alone.

B. Circumstances in which certiorari is granted

Whether the grant or denial of certiorari implies a ruling on the underlying merits of a case depends on the type of case up for review. Generally, certiorari is granted when a given rule was misapplied by a lower court, the current standard governing the case is likely to be overturned, or when there is a conflict amongst lower courts that must be resolved.

First, if the case is one in which the rule of law is clear but was allegedly misapplied by the lower court, a vote to grant certiorari will most likely parallel one’s vote on the substantive merits.\textsuperscript{58} If a Justice believes the lower court misapplied the rule and the rule is substantively correct, so long as he or she is willing to spend precious docket-space on that case, he or she will vote to grant certiorari.\textsuperscript{59} The time constraint is an important limitation. Even in this simplest type of case, the denial of certiorari will probably be due to the practical limitations placed on the Court rather than a judgment on the merits. A vote not to grant certiorari in such a case could reflect either the opinion that the rule was correctly applied, or that correcting the mistake is not worth the Court’s time. As such, the assumption that the case was correctly decided in the court below may very well be inaccurate.

Second, a case might involve a clear rule the Court is seeking to overrule. Those who wish to overrule are much more likely to grant certiorari, as those content with the present rule

\textsuperscript{58} Revesz & Karlan, \textit{supra} note 53, at 1101-02.
\textsuperscript{59} \textit{Id.}
have nothing to gain by doing so.\textsuperscript{60} The denial of certiorari in such a case is probably the easiest to interpret. However, distinguishing this type of case from a case of the simple misapplication of a rule would be difficult. Thus, granting certiorari in most cases could be due either to the fact that the lower court misapplied a rule the Court will continue to apply, or that the Court intends to abandon the rule entirely. A denial of certiorari would theoretically indicate that the Court is standing by the underlying rule, but does not disclose whether the rule was applied properly. Additionally, because certiorari might be denied for any number of other reasons, even this small piece of insight is greatly outweighed by the other considerations that might have influenced the decision. For example, the Court might deny certiorari in a case in which it would want to abandon the rule at issue, but due to intense social opposition, or time constraints, or the lack of third-party interest in the case, the Court will deny certiorari.

Finally, if the case represents a conflict among the lower courts, there will not likely be a parallel between a vote to grant certiorari and the final vote on the merits. The main issue at the certiorari stage is whether it is essential to have a uniform rule, not necessarily what the nature of that rule should be.\textsuperscript{61} The Court could easily deny certiorari on the same issue from two circuits that have resolved the issue in different ways. Clearly in that case, no significance can be drawn from the denial as to what rule should be applied. In fact, it is not even certain from the denial that the Court thinks the issue does not demand a uniform rule. A complicating factor to deciding whether to hear the case is the Justice’s perception of what rule would likely prevail. If a Justice believes his or her preferred rule would not likely succeed, he or she would be more inclined to allow the conflict to remain, voting against certiorari.\textsuperscript{62} Tolerating the conflict in the short-run can save the issue for a time when one’s preferred rule has a better chance of success.

\textsuperscript{60} Id.
\textsuperscript{61} Id. at 1103.
\textsuperscript{62} Id.
Alternatively, the Justice might simply wish to allow time for percolation. Therefore, when there is conflict amongst the circuits, lower courts would find it particularly difficult to derive insights from the denial of certiorari.

C. Inferences to be drawn from the denial of certiorari

Despite the Court’s lack of explanation for its denial of certiorari and the difficulty drawing conclusions from the denial by implication, it would seem that lower courts could derive insights from the certiorari process in some instances. In spite of the complexities, there does appear to be a correlation between the Justices’ votes on certiorari and on the merits.\(^\text{63}\) At the very least, when certiorari is denied, one of the three rationale for hearing the cases described above is most likely missing. Additionally, lower courts are aware of the complicating factors and can take them into account. For example, knowing that about three-fourths of the petitions filed by the federal government are granted, as opposed to the roughly one percent generally,\(^\text{64}\) might make lower courts pay more attention to a denial of certiorari when the federal government is a party. Because of the Court’s tendency to hear cases brought by the federal government, it is more likely that the Supreme Court denied certiorari because it agreed with the lower court opinion rather than that it denied certiorari due to time constraints.

