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Externalist Statutory Interpretation

ABSTRACT. The dominant paradigm of statutory-interpretation scholarship is an "internalist" one. It treats statutory interpretation as a self-contained set of tools primarily deployed by lawyers and judges within the closed universe of courts. But as judges increasingly justify textualism by invoking a populist fidelity to "the people," the internalist paradigm has proven too narrow to support a robust democratic theory of statutory interpretation. Urgent, foundational questions such as "How should laypeople engage with statutes in the first place?" and "What is the relationship between statutory interpretation and power?" are entirely illegible within an internalist, juricentric paradigm. The concept of a statute's "ordinary meaning" has in turn developed with little attention paid to laypeople's actual participation in political processes.

In response, this Article—the second in a series—begins a new conversation in the field of legislation by developing a broader, critically "externalist" perspective. The Article lays the foundations for a social and political theory of statutory interpretation that is more inclusive of diverse and historically marginalized peoples, grounded in the realities of lay politics, and capable of reflecting the social nature of statutory interpretation. An externalist perspective reveals the lived experience of statutory interpretation beyond traditional governmental actors. It sees statutory interpretation and society as mutually constitutive. It pays attention to on-the-ground manifestations of abstract values like "the rule of law." And it situates statutory interpretation as a component of political culture, political economy, grassroots participation, and racial politics. This perspective reveals how statutory interpretation might frame how people imagine the possibilities of societal change. And it enables us to ask, counterintuitively, whether statutory interpretation makes social change more difficult.

To begin the work of articulating this externalist paradigm, the Article chiefly recovers a new history of expository legislation—statutes that purported to interpret previous legislative enactments—and uses that history to articulate three new frameworks.

The first framework—"participatory statutory interpretation"—shows how statutory interpretation has been a profoundly democratic practice done by "ordinary" people. Many laypeople—including unenfranchised, poor, and other marginalized people—once had a direct, personal, and intimate connection to statutory interpretation that they channeled into petitions for expository legislation. Through expository legislation, they accessed an alternative to judicial remedies and checked administrative officials' interpretations of statutes. However, this mechanism of participation was fragile and imperfect, as corporations also could exploit it to secure their own interests.

The second framework—"sociopolitical statutory interpretation"—shows how statutory interpretation has been inseparable from mass politics. Challenging the idea that statutory interpretation is relatively apolitical, this framework highlights how statutory interpretation can be a part of grassroots, nationwide political struggles—not just individualized legal conflicts in courts. At the same time, it raises questions about the limitations of statutory interpretation as a tool of political struggle.

These two frameworks lead to a third: "legislative intent as ordinary meaning." Whereas scholars and judges have presumed that the "ordinary meaning" of statutes must ultimately be about textual meaning, this framework demonstrates the historical basis of an "ordinary meaning" not centered around statutory text. As the Article shows, laypeople cared deeply about legislative "intentions," and many saw text as merely evidence of law rather than law itself. Meanwhile, as expository legislation shifted toward directly modifying statutory text, the notion that "text is law" became imperiled in new ways.

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ARTICLE CONTENTS

INTRODUCTION 450

I. PARTICIPATORY STATUTORY INTERPRETATION 462
- A. Petitioning for Interpretation 463
- B. Making Interpretation Democratic 466
  - 1. Accessible Alternatives to Judicial Remedies 466
  - 2. Democratically Accountable Administrative Statutory Interpretation 473
  - 3. New Remedies and the Transformation of Petitioning 474
- B. Corrupting Statutory Interpretation 476

II. SOCIOPOLITICAL STATUTORY INTERPRETATION 481
- A. The National Racial Politics of Statutory Interpretation 483
  - 1. Territorial Conquest, Slavery, and Civil War 484
  - 2. Reconstruction and Executive Statutory Interpretation 488
- B. Social Movements and Legal Interpretation on the Ground 494
- C. The State Constitutional Politics of Statutory Interpretation 497
  - 1. The Decline of Traditional Expository Legislation 497
  - 2. The Impact of State Constitutional Politics on Expository Legislation 501

III. LEGISLATIVE INTENT AS ORDINARY MEANING 506
- A. The Shifting Textuality of Statute-Based Law 508
- B. Textualism Turned Inside Out 521
  - 1. Text Was Evidence of Law, Not Law Itself 522
  - 2. A New Theory of "Ordinary Meaning" Based on Legislative Intent—Not on Word Usage 524

CONCLUSION 529

APPENDIX 534

INTRODUCTION

The dominant paradigm of statutory-interpretation scholarship is an "internalist" one. Under this paradigm, statutory interpretation remains separate and insulated from society; it is valued only insofar as it enables attorneys and governmental actors to resolve individualized legal disputes, usually within the closed universe of courts; and the historical development of its methodology depends primarily upon the refinement of intellectual justifications for specific interpretive tools.[1] With few exceptions,[2] the role of politics is invisible beyond

1. This "internalist" scholarship is tremendously important, valuable, and interesting, and my purpose here isn't to suggest anything otherwise. The companion article to this one also rests on "internalist" framing, and there are elements of the present Article that are "internalist." *See generally* Alexander Zhang, *Legislative Statutory Interpretation*, 99 N.Y.U. L. REV. 950 (2024) (discussing the roles of legislatures and courts—governmental actors—in statutory interpretation). My goal, then, is simply to illuminate the conceptual foundations and assumptions of an "internalist" paradigm and to suggest that an additional, "externalist" perspective can complement it. To illustrate the contours of this "internalist" paradigm without discrimination to any particular piece of scholarship, the following is a brief survey of every statutory-interpretation-focused article or forum piece published in three leading generalist law journals between 2020 and 2023. As the survey shows, these pieces share a concern regarding the internal consistency of interpretive theories and methods as well as how judges (as actors internal to the legal system) do and should interpret statutes. In the *Harvard Law Review*: William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1653 (2020), which describes the evolution of the presumption against extraterritoriality based on descriptions of Supreme Court cases and sketches out the "best version of the presumption against extraterritoriality that is consistent with the Supreme Court's post-2010 decisions"; Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 733-34 (2020), which evaluates whether judicial assumptions about "ordinary meaning" are justified based on whether they match how actual ordinary people use language; Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 269 (2020), which advocates that judges should embrace a "formalistic" textualism as opposed to a "flexible" textualism; Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 HARV. L. REV. F. 167, 167-69 (2021) [hereinafter Krishnakumar, *Metarules*], which responds to Kevin P. Tobia's *Testing Ordinary Meaning* and proposes judicial metarules for ordinary meaning; Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 612 (2022), which provides "the first empirical and doctrinal analysis of how the modern Supreme Court uses the common law to inform its statutory constructions" and offers recommendations for the use of common law by judges; Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 520 (2023), which "systematically and closely assesses each of the leading efforts to square modern textualist theory with substantive canons"; and Brian G. Slocum & Kevin Tobia, *The Linguistic and Substantive Canons*, 137 HARV. L. REV. F. 70, 70 (2023), which responds to *The Incompatibility of Substantive Canons and Textualism* and argues that "textualists need not abandon all substantive canons." In the *Yale Law Journal*: Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1956 (2020), which documents politics within Congress as reflected through parliamentary practices and offers proposals for statutory interpretation based on those in-

congressional partisanship and lobbying[3] or the appointment of politically biased judges.[4] This internalist conception of statutory interpretation has persisted even as scholars and judges have increasingly justified textualism based on a populist, "democratic" fidelity to the perspective of "ordinary" people who are "outsiders" to these processes.[5] Statutory interpretation remains seen as a tech-

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ternal practices; Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 11-12 (2020), which describes how distinctions between different forms of legislation have historically informed different approaches to judicial interpretation by judges, although this piece blends internalist and externalist approaches by connecting intellectual developments to surrounding political circumstances; and Abbe R. Gluck, *Reading the ACA's Findings: Textualism, Severability and the ACA's Return to the Court*, 130 YALE L.J.F. 132, 133-36 (2020), which evaluates the statutory-interpretation arguments of litigants in a case about the Affordable Care Act. In the *Stanford Law Review*: Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195, 199-201 (2020), which develops justifications for substantive tax canons of interpretation and explains the consequences of these justifications.

2. *See* Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 891-903 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (providing an excellent history of the rise of textualism in the late twentieth century as linked to conservative politics).

3. *See, e.g.*, Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 208-09 (2013) (attributing the decline of congressional overrides of Supreme Court interpretations of statutes to hyperpartisanship). *But see* Matthew R. Christiansen, William N. Eskridge Jr. & Sam N. Thypin-Bermeo, Response, *The Conscious Congress: How Not to Define Overrides*, 93 TEX. L. REV. SEE ALSO 289, 291-92 (2015) (disagreeing with Richard L. Hasen's conclusions about partisanship's role).

4. *See, e.g.*, Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 634-40 (2021) (describing textualism in practice as "predictably ideologically conservative"); Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1028 (2020) (comparing Republican-appointed judges' and Democratic-appointed judges' approaches to using legislative history).

5. *See* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1722-23 (2021) (describing textualists' focus on "ordinary" consumers' understandings of law). For an astute analysis of this trend, see Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 309-14 (2021). As some have argued, the text of a statute is all that matters because that's what laypeople can obtain and understand. *See* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 352 (2005) (describing textualism in terms of "fair notice" values); David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 177 (2019) (claiming that legislative history is unavailable to everyday people). The underlying idea is that even if trained professionals are generally the ones who end up interpreting statutes, laypeople in a democracy should be able to pick up a statute and grasp its meaning. But in a forthcoming article, I explain how unequal material realities have historically affected fair notice of legislation. *See generally* Alexander Zhang, *Fair Notice Is a Sociopolitical Choice*, 74 DUKE L.J. (forthcoming 2025) (laying out this argument). Meanwhile, the focus on the "ordinary" perspective has sparked a growing chorus of backlash full of difficult questions

nical game that law students learn, that lawyers play, and that judges fight about while invoking fictional "ordinary readers"—obscuring statutory interpretation's role as a form of democratic participation that laypeople engage in and think about.

Yet below the surface of this elite and internalist view of statutory interpretation, a hidden world of lay participation continues to materialize amidst today's most pressing social and political crises. One can glimpse this world, for example, through online petitions making interpretive claims about statutes affecting the COVID-19 pandemic,[6] police-inflicted violence against Black people,[7] gun control,[8] the survival of small farms,[9] the scope of religious-freedom

about what "ordinary meaning" means and how to determine it—and whether it matters at all. For example, one variant of backlash against this supposedly "democratic" method instead seeks to focus on elites—especially leading lawyers and jurists—who as individuals had the largest hands in shaping the jurisprudence of statutory interpretation. *See* Peterson, *supra* note 1, at 75 (criticizing "a charming but misplaced *democratic* style of engagement" and instead focusing on prominent jurists). Another variant urges judges not to "outsource" statutory interpretation to a fictional and opaquely selected audience that supposedly represents "reasonable" readers of statutes. *See* Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 438-39 (2018).

6. *See* Brandy Blackwell, *Hazard Pay for Medical Staff Working During Covid-19 Pandemic*, CHANGE.ORG (Mar. 19, 2020), https://www.change.org/p/brian-kemp-hazard-pay-for-medical-staff-working-during-covid-19-pandemic [https://perma.cc/2K5B-ZMVM] (using the U.S. Department of Labor's definition of "hazard pay" to argue that medical workers should receive hazard pay when there is "reduced access to PPE"); Joe Marin, *Please Let Massachusetts Golf*, CHANGE.ORG (Mar. 28, 2020), https://www.change.org/p/governor-charlie-baker-please-let-massachusetts-golf [https://perma.cc/B6T4-DPHB] (claiming that an exemption for golf "can comply completely with the intent of the 'Stay at Home' designation" of a Massachusetts stay-at-home order); Ashley Domingue, *Unvaccinated Students Deserve Equal Education Opportunities in Pointe Coupee*, CHANGE.ORG (Jan. 24, 2022), https://www.change.org/p/pointe-coupee-parish-school-board-unvaccinated-students-deserve-equal-education-opportunities-in-pointe-coupee [https://perma.cc/FTA2-3KMQ] (using the text of the Equal Educational Opportunities Act of 1974 to argue that a public-school system had violated the Act by discriminating against unvaccinated students).

7. *See* Rene Montesino, *End Qualified Immunity for the LAPD*, CHANGE.ORG (Aug. 17, 2020), https://www.change.org/p/los-angeles-city-council-end-qualified-immunity-for-the-lapd-9278d323-5d81-4de7-a7ac-2b202ad16189 [https://perma.cc/4R85-RMZ7] (claiming that qualified immunity is "flatly at odds with the plain language of Section 1983 and unsupported by the relevant legal history"); Action 4 Change, *21st Century Non Violent Policing in Rockford, IL*, CHANGE.ORG (June 7, 2020), https://www.change.org/p/thomas-mcnamara-21st-century-non-violent-policing-in-rockford-il [https://perma.cc/9LCM-GYS2] (supporting Representative Ayanna Pressley and Representative Justin Amash's proposed legislation to end qualified immunity and to "clarify Congress' original intent for Section 1983").

8. *See* Stef'an Simmons, *Demand Fairer Gun Laws for Responsible Gun Owners*, CHANGE.ORG (Feb. 4, 2022), https://www.change.org/p/demand-fairer-gun-laws-for-responsible-gun-owners [https://perma.cc/XY52-G353] (advocating for a change to a seven-day waiting-

protections,[10] consumer privacy,[11] and more. One can see this world in Reddit threads that allow communities to debate and interpret the language of proposed legislation. Take, for instance, a post on the subreddit r/gunpolitics titled "Understanding H.R. 7910 and H.R. 8, How they Function, and why you should oppose them,"[12] which interpreted proposed bills and led readers to make comments such as, "This line makes the FFL03 [Federal Firearms License] useless. . . . Whenever you see this explicit list 'licensed importer, licensed manufacturer, or licensed dealer' it means everyone but FFL03 collectors because they could just use 'license holders' to refer to all FFL holders."[13] So too can one see this world in the guts of the regulatory process—for example, in emails from business owners, interest groups, and laypeople to Califor-

period requirement for firearms purchases because said requirement "will not prevent [someone who already owns a firearm] from using the firearm already owned, thus nullifying the intent of the law"); Geoffrey Landrum, *Change IL Open Carry Law: Remove Exceptions for Open Carry Outside of Commercial Zones*, CHANGE.ORG (June 26, 2020), https://www.change.org/p/illinois-state-house-change-il-open-carry-law-exclude-exceptions-for-carry-outside-of-commercially-zoned-props [https://perma.cc/C76R-ST38] (advocating that Illinois legislators "remov[e] the exception for open carry outside in a commercially zoned area" because "[i]f the intent of the law is ignored due to loopholes, it must be changed to protect innocent Illinois lives").

9. *See* Cedar Summit Farm, *Help Save Our Organic Grass-Fed Family Farm*, CHANGE.ORG (Feb. 25, 2013), https://www.change.org/p/help-save-our-organic-grass-fed-family-farm [https://perma.cc/8L3K-DW97] (asking the Minnesota legislature to "clarify the original intent of the Buy The Farm law and give [them] the option to continue to grow [their] family business").

10. *See* Creation Ministries, *Clarify Whether the Religious Freedom Restoration Act Applies to Private-Party Lawsuits*, CHANGE.ORG (Apr. 26, 2014), https://www.change.org/p/u-s-house-of-representatives-clarify-whether-the-religious-freedom-restoration-act-applies-to-private-party-lawsuits [https://perma.cc/7RAL-LFUZ] (interpreting the Religious Freedom Restoration Act (RFRA) and concluding that they "ask Congress to once and for all clarify the intent and application of the RFRA's language, and settle the divisive question of whether the RFRA's protection applies to private-party lawsuits that rely on Federal laws").

11. *See* Doc Compton, *Stop Robocalls – Tell Congress to Update the Federal Telephone Consumer Protection Act*, CHANGE.ORG (Jan. 2, 2023), https://www.change.org/p/stop-robocalls-tell-congress-to-update-the-federal-telephone-consumer-protection-act [https://perma.cc/22M7-G2QF] (advocating that Congress amend the Telephone Consumer Protection Act partly by updating specific definitions to "truly fulfill the statute's original intent, which was, in large part, to prevent the unwanted invasion of privacy that these incessant illegal robocalls represent!").

12. @pcvcolin, *Understanding H.R. 7910 and H.R. 8, How They Function, and Why You Should Oppose Them*, REDDIT (June 6, 2022, 7:23 AM EDT), https://www.reddit.com/r/gunpolitics/comments/v6188r/understanding_hr_7910_and_hr_8_how_they_function [https://perma.cc/2YEU-WRHB].

13. @lordnikkon, REDDIT (June 6, 2022, 1:10 PM EDT), https://www.reddit.com/r/gunpolitics/comments/v6188r/comment/ibdxwxz [https://perma.cc/8BA4-A6M2].

nia's Privacy Regulations Coordinator in response to proposed regulations under the California Consumer Privacy Act.[14] Consider one email, written by a barbershop franchisee who asked for more guidance on the applicability of the term "business" to franchises,[15] or another email, written in Comic Sans font, criticizing how the term "business" might not apply to "government agency businesses."[16] These forms of participation remain invisible in the statutory-interpretation literature, despite the field's increasing focus on elaborating theories of "ordinary meaning."

But as this Article—the second in a series[17]—excavates, lay participation in statutory interpretation has been an important part of American history since the nation's beginning. This history reveals the past and potential future of statutory interpretation as a site of democratic deliberation and collective power building while also raising questions about the limits and exploitability of statutory interpretation as a vehicle for societal change. And, as this Article argues, these possibilities and limits are perceptible only when one takes a *critically externalist* view of statutory interpretation—a view that this Article begins to develop.

A critically externalist paradigm of statutory interpretation, unlike the dominant internalist paradigm, reveals the lived experience of people engaged in statutory interpretation beyond traditional actors in government institutions. If an internalist perspective conceptualizes statutory interpretation as linked to but ultimately autonomous from developments in society, then a critically externalist perspective sees statutory interpretation and society as mutually constitutive. Most importantly, if an internalist perspective assumes that statutory interpretation is simply about advancing abstract values—whether "rule of law" or "fairness" values—a critically externalist lens attends to the material manifestations of those values. This externalist perspective builds on Margaret H. Lemos's recent scholarship on the politics of statutory interpretation[18] by expanding what kinds of politics are relevant—not just politics in

14. *See generally, e.g.*, *Part 1 of 7 – Written Comments Received During 45-Day Comment Period – California Consumer Privacy Act (CCPA)*, STATE OF CAL. DEP'T OF JUST. [hereinafter *CCPA Comments*], https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-comments-45day-pt1.pdf [https://perma.cc/LV83-9Q5W] (containing emails providing written comments from the public).

15. Mark Green, Comment Letter on Proposed Rule Under California Consumer Protection Act (Oct. 11, 2019, 9:45 AM PST), *in CCPA Comments*, *supra* note 14, at 9.

16. Elaine Morgan, Comment Letter on Proposed Rule Under California Consumer Protection Act (Nov. 29, 2019, 11:21 PM PST), *in CCPA Comments*, *supra* note 14, at 18.

17. For the first paper in this series, see generally Zhang, *supra* note 1.

18. *See* Lemos, *supra* note 2, at 891-903.

terms of partisanship but also in terms of political culture, political economy, grassroots participation, racial politics, and more. Moreover, it broadens the frame of conversation about the politics of statutory interpretation beyond debates about particular theories or methods of statutory interpretation such as textualism[19] by instead raising questions about the political valence of statutory interpretation *in general*.[20]

The upshot is that this Article lays the descriptive foundations for a theory of statutory interpretation that is more inclusive of diverse and historically marginalized peoples, grounded in the realities of lay politics, and capable of reflecting the social nature of statutory interpretation. It suggests that statutory interpretation could play an important role in framing how laypeople imagine the possibilities of societal change. Yet even as an externalist perspective allows us to conceptualize statutory interpretation as a vehicle of societal change, it also enables us to consider the possibility that social struggle over statutory interpretation actually conserves the status quo by directing energy toward interpretive activity that presumes the continuation of the underlying statutes. Indeed, an externalist perspective allows us to ask whether statutory interpretation impedes social change by facilitating what Reva B. Siegel has called "preservation through transformation."[21]

The Article also contributes to two other bodies of scholarship. First, whereas political scientists and public-choice theorists have assessed the role of lobbyists and interest groups in the legislative process,[22] this Article's external-

19. *See, e.g.*, Katie Eyer, *Textualism and Progressive Social Movements*, U. CHI. L. REV. ONLINE *4 (Mar. 12, 2024), https://lawreview.uchicago.edu/sites/default/files/2024-03/Eyer_ESSAY_v91_Online.pdf [https://perma.cc/U5SE-BNRN] ("[T]here are good reasons to believe that progressive lawyers' embrace of textualist arguments would be strategically successful and few reasons to fear that such an embrace would undermine progressive lawyers' longer-term goals."); Eliot T. Tracz, *Words and Their Meanings: The Role of Textualism in the Progressive Toolbox*, 45 SETON HALL LEGIS. J. 355, 357 (2021) (arguing that textualism is a "powerful tool in the progressive toolbox").

20. *Cf.* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1606 n.15 (1986) (arguing that "legal interpretation" is "part of the *practice* of political violence").

21. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2180 (1996) (elaborating the idea of "preservation-through-transformation"—namely, that "[s]ocial struggle over the legitimacy of a status regime will produce changes in its formal structure," yet "the legal system may *still* be enforcing social stratification, but by new means").

22. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-37 (1991); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 533-34 (1983); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 301-02 (1988) (discussing Paul Rubin's work examining interest groups' growing roles in the legislative process and in liti-

ist perspective posits that certain aspects of statutory interpretation can themselves be seen as part of a story about competing societal interests. Second, whereas legal scholars have recently argued that administrative agencies today exemplify values of agonistic and pluralistic democracy,[23] this Article demonstrates how statutory interpretation can be—and historically has been—an important vehicle for actualizing those values.

To begin the work of developing a critically externalist perspective of statutory interpretation, the Article chiefly unearths the history of a little-known type of statute called expository legislation.[24] An expository statute is a legislative enactment passed for the specific purpose of interpreting or construing an existing enactment.[25] Expository legislation is a surprising phenomenon, as I have suggested in an earlier article, because it shows that Congress and state legislatures historically have believed that they were capable of performing statutory interpretation themselves—even if their interpretative acts sometimes looked, at least to outsiders, like making new law.[26] In fact, until the late nineteenth and early twentieth centuries, expository enactments typically purported

gation); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

23. *See* Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1777 (2023) ("Administrative agencies are the primary sites of pluralistic contestation over public policy in the United States."); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 58 (2022) (elaborating the agonistic potential of the administrative state).

24. In the most exhaustive study of expository legislation to date, I have documented the early history of expository legislation from a top-down perspective. *See* Zhang, *supra* note 1, at 956-57. For other useful explorations of select aspects of expository legislation's history, see James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1319 (1998), which documents expository legislation in the 1770s through 1790s; Legislation, *Declaratory Legislation*, 49 HARV. L. REV. 137, 137-43 (1935), which describes the then-current state of expository legislation purporting to "merely explain[] rather than alter[]" previous acts; Hubert D. Forsyth, Notes and Recent Decisions, *Declaratory Legislation in California*, 36 CALIF. L. REV. 634, 634-36 (1948), which similarly analyzes California declaratory legislation; Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 799-802 (2023), which discusses debates about several expository laws; Pat McDonell, Note, *The Doctrine of Clarifications*, 119 MICH. L. REV. 797, 805-10 (2021), which traces judicial treatments of modern "clarifying" legislation; and Adam Crews, *Textualism and the Modern Explanatory Statute*, 66 ST. LOUIS U. L.J. 197, 203-08 (2022), which explores the English origins of expository laws.

25. Elaborations on this definition and descriptions of my methods for locating and defining expository statutes can be found in Appendix A of my previous article. *See* Zhang, *supra* note 1, at 1025-33.

26. *See id. See generally* Jesse M. Cross, *The Amended Statute*, 92 U. CHI. L. REV. (forthcoming 2025) (on file with author) (explaining the historical transformation of the concept of "amending" statutes).

to "explain" or "declare" the "true meaning" or "true intention" of prior statutes—usually without modifying the texts of the statutes being construed.[27] Legislators, laypeople, and lawyers understood expository legislation to be a formally distinct type of enactment that—unlike amendments—by definition did not change the law. Rather, expository laws allowed legislatures to express what they believed were the original intentions behind statutes in ways that regular "amendments" by definition could not.[28]

From a *top-down* perspective, as I have suggested previously, expository legislation raised questions about strict separation of powers in statutory interpretation.[29] Expository legislation has been a longstanding feature of American history since before the Founding.[30] It allowed legislators to supervise administrative statutory interpretation and override judicial interpretations.[31] It allowed administrative officers to clear up inter- and intradepartmental statutory-interpretation disputes.[32] Especially when it didn't have retroactive effects,

27. *See* discussion *infra* Part III.

