

Enacted Legislative Findings and Purposes

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Statutory interpretation scholarship generally imagines a sharp divide between statutory text and legislative history. This Article shows that scholars have failed to consider the implications of a hybrid type of text that is enacted by Congress and signed by the president, but which looks like legislative history. This text commonly appears at the beginning of a bill under headings such as “Findings” and “Purposes.” This enacted text often provides a detailed rationale for legislation and sets out Congress’s intent and purposes. Notably, it is drafted in plain language by political congressional staff rather than technical drafters, so it may be the portion of the enacted text that is most accessible to members of Congress and their high-level staff. Despite enacted findings and purposes’ apparent importance to interpretation, courts infrequently reference them and lack a coherent theory of how they should be used in statutory interpretation. In most cases in which courts have referenced them, they have relegated them to a status similar to that of unenacted legislative history despite the fact that they are less subject to formalist and pragmatic objections. Perhaps because courts have infrequently and inconsistently relied on enacted findings and purposes, scholars have also failed to consider them, so their relevance to statutory interpretation has gone mostly unrecognized and untheorized in the legal literature.

This Article argues that all of the enacted text of a statute must be read together and with equal weight, as part of the whole law Congress enacted, to come up with an interpretation that the entire text can bear. This is more likely to generate an interpretation in line with Congress’s intent than a mode of interpretation that focuses on the specific meaning of isolated terms based on dictionaries, canons, unenacted legislative history, or other unenacted tools. This Article shows that, when textualists’ formalist arguments against legislative history are taken off the table, there may be less that divides textualists from purposivists. Enacted findings and purposes may offer a text-based, and therefore more constrained and defensible, path forward for purposivism, which has been in retreat in recent decades in the face of strong textualist attacks.

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INTRODUCTION

Whether judges should consider legislative history is the most hotly debated issue in statutory interpretation.¹ This debate focuses on the relative merits of enacted statutory text and unenacted text that provides background to congressional intent and purposes.² This Article shows that this debate has almost entirely failed to account for Congress’s frequent use of enacted text to

¹ For just a few discussions of the debate over the use of legislative history, see John F. Manning, *Chevron and Legislative History*, 82 *Geo Wash L Rev* 1517, 1529 (2014) (stating that “the appropriate methods of interpretation are hotly contested” and that whether to use legislative history is “one crucial aspect of that question”); Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *Stan L Rev* 901, 964 (2013) (noting that legislative history is the most “hotly contested” interpretive tool); Caleb Nelson, *What Is Textualism?*, 91 *Va L Rev* 347, 353 (2005) (stating that “[t]extualists and intentionalists have a well-known disagreement about the proper use of internal legislative history”); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 *Stan L Rev* 1833, 1833 (1998) (“Intentionalists and textualists have vigorously debated whether judges should consult legislative history in statutory interpretation cases.”).

² See Part IV.B (discussing common arguments made by textualists against the use of legislative history and in favor of a focus on statutory text).

provide legislative background and to express its intent and purposes. As this Article shows, Congress frequently includes legislative findings and purposes in enacted bills, but these enacted texts have mostly been ignored in ongoing debates over theories of statutory interpretation.

To uncover Congress's use of enacted findings and purposes, I searched volumes of the Statutes at Large over an almost thirty-year period for examples of how often, and in what context, this type of statutory language appears.³ These searches revealed that findings and purposes most commonly appear at the beginning of a bill, with findings providing background on the issues that led Congress to act and purposes explaining what Congress hoped to achieve in enacting the legislation. Because findings and purposes are often related, Congress commonly includes both in a bill, with the findings explaining the background issues that led Congress to act and the purposes explaining Congress's solution. As this Article quantifies, over the last few decades Congress has used these provisions frequently, and they appear in a majority of significant bills.⁴ These provisions are not spare statements of background that provide little context to the legislation. Instead, they are often detailed rationales for congressional action and explanations of Congress's expectations for the legislation. Yet despite its statutory prominence and its similarity to oft-debated unenacted legislative history, this type of enacted statutory language has never been explored or explained at any length in the literature, so its significance to common debates in statutory interpretation has gone mostly unnoticed.⁵

³ See Parts I.A–B.

⁴ See Parts I.A–B (discussing the use of enacted findings and purposes in bills over time).

⁵ Perhaps that is because it is viewed by scholars as just another part of the statutory text. But this Article argues that it is less like statutory text and more like legislative history and that this should affect how we think about statutory text and legislative history. Scholars have occasionally discussed enacted findings and purposes for a particular bill but have rarely considered what these provisions could mean for statutory interpretation or compared them with legislative history more broadly, and never in a comprehensive or systematic way. The most in-depth discussions have come in articles focused on other topics, with little meaningful consideration of what they mean for the theories and practice of statutory interpretation. See, for example, Ethan J. Leib and James J. Brudney, *Legislative Underwrites*, 103 Va L Rev 1487, 1528–29 (2017) (discussing findings and purpose provisions used to “underwrite” judicial opinions); Daniel A. Crane, *Enacted Legislative Findings and the Deference Problem*, 102 Georgetown L J 637, 679–80 (2014) (discussing enacted findings in the context of constitutional analyses, with brief mentions of statutory interpretation); Steve Thel, *Statutory Findings and Insider Trading Regulation*, 50 Vand

This Article also explores how Congress drafts findings and purposes, revealing new parts of the legislative process that challenge common conceptions of how statutes are made. In some ways, the process by which findings and purposes are created is similar to that of other types of statutory language. They are often included in early drafts of bills, which may take many years to pass, and undergo revisions throughout the legislative process, just like other statutory language.⁶ Congress also amends its findings and purposes in subsequent bills to account for updated facts and changing congressional preferences.⁷

In other ways, however, enacted findings and purposes are different from other statutory language. For example, they are drafted by political staff who are much more closely connected to members of Congress than nonpartisan drafters from Congress's Offices of Legislative Counsel, who often draft the more technical provisions of statutes.⁸ In fact, Legislative Counsel explicitly discourage the inclusion of findings and purposes in bills, advising Congress that those materials are best left to committee reports.⁹ Despite this admonition, Congress continues to frequently include them in statutes. Findings and purposes are prominently placed at the beginning of statutes and are written in plain language that is intelligible to members of Congress and their high-level staffs, and so they may be the statutory language that members of Congress and their high-level staffs are most likely to read. Members of Congress generally engage with legislation at a relatively high level of abstraction, and it may be that enacted findings and purposes, rather than the much more voluminous

L Rev 1091, 1125–33 (1997) (discussing findings in a certain insider trading bill and how they could be used in statutory interpretation).

⁶ See Part I.D.

⁷ See note 74 and accompanying text.

⁸ This reality complicates earlier scholarship that suggests there is a strict authorship dichotomy between statutory text and legislative history text rather than a situation in which political staffers indeed draft some statutory provisions. See Part III.A (discussing empirical implications of this Article). For an example of such earlier scholarship, see Lisa Schultz Bressman and Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan L Rev 725, 741 (2014) (indicating that legislative history is “drafted by those staff with more policy expertise and greater direct accountability to the members than the staff who may draft the text”).

⁹ See *Legislative Drafting Manual* § 124 at *19 (Office of the Legislative Counsel, US Senate, Feb 1997), archived at <http://perma.cc/66QV-9ASN>; *House Legislative Counsel's Manual on Drafting Style* § 325 at *28 (Office of the Legislative Counsel, US House of Representatives, Nov 1995), archived at <http://perma.cc/4LYV-DE7C>.

unenacted legislative history, best reflect members' understanding of why a bill was drafted and what it was meant to accomplish.

Another notable difference between findings and purposes and other statutory text is in the way they are codified. Although findings and purposes are valid law published in the Statutes at Large, which contain the law as passed by Congress and signed by the president,¹⁰ it is common practice for a bill to be stripped of its findings and purposes before the rest of the statute is placed in the main text of the US Code.¹¹ Findings and purposes most commonly end up in notes to the Code, where they can be difficult to locate and identify as enacted text because they are often placed far from much of the rest of a bill's text and often appear similar to other unenacted editor's notes. Even more surprisingly, findings and purposes are sometimes left out of the Code altogether.¹² The decision of where to put findings and purposes in the Code, or whether to leave them out altogether, is made by the Office of the Law Revision Counsel (OLRC), an unelected body within Congress that is responsible for the codification process. These technical organizers of the Code have significant power over how (and in some cases, whether) courts, litigants, and the public see the law, but their role has gone unnoticed by scholars and judges. It is peculiar, to say the least, that this office regularly hides away in notes some of the most salient text that Congress

¹⁰ *Frequently Asked Questions and Glossary* (Office of the Law Revision Counsel, US House of Representatives), archived at <http://perma.cc/JS8Q-X93A>:

Placement of a provision as a statutory note under a section of either a positive law title or a non-positive law title has no effect on the validity or legal force of the provision; that is, a provision set out as a statutory note has the same validity and legal force as a provision classified as a section of the Code.

For examples of the Supreme Court acknowledging this, see *United States National Bank of Oregon v Independent Insurance Agents of America, Inc.*, 508 US 439, 448 (1993); *United States v Welden*, 377 US 95, 98 n 4 (1964); *Stephan v United States*, 319 US 423, 426 (1943).

¹¹ *Detailed Guide to the United States Code Content and Features* (Office of the Law Revision Counsel, US House of Representatives), archived at <http://perma.cc/HJ4P-FXAB>:

There are several categories of statutory notes. The most common are Change of Name, Effective Date, Short Title, Regulations, Construction, and miscellaneous notes. Miscellaneous notes include things like congressional findings, study and reporting requirements, and other provisions related to the subject matter of the Code section under which they appear.

For example, the Partial-Birth Abortion Ban Act of 2003 has findings in notes following 18 USC § 1531, which were examined in *Gonzales v Carhart*, 550 US 124, 141 (2007). The Lilly Ledbetter Fair Pay Act of 2009 has findings in a note following 42 USC § 2000e-5.

¹² See note 92 and accompanying text (discussing examples in which enacted findings and purposes were not included in the Code).

enacts, and does so in ways that are inconsistent and based on institutional practice that is not accessible to outsiders. This codification process is a potential explanation for the scant attention enacted findings and purposes have received from courts and scholars.

Despite their apparent relevance to interpretation for both textualists and purposivists, courts infrequently cite enacted findings and purposes when interpreting statutes, especially compared to unenacted legislative history. Even when courts have cited them, they have often relegated them to a status similar to that of unenacted legislative history, or at least have failed to differentiate them from unenacted text.¹³ For example, when the Supreme Court cites enacted findings and purposes, it most commonly does so side by side with unenacted legislative history, and often it uses the findings and purposes merely to confirm what the unenacted legislative history says, even when they say the same thing.¹⁴ Other times the Court simply ignores relevant enacted findings and purposes.¹⁵ And in rare cases, findings and purposes have been central to the Court's decision.¹⁶ Courts appear to lack a coherent theory of how enacted findings and purposes should be used in statutory interpretation.

This Article argues that a theory of interpretation that accounts for enacted legislative findings and purposes would simply be a more complete version of the commonly cited whole act rule. The Court has said, "We do not . . . construe statutory phrases in isolation; we read statutes as a whole,"¹⁷ yet in practice it has

¹³ See Part II.B.

¹⁴ See, for example, *Scarborough v Principi*, 541 US 401, 406 (2004) (quoting a House committee report to establish the purpose of the statute, followed by a citation of enacted congressional findings and purposes that state the same purpose); *General Dynamics Land Systems, Inc v Cline*, 540 US 581, 586–90 (2004) (discussing legislative history before enacted findings and purposes and then treating them all as a combined group of "findings and statements of objectives"); *American Textile Manufacturers Institute, Inc v Donovan*, 452 US 490, 514–22 (1981) (discussing unenacted legislative history at length before mentioning Congress's "statement of findings and declaration of purpose encompassed in the Act itself").

¹⁵ Compare, for example, *Federal Aviation Administration v Cooper*, 566 US 284, 287 (2012) (interpreting the statutory term "actual damages" to be ambiguous and denying recovery for mental or emotional damages), with *id* at 315 (Sotomayor dissenting) (pointing out that the enacted purposes section suggests the term was intended to refer to *all* damages).

¹⁶ See, for example, *Holder v Humanitarian Law Project*, 561 US 1, 29 (2010) (citing enacted findings to determine whether certain assistance to listed terrorist organizations was prohibited by statute).

¹⁷ *Samantar v Yousuf*, 560 US 305, 319 (2010), quoting *United States v Morton*, 467 US 822, 828 (1984). See also James J. Brudney and Corey Ditslear, *Canons of Construction*

treated enacted findings and purposes as less important than other parts of a statute without a clear normative justification for doing so. If the ultimate goal of interpretation is to give effect “to every clause and word of a statute”¹⁸ so that “no part will be inoperative or superfluous,”¹⁹ then judges should interpret a statute in light of Congress’s enacted background and purposes. Judges distinguishing between enacted findings and purposes and other enacted provisions are making an interpretive choice that is neither connected to nor required by the statutes passed by Congress. Enacted findings and purposes are law just like any other law, and there is no reason why they should not be given the full weight of law.

This is not to say that enacted findings and purposes should be used in boundless ways. They should not be used to give meaning to other parts of the statute that the words “will not bear.”²⁰ The contention here is that all of the text of a statute, including the enacted findings and purposes, must be read together as part of the whole legislative enactment to come up with an interpretation that the entire text can bear. This is more likely to generate an interpretation in line with Congress’s intent than an interpretation based on an isolationist mode of interpretation. This proposal would still require analysis of which interpretations the text permits, what Congress likely intended, and at what level of generality.²¹ Courts should engage in these types of inquiries when congressional findings and purposes are enacted rather than confining themselves to more narrowly focused arguments about specific meanings of isolated terms, based on dictionaries, canons, legislative history, and other unenacted sources, while ignoring important parts of the enacted text.

Enacted findings and purposes should be useful tools of interpretation even for textualists because they are not subject to the formalist and pragmatic arguments textualists commonly raise against legislative history. Enacted findings and purposes

and the Elusive Quest for Neutral Reasoning, 58 Vand L Rev 1, 12–13 (2005) (stating that the whole act canon suggests that “each term or provision should be viewed as part of a consistent and integrated whole”).

¹⁸ *Montclair v Ramsdell*, 107 US 147, 152 (1883).

¹⁹ *Corley v United States*, 556 US 303, 314 (2009) (citations omitted).

²⁰ Henry M. Hart Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1375 (Foundation 1994) (William N. Eskridge Jr and Philip P. Frickey, eds).

²¹ See note 194.

are voted on by both houses of Congress and signed by the president, so there is no question they are law.²² When purposes are enacted, textualism would appear to require a purposive manner of interpretation based on the text. Enacted findings and purposes are also less voluminous and more homogeneous than unenacted legislative history, so they are unlikely to have “something for everybody” in the way unenacted legislative history sometimes does.²³ Enacted findings and purposes are also prominently included at the beginning of the statutory text Congress votes on, so it is less susceptible to manipulation and is uniquely reliable and attributable to Congress as a whole. Additionally, enacted findings and purposes call into question common arguments about Congress’s inability to have a collective intent.²⁴ It has become commonplace for textualists to argue and purposivists to concede that, because Congress is a “they,” not an “it,”²⁵ Congress cannot have an intent. However, this Article’s discussion of enacted findings and purposes complicates this claim because it

²² See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv J L & Pub Pol 61, 68–69 (1994) (“Using legislative history and an imputed ‘spirit’ . . . dishonors the legislative choice as effectively as expressly refusing to follow the law. . . . No matter how well we can know the wishes and desires of legislators, the only way the legislature issues binding commands is to embed them in a law.”).

²³ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 36 (Princeton 1997) (Amy Gutmann, ed) (“In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends.”).

