Congressional Rules of Interpretation

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CONGRESSIONAL RULES OF INTERPRETATION

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ABSTRACT

Many scholars argue that Congress should adopt federal rules of statutory interpretation to guide judicial interpretation. This Article uses a novel dataset to show that Congress has long used enacted rules of interpretation and has increasingly done so in recent decades. However, it has chosen to do so on a statute-by-statute basis in a way that has gone mostly unnoticed by scholars and judges. We developed a dataset by using computer code to search the U.S. Code dating back to 1946 for specific phrases indicating a rule of interpretation, then manually checked and classified each rule. These rules not only show that Congress can create interpretive rules, and has become increasingly likely to do so, but they also call into question how we should think about the use of judicial canons. Canons are judge-made interpretive presumptions, and this Article shows that Congress increasingly includes interpretive rules to the same effect in the enacted text of its statutes. For example, one of the most important substantive canons of interpretation is the federalism canon, which tells courts to presume that a federal statute does not preempt state law absent a clear congressional intent to do so. Yet, Congress includes hundreds of rules of interpretation in the U.S. Code that

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directly address this same issue. Similarly, Congress directly ad-
dresses canons like the presumption against implied repeal, pre-
sumptions of consistent usage, and many others in enacted statutes.
This Article’s findings should cause judges and scholars to rethink
the use of canons and the justifications for using them.
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Scholars have engaged in an extensive and lively debate over whether Congress should enact rules of statutory interpretation that would guide judicial interpretation and the constitutionality of doing so. This debate focuses on the creation of a set of interpretive rules that would apply to the U.S. Code generally and proceeds under the assumption that Congress has yet to enact rules of interpretation in any meaningful way, with many scholars and judges claiming that enacted rules of interpretation do not yet exist. As a result, the debate is treated as purely academic. This Article refutes the conventional wisdom about enacted rules of interpretation by demonstrating that Congress has long enacted rules of interpretation throughout the U.S. Code that apply to individual statutory schemes, and that Congress has enacted these rules more commonly in recent decades. The debate surrounding enacted rules of statutory interpretation fails to account for this important fact about how Congress writes statutes.


2. See, e.g., Rosenkranz, supra note 1, at 2088. One prominent article claims that Congress only enacts such rules "sporadically," and that even when they do, the rules are "at the periphery of the United States Code." Id.; see also 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, 1025 (2013) ("Scholars have exhaustively debated whether Congress has the power to impose rules of interpretation on the courts. To our knowledge, however, that debate has not addressed these rules of interpretation that Congress already imposes." (footnote omitted)).

3. See, e.g., Scalia & Garner, supra note 1, at 245 (incorrectly claiming that any discussion of the constitutionality of statute-specific interpretive rules is "academic" because "the only common enactments directing judicial interpretation that we are aware of are those prescribing that the provisions of a statute 'are to be liberally construed'").

4. See discussion infra Part II.
This Article is the first empirical study of Congress’s use of rules of interpretation in enacted statutes, or what this Article calls “Congressional Rules of Interpretation.” Although a few scholars have mentioned the existence of enacted interpretive rules in individual statutory schemes, no one has studied the scope and content of these rules across the U.S. Code and across time. Relatedly, no one has examined what the existence of these rules should mean for how courts approach statutory interpretation. To fill this gap in understanding of how Congress creates law, the Author created a dataset of these rules of interpretation. The Author used computer code to search various volumes of the U.S. Code over the last seventy-five years for specific phrases indicating a rule of interpretation, then manually checked and classified each of them. This process uncovered thousands of rules of interpretation across nearly every title of the U.S. Code. This Article provides an in-depth study

5. Cf. Gluck, Federal Common Law, supra note 1, at 802 (mentioning the existence of enacted interpretive rules without categorizing or analyzing these rules).

6. A few scholars have mentioned that individual statutes can contain enacted rules of interpretation without examining the rules in-depth themselves. See id. (showing that a Westlaw search of the phrase “shall be construed” in the U.S. Code returns more than 5,200 results of enacted rules of construction, without attempting to categorize or analyze the rules); Cass R. Sunstein, Law and Administration After Chevron, 90 COLUM. L. REV. 2971, 2106 (1990) (“Courts sometimes rely on explicit and implicit interpretive instructions from Congress about how statutes should be construed. Substantive principles attempt to carry out policies, some of them with constitutional status, that cannot be tied to any legislative judgment.”); id. at 2107 (“Interpretive instructions include, least controversially, explicit legislative guidance about statutory interpretation. The first provisions of the United States Code provide a long list of these instructions, and other more particular statutes furnish similar guidance.” (footnote omitted)); see also Jacob Scott, Codified Canons and the Common Law of Interpretation, 98 GAB. L.J. 341, 349 (2010) (studying enacted interpretive rules in state codes and noting that “legislatures are extremely active when it comes to enacting or refuting canons. Congress, the legislatures in all fifty states, and the District of Columbia have codified canons in varying degrees. In this way, legislatures seek to instruct judges on how legislatures operate and to govern the sources and methods of statutory interpretation.” (footnote omitted)); Rosenkranz, supra note 1, at 2086 (considering instructions given in individual statutes, including statutes that “purport to give interpretive instructions. The class includes prosaic, definitional provisions such as ‘for the purposes of this Act, X shall mean Y,’ as well as interpretive instructions like ‘this Act shall be construed broadly.’ It also includes any codification or abrogation of a canon of interpretation.”); id. at 2088 (“Congress has used this power [to codify some tools of statutory interpretation] in the past, but only sporadically and unself-consciously, at the periphery of the United States Code.”).

7. See infra Tables 1 & 2.

8. The only Title of the Code without a rule of interpretation is Title 9, which is only seven pages long. See infra Table 1.
of these legislated rules of interpretation and discusses what the rules and their uses could mean for interpreters.  

First, this Article argues that when a statute contains enacted rules of interpretation, those rules should receive the full weight of law in interpretation. While a set of broadly applicable interpretive rules that apply to all statutes equally might be viewed as nonbinding on later Congresses, or even an unconstitutional infringement on the powers of courts, statute-specific rules are less susceptible to these criticisms. Statute-specific enacted interpretive rules are Congress's attempt to provide a clear indication of its intended meaning and scope in enacting the statutory scheme, much like definition or exception sections that courts apply without question. Yet, despite the status of these rules as enacted law, there is a risk that courts treat enacted rules of interpretation as "precatory," and may dismiss them as nonoperative language that is merely advisory rather than binding, as courts have with other similar provisions. This may be especially true given the fact that these provisions are often hidden away in small text in notes at the back of the U.S. Code, or separated from other provisions of an enacted bill when that bill is codified in various places throughout the U.S. Code. Decisions about how rules of interpretation will appear in the Code are often not made by Congress, but instead are made by the Office of the Law Revision Counsel, an unelected body within Congress responsible for the codification process. This Article argues that judges should give these enacted rules of interpretation, wherever they end up in the Code, the full weight of law. Therefore, a judge's analysis of the entire legislative enactment should include enacted rules, as part of the regularly applied "whole act rule," to determine an interpretation supported by the entire enacted text. This approach is more likely to generate an interpretation in line with

9. The full record of the Author's research results are on file with the Author.
10. See, e.g., Sunstein, supra note 6, at 2107.
12. See id.
13. See infra notes 201-07 and accompanying text.
congressional intent than an approach to interpretation that focuses on other, unenacted, interpretive tools. 16

This Article’s findings are also relevant to the substantial and ongoing debate over the use of judge-made rules of interpretation, known as canons. 17 The scholarly literature has generated many justifications for the use of canons—both in the aggregate and with respect to specific canons—18—and has empirically investigated their use by judges. 19 This Article provides a new perspective on this debate over judicial canons by showing that Congress often enacts interpretive rules that function similarly to existing judicial canons. For example, Congress often enacts provisions stating that a law should not be interpreted to preempt state law, yet courts apply a similar rule even when a statute is silent on the issue. 20 Congress also often enacts provisions stating that a statute should not be interpreted to repeal an earlier statute, which is similar to the commonly used judge-made presumption against implied repeals. 21 And Congress often defines terms in relation to words in other parts of the statute or even other

16. See, e.g., Rosenkranz, supra note 1, at 2086.

17. See, e.g., SCALIA & GARNER, supra note 1, at 245; William Baude & Stephen E. Sachs, The Law of Interpretation, 130 HARV. L. REV. 1079, 1121 (2017) (“What authority do these canons have, if any? How would one know whether a proposed canon is real or false? The competing accounts seem to make these questions harder, and also raise the possibility that they’re ultimately indeterminate.”); Andrew Koppehnan, Passive Aggressive: Scalia and Garner on Interpretation, 41 BOUNDARY 2: AN INT’L J. LITERATURE & CULTURE 227, 229-31 (2014) (providing a disfavorable review and criticism of Scalia and Garner’s work); William N. Eskridge, Jr., The New Textualism and Normative Canons, 113 COLUM. L. REV. 531, 534-36 (2013) (reviewing Scalia and Garner’s book and criticizing Scalia and Garner’s analysis of the canons).


20. See infra Part II.A.1; Gluck & Bressman, supra note 2, at 942.

parts of the Code, yet courts often apply a presumption of consistent usage of language within a statute and across the Code even when a statute is silent on Congress's intent.22

This Article raises novel questions about the use of canons by asking the following question: How should judges apply judicial canons in light of the fact that Congress regularly writes similar interpretive rules directly into statutes and has increasingly done so in recent decades? This Article’s findings should cause judges of all interpretive leanings to recalibrate the weight they give to canons, or at least encourage them to be more forthright about what they are doing when they use canons. If courts still choose to use an unenacted canon to resolve ambiguous or vague statutory language, they should at least acknowledge that the canon is serving as a judicial tool reflecting judicial preferences that are not necessarily tethered to congressional preferences and practices.23 This Article’s findings should cause courts and scholars to rethink and make explicit their justifications for the use of canons, subjecting them to the criticisms that such use might entail.

This Article proceeds in three Parts. Part I introduces the debates surrounding enacted rules of statutory interpretation and canons. Part II provides the results of the Author’s study, showing the types of interpretive rules Congress regularly uses and compares them to their judicial equivalents. Part III explores what enacted rules of statutory interpretation should mean for statutory interpretation, discussing both when a statute contains enacted rules and when it does not.

I. JUDICIAL CANONS AND PROPOSALS FOR CODIFICATION

Judicial canons are a set of judicially created rules and norms that judges use as tools to interpret statutes, generally when they find the text otherwise ambiguous or unclear.24 These tools allow judges to use grammar rules, context, and normative values to

22. See infra Part II.B.1.
extract meaning from statutory language. Many of these rules have a long pedigree. This Part does not make extensive efforts to categorize canons under any specific heading. Instead, this Part gives a simple introduction to some of the most important types of canons and summarizes the debate over whether Congress should enact a set of rules of interpretation akin to canons.

**A. Canons**

Judicial use of judge-made rules of interpretation is ubiquitous yet contested among scholars and judges. Courts have adopted hundreds of judge-made interpretive rules, often referred to as “canons,” to attempt to resolve statutory ambiguities.

25. See id.


27. These rules are often classified as either linguistic or substantive, although the labels used vary, and there is some disagreement about which category a particular canon should fall in. See, e.g., Baude & Sachs, supra note 17, at 1123 (proposing a new system for classifying canons as either “canons of language” or “canons of law”).

28. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1303-05, 1310-13 (2018) (discussing the disagreement among camps of judges, congressional staff, and legal scholars over the use of tools of interpretation). Recent studies have shown a dramatic increase in the use of canons in Supreme Court statutory opinions. See, e.g., James J. Brudney & Corey Ditalear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand. L. Rev. 1, 36 (2005) (showing an increase in the use of canons in employment law cases). Although this Article focuses on enacted rules found in the U.S. Code and their judicial analogues, judges commonly use similar rules of construction to interpret a variety of legal texts, including contracts. See, e.g., Horse Creek Conservation Dist. v. State ex rel. Wyo. Att’y Gen., 221 P.3d 306, 315 (Wyo. 2009) (describing statutory and contract interpretation as embracing the “plain meaning” approach); Thomas v. Progressive Cas. Ins. Co., 749 N.W.2d 678, 683 n.5 (Iowa 2008) (“Cases interpreting language in statutes are persuasive authority in interpreting contractual language.”); Gentile v. SinglePoint Fin., Inc., 788 A.2d 111, 113 (Del. 2001) (“It is a fundamental principle that the rules used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters.”). For example, under the “four corners’ rule, … if the meaning of a written contract can be inferred from its terms, the judicial inquiry stops there; extrinsic evidence … is inadmissible.” Coplay Cement Co. v. Willis & Paul Grp., 983 F.2d 1435, 1438 (7th Cir. 1993).

canons are deployed by both textualists and purposivists in nearly every statutory interpretation decision, often in majority and dissenting opinions that use a variety of canons to argue in favor of each side’s preferred interpretation. Canons have grown in importance in recent years, likely due to the rise of textualism in statutory interpretation, which gives canons a privileged place in interpretation.

