LEGISLATIVE STATUTORY INTERPRETATION

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We like to think that courts are, and have always been, the primary and final interpreters of statutes. As the conventional separation-of-powers wisdom goes, legislatures "make" statutes while judges "interpret" them. In fact, however, legislatures across centuries of American history have thought of themselves as the primary interpreters. They blurred the line between "making" and "interpreting" by embracing a type of legislation that remains overlooked and little understood: "expository" legislation—enactments that specifically interpreted or construed previous enactments.

In the most exhaustive historical study of the subject to date, this Article—the first in a series of Articles—unearths and explains that lost tradition of legislative statutory interpretation from an institutional perspective. To do so, it draws on an original dataset of 2,497 pieces of expository legislation passed from 1665 to 2020 at the colonial, territorial, state, and federal levels—the first effort of its kind. It shows how expository legislation originated as a colonial-era British import that Americans came to rely on beyond the creation of new constitutions. Lawmakers used expository statutes to supervise administrative statutory interpretation and to negotiate interpretation in the shadows of courts. Judges accepted and even encouraged legislative statutory interpretation. In the mid-nineteenth century, judges increasingly fought back, emboldened by growing calls for judicial independence. Yet even as the backlash entered into treatises, and even as some lawmakers began to balk, legislatures and judges continued to accept and use legislative interpretations of statutes well into the nineteenth century.

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The early history of expository legislation offers an alternative constitutional vision to the oft-repeated notion that statutory interpretation is necessarily and has always been an intrinsically and exclusively "judicial" power. As the Article ultimately argues, strict and formalist conceptions of separation of powers in statutory interpretation are misguided, for the extent to which statutory interpretation was considered a judicial power has fluctuated in ways that were intertwined with broader transformations in American society. This history teaches us to think of statutory interpretation as a shared task among branches but exercised in different contexts and domains.

It also illuminates the historically contingent nature of legislation, revealing new ways that statutes can contain an inherent interpretive openness. These particular forms of openness raise new questions about the validity of subsequent legislative history. They also reveal how legislatures have embraced a paradoxical concept of original intent and meaning—one that legislatures recognized was rarely a "pure" kind but more often a fictional, dynamic kind intertwined with the changing views of post-enactment interpreters.

INTRODUCTION

According to the conventional story, courts are—and have always been—the primary and final interpreters of statutes.[1] The thundering claim of Chief Justice John Marshall in *Marbury v. Madison*, that it is "emphatically the province and duty of the Judicial Department to say

[1] *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, 1826–27 (2010) (describing state judges' widespread resistance to state legislatures' enactments of rules of statutory interpretation); Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 867 (2009) ("Only the judiciary can dispositively interpret laws to resolve legal disputes."); 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 (2002) (advocating for judges to retain significant authority over statutory interpretation); Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 278 (2011) ("[P]rior to *Chevron*, Congress legislated against a background understanding that the courts have ultimate judicial responsibility to say what the law is."); Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495, 1523 (2017) (claiming that lawmakers rarely insist on judicial supremacy in statutory interpretation but nonetheless acquiesce to it because of institutional incentives). To be sure, not everyone has endorsed this view. For an account of administrative statutory interpretation in the first century of the United States, for example, see Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7.

what the law is,"[2] has become the mantra of those who believe in judicial supremacy and strict separation of powers in statutory interpretation.[3] If judges ultimately interpret statutes, as the logic goes, then legislatures have little power to tell judges how to interpret statutes, which implies that administrative agencies have little power too and so courts should not defer to agencies' interpretations of statutes.[4]

This logic has gained such prominence that in early 2024 a version of it appeared recently in the oral argument for *Relentless, Inc. v. Department of Commerce*, a U.S. Supreme Court case concerning the fate of a kind of judicial deference to agencies' interpretations of statutes known as *Chevron* deference.[5] After Justice Elena Kagan asked one counsel whether Congress could codify *Chevron* deference, the counsel responded that such an act would "take away from courts and give to agencies core judicial interpretive authority," and "Congress could [not] do that. . . . [I]t can't tell courts how to do interpretation and to defer to someone else."[6]

Marbury's antiquity has given this view a supposedly historical foundation, as seen in Justice Neil Gorsuch's concurring opinion in the 2019 Supreme Court case *Kisor v. Wilkie*.[7] America's founders, Gorsuch claimed, "designed a judiciary that would be able to interpret the laws

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

3 *See, e.g.*, Jellum, *supra* note 1, at 867 (invoking *Marbury*); Gluck, *supra* note 1, at 1825–26 n.285 (discussing a Delaware statutory interpretation case that invoked *Marbury*); Molot, *supra* note 1, at 1320 ("[J]udges should retain ultimate say over matters of interpretation just as *Marbury* declared.").

4 *See, e.g.*, Elizabeth Garrett, *Legislating* Chevron, 101 Mich. L. Rev. 2637, 2637–38 (2003) (discussing scholarly views on the tension between *Marbury* and judicial deference to agency interpretations of statutes).

5 Relentless, Inc. v. Dep't of Commerce, No. 22-1219 (U.S. argued Jan. 17, 2024); *see also* Adam Liptak, *Conservative Justices Appear Skeptical of Agencies' Regulatory Power*, N.Y. Times (Jan. 17, 2024), https://www.nytimes.com/2024/01/17/us/supreme-court-chevron-case.html [https://perma.cc/A822-5VZ3] ("Judging from questions . . . Chevron deference appeared to be in peril.").

6 Transcript of Oral Argument at 49–50, Relentless, Inc. v. Dep't of Commerce, No. 22-1219 (U.S. filed June 14, 2023), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-1219_e2p3.pdf [https://perma.cc/GJA9-LWMK]. Insofar as one claimed basis of *Chevron*'s legitimacy is the idea that Congress implicitly delegates interpretive authority to agencies, *see* Garrett, *supra* note 4, the phenomenon of expository legislation doesn't necessarily indicate that Congress presumptively chooses to keep interpretive power for itself rather than to delegate interpretive authority to administrative actors. Rather, as Section III.A *infra* suggests, 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.

7 139 S. Ct. 2400 (2019).

'free from potential domination by other branches of government.'"[8] Congress couldn't force courts to interpret statutes in specific ways, and if that were true, "how can an executive agency control a judge's interpretation of an existing and equally binding regulation?"[9] Statutory interpretation was for judges.

Scholars have long challenged this notion that government powers should be rigidly divided into the categories "judicial," "legislative," and "executive,"[10] but the idea of strict separation of powers *in the statutory interpretation context* depends on an additional formal distinction that scholars have largely taken for granted. It depends on the premise that there must be, and must have always been, a clear conceptual distinction between "making" and "interpreting" law. When "making" is seen as distinct from "interpreting," it's possible to see each power as belonging to a different branch.[11] As Justice Gorsuch claimed in *Kisor*, America's founders knew that "the power of making ought to be kept distinct from that of expounding, the laws."[12] Even for thinkers who tread lightly on what the Constitution requires, this distinction facilitates the conclusion that statutory interpretation is an intrinsically and exclusively "judicial" power. The legal scholar John Manning has written, for instance, that "the Constitution speaks so softly about the nature of the legislative power to enact law and of the judicial power to say what the law is,"[13] as if describing some pre-existing and natural distinction, like water and oil, between the "legislative power to enact law" and the "power to say what the law is."

But as this Article—the first in a series of Articles—demonstrates in the most exhaustive historical study on the subject to date, the premises and "histories" underlying the strict view of separation of powers for statutory interpretation are in large part false. For much of American history, there was a widely accepted tradition of *legislative* statutory

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[8] *Id.* at 2438 (Gorsuch, J., concurring) (quoting United States v. Will, 449 U. S. 200, 218 (1980)).

[9] *Id.* at 2439 (Gorsuch, J., concurring).

[10] As the legal scholar Victoria Nourse has argued, for example, this formalist distinction that "rel[ies] upon the terms 'legislative, executive, and judicial'" supports only "a weak understanding of the separation of powers." Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. Pa. J. Const. L. 313, 317, 347, 351–52 (2014).

[11] For examples of this logic, see discussion *infra* Section IV.A. *See also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 644 (1996) ("[A] core objective of the constitutional structure was to ensure meaningful separation of lawmaking from the exposition of a law's meaning in particular fact situations.").

[12] *Kisor*, 139 S. Ct. at 2437 (Gorsuch, J., concurring) (quoting 2 Records of the Federal Convention of 1787, at 75 (M. Farrand ed. 1911)).

[13] John F. Manning, *Without the Pretense of Legislative Intent*, 130 Harv. L. Rev. 2397, 2432 (2017).

interpretation that blurred the line between "making" and "interpreting" law. Founders that Justice Gorsuch may have been referencing in *Kisor*—including presidents such as George Washington and James Madison—actually accepted legislative statutory interpretation.[14] So, too, did many state and federal courts.[15] The extent to which statutory interpretation was considered a "judicial power" and the distinction between "making" and "interpreting" law have, in fact, fluctuated in ways that were intertwined with broader transformations in American society. As the Article argues, this story radically disrupts and offers an alternative first-order constitutional vision to the dogma that statutory interpretation is necessarily, has always been, and has always been believed to be, an intrinsically and exclusively "judicial" power.[16]

At the heart of this alternative constitutional vision was a type of legislation that this Article excavates called "expository legislation." An expository enactment purports to interpret or construe what a law means and had always meant. Unlike a statutory section that defines terms elsewhere in that *same* statute—which is a regular feature of "making" law—an expository enactment is surprising because it purports to interpret or construe a *previous* enactment and blurs the line between making and interpreting law. Though many of these enactments also purported to "amend" previous enactments,[17] the idea behind expository laws was that they didn't actually change anything about the law—they merely announced what the law had always meant. Typically, expository enactments could be identified by their titles, which used phrases such as "An Act to explain an Act,"[18] "An Act to construe an Act,"[19] and "An Act declaratory of an Act"[20] to signal that they were expository. A textbook

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14 *See* discussion *infra* Section II.B.

15 *See* discussion *infra* Parts II, III.

16 In offering this counter-story, I hope to demonstrate how scholarship on legislative practices *can* indeed provide a useful foundation for first-order jurisprudential theories of institutional roles in statutory interpretation—contrary to the skepticism of some scholars like John Manning. *See, e.g.*, Manning, *supra* note 13, at 2429–30 (criticizing a major empirical study on legislative practice as neglecting "first-order questions about proper institutional roles").

17 *E.g.*, Act of Jan. 5, 1850, No. 116, 1849-1850 Ala. Laws 150.

18 *E.g.*, Act of Feb. 14, 1838, ch. 212, 1838 Va. Acts 154 ("An Act to explain the act, entitled, 'an act concerning the navigation of Elk river,' passed February eleventh, eighteen hundred and thirty-seven."); Act of Jan. 1842, 1842 R.I. Acts & Resolves Jan. Adjourned Sess. 37 ("An Act explanatory of an act requiring each session of the General Assembly to be opened with prayer.").

19 *E.g.*, Act of Nov. 1, 1843, No. 21, 1843 Vt. Acts & Resolves 17 ("An act, construing the seventh section of the act relating to public accounts, approved November 12, 1842.").

20 *E.g.*, Act of Dec. 18, 1844, No. 2930, 1844 S.C. Acts 296 ("An act to declare the meaning of an act prescribing the mode of electing clerks, sheriffs, and ordinaries, passed on the twenty-first day of December, Anno Domini one thousand eight hundred and thirty-nine."); Act of Apr. 25, 1844, No. 264, 1844 Pa. Laws 390 ("An act declaratory of the act passed the

expository enactment had one of these titles, a preamble with language such as "[w]hereas doubts have arisen as to the true construction of the act," and/or a section that explained how to construe a previous statute or described what the original legislature had intended it to mean.[21] Legislatures assumed not only that "legislative intent" existed and could be deciphered but also that legislatures themselves could competently determine the intentions of *previous* legislatures.[22]

The current stalemate in debates over separation of powers in statutory interpretation is understandable given how little scholarship there is about this type of legislation. Of the scholarship that exists, virtually all of it is limited to providing snapshots of judicial views on expository legislation, or to exploring the question of how to tell whether a statute is expository, or to suggesting methods for judges to use when interpreting expository statutes.[23] This juricentric paradigm has both marginalized the perspectives of non-judicial branches and obscured the profound roles that legislative statutory interpretation has played in society. Meanwhile, we know nearly nothing about the American *history* of expository statutes outside of a few short and sporadic

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thirty-first day of March, Anno Domini, one thousand eight hundred and thirty-six, entitled 'An Act to authorize the governor to incorporate a company to make a lock navigation on the river Monongahela.'").

[21] *See, e.g.*, Act of Mar. 6, 1833, Ch. 25, 1832 Va. Acts 20. The exact wording of these statutes varied greatly, and not every expository statute had the same basic components. For a similar typology, see James E. Pfander, *History and State Suability: An Explanatory Account of the Eleventh Amendment*, 83 Cornell L. Rev. 1269, 1319 (1998). Not every statute with these textual signals was *substantively* expository—sometimes legislatures used these signals to disguise the amendatory nature of laws. *See* discussion *infra* Section III.B. But here I employ this more formalistic/stylistic concept of expository legislation, which is both underinclusive and overinclusive as described in Appendix A *infra*, because my primary purpose in this Article is to recover legislatures' *self-conceptions* of their abilities to construe their prior statutes.

[22] On the problem of legislatures "expir[ing]," see Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 548–49 (1983) ("In order to authorize judges (or agencies) to fill statutory gaps, the legislature must deny itself life after death and permit judges or agencies to supply their own conceptions of the public interest."). *See also* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 95–98 (1988) (noting the Supreme Court's statement that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (quoting Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980))).

[23] Specifically, judicial doctrine on expository legislation has received brief treatments in a casebook, William D. Popkin & Walter W. Foskett, Materials on Legislation: Political Language and the Political Process 82 (5th ed. 2009), and a modern statutory interpretation treatise, Shambie Singer & Norman J. Singer, Sutherland Statutes and Statutory Construction § 26:1-7 (7th ed. 2020). One recent piece has examined present-day federal "clarifying legislation" and how judges have approached them. Pat McDonell, Note, *The Doctrine of Clarifications*, 119 Mich. L. Rev. 797 (2021). Another has described one federal amendment as an "explanatory statute." Adam Crews, *Textualism and the Modern Explanatory Statute*, 66 St. Louis U. L.J. 197 (2022).

accounts focused on very limited time periods or specific jurisdictions.[24] Our view is more scattershot than panoramic, causing fundamental questions to remain unanswered. How often did legislatures interpret their statutes? Why did they do it? What were the legal and societal consequences? Where did the practice come from? How did it change? How did judicial views change over time? What was and is the place of legislative statutory interpretation in America?

This Article answers these questions from an institutional perspective by blending original historical research with analyses of an original dataset of 2,497 expository enactments passed at the colonial, territorial, state, and federal levels from 1665 to 2020.[25] (Appendix A details the methodology for compiling the dataset, and Appendix B presents macro-level quantitative insights about the geographic diffusion, subject matter, and immediacy of expository legislation.) A second, future Article will recover the bottom-up history of expository legislation—including its relationship to petitioning, politics, social movements, and, more broadly, "society"—and will home in on twentieth-century transformations in expository legislation (such as its shifting textuality).[26]

Here, Part I begins the work by providing a new definition of expository legislation, informed by historical realities, and introducing expository legislation's conceptual puzzles that destabilized ideas about separation of powers.

Part II uncovers the origins of legislative statutory interpretation as a British import in colonial North America. It demonstrates how expository legislation became entrenched in North America due to a vertical relationship between the colonies and the British mainland. The creation of the United States didn't immediately disrupt legislative statutory interpretation. Instead, many of America's founders continued to accept and rely on expository legislation. Well into the nineteenth century, expository legislation was a tool that presidents, governors,

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[24] These include: a short essay from 1935 on expository legislation at the time, Note, *Legislation—Declaratory Legislation*, 49 HARV. L. REV. 137 (1935); an even shorter essay from 1948 on expository legislation in California at the time, Hubert D. Forsyth, *Declaratory Legislation in California*, 36 CAL. L. REV. 634 (1948); a more extended description from 1998 about expository legislation in the 1770s through 1790s, Pfander, *supra* note 21, at 1314–23; a short summary about expository legislation in medieval England, Crews, *supra* note 23, at 204–07; and a recent article about a 1789 legislative debate on a specific declaratory statute (citing the present Article), Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 800 n.244 (2023).

[25] In this 2,497 number, and in Figures 1 and 2 below, I generally do not include any "clarifying" legislation—a type of legislation that emerged in the early-twentieth century after the decline of traditional expository legislation. *See* discussion *infra* Appendix A. A second, future Article will provide an account of federal "clarifying" legislation. Alexander Zhang, *Externalist Statutory Interpretation*, 134 YALE L.J. (forthcoming 2024).

[26] *Id.*

judges, lawmakers, and administrators strategically used to collaborate on statutory interpretation. Even as a handful of state judges began to turn against expository legislation—especially retroactive ones seen as violations of "vested rights"—legislatures paid little attention. If anything, legislatures doubled down.

Part III recovers the forgotten "golden age" of expository legislation, which I argue began around the early 1820s and ended around the late 1870s and early 1880s. Legislators passed a flurry of expository enactments in this period, sometimes abusing the concept to evade parliamentary rules and to quietly amend old statutes. But expository legislation also facilitated the rise of the administrative state, as it allowed legislatures to supervise and guide administrative statutory interpretation. It enabled administrators themselves to secure overrides of unfavorable court interpretations and to quickly resolve inter- and intra-departmental confusions.

And so whereas a growing body of scholarship has uncovered legislatures' modern practice of overriding judicial interpretations of statutes,[27] this Article presents the rest of the picture. Legislative overrides of judicial opinions were just subsets of a broader phenomenon of legislative statutory interpretation in which overrides and underwrites of *administrative* and *executive* interpretations were just as if not more important. Moreover, expository statutes were sometimes enacted while cases were pending in courts—not just after they had been resolved. Whereas legal scholar Amanda Frost has proposed allowing courts to consult legislatures about statutory meaning while cases are pending,[28] this Article shows how expository legislation had already served that purpose for many years while raising similar constitutional issues. Most importantly, expository legislation was frequently enacted *preemptively* to prevent litigation, not just while cases were pending or concluded. Given that many early judges disfavored advisory opinions[29] and that the jurisdiction of courts

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[27] *See generally* Jeb Barnes, Overruled? Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations (2004); James J. Brudney, *Distrust and Clarify: Appreciating Congressional Overrides*, 90 Tex. L. Rev. 205 (2012); Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex. L. Rev. 1317 (2014); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 96 S. Cal. L. Rev. 205 (2013); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 Tex. L. Rev. 859 (2012).

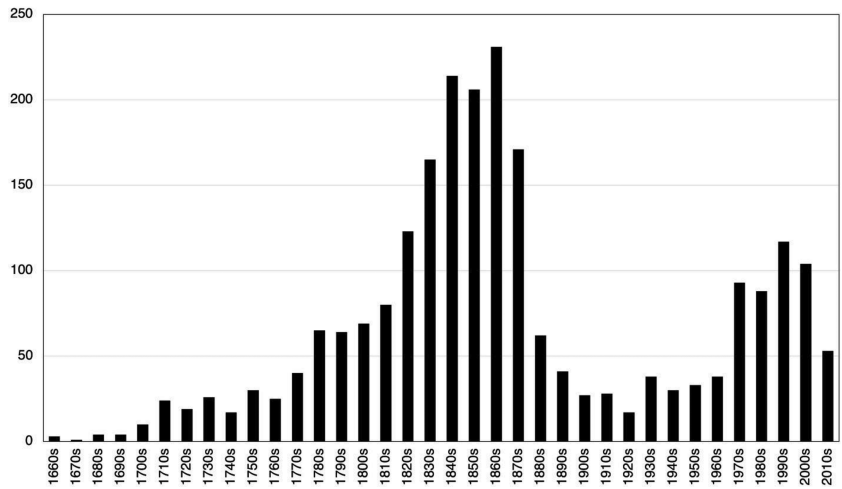
[28] *See* Amanda Frost, *Certifying Questions to Congress*, 101 Nw. U. L. Rev. 1 (2007).

[29] *See* Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 Vand. L. Rev. 621, 670–71, 676 (2021).

could be limited in various ways,[30] expository legislation provided an important workaround for settling statutory interpretation questions. Indeed, legislatures used the form of expository legislation to interpret statutes *in the shadows of courts*.

But, as shown in the two figures below, traditional forms of expository legislation declined in the last three decades of the nineteenth century. These two figures are based on the data and methodology described in Appendix A, and they document the number of expository enactments per decade. They exclude "clarifying" legislation—a related form that emerged between the 1910s and 1930s and became dominant over traditional expository legislation after surging in the late-twentieth century, a phenomenon that will be addressed in a second Article.[31] "Clarifying" enactments use forms of the verb "clarify" as their operative word and are identical in purpose to traditional expository legislation except for an important difference: they became increasingly likely to modify statutory text and thus reflected a change in the character of legislative statutory interpretation that made it more like regular lawmaking and what we now consider "amendments" (meaning modifications to statutory text).[32]

FIGURE 1. STATE/COLONIAL/TERRITORIAL EXPOSITORY ENACTMENTS PER DECADE (EXCLUDING "CLARIFYING" LEGISLATION)

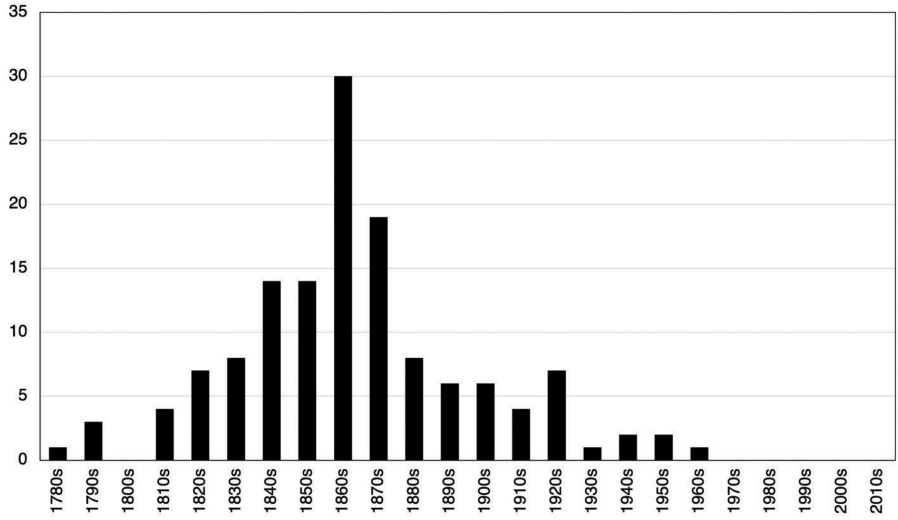


[30] *See, e.g.*, Dyer v. Webster, 18 N.H. 417, 418 (1846) (discharging a case for lack of ripeness); James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1432 (2015) (describing *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), as "a precedent that insists on judicial finality").

[31] *See* Zhang, *supra* note 25 (tracing the rise of "clarifying" legislation in the United States).

[32] *Id.*

FIGURE 2. FEDERAL EXPOSITORY ENACTMENTS PER DECADE (EXCLUDING "CLARIFYING" LEGISLATION)



Traditional forms eventually came to resemble modern clarifying legislation,[33] but in the meantime they starkly declined. Part IV details some of the many factors that contributed to this decline, while a second, future Article will address the remaining factors.[34] Specifically, Part IV explains how judges, newly empowered by the rise of judicial elections, fought back. Most judges who criticized expository legislation rejected only those statutes that applied retroactively, but some went even further to reject *all* expository legislation as an unconstitutional violation of separation of powers. As statutory interpretation treatises became Americanized and as negative case law proliferated, judges became increasingly empowered to claim statutory interpretation as an exclusively "judicial power." Though legislatures would continue to pass expository statutes, some lawmakers began to hesitate. A new equilibrium of separation of powers in statutory interpretation had arisen.

Although my purpose is primarily to excavate the lost history of expository legislation, this history implicates ongoing debates about statutory interpretation and separation of powers, as Part V elaborates. For one, the Article adds a historical dimension to a growing body of scholarship that investigates the relationship between legislative

33 *Id.*
34 *See id.*

practice and statutory interpretation,[35] and it provides a historical backbone to what scholar Abbe Gluck has called "states as laboratories of statutory interpretation."[36] Above all, the Article suggests that separation of powers in statutory interpretation should not be seen reductively as the linkage of a task (statutory interpretation) to a branch (judicial). A more nuanced view adds a third dimension: context. The nation's founders, ancestors, and descendants all understood that while courts could interpret statutes in cases before them, legislatures had important roles to play in statutory interpretation both within and *beyond* the courts. And as legal scholars now begin to elaborate the limits of the belief that judges are "faithful agents" of legislatures,[37] expository legislation's history provides us with an additional descriptive model: Judges were, at times, hostile "double agents" who tried to intimidate and grab power from legislatures. At the heart of these inter-branch relationships was a profound uncertainty about the ontology of legislation, and about the distinction between "making" and "interpreting" law, which expository legislation exposed. As history suggests, the option of expository legislation gave statutes an inherent interpretive openness, destabilizing the concept of "subsequent legislative history," and illuminating new ways in which legislatures could avoid problems of entrenchment.

Most surprisingly, the inherent interpretive openness created by expository legislation meant that legislatures that used expository legislation may have been embracing a counter-intuitive meta-rule about original intent and meaning in statutory interpretation. While expository legislation often proclaimed to recover the original intent or "true meaning" of old statutes, lawmakers knew that expository

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35 *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); Jesse M. Cross, *Legislative History in the Modern Congress,* 57 HARV. J. ON LEGIS. 91 (2020); Jesse M. Cross, *The Staffer's Error Doctrine*, 56 HARV. J. ON LEGIS. 83 (2019); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 576 (2002); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Drafting*, 114 COLUM. L. REV. 807 (2014). Still, other scholars have rebutted that how Congress works doesn't really matter, especially because attempts to identify legislative "intent" are doomed to failure. *See* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979 (2017). In response, some have pointed to enacted legislative findings and purposes clauses to demonstrate the possibility of legislative intent. *See* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 88 U. CHI. L. REV. 669, 676–77 (2019).

36 Gluck, *supra* note 1.

37 *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010).

statutes were never pure statements of original intentions and meanings but rather just *interpretations* of them. If lawmakers expected future legislatures to pass expository enactments—to articulate original intent and meaning through these enactments—and expected judges to defer to those interpretations of original intent and meaning, they nonetheless recognized that their notion of original intent and meaning had a fictional quality. Thus, to the extent that the history of legislative statutory interpretation sheds light on originalism as a preferred method of statutory interpretation, it also reveals how this originalism—as it was embraced by legislatures—was always paradoxical and intertwined with dynamic interpretation.[38]

I
Defining Expository Legislation

To understand how legislatures blurred the line between "making" and "interpreting" statutes, we first need a robust definition of expository legislation—the tool they used to blur it. This Part (and Appendix A) provides a historically grounded definition informed by the largest dataset of expository legislation constructed to date. It offers a variety of examples and introduces some of the deep conceptual puzzles that enabled forgotten debates about separation of powers, which the remainder of the Article recovers.

A. The Blurry Line Between Interpretation and Construction

An expository law is a legislative enactment that interprets, declares the legislative intention of, constructs, defines, clarifies, or explains a previously existing enactment as that enactment existed prior to the expository law's enactment. Legislatures can and did use expository enactments to interpret the linguistic meanings of words, as seen in Figure 3 below, and to *construe* the legal effects of statutory provisions, as seen in Figure 4 below.

[38] *See* William N. Eskridge, Jr., Dynamic Statutory Interpretation 9 (1994) (describing dynamic statutory interpretation as a theory involving the ideas that "the meaning of a statute is not fixed until it is applied to concrete circumstances, and [that] it is neither uncommon nor illegitimate for the meaning of a provision to change over time").

FIGURE 3.[39]

AN ACT declaratory of the meaning and effect of the word "mining" as used in Chapter thirty-five (35) of the Revised Statutes of Indiana, now in force on the subject of corporations, manufacturing and mining companies, to legalize companies heretofore organized under the provisions of said chapter for the purpose of drilling, sinking and operating wells for the production and sale of natural gas and petroleum, and to validate the acts and contracts of such company and association heretofore organized supplemental to said act, and declaring an emergency.

[APPROVED FEBRUARY 23, 1889.]

WHEREAS, Certain persons have formed companies, corporations and associations to carry on the business of mining, drilling, sinking and operating wells for petroleum and natural gas, and selling the same, and for the purpose of manufacturing petroleum and other minerals into gas for fuel and light, and doubts are entertained as to whether corporations, companies and associations so formed are valid corporations and associations under the provisions of said chapter thirty-five (35) of said Revised Statutes; now, therefore,

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That it was and is the intent and meaning of said word "mining" as used in said chapter to cover and include the sinking, drilling, boring and operating wells for petroleum and natural gas.

