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A Multiple Choice Legislative Certification Procedure: Asking Congressional Preferences in Statutory Interpretation

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Abstract: In response to failed efforts at enhancing judicial-legislative collaboration, I propose a procedure that would enable the Court to take account of congressional preferences in a pending statutory interpretation decision, without requiring Congress to amend the ambiguous law. In “hard cases” the Court could certify, through a fast-track procedure, a question presenting Congress with two multiple choices that the Court predetermines to be viable readings of the statute. This procedure avoids constitutional problems because congressional input is voluntary and non-binding for both branches, and judicial constraint enforces rule of law and constitutional values.

Table of Contents

I. Introduction .......................................................... 2
II. The Statutory Interpretation Debate ................................ 7
III. Other Proposed Mechanisms for Interbranch Cooperation ................. 10
IV. Certification Procedures ............................................ 16
V. A Multiple-Choice Certification Procedure .......................... 18
VI. Applying the Procedure in Recent Statutory Decisions .................. 23
VII. Constitutionality of a Multiple-Choice Certification Procedure .......... 32
   a. Separation of Powers .................................................. 33
   b. Presentment clause .................................................... 39
   c. Ex Post Facto .............................................................. 40
   d. Intra-branch tension – subsequent vs. enacting legislature: ................ 41
VIII. Conclusion .......................................................... 59
I. Introduction

Most agree that courts interpreting legislation should aim, as best possible, to defer to democratically enacted preferences, or ‘legislative will.’ These efforts have generated “interminable repetition of…essentially the same methodological debates” about how judges should best serve the democratic branch: whether they should operate as partners in effecting its policy-making objectives, or as ‘faithful agents’ enforcing the terms of its agreements. This leads to disagreement about the most accurate hermeneutic strategy, and impliedly, what source of ‘legislative will’ is being deferred to. This “[c]ontinually debated, but never definitively resolved” uncertainty about how to interpret statutory law generates the impression that statutory interpretation decisions are ad hoc or made to suit the Court’s own outcome preferences, and causes acrimony.

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1 E.g., Henry Hart & Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law in Eskridge, Frickey, & Garret, Cases and Materials on Legislation, 4th Ed. 718 (2007) (“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 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 Denver Univ. 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.”).
5 There are two levels to the statutory interpretation inquiry: first, what source of meaning is being deferred to. (For instance, Justice Scalia “reject[s] the intent of the legislature as the proper criterion of the law.” Scalia, Common Law Courts, supra note 3, at 101.) The second inquiry asks how to most accurately and reliably deduce the correct meaning of that source. Justice Scalia separately addresses this inquiry, arguing that even for those who do “accept legislative intent as the criterion [of the law],” legislative history should not be their method of deducing that intent because “it is much more likely to produce a false or contrived legislative intent than a genuine one.” Id. at 101-02.
6 Id.
7 E.g., Richard Posner, The Federal Courts: Crisis and Reform 287 (1985)(“The irresponsible judge will twist any approach to yield the outcomes that he desires, and the stupid judge will do the same thing unconsciously.”); James Brudney & Corey Ditslear, Canons of Construction and the Elusive Quest for
between the Justices, the Court, and the legislature. Justice Scalia has expressed frustration with the legislature, criticizing Congress for an “ever-increasing volume” of “[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation.” He has also criticized other members of the Court for reaching outcomes in statutory interpretation decisions that “require[] not interpretation but invention,” creating policy or ‘legislating from the bench,’ and enabling sloppy drafting. On the other side, legislators have chastised “the denigration by the court of congressional authority.”

One source of this conflict is that the Court hears many “hard cases” – cases where legislation so genuinely ambiguous that “the legal problem has more than one legal answer”; “there is no precedent or other text that is authoritative, [and] the judge has to fall back on whatever resources he has to come up with a decision that is reasonable.” In order for these cases to reach the highest court, pervasive disagreement between the circuits has established that there are multiple legally viable answers, and the Court must choose between them, thereby in some measure creating and changing law.

14 Justice Barak explains that that in a majority of the “hard cases” that do get to the highest court, “I have discretion in resolving them.” Hence, “the contention that the judge merely states the law and does not create it…is a fictitious and even a childish approach.” Barak, supra note 12, at 23.
This inevitable reality – that the Court, at times, is asked to choose between two almost legally viable interpretations – renders it susceptible to the critique that its interpretations suit its own outcome or policy preferences, as opposed to strictly deferring to legislative choices.\(^{15}\)

Decades of commentators have aimed to address this problem by promoting better cooperation or comity between legislatures and courts. To this end, commentators have suggested the creation of inter-branch committees to enhance communication between courts and legislatures, and one author has argued that courts should certify questions to Congress.\(^{16}\) In one form or another, these proposals all provide means for courts to provoke the legislature to amend the ambiguous law in question. These efforts at enhancing judicial-legislative collaboration all suffer fundamental shortcomings, and have not taken hold. This proposal aims to remedy these shortcomings, as described below, to present the first viable mechanism for the Court to consider legislative preferences (without deferring entirely to them) in an efficient and constrained manner. This enables the Court to take account of congressional preferences in its decisionmaking, and is particularly geared towards avoiding decisions where the Court interprets a statute contrary to the will of the contemporary majority, and Congress goes through the resource and time consuming process of amending the law to override the judicial interpretation.