28. To be sure, as Part III documents, the form of expository legislation increasingly resembled modern amendatory legislation in the twentieth century because expository laws increasingly modified the texts of prior statutes. And as Jesse M. Cross has shown in a breathtaking study of "amendments," federal amendments increasingly involved textual modifications starting in the 1840s. Cross, *supra* note 26 (manuscript at 18-19). In turn, the operative mechanism that distinguished expository laws from amendments became reduced to the mere signal words that expository laws used (particularly the word "clarify") to indicate that the expository laws did not change the law. Meanwhile, the conceptual distinction between modern expository legislation and regular amendatory legislation—at least as to how such legislation functioned—increasingly became reduced to the idea that expository laws' expressions of statutory meanings were by default retroactive. Nonetheless, as I have suggested elsewhere, a nonretroactive expository law that works by making textual modifications to a prior statute still has unique value beyond that of a regular textual amendment because, given its nature as a self-conscious expression of original intention or meaning, it offers signals about what else the texts of those prior statutes could also have been originally intended to mean. Zhang, *supra* note 1, at 1017. Thus, although a retroactive textual amendment might sometimes accomplish the same thing as an expository law when it comes to the impact on a statute's *operation* in the future, an expository law uniquely can inform us about that statute's *original meaning* in ways that might shed light on how else that statute was always intended to operate. And insofar as there are retroactive textual amendments in the world, their existence merely illustrates an instance in which amendments resemble expository legislation rather than the other way around (and so does *not* demonstrate that, as a general matter, expository legislation and amendatory legislation are identical in the sense of making new law).

29. Zhang, *supra* note 1, at 1012-16.

30. *Id.* at 969-72 (describing the colonial origins of American expository legislation).

31. *Id.* at 984-91 (discussing supervision); *id.* at 975-76 (offering an example of expository legislation's relationship to overrides of judicial interpretations).

32. *Id.* at 987-90.

expository legislation was widely accepted by American legislatures, executives, administrative officers, and even judges, who sometimes asked for these statutes.[33]

The present Article builds on my earlier article by explaining more fully the historical transformations in the form and volume of expository legislation, recovering the *bottom-up* history of expository legislation, and bringing the history of expository legislation into the twenty-first century. Together, the two pieces illustrate how legislatures' self-conceptions of their interpretive abilities, combined with legislatures' unique institutional features and benefits relative to the limitations of other branches of government, not only sparked abstract separation-of-powers conflicts but also facilitated a democratic world of statutory interpretation that real people took advantage of.

Grounded in that history, this Article develops three foundational, largely descriptive frameworks for understanding and applying the critically externalist paradigm.

Part I offers a framework that I call "participatory statutory interpretation"—the idea that laypeople can build power through direct engagement with statutory interpretation both within and beyond courts. Drawing on insights on petitioning by scholars such as Maggie Blackhawk,[34] Part I excavates the forgotten phenomenon of laypeople petitioning their legislatures for particular interpretations of statutes via expository legislation. In doing so, this Article is one of the first to illuminate the historical relationship between laypeople—especially historically marginalized people such as Black and Indigenous people and women—and elite lawyers, lawmakers, and judges in the transformation of statutory interpretation. Many laypeople found litigation to be too expensive, prone to delay, and unavailable because of procedural obstacles; they wrote to their lawmakers for help instead. For laypeople, legislative statutory interpretation became an accessible alternative to judicial remedies—particularly in response to executive-branch administrators' misreadings of statutes. This form of participation was fragile and imperfect. Corporations learned how to exploit it, which ironically contributed to the decline of participatory statutory interpretation. Nonetheless, this history suggests that statutory interpretation can be an important way for laypeople to build power collectively, beyond and in the shadows of the judiciary.

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33. *See id.* at 1002-03 (describing judicial acceptance of expository legislation); *id.* at 1007 (describing how, even after judicial acceptance of retroactive expository legislation declined, there was still "occasional usage and acceptance of expository legislation").

34. *See generally* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018) (providing a history of a process by which individuals and minorities participated in lawmaking through petitioning).

Whereas Part I argues that statutory interpretation can be participatory—and should be seen as participatory—Part II introduces a second framework that I call "sociopolitical statutory interpretation": the idea that statutory interpretation is and has been a site of profound, mass *sociopolitical* conflict, not only individualized legal conflict. To demonstrate this, Part II documents how national fights over slavery, territorial conquest, and Reconstruction drew upon expository legislation and legislative statutory interpretation. It then contextualizes this history, highlighting how phenomena "external"[35] to law made statutory interpretation not just a neutral, technocratic tool of elite jurists but also a site of political, ideological, class, gender, and racial struggle. For example, Part II describes how social movements on issues ranging from labor to temperance to women's rights used the form of expository legislation to interpret law "with their feet." Statutory interpretation became about winning on the streets, not just in courtrooms. Statutory interpretation became politics. At the same time, Part II also suggests there may be limits to the transformative potential of statutory interpretation as a tool and site of politics.

Part III shows how these politics were surprisingly intertwined with a theory of statutory interpretation that modern legislation scholars have debated: the theory that identifying legislative intentions and purposes is an important component—if not the primary goal—of statutory interpretation. Thus, Part III draws on the histories of participatory and sociopolitical statutory interpre-

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35. On the "external" perspective of legal history, see Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 11 (1975). *See also* Peterson, *supra* note 1, at 11 n.18 ("One of the projects of legal history is to refuse to take legal opinions as though they announce a context-free gospel, and to instead recover the furniture that littered the room. Legal history makes visible all of the obstacles that explain a chosen path."). Much scholarship on the history of statutory interpretation, Farah Peterson's scholarship notwithstanding, has adopted an "internal" perspective, working backwards from present-day ideas about statutory interpretation (such as theories of "textualism" and the use of "legislative history") to find historical explanations for them. *See generally* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) (describing early American understandings of statutory interpretation); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (arguing in favor of the faithful-agent theory of statutory interpretation over the equity-of-the-statute doctrine). The present Article starts from the beginning, tracing the jagged, discontinuous, and multiple paths that statutory interpretation took and embracing the ways in which the stories of statutory interpretation and legislation have been historically contingent rather than determined by a set trajectory. This Article aims not only to present an account of the historical contingency of statutory interpretation and legislation but also, to borrow the words of two scholars, to "provide a sense of why outcomes accrued as they did, precisely when they might have been different." Justin Desautels-Stein & Samuel Moyn, *On the Domestication of Critical Legal History*, 60 HIST. & THEORY 296, 308 (2021).

tation to develop a third and final framework: "legislative intent as ordinary meaning"—the idea that determinations of "ordinary meaning" should sometimes include determinations of "legislative intent" rather than remaining strictly text-centric inquiries. This is a departure from present-day judges' and scholars' presumption that the search for "ordinary meaning" must be focused on how laypeople would understand and use the *words* of statutes.[36] Today, "ordinary meaning" has been narrowly construed to mean the ordinary meaning of specific words, despite recent empirical scholarship showing that people care significantly about statutes' purposes.[37] By contrast, this Article investigates how laypeople actually understood statutes by examining how they participated in political processes.[38]

Part III grounds the legislative-intent-as-ordinary-meaning framework in two historical developments. First, as the history of participatory and sociopolitical statutory interpretation shows, many everyday Americans believed that statutory text was merely evidence of law, not law itself. Many expository statutes left original statutes unchanged and so created a legal system in which the meanings of statutes inherently couldn't be gleaned by only looking at the

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36. *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018) (employing corpus-linguistics tools to identify how words were once used in large bodies of texts). For example, scholarly debates have focused on questions such as how useful dictionaries are for finding "ordinary meaning" and whether the most frequent or prototypical usages of words are better evidence of "ordinary meaning." *See, e.g.*, Brian G. Slocum, *Ordinary Meaning and Empiricism*, 40 STATUTE L. REV. 13, 18-19 (2019) (criticizing the use of dictionaries as disregarding important context); Tobia, *supra* note 1, at 746 (testing the degree to which dictionaries and corpus-linguistics tools reflect "ordinary meaning"); Tobia, *supra* note 1, at 759 (suggesting that corpus-linguistics data about most frequent usages of terms is actually data about prototypical meaning); Krishnakumar, *Metarules*, *supra* note 1, at 169 (proposing a rule in favor of prototypical meaning).

37. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1488-92 (2022) ("Recent empirical research has suggested that ordinary people rely on both text *and* purpose in interpreting rules."); *see also* Tobia, *supra* note 1, at 753-56 (showing that individuals primed with legal-linguistic or dictionary information generate textual interpretations that differ significantly from "ordinary concept" interpretations); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 284-85 (2022) (discussing the purposivist findings of Kevin P. Tobia's 2020 empirical study and claiming that "it is likely that purpose plays an important role in the ordinary application of contextual canons"). Scholars have recently criticized the related phenomenon of "textual gerrymandering" and narrowing without proper attention to surrounding text. *See* Eskridge & Nourse, *supra* note 5, at 1721.

38. Meanwhile, the Article provides significant historical support for recent, more philosophically oriented scholarship criticizing textualists' conflation of text with law. *See* Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2031 (2022).

words of those original statutes.[39] "Ordinary" people—in their petitions to legislatures for expository legislation—argued that statutes had been construed contrary to legislatures' intentions, not that there had been a failure to arrive at objectively correct or "ordinary" definitions of specific words. Ordinary people cared about legislative intent, and so the "ordinary meaning" of statutes involved more than statutory text.

Part III also tracks a macrolevel historical transformation in expository legislation to show how the stability of statutory text, and the textuality of the concepts of "amending" and "expounding," were historically contingent. Whereas expository statutes before the 1870s rarely changed the texts of old statutes being interpreted, Part III draws on original datasets of thousands of expository enactments to document this transformation, showing how these enactments increasingly modified statutory text. As traditional expository legislation declined, legislatures in the early twentieth century reincarnated expository legislation but increasingly used it to modify the texts of old statutes, making these expository laws nearly indistinguishable from what we now consider to be "amendments."[40] As expository legislation increasingly became based on changing statutory text while announcing that these changes were merely "declaratory" or "clarifying," it imperiled a central assumption of textualism: that legislature-enacted changes to text necessarily create meaningful changes in law. Contrary to that tenet of textualism, expository legislation showed that it was possible for a legislature to enact changes to statutory text without creating meaningful changes in law.

These three frameworks—and the critically externalist paradigm that grounds them—offer a new historical backbone for a more realistic and robust social and political theory of statutory interpretation. It allows us to ask: Who is statutory interpretation for? Who can legitimately do statutory interpretation? What are the democratic possibilities—and limits—of lay participation in this seemingly niche, technical endeavor? Is statutory interpretation merely a distracting off-ramp for political energies that could be expended elsewhere? Is societal change via statutory interpretation illusory? Most importantly, what is the relationship between statutory interpretation and power? As this Article demonstrates, questions such as these were ever-present for laypeople. And the

39. *See infra* Part III. On the difficulty of finding statutory text and meaning in the present-day U.S. Code, see Jesse M. Cross, *The Fair Notice Fiction*, 75 Ala. L. Rev. 487, 490 (2023). Indeed, this Article shows how expository legislation enabled a particular instantiation of the instability of statutory text that Jesse M. Cross has documented, and it suggests that laypeople recognized this instability. *See* Jesse M. Cross, *Where Is Statutory Law?*, 108 Cornell L. Rev. 1041, 1044-45 (2023).

40. On present-day "clarifying" legislation, see McDonell, *supra* note 24, at 803.

Article's recovery of those lost questions and histories invites us to think more broadly, and more imaginatively, about what statutory interpretation is and can be to the American public.

I. PARTICIPATORY STATUTORY INTERPRETATION

Participatory statutory interpretation is the direct involvement of laypeople in the interpretation of statutes both within and beyond courts. If statutory interpretation has traditionally been seen as an activity done by lawyers and judges in courts, a participatory-statutory-interpretation framework expands the view to include nontraditional actors and contexts. Such a view allows us to theorize and debate whether and how the activity of statutory interpretation should be made more inclusive of nontraditional actors and contexts, and eventually to theorize and debate optimal strategies for any nontraditional actors wishing to participate in statutory interpretation.

As this Part documents, participatory statutory interpretation exists in relation to the government institutions that create and foreclose avenues of lay engagement with statutes. The nature of this participation depends on what it means to do statutory interpretation with, beyond, against, and in the shadows of a given arrangement of state power. Because of this, and because—as this Part shows—these arrangements of state power are historically contingent, the possibilities and forms of participatory statutory interpretation vary, and rightfully so, across time. Participatory statutory interpretation *today* looks and should look different from what it looked like in the past.

Yet we currently lack any sense of what participatory statutory interpretation could—and did—look like. Scholars have generated an important body of scholarship about how lay participation in governance can rebalance power and facilitate democratic values.[41] Some have thoughtfully contended that administrative agencies today are best positioned to be the focal points of lay engage-

41. This body of scholarship is incredibly vast. For some examples, see K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 685 (2020), which advocates "power-shifting institutional designs arising from the bottom up and at the local level" that facilitate participation; Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 256 (2019), which advocates a model of participation in which "members of the public are allowed to voice their support or opposition through procedural channels other than elections, juries, or community justice fora" for criminal justice; and Bernstein & Staszewski, *supra* note 23, at 1774-77, which criticizes "authoritarian populism" for undermining more participatory visions of democracy.

ment.[42] The following three Sections add to this literature by identifying how statutory interpretation specifically can be an important site of participation.

Historically, as this Part shows, expository legislation enabled a system of participatory statutory interpretation by allowing laypeople to ask their legislatures for particular interpretations of statutes. This method of participation was appealing—especially to unenfranchised and poorer people—because it was an accessible alternative to costly, delay-prone litigation. Although legislatures could sometimes be inaccessible without the help of lobbyists, legislatures frequently considered petitions from laypeople throughout much of the nineteenth century.[43] In turn, laypeople resorted to expository legislation as a democratic tool to check administrative interpretations of statutes. Even the mere option of this form of participation could allow implementers of the law to calibrate how much discretion to exercise over statutory interpretation. This system wasn't perfect, as corporations could wield their outsized influence in legislatures to exploit the form of expository legislation. It also wasn't permanent, as traditional expository legislation eventually declined in the nineteenth century, as described in Part III. Nevertheless, for more than a century, this model of participatory statutory interpretation thrived because of expository legislation's democratic promise. The next three Sections unearth this lost vision.

A. Petitioning for Interpretation

All kinds of issues could be resolved through participatory statutory interpretation. That much was clear when a great schism over the tiniest of trifles ripped through the Reformed Protestant Dutch Church of Albany, New York, in 1798.[44] Did the church's charter, granted by New York in a 1720 statute, allow for more than one minister to have a seat in the consistory, the church's administrative body?[45] The church's growing numbers made it appealing to have multiple ministers in the consistory, but the congregants and the clergymen disagreed on what the law allowed.[46] They could, however, unanimously agree on one thing: the legislature should pass an "explanatory law" to settle everyone's confusion.[47] The ministers, elders, and deacons of the church sent a

42. *See, e.g.*, Bernstein & Staszewski, *supra* note 23, at 1788.

43. *See* Daniel Carpenter, Democracy by Petition: Popular Politics in Transformation, 1790-1870, at 36 (2021).

44. *Legislature of New York. House of Assembly*, Alb. Gazette, Jan. 29, 1798, at 3, 3.

45. *Id.*

46. *Id.*

47. *Id.*

petition to the New York legislature, where a committee concluded that the legislature ought to "explain the doubts on the subject in such way as shall be most agreeable to the spirit and meaning of the charter."[48] Just a few weeks later, New York enacted a law "for removing the said doubts," declaring that only one minister could be in the consistory at a time.[49]

Like these church members, early Americans directed their confusion over the interpretation of legislative enactments to external umpires who could settle their disagreements. But instead of turning to courts, they drafted petitions and similar documents called "memorials" and sent them to legislative bodies, urging representatives to pass new expository laws.[50] Through the petition process, people like them could participate in lawmaking by presenting grievances and suggestions for new laws even if they couldn't vote.[51] And the availability of expository legislation meant that the petition process could make statutory interpretation itself a *participatory* endeavor. The petitioners for expository statutes came from varied walks of life: they included public-school comptrollers from Philadelphia,[52] fish-oil dealers from New York City,[53] and trustees of the village of Cleveland, Ohio.[54] These petitions for expository legislation could even draw hundreds of supporters. One memorial to the U.S. Senate in 1840, for example, drew the support of 627 people—Philadelphians and manufacturers of umbrellas and parasols—after they disagreed with how a tariff act had been interpreted.[55] Companies and other organized bodies also petitioned for expository legislation. The city council of Charleston, South Carolina, for instance, drafted a memorial to the state legislature in 1791 "to re-

48. *Id.*

49. Act of Feb. 2, 1798, ch. 7, 1798 N.Y. Laws 147, 147.

50. *See* CARPENTER, *supra* note 43, at 30, 502 n.7 (2021) (noting that memorials were originally distinct from petitions in that they conveyed "an institution's official statement of position before a legislature," but explaining that the "meaning and usage" of memorials and petitions "had been converging for some time" by the early nineteenth century and that "late eighteenth-century legislatures regarded 'petition' and 'memorial' as functional equivalents even before the American Revolution").

51. *See generally* McKinley, *supra* note 34 (providing a history of a process by which individuals and minorities participated in lawmaking through petitioning); CARPENTER, *supra* note 43 (tracing the expansion of petitioning in American politics).

52. *Pennsylvania Legislature*, FRANKLIN GAZETTE (Phila.), Dec. 21, 1819, at 2, 2.

53. *Legislature of New York*, N.Y. DAILY ADVERTISER, Jan. 11, 1819, at 2, 2.

54. *Ohio Legislature*, OHIO ST. J. & COLUMBUS GAZETTE, Dec. 11, 1835, at 3, 3.

55. CONG. GLOBE, 26th Cong., 1st Sess. 198 (1840).

quest your honorable house to pass an explanatory law defining the powers of the city council and jurisdiction of the court of wardens."[56]

As early Americans' calls for expository legislation reached the halls of legislatures, they reflected a popular understanding of *shared* institutional capacities for statutory interpretation. Maggie Blackhawk has argued that the petition process blended "legislative and adjudicative functions" and therefore "defied modern notions of separation of powers."[57] The same was true for petitions to resolve statutory-interpretation questions. In the eyes of laypeople, the notion of separation of powers was guided by practical concerns over the circumstances of everyday life, not by abstract, formalistic ideas about strict divisions between branches of government.

Laypeople had many practical concerns. Part of the early growth of participatory statutory interpretation can be attributed to the sorry state of legislation in the British North American colonies. Colonial statutes were sometimes unpublished, riddled with errors, and challenging for laypeople to understand.[58] In some colonies, it was not just statutes that had accessibility issues but also legislative proceedings, which were rarely published.[59] Reflecting this inaccessibility, petitioners sometimes asked for laws that were already in force.[60] Participation through expository legislation helped to close the gap between lawmakers and laypeople. It allowed lawmakers to communicate their intentions to individual petitioners who might not otherwise be able to understand the meaning of past legislation.

Laypeople also participated in statutory interpretation through expository legislation because it allowed them to avoid litigation and to save time and money. Litigation was slow and expensive. By contrast, laypeople could easily send petitions and memorials to their legislatures, so laypeople often preferred to channel their statutory-interpretation disputes to legislatures instead of courts. During an 1813 meeting of mechanics and manufacturers in New York City, for instance, attendees resolved to draft a memorial asking for an expository law in order to "obviate the grievance of litigation" for a dispute over the

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56. *Proceedings of the House of Representatives at Columbia, Thursday, January 13, 1791*, City Gazette or Daily Advertiser (Charleston), Jan. 20, 1791, at 2, 3.

57. McKinley, *supra* note 34, at 1563, 1569.

58. Farah Peterson, Statutory Interpretation and Judicial Authority, 1776-1860, at 34-35 (Sept. 2015) (Ph.D. dissertation, Princeton University) (ProQuest).

59. Richard R. Beeman, The Varieties of Political Experience in Eighteenth-Century America 56 (2004).

60. *See* Peterson, *supra* note 58, at 34.

interpretation of a tax law.[61] In another instance, instead of bringing a lawsuit in a dispute over how to interpret a seven-year-old statute, residents in Fryeburg, Maine, petitioned the state legislature in 1828 for an expository law simply to "avoid the needless expense and delay of litigation, and to obtain our *rights*."[62] Legislative statutory interpretation saved people time and money, but, more than that—as the next Section explains—it gave people a way to obtain remedies for harms when it didn't look like any remedies would be obtainable.

B. Making Interpretation Democratic

The tangible benefits and relative accessibility of expository legislation made it especially democratic. For one thing, expository legislation encouraged laypeople to engage directly in the legislative process. Once people petitioned for expository statutes, majoritarian legislatures had to approve of those expository statutes. And so, legislatures promised to be an antidote to courts, which were expensive to engage with, difficult to reach, slow to opine, and—especially before the rise of judicial elections—countermajoritarian. Meanwhile, participation through expository legislation gave people recourse against administrators and field officers who had misinterpreted statutes. In an age of limited judicial remedies for abuses of administrative discretion, this function meant that participation through expository legislation was a way to keep the administrative state democratically accountable.

1. Accessible Alternatives to Judicial Remedies

Participatory statutory interpretation through expository legislation was especially important as an alternative to judicial remedies. People could petition for expository statutes to override court interpretations, allowing legislatures to become alternatives to courts as sites of statutory interpretation. Legislators widely accepted this role for themselves. For example, one lawmaker argued in 1840 that "if the existing tariff laws have received such judicial constructions as to deprive the Treasury of the pecuniary benefit which it was designed they should afford, why not correct, by an immediate declaratory act, the evil?"[63] In fact, he claimed, it was lawmakers' "bounden duty" to pass legislation "correct-

61. N.Y. EVENING POST, Dec. 31, 1813, at 3, 3.

62. Andrew McMillan et al., Petition (Oct. 7, 1828), E. ARGUS (Portland, Me.), Nov. 25, 1828, at 4, 4.

63. CONG. GLOBE, 26th Cong., 1st Sess. app. 326 (1840) (statement of Sen. Hubbard).

ing the judicial constructions."[64] The scope of Congress's power to override courts extended to the U.S. Supreme Court. Describing an appeal to the Court on a question involving duties, the Director of the Mint in 1874 insisted that, should the Court affirm the lower court's decision, it was "probable" that Congress would "pass an explanatory law or revise and correct the undervaluations."[65]

Expository statutes allowed people to make claims about how statutes should be interpreted beyond the circumstances of a given case. This meant that, although laypeople could already "participate" (in one sense) in statutory interpretation through litigation, expository legislation enabled a different type of participation rooted in *collective* power building.[66] It liberated laypeople from the need to reduce their statutory-interpretation claims to individualized narratives about harm, or to narrow their claims to fit particular causes of action, or to translate their narratives into technical language that was legible to courts. If litigation made statutory interpretation more individualized, expository legislation could make it more generalized.

If courts lacked the resources to hear endless statutory-interpretation claims by individuals, expository legislation allowed those claims to be resolved collectively. Describing an amendment to a charter as "simply a short explanatory act," one commentator argued in 1875, for example, that such an act would "prevent numerous interminable law suits."[67] The value of expository legislation increased as the number of would-be litigants increased. In response to a test case regarding Civil War veterans trying to claim land under an 1872 homestead law, one writer explained that the "large number of persons affected by this decision renders it almost certain that the matter will not be permitted to rest here and Congress will be asked to pass an explanatory bill as to the real meaning of the law."[68]

The extrajudicial nature of expository statutes also meant that laypeople could use these statutes to preempt endless litigation and engage in a different character of participatory statutory interpretation than litigation allowed. People who asked for expository laws did so in part to "avoid doubt and litigation"

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64. *Id.*

65. Sec'y of the Treasury, Annual Report of the Secretary of the Treasury on the State of the Finances for the Year 1874, H.R. Exec. Doc. No. 43-2, at 195 (1874).

66. I thank Tara Grove, Maggie Lemos, and Deb Widiss for pushing me to consider the participatory nature of litigation and how it differs from participation via expository legislation.

67. *A Card from the Washington Market Company*, Nat'l Republican (D.C.), Feb. 13, 1875, at 4, 4.

68. *Washington*, Salt Lake Wkly. Trib., Apr. 19, 1879, at 2, 2.

that involved "unnecessary conflicts with courts and juries."[69] For instance, in advocating for a declaratory act about compensation for surveyors, Senator Stephen Douglas argued that without such a law, Congress would be forcing surveyors to "go into the courts" and "be branded as defaulters" just to get "that which is clearly their right under the law."[70] Laypeople could avoid this adversarial form of participation by instead asking for expository statutes. Whereas litigation usually required people first to suffer or demonstrate harm, expository legislation didn't. Litigation was also slow. One newspaper complained in 1842: "Here . . . is another illustration of the 'glorious uncertainty of the law,' through which our merchants must darkly grope their way, until the session of the Supreme Court in February next, unless Congress, in the meanwhile, should pass a declaratory act."[71]

Sometimes, expository laws were the only remedies that potential litigants could get. Describing a difference of opinion between courts on a statutory-interpretation question, one judge explained that as "the act makes no provision for bringing questions arising under it before the Supreme Court for decision, I think it would be well to settle this question by an explanatory act."[72] In other words, expository legislation could allow people who had been harmed to sidestep procedural hurdles to judicial remedies.

