The Amended Statute

Jesse M. Cross†

We live in a republic of amended statutes. In each Congress, our laws are amended tens of thousands of times. Individual statutes make amendments that number in the thousands. As a result, the amended statute has become the central democratic text of our age—a remarkable development for a type of document unknown at the Founding. Yet the amended statute has been relegated to an afterthought in legal theory. This is incredible neglect for an essential source of modern law—one that anchors innumerable rights in U.S. society.

This Article demonstrates that, instead, the amended statute belongs at the center of public law. To that end, it undertakes three projects with respect to the amended statute: documenting, theorizing, and interpreting.

It begins with documenting. Through a study consisting of over seven hundred searches of the Statutes at Large, it identifies—for the first time—the nearly half-million amendments made to federal statutes since the Founding. In so doing, it tells the story of statutory amendments in U.S. law. It is a story of remarkable transformation: from a statutory corpus with no amendments through the 1830s to one that now undergoes over eight thousand amendments each year. Contemporary statutes, it reveals, typically are amended statutes.

Next, the Article theorizes amended statutory law. Despite its neglect in current legal theory, the amended statute was transformative. It created a new idea of the "statute" in the United States—introducing a new document, and one with different traits than the traditional statute. The Article theorizes the key changes this introduced into: (1) legislation, (2) the legislative process, (3) the institution of the legislature, and (4) statutory interpretation. These changes include enabling the rise of textualism, making methodological originalism impossible in interpretation, and divorcing the drafter from the legislator. The Article chronicles these many theoretical insights.

Finally, the Article asks how to interpret amended statutory law. Revisiting two recent classics of statutory interpretation, Niz-Chavez v. Garland *and* Van Buren v. United States*, it uncovers the unknown amendatory stories behind these landmark cases. In so doing, it shows the contemporary Supreme Court's troubling inability to locate democratic decisions beneath the amended statute. And it models a competing method of interpretation—one more appropriate for a republic of amended statutes.*

† Professor of Law, Joseph F. Rice School of Law, University of South Carolina. The author wishes to thank Aaron Galbraith for his outstanding data analysis contributions. The author also wishes to thank William Eskridge, Abbe Gluck, Anita Krishnakumar, Nicholas Parrillo, Josh Chafetz, Alexander Zhang, and all the participants in the Legislation Roundtable at the Georgetown University Law Center, the Legislation Colloquium at the Georgetown University Law Center, and the works in progress workshop at the Joseph F. Rice School of Law.

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INTRODUCTION

We live in a republic of amended statutes.[1]

In each Congress, our laws are amended tens of thousands of times.[2] Individual statutes make amendments that number in the thousands.[3] When legal rights come before a contemporary court, therefore, they likely rest upon an amended statute. In the Supreme Court's 2022 Term, cases involving amended statutes comprised 95% of the Court's statutory cases[4]—and over 70% of its total docket.[5] The amended statute has become the locus of legislation and judicial interpretation, in other words. It is the central democratic text of our age.

This was not always true. As legal historian Alexander Zhang has noted, the Founding generation did not amend its statutes.[6] For the Founders, a statute was simply a congressional enactment. However, amendments imagined into existence a new text—one built from the raw materials of congressional enactments, and one with different traits than the traditional statute. In so doing, the amended statute fundamentally reshaped how democratic decisions are encoded in law. In a democracy, it is difficult to imagine a more important development.

Yet scholars have not reckoned with the challenges it poses. Instead, the amended statute has been relegated to an afterthought in legal theory. In casebooks[7] and academic articles,[8] it

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[1] This is an amendment to Professors William Eskridge and John Ferejohn's well-known declaration that: "America is now, and long has been, a *republic of statutes*." WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 14 (2010) (emphasis in original).

[2] *See infra* text accompanying note 89.

[3] *See, e.g.*, *infra* note 97 and accompanying text (noting that the Affordable Care Act made over 1,400 insertions).

[4] *See infra* Appendix B (documenting the amended statutes at issue in each case of the 2022 Term). This excludes cases decided based solely on standing (though one involved an amended statute and the other arguably did).

[5] *See infra* Appendix B. The Court decided fifty-seven cases in Term year 2022. *See Opinions of the Court - 2022*, SUP. CT. OF THE U.S., https://perma.cc/ZQJ7-VGDV (listing fifty-eight opinions, including one dismissing a writ of certiorari as improvidently granted); *In Re* Grand Jury, 143 S. Ct. 543, 543 (2023) (dismissing writ of certiorari as improvidently granted). Three of these were excluded from this percentage calculation because they were statutory cases (all of which arguably involved amendments) but were resolved on other grounds (e.g., standing). *See* Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2351 (2023) (lack of standing); United States v. Texas, 143 S. Ct. 1964, 1971 (2023) (same); Gonzalez v. Google LLC, 143 S. Ct. 1191, 1192 (2023) (per curiam) (failure to state a claim).

[6] Alexander Zhang, *Externalist Statutory Interpretation*, 134 YALE L.J. 447, 456–57, 508–21 (2024) [hereinafter Zhang, *Externalist*].

[7] *See infra* notes 30–33.

[8] *See infra* notes 34–35.

hardly even receives mention. When it does, it is presented merely as a document with additional context or background—not as a unique textual source.[9] Meanwhile, the Supreme Court invents fictions to avoid acknowledging (much less understanding) the amended quality of laws.[10] This is incredible neglect for an essential source of modern law—one that anchors innumerable rights in U.S. society, and one that poses unique theoretical and interpretive questions.

This neglect of the amended statute contrasts starkly with constitutional law. There, scholars have long recognized that the Constitution—with its very different amendatory model—creates urgent questions for interpreters.[11] In response, scholars have developed a sophisticated literature on ways to reconcile our multiple constitutional enactments into a governing law.[12] It is high time for legislation scholars to join that conversation, and to envision interpretive methods that are appropriate to our amendatory statutes.

This Article undertakes that project. It posits that the amended statute, a conceptually unique and vitally important legal source, belongs at the center of public law. To illustrate why, the Article undertakes three projects with respect to amended statutory law: *documenting*, *theorizing*, and *interpreting*.

To begin, the Article documents the amendatory dimension of modern statutory law. Through a study consisting of over seven hundred searches of the Statutes at Large, it identifies—for the first time—the nearly *half-million* amendments made to federal statutes since the Founding. In so doing, it chronicles the changing volume of statutory amendments across centuries of lawmaking. That changing volume tells a story of remarkable transformation: from a statutory corpus with no amendments through the 1830s, to one that now undergoes over eight thousand amendments each year.[13] Contemporary statutes, this study reveals, typically are amended statutes.

Next, the Article theorizes amended statutory law. To that end, it examines four aspects of law that were remade by the

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[9] *See infra* notes 36–42 (reviewing sources that present amendments as merely raising issues of statutory context).

[10] *See infra* Part IV; *see also* Jesse M. Cross, *Where Is Statutory Law?*, 108 CORNELL L. REV. 1041, 1112–16 (2023) [hereinafter Cross, *Statutory Law*].

[11] On the differences between statutory and constitutional amendatory models, see *infra* note 198 and accompanying text.

[12] For discussion of this constitutional law scholarship, see *infra* note 198 and accompanying text.

[13] *See infra* text accompanying note 89.

amended statute: (1) legislation, (2) the legislative process, (3) the institution of the legislature, and (4) statutory interpretation.[14] The Article theorizes the crucial changes the amended statute introduced in each of these areas.

This examination begins with how the amended statute has transformed *legislation*. The introduction of amendments created a new idea of the "statute" in the United States, it explains. Previously, a statute was simply a congressional enactment: emerging directly from Congress, it issued policy instructions to regulated actors.[15] Amendments remade this documentary landscape, however. They introduced a new type of enactment, the *amending* statute, which issued semantic alterations instead of policy instructions.[16] This in turn required the creation of a secondary document, the *amended* statute, which would bring those alterations into existence.

The secondary document created by this amendatory revolution—the amended statute—is typically not treated as a unique legal source. Yet it is a document unlike the traditional statute. This is a lesson that Professor Abbe Gluck and I began to outline in a previous work (Cross–Gluck study), as we explained how the amended statute is a uniquely "deconstruct[ed]" document.[17] Building upon that work, this Article chronicles the six domains in which the amended statute is different from a traditional statute, as follows:[18]

Traditional Statute	**Amended Statute**
Monotemporal	Multitemporal
Temporally transparent	Temporally nontransparent
Policy explicit	Policy dual submerged
Divided text	Unified text
Chronologically arranged	Topically arranged
Authoritative	Arguably nonauthoritative

[14] *See infra* Part III.

[15] *See infra* Part II.A.

[16] *See infra* notes 120–24 and accompanying text.

[17] Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1653 (2020).

[18] *See infra* Part III.A.

The Article catalogues these distinctive features of the amended statute, and it outlines the ramifications for a host of audiences—including the public, legislators, and courts.

Next, the Article theorizes how the amended statute has transformed the *legislative process*. As it explains, the amended statute added two new steps to this process: conversion and incorporation.[19] In the process of conversion, policy decisions are converted into semantic alterations. Via incorporation, those semantic alterations are inserted into a vast semantic corpus. Because conversion and incorporation are not skills that elected representatives typically possess, however, the amended statute produced a particular need for drafting expertise in the legislature. The amended statute thereby also reshaped the *institution of the legislature*, as it: (1) divorced the legislator from the drafter, and (2) fueled the growth of the congressional bureaucracy in the twentieth century.[20] In this way, the amended statute adds to the growing literature on the modern institution of Congress,[21] and on dynamics that the Cross–Gluck study referred to as the internal and external separation of powers for the legislature.[22] Through this analysis, it reveals the surprising extent to which the structure of our governmental institutions can depend upon the linguistic form of our statutes.

The Article also theorizes how the amended statute changed *statutory interpretation*. As it explains, the amended statute rendered methodological originalism impossible in statutory interpretation, as the amended statute never existed for the Founding generation. It also enabled the rise of textualism—rearranging the presentation of democratic decisions to courts, and thereby creating fertile ground for a school that would seize upon its modified presentation of the law. The result is a picture of statutory interpretation quite different from that often assumed in our originalist era, which promises a world of unchanged (and unchanging) interpretive practices.[23] Instead, the Article discovers, our interpretive practices have unavoidably evolved in dialogue with the changing texts they construe.

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19 *See infra* Part III.A.3.

20 On the concept of the "congressional bureaucracy," see generally, for example, Cross & Gluck, *supra* note 17.

21 For a review of this literature, see Jesse M. Cross, *Federal Bureaucratic Studies*, 80 WASH. & LEE L. REV. 229, 240–42 (2023).

22 *See* Cross & Gluck, *supra* note 17, at 1608–12.

23 *See infra* Part III.C.

Finally, the Article turns to the topic of interpretation. It asks: How should courts interpret amended statutes? Today, this question has acquired a new urgency. In the last half decade, the Supreme Court has eroded traditional doctrines on the interpretation of amended statutes. Increasingly, the Court overlooks the amendatory dimension altogether—mischaracterizing our statutory law in the process.[24] It is newly important, therefore, to critically examine the Court's method of interpreting amended statutes, and to inquire more broadly into their proper interpretation.

This critical examination begins with a diagnosis of the Court's current method of statutory interpretation. The Court has begun to deploy a new method of interpreting amended statutes—one driven by its recent turn to original public meaning textualism.[25] This method has introduced three new constraints into statutory interpretation, which prior scholars have outlined to varying degrees: a *temporal* constraint, a *textual* constraint,[26] and a *meaning* constraint.[27] The combined effect of these constraints, the Article argues, is that the Court's methodology has largely failed as a tool to protect the democratic decisions embedded in our amended statutes.

To illustrate this methodological failure, the Article examines two recent classics of statutory interpretation: *Niz-Chavez v. Garland*[28] and *Van Buren v. United States*.[29] In each case, the three constraints of the Court's new methodology were on full display. This included an effort to ignore the amendatory dimension of statutes, leading to puzzling mischaracterizations of federal law. It also included efforts to ignore texts and meanings that were essential to the interpretation of the statutes involved.

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[24] *See infra* notes 261–62, 345–51, and accompanying text.

[25] *See infra* notes 199–204 and accompanying text.

[26] For prior scholarship on this constraint, see *infra* notes 218–22.

[27] For prior scholarship on this constraint, see *infra* notes 223–24.

[28] 141 S. Ct. 1474 (2021).

[29] 141 S. Ct. 1648 (2021). For prior scholarship on these cases, see Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 305–12 (describing these as cases that "capture textualism's current position"); Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020–2022*, 38 CONST. COMMENT. 1, 9–10 (2023) [hereinafter Nourse, *Unified Judicial Philisophy Paradoxes*] (selecting these as "representative statutory decisions" of the Court's new "methodological orthodoxy"); William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1727 n.29 (2021) (citing these as cases that reveal "a defining feature of the Court's method").

The result was a set of interpretations that were troublingly ineffective at locating the democratic decisions beneath amended statutes.

If the Court's interpretive method is inadequate, then how should courts interpret amended statutes? To answer, the Article develops a proposed model of amendatory statutory interpretation. Under that model, courts perform a three-step process that directs them to: (1) uncover the multiple linguistic interventions beneath a statute, (2) identify the policy goals embedded in those linguistic interventions, and (3) weigh their obligations to protect those policy goals. Through this approach, the Article posits, courts can be adequately respectful of the democratically made decisions beneath amended statutes.

To illustrate this methodology in action, the Article again considers *Niz-Chavez* and *Van Buren*. Applying the Article's method, it uncovers a wealth of new information about Congress's policy goals in the interpreted statutes. By finding the amendatory stories missing from these landmark cases, the Article not only reveals the troubling failures of the Court's current methodology for amended statutes. It also offers a template for what a democratically superior model of interpretation might look like for our amendatory era of legislation.

Our modern statutes pose a fascinating challenge. It is the challenge of how to understand the amended statute—a democratic text unknown to the Founding generation. It is not a challenge that courts and scholars have answered. This Article attempts to illustrate that, once we recognize our republic of amended statutes, a richer and more interesting statutory world awaits.

The Article proceeds in four Parts. Part I provides a brief background. Part II chronicles the amendatory dimension of modern statutory law. Part III discusses the theoretical implications of a republic of amended statutes. Part IV turns to the interpretation of amended statutes. A brief conclusion follows.

I. BACKGROUND: AMENDED STATUTES OVERLOOKED

The amended statute is now an essential legal source in the United States, and it raises unique theoretical questions. Yet it has been largely overlooked by legal theory. This Part briefly reviews the literature on the amended statute.

In the field of legislation, the amended statute is generally not given separate discussion and treatment. Leading casebooks

include myriad cases that involve amended statutes, yet they offer only passing comment on their amended quality.[30] Typically, they simply note that amendment history is an accepted source of legislative meaning.[31] No further guidance is given on how to interpret an original statute in conjunction with later amending statutes. By contrast, such casebooks regularly provide full sections on the interpretation of a statute in conjunction with other (i.e., nonamending) statutes.[32] They also typically provide full chapters on interpretation of the statute in conjunction with secondary materials, such as congressional debates.[33] Yet the interaction between a statute and its later amendments receives no such treatment.

Legal scholarship, too, has traditionally given scant attention to the amended statute. As Professor Anita Krishnakumar observed in a 2022 article: "[S]cholars have paid surprisingly little attention to it as an interpretive resource."[34] Krishnakumar identified only one prior article to examine it, which she noted "did so

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[30] *See, e.g.*, WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION AND REGULATION 728 (6th ed. 2020) [hereinafter ESKRIDGE ET AL., CASES] (providing the basic rule that amendment history is a permissible source); *id.* at 81–83 (briefly discussing amendments); *id.* at 461–63 (discussing statutory overrides and underwrites); *id.* at 448–51 (discussing the role of new legal rules and policies in dynamic interpretation); *id.* at 519 (discussing amendment issues in a Voting Rights Act case); *see also* WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION 601 (2014) [hereinafter ESKRIDGE ET AL., STATUTES].

[31] *See, e.g.*, ESKRIDGE ET AL., CASES, *supra* note 30, at 727 ("The formal history of a statute's evolution is widely considered relevant to statutory interpretation."); ESKRIDGE ET AL., STATUTES, *supra* note 30, at 601 ("Strict textualists, as well as most other kinds of interpreters, will in theory consider a law's statutory history, although practice is less consistent."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 256–57 (2012) (outlining the "Reenactment Canon," which permits citation to amendments for a presumed "change in meaning"); BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (describing statutory history as "the sort of textual evidence everyone agrees can sometimes shed light on meaning"); Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 271 (2022) [hereinafter Krishnakumar, *Statutory History*] ("New textualists openly embrace the 'amendment history' form of statutory history."); WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 204–05 (2016) [hereinafter ESKRIDGE, INTERPRETING LAW] (noting the willingness of judges, including textualists, to consider statutory history).

[32] *See, e.g.*, ESKRIDGE ET AL., CASES, *supra* note 30, at 817–24, 835–47.

[33] *See, e.g.*, *id.* at 728–817; ESKRIDGE ET AL., STATUTES, *supra* note 30, at 601–98.

[34] Krishnakumar, *Statutory History*, *supra* note 31, at 268 ("[W]hile the use of statutory history has been part of the Court's interpretive arsenal for some time, scholars have paid surprisingly little attention to it as an interpretive resource.").

only briefly, in passing."[35]

On the rare occasion when the amended statute does receive attention, meanwhile, it typically is relegated to discussions of statutory context.[36] In the field of legislation, which generally divides materials into text and context, this classification (or misclassification) has been consequential. The idea has been, in essence, that amendments simply produce unique contextual background information for statutes. Discussion therefore appears in casebook chapters on "sources extrinsic to the statutory text"[37] and "[l]egislative [h]istory and [l]awmaking [c]ontext."[38] Similarly, judges and scholars discuss amendments as creating unique "statutory history,"[39] a category viewed as akin to background legislative history.[40] Discussion of the amended statute as a statutory text, therefore, goes missing.

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[35] *Id.* (citing James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681, 688–89 (2017)). This was true despite Krishnakumar's study encapsulating both drafting history *and* amendment history. *See id.* at 269–74.

[36] *See, e.g.*, *BNSF Ry. Co.*, 139 S. Ct. at 906 (Gorsuch, J., dissenting) ("Looking beyond the statute's text to its [statutory] history . . . ."); SCALIA & GARNER, *supra* note 31, at 256 (defining "*statutory* history," in the form of "the statutes repealed or amended by the statute under consideration," as "form[ing] part of the context of the statute" (emphasis in original)); Krishnakumar, *Statutory History*, *supra* note 31, at 267, 297–313 (observing how courts deploy "references to statutory history" as a form of "contextual support for [their] chosen statutory constructions"); *id.* at 268, 315–22 (evaluating "whether textualist Justices' willingness to employ statutory history can be squared with their unwillingness to examine traditional legislative history or other forms of background legislative context"); *id.* at 337–38 (describing statutory history as an "interpretive tool[ ], beyond the words of the statute, to fill in the contextual gaps").

[37] ESKRIDGE ET AL., CASES, *supra* note 30, at 713.

[38] ESKRIDGE ET AL., STATUTES, *supra* note 30, at 601.

[39] *See, e.g.*, SCALIA & GARNER, *supra* note 31, at 256 (referring to "*statutory* history," which includes "the statutes repealed or amended by the statute under consideration" (emphasis in original)); Krishnakumar, *Statutory History*, *supra* note 31, at 265 (defining "statutory history" as "the cold record of how a statute evolved from one version to the next," a definition that refers to both "earlier drafts of a bill that ultimately became law [and] the original version of a statute that has since been amended"); *BNSF Ry. Co.*, 139 S. Ct. at 906 (Gorsuch, J., dissenting) (defining "statutory history" as "the record of *enacted* changes Congress made to the relevant statutory text over time" (emphasis in original)); ESKRIDGE, INTERPRETING LAW, *supra* note 31, at 204 (defining "statutory history" as the "formal changes in the Code made by the legislature when it enacts new laws and amends them over time"); Krishnakumar, *Statutory History*, *supra* note 31, at 268 (defining "statutory history" as "a statute's historical evolution").

[40] *See, e.g.*, Krishnakumar, *Statutory History*, *supra* note 31, at 265, 315–22 (framing rules about use of statutory history as "corollary" to rules about legislative history); *id.* at 335 ("[C]ombing through the legislative record to identify and compare previous versions of a statute . . . to the enacted version . . . can be just as, if not more, complicated and time-consuming as finding the committee report that accompanied a statute or the . . . Congressional Record that correspond[s] to floor debate about the statute.");

This treatment of the amended statute, where its amended quality is relegated to the domain of statutory context, also informs judicial practice. Courts regularly approach amendment history as a favored form of secondary material—one they may, but need not, consider, as with other contextual materials.[41] This distinction has become increasingly important with the rise of textualism, a methodology that views statutory text as essential—but statutory context as optional.[42]

This neglect of the amended statute, and specifically of it as a unique legal text, has been partly attributable to a broader issue in legal theory. Traditionally, legal theory has mostly ignored the documentary foundations of statutory law.[43] Instead, it has treated the statute as a ready-made text divorced from documentary details.[44] For many years, in fact, legal theory showed almost

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ESKRIDGE ET AL., CASES, *supra* note 30, at 727 (using "statutory history" to refer "in a broad sense, [to] the entire circumstances of a statute's creation and evolution," including both legislative history and amendment history); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1619–20, 1644–46 (2014) (using "statutory history" to capture language changes to a bill during the drafting process, as distinct from commentary by legislators); Brudney & Baum, *supra* note 35, at 688–89, 746 & n.248 (referring to statutory amendment as a form of "vertical legislative history"); LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 44 (2011) (discussing legislative history as including differences introduced by amendments). *But see* SCALIA & GARNER, *supra* note 31, at 256 (distinguishing statutory history from legislative history on the assumption of whether the material likely appeared before all legislators); *BNSF Ry. Co.*, 139 S. Ct. at 906 (Gorsuch, J., dissenting) (same).

41 *See* Krishnakumar, *Statutory History*, *supra* note 31, at 294 ("[T]he members of the Roberts Court typically used statutory history to corroborate a statutory construction arrived at through other interpretive tools—i.e., they used statutory history in precisely the manner in which Justice Scalia and other new textualists have refused to employ traditional legislative history."); *id.* at 302 (noting that the textualist use of amendment history "is similar to the decontextualized manner in which textualist Justices often apply other interpretive tools—such as language and grammar canons, dictionary definitions, and the whole act rule"). Krishnakumar's analysis suggests that only 6.2% of Roberts Court opinions through the 2018 Term invoked amendment history. *See id.* at 282, 295.

42 *See infra* notes 186–87 and accompanying text (discussing the plain meaning rule).

43 This neglect has largely been fueled by an uncritical acceptance of the United States Code as an authoritative statement of statutory text. *See* Cross, *Statutory Law*, *supra* note 10, at 1049 n.31 (noting other scholars observing this treatment); *id.* at 1060–62 (documenting those advancing this approach). For the recent wave of scholarship challenging this approach, see *infra* notes 50–51 and accompanying text.

44 For an overview of the postenactment production realities of statutory texts, see Cross, *Statutory Law*, *supra* note 10, at 1049–59. Interpreters and theorists regularly consider the deliberation and drafting details of the legislature, of course—but not the documentary details that give those details statutory form, many of which occur after enactment. *See id.*

no understanding of our statutory documents.[45] And while some legal scholarship has developed sophisticated theories about the growth of the law, including via amendment, even that work typically regards statutory amendment as an abstract input into an interbranch conversation, leaving others to reckon with its distinctive documentary characteristics.[46]

In recent years, however, there have been the beginnings of what might be labeled a "documentary turn" in legislation scholarship. Moving away from the oversimplified, traditional view of statutory text, scholars have begun a conversation about the complex documentary foundations of statutory law. In a 2020 article, Professor Gluck and I sought to begin this conversation, focusing attention on the multitemporal or "deconstruct[ed]" quality of modern statutes.[47] We suggested that this was the "modern defining feature" of federal legislation.[48] In an article published last year, I also called attention to the nonauthoritativeness of amended statutes.[49] These articles began to trace the facets of the amended statute, a project this Article undertakes comprehensively.

Recent scholarship on codification has also contributed to this project. This work has focused primarily on the United States Code, not the amended statute.[50] Still, it has directed new attention to the documentary realities of statutory law, and it has identified some features that are relevant to the amended statute, including issues of authoritativeness, editorial omission, and topical arrangement.[51] This Article will attempt to highlight

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45 The main exception to this has been in law library studies. *See, e.g.*, Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 L. LIBR. J. 213, 217–22 (2020); Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 L. LIBR. J. 545, 549–52 (2009).

46 *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 126–28 (1994) (discussing the role of new legal rules and policies); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1519–20 (1987); RONALD DWORKIN, LAW'S EMPIRE 228–32 (1986) (analogizing statutory interpretation to a "chain novel"); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 540–46 (1982) (same); Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 VA. L. REV. 1487, 1491–92, 1494–1511 (2017) (describing the interbranch dialogue of statutory "overrides" and "underwrites"); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69, 78–84 (1988) (discussing the "reenactment rule" relating to statutory underwrites).

47 Cross & Gluck, *supra* note 17, at 1656.

48 *Id.* at 1654.

49 Cross, *Statutory Law*, *supra* note 10, at 1059–92.

50 On the distinction between amendment and codification, see *infra* Part II.D.

51 On questions about the United States Code's authoritativeness, see, for example, Daniel B. Listwa & Adam Flaherty, *Interpreting Code*, 61 HARV. J. ON LEGIS. ONLINE 69, 73–79 (2024); Nevers & Krishnaswami, *supra* note 45, at 217–22; Tobias A. Dorsey, *Some*

when these insights about codification translate to the amended statute, and when they do not.

With respect to the interpretation of amended statutes, meanwhile, a key contribution came in 2022. In that year, Professor Krishnakumar published the first article-length study on judicial use of statutory history.[52] In her impressive empirical analysis, Krishnakumar documented the use of this history by the Roberts Court in the 2005–2018 Terms.[53] That article also usefully catalogued the inferences judges draw from amendments.[54] And it raised concerns about those inferences, explaining how the Roberts Court's early use of a *textual* constraint to exclude legislative history materials disconnected interpretations from legislative policy decisions.[55]

Other scholarship has occasionally touched on interpretation issues, too. A 2017 article by Professors James Brudney and Lawrence Baum documented the Supreme Court's greater use of "vertical legislative history" (including amendment history) than its circuit court counterparts, for instance, which they attributed to the appeal of that history for textualist Justices.[56] And Professor Thomas Merrill has asked whether courts should take a different interpretive approach for functionally unamendable statutes.[57] Outside of Krishnakumar's valuable correctives, however, there has been virtually no theoretical work to construct a defensible interpretive method for amended statutes.

Reflections on Yates *and the Statutes We Threw Away*, 18 GREEN BAG 2D 377, 386–89 (2015); Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283, 283–92 (2007); Daniel B. Listwa, Comment, *Uncovering the Codifier's Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464, 473–88 (2017). For observations about omissions that occur during incorporation process for the Code, see Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 U.C.L.A. L. REV. 640, 664–66 (2020). On topical arrangement of the Code, see Cross & Gluck, *supra* note 17, at 1568; Zhang, *Externalist*, *supra* note 6, at 518–19.

52 *See generally* Krishnakumar, *Statutory History*, *supra* note 31.

53 *See id.* at 268–69, 280–313 (summarizing findings).

54 *See id.* at 297 (identifying five forms of inference courts draw from statutory history).

55 *Id.* at 269 ("[T]he decontextualized use of statutory history shifts to judges, rather than legislators, the authority to fill in the gaps between different versions of a statute—and [ ] judges engage in substantial speculation when performing such gap filling."). For further discussion of these inferences, see *infra* Part IV.

56 Brudney & Baum, *supra* note 35, at 688–89, 746 & n.248.

57 Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 585–600 (2018); *see also* Krishnakumar, *Statutory History*, *supra* note 31, at 274–77 (listing scholarship that has "used the history of individual statutes to make case-specific arguments about the proper way to interpret a particular statute").