FIGURE 4.[40]

An Act explanatory of an act to establish the Real Estate Bank of the State of Arkansas.

Whereas, it appears, by the reading of the charter of the Real Estate Bank of the State of Arkansas, that the implied meaning thereof is not explicitly expressed, as regards subsequent elections after the first: Therefore,

Be it enacted by the General Assembly of the State of Arkansas, That the true construction of the charter of said bank is, and shall be, that the principal bank, and each of the branches, shall, when organized, have three members each in the central board of directors, and that said central board is fully competent and empowered to order all succeeding elections, so that each office shall have an equal number of directors, with the president thereof, and an equal representation in the central board of directors.

Approved: December 13th, 1837.

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39 1889 Ind. Acts 38.

40 1837 Ark. Acts Special Sess. 139.

Legislatures often blurred the distinction between interpretation and construction.[41] As legal scholar Lawrence Solum has argued, interpretation is about finding the "linguistic meaning or semantic content of the legal text," while construction is about giving "a text legal effect" by "translating the linguistic meaning into legal doctrine or by applying or implementing the text."[42] But legislatures often used "meaning" and "construction" interchangeably, as seen in the figure below. They began from the premise that a statute had a "true meaning" and "true intent," and they expounded statutes to make that "true meaning" and "true intent" clearer.

FIGURE 5.[43]

AN ACT explanatory of "an act concerning strays."

	SECTION		SECTION
The Secretary of State shall contract, for printing stray notices without advertising for proposals. - - - - - -	1	Twenty-five cents allowed for printing each stray notice. - - - - - - -	ib.

Be it enacted by the General Assembly of the State of Missouri, as follows:

"§ 1. The true meaning and construction of the 12th, 16th, and 17th sections of "an act concerning strays," approved March 17th, 1835, is that the Secretary of State shall not advertise, annually, for proposals to publish stray notices, but that he shall contract, without such advertisement, with such printers mentioned in the law, as he may select, at a price not exceeding that mentioned in the act of which this act is explanatory. The amount allowed for printing each stray notice shall not exceed twenty-five cents.

This act shall take effect from its passage.

APPROVED, Dec. 19, 1842.

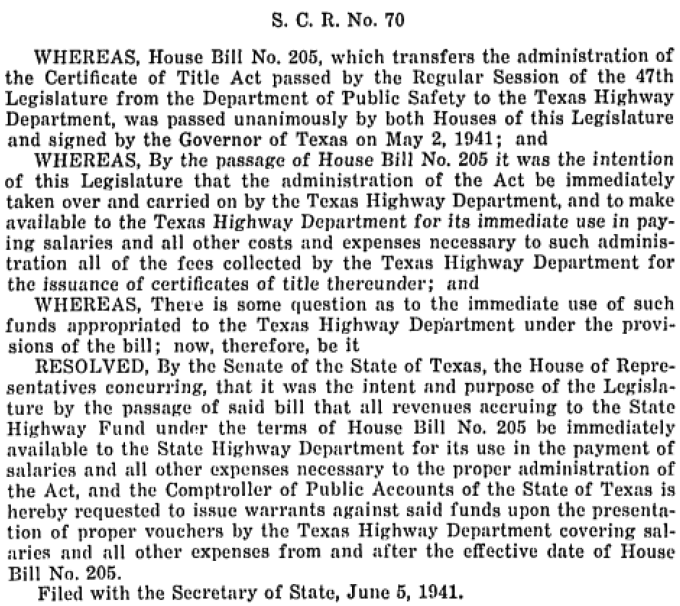
Some expository enactments solely declared legislative intent and purpose, as seen in the next example.

41 On the distinction between interpretation and construction, see Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

42 *Id.* at 96.

43 1842 Mo. Laws 135.

FIGURE 6.[44]



S. C. R. No. 70

WHEREAS, House Bill No. 205, which transfers the administration of the Certificate of Title Act passed by the Regular Session of the 47th Legislature from the Department of Public Safety to the Texas Highway Department, was passed unanimously by both Houses of this Legislature and signed by the Governor of Texas on May 2, 1941; and

WHEREAS, By the passage of House Bill No. 205 it was the intention of this Legislature that the administration of the Act be immediately taken over and carried on by the Texas Highway Department, and to make available to the Texas Highway Department for its immediate use in paying salaries and all other costs and expenses necessary to such administration all of the fees collected by the Texas Highway Department for the issuance of certificates of title thereunder; and

WHEREAS, There is some question as to the immediate use of such funds appropriated to the Texas Highway Department under the provisions of the bill; now, therefore, be it

RESOLVED, By the Senate of the State of Texas, the House of Representatives concurring, that it was the intent and purpose of the Legislature by the passage of said bill that all revenues accruing to the State Highway Fund under the terms of House Bill No. 205 be immediately available to the State Highway Department for its use in the payment of salaries and all other expenses necessary to the proper administration of the Act, and the Comptroller of Public Accounts of the State of Texas is hereby requested to issue warrants against said funds upon the presentation of proper vouchers by the Texas Highway Department covering salaries and all other expenses from and after the effective date of House Bill No. 205.

Filed with the Secretary of State, June 5, 1941.

B. The Dilemma: Expounding Old Law or Making New Law?

Whether to interpret, construe, or declare meaning or intention, the very concept of expository legislation had an uncertainty at its core. When a legislature passed an expository statute, was it really interpreting what the law had always been, or was it just making new law for the future? Put another way, is there such a thing as a non-retroactive expository statute?[45] And if so, what does that statute do that a regular statute or "amendment" can't? From a judge-centric perspective, these questions mattered because a retroactive expository statute might allow legislatures to control the outcomes of specific cases and controversies in the courts, raising constitutional problems.[46] If a case involving statutory

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[44] 1941 Tex. Gen. Laws 1456.

[45] One approach, as suggested recently by Pat McDonell, has been to distinguish between laws that are "retrospective" (merely applying to events before those laws' enactments) and laws that are "retroactive" (which "change the legal consequences" of preenactment events). McDonell, *supra* note 23, at 801–02. According to McDonell, clarifications are "never retroactive because they are simply restatements of the law with no new legal consequences." *Id.* at 802. This nevertheless raises a difficult problem: Even if a clarification statute restates past law, it creates a certainty that didn't previously exist and that therefore newly guides behavior; and the question remains whether that new certainty should affect the legality of past actions when there was less certainty.

[46] *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871) (explaining that Congress lacks the power to prescribe rules of decision to pending cases). *But see* Helen Hershkoff

interpretation were pending, a legislature might pass an expository statute that settled the interpretation question before the judge could opine.[47]

As judges increasingly grew disturbed by this possibility in the nineteenth century, they transformed the formal concept of expository legislation. Initially, people began from the formalist premise that there was a distinct type of law called expository legislation, which had certain formal features. For example, sometimes legislators deliberately chose to use words like "declare" instead of words like "amend" to make it clear that the statutes were expository even if the statutes otherwise looked completely identical to regular amendments.[48] According to the formalist logic, whenever a statute was determined to be "expository," it automatically had certain effects: It declared what a prior law had *previously* meant, and that declaration of prior meaning presumptively operated retroactively.

But there were three problems with this formalism that Americans increasingly recognized. First, the line between "amending" and "expounding" was blurry, and that blurriness changed over time. As seen in the example below, legislatures often purported to *both* amend and expound the law—all within the same statute.

FIGURE 7.[49]

CHAP. 25.—An ACT to explain and amend the act, entitled, "an act concerning patrols."

[Passed March 6th, 1833.]

Whereas, doubts have arisen as to the true construction of the act passed the twenty-first day of March eighteen hundred and thirty-two, entitled, "an act concerning patrols," for remedy whereof,

1. *Be it enacted and declared by the general assembly*, That the above recited act did not, and shall not in future be construed to repeal the laws theretofore in existence providing for patrols, but that the said laws are still in force, and the said recited act is only cumulative in its provisions.

2. *Be it further enacted*, That hereafter the said recited act shall not be enforced in any county within this commonwealth, except in cases of insurrection, unless the court of such county, a majority of the justices thereof being present, shall make an order approving the enforcement of the said act, for some particular period of time stipulated in the said order.

3. This act shall be in force from its passage.

& Fred O. Smith, Jr., *Reconstructing* Klein, 90 U. CHI. L. REV. 2101 (2023) (describing the relationship between white supremacy and *Klein*'s assertion of judicial supremacy). Even after *Klein*, though, the Supreme Court continued to hold that Congress can pass expository statutes and even cause those statutes to have retroactive effect. *See* Stockdale v. Ins. Cos., 87 U.S. (20 Wall.) 323, 331 (1873).

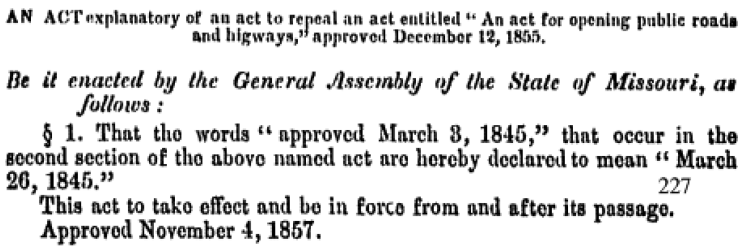
47 *See infra* text accompanying note 204; *see also* McDonell, *supra* note 23, at 803.

48 *See infra* text accompanying notes 211–12.

49 1832 Va. Acts 20.

Other times, expository enactments changed the natural meanings of words but didn't proclaim to be "amending" the old statutes, as seen in the next example.

FIGURE 8.[50]



AN ACT explanatory of an act to repeal an act entitled "An act for opening public roads and higways," approved December 12, 1855.

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. That the words "approved March 3, 1845," that occur in the second section of the above named act are hereby declared to mean "March 26, 1845." 227

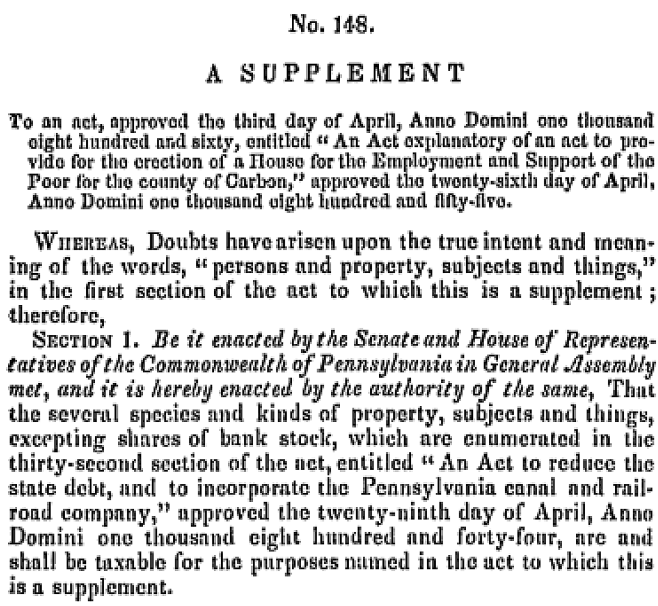
This act to take effect and be in force from and after its passage.

Approved November 4, 1857.

A second problem was that legislatures sometimes mixed past, present, and future tenses. As seen earlier in Figures 3, 4, and 7, this led to phrases like "was and is the intent and meaning," "is and shall be," and "did not, and shall not in future be construed." Third, even when legislatures *exclusively* deployed future-oriented language like "shall be," they also used concepts inherent to retroactive forms of expository legislation. As seen in the next example, they sometimes talked as if a statute had a "true intent and meaning" that transcended time, but they simultaneously declared that the *effect* of that "true intent and meaning" would manifest only in the future.

50 1857 Mo. Laws 227.

FIGURE 9.[51]



No. 148.

A SUPPLEMENT

To an act, approved the third day of April, Anno Domini one thousand eight hundred and sixty, entitled "An Act explanatory of an act to provide for the erection of a House for the Employment and Support of the Poor for the county of Carbon," approved the twenty-sixth day of April, Anno Domini one thousand eight hundred and fifty-five.

WHEREAS, Doubts have arisen upon the true intent and meaning of the words, "persons and property, subjects and things," in the first section of the act to which this is a supplement; therefore,

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same*, That the several species and kinds of property, subjects and things, excepting shares of bank stock, which are enumerated in the thirty-second section of the act, entitled "An Act to reduce the state debt, and to incorporate the Pennsylvania canal and railroad company," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and forty-four, are and shall be taxable for the purposes named in the act to which this is a supplement.

What consequence did these Frankensteinian expository statutes have? Did their declarations of statutory meaning operate retroactively? While these questions might have mattered tremendously to judges—and were resolved differently by each—they mattered much less outside of the narrow context of specific cases and controversies heard in courtrooms. As this Article insists, legislative statutory interpretation was important *beyond and in the shadows of courts*. Legislatures' deliberate use of traditional expository forms, even in messy statutes like the ones above, suggested that lawmakers had self-conscious perceptions of their duties and abilities to engage in statutory interpretation. From a non-juricentric perspective, this self-conscious engagement was significant in and of itself, but it also mattered for another reason: Many statutory interpretation disputes never made it to court. As this Article shows, many expository statutes were passed prophylactically simply to help people understand their obligations, to *prevent* the need for litigation, and to get around procedural barriers to litigation. Even the mere option of expository legislation could shape the behavior of administrators and judges.

Many judges recognized this unique role that legislatures could play. And so, as discussed throughout the Article, many judges struck

51 1861 Pa. Laws 161.

a compromise: They disentangled statutory *meaning* from statutory *operation*. Legislatures could continue as expositors of legal or semantic *meanings*, but the retroactivity of those meanings' *operation* in the specific context of litigation became limited. There was, then, such a thing as a non-retroactive expository statute with uses that regular "amendments" didn't have. The next Part unearths these features and functions in early America. Later, Part V discusses how the distinction between meaning and operation, as driven by expository legislation's development, imbued legislation with a fluidity that made the concept of "original meaning" paradoxically intertwined with interpretive dynamism.

II
Legislative Statutory Interpretation in Early America

As a creature of English law, expository legislation took root in North America during the seventeenth and early-eighteenth centuries. By the early-nineteenth century, Americans recognized that the challenges of legal interpretation in practice made it useful to have legislatures intervene. Whatever abstract ideals of separation of powers became expressed in the U.S. Constitution, the realities of an imperfect legislative process and the resulting desire for expository legislation disrupted notions of strict separation of powers.

A. The Origins of American Expository Legislation

Several early colonial assemblies embraced expository legislation. Virginia's colonial assembly, for instance, enacted a number of laws whose purposes were to clarify, declare, and explain legislative intentions. One Virginia statute in 1666 aimed to "declare[] what was meant" by a "clause for planting or seating the land" in patents.[52] Another statute aimed to rectify the fact that "[c]omplaint hath been made that some of the said justices have [acted] contrary to the good intent" behind a prior statute.[53] Also common were statutory *sections* that laid out how legislatures wanted their prior statutes to be construed—a practice that later evolved into the modern form of adding new "definition sections" to statutes. For example, one Massachusetts statute from 1726 provided that "nothing in this Act shall be construed so as to debar or hinder the

[52] 2 The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619, at 244 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823) (1619) [hereinafter Hening's Statutes].

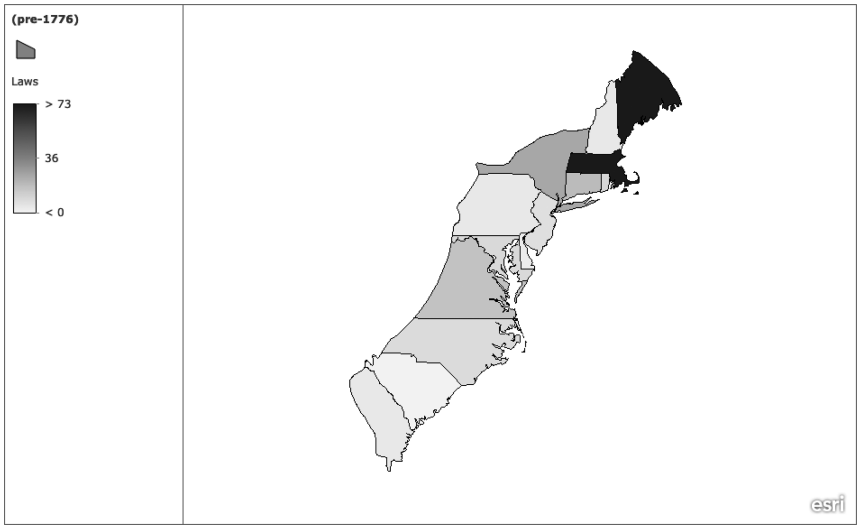
[53] *Id.*

Surveyors of High Ways of doing any thing necessary and convenient in and about their Duty, as by Law impowred [sic]."[54]

Expository legislation wasn't just about trifles. As the preamble of one Virginia expository statute in 1668 explained, that statute existed because doubts had "arisen whether negro women set free were still to be accompted tithable according to a former act."[55] It ultimately declared that "negro women, though permitted to enjoy their ffreedome [sic] yet ought not in all respects to be admitted to a full fruition of the exemptions and impunities of the English, and are still lyable [sic] to payment of taxes."[56]

The bulk of expository legislation—based on a count using the methodologies described in Appendix A—was concentrated in a handful of colonies: Massachusetts (including Maine), New York, Virginia, and Connecticut. The first identifiable piece of expository legislation was in Virginia in 1665, titled "An Act concerning the Intent of some former penal Acts."[57] However, Massachusetts came to be the most prolific, with seventy-three pieces of expository legislation by 1776.

FIGURE 10. EXPOSITORY LEGISLATION IN THE COLONIES[58]



Base Map Source: 13 Colonies Map from Esri

54 ACTS AND LAWS, OF HIS MAJESTY'S PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND 330 (Boston, B. Green 1726).

55 HENING'S STATUTES, *supra* note 52, at 267.

56 *Id.*; *see also* Winthrop D. Jordan, *Modern Tensions and the Origins of American Slavery*, 28 J.S. HIST. 18, 26–28 (1962).

57 1 ACTS OF ASSEMBLY, PASSED IN THE COLONY OF VIRGINIA, FROM 1662, TO 1715, at 72 (London, John Baskett 1727).

58 This figure is based on the counts using the methodology described *infra* Appendix A.

British rule had fueled this robust culture of legislative statutory interpretation. Although the colonies' governance structures varied, each colony had a governor.[59] Royal governors served as intermediaries to the British mainland and presided over colonial legislatures' upper houses (known as councils).[60] Governors received their powers and were obligated to perform certain duties through documents called "instructions," which were sent from Britain to North America.[61]

These royal instructions perpetuated expository legislation. For instance, instructions about how to report legislation were sent to governors in Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, South Carolina, and Virginia (as well as Caribbean colonies).[62] These instructions generally read:

> [Y]ou are to be as particular as may be in your observations to be sent to our Commissioners for Trade and Plantations upon every act, that is to say, whether the same is introductive of a new law, declaratory of a former law, or does repeal a law then before in being . . . .[63]

Sometimes, royal instructions even directed governors to advocate for specific pieces of expository legislation. Instructions sent to North Carolina Governor William Tryon in 1767, for instance, urged him to "recommend to the Council and Assembly of Our said Province to pass an Act, explanatory of the aforementioned Act, intitled, 'An Act for establishing an Orthodox Clergy.'"[64]

While governors had veto power over assemblies' enactments, England could step in by "disallowing" laws—a process that left legislation in force until news of the legislation made it to England where it could be "disallowed."[65] Legislative assemblies tried to evade these restrictions by passing temporary laws and re-enacting prohibited laws for short amounts of time before England could disallow them.[66] However, England began requiring some legislation to have "suspending clauses," which made it so that laws had to first have English approval

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59 *See* Leonard W. Labaree, Royal Government in America: A Study of the British Colonial System Before 1783, 1–11, 37–45 (2d prtg. 1964) (1930) (describing how Britain ruled over its colonies by appointing royal governors to each).

60 *Id.* at 37–44, 158–59.

61 *Id.* at 51–71.

62 1 Royal Instructions to British Colonial Governors, 1670–1776, § 217, at 136–37 (Leonard Woods Labaree ed., Octagon Books, 1967) (1935).

63 *Id.*

64 7 The Colonial Records of North Carolina 507 (William L. Saunders ed., AMS Press, Inc. 1968) (1890).

65 Labaree, *supra* note 59, at 223–25.

66 *Id.* at 247.

before they could go into effect.[67] In the late 1710s and 1720s, England also countered efforts to evade these restrictions by prohibiting assemblies from repealing prior statutes (and thus, in effect, prohibiting assemblies from revising and amending previous statutes) without royal consent.[68] Expository legislation may have arisen from the severe constraints placed on legislatures as a way to sidestep English control. Whereas legislative assemblies had to have royal approval to partially repeal laws (and in effect to modify and revise laws), it was easier for mere "interpretations" and "explanations" of previous laws to fly under the radar. Through expository legislation, assemblies could subtly shift the meanings of prior enactments without having to wait months if not years for royal approval.

While expository legislation was a form of quiet rebellion, it was ironically also a way of mimicking Parliament. Colonial assemblies modeled themselves after Parliament, which blended legislative and judicial functions.[69] They sometimes served as courts for litigants to bring their cases,[70] which meant that legislatures had an additional reason to think of themselves as interpreters of their own statutes. In Virginia, the lack of professionalized judges and lawyers also made it desirable for legislatures to step in as courts of last resort, creating a governmental system of shared and overlapping powers.[71] In response, England prohibited this practice in the late-seventeenth century and directed Virginians to appeal their cases to a different body in England known as the Privy Council.[72] And so the concept of "separation of powers" was not just a horizontal issue, but also a vertical one. At a time when assemblies were increasingly thinking of themselves as mini-parliaments, the balance of power across royal governors, courts, councils, and legislative assemblies was mediated by a vertical relationship between the colonies and the Crown, and vice versa. Expository legislation stood at the heart of these intersecting relationships.

After the colonies declared independence and drafted new constitutions, expository legislation continued to flourish. The constitutions of six states included explicit separation-of-powers provisions, but the new constitutions tended to provide for strong legislatures that often ignored

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67 *Id.* at 224.

68 *Id.* at 251–52.

69 *Id.* at 215, 217.

70 *See* Christine A. Desan, *Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York*, 16 LAW & HIST. REV. 257 (1998) (pointing out that early New York legislatures performed judicial functions like settling contract disputes).

71 LABAREE, *supra* note 59, at 401.

72 *Id.* at 402.

those provisions.[73] The Articles of Confederation hardly spoke of statutory interpretation and failed to provide for an independent federal judiciary.[74] By the time the states began to ratify the new U.S. Constitution in the late 1780s, the concept of expository legislation for statutory interpretation was well established. In fact, the Continental Congress in the 1770s and 1780s also passed expository legislation itself.[75]

That explains why there were so few remarks among the nation's founders about the validity of legislative statutory interpretation. It was already well understood. One of the best pieces of evidence for this is a letter addressed to the states that was unanimously agreed to by the Congress of the Confederation on April 13, 1787—just over a month before the Constitutional Convention began.[76] The letter was about the peace treaty between Britain and the United States, and it contrasted statutory interpretation with treaty interpretation.[77] The comments appear to have been derived from a report that Secretary

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[73] William S. Popkin, Statutes in Court: The History and Theory of Statutory Interpretation 37–38 (1999); Lawrence M. Friedman, A History of American Law 94 (Oxford Univ. Press, 4th ed. 2019) (1973); *see also* Farah Peterson, Statutory Interpretation and Judicial Authority, 1776–1860, at 60–66 (2015) (Ph.D. dissertation, Princeton University) (ProQuest) (noting that early legislatures disregarded separation-of-powers limitations, often adjudicating legal disputes themselves).

[74] *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806,* 101 Colum. L. Rev. 990, 1031–36, 1042 (2001) (explaining that the Virginia Plan broke from the Articles of Confederation when it proposed an indepdendent federal judiciary, and pointing out that "[a] problem with the Articles of Confederation was their inability to secure such uniformity of interpretation").

[75] *See, e.g.*, 7 Journals of the Continental Congress, 1774–1789, at 312 (Worthington C. Ford et al. eds., 1904–37) (passing a resolution to clarify a prior resolution because "doubts have arisen, whether, by the said resolution, it is not required of the general, to enter into the detail and examination of the said accounts, to enable him to confirm the report of the commissioners"); 9 *id.* at 768 (passing a resolution "[t]hat it never was the intention of Congress to make any purchase of live stock, or officer of the department, liable for unavoidable loss" provide certain conditions are met); 10 *id.* at 178 (passing a resolution because "doubts have arisen in the mind of General Washington, to whom the one month's extra pay allowed . . . by the resolutions of Congress of the 29 of December last, should be confined"); 11 *id.* at 581 (passing a resolution because "doubts have arisen as to the sum which shall be paid . . . by reason whereof the intentions of Congress . . . are frustrated"); 11 *id.* at 750 (passing a resolution explaining "the intention of Congress" in response to a letter "desiring an explanation of the resolution"); 15 *id.* at 1418–19 (making resolutions in agreement with a proposed "explanatory resolution"); 18 *id.* at 1100 (passing a resolution about what a prior resolution "so meant and intended" because "doubts hav[e] arisen in the minds of the general officers, whether the resolution of the 21st of October last . . . was meant to extend to them"); 23 *id.* at 688 (passing "a supplemental ordinance" that was initially recorded as "an explanatory ordinance").

[76] 32 *id.* at 177.

[77] *See id.* at 177–78 (explaining that treaties are of national concern and cannot be construed by state legislatures). The distinction between treaties and statutes was an important one that shaped contrasting approaches to legal interpretation. *See* Farah Peterson, *Expounding the Constitution*, 130 Yale L.J. 2, 29–31 (2020).

of Foreign Affairs John Jay—one of the *Federalist Papers*' authors—presented to the Congress six months earlier in October of 1786.[78] Although acknowledging that "all doubts respecting the meaning of a law, are in the first instance mere judicial questions," the letter carved out a space for expository legislation.[79] "When doubts arise respecting the construction of State laws," the letter explained, "it is not unusual nor improper for the State Legislatures, by explanatory or declaratory Acts, to remove those doubts."[80]

While legislative statutory interpretation was generally accepted around the time the United States of America came into existence, it had detractors too. As Representative Elbridge Gerry of Massachusetts claimed in 1789, not only were judges the "expositors of the constitution," but they were also expositors of "the acts of Congress."[81] Any congressional interpretation would "be subject to their revisal . . . . [T]he Judiciary may disagree with us, and undo what all our efforts have labored to accomplish."[82] Gerry was making a subtle distinction that would become important in the nineteenth century. A legislature could enact expository laws, but it didn't necessarily have the power to enforce interpretations *in specific legal cases*.

B. Early Inter-Branch Statutory Interpretation

Despite Gerry's misgivings, Congress took advantage of the power to interpret laws. The First Congress in 1789 passed "An Act to explain and amend an Act, intituled 'An Act for registering and clearing Vessels, regulating the Coasting trade, and for other purposes.'"[83] The act didn't explicitly explain how any particular terms in the original statute were to be construed, but the act was nevertheless a legislative exercise of statutory elaboration. Congress passed three more expository statutes within a decade: a 1791 statute to "explain and amend" a law concerning

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[78] 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 75, at 781, 798 ("When doubts arise respecting the construction of State Laws, it is common and proper for the State Legislatures by explanatory or declaratory Acts to remove those doubts; but when doubts arise respecting the construction of a treaty . . . Congress itself have no authority to settle and determine them.").

[79] 32 *id.* at 178–79.

[80] *Id.* at 178.

[81] 1 ANNALS OF CONG. 596 (Joseph Gales ed., 1789). On legislative constitutional interpretation and construction, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 1970 (2023).

[82] 1 ANNALS OF CONG. 596. For more on this specific controversy, see Shugerman, *supra* note 24.

[83] Act of Sept. 29, 1789, ch. 22, 1 Stat. 94 (repealed 1793).

duties on goods,[84] a 1791 supplementary act that declared the "true intent and meaning" of a previous law about public debt,[85] and a 1794 act to "amend and explain" a section of the 1789 Judiciary Act.[86] The next expository statute, passed in 1813, would be Congress's first statute that purported to be *purely* expository rather than also "amendatory" or "supplementary."[87]

Thomas Jefferson's 1801 manual of legislative procedure, which he published after years of presiding over the Senate, exemplified lawmakers' self-belief in their power to interpret statutes. It affirmed expository legislation in a section about rules concerning the reconsideration of bills, noting that "[d]ivers expedients are used to correct the effects of this rule; as by passing an explanatory act, if any thing has been omitted or ill expressed."[88] Jefferson's Manual—with the tool of expository legislation baked into it—would proliferate across the new United States well into the nineteenth century and shape legislatures' practices.[89]

When Congress interpreted its own statutes, it often did so in collaboration with other branches.[90] After confusion arose over whether a 1796 statute allowed for relief to be "extended to persons imprisoned in civil causes, at the suit of the United States," a House committee asked the nation's Attorney General for his opinion of the "true construction of the law."[91] After receiving a reply, one committee member reported that the committee had decided that "it would not be advisable to pass any law explanatory of the act before cited, until a judicial decision of the Supreme Court shall make it necessary."[92] This remarkable collaboration revealed not only the operation of a formal system of checks and balances but also Congress's voluntary reliance on

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84 Act of Mar. 2, 1791, ch. 13, 1 Stat. 198.