Canons can be divided into textual or linguistic canons, which serve to help uncover the linguistic meaning of the text, and substantive canons, which provide a judicial presumption in favor of a particular outcome based on values that a court decides should be protected or emphasized. Textual canons generally reflect common usage of the English language, thereby allowing a judge to uncover what Congress likely intended in the words it used. For example, the rule against surplusage states that every word or phrase of a statute should be given effect, the *ejusdem generis* canon states that a court should interpret a general term used at the end of a list to share the characteristic of the preceding words in the list, and the *expressio unius* canon presumes that the inclusion of some

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31. See, e.g., Brudney & Ditslear, supra note 28, at 30-35 (documenting the increased use of language canons and substantive canons with the rise of textualism on the Supreme Court).

32. See, e.g., Gluck & Posner, supra note 28, at 1311-12.

33. This terminology is not used consistently, although the concepts are generally the same. See, e.g., Barrett, supra note 30, at 117 (classifying canons as “either linguistic or substantive”); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 356 (2007) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006)) (describing some canons as helping uncover “a statute’s intended meaning” and others as reflecting normative values that underlie “our Constitution or other aspects of our legal traditions”); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law and Equilibrium*, 108 HARV. L. REV. 26, 68 (1994) (referring to “textual,” “referential,” and “substantive” canons).

34. See ESKRIDGE ET AL., supra note 29, at 643; JOHN F. MANNING & MATTHEW C. STEPHINSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 202 (2d ed. 2013) (noting that “semantic” canons “are generalizations about how the English language is conventionally used and understood”). Not all observers agree that they do a good job of reflecting actual language usage. See, e.g., William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 676 (1999) (“Although [inclusio unius] is one of the most frequently invoked linguistic canons, it strikes me as an unreliable rule of thumb about the ordinary use of language.”).

35. SCALIA & GARNER, supra note 1, at 174.

36. Id. at 199-201.
things in a list implies the exclusion of others.\textsuperscript{37} Many other textual canons assume continuity in congressional enactments. For example, one of the most important textual canons is the presumption of consistent usage, or that "identical words used in different parts of the same act are intended to have the same meaning."\textsuperscript{38} The whole code rule is a corollary to this rule that assumes words are used consistently across the entire U.S. Code rather than just within a particular statutory scheme.\textsuperscript{39} Because all of these canons are meant to reflect how judges believe language is ordinarily used, courts rarely feel the need to justify using textual canons on any basis other than that they help uncover what Congress is most likely to have meant.\textsuperscript{40}

In contrast, substantive canons place a thumb on the scale in favor of a policy external to the statute that courts identify as desirable.\textsuperscript{41} Perhaps the best known substantive canon is the rule of lenity, which requires courts to interpret ambiguous criminal statutes in favor of criminal defendants.\textsuperscript{42} Another example is the federalism canon, which instructs courts to interpret statutes in

\begin{itemize}
  \item \textsuperscript{37} Id. at 107. Although these tools are supposed to be policy-neutral reflections of how an average person would use language, they can sometimes create conflicts even between Supreme Court Justices. Compare Lockhart v. United States, 577 U.S. 347, 349-52 (2016) (Justice Sotomayor advocating for the rule of the last antecedent), with id. at 362-64 (Kagan, J., dissenting) (advocating that the application of the series-qualifier canon better reflects "ordinary understanding of how English works").
  \item \textsuperscript{40} See, e.g., Caleb Nelson, \textit{What Is Textualism?}, 91 VA. L. REV. 347, 383 (2005) (justifying \textit{noscitur a sociis} and \textit{expressio unius} canons on the ground that "they reflect ordinary principles that laymen as well as lawyers use to interpret communications").
  \item \textsuperscript{42} See, e.g., United States v. Castleman, 572 U.S. 157, 172-73 (2014) (declining to apply the rule of lenity because the statute was not sufficiently ambiguous); United States v. Santos, 553 U.S. 507, 513-14 (2008).
\end{itemize}
ways that protect state sovereignty and maintain a balance between federal and state governments. These substantive canons do not attempt to give literal meaning to the text because the text is generally silent as to the subject the canon addresses. Instead, these canons enforce norms that are not explicit in the statutory text.

Judges claim several justifications for relying on canons. Some claim that canons reflect likely congressional preferences because the canons comprise a set of long-established rules that Congress must be aware of and draft in light of. Other judges use canons to encourage Congress to draft more precisely, or at least to provide a useful “background rule of law against which Congress can legislate.” Others claim that canons improve the coherency and efficiency of the law or protect certain underenforced constitutional norms or policy preferences, whether or not those are the goals of

44. See Barrett, supra note 30, at 109-10.
45. See Sunstein, supra note 41, at 457.
46. See John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 113 (2001) (“Modern legislatures ... pass such statutes against deeply embedded ‘norms of interpretation and defense,’ which frame the social understanding of such statutes, just as rules of grammar and diction do.” (quoting Frank H. Easterbrook, The Case of the Speluncean Explorers: Revisited, 112 Harv. L. Rev. 1913, 1914 (1999))); see also McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991); Cannon v. Univ. of Chi., 441 U.S. 677, 699 (1979) (“[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with ... unusually important precedents ... and that it expected its enactment to be interpreted in conformity with them.”); MANNING & STEPHENSON, supra note 34, at 202 (“It is possible to conceive of [substantive] canons as representing generic approximations of congressional intent.”); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25-27 (1997).
48. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517; see Lockhart v. United States, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (“[L]egislative express-reference or express-statement requirements may function as background canons of interpretation of which Congress is presumptively aware.”); AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 397 (1999) (“Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency.”); see also Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 531 n.22 (1983) (“Congress ... appear[s] to have been generally aware that the statute would be construed by common-law courts in accordance with traditional canons.”); John F. Manning, Continuity and the Legislative Design, 79 Notre Dame L. Rev. 1863, 1864-65 (2004).
49. See Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 320 (2000);
Yet others argue that certain substantive canons serve to enhance the power of underrepresented groups by forcing Congress to consider those groups more explicitly when creating legislation. 51

Courts often apply canons without providing any justification beyond the fact that canons exist and have been used before, and therefore are ingrained in how statutes are drafted and read. 52 Many criticize the textual and substantive canons as either expecting too much of Congress or poorly reflecting congressional intent, noting that Congress is disproportionately likely to overrule cases relying on these canons. 53 Some scholars criticize the...
inconsistency with which courts apply the canons, which they argue makes it difficult for readers of statutes to predict a judicial outcome. Some have questioned whether it is realistic to expect congressional drafters to know and follow all of the canons. Moreover, Professors Abbe Gluck and Lisa Bressman's interviews with congressional staffers indicate that many canons do not reflect how Congress writes statutes.

B. Codifying Rules of Interpretation

In response to many of the criticisms about the use of canons, including the unpredictability of their application and lack of connection to Congress, some scholars propose that Congress take the lead by telling courts which canons they want applied and which ones they do not. Indeed, some propose that Congress enact a "Federal Rules of Statutory Interpretation" to guide judicial interpretation of all laws, using legislated interpretive rules in the states as possible guides.

These proposals generated an extensive debate about benefits of federally legislated interpretive rules and whether such rules

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55. Posner, supra note 23, at 806 ("We should demand evidence that statutory draftsmen follow the code before we erect a method of interpreting statutes on the improbable assumption that they do."); Eskridge, supra note 17, at 569 (arguing that, in READING LAw: THE INTERPRETATION OF LEGAL TEXTS, Scalia and Garner make no attempt to investigate whether their preferred canons are known by, let alone approved by, congressional drafters).
56. Gluck & Bressman, supra note 2, at 964-55.
57. Stephen F. Ross, Where Have You Gone, Karl Llewellyn—Should Congress Turn Its Lonely Eyes to You?, 45 VAND. L. REV. 561, 566, 577 (1992) ("The only way for Congress to prevent the continued use of normative canons with which it disagrees is to enact an amendment to Title I of the United States Code that expressly provides for different rules of construction.").
58. E.g., Rosenkranz, supra note 1, at 2156-57.
59. See Scott, supra note 6, at 350. Scott's study of state codified canons only examined "rules of interpretation that govern a polity's entire legal system," because he wanted a "reliable means of comparison across states." Id. at 351 n.35.
60. Jellum, supra note 1, at 846-47 ("[S]ome legal scholars, like Nicholas Rosenkranz and Stephen Ross, have urged Congress to regulate statutory interpretation. But they are misguided; this issue is one for the judiciary to resolve, not the legislature." (footnote omitted)).
Most scholars argue that such a set of interpretive rules—or at least certain types of those rules—would unconstitutionally infringe on judicial power. Laurence Tribe argues that, if judges were to adhere to “previously enacted legislative ‘rules’ of construction,” then they “would in a sense permit an earlier Congress to add to art. I’s requirements for the enactment of laws by a later Congress.” Tribe argues that a subsequent Congress should be free to use its preferred interpretive approach without being bound by a prior Congress’s rules of interpretation. Similarly, Larry Alexander and Saikrishna Prakash argue that Congress cannot alter the constitutional requirements for the creation of law. For example, they argue that “Congress does not have any generic right to pass legislation that requires future Congresses to utter certain words or phrases if it wishes to overcome the prior Congress’s rules of interpretation” and, more colorfully, that Congress cannot require “future Congresses to bark like seals prior to legislating.” Scalia and Garner argue that legislatively enacted rules of interpretation would likely “be an intrusion upon the courts' function of interpreting the laws.” For these reasons, others argue that “if push came to shove, [federal

61. See, e.g., Rosenkranz, supra note 1, at 2156-57.
62. See, e.g., Einer Elhauge, Preference-Eliciting Statutory Default Rules, 102 COLUM. L. REV. 2162, 2203-05 (2002) (suggesting that legislative attempts to opt out of the rule of lenity violate courts’ interpretive authority); see also id. at 2108-11 (discussing constitutional limitations on enacted rules of interpretation). This constitutional argument can be based on the famous declaration in Marbury v. Madison: “It is emphatically the province and duty of the judicial department to say what the law is.” 5 U.S. (1 Cranch) 137, 177 (1803); see also THE FEDERALIST No. 78, at 404 (Alexander Hamilton) (Benjamin E. Wright ed., 1961) (“The interpretation of the laws is the proper and peculiar province of the courts.”).
63. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 123 n.1 (3d ed. 2000).
64. Id.
65. Larry Alexander & Saikrishna Prakash, Mother May It? Imposing Mandatory Prospective Rules of Statutory Interpretation, 20 CONST. COMMENT 97, 98 (2003) (“Artificial rules of interpretation laid down in advance that do not reflect subsequent usages or intentions should not be allowed to trump the actual meaning of statutes.”).
66. Id. at 105-06. As Christian Turner notes, no one suggests a problem exists in the congressional requirement, codified in 1 U.S.C. § 101, that enacted laws must begin with the language: “Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.” Christian Turner, Submarine Statutes, 55 HARV. J. ON LEGIS. 185, 193 n.35 (2018).
67. SCALIA & GARNER, supra note 1, at 245.
judges] would probably hold many binding interpretive rules un-Constitutional.”

Others make policy-based arguments, maintaining that a set of federal rules of statutory interpretation would be unworkable, and ultimately, more trouble than they would be worth. One policy objection is that enacted “interpretive statutes ... may bind future Congresses excessively, forcing them to jump through specific textual hoops to achieve legislative goals.” Others point to the fact that judges would need to subject the interpretive rules themselves to judicial interpretation to determine whether and how the rules would apply to a particular circumstance. Glen Staszewski raises several issues concerning the application of enacted interpretive rules, including how judges should reconcile enacted rules with other widely accepted interpretive principles and how judges should handle potential conflicts, especially when evidence of legislative intent exists that contradicts the earlier-enacted interpretive rule. These scholars ultimately argue that courts are unlikely to allow interpretive rules to bind their decision-making, and instead, will find reasons to justify not applying the rules when doing so would result in an interpretation with which they disagree.

