WHERE IS STATUTORY LAW?

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Textualism has become the ascendant method of statutory interpretation on the Court, and it is rapidly reshaping the entire judiciary. Yet we still do not understand the "text" in textualism. This is part of a broader failure in legislative studies: we lack a basic understanding of the texts that comprise our statutory law. As this Article explains, this failure has consequences: statutory documents cannot support the prevailing understanding of legislation and statutory interpretation.

In response, this Article begins with a breakdown of our contemporary statutory texts—many of which are misunderstood or, remarkably, wholly unknown. This documentary study reveals a key dimension of modern statutory law: in our amendatory regime, statutory law is not found in any published document. Rather, it must be imaginatively reconstructed in the act of statutory interpretation.

Through an examination of American legisprudence, the Article identifies a judicial responsibility to undertake this reconstructive project. Courts must engage in statutory "construction," quite literally. To rediscover this judicial obligation in statutory law, the Article uncovers its historical roots—its origins in early English law, and its importation into American courts. And it brings it into the present, developing a methodology for courts to use in statutory cases today. It also examines the theoretical implications of this new understanding of statutory law, particularly for textualism. Through this analysis, the Article aims to develop a new understanding of this foundational source of modern American law.

The Supreme Court is fond of declaring that it always begins with "the text of the statute." As Abbe Gluck and I have explained before, it is vital to understand what this means—and should mean—in a modern era of deconstructed

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statutory texts. This Article continues the work of developing an answer for our contemporary statutory world.

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INTRODUCTION

Textualism has grown up. No longer limited to a few high-profile conservative judges,[1] it has become the ascendant method of statutory interpretation on the Supreme Court,[2] a fact noted by many in the wake of the landmark case of *Bostock v. Clayton County*.[3] Nor has this phenomenon been limited to

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1 On the early textualist movement, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (identifying the "new textualism").

2 *See, e.g.*, William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1722 (2021) (observing textualism as "the now-dominant Supreme Court approach").

3 Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (Alito, J., dissenting); *see also* Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 121 (claiming

the Supreme Court, with textualism now exerting significant influence on the lower courts as well.[4] When one looks out at the federal judiciary, it does seem that Justice Kagan was correct in her famous remark: "we're all textualists now."[5]

Not surprisingly, this onset of "high textualism" has led to new scrutiny of textualist methodology.[6] Of course, scholars have questioned the premises of textualism ever since its arrival in the 1980s.[7] Yet the Court's opinions in *Bostock* and other recent cases have led to renewed examination of the methodology—its theoretical foundations, its contradictions, and its unresolved ambiguities.[8] Textualists have long contended that their methodology has a host of virtues, arguing

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Bostock "cemented [textualism's] triumph" for many); Jonathan Skrmetti, *Symposium: The Triumph of Textualism: "Only the Written Word is the Law,"* SCOTUSBLOG (June 15, 2020, 9:04 PM), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law [https://perma.cc/8N7F-LS2X] (describing *Bostock* as a "triumph for textualism"); Daniel Hemel, *The Problem With That Big Gay Rights Decision? It's Not Really About Gay Rights*, WASH. POST (June 17, 2020), https://www.washingtonpost.com/outlook/2020/06/17/problem-with-that-big-gay-rights-decision-its-not-really-about-gay-rights [https://perma.cc/4QVC-XRRV] (noting opinion is "a triumph for textualism").

4 *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1829–32, 1859–60 (2010) (describing the adoption of a "modified textualism" by various state courts).

5 Harvard Law School, *The 2015 Scalia Lecture — A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:28 (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg [https://perma.cc/ALK6-MAYG]; *see also* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 271 (2013) ("We are living through what appears to be an interpretive revolution."); *but see* West Virginia v. EPA, 142 S. Ct. 2587, 2641 (Kagan, J., dissenting) ("It seems I was wrong. The current Court is textualist only when being so suits it.").

6 Eskridge & Nourse, *supra* note 2, at 1721 n.6.

7 For early critiques, see, for example, Eskridge, *supra* note 1, at 667–84; Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 300–310 (1990) (advancing arguments to challenge textualist rejection of legislative history); Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 420–33.

8 *See, e.g.*, Eskridge & Nourse, *supra* note 2, at 1721 ("It is time to think much harder and deeper about [textualism's] methodology, its meta-theoretical foundations, and its overall legitimacy within our constitutional democracy."); Franklin, *supra* note 3, at 125 ("Textualism and public meaning originalism do not offer more objectivity or determinacy than their more explicitly dynamic counterparts, however. What they offer is the illusion of those characteristics."); Matthew Jennejohn, Samuel Nelson & D. Carolina Nunez, *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767, 771 (2021) (arguing that corpus linguistics tools generate sexist results); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUMBIA L. REV. 1 (2022) (finding that textualist methodology does not track non-lawyer interpretive practices).

that it tethers statutory interpretation to bicameralism and presentment,[9] promotes public notice of the law,[10] and minimizes the judicial role in statutory cases.[11] As textualism becomes our prevailing method of statutory interpretation, scholars have realized an urgent need to interrogate whether the methodology lives up to these aspirations.

These examinations have been thoughtful and illuminating. Despite them, however, a foundational uncertainty of textualism remains. It asks: *what is the "text" in textualism*?

This question has never been fully explored. It has been overlooked, in part, due to a broader failure in the field of legislation: we lack a basic understanding of the texts that comprise our statutory law. In a prior article, Abbe Gluck and I highlighted this problem.[12] Yet interpreters today still select between these texts unaware of the tradeoffs that they provide. And they make this choice in a startling absence of any rigorous theoretical understanding of the justifications for viewing any of them as truly presenting our statutory law.

These are not inconsequential or academic choices. To the surprise of many, different statutory texts can present different visions of the law. As the Cross/Gluck study documented,[13] editors modify federal statutes when preparing the U.S. Code,[14] for example, and editors at Lexis and Westlaw may further

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9 *See, e.g.*, NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 132 (2019) ("Textualism honors only what's survived bicameralism and presentment—and not what hasn't. The text of the statute and only the text becomes law. Not a legislator's unexpressed intentions, not nuggets buried in the legislative history, and certainly not a judge's policy preferences."); *see also* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 273 (2020) ("Textualists started from the premise that, under Article I, only the text voted upon by the House of Representatives and the Senate and signed by the President (or passed over a presidential veto) constitutes the law.").

10 *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1749 (2020) ("The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."); Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017) (textualists "view themselves as agents of the people rather than of Congress").

11 *See, e.g.*, 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 3, 16–17 (Amy Gutmann ed., 1997) (arguing that elimination of legislative history correspondingly limits judicial activism); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxviii (2012) (distinguishing textualism from methods that invite "judges to imbue authoritative texts with their own policy preferences").

12 Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1651–74 (2020).

13 *Id.*

14 *See infra* notes 51–65 and accompanying text.

revise them.[15] These are changes directly to statutory text—edits that can alter the interpretation of landmark statutes. Their ramifications extend from voting rights to the Clean Air Act, from Section 1983 actions to the independent state legislatures doctrine.[16] A lack of understanding about this basic dimension of statutory law has largely precluded deeper, more fundamental inquiries into the nature of statutory documents and the judicial obligations regarding them.

Modern textualism also has contributed to this problem. It typically has embraced a scholasticism that does not get close enough to legislative materials to understand these challenges and distinctions.[17] Instead, it has conflated our statutory texts, in the effort to claim the virtues associated with them all. Textualists therefore have touted the methodology's connection to bicameralism and presentment (a virtue of what this Article calls *enacted statutory texts*), while also pointing to its promotion of public notice and minimization of the judicial role (virtues of what will be termed *assembled* or *improved statutory texts*).[18] By claiming all these virtues on behalf of textualism, theorists have made a strong case for their methodology—but have sowed confusion along the way. This has left our increasingly textualist courts with an odd predicament: they claim to place statutory text at the center of statutory interpretation, but one cannot do this without knowing what the statutory text is, and their methodology has strategically equivocated on this question. It therefore is more important than ever to ask: what exactly, and where exactly, is the text of our statutes?

To answer this question, this Article undertakes an in-depth examination of statutory law. And the answer it discovers is more interesting than a simple identification of any authoritative citation. The text of our statutory law is not found in any published document, it concludes. Rather, statutory text is something that must be imaginatively reconstructed by interpreters, time and again, in the act of statutory interpretation.[19]

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15 *See infra* notes 75–72 and accompanying text.

16 For examples, see *infra* notes 82–88 (documenting implications for these areas of law). *See also* Part IV.D (discussing implications for Robinson-Patman Antidiscrimination Act).

17 For a study of this scholasticism at work, see, for example, Cross & Gluck, *supra* note 12, at 1668–70 (analyzing the Court's opinions in *Yates*). *See also* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 309–18 (2021) (discussing the various legislative, institutional, and social contexts that textualism views as off-limits).

18 *See supra* notes 9–11.

19 *See infra* notes 285–289 and accompanying text.

This is not how courts and lawyers typically think about statutes. Yet, as the Article discovers, this idea harkens back to the forgotten foundations of our statutory law. The original versions of many foundational English statutes were destroyed, especially in the Barons' Wars of the 1200s,[20] and so many early English statutes existed only as copies of an absent original.[21] This led courts to embrace a particular understanding of statutory text: not as a document to be located and passively interpreted, but as a missing text to imaginatively reconstruct.[22]

The predicament of contemporary American courts is not so different. The original copies of our statutory texts have not been similarly destroyed, of course. Yet in a complex statutory regime, one where most laws have been amended over time, these statutory texts fail to capture and report contemporary law. Meanwhile, updated compilations do purport to present contemporary law—but trusting these texts means trusting the post-enactment actors who assemble them, and it is not clear that courts should do this. Edited compilations such as the U.S. Code present this dilemma in exaggerated form, requiring courts to place incredible trust (and perhaps even lawmaking power) in post-enactment editors who modify the law.

To determine the judicial obligation in the face of these competing texts, this Article conducts a historical and theoretical examination of American legisprudence. Under longstanding conceptions of the legislative and judicial power, it concludes, courts cannot simply defer to post-enactment editors and the texts they generate. Instead, courts must engage in statutory *construction*, quite literally. Like their English predecessors, American courts bear an obligation to imaginatively reconstruct a statutory law that, ultimately, does not reside in any authoritative document awaiting passive judicial interpretation. In so doing, they must develop their best understanding of the statutory law that was envisioned by Congress. It is an obligation that courts cannot renounce—and that Congress cannot alter.[23]

To develop this argument, the Article proceeds in five Parts. Part I begins by addressing one obstacle that has prevented

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20 *See id.*

21 THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 93–95 (John Norton Pomeroy ed., 2d ed. 1874) (1857); DWARRIS, *infra* note 178, at 613; *see also* Gardner v. The Collector, 73 U.S. (6 Wall.) 499, 501 (1867) (discussing this history).

22 *See infra* notes 285–289 and accompanying text.

23 *See infra* Parts II–III.

modern courts from understanding their basic judicial obligation in statutory cases: our collective illiteracy of statutory texts. Did you know that, as Abbe Gluck and I have outlined before, half the U.S. Code is enacted into law, and another half is not? Or that Lexis and Westlaw provide access to private compilations, not the official U.S. Code, even when an official Code citation is entered? Few understand these basic aspects of our statutory law.

To address this widespread ignorance about statutory documents, Part I begins with a comprehensive breakdown of the texts that constitute our statutory regime—and of the unseen actors that produce them. In this regard, it joins an ongoing project of civic education to illuminate the real-world processes that shape modern legislation.[24] In the words of Justice Barrett, this work has constituted a new "process-based turn" in legislation scholarship—and this Article adds to that project, revealing even more overlooked elements of the legislative process that occur *after* a statute's enactment.[25]

Part II then addresses a second obstacle that has prevented awareness of the judicial obligation to "construct" statutory law. This obstacle comes from evidentiary standards that Congress has enacted for statutory documents.[26] Assuming that these standards are valid, and also that they provide a clear hierarchy of statutory documents, some scholars have concluded that we need not conduct an inquiry into the foundations of statutory law, and instead can summarily cite these standards. Congress has already done the work for us, they assume. The Court also has taken this approach.[27]

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24 *See, e.g.*, Cross & Gluck, *supra* note 12; Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946 (2020); Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 UCLA L. REV. 640 (2020) [hereinafter Shobe, *Codification*]; Jesse M. Cross, *The Staffer's Error Doctrine*, 56 HARV. J. ON LEGIS. 83 (2019); 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 (2014); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014) [hereinafter Shobe, *Intertemporal Statutory Interpretation*]; ROBERT A. KATZMANN, JUDGING STATUTES (2014); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012).

25 This Article's observations about the changes made by commercial databases are particularly new to legislation scholarship. *See infra* notes 72–75, 356–359 and accompanying text.

26 *See* 1 U.S.C. § 204(a) (labeling some portions of the U.S. Code as "legal evidence," while labeling other portions "prima facie" evidence).

27 *See infra* notes 97–100 and accompanying text.

In response, Part II offers the first in-depth examination of Congress's evidentiary standards for statutory documents. In so doing, it uncovers serious problems with the prevailing scholarly consensus. These standards do not have the meaning that scholars and the Court have assumed, it turns out—and, even if they did, their use would exceed Congress's power. Congress's evidentiary standards therefore do not—and cannot—accomplish the goals that scholars and the Court have asked of them. Work therefore remains to construct a proper, theoretically-grounded understanding of the judicial role in statutory cases.

Part III takes on this challenge. It turns to the Article's affirmative project: to develop a defensible theory of the judicial role in statutory interpretation, and of the documents that courts should use to perform this task. To accomplish this, it revisits forgotten cases from the early codification movement of the 1800s, when many American courts first grappled with questions about their authority and role in the face of edited statutory publications. In these cases, we find a historical understanding of the judicial power—one that outlines an unalterable judicial obligation to imaginatively reconstruct the version of statutory law that was seen, understood, and approved by the legislature.

Part IV applies this approach to our modern statutory regime. To this end, it outlines a methodology that courts can use to construct and understand federal law. This Part shows interpreters how to disentangle and weigh the different types of authority found in different statutory documents. In so doing, it alters the classic view regarding the hierarchy of legislative documents—revealing, for example, that legislative history sometimes is more useful than statutory text itself.[28] It also illustrates this interpretive practice in action, using an example from antitrust law.

Finally, Part V turns to theoretical implications. Here, it particularly highlights theoretical concerns this Article's study raises for textualism. Ironically, it observes, these concerns arise from the nature of modern statutory text itself. Turning to the recent landmark case of *Niz-Chavez v. Garland*, this Part also explains the challenges the Article raises specifically for the "ordinary public meaning" brand of textualism that the Court has used in recent years.

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28 *See infra* notes 364–368 and accompanying text.

Through this analysis, the Article aims to cultivate a new understanding of the legal source that, in our modern republic, is a foundational source of law: statutory text.[29] The Supreme Court is fond of declaring that it always begins with "the text of the statute."[30] As we enter the period of high textualism, it is more important than ever to understand what that actually means. This Article attempts to provide an answer for our contemporary statutory world.

I
BACKGROUND: STATUTORY TEXTS, UNSEEN ACTORS

To understand modern statutory law, as well as the judicial obligations regarding it, we first need a basic literacy of statutory texts. Today, interpreters often misunderstand these texts. For example, many regularly use the U.S. Code as a straightforward and authoritative source of all federal statutory law.[31] Many also use commercial databases, such as Lexis and Westlaw, assuming that these provide direct and unproblematic access to the Code.[32] As Abbe Gluck and I have previously outlined,[33] these assumptions are incorrect—and dispelling them is necessary to the development of any larger theory of statutory interpretation.

In furtherance of that project, this Part provides a brief overview of federal statutory texts. These statutory texts can be divided into three categories, as follows:

- ***Enacted statutory texts:*** texts that present the law that Congress actually saw, voted upon, and enacted.
- ***Assembled statutory texts:*** texts that assemble Congress's enactments (and later amendments) into a single, updated law.

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29 *See* WILLIAM N. ESKRIDGE, JR. & JOHN A. FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2013).

30 *See*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1568 (2017) ("We begin, as always, with the text."); Hawaii v. Off. Of Hawaiian Affs., 556 U.S. 163, 173 (2009) ("We begin, as always, with the text of the statute."); Limtiaco v. Camacho, 549 U.S. 483, 488 (2007) ("As always, we begin with the text of the statute."); Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 197 (2007) ("We begin, as always, with the text of the statute.").

31 *See, e.g.*, Tobias A. Dorsey, *Some Reflections on Not Reading Statutes*, 10 GREEN BAG 2D 283, 287 (2007) (noting that "nowadays the Code is what we cite to, quote from, and interpret."); Mary Whisner, *The* United States Code*, Prima Facie Evidence, and Positive Law*, 101 LAW LIBR. J. 545, 549 (2009) (noting "we think of the *United States Code* as law").

32 *See* Cross & Gluck, *supra* note 12.

33 *See id.*

- ***Improved statutory texts:*** texts that not only assemble federal law, but also make additions or improvements to it.

During the post-enactment legislative process, our federal system produces statutory texts in each of these three categories.

A concrete example will help illustrate. For this purpose, this Part uses Section 1813(a) of the Social Security Act,[34] a provision that addresses deductibles and coinsurance under the Medicare program.[35] Looking at the opening of this provision on Lexis, an interpreter would encounter the statutory text presented in Figure 1.

FIGURE 1


§ 1395e. Deductibles and coinsurance

(a) Inpatient hospital services or inpatient critical access hospital services; outpatient hospital diagnostic services; blood; post-hospital extended care services.

(1) The amount payable for inpatient hospital services or inpatient critical access hospital services furnished....

The text displayed in Figure 1 is the culmination of a post-enactment process that consists of three important stops: the Archivist, the Office of the Law Revision Counsel (OLRC), and commercial databases. Each warrants consideration.

A. The Archivist

After Congress enacts a statute, the signed physical document is transmitted to the National Archives, where Congress has directed the Archivist to "carefully preserve the originals" of statutes.[36] The Archivist publishes versions of the statute in slip form[37] and in the *Statutes at Large*,[38] and the Library of Congress makes the statute available on congress.gov.[39] In

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34 Social Security Act § 1813(a), 42 U.S.C. § 1395e(a) (1982).

35 *Id.*

36 1 U.S.C. § 106a.

37 *See Federal Register Publications System – Public Laws*, NAT'L ARCHIVES, https://www.archives.gov/federal-register/publications/laws.html (last visited May 31,2023) [https://perma.cc/GL2Q-3FYW]. For both slip laws and the *Statutes at Large*, the Archivist does this in conjunction with the Government Publishing Office. *See id.*

38 1 U.S.C. § 112.

39 *See, e.g.*, *Public Laws*, CONGRESS.GOV, https://www.congress.gov/public-laws/118th-congress (last visited May 31, 2023) [https://perma.cc/38DM-WY67] (listing and linking to enacted bills and joint resolutions passed by the 118th Congress).

these sources, each statute is presented as it appeared before Congress upon enactment, with only slight modifications.[40] If the statute is amended by Congress at a later date, those changes will not be reflected in these sources, even in subsequent editions.[41] These therefore are *enacted statutory texts*.

The use of these published texts may seem intuitive for courts, since these documents bear a strong connection to bicameralism and presentment. However, this approach presents a problem: there is no single enacted statutory text that presents most federal laws. Consider our example: Section 1813(a) of the Social Security Act. Today, Section 1813 consists of amendments that are dispersed across fourteen separate enacted statutory texts.[42] Even the small excerpt shown in Figure 1 has combined three separate documents, each of which cleared bicameralism and presentment. The underlying statutes read as follows:

> 1. Social Security Amendments of 1965:
> DEDUCTIBLES AND COINSURANCE
> Sec. 1813. (a)(1) The amount payable for inpatient hospital services furnished . . . .[43]
>
> 2. Social Security Amendments of 1994:
> Section[ ] 1813(a) [is] amended by striking "inpatient hospital services" and inserting "inpatient hospital services or inpatient rural primary care hospital services".[44]
>
> 3. Balanced Budget Act of 1997:
> [Title XVIII of the Social Security Act is] amended by striking "rural primary care" each place it appears and inserting "critical access".[45]

We therefore do not have a single, complete enacted statutory text from Congress. Instead, we have three separate statutes that, together, provide the various pieces that must be

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40 The Office of the Federal Register (in the Archives) assigns the permanent law number and legal statutory citation, adds marginal and legislative history notes, and removes some marginal material (such as signatures). *See Federal Register Publications System – Public Laws*, *supra* note 37.

41 *See Statutes at Large*, GOVINFO, https://www.govinfo.gov/help/statute#about (last visited May 31, 2023) ([https://perma.cc/2JZW-RHUW]; *Federal Statutes: A Beginner's Guide*, LIBR. CONG. https://guides.loc.gov/federal-statutes/slip-laws (last visited May 31, 2023) [https://perma.cc/2KU5-3DUC].

42 *See* 42 U.S.C. § 1395e (listing the various statutory amendments in the editorial note).

43 Social Security Amendments of 1965, Pub. L. No. 89-97, sec. 102(a), § 1813(a)(1), 79 Stat. 290, 292.

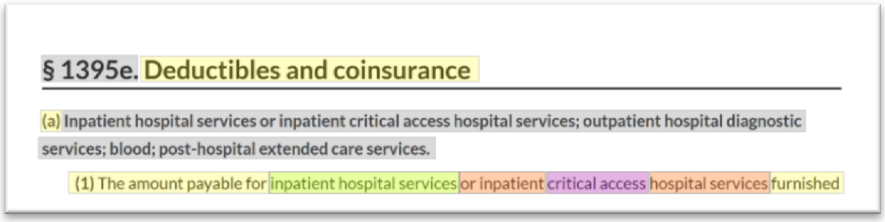
44 Social Security Act Amendments of 1994, Pub. L. No. 103-432, sec. 102(e), § 1813(a), Stat. 4398, 4404.

45 Balanced Budget Act of 1997, Pub. L. No. 105-33, sec. 4201(c), 111 Stat. 251, 373.

assembled to construct this provision. This reveals why we cannot simply say to courts: look to the version of the law enacted by Congress. No such law exists, assembled and awaiting interpretation.

Figure 2 illustrates this, showing the fragmented congressional enactments that live beneath the surface of the Lexis provision. Statutory text taken from the 1965 statute is in *yellow*, text arguably taken from either the 1965 or 1994 statute is in *green*,[46] text taken from the 1994 statute is in *orange*, and text taken from the 1997 statute is in *purple*. Meanwhile, the text in *gray* did not come from any enacted statutory text. This begs the question: who added this gray text, and why?

