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Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations

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SUMMARY

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Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations

Federal bills are increasingly complex, making them difficult to understand for the average reader and the seasoned practitioner alike. What a congressional drafter understands to be the import of a given provision could later be discussed and interpreted in committee or on the floor of the House or the Senate. If the bill is enacted, federal agencies may then consider its meaning, either behind the scenes when evaluating their own compliance with the law or through guidance, rules, or agency orders governing third parties. If a litigant challenges an agency's interpretation of the law, a court may need to resolve the law's meaning. Although the court's ultimate goal is to effectuate Congress's intent, judges may draw on different philosophies or tools to arrive at their conclusions about what the law means.

A basic awareness of the rules and presumptions that apply when construing different components of a bill can help Members and congressional staff identify potential issues with the help of legislative counsel when formulating legislation or avoid interpretive pitfalls when reviewing bills proposed by other offices. For example:

- Titles, headings, and general statements of purpose can help to elucidate the meaning of substantive provisions in the bill, but they generally will not override the plain language of those provisions.
- Formal legislative findings can show whether Congress may legislate in areas typically reserved for the states or has identified harms sufficient to regulate speech or other constitutionally protected activities.
- Defined terms in a bill set the meaning of those terms wherever those definitions apply, even if those terms would normally have a different meaning in everyday usage.
- Language that ostensibly creates rights may not help the intended beneficiaries without an explicit remedy, just as prohibiting conduct may not amount to much without an enforcement mechanism.
- If a bill potentially conflicts with an existing law, a reader may look to see if the bill would repeal the existing law or otherwise address the potential conflict through an exception or a "notwithstanding" clause. In the absence of such language, courts are instructed to try to harmonize the conflicting provisions instead of assuming that Congress implicitly repealed the old law.
- A preemption clause or non-preemption clause may indicate whether the bill displaces state laws on the same subject. Without one, if the bill later becomes law, a court may have to decide whether Congress implicitly preempted state law, presuming that it did not but asking, among other questions, whether it is impossible to comply with both laws.
- A severability clause may persuade a court not to strike down an entire law after concluding that a particular provision in the legislation was unconstitutional.
- Timing rules addressing when a provision takes effect or how long it remains in force override the usual default rules that the provision takes effect upon enactment and remains in force until repealed or amended.

Beyond these considerations about the parts of a bill, it is useful to know how courts have interpreted common legislative language. For example:

- The word "shall" generally introduces a requirement. While "may" can leave room for discretion, "may not" signals a prohibition.
- Words like "this Act" or "this section" can refer to different language, depending on whether they are used "inside the quotes" in language amending an existing law, or "outside the quotes" as part of the stand-alone bill text.
- And the phrase "notwithstanding any other provision of law" is susceptible to different interpretations depending on the context.

The Supreme Court has advised lower courts to presume that "Congress says what it means and means what it says." Thus, unless a provision contains an obvious technical error, a court may give effect to clear, though seemingly unintended, language rather than assume that the provision contains a drafting error.

Contents

A Bill in Context 2
How a New Act Affects Existing Law 3
Freestanding Versus Amendatory Bills 5
The *U.S. Code* and Positive Law Codification 9
The Role of Statutory Interpretation 12
Parts of a Bill and Their Legal Significance 15
Introductory and Organizational Elements of a Bill 16
Preliminary Identifiers 16
The Long Title 17
The Enacting Clause 19
Short Titles 20
Headings and Subheadings 21
Prefatory Statements 23
Preambles 24
Sense of Congress Provisions 27
Declarations of Policy 28
Statements of Purpose 31
Findings 32
Definitions 35
When the Bill Defines a Term Used in the Bill 36
When the Bill Does Not Define a Term Used in the Bill 37
When the Term Does Not Have an Applicable Statutory Definition 39
Substantive Provisions 42
General Rules and Exceptions 43
Rights, Remedies, and Enforcement 46
Preemption Clauses 48
Savings Clauses 51
Timing Rules 54
Effective Dates 54
Transitional Provisions 55
Sunset Provisions 56
Severability or Inseverability Clauses 57
When a Bill Contains a Severability Clause 58
When a Bill Does Not Address Severability 59
When a Bill Contains an *In*severability Clause 61
Technical and Conforming Amendments 62
Authorization of Appropriations 65
Common Terms, Phrases, and Interpretive Issues 67
HOLC's "Three Important Conventions" 67
"Means" Versus "Includes" 67
"Shall" Versus "May" 68
Singular and Plural 69
Other Commonly Used Terms and Phrases 70
"Any Other" 70
"This Act" or "This Section" (or Other Subdivision) 71
"Notwithstanding" Clauses 76

Drafting Errors 80
Takeaways and Suggestions for Reading a Bill 81

Figures

Figure 1. Freestanding Bill with Requirements Under Separate Bill Sections 6
Figure 2. Freestanding Bill in the Form of a Title 7
Figure 3. Amendatory Bill Proposing Amendments to *U.S. Code* 8
Figure 4. Divisions Within a Section of the *Code* 9
Figure 5. Amendatory Bill Proposing Amendments to Act 12
Figure 6. Bill Identifiers 17
Figure 7. Long Title 18
Figure 8. Enacting Clause 19
Figure 9. Short Title 20
Figure 10. Section Headings 22
Figure 11. Preamble 25
Figure 12. Sense of Congress 27
Figure 13. Statement of Policy 29
Figure 14. Purpose 31
Figure 15. Findings 32
Figure 16. Definitions Subsection 36
Figure 17. Exceptions to a General Rule 44
Figure 18. Exceptions to Exceptions 45
Figure 19. Preemption Clause 49
Figure 20. Savings Clause 53
Figure 21. Transitional Provision 56
Figure 22. Sunset Provision 57
Figure 23. Severability Clause 58
Figure 24. Inseverability Clause 61
Figure 25. Technical Amendment 63
Figure 26. Conforming Amendment 63
Figure 27. Authorization of Appropriations 66
Figure 28. “This Section” Referring to Underlying Statute: Example 1 72
Figure 29. “This Section” Referring to Underlying Statute: Example 2 73
Figure 30. “This Act” Referring to Bill as a Whole 74
Figure 31. “This Act” Referring to Division of Bill 75

Contacts

Author Information 83

A drafting manual for the U.S. House of Representatives cautions that legislation "should be written in English for real people."[1] The authors encourage drafters to use organizational elements like headings and numbered lists "with enthusiasm whenever they will increase readability and understandability."[2] Even when these lessons are heeded, the length and complexity of federal legislation can make it difficult for the average reader to understand what changes a given bill would make to the law.[3] Often the picture is further obscured when the bill is viewed against the vast backdrop of legal principles on how to interpret legislative language.[4]

This report serves as a general guide for understanding federal legislation, with a focus on the legal significance of each component of a bill and modern judicial approaches to interpreting common statutory language.[5] Although the report, and in particular its emphasis on legal issues, is geared toward Members of Congress and congressional staff who routinely review proposed legislation, the report may also serve as a useful introduction to the structure and terminology of federal bills for those who may not have extensive experience in this area.[6] In addition, although the report is by no means intended as a comprehensive source for congressional drafters,[7] it may help those overseeing or assisting in the drafting process to identify and avoid language that may lead to interpretive confusion or even legal challenges if a bill is enacted.

This report begins by summarizing how new legislation affects existing law, the general approaches to amending federal law, and how the organization of federal laws bears on the format of legislation. The report then sets out the major components of federal bills, such as findings and definitions sections, and discusses the legal significance of each component. Next, the report discusses how courts have interpreted certain terms and phrases commonly used in federal legislation. The report concludes with general takeaways and suggestions for reading a bill.

While this report sets forth general rules and presumptions for interpreting federal laws that the Supreme Court has recognized, statutory interpretation depends heavily on the precise wording of

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[1] *See* OFF. OF LEGIS. COUNSEL, U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE: NOVEMBER 1995, at 5, https://legcounsel.house.gov/sites/legcounsel.house.gov/files/documents/draftstyle.pdf [hereinafter HOLC MANUAL ON DRAFTING STYLE].

[2] *Id.*

[3] *See Outrageous Bills: Why Congress Writes Such Long Laws*, THE ECONOMIST (Nov. 23, 2013), https://www.economist.com/united-states/2013/11/23/outrageous-bills ("In 1948 the average length of bills that made it through Congress was two and a half pages. Now it is 20. That may not sound too much, but the mean is brought down by short, uncontroversial laws. . . . The most consequential laws, by contrast, go on for thousands of pages.").

[4] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxvii (2012) ("In legal systems, there are linguistic usages and conventions distinctive to private legal documents in various fields and to governmental legislation. And there are jurisprudential conventions that make legal interpretation more than just a linguistic exercise . . . .").

[5] This report cites Supreme Court decisions wherever possible because their holdings are binding on lower courts. Some legal scholars have observed that statutory interpretation methods vary at different levels of the federal judiciary, among courts, and among judges. *See infra* "The Role of Statutory Interpretation."

[6] For an introduction to the legislative process, see CRS Report R42843, *Introduction to the Legislative Process in the U.S. Congress*, by Valerie Heitshusen.

[7] References to "congressional drafters" in this report primarily refer to the legislative branch employees who draft or assist in drafting legislation, including individual Members of Congress, legislative staff, and attorneys within the House and Senate Offices of the Legislative Counsel. Entities outside of Congress, such as representatives of the executive branch or interest groups, may also supply legislative language throughout the life cycle of a bill. *See* ABNER J. MIKVA ET AL., LEGISLATIVE PROCESS 74 (4th ed. 2015).

the bill at issue, the subject matter involved, and agency and judicial interpretations in the relevant area.[8]

Report Terminology on Types of Federal Legislation

This report focuses on federal legislation[9] in the form of **bills**, which, to become law, must be passed by both houses of Congress and presented to the President for consideration.[10] For simplicity, the terms "**bill**" and "**legislation**" are used interchangeably. Bills become law upon *enactment*, that is, (1) when the President signs the bill into law; (2) when the President has not signed the bill within ten days of presentment and Congress is in session; or (3) when Congress overrides a presidential veto.[11]

The report also references elements characteristic of **joint resolutions**—the other vehicle that Congress may use to pass laws—where applicable. Like bills, joint resolutions require passage by both houses and presentment to the President.[12] Simple and concurrent resolutions, which do not require the President's signature and do not have the force of law, are beyond the scope of this report.[13]

Judicial decisions involving questions of statutory interpretation typically concern enacted legislation rather than pending legislation.[14] Accordingly, the report generally refers to **laws** rather than bills when discussing matters of statutory interpretation, and to that end uses the terms "**public law**,"[15] "**act**," and "**statute**" interchangeably unless otherwise noted.

A Bill in Context

A key step in understanding the potential effects of a given bill is to place the bill in the larger context of the existing law. This part of the report discusses how new legislation affects existing law as a general matter, including when conflicts arise between two provisions. It then briefly addresses the differences between a freestanding and an amendatory bill and why drafters might amend an act of Congress rather than a section of the *United States Code*. The discussion in this

[8] *See infra* "The Role of Statutory Interpretation."

[9] This report is not intended to provide guidance in reviewing legislation at the state or local levels, where drafting rules and practices may vary depending on the jurisdiction. *See, e.g.*, MD. DEP'T OF LEGISLATIVE SERVS., LEGISLATIVE DRAFTING MANUAL (2019), http://dls.maryland.gov/pubs/prod/LegisBillDrafting/Drafting-Manual.pdf; LEGISLATIVE COUNCIL, NORTH DAKOTA LEGISLATIVE DRAFTING MANUAL (2019), https://www.legis.nd.gov/files/documents/legislativedraftingmanual.pdf.

[10] *See generally* CRS Infographic IG10005, *From Bill to Law: Stages of the Legislative Process*, by Valerie Heitshusen and Jennifer E. Manning.

[11] U.S. CONST. art. I, § 7, cl. 2; *see also* ROBERT B. DOVE, PARLIAMENTARIAN, U.S. SENATE, ENACTMENT OF A LAW (1997), https://www.congress.gov/resources/display/content/Enactment+of+a+Law+-+Learn+About+the+Legislative+Process.

[12] A different process exists for joint resolutions proposing a constitutional amendment. See generally CRS Report 98-728, *Bills, Resolutions, Nominations, and Treaties: Characteristics, Requirements, and Uses*, by Richard S. Beth.

[13] *See Types of Legislation*, UNITED STATES SENATE, https://www.senate.gov/legislative/common/briefing/leg_laws_acts.htm#3 (last visited July 26, 2020) (explaining how bills and the three forms of resolutions differ).

[14] Pre-enactment challenges typically are not ripe for judicial consideration. *See, e.g.*, Brubaker Amusement Co. v. United States, 304 F.3d 1349, 1358 (Fed. Cir. 2002) (reasoning that "facial challenges to statutes or regulations are ripe as of the enactment of the rule"); Boehner v. Anderson, 30 F.3d 156, 163 (D.C. Cir. 1994) (holding that a challenge to a prospective congressional pay adjustment was "far from ripe" because, among other contingencies, Congress had not yet passed a law approving the pay adjustment, as required by statute).

[15] "Most laws passed by Congress are public laws," laws that "affect society as a whole," rather than "an individual, family, or small group." U.S. Gov't Publishing Office, *About Public and Private Laws*, GOVINFO, https://www.govinfo.gov/help/plaw (last visited July 26, 2020).

part refers primarily to legislation outside of appropriations bills, which are not presumed to make permanent, substantive changes to existing law.[16]

How a New Act Affects Existing Law

A bill has no legal effect on existing law until it is enacted—that is, until it passes both houses of Congress and is signed by the President (or the President does not act on the bill within ten days of presentment when Congress is in session, or Congress overrides a presidential veto).[17] Once enacted, the bill becomes an act of Congress, and its content, the law.[18] That law takes effect either upon enactment or at a later time as specified by Congress.[19] And, unless the act itself specifies otherwise,[20] the act remains in force until Congress *amends* (i.e., changes) or *repeals* (i.e., revokes) it.[21]

Legal disputes can arise if a new federal law conflicts with, or regulates the same subject matter as, an existing federal law but does not expressly repeal that existing law.[22] Whether one law takes precedence over the other law, and which one, depends on several factors, including whether Congress addressed the conflict in the statutory text, whether the laws are "capable of co-existence," and the statutes' order of enactment.[23] Courts generally will heed Congress's instructions on how to resolve conflicting provisions,[24] which may come in the form of an exception or a notwithstanding clause.[25] If, however, the new act is silent on the interplay

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[16] *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190–91 (1978) ("We recognize that both substantive enactments and appropriations measures are 'Acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs."). *But cf.* United States v. Will, 449 U.S. 200, 222 (1980) ("Indeed, the rules of both Houses limit the ability to change substantive law through appropriations measures. Nevertheless, when Congress desires to suspend or repeal a statute in force, '[there] can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' 'The whole question depends on the intention of Congress as expressed in the statutes.' (internal citations omitted)).

[17] U.S. CONST. art. I, § 7, cl. 2.

[18] Although a bill is *styled* as "An Act" once it passes one house of Congress, it does not become law until it is enacted. *See* H. Off. of Legis. Counsel, *Drafting Legislation*, HOLC, https://legcounsel.house.gov/holc-guide-legislative-drafting (last visited July 27, 2020) [hereinafter *HOLC Guide to Legislative Drafting*] ("When a bill passes one house of Congress, its designation changes from "A Bill" to "An Act", even though it has not yet become law.").

[19] *See infra* "Effective Dates."

[20] *See infra* "Sunset Provisions"

[21] *See generally Amendment*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Repeal*, BLACK'S LAW DICTIONARY (11th ed. 2019). Appropriations bills are the exception. Their provisions are presumptively in force only for the fiscal years to which they apply. *See* Bldg. & Constr. Trades Dep't v. Martin, 961 F.2d 269, 273–74 (D.C. Cir. 1992) ("While appropriation acts are 'Acts of Congress' which can substantively change existing law, there is a very strong presumption that they do not, and that when they do, the change is only intended for one fiscal year." (citing *Tenn. Valley Auth.*, 437 U.S. at 190; Minis v. United States, 40 U.S.(15 Pet.) 423 (1841); Nat'l Treasury Emps. Union v. Devine, 733 F.2d 114, 120 (D.C. Cir. 1984); GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-34 (1982))); *id.* at 274 ("In fact, a federal appropriations act applies only for the fiscal year in which it is passed, unless it expressly provides otherwise." (citing 31 U.S.C. § 1301(c)(2) (1991)).

[22] *See generally Repeal*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "express repeal," in relevant part, as "[r]epeal by specific declaration in a new statute").

[23] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) (internal quotation marks omitted) (quoting Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 133–34 (1974)).

[24] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (observing the presumption that "'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." (quoting United States v. Fausto, 484 U.S. 439, 452, 453 (1988))).

[25] *See, e.g.*, 28 U.S.C. § 1334(b) ("*Except as provided in subsection (e)(2)*, and *notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts*, the district courts shall have

between the two laws, a court will not assume that Congress intended to repeal the old law—in the Supreme Court's words, "repeals by implication are disfavored."[26] Instead, "where two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective'"[27] and to attempt to "harmonize[]" their provisions.[28] The Supreme Court expounded the reasons behind these principles in a 2018 decision:

> Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.[29]

There are, however, two, limited circumstances in which a court may recognize an implied repeal of an earlier law. First, if a new law poses an "*irreconcilable conflict*" with an existing law, the new law implicitly repeals the earlier one "to the extent of the conflict."[30] An irreconcilable conflict occurs only when "there is a positive repugnancy between [the two laws]" or "they cannot mutually coexist."[31] Second, a court may recognize an implied repeal "if the later act *covers the whole subject* of the earlier one and is *clearly intended as a substitute*."[32] Congressional intent to wholly replace the old law is key because the Supreme Court "has not hesitated to give effect to two statutes that overlap, so long as each [statute] reaches some distinct cases."[33]

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original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." (emphasis added)); 29 U.S.C. § 3174(c)(3)(B)(i) ("*Notwithstanding section 479B of the Higher Education Act of 1965* (20 U.S.C. § 1087uu) and *except as provided in clause (ii)*, provision of such training services shall be limited to individuals who. . . ." (emphasis added)). *See infra* "General Rules and Exceptions" and ""Notwithstanding" Clauses."

[26] *Ruckelshaus*, 467 U.S. at 1017 (internal quotation marks omitted) (quoting Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 133 (1974)).

[27] *Id.*; *see, e.g.*, POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 115, 118 (2014) (holding that the Food, Drug, and Cosmetic Act (FDCA) did not preclude the petitioner's Lanham Act false labeling suit, reasoning that the statutes were "complementary" because "[a]lthough both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety"); Morton v. Mancari, 417 U.S. 535, 550–51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

[28] *Epic Sys. Corp.*, 138 S. Ct. at 1624 ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" (quoting *Morton*, 417 U.S. at 551)).

[29] *Id.*

[30] Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936) (emphasis added).

[31] Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976) ("It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem."); *see also* J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 142 (2001) ("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue." (internal quotation marks and citation omitted)); *see, e.g.*, EC Term of Years Tr. v. United States, 550 U.S. 429, 435 (2007) ("We simply cannot reconcile the 9-month limitations period for a wrongful levy claim under § 7426(a)(1) with the notion that the same challenge would be open under § 1346(a)(1) for up to four years.").

[32] *Posadas*, 296 U.S. at 503 (emphasis added).

[33] *J.E.M. Ag. Supply, Inc.*, 534 U.S. at 144.

Freestanding Versus Amendatory Bills

Bills, once enacted, amend the law, but they can do so in one of two ways.[34] They can create new statements of law that are not tied to an existing statute, or they can amend one or more existing statutes.[35] The bill text itself generally informs the reader of the type of change the bill, or a given section of a bill, would make.

In a freestanding bill, the legal requirements or prohibitions are set out under sections of the bill without reference to an existing public law. For example, in the bill excerpt shown in **Figure 1**,[36] requirements related to a Department of Veterans Affairs hiring plan are listed directly under section 3 of the bill.

[34] See generally CRS Report R45190, *From Slip Law to United States Code: A Guide to Federal Statutes for Congressional Staff*, by Eva M. Tarnay.

[35] *See id.*; *see also* MIKVA ET AL., *supra* note 7, at 76 (explaining that the fact that a statute is "freestanding" does not mean that it "has not been the subject matter of prior law, but that this statute does not expressly amend existing statutes").

[36] Excerpts from actual bills are provided throughout this report for illustration, and their inclusion does not imply the endorsement of any particular language or drafting style.

Figure 1. Freestanding Bill with Requirements Under Separate Bill Sections

8 **SEC. 3. PLAN TO HIRE DIRECTORS OF MEDICAL CENTERS**
9 **OF DEPARTMENT OF VETERANS AFFAIRS.**
10 (a) PLAN.—Not later than 120 days after the date
11 of the enactment of this Act, the Secretary of Veterans
12 Affairs shall develop and implement a plan to hire highly
13 qualified directors for each medical center of the Depart-
14 ment of Veterans Affairs that lacks a permanent director
15 as of the date of the plan. The Secretary shall prioritize
16 the hiring of such directors for the medical centers that
17 have not had a permanent director for the longest periods.
18 (b) MATTERS INCLUDED.—The plan developed under
19 subsection (a) shall include the following:
20 (1) A deadline to hire the directors of the med-
21 ical centers of the Department as described in such
22 subsection.
23 (2) Identification of the possible impediments to
24 such hiring.

Source: VA Health Center Management Stability and Improvement Act, H.R. 3956, 114th Cong. (as referred in Senate, May 24, 2016), https://www.congress.gov/114/bills/hr3956/BILLS-114hr3956rfs.pdf#page=3.

A freestanding bill or section may be written in the form of a new statutory title.[37] For example, the 114th Congress considered and enacted a bill "to implement the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean . . . and for other purposes."[38] As shown in **Figure 2**, the first (and only)[39] section of the bill contains a short title stated as follows: "This Act may be cited as the 'Ensuring Access to Pacific Fisheries Act'." Directly below the short title, the bill sets forth the six titles that comprise the Ensuring Access to Pacific Fisheries Act, beginning with Title I, "NORTH PACIFIC FISHERIES." In this example, "SECTION 1. SHORT TITLE" refers to the first section of the bill, while the reference

[37] *See* LAWRENCE E. FILSON & SANDRA L. STROKOFF, THE LEGISLATIVE DRAFTER'S DESK REFERENCE 491 tbl. 33.6 (2d ed. 2008) (comparing the superior headings used in various federal drafting styles, with each beginning with "title").

[38] *See* Ensuring Access to Pacific Fisheries Act, H.R. 6452, 114th Cong. (as introduced, Dec. 7, 2016), https://www.congress.gov/114/bills/hr6452/BILLS-114hr6452ih.pdf; Ensuring Access to Pacific Fisheries Act, Pub. L. No. 114-327, 130 Stat. 1974 (Dec. 16, 2016), https://www.congress.gov/114/plaws/publ327/PLAW-114publ327.pdf.

[39] Section 1 happens to be the only section of this bill, but freestanding bills can have more than one section as **Figure 1** illustrates.

to "SEC. 101. DEFINITIONS" refers to the first section of title I, subtitle A of the Ensuring Access to Pacific Fisheries Act.

Figure 2. Freestanding Bill in the Form of a Title

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ensuring Access to Pacific Fisheries Act".

TITLE I—NORTH PACIFIC FISHERIES

Subtitle A—North Pacific Fisheries Convention Implementation

SEC. 101. DEFINITIONS.

In this subtitle:

(1) COMMISSION.—The term "Commission" means the North Pacific Fisheries Commission established in accordance with the North Pacific Fisheries Convention.

(2) COMMISSIONER.—The term "Commissioner" means a United States Commissioner appointed under section 102(a).

(3) CONVENTION AREA.—The term "Convention Area" means the area to which the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean applies under Article 4 of such Convention.

(4) COUNCIL.—The term "Council" means the North Pacific Fishery Management Council, the Pacific Fishery Management Council, or the Western Pacific Fishery Management Council established under section 302 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1852), as the context requires.

(5) EXCLUSIVE ECONOMIC ZONE.—The term "exclusive economic zone" means—

(A) with respect to the United States, the zone established by Presidential Proclamation Numbered 5030 of March 10, 1983 (16 U.S.C. 1453 note); and

(B) with respect to a foreign country, a designated zone similar to the zone referred to in subparagraph (A) for that country, consistent with international law.

(6) FISHERIES RESOURCES.—

Source: Ensuring Access to Pacific Fisheries Act, H.R. 6452, 114th Congress (2016) (as enrolled), https://www.congress.gov/114/bills/hr6452/BILLS-114hr6452enr.pdf.

Unlike freestanding bills, amendatory bills or amendatory sections in a bill typically include a clause referencing a specific section of the existing law (e.g., "Section # of title X") and signaling that an amendment will follow (e.g., "is amended by . . ."). [40] For example, another bill considered and enacted by the 114th Congress amends an existing section of title 5 of the *U.S. Code*. [41] This

[40] *See* HOLC MANUAL ON DRAFTING STYLE, *supra* note 1, at 34–35 ("Amendatory bills . . . are stated in the indicative mood. Example: 'Section 12 of the ABC Act is amended by striking 'XX' and inserting 'YY'.'."); *see generally* FILSON & STROKOFF, *supra* note 37, at 191 (distinguishing between the "vehicular language" that introduces the amendment and the amendment itself).

[41] *See* H.R. 4902, 114th Cong. (as introduced, Apr. 12, 2016), https://www.congress.gov/114/bills/hr4902/BILLS-114hr4902ih.pdf; Act of Dec. 8, 2016, Pub. L. No. 114-250, 130 Stat. 1001, https://www.congress.gov/114/plaws/publ250/PLAW-114publ250.pdf.

bill, an excerpt of which appears at **Figure 3**, is titled an act[42] "to amend title 5, United States Code, to expand law enforcement availability pay to employees of U.S. Customs and Border Protection's Air and Marine Operations." Section 1 of the bill states that "Section 5545a(i) of title 5, United States Code, is amended" by striking certain words and inserting new language.

Figure 3. Amendatory Bill Proposing Amendments to *U.S. Code*

An Act

To amend title 5, United States Code, to expand law enforcement availability pay to employees of U.S. Customs and Border Protection's Air and Marine Operations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. LAW ENFORCEMENT AVAILABILITY PAY FOR EMPLOYEES OF CUSTOMS AND BORDER PROTECTION'S AIR AND MARINE OPERATIONS.

(a) IN GENERAL.—Section 5545a(i) of title 5, United States Code, is amended—

(1) by striking "apply to a pilot employed by the United States Customs Service" and inserting "apply to any employee of the U.S. Customs and Border Protection's Air and Marine Operations, or any successor organization,"; and

(2) by striking "such pilot" and inserting "such employee".

(b) APPLICABILITY.—The amendments made by subsection (a) shall take effect on the first day of the first applicable pay period beginning on or after the date that is 14 days after the date of enactment of this Act.

Source: H.R. 4902, 114th Cong. (2016) (as enrolled), https://www.congress.gov/114/bills/hr4902/BILLS-114hr4902enr.pdf.

As shown in **Figure 3**, when a bill would amend an existing statute, the text to be added or deleted is placed in quotation marks. Amendatory bills can also have freestanding provisions, such as the "Applicability" provision in section 1(b).[43] Congressional drafters sometimes refer to amendments in a bill as "inside the quotes" and freestanding provisions as "outside the quotes."[44] The statute's table of contents in the *U.S. Code* can help to orient readers to the amendment's place in the overall statutory scheme and any general rules or definitions that might apply to the bill.[45] To understand the *specific* amendments the bill is proposing, it is sometimes necessary to annotate a copy of the statute that the bill is amending to see what language would be added or deleted.[46]

[42] *See supra* note 18 (explaining that a bill is styled as "An Act" once it passes one house of Congress).

[43] *See HOLC Guide to Legislative Drafting*, *supra* note 18 ("Even if all of the substantive provisions of a bill are inside the quotes, it will still have technical provisions that are freestanding, most notably amendatory instructions that indicate where in the existing statute the new material is to be placed.").

[44] *See id.*

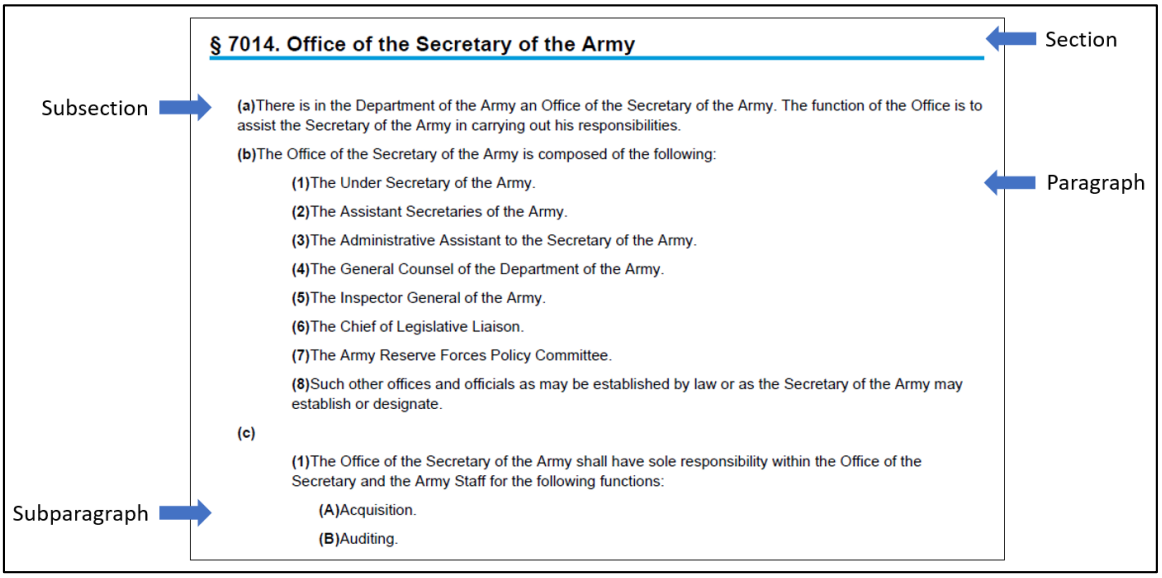
[45] *See, e.g.*, Off. of Law Revision Counsel, *United States Code*, https://uscode.house.gov/browse/prelim@title5/part3/subpartD/chapter55/subchapter5&edition=prelim (last visited July 27, 2020) (displaying the table of contents for 5 U.S.C. § 5545a referenced in **Figure 3**).