This form of participation in statutory interpretation could be particularly important for Black people, whose legal rights were constantly called into question and who often lacked the means to pursue litigation. That became clear when Congress debated a bill incorporating a railroad company in Washington, D.C., in 1864 and considered adding a provision proposed by Senator Charles Sumner, who was one of the fiercest advocates in Congress for Black rights at the time. The provision said, "[T]here shall be no regulation excluding any person from any car on account of color."[73] Sumner had introduced the provision, at least according to critic Senator Reverdy Johnson, because he had thought it was "necessary to guard against the mischief which at one time he thought under the original charter might possibly be practiced as against persons of a certain description."[74] But if Johnson had his way, Congress would

69. CONG. GLOBE, 27th Cong., 2d Sess. 669 (1842) (statement of Sen. Woodbury).

70. CONG. GLOBE, 35th Cong., 1st Sess. 2572 (1858) (statement of Sen. Douglas).

71. *Revenue Laws*, EVENING POST (N.Y.), Aug. 9, 1842, at 2, 2.

72. DANIEL WEBSTER, REPORT FROM THE SECRETARY OF STATE, IN COMPLIANCE WITH A RESOLUTION OF THE SENATE, IN RELATION TO THE OPERATION OF THE BANKRUPT LAW, S. DOC. NO. 27-19, at 64 (1842).

73. CONG. GLOBE, 38th Cong., 1st Sess. 1156 (1864).

74. *Id.* (statement of Sen. Johnson).

decline to enact the provision since it was "unnecessary" and a "special guarantee[] for the black man," instead leaving the issue to the courts.[75] As Johnson explained, "If the black man is improperly excluded from one of these cars . . . he has the right to go to the courts and seek his remedy there."[76]

But to Sumner, clarity provided by the *legislature* was critical for the people whom the provision was designed to protect. According to Sumner, the particular "legal right [at issue] has been called in question. In point of fact [Black people] are excluded from the cars."[77] As to the idea that any statutory ambiguity should be left to the courts to adjudicate, Sumner asked, "[W]hat is that for a poor, humble person, without means and without consideration? The Senator knows something of the law's delay and the law's expense; and I ask him whether it is right to subject this oppressed people to this additional oppression."[78] Acknowledging that Black people might have to go to courts as a last resort, Sumner insisted that a statutory provision clarifying the law would make it harder for companies to exclude Black people in the first place. "There is nothing more common in legislation than, where there is a doubt as to the meaning of a statute or of the common law," Sumner continued, "to provide against any mischief from it by what is well known as a 'declaratory' statute."[79] Quoting an English treatise on statutory interpretation to bolster his claims, Sumner concluded that the Senate had the power to "give an authentic interpretation" in such a "simple" manner.[80]

Even enslaved people could participate in statutory interpretation through expository statutes. Consider the case of a young woman named Maria Diggs. Less than a year before the Emancipation Proclamation declared that all enslaved people in rebel states shall be "forever . . . free,"[81] she was growing impatient.[82] Freedom beckoned in Washington, D.C., where she had lived with her family until their enslaver, Robert C. Brooke, sent her to work with a man in

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75. *Id.*

76. *Id.*

77. *Id.* at 1158 (statement of Sen. Sumner).

78. *Id.*

79. *Id.*

80. *Id.*

81. Emancipation Proclamation, Proclamation No. 17, 12 Stat. 1268, 1268 (Jan. 1, 1863).

82. Robert C. Brooke, Petition (May 26, 1862), *reprinted by* CIV. WAR WASH., https://civilwardc.org/texts/petitions/cww.00422.html [https://perma.cc/3VE6-K4HN]. The exact age of Maria Diggs is uncertain. Her enslaver described her as twenty years old. *See id.* However, Maria described herself in her petition as "about" sixteen years old. *See* Maria Diggs, Petition (May 24, 1862), *reprinted by* CIV. WAR WASH., https://civilwardc.org/texts/petitions/cww.00422.html [https://perma.cc/3VE6-K4HN].

nearby Maryland.[83] Over the years, she had voyaged back home, again and again, to visit her mother and father.[84] One imagines that she yearned for the city. As the nation swirled in fury over the fate of human enslavement, news about the latest cause for celebration soon found its way to Maria: in April of 1862, Congress enacted the Compensated Emancipation Act, ending all slavery in the District of Columbia and allowing enslavers to petition a newly created Emancipation Commission for compensation.[85] Not long afterward, Maria's enslaver petitioned for compensation for her newly free family members, but claimed that the Act had not freed Maria because she had been "held to service or labor" in Maryland, not D.C.[86]

The Act was unclear about whether people like Maria were free or not. The relevant provisions said that "all persons held to service or labor within the District of Columbia by reason of African descent are hereby discharged and freed"[87] and that "no claim [for compensation] shall be allowed for any slave or slaves brought into said District after the passage of this act."[88] But what did it mean to be "held to service or labor within the District of Columbia"? Was that defined by where the enslaved person worked or where the enslaver lived? And on a normal day, Maria could return to D.C. of her own will with the consent of her enslaver, so was she really "brought" into the city after the passage of the Act?

Maria could not have been happy that something as trifling as the ambiguity of a statute might steal her freedom, keeping her confined as if merely a piece of property worth $1,500 to her enslaver.[89] And so she acted. Enslaved people in America had been suing for their freedom for years already,[90] but Maria did not take her issue to the courts, the institution usually seen as the main and final arbiter of statutory interpretation.[91] She instead went to the Emanci-

83. *See* Tamika Y. Nunley, At the Threshold of Liberty: Women, Slavery, & Shifting Identities in Washington, D.C. 172 (2021); Brooke, *supra* note 82.

84. Diggs, *supra* note 82.

85. Act of Apr. 16, 1862, ch. 54, §§ 1-3, 12 Stat. 376, 376-77.

86. Brooke, *supra* note 82.

87. § 1, 12 Stat. at 376.

88. *Id.* § 3, 12 Stat. at 376-77.

89. Brooke, *supra* note 82.

90. *See* Alejandro de la Fuente & Ariela J. Gross, Becoming Free, Becoming Black: Race, Freedom, and Law in Cuba, Virginia, and Louisiana 1-5 (2020).

91. *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1825-27 (2010) (describing state judges' widespread resistance to state legislatures' interpretive rules and guidance); Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Direc-*

pation Commission to "humbly complain[]."[92] In asking that the Commission grant her "papers as shall make her free," she insisted that her enslaver lived in D.C. when the Act was passed and so she "was, (within the meaning of the act of emancipation) held to service or labor within said District."[93] When her attorney presented the petition later that week, the commissioners rejected that argument.[94] Maria did not stop her fight for freedom. Once again, she did not run to the courts. She went to Congress and petitioned for an expository statute.[95]

Whereas Black people leveraged expository legislation as a means of participating in statutory interpretation through Congress, Native Americans used it as a tool for self-governance within their own jurisdictions. In 1859, for example, the Choctaw Nation enacted an expository law explaining that a limitation contained in a prior Choctaw statute "shall not be so construed as to take effect from the passage of the said act, but to commence from the time that the Board [of Commissioners] shall first meet to determine and adjudicate claims."[96] In 1873, the Muscogee (Creek) Nation enacted an expository law declaring that an enactment from months prior "shall not be so construed as to prevent any one from carrying arms of any kind on the public highway, in the wilderness, or

tives Violate Separation of Powers, 56 UCLA L. Rev. 837, 867 (2009) ("[I]nterpreting the law is the quintessential judicial act. . . . Only the judiciary can dispositively interpret laws to resolve legal disputes." (footnote omitted)); Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 Nw. U. L. Rev. 1239, 1276 (2002) (arguing that there are important constitutional and judicial-independence reasons for judges to retain significant authority over statutory interpretation). *But see* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 Tex. L. Rev. 1317, 1317 (2014) ("Once upon a time, law professors and political scientists assumed that the Supreme Court was, as a practical matter, the final word on matters of statutory interpretation. . . . In 1991, that conventional wisdom was shattered . . . .").

92. Diggs, *supra* note 82.

93. *Id.* (emphasis omitted).

94. *A Case Before the Emancipation Commissioners*, Nat'l Republican (D.C.), May 29, 1862, at 1, 1.

95. Cong. Globe, 37th Cong., 2d Sess. 2439 (1862) (statement of Sen. Wilson). The senator who introduced the petition explained that he did "not know what disposition to make of it" but that he "supposed, when we passed the act [in question], a slave owned in the District, and, by the master's consent, hired out of it, would be free." *Id.* He then moved that the petition lie on the table, which was agreed to. *Id.*

96. Act of Oct. 25, 1859, *in* Constitution and Laws of the Choctaw Nation, Together with the Treaties of 1855, 1865 and 1866, at 226, 226 (Joseph P. Folsom & Chahta Tamaha eds., New York City, Wm. P. Lyon & Son 1869).

about his own premises."[97] In 1876, the Chickasaw Nation enacted an expository law declaring that a prior statute concerning prisoners "shall not be so construed as to apply to the women of this Nation."[98] Tribal governments such as these were able to use the form of legislative statutory interpretation to facilitate the administration of their own statutes even as they endured the violence of federal and state laws.

Meanwhile, the form of expository legislation also gave Native Americans a way to fight for treaty interpretations without turning to U.S. courts. As one memorial by Cherokee Indians in North Carolina explained in 1846, the Cherokees had understood a treaty with the federal government as entitling them to certain money, "but the executive government ha[s] now reversed that decision upon the meaning of the treaty, and consequently your petitioners are not paid."[99] What they wanted was an interpretation from Congress: "[Y]our petitioners do humbly submit, that if they are entitled to be paid by reason of the true interpretation of the said treaty, it is necessary to procure a declaratory act, or resolution, to reverse the decision referred to."[100] The legislative power to interpret *treaties* no doubt stood on different ground than the legislative power to interpret *statutes*.[101] Nonetheless, the Cherokee petitioners had leveraged the form of expository legislation, extending it from the context of statutory interpretation to the context of treaty interpretation and leveraging that new vehicle to engage in legal interpretation.

Expository legislation could make statutory interpretation more democratic by channeling interpretation through legislatures. It could give people—including unenfranchised and historically marginalized people—a faster, cheaper, and more easily obtainable remedy when disputes over interpretation arose. It could even check the administrative state.

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97. Act of Oct. 1873, *in* Constitution and Laws of the Muskogee Nation 135, 135 (St. Louis, Levison & Blythe Stationery Co. 1880).

98. Act of Sept. 29, 1876, § 1, *in* Constitution, Treaties and Laws of the Chickasaw Nation 146, 146 (Atoka, I.T., Indian Citizen Print 1890).

99. Memorial of the Cherokee Indians Residing in North Carolina, Praying the Payment of Their Claims, Agreeably to the 8th and 12th Articles of the Treaty of 1835, S. Doc. No. 29-408, at 1 (1846).

100. *Id.* at 2.

101. *See* Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 Yale L.J. 1762, 1804-22 (2009).

2. *Democratically Accountable Administrative Statutory Interpretation*

Judicial remedies were especially limited when people wanted to challenge the actions of federal administrative officials and executive-branch department heads tasked with implementing the law. A litigant could seek common-law relief by suing officials in their individual capacities, but common-law actions were less useful for certain areas, such as veterans' pensions;[102] litigants could seek writs of mandamus and injunctions, but courts were particularly hesitant to grant these.[103] The result, as one legal scholar has described the period, was that "[i]ndividual protection from erroneous or abusive administrative decision making was largely a function of internal systems of administrative adjudication and appeal."[104]

Congress stepped in where courts could not, developing a robust process through which individuals could petition for relief,[105] including for expository legislation. For instance, one memorial from New York City ship owners and merchants in 1845 asked for an expository law, reportedly acknowledging that the Secretary of the Treasury could "review[] his decision on this subject" of refunding duties but insisting that if he did not, "it will be for Congress . . . to enact such explanatory law as it may deem proper."[106] When people's rights to sue government officials in the first place was unclear, people could ask Congress for a declaratory act to secure those rights.[107] As legislatures passed expository legislation in response to interpretive disputes within administrative bodies, they strengthened their supervision over administrative statutory interpretation. They made the administrative state more democratically accountable.

The creation of the U.S. Court of Claims in 1855 helped "siphon" off Congress's tremendous docket of individual petitions and adjudications, especially regarding veterans' claims.[108] But desires for expository legislation persisted. After all, the Court of Claims could not hear every kind of case, and the process could be tedious. In response to a lawmaker's question in 1878 about why an

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102. Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 77 (2012).

103. *Id.* at 210.

104. *Id.* at 216.

105. *See* McKinley, *supra* note 34, at 1545-48.

106. S. Doc. No. 28-151, at 4 (1845).

107. A.A. Low & Bros. et al., *Memorial of New York Merchants*, Evening Post (N.Y.), Feb. 19, 1867, at 3, 3.

108. *See* McKinley, *supra* note 34, at 1584-86.

injured party should get an expository law when they could get a remedy in court, Senator Charles Jones quickly shot back.[109] Jones asked, "What has the laboring-man to do? How can he go into the Court of Claims and settle controversies about the price of his labor? The Senator knows too well the difficulties that attend a litigant . . . [and] how far he is from justice when he goes into court."[110]

Not only was the Court of Claims process time-consuming and sometimes inaccessible, but the question whether the Court of Claims could offer *final* judgments was also still being debated.[111] These debates revealed the important role that expository legislation continued to play in allowing people to participate in the growing administrative state. As Senator James Harlan insisted during a debate over a bill that would give the court final authority, such authority "cannot, by any possibility, relieve [Congress] of the examination of all" claims that "arise in equity that do not exist in law."[112] As he explained, such claims "arise every day," such as in pension cases, and people may not be able to "make the proof under the law" to receive administrative or judicial remedies.[113] Even in cases where people could get judicial review of administrative statutory interpretations, he argued, "claimants ought to have the right to come to Congress for an explanatory act."[114] And indeed, people expected to be able to go to Congress to appeal Court of Claims decisions. A woman named Bella Lockwood, for example, sought admission to become a practicing attorney in 1874, but while waiting for a decision from the Court of Claims, she planned to petition for an expository statute or resolution if the court ruled against her.[115] People like Lockwood participated in statutory interpretation even as they waited for judges to offer interpretations.

3. New Remedies and the Transformation of Petitioning

Over time, Congress made the alternatives to expository legislation more appealing and less costly. In the late nineteenth century, Congress dramatically expanded the Court of Claims's jurisdiction and transferred greater authority

109. 7 CONG. REC. 4488 (1878) (statement of Sen. Jones).

110. *Id.*

111. *See* McKinley, *supra* note 34, at 1584-85.

112. CONG. GLOBE, 37th Cong., 3d Sess. 420 (1863) (statement of Sen. Harlan).

113. *Id.*

114. *Id.*

115. *Washington: A Persistent Female Attorney*, DAILY PATRIOT (Harrisburg, Pa.), Apr. 8, 1874, at 1, 1.

to it.[116] Whereas war veterans had successfully petitioned Congress for expository legislation,[117] "the petition process broke down with respect to pensions" as the number of pension petitions soared.[118] Merchants and railroad companies had been major requesters of expository legislation, especially when it came to taxes and tariffs, but the creation of the Interstate Commerce Commission in 1887 gave people a new body to appeal to for statutory-interpretation questions.[119] As Maggie Blackhawk has shown, the process of petitioning was shifting to processes of bringing claims to new agencies, boards, and commissions such as the Interstate Commerce Commission and the Bureau of Pensions.[120]

The federal judiciary was transforming, too. Throughout much of the nineteenth century, Americans didn't have many ways to get judicial review if administrative officials misinterpreted statutes.[121] But in 1875, Congress enacted a statute granting federal courts jurisdiction over all cases involving questions of federal law in disputes over amounts greater than $500.[122] The power of federal courts to provide equitable remedies (namely injunctions) in response to administrative actions expanded as a result.[123] In the early twentieth century, this model of judicial review transformed yet again into a new form of appellate review.[124] Throughout this time, courts increasingly relied on injunctions to respond to administrative actions.[125]

The transformations of the Court of Claims and the federal judiciary may have contributed to a decline in participatory statutory interpretation, but they alone could not make participatory statutory interpretation obsolete. After all, if people didn't like the interpretative decisions of agencies, boards, and commissions that had taken on the Court of Claims's workload, then those people could have still asked Congress for expository legislation. And the Court of

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116. *See* McKinley, *supra* note 34, at 1585-86.

117. *See* Zhang, *supra* note 1, at 985.

118. *See* McKinley, *supra* note 34, at 1592-94.

119. *See id.* at 1600 (describing the creation of the Interstate Commerce Commission).

120. *See id.* at 1593, 1600.

121. *See* discussion *supra* Section I.B.2.

122. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

123. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 121-30 (1998); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 949 (2011).

124. *See* Merrill, *supra* note 123, at 953.

125. James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 Stan. L. Rev. 1269, 1327-33 (2020).

Claims itself, according to some, was still clogged with cases. As one Senate report in support of an expository resolution claimed in 1896, the court was a "tribunal already crowded with French spoilation claims, Indian depredation claims, Bowman Act claims, Tucker Act claims, letter-carrier and other eight-hour claims, Congressional claims of many years standing, and thousands of private claims of all varieties."[126] Instead of forcing parties through a process "so promising in additional and aggravating delay," the report explained, Congress could easily bypass the problem by passing an expository resolution.[127]

Meanwhile, the expansion of federal-court jurisdiction didn't necessarily make litigation any less slow or expensive—two of the main reasons why people resorted to expository legislation. In fact, people continued to point out that going to courts was so costly that it would be better to ask for relief from Congress. For instance, in response to a question about why a person suffering from the U.S. Post Office Department's misinterpretation of a law couldn't just go to a court, one lawmaker explained in 1894, "Well, they might go into the court; and they can also come to the Congress of the United States!"[128] His remark was so popular that his colleagues applauded as he finished saying it.[129] Another lawmaker chimed in: those would-be litigants, by going to Congress, "have chosen a more expeditious way."[130]

If these transformations affected how people participated in statutory interpretation, they must have done so in subtler ways. Perhaps the transformation of the administrative state in the late nineteenth century simply changed people's *expectations* of what kinds of relief they could get. Perhaps people began to believe that the decisions of agencies, boards, and commissions were final, or perhaps the costs of getting expository legislation became too high to be justified.

B. Corrupting Statutory Interpretation

Although laypeople could participate in statutory interpretation through expository legislation, so too could those who had the resources and know-how to influence legislatures. Corporations—not just laypeople—were frequent requestors of legislative statutory interpretation. This is partly because, for much of the nineteenth century, legislatures had not yet fully embraced the practice

126. S. Doc. No. 55-133, at 8 (1897).

127. *Id.*

128. 26 Cong. Rec. 3511 (1894) (statement of Rep. Terry).

129. *Id.*

130. *Id.* (statement of Rep. Hainer).

of passing "general" legislation that applied to the overall population. They instead passed countless "special" laws that applied only to specific people and entities.[131] Many of these "special" statutes were charters that created specific corporations and granted these new corporations special privileges.[132] Because the statutes that established specific corporations were so individualized, corporations had an even greater reason to pay attention to how their incorporation statutes would be interpreted.

And so, corporations took advantage of legislative statutory interpretation as a way to challenge administrative statutory interpretation. For instance, in 1842, the New Jersey Rail Road and Transportation Company sent a memorial to the New Jersey legislature because "a difference of opinion exists, in reference to the true legal construction" of the statute that had made that company a corporation.[133] The company wanted clarity on how it had to pay its taxes and duties since the "Officers of the State have not only differed in opinion from those of this Company, but in some respects from each other."[134] The company had a preference for which governmental actor should be the one to explain the "true" construction of the statute: "Your memorialists have always maintained that such differences could best be adjusted by Legislative action, and they appeal rather [sic] to the sound equity and enlightened discretion of the State."[135] The company didn't want a "legal decision," it explained, but instead was petitioning for the "passage of an explanatory act or resolution" that would set into law a "fair, liberal, and equitable" construction.[136]

Why did corporations participate in statutory interpretation through legislatures? Why didn't they want a "legal decision?" A major reason is that they could influence lawmakers more easily than they could influence courts. Lobbyists had long been influencing state legislatures, literally wining and dining lawmakers.[137] Now they were giving lawmakers passes to ride on trains for

131. *See generally* Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 Am. J. Legal Hist. 271 (2004) (considering the "overwhelming volume" of special legislation and relative lack of general legislation in the nineteenth century).

132. *Id.* at 281-82.

133. John S. Darcy & John P. Jackson, *Memorial: Office of the New Jersey Rail Road and Transportation Company*, Newark Daily Advertiser, Jan. 15, 1842, at 4, 4.

134. *Id.*

135. *Id.* The word "rather" in the memorial's language was likely a printing error by the newspaper and was likely intended to have been printed as the word "matter."

136. *Id.*

137. Douglas E. Bowers, *From Logrolling to Corruption: The Development of Lobbying in Pennsylvania, 1815-1861*, 3 J. Early Republic 439, 456 (1983).

free.[138] Meanwhile, lawmakers were "logrolling"—agreeing to vote on their fellow lawmakers' bills in exchange for their votes.[139] The influence of corporate interests had significant effects on the process of statutory drafting, too. As corporate interests contributed even further to the ballooning of special legislation, bills sailed through legislatures without lawmakers knowing what those bills said, leading to poorly written statutes.[140] Lobbyists and company attorneys also drafted legislation themselves. In an 1884 speech to the American Bar Association on "Defective and Corrupt Legislation: The Cause and the Remedy,"[141] one attorney presented a clear picture of the situation. Lobbyists were so influential that some bills weren't prepared by legislators, who as a result were "frequently ignorant of the contents."[142] Instead, the drafters were "lawyers who are privately retained for the special interests behind the bill" and who were "little mindful of the consequences . . . of such a bill on the general body of the law."[143] Bills were "frequently not printed" but instead rushed through by overloaded committees; lawyers knew that the idea of legislative intent was something of a fiction since bills were "smuggled through without debate."[144]

Companies were wielding influence on not just regular legislation, but also expository legislation. Hoping to override unfavorable court judgments or to influence pending court cases, they turned to their legislatures to seek expository legislation that interpreted the statutes in question. The influence of lobbying (whether real or perceived) was so great that after one state court in 1874 rejected a retroactive expository act as an unconstitutional legislative exercise of judicial power, a local newspaper pontificated about whether corruption had led to that statute. The law in question was "the famous insurance companies' bill, by which it was sought to evade the payment of a capital tax," but its origins were "slightly obscure."[145] There had been rumors that insurance employees had spent days lobbying lawmakers, and some people even "openly charged the insurance companies with having bribed members" (although the newspa-

138. Peverill Squire, The Evolution of American Legislatures: Colonies, Territories, and States, 1619-2009, at 239-41 (2012).

139. Ireland, *supra* note 131, at 273-74.

140. *Id.* at 272-73.

141. Simon Sterne, Defective and Corrupt Legislation: The Cause and the Remedy 3 (New York, G.P. Putnam's Sons 1885) ("This paper was originally prepared for the American Bar Association, before which it was read in August, 1884.").

142. *Id.* at 5.

143. *Id.*

144. *See id.* at 6, 8.

145. *That Explanatory Law*, New Orleans Republican, May 6, 1874, at 2, 2.

per called this charge "doubtless a slander").[146] But at the very least, the paper believed that the law had been passed to override the Louisiana Supreme Court's decision in a related case involving an insurance company.[147]

While lobbyists could help push expository bills through legislatures, they also tried to wield their power to defeat expository bills they didn't like. After an expository bill about corporate elections made its way into New Hampshire's legislature in 1881, a majority of the legislature sustained the bill to keep it alive.[148] But corporate lobbyists who "boldly declared" their opposition successfully pushed to delay the bill for a week.[149] After that week, the legislature suddenly rejected the bill by a solid majority, with its opposition "championed by those alone recognized as controlled by the corporations."[150] The "remarkable sudden conversions," one newspaper insisted, only demonstrated the power of lobbies manipulating an "offensive, shameful, and outrageous system of corruptly influencing legislation"—a system where the "representatives of railroads declare[d]" with "apparent confidence" that they knew how legislative votes would shake out.[151] The upshot of defeating an expository bill like this one was that companies would be able to claim that the law was still ambiguous, giving them leeway to do what they wanted.[152]

The corrupting power of corporate interests was so widely criticized that newspapers published parody statutes that invoked the form of expository legislation. One parody statute about state aid to railroads in 1867 was titled, "A bill to botch an act, to amend an act, to define an act, to explain an act, to comprehend an act, to give everybody something and somebody everything, and for other purposes therein mentioned."[153] It abolished the office of the governor and transferred governing power to the railroads; gave railroad boards legislative power, with one house "filled with railroad conductors and the other house with brakesmen"; created salaries "fixed by the railroad interest, at such rate as will keep them subservient"; and vested judicial power in railroad attorneys who could prove their lobbying prowess.[154] Another parody statute published in 1890 mocked how lawmakers took free rides from railroad companies

146. *Id.*

147. *Id.*

148. *Corporation Elections and Influence*, PEOPLE & N.H. PATRIOT, Aug. 18, 1881, at 2, 2.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *State Aid to Railroads*, ALB. EVENING J., Apr. 9, 1867, at 1, 1.

