The Enacted Purposes Canon

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ABSTRACT: This Article argues that the principle relied upon in King v. Burwell *that courts "cannot interpret statutes to negate their stated purposes"—the enacted purposes canon—is and should be viewed as a bedrock element of statutory interpretation. The Supreme Court has relied upon this principle for decades, but it has done so in ways that do not call attention to this interpretive choice. As a result, the scope and patterns of the Court's reliance are easy to miss. After reconstructing the Court's practice, this Article defends this principle of interpretation on analytic, normative, and pragmatic grounds. Building on jurisprudence showing that when a rule states its own justification the meaning of the rule changes, this Article argues that enacted purposes change the range of permissible readings of a statute. The Article also argues that the enacted purposes canon has beneficial consequences because it requires courts to prioritize the most public-regarding elements of legislation. The canon, moreover, represents a point of agreement between textualist and purposivist approaches to statutory interpretation. Based on the Court's long reliance and positive justification, it is time to acknowledge the enacted purposes canon.*

Recognition of the enacted purposes canon matters to administrative law and legislation. The enacted purposes canon applies in review of administrative agency action to prevent agencies from adopting interpretations inconsistent with their statutes' enacted purposes—an implication with particular importance when the president's policies are in tension with some of the enacted purposes in legislation. This analysis also exposes how conventional guidance on legislative drafting misses the critical feature of enacted purpose provisions: the way they entrench policy. Finally, and most importantly, attention to enacted purposes serves as a reminder that our federal legislation is a messy accumulation of individual statutes, with their own purposes, not a formal code.

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I. INTRODUCTION

"We cannot interpret federal statutes to negate their own stated purposes."[1] The Supreme Court relied on this principle in *King v. Burwell*[2] after a careful recitation of the Affordable Care Act's ("ACA('s)") enacted aims and policies.[3] This Article's core argument is that this principle—which I call the enacted purposes canon—is and should be viewed as a bedrock principle of statutory interpretation.

Many federal statutes include an enacted statement of the statute's purpose. These enacted purposes are part of the enacted text of the statute—they follow the statute's enacting clause,[4] often at the beginning of the statute under a separate heading or combined with findings or statements of policy. Like statutory definitions, enacted purposes purport to speak to the entire statute.

For decades, the Supreme Court has relied upon enacted purposes in statutory interpretation but has done so without calling attention to its practice as an interpretive choice.[5] As a result, each instance is easy to miss, and the overall patterns of reliance are even harder to see. Reconstructing the Court's practice reveals that it has long relied on enacted purposes to exclude interpretations inconsistent with those purposes. In a sense, there already is an enacted purposes canon; the Court just has not expressly identified it as such. Moreover, the enacted purposes principle has strong justifications. At the most basic level, the enactment of a statement of purpose changes the range of permitted meanings of a statute; as part of the enacted text, these provisions exclude interpretations inconsistent with them, just as the adoption of a rationale for a rule excludes applications of the rule inconsistent with that rationale. Because Congress generally adopts broad purposes provisions even when it accommodates special interests in other parts of the legislation, interpreting statutes in light of their enacted purposes excludes some private-regarding interpretations in favor of more public-regarding constructions. In addition, the canon has the pragmatic virtue of being a point of common ground between textualist and purposivist approaches to statutory interpretation. On the one hand, it satisfies textualism's core commitment to privileging the enacted text.[6] These

1. King v. Burwell, 135 S. Ct. 2480, 2493 (2015) (quoting N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419–20 (1973)).

2. *Id.* at 2493.

3. *See id.* at 2486–87; *see also infra* text accompanying notes 115–31 and 138–42 (discussing *King*'s reliance on enacted aims and policies).

4. 1 U.S.C. § 101 (2012) ("The enacting clause of all Acts of Congress shall be in the following form: 'Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.'").

5. *See infra* Part III.

6. John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) [hereinafter Manning, *What Divides?*] (noting that textualists seek to understand how a

purposes are part of the statutory text. On the other hand, it reflects the core commitment of purposivism that the specific provisions of statutes be interpreted in light of their more general purposes.[7] It insists that general purposes constrain more specific provisions. This overlap is not just theoretical: The principle has been relied upon by jurists with very different perspectives on statutory interpretation[8]—suggesting its prospects for emerging as a consensus plank on a closely divided Supreme Court. Based both on the Court's pattern of reliance and these justifications, this principle warrants recognition as its own canon of interpretation.

The enacted purposes canon, once made explicit, has implications for judicial review of agency action as well as for statutory drafting and our statutory culture. When a court reviews an agency's action, this principle operates to exclude agency interpretations of statutes that are inconsistent with the statute's enacted purposes—a particularly important constraint when the president's policies are in tension with many existing regulatory statutes' purposes. Uncovering this bedrock principle of statutory interpretation also shows what conventional advice on legislative drafting gets wrong: Enacted purpose provisions can be powerful tools for entrenching a policy. More generally, express recognition of this canon reorients statutory practice. By requiring a focus on the purpose provision of individual public laws, the enacted purposes canon serves as a potent reminder that statutory interpretation must remain focused on construing individual statutes, as messy and diverse as they are, not making inferences from a legislative code.

Leading treatises on statutory interpretation touch on enacted purposes, but do not isolate an enacted purposes canon. Justice Scalia and Bryan Garner's compilation of statutory interpretation canons mentions a "prefatory-materials canon," under which "[a] preamble, purpose clause, or recital is a permissible indicator of meaning."[9] The enacted purpose canon differs from this prefatory-materials canon in important respects. The prefatory-materials canon treats enacted purpose provisions no differently than unenacted preambles, bearing only on the choice of among permissible interpretations.[10] In contrast, the enacted purposes canon is triggered only by enacted purposes, and relatedly, treats enacted purposes as part of what determines what the statute permits, not merely bearing on the choice among

skilled, reasonable user of the words would understand their meaning in context as opposed to trying to discern actual legislative intent).

7. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (urging statutory interpreters to determine statutory purpose and interpret the words of the statute to carry out that purpose).

8. *See, e.g.*, *infra* text accompanying notes 109–14 and 143–46.

9. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63 (2012) (endorsing the principle that "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored").

10. *See id.* at 219 (noting that "[l]ike other indications of purpose, prefatory text can suggest only which permissible meanings of the enactment should be preferred").

permissible readings. William Eskridge's treatise on interpretation endorses a "purposes canon,"[11] explaining that "[b]ecause purpose clauses are enacted into law as part of the statute and because they provide authoritative context for reading the entire statue, my view is that judges should consider them, to guide judicial discussions of statutory purpose."[12] Eskridge notes a few decisions in which the Supreme Court has relied on enacted purposes,[13] but does not explore the scope of the Court's reliance. Sutherland's treatise on statutory interpretation does not single out enacted purposes or identify a similar canon.[14] Enacted purposes also receive only brief, if any, mention in contemporary teaching materials on statutory interpretation.[15]

In academic literature, the idea that enacted purposes should play a greater role in statutory purposes has been circulating for several decades, with various formulations and justifications. Attention to enacted statements of purpose, as discussed in more detail below, is an important element of Henry Hart and Albert Sacks's method of statutory interpretation set forth in *The Legal Process*.[16] Statutory enacted purpose provisions play a role in Susan Rose-Ackerman's 1992 book, *Rethinking the Progressive Agenda*, which featured an inconsistency principle under which courts should not "enforce statutory provisions that are inconsistent with legislative preambles and policy statements."[17] David Driesen argues that enacted statements of purpose are more likely to reflect both the legislators' judgments about sound value and the public's own values than specific provisions in statutes.[18] Based on

11. WILLIAM N. ESKRIDGE, INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 105–06 (2016).

12. *Id.*

13. *Id.* at 106–07 (noting Sutton v. United Airlines, Inc., 527 U. S. 471 (1999); *id.* at 494–95 (Gisburg, J., concurring)).

14. *See* 2A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §§ 47:1, 47:4, 47:6 (7th ed. 2006, Nov. 2018 update) (providing brief discussion of preambles and purview materials, largely with reference to state legislative materials).

15. *See, e.g.*, LISA S. BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, THE REGULATORY STATE 167 (2d ed. 2013) (mentioning statements of purpose); WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 676 (5th ed. 2014) (mentioning that the enacted statements of purpose "are useful in conveying the overall policy" of the statute); WILLIAM N. ESKRIDGE, JR. ET AL., STATUTES, REGULATION AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 466 (2014) (mentioning purpose clauses); CALEB NELSON, STATUTORY INTERPRETATION (2011) (providing no discussion of purpose clauses); ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 107–08 (2d ed. 2002) (providing a brief and cautionary statement on the use of "enacted purpose" statements).

16. HART & SACKS, *supra* note 7, at 1378; *see infra* discussion accompanying notes 79–87. In other writing, I use Hart and Sacks's theory to argue that regulations should be interpreted in light of their statements of basis and purposes, which I suggest are analogous to enacted statements of purpose for legislation. *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 391–96 (2012) [hereinafter Stack, *Interpreting Regulations*].

17. SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA 44 (1992).

18. David Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 125 (2013).

arguments about the democratic pedigree of statutory purposes when a statute includes explicit statements of purpose, Driesen maintains that those statements should be treated "as a complete catalogue of the statute's goals."[19] At least for the purposes of review of the constitutionality of legislation, Daniel Crane argues the courts should rely on Congress's enacted, not unenacted findings.[20] And most recently, Jarrod Shobe argues "a statute's findings and purposes can serve as guideposts to understanding . . . the rest of the text"[21] because they are more likely to reflect congressional intent and represent part of the legislative bargain.[22] This Article aims to build on this prior work and make the case for the enacted purpose canon—by both reconstructing the Court's past reliance on enacted purposes and refining the justification for the such a canon.

This Article is organized as follows. Part II describes enacted purpose provisions, contrasts them with preambles, and discusses their frequency. Parts III and IV are the heart of the Article. Part III documents the development of judicial reliance on enacted statements of purpose from early English practice through the Supreme Court's decision in *King v. Burwell*.[23] Part IV defends this judicial reliance on enacted purposes. Building on jurisprudence showing that a rule's meaning changes when it states its own justification,[24] this Article makes the analytic case that the enactment of purpose changes the range of permitted meanings of a statute. It then offers a normative justification of the canon on the ground that, in practice, it will exclude some private-regarding interpretations of legislation. Finally, it illustrates the ways in which the enacted purposes canon builds on the premises of both textualism and purposivism, giving the canon a pragmatic virtue.

Part V argues that the enacted purpose principle warrants recognition as a canon of statutory interpretation. It argues that the enacted purposes principle has been relied upon as frequently as other recognized canons of interpretation, and also has a strong normative and analytic justification. It also argues that the canon is not defeated by the apparently contrary canon, the specific governs the general.

Part VI then traces the implications the enacted purposes canon, once recognized, for administrative law, legislative drafting, and statutory practice. First, adherence to the enacted purposes canon in applying *Chevron* review

19. *Id.* at 137.

20. Daniel A. Crane, *Enacted Legislative Findings and the Deference Problem*, 102 GEO. L.J. 637, 666–72 (2014).

21. Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 715 (2019).

22. *Id.* at 718–21.

23. King v. Burwell, 135 S. Ct. 2480, 2485 (2015).

24. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 213 (1991) [hereinafter SCHAUER, PLAYING BY THE RULES].

(and other frameworks of judicial review of agency action), constrains the scope of deference to administrative agencies. Second, and closely related, it shows that current legislative drafting manuals misunderstand the effects of purpose provisions. Enacted purposes tether a statute's meaning by excluding otherwise permissible interpretations. The proper advice to legislative drafters is not simply to avoid these provisions, but to use them when the legislature wants the entrenchment effects these provisions deliver. Finally, the placement of purpose provisions in the United States Code ("U.S. Code" or "the Code") clouds the role of these provisions. Typically, they are placed either in the text of the Code or in the official Notes under the text of Code provisions. Either way, the intrinsic connection between the purpose provision and the statutory provisions they address are obscured. In a statutory culture that has come close to relying on the United States Code as a comprehensive statement of federal legislation, purpose provisions that appear only in the Notes to the Code provisions fade almost entirely from view. Focus on the enacted purposes canon as a threshold consideration in statutory interpretation reorients our statutory practice; it reinforces the fact that our federal legislation is an accumulation of individual statutes, with their own purposes, not a formal code, much less the United States Code.

II. ENACTED PURPOSE PROVISIONS

Enacted purpose provisions are enacted in the sense that they appear as part of the text of the public law after the enacting clause, typically at the beginning of the statute's text.[25] They often appear under their own headings, typically called "Purpose,"[26] "Policy,"[27] or words to that effect, or combined with "Findings,"[28] but can also be found without a separate heading.[29] These

25. *See infra* Appendices A and B (providing a sampling of statutes with purpose provisions).

26. *See, e.g.*, Nuclear Energy Innovation and Modernization Act, Pub. L. No. 115-439, § 2, 132 Stat. 5565, 5565 (2019) (including purposes under a separate heading); Border Patrol Agent Pay Reform Act of 2014, Pub. L. No. 113-277, § 2, 128 Stat. 2995, 2995 (stating the purpose of the Act).

27. *See, e.g.*, Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, § 8001(a)(3), 102 Stat. 4181, 4518 (codified at 27 U.S.C. § 213 (1988)) (stating the declaration of policy and purpose of the Act).

28. *See, e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922–23 (codified as amended in scattered sections of 18 U.S.C.) (including a statement of findings and purpose); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2, 88 Stat. 829, 832–33 (including a section of findings and declaration of Policy); Endangered Species Act of 1973, Pub. L. No. 93-205, § 2, 87 Stat. 884, 884–85 (codified at 16 U.S.C. § 1531) (including a statement of findings, policy, and purpose); Victim and Witness Protection Act of 1982, Pub. L. 97-291, § 2, 96 Stat. 1248, 1248–49 (codified at 18 U.S.C. § 1512) (including a provision stating the findings and purpose of the act); High-Performance Computing Act of 1991, Pub. L. No. 102-194, § 2, 105 Stat. 1594, 1594 (codified at 15 U.S.C. § 5502) (including a findings and purposes section).

29. *See, e.g.*, Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, 1783 (codified at 50 U.S.C. § 1801) (stating the act is to authorize electronic surveillance to obtain foreign intelligence information but not under a purpose, policy, or finding heading).

are purpose provisions because they make statements regarding the aims, goals, or ends of the statute they accompany, and, like definitions sections, purport to speak to the entire statute in which they are enacted.[30]

Enacted purpose provisions are often confused with preambles. In a sense, the enacted purpose provisions are descendants of the preamble in federal legislative practice. Preambles were a common feature of legislation in England in the sixteenth century,[31] and still flourish in state statutory practice in the U.S.[32] In its classic form, the preamble begins with a "whereas" clause,[33] and then proceeds to identify the purposes the act aims to achieve.[34] Preambles still frequently appear in ceremonial congressional joint resolutions.[35] Enacted purpose statements include material that might have previously appeared under the heading of a preamble or introduced by a "whereas" clause—that is, statements of the aims of the goals of the legislation. The difference is the formal one that enacted purpose provisions appear in the text of the public law, after the enacting clause, and without a "whereas" provision.[36]

Enacted purpose provisions are littered throughout the public laws and appear in tremendous variety. Some state only one overarching purpose,[37] some state multiple independent or overlapping purposes,[38] some specify the means for achieving the enacted purposes,[39] and some do not.[40] Federal legislation includes over 1000 enacted purpose provisions—and perhaps substantially more. It is difficult to get a precise count. Because purposes are mostly found in purpose sections, one rough measure is the number of headings of the U.S. Code that contain the word "purpose." That yields over

30. *Id.*

31. *See infra* text accompanying notes 50–64; *see also* Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 398 (1942) (noting this English practice).

32. *See, e.g.*, SINGER & SINGER, *supra* note 14, § 20:3 (noting state practice).

33. SCALIA & GARNER, *supra* note 9, at 217.

34. ESKRIDGE, *supra* note 11, § 20:3.

35. *See, e.g.*, H.R.J. Res. 44, 111th Cong., 123 Stat. 1996 (2009).

36. In Commonwealth practice, enacted purpose provisions are called "objects" clauses. *See* Jeffrey Barnes, *Statutory Objects Provisions: How Cogent is the Research and Commentary?*, 34 STATUTE L. REV. 12, 17–23 (2012).

37. *See, e.g.*, Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. § 1531) (stating the overarching purpose of conserving endangered and threatened species).

38. *See, e.g.*, National Critical Materials Act of 1984, Pub. L. No. 98–373, § 202, 98 Stat. 1249, 1249–50 (codified at 30 U.S.C. § 1801) (providing multiple independent purposes of establishing a council, program, and to stimulate industry).