[46] When a bill is reported out of committee, a comparative print or "Ramseyer" is prepared to indicate changes to the existing statutory section using strike-throughs for deletions, italics for additions, or other comparative notations. *See* RULES OF THE HOUSE OF REPRESENTATIVES 655 (2019) (House Rule XIII, cl. 3(e)(1)), https://www.govinfo.gov/

The *U.S. Code* and Positive Law Codification

Once a bill is enacted into law, it may then be added to the *U.S. Code* (the *Code*), the official compilation of the "general and permanent" federal laws.[47] The Office of the Law Revision Counsel (OLRC) within the U.S. House of Representatives compiles and publishes the *Code*.[48] The *Code* is arranged by subject matter and divided into 54 titles.[49] The main unit of a title is a section, and within that, content may be further delineated by subsection, paragraph, and subparagraph as in **Figure 4**.[50] A given *Code* title may also include broader units such as subtitles or chapters that contain multiple sections.[51]

Figure 4. Divisions Within a Section of the *Code*



Source: Excerpt of 10 U.S.C. § 7104 (2019) from *Lexis Advance*.

Because the *U.S. Code* contains only the "general and permanent laws of the United States," it does not include "[t]emporary laws, such as appropriations acts, and special laws, such as one naming a post office."[52] Moreover, with certain freestanding provisions, OLRC exercises its discretion in determining which statutory provisions to assign to *Code* sections (i.e., the basic

content/pkg/HMAN-116/pdf/HMAN-116-pg642.pdf#page=14; SENATE MANUAL, S. Doc. No. 113-1, at 50–51 (2013) (Senate Standing Rule 26.12), https://www.govinfo.gov/content/pkg/SMAN-113/pdf/SMAN-113.pdf#page=58.

[47] 1 U.S.C. § 204(a).

[48] 2 U.S.C. §§ 285, 285b.

[49] Off. of Law Revision Counsel, *United States Code: About the United States Code and This Website*, http://uscode.house.gov/about_code.xhtml (last visited July 27, 2020).

[50] Off. of Law Revision Counsel, *United States Code: Detailed Guide to the United States Code Content and Features*, https://uscode.house.gov/detailed_guide.xhtml (last visited July 27, 2020) [hereinafter *Detailed Guide to the U.S. Code*]. A subparagraph may be further broken down into "clauses, subclauses, and items." *Id.*

[51] *Id.*; *see, e.g.*, 11 U.S.C. §§ 101 et seq. (Bankruptcy).

[52] Off. of Law Revision Counsel, *United States Code: Frequently Asked Questions and Glossary*, http://uscode.house.gov/faq.xhtml (last visited July 27, 2020).

organizational units of the *Code*) and which to include as statutory notes following a particular section's text.[53]

Statutory Versus Editorial Notes

Placing a public law's text in a **statutory note** does not diminish its status as federal law.[54] In other words, it has the same legal effect regardless of where it is classified in (i.e., added to) the *Code*.

The *Code* also contains **editorial notes**.[55] Like statutory notes, these notes follow the text of a *Code* section. However, unlike statutory notes, editorial notes are not provisions of law enacted by Congress. Instead, editorial notes are "prepared by the Code editors to assist users of the Code," providing "information about the section's source, derivation, history, references, translations, effectiveness and applicability, codification, defined terms, prospective amendments, and related matters."[56]

There are two types of titles in the *Code*: positive law and non-positive law titles.[57] Non-positive law titles of the *Code* consist of separately enacted federal statutes arranged and edited by OLRC to conform to the *Code*'s style and numbering scheme.[58] In contrast, a positive law title "is basically one law enacted by Congress in the form of a title of the Code," which does not then undergo editorial changes to the title's organization, structure, or designations.[59] In a process called positive law codification, OLRC is tasked with organizing statutes enacted at different times into a codification bill so that Congress can reenact the law as a single restatement of the law on that subject.[60]

For practical purposes, the distinction between positive and non-positive laws seldom affects how a given law is interpreted.[61] Congress has said that both forms of *Code* titles contain "the laws" and can be introduced as evidence of such laws in court.[62] However, in the event of a discrepancy

[53] *See generally* Off. of Law Revision Counsel, *United States Code: About Classification of Laws to the United States Code*, http://uscode.house.gov/about_classification.xhtml (last visited July 27, 2020); *Detailed Guide to the U.S. Code*, *supra* note 50.

[54] *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1251 (11th Cir. 2005) (per curiam) ("That the [Torture Victim Protection Act of 1991 (TVPA)], which was published in the Statutes at Large, appears in the United States Code as a historical and statutory note to the Alien Tort Act does not make the TVPA any less the law of the land."); Conyers v. MSPB, 388 F.3d 1380, 1382 n.2 (Fed. Cir. 2004) ("[T]he fact that this provision [of the Aviation and Transportation Security Act] was codified as a statutory note is of no moment. The Statutes at Large provide the evidence of the laws of the United States.").

[55] *Detailed Guide to the U.S. Code*, *supra* note 50.

[56] *Id.*

[57] See CRS Report R45190, *From Slip Law to United States Code: A Guide to Federal Statutes for Congressional Staff*, supra note 34, at 6–8.

[58] *See* Off. of Law Revision Counsel, *United States Code: Positive Law Codification*, https://uscode.house.gov/codification/legislation.shtml (last visited July 27, 2020) [hereinafter *Positive Law Codification*].

[59] *Id.*

[60] *See id.* (explaining that 2 U.S.C. § 285b "provides the mandate for positive law codification").

[61] *See, e.g.*, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 12.2.1(a), 12.3 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020) (directing legal professionals to "cite statutes currently in force" to the *U.S. Code* "[i]f available").

[62] 1 U.S.C. § 204(a) ("The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however,* That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.").

or dispute about the wording of a non-positive law, the controlling wording appears not in the *Code*, but in the *United States Statutes at Large* (the *Statutes at Large*), the official compilation of the laws of each congressional session.[63] Once again, this distinction is because non-positive law titles reflect editorial changes, while positive law titles have the "imprimatur" of Congress because they were passed by both houses and presented to the President in precisely that form.[64] Thus, courts may not consider OLRC's editorial changes to be persuasive evidence of Congress's meaning when interpreting a statute.[65]

When it comes to understanding a bill, it also helps to know that amendments to positive and non-positive laws are expressed differently in legislation. Amendments to positive law titles, whether amending an existing section or adding a new title, can be expressed as amendments to the *Code* itself (e.g., **Figure 3**). In contrast, if Congress seeks to amend or add a new section to a non-positive law title, it must amend the original act that enacted that law.[66] However, it may note the *U.S. Code* reference parenthetically (e.g., **Figure 5**).

[63] *See Positive Law Codification*, *supra* note 58 ("Statutory text appearing in a non-positive law title may be rebutted by showing that the wording in the underlying statute is different. Typically, statutory text appearing in the Statutes at Large is presented as proof of the words in the underlying statute. The text of the law appearing in the Statutes at Large prevails over the text of the law appearing in a non-positive law title."); Gov't Publ'g Off., *United States Statutes at Large*, https://www.govinfo.gov/app/collection/STATUTE (last visited July 27, 2020) (noting that the *Statutes at Large* is the "permanent collection of all laws . . . enacted during each session of Congress") (citing 1 U.S.C. § 112 (stating that the *Statutes at Large* "shall be legal evidence of laws . . . therein contained, in all the courts of the United States")).

[64] *See Positive Law Codification*, *supra* note 58 ("Because a positive law title is enacted as a whole by Congress, and the original enactments are repealed, statutory text appearing in a positive law title has Congress's 'authoritative imprimatur' with respect to the wording of the statute." (quoting Wash.-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth., 263 F.3d 371, 378 n.2 (4th Cir. 2001))).

[65] For example, in *Citizens Against Casino Gambling v. Hogen*, a U.S. district court rejected an agency's conclusion that a statute providing payments to the Seneca Nation of Indians to resolve inequities relating to past leases concerned "a settlement of a land claim" for purposes of another law prohibiting gaming on certain lands acquired in trust for the benefit of an Indian tribe. No. 07-CV-0451S, 2008 U.S. Dist. LEXIS 52395, at *43–44, 51, 178–86 (W.D.N.Y. July 8, 2008). Among other reasons, the court noted that the agency relied on the wrong title in support of its interpretation. *Id.* at 179. Although the statute's title, as printed in the *U.S. Code*, was "Seneca Nation (New York) Land Claims Settlement," Congress had actually assigned the act the short title "Seneca Nation Settlement Act of 1990," which mentioned neither the terms "land" nor "claim." *Id.* at 178–79. The court held that it was unreasonable for the agency to rely on the short title printed in the *U.S. Code* because Congress had not yet enacted the applicable *Code* title into positive law. *Id.* at 179.

[66] *See* FILSON & STROKOFF, *supra* note 37, at 330 (instructing drafters not to cite a provision by its *U.S. Code* designation unless it is in a positive-law title of the *Code*).

Figure 5. Amendatory Bill Proposing Amendments to Act

A BILL

To extend temporarily the Federal Perkins Loan program, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the "Higher Education Ex-
5 tension Act of 2015".
6 **SEC. 2. EXTENSION OF NATIONAL ADVISORY COMMITTEE**
7 **ON INSTITUTIONAL QUALITY AND INTEGRITY.**
8 Section 114(f) of the Higher Education Act of 1965
9 (20 U.S.C. 1011c(f)) is amended by striking "2015" and
10 inserting "2016".

Source: Higher Education Extension Act of 2015, H.R. 3594, 114th Cong. (as introduced, Sept. 24, 2015), https://www.congress.gov/114/bills/hr3594/BILLS-114hr3594ih.pdf.

The prospective legal effect of any given provision in a bill—whether it, for example, creates a requirement, imposes a penalty, prohibits certain conduct, directs an agency to act, or delegates authority—does not depend on whether the language amends a positive law or non-positive law title of the *Code*. Instead, the provision's legal effect depends on its precise language in the context of the bill as a whole.[67] Because federal bills often follow a similar format, it helps to think about the various parts of a bill and the legal rules generally associated with those types of provisions, which are the focus of the second part of this report.

The Role of Statutory Interpretation

While the legislative power resides in Congress,[68] other elected officials, entities in the public and private sectors, and individuals all have an interest in what acts of Congress say and mean. Consider the basic life cycle of a law. It starts out as a bill subject to interpretation by its drafters, cosponsors, committees, and other stakeholders, before each house of Congress votes on it as a

[67] *See, e.g.*, Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 412 (2012) (construing "two statutory phrases" "against the backdrop of yet a third statutory phrase," and "in the context of the entire statute"); Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 173 (2009) (observing that the "first substantive provision" in a joint resolution "use[d] six verbs, all of which are conciliatory or precatory" and reasoning that "[s]uch terms are not the kind that Congress uses to create substantive rights").

[68] U.S. CONST. art. I, § 1.

body.[69] Congress then presents the bill to the President, who may sign the bill into law, sometimes with a signing statement setting forth the President's interpretation of the law.[70] The federal agencies tasked with implementing that law are often the first to issue official interpretations of the statute through guidance documents, rulemaking, agency orders, and other actions.[71] If a dispute about the statute's meaning is litigated, the courts may also interpret the statute and, through their rulings, declare what the law means.[72] If Congress disagrees with an agency's or a court's interpretation on a statutory question, it can amend the law to clarify its intent.[73] With so many entities weighing in on a law's meaning, some basic ground rules for interpreting the law are needed to promote consistent interpretations.[74]

Statutory interpretation is the exercise, including the process and methods, through which judges, agency counsel, and other legal practitioners decide what a law means.[75] At its core, statutory interpretation involves consideration of a law's "text, structure, purpose, and history" to discern Congress's meaning.[76] But it is not a simple formula. While, for the Supreme Court and many federal courts, statutory interpretation begins with the law's text,[77] there are different approaches

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[69] *See generally* CRS Infographic IG10005, *From Bill to Law: Stages of the Legislative Process*, by Valerie Heitshusen and Jennifer E. Manning.

[70] *See, e.g.*, Presidential Statement on Signing the CARES Act, 2020 DAILY COMP. PRES. DOC. 194 (Mar. 27, 2020), https://www.govinfo.gov/content/pkg/DCPD-202000194/pdf/DCPD-202000194.pdf ("Today, I have signed into law H.R. 748, the 'Coronavirus Aid, Relief, and Economic Security Act' or the 'CARES' Act (the 'Act'). The Act makes emergency supplemental appropriations and other changes to law to help the Nation respond to the coronavirus outbreak. I note, however, that the Act includes several provisions that raise constitutional concerns.").

[71] *See* Smiley v. Citibank, N.A, 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."). *See generally* CRS In Focus IF10003, *An Overview of Federal Regulations and the Rulemaking Process*, by Maeve P. Carey.

[72] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."); *see also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

[73] *See* Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 456 (2015) ("[U]nlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. That is true . . . regardless whether our decision focused only on statutory text or also relied . . . on the policies and purposes animating the law." (internal citation omitted)).

[74] *See* SCALIA & GARNER, *supra* note 4, at xxiii (foreword by Hon. Frank H. Easterbrook) ("Interpretation is a human enterprise, which cannot be carried out algorithmically by an expert system on a computer. But discretion can be hedged in by rules. . . .").

[75] *See id.* at xxvii (preface by Justice Antonin Scalia & Bryan A. Garner) (professing that "meaning" must be determined by "convention" because "[n]either written words nor the sounds that the written words represent have any inherent meaning"); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1997 (2011) (contending that "the federal courts do not currently treat statutory interpretation methodology as law but that it would be permissible, maybe even preferable, for them to do so"). The process and methods of statutory interpretation are discussed in more detail in CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon.

[76] Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 600 (2004); *see also* Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) ("We look first, of course, to the statutory language . . . . Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent.").

[77] *See, e.g.*, Permanent Mission of India to the UN v. City of New York, 551 U.S. 193, 197 (2007) ("We begin, as always, with the text of the statute."); IRS v. WorldCom, Inc., 723 F.3d 346, 352 (2d Cir. 2013) ("In interpreting any statute, we start with its text, giving the language its ordinary meaning." (internal citations omitted)).

to statutory interpretation and myriad rules and presumptions to consider.[78] The Court is guided by "canons of construction" developed over time,[79] such as the "rule against surplusage," which states that readers should avoid construing a provision in a way that makes it redundant if another plausible reading gives effect to that language.[80] These canons provide "default assumptions about the way Congress generally expresses meaning, but are not 'rules' in the sense that they must invariably be applied."[81] The canons themselves can sometimes be in tension.[82] In some cases, judges disagree over which canons apply, leading to different interpretations of the same statutory text.[83] In other cases, judges disagree over whether resort to linguistic canons is even necessary.[84]

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[78] *See, e.g.*, James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681, 686 (2017) (examining "empirically whether circuit court judges embrace, or clash over, interpretive theories as the [Supreme Court] Justices have so often done, or—alternatively—whether they apply textualist and purposive resources in ways that are more pragmatic, and less dogmatic, than their Supreme Court counterparts"); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 435 (2012) ("Although certain interpretive tools and doctrines are fairly well established, interpretive methodology displays significant diversity from judge to judge and from case to case, both in the Supreme Court and in the lower courts.").

[79] *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) ("[T]he canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle."). Legal scholars have traced certain canons that modern courts still recognize to the founding era, and some have argued that the framers of the U.S. Constitution were well aware of these principles. *See, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1057 (concluding, from his review of the ratifying debates, that "[n]o one questioned the rule of lenity, nor did any debater ever question the authority of Blackstone and Bacon, whose canons of statutory construction were libertarian and protective of common law rights"). But legal scholars have also observed significant changes in the field of statutory interpretation since the founding. *See, e.g.*, Gluck, *supra* note 75, at 1988 (asserting that "the canons of interpretation as understood by the Founders . . . have not been frozen in time" and that the "Supreme Court continues . . . to generate new interpretive rules").

[80] *See, e.g.*, Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 669 (2007) ("On the dissent's reading, [the section's] reference to 'discretionary' federal involvement is mere surplusage, and we have cautioned against reading a text in a way that makes part of it redundant.").

[81] See CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, *supra* note 75, at 25 (footnotes omitted).

[82] *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) ("Specific canons 'are often countered . . . by some maxim pointing in a different direction.'" (citation omitted)); Landgraf v. Usi Film Prods., 511 U.S. 244, 263 (1994) (observing that "[i]t is not uncommon to find 'apparent tension' between different canons of statutory construction" because "many of the traditional canons have equal opposites").

[83] *Compare* Lockhart v. United States, 136 S. Ct. 958, 962 (2016) ("When this Court has interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the 'rule of the last antecedent.' The rule provides that 'a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" (internal citations omitted)), *with id.* at 970 (Kagan and Breyer, JJ., dissenting) ("[T]his Court has made clear that the last-antecedent rule does not generally apply to the grammatical construction present here: when '[t]he modifying clause appear[s] . . . at the end of a single, integrated list.' Then, the exact opposite is usually true: . . . the modifying phrase refers alike to each of the list's terms." (internal citation omitted)).

[84] *Compare* Yates v. United States, 574 U.S. 528, 546 (2015) (plurality opinion) ("Having used traditional tools of statutory interpretation to examine markers of congressional intent within the Sarbanes-Oxley Act and § 1519 itself, we are persuaded that an aggressive interpretation of 'tangible object' must be rejected."), *with id.* at 563–64 (Kagan, Scalia, Kennedy, and Thomas, JJ., dissenting) ("Getting nowhere with [the] surplusage [canon], the plurality switches canons, hoping that *noscitur a sociis* and *ejusdem generis* will save it. . . . According to the plurality, those Latin maxims change the English meaning of 'tangible object' to only things, like records and documents, 'used to record or preserve information.' But understood as this Court always has, the canons have no such transformative effect on the workaday language Congress chose." (internal citation omitted)).

The extent to which judges and legal practitioners look to a law's *purpose*, as well as the sources that courts find most authoritative in ascertaining that purpose, may vary based on the reviewer's interpretive philosophy.[85] For example, "textualists" generally eschew looking beyond a law's text to interpret its meaning.[86] When a dispute about a law's scope arises, they seek to give the statute a "fair reading" based on how language and punctuation are normally used—or how certain terms were commonly understood when the law was enacted.[87] Textualists subscribe to the frequently quoted passage that when Congress passes a law, Congress "says what it means and means what it says."[88] In contrast, those who take a more "purposivist" approach to statutory interpretation may seek to resolve a disputed or ambiguous provision based on statements of purpose in the act or even statements made during its passage (i.e., legislative history).[89] These differing approaches to statutory interpretation,[90] which are discussed in more detail in other CRS publications,[91] may affect how closely an agency or court examines certain parts of a bill, such as a general purpose section.

Parts of a Bill and Their Legal Significance

This part of the report describes common bill sections and other organizing features of legislation and explains the legal significance of each component, focusing on relevant Supreme Court decisions.[92] Not every bill will include all the sections listed below, and some bills may present these sections in a different order.[93]

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[85] *Compare* Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782 (2018) (Sotomayor & Breyer, JJ., concurring) ("I write separately only to note my disagreement with the suggestion in my colleague's concurrence that a Senate Report is not an appropriate source for this Court to consider when interpreting a statute."); *with id.* at 783 (Thomas, Alito, & Gorsuch, JJ., concurring in part and concurring in the judgment) ("Even assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd-Frank with the same intent, 'we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.'" (citation omitted)).

[86] *See* SCALIA & GARNER, *supra* note 4, at 16 ("Textualism, in its purest form, begins and ends with what the text says and fairly implies."); CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, *supra* note 75, at 13–15.

[87] Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018); *see also* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President."); Rehaif v. United States, 139 S. Ct. 2191, 2196 (2019) (stating that the Court "normally read[s] the statutory term 'knowingly' as applying to all the subsequently listed elements" of a crime as "a matter of ordinary English grammar" (internal quotation marks and citation omitted)).

[88] Simmons v. Himmelreich, 136 S. Ct. 1843, 1848 (2016).

[89] See CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, *supra* note 75, at 11–13.

[90] *But see id.* at 16–18 (discussing a possible "convergence of theories").

[91] See, e.g., id. at 10–18; CRS Legal Sidebar LSB10305, *The Feres Doctrine: Congress, the Courts, and Military Servicemember Lawsuits Against the United States*, by Kevin M. Lewis; CRS Legal Sidebar LSB10122, *No Overtime for Auto Service Advisors after Court's "Fair Reading" of the FLSA*, by Jon O. Shimabukuro.

[92] The following resources informed the selection and ordering of bill sections in this report: (1) the "[g]eneral template for structuring content" in the *HOLC Guide to Legislative Drafting*, *supra* note 18; (2) *The Legislative Drafter's Desk Reference: Second Edition* by Lawrence E. Filson and Sandra L. Strokoff, *supra* note 37, which is cited in the *HOLC Guide to Legislative Drafting*; and (3) legislation introduced in the 112th through the 116th Congresses available on *Congress.gov*.

[93] *See* 1A SUTHERLAND STATUTORY CONSTRUCTION § 20:2 (7th ed. 2019) (listing the "customary order of provisions" in "original, comprehensive, legislation"); FILSON & STROKOFF, *supra* note 37, at 106 ("The order of a bill's 'typical' provisions recommended by some legislative drafting manuals can be moderately helpful, but . . . the organization of a bill in real life is never quite that straightforward." (internal cross-reference omitted)).

Introductory and Organizational Elements of a Bill

A typical bill contains many elements to help identify the legislation and organize its substantive provisions. Some of these provisions, like the enacting clause, are required in every bill. Others, like short titles and captions, are used at the drafter's discretion. Such organizational features generally do not contain the bill's legally operative language—that is, they do not, by themselves, create legal rights or obligations, prohibit conduct, or impose penalties. Nevertheless, a court or legal practitioner interpreting the statute may look to these contextual elements to resolve an ambiguous provision that *is* substantive. In the Supreme Court's words, headings and titles are "tools available for the resolution of a doubt" about a statute's meaning.[94] There are several distinct introductory and organizational elements of a bill, discussed below.

Preliminary Identifiers

As shown in **Figure 6**, a typical bill introduced in the House or Senate begins by identifying:

- the then-current session of Congress,
- the bill number,[95]
- the long title of the bill,[96]
- the house in which the bill was introduced,
- the date of introduction,
- the bill's sponsor and any cosponsors, and
- any congressional committee referrals.

This information helps to identify and track the legislation.[97] If the bill progresses through committee (i.e., is reported), passes one house of Congress (i.e., is engrossed), or passes both houses (i.e., is enrolled), subsequent versions of the bill may be updated to reflect the congressional session, body, and date that corresponds to that action.[98]

[94] *See* Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (noting that "the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute" (quoting Bd. of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 528–29 (1947))); *Bd. of R.R. Trainmen*, 331 U.S. at 529 ("For interpretative purposes, [titles and headings] are of use only when they shed light on some ambiguous word or phrase. . . . [T]hey cannot undo or limit that which the text makes plain.").

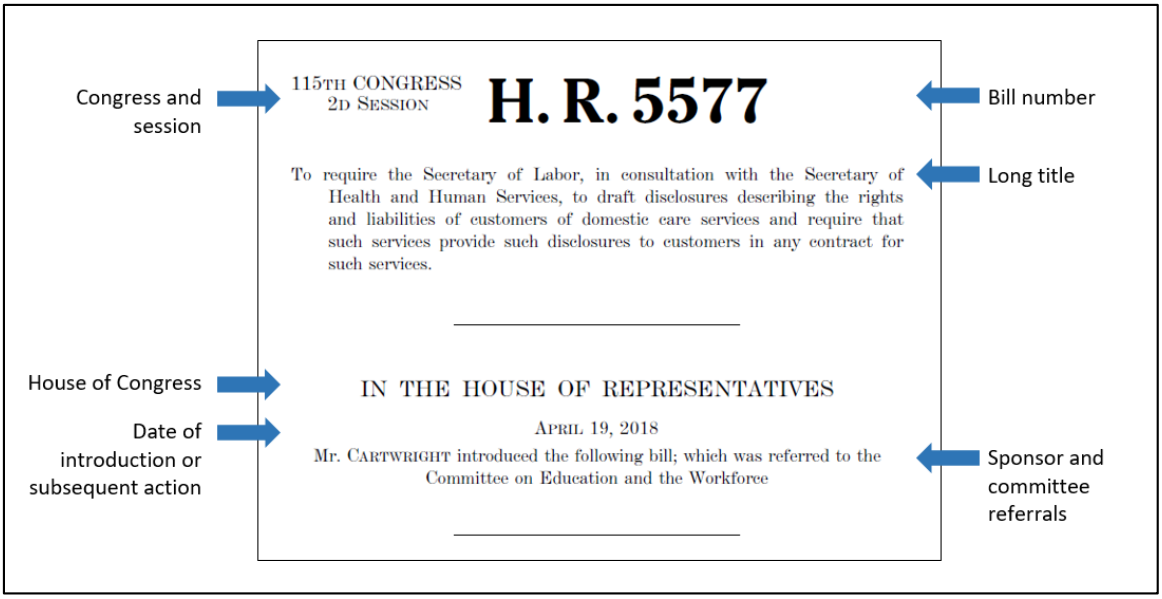
[95] The bill number is "typically the next number available in sequence during that two-year Congress." CRS Report R42843, *Introduction to the Legislative Process in the U.S. Congress*, *supra* note 6, at 3.

[96] *See infra* "The Long Title."

[97] *See, e.g.*, CONGRESS.GOV, https://www.congress.gov/ (last accessed July 28, 2020) (allowing viewers to search for legislation by session of Congress, bill number, sponsor, and committee).

[98] *See, e.g.*, Correcting Miscalculations in Veterans' Pensions Act, H.R. 4431, 115th Cong., https://www.congress.gov/bill/115th-congress/house-bill/4431/text (allowing viewers to access 6 versions of the bill: the bill text as introduced, as reported in the House, as engrossed in the House, as referred in the Senate, as enrolled, and finally, as a public law). *See generally* Gov't Pub. Off., *Congressional Bills, 103rd Congress (1993-1994) to Present: About Congressional Bills*, GOVINFO (May 7, 2019), https://www.govinfo.gov/help/bills#about.

Figure 6. Bill Identifiers



Source: Notification of Your Eldercare Rights Act, H.R. 5577, 115th Cong. (as introduced, Apr. 19, 2018), https://www.congress.gov/115/bills/hr5577/BILLS-115hr5577ih.pdf.

The Long Title

The official or "long" title of a bill appears after the bill number and also immediately following the prefatory words "A BILL" as shown in **Figure 7**. The long title generally summarizes or describes the purpose of the bill. However, as veteran legislative drafters have noted, "parliamentary maneuvering sometimes results in bills whose long titles bear little or no relationship to the substantive provisions they contain."[99] In other circumstances, a long title may reflect a "broad policy objective" rather than a detailed description of what the law does.[100]

[99] FILSON & STROKOFF, *supra* note 37, at 119.

[100] *Id*. at 138 n.2.

Figure 7. Long Title

115TH CONGRESS
2D SESSION

H. R. 5163

To amend chapter 44 of title 18, United States Code, to prohibit the sale or other disposition of a firearm to, and the possession, shipment, transportation, or receipt of a firearm by, certain classes of high-risk individuals.

IN THE HOUSE OF REPRESENTATIVES

MARCH 5, 2018

Ms. KELLY of Illinois (for herself, Ms. SCHAKOWSKY, Mr. YARMUTH, Ms. CLARK of Massachusetts, Mr. TAKANO, Mr. COHEN, Mr. BRENDAN F. BOYLE of Pennsylvania, Mr. LOWENTHAL, Mr. GUTIÉRREZ, Mr. RYAN of Ohio, Mr. CUMMINGS, Ms. GABBARD, Mr. LYNCH, Mr. DANNY K. DAVIS of Illinois, Ms. PLASKETT, Ms. BROWNLEY of California, Mr. MOULTON, Ms. NORTON, and Ms. WASSERMAN SCHULTZ) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 44 of title 18, United States Code, to prohibit the sale or other disposition of a firearm to, and the possession, shipment, transportation, or receipt of a firearm by, certain classes of high-risk individuals.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the "Keeping Guns from
5 High-Risk Individuals Act".

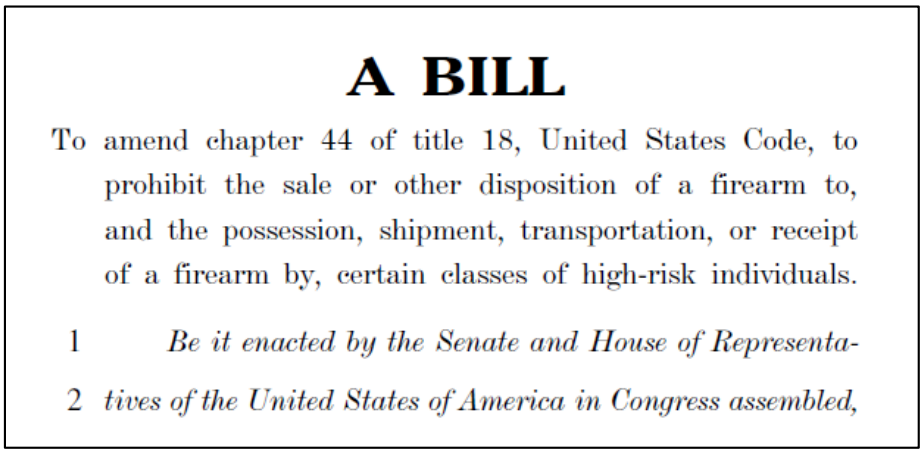
Source: Keeping Guns from High-Risk Individuals Act, H.R. 5163, 115th Cong. (as introduced, Mar. 5, 2018), https://www.congress.gov/115/bills/hr5163/BILLS-115hr5163ih.pdf.

Courts generally assign little weight to a federal law's long title in interpreting a disputed provision.[101] One reason may be that the long title appears before the enacting clause (discussed in the next section) and thus does not become part of the law even if the bill is enacted.[102] Another reason may be that the long title, being only a single sentence, cannot exhaustively describe what the law does.[103] Nevertheless, when a party's interpretation of an act runs headlong into a conflict with a long title, a court may cite the long title as evidence of a contrary interpretation. For example, in *Jackson Women's Health Organization v. Currier*, a federal district court rejected a state's characterization of its own law based on the law's long title.[104] The court analyzed the state law as a *ban* on, rather than a *regulation* of, pre-viability abortion because the act's full title included the language "To *Prohibit* Abortions After 15 Weeks' Gestation."[105]

The Enacting Clause

Each bill contains the enacting clause, "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled," shown in **Figure 8**. The language and placement of the enacting clause are prescribed by statute.[106]

Figure 8. Enacting Clause



A BILL

To amend chapter 44 of title 18, United States Code, to prohibit the sale or other disposition of a firearm to, and the possession, shipment, transportation, or receipt of a firearm by, certain classes of high-risk individuals.