²⁴ Although intent skepticism is commonly associated with textualism, neither textualism nor purposivism purports to uncover Congress’s actual intent with respect to a particular statutory ambiguity. See John F. Manning, *Inside Congress’s Mind*, 115 Colum L Rev 1911, 1917–24 (2015) (collecting sources describing intent skepticism in various theories of statutory interpretation). Instead, each method relies on tools and approaches that its proponents believe best enable legislators to do their job without claiming that its preferred theory of interpretation actually answers the question of what Congress intended in each case. See, for example, John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 BU L Rev 1349, 1362–64 (2012) (discussing the original public meaning approach); John F. Manning, *Textualism and Legislative Intent*, 91 Va L Rev 419, 430–32 (2005) (discussing textualism); Peter L. Strauss, *The Common Law and Statutes*, 70 U Colo L Rev 225, 236 (1999) (arguing that “the difficulties of collective authorship . . . make [] problematic the idea that legislation can have an ‘intent’ if it emerges from the highly variable participation of 535 legislators divided among two Houses of Congress and their many committees and subcommittees, and assisted by innumerable staff and lobbyists”); William N. Eskridge Jr., *Gadamer / Statutory Interpretation*, 90 Colum L Rev 609, 635 (1990) (discussing and critiquing purposivism); William N. Eskridge Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan L Rev 321, 332–33 (1990) (discussing purposivism); William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U Pa L Rev 1479, 1538–39 (1987).

²⁵ See generally, Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 Intl Rev L & Econ 239 (1992).

shows that Congress often generates an institutional intent that can fairly be attributed to all of Congress. This Article shows that, when textualists' arguments against legislative history are taken off the table, there is less that divides textualists from purposivists. Enacted findings and purposes should be places where textualism and purposivism have common ground. This could offer a more constrained and defensible path forward for purposivism, which has a long pedigree as a mode of statutory interpretation but has been in retreat in the face of strong formalist and pragmatic attacks in recent decades.²⁶

Enacted findings and purposes also raise new questions about how courts should view similar types of statements included in legislative history that have not been enacted. If Congress wants courts to consult unenacted legislative history, then why does it go to the effort of enacting some statutory language that is often very similar to the unenacted legislative history? Why not follow the admonition of Legislative Counsel and leave all findings and purposes to the unenacted legislative history? These are important questions that scholars and judges have mostly failed to ask because they have missed the significance of enacted findings and purposes. This Article shows that there is much work to be done in developing a more complete empirical account of the ways Congress legislates, which is necessary to constructing a comprehensive theoretical framework for how judges should approach statutory interpretation.

This Article proceeds as follows. Part I introduces enacted findings and purposes and discusses to whom they are directed and the legislative process by which they are created. Part II discusses courts' use of enacted findings and purposes, focusing primarily on cases of statutory interpretation. Part III describes the implications of enacted findings and purposes for how scholars and courts think about the empirical realities of statutory text and legislative history. Part IV considers how enacted findings and purposes should influence interpretation for both textualists and purposivists.

²⁶ See William N. Eskridge Jr., *All about Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 Colum L Rev 990, 1003–05, 1018–21 (2001) (documenting early practices of statutory interpretation in which the courts expanded statutes beyond their words to attend to the "mischief" the statute sought to remedy); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum L Rev 1, 29–36, 78–85 (2001) (documenting early English practices of interpreting a statute in light of its spirit and arguing that early American understandings of "judicial power" contradict the view that judges were vested with the power of equitable interpretation).

I. BACKGROUND ON ENACTED FINDINGS AND PURPOSES

This Part describes and provides examples of enacted findings and purposes. To uncover these, I began by reading through volumes of the Statutes at Large, searching for examples of how Congress uses legislative history–type language in enacted text. Although Congress does this in many ways,²⁷ it became clear that the two most common types fall under headings of “Findings” and “Purposes.” Because they are the most common, this Article focuses on these provisions.²⁸

²⁷ Although findings and purposes provisions are the most common forms of enacted background text, they aren’t the only kind. For example, Congress also occasionally enacts portions of traditional sources of legislative history, such as committee reports, directly into the statutory language. It usually does so by incorporating by reference certain portions of the legislative history. For example, in the text of the Civil Rights Act of 1991 § 105(b), Pub L No 102-166, 105 Stat 1071, 1075, Congress included the following restriction on the use of legislative history:

No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

In another statute, the Intelligence Authorization Act for Fiscal Year 2004, Congress incorporated reporting requirements from the joint explanatory statement accompanying the conference report into the Act, thereby making it “a requirement in law.” § 106(a), Pub L No 108-177, 117 Stat 2599, 2604 (2003). Many other similar examples occur in the Statutes at Large.

²⁸ There are other, less common, types of statutory text that are similar to findings and purposes. “Sense of Congress” provisions, for example, are one type of statutory provision whereby Congress states its purposes or goals with respect to legislation, although they are used less frequently than the other forms discussed here. Sense of Congress provisions are often expressly precatory, voicing a general congressional desire for something to be done without much description of how. For example, one sense of Congress provision states that “the United States should pursue research and development capabilities to take the lead in developing and producing the next generation of integrated circuits” without providing further context. Ike Skelton National Defense Authorization Act for Fiscal Year 2011 § 241(b), Pub L No 111-383, 124 Stat 4137, 4176 (2011). Because these provisions are mostly precatory in nature, they are subject to a number of criticisms that may not apply to findings and purposes, and so they are outside the scope of this Article.

Another type of enacted background language that is much less commonly used is the Statement of Policy. These are similar to purposes, but are generally used only a few times per volume of the Statutes at Large. For example, the 2011 volume of the Statutes at Large contained two Statements of Policy. See National Defense Authorization Act for Fiscal Year 2012 § 1235, Pub L No 112-81, 125 Stat 1298, 1638 (2012); Belarus Democracy and Human Rights Act of 2011 § 3, Pub L No 112-82, 125 Stat 1863, 1865–66. See also, for example, Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009 § 3, Pub L No 111-172, 124 Stat 1209, 1210 (2010). These are not discussed here because each volume of the Statutes at Large has only a handful of them, and so they are less relevant than the other types discussed here.

Findings and purposes are most commonly inserted at the beginning of a bill after the title and before the operative provisions, although in longer bills they are sometimes moved closer to the relevant provisions of the bill.²⁹ Findings and purposes can be vague and at a high level of abstraction but more commonly are relatively long and detailed, although they are generally much more purposive in nature than operative text. I searched for these provisions in the Statutes at Large from 1985 to 2011 to quantify their use, although their use goes back much further.³⁰ These searches show that findings and purposes have been frequently used by Congress for decades, with no obvious upward or downward trend in their use in recent decades except that, unsurprisingly, Congress creates more of them in years when it creates more pages of legislation. In the volumes of the Statutes at Large that I searched, around 21 percent of all enacted bills contain some findings or purposes. However, many of these enacted bills are short and simple and therefore would not require statements of findings and purposes. For bills of at least twenty pages, which tend to be more important and therefore more likely to be subject to litigation, almost two-thirds contain at least one of these provisions.³¹ So it appears that bills dealing with significant policy issues are much more likely to contain findings and purposes,

²⁹ See Lisa Schultz Bressman, Edward L. Rubin, and Kevin M. Stack, *The Regulatory State* 129–35 (Aspen 2010) (discussing the structure of modern congressional statutes).

³⁰ I chose to look at statutes starting in 1985 for a few reasons. One is that older versions of the Statutes at Large are scans of documents that optical character recognition software has some difficulty rendering accurately and so can produce inaccurate results in document searches like those I used. Another is that I was not attempting to engage in historical research but instead to focus on the creation of modern statutes, which is more relevant to modern courts and scholars. However, there are certainly many enacted bills in the current US Code that are much older than 1985. Although not the focus of this Article, these bills also often contained text similar to the findings and purposes discussed here. See, for example, Max Radin, *A Short Way with Statutes*, 56 Harv L Rev 388, 398 (1942):

In modern statutes it has become increasingly common to set forth the purpose in elaborate detail in the preamble. This, it may be well to add, is far from being an innovation. At all times in English history it was an extremely common practice But old or new, the practice gives us a fairly definite notion of what the statute means to accomplish.

See also Joseph Story, 1 *Commentaries on the Constitution of the United States* § 459 at 326 (Little, Brown 3d ed 1858) (remarking that “the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute”).

³¹ I counted a total of 6,680 bills passed between 1985 and 2011, with 1,411, or 21.12 percent, of those bills containing either findings, purposes, or both. During this same period Congress enacted 751 bills of at least twenty pages, and of these 476, or 63.38 percent, contained either findings, purposes, or both.

which makes sense given their length and relative complexity. Additionally, many bills amend existing statutory schemes that already contain findings and purposes and so may not need to include new ones. More of these results on Congress's use of findings and purposes are provided below.

A. Findings

Findings are commonly included in enacted bills, as illustrated in Figure 1, and can come in many forms. As the name indicates, findings often recite facts that Congress found as part of developing the legislation, which are generally an explanation of the "mischief" that prompted the statute.³² Sometimes these findings are quantifiable. For example, Congress has found that "[o]nly 6 states spent 50 percent or more of their Medicaid long-term care dollars on home and community-based services for elderly individuals and adults with physical disabilities while 1/2 of the States spent less than 25 percent."³³ Other times findings are not easily quantifiable and instead reflect a congressional policy preference. For example, Congress has found that "[p]arents are best equipped to make decisions for their children, including the educational setting that will best serve the interests and educational needs of their child."³⁴

Findings do not appear to be restricted to any one use and can serve a variety of functions in a bill. Often the findings will describe the reason why Congress decided to act. Findings also often describe the purpose of the bill and what Congress expected the legislation to do. Sometimes findings take up many pages of

³² Blackstone and others have discussed the search for the "mischief" that led to the enactment of a statute as a tool for interpreting congressional intent. William N. Eskridge Jr., Abbe R. Gluck, and Victoria F. Nourse, *Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes* 303 (West 2014).

³³ Patient Protection and Affordable Care Act § 2406(a)(4), Pub L No 111-148, 124 Stat 119, 306 (2010). See also Dodd-Frank Wall Street Reform and Consumer Protection Act § 1491(a)(6), Pub L No 111-203, 124 Stat 1376, 2205 (2010) ("In 2004 alone, Fannie Mae and Freddie Mac purchased \$175,000,000,000 in subprime mortgage securities, which accounted for 44 percent of the market that year, and from 2005 through 2007, Fannie Mae and Freddie Mac purchased approximately \$1,000,000,000,000 in subprime and Alt-A loans."); Children's Health Insurance Program Reauthorization Act of 2009 § 622(a)(1), Pub L No 111-3, 123 Stat 8, 105 (finding that "[t]here are approximately 45 million Americans currently without health insurance").

³⁴ Scholarships for Opportunity and Results Act § 3002(1), Pub L No 112-10, 125 Stat 199, 199 (2011).

a bill, and sometimes they are a single paragraph.³⁵ Sometimes they are general in nature, and other times they provide detailed explanations for why the legislation is being passed and congressional expectations of how the statute will be applied to remedy the perceived problem. Relatedly, findings will often describe why Congress has the constitutional authority to enact the legislation. This is important because, as will be discussed in more detail below, courts often look to Congress's findings as evidence of a law's constitutionality.

³⁵ On occasion, findings can take up a majority of a bill. The Partial-Birth Abortion Ban Act of 2003 contained fourteen detailed findings that were about four times longer than the rest of the statute. See § 2, Pub L No 108-105, 117 Stat 1201, 1201–06. See also Appeal Time Clarification Act of 2011 § 2, Pub L No 112-62, 125 Stat 756, 756–57 (including findings about twice as long as rest of the statute).

TABLE 1: FINDINGS IN THE STATUTES AT LARGE³⁶

| Year | Number of Public Laws with Findings | Total Number of Findings |
|------|-------------------------------------|--------------------------|
| 2011 | 11 | 90 |
| 2010 | 28 | 334 |
| 2009 | 20 | 349 |
| 2008 | 51 | 614 |
| 2007 | 23 | 282 |
| 2006 | 48 | 578 |
| 2005 | 22 | 331 |
| 2004 | 45 | 543 |
| 2003 | 43 | 542 |
| 2002 | 55 | 677 |
| 2001 | 20 | 291 |
| 2000 | 123 | 1,699 |
| 1999 | 42 | 365 |
| 1998 | 78 | 832 |
| 1997 | 36 | 315 |
| 1996 | 46 | 876 |
| 1995 | 11 | 105 |
| 1994 | 52 | 1,014 |
| 1993 | 36 | 364 |
| 1992 | 81 | 913 |
| 1991 | 34 | 356 |
| 1990 | 94 | 1,096 |
| 1989 | 21 | 157 |
| 1988 | 85 | 800 |
| 1987 | 29 | 519 |
| 1986 | 44 | 369 |
| 1985 | 15 | 363 |

An example helps illustrate the many ways Congress uses findings. In the Patient Protection and Affordable Care Act³⁷ (ACA), Congress included several sets of findings throughout the

³⁶ To count findings, I searched volumes of the Statutes at Large for the word “finding” and filtered for findings of the type described here. Because these findings are almost always contained in findings sections that contain a list of findings, I counted each finding separately. For example, if a findings section contained ten different findings, I counted that as ten findings. I chose to do this rather than count findings sections because of the variability between findings sections, some of which contain a few and some of which contain many.

³⁷ Pub L No 111-148, 124 Stat 119 (2010).

bill. One set of findings, relating to the individual mandate, became a focus of subsequent litigation about the Act.³⁸ This findings section began with a constitutional justification for the mandate, noting that “[t]he individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce.”³⁹ Many of the other findings, however, focused on explaining in detail the purpose for the mandate, and for the legislation generally, without regard for concerns about constitutionality. For example, the findings went on to explain that the individual mandate would reduce “adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.”⁴⁰ The findings also stated that the bill’s changes were “essential to creating effective health insurance markets” that provide coverage for preexisting conditions and therefore reduce administrative costs.⁴¹ As discussed below in more detail, the majority in *King v Burwell*⁴² relied on these findings as evidence of congressional intent with respect to a contested provision of the ACA.⁴³

B. Purposes

Unsurprisingly, purposes provisions explain the purpose of the legislation.⁴⁴ Because of their nature, purposes tend to be more subjective than findings. Rather than focusing on the background problems that gave rise to the legislation, they often explain what Congress intends the act to do and how that will be accomplished. Purposes are common in enacted statutes, as shown in Figure 2, although they are not included as frequently as findings.

Purposes are most commonly used in conjunction with findings, with the purposes coming after the findings. In fact, Congress often combines the two by using a legislative heading

³⁸ See ACA § 1501(a), 124 Stat at 242–44.

³⁹ ACA § 1501(a)(1), 124 Stat at 242. The findings also cited a Supreme Court decision ruling that “insurance is interstate commerce subject to Federal regulation.” ACA § 1501(a)(3), 124 Stat at 244, citing *United States v South-Eastern Underwriters Association*, 322 US 533 (1944).

⁴⁰ ACA § 1501(a)(2)(G), 124 Stat at 243.

⁴¹ ACA § 1501(a)(2)(G), 124 Stat at 243.

⁴² 135 S Ct 2480 (2015).

⁴³ See id at 2493; Part II.B.

⁴⁴ See, for example, Animal Welfare Act Amendments of 1976 § 2, Pub L No 94-279, 90 Stat 417, 417, codified at 7 USC § 2131(1) (describing the purpose of the legislation as to “[i]nsure that animals intended for use in research facilities . . . are provided humane care and treatment”).

like “Findings and Purposes.”⁴⁵ When a bill contains both findings and purposes, the findings generally describe the reason why Congress decided to act and the purposes describe the solution to the problem that Congress perceived. For example, the Americans with Disabilities Act of 1990⁴⁶ (ADA) included findings describing the discrimination disabled persons face followed by a purposes section stating, among other things, that the purpose of the bill was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁴⁷ Similarly, in the Prevent All Cigarette Trafficking Act of 2009⁴⁸ (PACT Act), Congress enacted a series of findings describing the problem of trafficking in illegal cigarettes followed by a list of purposes explaining how Congress intended the bill to “make it more difficult for cigarette and smokeless tobacco traffickers to engage in and profit from their illegal activities.”⁴⁹

⁴⁵ See, for example, the Payment, Clearing, and Settlement Supervision Act of 2010 § 802, Pub L No 111-203, 124 Stat 1802, 1802–03, codified at 12 USC § 5461; Tribal Law and Order Act of 2010 § 202, Pub L No 111-211, 124 Stat 2261, 2262–63, codified at 25 USC § 2801 note.

⁴⁶ Pub L No 101-336, 104 Stat 327, codified at 42 USC § 12101 et seq.

⁴⁷ ADA § 2(b)(1), 104 Stat at 329.

⁴⁸ Pub L No 111-154, 124 Stat 1087 (2010).

⁴⁹ PACT Act § 1(c)(4), 124 Stat at 1088.