And none of this scholarship has examined the "original public meaning" textualism that now prevails on the Court.[58]

With respect to documenting the amended statute, a recent work by Alexander Zhang also offers an important contribution. Zhang explored the rise of amendments in "expository legislation," or legislation that issues clarifying interpretations of prior statutes.[59] Locating this shift in the mid-twentieth century, Zhang hypothesized that it was a product of codification, and he suggested it was linked to an increasingly text-centric view of statutory law.[60] Beyond this analysis of a legislative subgenre, however, there has been no broader examination of the history of amendments in our statutory law.

That is the status of the amended statute in legal scholarship. For years, it has been relegated to an afterthought—and viewed merely as a document with additional context or background, not as a unique textual source. A recent documentary turn in legal scholarship has begun to correct this—but has focused primarily on codification, not the amended statute. As a result, the amended statute remains unexamined. Yet the amended statute is a distinct legal source—one that transformed our legal landscape. It remade the nature of legislative instructions, and it invented a new idea of the "statute" in the United States—introducing a legal source with characteristics unlike those of its predecessor. It is to that new, amended statute that we now turn.

II. DOCUMENTING: THE AMENDATORY DIMENSION OF STATUTES

To understand the amended statute, we must begin with its evolving place in U.S. law. When did it take root in our legal system? And how prevalent is it today?

To answer these questions, a study was conducted for this Article. Under this study, six statutory terms were identified that signal the presence of an amendment to statutory text.[61] Over seven hundred distinct searches for those terms were conducted in the Statutes at Large, including hundreds that were subjected

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58 Jesse M. Cross, *The Fair Notice Fiction*, 75 ALA. L. REV. 487, 494–513 (2023) [hereinafter Cross, *Fair Notice Fiction*].

59 *See* Zhang, *Externalist*, *supra* note 6, at 456–57. *See generally* Alexander Zhang, *Legislative Statutory Interpretation,* 99 N.Y.U. L. REV. 950 (2024).

60 *See* Zhang, *Externalist*, *supra* note 6, at 515–21.

61 These terms were: "inserting," "striking," "adding," "amended so as to read," "amended as" (which always was subjected to result-by-result review to count only relevant results, as explained in Appendix A), and "amended to."

to result-by-result reviews for accuracy. This was done to identify the number of amendatory edits made in the public laws of each Congress from 1789 to 2018. (Statutes at Large have not yet been published for full Congresses beyond 2018.)

This Part reports the results of that study. It supplements those results with information from primary and secondary sources to contextualize its key findings. The result is a portrait of the amendatory dimension of our statutory law—its historical rise and its current omnipresence. Appendix A provides further analysis by individual statutory term and a detailed explanation of methodology.

A. 1789–1843

The first period covered by this study, 1789–1843, is straightforward to report: no amendments to statutory text were discovered. The reason for this has recently been outlined by Alexander Zhang in his excellent study of "expository legislation," or legislation that purports to interpret a prior statute.[62] As Zhang documented, Congress did not always modify prior statutes by making edits to statutory text (or, in the vocabulary of this Article, by making "language-editing amendments"). Instead, Zhang showed, the early Congress created interactions with prior statutes via a different approach, which might be termed "instruction-updating amendments."[63] Under this approach, the amending law simply issued a new, freestanding set of instructions.[64] Such a statute left it to the reader to discern how the new instructions interacted with those found in the prior law. This practice traced to the first Congress.[65] It prevailed even though, from the earliest years, Congress did amend proposed bills via language-editing amendments.[66] In addition to providing

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[62] *See* Zhang, *Externalist*, *supra* note 6, at 462–63.

[63] *Id.* at 515–16 (noting statutes that "amended" without changing the text).

[64] *Id.* at 515 (describing a method of "repairing a previous law simply by passing a new statute"). This feature similarly marked statutes that "supplement[ed]" existing laws. *See, e.g.*, Act of Mar. 2, 1791, ch. 11, 1 Stat. 196 ("An Act supplementary to the act intituled . . . ."); Act of Feb. 1, 1798, ch. 11, 1 Stat. 539 (same).

[65] *See, e.g.*, Act of Sept. 29, 1789, ch. 22, 1 Stat. 94; Act of July 22, 1790, ch. 32, 1 Stat. 137; Act of Apr. 15, 1790, ch. 8, 1 Stat. 112; Act of Mar. 2, 1791, ch. 13, 1 Stat. 198; Act of Mar. 3, 1791, ch. 17, 1 Stat. 214.

[66] *See, e.g.*, H.R. 5, 1st Cong. (1st Sess. 1789) (offering amendments "expung[ing]" and "insert[ing]" language in a bill); H.R. 69, 6th Cong. (1st Sess. 1800) (presenting amendment proposed by House).

instruction-updating amendments, these early statutes sometimes expressly declared their effect of repealing,[67] overriding,[68] or extending[69] an older law (or portions thereof). What they did not do, however, was revise the text of earlier statutes. This practice continued into the nineteenth century.[70]

Figure 1 provides an example of an early instruction-updating amendment by Congress.[71] Notice that it claims (in the title) to "amend" another statute, yet the following provision simply states a new rule.

FIGURE 1: AMENDATORY STATUTE FROM 1795

> CHAP. XXI.—*An Act to amend the act intituled "An act making alterations in the Treasury and War departments."(a)*
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the department of War, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices; it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices, until a successor be appointed, or such vacancy be filled: *Provided,* That no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months.
>
> APPROVED, February 13, 1795.

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67 *See, e.g.*, Act of Mar. 3, 1791, ch. 17, 1 Stat. 214 (stating that a portion of prior law "is hereby repealed"); Act of Mar. 2, 1799, ch. 29, 1 Stat. 724 (providing that a section of a prior act "is hereby repealed" and providing new instructions); *see also* Act of Mar. 2, 1799, ch. 30, 1 Stat. 724, 725 (stating a new rule and that a portion of prior law "is hereby repealed"). For a version that comes close to a language-editing amendment, see Act of Feb. 28, 1799, ch. 20, 1 Stat. 626 (quoting a seven-word statutory phrase capturing a requirement that "hereby is repealed").

68 *See, e.g.*, Act of July 16, 1798, ch. 88, 1 Stat. 611 (providing a "notwithstanding" rule).

69 *See, e.g.*, Act of Mar. 2, 1791, ch. 13, § 1, 1 Stat. 198 (providing that a prior act "shall be deemed and taken to extend to" various topics).

70 *See, e.g.*, Act of Feb. 4, 1815, ch. 32, 3 Stat. 201 (extending prior rule); Act of Mar. 3, 1821, ch. 49, 3 Stat. 643 (modifying rule); Act of Apr. 23, 1830, ch. 73, § 2, 4 Stat. 395 (partially repealing rule); Act of Apr. 14, 1802, ch. 26, 2 Stat. 153 (creating exceptions to rule).

71 Act of Feb. 13, 1795, ch. 21, 1 Stat. 415.

This amendatory approach also shaped early constitutional practice. As Professor Edward Hartnett has documented, James Madison had proposed the Bill of Rights at the first Congress as a series of language-editing amendments to the Constitution.[72] In response, Representative Roger Sherman of Connecticut argued that the prevalence of instruction-updating amendments in legislation showed the "absurdity" of Madison's approach.[73] Partly as a result, it was decided that constitutional amendments would appear at the end of the original Constitution—not interlineated within it.[74] Yet Sherman's observation about statutory amendments would not prove enduring.

B. 1843–2018

The second period covered by this study, 1843–2018, saw the transformative rise of the amendatory dimension in federal law. Scattered examples of language-editing amendments begin to appear in the 1840s[75] and 1850s,[76] with Congress both striking and inserting specific language in existing statutes.[77] An example appears in Figure 2.

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[72] *See* Edward Hartnett, *A "Uniform and Entire" Constitution; Or, What If Madison Had Won?*, 15 CONST. COMMENT. 251, 252–53 (1998).

[73] *See id.* at 254 ("[Roger] Sherman contended that the 'absurdity' of amending Madison's way was demonstrated by comparing it to statutory amendments, asking whether 'any Legislature [would] endeavor to introduce into a former act, a subsequent amendment, and let them stand so connected.'" (quoting CONG. REG. (Aug. 13, 1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 117 (Helen E. Veit et al. eds., 1991))); *see also id.* at 255 (quoting Delaware Representative John Vining's rebuttal that he had seen statutes with titles that suggested layers of amendments).

[74] For an example of what the Constitution would look like with interlineated amendments, see *id.* at 258–81.

[75] *See, e.g.*, Act of May 17, 1848, ch. 42, § 7, 9 Stat. 223, 227 (declaring a prior statute "amended, so as to read" as provided); Act of Mar. 2, 1849, ch. 82, 9 Stat. 350 (same). For an example of interlineation, see Act of Feb. 4, 1845, ch. 2, 5 Stat. 721 (framing an insertion as a correction of clerical error).

[76] *See, e.g.*, Act of Feb. 14, 1855, ch. 103, 10 Stat. 608 (striking language); Act of July 30, 1852, ch. 74, § 3, 10 Stat. 25 (striking and inserting language); Act of Mar. 3, 1855, ch. 175, § 12, 10 Stat. 643, 671 (instructing to read prior law as though certain words interlineated).

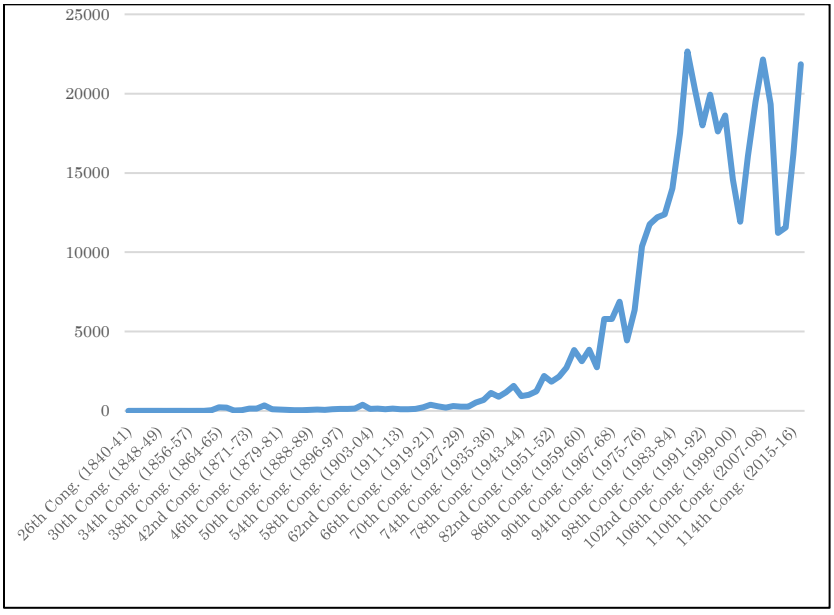
[77] *Cf.* Zhang, *Externalist*, *supra* note 6, at 515 (providing a graph with collective "state/colonial/territorial" expository legislation that reports nonzero numbers of textual amendments).

FIGURE 2: STATUTE FROM 1852 AMENDING VIA STRIKING AND INSERTING LANGUAGE

> SEC. 3. *And be it further enacted,* That the twentieth section of the said act be amended by striking out the words "has been" from the last line, and inserting the words "may necessarily be" in lieu thereof.
>
> APPROVED, July 30, 1852.

The foundation had been laid for a remarkable transformation of U.S. lawmaking. Over the next 150 years, this amendatory practice would come to dominate federal law—changing the nature of statutory text along the way. Figure 3 provides the key documentation of this phenomenon. It provides a calculation of the number of amendments made by the public laws of each Congress from 1840 to 2018.[78] It thereby reveals a massive sea change in legislation: one that made the amendatory dimension omnipresent in federal law.

FIGURE 3: FREQUENCY OF AMENDMENT-SIGNALING TERMS IN FEDERAL STATUTES OF EACH CONGRESS, 1840–2018



78 Due to space constraints, the x-axis labels list every fourth Congress, but the data reported includes every Congress in the studied period.

As Figure 3 reveals, there has been a tremendous rise in the amendatory dimension of federal law.[79] In the 28th Congress (1844–1845), Congress made two amendments to statutory text. In the 100th Congress (1987–1988), it made *over twenty-two thousand*.

Several changes in lawmaking were needed to produce this dramatic rise in amendments. The first already has been mentioned: the transition away from instruction-updating amendments and toward language-editing amendments.[80] In the domain of expository legislation, Zhang found that transition beginning around 1930, and increasing throughout the twentieth century.[81] This Article's study largely corroborates that finding, while also suggesting that expository legislation may have been a bit late to the game: in Congress, the transition to language-editing amendments occurred in four phases, reaching from roughly 1840 to 1930.

During the first period, from 1840 to 1860, instruction-updating amendments were still the norm, and language-editing amendments appeared only sporadically. By 1860, however, Congress had entered a second period: one of blended amendatory methods. During this period, which ran until approximately 1915, Congress's two amendatory methods coexisted. This was true even of amendments to the Revised Statutes, the predecessor to the United States Code.[82] Sometimes both formats even appeared within a single statute, as illustrated in Figure 4. That Figure highlights the language-editing amendment in green and the instruction-updating amendment in red.[83]

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79 *See infra* Appendix A. The graph presents the number of relevant occurences of the keywords "inserting," "striking," "adding," "amended as to read," "amended to," and "amended as" in the Statutes at Large, as identified in accordance with the methodology reported in that Appendix. These occurences were identified across two sources: (1) *United States Statutes at Large*, LIBR. OF CONG., https://perma.cc/A4DC-PCE4; and (2) *United States Stautes at Large*, U.S. GOV'T PUBL'G OFF., https://perma.cc/YM9G-CMZ3.

80 *See supra* notes 63–76 and accompanying text.

81 Zhang, *Externalist*, *supra* note 6, at 521 fig.13.

82 *See, e.g.*, Act of June 9, 1884, ch. 73, 23 Stat. 40; Act of June 11, 1884, ch 75, 23 Stat. 40; Act of July 2, 1884, ch. 143, 23 Stat. 64; Act of Mar. 3, 1885, ch. 350, 23 Stat. 436, 437. A temporary period of increased language-editing amendments in the 1870s does appear, perhaps associated with the enactment of the Revised Statutes, before a period of retrenchment in the 1880s. *See infra* Appendix A.

83 Act of Mar. 3, 1893, ch 206, § 6, 27 Stat. 569, 570.

FIGURE 4: AN ACT TO FACILITATE THE ENFORCEMENT OF THE IMMIGRATION AND CONTRACT-LABOR LAWS OF THE UNITED STATES § 6 (1893), HIGHLIGHTED BY AMENDMENT STYLE

> SEC. 6. That section five of the act of March third, eighteen hundred and ninety-one, "in amendment of the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," is hereby amended by striking out the words "second proviso" where they first occur in said section and inserting the words "first proviso" in their place; and section eight of said act is hereby so amended that the medical examinations of arriving immigrants to be made by surgeons of the Marine-Hospital Service may be made by any regular medical officers of such Marine-Hospital Service detailed therefor by the Secretary of the Treasury; and civil surgeons shall only be employed temporarily from time to time for specific emergencies.

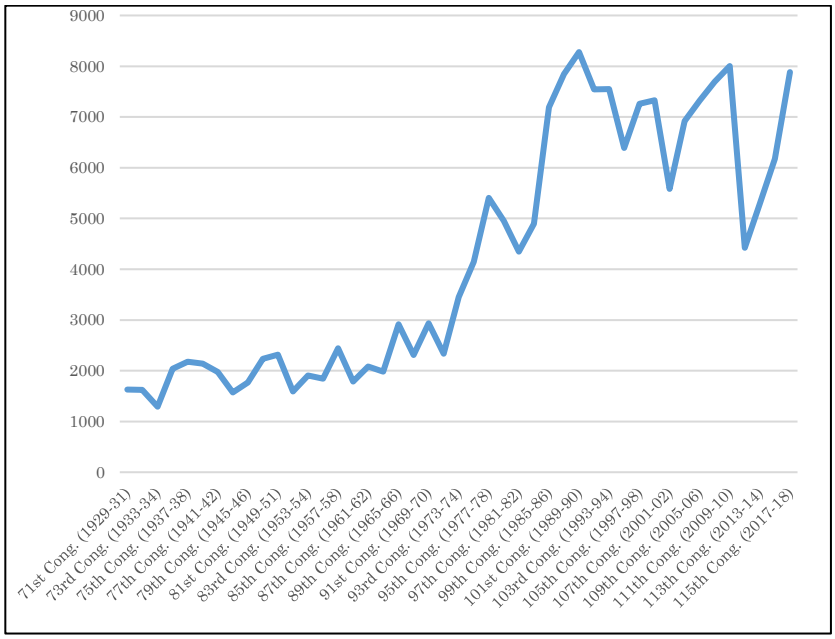
A third period lasted from 1915 to 1930. In this period, language-editing amendments were Congress's preferred amendatory method, and instruction-updating amendments were increasingly rare. By 1930, the transition was essentially complete: going forward, Congress would amend almost exclusively by language-editing amendment.

This transition to language-editing amendments was only the beginning of the amendatory revolution, however. That revolution required a change not only in the style of amendments, but also in their volume. And indeed, from 1930 to 1990, there was a meteoric rise in the overall frequency of amendments. After Congress largely switched to language-editing amendments by 1930, each subsequent decade saw at least a 40% increase in

amendments over the prior decade,[84] with one decade (1930–1940) witnessing an increase that exceeded 330%.[85]

This increased volume of amendments resulted from two factors. First, the overall amount of text enacted by each Congress was increasing. This factor is documented in Figure 5, which reports the number of pages each Congress enacted as public laws into the Statutes at Large.[86] It reveals that, while uneven, the volume of statutory law enacted by each Congress was generally growing. From 1930 to 1990, it shows a 408% increase in the pages of law enacted per Congress.

FIGURE 5: PAGES OF PUBLIC LAW ENACTED PER CONGRESS, 1930–2018



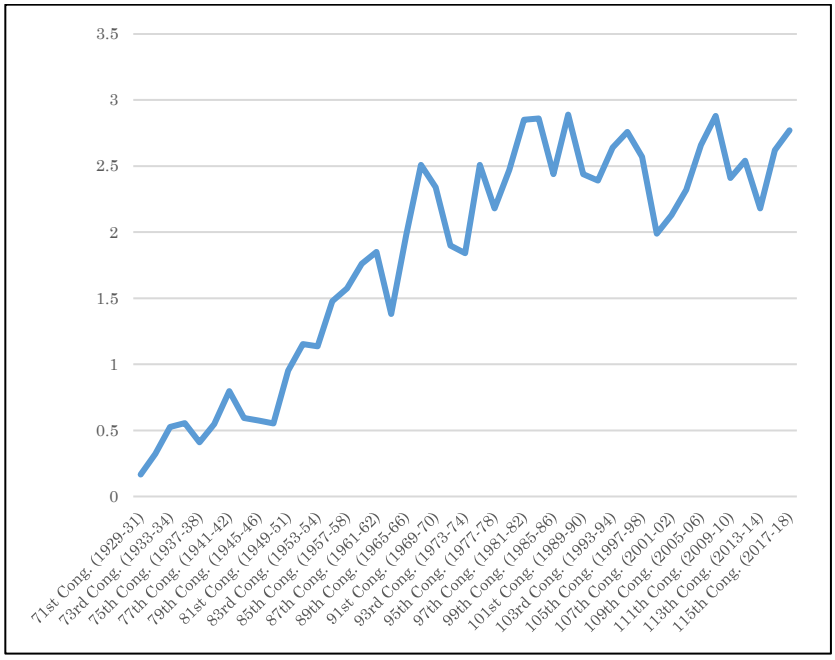
84 Based on a comparison of the 71st Congress (1929–1931) (271 results); 76th Congress (1939–1941) (approximately 333% increase to 1,173 results); 81st Congress (1949–1951) (approximately 88% increase to 2,210 results); 86th Congress (1959–1960) (approximately 42% increase to 3,138 results); 91st Congress (1969–1970) (approximately 119% increase to 6,885 results); 96th Congress (1979–1980) (approximately 77% increase to 12,209 results); and 101st Congress (1989–1990) (approximately 65% increase to 20,192 results). For methodological details, see *infra* Appendix A.

85 Based on a comparison of the 76th Congress (1939–1941) to the 71st Congress (1929–1931) (approximately 333% increase). *See infra* Appendix A.

86 *See infra* Appendix A.

Second, the frequency of amendments was increasing, even when controlled for legislative output. This growth actually was significantly more dramatic than the increase in statutory volume. This is documented in Figure 6, which reports the average number of amendments per page by each Congress.[87]

FIGURE 6: AMENDMENTS PER PAGE BY EACH CONGRESS, 1930–2018



This increase in amendments per page is remarkable. From 1930 to 1990, it shows a 1,370% increase in per-page amendments.[88] Combined with the increase in legislative output, this means that, whereas the 71st Congress made scarcely over 270 amendments to prior statutes, the 100th Congress enacted over 22,600.[89] While the number of amendments by Congress would fluctuate thereafter, each subsequent Congress would make at least eleven thousand such amendments. The amendatory dimension of federal law had fully arrived.

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87 *See infra* Appendix A.

88 Based on a comparison of the 101st Congress (1989–1990) to the 71st Congress (1929–1931). For data and methodology, see *infra* Appendix A.

89 *See supra* note 84 (providing numbers for the 71st Congress); *see also, e.g.*, *infra* Appendix A (providing numbers for the 100th Congress (1987–1988)).

C. Present Day

As of 2018, therefore, statutory amendments occurred in federal law in a volume that is difficult to fathom. While more recent data is not available from the Statutes at Large, contemporary enactments suggest a similar volume. For instance, the Inflation Reduction Act of 2022[90] made over 500 insertions[91] and over 320 excisions,[92] along with other amendments.[93] This matched the Tax Cut and Jobs Act[94] from 2017, which made over 440 insertions and over 420 excisions.[95] These are striking numbers—though they admittedly were exceeded by the Affordable Care Act[96] (ACA), which made over 1,400 insertions and nearly 800 excisions.[97] The ACA even amended *itself*[98] in provisions then further amended by its companion bill, the Health Care and Reconciliation Act of 2010,[99] all of which amended the tax code.[100] Modern federal law is endlessly modifying other statutory text.

A century plus of this practice has changed the nature of U.S. statutes. Today, our laws rarely take the shape of a textbook statute, whereby they report a single snapshot enactment.[101] Instead, our statutes regularly have an amendatory dimension—one that can be staggering. A single provision of the Federal Food, Drug, and Cosmetic Act[102] has undergone over 90 amendments, for

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90 Pub. L. No. 117-169, 136 Stat. 1818 (2022).

91 *Id.* A search for the term "inserting" returned 386 results and for "adding at the end" returned 135 results.

92 *Id.* A search for the term "striking" returned 326 results.

93 *Id.* The Act also made twenty amendments "to read as follows."

94 Pub. L. No. 115-97, 131 Stat. 2054 (2017).

95 *Id.* A search for "inserting" returned 327 results, "adding at the end" returned 118 results, and "striking" returned 421 results.

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

97 *See id.* A search for "inserting" returned 1,035 results, "adding at the end" returned 414 results, "striking" returned 797 results, and "amended to read" returned 45 results. These results do not include any search of its companion bill. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

98 *See* Pub. L. No. 111-148, § 10106, 124 Stat. 119, 907–09 (2010) (amending a provision added to the tax code by § 1501(a)(2)); *id.* § 10107, 124 Stat. 119, 911 (amending a provision added to the tax code by § 1562).

99 Pub. L. No. 111-152, 124 Stat. 1029 (2010); *see id.* §§ 1002–1003, 124 Stat. 1032–33.

100 *See* Pub. L. No. 111-148, § 1501(b), 124 Stat. 119, 909 (2010) (adding § 5000A(c) to the Internal Revenue Code of 1986); *id.* § 1513, 124 Stat. 119, 910–11 (adding § 4980H(d)(2)(D) to the same).

101 For the classic textbook statute, the "No Vehicles in the Park" statute, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–08 (1958).

102 Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301 et seq.).

instance.[103] A provision in the tax code has undergone over 70 amendments.[104] A provision of the Medicare statute, enacted as recently as 1989, has undergone *over 170* amendments.[105] These are numbers for individual sections of law, not entire statutes.

Today, this is the status of much federal statutory law. As a result, when legal rights come before a contemporary U.S. court, they regularly rest upon an amended statute. Consider the Supreme Court's 2022 Term. There, the Court decided forty statutory cases, and thirty-eight (95%) involved provisions with amendments.[106] That is over 70% of the Court's total docket, including both statutory and constitutional cases.[107] It is difficult to overstate the omnipresence of amended statutes in our courtrooms, and in our legal culture.

D. Amendment and Codification

Thus far, this Part has chronicled the amendatory revolution that has remade our legal regime. One reason why this revolution has gone overlooked, it seems, is because of its complicated relationship with codification movements in our legal history. The rise of amendments has intersected in important ways with these codification movements. However, they are distinct phenomena—and need to be understood as such.

On the one hand, the rise of the amended statute was plainly influenced by various codification movements throughout U.S. legal history.[108] Those movements drew, in turn, upon a long-existing aspiration for codified law, which traced back at

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[103] *Id.* The author's count of itemized amendments listed in the United States Code, as prepared online by the Office of the Law Revision Counsel, showed 93 amendments as of January 23, 2025.

[104] I.R.C. § 1 (codified as amended at 26 U.S.C. § 1). The author's count of itemized amendments listed in the United States Code, as prepared online by the Office of the Law Revision Counsel, showed 72 amendments as of January 23, 2025.

[105] Social Security Act § 1848, Pub. L. No. 101-239, § 6102, 103 Stat. 2169 (1989) (codified as amended at 42 U.S.C. § 1395w-4). The author's count of itemized amendments listed in United States Code, as prepared online by the Office of the Law Revision Counsel, showed 175 amendments as of January 23, 2025. This figure understates this amendatory history: § 1848 itself was created to amend an existing payment system in Medicare, a program itself created via amendment to the Social Security Act.

[106] *See infra* Appendix B. This excludes cases decided based solely on standing (though one involved an amended statute and the other arguably did).

[107] *See supra* note 5.

[108] On these movements, see Cross, *Fair Notice Fiction*, *supra* note 58, at 543–47 (outlining codification movements). *See generally* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981).

least to the Code of Justinian.[109] These movements had aspired for statutory law to exist as a single governing text that is comprehensive, readable, and current. Indeed, long-standing ideas about codified law likely made the transition to amended statutes seem natural to the legal community, thereby hiding its revolutionary dimensions at crucial moments of transformation. And the steady, decades-long increase in amendments after 1926 (when the United States Code was created)[110] attests to the extent to which these phenomena were intertwined. In these ways, the amended statute was certainly entangled with debates around legal codification, which made the amended statute not seem novel to Americans.

Yet the rise of amended statutes was not simply a byproduct of codification. It was a broader phenomenon. Several facts underscore this reality. First, Congress began changing amendatory practices decades before its first codification in 1874.[111] In fact, it began making language-editing amendments decades before it required any publication of amended statutes whatsoever, codified or otherwise. From the 1840s to the 1860s, this meant that Congress was amending the language of its statutes even though no official publication existed to make these amendments.[112] As a result, as Congress made hundreds of language-editing amendments throughout the 1860s,[113] the amended statutes it was creating were purely imagined texts—secondary documents that nobody was actually required to construct. Perhaps this was simply force of habit from the legislative process, where language-editing amendments were always the norm (and where clerks executed the amendments on their behalf).[114] Still, it was a remarkable approach—and one

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[109] *See generally* Wolfgang Kaiser, *Justinian and the* Corpus Iuris Civilis, *in* THE CAMBRIDGE COMPANION TO ROMAN LAW (David Johnson ed., 2015).

[110] Act of June 30, 1926, Pub. L. No 440, ch. 712, 44 Stat. 777.

[111] Act of June 20, 1874, ch. 333, 18 Stat. 113. On uses predating the Revised Statutes, see *supra* notes 75–76.

[112] This may have made topically arranged statutory compilations, produced by private actors and agencies during the period, all the more important—even though these presumably merely gathered laws without executing textual amendments. On these topical compilations, see Erwin C. Surrency, *The Publication of Federal Laws: A Short History*, 79 LAW LIBR. J. 469, 474, 477 (1987).

[113] For example, the 38th Congress (1863–1865) and the 39th Congress (1865–1867) each made over two hundred amendments. For further details, see *infra* Appendix A.

