SUPREME COURT OF THE UNITED STATES

No. 96–1613

UNITED STATES, PETITIONER *v.* ESTATE OF FRANCIS J. ROMANI ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

[April 29, 1998]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court except that portion which takes seriously, and thus encourages in the future, an argument that should be laughed out of court. The Government contended that 31 U. S. C. §3713(a) must have priority over the Federal Tax Lien Act of 1966, because in 1966 and again in 1970 Congress "failed to enact" a proposal put forward by the American Bar Association that would have subordinated §3713(a) to the Tax Lien Act, citing hearings before the House Committee on Ways and Means, and a bill proposed in, but not passed by, the Senate. See Brief for United States 25–27, and n. 10 (citing American Bar Association, Final Report of the Committee on Federal Liens 7, 122–124 (1959), contained in Hearings on H. R. 11256 and 11290 before the House Committee on Ways and Means, 89th Cong., 2d Sess., 85, 199 (1966); S. 2197, 92d Cong., 1st Sess. (1971)). The Court responds that these rejected proposals "provide no support for the hypothesis that both Houses of Congress silently endorsed" the supremacy of §3713, *ante,* at 16, because those proposals contained other provisions as well, and might have been rejected because of those other provisions, or because Congress thought the existing law already made

§3713 supreme. This implies that, if the proposals had not contained those additional features, or if Members of Congress (or some part of them) had somehow made clear in the course of rejecting them that they wanted the existing supremacy of the Tax Lien Act to subsist, the rejection *would* "provide support" for the Government's case.

That is not so, for several reasons. First and most obviously, Congress can not express its will by a *failure* to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law. The Constitution sets forth the only manner in which the Members of Congress have the power to impose their will upon the country: by a bill that passes both Houses and is either signed by the President or repassed by a supermajority after his veto. Art. I, §7. Everything else the Members of Congress do is either prelude or internal organization. Congress can no more express its will by not legislating than an individual Member can express his will by not voting.

Second, even if Congress *could* express its will by not legislating, the will of a later Congress that a law enacted by an earlier Congress should bear a particular meaning is of no effect whatever. The Constitution puts Congress in the business of writing new laws, not interpreting old ones. "[L]ater-enacted laws . . . do not declare the meaning of earlier law." *Almendarez-Torres* v. *United States*, 523 U. S.___ (1998) (slip op., at 12); *id.*, at ___ (SCALIA, J., dissenting) ("This later amendment can of course not cause [the statute] to have meant, at the time of petitioner's conviction, something different from what it then said") (slip op., at 23). If the *enacted* intent of a later Congress cannot change the meaning of an earlier statute, then it should go without saying that the later *unenacted intent* cannot possibly do so. It should go without saying, and it should go without arguing as well.

I have in the past been critical of the Court's using the so-called legislative history of an enactment (hearings, committee reports, and floor debates) to determine its meaning. See, *e.g.*, *Conroy* v. *Aniskoff*, 507 U. S. 511, 518–529 (1993) (SCALIA, J., concurring in judgment); *United States* v. *Thompson/Center Arms Co.*, 504 U. S. 505, 521 (1992) (SCALIA, J., concurring in judgment); *Blanchard* v. *Bergeron*, 489 U. S. 87, 98–100 (1989) (SCALIA, J., concurring in part and concurring in judgment). Today, however, the Court's fascination with the files of Congress (we must consult them, because they are there) is carried to a new silly extreme. Today's opinion ever-so-carefully analyzes, not legislative history, but the history of legislation-that-never-was. If we take this sort of material seriously, we require conscientious counsel to investigate (at clients' expense) not only the hearings, committee reports, and floor debates pertaining to the history of the law at issue (which is bad enough), but to find, and then investigate the hearings, committee reports, and floor debates pertaining to, later bills on the same subject that were never enacted. This is beyond all reason, and we should say so.