Even more obviously, one would think that lower courts could use the published dissents from denial of certiorari for guidance. In spite of the arguments against their use, in some cases a Justice will pen a dissent from the denial of certiorari, which occasionally will lead to responses supporting the denial.\(^\text{65}\) Some simply express that the case is important and the issues

\(^{63}\) S. Sidney Ulmer, The Decision to Grant Certiorari as an Indicator to Decision “On the Merits,” 4 POLITY 429, 440-41 (1972).

\(^{64}\) Lawless & Murray, supra note 33, at 112.

\(^{65}\) Id.
should have been reviewed.66 Others reach the merits of the case, even stating how the author would have ruled in a case that was never briefed or presented before the Court.67 While these statements do not have the binding effect of legal precedent,68 it would seem that they could be instructive when choosing from among split circuits or could add some weight to the precedent the Court decided not to review.

There are certainly valid reasons to disapprove of such dissents. They present a one-sided account of the certiorari decision, as they tend to go unanswered.69 They also seem to run afoul of the Constitution’s prohibition against advisory opinions;70 if they express views on the merits of the case, they effectively rule on a case that is not before the Court and did not have the benefit of thorough adversarial presentation. Worst of all, they can mislead parties into thinking that the denial of certiorari is the same as the Court agreeing with the lower court ruling.71 But when such dissents are written, even if they are purely for self-expression and outward expressions of frustration, they do give lower courts some insight into the leanings of the Court and the reasons for which certiorari was not granted. This, in turn, would seem to provide some guidance as to the correctness of the lower court’s opinion and the continuing validity of the

66 Bleich & Pearlstein, supra note 32, at 13.
67 Id. at 14-15.
68 “Of course, ‘[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.’” Missouri v. Jenkins, 515 U.S. 70, 85 (1995) (quoting United States v. Carver, 260 U. S. 482, 490 (1923)).
69 Bleich & Pearlstein, supra note 32, at 17. See also Singleton v. Commissioner 439 U.S. 940, 494-495 (1978) (Stevens, J., opinion respecting denial of certiorari), stating “One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the purest form of dicta, since they have even less legal significance than the orders of the entire Court which, as Mr. Justice Frankfurter reiterated again and again, have no precedential significance at all. Another attribute of these opinions is that they are potentially misleading. Since the Court provides no explanation of the reasons for denying certiorari, the dissenter’s argument in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover, since they often omit any reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference.”
70 Id.
71 Id.
rules that were up for review. Nevertheless, such statements, and the denial of certiorari in general, can not be used or relied upon by other courts.

For example, in Noriega v. Pastrana, Justice Thomas penned a dissent from the denial of certiorari in which Justice Scalia joined. Petitioner General Manuel Noriega, the former head of the Panamanian Defense Forces, had been indicted by a federal grand jury and brought by the U. S. military to Florida. He was convicted by a federal jury of various federal narcotics-related offenses, and the District Court sentenced him to a 30-year prison term. Two months before Noriega was scheduled to be released on parole, he filed a habeas corpus petition under 28 U. S. C. Section 2255. Relying on the District Court’s Prisoner of War designation, Noriega alleged that the United States violated the Geneva Conventions when it acquiesced in the French Government’s request to extradite him to France so he could face criminal charges there upon his release from United States custody. On appeal, the Eleventh Circuit held that Section 5 of the Military Commissions Act of 2006 precluded Noriega from invoking the Geneva Convention as a source of rights in a habeas proceeding and therefore denied Noriega’s habeas petition. Subsequently, the Supreme Court was presented with two questions: (1) Whether Section 5 of the Military Commissions Act of 2006 precludes one from invoking the Geneva Convention Relative to the Treatment of Prisoners of War as a source of rights in a habeas corpus proceeding; and (2) Whether, assuming one can assert a claim based on the Geneva Convention,

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73 Id. at 2.
74 Id. at 2.
75 Id. at 3.
76 Id. at 3.
77 564 F. 3d 1290, 1292 (CA11 2009).
78 MCA §5(a) provides: “No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or any current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.” 120 Stat. 2631, note following 28 U. S. C. §2241.
extradition would violate the Convention MCA Section 5(a).\footnote{559 U.S. at 2.} However, the writ of certiorari was denied.\footnote{Id. at 1.}