TABLE 2: PURPOSES IN STATUTES AT LARGE⁵⁰

| Year | Number of Public Laws with Purposes | Total Number of Purposes |
|-------------|--|---------------------------------|
| 2011 | 10 | 24 |
| 2010 | 23 | 211 |
| 2009 | 15 | 173 |
| 2008 | 23 | 222 |
| 2007 | 11 | 115 |
| 2006 | 41 | 133 |
| 2005 | 17 | 190 |
| 2004 | 35 | 150 |
| 2003 | 29 | 131 |
| 2002 | 30 | 183 |
| 2001 | 9 | 211 |
| 2000 | 82 | 455 |
| 1999 | 22 | 66 |
| 1998 | 43 | 230 |
| 1997 | 22 | 63 |
| 1996 | 26 | 172 |
| 1995 | 8 | 40 |
| 1994 | 38 | 424 |
| 1993 | 18 | 70 |
| 1992 | 45 | 264 |
| 1991 | 22 | 84 |
| 1990 | 69 | 477 |
| 1989 | 14 | 49 |
| 1988 | 49 | 234 |
| 1987 | 16 | 73 |
| 1986 | 36 | 216 |
| 1985 | 7 | 26 |

⁵⁰ Similar to the discussion of findings above, I searched volumes of the Statutes at Large for the word “purpose.” This returned many false positives, and so I filtered for purposes of the type described here. Because these purposes are almost always contained in purpose sections that contain a list of purposes, I counted each purpose separately. For example, if a purpose section contained ten different purposes, then I counted that as ten purposes. I chose to do this rather than count purpose sections because of the variability between purpose sections, some of which contain a few and some of which contain many.

C. Audiences

Because they often appear prominently at the beginning of the statutory text and are written in relatively plain language, Congress likely uses findings and purposes to speak to various audiences that would be unlikely to read an entire bill. For example, findings and purposes often appear to serve as a kind of press release to the general public. Other members of Congress and their staffs are also likely audiences. Most members of Congress have little interaction with legislation outside of the committees they work on and are unlikely to read the entire text of any bill. Some scholars have noted that members and their staffs may be more likely to read legislative history than the text because legislative history is more accessible.⁵¹ However, committee reports are often long and complex, and so many of the same obstacles to reading statutory text exist for committee reports, especially for members and their staff who are not on the drafting committee. Because of their brevity and prominence in the statutory language, enacted findings and purposes may be a way in which committees of Congress speak to other members of Congress and their high-level staff who were not involved in the drafting process and who need a relatively plain-language explanation of the bill before voting on it.

Another obvious audience for findings and purposes is federal agencies. Sometimes Congress speaks directly to agencies in findings and purposes, either to approve or disapprove of an agency's actions or to provide direction to the agency going forward. For example, Congress has enacted findings directed at the Internal Revenue Service stating that "Internal Revenue Service Notice 2008-83 is inconsistent with the congressional intent in enacting such section 382(m)" and that the "legal authority to prescribe Internal Revenue Service Notice 2008-83 is doubtful."⁵² In another bill, Congress urged the Secretary of Agriculture "to repeal the October 30, 1989, regulation and promulgate a new regulation reflecting the intention of the Congress."⁵³ Other times Congress

⁵¹ See, for example, Gluck and Bressman, 65 *Stan L Rev* at 968 (cited in note 1) (reporting that some respondents to their survey of congressional counsels told them that "members are more likely to vote (and staffers are more likely to advise their members) based on a reading of the legislative history than on a reading of the statute itself").

⁵² American Recovery and Reinvestment Act of 2009 § 1261(a)(2)–(3), Pub L No 111-5, 123 Stat 115, 343.

⁵³ Food, Agriculture, Conservation, and Trade Act of 1990 § 2507(b)(2), Pub L No 101-624, 104 Stat 3359, 4069. This bill was the subject of litigation. See *Mississippi Poultry Association, Inc v Madigan*, 31 F3d 293 (5th Cir 1994). In that case, the court

has shown its agreement with an agency by adopting agency statements as part of its findings or purposes.⁵⁴ Congress also might use findings and purposes to attempt to influence agency behavior in an informal way, and perhaps as a signal that Congress will enact binding law if the agency does not act.⁵⁵ These common provisions are unique within the Statutes at Large in that they are written as operative law, except with the option of whether to follow through being left to the agency. Even when an agency is not specifically mentioned in the findings or purposes, the types of statements made in them are useful for agencies tasked with carrying out the operative statutory language. Enacted findings and purposes can guide agency implementation to conform more closely to Congress's stated goals in enacting the legislation.

Courts are another potential audience for enacted findings and purposes. Congress is undoubtedly aware that some statutes will end up in litigation, and perhaps it includes findings and purposes because they can help direct judicial interpretation. As a number of scholars have noted, Congress has used statutory updates as a means of speaking directly to courts and "overriding" judicial decisions with which Congress disagrees.⁵⁶ The findings and purposes provisions of these contested statutes often house

noted that, although courts have long held that subsequent legislation can play some role in interpreting earlier statutes, it has been treated as having "anything from [] 'great weight' or having 'persuasive value,' to being of 'little assistance' to the interpretive process." *Id.* at 302 (citations omitted). The court said that the overlap in membership in Congress, the close temporal proximity, and the specificity and directness with which the findings and sense of Congress provisions addressed the agency's regulation rendered those provisions "highly persuasive, albeit not per se binding." *Id.* at 303. The dissent argued that it is the role of the court to say what the enacted statute means and that the findings and sense of Congress provisions did not create new law but merely urged the agency to change its rule. See *id.* at 314–15 (Higginbotham dissenting).

⁵⁴ See, for example, National Defense Authorization Act for Fiscal Year 2012 § 1245 Pub L No 112-81, 125 Stat 1298, 1647 (2011), codified at 22 USC § 8513a (adopting a Treasury Department finding identifying Iran as a significant source of money laundering).

⁵⁵ For a brief discussion of how similar "sense of" provisions potentially influence federal agencies, see Christopher M. Davis, "Sense of" Resolutions and Provisions *2 (Congressional Research Service, May 16, 2016), archived at <http://perma.cc/EE6V-7A9M>.

⁵⁶ See generally, for example, Matthew R. Christiansen and William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 *Tex L Rev* 1317 (2014); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 *S Cal L Rev* 205 (2013); Pablo T. Spiller and Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 *Intl Rev L & Econ* 503 (1996); William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L J* 331 (1991).

these congressional responses.⁵⁷ For example, in the Lilly Ledbetter Fair Pay Act of 2009,⁵⁸ Congress's list of findings included a substantial discussion of *Ledbetter v Goodyear Tire & Rubber Co.*,⁵⁹ noting that the decision "significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades."⁶⁰ Similarly, Congress used findings in the ADA Amendments Act of 2008⁶¹ to disavow the Supreme Court's interpretation of the ADA in *Sutton v United Air Lines, Inc.*,⁶² discussed in greater detail in Part II.B below.⁶³ In the purposes provision of the same bill, Congress further explained that the purpose of the bill was "to reject" the Supreme Court's earlier interpretation.⁶⁴ Congress also sometimes uses findings or purposes to express agreement with a judicial decision.⁶⁵ Either way, enacted findings and purposes may be the most direct and salient way for Congress to communicate with courts.

D. The Legislative Drafting Process and Enacted Findings and Purposes

Enacted findings and purposes are unique within the legislative drafting process and differ from other types of statutory text in notable ways. For example, they are drafted primarily by political staff, while other statutory language is more often drafted by Congress's nonpartisan technical drafters in the Offices of

⁵⁷ See Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 Tex L Rev 859, 921 (2012); Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 Notre Dame L Rev 511, 559, 582 (2009). See also, for example, Older Workers Benefit Protection Act § 101, Pub L No 101-433, 104 Stat 978, 978 (1990), codified at 29 USC § 621 note (stating in its findings that, as a result of a recent Supreme Court decision, "legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967").

⁵⁸ Pub L No 111-2, 123 Stat 5.

⁵⁹ 550 US 618 (2007).

⁶⁰ Lilly Ledbetter Fair Pay Act § 2(1), 123 Stat at 5.

⁶¹ Pub L No 110-325, 122 Stat 3553.

⁶² 527 US 471 (1999).

⁶³ See ADA Amendments Act of 2008 § 2(a)(4), 122 Stat at 3553 (noting that the Court's holding "narrowed the broad scope of protection intended to be afforded by the ADA").

⁶⁴ ADA Amendments Act § 2(b)(3), 122 Stat at 3554.

⁶⁵ See Leib and Brudney, 103 Va L Rev at 1495 & n 16 (cited in note 5). See also Nancy C. Staudt, René Lindstädt, and Jason O'Connor, *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 NYU L Rev 1340, 1386–88 (2007) (discussing examples of Congress responding positively to, and even codifying, Supreme Court statutory decisions within the tax area).

Legislative Counsel.⁶⁶ The House Legislative Counsel's Manual on Drafting Style urges drafters to "[d]iscourage clients from including findings and purposes" because they "are more appropriately and safely dealt with in the committee report than in the bill."⁶⁷ The manual then notes that "[i]f the client insists on findings or purposes, or both, request the client to submit a draft."⁶⁸ The Senate Office of the Legislative Counsel's Legislative Drafting Manual contains separate discussions of findings and purposes. The manual states that "findings may contain statements that would be more appropriate to include in a committee report" but also notes that "findings are often important to a client and may be used by a client to convey policy."⁶⁹ The Senate manual also states that a section of purposes may be more appropriate for a committee report but that "a purposes section can serve as a useful summary of the substantive provisions of the legislation."⁷⁰ The Senate manual acknowledges that "[o]ften a client will want a findings or purposes section, regardless of clarity, constitutionality, or other concerns. In such a case, ask the client to submit a draft and then carefully review and edit the draft."⁷¹ It seems clear from these manuals that, unlike operative text, enacted findings and purposes are drafted almost entirely by political staff. This is unsurprising because they are expressly purposive in nature and thus outside the expertise of Congress's technical and apolitical professional drafters.

In other ways, the process of drafting enacted findings and purposes is similar to that of other statutory text. Like other statutory text, there is no single process by which they are created. A review of the drafting process of a sampling of these provisions does reveal some patterns. For example, it appears that findings and purposes are most commonly included in early versions of bills, before the legislative history is drafted, and that findings and purposes often inform the legislative history.⁷² Like other

⁶⁶ See Bressman and Gluck, 66 *Stan L Rev* at 740–41 (cited in note 8).

⁶⁷ *House Legislative Counsel's Manual on Drafting Style* § 325 at *28 (cited in note 9).

⁶⁸ *Id.*

⁶⁹ *Legislative Drafting Manual* § 124(a) at *19 (cited in note 9).

⁷⁰ *Id.* § 124(b) at *19.

⁷¹ *Id.* § 124(e) at *19–20.

⁷² The bill that originally introduced the Anti-Border Corruption Act of 2010, S 3243, 111th Cong, 2d Sess, in 156 *Cong Rec* 5933 (Apr 21, 2010), contained the exact same findings as the Public Law that was passed on January 4, 2011. § 2, Pub L No 111-376, 124 Stat 4104, 4104 (2011). A version of the Lilly Ledbetter Fair Pay Act of 2009 was first introduced on June 22, 2007. HR 2831, 110th Cong, 1st Sess. This bill contained three of the four findings that ultimately ended up in the Public Law. § 2, Pub L No 111-2, 123

statutory text, enacted findings and purposes are often drawn from earlier drafts of bills that were not enacted.⁷³ And like other statutory text, the findings and purposes often undergo revisions and modifications as they proceed through various steps of the legislative process.⁷⁴ A recent example of this is the Nuclear Forensics and Attribution Act.⁷⁵ A version of the law introduced in an earlier session of Congress had several findings that were similar to what ended up in the enacted law but were not exactly the same.⁷⁶ This earlier bill was amended in committee, which included making amendments to the findings.⁷⁷ Although that amended bill did not pass, the same findings were included in a version of the bill that was reintroduced in the 111th Congress and remained in the bill until it was passed into law.⁷⁸ It appears

Stat 5, 5 (2009). A House Report on this bill was published on July 18, 2007 and included the three findings, plus the additional fourth (the language of which varied slightly in the Public Law but did not change the meaning). See *Lilly Ledbetter Fair Pay Act of 2007*, HR Rep No 110-237, 110th Cong, 1st Sess 1–2 (2007). In the “Section-by-Section Analysis,” the House Report discussed each finding, including a fairly long paragraph about the fourth finding. See *id.* at 17–18. The bill that became law was introduced on January 8, 2009 and had the four findings as they appeared in the Public Law. S 181, 111th Cong, 1st Sess. The Public Law was passed on January 29, 2009. Pub L No 111-2, 123 Stat 5.

⁷³ A version of the PACT Act was first introduced on June 3, 2003. S 1177, 108th Cong, 1st Sess, in 149 Cong Rec 13434. That version did not have findings or purposes. A similar bill was introduced in 2006. S 3810, 109th Cong, 2d Sess, in 155 Cong Rec 16987 (Aug 3, 2006). That bill did have the findings and purposes that were found in the Public Law § 1(b)–(c), Pub L No 111-154, 124 Stat 1087, 1087–88 (2010), which also explains why the figures in the findings were from 2005 despite the law being passed in 2010.

⁷⁴ For example, the first bill with the title “Americans with Disabilities Act,” which led to the ADA of 1990, was introduced in the House on April 29, 1988. HR 4498, 100th Cong, 2d Sess, in 134 Cong Rec 9600. This bill contained many of the findings and purposes that would later be enacted in the ADA. Besides the change to one of the numbers and some grammatical changes, there were a couple of significant changes. The enacted law has a different finding (4). In the purposes section, the enacted law has a new purpose (3) and does not have what was purpose (2) in the original bill. Additionally, in purpose (4) the enacted law does not have the reference to regulating interstate transportation. Similar findings and purpose language to HR 4498 is found in a Senate bill (S 2345, 100th Cong, 2d Sess) introduced on April 28, 1988. The “Americans with Disabilities Act” was reintroduced in the 101st Congress in both the House (HR 2273, 101st Cong, 1st Sess) and the Senate (S 933, 101st Cong, 1st Sess, in 135 Cong Rec 8509) on May 9, 1989. Both of these versions of the bill include the changes to the findings and purposes referenced above that would show up in the Public Law. The only difference is that finding (4) says “color” in the Public Law and not in these bills. According to the conference report, that was an amendment by the House that was accepted by the Senate. *Americans with Disabilities Act of 1990*, HR Rep No 101-596, 101st Cong, 2d Sess 57 (1990).

⁷⁵ Pub L No 111-140, 124 Stat 31 (2010).

⁷⁶ HR 2631, 110th Cong, 1st Sess (June 7, 2007).

⁷⁷ *Nuclear Forensics and Attribution Act*, HR Rep No 110-708, 110th Cong, 2d Sess 2 (2008).

⁷⁸ HR 730, 111th Cong, 1st Sess (Jan 27, 2009).

that in this respect, Congress treats findings and purposes like other statutory text, which is also often revised over a period of many years before it is enacted. Like other statutory text, Congress also sometimes amends findings and purposes through subsequent legislation.⁷⁹ For example, in 2008 Congress enacted the ADA Amendments Act to amend certain provisions of the ADA. As part of these amendments, Congress amended one of its findings and deleted another, while leaving the rest intact.⁸⁰ If the findings and purposes were mere inoperative precatory language, then why would Congress go to the effort to update and amend them in subsequent enactments? It seems that Congress views enacted findings and purposes as part of the text of a statute and treats it similarly in significant ways.

E. The Codification Process and Enacted Findings and Purposes' Inaccessibility

A key difference between enacted findings and purposes and other statutory text is in the way they are codified. After a bill is enacted, it is reviewed by the OLRC, which is a nonpartisan group within Congress tasked with taking Congress's enacted laws and organizing them within the US Code, either by amending the existing Code or inserting new law in the proper places in the Code.⁸¹ Despite the importance of its work, the role of the OLRC in determining how enacted law is presented, or often hidden, has gone virtually unnoticed in the statutory interpretation literature. A review of this codification process reveals that enacted findings and purposes often do not make it into the main text of the US Code.⁸² Although they are law that is published in the

⁷⁹ Compare Belarus Democracy and Human Rights Act of 2011 § 2, Pub L No 112-82, 125 Stat 1863, 1863–65, with Belarus Democracy Act of 2004 § 2, Pub L No 108-347, 118 Stat 1383, 1383–84 (2004).