This proposal is a significant change from all other proposals for inter-branch cooperation, which, in some form, require the Court signaling to Congress that it should

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\(^{15}\) This has been a pervasive concern dating back to Dean Pound’s worry about “spurious” statutory interpretation. ESKRIDGE, FRICKEY, & GARRET, supra note 1, at 706; Scalia, Common Law Courts, supra note 5, at 94.

amend the law in question. Thus, these proposals fail to overcome the fact that amending or reenacting a law is resource consuming and often infeasible, and measures responding to judicial decisions might be difficult to place on the agenda due to committee delay or the difficulty of negotiating agreement between the houses on the text of an amendment.

I set forth a judicially constrained, multiple-choice certification procedure that allows Congress to voice its preference between competing potential judicial interpretations without amending the law in question. In scenarios where the Court disagrees about best interpretation following ordinary statutory analysis (including application of the substantive cannons of construction to safeguard constitutional and rule-of-law values), it could choose to certify, through a statutory fast-track-procedure, a multiple choice question presenting the outcomes it deems viable readings of the statute to Congress for a floor vote. Because the Court predetermines and defines the possible interpretations based on its own statutory and legal analysis, it constrains congressional input so as to not allow Congress to alter the law’s meaning any more than a judicial decision interpreting a statute would otherwise change its meaning. After the vote, the Court could evaluate legislative response, including the strength of majority preferences and the political climate surrounding voting, and decide how heavily to weight the legislative response, or even to disregard it entirely. The certification procedure is voluntary for both branches.

This proposal resolves two primary inherent shortcomings of other proposed methods for inter-branch communication: (a) Practical shortcomings: All other proposals require Congress to draft and agree upon a new enactment, and are thus insufficiently direct or efficient to avoid congressional delay or committee stalling that operate as
barriers to ordinary legislative enactment. Because these proposals do not offer a means for circumventing the costly amendment process, Congress has far less incentive to take advantage of them than the procedure I propose here, which allows Congress to voice its preferences in a pending question of statutory interpretation while avoiding the resource consuming amendment process. (b) Structural shortcomings: Other proposed means for allowing Congress to weigh in on a pending statutory decision, such as Frost’s certification proposal, suffer structural and constitutional shortcomings because they offer no judicial safeguard on the extent to which, and how Congress may alter or update the law as it pertains to the pending decision. These proposals do not preserve the Court’s important role of safeguarding constitutional and rule of law values in statutory decisions.

This certification procedure would allow the Court to assess the direction and strength of legislative preferences, in order to recognize and potentially avoid adopting an interpretation contrary to the overwhelming will of the present Congress that is likely to be overruled. It would enable the court to adduce this information more accurately, reliably, and efficiently than current interpretive methodologies. There remain a number of rule-of-law concerns with a practically and structurally viable legislative certification procedure. They are ameliorated by checking legislative input with judicial review. In recognizing how problems with direct deference are prevented through judicial oversight, this procedure illustrates the unique ‘value added’ by judges interpreting statutes. Considering judges’ indispensable role in this certification procedure illustrates how judges contribute independent value to statutory interpretation decisions despite language of deference and judicial restraint. By incorporating judicial review on the front and back end of non-binding legislative input, this proposal aims to employ both judges and
legislators in their most adept roles, and is therefore viable. Regardless of whether this proposal is adopted, it is valuable thought experiment illustrating the distinct roles of judges and legislative preferences in constructing statutory law.

Following this introduction, Part Two provides brief background on the debate about statutory interpretation methodology and the relationship between the Justices, the Court, and the legislature that is useful for framing this procedure. Part Three describes other proposals, including Frost’s, for promoting comity between courts and legislatures, to illustrate how they fall short of solving the problems identified above. Part Four provides background certification procedures that serve as precedent for this proposal. Part Five describes the multiple-choice certification procedure, and explains how it resolves the shortcomings of earlier proposals. Part Six explains how the certification procedure would have been invoked in three of the Court’s recent statutory interpretation decisions addressing slightly different types of statutory interpretation problems. Part Seven addresses questions about the constitutionality of this proposal. In conclusion, I will describe the certification procedure’s unique strengths, in terms of reliability, legitimacy, and accuracy, in deferring to the democratic branches. I will evaluate how this proposal illustrates the independent judicial and legislative contributions to statutory interpretation decisions and the ideal partnership roles of judges and legislatures in shaping statutory law.

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. There is a strong democratic sentiment in favoring judicial deference to legislative will in questions about legislation, no doubt grounded in anxiety about countermajoritarian courts altering or subverting the choices of majoritarian bodies. Hamilton expressed this concern for separation of powers in Federalist No. 78, warning that courts must not substitute their preferences for those of the legislative body. Justice Scalia echoes this concern: “it is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.”

There is a tension between courts striving to defer as faithfully as possible to the choices of the legislature, and the traditional judicial role in other areas – independently guarding enduring principles against short-sighted political fluctuation.

Judicial efforts to defer to legislative choices lead to two yet unsettled questions: First, what are judges deferring to when they defer to choices of ‘the legislature’ – is it the enacting legislature, or the current one (which has the power to override the court’s interpretation)? Second, what is the best method for deducing that legislature’s will?

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18 Scalia, supra note 5, at 22.