A potential rationale for the denial of certiorari—the Solicitor General’s principal ground for opposing certiorari—was that the Eleventh Circuit’s decision did not conflict with the decision of any other Circuit.\footnote{Id. at 14, n15.} No official information supporting the denial was released. Because this was not a case of conflict amongst the circuits, the denial of certiorari suggests that the majority of the Court may agree with the Eleventh Circuit’s holding that a Prisoner of War can not invoke the Geneva Convention as a source of rights in a habeas proceeding. This could be useful to other courts as a default presumption in the absence of explicit guidance from the Court to the contrary.

In his dissent from the denial of certiorari in \textit{Noriega v. Pastrana}, Justice Thomas expressed a desire for the Court to determine whether MCA Section 5(a) is valid; “Providing that guidance in this case would allow us to say what the law is without the unnecessary delay and other complications that could burden a decision on these questions in Guantanamo or other detainee litigation arising out of the conflict with Al Qaeda.”\footnote{Id. at 8.} Although the dissent does not expressly indicate any leanings as to the merits of the \textit{Noriega} case, the fact that it was written reinvigorates some of his arguments from \textit{Hamdan v. Rumsfeld}.\footnote{548 U.S. 557 (2006).} Specifically, Justice Thomas wrote:

\footnote{559 U.S. at 2.}
\footnote{Id. at 1.}
\footnote{Id. at 14, n15.}
\footnote{Id. at 8.}
\footnote{548 U.S. 557 (2006).}[A] ruling could well allow us to reach the question we left open in \textit{Hamdan}—whether the Geneva Conventions are self-executing and judicially enforceable—because this case is not governed by the Uniform Code of Military Justice
provisions on which the *Hamdan* majority relied in holding Common Article III applicable to the proceedings in that case.\textsuperscript{84}

Given Justice Thomas’ dissent, lower courts may be encouraged to adopt a narrow interpretation of *Hamdan*, limited to cases arising from the conflict with Al Qaeda while continuing to consider claims under the Geneva Conventions in other contexts.

Though lacking the conclusive effect of precedent, lower courts could find the denial itself or the written dissent instructive when considering cases of this sort. In his dissent from the denial of certiorari in *Noriega*, Justice Thomas stated, “Whatever conclusion we reach, our opinion will help the political branches and the courts discharge their responsibilities over detainee cases, and will spare detainees and the Government years of unnecessary litigation.”\textsuperscript{85}

In the absence of such a conclusion, it would seem clear that insights from the Court’s denial of certiorari or the dissent from said denial could also be helpful.

Nevertheless, as discussed above, no significance can be given to the denial of certiorari. Even written dissents describing the reasons why a Justice believes certiorari should have been granted are pure dicta. In spite of the potential insights that could be gleaned from the denial of certiorari, the Court has repeatedly guided lower courts not to consider these denials. This is due to the number of confounding factors at play such as the Court’s limited calendar and the multitude of reasons why a given case may or may not be heard. Given the risk that the Court’s denial would be misconstrued, the Court continues to profess that such a decision can be given no precedential weight.

This begs the question: why can the Court refuse to hear a case and then forbid lower courts from inferring that the Court agreed with the court below, but when Congress refuses to amend a statute, this is used as evidence of the validity of the standing statutory interpretation?

\textsuperscript{84} 559 U.S. at 14. See *Hamdan*, 548 U. S. at 627–628; see also id. at 637, 642– 643 (Kennedy, J., concurring in part).  
\textsuperscript{85} 559 U.S. at 2.
III PARALLELS BETWEEN THE DENIAL OF CERTIORARI AND THE ACQUIESCENCE CANON

There are many similarities between the Court and Congress, placing both under comparable constraints and subject to comparable pressures. Inactivity by either group may provide insights into the intent of the group. However, the inactivity of Congress carries interpretive significance for the Court while its own inactivity does not. Part III addresses this paradox and suggests that for the reasons discussed above regarding the prohibition against deriving meaning from the denial of certiorari, the Court should not derive meaning from legislative inaction.

