

Uncovering the Codifier's Canon: How Codification Informs Interpretation

To contend that the category of “tangible objects” should be understood to exclude an actual fish, one must marshal some strong arguments. The ordinary meaning of a textual phrase in a statute is often the most persuasive evidence in favor of a particular interpretation.¹ An interpretation at odds with ordinary meaning requires citing textual or other clues of nearly equal interpretive force. In *Yates v. United States*, the Supreme Court narrowed the meaning of the word “tangible object” in 18 U.S.C. § 1519, in part by citing the language’s organizational context in the United States Code, including its caption and the function of the surrounding provisions.² In doing so, it implicitly placed arguments based on the organization of the Code on a high pedestal, possibly above legislative history and substantive policy canons, like the rule of lenity.³

Setting aside the question of how much relative weight these organizational features should be accorded, it seems reasonable that any interpreter – regardless of where she or he stands in the textualist–purposivist debate – ought at least to consider what information might be communicated by Congress’s decision to place a provision in a particular part of the Code and give it a particular title.⁴

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1. See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (rejecting the petitioners’ interpretation of the relevant statute as “ignor[ing] the ordinary meaning of plain language”).
 2. 135 S. Ct. 1074, 1083–84 (2015) (interpreting 18 U.S.C. § 1519 (2012)).
 3. Although the plurality references both the rule of lenity and legislative history, they are given less weight than the heading and placement in the Code. The rule of lenity is invoked only at the end of the opinion and is introduced as applying only “if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of ‘tangible object,’ as that term is used in § 1519.” *Id.* at 1088. Legislative history appears in the plurality’s opinion to note that § 1519 was drafted before § 1512(c)(1), a fact that the plurality uses in its broader argument about the relevance of the provision’s placement. *Id.* at 1084.
 4. See, e.g., WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 264 (2000) (“[T]here might be greater legal legitimacy, as

But while invoking these contextual features might seem uncontroversial, the text of the Code itself says otherwise. Unbeknownst to most interpreters, Title 18, along with many other titles, includes a rule of construction that appears to forbid invoking either a provision's placement or its caption in the Code.⁵ This feature of the Code affects both dominant schools of interpretation: the textualist move of constructing coherence in the Code is short-circuited,⁶ and a staple of the purposivist's approach is foreclosed.⁷

In other words, this rule of construction seems to command that, far from being strong enough to overcome ordinary meaning, an argument based on organizational features of the Code is invalid. Such a conclusion, this Comment argues, relies on a mistaken interpretation of what this statutory rule of construction—or “legislated canon”—means. This Comment theorizes that provisions that guide interpreters' reading of codification information embody a “codifier's canon”: an interpretive principle that judges should heed caption and placement in the Code where they reflect the choices of Congress, but not where they are introduced by nonlegislative codifiers. This novel understanding of the

well as an aesthetic advantage, if courts presume coherence among statutes as well as within statutes.”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (“[T]he meaning of a statute is apparent from its text and from its relationship with other laws.”).

5. Act of Sept. 6, 1966, Pub. L. No. 89-554, § 7(e), 80 Stat. 378, 631 (codified at 5 U.S.C. Front Matter at 10 (2012)); Act of Aug. 10, 1956, Pub. L. No. 84-1028, § 49(e), 70A Stat. 1, 640 (codified at 10 U.S.C. Front Matter at 12 (2012)); Act of Aug. 31, 1954, Pub. L. No. 83-740, § 5, 68 Stat. 1012, 1025 (codified at 13 U.S.C. Front Matter at 1 (2012)); Act of Aug. 4, 1949, Pub. L. No. 81-207, § 3, 63 Stat. 495, 557 (codified at 14 U.S.C. Front Matter at 2-3 (2012)); Act of June 25, 1948, Pub. L. No. 80-772, § 19, 62 Stat. 683, 862 (codified at 18 U.S.C. Front Matter at 5 (2012)); Act of June 25, 1948, Pub. L. No. 80-773, § 33, 62 Stat. 869, 991 (28 U.S.C. Front Matter at 5 (2012)); Act of Sept. 13, 1982, Pub. L. No. 97-258, § 4(e), 96 Stat. 877, 1067 (codified at 31 U.S.C. Front Matter at 6 (2012)); Act of Nov. 3, 1998, Pub. L. No. 105-354, §4(e), 112 Stat. 3238, 3245 (codified at 36 U.S.C. Front Matter at 11 (2012)); Act of Aug. 12, 1970, Pub. L. No. 91-375, § 11(b), 84 Stat. 719, 785 (codified at 39 U.S.C. Front Matter at 7 (2012)); Act of Aug. 21, 2002, Pub. L. No. 107-217, § 5(f), 116 Stat. 1062, 1304 (codified at 40 U.S.C. Front Matter at 7 (2012)); Act of Oct. 22, 1968, Pub. L. No. 90-620, § 2(e), 82 Stat. 1238, 1306 (codified at 44 U.S.C. Front Matter at 3 (2012)); Act of Aug. 26, 1983, Pub. L. No. 98-89, § 2(e), 97 Stat. 500, 598 (codified at 46 U.S.C. Front Matter at 10 (2012), applying to subtitle II); Act of Nov. 23, 1988, Pub. L. No. 100-710, § 105(d), 102 Stat. 4735, 4751 (codified at 46 U.S.C. Front Matter at 10 (2012), applying to subtitle III); Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(e), 92 Stat. 1337, 1466 (codified at 49 U.S.C. Front Matter at 14 (2012)).
6. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (characterizing the role of the Court as defining a meaning that fits “logically and comfortably” with the statute in question and the broader Code).
7. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 462 (1892) (relying on the title and preamble of a statute to construe the term “labor” in a purposive manner, while acknowledging the tension with the text's ordinary meaning).

apparent prohibition on utilizing captions and placement offers important lessons for how interpreters should consider the codification process when extracting meaning from statutory provisions.

As Tobias Dorsey, a former attorney for the House Office of Legislative Counsel, has observed, the provision in Title 18 and elsewhere has gone largely unheeded; citing placement and captions remains the norm in the judiciary.⁸ In fact, the Supreme Court has only once cited one of these statutory prohibitions against invoking caption and structure.⁹ In *Ex parte Collett*, the Court rejected the interpretation that a provision addressing venue transfer applied exclusively to the particular types of civil suits discussed in neighboring provisions.¹⁰ While relying primarily on the plain meaning of the text, which referenced “any civil action,” the Court also cited the provision that prohibited drawing conclusions based on where in Title 28 the statute was codified.¹¹

Scholars have offered three related approaches to the problem of inconsistent invocation of organizational context. Gregory Sisk has called for the repeal of provisions banning invocation of placement and captions, contending that they seal off important interpretive resources from judicial consideration.¹² On the other hand, Dorsey advocates adherence to such rules as legitimate acts of legislation.¹³ Most recently, William Eskridge has advocated treating this legislated direction as nonbinding, while suggesting that it provides a “note of caution” for interpreters looking at a provision’s context in the code.¹⁴ Although Sisk, Dorsey, and Eskridge take distinct attitudes toward the legislated prohibition, they all

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8. Tobias A. Dorsey, *Some Reflections on Yates and the Statutes We Threw Away*, 18 GREEN BAG 2D 377, 382 (2015).
 9. See *Ex parte Collett*, 337 U.S. 55, 57-59 (1949). Note that this Comment excludes cases citing I.R.C. § 7806(b), which is similar to the codifier’s canon in that it prohibits inferences based on captions and placement, among other things. The Court has cited and discussed that provision and its relationship to the codification process. See *United States v. Dixon*, 347 U.S. 381, 385-86 (1954); see also Dorsey, *supra* note 8, at 382-83 (discussing *Dixon*). However, § 7806(b) is different in both text and function from the codifier’s canon. It is worded much more broadly in its application and appears in Title 26, which is not a positive law title and contains the text of the Internal Revenue Code. These factors make Title 26 a unique case, but further analysis is beyond the scope of this Comment. For a discussion of the differences between positive law and nonpositive law titles, see *infra* notes 15-17 and accompanying text.
 10. *Collett*, 337 U.S. at 57-59.
 11. *Id.* (interpreting 28 U.S.C. § 1404(a) (2006) and citing Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869 (revising and codifying Title 28)).
 12. See Gregory C. Sisk, *Lifting the Blindfold from Lady Justice: Allowing Judges To See the Structure in the Judicial Code*, 62 FLA. L. REV. 457 (2010).
 13. See Dorsey, *supra* note 8, at 386.
 14. See WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 120 (2016).

interpret the rules of construction as meaning the same thing—that is, as an instruction by Congress not to draw interpretive inferences based on where a provision was placed in the Code or what caption it was given. All of these arguments, this Comment contends, start from the wrong premise.