1 *Be it enacted by the Senate and House of Representa-*

2 *tives of the United States of America in Congress assembled,*

Source: Keeping Guns from High-Risk Individuals Act, H.R. 5163, 115th Cong. (as introduced, Mar. 5, 2018), https://www.congress.gov/115/bills/hr5163/BILLS-115hr5163ih.pdf.

[101] *See, e.g.*, Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1187 (9th Cir. 2016) ("Defendants' heavy reliance on the title of the 2014 Amendment, 'An act to amend the Interstate Land Sales Full Disclosure Act to clarify how the Act applies to condominiums,' is similarly misplaced. Although the title notes that this is a clarification, the lapse between the enactment of the bill and the bill's effective date (180 days), coupled with the bill's silence on the issue of retroactivity, suggests that this was actually a change in the law.").

[102] *See* FILSON & STROKOFF, *supra* note 37, at 120.

[103] *See supra* notes 99–100 and accompanying text.

[104] 349 F. Supp. 3d 536, 541 (S.D. Miss. 2018), *aff'd sub. nom.* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 277 (2019), *petition for cert. filed*, No. 19-1392 (Jun. 15, 2020).

[105] *Id.* (internal quotation marks omitted).

[106] *See* 1 U.S.C. § 101 ("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.'"); *id.* § 103 (prohibiting "enacting or resolving words" after the first section of the bill).

The enacting clause introduces the text that will become law and serves to identify the document as an act of Congress.[107] As a practical matter, it also signals to readers that the form of the legislation is a bill rather than a joint resolution, which contains a "resolving clause."[108] While the clause is standard prefatory language, a few federal courts have posited that its absence would not necessarily render a statute invalid, because the U.S. Constitution does not require an enacting clause.[109]

Short Titles

Congressional drafters often include short titles for their bills, as in the example in **Figure 9**. If the bill is enacted, OLRC may assign the specified short title to a section in the *U.S. Code*[110] or place it in the statutory notes following the text of a *Code* section.[111]

Figure 9. Short Title

A BILL

To amend the Patient Protection and Affordable Care Act to clarify the application of the rule for counting resident time in nonprovider settings.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the "Fairness to Teaching
5 Hospitals Act of 2016".

Source: Fairness to Teaching Hospitals Act of 2016, H.R. 6515, 114th Cong. (as introduced, Dec. 8, 2016), https://www.congress.gov/114/bills/hr6515/BILLS-114hr6515ih.pdf.

[107] *See Enacting Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019); *cf.* Joiner v. State, 155 S.E.2d 8, 10 (Ga. 1967) ("The purpose of an enacting clause is to establish the act; to give it permanence, uniformity and certainty; to afford evidence of its legislative, statutory nature, and to secure uniformity of identification, and thus prevent inadvertence, possible mistake, and fraud." (internal quotation marks omitted) (quoting 82 C.J.S. 104, § 65 (c 2))).

[108] *See* 1 U.S.C. § 102 (prescribing a "resolving clause" for "all joint resolutions").

[109] *See* White v. United States, 175 F. App'x 292, 294 (11th Cir. 2006) (per curiam) (observing that the "Constitution does not require that federal laws contain an enacting clause"); United States v. Laroche, 170 F. App'x 124, 126 (11th Cir. 2006) (per curiam) (stating that "[t]here is no federal authority to support [the petitioner's] argument that a lack of an enacting clause renders a statute invalid"). *But cf. Joiner*, 155 S.E.2d at 10 (holding that a state legislative act was "a nullity and of no force and effect as law" because it did not contain an enacting clause and rejecting the view that an enacting clause "is a mere matter of form, a relic of antiquity, and serves no useful purpose").

[110] *See, e.g.*, 15 U.S.C. § 78a (stating that the Act of June 6, 1934, Pub. L. No. 73-291, ch. 404, 48 Stat. 881, may be cited as the "Securities Exchange Act of 1934").

[111] For example, the short title "Employee Retirement Income Security Act of 1974" (more commonly known as ERISA) is indicated in the statutory notes following 29 U.S.C. § 1001, the section containing the congressional findings and declaration of policy within the chapter on the Employee Retirement Income Security Program.

Unlike a bill's long title, a designated short title *does* become part of the law. However, like a long title, a short title is unlikely to describe all of the bill's purposes. Drafters often select words that describe a general purpose or that form an acronym. In a 2008 decision, Justice Antonin Scalia alluded to Congress's penchant for acronyms, referring to a law with "the unlikely title of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 117 Stat. 650."[112] Although Congress had supplied the acronym "PROTECT Act" in the statute itself, Justice Scalia quipped, "We shall refer to it as the Act."[113]

Given that Congress includes short titles for ease of reference or effect, a short title is unlikely to supply the answer to a disputed issue of statutory interpretation. Occasionally, however, a short title supports the interpretation the court has arrived at independently through an examination of the text. For example, in a 2009 decision, the Idaho Supreme Court held that a state statute "create[d] a new cause of action" rather than "simply codify[ing] the common law."[114] In a footnote, the state supreme court suggested that the law's short title supported its reading because it included the language "to *create* a civil cause of action in child abuse cases."[115]

Headings and Subheadings

Congressional drafters may assign headings or subheadings (also called "captions") to particular divisions of a bill. In **Figure 10**, section 2 of the bill is entitled "Disclosure of Personal Information with the Intent to Cause Harm." The new offense that the bill would add to chapter 41 of title 18 of the *U.S. Code* is separately entitled "Publication of personally identifiable information with the intent to cause harm."[116] Subsection (a) has the caption "Prohibition."

[112] United States v. Williams, 553 U.S. 285, 289 (2008).

[113] *Id*.

[114] Doe v. Boy Scouts of America, 224 P.3d 494, 498 (Idaho 2009).

[115] *Id*. at 498 n.3 (internal quotation marks omitted) (emphasis added).

[116] Because the heading assigned to § 881 is "inside the quotes," this heading would likely become the section heading in the *U.S. Code* if the bill were enacted. *See Detailed Guide to the U.S. Code*, *supra* note 50 (noting that the "basic unit of every Code title is the section," that in positive law titles, *Code* sections have "the exact same text as in the enacting and amending acts," and that even in non-positive law titles, if a *Code* section "is based on an act section that has headings, the Code will usually retain the original headings").

Figure 10. Section Headings

6 **SEC. 2. DISCLOSURE OF PERSONAL INFORMATION WITH**
7 **THE INTENT TO CAUSE HARM.**
8 (a) IN GENERAL.—Chapter 41 of title 18, United
9 State Code, is amended by adding at the end the following:

1 **"§ 881. Publication of personally identifiable informa-**
2 **tion with the intent to cause harm**
3 "(a) PROHIBITION.—Whoever, with the intent to
4 threaten, intimidate, harass, stalk, or facilitate another to
5 threaten, intimidate, harass, or stalk, uses the mail or any
6 facility or means of interstate or foreign commerce to
7 knowingly publish the personally identifiable information
8 of another person, and as a result of that publication
9 places that person in reasonable fear of the death of or
10 serious bodily injury to—
11 "(1) that person;
12 "(2) an immediate family member of that per-
13 son; or
14 "(3) an intimate partner of that person,
15 shall be subject to the criminal penalty and the civil liabil-
16 ity provided by this section.

Source: Interstate Doxxing Prevention Act, H.R. 6478, 114th Cong. § 2 (as introduced, Dec. 8, 2016), https://www.congress.gov/114/bills/hr6478/BILLS-114hr6478ih.pdf.

Once a bill is enacted, headings and subheadings operate in the same way as titles: while headings cannot alter the meaning of clear statutory text,[117] they can sometimes point in favor of one interpretation of an ambiguous provision over another plausible interpretation.[118] For example, in 2016, the Supreme Court interpreted a "recidivist enhancement" in section 2252 of the Federal Criminal Code that raised penalties for individuals convicted of possessing child pornography who had "'a prior conviction . . . under the laws of any State relating to aggravated

[117] *See* United States v. Michael, 882 F.3d 624, 629 (6th Cir. 2018) (focusing on a section's text instead of its heading and stating that "[j]ust as it is dangerous to judge a book by its cover, it is dangerous to judge a statute by its title").

[118] *See, e.g.*, Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) (concluding that a certain section of the Bankruptcy Code did not apply to "preconfirmation transfers," finding it "informative that Congress placed [that section] in a subchapter entitled, 'POST CONFIRMATION MATTERS'").

sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.'"[119] A key contested issue in the case was whether the language "involving a minor or ward" modified: (1) "aggravated sexual abuse," "sexual abuse," *and* "abusive sexual conduct"; or (2) only the last reference to "abusive sexual conduct."[120] While the traditional canons of statutory interpretation produced conflicting interpretations, a majority of the Court concluded that the language "involving a minor or ward" modified only "abusive sexual conduct."[121] The Court reasoned that the phrase "abusive sexual conduct involving a minor or ward," while referring to state law, tracked the language of a federal offense that also triggered enhanced penalties under section 2252. The Court explained:

> Among the chapters of the Federal Criminal Code that can trigger § 2252(b)(2)'s recidivist enhancement are crimes "under . . . chapter 109A." Chapter 109A criminalizes a range of sexual-abuse offenses involving adults *or* minors and wards. And it places those federal sexual-abuse crimes under headings that use language nearly identical to the language § 2252(b)(2) uses to enumerate the three categories of state sexual-abuse predicates. The first section in Chapter 109A is titled "Aggravated sexual abuse." 18 U.S.C. § 2241. The second is titled "Sexual abuse." § 2242. And the third is titled "Sexual abuse of a minor or ward." § 2243. Applying the rule of the last antecedent, those sections mirror precisely the order, precisely the divisions, and nearly precisely the words used to describe the three state sexual-abuse predicate crimes in § 2252(b)(2): "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct involving a minor or ward."[122]

While the Court cautioned that it could not "state with certainty that Congress used Chapter 109A as a template for the list of state predicates set out in § 2252(b)(2)," it concluded that it could not "ignore the parallel, particularly because the headings in Chapter 109A were in place when Congress amended the statute to add § 2252(b)(2)'s state sexual-abuse predicates."[123]

Prefatory Statements

Congressional drafters sometimes introduce a bill's substantive provisions with prefatory statements explaining the need for or the purpose of the legislation. These introductory statements may take the form of preambles, sense of Congress provisions, declarations of policy, statements of purpose, or congressional findings. After enactment, courts may use these statements to resolve ambiguities in the statutory text or to ascertain Congress's purpose in enacting the law.[124] But, as previously noted, because these statements tend to describe the legislation's general purposes,

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[119] *See* Lockhart v. United States, 136 S. Ct. 958, 961, 964 (2016) (quoting 18 U.S.C. § 2252(b)(2)).

[120] *Id*. at 961.

[121] *Id*. at 964.

[122] *Id*. (footnote omitted). *Cf. id*. at 969 (Kagan, J., dissenting) ("The Court today, relying on what is called the 'rule of the last antecedent,' reads the phrase 'involving a minor or ward' as modifying only the final term in that three-item list. But properly read, the modifier applies to each of the terms . . . . That normal construction finds support in uncommonly clear-cut legislative history, which states in so many words that the three predicate crimes all involve abuse of children. And if any doubt remained, the rule of lenity would command the same result. . . .").

[123] *Id*. at 964 (majority opinion).

[124] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 290, 307 (1936) (citing the preamble of a 1935 statute in support of the Court's holding that Congress was not acting within its enumerated Commerce Clause power). *Cf.* District of Columbia v. Heller, 554 U.S. 570,577 (2008) (noting that a "prefatory clause" in a constitutional provision may "resolve an ambiguity in the operative clause").

they may not be persuasive evidence of another provision's meaning to a textualist judge who prefers to rely exclusively on the language of that provision.[125]

Preambles

Preambles may take the form of a series of "whereas" clauses or a stand-alone paragraph at the beginning of a bill declaring Congress's findings or goals for the legislation.[126] Whereas clauses may appear in *joint resolutions* before the resolving clause (e.g., **Figure 11**), but are used less frequently in modern *bill* drafting.[127] Sometimes, courts also refer to the descriptive portion of a bill's long title, or a bill's findings and purposes section (discussed *infra*), as a preamble.[128]

[125] *See supra* "The Role of Statutory Interpretation."

[126] *See Preamble*, BLACK'S LAW DICTIONARY (11th ed. 2019) (noting that a preamble "often consists of a series of clauses introduced by the conjunction *whereas*," and that "[s]uch a preamble is sometimes called the *whereas clauses*"). *See also, e.g.*, Bituminous Coal Conservation Act of 1935, Pub. L. No. 74-402, ch. 824, 49 Stat. 991, https://www.loc.gov/law/help/statutes-at-large/74th-congress/session-1/c74s1ch824.pdf.

[127] Based on a search of CONGRESS.GOV for bill text containing the word "whereas," less than ten bills from the 112th to the 116th Congress contained prefatory whereas clauses. Four related bills would have amended an existing preamble. *E.g.*, Lumbee Recognition Act, H.R. 184, 114th Cong. § 2 (as introduced, Jan. 7, 2015), https://www.congress.gov/114/bills/hr184/BILLS-114hr184ih.pdf. Most of the remaining whereas statements were included in a "Findings" or "Sense of Congress" section rather than a stand-alone preamble. *See, e.g.*, Black History is American History Act, H.R. 6902, 116th Cong. § 2 (introduced May 15, 2020), https://www.congress.gov/116/bills/hr6902/BILLS-116hr6902ih.pdf.

[128] *See, e.g.*, Cyan, Inc. v. Beaver Cnty. Empls. Ret. Fund, 138 S. Ct. 1061, 1064 (2018) (noting that the "preamble" to the Securities Litigation Uniform Standards Act of 1998 "states that the statute is designed 'to limit the conduct of securities class actions under State law, and for other purposes.'" (quoting Pub. L. No. 105-353, 112 Stat. 3227 (1998))); Tennessee v. Lane, 541 U.S. 509, 516 (2004) (referring to the findings and purposes section of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, as the statute's "preamble").

Figure 11. Preamble

Joint Resolution

Condemning the violence and domestic terrorist attack that took place during events between August 11 and August 12, 2017, in Charlottesville, Virginia, recognizing the first responders who lost their lives while monitoring the events, offering deepest condolences to the families and friends of those individuals who were killed and deepest sympathies and support to those individuals who were injured by the violence, expressing support for the Charlottesville community, rejecting White nationalists, White supremacists, the Ku Klux Klan, neo-Nazis, and other hate groups, and urging the President and the President's Cabinet to use all available resources to address the threats posed by those groups.

Whereas, on the night of Friday, August 11, 2017, a day before a White nationalist demonstration was scheduled to occur in Charlottesville, Virginia, hundreds of torch-bearing White nationalists, White supremacists, Klansmen, and neo-Nazis chanted racist, anti-Semitic, and anti-immigrant slogans and violently engaged with counter-demonstrators on and around the grounds of the University of Virginia in Charlottesville;

Whereas, on Saturday, August 12, 2017, ahead of the scheduled start time of the planned march, protestors and counter-demonstrators gathered at Emancipation Park in Charlottesville;

Whereas the extremist demonstration turned violent, culminating in the death of peaceful counter-demonstrator Heather Heyer and injuries to 19 other individuals after a neo-Nazi sympathizer allegedly drove a vehicle into a crowd, an act that resulted in a charge of second degree murder, 3 counts of malicious wounding, and 1 count of hit and run;

Whereas 2 Virginia State Police officers, Lieutenant H. Jay Cullen and Trooper Pilot Berke M.M. Bates, died in a helicopter crash as they patrolled the events occurring below them;

Whereas the Charlottesville community is engaged in a healing process following this horrific and violent display of bigotry; and

Whereas White nationalists, White supremacists, the Ku Klux Klan, neo-Nazis, and other hate groups reportedly are organizing similar events in other cities in the United States and communities everywhere are concerned about the growing and open display of hate and violence being perpetrated by those groups: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress—

(1) condemns the racist violence and domestic terrorist attack that took place between August 11 and August 12, 2017, in Charlottesville, Virginia;

(2) recognizes—

Source: S.J. Res. 49, 115th Cong. (2017) (as enrolled), https://www.congress.gov/115/bills/sjres49/BILLS-115sjres49enr.pdf.

Preambles typically express nonbinding legislative findings and "value judgments."[129] As such, they do not include "the operative words of the law"—that is, they do not, by themselves, create

[129] *Cf.* Webster v. Reprod. Health Servs., 492 U.S. 490, 504, 506 (1989) (reasoning that a state abortion statute's

legal rights or duties.[130] For example, in *Hawaii v. Office of Hawaiian Affairs*, the Supreme Court considered the legal effect of a 1993 congressional joint resolution "to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians"—which the Court referred to as the "Apology Resolution."[131] The case involved a dispute over a parcel of land in Maui that Hawaii ceded to the United States following the United States's overthrow of the Hawaiian monarchy in 1893.[132] Upon Hawaii's admission as a state in 1959, the federal government transferred title to the ceded lands back to Hawaii to be "held by [the] State as a public trust."[133] Hawaii state law "authorize[d] the State to use or sell the ceded lands, provided that the proceeds [were] held in trust for the benefit of the citizens of Hawaii."[134] Relying on the Apology Resolution, the Office of Hawaiian Affairs sued in state court to prevent Hawaii from selling the disputed tract to a state agency for redevelopment.[135] The Hawaii Supreme Court enjoined the sale, citing a series of "whereas clauses" in the Apology Resolution that, in the court's view, showed that "Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands."[136] On review, the U.S. Supreme Court described the whereas clauses as "preambular" clauses in which "Congress made various observations about Hawaii's history," such as the statement that "'the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States.'"[137] The Supreme Court concluded that the state supreme court's reliance on the whereas clauses, rather than the two "substantive" provisions in the resolution, was misplaced.[138] The Court explained that whereas clauses were not "designed" to have "operative effect," and that even if they "had some legal effect," they could not silently "restructur[e] the rights and obligations of the State" because repeals by implication are disfavored.[139]

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preamble stating that "'[t]he life of each human being begins at conception,' and that '[u]nborn children have protectable interests in life, health, and well-being'" did not "by its terms regulate abortion" and merely expressed the state's "value judgment favoring childbirth over abortion," but leaving "the extent to which the preamble's language might be used to interpret other state statutes or regulations" to the state courts to decide in the first instance (internal quotation marks and citations omitted)).

[130] Hawaii v. Office of Haw. Affairs, 556 U.S. 163, 175 (2009); *see also* District of Columbia v. Heller, 554 U.S. 570, 578 n.3 (2008) (stating, in interpreting the language of the Second Amendment, 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").

[131] 556 U.S. 163, 168 (2009) (internal quotation marks omitted) (quoting Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1513 (1993)).

[132] *Id*. at 167.

[133] *Id*. at 168 (internal quotation marks and citation omitted).

[134] *Id*.

[135] *Id*. at 170.

[136] *Id*. at 175 (internal quotation marks omitted) (quoting 177 P.3d 884, 901 (Hawaii 2008)).

[137] *Id*. at 168–69 (quoting 107 Stat. at 1512).

[138] *Id*. at 173–75.

[139] *Id*. at 175–76 (internal quotation marks and citations omitted). *See supra* "How a New Act Affects Existing Law" (discussing the Court's presumption against implied repeals).

Sense of Congress Provisions

Some bills contain a provision stating the "sense of Congress" about a particular topic addressed by the legislation (e.g., **Figure 12**).[140]

Figure 12. Sense of Congress

8 (b) SENSE OF CONGRESS.—It is the sense of Con-
9 gress that policies governing the Internet of Things should
10 maximize the potential and development of the Internet
11 of Things to benefit all stakeholders, including businesses,
12 governments, and consumers.

Source: Developing Innovation and Growing the Internet of Things Act, S. 88, 115th Cong. § 2(b) (as referred in House, Aug. 4, 2017), https://www.congress.gov/115/bills/s88/BILLS-115s88rfh.pdf#page=3.

Courts generally regard these provisions as "precatory" and "not amounting to positive, enforceable law."[141] For example, in a 1992 decision, the U.S. Court of Appeals for the First Circuit[142] reasoned that language "setting forth 'the sense of Congress' and recommending that states 'should' review their laws regarding mental health patients [was] plainly precatory."[143] The court held that the language "neither require[d] nor prohibit[ed] any action on the part of the states or any other party."[144]

Congress sometimes uses sense of Congress provisions in bills or nonbinding resolutions to express its position in an area where Congress shares authority with the executive branch or where the division of authority is unclear or unsettled, such as certain matters of foreign policy.[145] While sense of Congress language, by itself, does not compel the President to follow a particular

[140] Simple or concurrent resolutions, which do not have the force of law, are often used to express the "sense of Congress" on a topic. *See, e.g.*, H. Res. 895, 116th Cong. (as introduced, Mar. 10, 2020), https://www.congress.gov/bill/116th-congress/house-resolution/895/ ("Recognizing National School Breakfast Week from March 2nd through March 6th, 2020, and expressing the sense of Congress that providing breakfast in schools through the National School Breakfast Program has a positive impact on classroom performance."). *See supra* "Report Terminology on Types of Federal Legislation."

[141] Chong Yia Yang v. Cal. Dep't of Soc. Servs., 183 F.3d 953, 955, 958–61 (9th Cir. 1999) (holding that sense of Congress provision did not create an entitlement to welfare benefits for certain noncitizen veterans even though the provision expressed Congress's sense that such residents "*should* be considered veterans for purposes of continuing certain welfare benefits" because the act did not list such residents among its exceptions to the act's welfare benefit restrictions and Congress later amended the act to reinstate benefits for certain refugees in this population at a later effective date (internal quotation marks and citation omitted)).

[142] References to a particular circuit in this report (e.g., First Circuit) refer to the U.S. Court of Appeals for that circuit.

[143] Monahan v. Dorchester Counseling Ctr., Inc., 961 F.2d 987, 995 (1st Cir. 1992).

[144] *Id.*

[145] *See generally* Zivotofsky v. Kerry, 576 U.S. 1, 14 (2015) ("Recognition [of a foreign sovereign] is a topic on which the Nation must 'speak . . . with one voice.' That voice must be the President's." (internal citations omitted)); *id.* at 16 ("It remains true, of course, that many decisions affecting foreign relations—including decisions that may determine the course of our relations with recognized countries—require congressional action.").

course of action,[146] it allows Congress to speak with a unified voice,[147] to bring attention to an issue, and, perhaps, to persuade the executive branch to adopt the legislature's position.[148]

Although sense of Congress language may not have independent legal effect, as with other contextual clues, such language may confirm a court's interpretation of other provisions in the act that the court does see as positive, enforceable law.[149] And for courts willing to look beyond the language of a disputed provision to statements of congressional intent, sense of Congress provisions may be instructive.[150] For example, the Supreme Court has said that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[151] The Eighth Circuit cited this principle in construing a statute expressing "'the sense of Congress that under existing law' the Secretary [of Transportation] was not to impound funds under the Federal-Aid Highway Act."[152] In holding that the Secretary could not withhold apportioned funds "for purposes totally unrelated to the highway program," the court explained that the sense of Congress language "merely *corroborates* what . . . the statute as a whole already provides."[153]

Declarations of Policy

Some bills contain a "Declaration of Policy" or "Statement of Policy" section. This section may identify the general purpose of the legislation or the intent of Congress,[154] in which case it operates much like other statements of purpose or intent: it provides evidence of Congress's intent but rarely displaces the text of substantive provisions or creates new legal rules or requirements.[155] A statement of policy may also be used to express a particular policy stance, as

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[146] Although a sense of Congress provision is usually framed in precatory terms, to the extent it uses mandatory language seeking to bind the President, the provision could raise separation-of-powers issues. *Cf. Zivotofsky*, 576 U.S. at 30 ("If Congress may not pass a law, speaking in its own voice, that effects formal recognition [of a foreign sovereign], then it follows that it may not force the President himself to contradict his earlier statement.").

[147] *See Zivotofsky*, 576 U.S. at 80 (Scalia, J., dissenting) (arguing that the majority's "perception that the Nation 'must speak with one voice'" in certain foreign policy matters "will *systematically* favor the unitary President over the plural Congress in disputes involving foreign affairs").

[148] *See* Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the* Chadha *Case*, 79 A.J.I.L. 912, 935 (1985) (stating that a sense of Congress resolution, though nonbinding, "enable[s] the legislative branch to communicate its collective thinking on a particular subject" and to raise awareness of Congress's disagreement with a particular course of action taken by the executive branch).

[149] *See, e.g.*, Husty v. United States, 282 U.S. 694, 702–03 (1931) (interpreting an "intent of Congress" proviso as "only a guide to the discretion of the court in imposing the increased sentences for those offenses for which an increased penalty [was] authorized by the Act").

[150] *See, e.g.*, Doe v. Risch, 398 F. Supp. 3d 647, 657 (N.D. Cal. 2019) (reasoning that although Congress did not mandate a particular timetable for processing the asylum application at issue, a sense of Congress provision that the agency should adjudicate the application within 180 days cut in plaintiff's favor on one factor in the court's analysis of whether the agency's delay was reasonable). *But cf.* Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 877 (D.C. Cir. 2006) (interpreting sense of Congress language as a response to "what Congress believed to be an erroneous judicial interpretation of a treaty," and reasoning that it did "not in any way alter the plain text of the [statute's] other provisions").

[151] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380–81 (1969).

[152] State Highway Comm'n v. Volpe, 479 F.2d 1099, 1115 (8th Cir. 1973) (quoting 23 U.S.C. § 101(c)).

[153] *Id.* at 1116.

[154] *See, e.g.*, Sea-Land Serv., Inc. v. Kreps, 566 F.2d 763, 765–66 (D.C. Cir. 1977) (referring to the declaration of policy in the Merchant Marine Act of 1936 as a statement of Congress's "goals").

[155] *See, e.g.*, S.D. Warren Co. v. Me. Bd. of Envt'l Prot., 547 U.S. 370, 386 (2006) (citing a declaration of policy in the Clean Water Act in support of the Court's interpretation of a certain statutory term); Citizens Against Casino Gambling v. Chaudhuri, 802 F.3d 267, 287–88 (2d Cir. 2015) (reasoning that the court's narrow interpretation of an exception in

with legislation on a question of foreign policy, an example of which appears in **Figure 13**. But, as noted above, even an expressly stated policy position will not, in and of itself, create third-party rights and obligations.[156]

Figure 13. Statement of Policy

16 **SEC. 3. STATEMENT OF POLICY.**

17 Congress—

18 (1) opposes the United Nations Human Rights

19 Council resolution of March 24, 2016, which urges

20 countries to pressure their own companies to divest

21 from, or break contracts with, Israel, and calls for

22 the creation of a "blacklist" of companies that either

23 operate, or have business relations with entities that

24 operate, beyond Israel's 1949 Armistice lines, includ-

25 ing East Jerusalem;

Source: Israel Anti-Boycott Act, S. 720, 115th Cong. § 3 (as introduced, Mar. 23, 2017), https://www.congress.gov/115/bills/s720/BILLS-115s720is.pdf#page=4.

While they may have limited effect in terms of altering existing rights and obligations, policy statements may be especially relevant in two, specific contexts. The first context involves lawsuits filed against the United States under the Federal Tort Claims Act (FTCA).[157] That law does not extend its partial waiver of sovereign immunity to—that is, the United States has not consented to suits against its officials for—claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an

the Indian Gaming Regulatory Act comported with "Congress's intent to promote tribal interests through gaming" as expressed through the act's declaration of policy); Bd. of Educ. v. Leininger, 822 F. Supp. 516, 527 (N.D. Ill. 1992) (holding that the declaration of policy in the National School Lunch Act—"to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means"—did not create enforceable rights for school districts and "merely presents the broad policy aims of the Act"). *But see* Aqua Harvesters, Inc. v. N.Y. State Dep't of Envtl. Conservation, 399 F. Supp. 3d 15, 40 (E.D.N.Y. 2019) (rejecting the plaintiffs' dormant commerce clause challenges to state commercial fishing laws because a federal law provided that "It is the policy of Congress that it is in the public interest for each State to continue to regulate the taking for any purpose of fish and wildlife within its boundaries" and that congressional silence "shall not be construed to impose any barrier" under the Commerce Clause "to the regulation of hunting or fishing by a State").

[156] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 454–55 (1988) (stating, with regard to a policy statement in the American Indian Religious Freedom Act, that "[n]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights"); Greenberg v. Bush, 150 F. Supp. 2d 447, 451 (E.D.N.Y. 2001) (holding that a 1922 House Joint Resolution stating, *inter alia*, that the United States "favors the establishment in Palestine of a national home for the Jewish people" did not "set forth a legislative scheme" from which to infer a private right of action).

[157] *See generally* CRS Report R45732, *The Federal Tort Claims Act (FTCA): A Legal Overview*, by Kevin M. Lewis.

employee of the Government."[158] Courts have interpreted this "discretionary function exception" to bar an FTCA suit if "the federal employee was engaged in conduct that was (1) discretionary and (2) policy-driven."[159] In an analogous context involving a statute that courts had interpreted to include a similar discretionary function exception,[160] the Fifth Circuit analyzed a declaration of policy to determine whether a particular governmental action was sufficiently based on public policy considerations to be insulated from judicial review.[161]

The second situation in which statements of policy may be particularly relevant is where Congress directs an agency to implement a law in accordance with a declaration of policy. For example, in 1940, Congress included a "National Transportation Policy" in the Interstate Commerce Act.[162] The policy began: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . ."[163] At the conclusion of the policy statements, the act stated: "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."[164] In reviewing an action by the Interstate Commerce Commission in *Schaffer Transportation Company v. United States*, the Supreme Court referred to the National Transportation Policy as "the yardstick by which the correctness of the Commission's actions will be measured."[165] The Court reasoned that although the Commission "possesse[d] a 'wide range of discretionary authority'" in making the contested determination, the Commission's discretion "must be exercised in conformity with the declared policies of the Congress."[166]

The Court's focus on the National Transportation Policy in *Schaffer Transportation* can be traced to the mandatory language "shall be administered and enforced" in that policy statement.[167] A later, D.C. Circuit decision suggests that inserting mandatory language into a declaration of policy—which is normally a prefatory statement about the goals or purpose of the legislation—can raise questions as to that section's legal effect. The D.C. Circuit considered whether 1978 amendments to the declaration of policy section of the Federal Aviation Act altered the allocation of responsibility for approving new airline carriers, which at that time was divided between the Federal Aviation Administration (FAA)—charged with "safety regulation"—and the Civil Aeronautics Board (CAB)—responsible for "economic regulation."[168] The amended declaration

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[158] 28 U.S.C. § 2680(a).