A. Comparison of Congress to the Court

There are a number of similarities between the processes of granting certiorari and passing legislation. Both the Court and Congress are discontinuous decision makers, with the personnel of both bodies changing over time and influencing how legislation and precedent will be read from year to year. 86 Both are collective decision makers, reflecting the opinions and intent of a group, making it difficult to discern the intent of either body when they fail to do something. 87 Both are public decision makers, acting largely in open fora and releasing their decisions in written form, with the potential to impact millions of people. 88 As discussed in Part II, for the Court there are at least guidelines regarding which cases should be heard in a given term; Congress has no such guidance when setting its agenda. Even so, both have tremendous discretion when deciding which issues to address each year. As such, the decision to address or not to address a given issue may provide some insight, but reflects a multitude of factors.

86 Eskridge, supra note 17, at 94.
87 Id.
88 Id.
Both Congress and the Court act publicly. While certainly Congress is much more public than the Court, particularly when it comes to the certiorari stage as opposed to debates over legislation, the Court’s final decision on whether to grant certiorari is public. Moreover, the public knows which cases have petitioned for a writ of certiorari, making it certain that the Court will address a finite set of cases each term. If anything, limiting the issues under consideration in this way makes it easier to glean meaning from the Court than from Congress, for whom the universe of possible issues is limitless. The congressional decision not to discuss a certain statutory interpretation can be infinitely more difficult to understand given that there will never be a public statement that Congress refuses to discuss the issue. At least the “inactivity” of the Court is clearly codified, and therefore discoverable. Even if the actual votes and discussion remain a mystery, at least one can be sure that the issue was discussed and action was affirmatively not taken. The openness of Congress as opposed to the secrecy surrounding the Court is the primary distinction between the two bodies, however, and does limit the extent to which they can and should mirror each other when it comes to deciphering intent from inactivity.

Both face immense pressure when setting their agendas. Time constraints limit how many issues can be addressed in a term for both entities. For Congress, whether a statutory interpretation decision is noticed, let alone overridden, will depend on factors ranging from the special interests at stake to the political savvy of the litigants. For example, an organized special interest group with firmly-established ties in Washington, such as the Department of Justice, is much more likely to bring the issue to the attention of Congress than a diverse group such as criminal defendants.\footnote{Eskridge, supra note 14, at 360-363.} A more extreme example involves the \textit{Citizens United v. Federal Election Commission}\footnote{558 U. S. ____ (2010).} case, involving interest groups ranging from various Senators to the ACLU to the
NRA. It is not at all surprising that congressional and Presidential action was spurred following the controversial decision.\textsuperscript{91}

The role of the parties impacts the Court in similar ways. The Solicitor General generally has success having petitions granted due to the careful screening of cases and credibility with the Court.\textsuperscript{92} Particularly, the Court may invite the Department of Justice, through the Solicitor General, to file a brief analyzing the certiorari petition.\textsuperscript{93} This process is referred to as a “call for the views of the Solicitor General,” and requires a formal vote of the Justices.\textsuperscript{94} Although this practice is relatively uncommon,\textsuperscript{95} the overall grant rate increases from 0.9 percent to 34 percent following a call for the views of the Solicitor General; this means the Court is 37 times more likely to grant a petition when it has called for the views of the Solicitor General.\textsuperscript{96} Moreover, the Court follows the recommendation of the Solicitor General 79.6 percent of the time when either a straight grant, deny, or grant/vacate/remand is recommended.\textsuperscript{97} This relative success rate, though undoubtedly reflecting additional factors,\textsuperscript{98} demonstrates the power of credible, repeat players in obtaining the Court’s consideration of particular issues.