85 Act of Mar. 3, 1791, ch. 25, 1 Stat. 218.

86 Act of Dec. 12, 1794, ch. 3, 1 Stat. 404.

87 *See* Act of Aug. 12, 1813, ch. 41, 3 Stat. 74 (containing language explicit in the title and in the body of the Act that purports to explain a previous act, rather than amending language). For a fuller explanation on the blurry lines between "purely expository," "amendatory," and "supplementary" statutes, see *infra* Appendix A

88 Thomas Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States 108 (Applewood Books, 1993) (1801).

89 Peverill Squire, The Evolution of American Legislatures: Colonies, Territories, and States, 1619–2009, at 151, 173, 179, 191–93, 200, 227, 256–60 (2012).

90 On "collaborative" statutory interpretation, particularly at the state level, see Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 Md. L. Rev. 713 (2018) (pinpointing judicial collaboration as an important stage in early legal development in the United States).

91 1 American State Papers: Miscellaneous 160–61 (Washington, Gales & Seaton 1834).

92 *Id.* at 160.

other branches to shape its own engagement in statutory interpretation. Congress not only deferred to the Attorney General but also asserted its ability to override a Supreme Court interpretation.

Even presidents of the United States—including some of the nation's Founders—blessed expository legislation. Nine presidents from 1789 to 1860—a majority, including George Washington and James Madison—saw Congress pass expository legislation when they were in office.[93] Some presidents even advocated for expository legislation. In 1825, President James Monroe told Congress he wanted to "remove all doubt[s]" regarding an act about wrecks on the coast of Florida, so he "submit[ted] to the consideration of Congress the propriety of passing a declaratory act to that effect."[94] The next year, President John Quincy Adams's State of the Union Address described how a difference of opinion between the Senate and the former President Monroe over the construction of a federal statute had resulted in there being no action on a military appointment. President Adams implored that a "supplementary or explanatory act of the legislature appears to be the only expedient practicable for removing the difficulty of this appointment."[95] For that same federal statute, President Andrew Jackson used his first State of

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[93] *See, e.g.*, An Act to explain and amend an Act, intituled "An Act for registering and clearing Vessels, regulating the Coasting Trade, and for other purposes.", ch. 22, 1 Stat. 94 (1789) (George Washington, 1789–1797); An Act explanatory of an act, entitled, "An act to raise ten additional companies of Rangers.", ch. 41, 3 Stat. 74 (1813) (James Madison, 1809–1817); An Act explanatory of the act entitled "An act for the final adjustment of land titles in the state of Lousiana and territory of Missouri.", ch. 86, 3 Stat. 517 (1819) (James Monroe, 1817–1825); An Act explanatory of "An act to grant a certain quantity of land to the state of Ohio for the purpose of making a road from Columbus to Sandusky.", ch. 31, 4 Stat. 263 (1828) (John Quincy Adams, 1825–1829); An Act declaratory of the law concerning contempts of court. (b), ch. 99, 4 Stat. 487 (1831) (Andrew Jackson, 1829–1837); An Act explanatory of an act entitled "An act to constitute the ports of Stonington, Mystic river, and Pawcatuck river, a collection district.", ch. 177, 5 Stat. 506 (1842) (John Tyler, 1841–1845); An Act explanatory of the Act entitled "An Act to raise, for a limited Time, an additional Military Force, and for other Purposes," approved eleventh February, eighteen hundred and forty-seven., ch. 49, 9 Stat. 232 (1848) (James K. Polk, 1845–1849); Res. 1, 32d Cong., 10 Stat. 260 (1852) (Millard Fillmore, 1850–1853); An Act to explain the Act approved twelfth April, eighteen hundred and fifty-four, entitled "An Act to establish additional Land Districts in the Territory of Minnesota.", ch. 57, 11 Stat. 25 (1856) (Franklin Pierce, 1853–1857); An Act to declare the Meaning of the Act entitled "An Act making further Provisions for the Satisfaction of Virginia Land Warrants," passed August thirty-one, eighteen hundred and fifty-two., ch. 183, 12 Stat. 84 (1860) (James Buchanan, 1857–1861). There were five presidents who did not see a federal expository statute pass during their administrations: John Adams (1797–1801), Thomas Jefferson (1801–1805), Martin Van Buren (1837–1841), William Henry Harrison (1841), and Zachary Taylor (1849–1850).

[94] 1 REG. DEB. 695 (1825).

[95] President John Quincy Adams, State of the Union Address (Dec. 5, 1826), *in* H. JOURNAL, 19th Cong., 2d sess., 8, 17 (1826).

the Union Address in 1829 to continue the call for an explanatory act, insisting that it would "remove this difficulty."[96]

The shared acceptance of expository legislation across government branches would become evident at the state level too. In an 1822 speech to South Carolina's lawmakers, for example, the state's governor bemoaned how the "intention of the Legislature" for a statute had "in many instances been frustrated, and will eventually be wholly defeated" by "the constitutional Court."[97] The solution, to him, was that "an explanatory act should be passed."[98] Governors also collaborated with administrators to ask for expository legislation. In 1832, the Governor of Ohio communicated to the state legislature that a previous act for the construction of an asylum "will require an explanatory act" because "[t]hose whose duty it is to carry into effect the provisions of that act, are at a loss to determine whether it was the intention of the Legislature" to appropriate one source of money or another.[99]

C. Early Judicial Responses

Courts for the most part either accepted legal arguments that relied on expository statutes or evaded the question of expository legislation's legality.[100] Judges even *requested* that legislatures pass more expository statutes to resolve statutory ambiguities. After being confronted with an ambiguous statute about arrests, one justice of the Supreme Court of Pennsylvania explained in 1810, "I will admit that the act is ambiguous, and that it is difficult to ascertain the meaning beyond a doubt; and it would seem to require the explanation of the legislature, by a declaratory act on this head."[101]

If there were any controversy over expository legislation, it was focused on two questions. First, how should courts construe expository statutes that were *themselves* unclear or ambiguous? Second, should expository statutes get to have retroactive effect?

On the first question, judges had two options. On the one hand, they could interpret expository laws literally and strictly. As Justice Caleb Wallace of Kentucky argued in 1799, it was "essential to the design of a

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96 President Andrew Jackson, State of the Union Address (Dec. 8, 1829), *in* H. Journal, 21st Cong., 1st sess., 11, 22 (1829).

97 *Governor's Message*, S.C. St. Gazette, Nov. 29, 1822, at 1.

98 *Id.*

99 *Governor's Message*, Jefferson Democrat (Steubenville), June 13, 1832, at 2.

100 *See, e.g.*, Coleman v. Dickinson, Jefferson 67, 68 (Va. 1740) (relying on an explanatory statute).

101 Jack v. Shoemaker, 3 Binn. 280, 286 (Pa. 1810) (Brackenridge, J.).

declaratory or explanatory law . . . that it should be taken literally."[102] On the other hand, judges could interpret expository statutes more flexibly through what was known as "equitable interpretation."[103] As Justice Spencer Roane of the Supreme Court of Virginia argued in 1800, "the better opinion seems to be, that such a statute may now receive even an equitable construction" based on a "general view of the whole act."[104]

The second question of retroactivity sparked more debate.[105] Some courts found little issue with retroactivity.[106] But backlash soon arose amidst a wave of outrage against laws that violated property rights.[107] The U.S. Constitution had also prohibited states from passing any "ex post facto [l]aw, or [l]aw impairing the [o]bligation of [c]ontracts."[108] The scope of this prohibition narrowed in 1798, when the Supreme Court held that the prohibition applied only to criminal laws.[109] But for expository legislation, the issue became muddied by a catch-22: Some people argued that laws were defined as expository precisely because they were retroactive, but others argued that expository laws shouldn't be

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102 McConnell v. Kenton, 1 Ky. 257, 280 (1799) (Wallace, J., dissenting); *see also* Respublica v. Betsey, 1 U.S. 469, 478 (Pa. 1789) (Rush, J., concurring) ("There can be no exposition against the direct letter of an explanatory statute—which admits there may be against an original statute.").

103 For additional historical information on equitable interpretation, see Popkin, *supra* note 73, at 11–29, which provides a historical overview of the development of equitable interpretation; Eskridge, *supra* note 74, which explores early understandings of the judiciaries' role in interpreting statutory text; John Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1 (2001), which discusses the "ancient English doctrine of the equity of the statute" in early American history; Peterson, *supra* note 90, which discusses the use of equitable interpretation from the 1790s to the 1820s; and Peterson, *supra* note 73, at 76–87, which connects acceptance of equitable interpretation with legislative instability in the first decade after the Founding.

104 Wallace v. Taliaferro, 6 Va. (2 Call) 447, 459–60 (1800).

105 On the relationship among retroactivity, "vested rights," and separation of powers in this era, see Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 Geo. L.J. 1015 (2006); Pfander, *supra* note 21, at 1319–23. Chapman and McConnell also briefly discuss the historical powers of legislatures to expound laws through expository legislation, but they place too much stock on the creation of the federal and state constitutions as a turning point after which statutory interpretation was understood to be a distinctly judicial function. Chapman & McConnell, *supra* at 1729–30. As I argue, there was no such clear turning point.

106 *See, e.g.*, Dole v. Moulton, 2 Johns. Cas. 205, 208 (N.Y. Sup. Ct. 1801) ("[T]he Declaratory Act of the 30th March, 1799 . . . is retrospective, and affects pre-existing, as well as subsequent bonds.").

107 Peterson, *supra* note 73, at 64.

108 U.S. Const. art. 1, § 10, cl. 1.

109 Calder v. Bull, 3 U.S. 386, 390–91 (1798). For a different interpretation of the "original meaning" of the prohibition against ex post facto laws, see Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 Wis. L. Rev. 727.

given retroactive effect.[110] This raised difficult questions. If an expository statute couldn't be retroactive, wasn't the legislature just "making" a new law (since it was for the future) instead of "interpreting"? And if that were true, what was the real-world effect of expository statutes?

Answers began to come in 1804, when the U.S. Supreme Court decided a case called *Ogden v. Blackledge*.[111] The Supreme Court delivered a one-paragraph opinion explaining that the plaintiff wasn't barred from recovering a debt, implying that the expository law in question didn't have any effect, but the Court didn't explicitly address the expository law.[112] The case became important not so much for the opinion's reasoning but for how litigants in the decades afterward would *assume* that the case repudiated expository legislation.

The ambiguous impact of *Ogden v. Blackledge* could be seen in a mildly influential New York case from 1811 called *Dash v. Van Kleeck*, which addressed retroactivity and separation of powers head-on.[113] Chancellor James Kent, with another justice joining him, rejected expository legislation—regardless of retroactivity—the most bluntly. An "exposition of the former acts for the information and government of the courts in the decision of causes before them," he insisted, would be "taking cognisance [sic] of a judicial question."[114] To him, the "power that makes is not the power to construe a law. It is a well settled axiom that the union of these two powers is tyranny."[115] But according to Justice Ambrose Spencer, it would be "absurd" for judges to ignore when a "legislature has spoken its will" in an expository statute.[116] He dismissed Kent's constitutional argument: "It is in vain to search for any prohibition in the State constitution."[117] The case of *Ogden* also didn't have much to say for him—"no reasoning is gone into" about the power to pass expository statutes.[118] Although statutory interpretation was "undoubtedly" a judicial function, Spencer claimed, it was subject to

110 *See, e.g.*, Higbee v. Rice, 5 Mass. 344, 349 (1809) (statement of counsel) ("That act essentially altered a principle of the common law, and was far from being intended as a declaratory act."); Walker v. Gibbs, 1 Yeates 255, 256 (Pa. 1793) ("The law of 28th September 1789, though it has no retrospection, is a declaratory act . . . ."); Claiborne v. Henderson, 13 Va. (3 Hen. & M.) 322, 378–79 (1809) ("This statute, in its nature prospective, does not purport to be a declaratory act . . . . It does not attempt the vain purpose, as some of our acts have sometimes done, by express words, to impugn and reverse the antecedent decisions of the Courts.").

111 6 U.S. (2 Cranch) 272 (1804).

112 *Id.* at 278.

113 Dash v. Van Kleeck, 7 Johns. 477 (N.Y. Sup. Ct. 1811).

114 *Id.* at 508 (opinion of Kent, C.J.).

115 *Id.*

116 *Id.* at 487 (opinion of Spencer, J.).

117 *Id.* at 488.

118 *Id.* at 490.

"the uncontrollable power of the legislature, to alter that construction in cases which have not passed to judgment."[119]

Indeed, little had changed after *Ogden*. Attorneys continued to make arguments that took for granted the validity of even retroactive expository statutes. Argued one Connecticut attorney in 1808, "Declaratory and explanatory acts are not uncommon in the statute books; and our courts have respected these, while in force, as part and parcel of the original acts to which they refer; even in cases which had arisen between the precedent and subsequent acts."[120] State judges continued to accept expository legislation, though the exact weight of expository laws was up for debate.[121] In New Jersey,[122] Virginia,[123] Connecticut,[124] Tennessee,[125] Massachusetts,[126] and New York,[127] there were at least some judges who accepted or took for granted the fact that legislatures were engaging in statutory interpretation by passing expository laws. In 1808, Justice Roane of the Supreme Court of Virginia gave one of the most emphatic statements confirming this: "I cannot for a moment doubt the power of the Legislature to pass the law in question."[128] The practice was so beyond question that Pennsylvania Justice Hugh Henry Brackenridge wrote in an 1814 treatise that a main purpose of judges writing dissenting opinions was so that "the attention of the legislature may be attracted to settle the principle, whether of law or of construction."[129] The practice of legislative statutory interpretation, he continued, had been done "in many cases, . . . though it will be at

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119 *Id.* at 492.

120 Hillhouse v. Chester, 3 Day 166, 202–03 (Conn. 1808) (Daggett and W. Hillhouse, counsel for the plaintiff).

121 *Compare* Jackson v. Phelps, 3 Cai. R. 62, 69 (N.Y. Sup. Ct. 1805) (explaining that expository laws weren't binding on courts but were deserving of "very respectful consideration"), *with* Sale v. Roy, 12 Va. (2 Hen. & M.) 69, 75 (1808) (explaining that when expository laws were on subjects for which judges had "no guide but the will of the legislature," they "must be taken as [the legislature] have thought proper to express it").

122 *See* Crane v. Fogg, 3 N.J.L. 385, 390 (1811) (accepting the use of an explanatory act from 1786).

123 *See* Kinney v. Beverley, 12 Va. (2 Hen. & M.) 318, 343 (1808) (opinion of Roane, J.) ("My opinion, therefore, is that the legislative construction upon this subject, manifested in their declaratory act of 1794, is the true construction of the act now in question . . . .").

124 *See* Allen v. Gleason, 4 Day 376, 381 (Conn. 1810) ("[T]o remove all doubt this explanatory statute was made, not to extend, but to confirm, their power.").

125 *See* Napier's Lessee v. Simpson, 1 Tenn. (1 Overt.) 448, 453 (1809) (construing an explanatory statute).

126 *See* Dillingham v. Snow, 3 Mass. 276, 280–81 (1807) (relying on an explanatory statute).

127 *See* Jackson v. Phelps, 3 Cai. R. 62, 69 (N.Y. Sup. Ct. 1805) (explaining that even if the act in question were a declaratory act, "it would not be binding on the courts as such" but that "as a legislative opinion it would deserve and receive very respectful consideration").

128 *Kinney*, 12 Va. at 344.

129 Hugh Henry Brackenridge, Law Miscellanies 90 (P. Byrne 1814).

all times a matter of the most delicate interference."[130] Legislatures were the institutions of "ultimate appeal," and so when judges in a jurisdiction's highest court were divided, it "may seem necessary" for legislatures to step in.[131]

The 1811 case of *Dash* also had little impact. In the decade before the case, from 1801 through 1810, New York passed seven expository statutes. In the decade afterward, from 1812 through 1821, New York passed eleven. From 1822 through 1831, New York passed ten. The impact on case law was similarly mixed. New York jurists sometimes invoked *Dash* to reject the retrospective applications of statutes.[132] But other New York judges evaded broad pronouncements about separation of powers, striking a balance between allowing expository enactments to stand and refusing to apply the enactments retroactively.[133] Many New York judges still used expository laws to support their independent interpretations of statutes.[134] As Justice Spencer explained, writing for the Supreme Court of Judicature in 1818, expository statutes were "entitled to high respect" and could provide "decisive support."[135] Judges in Pennsylvania had also cited *Dash*, but the case's impact was similarly mixed. In 1818, the Supreme Court of Pennsylvania cited *Dash* and *Ogden* to require expository statutes to be explicitly written as retroactive in order to have retroactive effect.[136] And yet, two justices equivocated because of "respect for a co-ordinate branch of the government"[137] and because it was an issue of "such delicacy and importance."[138] A decade later,

130 *Id.*

131 *Id.*

132 *See* Watkins v. Haight, 18 Johns. 138, 140 (N.Y. 1820) (per curiam).

133 *See, e.g.*, Pardee v. Blanchard, 19 Johns. 442, 448 (N.Y. 1822) ("I am happy that we are not embarrassed by this declaratory act, and that it can have a full operation . . . ."); Platner v. Sherwood, 6 Johns. Ch. 118, 128 (N.Y. 1822) ("[T]he bill in this case states that the plaintiff was convicted of a felony charged in the indictment to have been committed before the 29th of March, and therefore the statute does not reach the case."); Jansen v. Hilton, 10 Johns. 549, 562 (N.Y. 1812) ("I decide on this question as if the statute of 1810 was not in existence, as I cannot discover that it has any application.").

134 *See* Gardner v. Trs. of Newburgh, 2 Johns. Ch. 162, 166 (N.Y. 1816) ("This is an ancient and fundamental maxim of common right to be found in Magna Charta, and which the Legislature has incorporated into an [A]ct declaratory of the rights of the citizens of this [S]tate."); Jackson v. Haines, 2 Cow. 462, 463 (N.Y. Sup. Ct. 1824) ("If there had otherwise been any doubt upon our minds, it would have been moved by this declaratory law."); Jackson v. Lyon, 9 Cow. 664, 669–70 (N.Y. Sup. Ct. 1824) (accepting that a statute from 1803 was declaratory and should be given effect); King & Verplanck v. Root, 4 Wend. 113, 165 (N.Y. 1829) (demonstrating the weight of expository legislation by quoting Chief Justice Kent in *People v. Croswell*—that declaratory statutes should be considered "very respectable authority" although not binding).

135 Stow v. Tifft, 15 Johns. 458, 463–64 (N.Y. Sup. Ct. 1818).

136 Bedford v. Shilling, 4 Serg. & Rawle 401, 403–04 (Pa. 1818) (opinion of Tilghman, C.J.).

137 *Id.* at 404 (opinion of Gibson, J.).

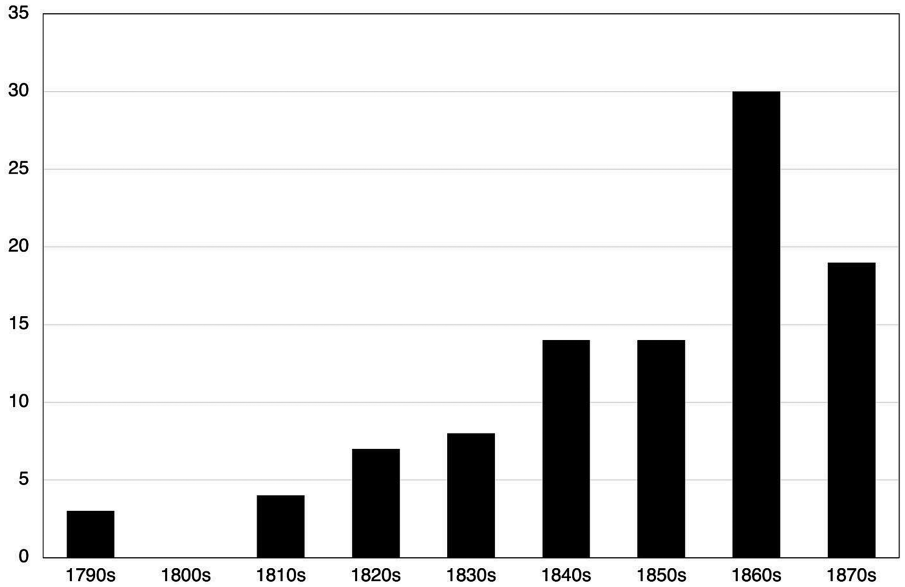
138 *Id.* at 412 (opinion of Duncan, J.).

in 1827, the Court of Appeals of Kentucky also cited *Ogden* and *Dash* to argue that there was a presumption against retroactive laws.[139] But beyond the courtroom, legislatures paid no mind. This was a golden age of legislative statutory interpretation.

III
The Golden Age of Legislative Statutory Interpretation

While judges mostly accepted expository statutes, legislatures passed even more of them. From roughly the years 1820 through 1877, the total volume of expository legislation surged at both the state and federal levels, as seen in Figures 11 and 12 below (which are based on the methodology and data described in Appendix A). In the 1790s, 1800s, and 1810s, the federal government passed on average 2.66 pieces of expository legislation per decade. From the 1820s through the 1870s, that number increased by 475% to an average of 15.3 per decade.

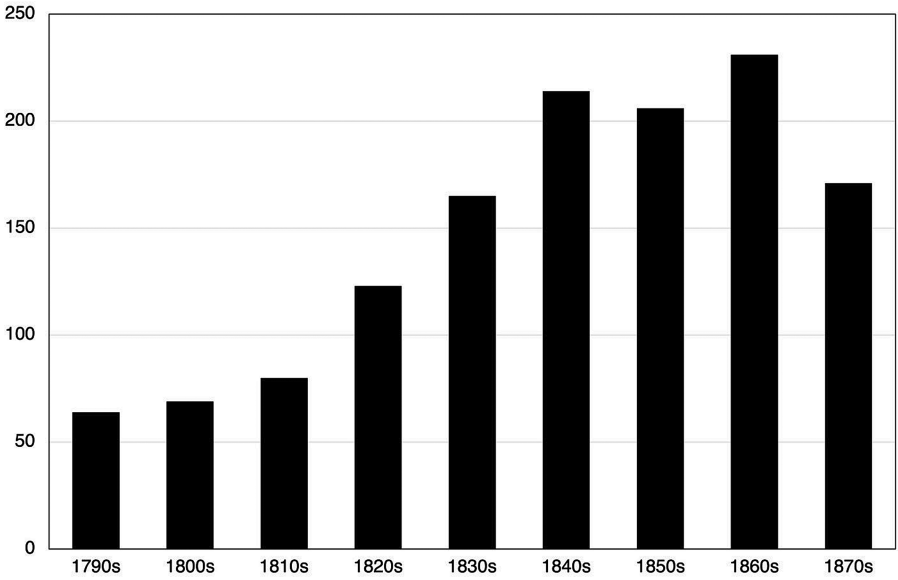
Figure 11. Federal Expository Enactments, 1790s-1870s



[139] Fisher v. Cockerill, 21 Ky. (5 T.B. Mon.) 129, 135–37 (1827).

At the state level in the aggregate, it increased by more than 160%, from an average of around 71 per decade (from 1790 to 1819) to around 185 per decade (from 1820 to 1879).[140]

FIGURE 12. STATE/TERRITORIAL EXPOSITORY ENACTMENTS, 1790S-1870S



This golden age of expository legislation was intertwined with profound societal change. As the next Sections explain, expository legislation helped lawmakers supervise administrative statutory interpretation, conduct unorthodox lawmaking, and engage in dialogue with judges.

[140] My purpose here is simply to track the absolute number of expository enactments across time to document trends in legislatures' engagement in statutory interpretation in absolute terms. Although the growth at the state level might be attributable partly to a general increase in all legislation, the task of identifying directly causal explanations for that growth is beyond the scope of this Article. For good measure, though, Appendix B offers two limited robustness checks for anyone interested in the question of causation. I also note that, although expository legislation was always a small portion of all legislation in this period—legislatures were obviously far more focused on making new law—the absolute number of expository enactments is an important reflection of the amount of resources that legislatures dedicated to statutory interpretation as well as of legislatures' self-conceptions of their abilities to engage in statutory interpretation. And as noted in Appendix A, the dataset may undercount the amount of expository legislation, as it generally excludes "shadow" expository laws that lacked textual expository signals.

A. Supervising Administrative Statutory Interpretation

By the middle of the nineteenth century, expository legislation was facilitating the expansion of an administrative state that revolved around statutes and regulations.[141] In the 1840s, as determined by the methodology described in Appendix A, states enacted 214 expository laws—the second most out of any decade in American history—and in the 1850s, they enacted 206. A significant number dealt with banks, incorporation charters, revenue, infrastructure improvements, and special statutes passed for the relief of individual people. But expository legislation was a form of legislation that could be used to interpret any type of legislative enactment, from the gravest and most general issues of the day like slavery to the most trifling and specific ones like name changes. States passed expository laws to interpret statutes that created free schools,[142] protected oysters,[143] regulated militias,[144] established probate courts,[145] outlined the rights of married women,[146] prohibited lotteries,[147] organized fire companies,[148] defined geographic boundaries,[149] and much, much more.

Legislatures passed expository legislation not just in response to *judicial* interpretations but also administrative interpretations. The reasons given in support of a federal declaratory bill from 1876 involving vessels are telling. Despite an amendment to the initial statute that prevented shipping commissioners from enforcing certain penalties, shipping commissioners had continued trying to enforce those penalties.[150] There was an appeal to the Treasury Department

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141 *See, e.g.*, WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (describing extensive regulation in the nineteenth century).

142 Act of Jan. 26, 1846, ch. 44, 1845 Va. Acts 44 ("An act to explain and amend the fourth, seventh and eighth sections of the act passed 17th February 1845, establishing a system of free schools in Norfolk county.").

143 Act of May, 1844, 1844 R.I. Pub. Laws 537 ("An Act in amendment and explanatory of an Act entitled, 'An Act for the preservation of Oysters and other Shell Fish, within this State.'").

144 Act of Apr. 5, 1855, ch. 233, 1855 N.J. Laws 666 ("An act explanatory of an act entitled, 'An act further supplemental to an act establishing a militia system.'").

145 Act of Mar. 8, 1849, 1848-1849 Mo. Laws 409 ("An act supplementary and explanatory of an act entitled 'An act to establish a Probate Court in the county of Dallas.'").

146 Act of Nov. 13, 1850, No. 22, 1850 Vt. Acts & Resolves 13 ("An act in explanation of 'An act relating to the rights of married women,' approved November 15, A.D. 1847.").

147 Act of May 15, 1854, ch. 53, 1854 Cal. Stat. 58 ("An act explanatory of an Act entitled 'An Act to prohibit Lotteries,' passed March 11, 1851.").

148 Act of Mar. 10, 1845, 1844 Ohio Gen. Laws 69 ("An act explanatory of the act entitled 'An act to encourage the organization of Fire Companies.'").

149 Act of Apr. 15, 1847, No. 131, 1847 La. Acts 96 ("An act explanatory of an act changing and fixing definitively the boundary line between Natchitoches and Rapides.").

150 44 CONG. REC. 2268 (1876) (statement of Rep. Ward).

for a remedy, but, as a lawmaker explained, "the construction of the shipping law is such that the control is almost supreme with the shipping commissioners, and there is no power to restrain them except through the course of law."[151] A declaratory act, he hoped, would solve the problem.[152]

At the federal level, the content of expository legislation reflected the usefulness of legislative statutory interpretation for a growing administrative state. From the 27th through 35th Congresses (1841–1859), Congress passed twenty-eight pieces of expository legislation. Twelve were "private" statutes while the other sixteen were "public."[153] Among the private statutes, nearly all dealt with money and individual relief—three involved pensions, another related to general damages, and seven involved compensation (three of which dealt with military-related compensation), while the last one dealt with land. Among the public statutes, five dealt with appropriations, four dealt with transportation and infrastructure, three involved military affairs including veterans' benefits and pensions, while the remainder covered subjects as diverse as Indian treaties, statehood, and land districts. As at the state level, expository legislation at the federal level was only a small fraction of all the legislation enacted. The twenty-eight pieces of expository legislation enacted from the 27th through 35th Congresses (1841–1859) comprised just 0.85% of the 3,310 legislative enactments passed by those same Congresses.[154]

From the 36th through 45th Congresses (1859–1879), Congress passed even more expository laws—forty-nine. In a dramatic shift from the two decades prior, only four of these (or around 8%) were "private" legislation.[155] Nine of the expository laws (or around 18%) involved military issues, ranging from the compensation of officers to veterans' pensions. Several involved the nation's finances—ten (or 20%) dealt with revenue and taxation, four with appropriations, two

151 *Id.*

152 *Id.*

153 The distinction between private and public legislation is historically fraught, but, typically, private legislation was specific to individuals while public legislation tended to be more general. *See* Peterson, *supra* note 77, at 8. Here, I follow Congress's lead in the labeling of particular statutes as "private" and "public."