[159] See CRS Report R45732, *The Federal Tort Claims Act (FTCA): A Legal Overview*, supra note 157, at 19.

[160] *See* Wiggins v. United States, 799 F.2d 962, 964 (5th Cir. 1986) (explaining that although the "Suits in Admiralty Act, passed in 1920, does not contain a specific exception of the discretionary acts of government employees from coverage as does the later enacted Federal Tort Claims Act," all but one federal circuit to consider the question had "implied a discretionary exception comparable to the exception in the [FTCA]").

[161] *See* Baldassaro v. United States, 64 F.3d 206, 211–12 (5th Cir. 1995) (reasoning that a declaration that "an efficient and adequate merchant marine composed of the best-equipped, safest, and most suitable vessels" was necessary for national security demonstrated that even discrete design decisions for vessels covered by the act "involve the weighing of competing policy considerations that the discretionary function exception protects from judicial scrutiny").

[162] Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898, 899.

[163] *Id*.

[164] *Id*.

[165] 355 U.S. 83, 87–88 (1957).

[166] *Id*. at 88 (internal citation omitted).

[167] *See id*. at 87–88 (reasoning that the "National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act" (footnote omitted)). *See also infra* ""Shall" Versus "May"."

[168] Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd., 667 F.2d 181, 182 (D.C. Cir. 1981) (quoting 49 U.S.C.

set forth factors that the CAB "*shall consider*" in evaluating new air transportation services, including the "assignment and maintenance of safety as the highest priority in air commerce."[169] Although the court ultimately concluded that "Congress did not intend . . . to alter the existing allocation of responsibility" between the FAA and the CAB, the framing of the declaration made it a key contested issue in the case.[170] As a result, the precise wording of a declaration of policy is likely more significant than its label as a "declaration."

Statements of Purpose

Congressional drafters may indicate the purpose of a particular bill in a separate section of the bill or combined with proposed congressional findings. In the example in **Figure 14**, the purpose of the legislation follows a subsection on findings.

Figure 14. Purpose

3 (b) PURPOSE.—The purpose of this Act is to promote
4 working Americans' economic opportunity by ensuring
5 that they have the full benefit of competition by amending
6 the Clayton Act to include the term "monopsony" to clar-
7 ify that an acquisition that tends to create a monopsony
8 violates the Clayton Act.

Source: Economic Freedom and Financial Security for Working People Act of 2018, H.R. 5630, 115th Cong. § 2(b) (as introduced, Apr. 26, 2018), https://www.congress.gov/115/bills/hr5630/BILLS-115hr5630ih.pdf#page=3.

As with other evidence of legislative intent, the stated purpose of an act can help a court determine whether other language in the bill should be read expansively or narrowly.[171] For example, in interpreting the Fair Credit Reporting Act, the Supreme Court construed the phrase "increase in any charge for . . . insurance" to include an unfavorable *initial* rate due to an inaccurate credit report, even though the initial rate is the first charge and not an "increase" from a prior one.[172] For the Court, this reading comported with "the ambitious objective set out in the

§§ 1371–87 (1976)).

[169] Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1706 (1978), https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg1705.pdf (emphasis added).

[170] *Air Line Pilots Ass'n Int'l*, 667 F.2d at 188.

[171] *See* Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 407, 409 (6th Cir. 2014) (declining to read a statutory term in § 230(f) of the Communications Decency Act of 1996 (CDA) "so broadly" as to "defeat the purposes of the CDA," expressed, *inter alia*, in the "policy" statements in § 230(b)); EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982) (reciting the purpose of the Age Discrimination in Employment Act as set forth in the act's Statement of Findings and Purpose, and noting that courts interpret "employee" in social welfare legislation broadly "so as to effectuate the state[d] purposes of [those laws]"); United States v. Angelilli, 660 F.2d 23, 32–33 (2d Cir. 1981) (citing congressional findings and purpose as support for the court's interpretation that a RICO enterprise includes governmental units).

[172] Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 61–63 (2007) (internal quotation marks omitted) (quoting 15 U.S.C. § 1681a(k)(1)(B)(i))).

Act's statement of purpose, which uses expansive terms to describe the adverse effects of unfair and inaccurate credit reporting and the responsibilities of consumer reporting agencies."[173]

Findings

In preparing new legislation or amendments to existing laws, Congress sometimes makes formal findings regarding the circumstances that prompted a particular piece of legislation. Congress may document these findings in a legislative record such as a conference or committee report on the bill, or it may include its findings in the bill text itself.[174] When included in a bill, the findings may appear in a separate bill section (e.g., **Figure 15**) or alongside statements of purpose.

Figure 15. Findings

1 **SEC. 2. FINDINGS.**

2 Congress finds that—

3 (1) an innocent seller should not be held re-

4 sponsible under the doctrine of product liability for

5 damages that the seller did not cause;

6 (2) as a result of product liability, sellers are

7 often brought into litigation despite the fact that

8 they had no control or input in the design, produc-

9 tion, or any other aspect of an allegedly defective

10 product, and may therefore face increased costs due

11 to the possibility or result of disproportionate dam-

12 age awards;

Source: Innocent Sellers Fairness Act, H.R. 1118, 115th Cong. § 2 (as introduced, Feb. 16, 2017), https://www.congress.gov/115/bills/hr1118/BILLS-115hr1118ih.pdf#page=2.

Like other prefatory text, congressional findings generally do not have independent legal effect or "override the plain meaning of specific provisions"[175]—regardless of whether they are included in

[173] *Id.* at 62; *see also* Sturgeon v. Frost, 139 S. Ct. 1066, 1083 (2019) (declining to adopt an agency's construction of an act's provision that, in the Court's view, was not only unsupported by the statutory text but also "would undermine [the act's] grand bargain" as reflected in "its statement of purpose").

[174] *See* Pub. Citizen v. Dep't of Justice, 491 U.S. 440, 475 (1989) (Kennedy, J., concurring in the judgment) (describing "the section of the Conference Committee Report entitled 'Findings and Purposes'" as "the most obvious place" to look to identify Congress's purpose in enacting the Federal Advisory Committee Act); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277 (1981) (referring to "Congress' express findings, set out in the [Surface Mining Control and Reclamation] Act itself").

[175] Reeves v. Astrue, 526 F.3d 732, 737 (11th Cir. 2008) (stating that the court "cannot use Congress's general statements of findings and purpose to override the plain meaning of specific provisions of the Act"); *see also* Astrue v. Ratliff, 560 U.S. 586, 589–91 (2010) (resolving a circuit split involving the same statutory question at issue in *Reeves*

the bill itself or in the legislative record.[176] But legislative findings can influence a court's perception of Congress's intended meaning when weighing competing interpretations of other provisions.[177] Detailed findings may also spell out Congress's reasons for intervening in an area that implicates states' or individuals' rights, such as laws regulating commerce or speech, discussed below.[178] In such situations, judicial deference to formal congressional findings may reflect broader concerns about the judiciary second-guessing the legislature's factual determinations in scrutinizing the challenged law.[179]

A court may look to congressional findings to evaluate whether a law falls within Congress's authority to "regulate Commerce . . . among the several States" under the Constitution's Commerce Clause.[180] The Supreme Court has interpreted that Clause to empower Congress to regulate, among other things, *intra*state economic activity that has a "substantial effect" on *inter*state commerce.[181] On occasion, the Court has concluded that Congress exceeded its Commerce Clause power by regulating noneconomic activity within the province of the states "based solely on [the activity's] aggregate effect on interstate commerce."[182] In one such decision, *United States v. Morrison*, the Supreme Court made two observations about congressional findings that demonstrate their relevance in "substantial effect[s]" cases.[183] First, the Court noted that "[w]hile Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, the existence of such findings may enable [the Court] to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect [is] visible to the

consistently with the Eleventh Circuit's interpretation).

[176] Two considerations may weigh in favor of including findings in the bill itself in some circumstances. First, when Congress includes findings in the bill text itself, they become part of the statute once the bill is enacted and may be codified in the *U.S. Code* or included in the statutory notes. Second, if a court is willing to consult legislative findings as part of its statutory interpretation analysis, it may view findings in the bill text itself as more authoritative than those that appear in the legislative history because both houses of Congress passed them. *See* City of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 440 (2002) (describing a finding that Congress included "in the Act itself" as "[c]arrying more weight" than a finding in the conference report on the bill).

[177] For example, in 2002, the Supreme Court unanimously interpreted the definition of "disability" in the Americans with Disabilities Act (ADA) to "create a demanding standard for qualifying as disabled." Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 197 (2002). Beyond "the words of the disability definition itself," the Court found support for its interpretation in the act's findings, reasoning that the number of Americans with "'one or more physical or mental disabilities'" that Congress cited "would surely have been much higher" had Congress intended "everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled." *Id.* at 196–97. In 2008 amendments to the ADA, Congress expressly rejected the Court's interpretation and adopted rules of construction for the "disability" definition. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), § 3, 122 Stat. 3553, 3554–56; *see also, e.g.*, Woolf v. Strada, 949 F.3d 89, 94 (2d Cir. 2020) (recognizing that the 2008 amendments superseded the Court's interpretation in *Toyota Motor Manufacturing*).

[178] *See* Gonzales v. Raich, 545 U.S. 1, 20 (2005) ("Findings in the introductory sections of the [Controlled Substances Act (CSA)] explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA.").

[179] *See Hodel*, 452 U.S. at 276–77 ("Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. . . . Here, the District Court properly deferred to Congress' express findings, set out in the Act itself, about the effects of surface coal mining on interstate commerce.").

[180] U.S. CONST. art. I, sec. 8, cl. 3.

[181] United States v. Darby, 312 U.S. 100, 119–20 (1941). *See generally* United States v. Lopez, 514 U.S. 549, 558–59 (1995) (setting forth the "three broad categories of activity that Congress may regulate under its commerce power": (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities that substantially affect interstate commerce").

[182] United States v. Morrison, 529 U.S. 598, 617 (2000); *see also Lopez*, 514 U.S. at 567–68 (stating the need to distinguish "between what is truly national and what is truly local").

[183] *Morrison*, 529 U.S. at 612–14.

naked eye."[184] Second, the Court cautioned that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[185]

Morrison involved a provision in the Violence Against Women Act of 1994 (VAWA) that created a cause of action for victims of gender-motivated violence.[186] The Court observed that VAWA was "supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."[187] However, the Court found the relationship between gender-motivated violence—itself "noneconomic" conduct—and interstate commerce too attenuated, concluding that Congress may not regulate violence based solely on its aggregate effects on interstate commerce because to allow such regulation would "completely obliterate the Constitution's distinction between national and local authority."[188]

Outside the Commerce Clause context, there are at least three other areas where congressional findings may come into play in constitutional challenges. The first area involves Congress's authority to "enforce" the Thirteenth, Fourteenth, and Fifteenth Amendments through "appropriate legislation."[189] For example, section 5 of the Fourteenth Amendment grants Congress the power to enforce the Amendment's due process and equal protection guarantees in the states,[190] but that legislation must be appropriately limited to remedy or deter state violations of these constitutional rights.[191] The Supreme Court has said that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one."[192] While courts generally defer to Congress's judgment about what types of measures are required, they may examine legislative findings to determine whether Congress has, in fact, found a "pattern or practice of unconstitutional [state] conduct" to support the legislation.[193] Second, in a First Amendment free speech challenge, a court may examine legislative findings to determine

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[184] *Id*. at 612 (internal quotation marks and citations omitted). *But cf.* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252 (1964) ("While the Act as adopted carried no congressional findings[,] the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. . . . [T]he voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.").

[185] *Morrison*, 529 U.S. at 614; *see also* Charles Tiefer, *After* Morrison, *Can Congress Preserve Environmental Laws from Commerce Clause Challenge?*, 30 ENVTL. L. REP. 10888, 10888 (2000) (positing that after the *Morrison* decision "congressional findings are no longer a magical panacea" for attenuated links to interstate commerce, but offering reasons why congressional findings can still play a role in justifying environmental regulations).

[186] *Morrison*, 529 U.S. at 605.

[187] *Id*. at 614.

[188] *Id*. at 615–17.

[189] See U.S. CONST. amend. XIII, § 2; id. amend. XIV, § 5; id. amend. XV, § 2; see generally CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview* 14–20, coordinated by Andrew Nolan and Kevin M. Lewis.

[190] U.S. CONST. amend. XIV, § 5.

[191] City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

[192] *Id*.

[193] *Id*. at 534; *see also* Shelby Cty. v. Holder, 570 U.S. 529, 553–54 (2013) (holding that Congress exceeded its powers under the Fifteenth Amendment in reauthorizing the coverage formula in the Voting Rights Act in 2006, reasoning that "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions," but "instead reenacted a formula based on 40-year-old facts having no logical relation to the present day"); Bd. of Trs. v. Garrett, 531 U.S. 356, 372 (2001) (stating that "Congress' failure to mention States in its legislative findings addressing discrimination in employment" in the Americans with Disabilities Act (ADA) "reflects that body's judgment that no pattern of unconstitutional state action had been documented"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (reasoning that "Congress' failure to uncover any significant pattern of unconstitutional [age] discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field").

whether the harms said to be associated with the restricted speech are documented, because a regulation of protected speech may not be based on speculative harms.[194] And third, in a due process challenge to an abortion regulation, a court may independently review legislative findings to assess whether the law runs afoul of the Court's undue burden standard.[195]

In sum, while formal legislative findings are not required, a court may refer to congressional findings in a bill or in the legislative history in evaluating the constitutionality of a law but may reach a different conclusion than the enacting Congress about whether the findings actually support the law's constitutionality.

Definitions

Among the most important features of a bill are the terms that it defines or does not define.[196] Congressional drafters generally organize defined terms in a section or subsection of the bill called "Definitions," as in **Figure 16**, rather than stating the meaning of those terms when they first appear, or each time that they appear, in the proposed law.[197] For bills that contain freestanding provisions as opposed to amendments to existing law, definitions sections typically appear in the first few sections of the bill (e.g., following short titles or general statements of purpose or intent) or toward the end of the bill (e.g., before any effective date).[198] Language preceding the definitions typically shows where those definitions apply: for example, stating if those definitions are limited to the section where they appear or if they apply wherever the defined terms appear in the act. Importantly, if a term used in an amendatory bill is not defined in that bill, it may still be defined in the statute that the bill is amending.[199]

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[194] *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 257 (2002) ("While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way."). *Cf.* Gonzales v. Raich, 545 U.S. 1, 21 (2005) ("[W]e have never required Congress to make particularized findings in order to legislate, absent a special concern such as the protection of free speech." (citing Turner Broad. Sys. v. FCC, 512 U.S. 622, 664–68 (1994) (plurality opinion)) (other internal citations omitted); *Turner Broad. Sys.*, 512 U.S. at 664 (stating that "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms," it must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way").

[195] *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020) (plurality opinion) (stating that courts must "independently . . . review the legislative findings upon which an abortion-related statute rests") (citing Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016)).

[196] *See* MIKVA ET AL., *supra* note 7, at 85 (positing that "statutory definitions, after statutory sanctions, can be the most important part of a statute").

[197] *HOLC Guide to Legislative Drafting*, *supra* note 18 (including "Definitions" in HOLC's "[g]eneral template for structuring content"); HOLC MANUAL ON DRAFTING STYLE, *supra* note 1, at 30 (stating that defined terms generally should be listed in a single section).

[198] *Compare HOLC Guide to Legislative Drafting*, *supra* note 18 (placing definitions after general and special rules but before effective date and authorization of appropriations provisions in HOLC's "[g]eneral template for structuring content"), *with* FILSON & STROKOFF, *supra* note 37, at 66 (reflecting the prescription in the Senate Office of Legislative Counsel's 1997 manual to place definitions after the findings and purposes section in single-subject legislation).

[199] *See, e.g.*, 5 U.S.C. § 105 (defining "executive agency" for purposes of the entire title, 5 U.S.C. §§ 101 et seq.).

Figure 16. Definitions Subsection

1 (b) DEFINITIONS.—For purposes of this Act, the fol-
2 lowing definitions shall apply:
3 (1) CHAIRPERSON.—The term "Chairperson"
4 means the Chairman of the Board of Governors of
5 the Federal Reserve System.
6 (2) FINANCIAL COMPANY.—The term "financial
7 company" means a company or other entity—
8 (A) that is—
9 (i) incorporated or organized under
10 the laws of the United States or any State,

Source: Financial Services Industry Stability Act of 2010, H.R. 4516, 111th Cong., § 1(b) (as introduced, Jan. 26, 2010), https://www.congress.gov/111/bills/hr4516/BILLS-111hr4516ih.pdf#page=2.

When the Bill Defines a Term Used in the Bill

When the bill has a definitions section, the terms defined in the bill carry that meaning unless otherwise noted. This is because when a court is interpreting a federal statute, it generally gives statutorily defined terms the meanings that Congress assigned to them, rather than their ordinary or customary meanings in every day speech.[200] For example, *Digital Realty Trust, Inc. v. Somers* concerned the meaning of the term "whistleblower" in the Dodd-Frank Act, and specifically, whether an employee who reported suspected securities violations to senior management, but not to the SEC, could bring a retaliation claim under the act.[201] The law defined "whistleblower" as an individual who provides "information relating to a violation of the securities laws *to the Commission*," (i.e., to the SEC).[202] But another provision prohibited retaliation against a whistleblower "because of any lawful act done by the whistleblower . . . in providing information to the Commission . . . *[or] in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002*" among other laws.[203] The court of appeals declined to apply the "narrow" statutory definition of "whistleblower"—one who reports "to the Commission"—to this provision.[204] Instead, it concluded that the statute protected an employee who made covered disclosures to *either* his employer *or* to the SEC, because Sarbanes-Oxley required internal reporting before SEC reporting and because a whistleblower was "not likely to report in both

[200] *See* Burgess v. United States, 553 U.S. 124, 129–30 (2008) ("'Statutory definitions control the meaning of statutory words . . . in the usual case.'" (quoting Lawson v. Suwannee Fruit & S.S. Co., 336 U.S. 198, 201 (1949))).

[201] 138 S. Ct. 767, 776 (2018) (analyzing the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)).

[202] *Id.* at 774 (internal quotation marks omitted) (emphasis in *Digital Realty*) (quoting 15 U.S.C. § 78u-6(a)(6)).

[203] 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added).

[204] Somers v. Digit. Realty Tr., Inc., 850 F.3d 1045, 1049–50 (9th Cir. 2017), *rev'd*, 138 S. Ct. 767.

ways."[205] But the Supreme Court reversed, stating that "'[w]hen a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning."[206] It reasoned that the statutory definition of whistleblower was "unequivocal" and that Congress's limitation of the anti-retaliation remedy to "whistleblowers" meant that "an individual who falls outside [of that definition] is ineligible to seek redress . . . regardless of the conduct in which that individual engages."[207] In other words, "[c]ourts are not at liberty to dispense with" the specific meaning Congress assigned to the term.[208]

When the Bill Does Not Define a Term Used in the Bill

If a term used in a bill is not defined in that bill, the term may nevertheless be defined in the underlying statute that the bill is amending. If an existing statutory definition applies to the division that the bill is adding or amending, then that definition likely supplies the meaning of the term as used in the bill. For example, 5 U.S.C. § 551 defines terms like "agency" and "rule" "*[f]or the purpose of this subchapter*"—referring to §§ 551–559, otherwise known as the Administrative Procedure Act (APA).[209] If a bill used these terms in an amendment to the APA, their § 551 definitions would apply unless the bill specified otherwise. Likewise, because the APA is a subchapter, and because a subchapter is a division of a title, any definitions that apply "*[f]or the purpose of this title*," such as the definition of "government corporation" in 5 U.S.C. § 103, would presumptively apply to the bill's APA amendment as well.[210]

In *Digital Realty*, discussed above, the definition of "whistleblower" was in the same section—15 U.S.C. § 78u-6—as the contested whistleblower retaliation provision.[211] For the Court, it did not matter if the retaliation provision, viewed in isolation, suggested that "whistleblower" carried a broader meaning than the explicit definition, because the section's text left "no doubt as to the definition's reach" by "instruct[ing] that the 'definitio[n] shall apply' '[i]n this section,' that is, throughout § 78u-6."[212]

In the same way that a court gives effect to the definition that Congress chose, a court may heed any explicit limitation on where a definition applies (e.g., to a particular section or subdivision) rather than export that definition to other parts of the law. In a 2002 decision, the Sixth Circuit found "[n]o statutory basis" for applying the definition of "bank" in § 581 of the Internal Revenue Code to a provision in § 956 of the Code.[213] The court reasoned that "[i]n its first sentence, § 581 expressly states that its definition of 'bank' is 'for purposes of sections 582 and 584.'"[214] In the court's view, it was "clear" from that restriction that "Congress was not providing a general

[205] *Id*.

[206] *Digit. Realty Tr., Inc.*, 138 S. Ct. at 776–77 (quoting Burgess v. United States, 553 U.S. 124, 130 (2008)).

[207] *Id*. at 777.

[208] *Id*.

[209] 5 U.S.C. § 551 (emphasis added); *see generally* Nat'l Archives & Records Admin., *Federal Register: Administrative Procedure Act (5 U.S.C. Subchapter II)*, https://www.archives.gov/federal-register/laws/administrative-procedure.

[210] 5 U.S.C. § 103 (emphasis added); *see also* Off. of Law Revision Counsel, *United States Code: 5 U.S.C. § 103*, uscode.house.gov (last visited July 30, 2020) (stating in the "Historical and Revisions Notes" for this section that § 103 was "supplied to avoid the necessity for defining 'Government corporation' and 'Government controlled corporation' each time it is used in this title").

[211] *Digit. Realty Tr., Inc.*, 138 S. Ct. at 777.

[212] *Id*. (quoting 15 U.S.C. § 78u-6(a) with alterations).

[213] The Limited, Inc. v. Commissioner, 286 F.3d 324, 337 (6th Cir. 2002).

[214] *Id*. (quoting 26 U.S.C. § 581).

definition of 'bank,' but rather a specialized definition that applied only to certain statutory sections."[215]

In limited circumstances, a court will draw on interpretations of a similar definition in another statute to ascertain the scope of a defined term. For example, in *BNSF Railway Co. v. Loos*, the Supreme Court considered whether a damages award for lost wages stemming from a workplace injury constituted taxable "compensation" under the Railroad Retirement Tax Act (RRTA).[216] The RRTA defined "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee," excepting certain forms of sick pay and disability pay.[217] The Supreme Court observed that the RRTA's definition of "compensation" was "materially indistinguishable" from the definition of taxable "wages" used to fund Social Security benefits in the Federal Insurance Contributions Act (FICA).[218] FICA defined wages "to include 'remuneration' for 'any service, of whatever nature, performed . . . by an employee.'"[219] Because of the "textual similarity" between these definitions, the Court interpreted "compensation" by drawing on its prior decisions on the meaning of "wages," in which the Court construed the term broadly to include back pay and severance pay (i.e., pay for periods of absence).[220] The Court thus concluded that damages for lost wages likewise qualified as taxable "compensation" under the RRTA.[221]

Although far less common, some terms are not defined in a particular statute but have default definitions in what is often called "the Dictionary Act,"[222] which refers to the first eight sections of the *U.S. Code*.[223] In addition to setting out some general rules of construction, the Dictionary Act defines a handful of widely used terms in federal statutes.[224] For example, it defines the terms "person" and "whoever" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," and the term "writing" to include "printing and typewriting and reproductions of visual symbols by photographing . . . or otherwise."[225]

[215] *Id*.

[216] Burlington N. Santa Fe Ry. v. Loos, 139 S. Ct. 893, 897 (2019).

[217] *Id*. at 898 (quoting 26 U.S.C. § 3231(e)(1)).

[218] *Id*. at 899.

[219] *Id*. (quoting 26 U.S.C. § 3121).

[220] *Id*.

[221] *Id*. at 900.

[222] *E.g.*, United States v. Windsor, 570 U.S. 744, 752 (2013).

[223] 1 U.S.C. §§ 1–8.

[224] *Id*.

[225] *Id*. § 1.

Terms Defined in the Dictionary Act[226]

- Association
- Child
- Company
- County
- Human being
- Individual
- Insane
- Insane person
- Marriage[227]
- Oath
- Officer
- Person[228]
- Products of American fisheries
- Signature
- Spouse[229]
- Subscription
- Sworn
- Vehicle
- Vessel
- Whoever
- Writing

Because the Dictionary Act supplies *default* definitions, a question of statutory interpretation can arise as to whether a Dictionary Act definition applies to a particular law. For example, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court considered whether the Religious Freedom Restoration Act (RFRA), which "applies to 'a person's' exercise of religion," applied to for-profit closely held corporations.[230] Because RFRA did not define the term "person," the Court looked to section 1 of the Dictionary Act, which defines person to include "corporations."[231] But section 1's definitions apply in "determining the meaning of any Act of Congress, *unless the context indicates otherwise*."[232] While acknowledging that context can override the default definition, the Justices in the majority saw "nothing in RFRA that suggest[ed] a congressional intent to depart from the Dictionary Act definition."[233]

When the Term Does Not Have an Applicable Statutory Definition

If a term used in a bill is *not* defined—whether in the bill itself, in the underlying statute that the bill is amending, or in the Dictionary Act—a court generally gives the term its "ordinary meaning" when Congress enacted the law.[234] A notable exception is when a term carries a specific meaning, as explained below.

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[226] The terms in this figure are listed in alphabetical order. Please refer to 1 U.S.C. §§ 1–8 for their definitions and the rules governing where these terms apply.

[227] *But see Windsor*, 570 U.S. at 752, 774–75 (holding that section 3 of the Defense of Marriage Act (DOMA), which "provide[d] a federal definition of 'marriage' and 'spouse'" that did not extend to same-sex marriages, unconstitutionally deprived married, same-sex couples of liberty and equal protection under the Fifth Amendment).

[228] *See* 1 U.S.C. § 1 (defining person); *id*. § 8 (including born-alive infants).

[229] *See supra* note 227.

[230] 573 U.S. 682, 707 (2014) (quoting 42 U.S.C. § 2000bb-1(a), (b)).

[231] *Id*. at 707–08.

[232] *Id*. at 707 (quoting 1 U.S.C. § 1) (emphasis added).

[233] *Id*. at 708. The majority rejected the context-based argument of two of the dissenting Justices that only natural persons can "exercise . . . religion," in part because the Court had previously entertained free exercise claims by nonprofit corporations. *Id*. at 709–15.

[234] *See* Kouichi Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."); *e.g.*, Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1759 (2018) ("Because the Bankruptcy Code does not define the words 'statement,' 'financial condition,' or 'respecting,' we look to their ordinary meanings."). Although courts often consider an undefined term's ordinary meaning, as with all questions of statutory interpretation, the context in which the term is used may suggest a broader or narrower construction. *See, e.g.*, Norton v. S. Utah Wilderness All., 542 U.S. 55, 62–63 (2004) (interpreting "failure to act" as used in the Administrative Procedure Act's definition of "agency action" as "a failure to take one of the agency actions (including their equivalents)" previously referenced in the "agency action" definition, in part because "the interpretive

Ordinary Meaning

Ordinary meaning refers to how a term was commonly understood at the time the law was enacted.[235] For example, Title VII of the Civil Rights Act of 1964 prohibited covered employers from firing or otherwise "discriminat[ing] against" an employee "because of such individual's . . . sex."[236] When a dispute about the scope of this protection reached the Supreme Court in 2019, the Court analyzed the meanings of "discriminate against," "because of," and "sex" as those terms were understood in 1964.[237] Justice Neil Gorsuch, writing for the Court, explained the reasons for determining a statute's "ordinary public meaning" at the time of enactment:

> After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.[238]

To discern the ordinary meaning of terms, the Court often consults dictionaries.[239] For example, the question in *Encino Motorcars, LLC v. Navarro* was whether a service advisor at a car dealership—a type of customer service representative[240]—is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" under an overtime-pay exemption that Congress included in the applicable federal labor law in 1974.[241] To determine the meaning of the terms "salesman" and "servicing," the Court consulted dictionaries from around the time those terms were added to the law.[242] The Court reasoned that a "service advisor is obviously a 'salesman'" because the "ordinary meaning of 'salesman' is someone who sells goods or services" and service advisors "do precisely that."[243] The Court also reasoned that service advisors are "primarily engaged" in "servicing automobiles" under two dictionary definitions of the word "servicing"—"the action of maintaining or repairing a motor vehicle" or "[t]he action of providing a service"—because, among their other job responsibilities, they interact with

canon of *ejusdem generis* would attribute to the last item ('failure to act') the same characteristic of discreteness shared by all the preceding items"); *see also* 5 U.S.C. § 551(13) (defining "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act").

[235] MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994) (stating that "the most relevant time for determining a statutory term's meaning" is when the statute "became law").

[236] 42 U.S.C. § 2000e-2(a)(1).

[237] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1739–41 (2020). While the meaning of "sex" was a key contested issue in the lower courts, the parties and the Court assumed, for the sake of argument, that "sex" referred "only to biological distinctions between male and female." *Id.* at 1739.

[238] *Id.* at 1738.

[239] *See, e.g.*, *Kouichi Taniguchi*, 566 U.S. at 562, 566–69 (giving the undefined term "interpreter" in the Court Interpreters Act its "ordinary or common meaning" based on the Court's survey of dictionaries in use at the time of enactment).

[240] *See generally Learn About Being a Service Advisor*, INDEED.COM, https://www.indeed.com/career-advice/careers/what-does-a-service-advisor-do (last visited July 17, 2020).

[241] Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1138 (2018) (quoting 29 U.S.C. § 213(b)(10)(A)).

[242] *Id.* at 1140 (citing a 1989 edition of the *Oxford English Dictionary* and a 1966 edition of the *Random House Dictionary of the English Language*).