[114] On the different drafting styles of statutory versus bill amendments, and the assumptions about self-execution therein, see OFF. OF THE LEGIS. COUNS., U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE 25 (2022) [hereinafter OFF. OF THE LEGIS. COUNS., MANUAL ON DRAFTING STYLE].

that showed that the turn to amended statutes began before codification, rather than being a pure byproduct of it.

Second, the foregoing study reveals that Congress's transition to this amendatory practice was gradual. In the period from 1840 to 1980, the number of amendments steadily and incrementally increased across Congresses.[115] Codification plainly played some role in those increases, as is seen in the significant increases in amendments that occurred in the wake of major codifications (viz., the Revised Statutes and the United States Code). Still, Congress continued to issue instruction-updating amendments for decades after publication of the Revised Statutes—including for amendments to the Revised Statutes itself.[116] And the rise of language-editing amendments had only just begun when it first published the United States Code. The resulting picture is not of an overnight shift that accompanied any codification effort.

Third, Congress has never limited the practice of language-editing amendments to its codifications. In the late 1800s, after it had produced the Revised Statutes, it still regularly amended statutes located outside that codification. Likewise, ever since the creation of the United States Code, it has amended statutory language even in those portions of the statutory corpus that are not codified.[117] The Social Security Act[118] is not codified, for instance, yet Congress has amended it thousands of times.[119] Even where Congress has resisted codification, in other words, it has consistently produced amended statutes.

In short, codification of federal law has been partial, inconsistent, and controversial.[120] The rise of the amended statute, by contrast, has been total and uncontroversial. Even if courts stopped using codifications tomorrow, therefore, the challenges posed by the amended statute would remain. That is because codification plays a role in the story of the amended statute, but only

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115 *See supra* notes 84–89 and accompanying text.

116 *See supra* note 82 and accompanying text.

117 For examples of this practice being used for noncodified titles of the United States Code, see *supra* notes 102–04 and accompanying text.

118 Pub. L. No. 74-271, 49 Stat. 620 (1935).

119 *See generally* 42 U.S.C. ch. 7.

120 On its controversial nature, see Cross, *Fair Notice Fiction*, *supra* note 58, at 544–45 (discussing Congress's decisions not to make Revised Statutes supplements or the initial publication of the United States Code authoritative, due to concerns about codification accuracy).

a partial role. To understand the amended statute, we must consider it on its own terms—as a unique legal source. That is the project of Part III.

III. THEORIZING: CONCEPTUALIZING AMENDATORY STATUTES

Beneath the amendatory revolution chronicled in Part II, there was a deep conceptual shift in legislation. This Part considers the transformation in U.S. thinking about statutory law created by the amended statute. It examines four dimensions of statutory law that were remade by the amended statute: (1) legislation, (2) the legislative process, (3) the institution of the legislature, and (4) statutory interpretation.

A. Legislation

The introduction of amendments changed legislation. Consider the statutes of the early republic.[121] In these statutes, with their instruction-updating amendments, there was a particular model of legislation. Under that model, legislation was not viewed as the maintenance of a comprehensive legal code. Rather, it was viewed as a more pragmatic activity. Statutes were conceived to be a series of targeted linguistic interventions made by Congress, at various moments, to adjust the prevailing society. Statutes therefore consisted simply of binding policy instructions.[122]

However, language-editing amendments introduced a different understanding of legislation. According to this understanding, legislation entails the maintenance of a particular corpus or text. This introduced a new layer of textuality into the law. Under this model, congressional enactments operate as instructions for the assembly of a secondary text, which this Article labels the amended statute.[123] That text would be a compilation of Congress's various enactments into a current version of the law.[124] Figure 7 offers a visual depiction of this amended statute.

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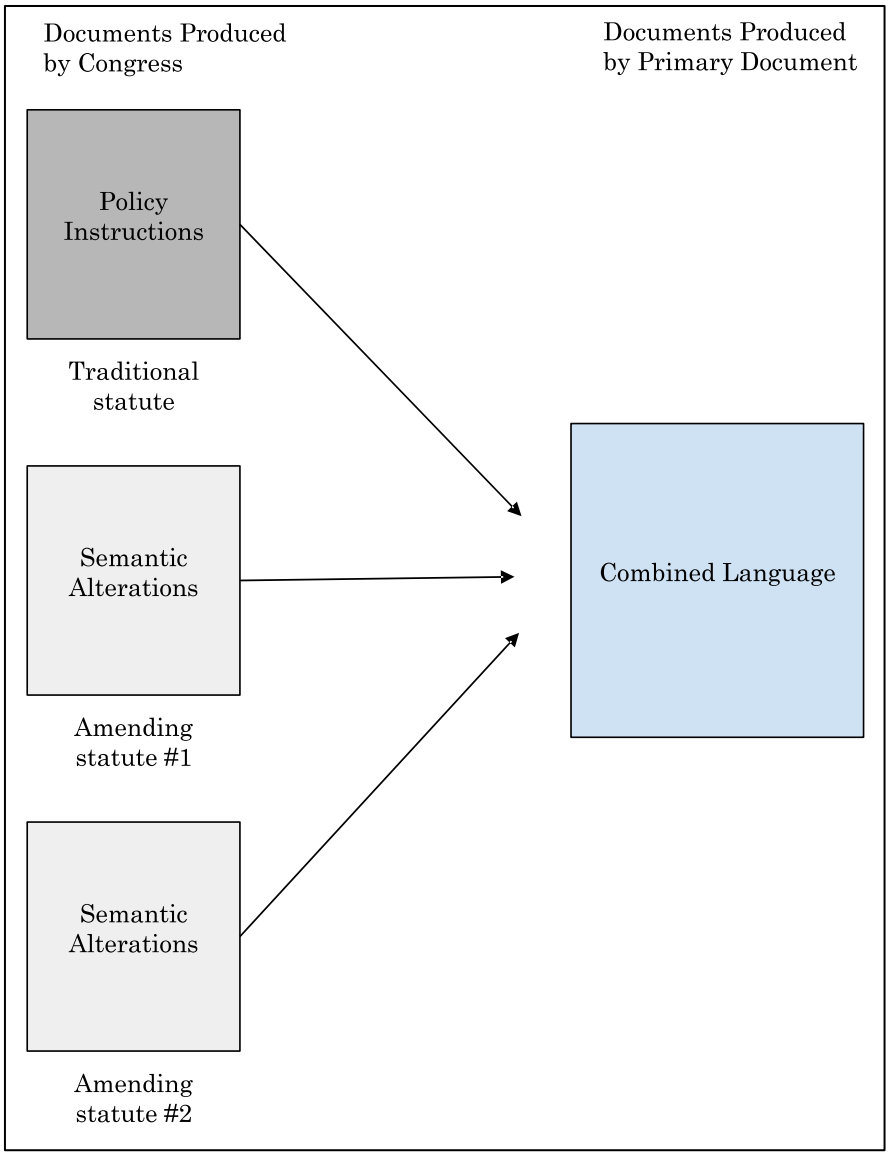
[121] *See, e.g.*, *supra* notes 65–69 and accompanying text.

[122] *See, e.g.*, *supra* notes 62–64 and accompanying text.

[123] For a discussion of this assembly process, see *id.*

[124] Interestingly, this amendment assembly was not always accomplished in early England via a secondary document, where amendments often were physically made (with knives and ink) on original parchment rolls. *See From Parchment to Print*, U.K. PARLIAMENT, https://www.parliament.uk/about/living-heritage/building/cultural-collections/archives/the-records/parchment-to-print/ ("Many parchment rolls before 1850 contain visible amendments; knives were used to scrape away the script from the top surface of the rolls, before new text was added.").

FIGURE 7: VISUAL DEPICTION OF THE AMENDED STATUTE[125]



[125] The label "Documents Produced by Primary Document" refers to the fact that, whereas linguistic choices in other documents in this Figure are dictated by a relatively unencumbered institutional actor, linguistic choices in the amended statute are largely dictated by instructions provided in primary documents. Of course, codifiers and editors must actually execute those instructions. For a detailed discussion of their work and the discretion it entails, see Cross, *Statutory Law*, *supra* note 10, at 1049–59.

In modern legal culture, the document that Figure 7 labels as the "amended statute" is often regarded as the primary source of statutory law.[126] In fact, the term "statute" regularly refers to that document.[127] It is an approach that potentially regards congressional enactments, with the richness of their policy context, essentially as booster rockets: they merely get statutory language into orbit, then quickly fall away once this feat is accomplished. In this regard, the amendatory revolution did something remarkable: it invented (or perhaps rediscovered) the contemporary idea of the "statute."

This new secondary document, the amended statute, has different characteristics from its predecessor. To illustrate, this Section chronicles the features of the amended statute that distinguish it from the traditional statute. It divides these differences into six domains: (1) temporal division, (2) temporal transparency, (3) policy presentation, (4) semantic division, (5) semantic organization, and (6) authoritativeness. Through this analysis, this Section introduces the amended statute as a unique democratic document—one with markedly different characteristics from the traditional statute.

1. Temporal division.

First, the amended statute has different temporal qualities than its predecessor. For example, the traditional statute is *monotemporal*. Since it came from only one congressional enactment, it is the product of a single historical moment. This trait is particularly relevant to any interpretive school that seeks an "original" meaning of the statute, which includes versions of both intentionalism[128] and textualism.[129] The monotemporal quality of the traditional statute allows these schools of interpretation to focus on a single, originating moment of meaning creation.

By contrast, the amended statute is *multitemporal*. Because it comes from several congressional enactments, it is the product

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[126] *See* Cross, *Statutory Law*, *supra* note 10, at 1060–62 (citing sources regarding compiled statutory documents as authoritative).

[127] *See id.*

[128] *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("This method incorporates a principle of original intent—intent of the subjective variety. Its fundamental assumption is that whatever Congress thinks, is law.").

[129] On the recent textualist approach that seeks original public meaning, see *infra* Part IV.

of multiple historical moments. Even a single sentence can consist of linguistic fragments of various enactments. In the Cross–Gluck study, we described this as the "deconstructed" quality of modern statutes.[130] This quality poses thorny challenges for any interpretive school that values original or historical meaning, which now must apply those principles to a compound document of plural origins.[131]

2. Temporal transparency.

The traditional statute is also temporally *transparent*. It is almost always presented in publication as a historical document. This presentation is reinforced by dating practices,[132] enactment numbering,[133] and retention of boilerplate legislative formalities[134]—all of which underscore that it emerged from a discrete moment of past legislative activity. In these senses, the traditional statute is a document that flags its own historical foundations. It is presented as a historical document, tied to a past moment of enactment.

By contrast, the amended statute is temporally *nontransparent*. In published form, it typically aspires to give the "current" version of each statute: not a collection of historical enactments, but a straightforward statement of the law. As a result, it effaces the historical foundations of statutory text. Acknowledgment of such foundations is (at best) relegated to secondary annotations, which are not presented as integral to the text of the statute itself.[135] Temporary statutes, which disrupt the presentation of a presentist or permanent statement of the law, are omitted altogether.[136] By presenting itself as a presentist statement of law, in short, the amended statute typically obscures the historical foundations of its text.

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130 *See, e.g.*, Cross & Gluck, *supra* note 17, at 1635.

131 Part IV further discusses the failure of modern courts to reckon with this dimension.

132 The date of enactment is prominently attached, at both the beginning and the close. *See Slip Laws*, LIBR. OF CONG., https://perma.cc/MQR6-V49T; *United States Statutes at Large*, U.S. GOV'T PUBL'G OFF., https://perma.cc/6LJL-3R5K.

133 A traditional statute is numbered according to the Congress that enacted it. *See Laws and Acts*, U.S. SENATE, https://perma.cc/9JCK-TM9Q.

134 For instance, these publications retain the enacting clause. *See id.*

135 *See Statute Compilations*, U.S. GOV'T PUBL'G OFF., https://perma.cc/FEQ4-R3SW (last updated Dec. 20, 2024); *United States Code*, OFF. L. REVISION COUNS., https://perma.cc/EQJ8-XBQN (showing the dates of amendments in the editorial notes section).

136 *See* 2 U.S.C. § 285b(1) (requiring the United States Code to include only "general and permanent laws of the United States").

3. Policy presentation.

In the traditional statute, legislative policy choices are *transparent*. That legislation presents direct articulations of policy instructions. By contrast, legislative policy choices in the amended statute are *dually submerged*. This is because the amended statute makes policy decisions that undergo two additional legislative processes: conversion and incorporation. Each obscures policy decisions that are evident in the traditional statute. To understand this idea, we must analyze these twin steps that the amended statute added to the legislative process.

a) Policy conversion. First, consider the process of policy conversion. This occurs in the drafting of the amending statute. Here, the legislature converts its policy instructions into semantic interventions—obscuring its policy choice along the way. An example can illustrate. Imagine a statute that looks to create a "Medicare for All" program. As the legislative format changes, notice how the legislative policy decision becomes submerged:

> Traditional statute: *Every American shall receive health insurance via the Medicare program, regardless of age.*
>
> Amending statute: *In section 1811 of the Social Security Act, strike "65" each place it appears and insert "0".*[137]

This introduction of conversion had significant implications for multiple audiences. For the general public, it made individual legislative proposals less readable.[138] This decreased the capacity of ordinary people to read proposed bills, respond to their content, and place real-time pressure upon their legislators for action. Increasingly, the public instead would have to rely upon secondary explanations of legislation to drive this democratic feedback loop.[139] In this way, it changed the role of the statute in a deliberative democracy, definitively removing statutory text as a focal

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[137] *See* Social Security Act § 1811, Pub. L. No. 89-97, § 102, 79 Stat. 291 (1965) (codified as amended at 42 U.S.C. § 1395c). This is a simplified hypothetical, of course—in reality, expanding the Medicare program to all Americans would require a far more extensive set of further statutory edits.

[138] *See* On the Media, *Just Read It*, WNYC STUDIOS (Sept. 11, 2009), https://perma.cc/3FRW-MP59 (observing that conversion makes bills "largely unreadable" for the public).

[139] *See id.* (urging individuals to "[g]o to organizations that are monitoring and tracking and analyzing the bill" as a necessary workaround to "having to read the whole thing [themselves]").

point for discussion.[140]

The introduction of policy conversion also had important implications for other actors, including legislators and judicial interpreters. These implications are discussed further below.

b) Policy incorporation. The obscuring of legislative policy decisions continues in the next step of the legislative process for an amended statute: policy incorporation. There, editors assemble the various amendments into a new document: a "current" statement of law. The addition of this step to the legislative process has the potential to obscure policy decisions in two senses.

First, incorporation can obscure policy decisions in the *amending* statute. In that document, a set of semantic alterations are provided. Since these are not yet incorporated into the altered document, however, their presentation in isolation can provide little clue as to their ultimate policy impact once incorporated. In the words of one treatise on statutes, amending statutes thereby require legislators (and others) to read a statute "in shreds"—that is, prior to the linguistic incorporation that will generate a unified, amended document.[141]

This policy-obscuring effect of incorporation on amending statutes was so concerning that, from the mid-1800s onward, states regularly enacted constitutional provisions to help mitigate its effect for legislators.[142] These constitutional amendments, which prohibited "blind" amendments, required amending statutes to set out the entire section of existing law to be amended.[143] In this way, they attempted to assist the reader in understanding the ultimate effect of incorporation. While the U.S. Constitution contains no such requirement,[144] chamber rules do require committee reports to include a report (colloquially known as a "Ramseyer")[145] that depicts

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[140] For a debate on the extent to which text ever served as this focal point, compare Cross, *Fair Notice Fiction*, *supra* note 58, at 513–47 (outlining challenges to using statutory text as a focal point for deliberative democracy throughout history), with Alexander Zhang, *Fair Notice Is a Sociopolitical Choice*, 74 DUKE L.J. 101, 141–42, 162–64 (2025) (discussing how statutes were read out loud as well as published in communal spaces like post offices, hotels, and social clubs).

[141] 1 JABEZ GRIDLEY SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 432 (2d ed. 1904) [hereinafter SUTHERLAND, 2d ed.].

[142] *See* CHESTER LLOYD JONES, STATUTE LAW MAKING IN THE UNITED STATES 176 (1912) ("The form usually followed seems to have originated in the Louisiana constitution of 1844–5.").

[143] *See, e.g.*, *id.* (noting that "this clause has uniformly been interpreted to forbid 'blind' amendments").

[144] On the tradeoffs between these models of amending, see OFF. OF THE LEGIS. COUNS., MANUAL ON DRAFTING STYLE, *supra* note 114, at 26 n.17.

[145] *See Our Services*, HOUSE OFF. LEGIS. COUNS., https://perma.cc/3WC5-V67V.

the committee's expectation of how incorporation will be executed after enactment, with strike-throughs and insertions annotated.

Second, with respect to the focus of this Article: incorporation also obscures policy decisions in the *amended* statute. Here, the incorporative process takes a discrete historical legislative intervention and subsumes it into a presentist statement of law. In this way, as discussed above, the amended statute makes the reader confront statutory language unmoored from any historical enactment. No longer would readers encounter the law as a series of acts tied to moments in time—particular crises, moments of opportunity, and so on. Instead, they would confront an atemporal, presentist statement of rules. This divorces statutes from the "mischiefs" they seek to remedy—mischiefs that courts have long referenced to understand the policy choices made in statutes.[146] In this way, incorporation further submerges the policy decisions in our statutory law.

Policy incorporation submerges legislative policy decisions in other ways, too. As Professor Jarrod Shobe has noted, that process often leads to omissions of "purpose" and "findings" sections that appeared in the underlying congressional enactments.[147] These are sections of law in which Congress expressly flags for readers the policy context for an enactment. As a result, Shobe observed, this editorial approach further hides the purposive (or policy-directed) dimension of statutory law.[148]

By adding the steps of conversion and incorporation to the legislative process, therefore, the amended statute obscures the legislative policy decisions beneath statutory text—in a way that its Founding Era statutory predecessor did not.

4. Semantic division.

The amended statute also changed the semantic context for statutes. In statutory law, the phrase "semantic context" commonly refers to the statutory language that surrounds a contested

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[146] On the "mischief" rule in statutory interpretation, see ESKRIDGE ET AL., CASES, *supra* note 30, at 408.

[147] *See* Shobe, *supra* note 51, at 664–66, 688–89.

[148] *Id.* at 688–90.

or interpreted phrase.[149] This context is widely considered a permissible source of statutory meaning.[150] The amended statute was noteworthy in this regard because it imagined into existence a new document—one that repackaged enacted statutory language. As that secondary document became known as the "statute," it thereby changed the linguistic context of statutory phrases. This context was changed in two different ways.

First, in the traditional statute, semantic context was *divided*. Statutes were presented as separate texts or documents. This was especially true when published as slip laws or in other formats in which statutes were published individually.[151] Even in compilations such as the Statutes at Large, however, statutes typically were presented as a collection of separate texts.[152] Semantic structure thereby encouraged readers to regard the individual congressional enactment as an organic unit, perhaps at the expense of the larger statutory corpus.

This structural feature would change in the amended statute, where semantic context increasingly was *unified*. That statute amalgamated a series of enactments into a larger document—one presented to the reader as a single text. Rather than appearing as a series of discrete enactments or as isolated interventions into the law at distinct moments, these enactments would now be combined in a single, ahistorical text: an assembled statute, and perhaps even an assembled code.[153]

To see the consequences of this modified semantic context, consider how it has reframed important canons of interpretation. One such canon is the "whole act rule," which directs interpreters to construe each act holistically.[154] The amended statute changed the "act" to which this rule applies. Previously, it applied to an

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[149] *See* John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 91–110 (2006) [hereinafter Manning, *What Divides Textualists*].

[150] *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 25 (2023) ("Courts will interpret [statutory] words [ ] in light of the full statutory context. To gather evidence of statutory meaning, a judge may turn to the rest of the provision, to the act as a whole, or to similar provisions elsewhere in the law.").

[151] *See Slip Laws*, *supra* note 132.

[152] This presentation was achieved largely via formatting decisions, whereby statutes were partitioned, contextualized, and dated in a manner that highlighted their existence as distinct documents.

[153] The United States Code can mislead readers on the extent to which it provides a unified statement of federal law, for not all statutory law is included in the Code. *See* Cross & Gluck, *supra* note 17, at 1656–63 (explaining that only half of federal law is included).

[154] *See* ESKRIDGE ET AL., CASES, *supra* note 30, at 617–21.

individual congressional enactment—and no further. Amendments invented a new idea of the "act," however—one that might combine myriad congressional enactments. As this occurred, the whole act rule would be applied to this new and larger, multitemporal document.[155] As a result, the canon would gain a significantly wider purview. To apply the whole act rule to the Federal Food, Drug, and Cosmetic Act, for example, is to apply it to hundreds of enactments.[156] In this way, the increased *semantic unity* of the amended statute invited interpreters to use semantic context in new ways.

5. Semantic organization.

The amended statute also changed semantic context in another sense. In the traditional statute, semantic context was *chronological*. When statutes were published together, it typically was in a compilation that arranged them chronologically.[157] The most notable example again was the Statutes at Large, which today still publishes enactments in chronological order.[158] In such publications, the immediate semantic context is that of contemporaneous statutes—not *in pari materia*.[159] To the extent that these publications are divided into distinct volumes, the divisions are by Congress or legislative session, not by subject matter.[160] In this way, semantic context encouraged readers to consider contemporaneous language use by the enacting legislature, perhaps at the expense of context from statutes enacted decades apart.

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[155] *See supra* notes 103–05 and accompanying text (providing examples of sections combining hundreds of enactments).

[156] *See supra* note 103 (noting amendments to a single provision of this "act").

[157] *See* COOK, *supra* note 108, at 25 ("Instead of a systematic arrangement, the tried and true chronological organization was used."); Surrency, *supra* note 112, at 477 ("All previous official collections had ordered the statutes chronologically . . . ."); *see also* Cross, *Fair Notice Fiction*, *supra* note 58, at 539–43 (discussing session laws publications and noting that statutory compilations "presented the entire corpus of enacted statutes chronologically"); Zhang, *Externalist*, *supra* note 6, at 516 ("In the mid-nineteenth century, Congress's laws were put together in chronological order each year into a series of books called the *Statutes at Large*." (emphasis in original)).

[158] *See United States Statutes at Large*, *supra* note 132.

[159] This Latin phrase is commonly used in statutory interpretation to reference materials on the same subject. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *39 n.13 ("By the common rule of construction all statutes upon the same subject, or in *pari materia*, are considered as making one system of law, and must be construed in reference to each other." (emphasis in original)).

[160] *See United States Statutes at Large*, *supra* note 132.

However, semantic context in the amended statute is *topical*. In codifications, as scholars have observed, statutory law is repackaged in the effort to construct a topically arranged code.[161] Yet this phenomenon is not limited to codifications. In noncodified statutes, Congress drafts enactments on the same topic such that they provide instructions on how to assemble a single secondary text.[162] In so doing, it groups enactments on a programmatic basis, if not a topic-wide basis.

These contextual changes have almost certainly increased the readability of the statutory corpus for both laypeople and lawyers.[163] In a regime with tens of thousands of pages of statutory law, the topical grouping of related enactments is essential for anyone attempting to navigate the law.[164] The method of achieving this, however, has resulted in a significant rearrangement of semantic context in the law. That method has used editorial rearrangement to make the law appear more unified, more topically coherent, and less temporally divided than it appears in traditional legislation.

6. Authoritativeness.

Finally, the traditional statute is *authoritative*. Under the Constitution, legal weight (or authoritativeness) is vested in documents that have survived bicameralism and presentment.[165] The traditional statute is a direct facsimile of a document that has survived these constitutional hurdles.[166] As a result, it is incontrovertibly an authoritative document—a direct report of the "supreme Law of the Land."[167]

By contrast, the amended statute is arguably *nonauthoritative*. This is because of its differing pedigree. An assemblage of

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[161] *See* Surrency, *supra* note 112, at 474–80 (tracing the evolution from chronological to topical arrangement); *see also* Cross & Gluck, *supra* note 17, at 1568 ("By creating the U.S. Code in 1926, Congress joined many state legislatures that had begun to prepare and adopt topically-arranged legal codes."); Cross, *Fair Notice Fiction*, *supra* note 58, at 543 (noting that codifications are "organized by subject matter"); Zhang, *Externalist*, *supra* note 6, at 518 ("[T]he code was divided into 'titles' based on subject area.").

[162] *See supra* notes 103–05 and accompanying text.

[163] On the need for topical arrangement, see Surrency, *supra* note 112, at 477–80 (describing efforts to produce topical compilations of statutes before governmental publications did so).

[164] *See* Listwa & Flaherty, *supra* note 51, at 74 ("But what the Statutes at Large possess in fidelity, they lack in readability.").

[165] *See* U.S. CONST. art. I, § 7.

[166] *See Slip Laws*, *supra* note 132; *United States Statutes at Large*, *supra* note 132.

[167] U.S. CONST. art. VI.

congressional enactments, the amended statute is constructed from raw materials that have survived bicameralism and presentment—and it is constructed according to instructions provided in those enactments. In most instances, however, the editorial reconstruction and presentation of those raw materials has not undergone bicameralism and presentment. Consequently, the amended statute's legal status is far less clear.

This potential nonauthoritativeness of the amended statute invests all other differences listed in this Section with potential significance. It raises pointed questions about whether courts can legitimately rely upon amended statutes—and may permissibly glean meaning from their distinctive features.[168]

B. The Institution of the Legislature

The amended statute also changed the institution of the legislature. That institution has been responsive, at various times, to the practical demands of lawmaking in an evolving society.[169] Amendments created a new set of these demands. They changed the task of lawmaking—thereby creating the need for new institutional actors, as well as for realignments of existing actors. In the vocabulary of the Cross–Gluck study, amendments thereby altered the *internal* and *external* separation of powers for the legislature.[170] They generated a legislature that functioned differently, and that interacted with the outside legal world differently, than it had previously.

To begin, consider how amendments changed the act of legislating. Prior to amendments, the task of the legislature was to issue targeted instructions to modify the status quo. In this regard, amendatory practice mirrored the communicative practices of everyday life.[171] While knowledge of prior statutes certainly was helpful to this task, it was not necessary. All the legislator truly

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[168] Elsewhere, I have argued that the published versions of amended statutes are indeed nonauthoritative and that courts therefore should not be using them. *See* Cross, *Statutory Law*, *supra* note 10, at 1090–1100.

[169] *See, e.g.*, Cross & Gluck, *supra* note 17, at 1555–60 (describing the rise of the congressional bureaucracy in the twentieth century).

[170] *See id.* at 1547, 1603–04, 1608–12.

[171] An example can illustrate: If you email a family member with updated instructions for dinner plans, you (most likely) do not provide those updates in the form of targeted linguistic edits to execute on your previous instructions (e.g., "In my email dated January 4, please insert the term 'carrots' on line 2 between 'peas,' and 'chicken stock.'"). Instead, you likely provide a new instruction that, when interpreted against the status quo of your earlier instructions, will accomplish your desired ends (e.g., "Please also buy carrots when at the store.").

needed to complete this task was a command of language and a clear-eyed sense of the policy change they wished to see in the world. Their job was to articulate that policy with clarity; it remained to the legal community to integrate that instruction into an existing legal regime.

With the amended statute, however, the job of the legislature shifted. Legislation came to be viewed as the maintenance of a particular document, and perhaps even of a comprehensive legal code. As explained above, this would require successful performance of two new legislative processes: conversion and incorporation. One of these tasks (conversion) had previously been unnecessary. However, the other (incorporation) had previously been necessary, but had been performed by outside actors—including courts, agencies, and even treatise authors. In this regard, the amended statute shifted the external separation of powers, allowing the legislature to reclaim a particular power: namely, the power to dictate how multiple statutory instructions should be knit together into a single, governing law.

At the same time, the need to perform conversion and incorporation also changed the internal separation of powers. These were very different tasks than the simple articulation of binding policy rules, and different competencies were required to perform them. To successfully advance policy goals through conversion, one needed a specific linguistic competence. To succeed at incorporation, one needed a comprehensive knowledge of the existing statutory corpus.[172] Without those competencies, one could not properly insert a new policy objective into the fabric of existing statutory language.

These were not skills that necessarily overlapped with those of successful politicians or campaigners, and ones that elected representatives therefore could be expected to possess. Insofar as legislative drafting required conversion and incorporation, therefore, it would predictably fall to actors other than the legislators themselves. In this way, the amended statute was a factor that divorced the drafter from the legislator.