19 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, “[t]he evidence suggests that despite frequent statements to the contrary, we do not really look for subjective legislative intent.” Scalia, supra, note 5, at 17. For more on how textualists consider legislative intent, see
do not aim to fully address the debate between interpretive methodologies here. Suffice it
to say that this indeterminacy invites judges to select between interpretive methods,21 and
there is little consistency in how courts interpret statutes.22 Coupled with the construct
that judges must interpret statutes in formal methodological terms as opposed to openly
making choices about the law’s meaning,23 this inconsistency gives rise to suspicion that
Judges manipulate formal methods in order to reach their own preferred outcomes.24

The Court has frequently adopted unfavorable interpretations that Congress has
overridden through amendment.25 It requires significant legislative resources and inertia

SCALIA, A MATTER OF INTERPRETATION, supra note Error! Bookmark not defined.; Frank H.
Easterbrook, Statutes’ Domains, 50 U. CHI. L. REV. 533 (1983); See also John Manning, Textualism and
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. HART & SACKS, supra note 1, at 1111; Richard Posner, Statutory Interpretation—In the
Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 817–22 (1983); Fishgold v. Sullivan Drydock
and Repair Corp., 328 U.S. 275 (1946); Richard Posner, The FEDERAL COURTS: CRISIS AND REFORM 286-
93; Caleb Nelson, What is Textualism? 91 VA. L. REV. 347 (2005); BREYER, supra note Error! Bookmark not defined.

20 Id.; ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); c.f.
STEPHEN BREYER, MAKING OUR DEMOCRACY WORK (2010); Einer Elhague, Preference Estimating
21 ESKRIDGE & FRICKY, 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); James Brudney & Corey Distlear, The Canons of Construction and the Quest for Neutral
Reasoning, 58 VAND. L. REV. 1 (2004); 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).
22 Gluck, supra note 2.
23 Segall, supra note 13 (“[S]ome judges fool themselves into thinking there is a correct answer, generated
by a precedent or other authoritative text, to every legal question.*** People 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.”).
24 See also Brudney, supra note 7; Posner, supra note 7; Brudney & Ditslear, supra note 21; Rosenkranz,
supra note 7; Robert A. Katzmann, 104 YALE L. J. 2345, 2346 (1995) (“When courts interpret legislation,...they become an integral component of the legislative process.”); Jellum, supra note 17, at 837
(“[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, FRICKY, & GARRETT, supra at 1241-42.
25 E.g., Allison Engine Co. v. U.S., 553 U.S. 662 (2008), overridden by Fraud Enforcement and Recovery
Act of 2009, Pub. L. 111-21, S. 386; Senate Report 111-010 – Fraud Enforcement and Recovery Act of
2009, III. Sec. 4 (“This section amends the FCA to clarify and correct erroneous interpretations of the law
to reenact a law to override a judicial interpretation. Hence, Justice Stevens lamented that court interpretations that do not comport with legislative will “do the country a disservice”\textsuperscript{26} because of their cost in terms of scarce judicial and legislative resources, and taking time away from other issues both branches might be focusing on. Additionally, concentration of power in committees and committee chairs might prevent re-enactment to override a judicial interpretation that a majority of the legislature opposes.\textsuperscript{27} Proposals for inter-branch cooperation aim to address these problems.

III. Other Proposed Mechanisms for Inter-branch Cooperation

A number of well known justices and judges have proposed measures for promoting interbranch comity – cooperation and communication between court and legislature. These proposals show that Judges and lawmakers recognize of the problematic disconnect between Courts and Congress, and suggest that some judges and lawmakers might approve of or use an interbranch certification procedure. Many states


\textsuperscript{27} For instance, Eskridge, Frickey, & 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.” \textbf{ESKRIDGE, FRICKY, \\& GARRET, \textit{supra} note 1, at 86.}
have also taken measures to promote interbranch comity, illustrating further efforts to mitigate the problems this procedure aims to remedy. While they illustrate concern for the problem of court-legislature communication, these mechanisms 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. Frost’s argument helpfully identifies many of the considerations militating towards a certification procedure: improving communication, reducing conflict, best taking advantage of competencies of each branch, and promoting transparency. Frost proposes a certification procedure whereby courts, upon finding statutory ambiguity, would ‘refer’ the statute to Congress, by sending it to the ranking members of the House and Senate Judiciary Committees along with a clearly stated question about statutory meaning. The Court would abstain from deciding the case in order to provide Congress with at least a six-month opportunity to amend the statute. The amended meaning 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 statute, but instead is enlisting the current Congress’s help by asking it to revise a poorly drafted statute.” Frost’s procedure is essentially a judicially prompted amendment process, whereby the Court would apply the amended legislation to the pending case. 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

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28 Frost, supra note 16.
29 Id. at 5-6.
30 Id. at 32.
radically alter, rather than to clarify, the statute at issue.”

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.\(^{32}\) 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. They all fail to resolve the practical barriers – delay and committee stalling – that currently prevent efficient congressional responses to judicial interpretation. Second, Frost’s proposal has the additional structural problem of allowing unrestrained amendment to the law as it applies in a pending judicial decision, thereby negating the judicial role of enforcing substantive constitutional and rule-of-law values in statutory interpretation decisions. Frost acknowledges these problems - impermissible case-by-case delegation of authority to Congress, \textit{Ex Post Facto} concerns that arise from this delegation, politicization of judicial decisionmaking.\(^{33}\) However, she does little to resolve them beyond presenting examples of other instances in which Congress amends legislation in a non-specified or individualistic manner, so as to impact the outcome of pending cases. Frost also responds to this problem by implying that the \textit{Ex Post Facto} clause constitutionally constrains Congress from changing the law.\(^{34}\) This response is unsatisfying because the Court guards against \textit{Ex Post Facto} and other constitutional violations through substantive cannons, and Frost’s proposal provides no automatic means for the Court to review or

\begin{footnotesize}
\begin{enumerate}
\item Id. at 33.
\item 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, \textit{Certifying a Question to Congress?}, PrawfsBlog, May 18, 2007, available at http://prawfsblawg.blogs.com/prawfsblawg/2007/05/certifying_ques.html.
\item Id. at 36-41.
\item Id. at 41-42.
\end{enumerate}
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constrain the application of a congressional amendment to a pending case in accordance with constitutional values.