[243] *Id.*

customers, recommend repair and maintenance services, and sell new accessories or replacement parts.[244]

Specific Meaning

There are, however, some circumstances in which an undefined term has acquired a special meaning that may differ from its ordinary meaning. This may occur if:

- a word or phrase is a term of art used in a particular field;[245]
- the term has a "well-settled meaning" at common law;[246] or
- the Supreme Court has authoritatively construed the term in a given way.[247]

When a term has a settled meaning or a specialized meaning in the field that the legislation covers, a court may presume that Congress intended to adopt that meaning.[248] For example, in *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, the Court considered a federal law barring a person from obtaining a patent for an invention that was "on sale" before the person filed for the patent.[249] The Court was asked to decide whether "on sale" meant that the invention had to be available to the public for purchase, or whether a sale to a "third party who [was] contractually obligated to keep the invention confidential" sufficed.[250] The Court began by noting that "Congress enacted [the current wording of the provision] in 2011 against the backdrop of a substantial body of law interpreting [that section's] on-sale bar."[251] In particular, in 1998, the Court had determined that a prior version of the on-sale bar applied when the product was "the subject of a commercial offer for sale" and "ready for patenting" more than a year before the inventor filed for a patent.[252] While the Court acknowledged that it had not precisely addressed the question of public access, it stated that "our precedents suggest that a sale or offer of sale need not make an invention available to the public"—a suggestion "made explicit" in other, appellate

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[244] *Id.* (internal quotation marks and citations omitted).

[245] *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 297 (2006) (declining to interpret "costs" according to its "ordinary usage" as expenses incurred because "'costs' is a term of art that generally does not include expert fees" (internal quotation marks and citation omitted)); Utah v. Evans, 536 U.S. 452, 467 (2002) (interpreting the statutory phrase "the statistical method known as 'sampling,'" and reasoning that "the words 'known as' and the quotation marks that surround 'sampling'" suggested that "sampling" was "a term of art with a technical meaning" in the field of statistics).

[246] Universal Health Servs. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1999 (2016) (reasoning that "the term 'fraudulent' is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud" and holding that the False Claims Act's reference to "'false or fraudulent claims' include[s] more than just claims containing express falsehoods" because "common-law fraud has long encompassed certain misrepresentations by omission"); *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989) (noting that the term "scope of employment" is a "widely used term of art in agency law," referring to "common-law agency doctrine"). *See generally Common Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defined, *inter alia*, as the "body of law derived from judicial decisions, rather than from statutes or constitutions").

[247] *E.g.*, Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc., 139 S. Ct. 628 (2019).

[248] *See Cmty. for Creative Non-Violence*, 490 U.S. at 739 (stating, in a case concerning the meaning of the term "employee" as used in the Copyright Act of 1976, the "well established" principle that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms" (internal quotation marks omitted)).

[249] *Helsinn Healthcare S.A.*, 139 S. Ct. at 630 (quoting 35 U.S.C. § 102(a)(1)).

[250] *Id.*

[251] *Id.* at 633.

[252] *Id.* (quoting Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 67–68 (1998)).

court decisions.[253] Thus, even though in some contexts "on sale" denotes an item's availability for the public to purchase, because those words had "acquired a well-settled judicial interpretation" since 1998, the Court "presume[d]" that when Congress reenacted the on-sale bar in 2011 using the same "on sale" language, it intended to adopt "the earlier judicial construction."[254]

Substantive Provisions

The substantive content in a bill—the provisions that have "the purpose and effect of altering the legal rights, duties, and relations of persons"[255] and the potential to bind third parties—can take different forms.[256] The following is a non-exhaustive list of ways to characterize and categorize a bill's substantive provisions:

1. requirements (e.g., mandating that government officials or private entities comply with certain standards);
2. prohibitions (e.g., banning or restricting certain conduct);
3. delegations (e.g., granting an agency rulemaking authority);
4. enforcement mechanisms (e.g., specifying civil, criminal, or administrative penalties for violations of the statute, who can bring claims, and in what forum); and
5. oversight provisions (e.g., requiring an agency to study an issue or submit an annual report to Congress).

Substantive provisions may implicate a host of legal considerations, such as compliance with constitutional standards,[257] the availability of funding (i.e., appropriations),[258] or the retroactivity of laws creating liability or penalties.[259] They may also implicate questions of timing and procedure, which may or may not be addressed in the applicable legislation.[260]

Because the topics of legislation vary widely—each with their own set of unique legal and policy considerations—this section highlights a few background principles that may help to inform a

[253] *Id.* (observing that the "Federal Circuit—which has 'exclusive jurisdiction' over patent appeals" had "long held that 'secret sales' can invalidate a patent." (citations omitted)).

[254] *Id.* at 633–34. The Court reached this conclusion even though Congress added "a new catchall clause ('or otherwise available to the public')," reasoning that the addition of this language was "simply not enough of a change for [the Court] to conclude that Congress intended to alter the meaning of the reenacted term 'on sale.'" *Id.* at 634.

[255] INS v. Chadha, 462 U.S. 919, 952 (1983) (describing what makes a congressional action "legislative" in nature and thus subject to the Constitution's requirements of bicameralism and presentment).

[256] *See* FILSON & STROKOFF, *supra* note 37, at 140 (describing "the central part" of a bill as "the part that actually carries out the sponsor's basic policy"); *id.* at 141 (stating that the "key operating provisions" of a bill "can take many forms because what they do and how they do it will depend upon the nature and scope of the bill's principal objective and upon the kinds of things that have to be done in order to achieve it").

[257] *See, e.g.*, CRS Legal Sidebar LSB10507, *Supreme Court Rules CFPB Structure Unconstitutional: Implications for Congress*, by Jacob D. Shelly.

[258] See generally CRS Report RS20371, *Overview of the Authorization-Appropriations Process*, by Bill Heniff Jr.; CRS Report R42098, *Authorization of Appropriations: Procedural and Legal Issues*, coordinated by Edward C. Liu.

[259] See generally CRS In Focus IF11293, *Retroactive Legislation: A Primer for Congress*, by Joanna R. Lampe.

[260] See CRS Report R45336, *Agency Delay: Congressional and Judicial Means to Expedite Agency Rulemaking* 4, 6, by Kevin J. Hickey (discussing the tools Congress may use to encourage timely agency action, including "nonbinding time frames," "hard statutory deadline[s]," and deadlines backed by statutory penalties); CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review* 4, by Todd Garvey ("In providing rulemaking authority to an agency, Congress may direct the agency to follow specific procedural requirements in addition to those required by the informal rulemaking procedures of the [Administrative Procedure Act].").

reader's review of substantive bill provisions. It begins by identifying how substantive provisions are typically organized: as general rules and exceptions. It then discusses legal principles related to the creation of rights and remedies.

General Rules and Exceptions

Many times, substantive provisions are divided into general rules and exceptions.[261] Often, but not always,[262] the exceptions are listed directly below the general rule that they modify, as in the example in **Figure 17**. Headings such as "Exceptions" or "Exemptions," or language such as "except as provided in," may alert the reader to an exception or exclusion.[263] Congressional drafters may also include broader limitations on a bill's scope in a section entitled "Applicability."[264] In a similar vein, provisos—typically introduced with "provided that"—may alert the reader to an exception, a condition, or a special or supplemental rule, depending on the context.[265] Attention to each provision is important because some exceptions or limitations have their own exceptions, as shown in **Figure 18**.

[261] *See HOLC Guide to Legislative Drafting*, *supra* note 18 (describing the office's "general template for structuring content" in a bill, beginning with the "general rule," followed by any "exceptions" or "special rules"). Although HOLC distinguishes between *exceptions* ("the persons or things to which the [general rule] does not apply") and *special rules* ("the persons or things to which the [general rule] applies in a different way or for which there is a different [rule]"), this report refers to these provisions collectively as *exceptions* for simplicity.

[262] *See, e.g.*, Pain-Capable Unborn Child Protection Act, S. 1922, 115th Cong. § 3(a) (as introduced, Oct. 5, 2017), https://www.congress.gov/115/bills/s1922/BILLS-115s1922is.pdf (including in proposed § 1532(b)(2)(I), a subparagraph of "additional exceptions and requirements" applicable to certain other subparagraphs).

[263] The terms "exception" and "exemption" are generally synonymous and are often used interchangeably. *See Exemption*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "exemption" as "[f]reedom from a duty, liability, or other requirement; an exception"); *Exception*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "statutory exception" as a "provision in a statute exempting certain persons or conduct from the statute's operation"); 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:11 (7th ed. 2019) ("A true statutory exception exists only to exempt something which would otherwise be covered by an act."). But one or the other term may have gained prominence in certain contexts. *See, e.g.*, 3A SUTHERLAND STATUTORY CONSTRUCTION § 66:9 (8th ed. 2019) ("Exemptions from taxation have an ancient history, as old as taxation itself.").

[264] *See, e.g.*, **Figure 18**.

[265] *See Proviso*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating that "[i]n drafting," a proviso is "a provision that begins with the words *provided that* and supplies a condition, exception, or addition"); 1A SUTHERLAND STATUTORY CONSTRUCTION § 20:22 (7th ed. 2019) (cautioning that "provided" can "either introduce a condition or exception, and be synonymous with 'if,' or it can be used as a conjunction meaning 'and,'" and positing that "the word 'provided' has so frequently been used as a conjunctive to add amendments, particularly those made on the floor of the House during the passage of the act, that there is no assurance a court can determine whether the legislative intent was to create a limitation on the general language of the act or to add independent and supplementary regulation").

Figure 17. Exceptions to a General Rule

1 **SEC. 502. SENTENCE OF PROBATION.**

2 Subsection (a) of section 3561 of title 18, United
3 States Code, is amended to read as follows:

4 "(a) IN GENERAL.—

5 "(1) PROBATION GENERALLY AVAILABLE.—Ex-
6 cept as provided in paragraph (2), a defendant who
7 has been found guilty of an offense may be sen-
8 tenced to probation.

9 "(2) GENERAL EXCEPTIONS.—A defendant may
10 not be sentenced to probation if—

11 "(A) the offense is a Class A or Class B
12 felony and the defendant is an individual;

13 "(B) the offense is an offense for which
14 probation has been expressly precluded; or

15 "(C) the defendant is sentenced at the
16 same time to a term of imprisonment for the
17 same or a different offense that is not a petty
18 offense.

Source: SAFE Justice Act, H.R. 4261, 115th Cong., § 502 (as introduced, Nov. 6, 2017), https://www.congress.gov/115/bills/hr4261/BILLS-115hr4261ih.pdf#page=77.

Figure 18. Exceptions to Exceptions

4 **SEC. 2. NUISANCE DUST.**
5 Part A of title I of the Clean Air Act (42 U.S.C. 7401
6 et seq.) is amended by adding at the end the following:
7 **"SEC. 132. REGULATION OF NUISANCE DUST PRIMARILY BY**
8 **STATE, TRIBAL, AND LOCAL GOVERNMENTS.**
9 "(a) DEFINITION OF NUISANCE DUST.—In this sec-
10 tion, the term 'nuisance dust' means particulate matter—
11 "(1) generated from natural sources, unpaved
12 roads, agricultural activities, earth moving, or other
13 activities typically conducted in rural areas; or
14 "(2) consisting primarily of soil, windblown
15 dust, or other natural or biological materials, or
16 some combination of those materials.
17 "(b) APPLICABILITY.—Except as provided in sub-
Exclusion → 18 section (c), this Act does not apply to, and references in
19 this Act to particulate matter are deemed to exclude, nui-
20 sance dust.
Exception to Exclusion → 21 "(c) EXCEPTION.—Subsection (b) does not apply
22 with respect to any geographical area in which nuisance
23 dust is not regulated under State, tribal, or local law to
24 the extent that the Administrator finds that—

Source: Farm Dust Regulation Prevention Act of 2011, S. 1528, 112th Cong., § 2 (as introduced, Sept. 8, 2011), https://www.congress.gov/112/bills/s1528/BILLS-112s1528is.pdf#page=2.

While, at times, the Supreme Court has concluded that certain statutory exceptions should be narrowly construed, a court normally has "no license to give [statutory] exemption[s] anything but a fair reading."[266] As with other questions of statutory interpretation, that reading depends on the exception's text, read in the context of the surrounding provisions and the legislation as a

[266] Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) (quoting Encino Motorcars LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018)); *see also* Milner v. Dep't of the Navy, 562 U.S. 562, 571–72 (2011) (observing that the Court has "often noted" the Freedom of Information Act's (FOIA's) "'goal of broad disclosure' and insisted that the exemptions be 'given a narrow compass,'" but construing its second exemption with the "'narrower reach' Congress intended through the simple device of confining the provision's meaning to its words" (internal citations omitted)).

whole.[267] This analysis may be informed by applicable canons of construction,[268] or the purpose of the statute as garnered from the statutory text or legislative history.[269] Although the Roberts Court has cautioned against elevating statements of statutory purpose over an exception's text,[270] the Court has sometimes declined to give broad effect to the literal language of an exception if doing so would "contravene the statutory design."[271]

How broadly a court interprets an exception can also be informed by the interplay between the exception and the general rule. Where "a general statement of policy is qualified by an exception," the Supreme Court "usually read[s] the exception narrowly in order to preserve the primary operation of the provision."[272] This is not to say that a court will give all exceptions their narrowest, plausible reading; only that a court may hesitate to read an exception in a way that "swallows" the general rule.[273]

Rights, Remedies, and Enforcement

In practice, a requirement may not compel, and a prohibition may not deter, the specified conduct without an enforcement mechanism to promote compliance.[274] Sometimes Congress uses its oversight powers to assess compliance, such as when it asks an agency to report back to Congress on an issue that it has entrusted to agency implementation.[275] In other situations, there are established statutory frameworks that provide remedies for aggrieved parties. For example, if a

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[267] *See, e.g.*, Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018) (reasoning that because the Fair Labor Standards Act gave "no 'textual indication' that its exemptions should be construed narrowly, 'there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation'" (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 363 (2012))); *Milner*, 562 U.S. at 569 (explaining, in reference to FOIA, that the Court's "consideration of [an exemption's] scope starts with its text").

[268] *See, e.g.*, Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 50–51 (2008) (concluding, based on the "federalism canon," that the Court must construe the Bankruptcy Code's stamp-tax exemption "narrowly," to avoid "'recogniz[ing] an exemption from state taxation that Congress has not clearly expressed'" (emphasis removed) (quoting Cal. State Bd. of Equalization v. Sierra Summit, 490 U.S. 844, 851–52 (1989))).

[269] *See, e.g.*, Dolan v. U.S. Postal Serv., 546 U.S. 481, 492 (2006) (reasoning that "'unduly generous interpretations of the exceptions [in the Federal Tort Claims Act] run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language'" (internal citations omitted).

[270] *See, e.g.*, *Food Mktg. Inst.*, 139 S. Ct. at 2366 ("[J]ust as we cannot properly *expand* [FOIA's fourth exemption] beyond what its terms permit, we cannot arbitrarily *constrict* it either by adding limitations found nowhere in its terms." (internal citation omitted) (quoting *Encino Motorcars, LLC*, 138 S. Ct. at 1142)).

[271] *See, e.g.*, Maracich v. Spears, 570 U.S. 48, 59–61 (2013) (acknowledging that an exception in the Driver's Privacy Protection Act of 1994 [DPPA] allowing the disclosure of information "'for use in connection with any civil, criminal, administrative, or arbitral proceeding'" was "susceptible to a broad interpretation" that included attorney solicitation, but reasoning that if the exception "were read to permit disclosure of personal information whenever any connection between the protected information and a potential legal dispute could be shown, it would undermine in a substantial way the DPPA's purpose of protecting an individual's right to privacy in his or her motor vehicle records").

[272] Comm'r v. Clark, 489 U.S. 726, 739 (1989). *But see* City of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 440 (2002) (reasoning that a "congressional decision to enact both a general policy that furthers a particular goal and a specific exception that might tend against that goal does not invariably call for the narrowest possible construction of the exception," particularly where the rule and the exception "do not necessarily conflict").

[273] Knight v. Comm'r, 552 U.S. 181, 191 (2008).

[274] *See* H. OFF. OF LEG. COUNSEL, INTRODUCTION TO LEGISLATIVE DRAFTING 6 (2019), https://legcounsel.house.gov/sites/legcounsel.house.gov/files/documents/intro_to_drafting.pdf (identifying "[q]uestions of enforcement" among the "key questions [that] should be answered to produce a draft that accomplishes the intended policy and avoids unintended consequences").

[275] *See generally* CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Christopher M. Davis, Walter J. Oleszek, and Ben Wilhelm; CRS In Focus IF10015, *Congressional Oversight and Investigations*, by Todd Garvey and Walter J. Oleszek.

bill authorizes an agency to adopt rules to implement its requirements, an entity affected by that agency's rulemaking may be able to challenge the rule as violating the Administrative Procedure Act (APA) if the rule exceeded the agency's authority or was "arbitrary and capricious."[276]

Where an existing remedy or enforcement regime does not apply, Congress may need to specify the enforcement mechanism in the bill itself.[277] For example, if Congress prohibits a private party from engaging in certain conduct, the prohibition, while still a law, may not achieve its intended purpose without an administrative, civil, or criminal penalty to hold the private party accountable.[278] Subject to certain constitutional limitations,[279] this penalty can take many forms, including the termination of federal funding (in the case of funding recipients), civil money damages, or criminal fines or imprisonment.[280] The bill may authorize the government or private parties to initiate a civil cause of action to sue for relief.[281] Or it may require a private party to "exhaust" the party's claim before a federal agency,[282] sometimes specifying which courts have jurisdiction to hear appeals from adverse agency decisions.[283] Whether the remedy is exclusive, or in addition to state law remedies, may be addressed in a preemption clause, discussed in the next section.[284]

Whether a bill creates a private right of action (i.e., allowing an aggrieved individual or entity, as opposed to the government, to bring suit), depends primarily on the bill's language. A bill written for the benefit or protection of certain individuals or entities—even language that ostensibly creates rights for those persons—may not help the intended beneficiaries without an explicit remedy.[285] This is because, "[l]ike substantive federal law itself, private rights of action to enforce

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[276] *See generally* CRS In Focus IF10003, *An Overview of Federal Regulations and the Rulemaking Process*, by Maeve P. Carey; CRS Legal Sidebar LSB10497, *Supreme Court: DACA Rescission Violated the APA* 3, by Ben Harrington ("The APA provides that agency actions are unlawful if they are 'arbitrary and capricious'—a standard that requires federal agencies to provide satisfactory explanations for their decisions, including decisions to change existing policies.").

[277] *See* H. OFF. OF LEG. COUNSEL, INTRODUCTION TO LEGISLATIVE DRAFTING, *supra* note 274, at 6.

[278] *See id.* at 6 (encouraging drafters to ask whether "people [will] be encouraged to follow the policy through incentives or punished for violating it (carrots versus sticks)").

[279] *See, e.g.*, CRS In Focus IF11293, *Retroactive Legislation: A Primer for Congress*, by Joanna R. Lampe.

[280] *See* H. OFF. OF LEG. COUNSEL, INTRODUCTION TO LEGISLATIVE DRAFTING, *supra* note 274, at 6 (encouraging drafters to ask whether any specified penalties should be criminal or civil).

[281] *See* Stokes v. Sw. Airlines, 887 F.3d 199, 201 (5th Cir. 2018) ("Often, Congress expressly provides for private civil-suit enforcement. Other times, however, Congress specifies only criminal-law enforcement, or leaves civil enforcement in the hands of administrative agencies. Courts are bound to follow Congress's choices in this arena, and bound to ascertain those choices through the tools of statutory interpretation.").

[282] *See, e.g.*, Darby v. Cisneros, 509 U.S. 137, 147 (1993) (stating that "Section 10(c) [of the APA] explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule"); Patsy v. Bd. of Regents, 457 U.S. 496, 502 n.4 (1982) ("Of course, exhaustion is required where Congress provides that certain administrative remedies shall be exclusive. Even where the statutory requirement of exhaustion is not explicit, courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme. In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress." (internal citation omitted)).

[283] *See, e.g.*, Rochester v. Bond, 603 F.2d 927, 931, 934, 939 (D.C. Cir. 1979) (holding that "§ 402 of the Communications Act and § 1006 of the Aviation Act . . . prescribed the exclusive mode of judicial review"—an appeal to a federal court of appeals—and that the plaintiffs, who sought review in federal *district* court, sued in the "'wrong' court").

[284] *See infra* "Preemption Clauses."

[285] *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) ("[E]ven where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to

federal law must be created by Congress."[286] While the Supreme Court has in the past recognized "implied" rights of action "under certain limited circumstances,"[287] more modern case law has instructed courts to "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."[288] Accordingly, if a bill does not expressly authorize private parties to sue to enforce its provisions, a court is unlikely to conclude that the bill implicitly creates a private cause of action.[289]

Preemption Clauses

Under our system of dual sovereignty, governance is a responsibility shared by the federal government and the states.[290] Accordingly, when a federal bill seeks to regulate private entities or individuals, questions may arise as to how the regulation interacts with state law. For example, would the bill set a regulatory baseline or "floor" that states could supplement with their own laws? Would it establish a regulatory "floor" and "ceiling" or displace state law entirely?[291] Would the bill allow states to mirror the federal regulation as long as their laws are co-extensive with the federal one?[292]

The doctrine of federal preemption, which derives from the Supremacy Clause of the U.S. Constitution,[293] provides that a state law that conflicts with a federal law "must yield" to the federal law.[294] Federal preemption can occur in two main ways: (1) a federal law can *expressly* preempt a state law through explicit statutory language—referred to in this report as a preemption clause (e.g., **Figure 19**); or (2) a federal law can *impliedly* preempt a state law as reflected in the statute's text, structure, or purpose.[295]

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create not just a private *right* but also a private *remedy*.'" (quoting Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (with emphasis added)); Cannon v. Univ. of Chi., 441 U.S. 677, 688 (1979) ("[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.").

[286] Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

[287] *Cannon*, 441 U.S. at 717; *see also Alexander*, 532 U.S. at 287 (explaining that at one time, the Supreme Court believed that courts had a duty to "'provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute," but has since "sworn off the habit of venturing beyond Congress's intent" (quoting J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964))).

[288] *Alexander*, 532 U.S. at 286; *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017) ("If the statute does not itself so provide, a private cause of action will not be created through judicial mandate.").

[289] *Cf. Alexander*, 532 U.S. at 291 (finding "no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations" promulgated under the statute).

[290] *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 286–87 (1981).

[291] *See* CRS Report R45825, *Federal Preemption: A Legal Primer* 26, by Jay B. Sykes and Nicole Vanatko, by Jay B. Sykes and Nicole Vanatko.

[292] *See id.* at 12.

[293] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[294] Felder v. Casey, 487 U.S. 131, 138 (1988) (internal quotation marks and citation omitted). For brevity, this section refers to state laws, but the same preemption principles generally apply to local laws. *See* Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) ("[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.").

[295] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (plurality opinion) ("Pre-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977))); *see also* Murphy v. NCAA, 138 S. Ct. 1461, 1480 (2018) (stating that preemption operates the same way whether express

Figure 19. Preemption Clause

"(d) PREEMPTION.—

"(1) IN GENERAL.—This section preempts the laws of a State or any political subdivision of a State to the extent that such laws are inconsistent with this section, unless such laws provide greater protection from liability.

"(2) VOLUNTEER PROTECTION ACT.—Protections afforded by this section are in addition to those provided by the Volunteer Protection Act of 1997.

Source: Good Samaritan Health Professionals Act of 2016, S. 3101, 114th Cong. § 2(a) (as introduced, Jun. 27, 2016), https://www.congress.gov/114/bills/s3101/BILLS-114s3101is.pdf#page=3.

Judicial interpretations of preemption provisions largely depend on the precise language used and the overall context of the relevant statutory scheme.[296] Even so, some general principles can be discerned from the relevant case law.[297] First, the reach of an express preemption clause often depends on the terms used to describe the relationship between the federal law and the state law.[298] For example, a court may construe a preemption clause providing that a federal statute supersedes state laws "related to" the act's requirements or prohibitions as having broader preemptive effect than one stating that a federal statute "covering" the subject matter of a state law displaces the state law.[299] Moreover, terms that might be used interchangeably in common

or implied).

[296] *See, e.g.*, Altria Grp., Inc. v. Good, 555 U.S. 70, 80 (2008) (reasoning that "[a]lthough it is clear that fidelity to the [Federal Cigarette Labeling and Advertising] Act's purposes does not demand the pre-emption of state fraud rules, the principal question that we must decide is whether the text of § 1334(b) nevertheless requires that result"); Ky. Ass'n of Health Plans v. Miller, 538 U.S. 329, 339–40 (2003) (stating that the Court's prior "use of the McCarran-Ferguson [Act] case law in the ERISA context has misdirected attention, failed to provide clear guidance to lower federal courts, and . . . added little to the relevant [preemption] analysis," which, in the Court's view, was "unsurprising, since the statutory language of [ERISA] § 1144(b)(2)(A) differs substantially from that of the McCarran-Ferguson Act").

[297] For an in-depth analysis of terminology commonly used in express preemption clauses and savings clauses, see CRS Report R45825, *Federal Preemption: A Legal Primer*, *supra* note 291, at 6–13.

[298] *See, e.g.*, Kansas v. Garcia, 140 S. Ct. 791, 802 (2020) (reasoning that although a federal statute "contain[ed] a provision that expressly preempts state law," that preemption provision was "plainly inapplicable" in the circumstances before the Court, because it preempted state laws imposing liability on employers, not on employees).

[299] See CRS Report R45825, *Federal Preemption: A Legal Primer*, supra note 291, at 10 (explaining that the Supreme Court has held that federal law preempts state laws "related to" matters of federal regulatory concern when the state laws have a "connection with" or "reference to" such federal matters, whereas the Court has held that a federal law "covers" the subject matter of the state requirement only when it "'substantially subsume[s]'" the subject matter of the relevant state law (citing Shaw v. Delta Air Lines, 463 U.S. 85, 96–97 (1983) and quoting CSX Transp. v. Easterwood, 507 U.S. 658, 664 (1993))). Cf., e.g., Stern v. Gen. Elec. Co., 924 F.2d 472, 475 (2d Cir. 1991) ("The preemption provision of the [Federal Election Campaign Act of 1971], however, relates only to state-law provisions 'with respect to election to Federal office.' 2 U.S.C. § 453 (1988). The narrow wording of this provision suggests that Congress did not intend to preempt state regulation with respect to non-election-related activities." (emphasis added)).

parlance may lead to different interpretations when used in express preemption clauses. For example, in preemption clauses, the terms "laws" and "regulations" generally connote positive enactments such as statutes or agency regulations, while the terms "requirements" or "standards" may embrace common law causes of action.[300] And if a bill preempts state requirements that are "in addition to, or different than" federal requirements, it may be interpreted to allow *parallel* state requirements even if they do not explicitly incorporate federal law or they provide for different remedies than federal law.[301]

Second, in the past courts have applied a presumption *against* preemption, not only in the absence of an express preemption clause but also where the clause is ambiguous or the federal statute concerns a field that states have traditionally occupied.[302] Courts have not always been consistent in applying this presumption,[303] however, and in 2016, the Supreme Court suggested that the presumption should not apply in cases involving "plain" express preemption language.[304]

Third, the existence of a preemption provision does not necessarily foreclose analysis into implied preemption, which can take two forms.[305] The Supreme Court recognizes the "well-settled" principle of conflict preemption,[306] which occurs when "compliance with both federal and state regulations is a physical impossibility,"[307] or because "the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[308] And in "rare cases," the Court has invoked the theory of "field preemption" to conclude "that Congress 'legislated so comprehensively' in a particular field that it 'left no room for supplementary state legislation.'"[309]

In *Geier v. American Honda Motor Co.*, the Court invoked implied, conflict preemption principles in analyzing a federal statute that contained a preemption clause and an exception in

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[300] CRS Report R45825, *Federal Preemption: A Legal Primer*, *supra* note 291, at 12–13 (summarizing judicial decisions in which the Supreme Court held that the phrase "law or regulation" did not include common law causes of action and that the term "requirements" encompassed common law causes of action, and noting that in one decision, the Court declined to decide whether the term "standard" included common law causes of action).

[301] *Id*. at 11–12 (citing, *inter alia*, Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005)).

[302] *See* Altria Group, Inc. v. Good, 555 U.S. 70, 77 (2008) (stating that the presumption against preemption "applies with particular force when Congress has legislated in a field traditionally occupied by the States," and that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption" (internal quotation marks and citation omitted)).

[303] See CRS Report R45825, *Federal Preemption: A Legal Primer*, supra note 291, at 3–6 (discussing the evolution of the presumption against preemption); Graham v. R.J. Reynolds Tobacco Co., 857 F.3d 1169, 1294 n.281 (11th Cir. 2017) (Tjoflat, J., dissenting) (describing the presumption against preemption as "hotly debated, particularly when applied to issues of statutory interpretation in cases involving express preemption").

[304] *Compare* CTS Corp. v. Waldburger, 573 U.S. 1, 19 (2014) (stating that the presumption against preemption supports "a narrow interpretation" of an express preemption provision "where plausible" and using the presumption as "additional support" for its interpretation based on "the natural reading" of the statute's preemption provision (internal quotation marks and citation omitted)), *with* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946 (2016) (stating that "because the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption" (internal quotation marks and citation omitted)).

[305] *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 869, 874 (2000) (holding that an express preemption provision did not, by itself, "foreclose or limit the operation of ordinary pre-emption principles," including implied preemption).

[306] Arizona v. United States, 567 U.S. 387, 406 (2012).