This Comment offers an alternative interpretation of these statutorily enacted rules of interpretation. These provisions ought not to be read as broad rejections of citing structural placement or caption. Instead, they should be understood as signaling to the courts that placement and caption choices within the Code should be respected and considered when they originate in the decisions of Congress, but not when those choices are the result of intervention by the office that codifies the United States Code. In other words, the apparent prohibition on invoking organizational context should be understood as tailored to the circumstances of the codification process, not a categorical rejection of the salience of placement and caption.

This observation is informed by the codification process. The United States Code is a project of compilation and codification of federal statutes that has been ongoing for generations. Central to that project is the Office of the Law Revision Counsel (OLRC). The OLRC is tasked with preparing and publishing the Code.¹⁵ The Code is itself composed of both positive law titles and nonpositive law titles, and the role of the OLRC differs with respect to each type of title, as is elaborated in this Comment. Nonpositive law titles are not themselves binding authorities. This is because, although they are composed of statutory provisions passed by Congress, the titles have not been independently enacted into law.¹⁶ Positive law titles are like nonpositive law titles in that they compile and restate previously enacted federal statutes, but there is one major difference: a positive law title is itself enacted into law as a statute that also repeals the existing laws that the positive law title restates.¹⁷

The codifier's canon only appears in positive law titles. That is because of the role of the OLRC in the positive law codification process. The OLRC is the critical player in the enactment of a positive law title, a process that requires decision making about the placement of provisions and, sometimes, captions. The codifier's canon—that is, the prohibition on invoking organizational context—ought to be understood as responding directly to the role of the OLRC, barring reliance on those decisions made during the codification process, but not those that reflect legislative choice. It is the close relationship between these legislated rules

15. *About the United States Code and This Website*, OFF. L. REVISION COUNS., http://uscode.house.gov/about_code.xhtml [<http://perma.cc/2NYW-32U3>].

16. *Positive Law Codification*, OFF. L. REVISION COUNS., <http://uscode.house.gov/codification/legislation.shtml> [<http://perma.cc/NY5D-KT5M>].

17. *Id.*

and those who codify statutes into the United State Code that motivates referring to this interpretive principle as the “codifier’s canon.”

But not every captioning and placement decision is made by the OLRC. Often, Congress makes those choices as part of the statute as it was enacted. In particular, every statute enacted by Congress amending a positive law title includes specific directions about how the provisions relevant to the statute ought to be arranged in the U.S. Code. The codifier’s canon should not be understood to impede an interpreter from drawing inferences from Congress’s statutorily enacted choices about placement and captions.

Instead, the interpreter ought to follow a simple rule: ignore editorial decisions made by the nonlegislative codifiers—i.e., the OLRC—but consider those made by Congress. This broad principle of interpretation—the *generic* codifier’s canon—ought to be considered regardless of whether the provision one is interpreting appears in a title in which the prohibition on citing captions and placement is present in the text of the title itself. The generic codifier’s canon should be—and arguably already has been¹⁸—added to the Supreme Court’s litany of canons of statutory interpretation. The canons of statutory interpretation are “formal presumptions or rules about statutory meaning.”¹⁹ The generic codifier’s canon should be recognized as such a rule because doing so would avoid inaccurate interpretations based on artifacts of the codification process—an error that does, in fact, occur in the federal courts.²⁰ As this Comment explains, understanding how the OLRC generates both positive and nonpositive law titles enables the interpreter to better determine the meaning of the law as Congress intended it.

On the other hand, where the *legislated* codifier’s canon—which is referred to here as simply the “codifier’s canon,” as it is the focus of this Comment²¹—appears as a statutorily enacted rule, it has a special and important meaning. The inclusion of the codifier’s canon in a positive law title directs the interpreter not to draw inferences from editorial decisions made by the OLRC or one of its predecessor institutions during the positive law codification process. Unlike the *generic* codifier’s canon, this is not just a helpful principle to increase the fidelity of

18. See *infra* note 99 and accompanying text.

19. William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 673 (1999).

20. See *infra* notes 70-73 and accompanying text.

21. The *legislated* codifier’s canon is the statutory text directing that interpreters ought not to draw inferences from a provision’s caption or placement in the Code. In contrast, the *generic* codifier’s canon is simply the principle that interpreters should distinguish between aspects of the Code that reflect the choices of Congress and those that reflect those of the OLRC. This Comment argues that the *legislated* codifier’s canon should be understood as reflecting the general principle instantiated in the *generic* codifier’s canon.

one's interpretation to Congress's will; rather, the statutory inclusion of the codifier's canon prevents inadvertent substantive changes introduced through the positive law codification process from gaining formal legal significance.

This Comment argues in favor of this tailored interpretation of the codifier's canon. Part I provides a general account of legislated canons in statutory interpretation. Part II introduces the codifier's canon, examining it in relation to the Court's standard methodology of finding significance in a provision's placement and caption in the Code. Part III explains the role of the OLRC in the codification process. Part IV builds on the history of the codifier's canon and the function of the OLRC to explain how the codifier's canon should be understood. Finally, Part V applies these insights to the statutory provision at the center of the dispute in *Yates v. United States*, illustrating the circumstances under which a provision's captioning and placement may be legitimately invoked.

I. LEGISLATED CANONS AND INTERBRANCH UNDERSTANDING

To understand the codifier's canon, it is useful to contextualize it within the broader field of statutory interpretation. An outside observer, even one comfortable with legal reasoning, might be caught off guard reading the Justices' opinions in a divisive statutory interpretation case like *Lockhart v. United States*.²² In that case, the debate between the majority and dissent made heavy use of archaic-sounding terms and spoke little about what Members of Congress would have thought about the issue. A growing body of literature has expressed concern with this interpretive methodology, pointing out the disconnect between the Justices' canon-based interpretations and the way Congress produces legislation.²³ Among the most significant observations is that many of the Court's *textual* interpretive canons – rules of thumb for drawing meaning from sometimes minute details of text²⁴ – do not align with the assumptions of the people who actually draft statutes.²⁵ Drafters include the House and Senate Offices of Legislative

22. 136 S. Ct. 958 (2016).

23. See, e.g., ROBERT A. KATZMANN, *JUDGING STATUTES* (2014); 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 (2013) [hereinafter Gluck & Bressman (pt. 1)]; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014) [hereinafter Gluck & Bressman (pt. 2)]; Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012).

24. Textual interpretive canons are a distinct subset of the larger body of canons regularly referenced by the Court. See ESKRIDGE, *supra* note 14, at 407-45 (categorizing each of the Court's various canons as either “textual canons,” “extrinsic source canons,” or “substantive policy canons,” with the majority falling into the third category).