A minority of commentators seem to think that enacted legislative rules create no problem. Cass Sunstein reasons that “[t]he easiest cases ... involve express legislative instructions about interpretation.... When the legislature has been explicit, there can be no objection to judicial use of the relevant instructions.” Nicholas Rosenkranz wrote the most prominent article in defense of both the constitutionality and wisdom of congressional enacted rules of

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69. Rosenkranz, supra note 1, at 2120 (reiterating Professor Tribe’s objection to interpretive rules in the McCarran-Ferguson Act and the Religious Freedom Restoration Act).
70. See Alan R. Romero, Note, Interpretive Directions in Statutes, 31 Harv. J. on Legis. 211, 228 (1994); Andrew Tutt, Comment, Interpretation Step Zero: A Limit on Methodology as “Law,” 122 Yale L.J. 2055, 2058 (2013); Staszewski, supra note 68, at 265.
71. Staszewski, supra note 68, at 266-67. Tribe similarly argues that all “rules of construction contained in the United States Code” may be trumped by “other interpretive indicia.” Tribe, supra note 63, at 125 n.1.
72. Staszewski, supra note 68, at 266-67.
Rosenkranz’s arguments mostly center on the idea that as long as a future Congress can amend an earlier Congress’s interpretive rules, subsequent Congresses are not actually bound by the earlier Congress. Rosenkranz also argues that the idea that courts can create rules of interpretation, but Congress cannot, is “an untenable endorsement of imperial judging.”

Although it is not always clear because commentators often speak in generalities, this debate seems to primarily focus on the constitutionality of enacting a set of interpretive rules applicable to the entire body of current and future U.S. laws, not the constitutionality of a statute-by-statute approach to creating interpretive rules. Some of those who seem skeptical of the constitutionality of a generally applicable set of enacted rules of statutory interpretation concede that interpretive rules applicable to a specific statutory scheme are unlikely to raise constitutional issues, even as they assume that rules that apply only to a specific statutory scheme rarely, if ever, exist. For example, Scalia and Garner state, “[w]hen [an enacted rule of interpretation] applies to interpretation of only the statute in which it is contained, it can amount to nothing


75. Rosenkranz, supra note 1, at 2111.

76. Id. at 2119.

77. See SCALIA & GARNER, supra note 1, at 245 (arguing that a set of interpretive rules that applies to all statutes is “more likely to be an intrusion upon the courts’ function of interpreting the laws, rather than an exercise of the legislature’s power to clarify the meaning of its product”); John F. Manning, Putting Legislative History to a Vote: A Response to Professor Siegel, 53 VAND. L. REV. 1529, 1532 (2000) (“Congress can and does pass interpretation acts prescribing general rules of construction to govern future enactments.”); Jonathan R. Siegel, The Use of Legislative History in a System of Separated Powers, 53 VAND. L. REV. 1457, 1490 n.181 (2000) (“Congress rarely adopts legislation containing general instructions for the interpretation of statutes.”).

78. E.g., SCALIA & GARNER, supra note 1, at 244; Gluck, Federal Common Law, supra note 1, at 764 (discussing canons and claiming that “Congress has not formally adopted any of these presumptions (for example, by statute or internal rule”); Mark Tushnet, The “Constitution Restoration Act” and Judicial Independence: Some Observations, 56 CASE W. RESV. L. REV. 1071, 1077 n.27 (2006) (“Methodological directives with respect to statutes seem to me more like provisions intrinsic to the statutes themselves, and in light of the obvious congressional power to prescribe a statute’s terms (and so its meaning), congressional power to prescribe interpretive methods seems to me to follow.”).
more than the legislature’s clarification of the statute’s meaning.”

Yet, Scalia and Garner also incorrectly claim that this debate is “academic” because “the only common enactments directing judicial interpretation that we are aware of are those prescribing that the provisions of a statute ‘are to be liberally construed.’”

For their part, courts seem to rely on statute-specific rules of interpretation to some degree without raising constitutional concerns. The arguments against the constitutionality of enacted rules of interpretation seemingly apply with much less force to more constrained rules of interpretation that purport only to guide the interpretation of a specific statutory regime rather than the entire Code. To attempt to say what does and does not constitute an interpretive rule in a particular statute could cause line-drawing problems because all kinds of enacted provisions could arguably be classified as interpretive and, therefore, unconstitutional. For example, are definitions that apply to an individual statute interpretive rules that encroach on the judicial power to “say what the law is”? What about exception sections that attempt to carve out certain things from a statute?

Congress needs leeway to clarify and constrain the meaning of each statute to draft legislation that accurately captures what Congress hopes to achieve. So, while a generally applicable set of enacted statutory interpretation rules might cause constitutional issues, this Article proceeds under the assumption that statute-specific interpretive provisions are a constitutional use of Congress’s legislative power.

79. SCALIA & GARNER, supra note 1, at 244.
80. See id. at 245; Gluck, Federal Common Law, supra note 1, at 804.
81. See Sunstein, supra note 6, at 2107.
82. Compare SCALIA & GARNER, supra note 1, at 245 (“[I]nterpretative command[s] applicable to all statutes [are] ... problematic.”), and Manning, supra note 50, at 427 (claiming that enacted interpretative rules are most problematic because “they enforce ... values as abstracted from the specific provisions that implement those values”), with id. (finding that ignoring statute-specific enacted rules ignores the lawmaking “process of compromise ... [that] entail[s] making hard decisions about means as well as ends”).
II. ENACTED RULES OF INTERPRETATION

One of this Article's most important contributions is to show that scholars have overlooked the fact that Congress regularly enacts rules of interpretation and that many of these enacted rules are similar to many of the interpretive canons judges commonly use. This Article also shows that this is not a new phenomenon, and the use of enacted rules of interpretations has been on the rise for many decades. This Part describes many of the most important canons of interpretation and their use in enacted statutes.

As explained in greater detail in the Appendix, the Author and his research assistants uncovered enacted rules of interpretation by conducting several different searches in the U.S. Code. The Author searched the 1946, 1970, 1994, and 2017 versions of the U.S. Code to track the use of enacted rules of interpretation over time.84 The Author chose 2017 because it was the most recent available version of the Code and chose the other years of the Code in an attempt to go back far enough to capture trends in the evolution of the Code. Because the Code changes slowly as Congress adds and takes away from it each year,85 the Author believed it was most helpful to look at years of the Code with sufficient separation to show significant change.86

To conduct the searches, we created a program using Python 3.0 software that reads all titles of each year of the Code and searched the text of each title for the phrases “construe,” “rule(s) of

84. See infra Tables 2-5.
construction,” “rule(s) of interpretation,” and “interpreted,” ignoring case in each instance. We also did a series of more targeted searches in each year of the Code for particular rules of interpretation that use unusual words (like “severability”), and then manually weeded out false positives. This yielded many additional rules of interpretation for each year. We put the results of all these searches into a spreadsheet containing the title number, section heading, and text of each rule of interpretation. For the 2017 Code, we entered a symbol indicating whether Congress codified the rule in the notes or the body of the Code. We then sorted through this file to weed out false positives and to sort the rules into groups of rules similar to judicial canons. While many of these enacted interpretive rules were specific to the statute and did not match a judicial canon, a significant portion of the rules did address similar issues as a common judicial canon would. This Part focuses on those enacted rules of interpretation.

In the 2017 Code, these rules of construction appear in thousands of different sections and in all but one title. The rules appear, on average, in about one of every three pages of the 2017 Code. By using trial-and-error, we determined the searches most likely to return the types of rules of interpretation we sought. Although we attempted to be as thorough as possible, our search methodology undoubtedly missed some rules of interpretation because of the variety of language Congress uses to express similar concepts, which makes it impossible to find every rule without reading the Code all the way through. However, we believe that our results capture a
significant majority of enacted rules of interpretation that relate to judicial canons and allow us to make useful observations about how Congress has used these rules over time. Table 1 and Table 2 below summarize our findings. We provide more detail for rules enacted in 2017 because the 2017 Code provides a view into current use of these rules. However, because Congress reorganized the titles of the Code various times over the last seventy years, comparisons between years are difficult on this point. Further data is presented in following Sections.
<table>
<thead>
<tr>
<th>Title</th>
<th>Pages</th>
<th>No. of Rules of Interpretation</th>
<th>Title</th>
<th>Pages</th>
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Table 2. Total Enacted Rules of Interpretation per Year

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A. Substantive Canons

As discussed above, substantive canons are not policy neutral. These canons aim to privilege certain interpretations over others.\(^{90}\) This Section discusses a number of enacted provisions similar to these canons that regularly appear in legislation.

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90. See, e.g., Barrett, supra note 30, at 110.
Table 3. Enacted Rules of Interpretation in the U.S. Code—Substantive Canons

<table>
<thead>
<tr>
<th>Type of Rule of Interpretation</th>
<th>1946</th>
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1. Federalism Canons

One of the most important and long-standing sets of substantive canons enforces the values of federalism. Federalism canons aim to interpret ambiguous statutes in a way that does not preempt or interfere with state law absent a clear congressional intent to do so. These canons are based on the premise that “Congress does not readily interfere” with the powers retained by the states under the Constitution. Whether and how to apply preemption is one of the most important and hotly contested questions in interpretation because it determines whether the federal government or states control the law in many politically controversial areas.

91. See Jamelle C. Sharpe, Legislating Preemption, 53 WM. & MARY L. REV. 163, 167 (2011). For example, the Supreme Court applied a version of the preemption canon in 1821. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 443 (1821) (“To interfere with the penal laws of a State ... is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty.”). Many early cases did not mention this canon, however. See Barrett, supra note 30, at 153 & n.211 (“[T]he presumption against preemption of state law seems not to have become an established part of the interpretive lexicon until the latter half of the nineteenth century.”).

92. Bond v. United States, 572 U.S. 844, 858 (2014) (“It has long been settled ... that we presume federal statutes do not abrogate state sovereign immunity, impose obligations on the States pursuant to section 5 of the Fourteenth Amendment, or preempt state law.” (citations omitted)); Bates v. Dow AgroSciences LLC, 544 U.S. 431, 449 (2005); Gregory v. Ashcroft, 501 U.S. 452, 475, 478 (1991); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 223, 241 (1947); Scalia & Garner, supra note 1, at 290 (“[T]his is a reliable canon of interpretation ... to presume that a federal statute does not preempt state law.”); Gluck & Bressman, supra note 2, at 942.

93. Gregory, 501 U.S. at 461. Interestingly, Manning argues that the Constitution does not endorse “federalism” per se but instead reconciles “competing values about the appropriate sphere of state authority.” Manning, supra note 50, at 433 (emphasis omitted).

94. Sharpe, supra note 91, at 166 (“[T]he enormity of the stakes in preemption cases [is]
The Author’s searches uncovered nearly one thousand examples in the 2017 U.S. Code, and many instances from earlier editions of the Code, in which Congress enacted a federalism rule of interpretation stating that a statute should not be interpreted to preempt state laws. For instance, many statutes simply say: “Nothing in this chapter shall be construed to preempt any State law.” Others target specific state laws: “Nothing in this Section shall be construed as waiving applicable State requirements relating to licensing of pharmacies,” and “Nothing in this section shall be construed to limit any prior, current, or future efforts of any State to establish any alternative to tort litigation.” These rules of interpretation codify what judges already often do even in the absence of such a rule.

While most of the searches revealed enacted presumptions against preempting state laws, some examples explicitly stated that the federal law should apply notwithstanding any state law. For example, one statute states that it “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan,” and another says that rules different than those under the Act “may not be imposed by any State.” This shows that Congress is not only capable of enacting rules that avoid preemption, but that it is also able to clearly state when it wants state laws preempted. More than any other enacted rules uncovered by this study, it appears that Congress is aware of and regularly accounts for federal legislation’s effect on state laws.

This raises the question of why state-related interpretive rules feature so prominently in the U.S. Code, both past and present. It

unmistakably clear: preemption determines which level of government—federal or state—gets to control regulatory policy in a complex federal system.).