[307] *Id*. at 399 (internal quotation marks omitted) (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

[308] *Id*. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[309] Kansas v. Garcia, 140 S. Ct. 791, 804 (2020) (quoting R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 140 (1986)).

the form of a savings clause.[310] The Court considered whether a person injured in a car accident could sue the car manufacturer under state tort law for not designing the car with driver-side airbags.[311] A federal motor vehicle safety standard in place at the time allowed manufacturers to choose among different types of passive restraint devices, such as airbags and automatic seatbelts, while phasing in specific requirements.[312] The federal statute authorizing that regulatory standard contained a preemption clause providing that no state could have a vehicle "safety standard . . . which is not identical to the Federal standard" established under the act.[313] It also contained a savings clause providing that "'compliance with' a federal safety standard 'does not exempt any person from any liability under common law.'"[314] The Court reasoned that the savings clause "*at least* remove[d] tort actions from the scope of the express pre-emption clause."[315] However, the Court did not construe the savings clause to allow *all* state tort actions, finding that ordinary principles of conflict preemption applied.[316] The Court asked whether the petitioner's tort claim conflicted with the federal regulations.[317] Reasoning that the federal standard in place at the time "deliberately sought variety" in manufacturers' use of passive restraint devices, the Court held that the claim, which alleged that the manufacturers had to use one specific device—an airbag—impeded the federal standard and was therefore preempted.[318]

Savings Clauses

A savings clause is a provision that preserves legal rights, remedies, or requirements, such as those previously recognized by courts or created by other laws.[319] Savings clauses may appear in their own bill sections or alongside the substantive provisions that they modify (for example, as exceptions to general rules).[320] Uses for savings clauses include:

1. non-preemption—that is, preserving state or local authority to regulate in a given area;[321]

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[310] *Geier*, 529 U.S. at 870. *See infra* "Savings Clauses."

[311] *Geier*, 529 U.S. at 864–65, 875, 878–79.

[312] *Id*.

[313] *Id*. at 867 (quoting 15 U.S.C. § 1392(d) (1988 ed.)).

[314] *Id*. at 868 (quoting 15 U.S.C. § 1397(k) (1988 ed.)).

[315] *See id*. at 868–70 (reasoning that the clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor"). For this reason, the Court declined to reach the threshold question of whether a tort claim premised on an airbag requirement constituted a "safety standard" within the meaning of the preemption clause. *Id*. at 867–68.

[316] *Id*. at 869–70.

[317] *Id*. at 874.

[318] *Id*. at 878–81. Four Justices dissented. While they agreed that the savings clause preserved state common-law tort claims, they argued that the majority should have applied the judicial presumption against preemption and found that the car manufacturer failed to meet its burden to show how the federal standard implicitly preempted the petitioners' state law claim. *Id*. at 894–98, 907–10 (Stevens, J., dissenting).

[319] *See Saving Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "saving clause" or "savings clause" as a "statutory provision exempting from coverage something that would otherwise be included"); FILSON & STROKOFF, *supra* note 37, at 177 ("A savings clause allows specified persons or groups already operating in the area covered by the bill to continue their established operations as though the bill had not been enacted, or addresses particular problems that those persons or groups might face in adapting to the new rules.").

[320] FILSON & STROKOFF, *supra* note 37, at 177.

[321] *See, e.g.*, Climate Solutions Act of 2017, H.R. 2958, 115th Cong., at 9–12 (as introduced, June 20, 2017), https://www.congress.gov/115/bills/hr2958/BILLS-115hr2958ih.pdf#page=9 (requiring the EPA Administrator to promulgate certain annual emission reduction targets and including a savings clause stating that "[n]othing in this title

2. preserving rights, claims, or entitlements "that would otherwise be lost" in legislation repealing an existing law, as in the example in **Figure 20** below;[322]
3. exempting certain existing entities or conduct—permanently, temporarily, or on a conditional basis—from the reach of otherwise applicable provisions;[323] and
4. preserving federal laws or standards that might otherwise be deemed in conflict with or superseded by the new law.[324]

shall be interpreted to preempt or limit State actions to address climate change"). A non-preemption clause can be drafted as an independent provision or as an exception or carve-out to an express preemption clause. For example, section 514(a) of ERISA contains an express preemption clause stating that "[e]xcept as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)." 29 U.S.C. § 1144(a). Subsection (b)(2)(A) contains what courts have referred to as a "savings clause," which states that "[e]xcept as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." *Id.* § 1144(b)(2)(A); *see also* Ky. Ass'n of Health Plans v. Miller, 538 U.S. 329, 334 (2003) ("It is well established in our case law that a state law must be 'specifically directed toward' the insurance industry in order to fall under ERISA's savings clause; laws of general application that have some bearing on insurers do not qualify."). *See generally* Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1269–70 (2010) (providing examples of ways in which Congress "accommodate[s] federalism concerns" through the use of exclusions or exceptions in preemption provisions).

[322] *Saving Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[323] *See, e.g.*, Southeast Hurricanes Small Business Disaster Relief Act of 2011, S. 653, 112th Cong. § 2(b) (as introduced, Mar. 28, 2011), https://www.congress.gov/112/bills/s653/BILLS-112s653is.pdf (proposing to change the eligibility criteria and terms of a disaster relief loan program but providing that a loan refinanced under the existing program before the bill's enactment date "shall remain in full force and effect under the terms, and for the duration, of the loan"). Savings clauses of this type are sometimes referred to as "grandfather clauses." *See* FILSON & STROKOFF, *supra* note 37, at 177 (noting that savings clauses are "sometimes called 'grandfather clauses,'" a term with roots in "the post–Civil War practice in some States of extending the right to vote only to individuals whose grandfathers had been eligible to vote"); Alan Greenblatt, *The Racial History of the 'Grandfather Clause'*, NPR CODE SWITCH: WORD WATCH (Oct. 22, 2013), https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause.

[324] *See, e.g.*, Water and Energy Sustainability through Technology Act, H.R. 3275, 115th Cong., at 76 (as introduced, July 17, 2017), https://www.congress.gov/115/bills/hr3275/BILLS-115hr3275ih.pdf#page=76 (stating that the act "shall not be interpreted or implemented in a manner that . . . overrides, modifies, or amends the applicability of the National Environmental Policy Act of 1969, the Endangered Species act of 1973, or the Federal Water Pollution Control Act of 1948" (internal citations omitted)).

Figure 20. Savings Clause

SEC. 4. CONFORMING AMENDMENTS AND REPEAL.

(a) CONFORMING AMENDMENTS.—Section 411(c) of section 411 of the Homeland Security Act of 2002 (6 U.S.C. 211(c)) is amended—

(1) in paragraph (17), by striking "and" at the end;

(2) by redesignating paragraph (18) as paragraph (19); and

(3) by inserting after paragraph (17) the following:

"(18) carry out section 418, relating to the issuance of Asia-Pacific Economic Cooperation Business Travel Cards; and".

(b) REPEAL.—

(1) IN GENERAL.—The Asia-Pacific Economic Cooperation Business Travel Cards Act of 2011 (Public Law 112–54; 8 U.S.C. 1185 note) is repealed.

(2) SAVING CLAUSE.—Notwithstanding the repeal under paragraph (1), an ABT Card issued pursuant to the Asia-Pacific Economic Cooperation Business Travel Cards Act of 2011 before the date of the enactment of this Act that, as of such date, is still valid, shall remain valid on and after such date until such time as such Card would otherwise expire.

Source: Asia-Pacific Economic Cooperation Business Travel Cards Act of 2017, S. 504, 115th Cong. § 4 (2017) (as enrolled), https://www.congress.gov/115/bills/s504/BILLS-115s504enr.pdf#page=3.

A true savings clause does not create new rights or remedies.[325] But even in preserving existing ones, savings clauses can pose challenging interpretive issues for the courts because they are unlikely to provide definitive instructions for how the law applies in every situation.[326] For example, in *Epic Systems Corp. v. Lewis*, the Supreme Court considered the interplay between two federal statutes: the National Labor Relations Act (NLRA)—which generally protects employees when they engage in concerted activities for their mutual aid and protection—and the Federal Arbitration Act (Arbitration Act)—which generally requires courts to enforce arbitration agreements.[327] A key issue was whether a savings clause in the Arbitration Act allowed courts to refuse to enforce arbitration agreements that prohibit employee class actions on the ground that such agreements violate the NLRA.[328] The Arbitration Act provided that arbitration agreements are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."[329] The Court divided over this question, five Justices to four. The majority held that the Arbitration Act's savings clause did not encompass an NLRA/class-action

[325] *See, e.g.*, Musson Theatrical v. Fed. Express Corp., 89 F.3d 1244, 1252 (6th Cir. 1996) (stating that the "existence of a general savings clause in a federal statute does not license a court to create a federal cause of action when the plaintiff cannot meet the normal requirements" demonstrating an implied right of action), *amended in other respects by* No. 95-5120, 1998 U.S. App. LEXIS 1626 (6th Cir. Jan. 15, 1998); Roth v. Cox, 210 F.2d 76, 79 (5th Cir. 1954) ("The saving clause neither creates substantive rights in itself nor assents to their creation by the state."), *aff'd*, 348 U.S. 207 (1955).

[326] *See, e.g.*, Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493–94 (1987) (deciding whether "a general saving clause" blocked the operation of the Clean Water Act's preemption language in a specific scenario by examining the statute "as a whole, its purposes and its history" because the statute "itself [did] not speak directly to" the question). *But cf.* Chamber of Commerce of the United States v. Whiting, 563 U.S. 582, 599 (2011) ("Whatever the usefulness of relying on legislative history materials in general, the arguments against doing so are particularly compelling here. Beyond verbatim recitation of the statutory text, all of the legislative history documents related to [the Immigration Reform and Control Act] save one fail to discuss the saving clause at all.").

[327] 138 S. Ct. 1612 (2018).

[328] *Id.* at 1622.

[329] *Id.* (quoting 9 U.S.C. § 2 (emphasis added)).

defense to arbitration.[330] The Court reasoned, *inter alia*, that the NLRA/class-action defense was not a ground that "exist[ed] at law or in equity for the revocation of *any contract*,"[331] unlike "generally applicable contract defenses, such as fraud, duress, or unconscionability."[332] In contrast, the dissent argued that the savings clause allowed an NLRA-based defense to enforcement of an arbitration agreement, reasoning that "[i]llegality is a traditional, generally applicable contract defense."[333]

Timing Rules

By default, a bill takes effect upon enactment; that is: (1) when the President signs the bill into law; (2) when the bill becomes a law because the President has not signed the bill within ten days of presentment and Congress is in session; or (3) when Congress overrides a presidential veto.[334] And by default, an enacted bill remains the law until repealed, amended, or superseded by another law.[335] However, Congress can specify an alternative effective date in the bill or period in which the law remains in effect to override these default rules, subject to certain constitutional constraints.[336]

Effective Dates

As previously noted, a bill may include one or more effective dates indicating when the bill as a whole, or certain provisions of it, take effect. These examples illustrate various forms of effective dates:

1. "This Act and the amendments made by this Act shall take effect 60 days after the date of the enactment of this Act."[337]
2. "Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect upon enactment."[338]
3. "The amendments made by this section shall apply to taxable years beginning after December 31, 2017."[339]

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[330] *Id*. at 1621–23.

[331] *Id*. at 1622 (emphasis added) (quoting 9 U.S.C. § 2).

[332] *Id*. (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).

[333] *Id*. at 1645 (Ginsburg, J., dissenting).

[334] *See* Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) ("It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment."). *See supra* note 11 and accompanying text.

[335] *See supra* "How a New Act Affects Existing Law."

[336] For example, once Congress has delegated a particular decision to the executive branch, it cannot maintain control over that decision without going through the "finely wrought and exhaustively considered" procedures of bicameralism and presentment. INS v. Chadha, 462 U.S. 919, 951, 954–55 (1983) ("Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."); *see also* Clinton v. City of New York, 524 U.S. 417, 448 (1998) (holding that the procedures authorized by the Line Item Veto Act, which allowed the President to "cancel" a provision of a previously enacted law under certain circumstances, were unconstitutional).

[337] United States-Cuba Normalization Act of 2017, H.R. 2966, 115th Cong. § 9 (as introduced, Jun. 20, 2017), https://www.congress.gov/115/bills/hr2966/BILLS-115hr2966ih.pdf#page=12.

[338] ARTICLE ONE Act, H.R. 1755, 116th Cong. § 7 (as introduced, Mar. 14, 2019), https://www.congress.gov/116/bills/hr1755/BILLS-116hr1755ih.pdf#page=17.

[339] S Corporation Modernization Act of 2017, H.R. 1696, 115th Cong. § 3(d) (as introduced, Mar. 23, 2017),

4. "This Act shall take effect when the President certifies to the Congress that all foreign countries possessing nuclear weapons have established legal requirements comparable to those set forth in section 2 and those requirements have taken effect."[340]

As the examples above show, laws can take effect on a specific date or after a designated time period following enactment, or be delayed to coincide with the start of a calendar or fiscal year. The effective date of a law can also hinge on the performance of one or more requirements under the act or some other occurrence.[341] Additionally, effective dates may be accompanied or qualified by provisions limiting the reach of new or amended requirements or prohibitions, such as a statement that the law does not apply retroactively to conduct occurring before that date.[342]

Transitional Provisions

Transitional provisions in bills typically contain requirements that apply for a set time period.[343] Such provisions may define a "transition period" from the date of enactment until a specified date or event to allow time for the preparation and submission of reports to Congress or the promulgation of agency regulations.[344]

Transitional provisions also may be used to ameliorate the effects of regulatory changes by phasing in certain requirements or creating special rules to ease the transition for "classes of people for whom the adjustment would be particularly difficult."[345] For example, the bill in **Figure 21** would generally prohibit a principal supervisory inspector with the Federal Aviation Administration from overseeing the same air carrier for more than five consecutive years. However, a transitional provision in the bill would allow inspectors serving in that role as of the bill's enactment date to continue their oversight responsibilities until the end of five consecutive years or for two years from the enactment date, whichever is later. Accordingly, the bill would allow, for example, a principal supervisory inspector who was overseeing the same carrier for

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https://www.congress.gov/115/bills/hr1696/BILLS-115hr1696ih.pdf#page=6.

[340] Nuclear Disarmament and Economic Conversion Act of 2009, H.R. 1653, 111th Cong. § 3 (as introduced, Mar. 19, 2009), https://www.congress.gov/111/bills/hr1653/BILLS-111hr1653ih.pdf#page=2.

[341] *But cf.* Marshall Field & Co. v. Clark, 143 U.S. 649, 668–69, 672 (1892) (declining to question the validity and legal force of "an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States," because it did not contain a section reflected in the congressional record from the bill's passage). *See also supra* note 336 (identifying potential constitutional limitations).

[342] *See, e.g.*, Fair Franchise Act of 2017, H.R. 470, 115th Cong. § 12(b) (as introduced, Jan. 12, 2017), https://www.congress.gov/115/bills/hr470/BILLS-115hr470ih.pdf#page=35 (stating that the bill's provisions prohibiting certain unfair franchise practices "shall take effect 90 days after the date of enactment" and "shall apply only to actions, practices, disclosures, and statements occurring on or after such date").

[343] FILSON & STROKOFF, *supra* note 37, at 175–76. Because transitional provisions are usually temporary in nature, they might not be codified in the *U.S. Code*. *See* Fuller v. INS, 144 F. Supp. 2d 72, 76 (D. Conn. 2000) (explaining that the Illegal Immigration Reform and Immigrant Responsibility Act "contains two sets of provisions, one transitional and the other permanent" and that the transitional provisions "are not codified in the U.S. Code").

[344] *See, e.g.*, BUILD Act of 2018, H.R. 5105, 115th Cong. § 601 (as engrossed in the House, July 17, 2018), https://www.congress.gov/115/bills/hr5105/BILLS-115hr5105eh.pdf#page=601 (defining a "transition period" that begins on the date of enactment and ends on the effective date of a reorganization plan required by the bill).

[345] FILSON & STROKOFF, *supra* note 37, at 176; *see, e.g.*, Kai v. Ross, 336 F.3d 650, 651–52 (8th Cir. 2003) (analyzing the transitional provisions in welfare reform legislation that provided for continued payment of Medicaid benefits to certain persons for up to one year); Tataranowicz v. Sullivan, 959 F.2d 268, 277 (D.C. Cir. 1992) ("Such grandfathering typically seeks to provide special relief for persons on whom the new regime might bear with unusual severity, because it specially disrupts their lives, usually because of decisions they are likely to have taken in reliance on the prior regime.").

four years on the date of enactment to continue the inspector's principal oversight functions for two more years, despite the five-year limit.

Figure 21. Transitional Provision

15 (a) IN GENERAL.—An individual serving as a prin-
16 cipal supervisory inspector of the Federal Aviation Admin-
17 istration (in this section referred to as the "Agency") may
18 not be responsible for overseeing the operations of a single
19 air carrier for a continuous period of more than 5 years.
20 (b) TRANSITIONAL PROVISION.—An individual serv-
21 ing as a principal supervisory inspector of the Agency with
22 respect to an air carrier as of the date of enactment of
23 this Act may be responsible for overseeing the operations
24 of the carrier until the last day of the 5-year period speci-
1 fied in subsection (a) or last day of the 2-year period be-
2 ginning on such date of enactment, whichever is later.

Source: FAA Reauthorization Act of 2009, H.R. 915, 111th Cong. § 334 (as referred in Senate, June 1, 2009), https://www.congress.gov/111/bills/hr915/BILLS-111hr915rfs.pdf#page=151.

Sunset Provisions

The purpose of a sunset provision in a bill is to "terminate[] all authority to carry out that law (or to spend money under that law) at some specified future time."[346] In some cases, a sunset provision gives Congress a period of time to review the law to determine if reenactment (for example, with a repeal or extension of the sunset provision) or amendment is appropriate.[347] In other circumstances, Congress has determined that the law is needed only for a limited period of time to address a particular situation.[348] In enacted legislation, if Congress takes no action to extend the law by the sunset date, then the law subject to the sunset provision ceases to have legal effect.[349]

[346] FILSON & STROKOFF, *supra* note 37, at 180.

[347] *Id.*; *see, e.g.*, ACLU v. Clapper, 785 F.3d 787, 795 (2d Cir. 2015) (noting that at the time of the court's opinion, Congress had renewed a section of the PATRIOT Act with a sunset provision seven times).

[348] *See, e.g.*, Cablevision Sys. Corp. v. FCC, 649 F.3d 695, 721 (D.C. Cir. 2011) (reasoning that Congress built a sunset provision into an "exclusive contract prohibition" in a statute designed to increase competition in the cable industry because it "sought to balance the need for regulatory intervention in markets possessing significant barriers to competition with its recognition that vertical integration and exclusive dealing arrangements are not always pernicious and, depending on market conditions, may actually be procompetitive").

[349] *See* Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional*

Figure 22 is an excerpt of a sunset provision from a bill that, among other things, would require the Secretary of Health and Human Services to convene a "Family Caregiving Advisory Council" and develop a "Family Caregiving Strategy" as specified in the bill.[350] Under the bill, such authority and obligations would end five years after the bill's enactment.[351]

Figure 22. Sunset Provision

5 **SEC. 6. SUNSET PROVISION.**

6 The authority and obligations established by this Act

7 shall terminate on the date that is 5 years after the date

8 of enactment of this Act.

Source: RAISE Family Caregivers Act, S. 1028, 115th Cong. § 6 (as referred in House, Sept. 27, 2017), https://www.congress.gov/115/bills/s1028/BILLS-115s1028rfh.pdf#page=12.

Severability or Inseverability Clauses

When a court has determined that one or more provisions of a statute are unconstitutional, the court is faced with the question of whether to strike down the statute in its entirety or only invalidate the offending provision or provisions.[352] The Supreme Court has long recognized that "one section of a statute may be repugnant to the Constitution without rendering the whole act void."[353] Accordingly, "when confronting a constitutional flaw in a statute," the Court tries "to limit the solution to the problem, severing any problematic portions while leaving the remainder intact."[354] In practice, this means that the Court leans toward "severing" the unconstitutional provision so that the rest of the statute can remain in force.[355]

Silence, 57 IND. L.J. 515, 528 (1982) (noting that sunset provisions "creat[e] situations in which *inaction* by a future Congress will lead a law to *lapse* when it would otherwise have survived").

[350] RAISE Family Caregivers Act, S. 1028, 115th Cong. §§ 3–4 (as referred in House, Sept. 27, 2017), https://www.congress.gov/115/bills/s1028/BILLS-115s1028rfh.pdf#page=2.

[351] *Id*. § 6. A related bill, H.R. 3759, became public law, with a three-year sunset. Pub. L. No. 115-119, § 6, 132 Stat. 23, 27 (2018).

[352] *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring) (explaining that because the statute at issue "is at least partially unconstitutional, our precedents instruct us to determine 'which portions of the . . . statute we must sever and excise'" (quoting United States v. Booker, 543 U.S. 220, 258 (2005) (emphasis removed))).

[353] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2208 (2020) (plurality opinion) (internal quotation marks omitted) (quoting Loeb v. Columbia Twp. Trs., 179 U.S. 472, 490 (1900)).

[354] Free Enter. Fund v. Pub. Co. Account. Oversight Bd., 561 U.S. 477, 508 (2010) (internal quotation marks and citation omitted).

[355] *Seila Law LLC*, 140 S. Ct. at 2209; *see also Murphy*, 138 S. Ct. at 1489 (Ginsburg, J., dissenting) (stating that "[w]hen a statute reveals a constitutional flaw, the Court ordinarily engages in a salvage rather than a demolition operation").

The Court's test for severability is well-settled:[356] courts should sever an unconstitutional portion of a statute if the remainder of the statute can stand on its own, *unless* it is evident that Congress would not have enacted the remainder of the statute independently of the invalid part.[357]

When a Bill Contains a Severability Clause

A severability clause (e.g., **Figure 23**) is a provision intended to "keep[] the remaining provisions of a . . . statute in force if any portion of that . . . statute is judicially declared . . . unconstitutional."[358]

Figure 23. Severability Clause

15 SEC. 4. SEVERABILITY.

16 If any provision of this Act or the application thereof

17 to any person or circumstance is held invalid, the remain-

18 der of this Act, or the application of that provision to per-

19 sons or circumstances other than those as to which it is

20 held invalid, is not affected thereby.

Source: Puerto Rico Emergency Financial Stability Act of 2015, H.R. 4290, 114th Cong. § 4 (as introduced, Dec. 18, 2015), https://www.congress.gov/114/bills/hr4290/BILLS-114hr4290ih.pdf#page=4.

A clear severability clause all but resolves the "elusive inquiry" into congressional intent by "giv[ing] rise to a presumption that Congress did not intend the validity of" the statute as a whole to depend on the validity of the provision or provisions in question.[359] Thus, when in 2020, the Supreme Court held that the leadership structure of the Consumer Financial Protection Bureau (CFPB) was unconstitutional because a statutory provision limited the President's ability to remove the agency's sole director, the Court found that its severability analysis was "simplified" by a severability clause in the Dodd-Frank Act, the statute that created the CFPB.[360] Writing for a plurality of the Court,[361] Chief Justice John Roberts, Jr. explained, "[t]here is no need to wonder

[356] *But see Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring) (questioning the Court's severability doctrine because, in the Justice's view, it invites courts to speculate about "legislators' *hypothetical* intentions," at least in situations where "Congress has not expressed its fallback position in the text" of the statute).

[357] *E.g.*, Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); Buckley v. Valeo, 424 U.S. 1, 108–09 (1976) (per curiam).

[358] *Severability Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[359] INS v. Chadha, 462 U.S. 919, 932 (1983); *e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 586 (2012) (plurality opinion) ("The chapter of the United States Code that contains § 1396c includes a severability clause confirming that we need go no further [than limiting § 1396c's enforcement]. That clause specifies that '[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.'" (quoting 42 U.S.C. § 1303)).

[360] *Seila Law LLC*, 140 S. Ct. at 2209. *See also* CRS Legal Sidebar LSB10507, *Supreme Court Rules CFPB Structure Unconstitutional: Implications for Congress*, by Jacob D. Shelly.

[361] While the Court's severability analysis was set forth in a plurality opinion authored by Chief Justice Roberts and joined by two Justices, four additional Justices who dissented from the constitutional holding nonetheless concurred in the Court's severability judgment. *See id.* at 564 (Kagan, J., dissenting) ("The outcome today will not shut down the

what Congress would have wanted if 'any provision of this Act' is 'held to be unconstitutional' because it has told us: 'the remainder of this Act' should 'not be affected.'"[362] The plurality went on to reject the petitioner's argument that the severability clause was a mere "boilerplate" provision appearing in an "848-page" statute and "almost 600 pages before the removal provision at issue," remarking, "boilerplate is boilerplate for a reason—because it offers tried-and-true language to ensure a precise and predictable result."[363]

When a Bill Does Not Address Severability

When a bill does not address severability but amends an existing law, a severability clause in the underlying statute may address the question.[364] For example, in *Barr v. American Association of Political Consultants*, another 2020 decision, the Court held that an exception in the Telephone Consumer Protection Act of 1991 (TCPA)—a federal law that prohibited certain robocalls but exempted government-debt collection calls—violated the First Amendment.[365] A majority of the Justices concluded that the "government-debt exception must be invalidated and severed from the remainder of the statute."[366] In a plurality opinion,[367] Justice Brett Kavanaugh explained that the act that the TCPA amended, the Communications Act of 1934, "has contained an express severability clause" since its passage.[368] The severability clause applied to "this chapter" of the Communications Act—that is, the provisions classified to chapter 5 of title 47 of the *U.S. Code*, the same chapter that now includes "the provision with the robocall restriction and the government-debt exception."[369] In the plurality's view, it did not matter that Congress enacted the severability clause in 1934, "long before the TCPA's 1991 robocall restriction and the 2015 government-debt exception," because the clause's text "squarely covers the unconstitutional government-debt exception."[370]

If the legislation or the statute it amends lacks any severability clause, the absence of a severability clause does not signal much about Congress's intent; it does not support a

CFPB: A different majority of this Court, including all those who join this opinion, believes that *if* the agency's removal provision is unconstitutional, it should be severed.").

[362] *Seila Law*, 140 S. Ct. at 2209 (plurality opinion) (quoting 12 U.S.C. § 5302). The plurality further reasoned that the remainder of the act was capable of operating independently of the unconstitutional removal provision. *Id*.

[363] *Id*. (internal quotation marks and citations omitted).

[364] *See, e.g.*, Barr v. Am. Ass'n of Political Consultants, No. 19-631, 2020 U.S. LEXIS 3544, at *20 n.6 (July 6, 2020) (plurality opinion) ("When Congress enacts a law with a severability clause and later adds new provisions to that statute, the severability clause applies to those new provisions to the extent dictated by the text of the severability clause.").

[365] 140 S. Ct. 2335, 2343 (2020) (plurality opinion) ("[T]he Telephone Consumer Protection Act of 1991, known as the TCPA, generally prohibits robocalls to cell phones and home phones. But a 2015 amendment to the TCPA allows robocalls that are made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts."). Justice Brett Kavanaugh wrote a plurality opinion on the First Amendment issue that was joined by three other Justices, though, in total, "[s]ix Members of the Court . . . conclude[d] that Congress ha[d] impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment." *Id*.

[366] *Id*.

[367] This portion of Justice Kavanaugh's opinion was joined by two other Justices, though seven Members of the Court in total concluded that the government-debt exception should be severed. *See id*.

[368] *Id*. at 2352.

[369] *Id*.

[370] *Id*.

presumption of *inseverability*.[371] In these circumstances, a court may look for other indicia of congressional intent in the statute's text or legislative history.[372] However, the Justices in the *Barr* plurality expressed their view that courts should avoid speculating about the enacting Congress's intent and instead follow the Court's "strong presumption of severability," focusing on whether the remainder of the statute is still "fully operative" as a law.[373] With respect to the TCPA, the *Barr* plurality concluded that even if the statute did not contain an applicable severability clause, the presumption of severability was not overcome because, without the government-debt exception, the TCPA was "capable of functioning independently and thus would be fully operative as a law."[374] The plurality reasoned that "the remainder of the robocall restriction *did* function independently and fully operate as a law for 20-plus years before the government-debt exception was added in 2015."[375] This case, and decisions that it cites, suggest that "an unconstitutional amendment to a prior law" *may* be easier to sever than a provision that was central to the original statutory scheme.[376]

In view of this presumption of severability,[377] a court may focus on whether the statute can operate without the invalid provision. In addition to the considerations discussed above relating to discrete, later-enacted amendments,[378] relevant factors for this step of the analysis include whether the invalid provision is "functionally independent" of the rest of the law so that its exclusion would not change the "basic operation" of the statute;[379] and whether the act, as modified, "still serves Congress' objective."[380] This step can be a difficult exercise.[381] In cases involving complex legislation, it can be particularly hard for a court to determine whether the law as modified would continue to operate as Congress intended.[382]

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[371] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987) ("In the absence of a severability clause . . . Congress' silence is just that—silence—and does not raise a presumption against severability.").

[372] *See, e.g.*, New York v. United States, 505 U.S. 144, 186 (1992) (reasoning that "where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated").

[373] *Barr*, 140 S. Ct. at 2350–52 (internal quotation marks and citation omitted).

[374] *Id*. at 2353.

[375] *Id*. (emphasis added).

[376] *Id*. (citing Frost v. Corp. Comm'n of Okla., 278 U.S. 515, 526–27 (1929); Truax v. Corrigan, 257 U.S. 312, 342 (1921)).

[377] *See supra* notes 354–55 and accompanying text.

[378] *See supra* notes 375–76 and accompanying text.

[379] United States v. Jackson, 390 U.S. 570, 586 (1968). *Compare* Free Enter. Fund v. Pub. Co. Account. Oversight Bd., 561 U.S. 477, 509 (2010) (invalidating certain statutory protections against board members' removal from office but concluding that the "Sarbanes-Oxley Act remains 'fully operative as a law' with these tenure restrictions excised" (citation omitted)), *with* Wyoming v. Oklahoma, 502 U.S. 437, 460 (1992) (reasoning that because the state statutory provision applied to "all entities" providing electric power in the state and contained "no parts or separate provisions," once the court struck that provision, "[n]othing remain[ed] to be saved" and the law had to "stand or fall as a whole").

[380] New York v. United States, 505 U.S. 144, 187 (1992).

[381] *See, e.g.*, Texas v. United States, 945 F.3d 355, 394 (5th Cir. 2019) (stating that "[s]everability doctrine places courts between a rock and a hard place" when they "strive to be faithful agents of Congress, which often means refusing to create a hole in a statute in a way that creates legislation Congress never would have agreed to or passed" while "'limit[ing] the solution to the problem' by 'refrain[ing] from invalidating more of the statute than is necessary'" (footnote omitted) (quoting Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328 (2006))), *cert. granted sub nom*. Texas v. California, 140 S. Ct. 1262 (2020).