⁸⁰ See ADA Amendments Act § 3, 122 Stat at 3554–55.

⁸¹ See *About Classification of Laws to the United States Code* (Office of the Law Revision Counsel, US House of Representatives), archived at <http://perma.cc/X8VW-J8TL>. Some of the Statutes at Large do not make it into the Code at all because they are not considered “general and permanent” in nature. Whether something qualifies as general and permanent can be a difficult judgment to make, and the OLRC relies on its own precedents as to whether something qualifies.

⁸² See note 92. See also, for example, Steve Thel, *Statutory Findings and Insider Trading Regulation*, 50 Vand L Rev 1091, 1095 n 14 (1997) (noting that certain securities law findings are difficult to find because they “are not included as a numbered section of the United States Code (although they are appended to 15 U.S.C. § 78u-1 (1994)), nor are they included in the various single-volume collections of federal securities statutes and rules”).

Statutes at Large, which contains the law as passed by Congress and signed by the president,⁸³ it is common practice for a bill to be stripped of its enacted findings and purposes as part of the codification process.⁸⁴ These provisions are then placed in notes at the end of a provision of the Code, which can make them difficult to connect to the substantive provisions they accompanied when they were enacted by Congress. Sometimes they are difficult to even identify as part of the enacted text because they appear similar to other editor's notes that are not enacted. It is peculiar, to say the least, that the OLRC regularly hides away in notes some of the most important text that Congress enacts.

Another complication with the codification process is that most bills enacted by Congress are codified at various locations throughout the Code. As the OLRC states, "a single freestanding provision that is general and permanent can relate simultaneously to a number of different chapters and titles in the Code," and because of this, the OLRC must decide how to split the bill among various parts of the Code.⁸⁵ As part of this process, the OLRC decides where in the Code to insert enacted findings and purposes, and this can mean they end up far away from many of the relevant operative provisions of the bill.⁸⁶ As the OLRC states, where to put these provisions is an "editorial judgment."⁸⁷ At the same time, if provisions in a public law are "tied together with definitions, mutual cross references, or a common effective date and comprise the entire law or a distinct title of the law,"⁸⁸ then the public law might be inserted into its own chapter rather than split up among the Code. In that case, the findings and purposes might remain in their original form from the Statutes at Large rather than be moved into notes.⁸⁹ The process by which the OLRC codifies findings and purposes is often based on OLRC precedent that may be opaque to outsiders.⁹⁰ This makes it difficult for courts and litigants to match up the findings and purposes with the text of the bill without looking back at the Statutes at

⁸³ See note 10.

⁸⁴ See note 11.

⁸⁵ *About Classification of Laws to the United States Code* (cited in note 81).

⁸⁶ For example, the findings and purposes of the International Money Laundering Abatement and Financial Anti-terrorism Act of 2001 (Title III of the USA PATRIOT Act, Pub L No 107-56, 115 Stat 272 (2001)) are found in notes following 31 USC §§ 5311, 5313, 5332.

⁸⁷ *About Classification of Laws to the United States Code* (cited in note 81).

⁸⁸ *Id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

Large, which is difficult to do because the Statutes at Large are unorganized, difficult to navigate, and often out of date.⁹¹

Perhaps most surprising is that enacted findings and purposes sometimes never make it into the Code at all. For example, a search of the US Code reveals that a number of findings provisions contained in the Statutes at Large were never codified.⁹² Allowing the OLRC editorial discretion in how to organize the law, which is concerning in its own right, is different from allowing it the ability to choose not to include enacted law in the Code at all without any apparent explanation. All of the difficulties in accessing enacted findings and purposes described here have gone unanalyzed in the literature and are a potential explanation for the scant attention they have received from courts and scholars. This is concerning because the failure to recognize the frequency and importance of these types of provisions may be one reason that formalism has flourished in recent decades, unrestrained by a clearer understanding of the purposivist ways in which Congress legislates.

Even if enacted findings and purposes were always available to courts in litigation, when both sides have an incentive to scour any available sources for materials helpful to their clients, the difficulty of locating them in the US Code is concerning because of its potential effects on public notice. Because enacted findings and purposes are the most plain-language description of why a law was enacted and what Congress hoped to achieve, it would seem to be something that should be broadly available to the public in an easily accessible form. It may be unlikely that the public will read the Code, but the Supreme Court has often explicitly noted the importance of public notice of laws enacted by Congress, and if it is indeed important, then it would seem that findings and

⁹¹ These arguments are less relevant when Congress has enacted the Code as “positive law.” This is a process by which the OLRC revises the Code so that “the organizational structure of the law is improved, obsolete provisions are eliminated, ambiguous provisions are clarified, inconsistent provisions are resolved, and technical errors are corrected.” OLRC then submits this to Congress as a restatement of existing law, which Congress then votes to enact as “positive law,” meaning that after Congress’s vote to approve it, the Code is the binding law, not the Statutes at Large. Currently half of the titles in the Code are positive law. *Positive Law Codification* (Office of the Law Revision Counsel, US House of Representatives), archived at <http://perma.cc/GKE4-3U75>.

⁹² See, for example, Protection of Children from Sexual Predators Act of 1998, Pub L No 105-314, 112 Stat 2974, 2990 (including findings and sense of Congress provisions in § 802, which were not included in the US Code); USA PATRIOT Act, 115 Stat at 276–77 (including findings and sense of Congress provisions in § 102, which were not included in the US Code).

purposes should be available in an easily accessible form along with the rest of the enacted text.

II. COURTS' USE OF ENACTED FINDINGS AND PURPOSES

Courts have relied on enacted findings and purposes most commonly when deciding whether a statute is constitutional, and because of this, legal scholars have written some about how they should be used in constitutional review of statutes.⁹³ Enacted findings and purposes are less frequently used as a tool of statutory interpretation. When courts have used them in interpretation, they most commonly treat them as something less like statutory text and more like unenacted legislative history. This Part discusses these cases, which are instructive as to how enacted findings and purposes should and should not be used in the future.

A. Constitutionality and Findings

In the constitutional context, courts regularly look to whether congressional findings and purposes establish sufficient justification for a statute to survive a constitutional challenge.⁹⁴ The focus of courts in these cases is using findings and purposes not to understand the operative statutory text but rather to establish whether Congress's purposes and means are justified under Congress's constitutional power. Congress is not required to include findings or purposes to overcome a constitutional challenge, but courts' frequent use of findings in constitutional cases shows that courts find them useful.⁹⁵ Congress has responded to the

⁹³ See generally, for example, William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 NYU L Rev 878 (2013); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal L Rev 297 (1997). See also Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 NYU L Rev 1784, 1879–82 (2008); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 Iowa L Rev 41, 90–102 (2006) (arguing that an explanation of an appropriate legislative purpose has become a de facto requirement in the Supreme Court's Commerce Clause jurisprudence).

⁹⁴ See generally William W. Buzbee and Robert A. Schapiro, *Legislative Record Review*, 54 Stan L Rev 87 (2001).

⁹⁵ See, for example, *Gonzales v Raich*, 545 US 1, 21 (2005):

While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.

See also *United States v Lopez*, 514 US 549, 562 (1995) ("Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate

Court's apparent preference for constitutional findings by including findings seemingly whenever constitutionality might be an issue, although even this has not always been enough to avoid invalidation by the Supreme Court.⁹⁶

Findings are often found in the text of the statute, although they are also sometimes included only in a committee report. Importantly, as Professor Daniel Crane has noted, in its constitutional analyses, the Supreme Court has treated congressional findings the same whether they are part of the statute or the legislative history.⁹⁷ Surprisingly, even textualists have failed to differentiate between enacted findings and unenacted findings in constitutional cases, treating them as essentially the same.⁹⁸ Either way, congressional findings, enacted or unenacted, have become an increasingly helpful tool for courts attempting to ascertain the constitutionality of a statute.⁹⁹

commerce."); *Fullilove v Klutznick*, 448 US 448, 502–03 (1980) (Powell concurring) (arguing that requiring Congress to make findings of fact in support of its legislation would “treat Congress as if it were a lower federal court” and “mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government”). For examples in which findings were important to sustaining the constitutionality of statutes, see *Holder v Humanitarian Law Project*, 561 US 1, 29, 32 (2010) (considering Congress’s findings and purpose in the Antiterrorism and Effective Death Penalty Act of 1996 in a case about government encroachment on free speech values); *Tennessee v Lane*, 541 US 509, 529 (2004) (considering congressional findings to sustain legislation enacted as an exercise of Congress’s powers under § 5 of the Fourteenth Amendment); *Federal Energy Regulatory Commission v Mississippi*, 456 US 742, 757–58 (1982) (considering findings to sustain legislation relying on the Commerce Clause power); *Donovan v Dewey*, 452 US 594, 602 n 7 (1981) (considering findings in a case about Fourth Amendment searches).

⁹⁶ See, for example, *Coleman v Court of Appeals of Maryland*, 566 US 30, 38–44 (2012) (Kennedy) (plurality) (considering statutory findings and holding that Congress’s findings in the Family and Medical Leave Act of 1993’s self-care provisions did not cover gender-discriminatory impact in a way that would justify the abrogation of state sovereign immunity under § 5 of the Fourteenth Amendment); *Board of Trustees of the University of Alabama v Garrett*, 531 US 356, 369–72 (2001) (declining to permit abrogation of Eleventh Amendment immunity because Congress failed to make findings in the ADA of unconstitutional discrimination against disabled individuals by states).

⁹⁷ Crane, 102 Georgetown L J at 639 (cited in note 5) (“Congressional findings seem to carry equal weight when they appear in a statute and when they appear in legislative history.”).

⁹⁸ See, for example, *Garrett*, 531 US at 370–71 (citing the absence of findings in legislative history as evidence that application of the statute was unconstitutional); *Bartnicki v Vopper*, 532 US 514, 549–50 (2001) (Rehnquist dissenting) (arguing in favor of relying on findings from House and Senate reports to determine whether congressional action was constitutional).

⁹⁹ See, for example, *Raich*, 545 US at 21 (2005). Some have cautioned against requiring findings. See *Fullilove*, 448 US at 502–03 (Powell concurring).

B. Statutory Interpretation

As part of this project, I searched for examples of courts' use of findings or purposes in statutory interpretation, which revealed a number of insights. First is that, as a historical matter, US courts in the 1800s sometimes referenced preambles to statutes as a tool of interpretation.¹⁰⁰ This apparently carried over from the English system, in which statutory preambles have generally been a more important tool.¹⁰¹ Second is that, in more recent years, courts have considered the modern equivalents of preambles, such as findings and purposes, in constitutional cases with some regularity, but have referenced them surprisingly little in cases of statutory interpretation, and far less than unenacted legislative history. This is true despite the frequency with which they appear in statutes and despite the fact that these modern provisions are much longer and more specific than preambles from earlier eras.¹⁰² In cases when courts have cited enacted findings and purposes, they have used them inconsistently. As this Section illustrates, courts seem to lack a clear theory of how findings and purposes should be used in statutory interpretation.

Much like courts' use of enacted findings in constitutionality analyses, when courts have considered enacted findings and purposes, they have most often relegated them to a status similar to

¹⁰⁰ See, for example, *Price v Forrest*, 173 US 410, 427 (1899):

Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions.

See also *Coosaw Mining Co v South Carolina*, 144 US 550, 563 (1892) ("While express provisions in the body of an act cannot be controlled or restrained by the title or preamble, the latter may be referred to when ascertaining the meaning of a statute which is susceptible of different constructions."); *Beard v Rowan*, 34 US 301, 317 (1835) ("The preamble in the act may be resorted to, to aid in the construction of the enacting clause, when any ambiguity exists."); *United States v Fisher*, 6 US (2 Cranch) 358, 368 (1805) ("We admit that neither a title nor preamble can controul the express words of the enacting clauses; but if these are ambiguous, you may resort to the title or preamble to elucidate them."); *Wilson v Mason*, 5 US (1 Cranch) 45, 76 (1801) ("The preamble of a statute is said to be a key to unlock its meaning.").

¹⁰¹ See Norman J. Singer and Shambie Singer, 2*A Statutes and Statutory Construction* § 47:4 at 299 (Thomson Reuters 7th ed 2014) ("In the United States, preambles have never been as important for statutory interpretation as they have been in England."). English courts have traditionally been willing to treat preambles as an important tool of interpretation, although not without some caveats. See *id.* at 298–99.

¹⁰² See Parts I.A–B.

that of unenacted legislative history. The Supreme Court has frequently done this by citing findings and purposes provisions and unenacted legislative history side by side without differentiation, and occasionally by explicitly treating findings and purposes as the same as unenacted legislative history.¹⁰³ Moreover, when the Court discusses both, it sometimes first discusses unenacted legislative history at length before even mentioning enacted findings or purposes.¹⁰⁴ Similarly, the Court has quoted legislative history in the main text of a decision and then cited enacted findings or purposes merely as support for what the unenacted legislative history says, even when the enacted findings or purposes effectively say the same thing.¹⁰⁵

In a number of cases, the Court has entirely ignored relevant enacted findings and purposes, choosing instead to rely on other tools to interpret ambiguous terms.¹⁰⁶ For example, in *Federal*

¹⁰³ See, for example, *General Dynamics Land Systems, Inc v Cline*, 540 US 581, 587–90 (2004) (discussing legislative history before enacted findings and purposes and then treating them all as a combined group of “findings and statements of objectives”); *Ardestani v Immigration and Naturalization Service*, 502 US 129, 138 (1991) (citing enacted findings and purposes along with a House report and a Senate report to establish the purpose of statute); *Commissioner, Immigration and Naturalization Service v Jean*, 496 US 154, 163–65 (1990) (citing unenacted legislative history and enacted findings and purposes statements, without distinction, to establish the purposes of the bill); *Russello v United States*, 464 US 16, 26–29 (1983) (including enacted statement of findings and purpose in discussion of legislative history, along with a variety of other unenacted legislative history); *United States v Turkette*, 452 US 576, 588–93 (1981) (citing enacted statements of findings and purposes followed by statements from unenacted legislative history); *United States v Smith*, 499 US 160, 179–82 (1991) (Stevens dissenting) (citing first a House report, then enacted findings and purposes, and then congressional hearings).

¹⁰⁴ See, for example, *American Textile Manufacturers Institute, Inc v Donovan*, 452 US 490, 514–22 (1981) (discussing unenacted legislative history at length before mentioning Congress’s “statement of findings and declaration of purpose encompassed in the Act itself”). Even in cases in which a dissent discusses enacted findings or purposes that the majority ignored, the dissent has relegated the discussion to after a discussion of the operative enacted text and legislative history. See, for example, *Secretary of the Interior v California*, 464 US 312, 347–57 (1984) (Stevens dissenting).

¹⁰⁵ See *Scarborough v Principi*, 541 US 401, 406 (2004) (quoting in the main text a House committee report to establish the purpose of the statute, followed by a citation of enacted Congressional Findings and Purposes that state the same purpose). In another case, Justice Antonin Scalia made this exact point in a concurring opinion, criticizing the majority for looking to unenacted legislative history for the purpose when the statute itself already contained the same purpose. *Samantar v Yousuf*, 560 US 305, 329 (2010) (Scalia concurring in the judgment) (citations omitted) (“Third, and finally, the Court points to legislative history to establish the purpose of the statute. This is particularly puzzling, because the *enacted* statutory text itself includes findings and a declaration of purpose—the very same purpose (surprise!) that the Court finds evidenced in the legislative history.”).

¹⁰⁶ This has been so even when the relevant provisions were raised in concurrence or dissent. See, for example, *Smith v City of Jackson*, 544 US 228, 257–58 (2005) (O’Connor

Aviation Administration v Cooper,¹⁰⁷ the Court interpreted the statutory term “actual damages” as not including damages for mental or emotional distress.¹⁰⁸ The Court, in a majority made up of the conservative justices, admitted that the term “actual damages” was ambiguous.¹⁰⁹ The Court relied on the sovereign immunity canon to rule in the government’s favor, stating that the Court requires that “the scope of Congress’ waiver [of sovereign immunity] be clearly discernable from the statutory text in light of traditional interpretive tools.”¹¹⁰ The Court failed to mention the enacted findings and purposes of the statute, which were codified in notes in the US Code.¹¹¹ The enacted purposes said that the purpose of the act in question was to require federal agencies to “be subject to civil suit for *any damages* which occur as a result of willful or intentional action which violates any individual’s rights under this Act.”¹¹² In light of these enacted purposes, it would seem that the best interpretation of “actual damages” would be broader than the constrained version allowed by the majority. Even if the majority would not have been swayed by this argument, the failure to even consider that part of the text calls into question whether the Court considers enacted findings and purposes to be a “traditional interpretive tool” that should be given effect as part of the text.