In light of this development, it should not be surprising to see the rise of professional drafting offices inside Congress in the early twentieth century, a phenomenon documented in the

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[172] Elsewhere, I have labeled this form of knowledge as "regime literacy," which refers to a knowledge of where relevant rules exist within a vast semantic corpus. Cross, *Fair Notice Fiction*, *supra* note 58, at 489–90, 497.

Cross–Gluck study.[173] As legislators acknowledged when creating these offices,[174] and as legislators and outside commentators continue to document today,[175] legislators predictably require assistance with the challenge of integrating policies into existing legislation. Increasingly over the twentieth century, internal drafting offices (along with agency and interest-group consultation) have been the congressional answer to this need.[176] The amended statute is an underappreciated element in the rise of these drafting offices, which internally separated power in the legislature across elected officials and nonpartisan bureaucrats.

These realignments of power were only the first stage of contestation over the separation of powers. As Part III.C.2 and Part IV explain, courts have since opportunistically seized on the amended statute as providing new chances to reclaim policymaking powers from Congress—a next chapter in the battle over external separation of powers occurring via the amended statute. The amended statute thereby realigned the boundaries of power in our government in multiple and conflicting ways. These realignments become visible once we regard the amended statute as a distinct object of study—one that reveals the interplay between linguistic forms and institutional structures.

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[173] *See* Cross & Gluck, *supra* note 17, at 1563–73 (giving a history of congressional drafting offices).

[174] *See* Frederic P. Lee, *The Office of the Legislative Counsel*, 29 COLUM. L. REV. 381, 383 (1929) (quoting Senator Robert Owen on the value of an office to assist legislators "not entirely confident of their ability to draft a complicated act in such way as to comport with every statute that is on the statute books"); *id.* at 384 (quoting Senator Elihu Root on the need for an "officer who is familiar with existing legislation" who can "see how [a policy] fits into the existing laws of the country" and noting that a "very large part of the litigation and the miscarriages of intention on the part of the law-makers . . . comes from the fact that . . . laws are drawn without . . . a sufficient understanding of what is going to be the resultant of putting them into the same system with existing laws"); *see also id.* at 394 (noting the early use of an office to produce statutory compilations).

[175] *See, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES 18–22 (2014) (noting that, given the the policy-submerged quality of amending statutes, "reading every word is often not particularly instructive, to the degree bills contain language amending the United States Code or enacted statutes" and explaining the resulting reliance on members and staff of the committee with jurisdiction over the bill and each chamber's legislative counsel); Victoria McGrane, *Read the Bill? It Might Not Help*, POLITICO (Sept. 8, 2009), https://www.politico.com/story/2009/09/read-the-bill-it-might-not-help-026846 (quoting Representative John Conyers saying, "What good is reading the bill if it's a thousand pages and you don't have two days and two lawyers to find out what it means after you read the bill?").

[176] *See* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 338–42 (2013) (chronicling the role of agencies in New Deal statutory drafting); Cross & Gluck, *supra* note 17, at 1563–73 (chronicling this turn to congressional offices).

C. Statutory Interpretation

The introduction of the amended statute also transformed statutory interpretation. It rendered methodological originalism impossible in statutory interpretation, and it empowered the rise of textualism—an interpretive school that has been deeply reliant on this new document. This Section briefly reviews these interactions between the amended statute and interpretive method.

1. The impossibility of methodological originalism.

For decades, there has been a strong tendency across legal fields toward originalism.[177] As an academic school, originalism posits that present-day judicial answers should track the accepted answers scholars find in the Founding Era.[178] This premise has extended to legislation, where it has shaped conversations about interpretive method.[179] Here, scholars have inquired into Founding Era interpretive methods, with the hope that modern-day courts might simply continue those interpretive practices. In this way, originalists hoped that "original" practices might settle questions of modern statutory interpretation.

This sort of originalism is impossible in statutory interpretation, however. The amended statute is a document that never existed for the Founding generation. When Chief Justice John Marshall died in 1835, the first textual amendment to a federal statute was nearly a decade away.[180] There is no model in early federal practice, therefore, of how to interpret this category of document—a multitemporal, policy-obscured, semantically rearranged secondary document that we now commonly call a "statute."

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[177] *See, e.g.*, Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 607–12 (2004) (tracing the rise of "new originalism" to the early 1990s).

[178] *See id.* at 599 ("Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.").

[179] *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 27–56 (2001) (arguing that textualism is more compatible with the original understanding of Article III "judicial power"); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1088–96 (2001) (arguing that dynamic statutory interpretation is more compatible with the original understanding of "judicial power"); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110–11, 125–55 (2010) (defending interpretive canons based on their acceptance at the Founding).

[180] CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE 12 (1996) (noting Marshall's 1835 death); Act of Feb. 4, 1845, 24 Stat. 721 (providing an example of one of the first textual amendments).

As a result, many of the most challenging questions in statutory interpretation have no originalist answer. How, for instance, should interpreters reckon with the multitemporal element of the amended statute, which requires an interpreter to reconcile multiple layers of language from different moments in our history? What is its authoritativeness, given that it does not emerge directly from bicameralism and presentment? To develop originalist answers to these questions is to indulge in anachronistic or counterfactual thinking. It is to imagine the Founders' methods for reading a type of document they never confronted.

The amended statute thereby aligns statutory interpretation with various other legal fields, where legal historians have repeatedly undermined the assumptions of originalism.[181] Time and again, these scholars have illuminated the strangeness of the past—and have explained how it renders anachronistic any effort to apply centuries-old judicial answers to the modern world.[182] In statutory interpretation, the amended statute provides documentary foundation for that insight.

2. Historicizing interpretive method.

The amended statute therefore reveals that our interpretive practices could not have continued seamlessly from the Founding generation onward. Nor did they. Instead, interpretive methods evolved—and the amended statute casts light on this evolution. It offers a new understanding of this evolving history: one in which interpretive practices are historically dependent upon the changing texts they interpret.

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[181] *See, e.g.*, Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 942–44 (2015) (underscoring "the inherent differentness of the past"); Stuart Banner, *Legal History and Legal Scholarship*, 76 WASH. U. L. REV. 37, 37 (1998) ("History, or at least history written according to the conventions of late twentieth century professional historians, with an emphasis on the ways in which the past differed from the present[, i.e.,] history as an account of the pastness of the past, . . . enormously complicates the task of legal argument.").

[182] Explaining this principle in constitutional scholarship, and noting its application to statutory interpretation in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), one study cited English novelist L.P. Hartley's articulation of this principle as, "The past is a foreign country: [T]hey do things differently there." *See* William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1634 (2023) [hereinafter Eskridge et al., *Textualism's Defining Moment*] (alteration in original) (quotation marks omitted) (quoting L.P. HARTLEY, THE GO-BETWEEN 3 (1953)).

We can see this, in particular, with the rise of textualism. An interpretive school popularized by Justice Antonin Scalia and others in the 1980s,[183] textualism has become the dominant school in statutory interpretation.[184] In the words of Professor John Manning, this school advances the basic premise that "interpreters should give precedence to semantic context . . . rather than policy context."[185] It is remarkable the extent to which this approach seized upon the opportunities presented by the amended statute.

On the one hand, consider textualism's mandate to de-emphasize "policy context." The amended statute enabled this. It reformatted statutory text, creating a new document wherein policy goals were dually submerged. Through the processes of conversion and incorporation, it moved policy choices beneath the surface of the statute. In so doing, the amended statute created a fertile ground for an interpretive theory that sought to shift focus away from those policy choices.

This point is nicely illustrated by the interaction of the amended statute with one of textualism's favored interpretive canons, the "plain meaning rule."[186] That canon provides a prophylactic rule: if statutory text appears "plain" in its meaning, then interpreters should not investigate beyond the surface of the text.[187] Notice how that rule interacts with the amended statute—a text in which policy goals are increasingly submerged. As the amended statute has pushed policy goals beneath the text's surface, the plain meaning rule has forbidden readers from looking beyond that surface. In this way, the amended statute empowered an interpretive school that would direct attention away from policy goals.

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[183] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–24 (1990) (discussing the development of "new textualism" as outlined in Justice Scalia's opinions).

[184] *See, e.g.*, Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg (stating that "we're all textualists now"); *see also* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 97 (2021) [hereinafter Krishnakumar, *Whole Code Rule*] (charting the rise of textualist concerns in Roberts Court opinions). *But see* West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("It seems I was wrong. The current Court is textualist only when being so suits it.").

[185] Manning, *What Divides Textualists*, *supra* note 149, at 110.

[186] *See, e.g.*, ESKRIDGE ET AL., CASES, *supra* note 30, at 497 (presenting a revival of the plain meaning rule as a precursor to textualism).

[187] *See id.* at 497–98.

On the other hand, the amended statute also naturalized textualism's mandate to prioritize semantic context. As literary theorists have chronicled, textual structure often invites readers to regard certain documents as organic, self-contained texts.[188] By imposing greater semantic unity on the statutory corpus, the amended statute encouraged readers to take this approach to increasingly broader portions of federal law—and thereby made unity-seeking principles of interpretation seem more natural and appropriate. Moreover, the amended statute inserted amendments into a vast semantic corpus that was immediately visible to the reader. In so doing, it made this interpretive instinct even more intuitive.

Once again, this lesson is underscored by statutory interaction with textualism's preferred interpretive canons.[189] Increased semantic unity expanded the purview of the "whole act rule," for instance, as previously explained.[190] It likewise changed the appeal of the "whole code rule," which instructs interpreters to construe terms consistently or holistically across the entire code of statutory law.[191] There was no "code" of statutory law for the first century of U.S. history,[192] of course, yet the underlying principle is long-standing: in statutory interpretation, interpretive rules have long encouraged interpreters to consider semantic context even across unrelated subject-matter areas.[193] Still, increased semantic unity invited more aggressive application of this principle—and textualists have indeed applied it more aggressively, as scholars have chronicled.[194]

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[188] *See, e.g.*, CLEANTH BROOKS, THE WELL WROUGHT URN, at ix–xi (1947); SAMUEL TAYLOR COLERIDGE, BIOGRAPHIA LITERARIA 1 (Adam Roberts ed., Edinburgh Univ. Press 2014) (1817); *see also* ESKRIDGE ET AL., STATUTES, *supra* note 30, at 464 (observing the similarity of the whole act rule "to interpretation of contracts and sacred texts like the Bible").

[189] These "linguistic" canons have been widely accepted by textualists, in contrast to the "substantive" canons, which have been more controversial. *See* Barrett, *supra* note 179, at 110, 121–25 (discussing the tension between textualism and substantive canons that is absent with linguistic canons).

[190] *See supra* text accompanying notes 154–56.

[191] *See* ESKRIDGE ET AL., CASES, *supra* note 30, at 630–31 (explaining the whole code rule); Krishnakumar, *Whole Code Rule*, *supra* note 184, at 77 (describing the rule as inviting "analogies and comparisons across statutes that contain similar words or phrases").

[192] The first effort at a codification was the Revised Statutes, which came in 1874. *See supra* note 111.

[193] *See, e.g.*, 2 JABEZ GRIDLEY SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 529–35 (3d ed. 1943).

[194] *See, e.g.*, Krishnakumar, *Whole Code Rule*, *supra* note 184, at 77 ("Since the late Justice Scalia ushered in a new era of text-focused statutory analysis three decades ago, there has been a move towards holistic interpretation and 'mak[ing] sense rather than

This interpretive instinct was only further encouraged by the temporal nontransparency of the amended statute. This feature made it easier to ignore whether compared statutes were enacted contemporaneously—a feature that, as Anita Krishnakumar has documented, textualist Justices have indeed ignored with increased regularity.[195] The amended statute empowered this, shifting semantic context in a manner that de-emphasized the era of enactment.

In several ways, therefore, the amended statute invited the reader to prioritize semantic context over policy context. Textualism took that invitation and ran with it. In so doing, it offered insight into the relation between statutory form and interpretive method. It suggested an evolving, dialogic relationship between schools of statutory interpretation and the "statutes" they interpret. That is quite different from the interpretive theory often assumed by our originalist era, which promises a world of unchanged (and unchanging) interpretive practices.

IV. INTERPRETING: AMENDATORY STATUTORY INTERPRETATION

The amended statute also raises a rich set of theoretical questions for statutory interpretation. How to interpret this distinctive legal source? What method is appropriate for an assembled, multitemporal text? Analogous questions have long interested scholars in other textual disciplines, such as religious studies[196] and literary studies,[197] where compiled texts similarly appear. Such questions have also been central to theoretical debates in constitutional law, where judges and scholars have debated the effect that later amendments can (and should) have upon the

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nonsense out of the *corpus juris*' writ large." (quoting W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991))).

195 *See id.* at 82, 95–109.

196 *See, e.g.*, Jared W. Ludlow, *Paul's Use of Old Testament Scripture*, *in* HOW THE NEW TESTAMENT CAME TO BE 227, 239–41 (Kent P. Jackson & Frank F. Judd, Jr. eds., 2006) (discussing the New Testament's recontextualization of Old Testament passages). *See generally* Thomas B. Dozeman, *The Pentateuch and Israelite Law*, *in* THE CAMBRIDGE COMPANION TO THE HEBREW BIBLE/OLD TESTAMENT 187 (Stephen B. Chapman & Marvin A. Sweeney eds., 2016) (reviewing debates over sources within the Pentateuch and their relation to interpretive practice debates).

197 *See, e.g.*, T.S. ELIOT, *Tradition and the Individual Talent*, *in* THE SACRED WOOD 47–58 (7th ed. 1969) (defending a reading method for new poems as rhetorical interventions into an existing poetic corpus); *see also* MARK DAVID USHER, HOMERIC STITCHINGS: THE HOMERIC CENTOS OF THE EMPRESS EUDOCIA 1–5 (1998) (discussing centos, a poetic form that stitches together lines from different prior texts). *See generally* Julia Kristeva, *Word, Dialogue, and Novel*, *in* DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART 64 (L.S. Roudiez ed., 1980).

meaning of a larger document.[198] The amended statute asks: How should statutory interpreters construe their unique, amendatory document?

A. The Supreme Court's Proposal: Textualist Interpretation

In recent years, the Court has implicitly proffered an answer to this question. Developing a specific brand of textualist interpretation, which might be termed "original public meaning" interpretation, it has begun to deploy this new method to interpret amended statutes. To appreciate this answer to the challenge of amended statutes, it is necessary to understand both the Court's theory and its practice. Each is considered below.

1. Interpretive theory.

Launching a new project in statutory interpretation,[199] the Court has begun to assert that interpreters must seek the "original public meaning" or "ordinary public meaning" of statutes.[200] As the Court has put it, this interpretive method "seeks to afford the law's terms their ordinary meaning at the time Congress adopted them."[201] This approach has already remade significant domains of federal law—from civil rights,[202] to criminal law,[203] to

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[198] The classic example of this is the debate over incorporation of the Bill of Rights via the Fourteenth Amendment. *See, e.g.*, Adamson v. California, 332 U.S. 46, 67–68 (1947) (Frankfurter, J., concurring) (arguing for selective incorporation); *id.* at 68–92 (Black, J., dissenting) (arguing for total incorporation); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, at xiii (1998) (arguing for a version of refined incorporation whereby "the [Fourteenth] Amendment transformed the nature of the original Bill of Rights"); Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. 450, 482–89 (2020) (arguing for a "synthetic" reading of the Fourteenth and Nineteenth Amendments).

[199] *See, e.g.*, Nourse, *Unified Judicial Philisophy Paradoxes*, *supra* note 29, at 1 (describing "the Supreme Court's new interpretive philosophy"); Doerfler, *supra* note 29, at 282 (describing judges and scholars as "increasingly transitioning . . . to what one might call 'late-stage' textualism"); Eskridge & Nourse, *supra* note 29, at 1718, 1761–77 ("We have entered the era dominated by a dogmatic textualism . . . .").

[200] For an extended discussion of this development, see generally Cross, *Fair Notice Fiction*, *supra* note 58.

[201] *Niz-Chavez*, 141 S. Ct. at 1475.

[202] *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1734, 1754 (2020) (holding that the Civil Rights Act of 1964 extends to employment discrimination based on gender identity and sexual orientation).

[203] *See, e.g.*, Borden v. United States, 141 S. Ct. 1817, 1825–30 (2021) (plurality opinion) (narrowly construing the mandatory minimum sentence provision in the Armed Career Criminal Act); *Van Buren*, 141 S. Ct. at 1657–58; Rehaif v. United States, 139 S. Ct. 2191, 2195–96 (2019) (construing the "knowingly" requirement in the Gun Control Act of 1968).

environmental law.[204] As the Court's approach reshapes our law across these domains, it is essential to understand its navigation of the amended statute.

This is particularly important because, for any serious effort to locate original public meaning, the amended statute poses difficult questions. As Part III explained, for instance, the amended statute introduces a new document of uncertain authoritativeness, thereby multiplying the number of statutory documents.[205] Therefore, the amended statute raises the question: Which text should interpreters use? Is the goal to know how ordinary people understand the *congressional enactment* or the *amended statute*?

The answer can be consequential. Consider the recent case of *Dubin v. United States*.[206] That case asked whether a criminal law provision was targeted specifically at identity theft.[207] At oral argument, the petitioner focused on the amended statute, explaining the meaning that would appear if an ordinary person "were looking at the title of the U.S. Code."[208] Because the term "identity theft" appeared only once in the Code provision (in a heading), the petitioner conceded that "[t]hose words do not otherwise appear in the statute."[209] The Court accepted that premise, relying heavily upon a single statutory heading as a result.[210] Yet the

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[204] *See, e.g.*, HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2177–81 (2021) (expansively interpreting the Clean Air Act to permit certain small refinery exemption extensions under a renewable fuel program); U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1844–46 (2020) (construing the National Park Service Organic Act not to include the Appalachian Trail in the National Parks System); County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1473–76 (2020) (construing the Clean Water Act to require a permit for certain pollutant discharges).

[205] *See supra* notes 164–68 and accompanying text.

[206] 143 S. Ct. 1557 (2023).

[207] *See id.* at 1563–72 (interpreting 18 U.S.C. § 1028A(a)(1)).

[208] Transcript of Oral Argument at 53, *Dubin*, 143 S. Ct. 1557 (No. 22-10).

[209] The full discussion proceeded as follows, *id.* at 34:

> JUSTICE THOMAS: Mr. Fisher, beyond the title, there is no reference to "identity theft," right?
> MR. FISHER: Those words do not otherwise appear in the statute.
> JUSTICE THOMAS: Let's assume that the title wasn't there. What would your argument look like?
> MR. FISHER: I think it would look like most of what I've said today, which is understanding the – the broad abstract phrases "in relation to" and "without lawful authority" needs to be done through the lens of understanding this is a sentence enhancement for a particularly egregious form of an underlying crime, the predicate offense.

[210] *Dubin*, 143 S. Ct. at 1569 (basing the first portion of the opinion's statutory analysis on the fact that "[t]he title suggests identity theft is at the core of § 1028A(a)(1)"). For an argument defending the permissibility of citing this heading, see Listwa & Flaherty, *supra* note 51, at 73–87.

congressional enactment presented a very different text. That enactment mentioned "identity theft" a remarkable eight times—heavy use for a three-page statute.[211] Whether an "ordinary" member of the public would interpret the provision as targeted at identity theft, therefore, would depend in significant measure on which document that ordinary person was reading. Does original public meaning theory have a defensible way to make this choice?

A serious effort to locate the original public meaning for amended statutes would also answer further questions. As Part III explained, for instance, the amended statute is a multitemporal document.[212] Its sentences can contain linguistic fragments from various years. It therefore raises the question: Which "original" date should interpreters use?[213]

The answer begins, presumably, with the ostensible goal of this interpretive movement: to locate the meaning that would appear to the general public when it reads the amended statute. But do we assume the public rereads the entire amended sentence, even if an amendment changes only a single word? Perhaps we assume they reread the whole section? The whole statute? Must we therefore update the meaning of those larger units? Do we update the meaning of repeal-and-reenact amendments, which mostly reenact prior statutory text?[214] And how do interpreters synthesize these updated meanings with those of surrounding provisions from earlier years, which ordinary people presumably do not reread? Once again, it is incumbent upon ordinary public meaning theorists to provide principled answers.[215]

Troublingly, however, the Court has not offered answers. Instead, it has avoided these questions—devising an interpretive method that relies on fictions to ignore them. To understand these fictions, we must pivot from theory to practice in the Court's original public meaning legisprudence.

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[211] Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, § 1028(A), 118 Stat. 831 (2004) (codified at 18 U.S.C. ch. 47).

[212] *See supra* notes 111–12 and accompanying text.

[213] *See* Eskridge et al., *Textualism's Defining Moment*, *supra* note 182, at 1633 (observing that one unanswered question for textualism is: "[W]hat year is the observation point for 'original' public meaning?").

[214] On this not being a new question, see JONES, *supra* note 142, at 180–82; SUTHERLAND, 2d ed., *supra* note 141, at 445–46.

[215] Elsewhere, I have counseled against courts going down the paths posed by these questions. Since ordinary people do not read statutes, I have suggested, these are questions that invite courts to venture hypotheses about nonexistent reading practices. *See* Cross, *Fair Notice Fiction*, *supra* note 58, at 513–47.

2. Interpretive practice.

In practice, the Court has used its new methodology to introduce several new constraints into statutory interpretation. These are self-imposed limitations that the Court increasingly adheres to when interpreting a statute. Together, these constraints have empowered the Court to ignore the theoretical questions outlined in the prior Section.

First, the Court increasingly subjects its interpretations to a *temporal* constraint. Under this constraint, the Court artificially limits the time period for its analysis. To accomplish this, it ignores (or minimizes) the multitemporal dimension of amended statutory law. At times, it even adopts a temporal fiction: it pretends that the statutory text it interprets is borne of a single enactment.[216] This empowers the Court to seek "original" meaning at a single moment in time, rather than reckoning with the temporal layers of a statute.[217]

This temporal constraint joins two other constraints the Court has introduced, and which other scholars have begun to document. First, the Court now subjects interpretations to a *textual* constraint, whereby it artificially narrows the interpreted text to isolated statutory terms (such as "because," "so," and "a").[218] In this regard, the Court commits to the premise that dispositive meaning can be found in small, decontextualized linguistic units.[219] This has been labeled by Professors William Eskridge and Victoria Nourse as "textual gerrymandering,"[220] and it is perhaps

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[216] As this Article explains further, this does not mean that the Court never acknowledges or cites any statutory history. For documentation of the frequency of such citations on the Roberts Court, see Anita S. Krishnakumar, *Textualism in Practice*, 74 DUKE L.J. 573, 607–10 (2024) [hereinafter Krishnakumar, *Textualism*]. Rather, these "constraints" all serve to dramatically reduce the Court's reference to, and reliance upon, evidence otherwise relevant to the interpretive inquiry.

[217] *See also* Krishnakumar, *Statutory History*, *supra* note 31, at 282, 295 (suggesting that only 6.2% of Roberts Court opinions in statutory cases through the 2018 Term invoked amendment history).

[218] *See Bostock*, 140 S. Ct. at 1734 (relying on an interpretation of "because of"); *Niz-Chavez*, 141 S. Ct. at 1480–82, 1489–94 (relying on an interpretation of "a"); *Van Buren*, 141 S. Ct. at 1654–57, 1664 (relying on an interpretation of "so"). The latter two cases are discussed in Part IV.C–D.

[219] Excluded materials include neighboring statutory text, statutory structure, and secondary legislative documents. *See* Krishnakumar, *Textualism, supra* note 216, at 607–10 (reporting a statistical analysis that finds legislative history to be the one source the Roberts Court has "rejected almost across the board").

[220] *See* Eskridge & Nourse, *supra* note 29, at 1718.

the best appreciated of the Court's new constraints.[221] Professor Krishnakumar has previously documented how one long-standing element of this constraint, the Court's exclusion of legislative history, has untethered its interpretation of amended statutes from congressional goals.[222]

Finally, the Court often subjects interpretations to a *meaning* constraint. This can exclude consideration of types of linguistic meaning beyond ordinary meaning. Scholars have noted the Court's theoretical commitment to this constraint,[223] and they have questioned the extent to which the Court adheres to it in practice.[224] As elaborated in Part IV.C–D, this constraint particularly tends to exclude evidence of technical legislative meaning, and to troubling effect.

None of these constraints is absolute. What is noteworthy, however, is the sheer volume of evidence they do exclude. The Court now leaves behind large swaths of statutory evidence that fall into these three categories.

This Part illustrates the troubling effect of these constraints on amendatory statutory interpretation: they regularly blind the Court to the democratic decisions behind amended statutes. To

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[221] *See id*. at 1727 (noting that "new textualists . . . have increasingly focused on small bits of text . . . and have demanded plain meanings from those language morsels"); Doerfler, *supra* note 29, at 305 (noting the linguistics turn's tendency to "exaggerate the determinacy of linguistic meaning," including by "devot[ing] extended, dictionary-supported analysis to Congress's selection of a one- or two-letter word"); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1447 (2022) (noting how professional linguists would not "reduce sentences to tiny words" as recent Supreme Court opinions have done).

[222] Krishnakumar, *Statutory History*, *supra* note 31, at 277–314 (explaining that "there is substantial judicial discretion involved in the practice of inferring meaning from statutory history" without use of legislative history).

[223] *See, e.g.*, Eskridge & Nourse, *supra* note 29, at 1733 (describing the Court's method as "a form of judicial politics that weaponizes 'ordinary' meaning"); Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195, 2207–11 (2017); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365, 368–69 (2023) [hereinafter Tobia et al., *Ordinary Meaning*] ("The 2021 Term is even more notable: for the first time, a super-majority of Justices clearly accept the primacy of 'ordinary meaning.'"); Evan Zoldan, *The Conversation Canon*, 110 KY. L.J. 1, 8–19 (2022) (describing the rise of a "conversation canon" whereby the Court interprets statutory text as if it were said in ordinary conversation).

[224] *See, e.g.*, Eskridge et al., *Textualism's Defining Moment*, *supra note* 182, at 1637–40 (describing the choice of "ordinary vs. term-of-art meaning" that the Court sometimes resolves in different directions); Krishnakumar, *Textualism*, *supra* note 216, at 624 (observing the Court's "uneven stances" in practice between ordinary meaning and legal meaning); Tobia et al., *Ordinary Meaning*, *supra* note 223, at 370 ("Textualists are openly divided about *when* to apply technical rather than ordinary meaning in both statutory and constitutional cases." (emphasis in original)).

that end, it examines two Supreme Court cases that have quickly become classics in the field of legislation: *Niz-Chavez* and *Van Buren*. With respect to each case, it shows how the Court has rendered itself unable to perceive legislative goals behind amended statutes.

B. A Proposal: Amendatory Interpretation

The following pages therefore offer a critique of the Court's current method of interpreting amended statutes. Before issuing that critique, however, it is worth asking: Might we also offer something more constructive? If the Court's method of interpreting amended statutes is inadequate, then what might a superior method look like?

To answer, this Part models a competing interpretive methodology. In addition to analyzing the Court's interpretations, it deploys its proposed methodology to develop novel analyses of the statutes in *Niz-Chavez* and *Van Buren*. At the outset, it is worth briefly outlining the tenets of this alternative method.

Any method of interpreting amended statutes, this Article proposes, must answer to a *democratic imperative* in statutory interpretation. That imperative is grounded in a basic premise: in our system, the people choose representatives, and those representatives choose rules. If legislators cannot dictate rules or goals, after all, there is nothing meaningfully democratic about our system of government.[225]

This imperative places a burden on statutory interpretation. It must successfully recover the goals and decisions that legislators, when drafting the statutes, hoped to encode in statutory text.[226] And that is why the amendatory dimension of statutory law is important: it has reshaped how legislators' decisions are encoded in statutory text. This defines the key challenge for this era of statutory interpretation: to devise methods that are successful at recovering the compacted decisions of successive legislatures that are embedded in amended statutes.

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[225] For a prior article where I discuss this idea at length, see generally Jesse M. Cross, *Disaggregating Legislative Intent*, 90 FORDHAM L. REV. 2221 (2022).