95. See supra Table 3.
97. See, e.g., 42 U.S.C. § 1395w-3b(6).
99. See generally Sharpe, supra note 91, at 166-72. Professor Gluck made a similar observation about one preemption clause: “After all, how different is ERISA’s ‘savings clause,’ which states that ‘nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities,’ from the presumption against preemption?” Gluck, Federal Common Law, supra note 1, at 803 (footnote omitted).
100. 29 U.S.C. § 1144(a).
is, of course, difficult to know why Congress chooses to draft laws the way it does. The most plausible explanation is a combination of drafter awareness and state lobbying. In their study, Professors Abbe Gluck and Lisa Bressman interviewed legislative drafters who showed a better understanding of rules against preemption than many other canons, even if the drafters did not always agree with how courts apply those canons. Perhaps the drafters' awareness has translated to more targeted drafting of provisions to ensure that congressional intent regarding preemption is clear. Debates about the division of legal authority between state and federal governments date back to the founding, so it makes sense that Congress has been thinking about federalism concerns for a long time when drafting statutes.

2. International Law Canons

Other enacted rules of interpretation that appear in the U.S. Code relate to international or foreign law. For example, the Charming Betsy canon, named after a Supreme Court decision more than two centuries old, states that courts should construe ambiguous congressional statutes in a manner consistent with international law. This canon has been the subject of extensive debate. In

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103. See Gluck & Bressman, supra note 2, at 927.

104. See JAY B. SYKES & NICOLE VANATKO, CONG. Rsch. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 1-6 (2019) (discussing the uncertainty of reliance on the presumption against preemption and supplying drafters with the tools necessary to enact explicit federalism rules). Additionally, perhaps states serve as a successful interest group in the drafting process, either directly through review of proposed legislation or through influence of elected officials.


106. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). Although this canon derives its name from the Charming Betsy case, courts used a similar rule of interpretation in a number of earlier cases. See Barrett, supra note 30, at 134-35 (citing Jones v. Walker, 13 F. Cas. 1059, 1064 (Jay, Circuit Justice, C.C.D. Va. 1800) (No. 7507); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801)).

order to respect international law and protect the authority of the political branches in foreign relations, *Charming Betsy* functions to require courts to interpret statutes not to violate international law, absent clear congressional intent to do so. 109 The Author uncovered nine instances in the 2017 U.S. Code in which Congress enacted language aimed at a similar concept. For example, statutes say, “[t]his chapter shall be interpreted and applied in accordance with United States obligations under international law,” 110 or, “[n]othing in this section shall be construed to restrict in a manner inconsistent with international law navigational rights and freedoms as defined by United States law, treaty, convention, or customary international law.” 111 Although Congress only rarely enacts these provisions, courts also rarely apply the *Charming Betsy* doctrine, with one scholar estimating that the Court applied it in only a dozen cases in the last hundred years. 112 The infrequency with which Congress enacts this interpretive rule may simply reflect the rarity with which domestic laws conflict with international laws. 113 It may also

*Charming Betsy*, 6 U.S. at 118).


109. Anthony J. Bellia, Jr. & Bradford R. Clark, The Federal Common Law of Nations, 109 COLUM. L. REV. 1, 63-64 (2009) (arguing that *Charming Betsy* respects the principle that “the Constitution allocates to the political branches, not courts, the powers to recognize foreign nations and to risk bilateral conflict with such nations by interfering with their perfect rights”); Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 GEO. L.J. 479, 495-97, 526 (1998); see also Philip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. REV. 665, 675 (1986) (reasoning that the application of the *Charming Betsy* canon “is the same as creating a rule that the government regulatory scheme cannot violate international law.”).

110. 16 U.S.C. § 7409(b).

111. 33 U.S.C. § 1902(g).

112. Alford, supra note 108, at 1353 (“[T]he Supreme Court has expressly relied upon the *Charming Betsy* doctrine in approximately a dozen cases in the past one hundred years.”).

113. Barrett, supra note 30, at 138 n.132 (arguing that the rarity with which Supreme Court cases rely on the *Charming Betsy* canon “may be more a function of the frequency with which federal courts interpret statutes arguably infringing upon international law than a
be that Congress is not particularly aware of, or concerned with, international law and drafts accordingly.

Relatedly, courts sometimes invoke the Charming Betsy canon to avoid conflict with a treaty rather than with international law. These courts applied the canon to treaties in a variety of substantive areas, including immigration, diplomatic relations, and employment discrimination. Congress has enacted dozens of rules of interpretation aimed at treaties. For example, Congress created rules as straightforward as: "Nothing in this chapter may be construed as contravening any treaty of the United States." That Congress has enacted more provisions aimed at treaties than provisions aimed at international law generally is perhaps unsurprising given that treaties are voted on by Congress and so look more like enacted statutes than international law, which exists apart from any action by Congress.

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118. See, e.g., 18 U.S.C. § 2441(d)(1); 16 U.S.C. § 1274(a)(17); see also CONG. RSCH. SRV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 20-23 (2018) [hereinafter CONG. RSCH. SRV., INTERNATIONAL LAW]. The Author’s searches uncovered seventy-six different instances where an interpretive rule was aimed at the interpretation of a law in light of treaties.

119. 10 U.S.C. § 7661(d).

Another set of substantive canons deals with the interpretation of statutes that affect Native American tribes. These canons have a long pedigree going back to the early 1800s. The first of these canons began as a rule of treaty interpretation but expanded to include statutory interpretation, and it continues to apply to both sources of law. As developed over the last two hundred years, the Indian canons today instruct courts to construe treaties and agreements with tribes as the Indians themselves would have understood them, including broadly implied tribal rights, ... construe treaties, statutes, and other sources of law liberally in favor of Indians, so as to resolve any ambiguities or uncertainties in their favor, ... and ... construe federal statutes not to abrogate or limit tribal sovereign rights ... unless Congress clearly intended such laws to limit such rights.

This Article’s findings reveal an increasing number of enacted interpretive rules that accomplish the same purpose as the Indian Canons. For example, Congress enacted an interpretive rule stating that “[n]othing in this section shall be construed to affect the

obligation of the United States to any Indian or Indian tribe arising out of any treaty, statute, Executive order, or the trust responsibility of the United States owing to such Indian or Indian tribe.\textsuperscript{125}

\textbf{B. Continuity Canons}

Another set of canons focuses on creating continuity within a statutory scheme. These canons generally aim to interpret laws in ways that make the broader body of law consistent, to the extent possible.\textsuperscript{126} This Section discusses some of the most important of these canons and how Congress enacts similar rules in statutes. Of enacted rules, continuity canons are by far the most commonly used.\textsuperscript{127}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
\textbf{Type of Rule of Interpretation} & \textbf{1946} & \textbf{1970} & \textbf{1994} & \textbf{2017} \\
\hline
Consistent Usage & 59 & 145 & 1,308 & 3,605 \\
\hline
Presumption Against Implied Repeal & 411 & 366 & 608 & 1,178 \\
\hline
Common Law & 42 & 74 & 113 & 97 \\
\hline
\end{tabular}
\caption{Enacted Rules of Interpretation in the U.S. Code—Continuity Canons}
\end{table}

\textbf{1. Whole Act, Whole Code, and Presumption of Consistent Usage}

Courts frequently use presumptions that assume consistency within, and even across, individual statutes.\textsuperscript{128} One example is the presumption of consistent usage, one of the most important continuity canons, which presumes that "identical words used in different parts of the same act are intended to have the same meaning."\textsuperscript{129}

\textsuperscript{125} 21 U.S.C. § 862(f).
\textsuperscript{126} See Manning, supra note 48, at 1869.
\textsuperscript{127} See id.
\textsuperscript{128} CONG. RsCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 23-25 (2018) [hereinafter CONG. RsCH. SERV., THEORIES].
This rule is a type of a more general interpretive principle, sometimes known as the whole act rule, according to which “each term or provision [of a statute] should be viewed as part of a consistent and integrated whole” body of federal law.130

Courts also apply this type of reasoning across statutes. For example, the Court often invokes a canon known as the in pari materia canon, which presumes that when two statutes use similar language, the fact that Congress chose to use the similar language should be read as a “strong indication that the two statutes should be interpreted pari passu,” meaning side by side.131 Similarly, the Court often applies the whole code rule to presume consistency among enacted laws even if those laws were enacted at very different times.132 In other words, not only will courts construe the same or similar words within one statute to have the same meaning,

Smith v. United States, 508 U.S. 223, 229-31 (1993). But see Dewsnup v. Timm, 502 U.S. 410, 417 & n.3 (1992). This presumption is commonly enacted into state laws guiding interpretation. See Scott, supra note 6, at 368 tbl.3 (showing that thirty states have enacted such a presumption).


131. Northcross v. Bd. of Educ., 412 U.S. 427, 428 (1973) (per curiam); see also United States v. Freeman, 44 U.S. (3 How.) 556, 564-65 (1845) (“If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute; and if it can be gathered from a subsequent statute in pari materia, what meaning the legislature attached to the words of a former statute, it will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.” (citation omitted)); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.”); Scalia & Garner, supra note 1, at 232-255; William N. Eskridge Jr., James J. Brudney, Josh Chafetz, Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy 859-66 (6th ed. 2020).

132. See, e.g., Brown & Williamson Tobacco, 529 U.S. at 130, 133; Amoco, 526 U.S. at 875; Bennett, 520 U.S. at 157, 173-74.
but courts will also construe the same or similar words used in different statutes to have the same meaning. These rules are not without their critics, but courts continue to apply them regularly.

This Article’s findings show that Congress chooses to explicitly define specific terms in one statute in relation to other words in that statute, or other statutes, with increasing frequency in recent decades. In 1946, Congress rarely did so, but today this is by far the most common type of enacted interpretive rule. Increasingly, when Congress intends for similar words to have the same meaning across a statute or the Code, it explicitly says so in clear statutory terms. For example, many statutes say something like: “The term ‘publication’ has the meaning given such term in section 101 of title 17,” “[t]he terms ‘emergency’ and ‘unanticipated’ have the meanings given to such terms in section 900(c) of this title,” or “the term ‘Member’ has the meaning given such term by section 2106, notwithstanding section 8331(2).” While Congress most often defines terms in relation to other federal statutes, Congress

133. See Richard Posner, The Federal Courts: Crisis and Reform 281 (1985) (“The conditions under which legislators work is not conducive to careful, farsighted, and parsimonious drafting.”); Gluck & Bressman, supra note 2, at 936-37 (noting that less than 10 percent of their respondents indicated that drafters often or always intend to apply terms consistently across unrelated statutes); Buzbee, supra note 53, at 171-72. But see Scalia & Garner, supra note 1, at 51 (“When it is widely understood in the legal community that, for example, a word used repeatedly in a document will be taken to have the same meaning throughout ... you can expect those who prepare legal documents competently to draft accordingly.”).

134. See Powerex Corp., 551 U.S. at 232; Gustafson, 513 U.S. at 570; Sullivan, 496 U.S. at 484. But see Dewsnup, 502 U.S. at 417 & n.3 (finding the whole act rule unhelpful). Courts do not apply rules of consistent usage without limit. Courts still look for indicia of legislative intent indicating that the terms were intended to have different meanings. See, e.g., Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 595-96 (2004); Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932).