FIGURE 2



B. Office of the Law Revision Counsel (OLRC)

After the Archivist, a statute continues to its next stop: the Office of the Law Revision Counsel (OLRC).[47] Created in 1974,[48] the OLRC is a nonpartisan legislative office directed by Congress to assemble the U.S. Code.[49] (Congress actually created the Code nearly a half-century prior, only later deciding to create a nonpartisan office devoted to its maintenance.)[50]

To a certain extent, the Code was intended to be an *assembled statutory text*.[51] To that end, the OLRC regularly assembles and publishes updated versions of the Code that piece

46 This ambiguity is because Congress, after initially inserting this language in 1965, struck and reinserted the language in its 1994 amendment. For a high-profile case involving this strike-and-reinsert issue (but not addressing it), see *infra* Part V.C (discussing *Niz-Chavez v. Garland*).

47 This account of a statute's sequential journey is temporally stylized to communicate the cumulative nature of post-enactment editorial work; OLRC need not wait for Archivist action to complete before it begins editorial work on a statute.

48 Committee Reform Amendments of 1974, H.R. 988, 93rd Cong. § 405 (1974); Supplemental Appropriations Act, 1975, Pub. L. No. 93-554, 88 Stat. 1771, 1777 (1974) (codified at 2 U.S.C. §§ 285–285g (2018)).

49 2 U.S.C. §§ 285–285g.

50 Act of June 30, 1926, Pub. L. No. 440, ch. 712, 44 Stat. 777.

51 *See* 2 U.S.C. § 285b(1) (describing the Code as "a complete compilation . . . of the general and permanent laws of the United States").

together Congress's various enacted statutory texts,[52] incorporating recent amendments into existing laws.[53]

However, the U.S. Code ultimately is something else. Rather than directing the OLRC simply to assemble existing law, Congress has instructed it to additionally perform editorial work when assembling the Code—work to simplify, clarify, and helpfully rearrange the laws.[54] In addition to assembling Congress's scattered enactments together, the OLRC therefore also inserts new alterations (or improvements) into federal law when preparing the Code. As a result, it can instead be labeled an *improved statutory text*.

These OLRC improvements take various forms. In all aspects of its work, the OLRC has significant discretion to omit provisions from the Code entirely that it deems not "general and permanent."[55] It also has discretion to rearrange statutory provisions to group them by subject matter (building on similar work by prior codifiers).[56] And it can move provisions outside the main text of the Code, relocating them into marginal notes—even though they are duly-enacted law, like the rest of the Code's main provisions.[57]

In other instances, the nature of OLRC's editorial work varies based on the title of the U.S. Code. The U.S. Code is divided into 54 titles, which sort into two categories. For "positive law" titles, Congress has enacted the title as a federal law (and repealed the underlying statutes it collects),[58] and it has declared the title to be "legal evidence" of the laws it contains.[59] For "non-positive" titles, Congress has not enacted the title itself (or repealed the underlying statutes it collects), and it has

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52 *See About Classification of Laws to the United States Code*, OFF. OF THE L. REVISION COUNS., https://uscode.house.gov/about_classification.xhtml (last visited May 31, 2023) [https://perma.cc/M9R2-6UG6] ("The Office . . . reviews every provision of every public law to determine whether it should go into the Code, and if so, where. This process is known as U.S. Code classification.").

53 *See Frequently Asked Questions and Glossary*, OFF. OF THE L. REVISION COUNS., https://uscode.house.gov/faq.xhtml (last visited May 31, 2023) [https://perma.cc/F827-AC9L] (noting online updates "on an ongoing basis" and annual print version updates).

54 *See* 2 U.S.C. § 285b.

55 § 285b(1).

56 *See* Cross & Gluck, *supra* note 12, at 1657, 1669.

57 *See About Classification of Laws to the United States Code*, *supra* note 52 (describing decision-making process for placing provisions in statutory notes).

58 *See Positive Law Codification*, OFF. L. REVISION COUNS., https://uscode.house.gov/codification/legislation.shtml (last visited May 31, 2023) [https://perma.cc/EM8M-7QQC].

59 1 U.S.C. § 204.

declared the title to be "prima facie evidence" of the laws therein.[60]

In preparing a codification bill (i.e., a bill to create a new positive law title), OLRC may make editorial changes to clarify presumed congressional intent, including grammatical changes or even the insertion of substantive textual provisions (such as definitions).[61] In non-positive law titles, its work can also entail edits to statutory text, such as modifying cross-references and inserting headings.[62] Pre-OLRC codifiers sometimes were more ambitious in these edits, even modifying and combining operative statutory language.[63] The result is a Code that not only assembles present-day federal laws, but that also adds a layer of editorial work upon them. OLRC publishes this official Code in printed hard copies[64] and in an electronic version on its official website.[65]

These elements of the U.S. Code are evident in Section 1813(a), which appears in the Code as shown in Figure 3. Notice that much of the language comes from Congress—but not all of it. Congress did not give subsection (a) any heading,[66] so OLRC has added one.[67] OLRC also has renumbered the section (and accordingly relocated it).[68] These are noteworthy alterations since, under traditional statutory interpretation doctrine, headings and placement are considered permissible indicators of statutory meaning.[69]

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60 *See Positive Law Codification*, *supra* note 58; 1 U.S.C. § 204.

61 *See* Cross & Gluck, *supra* note 12, at 1571.

62 *See id.* at 1572.

63 *See id.* at 1673.

64 *See Frequently Asked Questions and Glossary*, *supra* note 53 ("For the print version of the Code, each title is updated once a year to include all of the laws enacted during the latest session of Congress.").

65 *See id.* (noting "updates are made throughout a congressional session on an ongoing basis as public laws are enacted").

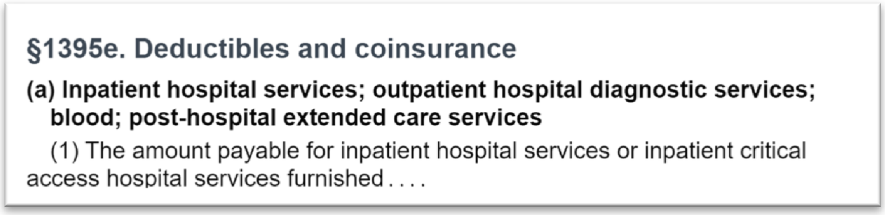
66 *See* Social Security Amendments of 1965, Pub. L. No. 89–97, § 102(a), § 1813(a)(1), 79 Stat. 286, 292.

67 *See* 42 U.S.C. § 1395e(a) (adding heading: "Inpatient hospital services; outpatient hospital diagnostic services; blood; post-hospital extended care services.").

68 *See id.*

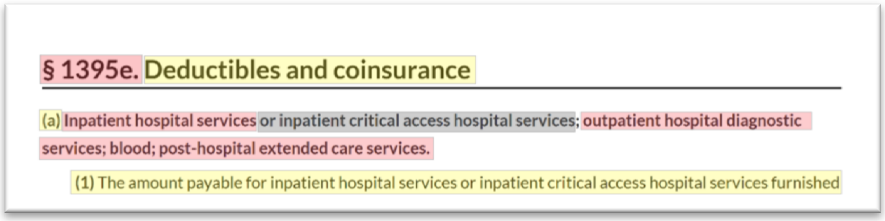
69 *See, e.g.*, SCALIA & GARNER, *supra* note 11, at 221 (Title-and-Headings Canon); *see also* Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 GEO. MASON L. REV. 453, 470 (2019) (discussing further sources).

FIGURE 3



At this point, we are beginning to understand the various texts beneath the Lexis provision. Figure 4 shows the Lexis version with the language added by Congress in *yellow* and by OLRC in *red*. However, the source for the text in *gray* still has not been identified. Where did this text originate?

FIGURE 4



C. Commercial Databases

Finally, statutory text makes a third important stop: the commercial databases of Lexis and Westlaw. This role for private publishers actually antedates the Code itself: prior to the first edition of the U.S. Code, commercial publishers would produce their own compilations of updated federal law.[70] These publishers even assisted Congress with assembly of the U.S. Code, as they had expertise in codification due to these publications.[71] After Congress began producing the official Code, these publishers continued to produce their private compilations. Today, few lawyers or scholars know that these sources do not actually provide access to the Code itself, even when a U.S. Code citation is entered.[72] In reality, a Code

70 *See* Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 & H.R. 2055 Before Subcomm. No. 1 of the Comm. on the Judiciary, 80th Cong. 37 (1947) (statement of Meldrim Thompson, Editor-in-Chief, Edward Thompson Company) (noting that West Publishing Company produced the *United States Compiled Statutes Annotated* and the Edward Thompson Company produced the *Federal Statutes Annotated*).

71 *Id.*

72 None of the sources discussed in *infra* notes 91–94 discuss this feature, for example.

search on Westlaw will return provisions of the *United States Code Annotated* (U.S.C.A.),[73] and a search on Lexis returns provisions of the *United States Code Service* (U.S.C.S.)—private compilations that are not technically the United States Code.[74]

Like the Code itself, these private compilations are *improved statutory texts*. They are efforts not only to assemble Congress's myriad enactments into a single statutory text, but also to incorporate new improvements into them. In preparing the U.S.C.A. and U.S.C.S., the commercial databases therefore impose upon statutory law another layer of editorial work. According to the databases, the U.S.C.A. is meant to track the language of the official U.S. Code particularly closely,[75] while the U.S.C.S. claims to hew more closely to the language of the Statutes at Large.[76] However, there is evidence that both sources begin with the language of the official U.S. Code and then work to modify it, rather than bypassing this initial layer of editorial work by OLRC.[77] The result is statutory text that can contain two layers of post-enactment editorial work.

Section 1813(a) illustrates this. In this instance, editors at Lexis added to the OLRC heading, inserting the phrase "or inpatient critical access hospital services."[78] Again, this is a noteworthy addition, since courts regularly use headings in statutory interpretation.[79]

At this point, we are equipped to understand the Lexis provision that began our analysis. Beneath that provision is a dizzying patchwork created by several different actors. This is illustrated in Figures 5 and 6. Figure 5 shows the language added by different actors: OLRC in *red*, Lexis in *blue*, and Congress in *yellow*.

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73 Whisner, *supra* note 31, at 546.

74 On the implications of this differing publication status, see *infra* Part IV.C.

75 Whisner, *supra* note 31, at 546 n.4.

76 *Id.* at 546.

77 *See, e.g.*, *supra* Figures 1–3 (showing conspicuous use of semicolons across both U.S.C. and U.S.C.S.). The organic statute for the Senate Legislative Counsel provides another clear example. *See also* Cross & Gluck, *supra* note 12, at 1673 (explaining codifier edits to 2 U.S.C. § 271). *Compare* 2 U.S.C. § 271, *with* 2 U.S.C.S. § 271 (Lexis compilation).

78 *Compare* 42 U.S.C. § 1395e(a) (official U.S. Code), *with* 42 U.S.C.S. § 1395e(a) (Lexis compilation).

79 *See, e.g.*, SCALIA & GARNER, *supra* note 11, at 221 (Title-and-Headings Canon).

FIGURE 5

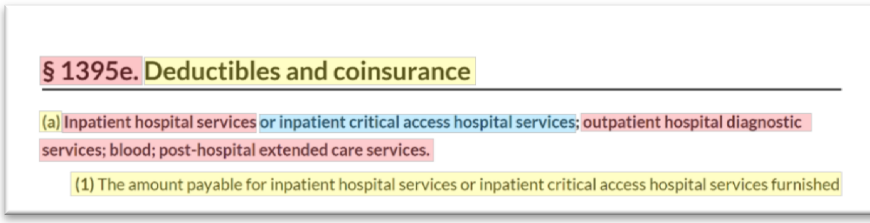
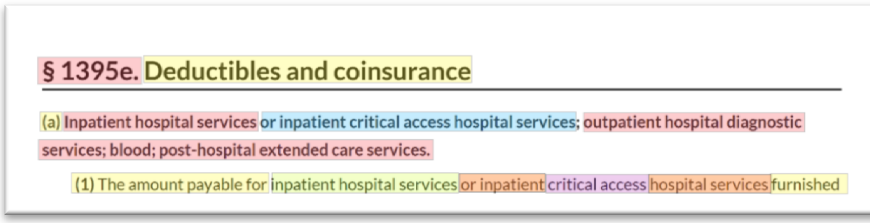


Figure 6 shows the various sources of text, with language from: the U.S. Code in *red*, the U.S.C.S. in *blue*, the 1965 statute in *yellow*, the 1965 or 1994 statute (unclear) in *green*, the 1994 statute in *orange*, and the 1997 statute in *purple*.

FIGURE 6



D. Implications: The Interpreter's Challenge

The foregoing analysis illustrates the twofold challenge awaiting statutory interpreters. First, interpreters need access to an *assembled statutory text*: they need to identify statutory text as it exists in the present, with up-to-date amendments incorporated. Yet the bicameralism-and-presentment process does not produce *assembled statutory texts*. Rather, statutory law typically emerges from Congress in fragmented form. It is only the post-enactment work of governmental or private actors to construct federal law which creates the appearance that bicameralism and presentment naturally generates an authoritative, assembled text. Trusting these assembled texts means trusting post-enactment actors, however—which it is not obvious that courts should do.

In most instances, this work of producing assembled statutory texts is mostly clerical. Yet this is not always so. Consider situations in which Congress, when enacting a new statute, repeals all prior federal laws that are "inconsistent" with the

new law.[80] That is not merely a rule of construction.[81] It is a declaration of what is, and is not, federal law. And it is unavoidably subject to contestable interpretations. Such provisions are not uncommon—the result, in many instances, of a rushed legislature unable to conduct a comprehensive review for conflicting provisions.

Other examples abound. The Obama administration's effort to regulate power plant emissions depended upon a contestable (and contested) assembly of the Clean Air Act.[82] The Second Circuit recently confronted a case in which, as the court remarked: "It is not apparent what the statute in its current incarnation says."[83] The pre-enactment process of drafting and enacting federal statutes can be messy—and, as a consequence, so can the post-enactment process of constructing federal law. This raises concerns about judicial dependence on post-enactment assemblies.

Second, these challenges aside, Congress has not even provided an official *assembled statutory text*. Instead, it has directed OLRC to produce an *improved statutory text*—instructing them to make modifications to our statutory law. And while some *assembled statutory texts* do exist (as discussed later in this Article), courts typically do not use them.[84] Instead, courts use *improved statutory texts*, whether from OLRC, Westlaw, or Lexis. This raises further concerns. It puts courts in the position of relying on statutory texts that avowedly contain post-enactment modifications made by non-legislative actors—something it is not clear that courts should do.

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80 *See, e.g.*, Act of June 10, 1920, ch. 285, pt. I, § 29, 41 Stat. 1067, 1077 ("[A]ll Acts or parts of Acts inconsistent with this Act are hereby repealed"); Act of Apr. 16, 1908, Pub. L. No. 60-96, ch. 145, 35 Stat. 61, 63 ("That all Acts or parts of Acts inconsistent herewith are hereby repealed.").

81 As the Court put it in *Pease v. Peck*: "The question is, therefore, not what is the construction of an admitted statute, but what is the statute." 59 U.S. (18 How.) 595, 595 (1855).

82 These regulations relied upon section 111(d) of the 1990 Clean Air Act amendments, 42 U.S.C. § 7411(d)(1)(A), which had been enacted in different form by the House and Senate—arguably only one of which supported the regulation. *See* Pub. L. No. 101-549, sec. 108(g), § 111(d)(1)(A)(i), 104 Stat. 2399, 2467 (1990) (House-originated amendment); Pub. L. No. 101-549, sec. 302(a), § 111(d)(1), 104 Stat. 2399, 2574 (Senate-originated amendment).

83 Panjiva, Inc. v. U.S. Customs & Border Prot., 975 F.3d 171, 174 (2d Cir. 2020). The court therefore examined the work of the Office of Law Revision "Council." *Id.*

84 *See infra* notes 338–339 (discussing Ramseyer reports), 342 (discussing Legislative Counsel compilations).

These post-enactment modifications, too, can have consequences for the interpretation of landmark statutes.[85] Crucial voting rights provisions hinge upon contested codifier decisions.[86] The "independent state legislatures doctrine," regarding the ability of state legislatures to subvert elections, potentially implicated decisions made by codifiers.[87] The availability of qualified immunity in 1983 actions may depend upon such codifier decisions as well.[88] These are vital legal questions—and ones that require better legal answers than those courts have developed to date.

II
EVIDENTIARY STANDARDS

When confronting a question of statutory interpretation, how should courts use the texts discussed in Part I to find statutory law? Among courts and scholars, it has become conventional wisdom to give a particular answer to this question. According to this answer, Congress's evidentiary standards for the U.S. Code solve the problem of statutory authority. Congress has labeled some parts of the Code as "legal evidence," these commentators observe, while labeling other parts as "prima facie evidence." We need not conduct an inquiry into the foundations of statutory law, these commentators conclude. After all, Congress seems to have already done the work of prioritizing among texts for us.

As this Part explains, this conventional wisdom is incorrect. Congress's evidentiary standards cannot answer our questions about the authoritative source of federal statutory law. This is true for two reasons. First, the terms "legal evidence" and "prima facie evidence" do not have the meanings

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85 *See, e.g.*, Cross & Gluck, *supra* note 12, at 1668 (discussing role of codifier placement in *Yates* case).

86 *See, e.g.*, Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, 89 FORDHAM L. REV. 145, 157-58 (2020) (discussing reliance on codifier placement of voting rights statute).

87 *See generally* Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1083 (2021) (discussing codifier change in failed elections provision of 3 U.S.C. 2 of phrase "in such manner as the State shall by law provide" to phrase "in such manner as the legislature of such State may direct"). In December 2022, Congress repealed 3 U.S.C. 2. *See* Electoral Count Reform Act of 2022, Pub. L. No. 117-328, § 102. The provision had potentially implicated a statutory path for an independent state legislature theory regarding presidential elections; for the Supreme Court's recent decision on the constitutional path regarding legislative elections, see Moore v. Harper, No. 21–1271, slip op. (U.S. June 27, 2023).

88 *See* Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701, 704 (1989) (discussing codifier role in inclusion of phrase "and laws" in Revised Statutes).

scholars have assumed. Second, even if conventional wisdom were correct about the meaning of these terms, their application to the U.S. Code would exceed Congress's evidentiary powers.

A. The Conventional View

First, let us briefly review the conventional view on statutory texts. In recent years, legislation scholarship has begun to face the challenge posed by different statutory texts, especially as scholars have noticed the many post-enactment changes that OLRC makes to produce the U.S. Code.[89] While this scholarship has primarily been descriptive, or has focused on discrete doctrinal takeaways,[90] it occasionally has alluded to more foundational questions of legal authority. In these instances, it has tended to suggest a particular view: namely, that Congress's evidentiary labels for statutory documents create an unproblematic hierarchy of sources.[91] Under this hierarchy, "legal evidence" is superior to "prima facie evidence" and is even authoritative or conclusive.[92] Citing these evidentiary

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89 *See, e.g.*, Cross & Gluck, *supra* note 12; Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 208 (2017) (calling attention to the role of the Law Revision Counsel); Shobe, *Codification*, *supra* note 24, at 654–58 (studying Law Revision Counsel's codification work); Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 143–45 (2010) (discussing Law Revision Counsel's role as "the current keeper of the U.S. Code"); Whisner, *supra* note 31 ¶ 28 (discussing Law Revision Counsel's various responsibilities regarding codification and revision); Dorsey, *supra* note 31, at 284 (noting that many changes are made by the Law Revision Counsel when preparing the U.S. Code); Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the* United States Code, 112 LAW LIBR. J. 213, ¶ 4 (2020) (discussing notes following statutory text in each provision of the U.S. Code added by the Law Revision Counsel); Daniel B. Listwa, Comment, *Uncovering the Codifier's Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464, 467 (2017) (discussing role of Law Revision Counsel in enacting positive law titles).

90 As Jarrod Shobe put it, "[s]cholars and judges have an undertheorized understanding of what the Code is." Shobe, *Codification*, *supra* note 24, at 658.

91 *See, e.g.*, Dorsey, *supra* note 31, at 286–87 ("The Code is only 'prima facie' evidence of the law, while the Statutes at Large is 'legal' evidence, and 'the very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.'"); Tress, *supra* note 89, at 132, 151 (same); Nevers & Krishnaswami, *supra* note 89 ¶14 ("For the other 27 nonpositive law titles, what the *United States Code* says is only *prima facie* evidence of the law that can be rebutted by the *Statutes at Large*."); Whisner, *supra* note 31, ¶4 ("[I]f there's any change in language between *Statutes at Large* and U.S.C., the language in *Statutes at Large* governs. The *United States Code* is only prima facie evidence of the law for much of the code.").

92 *See, e.g.*, George K. Yin, *How Codification of the Tax Statutes and the Emergency of the Staff of the Joint Committee on Taxation Helped Change the*

labels, these scholars imply that courts should use the U.S. Code as the source for federal statutory law when interpreting positive law titles but should view the Code as rebuttable for non-positive titles, with recourse available to the Statutes at Large (which Congress also has labeled as "legal evidence").[93] This argument has not always been presented clearly, as commentators have sometimes failed to disentangle the authority granted by Congress's evidentiary standards, on the one hand, from the inherent authority bestowed by bicameralism and presentment, on the other.[94] However, the argument generally has been that Congress's evidentiary standards instruct courts on a hierarchy of statutory documents to use in statutory interpretation—one that always permits, and sometimes requires, use of the U.S. Code.[95]

The Court has articulated the same idea.[96] Dating back to the foundational 1943 case of *Stephan v. United States*, it often has taken a particular approach: cite Congress's evidentiary labels, and assume these labels answer all questions about the Code's authority in relation to other statutory documents.[97] In a 1993 case, for example, the Court reiterated:

Nature of the Legislative Process, 71 TAX L. REV. 723, 744 (2018) (describing the titles as divided into prima facie evidence and "conclusive" or "absolute" evidence); Dorsey, *supra* note 31, at 292 ("What about the legal evidence of the law? What about the documents that passed Congress, were presented to the President, and are preserved on parchment in the National Archives? What about the supreme law of the land?"); Tress, *supra* note 89, at 149 ("This was solved by downgrading the authority of the Code from 'evidence of the law' to 'prima facie evidence of the law.' Any inadvertent changes to existing law would not be locked in as enacted law, allowing the courts to determine the authoritative text . . . .").

93 *See* Yin, *supra* note 92, at 763.