154. *Id.*

to traverse the country for fun.[155] Claiming to be House bill number 10,000, it was titled: "AN ACT, entitled an act, to explain the explanation."[156]

While statutory interpretation via expository legislation wasn't necessarily politically neutral, it wasn't necessarily rigged in favor of corporate interests either. It could also be used to defeat corporate interests. Criticizing how monopolistic railroad companies were making "swindling assaults upon the public lands" by getting government officials to misinterpret land-grant statutes, the *New York Herald* feared in 1871 that Congress would kiss the feet of lobbyists.[157] The monopolists' "agents in the two houses" would "present a bill asking for a confirmation of their grant as construed in the department; and, as such things are often passed on the sly with comparatively few of the members knowing the real object of the bill," the monopolists' bill might actually get passed.[158] But expository legislation could also be the antidote. Congress, the newspaper hoped, would act to "defeat [the monopolists] by the passage of an explanatory act."[159]

One thing was clear: the culture of participatory statutory interpretation had changed by the end of the nineteenth century. As Americans tied corporate interests to the tedium of legislative "explanations" of statutes, the cultural status of expository legislation sank. Laypeople were parodying the tool of expository legislation that had made statutory interpretation so participatory.

Yet this vision of participatory statutory interpretation was no less urgent in a nation whose crises often entailed questions of statutory interpretation, as the next Part will explain. Yes, lobbyists representing wealthy interests could exploit expository legislation—a form that enabled laypeople, including historically marginalized people, to participate in statutory interpretation beyond the courts. But so too could laypeople *collectively* build power through statutory interpretation against moneyed interests. Expository legislation enabled people to imagine their legislatures, rather than courts, as the critical intervenors in the nation's statutory-interpretation crises. As a result, statutory interpretation became sociopolitical.

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155. *H.B. No. 10,000*, CLARION-LEDGER (Jackson, Miss.), Feb. 27, 1890, at 6, 6.

156. *Id.*

157. *The General Land Office*, N.Y. HERALD, Dec. 18, 1871, at 10, 10.

158. *Id.*

159. *Id.*

II. SOCIOPOLITICAL STATUTORY INTERPRETATION

Sociopolitical statutory interpretation is the use of statutory interpretation as an essential tool in broad-scale political conflicts and grassroots political movements. If *participatory* statutory interpretation involves the personal, direct relationship between laypeople and interpretation, then *sociopolitical* statutory interpretation involves the multiplication of participatory statutory interpretation into a shared experience, the injection of statutory interpretation into mass political consciousness, and the deployment of statutory interpretation as popular political rhetoric.

Nineteenth-century politics in America encompassed a wide range of activity—abolitionist protests, union campaigns, suffrage organizing, war. Statutory interpretation took on a sociopolitical character amidst this flurry of activity. In fights over westward expansion and fugitive-slave laws, Americans leveraged statutory interpretation through expository legislation to fight for their substantive policy goals. After the Civil War, major nationwide conflicts over the interpretation of Reconstruction-era statutes led Americans to debate the necessity of expository legislation to resolve those conflicts. Meanwhile, expository legislation facilitated local social movements and became inseparable from the politics of state constitutional transformation.

The lost history of sociopolitical statutory interpretation—as documented in the next three Sections—offers a new descriptive starting point from which to theorize the social possibilities and limits of statutory interpretation. For example, if statutory interpretation has been as intertwined with societal change as the next three Sections suggest, how might laypeople today take advantage of those linkages? How, if at all, should movement lawyers and activists divide the labor of elaborating legal claims at different levels of generality and technicality?[160] Should chants in the streets call to "protect the original legislative intent"? The next three Sections also raise questions about which institutions laypeople should direct their statutory interpretation energies toward. Imagine if, before litigation even began for *Bostock v. Clayton County*, which concerned whether Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation or gender identity,[161] Congress had a serious chance of passing a statute "clarifying" or "explaining" whether Title VII did in fact do so. How might movements on the ground have adapted?

160. *Cf.* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. Pa. L. Rev. 365, 388-93 (2023) (describing the "division of linguistic labor").

161. 590 U.S. 644, 651 (2020).

Meanwhile, the framework of sociopolitical statutory interpretation allows us to ask a new series of questions about the relationship between statutory interpretation and social change more generally. Scholars have begun this work by examining the political valences (or lack thereof) of particular methods or theories of statutory interpretation.[162] But the history of sociopolitical statutory interpretation invites us to consider whether statutory interpretation itself may have a political valence that ranges from radical to small-c conservative based on how it affects the possibility of major transformation to a given statutory regime. Statutory interpretation may divert energy and political capital from proposals for more revolutionary policy changes by reducing the pressure to enact legislation to solve what statutory interpretation cannot. For example, as this Part suggests, efforts to expound Reconstruction laws in the nineteenth century may have diverted political energy away from fully actualizing ideas for more far-reaching changes to Reconstruction.

Thus, this Part poses a question: does statutory interpretation counterintuitively make social change more difficult by merely facilitating "preservation through transformation"?[163] In Reva B. Siegel's formulation, "preservation through transformation" describes how advocacy for legal reform can lead legal elites to "gradually relinquish[] the original rules and justificatory rhetoric of [a] contested regime and find[] new rules and reasons to protect such status privileges as they choose to defend."[164] Whereas one feature of "preservation through transformation," as Siegel conceptualizes it, is the ability to claim that a new regime of law diverges from an old one (even as this new regime, in reality, reproduces the old one in different forms),[165] statutory interpretation as an enterprise inescapably embraces the idiom of preservation. To say what a statutory provision should be construed to mean is to recognize the legitimacy of that provision's surrounding or underlying statutory regime and framework in their current configurations, for the operation of that statutory meaning depends on the existence of the underlying statutory regime and framework in their then-existing forms. And so, even as people exploited expository legislation's self-consciously preservative function by advocating for changes to law under the guise of elaborating what the law had always been, there remained the question whether the transformative potential of this tactic was, at bottom, illusory.

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162. For some examples of this work, see generally sources cited *supra* note 19.

163. *See* Siegel, *supra* note 21, at 2119.

164. *Id.*

165. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997).

While one could opportunistically claim that a statutory provision should be construed to mean whatever is helpful to one's goals, one might wonder whether doing so may in fact stave off questions about the desirability of that provision, which itself might constrain the possibilities of societal transformation in still unknown or unpredictable ways. Although statutory interpretation could offer the prospect of "improv[ing] the material and dignitary circumstances of subordinated groups," it might also tend to "enhance the legal system's capacity to justify regulation that perpetuates inequalities" by legitimizing such regulation through the prospect of future, adequate elaboration and completion—indeed, interpretation.[166] If one can always interpret away unfavorable things in legislation, might that possibility divert energy away from challenging those unfavorable things in the first instance (such as through advocacy to block proposed legislation or to repeal enacted legislation)? Might it rob our political imaginations of transformative, alternative legislation?

The remainder of this Part excavates the history of sociopolitical statutory interpretation that frames these questions. It shows how these questions become cognizable and salient once we pay attention to how statutory interpretation influences the scale, process, and democratic texture of social change. Later, the Conclusion offers one contemporary example—fights over an abortion statute in Wisconsin following the U.S. Supreme Court's overruling of *Roe v. Wade*—that reveals the urgent stakes of paying attention.

A. The National Racial Politics of Statutory Interpretation

If an internalist view of statutory interpretation confines the social role of statutory interpretation to the frame of court disputes, an externalist view shows how statutory interpretation can be foundational to broader societal dynamics. The mid-nineteenth century offers a revelatory case study, as participation in statutory interpretation through expository statutes weighed heavily on some of the United States's most serious fractures.

166. *Id.*

1. *Territorial Conquest, Slavery, and Civil War*

The explosive, genocidal expansion of the United States not only added several new states between 1840 and 1870,[167] but also generated new legal issues that demanded resolution. As the United States captured territory from Mexico during the Mexican-American War, the question whether slavery would be permitted in these territories surged into view as a national political lightning rod.[168] After an 1846 proposal to ban slavery known as the Wilmot Proviso failed in the U.S. Senate,[169] debate over the status of new states continued for years until Senator Henry Clay made a series of proposals that became known as the Compromise of 1850.[170] One of the Compromise's controversial parts would have dramatically increased the power of law-enforcement officials to pursue and capture people who had escaped from slavery—a proposal that eventually became the Fugitive Slave Act of 1850.[171]

While historical accounts of the Compromise of 1850 and Fugitive Slave Act have long focused on describing the sectional politics behind their implementations and explaining their mixed impacts,[172] an externalist account of statutory interpretation sheds new light on the legal issues at the heart of these histories. Indeed, fights over the Compromise of 1850 became inseparable from fights over Congress's power to engage in legislative statutory interpretation. Some of the proposals for compromise purported to declare and settle what the law was, sparking debate over the role of the people's representatives in statutory interpretation. One senator worried, "[I]f Congress declare what is the law, it can no longer be a question to be taken up by the Supreme Court. Why, after such a declaratory act, the question would be settled, call it by what name you please—a Wilmot proviso or a compromise."[173] After one lawmaker proposed

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167. In order of admission, these states are Florida, Texas, Iowa, Wisconsin, California, Minnesota, Oregon, Kansas, West Virginia, Nevada, and Nebraska. THE READER'S COMPANION TO AMERICAN HISTORY 1025 (Eric Foner & John A. Garraty eds., 1991).

168. SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 602-32 (2005).

169. *Id.* at 594-601.

170. *Id.* at 637-45.

171. *Id.* at 645-53.

172. *See, e.g.*, Michael E. Woods, *The Compromise of 1850 and the Search for a Usable Past*, 9 J. CIV. WAR ERA 438, 441-49 (2019) (surveying historical accounts of the Compromise of 1850); Cooper Wingert, *Fugitive Slave Renditions and the Proslavery Crisis of Confidence in Federalism, 1850-1860*, 110 J. AM. HIST. 40, 41-43 (2023) (using data on court cases about the Fugitive Slave Act to explain the law's operation and impact).

173. CONG. GLOBE, 31st Cong., 1st Sess. app. 170 (1850) (statement of Sen. Downs).

an amendment that would have "declared that the Mexican laws prohibiting slavery shall be and remain in force in said territory,"[174] another rose to criticize it based on separation-of-powers principles. He explained that a declaratory law "is a mere expression of opinion, and binding upon nobody," since "what the law is, so far as respects existing rights, is a question for the judiciary."[175] But not all agreed. As one senator explained the next month, legislators "generally regard it to be their duty to pass declaratory statutes to remove doubts that exist, and it was to do this that I voted for the Wilmot proviso."[176]

Within a year after Congress enacted the Fugitive Slave Act in 1850, there were unsettled questions of law that people were trying to resolve through legislative statutory interpretation. As the Democratic Senator Jesse Bright explained when he introduced one bill, there were "conflicting opinions . . . among the legal minds of the country, as to whether the [Fugitive Slave Act of 1793] was repealed by the compromise measures of last session."[177] The proposed bill was "merely declaratory in its nature, enacting that all legal rights existing under the law of 1793 may be prosecuted to final judgment and execution, as though the fugitive slave law of 1850 had not passed."[178] Oliver Hampton Smith, a lawyer and former U.S. representative and senator, had drafted the bill and given it to Senator Bright to introduce.[179] According to Smith, a number of cases involving enslavers had been pending in courts when the Fugitive Slave Act of 1850 was passed, and a declaratory law would "leave no ground for doubt on the subject" of whether Congress intended to "defeat the prosecutions pending."[180]

As the nation headed toward secession and the Civil War, Americans continued to debate the Fugitive Slave Act. To undermine the Act's effects, states passed their own laws that offered procedural protections for enslaved people. Massachusetts led the way with an 1855 law that allowed the state to remove captured enslaved people from federal control.[181] As southern states began to secede, an effort by conservatives to repeal Massachusetts's law (which they

174. CONG. GLOBE, 31st Cong., 1st Sess. 1146 (1850) (statement of Sen. Baldwin).

175. *Id.* at 1148 (statement of Sen. Cass).

176. CONG. GLOBE, 31st Cong., 1st Sess. app. 1009 (1850) (statement of Sen. Cooper).

177. CONG. GLOBE, 31st Cong., 2d Sess. 492 (1851) (statement of Sen. Bright).

178. *Id.*

179. *Id.*

180. *Id.*

181. Norman L. Rosenberg, *Personal Liberty Laws and Sectional Crisis: 1850-1861*, 17 CIV. WAR HIST. 25, 33 (1971).

called unconstitutional) reached a tipping point in January of 1861.[182] Supporting the law, Governor John Andrews in his inaugural address argued that the law was constitutional, interpreting it to prohibit state courts from taking enslaved people from federal control when there was a lawful warrant.[183]

But the meaning of the statute was up for debate—which is why the *Massachusetts Spy* asked, "[W]ill it not be better to redeem existing laws from misrepresentation, rather than to repeal them incontinently, and then supply their place with 'new legislation,' which, in turn, may be misrepresented quite as badly?"[184] Perhaps the same goals could be accomplished "as thoroughly, and much more wholesomely," the *Spy* argued, through a declaratory act that "should make it impossible for anybody to misunderstand or misapply their meaning."[185] The *Spy* had in effect offered an answer to the possible criticism that statutory interpretation merely obstructed societal change. As the *Spy* seemed to suggest, the alternative to legislative statutory interpretation—"new legislation"—might not only reproduce old regimes of law that had been repealed, but also do so in ways that demanded more energy to be spent on interpretation, further hindering the enforcement of the law.

The Massachusetts legislature seemed to agree with the *Spy*, and in March it passed a statute with these expository provisions, requiring that "[n]othing contained in the statutes of the Commonwealth shall be construed to authorize the taking of any person by writ of habeas corpus out of the custody" of a U.S. marshal who had "legal and sufficient process."[186]

Even as the secession and formation of the Confederate States of America and the outbreak of the Civil War split the nation into two governments, Americans continued to turn to legislative statutory interpretation as a tool for resolving their political conflicts. Officials in the Confederacy asked for expository legislation when difficulties arose in administering its laws.[187] In turn, the Confederacy passed its own expository legislation interpreting its statutes.[188]

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182. Patrick T.J. Browne, *"This Most Atrocious Crusade Against Personal Freedom": Anti-Abolitionist Violence in Boston on the Eve of War*, 94 NEW ENG. Q. 47, 59-67 (2021).

183. *Id.* at 67.

184. *Judge Thomas on the Crisis*, MASS. WKLY. SPY, Jan. 16, 1861, at 1, 1.

185. *Id.*

186. Act of Mar. 25, 1861, ch. 91, § 3, 1861 Mass. Acts 398, 399.

187. *Report of Secretary of the Treasury*, RICH. WHIG & PUB. ADVERTISER, May 10, 1864, at 1, 1.

188. *An Act to Explain an Act Entitled "An Act to Amend an Act Entitled an Act to Establish a Patent Office, and to Provide for the Granting and Issue of Patents for New and Useful Discoveries, Inventions, Improvements and Designs, Approved May Twenty-First, Eighteen Hundred and Sixty-One,"* DAILY RICH. EXAM'R, Mar. 19, 1862, at 3, 3.

At the same time, U.S. lawmakers continued to enact expository legislation to settle the meanings of statutes.

A source of particular confusion was the Confiscation Act of 1862—"An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes."[189] Just days after it passed both houses of Congress, President Lincoln threatened to veto it unless modifications were made. Rather than "amend" the bill, lawmakers debated an expository resolution that explained how the Act should be construed. Since the Senate was planning to adjourn the next day, Senator William P. Fessenden explained that the resolution was "the only way we can act under the rules of the Senate with any effect."[190] An expository resolution was a "perfectly legal and constitutional mode of action," and if Congress "pass[ed] a bill hastily, even before it is signed we can pass another bill explanatory of it."[191] President Lincoln seemed to agree and signed both the Confiscation Act and the expository resolution, calling them "substantially one."[192] Not everyone was happy. "It was bad enough," said the *Daily Missouri Republican*, that senators had to "bear the indignity of passing an explanatory act in advance of a veto, to prevent the descent of the Executive thunderbolt upon wild and reckless legislation."[193]

With the close of the Civil War, Republicans seized on statutory interpretation to advance the painful process of repairing the nation. Faced with the challenge of dealing with states that had disobeyed federal law, seceded, lost a civil war, and now hoped to return to the United States, Congress passed a series of laws known as the Reconstruction Acts. The first was a statute passed on March 2, 1867, which split the former Confederacy into five military districts, appointed a military officer to govern each district, and created a process by which states could be readmitted to the United States.[194] President Johnson vetoed it, and Congress overrode his veto.[195] Congress followed up with another

189. Act of July 17, 1862, ch. 195, 12 Stat. 589, 589.

190. CONG. GLOBE, 37th Cong., 2d Sess. 3376 (1862) (statement of Sen. Fessenden).

191. *Id.*

192. S. EXEC. DOC. NO. 37-70, at 1 (1862).

193. *News from Washington*, DAILY MO. REPUBLICAN, July 25, 1862, at 1, 1.

194. Act of Mar. 2, 1867, ch. 153, § 1, 14 Stat. 428, 428; *see also* JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 70-71 (3d ed. 2013) (describing the implementation of the Act).

195. CONG. GLOBE, 39th Cong., 2d Sess. 1729-32 (1867) (providing the veto message); *id.* at 1733 (recounting the House override); *id.* at 1972-76 (recounting the Senate override).

law on March 23, 1867, laying out more details about how the military districts were to be governed.[196]

But these laws still left room for interpretation. One newspaper complained in May of 1867 that the Reconstruction laws were "in many particulars, so ambiguous, and admit of so great a latitude of interpretation, that they would have the effect of five different sets of regulations if the varying judgments, whims, or caprices of the five different commanders were to prevail."[197] And within months, a new idea to solve these problems would emerge: legislative statutory interpretation.

2. *Reconstruction and Executive Statutory Interpretation*

The Reconstruction statutory-interpretation crisis quickly became a national political crisis, turning the top-down interpretation of statutes into a matter of general, grassroots concern. Confronted with ambiguous Reconstruction statutes, President Johnson turned to Attorney General Henry Stanbery for advice, in an episode seen by historians as a fight over executive-branch power and the administration of Reconstruction.[198] This episode, though, was also a national fight in which ordinary Americans used the vehicle of legislative statutory interpretation to express their desires for the political future of the nation.

The crisis blew up in June of 1867, when Stanbery sent President Johnson an opinion that advanced a limited interpretation of the governing military officers' powers and answered questions about voter-registration requirements in the South.[199] The opinion threatened to undermine the Reconstruction Acts

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196. Act of Mar. 23, 1867, ch. 6, §§ 1-8, 15 Stat. 2, 2-4.

197. *Registration of Southern Voters—Attorney General Stanbery's Opinion*, WORLD (N.Y.), May 28, 1867, at 4, 4.

198. *See* PAUL H. BERGERON, ANDREW JOHNSON'S CIVIL WAR AND RECONSTRUCTION 153-55 (2011) (framing the episode in terms of President Johnson's strategic effort to procure an answer to "whether or not [he] had control over the district commanders"); Michael Les Benedict, *The Rout of Radicalism: Republicans and the Elections of 1867*, 18 CIV. WAR HIST. 334, 336 (1972) (framing the episode as part of the history of impeaching Andrew Johnson); JOSEPH G. DAWSON III, ARMY GENERALS AND RECONSTRUCTION: LOUISIANA, 1862-1877, at 55 (1982) (focusing on the impact of this episode on army officials' actions); DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS 175 (2016) ("As much as Andrew Johnson hated the new Reconstruction Act, he could not figure out how to stop it from becoming law. Any more than Johnson could figure out how to stop the Command of the Army Act—or seemingly anything else Congress wanted to do." (emphasis omitted)).

199. BERGERON, *supra* note 198, at 154. Among other things, Attorney General Henry Stanbery's opinion claimed that there was "no authority anywhere in this act for the removal by the

and thus the ability of the federal government to keep the South out of the hands of former Confederates.[200] After Johnson sent the opinion to the five military governors, General Phillip Sheridan—the military governor of the Fifth Military District (Texas and Louisiana)—complained to then-General Ulysses S. Grant that Stanbery's opinion was causing a "defiant opposition to all acts of the military commander."[201]

Stanbery's opinion quickly stoked political flames around the nation. Doing the bidding of "his lord and master Andy," jeered one newspaper, Stanbery had "completely emasculate[d] the law," had usurped the "prerogatives of the highest judicial tribunals," and had made a "miserable attempt to substitute the will of Andrew Johnson for the will of the sovereign people."[202] Stanbery's strict construction of the Reconstruction Acts was, the paper seemed to insist, just politics in the disguise of law. President Johnson had commandeered Stanbery into parroting Johnson's opposition to the efforts of the Radical Republicans in Congress. But this was hardly the only view. The *New York Times* took almost the opposite stance in criticizing Stanbery: he had delivered his interpretation "like a lawyer, and as if none but legal points were involved in its decision."[203] Whatever the case, though, the question remained: what was the solution?

The answer: expository legislation. If President Johnson agreed with Stanbery's opinion, one newspaper pontificated, the country's people would demand an expository law that made the meaning of the Reconstruction Acts so beyond doubt that "neither a sullen desire in the Executive to avoid executing the act, or a proclivity to small quibbles and illogical delusions on the part of the Attorney General" would block Reconstruction.[204] According to another paper, the Attorney General and the President's interpretation was "so widely at variance with the manifest intentions of Congress" that there was a "universal conviction, North and South," that Congress would pass a law "so positive and clear . . . as to admit of neither evasion nor misconstruction."[205]

But to pass an expository law, Congress would have to call a special session in July. Was that really necessary? The answer among Republicans was yes.

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military commander of the proper officers of a State . . . or the appointment of persons in their places." The Reconstruction Acts, 12 Op. Att'y Gen. 182, 189 (1867). It also challenged the "supposed power of the military commander to change or modify the laws in force." *Id.* at 192.

200. *See* BERGERON, *supra* note 198, at 154.

201. S. EXEC. DOC. NO. 40-14, at 236 (1867).

202. *Reconstruction*, CONSTITUTION (Middletown, Conn.), July 3, 1867, at 2, 2.

203. *The President and Reconstruction—The Perils of Interference*, N.Y. TIMES, June 18, 1867, at 4, 4.

204. *Mr. Stanbery's Opinion*, EASTON GAZETTE (Easton, Md.), June 22, 1867, at 2, 2.

205. *The Approaching July Session of Congress*, N.Y. HERALD, June 29, 1867, at 4, 4.

The Republican *Albany Evening Journal* urged other northern papers to ask Congress to convene a special session so that it could pass an expository law, claiming that there "never was a period when the counsel and deliberation" of lawmakers was "more imperatively required."[206] The Republican *New York Tribune* likewise argued that "Congress MUST pass an explanatory act."[207] The Republican *New York Times* hoped that Congress would make the law "so clear and explicit that even Mr. Stanbery, with his legal microscope, can detect no flaw in it."[208]

Objections soon emerged. Some suggested that the form of expository legislation was too radical, others that it was not radical enough. At the heart of the former criticism was a common complaint about expository legislation: that it actually created *new* law while pretending to merely restate and interpret an older law.[209] The framing of the proposed bill as expository, complained the *Daily National Intelligencer*, was just trickery and "subterfuge"—"monstrous enactments" and "puerile evasions"—disguising something more insidious.[210] The provisions proposed were actually new provisions, the paper claimed, but "the effrontery is exhibited in both Houses of pretending that the contemplated legislation is only explanatory of what Congress had already provided."[211]

By contrast, at the heart of the latter criticism—that expository legislation was not radical enough—was the idea that expository legislation gave lawmakers an easy way out of instituting real change. The *National Anti-Slavery Standard* took perhaps the most radically progressive stance along this line of thought. Decrying the "partial and compromising" measures put forth so far by Congress, it insisted: "We want no mere explanatory act which will leave fundamental wrongs to be hereafter reached in a much more laborious way, but a new law of reconstruction, with more ample guarantees."[212] Specifically, it advocated that "Johnson should be deposed from office," that Congress should not "use in any way the rebellious machinery of Johnson's bogus State governments" and instead clear the South of "all such rubbish," that Congress should make Black people's "guarantee of the ballot" extend beyond "the preliminary

206. *A Session of Congress*, ALB. EVENING J., June 18, 1867, at 2, 2.

207. *Radical Difference About a July Session*, CLEV. DAILY PLAIN DEALER, June 22, 1867, at 1, 1 (quoting the position of the *New York Tribune*).

208. *The South and Reconstruction*, N.Y. TIMES, July 8, 1867, at 4, 4.

209. *See* Zhang, *supra* note 1, at 992-93 (providing historical examples of such complaints).

210. *Another Change of Pace*, DAILY NAT'L INTELLIGENCER (D.C.), July 10, 1867, at 2, 2.