135. See supra Table 4.


137. 2 U.S.C. § 622(11).

also frequently defines a word in a statute in relation to its use in agency regulations,\textsuperscript{139} treaties,\textsuperscript{140} or state law.\textsuperscript{141}

2. Presumption Against Implied Repeal

Another frequently invoked continuity canon is the presumption against implied repeal. The large body of enacted laws gives rise to potential conflicts that courts must reconcile.\textsuperscript{142} This canon presumes that Congress does not intend to repeal an earlier statute with the enactment of a later statute unless it does so explicitly.\textsuperscript{143} To quote a leading Supreme Court case on this canon, it is a “cardinal rule ... that repeals by implication are not favored.”\textsuperscript{144} Courts often justify using this canon on similar grounds as other continuity canons, explaining that the goal of interpretation is to give a coherent meaning to the entire body of law of which any one law is just a small part.\textsuperscript{145} This canon creates a strong presumption, with judges rarely willing to find that a later statute repealed an earlier statute without clear evidence of a congressional intent to do so.\textsuperscript{146}

\begin{itemize}
  \item 139. See, e.g., 50 U.S.C. § 1701(e)(1)(D) (“The term 'foreign financial institution' has the meaning given that term in section 1010.605 of title 31, Code of Federal Regulations.”); 42 U.S.C. § 17921(12) (“The term 'protected health information' has the meaning given such term in section 160.103 of title 45, Code of Federal Regulations.”).
  \item 140. See, e.g., 19 U.S.C. § 3805(15) (“The term 'territory' has the meaning given that term in Annex 1A of the Agreement.”).
  \item 141. 33 U.S.C. § 668 (“For the purposes of this chapter 'hydraulic mining' and 'mining by the hydraulic process' are declared to have the meaning and application given to said terms in the State of California.”); 42 U.S.C. § 15092(2)(A) (“Subject to subparagraph (B), for purposes of the application of this subchapter in a State, the term 'family' has the meaning given the term by the State.”).
  \item 142. ESKRIDGE, supra note 108, at 127.
  \item 143. ESKRIDGE ET AL., supra note 29, at 868 (noting that the more recent law can specify whether it is intending to overturn earlier law, but observing that “[u]nfortunately, most of the time the more recent statute says nothing on” the question of implied repeal); SCALIA & GARNER, supra note 1, at 327; Karen Petroski, Retheorizing the Presumption Against Implied Repeals, 92 CALIF. L. REV. 487, 488-89 (2004).
  \item 146. See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 142 (2001) (“The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.” (quoting Matsuura Elec. Indus. Co. v. Epstein, 516 U.S. 367, 381 (1996))); ESKRIDGE ET AL., supra note 29, at 875 (“[I]t is almost unheard of for federal
The Author’s searches uncovered over one thousand examples in the 2017 U.S. Code explicitly stating that courts should not construe an enacted statute to repeal other laws.147 These enacted provisions often target ensuring that a later law is not construed to repeal a specific earlier law.148 For example, one statute says, “[n]othing in this section shall be construed to repeal or modify any provision of the Public Health Service Act or Federal Food,Drug, and Cosmetic Act.”149 Sometimes, however, the later law more broadly states that it should not be construed to repeal any earlier law that is not explicitly addressed in the statute.150 For example, one provision says that the statute “shall not be construed as limiting or repealing any existing law or authority of the Secretary except as specifically cited in this subchapter.”151 Although these provisions appear more frequently in recent versions of the Code, Congress has long used similar enacted provisions.

3. Common Law Canons

A longstanding canon of interpretation presumes that Congress does not intend to change common law without explicitly doing so, or in other words, “statutes in derogation of the common law are to be strictly construed.”152 Judges and scholars have criticized this canon, calling it a “relic,” a “fossil,” and “a sheer judicial power grab.”153 Twenty state legislatures have rejected this canon, with

147. See supra Table 4. States often enact a similar presumption as a generally applicable rule. See Scott, supra note 6, at 397 tbl.10 (showing that fifteen states have enacted a rule against implied repeals).
149. 18 U.S.C. § 42(a)(1).
150. See CONG. RSCH. SERV., GENERAL PRINCIPLES, supra note 148, at 31-33 (2014).
151. 16 U.S.C. § 1645(e).
153. Harlan Fiske Stone, The Common Law in the United States, 50 HARV. L. REV. 4, 18 (1936) (calling this canon an “ancient shibboleth”); Wenfang Liu v. Muod, 686 F.3d 418, 421 (7th Cir. 2012) (calling this canon a “fossil remnant of the traditional hostility of English judges to legislation”); SCALIA & GARNER, supra note 1, at 318 (calling this canon “a relic of
none of them endorsing it.\textsuperscript{154} The canon has eroded in recent decades as statutory law has grown to overtake the common law.\textsuperscript{155} Although the canon is now less relevant, courts still apply the canon with some frequency when there is a potential for conflict between common law and a statute.\textsuperscript{156} When applied, the canon looks similar to the presumption against implied repeal, discussed in the previous Subsection, in that "[f]or both, the alteration of prior [common or statutory] law must be clear—but it need not be express, nor should its clear implication be distorted."\textsuperscript{157}

The Author’s searches uncovered nearly one hundred examples in the 2017 Code of enacted interpretive rules aimed at interpreting the statute not to derogate from the common law.\textsuperscript{158} For example, one statute says, “[t]he remedies provided under this subsection ... shall not be construed as limiting such other remedies, including any remedy available to an individual at common law.”\textsuperscript{169} Another states, “[n]othing in this subsection shall be construed to restrict the applicability of common law protections and rights that a member of the Board of Governors or officer of the Civil Air Patrol may have.”\textsuperscript{160} However, unsurprisingly, enacted interpretive rules relating to the common law are the only rules that appear less often in the courts’ historical hostility to the emergence of statutory law”); Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION, supra note 46, at 29 (calling this canon a “sheer judicial power grab”); Gluck, Federal Common Law, supra note 1, at 769 (“[P]erhaps this canon is simply the most obvious manifestation of the way in which courts use interpretive methodology to retain some law-making power for themselves in a changing legal world.”). The origins of this canon are contested. Compare Roscoe Pound, Common Law and Legislation, 21 HARV. L. REV. 383, 402 (1908) (claiming that this canon did not originate in English courts but was instead “an American product of the nineteenth century”), with CARLETON KEMP ALLEN, LAW IN THE MAKING 456-57 n.6 (7th ed. 1964) (showing that this canon “was at least as old as the time of Edward III [1327-1377]” and that the canon is “older than Professor Pound allows”).

\textsuperscript{154} Scott, supra note 6, at 402 tbl.11.
\textsuperscript{155} ESKRIDGE ET AL., supra note 29, at 761-62.
\textsuperscript{156} See CONG. RSCH. SERV., GENERAL PRINCIPLES, supra note 148, at 20-21 (2014).
\textsuperscript{157} SCALIA & GARNER, supra note 1, at 318; see also Isbrandt Co. v. Johnson, 343 U.S. 779, 783 (1952) (“Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”).
\textsuperscript{158} The Author uncovered ninety-seven different instances across twenty-three different titles of the Code. See supra Table 4.
\textsuperscript{159} 42 U.S.C. § 1395i-3(b)(5).
\textsuperscript{160} 10 U.S.C. § 9497(g)(3).
the 2017 Code than in the 1994 Code, which means more laws with these types of provisions were removed from the Code than were added. This is likely the case for the same reason that the common law canon is less commonly used in recent years: statutes are now the primary source of law and, accordingly, congressional drafters need not account for the common law as much as they used to.

C. Other Interpretive Rules

The Author’s searches uncovered several other regularly enacted interpretive rules that relate to common interpretive rules but do not fall neatly into the categories covered in the previous two Sections.

Table 5. Enacted Rules of Interpretation—Others

<table>
<thead>
<tr>
<th>Type of Rule of Interpretation</th>
<th>1946</th>
<th>1970</th>
<th>1994</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Severability</td>
<td>251</td>
<td>303</td>
<td>283</td>
<td>395</td>
</tr>
<tr>
<td>Private Right of Action</td>
<td>0</td>
<td>0</td>
<td>17</td>
<td>68</td>
</tr>
<tr>
<td>Sovereign Immunity</td>
<td>0</td>
<td>5</td>
<td>36</td>
<td>59</td>
</tr>
</tbody>
</table>

1. Severability

Another judicial canon, known as severability, attempts to salvage the remainder of a statute when a portion of the statute is found unconstitutional. The idea underlying this canon is that Congress would prefer to leave as much of its laws intact as possible if a portion of the law is determined to be unconstitutional by a court. The question that courts must confront in a severability analysis is whether the law can stand without the unconstitutional provision and how much of the law remains. Scholars have

161. See, e.g., Virginia ex rel. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 789-90 (E.D. Va. 2010) (holding that the “individual mandate” portion of the Patient Protection and Affordable Care Act, colloquially known as Obamacare, is unconstitutional and must be severed from the rest of the Act).

162. See id. at 789.

163. See id.
debated how courts should conduct these kinds of severability analyses and whether they should even do so at all.164

As this Article's findings show, Congress has long included severability provisions in statutes by explicitly stating that the rest of a law should stand if a portion is found unconstitutional.165 Enacted severability clauses are among the most commonly enacted interpretive rules of the last seventy-five years; the most recent version of the Code includes hundreds of these provisions throughout.166 These provisions contain language like: "If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of

164. See, e.g., David H. Gans, Severability as Judicial Lawmaking, 76 GEO. WASH. L. REV. 639, 643-45 (2008) (arguing that severability should be limited not by an inquiry into legislative intent, but an analysis of whether the court would be engaged too much in lawmaking); Mark L. Movsesian, Severability in Statutes and Contracts, 30 GA. L. REV. 41, 45-46 (1995) (arguing that severability should be decided purely on textualism, that a severability or inseverability clause should be followed literally, and that there should be a presumption of severability otherwise); Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 STAN. L. REV. 235, 293 (1994) (arguing that a default presumption of inseverability is preferable). For an example of authors arguing for expansions of the doctrine, see Michael D. Shumsky, Severability, Inseverability, and the Rule of Law, 4 HARV. J. ON LEGIS. 227, 271-72 (2004) (advocating a clear statement rule indicating severability and arguing that "[s]tatutes are severable unless the legislature clearly states otherwise"); John Copeland Nagle, Severability, 72 N.C. L. REV. 203, 206 (1993) (arguing that in the absence of a clear statement of inseverability in the statute, severability should be assumed); Glenn Chatmas Smith, From Unnecessary Surgery to Plastic Surgery: A New Approach to the Legislative Veto Severability Cases, 24 HARV. J. ON LEGIS. 397, 461-63 (1987) (arguing that courts should not stop with simply severing unconstitutional sections of a bill, but should reconstruct a law in order to vindicate legislative will, even when this means adding new language).

165. See supra Table 5. More rarely, Congress enacts rules of inseverability whereby if one portion of the statute is held unconstitutional, the rest of the statute, or another part thereof, is invalid. See, e.g., 42 U.S.C. § 300aa-1(a) ("In General.—Except as provided in subsection (b), if any provision [of] part A or B of subtitle 2 of title XXI of the Public Health Service Act [42 U.S.C. 300aa-10 et seq., 300aa-21 et seq.], as added by section 311(a), or the application of such a provision to any person or circumstance is held invalid by reason of a violation of the Constitution, both such parts shall be considered invalid."); 25 U.S.C. § 2201 (explicitly stating that invalidity of any provision of Pub. L. 108-374 does not affect the validity of remaining provisions, "except that each of subclauses (II), (III), and (IV) of section 205(c)(2)(D)(i) of the [Act] is deemed to be inseverable from the other 2, such that if any 1 of those 3 subclauses is held to be invalid for any reason, neither of the other 2 of such subclauses shall be given effect"). It is also worth noting that the Author did not find evidence of enacted canons requiring courts to read statutes to avoid constitutional issues, which is a popular judicial canon. Barrett, supra note 30, at 138-43 (describing the evolution and use of the constitutional avoidance canon). Instead, Congress only focused on how much of a law should remain if a court found a provision unconstitutional.

166. See supra Table 5.
such provision to other persons or circumstances, shall not be affected thereby.” The fact that these provisions are so ubiquitous, and are almost always directed at giving the rest of the law effect if a court finds a portion of the law to be unconstitutional, shows that Congress is aware of the possibility of unconstitutionality and that its general preference is that as much of their laws survive as possible.

These enacted severability provisions are unique from many other rules of interpretation in that they often use the same language and structure no matter where they appear in the Code. They also have not changed much over the last seventy-five years. They may, therefore, function more as boilerplate and less as well-drafted and thought through descriptions of congressional intent, although there is a good argument that this may not matter in the statutory context. Courts appear skeptical of these kinds of enacted provisions and seem to apply a similar severability standard and analysis whether or not a statute contains an enacted severability clause. To quote one such court, “[t]he act in question contains a ‘saving clause,’ which it seems customary nowadays to insert in all legislation with the apparent hope that it may work some not

167. 45 U.S.C. § 161. States regularly enact similarly generally applicable severability rules that require courts to “permit[ ] as much of a questionable act to survive as possible.” Scott, supra note 6, at 385-86 (“Legislatures are wildly enthusiastic about severability: it is codified in thirty-five jurisdictions; none have rejected it.”). Alabama’s formulation is common: “If any provision of this Code or any amendment hereto ... is held invalid by a court of competent jurisdiction, such invalidity shall not affect the provisions or application of this Code ..., and to this end, the provisions of this Code ... are declared to be severable.” ALA. CODE § 1-1-16 (2021).