94 *See, e.g.*, Dorsey, *supra* note 31, at 292 (conflating "legal evidence of the law" with "documents that passed Congress, were presented to the President, and are preserved on parchment in the National Archives"); Tress, *supra* note 89, at 149 (conflating "evidence of the law" with "lock[ing] in as enacted law" and as "the authoritative text").

95 *See also* Shameema Rahman, *What Happens When There Is an Inconsistency Between the Statutes at Large and the U.S. Code?*, LIBR. OF CONG. (May 29, 2014), https://blogs.loc.gov/law/2014/05/when-there-is-a-difference-between-the-u-s-code-and-the-statutes-at-large-the-statutes-at-large-controls [https://perma.cc/PP8D-352H] ("Put simply, [based on meaning of evidentiary terms,] where the *U.S. Code* title has been enacted into positive law, that *U.S. Code* title will trump the corresponding *Statutes at Large*.").

96 The Court's approach to the Code's authority interestingly contrasts with its typical neglect of the *Constitution Annotated*, which similarly provides an official, statutorily-mandated version of, and gloss on, the Constitution prepared by a nonpartisan congressional office. *See* 2 U.S.C. § 168.

97 Stephan v. United States, 319 U.S. 423, 426 (1943) ("[T]he very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent."); *see also* Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 379–80 (1958) (Harlan, J.) ("[T]his codification seems to us . . . to be manifestly

> Though the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law . . . it is the Statutes at Large that provides the 'legal evidence of laws,' . . . and . . . [so a law] remains on the books if the Statutes at Large so dictates.[98]

Following this example, lower courts have consistently assumed that Congress's evidentiary standards provide a straightforward hierarchy of sources to follow,[99] with at least one adding that "legal evidence" also is conclusive.[100]

B. The Meaning of Evidentiary Standards

The conventional wisdom described in Section A misunderstands the meanings of Congress's evidentiary standards. To see why this is so, it is necessary to explore the historic usage of these terms by Congress and the courts.

1. *Prima Facie Evidence*

For non-positive titles, federal law provides that the U.S. Code shall "establish prima facie the laws of the United States."[101] The meaning of this evidentiary standard has been relatively uncontroversial. By referring to "prima facie" evi-

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inconsistent with the Robinson-Patman Act, and in such circumstances Congress has specifically provided that the underlying statute must prevail.").

98 U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993) (internal citations omitted).

99 *See, e.g.*, Wash.-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth., 263 F.3d 371, 378 (4th Cir. 2001), *cert. denied*, 543 U.S. 813 (2004) (internal citations omitted) ("The statutory text contained in the United States Code is 'prima facie' evidence of what the law is. The Statutes at Large, however, are 'legal evidence' of the law. Accordingly, if there is a discrepancy between the two, the codified version of the law must yield to the Statutes at Large. By the same token, Congress has enacted some (slightly less than half) of the titles of the United States Code into positive law, in which case the text of the Code also becomes 'legal evidence of the laws.'"); United States v. Ward, 131 F.3d 335, 339–40. (3d Cir. 1997) ("The codified version of legislation is *prima facie* evidence of the laws of the United States unless Congress has enacted the particular title into positive law. . . . When there is such a conflict, the version in the Statutes at Large . . . must control."); Panjiva, Inc. v. U.S. Customs & Border Prot., 342 F. Supp. 3d 481, 488 (S.D.N.Y. 2018), *aff'd*, 975 F.3d 171 (2d Cir. 2020) ("Though the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law, it is the Statutes at Large that provides the 'legal evidence of laws[.]' Accordingly, if there is a discrepancy between the two, the codified version of the law must yield to the Statutes at Large.").

100 United States v. Zuger, 602 F. Supp. 889, 891 (D. Conn. 1984), *aff'd*, 755 F.2d 915 (2d Cir. 1985), *cert. denied*, 474 U.S. 805 (1985) ("Where a title has, however, been enacted into positive law [and therefore is 'legal evidence' under 1 U.S.C. § 204], the Code title itself is deemed to constitute conclusive evidence of the law; recourse to other sources is unnecessary and precluded.").

101 1 U.S.C. § 204.

dence, Congress was establishing a standard of rebuttable evidence. This standard had two elements. First, it implied a presumption of authenticity and accuracy—one that precluded the need for external verification.[102] Second, it meant that the presumption could be overcome by recourse to superior forms of evidence.

This use of the term "prima facie" was well established as early as the nineteenth century, despite some scholars' claims to the contrary.[103] And its use was not confined to Congress. In 1825, the Court explained that the effect of prima facie evidence was to "throw the burthen of proof upon [the other party] to show the contrary."[104] It elaborated in an 1832 case, where it said, "What is prima facie evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose."[105] The Court also equated the term with "presumptive evidence" because it referred to evidence that was presumed valid until proven otherwise.[106] The Court repeatedly used the term "prima facie evidence" to communicate this meaning throughout the nineteenth century.[107]

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102 The Federal Rules of Evidence refer to this as the "self-authenticating" quality of prima facie evidence. *See* FED. R. EVID. 902(10).

103 *See* 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2494, at 380-81 (James H. Chadbourn ed., rev. ed. 1981) (proposing that this meaning originated in England in 1841); Georg Nils Herlitz, Comment, *The Meaning of the Term "Prima Facie,"* 55 LA. L. REV. 391, 398 (1994) (citing Wigmore that "[v]ery probably there was no such meaning of 'prima facie' before 1841" and identifying *State v. Sattley*, 33 S.W. 41 (Mo. 1895) as "[o]ne of the earliest American cases to address the meaning of 'prima facie'").

104 The Antelope, 23 U.S. (10 Wheat.) 66, 109 (1825).

105 Kelly v. Jackson *ex dem.* Morris, 31 U.S. (6 Pet.) 622, 632 (1832)*; see also* United States v. Wiggins, 39 U.S. (14 Pet.) 334, 347 (1840) (quoting *Kelly*).

106 *See*, *e.g.*, De Treville v. Smalls, 98 U.S. (8 Otto) 517, 524 (1878) ("That certificate was made *prima facie* evidence . . . irrespective . . . of any evidence which might afterwards be adduced to rebut the *prima facies*. It was presumptive evidence of all antecedent facts essential to its validity, and hence admissible as such. The only question, then, is whether the evidence offered tended to rebut this presumption.")*; see also The Antelope*, 23 U.S. at 110-11 (describing prima facie evidence as creating a presumption); Chirac v. Reinecker, 27 U.S. (2 Pet.) 613, 621 (1829) (same).

107 *See*, *e.g.*, United States v. Wiggins, 39 U.S. at 347 (quoting *Kelly*); *id.* at 348 ("Nothing is therefore found in the condition of the office, to rebut the prima facie presumption furnished by the secretary's certificate"); Holker v. Parker, 11 U.S. (7 Cranch) 436, 452 (1813) (explaining that "prima facie evidence of a claim . . . [would be] open to such objections as [the opposing party] might make to it."); The Luminary, 21 U.S. (8 Wheat.) 407, 411 (1823) ("[T]he United States have made out a *prima facie* case, and [so] the burthen of proof to rebut it, rests on the claimant."); Stokes v. Saltonstall, 38 U.S. (13 Pet.) 181, 193 (1839) (facts constituting "prima facie evidence of negligence" function to "throw upon the defendant the burden of [proof]"); Secrist v. Green, 70 U.S. (3 Wall.) 744, 751 (1865) (same).

During this period, Congress occasionally used the term as well—and, when so doing, it similarly referred to rebuttable evidence. In the 1860s, for example, several tax statutes made one fact "prima facie evidence" of another,[108] using the term interchangeably with references to presumptive evidence.[109] The phrase "prima facie" similarly bore this meaning in congressional reports[110] and debates.[111] Congress increasingly used the term to this end in the ensuing decades, with it appearing in federal law over 100 times by 1926.[112]

Two congressional uses of this label would provide particularly important precedent for its application to the U.S. Code. In 1874, Congress had produced the Revised Statutes, its first official, positive-law codification. In 1880, Congress then provided for a new supplement to the Revised Statutes. Congress specified that this supplement "shall be taken to be prima facie evidence of the laws" in the courts, and it explained that this meant the supplement "shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress."[113] An 1890 act providing for another Revised Statutes supplement contained nearly identical language.[114] Here, reference to "prima facie evidence" meant that the supplements would be evidence of the laws, but evidence that could be rebutted. If discrepancies were found with the acts that the supplements purported to assemble, the underlying acts would control. To reinforce this goal, the supplements

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108 Act of June 30, 1864, Pub. L. No. 38-173, §§ 30, 35, 45, 125, 13 Stat. 223, 234, 237, 240, 287; Act of June 13, 1866, Pub. L. No. 39-184, §§ 9, 57, 4 Stat. 98, 101, 167; Act of July 20, 1868, Pub. L. No. 40-186, §§ 70 & 90, 15 Stat. 125, 156, 163.

109 *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1880 (1864) (statement of Rep. George Pendleton) ("I am also instructed by the Committee on Ways and Means to move to amend by striking out of the proviso the words 'presumed to be true' and insert in lieu thereof the words '*prima facie* evidence of its truth,'" and noting agreement to amendment.).

110 *See, e.g.*, 26 ANNALS OF CONG. 131 (1813) (statement of Rep. James Fisk) (describing "*prima facie* evidence" as evidence "that, until disproved . . . ought to be respected").

111 *See, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 3117 (1868) (evidence "regarded as *prima facie* evidence" is considered valid "until the contrary shall be shown").

112 Search of Pub. L. No. 69-440, § 2(a) (1926) (showing 110 uses).

113 Act of June 7, 1880, Pub. L. No. 46-48, 21 Stat. 308, 308.

114 Act of Apr. 9, 1890, Pub. L. No. 51-74, § 3, 26 Stat. 50, 50 ("That the publication herein authorized shall be taken to be prima facie evidence of the laws therein contained, but shall not change nor alter any existing law, nor preclude reference to nor control in case of any discrepancy, the effect of any original act passed by Congress.").

also had rules of construction that prohibited construing the supplement to have altered existing law.[115]

This meaning of "prima facie evidence" was often underscored by its appearance alongside a second, contrasting term: conclusive evidence. The Supreme Court would regularly employ the terms together,[116] as would state courts.[117] In an 1865 case, for example, the Court stated that: "[S]uch a finding is *primâ facie* evidence of the fact, although not conclusive."[118] Congress also followed this practice.[119] When drawing this distinction, the meaning was clear: "prima facie" described rebuttable evidence, whereas "conclusive" labeled irrebuttable evidence.[120] In the 1892 case of *Marshall Field & Co. v. Clark*, which established the enrolled bill rule,[121] the Court underscored this contrasting meaning of "conclusive evidence," quoting the California Supreme Court that, "[An enrolled bill] is conclusive as to what the statute is, and cannot be impeached,

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115 Act of June 7, 1880, Pub. L. No. 46-48, 21 Stat. 308, 308; Act of Apr. 9, 1890, Pub. L. No. 51-74, § 3, 26 Stat. 50, 50.

116 *See*, *e.g.*, Chirac v. Reinecker, 27 U.S. (2 Pet.) 613, 613 (1829) (stating that evidence "is not conclusive evidence of title in the plaintiffs; but is *prima facie* evidence thereof"); Croudson v. Leonard, 8 U.S. (4 Cranch) 434, 442 (1808) (asking "can it be *prima facie* evidence, if not *conclusive*" (emphasis in original)); Kelly v. Jackson *ex dem.* Morris, 31 U.S. (6 Pet.) 622, 631-32 (1832) ("In a legal sense, then, such prima facie evidence in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive . . . . ").

117 *See*, *e.g.*, People v. Purdy, 2 Hill 31, 34 (N.Y. Sup. Ct. Oct. 1, 1841) ("If this be not conclusive, it is at least *prima facie* evidence")*; see also* Utpatel v. Chi. Title & Tr. Co., 218 Ill. App. 75, 79 (1920) ("[T]he act in question is prima facie part of the Statute law of this State, although such prima facie evidence thereof is not conclusive."); State v. Groves, 88 N.E. 1096, 1098 (Ohio 1909) ("While true that the certificate of the Secretary of State . . . makes the contents of such volume competent and prima facie evidence of the correctness and authenticity the laws as therein printed, it is not conclusive of that fact . . . "); Meracle v. Down, 25 N.W. 412, 414 (Wis. 1885) ("[T]he presence of chapter 314 in the Session Laws of 1883 is only prima facie evidence of its enactment by the legislature, which evidence is entirely rebutted by the conclusive proof that it was not so enacted.").

118 Secrist v. Green, 70 U.S. (3 Wall.) 744, 751 (1865).

119 *See*, *e.g.*, Act of June 30, 1864, Pub. L. No. 38-173, § 45, 13 Stat. 223, 240 ("[Bill of sale] shall be prima facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings . . . . "); *id.* § 35, 13 Stat. at 237 ("[Bill of sale] shall be conclusive evidence of title to the purchaser, and prima facie evidence of the right of the officer to make such sale . . . . "); Act of Feb. 26, 1921, Pub. L. No. 66-329, 41 Stat. 1145, 1145 ("[Estimates] shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.").

120 *See*, *e.g.*, McKey v. Vill. of Hyde Park, 134 U.S. 84, 97 (1890) ("Acquiescence . . . is not, as held by the Circuit Court, conclusive evidence of a dedication, for it may be rebutted."); Hinde's Lessee v. Longworth, 24 U.S. (11 Wheat.) 199, 213 (1826) ("The want of a valuable consideration may be a badge of fraud, but it is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side.").

121 Field v. Clark,143 U.S. 649 (1892).

destroyed, or weakened by the journals of Parliament, or any other less authentic or less satisfactory memorials."[122] In *Duncan v. McCall*, the Court similarly quoted the Nevada court's explanation that, because an enrolled bill "constitutes a record which is conclusive evidence of the passage of the act as enrolled," the court "cannot look beyond the enrolled act" for evidence of its passage or its terms.[123] Employing the same meaning, Congress regularly referred to evidence as "final and conclusive."[124]

Therefore, when Congress was devising its plan for the U.S. Code in 1926, it had two contrasting terms available with clear meanings. As Congress assembled early drafts of the Code in 1926, it began work under the impression that it could muster support for an authoritative version of the Code.[125] Early versions therefore provided that, if the Code were approved, official copies would be "competent and conclusive evidence of the law therein."[126]

However, some in Congress proved reluctant to endorse a United States Code that would immediately become binding law. Borrowing the approach taken for the Revised Statute supplements, the final 1926 version of the U.S. Code therefore removed the proposed reference to "conclusive evidence" and instead declared that, "The matter set forth in the Code . . . shall establish prima facie the laws of the United States."[127] Copies published by GPO were made conclusive evidence only of "the original of the Code in the custody of the Secretary of State," rather than of the law itself.[128]

The Preface to the Code explained the meaning of this prima facie standard, stating of the new Code: "It is prima facie the law. It is presumed to be the law. The presumption is rebuttable by production of prior unrepealed Acts of Congress at variance with the Code."[129] Statements from Members of

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122 *Id.* at 675.

123 Duncan v. McCall, 139 U.S. 449, 459-60 (1891) (quoting State v. Swift, 10 Nev. 176, 187 (1875)).

124 For examples in the 1926 Code, see 7 U.S.C. § 194(a); 8 U.S.C. § 211(e); 8 U.S.C. § 212(e) (May 26, 1924, ch. 190, § 12, 43 Stat. 160)*; see also* 15 U.S.C. § 21 (alternately using "shall be conclusive" and "shall be final").

125 Frederic P. Lee & Middleton Beaman, *Legal Status of the New Federal Code*, 12 A.B.A. J. 833, 834 (1926).

126 *See id.*

127 Pub. L. No. 69-440, § 2(a) (1926).

128 *Id.* § 2(b).

129 THE CODE OF THE LAWS OF THE UNITED STATES OF AMERICA, at v (1926) (statement of Rep. Roy Fitzgerald) [hereinafter "1926 CODE"].

Congress reinforced this interpretation, such as when Representative Ramseyer elaborated:

> [T]his codification of the law, if taken into court with reference to any particular section of the code, would be taken as prima facie evidence that that is the law. To be absolutely certain about what the law is, you would still have to go through the numerous statutes at large and prove up what the law is; that is, if any question should arise as to that particular section that you are presenting to the court being the law, then you would have to bring in the acts and prove it up.[130]

Congress underscored this rebuttable standard in several ways. A table of statutes repealed prior to December 7, 1925, was published in the effort to assist interpreters looking to compare the Code to underlying Acts.[131] And, as with the Revised Statute supplements, rules of construction were included that prohibited construing the supplement to have changed or altered existing law.[132]

This meaning of "prima facie" evidence has been relatively uncontroversial. Both the Supreme Court and lower federal courts have acknowledged it.[133] Since 1975, the Federal Rules of Evidence have made half of this definition explicit for federal

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130 Lee & Beaman, *supra* note 125, at 837 n.27. The Chairman of the Committee on the Revision of the Laws in the House, who wrote the aforementioned Preface, added that: "The law remains exactly as it is, but this codification is stamped by Congress officially as the collection in convenient form of the law, prima facie evidence only of that law, and always subject to the original statutes." *Id.*

131 1926 CODE, *supra* note 129, at v (statement of Rep. Roy Fitzgerald) ("Because of such possibility of error in the Code and of appeal to the Revised Statutes and Statutes at Large, a table of statutes repealed prior to December 7, 1925, will be published in the permanent edition . . . . ").

132 *See id.*

133 *See, e.g.*, Stephan v. United States, 319 U.S. 423, 426 (1943) ("[T]he very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent."); U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993) ("Though the appearance of a provision in the current edition of the United States Code is "prima facie" evidence that the provision has the force of law, . . . it is the Statutes at Large that provides the 'legal evidence of laws . . . .'"); Ingerman v. Del. River Port Auth., 630 F. Supp. 2d 426, 434 (D.N.J. 2009) ("[S]tatutes set forth in the United States Code 'shall . . . establish prima facie the laws of the United States' . . . . In case of conflict, the Statutes at Large prevail." (citing *Stephan*)); United States v. Zuger, 602 F. Supp. 889, 891 (D. Conn. 1984) ("Where, however, a title, as such, has not been enacted into positive law, then the title is only *prima facie* or rebuttable evidence of the law. If construction of a provision to such a title is necessary, recourse may be had to the original statutes themselves."); *see also* Nevers & Krishnaswami, *supra* note 89, at 253 (noting that "[t]here are dozens of cases—and even a [West] Topic and Key Number . . . —that announce this principle [that non-positive titles are only prima facie evidence and rebuttable via Statutes at

courts, as Rule 902(10) provides that extrinsic evidence of authenticity is not required for any "signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic."[134] Today, this rule has wide applicability, as many federal statutes make one fact "prima facie evidence" of another.[135]

2. *Legal Evidence*

In 1947, as Congress first enacted titles of the Code into positive law, it provided that such titles shall be "legal evidence of the laws therein contained."[136] It is this standard that courts and scholars have regularly misunderstood. This standard was not without precedent, either on the Court or in Congress. When the Court used the term in the nineteenth and early twentieth centuries, it typically was describing legally admissible evidence.[137] Congress regularly used the term for the

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Large]"); Tress, *supra* note 89, at 132 ("'Prima facie evidence' is rebuttable evidence.").

134 FED. R. EVID. 902(10). Though on the questionable utility of such rules to statutory publications, see *infra* notes 165–173, 287.

135 *See* 12A TRACY BATEMAN ET AL., FEDERAL PROCEDURE LEGAL EDITION § 33:550 (2020). Documents presumptively or prima facie authentic under acts of Congress, 12A FED. PROC., L. ED. § 33:550 (listing statutory prima facie provisions).

136 1 U.S.C. § 204.

137 *See*, *e.g.*, Pennsylvania Co. v. Roy, 102 U.S. 451, 459 (1880) (courts should assume "the jury were influenced in their verdict only by legal evidence" when error in admission at trial occurred); Mut. Benefit Life Ins. Co. v. Higginbotham, 95 U.S. (5 Otto) 380, 390 (1877) ("The paper contained nothing that was legal evidence upon the point in issue, and a verdict founded upon it could not have been sustained."); Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7, 21 (1858) ("Such propositions, therefore, must be considered in connection with all the legal evidence exhibited in the record . . . ."); Bryan v. Forsyth, 60 U.S. (19 How.) 334, 338 (1856) ("[T]he plaintiff offered in evidence the printed report . . . to which the defendant objected, because it was not, without proof of its authenticity, legal evidence. But the court overruled the objection, and the report was given in evidence to the jury . . . ."); Luther v. Borden, 48 U.S. (7 How.) 1, 41 (1849) ("[H]ow could the majority have been ascertained by legal evidence, such as a court of justice might lawfully receive?"); United States v. Delespine's Heirs, 40 U.S. (15 Pet.) 226, 226 (1841) (evidence "was legal evidence of the grant; and was properly admitted as such"); Hagan v. Lucas, 35 U.S. (10 Pet.) 400, 400 (1836) ("The district court instructed the jury, that the records of the state court were legal evidence, by which they might infer [relevant takeaways]."); *see also In re* Charge to Grand Jury, 30 F. Cas. 992, 993 (C.C.D. Cal. 1872) (Fields, J.) ("In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions and hearsay evidence."); SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:21 (2d ed. 2020) ("In another nine states, statutes or court rules use the terms 'legal' evidence or 'legal documentary' evidence in describing the evidence that may be considered by the grand jury. The use of the phrase 'legal evidence' in the grand jury context apparently originated in the late nineteenth and early twentieth centuries. . . . [T]he general intent appears to be to require legally admissible evidence.").

same meaning.[138] Used in this way, the term "legal evidence" was silent on whether the evidence provided was rebuttable or irrebuttable. The emphasis was simply on the adequacy of the evidence, not its conclusiveness.