\textsuperscript{91} President Barack Obama, for example, referenced the Court’s decision in his State of the Union address. “With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I’d urge Democrats and Republicans to pass a bill that helps to correct some of these problems.” (Transcript as released by the White House. January 27, 2010).
\textsuperscript{92} Lawless & Murray, \textit{supra} note 33, at 112.
\textsuperscript{93} See, e.g., Whitburn v. Addis, 525 U.S. 1176 (1999) (“The Solicitor General is invited to file a brief in this case expressing the views of the United States.”).
\textsuperscript{94} Medellin v. Texas, 129 S. Ct. 360, 364 (2008) (Breyer, J., dissenting) (stating that four votes are required to call for the Solicitor General’s views).
\textsuperscript{96} Id. at 245, 273.
\textsuperscript{97} Id. at 245, 276.
\textsuperscript{98} Id. at 273-274, n153. As noted by Thompson & Wachtell, it is likely that confounding factors are at play. “It is not necessarily that the Solicitor General’s recommendation itself increases the likelihood of a grant; instead, it is quite likely that cases which the Court thinks worthy of a CVSG are those it thinks possibly worthy of a grant. Thus, an observer who knows nothing about a case other than that the court has called for the views of the Solicitor can comfortably predict a substantially higher likelihood of a grant than in a case in which the Court has not yet acted.”
Although lobbyists and special interest groups might not have the same persuasiveness when it comes to the Court as opposed to Congress, sophisticated litigants do have an edge. For either body, the role of financed, organized interests would have to be taken into account when analyzing which issues go unnoticed or are not reviewed.

Some have argued that Congress is distinct in its duty to respond to the interpretation of statutes to maintain continuity, security, and legitimacy in the law. However, this same duty can be attributed to the Court. Under a “preference-eliciting” theory of statutory interpretation, it may be the case that the legislature has the duty to address statutory interpretations in a way courts do not. Any error is for the legislature to correct, whereas the Court does not have the duty to correct all errors in the lower courts. While this may be valid in theory, the legislature, like the Court, has ultimate discretion when setting its agenda. The duty of the legislature to review statutory interpretation can not be absolute; it would be impossible for it to address every suboptimal statutory construction. Likewise, the Court may have virtually unlimited discretion, but it would be disastrous if the Court stopped intervening when significant lower court rulings were patently erroneous. Both must try to correct errors they see as important enough to justify the use of their limited resources and attention.

Another potential distinction between congressional inaction and inaction by the Court is that for statutory interpretation, congressional intent matters whereas the Court’s intent does not. However, legislative intent is not meaningful on its own. The reason courts look to legislative intent, either past or present, is to discern the true meaning of the statute. In the same way, in any given case, courts are trying to discern and apply the true meaning of a given legal doctrine. The Supreme Court is the ultimate arbiter of “what the law is,” just as Congress is the central body from which law derives its true meaning. It is not unreasonable for lower courts to look to

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99 Eskridge, *supra* note 17, at 110.
the Court for guidance in their mission of applying and interpreting the law. Any indication from a higher court that a given lower court opinion got it right would seem apt for consideration by other lower courts. The issue is not what the Justices want the law to be so much as what the law actually is and how it should be applied. If the denial of certiorari were reliable evidence of this, surely lower courts would benefit from this information to the same extent that courts benefit from the legislative intent behind a particular statute.

B. Parallel between Congressional and Supreme Court inaction

The many reasons why the Court does not want its refusal to grant certiorari to be interpreted as agreement with the decision of the court below also apply to legislative inaction. The Court, from its own experience with the complexities of the certiorari process, has decided that it would be imprudent for lower courts to view the denial of certiorari as evidence that the lower court’s opinion was correct. As discussed above, numerous factors underlie the decision to grant certiorari, including timing, ideological alignment with Congress, the posturing of the issue, and the Court’s interest in percolation of certain issues.

When a Justice votes to grant certiorari, he is saying, in effect, that the Court’s limited resources would be well invested in deciding the merits of that case; he is not necessarily saying, at the same time, that the judgment of the lower court should be reversed. . . . Similarly, when a Justice votes to deny certiorari, he is reaching the opposite conclusion on the wisdom of plenary consideration but is not saying thereby that the lower court’s judgment was correct.100 Thus, for a lower court to take the denial of certiorari as an indication that the Supreme Court would rule in a certain way runs such a risk of being erroneous that the Court does not permit such arguments.

The same problems apply to the legislative process. The legislature might decline to address a judicial statutory construction because of simple time constraints. Political interests

100 Revesz & Karlan, supra note 53, at 1101.
can also come into play, as members of a committee might want to save an issue for a time when there is clear agreement as to how the issue should be resolved, avoiding the risk of failing legislation. Certainly not every interest of Congress, even those that could pass through both houses, is actually addressed. Thus, when a Congress person does not open the floor to discussion of a statutory interpretation, she is saying only that Congress’s limited resources would not be well invested in reconsidering the court’s or agency’s interpretation. She is not necessarily saying that the statutory construction was correct.

