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WHAT WOULD CONGRESS WANT? IF WE WANT TO KNOW, WHY NOT ASK?

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Judges often disagree about which interpretation of a statute is most faithful to 'legislative intent.' If judges are concerned about adhering to democratic preferences when interpreting statutes, why not ask Congress what it would prefer? I propose a procedure that would enable the Court, in a case where Justices are divided over the meaning of a statute, to submit both sides' reasoning to Congress, and Congress may choose to vote on its preferred of the alternative rulings the Court puts before it. Congress's preferences would be evidentiary only; they would not bind the Court to make one decision or another. Insofar as the Court is concerned with avoiding a decision that Congress will overrule, this procedure could provide more reliable and direct evidence of what the contemporary Congress wants, than does post-enactment legislative history, canons of construction, or other means judges use to adduce legislative intent. This procedure would enable a partnership between the Court and Congress in updating and adapting the law to ever-changing circumstances; a partnership that draws upon each branch's particular competencies—Congress being democratic, the Court accounting for overarching constitutional values and ideals of predictability, consistency, and intelligibility in the law.

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I. INTRODUCTION

Most would agree that courts interpreting legislation should aim, as best possible, to adhere to the intent of the legislature.[1] Inconsistency in the methods judges use to decipher Congress's intent has generated the impression that statutory interpretation decisions are ad hoc or made to suit the Court's own outcome preferences.[2] Debates about statutory meaning cause acrimony between the Justices, the Court, and Congress.[3] Justice Scalia has criticized Congress for an "ever-increasing volume" of "[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation,"[4] and other members of the Court for reaching outcomes that "require[] not interpretation but invention."[5] Members of the public criticize judges for

1. *E.g.*, Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, *in* WILLIAM ESKRIDGE, JR., PHILIP FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY 718 (William N. Eskridge, Jr. et al. eds., 4th ed. 2007) [hereinafter ESKRIDGE, FRICKEY & GARRETT] ("The court should respect the position of the legislature as chief policy-determining agency of the society, subject only to the limitations of the constitution."); James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 156 (2003); Russell Carparelli, *Separate Powers-Shared Responsibility: Constructing Avenues of Interbranch Communication*, 85 DENV. U. L. REV. 267, 267 (2007) ("[S]cholars and jurists have written countless books, articles, and opinions about the separation of powers and how courts should go about exercising their judgment to effect legislative intent."). But Justice Scalia "reject[s] the intent of the legislature as the proper criterion of the law," and instead argues that legislation should be given its "plain meaning," regardless of intent. Antonin Scalia, Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, The Tanner Lectures on Human Values at Princeton University 79, 94 (Mar. 1995).

2. *E.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1767 (2010) (observing that inconsistency in methodological approach "makes the Court appear results-oriented, because the governing principles change from case to case"); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 5–6 (2005); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002). This has been a pervasive concern dating back to Dean Pound's worry about "spurious" statutory interpretation. ESKRIDGE, FRICKEY & GARRETT, *supra* note 1, at 706; Scalia, *supra* note 1, at 94.

3. Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155, 1172–73 (2007); ROBERT A. KAGAN, Adversarial Legalism: The American Way of Law 44–51 (2001).

4. Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J. dissenting).

5. Skilling v. United States, 130 S.Ct. 2896, 2939 (2010) (Scalia, J., dissenting).

"legislating from the bench."[6] And legislators have criticized the Court for "the denigration . . . of congressional authority."[7]

Commentators have aimed to address this problem by promoting better cooperation between legislatures and courts. They have proposed inter-branch committees to enhance communication between courts and legislatures, and one author has argued that courts should certify questions of statutory interpretation to Congress, so as to provide Congress an opportunity to amend the law as it would apply to the pending judicial decision.[8] These efforts at enhancing judicial-legislative collaboration aim to prompt Congress to amend an ambiguous statute. But requiring Congress to pass an amendment to the law does not alleviate the problems of congressional delay, committee stalling, and limits on the legislative agenda that cause Congress's general slowness in correcting legislation that is plainly causing confusion among courts.[9] Additionally, as discussion of this proposal illustrates, judges actually do play an important partnership role in developing statutory law; refining it with rule of law, public policy, and constitutional values that legislators do not always consider when drafting legislation. Proposals that merely aim to provoke a more prompt legislative response do not fully embrace the value that judges add to statutory interpretation decisions. This procedure is designed to draw on the relative competencies of judges and legislators to enable a true partnership between the branches in updating and adapting statutory law to fit unforeseen scenarios.

Congress would enact legislation providing that the Court, in cases where the Justices disagree about best interpretation, could voluntarily certify a statement of the competing reasoning (just as would be included in a majority and dissenting opinion) along with a multiple choice question asking Congress to vote on its preferred outcome. Congress would have the option of declining to respond. The Court can weigh the response as it chooses: it could decline to follow it, consider it as one factor in the decision along with other tools of statutory construction, or rely on a strong congressional preference for one

6. *E.g.*, Martin Mayer, *Why They Legislate 'From the Bench'*, CHRISTIAN SCIENCE MONITOR (Sept. 13, 2005), http://www.csmonitor.com/2005/0913/p08s02-coop.html; Jeffrey Rosen, *What's Wrong with Judges Legislating from the Bench?*, TIME MAG. (July 16, 2009), http://www.time.com/time/magazine/article/0,9171,1910989,00.html#ixzz1iJr2WHLE.

7. .Wheeler & Katzmann, *supra* note 3; *Confirmation Hearing of the Nomination of John G. Roberts Jr. To Be the Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 2–4 (2005) (statement of Sen. Arlen Specter, Chairman), *available at* http://www.gpo.gov/fdsys/search/pagedetails.action?granuleId=&packageId=GPO-CHRG-ROBERTS.

8. Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007).

9. For instance, the Court has heard four cases in recent years, all pertaining to the meaning of "violent felony" under the residual clause of the Armed Career Criminal Act. *Sykes*, 131 S. Ct. at 2283 (Scalia, J. dissenting).

outcome as evidence in favor of that ruling, knowing that a contrary outcome would likely be overruled. This procedure would allow the Court to ascertain current democratic preferences more accurately, reliably, and efficiently than other sources the Court has relied upon, such as post-enactment legislative history, legislative acquiescence, linguistic canons, and various other interpretive methodologies.

Following this introduction, Part II provides brief background on the debate about statutory interpretation methodology that is useful for framing this procedure. Part III describes other proposals for judicial-legislative cooperation which illustrate that judges, academics, and legislators recognize this problem, and may be likely to endorse a solution along the lines I am proposing. Part IV provides background on certification procedures that serve as precedent for this proposal. Part V describes the multiple-choice certification procedure. Part VI explains how the certification procedure would have been invoked in three of the Court's recent decisions addressing slightly different types of statutory interpretation problems. Part VII addresses questions about the constitutionality of this proposal. In conclusion, I will describe how this partners the particular competencies of the two branches in dynamic statutory interpretation.

II. THE STATUTORY INTERPRETATION DEBATE

Our legal regime is dominated by statutes. Courts deciding questions of statutory law are in a more deferential position than when they decide questions of common or constitutional law, where they are the final authority on meaning.[10] There is a strong democratic sentiment favoring judicial deference to legislative will, no doubt grounded in anxiety about counter-majoritarian courts subverting the choices of elected officials. Hamilton expressed this concern in *Federalist No. 78*, warning that courts must not substitute their preferences for those of the legislative

10. *See, e.g.*, *supra* note 1; WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010) (noting prominence of statutory law in contemporary regime); Linda D. Jellum, *"Which is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 837 (2009) ("Statutory interpretation is at the cutting edge of legal scholarship and, now, legislative activity."); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1985) (commenting on the dominance of legislatures and statutory law); Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 279 (1991) ("[The] complexities of the law making and law-interpreting tasks in the third century of this republic cry out for systematic dialogue between those who make and those who interpret legislation."); JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY (Robert A. Katzmann ed., 1988); Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge of Positive Political Theory*, 80 GEO. L.J. 653 (1992); Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1047 (1991).

body. Justice Scalia echoes this concern: "[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[11] But judges can be said to add value precisely because they are independent of, and can be resistant to, democratic actors. Judicial review has been justified by the notion that judges balance out short-sighted and reactionary political bodies by making decisions with a "longer view" of history, keeping in mind overarching constitutional values, as well as the ideals of stability, consistency, reliability, and intelligibility in the law.[12] There is a tension between this conception of the counter-majoritarian value of judges and courts striving to defer as faithfully as possible to the choices of the legislature. Judicial efforts to defer to Congress's intent have generated "interminable repetition of . . . essentially the same methodological debates" about how to ascertain what Congress wanted; and there is little consistency in their methods for doing so.[13] I do not aim to fully

11. Scalia, *supra* note 1, at 97.

12. Richard Albert, *Why Judicial Review: A Preliminary Typology of Scholarly Arguments*, INT'L J. CONST. L. BLOG (Mar. 25, 2013), *available at*: http://www.iconnectblog.com/2013/03/why-judicial-review. While a constitutional decision rather than a statutory one, the Court's discussion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), describes some of the judicial values that could also be said to apply in decisions interpreting legislation:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id. at 854–55.