39. *See, e.g.*, Asian Elephant Conservation Act of 1997, Pub. L. No. 105-961, § 3, 111 Stat. 2150–51 (codified at 16 U.S.C. § 4262) (stating the purpose of conserving Asian elephants through the means of providing financial resources to conservation programs and projects).

40. *See generally* Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified at 17 U.S.C. § 1401) (stating only the purpose of modernizing copyright law but not the means to achieve the purpose).

1000 results.[41] Counting only U.S. Code heading undercounts the number of these provisions. As just noted, some do not appear in a section heading with the word purpose; some do not appear in a separate section or are included under another heading, such as "findings"; and, as discussed below, some purpose statements are relegated to the official Notes of the U.S. Code.[42] As to a percentage of public laws, Shobe reports that 21 percent of the public laws enacted from 1985 through 2011 had either a finding or purpose provision, and nearly two-thirds of the laws over 20 pages had either a finding or purpose provision.[43] He reports that purpose provisions appeared in approximately eight percent of public laws during that period, and with a substantial greater percentage in laws over 20 pages.[44] For present purposes, what is important is that enacted purpose provisions appear in a significant portion of our public laws. Moreover, enacted purpose provisions appear in a wide variety of statutes from criminal,[45] environmental,[46] and securities[47] to communications[48] and labor.[49]

III. JUDICIAL RELIANCE ON ENACTED PURPOSES

Reliance on enacted purposes has been a feature of judicial, and in particular, Supreme Court statutory practice for decades. This Part traces the origins of judicial reliance on enacted statements of purpose to early English jurists' reliance on statutory preambles. By the end of the nineteenth century, courts in the U.S. distinguished between statutory preambles and enacted

41. *See* OFFICE OF LAW REVISION COUNSEL, UNITED STATES CODE, search term: "purpose," *available at* http://uscode.house.gov/search.xhtml?searchString=head%3A%28purposes%29&pageNumber=2&itemsPerPage=100&sortField=CODE_ORDER&action=search&q=%7C%3A%3A%3A%3A%3A%3A%3A%3Afalse%3A%7C%3A%3A%3A%3A%3A%3A%3A%3Afalse%3A%7Ctrue%7C%5B%3A%3A%3A%3A%3A%3A%3A%3Afalse%3A%5D%7C%5BSGVhZGluZw%3D%3D%3AcHVycG9zZXM%3D%5D [https://perma.cc/MSK7-Q4PQ].

42. *See infra* text accompanying notes 282–85.

43. *See* Shobe, *supra* note 21, at 679 n.31.

44. Shobe counts 1193 statutes with findings, and 760 statutes with purposes (Table 1 and Table 2), so eight percent of public laws in his dataset have purpose provisions. *See id.* at 682–83. My own prior estimation for 107th–111th Congress was 13 percent of public laws included purpose provisions. *See* Stack, *Interpreting Regulations*, *supra* note 16, at 392 n.197. One coding difference that may help to explain the modest gap is that I included purposes which appear under a heading of "policy" (such as "statements of policy" or "declaration of policy"), which Shobe excludes. *See* Shobe, *supra* note 21, at 678 n.28.

45. *See, e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922–23 (codified at 18 U.S.C. § 1961).

46. *See, e.g.*, Clean Air Act, Pub. L. No. 88-206, § 1, 77 Stat. 392, 392–93 (1963) (codified at 42 U.S.C. § 7401).

47. *See, e.g.*, Securities Exchange Act of 1934, Pub. L. No. 73-291, § 2, 48 Stat. 881, 881–82 (codified at 15 U.S.C. § 78b).

48. *See, e.g.*, Communications Act of 1934, Pub. L. No. 76-416, § 1, 48 Stat. 1064, 1064 (codified at 47 U.S.C. § 151).

49. *See, e.g.*, National Labor Relations Act of 1935, Pub. L. No. 74-198, § 1, 49 Stat. 449, 449–50 (codified at 29 U.S.C. § 151).

statements of purpose, and by the 1940s, courts frequently relied on these statements to rule out prospective interpretations that conflicted with a statute's enacted purposes. But the Court does not call attention to its reliance on enacted purposes as a principle, practice, or canon—and, as a result, these decisions have not been previously associated or identified as stating a basic principle of statutory interpretation.

A. ORIGINS IN PREAMBLES

The sixteenth century English doctrine of the "equity of the statute"[50] prompted Parliament to include preambles to its acts, and English courts to begin relying on them as an authoritative source of the act's purposes. Edmund Plowden's *Commentaries*, collecting and describing cases decided between the 1550s and 1570s, provides the leading account of interpreting a statute according to its "equity."[51] The idea comes through in Plowden's famous metaphor of the law as a nut:

> And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter. And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. And equity, which in Latin is called equitas, enlarges or diminishes the letter . . . .[52]

For Plowden, the means for discerning the "equity" of a statute involved consulting the statute's words but also engaging in a process of imaginative reconstruction.[53] When determining whether the letter of the statute is "restrained" or "enlarged, by equity," the judge should suppose the lawmaker is present; "you must give yourself such an answer as you imagine he would

50. *See* NEIL DUXBURY, ELEMENTS OF LEGISLATION 179–90 (2013); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 32 (2001) [hereinafter Manning, *Equity of the Statute*] (noting the sixteenth century as the era of the doctrine's fullest elaboration).

51. *See* DUXBURY, *supra* note 50, at 180–81.

52. Eyston v. Studd (1574) 2 Plowd. 459, 465.

53. Partridge v. Strange & Croker (1552) 1 Plowd. 77, 82 ("[W]ho may approach nearest to their minds shall construe the words, and there are the sages of the law, whose talents are exercised in the study of such matters."); *see also* DUXBURY, *supra* note 50, at 182. As Duxbury explains, by "rooting out the purpose or kernel of a statute, a judge will sometimes determine that it applies to a more limited range of circumstances than would have" resulted from applying the statute "by reference only to its language, or its shell." DUXBURY, *supra* note 50, at 181.

have done" with regard to questions touching on equity.[54] In this way of thinking, when the judge imagines a dialogue with the legislature with regard to a question of the equity of the statute, the judge is both conjuring a conception of a legislature but also assuming the lawmaker wanted to achieve a just and reasonable construction, had he or she known of the facts at issue.[55] As Plowden explains, while sage judges sometimes construe statutes contrary to their letter, they "have 'always' interpreted 'the intent of the legislature . . . according to that which is consonant to reason and good discretion.'"[56] The interpretation of the statute in accordance with its "equity" puts the judge in the position of enlarging or restraining the statute based on an attribution of a just or equitable construction of the law to the legislature.

The breadth of this inquiry into the "equity" of the statute gave rise to objections similar to those in our current debate, including criticizing it as "too general" or too "dangerous" a ground for statutory interpretation.[57] In the seventeenth and eighteenth centuries, the doctrine fell out of favor.[58] But before it did so, it left another mark on English statutory law. As the English scholar Neil Duxbury writes, during the sixteenth and seventeenth centuries, statutory drafters realized that "one way to minimize the likelihood of parliament's intentions being usurped by the predilections of an equity-minded judge would be to include in a statute a preamble setting out parliament's reasons for enacting it."[59] Sir Francis Bacon argued the point: "The lawyers of this realm are [sic] wont always to make light of the preamble . . . but our preambles are annexed for exposition; and this gives aim to the body of the statute."[60] Parliament began to enact preambles to anchor courts' inquiries into the equity of the statute, and courts in turn began to give these thopublic and authoritative statements weight.[61] As Plowden reported, a prominent jurist (Sir James Dyer) considered "the preamble . . . to be . . . a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress."[62]

In eighteenth century England, enthusiasm for preambles in statutory interpretation faded, prompted by several different sources, as Duxbury explains. On the one hand, with the increased specificity of legislative drafting

54. DUXBURY, *supra* note 50, at 182; *Eyston*, 2 Plowd. at 468.

55. Manning, *Equity of the Statute*, *supra* note 50, at 34; *see also* DUXBURY, *supra* note 50, at 184 ("[N]ot[ing] that Plowden considered the determination of unspecified legislative intention through conjectural reconstruction to be not an end itself, but 'a good way' of determining the equity of a statute." (quoting Warren Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 497)).

56. DUXBURY, *supra* note 50, at 185 (quoting Stradling v. Morgan (1560) 1 Plow. 199, 205).

57. *Id.* at 187.

58. *Id.* at 186–87.

59. *Id.* at 187.

60. *Id.* (citing Chudleigh's Case (1594), *in* 15 THE WORKS OF FRANCIS BACON 170 (1900)).

61. *Id.* at 207.

62. *Id.* at 188 (quoting Stowel v. Zouch (1572) 1 Plowd. 353, 369).

in the eighteenth century, "the value of the preamble waned."[63] More significantly for later developments, courts began to distinguish the preamble from the other parts of the statute. The preamble came to be seen as part of the "descriptive" rather than the "operative" part of the statute, and so "they cannot have the same weight as enacting provisions and so are at best aids to construction when those provisions are ambiguous."[64]

A similar evolution occurred in the United States in the nineteenth century. In Justice Story's *Commentary on the Constitution of the United States*, capturing the early and mid-nineteenth century view, he endorsed the preamble: "[T]he preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute."[65] By the end of the nineteenth century, however, this distinction between the descriptive and the operative parts of the statute, with preambles treated as descriptive, took hold in American law. As the Supreme Court stated in 1889, "the preamble is no part of the act" and therefore "cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous."[66] That general doctrine—that preambles are outside the act, and therefore relevant only to clarifying ambiguities—remains the law today, and versions of it can be found in prominent treatises on statutory interpretation.[67] But this treatment of preambles does not decide how courts would (or should) use an enacted statement of purpose.

B. RISE OF RELIANCE IN THE TWENTIETH CENTURY

Enacted recitals of a statutes' purposes began appearing with more frequency at the beginning of the twentieth century. From the beginning of the twentieth century, the Supreme Court has treated enacted statements of purpose differently from preambles.[68] The Court clearly stated that it was bound by the enacted recitals, and by the 1940s, the starting point for the modern era of the doctrine, the Court's reliance became more frequent.[69]

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63. *Id.* at 208.

64. *Id.* at 209.

65. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 163 (Rotunda & Nowalk eds., 1987).

66. Yazoo & Miss. Valley R.R. v. Thomas, 132 U.S. 174, 188 (1889).

67. *See, e.g.*, SINGER & SINGER, *supra* note 14, § 47:4; SCALIA & GARNER, *supra* note 9, at 219.

68. *See, e.g.*, Arizona v. California, 283 U.S. 423, 456 (1931) (rejecting the suggestion that "the court is not bound by the recital of purposes in the act," and adopting a construction of the Act which authorized a dam for purposes of improving navigation consistent with those recitals); United States v. American Surety Co., 200 U.S. 197, 205 (1906) (holding that "in view of the declared purpose[s] of the statute" the language requiring "full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract" authorized subcontractors in construction for the U.S. government to sue contractor under Act).

69. *See, e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192, 199–200 (1944) (holding that the Railway Labor Act's "declared" purposes of "avoidance of 'any interruption to commerce

The Court's decision in *Roland Electrical v. Walling*[70] exemplifies this emerging modern practice. In *Roland*, the Court faced the question of whether an electrical manufacturing company fell within an exception to the Fair Labor Standards Act applicable to "any retail or service establishment."[71] The Court rejected the argument that an electrical service company doing business with other businesses fit within this exception.[72] The Court acknowledged that this language could be read broadly to include all employees of manufacturers who provide products and services to other firms engaged in interstate commerce.[73] But when read "in connection with the declared purpose[s] of the Act," along with its legislative history, the Court concluded "the exemption reaches employees of only such retail or service establishments as are comparable to the local merchant . . . who . . . serves ultimate consumers."[74]

As a basis for the *Roland* Court's understanding of the purposes of the Act, it relied extensively on its enacted statement of purpose.[75] The Act stated its purpose was to "eliminate" labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health . . . and general well-being of workers."[76] The Court concluded that including the electrical manufacturers in the exception would thwart the Act's purpose. The Court found that the purpose "to raise living standards . . . will fail of realization" unless the Act has sufficient coverage to largely eliminate the competitive advantage to those firms relying on substandard labor costs.[77] Otherwise, the Act "will be ineffective" and will punish "those who practice fair labor standards as against those who do not."[78]

The idea, reflected in *Roland* and earlier decisions, of the legislature expressly stating its aims to guide judicial construction, and courts heeding

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or to the operation of any carrier'" and "encouraging 'the prompt and orderly settlement of all disputes'" would "hardly be attained if a substantial minority [African Americans workers]" were denied access to the bargaining table so their only recourse was to strike); Purcell v. United States, 315 U.S. 381, 385 (1942) (relying on the "stated purpose" of the Transportation Act of 1940 "to promote . . . adequate, economical, and efficient service" as the basis for affirming the Commission's decision to authorize a railway line that would be partially submerged by a new dam's waters (alteration in original) (quoting Transportation Act of 1940, 54 Stat. 898, 899)); *cf.* Yakus v. United States, 321 U.S. 414, 421–25 (1944) (invoking the act's "declared purposes" as enacted to rebut argument that the act failed to provide sufficient guidance to the Administrator so it would constitute an unconstitutional delegation).

70. Roland Co. v. Walling, 326 U.S. 657, 678 (1946).

71. *Id.* at 660 (addressing Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 13(a)(2), 52 Stat. 1060, 1067 (codified at time in 29 U.S.C. § 202)).

72. *Id.* at 667.

73. *Id.*

74. *Id.* at 666.

75. *See id.* at 667–68.

76. *Id.* at 667 (quoting § 2, 52 Stat. at 1060).

77. *Id.* at 670.

78. *Id.*

those statements, found a firm endorsement in American statutory jurisprudence of the middle of the twentieth century. Beginning in the 1940s and extending for several decades, the legal process school was the dominant approach to statutory interpretation in the United States, for which materials developed by Henry Hart and Albert Sacks, *The Legal Process*,[79] provided the most established formulation. According to Hart and Sacks, when interpreting a statute, the court should first endeavor to discern the statute's purpose.[80]

In the years since the issuance of *The Legal Process*, Hart and Sacks's theory is often taken to amount to the reconstructive inquiry that a court should "assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[81] But that is a misreading, and one which overlooks the central place of enacted statements of purpose in their approach.[82] Hart and Sacks do not simply urge courts to determine a statute's purpose by asking what a reasonable purpose would be. They instead describe the process of determining the purpose or purposes of legislation as having two sequential steps. First, they call for the court to examine "formally enacted statement[s] of purpose."[83] If such a statement exists, pertains to the issue at hand, was designed to shed light on interpretation, and is consistent with the other text of the statute, then the court's job is straightforward: it should "accept" the formally enacted statement of purpose.[84] It is only if such an enacted statement of purpose is not present or does not satisfy these other conditions that the court should launch into the more constructive inquiry of "attributing" reasonable purposes to the legislation.[85]

Reliance on enacted statements of purpose implements Hart and Sacks's larger principle of institutional settlement—that courts should respect the decisions of duly authorized bodies.[86] The general inquiry into legislative purpose was seen to be an objective one, looking to determine purpose "evinced in the language of the statute, as read in the light of other external manifestations of purpose," as Felix Frankfurter put it.[87] Legal process

79. HART & SACKS, *supra* note 7, at 1374–78.

80. *Id.* at 1374.

81. *Id.* at 1378.

82. Stack, *Interpreting Regulations*, *supra* note 16, at 384–85.

83. HART & SACKS, *supra* note 7, at 1377.

84. *Id.*

85. *See id.* at 1377–78.

86. *Id.*; *cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947) (stating that "[o]ften the purpose or policy that controls is not directly displayed in the particular enactment" and implying that when it is so stated, it should be respected); *see also* Radin, *supra* note 31, at 398 ("The legislature . . . had the constitutional right and power to set this purpose as a desirable one for the community, and the court or administrator has the undoubted duty to obey it.").

87. Frankfurter, *supra* note 86, at 539.

scholars seized upon a very basic insight apparent in *Roland* and earlier decisions: A positively enacted statement of purpose is hard to ignore.

The explosion of statutory law post-war through the 1970s added a host of important statutes with enacted purposes, and the Court often turned to those statements as grounds to reject interpretations inconsistent with those enacted purposes. In *Johnson v. Robison*,[88] for instance, the Court complimented Congress for "responsibly reveal[ing] its express legislative objectives" in the Veterans' Readjustment Benefits Act of 1966,[89] and relied on those purposes to reject the suggestion that its benefits also applied to conscientious objectors who performed alternative civilian service.[90] In *Johnson*, the claimant had latched onto one of the Act's enacted purposes of "extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education."[91] The Court firmly rejected that reading. It noted that the Act's goals were also "enhancing and making more attractive service in the Armed Forces," and assisting in the "vocational readjustment and restoring [of] lost educational opportunities" to those service men and women "whose careers [were] interrupted or impeded by reason of active duty."[92] In that light, it was clear that the primary aim of the act was to assist those on active duty to "readjust" to civilian life.[93] The basic principle invoked was the same as in early decisions: The declared purposes provided a basis to reject an interpretation that would have thwarted those purposes by making a benefit targeted to active duty personnel available to others.

