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ARTICLE

LOST LAWS: WHAT WE CAN'T FIND IN THE UNITED STATES CODE

*WILL TRESS**

INTRODUCTION

For a nation governed by laws, public access to the law should be a national priority. Consequently, our government should strive to make finding the law as straightforward as possible. This is easier for some sources of law than for others. Common law, a complex assemblage of different voices, may present too great a challenge. Over time, any number of judicial opinions can treat a point of law, with overlapping layers of decision, explication and disagreement.¹ By contrast, statutory law is law with a single voice. At least in theory, the legislature's monopoly on the writing of statutes creates a

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¹ "With the common law . . . [g]eneral rules, underlying principles, and finally legal doctrine, have successively emerged only as the precedents, accumulated through the centuries, have been seen to follow a pattern, characteristically not without distortion and occasional broken threads, and seldom conforming consistently to principle." Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 6 (1936). This development of common law principles through the accumulation of precedents may be impeded by the replacement of the digest system with electronic research: researchers may be less likely to rely on the same cases to support a point of law. Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 HARV. J. L. & TECH. 224, 249-50 (2008).

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universally recognized authoritative text to shape expectations and regulate behavior, “a directive arrangement which is embodied in a single authoritative set of words.”² To be effective, that single voice must be heard. The statutes must be easily found and must be presented in a format that promotes comprehension and instills confidence in their authority.

Federal statutes, the laws enacted by Congress, are found in and through the United States Code.³ The Code is a compilation of the “laws of the United States, general and permanent in their nature.”⁴ It is a complex and mutable creation, composed of disparate parts. Some parts, the “positive law” titles,⁵ are literally the law itself. Other titles merely represent the laws, which are found in the Statutes at Large.⁶ Adding to the Code’s complexity, some “general and permanent” laws are found in footnotes or appendices, rather than in the text of the Code. Many enacted laws are left out of the Code entirely—even though of general applicability—because they are considered temporary. Some of these “temporary” laws—general provisions in appropriations acts that must be sought in the Statutes at Large—have been in effect for decades because successive Congresses enacted them over and over again.⁷ These complications create pitfalls even for legal professionals researching statutory law.⁸ The average citizen, without a background in legal research, has no way of knowing that there is something missing. To make our federal statutory law accessible to all, the misleading and obscure features in the U.S. Code must be minimized, and better tools must be developed to alert a researcher to those that remain.

² HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS* 125 (William N. Eskridge & Philip P. Frickey eds., 1994).

³ 1 U.S.C. § 1 et seq. (2006).

⁴ 1 U.S.C. § 204(a) (2006).

⁵ Office of the Law Revision Counsel, Codification Legislation, <http://uscode.house.gov/codification/legislation.shtml> (last visited Jan. 3, 2010).

⁶ The volumes of the Statutes at Large contain an official chronological set of the laws passed by Congress and signed into law by the President, as well as some other documents. For more information on the documents contained in the Statutes at Large, see RICHARD MCKINNEY, *U.S. STATUTES AT LARGE: DOCUMENTS AND INFORMATION INCLUDED* (2004), available at <http://www.llsdc.org/attachments/wysiwyg/544/us-statutes-contents.pdf>.

⁷ See Part II.A.4 of this article.

⁸ See, e.g., JAN BISSETT & MARGI HEINEN, *REFERENCE FROM COAST TO COAST: OUR UNCODIFIED PUZZLERS* (2006), <http://www.llrx.com/columns/reference47.htm>.

This article looks at the development of the U.S. Code as the primary expression of federal statutory law and at those features which detract from its usefulness in that role. To provide background, some definitions of terms pertaining to codes are provided, followed by a history of the U.S. Code, a description of appropriations riders⁹ as a source of uncodified law, and a look at some of the agencies that create and maintain the Code. The Analysis section discusses particular problems with the current Code. Special attention is paid to enacted law relegated to footnotes and appendices of the Code, and to serially enacted appropriations riders that are never codified at all.

Afterward, ameliorative measures are suggested. The addition of codification notes would indicate the authoritativeness (*prima facie* or legal evidence) of a Code section. The institution of regular, periodic corrective acts would integrate statutes now found in footnotes and appendices into the main text of the Code. Most importantly, a government-managed unofficial electronic version of the Code would incorporate enactments codified in notes and appendices, as well as “temporary” laws of general application. The electronic version would be arranged in a way to inform the user that all these enactments are valid law.

I. BACKGROUND

A. CODE WORDS: SOME DEFINITIONS

The term “code” applies to almost any organized collection of enacted or administratively established laws. However, there are some important distinctions covered by the general term “code.”¹⁰ Unlike classical and European civil codes,¹¹ most

⁹These are general law provisions inserted into appropriations bills by amendment.

¹⁰There is no universally accepted set of definitions for these terms. For a different set of definitions, see M. PRICE, H. BITNER & S. BYSIEWICZ, *EFFECTIVE LEGAL RESEARCH* 30 (4th ed. 1979) (paraphrasing an earlier English source).

¹¹“A civil code . . . is not a list of special rules for particular situations; it is, rather, a body of general principles carefully arranged and closely integrated A code purports to be comprehensive and to encompass the entire subject matter, not in the details but in the principles, and to provide answers for questions which may arise.” Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 424 (1967); see also Jean Louis Bergel, *Principal*

legal codes in the United States re-work statutes passed piecemeal by legislatures over a period of years. The repealed and obsolete provisions are omitted and amendments are inserted. A distinction can be made between collections that keep the language and structure of the original session laws and those codes that rewrite the session laws to improve clarity and impose an organizational structure.

“Cumulative statutes” or “compiled statutes” collect and order the session laws by date or subject in order to make research more convenient. The language of these statutes is not changed. They present the previously enacted session laws in a more compact format but do not change or reenact those statutes.

“Consolidated statutes” are arranged and edited to make them readable. Usually, they incorporate later amendments and note the effects of inconsistent laws.¹² Typically, such codes have provisions making them “prima facie evidence”¹³ of the law, which are susceptible to rebuttal by citation to the language of the session laws from which the code was derived.

On the other hand, “revised statutes” are the result of an editorial process that rewrites and reorganizes the session laws in a coherent arrangement, usually grouped by subject. Such codes typically replace the session laws and become the law itself.¹⁴

“Prima facie evidence” is rebuttable evidence.¹⁵ For a title of the U.S. Code that remains prima facie evidence of the law, the language of the session laws encoded in the title trumps that of the Code. “[T]he very meaning of ‘prima facie’ is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.”¹⁶

“Positive law titles” are titles of the U.S. Code that are enacted all at once as a single statute, rather than compiled

Features and Methods of Codification, 48 LA. L. REV. 1073, 1073-88 (1988) (for a brief history of European codification).

¹² Charles Zinn, *Revision of the United States Code*, 51 LAW LIBR. J. 388, 389 (1958).

¹³ See, e.g., 1 U.S.C § 204 (2006).

¹⁴ In the United States, the term “code” usually refers to a set of revised statutes. N. SINGER & S. SINGER, 2 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 36A:3 (6th ed. 2008).

¹⁵ “Prima facie” literally means “at first sight.” BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁶ *Stephan v. U.S.*, 319 U.S. 423, 426 (1943).

from multiple enactments. The term “positive law” was originally used to mean man-made laws, especially enactments, as opposed to a “natural law” that was inherent in the natural or divine order.¹⁷

The present U.S. Code is slowly changing from a set of consolidated statutes—with titles that are prima facie evidence of the law—into a revised code, as Congress reenacts titles one at a time into positive law. This deliberate process is an outgrowth of the historical development of the Code and Congress’s unhappy early experience with all-at-once codification.

B. THE DEVELOPMENT OF THE U.S. CODE

The first collection of federal statutes—a compilation—was authorized by Congress in 1795.¹⁸ It included all the public laws and treaties enacted up to that date, and an index. The annual session laws themselves were not published on a regular basis until the creation of the Statutes at Large in 1845; before that time, official federal statutes were published in newspapers.¹⁹ By the 1840’s, Americans were familiar with the pros and cons of codifying statutes.²⁰ Beginning in the early 1820’s, individual states had debated the benefits of codification.²¹ The New York Revised Code of 1829 served as a model for some states enacting their codes; this was particularly evident in the newly admitted states in the West.²²

The first legislative initiative for a revision of the federal statutes²³ was introduced in 1848 by the chairman of the House Judiciary Committee.²⁴ The Report²⁵ accompanying that

¹⁷ “[N]atural law called for search for an eternal body of principles to which the positive law must be made to conform.” ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 163 (1921).

¹⁸ Act of Mar. 3, 1795, ch. 50, 1 Stat. 443.

¹⁹ Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008 (1938).

²⁰ CHARLES COOK, *AMERICAN CODIFICATION MOVEMENT*, 158-59 (1981).

²¹ *Id.* at 69-120.

²² EDWIN C. SURRENCY, *A HISTORY OF AMERICAN LEGAL PUBLISHING* 90-91 (1990).

²³ H.R. 535, 30th Cong. (1st Sess. 1848).