[226] This does not mean that interpreters must be "intentionalists," as I have explained elsewhere. *See id.* at 2243 (distinguishing intentionalism from the advancement of legislative intent). It does mean, however, that any methodology must successfully preserve the goals that legislators hoped to accomplish via the text. *See also* Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381–82 (1907) (outlining a link between intent recovery by interpreters and democracy).

The best chance of locating those decisions, this Article suggests, comes when interpreters expressly work to uncover them.[227] As Part III.A.3 explained, two legislative processes submerge these policy decisions in amended statutes: conversion and incorporation. To properly interpret an amended statute, therefore, an interpreter must work backwards to strip away the transformations wrought by these two processes. By unwinding those processes, the interpreter can uncover the series of legislative policy goals beneath the amended statute.

This generates an interpretive method consisting of three steps. First, the interpreter must unwind the act of incorporation. To do this, the interpreter must locate the multiple semantic interventions beneath the statute. This requires use of congressional enactments to find the constituent parts of the interpreted provision. Here, the interpreter separates out the various contributions each enactment makes to the document of the amended statute.

Second, the interpreter must unwind the act of conversion. To do this, the interpreter must pinpoint the policy goals behind those various semantic interventions. What policy change did each linguistic alteration hope to encode into the statute, as it then existed? As linguists have noted[228] (and textualists have agreed),[229] this requires consideration of language not in a vacuum, but in the context in which it was chosen: that is to say, against the backdrop of the language it was replacing (or otherwise altering). As Part III.C–D illustrates, it also requires consideration of factors beyond ordinary word meaning—factors that include technical word meaning, statutory structure, and

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227 *See* Caleb Nelson, *What Is Textualism*, 91 VA. L. REV. 347, 380 (2005) ("It is in the practical application of this concept [of reviewing evidence from legislative intent] that textualists and intentionalists really part company.").

228 *See, e.g.*, H.P. Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975) ("Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.").

229 *See, e.g.*, SCALIA & GARNER, *supra* note 31, at 256 (providing the "Reenactment Canon," which holds that "[i]f the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning"); BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 907 (2018) (Gorsuch, J., dissenting) (rejecting an interpretation because it would imply that "when Congress first added and then removed language . . . it quite literally wasted its time because none of its additions and subtractions altered the statute's meaning").

evidence from secondary legislative materials.[230] All can be necessary to discover the policy change obscured by conversion.

Third, the interpreter must adopt an interpretation that, at a minimum, accounts for those policy goals. As considered further below, there may be situations where it is appropriate to balance those policy goals against competing concerns. However, a statutory interpreter should be aware that she is going against a legislative policy choice—and that, in so doing, she is promoting a competing value over the democratic value of deferring to congressional decisionmaking.

This interpretive method goes beyond the traditional approach, which has historically treated investigation of statutory history as permissible but not necessary.[231] It also goes well beyond the Court's current methodology—one that increasingly avoids the amendatory dimension of statutes altogether.

In the following Sections, the benefits of this alternative method are hopefully apparent. Through its application, this Part uncovers a wealth of new information about Congress's policy goals in the amended statutes from *Niz-Chavez* and *Van Buren*. This information was overlooked by the Court—and, in many cases, previously altogether unknown. By finding the statutory stories missing from these landmark cases, it reveals the troubling failures of the Court's current methodology for amended statutes. And by offering superior interpretations, it models a method of statutory interpretation that can better reckon with the ways that democratic decisions are encoded in modern amendatory legislation.

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[230] On the concern that statutory history without consideration of legislative history untethers interpretation from legislative goals and empowers judicial legislating, see Krishnakumar, *Statutory History*, *supra* note 31, at 315–22. By highlighting the need for these materials, this study also reveals the limits of recent survey and corpus linguistics work, which looks to settle statutory interpretation questions by testing the meaning that "ordinary" people ascribe to selected words or phrases. For a review of these literatures, see Cross, *Fair Notice Fiction*, *supra* note 58, at 491–94.

[231] *See* ESKRIDGE ET AL., CASES, *supra* note 30, at 727 ("The formal history of a statute's evolution is widely considered relevant to statutory interpretation."); *BNSF Ry. Co.*, 139 S. Ct. at 906 (Gorsuch, J., dissenting) (describing statutory history as "the sort of textual evidence everyone agrees can sometimes shed light on meaning"); Krishnakumar, *Statutory History*, *supra* note 31, at 271 ("New textualists openly embrace the 'amendment history' form of statutory history."); ESKRIDGE, INTERPRETING LAW, *supra* note 31, at 204–05 (noting the willingness of judges, including textualists, to consider statutory history).

C. *Niz-Chavez v. Garland*

Consider *Niz-Chavez*, a case that posed a question regarding the Immigration and Nationality Act (INA).[232] In § 239(a) of the INA, a rule (the "notice rule") requires that written notice be given to an alien to appear for removal proceedings.[233] Section 240A of the statute then makes nonpermanent residents in removal proceedings eligible for discretionary relief if they have been continuously present in the United States for at least ten years.[234] To calculate whether this ten-year period has passed, that section provides a rule (the "stop-time rule") that the period ends when the individual is served with "a notice to appear under section 239(a)."[235] In *Niz-Chavez*, the government had provided the information required by the notice rule across two separate notices. The case asked: Did this constitute a notice under § 239(a), thereby triggering the stop-time rule?

By asking this question, *Niz-Chavez* highlighted a puzzling tension. The INA seemed to use the term "notice" in three inconsistent ways. In various places, it used the term as a noncountable noun ("written notice"),[236] a countable generic noun ("a notice"),[237] and a countable proper noun (the "Notice to Appear").[238] As Part IV.C.2 explains, the Court in *Niz-Chavez* simply focused on one of these uses ("a notice") and made it dispositive.[239] However, a compelling interpretation would answer the bigger question: How to make sense of this inconsistency? What actually happened here?

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[232] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

[233] *Id.* § 239(a) (codified as amended at 8 U.S.C. § 1229(a)(1)).

[234] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 304, 110 Stat. 3009-547, § 240A(b)(1)(A) (1996) (codified at 8 U.S.C. § 1229b(b)(1)(A)).

[235] *Id.* § 240A(d)(1) (codified at 8 U.S.C. § 1229b(d)(1)).

[236] *Niz-Chavez*, 141 S. Ct. at 1479.

[237] *See id.*; *see also* 8 U.S.C. § 1229(a)(2)(A).

[238] *See* 8 U.S.C. § 1229(e)(1).

[239] The closest the Court came to addressing this question was to argue for a definition–defined-term relationship between the use of "notice" as a noncountable noun and its use as a countable generic noun, a structure that it said allowed the latter to override the former. *Niz-Chavez*, 141 S. Ct. at 1481–83. This argument neglects that (1) this inverts the usual relationship between definitions and defined terms and (2) the cited provision is not phrased as a definition.

1. The amendatory interpretation.

Consider an interpretation that recognizes the INA's amended foundations. Such an interpretation uncovers a series of democratic decisions by Congress—decisions that not only explain the linguistic puzzle in *Niz-Chavez*, but that also directly answer the question in the case.

To begin, this amendatory interpretation must unwind the act of incorporation. That is, it must identify the multiple enactments beneath the amended statute. In the notice rule, for instance, we discover three separate enactments. This is illustrated by Figure 8. That Figure shows the version of the notice rule that appears in the United States Code today[240]—with language from 1996 in yellow, language from 1990 in green, language from 1952 in red,[241] and language added by the Law Revision Counsel in gray.

FIGURE 8: NOTICE RULE WITH CONGRESSIONAL ENACTMENTS HIGHLIGHTED

§1229. Initiation of removal proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

Next, an amendatory interpretation must unwind the act of conversion. To accomplish this, it must ask: What legislative policy choices animated these linguistic interventions by Congress? To answer, it is necessary to revisit each congressional enactment that shaped the amended statute. This begins with the 1952 statute.

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240 8 U.S.C. § 1229.

241 These dates assume that the year of this language was not changed by subsequent strike-and-reinsert amendment.

a) 1952 statute. In 1952, Congress enacted the INA.[242] There, it required that aliens "shall be given notice" about deportation proceedings, thereby introducing "notice" as a noncountable noun into the INA.[243] It also accompanied this rule with an opportunity to be heard,[244] a protection typically paired with the noncountable form of notice in due process discussions.[245] Plainly, Congress in 1952 conceptualized "notice" as an abstraction, not a specific document.

Once enacted, this statutory requirement would be implemented by the Immigration and Naturalization Service (INS). Beginning in 1956, the INS would implement it by furnishing to aliens a particular document—one that it labeled an "Order to Show Cause."[246] Going forward, therefore, there would be a specific document Congress could envision (and reference) when it wanted to clarify notice practices under the INA. And that is precisely what it would do.

b) 1990 amendments. This began when Congress rewrote the notice rule in 1990.[247] Starting with the 1952 notice requirement, Congress restructured that rule by breaking it out into two paragraphs—each labeled as one of two distinct "notices."[248] This is illustrated in Figure 9, which uses the 1952 statute to illustrate the structural changes Congress made in 1990.

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[242] *See supra* note 232 and accompanying text.

[243] Immigration and Nationality Act § 242(b)(1), 66 Stat. at 209.

[244] *Id.* § 242(b)(3), 66 Stat. at 209.

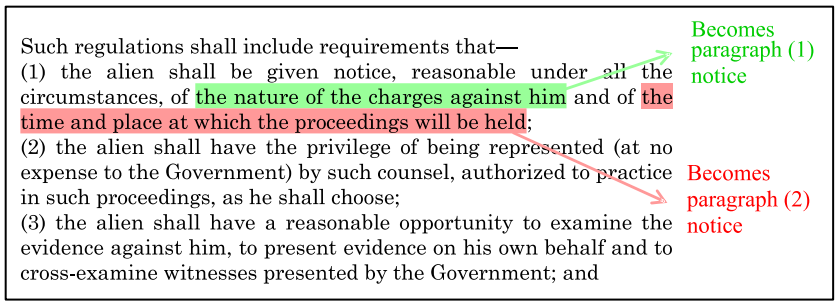
[245] *See, e.g.*, United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993) ("Our precedents [under the Fifth Amendment's Due Process Clause] establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.").

[246] *See* 8 C.F.R. § 242.1(a) (1957) ("Every proceeding to determine the deportability of an alien in the United States is commenced by the issuance and service of an order to show cause by the Service."); *id.* § 242.2; *see also* Reply Brief for Petitioner at 2, *Niz-Chavez*, 141 S. Ct. 1474 (No. 19-863) ("The statutory 'order to show cause' was modeled on the regulatory one, and the regulatory 'order to show cause' was long understood to be a specific document."); *id.* at 15 ("The agency created the 'order to show cause' by regulation in 1956, and required that it include the 'time and place' of the hearing.").

[247] Immigration Act of 1990, Pub. L. No. 101-649, § 545, 104 Stat. 4978, 5061–63 (codified at 8 U.S.C. § 1525b) (adding § 242B to the INA).

[248] *Id.* As I have noted before, Congress placed a cross-reference to the new notice requirement in the location of the prior 1952 requirement, signaling that this requirement had been moved. *See id.* § 545(e) ("Such regulations shall include requirements consistent with section 242B."). However, this history was obscured when Congress eliminated the cross-reference and reinserted the statutory text that had preceded it in 1991. *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 306(b)(7), Pub. L. No. 102-232, 105 Stat. 1733, 1753 (codified as amended at 8 U.S.C. § 242B); *see also* Cross, *Statutory Law*, *supra* note 10, at 1112–16 (discussing this history).

FIGURE 9: THE 1952 VERSION OF THE IMMIGRATION AND NATIONALITY ACT, HIGHLIGHTED TO SHOW 1990 RESTRUCTURING



In the 1990 revision, Congress nicely communicated this restructuring via headings. There, the headings in the notice rule appeared as follows:

> (a) NOTICES.—
>
> (1) ORDER TO SHOW CAUSE.— . . . .
>
> (2) NOTICE OF TIME AND PLACE OF PROCEEDINGS.— . . . .[249]

Through the subsection heading ("Notices"), the 1990 statute clearly signaled its use of "notice" as something that was countable—and plural. Each paragraph then identified a notice: (1) an order to show cause, and (2) a time-and-place notice. Additional provisions reinforced this.[250] Despite retaining historic phrasing from the 1952 statute,[251] a change in Congress was clear: it now was thinking in terms of documents, not abstract notifications. It had entered into a dialogue with INS about precisely what information needed to be furnished in the "Order to Show Cause" document, versus what information could be furnished via a second document. Unsurprisingly, therefore, the statutory locations Congress used to reference the "Order to Show Cause" (namely, a parenthetical, a defined term, and a heading) are precisely the

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[249] Immigration Act of 1990 § 545, 104 Stat. at 5061–62 (codified as amended at 8 U.S.C. § 242B).

[250] *See id.*, 104 Stat. at 5062 (adding paragraph (3) to the § 242B(a) notice rule that refers to "[e]ach order to show cause or other notice under this subsection").

[251] When Congress wants an agency to retain an existing practice—such as using the Order to Show Cause—it often attempts to retain the statutory language under which the document was created. This presumably is why Congress preserved the historic language of the INA (which referred to giving "notice") here, despite transitioning to a countable understanding of notice documents.

locations Congress often uses to clarify for an agency how its instructions dovetail with existing agency practices.[252] In these 1990 instructions, therefore, its answer to the question in *Niz-Chavez* was clear: although the agency could include time-and-place information in the order to show cause, that was not required. Instead, there existed a separate notice—the time-and-place notice under paragraph (2)—that existed solely to convey that information where necessary.[253]

c) 1996 amendments. In 1996, however, Congress changed the structure of the provision again.[254] One such change directly addressed the question in *Niz-Chavez*: the time-and-place notification requirement from paragraph (2) was relocated into paragraph (1).[255] This is illustrated in Figure 10, which uses the 1990 statute to illustrate the structural changes Congress made in 1996.

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[252] *See, e.g.*, Social Security Act § 1886(d)(3)(E), Pub. L. No. 106-554, § 304(c)(2), 114 Stat. 2763A-494, 2763A-495 (2000) (codified as amended at 42 U.S.C. § 1395ww(d)(3)(E)) ("Not less often than once every 3 years the Secretary (through such survey or otherwise) shall measure . . . ."); Social Security Act § 1833(h)(8)(B)(i), Pub. L. No. 108-173, § 942(b), 117 Stat. 2420, 2421 (2003) (codified as amended at 42 U.S.C. § 1395*l*(h)(8)(B)(i)) ("[The Secretary] makes available to the public (through an Internet website and other appropriate mechanisms) a list . . . ."); Social Security Act § 1848(o)(2)(A)(ii), Pub. L. No. 114-10, § 106(b)(2)(A), 129 Stat. 137, 139 (2015) (codified as amended at 42 U.S.C. § 1395w–4(o)(2)(A)(ii)) ("[T]he professional demonstrates (through a process specified by the Secretary, such as the use of an attestation) . . . ."). The Court describes this parenthetical as a statutory definition—a roughly accurate description for the way Congress sometimes uses parentheticals. However, Congress here was combining that practice with this second use. On the use of all these features for these purposes, see Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 GEO. MASON L. REV. 453, 471–80 (2019).

[253] Immigration Act of 1990 § 545, 104 Stat. at 5062 (creating § 242B(a)(2) of the INA).

[254] Pub. L. No. 104-208 § 304, 110 Stat. at 3009-587.

[255] *Id.*

FIGURE 10: THE 1990 VERSION OF THE INA NOTICE RULE, ANNOTATED TO SHOW 1996 RESTRUCTURING

"DEPORTATION PROCEDURES

"SEC. 242B. (a) NOTICES.—

"(1) ORDER TO SHOW CAUSE.—In deportation proceedings under section 242, written notice (in this section referred to as an 'order to show cause') shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) specifying the following:

"(A) The nature of the proceedings against the alien.

"(B) The legal authority under which the proceedings are conducted.

"(C) The acts or conduct alleged to be in violation of law.

"(D) The charges against the alien and the statutory provisions alleged to have been violated.

"(E) The alien may be represented by counsel and, upon request, the alien will be provided a list of counsel prepared under subsection (b)(2).

"(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 242.

"(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

"(iii) The consequences under subsection (c)(2) of failure to provide address and telephone information pursuant to this subparagraph.

"(2) NOTICE OF TIME AND PLACE OF PROCEEDINGS.—In deportation proceedings under section 242—

"(A) written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any), in the order to show cause or otherwise specifying—

Relocated into paragraph (1)

"(i) the time and place at which the proceedings will be held, and

"(ii) the consequences under subsection (c) of the failure to appear at such proceedings; and

Here, the intention again was clear: Congress was requiring the time-and-place information to be included within the paragraph (1) notice.

Underscoring the deliberateness of this change, Congress also addressed its linguistic and policy ramifications. Linguistically, it retitled the notice document, presumably because it became a hybrid of two prior agency documents.[256] Policywise, it created a new paragraph (2) notice to inform individuals of a *change* to the time and place of their proceeding—thereby preserving the scheduling flexibility that presumably was lost by incorporating this information into the paragraph (1) notice.[257] Throughout, it appears that the aim was to fuse two separate notices from 1990 into one. It is difficult to imagine Congress being clearer that, going forward, it expected (and required) a single notice that included time-and-place information.

d) 2006 amendments. After the 1996 amendments, Congress's dialogue with the INS continued. Since Congress had changed the statutory label for the paragraph (1) notice, no longer terming it the "Order to Show Cause," the agency likewise changed the name of the document—now labeling it a "Notice to Appear."[258] When Congress amended the INA notice provisions again in 2006, therefore, it could reference an extant agency document titled the "Notice to Appear" (with capitalization) to flag the specific document it wanted the agency to address.[259] This is why the term is conspicuously capitalized in one provision of the INA—a provision added in 2006, once this agency document existed. (This was a rare piece of statutory history that the Court did seem to notice.)[260] The result was a statute that eventually referred to "notice," in various places, in three different ways.

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[256] *Id.* This retitling also may have been attributable to the fact that Congress was combining deportation proceedings with other types of proceedings via the statute.

[257] *See id.*

[258] *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 449 (Jan. 3, 1997) ("The charging document[,] which commences removal proceedings under section 240 of the Act[,] . . . referred to as the Notice to Appear, Form I–862, replac[es] [ ] Order to Show Cause, Form I–221, that was used to commence deportation proceedings[,] and . . . Notice to Detained Applicant of Hearing Before an Immigration Judge, Form I–110.").

[259] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 3065 (codified at 8 U.S.C. § 1255).

[260] *See Niz-Chavez*, 141 S. Ct. at 1483 ("Maybe they simply reflect how clear it was by the time Congress added § 1229(e)(1) in 2006—a decade after IIRIRA's adoption—that a notice to appear *is* a specific document." (emphasis in original)); *id.* at 1484 ("Notably, too, the year after Congress adopted IIRIRA the government proposed a rule to create 'the Notice to Appear.'").

2. The Court's interpretation.

Niz-Chavez should have been an easy case. In 1990, Congress began specifying the information it expected to be collectively furnished in a single notice document. In 1996, it added a new category of information required in that initial document: time-and-place information. When the agency failed to include that information in the document, it failed to meet its statutory obligations. The stop-time rule therefore was never triggered.

The evidence that revealed this plain congressional policy, however, is evidence that the Court has blinded itself to through its pivot to the original public meaning methodology. In *Niz-Chavez*, all the hallmarks of that method were on full display.

First, the Court's opinion illustrated the *temporal* constraint. Here, the Court ignored the amendatory dimension of the INA, leading the Court to mischaracterize the statute. Despite acknowledging statutory history at certain points, the Court nonetheless implied—in the crucial portion of its analysis—that the INA provisions were straightforwardly enacted in 1996.[261] The Court therefore suggested that only two historical benchmarks were relevant: "1996 and today."[262] This led the Court to overlook key insights from the statute's dynamic history—including its transition to countable notices in 1990, as well as the relation of the 1996 amendatory restructuring to prior law.

Second, the Court in *Niz-Chavez* also deployed the next feature of its new methodology: the *textual* constraint. Here, it focused attention on a single, isolated term in the statute: the word "a."[263] Observing that this word signaled use of "notice" as a countable noun, the Court declared this use to be dispositive.[264] As a result, it never explained the larger contradiction in the case—one created by the INA elsewhere using "notice" as a noncountable noun and as a countable proper noun. The result was an interpretation that many have found lacking.[265]

Third, the Court's opinion deployed the *meaning* constraint. As the Court put it, "this Court normally seeks to afford the law's

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[261] *See id.* at 1480 (citing ordinary readers in 1996 as a proper reference point).

[262] *Id.*

[263] As the dissent put it, the Court's opinion "rest[s] its conclusion almost entirely on the word 'a.'" *Id.* at 1489 (Kavanaugh, J., dissenting).

[264] *Niz-Chavez*, 141 S. Ct. at 1480–82. The closest the Court came to addressing this question was to argue for a definition–defined-term relationship, *see supra* note 239.

[265] *See* Doerfler, *supra* note 29, at 307–08 (noting that this focus "elicited mockery," citing examples, and "sympathiz[ing] with this sort of derision").

terms their ordinary meaning."[266] While the Court acknowledged that it theoretically might consider other meanings in some instances,[267] it nonetheless focused on the meaning for an "ordinary reader."[268] As a result, the Court overlooked a key to understanding Congress's evolving instructions: namely, that Congress was borrowing terms of art coined by the agency, in the effort to require modifications to specific documents.[269]

In *Niz-Chavez*, these three constraints combined to embarrassing effect. By ignoring amendatory history (via the temporal constraint), the Court overlooked a crucial shift: Congress's transition to countable notices in 1990. By focusing on a narrow snippet of statutory text (via the textual constraint), it missed a key insight from statutory structure: a 1996 restructuring showed plain congressional intent for the INS to include time-and-place information in the initial notice. By focusing on ordinary word meanings (via the meaning constraint), it missed the key to understanding the linguistic puzzle in the case: namely, that a Congress-agency implementation dialogue had gradually coined several technical legal terms. None of these indicia of Congress's amendatory decisions are visible when statutory interpretation is reduced to (1) generalist "ordinary" meanings (2) of isolated terms (3) at a snapshot moment in time.[270]

D. *Van Buren v. United States*

A more challenging case was *Van Buren*. That case involved a police sergeant who, by using his patrol car's computer, retrieved license plate information in exchange for money.[271] Sergeant Nathan Van Buren had authority to access the license

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[266] *Niz-Chavez*, 141 S. Ct. at 1480–81.

[267] *Id.* at 1481–82 ("Of course this is just a clue. Sometimes Congress's statutes stray . . . from ordinary English. Sometimes, too, Congress . . . endow[s] seemingly familiar words with specialized definitions. But until and unless someone points to evidence suggesting otherwise, affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning.").

[268] *Id.* at 1480.

[269] These meanings also would have been apparent to an "ordinary reader" being subjected to INA removal proceedings—someone who surely would have associated the statutory terms with the agency documents they received that bore matching titles. *See supra* notes 209–15 and accompanying text.

[270] Incidentally, regarding the focus on "ordinary meaning," these word meanings presumably would be evident to ordinary people subject to INA removal proceedings because they were the names of the documents they would have received. *See supra* notes 209–15 and accompanying text.

[271] *Van Buren*, 141 S. Ct. at 1653.

plate information for certain work purposes—but obviously not for private gain. In *Van Buren*, the Court was asked whether this action by Van Buren violated 18 U.S.C. § 1030(a)(2), a provision that applies to an individual who "intentionally accesses a computer without authorization or exceeds authorized access."[272] The question was whether Van Buren had "exceed[ed] authorized access" under this provision, a phrase defined in the statute as meaning "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[273] When Van Buren accessed information for an impermissible purpose, did he violate this provision?

For the Court, this presented a choice between two competing interpretations of § 1030. Under one interpretation, an individual violates § 1030 if the individual lacks authority to access computer information in the specific circumstances in which they accessed it. Violations therefore might occur even if, under other circumstances, access by that individual was permitted. (In the following pages, this will be referred to as the *circumstance-specific* interpretation.) This interpretation spelled trouble for Van Buren, since he lacked authority to access computer information for private gain.

Under another interpretation, however, an individual violates § 1030 only if the individual lacks authority to access the computer information under *any* circumstances. (This will be referred to as the *categorical* interpretation.) This interpretation would allow Van Buren to evade liability, since he was permitted to access the computer information in some circumstances. Which interpretation was correct?

1. The amendatory interpretation.

Consider an interpretation that accounts for the amendatory foundations of § 1030. Such an interpretation does not, in this instance, uncover decisive evidence of Congress's goals. However, it does reveal strong evidence of those goals—evidence that the Court missed. In fact, the Court missed a wealth of relevant democratic evidence in the case, to embarrassing effect. Moreover, an amendatory interpretation reveals *Van Buren* to have been a potentially useful forum for key questions regarding

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[272] *See id.* at 1652 (quotation marks omitted) (quoting 18 U.S.C. § 1030(a)(2)).

[273] *See id.* (quotation marks omitted) (quoting 18 U.S.C. § 1030(e)(6)).

the interpretation of amendatory statutes—an opportunity squandered by the Court.

Such an interpretation begins, once again, by unwinding the act of incorporation. Beneath § 1030(a)(2) are four relevant enactments. This is illustrated in Figure 11. This Figure shows § 1030(a)(2) with language from 1984 highlighted in blue, from 1986 in yellow, from 1996 in red, and from 1996 subsequent to certain redactions made in 2008 in orange.

FIGURE 11: § 1030(A)(2) WITH CONGRESSIONAL ENACTMENTS HIGHLIGHTED

> (2) intentionally access a computer without authorization or exceeds authorized access, and thereby obtains-
>
> (A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);
>
> (B) information from any department or agency of the United States; or
>
> (C) information from any protected computer;

Having established the underlying enactments by Congress, we next must unwind their acts of conversion. What policy choices animated these language insertions? To answer, we must begin with the 1984 statute.

a) 1984 statute. In 1984, Congress first enacted § 1030 into law.[274] Part of a broader trend in computer crime legislation, that section was designed to penalize unauthorized access to certain computer information.[275] It included three provisions, which

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[274] Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, Pub. L. No. 98-473, § 2102(a), 98 Stat. 2190, 2192 (codified as amended at 18 U.S.C. § 1030).

[275] *See* Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1615 (2003) [hereinafter Kerr, *Cybercrime*] (noting that all fifty states enacted similar provisions, beginning with Florida in 1978).

were largely parallel in their language.[276] One such provision addressed access to financial information.[277] It is this provision that, after subsequent legislative expansion, would be at issue in *Van Buren*.

That provision created two violations regarding financial information. First, it penalized individuals who access a computer without authorization (i.e., outside "hackers") and who thereby obtain such financial information.[278] Second, for those who access a computer with authorization, it created a purpose-based test. If such individual "uses the opportunity such access provides for purposes to which such authorization does not extend," and the individual thereby obtains financial information, it would constitute a violation.[279] The 1984 statute therefore was clear: even if insiders had authority to obtain the financial information in some circumstances, they still could run afoul of the statute if they accessed the information for an unauthorized purpose.

Additionally, the 1984 statute included an exception to this purpose-based rule. Under this exception, the rule (as well as a parallel rule) would not apply "if the using of such opportunity [to access financial information] consists only of the use of the computer."[280] As early drafts of § 1030 reveal,[281] and as the committee report explained,[282] this exception was understood to exclude any

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[276] *See* Counterfeit Access Device and Computer Fraud and Abuse Act of 1984 § 2102(a), 98 Stat. at 2190 (enacting 18 U.S.C. § 1030(a) with paragraphs (1)–(3)).

[277] 18 U.S.C. § 1030(a)(2).

[278] Counterfeit Access Device and Computer Fraud and Abuse Act of 1984 § 2102(a), 98 Stat. at 2190.

[279] *Id.*, 98 Stat. at 2190–91.

[280] *Id.*, 98 Stat. at 2191.

[281] The exception originated in early drafts, where Congress was concerned with accessers who extract something of value, such as valuable government information. *See* H.R. 5616, 98th Cong. § 2(a) (1984) (adding 18 U.S.C. § 1030(a)(1)(A), which provides that statutory coverage would extend only to an accesser who "obtains . . . anything of value (other than the use of the computer) aggregating $5,000 or more . . . ."). In those drafts, its phrasing was more logical, as there was a problem: an individual always theoretically receives incidental value simply by using a computer. Changes at committee reoriented the statute around references to use, however, not to value. As this occurred, the exception became understood as a tool to address harmless employee uses generally. *See infra* note 324. This was connected to the decision not to fully mirror wire fraud and other laws, where use of a system is merely a jurisdictional hook.