As a result, the term "legal evidence" was used in ways that, at different times, could capture both rebuttable and irrebuttable evidence. On the one hand, as an 1842 opinion by the Court illustrated, the term could apply to congressional publications of the "very highest authority" and "most authentic form"—which is to say, to irrebuttable evidence.[139] On the other hand, the term was also regularly applied to rebuttable evidence. When speaking in Congress in 1873, Senator Morton explained this usage, remarking:

> Mr. President, when we speak of the credentials of a Senator, what do we mean? I take it, we mean the legal evidence of his election provided by law. The law provides what shall be the legal evidence of a Senator's election, as well as it provides what shall be the legal evidence of title to a piece of land. It is only *prima-facie* evidence. You can go behind it; you can inquire into any questions that go to the validity of the election afterward; but the law provides that there shall be certain evidence which shall *prima facie* entitle a man to his seat.[140]

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138 *See*, *e.g.*, Act of Aug. 8, 1846, Pub. L. No. 29-108, 9 Stat. 80, 80 (law providing that certified copies of each chamber's journal "shall be admitted as evidence" described in long title describes as "making [the copies] legal Evidence," which GPO margin comments equate with "ma[king] evidence in U.S. courts"); H.R. 3800, 44th Cong. (1876) ("[A]ll the evidence of record in the premises taken by authority of the Interior Department or by authority of Congress shall be admitted as legal evidence by the court."); 4 CONG REC. 74 (daily ed. Mar. 16, 1875) (statement of Sen. Howe) ("[I]n the consideration of contested elections by legislative bodies, those bodies are not bound by strict legal evidence."); 4 CONG REC. 79 (daily ed. Mar. 16, 1875) (statement of Sen. Logan) ("[T]he returns, the only evidence which would be legal evidence if these laws were unconstitutional, were in the hands of the governor, and that was the only evidence upon which an opinion could be based in reference to the result."); CONG. GLOBE, 42d Cong., 2d Sess. 3129 (May 7, 1872) (statement of Sen. Harlan) ("I do not suppose that this could be relied on as legal evidence in a court of justice. . . . "); 1 CONG. REC. 129 (daily ed. Mar. 20, 1873) (statement by Sen. Conkling) ("Conjecture will not do; hearsay will not do; it must be established by legal evidence."); CONG. GLOBE, 42d Cong., 2d Sess. 2663 (Apr. 22, 1872) (statement by Arthur) ("[A]lthough the certificate was the proper legal evidence for that, yet it was not the only evidence, and .that other proof was admissible to establish the fact."); 7 CONG. REC. 1554 (daily ed. Mar. 7, 1878) (statement of Sen. Christiancy) ("I am in favor of this bill if the case can be referred to the Court of Claims upon such evidence as is ordinarily received in court; that is, legal evidence . . . . ").

139 Watkins v. Holman's Lessee, 41 U.S. (16 Pet.) 25, 56 (1842).

140 1 CONG. REC. 7 (daily ed. Mar. 6, 1873) (statement of Sen. Morton).

In 1874, Senator Saulsbury likewise described "*prima facia* evidence of title" as a form of "legal evidence of title."[141] A federal statute from 1870 also declared certain copies of incorporation certificates to be "presumptive legal evidence," a phrase that makes sense only if rebuttable (or "presumptive") evidence is a subset of "legal evidence."[142] The term "legal evidence" might be sufficient to capture irrebuttable evidence, but it was not limited to it.

Against this backdrop, Congress in 1874 applied the standard of "legal evidence" to the Revised Statutes.[143] Congress also provided in the Act that, for statutes enacted subsequent to publication of the Revised Statutes, the Statutes at Large would be "legal evidence" of the laws.[144]

Congress additionally would apply this standard to an updated version of the Revised Statutes produced a few years later. Here, the broad meaning of "legal evidence" would be on full display. In 1877, Congress provided that the updated version would be "legal and conclusive evidence" of the laws.[145] In using this phrase, Congress showed that "legal evidence" could encompass "conclusive" or irrebuttable evidence.[146] However, Congress amended this provision a year later.[147] Troubled by the many errors found in the first edition of the Revised Statutes,[148] it struck the words "and conclusive," leaving the 1878 edition to be only "legal evidence."[149] Further, Congress clarified that—in its role as "legal evidence"—the updated version "shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act" with respect to enactments subsequent to the 1874 edition.[150] As GPO noted in

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141 2 CONG. REC. 4326 (daily ed. May 28, 1874) (statement of Sen. Saulsbury). Saulsbury described this prima facie evidence as supporting possession of office "until by a contest his right shall be disproved." *Id. See also* CONG. GLOBE, 42d Cong., 2d Sess. app.135 (Mar. 12, 1872) (Contested Elections. Speech of Hon. W. E. Arthur, of Kentucky, in the House of Representatives) ("[I]n the absence of antagonistic proof impeaching or discrediting them, their apparent intrinsical completeness and credibility raise them to the dignity of legal evidence . . .").

142 Act of May 5, 1870, Pub. L. No. 41-80, § 4, 16 Stat. 98, 103; *see also* S. 181, 44th Cong. (1876) (same).

143 Act of June 20, 1874, § 2, 18 Stat. 113, 113.

144 *Id.* § 8, 18 Stat. 113, 114.

145 Act of Mar 2, 1877, 19 Stat. 268.

146 This also illustrated that the term "legal evidence" did not refer solely to irrebuttable evidence—hence the need to clarify that it also was "conclusive."

147 *See* Tress, *supra* note 89, at 135–36.

148 *See* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1014-16 (1938).

149 Act of Mar. 9, 1878, Pub. L. No. 45-26, 20 Stat. 27, 27.

150 *Id.*

its margin notes,[151] and as observed on the Senate floor,[152] Congress thereby made the new edition prima facie evidence for these more recent enactments. As one district court put it: "[The Act provides] that, 'the volume shall be legal evidence of the laws,' and does not make it conclusive."[153] In so doing, Congress illustrated that "legal evidence" also could encompass rebuttable, prima facie evidence. Moreover, by carving out pre-1874 enactments as "legal evidence" that explicitly was neither conclusive nor prima facie, Congress illustrated that the term "legal evidence"—without other modification—could be meaningful without providing any insight on this rebuttable-versus-irrebuttable issue. In these instances, it connoted merely the lack of any need of external corroborating evidence.

By 1878, through use of these standards, Congress had settled upon an evidentiary approach for laws enacted after the Revised Statutes. Under this scheme, updated versions of the Revised Statutes were prima facie evidence of the law, while the Statutes at Large were legal evidence of it. In subsequent years, Congress would retain this scheme—declaring updated versions of the Revised Statutes prima facie evidence in 1880 and 1890,[154] and labeling the Statutes at Large legal evidence in 1895,[155] 1936,[156] and 1938.[157] With these labels, Congress established that both sources were admissible evidence. Additionally, it flagged that updated versions of the Revised Statutes were rebuttable via reference to original acts. However, since "legal evidence" similarly could apply to rebuttable evidence, there was good reason to think that the Statutes at Large might also be rebuttable by reference to original acts. Congress's labels did not imply otherwise.

Over time, a hierarchy developed for these two sources. This hierarchy would emerge not from the differing evidentiary statuses of the publications, however, but from the nature of their contents. The Revised Statutes was, as its name implies, a revision. As such, it inserted a layer of editorial work between Congress's statutes and the final, printed document. By de-

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151 *Id.* (stating provision made "new edition *prima facie* evidence").

152 The following colloquy occurred:

Mr. Davis, of Illinois: It makes the revision only prima facie evidence.

Mr. Christiancy: That is it.

7 CONG. REC. 1137 (1878).

153 United States v. Moore, 26 F. Cas. 1306, 1307 (C.C.D. Ala. 1878).

154 *See supra* notes 113–114.

155 The Printing Act, Act of Jan. 12, 1895, 28 Stat. 601, 615.

156 Act of June 20, 1936, Pub. L. No. 74-724, 49 Stat. 1545, 1551.

157 Act of June 16, 1938, Pub. L. No. 75-657, 52 Stat. 760, 760.

claring that new editions of the Revised Statutes were only prima facie evidence, Congress seemed to be directing interpreters to look behind this layer of editorial work. In this endeavor, the Statutes at Large naturally would be a valuable resource. The Statutes at Large purported to present federal statutes in a more original, less edited format—showing statutes as they appeared prior to codifiers' editorial work. If the interpretive goal was to view the laws as they had appeared to Congress, such a publication was uniquely valuable (if accurate and admissible).[158] The value of the Statutes at Large was not derived from Congress awarding it a heightened evidentiary status, therefore. Congress had declared it to be admissible evidence of something that interpreters realized was of particular importance: an unvarnished look at the statutes as they emerged from Congress, prior to assembly and editing. The point was not that one evidentiary term was superior to the other; it was that one source was inherently superior to the other. In short, Congress had provided similar evidentiary standards for two sources, deeming both admissible—and the nature of the interpretive task led to prioritizing one source over the other.

When Congress enacted a Code in 1926 that it similarly declared prima facie evidence that was "rebuttable by production of prior unrepealed Acts of Congress at variance with the Code," it therefore was easy to conclude that the Statutes at Large had superior validity.[159] The Court reached this conclusion in *Stephan v. United States* in 1943.[160] When the Court reached this conclusion vis-à-vis the Code,[161] and when others did the same,[162] they often simply stated the conclusion without explaining their underlying reasons, however. In so doing, they sowed the seeds for confusion in later decades.[163]

Against this backdrop, Congress, in 1947, enacted titles into positive law for the first time. In the codification bill for Title I, it added a proviso establishing that positive law titles

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158 On this goal animating the courts, see *infra* Section IV.A.

159 *See* 1926 CODE, *supra* note 129.

160 319 U.S. 423 (1943).

161 *Id.* at 426 ("By [statutory mandate,] the Code establishes 'prima facie' the laws of the United States. But the very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.").

162 *See*, *e.g.*, Lee & Beaman, *supra* note 125, at 837 n.27 (quoted statement of Rep. Ramseyer).

163 For an early, oft-quoted instance of this confusion, see Charles S. Zinn, *Revision of the United States Code*, 51 LAW LIBR. J. 388, 389-90 (1958) (finding the Statutes at Large as superior because "*Statutes at Large* are legal evidence of the law, whereas the *Code* is only prima facie evidence").

"shall be legal evidence of the laws therein contained."[164] It appears that, in Congress, there was some confusion about what exactly this accomplished.[165] However, there does not appear to be any reason to believe that Congress had abandoned its longstanding usage of this term. Under this usage, positive law titles of the U.S. Code would be admissible and adequate evidence of the laws. But they would not, simply by virtue of their evidentiary label, automatically be superior to sources labeled as prima facie evidence. And they certainly would not become conclusive evidence that courts were prohibited to look behind. Without these meanings, however, Congress's evidentiary labels could not—and cannot—provide the simple hierarchy of statutory sources that courts and scholars have assumed them to give. Decisions about how to sort and weigh statutory documents would need to be grounded on something else.

C. The Legitimacy of Evidentiary Standards

As Section B explained, Congress's evidentiary standards do not have the meaning that courts and scholars have assumed. Even if they did, however, their application to the U.S. Code would exceed Congress's power. To explain this point, Subsection 1 examines the limits on the legislature's power to use evidentiary provisions for statutory law. Subsection 2 then outlines the features of the U.S. Code that place it beyond such limits.

1. *Evidentiary Rules and the Judicial Power*

What is the scope of a legislature's power to declare certain documents to be evidence of the laws? The answer has its roots in early English law and in the modifications this law underwent when imported into America.

In England, courts traditionally had the power to take judicial notice of statutes, which gave them latitude to seek out any documents that might assist with uncovering statutory law. Here, the formalities and constraints of evidence law did not

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164 July 30, 1947, ch. 388, 61 Stat. 633, 638.

165 The Senate report remarked: "This provision apparently is intended to carry out the basic scheme of establishing as positive law the various titles of the code." S. REP. NO. 658 (July 21, 1947). This use of "apparently" does not instill confidence. *See also* 93 CONG. REC. 5029 (May 12, 1947) (statement of Rep. Robsion) ("When this [codification] bill is enacted, . . . it will be no longer necessary to have recourse to the Revised Statutes and the Statutes at Large in order to present legal evidence of these laws.").

apply.[166] This judicial notice power was regarded as an element of the common law,[167] which meant that it could be overridden by positive law.[168] That positive law power was vested in Parliament, which was regarded as the supreme legislative body.[169] As such, Parliament possessed the power to modify courts' judicial notice power—including, presumably, via evidentiary rules specifying the documents that courts must use to ascertain statutory law.

Much of this legal structure was imported into America.[170] Following their British counterparts, American courts asserted their judicial notice power to determine statutory law.[171] The Supreme Court acknowledged this power from the time of John Marshall[172] and explicitly extended it to statutory construction.[173] State courts did the same.[174] As in England, this judi-

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166 *See* SEDGWICK, *supra* note 21, at 26.

167 *See* JABEZ GRIDLEY SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 29, at 50 (2d. ed. 1904) ("Legislative records.—The conclusiveness of records is a conclusion of the common law.").

168 *See id.* ("A technical record here has the same effect as by the common law of England, except as it is modified by the written law . . . .").

169 *See* Chicot County v. Davies, 40 Ark. 200, 210 (1882) ("The people of England have no written constitution defining and limiting the powers of their government. The Parliament being supreme, there can be no such thing as the passage of laws in an unconstitutional manner."); Green v. Weller, 32 Miss. 650, 704 (1856) (Smith, C.J., dissenting) (discussing same); Rash v. Allen, 76 A. 370, 379 (Del. Super. Ct. 1910) (discussing same).

170 *See* SUTHERLAND, *supra* note 167, § 29, at 50 ("We have in America the common law so far as it is suited to our condition. A technical record here has the same effect as by the common law of England, except as it is modified by the written law, or conditions are so changed as to render the common law inapplicable.").

171 *See*, *e.g.*, SUTHERLAND, *supra* note 167, § 57, at 97-98 ("The court takes judicial notice of all general laws. This is a cardinal rule . . . ."). For courts noting this as an extension of English common law practices, see, for example, Pangborn v. Young, 32 N.J.L. 29, 43-44 (1866); State v. Wheeler, 89 N.E. 1, 3–4 (Ind. 1909).

172 *E.g.*, Leland v. Wilkinson, 31 U.S. (6 Pet.) 317, 321-22 (1832); Gardner v. The Collector, 73 U.S. (6 Wall.) 499, 508 (1867); Town of S. Ottawa v. Perkins, 94 U.S. (4 Otto) 260, 266-67 (1876); Jones v. United States, 137 U.S. 202, 216 (1890); Post v. Kendall Cnty. Supervisors, 105 U.S. (15 Otto) 667, 669 (1881); Lyons v. Woods, 153 U.S. 649, 663 (1894).

173 *Gardner*, 73 U.S. at 509 ("The judicial notice of the court must extend, not only to the existence of the statute, but to the time at which it takes effect, and to its true construction.").

174 *See*, *e.g.*, Legg v. Mayor, Counsellor & Aldermen of City of Annapolis, 42 Md. 203, 221 (Ct. App. 1875); McLaughlin v. Menotti, 38 P. 973, 973 (Cal. 1895); State v. Bauman, 87 So. 732, 735-36 (La. 1921); *In re* Vanderberg, 28 Kan. 243, 254 (1882); Hollingsworth v. Thompson, 12 So. 1 (La. 1893); Berry v. Balt. & Drum Point R. Co., 41 Md. 446, 464 (1875); Scott v. Clark County, 34 Ark. 283, 284 (1879); People *ex rel.* Purdy v. Highway Comm'rs of Marlborough, 54 N.Y. 276, 279 (1873); State v. Bailey, 16 Ind. 46, 47-48 (1861); *Pangborn*, 32 N.J.L. 29; Nesbit v. People, 36 P. 221, 224 (Colo. 1894).

cial practice was subject to override by positive law.[175] As the Court put it in *Gardner v. The Collector*: "[Judges] have a right to resort to any source of information . . . unless the positive law has enacted a different rule."[176] This passage from *Gardner* was repeatedly quoted by state courts.[177]

However, the American context also introduced a key change to this legal structure. Unlike their British counterpart, American legislatures were not supreme lawmaking bodies.[178] Instead, positive law in America was bifurcated: written constitutions operated as supreme law, and statutory law was developed subject to it. When the Court in *Gardner* described judicial notice as subject to modification by "positive law," it was alluding to the collective power of these two sources—constitutional and statutory—to modify the judicial practice.[179] If American constitutions had weighed in on the issue of judicial notice, that would have settled the issue, removing it from legislative control. Consequently, American courts were faced with the question: had constitutions withdrawn this topic from the domain of the legislature?

This question increasingly arose for American courts in the nineteenth century, as the burgeoning codification movement placed before them new statutory compilations, many of which contained evidentiary standards.[180] While courts approached this question carefully, a trend did emerge. Perhaps due to their written constitutions, courts seemed newly empowered to

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175 *See*, *e.g.*, Sherman v. Story, 30 Cal. 253, 276 (1866) ("[T]here has been no departure from the principles of common law in this respect in the United States, except in instances where a departure has been grounded on, or taken in pursuance of some express constitutional or statutory provision requiring some relaxation of the rule. . . . It remains to be seen whether there is anything in our Constitution or laws requiring or authorizing a departure from the common law rule.").

176 *Gardner*, 73 U.S. at 511 (emphasis added).

177 *See*, *e.g.*, Bauman, 87 So. at 753; *Berry*, 41 Md.at 464; *Hollingsworth*, 12 So. 1; *Legg*, 42 Md.at 221.

178 *See* SUTHERLAND, *supra* note 167, § 29, at 50 ("The conditions in respect to legislation in this country, where a mandatory procedure is prescribed in a constitution, are not the same as in England."); 2 FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 613 (London: William Benning & Co, 2d ed. 1848) (1830) (same); Rash v. Allen, 76 A. 370, 379 (Del. Super. Ct. 1910) (discussing same).

179 *See*, *e.g.*, *Rash*, 76 A. at 387 (giving and relying upon this two-track interpretation of *Gardner*); *see also* Town of S. Ottawa v. Perkins, 94 U.S. (4 Otto) 260, 269 (1876) ("Of course, any particular State may, by its Constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute . . . .").

180 On the codification movement, see generally CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981).

police the boundaries of the judicial and legislative powers[181]—and evidentiary standards regularly seemed to threaten those boundaries. This was particularly true when evidentiary standards potentially empowered non-legislative actors to make changes or additions to statutory law—a situation that courts repeatedly found to be unacceptable. While typically opting not to declare the evidentiary standards flatly unconstitutional, courts nonetheless found ways to quietly sideline them.

Several state courts emphasized the inherent limits of the legislative power when confronted with these evidentiary provisions—and the power of the courts to enforce such limits. The Wisconsin court provides an example. Its statutory publications were declared by law to be "sufficient evidence thereof in all courts of law."[182] Construing this provision, the court explained:

> Section 4135, Rev. St., makes an authorized printed statute sufficient evidence thereof, but we cannot think the legislature intended thereby to make that a law which, although so printed, was never enacted by both branches of that body. Evidence may be sufficient and yet not conclusive. To hold that chapter 314 is a valid law merely because it has been printed as such in the statutes, when it was never enacted, would be, in effect, to vest the power of legislation in some dishonest or inaccurate clerk. Of course the legislature, when it enacted section 4135, could not have intended anything so absurd and intolerable. We conclude, therefore, that the presence of chapter 314 in the Session Laws of 1883 is only *prima facie* evidence of its enactment by the legislature, which evidence is entirely rebutted by the conclusive proof that it was not so enacted.[183]

In this manner, the Wisconsin court avoided a constitutional decision by emphasizing the absence of a true conflict. At the same time, however, the court identified the underlying constitutional dynamic: were these evidentiary standards to assert a conclusive standard, it would potentially give legislative power to "some dishonest or inaccurate clerk," and that would be "intolerable."[184] The implication was clear: the court viewed such an approach as a legislature overstepping the lim-

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181 For courts policing this boundary in related contexts, see, for example, Chicot County v. Davies, 40 Ark. 200, 209-12 (1882); State *ex rel.* City of Cheyenne v. Swan, 51 P. 209, 213-14 (Wyo. 1897); *Rash*, 76 A. at 379; Wilson v. Duncan, 121 So. 1017, 1017-18 (Ala. 1897).

182 REV. STAT. WIS. § 4135 (1878).

183 Meracle v. Down, 25 N.W. 412, 414 (Wis. 1885).

184 *Id.*

its on its constitutional power to enact and promulgate legislation, and it viewed its own constitutional role as one of policing the limits on that power, if necessary.[185]

The Missouri court was similar. In *Bowen v. Missouri Pacific Railway Company*, the court confronted an evidentiary provision declaring that a recent state codification "shall be *prima facie* evidence of such statutes."[186] Rejecting the party's argument that this standard was consequential, the court explained:

> The two sections of the act were simply brought forward and placed in article 2 by the committee on revision, which was appointed to compile, arrange, and publish the statutes after the adjournment of the general assembly. That committee had no legislative power conferred upon it, for the legislature could not, and indeed did not attempt to, delegate to it any such powers. The fact that the committee brought the said act forward and placed it in the Revised Statutes gave it no validity, and the two sections are void, just as they were when first enacted into the form of a law.[187]

According to the Missouri court, it was the lack of legislative power held by the editors—and the impossibility of giving such power to editors—that was relevant. The evidentiary standard was beside the point. The court would reiterate this idea a few years later, remarking that, "[The codification] committee had no legislative power conferred upon it, nor could such power have been conferred under the Constitution, nor did the Legislature attempt to confer upon it such power."[188] This principle would be echoed by the courts of Florida,[189]

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185 *See also* Jamison v. Admiralty Zinc Co., 96 P.2d 26, 28 (Okla. 1939) (noting of statutory compilation with *prima facie* standard that "[c]ertainly the Legislature did not attempt to delegate its power to enact laws to any commission in the acts appointing the Code Commission").

186 MO. REV. STAT. § 6613 (regarding Revised Statutes deposited in Secretary of State's office).

187 Bowen v. Mo. Pac. Ry. Co., 24 S.W. 436, 436 (Mo. 1893).

188 Brannock v. St. Louis, M. & S.E.R. Co., 98 S.W. 604, 606 (Mo. 1906).

189 Mathis v. State, 12 So. 681, 683-84 (Fla. 1893) ("The language in the second section . . . cannot be held to confer upon the commissioners, of themselves, the power to make such omissions or additions to the existing statutes as might be submitted of any binding force, independent of the sanction of the legislature. This could not have been done, if the legislature had intended.").

Georgia,[190] Michigan,[191] and Oregon,[192] with respect to state codifications.

The Missouri court in *Bowen* additionally emphasized its understanding of the judicial power, and other courts did the same when avoiding or limiting evidentiary standards.[193] The Supreme Court had provided a model for this approach in *Town of South Ottawa v. Perkins*, a case decided nine years after *Gardner,* which explained:

> Of course, any particular State may, by its Constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but, the question of such existence or non-existence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in any particular case is imposed.[194]

Legislatures may enact evidentiary standards for statutes, in other words—and courts may disregard them.