*Interbranch Committees:* Judge Cardozo, Justice Stevens, Justice Ginsberg, Judge Mikva, Judge Katzmann have all proposed inter-branch communication committees. In 1921, Judge Cardozo lamented that “the courts are not helped as they could and ought to be in the adaptation of law to justice” given the dominance of statutory law. 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. 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.”

In a similar vein, Justice Stevens also proposed that there should be a standing committee in Congress charged with identifying conflicts that arise from ambiguity or omissions in statutes, and to draft 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.” 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

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36 *Id.* at 125.
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.”

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 denies proposing envisions sending the question to a *legislative committee*, instead of to the entire legislature for a floor vote. It seems that 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 to route judicial opinions interpreting statutes to a legislative statutory revision committee composed of members of the House and Senate as well as retired members of the judiciary. 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.”

Mikva proposes that “the lawyers who argue those cases, and certainly the administrators who initiate the interpretation and enforcement process, should be called. I also would suggest 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.”

Existing State Mechanisms: A number of states have established ‘law revision commissions’ which evaluate how the law should be updated, considering judicial

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38 Id.
40 Ginsburg & Huber, supra, at 1433.
41 Mikva, supra note 8, at 630-31.
interpretation and identification of defects or anachronisms in statutes, amongst other factors.\textsuperscript{42} There are a number of states that have legislated similar processes – various states have enacted statutes creating legislative councils, reporting, or revision committees, responsible for overseeing judicial interpretations of legislation and reporting to the legislature on problematic interpretations or language in statutes causing issues.\textsuperscript{43}

These attempts at inter-branch communication all envision prompting legislative response to judicial decisions, as opposed to giving the legislature input in pending judicial decisions.\textsuperscript{44} They are geared towards encouraging the legislature to update laws that were antiquated, anachronistic, or otherwise giving courts trouble. Thus, all of these procedures (including Frost’s certification procedure) essentially allow the Judiciary to prompt Congress to amend the law. Hence they present both practical and structural problems. (a) Practical shortcomings: Because these proposals do not offer a means for circumventing the costly amendment process, Congress has far less incentive to take advantage of them than the procedure I propose here, which allows Congress to voice its preferences in a pending question of statutory interpretation while avoiding the resource

\begin{itemize}
  \item \textsuperscript{42}Abrahamson & Hughes, \textit{supra} note \textbf{Error! Bookmark not defined.}, at 1067-68.
  \item \textsuperscript{43}Id. at 1061. Judge Calabresi proposed has also proposed a measure dubbed the “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’ to the legislature could provide an updated statement on its contemporary rational basis for the law. Quill v. Vacco, 80 F.3d 716, 738 (2d Cir. 1996)(Calabresi, J. concurring). Judge Calabresi’s remand was not proposed in the context of interpreting a statute, but provides another example of judicial efforts to invite legislative input on a pending decision.
  \item \textsuperscript{44}There are two 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: stalling, delay, and insufficient initiative to overcome preoccupation with new policy matters. Moreover, it would be unlikely for a sense-of-Congress resolution to speak specifically to the choice between the judicially endorsed outcomes. A second alternative is Congress filing an amicus brief. A Congressional amicus brief faces the same problems of relying on Congressional initiative as well as representative problems: one cannot discern the extent to which Congress agrees with the brief’s content. Furthermore, it would be similarly difficult to ensure that an amicus brief would speak with specificity to the question before the court.
\end{itemize}
consuming amendment process. Because they require introducing and drafting an amendment, they do not overcome a general lack of initiative to amend existing law, given occupation with new legislation on 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. (b) Structural shortcomings: Frost’s proposal, which essentially stays the judicial decision pending legislative amendment, suffers additional constitutional and rule-of-law risks that arise from allowing Congress unchecked authority to amend the law as it applies to a pending decision. There is no judicial safeguard to enforce substantive cannons expressing constitutional and rule of law values, or limiting the extent to which, and how Congress may alter or update the law as it pertains to the pending decision. Following a brief background on inter-jurisdictional certification procedures, I will show how a multiple choice certification procedure resolves these problems.

IV. Certification Procedures

Certification is a process whereby one decisionmaking body obtains a conclusive 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. Federal appellate courts can certify uncertain questions to the U.S. Supreme Court, and federal courts can certify questions to state supreme courts. This process developed in response to an

interpretive problem faced by federal courts required to apply state law, once federal common law was abolished. This gave rise to 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.47

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.48 The U.S. Supreme Court and federal courts have certified a variety of questions to state supreme courts, such as the scope of abortion statutes, the power of cities, the standing rules, whether an Internet domain name is “property” subject to the tort of conversion, the definition of a ‘child’ for the purposes of state intestate law, the meaning of terms in state regulatory statutes, and the scope of a state’s long-arm statute.49

48 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); West Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 633 (Or. 1991).
This 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. 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 S.E.C. 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).