154 I calculated this 3,310 number using Dep't of Commerce, Historical Statistics of the United States, Colonial Times to 1970, at 1082 (1975), by adding together the "total" numbers of measures passed for each of the 27th through 35th Congresses as those numbers are listed in the fourth column listing numbers of measures passed. Specifically, the 27th Congress is listed as having passed 524 measures, 28th with 279 measures, 29th with 303 measures, 30th with 446 measures, 31st with 167 measures, 32nd with 306 measures, 33rd with 540 measures, 34th with 433 measures, and 35th with 312 measures.

155 One of these four was simultaneously listed as a "public resolution."

with bankruptcy law, and one with currency. Eight (or 16%) dealt with land—two of these involving land grants for the purpose of constructing railroads. Still others involved the powers of territorial legislatures, Indian relations, executive power, and more. Like in the preceding two decades, expository legislation was just a small fraction of Congress's total legislation.

But to truly understand the significance of expository legislation, one should look not just at how much of it was actually passed but also at how the option of expository legislation shaped people's expectations and behaviors. As a low-cost tool to direct the administration of law, expository legislation could help set the outer limits of what lawmakers believed they could do to remedy incorrect administrative interpretations of statutes. While debating an amendment to a pension law in 1874, for example, one lawmaker worried about the "large amount of increase of business on the part of Congress provided we undertake to correct the blunders of every officer who administers the law."[156] In response, another lawmaker agreed but insisted that "the most that can be called for here is a declaratory act."[157]

The *option* of expository legislation provided the rationale for a principle of statutory interpretation that has come to be known as "legislative acquiescence."[158] The idea was that when Congress failed or declined to pass an expository statute on a subject, that "acquiescence" provided evidence of the meaning of already-existing laws. In 1842, for example, the Committee on Revolutionary Claims rejected a claim because it argued that if the statute in question really covered the petitioner in front of them, "it is incredible that Congress should not have passed a declaratory resolution."[159] The "refusal to interfere with the construction given by the Department" was "decisive."[160] Executive officials also drew on the availability of expository legislation to invoke the idea of legislative acquiescence. As Attorney General E.R. Hoar explained to the Secretary of the Navy about a case in 1869, the President and his cabinet's decision in a similar case from 1867 should be adhered to in part because "[a]mple opportunity has occurred in Congress, by a new provision of law, or by a declaratory act, to establish authoritatively the construction of the statute."[161]

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156 43 Cong. Rec. 2718 (1874) (statement of Sen. Morrill).

157 *Id.* (statement of Sen. Conkling).

158 *See* Terhune v. Barcalow, 11 N.J.L. 38, 42 (1829) (concluding that precedents had been "acquiesced in by the legislature, since no declaratory or remedial law has been passed"). On legislative acquiescence, see Eskridge, *supra* note 22.

159 S. Doc. No. 27-160, at 2 (1842).

160 *Id.*

161 13 Official Opinions of the Attorneys General 35 (A.J. Bentley ed., 1873).

The actual effect of expository legislation on administrative decision making could vary. In its most potent form, expository legislation was a tool to control and limit the power (and sometimes the abuses) of officials from other branches. The Committee of Ways and Means in 1844, for example, recommended an expository resolution for "remedy of which abuse of authority, and violation of law and the Constitution," and "restraining the Secretary of the Treasury within the true boundary of his authority."[162] In its weakest form, expository legislation required additional legislation because of administrative disobedience or neglect. As one Senator explained in 1851, Congress had passed an expository act deciding that the Department of War's interpretation of a pension law was incorrect, but Congress nevertheless still ended up passing "bills to remedy that construction in individual cases" in "repeated instances."[163]

The great irony was that administrative and executive officials were often the very ones who asked Congress to interpret statutes for them. In an age in which statutes were only beginning to regulate the payment of government officers through fee schedules—which were themselves crude and prone to evasion[164]—many requests for expository legislation were unsurprisingly about compensation.[165] Congress also debated expository legislation relating to what bounties the families of deceased war veterans could receive in exchange for past military service.[166] The desire for expository legislation especially arose in the course of everyday business. Government employees including chief engineers,[167] military officers,[168] accountings officers of the

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162 H.R. Rep. No. 28-379, at 11 (1844).

163 Cong. Globe, 31st Cong., 2d Sess. 316 (1851) (statement of Sen. Hale).

164 *See* Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780–1940, at 91–92, 117–18 (2013).

165 *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 1221 (1866) (statement of Sen. Clark) ("Mr. Clark presented the memorial of Stuart Gwynn, praying for the passage of an act explanatory of the act of March 2, 1865, for his relief, whereby he may be enabled to receive payment for printing presses, machinery, material, and labor furnished the Treasury Department in 1861 and 1862."); *Delegations to the President*, Balt. Sun, Mar. 23, 1869, at 4 ("The clerks and employees of the Patent Office have received but one half of their pay . . . in consequence of a defect in legislation. . . . [T]he clerks will have to go without one-half of their pay for February, or Congress will have to pass an explanatory act."); *The Quartermaster's Employees*, Daily Morning Chron. (D.C.), Mar. 18, 1867, at 3 ("The Comptrollers of the Treasury having decided that the twenty per cent. extra compensation bill does not include certain employees in the Quartermaster's Department, they have petitioned Congress for an explanatory act or to pass a new bill including them.").

166 Cong. Globe, 40th Cong., 2d Sess. 712 (1868).

167 S. Doc. No. 28-1, at 89 (1843) ("As important results are sometimes dependent on the exercise of this power, it is very desirable to obtain a clear expression of the intention of Congress, by a declaratory act, or in some other way.").

168 *E.g.*, S. Exec. Doc. No. 32-1, at 12–13 (Spec. Sess. 1851) ("We believe this object would be fully attained by a declaratory act of Congress."); H. Exec. Doc. No. 33-1, at 355 (1854) ("I

Treasury,[169] the Commissioner of Public Buildings,[170] and Department of War officials[171] asked for help with interpreting statutes. They wanted to "avoid ambiguity in their administration."[172] Sometimes, public officials had divergent opinions about how statutes should be interpreted.[173] Sometimes, different *departments* disagreed with each other.[174] Other times, court interpretations differed from administrative interpretations.[175] Lawmakers understood that expository legislation could resolve all these conflicts. At times, administrative leaders even depended on expository laws—waiting for these laws to be passed before they felt like they were authorized to act. According to one lawmaker in 1857, the Postmaster General had once "deemed it his duty to wait until an explanatory act was passed, putting a construction upon the word 'authorized;' and because the word was not qualified by the word 'directed,' he declined paying."[176]

Perhaps the most surprising government requesters of expository legislation were department heads, such as the Secretary of Treasury.[177] Secretaries interpreted statutes, but they left room for Congress to override them through expository legislation. Leading officials such as the Postmaster General communicated their desire for such laws

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trust that the attention of the legislature will be called to it, and that a declaratory act will be passed.").

169 SEC'Y OF THE NAVY, REPORT OF THE SECRETARY OF THE NAVY, S. EXEC. DOC. NO. 30-1, at 956 (1847) ("[T]he accounting officers of the treasury deemed it uncertain to whom it applied, and recommended that Congress should pass an explanatory law.").

170 H.R. EXEC. DOC. NO. 31-47, at 20 (1851) ("I do not pretend to decide as to the proper construction of the charter; but . . . it seems me that an explanatory law upon the subject would be very appropriate.").

171 H.R. REP. NO. 28-475, at 42 (1844) ("This explanatory resolution was occasioned by some doubts expressed at the department in regard to the claims presented under the 3d section of the law.").

172 *Investigation by the Committee on Naval Affairs: Testimony Taken by the Committee on Naval Affairs: Circular Letter and Answers to Circular Letter*, 44th Cong. 141 (1876).

173 CONG. GLOBE, 34th Cong., 3d Sess. 1004 (1857) (statement of Sen. Crittenden) ("It is because of honest differences of opinion among high public officers upon that question that Congress has found it necessary to interfere by this declaratory resolution, saying how it shall be understood.").

174 For an example of a difference of interpretation between the Comptroller of the Treasury and the army's Paymaster General, see CONG. GLOBE, 41st Cong., 2d Sess. 630–31 (1870) (statement of Sen. Sherman) (reporting on a declaratory resolution involving a "difference of construction in different departments of the Government as to the income tax").

175 CONG. GLOBE, 26th Cong., 1st Sess. 163 (1840) ("Whichever construction in these cases be in the view of Congress correct, whether that adopted by the courts, or the Department, it is highly important to have a declaratory law passed, settling the rule clearly for the future in all doubtful cases.").

176 CONG. GLOBE, 34th Cong., 3d Sess. 976 (1857) (statement of Rep. Walker).

177 *See* CONG. GLOBE, 26th Cong., 1st Sess. 163 (1840); CONG. GLOBE, 26th Cong., 2d Sess. 7 (1840).

through annual reports to Congress.[178] This deference to Congress could be helpful in times of administrative transitions. For example, after describing his predecessor's interpretation of a statute, the Secretary of the Interior explained in 1866 that he concurred with the interpretation but that Congress could pass an expository law if it "does not, in the opinion of Congress, give full effect to their intentions."[179] Officers also used expository legislation as a tool for inter-department cooperation and separation of powers among departments. Amidst worry that a bill regulating district attorneys would interfere with the duties of the Solicitor of the Treasury, the Secretary of the Treasury and the Attorney General coordinated in 1861 to ask Congress for an explanatory act that would resolve the doubt.[180] Departments even drafted their own expository legislation,[181] part of a broader trend of departments increasingly writing bills themselves.[182]

Many administrators turned to the Attorney General for interpretations of statutes, but even Attorneys General left room for Congress to override their interpretations. "The construction I put upon the act makes it sensible and just, and reconciles it with the view which the Comptroller takes," wrote Attorney General Hugh Legaré to the Secretary of War in 1841, but he added that "[s]hould it, however, not be satisfactory to you, there is no remedy but in a declaratory act of Congress."[183] In another instance, Legaré called expository legislation "[p]erhaps . . . the best means of putting an end to all difficulty."[184] Besides, even Attorneys General could disagree with department heads and courts, and that itself could give rise to a desire for legislative interpretations of statutes. Compared to an Attorney General's interpretation, which could be made at the whims of that one person, the process of creating expository legislation made it a more stable, consensus-based, and democratically accountable form of statutory

178 Postmaster Gen., Report of the Postmaster General, S. Exec. Doc. No. 35-1, at 723 (1858).

179 H.R. Exec. Doc. No. 39-1, at 20 (1866).

180 Cong. Globe, 37th Cong., 1st Sess. 426 (1861) (statement of Sen. Trumbull).

181 For example, in 1855, the Commissioner of the General Land Office asked for expository legislation, drafted it, and then sent it to Congress where it was passed. Cong. Globe, 33d Cong., 2d Sess. 915 (1855) (statement of Sen. Walker) ("This resolution is the form drawn by the Commissioner of the General Land Office."). For another example, this time involving the Treasury Department drafting a declaratory bill, see 44 Cong. Rec. 2268 (1876) (statement of Rep. Ward) ("The bill which I have the honor to report is one prepared at the Treasury Department to meet this difficulty.").

182 Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 221, 242 (2012).

183 H. Exec. Doc. No. 31-55, at 1459 (1851).

184 *Id.* at 1426.

interpretation. Committees had to agree, lawmakers had to agree, and the President had to sign off or face a congressional override of a veto.

It wasn't until the 1870s that the Attorney General took on the duty of administrative statutory interpretation with greater finality. As lawyers who could provide opinions independent of law officers hired to serve within other departments, Attorneys General could interpret statutes with a different kind of authority.[185] A crucial change came in 1870, when Congress enacted a statute creating the U.S. Department of Justice.[186] The sixth section of the statute read, "each head of any Department of the government may require the opinion of the Attorney-General on all questions of law arising in the administration of their respective Departments."[187]

The effects of this provision could be seen in an 1884 debate over a proposed resolution that directed the Attorney General to report to the Senate any reasons for delay in interpreting a statute for the Postmaster General.[188] Congress in 1883 had passed a statute adjusting the salaries of postmasters, and the Postmaster General had referred a statutory interpretation question to the Attorney General, who—according to one Senator—for six months "has not as yet been able to make up his mind."[189] In that period of delay, "the will of Congress goes unexecuted," and lawmakers were allegedly "estopped and forbidden in fact, either by courtesy or in some other way, from executing our own will."[190] To fix the problem, the Senator suggested, Congress could pass a resolution directing the Postmaster General to tell Congress what his issue was, and Congress could then change the statute or pass a joint resolution interpreting the statute.[191] Although the Attorney General had advised department heads before, there was now an expectation—a norm or "courtesy"—that administrators would turn to the Attorney General first. Rather than jump in with its own interpretations, Congress would allow the Attorney General to take the first, and perhaps only, shot.

The debate revealed the newness of this norm. During the debate, one Senator suggested that the Postmaster General didn't have any legal authority to ask the Attorney General—who was "the legal adviser of the President"—to interpret a statute.[192] Rather than wait for an

185 *See* Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 125 (2014).

186 Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).

187 § 6, 16 Stat. at 163.

188 *See* 48 CONG. REC. 1044 (1884).

189 *Id.* at 1044 (statement of Sen. Morgan).

190 *Id.*

191 *Id.*

192 *Id.* at 1045 (statement of Sen. Ingalls).

Attorney General's interpretation, he insisted, the officer should just try to figure it out as best as he could.[193] Another was skeptical that the 1870 statute had "transferred the jurisdiction to decide this question to the Attorney-General."[194] Others pushed back. As one senator responded, America "never had a statute until 1870 allowing the different heads of Department to call upon the Attorney-General for his opinion."[195] The statute had transformed the Attorney General from an interpreter of statutes primarily for the President to an interpreter of statutes also primarily for administrators. As another senator claimed, if the Attorney General weren't there to solve doubts for various departments, as the 1870 statute had allowed, then "what is he there for?"[196] If he weren't "there to answer as to the proper interpretation of the laws of the country," the senator pontificated, "I do not know what purpose he would serve in the economy of this Government."[197] Some even saw the 1870 statute as creating a complete transfer of administrative statutory interpretation authority to the Attorney General. As one senator worried, "there is a disposition on the part of all of them to keep back this knotty question from the Senate and to cut us off from an opportunity of making a further explanation of it by a joint resolution or a law."[198] In other words, the 1870 statute had allowed officials to use the option of going to the Attorney General as a way to informally preclude legislative statutory interpretation.

B. Form or Substance? Expository Legislation as Unorthodox Lawmaking

If expository legislation had allowed lawmakers to supervise the administrative state, it also gave them power in legislatures. By proposing laws in the form of expository legislation, lawmakers could avoid certain procedural objections. For instance, after conceding that, "according to original parliamentary law, you cannot pass at the same session two bills upon the same subject-matter," one lawmaker insisted in 1882 that, "in all deliberative bodies governed by ordinary parliamentary rules, a supplementary or explanatory bill can be introduced and passed to correct any error or mistake in a former bill."[199] The formal concept of expository legislation was especially useful for

193 *Id.*
194 *Id.* at 1046 (statement of Sen. Morgan).
195 *Id.* at 1045 (statement of Sen. Garland).
196 *Id.* at 1047 (statement of Sen. Voorhees).
197 *Id.*
198 *Id.* at 1046 (statement of Sen. Morgan).
199 47 Cong. Rec. 5405 (1882) (statement of Rep. Hooker).

dealing with procedural objections relating to appropriations bills. For instance, House rules required that laws relating to appropriations had to first be discussed by the Committee of the Whole House. House rules also stipulated that no "provision changing existing law [shall] be in order in any general appropriation bill or in any amendment thereto."[200] But a lawmaker could avoid this requirement by framing his bill as a merely expository one.[201] The threat of abusing expository legislation to change appropriations bills was so great that one lawmaker put his foot down in 1888, declaring that "if one is permitted there will be a flood of them."[202]

Expository legislation was by no means perfectly benevolent. Lawmakers could add expository legislation as "poison pills" to otherwise promising bills to help defeat those bills.[203] Expository legislation could also be susceptible to interest group pressure. As one federal lawmaker in 1873 criticized about a declaratory bill, "it is so carefully phrased and drawn that it is intended to apply to cases now pending in the courts, and that it is the influence and the self-interest" of the people in those pending cases that "led to the pressing of that particular bill."[204]

Underlying this strategic—this unorthodox[205]—lawmaking was the fact that the very concept of "expository legislation" was ambiguous. Much expository legislation didn't just interpret or declare what the law was but also amended past laws. This may have been useful in the colonial context against British control, but it raised eyebrows in the nineteenth century. Lawmakers fought over whether expository legislation was actually "mandatory" and "prohibitory" rather than just expository.[206] They invoked judges' interpretations of statutes to

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200 50 Cong. Rec. 3177 (1888).

201 *See* Cong. Globe, 33d Cong., 2d Sess. 694 (1855) (statement of Rep. Boyd) ("If this joint resolution be merely explanatory of an act appropriating money, it need not go to the Committee of the Whole on the state of the Union."); 50 Cong. Rec. 3176 (1888) (statement of Rep. Peters) ("[T]he amendment . . . is simply an interpretation of existing law, and therefore is not subject to the point of order.").

202 50 Cong. Rec. 3176 (1888) (statement of Rep. Foran).

203 *See* Cong. Globe, 27th Cong., 2d Sess. 599 (1842) (statement of Rep. Cushing) ("It was sent to the Senate, and only failed to become a law, because the Senate appended to it a voluminous bill, declaratory of what construction should be put upon the act of 1832. That was the sole cause of its defeat.").

204 H.R. Misc. Doc. No. 43-264, at 213 (1874).

205 *See* Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress (1997) (describing departures from traditional forms of lawmaking).

206 *See* Cong. Globe, 41st Cong., 2d Sess. 5191 (1870) (statement of Rep. Poland) ("I know the gentleman says it is mandatory, but I understand that it is the first instance in the history of legislation in Kentucky or anywhere else where a statute explanatory of a directory law is itself mandatory and prohibitory.").

argue that certain expository laws did, "without doubt, change the law."[207] The line between "amending" and "expounding" was so blurry that one lawmaker in 1852 criticized an explanatory act as arriving in Congress "under the most innocent title imaginable—a title that gives you no clue whatever to the character of the proposition, or the extent of land that is to be appropriated under its cover" but that, "[i]nstead of merely explaining . . . contains new propositions unconnected with and . . . entirely independent" of the statute it sought to explain.[208] In other instances, lawmakers called the form of expository legislation "deceptive"[209] and a "guise."[210]

The formalism of legislation further complicated the task of figuring out whether a law was actually expository or not. At the federal level, lawmakers deliberately chose the *form* of expository legislation to explicitly signal that they wanted laws to be seen as expository. Sometimes, the form of expository legislation provided a deliberate signal that lawmakers intended a law to be retroactive.[211] The importance of titles could also be seen at the federal level in an 1867 debate over an amendment to a bill involving military affairs. The Committee on Military Affairs reported the amendment back to Congress without making any changes… except in the title. It recommended "an amendment to the title making the bill only declaratory of the law."[212] Lawmakers actively chose to declare, explain, construe, and interpret, rather than amend.

But despite the formalism of legislation, two problems persisted: Some laws that didn't have expository titles could be deemed expository, and some laws that *did* have expository titles were met with criticism that they weren't actually expository in *substance*. The Commissioner of Internal Revenue in 1875, for instance, claimed that even though it was "apparent from its title" that "Congress designed it as an explanatory act," a certain expository statute's title was a "misnomer, as nothing in the act itself . . . assumes to explain or declare the intent or meaning" of the original statute.[213] Hence, the two questions of (1) whether a law was

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207 H.R. Misc. Doc. No. 43-264, at 212 (1874).

208 Cong. Globe, 32d Cong., 1st Sess. 286 (1852) (statement of Rep. Tuck).

209 Cong. Globe App., 40th Cong., 3d Sess. 233 (1869) (statement of Rep. Van Trump).

210 Cong. Globe, 41st Cong., 2d Sess. 2487 (1870) (statement of Sen. Casserly).

211 *See* Cong. Globe, 40th Cong., 2d Sess. 133 (1867) (statement of Sen. Dawes) ("I suggest the form of his bill leaves the inference fairly to be drawn up to this hour . . . it would have been legal so [as] to restore officers. In order to avoid any such inference he should put his bill in form of a declaratory act . . . .").

212 Cong. Globe, 40th Cong., 2d Sess. 232 (1867) (statement of Rep. Garfield).

213 S. Rep. No. 43-660, at 2 (1875).

expository in the first place and (2) whether an expository law changed versus merely restated a law, were wrapped together.

C. Continued Judicial Acceptance

These questions framed how and why judges continued to accept legislative statutory interpretation. The U.S. Supreme Court in 1816 took for granted the validity of state expository legislation while pointing out that, "[a]s not unfrequently happens, this explanatory law generated as many doubts as the law it was intended to explain."[214] Even in Pennsylvania, which had seen negative judicial treatments of expository legislation, judges and lawmakers continued to accept legislative statutory interpretation. Just three years after the 1818 Pennsylvania case of *Bedford*, the state's supreme court drew on an explanatory law to find a "clear intention" of the legislature.[215] The main debates on the court were merely about whether particular laws were in fact expository or not.[216] There was, to be sure, dissent. In an 1827 case, one justice insisted that "[w]hatever respect may be due to legislative construction, I do not think that courts of justice are bound to adopt the same construction."[217] Nevertheless, the Pennsylvania legislature passed five expository laws in the 1820s, eight in the 1830s, and nineteen in the 1840s (as determined by the methodology described in Appendix A).

Elsewhere, courts of last resort took a wide range of neutral and favorable stances. Some, including courts in Delaware,[218] Maryland,[219]

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214 Patton's Lessee v. Easton, 14 U.S. (1 Wheat.) 476, 480 (1816).

215 Bevan v. Taylor, 7 Serg. & Rawle 397, 409 (Pa. 1821).

216 *See* Lyle v. Richards, 9 Serg. & Rawle 322, 342 (Pa. 1823) (Gibson, J.); *see also* Witherow v. Keller, 11 Serg. & Rawle 271, 276 (Pa. 1824) (Gibson, J.) ("[T]here cannot be a doubt that they would have passed a declaratory act in express terms, settling the question of its legal existence among us, for ever. But if implication is to go for any thing, they have, I take it, passed such an act.").

217 Satterlee v. Matthewson, 16 Serg. & Rawle 169, 190 (Pa. 1827) (Duncan, J., dissenting).

218 In Delaware, the High Court of Errors and Appeals mentioned an expository statute in an 1818 case. *See* Wilson v. George, 1 Del. Cas. 632, 633 (Del. 1818) ("This very case of *Negro Rose v. McGarmont* gave rise to the explanatory Act . . . . This latter Act excepts in favor of slaves above eighteen and not exceeding thirty-five years who are 'healthy and no ways decrepit.'").

219 In Maryland, the Court of Appeals in 1830 mentioned expository statutes only in passing. *See* Sibley v. Williams, 3 G. & J. 52, 63 (Md. 1830) ("[I]t is in the nature of a declaratory law, expounding the statute of 30 *Chas.* 2.").

Vermont,[220] and Ohio,[221] merely mentioned expository statutes, particularly statutes from England. Others, including courts in Massachusetts,[222] New Jersey,[223] Louisiana,[224] and Virginia,[225] accepted expository statutes at face value and used them to interpret the law. (In Virginia, to be sure, one judge on the state's highest court believed that "[w]hatever efficacy the omnipotence of the british [sic] parliament may give to a declaratory statute, neither the old nor the new constitution authorizes that kind of legislation in *Virginia*. It belongs to the legislature to say what the law shall be; to the courts to say, what the law is.")[226] In New Jersey, the Supreme Court in an 1827 case went so far as to say that it was "necessary . . . for the legislature to interfere, and to pass a declaratory act."[227] Still other courts, including in North Carolina and Connecticut, focused on *how* to interpret expository statutes.[228]

At the federal level, the U.S. Supreme Court made two major pronouncements on the validity of expository legislation in the late 1820s.

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220 In Vermont in the late 1820s and early 1830s, litigants invoked expository statutes, particularly from England, but the Supreme Court failed to make any major pronouncements about the general validity of expository laws passed in the United States. *See* Brackett v. Waite, 4 Vt. 389, 395 (1832) (counsel for defendants); State v. Hodgeden, 3 Vt. 481, 482 (1831) (counsel for respondent); Sutton v. Beach, 2 Vt. 42, 47 (1829) ("[I]t was a remedial and not an explanatory act."); Hubbell v. Gale, 3 Vt. 266, 267 (1829) (counsel for plaintiff). The Supreme Court appeared to take for granted the validity of expository legislation in *Hall v. Adams*, 1 Aik. 68, 70 (Vt. 1826), when it explained, "Since the passing of this explanatory statute, the two acts are to be taken together, and are the same as the original statute would have been, with an omission, or exception, in the first section, of the present case."

221 In Ohio, the Supreme Court in 1831 only mentioned an English explanatory act. *See* Allen v. Little, 5 Ohio 65, 67 (1831).

222 In *Commonwealth v. Douglas*, 17 Mass. 49, 52 (1820), the Supreme Court in 1820 accepted the validity of an expository statute from 1811 and one from 1814 that functionally repealed the 1811 statute. *See also* Coolidge v. Inglee, 15 Mass. (14 Tyng) 66, 67–68 (1818) ("[T]his opinion is confirmed by a recurrence to a subsequent statute . . . which is declared to be explanatory of the former act.").

223 *See* Den *ex dem.* Young v. Robinson, 5 N.J.L. 689, 708–09 (N.J. 1819) (construing an explanatory statute).

224 In Louisiana, the Supreme Court accepted the use of an expository statute in 1830. *See* McDonough v. Duplantier, 1 La. 223, 228 (1830).

225 *See* Mut. Assurance Soc'y v. Stone, 30 Va. 218, 234 (1831) (Tucker, J.).

226 Commonwealth v. Tate, 30 Va. 802, 808–09 (1831) (Scott, J., concurring).

227 State v. Parkhurst, 9 N.J.L. 427, 448 (N.J. 1802).

228 In North Carolina, the Supreme Court simply interpreted expository laws rather than ruling on their validity, Hilliard v. More, 4 N.C. (2 Car. L. Rep.) 392, 395 (1816), though in 1823 it added the caveat that "[l]egislative exposition is good while the system of law thus expounded is in force; but when the whole system is abandoned . . . the exposition should be laid aside." State v. Reed, 9 N.C. (2 Hawks) 454, 456 (1823). In Connecticut, the Supreme Court of Errors similarly focused on *how* to interpret expository statutes rather than *whether* expository statutes were allowable in the first place. *See* Griswold v. North-Stonington, 5 Conn. 367, 373 (1824) ("Like an explanatory statute, it must be interpreted by an entire regard to the popular meaning of its expressions."); Clark v. Hoskins, 6 Conn. 106, 110–11 (1826).

In the 1827 case of *Postmaster-General v. Early*, Chief Justice Marshall declared that the "legislature may pass a declaratory act, which, though inoperative on the past, may act in future."[229] This came from a Chief Justice who, in *Marbury v. Madison*, had previously declared that it was the province of the courts to interpret law.[230] Two years after *Postmaster-General v. Early*, the Supreme Court decided the 1829 case of *Satterlee v. Matthewson*, in which the litigants fought over whether a state statute from 1826 was actually expository or not, and, if it were, whether it was unconstitutional.[231] The key question was: Did the statute impair any obligations of contracts, infringe on the plaintiff's vested rights, or arise from the legislature's exercise of an exclusively judicial power? The Court declared the constitutionality of the statute and explained that "[t]here is nothing in the constitution of the United States, which forbids the legislature of a state to exercise judicial functions."[232] Just as importantly, it argued that in the case of *Ogden v. Blackledge* from two decades prior, the Court hadn't actually decided on the constitutionality of the case's expository statute.

These Supreme Court cases signaled the next stage of a decades-long transformation in the concept of expository legislation. As the Supreme Court separated the problem of retroactivity from the concept of expository legislation, it became far less certain that a law had to *operate* retroactively in order to be seen as expository.[233] In turn, expository legislation that operated *prospectively* came to be seen as far more permissible.

To be sure, courts in two states—New York and Delaware—took a strong stand against legislative statutory interpretation in the 1830s. When expository statutes were retroactive, these courts leveraged their outrage against retroactivity to make broad pronouncements about separation of powers in statutory interpretation *in general*. In an 1832 case involving a retroactive expository law, Chancellor Reuben Walworth of New York argued, "In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a preexisting law."[234] Courts would consider expository statutes, but if the "judge is satisfied the legislative construction is wrong, he is bound

229 25 U.S. (12 Wheat.) 136, 148–49 (1827).