13. Gluck, *supra* note 2, at 1766. In arguing for more uniform rules of statutory construction, Gluck provides a thorough overview of methodological disagreement about how judges should interpret statutory law. *Id.* at 1761–68. Justice Scalia recognizes, "[I]t [is] frequently said in judicial opinions of my court and others that the judge's objective in interpreting a statute is to give effect to 'the intent of the legislature.'" However, the evidence suggests that despite frequent statements to the contrary, "[w]e do not really look for subjective legislative intent." Scalia, *supra* note 1, at 91–92. For more on how textualists consider legislative intent, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); *see also* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 287, 286–93 (1985); Caleb Nelson, *What is Textualism?* 91 VA. L. REV. 347 (2005). Judges who look to sources beyond the text sometimes seem to defer to only the enacting legislators' understanding by imaginatively reconstructing enactment, while at other times they aim more generally to serve the overarching purpose of the legislation. *See* Hart & Sacks, *supra* note 1, at 1111; Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817–22 (1983); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946); POSNER, *supra*, at 286–93; Nelson, *supra*; STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2011); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

recount the debate between interpretive methodologies here. Suffice it to say that this indeterminacy invites judges to select between interpretive methods,[14] and gives rise to suspicion that Judges manipulate formal reasoning in order to reach their own preferred outcomes.[15]

Many times, Congress has overridden the Court's unfavorable statutory interpretation decisions by amending the law.[16] This requires significant legislative resources, and it may be difficult to fit a corrective amendment on the overloaded congressional agenda, since enacting new legislation takes priority (as it is higher political visibility). Additionally, concentration of power in committees and committee chairs might stall initiative to override a judicial interpretation, even

14. ESKRIDGE, FRICKEY & GARRETT, *supra* note 1, at 1169; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401–06 (1950); Brudney & Ditslear, *supra* note 2; Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L. J. 221 (2010).

15. *See* POSNER, *supra* note 13, at 287 ("The irresponsible judge will twist any approach to yield the outcomes that he desires, and the stupid judge will do the same thing unconsciously."); Brudney & Ditslear, *supra* note 2, at 5–6; Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002); Robert A. Katzmann, *Making Sense of Congressional Intent: Statutory Interpretation and Welfare Policy*, 104 YALE L.J. 2345, 2346 (1995) ("When courts interpret legislation, . . . they become an integral component of the legislative process."); Jellum, *supra* note 10, at 839 ("[L]egislatures have increasingly begun to perceive judges as activist meddlers."). Even judges who earnestly aim to act as neutral 'faithful agents' inevitably make interpretive decisions within the context of their own 'normative horizons.' ESKRIDGE, FRICKEY & GARRETT, *supra* note 1, at 1241–42; Eric J. Segall, *The Court: A Talk with Judge Richard Posner*, THE N.Y. REV. OF BOOKS (Sept. 29, 2011) ("[S]ome judges fool themselves into thinking there is a correct answer, generated by a precedent or other authoritative text, to every legal question . . . [p]eople want to avoid . . . 'cognitive dissonance,' . . . [w]e were taught in law school what we are supposed to be doing as judges—apply the law, not make it up.") (quoting Judge Posner).

16. *E.g.*, Allison Engine Co., Inc. v. United States ex rel. Sanders, 553 U.S. 662 (2008), *overruled by* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009); S. REP. No. 111-010 (2009) ("This section amends the FCA to clarify and correct erroneous interpretations of the law that were decided in Allison Engine Co. v. United States *ex rel.* Sanders, 128 S. Ct. 2123 (2008)."); W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83 (1991), *overruled by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (1991); Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158 (1989), *overruled by* Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), *overruled by* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986); Smith v. Robinson, 468 U.S. 992 (1984), *overruled by* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986); *see also generally* Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. J.REV. 887, 903–10 (2000); ESKRIDGE, FRICKEY & GARRETT, *supra* note 1, at 347–48; Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. J. REV. 425, 448 (1992); Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37 (1991); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB L. 53 (2000); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res., 532 U.S. 598, 622–23 (2001) (Ginsburg, J., dissenting).

when a majority of the legislature opposes it.[17] Justice Stevens described the Court as doing a "disservice to the Country" if it issues a ruling that requires Congress "to take the time to revisit the matter . . . whenever its work product suffers from an omission or inadvertent error."[18] This consumes significant legislative resources, taking time away from other issues that lawmakers might be focusing on.

III. OTHER PROPOSED MECHANISMS FOR INTER-BRANCH COOPERATION

A number of judges, policymakers, and academics have proposed measures for promoting cooperation and communication between courts and legislatures. Many state legislatures have also taken measures to aid courts in accurately adhering to legislative will. This suggests that judges and lawmakers recognize the problem, and that they might be inclined to take advantage of a procedure along the lines of what I am proposing. While these efforts to address the disconnect between courts and legislatures illustrate desire to address the problem, they all fail to overcome the inherent problems that arise from relying on Congress to amend the law in question.

Frost's Argument for Legislative Certification: Frost sets forth a certification procedure whereby the Court would send a question to Congress in ambiguous statutory interpretation cases.[19] After identifying many of the advantages of referring a statutory interpretation question directly to Congress, including improving communication, reducing conflict, best taking advantage of the competencies of each branch, and promoting transparency, Frost proposes that courts refer a clearly stated question about a statutory ambiguity to the ranking members of the House and Senate Judiciary Committees.[20] The certifying court would abstain from deciding the case in order to provide Congress with at least a six-month opportunity to amend the statute. Assuming Congress does so, the amended law would then be applied to the pending case. On Frost's description, "judicial referral is not seeking the current Congress's interpretation of a previously enacted

17. For instance, Eskridge, Frickey, and Garrett explain that the majority of Congress likely disapproved of the Court's pro-disparate impact interpretation of Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), but were unable to enact overriding legislation because the committees were "dominated by preferences to the left of chambers on civil rights. And because those committees exercised gatekeeping power over issues on the legislative agenda, they had substantial ability to head off overrides of agency policies or judicial decisions." ESKRIDGE, FRICKEY, & GARRET, *supra* note 1, at 86.

18. W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting).

19. Frost, *supra* note 8.

20. *Id.* at 5–6.

statute, but instead is enlisting the current Congress's help by asking it to revise a poorly drafted statute."[21]

Because it envisions staying a judicial decision while provoking Congress to amend the ambiguous law, Frost's proposal leaves unresolved the important practical and structural problems identified above.[22] Frost's procedure is essentially a judicially prompted amendment process. There is no constraint on the extent to which Congress can amend the legislation in question: "the Congress that receives a judicial referral may choose to radically alter, rather than to clarify, the statute at issue."[23] Because Frost's proposal essentially provides for provoking Congress to amend the law in response to a judicial decision, it is functionally similar to the following inter-branch committee proposals. Frost acknowledges that several problems arise from allowing Congress unrestrained discretion to amend the law as applied to a pending decision: impermissible case-by-case delegation of authority to Congress, Ex Post Facto concerns that arise from this delegation, politicization of decision making.[24] For reasons discussed in Part VII, these constitutional concerns are ameliorated when the Court constrains Congress to outcomes that the Justices are prepared to adopt themselves.

Interbranch Committees: Judge Cardozo, Justice Stevens, Justice Ginsberg, Judge Mikva, Judge Katzmann have all proposed committees that would facilitate inter-branch communication. In 1921, Judge Cardozo lamented that in a regime increasingly dominated by statutory law, "[t]he courts are not helped as they could and ought to be in the adaptation of law to justice." Judge Cardozo's problem was that there was no way to signal to the legislature that it should update or weigh in on the development of the law.[25] Cardozo argued for a "Ministry of Justice" that would be composed of members of the judiciary, the legislature, law schools, and the bar. Cardozo's Ministry would mediate between the Court and the Legislature by studying the law and recommending changes so that "[t]he spaces between the planets will at last be bridged."[26]

In a similar vein, Justice Stevens also proposed that there should be a

21. *Id.* at 38.

22. One commentator responds to Frost's proposal: "The devil is all in the details, I think, since there would have to be some meaningful guidelines on the exercise of such a certification power. As the article shows, drawing these lines is hard work and it is hard to see why the certification system wouldn't be gamed." Ethan Lieb, *Certifying a Question to Congress?*, PRAWFSBLOG (May 18, 2007), http://prawfsblawg.blogs.com/prawfsblawg/2007/05/certifying_ques.html.

23. *Id.* at 38.

24. Frost, *supra* note 8, at 36–41.

25. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113 (1921).