V. A Multiple-Choice Certification Procedure

Similar to the rationale for adopting federal-state court certification – reducing the need to speculate on the meaning of law created by an external lawmaking body – applies to the objective of the Court interpreting statutes. If it aims to most accurately defer to congressional will, why not take account of congressional preferences, rather than speculating, when the meaning of a law is genuinely ambiguous? The Court would have the option of voluntarily invoking this procedure in the inevitable “hard cases” where Justices disagree as to the most viable and sound interpretation. Members of the Court could first apply their own ordinary statutory interpretation analysis, including all factors

51 Id. at 192-195; CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 228 (Del. 2008).
52 Such cases have been described by judges as inevitable decisions where “the legal problem has more than one legal answer,” Barak, supra note 12, at 23, or “there is no precedent or other text that is authoritative, [and] the judge has to fall back on whatever resources he has to come up with a decision that is reasonable.” Segall, Interview with Judge Richard Posner, supra note 13.
that inform judicial interpretation of statutes – substantive cannons addressing constitutional issues, federalism concerns, consistency within the law, etc., as well as administrability concerns. If pursuant to this analysis, they are divided between two compelling, viable outcomes, they could choose to ask the legislature for its view. The Court would formulate the predetermined alternative interpretations in a narrowly framed multiple-choice question for the legislature.\textsuperscript{53} This question would present the discrete choice between the interpretations preferred (therefore deemed most viable) by different Justices (meaning x or meaning y). The Court would only include an interpretation as an optional response if certain Justices believe the Court should adopt it, and therefore it they have impliedly determined is a viable reading of the statute that comports with other substantive cannons. When the Court applies substantive canons like constitutional avoidance and the rule of lenity, it defaults towards protection of constitutional values and sets stringent altering rules setting higher conditions for displacing a constitutional-rights-protecting default. With substantive canons like the rule of lenity, the Court properly allows overarching constitutional or rule of law values to inform the interpretation, as opposed to what the statute really "means." This is why it is crucial for the Court to perform its full statutory interpretation analysis prior to certifying the question. If values enshrined in the substantive canons foreclose one reading or another, the Court shouldn't certify the question.\textsuperscript{54}

\textsuperscript{53} One might question the difficulty of the Court agreeing on the terms of a certified question, and even wonder whether disagreement with the framing of the question could be the basis for a dissent. While initial disagreement on the ideal framing might occur, I’d expect the Court would be able to negotiate an agreeable question in the vast majority of cases. After all, the Court is a collegial body that regularly negotiates potential disagreement in order to function effectively. For instance, aside from negotiating the language of written opinions, the Court has also long managed to reach agreeable wording for questions certified to state courts.

\textsuperscript{54} If it is questionable whether the statute violates a substantive canon, procedure might incorporate a flagging function for substantive canons, allowing the Court to inform Congress that one of the optional
This procedure would be provided for and defined by statute. The statute would establish a fast-track procedure: “special legislative procedures that apply to one or both houses of Congress and that expedite… congressional consideration of a certain measure or a narrowly defined class of measures” by eliminating delay in committee reporting, floor debates, or amendments.\(^5^5\) Congress has enacted fast-track procedures for approving or disapproving recommendations for military base closures and for enacting legislation to implement major international trade agreements. Similar to currently enacted fast-track procedures, the procedure for legislative certification would provide (1) that the question would not be sent to committee, (2) set a time limit within which the question must reach the House or 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\(^5^6\)), (3) specifically limit the time allotted for floor debate and prohibit amendments (the format of the multiple choice question does not lend itself ‘amendment’), and (4) that a final floor vote within the time permitted cannot be prevented through delay (such as filibuster) in either house.\(^5^7\) The statute might stipulate particular time requirements on how readily the certified question must be addressed, as has been done in the fast-track procedure for considering implementation of federal trade agreements stipulating that a vote on final passage of a trade implementing bill “shall be

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\(^5^5\) CONGRESSIONAL RESEARCH SERVICE, STANLEY BACH, Fast Track or Expedited Procedures: Their Purposes, Elements, and Implications 1 (Jan. 18, 2001).

\(^5^6\) Id. at 4.

\(^5^7\) These are the typical provisions of effective fast-track procedures. Id. at 3.
taken in each House on or before the close of the 15 day” from when it was reported to
the floor.\textsuperscript{58}

Both sides of this procedure would be voluntary – the court would discretionarily
opt to certify questions, and the legislature would have the option, when the certified
question is introduced on the floor for voting, of declining to answer the question. The
floor vote on a certified question would therefore look like this: the question would be
introduced, and there would first be a vote on whether to answer the question. Assuming
a majority vote in favor of answering the question, the second vote would ask which of
the two alternatives it should be. If the majority favors not answering the question in the
first vote, then there is no second vote, and the legislature is essentially consciously
punting the decision to the Court. The legislature declining to answer a certified question
would be informative to the Court. It would allay concern for encroaching on Congress’
domain by clearly signaling to the Court that it is charged with resolving the issue. If the
legislature did answer the certified question, the response that received the majority of
votes would be taken to represent its chosen interpretation. The Court could weigh the
legislature’s choice however it decides, but would have evidence of the current
legislature’s preferences, including how strong a majority prefers that interpretation,
and would be able to assess the likelihood that Congress would overrule a contrary
interpretation. The legislature’s response will indicate the preferences of the current
legislature, and if they a strong enough majority favors one interpretation, such that they
are likely to override judicial interpretation. The Court could also retrospectively
determine that the vote is an insufficient basis for decision, if, for instance only a very
weak majority favors one outcome, or if the two houses come to different conclusions

\textsuperscript{58} \textit{Id.} at 4.
about the preferred meaning. In this case, the exercise is still valuable, since this procedure is chiefly geared towards smoking out cases where Congress has a clear preference as to the statute’s meaning, and will likely override the Court’s interpretation contrary to that preference. If there is no strong majority or the houses disagree, the Court will have clearer license to impose its statutory construction analysis, knowing Congress does not strongly prefer one interpretation, and is therefore not likely to immediately override the judicial construction one way or another.