230 *See supra* note 2 and accompanying text.

231 *See* Satterlee v. Matthewson, 27 U.S. (2 Peters) 380 (1829).

232 *Id.* at 413.

233 *But see* Hall v. Goodwyn, 15 S.C.L. (4 McCord) 442, 445 (1828) ("[T]he Act of 1824 was declaratory of what the law was, and therefore operated retrospectively.").

234 Salters v. Tobias, 3 Paige Ch. 338, 344–45 (N.Y. Ch. 1832).

to disregard it."[235] This rejection of retroactive expository laws went further than rejections by other courts: It didn't just say that judges had the *discretion* to disregard these laws but rather that judges had the *obligation* to.

The next year, in 1833, the Superior Court of Delaware offered an even more trenchant rejection of expository legislation on the grounds of separation-of-powers issues. "If that act is to be considered as an act declaratory of what the law was before its passage," claimed the court, "it cannot as such have any weight with the court."[236] While the court was speaking directly about *retroactive* expository statutes, it also used the opportunity to make a declaration about *all* expository statutes: The power to declare what the law "is or has been" belonged "to the judicial department alone, and they in discharging their duty are to form their own opinion and are not to be the mere organ of the legislature."[237] This conclusion was unnecessarily broad. The court could have narrowly rejected only expository statutes that affected vested rights or impaired the obligations of contracts. It didn't have to reject wholesale the legislature's power to construe laws both for the future and the past. But the court's statement reflected an anxiety about the independence of judges—an anxiety that culminated in expanding the borders of judicial power.

Courts in other states appeared to have paid little attention to Delaware. As the 1830s wore on into in the 1840s, courts of last resort in Kentucky,[238] Massachusetts,[239] Maryland,[240] North Carolina,[241]

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235 *Id.* at 345.

236 Jones v. Wootten, 1 Del. (1 Harr.) 77, 81 (1833).

237 *Id.*

238 *See* Commonwealth v. Miller, 35 Ky. (5 Dana) 320, 321–22 (1837) (using a declaratory act from 1809 as evidence of statutory meaning).

239 *See* Devoe v. Commonwealth, 44 Mass. (3 Met.) 316, 322 (1841) ("But as this was merely a declaratory act, useful and important to remove doubts, and make a plain and unquestionable provision for the future, it can afford little aid in coming to a true construction of the previous statutes."); Commonwealth v. Cambridge, 37 Mass. (20 Pick.) 267, 272 (1838) (suggesting that the legislature's allowance of the claims of towns "for the support of paupers of ability to do some labor" is "equivalent to a declaratory act" that should factor into statutory interpretation); Commonwealth v. Blackington, 41 Mass. (24 Pick.) 352, 354 (1837) ("[T]he late act . . . is . . . merely declaratory . . . . [The act], so far as it can have any weight as a legislative exposition, seems rather a declaration of what the true meaning of the former act was, than an enactment introductive of a new law.").

240 *See* Phalen v. State, 12 G. & J. 18, 30–31 (Md. 1841) ("That we have construed correctly the acts . . . we think demonstrated by the first section of the act of 1810 . . . . [S]uch a declaration of the will or intent of the Legislature must be regarded as of overwhelming influence.").

241 *See* State v. Samuel, 19 N.C. (2 Dev. & Bat.) 177, 184 (1836) (per curiam) ("Whatever doubts formerly existed on that point, none have been entertained since the declaratory act of 1817.").

New Hampshire,[242] New Jersey,[243] Ohio,[244] and Vermont[245] generally accepted expository legislation—emphatically so when the statutes were prospective in application. Courts in Alabama,[246] Illinois,[247] Indiana,[248] New York,[249] Pennsylvania,[250] South Carolina,[251] Tennessee,[252] and Virginia[253] made far fewer comments about expository legislation, mostly mentioning them in passing.

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242 *See* Bedel v. Loomis, 11 N.H. 9, 15 (1841) ("[T]he state itself, after much investigation upon the subject, asserted a title and jurisdiction . . . in 1824, by an express declaratory act. . . . [T]hese acts must be taken and deemed to be an assertion of title, and a right of jurisdiction, from that period.").

243 *See* Den *ex dem.* McMurtrie v. McMurtrie, 15 N.J.L. 276, 285 (1836) (taking for granted an explanatory act from 1786).

244 *See* Armstrong v. Treasurer of Athens County, 10 Ohio 235, 238 (1840) ("There is certainly nothing in this law which of itself contravenes the constitution of the United States, or of this state. . . . [A] provision of this kind is highly necessary and proper."); Magee v. Beatty, 8 Ohio 396, 398 (1838) ("This declaratory law, we suppose, is decisive of the rights of these parties, and the claim of the complainant can not be sustained.").

245 *See* Forbes v. Davison, 11 Vt. 660, 672–73 (1839) ("The declaratory statute of 1808 provides that this section shall not be so construed . . . . We feel no inclination to trifle with the clear intent of the legislature, as expressed in the act of 1808, or to render that act nugatory." (internal quotation marks omitted)); Brown v. Hoadley, 12 Vt. 472, 478 (1839) ("[T]his matter is placed beyond doubt by the explanatory act of 1833.").

246 The Alabama Supreme Court in 1837 construed a word in a statute as "declaratory." Kennedy v. Spencer, 4 Port. 428, 432 (Ala. 1837).

247 *See* Field v. People *ex rel.* McClernand, 3 Ill. (2 Scam.) 79, 92 (1839) (discussing separation of powers in legal interpretation generally).

248 *See* Martindale v. Moore, 3 Blackf. 275, 291 (Ind. 1833) (referring to an act of 1826 as declarative).

249 *See* Cook v. Spaulding, 1 Hill 586, 588 (N.Y. Sup. Ct. 1841) (regarding the relevant statute as declaratory).

250 *See* Stiles v. Bradford, 4 Rawle 394, 398, 403–04 (Pa. 1834) (referring to an act of 1827 as declaratory and partially relying on it for judgment).

251 The South Carolina Court of Errors in 1837 considered but did not resolve the question of expository legislation's validity. Moultrie v. Jennings, 27 S.C.L. (2 McMul.) 508, 510 (1837) ("How far the power of the Legislative Department of this government can interfere with vested rights by declaratory laws, is a grave question, but one which will be decided promptly whenever it arises.").

252 *See* State v. Foreman, 16 Tenn. (8 Yer.) 256, 322 (1835) (referring to the passage of a declaratory act); Zollicoffer v. Turney, 14 Tenn. (6 Yer.) 297, 301 (1834) (referencing a declaratory act as evidence of common law). *But see* Love v. Smith, 12 Tenn. (4 Yer.) 117, 135 (1833) (Whyte, J., dissenting) ("The recent act of assembly of 1831 . . . cannot be held as a legislative construction of the previous acts binding on this court, yet . . . it became necessary to have the will and intention of the legislature clearly and distinctly stated upon their subject-matter.").

253 *See* Commonwealth v. Weldon, 31 Va. (4 Leigh) 652, 659 (1833) (Thompson, J., dissenting) (noting an explanatory statute would help resolve the present issues).

IV
The Rise of Separation of Powers in Statutory Interpretation

But the tides were turning. For the loudest judges, the golden age of legislative statutory interpretation gave way to emboldened understandings of judicial power and independence. Meanwhile, legal treatises were becoming Americanized and increasingly critical of legislative statutory interpretation. A number of lawmakers, in turn, balked at the idea of interpreting their own statutes. Yet legislatures continued to pass expository statutes in the mid-nineteenth century like never before. A new regime of separation of powers was rising, but it was encountering heavy resistance.

A. Backlash as Judicial "Independence"

From the mid-1840s to the early 1860s, some state courts began to viciously attack expository legislation. By 1840, judges in only five states' courts of last resort (out of twenty-six states)—Delaware,[254] Pennsylvania,[255] Virginia,[256] New York,[257] Tennessee[258]—had offered a major rejection of some form of expository legislation. By the end of 1861, that number had more than doubled to at least fourteen states out of thirty-two.[259] As more courts turned against expository

254 *See* Jones v. Wootten, 1 Del. (1 Harr.) 77, 81 (1833) ("If that act is to be considered as an act declaratory of what the law was before its passage, it cannot as such have any weight with the court.").

255 *See* Bedford v. Shilling, 4 Serg. & Rawle 401, 403 (Pa. 1818) ("The question will be then, whether this explanatory act of assembly extends to suits commenced before its passage. And that it does not, I am clearly of opinion, because nothing less than positive expressions would warrant the court in giving a construction which would work manifest injustice.").

256 *See* Commonwealth v. Tate, 30 Va. (3 Leigh) 802, 808 (1831) (Scott, J., concurring) ("Whatever efficacy the omnipotence of the British parliament may give to a declaratory statute, neither the old nor the new constitution authorizes that kind of legislation in Virginia.").

257 *See* Dash v. Van Kleek, 7 Johns. 477, 508 (N.Y. Sup. Ct. 1811) (opinion of Kent, C.J.) ("[I]f it be considered as an exposition of the former acts for the information and government of the courts in the decision of causes before them, it would then be taking cognizance of a judicial question.").

258 *See* Negroes v. Dabbs, 14 Tenn. (6 Yer.) 119, 132, 134–36 (1834) (enslaved parties) (agreeing with the lower court's decision that an explanatory act was unconstitutional and that it was for courts, not legislatures, to expound the law).

259 The new states were: Georgia, Indiana, Iowa, Kentucky, Louisiana, Maine, North Carolina, Ohio, and Wisconsin. *See* Wilder v. Lumpkin, 4 Ga. 208, 211 (1848) (rejecting a declaratory statute); Stephenson v. Doe *ex dem.* Wait, 8 Blackf. 508, 515 (Ind. 1847) (holding a court ruling as unaffected by a declaratory act); Duncombe v. Prindle, 12 Iowa 1, 12–13 (1861) (rejecting the use of an explanatory act's preamble); Graham v. Strader, 44 Ky. (5 B. Mon.) 173, 182 (1844) (rejecting a foreign state's declaratory law); State v. Benoit, 16 La. Ann. 273, 274 (1861) (entitling no authority to a declaratory statute from a foreign state); School Dist.

legislation, they began to reject not only expository laws that operated retroactively but also *all* legislative attempts at statutory interpretation. By 1861, the Supreme Court of Pennsylvania was opining, "We hope we have seen the last expository statute under our constitution: all such are fundamentally vicious."[260]

These harsh court opinions announced a magnified sense of judicial authority and a territorial belief in strict, formalistic separation of powers. Empowered in part by new constitutions that revitalized judicial review and instituted judicial elections beginning in the late 1840s,[261] judges found a juicy target in expository legislation. Some courts, like the Supreme Court of Ohio in 1848, rejected merely *retroactive* expository laws and explained that legislative statutory interpretations couldn't be binding on courts since "the constitution confers judicial power upon the courts, and withholds it from the legislature."[262] The Supreme Court of North Carolina went slightly broader in 1849, claiming that it was "settled" that the legislature couldn't declare what the law used to be "so as to give it any binding weight with the courts."[263] The Supreme Court of Tennessee in 1844 made a case against *all* legislative statutory interpretation by explaining that it was the "province of the Judiciary, to ascertain [laws'] meaning, and determine upon their construction. Any other doctrine would destroy the checks contained in the Constitution against the abuse of power, and tend to a concentration of all power in a single department of the government."[264]

The appeal to constitutional principles was intertwined with American exceptionalism. According to the Supreme Court of Wisconsin in 1850, the United States had a "system of written constitutions," and Americans had gotten their ideas about expository legislation "from abroad, without attending to the wondrous difference there is between the legislative power in our own country and all others."[265] Distinguishing the United States from England—where the parliament was "said to be supreme"—as well as Russia and Turkey—where the "legislative power

No. 5 v. Lord, 44 Me. 374, 386 (1857) (rejecting an explanatory law because of separation-of-powers principles); Houston v. Bogle, 32 N.C. (10 Ired.) 496, 504 (1849) (rejecting the power of legislatures to pass retroactive expository laws); The Schooner Aurora Borealis v. Dobbie, 17 Ohio 125, 127–28 (1848) (rejecting an explanatory law because of separation-of-powers principles); *In re* Cnty. Seat of La Fayette Cnty. *ex rel.* Knowlton, 2 Pin. 523, 530 (Wis. 1850) (claiming legislature had no authority to pass declaratory law).

260 Reiser v. William Tell Sav. Fund Ass'n, 39 Pa. 137, 147 (1861).

261 *See* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1068–69 (2010).

262 *Aurora Borealis*, 17 Ohio at 128.

263 *Bogle*, 32 N.C. at 504.

264 Governor v. Porter, 24 Tenn. (5 Hum.) 165, 167 (1844).

265 *In re* Cnty. Seat of La Fayette Cnty. *ex rel.* Knowlton, 2 Pin. 523, 530 (Wis. 1850).

being one with the judicial and executive, is purely despotic"—the Court declared that a legislature "usurps powers which do not belong to it" when it interprets statutes.[266] Judge Nisbet of the Supreme Court of Georgia went even further in 1848: "I can imagine no more perfect embodiment of tyranny than the power in one and the same functionary, whether legislature, king, emperor, prince or proconsul, to make the laws and to expound them."[267] Not only did the three branches have powers "defined with careful exactness" and boundaries "marked with precision and clearness," but the "independence of the legislative, judicial and executive departments is the chief glory and distinguishing excellence of the free institutions under which it is our happiness to live."[268]

Of all the states, Pennsylvania had some of the most developed and negative case law on expository legislation. In 1842, the Pennsylvania Supreme Court was still willing to allow that, "till the judiciary has fixed the meaning of a doubtful law, the legislature has a right to explain it."[269] But the Court slowly added caveats. In 1845, the Court elaborated that expository laws "must be construed as operating on future cases alone, except where they are designed to explain a doubtful statute, in which cases they deserve and always will receive the most respectful attention from the judicial branch of the government."[270] Four years later, it declared that every "tyro or sciolist [amateur] knows that it is the province of the legislature to enact, of the judiciary to expound, and of the executive to enforce."[271] Retroactive legislation persisted, the Court explained, because the "judiciary has thought itself too weak to withstand; too weak, because it has neither the patronage nor the prestige necessary."[272] Now, the resentful Court was shooting back. The fatal shot came in 1861, when the Court concluded that judges' respect for legislatures had gone too far, that "this sentiment has led this court so far astray that it has sometimes yielded to mere arbitrary legislative interpretation, and has decided causes, not according to law, but according to the direction of the legislature."[273]

Some of these opinions would become influential precedents,[274] but for the most part they merely represented judges flexing their muscles to empty stadiums. In many states, courts continued to treat expository

266 *Id.*
267 Wilder v. Lumpkin, 4 Ga. 208, 213 (1848).
268 *Id.* at 211.
269 O'Conner v. Warner, 4 Watts & Serg. 223, 227 (Pa. 1842).
270 Lambertson v. Hogan, 2 Pa. 22, 25 (1845).
271 Greenough v. Greenough, 11 Pa. 489, 494 (1849).
272 *Id.* at 495.
273 Reiser v. William Tell Sav. Fund Ass'n, 39 Pa. 137, 145 (1861).
274 *See infra* Section IV.B.

laws as acceptable. Courts in Alabama,[275] California,[276] Connecticut,[277] Massachusetts,[278] Michigan,[279] and New York[280] used expository laws as important evidence of statutory meaning. Sometimes, judges used expository laws merely to confirm the interpretations that they had arrived at through other means.[281] Others even defended expository legislation. The Supreme Court of Texas explained that legislation's "legitimate province is as well to restore the common law as render certain what may be thought doubtful."[282] A concurring opinion in a California Supreme Court case noted that "[n]othing is more common in legislation than amendatory and declaratory acts."[283] Judges in New York even *invited* legislators to pass expository laws.[284] Even in Georgia,[285]

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275 *See* Boren v. Chisholm, 3 Ala. 513, 514 (1842) ("[I]n all such cases, the act would apply, and was, to say the least, proper, as a declaratory act of what was before considered, somewhat doubtful."); Magee v. Fisher, 8 Ala. 320, 321 (1845) (giving effect to a declaratory act relating to sealed instruments).

276 *See* Fremont v. Boling, 11 Cal. 380, 387 (1858) (invoking an explanatory act relating to tax collection); Manlove v. White, 8 Cal. 376, 377 (1857) (same).

277 *See* State v. Norwich & Worcester R.R. Co., 30 Conn. 290, 295 (1861) ("[I]n that year a declaratory act was passed which shows a clear intention to exempt the defendants, if they were still exempt by the terms of their charter.").

278 *See* Wildes v. Vanvoorhis, 81 Mass. (15 Gray) 139, 146 (1860) ("[I]t is a declaratory act. If the two former acts left any doubt whether anything passed by such a deed without joinder of the wife, this act declares in express terms that the deed shall not be void, but shall be valid for the excess.").

279 *See* Joy v. Thompson, 1 Doug. 373, 377 (Mich. 1844) ("The language of the declaratory act, 'the several statutes of limitations in this state theretofore in force in this state, applicable to,' etc., would save this consequence. And such appears to me on the face of it to be its intent, as well as to remove the ambiguity.").

280 *See* Main v. Green, 32 Barb. 448, 458 (N.Y. Gen. Term 1860) ("[I]t was professedly only a declaratory act . . . . The very passage of the act implies a legislative opinion that the previous act was broad enough, when construed according to its spirit and intent, to reach grants and leases in fee.").

281 *See, e.g.*, City of Boston v. Dedham, 49 Mass. (8 Met.) 513, 516 (1844) ("[I]f this would admit of any doubt, it is wholly removed by St. 1843, c. 66, § 2 . . . . This we consider as a declaratory law; and it removes any doubt, if any there is, as to the construction of the St. of 1839."); Duke of Cumberland v. Graves, 7 N.Y. 305, 313 (1852) ("The statute of 1819 is by its title an act declaratory of the construction and intent of the act of 1798. . . . The intent and meaning of the act of 1798 as explained by this statute is in conformity with its true judicial construction.").

282 Snoddy v. Cage, 5 Tex. 106, 123 (1849).

283 People *ex rel.* Harris v. Brenham, 3 Cal. 477, 490 (1851) (Murray, J., concurring).

284 *See* Weed v. Tucker, 19 N.Y. 422, 435 (1859) ("As what we might now say upon that question would not have the force of a precedent, we express no opinion upon it, leaving it to be determined if it shall arise. In the meantime a declaratory act could be passed, if the Legislature should consider it expedient."); Selkirk v. Waters, 5 How. Pr. 296, 301 (N.Y. Sup. Ct. 1851) ("I think it is my duty to be governed by my own settled convictions, until the construction shall be settled by the Court of Appeals, or the legislature shall alter the law or pass a declaratory act.").

285 *See* Goodwyn v. Goodwyn, 11 Ga. 178, 179 (1851) ("Whatever doubts may have existed heretofore in regard to the intention of the Legislature in the Act of 1817, the late declaratory Act of the last Legislature, removes all doubt as to such intention.").

Ohio,[286] Pennsylvania,[287] and Virginia[288]—states in which some courts had vociferously rejected expository laws—other courts continued to use such laws as evidence of statutory meaning.

Many legislatures, meanwhile, seemed to disregard any early judicial backlash. Even after the Wisconsin Supreme Court rejected expository legislation in 1850, the state's legislature passed thirty-five expository laws by the end of the century.[289] Whereas Georgia's legislature passed nineteen expository laws from 1838 through 1847, after the state supreme court's rejection in 1848 the number declined only to fifteen in the years 1849 through 1858 (if 1859 is included, the number actually increased to twenty). In Pennsylvania, the 1840s and 1850s saw the passage of forty-six expository laws despite state supreme court opinions hostile to such legislation.[290] The 1840s through the 1860s were the decades in which states passed the *most* expository legislation out of any time in American history.[291]

B. The Americanization of Treatises

Despite some more intense judicial backlash, state courts continued to let legislatures interpret their own statutes through the late-nineteenth century.[292] Some explicitly stated that prospective expository legislation was "within the power of legitimate legislation."[293] Even as judges tried to assert a sense of judicial independence, declaring that expository legislation couldn't bind courts, they conceded that it at least had "moral

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286 *See* Bloom v. Noggle, 4 Ohio St. 45, 52 (1854) ("By the positive provisions of that section, as construed by the declatory [sic] act of March 16, 1838 . . . and repeated decisions of this court, as against such third persons, mortgages have no effect either at law or in equity until delivered to the recorder of the proper county for record.").

287 *See* McMichael v. Skilton, 13 Pa. 215, 217 (1850) ("Whether the change is for the better it is not in our power to say; for as the legislature have thought proper to pass an explanatory act, it will of course, govern the construction from the date of its passage.").

288 *See* Wilson v. Miller, 1 Va. (Patt. & Heath) 353, 395 (Spec. Ct. App. 1855) ("[A]s the opinion of the law-making power of the State, it is entitled to the respectful consideration of the law-expounding power.").

289 For an explanation of the methodology used to determine the number of expository laws passed in a particular state, see *infra* Appendix A.

290 *See supra* notes 271–73 and accompanying text (illustrating Pennsylvania Supreme Court opposition to expository legislation).

291 *See supra* Part III (discussing the "golden age" of traditional expository enactments, the height of which occurred in the mid-nineteenth century).

292 State courts around the country referred to, quoted from, and relied on expository legislation. *See* Chisolm v. Chisolm's Ex'rs, 41 Ala. 327, 328–29 (1867); Cannon v. Rowland, 34 Ga. 422, 424–25 (1866); Fountaine v. Urquhart, 33 Ga. Supp. 184, 187, 192 (1864); Succession of Young, 21 La. Ann. 394, 395 (1869); McMurtry v. Giveans, 13 N.J. Eq. 351, 354–55 (Ch. 1861); Ludlam v. Ludlam, 26 N.Y. 356, 362–63 (1863); People *ex rel*. Hanover Bank v. The Comm'rs of Taxes, 37 Barb. 635, 644 (N.Y. Gen. Term 1862).

293 Noble v. Enos, 19 Ind. 72, 75 (1862).

weight."[294] Pennsylvania's Supreme Court, which had some of the most developed and negative jurisprudence on expository legislation out of any state, nonetheless continued to use expository legislation.[295] There were judges in Connecticut,[296] Georgia,[297] Illinois,[298] Indiana,[299] Kentucky,[300] Maine,[301] Missouri,[302] New Hampshire,[303] New Jersey,[304] New York,[305] North Carolina,[306] Rhode Island,[307] and Wisconsin[308] who used or gave at least some weight to expository legislation.

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294 State v. Benoit, 16 La. Ann. 273, 274 (1861).

295 *See* Delaware Div. Canal Co. v. Commonwealth, 50 Pa. 399, 406–08 (1865) (discussing a declaratory act in determining a canal company's tax liability); Hawkins v. Commonwealth, 76 Pa. 15, 18 (1873) (following a declaratory act to determine the eligibility of a notary public for election to the Common Council of Philadelphia).

296 *See* State v. Keena, 29 A. 470, 471 (Conn. 1894) (illustrating that the Supreme Court of Connecticut had invited the legislature to pass a declaratory law explaining the superior court's original jurisdiction over criminal cases); State v. Ward, 43 Conn. 489, 493–94 (1876) (accepting a statute to be declaratory of the crime of burglary at common law).

297 *See* Lewis v. Oliver, 22 S.E. 949, 950 (Ga. 1895) (construing a Georgia law that governed legal remedies for creditors according to an expository act).

298 *See* Ward v. Farwell, 97 Ill. 593, 611 (1881) ("[I]t is the unquestioned right of the legislature . . . to enact statutes declaratory of the common law.").

299 *See* State *ex rel*. Michener v. Harrison, 19 N.E. 146, 149 (Ind. 1888) (explaining that a subsequent expository act should be weighed in determining the "proper construction" of the original act).

300 *See* Bryan v. Bd. of Educ., 13 S.W. 276, 279 (Ky. 1890) (accepting the validity of an expository act in construing a series of acts passed to help accomplish the local Board of Education's goals).

301 *See* State v. Liquors and Vessels, 12 A. 794, 796 (Me. 1888) (noting that "declaratory statutes are not uncommon" and that "[t]hey often serve to remove doubts, and to give certainty and stability to a rule of law which it did not before possess").

302 *See* State *ex rel*. Twp. Bd. of Educ. v. Heath, 56 Mo. 231, 235 (1874) (looking to an explanatory act to determine the lawfulness of certain conduct).

303 *See* Abbott v. Kimball, 38 A. 1051, 1052 (N.H. 1895) (denying a motion to dismiss after giving a declaratory act its "entitled" weight).

304 *See* Skinner v. Christie, 29 A. 772, 776 (N.J. Ch. 1894) ("[I]f there be any doubt about the force of the eighteenth section . . . it is set at rest by the subsequent declaratory act . . . ."); Van Horn v. Goken, 41 N.J.L. 499, 503 (1879) (discussing a "modification made by [an] explanatory act").

305 *See* Perry v. People, 62 How. Pr. 148, 149 (N.Y. 1881) (applying expository legislation to construe the Code of Civil Procedure); People *ex rel*. Egan v. Justs. of the Marine Ct. of N.Y., 59 How. Pr. 413, 416–17 (1880) (using expository legislation to glean the intention of a legislative act); Farmers' Bank of Fayetteville v. Hale, 59 N.Y. 53, 62–64 (1874) (stating that the legislature may pass prospective expository legislation and that it is "mandatory" for courts to accept such legislation).

306 *See* E. Carolina Land, Lumber & Mfg. Co. v. State Bd. of Educ., 7 S.E. 573, 577 (N.C. 1888) (noting alignment between the court's statutory interpretation and the legislature's expository law); Johnson v. Futrell, 86 N.C. 122, 124–25 (1882) (applying and quoting from a "subsequent explanatory act").

307 *See In re* Providence & Worcester R.R. Co., 21 A. 965, 966, 971 (R.I. 1891) (considering both an original law and subsequent expository legislation in construing the meaning of a statute).

308 *See* Munger v. Lenroot, 32 Wis. 541, 546 (1873) ("This legislative exposition of the law of 1860 is entitled to almost controlling force when placing a construction upon a precisely similar statute.").

These weren't the kinds of cases that made the headlines. It was the most negative opinions that usually made it into the leading treatises of the time. As treatise literature matured during the second half of the nineteenth century, the once-toothless judicial backlash started to have real bite.

The first treatises covering expository legislation had deeply relied on English law and tended to accept expository legislation. Declaratory laws, as English lawyer Fortunatus Dwarris explained in his 1830s treatise, were made when Parliament, "for avoiding all doubts and difficulties," needed to "declare what the common law is and ever hath been."[309] Meanwhile, the 1836 edition of *A Course of Legal Study: Addressed to Students and the Profession Generally* asked students to "particularly attend to the distinction between *retrospective*, *explanatory*, and *declaratory* statutes" by marking each type with a specific symbol, since the "distinction between statutes explanatory, retroactive, &c. is highly important."[310] The legitimacy of expository legislation had become infused into American legal thought. An 1834 guide to the U.S. Constitution, for example, contemplated instances when "through mistake, but with the best intentions, an officer might put an erroneous construction on some law intrusted to his supervision: in such a case, an explanatory act of Congress . . . might remedy the error."[311]

By the mid-nineteenth century, endorsements of expository legislation in treatises diminished as these treatises became Americanized. Theodore Sedgwick's 1857 treatise, one of the first major treatises on American statutory interpretation, cited Dwarris but concluded that the "exposition of statutes by subsequent legislative bodies, has weight—though not a controlling authority."[312] Things got worse in 1868, when Thomas Cooley published one of the most influential treatises of the era.[313] In the treatise, Cooley maintained that legislatures made laws while judges construed them, that legislatures determined law for

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309 Fortunatus Dwarris, A General Treatise on Statutes; and Their Rules of Construction 8 (Phila., John S. Littell 1835) (1830).

310 2 David Hoffman, A Course of Legal Study: Addressed to Students and the Profession Generally 782–83 (2d ed., Balt., Joseph Neal 1836) (1817).

311 The Constitutional Guide: Comprising the Constitution of the United States: with Notes and Commentaries from the Writings of Judge Story, Chancellor Kent, James Madison, and Other Distinguished American Citizens 13 (R.K. Moulton ed., N.Y., G. & C. Carvill 1834).

312 Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law 37, 252 (N.Y.C., John S. Voorhies 1857).