²⁴ The chairman of the House Judiciary Committee was Rep. Joseph Ingersoll, a Whig from Pennsylvania. A fellow Whig, Rep. William Duer of New York, recorded his intention to introduce a similar bill in that same Congress. HOUSE JOURNAL at 97 (Dec. 13, 1848). But no record of the actual bill remains. William Duer had strong

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bill laid out the arguments for revising (rather than merely compiling) the session laws: that these laws may have been “enacted under the pressure of momentary emergency; if not inconsistent, they are obscure; sometimes involved in statutes dissimilar in title and object, and always scattered over different parts of a broad surface, in the numerous hiding places of which they are concealed.”²⁶ Ideally, however, “enactments defining the duties of a particular office should naturally be so united as to furnish all needful information in one comprehensive body. *That which seems to be complete in its enumeration should be so in reality.*”²⁷

1. *The Revised Statutes of 1873 and 1878*

Despite the evident need for an orderly and up-to-date arrangement of statutes, it was not until 1866 that Congress enacted legislation creating a commission charged with the “[r]evision and [c]onsolidation of the [s]tatute [l]aws of the United States.”²⁸ The commissioners soon discovered that creating an overall subject scheme and fitting in the individual session laws was a monumental task requiring extensive rewriting: “Where several statutes relating to the same subject modify each other, it has been impossible to state their united effect without writing a new statute.”²⁹ When the revision was presented to Congress in 1872, however, the work was deemed too extreme a departure from the language of the existing session laws, and the draft was passed on to a special reviser to reverse some of the changes made by the commission.³⁰ The

connections to the codification movement in the states. He shared a law practice with Robert Livingston, the author of the radical (and never adopted) Louisiana Code; his brother, John Duer, was one of the “revisers” of the New York 1829 Code. Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 480 (2009).

²⁵ H.R. REP. NO. 30-671 (1848).

²⁶ *Id.* at 1.

²⁷ *Id.* at 2 (emphasis added).

²⁸ Act of June 27, 1866, ch. 140, 14 Stat. 74.

²⁹ WILLIAM JOHNSTON & CHARLES P. JAMES, REPORT OF THE COMMISSIONERS APPOINTED UNDER ACT OF JUNE 27, 1866, S. Misc. Doc. 101, 40th Cong. (2d Sess. 1868).

³⁰ Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1013 (1938). The Commissioners’ proposed code was published in two volumes in 1872. A reprint edition was issued by the Government Printing Office in 1981 and is widely available. A thirteen-page report by the special reviser, Thomas J. Durant, was submitted to the House in 1873. The introduction to

final product of this process—commission drafting and reviser undrafting—was introduced in the House in 1873, enacted in 1874, and published in 1875.³¹

In enacting the Revised Statutes of 1873, Congress not only reorganized the previously passed session laws, but replaced them as legal authority. All *general* acts of Congress “embraced in any section” of the revision were repealed.³² Appropriations and local and temporary statutes were not covered by the repeal, but general law provisions within appropriations acts were covered by the repeal. A separate act declared the printed volumes of the Revised Statutes of 1873 to be “legal evidence of the laws therein contained, in all the courts of the United States, and of the several States and Territories.”³³

Congress soon had reason to regret such an affirmative break with the accumulated authority of the pre-1874 Statutes at Large.³⁴ Numerous complaints about mistakes and omissions in the 1873 Revised Statutes³⁵ led to the publication of an amended and updated version in 1878.³⁶ After the

the 1981 reprint of the Commissioners’ draft speculated that this report had been lost. However, the report was subsequently cited by Justice Brennan in a 1989 dissent. *See Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 81 (1989) (Brennan, J., dissenting). A copy of the special reviser’s report is listed in the rare-book collection of the Library of Congress.

³¹ Fully entitled as “Revised Statutes of the United States, Passed at the First Session of the Forty-Third Congress, 1873-’74; Embracing the Statutes of the United States, General and Permanent in Their Nature, In Force on the First Day of December, One Thousand Eight Hundred And Seventy-Three, As Revised and Consolidated By Commissioners Appointed Under an Act of Congress,” it is usually referred to as the Revised Statutes of 1873.

³² Sec. 559, 1 Rev. Stat. 1091 (1873). However, a few stray provisions from pre-1873 statutes managed to survive the mass repeal associated with the Revised Statutes. These legal coelacanths can be located by using the Statutes at Large table (Table III) in the U.S. Code, looking for acts that lack a Revised Code citation. *E.g.*, Act of July 2, 1862, ch. 130, §§ 1-8, 12 Stat. 503-05, now found at 7 U.S.C. §§ 301-308 (2006).

³³ Act of June 20, 1874, ch. 333, § 2, 18 Stat. 113.

³⁴ The initial volumes of the Statutes at Large had been made “competent evidence” of the law by statute in 1846. Act of Aug. 8, 1846, ch. 100, 9 Stat. 76. The Act of June 20, 1874 extended this authority to future volumes of the Statutes at Large.

³⁵ *See, e.g.*, INACCURACIES AND OMISSIONS IN REVISED STATUTES, H. Exec. Doc. 36, 44th Cong. (1st Sess. 1876). The original Revised Statutes was published in 1875 with a four-page appendix of correction. Several acts were subsequently passed to correct other errors. *See* Act of Feb. 18, 1875, ch. 84, 19 Stat. 37; Act of Apr. 27, 1876, ch. 84, 19 Stat. 37; Act of Feb. 27, 1877, ch. 69, 19 Stat. 240.

³⁶ Revised Statutes (1878).

problems with the 1873 Revision, Congress declined to make the 1878 edition conclusive evidence of the laws passed since 1873. This amended edition was still “legal evidence” of the laws covered in the 1873 Revision, but did not “preclude reference to, nor control, in case of discrepancy, the effect of any original act passed by Congress since the first day of December, eighteen hundred and seventy-three”³⁷

2. *The 1926 United States Code*

The difficulties with the Revised Statutes seem to have thoroughly dampened congressional enthusiasm for codification. It was not until almost fifty years later, in 1926, that Congress brought forth a new official federal code of laws.³⁸ During that extended period, the unofficial commercial versions of the federal laws that were produced used the basic structure of the Revised Statutes to integrate later enactments. Two of the commercial code publishers, West and Edward Thompson, were enlisted in the production of the 1926 edition.³⁹

This 1926 Code was even more emphatic on the subject of the Code’s authority vis-à-vis the session laws:

This Code is the official restatement in convenient form of the general and permanent laws of the United States. No new law is enacted and no law repealed. It is prima facie the law. It is presumed to be the law. The presumption is rebuttable by production of prior unrepealed Acts of Congress at variance with the Code.⁴⁰

³⁷ *Id.* at iii (preface). The original enabling legislation passed in 1877 had made the 1878 edition “legal and conclusive evidence” of all the statutes therein. Act of Mar. 2, 1877, ch. 82, 19 Stat. 268. The caveat about laws passed since the 1873 Revision was added by statute a year later. Act of Mar. 9, 1878, ch. 26, 20 Stat. 27.

³⁸ CODE OF LAWS OF THE UNITED STATES OF AMERICA OF A GENERAL AND PERMANENT NATURE IN FORCE DECEMBER 7, 1925. There were some attempts in Congress to update or replace the Revised Statutes in this period, and a few commercial codes were published to fill the gap. See EDWIN C. SURRENCY, A HISTORY OF AMERICAN LEGAL PUBLISHING, 107-10 (1990); Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1016-21 (1938). For a more detailed account of the enactment of the 1926 Code, see Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 LAW LIBR. J. 545, 550-52 (2009).

³⁹ EDWIN C. SURRENCY, A HISTORY OF AMERICAN LEGAL PUBLISHING at 107-08.

⁴⁰ Preface, U.S.C. (1926).

This left the question of authority—which incarnation of the statute will conclusively establish the text of the law—somewhat muddled. For statutes enacted before 1873, the Revised Statutes (2d ed. 1878) is the authoritative text, although that amended edition also contains statutes enacted between 1874 and 1878. For statutes enacted since 1873 (including those post-1873 statutes included in the 1878 Revised Statutes) the Statutes at Large is the authoritative text.⁴¹

The 1926 Code was replaced by a new edition in 1934, and thereafter new editions have been published at six-year intervals.⁴² All subsequent editions contain the “prima facie evidence of the laws general and permanent” language.⁴³

3. *The Positive Law Titles*

In 1947, Congress began a new effort to gradually convert the entire Code into positive law. Under the 1947 law,⁴⁴ a Code title enacted into positive law made statutes in the title into legal evidence of the law, not merely rebuttable prima facie evidence. The same legislation enacted the entirety of Title 1

⁴¹ The term “authoritative” is itself somewhat slippery. In the case of the published statutes, it identifies which version should receive judicial notice. There is also, however, a physical document signed by the leaders of both houses of Congress and sent to the President; this is ultimately kept in the National Archives and is the truly authentic version of the statute. M. DOUGLASS BELLIS, *FED. JUD. CTR., STATUTORY STRUCTURE AND LEGISLATIVE DRAFTING CONVENTIONS: A PRIMER FOR JUDGES* 2 (2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/draftcon.pdf/\\$file/draftcon.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/draftcon.pdf/$file/draftcon.pdf); Jacob Leibenluft, *Explainer: Does Congress E-mail the President?* SLATE, May 22, 2008, available at <http://www.slate.com/id/2191994/>. For the question of whether this signed document is actually on parchment, see *Nation's Rare Documents Unprotected Against Fire*, N. Y. TIMES, May 28, 1911, at magazine section SM9, available at <http://query.nytimes.com/gst/abstract.html?res=980CE4D71439E333A2575BC2A9639C946096D6CF>.

⁴² New Code editions “shall not be published oftener than once in each five years.” 1 U.S.C. § 202(c) (2006). Commercial codes, such as West’s U.S. Code Annotated and the U.S. Code Service now published by Lexis, are updated annually. Since these services replace volumes of the code irregularly, as dictated by the size of the supplements accompanying the volumes, the six-year official codes have served as useful benchmarks to establish the law as of a certain date. Today, this function may well have been usurped by annual archiving of the electronic versions of the Code.

⁴³ See 1 U.S.C. § 204 (2006); this section is entitled “Codes and Supplements as Evidence of the Laws of United States and District of Columbia; Citation of Codes and Supplements.”

⁴⁴ Act of July 30, 1947, ch. 388, 61 Stat. 633, 638.