Enacted purposes also supported the Court's refusal to imply an exception in the widely-discussed *TVA v. Hill* decision.[94] The question in *Hill* was whether the Endangered Species Act of 1973's ("ESA") provisions preventing federal expenditure on projects which jeopardize the continued existence of an endangered species prevented further funding of a federal dam nearing completion. Section 2 of the ESA, titled "Findings, Purposes, and Policy," declared that the Act sought "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved," and policy that "all Federal departments and agencies shall seek to conserve endangered species."[95] The Court read the critical operative provision requiring federal agencies to "utilize their authorities in furtherance of the

88. Johnson v. Robison, 415 U.S. 361, 376 (1974).

89. Veterans' Readjustment Benefits Act of 1966, Pub. L. No. 89-358, § 1651, 80 Stat. 12, 12–13 (codified at the time at 38 U.S.C. §§ 101, 1651 (1974)).

90. *Johnson*, 415 U.S. at 376–77.

91. *Id.* (quoting Senate Committee on Labor and Public Welfare, Cold War Veterans' Readjustment Assistance Act, S. Rep. No. 269, 89th Cong., 1st Sess. 7, at 8).

92. *Id.* (quoting 38 U.S.C. § 1651).

93. *Id.* at 377.

94. TVA v. Hill, 437 U.S. 153, 195 (1978).

95. *Id.* at 180 (emphasis omitted) (quoting 16 U.S.C. § 1531(b) (1976)).

purposes of [the Act],"[96] in light of these enacted goals.[97] The invocation of those enacted purposes supported the Court's conclusion that the ESA did not authorize the courts to imply an exception inconsistent with the Act's goal of conservation, even when the conservation concerned a small, obscure fish.[98] *TVA v. Hill* might be seen as a case where the Court used the enacted purposes more aggressively, but a core idea was still implicated. Whatever is permitted by the rest of the statutory text, the court should reject constructions that result in substantive effects—like the elimination of a species—that contradict the Act's enacted purposes.

In the same period, the Court invoked enacted purposes to reject inconsistent interpretations of other important statutes. For instance, enacted purposes figured in the extensive litigation arising from the Employee Retirement Income Security Act of 1974 ("ERISA"). In *Firestone v. Bruch*, for instance, the Court was tasked with determining the standard of review for challenges to benefit denials under ERISA,[99] a question on which the Act was silent. The district court had granted Firestone's motion for summary judgment, finding that Firestone's decision to deny a termination benefit in connection with the sale of a business unit was not arbitrary and capricious.[100] The court of appeals reversed, explaining that when an employer is itself the fiduciary for an unfunded benefit plan, its decision to deny benefits is subject to more stringent *de novo* review.[101] The Supreme Court affirmed, citing ERISA's findings and declaration of policy in support of the conclusion that *de novo* review applies.[102] "Adopting Firestone's reading of ERISA," Justice O'Connor wrote for the Court, "would require [the Court] to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted."[103] The Court rejected the suggestion that de novo review would contradict the higher aims of ERISA by discouraging employers to create benefit plans,[104] reasoning that the grounds for de novo review, including enhancing workers protections over pre-ERISA levels, outweighed the risk of discouraging plan creation.[105] The *Firestone* Court's invoked the statute's enacted purposes to establish the

96. *See id.* at 160 (quoting 16 U.S.C. § 1536).

97. *Id.* at 183 (construing § 7 of 119 Cong. Rec. 25664 (1973)).

98. *Id.* at 189–90.

99. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829; Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 102 (1989).

100. *Firestone*, 489 U.S. at 106–07.

101. *Id.* at 107.

102. *See id.* at 113 ("ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans,' and 'to protect contractually defined benefits.'" (first quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983); then quoting Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985)) (discussing 29 U.S.C. § 1001)).

103. *Id.* at 113–14.

104. *Id.* at 114–15.

105. *Id.* at 115.

standard of review, where statute had not spoken to the issue.[106] The Court continued to rely on enacted purposes in the 1990s,[107] and subsequently.[108]

C. CONTEMPORARY EXAMPLES

Several more recent decisions reflect this developing practice—both in refusing to interpret statutes in ways that contradict their enacted purposes and in not calling attention to this practice as an interpretive choice or principle.

First consider a 2006 decision, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*,[109] written by Justice Stevens, regarded as an intentionalist or purposivist in statutory interpretation. In *Dabit*, the Court faced the question of whether the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") bars state class action claims for which federal law does not authorize a claim for relief.[110] In 1995, Congress enacted the Private Securities Litigation Reform Act ("the Reform Act"), which made it more difficult to bring securities class actions in federal court.[111] As a direct result, plaintiffs began to bring more securities class actions in state court under state law.[112] To close down this

106. *Id.* at 109.

107. *See, e.g.*, Morse v. Republican Party of Va., 517 U.S. 186, 210–11, 217, 233 (1996) (relying on the enacted purpose provision [which the Court incorrectly called its preamble] providing that the Voting Rights Act seeks to "enforce the guarantees of the fifteenth amendment," and therefore triggering the Court's fifteenth amendment jurisprudence, to reject the argument that the filing fee did not constitute a "voting qualification or prerequisite to voting"); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 35, 52–53 (1989) (rejecting claim that infants born off the reservation were not "domiciles" of the tribe and subject to tribal jurisdiction based in part on enacted statement that "exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, ha[s] often failed to recognize the essential tribal relations of Indian people").

108. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 737 (2006) (Scalia, J., announcing the judgment and authoring an opinion joined by Roberts, C.J., Thomas, and Alito, JJ.) (holding that only a narrow construction of "waters" in the Clean Water Act is "consistent" with the Act's stated policy "to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent . . . pollution" (citations omitted)). With the increased reliance on enacted statements of purpose, Justices in dissent likewise have occasionally made use of these statements to batter the majority for not paying the enacted statement sufficient heed. *See, e.g.*, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2572 (2013) (Sotomayor, J., dissenting) ("The third clue is that the majority openly professes its aversion to Congress' explicitly stated purpose in enacting the statute. The majority expresses concern that reading the Act to mean what it says will make it more difficult to place Indian children in adoptive homes . . . but the Congress that enacted the statute announced its intent to stop 'an alarmingly high percentage of Indian families [from being] broken up.'" (citing 25 U.S.C. § 1901(4))).

109. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006).

110. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227; *Dabit*, 547 U.S. at 74.

111. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; *Dabit*, 547 U.S. at 81 (commenting that the Reform Act sought to deter class action securities litigation in federal court).

112. *See, e.g.*, *Dabit*, 547 U.S. at 82.

workaround, two years later, Congress enacted SLUSA, including an enacted statement of its purpose "to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of the 1995 Reform Act.[113]

In *Dabit*, the Court relied on that enacted purpose to support a broader reading of the preemptive scope of the Act. In particular, the Court wrote that "[a] narrow reading of the [Act] would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose, viz, 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the 1995 Act."[114] The Act's enacted purposes precluded the Court from adopting a construction that would have continued to facilitate the very end-run SLUSA sought to prevent.

Reliance on enacted purposes found the most prominence in the Court's decision in *King v. Burwell*, authored by Chief Justice Roberts. Because of *King v. Burwell*'s importance and reliance on enacted purposes, it is worth providing a fuller description of its context and reasoning. *King v. Burwell* hinged on the interpretation of the phrase "an Exchange established by the State"[115] under a section of the ACA.[116] The challengers to the ACA argued that this phrase included only exchanges—marketplaces to buy health insurance—created by state governments, not exchanges established by the federal government.[117] The result of that construction would be that individuals purchasing health insurance on federally run exchanges would not qualify for tax credits to offset the cost of health insurance the ACA required them to buy. Those consequences would be significant for the ACA. Thirty-four states had declined to establish their own exchanges.[118] As a result, the only exchanges operating in those states were federal exchanges. If the challengers prevailed, the tax credits which make the mandate to purchase health insurance financially viable for individuals with low income would not have been available in the majority of states.

The Court could have approached the case with a narrow focus on the provisions of the ACA most implicated by the challenge. The Court instead took a step back to understand the scheme that Congress devised in the statute, a scheme that included "a series of interlocking reforms designed to expand coverage in the individual health insurance market."[119] Importantly for present purposes, Congress's own enacted statements of the statute's

113. § 2(5), 112 Stat. at 3227 (listing the Congressional Findings of 1998 Amendments to 15 U.S.C. § 78a note).

114. *Dabit*, 547 U.S. at 86 (quoting enacted findings printed at § 2(5),112 Stat. at 3227).

115. 26 U.S.C. § 36B(b)–(c) (2012); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

116. King v. Burwell, 135 S. Ct. 2480, 2487 (2015).

117. *Id.*

118. *Id.*

119. *Id.* at 2485.

policy, located in its enacted introductory findings section, guided and grounded the Court's detailed account of the ACA and the place of tax credits within it.[120]

As part of the statement of findings regarding the Act's effects on the national economy and interstate commerce, Congress articulated the central logic underlying the ACA's provisions. Congress stated that the individual coverage requirement was critical to activating "near-universal coverage"[121] as it had been under the Massachusetts plan.[122] "In Massachusetts, a similar [individual mandate] requirement has strengthened private employer-based coverage,"[123] Congress declared. Congress also stated that without such a requirement "many individuals would wait to purchase health insurance until they needed care."[124] That consequence is known in this context as leading to an economic "death spiral," in which individual premiums continue to rise, the number of individuals buying insurance then shrinks and ultimately insurers leave the market.[125] But the mandate for coverage, Congress declared in the ACA, "will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums."[126]

Congress's findings, which amounted to declarations of policy and purpose,[127] structured the Court's presentation and its overriding conclusion that the reforms operated as "interlocking" elements. The Court emphasized that "Congress *found* that the guaranteed issue and community rating requirements"—obliging provision of health insurance at the same cost to individuals with pre-existing conditions—"would not work without the coverage requirement."[128] The Court went on: "In Congress's view, that coverage requirement was 'essential to creating effective health insurance markets,'"[129] quoting again from Congress's findings. Moreover, the Court viewed these three reforms—the individual mandate to obtain insurance, the prohibition on discrimination against individuals with pre-existing conditions, and the provisions of tax credits to individuals of limited means

120. § 1501, 124 Stat. at 242–43.

121. 42 U.S.C. § 18091(2)(D) (2012).

122. *Id.* § 18091(2)(I); *see also King*, 135 U.S. at 2486 (quoting 42 U.S.C. § 18091(2)(I)).

123. 42 U.S.C. § 18091(2)(D).

124. *Id.* § 18091(2)(I).

125. *King*, 135 S. Ct. at 2486.

126. *Id.*

127. *See* Crane, *supra* note 20, at 669–72 (noting that many "findings" made by Congress involve normative, moral, and aesthetic judgments and hence provide a basis for legislative deference even conceding that other institutions may be better at finding facts).

128. *King*, 135 S. Ct. at 2487 (emphasis added) (citing 42 U.S.C. § 18091(2)(I)).

129. *Id.* at 2486 (quoting 42 U.S.C. § 18091(2)(I)).

—were "closely intertwined,"[130] and "interlocking"[131] just as Congress had concluded.

With this general understanding of the ACA established, the Court turned to the Act's implicated provisions. But even there, the Court emphasized that its duty "is 'to construe statutes, not isolated provisions,'"[132] and framed its inquiry as a contextual one:

> If the statutory language is plain, we must enforce it according to its terms . . . But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context". . . . So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme."[133]

The Court divided its analysis of the operative provisions into two parts: first, examining the interaction between operative provisions and, second, considering them in light of the larger statutory scheme. Looking at the operative provisions, the Court observed that adopting the challengers' construction of "established by the State" would have created puzzles and contradictions in how other provisions of the ACA operate. For instance, the challengers' construction would have the implication that there were "*no* 'qualified individuals' on Federal Exchanges."[134] The Court rejected that implication, finding "the Act clearly contemplates that there [would] be qualified individuals on *every* exchange."[135] This and other perplexities created by the way in which challengers' construction works with the other operative provisions lead the Court to observe that, considering these operative statutory provisions on their own, the text is ambiguous.[136]

The Court then noted that the meaning of "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[137] It is at this moment the Court then invoked the enacted purposes principle to decide the case. The challengers' construction of the Act, the Court concluded, "would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed

130. *Id.* at 2487.

131. *Id.* at 2485.

132. *Id.* at 2489 (quoting Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 290 (2010)).

133. *Id.* (citations omitted).

134. *Id.* at 2489–90 (comparing operation of 42 U.S.C. § 18031(d)(2)(A) with 42 U.S.C. § 18032(f)(1)(A)).

135. *Id.* at 2490.

136. *See id.* at 2492.

137. *Id.* (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988)).

the Act to avoid."[138] With that premise in place, the enacted purposes principle clinched the argument: "We cannot interpret federal statutes to negate their own stated purposes."[139] The incompatibility of the challengers' construction with the "rest of the law" excluded an otherwise permissible construction.

King's invocation of the ACA's enacted purposes was specific in two respects. First, in *King*, the Court invoked the enacted purposes principle as part of its inquiry into whether the statute precludes a prospective interpretation. When read in isolation, the operative provisions might have been considered ambiguous as to the challenges' construction. But once the Court consider the enacted purposes, it concluded that the Act as a whole could not permit that construction. Enacted purposes were invoked as part-and-parcel of determining what set of interpretations the Act permitted. Second, the enacted purposes operated to exclude prospective interpretations, not to require the interpretation that best carries forward those purposes. Specifically, the Court invoked the Act's enacted purpose to bar an interpretation that would "negate" those purposes.[140] The challenger's construction would have made the ACA's mandate for health insurance practically unachievable for those at the lowest end of the income spectrum. Thus, in the context of *King*, enacted purposes preclude interpretations that would be likely (or highly likely) to create the very consequence "Congress designed the Act to avoid,"[141] or "produc[e] a substantive effect that is [not] compatible with the rest of the law."[142] In this sense, the doctrine bars interpretations that will or likely will frustrate (or substantially frustrate) the achieving enacted ends.

Consider, finally, *Alabama Dep't of Revenue v. CSX Transportation, Inc.*,[143] a 2015 decision, authored by Justice Scalia, which relies on an act's enacted purposes but does not cite *King* (or any other decision) as a basis for this reliance. In *CSX Transportation*, the Court held that state diesel taxes which applied to railroads, but not to trucking companies, were prohibited under a federal railroad act known as the 4-R Act.[144] In the 4-R Act, Congress enacted a "Declaration of Policy," which included a purpose of "restor[ing] the financial stability of the railway system" and "foster[ing] competition among all carriers by railroad and other modes of transportation."[145] The Court relied on these purposes to conclude that trucking companies were "similarly

138. *Id.* at 2493 (citing N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419–20 (1973)).

139. *Id.* (quoting *N.Y. State Dep't of Soc. Servs.*, 413 U.S. at 419–20).

140. *Id.*

141. *Id.*

142. *Id.* at 2492 (quoting *United Sav. Ass'n of Tex.*, 484 U.S. at 371).

143. Ala. Dep't of Revenue v. CSX Transp., Inc., 135 S. Ct. 1136, 1142–43 (2015).

144. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94–210, 90 Stat. 31; *see also CSX Transp.*, 135 S. Ct. at 1143.

145. § 101(a), (b)(2), 90 Stat. at 33.

situated" as a comparison class to railroads, "since discrimination in favor of that class most obviously frustrates the purpose of the [federal act], which was to 'restore the financial stability of the railway system of the United States' while 'foster[ing] competition among all carriers by railroad and other modes of transportation.'"[146] The alternative construction would thwart "fostering of competition among all carriers" and thus impede the aims of the Act. The reliance on the enacted purposes principle in *CSX* largely parallels that in *Dabit* and *King*—using a purpose statement to exclude a prospective interpretation that would thwart the statement's aims—but this time the pen is in Justice Scalia's hand.

D. SUMMARY AND QUALIFICATIONS

By identifying these decisions in which the Court relies on a statute's enacted statement of purposes, I do not mean to suggest that the enacted purposes principle was often or always decisive. Even in the decisions just surveyed, arguments from enacted purposes travelled alongside engagement with the meaning of particular provisions, legislative history, and the larger statutory context. That is to be expected. Statutory interpretation frequently involves consideration of multiple tools and sources. Relying on enacted purposes can be a bedrock principle while still appearing alongside, and occasionally in tension with, other principles; a principle need not exclude all other considerations to be foundational.