As with the Court, the significance of legislative inaction will depend on the type of statute being interpreted and how it was construed. Generally, certiorari is granted when a rule was misapplied by a lower court, the rule governing the case is likely to be overturned, or when there is a conflict amongst lower courts. The legislature responds to judicial or agency interpretations under the same three scenarios.

First, if the legislative intent is clear but was misapplied, Congress might amend the statute if it is willing to allot the precious space on the agenda. If not, Congress might leave the statute alone hoping future courts or agencies will construe it correctly. This reaction is penalized under the acquiescence canon. In spite of the extreme limitations on the legislative agenda, the acquiescence rule attempts to force Congress to correct all faulty applications of its statutes; failing to do so actually entrenches the error in the courts.

Second, in a given instance the court or agency could be applying a statute that Congress was already seeking to override. If so, legislative attention would depend on how the court or agency construed the statute. If the reading were in line with present intent, Congress might leave the statute alone. In such a case, the acquiescence canon appears to operate seamlessly. However, this leaves a statute on the books in a form that does not actually reflect legislative
intent, as Congress thought the statute as written required amendment. In such a case, rather than eliciting legislative intent, the canon actually perverts the incentive to modify the text to capture that intent. If the reading were not in line with present intent, Congress would likely continue unabated and amend the statute. In that case, the acquiescence canon is inapplicable. If Congress does not amend the statute, it may be for any of the reasons outlined in Part I, meaning that the subsequent use of the acquiescence canon may be based on faulty assumptions. When a statute is on the books that Congress intends to override, the acquiescence canon is at best irrelevant and at worst perpetuates archaic legislation or leads to faulty conclusions.

Finally, if there is conflict among the members of Congress as to the true meaning of the statute following an interpretation by the court or agency, it is not clear how Congress will react. Even if a majority of the members of Congress disagree with the interpretation, it is possible that none will raise the issue out of fear that a new reading that they consider even less favorable will be passed into law. Alternatively, raising the issue and failing to succeed in securing a legislative override for any variety of reasons could unintentionally entrench the interpretation through the operation of the acquiescence canon. In that case it would be better not to discuss the ruling at all, maintaining a credible case that Congress did not consider the interpretation. Just as in the Court, strategy on the part of the players will often mask whether one agrees with the ruling at issue. If anything, the canon prevents the conflict within Congress from being resolved. In all three scenarios, the effect of the canon is at best neutral while running the risk of perverting legislative intent.

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101 See, e.g., FDA v. Brown & Williamson Tobacco Corp, 529 U.S. 120 (2000) (wherein the Court held that the FDA’s consistent interpretation that it had no jurisdiction over tobacco products was essentially “ratified” by Congress because Congress had demonstrated awareness of the FDA position and had adopted tobacco statutes that were much weaker forms of regulation).
C. Reconciliation of the doctrines

All of the similarities between the Court’s and Congress’s decision making in the context of agenda-setting outlined above suggest that similar policies should underlie how much interpretive weight can be given to the inaction of either body. Just as the Court has deemed it unwise to rely on its past decisions regarding the denial of certiorari, it is unwise for the Court to rely on decisions by Congress not to amend a given statutory construction. Rather than abandoning the acquiescence doctrine entirely, some have argued that it should be limited to particular contexts in which legislative inaction is more likely to be a reliable indicator of legislative intent.102 The acquiescence doctrine, however, is not the best tool to achieve the horizontal coherence sought in such cases. Instead, just as lower courts are not to consider the inaction of the Supreme Court, courts in general should not give weight to the inaction of Congress. If there were no acquiescence canon, courts would be freer to analyze a prior interpretation for its intrinsic validity. When the prior reading of a statute no longer makes sense, the court would not feel pressured to forego a more logical, horizontally-coherent reading of the statute due to the fact that Congress, for any variety of reasons, did not amend the statute in question after learning about the court’s or agency’s interpretation. Other interpretive tools are much more constructive.