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(General Provisions) of the U.S. Code into “positive law,” making it legal evidence of every word and punctuation mark in that title. Four other Title titles of the Code were similarly reenacted that year: Title 4 (Flag and Seal, Seat of Government, and the States), Title 6 (Official and Penal Bonds), Title 9 (Arbitration) and Title 17 (Copyrights) as part of a grand scheme to convert the entire Code to positive law, one title at a time.⁴⁵ Except for the Copyright title, this constituted low-hanging fruit in the re-codification effort, since these titles required little editing to prepare them for passage.⁴⁶ To date, twenty-four titles have been converted to positive law titles, and seven more are in the works.⁴⁷ The proposed titles include several numbered above fifty; Title 51 is entitled “National and Commercial Space Programs.”⁴⁸

Despite the scope of its ambition—a Code consisting entirely of positive law titles—this effort has been undertaken with the lessons of the past in mind, specifically the too-radical revisions made in drafting the original version of the 1873 Revised Statutes. The goal of the current revisers is limited to “reorganizing [existing provisions], conforming style and terminology, modernizing obsolete language, and correcting drafting errors.”⁴⁹

⁴⁵ William Chamberlain, *Enactment of Parts of the United States Code into Positive Law*, 36 GEO. L.J. 217 (1947).

⁴⁶ *Id.* at 218. This seems to have been a change of strategy. Initially the plan was to “take up first the more important titles and those urgently needing codification . . .” (including title 28 on the judiciary). 93 CONG. REC. 8384 (1947) (remarks of Rep. John Robison).

⁴⁷ The positive law titles are: Titles 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 40, 44, 46, and 49. The website of the Law Revision Counsel of the U.S. House of Representatives has a current list of enacted positive law titles, as well as those still in draft. Office of the Law Revision Counsel, <http://uscode.house.gov/lawrevisioncounsel.shtml> (last visited Jan. 3, 2010); see also RICHARD MCKINNEY, UNITED STATES CODE: LIST OF POSITIVE LAW TITLES WITH ENACTING CITES AND LOCATION TO REVISION NOTES (2006), <http://www.llsdc.org/attachments/wysiwyg/544/usc-pos-law-titles.pdf> (one of many useful guides to legal research on the website of the Law Librarians Society of the District of Columbia).

⁴⁸ The creation of U.S. Code titles beyond the iconic number 50 should ease the positive law process; Title 42 will finally be shorn of its many provisions (dealing, e.g., with the space program or the Department of Energy) that have nothing to do with Public Health and Welfare.

⁴⁹ U.S. HOUSE OF REPRESENTATIVES, OFFICE OF LAW REVISION COUNSEL, EXPLANATION OF H.R. 1983, TO ENACT CERTAIN LAWS RELATING TO SMALL BUSINESS AS TITLE 53, UNITED STATES CODE, “SMALL BUSINESS,” <http://uscode.house.gov/cod/t53/EXPLANATION.pdf> (last visited Dec. 23, 2009).

C. LAWS LEFT OUT OF THE CODE: RIDERS ON APPROPRIATIONS ACTS

The *prima facie* law titles and positive law titles of the U.S. Code both present difficulties for their editors and for legal researchers.⁵⁰ These difficulties stem from what has been included in the Code. A different problem arises from temporary laws because this legislation appears to be of general application but does not appear in the Code at all.

Beginning with the Revised Statutes of 1873, the federal codes have been prescriptively limited to “general and permanent” statutes.⁵¹ Various types of legislation passed by Congress do not meet these criteria and are not included in the Code. Private acts, such as those bestowing a preferred immigration status on an individual, are excluded. Likewise, acts that effect one-time transfers of government property, or those naming federal buildings, are non-general public acts and are not included. Temporary (non-permanent) acts that are in effect for a short, fixed period of time, such as an extension of time to file for benefits, are also left out.

1. *Riders: General Law in Appropriations Bills*

Appropriations acts, which provide funding to federal agencies and programs for (usually) one fiscal year, fall into the temporary category.⁵² Generally, they are not included in the Code. Yet few appropriations acts are limited solely to providing funding to the government:

An annual appropriation act generally consists of two parts—paragraphs providing funding, and general provisions

⁵⁰ See Part II of this article for an analysis of these difficulties. The multiple layers of statutes that can underlie the Code text in a *prima facie* title can create ambiguity and uncertainty about the language and structure of the statute, while amendments to a positive law title that are not precisely tailored to the existing language will end up in a footnote or appendix rather than in the main text.

⁵¹ This includes some portions of appropriations acts. The repealing clause of the 1873 Revised Statutes made clear that included in those acts repealed was general legislation in existing appropriations acts, but not the funding provisions, which might be for more than one year. Sec. 559, 1 REV. STAT. 1091 (1875).

⁵² For a concise overview of the appropriations process, including the different varieties of appropriations bills and the difference between authorizations and appropriations, see SANDY STREETER, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION, C.R.S. REP. 97-684 (Feb. 22, 2007).

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focusing on non-funding as well as funding issues. . . . Some general provisions establish restrictions and conditions which apply to a single account, multiple accounts, the entire bill, or a department or agency⁵³

This intermingling of government funding and general legislation in appropriations acts is a practice that Congress has tried to rein in with procedural rules since the early years of the Republic.⁵⁴ Both the House and Senate have internal rules that are designed to keep non-funding provisions out of appropriations bills.⁵⁵ House Rule XXI, regulating procedure in the chamber that initiates appropriations, is the more widely studied and cited:

A provision changing existing law may not be reported in a general appropriation bill, including a provision making the availability of funds contingent on the receipt or possession of information not required by existing law for the period of the appropriation⁵⁶

“Changing existing law” includes a change in the text of an existing law, the enactment of law where none exists, the repeal of existing law, or a waiver of a provision of existing law.⁵⁷ Strict enforcement of the rule ensures that the

⁵³ SANDY STREETER, APPROPRIATIONS BILLS: WHAT ARE “GENERAL PROVISIONS?” C.R.S. REP. 98-648, at 1 (Jan. 25, 2007), *available at* <http://www.rules.house.gov/archives/98-648.pdf>. General provisions that operate by posing restrictions on how appropriations are spent are sometimes called “limitations riders.”

⁵⁴ The first rule was adopted in 1814. L. MCCONACHIE, CONGRESSIONAL COMMITTEES 178 (1898). Adopting these rules became a regular practice starting with the 25th Congress in 1837. House Rule XXI, cl. 2 (annotations), H.R. DOC. 109-157 §1043 at 835 (2007).

⁵⁵ The respective rules are House Rule XXI, clauses 2 and 4, H.R. DOC. 109-157 (2007), and Senate Rule XVI, S. DOC. 110-1 (2007).

⁵⁶ House Rule XXI, cl. 2(b), H.R. DOC. 109-157, at 833 (2007). In practice, the rule is invoked by a member of the House raising a point of order during consideration of the appropriations. The Speaker then rules on the point of order, either stripping the contested provision or allowing it to remain in the bill, based on his or her understanding of the Rule.

⁵⁷ W. BROWN & C. JOHNSON, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 99 (2003). This is a summary work on the rules and precedents of the House of Representatives by the House Parliamentarian; the precedents are drawn from compilations of procedural decisions made by the Speaker of the House: Hinds’ Precedents (1907), Cannon’s Precedents (1936) and Deschler’s Precedents (1977).

Appropriations Committee considers only funding measures and leaves changes in substantive laws to other committees. At least originally, the concern seemed to be with the efficiency of the appropriations process.

The chief reason behind this procedural division is to ensure that the regular funding of the federal government is not impeded by controversies associated with authorizing and other legislation that establishes and organizes agencies . . . and sets forth policy guidelines and restrictions.⁵⁸

Many other reasons to disfavor “appropriations riders”⁵⁹ have been identified. They diminish the opportunity to consider legislation carefully and remove it from the jurisdiction of the congressional committee charged with oversight of that area of legislation.⁶⁰ They can undermine public confidence in the legislative process because they “are most often added in Committee or in conference . . . on the application of one member or a small group, and may not embody any considered policy preference reflecting a true consensus of Congress.”⁶¹ Riders are often used to reverse the effect of established legislation on an ad-hoc basis.⁶²

But the temptation to use riders is strong, precisely because they circumvent the full legislative process:

Congress often resorts to limitation riders in response to

⁵⁸ ROBERT KEITH, EXAMPLES OF LEGISLATIVE PROVISIONS IN ANNUAL APPROPRIATIONS ACTS 1, C.R.S. REP. RL30619 (Sept. 4, 2008).

⁵⁹ The term “appropriations rider” can mean any nonfunding measure in an appropriations bill. Some would exclude those provisions that operate to affect policy or operations by denying the use of appropriated funds for some particular purposes; the more specific term “limitations rider” is used for those instead. See ROBERT KEITH, EXAMPLES OF LEGISLATIVE PROVISIONS IN ANNUAL APPROPRIATIONS ACTS 1, C.R.S. REP. RL30619 (Sept. 4, 2008).

⁶⁰ The riders, along with the rest of the appropriations bill, are considered by the Appropriations Committee instead. See Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 458, 464-65 (1987).

⁶¹ American Bar Association, *Report of the Section of Antitrust Law Concerning the Abuse of the Appropriations Process* (1999), available at www.abanet.org/antitrust/at-comments/1999/reports/4D4A22AE.pdf.

⁶² This ad-hoc reversal happens especially with environmental laws. See Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997). Appropriations acts for the District of Columbia have also been heavily burdened with ad-hoc micromanaging riders. Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, Appendix 355-71 (1990).

pending or recent agency action or to large-scale public protest of court rulings. Therefore, limitation riders are often introduced on emotional issues where the stakes are high. At other times, members of Congress introduce limitations riders out of sheer frustration with the committee system.⁶³

There are several ways for House members to add riders, despite Rule XXI. The Rule is not self-enforcing, so the inclusion of a rider must be challenged during consideration by the House.⁶⁴ The operation of Rule XXI can be suspended by the “special rule” attached to the bill by the Rules Committee.⁶⁵ If appropriations are enacted by a continuing resolution (used to keep government running when the normal appropriations process is stalemated), Rule XXI does not apply because it specifically governs the procedure for appropriations bills.⁶⁶ A study in 1995, when agencies’ appropriations were passed in several separate bills, found 624 legislative provisions in appropriations bills.⁶⁷

2. *Riders Usually Left Out of the Code*

Once incorporated into the appropriations bill and enacted, the appropriations rider still faces an uncertain future vis-à-vis the Code. It is presumed to be temporary legislation—in effect only for the fiscal year covered by the appropriations—unless it has some special attribute that makes it permanent law, such as “words of futurity” in the text of the rider (“hereafter” or “henceforth”) that can indicate that the measure was meant to be permanent law, despite being enacted as part of an appropriations act.⁶⁸ The presumption against permanence was strengthened by the Supreme Court’s development of an

⁶³ Devins, *supra* note 60, at 464.