Notice, too, that the Court relies on enacted purposes in a variety of contexts. The Court relies on them to bar what otherwise might be the most natural reading of the text (*King*; *Roland*; *CSX*); to bar implied exceptions (*TVA v. Hill*); to support a relatively broad construction where the narrow would contradict the purposes (*Dabit*); and to provide ground to exclude an interpretation where Congress had been silent (*Firestone*). Given the diversity of statutes and questions presented to courts, it is not surprising that enacted purposes would be deployed in these and many different ways. Moreover, some variations in use of enacted purposes is to be expected given the Court's and commentators' lack of attention to the Court's practices with regard to enacted purposes; without identification of this practice as a doctrine or canon, there is less occasion for the Court or others to assess the consistency of judicial practice. But what is clear is that the Court has repeatedly, over many decades, relied upon enacted purposes to dismiss prospective interpretations that conflict with those purposes.

IV. DEFENDING RELIANCE ON ENACTED PURPOSES

This Part defends this pattern of judicial reliance on enacted purposes to exclude interpretations inconsistent with those purposes. It begins by arguing

146. *CSX Transp., Inc.*, 135 S. Ct. at 1142 (alteration in original) (citation omitted) (first quoting § 101(a), 90 Stat. at 33; then quoting § 101(b)(2), 90 Stat. at 33).

that statutes with enacted purposes are similar to rules with express justifications. In both cases, the expressed justification or purpose changes the meaning of the rule or statute. It supports that jurisprudential point with evidence that Congress negotiates over the language of purpose provisions just as it negotiates over other provisions. An aspect of understanding these provisions concerns their effects. Based on principles of political economy, this Part then argues that interpreting statutes in light of their enacted purposes leads to more public-regarding statutory constructions. Finally, it situates enacted purpose provisions within longstanding debates between textualists and purposivists, showing that attention to a statute's enacted purposes represents a welcome point of agreement between textualism and purposivism.

A. STATUTES WITH ENACTED PURPOSES ARE DIFFERENT

Statutes with enacted statements of purpose have different meanings than statutes without such statements. One way to appreciate this difference is to examine the jurisprudence on the relationship between rules and purposes. The question of whether a legal rule may be understood and applied without understanding its purpose is one of the central questions in the jurisprudential debate between H.L.A. Hart and Lon Fuller. On this issue, Fuller took the view that understanding a rule always involves understanding its purposes.[147] Hart defended the idea that there are some core meanings of rules which can be understood without making recourse to their purpose or justification.[148] The leading view among contemporary scholars is that Hart has the stronger side of this argument.[149]

But we need not adopt Fuller's position to appreciate that statutes which state their own purposes require a distinctive approach. First consider the case of rules. Some rules include not only a rule formulation (e.g., "no vehicles are permitted in the park") but also an authoritative statement of the justification or purpose of the rule (e.g., "To preserve peace and quiet, no vehicles are permitted in the park.").[150] As Frederick Schauer explains in his foundational book, *Playing by the Rules*, the authoritative statement of the purpose or justification changes the character of the rule; the rule is now equivalent to "the rule-when-consistent-with-its-justification," not merely the first-order rule

147. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663–66 (1958); *see also* ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 99, 103 (2005) (characterizing Fuller's position).

148. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–09 (1958).

149. *See* MARMOR, *supra* note 147, at 103–16; SCHAUER, PLAYING BY THE RULES, *supra* note 24, at 213.

150. *See* SCHAUER, PLAYING BY THE RULES, *supra* note 24, at 74–76, 144, 212 (noting that a justification can be built into the formulation of a rule).

formulation.[151] For example, as Schauer explicates, the rule formulation, "no sleeping is allowed in the train station," is a different rule than one which says, "for the purposes of preventing people from using the train station as a hotel or home, no sleeping is allowed in the train station."[152] The latter rule would prohibit sleeping only if it were consistent with the rule's purpose —preventing people from using the train station as a hotel or home—and so would not prohibit commuters dozing while waiting for connections between trains. Enforcement of the latter rule as if it were enforcement of the former rule would not heed the latter rule's purposes. Of course, even rules with authoritative statements of purpose will still be over- or under-inclusive with regard to some larger background purpose, say, ensuring that all members of society have secure living arrangements.[153] But, for present purposes, the basic point is that rules which include their own statement of justification have a different meaning than rules that are otherwise identical but do not include that statement. The statement of justification in the rule alters the meaning of the provisions it accompanies. It makes applying the rule a matter of examining the rule, but then checking prospective interpretations to make sure they are consistent with the rule's enacted purposes or justification.

Does this same logic apply to statutes? Statutes have some distinguishing features. Many statutes state standards (e.g., prevention of "unreasonable risk"), not rules.[154] In addition, enacted purpose statements in statutes are not necessarily linked to a single rule, as in the stylized examples above about vehicles in parks and sleeping in train stations, but sometimes introduce tens, hundreds, or even thousands, of provisions. These differences make clear these arguments must be extended to reach statutes with enacted purposes.

That extension is a valid one. First, the fact that statutes often express their requirements in standards, not rules, does not undermine the relevance of an authoritative statement of purpose. While standards generally leave more judgment to the enforcer or interpreter than rules,[155] an authoritative purpose statement could guide the application of a standard just as it does for rules. A statute which said "for the purposes of protecting endangered wildlife, roads shall not be constructed through parks unless there is no feasible and prudent alternative" has a narrower meaning than the same prohibition without the purpose clause. The addition of the purpose provision creates a second layer of inquiry, just as it does for rules. So the point remains: The addition of the purpose statement changes the statute; it

151. *Id.* at 212–13.

152. *Id.*

153. *Id.* at 212–13.

154. On the theoretical distinction between, and practical converges of rules and standards, see Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 305–09.

155. *See id.* at 308–09.

requires some consideration of the consistency of the prospective interpretation with the enacted purposes.[156]

The more complex issue is that statutes frequently include many provisions. The coupling of a single rule with a justification, as in the stylized examples of train stations and vehicles in parks, suggests conscious choice by the rule-maker about how a norm is to apply. The coupling makes it hard to avoid the idea that the rule-maker sought the rule-interpreter or enforcer to hold onto two ideas, the rule-formulation and the purpose, and reason back-and-forth between them. The close nesting of the purpose and rule-formulation also suggests careful deliberation by the rule maker. That impression of deliberation may support the confidence the rule-enforcer feels when applying the rule, but it is not necessary for the purpose statement to be relevant to interpretation.

What drives the relevance is a formal feature: whether the purpose statement is part of, or is incorporated within, the same legal act or instrument as the provisions at issue. To see this, consider an enacted statement declaring "disturbances to pedestrians shall be minimized" and a separate, unconnected enactment "no vehicles in the park." Those two separate enactments are not the same as an enactment that includes both. In this context, formality matters. Because purpose statements are enacted as part of the text of a

156. The Supreme Court's decision in *District of Columbia v. Heller* directly engaged the relation between the Second Amendment's prefatory clause and its operative provisions based on an analogy to mid-nineteenth century practice regarding statutory preambles. *See* District of Columbia v. Heller, 554 U.S. 570, 577 (2008). The *Heller* Court held that while "[l]ogic demands that there be a link between the stated purpose [in the prefatory clause] and the command," prefatory clauses may "resolve an ambiguity in the operative clause" but "does not limit or expand the scope of the operative clause." *Id.* at 577–78 (citing F. DWARRIS, A GENERAL TREATISE ON STATUTES 268–69 (P. Potter ed., 1871); T. SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 42–45 (2d ed. 1874)). To support this proposition, the Court, with Justice Scalia writing, relied upon two nineteenth century treatises on statutory construction. *See id.* at 578 (citing DWARRIS, *supra*, at 268–69; SEDGWICK, *supra*, at 42–45). The *Heller* Court opines that "where the text of a clause itself indicates that it does not have operative effect, such as 'whereas' clauses in federal legislation or the Constitution's preamble, a court has no license to make it do what it was not designed to do." *Id.* at 578 n.3. *Heller* then generalizes further: "[T]o put the point differently, operative provisions should be given effect as operative provisions, and prologues as prologues." *Id.* That final statement simply asserts a presumption, without support, that contradicts the idea that express justifications for rules, or enacted purposes for statutes can have an effect on their scope. Others have criticized the applicability of mid-nineteenth century principles of statutory interpretation to the Second Amendment, as "preamble" in the statutory context referred to materials that appear before the enacting clause, which the prefatory parts of the Second Amendment do not. *See* Dennis A. Henigan, *The* Heller *Paradox*, 56 UCLA L. REV. 1171, 1210 (2009). And that presumption does not reach enacted purpose provisions. Enacted purpose provisions are not generally introduced with any indication, such as a "whereas clause." More fundamentally, the enactment of purposes does not imply they were not designed to bear on the interpretation of the statute's other provisions.

statute, they change the statute.[157] Statutes with and without purpose provisions have different meanings.[158]

This logic—that authoritative purpose statements change the rules and statutes of which they are a part—has stark implications: If a court interprets a statute without attention to its enacted purposes, it is not reading the rule or standard that the statute establishes. This logic supports relying on enacted purposes to bar interpretations that otherwise may seem permissible. The enactment of purposes instructs the interpreter to check prospective interpretations for consistency with those purposes.

B. CONGRESSIONAL PRACTICE

Even if, as just argued, there are formal, analytic grounds to view enacted purpose statements as changing statutes of which they are a part, is there evidence that Congress considers enacted purposes as meaningful parts of the statute?

Justice Scalia and John Garner voice a conventional skepticism over whether purpose clauses should be treated the same way as other provisions. They write, it "is hard to imagine, for example, that any legislator who disagreed with that aside [the purpose provision] would vote against a bill containing all dispositions the legislator favored."[159] But as an argument against the relevance of a purpose provision, this seems question-begging; it asserts legislators would not view them as of interest. Given that they are part of the text of the statute, the presumption should be in favor of their being just as important as any other part of the text. One source of evidence that Congress takes purpose statements as seriously as other enacted text is that whether these statements are subject to amendments and revisions in the legislative process. This Section highlights two examples of the purpose provisions in prominent statutes—the Endangered Species Act and ERISA —which were amended in the legislative process.

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157. What constitutes a single statute can be complex, for instance, when a statute is amended by a later act, adopted into a codified version of the U.S. Code, and amended again. For present purposes, it is enough that we can recognize core cases of what counts as a statute, either as the initial public law or the public law as amended by later acts.

158. This principle has foundations similar to a public justification approach to statutory interpretation developed in an important article by Bernard Bell. *See* Bernard W. Bell, *Legislative History without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 79, 83 (1999). Bell argues that Congress as an institution has a duty to provide a justification for its decisions, and its statutes should be interpreted in light of the justifications provide in the legislative process because those justification are public, subject to reversal by its members, and authoritative. *See id.* at 83. Both Bell's public justification approach and the enacted purposes principle maintain that statutes should be construed in light of their public justifications. *See id.* One of the key differences is the source of that justification. The enacted purposes principle relies only on formally enacted justifications whereas Bell's approach treats some legislative history as part of the statute's public justification, and, as a result, their justifications differ as well. *See id.* at 88.

159. SCALIA & GARNER, *supra* note 9, at 217.

First consider the Endangered Species Act of 1973 ("ESA").[160] In the legislative process culminating in the enactment of the ESA, the purpose provision was revised in many ways. To focus on just one of those revisions, in House committee hearings on H.R. 37,[161] Representative Breaux offered an amendment to Section 2 of the bill, titled, "Findings, Purposes, and Policy," to insert the following language: "that a key to more effective protection and management of native fish, wildlife, and plants that are endangered or threatened is to encourage and assist these States in developing programs for such fish, wildlife."[162] The Committee Chairman, Representative Dingell, called for a vote on the amendment, and the amendment passed.[163] The amended version of H.R. 37, which was reported in the House on July 27, 1973, included the gist of Representative Breaux's amendment.[164] While the original version of the Senate bill, S. 1983, did not include the language Representative Breaux had introduced in the House,[165] the final, reported Senate bill did include an even more explicit encouragement to States to engage in preservation.[166] And the enacted Endangered Species Act of 1973 included almost identical language to the final, reported version of S. 1983.[167] This process of amendment looks similar to other amendments in statutory language. An issue of importance to some members of Congress—here, the role of states in protecting endangered species—became one of the purposes included in the ESA's enacted statement.

The enacted purposes provision in ERISA, the Employee Retirement Income Security Act of 1974,[168] bears similar marks of amendment during the legislative process. The enacted public law, as part of its "Findings and Declarations of Policy," stated that it "is hereby further declared to be the policy of this Act to protect . . . the interests of participants in private pension[s] . . . by requiring plan termination insurance."[169] The requirement for plans to obtain insurance in the event of termination is a meaningful aim.

160. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (enacting S. 1983, 93d Cong. (1973)).

161. H.R. 37, 93d Cong. (1973).

162. *Endangered Species: Hearing on H.R. 37 Before the Subcomm. on Fish and Wildlife of the Committee on Merchant Marine and Fisheries*, 93d Cong. 4–6 (1973) (statement of Rep. Breaux).

163. *Id.* ("The 'ayes' have it. The amendment is adopted.").

164. *Id.* (including "to encourage and assist these States in developing programs for such fish, wildlife").

165. *See generally* S. 1983, 93d Cong. (1973) (making no mention of States).

166. S. REP. NO. 93-307, at 342 (1973) (including the following: "(5) encouraging the States, through Federal financial assistance and a system of incentives, to develop and maintain conservation, protection, restoration, and propagation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish and wildlife").

167. Endangered Species Act of 1973, Pub. L. No. 93-205, § 2(a)(5), 87 Stat. 884, 884–85.

168. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (adopting H.R. 2, 93d Cong. (1973)).

169. § 2(c), 88 Stat. at 833.

While the earliest version of the bill in the House included a similar statement,[170] that language was dropped in the amended version of the House bill,[171] only to reappear in the enacted bill in shorter phrasing.[172]

Given that enacted purpose provisions are included within the enacted text of a statute, it should be presumed that they reflect the same level of congressional consideration as any other portion of the statute's text.[173] These two examples add support to the idea that purpose provisions are actively considered, amended, and debated in the legislative process.[174]

C. Enacted Purposes and Public-Regarding Interpretation

Interpreting statutes in accordance with their enacted purposes also has substantive implications for the type of interpretations adopted. By adhering to a statute's enacted purposes, courts reach interpretations of statutes that, in general, are more public-regarding. [175]

The support for this claim relies on economic theories of legislation which suggest that enacted purposes are more likely to contain public-regarding elements than other provisions. In the 1980s and 1990s, economic theories sought to understand legislation by examining the influence of interest groups, the transaction costs of bargaining, and the reelection

170. H.R. 2 ("[T]o protect the vested rights of participants against losses due to involuntary plan termination through the establishment of vested liability insurance").

171. *Id.* (omitting from section 2(c) discussion of plan termination insurance).

172. § 2(c), 88 Stat. at 833 (codified at 29 U.S.C. § 1001 (2012)).

173. *See* Shobe, *supra* note 21, at 689–91 (providing examples of amendment of purposes and findings in legislative process and by subsequent legislation).

174. William Eskridge offers an additional ground for reliance on enacted purpose provisions. As he notes, some legislative drafting manuals discourage their use. ESKRIDGE, *supra* note 11, at 106; *e.g.*, HOUSE OFFICE OF LEGISLATIVE COUNSEL, MANUAL ON DRAFTING STYLE 28, § 325 (Nov. 1995) ("Discourage clients from including findings and purposes. Both are matters that are more appropriately and safely dealt with in the committee report than in the bill."); TOBIAS A. DORSEY, LEGISLATIVE DRAFTER'S DESKBOOK: A PRACTICAL GUIDE 186 (2006) ("A statement of purpose can invite a judge to bend the meaning away from the meaning your client intended."); OFFICE OF LEGISLATIVE COUNSEL, UNITED STATES SENATE, LEGISLATIVE DRAFTING MANUAL 19, § 124 (Feb. 1997) ("Like a section of findings, a section of purposes may contain statements that would be more appropriate to include in a committee report. However, a purposes section can serve as a useful summary of the substantive provisions of the legislation."). Eskridge argues that "because legislative drafters presume against including purpose provisions unless statutory sponsors insist on them, it may be that statutory purpose clauses take on added significance." ESKRIDGE, *supra* note 11, at 106.