211. *Id.*

212. *The "Macadamized Road"—Reconstruction*, NAT'L ANTI-SLAVERY STANDARD (N.Y.), June 29, 1867, at 2, 2.

process," that Congress should enact measures for "confiscation of the large landed estates of those engaged in the rebellion," and that Congress should provide "free homesteads for the former slaves" and make "small farms within easy purchase of all."[213] One can only wonder where such expansive ideas would have led in the absence of expository legislation, and the difficulty of imagining the full extent of these untaken paths illuminates how statutory interpretation may in fact constrain societal change.

Framed this way, the form of expository legislation and its self-conscious interpretive function appear more like conservative tools—excuses for lawmakers to settle for moderate measures instead of pushing for more expansive ones. And indeed, there were rumors that the "conservative wing" of the Republican Party had wanted only an expository law rather than a new Reconstruction act.[214] Thus, if expository legislation had made statutory interpretation increasingly sociopolitical in nature, it also raised deeper questions about *which sociopolitical direction* it would favor. Nevertheless, there was no denying that, faced with the choice between interpretation or nothing at all, the people who needed at least an interpretation in order to secure their interests would choose interpretation. And who could blame them?

As newspapers, legal elites, and politicos sparred over the appropriateness of a legislative-statutory-interpretation solution to the Reconstruction dilemma, laypeople tuned in as well. This could be seen at an abolition convention in Ohio that June, when the Union Army general Robert C. Schenck delivered a rousing speech imploring his listeners to "renew your pledge to give continued support to the wise, firm policy of reconstruction and pacification."[215] As part of that plea, he railed against the President and Attorney General's interpretation of the Reconstruction Acts. According to Schenck, the President had chosen a "strained and absurd interpretation, which shocks the common sense of every honest mind, to construe away and get rid of the obvious meaning and intention of laws, the passage of which he was unable directly to defeat."[216] That was why, Schenck explained to his crowd, Congress needed to "provide by unmistakable, declaratory legislation against this attempt to paralyze the popular will."[217]

People seemed to agree. "Squads are gathered in hotels, public places, and everywhere discussing the probability of a short session and the final settle-

213. *Id.*

214. *Another Change of Pace*, *supra* note 210, at 2.

215. *Abolition Convention!*, CRISIS (Columbus, Ohio), June 26, 1867, at 170, 170.

216. *Id.*

217. *Id.*

ment of the reconstruction difficulty," wrote one newspaper correspondent in July of that year.[218] According to him, in "mingling among these groups we should judge that at least two-thirds agree in the opinion that Congress alone has the right to settle the matter"—that Congress could pass an expository law interpreting the Reconstruction Acts to avert further crisis.[219] Although these groups weren't engaging in statutory interpretation itself through their discussions, the possibility of a statutory-interpretation solution through Congress gave them a vehicle to express their political desires and to build political community. It opened an avenue for them to make claims about what kinds of policies and political representatives their nation deserved. As one discussant reportedly said of Thaddeus Stevens, a Radical Republican leader in the House, "Old Thad won't consent to any weak dish-washy articles in this explanatory act."[220]

And so Congress gathered. After calling a special July session, it passed on July 19 the "Act supplementary to an Act entitled 'An Act to provide for the more efficient Government of the Rebel States.'"[221] The title of the statute wasn't explicitly expository—it didn't claim to explain or be declaratory of another law—but its provisions were expository, and the bill had caused such a national ruckus that everyone knew that it was meant to be expository.[222] President Johnson quickly vetoed it. In his veto message, Johnson affirmed that Congress was allowed to pass an expository law "fix[ing] upon a prior act a construction altogether at variance with its apparent meaning."[223] But the statute made it seem like the original Reconstruction Acts had been intended to make the governing military authority expansive. To Johnson, it was "impossible to conceive any state of society more intolerable than this."[224] Congress, tired of Johnson's resistance, overrode his veto.[225]

The eventual enactment of that expository Reconstruction law thundered around the country. It laid a crisis to rest. It put the Attorney General in his place. "The very elaborate opinion" of the Attorney General, said one California newspaper, "is now no better than waste paper."[226] More importantly, the ex-

218. *Correspondence*, PRESS (Phila.), July 18, 1867, at 2, 2.

219. *Id.*

220. *Id.*

221. Act of July 19, 1867, ch. 30, 15 Stat. 14, 14.

222. *See supra* text accompanying notes 204-220.

223. CONG. GLOBE, 40th Cong., 1st Sess. 729 (1867).

224. *Id.* at 729-30.

225. *See id.* at 732.

226. *Explanatory Reconstruction Law*, WKLY. ALTA CAL. (S.F.), July 20, 1867, at 7, 7.

pository law became a symbol. The paper continued: the "president and his Southern friends ought now to be satisfied that they can do nothing that will be final in arrest of the great work [of] Congress."[227] But if the expository law had become a symbol, it was a divisive one. In a speech the next year, the Connecticut Democratic State Central Committee Chairman made an appeal to conservative Republicans by claiming that what "four years of war, and a million of Southern men in arms, failed to accomplish, Radical legislation has achieved by a single declaratory act."[228] This kind of criticism was a smart strategy, as President Johnson's allies had been excoriating the expository law. Thurlow Weed, one such ally, had even proclaimed in 1867 that the expository law "inaugurates a warfare between the white and black races."[229]

When rhetoric turned into reality, the limits of statutory interpretation became clearer. Like much expository legislation in the United States, the Reconstruction expository law didn't stop all questions. Just days after the law's passage, one newspaper in New Orleans criticized Congress for involving "the people of the Southern States in endless and most annoying litigation," and that the new expository law had itself raised a question "of most serious import"—whether laws passed by rebel states still had any legal effect.[230] Perhaps, the paper contemplated, Congress would have to pass yet another expository law.[231] The next month, the *Daily Missouri Republican* claimed that "the reconstructionists are in a terrible stew" since even the July expository law still left President Johnson with power.[232] Whereas the *Massachusetts Spy*'s comments about fugitive-slave laws in 1861 had once revealed how the tool of statutory interpretation might sometimes be less conservative than the tool of enacting "new legislation,"[233] the aftermath of the fight over the 1867 Reconstruction expository law offered a counterexample. Congress's self-conscious exercise of statutory-interpretation power via the expository law raised more statutory-interpretation questions and, as the *Daily Missouri Republican* claimed, "still leaves the President with some power, and, as a consequence, all [the reconstructionists'] schemes are in a muddle again."[234]

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227. *Id.*

228. *Address of the Democratic State Central Committee*, Norwich Aurora (Norwich, Conn.), Feb. 12, 1868, at 4, 4.

229. *Radical Hari-Kari*, Daily Mo. Republican, July 20, 1867, at 2, 2.

230. *More Complications*, New Orleans Times, July 23, 1867, at 4, 4.

231. *Id.*

232. *A Respectful Suggestion*, Daily Mo. Republican, Aug. 31, 1867, at 2, 2.

233. *See supra* text accompanying notes 184-186.

234. *A Respectful Suggestion*, *supra* note 232, at 2.

These episodes, from the debates over westward expansion and slavery to the implementation of Reconstruction, revealed how people at the very least could leverage statutory interpretation to engage in the enormous sociopolitical issues of their day. As legislative statutory interpretation became intertwined with sociopolitical issues, the form of expository statutes became a flashpoint for broader debates about the scope of abolition and the limits of government power. And just as statutory interpretation became sociopolitical, the politics of statutory interpretation became ambiguous. People drew on statutory interpretation to challenge longstanding practices and institutions; it held the promise of transformation. And yet, to the extent that the alternative to statutory interpretation was the enactment of new, potentially more revolutionary legislation, perhaps the promise of transformation through statutory interpretation was, in the end, just a mirage.

B. Social Movements and Legal Interpretation on the Ground

The mobilization of statutory interpretation as a component of mass politics extended beyond the issues of slavery, Reconstruction, and westward expansion to other types of reform. Indeed, social movements pushing for temperance, labor, and women's rights reforms all leveraged the tool of expository legislation for their own purposes.

Temperance advocates in Maine, for example, gathered together to debate the necessity of passing an "explanatory bill" that would constitute a "strengthening clause to the statute forbidding the sale of intoxicating liquors—so as to include malt liquors in the proscribed drinks."[235] At their meetings, they urged their members to nominate and vote for lawmakers who would support their proposed expository legislation.[236] As some described it, the expository legislation had been "so loudly called for and so clearly demanded by all who have a regard for the moral and pecuniary position of our young men."[237] Some believed that an expository law would be a gateway to broader reform—that if an expository law clearly stated that liquor laws prohibited the sale of malt liquor, "there will be no difficulty in banishing all intoxicating liquors from the State."[238] In doing so, they offered a challenge to the idea that statutory interpretation might divert energy away from broader change. On this view, statu-

235. *Temperance Convention*, CHRISTIAN MIRROR (Portland, Me.), Feb. 16, 1864, at 2, 2.

236. *See Grand Division of Maine*, ME. FARMER, Aug. 6, 1863, at 2, 2.

237. *News of the Week: Our City and State*, ZION'S ADVOC. & E. WATCHMAN (Portland, Me.), Nov. 13, 1863, at 2, 2.

238. *Temperance Convention*, *supra* note 235, at 2.

tory interpretation was not mutually exclusive with new legislation or broader reform but rather was synergistic with it and perhaps even a prerequisite for it.

Yet still others in Maine believed that an expository law would be mostly futile. It was not an ambiguity in the law, they believed, but "an indisposition on the part of Courts to execute" the law.[239] And besides, some believed, even if an expository law named certain liquors as prohibited, "commercial ingenuity will invent new drinks equally intoxicating, under names entirely unknown to the law."[240] To engage in the project of reform through statutory interpretation was to throw oneself into an endless game of whack-a-mole.

Other groups nevertheless saw the potential of statutory interpretation. After labor groups advocated for laws to regulate the length of the workday, Congress in 1868 enacted the "Eight-Hour Law," which set an eight-hour default workday for federal employees. But a ruckus soon arose over the question whether employees' pay had to be cut since the number of hours they worked was now reduced to eight. Labor groups from the Bricklayers' National Union[241] to the Workingmen's Assembly of Washington, D.C.,[242] insisted that Congress pass an expository statute to interpret the Eight-Hour Law. The tensions only grew after the Secretary of War in April of 1869 told naval employees that they could either work ten hours a day for full pay or only eight hours a day with a twenty percent pay cut.[243] The Secretary was willing to let Congress settle the issue through an expository law, but that would have to wait until the next session of Congress since it was adjourning.[244] Rather than wait, President Grant took action, issuing an order that proclaimed that the reduction of working hours shouldn't cause pay cuts.[245] According to one historical account, Grant had been "moved by the storm of protest from the working people,"[246] illustrating how the sociopolitical dimensions of statutory interpretation could influence—if not motivate—internalist forms of executive statutory construction as well.

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239. *Id.*

240. *Id.*

241. *Latest News by Telegraph: Washington*, Mo. Republican, Jan. 15, 1869, at 3, 3.

242. *Workingmen's Petition*, Sun (Balt.), Mar. 2, 1869, at 4, 4.

243. *The Eight-Hour Law*, Cin. Com. Trib., Apr. 5, 1869, at 4, 4.

244. *The Eight-Hour Question Considered in Cabinet Meeting*, Cin. Com. Trib., May 5, 1869, at 1, 1.

245. 2 John R. Commons, David J. Saposs, Helen L. Sumner, E.B. Mittelman, H.E. Hoagland, John B. Andrews & Selig Perlman, History of Labour in the United States 124-25 (1918).

246. *Id.* at 124.

Meanwhile, the availability of legislation that could be used to interpret *statutes* gave some women an innovative idea: use expository legislation to interpret the *Constitution*. After decades of activism for suffrage, feminists seized a novel opportunity in 1871, a year after the United States ratified the Fifteenth Amendment. Leading the charge was Victoria Woodhull, an activist and soon-to-be presidential nominee, who petitioned Congress for a declaratory act confirming that the Fifteenth Amendment secured the right to vote for women.[247] The argument went like this: even though the Fifteenth Amendment prohibited voting discrimination based on "race, color, or previous condition of servitude" but not "sex," the Fourteenth Amendment protected women's right to vote since it prohibited states from abridging the "privileges or immunities of citizens."[248] According to an organization called the Victoria League (formed to support Woodhull),[249] an expository law would set forth "definitely" this interpretation of both the Fourteenth and Fifteenth Amendments.[250] As one newspaper claimed, "The passage of a declaratory act does not seem so impracticable as to amend the Constitution" and would be "far easier of accomplishment."[251]

In the end, Congress rejected the petition. The Judiciary Committee rejected Woodhull's interpretation of the Constitution and also concluded that a "declaratory act" like the one Woodhull pushed for was "not authorized by the constitution nor within the legislative power of congress."[252] Nevertheless, the campaign revealed how the form of expository legislation could spark creative attempts by disenfranchised Americans to participate in legal interpretation as a regular mode of politics and activism. Within a few decades, expository legislation would decline and transform, reconfiguring the relationship between laypeople and legislation. And, as the next Section documents, one of the contributing factors to this decline and transformation was constitutional politics at the state level.

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247. On Victoria Woodhull's life and times, see generally MIRIAM BRODY, VICTORIA WOODHULL: FREE SPIRIT FOR WOMEN'S RIGHTS (2003).

248. U.S. CONST. amend. XV, § 1; *id.* amend. XIV, § 1. For a more elaborate summary of the argument, see *A Constitutional Dilemma*, DAILY MORNING CHRON. (D.C.), Jan. 9, 1871, at 2, 2.

249. *See* LOIS BEACHY UNDERHILL, THE WOMAN WHO RAN FOR PRESIDENT: THE MANY LIVES OF VICTORIA WOODHULL 164 (1995).

250. *The Victoria League*, KALAMAZOO GAZETTE, Aug. 11, 1871, at 2, 2.

251. *Our Philadelphia Letter*, NAT'L STANDARD (N.Y.), Apr. 1, 1871, at 3, 3.

252. *Woman Suffrage*, DAILY ALB. ARGUS, Dec. 13, 1872, at 1, 1.

C. The State Constitutional Politics of Statutory Interpretation

Notwithstanding their use of expository legislation to serve their own interests, Americans in the mid-nineteenth century turned against their state legislatures, riding a wave of antilegislative sentiment amplified by the presidency of Andrew Jackson and exemplified by the occasional abuses of expository statutes. They rallied against corruption.[253] They criticized lobbyists.[254] They argued against "logrolling"—legislators' practice of agreeing to vote for each other's bills.[255]

The upshot was a series of state constitutional conventions in the 1840s and 1850s that significantly limited the powers of legislatures.[256] In turn, the politics of statutory interpretation—via expository legislation—became intertwined with the state constitutional politics of the mid- and late nineteenth century. As the nineteenth century rolled into the twentieth, the sociopolitical role of statutory interpretation began to look different than it did in earlier decades. This Section documents this decline and explains its relationship to the state constitutional politics of the nineteenth century.

1. The Decline of Traditional Expository Legislation

The transformation of expository legislation was slow. As Reconstruction neared its end, the United States saw the golden age of expository legislation creep to a halt. Congress had passed thirty pieces of expository legislation in the 1860s and nineteen in the 1870s, but only eight in the 1880s and six in the 1890s—bringing the volume of expository legislation enacted each decade back to levels unseen since the 1810s and 1820s.[257] Figure 1 tracks this change.

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253. John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. Econ. Hist. 211, 233-39 (2005).

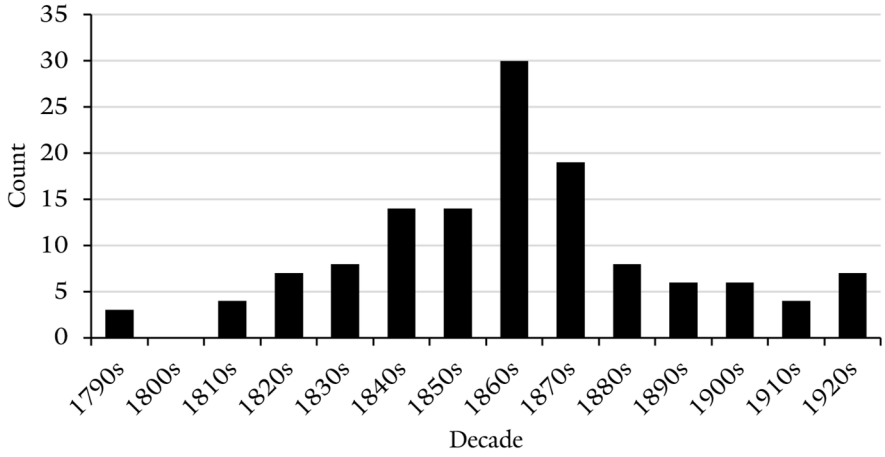
254. Bowers, *supra* note 137, at 471-72.

255. *See* Ireland, *supra* note 131, at 273-76, 274 n.6.

256. *See* Lawrence M. Friedman, A History of American Law 95-96, 331-32 (4th ed. 2019).

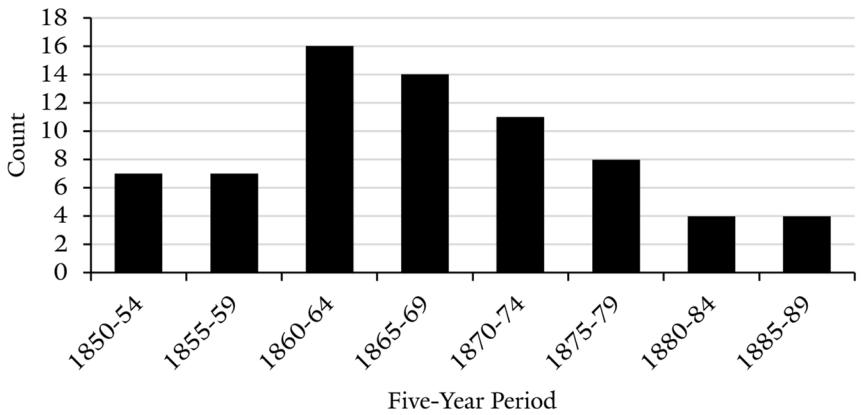
257. These numbers are based on the datasets in Zhang, *supra* note 1, whose Appendix A details my methodology for counting expository enactments.

FIGURE 1. FEDERAL EXPOSITORY ENACTMENTS, PER DECADE (1790S-1920S)[258]



And as shown in Figure 2, a closer look at the period from 1850 through 1889 reveals that the decline was a slow but steady one. It began just as soon as expository legislation peaked, then bottomed out in the early 1880s.

FIGURE 2. FEDERAL EXPOSITORY ENACTMENTS, PER FIVE YEARS (1850-1889)[259]

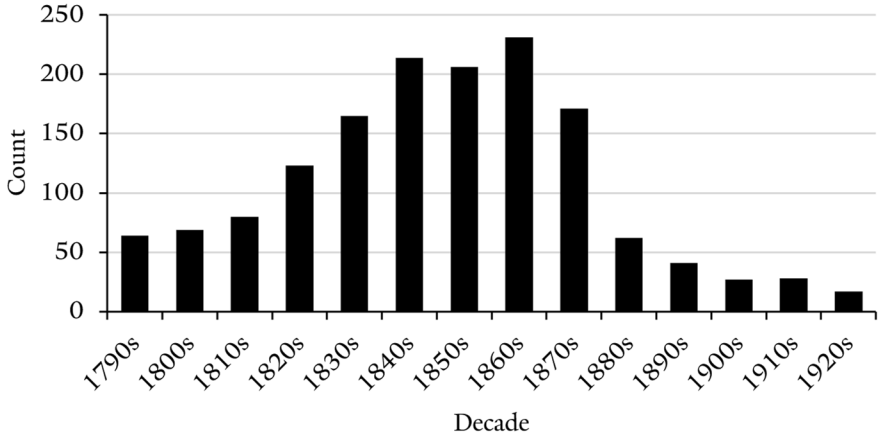


258. *Id.*

259. *Id.*

The decline of expository legislation at the state and territorial levels was even more pronounced, as seen in Figure 3. States and territories enacted 206 pieces of expository legislation in the 1850s, 231 in the 1860s, and 171 in the 1870s, but only a meager 62 in the 1880s and a paltry 41 in the 1890s.

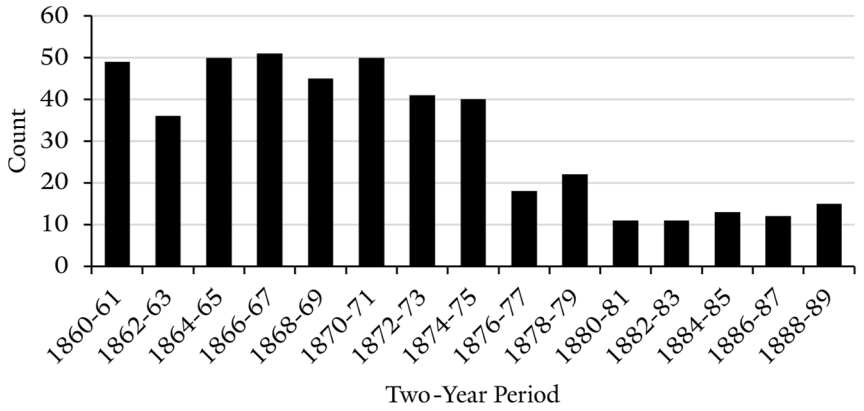
FIGURE 3. STATE/TERRITORIAL EXPOSITORY ENACTMENTS, PER DECADE (1790S-1920S)[260]



Zooming in on the years of decline at the state and territorial level reveals an important rupture. In the aggregate, as shown in Figure 4, expository legislation began declining in the early 1870s but dramatically decreased around the years 1876 and 1877—coinciding with the end of Reconstruction in 1877.

260. *Id.*

FIGURE 4. STATE/TERRITORIAL EXPOSITORY ENACTMENTS, PER TWO YEARS (1860-1889)[261]



There were likely multiple causes of this collapse. Lawmakers around the country didn't wake up one day in 1876 and collectively decide that expository legislation was now out of fashion. There was never a constitutional provision that explicitly prohibited all expository legislation. The decline of expository legislation—although relatively rapid in the aggregate at the state level—happened in different states at different times.[262] As I have previously identified elsewhere, some of the factors of decline include: (1) a significant increase in judicial backlash, supported by (2) the rise of Americanized statutory-interpretation treatises, which helped inspire (3) self-policing by lawmakers.[263] Another potential factor I have documented elsewhere is the rise of the U.S. Department of Justice as a major institution of statutory interpretation for ad-

261. *Id.*

262. Declines in seven states—Alabama, California, Iowa, Maine, Missouri, Pennsylvania, and Vermont—accounted for virtually the entirety of the overall decline between the 1860s and the 1870s. Expository legislation declined slightly in other states during this period too, but these declines were offset by increases in other states like North Carolina and New York. The increases for the most part did not persist into the 1880s, and declines in nine states—Alabama, Georgia, Mississippi, Missouri, New York, North Carolina, Pennsylvania, Tennessee, and Wisconsin—accounted for eighty percent of the net decline from the 1870s to the 1880s. In Virginia, by contrast, the peak of expository legislation was in the 1830s, when the legislature passed twenty-one pieces of expository legislation (in the next decade, the legislature passed only seven).

263. *See* Zhang, *supra* note 1, at 1009.

ministrative offices.[264] Other potential factors include the rise of alternatives to petitioning and expanded federal-court jurisdiction[265] and backlash against corporate influence over expository legislation.[266] But one other factor deserves special attention: state constitutional politics.

2. *The Impact of State Constitutional Politics on Expository Legislation*

Fearing abuses of legislative power, Americans in states across the nation in the mid- and late nineteenth century introduced new constitutional provisions that limited what legislatures could do, how often they could meet, and how powerful they were in relation to other branches of government.[267] While creating new constitutions, states borrowed from previously ratified constitutions in other states, leading to shared constitutional norms against legislative excess.[268]

The state constitutional politics of the mid- and late nineteenth century became intertwined with the politics of statutory interpretation and expository legislation. Some of the state constitutional changes of the nineteenth century had direct impacts on expository legislation. Missouri's 1875 constitution explicitly proclaimed that the state's general assembly had "no power to release or alienate the lien held by the State upon any railroad, or in anywise change the tenor or meaning, or pass any act explanatory thereof."[269] Texas's 1876 constitution copied this provision verbatim.[270] However, this prohibition against expository legislation covered only a specific kind of expository legislation (relating to railroad liens) and only in two states.

The transformation of state constitutions would instead, for the most part, come to influence expository legislation in less direct ways—chiefly by contributing to a general decrease in legislation. To save money and reduce the amount of legislation passed each year, many new state constitutions required legislatures to meet every two years instead of each year.[271] In 1832, eighty-eight percent of state legislatures met annually; by 1861, only forty-five percent

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264. *See id.* at 990.

265. *See* discussion *supra* Section I.B.3.

266. *See* discussion *supra* Section I.C.