[282] *See* H.R. REP. NO. 98-894, at 15 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3689, 3701 (describing the paragraph (1) exclusion as for an individual who "merely exceeds such authorization by the incidental use of the computer (e.g., if a government employee does homework or plays computer games on a government computer)"); *id.* at 22 ("There is also an exclusion in [paragraph (5)] of a person authorized to access a government computer who merely exceeds such authorization by the use of a computer in, for example, doing one's homework or playing computer games.").

incidental, otherwise-innocent computer uses, such as doing homework or playing computer games. In this way, it would exempt instances of "time stealing," wherein the accesser gains nothing beyond the inherent value of time spent on the computer.[283] Individuals with access thereby would be protected from penalty for mundane, personal computer uses. (In *Van Buren*, the Court would speculate about these policy concerns, seemingly unaware of this provision and its history.)[284]

This was the status of § 1030 for financial information in the wake of its enactment in 1984. For insiders—i.e., individuals with computer authorization—it created a purpose-based test. When accessing financial information, it asked: Had they used the computer access for unauthorized purposes? This test differed from the treatment of those without computer authorization, where no purpose-based test existed. And the purpose-based test would be subject to an exception, which was designed to protect individuals who used their computer access for seemingly harmless personal purposes.

b) 1986 amendments. Against this legislative backdrop, a key subcommittee in 1985 held hearings on proposals to amend § 1030.[285] Building on these hearings, Congress in 1986 made crucial changes to § 1030.[286] First, it removed the language that created the purpose-based test. This was replaced with new language, which penalized an individual with computer access whenever she "exceeds authorized access," a defined phrase in the amendments.[287] This is illustrated in Figure 12, which shows § 1030(a)(2) after the 1986 amendments, with language newly inserted in 1986 highlighted in yellow.

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[283] *Id.* at 20 ("The phrase 'other than the use of the computer' [in paragraph (1)] is to exclude 'time stealing' from the felony offense."); *id.* at 22 ("There is also an exclusion in this [paragraph (4)] offense if the defendant has authorization to use the computer and merely abuses that authorization by means of use of 'time stealing.'").

[284] *Van Buren*, 141 S. Ct. at 1661–62. On this Court's practice of replacing Congress's considerations of policy consequences with its own, see Nourse, *Unified Judicial Philisophy Paradoxes*, *supra* note 29, at 55–66 (discussing the Court's "consequentialist paradox").

[285] *See Computer Crime and Computer Security: Hearing on H.R. 1001 and H.R. 930 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 2 (1985) [hereinafter *Hearing*].

[286] *See generally* Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213 (codified as amended at 18 U.S.C. § 1030).

[287] *Id.*, 100 Stat. at 1213.

FIGURE 12: § 1030(A)(2) IN 1986 WITH 1986 LANGUAGE HIGHLIGHTED

> (2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

Why had Congress replaced the purpose-focused language from 1984 with the phrase "exceeds authorized access" and its definition? Explaining this change, legislative materials repeatedly attested to the same goal: simplification and clarification, not significant alteration. For instance, the House committee report said: "The purpose of this change is merely to clarify the language in existing law."[288] The Senate committee report elaborated:

> Section 2(c) substitutes the phrase "exceeds authorized access" for the more cumbersome phrase in present 18 U.S.C. 1030 (a)(1) and (a)(2)[ ] . . . . The Committee intends this change to simplify the language in 18 U.S.C. 1030(a)(1) and (2), and the phrase "exceeds authorized access" is defined separately in Section (2)(g) of the bill.[289]

And New Jersey Representative William Hughes remarked:

> This bill will alter [§ 1030(a)(1)] only to the extent necessary to simplify the language pertaining to those who "exceed authorized access" to a particular computer system. The same clarification on "exceed authorized access" will be made in 18 U.S.C. 1030(a)(2) in regard [to] trespass of financial institutions.[290]

This goal of simplification is not uncommon in the insertion of a defined term, which can be used to relocate a lengthy description into a separate definition. In what ways, however, did its further

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288 H.R. REP. NO. 99-612, at 11 (1986) ("The purpose of this change is merely to clarify the language in existing law."); *see also* Brief for the United States at 27–28, *Van Buren*, 141 S. Ct. 1648 (No. 19-783) (quoting the House and Senate Reports).

289 S. REP. NO. 99-432, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2479, 2486.

290 132 CONG. REC. 9,160 (1986) (statement of Rep. William Hughes).

linguistic changes in that definition amount to a "clarification" of the preceding test? To answer, we must closely examine the newly inserted definition—and its modifications to the descriptive language that preceded it. Consider the various phrases this amendment inserted into law.

"Exceeds Authorized Access." First, consider the defined term inserted by the 1986 amendments: "exceeds authorized access." The quotations above suggest an interpretation of that phrase as a simplification of the purpose-based test, not a significant alteration to it. That interpretation aligned with continued use of that phrase in Congress. In 1984, the committee report had repeatedly described the purpose-based test as applying when an individual with authorization "exceeds such authorization,"[291] a description repeatedly echoed by a key legislator during the 1984 enactment.[292] At the aforementioned hearing in 1985, witnesses[293] and pivotal legislators[294] continued to describe that purpose-based test as applying when an individual has "exceeded his authority." In the committee report for the amendments, such legislators also continued to use that statutory phrase (or close variants) to refer to the purpose-based test.[295] Converting that phrase into a defined

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[291] H.R. REP. NO. 98-894, at 15, 22; *see also* Kerr, *Cybercrime*, *supra* note 275, at 1630 & n.145 (citing Congress's committee reports as the primary source for understanding legislative efforts to distinguish "exceeds authorized access" tests from "without authorization" tests).

[292] 130 CONG. REC. 31,797 (1984) (statement of Sen. Charles Mathias) (discussing, as a cosponsor, the Senate bill that key sponsors used in a last-minute attempt to introduce a version they believed had fewer flaws, and glossing the rule's coverage as applying "if the scope of authorized access is exceeded" or "in excess of his authority").

[293] *See Hearing*, *supra* note 285, at 28 (statement of John C. Keeney, Deputy Assistant Att'y Gen., Criminal Division) (describing the "for purposes" language of H.R. 1001 as applying when an individual "exceeds that authority by accessing the computer for purposes to which such authorization does not extend"); *id.* at 29 (describing such language as applying to "a person who had authority to access a computer and exceeded his authority by accessing it for an unauthorized purpose"); *id.* at 31 (objecting to such language making the government prove an individual "exceeded his authority by accessing [the computer] as part of an unlawful scheme").

[294] *Id.* at 212 (statement of Rep. Hughes, Member, H. Comm. on the Judiciary) (discussing, at a hearing for H.R. 1001, a prototype for the 1986 legislation that still used "for purposes" phrasing, describing a violation under the pre-1986 language: "They have exceeded that authority, although they had access. They became a trespasser when they exceeded that authority and used it for improper purposes"); *id.* at 214 ("A person who has authority but then exceeds that authority basically at that point becomes a trespasser."). Hughes was the sponsor of the ultimate 1986 amendment. *See* 132 CONG. REC. 9,159 (1986) (statement of Rep. Hughes).

[295] S. REP. NO. 99-432, at 20 (documenting remarks by Sen. Charles Mathias and Sen. Patrick Leahy describing the current provision under § 1030(a)(3) as covering "conduct [that] exceeds the scope of his authorization"); *id.* at 21 (describing the same provision as

term—one meant to capture the same basic idea—therefore made sense as an effort to "simplify" the law.[296]

"Entitled." In addition to simplifying the law, legislators had also explained their 1986 amendments as clarifying the purpose-based test, as mentioned above. Consistent with those statements, the phrase "exceeds authorized access" was given a definition in 1986 that differed from the prior statutory language. The phrase came to be defined as meaning: "[T]o access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[297] As Professor Orin Kerr has noted, this definition seems circular: reference to an "entitle[ment]" seems no clearer than the term "authorization" that it defines.[298] So why did Congress bother with this definition, and with its notion of information one is "entitled" to obtain? What clarification did it think it was providing?

A persuasive answer appears in the record of the 1985 congressional hearing. There, a key concern was the potential chilling effect of the purpose-based test on Freedom of Information Act (FOIA) disclosures, particularly in the parallel provision regarding government computers.[299] In response, the sponsor of the 1986 amendments expressed his reluctance to fundamentally change the purpose-based test. He emphasized the desire to reach insiders who use access "for their personal gain" and thereby have "exceeded

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applying if one were to "exceed his authorization"). Interestingly, contemporaneous legislation sponsored by those legislators also used this phrase. *See* S. 1667, 99th Cong. § 102(a)(3) (1986) (containing the language: "willfully exceeds an authorization to access that electronic communication service"); S. 2575, 99th Cong. § 201 (1986) (proposing to modify 18 U.S.C. § 2701(a)(2) with the text: "intentionally exceeds an authorization to access that facility").

296 In *Van Buren*, the Court would speculate about the meaning of this phrase, never acknowledging its use in Congress. 141 S. Ct. at 1657. Professor Orin Kerr has argued that, for normative policy reasons, courts should interpret "access" broadly but "authorization" narrowly to apply to code-based internet restrictions. Orin S. Kerr, *Cybercrime*, *supra* note 275, at 1601–02 (describing this approach as "a normative proposal for the interpretation of 'unauthorized access'" that would "limit[ ] the scope of unauthorized access statutes to the circumvention of code-based restrictions"). Perhaps a similar agenda shaped the Court's interpretation in *Van Buren*, but the Court's purported methodology has rejected this sort of "partner in lawmaking" model of statutory interpretation.

297 Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, § 2(g), 100 Stat. 1213, 1215 (enacting 18 U.S.C. § 1030(e)(6)).

298 Orin S. Kerr, *Norms of Computer Trespass*, 116 COLUM. L. REV. 1143, 1146 n.16 (2016) (noting that the "term 'exceeds authorized access' is defined circularly").

299 *See, e.g.*, *Hearing*, *supra* note 285, at 148–53 (statement of Allan Robert Adler, Legis. Couns., ACLU) (outlining whistleblower and FOIA concerns); *id.* at 173–75 (statement of Charles Rowe, Publisher, American Newspaper Publishers Association & ASNE) (same); *id.* at 188 (statement of Richard Schmidt, Couns., ASNE).

[their] authority and used it for improper purposes."[300] These comments were addressed to a witness from the American Society of Newspaper Editors (ASNE), who said that the ASNE did not object to such coverage.[301] However, the witness reiterated the ASNE concern: the purpose-based test could impede access to information "we are entitled to."[302] In this regard, the witness was using common FOIA terminology, where courts[303] and agencies[304] often speak of recipients being "entitled" to government information.[305]

The witness concluded by requesting that they "work together to clarify" this issue of FOIA entitlement in the statute.[306] The bill sponsor agreed, proposing they "work together to develop some language that will make it very clear what we intend."[307] This offer was particularly noteworthy because, in the enacted legislation, nearly every concern voiced by witnesses at the hearing was addressed—and their terminology was repeatedly incorporated into the statute.[308]

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[300] *Id.* at 212 (statement of Rep. Hughes, Member, H. Comm. on the Judiciary).

[301] *Id.* at 214 (statement of Richard Schmidt, Couns., ASNE) ("We have no argument with your hypotheticals.").

[302] *Hearing*, *supra* note 285. At 214 (statement of Richard Schmidt, Couns., ASNE)

[303] *See, e.g.*, EPA v. Mink, 410 U.S. 73, 86 (1973) ("This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency."); Martin v. Merit Sys. Prot. Bd., 819 F.2d 1181, 1184 (D.C. Cir. 1987) (concluding that the public "is entitled to the cumulative result of what both [FOIA and the Privacy Act] provide" (quoting Fagot v. Fed. Deposit Ins. Corp., 584 F. Supp. 1168, 1173 (D.P.R. 1984))).

[304] For instance, agency FOIA regulations often include a provision stating: "Nothing in this [portion] shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA." *See, e.g.*, 1 C.F.R. § 304.11 (2011); 1 C.F.R. § 426.211 (2018); 6 C.F.R. § 5.13 (2016); 29 C.F.R. § 2702.1 (2022); *see also* 6 C.F.R. § 5.11(e) (2025) (providing that "[i]f the requester is a noncommercial use requester, the notice will specify that the requester is entitled to his or her statutory entitlements of 100 pages of duplication at no charge" and further entitling the requester to a free two hours of search time "regardless of whether they agree to pay estimated fees"); *OIP Guidance: The Interface Between the FOIA and Privacy Act*, U.S. DEP'T OF JUST.: OFF. OF INFO. POL'Y (last updated Sept. 30, 2022), https://perma.cc/8JD4-WS6L ("In summary, an individual's Privacy Act record can only be withheld from them when both Privacy Act and FOIA exemptions apply. This ensures that first-party requesters obtain the greatest access to which they are entitled under both statutes.").

[305] *See also* Pub. L. No. 94-409, § 2, 90 Stat. 1241 (1976) ("It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.").

[306] *Hearing*, *supra* note 285, at 214 (statement of Richard Schmidt, Couns., ASNE).

[307] *Id.* at 214–15 (statement of Rep. Hughes, Member, H. Comm. on the Judiciary).

[308] *See, e.g.*, *id.* at 145 (summary of statement by Allan Adler, Legis. Couns., ACLU) (requesting removal of coverage of insiders in § 1030(a)(3)); *id.* at 31 (statement of John C. Keeney, Deputy Assistant Att'y Gen., Criminal Division) (requesting coverage of computers in which there is a "strong federal interest"); *id.* at 156–57 (statement of George M.

Ultimately, it should be noted, any such FOIA-protecting language would be largely unnecessary. Following the broader recommendation of the American Civil Liberties Union (ACLU) (which was offered at the same hearing), the 1986 amendments would eliminate coverage of insiders from the government-computer provision—and FOIA generally does not reach the financial institutions then covered by § 1030(a)(2).[309] Still, there were several reasons why this FOIA-inspired linguistic change (to the term "entitled") still might have been made. First, this new language replaced the purpose-based test in all remaining provisions—including a new provision for "Federal interest computer[s]"[310]—so there may have been a feeling it still had purchase.[311] Second, there may have been a broader concern that any such test would be used in parallel provisions going forward, where FOIA issues could arise again. Third, there may have been a wider sense that "authorization" referred only to employer-based permissions, an approach that proved awkward when such permissions (or prohibitions) were misaligned with legal entitlements. By contrast, a reference to information one is "entitled" to access would seem to capture this broader universe of permissions, FOIA-related or otherwise.

It is therefore easy to conclude that this "clarifying" definition, with its attempt to protect access to information one is "entitled" to obtain, was an effort to (1) preserve the purpose-based test, and (2) expressly signal that the criminal provisions of § 1030 did not cover information employees might otherwise believe they have legal entitlement to obtain, such as information subject to FOIA disclosure. ("Authorization" comes from one's employer, in other words, whereas "entitlement" can come from the law.) Understood as such, it provided a linguistic nod (albeit a poorly worded one) to interest groups who wanted some recognition of their continued entitlement to certain information, notwithstanding the § 1030 test for insiders—and notwithstanding employer access rules.

Minot, Senior Vice President, Compuserve) (requesting coverage of theft of passwords); *infra* text accompanying notes 322–23 (discussing the use of the computer exception).

309 It even includes an exemption for agency materials regarding their supervision. 5 U.S.C. § 552(b)(8).

310 Computer Fraud and Abuse Act of 1986 § 2(d), 100 Stat. at 1214.

311 18 U.S.C. § 1030(a)(4).

"So." In *Van Buren*, the Court would approach this definition differently. It argued that a different term in the definition provided the sought-after clarity: the term "so." That definition refers to information an insider is entitled "so to obtain or alter."[312] According to the Court, the word "so" ordinarily serves a text-referencing function, whereby it refers back to a description given previously in the text.[313] Taking its interpretation further, the Court also suggested that "so" specifically serves a *categorical* text-referencing function, whereby it frames the level of generality for the interpreter's inquiry.[314] To adhere to the level of generality in § 1030, the Court regarded the previously described entitlement as a unified, yes-or-no category—one satisfied where an entitlement exists in at least one circumstance. In this way, the Court concluded that "so" conclusively supported the categorical interpretation of § 1030.

The conclusiveness of this interpretation was odd, in part because the term "so" has multiple meanings for legislatures. A term of art in legislative drafting, it belongs to a larger set of technical terms that legislatures use to reference statutory antecedents. As the drafting manual for the House acknowledges, several terms are used "to refer to an antecedent" in this way.[315] These can include: "such," "the," "that," and "so."[316] Unbeknownst to the Court, apparently, these terms can serve either of two functions in statutes.

Sometimes, as the Court acknowledged, these statutory terms serve a text-referencing function. However, they also can serve an *object-referencing* or *action-referencing* function. An example can illustrate. Imagine legislation that uses the term "such" in the following way:

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[312] Computer Fraud and Abuse Act of 1986 § 2(g), 100 Stat. at 1215 (enacting 18 U.S.C. § 1030(e)(6)).

[313] *Van Buren*, 141 S. Ct. at 1654–55 ("It refers to a stated, identifiable proposition from the preceding text; indeed, 'so' typically '[r]epresent[s]' a 'word or phrase already employed,' thereby avoiding the need for repetition." (quoting 15 OXFORD ENG. DICTIONARY 887 (2d ed. 1989))).

[314] *Id.* at 1656–57 ("The consequence of accepting Van Buren's reading of 'so' is the narrowed scope of 'entitled.'").

[315] OFF. OF THE LEGIS. COUNS., MANUAL ON DRAFTING STYLE, *supra* note 114, at 48.

[316] *See id.* (explaining the role of "such" to refer to the antecedent, and instructing drafters to "[a]void 'such' if 'the' works equally well"); *id.* at 21 (discussing the use of "such" in definitions); *id.* at 40 (discussing the use of "such" for citations); *id.* at 46 (illustrating the use of "such" for its action-referencing function); *id.* at 53–55 (same); *id.* at 34–35 (quoting a statute illustrating the use of "so" and illustrating the use of "so" for its action-referencing function).

> If an individual steals an automatic firearm and such firearm is used in the commission of a crime, the individual shall be imprisoned for five years.

In this usage, the term "such" is not simply referencing the prior textual formulation. Its function is not simply to repeat the phrase "automatic firearm." Instead, it specifies that the firearm used in committing a crime must be the *exact same* firearm that was stolen by the individual. Otherwise, an individual could steal a firearm, and then a *different* firearm could be used in the commission of a crime (any automatic firearm at all!), and it would trigger this unique statutory penalty for the thief. The term "such," by referencing the actual object stolen by the thief, prevents that.

This example illustrates a key purpose of this class of statutory terms. They exist to avoid a particular legislative circumstance, which might be termed *element splitting*. These are situations where item (1) can satisfy one element of a statute, while item (2) can satisfy another element—an undesirable occurrence if the legislature wishes to attach multiple predicates to a single item.[317]

In § 1030, the term "so" would make sense as an effort to prevent element splitting.[318] In that role, it would ensure that entitlement to one method of information access could not be used to exonerate the use of a different method of access.[319] Moreover, that statutory goal would be fully accomplished if "so" were interpreted to serve an action-referencing function—but not if interpreted to have a text-referencing function.[320]

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[317] Congress also frequently addresses element splitting with the statutory phrases "with respect to" or "in the case of." *See, e.g.*, 5 U.S.C. § 552(a)(6)(B)(ii) ("With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed . . . ."); 46 U.S.C. § 56308 ("In the case of any vessel constructed in the United States after January 1, 1937, which has been taken by the United States . . . the Secretary of Transportation . . . is authorized to transfer to the owner of such vessel another vessel . . . .").

[318] The term "so" is particularly necessary where, as in § 1030, legislation addresses element splitting for intangible objects. In such situations, an object-referencing term typically is insufficient (e.g., "such information" could apply to any retrieved copy of the same substantive information).

[319] The Court halfway understands this but somehow sees the issue of element splitting only with respect to non-computer modes of access. *Van Buren*, 141 S. Ct. at 1656 ("[W]ithout 'so,' the statute would allow individuals to use their right to obtain information in nondigital form as a defense to [Computer Fraud and Abuse Act] liability.").

[320] Imagine an employee who is entitled to access computer information, but must access the information via secure VPN access, with use of a password, and on a system that tracks all login occurrences. However, the employee wishes to obtain the information

If the term "so" served an action-referencing function in § 1030, then it failed to clarify the ambiguity in the 1986 amendment. To prevent element splitting, the term "so" would frame the relevant entitlement in each case.[321] However, it would not answer the further question: What if the individual *sometimes* has that entitlement? That was the question in *Van Buren*.

"Use of the Computer." Meanwhile, the 1986 amendments made another crucial change: one regarding the "use of computer" exception. This provision, too, had received comments at the 1985 hearing. There, witnesses complained that the exception was unclear,[322] with one suggesting its repeal and remarking, "It appears to have been inadvertently retained as far as [the financial information provision] because it doesn't seem to have an application there."[323] This occurred despite its seemingly clear protection of employees who engaged in personal online banking (a nascent but extant practice in 1984).[324]

In the 1986 amendments, Congress then removed this exception. Did this mean that Congress now wanted these mundane workplace computer uses covered? A closer look reveals a more complicated story. The 1986 amendment was incorrectly drafted (in multiple ways) to misleadingly suggest that it was striking the exception only for a neighboring provision—*not* for the financial information provision.[325] As a result, there are significant textual

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without leaving a digital footprint. Rather than log in with her password, she hacks into the computer information (in the same manner that any outside hacker might). Was the employee "entitled so to obtain" the information? Based on its interpretation, the Court presumably would answer affirmatively. If "so" serves a text-referencing function, then so long as the employee had some entitlement to access the information via this particular computer, she was "entitled so to obtain" the information.

[321] In *Van Buren*, for instance, "so" would frame it as an entitlement to access the information via login to his patrol car computer.

[322] *Hearing*, *supra* note 285, at 130 (statement of David Geneson, Assistant U.S. Att'y, D.C.) ("There is a question as to whether or not that authorization under the language in 1030 precludes prosecution because of the conditional words which follow a certain subsection in 1030 which suggest that the use of the computer alone does not constitute criminal conduct.").

[323] *Id.* at 210–11 (statement of Joseph Tompkins, Chairman, Am. Bar Ass'n Task Force on Computer Crime).

[324] *See* DEBORAH GONZALEZ, MANAGING ONLINE RISK: APPS, MOBILE, AND SOCIAL MEDIA SECURITY 187–88 (2014) (recounting the early history of online banking).

[325] *See* H.R. 4718, 99th Cong. (as introduced in the House of Representatives, Apr. 30, 1986) (drafting incorrectly the elimination of the exception as an amendment to subsection (a)(3) of 1030 and using an amendatory subsection heading: "MODIFICATION OF EXISTING GOVERNMENT COMPUTERS OFFENSE"). Inside Congress, there was some recognition of these drafting errors: the version that passed the House and was approved by Senate committee corrected some (but not all) of the misleading traits of the introduced version.

clues that the striking of this exception from the financial information provision may have been accidental. However, some evidence does suggest the contrary as well.[326] Uncertainty therefore surrounds the repeal of this exception.

Lastly, the 1986 amendments also deployed the "use of computer" exception in an interesting new provision.[327] To create that provision, they paired the exception with the new "exceeds authorized access" test.[328] This pairing suggested that the "exceeds authorized access" test would reach mundane personal computer uses if left unmodified. (This assumes that the meaning of the exception was unchanged from 1984—an assumption that committee materials supported,[329] and that they would continue to support in 1996.)[330]

Putting it all together. This was the status of § 1030 for financial information after the 1986 amendments. That status was, frankly, a mess. For individuals with computer authorization, it

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See H.R. 4718, 99th Cong. (as reported by S. Comm. on the Judiciary, Sept. 3, 1986) (correcting the drafting as an amendment to subsection (a)(3) and adding "USE OF COMPUTER EXCLUSION" into the heading, but leaving the amendment in a subsection otherwise amending subsection (a)(3), not (a)(2)). Worryingly, however, the final version backslid. It introduced new drafting errors that similarly suggested the exception was being struck only for the neighboring provision. *See* Pub. L. No. 99-474, § 2(b), 100 Stat. 1213 (striking "USE OF COMPUTER EXCLUSION" from the heading and replacing the lead-in language to incorrectly frame the provision as an amendment only to subsection (a)(3)). Striking it for the neighboring provision also made sense because other changes made that provision apply only to outside accessers, and therefore made the exception irrelevant.

[326] Most proposed drafts from 1984 had not extended this exception to the financial information provision. *See* H.R. REP. NO. 98-894, at 2–3 (providing the reported version of H.R. 5616 § 2(a) and adding 18 U.S.C. § 1030(a)); H.R. 5690, 98th Cong. (1984) (comprising a proposed alternative legislative vehicle); Sen. amend. no. 7101, H.R. 5616 (1984) (comprising another proposed alternative: an amendment in the nature of the substitute for H.R. 5616). A proposed 1985 amendment looked to (quietly) remove that exception. *See* H.R. 1001, 99th Cong. (1985) (proposing to replace references to the use-of-computer exception to paragraphs "(2) or (3)" with "(3) or (5)," while also inserting it via a parenthetical into new paragraph (4)). And witnesses in 1985 had complained that the provision was unclear and potentially irrelevant. *See supra* note 323 and accompanying text.

[327] Computer Fraud and Abuse Act of 1986 § 2(d), 100 Stat. at 1213 (adding paragraph (4) to 18 U.S.C. § 1030(a)).

[328] *See* 18 U.S.C. § 1030(a)(4) (penalizing one who "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer").

[329] *See, e.g.*, S. REP. NO. 99-432, at 9 (describing the distinction that the provision achieves from the mail and wire fraud statutes, where system use is simply the jurisdictional hook).

[330] *See* S. REP. NO. 104-357, at 4 (1996) (describing the exception as excluding a "loss of computer time"); *id.* at 9 (describing the amendment narrowing the exception as targeting major instances of time stealing).

removed the language of the purpose-based test and replaced it with a defined term—one that admittedly was ambiguous. However, the defined term itself was consistently used in Congress as a shorthand for the purpose-based test that preceded the 1986 amendments. Secondary legislative materials expressly and repeatedly stated that Congress was not attempting to substantively change that test. A "clarifying" definition of that defined term made sense as an effort to address a targeted interest group concern while mostly preserving that test. And the statutory word that would lead the Court to a different conclusion in *Van Buren*—the term "so"—had a technical meaning that undermined the Court's interpretation. Meanwhile, the 1986 amendments also eliminated the "use of computer" exception that protected employees who engaged in mundane personal computer use—an elimination that may have been accidental or overlooked.

c) Subsequent amendments. After 1986, Congress made several more noteworthy amendments to § 1030. The first was enacted in 1994.[331] There, Congress added civil penalties for violations of § 1030(a)(2).[332] In *Van Buren*, the Court pointed to these penalties—with their limited scope—as illuminative of the scope of § 1030(a)(2).[333] In so doing, the Court never acknowledged that the civil penalties were enacted eight years after the provision they ostensibly illuminated.[334]

Finally, amendments in 1996[335] and 2008[336] would stunningly expand § 1030(a)(2). Prior to 1996, that provision merely protected financial information held by three types of fiscal institutions.[337] After the 1996 and 2008 amendments, however, its scope was entirely different. It now criminalized unauthorized access to any information whatsoever and on virtually any computer.[338]

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[331] Computer Abuse Amendments Act of 1994, Pub. L. No. 103-322, 108 Stat. 2097 (codified as amended at 18 U.S.C. § 1030).

[332] *Id.* § 290001(d), 108 Stat. at 2098.

[333] *See Van Buren*, 141 S. Ct. at 1659–60.

[334] *See id.*

[335] Economic Espionage Act of 1996, Pub. L. No. 104-294, § 201(1)(B), (4), 110 Stat. 3491, 3492–93 (1996).

[336] Former Vice President Protection Act of 2008, Pub. L. No. 110-326, §§ 203, 204, 122 Stat. 3561, 3561–63 (2008) (codified as amended at 18 U.S.C. § 1030(a)(2)(C)).