In a pair of cases, the New York court was similarly assertive. An evidentiary standard in the state had declared the printed volume "presumptive evidence" that statutes had passed in the form and manner therein presented.[195] In a first case, the court held that, "the printed volume is presumptively correct, and the original act is conclusive."[196] Following on

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190 Cent. of Ga. Ry. Co. v. State, 31 S.E. 531, 533 (Ga. 1898) ("No one would pretend that any new matter in the Code derives force or efficacy by virtue of the act of the commissioners alone. Even if the legislature had attempted to confer upon the commissioners the power to make changes in the law, and to embody in the Code such new matter as they saw proper, such an act of the legislature, in so far as its purpose was to thus create new legislation for the State, would have been an absolute nullity. Enacting and changing laws for a State devolves by the constitution upon the legislative branch of its government, and that branch cannot delegate the power to another.").

191 Hulburt v. Merriam, 3 Mich. 144, 156 (1854) ("These provisions show the object for which the commission was created, and define the manner in which the trust confided to them was to be executed. No legislative authority was or could have been delegated to that body.").

192 State v. Gaunt, 9 P. 55, 56 (Or. 1885) ("[T]he legislature cannot delegate to a code commission power to amend the laws of the state. If the act of 1872 professed to do that, it was *ultra vires* and void. Acts of the legislature are records, and should be printed as recorded.").

193 Bowen v. Mo. Pac. Ry. Co., 24 S.W. 436, 436-37 (Mo. 1893). *See also* Brannock v. St. Louis, M. & S.E.R. Co., 98 S.W. 604, 606 (Mo. 1906) (quoting *Bowen).*

194 Town of S. Ottawa v. Perkins, 94 U.S. (4 Otto) 260, 269 (1876) (where Illinois statute prescribed evidence for whether statute was properly passed). *See also* Duncan v. McCall, 139 U.S. 449, 457 (1891) (quoting *Perkins* favorably).

195 1 R. S. 156, § 3.

196 People *ex rel.* Purdy v. Highway Comm'rs of Marlborough, 54 N.Y. 276, 279 (1873).

that opinion, the court later explained that its reasoning had been grounded in judicial power, not statutory interpretation. It remarked, "[I]t is now settled, that it is the business of the court to determine what is statute, as well as common law; and for that purpose the judges may and should, if necessary, look beyond the printed statute-book."[197] For this court, the ability to ascertain the law—and to seek out any documents necessary to this task—was a core aspect of the judicial power, and was not to be altered by evidentiary standards.

Not all courts addressed these evidentiary provisions in the language of constitutional powers. Even among those that avoided constitutional rhetoric, however, the trend was to sideline these provisions. In some cases, courts underscored that the legislature did not specify a conclusive evidentiary standard. Here, courts emphasized the absence of a true conflict. The Nebraska court took this approach, explaining of its evidentiary provision: "[It] merely makes the printed laws published under authority of the state presumptive evidence of such laws. In case of conflict, the original enrolled act . . . is the controlling evidence."[198]

Other courts found further ways to sideline the standards. Iowa provides an example. State law declared publications of statutes by authority to be "presumptive evidence of such laws."[199] In a pair of cases addressing the proof of statutes, the Iowa court simply ignored this evidentiary standard, never mentioning it.[200] In a subsequent case, however, the court staked out a different position: the legislature's rule did not extend to elements added by codifiers, because these are not part of the law.[201] Addressing elements such as head-lines and margin notes that were added by codifiers or publishers, the court remarked: "[These elements] are no part of the statute. They are merely for convenience in examining it."[202] As a consequence, these elements fell outside the statutory directive. The court therefore concluded that "these [elements] are not to

197 De Bow v. People, 1 Denio 9, 14 (N.Y. 1845).

198 Bruce v. State, 67 N.W. 454, 454 (Neb. 1896); *see also* Peterson v. Peterson, 320 P.3d 1244, 1249 (Idaho 2014) (stating evidentiary standard for non-positive code is just evidence, not law itself).

199 IOWA CODE § 2443 (1851).

200 *See* Dishon v. Smith, 10 Iowa 212, 217 (1859); State v. Donehey, 8 Clarke 396, 398 (Iowa 1859).

201 Cook v. Fed. Life Ass'n, 35 N.W. 500, 501–02 (Iowa 1887).

202 *Id.*

be considered in construing the statute, for the simple reason that they are not a part of the law."[203]

The Alabama court took another narrowing approach. A statutory provision had declared one publication of the state's laws to be "hereby received."[204] However, that provision "did not alter or repeal any law," the court explained.[205] As such, the evidentiary rule bestowed no authority on the publication to "alter the statute, or give a construction to the words used in it, in direct opposition to their meaning."[206] As a result, the statute implied no limitation on the court's power to independently ascertain the language and meaning of the law.[207] A similar approach was taken in Utah.[208]

When confronted with evidentiary standards for statutes, therefore, courts typically found ways to assert their independent power to locate and interpret the law, the evidentiary provisions notwithstanding. This approach fit within a broader set of cases: those that looked at the power of legislatures to control, via other methods, the documents that courts will consider as evidence of statutory law. As Subsection 2 will explain further, legislatures often require publication of statutes by governmental authority, and they also require statutes to bear official attestation or certification.[209] As with evidentiary standards, these provisions force courts to consider whether to defer to legislative assurances regarding the content of statutory law, or to conduct their own inquiry. In response, courts typically have asserted that, while these legislative strategies can make copies of statutes prima facie evidence, courts retain the power to look behind them, seek out additional sources, and reach independent conclusions about the content of statutory law. The Supreme Court adopted this approach for printings by authority[210] and certifications on statutory printings,[211]

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203 *Id.*

204 C.C. CLAY, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 367 (1843). Based on Act of Jan. 11, 1843 § 1.

205 State v. Marshall, 14 Ala. 411, 415 (1848).

206 *Id.*

207 *Id.* For a later example (that strongly parallels the Code), see Fid. & Columbia Tr. Co. v. Meek, 171 S.W.2d 41, 43 (Ky. 1943).

208 *See* Lyman v. Martin, 2 Utah 136, 141 (1877).

209 *See infra* Part II.C.2.

210 Jones v. United States, 137 U.S. 202, 216 (1890); Pease v. Peck, 59 U.S. 595, 596–97 (1855); s*ee also* SUTHERLAND, *supra* note 167, § 74 ("When there is a discrepancy between the printed statute and the enrolled act, all the authorities agree that the latter controls."). *See also* Rex v. Jefferies, 1 Strange, 446 (7 Geo. 1721).

211 *Jones*, 137 U.S. at 216; *In re* Duncan, 139 U.S. 449, 457 (1891).

and state courts typically followed suit on both authenticated printed versions[212] and printings by authority.[213]

Explaining this refusal to let legislative certifications limit their inquiries, courts echoed the cases on evidentiary provisions, similarly positioning themselves as guardians against lawmaking by actors or methods not constitutionally permitted.[214] Time and again, courts emphasized that printers, transcribers, and publishers cannot change the law.[215] The implication was clear: legislation "must be the work of the legis-

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212 *See, e.g.*, Charleston Nat'l Bank v. Fox, 194 S.E. 4, 9 (W. Va. 1937); Berry v. Balt. & Drum Point R.R. Co., 41 Md. 446, 461–63 (1875); Union Bank of Richmond v. Comm'rs of Town of Oxford, 25 S.E. 966, 967–68 (N.C. 1896); Nesbit v. People, 36 P. 221, 224 (Colo. 1894); Dishon v. Smith, 10 Iowa 212, 217 (1859); State v. Groves, 88 N.E. 1096, 1097–98 (Ohio 1909); Att'y Gen. v. Foote, 11 Wis. 14, 16–17 (1860); Legg v. Mayor, Couns. & Aldermen of City of Annapolis, 42 Md. 203, 220–21 (1875).

213 *See, e.g.*, 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 628 (John Henry Wigmore ed., 16th ed. 1899) (1842) (stating this as the rule "in most if not all of the United States"); Simpson v. Union Stock Yards Co., 110 F. 799, 801–02 (C.C.D. Neb. 1901) (citing state cases showing "it is now settled beyond all debate that a printed official statute must give way to and be controlled by the official enrollment . . . .").

214 *See, e.g.*, *Legg*, 42 Md. at 221 ("A valid statute can only be passed in the manner prescribed by the Constitution, and when the provisions of that instrument, in regard to the manner of enacting laws, are wholly disregarded, in respect to a particular Act, it would seem to be a necessary conclusion that the Act, though having the forms of authenticity, must be declared to be a nullity. Otherwise the express mandatory provisions of the Constitution would be of no avail or force whatever."); *Berry*, 41 Md. at 462 ("But to do this would be virtually denying to the people of the State the benefit of the safeguards provided by the Constitution, and to allow and enforce that as law which has not been assented to by their representatives."); *Fox*, 194 S.E. at 8 ("Is the question of presentment to the Governor and his permitting a bill to become a law without his signature to be left to the attestation of the clerk of the House as evidenced by the printed acts, or do the courts, when called upon to enforce a purported statute, have a right and duty, *ex mero motu*, to determine the existence of this fact? We think such right and duty exist.").

215 *See, e.g.*, *Pease*, 59 U.S. at 596–97 ("It is no doubt true, as a general rule, that the mistake of a transcriber or printer cannot change the law; and that when the statutes published by authority are found to differ from the original on file among the public archives, that the courts will receive the latter as containing the expressed will of the legislature in preference to the former."); Epstin v. Levenson, 4 S.E. 328, 328 (Ga. 1887) ("If we should go by the act as published by the public printer, the printer would have the power to make any law he wished, just by changing the act of the legislature. We think that when an act has passed both branches of the legislature, and has received the approval and signature of the governor, the publication is complete."); Meracle v. Down, 25 N.W. 412, 414 (Wis. 1885) ("To hold that chapter 314 is a valid law merely because it has been printed as such in the statutes, when it was never enacted, would be, in effect, to vest the power of legislation in some dishonest or inaccurate clerk. Of course the legislature, when it enacted section 4135, could not have intended anything so absurd and intolerable.").

lature," as one court put it.[216] In the words of a New York court:

> We live under a government of laws, reaching as well to the legislative as to the other branches of the government; and if we wish to uphold and perpetuate free institutions, we must maintain a vigilant watch against all encroachments of power, whether arising from mistake or design, and from whatever source they may proceed. The constitution is explicit in its terms. . . . To give efficiency to this provision, and secure the people against the exercise of powers which they have not granted, we must, I think, when called on to do so, look beyond the printed statute book . . . .[217]

Here, the freedom to disregard legislative endorsements—and to conduct independent inquiries into the content of statutory law—was inherent to the judicial power to enforce state or federal constitutions. Those constitutions specified who could make statutory law, and how they could make it. Courts, as actors empowered to enforce those provisions, could rightly look past legislative preferences and conduct independent inquiries to locate the statutory law that the legislature had produced in accordance with such constitutional requirements.

In sum, American courts have traditionally proven unwilling to accept legislative constraints on the documents they will consider as evidence of statutory law, via evidentiary standards or otherwise. This trend has not been without exception, it should be noted. With respect to evidentiary standards, at least one state court in the codification era said that the legislature could override its default approach to statutory documents.[218] And with respect to the broader universe of legislative certifications, the Supreme Court[219] and some state courts[220] did defer to attestations on enrolled bills (with the

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216 *Simpson*, 110 F. at 802.

217 People v. Purdy, 2 Hill 31, 34 (N.Y. Sup. Ct. 1841); *see also* Purdy v. People, 4 Hill 384, 390–91 (N.Y. 1842) (affirming conclusion, but with additional emphasis on presumed legislative intent).

218 Sherman v. Story, 30 Cal. 253, 279 (1866) ("If any inconvenience is likely to result from the common law rule, the Legislature is the proper body to provide a remedy."); *see also* State *ex. rel.* Colbert v. Wheeler, 89 N.E. 1, 3–4 (Ind. 1909) (quoting *Sherman*, 30 Cal. at 258–59, 275–76). State courts also defer to Congress's evidentiary standards for sister states' laws, of course, but those standards are anchored in Congress's unique Full Faith and Credit power. *See* U.S. CONST. art. IV, § 1.

219 In *Marshall Field*, the Supreme Court announced that it would defer to these attestations and treat enrolled bills as conclusive (rather than, for example, comparing it to legislative journals). 143 U.S. 649, 672 (1892).

220 *See In re* Duncan, 139 U.S. 449, 455–56 (1891) (observing that, among the states, "[t]he decisions are numerous, and the results reached fail of uniformity");

Court further acknowledging Congress's power to alter this rule).[221] However, enrolled bills have unique features that explain this exceptional treatment—a justifiable anomaly to a broader trend of courts resisting legislative intrusion in the ascertainment of statutory law.[222]

In sum, American courts have grappled before with their role regarding statutory documents bearing evidentiary provisions. These cases helpfully demarcate the boundary of the judicial power, as historically understood. Both textualists[223] and non-textualists[224] have suggested such understanding should shape courts' modern-day purview. And while exceptions did emerge, the historical trend was clear: evidentiary

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GREENLEAF, *supra* note 213, at 629–30 (claiming that it "has been a subject of much controversy" and that "the majority [of states] (perhaps justified in part by constitutional phraseology) refuse to treat the enrolment as conclusive.").

221 Signed by the presiding Member of each chamber, an enrolled bill bears signatures that attest to its contents and passage. Harwood v. Wentworth, 162 U.S. 547, 560 (1896) ("[I]f the principle announced in *Field v. Clark*involves any element of danger to the public, it is competent for Congress to meet that danger by declaring under what circumstances, or by what kind of evidence, an enrolled act of Congress . . . may be shown not to be in the form in which it was when passed by Congress or by the territorial Legislature."); *see also Sherman*, 30 Cal. at 279 ("[The Legislature] can guard by proper restrictive provisions against other and greater inconveniences by designating the cases in which, and the circumstances and limitations under which an enrolled statute may be impeached.").

222 First, courts deferred to enrolled bills because of concern over interference with the pre-enactment legislative process, a concern inapplicable to the post-enactment assembly of the Code. *See, e.g.*, Whited v. Lewis, 25 La. Ann. 568, 569 (1873) (underscoring this distinction). Second, courts have emphasized that there typically is no reason to suspect that publications would diverge from enacted law. *See, e.g.*, *Marshall Field*, 143 U.S. at 672–73 ("[T]his possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy . . . ."); United States v. Amedy, 24 U.S. (11 Wheat.) 392, 408 (1826) ("Any subsequent alteration or subtraction would be a public crime of high enormity; and the commission of a crime is not to be presumed."). For the Code, no guesswork is necessary: Congress has explicitly directed OLRC to modify its texts, and OLRC is public about its adherence to this mandate. *See Detailed Guide to the United States Code Content and Features*, OFF. L. REVISION COUNS., https://uscode.house.gov/detailed_guide.xhtml (last visited May 31, 2023) [https://perma.cc/23LR-E4MN] (explaining OLRC's editorial role). Third, if anything, the legal community's view of the branches has moved steadily away from a vision as co-equal guardians of constitutional structure found in some cases asserting the enrolled bill rule, and toward a vision of the courts as robustly empowered to act as the supervisors of constitutionality. On the Founding vision of the branches as equal defenders of the Constitution, *see, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2006).

223 *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 98–108 (2001); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

224 *See, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1038 (2001) (arguing that "the judicial Power" includes the power of equitable interpretation).

provisions cannot limit courts' judicial notice powers to seek out the best evidence of statutory law, particularly when they threaten to entrust quasi-legislative power to post-enactment editors and publishers.

2. *Understanding the U.S. Code*

American courts therefore have tended to view evidentiary provisions for statutory law with skepticism. In particular, they have raised concerns when these evidentiary provisions are applied to edited codifications, as evidentiary provisions here can have the troubling effect of entrusting legislative power to non-legislative editors. This means that evidentiary standards raise serious concerns when applied to the United States Code—a document that is the creative product of post-enactment editors.

While this creative dimension of the Code is partly avoidable, it also results from a more fundamental issue: the laws simply are ill suited to evidentiary standards. Such standards typically are a legislative solution to a consistent problem: how to take an authoritative original document, often in the custody of government officials, and publicize its contents to far-flung actors (and in a reliable and authoritative manner).[225] To address this challenge, legislatures developed a practice whereby they issue three interlocking statutory instructions. For most laws, however, this three-step strategy is impossible—revealing a key dimension of our law along the way.

Consider each step of this evidentiary process. First, the legislature directs the printing, publication, or transmission of the document. This practice has readily extended to statutes: legislatures have regularly provided for the distribution of document copies produced under state authority, including for statutes.[226] In England, before the advent of printing, the clerk of Parliament would produce transcripts of statutes to send to county sheriffs, who proclaimed the statutes in county courts that retained the transcripts on file.[227] With the rise of printing, English statutes instead would be printed and published—

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225 It is a challenge akin to that which, under the Full Faith & Credit Clause, Congress also assumes with respect to state laws. U.S. CONST. art. IV, § 1.

226 Blackstone noted that England employed three ways to notify the public of laws: by longstanding tradition (e.g., common law), public readings (e.g., proclamations), and writing or printing ("which is the general course taken with all our acts of parliament"). 1 WILLIAM BLACKSTONE, COMMENTARIES 45–46 (Univ. Chi. Press 1979) (1765–1769).

227 1 DWARRIS, *supra* note 178, at 10*; see also* Gardner v. Collector, 73 U.S. (6 Wall.) 499, 507–08 (1867); BLACKSTONE, *supra* note 226, at 178.

a practice that would transfer to the United States.[228] At the state level, publication of statutes was even required by many state constitutions.[229] At the federal level, Congress provided for publication of the laws as early as 1789[230] (and also for printing of the laws of the territories).[231] As an 1842 treatise observed:

> It is the invariable course of the Legislatures of the several States, as well as of the United States, to have the laws and resolutions of each session printed by authority. Confidential persons are selected to compare the copies with the original rolls, and superintend the printing. The very object of this provision is to furnish the people with authentic copies . . . .[232]

Second, the legislature would require a certification or authentication of this published document. Here, the government looked to vouchsafe that the publication was authentic and accurate. Prior to modern printing technologies, certification and authentication practices had been developed for a variety of governmental documents—and were applied to stat-

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228 *See* BLACKSTONE, *supra* note 226, at 178 (explaining that, since the invention of printing, "a copy [of the statute] is usually printed at the king's press, for the information of the whole land").

229 *See, e.g.*, KAN. CONST. art. 2, § 19 (1861) ("The Legislature shall . . . provide for the speedy publication of [acts]; and no law of a general nature, shall be in force until the same be published."); WIS. CONST. art. 7, § 21 (1848) ("The legislature shall provide by law for the speedy publication of all statute laws . . . . And no general law shall be in force until published."); MD. CONST. art. 3, § 29 (1864) (every law shall "in due time be printed, published, and certified under the Great Seal to the several courts . . . ."); IND. CONST. art. 4, § 28 (1851) ("No act shall take effect, until the same shall have been published and circulated in the several counties of the State by authority, except in case of emergency; which emergency shall be declared in the preamble or in the body of the law."); IOWA CONST. art. IV, § 27 (1846) ("No law of the General Assembly, of a public nature shall take effect until the same shall be published and circulated in the several counties of this State, by authority. If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state."); ALA. CONST. art. 1, § 9 (1867) (criminal punishment permitted only under law "established and promulgated prior to the offense"); *see also* Gilmore v. Landsidle, 478 S.E.2d 307, 312 (1996) ("The publication requirement of [the Virginia constitution] is a provision that is common to many state constitutions.").

230 Act of Sept. 15, 1789, ch. 14, 1 Stat. 68 (requiring publication in three newspapers and the sending of two "duly authenticated" copies to state executives); *see also* Act of Feb. 18, 1791, 1 Stat. 224 (permitting any printer, under the direction of the Secretary of State, to print "the laws, resolutions, and treatises of the United States"); Act of Mar. 3, 1795, ch. 50, § 1, 1 Stat. 443, 443 (requiring printing of complete edition of the federal laws).

231 *See, e.g.*, Act of May 8, 1792, ch. 42, § 1, 1 Stat. 285, 285 (printing of laws of Northwest Territory and federal laws, to be delivered to territory governor and judges for distribution).

232 GREENLEAF, *supra* note 213, at 628.

utes in England,[233] the states,[234] and Congress.[235] These practices were readily extended to printed documents in both England and America,[236] with Congress requiring official certifications on publications of statutes as early as 1791,[237] and also on published constitutional amendments[238] and the Revised Statutes.[239] Today, these certification requirements remain in place for a host of legislative documents, including bills that pass one[240] or both[241] chambers, the Statutes at Large,[242] and copies of the U.S. Code Supplement.[243]

On these publications, certification was understood to serve a purpose: it vouched that an authorized government official had confirmed the accuracy and authenticity of the

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233 *See* State *ex rel.* Pangborn v. Young, 32 N.J.L. 29, 33, 42 (1866) (describing authentication for enrolled bills as "the invariable course of legislative practice . . . from the earliest times," and discussing English practice of affixing certificate from the Court of Chancery); Gardner v. Collector, 73 U.S. (6 Wall.) 499, 507–08 (1867) (discussing act requiring clerk of Parliament to indorse the date of the King's approval upon the roll of each statute).

234 Congress's full faith and credit statute effectively required state seal. *See* Act of May 26, 1790, ch. 11, 1 Stat. 122. For constitutional requirement to attach seal, see, for example, DEL. CONST. art. 19 (1776). For courts discussing additional state certifications, see, for example, Martin v. Payne, 11 Tex. 292, 294–95 (1854); Leland v. Wilkinson, 31 U.S. (6 Pet.) 317 (1832); Fouke v. Fleming, 13 Md. 392, 413 (1859); People v. Purdy, 2 Hill 31 (N.Y. Sup. Ct. 1841); Henthorn v. Doe *ex dem.* Shepherd, 1 Blackf. 157, 158 (Ind. 1822); Duncombe v. Prindle, 12 Iowa 1, 11 (1860); State *ex rel.* Colbert v. Wheeler, 89 N.E. 1, 2 (Ind. 1909).

235 *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 671 (1892) ("Although the Constitution does not expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication.").

236 English practice had long extended it to exemplifications under seal. *See* State v. Carr, 5 N.H. 367, 369–70 (1831). This article discusses seals, exemplifications, and certifications together, but these carried different weight in English courts. *See* THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 257 (10th ed. 1876).

237 Act of Feb. 18, 1791, 1 Stat. 224.

238 Act of Apr. 20, 1818, ch. 80, § 2, 3 Stat. 439.

239 Act of June 20, 1874, ch. 333, § 2, 18 Stat. 113; Act of Dec. 28, 1874, ch. 9, § 1, 18 Stat. 293.

240 1 U.S.C. § 106.

241 *Id.*

242 1 U.S.C. § 112.