313 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (1st ed., Bos., Little, Brown, & Co. 1868); *see also* Friedman, *supra* note 73, at 611–12 (discussing the importance and influence of Cooley's treatise).

the future while judges determined the existing and previous law.[314] Cooley's treatise was so influential that it was cited in the next major publication on statutory interpretation—Platt Potter's 1871 American adaptation of Dwarris's treatise.[315] The treatise explained that expository legislation was "apt to create a conflict between the proper functions of the legislative and judicial departments,"[316] and it went on to claim that legislatures "exceed their power, and invade the domain of judicial authority" when declaring what the law used to be.[317]

By the end of the nineteenth century, three more behemoths would make major pronouncements on expository legislation's validity. Jabez Sutherland's 1891 treatise reaffirmed the sentiments of previous treatises.[318] Gustav Endlich's 1888 treatise explained that "the opinion of a subsequent Legislature upon the meaning of an act passed by a former one is of no more weight than that of the same men in a private capacity."[319] At the same time, Endlich was realistic. "However earnestly" that retroactive legislation might be "deprecated," it was "undoubtedly true" that legislatures constantly passed valid retroactive laws.[320] When the language of expository legislation was "plainly retrospective," it "must be given the effect it clearly is intended to have."[321] Henry Campbell Black's 1896 interpretation handbook took a more positive view, explaining that prospective expository laws were not only entitled to "respectful consideration" but were "binding."[322] Retroactive expository legislation was invalid when it affected vested rights, but "if no rights or titles will be affected, there is authority for holding that a declaratory statute may be accorded a retroactive operation."[323]

Courts and lawyers beginning in the 1870s relied on Sedgwick's, Potter's, and Cooley's treatises—and later Endlich's and Sutherland's—in cases involving legislative statutory interpretation. They cited them to argue against letting expository legislation have retroactive

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314 Cooley, *supra* note 313, at 91–92.

315 Fortunatus Dwarris, A General Treatise on Statutes; and their Rules of Construction 69 n.2 (Platt Potter ed., Albany, William Gould & Sons 1871) (1830).

316 *Id.* at 68 n.1.

317 *Id.*

318 *See* J.G. Sutherland, Statutes and Statutory Construction 265–66 (Chi., Callaghan & Co. 1891) (indicating skepticism of declaratory statutes and concerns about their retroactivity).

319 G.A. Endlich, A Commentary on the Interpretation of Statutes 68 (Jersey City, Frederick D. Linn & Co. 1888).

320 *Id.* at 394.

321 *Id.* at 396 (quoting Journeay v. Gibson, 56 Pa. 57, 61 (1867)).

322 Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws 371 (St. Paul, West Publ'g Co. 1896).

323 *Id.* at 373.

effects.[324] They drew on the treatises to criticize legislatures' overrides of judges' interpretations of statutes.[325] The Supreme Court of South Carolina in 1899 cited Potter and Dwarris, for example, to explain that expository laws were "not common, and are not of much expediency" in a nation with written constitutions and clearly defined borders between government branches.[326] Yet courts also cited these treatises to *support* expository legislation.[327] Most prominently, the U.S. Supreme Court in 1873 cited Sedgwick to argue that, "[b]oth in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law."[328]

The pattern in the last three decades of the nineteenth century was an overwhelming judicial rejection of *retroactive* expository legislation but occasional usage and acceptance of expository legislation despite these misgivings. Courts in Alabama,[329] Arkansas,[330] California,[331] Minnesota,[332]

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[324] *See* Lindsay v. U.S. Savs. & Loan Co., 24 So. 171, 174, 176–77 (Ala. 1898) (citing Cooley to do statutory interpretation); McNichol v. U.S. Mercantile Reporting Agency, 74 Mo. 457, 471 (1881) (same); State *ex rel.* Rodwell v. Harrison, 43 S.E. 540, 541 (N.C. 1903) (quoting from Sedgwick's and Cooley's treatises); Vanderpool v. La Crosse & Milwaukee R.R. Co., 44 Wis. 652, 663–66 (1878) (drawing from Cooley's, Sedgwick's, and Dwarris's treatises); Gilpin v. Williams, 25 Ohio St. 283, 291 (1874) (counsel) (citing Cooley and Sedgwick to argue that "a statute will be construed to be prospective unless, on the face of the enactment, the intention is clear and positive that the legislature meant it to operate retrospectively").

[325] *See* Pryor v. Downey, 50 Cal. 388, 403, 410 (1875) ("The Legislature of California cannot exercise any judicial function . . . ."); *In re* Handley's Estate, 49 P. 829, 831 (Utah 1897) (citing Cooley to declare that the legislature is not vested with "judicial powers").

[326] Carroll v. Thomas, 32 S.E. 497, 500 (S.C. 1899).

[327] In 1888, for example, the Supreme Court of Indiana cited Sedgwick's treatise to argue that legislative interpretations of statutes were "of weight in all cases of doubt" and should thus be used. State *ex rel.* Michener v. Harrison, 19 N.E. 146, 149 (Ind. 1888). It cited Endlich's treatise to support its claim that legislative interpretations were "binding on the courts." *Id.* And a Pennsylvania appellate court in 1896, giving effect to an expository law passed in 1866, cited Endlich to explain that laws on the same subject should be considered together as evidence of statutory meaning. West Branch Lumberman's Exch. v. Lutz, 2 Pa. Super. 91, 97 (1896).

[328] Stockdale v. Ins. Cos., 87 U.S. (20 Wall.) 323, 331 (1873).

[329] *See* Lindsay v. United States Savs. & Loan Co., 24 So. 171, 175 (Ala. 1898) ("[F]or the legislature has no power to direct the judiciary in the interpretation of acts previously passed . . . .").

[330] *See* Sidway v. Lawson, 23 S.W. 648, 649 (Ark. 1893) ("The legislature cannot control [the courts] . . . by declaratory statutes designed to interpret previous enactments . . . .").

[331] *See* Pryor v. Downey, 50 Cal. 388, 403 (1875) (expressing opposition to expository legislation).

[332] *See* Meyer v. Berlandi, 40 N.W. 513, 517 (Minn. 1888) ("The legislature enacts the laws, but it belongs to the courts alone to construe them.").

Nebraska,[333] New York,[334] North Carolina,[335] Pennsylvania,[336] South Carolina,[337] Tennessee,[338] Utah,[339] and Wisconsin[340] all made declarations that were at least somewhat unfavorable to expository legislation. Just as before, Pennsylvania continued to have some of the nation's most developed and negative case law on expository legislation. The Pennsylvania Supreme Court insisted in 1871 that it would be "monstrous" to let retroactive expository legislation be used to interpret laws that were plain and beyond doubt.[341] In 1888, the court held that an expository statute was particularly objectionable because it was passed decades after the original act, attempted to override a court's interpretation of the statute, and would be "an abandonment of a long line of cases."[342] In 1895, the court went even further, rejecting a *prospective* expository law because it couldn't be "reconciled with the theory of exclusive legislative and judicial functions."[343] And yet, the sentiment wasn't unanimous. A dissenting opinion called the court's rejection an "unprecedented and unwarranted invasion by the judiciary of the legislative authority."[344] Expository legislation, the justice explained, had "been in common use" and there had "been scores if not hundreds of them."[345]

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333 *See* Lincoln Bldg. & Sav. Ass'n v. Graham, 7 Neb. 173, 180 (1878) (asserting that legislatures cannot "expound" laws).

334 *See* Smith v. City of Syracuse, 17 A.D. 63, 71 (N.Y. App. Div. 1897) ("[Legislatures are] without power under the Constitution to enact that pre-existing statutes shall be construed so as to affect causes of action then existing, or actions then pending, as prescribed by the subsequent and declaratory act.").

335 *See* E. Carolina Land, Lumber & Mfg. Co. v. State Bd. of Educ., 7 S.E. 573, 577 (N.C. 1888) (using expository legislation to determine the legislature's satisfaction with a judicial construction).

336 *See* Commonwealth *ex rel.* Roney v. Warwick, 33 A. 373, 374–75 (Pa. 1895) (rejecting expository legislation); Titusville Iron-Works v. Keystone Oil Co., 15 A. 917, 919 (Pa. 1888) (same).

337 *See* Carroll v. Thomas, 32 S.E. 497, 500 (S.C. 1899) (construing a declaratory statute to have only prospective effect and noting that "declaratory statutes are not common and are not of much expediency").

338 *See* Arrington v. Cotton, 60 Tenn. 316, 319 (1872) ("The Legislature has not the constitutional power to construe a statute, or to give a mandate to the Courts as to how they shall construe them . . . .").

339 *See In re* Handley's Estate, 49 P. 829, 830 (Utah 1897) ("After the court has interpreted or construed a statute on the trial of a case, and rendered judgment, the legislature cannot affect it by a declaratory or explanatory law, giving the law under which the decree was rendered a different construction.").

340 *See* Vanderpool v. La Crosse & Milwaukee R.R. Co., 44 Wis. 652, 664–68 (1878) (asserting that a "subsequent act of the legislature," including an "explanatory act," "cannot affect or change previous rights already fixed and settled").

341 *See* Haley v. Philadelphia, 68 Pa. 45, 47 (1871).

342 Titusville Iron-Works v. Keystone Oil Co., 15 A. 917, 919 (Pa. 1888).

343 Commonwealth *ex rel.* Roney v. Warwick, 33 A. 373, 374 (Pa. 1895).

344 *Id.* at 375 (Mitchell, J., dissenting).

345 *Id.*

Federal courts, including the Supreme Court, were also beginning to turn more forcefully against expository legislation. Although the Supreme Court had blessed expository legislation in 1873, it insisted in 1881 that the "utmost effect to be given to a subsequent legislative declaration . . . would be to regard it as an alteration of the existing law in its application to future transactions."[346] One lower court judge called an expository law "obnoxious to two fatal objections," one being that Congress was using a power that was "purely and undoubtedly judicial."[347] Yet another judge incorrectly claimed in 1873 that expository laws were "without a precedent, save in the ancient parliaments in England."[348] Still, many lower courts simply used expository laws without much comment on their general validity.[349] Some judges made forceful arguments that expository laws were constitutional,[350] while others deferred to legislatures. For instance, according to one Court of Claims judge in 1897, "[w]hile it is the duty of the judiciary to determine for itself the construction of all laws involved in the case, it may with propriety consult the action of other departments."[351]

C. Self-Policing by Legislatures

The combination of judicial backlash and new treatises likely had some limited effect on legislative practices. Certain lawmakers began to police themselves by citing specific treatises, while others invoked the ideas that hostile judges were developing.

Some lawmakers had been judges, after all. U.S. Senator Allen Thurman had begun a four-year term as an Ohio Supreme Court justice in 1852, just four years after that Court had opined that expository legislation could only operate prospectively because it was "the right of the legislature to enact laws, and the province of the court to construe them."[352] While Thurman was a justice, the Court had heard cases that directly and indirectly involved expository legislation.[353] In 1870, a

346 Koshkonong v. Burton, 104 U.S. 668, 679 (1881).

347 *In re* Landsberg, 14 F. Cas. 1065, 1068 (E.D. Mich. 1870).

348 *In re* Kean, 14 F. Cas. 157, 159 (W.D. Va. 1873).

349 *See, e.g.*, Del. R. Co. v. Prettyman, 7 F. Cas. 408, 410 (C.C.D. Del. 1872); Jessup v. Ill. Cent. R.R. Co., 36 F. 735, 741 (C.C.N.D. Ill. 1888); Kintzing v. Hutchinson, 14 F. Cas. 644, 647 (C.C.D.N.J. 1877).

350 *See In re* Everitt, 8 F. Cas. 906, 908 (S.D. Ga. 1873) ("The constitutionality of the amendatory or declaratory act . . . cannot, I think, be doubted, at least when it is applied to bankruptcy proceedings which have arisen since its passage."); United States v. Ohio, 27 F. Cas. 219, 229 (E.D. Pa. 1872) ("[T]he legislature may at present enact how a prior one shall be construed in future.").

351 Robert Dunlap & Co. v. United States, 33 Ct. Cl. 135, 167 (1897).

352 The Schooner Aurora Borealis v. Dobbie, 17 Ohio 125, 127 (1848).

353 *See* Bloom v. Noggle, 4 Ohio St. 45 (1854); White v. Denman, 1 Ohio St. 110 (1853).

year after he became a U.S. Senator, Thurman shared his views about expository legislation with the rest of the Senate. He explained that he had never "believed that any Legislature has power, by a declaration as to the meaning of a law," to change a court's statutory interpretation.[354]

Few lawmakers had been judges, but many had been lawyers. They, too, began to dissent in the second half of the nineteenth century. The U.S. Representative Thomas Davis, a lawyer from New York, declared in 1865:

> I am not to be told that I am to be bound by what Congress says is the law; not by declaratory statutes; nor by anything except the adjudication by the constitutional tribunals of the law. . . . Congress may make a law, but it can neither interpret it judicially nor execute it physically.[355]

The influence of these lawmakers' legal training became clear when they quoted from treatises. In 1869, Representative Philadelph Van Trump,[356] a lawyer and former Ohio Supreme Court candidate, quoted from Chancellor Kent's *Commentaries* to claim that the "sole ground upon which a declaratory act of Parliament in England is sustained by their courts does not at all exist in this country."[357] The next year, Representative James Beck—a lawyer from Kentucky—also cited Kent to argue that Parliament's power to pass expository legislation didn't exist in Congress since "laws are all written, and cannot be forgotten."[358] As Beck would explain in 1880, expository legislation was "beyond the scope of legislative authority."[359]

Perhaps the most extreme critic of expository legislation in Congress was Senator Thomas Bayard, a lawyer from Delaware. "Declaratory legislation is never to be favored and is to be regarded as rather vicious in its character," he claimed in 1877, as if writing his own legal treatise out loud.[360] Bayard's absolutist rejection of expository legislation was based on constitutional concerns: "within the terms of the Federal Constitution declaratory laws by Congress, if not absolutely unconstitutional, are certainly unwise and improper."[361] But these constitutional concerns were intertwined with deeper anxieties that the breakdown of borders between government branches would lead

354 CONG. GLOBE, 41st Cong., 2d Sess. 631 (1870) (statement of Sen. Thurman).
355 CONG. GLOBE, 38th Cong., 2d Sess. 1408 (1865) (statement of Rep. Davis).
356 What a name!
357 CONG. GLOBE, 40th Cong., 3d Sess. 233 (1869) (statement of Rep. Van Trump).
358 CONG. GLOBE, 41st Cong., 2d Sess. 690 (1870) (statement of Rep. Beck).
359 46 CONG. REC. 438 (1880) (statement of Sen. Beck).
360 45 CONG. REC. 168 (1877) (statement of Sen. Bayard).
361 CONG. GLOBE, 40th Cong., 3d Sess. 1829–30 (1869) (statement of Sen. Bayard).

to "confusion," "elective despotism," and "anarchy."[362] Expository legislation had risen in England, he claimed, but it was "never intended that the law-making power should usurp the functions of the judicial branch of the Government and interpret laws."[363] Like other lawmakers, he quoted from both Dwarris's and Kent's treatises to argue that no "honest judicial tribunal of this country, will ever permit their peculiar and necessary functions to be invaded and wrested from them by the unauthorized act of a legislative body."[364]

Although it's difficult to trace precisely how these individual lawmakers' negative attitudes shaped legislative practice, some evidence suggests that lawmakers' self-policing paid off. California, which became a state in 1850, had quickly emerged as one of the nation's most prolific states for expository legislation. According to a count based on the methodology described in Appendix A, California in the 1850s passed twenty-three expository laws—only Pennsylvania, which passed twenty-seven that decade, surpassed California. California then passed eight expository statutes between 1860 and 1866, and it then abruptly stopped for the rest of the century. The reason appears to be that a growing recognition of strict separation of powers had become entrenched in the legislature. Shutting down an expository bill in 1868, the state Assembly's judiciary committee described the bill's attempt to interpret a statute as "beyond the jurisdiction of the legislative body, that authority by the Constitution of the State being devolved upon the judiciary, as the sole judges of legislative enactments."[365]

In the end, even as some lawmakers criticized the practice of passing expository legislation, they left room for such legislation. "I do not like declaratory statutes," said one lawmaker in 1878, "but, when I find that they have been passed in the interest and for the protection of the bondholders I see no reason why they may not be enacted in the interest and for the protection of the people."[366] Or, as Senator Allen Thurman (the former Ohio judge) conceded that same year, "I do not, as a general rule, favor declaratory laws . . . but a declaratory law may be retroactive in its operation as against the Government if the Government see fit to pass it."[367] Even Senator Bayard could find a place for expository legislation. In an 1877 debate, he rose to ask whether the bill under consideration would "propose to control judicial interpretation of statutes," but a colleague quickly calmed him

362 Cong. Globe, 41st Cong., 1st Sess. 69 (1869) (statement of Sen. Bayard).
363 *Id.*
364 *Id.*
365 *California Legislature*, Sacramento Daily Union, Jan. 15, 1868, at 1.
366 45 Cong. Rec. 436 (1878) (statement of Sen. Jones).
367 45 Cong. Rec. 3824 (1878) (statement of Sen. Thurman).

down.[368] Bayard then delivered a fiery rebuke of expository legislation, yet he conceded that, since the bill merely directed "ministerial officers or officers of the executive department" how to interpret statutes, his criticism was neither here nor there.[369]

And so all the fury was for naught. Lawmakers continued to bless expository legislation despite their colleagues' objections. Congressional committees continued to signal support for expository legislation in their reports.[370] Lawmakers in floor debates made arguments that relied on expository legislation and took for granted its validity.[371] Some lawmakers were emphatic. "There is no doubt that Congress has the power to pass a declaratory law interpreting its own statutes, declaring what effect in the future that declaratory law shall have," argued one lawmaker in 1890.[372] Some even cited treatises to support legislative statutory interpretation. One lawmaker in 1898 invoked Dwarris's treatise.[373] Another, in 1910, quoted extensively from Sutherland's treatise.[374] In fact, one lawmaker claimed that not only was expository legislation perfectly allowable, but that "[a]ll men who are lawyers will agree to that."[375] Even as some of the loudest judges heralded a new regime of American separation of powers, lawmakers clung to their tradition of legislative statutory interpretation.

V
Normative and Theoretical Implications

A. Toward a Three-Dimensional View of Separation of Powers

The early history of legislative statutory interpretation calls into question the received wisdom that statutory interpretation is necessarily, and has always been understood to be, an exclusively "judicial" power. At both the federal and state levels, lawmakers, judges, administrators, and executives frequently accepted and actively encouraged legislative statutory interpretation. The practice had roots in colonial America, and it continued for hundreds of years even as it fluctuated and transformed across time. The creation of new state and federal constitutions didn't come close to causing a rupture from past practices. In fact, legislative

368 44 Cong. Rec. 399 (1877) (statement of Sen. Bayard).
369 *Id.*
370 *See* H. Rep. No. 53-286 (1894).
371 47 Cong. Rec. 850 (1883) (statement of Rep. Holman) (referencing a "declaratory resolution of Congress").
372 51 Cong. Rec. 5330 (1890) (statement of Sen. Eustis).
373 55 Cong. Rec. 1079 (1898) (statement of Sen. Daniel).
374 61 Cong. Rec. 7866 (1910) (statement of Sen. Beveridge).
375 53 Cong. Rec. 4688 (1894) (statement of Rep. Everett).

statutory interpretation *increased* and became distinctly American in the century following the U.S. Constitution's ratification. Many of the nation's founders accepted and continued to accept legislative statutory interpretation. Federal and state courts continued to bless legislative statutory interpretation.

This view of continuity at the nation's founding directly contradicts the prevailing story of strict separation of powers in statutory interpretation. For instance, legal scholar John Manning has forcefully argued that the creation of the U.S. Constitution represented a dramatic departure from old British practices and that the "Constitution self-consciously separated the judicial from the legislative power and, in so doing, sought to differentiate sharply the functions performed by these two distinct branches."[376] According to Manning, this idea is supported by the Constitution's structure, which reveals that the Founders strongly believed in judicial independence.[377] Moreover, Manning argues, the Constitution was the product of a *rejection* of legislative overreach at the state level, as evidenced by how the Framers refused to give judges a role in revising and vetoing legislation.[378]

But a *greater* separation of powers didn't mean a *complete* separation of powers. Both federal and state lawmakers—as well as judges—continued to believe that legislators had a role to play in statutory interpretation *even if* judges were "the expositors" of the law.

At first glance, evidence of any consensus during the ratification debates of the Constitution is spotty and inconclusive. Similarly, evidence about the Framers' individual attitudes toward legislative statutory interpretation specifically is scant. Given the paucity of direct evidence revealing how constitutional drafters, signatories, and ratifying states viewed legislative statutory interpretation at the federal level, a turn to historical practice may be appropriate. As the legal scholars Curtis Bradley and Neil Siegel have explained, "[s]cholars and courts have increasingly recognized that the conduct of government institutions over time can play an important role in defining understandings of the separation of powers."[379] Although well-aligned with non-originalist theories of constitutional meaning, a turn to post-Founding historical practices has garnered support from even originalists.[380] Two theories of historical practice have become prominent: a "historical gloss"

376 Manning, *supra* note 103, at 57.

377 *Id.* at 58–78.

378 *Id.* at 59 n.237.

379 Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 Geo. L.J. 255, 321 (2017).

380 *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 Va. L. Rev. 1, 9–16 (2020). On a related judicial method that one

approach that draws on longstanding historical practices as evidence of constitutional meaning, and a "liquidation" approach that's advocated for by some originalists and that asserts that post-Founding practices caused unsettled constitutional meanings to become fixed and stabilized.[381]

The distinctions between the "historical gloss" and "liquidation" approaches remain up for debate, but under both views the early history of expository legislation calls into question the conventional wisdom about strict separation of powers in statutory interpretation. One view of the "historical gloss" approach is that it requires demonstrating longstanding governmental practice that is accepted or not acted upon by the affected branch, but it doesn't require inter-branch agreement that the practice is constitutional.[382] By contrast, proponents of the "liquidation" approach stress that constitutional meanings become *permanently* fixed by historical practices.[383] Still other advocates of "liquidation" suggest that the practices must be approved by the public[384] and be the result of deliberation.[385] Under both approaches, the trend for statutory interpretation is clear. Among judges, lawmakers, administrators, and everyday people—both before and after the Constitution's ratification—there was longstanding and widespread acceptance of legislative statutory interpretation, although, to be sure, there were increasingly detractors as the nineteenth century progressed.

When abstract rhetoric met concrete reality, compromises resulted. Not every statutory interpretation question made it before a judge, and legislative statutory interpretation filled in the gaps. Judges took up the task of interpreting statutes, but they also relied on expository legislation and sometimes even asked for it. The U.S. Constitution may have been a departure from excessive legislative power at the state level, but both Congress and state legislatures continued to pass expository legislation. Even constitutional signatories like James Madison signed off on expository legislation.[386] Judges, especially at the state level, no doubt increasingly rejected expository legislation as unconstitutional in the

scholar has called "Living Traditionalism," see Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. Rev. 1477 (2023).

381 *See* Bradley & Siegel, *supra* note 380, at 6–8.

382 *See id.* at 31.

383 *See* Bradley & Siegel, *supra* note 380, at 50.

384 *See* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 19 (2019) ("A liquidated practice would 'carry with it the public sanction.'" (citation omitted)); *see also* Bradley & Siegel, *supra* note 380, at 57.

385 *See* Baude, *supra* note 384, at 52 ("Madison linked the requirement of deliberation to the scope of a liquidated practice . . . ."); *see also* Bradley & Siegel, *supra* note 380, at 52.

386 *See supra* note 93.

mid-nineteenth century.[387] But they were mostly attacking *retroactive* expository legislation, and they nonetheless continued to use and rely on legislative interpretations of statutes.[388]

Certainly, there were key figures who *said* that it was the exclusive duty of courts to expound the law, but their actions didn't fit their stated ideals. Alexander Hamilton, who had argued that "the interpretation of the laws is the proper and peculiar province of the courts"[389] would go on to defend expository legislation as a lawyer.[390] At the Constitutional Convention, Caleb Strong insisted that "the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws."[391] Similarly, Elbridge Gerry worried about turning judges, who were the "Expositors of the Laws," into "the Legislators which ought never to be done."[392] Strong's and Gerry's comments were in the context of giving legislative duties to judges, but they were quiet about the other way around—about sharing statutory interpretation with legislators. Strong's and Gerry's actual practices suggested they found legislative statutory interpretation acceptable. Caleb Strong, as Massachusetts Governor from 1800 to 1807 and 1812 to 1816, signed off on five pieces of expository legislation.[393] Elbridge Gerry, as Massachusetts Governor from 1810 to 1812, signed off on two.[394]

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387 *See supra* Section IV.A.

388 *See supra* notes 275–88 and accompanying text.

389 The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

390 *See* The Speeches at Full Length of Mr. Van Ness, Mr. Caines, The Attorney-General, Mr. Harrison, and General Hamilton, in the Great Cause of the People, against Harry Croswell, on an Indictment for a Libel on Thomas Jefferson, President of the United States 74–75 (N.Y.C., G. & R. Waite 1804) ("When we pass from this to the declaratory law of Great Britain, the whole argument is enforced by one of the first authority."); *see also* People v. Croswell, 3 Johns. Cas. 337, 361 (N.Y. Sup. Ct. 1804) (describing a law as declaratory in the case Hamilton argued).

391 2 The Records of the Federal Convention of 1787, at 75 (Max Farrand ed., rev. ed. 1966).

392 *Id.*

393 Act of June 18, 1802, ch. 4, 1802 Mass. Acts May Sess. 5 (explaining and amending prior act incorporating a religious society); Act of June 10, 1813, ch. 11, 1813 Mass. Acts June Sess. 234 (adding to and explaining prior act establishing fees for officers); Act of Feb. 28, 1814, ch. 199, 1814 Mass. Acts Jan. Sess. 475 (adding to and explaining prior act repealing another prior act appointing clerks); Act of Feb. 7, 1814, ch. 97, 1814 Mass. Acts Jan. Sess. 345 (declaring true intent of prior act ensuring the safe keeping of federal prisoners in Massachusetts); Act of Feb. 16, 1816, ch. 139, 1816 Mass. Acts Jan. Sess. 182 (explaining prior act encouraging literature, piety, and morality).

394 Act of June 22, 1811, ch. 55, 1811 Mass. Acts May Sess. 456 (adding to and explaining prior act concerning the ability of British trustees to buy land); Act of Feb. 27, 1811, ch. 99, 1811 Mass. Acts Jan. Sess. 348 (explaining prior act authorizing one George Ulmer to build a bridge).

In the end, a compromise view of separation of powers emerged. Judges were expositors of statutes in particular cases and controversies, and they could—and did—use legislative interpretations of statutes as persuasive evidence of statutory meaning in those cases. But lawmakers could interpret previous legislative enactments as well. The only question was in which scenarios and contexts those interpretations *mattered*. Administrators often treated expository legislation as binding beyond the courts, where much statutory interpretation took place, while judges were divided on expository legislation's binding nature *within* the courts, where only some statutory interpretation took place. Thus, separation of powers for statutory interpretation couldn't be reduced to a simplistic one-to-one identification between a task (statutory interpretation) and a branch (judicial or legislative). This was attractive as rhetoric but unworkable as reality. Instead, separation of powers for statutory interpretation operated in *three* dimensions: task, branch, and context.

B. The Inherent Interpretive Openness of Legislation: Paradoxical Originalism, Enacted Subsequent Legislative History, and Anti-Entrenchment

This three-dimensional view of separation of powers was possible because expository legislation blurred a different type of formal border: the distinction between interpreting and making law. As the Article has shown, the *option* of expository legislation imbued statutes with an inherent interpretive openness. When a legislature knows that a future legislature has the option to enact expository statutes, it legislates under the assumption that any statute it passes is just a piece of evidence that informs a set of possible default interpretations. A future legislature can then pass an expository statute that provides additional evidence of the original statute's construction or linguistic meaning. The new evidence might lead to the same default interpretations that were possible with only the first statute, but it also might not. Historically, legislatures passed expository legislation interpreting prior enactments and expected that future legislatures would do the same. And so, as long as expository legislation existed, *all* statutes were in some way what legal scholar Nicholas Rosenkranz defines as "dynamic": They implicitly "incorporate[d] the future interpretation (or interpretive methodology) of some entity."[395]

[395] Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2139 (2002).

This kind of interpretive dynamism is different from the dynamism that regular amendments that "make" law might provide. The difference can be seen by first understanding the distinction between statutory meaning and statutory operation. Just on a page, a statute has a meaning and allows a certain set of effects; in the real world, however, a statute has an operation that causes those meanings and allowable effects to impact real people. When a legislature enacts an expository statute, it says what a previous statute had always *meant*, but it doesn't necessarily dictate how that original meaning had always affected people's rights and obligations. That latter issue depends on whether the expository statute *operates* retroactively. For example, a legislature might pass a statute in January that says "no vehicles in the park" and then a statute in March that says "the word 'vehicles' was meant to include helicopters." When it comes to statutory *meaning*, the March expository statute affirms that the meaning of "vehicles" had always included "helicopters." But a court could refuse to let that March statute *operate* retroactively. It could hold someone *not* liable for flying a helicopter in the park in February.