[337] It applied to such information held by financial institutions, credit card companies, and credit reporting agencies. *See* Computer Fraud and Abuse Act of 1986, 100 Stat. at 1213 (codified as amended at 18 U.S.C. § 1030).

[338] The only requirement was that the computer was used for any communication "in interstate or foreign commerce." Former Vice President Protection Act of 2008, 122 Stat. at 3563 (codified as amended at 18 U.S.C. § 1030(a)(7)). The 1996 statute first extended it to (1) information from any department or agency of the United States and (2) computers

During congressional discussion of the 1996 expansion, the situation presented by *Van Buren* was directly addressed in Congress. As Senator Patrick Leahy explained, a General Accounting Office report had shown that individuals with authorized access to a National Crime Information Center (NCIC) database had "used access to the NCIC for personal purposes."[339] Extension of § 1030(a)(2) to federal agency databases would reach that conduct, Leahy said—a basic goal of the legislation.[340]

That expanded version of § 1030, with its unauthorized access rule for virtually every computer, remains the law today.

2. The Court's interpretation.

Van Buren was a hard case. A series of puzzling modifications had been made to the statute in 1986, leaving no definitive answers about whether Congress was trying to remove coverage of individuals such as Van Buren. The clearest indication on that front arguably came from secondary legislative documents, which spoke with unusual clarity about an intention to leave the prior statutory test intact. That interpretation fit with the use of key phrases in both statutory text and secondary documents.

Meanwhile, subsequent amendments posed interesting questions about whether, when legislators drastically expand a provision, their background understanding of the provision can remake its legal scope. Secondary legislative documents indicated that legislators understood at least one expansion (in 1996) in accordance with the purpose-based test for § 1030. Reliance upon that evidence to shape the meaning of language inserted in 1986, however, would require a model of amendment interaction that, while it has appeared in constitutional interpretation, is generally unfamiliar to statutory interpretation.[341] *Van Buren* thereby posed interesting, unexplored questions

involved in an interstate or foreign communication. Economic Espionage Act of 1996, 110 Stat. at 3492 (codified as amended at 18 U.S.C. § 1030).

339 142 CONG. REC. 23,784 (1996) (statement of Sen. Leahy). Leahy had sponsored bills that were incorporated into this Act. *See id.* at 23,783.

340 *Id.* at 23,784 ("This bill would criminalize these activities by amending the privacy protection provision in section 1030(a)(2) and extending its coverage to Federal Government computers.").

341 This approach would differ from the more familiar approach in statutory interpretation of treating the provision as subsequent legislative history. On the concept of subsequent legislative history and the minimal weight courts typically give it, see ESKRIDGE ET AL., STATUTES, *supra* note 30, at 631–76.

about the potential of dynamic interactions between statutory provisions from different years.

Additionally, the case provided an intriguing chance for reflection on whether, in addition to locating Congress's democratic goals, there is a role for courts as "partners in lawmaking" in statutory interpretation.[342] On the issue in *Van Buren*, the evidence of Congress's goals was weak and confused, suggesting that a proactive role for courts would not undermine clear democratic decisions. Such a proactive role could have taken several forms in *Van Buren*. For instance, I have argued before that courts may remedy drafting errors plainly unintended by legislators—and such an error arguably occurred with the elimination of the "use of computer" exception in § 1030.[343] Orin Kerr also has argued for judicial use of tools such as constitutional avoidance to openly guide "exceeds authorized access" statutes toward normatively desirable standards.[344] *Van Buren* provided a clear opportunity to consider whether such approaches have a place in contemporary statutory interpretation, in addition to preserving Congress's goals.

Van Buren therefore presented a statutory puzzle rich in questions—yet lacking easy answers. At a minimum, however, any such answer should have reckoned with the democratic evidence in the effort to uncover Congress's goals. In this regard, the Court plainly failed. Adopting the categorical interpretation of § 1030, it overlooked an astounding quantity of democratic evidence. As a result, it failed to develop an adequate understanding of the statute before it—and the questions it potentially posed.

This failure by the Court is worth detailing. In *Van Buren*, the Court ultimately advanced six statutory arguments.[345] Each overlooked pivotal democratic evidence. Figure 13 illustrates this. It lists the Court's six arguments in the left column and the contradictory (yet missing) democratic evidence in the right column. The arguments are divided into groups, based on which of the Court's three constraints applies. For brevity, the abbreviation "C.I." is used to refer to the categorical interpretation.

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[342] *See id.* at 332–33 (discussing the "partner" in lawmaking model in statutory interpretation).

[343] *See* Jesse M. Cross, *The Staffer's Error Doctrine*, 56 HARV. J. ON LEGIS. 83, 121–38 (2019).

[344] Kerr, *Cybercrime*, *supra* note 275, at 1658–60.

[345] This Section does not consider the Court's precedent-based argument, which addresses *Musacchio v. United States*, 577 U.S. 237 (2015). *See Van Buren*, 141 S. Ct. at 1660.

FIGURE 13: *VAN BUREN* STATUTORY ARGUMENTS, PAIRED WITH MISSING CONTRADICTORY EVIDENCE

Court Interpretation	Missing Democratic Evidence
Temporal Constraint	
C.I. finds symmetry between two violations in § 1030	No symmetry in original 1984 violations No evidence 1986 amendment altered one violation for new symmetry
C.I. has fewer violations without civil liability	Civil liability not added until 1994
Textual Constraint	
C.I. interprets "exceeds authorized access" test to exclude mundane violations (e.g., personal email)	Congress had separate exception to exempt mundane violations 1986 amendment paired new "exceeds authorized access" provision with such exception
Inherent meaning of "exceeds authorized access" is narrower than 1984 test	Legislators and witnesses consistently used phrase to reference 1984 test
Presumption of meaningful variation suggests 1986 amendments narrowed § 1030	Congressional actors repeatedly stated goal to preserve and clarify 1984 test
Meaning Constraint	
Inherent meaning of "so" is text-referencing function	Technical legislative meaning of "so" includes action-referencing function

It is remarkable for a court to make six arguments and for *every single argument* to overlook contradictory democratic evidence. That is the troubling potential of the Court's new methodology.

In *Van Buren*, the Court reached that potential by deploying its three constraints. First, consider the *temporal* constraint. In its opinion, the Court minimized the amendatory dimension of § 1030—a flaw that led the Court again to mischaracterize the statutory provision. According to the Court, in 1986 "Congress passed the [Computer Fraud and Abuse Act (CFAA)], which included the provisions at issue in this case."[346] Immediately thereafter, the Court quotes the primary "provision[ ] at issue"—which

[346] *Id.* at 1652.

was actually enacted partly in 1984 and partly in 1986.[347] Figure 14 shows this passage of the Court's opinion, with language from 1984 in blue and from 1986 in green.

FIGURE 14: MAJORITY OPINION IN *VAN BUREN* DESCRIBING § 1030, ANNOTATED BY UNDERLYING STATUTE

> The Act subjects to criminal liability anyone who "intentionally accesses a computer without authorization or exceeds authorized access," and thereby obtains computer information. 18 U.S.C. §1030(a)(2).

As Part IV.D.1 chronicled, there were further amendatory layers beneath § 1030. This provision was extended to situations such as Van Buren's in either 1996 or 2008.[348] All of these provisions were inserted as amendments to Title 18 of the United States Code, which was enacted into law in 1948.[349] The Court effaced this amendatory history—preferring to pretend it simply interpreted a provision from 1986.

This fiction warped the Court's opinion in multiple ways. As shown above, the Court consistently referred to the statutory provision simply as "the CFAA," even though the CFAA did not enact § 1030, but simply made targeted (but pivotal) amendments to it in 1986.[350] The Court also repeatedly cited to the United States Code, not the underlying statutes—a decision that hid the multiple statutory texts beneath the Code's language.[351] Remarkably, this left the Court with no actual statutes to cite in its brief discussions of statutory history.[352] Throughout, the effect was to

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[347] Counterfeit Access Device and Computer Fraud and Abuse Act of 1984 § 2102(a), 98 Stat. at 2190; Computer Fraud and Abuse Act of 1986 § 2(d), 100 Stat. at 1213. For an illustration of pieces from each law, see *supra* Figure 11.

[348] Economic Espionage Act of 1996, 110 Stat. at 3491; Former Vice President Protection Act of 2008, 123 Stat. at 3563. On the coverage under each amendment, see *supra* notes 335–38 and accompanying text.

[349] Act of June 25, 1948, ch. 645, § 1, 62 Stat. 683.

[350] *But see* Kerr, *Cybercrime*, *supra* note 275, at 1598 n.11 ("In practice, however, courts and commentators use both labels to refer to the entire federal unauthorized access statute, 18 U.S.C. § 1030."). For an example of the Court again making this interpretive elision, see Facebook, Inc. v. Daguid, 141 S. Ct. 1163, 1167 (2021) (citing the interpreted statute only as "The Telephone Consumer Protection Act of 1991," despite that statute having inserted the relevant language into the Communications Act of 1934).

[351] The lone exception is an initial citation to the 1984 statute in the Statutes at Large. *Van Buren*, 141 S. Ct. at 1652.

[352] *Id.* at 1660 (citing the Code Supplement for the 1984 statute); *id.* at 1652 (citing the current Code for the 1996 and 2008 expansions).

exaggerate the extent to which § 1030 was the result of a single snapshot in 1986, instead of resulting from a series of linguistic interventions by Congress.

As noted in Figure 13, this temporal constraint led the Court to arguments about statutory structure unmoored from any plausible theory of Congress's underlying policy goals. It also contributed to the Court missing perhaps the most useful evidence of those goals—evidence that revealed a desire in 1986 for continuity of pre-amendatory meaning.

Next, consider the Court's *textual* constraint. While ultimately advancing several statutory arguments, the Court again focused heavily on a single word: the term "so."[353] In a multipage analysis, the Court claimed that this term provided a dispositive answer to the case.[354] This myopic focus on "so" led the Court to neglect a wealth of primary and secondary evidence—documents that, as outlined above, spoke more directly to Congress's preferred resolution of the issue in the case.

Third, the Court's opinion illustrated the *meaning* constraint. When interpreting the term "so," the Court expressly sought its "ordinary usage."[355] This allowed the Court to ignore the fact that, as Part IV.D.1 explained, the term "so" has multiple technical meanings for legislatures. Rather than confront those textual ambiguities, however, the Court simply applied the meaning constraint in its opinion—and thereby ignored these technical legislative meanings. This omission is particularly noteworthy because, elsewhere in its opinion, the Court concluded that technical definitions can override generalist meanings.[356]

Van Buren therefore illustrates again the perils of the Supreme Court's new methodology. By ignoring amendatory history (via the temporal constraint), it relied on confused claims about statutory structure—and overlooked the crucial goal of the 1986 amendments vis-à-vis preceding law. By ignoring neighboring statutory text (via the textual constraint), it missed a key exception in the law, among other provisions. By ignoring secondary legislative materials (via the textual constraint), it neglected the

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353 *Id.* at 1654–57.

354 *Id.*

355 *Van Buren*, 141 S. Ct. at 1655 (citing 7 U.S.C. § 171(8), 18 U.S.C. § 648, 18 U.S.C. § 1163, and 18 U.S.C. § 1708) ("Myriad federal statutes illustrate this ordinary usage.").

356 *See id.* at 1658–59 (adhering to the technical meaning of "access," and suggesting this is consistent with the ordinary meaning approach).

clearest evidence of Congress's goals regarding the question at issue. By focusing solely on "ordinary" word usage (via the meaning constraint), it erroneously found clarity in a crucial, ambiguous term. In short, the Court deployed a jurisprudence poorly designed to locate the democratic decisions beneath our amendatory statutes—and unable to confront the rich interpretive questions that such statutes can raise. Hopefully, this Part has contrasted that jurisprudence with a more compelling interpretive model—one capable of developing more democratically responsive interpretations in a republic of amended statutes.

CONCLUSION

There has been a quiet revolution in U.S. lawmaking. Due to decades of amendments, U.S. law is now dominated by a document unknown at the Founding: the amended statute. This amended statute has created new (and largely unrecognized) challenges for the field of legislation. It demands new ideas about how to conceptualize, teach, and interpret statutory law. This Article has attempted to begin that conversation, awakening the legal community to the vital importance of understanding this legal source. The sooner the legal profession abandons its misplaced neglect of it, the sooner we will be able to focus squarely on a fascinating challenge posed by our modern statutory regime: the challenge of understanding the amended statute.

APPENDIX A

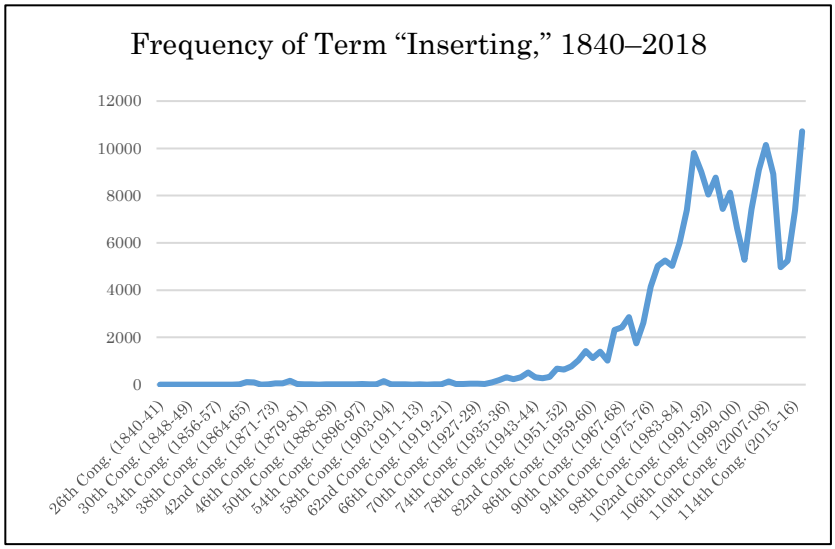
In the study conducted for this Article, the Statutes at Large were searched for the number of appearances, in each Congress, of six terms that commonly signal the presence of a language-editing amendment. This Appendix shows the results of those searches by individual term, and it provides a brief explanation of this study's methodology.

A. Individual Term Results

The graphs below show the number of appearances of each searched term from the 26th Congress (1840–1841) through the 115th Congress (2017–2018). Due to space constraints, each set of x-axis labels list every fourth Congress, but the data reported includes every Congress in the studied period.

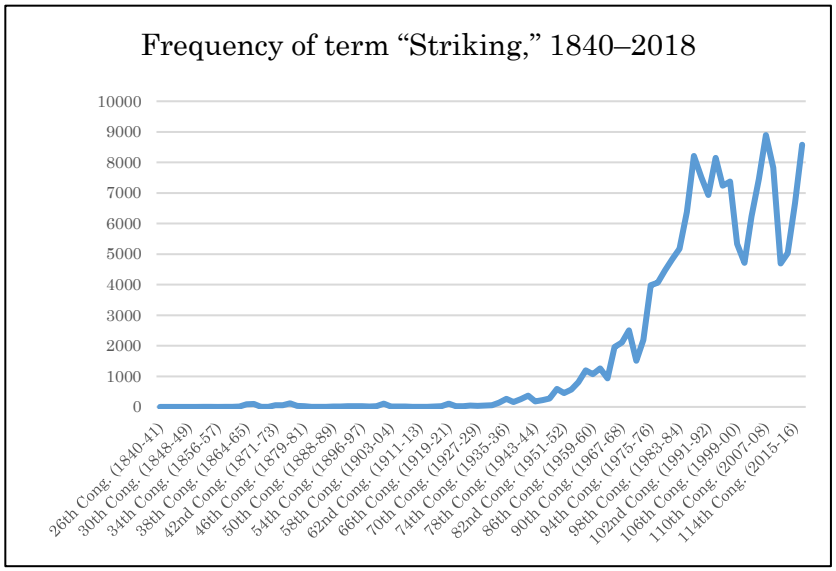
1. Inserting.

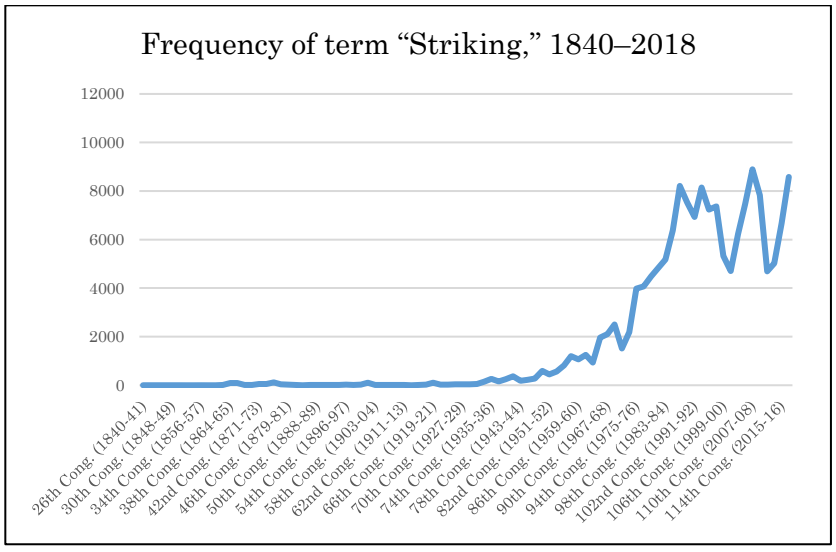
The first term searched in this study was "inserting." The most frequently used of the searched terms, its usage has exceeded 10,000 appearances in a single Congress, as shown below.



2. Striking.

The second term searched in this study was "striking." The below graphs show its volume of appearances in two formats: one with a y-axis that extends only to 10,000 (so as to clearly illustrate changed usage over time) and one with a y-axis of 12,000 (for ease of comparison to prior graphs).

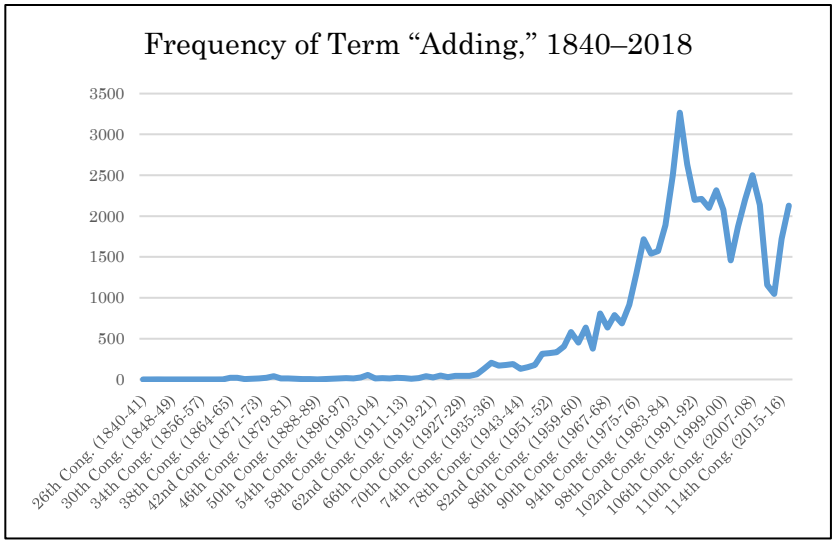


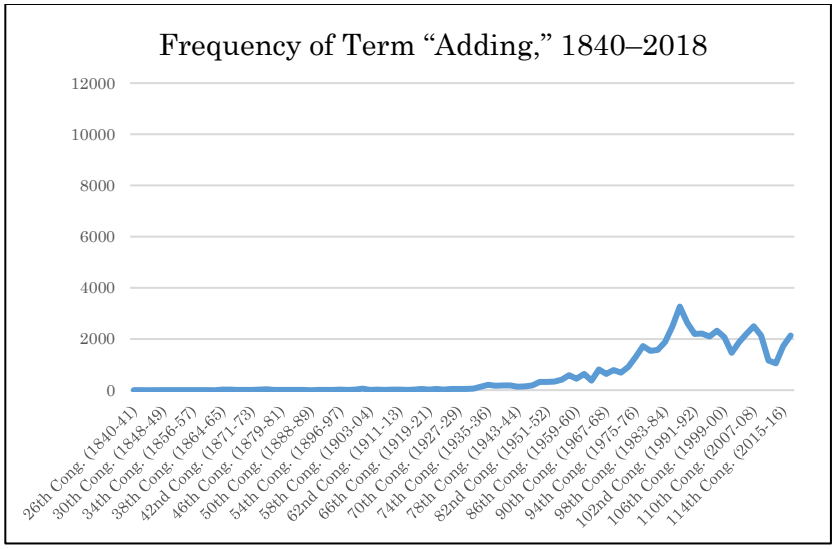


3. Adding.

The third term searched in this study was "adding." The below graphs show its volume of appearances in two formats: one with a y-axis that extends only to 3,500 (so as to clearly illustrate changed usage over time) and one with a y-axis of 12,000 (for ease of comparison to prior graphs).

On the case-by-case review of the results for this term to filter unrelated results, see the methodology discussion below.

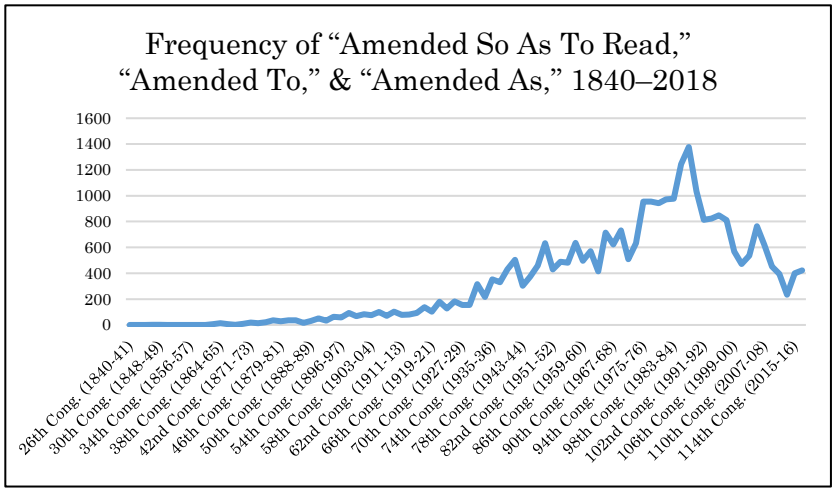


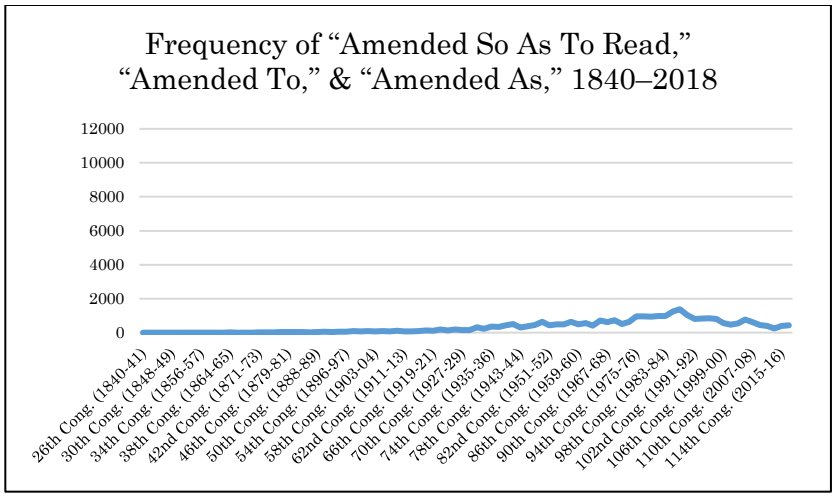


4. Amended so as to read; amended as; amended to.

A final search looked, collectively, for three similar phrasings: "amended so as to read," "amended as," and "amended to." The below graphs show their volume of appearances in two formats: one with a y-axis that extends only to 1,600 (so as to clearly illustrate changed usage over time) and one with a y-axis of 12,000 (for ease of comparison to prior graphs).

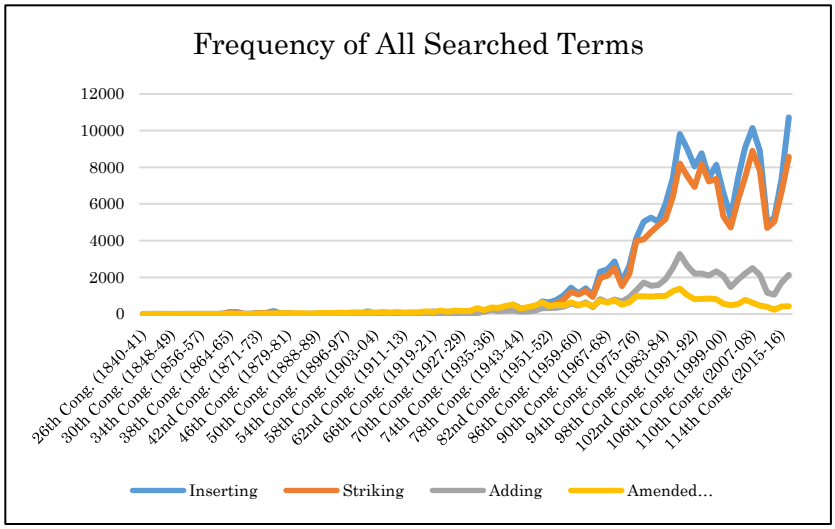
On the case-by-case review of the results for the term "amended as" to filter unrelated results, see the methodology discussion below.





5. Putting it all together.

The below graph shows the volume of appearances of each of the terms discussed previously in this Appendix. The y-axis extends to 12,000 for comparison between the terms.



B. Methodology

For the searches in this study, versions of the Statutes at Large were retrieved from the Library of Congress website (loc.gov)[357] for Congresses through the 86th Congress, and from the Government Publishing Office website (govinfo.gov)[358] for the 87th Congress onward. As those documents are in PDF format, searches of their texts relied on text searching of scanned PDFs. Accordingly, the study was unavoidably limited by the imperfections of this optical scanning, which presumably led to a fraction of term occurrences not resulting in search hits.

Those documents then were searched using two distinct methods—one for an initial count and another for confirmation of accuracy of that initial count. Regarding the first method: In each publication, a search was conducted for each term listed above, and the portion of the results that appeared within public laws was identified (as opposed to other sources in the Statutes at Large, such as private laws, treaties, or proclamations). When any publication search returned fewer than twenty results, the

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[357] *About This Collection*, LIBR. OF CONG., https://perma.cc/J9JN-DK2F.

[358] *See supra* note 132.

results were individually reviewed for relevance, and potential variants of terms (e.g., "insert") also were searched, due to a desire to locate with precision the emergence of language-editing amendments. Results were periodically subjected to individual review to ensure that returned results were relevant.

Several term-specific review practices warrant comment. Results for the phrase "amended as" always were individually reviewed for relevance, as the phrase was also used frequently in early legislation to introduce instruction-updating amendments, and in later legislation to redundantly introduce language-editing amendments already captured by other searched terms. The term "adding" was searched with a space at the beginning to avoid any terms that might end with that spelling. Through the 82nd Congress, searches for "adding mach" and "adding and" also were conducted, and the results were subtracted from the total number reported so as to address the phenomenon of legislation in this period that commonly referenced adding machines.

On rare occasion, it should be noted, language-editing amendments are made in federal statutes without employing any of the six searched terms.[359] Nonetheless, two reasons counseled toward searching only the six terms in this study. First, other terms that appear on occasion (e.g., "deleting," "substituting") are sufficiently rare that they would not meaningfully impact the reported data or any conclusions based on it. Second, the excluded terms provided a poor signal-to-noise ratio: they were used with much greater frequency for irrelevant reasons, and they risked creating misleading data if included. As a result, there was confidence that limitation to the searched terms most accurately captures the initial emergence, subsequent rise, and total volume of language-editing amendments in federal legislation.

Those results were then confirmed via a second method.[360] PDFs from the aforementioned sources were converted into .txt files and loaded as strings of text into Pandas DataFrames software (with special characters indicating line breaks removed,

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[359] Other terms occasionally used to introduce such amendments include "deleting," "changing," and "substituting," as well as variants such as "insert" and "delete." The latter two are often paired with "amended as" or "amended to," and therefore were mostly captured by the study.