267. FRIEDMAN, *supra* note 256, at 332.

268. Ireland, *supra* note 131, at 296.

269. MO. CONST. of 1875, art. IV, § 50.

270. TEX. CONST. art. III, § 54 (repealed 1999).

271. SQUIRE, *supra* note 138, at 244-48.

did.[272] Most of the new constitutions required legislatures to pass general incorporation laws instead of special ones.[273] They also limited the subjects that laws were allowed to cover, for instance prohibiting legislatures from passing laws that granted divorces.[274] New state constitutions also limited legislatures' power to pass special legislation in other areas. Illinois's 1870 constitution, for example, prohibited special legislation that protected game and fish, changed people's names, chartered ferries and toll bridges, and more.[275] Louisiana's 1879 constitution prohibited special legislation that created corporations, fixed interest rates, regulated labor, regulated the management of public schools, and more.[276]

Expository legislation had been previously passed in some of these areas. For instance, from 1850 through 1865, Alabama enacted five pieces of expository legislation relating to specific company charters.[277] Alabama's 1867 constitution required corporations to be formed through general, not special, laws.[278] Afterward, Alabama did not enact any more expository laws relating to company charters. Not every state had these specific prohibitions, but in general, the new constitutional transformations led state legislatures to pass fewer pieces of legislation overall as they shifted from special to general laws.[279]

The decline of expository legislation in some states can be at least partially explained by this overall decline in the volume of legislation, which meant that there was less legislation that could be left up to interpretation. The correlation can be seen in Missouri, where new constitutions were ratified in 1865 and 1875 and where the amount of expository legislation declined as the number of pages of session laws decreased:

272. *Id.* at 244.

273. Wallis, *supra* note 253, at 212.

274. Ireland, *supra* note 131, at 289.

275. ILL. CONST. of 1870, art. IV, § 22.

276. LA. CONST. of 1879, art. 46.

277. The underlying data for this assertion is drawn from the datasets in Zhang, *supra* note 1.

278. ALA. CONST. of 1867, art. XIII, § 1.

279. Ireland, *supra* note 131, at 299.

TABLE 1. MISSOURI[280]

Decade	1850s	1860s	1870s	1880s	1890s
Session-Law Pages	4,425	4,032	3,246	1,352	1,461
Expository Laws	21	25	7	3	7

Pennsylvania, which adopted a new constitution in 1874, had an even more pronounced pattern:

TABLE 2. PENNSYLVANIA[281]

Decade	1850s	1860s	1870s	1880s	1890s
Session-Law Pages	8,123	10,666	6,828	1,625	2,574
Expository Laws	27	54	27	2	0

But this is only one piece of the puzzle. After all, complaints about corporate influence on lawmaking persisted even after state constitutions were changed.[282] According to one lawyer in 1884, the constitutional changes had "afforded no protection whatever," and instead "special legislation of the worst possible description lurks under the form of amendments to the general law."[283] Moreover, in some jurisdictions where the total volume of legislation increased, expository legislation either remained steady or decreased.[284] For instance, as

280. The data on expository legislation is drawn from the datasets used for Zhang, *supra* note 1. To determine the number of session-law pages per decade, I totaled the number of pages for each session volume for the relevant years. The session volumes used are available on the HeinOnline Session Laws Library. I use as a comparator the numbers of session-law pages because those numbers are, for the most part, directly correlated with the number of words that the legislature enacted into law (more pages equals more words)—and thus the number of words that may cause confusion and demand future legislative exposition. Of course, another possible comparator—beyond the scope of this Article—is the total number of laws passed per decade.

281. *See id.*

282. *See* Robert Harrison, *The Hornets' Nest at Harrisburg: A Study of the Pennsylvania Legislature in the Late 1870s*, 103 PA. MAG. HIST. & BIOGRAPHY 334, 335-36 (1979).

283. STERNE, *supra* note 142, at 15.

284. The same appeared to be true at the federal level. The 36th through 41st Congresses (1859 to 1871) enacted 3,654 pieces of public and private legislation and 37 pieces of expository legislation. By contrast, the 56th through 61st Congresses (1899 to 1911) enacted 17,327 pieces of

seen in the next table, North Carolina's new constitution in 1868 wasn't followed by a decrease in the volume of legislation but rather an increase. Nor was there an immediate decrease in expository legislation, as the state enacted twelve expository laws in the 1870s.[285]

TABLE 3. NORTH CAROLINA[286]

Decade	1850s	1860s	1870s	1880s	1890s
Session-Law Pages	3,041	2,968	5,083	5,060	6,798
Expository Laws	7	11	12	8	2

Moreover, expository legislation declined in states that did not create new constitutions. For example, Vermont, which had not changed its constitution since 1793, passed nine pieces of expository legislation in the 1860s and only four in the 1870s and three in the 1880s.[287]

But the state constitutional politics of the nineteenth century may have contributed to the transformation of statutory interpretation and expository legislation in another way, too. More state constitutions began to include provisions prohibiting statutes from being amended, revised, and extended by reference only to their titles. They instead required statutory revisions to reenact and republish the initial statutes. These constitutional provisions were newly included in four state and territorial constitutions in the 1840s,[288] seven in the 1850s,[289] seven in the 1860s,[290] five in the 1870s,[291] four in the 1880s,[292] and

public and private legislation but only 7 pieces of expository legislation. The data on public and private legislation is drawn from DEP'T OF COM., HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, PART 2, at 1081-82 (1975). The data on expository legislation is drawn from the datasets used in Zhang, *supra* note 1.

285. The underlying data is from the datasets in Zhang, *supra* note 1.

286. *See supra* note 280 (describing my methodology).

287. The underlying data is from the datasets in Zhang, *supra* note 1.

288. CAL. CONST. of 1849, art. IV, § 25; LA. CONST. of 1845, art. 119; N.J. CONST. of 1844, art. IV, § 7, cl. 4; TEX. CONST. of 1845, art. VII, § 25.

289. IND. CONST. art. IV, § 21 (repealed 1960); KAN. CONST. of 1855, art. IV, § 16; MICH. CONST. of 1850, art. IV, § 25; MD. CONST. of 1851, art. III, § 17; OHIO CONST. of 1851, art. II, § 16; OR. CONST. art. IV, § 22; VA. CONST. of 1851, art. IV, § 16.

290. ALA. CONST. of 1865, art. IV, § 2; ARK. CONST. of 1868, art. V, § 23; FLA. CONST. of 1868, art. IV, § 14; GA. CONST. of 1868, art. III, § 6, cl. 3; MO. CONST. of 1865, art. IV, § 25; NEB. CONST. of 1867, art II, § 19; NEV. CONST. art. IV, § 17.

three in the 1890s.[293] In several states, these provisions appeared to have little effect on expository legislation. For instance, California's provision had been added in its 1849 constitution, but California passed twenty-three expository laws in the 1850s—the second most of any state in that decade.[294]

Nevertheless, some evidence suggests that these requirements made a difference. Specifically, judges cited these specific constitutional requirements when rejecting expository legislation. After Pennsylvania added its requirement in its 1874 constitution, the state supreme court drew on it in 1888 to reject an expository law passed in 1887. The statute's title was not explicitly expository (it began, "An act relating to the lien of mechanics"), but its first section explained how statutes in 1836 and 1845 should be construed.[295] The court held that the statute extended the old statutes by referencing their titles without reenacting them, thus violating the state's constitution.[296] "It would be difficult to imagine a plainer violation of the constitutional provision," said the court, which went on to explain that previous decisions friendlier to expository legislation were handed down *before* the new constitution.[297] The court explained that before the new constitution had been ratified, "the limits within which legislative power was to be exercised were not as clearly drawn," and "[m]any things were then permissible, as to the character and form of legislation, which the present constitution plainly forbids."[298] In particular, expository legislation was "not uncommon" before 1874, but now the new constitution "apparently closes the old and well-worn short-cut route."[299]

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291. Colo. Const. art. V, § 24; Ill. Const. of 1870, art. IV, § 13; Pa. Const. of 1874, art. III, § 6; Tenn. Const. art. II, § 17; W. Va. Const. art. VI, § 30.

292. Mont. Const. of 1889, art. V, § 25; N.D. Const. of 1889, art. II, § 64; Wash. Const. art. II, § 37; Wyo. Const. art. III, § 26.

293. Ky. Const. § 51; Miss. Const. art. IV, § 61; Utah Const. art. VI, § 22.

294. The underlying data is from the datasets in Zhang, *supra* note 1.

295. Titusville Iron-Works v. Keystone Oil Co., 15 A. 917, 918 (Pa. 1888).

296. *Id.* at 918-19.

297. *Id.* at 919.

298. *Id.*

299. *Id.* But this, too, provides only a partial explanation for expository legislation's decline. Even if the Supreme Court of Pennsylvania rejected an expository law because it violated the constitutional requirement, the legislature had nevertheless passed the law *despite* that constitutional requirement. Moreover, it was easy to distinguish expository legislation from the types of laws that the constitutional requirement contemplated. One could argue that an expository law didn't "revise" or "amend" an old statute but rather interpreted it or clarified it. And some courts distinguished between the two. For instance, the California Supreme Court in 1913 insisted that in enacting a statute defining certain words, the legislature wasn't trying to change the previous statute but was trying "merely to clarify and make more cer-

Through changes such as these, the nineteenth century witnessed the transformation of statutory interpretation's sociopolitical role in the United States. People had found ways to organize and build power for their movements and causes by leveraging expository legislation (and thus by leveraging statutory interpretation), notwithstanding that moneyed interests could exploit these tools for their own purposes too. Meanwhile, expository legislation turned people's attention to their legislatures—rather than to their courts—to intervene in national crises through statutory interpretation, and this only further intertwined statutory interpretation with politics. Yet, as some critics complained that legislative statutory interpretation was too narrow or conservative a tool for societal change, others saw it as a sign of legislative excess that needed to be curtailed. And, as the state constitutional politics of the nineteenth century became inseparable from legislative statutory interpretation in response to pressures like these, contributing to the decline of traditional expository legislation, the possibilities and limits of statutory interpretation as a tool of societal change became even clearer.

III. LEGISLATIVE INTENT AS ORDINARY MEANING

The collapse of the traditional forms of expository legislation was starkly evident in the *Statutes at Large*. In 1878, Congress passed the last statute with a title proclaiming it to be explaining another law.[300] Ten years later, Congress passed the last statute with a title proclaiming it to be declaratory of another enactment.[301]

But expository legislation didn't completely die. At the federal level, individuals continued to petition Congress for expository legislation.[302] Administrative officials also asked for expository legislation,[303] and committees in Congress continued to recommend expository legislation.[304] One federal lawmaker

tain the meaning and effect of those sections," which meant the statute wasn't prohibited by the state constitution. *In re* Coburn, 131 P. 352, 356 (Cal. 1913).

300. Act of June 8, 1878, ch. 168, 20 Stat. 101, 101.

301. Act of Oct. 1, 1888, res. no. 46, 25 Stat. 631, 631.

302. *See, e.g.*, 23 CONG. REC. 746 (1892) (statement of Sen. Chilton).

303. *See, e.g.*, SEC'Y OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR 1887, H.R. EXEC. DOC. NO. 50-2, at 540 (1887).

304. S. REP. NO. 48-1002, at 1 (1885) ("The Committee on the District of Columbia, to whom was referred S. 1941, being a bill declaratory of the meaning of section 3 of the act of June 16, 1882, for the relief of Howard University . . . beg leave to make the following report . . . .").

asked in 1885, "Do we not constantly pass declaratory laws?"[305] Bankers maintained that Congress had the power to pass expository legislation on the meaning of "coin."[306] One newspaper insisted in 1906 that Congress ought to pass an expository law "[e]very time" it passed a law since doing so would "save trouble for the courts and also save them from being roasted."[307] As late as 1916, one U.S. representative argued that if a court interprets a statute in a way that a department "never dreamed of putting on it for years, and that no one thought of putting on it until the court" did, then there was "nothing else to do but for Congress to come forward and say what the act is to-day."[308]

More significantly, the very concept of expository legislation transformed as the traditional forms of it declined. Whereas old expository legislation rarely modified the text of the enactment it construed (instead using phrases such as "it was the true intention of that act"), expository laws in the twentieth century became virtually indistinguishable from textual amendments save for the fact that they contained variants of a new word—"clarify"—to indicate their expository nature. Although the use of this new word did not itself reflect any substantive change in the nature of expository legislation, all but a handful of federal expository enactments since the 1930s have used a variant of "clarify." At the state level, the picture is more varied, and for practical reasons I present data on only non-"clarifying" expository enactments at the state level. Section III.A documents these transformations, building on an original dataset of thousands of non-"clarifying" state expository enactments first used in the prequel to this Article[309] and a new, original dataset of the 776 federal expository enactments passed from the 71st through 117th Congresses (1929-2023).

The upshot, as this Part demonstrates, is that the degree to which statutes could be thought of in terms of written words also transformed. If, as the historian Jonathan Gienapp has shown, the U.S. Constitution increasingly became seen as a textual object in its first decades,[310] the same was true about legislation in the early twentieth century. As a result, particularly because expository

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305. 16 CONG. REC. 1969 (1885) (statement of Rep. Findlay).

306. *A Boston Idea*, WALL ST. DAILY NEWS (N.Y.), Feb. 2, 1895, at 1, 1.

307. MORNING WORLD-HERALD (Omaha, Neb.), Apr. 19, 1906, at 6, 6.

308. *Lands for Educational Purposes: Hearing on H.R. 8941 Before the Comm. on the Pub. Lands*, 64th Cong. 154 (1916) (statement of Rep. Mondell).

309. Zhang, *supra* note 1, at 957. For the present Article, I have added new dimensions to this dataset (such as by indicating whether the statutes made textual amendments) and have hand-coded each of the statutes along these new dimensions.

310. *See generally* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018) (arguing that the U.S. Constitution was originally not thought of as a complete, fixed document).

legislation was a critical tool for participatory and sociopolitical statutory interpretation, the link between statutory text and lay engagement with statutory meaning became newly tenuous in the late nineteenth and early twentieth centuries. And, to the extent that the concept of "ordinary meaning" in statutory interpretation is grounded in notions of how "ordinary" people understand statutes, the nature of "ordinary meaning" transformed too.

This Part elaborates those insights by laying the foundations for an externalist framework that I call "legislative intent as ordinary meaning." If scholars and judges have tended to characterize "ordinary meaning" in terms of the meanings of specific words in statutes, then a legislative-intent-as-ordinary-meaning framework develops a broader theory of "ordinary meaning" that accounts for "legislative intent"—which was at the heart of expository legislation. The externalist, bottom-up history of expository legislation shows how for many laypeople the meanings of statutes depended on what people thought the legislative intentions behind those statutes were. When laypeople asked for expository legislation, they asked for expressions of legislative intent, not changes to the original texts of statutes. They did not think that the text of a law was law itself, but rather that the text was merely evidence of law.

But starting in the early twentieth century, the concept of "expounding" the law increasingly came to revolve around *textual* modifications, mirroring a historical shift that Jesse M. Cross has identified regarding the concept of the "amended statute" (a shift from statutory amendments that didn't make textual modifications to statutory amendments that did).[311] This only created a new dilemma, though. If text *is* law—and if changes to texts are meaningful, as is reflected in canons of interpretation like the "presumption of meaningful variation" and the "rule against surplusage"—then expository laws that changed the texts of old statutes *had to be changing the law*. And yet the very concept of expository legislation was that expository laws did not change the substantive meanings of laws, for they merely revealed or clarified the "true" substantive meanings of those laws. Thus, the increasingly blurred lines between "exposition" and "amendment" raised new questions about the degree to which text "is" law.

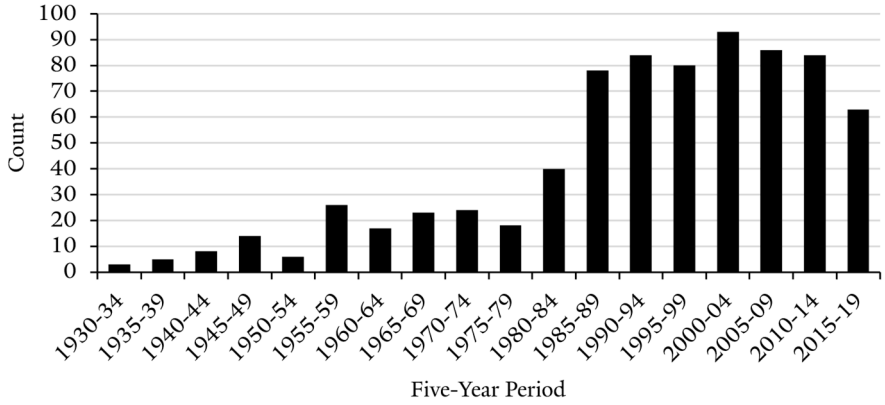
A. The Shifting Textuality of Statute-Based Law

As seen in Figure 5—based on an original dataset of the 776 federal expository enactments from the 71st through 117th Congresses (1929-2023)—the

311. *See* Cross, *supra* note 26 (manuscript at 42).

number of federal expository enactments significantly increased in the twentieth century and especially during the second half of the 1980s.

FIGURE 5. FEDERAL ENACTMENTS WITH EXPOSITORY PROVISIONS, PER FIVE-YEAR PERIOD[312]

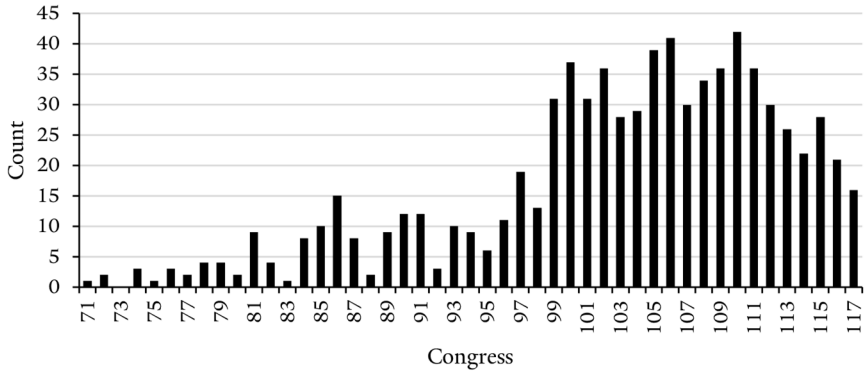


As seen in Figure 6, a crucial turning point was the 99th Congress (1985-1987), which occurred during Ronald Reagan's presidency and soon after the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[313] However, the number of federal enactments with expository provisions has generally decreased since it peaked in the 110th Congress (2007-2009)—coinciding with the beginning of Barack Obama's presidency.

312. The Appendix, *infra*, details my methodology for counting federal enactments with expository provisions.

313. 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024). The coincidence of this turning point with *Chevron* is interesting because, as I have suggested in the prequel to this Article, "expository legislation and administrative statutory interpretation were synergistic: Expository laws facilitated administrative statutory interpretation by reducing the risks and costs of delegation gone awry, for Congress knew that it could enact expository laws to preemptively guide, supervise, and correct administrative actors' interpretations and constructions of statutes." Zhang, *supra* note 1, at 953 n.6.

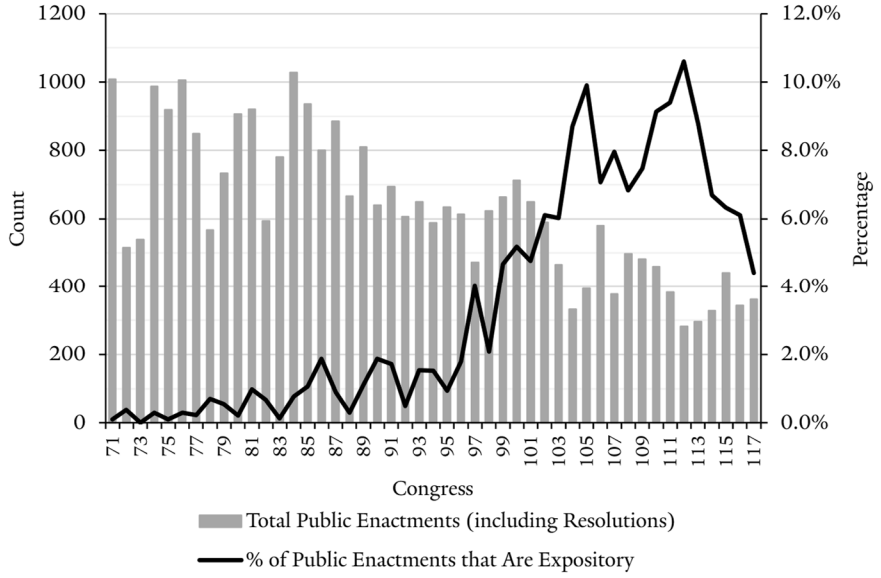
FIGURE 6. FEDERAL ENACTMENTS WITH EXPOSITORY PROVISIONS, PER CONGRESS[314]



Just as significantly, while the percentage of federal legislation with explicitly expository provisions was once negligible—never more than 2% until the 97th Congress (1981-1983)—that percentage became substantial in the four decades afterward. At the peak, in the 112th Congress (2011-2013), 10.6% of public enactments had explicitly clarifying provisions. Figure 7 tracks this evolution in relation to the general decline in all federal public legislation.

314. *See infra* Appendix.

FIGURE 7. ALL FEDERAL PUBLIC ENACTMENTS VERSUS PERCENTAGE OF ENACTMENTS WITH EXPOSITORY PROVISIONS, PER CONGRESS[315]



Looking at the texts of these expository statutes shows how expository legislation underwent a profound transformation. Before the decline of traditional forms of expository legislation in the late nineteenth century, very little expository legislation actually inserted or deleted text. When words were unclear, legislatures mostly announced how those words "shall be construed" rather than writing those clarifications into the original enactments or codes. The rise of expository statutes that used a variant of the term "clarify" initially continued this trend. In the 1930s and less so in the 1940s, the texts of laws that used the

315. *See infra* Appendix. The data for the number of federal public enactments is compiled from several sources: DEP'T OF COM., *supra* note 284, at 1081, for the 71st through 79th Congresses; *Vital Statistics on Congress*, BROOKINGS INST. tbl.6-4 (Nov. 21, 2022), https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress [https://perma.cc/J7LY-29RS], for the 80th through 115th Congresses; Drew DeSilver, *Nothing Lame About This Lame Duck: 116th Congress Had Busiest Post-Election Session in Recent History*, PEW RSCH. CTR. (Jan. 21, 2021), https://www.pewresearch.org/fact-tank/2021/01/21/nothing-lame-about-this-lame-duck-116th-congress-had-busiest-post-election-session-in-recent-history [https://perma.cc/EH3P-ZBZC], for the 116th Congress; and *Statutes at Large and Public Laws: 117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/public-laws/117th-congress [https://perma.cc/PNQ9-F4XU], for the 117th Congress.

term "clarify" were essentially identical to the texts of traditional expository legislation. The very first of these laws in 1930 explained how a previously passed statute should apply; although its title claimed to "amend" the old statute, nothing in its substance changed the prior statute's text.[316] The next such statute, passed in 1932, merely specified whom should be considered an "artist" or "professional actor" within the meaning of the 1917 Immigration Act; it too did not change the text of the old statute.[317] A 1939 statute to "amend and clarify" an older statute consisted of one paragraph explaining how that older statute "shall be construed"; even as its title claimed to "amend," it similarly did not change the text of the older statute.[318]

But the tides were turning. From the 71st through 75th Congresses (1929-1939), six out of the seven (86%) expository laws did not modify any previous text. But from the 76th through 80th Congresses (1939-1949), only six out of fifteen (40%) did not. And from the 81st through 85th Congresses (1949-1959), only five out of thirty-two (16%) did not. Then, from the 86th through 90th Congresses (1959-1969), only three out of forty-six (7%) did not. This downward trend was followed by a slight uptick in leaving old statutes intact. Figures 8 and 9 track this change over time.

316. Act of June 9, 1930, ch. 423, 46 Stat. 531, 531.

317. Act of Mar. 17, 1932, ch. 85, § 2, 47 Stat. 67, 67; *see also* Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 875-76 (specifying which "classes of aliens shall be excluded from admission into the United States" without changing the text of the old statute).