26. *Id.* at 125.

standing committee in Congress charged with identifying conflicts that arise from ambiguity or omissions in statutes, and drafting bills to resolve them. He argued that when "the conflict is over the meaning of an ambiguous statutory provision, it may be both more efficient and more appropriate to allow Congress to make the necessary choice between alternative interpretations of the legislative intent."[27] If the Court were faced with a case that involved pure ambiguity or uncertainty about the meaning of a statute, "it would seem to make good sense to assign Congress the task of performing the necessary corrective lawmaking." In a footnote, Justice Stevens explained, "I do not mean to suggest that the Supreme Court should seek to certify issues of statutory construction to a legislative committee. Rather I am suggesting that the policymaking branch of the federal government might assign itself that task."[28] Importantly, Justice Stevens' statement seems to suggest that a certification procedure would be acceptable and even desirable if the legislature itself adopted the practice. (The 'certifying' that Justice Stevens envisions appears to contemplate sending the question to a *legislative committee*, instead of to the entire legislature for a floor vote. A vote on preferences by the whole legislature is more democratically legitimate than a committee's response.)

Justice Ginsburg, Judge Robert Katzmann, and Judge Abner Mikva have also proposed and attempted implementing a "transmission belt" between the judiciary and Congress. The belt would convey judicial opinions indicating uncertainty about a statute's meaning to a statutory revision committee composed of members of the House and Senate as well as retired members of the judiciary.[29] The committee would "hear and initiate action on pleas for a clear statement of 'what Congress meant (or in any event what it means now.)'"[30] Mikva envisions that:

> [T]he lawyers who argue those cases, and certainly the administrators who initiate the interpretation and enforcement process, should be called . . . [and] that the opinions of courts of appeals and the Supreme Court interpreting statutes be distributed to all members of the House and Senate having responsibility for the statute in question.[31]

In a slightly different vein, Judge Calabresi has also proposed a

27. John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982).

28. *Id.* at n.20.

29. Wheeler & Katzmann, *supra* note 3; Robert A. Katzmann, *No Court is an Island*, 8 J. APP. PRAC. & PROCESS 115 (2006); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1420–21 (1987); Abrahamson & Hughes, *supra* note 10; Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627 (1987); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 384 (1987).

30. Ginsburg & Huber, *supra* note 29, at 1433.

31. Mikva, *Reading and Writing Statutes*, *supra* note 29, at 630–31.

"constitutional remand": In evaluating the constitutionality of a state law whose rational basis findings were out of date, Judge Calabresi argued that the matter should be 'remanded' so the legislature could provide an updated statement on its contemporary rational basis for the law.[32] While the "constitutional remand" was not proposed in the context of interpreting a statute, it provides another example of judicial efforts to invite legislative input on a pending decision.

State Measures: Along these lines, a number of states have established law revision commissions that periodically review judicial decisions interpreting legislation in order to identify defects or anachronisms in statutes that are causing the judiciary trouble, or being applied in an unfavorable manner.[33]

All of these procedures are geared toward prompting Congress to amend legislation. Because these proposals do not offer a means for circumventing the costly amendment process, they do not overcome a general lack of initiative to amend existing law, given policymakers' occupation with new legislation on more pressing political issues. They also do not avoid the challenge of mustering agreement on the scope and language of a new amendment, or control and stalling by non-representative committee members, which might preclude Congress from successfully amending a law. Compared with inter-branch committee proposals and Frost's proposal of referring a statute to Congress for revision, Congress has more incentive to take advantage of the middle-of-the road procedure I propose here: Congress has a chance to address the problem without going through the resource and time intensive process of amending the legislation. While voting on a certified question would not create the same binding solution as amending the law—the Court could always decline to follow Congress's vote—it would give Congress an efficient way to address a problem that may not rise to the priority level of amending a statute.[34] Following a brief background on inter-jurisdictional certification procedures, I will

32. Quill v. Vacco, 80 F.3d 716, 738 (2d Cir. 1996) (Calabresi, J., concurring).

33. Abrahamson & Hughes, *supra* note 10, at 1061–68.

34. I should note there are two existing ways that Congress might weigh in on pending judicial decisions. Congress is able to enact a sense-of-Congress resolution expressing its views on the subject. Sense-of-Congress resolutions present the same practical problems that have inhibited congressional response to judicial decisions: because the sense-of-Congress resolution is not judicially prompted, gathering support for such an initiative is vulnerable stalling, delay, and preoccupation with new policy matters. Moreover, it would be unlikely for a sense-of-Congress resolution to speak as specifically to the choice between the competing rationales that the Justices have defined. Essentially, this procedure is a judicially prompted and judicially constrained sense-of-Congress resolution. A second alternative is Congress filing an amicus brief. A Congressional amicus brief faces the same problems of initiative, directly addressing the precise alternatives the Justices are willing to endorse, and it also suffers representative problems, since amicus briefs are generally filed by particular members of Congress, rather than representing the strength of support within the whole body.

describe the procedure in more detail, and show how it could have been used in some of the Court's recent statutory interpretation decisions.

IV. CERTIFICATION PROCEDURES

Certification is a process whereby one decision-making body obtains an answer to a question of law from another entity, where each could legitimately make a decision in that area. Certification mediates among different jurisdictions and branches of government that are both sources of authority on a legal question.[35] Federal appellate courts can certify uncertain questions to the U.S. Supreme Court,[36] and federal courts can certify questions to state supreme courts. This process developed in response to an interpretive problem faced by federal courts applying state law. This creates challenges similar to statutory interpretation—in both instances courts seek to deferentially interpret law created by an external source of legal authority. Federal courts struggled to rule on ambiguous or unresolved questions of state law, including state statutes, by anticipating and speculating what 'reasonable' lawyers and judges trained in the state's law would do. In 1945, frustrated with federal courts' faltering efforts to predict state law, the Florida state legislature enacted a law authorizing the Florida Supreme Court to adopt rules for accepting certified questions from federal courts of appeal and the United States Supreme Court. Since then, a vast majority of state legislatures have passed procedures for certifying questions from federal courts to their supreme courts.[37]

Certification procedures are voluntary on both ends; the state supreme court can accept or decline the certified question, but it must provide a response to the certifying federal court.[38] The U.S. Supreme Court and federal courts have certified a variety of questions to state supreme courts, pertaining to common law and statutory interpretation.[39] This

35. James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 1–2 (1949).

36. 28 U.S.C. § 1254(2) (2006).

37. Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 164 (2003); Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 DUKE L. J. 69, 71 n.13 (2008).

38. Both federal and state courts have adopted standards for determining whether to expend the time to certify or answer a question, depending on the importance of the question to the outcome of the case and to state policy. O'Mara v. Town of Wappinger, 485 F.3d 693, 698 (2d Cir. 2007); W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 633 (Or. 1991).

39. These decisions include questions about state intestate law: Aldrich v. Aldrich, 375 U.S. 249 (1963); Dresner v. City of Tallahassee, 375 U.S. 136 (1963) (whether a higher state court had power to review the constitutional claims in question); Kremen v. Cohen, 325 F.3d 1035, 1038 (9th Cir. 2003) (whether an Internet domain name is "property" subject to the tort of conversion); Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 259 (Mass. 2002) (the definition of a 'child' for the purposes of

inter-jurisdictional certification is touted as promoting comity and federalism; allowing state courts greater self-determination in shaping their law, and greater control over state policy and state regulation of primary conduct.[40] This rationale extends to federal agencies interpreting state law, as a Delaware statute permits the state supreme court to answer questions certified to it from the Securities and Exchange Commission.[41] Delaware's law is significant, as it provides an example of not only inter-jurisdictional certification (from federal to state court), but inter-branch certification (executive-judicial), as I am proposing here (judicial-legislative). The rationale for adopting federal-state court certification—reducing the need to speculate on the meaning of law created by an external lawmaking body—is similar and applies to the objective of the Court when interpreting a statute.

V. A MULTIPLE-CHOICE CERTIFICATION PROCEDURE

Congress would enable this procedure by enacting legislation providing for "fast-track certification." Fast-track legislation mandates that certain measures are subject to expedited consideration in one or both houses. Fast-track procedures eliminate committee reporting, floor debates or amendments, and limit the time in which the measure must be voted upon.[42] Similar to existing fast-track legislation, this legislation would: (1) prohibit sending the certified question to committee, (2) set a time limit within which the question must reach the House and Senate floor for consideration (i.e., the fast-track legislation for considering federal trade agreements states that a vote on final passage of a trade implementing bill "shall be taken in each House on or before the close of the 15th day" from when it was reported to the floor[43]), (3) specifically limit the time allotted for floor debate and prohibit amendments, and (4) ensure that a final floor vote within the time

state intestate law); Allstate Ins. Co. v. Serio, 98 N.Y.2d 198, 204 (2002) (whether a state statute regulating insurers prohibits a "preferred repairer" clause in vehicle casualty policy); and Landoil Res. Corp. v. Alexander & Alexander Servs., Inc., 77 N.Y.2d 28, 31 (1990) (whether a defendant's activities qualify as "doing business" within the state for the sake of the state's long-arm statute).

40. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) ("[Certification] save[s] time, energy, and resources and helps build a cooperative judicial federalism."); Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181, 183 (2010).

41. Winship, *supra* note 40, at 192–95; CA, Inc. v. AFSCME Emp. Pension Plan, 953 A.2d 227, 228 (Del. 2008).

42. CONG. RESEARCH SERV., "FAST-TRACK" OR EXPEDITED PROCEDURES: THEIR PURPOSES, ELEMENTS, AND IMPLICATIONS 1 (Jan. 21, 2003). Congress has enacted these forms of fast-track procedures for voting on recommendations for military base closures and for legislation to implement major international trade agreements.

43. *Id.* at 4.

permitted cannot be prevented through delay (such as filibuster) in either house.[44]

Both sides of this procedure would be voluntary—the Court would only certify questions when the conference agrees to it as described below, and the legislature would have the option of declining to answer the question. I imagine that the Court should voluntarily invoke this procedure only after hearing oral argument, conferencing the case, debating reasoning supporting different views, and determining that there will very likely be at least one dissenting opinion. Preserving the procedure for use only where Justices endorse different outcomes ensures that Congress is constrained to elect between outcomes that Justices, in their legal expertise and application of statutory construction, deem the best outcome (therefore implicitly constitutional and legally viable). Justices would prepare statements detailing their own statutory interpretation analysis (basically a summary of what would be the majority and dissenting opinions), including their own views about controlling methodology (e.g., Justice Scalia's commitment to adhering to the text's plain meaning), substantive canons (e.g., presumption against retroactivity, lenity) and consistency with precedent or other areas of the law. They would also draft a narrowly framed multiple-choice question presenting the discrete choice between the alternative interpretations. Just like a draft opinion, these materials would be circulated to all members of the Court for approval, and Justices would suggest changes to the formulation of the statements, question and the answers, and negotiate the final version to be sent to Congress. The question formulated through the Justices' negotiation would be worded carefully to present the ambiguity as abstractly, neutrally and with as few additional words beyond those in the statute as possible, without referring to facts of the specific case, or suggesting one outcome over the other. These documents would not identify which Justices are supporting either of the outcomes.

Before moving on, I should say an additional word about the Court's administration of this process: Questions might arise about what would happen in the event that Justices cannot agree about whether to certify the question, or as to the wording of the question. I am relying on the Court's ability, as a deliberative decisionmaking body, to negotiate compromise and adhere to neutral procedures despite disagreement. This ability is demonstrated in that the Court maintains collegiality in making contentious decisions as to whether to grant cert, whether to issue orders granting additional time for oral argument or other procedural matters, and deciding upon the terms and language of

44. These are the typical provisions of effective fast-track procedures. *Id.* at 3.

opinions. In addition to negotiating the language of written opinions, the Court has also long managed to reach agreement on wording for questions certified to state courts. I expect the conference would likewise be able to formulate a consistent, neutral process for determining whether to certify a question that is deemed fair and workable, and that the Justices respect despite disagreement about the outcome of a decision. The conference could adopt a standard similar to deciding whether to grant cert: Justices could vote on whether to certify a question, the Court would do so if four Justices favor it. Or the Court might set the bar lower, allowing certification whenever at least one Justice calls for certifying the question. And there is no reason to expect the Court would be any more paralyzed by disagreement in formulating the question presented to Congress than it is when circulating and negotiating an opinion draft. Justices regularly have deep disagreements about language and rationale for the ruling, and often go through many circulations before an opinion satisfies all members endorsing the outcome. The Court is accustomed to compromising over significant differences in order to keep the institution functioning. Finally, because the certifying a question is essentially a tool of statutory construction, a member of the Court who does not agree with the methodology could dissent on these grounds, arguing that certification was not an appropriate method for deciding this case (one can imagine that a justice might categorically disagree with certification, as Justice Scalia does with legislative history). A dissenting Justice might also argue that the certified question was wrongly phrased.

The congressional proceedings on a certified question would look like this: The memo summarizing the legal reasoning of the potential majority and dissent, along with the question, would be introduced on the floor, and distributed to members of Congress. Importantly, members of Congress would receive no indication of which Justices are associated with the different outcomes presented. A floor vote would be scheduled within fifteen days of the question's introduction. On the day of the scheduled vote, there would first be a vote on whether to answer the question. If a majority favors not answering the question, then there is no second vote, and the legislature is essentially punting the decision back to the Court. Even this response would be informative to the Court. It would provide some license to Justices, generally conscientious about lending sufficient deference to the will of elected officials, to speak more plainly in terms of their own judgment about how the statute should apply as a matter of the overarching policy, practical concerns, or synthesis with existing law.

If a simple majority votes in favor of answering the question, the second vote would ask which of the two alternatives it should be. The

result of the vote in each house would be reported back to the Court. Because Congress's preferences are only evidentiary in the Court's decision, there is no need for a majority strong enough to pass legislation to support one interpretation. It is important that the congressional vote is reported in terms of aggregate numbers (e.g., 64/99 voting Senators support interpretation "a", and 35/99 support "b"; 320/400 voting Representatives support interpretation "a"; and 80/400 support "b") since the purpose of the procedure is to provide the Court evidence that allows it to gauge the strength (or uncertainty) of congressional preferences. A strong majority of Congress preferring one ruling would indicate that Congress could be inclined to overrule an interpretation to the contrary. On the other hand, if a weak majority preferred one ruling, or there is almost equal division, this suggests that the law is genuinely ambiguous, and Congress is itself ambivalent or indeterminate about what the law should say. Somewhat like a congressional decision not to respond to the question, an ambivalent response from Congress may signal to the Court that judicial expertise is warranted in determining which interpretation to adopt. The next section will illustrate how the procedure would apply in several of the Court's recent statutory interpretation decisions.

VI. APPLYING THE PROCEDURE IN RECENT STATUTORY DECISIONS

Here is how the procedure could have been used to address three slightly different interpretive questions presented in recent statutory cases—straightforward ambiguous language, whether a statute delegates interpretive authority to an administrative agency, and whether a statute makes a clear enough statement to overcome the presumption imposed by a substantive canon of construction.

Ambiguous language: In *Kasten v. Saint-Gobain Performance Plastics Corp*,[45] the Court was asked to decide between two possible meanings of the words "file[] any complaint." Katsen's suit alleged that his employer violated a provision of the Fair Labor Standards Act making it unlawful "to discharge . . . any employee because such employee has filed any complaint . . . under or related to [the Act]," by firing Katsen. Katsen alleged that he was discharged because he complained orally to his employer that its method of calculating employees' clock-in and clock-out times violated the Act. The Court addressed whether "filed any complaint" includes oral complaints made to the employer.[46] Justice Breyer, writing for the majority,

45. 131 S.Ct. 1325 (2011).

46. *Id.* at 1329 (emphasis in original).

acknowledged that the word "file" had different meanings: some dictionary definitions contemplate a complaint made in writing, while others suggest that something may be filed orally; in records of various proceedings, legislators, judges, and administrators have all used the word "file" in conjunction with oral statements; and other provisions of the Act do not make clear whether a filing is inherently a written complaint.[47] Hence, "the text, taken alone, cannot provide a conclusive answer to our interpretive question."[48] Justice Breyer reasoned that "file" must be understood as including oral complaints, on account of "the Act's basic objective, . . . to prohibit 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,'" and that it "relies for enforcement of its substantive standards on information and complaints received from employees."[49] Justice Breyer asked:

> Why would Congress want to limit the enforcement scheme's effectiveness by inhibiting use of the Act's complaint procedure by those who would find it difficult to reduce their complaints to writing, particularly the illiterate, less educated, or overworked workers who were most in need of the Act's help at the time of passage?[50]

Dissenting, Justice Scalia concluded that "filed any complaint" referred to a much more limited realm of activities, not including any complaints made directly to the employer. In the dissent's view, "filed" implied only formal charges made in an official court or administrative setting. The dissent also speculated about what Congress wanted: "Congress may not have . . . provide[d] a private cause of action for retaliation against complaints[] because it was unwilling to expose employers to the litigation, or to the inability to dismiss unsatisfactory workers, which that additional step would entail."[51]

If invoking a certification procedure, the Court would first write up a statement of the legal reasoning in the opinions of Justice Breyer and Justice Scalia, then draft a certified question along the lines of the question presented. The question and answers might look like this:

> **Question:** § 215(a)(3) of the Fair Labor Standards Act makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint* . . . under or related to [the Act]." Does the term "filed any complaint" in § 215(a)(3):
>
> **Responses:** (a) include oral complaints made directly to the employer; or

47. *Id.* at 1331–33.
48. *Id.* at 1333.
49. *Id.* at 1333 (quoting 29 U.S.C. § 202(a)).
50. *Id.*
51. *Id.* at 1339 (Scalia, J., dissenting).