The Court always has the latitude to decline to adopt the majority preference for whatever reason: for instance, if, in retrospect, the congressional decision appeared highly politicized or lobbied, or if a narrow majority of Congress favors an interpretation that a majority of the Court disfavors. In this case also, the exercise is still valuable, since it will be out in the open that the Court is adopting a meaning contrary to expressed legislative will, and the Court’s opinion will bear the burden of that transparency. This will send a clear message to the legislature that judicial interpretation has strayed from its elected meaning, and that it might choose to update the law. Because judicial review bookends congressional input, checking it both before and after the procedure, the Court can police congressional elaboration to comport with constitutional requirements and procedural safeguards, the same way it would police its own interpretations of the law. The following will more thoroughly convey how this procedure might operate by illustrating how it might have been invoked in several of the Court’s recent statutory interpretation decisions.

59 This might be recognized if the Congressional decision was subject of media attention, public discourse, Congressional lobbying, or politician’s public statements to their constituents.
VI. Applying the Procedure in Recent Statutory Decisions

In this section, I will more concretely illustrate the certification procedure by discussing how the Court could have invoked it to address three slightly different types of interpretive questions presented in recent statutory cases – ambiguity in one specific term in a statute, a vague clause in a statute, and a challenge to an agency’s interpretation of its enabling statute.

Specific ambiguous terms within legislation: The Court was recently asked to decide between two meanings of one specific statutory term in Kasten v. Saint-Gobain Performance Plastics Corp,60 arising under the Fair Labor Standards Act provision making 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].” The Court addressed the question of whether “the statutory term "filed any complaint" includes oral as well as written complaints.”61 The petitioner alleged he had been fired for complaining orally to his employer that it’s time clocking procedures violated the Act. Justice Breyer, writing for the majority, acknowledged that the word “file” had different meanings: “Some dictionary definitions of the word contemplate a writing” but “other dictionaries provide different definitions that permit the use of the word "file" in conjunction with oral material. One can, for example, file an oral statement that enters a matter ‘into the order of business.’”62 Hence, “the text, taken alone, cannot provide a conclusive answer to our interpretive question. The phrase "filed any complaint" might, or might not, encompass oral complaints. We must look further.”

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60 131 S.Ct. 1325 (2011).
61 Id. at 1329.
62 Id. at 1331.
Justice Breyer ultimately held 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,’” that it “relies for enforcement of its substantive standards on information and complaints received from employees,” and that “its antiretaliation provision makes the enforcement scheme effective by preventing fear of economic retaliation from inducing workers quietly to accept substandard conditions.”

Justice Breyer speculated about congressional desire: “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?” Dissenting, Justice Scalia concluded that “filed any complaint” referred only to formal charges made in an official court or administrative setting, and 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.”

Kasten’s majority and dissent demonstrate that Congress could be attributed with a rationale consistent with either reading, the textual definitions were equivocal, and that different Justices were willing to rule either way suggests their satisfaction that there were no extraneous constitutional or rule of law values (substantive cannons) preventing their preferred interpretation. If invoking a certification procedure, the Court would, once

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63 Id. at 1328.
64 Id. at 1339 (Scalia, J. dissenting).
recognizing two competing viable legal interpretations, draft and circulate a certified question along the lines of the question presented in the case and answers to the question. Just like an opinion, Justices would suggest changes to the formulation of the question and the answers, and negotiate the final version sent to Congress. I’d imagine 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. The answers would be formulated so as to most accurately and exactly capture the outcomes members of the Court has predetermined they would elect. The question and answers would 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 (b) include only formal charges made in an official court or administrative proceeding and “not cover complaints to the employer at all.”  

**Vague Statutes:** The certification procedure could also operate in cases where the Court is called upon to interpret or define the scope of a more generally vague statutory provision, where uncertainty goes beyond one specific term that could have two possible meanings. One recent example of this *Sykes v. U.S.*, where the Court addressed “for the fourth time since 2007” what constitutes a “violent felony” under the Armed Career Criminals Act (ACCA). The Act defines a ‘violent felony’ as an offense that is punishable by more than one year imprisonment and “is burglary, arson, or extortion,

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65 Id.
66 131 S.Ct. 2267 (2011).
67 Id. at 2284.
involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The offense at issue in this case was vehicular flight from law enforcement, and Justice Kennedy’s majority opinion concluded that this was a violent felony because it was a “purposeful, violent, and aggressive” act that presented a statistically more serious risk than burglary and arson, two of the listed offenses. Dissenting, Justice Scalia noted three different standards the court had used to define whether a felony fell within the violent felony clause – whether the felony is as risky as the most analogous of the enumerated felonies, whether it is as risky as the least risky of the three enumerated felonies, and whether it is “purposeful, violent, and aggressive,” – and criticized the Court for “produc[ing] a fourth ad hoc judgment that will sow further confusion.” On Justice Scalia’s view, the statute is incurably vague and should be struck down: “We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness.”