318. Act of July 15, 1939, ch. 282, 53 Stat. 1042, 1042.

FIGURE 8. PERCENTAGE OF FEDERAL EXPOSITORY LEGISLATION THAT MODIFIED TEXT, DID NOT MODIFY TEXT, OR HAD BOTH MODIFYING AND NONMODIFYING PROVISIONS, PER FIVE CONGRESSES

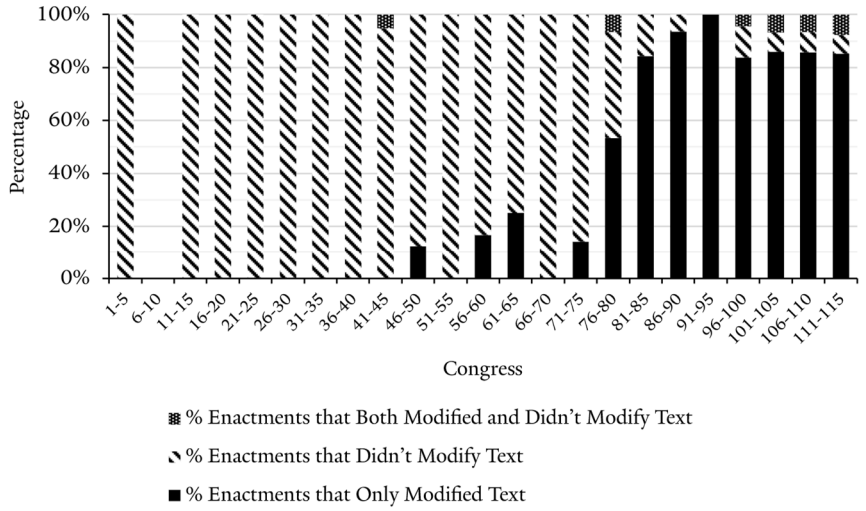
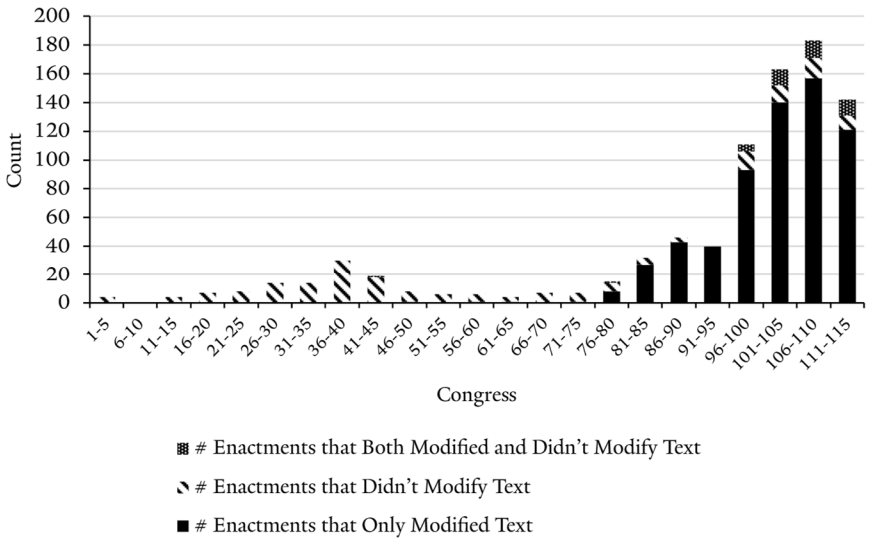
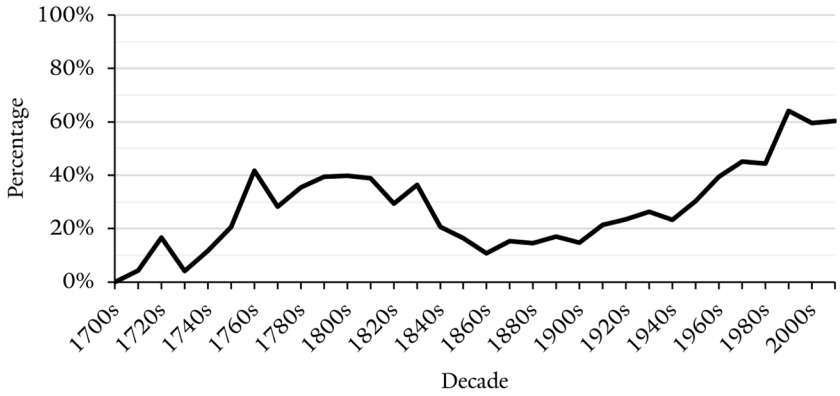


FIGURE 9. NUMBER OF FEDERAL EXPOSITORY ENACTMENTS THAT MODIFIED TEXT, DID NOT MODIFY TEXT, OR HAD BOTH MODIFYING AND NONMODIFYING PROVISIONS, PER FIVE CONGRESSES



Long-term trends in state-level expository legislation reinforce the idea that there was a shift in the nature of statutory text. Figure 10 below shows an increasingly blurred boundary between "amending" and "expounding," as the percentage of non-"clarifying" state expository statutes with a variant of the word "amend" in their titles rose dramatically in the twentieth century.

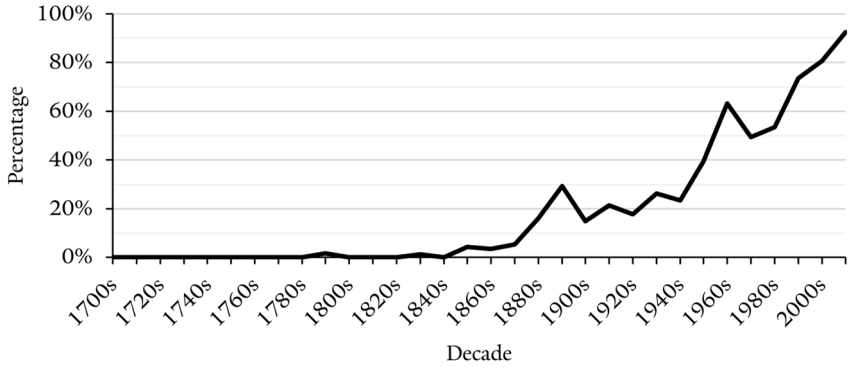
FIGURE 10. PERCENTAGE OF STATE/COLONIAL/TERRITORIAL EXPOSITORY ENACTMENTS (NON-"CLARIFYING") WITH VARIANT OF "AMEND" IN THE TITLE, PER DECADE[319]



The more dramatic shift was in the percentage of expository legislation that made textual changes to prior enactments, as shown in Figure 11. Over the course of the twentieth century—and especially in the second half of that century—the underlying statute that was being interpreted by expository legislation increasingly came to be seen as a textual object whose words needed to be modified to reflect the interpretation of a later expository statute.

319. The underlying data is from the datasets in Zhang, *supra* note 1, and that article's Appendix A describes the methodology for counting the number of expository enactments. To produce Figure 10, I coded the statutes in this dataset based on whether they had a variant of "amend" in their titles.

FIGURE 11. PERCENTAGE OF STATE/COLONIAL/TERRITORIAL EXPOSITORY ENACTMENTS (NON-"CLARIFYING") MODIFYING PREVIOUSLY ENACTED TEXT, PER DECADE[320]



The concept of "amendment" had transformed—and narrowed—from (1) a broad and general concept about repairing a previous law simply by passing a new statute to (2) a specific and concrete concept about changing the *text* of a previous law (sometimes, but not necessarily, to "repair" or "cure" a defective law). Until the early twentieth century, a legislature could usually "expound" a statute without making its text look any different. It could simply pass an expository law that gave the world another piece of paper that could be used to determine what the words on the old piece of paper meant.

In the twentieth century, the concept of "amendment" became more closely tied to a desire to fuse the two pieces of paper together.[321] For example, the clarifying statutes mentioned above that supposedly also "amended" did not actually change any text in the original laws. By contrast, a statute in 1956, titled "An Act to clarify section 1103 (d) of title XI (Federal Ship Mortgage Insurance) of the Merchant Marine Act, 1936, as amended," looks almost identical to what today we might consider an "amendment" (in the changing-the-text sense).[322] The 1956 statute is only two paragraphs. The first paragraph briefly

320. The underlying data is from the datasets in Zhang, *supra* note 1. The methodology for compiling this data is described in that article. *Id.* at 1025. To produce Figure 11, I have coded the statutes in this dataset based on whether they modified the texts of prior enactments.

321. *Cf.* Cross, *supra* note 26 (manuscript at 28-29) (framing the transformation of "amendments" with regard to changing legislation to now "entail[] the maintenance of a particular corpus or text").

322. Act of June 25, 1956, ch. 438, 70 Stat. 332, 332.

explains that a section of the 1936 Merchant Marine Act is now "amended to read as follows."[323] The entirety of the second paragraph contains the new text for the old statute.[324] This transformation reflected a broader shift in ideas about the nature of legislation—ideas that were then translated into an evolution in the forms and uses of expository legislation. As expository legislation evolved, legislative statutory interpretation increasingly looked identical to amendments that changed the *texts* of prior statutes.

Why did this transformation take place?[325] The history of codification offers a good answer.[326] In the mid-nineteenth century, Congress's laws were put together in chronological order each year into a series of books called the *Statutes at Large*. Then, in 1873, Congress compiled every federal law into a new series of books called the *Revised Statutes*, which, despite their name, contained errors and were only published and supplemented periodically.[327] To know what the current state of the law was in a given area, a researcher had to go through each year of the statutes and look for any amendments to the original law.[328] But that was so agonizingly tedious that administrative agencies stepped in to publish compilations of laws in specific areas.[329]

The traditional form of expository legislation made sense in those days. To a researcher flipping through page after page, year after year of statutes, an expository law in the traditional form was understandable. By first reading the original statute and then reading a subsequent expository law, a researcher

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323. *Id.*

324. *Id.*

325. Another way to understand this transformation is to think about it in terms of lawmakers' own understandings of an important "canon" (a rule-like principle) that judges use to interpret statutes: the whole code canon. The whole code canon encourages judges to read a word used in one place of a code (i.e., in one statute) to mean the same thing when used in other places in that same code (i.e., in another statute incorporated in that same code). *See* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. Rev. 76, 77 (2021). This is an incredibly specific idea, but it descends from a much broader idea that similar statutes should be read in relation to each other to infer meaning. *See id.* at 85. Early expository legislation suggests a strong fidelity to this general idea. Lawmakers assumed that even though the *text* of an old statute never changed, judges and others would interpret those statutes in light of subsequently passed expository legislation.

326. I thank Katherine Mims Crocker for suggesting that I emphasize this point more strongly.

327. Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 Law Libr. J. 545, 549-50 (2009).

328. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. Pa. L. Rev. 1541, 1568 (2020).

329. Whisner, *supra* note 327, at 550.

would be able to understand that the expository law dealt with that original statute.

Moreover, the very concept of textual amendments made less sense if Congress wasn't going to republish old statutes with the new text. That explains why nineteenth-century statutes "amending" previous laws did not always make textual changes. For example, an 1845 statute titled "An Act to amend the act entitled 'An act to provide for the enlistment of boys for the naval service, and to extend the term of enlistment of seamen'" looked almost identical to an "explicit-in-the-body" expository law.[330] Its first section explained how the previous statute "shall be understood and construed."[331] The remaining section authorized certain commanding officers to exercise the powers of a consul.[332] In other words, the amendment was in some ways expository in substance. What distinguished this amendment from an expository law was simply its title, which proclaimed to "amend" a law but not to "explain" or "declare the meaning" of a law.

This was a formal distinction. A law's operative portions, not its title, are often what really matter to judges.[333] But out of the formalism of the nineteenth century had come a general conceptual distinction between amending and expounding. Statutes explicitly proclaiming to "explain" or "construe" other laws were formally distinct from statutes proclaiming to "amend," even if in substance they each caused the underlying statute to have identical operations.[334] As one lawyer argued in 1912, if no appeal was possible for a court's honest misinterpretation of a law, then the proper remedy was "the enactment of a clarifying act, making the meaning so clear that it can not be questioned."[335] If, on the other hand, the "court is not mistaken," and the court's interpretation was merely "not what the people want," then the proper remedy was "an act such as the people want, amending, or in place of, the preceding

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330. Act of Feb. 20, 1845, ch. 17, 5 Stat. 725, 725.

331. *Id.* § 1, 5 Stat. at 725.

332. *Id.* § 2, 5 Stat. at 725.

333. *See* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 713 n.184 (2019). Even in early America, courts refused to infer meaning from the titles of statutes. *See, e.g.*, Hubley v. White, 2 Yeates 133, 147 (Pa. 1796) ("We do not much regard the title of the law; it is said to be no part of a statute."). However, not all courts refused to do so. *See, e.g.*, People *ex rel.* Westchester Fire Ins. Co. v. Davenport, 91 N.Y. 574, 591 (1883) ("The title of the act thus becomes an important element in ascertaining such [legislative] intent.").

334. *See* Zhang, *supra* note 1, at 962-69 (describing these distinctions and elaborating on the difference between statutory meaning and operation in the context of expository legislation).

335. JOHN H. HAZELTON, THE RECALL OF JUDGES, S. DOC. NO. 62-723, at 4 (1912).

act."[336] The strength of this distinction about the form of legislation was in flux, but it was no less present throughout the nineteenth century. It made the very concept of "expository legislation" imaginable as an independent form of legislation and emboldened lawmakers to interpret statutes themselves, ironically blurring the line between "amending" and "interpreting" law.

But the evolution of drafting, codification, and revision practices transformed the nature of American legislation. Congress radically upended the way statutes were published when, in 1926, the U.S. Code was first published.[337] Instead of arranging every statute in chronological order of enactment, the code was divided into "titles" based on subject area and reflected only the current state of the law.[338] Some states had long codified laws in this way, and some states had long employed people to revise and compile statutes.[339] Now, Congress was catching up. It worked with private companies to publish these federal codes until 1974, when it created a new governmental body—the Office of Law Revision Counsel—to do the job.[340] In creating these codes, codifiers dissected newly passed statutes and then restitched them into the existing code—sometimes putting different pieces of a statute in different parts of a code—and leaving the rest on the cutting-room floor.[341]

As changes in drafting, codification, and revision processes transformed the nature of "amendments," the explicitness of lawmakers' intentions to interpret statutes declined. The picture was clearest at the state level. Starting in the early twentieth century, states began to enact statutes that seemed to be purely "amendatory" based on their titles but that were actually expository based on their bodies.[342] An Iowa statute in 1925, for example, proclaimed to be an act "to amend section twelve thousand seven hundred nineteen (12719) of the code, 1924, relating to priority of claims in receiverships."[343] Despite it being an "amendment," the statute's second section explained that the "provisions of this amendment are declaratory of the intent of the legislature and of its interpretation of the provisions of section twelve thousand seven hundred and nineteen (12719) of the code, 1924."[344] Some, like a 1991 California amendatory statute,

336. *Id.*

337. Whisner, *supra* note 327, at 552 n.33.

338. *Id.* at 546.

339. Cross & Gluck, *supra* note 328, at 1568.

340. *Id.* at 1568-69.

341. *Id.* at 1572.

342. *See supra* Figure 10; *infra* Figure 12.

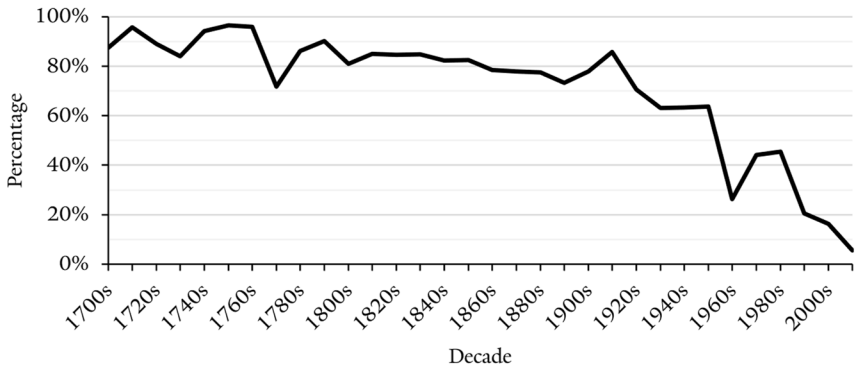
343. Act of Apr. 3, 1925, ch. 182, 1925 Iowa Acts 168, 168.

344. *Id.* § 2, 1925 Iowa Acts at 169.

explained that the amendment "does not constitute a change in, but is declarative of, existing law."[345]

Meanwhile, the explicit signal that a law was expository shifted from the titles to the bodies of statutes. This form of "explicit-in-the-body" expository legislation at the state level became the predominant form in the second half of the twentieth century. As seen in Figure 12 below, the share of state expository statutes (excluding clarifying legislation) with expository signals in their titles significantly declined in the twentieth century, as legislatures increasingly shifted expository signals to sections in the bodies of statutes. *Expository* statutes were becoming absorbed into *amendatory* statutes.

FIGURE 12. PERCENT OF STATE/COLONIAL/TERRITORIAL EXPOSITORY ENACTMENTS (NON-"CLARIFYING") WITH EXPOSITORY SIGNAL IN TITLE, PER DECADE[346]



The percentage of state expository laws with expository signals in their titles was 63% in the 1940s, 44% in the 1970s, and 16% in the 2000s.[347] By contrast, the percentage of state expository laws with a variant of the word "amend" in their titles was 23% in the 1940s, 45% in the 1970s, and 60% in the 2000s.[348] Most dramatically, the percentage of expository laws making *textual*

345. Act of Oct. 14, 1991, ch. 1110, § 53, 1991 Cal. Stat. 5263, 5295.

346. The underlying data is from the datasets in Zhang, *supra* note 1, and the methodology used to compile the data is described in further detail in Appendix A of that article. To produce Figure 12, I have coded the statutes in this dataset based on whether their titles contain an expository signal.

347. *See supra* Figure 12.

348. *See supra* Figure 10.

amendments soared from 23% in the 1940s, to 49% in the 1970s, to 81% in the 2000s.[349]

This formal change reflected a shift in legislatures' conceptions of their own powers. An expository statute with a title like "An act to declare the true intent and meaning of an act"[350] had once revealed lawmakers' strong beliefs that they had significant powers—duties, even—to interpret statutes themselves. But new expository statutes, with titles such as "An act to amend an act,"[351] signaled a retreat.

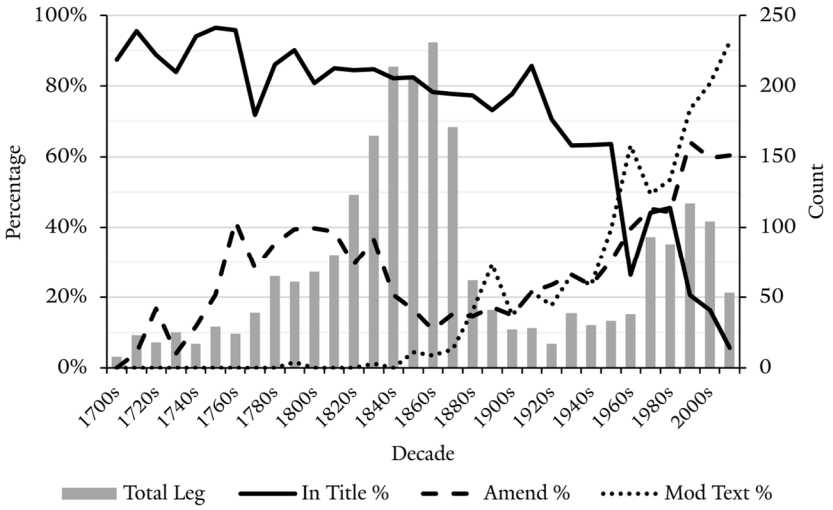
Putting these figures together and comparing them with the change in volume of expository legislation over time reveals still more insights, as seen in Figure 13. In the mid-nineteenth century, the surge of expository legislation was accounted for by relatively lower numbers of expository statutes that purported to "amend" prior enactments. In the twentieth century, the rebirth of expository legislation increasingly involved laws that purported to "amend" prior enactments, that made textual changes to prior enactments, and that contained expository signals not in their titles but rather their bodies.

349. *See supra* Figure 11.

350. *See, e.g.*, Act of Apr. 10, 1884, 1884 Ohio Laws 126, 126 ("AN ACT To declare the true intent and meaning of an act entitled an 'act to amend sections 3207, 3208, 3209, 3210, and 3211 of the revised statutes of Ohio,' as amended April 6, 1883.").

351. *See, e.g.*, Act of Dec. 15, 1995, 1995 Ill. Laws 4633, 4633 ("AN ACT to amend the Municipal Code by changing Sections 11-15.1-2 and 11-15.1-4.").

FIGURE 13. EVOLUTION OF STATE/COLONIAL/TERRITORIAL EXPOSITORY ENACTMENTS (NON-"CLARIFYING"), PER DECADE



What should we make of all this data for the purpose of statutory-interpretation theory? As the next Section shows, tracking these shifts allows us to see a historical counterpoint to the idea that "ordinary meaning" must be a text-focused concept. The counterpoint is an older, bottom-up vision of "ordinary meaning" as it was practiced by actual "ordinary" people—an "ordinary meaning" based on legislative intent.

B. Textualism Turned Inside Out

For much of American history, when laypeople asked for expository statutes, they understood that the end results would not involve changes to the texts of the statutes that they wanted interpreted. In expository legislation's mid-nineteenth-century golden age, fewer than ten percent of state expository statutes actually modified old text. This low percentage reflected a shared understanding that the capital-L Law was located in *not only* the texts of statutes. Rather, as those requesting expository legislation understood, there was some underlying, nontextual legislative intent or "true meaning" to statutes that words could only approximate. Historically, and viewed from an externalist perspective, "ordinary meaning" involved legislative intent. This in turn raises questions about whether, under an externalist paradigm of statutory interpretation, the following two assumptions of modern textualism have any historical

basis: (1) that text is not merely evidence of law but rather law itself and (2) that "ordinary meaning" must be a solely textual concept.

1. *Text Was Evidence of Law, Not Law Itself*

If there is a central premise underlying textualism, it is that the text of a statute *is* the law and not just a piece of evidence about what the law is. "The text of the law is the law," writes Justice Brett M. Kavanaugh.[352] "Statutes are law, not evidence of law," writes Judge Easterbrook.[353] "The text is the law, and it is the text that must be observed," writes Justice Antonin Scalia.[354] If that weren't true, Lawrence M. Solan has explained, then we would have a big problem: it would mean that "constitutional procedures for enacting laws are not enough to determine the rights and obligations of the citizenry in a significant set of circumstances."[355] Although textualists continue to debate what kind of evidence should be used to determine "ordinary meaning"—some going so far as to allow considerations of social context and practical consequences—the inquiry remains centered on the text: how would a hypothetical reader have understood the *words* of the statute?[356]

But the history of expository legislation teaches us that for much of American history, laypeople, lawmakers, and even some judges believed that the text of a statute was an imperfect proxy for legal meaning. They knew that statutes would have errors, and they participated in a process designed to catch and correct those errors. People asked for expository legislation when they believed that the texts of statutes didn't accurately reflect legislatures' intentions and motivations. Before the mid-twentieth century, most expository legislation did not even change the texts of previous statutes. When a legislature passed this kind of expository law, it was most often elaborating on the meanings that could not be gleaned solely from the texts of prior statutes. For instance, if a law hypothetically had said "widows shall receive $50 each month," a typical expository law could have said, "the true intent and meaning of that law was to

352. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

353. *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989).

354. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., new ed. 2018).

355. Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 465 (2005).

356. Tara Leigh Grove, *Foreword: Testing Textualism's "Ordinary Meaning,"* 90 GEO. WASH. L. REV. 1053, 1066, 1071 (2022).

include widows who had divorced the deceased spouses before the spouses' deaths." But nothing in the text of that original law would have said anything about ex-spouses. The expository law would not have explicated the dictionary definition of any of the words in the previous statute but would have instead treated those words as incomplete approximations of what the legislature had meant.

It was the shift from nontextual to textual expository legislation that truly challenged the text-is-law premise of textualism. This new breed of expository legislation, which most prominently arrived in the form of "clarifying" amendments starting in the mid-1910s at the state level and in 1930 at the federal level, altered the texts of prior enactments while claiming not to change statutory meaning. This created a tension: if the text *is* law, then how could the text change without also changing the law? One solution is that the old text and the new text are essentially the same. And in some cases, this might be true, such as when someone changes the word "bird" to "avian" or the phrase "that blue Muppet who likes baked chocolate-chip treats more than any other Muppet" to "Cookie Monster." But even common synonyms can refer to different sets of things. If one changes the term "sippy cups" to "bottles" in a statute, one may wonder whether the law now covers beer bottles.

Consider the black bass. In 1926, Congress enacted the Black Bass Act, regulating the transportation of that fish.[357] After the statute was codified in the U.S. Code, it read, in 1958, "Nothing in this chapter shall be construed to prevent the shipment in interstate commerce of *live* fish *and* eggs for breeding or stocking purposes."[358] Then, in 1959, Congress enacted a clarifying statute, which revised the relevant portion of the original statute so that it read:

> Nothing in this Act shall be construed to prevent the shipment in interstate commerce of *any* fish *or* eggs for breeding or stocking purposes *if they were caught, taken, sold, purchased, possessed, or transported in accordance with the law of the State, the District of Columbia, or Territory in which they were caught, taken, sold, purchased, possessed, or transported.*[359]

The expository law changed the term "live fish and eggs" to "any fish or eggs" and added a new phrase at the end that made the law's limits explicit.

This created a paradox. At least when conceptualized through the lens of the traditional formalist distinction between expository and nonexpository leg-

357. Act of May 20, 1926, ch. 346, 44 Stat. 576.

358. 16 U.S.C. § 855 (1958) (emphasis added).