25. See Gluck & Bressman (pt. 1), *supra* note 23, at 905.

Counsel, the nonpartisan professional drafting offices that write much of the statutory text.²⁶ The misalignment between Congress and the Court's respective practices suggests a need for better interbranch communication if the judiciary is going to enforce the law as Congress intended.²⁷

In fact, Congress does engage in explicit communication, but the judiciary has, at times, failed to heed it. While exchanging esoteric rules, the Supreme Court has largely ignored legislated canons, Congress's statutorily enacted instructions about how to interpret a law. For example, the Racketeer Influenced and Corrupt Organization Act (RICO) includes a provision that instructs courts to construe the title "liberally" in order "to effectuate its remedial purposes."²⁸ The Court has given weight to some of these rules of construction. For example, in *Russello v. United States*, the Court cited the RICO provision along with legislative history in support of a broad reading of the statute.²⁹ But this is an anomaly. On the whole, the Court has ignored these congressional directions.³⁰

The Court's failure to abide by congressional instructions on how to interpret statutes is a troubling development—although how troubling depends in part on one's perspective on legislated canons. As Eskridge has argued, the canons of statutory interpretation are not mere rules for mechanically drawing out meaning from text, a point made clear by the enormous number of substantive canons routinely cited by the Court.³¹ Instead, the canons are best understood as part of an "interpretive regime" formed through centuries of judicial practice

26. *Id.* at 908.

27. See KATZMANN, *supra* note 23, at 54 (arguing that courts need to have "a better understanding of the legislative process and its rules, and [should] appreciat[e] the internal hierarchy of communications" (footnote omitted)). Others, however, resist the position that the judiciary should be the branch striving to communicate Congress's intent, arguing instead that Congress bears the constitutional responsibility of legislating. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1998) ("It is the law that governs, not the intent of the lawgiver:").

28. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (amending RICO, Pub. L. No. 91-452, 84 Stat. 941 (1970)).

29. 464 U.S. 16, 26-27 (1983) (interpreting "interests" to include not only a defendant's property or ownership interests in an enterprise, but also the "profits or proceeds" from the enterprise); see also WILLIAM N. ESKRIDGE, JR. ET AL., STATUTES, REGULATIONS, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 595-96 (2014) (discussing potential constitutional objections to statutory rules of construction, including the RICO provision, on the basis of violating separation-of-powers doctrine).

30. See Dorsey, *supra* note 8, at 378 (arguing that the Court has ignored congressional directions regarding the proper interpretation of a specific statute).

31. See ESKRIDGE, *supra* note 14, at 11-13.

and intended to advance a litany of values, such as “rule of law,” “fidelity to democratically accountable legislators,” and “good governance.”³² Formed incrementally in the shadow of such policy considerations, the canons can thus be understood as “America’s common law of statutory interpretation,” comparable to, for example, the common law of contracts, which has developed its own interpretive regimes.³³

Taking seriously the view that canons are common law, it follows that Congress can override them and create binding rules for how statutes should be interpreted.³⁴ Scholars advance this position in arguing for a set of federal rules of statutory interpretation,³⁵ and the view is reflected in the code books of states that have enacted ambitious sets of legislated canons.³⁶ If one accepts this view, then legislated canons – such as the codifier’s canon – ought to be controlling.³⁷ In fact, legislated canons should be accorded a type of authority denied common-law canons (i.e., canons developed by courts). Namely, while the invocation of a common-law canon typically requires weighing various potentially applicable canons,³⁸ a legislated canon – like any statutory provision – ought to be applied whenever so required by its own terms.³⁹ From this perspective, the Court’s failure to abide by legislated canons – including ones that repudiate standard interpretive methods – borders on lawlessness.

Alternatively, one might deny that Congress is free to dictate how courts should interpret statutes. Pointing to Chief Justice Marshall’s declaration that it

32. *Id.* at 20.

33. *Id.* at 21; see also Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 344 (2010) (describing canons as “nothing more than common law”).

34. Cf. *Taylor v. United States*, 495 U.S. 575, 594 (1990) (stating that a “statutory term” will not be “given its common-law meaning, when that meaning is . . . inconsistent with the statute’s purpose”). Much as Congress can override the common-law meaning of a term, it can override common-law methodologies of interpreting a provision.

35. See, e.g., Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

36. See Scott, *supra* note 33, at 411-31.

37. Cf. Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1501-02 (2000) (“Congress makes the laws that the courts must apply, and it is appropriate for Congress, as for any giver of binding instructions, to give instructions about how those who must carry out the instructions should understand them.” (footnote omitted)).

38. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 59 (2012) (“No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.”).

39. One might also consider the heightened degree of democratic legitimacy underlying a congressionally enacted legislated canon, as compared to a canon developed by the courts.

is “the province and duty of the judicial department to say what the law is,”⁴⁰ some have argued that Congress would violate the separation of powers if it were to “attempt[] to control the interpretive process.”⁴¹ According to this view, Congress’s job is to write the text of the statute, and the judiciary’s task is to determine the statute’s meaning. Congress may not change the boundaries of the text of the statute by dictating what the courts can and cannot consider when determining meaning. A proponent of this view would take legislated canons to be non-binding.

However, even this view does not mean that such an interpretive rule would be irrelevant. Given that Congress enacted the rule, a legislated canon may signal Congress’s intent. A signal of intent is clearly relevant to the purposivist, who applies the statute in light of its intended purpose. But it should be of interest to the textualist as well. While the textualist generally eschews extrinsic sources of legislative intent, no such prohibition applies to reading a statutory provision in light of a related preamble or purpose clause, which, although not generating substantive law, gives the interpreter insight into how Congress expected the statute to apply.⁴² Like a preamble, the text of a legislated canon is enacted into law by Congress and thus may be considered by courts. While the rule of interpretation’s directive may not override all contrary interpretive canons—as it would for one who understood legislative canons to be binding—the interpreter ought to accord it significant weight.

The following Parts demonstrate that, by including the codifier’s canon in a statute that enacts a title into positive law, Congress indicates that it does not intend for changes in arrangement and captioning made by the OLRC, or its predecessor institutions, during the positive law codification process to alter the substantive meaning of the restated laws. This insight should guide courts in determining how to interpret a statutory provision in light of an inclusion of the

40. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

41. Linda D. Jellum, “Which Is To Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 840 (2009); see also Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 99-100 (2003) (“Because the lodestar of statutory interpretation is the discernment of the statute’s meaning, binding rules of interpretation of whatever sort must be ignored when an interpreter decides that the meaning of a statute differs from the constructed ‘meaning’ derived from the application of binding rules of construction.”).

42. See SCALIA & GARNER, *supra* note 38, at 217-20 (endorsing the canon that the preamble or purpose clause may be given interpretive weight). Note that Justice Scalia joined the majority opinion that featured one of the most remarkable uses of preambulatory text, *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999). In that case, the Court determined that myopia is not a disability within the meaning of the Americans with Disabilities Act by noting that the statute’s preamble only cited forty-three million people in the United States as having disabilities, a number much smaller than if those with myopia were counted. *Id.* at 484-87.

codifier's canon. Thus, although this Comment assumes that legislated canons are binding, its key thesis should be of interest to interpreters—regardless of their textualist–purposivist orientation—who are more skeptical of statutorily enacted rules of construction. Even if legislated canons are not binding, they reflect the will of Congress, which courts should implement. As the next Part shows, Congress has legislated about the interpretive weight to be accorded placement and captions. Sound statutory interpretation means taking those legislative choices seriously.