(b) include only formal charges made in an official court or administrative proceeding and "not cover complaints to the employer at all."[52]

Agency Interpretations: Another slightly different question arises when an agency's interpretation of its enabling statute is at issue, and under *Chevron v. N.R.D.C.*, the Court must address both whether an ambiguity in the statute amounts to a delegation of lawmaking authority to the agency (*Chevron* step 1), and second, whether the interpretation the agency selected is based on a permissible construction of the statute (*Chevron* step 2).[53] A certification procedure seems particularly apt to *Chevron* deference cases because inquiry into what Congress wanted is twofold: first, whether Congress wanted to delegate lawmaking power to another body, and second, whether Congress would approve of the agency's use of this authority.[54] A certification procedure could be informative at both layers of the *Chevron* inquiry. One recent *Chevron* case might serve as an example of how certification would work in the deference context: In *Arlington v. F.C.C.,* the Federal Communications Commission (FCC) argued that the Communications Act, by authorizing the agency to "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions," delegated it power to define the specific statutory provision, "within a reasonable period of time" for responding to a wireless siting application.[55] The question presented was whether the Court should defer to the agency's interpretation of the statute as giving it authority to define "within a reasonable period of time" as 90 to 150 days, specifically. The agency argued that Congress gave it this authority by providing it power to prescribe necessary rules and regulations; and the courts should defer to this determination. The majority reasoned that principles of *Chevron* deference applied to the agency's assessment that the statute gave it power to make these specific rules. Because the statute's language allowed the agency to promulgate necessary rules and regulations, the agency's decision that it had lawmaking power to fill in "reasonable period" was within the scope of its statutory authority.[56]

Justice Breyer's concurrence argued that the Court should not defer to the agency's determination about whether the statute delegated it

52. *Id.* at 1337 (Scalia, J., dissenting).

53. 467 U.S. 837, 843 (1984).

54. The idea that judges speculate as to congressional intent even more in *Chevron* cases is supported by findings that the Court has been more likely to cite legislative history in *Chevron* deference cases. William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L. J. 1083 (2008).

55. 133 S. Ct. 1863 (2013).

56. *Id.* at 1874.

authority to define a "reasonable period"; "[t]he question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently . . . considering 'traditional tools of statutory construction.'"[57] Justice Breyer independently concluded that the "reasonableness" provision does, in fact, leave a gap for the agency to fill. He therefore agreed with the judgment that the FCC lawfully promulgated regulations interpreting this provision.

The dissent argued that the majority and the lower court overlooked *Chevron* step 1 by failing to evaluate whether the specific provision, "within a reasonable period," amounted to a delegation of interpretive authority. The dissent emphasized structural principles pertaining to the role of the judiciary *vis-a-vis* Congress and the Executive. It explained that the judiciary is to determine what the law is, as defined by Congress. "We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities," and "before a court may grant such deference, it must on its own decide whether Congress . . . has in fact delegated to the agency lawmaking power over the ambiguity at issue."[58] Congress's general grant of authority to prescribe rules as necessary to carry out the statute "does not necessarily mean that Congress granted the agency interpretive authority over all its provisions."[59]

While this decision implicates more fundamental questions about the relative powers of courts and agencies, the core question was really whether Congress's general grant of power to prescribe rules and regulations amounted to a delegation of authority to declare lawmaking power with respect to this specific provision. The Court's discussion could have been enriched by the views of Congress. By indicating whether it viewed the general grant of rulemaking authority as delegation to the agency to flesh out the meaning of a specific provision, Congress would be indicating its view on the extent that an agency may assume a general grant of rulemaking power as authorizing it to determine its own authority to fill in any specific provision in the statute. In this case, the following two questions might be presented:

> **Question**: The Communications Act grants the Federal Communications Commission power to "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions," 47 U.S.C. § 201(b). Does this delegate the FCC authority to determine its own power

57. *Id.* at 1876 (Breyer, J. concurring)(internal quotations omitted).

58. *Id.* at *17 (Roberts, J. dissenting).

59. *Id.* at *21.

> to define "a reasonable period" in which local governments should respond to a wireless siting application?
>
> **Responses**: (a) the power to prescribe necessary rules and regulations under § 201(b) grants the FCC power to determine that it has authority to define the specific provision, "within a reasonable period"; or
>
> (b) § 201(b) does not delegate power to the FCC to determine that it has authority to define the specific provision, "within a reasonable period"; any delegation of power must come from ambiguity within the provision being defined, "within a reasonable period." This provision is sufficiently ambiguous to grant the FCC authority to issue an interpretation entitled to judicial deference.
>
> (c) § 201(b) does not delegate power to the FCC to define the specific provision "within a reasonable period"; any delegation of power must come from ambiguity within the provision being defined, "within a reasonable period." This provision is NOT sufficiently ambiguous to grant the FCC authority to issue an interpretation entitled to judicial deference.

If a simple majority prefers answer (a) or (b), the second question would be:

> **Question**: The FCC has determined that "a reasonable period" for a state or local government to respond to a wireless siting application is 90-150 days. The Secretary's determination is:
>
> **Responses**: (a) a permissible construction of the statute; or (b) arbitrary, capricious, or inconsistent with the statute.

In a case where the question presents three options to Congress, all three alternatives would be simultaneously voted on, and the aggregate support for each option would be reported to the Court. This eliminates any risk that the ordering of the vote would skew outcome towards one option or another.[60] The number of legislators favoring one of three options would be just as useful to the Court as knowing the number favoring one of two options. In either case, the Court would have the

60. In three outcome cases, there might be concern for Condorcet's Paradox; a vote between three choices equally preferred amongst three groups of voters allows one group to set the agenda, by giving up their first preference choice and voting for their second choice. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 12–13 (1997). A voting system that avoided Condorcet's Paradox would adopt a Condorcet Method, where each voter lists his preference rankings amongst three alternatives in order, and the winner is not determined by who receives the majority of first choice votes, but who has the overall highest preference ranking. Partha Dasgupta & Eric Maskin, *The Fairest Vote of All*, SCIENTIFIC AM. MAG., Feb. 9, 2004. Potential for this type of compromising should not detract from legitimacy of a congressional response any more than it detracts from the legitimacy of legislation enacted through ordinary horse trading. After all, legislation is well recognized to reflect strategic compromise and horse-trading amongst various constituencies in Congress, and not expected to represent perfect majority rule, as in a sum tally of the individual preference rankings of each member.

sort of evidence that this procedure is best suited to provide: whether an overwhelming majority of Congress prefers one outcome, such that the Court is likely to be overruled if it adopts a different interpretation.

Substantive Cannons: The Court relies on substantive cannons to promote constitutional or rule-of-law values external to the statute being interpreted. Substantive cannons set a default construing legislation in line with overarching legal values by putting a heavier burden on Congress to clearly express its intent to enact legislation contrary to those values. By requiring Congress to "speak clearly" in order to pass a statute that encroaches on constitutional values, these canons "trigger democratic (in the sense of legislative) processes and to ensure the forms of deliberation, and bargaining, that are likely to occur in the proper arenas."[61] For instance, the federalism cannon, requiring Congress to "clearly express" its intent to create an exemption from state taxation,[62] and the presumption against preemption, requiring Congress to make "clear and manifest" its purpose to supersede states' historic police powers[63] impose a higher burden on Congress to override state sovereignty values—making sure Congress really recognizes and means this result. Similarly, the common-law canon sets a default in favor of consistency and predictability in the law by requiring Congress to clearly indicate its intention for a statute to mean something contrary to the common law that previously governed the question.[64] And the presumption against retroactivity, requiring Congress to "clearly state" its intent for a provision of the statute to apply retroactively, protects values of fair notice incorporated in the due process and Ex Post Facto clauses of the Constitution.[65] The canons have been described as a "clarity tax" that raises the cost of passing constitutionally sensitive legislation,[66] and criticized as a "judge-made constitutional penumbra."[67] This procedure would be apt in cases where the Justices disagree about whether Congress has made a clear statement sufficient to overcome such a presumption. This would enable the Court to notify Congress that the legislation encroaches on a constitutional value guarded by a substantive canon, and ask Congress whether it really means to encroach on these values, without taking the more-extreme measure of automatically presuming the contrary.

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61. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 335 (2000).

62. Fl. Dept. of Rev. v. Picadilly Cafeterias, Inc., 544 U.S. 33, 50 (2008).

63. Wyeth v. Levine, 555 U.S. 555, 564 (2009).

64. Pasquantino v. United States, 544 U.S. 349, 359 (2005).

65. Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994).

66. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010).