175. The term "public-regarding" is from Jerry Mashaw. Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 867–69 (1980). I adopt Jonathan Macey's specification of the term with reference to legislation. Macey writes that public-regarding legislation is legislation that serves a "purpose other than obtaining for particular legislators the . . . advantage of the political support of some narrow interest group." Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 228–29, 228 n.29 (1986). Accordingly, more public-regarding interpretations of a statute reads provisions of the statute, including those that may benefit narrow special interest groups, in light of the statute's public purposes.

incentives of members of Congress. From this perspective, legislation is understood as a deal or contract between contending interests, and interest group analysis is used to explain what legislation Congress is likely to enact and how Congress might design the legislation to obtain the greatest electoral credit at the lowest cost in terms of time or risk of alienating important constituencies.[176]

Notwithstanding the prediction that narrow interest groups would be able to extract legislation to their benefit, some scholars took the view that the role of the courts is to implement the legislative deal as effectively as possible. This idea provides the ground for defenses of textualism—namely that respecting the semantic meaning allows legislators to effectively bargain about the details of legislation.[177] Other scholars drew a different conclusion. They did not disagree with the description of legislative dynamics but saw the influence of interest groups on legislation as a problem to mitigate if not to solve. Jonathan Macey and Susan Rose-Ackerman were the first to explore how statutory interpretation might play a role in mitigating these interest group effects, and both turned to statutory purposes as a central part of their solution.

In Macey's classic article,[178] he argues that courts can promote the public-regarding character of legislation by interpreting it in accordance with what he identifies as traditional principles of statutory interpretation.[179] In Macey's view of traditional statutory interpretation, "judges interpret statutes by starting with the language and reaching a decision that applies that language to a particular set of facts in a way that is consistent with the publicly articulated purpose of the statute."[180] Macey argues that this approach would impose important constraints on special interest legislation. The reason is that even legislation drafted to benefit narrow special interests will often include what Macey described as "a public-regarding gloss."[181] Such a gloss, Macey suggests, would make it easier for individual legislators to support the legislation, and thus reduce the cost to the special interest group of persuading the legislature to adopt it.[182] Alternatively, it would be relatively difficult for special interest groups to obtain passage of legislation without such a gloss or that made the special interest payout clear in the statement of the statute's purposes. Macey's core insight was that if courts read statutes in

176. Macey, *supra* note 175, at 231–33.

177. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546–47 (1983); John F. Manning, *Competing Presumptions about Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2033–34 (2006) [hereinafter Manning, *Competing Presumptions*].

178. *See generally* Macey, *supra* note 175 (arguing the judiciary uses statutory interpretation as a check on narrow interest group influence on legislation).

179. *Id.* at 250–56.

180. *Id.* at 250.

181. *Id.* at 251.

182. *Id.*

light of their inevitably public-regarding gloss, that mode of interpretation will constrain the influence of special interest groups. The interest group will not get the benefit of easing passage through a public-interest veneer or packaging, nor realize the full scope of the statute's private-regarding provisions.

Despite the power of Macey's theory, it was open to two important lines of objection. First, Macey does not attend specifically to how Congress may or must communicate the public-regarding gloss of the legislation. He suggests it could be contained in legislative history, enacted purposes, or inferred from other sources.[183] He thus opens up the critique from textualists that semantic meaning provides the only reliable way for legislators to state the scope and limits of their compromise.[184] Second, some quarreled with the characterization of his purpose-oriented method of interpretation as reflecting the traditional approach to statutory interpretation.[185]

Susan Rose-Ackerman works from similar descriptive premises about legislation, but defends a different remedy. She argues that courts "should refuse to enforce statutory provisions that are inconsistent with legislative preambles and policy statements,"[186] and that courts should insist that statutes contain statements of purpose.[187] By looking at these enacted statements or official preambles, Rose-Ackerman avoids the challenge that there is no reliable way of discerning purposes,[188] though she does so as part of a defense of a more intrusive judicial remedy. She defends her inconsistency principle—that courts should cast aside statutory provisions inconsistent with enacted purposes—on two primary grounds. First, she views it as a tool which would require (or give very strong incentives to) legislators to keep the provisions of a statute consistent with its enacted purposes in the drafting process.[189] This approach would give voters more reliable information about statutes—in particular, it would allow them to rely on preambles or enacted statements of purposes as representing what the statute in fact does.[190] Second, because the stated goals of a statute are generally public-regarding, Rose-Ackerman's inconsistency principle would render statutes more public-regarding, at least if they were to avoid judicial invalidation. In this regard, her inconsistency principle is stronger in its remedial prescription. She argues that judges should invalidate statutory provisions that are inconsistent with

183. *Id.* at 252–55, 262–66.

184. *See* Manning, *What Divides?*, *supra* note 6, at 104 (making this argument for textualism).

185. *See, e.g.*, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 297–98 (1988) (characterizing Macey's theory is a strategy for dynamic statutory interpretation).

186. ROSE-ACKERMAN, *supra* note 17, at 44.

187. *Id.* at 46.

188. *See id.* at 38.

189. *Id.* at 53.

190. *See* Driesen, *supra* note 18, at 125–26.

the statute's enacted purposes,[191] not merely interpret them in light of those enacted purposes.

While they have different aims, Macey's and Rose-Ackerman's arguments provide a strong foundation for the claim that adherence to statutes' enacted purposes will yield interpretations that are more public-regarding. If enacted statements of purpose are more likely to include public purposes, as they argue, then constraining statutory interpretation on the basis of those purposes will make the resulting interpretations more public-regarding.

D. AGREEMENT BETWEEN TEXTUALISTS AND PURPOSIVISTS

Reliance on enacted purposes in statutory interpretation also represents a point of agreement between textualist and purposivist approaches to statutory interpretation—in theory as well as in practice.

Relying on enacted purposes is clearly consistent with purpose-based theories of statutory interpretation. A premise of Henry Hart and Albert Sacks's legal process purposivist technique is for a court to consult and accept any enacted statement of purpose.[192] Purposivists should have no objection to a court taking seriously enacted statements of purpose, and indeed, being bound to them as an authoritative statement of statutory purposes.[193] Purposivists deny that purpose is relevant only when the statute includes an enacted statement of purpose and often urge courts to carry forward purpose as far as the statute's text permits.[194] But those commitments should not prevent purposivists from embracing the principle that when Congress expressly declares its purposes, those statements are owed respect, and exclude inconsistent interpretations.[195] More generally, the canon clearly reflects the core commitment of purposivism of reading specific statutory provisions in light of the more general purposes they implement. It does so in a way that is particularly attentive to statutory text, thus reflecting the principle of institutional settlement which is central to the legal process tradition,[196] and the growing strain of new purposivist jurisprudence.[197]

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191. ROSE-ACKERMAN, *supra* note 17, at 46.

192. HART & SACKS, *supra* note 7, at 1377.

193. *See* Driesen, *supra* note 18, at 137 ("When a statute contains explicit statements about its purposes, the Court should generally treat these statements as a complete catalogue of the statute's goals.").

194. *See* HART & SACKS, *supra* note 7, at 1375–77.

195. *See id.* at 1377.

196. *See supra* note 87 and accompanying text.

197. *See generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1842–46 (2010) (giving account of "modified textualism" or "structured purposivism" in state statutory interpretation); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2011) (articulating new purposivism reflected in Supreme Court statutory interpretation); Stack, *Interpreting Regulations*, *supra* note 16, at 362 (defending positively grounded purposivism as the method for interpreting regulations).

The more difficult issue is whether textualists would also embrace the reliance on enacted purposes to exclude inconsistent interpretations. One way to see that this practice is consistent with textualism's commitments is to consider textualism's core objection to purpose-based interpretation. Frank Easterbrook formulated this concern in a way that proved to be a central foundation for textualism. In Easterbrook's article, *Statutes' Domains*,[198] he directly challenges the idea that statutory purposes are relevant to statutory interpretation when the statute specifies the means of implementation. Easterbrook writes:

> A legislature that seeks to achieve Goal X can do so in one of two ways. First, it can identify the goal and instruct courts or agencies to design rules to achieve the goal. In that event, the subsequent selection of rules implements the actual legislative decision, even if the rules are not what the legislature would have selected itself. The second approach is for the legislature to pick the rules. It pursues Goal X by Rule Y. The selection of Y is a measure of what Goal X was worth to the legislature, of how best to achieve X, and of where to stop in pursuit of X. Like any other rule, Y is bound to be imprecise, to be over- and under-inclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule Y on the argument that, by doing so, it can get more of Goal X. The judicial selection of means to pursue X displaces and directly overrides the legislative selection of ways to obtain X. It denies to legislatures the choice of creating or withholding gapfilling authority.[199]

Easterbrook's point here is that courts should create neither implied exclusions nor implied extensions to better conform the statute to its goal or purpose when a statute specifies the means of implementation (as opposed to simply delegating those choices to the agency or court). In other words, judges "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes."[200]

This set of ideas has been a basis for sophisticated defenses of textualism and their critique of legal process purposivism. Textualists argue that adherence to semantic meaning provides the best way for courts to adhere to the means Congress has selected, and for legislators to "express the relevant limits on how far they are willing to go."[201] Conversely, John Manning argues, if a court were "to give background purpose priority over semantic detail," it

198. Easterbrook, *supra* note 177, at 545–47.

199. *Id.* at 546–47.

200. *See, e.g.*, Manning, *Competing Presumptions*, *supra* note 177, at 2033 (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 n.4 (1994)).

201. *Id.* at 2040.

would be "quite difficult to fathom how a legislator with the power to exact a compromise could bargain reliably for any particular outcome."[202] The challenge presented here is that allowing background purposes to influence interpretation of the more specific provisions in statutes ends up overriding Congress's choices about means and undermining its capacity to specify those means.[203]

These are substantial arguments, but reliance on enacted purposes does not implicate them—and the reasons why it avoids them exposes a central analytic ground for embracing interpretation in accordance with enacted purposes. A premise of these critiques is that one can distinguish the "rule" or the "means" established by the statute from its "purpose" or "purposes." This premise could be understood as stating the idea that adherence to a rule or means established by the statute does not necessarily require resorting to the statute's purpose. But when a statute includes a statement of purposes, that statement is not some background consideration, but part-and-parcel of the choices made in the statute.[204] With such enacted statements, it is not possible to cordon off the statute's purposes from its means; the purpose and the other provisions are intrinsically connected in the statute's text. More specifically, as argued above, the purpose becomes part of the overall rule the statute establishes such that its specific provisions must be read in light of its enacted purposes. In other words, for statutes with enacted statements of purpose, just as for rules with stated justifications, the purpose or justification alters the rule-formulation.[205] It provides that the means should be implemented only when they, at the very minimum, do not nullify the enacted purposes of the statute.[206]

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202. *Id.*

203. *See, e.g.*, *id.* at 2033–34.

204. *Cf.* Shobe, *supra* note 21, at 718 (noting that purpose provisions "are part of the complicated legislative bargain that led to enactment of the statute and so should be viewed as such rather than ignored or marginalized").

205. As Schauer puts it when talking about rules: "[A] rule in such a system [in which rules are taken as some combination of the meaning of the rule-formulation and the authoritative purposes] might very well just be the meaning of the formulation if and only if the result indicated by the formulation were consistent with the result indicated by the rule's justification." SCHAUER, PLAYING BY THE RULES, *supra* note 24, at 212 (emphasis omitted). Of course, as Schauer also points, out even a rule with a justification and formulation will still be over- and under-inclusive as to some other larger purpose. But that point does not undermine the more basic thought that enactment of a purpose changes the statute. *Id.*

206. For textualists, this point also distinguishes the enacted purposes canon from the absurdity doctrine. The enacted purposes canon should be unobjectionable because it merely requires reading given effect to part of the statutory text—purpose provisions. In contrast, textualist have grounds to reject the absurdity doctrine. As John Manning writes, for textualists, the absurdity doctrine is objectionable because it invites courts to read statutes in light of values that are not enacted as part of the legislative bargain. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391 (2003).

Indeed, the point can be made stronger still. Textualism is committed to formality. It takes the formal enactment of the legislative text as the object of interpretation. Given that enacted purposes proceed through the same bicameral and presentment process as the statutes of which they are apart, textualists have no grounds to reject their relevance to interpreting the statute. A textualist who disregards enacted purposes contradicts the core premise of textualism, that the formality of enactedness is the decisive consideration.

This common ground between purposivism and textualism is not only theoretical. As discussed above,[207] Supreme Court Justices with otherwise opposed positions on statutory interpretation have relied upon enacted statements of purpose. Indeed, relying on enacted purposes builds directly on the most general and fundamental practice of the federal judiciary —attending to statutory text and purpose.[208] Once articulated, it should be an easy case for pragmatist jurists as well as for those who fall closer to the extremes of the interpretive continuum. The attention to enacted purposes helps, in addition, to build on the developing strain of new purposivist thought. This strain of thought does not use purpose to override text, as some purposivists had been understood, but views the statute's purpose as an important, and even anchoring, consideration in statutory and regulatory interpretation.[209]

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We have many reasons to take enacted purposes seriously in statutory interpretation. When they appear, these purposes change the meaning of the provisions they accompany. Moreover, public choice theory suggests that relying on enacted purpose will nudge statutory interpretations in a more public-regarding direction, at least by excluding some private-regarding constructions that may have been permitted by the statutory text but not by its purpose provision. Reliance on purpose provisions also accords with the basic formal commitments of textualists to legislative text and of purposivists to reading the specific in light of the general. Should these practices be treated as a canon of interpretation?

V. THE ENACTED PURPOSES CANON

This Part argues that reliance on enacted purposes is not only a foundational principle of statutory interpretation but warrants recognition as

207. *See supra* Section III.C.

208. *See* Abbe R. Gluck & Richard Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1310 (2018) (characterizing results of survey showing that most judges view themselves pragmatically with commitment to text and purpose).

209. *See supra* note 197 and accompanying text.

an interpretive canon, under which a court will reject any prospective interpretation that negate—that are inconsistent with or likely in practice to thwart—the enacted purposes of the statute. It finally contends that relying on enacted purposes is not defeated by the canon stating that the specific governs the general.

A. LABELS

Not every principle or judicial practice should be considered a canon —a point Anita Krishnakumar and Victoria Nourse forcefully argue.[210] To be considered a canon, Krishnakumar and Nourse identify three factors—the frequency that the principle has been invoked by the Supreme Court, its longevity, and its justification.[211] They reject the idea that the Court must have identified that canon as such.[212] Based on the sensible criteria Krishnakumar and Nourse identify, the enacted purposes canon qualifies.

As to frequency of reliance, Krishnakumar and Nourse suggest that seven to ten citations in Supreme Court opinions since 1970 is a reasonable figure for frequency.[213] The enacted purposes canon easily meets the mark. It has been relied upon scores of times over decades.[214] Longevity, as Krishnakumar and Nourse observe, cannot mean only those maxims that find a place in Blackstone, as many current canons do not.[215] Rather, they argue that reliance on the canon over a long period of time—generations at the Court —strengthens the argument for the principle being considered a canon.[216] The Supreme Court's reliance on enacted purposes for almost a century also adds force to considering it a canon.[217] Finally, as to justification, Krishnakumar and Nourse posit that the principle must not only be embraced over time, but also by Supreme Court Justices appointed by different parties and across the ideological divide.[218] The enacted purposes canon satisfies that criteria as well.[219] It has the status of a well-established principle; even if it has been rarely remarked upon or noticed, frequent reliance by a broad array of jurists justify treating it as a canon.[220]

The enacted purposes canon is most readily classified as a language canon, though it could be viewed as a substantive canon as well. Language

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210. *See generally* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163 (2019) (reviewing ESKRIDGE, *supra* note 11).

211. *Id.* at 181–91.

212. *Id.* at 190.

213. *Id.* at 183.

214. *See supra* Part II.

215. *See* Krishnakumar & Nourse, *supra* note 210, at 184–88.

216. *Id.* at 185.

217. *See supra* Section III.B (describing use of canon in Supreme Court).

218. Krishnakumar & Nourse, *supra* note 210, at 188.

219. *See supra* Section III.C.

220. Krishnakumar & Nourse, *supra* note 210, at 189–90.

canons (also called linguistic canons) call upon the interpreter to make inferences about statutory meaning from the way words are used as well as from "the presumed relationship between particular words and language found in other parts of the same statute or in similar statutes."[221] In contrast, substantive canons are interpretive principles or tiebreakers that protect background values, such as clear notice of criminal liability and construing statutes to avoid constitutional doubts when such a reading is fairly possible.[222]

The enacted purposes canon shares elements of a language canon because it asks the court to make inferences about the meaning of operative statutory provisions in light of the enacted purposes of the same statute. It says that prospective interpretations inconsistent with those purposes are foreclosed. A broom provides a useful mental image: The purposes provision provides a clasp to the fibers of the broom. The fibers, or operative provisions, need to remain consistent with the clasp or they will snap. Moreover, as a language canon, it applies as part of the determination of whether the statute is ambiguous, as opposed to a substantive canon which is invoked only after the ambiguity determination. Finally, because the enacted purposes canon makes inferences between provisions of the same act, asking the reader to consider the entire text, structure, and logical relations among its parts,[223] it looks most like a whole act language canon.[224]

Yet the enacted purposes canon also can be defended on substantive grounds. Indeed, Part IV argues that relying on enacted proposes guides courts to reach more public-regarding interpretations of statutes. For those persuaded by those substantive arguments, the enacted purposes canon might be viewed as a substantive canon—a presumption adopted because it serves a substantive value. Because the canon involves making inferences between different parts of the statutory text, like language canons, it is best viewed as a species of whole act canon, but one which has a strong substantive justification.