II. CAPTION AND PLACEMENT: THE CODIFIER'S CANON

As the previous Part argues, legislated canons should be treated as authoritative by the judiciary. The codifier's canon, however, has been largely ignored. Rather than acknowledging Congress's directions regarding titles and captions, courts have adhered to what is essentially a set of common-law canons. As Jacob Scott has described, judges will turn to both titles and context when resolving ambiguities.⁴³ With regard to titles, the Court has long utilized this interpretive tool, a fact made evident, for example, in *Church of the Holy Trinity v. United States*, in which Justice Brewer made much of the criminal statute's title in order to construe the text beyond what he conceded was its plain meaning.⁴⁴ Noting the relative ubiquity of the practice, Eskridge recently proposed referring to the canon of interpreting a provision in light of its placement in the Code as *noscitur a legibus sociis* (“it shall be known by its neighboring statutes”).⁴⁵ Citing the captions and placement of provisions within the Code may seem reasonable, but like any common-law rule, the practice should give way to congressional legislation.⁴⁶ The codifier's canon is such a legislated rule, and as such, the judiciary ought to heed it.

A rough analysis reveals nearly identical statutory instructions on captions and placement in at least thirteen positive law titles of the United States Code, indicating that this phenomenon is not limited to any specific subset of laws.⁴⁷

43. See Scott, *supra* note 33, at 363–64 (discussing state-level legislated canons in relation to the process of codification).

44. 143 U.S. 457, 462 (1892). For another example of the Court's use of titles to discern statutory meaning, see *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). See also 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 47:3 (7th ed. 2007) (explaining that while “[t]he title cannot control a statute's plain words, . . . [i]n case of ambiguity, the title may help resolve uncertainty” (footnote omitted)).

45. ESKRIDGE, *supra* note 14, at 118–20.

46. See *Taylor v. United States*, 495 U.S. 575, 594 (1990).

47. Cf. sources cited *supra* note 5 (listing the occurrences of the codifier's canon). These occurrences of the codifier's canon were identified by searching for the canon's language in Westlaw.

The codifier's canon in Title 18 is typical: "No inference of a legislative construction is to be drawn by reason of the chapter in Title 18 . . . in which any particular section is placed, nor by reason of the catchlines [captions] used in such title."⁴⁸

Despite appearing at the beginning of the title, in *Yates* the rule went unnoticed; the Solicitor General's arguments, the opinion of the Court, and the concurrence all ran afoul of this instruction, relying on both the caption of 18 U.S.C. § 1519 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy") and its placement in the Code.⁴⁹ Even Justice Kagan's dissent, which is critical of the plurality's use of captions and placement, sanctions the use of context and fails to reference the codifier's canon in Title 18.⁵⁰ The Court's oversight was roundly criticized in the academic literature. Dorsey admonished the Court for failing to heed Congress's instructions, alerting the judiciary and the bar to these legislated canons' existence.⁵¹

Dorsey's reading of the legislated rule as prohibiting all reference to the captions or the placement is reasonable. However, a more nuanced understanding of the role of the OLRC offers a different lesson. The Justices did not rely on the caption or the placement of § 1519; rather, they relied on Congress's *choice* of caption and placement. As the next Part explains, the distinction between which actor makes the structural or preambulatory choice is practically significant. Further, it motivates a particular understanding of this statutory rule of construction.

Note that a few nonpositive law titles also include provisions that resemble the codifier's canon. For example, 33 U.S.C. § 2751(c) says that no inference of legislative construction shall be "drawn by reason of the caption or catchline of a provision enacted by this Act." The Act in question is the statute that enacted the Oil Pollution Act of 1990. As the text makes plain, this provision is of limited scope, applying only to the captions created by that statute. While this Comment does not consider these limited provisions, one might interpret the specificity of the provision as suggesting, *expressio unius*, that in other cases captions can be legitimately relied upon. This Comment discusses reliance on captions, *infra* text accompanying notes 74-75. Note that this Comment does not consider a similar provision that appears in Title 26. See *supra* note 9.

48. Act of June 25, 1948, Pub. L. No. 80-772, § 19, 62 Stat. 683, 862 (codified at 18 U.S.C. Front Matter at 5 (2012)).

49. See Dorsey, *supra* note 8, at 387-89.

50. *Yates v. United States*, 135 S. Ct. 1074, 1092 (2015) (Kagan, J., dissenting) ("I agree with the plurality (really, who does not?) that context matters in interpreting statutes."). While Justice Kagan does not reference the rule of construction, she does claim that utilizing captions and placement is inconsistent with the Court's standard methodology. *Id.* at 1094 ("I know of no other case in which we have *begun* our interpretation of a statute with the title, or relied on a title to override the law's clear terms."); *Id.* at 1095 ("As far as I can tell, this Court has never once suggested that the section number assigned to a law bears upon its meaning."). Justice Kagan's statement that the Court has never utilized a title to override a statute's "clear terms" is most clearly countered in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 462 (1892).

51. Dorsey, *supra* note 8, at 386.

III. WHOSE CHOICE IS IT, CONGRESS'S OR THE OFFICE OF THE LAW REVISION COUNSEL'S?

To understand how the codifier's canon works, it is essential that one has a picture of the codification process and the parties involved. When Congress has chosen how a provision is to be codified, an interpreter can reasonably probe that decision for evidence of intent; but Congress does not make every codification decision. Instead, at times, the OLRC makes the critical choice. Created by statute in 1974, the OLRC has two primary functions. Its first function, classification, is to examine each law that modifies a title that has not been enacted into positive law and determine where in the title it should be placed.⁵² A positive law title is itself a federal statute that constitutes legal evidence of the text of the law. In contrast, a nonpositive law title is an editorial compilation of federal statutes and serves only as *prima facie* evidence of the law. When choosing where to place the provisions of a nonpositive law title, the attorneys in the OLRC generally draw upon their own reading of the enacted text, without consulting congressional staff.⁵³ That a nonpositive law title is only *prima facie* evidence of the law is a product of the fact that the attorneys in the OLRC are making editorial decisions, which might, at least unintentionally, affect one's interpretation of the provisions. Since the OLRC's choices regarding nonpositive law titles are reflected in the Code without having been voted on by Congress, one cannot legitimately draw any substantive inference about congressional intent from the codification decision. Adhering to this principle would be an instance of applying what this Comment calls the *generic* codifier's canon, the interpretive rule that one should distinguish the choices of Congress from those of the OLRC.

The second function, codification, is to prepare an initial draft of a bill to restate existing law as a positive law title of the Code.⁵⁴ This is an ongoing project in which the OLRC goes through each title, preparing it to be enacted into positive law. By statute, as codified in 2 U.S.C. § 285b(1), the OLRC's compilation is supposed to "remove ambiguities, contradictions, and other imperfections both of substance and of form," while also leaving unchanged "the understood policy, intent, and purpose of the Congress in the original enactments."⁵⁵ This is

52. 2 U.S.C. § 285b(4) (2012).

53. E-mail from Robert Sukol, Deputy Law Revision Counsel, Office of the Law Revision Counsel (June 26, 2017) (on file with author).

54. 2 U.S.C. § 285b(1) (2012).

55. *Id.*

an extremely difficult task, which presumes the ability to understand the original intent behind the provisions in the first place. To assist in this process, the attorneys of the OLRC “actively seek[] input from Federal agencies, congressional committees, and others with expertise in the area of the law being codified.”⁵⁶ There is no reason to believe the attorneys in the OLRC do not carry out the office’s duties in good faith, but their task is herculean. Even small changes to the organization of a provision could have major repercussions, affecting, for example, whether a timeliness requirement is found to be jurisdictional or waivable.⁵⁷ While communicating with members of agencies and Congress is clearly helpful in this regard, there is no reason to believe that any of these actors will perfectly know the “policy, intent, and purpose” of the Congress that originally enacted the provision in question.