This matters for interpreters who care about searching for the "original meanings" or "original intentions" of statutes. An expository statute provides evidence of original meaning and intention even if it has no consequence on a statute's original operation. For example, the fact that a legislature has declared that "vehicles" originally included "helicopters" could make an originalist interpreter more likely to believe that "vehicles" *also* originally included things like drones, paragliders, or airplanes. An expository statute is like a lamp in a dark room—it casts a bright light that shows that something has always been in the room, and its dimmer edges gesture at what else might be in the room. It presupposes that the contents of the room weren't completely knowable to begin with. By contrast, an amendment assumes that the room is already bright—that the original statute's scope was always knowable—and it puts something into the room. The result is the same if you care about only statutory operation. Regardless of whether an expository statute asserted that a helicopter was already in the room or whether an amendment added a helicopter, either way you weren't able to use the helicopter until then. You either didn't know the helicopter was already in the room, or the helicopter wasn't actually in the room. But the results are different if you care about what else might be in the room—about what else the statute might mean or what else the statute might have originally been intended to cover.

Expository legislation thus fundamentally blurs what Nicholas Rosenkranz calls the "basic distinction between pre- and post-enactment

legislative history."[396] An expository statute is a paradox—it's an attempt to declare an original meaning or intention of a prior enactment, but because it comes *after* that prior enactment it inevitably reflects a new legislature's understanding. Much of the time at the state level, the "current legislature" was the same as the "enacting legislature."[397] Still, legislative statutory interpretation was inevitably impure, distorted by the gap in time between the original enactment and the expository statute's enactment. Expository legislation was a *dynamic* tool of interpretation that had original meaning and intention at its core but that incorporated the views of lawmakers over time. In other words, the concept of "original meaning" in statutory interpretation—as lawmakers used it—was historically a paradox, for it became intertwined with the inherent interpretive dynamism that expository statutes enabled.

It's partly for this reason why the non-delegation doctrine doesn't have to be an issue for legislative statutory interpretation. Purportedly grounded in Article I of the Constitution, the non-delegation doctrine prohibits Congress from enacting statutes that delegate legislative power to bodies such as agencies unless Congress also provides an "intelligible principle" to carry out the statute.[398] Nicholas Rosenkranz has argued that "dynamic interpretive statutes," which "purport to incorporate the future interpretation (or interpretive methodology) of some entity," are a "delegation of law-interpreting power and must be tested under the nondelegation doctrine."[399] Rosenkranz finds the use of "subsequent legislative history" in statutory interpretation to be similarly impermissible.[400] The idea is that when Congress delegates the interpretation of a statute to a future Congress, it violates principles announced in *INS v. Chadha*, which prohibited one house of Congress from vetoing an executive's actions.[401] But because expository legislation purports to recover the original intentions or meanings of statutes, the supposed "delegation of law-interpreting power" that they involve is never a full delegation. Moreover, expository legislation shows how even exclusively legislative interpretations of statutes could satisfy the requirements set out in *Chadha*. An expository statute could be passed

396 *Id.* at 2135, 2137.

397 *See infra* Figure 10 in Appendix B (showing the time elapsed between expository legislation and the legislation which it purports to explain).

398 Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1293 (2021) (quoting J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)); *see* U.S. CONST. art. I, § 1.

399 Rosenkranz, *supra* note 395, at 2139.

400 *Id.* at 2136 (emphasis removed).

401 *See id.* at 2134 (citing INS v. Chadha, 462 U.S. 919 (1983)).

by both houses of Congress and receive a presidential veto that gets overridden by Congress, making the statute purely legislative, but it would still have met the constitutional requirements of bicameralism and presentment.

The interpretive dynamism created by expository legislation finally reveals the possibility of a built-in check against what many scholars have called legislative "entrenchment," which Eric Posner and Adrian Vermeule defend and define as "the enactment of either statutes or internal legislative rules that are binding against subsequent legislative action in the same form."[402] Expository legislation was an *anti*-entrenchment tool. By imbuing legislation with interpretive dynamism ex ante, it created space for future legislatures to subtly modify the meanings of prior enactments. Hypothetically, a statute could appear to say it was binding a future legislature, such as by prohibiting a future legislature from repealing that statute,[403] but a future expository statute could claim that the original statute didn't actually mean what it said. Even if the expository statute operated prospectively, it would still free the future legislature from its shackles and allow it to now repeal the original statute.

C. Judges Were Sometimes "Double Agents," not "Faithful Agents" or "Partners"

As this Article has shown, not everyone accepted this vision of separation of powers that depended so heavily on legislative action. Judges increasingly fought back, revealing a potent counter-example to the present-day consensus that judges are and should be "faithful agents" of legislatures in statutory interpretation. That consensus has detractors, to be fair. For example, some have argued that judges are more like "partners" who cooperate with lawmakers to dynamically interpret statutes, and others have more fully disposed of the "faithful agent" idea.[404] But the "faithful agent" view has been, in the words of two legal scholars, a "conventional"[405] view that has had "remarkable staying power."[406]

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402 Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1667 (2002). Legal scholar Rebecca Kysar has proposed expanding this idea to include actions that "functionally bind" future legislatures. *See* Rebecca M. Kysar, *Dynamic Legislation*, 167 U. PA. L. REV. 809, 836 (2019).

403 *See* Posner & Vermeule, *supra* note 402, at 1668–69.

404 *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1554 (1987) (describing judges as "diplomats" and "agents in a common enterprise"); Gluck & Bressman, *supra* note 35, at 913 (discussing alternatives to the faithful agent model).

405 Barrett, *supra* note 37, at 112.

406 Gluck & Bressman, *supra* note 35, at 907.

There has been a growing recognition that the "faithful agent" model may not accurately describe and sufficiently justify what judges *actually do*. Justice Amy Coney Barrett has argued that the "faithful agency" model can't be reconciled with judges' uses of "substantive canons"—policy-based principles that tilt an interpretation one way over the other.[407] Judges aren't exactly being "faithful agents" when they use canons that legislatures don't know about, as Lisa Schultz Bressman and Abbe Gluck have suggested.[408] Bressman and Gluck go so far as to conclude that "the faithful-agent model seems incapable of bearing the full weight of modern interpretive practice."[409] For example, legal scholar James Brudney has drawn attention to how textualists' insistence on finding the "ordinary meaning[s]" of statutes through dictionaries and language-based canons "cannot be reconciled with the faithful agent model."[410] Ordinary meaning, according to Brudney, is "constructed" by judges and often "subordinate[s]" legislatures' desires.[411]

In response to these deficiencies, the work of identifying and theorizing alternative descriptions and justifications has begun. Yet this work remains nascent and lacks an affirmative theory of what judges actually do. Brudney explains, for example, that "the Court acts as something other than a faithful agent when it engages in dictionary-based or canon-based ordinary meaning analysis."[412] But what is this "other" thing that the Court acts as? Bressman and Gluck meanwhile ponder "whether a more frank acknowledgment that federal judges often operate outside the model is possible."[413] Well, is it? The probing challenges of these "faithful agent" skeptics have raised important questions that now must be answered.

The main roadblock is that debates over the court-legislature relationship have remained wedded to a premise that may not always be justified: that judges work with legislatures in good faith. As the legal scholar Deborah Widiss has suggested about this assumption's dogmatic hold, "[l]egal commentators frequently characterize overrides as a helpful 'colloquy' between the courts and Congress; courts, acting as agents of Congress in this context, engage in a good-faith effort to interpret statutes in line with legislative intent and welcome

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407 Barrett, *supra* note 37.

408 *See* Gluck & Bressman, *supra* note 35, at 905.

409 *Id.* at 907.

410 James J. Brudney, *Faithful Agency Versus Ordinary Meaning Advocacy*, 57 ST. LOUIS U. L.J. 975, 976 (2013).

411 *Id.* at 980.

412 *Id.* at 976.

413 Gluck & Bressman, *supra* note 35, at 1017.

'corrections' from Congress when appropriate."[414] For the sake of moving the ball forward a little, let me offer an alternative, more cynical, and intentionally provocative descriptive model that the history of expository legislation suggests co-existed with the "faithful agent" and "partner" models.

American judges engaging in statutory interpretation have, at times, been rebellious *double agents* to legislatures.[415] A faithful agent works for the best interests of its commander; a partner retains its own interests but nonetheless coordinates, collaborates, and tries to increase the size of the pie for both itself and its teammate. A double agent can carry out the desires of a commander, but it does so only as much as necessary for it to advance its own goals. Its values and goals may be in direct opposition to those of a commander. It extracts information from that commander, but it picks and chooses what it wants for its own purposes, sometimes even distrusting the information and rejecting it. A double agent's actions can be beneficial to both but also simultaneously subversive, additive but also subtractive. The relationship is ultimately one of commensalism and even parasitism, not mutualism and synergy. At its worst, the name of the game is sabotage.

The range of judicial responses to expository legislation provides examples of judges working as not only faithful agents and partners but also as double agents. The historically widespread judicial acceptance of expository legislation reflects the former two models of faithful agency and partnership. These judges anticipated that legislatures would respond to judicial misinterpretations of law. Sometimes, they used expository legislation merely to confirm their own interpretations and constructions of law. Other times, they depended on it.

But what were judges doing when they *rejected* expository legislation? A double-agent model accounts for this behavior. Judges who rejected expository legislation deliberately took a stand *against* legislative supremacy when they felt like it harmed other values. Without calling them "substantive canons," they imposed these values as if they were self-evident rules. One important perceived value was order. The Massachusetts Supreme Court in 1861, for example, painted its discussion of legislative statutory interpretation against a background of anxieties over the "entire destruction of the order and harmony of

414 Widiss, *supra* note 27, at 875–76 (citing Richard A. Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & Pol. 143, 143 (1991)).

415 To my knowledge, this is the first time judges have been described as "double agents" to legislatures. For an account of federal appellate court judges as double agents in relation to the U.S. Supreme Court, see Kevin Matthew Scott, Double Agents: An Exploration of the Motivations of Court of Appeals Judges (2002) (unpublished Ph.D. dissertation, Ohio State University) (on file with author).

our system of government."[416] In doing so, it cast itself as a protector of order, the super-ego to the legislature's id. Two other important values were reasonability and constitutionality. As the Pennsylvania Supreme Court explained in the 1849 case *Greenough v. Greenough*, it would be an "exercise of arbitrary and unconstitutional power" for a legislature to retroactively "enact that white meant black, or that black meant white."[417] This belief that a court could reject legislative directions was based on an underlying assumption that "law" *wasn't always what a legislature enacted.* It explains why the Pennsylvania Supreme Court in 1861 cautioned against judges deciding cases "not according to law, but according to the direction of the legislature,"[418] as if the "law" and "the direction of the legislature" were two distinct phenomena.

Many double-agent judges who relied on this justification were doing statutory interpretation as if they were judging *natural law*. The meaning of a statute, according to these judges, didn't depend on what legislatures said they meant but instead on more abstract background principles. The black-is-white argument was Exhibit A. As the reasoning went, how could a legislature possibly and authoritatively declare that something so ridiculous and counter-intuitive was The Law? Similarly, in deciding that legislative statutory interpretation couldn't be binding on courts, judges were making quasi-natural-law arguments about the importance of notions of justice over the "formal source" of law.[419] In balancing a double fidelity to natural law principles and legislative directions, judges at times subordinated legislative statutory interpretation to what they perceived to be "law" as it existed in the ether. Unsurprisingly, when the Louisiana Supreme Court in 1861 did say a good word about expository legislation despite criticizing the concept, the Court did so only insofar as the statute at issue had "moral weight."[420]

But so much for the nobility of judges. They were also doing something more blatant at times, not even pretending to tiptoe on the tripwire between judicial and legislative power. They were making broad pronouncements that pushed legislatures out of the murky-edged territory of statutory interpretation that they were still

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416 Denny v. Mattoon, 84 Mass. 361, 379 (1861).

417 Greenough v. Greenough, 11 Pa. 489, 495 (1849).

418 Reiser v. William Tell Sav. Fund Ass'n, 39 Pa. 137, 145 (1861).

419 *See* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691, 724 (1987); *see also* Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 Calif. L. Rev. 919, 951–53 (1989) (reviewing William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy (1988)).

420 State v. Benoit, 16 La. Ann. 273, 274 (1861).

attempting to define as "judicial power." One only needs to recall the Pennsylvania Supreme Court's lament, that the "judiciary has thought itself too weak to withstand; too weak, because it has neither the patronage nor the prestige necessary," to see what was really at stake in the fight over expository legislation.[421] Pressured by the threat of legislative control, judges couldn't kowtow to lawmakers as "faithful agents" without surrendering what they thought, mistakenly or not, was theirs alone.

Conclusion

Expository legislation was the crucial site of conflict for these competing ideas about separation of powers. The early history of expository legislation—dating back to colonial America, proceeding through the founding of the United States, and picking up steam in the nineteenth century at both the federal and state levels—upends the idea that there is a clear constitutional and historical foundation for strict separation of powers when it comes to statutory interpretation. Judges, lawmakers, and administrators all expected legislatures to interpret statutes through expository legislation. They sometimes even collaborated to enact expository statutes. Lawmakers relied on expository statutes to supervise administrative statutory interpretation, and administrators themselves asked for these statutes. Although not all judges believed that legislatures were the "ultimate arbiters" of statutory interpretation, and although judges increasingly asserted that statutory interpretation was a judicial power, the picture was far more complicated than a simple story of strict separation of powers. The division of power among legislatures, courts, and executives to interpret statutes has *fluctuated* according to historical circumstances.

Expository legislation's early history gives us a new vocabulary and theoretical direction for separation of powers in statutory interpretation. It shows how statutory interpretation in reality operates in three dimensions: task, branch, and context. It demonstrates how the boundary between "making" and "interpreting" legislation has actually been far blurrier than scholars have recognized, which destabilizes traditional ways of distinguishing between "legislative" and "judicial" power. It reveals new ways that statutes can contain an inherent interpretive openness, which calls into question the distinction between "pre-enactment" and "post-enactment" legislative history and suggests that the concepts of original meaning and intent in statutory interpretation

421 Greenough, 11 Pa. at 495.

have historically and paradoxically been intertwined with interpretive dynamism. Most of all, it offers an alternative, non-juricentric vision of the constitutional role of legislatures in statutory interpretation. After all, not every statutory interpretation question could or did make it to court. And because of that, legislatures negotiated statutory interpretation *beyond* and *in the shadows* of courts as they managed the growth of an administrative state.

Appendix A. Methods of Identifying and Compiling Expository Legislation

A. Identifying Expository Legislation

For purposes of this Article's dataset, "expository legislation" generally includes enactments that use specific textual signals that reflect legislatures' self-conscious attempts to interpret or construe prior enactments, even if the language used was future oriented. This is because the fact that legislatures used the *form* of exposition was significant in and of itself, as I argue throughout this Article.

Generally, there were three main forms of expository legislation throughout American history—and three corresponding ways to tell whether a law was expository.

1. "Explicit-in-the-Title" Expository Legislation

"Explicit-in-the-Title" expository enactments contain in their titles clear signals that the legislatures intended for the enactments to be expository. There were only a handful of root words that legislatures relied on to signal such intentions:

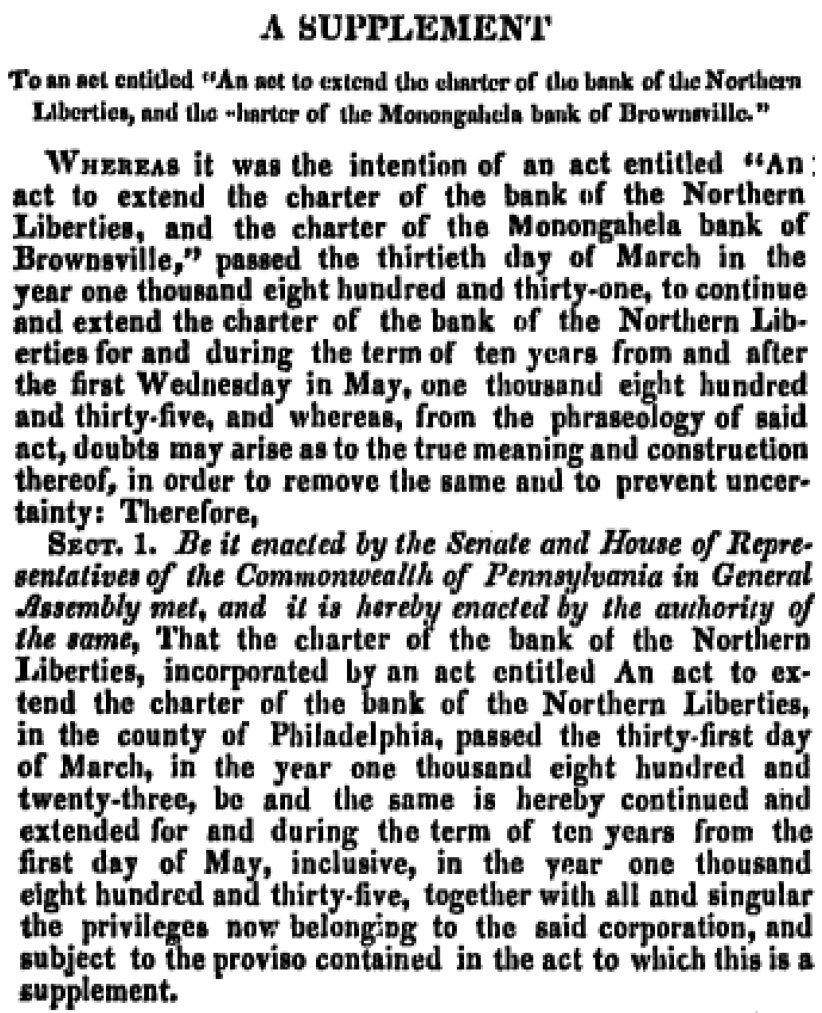
- Explain (the predominant form)—e.g., "act explaining," "act to explain," "act explanatory of," "in explanation of"
- Declare—e.g., "act declaring," "act to declare," "act declaratory of"
- Other Signal Words—e.g., "intent," "interpret," "meaning," "construction," "interpretation," "define"

However, signal words changed over time. In the mid-nineteenth century, legislatures began using the verb "construe," giving rise to titles such as "act to construe" and "act fixing the construction." In the early-twentieth century, the bulk of expository legislation transformed into a new form—"clarifying" legislation—which will be covered in a future Article.

2. "Explicit-in-the-Body" Expository Legislation

Occasionally, legislatures didn't use *any* expository words in titles but instead included signals in statutes' bodies. These "explicit-in-the-body" expository enactments otherwise look nearly identical to "explicit-in-the-title" expository enactments. Their titles used other forms, especially variants of the following three: "amend," "supplement," and "in addition," such as in the example below.

FIGURE 1.[422]



A SUPPLEMENT

To an act entitled "An act to extend the charter of the bank of the Northern Liberties, and the charter of the Monongahela bank of Brownsville."

WHEREAS it was the intention of an act entitled "An act to extend the charter of the bank of the Northern Liberties, and the charter of the Monongahela bank of Brownsville," passed the thirtieth day of March in the year one thousand eight hundred and thirty-one, to continue and extend the charter of the bank of the Northern Liberties for and during the term of ten years from and after the first Wednesday in May, one thousand eight hundred and thirty-five, and whereas, from the phraseology of said act, doubts may arise as to the true meaning and construction thereof, in order to remove the same and to prevent uncertainty: Therefore,

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That the charter of the bank of the Northern Liberties, incorporated by an act entitled An act to extend the charter of the bank of the Northern Liberties, in the county of Philadelphia, passed the thirty-first day of March, in the year one thousand eight hundred and twenty-three, be and the same is hereby continued and extended for and during the term of ten years from the first day of May, inclusive, in the year one thousand eight hundred and thirty-five, together with all and singular the privileges now belonging to the said corporation, and subject to the proviso contained in the act to which this is a supplement.

Since only *some* enactments with these titles were intended to be expository, identifying expository legislation among this pile requires looking at the enactments' preambles and operative texts for signal phrases. New York, for instance, enacted laws whose titles only spoke of "amend[ing]" but whose preambles nevertheless included language like, "Whereas doubts have arisen as to the true intent and meaning of the act."[423] Sometimes, legislatures even wrote small *sections* that

422 1832 Pa. Laws 85.

423 *See, e.g.*, Act of Feb. 28, 1806, ch. 29, 1806 N.Y. Laws 346.

were expository of other laws and then hid those sections inside other statutes.[424] For enactments that purport to "amend," "add," or be "supplemental" to previous enactments, I consider them to be expository only if there are other signals indicating an expository nature (such as through the enactment's title, preamble, or operative text).

3. "Shadow" Expository Legislation

Finally, "shadow" expository enactments don't contain any textual expository signals at all. However, they were understood by people at the time of enactment—or by later judges—to be expository. There is no reliable way to identify all of these statutes given how implicit the expository nature of these laws is. One can read through cases to identify statutes that judges considered "expository," but one would need to be an expert in each body of law in each jurisdiction to know which statutes merely interpreted the existing law. In an 1873 letter to the Bureau of Claims, for example, the U.S. Examiner of Claims described the following law as "declaratory" even though nothing in its text suggested that.[425]

FIGURE 2.[426]

CHAP. LX.—*An Act to exempt Canal Boats from the Payment of Fees and Hospital Money.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, **That the owner or owners, master or captain, or other persons employed in navigating canal boats without masts or steam-power, now by law required to be registered, licensed, or enrolled and licensed, shall not be required to pay any marine hospital tax or money; nor shall the persons employed to navigate such boats receive any benefit or advantage from the marine hospital fund; nor shall such owner or owners, master or captain, or other persons, be required to pay fees, or make any compensation for such register, license, or enrolment and license, nor shall any such boat be subject to be libelled in any of the United States courts for the wages of any person or persons who may be employed on board thereof, or in navigating the same.**

SEC. 2. *And be it further enacted,* That all acts, and parts of acts, repugnant to the provisions of this act, be, and the same are hereby, repealed.

APPROVED, July 20, 1846.

424 *See, e.g.*, Act of Apr. 7, 1806, ch. 167, § 3, 1806 N.Y. Laws 615.

425 H.R. MISC. DOC. No. 45-31, at 233 (1878).

426 Act of July 20, 1846, ch. 60, 9 Stat. 38.

These complexities make it impossible to identify every single expository enactment because legislatures ironically didn't always clearly communicate that their enactments were expository. Hence, there are some forms of expository legislation outside the scope of this Article's dataset and quantitative analyses. In the next Section, I detail my process for compiling expository legislation, and I further explain which forms of expository legislation are inside and outside the scope of this Article. I have certainly missed some expository enactments. Nonetheless, this Article presents the most exhaustive survey yet of expository legislation.

B. Searching for Expository Legislation

My process for compiling a dataset of expository legislation involved three main steps. Because very little scholarship exists on expository legislation, the first step involved discovering what expository legislation looked like. To get an initial sense, I read treatises, cases, legislative debates, and the few pieces of scholarship on the subject. I read through a random sample of volumes of colonial and state session laws from the seventeenth through nineteenth centuries, available from the HeinOnline State Session Laws Library. For some states that had indexes listing the titles of each act and resolution passed in each year, I read through those indexes for each year to identify what kinds of titles were used for expository legislation. I read the corresponding enactments. I used this process to identify key terms and phrases that legislatures used to signal their intentions to make legislation expository.

Then I created an initial dataset of expository legislation. For colonial and state expository legislation, I searched on HeinOnline's State Session Laws Library for the terms and phrases that I identified in the first step. Given that this was an initial dataset, I used open-ended search terms such as "decl*" (instead of the more restrictive terms of "declaratory" and "declaring"), "expl*," "constr*," "clarif*," "express*," "doubt*," "interp*," "intent*," and so on to achieve the broadest scope possible—at times sampling the results when there were too many to feasibly look through each one. This carried an additional benefit: although optical character recognition of state session laws on HeinOnline is generally very accurate from the mid-nineteenth century onward, it is unreliable for many searches in the session laws of the seventeenth, eighteenth, and even early-nineteenth centuries. For federal expository legislation, I used a combination of HeinOnline's Session Laws Library, ProQuest Congressional,

GovInfo Statutes at Large, and publicly available tables of federal legislation titles available from the Library of Congress website at https://web.archive.org/web/20210428020331/https://www.loc.gov/law/help/statutes-at-large/.

I then created a framework of definitions of expository legislation—of what I counted and didn't count as "expository"—as explained in Part I and further below. I created a list of search terms that would yield the entries from the initial dataset. Using the same online databases that were used to construct the initial dataset, I then created a second, refined dataset to replace the initial one, using a much more rigorous and standardized process of searching for expository legislation. For each jurisdiction, I searched for the following search terms.

Act w/25 explain	"define section"
act w/25 explaining	"define sections"
act w/25 explanation	"defining the phrase"
act w/25 explanatory	"defining the phrases"
resolution w/25 explain	"defining the word"
resolution w/25 explaining	"defining the words"
resolution w/25 explanation	"defining the term"
resolution w/25 explanatory	"defining the terms"
resolve w/25 explain	"defining the meaning"
resolve w/25 explaining	"defining section"
resolve w/25 explanation	"defining sections"
resolve w/25 explanatory	Act w/25 construe
Declaratory	Act w/25 construing
Declarative	Resolution w/25 construe
"Declaring what"	Resolution w/25 construing
"Declaring the law"	Act w/25 interpret
"Declaring the effect"	Act w/25 interpretation
"Declaring the force"	Act w/25 interpreting
"Declaring the legality"	Resolve w/25 interpret
Declaring w/10 term	Resolve w/25 interpreting
Declaring w/10 terms	Resolve w/25 interpretation
Declaring w/10 intent	Resolved w/25 interpret
Declaring w/10 intention	Resolved w/25 interpreting
Declaring w/10 construction	Resolved w/25 interpretation
Declaring w/10 word	Resolution w/25 interpretation
Declaring w/10 words	Resolution w/25 interpret
Declaring w/10 reading	Resolution w/25 interpreting
Declaring w/10 meaning	"express the sense"
Declare w/5 law	"expressing the sense"
Declare w/10 meaning	"it is the sense"
Declare w/10 intent	"it was the sense"
Declare w/10 intention	Resolution w/25 intent
Declare w/10 reading	Resolved w/25 intent
Declare w/10 construction	"True intent"
Declare w/10 word	"intent and meaning"
Declare w/10 words	"True meaning"
Declare w/10 term	"meaning and intent"
Declare w/10 terms	"True purpose"
"Declare the force"	"True intention"
"Declare the effect"	"True construction"
"Declare what"	"Make Certain the"
"Declare the legality"	"Making certain the"
"define the phrase"	
"define the phrases"	
"define the word"	
"define the words"	
"define the term"	
"define the terms"	
"define the meaning"	

For *state* expository legislation, I also used the following search terms:

doubts w/10 construction NOT "true construction"
doubt w/10 construction NOT "true construction"
doubts w/10 meaning NOT "true intent" NOT "true meaning" NOT "intent and meaning" NOT "meaning and intent" NOT "intent"
doubt w/10 meaning NOT "true intent" NOT "true meaning" NOT "intent and meaning" NOT "meaning and intent" NOT "intent"
doubts w/10 intent NOT "true intent" NOT "true meaning" NOT "intent and meaning" NOT "meaning and intent" NOT "intent"
doubt w/10 intent NOT "true intent" NOT "true meaning" NOT "intent and meaning" NOT "meaning and intent" NOT "intent"

I then cross-checked each entry in the second dataset with each entry in the first one to ensure that no expository enactments were left out without good reason.

I have inevitably missed some expository legislation. In particular, some expository statutes used constructions such as "act to define [word]," but because there is no way to know in advance all the words and terms a legislature has "defined" for purposes of constructing a search term, there is bound to be some undercounting. I have remedied this for federal expository legislation by going through the titles of each federal act and resolution. The task of doing this for each of the fifty states is herculean and unlikely to yield significant new data, so I deem it outside the scope of this Article and leave it to others to fill in the small gaps.

C. Deciding What to Include and Exclude

The process of creating a dataset of expository legislation necessarily requires making judgment calls about what to include and exclude, so I developed a set of principles that prioritize consistency and replicability.

Since my focus is on statutory interpretation, I excluded from the *quantitative* analysis expository statutes that didn't seek to interpret, construe, or express the legislative intent of previous legislative *enactments* (and instead declared the common law, sought to interpret a constitution instead of a statute, etc.). I generally excluded statutes that were expository of general powers, rights, and duties, unless they also involved statutory interpretation or construction. In the late-twentieth century, a number of statutory amendments claimed to be declaratory but did not specify what statutes they were declaratory of. I erred on the side of including these as "expository."

If an act or resolution had a variant of an expository form (such as "an act explanatory") in its *title*, I generally included it in the dataset.