In another case, *H.J. Inc v Northwestern Bell Telephone Co*,¹¹³ the Court interpreted a provision from the Racketeer Influenced and Corrupt Organizations Act¹¹⁴ (RICO) that required a showing of a “pattern of racketeering activity.”¹¹⁵ The majority relied on legislative history and other sections of the Organized Crime Control Act of 1970¹¹⁶ (OCCA), which enacted RICO, to define

concurring in the judgment) (discussing enacted findings and purposes that were not discussed in the plurality opinion); *United States v Smith*, 499 US at 179–80, 185–86 (Stevens dissenting) (discussing the same in response to a majority opinion); *Secretary of the Interior v California*, 464 US at 355–59 (Stevens dissenting) (citing enacted findings and policy statement relevant to, and potentially at odds with, the majority’s decision).

¹⁰⁷ 566 US 284 (2012).

¹⁰⁸ *Id* at 287.

¹⁰⁹ See *id* at 291–92.

¹¹⁰ *Id* at 291.

¹¹¹ See 5 USC § 552(a) notes.

¹¹² Privacy Act of 1974 § 2(b)(6), Pub L No 93-579, 88 Stat 1896, 1896, codified at 5 USC § 552(a) notes (emphasis added). This provision did not go unnoticed by the dissent. See *Cooper*, 566 US at 315–16 (Sotomayor dissenting).

¹¹³ 492 US 229 (1989).

¹¹⁴ 18 USC § 1961 et seq.

¹¹⁵ *Northwestern Bell*, 492 US at 232, citing 18 USC § 1962(a).

¹¹⁶ Pub L No 91-452, 84 Stat 922.

what a “pattern” meant for purposes of RICO, but it ignored a Statement of Findings and Purpose that describes the focus of the statute.¹¹⁷ Justice Antonin Scalia, joined by Chief Justice William Rehnquist, Justice Sandra Day O’Connor, and Justice Anthony Kennedy, wrote a concurrence that unsurprisingly criticized the majority for “[e]levating to the level of statutory text a phrase taken from the [unenacted] legislative history.”¹¹⁸ However, the concurrence also went on to discuss the bill’s enacted Statement of Findings and Purpose to arrive at the same interpretation as the majority. Justice Scalia wrote: “It is clear to me from the [Statement of Findings and Purpose], which describes a relatively narrow focus upon ‘organized crime,’ that the word ‘pattern’ in the phrase ‘pattern of racketeering activity’ was meant to import some requirement beyond the mere existence of multiple predicate acts.”¹¹⁹

In another case, *Arlington Central School District Board of Education v Murphy*,¹²⁰ the Court briefly acknowledged enacted findings and purposes but gave them little weight in its interpretation and explicitly treated them as if they were not part of the enacted text. The Court considered a provision of the Individuals with Disabilities Education Act¹²¹ (IDEA) that allows parents who successfully challenge the adequacy of a school’s education under the provisions of IDEA to be reimbursed for their “costs” incurred as part of such a challenge.¹²² The parents of a disabled student argued that costs incurred in hiring expert consultants should be included in reimbursable costs under the statute. The majority decision acknowledged that the term was ambiguous and ruled against reimbursement for expert fees primarily based on the canon that legislation enacted under the spending power must provide clear notice of federally imposed conditions.¹²³ The majority opinion, written by Samuel Justice Alito and joined by the Court’s textualist justices, briefly acknowledged one of the statute’s enacted purposes but dismissed as nondispositive all of the enacted findings and the rest of the enacted purposes.¹²⁴ For example, the majority quickly brushed off the one enacted purpose

¹¹⁷ See *Northwestern Bell*, 492 US at 238–40.

¹¹⁸ *Id.* at 252 (Scalia concurring in the judgment).

¹¹⁹ *Id.* at 255 (citation omitted) (Scalia concurring in the judgment).

¹²⁰ 548 US 291 (2006).

¹²¹ 20 USC § 1400 et seq.

¹²² *Arlington Central School District*, 548 US at 293–94, citing 20 USC § 1415(i)(3)(B).

¹²³ See *Arlington Central School District*, 548 US at 298, 300, 303–04.

¹²⁴ See *id.* at 303.

it cited as “not based on the text” and too broad to be useful in interpreting the phrase at issue.¹²⁵ The dissent, written by Justice Stephen Breyer and joined by Justice John Paul Stevens and Justice David Souter, put slightly more emphasis on the enacted purposes (but not the enacted findings), but only after it spent much longer discussing the unenacted legislative history as evidence of congressional purpose and without making any distinction between the two.¹²⁶

In a number of cases, courts have acknowledged the usefulness of enacted findings and purposes in understanding operative provisions of a statute,¹²⁷ and in some of these cases judges have closely engaged with them to influence their interpretations.¹²⁸ In one case, *General Dynamics Land Systems, Inc v Cline*,¹²⁹ the Court considered whether the Age Discrimination in Employment Act of 1967¹³⁰ (ADEA) should be applied in a case of reverse age discrimination that helps an older worker over a younger worker. The statute’s broad language prohibits discrimination against “any individual . . . because of such individual’s age,”¹³¹ which the circuit court argued was so clear that it must apply to discrimination against a younger worker in favor of an older worker.¹³² The Supreme Court reversed, holding that, although the language appears plain on its face, when read in light of both the enacted findings and purposes and unenacted legislative history, it is clear that Congress intended to address discrimination against older

¹²⁵ *Id.*

¹²⁶ See *id.* at 308–16 (Breyer dissenting).

¹²⁷ See, for example, *Globe Fur Dyeing Corp v United States*, 467 F Supp 177, 180 (DDC 1978) (“*A fortiori* congressional purpose or declaration of policy set out in the preamble of a statute provides a sound and thoroughly acceptable basis for ascertaining the goals of the statute.”).

¹²⁸ Besides the cases discussed here, there are a few other cases in which a judicial decision was heavily influenced by enacted findings and purposes. See, for example, *Humanitarian Law Project*, 561 US at 29 (citing enacted findings to determine whether certain assistance to listed terrorist organizations was prohibited by statute); *Tennessee Valley Authority v Hill*, 437 US 153, 180 (1978) (citing purposes and policy provisions as part of purposive analysis of statutory text); *Zimmerman v Cambridge Credit Counseling Corp*, 409 F3d 473, 476 (1st Cir 2005) (citing enacted findings and purposes to show that a statute was intended to be remedial in nature, and arguing that the provision at issue should be read narrowly because of the rule favoring narrow construction of exclusions in remedial statutes).

¹²⁹ 540 US 581 (2004).

¹³⁰ Pub L No 90-202, 81 Stat 602, codified at 29 USC § 621 et seq.

¹³¹ 29 USC § 623(a)(1).

¹³² *Cline v General Dynamics Land Systems, Inc*, 296 F3d 466, 469, 471–72 (6th Cir 2002).

workers in favor of younger workers, not discrimination against younger workers in favor of older workers.¹³³

More recently, in *King v Burwell*,¹³⁴ Chief Justice John Roberts emphasized the importance of trying to understand “Congress’s plan” when interpreting a statutory provision.¹³⁵ In that case, the question was how to interpret the phrase “Exchange established by the State”¹³⁶ in the ACA. The challengers of the ACA contended that this language clearly allowed tax credits only for healthcare exchanges established by states and not by the federal government.¹³⁷ In the Fourth Circuit, the government argued that, based on the structure and purpose of the bill, Congress intended the phrase to apply to “both state-run and federally-facilitated Exchanges.”¹³⁸ The Court agreed with the government and found ambiguity in the seemingly clear statutory language because to interpret it in accordance with the clear statutory language would lead to a “calamitous result” that would make insurance markets in states with federal healthcare exchanges unviable, thereby effectively reversing the reforms instituted by the ACA.¹³⁹ The Court argued, based on a contextual analysis of the bill, that this result would conflict with Congress’s statutory purpose.¹⁴⁰ One tool of the Court’s contextual analysis was the legislation’s enacted statement of findings relating to the

¹³³ *General Dynamics*, 540 US at 584.

¹³⁴ 135 S Ct 2480 (2015).

¹³⁵ *Id* at 2496. See also *id* at 2492, citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 545 (1947).

¹³⁶ *King*, 135 S Ct at 2488, citing 26 USC § 36B(b)–(c).

¹³⁷ *King*, 135 S Ct at 2488.

¹³⁸ Brief for the Appellees, *King v Sebelius*, No 14-1158, *13 (4th Cir filed Mar 18, 2014) (citation omitted).

¹³⁹ *King*, 135 S Ct at 2496. See also Linda J. Blumberg, Matthew Buettgens, and John Holahan, *The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums* *1–2 (Urban Institute, Jan 2015), archived at <http://perma.cc/2R8U-X6MF>; Brief Amici Curiae for Bipartisan Economic Scholars in Support of Respondents, *King v Burwell*, No 14-114, *28–33 (US filed Jan 28, 2015); Brief of the American Hospital Association, Federation of American Hospitals, Association of American Medical Colleges, and America’s Essential Hospitals as Amici Curiae in Support of Respondents, *King v Burwell*, No 14-114, *21–22 (US filed Jan 28, 2015).

¹⁴⁰ See *King*, 135 S Ct at 2496. The Court argued that the ACA was designed “to expand coverage in the individual health insurance market.” *Id* at 2485. Much of the Court’s analysis looked to three intertwined reforms that Congress aimed to achieve through the bill, which it used to argue that to interpret the statute the way the plain text seemed to indicate would create a “calamitous result that Congress plainly meant to avoid.” *Id* at 2486–87, 2496.

individual mandate.¹⁴¹ The Court used this as evidence of Congress's intent to allow subsidies for both state and federal exchanges, arguing that to interpret it to allow subsidies only for state exchanges would "negate [Congress's] own stated purposes."¹⁴²

The dissent, written by Justice Scalia, did not discuss the majority's use of enacted findings.¹⁴³ In its discussion of statutory purpose, the dissent stated: "The purposes of a law must be 'collected chiefly from its words,' not 'from extrinsic circumstances.' Only by concentrating on the law's terms can a judge hope to uncover the scheme of *the statute*."¹⁴⁴ Curiously, the dissent failed to mention that much of the "statutory purpose" that the majority cited was part of the enacted statute and that the majority had therefore, at least in part, collected the purposes of the law from its words.

In another case, *Sutton*, the Court relied on enacted findings, but not enacted purposes, as a main tool to determine congressional intent with respect to an ambiguous statutory provision.¹⁴⁵ In *Sutton*, the Court relied on a findings provision to decide whether individuals who use corrective or mitigating measures should be considered "disabled" under the ADA.¹⁴⁶ The Justice Department and the Equal Employment Opportunity Commission had interpreted the statute to include individuals who were disabled without regard to any corrective measure (such as hearing aids, glasses, medications, and prosthetics), but United Air Lines argued that the ADA should not cover potential pilots whose only disability was visual impairment that was fully correctable.¹⁴⁷ The Court ruled in United Air Lines's favor, relying primarily on the findings section of the ADA, which noted that "some 43,000,000 Americans have one or more physical or mental disabilities."¹⁴⁸ The Court relied on this number, and the fact that it was "included in the ADA's text,"¹⁴⁹ to determine that Congress

¹⁴¹ See *King*, 135 S Ct at 2486–87, 2492–93.

¹⁴² *Id* at 2493, quoting *New York State Department of Social Services v Dublino*, 413 US 405, 419–20 (1973).

¹⁴³ Justice Scalia did cite another recent Supreme Court decision to argue that "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *King*, 135 S Ct at 2502 (Scalia dissenting), quoting *Kloeckner v Solis*, 568 US 41, 55 n 4 (2012).

¹⁴⁴ *King*, 135 S Ct at 2503 (Scalia dissenting) (citation omitted).

¹⁴⁵ *Sutton*, 527 US at 484–87.

¹⁴⁶ *Id* at 475.

¹⁴⁷ *Id* at 481–82.

¹⁴⁸ *Id* at 484 (quotation marks omitted), quoting 42 USC § 12101(a)(1).

¹⁴⁹ *Sutton*, 527 US at 487.

could not have meant to count as disabled those whose disabilities are corrected because, if it had, the number of disabled listed in the findings would have been much larger.¹⁵⁰ For reasons that are unclear, the Court avoided mentioning other enacted findings and purposes that would have supported its decision. For example, other findings noted that “society has tended to isolate and segregate individuals with disabilities”; “census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society”; and “individuals with disabilities are a discrete and insular minority who have been . . . relegated to a position of political powerlessness in our society.”¹⁵¹ It seems clear from these findings that Congress intended a narrower conception of disability than one that would include those who wear glasses.¹⁵² Given how prominent and relevant the other enacted findings and purposes were, their exclusion from the majority’s decision is surprising, although perhaps necessary to get the votes of textualists who did not want to appear to rely on purposivist-style arguments based on the enacted findings and purposes.¹⁵³

The dissent in *Sutton* pressed for a more expansive reading of “disability” based primarily on unenacted committee reports. The dissent seemed to treat the enacted findings and purposes as merely another form of legislative history, which it argued was outweighed by other, more voluminous, unenacted legislative history.¹⁵⁴ The dissent also considered the purpose of the legislation in its broadest terms, which it used to argue that, “in order to be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly, construction.”¹⁵⁵ In effect, the dissent was willing to ignore the enacted purposes of the bill in favor of its own conception of the bill’s broadest purpose.

¹⁵⁰ See *id.* at 486–87.

¹⁵¹ ADA § 2(a)(2), (6)–(7), 104 Stat at 328–29.

¹⁵² The Court cited *Sutton* in a subsequent case to interpret the statute in similar ways based on the enacted findings. See *Toyota Motor Manufacturing, Kentucky, Inc v Williams*, 534 US 184, 197–98 (2002).

¹⁵³ For example, Justice Scalia was among those joining the majority opinion.

¹⁵⁴ Justice Stevens, in dissent, looked to the House and Senate committee reports to establish that Congress had intended to count anyone with a corrected or uncorrected disability as disabled for purposes of the ADA. See *Sutton*, 527 US at 499–501 (Stevens dissenting).

¹⁵⁵ *Id.* at 495 (Stevens dissenting).

III. IMPLICATIONS OF ENACTED FINDINGS AND PURPOSES

Enacted findings and purposes show that the differences between enacted text and legislative history are more complicated and case-specific than is commonly acknowledged. This also raises new questions about how courts should view legislative history that has not been enacted. If Congress wants courts to consult unenacted legislative history, then why does it go to the effort of enacting findings and purposes that appear similar to, and often mimic, unenacted legislative history? Why not follow the admonition of Legislative Counsel and leave all of the nonoperative text to the unenacted legislative history? And why choose to enact some legislative history-type language but not others? This Part addresses the implications of enacted findings and purposes for these kinds of questions.

A. Empirical Realities of the Legislative Process

A recent strand of empirical work in statutory interpretation has focused closely on the legislative process, but the empirical realities of the types of enacted provisions described here have been poorly understood. Enacted findings and purposes complicate claims scholars have made about the legislative process and how differences between enacted text and legislative history should play into statutory interpretation. For example, in articles based on interviews with congressional staffers, Professors Abbe R. Gluck and Lisa Schultz Bressman assert that statutory text is predominantly written by nonpartisan professional drafters in the Offices of Legislative Counsel, while legislative history is predominantly drafted by political staff who are more accountable to elected officials.¹⁵⁶ They indicate that members of Congress relate to statutes “at the more abstract level of policy rather than at the granular level of text”¹⁵⁷ and that legislative deals are struck in “bullet points” or “rough outlines,” which members and staff rely on and which are used as guides by the technical drafters in the Offices of Legislative Counsel to create a draft of the statutory text.¹⁵⁸ They argue that this creates a disconnect between policy

¹⁵⁶ Bressman and Gluck, 66 *Stan L Rev* at 741 (cited in note 8) (indicating that legislative history is “drafted by those staff with more policy expertise and greater direct accountability to the members than the staff who may draft the text”).

¹⁵⁷ Gluck and Bressman, 65 *Stan L Rev* at 940 (cited in note 1).