Given this reality, Congress, when enacting a title into positive law, has a choice. On the one hand, it could enact the title as is, accepting the risk that the new statute will unintentionally and substantively amend the previous law. On the other hand, it could hedge by including rules of construction intended to restrict the substantive effects of the positive law codification process. For the most part, Congress has chosen the latter option. As traced in the next Part, Congress has included the codifier’s canon in numerous statutes that enacted titles into positive law to prevent interpreters from mistakenly inferring a provision’s meaning from unintended artifacts of the codification efforts. Judges searching for textual meaning or legislative intent would do well to account for that choice.

IV. THE FUNCTION OF THE CODIFIER’S CANON

A. Codification and the Risk of Inadvertent Change

Each statute’s codifier’s canon was enacted along with its respective positive law title in order to prevent codifiers from inadvertently misleading interpreters through reorganization.⁵⁸ Consider, for example, the case of Title 28, enacted into positive law in 1948.⁵⁹ As the Court noted, the enactment into positive law

56. *Positive Law Codification in the United States Code*, OFF. L. REVISION COUNS. 3 (2006), http://uscode.house.gov/codification/positive_law_codification.pdf [<http://perma.cc/6KNC-W355>].

57. See, e.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982) (relying on the structure of 42 U.S.C. § 2000e-5 (1970) in its determination that the timely-filing requirement is non-jurisdictional).

58. Note that this Comment defines which canons are codifier’s canons in part by the fact that they are in positive law titles. See *supra* note 47 and accompanying text.

59. Act of June 25, 1948, Pub. L. No. 80-773, § 33, 62 Stat. 869, 991 (codified at 28 U.S.C. Front Matter at 5 (2012)).

“was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study.”⁶⁰ By this time, Congress had over half a century of experience attempting to codify law, generally using specially formed committees and third parties, such as professors and publishers, to undertake the immense editorial work that codification requires.⁶¹ These bodies, predecessors of the OLRC, made significant revisions to the classification of the statutes, discarded the previous arrangements, introduced an outline based on subject matter, and provided labels.⁶² Among the most significant alterations was the classification of provisions relating to issues of jurisdiction and procedure.⁶³ Although this work was useful, it necessarily involved interpretive decisions that are generally the station of courts.

The codifier's canon in Title 28 prevented future courts from drawing inferences of legislative intent from the organizational work that was the focus of the codification process leading up to 1948. Sisk views this as an instance of Congress having “lost its nerve,” apparently judging the insertion of this rule of construction as overly cautious.⁶⁴ But Sisk fails to acknowledge Congress's prior history of openly struggling with mistakes introduced by the codification process. Most dramatic might be the 1926 attempt at codification, which – as the legislative reference service of the Library of Congress revealed in a 1928 report – left out several hundred provisions of permanent law.⁶⁵ Such an incident is surely enough to give one pause regarding even the most meticulous codification processes. This concern is reflected in the congressional debates surrounding the first set of codifications, which included Titles 18 and 28. In those debates, proponents of the codification bills repeatedly assured other representatives of the

60. *Ex parte Collett*, 337 U.S. 55, 65 (1949).

61. See Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 L. LIBR. J. 545, 549-52 (2009).

62. H.R. REP. NO. 80-308, at 5 (1947).

63. *Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before the Subcomm. of the H. Comm. on the Judiciary*, 80th Cong. 44 (1947) (statement of John F.X. Finn, former Special Counsel to the H. Comm. on Revision of the Laws) (“I am proudest of the way this proposed code deals with jurisdiction, venue, removal of causes, full faith and credit, and evidence and procedure. These are but labels to the layman. To the lawyer they are the pitfalls of litigation.”).

64. Sisk, *supra* note 12, at 462.

65. See Whisner, *supra* note 61, at 552. The list of the excluded provisions was reprinted in the Congressional Record. See 69 CONG. REC. 4278-81 (1928).

care taken to ensure that there were no substantive changes to the law other than those explicitly reported to the Judiciary Committee (with those changes clearly stated, rather than subtly introduced through the arrangement or captions).⁶⁶ It is thus understandable that Congress included the codifier's canon not only in Title 28, but also in Title 18 and many other titles when they were enacted into positive law.⁶⁷ By directing courts not to draw inferences from the changes made by the codifiers, Congress limited the risk of inadvertently introducing substantive changes into the Code—a risk Congress had reason to believe was significant.

But the circumstances are different once a title is enacted into positive law. At that point, the title becomes a statute and only Congress can change it. For that reason, every statute amending a positive title also includes specific instructions regarding its codification, directing where the amended provision should be placed and how it should be captioned.⁶⁸ The editorial role of the OLRC recedes into the background. The directions regarding placement and captions in the Code are written into the statute by the legislative drafters, like any other part of statutory language. The OLRC is absent from this process, except on the occasion that someone in Congress informally calls upon an attorney from the OLRC for advice.⁶⁹

66. See, e.g., 93 CONG. REC. 5049 (1947) (statement of Rep. Walter) (explaining the care taken in the codification process and suggesting that “the Committee on the Revision of the Laws . . . pointed out and explained every change in substantive law made by the bill”); see also *id.* (statement of Rep. Cole) (seeking assurance that the bills “were simply codifications of existing law and undertook to make no changes in existing law”). The debates also give some hint as to why not every positive law title includes a version of the codifier's canon. At the same time the codification of Titles 18 and 28 was being debated, the codification of Titles 1, 4, 6, 9, and 17 was also considered. In the process of reassuring the other representatives that no substantive changes in the law would be made by the codification, one of Title 18 and 28's proponents distinguished between Titles 1, 4, 6, 9, and 17 and Titles 18 and 28. Specifically, he suggested that the former made “no change whatsoever in the law as it [was] written on the books” at the time, compared to the codifications of Titles 18 and 28, which underwent more substantial restructuring. 93 CONG. REC. 5029 (1947) (statement of Rep. Robinson). Of those titles, only 18 and 28 include the codifier's canon, supporting the view that it was added to respond specifically to the more involved changes made by the revisers.

67. Act of June 25, 1948, Pub. L. No. 80-772, § 19, 62 Stat. 683, 862 (codified at 18 U.S.C. Front Matter at 5 (2012)). See *supra* note 5.

68. See, e.g., *infra* notes 102-108 and accompanying text (discussing 18 U.S.C. § 1519 (2012)). The text of the statute enacting the provision specifies the language of the provision, the caption, and where it should be placed. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802, 116 Stat. 745, 800 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) (“Chapter 73 of title 18, United States Code, is amended by adding at the end the following: ‘§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.’”).

69. E-mail from Robert Sukol, Deputy Law Revision Counsel, Office of the Law Revision Counsel (June 27, 2017) (on file with author).

The distinction between codification decisions pre- and post-enactment into positive law is a subtle one that has eluded courts. The Ninth Circuit, for instance, failed to acknowledge this difference in *Duncan v. Madigan*, a case interpreting 18 U.S.C. § 5003.⁷⁰ The panel explicitly rejected placement considerations, explaining that “[a]s for § 5003, no act of Congress gave it that number.”⁷¹ The court’s caution about citing placement is understandable, but in *Duncan*, the court got it wrong: the statute passed by Congress and enacted into law did specifically direct that the provision should be labeled § 5003 and added that it should be placed “immediately after section 5002.”⁷² The statute in question was passed in 1952, after Title 18 was enacted into positive law. Thus, the placement of the provision was not a mere post-passage editorial decision of the OLRC, but rather a piece of the actual statute enacted by Congress.⁷³

From these facts about the codification process, one can derive a general rule: For codification instructions in positive law titles, placement can be legitimately invoked as reflecting congressional intent when they were passed after the enactment of the title into positive law. In contrast, placement in the Code that is solely the product of the title’s enactment into positive law cannot be as reliably invoked. It is this distinction that Congress, interested in defending the intent behind its legislative acts, sought to pass into law through the codifier’s canon.