Within this set, I excluded legislation that used a variant of the "define" form in their titles but that merely added new definition sections without any other signals that the statutes were expository (since these statutes were identical to "regular" amendments as opposed to "clarifying" amendments). For similar reasons, I excluded statutes that purported in their titles to "correct" prior enactments. The title isn't always the best signal, to be sure. However, because my purpose in this Article is to measure legislatures' *self-conception* of their power to interpret statutes—even if that means when they abused the forms of expository legislation—I included statutes as long as they had expository titles and didn't violate other principles described here.

"Explicit-in-the-body" statutes are even more challenging to identify. I included any act or resolution that included language signaling that the enactment was intended to clear up doubts about statutory meaning or was intended to declare the "true meaning" (or had other language to that effect). Most often, this language appeared in preambles. I did not include pieces of legislation whose expository portions were solely about those same pieces of legislation.

I generally included statutes that were simultaneously expository and amendatory given the blurry line between the two (such as statutes titled "an act to amend and explain"). For statutes with sections that made textual amendments, I included those statutes that also said that the amendments were "declaratory," "declarative," "expository," "confirming," or "explanatory" (or had words to that effect) or that didn't change those previous statutes in a substantive way.

I generally excluded "shadow" expository legislation from the quantitative analyses given the difficulties of creating a rigorous and systematic process for identifying all of it.

I included some but not all statutes that purported to "override" or "confirm" judicial decisions. First, overrides and underwrites overlapped with expository legislation but were not always expository in nature. As Matthew Christiansen and Bill Eskridge have identified, many overrides are "policy-updating" ones rather than "correction[s]."[427] Second, because of the spottier nature of state legislative history,[428] and because identifying overrides can depend on having this legislative history, it is impossible to identify every override at the state level.

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427 Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex. L. Rev. 1317, 1320 (2014).

428 For a good assessment of this problem, see Nicholas Parrillo, *Researching State Legislative Records: The Biggest Obstacle in American Legal History*, Legal Hist. Blog (Nov. 13, 2013), https://legalhistoryblog.blogspot.com/2013/11/researching-state-legislative-records.html [https://perma.cc/YX5J-LQF8].

In the twentieth century, a couple of states—namely Indiana and Maine—began passing annual "corrective" statutes to revise prior code provisions. I excluded these statutes from the dataset. I also excluded legislative enactments that mentioned prior intention in the context of disapproving an administrative action as contrary to that intention—legislatures generally did not interpret prior legislation through these enactments.

Finally, "clarification" legislation properly counts as "expository legislation," but a full empirical account of "clarification" legislation is beyond the scope of this Article. A second, companion Article will discuss the rise and transformation of clarification legislation and will present data on its rise at the federal level.[429] This limitation is important to take into account when interpreting this Article's quantitative analyses at the state level after 1915 and at the federal level after 1930. When clarification legislation is accounted for, the total volume of expository legislation was significantly higher in the mid- and late-twentieth century than described in this Article. My exclusion of "clarification" legislation, however, has no effect on any quantitative analyses involving any years prior to 1915 at the state level and prior to 1930 at the federal level.

D. Coding Expository Legislation

For purposes of analyzing the primary subject areas that state expository legislation involved, I limited the number of categories to thirty. Many pieces of expository legislation involved more than one subject area, and so the task of identifying the "primary" area necessarily involved making judgment calls. Below, I elaborate on some of the categories:

Commercial	includes subjects now governed by the Uniform Commercial Code as well as laws regulating businesses and trade practices (such as by requiring licenses)
Compensation	includes laws involving certain fees, bounties, and bonds as well as all laws involving salaries
Courts, Jurisdiction, Procedure	includes laws establishing courts and relating to court practices and administration, jurisdiction, procedure, evidentiary rules, and court fees
Criminal and Jails	includes criminal law, laws about prisons and persons imprisoned, and policing
Land and Property	a broad category that also includes wills, trusts, estates, and probate issues
Legislatures	includes laws dealing with legislatures' rules, practices, and administration
Revenue	includes laws involving taxes, duties, and tariffs

429 *See* Zhang, *supra* note 25.

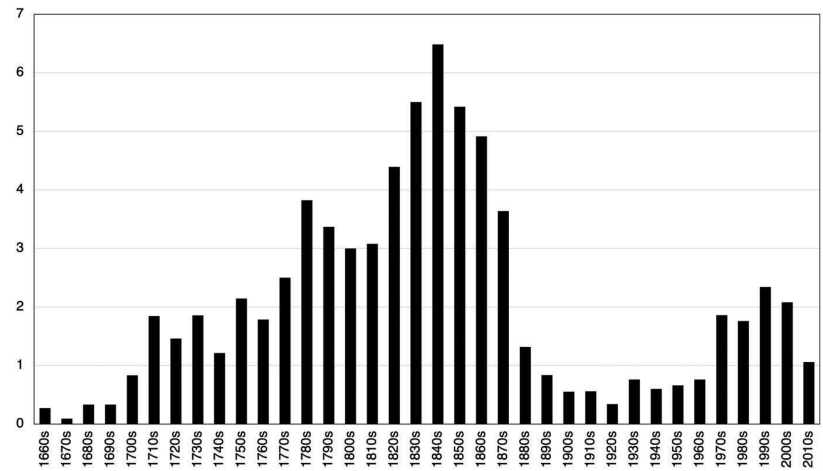
Appendix B. Historical Patterns in the Volume, Geographic Diffusion, Subject Areas, and Immediacy of Expository Legislation

When we view expository legislation in the aggregate, it becomes easy to see clear historical patterns. This Appendix documents those patterns.

A. Volume

As illustrated in the Article's Figures 1 and 2 above, the total volume of expository legislation at the state level exhibited a rise-and-fall pattern, peaking between the 1840s and 1860s. This was followed by a renewal of expository legislation in the mid- and late-twentieth century. Although my purpose in this Article is merely to document the growth of expository legislation in absolute terms, I recognize that some readers may be curious about causation. One might wonder whether the rise of expository legislation can simply be explained by the fact that more states and territories became part of the United States as time went on. But when the data is normalized by dividing the amount of expository legislation each decade by the number of colonies, territories, and states at the end of each decade, the pattern holds, as shown in Figure 1 below.[430]

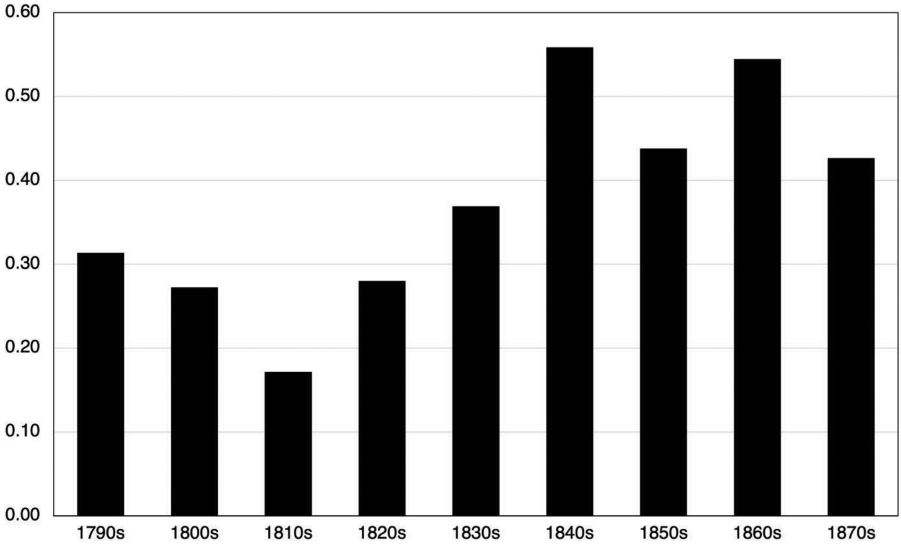
Figure 1. Average State/Colonial/Territorial Expository Enactments per Jurisdiction per Decade (Excluding "Clarifying" Legislation)



430 "Territories" as used in this Appendix includes only territories that became part of the continental United States plus Alaska and Hawai'i and so excludes territories such as Puerto Rico.

One might also wonder whether the growth of expository legislation can be explained by a general increase in all legislation. There is likely something to this theory, but its explanatory power may not be decisive. Figure 2 below shows how, at least in Pennsylvania (the state that passed the most expository legislation from the 1790s through 1870s), the trend in the number of expository enactments per 100 enactments is largely consistent with the trend in the absolute number of expository enactments across all states and territories as shown in the Article's Figure 12, save for a decrease from the 1790s to 1810s.[431]

FIGURE 2. NUMBER OF EXPOSITORY ENACTMENTS PER 100 ENACTMENTS IN PENNSYLVANIA PER DECADE

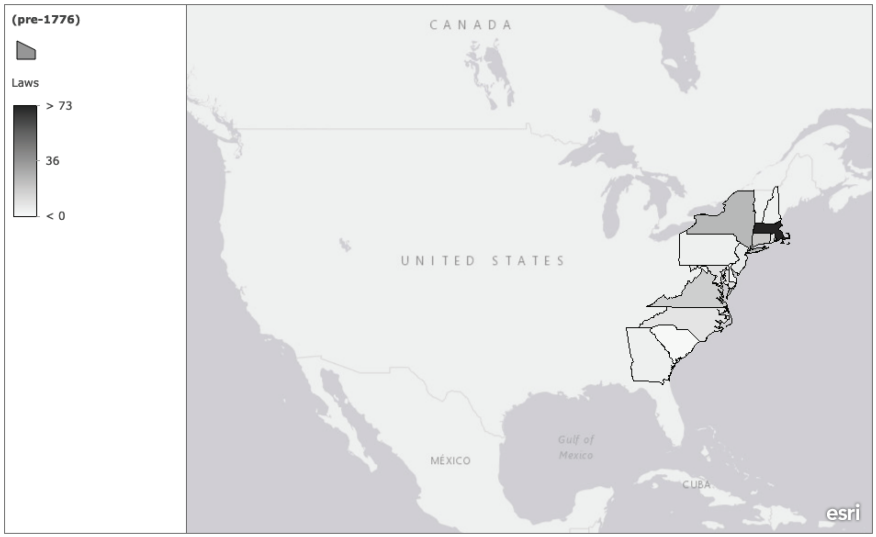


[431] To identify the number of total enactments in Pennsylvania per decade, I hand-counted the number of enactments in each volume of Pennsylvania's session laws using the HeinOnline Session Laws Library. I include laws that were originally "omitted" but that were then published in subsequent volumes. For bills that the Governor did not act upon but that became law anyway, I count those in the years in which the bills were presented to the Governor. For laws that were approved in years different from the nominal years of the respective sessions, I count those in the years in which the laws were approved (e.g., a law passed in January of 1870 during the 1869 session is an "1870 law"). One cautionary note: The number of enactments (including expository ones) in Pennsylvania dramatically decreased starting in 1874 following the ratification of Pennsylvania's 1874 Constitution. The potential influence of constitutional changes on expository legislation will be discussed in a second, future Article. *See* Zhang, *supra* note 25.

B. Geographic Diffusion

Expository legislation became geographically diffused over time. Before 1776, as seen in the figure below, expository legislation was concentrated in Massachusetts, followed by New York, Connecticut, and Virginia.

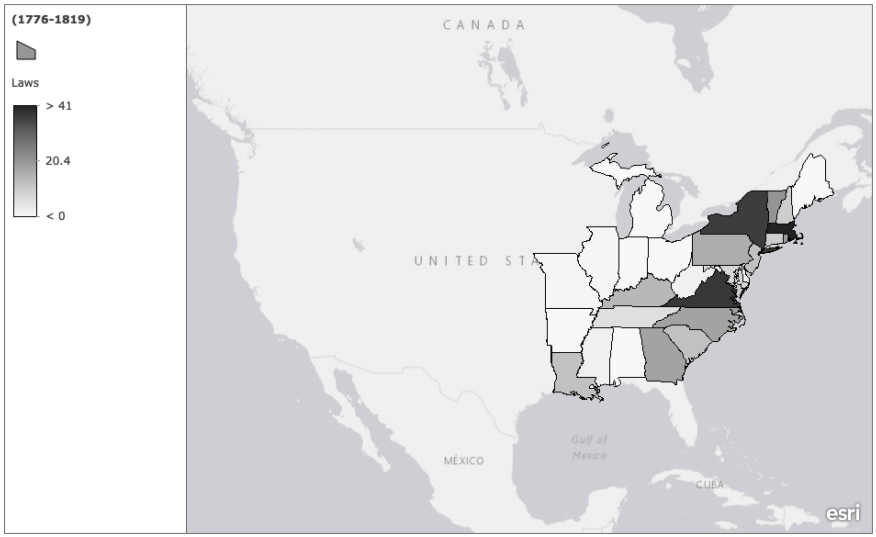
FIGURE 3. NUMBER OF EXPOSITORY ENACTMENTS (PRE-1776)[432]



432 The maps in this Section are not to scale when it comes to the boundaries of states and territories. I use present-day borders in these maps for consistency's sake so that it is easier to compare the distributions across these maps. These chloropleth maps were generated using ArcGIS.

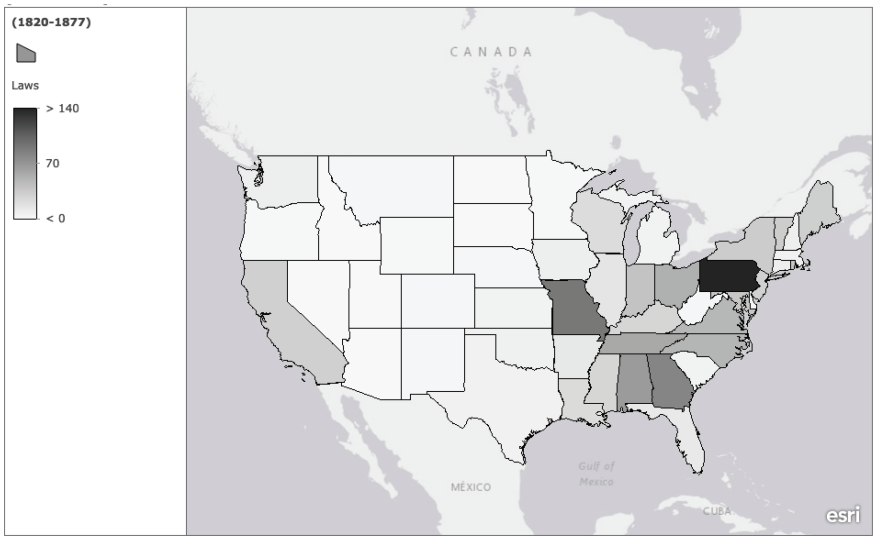
In a second period, from 1776 to 1819, as seen in the figure below, expository legislation expanded outward while remaining concentrated in Massachusetts, New York, and Virginia.

FIGURE 4. NUMBER OF EXPOSITORY ENACTMENTS (1776–1819)



In a third period—what I argue was expository legislation's golden age, from 1820 through 1877—there was a major geographic shift, as seen in the figure below. Pennsylvania's legislature became the most prolific interpreter of its own statutes, passing 140 pieces of expository legislation. Expository legislation was no longer so concentrated in the Northeast and instead shifted toward the South. Missouri (91) and Georgia (82) emerged as powerhouses, followed by Alabama (67) and Tennessee (58).

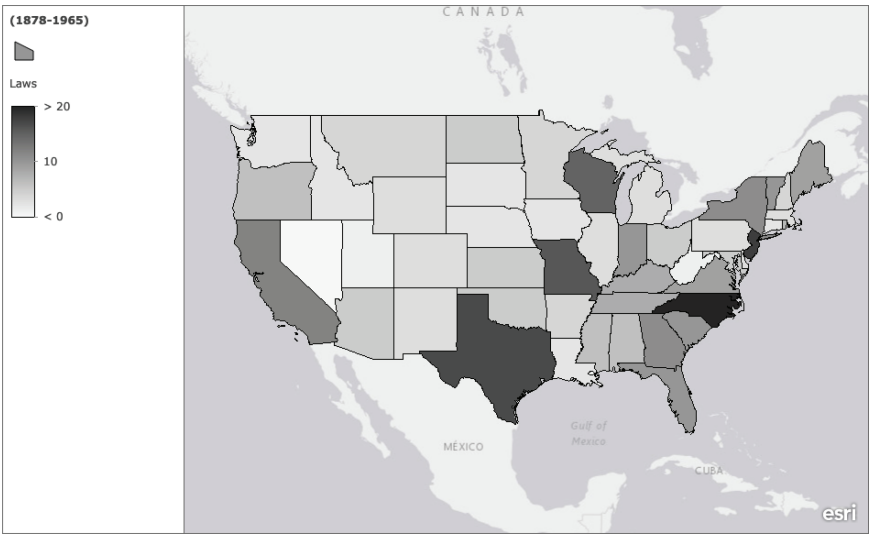
FIGURE 5. NUMBER OF EXPOSITORY ENACTMENTS (1820–1877)



As the Article explains, Pennsylvania's prolific record correlated with the state developing the nation's most advanced case law on expository legislation, leading the state to have an outsized influence nationwide in shaping judicial opinions on expository legislation.

A fourth period, from 1878 through 1965, as seen in the figure below, saw not only a major decline in expository legislation but also a less even geographic distribution of it.

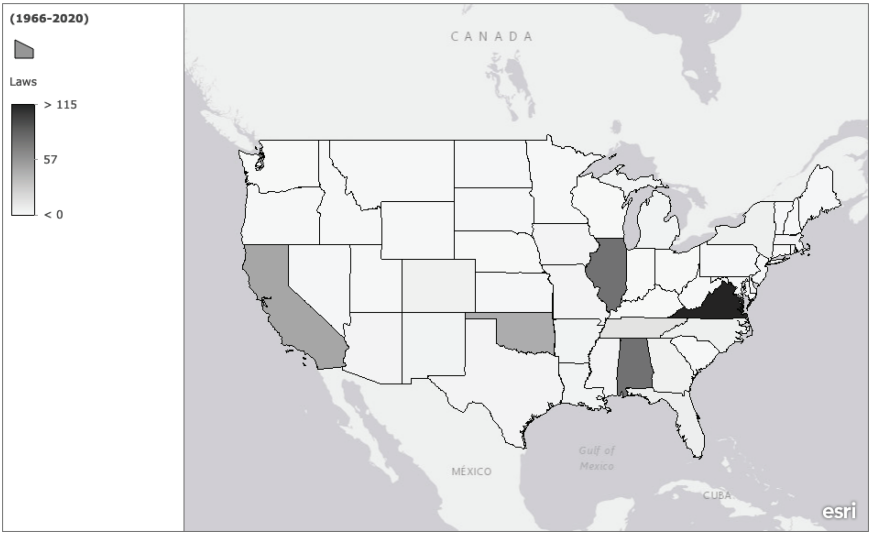
FIGURE 6. NUMBER OF EXPOSITORY ENACTMENTS (1878–1965) (EXCLUDING "CLARIFYING" LEGISLATION)[433]



[433] Hawai'i, not depicted in this figure, had five expository enactments in this period. Alaska, not depicted in this figure, had one expository enactment in this period.

Finally, in a fifth period, from 1966 to 2020, as seen in the figure below, non-clarifying expository legislation became almost entirely concentrated in a handful of states: Virginia, Illinois, Alabama, California, and Oklahoma.

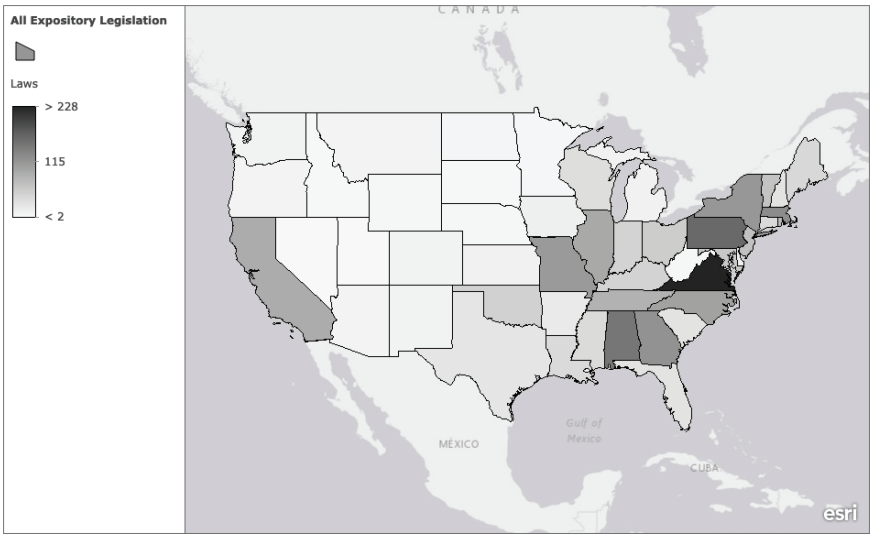
FIGURE 7. NUMBER OF EXPOSITORY ENACTMENTS (1966–2020) (EXCLUDING "CLARIFYING" LEGISLATION)[434]



434 Hawai'i, not depicted in this figure, had four expository enactments during this period. Alaska, not depicted in this figure, had one expository enactment during this period.

In sum, the locus of traditional forms of expository legislation shifted westward and southward before becoming contained within a few jurisdictions. But because so much expository legislation was enacted in the eighteenth and nineteenth centuries, the overall geographic distribution of expository legislation across time was East-centric.

FIGURE 8. NUMBER OF EXPOSITORY ENACTMENTS (UNTIL 2020) (EXCLUDING "CLARIFYING" LEGISLATION)[435]



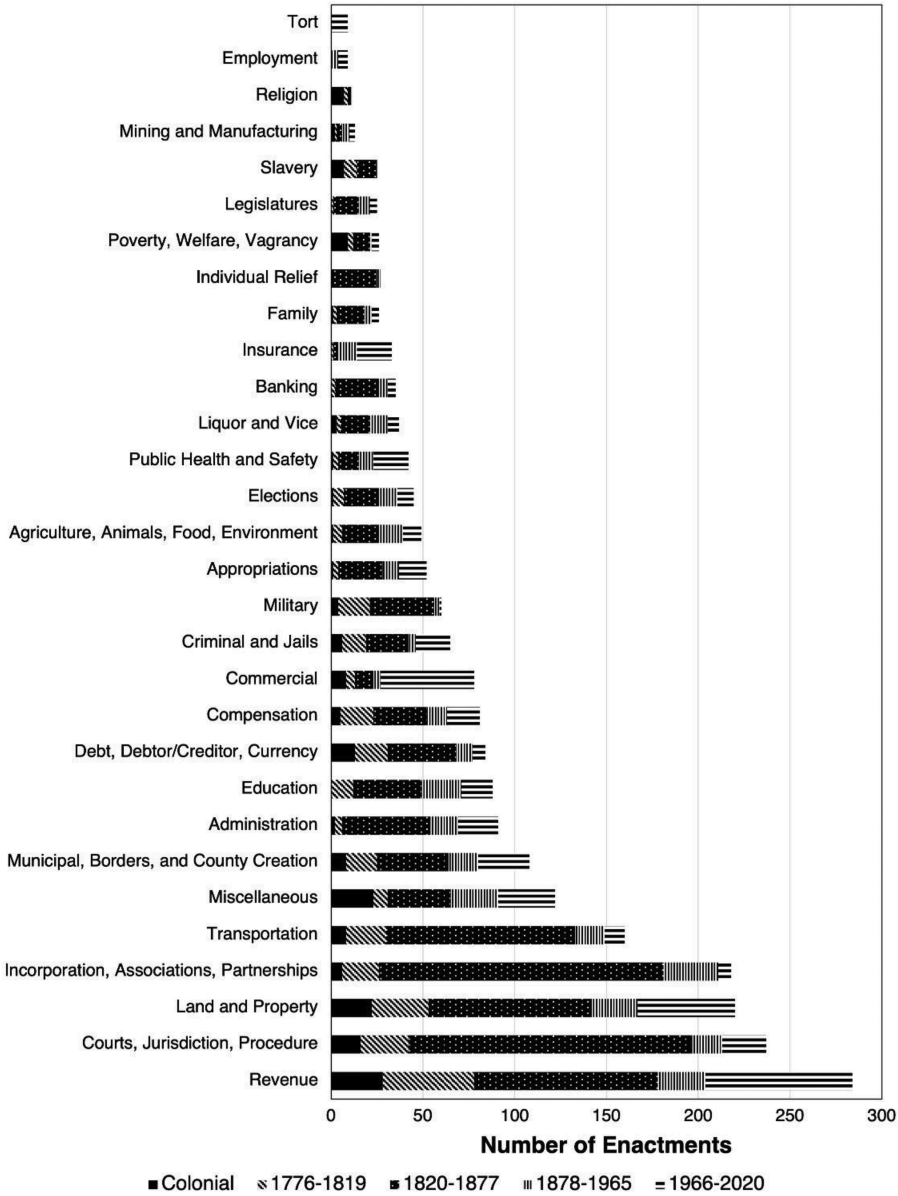
C. *Subject Areas*

The subjects of state and colonial expository legislation changed over time as well. The largest area in which legislatures enacted expository legislation was revenue, followed by court issues, land and property, incorporation, then transportation. Some issues were particularly salient in certain periods. For instance, in the nineteenth century, states frequently enacted expository legislation to interpret individual charters for corporations and towns, and they passed many pieces of expository legislation relating to railroads. The major areas of expository legislation and their changes over time are summarized in the figure below.[436]

[435] Hawai'i, not depicted in this figure, had nine expository enactments. Alaska, not depicted in this figure, had two expository enactments.

[436] I provide a chart only for state, colonial, and territorial expository legislation here because the aggregate volume at the federal level was not great enough to discern patterns.

FIGURE 9. TOPICS OF STATE/COLONIAL/TERRITORIAL EXPOSITORY LEGISLATION (EXCLUDING "CLARIFYING" LEGISLATION)

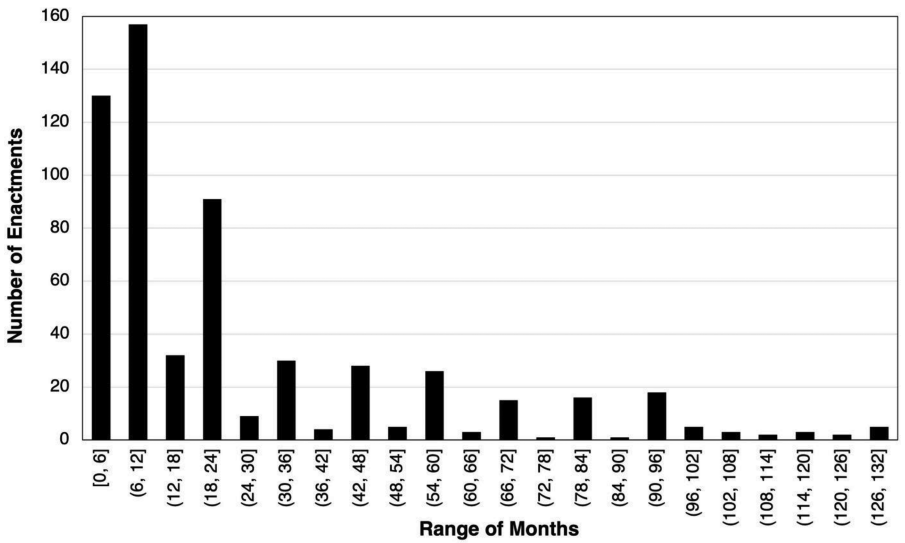


D. Immediacy

As the subject area, volume, and geographic diffusion of expository legislation changed, the process of making expository legislation changed with it. The major problem of expository legislation was its timing. How could a lawmaker in 1920 know what a lawmaker in 1810 intended a statute to mean? Intuitively, expository legislation seems to be more valid and accurate when it's passed closer to the enactment of the original laws—especially if it's passed by the same lawmakers or at the same legislative sessions as the original laws.

For the most part, legislatures were good about passing expository legislation not too long after the original enactments. Among the 660 pieces of expository legislation enacted before 1900 in the datasets that readily provided the dates of the original enactments,[437] the median amount of elapsed time was 669 days, or around 95 weeks or around 22 months—fewer than two years. In many cases, that would not be enough time for new lawmakers to be elected. The histogram (excluding outliers)[438] below demonstrates how the distribution of elapsed time at the state level skewed toward more immediate rather than less immediate enactments of expository statutes.

FIGURE 10. MONTHS BETWEEN EXPOSITORY AND ORIGINAL ENACTMENTS



437 I exclude from this smaller dataset expository legislation that expounded multiple prior enactments.

438 I determined outliers to be those values that were above the value at 1.5 times the interquartile range added to the value at the 75th percentile.

This picture needs to be historicized. Legislatures became somewhat quicker at passing expository legislation. Dividing the 660 statutes into four roughly equal chunks, the median numbers of full months elapsed in the first period (the years 1699 through 1837) and the second period (1838 through 1852) were 23.5 and 23 months respectively. But in the third period (1853 through 1865) and fourth period (1866 through 1897), the median decreased to 12 and 13 months respectively.