359. Act of Aug. 25, 1959, Pub. L. No. 86-207, 73 Stat. 430, 430 (emphasis added).

islation, the new expository law by definition did not change the substantive meaning of the old law. On the other hand, the new textual change altered the range of possible statutory meanings. As a matter of common sense, a "live fish" is different from "any fish" in the same way that a living human is different from a corpse or zombie. Under the original statute, it could also be argued that in the phrase "live fish and eggs," the adjective "live" also modified the word "eggs"—that is, the "eggs" had to be "live" in order to be covered by the statute. That might raise questions about what eggs are "live" and what eggs are not. The new clarifying statute revised the law so that the issue couldn't arise. Now, it was crystal clear that "any eggs" were covered. These textual amendments, then, could not have left the old law on the same footing as the new law. Even if the change in possible meanings was slight, there was a change nonetheless. Thus, one way out of the paradox—to reconcile the idea that expository legislation left the substantive meanings of old laws unchanged with the reality that much expository legislation made textual modifications—was to accept that statutory text was merely incomplete evidence of law.

And so, the transformation of expository legislation shows how the very existence of the concept of expository legislation undermined the idea that text *is* law itself. Long ago, when laypeople petitioned lawmakers to expound the law but did not expect lawmakers to focus on textual meaning, "ordinary meaning" as actually practiced *was* legislative intent. But even as the concept of legislative statutory interpretation shifted toward making textual modifications to old statutes, that shift did not necessarily lend support to the idea that "text is law." Textual amendments—and thus text itself—could not be a definitive source of legal meaning if those textual changes didn't change the substances of laws.

2. *A New Theory of "Ordinary Meaning" Based on Legislative Intent—Not on Word Usage*

Most startlingly, the framework of legislative intent as ordinary meaning reveals a middle ground between two methods of statutory interpretation that are currently understood to be polar opposites: searching for legislative intent and prioritizing ordinary meaning. As this Article has shown, if one believes that "ordinary meaning" refers to how an "ordinary" person would interpret a statute, then the "ordinary meaning" of a statute was often the same thing as the legislative intent behind that statute.

Not everyone has agreed that it's even possible for a legislature to form a collective intent.[360] Some skeptics of intent have insisted that it's impossible to synthesize various lawmakers' intentions because legislatures are composed of many different people, including multiple majorities whose votes reveal little because their votes are influenced by lawmakers who set the agenda for voting.[361] Others, although pushing back that a legislature is actually an "it" rather than a "they," have insisted on philosophical grounds that legislative intent is merely a "fiction," albeit a useful and necessary fiction.[362] Still others have questioned whether the subjective motivations of individual lawmakers can really be identified from the few words that these lawmakers happened to say.[363] In light of these challenges, some have tried to revive intent by conceiving of it in terms of voter preferences.[364] Others have used a narrower and more abstract concept of legislative intent, imagining what a person in the enacting legislature would have wanted rather than what that person actually wanted.[365] And yet even that inquiry, some scholars object, provokes more questions than answers.[366] More recently, some have attempted to resuscitate intent by "disaggregating" it.[367] The cacophonous impasse has led John F. Manning to conclude that, "rather than argue about the imponderable question," some scholars instead "push interpretive theory toward questions of constitutional structure."[368]

But the history of expository legislation lends greater support to the possibility of a unified legislative intent while showing how questions about intent are inseparable from questions about constitutional structure. Like enacted

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360. For a brilliant overview of various forms of intent skepticism, see generally John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911 (2015).

361. *See, e.g.*, Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241-49 (1992).

362. *See, e.g.*, Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 999-1000, 1020-21 (2017).

363. *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 866-71 (1930).

364. *See, e.g.*, Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and Its Implication for Statutory Interpretation*, 100 B.U. L. REV. 1817, 1825-29 (2020).

365. *See, e.g.*, Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) ("The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.").

366. *See, e.g.*, John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2406 (2017).

367. *See, e.g.*, Jesse M. Cross, *Disaggregating Legislative Intent*, 90 FORDHAM L. REV. 2221, 2225-27 (2022).

368. Manning, *supra* note 366, at 2413.

findings-and-purposes sections in statutes,[369] expository statutes provided expressions of legislative purposes and intentions—albeit after the enactments of the original statutes. Like these findings-and-purposes sections, expository legislation also avoided the usual criticism that legislative history could not be used to determine the meaning of "law" because it did not go through constitutionally required procedures of enactment.[370] Many lawmakers who enacted expository legislation presumed that legislative intent had always existed and that subsequent expository legislation merely expressed that intent more explicitly. Although the history of expository legislation does not tell us what laypeople thought of "legislative intent" as a concept, it does show at the very least that they believed legislatures had some kind of "intention" or "true intent" when enacting statutes.

Amid longstanding debates over legislative intent, there has been a new call to focus on "republican" forms of evidence for statutory meaning, such as legislative history. According to William N. Eskridge, Jr. and Victoria F. Nourse, because lawmakers are intermediaries between the citizenry and the law, the publicly available records of deliberations among lawmakers are relevant to statutory meaning in a republic.[371] By using this evidence, they helpfully insist, interpreters of the statutes will be better able to determine what texts are relevant to statutory meaning, check their own biases, and adhere to a view that courts are agents of legislatures.[372] But in making this assertion, they imagine a dichotomy—just as textualists do—between the producers and consumers of statutes.

The history of participatory statutory interpretation gives us reason to question this dichotomy. Laypeople did "consume" statutes, but they also played important roles in "producing" them through their petitions and memorials. The consumers were partly producers. Laypeople believed that the meaning of a statute depended on the intentions of the enacting legislatures, not the "objective" meaning or most common or prototypical usages of particular words. After all, in the nineteenth century, legislative debates were often published in newspapers.[373] Republican evidence was identical to "populist" or consumer evidence of statutory meaning. To refine a truly democratic theory of statutory interpretation, then, the question should thus no longer be, "Should

369. *See generally* Shobe, *supra* note 333 (arguing for greater weight to be accorded to enacted findings and purposes).

370. *See* Zhang, *supra* note 1, at 1017-18.

371. Eskridge & Nourse, *supra* note 5, at 1737-38.

372. *Id.* at 1791-94.

373. *See* Zhang, *supra* note 5 (manuscript at 17).

we depend on 'republican' or 'consumer' evidence?" but rather, "How should the *gap* between 'republican' evidence and consumer information networks shape what sources of statutory meaning we rely on?"

In other words, the history of expository legislation reveals the need for a recipient-specific version of what legal scholar Jarrod Shobe has introduced as a theory of "intertemporal statutory interpretation."[374] That theory, as Shobe has elaborated, "argues that the evolution of congressional drafting toward a more professionalized process should affect how judges approach the interpretation of modern statutes as compared to statutes from prior eras."[375] But if one approaches statutory interpretation from the perspective of the reader and consumer of statutes, should the evolution of how readers and consumers have interpreted statutes affect how judges approach statutory interpretation? And what should be the relationship between a legislature-based theory of intertemporal statutory interpretation and a recipient-based theory of intertemporal statutory interpretation? For much of American history, this latter question was unnecessary because the gap between "republican" evidence and consumer information channels was narrower, but now it demands answers.

A reexamination of modern textualism's increasingly populist justifications—although not all textualists subscribe to these justifications—points some ways forward. Certain textualists increasingly claim to take up the cause of the "ordinary English speaker"—the idealized reader of statutes whom Justice Amy Coney Barrett has called the "congressional outsider."[376] These textualists further insist that the plain or "ordinary" meaning of a statute should dictate that statute's interpretation.[377] Part of the idea is that courts are not faithful agents of legislatures but are instead agents of *the people*.[378] To be sure, many textualist judges continue to consider the purposes of statutes when interpreting and construing them.[379] But although some textualists grant that legislative history can be used as evidence of ordinary meaning,[380] the goal is still to identify an objective meaning detached from the purposes and intentions of a statute. In the search for objective "ordinary" meaning, dictionaries (and corpus

374. Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 814 (2014).

375. *Id.* at 851.

376. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2200 (2017).

377. *Id.* at 2194.

378. *See id.* at 2208-09.

379. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 132.

380. *See, e.g.*, Barrett, *supra* note 376, at 2207.

linguistics to a lesser extent) have become the tools of the textualist trade.[381] Tools like these, it is presumed by various textualists, provide the best evidence of how ordinary readers would have interpreted the words of statutes.[382]

Whether one conceptualizes "ordinary meaning" as a legal concept about textual meaning or as an empirical concept determined by how laypeople actually use the words of statutes,[383] the history of expository legislation suggests that "ordinary meaning" should not be thought of as necessarily centered around textual meaning and statutory words. The question "How would a hypothetical (or actual) reader have understood (or used) *the words* in a statute?" is not only an artificial but also a self-serving construct. It takes for granted that statutory words should ultimately be what matter in the first place. By asking the question as if it were presumed that ordinary readers were already textualists, populist textualists are further able to justify textualism on the grounds of fidelity to "ordinary" people.

Among those who take an empirical view of "ordinary meaning," there's meanwhile a mistaken conflation of "usage" with "meaning." For instance, advocates of corpus linguistics seek to identify how ordinary people used particular words outside the context of construing particular statutes.[384] Advocates then use this evidence to determine statutory meaning. With this methodology, a pattern of usage of the word "carry" in the *New York Times* might provide evidence of the meaning of "carry" in a statute. But this mismatch reveals a problem: how ordinary people used words is only an imperfect proxy for how ordinary people understood statutory meaning. If the goal is to interpret a legislative command "as its recipients would,"[385] then true fidelity to this principle requires an inquiry into "ordinary" reception of statutes instead of a proxy inquiry into "ordinary" usage of statutory terms in other contexts.

When the task is reframed more broadly—indeed, from an externalist perspective—expository legislation illuminates how ordinary people have often cared more about legislative purposes and intentions than about "objective" textual meaning. Laypeople certainly looked at the texts of statutes, but they understood texts merely to be proxies for legislative intentions. In a system of

381. *See* Lee & Mouritsen, *supra* note 36, at 795; *see also supra* note 36 and accompanying text (discussing the scholarly debate over the usefulness of these tools).

382. *See* Barrett, *supra* note 376, at 2203 ("Dictionaries are useful to the textualist not because the textualist assumes that legislators use them but because they offer some evidence of the meaning attributed to words by ordinary English speakers.").

383. Grove, *supra* note 356, at 1058.

384. *See, e.g.*, Lee & Mouritsen, *supra* note 36, at 813-28.

385. *See* Barrett, *supra* note 376, at 2209.

participatory statutory interpretation, the whole premise of expository legislation was that laypeople would be able to ask their legislatures for clarification when the perceived intentions of legislatures were in doubt—when people felt that they needed to hold legislatures accountable for those intentions. This shared understanding facilitated the rise of sociopolitical statutory interpretation as a vehicle of social change. In the end, the textualization of expository legislation further enabled people to believe that statutory text could only be evidence of law. As the externalist, bottom-up history of expository legislation suggests, one can be a populist or a textualist—but not both.

CONCLUSION

The three externalist frameworks excavated by this Article—participatory statutory interpretation, sociopolitical statutory interpretation, and ordinary meaning as legislative intent—arise from a "historical process . . . which has deposited . . . an infinity of traces" in American society without, until now, "leaving an inventory."[386] This Article's inventory of those historical processes provides a descriptive foundation for developing a social and political theory of statutory interpretation that is attentive to the possibilities and limits of statutory interpretation *in society*. Although the articulation of these possibilities and limits has so far been elusive within an internalist paradigm of statutory interpretation, this Article's critically externalist perspective facilitates their elaboration by revealing a forgotten world in which statutory interpretation was visceral, urgent, exploitable, collective, and absorbent of political energies. Several critical questions that cut against the grain of contemporary legislation scholarship emerge from this externalist history: Does the enterprise of statutory interpretation in general—and not just particular interpretive theories or methods—tend to favor certain interests and arrangements of power? Can statutory interpretation ever be an effective tool of grassroots mobilization and organization? Does statutory interpretation merely facilitate "preservation through transformation"?

The Article's three externalist frameworks offer ways to conceptualize and answer these questions. The first framework elaborated by this Article, "participatory statutory interpretation," recovers how statutory interpretation has been not just an elite practice but also a profoundly democratic endeavor done by "ordinary" people. Many laypeople once had a direct, personal, and intimate

386. Antonio Gramsci, The Study of Philosophy, *in* SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 323, 324 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

connection to statutory interpretation that they channeled into petitions for expository legislation. For many—particularly unenfranchised, poor, and historically marginalized people—expository legislation provided a relatively cheap way to engage in statutory interpretation. It was an alternative to judicial remedies and could be used to check administrative officials' interpretations of statutes. But it was also fragile and open to exploitation by those with power, which suggests that any successful model of participatory statutory interpretation must have built-in safeguards that are attentive to the operation of power in the social project of statutory interpretation.

The second framework, "sociopolitical statutory interpretation," shows how statutory interpretation became inseparable from mass politics. It shows how questions of statutory interpretation were part of grassroots and nationwide political struggles. Ultimately, it allows us to ask questions about how everyday people can (or cannot) and should (or should not) engage with statutory interpretation to facilitate social movements, influence litigation, and participate in democracy.

These two frameworks flow into the third: "legislative intent as ordinary meaning." As laypeople participated in statutory interpretation and integrated it into their political consciousnesses, they necessarily developed their own senses of what statutes meant. This "ordinary meaning" of statutes was based on more than statutory text; it hinged on what people perceived to be legislative "intentions" and "purposes." People saw text as merely evidence of law and not law itself.

From an externalist perspective, then, statutory interpretation was not "just politics" in terms of partisanship and bias. Statutory interpretation gave people infrastructure for social organization. It provided groundwork for political imagination. It entailed a world of democratic energy and interaction that spilled over beyond the texts of statutes.

The human stakes of this infrastructure and groundwork remain ever present and palpable—if one only knows where and how to look, as this Article has demonstrated. One need not gaze any further than the wake of the U.S. Supreme Court's overruling of *Roe v. Wade* in the summer of 2022,[387] which reignited debates about an 1849 Wisconsin statute that prohibited abortion and inspired a campaign seeking legislative clarification of the statute.[388]

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387. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)).

388. *See* Joy Powers, *Wisconsin Medical Society Requests the Legislature Clarify the State's 1849 Abortion Law*, WUWM 89.7 FM (June 29, 2022, 4:36 PM CDT), https://www.wuwm.com/2022-06-29/wisconsin-medical-society-requests-the-legislature-clarify-the-states-1849-abortion-law [https://perma.cc/596S-EDWR] (describing grassroots efforts to clarify the statute);

The battle for legislative clarification galvanized members of the public, seeped into everyday politics, and exposed both the possibility and fragility of statutory construction as a mechanism of social change. One early advocate for legislative clarification—the Wisconsin Medical Society—argued that the overruling of *Roe* "could result in significant interference with the physician-patient relationship," that "[d]efaulting to a law first created in 1849 is not the best path forward," and that "[i]nevitable confusion over the continued validity of that 19th century law makes proactive legislative action prudent."[389] Within months, candidates for the Wisconsin Senate were campaigning on promises to clarify the statute and offering their own views on how they would clarify its exception for situations when a mother's life was at risk.[390]

By the middle of 2023, Wisconsin's Republican lawmakers had made full use of the tool of legislative statutory interpretation when they introduced a group of four abortion-related bills. One of the bills, branded as a "clarification of medical necessity for abortion and exceptions," listed a number of circumstances that were encapsulated by the statutory phrase "to save the life of the mother."[391] Republican lawmakers packaged this abortion-protective bill with

Madison Pauly, *Abortion Rights Win Elections. Again.*, Mother Jones (Apr. 5, 2023), https://www.motherjones.com/politics/2023/04/wisconsin-supreme-court-election-abortion-protasiewicz [https://perma.cc/JK4A-B2ZE] (arguing that the Wisconsin Supreme Court election was decided based on the winner's support for abortion rights); Molly Beck, *Arguments Begin in Nationally Watched Lawsuit Seeking to Overturn Wisconsin's 1849 Abortion Ban*, Milwaukee J. Sentinel (May 4, 2023, 2:54 PM CT), https://www.jsonline.com/story/news/politics/2023/05/04/trial-begins-in-suit-seeking-to-overturn-wisconsin-1849-abortion-ban/70177010007 [https://perma.cc/PXJ9-XNAZ] (describing the history of a Wisconsin lawsuit filed after the overturning of *Roe v. Wade*).

389. Molly Beck, Roe *Decision Means an Immediate Halt to Abortion in Wisconsin, Setting the Stage for the State's 1849 Ban to Take Effect*, Milwaukee J. Sentinel (June 24, 2022, 9:19 PM CT), https://www.jsonline.com/story/news/politics/2022/06/24/overturning-roe-sets-stage-wisconsins-1849-ban-take-effect/7703590001 [https://perma.cc/SW32-MZ8P].

390. "[W]e need to have laws . . . put on the books that are clear so that th[e] doctor can know," explained one Republican candidate. Emily Davies & Tom Zurawski, *Republican Candidates for State Senate District 29 Seat Share Perspectives Ahead of Aug. Primary*, WSAW (Aug. 5, 2022, 2:34 AM EDT), https://www.wsaw.com/2022/08/05/republican-candidates-state-senate-district-29-seat-share-perspectives-ahead-aug-primary [https://perma.cc/6ZNH-YEK2]. A different Republican candidate wanted to clarify the exception so that it enshrined his belief that "[t]here is no medical situation where the health of the mother is at risk; 25-30 years ago, yeah, not now." *Id.*

391. S.B. 299, 2023-2024 Leg., Reg. Sess. (Wis. 2023). It also explained that the abortion ban excluded instances involving a "fetus that no longer has a heartbeat," and it noted that the ban also did not "apply to any pregnancy in the first trimester if the pregnancy is the result of sexual assault or incest." *Id.*

three other bills.[392] One would "increase[] the individual income tax exemption for a taxpayer's dependent from $700 to $1,000" while expanding the word "dependent" to include "an unborn child," which the bill defines as any fetus with a "fetal heartbeat."[393] Another would require the Wisconsin Department of Health Services to award an annual grant of $1,000,000 to Choose Life Wisconsin, Inc.[394] And the third would create "a grant program for financial assistance for adoption."[395]

Although only one of these four bills purported to "clarify" the 1849 statute, lawmakers seized the opportunity to market the *package* of four bills as merely a set of clarifications. "These bills offer an important clarification and reinforce the sanctity of life," three Republican sponsors wrote.[396] Some commentators saw through the statutory-interpretation camouflage of this exercise of power. One *Rolling Stone* article about the Wisconsin bills used the tag "Hidden Agenda" and was published with the subheadline "Wisconsin lawmakers are trying to 'clarify' the state's 1849 abortion ban in a bid to make the wildly unpopular and anachronistic law palatable to modern voters."[397] Others on the ground criticized the "clarifications" as being not so clarificatory at all.[398]

Within a year of the U.S. Supreme Court's overruling of *Roe*, the tool of statutory interpretation—via the people's elected representatives—had offered an externalist workaround beyond the court battles that were raging in the background. It also offered a way to maneuver around Wisconsin Republican senators' avoidance of a vote on repealing the 1849 statute and their eventual rejection of such a repeal.[399] Yet it was no guarantee of any particular out-

392. Todd Richmond, *Wisconsin Republicans Introduce Bill that Clarifies Procedures that Don't Qualify as Abortion*, AP NEWS (May 30, 2023, 5:05 PM EDT), https://apnews.com/article/abortion-wisconsin-bill-penalty-exception-rape-incest-b2cf79a97edd4273c3e96f391475e0e4 [https://perma.cc/ZD3R-ZDDG].

393. S.B. 344, 2023-2024 Leg., Reg. Sess. (Wis. 2023).

394. S.B. 345, 2023-2024 Leg., Reg. Sess. (Wis. 2023).

395. S.B. 346, 2023-2024 Leg., Reg. Sess. (Wis. 2023).

396. Richmond, *supra* note 392.

397. Tessa Stuart, *The Real Reason Republicans Want to Give Tax Breaks for Embryos*, ROLLING STONE (June 5, 2023), https://www.rollingstone.com/politics/politics-features/abortion-rights-embryos-tax-breaks-wisconsin-1234747167 [https://perma.cc/G2XV-RHAA].

398. *See id.* (presenting a Wisconsin OB-GYN's view that the supposed clarifications do not alleviate uncertainty for healthcare providers).

399. *See* Richard Eberwein, *Majority of Wisconsinites Support Abortion but GOP Lawmakers Refusing to Repeal 1849 Ban*, HEARTLAND SIGNAL (June 29, 2023), https://heartlandsignal.com/2023/06/29/majority-of-wisconsinites-support-abortion-but-gop-lawmakers-refusing-to-repeal-1849-ban [https://perma.cc/XYG8-YPME] (describing Republican avoidance of a vote and eventual rejection of a repeal); *cf.* Reva B. Siegel & Mary Ziegler, *Comstockery: How*

come—no promise of a pro-choice interpretation, no presage of an expanded pro-life campaign.

Just as one might marvel at the coalescence of participatory, sociopolitical energies by all parties around the tool, the process, and the strategy of legislative statutory interpretation, one might also wonder what might have been if that tool had been left off the table—if that tool had never carved certain paths into the table. One might wonder whether there was some force to the *National Anti-Slavery Standard*'s criticism of expository legislation during Reconstruction: "We want no mere explanatory act which will leave fundamental wrongs to be hereafter reached in a much more laborious way, but a new law of reconstruction, with more ample guarantees . . . ."[400] One might wonder whether Reddit user PhysicalPolicy6227, in response to a post announcing the Wisconsin "clarifying" bill, had good reason to comment, "What a bunch of lazy slugs."[401] One might wonder which of the infinity of possible histories could have been realized if there had never been an option to preserve the 1849 statute, or any statute, through transformation in the cloak of interpretation.

Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It, 134 YALE L.J. (forthcoming 2025) (manuscript at 13), https://ssrn.com/abstract=4761751 [https://perma.cc/7DU6-WJUZ] (discussing the "deform[ation]" of "democratic processes that might otherwise have enabled repeal or amendment" of the Comstock Act and its anti-abortion provisions).

400. *The "Macadamized Road"—Reconstruction*, *supra* note 212, at 2.

401. @PhysicalPolicy6227, REDDIT (June 2, 2023, 8:33 AM EDT), https://www.reddit.com/r/wisconsin/comments/13y14yj/wisconsin_republicans_introduce_bill_that [https://perma.cc/H7SK-262E].

APPENDIX

METHODS FOR DEFINING, IDENTIFYING, AND COMPILING FEDERAL EXPOSITORY STATUTES

I constructed the dataset of 776 federal expository enactments by taking the enactments I identified for the prequel to this Article—*Legislative Statutory Interpretation*[402]—and adding to them a set of federal "clarifying" enactments that I newly identified. I identified the clarifying enactments as follows. First, I conducted keyword searches of "clarif*" in the ProQuest Congressional database. I read the relevant provisions that appeared after filtering the results to include only those results that appeared in the *Statutes at Large*. I included both acts and resolutions. For more recent Congresses in the twenty-first century, I also filtered the results to include results that appeared as public laws given that the *Statutes at Large* results were occasionally underinclusive or unavailable. To ensure accuracy, I spot-checked the results by conducting periodic keyword searches of "clarif" in the PDF versions of the *Statutes at Large* available via GovInfo.[403] I conducted a similar keyword search of the titles of statutes on that same website. I additionally spot-checked by conducting periodic keyword searches of "clarif" on Congress.gov and cross-checking the results.[404]

I define clarifying legislation as any legislative enactment whose text explicitly claims to "clarify" a previous legislative enactment. This includes statutes with a variant of the word "clarify" in their titles or short titles. It includes statutes that do not have a variant of "clarify" in their titles but that do have a variant of "clarify" in their bodies for the purpose of signaling a clarification of a prior enactment.

While I believe I have located every federal clarifying enactment, I had to make some judgment calls about what to include and exclude—judgment calls that others may disagree with, particularly because it is sometimes unclear whether a purported clarification actually clarifies a prior enactment. I generally excluded clarifying laws that clarified boundaries of geographic areas without pointing to any specific prior statute. I excluded enactments that added new clarification sections to prior enactments if the new clarification sections were added to clarify additional new material added (as opposed to being added to clarify previously existing material in the original enactments). For enactments

402. Zhang, *supra* note 1.

403. *United States Statutes at Large*, GovInfo, https://www.govinfo.gov/app/collection/statute [https://perma.cc/7N23-NFRC].

404. Congress.gov, https://www.congress.gov [https://perma.cc/TY5N-NBEN].

that delegate clarification to executive officers, I included only those enactments that spell out what exactly the clarification is and that direct the officers to promulgate binding final rules (as opposed to issuing only nonbinding guidance).

I conceptualize "technical amendments" to be distinct from "clarifying" enactments.[405] This is primarily because Congress often distinguished between the two by labeling some amendments as "clarifying amendments" and others as "technical amendments" within the same statutes. (To be sure, Congress sometimes conflated the two, had "clarifying" sections with "technical amendment" subsections, or had "technical amendment" sections with "clarifying" subsections.) My sense is that "clarifying" amendments were far more likely to involve Congress's self-conception of its power to interpret or construe prior enactments. When a "technical amendment" also purports to be "clarifying," I included it.

All replication materials are available at the *Yale Law Journal*'s Dataverse at the following link: https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/M6ZMYZ.

405. Thank you to Victoria Nourse for suggesting I address technical amendments.