⁶⁴ ROBERT KEITH, EXAMPLES OF LEGISLATIVE PROVISIONS IN ANNUAL APPROPRIATIONS ACTS 1, C.R.S. REP. RL30619, at 3 (Sept. 4, 2008).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Max Reynolds, Note, *The Impact of Congressional Rules on Appropriations Bills*, 12 J.L. & POL’Y 481, 510-11 (1996).

⁶⁸ For a detailed and annotated list of the indicia of permanence, see U.S.G.A.O., 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-33 to 2-39 (3d ed. 2004). For the subsequent development of the appropriations canon, see Matthew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669 (2005).

“appropriations canon” in *Tennessee Valley Authority v. Hill*,⁶⁹ which held that an appropriations rider contradicting the policy in the Endangered Species Act did not constitute an implicit repeal of that Act, and generally disfavored a change in substantive legislation through the appropriations process. Omnibus appropriations acts usually have legislative provisions inserted into the appropriations for each agency (or group of agencies), as well as a number of provisions in a “general legislation” title of the act.⁷⁰

D. KEEPERS OF THE CODE

1. *Office of Law Revision Counsel*

The inclusion or exclusion of a rider in the Code, like other decisions about the content of the Code, is an editorial choice made by the House of Representatives’s Office of Law Revision Counsel. Charles Zinn, Law Revision Counsel in the 1950’s, described the process as “a matter of opinion and judgment” driven by “where we think the average user will look,” and Peter LeFevre, the current Counsel, agrees.⁷¹ The responsibility for creating and maintaining the Code has always been lodged in various locations within the House of Representatives. Congressional oversight of the publication of statutes was initially vested in the House Committee on Revisal and Unfinished Business (extant from 1795 to 1868—before the publication of a federal code).⁷² A Select Committee on the Revision of Laws was made a permanent standing committee in 1868, replacing the Unfinished Business

⁶⁹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

⁷⁰ The Omnibus Appropriations Act for 2009, Pub. L. No. 111-8, 123 Stat. 524, has “general provisions” in nine of its ten divisions. There are fifty-two sections of such legislative measures just in the division funding financial services and general government operations (Division D, Title VII); there are thirteen general provisions that apply to all the appropriations in the omnibus act (Division I, Title IV).

⁷¹ Craig Eastland, *The Office of the Law Revision Counsel: They’ve Got Their Work Cut Out for Them*, 30 L.L.A.G.N.Y. LAW LINES 3 (Winter 2007), available at http://www.aallnet.org/chapter/llagny/Law_Lines/LL_winter2007.pdf.

⁷² GUIDE TO THE RECORDS OF THE U.S. HOUSE OF REPRESENTATIVES AT THE NATIONAL ARCHIVES, 1789-1989 (RECORD GROUP 233), CHAPTER 14, RECORDS OF THE JUDICIARY COMMITTEE AND RELATED COMMITTEES, <http://www.archives.gov/legislative/guide/house/chapter-14-unfinished-business.html> (last visited Jan. 3, 2010).

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Committee.⁷³ The Revision of Laws Committee was in turn absorbed into the Judiciary Committee in 1946 as a subcommittee.⁷⁴ By a legislative reorganization act in 1974,⁷⁵ a special officer of the Judiciary Committee, called the Law Revision Counsel, was made head of a separate House office, reporting to the Speaker.⁷⁶ This office, without formal affiliation with a standing committee, is the current keeper of the U.S. Code.

The [Office of Law Revision Counsel's] responsibilities are divided between maintaining the Code and advancing the project of enacting the code into positive law. When Congress enacts a new law, lawmakers do not normally trouble themselves about where the law will fit in the Code. In its role as custodian of the Code, the OLRC decides where laws go. Organizing and maintaining the Code . . . occupies most of the OLRC staff.⁷⁷

The Office of Law Revision Counsel also maintains one of the two government websites that make the U.S. Code available to the public.⁷⁸ This version of the Code, although not as current as commercial versions, is more up-to-date and more usable than the official print Code; it incorporates the material from the annual supplements into the main text well before the print volumes are shipped.⁷⁹ There are plans to upgrade the website by converting the programming language of the Code data to web-friendly XML;⁸⁰ this should allow a more flexible

⁷³ *Id.* at § 14.36, <http://www.archives.gov/legislative/guide/house/chapter-14-revision-of-laws.html> (last visited Jan. 3, 2010).

⁷⁴ Eastland, *supra* note 71, at 3.

⁷⁵ Pub. L. No. 93-554, Title I, ch. III, §101, 88 Stat. 1777 (1974) (codified as amended at 2 U.S.C. §§ 285-285g (2006)).

⁷⁶ Eastland, *supra* note 71, at 3.

⁷⁷ *Id.* at 4.

⁷⁸ Office of Law Revision's online U.S. Code, <http://uscode.house.gov> (last visited Jan. 3, 2010); the other website is provided by the Government Printing Office: Government Printing Office's online U.S. Code, <http://www.gpoaccess.gov/uscode/index.html> (last visited Jan. 3, 2010).

⁷⁹ Compare the Code updating information on the website of the Law Revision Counsel, <http://uscode.house.gov/about/infor.shtml> (last visited Jan. 30, 2010), with the print volumes available from the Government Printing Office, <http://bookstore.gpo.gov/subjects/sb-197.jsp> (last visited Jan. 30, 2010).

⁸⁰ *Legislative Branch Appropriations for 2009, Pt. 2, Hearings Before the H. Committee on Appropriations*, 110th Congress 473 (2008) (Statement of Peter G. LeFevre, Law Revision Counsel). XML or Extensible Markup Language is a set of

format and better coordination with others involved in preparing and publishing federal statutes.

2. *The Government Printing Office*

While the Law Revision Counsel prepares the text of statutes for publication, the actual printing has been the province of the Government Printing Office (GPO), an agency with a more general—and more public—mandate.⁸¹ The GPO has long worked with libraries to make official publications from all branches of government available to the public. While the GPO's electronic version of the U.S. Code is virtually identical to the one provided by the Law Revision Counsel's website, the GPO's public mission and experience with XML formatting and Web 2.0 technology would make it an ideal leader in the development of a post-print, user-friendly Code.⁸²

3. *The Office of Legislative Counsel*

Both the House and Senate have Offices of Legislative Counsel that report to the Speaker of the House and President Pro Tempore of the Senate, respectively.⁸³ Their staffs draft the bills that become statutes, a function related to the creation of the Code. However, they do not work directly with the Office of Law Revision Counsel.

The activities—if not the budgets and staffs—of the Law Revision and Legislative Counsel are intertwined. As codifiers,

standards to structure, store and transport data. Current specifications for XML and a list of online tutorials on XML can be found at <http://www.w3.org/XML/>. Ubiquitous Web Doman, <http://www.w3.org/XML/> (last visited 1-3-2010). For an overview of the adoption of XML by federal agencies, see the 2002 GAO report, ELECTRONIC GOVERNMENT: CHALLENGES TO EFFECTIVE ADOPTION OF THE EXTENSIBLE MARKUP LANGUAGE (April 2003) (GAO-02-327), available at <http://www.gao.gov/new.items/d02327.pdf>.

⁸¹ The GPO website states that “[t]he core mission of *Keeping America Informed*, dated to 1813 when Congress determined to make information regarding the work of the three branches of Government available to all Americans. The U.S. Government Printing Office (GPO) provides publishing & dissemination services for the official & authentic government publications to Congress, Federal agencies, Federal depository libraries, & the American public.” Government Printing Office, <http://www.gpo.gov/about/> (last visited Sept. 8, 2009).

⁸² Robert C. Tapella, *GPO's Federal Digital System (FDsys): Open and Transparent Government*, 4-5 (July 27, 2009), available at http://www.gpo.gov/pdfs/news-media/PrepRe_072709.pdf.

⁸³ 2 U.S.C. §§ 271-277, 281-282e (2006).

the Law Revision Counsel must work with the enacted bills. As the bill drafters, the Offices of Legislative Counsel must try to fit the new legislation into the existing framework of the Code, an exacting task when it comes to positive law titles. Each Office of Legislative Counsel is also obligated to produce an assessment of the effect of a bill on existing law. In the House, this document is called a “Ramseyer.”⁸⁴ This task relies on the work of the codifiers but also may require a specially prepared cut-and-paste version of a session-law-as-amended because amendments to statutes codified in the *prima facie* titles amend the previous session laws, not the Code. As a former House Legislative Counsel put it:

Anyone in government or outside of government is free to cut and paste [a] new public law (often many of them) into the original and provide their best guess as to what the official law, if it existed, would look like. [The Office of Legislative Counsel], various universities, and private businesses all do this. However, none of these documents are official, and their degree of accuracy is unknown.⁸⁵

To facilitate the preparation of legislative-impact assessments, the House Office of Legislative Counsel is developing an interesting program that maintains an electronic version of the cut-and-paste laws. The program can generate color-coded legislative Ramseyers showing where the new language will appear in the Code.⁸⁶ Like the Law Revision

⁸⁴ Ramseyers are named after Rep. C. William Ramseyer and are required by House Rule XIII, cl. 3(e), which requires that a committee report on legislation that changes existing law include a before-and-after depiction of the affected statute. W. BROWN AND C. JOHNSON, *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE* 99 (2003). A similar document is produced by the Senate Legislative Counsel; it is called a “Cordon.” THOMAS CARR, *SENATE COMMITTEE REPORTS: REQUIRED CONTENTS*, C.R.S. REP. 98-305 (Rev. 2003), available at http://lugar.senate.gov/services/pdf_crs/Senate_Committee_Reports.pdf.