[382] *See, e.g.*, United States v. Booker, 543 U.S. 220, 248 (2005) ("In today's context—a highly complex statute, interrelated provisions, and a constitutional requirement that creates fundamental change—we cannot assume that Congress, if faced with the statute's invalidity in key applications, would have preferred to apply the statute in as many

When a Bill Contains an *In*severability Clause

In contrast to a severability clause, an inseverability (or non-severability) clause (e.g., **Figure 24**) states that if a court declares any provision or a certain provision of the law unconstitutional, the remainder of the statute—or at least some other designated portion of the statute—should fall with it.[383]

Figure 24. Inseverability Clause

SEC. 9. SEVERABILITY.

If any provision of this Act or of any amendment made by this Act, or the application of any such provision to any person or circumstance, is held to be invalid for any reason, the remainder of this Act and of amendments made by this Act, and the application of the provisions and of the amendments made by this Act to any other person or circumstance shall not be affected by such holding, except that each of subclauses (II), (III), and (IV) of section 205(d)(2)(I)(i) is deemed to be inseverable from the other 2, such that if any 1 of those 3 subclauses is held to be invalid for any reason, neither of the other 2 of such subclauses shall be given effect.

Source: American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, § 9, 118 Stat. 1773, 1810 (2004) (S. 1721, 108th Cong.), https://www.congress.gov/108/plaws/publ374/PLAW-108publ374.pdf#page=38.

The Supreme Court has not definitively ruled on the weight that courts should give *inseverability* clauses. However, in *Barr* (the TCPA case discussed above), the plurality placed these clauses on par with severability clauses in terms of enunciating Congress's intent.[384] The plurality stated that absent "extraordinary circumstances," a court "should adhere to the text of the severability or nonseverability clause" because "a severability or nonseverability clause leaves no doubt about what the enacting Congress wanted if one provision of the law were later declared unconstitutional."[385] This opinion echoed what the Court said in dicta in a 1982 decision when it suggested that inseverability clauses allow courts to avoid "speculat[ion]" about what the enacting legislatures intended.[386] In that case, the Court was interpreting a state statute and

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other instances as possible."); *Texas*, 945 F.3d at 396 ("Severability analysis is at its most demanding in the context of sprawling (and amended) statutory schemes like the one at issue here [(the Affordable Care Act)]."). *See generally* Robert L. Nightingale, *How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes*, 125 YALE L.J. 1672 (2016) (examining the challenges that severability analysis poses in the context of omnibus legislation and proposing alternatives).

[383] *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2349 (2020) (plurality opinion) ("Congress may include a *nonseverability* clause, making clear that the unconstitutionality of one provision means the invalidity of some or all of the remainder of the law, to the extent specified in the text of the nonseverability clause. *See, e.g.*, 4 U.S.C. § 125; note following 42 U.S.C. § 300aa-1; 94 Stat. 1797."); MIKVA ET AL., *supra* note 7, at 86 ("An inseverability clause is one that specifically ties certain provisions together. If one of these provisions, then, is invalidated by the courts, the other provisions would also be invalidated by statutory command. Use of this approach would protect important legislative compromises from being undermined."); Israel E. Friedman, Comment: *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 915 (1997) (stating that "the inclusion of an inseverability clause is an affirmative act by a legislature to preserve the coexistence of separate provisions"). As shown in **Figure 24**, a bill may include an inseverability clause under a section called "severability," but for purposes of differentiating between the two types of provisions, this report uses the distinct terms "severability clause" and "inseverability clause."

[384] Barr, 140 S. Ct. at 2349 (plurality opinion).

[385] *Id.*

[386] Zobel v. Williams, 457 U.S. 55, 65 (1982) ("Here, we need not speculate as to the intent of the Alaska Legislature;

remanded the severability question for the state court to decide.[387] In subsequent appellate cases, some courts have also treated inseverability clauses like severability clauses, reasoning that they give rise to a presumption about what the legislature intended (i.e., in the case of an inseverability clause, a presumption *against* invalidating only the offending portion of the law).[388]

Technical and Conforming Amendments

When a bill would amend the organization or language of an existing law, congressional drafters may include technical or conforming amendments to address anticipated inconsistencies. For instance, a bill that seeks to add a new definition in alphabetical order to a definitions section of an existing statute may need to include a technical amendment directing that the subsequent definitions be renumbered. In the example in **Figure 25**, the bill seeks to add the term "derivative" as paragraph 9 in an alphabetically arranged definitions section of the Commodity Exchange Act.[389] A technical amendment in the bill re-designates paragraphs 9 through 34 of that section as paragraphs 10 through 35 to accommodate the newly defined term.

the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid. . . . However, it is of course for the Alaska courts to pass on the severability clause of the statute.").

[387] *Id.*

[388] *See, e.g.*, Biszko v. RIHT Fin. Corp., 758 F.2d 769, 773 (1st Cir. 1985) (noting that the "Rhode Island legislature included a non-severability clause in the statute" and reasoning that although "a non-severability clause cannot ultimately bind a court, it establishes a presumption of non-severability"); *see also* Eric S. Fish, *Severability as Conditionality*, 64 EMORY L.J. 1293, 1336–37 (2015) (arguing that courts should give effect to clear inseverability clauses because "inseverability is a legislative power and not a judicial one" but noting the views of other scholars who have argued that inseverability clauses infringe on the judiciary's role of construing statutes); Friedman, *supra* note 383, at 920–23 (proposing that courts treat clear inseverability clauses as "dispositive," rather than invoking a mere presumption in favor of inseverability, because "the inclusion of an inseverability clause is a deliberate act of the legislature to enforce a legislative compromise and to ensure that the provision [in question] and the remainder of the statute operate in tandem").

[389] *See* 7 U.S.C. § 1a (2009).

Figure 25. Technical Amendment

SEC. 111. DEFINITIONS.

(a) AMENDMENTS TO DEFINITIONS IN THE COMMODITY EXCHANGE ACT.—Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended—

(1) by redesignating paragraphs (9) through (34) as paragraphs (10) through (35), respectively;

(2) by adding after paragraph (8) the following:

"(9) DERIVATIVE.—The term 'derivative' means—

"(A) a contract of sale of a commodity for future delivery; or

Source: Over-the-Counter Derivatives Markets Act of 2009, H.R. 3795, 111th Cong. § 111 (as introduced, Oct. 13, 2009), https://www.congress.gov/111/bills/hr3795/BILLS-111hr3795ih.pdf#page=2.

A bill might also include a conforming amendment if a change that it proposes warrants a similar change in another division of the statute or in another law. In the example in **Figure 26**, the redesignation of subsection (l) as subsection (k) in section 623 of the Communications Act required a cross-reference to subsection (l) in section 613 of the statute to be updated to reflect the new lettering scheme.

Figure 26. Conforming Amendment

4 (1) IN GENERAL.—Section 623 of the Commu-
5 nications Act of 1934 (47 U.S.C. 543) is amended—
6 (A) by striking subsection (k); and
7 (B) by redesignating subsections (l)
8 through (n) as subsections (k) through (m), re-
9 spectively.
10 (2) CONFORMING AMENDMENT.—Section
11 613(a)(3) of the Communications Act of 1934 (47
12 U.S.C. 533(a)(3)) is amended by striking "623(l)"
13 and inserting "623(k)".

Source: Federal Communications Commission Consolidated Reporting Act of 2012, H.R. 3310, 112th Cong. § 3(e) (as referred in Senate, June 4, 2012), https://www.congress.gov/112/bills/hr3310/BILLS-112hr3310rfs.pdf#page=6.

When amendments are labeled as "technical" or "conforming," courts may be disinclined to construe them as effecting major changes to the statutory scheme, particularly when those changes are not explicit.[390] This is not to say that the changes embedded in a technical or conforming amendment will be obvious to the reader. Sometimes, the changes are only apparent once the reader examines the amendments in the context of any cross-referenced provisions or the statutory scheme as a whole. But, in the Supreme Court's words, Congress generally does not "hide elephants in mouseholes"[391] by making "radical—but entirely implicit—change[s]" to the law through technical and conforming amendments.[392]

Nevertheless, a provision's designation as a "technical" or "conforming" amendment does not resolve whether it makes a substantive change, just as other types of headings and subheadings do not control the meaning of the provisions that they precede.[393] For example, the dispute in *Burgess v. United States* centered on a "conforming amendment[]" that changed the definition of "felony drug offense" in the Controlled Substances Act from "an offense that is a *felony*" under any federal, state, or foreign law pertaining to certain drug offenses to "an offense that is *punishable by imprisonment for more than one year*" under such laws.[394] The petitioner in the case argued that he was not subject to a mandatory sentencing enhancement for a prior "felony drug offense" because his previous conviction, although punishable by imprisonment for more than one year, constituted a misdemeanor rather than a felony under state law.[395] He argued that Congress did not actually remove the requirement that the prior offense constitute a felony, but merely *added* a requirement that the prior offense carry a term of imprisonment greater than one year, pointing to the inclusion of the amendment among other "conforming amendments" in the enacting bill.[396] The Court rejected the petitioner's interpretation, reasoning that "Congress did not disavow any intent to make substantive changes; rather, the amendments were 'conforming' because they harmonized sentencing provisions" in the Controlled Substances Act with another federal drug statute.[397] The Court further reasoned that "[t]reating the amendments as nonsubstantive would be inconsistent with their text.[398]

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[390] *See, e.g.*, United States v. Elec. Data Sys. Fed. Corp., 857 F.2d 1444, 1447 (Fed. Cir. 1988) (stating that the court was "loath to give a technical amendment substantive effect that would undermine the Postal Service's independence that 'was a part of Congress' general design'" (citation omitted)).

[391] Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061, 1071 (2018) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

[392] *Id*. (alteration in original) (quoting Dir. of Revenue of Mo. v. CoBank ACB, 531 U.S. 316, 324 (2001)).

[393] *See* Asociacion de Empleados del Area Canalera v. Pan. Canal Comm'n, 329 F.3d 1235, 1240 n.3 (11th Cir. 2003) (describing party's "generalization that technical and conforming amendments never make substantive changes in the law" as "simply unwarranted" and unsupported by Supreme Court precedent); Mudge v. United States, 308 F.3d 1220, 1229 (Fed. Cir. 2002) (applying "the usual tools of statutory construction" to evaluate whether the "affirmative addition" of a word to a statutory provision through a "technical and conforming amendment" made substantive changes to the provision (internal quotation marks and citation omitted)).

[394] 553 U.S. 124, 133–35 (2008) (internal quotation marks and citations omitted).

[395] *Id*. at 126.

[396] *Id*. at 134–35.

[397] *Id*. at 135.

[398] *Id*.

Authorization of Appropriations

A bill whose substantive provisions would require the expenditure of federal funds may include a section authorizing appropriations (e.g., **Figure 27**).[399] While "[l]anguage requiring or permitting government action carries an implicit authorization for an unlimited amount of money to be appropriated for that purpose," a bill may still include an express "authorization of appropriations" provision "to limit the authorization to the amount or fiscal years stated."[400] Although authorization is part of the appropriations process,[401] an authorization of appropriations—whether express or implied—does not *itself* appropriate any funds: that is, it does not provide an agency with "budget authority" or "the authority to make payments from the Treasury."[402]

[399] See generally CRS Report R42098, *Authorization of Appropriations: Procedural and Legal Issues*, supra note 258.

[400] *HOLC Guide to Legislative Drafting*, *supra* note 18; *see also* FILSON & STROKOFF, *supra* note 37, at 173 (positing that "the only legitimate purpose of a provision authorizing appropriations is to place a ceiling on their amount, or to limit the period for which they may be made or within which the money appropriated may be spent").

[401] According to the Government Accountability Office (GAO), the "typical sequence" for appropriating funds is: (1) "organic legislation"—that is, "legislation that creates an agency, establishes a program, or prescribes a function"; (2) "authorization of appropriations, if not contained in the organic legislation"; and (3) "the appropriation act." U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-54, 2-56 (4th ed., rev. 2016); *see also* Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1319 (2020) ("Creating and satisfying a Government obligation, therefore, typically involves four steps: (1) Congress passes an organic statute . . . that creates a program, agency, or function; (2) Congress passes an Act authorizing appropriations; (3) Congress enacts the appropriation, granting "budget authority" to incur obligations and make payments, and designating the funds to be drawn; and (4) the relevant Government entity begins incurring the obligation.").

[402] GAO, *supra* note 401, at 2-54 ("[A]ppropriation authorization legislation typically does not provide budget authority or an appropriation."); *id.* at 2-1 (explaining that "Congress finances federal programs and activities by providing 'budget authority,' which grants agencies authority to enter into financial obligations that will result in immediate or future outlays of government funds"); *id.* at 2-3 (explaining that "an appropriation is a law authorizing the payment of funds from the Treasury"); *see also* CRS Report R42098, *Authorization of Appropriations: Procedural and Legal Issues*, *supra* note 258, at 1 (stating that "[b]y itself . . . an authorization does not provide funding for government activities").

Figure 27. Authorization of Appropriations

SEC. 151. AUTHORIZATION OF APPROPRIATIONS.

In addition to amounts otherwise authorized to be appropriated, there are authorized to be appropriated for each of the fiscal years 2018 through 2021, $2,500,000,000 to implement this title and the amendments made by this title, of which—

(1) $10,000,000 shall be used by the Department of Homeland Security to implement Vehicle and Dismount Exploitation Radars (VADER) in border security operations;

(2) $200,000,000 shall be used by the Department of State to implement section 119; and

(3) $200,000,000 shall be used by the United States Coast Guard to implement paragraph (18) of section 113(a).

Source: Border Security for America Act of 2017, H.R. 3548, 115th Cong. § 151 (as reported in House, Mar. 23, 2018), https://www.congress.gov/115/bills/hr3548/BILLS-115hr3548rh.pdf#page=94.

There is no blanket constitutional or statutory requirement that Congress authorize an appropriation before appropriating funds. However, certain statutes require a specific authorization.[403] In addition, congressional rules "generally prohibit the reporting of an appropriation in a general appropriation bill for expenditures not previously authorized by law."[404] According to GAO, failure to comply with these requirements does not render a congressionally enacted appropriation substantively invalid; though noncompliance may make an appropriations bill moving through the House or Senate susceptible to a procedural challenge.[405]

[403] See GAO, supra note 401, at 2-55; CRS Report R42098, *Authorization of Appropriations: Procedural and Legal Issues*, supra note 258, at 8–9 ("There is no constitutional or general statutory requirement that an appropriation must be preceded by a specific act that authorized the appropriation. . . . A few statutes, however, require that funds to carry out particular activities may not be appropriated unless they have been specifically authorized.").

[404] GAO, *supra* note 401, at 2-55 (citing House Rule XXI(2)(a)(1) and Senate Rule XVI).

[405] *Id*. at 2-55–2-56.

Even so, "an authorization act is more than an academic exercise."[406] Unless altered in the appropriations act, "appropriations to carry out enabling or authorizing laws must be expended in accordance with the original authorization both as to the amount of funds to be expended and the nature of the work authorized."[407] Accordingly, courts and agencies may construe authorization-of-appropriations language to determine whether a particular agency action or expenditure was permissible.[408]

Common Terms, Phrases, and Interpretive Issues

This section of the report discusses terms and phrases commonly used in federal legislation and the interpretive questions associated with them. It begins by listing "three important conventions" in bill drafting identified by the Office of the Legislative Counsel for the U.S. House of Representatives (HOLC). It then analyzes how courts have interpreted other commonly used phrases.

HOLC's "Three Important Conventions"

In its online *Guide to Legislative Drafting*, HOLC highlights three important drafting conventions used in federal legislation.[409]

"Means" Versus "Includes"

When legislation includes defined terms, the definitions typically begin by stating that a certain term "means" X or "includes" Y, but these words are not synonymous. The term "means" denotes an exclusive definition while "includes" generally prefaces a non-exhaustive list.[410] However, context is important.[411] If the term "includes" is followed by the language "but is not limited to"

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[406] *Id*. at 2-57.

[407] *Id*.

[408] *See, e.g.*, U.S. Dep't of the Air Force v. Fed. Labor Rels. Auth., 648 F.3d 841, 846–48 (D.C. Cir. 2011) (holding that statutes authorizing the Air Force's expenditure of appropriated funds for civilian employee uniforms or uniform allowances did not authorize expenditures for uniform cleaning services, and thus Air Force had no obligation to bargain with union regarding such services). *Cf.* United States v. Navajo Nation, 556 U.S. 287, 299–300 (2009) (reasoning that a provision in the Navajo-Hopi Rehabilitation Act requiring the Secretary of the Interior to consider recommendations from the tribal councils applied only to projects enumerated in the act, observing that Congress authorized appropriations in specific amounts for each listed project).

[409] *See HOLC Guide to Legislative Drafting*, *supra* note 18.

[410] *Id.*; *see also* Burgess v. United States, 553 U.S. 124, 130 (2008) ("As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." (alterations in original) (quoting Colautti v. Franklin, 439 U.S. 379, 392–93 n.10 (1979))); United States v. Wyatt, 408 F.3d 1257, 1261 (9th Cir. 2005) (reasoning that the "use of the word 'includes'" in the statutory definition "suggests the list [of items that follows] is non-exhaustive rather than exclusive").

[411] Courts construing the word "including" in non-definitional provisions have observed that "[d]epending on context, the word 'including' can be either illustrative or enlarging." New York v. Dep't of Justice, 951 F.3d 84, 102 (2d Cir. 2020). As one appellate court explained,

> [T]he term "including" is perhaps more often than not the introductory term for an incomplete list of examples. Thus, when we say that several colors, "including red, blue and yellow" are in the rainbow, we are giving only examples, and we do not mean that the rainbow does not include other colors. In that sense, an "including" clause is illustrative. However, the term "including" can also introduce restrictive or definitional terms. If we say that "all licensed drivers, including *applicants* for driver's licenses, shall take an eye exam," the word "including" means "and" or "in addition to." That meaning is derived from the fact that a "licensed driver," by definition, excludes an

in some places in a statute but not others, a court could interpret "includes," when used in isolation, as introducing an exhaustive list.[412] This result is because courts generally presume that "when Congress includes particular language in one section of a statute but omits it in another . . . Congress intended a difference in meaning."[413] In addition, the object of "includes" in any given definition can still limit the scope of that definition. Because the terms in the list are illustrative, persons or things that do not share common traits with those terms may not be considered to fall within the definition. For example, in 2010, the Supreme Court ruled that a statutory definition of "foreign state" that expressly "include[d]" political subdivisions and agencies or instrumentalities, did not also encompass foreign officials.[414] While acknowledging that "the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive," the Court reasoned that the definition "still" did not "encompass officials, because the types of defendants listed are all entities."[415]

"Shall" Versus "May"

Congressional drafters typically use the term "shall" to denote that an action is required and "may" to indicate that an action is permitted, but not required.[416] Usually, one can silently substitute the word "must" for "shall" when reading a bill provision, but not always. For example, a bill that reads, "no person shall commit a crime"[417] cannot be translated literally as "no person *must* commit a crime" without implying that a person *may* commit a crime.[418] In this example, "no person shall commit a crime" means "no person *may* commit a crime"—in other words, a person *may not* commit a crime; crimes are prohibited. Additionally, whether "shall" denotes a command depends on context.[419] A bill that reads, "the Secretary shall have the authority to adopt

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"applicant," and therefore if we intend to include applicants we must say so.

Adams v. Dole, 927 F.2d 771, 776–77 (4th Cir. 1991).

[412] *See HOLC Guide to Legislative Drafting*, *supra* note 18 (noting that the phrase "'includes, but is not limited to' is redundant," but that "using it in some places out of an abundance of caution could cause a limitation to be read into places where it is not used"); *cf.* Williamson v. J.C. Penney Life Ins. Co., 226 F.3d 408, 410 (5th Cir. 2000) (finding that "[l]ittle meaning can be gleaned" from the word "includes" in the parties' insurance contract because the contract used the term "means" and the phrase "includes, but is not limited to" in other places); *id.* at 411 (Barksdale, J., concurring in the judgment) (reasoning that "the different uses, in [the same] provision, of 'includes' and of the immediately following 'includes, but is not limited to'" demonstrates that the former introduced "a complete, or exhaustive, list" and the latter, "a partial, or illustrative, one").

[413] Loughrin v. United States, 134 S. Ct. 2384, 2390 (2014) (internal quotation marks and citation omitted); *see also id.* (noting the "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute'" (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000))).

[414] Samantar v. Yousuf, 560 U.S. 305, 314, 317–19 (2010).

[415] *Id.* at 317–18 (noting that other contextual clues in the act supported this interpretation). *But cf.* S.D. Warren Co. v. Me. Bd. of Envt'l Prot., 547 U.S. 370, 379 (2006) (reasoning that "giving one example does not convert express inclusion into restrictive equation").

[416] *HOLC Guide to Legislative Drafting*, *supra* note 18; *see also* Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."); *see, e.g.*, NLRB v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017) (describing statutory provision stating that the first assistant to a vacant office "shall perform" acting duties as "mandatory and self-executing").

[417] *Cf.* Spratt v. State, 41 A.3d 984, 986 n.1 (R.I. 2012).

[418] *See* Bryan A. Garner, *Shall We Abandon Shall?*, ABA JOURNAL (Aug. 1, 2012), https://www.abajournal.com/magazine/article/shall_we_abandon_shall ("What about laws stating that 'No person shall . . . ?' If *shall* means 'has a duty to' or 'is required to,' we have a problem. We're negating a command to do something: You're not required to do it (but, by implication, you may if you like).").

[419] *See* Trumball Invs. Ltd. I v. Wachovia Bank, N.A., 436 F.3d 443, 447 (4th Cir. 2006) ("The word 'shall' cannot be interpreted in a vacuum, . . . and the words around it help elucidate the overall meaning of the clause.").

rules" does not mean that the Secretary *must* adopt rules; it simply *authorizes* her to adopt rules because of the inclusion of the words "have the authority to" after "shall."[420]

While "shall" and "may" usually have distinct meanings, the terms "shall not" and "may not" both prohibit conduct.[421] Even so, HOLC recommends the latter phrasing to avoid "arcane" alternative interpretations potentially associated with "shall not."[422]

Singular and Plural

Unless the context suggests otherwise, a bill's use of a term in its singular form includes the plural and vice versa.[423] For example, if a law prohibits "a pharmacist" from knowingly selling "misbranded drugs," it would also prohibit several pharmacists from knowingly selling a single misbranded drug. This rule of construction appears in the first chapter of the *U.S. Code* (i.e., the "Dictionary Act") and applies to "any Act of Congress."[424] HOLC nevertheless recommends the use of the singular for clarity when drafting federal legislation.[425]

Contextual clues can override the interchangeability of singular and plural meanings. In *Life Technologies Corp. v. Promega Corp.*, the Supreme Court considered whether a party that supplied a single component of a multicomponent invention for manufacture abroad violated a statute prohibiting the supply of "'all or a substantial portion' of the *components* of a patented invention for combination abroad."[426] The Court held that the term "substantial portion" denoted a quantitative—rather than a qualitative—measure, and that a single component of an invention could never constitute a "substantial portion" of the invention under the statute.[427] The Court reasoned that "[t]ext specifying a substantial portion of 'components,' plural, indicates that multiple components constitute the substantial portion."[428] The Court acknowledged that "[t]aken alone, [the statute's] reference to 'components' might plausibly be read to encompass 'component' in the singular" because of the Dictionary Act's rule of construction about singular and plural terms.[429] However, the Court held that the statute's "text, context, and structure"

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[420] *See id.* ("'Shall in its discretion' has an entirely different meaning than 'shall' standing alone. Any other interpretation would treat 'in its discretion' as mere surplusage, which courts are disinclined to do.").

[421] *See* Key Med. Supply, Inc. v. Burwell, 764 F.3d 955, 958 (8th Cir. 2014) (reasoning that "Congress granted relatively unconstrained authority to the Agency as to many issues, while narrowly defining and limiting authority as to other issues" through "the statute's use of the terms 'may' to identify factors for the Agency's discretionary consideration; 'shall' to identify mandatory tasks; and 'may not' or 'shall not' to identify prohibited actions").

[422] *HOLC Guide to Legislative Drafting*, *supra* note 18; *see also* HOLC MANUAL ON DRAFTING STYLE, *supra* note 1, at 62 (recommending use of "may not" for denying a right, privilege, or power, and "shall not" for directing that an action not be taken, but noting that a "distinction may be made that 'shall not' speaks to the person subject to the prohibition and is silent as to whether an act done by a person in violation of the prohibition is nevertheless valid (particularly as to an innocent 3rd party)"); FILSON & STROKOFF, *supra* note 37, at 286 ("One could also argue that 'A person shall not' literally means that a person does not have a duty to act, but still has the discretion to act." (footnote omitted)).

[423] *See* 1 U.S.C. § 1 (setting out "[r]ules of construction" for the *U.S. Code* and stating that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things" and "words importing the plural include the singular").

[424] 1 U.S.C. § 1. *See supra* notes 222–25 and accompanying text for a discussion of the Dictionary Act.

[425] *See HOLC Guide to Legislative Drafting*, *supra* note 18 (noting the possibility that someone could interpret the provision "Drivers may not run red lights" to mean that a violation occurs only when multiple drivers run multiple red lights).

[426] Life Techs. Corp. v. Promega Corp., 137 S. Ct. 734, 737 (2017) (emphasis added) (quoting 35 U.S.C. § 271(f)(1)).

[427] *Id.* at 739–41, 743.

[428] *Id.* at 741.

[429] *Id.* at 742.

demonstrate that "when Congress said 'components,' plural, it meant plural, and when it said 'component,' singular, it meant singular."[430] In particular, the Court observed that a companion provision in the statute separately prohibited the supply of a single component "that is especially made or especially adapted for use in the invention" under certain circumstances.[431] The Court reasoned that reading the "substantial portion" provision at issue to cover "*any* single component would not only leave little room for [its companion provision], but would also undermine [the companion provision's] express reference to a single component 'especially made or especially adapted for use in the invention.'"[432]

Other Commonly Used Terms and Phrases

This section discusses examples of other terms and phrases commonly used in federal legislation and their meanings as interpreted by federal courts.

"Any Other"

Congressional drafters regularly use the phrase "any other" to modify a noun to provide a catchall for certain persons, laws, or conduct not specifically enumerated. For example, a requirement for new labeling on "apples, bananas, and any other fruit," likely applies to the full range of produce ordinarily seen as fruit.

The Supreme Court has held that the phrase "any other" conveys a broad meaning,[433] but at times, the placement of the phrase has produced divided interpretations. In *Ali v. Federal Bureau of Prisons (BOP)*, the Supreme Court considered the scope of the federal government's waiver of sovereign immunity—that is, its consent to be sued—based on certain acts committed by federal employees.[434] Under the relevant statute, the waiver did not apply to certain claims arising from property detention by "any officer of customs or excise or *any other* law enforcement officer."[435] The dispute concerned whether that exception applied to property detention by BOP officers, who are not customs or excise officers.[436] Citing prior decisions interpreting the phrase "any other," the Court held that the phrase "any other law enforcement officer" encompassed BOP officers because "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind."[437] The Court rejected the petitioner's

[430] *Id*.

[431] *Id*. at 741 (quoting 35 U.S.C. § 271(f)(2)).

[432] *Id*. at 742.

[433] *See* United States v. Gonzales, 520 U.S. 1, 4–5, 11 (1997) (holding that statute prohibiting sentencing court from allowing a mandatory term of imprisonment for firearm use during and in relation to a drug trafficking crime to run concurrently with "*any other* term of imprisonment" applies to all terms of imprisonment, whether state or federal, because "the word 'any' has an expansive meaning" and "Congress did not add any language limiting [its] breadth" (emphasis added)); Harrison v. PPG Indus., 446 U.S. 578, 579, 587–89 (1980) (interpreting statute providing for direct appellate review of certain locally and regionally applicable EPA Administrator actions under specified statutory provisions and of "*any other final action* of the Administrator under [the] Act . . . which is locally or regionally applicable," and holding that statute "must be construed to mean exactly what it says, namely, *any other* final action," not just "those similar to the actions under the specifically enumerated provisions that precede that catchall phrase" (internal quotation marks and citations omitted)).

[434] 552 U.S. 214, 215 (2008).

[435] *Id*. at 216 (emphasis added) (quoting 28 U.S.C. § 2680).

[436] *Id*. at 218.

[437] *Id*. at 219–20 (citing United States v. Gonzales, 520 U.S. 1 (1997) and Harrison v. PPG Indus., Inc., 446 U.S. 578 (1980)).

argument that "any other law enforcement officer" should be read more narrowly, to refer only to "officers of the same nature" as customs or excise officers based on the linguistic canon of *ejusdem generis*, which provides that "'when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.'"[438] The Court reasoned that the structure of the provision—specifically its reference to "any officers of customs or excise" and then "any other law enforcement officer"—"does not lend itself to application of the canon" because the provision is "disjunctive, with one specific and one general category."[439] Moreover, the Court reasoned, "no relevant common attribute" clearly connected customs officers with excise officers to limit the meaning of "any other law enforcement officer."[440]

Four Justices dissented in *Ali*, arguing that a proper reading of the exception required applying the *ejusdem generis* canon and reference to statutory context and legislative history.[441] In the dissent's view, these interpretive aids supported a construction of "any other law enforcement officer" that was limited to those law enforcement officers who perform functions traditionally assigned to revenue officers such as enforcing federal revenue laws and conducting border searches.[442] According to the dissent, had Congress intended to allow the government to invoke sovereign immunity in cases involving property detention by any type of law enforcement officer, "in all likelihood it would have drafted the section to apply to 'any law enforcement officer, including officers of customs and excise,' rather than tacking 'any other law enforcement officer' on the end of the enumerated categories as it did here."[443]

"This Act" or "This Section" (or Other Subdivision)

Bills commonly refer to another provision of "this Act," "this section," or another referenced subdivision. The context of these references helps inform their meaning. If the reference occurs in a freestanding provision (i.e., "outside the quotes"), it is likely referring to the bill itself.[444] If the reference occurs in a provision amending an existing statute (i.e., "inside the quotes"), it is likely referring to the underlying statute rather than to the bill.[445] For example, a bill entitled the "Justice for Victims of Fraud Act of 2017" contains proposed amendments to the Truth in Lending Act in section 3, proposed amendments to the Electronic Fund Transfer Act in section 4, and a freestanding rule of construction in section 5.[446] The reference to "this section" in section 3 of the bill (**Figure 28**) refers to the new § 140B that the bill would add to the Truth in Lending Act. The reference to "this section" in section 4 of the bill (**Figure 29**) refers to the new section 920A that

[438] *Id*. at 223–24 (quoting Norfolk & W. R. Co. v. Train Dispatchers, 499 U.S. 117, 129 (1991)).