Notice, finally, that this formulation of the enacted purposes canon is not subject to the objections raised to Macey's and Rose-Ackerman's consideration of purpose in statutory interpretation. First, in contrast to Macey's view, it makes the identification of purposes clear; it applies to enacted purposes. Second, in contrast to Rose-Ackerman, the effect of an

221. James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1239 (2009).

222. Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 833 (2017).

223. *See* SCALIA & GARNER, *supra* note 9, at 167 (characterizing whole text canons). It also bears a resemblance to Scalia and Garner's identified "harmonious-reading" canon which provides that the "provisions of a text should be interpreted in a way that renders them compatible, not contradictory." *See id.* at 190.

224. Eskridge and Shobe also conclude that attention to enacted purposes is part of the whole act rule. *See* ESKRIDGE, *supra* note 11, at 102–06; Shobe, *supra* note 21, at 712.

enacted purpose canon is more modest. Rose-Ackerman advocates for judicial invalidation of statutory provisions that are inconsistent, whereas the enacted purposes canon more modestly seeks to exclude inconsistent interpretations of the statute. Relying on enacted purposes only would exclude interpretations that thwart a statute's enacted purposes.[225]

B. SUBSTANCE

Canons of statutory interpretation have hardly been darlings of jurists and scholars. Since Karl Llewellyn's famous pairing of canons as "thrusts" and "parries," canons have been criticized as contradictory and unreliable tools.[226] While the Roberts Court relies extensively on canons,[227] recent empirical studies—examining both congressional staffers' knowledge of canons and judicial use of them—have sharpened the general critique of canons, and of language canons in particular. The enacted purposes canon avoids the brunt of these critiques.

Abbe Gluck and Lisa Bressman's study of congressional staffers found that they had surprisingly little knowledge of many prominent statutory canons.[228] Their study raises fundamental questions about the basis for judicial reliance on many canons.[229] Not surprisingly, given the point of this

225. It is important to note that attention to enacted purposes in statutory interpretation is far from a comprehensive response to the problems of interest group dominance in the legislative process. As Anita Krishnakumar argues, judicial canons of construction address statutes only years after they have been enacted, if at all. Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 12 (2009). As a result, as Krishnakumar explains, adopting judicial canons that seek to mitigate private interest legislation "is likely to be after-the-fact judicial curtailment of the reach of statutes deemed to be rent-seeking," but not curtail "the production of fewer rent-seeking statutes or more public-regarding statutes in the first place." *Id.* at 13. The enacted purposes canon will only apply to those statutes for which Congress has included an enacted purpose. But where it applies, the canon has the benefit of pushing statutory law in public-regarding directions. Express recognition might make them a more prominent piece of legislative negotiation, though it is uncertain whether that would mean these provisions end up appearing more or less frequently in legislation.

226. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

227. *See* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 99 (2018) (reporting that majority opinions in the Roberts Court considered canons for "roughly 70% of contested statutory issues").

228. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 930 (2013) [hereinafter Gluck & Bressman, *Part I*] (listing six most common textual canons included in their survey of congressional staffers); 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, 744–46 (2014) [hereinafter Bressman & Gluck, *Part II*].

229. Nina Mendelson's recent article examining use of the canons Gluck and Bressman study, among others, shows that the Court is relying on canons that Bressman and Gluck found least support for in Congress. *See* Mendelson, *supra* note 227, at 79 ("Three, and possibly four, of

Article, their study did not ask their respondents about the enacted purpose canon; they focused on already recognized canons. The closest proxy in their study is the best-known of the whole act canons, the principle that "statutory terms are presumed to have a consistent meaning throughout a statute."[230] Their study showed that less than 50 percent of their respondents recognized this "consistent usage" version of the whole act canon by name,[231] though their results do not reveal the percentage that used the underlying concept.[232] Most respondents viewed consistent usage as a goal in statutory drafting, but perceived the realities of bill-drafting by multiple committees, bundled deals on language, and time pressure as barriers to achieving that goal.[233]

Nina Mendelson's recent study of the Roberts Court's use of canons pushes the critique of canons a step further.[234] Mendelson's study reveals the scope of confusion that attends almost every canon, though she too does not single out the enacted purposes canon.[235] Her findings reveal that when the Court engages (in the sense of mentioning) one canon, it typically also invokes another canon; that canons were not relied upon at least 25 percent of the time they were engaged; and that the Court has developed a wide array of reasons for not applying individual canons.[236] These results, as Mendelson argues, severely undercut the claim that recognized canons serve as stable background principles for drafting. Based on this welter of problems, Mendelson isolates a principle for reliance on canons: Canons should be relied upon only when application can "still be justified on first-order grounds—as connected to congressional preferences or" because the canon serves an important external value.[237]

The enacted purposes canon can satisfy Mendelson's principle. Most importantly, Part IV argues that relying on enacted purposes has a strong analytic and normative justification.[238] If those arguments are sound, then the

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the five most frequently applied canons in the Roberts Court were identified by Gluck and Bressman as canons outright 'rejected' by congressional staff . . . .").

230. Gluck & Bressman, *Part I*, *supra* note 228.

231. *Id.* at 931.

232. *Id.* at 932 ("Results for the whole act rule are not reported. Although most respondents knew that rule, most qualified their use of it in the comments.").

233. *Id.* at 936.

234. *See* Mendelson, *supra* note 227, at 131–35 (exposing gap between those canons most relied upon by the Roberts Court and those canons congressional drafters had greatest knowledge, as reported in the Gluck & Bressman study).

235. *See* Mendelson, *supra* note 227, at 90–94.

236. *See id.* at 106–10.

237. *Id.* at 130; *see also* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1193 n.9 (2006) (stating that conscientious use of canons requires "consideration of the values it is meant to serve, as well as the fit between those values and the context of the interpretation").

238. David Driesen and Susan Rose-Ackerman argue that construing statutes in line with their purpose provisions increases legislative transparency because it anchors statutes to the most

enacted purposes canon has justification independent from congressional practice, satisfying Mendelson's demand for first-order justification.

While there is a need for more empirical research on Congress's understandings and practices with regard to enacted purpose provisions, there are several reasons to think that the enacted purposes canon would have broader recognition in Congress than other whole act canons. First, the inference underlying the enacted purposes canon is different than that in the consistent meaning canon. It may be implausible, as the Gluck and Bressman study suggests, to assume that legislative drafters have the time to think through how terms are used across a statute, much less across a statute with multiple amendments. Consistent usage canons require (or presume) that staffers think through a web of back-and-forth inferences from each use of a term to each other use. The enacted purposes canon requires only that the specific terms be read in light of the enacted purposes. The inference is simpler, just asking the drafter to consider each part of the statute in relation to the purpose provision, not each word use in relation to every other use in the statute. To return to the image of a broom, the enacted purposes canon simply asks for each fiber of the broom to be considered in relation to the clasp, or purpose provision. It does not require cross-referencing every use of a term with every other use in the statute—that is, it involves no fiber-to-fiber considerations, just fiber-to-clasp. Moreover the inference has a stronger structural basis. Purpose provisions, like definition sections, generally appear under separate headings, at the beginning of a statute, and purport to address the entire statute that follows. Those facts are not hidden from Congress. Finally, as noted above, the general presumption that purpose provisions receive the same kind of consideration as other aspects of statutes finds support in the legislative history of the ESA and ERISA.

C. Is It Defeated by "the Specific Governs the General"?

"[I]t is a commonplace of statutory [interpretation] that the specific governs the general."[239] This "general/specific canon,"[240] poses a serious objection to the enacted purposes canon. Other provisions of a statute will (almost by definition) be more specific than those in the purpose provision. Does the general/specific canon defeat the enacted purposes canon?

The short answer is that if the general/specific canon is given an abstract formulation, it would wash away the enacted purposes canon—and much else too. In almost every case in which the enacted purposes are invoked, they are engaged to assist in the reading of a more specific statutory provision. (Think

prominent, easy to understand, and accessible parts of legislation. *See* ROSE-ACKERMAN, *supra* note 17, at 44–46; Driesen, *supra* note 18, at 126–27.

239. Radlax Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)).

240. *Id.*

of *King*, where the question was the meaning of "established by the State.")[241] If the general/specific canon were read in a highly abstract way, the enacted purposes would never be relevant to the interpretation of the more specific provisions (because the specific governs the general). Whatever uncertainties were involved in the more specific provisions would need to be resolved using other tools.

The longer and stronger answer is that the general/specific canon does not, properly understood, have that full, abstract reach, nor does it operate to trump the enacted purposes canon. First consider Justice Scalia and Bryan Garner's characterization of the canon in their treatise: "If there is a conflict between a general provision and a specific provision, the specific provision prevails."[242] What becomes clear in their exposition is that the canon applies only to a clash of operative provisions typically in the form of permissions versus prohibitions. It applies when the specific permission is viewed as an exception to a general prohibition, or the specific prohibition is treated as an exception to the general permission. It also applies where there is a more general authorization alongside a more specific authorization (for instance, one provision authorizing a seizure and another provision authorizing seizure provided specific procedures are followed).[243] The canon ensures that "[t]he terms of the [more] specific authorization" are complied with.[244] The rationale is that "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence."[245]

The key implied limitation is that the general/specific canon applies to conflicting provisions which have operative effects, whether by granting permissions, exceptions, or creating prohibitions or authorizations. Purpose provisions, in contrast, may narrow the interpretation of specific or general provisions, but they do not themselves have operative effects such as creating permissions, prohibitions, authorizations, etc. Therefore, the general/specific canon, properly understood, simply does not apply to enacted purposes; it is relevant only to the play of operative provisions that directly conflict. Indeed, both canons can coexist. Neither a specific nor a general operative provision should be read to negate the statute's enacted purposes. But when there is a conflict between a specific operative provision and a more general one, the general/specific canon applies.

The fact that enacted purposes may state aims or policies, not specific requirements that apply to private parties or government officials, does not make them merely discretionary or somehow less part of the "law" the statute

241. King v. Burwell, 135 S. Ct. 2480, 2487 (2015) (quoting 42 U.S.C. § 18031 (2012)).

242. SCALIA & GARNER, *supra* note 9, at 183.

243. *See Radlax*, 566 U.S. at 645–46.

244. *Id.* at 645.

245. SCALIA & GARNER, *supra* note 9, at 183; *see also* 3 THE WORKS OF JEREMY BENTHAM 210 (John Bowring ed., 1843) ("The particular provision is established upon a nearer and more exact view of the subject than the general, of which it may be regarded as a correction.").

establishes. As Edward Rubin has pointed out, much contemporary legislation does not impose rights and duties on individuals but imposes duties on administrative officials to create first-order obligations on private parties.[246] Imposing obligations on private parties is not a criteria of law or legislation. Nor does it make sense to disregard statements of purpose because, if read in an isolated manner, they would not constitute sufficient commands for courts to implement. The fact that statements of purpose are not sufficient to compel any particular behavior does not imply that they are extrinsic to the law the statute creates.[247]

This is not to suggest that courts always properly limit the general/specific canon. Sometimes they misapply the general/specific canon, using it to rebut inferences from purpose in general.[248] But it is only the misuse of the general/specific canon that washes away the enacted purposes, and enacted purposes provisions as well.

* * *

In sum, the duration and frequency of the Supreme Court's practice of relying on enacted statements of purpose to bar inconsistent interpretations, combined with the analytic and normative grounding for this practice, justify recognizing it as a canon of interpretation. Explicit recognition of the enacted purposes canon is a first step toward prompting courts and scholars to engage in further refinement of the conditions for its application and interactions with other canons.

VI. BEYOND JUDICIAL STATUTORY INTERPRETATION

The focus of the Article thus far has been identifying and defending a principle of statutory interpretation—the enacted purposes canon. But this principle, once identified, has implications for judicial review of agency action, how Congress writes statutes, and our larger statutory practices. This Part briefly considers those implications.

A. CHEVRON *AND* ENACTED PURPOSES

Whenever a court assesses whether a statute permits an agency's action, it must engage in statutory interpretation. That is true regardless of whether the court is applying the *Chevron* framework or a less deferential standard. The enacted purposes canon plays an important role in how these frameworks apply.

246. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 376–77 (1989).

247. *Cf.* Crane, *supra* note 20, at 655–59 (defending enacted findings as having the force of law).

248. *See, e.g.*, *Radlax*, 566 U.S. at 649 (finding that "nothing in the generalized statutory purpose of protecting secured creditors can overcome the specific manner of that protection which the text of § 1129(b)(2)(A) contains").

First consider *Chevron*.[249] As is familiar to students of administrative law, the *Chevron* doctrine structures how a court assesses an agency's interpretation of statutes the agency administers.[250] *Chevron* formally divides the judicial inquiry into two-steps. First, the reviewing court asks whether the statute speaks directly to the precise question at issue.[251] This step is best understood as asking "whether the statutory language precludes the meaning attached to it by the agency."[252] To make this step one inquiry, *Chevron* advises that the reviewing court should employ "traditional tools of statutory construction."[253] If the statute does not directly address the issue, then *Chevron* commands a court to accept the agency's construction of a statute it administers so long as the construction is reasonable.[254]

Consideration of enacted purposes—specifically, the enacted purposes canon—applies in the court's threshold evaluation of whether the statute precludes the meaning attached to it by the agency. Recall that the enacted purposes canon operates to preclude interpretations that might otherwise seem permissible when the specific provisions of the statute are viewed in isolation. When the canon applies, it eliminates ambiguity that may have existed based on the text of specific statutory provisions and exposes that the statute excludes otherwise permissible interpretations that thwart its enacted purposes. The canon operates in determining what the statute must mean, not only in determining what it may mean.[255] That is the same question the Court is asking at *Chevron*'s threshold inquiry into whether the statute precludes the meaning the agency has attached to it.

Under established doctrine, courts treat inferences drawn from the text of statutes as well as consideration of purpose as part of the initial examination of whether an authorizing statute precludes the agency's view. Indeed, courts consult the purpose of a statutory provision or the statute as a whole as part of the *Chevron* step one inquiry.[256] The enacted purposes canon merely guides that examination whenever the statute includes a purpose provision. It thus

249. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding a court reviewing agency statutory interpretation must accept any reasonable agency construction of a statute the agency administers as long as the statute does not clearly speak to the issue).

250. *Id.*

251. *Id.* at 842–43.

252. Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1162 (2012).

253. *Chevron*, 467 U.S. at 843 n.10.

254. *Id.*

255. Shobe reaches the same conclusion that because enacted purposes are part of the statutory text, and thus "the whole legislative bargain, an interpreter cannot say that the rest of the text is clear or unambiguous without first consulting them." Shobe, *supra* note 21, at 714.

256. *See* Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2144 (2016) ("[W]hether we look at statutory language alone, or that language in context of the statute's purpose, we find . . . a 'gap' that rules might fill, and 'ambiguity' in respect to the boundaries of that gap.").

fits comfortably in the Court's consideration of purpose in the *Chevron* threshold inquiry.[257] While there are reasons to be cautious about hinging a rejection of any agency's view based on a single language canon,[258] and reasons to be cautious generally about reliance on canons, courts treat language canons as among the tools they consult in step one.[259]

It might be objected that allowing courts to consider the purposes of statutes, purposes with which agencies are deeply familiar, undermines the underlying logic of *Chevron*. If agencies have more expertise concerning how a purpose is best implemented, shouldn't a court defer to the agency's view? The answer is yes, and nothing about the enacted purposes canon's operation in the context of judicial review of agency action bars that view. All the enacted purposes doctrine does is reinforce to courts that it is their job—as part of their independent construction of the meanings precluded by the statute—to determine if the agency's action contradicts the statute's enacted purposes. That is, the domain of agency discretion that *Chevron* allows does not include issuing rules or orders which contradict the statute's enacted purposes. But the agency still has discretion over how those purposes are best implemented.