⁸⁵ *Hearing on IT Assessment: A Ten-Year Vision for Technology in the House, Hearing Before the H. Committee on House Administration*, 109th Cong. 63 (2006) (Statement of Pope Barrow, House Legislative Counsel). One example of a commercially prepared statute-as-amended—with the original session law numbering and language—would be BENDER’S IMMIGRATION AND NATIONALITY ACT SERVICE; immigration-related statutes that were not passed as part of, or amendments to the Immigration and Nationality Act are provided in an appendix.

⁸⁶ *Legislative Branch Appropriations for 2009, Pt. 2, Hearings Before the H. Committee on Appropriations*, 110th Congress 483-84 (2008) (Statement of Pope Barrow, House Legislative Counsel).

Counsel and the GPO, the Legislative Counsel's Office is converting documents to XML⁸⁷ that can provide a platform for joint efforts to improve the codification process. It is only through such an effort that the problems with the Code can be addressed.

II. THE PROBLEMS WITH THE U.S. CODE

The very first attempt to codify the federal statutes in 1873 raised questions that continue to elude satisfactory answers: What version of a statute should be authoritative—session law or code section? Once enacted, how is a “positive law” code kept current? What should be included in the code— all enacted law, or only “general and permanent” laws—and how are these differentiated, especially if they are intertwined in a single enactment? Resolving these issues of authority and comprehensiveness will help to produce the statutory code the nation has come to expect.

A. CODIFICATION BY TRIAL AND ERROR

1. *The Revised Codes*

The initial problem that codification was intended to solve was the difficulty of reading statutes in session laws that have been enacted, amended, and possibly repealed in separate congressional sessions. But solving that basic problem has proved difficult, with each solution uncovering new obstacles to achieving an authoritative and usable Code. Publication of the Revised Statutes of 1873 was a bold attempt to deal simultaneously with the issues of comprehensiveness and authority.⁸⁸ However, in rewriting and replacing existing statutes with a comprehensive code, Congress discovered the pitfalls in such a monumental task. The wholesale enactment of a federal code proved too ambitious an undertaking.

There were mistakes that had to be corrected, but there was also the problem of updating. Once the Revised Statutes were enacted in 1873—basically as one big session law—new

⁸⁷ *Id.* at 482; see also *Drafting Legislation Using XML at the U.S. House of Representatives*, available at <http://xml.house.gov/drafting.htm> (last visited Dec. 23, 2009).

⁸⁸ See Part I.B. of this article for more information on the Revised Statutes.

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unincorporated session laws began to accumulate. The proposed solution to this new problem was to enact a new replacement edition, repealing the old. But the attempt to replace the first edition with an authoritative updated version foundered on lingering legislative distrust of the revision process. The resulting 1878 edition was a code of mixed authority (the pre-1873 provisions remained irrefutable evidence of the law; the post-1873 sections, however, were rebuttable by the language of the session laws from which they were derived). Thereafter, Congress abandoned the attempt to systematically revise the Revised Statutes.⁸⁹ Over the next several decades, a third layer of enacted law began to accumulate, which was all the statutes passed after 1877.

This process of enactment, reenactment, and eventual neglect left the goals of comprehensiveness and authority effectively unresolved. Increasingly, the statutory law was contained in unconsolidated session laws, published without regard to the organization of the Revised Statutes. It was time for a new approach.

2. *The Prima Facie Code*

Conceptually, the impasse created by Congress's reluctance to replace the Revised Statutes with a new authoritative code was resolved by separating the objective of creating a *comprehensive* text from that of creating an *authoritative* text. The United States Code enacted in 1926⁹⁰ incorporated the unrepealed portions of the Revised Statutes,⁹¹ as well as all the session laws passed subsequent to 1873 (volumes 18 to 43 of the Statutes at Large). Once again, the federal statutes were available in an official unified text, organized by subject and supplied with an index.

However, as in 1873, producing such a monumental work all at once created many errors in the text of the new Code.⁹²

⁸⁹ Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1016-20 (1938).

⁹⁰ Code of the Laws of the United States, ch. 712, 44 Stat. xiii (1926).

⁹¹ Obsolete provisions of the Revised Statutes were omitted from the 1926 Code but were not expressly repealed until later, e.g., by the general repeal act of 1933, ch. 202, 47 Stat 1428.

⁹² The Code finally enacted in 1926 had undergone many revisions due to congressional displeasure with the number of errors. See Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1019-21

This was solved by downgrading the authority of the Code from “evidence of the law” to “prima facie evidence of the law.” Any inadvertent changes to existing law would not be locked in as enacted law, allowing the courts to determine the authoritative text in the event of a challenge to the language in the Code. Once the six-year cycle of new editions and annual supplements was instituted, session laws were incorporated into the existing structure on a regular basis.⁹³ The nation had a usable, official code of laws that would, at least for most purposes, “make unnecessary reference to other sources than the Code and the latest supplement to ascertain the general and permanent laws of the United States.”⁹⁴

However, the goal of an *authoritative* text was unmet by the creation of the prima facie Code. The Code was a useful research tool but was not the law itself. The text in the Revised Statutes and Statutes at Large remained authoritative, but authenticating the language in the Code in case of doubt still required assembling original and subsequent enactments from the various volumes of the session laws.⁹⁵ The need for recourse to the text of the session laws was perhaps increased by the editors’ practice of altering the language of the session laws to fit the format of the Code.⁹⁶ An alternate method of incorporating amendments into a section of the

(1938).

⁹³ Problems with that structure were to develop, however. The somewhat arbitrary choice of fifty titles proved resistant to change and constrained the subject arrangement of the Code as the scope of government grew. Title 42, for instance, had only six chapters in the 1926 edition, all dealing with the “Public Health.” By the 2006 edition, Title 42, now “Public Health and Welfare,” had become an orphanage for programs that did not fit into existing categories. For example, “Space Programs” and “Nuclear Energy” expanded it to 151 chapters.

⁹⁴ Preface, Supplement I, U. S.C. v (1928).

⁹⁵ Even the House Legislative Counsel can find this to be a daunting task. “We cannot show the effect of a bill on existing law in an accurate and official way unless we have an accurate, current, and official version of existing law. We do not have this for most Federal law. Nor does anyone else.” *Hearing on IT Assessment: A Ten-Year Vision for Technology in the House, Hearing Before the H. Committee on House Administration*, 109th Cong. 62 (2006) (Statement of Pope Barrow, House Legislative Counsel).

⁹⁶ This is the practice now used in the West edition of the Code (United States Code Annotated) and may reflect the influence of the West Company in drafting the original 1926 Code. The United States Code Service, originally published by Bobbs-Merrill, then by Lawyers’ Cooperative and now by Lexis, has always taken a more deferential approach to the session law language. EDWIN C. SURRENCY, *A HISTORY OF AMERICAN LEGAL PUBLISHING 109-10* (1990).

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Code—retaining the exact language of the session laws—might have been a better choice for the official version of the Code. This method is used by the unofficial United States Code Service:

U.S.C.S., unlike U.S.C.A. [and the U.S. Code] follows the text of the public laws as they appear in the United States Statutes at Large. Therefore . . . the user of the U.S.C.S. will have the language that is needed. If the editors of the U.S.C.S. believe that clarification of the language of the public laws included in the set is necessary, this clarifying language is indicated by the use of brackets (inserting words or references) or explanatory notes.⁹⁷

Indicating the exact language of the original enactments codified in *prima facie* titles alerts the reader that a more authoritative source exists and provides guidance on the extent of the variation at the same time. Not all changes would need to be checked in the Statutes at Large.

3. *The Positive Law Titles in the Code*

The solution to the question of authority actually chosen by Congress—enacting titles of the Code into positive law one by one—should theoretically solve the authority problem by making the entire Code authoritative. However, this is a slow process. It began in 1946 and is still short of the half-way point.⁹⁸ The Code titles that have been enacted as positive law are marked with an asterisk in a table of titles at the front of each volume of the official U.S. Code and of the U.S. Code Service. In the U.S. Code Annotated they are listed in a note to 1 U.S.C.A. § 204.⁹⁹

⁹⁷ Roy Mersky, Steven Barkan & Donald Dunn, FUNDAMENTALS OF LEGAL RESEARCH 154-5 (2002). Unfortunately, this advantage of the U.S.C.S. has never been widely appreciated by legal researchers.

⁹⁸ Although twenty-four titles have been enacted into positive law to date, there will eventually be more than fifty Code titles (*see* Law Revision Counsel, <http://uscode.house.gov/codification/legislation.shtml> (last visited Jan. 3, 2010) for the currently proposed titles beyond number 50). The abandonment of the fifty-title arrangement of the Code may speed the process of positive law enactment, as it gives more flexibility to the revisers.

⁹⁹ For more detailed information about which titles are positive law titles, with notes on enactment and the content of title appendices, see RICHARD MCKINNEY, UNITED STATES CODE: LIST OF POSITIVE LAW TITLES WITH ENACTING CITES AND

In theory, once a title has been enacted into positive law with every parenthesis and period (as well as every word) being authoritative, that title will only be amended “directly” by Congress. That is, any change will incorporate the existing numbering, punctuation and syntax into the amending language.¹⁰⁰ Entirely new provisions added to a positive law title would also be by direct amendment, using the form “a new section X (or sections X-XX) is added” In this way, the language of the Code section is identical to that in the Statutes at Large and remains legal evidence of the law, at least in theory.