168. See, e.g., CONG. RSCH. SERV., GENERAL PRINCIPLES, supra note 148, at 42.


170. See id.


172. See, e.g., Movsesian, supra note 164, at 75-77 (persuasively making the case that the argument that statutory language is boilerplate and should therefore be ignored is weak in the statutory context and much weaker than in the contract context, in which boilerplate arguments are much more common).

quite understood magic."174 These severability clauses have received considerable scholarly attention, likely because of how much attention courts have afforded them.175

2. Private Right of Action Canon

Another canon creates a presumption against a private right of action for violating a statute absent an express or clearly implied intention to do so.176 Although historically courts expressed willingness to find that a statute created a private right of action,177 in recent decades the Court has implied a strong presumption against such a right, with one Supreme Court decision stating, "it is not for us to fill any hiatus Congress has left in this area."178 While courts do not require a statute to explicitly create a private right of action, congressional intention to create such a right must be clear from the statute.179

The Author's searches uncovered dozens of enacted statutes in the 2017 Code containing similar provisions,180 including language like: "Nothing in this paragraph shall be construed to create a private right of action."181 Interestingly, the Author did not find any instances of a similar interpretive rule in the 1946 or 1970 versions of the Code.182 Perhaps Congress was responding to courts' earlier willingness to read a private right of action into statutes by explicitly disallowing such a right.

175. Brian Charles Lea, Situational Severability, 103 VA. L. Rev. 735, 737 (2017); Gans, supra note 164, at 649 n.51; Movsesian, supra note 164, at 42; Nagle, supra note 164, at 204-05; Stern, supra note 171, at 77.
176. SCALIA & GARNER, supra note 1, at 315.
177. Id. (citing to cases from the nineteenth and twentieth centuries creating a private right of action based on the common law rule that "where there is a right, there is a remedy").
179. SCALIA & GARNER, supra note 1, at 315-17.
180. See supra Table 5.
182. See supra Table 5.
3. Sovereign Immunity

Another canon presumes that a statute does not waive federal or state sovereign immunity unless the statute is unequivocally clear.183 To quote a Supreme Court case from 1899: "The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it."184 This canon dates back to British courts before the founding of the United States.185 The canon has not gone unchallenged,186 and it does appear that the canon has lost some of its strength in recent decades,187 but it continues to be applied by federal courts with some regularity.

As with other canons discussed in this Part, Congress sometimes includes provisions relating to sovereign immunity in enacted statutes, with fifty-nine such provisions appearing in the 2017 Code.188 Most commonly, these provisions specify that the statute does not waive sovereign immunity with language as straightforward as, "[t]his section does not constitute a waiver of the sovereign immunity of the United States,"189 while other times a statute might say that it should be given full effect "notwithstanding ... any law of or relating to sovereign immunity."190 However, Congress began enacting these types of provisions relatively recently; the Author's searches did not uncover any such provisions in the 1946 Code and only five in the 1970 Code.191

185. See SCALIA & GARNER, supra note 1, at 281.
186. Id. at 283 ("Some state supreme courts have judicially abolished the doctrine of sovereign immunity in the area of tort liability, and the Supreme Court of the United States has spoken ill of the doctrine in general." (footnote omitted)).
187. Id. at 284 (noting that "the rigor with which courts have applied the interpretive rule disfavoring waivers of sovereign immunity has abated").
188. See supra Table 5.
191. See supra Table 5.
III. INTERPRETING STATUTES IN LIGHT OF ENACTED RULES OF INTERPRETATION

This Part considers the implications of the findings described in Part II for statutory interpretation. First, it discusses how Congress’s practice of regularly enacting rules of interpretation for individual statutes makes it less likely that Congress will create a generally applicable set of such rules. It then discusses the process of codification for rules of interpretation and how this process could affect courts’ usage of such rules. It then examines the potential impact of enacted rules of interpretation for how courts approach using unenacted canons. It also considers how changes in Congress’s use of enacted rules of interpretation over time should influence how judges approach interpretation today.

Because this is the first article to approach this issue, it does not attempt to resolve the issue conclusively; instead, it explores potential arguments for and against the use of judicial canons in light of Congress’s enacted rules of interpretation. These arguments are relevant for all dominant theories of interpretation because all such theories rely on judicial canons in their interpretive practices.

A. The Unlikely Federal Rules of Statutory Interpretation

This Article’s findings show that, despite calls for Congress to create a general set of rules of statutory interpretation that would apply equally to all statutes, Congress is unlikely to adopt that approach. The findings also show that the need for generally applicable rules is perhaps less pressing than commonly believed because Congress already regularly creates interpretive rules for individual statutes, and has increasingly done so in recent decades. Congress creates enacted rules on a statute-by-statute basis according to its preferences for each statute. Creating a generally applicable set of rules would upset the already existing rules of interpretation throughout the Code and would create inevitable

193. See, e.g., Scott, supra note 6, at 343.
conflicts between the general rules and the more specifically enacted rules.

Congress likely prefers a statute-by-statute approach to enacting interpretive rules because it allows drafters to tailor provisions according to their preferences in each situation. Some commentators argue that frequent conflicts between a generally applicable set of federal rules of interpretation and the legislature's intent in a specific enactment would complicate the courts' application of such rules. However, if Congress enacts these rules on a statute-by-statute basis, this concern is significantly diminished because Congress can specify the interpretive rules it wants to apply to an individual statute and consider those rules as part of the legislative negotiations surrounding that particular statute.

The Author did not find much evidence of the enactment of many commonly used textual or linguistic canons, especially those aimed at uncovering Congress's likely intended linguistic usage. That is perhaps unsurprising considering the nature of these canons. Because these canons mean to reflect common usage, it would make sense that congressional drafters would not even think to say that these types of canons apply.

Linguistic rules seem to be the type of rules best suited for Congress to enact on a Code-wide basis. Yet, Congress apparently either cannot reach a consensus on or has not bothered to consider how to instruct courts on which linguistic tools to use to uncover meaning. These types of linguistic rules, like expressio unius, noscitur a sociis, and ejusdem generis, also almost never appear in enacted state rules of interpretation, even though states often enact long and detailed rules of interpretation that are generally applicable to states codes. It is therefore unsurprising that Congress similarly chooses not to enact these types of linguistic rules on the federal level.

194. Cf. Scalia & Garner, supra note 1, at 245 (finding “[a]n interpretive command applicable to all statutes ... problematic—more likely to be an intrusion upon the courts' function of interpreting the laws, rather than an exercise of the legislature's power to clarify the meaning of its product”).

195. See, e.g., Barrett, supra note 30, at 117.

196. Scott, supra note 6, at 357 tbl.1 (showing that no states codified expressio unius (and in fact three reject it), and only two states codified each of noscitur a sociis and ejusdem generis).
One exception to the legislature’s refusal to enact linguistic rules is the generally applicable Dictionary Act, which appears in the first section of the first title of the Code and applies to “any Act of Congress.”\textsuperscript{197} But this Act only provides straightforward guidance like the plural includes the singular, the singular includes the plural, and the present tense includes the future. However, even that guidance is advisory and can be overcome by context.\textsuperscript{198} The rules provided in the Dictionary Act are rarely important to interpretation, and the Act does not address the common textual canons that courts often apply.\textsuperscript{199} Maybe the most we could expect from Congress in the form of a generally applicable set of interpretive rules is an expanded Dictionary Act with a set of textual canons that could apply across the entire Code, while other canons would be left for Congress to decide on a statute-by-statute basis.

\textbf{B. Issues of Codification}

One key difference between enacted rules of interpretation and other types of statutory language is the way they are codified. After Congress enacts a bill into law, a nonpartisan group within Congress known as the Office of Law Revision Counsel (OLRC) takes that enacted law and organizes it within the U.S. Code by either amending the existing Code or inserting the new law in the proper places in the Code.\textsuperscript{200} The OLRC’s role in determining how enacted

\begin{footnotesize}
\begin{enumerate}
\item[197.] 1 U.S.C. § 1.
\item[198.] Id. The Dictionary Act says that its rules apply unless “context indicates otherwise.” States often enact a similar presumption into their rules of interpretation. See Scott, supra note 6, at 371 tbl.4 (showing that states often enact interpretive rules relating to gender neutrality, rules that the singular includes plural, and rules that tenses are generally interchangeable).
\item[200.] See About Classification of Laws to the United States Code, OFF. OF L. REVISION COUNCIL, [hereinafter About Classification of Laws], https://uscode.house.gov/about_classification.xhtml [https://perma.cc/6MC3-ZBXU]. Some of the Statutes at Large do not make it into the Code at all because they are not considered “general and permanent” in nature. Id. Whether something qualifies as general and permanent can be a difficult judgment to make, and the OLRC relies on its own precedents as to whether something qualifies. The descriptions of the codification process here are based on the Author’s research with respect to other types of enacted provisions. See Shobe, supra note 11, at 691-94; Shobe, supra note 86, at 642-49.
\end{enumerate}
\end{footnotesize}
law is presented happens mostly behind the scenes and can lead to
certain enacted language being featured more prominently in the
Code than other enacted language.  

The rules of interpretation described here often do not make it
into the main text of the Code, even though they are enacted law.
Instead, the OLRC often strips rules of interpretation from the
original bill and places the rules in notes at the end of sections of
the Code, which can make these rules of interpretation difficult
to connect to the rest of the enacted bill. Sometimes, these rules
are even difficult to identify as part of the enacted bill because the
notes appear in small font at the back of each provision alongside
text including both enacted and unenacted editor's notes. Around
30 percent of the rules of interpretation found in the Author's
searches of the 2017 Code appear in these notes. Table 6, below,
illustrates the number of rules found in the main text of the Code
and in the notes of the Code for each of the types of rules discussed
in Part II.

201. See Shobe, supra note 86, at 642-43.
202. See id. at 643.
are several categories of statutory notes. The most common are Change of Name, Effective
Date, Short Title, Regulations, Construction, and miscellaneous notes. Miscellaneous notes
include things like congressional findings, study and reporting requirements, and other
provisions related to the subject matter of the Code section under which they appear.”).
204. See Shobe, supra note 86, at 656-58.
205. Id. at 661-62. Frequently Asked Questions and Glossary, OFF. OF L. REVISION COUNS.,
as a statutory note under a section of either a positive law title or a non-positive law title has
no effect on the validity or legal force of the provision; that is, a provision set out as a
statutory note has the same validity and legal force as a provision classified as a section of the
Code.”). For examples of the Supreme Court acknowledging this placement process, see U.S.
206. See id. at 656-58. Of the total of 11,415 rules of construction uncovered in the Author's
searches of the 2017 Code, 3,389 were in the notes to the Code (29.7 percent). The Author was
able to tell which provisions came from the notes in the 2017 Code because of the way the text
is tagged in the HTML version of the 2017 Code. Only PDF versions are available for the 1946
and 1970 versions of the Code, and those do not contain the same type of tagging as more
recent years of the Code. The Author is therefore unable to give data on the number of
provisions found in the notes of the Code for those years, and so decided to only present data
on the most recent version of the Code, 2017.
Another complication of the codification process that can make it difficult for interpreters to understand the role of rules of interpretation is that OLRC often takes a single enacted bill and splits it up among various places in the Code.\textsuperscript{207} As the OLRC states, “a single freestanding provision that is general and permanent can relate simultaneously to a number of different chapters and titles in the Code.”\textsuperscript{208} Because of this, it is left to OLRC’s “editorial judgment” to decide where each part ends up among the various options.\textsuperscript{209} At the same time, OLRC can decide to insert an entire bill, as it was enacted by Congress, into a new chapter of the Code if that law is “tied together with definitions, mutual cross references, or a common effective date and comprise the entire law or a distinct title of the law.”\textsuperscript{210} In that case, the rules of interpretation will appear in the same order and place as they appeared in Congress’s original enactment.\textsuperscript{211}

The process by which OLRC exercises its editorial judgment is often opaque to outsiders.\textsuperscript{212} It may be that this process sometimes

\begin{table}
\centering
\begin{tabular}{|l|c|c|}
\hline
\textbf{Type of Rule of Interpretation} & \textbf{Main Text} & \textbf{Notes} \\
\hline
Federalism & 792 & 95 \\
International Law & 66 & 17 \\
Indian Law & 87 & 159 \\
Consistent Usage & 2,581 & 1,024 \\
Presumption Against Implied Repeal & 640 & 538 \\
Common Law & 89 & 8 \\
Severability & 150 & 245 \\
Private Right of Action & 53 & 15 \\
Sovereign Immunity & 51 & 8 \\
\hline
Total & 4,509 & 2,109 \\
\hline
\end{tabular}
\caption{Number of Enacted Rules of Interpretation—2017 U.S. Code}
\end{table}

\begin{itemize}
\item \textsuperscript{207} See id. at 660-62.
\item \textsuperscript{208} See About Classification of Laws, supra note 200.
\item \textsuperscript{209} See id.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} See Shobe, supra note 86, at 668-73.
\item \textsuperscript{212} Shobe, supra note 11, at 692.
\end{itemize}
causes courts and litigants to overlook rules of interpretation. Either because OLRC relegated the rules to notes or because the OLRC separated the rules from other parts of the original law, it can therefore be impossible for courts and litigants to match up the rules to the original congressional enactment without resorting to the Statutes at Large, which is difficult and time consuming. 213

C. Interpreting Statutes Containing Enacted Rules of Interpretation

The fact that enacted rules of interpretation exist raises the question of how courts should account for them in interpretation. Although an in-depth empirical analysis of how courts use these enacted rules is outside the scope of this Article, it does appear that courts generally apply these provisions when enacted214—although there is some question of whether courts treat these provisions as coequal with other parts of a statute. There is some evidence that courts treat these types of interpretive provisions as less authoritative than other, more operative statutory text. 215 The Author has made similar observations about how courts tend to discount the language of enacted findings and purposes sections as “precatory”

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213. See, e.g., Shobe, supra note 86, at 660-68. These arguments are less relevant when Congress has enacted the Code as “positive law.” This is a process by which the OLRC revises the Code so that “the organizational structure of the law is improved, obsolete provisions are eliminated, ambiguous provisions are clarified, inconsistent provisions are resolved, and technical errors are corrected.” Positive Law Codification, OFF. OF L. REVISION COUNS., https://uscode.house.gov/codification/legislation.shtml [https://perma.cc/6WGE-NDN3]. OLRC then submits this to Congress as a restatement of existing law, which Congress then votes to enact as “positive law,” meaning that after Congress’s vote to approve it, the Code is the binding law, not the Statutes at Large. Id. Currently half of the titles in the Code are positive law. See, e.g., Shobe, supra note 86, at 674.