¹⁵⁸ Bressman and Gluck, 66 *Stan L Rev* at 740–41 (cited in note 8). See also Jesse M. Cross, *Statutory Text in the Era of the CEO Legislator: Lessons on Congressional Managing* *2 (unpublished manuscript, Aug 12, 2015) (on file with author) (arguing that members’

decisions made by members of Congress and their staff and the words that end up in enacted statutes because it is difficult for congressional staff outside of Legislative Counsel to confirm that the sometimes dense and technical statutory text “reflects the[] intentions” of the members of Congress and “accurately translates their deals.”¹⁵⁹ They also state that their findings “cast doubt on whether members or high-level staff read” statutory text at all,¹⁶⁰ which leads them to question whether the vote on the statutory text is a “spare formalism” that should not cause courts to ignore legislative history.

A consideration of enacted findings and purposes complicates this account in a number of ways. First, it shows that not all statutory text is dense and technical. Statutory text also contains plain-language descriptions of the problem Congress intends to remedy and Congress’s purposes in legislating. If it is true that members of Congress engage with legislation at a relatively high level of abstraction, it may be that enacted findings and purposes, rather than the much more voluminous unenacted legislative history, best reflect members’ understanding of the purposes behind a bill and how they expect it will be carried out. Legislative history can be long and complex, and it seems unlikely that a member of Congress who is unwilling to read statutory text would be willing to read unenacted legislative history that may be of comparable length, or much longer. Additionally, enacted findings and purposes may be the closest things we have to the bullet points or outlines of legislation created by high-ranking political

“pre-enactment knowledge about the content of bills typically comes from summaries that outline the purpose of statutory provisions”). One congressional staffer described it this way: “The unwritten rule is, you really want to give [your Member] one page.” Id at *22 (quotation marks omitted and brackets in original). And the purpose of this one page is to explain the legislation “at a high level [of generality], so usually it’s more of a policy question [that is discussed], and the policy strengths and weaknesses.” Id at *23 (quotation marks omitted and alterations in original).

¹⁵⁹ Bressman and Gluck, 66 Stan L Rev at 743 (cited in note 8). Professors Gluck and Bressman asked congressional counsels a wide range of questions about the legislative process, including questions about the drafting process for both statutes and legislative history, but they did not ask about enacted findings and purposes. Other scholars seem to have adopted the idea that there is a sharp divide between the “dry, technical, opaque, hard-to-read statutory text” and the relatively plain language legislative history. John F. Manning, Book Review, *Why Does Congress Vote on Some Texts but Not Others?*, 51 Tulsa L Rev 559, 566 (2016). Similarly, Judge Robert A. Katzmann has argued that the use of legislative history is justified because the dry and technical statutory language might not capture Congress’s full intent in enacting the bill and that the legislative history is more likely to provide “a bill’s context, purposes, policy implications, and details.” Robert A. Katzmann, *Judging Statutes* 18–22 (Oxford 2014).

¹⁶⁰ Bressman and Gluck, 66 Stan L Rev at 742 (cited in note 8).

staff early in the legislative process. If members and their staff read any part of a bill, it seems most likely that they read the relatively concise and plain-language findings and purposes that often appear at the beginning of a bill.

A second complication to existing empirical accounts of the legislative process is that, in fact, Legislative Counsel do not draft all types of statutory text, and certain enacted texts are drafted predominantly by political staff who are closely accountable to members of Congress. This Article's findings indicate that, despite the prominence of Legislative Counsel in technical drafting, they have little involvement in drafting enacted findings and purposes. Enacted findings and purposes exist as a third, hybrid type of statutory text that is drafted by political staff (not Legislative Counsel) yet is in form closer to legislative history. In fact, as discussed above, both the Senate and House Offices of Legislative Counsel's drafting manuals advise professional drafters to discourage the inclusion of findings and purposes in the statutory text and to instead leave those types of materials to a committee report or other legislative history.¹⁶¹ Yet Congress continues to draft and regularly enact these materials prominently within the statutory text. If the goal of interpretation is to maintain legislative supremacy by relying on texts that are closest to those who are politically accountable, then courts should consider enacted findings and purposes more closely.¹⁶²

B. Why Does Congress Vote on Some Texts and Not Others?

An obvious question that arises in debates surrounding legislative history is why it is not included in the bill on which members of Congress vote. This is a question that Professor John F. Manning has asked repeatedly, without reaching a satisfying answer.¹⁶³ Similarly, then-Judge Brett Kavanaugh posed the question, “[I]f Congress could—but chooses not to—include certain

¹⁶¹ See Part I.D.

¹⁶² Others have made similar arguments about the importance of linking interpretation to the legislature. See, for example, Joseph Raz, *Intention in Interpretation*, in Robert P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* 258 (Oxford 1996) (arguing that interpretation must be connected to the legislature; otherwise it would not “matter who the members of the legislature are, whether they are democratically elected or not, whether they represent different regions in the country, or classes in the population, whether they are adults or children, sane or insane”).

¹⁶³ See, for example, Manning, 115 Colum L Rev at 1946 (cited in note 24); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673, 730 (1997). See generally Manning, Book Review, 51 Tulsa L Rev 559 (cited in note 159) John F.

committee reports (or important parts thereof) in the statute, on what legal basis can a court treat the unvoted-on legislative history as ‘authoritative’?”¹⁶⁴ Congress certainly could enact legislative history in any form it chooses. It could add the text of a committee report to a bill or incorporate the text by specific reference in a bill, as it has occasionally done in the past.¹⁶⁵ Either of these would be relatively simple to do because the legislative history is generally already drafted at the time of a bill’s enactment. This would remove any doubt about whether courts should consider legislative history, yet Congress rarely enacts it. Congress could also enact a generic rule of statutory interpretation requiring courts to consider legislative history in all cases.¹⁶⁶ One response from supporters of legislative history is that legislative history is generated according to Congress’s own legislative rules and is crucial to the legislative process, so despite the fact that it is not formally enacted, courts should treat it as enacted by incorporation along with the voted-on statutory language.¹⁶⁷

Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 Vand L Rev 1529 (2000).

¹⁶⁴ Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv L Rev 2118, 2124 (2016). Then-Judge Kavanaugh relatedly argued that “[i]t is hard to consider something ‘authoritative’ if it was not voted on and may actually have been voted down if it had been voted on.” Id.

¹⁶⁵ See, for example, *Rostker v Goldberg*, 453 US 57, 92 (1981) (Marshall dissenting) (noting that the Senate report’s findings were subsequently adopted by both houses of Congress); *American Civil Liberties Union v Federal Communications Commission*, 823 F2d 1554, 1583 (DC Cir 1987) (Starr dissenting in part) (noting that, in the Cable Communications Policy Act of 1984, Congress spoke “to the precise issue at hand through a Committee Report that was expressly adopted by both Houses”). The Civil Rights Act of 1991 included a statement specifically noting which part of the legislative history should be considered authoritative. See note 27. This authoritative legislative history states:

The final compromise on S. 1745 (reflected in the purposes provision of the Act) states that with respect to “Wards Cove—Business necessity/cumulation/alternative business practice,” the exclusive legislative history is as follows: The terms “business necessity” and “job related” are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

102d Cong, 1st Sess, in 137 Cong Rec S 15276 (daily ed Oct 25, 1991) (statement of Senator Danforth).

¹⁶⁶ Indeed, Professor Jonathan R. Siegel proposed such a bill to solve the question of whether courts should consider legislative history. See Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand L Rev 1457, 1500 (2000). This solution has some appeal as a simple and one-time solution to the issue, although it is subject to a host of constitutional and pragmatic concerns that make it unlikely to be a viable solution. See Manning, 53 Vand L Rev at 1533–41 (cited in note 163).

¹⁶⁷ See Manning, 53 Vand L Rev at 1533, 1537–38 (cited in note 163).

This Article argues that these questions and responses do not fully account for the complexity of what Congress actually enacts and that they therefore might not be the right questions to ask. Better questions might be, “If Congress chooses to enact certain provisions that look like legislative history as part of a statute, but not others, what should this mean for how courts treat the unenacted legislative history?”; and relatedly, “If Congress intends for courts to consider unenacted legislative history, then why does Congress go to the effort of including provisions that are similar to, or even the same as, the legislative history in the enacted statutory text?”¹⁶⁸ Although it is impossible to definitively answer these questions in every case, enacted findings and purposes show that Congress is capable of regularly enacting legislative history–like language. It could be that Congress does not include more because it wants to avoid “cluttering” the Code.¹⁶⁹ It could also be that Congress chooses to enact some legislative history and not others because the political and resource costs of incorporating more legislative history are too high. It may be that the relatively short and concise findings and purposes are all Congress is able to agree to, or at least all Congress is willing to use its resources to agree to, and so the vote on the text is not actually a spare formalism.¹⁷⁰ Either way, enacted findings and purposes complicate questions raised by textualists and purposivists about how Congress’s decision not to incorporate legislative history more generally into enacted statutes should affect how courts view legislative history.

¹⁶⁸ These questions are even more relevant in light of textualist attacks on legislative history, which seem to have made judges more skeptical of legislative history and have added an extra emphasis on the enacted text.

¹⁶⁹ One court made exactly this argument. A Fourth Circuit panel, when deciding whether to uphold the Violence against Women Act, considered the findings in both the statute and the conference report. The panel found that the findings included in the statute were less extensive than those in earlier versions of the bill and argued that the original findings “were removed to the conference report only to avoid cluttering the U.S. Code [sic] with “congressional findings” that had no force of law.” *Brzonkala v Virginia Polytechnic Institute & State University*, 132 F3d 949, 967 n 10 (4th Cir 1997), revd en banc, 169 F3d 820 (4th Cir 1999), quoting David Frazee, Ann M. Noel, and Andrea Brenneke, eds, *Violence against Women: Law and Litigation* § 5:40 (Clark Boardman Callaghan 1997). It is not clear that this is necessarily true, and indeed a more likely reason why Congress went to the time and effort to narrow the enacted findings is that there was disagreement about what to include, and so Congress was able to include only things that could garner enough votes to pass the legislation. Otherwise why would Congress include any congressional findings or purposes at all if they are mere clutter with no force of law?

¹⁷⁰ They do not need to because courts already look to legislative history on a regular basis, and so the cost of incorporating it is not worth the benefits.

C. Congress-Court Dialogue

Enacted findings and purposes may also be an overlooked way in which Congress communicates with courts. Statutes will always have a certain amount of ambiguity because, for a variety of reasons, Congress is incapable of anticipating every possible issue that may arise in a statutory scheme.¹⁷¹ Congress knows that gaps or ambiguities in a statute will have to be interpreted by an agency or court. Just because statutes are unavoidably ambiguous does not necessarily mean that Congress is content to let other branches of government act without any congressional guidance. One plausible explanation for why Congress includes enacted findings and purposes in the first place is because Congress realizes its texts are imperfect and wants to provide context and guidance to judges. Enacted findings and purposes may show an effort by Congress to place legislation within a context that it hopes will provide parameters to those interpreting the statute under unanticipated circumstances.¹⁷² This is an empirical question that this Article does not attempt to answer. Instead, the point here is that, because scholars and judges have mostly ignored enacted findings and purposes, they have failed to ask these types of important questions about how Congress creates law and communicates its intent to interpreters.

If courts were to increase their reliance on enacted findings and purposes, it would incentivize Congress to include more legislative history–like language in the enacted text.¹⁷³ The Court has made efforts to improve the legislative process in other contexts,¹⁷⁴ and indeed the push to ban the use of legislative history

¹⁷¹ See Katzmann, *Judging Statutes* at 47 (cited in note 159) (arguing that “it is unreasonable to expect Congress to anticipate all interpretive questions that may present themselves in the future”); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 *Colum L Rev* 807, 865 (2014).

¹⁷² This is especially salient in light of the inconsistency and unpredictability with which courts practice statutory interpretation. This has left a conundrum for Congress, if Congress is looking to draft statutes that will be interpreted in ways that it can anticipate.

¹⁷³ As Manning has noted, the judicial use of legislative history “offers Congress a [] substantial temptation to shift the specification of detail outside the cumbersome legislative process.” Manning, 97 *Colum L Rev* at 707 (cited in note 163). Conversely, judicial emphasis on enacted findings and purposes would offer a temptation to shift more legislative history to the text.

¹⁷⁴ See, for example, *Boumediene v Bush*, 553 US 723, 738 (2008) (describing the Court’s rules as “facilitat[ing] a dialogue between Congress and the Court” and helping “Congress [] make an informed legislative choice”); *Bond v United States*, 134 S Ct 2077, 2089 (2014) (describing clear statement rules as rules that “assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision”), quoting *United States v Bass*, 404 US 336, 349 (1971). Justice Scalia

is sometimes justified as a way of improving the legislative process by constraining Congress.¹⁷⁵ Yet when Congress has enacted legislative history–like language, which is what judges, especially textualists, have presumably wanted Congress to do, courts have failed to consistently treat it as more authoritative than unenacted legislative history. As it stands now, the fact that courts have mostly treated enacted findings and purposes no different from unenacted legislative history means that what works best for Congress is to not go to the effort of including more legislative history in the text.¹⁷⁶ As long as courts continue to regularly cite unenacted legislative history and put little emphasis on the importance of enacted findings and purposes, there is almost no incentive to incur the legislative costs of moving more of it to the statutory text.¹⁷⁷

made similar arguments about the value of textualism in influencing how Congress drafts statutes. See Antonin Scalia and John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 *Geo Wash L Rev* 1610, 1613 (2012) (“Whether or not Congress is always meticulous, if we don’t *assume* that Congress picks its words with care, then Congress won’t be able to rely on words to specify what policies it wishes to adopt or, as important, to specify just how far it wishes to take those policies.”). Congress may have, to some degree, responded to this challenge by hiring scores of professionals to help draft long and detailed statutes replete with definitions and exceptions. See Shobe, 114 *Colum L Rev* at 812–13 (cited in note 171). But at a certain point, it becomes too complex, expensive, or time-consuming for Congress to draft with every possible scenario in mind. By enacting findings and purposes, Congress seems to have acknowledged the importance of context in the creation of statutes. Some prominent members of Congress have proclaimed the importance of context in statutory interpretation. See, for example, Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 *Harv J L & Pub Pol* 43, 43 (1988) (“Text without context often invites confusion and judicial adventurism.”).

¹⁷⁵ See, for example, Easterbrook, 17 *Harv J L & Pub Pol* at 63 (cited in note 22) (“A [] thing we wish to do is to constrain Congress.”); Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 51 (Thomson/West 2012) (arguing that the application of textualist canons of interpretation “promote[s] clearer drafting”).

¹⁷⁶ As Professor Gluck has stated, “Congress is focused on what works for Congress.” Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 *U Chi L Rev* 177, 198 (2017).

¹⁷⁷ In other words, the fact that courts have allowed Congress the ability to delegate the creation of legislative history primarily to committees or bill sponsors has compromised the “constitutional values embodied in the process of bicameralism and presentment.” Manning, 53 *Vand L Rev* at 1531 (cited in note 163). Others have made similar arguments about how this type of delegation could weaken constitutional values. See, for example, *Bowsher v Synar*, 478 US 714, 755 (1986) (Stevens concurring), quoting *Immigration and Naturalization Service v Chadha*, 462 US 919, 959 (1983) (“If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade ‘the carefully crafted restraints spelled out in the Constitution.’”); Peter L. Strauss and Andrew R. Rutten, *The Game of Politics and Law: A Response to Eskridge and Ferejohn*, 8 *J L Econ & Org* 205, 207 (1992) (arguing that the legislative veto would “encourage less precise and less frequent legislation by depriving

If courts were to rely on enacted findings and purposes in the statutory interpretation context more frequently, it is unlikely that Congress would respond by simply adopting all or most legislative history as part of statutes. The same political and resource constraints that make it difficult to enact legislative history would exist even if courts began to rely more heavily on enacted findings and purposes, so Congress would have to choose what to enact and what to leave out.¹⁷⁸ Statutes would inevitably become longer, which may be a positive development in this context, although it could be viewed as cluttering the code with text that courts would have to consider. However, it certainly would be less clutter than the combined code plus all legislative history, which is how many judges currently approach interpretation. And presumably it would be less noisy and contradictory and would be unlikely to become unwieldy given the difficulty of enacting statutes. It could also arguably have the effect of reducing judicial discretion by providing a more coherent set of congressional directives that judges could more uniformly apply.