The problem is that performing amendatory surgery on existing Code language is an exacting task that requires advance planning and careful execution to be successful. It is not an endeavor suited to the rush and confusion of a legislative session. Acts can be passed that amend a positive law title—intentionally or otherwise—but without the careful drafting that permits direct amendment. The Privacy Act of 1974¹⁰¹ managed to combine both a direct amendment to the U.S. Code (adding a new section 552a to Title 5) and additional provisions on the same topic that lacked the proper Code format,¹⁰² leaving their location in the Code up to the editors in the Office of Law Revision Counsel.

Changes, such as inserting a new provision in a title, cannot be made *editorially* (by the codifiers) to the text of a positive law title because only Congress can amend an enacted

LOCATION TO REVISION NOTES (2006), *available at* <http://www.llsdc.org/attachments/wysiwyg/544/usc-pos-law-titles.pdf>.

¹⁰⁰ This form of amending language reads as follows: “Section 1467 of Title 18, United States Code, is amended—(1) in subsection (a)(3), by inserting a period after “of such offense” and striking all that follows” Pub. L. No. 109-248, § 505, 120 Stat. 587, 629 (2006). For a comparison of the difference between “direct amendment” and amendment of a law in one of the *prima facie* titles, see Michael J. Lynch, *The U.S. Code, the Statutes at Large, and Some Peculiarities of Codification*, 16 LEGAL REFERENCE SERVICES Q. 69, 72-75 (1997).

¹⁰¹ Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a (2006)).

¹⁰² This resulted from a late session mash-up of a House bill (H.R. 16373 (1974)), which had been drafted as a direct amendment to Title 5, and a Senate bill (S. 3418 (1974)), which followed the traditional session-law format: Title I, sections 101, 102, etc.). See S. COMM. ON GOVT. RELATIONS AND H. COMM. ON GOVT. OPERATIONS, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1972 (Jt. Comm. Print 1976). Original text of S. 3418 is at 3. *Id.* Original text of H.R. 16373 is at 880. *Id.* An account of the procedural steps that led to the combined bill is at pp. 985-86. *Id.* This odd result has raised questions before; see note 105 below.

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law. That is what makes a title positive law: the entire title has been enacted. The solution employed by the Office of Law Revision Counsel has been to insert such amendments and additions into notes following the text of a section or in an appendix to the title.¹⁰³ Such changes to a positive law title have been enacted but not codified in the main text of the U.S. Code. It is valid law that lives in the session laws; its existence is only noted in the Code.¹⁰⁴ (This situation is analogous to that created by the 1878 Revised Statutes. There the sections from the 1873 Revised Statutes were authoritative, but additions from post-1873 enactments were not.)

While notes are used throughout the Code to direct the reader to uncodified statutes, “[p]ositive law titles tend to contain more notes and appendixes, because in order to amend a positive law title section, the title and section of the code must be set out specifically.”¹⁰⁵ With a comparable amendment to a *prima facie* title of the Code, the change *can* be made editorially to the text of the Code by the Office of Law Revision Counsel since the language, syntax and punctuation of the section were themselves created by the Code editors based on

¹⁰³ Michael J. Lynch, *The U.S. Code, the Statutes at Large, and Some Peculiarities of Codification*, 16 LEGAL REFERENCE SERVICES Q. 69, 77-81 (1997). See also the appendix to Title 5 of the United States Code (a positive law title), which includes the Inspector General Act and Ethics in Government Act, neither of which was enacted in correct direct-amendment format.

¹⁰⁴ Notes that indicate related enactments share space at the end of the official Code text with many other kinds of notes, including historical and reviser notes, cross-references to other Code sections, and notes for related executive orders. Commercial versions of the Code add notes that refer to other publications and to case law. RICHARD MCKINNEY, UNITED STATES CODE: HISTORICAL OUTLINE AND EXPLANATORY NOTES (Nov. 9, 2004; rev. Jan. 2010), available at <http://www.llsdc.org/attachments/wysiwyg/544/us-code-outline.pdf>.

¹⁰⁵ *Q & A: Answer*, 78 LAW LIBR. J. 591, 592 (1986) (drafted with the help of John Miller of the Office of Law Revision Counsel). The validity of laws inserted as notes in the Code was—and is—a source of some confusion for law librarians, who are not the least sophisticated legal researchers. A similar Question—with a less thorough Answer—had been published in the previous volume of the same journal. Nicholas Triffin, *Questions & Answers*, 77 LAW LIBR. J. 182, 183-84 (1984). The subject of both Q & A columns was the codification of the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a). One section of Pub. L. No. 93-579 was drafted as a new section 552a—a direct amendment of Title 5 (which was enacted into positive law in 1966). Other sections of Pub. L. No. 93-579 were not in direct-amendment format and were added as notes to section 552a. At least one of these “noted” sections, the right to withhold one’s Social Security number, seems to belong in the main text of the Code. Yet, despite many later amendments of 5 USC 552a, this section remains relegated to the notes.

the session law (and not definitively established by positive law enactment). Notes to sections in *prima facie* titles are more often used for uncodified parts of session laws that are “temporary or limited in scope.”¹⁰⁶

In addition to impeding the unity of Code language, the relegation of an increasing number of enactments to the notes in the U.S. Code subverts the goal of making the law findable and usable. Who, other than scholars, pays attention to footnotes? For those who find their way—via an index entry or search engine—to a law in a note, what are they to make of the separation of the main Code text and the notes that follow it? The Code as a unified and comprehensive text, which had been achieved to a reasonable degree with the *prima facie* Code, is slipping away as enactments that should be integrated have become divided into text and notes. The goal of an authoritative text is undermined as well, since the positive law text in the Code must be read together with the later undisciplined enactments reflected in the notes.

4. *Laws Left Out of the Code*

A law passed by Congress and signed by the President (or allowed to become law without his or her signature) is a valid law, whether or not it is added to the U.S. Code. Of those laws not encoded, private laws are, by definition, not of public interest. Some public laws, like those that name post offices and other public buildings, are so limited in their impact that they cannot be considered “of general application,” although this determination is to some extent a judgment call. More problematic are the enacted laws that are not permanent. A law that commands or prohibits some action can be of general interest even if it is effective for only a year.

The problem of uncodified temporary laws is most acute with those laws that are made temporary by a presumption: the appropriations riders. Except in those cases where there are clear indicia of permanence, or alternatively, where there is clear limiting language,¹⁰⁷ the temporary or permanent nature

¹⁰⁶ Examples would be a provision for the statute’s effective date, or one requiring an annual report to Congress. *Q & A: Answer*, 78 LAW LIBR. J. 591, 592 (1986).

¹⁰⁷ Some riders begin with the words “for the fiscal year” *See, e.g.*, Pub. L. No. 111-8, Div. D, § 733(a) (2009).

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of a rider is once again a matter of judgment.¹⁰⁸ There are, of course, constraints to the exercise of that judgment: “The Office of the Law Revision Counsel selects the statutes that meet the statutory requirements for inclusion in the Code.”¹⁰⁹ Those statutory requirements, however, are fairly broad. The statute that makes the Code *prima facie* evidence of the law also states that the statutes in the Code are “general and permanent in their nature.”¹¹⁰

The criteria for permanence can be in dispute. Charles Zinn, Law Revision Counsel to the House Judiciary Committee in the 1950’s, stated that “if [an] appropriation bill repeats a particular provision in identical language year after year it is inserted in the Code on the grounds that Congress intends the provision to be permanent.”¹¹¹ But a U.S. Attorney General’s opinion issued at about the same time suggested that successive enactments raised the presumption that the measure was *not* permanent.¹¹²

Successively enacted, but uncodified, appropriations riders highlight the issue of public notice of “temporary” congressional enactments. The omission of a law from the public’s official source of information on federal statutes might be excused on the ground that the law is in effect for only a few months. But what if the law has been serially reenacted and in effect for almost a decade? Consider a measure sponsored by Congresswoman Maloney¹¹³ that promotes breastfeeding by prohibiting the expenditure of federal funds to prevent a

¹⁰⁸ “Inclusion of legislation in the Code is purely an editorial matter under the supervision of the House of Representatives.” M. PRICE, H. BITNER & S. BYSIEWICZ, *EFFECTIVE LEGAL RESEARCH* 33 (4th ed. 1979).

¹⁰⁹ *Q & A: Answer*, 78 *LAW LIBR. J.* 591, 592 (1986).

¹¹⁰ 1 U.S.C. § 204(a) (2006). The enabling statute for the Office of Law Revision Counsel merely prescribes a duty to “classify newly enacted provisions of law to their proper positions in the Code,” except for positive law titles. 2 U.S.C. § 285b(4) (2006).

¹¹¹ Charles J. Zinn, *Codification of the Law*, 45 *LAW LIBR. J.* 2, 3 (1952).

¹¹² Herbert Brownell, Jr., *Permanent Legislation in an Appropriation Act — “Gwinn Amendment” Involving Public Housing*, 41 *Op. Att’y Gen.* 274 (1956); see also U.S.G.A.O., 1 *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* 2-37 (3D ED. 2004) (“The repeated inclusion of a provision in annual appropriations acts indicates that it is not considered or intended by Congress to be permanent.”) This would also be the view under the appropriations canon.