Babbitt v. Sweet Home[260] provides an illustration. In *Sweet Home*, landowners and logging companies challenged the validity of a regulation issued by the Secretary of Interior prohibiting significant habitat modification in lands inhabited by endangered species.[261] The ESA prohibits "taking" of endangered species, and defines "take" as including "to harass, harm, pursue."[262] The Secretary interpreted the term "harm" broadly as a basis to prohibit indirect takings of endangered species through habitat modification.[263] The challengers alleged that the ESA did not permit the Secretary's interpretation.[264] The Court disagreed, holding that the ESA permitted the Secretary's construction.[265] The Court upheld the Secretary's

257. For those who see the enacted purposes canon to be a language canon, there is an additional doctrinal ground for seeing the canon within the step one inquiry. Under established law, language canons are also part of the "traditional tools of statutory construction" that *Chevron* invites courts to use at its first step.

258. Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 694 (D.C. Cir. 1991) (holding that *expressio unis* canon has little application in review of permissibility of agency action under *Chevron*).

259. Higgins v. Holder, 677 F.3d 97, 102–03 (2d Cir. 2012) (explaining that statutory canons apply in the *Chevron* step one inquiry); *see also* Mejia v. Sessions, 866 F.3d 573, 585 (4th Cir. 2017) (relying on statutory canons in *Chevon* step one and characterizing them as part of the traditional tools of statutory construction).

260. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

261. *Id.* at 692.

262. 16 U.S.C. § 1532(19) (2012).

263. *Sweet Home*, 515 U.S. at 696.

264. *Id.* at 693–94.

265. *Id.* at 703–04.

construction under *Chevron*'s second step, concluding that it was a "reasonable"[266] and "permitted" construction, but not required. However, because the challengers had argued and the lower court held[267] that the statute precluded the Secretary's construction, the Supreme Court still had to judge what the statute permitted and what it precluded, a blurring of *Chevron*'s steps that sometimes occurs.[268]

In the course of rejecting the suggestion that the ESA unambiguously precluded the Secretary's interpretation, the Court relied on the statute's text, purpose, and legislative history.[269] The "broad purpose of the ESA supports the Secretary's decision," the Court wrote, specifically invoking the Act's stated purpose "to provide a means whereby the ecosystems upon which endangered species . . . may be conserved."[270] Consistency with the Act's purpose thus was one factor the Court assessed in concluding that the statute did not preclude the Secretary's view. That is, enacted purpose applied to determine the scope of the Secretary's power under the statute.

The application of the enacted purposes canon as part of the assessment of what the statute permits, as in *Sweet Home*, has a stark implication: The reviewing court will defer to an agency's construction under *Chevron* only when that decision is consistent with the statute's enacted purposes. While it augments the role of the courts at step one, it is a sensible result. An agency should not receive deference for an interpretation that negates the statute's enacted purposes. Consideration of enacted purposes thus narrows the range of agency interpretations that qualify for deference to those consistent with enacted purposes. This limitation has the most significance in two circumstances: first, when a relatively deregulatory presidential administration is implementing relatively pro-regulatory statutes, and second, when a relatively pro-regulatory presidential administration implements relatively deregulatory statutes.

The first circumstance is particularly timely. One of the Trump administration's clear goals has been to reduce the cost of regulation on the American economy,[271] and President Trump has sought to appoint agency

266. *Id.* at 697.

267. *Id.* at 694.

268. *See, e.g.*, Global Crossing Telecomms. v. Metrophones Telecomms., 550 U.S. 45, 47–49 (2007) (upholding the FCC's action stating as "reasonable" and "hence it is lawful" without specifying whether its decision was at *Chevron*'s first or second step); *see also* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG 1, 30 (1998) (finding, in a study of over 200 courts of appeals cases, that courts "condensed the two-step test into a single question of whether the interpretation was 'reasonable' in 28% of the applications").

269. *Sweet Home*, 515 U.S. at 696–703.

270. *Id.* at 698.

271. *See, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9,339 § 2(a)–(c) (Jan. 30, 2017) (requiring that for every one new regulation issued two existing regulations be identified for

heads who will roll back regulations in environmental protection, securities, energy and elsewhere.[272] But many existing regulatory statutes include enacted purposes with broadly regulatory goals, ranging from protecting endangered species to protecting the American consumer.[273] Deploying the enacted purposes canon does not require that agencies carry forward those goals to the fullest extent possible. But, as argued, it does bar a court adopting an otherwise permissible construction that negates those enacted purposes. That inquiry into negation will impose a significant constraint on deregulatory policies. To survive a *Chevron* challenge, the agency will need to show that its new deregulatory decisions do not negate stated statutory goals.[274] Often that showing will be easy to make. But where the agency completely or substantially rescinds its own prior action that furthered the statute's enacted purposes, the showing will be more difficult. The agency will have to demonstrate that its construction is not precluded by the statute's enacted purpose. In a sense, the enacted purposes canon exposes the tension and possible conflict between the policy of the statute and the administrative policy adopted. It does not require every administration to further those purposes as far as possible—but it does require all policy be consistent with them.

The enacted purposes canon will have the same effect when a pro-regulatory presidential administration is implementing more deregulatory statutes. There, too, the canon will deny deference to agency actions that negate stated deregulatory purposes.

While *Chevron* still provides the most prominent framework for review of agencies' statutory interpretations, the same analysis would hold under less deferential standards, such as *Skidmore*,[275] de novo review, and arbitrariness review. Briefly: Under *Skidmore*, while the court takes seriously the agency's own deliberate analysis,[276] the court reaches its own construction of what the statute means. That construction will involve consulting the statute's enacted purposes, and disallowing agency action that negates those purposes in the same manner as under *Chevron*.[277] Regardless of the standard of review, the

elimination, and requiring that agencies not issue regulations that impose additional costs of compliance not offset by the repeal of existing regulations).

272. *See, e.g.*, Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES (July 11, 2017), https://www.nytimes.com/2017/07/11/business/the-deep-industry-ties-of-trumps-deregulation-teams.html [https://perma.cc/7ECX-E2GC] (reporting on the many positions in Trump's administration that are filled with industry insiders).

273. *See infra* Appendices A and B (collecting statutes with purpose provisions).

274. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 55–56 (1983) (reversing agency rescission which did not carry forward the purposes of the act).

275. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

276. *See id.* at 140 (stating that the care of the agencies reasoning will influence the weight it is given by court).

277. A parallel inquiry also arises in the context of review of whether an agency's action is "arbitrary" and "capricious." 5 U.S.C. § 706 (2012). One way in which an agency's action can be

enacted purposes canon confines the scope of the agency's powers. The limitations it erects become particularly visible and significant in dynamic times when the president and the existing statutory corpus reflect different basic policies. That barrier is likely to be tested in a raft of cases challenging the validity of deregulatory actions taken by agencies in the Trump administration.

B. ENACTED PURPOSES, THE U.S. CODE, AND STATUTORY CULTURE

One might think that the way in which statutory provisions appear in the United States Code is so elemental that it would hardly merit discussion. But how the Code includes purpose provisions obscures these provisions in several important ways.

To appreciate how the Code does so, it is first important to recall what the United States Code is and how it is populated with legislation. The Office of Law Revision Counsel ("OLRC"), an office in the House of Representatives, has statutory responsibility for preparing and updating the United States Code.[278] That job has two main elements. The first is the job we imagine—the Office takes newly passed public laws and fits in the titles of the U.S. Code. Second, the OLRC also periodically assembles and reorganizes Code's titles, and submits them to Congress for reenactment as a consolidated title. To date, about half of the titles have been reenacted in this manner, and are called "positive" titles, to contrast them with the remainder of the code, the "nonpositive" titles.[279] Positive titles, because they have been reenacted as such in a public law, are authoritative sources, but the remainder of the Code, the nonpositive titles, are merely prima facie evidence of the law.[280]

In some cases, the task of placing new public laws in the U.S. Code is straightforward. The Law Revision Counsel can simply drop the provisions of the public law in a title of the Code, swapping the law's sections for new code section numbers. But much new legislation amends various parts of the existing corpus of federal legislation, and the organization of the new

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arbitrary is by contravening statutory purposes. *State Farm*, 463 U.S. at 45. In *State Farm*, the classic statement of arbitrariness review, the Supreme Court reversed an agency's decision to rescind the rule requiring air bags or automatic seat belts in part because the rescission conflicted with the basic purpose of the statute—promoting auto safety. *See id.* at 55–56; Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 548–49 (1985) (showing how statutory purpose intervened in hard look review in *State Farm*).

278. 2 U.S.C. § 281.

279. *See generally* OFFICE OF THE LAW REVISION COUNSEL: U.S. CODE, https://uscode.house.gov/browse.xhtml [https://perma.cc/7QEN-UWE9] (listing the positive and nonpositive titles).

280. *See* 1 U.S.C. § 204(a) (stating that nonpositive titles "establish prima facie the laws of the United States," but providing that positive titles are "legal evidence of the laws"); *see also* U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993) (applying 1 U.S.C. § 204(a)); United States v. Welden, 377 U.S. 95, 98 n.4 (1964) (noting principle of 1 U.S.C § 204(a) and commenting that change in arrangements in positive titles does not alter scope and purpose of original enactment).

legislation often does not neatly map the topical organization of the Code. As a result, individual statutes often end up being codified in scattered provisions of the Code.

When legislation includes an enacted statement of purpose, how are they codified in the Code? The OLRC typically takes one of two approaches, both with downsides. The first is to give the statute's purpose provision its own Code sections, just like any other statutory provision. This has the advantage of highlighting the purpose provision's existence within the Code.[281] But it has other effects as well. Because many statutes are codified in scattered or separated provisions, purpose provisions are separated from the provisions they accompanied when enacted. That disrupts the link between the purpose provision and the statutory provisions to which it speaks.

Moreover, the mere fact of inclusion of public laws into a larger legal corpus—the United States Code—diminishes the centrality of purpose provisions. In a public law, the purpose provision leads and structures the provisions that follow; it purports to speak to the entire statute. But once a public law is placed in the Code, the enacted purpose provision appears as part of this new legal entity, the Code, alongside many other Code provisions; the Code clouds the connections between purpose provisions and the statutory provisions with which they were enacted.

Frequently and even more worrisome, enacted purpose provisions do not even make it into the text of the United States Code. Instead, the OLRC places purpose statements in the Notes of the Code, which are reproduced under the numbered Code sections in the place a footnote would appear.[282] The relegation of purpose provision to the Notes of the Code has no formal legal effect. The text of the law in the Statutes-at-Large, not the text of the U.S. Code, controls.[283]

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281. Hundreds of purpose provisions are codified in sections of the United States Code. Indeed, searching for "purposes" solely in the headings of sections in the Code yields over 1000 results in the OLRC's electronic version of the Code. *See* OFFICE OF THE LAW REVISION COUNSEL: U.S. CODE, https://uscode.house.gov/search.xhtml?searchString=head%3A%28purposes%29&pageNumber=2&itemsPerPage=100&sortField=CODE_ORDER&action=search&q=%7C%3A%3A%3A%3A%3A%3A%3A%3Afalse%3A%7C%3A%3A%3A%3A%3A%3A%3A%3Afalse%3A%7Ctrue%7C%5B%3A%3A%3A%3A%3A%3A%3A%3Afalse%3A%5D%7C%5BSGVhZGluZw%3D%3D%3AcHVycG9zZXM%3D%5D [https://perma.cc/8MAT-5889]. For a sampling of purpose provisions in the text of the U.S. Code, see *infra* Appendix A (sampling of purpose provisions that appear in provisions of the United States Code).

282. *See infra* Appendix B (providing a sampling of purpose provisions that appear in the Notes of the United States Code). In some cases, as Shobe uncovers, finding provisions do not even make it into the Notes of the Code. Shobe, *supra* note 21, at 693 (noting findings and sense of Congress provisions that were not included in the U.S. Code).

283. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 448; *Welden*, 377 U.S. at 98 n.4; *see also* Crane, *supra* note 20, at 679 (noting same); OFFICE OF LAW REVISION COUNSEL, DETAILED GUIDE TO THE U.S. CODE CONTENT AND FEATURES, https://uscode.house.gov/detailed_guide.xhtml#statutory [https://perma.cc/F6XJ-KPJZ] ("A provision of a Federal statute is the law whether the provision appears in the Code as section text or as a statutory note, and even when it does not appear in the

These codification practices take place in a legal culture that frequently treats the Code as a shorthand for the corpus of all federal legislation.[284] Talk of "whole code" canons invites the incorrect perception that the U.S. Code is a comprehensive statement of the law in the tradition of a civil law code. In this regard, our citation practices are telling. *The Bluebook: A Uniform System of Citation* moved in 1926, the year of publication of the U.S. Code, from requiring citation only to the public law,[285] to requiring citation to the public law and U.S. Code,[286] to requiring citation only to the U.S. Code whenever a citation is available.[287] This shift carries a clear message about what the legal community considers an authoritative source of federal legislation.

Neglect is likely to be particularly acute for purpose provisions relegated to the Notes of the Code. In the official version of the Code, the Notes are parsimonious, appearing as discrete additions following the text of the Code provision. But today, few open hard-bound copies of the U.S. Code. The most widely used legal research tools, Westlaw and Lexis, further confuse the place of these official Notes. In Westlaw, the Notes of the Code appear under a tab labeled "History" (which they are not), and then under the heading of "Editor's and Revision Notes."[288] Those Editor's and Revision Notes mix Westlaw's own content with the official Notes in a way that makes it difficult to distinguish. Lexis also places the official Notes under the tab heading of "History" and reorganizes their content. These choices send the misleading

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Code at all. The fact that a provision is set out as a note is merely the result of an editorial decision and has no effect on its meaning or validity.").

284. *See, e.g.*, Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 572 n.7 (2012) (noting that respondent could cite "no provision in the United States Code" bearing proposed meaning of term); Bilski v. Kappos, 561 U.S. 593, 608 (2010) (applying surplusage canon to "any two provisions in the U.S. Code, even when Congress enacted the provisions at different times"); Abbe R. Gluck, *Comments: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 63, 85 (2015) ("Perhaps courts are best conceived as guardians of the U.S. Code. . . . A Court that sees its proper role as 'keeper of the U.S. Code' —in the sense of reading statutes to be perfectly coherent and consistent—is not a Court focused on legislative supremacy.").

285. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 12 (Columbia Law Review Ass'n et al. eds., 1st ed. 1926) (providing model citation to Stat. volume and page).

286. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 19 (Columbia Law Review Ass'n et al. eds., 2d ed. 1928) (requiring citation to Stat. by volume and page and then Code by title and provision).

287. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 20 (Columbia Law Review Ass'n et al. eds., 8th ed. 1949) (requiring citation to U.S. Code when available). There was some fluctuation after 1949, but that is the citation rule today. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 12, at 121 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015); Tobias A. Dorsey, *Some Reflections on Not Reading Statutes*, 10 GREEN BAG 2D 283, 288 n.14 (2007) (noting that Bluebook stopped requiring citation to Statutes at Large in 1949 in the Bluebook's 8th edition in 1949).

288. A Westlaw search for any of the portions of the U.S. Code of Appendix B *infra* shows that Westlaw reproduces the official Notes to the Code under its History tab but does not separately designate the official Notes. Instead, they appear mixed with its other editorial content. *See, e.g.*, 5 U.S.C.A § 504 (West 2019).

impression that the official Code Notes are just a collection of miscellaneous editorial notes or are merely of historical interest.[289] Surprisingly few lawyers and judges—even those who deal with federal legislation—know that purpose provisions are frequently relegated to the Notes of the U.S. Code.

The casual identification of our corpus of federal legislation with the Code diminishes the intrinsic importance of purpose provisions. It suggests that lawyers can resolve statutory issues based on the analysis of the Code, not by integrating free-standing statutes. It invites lawyers to view placement in the Code as significant.[290] And it creates a pathway for overlooking purpose provisions, either because they are relegated to Notes within the Code or isolated from the operative provisions they address. Indeed, Shobe identifies several cases in which the Supreme Court ignores relevant purpose statements, including those that appeared in the Notes to the Code.[291] No doubt the set of court decisions, briefs, and client advice in which purpose provisions are overlooked is vast.

Recognition of the enacted purposes canon reinforces that our federal legislation requires statutory, not code, interpretation. And statutory interpretation should begin by asking whether the statute includes an enacted purpose.

C. CONGRESS AND STATUTORY DESIGN

How would recognition of the enacted purposes canon influence congressional drafting? In asking this question it is important to first acknowledge that congressional staffers (and presumably members of Congress) devote little attention to understanding specific principles of statutory interpretation.[292] Drafting statutes in light of judicial interpretive

289. To find the Notes to the Code presented in a clear fashion in an electronic source, one needs to turn to U.S. government sources, see U.S. PUBLISHING GOV'T. OFFICE: U.S CODE, https://www.govinfo.gov/app/collection/uscode [https://perma.cc/HKD7-SAUA], or to Cornell's Legal Information Institute, see CORNELL LAW SCHOOL: LEGAL INFO. INST.: U.S. CODE, https://www.law.cornell.edu/uscode/text [https://perma.cc/32NA-T344]. Despite long practice of publishing purpose provisions only in the Notes to the U.S. Code, the Bluebook did not even include a cite form for U.S. Code Notes until the 20th edition. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 12, at 124 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

290. *See, e.g.*, Mendelson, *supra* note 227, at 112–13 (noting, critically, Justice Ginsburg's treatment of placement in the Code as bearing on interpretation in Yates v. United States, 135 S. Ct. 1074, 1085 (2015) (plurality opinion)).