243 1 U.S.C. § 209 (published by GPO with its imprint).

publication.[244] Congress[245] and state legislatures[246] therefore would present certification as a check for accuracy,[247] and state courts regularly observed this quality of certification,[248] as did the Court.[249]

Third, the legislature would specify the level of evidence to be accorded to the certified publication.[250] Of course, such specification was not always necessary; courts often would decide unilaterally to award a certified publication heightened evidentiary status. This is not surprising, since a goal of evidentiary standards is to protect courts from bad or misleading evidence, and certifications provide a bureaucratic safeguard against such bad evidence.[251] In England, seals and attesta-

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244 This accorded with prior English practice. *See* STARKIE, *supra* note 236, at 257 ("Nothing but records can be given in evidence exemplified under the great seal, for these are presumed to be preserved by the court free from erasure or interlineation, to which private deeds which are in the hands of private persons, are subject.").

245 *See, e.g.*, Resolution of Feb. 18, 1791, 1 Stat. 224 (directing printer to "collate . . . and correct by the original rolls" the laws to be printed, and print them with a "certificate of their having been so collated and corrected").

246 *See, e.g.*, IOWA CODE § 3.35 (1880) ("[Secretary of state shall publish laws] to which he shall attach his certificate that the acts, resolutions and memorials therein contained are truly copied from the original rolls. . . ."); MO. REV. STAT. § 6613 (1889) (proof sheet of Revised Statutes given to committee and Secretary of State, "who shall carefully examine the same and make all corrections therein, and such proof sheets of new or revised acts shall be compared with the original rolls and when such comparisons and corrections are fully made, and said statutes printed, said secretary and the chairman of said committee shall certify that the same have been examined and compared with such original acts, and that the same are true and correct copies thereof as passed and remaining in the office of the secretary of state. . . .").

247 Gardner v. Collector, 73 U.S. (6 Wall.) 499, 507 (1867) (discussing official "who is to be the future custodian of the statute—who alone can give certified copies of it, and from whose office the legally authorized publisher receives the copy from which it is printed").

248 *See, e.g.*, State *ex rel.* Pangborn v. Young, 32 N.J.L. 29, 35 (1866) ("[T]he legislature has with care, and a wise precaution, adopted a mode of certifying its own acts in an authentic form. And, indeed, so completely has this purpose been effected that it appears hardly practicable to suggest additional safe guards."); Mayor of Annapolis v. Harwood, 32 Md. 471, 477–78 (1870) ("The object of these careful provisions was to guard against controversy in respect to the *contents* of laws. To attest the verity of the contents of a law all these solemnities are invoked."); *see also* Duncombe v. Prindle, 12 Iowa 1, 11 (1860) (discussing procedure undertaken by Supreme Court of Iowa to ensure the accuracy and authenticity of a published law).

249 *See supra* note 247.

250 IOWA CODE § 3.35 (1880) ("[C]ertificate that the acts, resolutions and memorials therein contained are truly copied from the original rolls, shall be presumptive evidence of their correctness . . . .").

251 *See* FED. R. EVID. 902(2).

tions have long been treated as definitive.[252] In America, the states have consistently given evidentiary weight to publications by state authority,[253] and the United States Supreme Court noted in 1826[254] and again in 1832[255] that certification can confer evidentiary weight (the latter opinion by John Marshall). In *Marshall Field*, the Court said the same of attestations on enrolled bills.[256]

Still, Congress did also regularly specify the evidentiary weight to attribute to its certifications. By the time that the 1926 Code was published, Congress had taken this approach for a tremendous array of documents, including trademarks,[257] marriage certificates,[258] land titles,[259] land sale records,[260] bonds,[261] contract returns,[262] post office records,[263] patents,[264] marshals' bonds,[265] and bank organization certificates.[266] It had done this for publications by the

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252 *See Pangborn*, 32 N.J.L. at 41–43 (tracing the English history of seals and certifications importing verity).

253 *See, e.g.*, Reed v. Clark, 20 F. Cas. 433, 433 (C.C.D. Mich. 1844) ("The printed acts are declared to be the law of the land and are received as such, having been published by authority, and under the special superintendency of the secretary of state, by all the courts of the state."); Charleston Nat'l Bank v. Fox, 194 S.E. 4, 7 (W. Va. 1937) ("The printed acts are presumed to be valid enactments."); Martin v. Payne, 11 Tex. 292, 294–95 (1854) ("[I]t is declared that the printed statute books of the several States and Territories of the United States . . . shall be evidence in like manner.").

254 United States v. Amedy, 24 U.S. (11 Wheat.) 392, 407–08 (1826) ("[T]o afford additional proof of identity, the Secretary has on each copy annexed his own signature, with an attestation of its being a true copy. There is, therefore, no presumption, from the face of the papers, or otherwise, of any alteration or addition since the seal of the State was annexed.").

255 Leland v. Wilkinson, 31 U.S. (6 Pet.) 317, 319 (1832).

256 Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892) ("The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated . . . .").

257 Act of Mar. 19, 1920, chs. 104, 105, § 7, 41 Stat. 535.

258 Act of Mar. 3, 1887, ch. 397, § 9, 24 Stat. 635, 636; Act of Mar. 4, 1909, Pub. L. 60-350, § 319, 35 Stat. 1088, 1149–50.

259 *See* 73 Rev. Stat. § 5588 (1875).

260 35 Rev. Stat. § 3203 (1875); Act of Mar. 1, 1879, Pub. L. 45-125, 20 Stat. 327, 332.

261 13 Rev. Stat. § 795 (1875); Act of June 24, 1898, § 2, 30 Stat. 487; 13 Rev. Stat. § 795 (1875); Act of Feb. 22, 1875, ch. 96, § 3, 18 Stat. 333, 333; Act of Mar. 3, 1911, Pub. L. 61-475, § 220, 36 Stat. 1087, 1152–53.

262 13 Rev. Stat. § 888 (1875).

263 13 Rev. Stat. § 889 (1875); Act of June 10, 1921, Pub. L. 67-13, § 306, 42 Stat. 20, 24–25.

264 13 Rev. Stat. § 892 (1875); Act of Mar. 4, 1925, Pub. L. 68-611, § 2, 43 Stat. 1269.

265 13 Rev. Stat. § 783 (1875).

266 13 Rev. Stat. § 885 (1875).

Secretary of Labor,[267] the Solicitor of the Treasury,[268] the Comptroller of the Currency,[269] the General Land Office,[270] the Secretary of the Treasury,[271] the Commissioner of Indian Affairs,[272] and other executive departments.[273] In all these provisions, certification was the prerequisite to statutorily-conferred evidentiary legitimacy.

Beginning in 1846, Congress also extended this approach to publications of statutes.[274] The 1846 statute declared:

> **Sec. 2.** And whereas said edition of the said Laws and Treaties of the United States has been carefully collated and compared with the original rolls in the archives of the government, under the inspection and supervision of the Attorney-General of the United States, as duly certified by that officer; therefore, *Be it further enacted,* That said edition of the Laws and Treaties of the United States, published by Little & Brown, is hereby declared to be competent evidence . . . .[275]

Congress would apply similar evidentiary provisions to statutory publications in 1874,[276] 1877,[277] 1880,[278] and 1890.[279]

When Congress provided in 1926 for publication of the U.S. Code, it enacted two evidentiary standards for the Code, as previously explained.[280] One was accompanied by a certification requirement, as usual.[281] Here, it directed GPO to publish the Code bearing the GPO imprint, and it declared that such certified copies "shall be conclusive evidence of the origi-

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267 Act of June 29, 1906, ch. 3592, § 28, 34 Stat. 596, 606.
268 13 Rev. Stat. § 883 (1875).
269 13 Rev. Stat. § 884 (1875).
270 13 Rev. Stat. § 891 (1875).
271 Act of Sept. 21, 1922, Pub. L. 67-318, 42 Stat. 858, 966.
272 Act of July 26, 1892, Pub. L. 52-264, § 3, 27 Stat. 272, 273.
273 13 Rev. Stat. § 882 (1875) ("Copies of any books, records, papers, or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof.").
274 *See* Dwan & Feidler, *supra* note 148, at 1008–11 ("So far as the writers have been able to ascertain, that was the first time that a provision of that kind was made with reference to any published volumes of the federal statutes."). The 1789 Act is ambiguous on whether it contained such a provision.
275 Act of Aug. 8, 1846, Pub. L. No. 29-100, § 2, 9 Stat. 75, 76.
276 Act of June 20, 1874, ch. 333, §§ 2, 8, 18 Stat. 113, 113–114 (for Revised Statutes and Statutes at Large).
277 Act of Mar. 8, 1877, ch. 82, § 4, 19 Stat. 268, 269.
278 SUPPLEMENT TO THE REVISED STATUTES OF THE UNITED STATES 312 (William A. Richardson ed., 1891).
279 SUPPLEMENT TO THE REVISED STATUTES OF THE UNITED STATES ___ (William A. Richardson ed., 1891).
280 *See supra* Part II.B.
281 Pub. L. No. 69-440, § 2(b).

nal of the Code in the custody of the Secretary of State."[282] By contrast, the other evidentiary standard lacked an accompanying certification requirement. Here, it provided that "[t]he matter set forth in the Code . . . shall establish prima facie the laws of the United States," but no governmental actor was required to certify its accuracy.[283] This raises the question: why did Congress conspicuously omit a certification requirement in the latter instance? Why, despite attaching an evidentiary provision, did it depart from its usual three-step verification process?

There are several factors that may have contributed,[284] but one is fundamental: *there is no original document against which the Code's accuracy can be certified*. Assembling the Code is an act of production, not of reproduction. As a report of "the laws" of the United States, the U.S. Code is a copy without an original.

In this regard, the Code hearkens back to the foundations of our statutory law. The original versions of many foundational English statutes were destroyed,[285] especially in the Barons' wars of the 1200s.[286] English legal authorities decided that these statutes remained in force despite the absence of any authoritative, original copy. As a result, many important English statutes existed only as copies of an absent original.[287] This apparently provided one impetus for courts to begin taking judicial notice of statutes; if left to typical rules of pleading and evidence, many statutes would have been found lacking, since binding original texts no longer existed.[288] Going for-

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282 *Id.*

283 Pub. L. No. 69-440, § 2(a).

284 It also might have been assumed that the ongoing involvement of the House Committee on the Revision of the Laws would provide some comparable level of quality assurance, or that certification was unnecessary for purposes of authentication under Federal Rules of Evidence. *See Tress*, *supra* note 89, at 143–44; FED. R. EVID. 901(1). However, this second answer would apply to any publication of statutes, yet many others do receive certification.

285 Dwarris cites Statutes of Merton and Marlbridge as examples of statutes that were the "most important of the early statutes" and were lost or destroyed. 2 DWARRIS, *supra* note 178, at 466. While early statutes, these were not so early that they were considered to exist from time immemorial and therefore to be part of the common law. *Id.*

286 *Id.*

287 *See* SEDGWICK, *supra* note 21, at 93–94; 2 DWARRIS, *supra* note 178, at 466.

288 *See* Gardner v. Collector, 73 U.S. (6 Wall.) 499, 509 (1867) ("[M]any ancient statutes were no longer to be found, which yet were within the time of legal memory, and could not, therefore, be treated as common law. In order to prevent their existence being brought to the test of proof by record, the principle was adopted that the court should take notice of them; and that the judges are to inform themselves in the best way they can.").

ward, therefore, statutes would be proved by recourse to remaining copies and other secondary sources—sources that left it to courts to imaginatively reconstruct a missing underlying text.[289]

Despite this heritage, however, this is not how courts and lawyers typically think about our statutory law. Instead, they tend to assume that published versions of "the laws" are reproducing authoritative texts housed somewhere (perhaps in the National Archives), which are the original versions of the laws. Yet Congress has made clear that "the laws" are something other than these archival documents. After all, Congress has directed the Archivist to "carefully preserve the originals" of statutes, even as Congress also directs that the laws change via amendments.[290] By changing laws without modifying archival documents, Congress reveals that they are different things. Congress has clarified, in other words, that the task to be performed with bicameralism-and-presentment documents is custodial. The assembly of the "laws," by contrast, is creative—so it will have to occur elsewhere.

To the extent that Congress has directed any office to undertake this act of creative assembly, it has done so by directing OLRC to put together the U.S. Code. In so doing, however, it has tasked OLRC with the production of a Code that is creative in two distinct senses. First, as Part I.A explained, any attempt to produce an *assembled statutory text* in our modern, heavily-amendatory statutory regime will be creative. Second, as Part I.B explained, the Code was not designed simply to report the content of the laws. Rather, it was designed to be an *improved statutory text*. This is especially true for non-positive titles, where the avowed goal is not to assemble current law, but to imagine what federal law would look like had it been enacted into a comprehensive legal code.[291] This further

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289 *See, e.g.*, *Gardner*, 73 U.S. at 510 ("'[T]here are many old statutes which are admitted, and obtain as such, though there be no record at this day extant thereof; nor yet any other written evidence of the same but which is in a manner only traditional, as namely, ancient and modern books of pleadings, and the common received opinion and reputation and approbation of the judges learned in the laws.'") (quoting MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 16 (London: J. Nutt for J. Walthoe Jr., 2d ed. 1716)); SEDGWICK, *supra* note 21, at 26 (noting that, tracing to this English past, "the existence of a public act is determined by the judges themselves, who, if there be any difficulty, are to make use of ancient copies, transcripts, books, pleadings, or any other memorial, to inform themselves.").

290 1 U.S.C. § 106a.

291 *See supra* Part I.

makes the Code a creative document, as opposed to a purely clerical one.

This is why evidentiary standards for the Code are troubling. They are an attempt to bind courts, in the interpretation of federal statutory law, to the creative work of post-enactment actors.[292] While courts have developed a habit of blithely citing the evidentiary standards for the U.S. Code,[293] therefore, these standards do not (and cannot) meaningfully constrain the courts.[294] To understand courts' proper role in statutory cases, we must look elsewhere.

III
CONSTRUCTING FEDERAL LAW

In Part II, it was argued that the Code's evidentiary standards do not mean what courts and scholars have assumed, and that even if they did, the judicial power directs courts to ignore them. This Part asks: if not constrained by evidentiary standards, how should courts understand the judicial role in statutory cases? Where should they find, or how should they construct, statutory law?

In cases that have posed these questions, Section A explains, courts historically have understood the judicial power to entail an obligation to pursue the best evidence of the text enacted and envisioned by the legislature. As Section B adds, this is precisely the search that Congress's evidentiary standards were meant to direct interpreters to undertake anyhow.

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292 In prior work, Abbe Gluck and I noted that much of the creative work of Congress's nonpartisan bureaucracy—as well perhaps as effort to bind courts to that work—might be legitimated as the deference due to Congress's constitutional power to determine its own rules, procedures, and lawmaking structures. *See* Cross & Gluck, *supra* note 12, at 1553. For my view on the extent to which that deference does reasonably extend to this post-enactment work, see *infra* Part IV.B.

293 *See supra* notes 97–100.

294 A *prima facie* interpretation of the standard for positive law titles might be unobjectionable, which could be reached by accepting the interpretation of "legal evidence" developed in Section A. On the canon counseling courts to avoid interpretations that raise constitutional concerns, see WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION 512–13 (2014). But such a standard also ceases to do the constraining work that modern courts have asked it to perform.

On prima facie standards as nonsensical for statutes, see SUTHERLAND, *supra* note 167, § 57, at 97–98 ("Judicial knowledge takes in its whole range and scope at once; it embraces simultaneously, in contemplation of law, all the facts to which it extends. It would be a solecism to hold that a statute regularly authenticated is *prima facie* valid, if there exists facts of which the court must take judicial notice showing it to be void.").

A. Judicial Obligation

In the absence of binding evidentiary standards, how do courts prioritize among legislative documents and construct statutory law? Typically, they have been guided by an overarching principle: seek out the best evidence of the law that appeared for the enacting legislature. As one treatise put it, "[j]udges are bound to take the act of Parliament as the Legislature [has] made it."[295] It is that version of the law, courts have explained, that bears a crucial connection to the will of the legislature.[296] In this sense, while courts have not felt themselves bound by evidentiary standards, they have felt limited by the nature of the judicial task, which entails a natural hierarchy of documents. As one state court put it, they were seeking out the statutory text that had "been through . . . official hands" because text divorced from legislative enactment was merely "fugitive paper" to be disregarded.[297]

This understanding of the judicial task has tended to naturally generate a hierarchy of statutory documents. For example, it typically has led courts to prioritize the enrolled bill over printed versions.[298] As the Court explained in *Pease v. Peck*:

> It is no doubt true, as a general rule, that the mistake of a transcriber or printer cannot change the law; and that when the statutes published by authority are found to differ from the original on file among the public archives, that the courts will receive the latter as containing the expressed will of the legislature in preference to the former.
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> . . . .

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295 2 DWARRIS, *supra* note 178, at 598.

296 *See, e.g.*, Pease v. Peck, 59 U.S. 595, 596–98 (1856); Simpson v. Union Stock Yards Co., 110 F. 799, 802 (C.C.D. Neb. 1901) ("The title as well as all provisions of the act must be the work of the legislature. Not a word can be added to or taken from the title by the governor. I have no doubt but that the engrossing clerk made a mistake . . . ."); Duncombe v. Prindle, 12 Iowa 1, 11 (1860) ("This enrolled bill, thus filed and preserved in the Secretary's office, is the authenticated copy of the real bill which the General Assembly passed, and is the ultimate proof of the true expression of the legislative will . . . ."); Dayton v. Pac. Mut. Life Ins. Co., 210 N.W. 945, 947 (Iowa 1926) ("From this review, it is quite apparent that there is no link missing in the legislative chain, and the enrolled bill is the exclusive and conclusive evidence and ultimate proof of the legislative will."); Johnson v. Barham, 38 S.E. 136, 137 (Va. 1901) ("The enrolled bill is the best and controlling evidence of the legislative intent.").

297 Charleston Nat'l Bank v. Fox, 194 S.E. 4, 9 (W. Va. 1937).

298 *See, e.g.*, *Simpson*, 110 F. at 801 ("It is now settled beyond all debate that a printed official statute must give way to and be controlled by the official enrollment . . . ."); STARKIE, *supra* note 236, at 277 n.1 ("A printed statute may be corrected by the enrolled bill filed in the department of State."); *see also* 2 DWARRIS, *supra* note 178, at 473 ("Where the copy of an act is incorrect, the Court will be governed by the Parliament Roll.").

> That is the only original, if there be any such in existence, by which the printed copy could be corrected or amended. But to correct or amend the declared will of the legislature, as published under their authority, by the words of a document which did not emanate from them, which it is most probable they never saw, or if seen, they did not see fit to adopt where it differed from the published statutes, would be, in our opinion, judicial legislation, and arbitrary assumption.[299]

State courts regularly reached the same conclusion, holding that enrolled bills trump printed versions due to their superior connection to the legislative will[300] and to the enactment process.[301]

The same principle regularly has guided courts weighing whether to look past enrolled bills to legislative journals. For those that have looked to the journals, it typically has been because they believed the journals might provide insight into the text that the legislature confronted.[302] For those that adopted the enrolled bill rule, their approach has been anchored partly in this same interpretive principle. According to these courts, legislative journals were too unreliably kept—too incomplete and sloppily recorded—to provide trustworthy insight into the legislative text and intent that the legislature understood itself to be enacting.[303] On either side, courts were guided by the same search for the best evidence, and the same view of the judicial task. They just reached differing conclusions about its application.

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299 *Pease*, 59 U.S. at 596–98.

300 *See, e.g.*, Combs v. City of Bluefield, 125 S.E. 239, 240 (W. Va. 1924) ("[T]he enrolled bill is the best evidence of the intent of the Legislature."); *Barham*, 38 S.E. at 137 ("The enrolled bill is the best and controlling evidence of the legislative intent."); *see also* Hutchings v. Bank, 20 S.E. 950, 952 (Va. 1895); McLaughlin v. Menotti, 38 P. 973, 973 (Cal. 1895); Meracle v. Down, 25 N.W. 412, 414 (Wis. 1885); Goldsmith v. Augusta & Savannah R. Co., 62 Ga. 468, 471–72 (1879).

301 *See, e.g.*, State v. Byrum, 83 N.W. 207, 208 (Neb. 1900) ("No mere erroneously printed statute or law, by legislative sanction, can take the place of or override the law as actually passed, enrolled, approved, and deposited in the office of the secretary of state, the proper custodian."); *Duncombe*, 12 Iowa at 11 ("There is no other bill, original or a copy, to which the signatures of the President of the Senate and Speaker of the House of Representatives are affixed, or to which is appended the approval by the Governor."); *see also* Bruce v. State, 67 N.W. 454, 454 (Neb. 1896); Freeman v. Gaither, 76 Ga. 741, 742–43 (1886); State v. Groves, 88 N.E. 1096, 1097–98 (Ohio 1909).

302 *See, e.g.*, Field. v. Clark, 143 U.S. 649, 674–80 (1892) (surveying numerous state cases and their approaches to journals).

303 *See, e.g.*, *id.* (surveying numerous state cases finding journals are messy, bad evidence).

This principle also has been consistently applied to positive law codifications. There, the question has been *which* legislative intent to focus upon. Some courts have looked hard for any separate legislative intent in the codification bill itself.[304] Others emphasized the need to look past the codification, and to seek out the intention of the underlying statutes collected therein. Those courts sometimes emphasized that codifiers were not given authority to change law.[305] With this latter approach, the search for legislative intent dovetailed with long-standing interpretive doctrine, under which courts held that a new enactment of existing statutory text brings interpretations of the prior law along with it (though the Court has recently created new ambiguity on this front).[306] The Court repeatedly applied this principle to the Revised Statutes[307] and has extended it to codification in the U.S. Code.[308]

In these cases, courts occasionally would balance the value of locating legislative intent against other competing values, it should be noted. These values included public notice,[309] reli-

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304 *See Pease*, 59 U.S. at 598; Fid. & Columbia Tr. Co. v. Meek, 171 S.W.2d 41, 45 (Ky. 1943).

305 *See* City of Atlanta v. Gate City Gas Light Co., 71 Ga. 106, 119–20 (1883).

306 *Compare, e.g.*, Pennock v. Dialogue, 27 U.S. 1, 2 (1829) ("Where English statutes . . . have been adopted into our own legislation; the known and settled construction of those statutes by courts of law, has been considered as silently incorporated into the acts; or has been received with all the weight of authority."), *with* Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes.").