[439] *Id*. at 225.

[440] *Id*. *Cf.* Cleveland v. United States, 329 U.S. 14, 16–19 (1946) (applying the canon of *ejusdem generis* and holding that polygamy constituted "any other immoral purpose" in a statute prohibiting the interstate transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose," reasoning that polygamous practices "are in the same genus as the other immoral practices covered by the Act").

[441] *Ali*, 552 U.S. at 228–43 (Kennedy, J., dissenting).

[442] *Id*. at 232.

[443] *Id*.

[444] *See* FILSON & STROKOFF, *supra* note 37, at 333 (noting that references to "this Act" or a subdivision thereof are unnecessary if one section of the bill is referring to another section of the same bill, but may be used in the interest of clarity if there are nearby references to other acts or subdivisions).

[445] *HOLC Guide to Legislative Drafting*, *supra* note 18 (noting that "references inside the quotes to 'this Act' are to the statute being amended, not the new bill," and, similarly, "references inside the quotes to 'section 5' are to section 5 of the statute being amended").

[446] Justice for Victims of Fraud Act of 2017, H.R. 1414, 115th Cong. (as introduced, Mar. 7, 2017), https://www.congress.gov/115/bills/hr1414/BILLS-115hr1414ih.pdf.

the bill would add to the Electronic Fund Transfer Act. In contrast, the reference to "this Act" in section 5 of the bill (**Figure 30**) refers to the bill as a whole because it appears outside the quoted material in a freestanding section of the bill.

Figure 28. "This Section" Referring to Underlying Statute: Example 1

21 **SEC. 3. ARBITRATION OF CONSUMER DISPUTES RELATED**
22 **TO CREDIT CARD ACCOUNTS.**
23 Chapter 2 of the Truth in Lending Act (15 U.S.C.
24 1631 et seq.) is amended by adding at the end the fol-
3 **"§ 140B. Validity and enforceability**
4 "(a) DEFINITIONS.—In this section—
5 "(1) the term 'covered dispute' means a dispute
6 that is not subject to a final judgment by a court;

Source: Justice for Victims of Fraud Act of 2017, H.R. 1414, 115th Cong. § 3 (as introduced, Mar. 7, 2017), https://www.congress.gov/115/bills/hr1414/BILLS-115hr1414ih.pdf#page=3.

Figure 29. "This Section" Referring to Underlying Statute: Example 2

21 **SEC. 4. ARBITRATION OF CONSUMER DISPUTES RELATED**
22 **TO COVERED ACCOUNTS.**
23 The Electronic Fund Transfer Act (15 U.S.C. 1693
24 et seq.) is amended by inserting after section 920 (15
25 U.S.C. 1693o–2) the following:
1 **"SEC. 920A. VALIDITY AND ENFORCEABILITY.**
2 "(a) DEFINITIONS.—In this section—
3 "(1) the term 'covered account'—
4 "(A) means a demand deposit, savings de-
5 posit, or other asset account (other than an oc-
6 casional or incidental credit balance in an open
7 end credit plan as defined in section 103(i)), as
8 described in regulations of the Bureau, estab-
9 lished primarily for personal, family, or house-
10 hold purposes, including demand accounts, time
11 accounts, negotiable order of withdrawal ac-
12 counts, and share draft accounts; and

Source: Justice for Victims of Fraud Act of 2017, H.R. 1414, 115th Cong. § 4 (as introduced, Mar. 7, 2017), https://www.congress.gov/115/bills/hr1414/BILLS-115hr1414ih.pdf#page=4.

Figure 30. "This Act" Referring to Bill as a Whole

7 **SEC. 5. RULE OF CONSTRUCTION.**

8 Nothing in the amendments made by this Act shall
9 be construed—
10 (1) to authorize the imposition of a requirement
11 to submit a dispute to arbitration; or
12 (2) to restrict any court from ruling that a re-
13 quirement to submit a dispute to arbitration is in-
14 valid or unenforceable.

Source: Justice for Victims of Fraud Act of 2017, H.R. 1414, 115th Cong. § 5 (as introduced, Mar. 7, 2017), https://www.congress.gov/115/bills/hr1414/BILLS-115hr1414ih.pdf#page=6.

Along with understanding whether a reference to an act or a particular subdivision refers to the bill itself or a statute that the bill is amending or cross-referencing, one may need to decide whether the reference encompasses the whole act or subdivision or just a portion of it. Here again, context is critical. Although freestanding and otherwise unmodified references to "this Act" generally refer to the bill as a whole, many omnibus bills, such as the appropriations act in **Figure 31**, specify at the outset that references to "this Act" in a particular division refer only to the provisions of that division.

Figure 31. "This Act" Referring to Division of Bill

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.
Sec. 3. References.

DIVISION A—REINFORCING EDUCATION ACCOUNTABILITY IN DEVELOPMENT ACT

DIVISION B—SUPPLEMENTAL APPROPRIATIONS FOR DISASTER RELIEF REQUIREMENTS ACT, 2017

DIVISION C—TEMPORARY EXTENSION OF PUBLIC DEBT RELIEF

DIVISION D—CONTINUING APPROPRIATIONS ACT, 2018

SEC. 3. REFERENCES.

1 USC 1 note.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

DIVISION A—REINFORCING EDUCATION ACCOUNTABILITY IN DEVELOPMENT ACT

Reinforcing Education Accountability in Development Act. 22 USC 2151c note.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Reinforcing Education Accountability in Development Act" or the "READ Act".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.
Sec. 3. Assistance to promote sustainable, quality basic education.
Sec. 4. Comprehensive integrated United States strategy to promote basic education.

Source: Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-56, 131 Stat. 1129 (2017) (H.R. 601, 115th Cong.), https://www.congress.gov/115/plaws/publ56/PLAW-115publ56.pdf.

Lastly, the Supreme Court has held that the language "this section," when used in a subsection of a statute, refers to the *entire statutory section* where it is located rather than to a specific provision within that section.[447] And when the bill is amending a section of the *U.S. Code*, a reference to

[447] *See, e.g.*, NLRB v. SW Gen., Inc., 137 S. Ct. 929, 938–39 (2017) ("Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line. Congress used that structure in the [Federal Vacancies Reform Act of 1998] and relied on it to make precise cross-references. When Congress wanted to refer only to a particular subsection or paragraph, it said so. *See, e.g.*, § 3346(a)(2) ('subsection (b)'); § 3346(b)(2) ('paragraph (1)'). But in (b)(1) Congress referred to the entire section—§ 3345—which subsumes all of the ways a person may become an acting officer." (some internal citations omitted)).

"this section" that is "inside the quotes"[448] generally refers to the *U.S. Code* section rather than the separately numbered section of the bill that made that amendment.[449]

"Notwithstanding" Clauses

If a new law conflicts with an existing law without explicitly repealing it, courts generally will heed Congress's instructions in the law's text on how to resolve the conflicting provisions.[450] An example of such an instruction is a "notwithstanding clause."[451] A bill may state that a provision applies "notwithstanding" a specific law or even "any other" law. As the Supreme Court has noted, the "ordinary meaning of 'notwithstanding' is 'in spite of,' or 'without prevention or obstruction from or by.'"[452] Accordingly, when used in a bill, a notwithstanding clause "shows which provision prevails in the event of a clash."[453]

A notwithstanding phrase does not change the scope of the requirement or prohibition to which it attaches; in other words, it does not expand upon or limit the general rule that it introduces.[454] In *National Labor Relations Board (NLRB) v. SW General, Inc.*, the Supreme Court gave the following simplified example:

> Suppose a radio station announces: "We play your favorite hits from the '60s, '70s, and '80s. Notwithstanding the fact that we play hits from the '60s, we do not play music by British bands." You would not tune in expecting to hear the 1970s British band "The Clash" any more than the 1960s "Beatles." The station, after all, has announced that "we do not play music by British bands." The "notwithstanding" clause just establishes that this applies even to music from the '60s, when British bands were prominently featured on the charts. No one, however, would think the station singled out the '60s to convey implicitly that its categorical statement "we do not play music by British bands" actually did not apply to the '70s and '80s.[455]

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[448] *See supra* note 44 and accompanying text.

[449] Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 826 (2018) ("[P]etitioners assert that 'this section' [in 28 U.S.C. § 1610(g)] could possibly reflect a drafting error that was intended to actually refer to § 1083 of the [National Defense Authorization Act for Fiscal Year 2008 (NDAA)], the Public Law in which § 1610(g) was enacted. This interpretation would require not only a stark deviation from the plain text of § 1610(g), but also a departure from the clear text of the NDAA. Section 1083(b)(3) of the NDAA provides that 'Section 1610 of title 28, United States Code, is amended . . . by adding at the end' the new subsection '(g).' 122 Stat. 341. The language 'this section' within (g), then, clearly and expressly incorporates the NDAA's reference to 'Section 1610' as a whole. There is no basis to conclude that Congress' failure to change 'this section' in § 1610(g) was the result of a mere drafting error.").

[450] *See supra* "How a New Act Affects Existing Law."

[451] Courts sometimes describe notwithstanding clauses as "repealing" conflicting laws, but a notwithstanding clause technically does not formally repeal the laws that it references or with which it conflicts. *E.g.*, Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng'rs, 619 F.3d 1289, 1299 (11th Cir. 2010) (referring to the phrase "notwithstanding any other provision of law" as a "general repealing clause"); *see generally Repeal*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "repeal" as "[a]brogation of an existing law by express legislative act").

[452] NLRB v. SW Gen., Inc., 137 S. Ct. 929, 939 (2017) (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1545 (1986); BLACK'S LAW DICTIONARY 1091 (7th ed. 1999) ("Despite; in spite of")).

[453] *Id.* (internal quotation marks omitted) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 126–27 (2012)).

[454] *See* Kucana v. Holder, 558 U.S. 233, 238 n.1 (2010) (noting that the introductory language "notwithstanding any other provision of law (statutory or nonstatutory)," did not define the scope of the accompanying jurisdictional bar; it "simply informs that once the scope of the bar is determined, jurisdiction is precluded regardless of what any other provision or source of law might say").

[455] *NLRB*, 137 S. Ct. at 940.

The *NLRB* case concerned the complicated interplay between several provisions of the Federal Vacancies Reform Act of 1998.[456] The act identified three classes of officials who could serve as an acting officer following a vacancy.[457] Subsection (a)(1) set up a default rule requiring a certain official to serve in the position unless the President selected an acting official from the categories in subsections (a)(2) or (a)(3).[458] Subsection (b) stated that "[n]otwithstanding subsection (a)(1)," a person could *not* serve as an acting officer once he was nominated by the President to fill the position.[459] The Supreme Court held that even though the notwithstanding clause only referenced subsection (a)(1), the prohibition in the second half of the sentence also applied to an acting officer serving under subsection (a)(3).[460] The notwithstanding phrase, the Court explained, "[did] not limit the [prohibition's] reach" to persons serving under subsection (a)(1).[461] Instead, the phrase "clarifie[d] that the prohibition applies even when it conflicts with the default rule" set out in subsection (a)(1).[462]

Notwithstanding Specified Sections or Laws

When a requirement or prohibition applies "notwithstanding" another specified provision or law, that requirement or prohibition normally operates like a special rule that overrides the otherwise-applicable, specified rule in the event of a conflict. For example, in 1979, the Court considered a challenge by the Yakima Nation to a Washington statute that extended the state's jurisdiction over certain "Indians and Indian territory within the State."[463] The Yakima Nation argued that the "Enabling Act under which Washington . . . gained entry into the Union" required a state constitutional amendment, rather than a legislative statute, before the state could assert such jurisdiction.[464] The Supreme Court disagreed, because a federal law provided that "*Notwithstanding the provisions of any Enabling Act* for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, *their State constitution or existing statutes*, as the case may be, *to remove any legal impediment* to the assumption of civil and criminal jurisdiction . . . ."[465] In the Court's view, even assuming the Enabling Act required a constitutional amendment, the notwithstanding phrase was "broad enough to suggest" that "Congress meant to remove any federal impediments to state jurisdiction that may have been created by an Enabling Act."[466]

Notwithstanding "Any Other Provision of Law"

When a statutory provision applies "notwithstanding any other provision of law," it generally means that the rule set out in that provision "trumps any contrary provision elsewhere in the

[456] *Id*. at 934–35.

[457] *Id*. at 936.

[458] *See* 5 U.S.C. § 3345(a) (2017).

[459] *See id*. § 3345(b)(1).

[460] *See NLRB*, 137 S. Ct. at 943–44 ("Solomon was appointed as acting general counsel under subsection (a)(3). Once the President submitted his nomination to fill that position in a permanent capacity, subsection (b)(1) prohibited him from continuing his acting service.").

[461] *Id*. at 938.

[462] *Id*.

[463] Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 465 (1979).

[464] *Id*. at 479–83.

[465] *Id*. at 481 (emphasis added) (quoting Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, § 6, 67 Stat. 588, 590).

[466] *Id*. at 487–88.

law."[467] However, use of such broad notwithstanding language raises at least three interpretative issues. First, does "provision of law" refer to federal statutes alone or does it also extend to federal regulations, state statutes, or common law (i.e., non-statutory, judge-made law)? Second, should the phrase be construed literally to displace all other laws or only those relating to the same subject matter, or of the same type, as the provision it modifies? And third, does the notwithstanding phrase foreclose the application of later-enacted laws? Resolution of these issues largely depends on the context in which the language is used,[468] but a few general principles have emerged from the case law.

First, whether the phrase "notwithstanding any other provision of law" is meant to displace a particular law may depend on the area of law at issue because different presumptions about when federal law supersedes state law or common law apply in different legal fields. For example, in *Ordlock v. Commissioner*, the Ninth Circuit considered whether a federal tax statute that allowed certain credits or refunds "notwithstanding any other law or rule of law," displaced a state property law.[469] The state law did not relate to taxes specifically, but was a law generally instituting a "community property" regime in which spouses were liable for each other's debts.[470] Quoting from a Supreme Court decision, the court first observed that "[b]ecause domestic relations are preeminently matters of state law . . . Congress, when it passes general legislation, rarely intends to displace statutory authority in this area."[471] It then applied the Supreme Court's rule that "federal law supplants community property law only where" Congress's intent to do so is "clear and unequivocal."[472] The Ninth Circuit concluded that the notwithstanding clause did not clearly preempt the state's community property law based on the provision's context within the statute and the history of similar tax statutes.[473]

To take another example, the Second Circuit examined the preemptive effect of a statute establishing a "comprehensive remedial scheme" for the government to recoup costs for cleaning up oil spills.[474] The court held that the prescribed remedies, which applied "notwithstanding any other provisions of law," displaced the remedies traditionally available under federal maritime law.[475] The Court reasoned that in the context of the statute and the presumption that

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[467] Andreiu v. Ashcroft, 253 F.3d 477, 482 (9th Cir. 2001); *see also* Kucana v. Holder, 558 U.S. 233, 238 n.1 (2010) (noting that the introductory phrase "notwithstanding any other provision of law (statutory or nonstatutory)" does not define the scope of the jurisdictional bar that follows, but "simply informs that once the scope of the bar is determined, jurisdiction is precluded regardless of what any other provision or source of law might say").

[468] *See, e.g.*, United States v. Vasquez-Alvarez, 176 F.3d 1294, 1297–98 (10th Cir. 1999) (reasoning that it was "implausible" to read the phrase "notwithstanding any other provision of law" in a particular statute to include state law where the clause immediately following it was "to the extent permitted by relevant State and local law"). In certain cases, courts have also examined the legislative history of a statute in interpreting the import of a notwithstanding provision. In *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, for example, the Ninth Circuit considered whether, in enacting a provision granting the SEC authority to regulate the options market "notwithstanding any other provision of law," Congress meant to give the SEC exclusive authority to regulate options and preempt state regulation in this area. 828 F.2d 586, 588–89 (9th Cir. 1987). The court held that the legislative history of the provision—which showed that Congress inserted the notwithstanding provision in reaction to an appellate decision that another federal agency had exclusive jurisdiction over the options market—demonstrated that the provision was meant "to insure that the SEC could regulate options, not to exclude all other possible regulation." *Id.* at 589.

[469] 533 F.3d 1136, 1143 (9th Cir. 2008).

[470] *Id.* at 1138–39.

[471] *Id.* at 1140 (internal quotation marks omitted) (quoting Mansell v. Mansell, 490 U.S. 581, 587 (1989)).

[472] *Id.*

[473] *Id.* at 1144–45.

[474] *In re* Complaint of Oswego Barge Corp., 664 F.2d 327, 339–40 (2d Cir. 1981).

[475] *Id.* at 340.

congressional acts supersede federal common law, the language meant that the statutory remedies were "not to be modified by any preexisting law," including non-statutory maritime law.[476]

Second, the context of the language "notwithstanding any other provision of law" may suggest that the statutory language that follows controls only in cases involving laws of a certain type.[477] In other words, the intent may not be "to disregard *every* law on the books."[478] For example, in *Oregon Natural Resources Council v. Thomas*, the Ninth Circuit concluded that in the context of the statute at issue, a provision directing an agency to expedite the award of certain timber sale contracts "notwithstanding any other law" was "best interpreted as requiring the disregard only of environmental laws, not all laws otherwise applicable to [such] sales."[479] Specifically, the court concluded that the notwithstanding phrase, standing alone, did not foreclose review of the agency's action under the Administrative Procedure Act.[480] In the court's view, such an interpretation would render "nugatory" a separate provision providing for judicial review of timber sales that did not accord with "applicable law" other than specified environmental laws.[481]

Third, whether the phrase "notwithstanding any other provision of law" forecloses the application of later-enacted laws will likely depend on the language and context of the two laws at issue.[482] A court could reasonably conclude that at the time Congress adopted the earlier notwithstanding clause, Congress "could not have intended to disregard a provision of law that had not yet been enacted."[483] However, the Supreme Court has held that "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning."[484] Moreover, because courts presume that Congress is aware of

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[476] *Id.* at 337–38, 340.

[477] *See, e.g.*, Marsh v. Rosenbloom, 499 F.3d 165, 177 (2d Cir. 2007) (holding that state statute barring suits against dissolved corporations after a particular time period precluded recovery even though a federal statute established liability "notwithstanding any other provision or rule of law," because the phrase "refers only to substantive liability and does not express congressional intent to preempt state rules on how litigation proceeds, including a party's amenability to suit"); Mapoy v. Carroll, 185 F.3d 224, 228–29 (4th Cir. 1999) (interpreting a statute stating that "notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from [certain] decision[s] or action[s] by the Attorney General" to mean that "all other *jurisdiction-granting statutes* . . . shall be of no effect" (emphasis added) (internal quotation marks and citation omitted)).

[478] FILSON & STROKOFF, *supra* note 37, at 233 (stating, as an example, that "a provision that gives an official the authority to enter into contracts 'notwithstanding any other provision of law' is probably saying that other requirements regarding competitive bidding do not apply, not that the official can accept bribes to award contracts"); *see also Or. Nat. Res. Council*, 92 F.3d at 796–97 (noting that the Ninth Circuit has "repeatedly held that the phrase 'notwithstanding any other law' is not always construed literally").

[479] 92 F.3d 792, 796 (9th Cir. 1996).

[480] *Id.* at 798 (holding that APA review was unavailable on other grounds).

[481] *Id.* at 797. *But cf.* Mission Critical Sols. v. United States, 91 Fed. Cl. 386, 397 (Fed. Cl. 2010) (distinguishing *Oregon Natural Resources Council* because "the Ninth Circuit was presented with a statute that contained, in one subsection, the phrase 'notwithstanding any other law' and that, in another subsection, clearly excluded the application of a certain class of laws—all federal environmental and natural resource laws—to timber sales while still providing for judicial review of agency decisions not in accordance with applicable law").

[482] *See, e.g.*, CRS Legal Sidebar LSB10526, *PRWORA and the CARES Act: What's the Prospective Power of a "Notwithstanding" Clause?*, by Ben Harrington.

[483] Thomas v. LeBlanc, No. 18-496-JWD-RLB, 2019 U.S. Dist. LEXIS 188704, at *27 (M.D. La. Oct. 30, 2019) (deciding that between two provisions in the same state statute beginning "notwithstanding any other law to the contrary," the later-enacted provision controlled).

[484] Lockhart v. United States, 546 U.S. 142, 146 (2005) (internal quotation marks omitted) (quoting Union Bank v. Wolas, 502 U.S. 151, 158 (1991)) (reasoning that no statute of limitations barred the government from recovering petitioner's debt through offsets to Social Security benefits; even though offsets of that type were not permitted until 1996, Congress had repealed the statute of limitations for administrative offsets five years earlier, in 1991, and it did

existing laws—including existing notwithstanding clauses—when it enacts new ones, a court may conclude that Congress considered and elected to retain the earlier notwithstanding language.[485] Given these presumptions, unless the later-enacted statute clearly manifests Congress's intent to repeal the earlier notwithstanding clause by implication,[486] a court may harmonize the two laws by ruling that the notwithstanding clause displaces the new law to the extent of any conflict.[487]

Drafting Errors

Errors in drafting are inevitable, and the courts do not expect Congress to translate its objectives with absolute precision.[488] When an error is obvious or technical[489]—such as a cross-reference to a subdivision that is clearly inapplicable or does not exist—a court may construe the statute with the correction in mind,[490] or it may defer to the relevant agency's interpretation of the provision at issue.[491] For example, the Supreme Court has concluded that it is appropriate for courts to correct (through their interpretations) "a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design," when Congress's intended meaning is "clear beyond question."[492] In the main, however, a court presumes that Congress "says what it means and means what it says,"[493] and will not "rewrite" a statute through its interpretation simply because the law is imprecise, duplicative of another law, or contains a loophole.[494]

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not matter that the 1991 Congress may not have foreseen the effect of that law on Social Security benefits).

[485] *See* Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

[486] *See supra* notes 26–33 and accompanying text.

[487] *See, e.g.*, Mowbray v. Kozlowski, 914 F.2d 593, 594, 599 (4th Cir. 1990) (concluding that the phrase "'notwithstanding any other provision' of the Medicaid statute" applied to subsequently enacted provisions of the Medicaid statute, including one that appeared to conflict with the clause, based on the statutory scheme and the Secretary of Health and Human Services's "reasonable interpretation of the two provisions in issue which harmonizes them").

[488] *See* Torres v. Lynch, 136 S. Ct. 1619, 1633 (2016) ("Rather than expecting (let alone demanding) perfection in drafting, we have routinely construed statutes to have a particular meaning even as we acknowledged that Congress could have expressed itself more clearly.").

[489] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2492 (2015) (noting that "the Act creates three separate Section 1563s").

[490] *See* Chickasaw Nation v. United States, 534 U.S. 84, 91 (2001) ("[I]n context, common sense suggests that the cross-reference is simply a drafting mistake, a failure to delete an inappropriate cross-reference in the bill that Congress later enacted into law."); *cf.* Michigan v. Bay Mills Indian Cmty., 695 F.3d 406, 416 n.1 (6th Cir. 2012) (construing an ordinance's reference to "the power to sue and be sued provided in [s]ubsection 4.18(Z)" to be an "intended cross reference . . . to subsection 4.18(Y)" because "[s]ubsection 4.18(Z) does not provide the power to sue and be sued").

[491] *Cf.* Valero Energy Corp. v. EPA, 927 F.3d 532, 534–36 (D.C. Cir. 2019) (declining to review the EPA's interpretation of a statute that required the agency to review the impact periodically of requirements "described in subsection (a)(2)" on certain entities when the statute contained no subsection (a)(2), holding that the EPA's guidance did not constitute a final agency action).

[492] U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., 508 U.S. 439, 462 (1993) ("Against the overwhelming evidence from the structure, language, and subject matter of the 1916 Act there stands only the evidence from the Act's punctuation, too weak to trump the rest. . . . The true meaning of the 1916 Act is clear beyond question, and so we repunctuate.").

[493] Simmons v. Himmelreich, 136 S. Ct. 1843, 1848 (2016).

[494] *See* Bottinelli v. Salazar, 929 F.3d 1196, 1201 (9th Cir. 2019) ("Generally, we hesitate to presume a statutory drafting error . . . ."); Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775, 782 (D.C. Cir. 1998) ("Sometimes Congress drafts statutory provisions that appear preclusive of other unmentioned possibilities just as it sometimes drafts provisions that appear duplicative of others simply, in Macbeth's words, 'to make assurance double sure.'").

Sometimes it is not manifestly clear that a provision contains a drafting error,[495] and a court has to decide whether the most natural reading of the provision accords with Congress's intent.[496] Some judges adhere closely to the text of the statute if it reads clearly to them, even if extra-textual evidence suggests that Congress may have intended a different result.[497] Others have demonstrated a willingness to expand the lens to take in evidence of congressional intent from the legislative history of the act or the regulatory scheme as a whole.[498]

Takeaways and Suggestions for Reading a Bill

Understanding how a draft or pending bill would change the law if enacted requires a familiarity with both its subject matter and the legal principles that are likely to govern each type of provision, which are the focus of this report. While there is no substitute for a thorough analysis of the bill's unique text, context, purpose, and history, this section summarizes key takeaways from the report and suggestions for reading a bill to help Members and congressional staff flag potential interpretive issues for discussion with legislative attorneys in their offices and within CRS.

1. Scan the whole bill before diving into any given section. Key definitions or limitations on the bill's scope may be set out at the end of the bill or within a particular division.[499] If the bill is amending an existing law, consult the statute to be amended to get the full picture of the changes the bill would make. The statute's table of contents in the *U.S. Code* may help to orient you to the amendment's place in the overall statutory scheme and to identify any general rules or definitions that might apply to the bill.[500]
2. Pay attention to whether language in a bill is "inside the quotes"—signifying language that would be added to, or removed from, an existing law—or "outside the quotes"—indicating a stand-alone provision.[501] If a reference to "this act" or a particular subdivision (i.e., "this section") is "outside the quotes," it likely refers

[495] *See, e.g.*, CRS Legal Sidebar LSB10304, *Waiver of Congressional Notification Period in the Arms Export Control Act*, by Jennifer K. Elsea.

[496] *See, e.g.*, Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 826 (2018) (finding "no basis to conclude that Congress' failure to change 'this section,'" which appeared in amendatory language, to a reference to a section of the underlying public law "was the result of a mere drafting error").

[497] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2496, 2505 (2015) (Scalia, J., dissenting) (rejecting the majority's interpretation of the phrase "established by the State" as "established by the State or the Federal Government," reasoning that unless the phrase produced an "absurd result," the Court had "no authority to dismiss the terms of the law as a drafting fumble").

[498] *See, e.g.*, *King*, 135 S. Ct. at 2490 (majority opinion) (reasoning that although "it might seem that a Federal Exchange cannot" be "established by the State," the phrase, "when read in context, 'with a view to [its] place in the overall statutory scheme,' . . . is not so clear." (internal citation omitted)); Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring) ("[W]e cannot escape this unambiguous statutory command by proclaiming that it would produce an absurd result. We can, however, escape by using common sense. The history of the provision makes it perfectly clear that Congress did not intend its 1995 amendment adding (iii) to repeal the pre-existing interpretation of (i) as being limited by the ceiling contained in (ii). Thus, the Court unquestionably decides this case correctly. It has demonstrated that a busy Congress is fully capable of enacting a scrivener's error into law.").

[499] *See supra* "Definitions" and "General Rules and Exceptions."

[500] *See supra* "Freestanding Versus Amendatory Bills."

[501] *See supra* "Freestanding Versus Amendatory Bills."

to the bill itself. The same reference "inside the quotes" likely refers to the underlying statute instead of the bill.[502]

3. If a provision's text is unclear, do not assume that its caption or the bill's title will clarify the provision. A court may not put much weight on those types of organizational elements. Similarly, clarifications in bill summaries, committee reports, and other unenacted statements may not persuade an agency or court as to the meaning of a disputed provision.[503]
4. Remember that statements of purpose and findings generally do not create legal rights or duties but could be used as evidence of Congress's intended meaning.[504]
5. In deciding what a term means, check for applicable definitions in the bill and any statutes that the bill would amend.[505] Remember that a court will likely give defined terms the meaning that Congress has chosen while undefined terms usually (but not always) have their ordinary meaning. Observe whether a definition is prefaced by "means," suggesting that what follows is an exhaustive definition, or "includes," suggesting that what follows is illustrative but not exhaustive.[506]
6. Consider whether a provision is framed in mandatory (e.g., "shall", "may not") or discretionary (e.g., "may") terms.[507] Note any exceptions, exemptions, or other special rules. Language that qualifies a provision usually signals an important limitation on the provision's scope (e.g., "Except as provided in paragraph (2)," "for purposes of this section"). Captions may also indicate a default rule followed by an exception (e.g., an "In General" in paragraph (1) may precede exceptions in paragraph (2)).[508]
7. In reviewing the substantive provisions in a bill, remember that a requirement may not compel, and a prohibition may not deter, the specified conduct without an enforcement mechanism to promote compliance. Similarly, a benefit or protection conferred on private individuals or entities usually cannot be enforced by them without an explicitly authorized private right of action.[509]
8. If a provision potentially conflicts with an existing law, consider whether it clearly addresses what rule should prevail through an exception, a notwithstanding clause, or a preemption clause.[510]
9. Check cross-references to other provisions or statutes. Not only will this help to understand the effect of the amendments, but it can also help to identify technical drafting errors (e.g., a cross-reference to a subparagraph that no longer exists as a result of another amendment).[511]

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[502] *See supra* ""This Act" or "This Section" (or Other Subdivision)."

[503] *See supra* "Introductory and Organizational Elements of a Bill" and "The Role of Statutory Interpretation."

[504] *See supra* "Prefatory Statements."

[505] *See supra* "Definitions."

[506] *See supra* ""Means" Versus "Includes"."

[507] *See supra* ""Shall" Versus "May"."

[508] *See supra* "General Rules and Exceptions."

[509] *See supra* "Rights, Remedies, and Enforcement."

[510] *See supra* "How a New Act Affects Existing Law," ""Notwithstanding" Clauses," and "Preemption Clauses."

[511] *See supra* "Technical and Conforming Amendments" and "Drafting Errors."

10. Note any delayed effective dates, sunset provisions, or other special timing rules. The more specific rules will likely override the default presumptions regarding the provisions' immediate and continuing effect once enacted.[512]

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[512] *See supra* "Timing Rules."