The situation is slightly more complicated for captions. Today, most statutes, whether amending a positive law title or not, include captions.⁷⁴ These are simply adopted by the OLRC as it amends the Code. Older statutes, however, were not as consistently captioned, and on occasion, amendments to a provision make the original caption inappropriate.⁷⁵ This makes the assignment of cap-

70. *Duncan v. Madigan*, 278 F.2d 695, 696 (9th Cir. 1960) (per curiam).

71. *Id.*

72. Act of May 9, 1952, Pub. L. No. 82-333, 66 Stat. 68, 68.

73. On occasion, Congress does fail to specify where a provision should be placed despite the provision clearly belonging in a positive law title. For a recent example, see sections 421, 431-435, 501, 502, 508, 509, and 517 of the National Aeronautics and Space Administration Transition Authorization Act of 2017, Pub. L. No. 115-10, 131 Stat. 18. While clearly belonging in Title 51, they were enacted as free-standing provisions. In such circumstances, the OLRC will prepare a codification bill directing where the provisions ought to be codified. That codification bill will then be enacted by Congress like any other. Such circumstances are the exceptions to the rule that the OLRC is generally not involved in deciding the placement of provisions in positive law titles. See E-mail from Sukol, *supra* note 69.

74. See, e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802, 116 Stat. 745, 800 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) (“Chapter 73 of title 18, United States Code, is amended by adding at the end the following: ‘§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.’”).

75. See E-mail from Sukol, *supra* note 53.

tions, at least sometimes, part of the job of preparing a title for positive law codification. As with placement, the codifier's canon should be understood as prohibiting interpreters from relying on captions imposed by the OLRC, without preventing invocation of those captions added by Congress. As the next Section elaborates, such a rule maintains the Court's standard practice of using captions, but prevents the interpreter from mistakenly relying on the codifier's decisions as indicia of legislative intent.

B. Constructing the Codifier's Canon

As the history of the codifier's canon indicates, its purpose is to prevent the interpreter from mistakenly relying on the codifier's editorial decisions. To understand why such decisions ought not be relied upon, it is helpful to understand how codification and interpretation interact for nonpositive law titles. A bill is forwarded to the OLRC after it passes both chambers of Congress.⁷⁶ The attorneys in the office read each provision, determining where it will go in the Code. For amendments to positive law titles, that project is relatively trivial, given that the statutes themselves specify where the provisions are to be placed. For nonpositive law titles, on the other hand, the process is more involved. Except in the very rare case in which the statute itself directs where the provision should be placed in the nonpositive law title of the Code, the decision is left to the OLRC.⁷⁷

As already mentioned, the OLRC does not consult with Members of Congress or other congressional staff when determining where the provisions should go. While the attorneys in the office are experts in the Code, they do not generally have special insight into the minds of legislators. Thus, in addition to being only *prima facie* evidence of the law, the placement of provisions in nonpositive law titles can serve as only weak evidence of congressional intent. An interpreter may only legitimately rely on the codifier's editorial decisions to the extent that she believes that they reflect some insight into the statute's meaning gleaned through the codifier's experience reading and classifying provisions in the Code. In other words, the codifiers ought not to be accorded any more authority than would be given an equally expert secondary source. But unlike the scholarly writings of an expert, an editorial change in the Code introduced by a codifier is not

76. The OLRC begins making these editorial determinations, referred to as "classifications," after the bill has been enrolled, but prior to presentment to the President. *About Classification of Laws to the United States Code*, OFF. L. REVISION COUNS., http://uscode.house.gov/about_classification.xhtml [<http://perma.cc/8S5E-8AHH>].

77. See E-mail from Sukol, *supra* note 53.

accompanied by a set of reasons accessible to the public. As a result, it is of limited interpretive value – even as a secondary source. Thus, an interpreter should strive to avoid drawing inferences from changes made by the OLRC in a nonpositive law title.

As previewed in the previous Section,⁷⁸ captions or headings of provisions are less predictable than placement in terms of whose choices they reflect. The vast majority of statutory provisions, including in nonpositive law titles, are given captions by the legislative drafter, which are part of the statute voted on by Congress. On occasion, however, a statutory provision lacks a heading. When that occurs in a nonpositive law title, the OLRC may decide to add a heading of its own. While generally these are uncontroversial, there are exceptions. In *Mangum v. Action Collection Service, Inc.*, one of the litigants argued, and the district court agreed, that the fact that the statute of limitations for the Fair Debt Collection Practices Act appears in a provision labeled “Jurisdiction” implies that timeliness of an action is an element of subject matter jurisdiction, preventing equitable tolling.⁷⁹ On appeal, Judge Fernandez disagreed.⁸⁰ Noting that the heading “Jurisdiction” was not in the statute itself, Judge Fernandez asserted that “the mere fact that the Office of the Law Revision Counsel chose to create the heading when it codified the provision does not affect our decision.”⁸¹ In support of his decision not to consider the heading, Judge Fernandez explained that, while “titles, in general, are of some help, . . . the mere addition of a title by the Law Revision Counsel cannot change the meaning or intent of a statutory provision.”⁸²

The Statutes at Large prove Judge Fernandez correct. The label “Jurisdiction” appears as marginalia without any direction within the body of the text as to how the provision should be codified.⁸³ This demonstrates that the OLRC made the addition. Understanding how the OLRC works, the Ninth Circuit was able to get closer to the correct understanding of congressional intent and statutory meaning, while the lower court and other circuit courts were led astray.⁸⁴

78. See *supra* text accompanying note 74.

79. No. CV-05-507-E-BLW, 2007 WL 1959076, at *2-3 (D. Idaho July 3, 2007), *aff'd in part, rev'd in part*, 575 F.3d 935 (9th Cir. 2009).

80. *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935 (9th Cir. 2009).

81. *Id.* at 939-40 (footnotes omitted).

82. *Id.*

83. See Act of Sept. 20, 1977, Pub. L. No 95-109, § 813(d), 91 Stat. 874, 881.

84. The Eighth Circuit, for example, seemed to have missed this distinction in construing the jurisdictional provisions of the Act. See *Mattson v. U.S. W. Commc'ns, Inc.*, 967 F.2d 259, 262 (8th Cir. 1992).

For interpreters, this presents an important lesson: by consulting the Statutes at Large, one can ensure the legitimacy of an argument premised on a caption or placement in the Code.

One might object that this makes too much of a minor point. As Abbe Gluck and Lisa Schultz Bressman pointed out, the Senate or House Office of Legislative Counsel drafts the text of statutes, not the legislators who actually vote.⁸⁵ Thus, while prepassage captions, for example, may have not been written by the OLRC, they probably were not written by Members of Congress, either. But there is a significant difference. Whereas the Offices of Legislative Counsel draft legislation according to the direction of legislators and their staff before a bill is voted upon, the OLRC—except in cases of preparing a title to be voted into positive law—makes its decisions after the bill has been passed. Since postpassage decisions are not voted on by Congress, they do not constitute law. Nonpositive law titles, then, are only *prima facie* evidence of the law, which can be trumped by citation to the Statutes at Large—the language Congress actually considered.⁸⁶ The latter are arranged according to legislators’ instructions, even if Members do not write them themselves, while the former are the product of the OLRC.

In addition to that doctrinal difference, the nonlegislative codifiers differ from the drafters in the degree to which they communicate with congressional staffers. That difference matters if a statute’s interpretation is to reflect Congress’s intent. When drafting statutes, there is close collaboration between the Offices of Legislative Counsel and congressional staffers, who are directly accountable to the elected officials enacting the law.⁸⁷ While it is contested whether such interactions are relevant to the statutory interpreter,⁸⁸ it is reasonable to

85. Gluck & Bressman (pt. 2), *supra* note 23, at 740.

86. See 1 U.S.C. § 204(a) (2012); see also *Stephan v. United States*, 319 U.S. 423, 426 (1943) (*per curiam*) (“[T]he Code establishes ‘*prima facie*’ the laws of the United States. But the very meaning of ‘*prima facie*’ is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.”).