307 United States v. Ryder, 110 U.S. 729, 739–40 (1884); McDonald v. Hovey, 110 U.S. 619, 628 (1884); United States v. LeBris, 121 U.S. 278, 280 (1887); Logan v. United States, 144 U.S. 263, 302 (1892); United States v. Mason, 218 U.S. 517, 525 (1910); Anderson v. Pac. Coast S.S. Co., 225 U.S. 187, 198–99 (1912).

308 Finley v. United States, 490 U.S. 545, 554 (1989) ("[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.") (quoting *Anderson*, 225 U.S. at 199); *see also* Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222, 227 (1957); Tidewater Oil Co. v. United States, 409 U.S. 151, 162 (1972).

309 Scott v. Clark Cnty., 34 Ark. 283, 285 (1879) (citing notice as supporting enrolled bill rule); *but see* Town of South Ottawa v. Perkins, 94 U.S. 260, 269 (1876) (noting that "[n]ot only the courts, but individuals, are bound to know the law").

ance,[310] and the rule of law.[311] In *Pease*, for example, the Court ultimately upheld the printed version of the statute due to longstanding reliance upon it and legislative acquiescence to it.[312] However, these competing values are relevant only to situations where one version of a statute is publicly available, and another is not. As the Court put it in *Pease*, they involve situations where an original document must be "disinterred from the lumber room of obsolete documents."[313] As such, these competing values have little relevance to the U.S. Code, where a version of statutory law that is closer to Congress—the Statutes at Large—similarly is published by authority.[314] In such situations, courts traditionally have understood the judicial power to entail an obligation to identify and rely upon the statutory law that appeared before (and to construct the law envisioned by) the legislature.

B. Congressional Instructions

With respect to publications like the U.S. Code, therefore, courts typically have prioritized the documents that provide the best evidence of the legislative text that appeared to enacting legislators, and that therefore was connected to legislator intent. When we take a holistic view of Congress's evidentiary provisions and rules of construction for the U.S. Code, what emerges actually is a legislature encouraging courts to take this same approach.

First, consider non-positive law titles. In the statute providing the original 1926 edition of the Code, the provision declaring the Code prima facie evidence read in full:

> The matter set forth in the Code . . . shall establish prima facie the laws of the United States, general and permanent in their nature . . . but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new

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310 Pease v. Peck, 59 U.S. 595, 599 (1856); Field v. Clark, 143 U.S. 649, 670 (1892) (noting enrolled bill is the version "on which depend public and private interests of vast magnitude"); State v. Marshall, 14 Ala. 411, 414–15 (1848) (emphasizing enrolled copy had only "exist[ed] for a few years"); Indep. Fin. Inst. v. Clark, 990 P.2d 845, 854 (Okla. 1999) ("However, we also realize that the Department's interpretation was relied upon by the industry for twenty-seven years . . . ."); *In re* Vanderberg, 28 Kan. 243, 257–58 (1882) (holding that, partly due to reliance, the court would need unambiguous evidence in the journal that a law was not properly enacted).

311 *See, e.g.*, *Field*, 143 U.S. at 674 (noting concern that looking to journals would open many laws to cynical challenge).

312 *Pease*, 59 U.S. at 599.

313 *Id.*

314 1 U.S.C. § 112.

> law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.[315]

Here, a rule of construction follows the establishment of the prima facie standard: one which provides that, for non-positive titles, interpreters shall prioritize underlying enactments, not the Code, in any case of inconsistency. Interestingly, this rule of construction still appears to be in effect, despite not appearing alongside the prima facie standard in the current Code (or anywhere else in the Code).[316] When this rule of construction is viewed alongside the prima facie standard, it makes explicit what already is implied in the standard itself: Congress wants interpreters to look beneath the Code and give effect to statutory law as it appears in the underlying legislative documents.[317] The Supreme Court even recognized this meaning in the wake of the Code's enactment.[318]

Next, consider positive law titles. Here, Congress applied a "legal evidence" standard—the same standard it applied to the Statutes at Large. As Part II.B explained, this standard did not imply that either of these sources was conclusive. (Moreover, how could it imply this for two overlapping sources?) Instead, it merely established a standard of legal admissibility, without any effort to underscore that the source was rebuttable or irrebuttable.

Congress also has enacted various rules of construction and purpose provisions for positive titles. These provisions repeatedly offer the same reminder: interpreters should look past

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315 Pub. L. No. 69-440 § 2(a).

316 Congress enacted laws in 1928 and 1929 providing for Code supplements to be prima facie evidence, and these provisions alluded to the 1926 standard for the Code. Pub. L. No. 70-620 § 4; Pub. Res. No. 101 §§ 3–4. In 1934 and 1940, and again when title 1 was codified in 1947, codifiers used the 1928/1929 version of the prima facie standard, presumably because it referred to both the Code and supplements and thereby seemed comprehensive. *See* 1 U.S.C. § 54(a) (1934); 1 U.S.C. § 54(a) (1940); Pub. L. No. 80-278 § 3. Alternately, codifiers may have believed the 1926 provision applied only to the version of the Code reported in the 1926 Act, and therefore no longer was valid.

317 This rule of construction also could be interpreted as extending to positive law titles, since the final sentence applies to the entirety of "this Code"—though its appearance alongside the prima facie standard provides reason to read it more narrowly.

318 Warner v. Goltra, 293 U.S. 155, 161 (1934) ("The compilers of the Code were not empowered by Congress to amend existing law, and doubtless had no thought of doing so. As to that the command of Congress is too clear to be misread.") (citing 44 Stat. Part I, 1).

codification work. To this end, the laws codifying four titles[319] included rules of construction providing that the titles "may not be construed as making a substantive change" to existing law.[320] For nine titles, it specified that the purpose was to restate existing law "without substantive change."[321] For four others, it specified that "the intent is to conform to the understood policy, intent, and purpose of Congress in the original enactments."[322] These provisions provide explicit direction to interpreters: unless changes are explicitly noted, Congress intends for the title's substantive provisions to bear the meaning they held in underlying congressional enactments. For many titles, therefore, Congress expressed a policy that restates the interpretive principle courts typically would follow in the absence of any legislative instruction.

The final provision mentioned above, which is the formulation used in the most recent codification bills, comes directly from the statutory mandate given to OLRC for the drafting of codification bills.[323] In this sense, the purpose provision operates not only as an expression by Congress of its legislative intent to leave existing law unchanged. It also operates as an expression by OLRC of its intent not to exceed its statutory mandate.[324] In this regard, it offers a textual foundation for a narrowing interpretation employed by some state courts discussed in Part II.C.1.[325] Under that interpretation, courts assumed that codifiers intended to remain faithful to their statutory mandates, which directed them not to alter statutory meaning.[326] Based on that assumed codifier intent, it was reasoned that courts could safely locate desired statutory meaning by looking to underlying enactments. Here, that codifier intention has been made explicit.

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319 Pub. L. No. 97–258, § 4(a) (title 31); Pub. L. No. 105–225, § 5(a); Pub. L. No. 105–354, § 4(a) (title 36); Pub. L. No. 107–217, § 5(b)(1) (title 40); Pub. L. No. 105–102, § 4(a) (title 49); Pub. L. 104–287, § 9(a) (same); Pub. L. No. 103–429, § 10(a) (same); Pub. L. No. 103–272, § 6(a) (same); Pub. L. No. 98–216, § 5(a) (same); Pub. L. No. 97–449, § 6(a) (same); Pub. L. No. 96–258, § 2(a) (same); Pub. L. No. 95–473, § 3(a) (same).

320 Pub. L. No. 107–217, § 5(b)(1). For the same rule for miscellaneous codified provisions, see Pub. L. No. 97-295 § 5(a); Pub. L. No. 105-354 § 4(a).

321 Titles 5, 10, 31, 32, 36, 37, 40, 44, 49. For assorted updates to titles, see Pub. L. No. 103-429; Pub. L. No. 105-102.

322 Pub. L. No. 111–350, § 2(b) (title 41); Pub. L. No. 109–304, § 2(b) (title 46); Pub. L. No. 111–314, § 2(b) (title 51); Pub. L. No. 113–287, § 2 (title 54).

323 2 U.S.C. § 285b.

324 For additional commentary on OLRC adding these provisions, see Cross & Gluck, *supra* note 12, at 1668.

325 *See supra* notes 204–207 and accompanying text.

326 *Id.*

Twelve positive law titles also have rules of construction prohibiting consideration of placement or caption in interpretation.[327] As Daniel Listwa has noted, these prohibitions arguably were meant to apply solely to placement and captions from the original codification bill, not from later amendments.[328] Viewed as such, Listwa observes, they operate as instructions to look past elements typically added by codifiers in codification bills. At the same time, he adds, they leave interpreters free to consider placement and captions from later amendments—elements that Congress itself controls. In this way, statutory rules about placement and captions reiterate the lesson: courts should look past the surface of codified titles, and should conduct investigative work to find and prioritize the version of statutory law connected to the moment of substantive enactment and legislative will.

For a number of positive law titles, therefore, Congress has signaled that the law is meant to remain unchanged by codification. This would seem to direct interpreters to look to the underlying enactments. As noted above, however, these purpose provisions and rules of construction have been used inconsistently in codifications. As with any provisions that are inconsistently deployed by Congress, they raise the question of whether a negative inference is intended for titles lacking such provisions. In the vocabulary of statutory interpretation, it is a question of whether the *inclusio unius* canon is useful.[329]

As William Eskridge has explained, the utility of this canon depends on context: was this a situation in which speakers understood themselves to be giving permission against the backdrop of a blanket prohibition?[330] As the foregoing pages have explained, there was little reason for Congress to believe that. The default judicial practice was to look to pre-codification enactments for controlling evidence of statutory law.[331] Moreover, in the titles where Congress omitted these provisions, it consistently included them in committee reports or Reviser's Notes,[332] and Members issued similar assurances on

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327 Titles 5, 10, 13, 14, 18, 31, 36, 39, 40, 44, 49, and parts of 46.

328 Listwa, *supra* note 89, at 473–74.

329 *See* Holland v. Florida, 560 U.S. 631, 648 (2010) (describing this maxim as holding that "to include one item . . . is to exclude other similar items").

330 *See* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 676 (1999) ("My hypothesis would be that *inclusio unius* is only sometimes a reliable maxim, and whether it's reliable depends on normative baselines in the particular case.").

331 *See supra* notes 301–304 and accompanying text.

332 *See, e.g.*, S. REP. NO. 80-658, at 1–2 ("This bill takes each section of title 1 of the United States Code, 1940 edition, as of January 3, 1947, and, without any

the chamber floor.[333] It also included revision tables in committee reports, which were designed to assist interpreters in locating the underlying enactment for each codified provision.[334] As the Court has acknowledged, these sub-statutory elements plainly communicate Congress's intention: it wanted courts to look beyond the codification to underlying enactments.[335]

IV
PRACTICAL IMPLICATIONS

The foregoing Parts have argued that courts have an obligation to give effect to statutory text with the most direct connection to the legislature, and to construct the law according to enacting legislative intent, regardless of evidentiary provisions. They also have argued that, placed in context, Congress's evidentiary provisions reinforce these guiding principles.

This Part outlines how courts should apply those guiding principles today. It develops a concrete methodology for statutory interpretation, providing a practical set of rules regarding the use of modern statutory documents. To this end, Section A explains how courts should use materials emerging from Congress. Section B outlines the proper use of additions to the U.S. Code by Law Revision Counsel. Section C explains how to use contributions made by Lexis and Westlaw. Finally, Section D brings these pieces together: using an example from antitrust law, it illustrates this Article's methodology in action.

A. Congressional Materials

This Article has argued that interpreters must use statutory documents with the strongest, most immediate connection to the enacting legislature. If this argument is correct, then they must use *enacted statutory texts*. As Part I explained, *enacted statutory texts* present the law essentially as it appeared before the legislature. For federal statutes, a version of these texts is widely available: the Statutes at Large. Courts

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material change, enacts each section into positive law. . . . No attempt is made in this bill to make desired amendments in existing law. That is left to amendatory acts to be introduced after the approval of this bill."); *see also* H. REP. NO. 80-251 (same).

333 *See* Listwa, *supra* note 89, at 478 n.66 (quoting 93 CONG. REC. 5029 (1947) (statement of Rep. Robinson) that titles 1, 4, 6, 9, 17, 18, and 28 made "'no change whatsoever in the law as it [was] written on the books' at the time").

334 *See, e.g.*, S. REP. NO. 80-658, at 2–15 (revision table for title 1).

335 Cass v. United States, 417 U.S. 72, 82 (1974) (citing committee report); Goldstein v. Cox, 396 U.S. 471, 477–78 (1970) (citing Reviser's Notes).

therefore should regard the Statutes at Large as the proper source of statutory law—not the various compiled sources they often cite today.

As Part I discussed, however, use of *enacted statutory texts* presents a challenge. Many federal laws have been repeatedly amended. Interpreters need access to the law as it exists in the present, with up-to-date amendments incorporated. However, *enacted statutory texts* do not incorporate subsequent changes into the original law. Instead, they present the law in fragmented form—its constituent parts scattered across the Statutes at Large, awaiting unassembled.

If courts must use *enacted statutory texts* for statutory interpretation, then they must locate and assemble these fragments. In this sense, courts must engage in statutory *construction*, quite literally. They bear an obligation to imaginatively reconstruct a law that does not reside in any authoritative document awaiting passive judicial interpretation. This involves both (1) locating the relevant fragments of law across the Statutes at Large; and (2) figuring out how those pieces assemble to produce present-day law.

There are several sources that can assist courts in this project. Some are familiar to courts, whereas others have gone almost entirely overlooked. To begin with the familiar: while not the ultimate source for statutory law, there nonetheless is a role for the U.S. Code in this process. In the online version of the Code, each statutory provision includes a series of hyperlinks to the pages of the Statutes at Large that OLRC editors have used to construct their version of the provision.[336] These hyperlinks are an essential tool: they identify for courts the various *enacted statutory texts* that must be assembled to understand the present-day law.

The U.S. Code therefore is tremendously useful—but interpreters must learn how to use it. The goal should be to look *through* the Code, not *to* it. In other words, the Code should be thought of as a portal—one that usefully gathers materials that enable interpreters to peer through into Congress's relevant actions. Here, the Code becomes a resource that (1) helps disentangle the various congressional enactments that shaped a provision over time; (2) flags easily-overlooked legislative context (such as future amendments or repeals); (3) enables examination of policies in the context of related subject-matter enactments; and (4) adds the codifier's guidance to assist with

336 *See, e.g.*, 35 U.S.C § 152.

understanding truly unclear provisions. What the Code does not provide, however—and a burden it must cease to carry—is that of a straightforward presentation of statutory law. Viewing it as such has led courts to misconstrue consequential statutes,[337] and courts will continue to do so until they recognize how to properly use this tool.

Other congressional materials also can assist with the assembly of *enacted statutory texts*. Committee reports typically contain a provision labeled "Changes in Existing Law" that gives a redline showing how amendments in a bill are expected to change existing law.[338] This provision, known inside Congress as the "Ramseyer," is a useful tool for interpreters attempting to reconstruct statutory law in the manner envisioned by Congress.[339] When interpreters confront difficult questions about the incorporation of amendments into prior laws, therefore, the Ramseyer report can provide an important resource, as the Second Circuit discovered in a recent case.[340]

Finally, while courts should be using *enacted statutory texts* to construct statutory law, other interpreters may sometimes require a more efficient and informal way to quickly view the current text of federal statutes. Unfortunately, interpreters regularly use the U.S. Code for this purpose, even though it is an *improved statutory text*. This is particularly worrisome for non-positive titles of the Code, where editors have greater leeway to make modifications.[341] Unbeknownst to most, Congress does also make *assembled statutory texts* of many non-positive laws available. The House Office of the Legislative Counsel publishes "Statute Compilations" on a public website that provide up-to-date versions of many major statutes.[342] For interpreters who must develop sophisticated and authoritative interpretations of statutes, these compilations may be of limited utility; they do not disclose the various amendatory laws that have been compiled, for example, or provide the use-

337 *See* Shobe, *Codification*, *supra* note 24, at 658.

338 *See Our Services*, OFF. OF THE LEGIS. COUNS., https://legcounsel.house.gov/about/our-services (last visited Jan. 30, 2022) [https://perma.cc/YV2V-ANQZ].

339 *See id.* (noting "Ramseyer" terminology).

340 *See* Panjiva, Inc. v. U.S. Customs & Border Prot., 975 F.3d 171, 181 (2d Cir. 2020).

341 *See supra*, notes 55–65 and accompanying text.

342 *See Statute Compilations*, U.S. GOV. PUBL'G OFF., https://www.govinfo.gov/app/collection/comps (last visited May 31, 2023) [https://perma.cc/Z5DP-L6WG].

ful supplementary material given by the U.S. Code.[343] For those who desire efficient access to present-day law without editorial additions, however, these compilations are a tremendously useful (and remarkably overlooked) starting point.

B. Law Revision Counsel Materials

Section A explained how interpreters can use the U.S. Code to locate statutory text. In so doing, the goal was to disentangle legislator-endorsed material from elements inserted post-enactment by the editors at OLRC. But what about those editorial additions? Might they serve a purpose for courts as well?

While not regarded as statutory text, those editorial additions might appropriately be used as a form of subsequent legislative history. After all, as the Cross/Gluck study detailed, Congress created the OLRC, a legislative office founded specifically to produce and maintain the Code.[344] As that study further noted, Congress has directed the OLRC to produce a code of federal law that, in its editorial decisions, accurately reflects the legislative intent of its original enactments.[345] When courts look to those original enactments and disagree with OLRC editorial decisions—when they believe that the original enactments attempt to communicate a different vision of federal law than the one assembled by OLRC—those courts retain power to enforce the legislative will they discover there, as explained above. However, courts sometimes will be less certain about the legislative will found in the original enactments. In such situations, Congress's evidentiary provisions might be interpreted not as technical statements about the admissibility of different documents, but rather as endorsements of OLRC's interpretations of congressional intent. By telling courts to treat certain titles as prima facie evidence of the law, for example, Congress might be interpreted as saying, in effect: where the meaning or content of the law is ambiguous, assume that codifiers captured it correctly. In other words, it might be taken as an expression by Congress that, in cases where the

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343 *See* Statute Compilations, U.S. GOV. PUBL'G OFF., https://www.govinfo.gov/help/comps (last visited May 31, 2023) [https://perma.cc/PVJ8-Q26G].

344 Cross & Gluck, *supra* note 12 at 1553 (explaining that "it is Congress itself that has put this whole process in motion").

345 *See id.* . *See also* 2 U.S.C. § 285(b) (directing OLRC to produce a Code via codification bills that "conforms to the understood policy, intent, and purpose of the Congress in the original enactments"). OLRC interprets itself as having less editorial discretion in its classification work. *Editorial Reclassification*, OFF. OF THE LEGIS. COUNS., https://uscode.house.gov/editorialreclassification/reclassification.html (last visited May 31, 2023) [[https://perma.cc/8DYG-DDEZ].

law appears truly unclear, it trusts OLRC to capture its intent more than it trusts the courts.

In some senses, this might seem akin to a deference doctrine for an executive agency.[346] Much like an agency, Congress has established in OLRC a non-judicial office anchored in specialization and expertise: in this case, not expertise in a substantive area, but instead in discerning congressional intent and understanding the breadth of federal statutory law.[347] It has empowered that office to interpret federal law, and it has attempted to put some weight of authority behind those interpretations. Moreover, the process by which OLRC produces codification bills resembles a notice-and-comment process; it seeks the input of relevant stakeholders and responds to that feedback as it attempts to assemble titles that capture congressional policy, intent, and purpose.[348] By declaring OLRC's work product to be evidence of the law, perhaps Congress should be understood as suggesting that its editorial decisions should receive agencylike deference.

This analogy likely is too strong, however. Unlike administrative agencies, OLRC is housed in the legislative branch. For the production of the Code, this is a good thing: if the goal is to accurately capture congressional intent, then an institution closer to Congress (and immune to executive branch pressure) seems wise.[349] However, courts presumably are loath to extend formal deference to legislative-branch offices, an approach that might be viewed as raising separation-of-powers or nondelegation issues.[350]

A better analogy, therefore, might be to subsequent legislative history. When courts find ambiguity in a statute, they will give some weight to subsequent statements by legislators or committees about the intent of the provision.[351] Increasingly, they also will consider materials and interpretations generated

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346 *Cf.* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (establishing the doctrine of agency deference commonly known as "*Chevron* deference").

347 For additional commentary o specialization and expertise as features of Congress's nonpartisan offices, see Cross & Gluck, *supra* note 12, at 1613–16.

348 *See id.* at 1654.

349 For a review of literature on effects of cross-pressures, see Jesse M. Cross, *Federal Bureaucratic Studies*, 80 WASH. & LEE L. REV. 1 (2023).

350 For concerns about nondelegation relating to judicial reliance on legislative sub-units, see John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 693–95 (1997). Manning's concerns presumably also would extend even to regarding this material as subsequent legislative history.

351 *See* WILLIAM N. ESKRIDGE JR, ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION 631 (2014).

by nonpartisan legislative offices, including some generated post-enactment.[352] Courts do not defer to these materials in the way that they do to agency interpretations. Rather, they view these materials as helpful insider sources that assist in the project of understanding original, intended legislative meaning. The editorial choices OLRC (or earlier codifiers) make in the Code might be viewed similarly. Especially for codification decisions made since the creation of OLRC, these editorial choices are tantamount to a legislative office expressing its position on the intention of the enacting legislature. When courts are at a loss to identify Congress's original meaning, such an expression can be useful.

As a form of subsequent legislative history, the U.S. Code admittedly is anomalous—in ways both good and bad. On the one hand, subsequent legislative history typically is generated by partisan actors. For this reason, courts typically give it little weight, due to concerns about strategic political manipulation.[353] However, a nonpartisan legislative office produces the Code, so it does not raise these concerns.[354]

On the other hand, subsequent legislative history often is created by actors in Congress who helped shape the legislation they are describing. By contrast, OLRC is not part of the regular legislative process—and so it cannot shed light on internal congressional decisions in the same way. Nonetheless, it is a legislative-branch institution that specializes in assembling statutory text in a manner reflective of congressional intent, it has been insulated from the cross-pressures of administrative agencies, and Congress has expressed confidence (through evidentiary standards) in its work product.[355] All of this suggests that, when courts find the legislatively-desired construction of a statute to be unclear, they might treat the interpretations of OLRC (or prior codifiers) similarly to subsequent legislative history—*i.e.*, as evidence they are not bound to follow, nor that receives formal deference, but that warrants consideration

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352 For courts relying on calculations by the Congressional Budget Office, see, for example, King v. Sebelius, 997 F. Supp. 2d 415, 430–31 (E.D. Va. 2014); Halbig v. Sebelius, 27 F. Supp. 3d 1, 24–25 (D.D.C. 2014); Halbig v. Burwell, 758 F.3d 390, 407–08 (D.C. Cir. 2014); King v. Burwell, 759 F.3d 358, 374 (4th Cir. 2014); *but see* United States v. Woods, 571 U.S. 31, 47–48 (2013) (dismissing Joint Committee on Taxation's "Blue Book" while noting mixed history of its use).