First, the acquiescence canon does not add much to the conventional stare decisis or Chevron103 analysis. Instead of looking to subsequent legislative history, the Court could let the prior judicial or agency interpretation stand on its own merits when under review. It is true that a higher court is not bound by a lower court’s interpretation under stare decisis analysis, so the doctrines are not completely coextensive. Additionally, Chevron only calls for deference to an

102 Eskridge, supra note 14, at 120.
agency interpretation. However, in cases such as *Flood*, where the Court was deciding whether to override its own precedent, the logic behind the stare decisis analysis does not gain much from adding that Congress also allowed the prior interpretation to stand. In a modern version of *Bob Jones*, theoretically the Court could defer to the IRS interpretation rather than getting caught up in congressional silence. Because that the reasons behind legislative inaction are hard to determine, and relying on legislative inaction could cause a precedent that should be abandoned in the interests of horizontal coherence to be upheld, it would be better to maintain prior statutory interpretations through the operation of stare decisis or the *Chevron* doctrine alone.

Second, attention to Congress’s alleged failure to override a judicial interpretation is more likely to lead to faulty conclusions than reliance on the text of the statute. Only the text of the statute meets the bicameralism and presentment requirements. Thus, given the acquiescence canon’s potential for distorting the incentives to amend the text itself, the canon should be abandoned. Without the acquiescence canon, Congress members will no longer face a prisoner’s dilemma of either bringing up a statutory construction with which she disagrees and risking her failure being used as evidence of the validity of the construction, or remaining silent, hoping not to demonstrate awareness of the construction, but then becoming powerless to change it. Horizontal coherence can be better preserved by allowing Congress to freely discuss and debate statutory constructions.

Finally, the Court can continue to consider evolving norms and shifts in policy when interpreting a statute over time. Abandoning the acquiescence canon does not mean that statutory meaning must be frozen at the time of passage. Rather, it allows the Court to adapt its interpretation over time as appropriate, without needing to adhere to an interpretation that was not legislatively overridden in the past. Without the canon, the Court would continue to take into
account current legislative preferences when deciding statutory interpretation cases. The Court could continue to consider on-going legislative action, just as lower courts consider subsequent Court rulings. However, the Court would not look to Congress’s subsequent failure to act. In *Flood*, for example, if the Court had not felt constrained by legislative inaction, it would have been better able to take into account evolving law in other areas and changes in the sport over time. In this way, abandoning the acquiescence canon actually aids in the dynamic interpretation of statutes.

**CONCLUSION**

The Court applies the acquiescence canon to infer that Congressional inaction following an agency or judicial interpretation of a statute indicates agreement with that interpretation. While this argument is logical, it overlooks a number of confounding factors. Congress may not know about the interpretation or may not prioritize addressing that issue given a limited agenda. The canon is sporadically applied and creates perverse incentives for legislators to ignore statutory constructions out of fear that their failed efforts to change them will only result in further solidifying the erroneous interpretation. As a result of these flaws, the canon is often so narrowly construed as to become essentially meaningless.

Facing similar constraints, the Court has instructed lower courts not to derive conclusions from its own inaction via the denial of certiorari. For a number of reasons, the Court has made it clear that the denial of certiorari does not imply that a lower court’s ruling was correct. There are many similarities between the agenda-setting pressures facing the Court and Congress, as well as parallel risks when interpreting the inaction of either body. As such, the inconsistency behind the Court’s interpretation of these failures to act is unfounded.

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Therefore, the acquiescence canon should be abandoned. Using the Supreme Court’s approach to interpreting its own inaction as a foil, the canon appears to be more misleading and harmful than it is beneficial. The Court appreciates that many factors go into its decision to review a case, far beyond whether the underlying ruling is correct. In the same way, courts should acknowledge that Congress faces many of the same pressures and limits on its time and resources, such that it might also refuse to address a reading of a statute that it finds erroneous. While in some cases the denial of certiorari or the failure to amend a statute given a statutory construction would be enlightening, the danger of misinterpreting such inactivity is great enough to support a general prohibition against their interpretation. Rather, courts should rely on precedent, the text, and evolving legislative intent to interpret statutes.