IV. ENACTED FINDINGS AND PURPOSES AND STATUTORY INTERPRETATION

A pressing question modern judges face is what to do when the text of a statute runs out, meaning that the text does not provide a clear answer to how to resolve the issue in a particular case. The main divide between textualists and purposivists is over whether, when the text has run out, to consult legislative history.¹⁷⁹ Because both textualists and purposivists have failed to

Congress of the motivation to solve its substantial communications problems at the time of enactment”). Critics of legislative history have argued that the more legislative history is used, the less reliable it becomes and that, because of this, courts should not use legislative history at all. See, for example, *Blanchard v Bergeron*, 489 US 87, 97–100 (1989) (Scalia concurring in part and concurring in the judgment). See also *International Brotherhood of Electrical Workers, Local Union No 474, AFL-CIO v National Labor Relations Board*, 814 F2d 697, 717 (DC Cir 1987) (Buckley concurring). Scalia and Manning, 80 *Geo Wash L Rev* at 1612 (cited in note 174) (“[T]he more you use legislative history, the phonier it will become.”). This Article’s arguments do not disagree with that except to note that under the same reasoning if courts were to look at enacted findings and purposes more often, then Congress would include more of them in enacted statutes, which this Article argues would be a positive development.

¹⁷⁸ See Victoria F. Nourse and Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *NYU L Rev* 575, 596 (2002) (discussing Congress’s use of deliberate ambiguity to achieve consensus).

¹⁷⁹ As Professor Gluck has noted, “This categorization takes an exceedingly narrow view of the concept of purpose in interpretation,” for textualists claim they would be receptive to purposes enacted in the statutory text. Abbe R. Gluck, *Imperfect Statutes*,

consider enacted findings and purposes in a systematic way, we lack a theory of how it should affect interpretive theory and judicial practice. This Part argues that, when textualists' arguments against legislative history are taken off the table, there is less that divides textualists from purposivists. Of course, there will still be divergences on other questions of interpretation, but enacted findings and purposes should be places where textualism and purposivism have common ground. This Part begins to develop a theory of interpretation that accounts for enacted findings and purposes and that is both textual and purposive in nature.

A. Enacted Findings and Purposes and the Whole Act Rule

Enacted findings and purposes should be properly understood as part of the statutory text, and they should be treated like other enacted text for purposes of interpretation. A theory of interpretation that accounts for them is therefore simply a more complete version of the whole act rule.¹⁸⁰ The whole act rule is a common and relatively uncontroversial canon of construction commonly used by both textualists and purposivists. In articulating the use of this canon, the Court has said, "We do not . . . construe statutory phrases in isolation; we read statutes as a whole."¹⁸¹ Put another way, the whole act rule is a realistic form of interpretation because the "legislature passes judgment upon an act as an entity. . . . A subsequent judicial effort to segregate any portion of an act, or exclude any portion from consideration, then, will almost certainly produce a result different from what the enacting legislature intended."¹⁸² The ultimate goal of the whole act rule is to "give effect, if possible, to every clause and word of a statute."¹⁸³ It seems clear from these articulations of the rule that, if a court is to give full meaning to each provision of the text, and avoid distorting congressional intent, it must not interpret provisions of a statute in isolation and should instead

Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking, 129 Harv L Rev 62, 90–91 (2015).

¹⁸⁰ Thanks to Bill Eskridge for this framing.

¹⁸¹ *Samantar v Yousuf*, 560 US 305, 319 (2010), citing *United States v Morton*, 467 US 822, 828 (1984). See also Brudney and Ditslear, 58 Vand L Rev at 12–13 (cited in note 17) (stating that the whole act canon suggests that "each term or provision should be viewed as part of a consistent and integrated whole").

¹⁸² Singer and Singer, 2A *Statutes and Statutory Construction* § 47:2 at 289 (cited in note 101). See also Scalia and Garner, *Reading Law* at 167–82 (cited in note 175) (discussing the whole act rule and its many corollaries).

¹⁸³ *Montclair v Ramsdell*, 107 US 147, 152 (1883).

consider them in light of the enacted findings and purposes. Under the whole act rule, a court should not ignore or give less weight to enacted findings and purposes. Instead, courts must both understand the rest of the text of a statute in light of the enacted findings and purposes and understand the enacted findings and purposes in light of the rest of the text.¹⁸⁴

Treating the enacted findings and purposes as coequal with the rest of the statutory text would be a change from how these provisions are currently conceived of by courts and commentators. For example, the Supreme Court has argued that enacted findings and purposes are “irrelevant” when statutory text is unambiguous.¹⁸⁵ Other courts and commentators seem to agree that enacted findings and purposes should not be used to create ambiguities in “clear” statutory language.¹⁸⁶ Courts and commentators have made analogous arguments in the context of unenacted legislative history, so in effect have made no distinction between the importance and proper use of enacted text and unenacted legislative history.¹⁸⁷ Putting aside questions of

¹⁸⁴ In some ways, this would be similar to how judges treat statutory titles. In earlier eras, courts often treated titles as if they were “no part of a statute.” *Patterson v Bark Eudora*, 190 US 169, 172 (1903). However, modern courts have treated titles as part of the statute that can be helpful evidence of statutory meaning but that cannot supersede the operative text. See, for example, *United States v Spears*, 697 F3d 592, 597 (7th Cir 2012).

¹⁸⁵ *Pennsylvania Department of Corrections v Yeskey*, 524 US 206, 211–12 (1998).

¹⁸⁶ See, for example, *Jogi v Voges*, 480 F3d 822, 834 (7th Cir 2007) (“It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous.”); Singer and Singer, 2A *Statutes and Statutory Construction* § 47:4 at 299 (cited in note 101) (“The preamble cannot control the enacting part of the statute, in cases where the enacting part is expressed in clear, unambiguous terms.”) (citations omitted).

¹⁸⁷ See, for example, *Exxon Mobil Corp v Allapattah Services, Inc.*, 545 US 546, 568 (2005) (“As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”). See also Victoria F. Nourse, *The Constitution and Legislative History*, 17 U Pa J Const L 313, 335 (2014) (“[N]o one believes that legislative history should in fact replace or supplant clear text.”) (emphasis omitted). This use of legislative history is less controversial than another possible use most closely associated with the well-known Supreme Court decision in *Church of the Holy Trinity v United States*, 143 US 457 (1892). In *Holy Trinity*, the Supreme Court departed from the plain meaning of the statutory language because of the “spirit” of the law, which was illustrated by the preface to the statute and the legislative history. *Id.* at 459–61. Even though *Holy Trinity* was decided well over one hundred years ago, it is still cited by textualists as an example of the worst kind of statutory interpretation and has generally been disregarded even by purposivists. For example, in *Hughes Aircraft Co v Jacobson*, a unanimous court implicitly denounced the *Holy Trinity* approach: “As in any case of statutory

whether unenacted legislative history should be considered when statutory language is supposedly unambiguous, the contention here is that, because enacted findings and purposes are part of the text and therefore the whole legislative bargain, an interpreter cannot say that the rest of the text is clear or unambiguous without first consulting them. Whether a statute is ambiguous is often clear only once the entire statute is considered. The Court has acknowledged that “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.”¹⁸⁸ Because ambiguity is often subjective, it is impossible to draw the line between ambiguous and unambiguous in a way that provides a clear prospective rule for the use of enacted findings and purposes. Allowing a court to ignore one part of the statutory text when it claims another part of the text is unambiguous can therefore serve as an unprincipled excuse to disregard part of the duly enacted text. Yet this is what current approaches to enacted findings and purposes allow. Courts and commentators have been willing to read provisions of statutes in isolation and to relegate enacted findings and purposes to an inferior position in the interpretive hierarchy. Any distinction between findings and purposes and other provisions of an enacted text is a choice that is not connected to, or required by, Congress. One part of a statute cannot be divorced from the rest of the statute without distorting Congress’s work because the entire statute is the result of the legislative deal that led to enactment. Enacted findings and purposes are law just like any other part of the law, and there is no reason why they should not be given the full weight of law.

Of course, there must be a limiting principle on how to use enacted findings and purposes; otherwise, they could improperly subsume the rest of the text. To quote Professors Henry M. Hart Jr and Albert M. Sacks, purpose should not be used “to give the words of a statute a meaning they will not bear.”¹⁸⁹ Similarly, courts have commonly expressed the concern that consideration of purpose could allow for interpretations that go beyond the meaning of other portions of the statute.¹⁹⁰ While these concerns

construction, our analysis begins with ‘the language of the statute.’ And where the statutory language provides a clear answer, it ends there as well.” 525 US 432, 438 (1999), quoting *Estate of Cowart v Nicklos Drilling Co*, 505 US 469, 475 (1992) (citations omitted).

¹⁸⁸ *United Savings Association of Texas v Timbers of Inwood Forest Associates, Ltd*, 484 US 365, 371 (1988).

¹⁸⁹ Hart and Sacks, *The Legal Process* at 1375 (cited in note 20).

¹⁹⁰ As the Court has said, “[N]o legislation pursues its purposes at all costs,” and a court “frustrates rather than effectuates legislative intent simplistically to assume that

are valid, less attention has been given to the equally valid concern that portions of a statute can be interpreted in ways that go beyond, or fall short of, the enacted purposes, which is another form of giving a meaning that the text cannot bear. Courts must endeavor to find an interpretation that is permissible under the entire statute, including findings and purposes because they are part of the statute.¹⁹¹ This is more likely to generate an interpretation in line with Congress's intent than an isolationist mode of interpretation that attempts to narrow textually permissible interpretations based on unenacted tools.

When a statute contains enacted findings and purposes, the task, at its most basic level, is simple. The provisions of the statute must be interpreted in ways that carry out Congress's enacted goals to the extent permitted by the text.¹⁹² A statute's findings and purposes can serve as guideposts to understanding the scope of the rest of the text. This obviously has limitations. It will not allow courts to get into Congress's head to engage in "imaginative reconstruction" that will answer how Congress would necessarily have resolved a specific case.¹⁹³ Although it will not often give a specific answer to a complicated statutory question, it will rarely

whatever furthers the statute's primary objective must be the law." *Rodriguez v United States*, 480 US 522, 525–26 (1987) (per curiam).

¹⁹¹ Justice Scalia and Bryan A. Garner made a similar argument about these types of clauses. Scalia and Garner, *Reading Law* at 35 (cited in note 175) ("While such provisions as a preamble or purpose clause can clarify an ambiguous text, they cannot expand it beyond its permissible meaning. If they could, they would be the purposivists' playground.")

¹⁹² The idea of relying on enacted purposes goes back to an underappreciated part of Hart and Sacks's methodology, which stated that a statute must be understood first and foremost in light of its "formally enacted statement of purpose." Hart and Sacks, *The Legal Process* at 1377 (cited in note 20).

¹⁹³ Judge Richard Posner suggested that this kind of imaginative reconstruction is what judges should engage in when attempting to interpret an ambiguous statute. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U Chi L Rev 800, 817 (1983) (arguing that "the task for the judge called upon to interpret a statute is . . . one of imaginative reconstruction," which involves thinking his or her way "into the minds of the enacting legislators and imagin[ing] how they would have wanted the statute applied to the case at bar"). Scholars have long noted that "the overwhelming probability" in any difficult case is "that the legislature gave no particular thought to the matter and had no intent concerning it" and that attempting to reconstruct what Congress would have done had it considered the issue is impossible. Hart and Sacks, *The Legal Process* at 1182 (cited in note 20); *id.* at 1183:

[O]n what basis does a court decide what a legislature . . . would have done had it foreseen the problem? Does the court consider the political structure of the [] legislature? Does the court weigh the strength of various pressure groups operating at the time? How else can the court form a judgment as to what the legislature would have done?

provide no guidance on the interpretive question, even if it is not dispositive. Interpretation will still require analysis of to what extent the text permits a certain interpretation, what exactly Congress intended, and at what level of generality.¹⁹⁴ But these are the debates courts should be having over interpretation when congressional purposes are enacted rather than more narrowly focused arguments about specific meanings based on dictionaries, canons, unenacted legislative history, or other sources that ignore important parts of the enacted text. Enacted findings and purposes would allow these debates to proceed in light of relatively transparent sources that are unquestionably connected with the entire legislature.

B. Textualism and Enacted Findings and Purposes

Textualist arguments against the use of legislative history are well documented and have been endlessly debated.¹⁹⁵ Perhaps the strongest argument against the use of legislative history is a formalist one based on the Constitution. Textualists argue that the Constitution requires judges to look solely to the text of a statute because that is the only thing that underwent the process Article I, § 7 provides to make law.¹⁹⁶ They argue that legislative

¹⁹⁴ However, these concerns are not unique to enacted findings and purposes. Unenacted legislative history rarely provides evidence of a specific congressional intent. Instead, courts frequently rely on unenacted legislative history to understand Congress's purposes at a level of generality higher than that of the specific controversy. See, for example, *Johnson v United States*, 529 US 694, 723 (2000) (Scalia dissenting) ("Citing legislative history (although not legislative history discussing the particular subsection at issue), the Court explains what it views as the policies Congress seeks to serve with supervised release generally, and then explains how these general policies would be undermined by reading § 3583(e)(3) as written."). It is also true that legislative history is almost always just one of many tools and that judges would have arrived at the same decision without the legislative history. As Justice Elena Kagan has noted, most treatments of legislative history in the Supreme Court are "icing on a cake already frosted." *Yates v United States*, 135 S Ct 1074, 1093 (2015) (Kagan dissenting).

¹⁹⁵ See note 1 and accompanying text.

¹⁹⁶ US Const Art I, § 7, cl 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections."); *Wisconsin Public Intervenor v Mortier*, 501 US 597, 620–21 (1991) (Scalia concurring in the judgment):

All we know for sure is that the full Senate adopted the text that we have before us here, as did the full House, pursuant to the procedures prescribed by the Constitution; and that that text, having been transmitted to the President and approved by him, again pursuant to the procedures prescribed by the Constitution, became law.

history is not law because Congress cannot delegate its authority to make law to a committee or sponsors of legislation.¹⁹⁷ As Justice Scalia put it: “We are governed by laws, not by the intentions of legislators. . . . The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.”¹⁹⁸ Enacted findings and purposes are very clearly not subject to these formalist objections. They are voted on by both houses of Congress and signed by the president, so there is no question that they are “law” that reflects the entire Congress’s actions.

Perhaps even more influential have been textualists’ functional and pragmatic arguments against the use of legislative history.¹⁹⁹ One such argument is that legislative history is so voluminous and incoherent that it allows for judicial activism because judges can pick and choose the legislative history that supports the outcome they prefer.²⁰⁰ Commentators have also made related institutional objections to the use of legislative history, arguing that judges do not understand the complexities of the legislative

See also John F. Manning, *Second-Generation Textualism*, 98 Cal L Rev 1287, 1292 & n 28 (2010).

¹⁹⁷ See, for example, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv J L & Pub Pol 59, 64–65 (1988); *In re Sinclair*, 870 F2d 1340, 1342–44 (7th Cir 1989); Manning, 98 Cal L Rev at 1293–94 (cited in note 196); Manning, 97 Colum L Rev at 706 (cited in note 163) (“When a court assigns legislative history decisive weight because of the speaker’s legislative status, it permits a committee or sponsor to interpret a law on Congress’s behalf. This practice effectively assigns legislative agents the law elaboration function—the power ‘to say what the law is.’”); Scalia, *A Matter of Interpretation* at 35 (cited in note 23) (“The legislative power is the power to make laws, not the power to make legislators. It is nondelegable.”).

¹⁹⁸ *Conroy v Aniskoff*, 507 US 511, 519 (1993) (Scalia concurring in the judgment), quoting *Aldridge v Williams*, 44 US (3 How) 9, 24 (1845) (emphasis and quotation marks omitted). Many scholars have debated these constitutional arguments, with some taking the position that other provisions of the Constitution could justify judicial reliance on legislative history. See generally, for example, Nourse, 17 U Pa J Const L 313 (cited in note 187). See also Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L J 70, 96 (2012); Siegel, 53 Vand L Rev at 1527 (cited in note 166); James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 Cal L Rev 1199, 1218–24 (2010) (citing the Journal Clause in Article I, § 5 of the Constitution as supporting the use of legislative history); John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 Case W Res L Rev 489, 566–67 (2001).