67. Posner, *supra* note 13, at 816.

For instance, in *Kiobel v. Royal Dutch Petroleum Co.*,[68] the Court was faced with the question whether the Alien Tort Statute, providing that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," applies to torts occurring in a sovereign territory outside the United States. (The defendant oil companies—incorporated in the Netherlands and England—were alleged to have aided the Nigerian government in violently suppressing Nigerian demonstrators objecting to the environmental effects of the companies' activities in Nigeria.) In concluding the law did not apply to torts committed in foreign territories, the majority relied on the presumption against extraterritoriality—"'[w]hen a statute gives no clear indication of an extraterritorial application, it has none.'"[69] This "presumption that United States law governs domestically but does not rule the world . . . serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[70] The majority reasoned that there were three familiar offenses to which ATS applied when it was first enacted—violation of safe conducts, infringement of the rights of ambassadors, and piracy—and ATS's intended application to these torts does not evince the "clear indication of extraterritoriality" required to overcome the presumption.[71] Justice Kennedy concurred with the majority's result and reasoning, noting that future cases may require more elaboration on the proper implementation of the presumption against extraterritorial application.[72] And Justice Alito's concurrence, joined by Justice Thomas, agreed that the presumption against extraterritoriality had not been overcome; and went further to state that there is no cause of action under ATS unless the domestic conduct is sufficient to violate an international law norm "as definite in content and acceptance" as the three principal offenses that were familiar when ATS was enacted.[73]

Justice Breyer, joined by Justices Ginsburg, Kagan, and Sotomayor, concurred in the judgment based on the specifics of this case, but argued for a very different understanding of whether ATS applies to conduct outside the United States. They found that ATS did clearly indicate extraterritorial application because it "was enacted with 'foreign matters' in mind": "the statute's text refers explicitly to 'alien[s],' 'treat[ies],' and 'the law of nations.'"; its "purpose was to address

68. 133 S. Ct. 1659 (2013).

69. *Id.* at 1664 (quotations omitted).

70. *Id.*

71. *Id.* at 1665 (quotations omitted).

72. *Id.* at 1669 (Kennedy, J. concurring).

73. *Id.* at 1670 (Alito, J., concurring).

'violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs.'"; and it is undisputed that Congress intended ATS to apply to acts of piracy taking place on the high seas, which the Court has traditionally treated as foreign territory.[74] Because, in the concurrence's view, ATS is clearly intended to apply extraterritorially, ATS *could* apply to actions occurring in sovereign territory outside the United States if the defendant an American national or if "the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind."[75] In this case, there was not a sufficient connection between the United States and the parties or the conduct for a national interest to be affected.

In this case, the Court would provide Congress with a statement of the majority's reasoning and the reasoning in Justice Breyer's concurrence that argues for an extraterritorial interpretation of ATS. (It would likely be unnecessary to provide a statement of the reasoning in the other two concurrences, since both adopt the majority's view that ATS fails to overcome the presumption against extraterritorial application. This would be for the Court to decide, depending on whether Justice Kennedy or Justice Alito's concurrence was seen as endorsing a sufficiently different reading of the statute that it should be included in the alternatives put before Congress.) In this case, the Court might certify the following question:

> **Question**: The Alien Tort Statute provides "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Court presumes that "when a statute gives no clear indication of an extraterritorial application, it has none." When the Alien Tort Statute was enacted, it was understood to apply to the offense of piracy, which occurs on the high seas. Does the statute provide a *clear indication* of extraterritorial application such that it can be applied to conduct occurring outside the United States in the territory of a sovereign nation?
>
> **Responses**: (a) The Alien Tort Statute does not provide clear indication of extraterritorial application; or
>
> (b) The Alien Tort Statute does *clearly* indicate extraterritorial application, and can therefore be applied to offenses that occur outside the United States in the territory of a sovereign nation when defendant is

74. *Id.* at 1672 (Breyer, J. concurring) (quotations omitted).

75. *Id.* at 1671 (Breyer, J. concurring).

> an American national, or "the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind."

Congress's response would allay the concern underlying the presumption against extraterritoriality: to "ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[76]

VII. CONSTITUTIONALITY OF A MULTIPLE-CHOICE LEGISLATIVE CERTIFICATION PROCEDURE

While this procedure calls on both branches to function differently from their conventional roles, I would maintain that the procedure comports with constitutional limitations on the legislature and judiciary, especially because it is voluntary for both branches. I will address potential constitutional objections to this certification procedure, which I would expect to arise under Separation of Powers, the Ex Post Facto clause, and the Presentment clause, as well as concern for balance of power between the enacting and subsequent Congresses.

A. Separation of Powers

The Court's separation of powers jurisprudence has been described as a "doctrine easily invoked, but not clearly explained."[77] There are two approaches taken to addressing separation of powers questions: formalist and functionalist.[78] Formalists view the powers of each branch as limited to powers specifically prescribed in the vesting clauses of the Constitution: "Article I grants Congress '[a]ll legislative Powers herein granted;' Article II grants the president 'executive Power;' and Article III grants the judiciary 'judicial Power.'"[79] Under a formalist view, separation of powers analysis turns on whether a branch of government performs a function that falls outside the literal definition of its vested power; i.e. whether the legislature's activity is, in fact, 'legislating.'[80] The functionalist approach recognizes that each branch of government is given 'core' functions by the vesting clauses, but these do not represent

76. *Id.* at 1664.

77. Jellum, *supra* note 10, at 855.

78. *Id.* at 854–55.

79. *Id.* at 861.

80. The Court has explained that legislative acts "[have] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch." INS v. Chahda, 462 U.S. 919, 952 (1983).

absolute limitations. The goal of the analysis is to ensure no branch becomes too powerful, rather than formally restrict each branch to the literal definition of its vested function. The Court has recognized that the functionalist approach may more accurately meet the demands of an ever-changing government, explaining "[t]he Constitution by no means contemplates total separation of each of these three essential branches," as "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."[81] This is particularly true in light of the increasingly complex executive institutions in the modern administrative state.[82] The functional approach asks two questions to determine whether separation of powers has been violated: Whether one branch has "interfere[d] impermissibly with the other's performance of its constitutionally assigned function," or whether "one branch assume[d] a function that more properly is entrusted to another."[83]

It might be argued that this procedure violates separation of powers because the legislature would be assuming a judicial function when voting on a question about a statute's meaning. After all, the Court has explained that the power of "'[t]he interpretation of the laws' is 'the proper and peculiar province of the courts.'"[84] But with this procedure Congress is only acting as a part of the judicial decisionmaking process, at the request of the Court, to provide evidence that the Court has deemed relevant and asked to hear. The Court has upheld at least one Act of Congress doing much more to dictate the outcome of a pending decision.

In *Robertson v. Seattle Audobon*, a provision attached to appropriations legislation referred to two pending cases by name and caption number, and was plainly designed to dictate the outcome of those cases.[85] The *Seattle Audobon* plaintiffs alleged that the Forest Service and Bureau of Land Management violated the administrative guidelines governing the oversight of protected habitats under the National Environmental Policy Act, the Migratory Bird Treaty Act, and the National Forest Management Act when they proposed timber harvesting in protected habitats of the spotted owl. Congress's next appropriations act contained an amendment specifying that less rigorous guidelines, with which the agencies were already compliant, applied to the protected habitats in question. The legislation specifically stated that

81. Buckley v. Valeo, 424 U.S. 1, 121 (1976).

82. Jellum, *supra* note 10, at 870 ("[For] a government confronted with the complexity of the twenty-first century, functionalism seems to be winning the war.").

83. *Chahda*, 462 U.S. at 919, 963 (Powell, J. concurring); *Buckley*, 424 U.S. at 121.

84. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 222 (1995).

85. Robertson v. Seattle Audubon Soc., 503 U.S. 429, 434–35 (1992).

"the Congress hereby determines and directs that management of areas according to . . . this section . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases . . . ," and listed names and caption numbers of the two pending cases.[86] The Ninth Circuit found that the congressional enactment "directs the court to reach a specific result and make certain factual findings under existing law in connection with two [pending] cases" and "held the provision unconstitutional under *United States v. Klein*, . . . which it construed as prohibiting Congress from 'direct[ing] . . . a particular decision in a case, without repealing or amending the law underlying the litigation.'"[87]

The Court unanimously reversed, finding Congress' case-specific enactment constitutional since it "compelled changes in law, not findings or results under old law."[88] The Court reasoned that "what Congress directed—to agencies and courts alike—was a change in law, not specific results under old law."[89]

If what Congress did in *Seattle Audobon* was constitutional—declaring the law requires 'x' as applied to two pending cases; it is likely that Congress providing evidence of its preference between the options predefined by the Court, would also be constitutional. Because the vote is in no way binding, and the options presented are based on readings that the Justices would otherwise reach, Congress does far less to compel a specific result or change the law than it did in *Seattle Audobon*.[90]

Nor does this certification procedure suffer the problems associated with the legislative veto that the Court found unconstitutional in *INS v. Chadha*.[91] One house retained the automatic and absolute power to review and veto each executive decision granting a pardon from deportation. While the majority found that the legislative veto violated the bicameralism and presentment clauses, Justice Powell's concurrence argued that it should be invalidated on separation of powers grounds.