[360] I am deeply grateful to data analyst Aaron Galbraith for his expertise in the development and implementation of this confirmatory study.

and words split across line breaks repaired, using "regular expressions" or "regex"). Duplicated pages within the documents retrieved from loc.gov, which had been observed and addressed in the first study, were confirmed and likewise addressed (via seventy-five-character sequence searches). Frequency analysis then was conducted to index the most commonly occurring words that appeared directly before a quote and within five words before a quote, including an additional search with a filter for words that end in "ing." This confirmed the premises of the initial study, finding that the terms identified therein were the common signals of an amendment with an enclosed quote. (As also observed in the initial study, three additional terms also appeared—"substituting," "deleting," and "replacing"—but with such dramatically lower frequency as to not impact the article's conclusions.) All appearances of the identified terms were indexed, and examples were spot-checked to determine whether they appeared to be language-editing amendments.

Based on the results, the searches were modified using regex patterns to exclude common false positives (e.g., "adding machine"). After each revision to a regex pattern, examples were spot-checked from four overlapping "bins": (1) examples included under the current pattern revision; (2) examples that met the initial pattern but were excluded under the current pattern revision; (3) examples that switched from included to excluded under the most recent pattern revision; and (4) examples that switched from excluded to included under the most recent pattern revision. Using this review system, each regex pattern was continually revised via this method until the examples reached a satisfactory equilibrium for each search term.

These search patterns generated final counts that were used to confirm the data from the initial study. Through the 50th Congress, every individual discrepancy was reviewed. After the 50th Congress, data anomalies (i.e., when significant variations appeared between the initial and confirmatory searches) were reviewed. An explanation was identified for each discrepancy or anomaly, and numbers in the initial study were adjusted where appropriate. Those adjusted numbers from the initial study are the basis for the findings and conclusions in this Article.

APPENDIX B

In the 2022 Term, the Supreme Court issued fifty-seven total opinions.[361] Of those, forty-three involved issues of federal statutory law. Two of these statutory cases were decided on standing grounds, and one failed to state a claim, and so they are omitted from consideration here.[362] This Appendix briefly reviews the remaining forty statutory cases in order to support the Article's claim that thirty-eight involve amended statutes. Asterisks appear alongside the two cases that did not involve an amended statute.

A. *Biden v. Nebraska*[363]

Interpreting[364] the Higher Education Relief Opportunities for Students Act of 2003,[365] a statute whose provisions were initially designed to expire in 2005,[366] but then were amended to extend to 2007,[367] and again to be made permanent.[368] The statute was interpreted in conjunction with the Higher Education Act of 1965,[369] which has been extensively amended.

B. *Groff v. DeJoy*[370]

Interpreting Title VII of the Civil Rights Act of 1964.[371] The Court expressly discussed the role of the 1972 amendments in reshaping the statute.[372]

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[361] *Opinions of the Court - 2022*, *supra* note 5 (listing fifty-eight opinions, including one—*In re Grand Jury*, 143 S. Ct. 543 (2023)—dismissing the writ of certiorari as improvidently granted).

[362] *See* Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2351 (2023) (lack of standing); United States v. Texas, 143 S. Ct. 1964, 1971 (2023) (same); Gonzalez v. Google LLC, 143 S. Ct. 1119 (2023) (per curiam) (failure to state a claim).

[363] 143 S. Ct. 2355 (2023).

[364] *Id.* at 2358.

[365] Pub. L. No. 108-76, 117 Stat. 904 (codified as amended at 20 U.S.C. §§ 1098aa–1098ee).

[366] *Id.*, 117 Stat. at 908.

[367] Act of Sept. 30, 2005, Pub. L. No. 109-78, 119 Stat. 2043 (codified as amended at 20 U.S.C. § 1070 note).

[368] Act of Sept. 30, 2007, Pub. L. No. 110-93, 121 Stat. 999 (codified as amended at 20 U.S.C. § 1070 note).

[369] Pub. L. No. 89-329, 70 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.). For an additional discussion of the Supreme Court's interpretation, see *Biden*, 143 S. Ct. at 2362–65.

[370] 143 S. Ct. 2279 (2023).

[371] Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e et seq.).

[372] *Groff*, 143 S. Ct. at 2288–89.

C. *Abitron Austria GmbH v. Hetronic International, Inc.*[373]

Interpreting the Lanham Act[374], an extensively amended statute. In a concurrence joined by three colleagues, Justice Sonia Sotomayor noted that the provision the Court interpreted is "as amended."[375]

D. *United States v. Hansen*[376]

Interpreting 8 U.S.C. § 1324 narrowly in order to find it constitutional.[377] The Court expressly noted the important rewording accomplished by amendments in 1917[378] and 1952.[379]

E. *Coinbase, Inc. v. Bielski*[380]

Interpreting a provision of the Federal Arbitration Act.[381] As the Court noted, the interpreted provision was itself added to the statute as a later amendment.[382]

F. *Pugin v. Garland*[383]

Interpreting 8 U.S.C. §§ 1101(a)(43)(S) and 1227(a)(2)(A)(iii). The Court expressly noted that the former provision underwent a relevant amendment in 1996 to expand the provision.[384]

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373 143 S. Ct. 2522 (2023).

374 Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. § 1501 et seq.).

375 *Id.* at 2537 (Sotomayor, J., concurring).

376 143 S. Ct. 1932 (2023).

377 *Id.* at 1942–46.

378 *Id.* at 1943 ("Then, in 1917, Congress added 'induce' to the string of verbs.").

379 *Id.* ("Congress enacted the immediate forerunner of the modern clause (iv) in 1952 and, in doing so, simplifed the language from the 1917 Act.").

380 143 S. Ct. 1915 (2023).

381 Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended in scattered sections of 9 U.S.C.).

382 *Coinbase*, 143 S. Ct. at 1919 ("In 1988, Congress passed and President Reagan signed an amendment to the Act; the amendment is codifed at 9 U.S.C. § 16(a).").

383 143 S. Ct. 1833 (2023).

384 *Id.* at 1839 (citing the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1278 (codified as amended at § 1101(a)(43)(S))) ("In 1996, Congress passed and President Clinton signed legislation that expanded the definition of 'aggravated felony' to include offenses 'relating to obstruction of justice.'").

G. *Yegiazaryan v. Smagin*[385]

Interpreting the Racketeer Influenced and Corrupt Organizations Act[386] with particular focus on the civil remedies in 18 U.S.C. § 1964(c).[387] That provision was originally enacted as an amendment to Title 18,[388] and it was amended in 1995.[389]

H. *Jones v. Hendrix*[390]

Interpreting 28 U.S.C. § 2255, as well as the Antiterrorism and Effective Death Penalty Act of 1996[391] (AEDPA). The Court discussed the various amendments to § 2255, which included the AEDPA itself.[392]

I. *Lora v. United States*[393]

Interpreting 18 U.S.C. § 924, a provision that has been heavily amended, including in subsection (c), which was the Court's focus.[394]

J. *United States ex rel. Polansky v. Executive Health Resources, Inc.*[395]

Interpreting 31 U.S.C. § 3730, a provision of the False Claims Act[396] (FCA). The Court focused on § 3730(c), which has repeatedly been reworked by amendments since its original enactment

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385 143 S. Ct. 1900 (2023).

386 Pub L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. § 1961 et seq.).

387 *Yegiazaryan*, 143 S. Ct. at 1908–12.

388 Racketeer Influenced and Corrupt Organizations Act, 84 Stat. at 941 (codified as amended at 18 U.S.C. §§ 1961–1968).

389 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, §§ 107, 109 Stat. 737, 758 (codified as amended at 18 U.S.C. § 1964(c)).

390 143 S. Ct. 1857 (2023).

391 Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254).

392 *See id.* § 105, 110 Stat. at 1220 (codified as amended at 28 U.S.C. § 2255); *Hendrix*, 143 S. Ct. at 1879–82.

393 143 S. Ct. 1717 (2023).

394 *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended at 18 U.S.C. § 924); Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (codified as amended at 18 U.S.C. § 924(c)(1)); *see also Lora*, 143 S. Ct. at 1717–21.

395 143 S. Ct. 1720 (2023).

396 Pub. L. No. 97-258, 96 Stat. 978 (1982) (codified as amended at 31 USC §§ 3729-3733).

as § 6 of the FCA.[397]

K. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*[398]

Involving 11 U.S.C. §§ 106(a) and 101(27),[399] provisions of the Bankruptcy Code. Section 106 has undergone numerous amendments, including a wholesale rewrite in 1994.[400]

L. *Health and Hospital Corporation of Marion County v. Talevski*[401]

Involving 42 U.S.C. § 1983 and the Federal Nursing Home Reform Act[402] (FNHRA). As the Court noted, the FNHRA was an amendment to the Medicaid statute (with a parallel provision also inserted into the Medicare statute).[403]

M. *Jack Daniel's Properties, Inc. v. VIP Products LLC*[404]

Involving 15 U.S.C. § 1125,[405] a provision that has undergone numerous amendments.[406]

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397 An Act to Prevent and Punish Frauds Upon the Government of the United States, ch. 67, 12 Stat. 696 (1863) (codified as amended at 31 U.S.C. §§ 3729–3733). For amendments, see, for example, Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608, 609; Private Securities Litigation Reform Act of 1995 § 107, 109 Stat. at 758 (codified as amended at 31 U.S.C. § 1964(c)). *See also Polansky*, 143 S. Ct. at 1727–33.

398 143 S. Ct. 1689 (2023).

399 *Id.* at 1695–99.

400 Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 206, 108 Stat. 4111 (codified as amended at 11 U.S.C. § 101(41)).

401 143 S. Ct. 1444 (2023).

402 Pub. L. No. 100-203, 101 Stat. 1330, 1330-160 (1987) (codified as amended at 42 U.S.C. § 1396r et seq.).

403 *Talevski*, 143 S. Ct. at 1456 n.10 ("The Omnibus Budget Reconciliation Act of 1987 added the FNHRA to Title XIX of the Social Security Act, *i.e.*, Medicaid.") (citing FNHRA, 101 Stat. at 1330-160).

404 143 S. Ct. 1578 (2023).

405 *Id.* at 1582–84.

406 *See, e.g.*, Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935, 3946 (codified as amended at 15 U.S.C. § 1125(a)); Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified as amended at § 1125(a)); *see also Jack Daniel's Props.*, 143 S. Ct. at 1582–84.

N. *Dubin v. United States*[407]

Involving 18 U.S.C. § 1028A,[408] a provision enacted as an amendment to the criminal code (Title 18) of the United States Code.[409]

O. *Allen v. Milligan*[410]

Involving § 2 of the Voting Rights Act.[411] As the Court noted, § 2 had been amended in response to a 1980 Supreme Court case.[412]

P. *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*[413]

Involving a provision of the National Labor Relations Act.[414] That provision had been amended in 1947.[415]

Q. *Slack Technologies, LLC v. Pirani*[416]

Involving § 11 of the Securities Act of 1933.[417] That section has undergone several amendments, including one that added a paragraph to end of subsection (a), the subsection at issue in the case.[418]

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[407] 143 S. Ct. 1557 (2023).

[408] *Id.* at 1563.

[409] Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004) (codified as amended at 18 U.S.C. § 1028A); *see also Dubin*, 143 S. Ct. at 1560–72.

[410] 143 S. Ct. 1487 (2023).

[411] Pub. L. No. 89-110, 79 Stat. 437 (1965); *see also Milligan*, 143 S. Ct. at 1498.

[412] *Milligan*, 143 S. Ct. at 1516 ("Congress adopted the amended § 2 in response to the 1980 decision *City of Mobile* . . . .").

[413] 143 S. Ct. 1404 (2023).

[414] Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169); *see also Glacier*, 143 S. Ct. at 1410–12.

[415] Act of June 23, 1947, ch. 120, § 101, 61 Stat. 136, 140.

[416] 143 S. Ct. 1433 (2023).

[417] Pub. L. No. 73–22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77k et seq.); *see also Slack Techs.*, 143 S. Ct. at 1437.

[418] Act of June 6, 1934, ch. 404, § 206, 48 Stat. 907, 908.

R. *United States ex rel. Schutte v. Supervalu Inc.*[419]

Involving the scienter requirement in the FCA[420] The subsection cited for that requirement was added into law in 1986,[421] and it was reworked in 2009.[422]

S. *Sackett v. EPA*[423]

Involving various sections of the Clean Water Act[424]: a definition from 33 U.S.C. § 1362(7) used in §§ 1311 and 1362, and with interactions the Court discussed with § 1344(g)(1).[425] Sections 1311[426] and 1362[427] have both been amended numerous times, and § 1344(g)(1) was itself a later amendment to the law added after the studied definition.[428]

T. *Calcutt v. Federal Deposit Insurance Corporation*[429]

Involving § 8(e) of the Federal Deposit Insurance Act,[430] though the Court focused on the scope of the judicial power to uphold agency actions based on case law with little consideration of the statute itself. As the Court noted, however, § 8(e) had undergone a relevant amendment in 1989.[431]

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419 143 S. Ct. 1391 (2023).

420 96 Stat. at 978 (codified as amended at 31 U.S.C. § 3729 et seq.).

421 False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153, 3153 (codified as amended at 31 U.S.C § 3729).

422 Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a), 123 Stat. 1617, 1621 (codified as amended at 31 U.S.C. § 3729).

423 143 S. Ct. 1322 (2023).

424 Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. § 1251 et seq.).

425 *Sackett*, 143 S. Ct. at 1339–41.

426 *See, e.g.*, Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, 26, 29, 30, 32–34, 36–38, 40, 42–43, 46, 65, 67, 69, 74, 80–81 (codified as amended in scattered sections of 33 U.S.C.); Act of Jan. 8, 1983, Pub. L. No. 97-440, 96 Stat. 2289 (codified as amended in scattered sections of 33 U.S.C.).

427 *See, e.g.*, Ocean Dumping Ban Act of 1988, Pub. L. No. 100-688, § 3202, 102 Stat. 4139, 4154 (codified as amended at 33 U.S.C. § 1362); Energy Policy Act of 2005, Pub. L. No. 109-58, § 323, 119 Stat. 594, 694 (codified as amended at 33 U.S.C. § 1362).

428 Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 1575, 1578, 1600, 1610 (codified as amended at 33 U.S.C. § 1334).

429 143 S. Ct. 1317 (2023).

430 Pub. L. No. 81-797, 64 Stat. 873 (1950) (codified at 12 U.S.C. §§ 1811–1835a).

431 *Calcutt*, 143 S. Ct. at 1318 ("Under § 8(e) of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1818(e), as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, § 903, 103 Stat. 453, the FDIC may . . . .").

U. *Amgen Inc. v. Sanofi*[432]

Involving 35 U.S.C. § 112, a patent law provision.[433] Language of this provision traced back to patent law statutes from the 1790s,[434] and it has undergone amendatory restructuring as recently as 2011.[435]

V. *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*[436]

Involving 17 U.S.C. § 107, a copyright provision.[437] An amendment in 1992 added an additional sentence on the provision's fair use requirement, a requirement at issue in the case.[438]

W. *Twitter, Inc. v. Taamneh*[439]

Involving 18 U.S.C. § 2333, an antiterrorism statute.[440] Subsection (d) of the provision, which was the specific subsection at issue, was added by an amendment in 2016.[441]

X. *Ohio Adjutant General's Department v. Federal Labor Relations Authority*[442]

Interpreting the Federal Service Labor-Management Relations Statute,[443] particularly 5 U.S.C. §§ 7116(a)(1) and 7103(a)(3), alongside 32 U.S.C. § 709.[444] Section 7103(a)(3) has been repeatedly amended,[445] and it was enacted as an "amended

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[432] 143 S. Ct. 1243 (2023).

[433] *Id.* at 1251–52, 1258.

[434] *See, e.g.*, The Patent Act of 1793, ch. 11, § 3, 1 Stat. 318, 321–22.

[435] Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, 296 (2011) (codified as amended at 35 U.S.C. § 118).

[436] 143 S. Ct. 1258 (2023).

[437] *Id.* at 1266.

[438] Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified as amended at 17 U.S.C § 107).

[439] 143 S. Ct. 1206 (2023).

[440] *Id.* at 1214–15.

[441] Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4(a), 130 Stat. 852, 854 (2016) (codified as amended at 18 U.S.C. § 2333).

[442] 143 S. Ct. 1193 (2023).

[443] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1191 (codified at 5 U.S.C. §§ 7101–7135).

[444] *Ohio Adjutant Gen.'s Dep't*, 143 S. Ct. at 1194.

[445] GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763; Workforce Investment Act of 1998, Pub. L. No. 105-220, § 341, 112 Stat. 936, 1092 (codified as amended at 5 U.S.C. § 7103(a)); National Defense Authorization Act for Fiscal Year 1997, Pub. L.

to read" amendment to Title 5 of the United States Code.[446] Section 709(e) has been amended specifically on details regarding technicians, who were at issue in the case.[447]

Y. *Polselli v. IRS*[448]

Involving I.R.C. § 7609, a tax code provision.[449] The provision was enacted as an amendment to Title 26 of the United States Code,[450] and the subsection (c)(2) at issue has undergone amendments.[451]

Z. *Santos-Zacaria v. Garland*[452]

Regarding 8 U.S.C. § 1252, a provision of the Immigration and Nationality Act.[453] As a brief to the Court explained, the provision had an extensive and relevant amendatory history.[454]

AA. *Financial Oversight and Management Board for Puerto Rico v. Centro De Periodismo Investigativo, Inc.***[455]

Involving the Puerto Rico Oversight, Management, and Economic Stability Act[456] (PROMESA), particularly the section

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No. 104-201, 110 Stat. 2422 (1996); Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, 108 Stat. 3430 (1994) (codified as amended at 5 U.S.C. § 7103(a)(3)); Act of June 13, 1991, Pub. L. No. 102-54, § 13, 105 Stat. 267, 274 (1991) (codified as amended in scattered sections of 5 U.S.C.).

446 Civil Service Reform Act of 1978 § 701, 92 Stat. at 1191 (codified as amended at 5 U.S.C. § 7106 et seq.).

447 National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 524(c), 107 Stat. 1547, 1657 (1993) (codified as amended at 32 U.S.C. § 709(h)), as amended by National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1070(b)(2), 108 Stat. 2663, 2855–56 (1994) (codified as amended in scattered sections of 10 U.S.C.).

448 143 S. Ct. 1231 (2023).

449 *Id.* at 1233.

450 Tax Reform Act, Pub. L. No. 94-455, § 1205(a), 90 Stat. 1520, 1699 (1986) (codified as amended at I.R.C. § 7609).

451 Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, § 408(a)(1), 119 Stat. 2577, 2635 (codified as amended at I.R.C. § 7609); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3415(c)(2), 112 Stat. 685, 755 (codified as amended at I.R.C. § 7609) .

452 143 S. Ct. 1103 (2023).

453 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537).

454 *See* Brief for the Respondent at 3–4, *Santos-Zacaria*, 143 S. Ct. 1103 (No. 21-1436).

455 143 S. Ct. 1176 (2023).

456 Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified as amended at 48 U.S.C. § 2101 et seq.).

appearing in 48 U.S.C. § 2126(a).[457] That provision incorporates 11 U.S.C. § 106 of the Bankruptcy Code into this new Puerto Rico board. While § 106 has been amended,[458] the relevant provisions of PROMESA have not.

BB. *Percoco v. United States*[459]

Involving 18 U.S.C. §§ 1343, 1346, and 1349,[460] which are wire fraud provisions. The Court discussed how § 1346, which defines key terms for §§ 1341 and 1343, was enacted as an amendment in response to a Supreme Court opinion.[461]

CC. *Ciminelli v. United States*[462]

Also involving 18 U.S.C. §§ 1343, 1346, and 1349. Additionally, § 1343 is a short provision that has been amended numerous times.[463]

DD. *MOAC Mall Holdings LLC v. Transform Holdco LLC*[464]

Involving 11 U.S.C. § 363,[465] a provision of the Bankruptcy Code. The Court examined the role of subsection (m), which was a modified version of prior Bankruptcy Rule 805,[466] in the application of subsections (b) and (c)—both of which have been amended.[467]

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457 *Fin. Oversight & Mgmt. Bd. for P.R.*, 143 S. Ct. at 1181, 1184–86.

458 *See* Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, 124 Stat. 3557; Bankruptcy Reform Act of 1994, 108 Stat. at 4106 (codified as amended in scattered sections of 11 U.S.C.).

459 143 S. Ct. 1130 (2023).

460 *Id.* at 1134.

461 *See id.* at 1136 (2023) (quoting Skilling v. United States, 561 U.S. 385, 402 (2010)):

> *McNally*'s holding on honest-services fraud, however, lasted for less time than *Margiotta*'s. "Congress responded swiftly" and enacted 18 U.S.C. § 1346, which provides that the [sic] "'the term "scheme or artifice to defraud,"'" which appears in both § 1341 and § 1343, "'includes a scheme or artifice to deprive another of the intangible right of honest services.'"

462 143 S. Ct. 1121 (2023).

463 *See, e.g.*, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 1007, 103 Stat. 183, 500 (codified as amended at 18 U.S.C. § 1343); Crime Control Act of 1990, Pub. L. No. 101-647, § 2504, 104 Stat. 4789, 4861 (codified as amended at 18 U.S.C. § 1343).

464 143 S. Ct. 927 (2023).

465 *Id.* at 932–33.

466 FED. R. BANKR. P. 805 (1976).

467 *See, e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 204, 230, 1221, 119 Stat. 23, 49–50, 72–73, 195–96 (codified as amended

EE. *Turkiye Halk Bankasi A.S. v. United States*[468]

Involving provisions of the Foreign Sovereign Immunities Act of 1976[469] (28 U.S.C. §§ 1330 and 1604), as well as 18 U.S.C. § 3231. Sections 1330 and 1604 were added to Title 28 as amendments in 1976.[470] As the United States Code explains, § 3231 "was formed by combining sections 546 and 547 of title 18, U.S.C . . . with section 588d of title 12, U.S.C."[471]

FF. *Reed v. Goertz*[472]

Involving 42 U.S.C. § 1983.[473] In addition to being twice amended, § 1983 was modified when first codified in the Revised Statutes, as the United States Code notes observe and as Professor Alexander Reinert has discussed.[474]

GG. *Axon Enterprise, Inc. v. FTC*[475]

Involving 28 U.S.C. § 1331, as well as numerous provisions from the Securities Exchange Act of 1934[476] and the Federal Trade Commission Act.[477] Section 1331 is a short sentence that has been amended numerous times and is based on a precodified version.[478] Various other discussed provisions have also been repeatedly amended, such as an important paragraph in the Securities Exchange Act.[479]

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at 11 U.S.C. § 363); Bankruptcy Reform Act of 1994 §§ 214, 218, 108 Stat. at 4126, 4128–29 (codified as amended at 11 U.S.C. § 363).

468 143 S. Ct. 940 (2023).

469 Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.); *see Turkiye Halk Bankasi*, 143 S. Ct. at 943–44.

470 Foreign Sovereign Immunities Act of 1976 § 2, 90 Stat. at 2891 (codified as amended at 28 U.S.C. § 1330); *id.*, 90 Stat. at 2892 (codified as amended at 28 U.S.C. § 1604).

471 18 U.S.C. § 3231 (hist. n.).

472 143 S. Ct. 955 (2023).

473 *Id.* at 959–60.

474 *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 234–46 (2023).

475 143 S. Ct. 890 (2023).

476 Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 78).

477 Pub. L. No 62-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58); *see also Axon Enter.*, 143 S. Ct. at 900–06.

478 *See* 28 U.S.C. § 1331 (hist. nn.).

479 15 U.S.C. § 78u(d).

HH. *Wilkins v. United States*[480]

Involving provisions of the Quiet Title Act,[481] particularly those at 28 U.S.C. §§ 2409a(g) and 1346(f).[482] Section 2409a(g) was amended once;[483] § 1346 has undergone numerous amendments, with the relevant subsection (f) added via amendment in 1972.[484]

II. *Luna Perez v. Sturgis Public Schools*[485]

Involving the Individuals with Disabilities Education Act,[486] particularly the provision located at 20 U.S.C. § 1415, as well as the Americans with Disabilities Act of 1990.[487] Section 1415 has twice been subjected to "amended to read as follows" amendments that displaced a prior section bearing the same title.[488]

JJ. *Delaware v. Pennsylvania***[489]

Involving the Federal Disposition Act,[490] particularly the provision located at 12 U.S.C. § 2503. This statute has three operative sections enacted in 1974 as nonpositive law and never amended.

KK. *Bittner v. United States*[491]

Involving the Bank Secrecy Act,[492] particularly provisions located at 31 U.S.C. §§ 5314 and 5321.[493] Section 5314 underwent

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[480] 143 S. Ct. 870 (2023).

[481] Pub. L. No. 92-562, 86 Stat. 1176 (1972) (codified as amended at 28 U.S.C. §§ 1346(f), 1402(d), and 2409a).

[482] *Wilkins*, 143 S. Ct. at 874–77.

[483] Act of Nov. 4, 1986, Pub. L. No. 99-598, 100 Stat. 3351 (codified as amended at 29 U.S.C. § 2409a).

[484] Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176 (codified as amended at 28 U.S.C. § 1346).

[485] 143 S. Ct. 859 (2023).

[486] Pub. L. No. 101-476, 104 Stat. 1103, 1141 (1990) (codified as amended at 20 U.S.C. § 1400 et seq.).

[487] Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 et seq.); *see also Luna Perez*, 143 S. Ct. at 862–65.

[488] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615, 118 Stat. 2647, 2715–16 (codified as amended at 29 U.S.C. § 1415); Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105–17, § 615, 111 Stat. 37, 88 (codified as amended at 29 U.S.C. § 1415).

[489] 143 S. Ct. 696 (2023).

[490] Pub. L. No. 93-495, 88 Stat. 1500 (1974) (codified at 12 U.S.C. §§ 2501–03); *see also Delaware*, 143 S. Ct. at 700–01.

[491] 143 S. Ct. 713 (2023).

[492] Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12, 15, and 31 U.S.C.).

[493] *Bittner*, 143 S. Ct. at 717, 719–21.

amendatory changes when codified in 1982;[494] § 5321 has undergone numerous amendments.[495]

LL. *Bartenwerfer v. Buckley*[496]

Interpreting 11 U.S.C. § 523(a)(2)(A), alongside subparagraphs (B) and (C) of that paragraph.[497] The Court discussed relevant congressional amendments to subparagraph (A).[498]

MM. *Helix Energy Solutions Group, Inc. v. Hewitt*[499]

Involving the Fair Labor Standards Act of 1938[500] provision located at 29 U.S.C. § 213(a)(1). While the case addressed a regulation issued pursuant to this statutory provision, § 213(a)(1) itself has undergone several amendments.[501]

NN. *Arellano v. McDonough*[502]

Involving 38 U.S.C. § 5110(a)(1), a provision regarding veterans affairs.[503] Section 5110(a) was amended generally in 2017.[504]

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494 Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 993 (codified as amended in scattered sections of 31 U.S.C.).

495 *See, e.g.*, Act of Oct. 12, 1984, Pub. L. No. 98-473, § 901, 98 Stat. 2102, 2135 (codified as amended at 31 U.S.C. § 5321(a)(1)); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1356, 100 Stat. 3207, 3207-24 (codified as amended at 31 U.S.C. § 5321).

496 143 S. Ct. 665 (2023).

497 *Id.* at 671–74.

498 *Id.* at 674 (2023) ("Our precedent, along with Congress's response to it, eliminates any possible doubt about our textual analysis."); *id.* at 675 ("Thirteen years after *Strang*, when Congress next overhauled bankruptcy law, it deleted 'of the bankrupt' from the discharge exception for fraud, which is the predecessor to the modern § 523(a)(2)(A)." (citing Act of July 1, 1898, ch. 514, § 17, 30 Stat. 544, 550)).

499 143 S. Ct. 677 (2023).

500 Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201 et seq.)*; see also Hewitt*, 143 S. Ct. at 682.

501 *See, e.g.*, Act of Sept. 23, 1966, Pub. L. No 89-601, § 214, 80 Stat. 830, 837 (codified as amended at 29 U.S.C. § 13(a)(1)); Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65.

502 143 S. Ct. 543 (2023).

503 *Id.* at 546.

504 Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105.