87. See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 588–90 (2002) (discussing the collaboration between the Office of Legislative Counsel and congressional staff when drafting legislation).

88. See, e.g., John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911 (2015) (arguing that the Gluck-Bressman study reinforces the skepticism of legislative intent as a basis upon which to interpret a statute).

conclude that the collaboration between drafter and staff results in drafting decisions that track the intentions of the enacting Congress. That collaborative relationship is largely absent in the codification of nonpositive law. The OLRC does not typically communicate with congressional staffers when determining where to place a provision or what caption to add.⁸⁹ Without the dialogue that occurs during the drafting and enactment process, it would be misguided to infer legislative intent from any decision made during codification.

These two distinguishing features work together to maintain the integrity of the interpretive process. Since nonpositive law is only *prima facie* evidence, an argument drawn from the organizational structure chosen by the OLRC without consultation with Congress is less authoritative. In the case of positive law titles, however, the organizational structure does become law. And while the OLRC communicates with other actors when putting together a positive law title, it is far from certain that decisions made about placement reflect the intent of the enacting Congress, which may have passed the relevant provision decades before. Given that it is statutorily mandated that the positive law codification process not change “the understood policy, intent, and purpose” of Congress,⁹⁰ it is reasonable to seal off from consideration the editorial decisions of the OLRC. The codifier’s canon does just that.

To illustrate, consider a hypothetical version of *Mangum v. Action Collection Service, Inc.*⁹¹ In this hypothetical, Title 15 is enacted into positive law sometime before the case but after the enactment of 15 U.S.C. § 1692k, which occurred in 1977. As discussed above,⁹² after the Fair Debt Collection Practices Act was passed, the OLRC added the caption “Jurisdiction” to § 1692k(d), the provision specifying that an action to enforce a liability created by the statute must be brought within a year.⁹³ Since the caption was added by the OLRC to a nonpositive law code, it has no legal authority. If, however, the OLRC were to propose that Title 15 be enacted into positive law, it would likely submit to Congress a

89. E-mail from Sukol, *supra* note 53.

90. 2 U.S.C. § 285b(1) (2012). Note that this statute’s reference to “understood . . . intent” suggests that the enacting Congress expected that the judiciary would seek to enforce the intention behind a statute. The operative word, however, is “understood.” One might argue that the “understood” intent is Congress’s understanding of how the provision would apply. Alternatively, one could argue that it means that intent that would be inferred by a reasonable person reading the provision. Either way, reading the codifier’s canon in light of § 285b(1) supports an interpretation that the canon was enacted, in each case, in order to prevent the application of the statutory provision from changing as a result of codification.

91. 575 F.3d 935 (9th Cir. 2009).

92. See *supra* note 83 and accompanying text.

93. 15 U.S.C. § 1692k(d) (2012).

draft of the title based on the nonpositive law version. Thus, the caption “Jurisdiction” would appear in the proposed text. It is possible that a Member of Congress or her staff, while reviewing the proposed text, would recognize this change and its possible implications; but perhaps more likely, the change would go unnoticed or unappreciated for its significance, and, eventually, it would be enacted into law.

These two distinguishing features work together to maintain the integrity of the interpretive process by ensuring that the editorial decisions of the OLRC are not given legal effect. As a result, the court of appeals may have upheld the lower court’s holding and thrown out the case without considering the merits. That would be a significant effect, counter to the likely intent of the legislators who initially passed § 1692k; and that effect would be due to the title having been enacted into positive law. That is the consequence Congress sought to avoid by including the codifier’s canon in each of the thirteen positive law titles in which it appears.

The text of the codifier’s canon supports this tailored understanding of the provision’s command. The legislated canon in Title 18, for example, directs that no inference should be made from the placement or caption “in Title 18 . . . as set out in section 1 of this Act.”⁹⁴ Essentially identical language appears in each instance of the codifier’s canon.⁹⁵ Recall that these rules of construction were enacted as part of the statutes that included the full text of the respective title of the Code, as prepared by the OLRC or one of its predecessor institutions. The text of the title appeared, in the case of Title 18, in section 1 of the enacting statute. Thus, by pointing to the title “as set out in section 1 of this Act,” rather than using the language “this Title,” the legislated canon references only the version of the title included in the Act itself. Reading the text literally and narrowly, the prohibition on referencing placement and captions thus applies only to invoking these features of the title as first enacted into positive law. The text makes no reference to future statutes that amend the title by directing the OLRC to change portions of the title as it appears in the Code. Those subsequent organizational changes would come at the behest of Congress. The text of the codifier’s canon

94. Act of June 25, 1948, Pub. L. No. 80-772, § 19, 62 Stat. 683, 862 (codified at 18 U.S.C. Front Matter at 5 (2012)).

95. See sources cited *supra* note 5.

tracks its purpose: to prevent interpreters from relying on organizational features that do not reflect congressional intentions, without thwarting invocations of organizational features that reflect deliberate congressional action.⁹⁶

Not every positive law title, however, includes the codifier's canon, raising the question of how much weight the interpreter should accord captioning and placement decisions made during the positive law codification process in those titles. Congress's failure to include the codifier's canon indicates greater confidence that the codifier's organizational decisions have not modified the substance of the statutes. This might be, for example, because the title underwent less intensive restructuring⁹⁷ or because Congress has developed more confidence in the expertise of the OLRC in discerning its intent.⁹⁸ Still, one should proceed with caution, since the risk remains that the codifiers inadvertently modified a provision's meaning. Even in the absence of the codifier's canon, an interpreter should be careful not to place too much significance on a change introduced by the OLRC. The *generic* codifier's canon, in other words, ought to be applied, even if the *legislated* codifier's canon was not inserted into the title as it was enacted.

Judicial practice has arrived at something like the generic codifier's canon. In the past, the Court has warned against interpreting a change made in the context of codification to have substantive significance absent "clearly expressed" intent.⁹⁹ One distinction is that in positive law titles in which the codifier's canon

96. Besides the textual and purposive arguments in favor of the interpretation presented here, there is also an argument rooted in constitutional avoidance. Interpreting the codifier's canon as preventing inferences from even Congress's choices of placement and caption in subsequent legislation would threaten two distinct constitutional values. First, the expanded interpretation would have the effect of impairing Congress from effectively legislating by limiting the means by which it can transmit its intent. This would potentially constitute an instance of one Congress unconstitutionally attempting to restrict future Congresses' power to achieve legislative ends. See *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring). Second, there is the presumption against congressional curtailment of the judiciary's powers: a rule that suggests any legislated limitation on how the courts may engage in statutory interpretation should be read narrowly. Cf., e.g., *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812))).

97. See *supra* note 66 and accompanying text.

98. The fact that the codifier's canon has not been included in either of the most recently enacted positive law titles suggests that this is the explanation. See Act of Dec. 18, 2010, Pub. L. No. 111-314, 124 Stat. 3328 (codified at 51 U.S.C.); Act of Dec. 19, 2014, Pub. L. No. 113-287, 128 Stat. 3094 (codified at 54 U.S.C.).