215. See generally Shobe, supra note 11, at 694-98.
or otherwise less valuable than other text. Enacted rules of interpretation are similar in many ways to enacted findings and purposes and may receive similar treatment from courts. Although courts consider enacted rules, courts may treat this text as less important than other parts of the law that look more operative. For example, courts often treat severability clauses as mere legislative advisements rather than fully operative and binding statutory text.

However courts use these rules today, this Article argues courts should more explicitly treat enacted laws like law, distinguishing them from unenacted judicial canons. By including a rule of interpretation in a statute, Congress means to convey that the rule survived the “competitive process of coalition building, bargaining, and voting” necessary for law to be created and should, therefore, be treated as an integral part of the enacted text. Because enacted rules of interpretation are law, they are as much a part of the enacted text as any other part of a statute, and courts should give them the full weight of law. As the Court held, “[w]e do not ... construe statutory phrases in isolation; we read statutes as a whole.”

One part of a statute cannot be divorced from the rest of the statute without distorting Congress’s work because the entire statute is the result of the legislative deal that led to enactment. Courts must understand the rest of the enacted statute in light of the enacted rules of interpretation and understand the enacted rules of interpretation in light of the rest of the statute; otherwise,

216. Id. at 678 n.28.
217. See id. at 694-98.
218. See Movsesian, supra note 164, at 74 (“Under present doctrine, ... the ultimate determination of severability will rarely turn on the presence or absence of such a clause.” (quoting United States v. Jackson, 390 U.S. 570, 585 n.27 (1968))); Nagle, supra note 164, at 234-46 (showing that severability clauses are “usually treated as merely establishing a presumption of severability” and that sometimes “a severability clause does not even fare that well”). See generally Shumsky, supra note 164, at 245-66.
220. See, e.g., Montclair v. Ramsdell, 107 U.S. 147, 152 (1883) (stating that the goal of the whole act rule is to “give effect, if possible, to every clause and word of a statute”).
221. Samantar v. Yousuf, 560 U.S. 305, 319 (2010) (citing United States v. Morton, 467 U.S. 822, 828 (1984)); see also Brudney & Ditslear, supra note 28, at 12-13 (stating that the whole act canon suggests that “each term or provision should be viewed as part of a consistent and integrated whole”).
courts fail to give effect to the entire text that passed through the constitutionally authorized process.\textsuperscript{222} Because these rules have been voted on by both houses of Congress and signed by the President, they should receive more weight in interpretation than other, unenacted interpretive tools like legislative history and judge-made canons.\textsuperscript{223} For example, if Congress includes a provision stating that nothing in a particular law should be construed to preempt state law, that is the end of the matter as far as the encroachment on state law is concerned. Courts need not look to legislative history or other unenacted canons to make doubly sure that Congress meant what it said.\textsuperscript{224}

\textbf{D. Judicial Use of Canons in Light of Enacted Rules of Interpretation}

The previous Section discussed courts' use of enacted rules of interpretation to interpret statutes. This Section examines a bigger and more interesting question: If Congress increasingly enacts rules of interpretation akin to canons, why do courts not acknowledge Congress's ability to enact these rules of interpretation into law when it chooses? This Section explores that question and what it should mean for the use of judicial canons. It shows that all judges, whether textualist or purposivist, should account for enacted rules.

\textsuperscript{222} The Author has made similar arguments about judicial use of Findings and Purposes clauses. \textit{See} Shobe, \textit{supra} note 11, at 712.

\textsuperscript{223} \textit{See} id. at 673-75.

\textsuperscript{224} The interpretive rule can allow for a kind of imaginative reconstruction of what Congress may have wanted when attempting to interpret an ambiguous statute. Posner, \textit{supra} note 23, at 817 (arguing that "the task for the judge called upon to interpret a statute is ... one of imaginative reconstruction," which involves thinking his or her way "into the minds of the enacting legislators and imagin[ing] how they would have wanted the statute applied to the case at bar"). Scholars have long noted that "the overwhelming probability" in any difficult case is "that the legislature gave no particular thought to the matter and had no intent concerning it" and that attempting to reconstruct what Congress would have done had it considered the issue is impossible. Henry M. Hart, Jr. & Albert M. Sacks, \textit{The Legal Process: Basic Problems in the Making and Application of Law} 1182 (1968); \textit{id.} at 1183 ("[O]n what basis does a court decide what a legislature ... would have done had it foreseen the problem? Does the court consider the political structure of the ... legislature? Does the court weigh the strength of various pressure groups operating at the time? How else can the court form a judgment as to what the legislature would have done?").
of interpretation in their theories of interpretation given the central role of judicial canons to all existing modes of interpretation.

One of this Article's most interesting findings is that the use of enacted rules of interpretation has evolved over time, and that many types of enacted rules are much more common today than before. 225 Given how the drafting process has evolved, a static mode of interpretation for all statutes may fail to account for the variable circumstances under which statutes are created. 226 Perhaps courts should be more circumspect in applying certain canons to a recently drafted statute than to an older statute given Congress's demonstrated ability to account for certain canons in recently enacted statutes. This is consistent with the Author's previous findings about improvements in the drafting process more generally. 227

Congress's increased use of rules of interpretation akin to canons may be a manifestation of improving the substance of statutes. In other words, it could be that Congress has gotten better at expressing its preferences. Relatedly, it seems possible that Congress learned from judicial use of canons, which has become increasingly prominent in recent decades, and so chooses to apply canon-like rules when that is their preference. 228 Perhaps judges should respond to the evolving quality of the drafting process accordingly by giving less weight to unenacted canons and more weight to enacted ones.

For example, this Article's findings show that Congress is increasingly more explicit in defining terms in one statute by reference to other parts of that statute or other statutes. 229 The commonly used and discussed "whole act rule" and "whole code rule," discussed above, 230 which assume consistency inside a statute and across statutes, make less sense when applied to modern statutes given Congress's recent demonstrated ability to say when it intends this kind of consistency. 231

225. See supra Part II.
226. See Manning, supra note 46, at 113-14.
228. See CONG. RSCH. SERV., THEORIES, supra note 128, at 49-52.
229. See supra Table 4.
230. See supra Part II.B.1.
231. This Article's findings could also create viable arguments in favor of the use of judicial
When Congress does not include a canon in a statute that it regularly enacts in other statutes, it is most logical to assume that Congress neglected to consider including the canon when drafting the statute. For example, if Congress writes a statute without explicit language that avoids preempting state law, that does not necessarily reflect a congressional intent to preempt all state law. But a congressional intent to explicitly avoid preempting a particular state law is similarly unlikely. Congress likely gave no thought to the issue. Similarly, by not explicitly expressing intent to repeal earlier laws, Congress does not necessarily intend to repeal other laws. It is more likely Congress simply did not think about the law's effect on other laws. It seems that, in these situations, it is hard to justify applying a presumption in favor of state laws by using a federalism canon or a presumption against implied repeal of earlier statutes under the theory that those canons match Congress's likely preferences.

There is significant debate on the legal status of statutory interpretation methods generally, and canons specifically, with some scholars arguing that methodology, and therefore canons, should be treated as law. Indeed, textualists' use of canons implies that canons. Some scholars claim that many canons do not reflect congressional intent because "nowhere in the United States Code is there any congressional endorsement of these canons." Ross, supra note 57, at 563–64. As Professor Eskridge argues, "the substantive canons are hard if not impossible to defend on ordinary-use-of-language or this-is-what-the-legislature-would-want grounds." Eskridge, supra note 34, at 682. This Article's findings show that the U.S. Code does contain what could be viewed as congressional endorsement of certain canons, and therefore, those canons may reflect how Congress thinks about how courts should interpret its statutes more generally.

232. See CONG. RsCH. SERV., THEORIES, supra note 128, at 2 ("[A] statute might be silent with respect to a particular application because Congress simply did not anticipate the situation."). An alternative explanation for the omission is that Congress considered the issue but then decided to exclude a provision in the statute, either because they could not get a political consensus to include it or because Congress believed judges would already cover the issue by applying a canon. See id. at 1–2 (explaining that silence, "[v]ague or ambiguous language might also be the result of compromise ... or [Congress] may have intended to delegate interpretive authority").

233. Sometimes Congress will enact a provision stating that a particular state statute is not preempted. See, e.g., 49 U.S.C. § 14501(b)(2). In that case, it also seems unlikely that Congress intended to preempt all other state laws. Cf., e.g., 29 U.S.C. § 1144(a). Instead, Congress was most likely just including the state law it thought would be preempted without giving thought to other state laws.

234. See Petroski, supra note 143, at 492.

235. See, e.g., Abbe R. Gluck, Intersystemic Statutory Interpretation: Methodology as "Law."
canons are law, under the notion that canons' established status transforms them into statutory default rules that approximate congressional preferences and drafting practices. Justice Scalia argued that once rules of interpretation “have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language.” These arguments essentially assume that the judicial canons are implicit in each statute, and therefore function more or less as part of the enacted text.

This Article’s findings provide arguments against the idea that judicial canons should have the weight of law, at least in some circumstances. The fact that Congress increasingly enacts some interpretive rules akin to canons should cause courts to question whether unenacted canons should be treated the same as enacted interpretive rules that Congress has regularly chosen to enact. It seems that enacted rules, which are unquestionably law, should have a more privileged place in interpretation. Yet, courts continue to regularly give at least some judicial canons the weight of law as if they were enacted, for example, by “struggling hard” to interpret a statute in a way that comports with certain substantive canons.

236. See, e.g., Nelson, supra note 40, at 390 (“Many of the canons used by textualists reflect observations about Congress’s own habits.”).

237. Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 CASE W. RESV. L. REV. 581, 583 (1990). Professor Manning similarly claimed that “to the extent that either the canon of avoidance or any particular clear statement rule is well settled, its application would perhaps follow from the textualists’ practice of reading statutes in light of established background conventions.” Manning, supra note 46, at 125 (footnote omitted); see also id. at 113 (“Using such extra-textual conventions, provided that they are firmly established, does not offend textualist premises.”).

238. See, e.g., Scalia, supra note 237, at 583. Textualists do not require that each legislator actually be aware of these rules. Instead, textualists “assum[e] that a ‘reasonable legislator’ knows or should know the social and linguistic practices of the ... legal community.” John F. Manning, Chevron and the Reasonable Legislator, 128 HARV. L. REV. 457, 468 (2014); cf. Mark Greenberg, Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication, in PHILOSOPHICAL FOUNDATIONS OF THE LANGUAGE IN LAW 217, 254 (Andrei Marmor & Scott Soames eds., 2011) (“[T]he canons specify how legislation properly contributes to the law, rather than what the legislature is likely to have intended as a matter of actual psychological fact.”).

239. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801); see also United States v. Heth, 7 U.S. (3 Cranch) 399, 414 (1806). For a survey of the Court’s deployment of
If judicial canons receive less weight in interpretation and are, therefore, less likely to be dispositive in any case, then how will judges come up with an interpretation? Judges need tools to help them decide on an interpretation in each case. This question is relevant to both textualist and purposivist judges because both modes of interpretation give weight to canons.240 Textualists, who shun legislative history and look to canons as a supposedly neutral and unbiased tool to interpret ambiguous statutes, would find a reduced emphasis on canons especially problematic.241 In addition to canons, the most obvious interpretive tool for interpreting ambiguous statutory language is legislative history. Textualists criticize legislative history, arguing that legislative history is not law and is subject to judicial and congressional manipulation that make it untrustworthy.242 Textualists commonly oppose use of legislative history by arguing that Congress could include legislative history in the enacted text if it intends for courts to consider it.243 But that same line of reasoning could apply to canons Congress regularly enacts: if Congress wants a canon to apply, then it can say so through the constitutionally prescribed process. If Congress does not include a canon in the enacted text, then it could be argued under textualists’ own reasoning that courts should not impose that same canon under the guise of using neutral interpretive principles. If courts essentially apply the same interpretive rule, with the same weight, whether that rule is enacted or not, then what incentive does Congress have to specify which rules it wants courts to apply?

At the very least, an argument could be made that canons and legislative history should be viewed as tools of equal importance—neither is law and both are subject to judicial manipulation, as

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240. See, e.g., CONG. RCSCH. SERV., THEORIES, supra note 128, at 10-18.
241. See Manning, supra note 48, at 1864-65.
243. See Eskridge, The New Textualism, supra note 54, at 623; Manning, supra note 242, at 673, 679 (arguing that legislative history impermissibly allows Congress to delegate its constitutionally prescribed enactment process to a subgroup within Congress).
judges have the discretion to decide how and whether to use them.\textsuperscript{244} If textualists continue to refuse to use legislative history and instead rely extensively on canons to resolve ambiguity, they should at least acknowledge that the canon serves a gap-filling role because the court cannot determine how to interpret the ambiguity otherwise.

As an illustration of this approach, consider the canon that presumes that Congress does not impliedly repeal earlier statutes, discussed above.\textsuperscript{245} When Congress enacts a later law that does not explicitly say whether it repeals an earlier law, what should courts do? One option is for courts to assume that the "new legislative policy [should] be applied to full effect, liberally supplanting outdated prior statutes."\textsuperscript{246} Another option is for courts to interpret the later law in whatever way necessary to save the earlier law.\textsuperscript{247} The latter approach appears to be the approach taken by most modern courts.\textsuperscript{248} As a leading casebook notes, "judges will usually strain to reconcile federal statutes seemingly at odds"\textsuperscript{249} and "it is almost unheard of for federal judges to declare that a recent federal law has implicitly repealed a previous one."\textsuperscript{250}

Under the current application of the presumption against implied repeal canon, courts seek out an interpretation of the later law, even if it is not the best interpretation, that allows as much of the earlier law to stand as possible.\textsuperscript{251} This Article's findings show that if Congress intends for an earlier law to be preserved in the face of a

\textsuperscript{244} James J. Brudney, \textit{Canon Shortfalls and the Virtues of Political Branch Interpretive Assets}, 98 CALIF. L. REV. 1199, 1231-32 (2010) ("[A]lthough some judicial discretion is essential and indeed salutary for the interpretive enterprise, judges who regularly rely on the canons have license to employ a systemic kind of discretion, in contrast to judges who regularly invoke legislative history.").

\textsuperscript{245} See supra notes 91-101 and accompanying text.

\textsuperscript{246} ESKRIDGE ET AL., supra note 29, at 875.

\textsuperscript{247} See, e.g., Petroski, supra note 143, at 495.

\textsuperscript{248} See id.

\textsuperscript{249} ESKRIDGE ET AL., supra note 29, at 875.

\textsuperscript{250} Id.; see also J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc., 534 U.S. 124, 142 (2001) ("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue." (quoting Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 381 (1996))).

\textsuperscript{251} See Petroski, supra note 143, at 516.
later law, it can (and increasingly does) explicitly say so. Therefore, this presumption against implied repeal looks less like a reflection of what the enacting Congress intended, especially in more recent statutes, and more like a judicial creation based on something other than congressional intent. This canon is sometimes justified on the grounds of creating “whole-code coherence.” Although this might be a valid reason to apply the canon, a judge basing a decision on this canon should acknowledge that the decision is based on judicial values rather than congressional intent. A similar approach would make sense for other canons discussed above. For example, courts are often unclear about the meaning and scope of the presumption against preemption, but that canon is most commonly applied to construe statutes that could preempt state law narrowly to avoid preemption. In other words, courts are willing to bend the plain meaning of the statute to fit the canon. This Article’s findings provide a reason to question whether the canon should serve such a substantial role in interpretation. If Congress is concerned about the potential of a court interpreting a law to preempt state laws, it is capable of addressing that concern in the text of the statute. If Congress fails to address preemption, then a court straining to give the text an interpretation that avoids pre-empting state law requires justification other than congressional intent. Perhaps the canon is most justified as a simple tiebreaker when the text has equally plausible interpretations, not as a rule that courts use to overcome the most natural interpretation of the text. Either way, judges should be explicit about the role the canon is playing.

CONCLUSION

In recent decades, the debate over the use of canons has become a central issue in interpretation. Many scholars and judges continue to debate the use of canons, and many argue that Congress should resolve the debate conclusively by specifying which interpretive

252. See supra Table 4.
253. ESKRIDGE ET AL., supra note 29, at 868.
254. MANNING & STEPHENSON, supra note 34, at 288.
255. See SCALIA & GARNER, supra note 1, at 290.
rules it intends courts to apply. This Article provides an important insight into these debates by showing that Congress has already enacted thousands of interpretive rules throughout the Code, and has increasingly done so in recent decades. This Article’s findings demonstrate that our understanding of how Congress legislates is still incomplete. Congress’s laws are eclectic, but we can benefit from looking at the entire Code for clues about how Congress drafts and generates its intent.

This Article opens a new empirical perspective into congressional drafting, but one article is not enough to conclusively answer what this should mean for interpretation. Many unanswered questions remain: Why does Congress create rules of interpretation? What differences exist within Congress over their use? Who is Congress speaking to when it uses these rules? One article can only do so much—and there is much we still need to know about how Congress legislates. This Article provides a starting point and a path forward toward understanding how Congress thinks about the rules that should apply to the interpretation of its statutes.
APPENDIX

A. Description of Searches for Rules of Interpretation in the U.S. Code

For the years 1994 and 2017, we used the U.S. Code files available on govinfo.gov. To access a specific title of the Code for a given year, we used govinfo.gov’s API and the requests library in Python to read in the corresponding HTML file for the year and title. The use of HTML files allowed us to search the Code using both in-text keywords and HTML tag identifiers.

In web design, HTML code is used to define the structure and layout of a web page. When displaying a body of text, each heading, subheading, and section of the body (typically no more than the length of a paragraph) is given an HTML formatting tag. Each HTML tag is named according to its hierarchical position within the body of text and can contain a wide variety of attributes that describe or modify the text contained in the tag. In our analysis, we relied heavily on the “class” attribute of the HTML tags to identify whether a given part of the Code was in the notes or the main body of the Code. The “class” attribute also allowed us to determine whether a given instance of a phrase occurred in the headings of the Code or the body of the Code.

To analyze these HTML files, we created a program using Python 3.0 software that read all titles of the Code for a given year, parsed out each distinct rule of interpretation for each title, and then wrote information about each rule to an Excel file. The resulting Excel file contained the title number, section heading, and text of each rule of interpretation as well as an indicator for whether the rule was found in the notes or the body of the Code.

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256. The full record of the Author’s research results is on file with the Author.
For each title of the Code, we first used the Beautiful Soup Python library to parse the title by HTML tag. We then searched the text of the title for “construe,” “rule(s) of construction,” “rule(s) of interpretation,” and “interpreted,” ignoring case in each instance. For each search, we created a list of HTML tags that contained text matching the search word or phrase. We then iterated through this list and discarded all tags that were found in the table of contents of the title. For the remaining tags, we considered four different cases:

1) tags found in the headings of the title (denoted by their “class” attribute) that were immediately followed by a list (ordered text beginning with (i), (I), (a), (A), or (l));
2) tags found in the headings of the title that were not immediately followed by a list or a subheading;
3) tags found in the headings of the title that were immediately followed by a subheading; and
4) tags found in the body of the title.

For the first case, we replaced the heading tag in our list with the tags of all of its subsequent list items. For the second case, we replaced the heading tag with the next subsequent body tag. For the third case, we gathered all subheading tags under the heading tag and then either applied the procedure for case 1 or case 2 to each subheading tag, depending on whether it was immediately followed by a list. Finally, for the fourth case, we simply kept the body tag in our list. We repeated this method for all four search terms, adding tags from subsequent searches to our list only if the tags were not already contained in the list.

Next, we considered instances in which the text of a given tag ended with “construed as,” “construed to,” “construed,” or “affect,” followed by either a colon or an em dash. In the Code, such instances are typically followed by a list of items that can each be considered as a separate rule of interpretation. For this reason, in these cases we replaced such tags with their subsequent list items. In this way, we compiled a list of tags representing each rule of

interpretation in the title that had no duplicates and contained only body tags.

For each tag in our list, we recorded the section heading for the tag, whether it was in the notes of the title, and the text of the rule of interpretation it represented. To gather the correct amount of text for each rule of interpretation, we considered four cases:

1) tags whose text was a list item in a list immediately following text ending with “construed as,” “construed to,” “construed,” or “affect,” followed by either a colon or an em dash that were immediately followed by another list;

2) tags whose text was a list item in a list immediately following text ending with “construed as,” “construed to,” “construed,” or “affect,” followed by either a colon or an em dash that were not immediately followed by another list;

3) tags whose text was not a list item in a list immediately following text ending with “construed as,” “construed to,” “construed,” or “affect,” followed by either a colon or an em dash that were immediately followed by another list; and

4) tags whose text was not a list item in a list immediately following text ending with “construed as,” “construed to,” “construed,” or “affect,” followed by either a colon or an em dash that were not immediately followed by another list.

For the first case, we included the entire text that ended with “construed as,” “construed to,” “construed,” or “affect,” followed by either a colon or an em dash, the text of the tag itself, and the text of all subsequent list items following the tag. For the second case, we included the entire text that ended with “construed as,” “construed to,” “construed,” or “affect,” followed by either a colon or an em dash and the text of the tag itself. For the third case, we included the text of the tag itself and the text of all subsequent list items following the tag. Finally, for the fourth case, we included only the text of the tag itself. Additionally, in all cases we included the text of the first heading tag immediately preceding the rule of interpretation at the beginning.

For the years 1946 and 1970, we used text files of the U.S. Code obtained from Hein Online. Unlike the text in the HTML files we used for the 1994 and 2017 versions of the Code, the text in these files was not neatly separated into sections by HTML tag. Because
we could not rely on HTML tags to separate out the text in sections, we delimited sections of text by sentence.

For a given search term, we extracted each sentence of text in which the term occurred and treated these sentences as separate rules of interpretation. If a sentence was immediately followed by a list (ordered text beginning with (i), (I), (a), (A), or (1)), we also included the text from the list as part of the rule of interpretation.

Just as with the 1994 and 2017 versions of the Code, we used “construe,” “rule(s) of construction,” “rule(s) of interpretation,” and “interpreted” as search terms. However, without HTML tags, we were unable to collect data on the title number, section heading, and whether a given rule was found in the notes or the body of the Code. Instead, we merely wrote the text of each rule of interpretation to an Excel file.

B. Other Searches of the U.S. Code

We performed the following searches of the 1946, 1970, 1994, and 2017 versions of the U.S. Code in a similar manner to the way that we searched each of these versions of the Code for “construe,” “rule(s) of construction,” “rule(s) of interpretation,” and “interpreted”:

1) “private right of action” or “private remedies”;
2) “common law”;
3) “has the meaning” or “have the meaning”;
4) “severability,” “held invalid,” “unenforceable,” or “separability”; and
5) “sovereign immunity.”

For each of these searches, we went through and weeded out false positives by hand that did not match the type of interpretive rule we sought.