In a vagueness case like this, where a majority of the Justices view a statute as being salvageable through construction (as opposed to incurably vague), the Court grapples between alternative judicially construed limitations on the vague provision. Since a majority of the justices, as well as lower courts, have been willing to adopt these constructions of the vague statute, they have deemed the construction not-so unpredictable as to create notice and Ex Post Facto problems. However, choosing one of the limiting constructions on the table (i.e., as risky as the least risky felony vs. as risky as the closest analogue) must require some exercise of judicial discretion because

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68 Id. at 2273.
69 Id. at 2274.
70 Id. at 2284.
71 Id.
admittedly, none are clearly compelled by the statute. A legislative certification could limit this exercise of judicial discretion, but also allow the court to avoid the drastic measure of striking down a statute as void for vagueness. In a case like Sykes, the Court would frame the question in terms of the alternative constructions of the statute it has deemed viable:

**Question:** The ACCA defines ‘violent felony’ as an offense that is punishable by more than one year imprisonment and “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” What standard determines the whether an offense is a ‘violent felony’:

**Responses:** (a) a purposeful, violent, and aggressive felony that presents a more serious risk than the least risky of the enumerated felonies; (b) a purposeful, violent, and aggressive felony that presents a more serious risk than the most analogous of the enumerated felonies; or (c) neither construction is an appropriate reading.

This third alternative would enable the legislature to signal to the Court that it does not approve of the judicial constructions on the table. A majority vote for (c) could enhance the Court’s confidence in the drastic move of striking down the statute as void for vagueness, which the Court is typically reluctant to do out of anxiety about undemocratically invalidating legislative enactments. This would signal and place the burden on Congress to enact a clearer law. Likewise, if Congress comes back split between the three alternatives, this grants the Court more clear license to take the drastic move of striking the statute down as void for vagueness. While achieving a strong majority would be more difficult in a vote between three alternative outcomes, this is consistent with the goal of the legislative certification procedure: to identify instances where an majority of Congress favors one interpretation so strongly that it will override a judicial decision to the contrary.
In the rare cases where there are three options presented to Congress, all three alternatives would be simultaneously presented by for one vote.\textsuperscript{72} This eliminates any risk that the ordering of the vote would skew outcome towards one option or another. In three outcome cases, there might also be concern 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.\textsuperscript{73} However, this type of compromising – some legislators giving up their first preference to lend sufficient majority support to enact their second preference over their third ranked, least preferred choice – doesn’t seem different from the compromises that Congress often makes in order to enact legislation. This form of compromise shouldn’t delegitimize expressed congressional preference as to what legislation means, any more than it does legislation enacted through ordinary processes. After all, legislation is recognized to reflect strategic compromise and horse-trading amongst various constituencies in Congress,\textsuperscript{74} and not expected to represent perfect majority rule, as in a sum tally of the individual preference rankings of each member.\textsuperscript{75}

_**Agency Interpretations:**_ Another slightly different statutory interpretation problem arises when an agency’s interpretation of its enabling statute is at issue, and

\textsuperscript{72} Except for vagueness cases, I’d expect this to occur very infrequently. Statutory interpretation decisions seldom grapple between three arguably viable readings of a statute. The two parties typically each opt for one of two particular readings, and the Court’s majority and dissenting opinions almost always debate between two particular readings that different members view as compelling.

\textsuperscript{73} This problem is discussed in _JERRY MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW_ 12-13 (1997).

\textsuperscript{74} Easterbrook, _supra_ note Error! Bookmark not defined..\textsuperscript{75} 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 AMERICAN MAGAZINE_ (Feb. 9, 2004). The compromising nature of the legislative process implies that legislation is not expected to reflect the preference rankings of individual members of Congress in this manner.
under *Chevron* the Court must address both whether the agency was intended to have discretion to promulgate an interpretation (*Chevron* step 1), and whether the interpretation it has selected is “arbitrary or capricious in substance, or manifestly contrary to the statute.” (*Chevron* step 2). A certification procedure could help the Court most accurately answer both steps of the *Chevron* deference inquiry. Indeed, it seems that in *Chevron* deference cases more than any others, the Court projects itself into the ‘mind’ of the legislature by aiming to imagine how legislature feels about another distinct body’s interpretation of the law.\(^\text{77}\) The Court doesn’t evaluate whether the agency’s interpretation is *correct* or not, *per se*, but instead whether the legislature would approve of the agency rendering the interpretation; and, if so, whether the legislature would accept the content of the interpretation as reasonable. Because of these multiple layers of deference, whereby the court doesn’t make it’s own judgments but attempts to imagine and defer to the legislature’s, a certification procedure could be particularly apt. One recent *Chevron* case might serve as an example of how certification would work in the deference context: in *Mayo Foundation v. U.S.*\(^\text{78}\) this past term, the Court addressed a challenge to the Treasury department’s determination that full time medical residents count as ‘employees’ under the Federal Insurance Contribution Act even though the Act excludes “any” employment service “performed by a student who is enrolled and regularly attending classes at a school.”\(^\text{79}\) Here the Court found both *Chevron* steps satisfied. Under step one, where the “the ultimate question is whether Congress would


\(^{77}\) This is supported by findings that the Court has been more likely to cite legislative history in *Chevron* deference cases. William Eskridge & Lauren Baer, *The Supreme Court’s Deference Continuum, An Empirical Analysis* (Chevron to Hamdan), 96 GEO. L. J. 1083 (2008).