¹¹³ Rep. Carolyn B. Maloney of New York. This legislation, as reported in JAN BISSETT & MARGI HEINEN, *REFERENCE FROM COAST TO COAST: OUR UNCODIFIED PUZZLERS* (Oct. 20, 2006), <http://www.llrx.com/columns/reference47.htm>, was the starting point for this article.

mother from breastfeeding on federal property (a classic exclusion rider). Failing in an effort to enact a stand-alone bill on the subject,¹¹⁴ Rep. Maloney had the measure inserted in the Treasury and General Government Appropriations Act for 2000.¹¹⁵ Since that time the amendment has been enacted every year as part of an appropriations act, except for 2007 when political disputes produced a continuing appropriations act without any general law provisions.¹¹⁶ The lapse in 2007 shows one disadvantage of serial enactments: the law must be continuously re-introduced and steered through the appropriations process, which can be unpredictable. A greater problem is a lack of public knowledge of the existence of this provision. Despite its nine years in the Statutes at Large, the only place a member of the general public is likely to learn about this law is on Rep. Maloney's issue page about breastfeeding on her website.¹¹⁷

A more controversial serially enacted rider is the Hyde Amendment prohibiting the expenditure of federal funds on abortions.¹¹⁸ This provision, initially inserted into a continuing appropriations resolution in 1977,¹¹⁹ has been reintroduced and reenacted ever since, most recently as part of the Omnibus Appropriations Act of 2009.¹²⁰

The persistence of the Maloney measure as a temporary provision in the appropriations bills may be due to congressional indifference, or to the Congresswoman's pursuit of a broader permanent law.¹²¹ But the long life of the Hyde Amendment as an appropriations rider is the result of a

¹¹⁴ Right to Breastfeed Act, H.R. 1848, 106th Cong. (1999).

¹¹⁵ Pub. L. No. 106-58, 113 Stat. 430 (1999).

¹¹⁶ Pub. L. No. 110-5, 121 Stat. 8 (2007).

¹¹⁷ Rep. Carolyn B. Maloney's web page, http://maloney.house.gov/index.php?option=com_issues&task=view_issue&issue=262&parent=21&Itemid=35 (last visited Jan. 30, 2010).

¹¹⁸ Named for Rep. Henry Hyde of Illinois.

¹¹⁹ Pub. L. No. 95-205, 91 Stat. 1460 (1977).

¹²⁰ Pub. L. No. 111-8, § 203, 123 Stat. 524, 584 (2009). The Hyde amendment is usually attached to appropriations for multiple departments. In the 2009 Omnibus Appropriations Act it is found in the Divisions covering the Departments of Justice, Health and Human Services, independent agencies, the District of Columbia, and government generally. Pub. L. No. 111-8, 123 Stat. 524 (2009).

¹²¹ Rep. Carolyn B. Maloney's Breastfeeding Promotion Act, most recently introduced as H.R. 2819, seeks to amend the Civil Rights Act of 1964 to make breastfeeding a right of women nationally. Breastfeeding Promotion Act, H.R. 2819, 111th Cong. (2009).

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political impasse between pro-life proponents and pro-choice opponents.¹²² There is neither enough congressional support to pass a permanent law nor enough opposition to keep the rider out of appropriation bills. The result is that it has been the law for over thirty years without being added to the Code. At least for the Hyde Amendment, impermanence *is* the intent of Congress, if intent can be inferred from a persistent lack of agreement.

B. WHY PROBLEMS WITH THE CODE MATTER

The complexities of the U.S. Code would be merely a point of interest if they were widely and well understood. There are ways of researching the session laws as well as the Code. If, however, the general expectation is that the Code and federal statutory law are synonymous, then those complexities are a trap for the unwary, and the goal of the codifiers is unmet.

The government presents the Code as a comprehensive, authoritative source for federal legislation, accessible by the general public:

One of the important steps in the enactment of a valid law is the requirement that it shall be made known to the people who are to be bound by it. There would be no justice if the state were to hold its people responsible for their conduct before it made known to them the unlawfulness of such behavior. . . .

. . . .

The United States Code contains a consolidation and codification of the general and permanent laws of the United States Its purpose is to present the laws in a concise and usable form *without requiring recourse to the many volumes of the Statutes at Large* containing the individual amendments.¹²³

¹²² See Mike Lillis, *Abortion Ban For American Indians Only*, WASHINGTON INDEPENDENT, Mar. 5, 2008, available at <http://washingtonindependent.com/2093/abortion-ban-for-american-indians-only>.

¹²³ HOW OUR LAWS ARE MADE, H. DOC. NO. 110-49, at 52-54 (July 24, 2007) (emphasis added), available at <http://thomas.loc.gov/home/lawmade.bysec/publication.html#usc>.

This language comes from *How Our Laws Are Made*, a document written for the general public, and printed in ever-larger quantities since the first edition in 1953.¹²⁴ Today, it has a prominent link on the Library of Congress's Thomas website as a basic introduction to aid the public's understanding of the legislative process.¹²⁵

A less explicit, but more pervasive, message about the irrelevance of the session laws is delivered by the official online vehicles for the Code. The two federal government websites that provide free access to the Code¹²⁶ do not hyperlink from a Code section to the Statutes at Large citations in the section's history line for either positive law or prima facie law titles. For digitally literate users, a hyperlink would be the expected path to any related and relevant information, whereas the lack of a hyperlink suggests irrelevance. This means that for those members of the public who look beyond Wikipedia for information on federal statutes, the U.S. Code is likely to be the only stop in their search.

The general public is unlikely to consider "recourse to the Statutes at Large" to find the law unless there is a clear indication that the session laws are important and a clearly marked path to access them. Even legal professionals are increasingly ignoring the session laws in their research. An attorney in the House Office of Legislative Counsel, citing changes in Bluebook rules and recent Supreme Court decisions, lamented that the session laws are no longer used by the legal profession: "We do not cite to them, we do not quote from them, and—the most recent development—we do not use them in statutory interpretation."¹²⁷

¹²⁴ *Id.* at iii, v.

¹²⁵ See Thomas, http://thomas.loc.gov/home/laws_made.html (last visited Jan. 30, 2010).

¹²⁶ The House of Representatives' Office of the Law Revision Counsel, <http://uscode.house.gov> (last visited Jan. 3, 2010); and the Government Printing Office's GPO Access, <http://www.gpoaccess.gov/uscode/> (last visited Jan. 3, 2010). Presumably, the GPO Code pages will migrate to the new digital site FDSys.gov at some point. Both GPO Access and FDSys offer a choice only of text or PDF files for Code sections, neither of which permits the use of hyperlinking or other web technology.

¹²⁷ Tobias Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 283, 284 (2007). The Court decisions are *Lamie v. United States Trustee*, 540 U.S. 526 (2004), where the "predecessor statutes" in the session laws were ignored in favor of Code language, and *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50 (2004), which follows *Lamie*.

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While comprehensive reference works on legal research¹²⁸ provide information on the difference between positive law and prima facie law titles in the U.S. Code, the more basic texts meant for first-year legal research and writing courses omit that level of detail.¹²⁹ Neither the basic nor the advanced texts on legal research give any consideration to the problem of appropriations riders—those general statutes that are left out of the Code. All of this emphasizes the importance of providing complete information on statutes in the Code.

In addition to expecting that all statutory law will be found in the Code, the public increasingly expects information of all kinds to be presented in a format that displays the structure, eases comprehension, and links related documents—electronically. The public is now used to the provision of “enhanced access to Government information and services” as is promoted by the E-Government Act of 2002.¹³⁰ Instructive examples of “citizen-centric Government information and services”¹³¹ can be found on such websites as e-CFR¹³² (the electronic Code of Federal Regulations), a constantly updated “unofficial” companion to the authoritative updated-once-a-year version of the official CFR.¹³³ Regulations.gov is a related website that provides both information and interaction, providing comment forms for proposed regulations and an RSS feed for new additions to the site.¹³⁴

The provider of these sites is the Government Printing

¹²⁸ See, e.g., Roy Mersky, Steven Barkan & Donald Dunn, *FUNDAMENTALS OF LEGAL RESEARCH* 154-55 (9th ed. 2009).

¹²⁹ See, e.g., Amy Sloan, *BASIC LEGAL RESEARCH* 157-61 (4th ed. 2009). The reference material supplied by the legal database vendors is even more rudimentary. A Westlaw “Research Fundamentals” pamphlet entitled “How to Find Statutes” skips the session laws altogether when it states that “[a]fter the U.S. Congress passes a bill and the president signs it into law, it is typically codified, i.e., placed into the United States Code.” Westlaw Research Fundamentals: How to Find Statutes (June 2009), available at <http://lscontent.westlaw.com/images/banner/documentation/2009/FindStat09.pdf>.

¹³⁰ Pub. L. No. 107-347, § 2(b)(11), 116 Stat. 2899, 2901 (2002). Much of this session law is codified as a note to 44 U.S.C. § 3501 (Title 44 is a positive law title).

¹³¹ *Id.* § 2(b)(5), 116 Stat. at 2901.

¹³² Electronic Code of Federal Regulations <http://ecfr.gpoaccess.gov> (last visited Jan. 3, 2010).

¹³³ Code of Federal Regulations main page <http://www.gpoaccess.gov/cfr/index.html> (last visited Jan. 3, 2010).

¹³⁴ Regulations.gov home page <http://www.regulations.gov> (last visited Jan. 3, 2010).

Office (GPO), which publishes one of the electronic versions of the U.S. Code,¹³⁵ as well as congressional bills, session laws, and the Congressional Record.¹³⁶ The GPO is currently engaged in converting its online content to a more flexible and user-friendly format on a new website, the Federal Digital System.¹³⁷ There is a climate of open access to government information and there are increasingly sophisticated information-management tools available to congressional offices and the GPO. The expectation should be that they will use these new technologies to solve old problems with the Code.

C. PROPOSED SOLUTIONS

1. *Fixing the Current Code Contents*

The problem with the prima facie titles is that the Code language for the statutes in these titles is not authoritative, but the reader is not clearly informed that the Statutes at Large language prevails. Until an all-positive-law Code is achieved, it would be useful to clearly indicate when Code language is authoritative and when the authority lies in the text of the session law as amended. This clear indication could be accomplished in a codification note to each section of the Code so the reader would have that information without having to check on the status of the title in which the section is located. In an electronic version of the Code, these notes could be delivered with pop-up boxes that provide a link to the session laws themselves.