99. See *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) ("[W]e do not presume that the revision worked a change in the underlying substantive law 'unless an intent to make such [a] chang[e] is clearly expressed.'" (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S.

appears as a legislated canon, its rule should apply unconditionally, whereas in positive law titles in which it is not legislated, the rule should give way where there is strong evidence that some substantive intent was carried out through the change in captioning or arrangement. In practice, this would mean that in titles in which the codifier's canon is legislated, any apparent substantive change implied by placement or captions decisions during the positive law codification process ought to be ignored unless there is a clear statement in the statute indicating that the change is intended; in contrast, in positive law titles lacking the legislated codifier's canon, other evidence, such as from statutory history, might overcome the presumption against considering changes introduced through the positive law codification process. But beyond this specific distinction, the general principle embodied in the generic codifier's canon applies to every title, both positive and nonpositive: judges, when referencing placement or captions, should strive to understand whether the interpretive evidence they cite can in fact be attributed to the Congress that enacted the relevant provision.¹⁰⁰

V. *YATES* AS A CASE STUDY: CONGRESSIONAL INTENT THROUGH CAPTION AND PLACEMENT

The codifier's canon (in both its generic and legislated variety) should be read in conjunction with 2 U.S.C. § 285b, the provision dictating that the OLR may not make changes to the law's "understood policy, intent, and purpose."¹⁰¹ No such limitation applies to Congress. When Congress passes most new legislation, in contrast to enacting positive law titles, its intention is generally to generate new substantive law. As a result, it is sensible to turn to Congress's deliberate decisions about organization when reconstructing intent. This point is made clear by 18 U.S.C. § 1519, the provision at the center of *Yates*. The bill that the Senate considered and ultimately enacted into law specified both where in the Code it should be placed and the caption.¹⁰² These choices were not mere

222, 227 (1957)); *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 198-99 (1912) ("[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.").

100. Note that this rule applies equally to textualists and purposivists. It proposes that interpreters compare the statute as it appears post-positive law codification with how it was first enacted. This requires utilizing statutory history (as opposed to legislative history), which textualists have historically considered a legitimate interpretive source. See Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283, 290 (2007) (discussing the traditional usage of statutory history).
101. Recall that concern over inadvertent substantive changes to the law was the focal point of congressional debates over codification. See *supra* note 66 and accompanying text.
102. H.R. 3763, 107th Cong. (2nd Sess. 2002) (as passed by the Senate with amendments, July 15, 2002).

afterthoughts. In an amicus brief filed in *Yates*, Representative Oxley, one of the sponsors of the Sarbanes-Oxley Act (SOX) of which § 1519 was a part, pointed to parts of the Act's legislative history to show that the relationship between § 1519 and the section of the Code beside which it would appear featured prominently in the legislators' motivations for enactment.¹⁰³

Representative Oxley cited the legislative history, including the report of the Senate Judiciary Committee,¹⁰⁴ which explicitly stated that § 1519 was created to fill gaps in the criminal statutes caused by courts' narrow reading of 18 U.S.C. § 1512.¹⁰⁵ The Judiciary Committee's report specifically referred to the provision by its Code section designation and even cited its relationship to the rest of Title 18 as the reason why it should not be "interpreted more broadly than we intend."¹⁰⁶ In other words, the report spoke to a congressional expectation that interpreters would consider § 1519's placement. SOX's legislative history makes clear the congressional intent that is less obvious, though no less real, in other statutes that contain codification instructions: Congress occasionally vests titles, captions, and headings with interpretive significance. The text of legislated codifier's canon ought not to be understood as forbidding the courts from giving weight to these explicit and deliberate legislative decisions.

The plurality opinion in *Yates* applies the tailored interpretation of the codifier's canon this Comment has defended. Writing for the Court, Justice Ginsburg does not merely point to where the section appears; rather, she specifically addresses Congress's decision about how to "*direct codification* of the Sarbanes-Oxley Act."¹⁰⁷ By discussing where "Congress directed placement" of the provisions, Justice Ginsburg grounds her inference in Congress's statutory instructions to the codifiers and not the Code itself.¹⁰⁸

103. See Brief for the Honorable Michael Oxley as Amicus Curiae in Support of Petitioner at 9-11, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451) ("It is therefore no accident or happenstance that Section 1519 was paired with Section 1520, and that placement elucidates the scope of the 'tangible object[s]' within the scope of Section 1519. Reading the two provisions together makes clear that Congress's focus was the destruction of 'records,' a point reinforced by that word's usage in the title to SOX Section 802 and the titles of both Section 1519 and 1520.").

104. *Id.* at 12.

105. S. REP. NO. 107-146, at 6-7 (2002).

106. *Id.* at 27. These statements in the committee report are suggestive of congressional intent, since, as Gluck and Bressman have described, such reports are generally written by staff with significant policy expertise and a high degree of direct accountability to their respective Members of Congress. Gluck & Bressman (pt. 2), *supra* note 23, at 741.

107. *Yates v. United States*, 135 S. Ct. 1074, 1084 (2015) (plurality opinion) (emphasis added).

108. *Id.* Whether Justice Ginsburg consciously drew this distinction is not evident from the opinion. In fact, in other portions, she refers merely to "[s]ection 1519's position" within the title — a statement that does not reflect the distinction this Comment contends is crucial. *Id.* at 1083.

This is the proper line to draw, foreclosing the influence of nonelected codifiers without discarding Congress's own deliberate choices about codification. The distinction is not merely rhetorical. Congress's enactment of the interpretive instruction means that it is not enough to look at the Code; courts and practitioners must be able to point to the relevant text in the Statutes at Large before drawing inferences from a provision's caption or placement in the Code.

Noting that one may utilize a provision's placement or caption does not end the inquiry. Parties can disagree about the significance of a provision's placement or caption – a point reflected in the debate between the plurality and dissent in *Yates* – even if they agree that those choices matter in some way. As Justice Kagan argues, one should be cautious in citing a provision's caption, which is, “almost necessarily, an abridgment,” not describing the full scope of the provision's application.¹⁰⁹ Similarly, two parties might reasonably disagree about what a provision's placement in the Code indicates about the meaning of the text.¹¹⁰ Ultimately, a persuasive argument utilizing the organizational features of the Code is one that integrates those particular features into a larger narrative offering “a fair understanding of the legislative plan” underlying the statute's enactment.¹¹¹ To do so effectively requires an appreciation for how those organizational features were generated in the first place. In other words, statutory interpretation must be informed by the codification process. That is the crucial principle of the codifier's canon.

CONCLUSION

The realities of the codification process must inform statutory interpretation. The codifier's canon is therefore best understood within the context of how the Code is prepared. Enacted along with its respective positive law title, each instance of the codifier's canon directs courts not to draw inferences from the organizational decisions made by the OLRC or its predecessors during codification. It does not, however, prevent courts from drawing conclusions about legislative intent based on Congress's choice of caption and placement. As a general rule, this means that interpreters should consult the Statutes at Large before

109. *Id.* at 1094 (Kagan, J., dissenting).

110. Compare *id.* at 1095 (arguing that because the placement of § 1519 did not “logically fit into any of [Chapter 73's] pre-existing sections” and “with the first 18 numbers of the chapter already taken . . . the law naturally took the 19th place,” i.e., § 1519), with *id.* at 1077 (plurality opinion) (“Section 1519's position within Title 18, Chapter 73, further signals that § 1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence. Congress placed § 1519 at the end of Chapter 73 following immediately after pre-existing specialized provisions expressly aimed at corporate fraud and financial audits.”).

111. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

making arguments based on captions or placement in the Code. As a rule of thumb, however, it is legitimate to cite the placement of a provision in a positive law title so long as the provision was enacted after the title itself was passed into positive law. This rule should at least be considered—if not strictly followed—even when interpreting provisions in positive law titles that lack the codifier's canon. More generally, courts should adhere to the *generic* codifier's canon whenever interpreting provisions in the Code, being careful to distinguish the decisions of Congress from those of the OLRC. Adhering to these rules adds predictability and legitimacy to statutory interpretation, while also engendering respect for the interbranch communication exemplified by enactments of the codifier's canon.

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