86. *Id.*

87. *Id.* at 436. In *United States v. Klein*, 13 Wall 128 (1871), the Court held unconstitutional legislation invalidating the preexisting judicial rule that a presidential pardon would be taken as presumptive evidence that the pardoned individual had not aided or abetted the enemy during war. This statute violated separation of powers because it "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 133–34.

88. *Robertson*, 503 U.S. at 438.

89. *Id.* at 439. The Court has explained that "[w]hatever the precise scope of *Klein* . . . later decisions have made clear that its prohibition [on enactments prescribing specific outcomes] does not take hold when Congress 'amend[s] applicable law.'" *Miller*, 530 U.S. at327 349.

90. In Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), the Court held that the legislature could not "retroactively command[] the federal courts to reopen final judgments" without violating separation of powers.

91. 462 U.S. 919 (1983).

According to Justice Powell, the House's actions were "clearly adjudicatory" because "[t]he House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches."[92] With this procedure, as in *Seattle Audobon,* Congress speaks to a general rule. Congress is not asked to vote on how the law applies to a given set of facts; but rather, it makes a statement about what it would prefer the law to mean in the abstract. Most critically, this procedure is not intrusive on the judiciary's function because it is voluntary and non-binding. In a sense, when the Court chooses to certify a question, it is doing little more than it does when it looks at floor statements, a committee report or another form of legislative history; it is simply seeking testimony of congressional preferences to fit into its own interpretive analysis; evidence it may weight or disregard as it sees fit.

Further indication that this procedure comports with separation of powers may be found in the presumed constitutionality of legislative directives on statutory interpretation. Commentators have concluded that legislative rules prescribing methods of statutory construction, as enacted by a number of state legislatures,[93] would be unlikely to violate separation of powers, and have urged Congress to enact rules governing interpretation of federal statutes.[94] Even statutory default rules encroach more on judicial decisions than the certification procedure proposed here. First, these rules are binding on the courts, and, second, they dictate a particular outcome insofar as they *require* the outcome compelled by one interpretive methodology to trump the outcome compelled by another interpretive method which the Justices may prefer.

B. Presentment clause

Another conceivable objection is that accepting a congressional vote on a statutory interpretation question without the President's approval would violate the Presentment Clause.[95] First, "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements." Only acts of legislative power are subject to these requirements, and this depends "upon whether they contain matter which is properly to be regarded as legislative in its character and

92. *Id.* at 964–65 (Powell, J. concurring).

93. *See* Gluck, *supra* note 2.

94. *See* Jellum, *supra* note 10; Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1698–99 (2002).

95. *See Chadha*, 462 U.S. 919 (1983).

effect."[96] Because this procedure is not law-making; it amounts to something closer to a judicially prompted "sense-of-Congress" resolution, it does not seem to trigger the requirements of the presentment clause.

While I do not think that Congress's response need be subject to presentment requirements, there is no reason that the question and the legislature's response could not be presented to the President. The President could have the option of "vetoing" the legislature's response by indicating that she prefers a different interpretation; in which case the court could consider the President's contrary view in determining how to weight Congress's preference, this could potentially be a basis for lessening the weight given to congressional preferences. The President's response would be, like Congress's, wholly optional. The President would be likely to weigh in only in the event of significant disagreement with the legislature's vote. This is because a presidential vote contrary to Congress's would counteract legislative preferences, and it would therefore have the same meaning in terms of power-dynamics as vetoing a piece of legislation.

C. Ex Post Facto

Justice Powell's *Chadha* concurrence also emphasized Ex Post Facto concerns that arise from allowing Congress to make case-by-case determinations, stressing "the danger of subjecting the determination of the rights of one person to the tyranny of shifting majorities."[97] A politicized body might be inclined to make rash decisions motivated by the political climate surrounding a specific case, regardless of the preexisting law that the subject of the decision has relied upon. "Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards . . . that are present when a court or an agency adjudicates individual rights."[98] Frost acknowledges that her proposal, prompting the legislature to amend the law as it applies to a pending decision, may raise Ex Post Facto concerns. This risk is eliminated here, where the Justices would first rely on their tools of construction, including substantive canons such as the presumption against retroactivity (presuming prospective application so as to guard against Ex Post Facto violations),[99] before putting a potential interpretation as an option before Congress. The Justices would not give Congress the option of an

96. *Id.* at 952.

97. 462 U.S. at 961 (Powell, J. concurring) (internal quotations omitted).

98. *Id.* at 966.

99. Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994).

interpretation that they are not prepared to adopt, and thus impliedly find constitutional. The fact that this procedure is bookended by judicial review also mitigates the problem of politicized decisionmaking: The Court could alter the way that it weighs Congress's vote if it observes that the specifics of this particular case were highly politicized, and that Congress was focused on the outcome rather than the abstract meaning of the statute. It may be apparent, in retrospect, that legislators made public statements about their views on the facts underlying the case (e.g., "this particular defendant should be imprisoned for the heinous crime he committed"), rather than the abstract interpretive question, or that media coverage framed the vote almost exclusively as being about whether this defendant should go to prison, rather than the abstract statutory question—"does term 'y' in the statute mean 'a' or 'b'?". If this were the case, the Court might explain that because Congress's vote appeared to be oriented around the result of this particular case, it is not convinced Congress considered the meaning of the legislation in abstract (in terms of how it would apply in other cases, how it fits with other statutory provisions or the policy animating that statute, its compatibility with other areas of the law, consistency with previous judicial decisions, or constitutional values).

The possibility of this occurrence should not rule out the viability of certification. The potential for this sort of politicization will vary widely depending on the nature of the case. A question of less public salience, such as the delegation of authority to the FCC, or the meaning of the term "file" within the Fair Labor Standards Act, would be less conducive to the same sort of case-specific politicization. Vulnerability to this sort of case-specific politicization is a consideration for the Court in determining whether to certify the question. Also, political debate about the abstract statutory question, rather than the outcome of this specific case, would not undermine the legitimacy of this procedure. If for instance, the public debates whether "file" within the Fair Labor Standards Act should include an oral complaint made directly to the employer, it would be legitimate for this discourse to bear on Congress's vote, since the whole purpose is to defer to contemporary democratic will.

D. Intra-branch Tension—Subsequent vs. Enacting Legislature

One of the most significant concerns may be that this certification procedure takes into account the will of the contemporary legislature, rather than the enacting one. It could be argued that a later Congress should have no constitutional role in elaborating on or interpreting an

earlier Congress's enactments.[100] It is not clear that the Constitution requires any particular balance of power between enacting and subsequent legislatures. The Court has described the Constitution as being concerned with "the distribution of powers among the three coequal Branches; it does not speak to the manner in which authority is parceled out within a single Branch."[101] Article I says nothing about balance of power between previous and subsequent Congresses, and charges Congress with designing its own procedural rules.

If not characterized as a constitutional or balance of power issue, one could argue that a later Congress has no status as an authority on legislation enacted by earlier Congress. But this claim belies the Court's consistent practice of looking to post-enactment legislative signals in statutory interpretation decisions. With these decisions, the Court very-plainly recognizes the relevance of the preferences of post-enactment Congresses. Considering the preferences of more contemporary Congresses makes sense, insofar as Justices aim to avoid an interpretation that today's Congress will overrule.[102] Looking to the preferences of present-day legislators also comports with democratic values: contemporary legislative will, as opposed to the will of enacting legislators, best represents current political preferences; and deferring to present political preferences generates greater political satisfaction than deferring to past political preferences.[103] For this reason, one writer has observed that given the choice, most legislators (and their constituents) would prefer to influence the meaning of all present legislation, rather than permanently influence the future interpretations of legislation enacted while they were in office.[104]

Third, it makes practical sense to consider contemporary preferences because interpretation of a statute often becomes more problematic with time as social and legal context changes.[105] Contemporary legislators provide more valuable guidance on what a statute should mean in light of present circumstances. Positive political theory provides a dynamic account of statutory law akin to common law. Instead of having one

100. James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 Mich. L. Rev. 1 (1994); *see also*; Consumer Prod. Safety Commn. v. GTE Sylvania, 447 U.S. 102, 117–18 (1980); United States v. Price, 361 U.S. 304, 313 (1960).

101. Touby v. United States, 500 U.S. 160, 167–68 (1991) (internal citations omitted).

102. Edward P. Schwartz et al., *A Positive Theory of Legislative Intent*, 57 LAW & CONTEMP. PROBS. 51, 54 (1994).

103. Elhauge, *supra* note 13.

104. *Id.* at 2029 ("Even for the enacting government, a general default [interpretive] rule that accurately tracks current preferences (rather than the preferences of the government that enacted each statute) will maximize its political satisfaction.").