353 *See* Eskridge, *supra* note 1, at 640 ("[S]ubsequent history is usually too ambiguous to count as legislative history, but in some contexts the sources are considered by the Court.").

354 For additional commentary on the bipartisan trust in these offices, see Cross & Gluck, *supra* note 12, at 1630–31.

355 *See supra* note 349 and accompanying text.

under judicial notice powers as tipping the scales when more persuasive evidence is lacking.

C. Lexis and Westlaw Materials

The foregoing Sections discussed the weight and authority that interpreters should give to elements in the U.S. Code, and the manner in which they should interpret it. For a generation of researchers used to the electronic databases of Lexis and Westlaw, this might sound like guidance on how to use the Code that one accesses through those databases. After all, a researcher can type a citation to the Code into the search windows on these databases, and a statutory provision will appear. However, as Part I explained, the versions that appear on Lexis and Westlaw are not actually the U.S. Code.[356] Instead, a Code search on Westlaw will return provisions of the *United States Code Annotated* (U.S.C.A.),[357] and on Lexis will return provisions of the *United States Code Service* (U.S.C.S.).[358] This raises the question: how should interpreters use the U.S.C.S. and U.S.C.A.?

Based on the argument developed in the foregoing pages, they should not use these sources at all. Because the U.S.C.S. and U.S.C.A. are private compilations, their editorial decisions reflect only the judgments of private actors. As such, they do not benefit from the arguments made in Section B for editorial decisions carrying interpretive weight. Instead, these compilations can add another layer of editorial work for interpreters to distinguish, and one without any clear independent utility.[359] Interpreters presumably would be better off simply omitting these databases from their statutory research.

D. Putting it All Together: Methodology Applied

An example can help illustrate the approach to federal statutory law described in this Part. Consider the federal antitrust statute that Congress enacted in 1938 to adjust the Robinson-Patman Antidiscrimination Act, codified in a non-positive title at 15 U.S.C. § 13c.[360] Figure 7, below, shows that statute as it appears in the online version of the Code.

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356 *See supra* notes 70–77 and accompanying text.

357 Whisner, *supra* note 31, at 546.

358 *Id.*

359 For comments on these compilations using the Code as a starting point, see *supra* note 77 and accompanying text.

360 Pub. L. No. 75-550. For discussion of neighboring sections 15 U.S.C. §§13a & 13b, *see* Cross & Gluck, *supra* note 12, at 1671–72.

FIGURE 7

§13c. Exemption of non-profit institutions from price discrimination provisions

Nothing in the Act approved June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

(May 26, 1938, ch. 283, 52 Stat. 446 .)

Imagine that a court was asked: does this provision apply to for-profit schools or hospitals? The heading refers specifically to "non-profit institutions," implying that no for-profit institutions are covered. However, the following text is less clear. In statutory interpretation, the rule of the last antecedent holds that, when a modifying or limiting phrase appears at the end of a list, it should modify only the final item in the list.[361] Under this interpretation, the phrase "not operated for profit" modifies only the immediately-preceding reference to "charitable institutions," *not* the entire list of institutions appearing in the text. The rule therefore suggests that for-profit schools and hospitals actually are covered by the provision. However, the rule of the last antecedent is a notoriously imperfect tool for getting at legislative meaning.[362] What should an interpreter do?

As Section A explained, the court should look beyond the Code and examine evidence of the underlying statute in the Statutes at Large. Figure 8 shows the statute as it appears in the Statutes at Large.

FIGURE 8

446 PUBLIC LAWS—CHS. 283, 284—May 26, 1938 [52 STAT.

[CHAPTER 283]

AN ACT

May 26, 1938
[H. R. 8148]
[Public, No. 550]

To amend Public Law Numbered 692, Seventy-fourth Congress, second session.

Robinson-Patman Antidiscrimination Act.
Schools, churches, etc., excepted from provisions of.
49 Stat. 1526.
15 U. S. C., Supp. III, §§ 13-13b, 21a.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

Approved, May 26, 1938.

361 *See, e.g.*, Lockhart v. United States, 577 U.S. 347, 351 (2016) (describing "the rule of the last antecedent," which provides "that 'a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows'") (omission in original).

362 The Court therefore has emphasized that the rule applies only "where no contrary intention appears." Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (quoting 2A NORMAN J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.33, at 369 (6th ed. 2000)).

Here, we confront a more ambiguous text. The list of institutions and unclear modifier appear exactly as they did in the Code. However, the heading from the Code—which had labeled the provision as applying to "non-profit institutions"—does not appear. That heading would be added by codifiers in 1940.[363] Since it appears in a non-positive title, this heading never received even superficial congressional approval.

Now we can begin to understand the evidence offered by Congress's statutory publications. They present (1) an ambiguous statutory text; and (2) an interpretation of that text by pre-OLRC codifiers.

The codifier interpretation, it turns out, was correct. This is apparent from the legislative history. In both chambers, committee reports explained the purpose of the Act—namely, to preserve a specific price reduction that was uniquely available to nonprofit (or "eleemosynary") institutions. Both committee reports were titled "Exemption of Eleemosynary Institutions from the Robinson-Patman Act."[364] In the words of the House report, the Act was designed to preserve "favors in price which are occasionally extended to eleemosynary institutions, because of the character of the institution."[365] The Senate report explained that the Act's carveout was justified because the goal of the Robinson-Patman Act "does not seem to apply as to eleemosynary institutions as they are not operated for profit."[366] Both committee reports reprinted a letter which pinpointed the pricing tactic that the Act targeted, saying that "*[b]ecause of the charitable nature of their work* many suppliers have hitherto allowed these institutions special prices for their purchases."[367] Congress plainly understood itself to be creating a carveout for a specific price reduction made available to institutions precisely because they were nonprofits.

The important point is not just the correct interpretation of the statutory provision, however, but the sources that reveal it. The text of the Code ultimately contained two very different types of evidence: statutory text that had been enacted by Congress, and interpretation by pre-OLRC codifiers. In the face of unresolvable ambiguity about the meaning of the text as it appeared before Congress, the latter piece of evidence might have been persuasive as subsequent legislative history. How-

363 *See* 15 U.S.C. § 13(c), at 1017 (1940).
364 S. REP. NO. 75-1769 (1938); H. REP. NO. 75-2161 (1938).
365 H. REP. NO. 75-2161, at 1 (1938).
366 S. REP. NO. 75-1769 (1938).
367 *Id.*; H. REP. NO. 75-2161 (1938) (emphasis added).

ever, better evidence of Congress's legislative goal existed: here, in the form of unambiguous committee reports. The recourse to this better evidence was wholly in accordance with Congress's evidentiary instructions to the courts, which not only preserved courts' judicial notice power, but explicitly acknowledged through a prima facie standard that better evidence might exist. The result was a hierarchy of sources that was logical for this statutory provision. It was not the familiar hierarchy cited in legislation casebooks, however, much less by our increasingly textualist courts.[368] In this instance, the logical hierarchy required a fractured vision of the Code's text—one that treated some Code language as of highest authority (because it repeated congressional enactments, as confirmed in the Statutes at Large), while treating other portions as less authoritative than committee reports (because added by codifiers).

V
THEORETICAL IMPLICATIONS

This Article's study has a host of theoretical implications, not all of which can be addressed here. However, some implications for textualism are particularly worth noting. This Part comments upon three such implications, which involve: (1) textualism's virtues, (2) textualism's text, and (3) textualism's recent focus on "original public meaning" or "ordinary public meaning."

A. Textualism's Virtues

To date, textualism has been conspicuously atextual. It has made little effort to disentangle the statutory texts discussed in this Article. Instead, textualist theory has conflated our statutory texts, in the effort to claim the virtues associated with them all. Textualists therefore have touted the methodology's connection to bicameralism and presentment—a virtue specifically of *enacted statutory texts*.[369] Meanwhile, they also have claimed that textualism promotes public notice and minimizes the judicial role—virtues of *assembled* or *improved statutory texts*.[370] By claiming all these virtues on behalf of textualism, its theorists have taken inconsistent positions that cannot all apply to our modern, amendatory landscape.

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368 *See* ESKRIDGE, GLUCK & NOURSE, *supra* note 351, at 631 (reporting the "Conventional Hierarchy of Legislative History").

369 *See supra* note 9 and accompanying text.

370 *See supra* notes 10–11 and accompanying text.

If courts must use *enacted statutory texts*, as this Article contends, then textualism must abandon (or at least reduce) its pretenses to the values that do not attend *enacted statutory texts*. For example, textualism has thrived on the vision of judicial passivity that it conjures. It presents the statutory text as a ready-made document, and the interpreter as someone who passively and mechanically locates the plain meaning of that document. In so doing, it channels longstanding myths of judges as umpire-like figures who merely declare the meaning that awaits them, rather than as more active constructors of the law.[371] Yet this passive vision of the judicial role is impossible with *enacted statutory texts*. The fragmented, disassembled nature of those texts requires judges to become active assemblers of the law. In light of this reality, even textualist judges cannot be passive readers of statutory text. Textualists should abandon the fiction that their methodology can enable this brand of passivity.

Similar problems arise with textualism's claim to promote public notice of the law.[372] Here, textualism assumes that the public receives its notice of the law directly from statutory text. To the extent this does occur, it almost certainly entails public use of *improved statutory texts*. The required use of *enacted statutory texts* therefore undermines textualist claims that, by prioritizing bicameralism-and-presentment documents (and applying a plain-meaning interpretive lens to them), the methodology thereby renders the law readily accessible to the general public.

B. Textualism's Text

Textualism also regularly embraces the idea that statutory texts are autonomous creations, reliant on neither author nor audience for their existence or meaning. Prior theorists already have shown the falsehood of this premise regarding texts more broadly. For example, Stanley Fish has observed the extent to which "texts" do not exist as defined objects until supplemented by readerly principles.[373] For Fish, the challenge primarily is one of boundary-drawing: without guiding interpretive principles, we do not know where the "text" begins

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371 For commentary on the umpiring myth of judging, see Aaron Zelinsky, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 113–17 (2009).

372 *See supra* note 10 and accompanying text.

373 STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 174–81 (1980).

and ends. In this way, Fish highlights the falsity of the textualist premise regarding the autonomy of "texts" generally. Recently, Nourse and Eskridge have highlighted this problem specifically with statutes: textualists, they observe, have engaged in highly contestable boundary-drawing strategies (or "gerrymanders") to construct their ostensibly autonomous statutory text.[374]

Yet the situation for textualists is even worse. With statutes, the "text" not only lacks fixed boundaries. It also is fragmentary, disassembled, and incomplete—i.e., "deconstruct[ed]," in the words of the Cross/Gluck study.[375] Here, interpreters not only must delimit boundaries, but also must actively construct. Statutory text therefore is doubly dependent on interpreter contributions. In this regard, textualism has chosen a text uniquely ill-suited to bear the weight of its theoretical claims.

Historically, interpretive principles have provided the necessary supplement to generate a statutory text from these raw materials. Under these principles, legislative intent provides the cement to bind together the statutory pieces. This reveals the false binary that has animated much textualist rhetoric, which has positioned statutory text (and its "plain meaning") as a replacement to legislative intent.[376] Traditionally, legislative intent has provided not only the object to pursue within the text, but the stitching that holds this text together.

Now, perhaps a version of textualism could be devised that avoids this problem. Such a version would posit an alternative means of assembling statutory text, and of doing so without any recourse to legislative intent. Such a version has not been articulated to date, however. And it would be difficult to square any such practice with textualism's ostensible respect for methodological pedigree and history.[377] Inventing new ways to

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374 *See generally supra* note 2 and accompanying text (introducing the idea of textual "gerrymandering" to describe contemporary textualist practices).

375 Cross & Gluck, *supra* note 12, at 1653.

376 *See, e.g.*, John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1915 (2015) ("I thought it obvious that fighting it out on [non-intentional] terms was more desirable than taking on the seemingly fruitless task of asking whether one interpretive method or another better captures Congress's true 'intent.'"); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 29 (2012) ("We do not inquire what the legislature meant; we ask only what the statute means.") (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417. 419 (1899)).

377 *See* Manning, *supra* note 223, at 98–108; Barrett, *supra* note 223, at 111 ("Textualists have suggested that, in the modern landscape, those principles that we call substantive canons are a closed set of background assumptions justified by their sheer longevity.").

conceptualize statutory text is not supposed to be part of the textualist project. Without such an approach, however, its central concept of statutory text seems to rest upon the very intent it often looks to discredit.

C. Textualism's "Original Public Meaning"

Finally, this Article also raises questions for the specific brand of textualism that the Court has adopted in recent years. Increasingly, the Court has asserted that it seeks "ordinary public meaning" or "original public meaning" in statutes.[378] In these cases, the Court typically seeks a snapshot of "original" public meaning at a single moment in time. In this regard, the methodology rests upon another assumption—one regarding the documentary foundations of our statutory text. It assumes that each statutory provision is grounded in a document with a single, static moment of enactment and origin. As a result, it avoids the feature of federal statutes highlighted by this Article's study of these documentary foundations: namely, that statutory text often is a palimpsest, accruing and growing over time and across documents in ways that defy a simple concept of "original" public meaning.

Consider the recent case of *Niz-Chavez v. Garland*.[379] There, the Supreme Court faced a question regarding the Immigration and Nationality Act (INA). That statute makes nonpermanent residents in removal proceedings eligible for discretionary relief if continuously present in the United States for at least ten years.[380] To calculate whether this ten-year period has passed, section 240A of the statute directs that the continuous period ends when the individual is served with "a notice to appear under section 239(a)."[381] This "stop-time rule" therefore interlinks with section 239(a), which requires that

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[378] *See generally* Victoria Nourse, *The Promise and Paradox of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court, 2020-2022*, 38 CONST. COMM. 1 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179654 [https://perma.cc/RR6C-PV62] (noting that the Court has now "solidified 'original public meaning' as methodological orthodoxy in [its] constitutional and statutory cases"); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4034992 [https://perma.cc/4B33-C9P2] (finding that, for the first time, the Court consisted of "a super-majority of Justices [who] clearly accept the primacy of 'ordinary meaning'").

[379] 141 S. Ct. 1474 (2021).

[380] Immigration and Nationality Act § 240A(b)(1)(A), codified at 8 U.S.C. § 1229b(b)(1)(A).

[381] Immigration and Nationality Act § 240A(d)(1), codified at 8 U.S.C. § 1229b(d)(1).

written notice be given to the alien. In *Niz-Chavez*, the government had provided the information required by this "notice rule" of section 239(a) across two separate notices, rather than in a single notice. This raised the question: did this piecemeal notification constitute a notice under section 239(a), thereby triggering the stop-time rule?

Concluding that it did not, the Court rooted its answer in the purported original public meaning of the contested INA provisions.[382] For the Court, this meant looking to meaning in 1996.[383] Presumably, that was because Congress inserted both the stop-time rule and the notice rule into the INA via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[384]

Upon closer examination, however, these provisions defy any notion of a single "original" touchstone. Consider first the notice rule. A version of this rule was in the original INA enacted in 1952.[385] Building upon that 1952 provision, Congress extensively amended it in 1990.[386] This amendment took the form of a "strike-and-reinsert" amendment—Congress struck the entire provision, made edits to the removed text, and reinserted the provision (with edits now incorporated). Then, in 1996, Congress further amended the rule—again with a strike-and-reinsert amendment.[387]

Today, therefore, the statutory text of the notice rule is an amalgamation of phrases enacted into law over time. This amalgamation is illustrated by Figure 9. That Figure shows the version of the notice rule that appears in the U.S. Code today—with language from 1996 in *yellow*, language arguably from either 1990 or 1996 in *green*, language arguably from 1952, 1990, or 1996 in *red*, and language from OLRC in *gray*. It is

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382 *Niz-Chavez*, 141 S.Ct. at 1480 (2021) ("When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them.").

383 *See id.* (citing the ordinary readers in 1996, while also suggesting relevance of 2021 readers, as proper reference points).

384 Pub. L. No. 104–208.

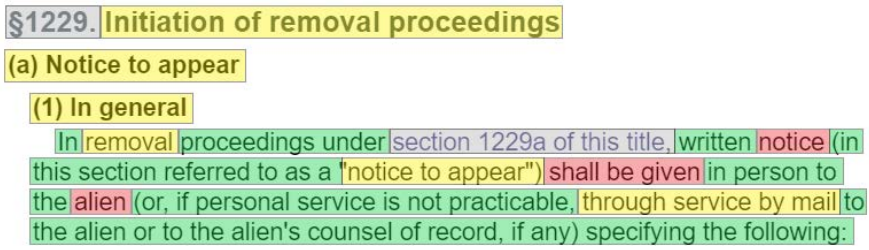
385 Immigration and Nationality Act, Pub. L. No. 82-414, § 242(b)(1), 66 Stat. 209.

386 Immigration Act of 1990, Pub. L. No. 101–649, § 242B. It also placed a cross-reference to the new notice requirement in the location of the prior 1952 requirement, directing the reader to the fact that this longstanding requirement had been moved and expanded. *See id.* § 545(e) ("Such regulations shall include requirements consistent with section 242B."). This history was obscured, however, when Congress in 1991 eliminated the cross-reference and re-inserted the statutory text that had preceded it. Pub. L. No. 102-232.

387 Pub. L. No. 104-208.

noteworthy just how little text is in *yellow*—i.e., is unambiguously from 1996, the "original" year selected by the Court.

FIGURE 9



Next, consider the stop-time rule. Enacted in 1996, Congress executed a strike-and-reinsert of this rule in 2000.[388] Consequently, the statutory text of this rule arguably is from either 1996 or 2000. Worse, the same argument that could justify treating the notice rule as originating wholly in 1996 would regard the stop-time rule as *not* originating in 1996.[389] A single "original" date is elusive.

This problem is only exacerbated by additional INA provisions discussed by the Court. These originate in various years, extending to 2006.[390]

Selection among these dates could have been consequential in *Niz-Chavez*. Several key phrases in the statute became terms of art at identifiable moments.[391] When Congress used the phrase "order to show cause" in 1990, for example, it was adopting the term that, beginning in 1956, INS had given to the document it used to furnish notice to aliens.[392] (This still was

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388 Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 1506(b), 114 Stat. 1527 (2000).

389 This argument would posit that provisions should be dated to the year of any strike-and-reinsert amendment.

390 Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, § 825(c). It also discusses provisions from 1996, § 239(a)(2)(A), and arguably from either 1990 or 1996, § 240(b)(7).

391 For a recent example of the Court considering a term of art in an ordinary meaning analysis, see HollyFrontier Chey. Refin. LLC v. Renew. Fuels Ass'n, 141 S. Ct. 2172 (2021).

392 *See* 8 C.F.R. 242.1(a) (1957) ("Every proceeding to determine the deportability of an alien in the United States is commenced by the issuance and service of an order to show cause by the Service."); 8 C.F.R. 241.2. *See also* Reply Brief for Petitioner at 2, Niz-Chavez v. Barr, 2020 WL 6379086 (No. 19-863) (subsequently *Niz Chavez v. Garland* after grant of certiorari) (arguing that "[t]he statutory "order to show cause" was modeled on the regulatory one, and the regulatory "order to show cause" was long understood to be a specific document" and "[t]he agency created the 'order to show cause' by regulation in 1956, and required that it include the 'time and place' of the hearing." (quoting 8 C.F.R. § 242.1(b) (1957)).

true when Congress replaced the phrase in 1996.) When Congress used the phrase "notice to appear" in 1996, there was no agency document bearing that title—but by the time Congress referred to the "Notice to Appear" in 2006, a document bearing that title had replaced the order to show cause.[393] These are the documents Congress plainly was referencing with these terms. Further, they are the documents that ordinary people subject to INA removal proceedings would have received—and which, if they were to open the pages of the statute, they would find Congress seemingly mentioning in its statutory instructions. In light of this shifting linguistic history, the Court's simplistic pursuit in *Niz-Chavez* of a snapshot "original" meaning in 1996 is particularly troubling.

In sum, the Court's interpretation in *Niz-Chavez* rests upon a fiction. It assumes statutory text to emerge from a single documentary origin, one borne of a static "original" moment. As this Article has illustrated, however, statutory text often is grounded on different documentary foundations: quite regularly, it consists of a dynamic layering drawn from multiple enactments (and multiple years). If the Court is serious about its purported methodology, it must wrestle with what an "original" meaning is for a text that has accrued across documents in this way.

That assumes, of course, that the Court is interested in grounding its current method in reality. If it desired, the Court instead could expressly defend its "original public meaning" interpretation as a fiction. An interpreter always can construe a text under assumptions that are at odds with its true documentary foundations. One may choose to read a cooking recipe as though it appeared in a book of poems, for example. One may read an ancient text as though it were composed yesterday. However, this approach—which might be termed "counterfactual interpretation"—must be defended as a useful, productive fiction. The Court has issued no such defense. Instead, it has pretended that its approach is consistent with the documents that lay beneath our statutory text. That position is untenable. Today, federal law is a text that results from the imagined assembly of scattered, fragmented *enacted statutory*

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393 *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444-01 ("The charging document which commences removal proceedings under section 240 of the Act will be referred to as the Notice to Appear, Form I-862, replacing the Order to Show Cause, Form I-221, that was used to commence deportation proceedings and the Notice to Detained Applicant of Hearing Before an Immigration Judge, Form I-110.").

texts—an assembly that courts must undertake, and that they should frankly acknowledge as well.

CONCLUSION

Textualism is becoming the ascendant method of statutory interpretation, both on the Court and beyond. As this occurs, it is more important than ever to cultivate a sophisticated understanding of statutory law. This Article has attempted to assist in that project. Rather than discovering statutory text to consist of musty, authoritative papers buried in "the lumber room of obsolete documents,"[394] as the Supreme Court once put it, this Article uncovered them as something perhaps more interesting: an imagined construction, and one that our courts are obligated to assemble in a manner that aligns with the enacting legislature's vision for the law. That project should guide the way in legislation—for textualists and non-textualists alike.

394 *Pease v. Peck*, 59 U.S. 595, 599 (1856).