291. Shobe, *supra* note 21, at 697–99. Shobe provides an excellent illustration. In *Federal Aviation Administration v. Cooper*, 566 U.S. 284 (2012), the Court denied that "actual damages" included mental or emotional distress, but "failed to mention the enacted findings and purposes of the statute, which were codified in notes in the US Code." Shobe, *supra* note 21, at 698.

292. *See generally* Bressman & Gluck, *Part II*, *supra* note 228 (documenting congressional drafters' dim knowledge of many judicial canons).

practices has not been at the top of congressional priorities.[293] So there must be moderate expectations about the extent to which greater judicial recognition of any principle would alter congressional practice.

Yet for legislative drafters, inside and outside of Congress, who are paying attention to judicial practice, recognition of the enacted purposes canon should alter their approach. The current counsel in federal legislative drafting manuals on purpose provisions is superficial. Some discourage purpose provisions on the ground that the material is better stated in committee reports,[294] and others endorse them only when necessary to eliminate ambiguity or to support constitutional requirements.[295] This counsel neglects the most salient feature of enacted purposes and their effect on how the statute is implemented: the enacting coalition's interest in entrenching a policy and making it more difficult for courts and agencies to stray from it. The greater the interest and support for entrenching a policy or set of policies, the more reason for the enacting coalition to include purpose provisions, and relatively more specific ones.[296] This logic goes right to the heart of what the enacted purposes canon does; it limits interpretations to those that do not thwart the enacted purposes, setting an overall trajectory for the statute that is more difficult to change. At times, an enacting coalition will want their statutes to constrain the courts' and presidential administrations' flexibility. At times not. But it is that consideration that should be at the forefront for legislative drafters seeking to serve their clients.[297]

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293. For a useful account of pragmatic efforts to create more judicial-Congress dialogue, including creating a pipeline for courts to notify Congress of glitches they find in statutes, see ROBERT A. KATZMANN, JUDGING STATUTES 97–102 (2014).

294. *See, e.g.*, OFFICE OF THE LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE, 104th Cong. 1st Sess., HLC–104, at 28 (1995) ("Discourage clients from including findings and purposes. Both are matters that are more appropriately and safely dealt with in the committee report than in the bill."); LAWRENCE E. FILSON & SANDRA L. STROKOFF, THE LEGISLATIVE DRAFTER'S DESK REFERENCE 127–28 (2d ed. 2008) (discouraging including a statement of purpose in a bill and stating that purpose is better dealt with in committee reports).

295. *See, e.g.*, REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 285 (2d ed. 1986) (noting that purpose provisions may be useful where there is "a pervasive uncertainty that cannot be removed in the specific directions, authorizations, and prohibitions of the bill" but even then that there are downsides); DONALD HIRSCH, DRAFTING FEDERAL LAW 29 (2d ed. 1989) (noting that findings and purpose statements "may be useful, in a bill founded on the commerce clause," but otherwise discouraging their use).

296. More specific purpose provisions are generally viewed as more useful. *See* G.C. THORNTON, LEGISLATIVE DRAFTING 155 (4th ed. 1996) ("Greater specificity can reduce the level of vagueness that depreciates the value of many purpose provisions."). A fruitful line of statistical research would be to evaluate whether Congress includes enacted purposes more often in periods of unified or divided government. The analysis here would suggest that they should appear more often in unified government, where Congress and the President have fewer constraints on entrenching legislative policy.

297. Separately from Congress's incentives to entrench policies through purpose provisions, more research is needed on how the presence of a purpose provision influences the drafting process. In the UK, it has been suggested that an early draft of the purpose provision improves the drafting process by helping to ensure that the operative provisions are drafted "in light of the

VII. CONCLUSION

When Congress includes an enacted statement of purpose, a court is bound to accept the statement, just as it is bound to accept other parts of the statutory text. This basic logic underlies the Supreme Court's long practice of reliance on enacted purpose provisions to exclude interpretations inconsistent with those purposes. Once that practice is reconstructed, it becomes clear that reliance on enacted purposes to exclude interpretations inconsistent with those purposes is already a bedrock principle of statutory interpretation. Given this principle's long and frequent use and its strong analytic and normative justifications, it warrants identification as a canon of statutory interpretation. Explicit recognition of the enacted purposes canon would alert Congress to the use of enacted purpose provisions as tools to entrench policy. More generally, recognition of the canon would serve as reminder to the bench and bar that the first step in statutory interpretation is to ask whether the statute has an enacted purpose.

purpose clause rather than the other way around." *Id.* at 156. *See generally* Barnes, *supra* note 36, at 24–25 (providing a concise summary of object clauses and their impact on drafting in parliaments). Does the same hold in Congress? There are likely no general answers to whether drafting in light of purpose exacerbates disagreements on higher-order issues or usefully anchors deliberation, but case studies of legislative drafting could identify some useful dynamics to guide drafters' choices about when and what kind of purpose provisions to include.

APPENDIX A

The following is a sampling of purpose provisions codified in provisions of the United States Code, in both positive and nonpositive titles.

POSITIVE TITLES

5 U.S.C. § 561 (2012) (codifying purpose provision of Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, § 3(a), 104 Stat. 4969, 4969–70);

5 U.S.C. § 6101 (2012) (codifying purpose provision in Federal Employees Flexible and Compressed Work Schedules Act of 1982, Pub. L. No. 97-221, § 2(a)(2), 96 Stat. 227, 227);

28 U.S.C. § 991 (2012) (codifying purpose provision of Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017–18);

28 U.S.C. § 1602 (2012) (codifying findings and declaration of purpose Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 4(a), 90 Stat. 2891, 2892);

31 U.S.C. § 5311 (2012) (codifying declaration of purpose provision for portion of Banking Secrecy Act of 1982, Pub. L. No. 97-258, § 5311, 96 Stat. 877, 995);

31 U.S.C. § 5361 (2012) (codifying congressional findings and purpose of Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No.109-347, § 802(a), 120 Stat. 1884, 1952);

38 U.S.C. § 2001 (2012) (codifying purpose provision of Homeless Veterans Comprehensive Assistance Act of 2001, Pub. L. No. 107-95, § 5(a)(1), 115 Stat. 903, 905);

38 U.S.C. § 4301 (2012) (codifying purpose provision of Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2(a), 108 Stat. 3149, 3150);

44 U.S.C. § 3501 (2012) (codifying purposes set forth in Paperwork Reduction Act of 1995, Pub. L. No. 104-13, § 2, 109 Stat. 163, 163–64);

44 U.S.C. § 3551 (2012) (codifying purposes set forth in Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283, § 2(a), 128 Stat. 3073, 3073–74);

11. 49 U.S.C. § 5101 (2012) (codifying purpose provision Hazardous Materials Transportation Authorization Act of 1994, Pub. L. No. 103-272, § 1(d), 108 Stat. 745, 759);

12. 51 U.S.C. § 20102 (2012) (codifying congressional findings and purpose of National Aeronautics and Space Act, Pub. L. No. 111-314, § 3, 124 Stat. 3328, 3330–32 (2010)).

NONPOSITIVE TITLES

2 U.S.C. § 661 (2012) (codifying purpose provision of Federal Credit Reform Act of 1990, Pub. L. No. 101-508, § 13201(a), 104 Stat. 1388, 1610–11);

2 U.S.C. § 931 (2012) (codifying purpose provision of Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, § 2, 124 Stat. 8, 8);

7 U.S.C. § 5 (2012) (codifying purpose provision of Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(5), 114 Stat. 2763, 2763A-383);

7 U.S.C. § 2011 (2012) (codifying "declaration of policy" of Food Stamp Act of 1964, Pub. L. No. 88-525, § 2, 78 Stat. 703, 703);

7 U.S.C. § 3001 (2012) (codifying Congressional statement of purpose of Farmer-to-Consumer Direct Marketing Act of 1976, Pub. L. No. 94-463, § 2, 90 Stat. 1982, 1982);

8 U.S.C. § 1571 (2012) (codifying purpose provision of Immigration Services and Infrastructure Improvements Act of 2000, Pub. L. No. 106-313, § 202, 114 Stat. 1251, 1262–63);

12 U.S.C. § 2281 (2012) (codifying Congressional findings and declaration of purpose of Federal Financing Bank Act of 1973, Pub. L. No. 93-224, § 2, 87 Stat. 937, 937);

12 U.S.C. § 3001 (2012) (codifying Congressional findings and declaration of purpose of National Consumer Cooperative Bank Act, Pub. L. No. 95-351, § 2, 92 Stat. 499, 499 (1978));

15 U.S.C. § 271 (2012) (codifying findings and purposes provisions of Technology Competitiveness Act, Pub. L. No. 100-418, § 5111, 102 Stat. 1107, 1427–28 (1988));

15 U.S.C. § 690a (2012) (codifying purpose provision of the Renewable Fuel Capital Investment Pilot Program of the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 1207, 121 Stat. 1492, 1775–76);

15 U.S.C. § 5502 (2012) (codifying purpose provision of High-Performance Computing Act of 1991, Pub. L. No. 102-194, § 3, 105 Stat. 1594, 1594–95);

19 U.S.C. § 2001 (2012) (codifying Congressional declaration of purposes of Automotive Products Trade Act of 1965, Pub. L. No. 89-283, § 102, 79 Stat. 1016, 1016);

22 U.S.C. § 3601 (2012) (codifying purpose provision of Panama Canal Act of 1979, Pub. L. No. 96-70, § 2, 93 Stat. 452, 455);

27 U.S.C. § 213 (2012) (codifying declaration of policy and purpose of Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, § 8001(a)(3), 102 Stat. 4181, 4518);

29 U.S.C. § 401 (2012) (codifying Congressional declaration of findings, purposes, and policy of Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 2, 73 Stat. 519, 519);

30 U.S.C. § 1801 (2012) (codifying Congressional findings and declaration of purposes of National Critical Materials Act of 1984, Pub. L. No. 98-373, § 202, 98 Stat. 1242, 1249–50);

42 U.S.C. § 7401 (2012) (codifying purposes set forth in Clean Air Act of 1963, Pub. L. No. 88-206, § 1, 77 Stat. 392, 392–93).

APPENDIX B

The following is a sample of purpose provisions that appear in the notes of the United States Code following codified provisions in both positive and nonpositive titles:

POSITIVE TITLES

5 U.S.C. § 504 note (2012) (reproducing in notes the purpose provisions of portion of Equal Access to Justice Act, Pub. L. No. 96-481, § 202, 94 Stat. 2321, 2325 (1980));

5 U.S.C.A. § 5542 note (2012) (reproducing in the notes the purpose provisions of Border Patrol Agent Pay Reform Act of 2014, Pub. L. No. 113-277, § 2, 128 Stat. 2995, 2995);

18 U.S.C. § 31 note (2012) (reproducing in notes the purpose provisions of portion of Joint Resolution making continuing appropriations for the fiscal year 1985, and for other purposes, Aircraft Sabotage Act, Pub. L. No. 98-473, § 2012, 98 Stat. 1837, 2187 (1984));

18 U.S.C.A. § 1961 note (2012) (reproducing in notes the purposes and finding provision of Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922–23);

18 U.S.C. § 891 note (2012) (reproducing in notes the purpose provisions of portion of the Consumer Credit Protection Act, Pub. L. No. 90-321, § 201, 82 Stat. 146, 159 (1968));

18 U.S.C. § 921 note (2012) (reproducing in notes the purpose provisions of portion of the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1(b), 100 Stat. 449, 449 (1986));

18 U.S.C. § 1512 note (2012) (reproducing in notes the purpose provisions of portion of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2, 96 Stat. 1248, 1248–49);

23 U.S.C. § 601 note (2012) (reproducing in notes the purpose provisions of portion of Transportation Infrastructure Finance and Innovation Act of 1998, Pub. L. No. 105-178, § 1502, 112 Stat. 107, 241);

28 U.S.C. § 2671 note (2012) (reproducing in notes the purpose provisions of portion of Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 2, 102 Stat. 4563, 4563–64);

31 U.S.C. § 1101 note (2012) (reproducing in notes the purpose provisions of portion of Government Performance and Results Act of 1993, Pub. L. No. 103-62, § 2, 107 Stat. 285, 285);

49 U.S.C. § 26101 note (2012) (reproducing in notes the purpose provisions of portion of Swift Rail Development Act of 1994, Pub. L. No. 103-440, § 102, 108 Stat. 4615, 4615–16);

51 U.S.C. § 20102 note (2012) (reproducing in notes the purpose provisions of portion of National Aeronautics and Space Administration Authorization Act of 2008, Pub. L. No. 110-422, § 2, 122 Stat. 4779, 4781–82).

NONPOSITIVE TITLES

7 U.S.C. § 1 note (2012) (reproducing in notes the purpose provisions of 2000 amendments to Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, § 1(a)(5), 114 Stat. 2763, 2763A-366);

10 U.S.C. § 441 note (2012) (reproducing in notes the purpose provisions of portion of National Imagery and Mapping Agency Act of 1996, Pub. L. No. 104-201, § 1102, 110 Stat. 2422, 2676);

7 U.S.C. § 2131 note (2012) (reproducing in notes the purpose provisions of portion of Food Security Act of 1985, Pub. L. No. 99-198, §§ 1751–1759, 99 Stat. 1354, 1645–50);

12 U.S.C. 1819 note (2012) (printing on notes the purposes provisions of Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, §101, 103 Stat. 183, 187);

12 U.S.C. § 3904a note (2012) (reproducing in notes the purpose provisions of portion of Foreign Debt Reserving Act of 1989, Pub. L. No. 101-240, § 402(a), 103 Stat. 2492, 2501);

15 USC § 16 note (2012) (reproducing in notes the purpose provisions of portion of Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, § 221(a), 118 Stat. 661, 668);

15 U.S.C. § 45 note (2012) (reproducing in notes the purpose provisions of portion of Federal Trade Commission Act, Pub. L. No. 93-153, § 408(a), (b), 87 Stat. 576, 591 (1973));

15 U.S.C. § 654 note (2012) (reproducing in notes the purpose provision of portion of Drug-Free Workplace Act of 1998, Pub. L. No. 105-277, § 902, 112 Stat. 2681, 2707–08);

15 U.S.C. § 3701 note (2012) (reproducing in notes the purpose provisions of portion of the National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 2, 110 Stat. 775, 775);

15 U.S.C. § 6301 note (2012) (reproducing in notes the purpose provisions of portion of the Muhammad Ali Boxing Reform Act, Pub. L. No. 106-210, § 2, 114 Stat. 321, 321–22 (2000));

21 U.S.C. § 353 1512 note (2012) (reproducing in notes the purpose provisions of portion of the Prescription Drug Marketing Act of 1987, Pub. L. No. 100-293, § 2, 102 Stat. 95, 95–96);

19 U.S.C. § 2102 note (2012) (reproducing in notes the purposes provision of the International Trade and Investment Act, Pub. L. No. 98-573, § 302, 98 Stat. 2948, 3000–01 (1984));

22 U.S.C. § 2377 note (2012) (reproducing in notes the purpose provisions of portion of Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 324, 110 Stat. 1214, 1255);

22 U.S.C. § 7101 note (2012) (reproducing in notes the purpose provisions of portion of Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 2, 119 Stat. 3558, 3558–59);

25 U.S.C. § 2201 note (2012) (reproducing in notes the purpose provisions of portion of American Indian Probate Reform Act of 2004, Pub. L. No.108-374, § 2, 118 Stat. 1773, 1773–74);

26 U.S.C. § 1 note (2012) (reproducing in the notes the purposes provision of American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 3, 123 Stat. 115, 115–16);

34 U.S.C. § 10531 note (2012) (reproducing in notes the purpose provisions of portion of Bulletproof Vest Partnership Grant Act of 2000, Pub. L. No. 106-517, § 2, 114 Stat. 2407, 2407);

42 U.S.C. § 247(c) note (2012) (reproducing in notes the purpose provisions of portion of Migrant and Community Health Centers Amendments of 1978, Pub. L. No. 95-626, § 204(a), 92 Stat. 3551, 3582–83);

42 U.S.C. § 4011 note (2012) (reproducing in notes the purpose provisions of portion of Bunning–Bereuter–Blumenauer Flood Insurance Reform Act of 2004, Pub. L. No. 108-264, § 2, 118 Stat. 712, 712–13);

42 U.S.C. § 1981 note (2012) (reproducing the purpose provisions of Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071).