105. William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, 57 L. & CONTEMP. PROBLEMS 75, 78 n.14 (1994).

meaning, fixed at the point of enactment, legislation develops and changes through ongoing collaboration between legislators overseeing agencies that administer the statute and interpret it to address new problems, and courts who apply it to particular situations.[106] An advantage of common law is that courts have flexibility to update the law as circumstances change and problems in its application become apparent through litigation. The same updating and adapting is desirable in a regime governed by statutory law in order to make the law best fit present reality. This procedure is geared toward facilitating collaboration between Congress and the Court in this sort of dynamic elaboration of statutory law.

The greater relevance of recent legislative preferences is reflected in canons addressing the balance of power between Congresses over time: the last in time rule provides that, when two pieces of legislation cannot be interpreted so as to avoid conflict, the most recently enacted one governs. The rule against entrenchment prohibits previous Congresses from enacting laws constraining the authority of future Congresses. Both of these rules reflect the value that more contemporary congressional preferences trump older ones.

The Court has often found the views or actions of more recent Congresses relevant to interpreting a provision enacted by an earlier Congress. In *Seatrain Shipbuilding Corp. v. Shell Oil*,[107] the Court held that the Merchant Marine Act authorized the Secretary to release a ship owner from conditions imposed in exchange for a subsidy provided under the Act, once the ship owner repaid the subsidy. The provision in question was enacted in 1934, and the 1971 and 1972 Congresses had proposed an amendment to the Act granting the Secretary authority to do exactly this. However, the House Committee report explained that it removed the language because the instances where the Secretary might invoke its authority to release a ship from conditions imposed as a part of a subsidy arose too infrequently, and the Committee "questions the desirability of general legislation to deal with such an unusual situation."[108] The Court relied on this "understanding" of the subsequent Congress, explaining that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure."[109] The same year as *Seatrain*, another decision explained that while, "arguments predicated upon subsequent congressional actions must be weighed with

106. Eskridge, *supra* note 105.

107. 444 U.S. 572, 596 (1980).

108. *Id.*

109. *Id.*

extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent."[110]

In *F.D.A. v. Brown & Williamson*,[111] the Court concluded that tobacco products were not "restricted devices" under the 1965 Food, Drug and Cosmetic Act.[112] Rather than relying exclusively on analysis of what the 1965 Congress meant by the term "restricted device," the Court also focused on laws enacted by subsequent Congresses, which acknowledged the importance of tobacco to national industry. "Congress' . . . decisions to regulate labeling and advertising and to adopt the express policy of protecting commerce and the national economy . . . to the maximum extent reveal its intent that tobacco products remain on the market."[113] The Court's opinion plainly speaks in the present tense of ongoing congressional intent. The Court explained:

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings . . . a specific policy embodied in a later federal statute should control our construction of the earlier statute, even though it has not been expressly amended.[114]

Furthermore, in 2008, the Court relied on the history surrounding a 1995 amendment to interpret the scope of liability under a much older section of the Private Securities Litigation Reform Act. Leading up to the 1995 amendment, the Senate subcommittee considered a recommendation to establish a private cause of action for aiding and abetting violations of the securities laws. However, the enacted amendment authorized only the Securities and Exchange Commission., not private plaintiffs, to prosecute aiders and abettors. The Court relied on the deliberations that took place during the 1995 amendments in order to interpret a preexisting provision of the Act as not allowing actions by private parties against aiders and abettors of securities violations. The Court quoted *Seatrain*'s statement that views of subsequent Congresses are "entitled to significant weight," and *Brown & Williamson*'s explanation that the implications of a later statute may alter the meaning of an earlier one.[115] The Court has also explained that

110. Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982) (relying on the legislative history—comments in the Conference Committee analysis—of the 1972 amendments to the Equal Opportunity Act to inform interpretation of a provision enacted in 1964).

111. 529 U.S. 120 (2000).

112. *Id.* at 134.

113. *Id.* at 139 (internal quotations omitted).

114. *Id.* at 143.

115. Stoneridge Inv. Partners, L.L.C. v. Scientific Atlanta, 552 U.S. 148, 163 (2008).

more recent legislators' understanding of the statute shapes "public reliance" on whatever the later Congress's understanding of the law was, even if different from the original Congress's view. Justice Scalia, who opposes reference to legislative history, has acknowledged the relevance of this form of reliance.[116]

Another more subtle way that the Court recognizes the relevance of contemporary legislators' preferences is by considering Congress's acquiescence to an agency interpretation as reason to adopt that reading. In *Bob Jones v. United States*,[117] the Court upheld the Internal Revenue Service's (IRS) determination that private schools which discriminate based on race are ineligible for tax-exempt non-profit status under federal tax laws. In reaching this result, the Court noted that post-enactment Congresses had considered and ultimately rejected amendments to override the agency's interpretation: "Failure of Congress to modify the IRS rulings . . . and Congress' awareness . . . when enacting other and related legislation make out an unusually strong case of legislative acquiescence . . . and ratification by implication."[118] The fact that post-enactment Congresses had accepted the agency's interpretation says nothing about what the enacting Congress intended. In finding recent Congress's acquiescence to an agency's ruling a reason to adopt an interpretation of a statute, the Court recognizes that the views of contemporary legislators are at least relevant, if not controlling, as to what a statute should mean. This shows how statutory meaning is dynamic—it is not fixed at what the enacting legislature had in mind, but changes as agencies, overseen in part by Congress, develop interpretations to fit new circumstances.

VIII. CONCLUSION

Insofar as the Court is, as the foregoing discussion suggests, concerned with deferring to contemporary democratic preferences, this certification procedure would enable it to do so more accurately, legitimately, and reliably than adducing these preferences from the forms of post-enactment legislative history relied upon in the decisions discussed above. A critique of legislative history—both enacting and post-enactment Congresses—is that it is non-representative. There is no guarantee that views expressed in the committee reports or floor debates

116. Gozlon-Peretz v. United States, 498 U.S. 395 (1991); Justice Scalia also invoked post-enactment legislative views in Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 78 (1992) (Scalia, J. concurring) (recognizing that subsequent enactments "must be read" as an "implicit acknowledgement" of the chosen interpretation).

117. Bob Jones v. United States, 461 U.S. 574 (1983).

118. *Id.* at 599.

reflect the majority preference. "If ordinary legislative history is . . . often cooked up by congressional staff and lobbyists to try to slant interpretation after the fact, the possibility for abuse is worse with subsequent legislative history."[119] The certification procedure avoids this problem because it allows the Court to much more reliably ascertain the preference of the majority. Those who oppose considering evidence of legislative intent because of the unrepresentative and potentially selective nature of legislative history may be more open to considering the legislative views expressed through a fully representative vote.

In conclusion, I stress that I am not advocating supplanting Congress's judgment for that of the Court. This procedure is geared toward facilitating collaboration between Congress and the Court, drawing from the particular competencies of each branch: Congress is democratically representative and has lawmaking prerogative; the Justices make decisions from a "longer view" of history, keeping in mind overarching constitutional values, and the ideals of stability, predictability, and intelligibility in the law.[120] While I have argued that this procedure would aid the Court insofar as it speaks in terms of deferring to legislative will, there are reasons that Congress's vote should only be taken as marginally persuasive, not dispositive, evidence in support of one interpretation. First, busy legislators presented with a certified question might be inclined to vote rashly in response based on their immediate reaction to the question, without having the time to research the statute or delve more deeply into its context, application, and effects. Beyond the few who are particularly interested in the issue, otherwise preoccupied legislators could be unlikely to dedicate the same reasoned thought and analysis to the matter that a the Court might—looking at the context of enactment, the problems that are playing out in administration, how the interpretation comports with other portions of the law, or the impact the interpretation would have on other cases. Or legislators might be heavily swayed by instant political preferences rather than long term overarching constitutional and public policy values that judges take into account when interpreting legislation. One could imagine lobbyists petitioning legislators to vote one way or another, or constituents otherwise pressuring for particular results. Legislators might also see the vote as an opportunity for horse-trading, agreeing to vote in one direction in exchange for other constituents' votes on some other matter. These factors don't seem illegitimate, per se, as a basis for defining the law, as they describe the climate in which laws are initially enacted. But they do show that judges make a valuable contribution to

119. ESKRIDGE, FRICKEY & GARRETT, *supra* note 1, at 1041.

120. Albert, *supra* note 12.

the meaning of legislation when they interpret it. This procedure would eliminate speculation about legislative intent, and knowing Congress's preference, the Court's decision might transparently discuss the interplay between congressional preferences and legitimate judicially-enforced values—values that safeguard the constitution and promote consistency, predictability, and uniformity in our law.