¹⁹⁹ See Crane, 102 Georgetown L J at 659 (cited in note 5).

²⁰⁰ Scalia, *A Matter of Interpretation* at 35–36 (cited in note 23) (“In any major piece of legislation, the legislative history is extensive, and there is something for everybody. As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends.”). See also Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L Rev 195, 214 (1983) (re-calling Judge Leventhal’s aphorism).

process for each bill and that, because of this, relying on legislative history requires them to do work that they are not equipped to do, and at a potentially high cost.²⁰¹ This argument is also based on the idea that the creation of legislation is a multilayered process that often turns on bargains necessary to achieve enactment that would be impossible for a court to uncover.²⁰² Textualists emphasize the importance of preserving these complicated, and potentially awkward, legislative bargains embodied in the statutory text.²⁰³ These concerns are less salient for enacted findings and purposes. Because they are less voluminous and more homogeneous, enacted findings and purposes are unlikely to have “something for everyone” in the way unenacted legislative history does, although they may be less specific. Enacted findings and purposes also do not require a judge to attempt to uncover the legislative process to decide how to weigh different types of legislative history. Because they are enacted, they are part of the complicated legislative bargain that led to enactment of the statute and so should be viewed as such rather than ignored or marginalized.

A final set of arguments, related to those above, is that legislative history is inherently unreliable or unrepresentative. Legislators are often strategic when they speak, and the argument is that they include language in the legislative history that is meant to distort rather than clarify or explain Congress’s true intent.²⁰⁴ Justice Scalia argued:

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the

²⁰¹ For a brief discussion of these criticisms, see William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 208–09 (Foundation 2016). The common argument is that interpretation should instead be left to agencies that are more accountable and expert. See, for example, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 514–15 (addressing this argument but concluding that “even I cannot agree with this approach”).

²⁰² See Frank H. Easterbrook, *Statutes’ Domains*, 50 U Chi L Rev 533, 547–48 (1983).

²⁰³ See, for example, Manning, 91 Va L Rev at 441 (cited in note 24) (“[Textualists] believe that smoothing over the rough edges in a statute threatens to upset whatever complicated bargaining led to its being cast in the terms that it was.”); Easterbrook, 50 U Chi L Rev at 541 (cited in note 202) (“[With] interest group legislation it is most likely that the extent of the bargain . . . is exhausted by the subjects of the express compromises reflected in the statute. The legislature ordinarily would rebuff any suggestion that judges be authorized to fill in blanks in the ‘spirit’ of the compromise.”).

²⁰⁴ *Blanchard v Bergeron*, 489 US 87, 97–100 (1989) (Scalia concurring in part and concurring in the judgment). See also *International Brotherhood of Electrical Workers*, 814 F2d at 717 (Buckley concurring) (arguing that the use of legislative history by courts creates an incentive “to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to accept”).

cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . , but rather to influence judicial construction.²⁰⁵

This provides a disincentive to hard legislative negotiation because legislators and lobbyists know they can “salt” the legislative record with their preferred interpretation and possibly achieve the same result at a much lower cost.²⁰⁶ Enacted findings and purposes are also much less susceptible to these objections. They are prominently included in plain language at the beginning of most bills, so it is much more difficult for a “sneaky” member or staffer to insert something into the findings and purposes that distorts the true purposes of a bill. In fact, other statutory text, which can be long and dense, might actually be more subject to manipulation.

Enacted findings and purposes also have relevance to common debates about Congress’s ability to form an intent. Scholars and judges have long argued that, because Congress is a “they”

²⁰⁵ *Blanchard*, 489 US at 98–99 (Scalia concurring in part and concurring in the judgment). See also Scalia and Manning, 80 *Geo Wash L Rev* at 1612 (cited in note 174); Manning, 98 *Cal L Rev* at 1294 (cited in note 196) (noting the common textualist theme that congressional committees “generate legislative history strategically at the behest of client interest groups”); Easterbrook, 17 *Harv J L & Pub Pol* at 61 (cited in note 22) (“These clues [in legislative history] are slanted, drafted by the staff and perhaps by private interest groups.”); Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 *Duke L J* 371, 376 (“Lobbyists maneuver to get their clients’ opinions into the mass of legislative materials.”); Gluck and Bressman, 65 *Stan L Rev* at 973 (cited in note 1) (showing that legislative drafters sometimes use legislative history to get “something we couldn’t get in the statute” in order “to make key stakeholders happy”).

²⁰⁶ See, for example, *Allapattah*, 545 US at 568 (arguing that reliance on committee reports “may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text”); *Sinclair*, 870 F2d at 1343 (asserting that legislative history is where losers of legislative battles follow the motto, “If you can’t get your proposal into the bill, at least write the legislative history to make it look as if you’d prevailed”); *International Brotherhood of Electrical Workers, Local Union No 474, AFL-CIO v National Labor Relations Board*, 814 F2d 697, 717 (DC Cir 1987) (Buckley concurring) (arguing that legislative history can be used to make an end run around Congress); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 *Harv L Rev* 1005, 1015–19 (1992) (same). Congressional staff have acknowledged that legislative history is sometimes used to include “something [legislators] couldn’t get in the statute.” Gluck and Bressman, 65 *Stan L Rev* at 973 (cited in note 1).

not an “it,”²⁰⁷ it is impossible for Congress to have a coherent “intent.”²⁰⁸ While these arguments hold obvious appeal, findings and purposes call into question whether they apply universally. Enacted findings and purposes allow Congress as a body to generate an institutional intent, and that intent is apparent to all members of Congress at the time of the vote because it is written into the statute.²⁰⁹ When the enacted text of a statute contains intentionalist language, we can fairly attribute those intentions to all of Congress in a way that we may not be able to for unenacted legislative history.²¹⁰ While it may be true, as Justice Scalia argued,

²⁰⁷ See generally Shepsle, 12 *Intl Rev L & Econ* 239 (cited in note 25).

²⁰⁸ See Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 *Duke L J* 979, 981 (2017) (“[A]s an empirical matter, members of Congress do not *share* intentions.”); John F. Manning, *The Absurdity Doctrine*, 116 *Harv L Rev* 2387, 2410–19 (2003); Easterbrook, 17 *Harv J L & Pub Pol* at 68 (cited in note 22); *Mortier*, 501 US at 620 (Scalia concurring in the judgment) (arguing that legislative history “does not necessarily say anything about what Congress as a whole thought”); Scalia, 1989 *Duke L J* at 517 (cited in note 201) (noting that “the quest for the ‘genuine’ legislative intent is probably a wild-goose chase anyway”); Ronald Dworkin, *Law’s Empire* 335–36 (Belknap 1986) (arguing that it is difficult to imagine a way in which “to consolidate individual intentions into a collective, fictitious group intention”); Easterbrook, 50 *U Chi L Rev* at 547–48 (cited in note 202) (“The existence of agenda control makes it impossible for a court—even one that knows each legislator’s complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact.”). Many of these arguments are based on the work of the realist-skeptic Max Radin in the 1930s. See Max Radin, *Statutory Interpretation*, 43 *Harv L Rev* 863, 870 (1930). Radin argued that it is impossible to uncover an intent of the legislature because it is an institution of many that can act only in collective ways. Radin argued that “[t]he chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.” *Id.* Radin also argued that, “[e]ven if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men.” *Id.* Others have noted that statutes can have multiple, potentially conflicting, purposes, and so to rely on an idea of congressional purpose is unlikely to generate coherent and reliable statutory interpretation. See William N. Eskridge Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 *Geo Wash L Rev* 1731, 1744–45 (1993):

[P]urpose is *too* easy to determine, yielding a plethora of purposes, cross-cutting purposes, and purposes set at such a general level that they could support several different interpretations. Purposive statutory interpretation, therefore, might be even less determinate than more traditional approaches. This has been a standard criticism of legal process interpretation.

²⁰⁹ Enacted findings and purposes may often be the best evidence of what Professor Einer Elhauge has called Congress’s “enactable preferences.” Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 8 (Harvard 2008).

²¹⁰ In some cases, enacted findings and purposes may allow courts to move away somewhat from the traditional assumption that Congress is “made up of reasonable persons pursuing reasonable purposes reasonably” and instead look to Congress’s actual purposes. See Hart and Sacks, *The Legal Process* at 1378 (cited in note 20) (discussing this traditional assumption about Congress). See also Cass R. Sunstein and Adrian Vermeule,

that “[i]t is the *law* that governs, not the intent of the lawgiver,”²¹¹ intent skepticism is less warranted when the law itself has an expressed intent or purpose.²¹²

Because enacted findings and purposes are not subject to textualists’ common criticisms of legislative history, they would appear to be a useful textualist tool for interpreting ambiguous statutory terms.²¹³ A deeper and more frequent reliance on findings and purposes would require textualists to somewhat modify their current approach to interpretation. For example, textualists generally focus on what Professor Manning has termed “semantic context” to find the meaning of words.²¹⁴ They look to generate an “objectified intent” by looking to “the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words.”²¹⁵ More colloquially, they look for the “best reading” of the text.²¹⁶ In this process they focus on dictionary definitions, technical terms, canons of construction, grammar rules, and other statutory usage.²¹⁷ The goal is not necessarily to reflect what Congress intended but to rely on

Interpretation and Institutions, 101 Mich L Rev 885, 895 (2003) (“Purposivism usually attributes goals or aims by envisioning reasonable legislators acting reasonably.”).

²¹¹ Scalia, *A Matter of Interpretation* at 17 (cited in note 23).

²¹² Indeed, some textualists have acknowledged the potential—albeit limited—relevance of preambles, which seem similar to the types of enacted text discussed here. See Scalia and Garner, *Reading Law* at 35 (cited in note 175) (“While such provisions as a preamble or purpose clause can clarify an ambiguous text, they cannot expand it beyond its permissible meaning.”).

²¹³ Justice Scalia, in one of his books with Bryan A. Garner, notes that “the prologue does set forth the assumed facts and the purposes that the majority of the enacting legislature . . . had in mind, and these can shed light on the meaning of the operative provisions that follow.” Scalia and Garner, *Reading Law* at 218 (cited in note 175). However, textualists seem to be hesitant to fully commit to this canon, arguing that “[i]t is hard to imagine, for example, that any legislator who disagreed with that [preamble or prologue] would vote against a bill containing all the dispositions that the legislator favored.” *Id.* at 217.

²¹⁴ See John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum L Rev 70, 91–92 (2006). Judge Easterbrook similarly noted that textualists generally focus on “the ring the words would have had to a skilled user of words at the time, thinking about the same problem.” Easterbrook, 11 Harv J L & Pub Pol at 61 (cited in note 197).

²¹⁵ Manning, 91 Va L Rev at 424 (emphasis omitted) (cited in note 24). See also Scalia, *A Matter of Interpretation* at 17 (cited in note 23) (explaining that textualists aim to uncover “a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*”).

²¹⁶ Kavanaugh, Book Review, 129 Harv L Rev at 2144 (cited in note 164).

²¹⁷ See *Finley v United States*, 490 US 545, 556 (1989) (“What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash U L Q 351, 372–73 (1994) (discussing textualists’ use of dictionaries, grammar, syntax, and semantic canons); Manning, 91 Va L Rev at 436–38 (cited in note 24).

a neutral and clear set of rules that reduce judicial discretion and provide a clear backdrop against which Congress can legislate.²¹⁸ Enacted findings and purposes complicate textualists' interpretive account because they show that judges must consider Congress's own stated goals and purposes as part of generating this "objectified intent." Indeed, because it is part of the enacted text, it should be a primary tool in determining the semantic context and objectified intent. Enacted findings and purposes allow courts to engage in purposivist-style interpretation that is based on textual sources.

In light of textualists' arguments against unenacted legislative history, we would expect them to assert that enacted findings and purposes are the only legislative history-type language that should be used to uncover congressional purpose. Yet the few times textualist judges have relied on findings and purposes, they have rarely placed any particular emphasis on the fact that it was enacted or treated it different from unenacted legislative history, such as committee reports. It may be that textualists would not want to consider enacted findings and purposes more broadly because it would require them to engage in more purposivist analyses, something they might prefer to avoid even if such a purposivist analysis were based on the text. However, because the enacted findings and purposes are part of the text, if they choose to give these provisions less weight than other statutory text, then they must justify their reasons for doing so on something other than their common arguments against legislative history.

C. Purposivism and Enacted Findings and Purposes

Modern purposivists acknowledge the primacy of enacted text and generally rely on legislative history only when the text is unclear.²¹⁹ For purposivists, enacted findings and purposes

²¹⁸ See John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 Harv L Rev 1, 25–26 (2014).

²¹⁹ See *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* 8:28 (Harvard Law School, Nov 18, 2015), online at <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> (visited Oct 19, 2018) (Perma archive unavailable) ("I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench."); Kavanaugh, Book Review, 129 Harv L Rev at 2118 (cited in note 164) ("Statutory text matters much more than it once did. If the text is sufficiently clear, the text usually controls."). Supporters of legislative history have argued that, when a statute is indeterminate, judges who refer to legislative history show greater respect for the legislative process than judges who act without regard for how legislators considered the relevant issue. See, for example, Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 Colum L Rev 242,

should therefore be a more authoritative source than legislative history and should be the starting point for interpreting and understanding legislative history. Noted purposivists have argued that statutes should be understood in light of Congress's "established institutional processes and practices" when arguing in favor of consulting legislative history.²²⁰ But perhaps purposivists have also failed to understand how Congress actually functions and signals its intent to courts and the public by failing to emphasize the importance of enacted findings and purposes.²²¹ Purposivist judges could rely on them in much the same way they already use unenacted legislative history. Additionally, they could use them to guide their reading of unenacted legislative history by disregarding as unreliable any evidence of congressional intent in the unenacted legislative history that conflicts with enacted findings and purposes. This would require purposivists to be more constrained in their use of legislative history, which would partially mitigate textualists' concerns about purposivists picking and choosing legislative history that supports their preferred interpretation. The dissent in *Sutton*, discussed above, took the opposite approach by allowing the unenacted legislative history to outweigh relatively clear and detailed findings and purposes.²²² The dissent acknowledged that the findings and purposes conflicted with its preferred interpretation but nevertheless cited multiple committee reports that conflicted with the findings and purposes.²²³ This would be a questionable use of unenacted legislative history because it seems incongruous to give more weight

262 (1998). These supporters of legislative history do not believe that legislative history provides all the answers to statutory ambiguities but do believe it is better to use interpretive tools that are tied to Congress than for judges to exercise unguided discretion using tools of their own choice. See Nelson, 91 Va L Rev at 359–61 (cited in note 1). Even purposivists, who tend to use a wider variety of sources when interpreting, acknowledge that only publicly available materials should be consulted. *Id.* at 359 (noting that purposivists are "happy to treat committee reports and other publicly available materials as part of the context" but "reject other information that is probative of lawmakers' actual intentions but not spread out on the public record").

²²⁰ Katzmann, *Judging Statutes* at 9 (cited in note 159). Judge Katzmann argues that scholars and legal analysts have mostly ignored "how Congress actually functions, how Congress signals its meaning, and what Congress expects of those interpreting its laws." *Id.* at 8. It is undoubtedly true that judges have mostly ignored how Congress actually functions, although this is arguably true of both textualists and purposivists.

²²¹ For example, Judge Katzmann urges judges "to interpret language in light of the statute's purpose[] as enacted by legislators." *Id.* at 31–35 (cited in note 159). He does not, however, note that the legislators' purposes are often enacted into the statute itself and are not just in the legislative history.

²²² *Sutton*, 527 US at 499 (Stevens dissenting).

²²³ *Id.* at 495 (Stevens dissenting).

to an unenacted statement made by a committee or one member of Congress than to a statement of background or purpose enacted by both houses of Congress and signed by the president through the constitutionally prescribed process.

CONCLUSION

This Article offers a new perspective on the old and contentious debate over statutory interpretation. It shows that this debate has mostly failed to consider enacted statutory text that serves a similar function to that of oft-debated unenacted legislative history. Enacted findings and purposes are often the most accurate reflection of the legislative background and Congress's intent and purposes, yet their relevance to statutory interpretation has gone mostly unrecognized and undertheorized in the legal literature. This Article argues that enacted findings and purposes have important implications for the practice and theory of statutory interpretation. It shows that there is much work to be done in developing a more complete empirical account of the ways Congress legislates, which is necessary to constructing a comprehensive theoretical framework for how judges should approach statutory interpretation.