The problem with the positive law titles of the Code is the relegation of nonconforming amendments to footnotes and appendices. This flaw in the enterprise of positive law codification may ultimately be resistant to a systematic solution. Congress—not the Code editors—writes laws, and the haste and disorder of the legislative process cannot be constrained by the editorial requirements of direct amendment.

¹³⁵ United States Code main page <http://www.gpoaccess.gov/uscode/index.html> (last visited Jan. 3, 2010).

¹³⁶ <http://www.gpoaccess.gov/legislative.html> (last visited Jan. 3, 2010). This website provides the index page for all legislative materials provided by GPO Access.

¹³⁷ Robert C. Tapella, *GPO's Federal Digital System (FDsys): Open and Transparent Government*, 3-5 (July 27, 2009), available at http://www.gpo.gov/pdfs/news-media/PrepRe_072709.pdf.

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In every new batch of session laws there will be new enactments that do not fit into the existing structure and language of the positive law titles. But, as long as a positive law Code is Congress's goal, there should be a concurrent commitment to perfecting the structure of the Code by integrating the laws found in the notes into the main text of the sections. This integration should be done in an organized and ongoing process. This would at least remediate the problem. The Office of Law Revision Counsel could draft an annual corrective bill proposing proper direct amendment language to reenact session laws now residing in positive law notes. Initially, this would be an immense task, but once the accumulation of past nonconforming enactments has been integrated into the Code, the annual corrections process should be manageable.¹³⁸

The Office of Law Revision Counsel already has the authority to undertake such an activity. Among the functions listed in section 285b of Title 2 of the Code are: "To prepare and submit periodically such revisions in the titles of the Code which have been enacted into positive law as may be necessary to keep such titles current."¹³⁹ The statute provides for a director (Law Revision Counsel)¹⁴⁰ and deputy director, as well as "such employees as may be necessary for the prompt and efficient performance of the functions of the Office."¹⁴¹

However, the resources made available to the Office of Law Revision Counsel are not sufficient for the tasks of preparing the regular editions and supplements of the U.S. Code, drafting additional titles for enactment into positive law, *and* preparing annual corrective acts to incorporate laws now relegated to notes into the positive law texts.¹⁴² In a military metaphor, the Office of Law Revision Counsel has the resources to take new

¹³⁸ Technical revision acts to conform enactments to correct format for inclusion in the Code have been passed occasionally, but not on a regular basis. *See, e.g.*, Technical Amendments to titles 10, 14, 37 and 38, United States Code, to codify recent law and to improve the Code, Pub. L. No. 97-295, 96 Stat. 1287 (1982).

¹³⁹ 2 U.S.C. § 285b(5) (2006).

¹⁴⁰ 2 U.S.C. § 285c (2006).

¹⁴¹ 2 U.S.C. § 285d (2006).

¹⁴² In addition to the Counsel and Deputy Counsel, the office has eighteen attorneys working on the Code. RICHARD J. MCKINNEY, UNRAVELING THE MYSTERIES OF THE U.S. CODE (REV. 2009), *available at* www.llsdc.org/attachments/wysiwyg/544/usc-mysteries.pdf. In contrast, the House Office of Legislative Counsel has forty staff attorneys.

ground with its codification of new titles into positive law, but it cannot hold that ground against the incursions of subsequent enactments that do not fit into the positive law framework.

United States Supreme Court Justice Ruth Bader Ginsburg and Peter Huber have suggested that one way to increase the resources devoted to correcting the Code would be to bolster the Office of Law Revision Counsel with the creation of congressional committees (or a joint committee) to oversee “statutory reexamination and repair.”¹⁴³ That suggestion was based on the assumption that direct involvement by members of Congress would ensure higher funding levels. To date, the proposal has not been acted on. New congressional committees may not be the best way to build a better Code. But additional resources will be needed by the Office of Law Revision Counsel to keep the current and forthcoming positive law titles both up-to-date and authoritative. Failing such a general repair project, the probable place of non-incorporated laws should be indicated in the main body of the Code text, at least unofficially and electronically.

2. *Fixing the Exclusion of Temporary Laws*

A law that is of general interest and importance, even if temporary, should be as findable as any permanent law. The exclusion of such enactments from the Code must be seen as an outgrowth of the Code’s creation and history as a printed document. Even today, editing, printing and distributing a full new edition of the Code takes place every six years, but the volumes are not actually shipped until years after the official year of publication. Even the commercial printed codes are supplemented with *annual* pocket parts. Including a law with a life expectancy of one year or less would be a waste of effort in that print environment. Increasingly, however, the print versions of the Code are becoming irrelevant to the research habits of lawyers, much less the general public.¹⁴⁴ And, while

¹⁴³ Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1429-34 (1987). That article addressed the need for a different kind of corrective legislation: to amend or remove laws in the Code that had been subjected to negative judicial scrutiny.

¹⁴⁴ See, e.g., SARAH PALMER, ABA LEGAL TECHNOLOGY RESOURCE CENTER, IF YOU CAN’T BEAT ’EM, TRAIN ’EM: HOW LAWYERS CONDUCT LEGAL RESEARCH (Jan. 2006), available at www.abanet.org/tech/ltrc/publications/lia_training.html. This does not

both commercial publishers and the government are providing electronic alternatives to the print volumes, those products are still based on the conceptual model of the printed page, with rigid boundaries and exclusive categories that relegate some laws to footnotes and leave out others altogether. An official print publication is an exclusive one. An electronic publication can have multiple versions, or multiple layers to a core document. An unofficial version with user-friendly and even experimental features might be the public face of a more traditional official document, providing access and comprehensiveness as well as authenticity.

With an unofficial electronic version, the keepers of the Code can circumvent the temporary/permanent distinction between enactments and provide access to the full range of statutory law in force just by building a better website. Users expect to be prompted with messages about related content. The problem of valid but uncodified laws being lost in the Statutes at Large would be solved—without changing the legal requirements for permanence—if a search of the Code brought up a list of current Code sections and a message: “There are uncodified session laws in effect on this subject. Do you want to see them?”

3. *An Electronic Future for the Code*

The United States Code we have today is a monumental, complex and confusing work, rooted in print technology and shaped by the struggles with codification over the last century and a half. Its role is still an important one: to provide an official compilation of federal statute law for both experienced researchers and the general public. That role would be furthered by making the Code’s complexity more apparent and more comprehensible by applying the results of research in digital presentation formats and information architecture.¹⁴⁵

necessarily mean that researching the Code electronically is the best option. In a survey of law-firm librarians conducted in 2007, over half of the respondents thought Code research is still better done in print. Patrick Meyer, *Law Firm Legal Research Requirements for New Attorneys*, 101 LAW LIBR. J. 297, 316-17 (2009).

¹⁴⁵ While web design and information architecture are beyond the scope of this article (and the author’s expertise), two sources that have been useful in suggesting possibilities for an electronic Code are Thomas Tullis et al., *Presentation of Information*, in HANDBOOK OF HUMAN FACTORS IN WEB DESIGN 107 (Robert Proctor & Kim-Phuong Vu eds., 2005), and James Kalbach, *On Uncertainty in Information*

This can be done without disturbing the legal definitions and administrative practices that are used to determine content or addressing the more difficult question of whether a positive law Code is practical given the realities of the legislative drafting process. The official Code as maintained by the House Office of Law Revision Counsel can continue to provide an authoritative benchmark for federal statutory laws. At the same time, the Government Printing Office should pursue its program of public information by experimenting with new formats and technologies to create a Code that reveals the underlying complexities of the statutory law while offering a range of functions to deal with them.

An unofficial government-provided electronic version of the U.S. Code would allow for experimentation with the presentation format and information architecture. Each section in a *prima facie* title could be labeled as official but not authoritative. Hyperlinks could be provided to the actual session laws, or even to an “as amended” version of the original statute, perhaps created using some variant of the House Legislative Counsel’s Ramseyer generator.

An unofficial version of a positive law section could show relevant but mistakenly drafted laws interpolated into the text rather than relegated to footnotes (with different typography or even color to indicate their nonauthoritative status). An unofficial version of the Code could generate pop-ups that ask: “do you want session laws with that?”

Such an unofficial *comprehensive* Code would not replace the *authoritative* print-based version mandated by law any time soon. It is critical to retain an authoritative text as we build a useful research aid. It will take years of experimentation to determine the best format and features for an official and authoritative electronic version. Digital information is still too new: “It takes several generations to get past the point of depending on the old medium for a way to think about the new and to get to the point of exploiting the new medium artfully in its own right.”¹⁴⁶

The challenge is to use modern information technology to accomplish the goal set out in 1848: creating a U.S. Code with “all needful information in one comprehensive body. That

Architecture, 1 J. INFO. ARCHITECTURE 48 (2009).

¹⁴⁶ JAMES J. O’DONNELL, AVATARS OF THE WORD 42 (1998).

which seems to be complete . . . should be so in fact.”¹⁴⁷ One hundred sixty years later we have new tools to begin to make that Code a reality.

III. CONCLUSION

Three features that detract from the U.S. Code as the comprehensive and authoritative source for federal statutes are rooted in the Code’s historical development. The prima facie titles of the Code lack sufficient notice that the authoritative language of the statutes codified there resides in the Statutes at Large. Better signposting for those titles is suggested. Amendments to the positive law titles that are not drafted in the proper “direct amendment” format are relegated to footnotes, where they can be overlooked by the uninformed reader. Annual corrective bills would ameliorate this problem. General laws that are considered temporary, such as those included in appropriations acts, are left out of the Code entirely. Pointers to these uncodified laws might be incorporated into an unofficial electronic version of the U.S. Code as part of the search results or by sidebar references. Such an electronic Code could easily provide the signposts to the session laws for prima facie titles and even insert draft versions of amendments into positive law titles pending official corrective legislation. The Congressional Offices of Code Revision and Legislative Counsel should collaborate with the Government Printing Office to use new information technology to fix old problems with the U.S. Code.

¹⁴⁷ H. R. Rep. No. 671, at 1 (1848).