\(^{79}\) *Id.*
have intended, and expected, courts to treat [the regulation] as within, or outside, its delegation to the agency of `gap-filling' authority,” the Court reasoned that “student” was not defined under the statute, and the statute vested the Secretary with broad discretion to issue rules and regulations in order to administer terms like this. The Court also determined that the Secretary’s determination was reasonable and passed _Chevron_ step 2. _Mayo Clinic_ was a unanimous opinion. Since there was likely substantial agreement amongst the Justices on outcome, this particular case would not likely be a candidate for certification, which should only be invoked when different members of the Court are convinced of different viable (legally correct) outcomes. If, however, the Justices _had been_ split on the outcome of this decision – either on the grounds of _Chevron_ step 1 or 2, the Court could ask the legislature to indicate whether it approved of the Treasury Department’s determination. The Court would ask two questions. First, addressing the Secretary’s lawmaking discretion:

**Question:** The Insurance Contribution Act excludes “any” employment service “performed by a student who is enrolled and regularly attending classes at a school.” Does the Act afford the Secretary discretion to issue regulations further defining “student”?

**Responses:** (a) the Secretary has authority under the statute to define what constitutes a “student,”; or (b) the statute does not leave the Secretary discretion to elaborate on what constitutes a “student.”

If the answer is (a), the second question would be:

**Question:** The Secretary has determined that full time medical residencies are counted as employment, and not as exempt as “any” employment service “performed by a student who is enrolled and regularly attending classes at a school.” The Secretary’s determination is:

**Responses:** (a) reasonable and consistent with the statute; or (b) arbitrary, capricious, or inconsistent with the statute.
In certifying these questions, the Court minimizes the extent it interjects itself into mediating between the legislature and the executive, or imagining how the legislature feels about what an executive body is doing. Often in cases where the Court evaluates the legality of agency activity, it is put in the position of reading the ongoing, contemporaneous relationship between legislature and agency to evaluate whether the legislature approves of what the agency has been doing. Legislators typically engage in ongoing oversight of agencies’ interpretation and implementation of their enabling statutes. Mikva explains that “agency administrators are hauled before the relevant committees of Congress from time to time and yelled at for messing up the statute, messing up that grand scheme that the sponsors of the statute had.”

Because *Chevron* defers to congressional approval of the agency’s discretion, providing the legislature with an opportunity to directly weigh in on whether it approves of an agency’s discretionary interpretation would be particularly appropriate.

Distinct from other efforts at interbranch communication, this multiple-choice legislative certification procedure would allow the legislature to clarify minor ambiguities, omissions, or anachronisms – small modifications that would otherwise be made by courts in course of interpretation – without expending scarce legislative resources to go through the full amendment procedure. Thus, the proposed certification procedure avoids the practical problems identified with the proposals above – inertia against amendment, difficulty in summoning agreement on the scope and text of amending legislation, and committee delay. It distinctly avoids the “disservice to the country” by requiring the legislature “to take the time to revisit the matter…whenever its

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work product suffers from an omission or inadvertent error.” For this reason Congress would likely embrace a multiple-choice certification procedure with more enthusiasm: it has greater incentive to speak to pending statutory interpretation decisions when it doing so can save the significant time and resources of deliberating on, drafting, and amending legislation. As discussed at length below, the judicially constrained nature of this certification procedure also safeguards constitutional and rule-of-law values that are not preserved by Frost’s certification procedure, which allows Congress unfettered discretion to amend the law in question.

VII. Constitutionality of a Multiple-Choice Legislative Certification Procedure

This proposal envisions a novel role for the legislature that defies longstanding conventions about legislative process for clarifying and updating the law. However, while this procedure defies conventional legislative process, it does not violate constitutional limitations on the legislature or the judiciary. I will address potential constitutional objections to this certification procedure, which I’d expect to arise under Separation of Powers, the Ex Post Facto clause, and the Presentment clause, as well as concern for balance of power within Congress – between the enacting and subsequent Congresses. I will show how a multiple-choice certification procedure ultimately comports with constitutional requirements and avoids the constitutional problems inherent in certification that allows Congress amend the law as applied to a pending case. I will also respond to potential concerns about impermissible disruption of the balance of power within Congress.

81 Casey, 499 U.S. at 115 (Stevens, J., dissenting).
a. Separation of Powers

The Court’s separation of powers jurisprudence has been notoriously unclear - a “doctrine easily invoked, but not clearly explained.”\(^{82}\) It’s analysis boils down to two ‘categories’: formalist and functionalist.\(^{83}\) Formalists view the powers of each branch as being limited to those powers specifically prescribed it in the vesting clauses of the constitution: “Article I grants Congress ‘[a]ll legislative Powers herein granted;’ Article II grants the president ‘executive Power,’\(^{158}\) and Article III grants the judiciary ‘judicial Power.’”\(^{84}\) 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.’\(^{85}\) However, “[t]he justices of the Supreme Court have never collectively embraced formalism. Rather, in light of the blurring of separation of powers by the administrative state, in “a government confronted with the complexity of the twenty-first century, functionalism seems to be winning the war.”\(^{86}\) Functionalisists recognize that each branch of government is given ‘core’ functions by the vesting clauses, but these do not represent absolute limitations. Separation of powers should ensure no branch becomes too powerful, but formally restricting each branch to the literal definition of its vested function is impossible. “The Constitution by no means contemplates total separation of each of these three essential branches” because the framers recognized that “a hermetic sealing off of the three branches of Government from one another would preclude the establishment of

\(^{82}\) Jellum, supra note 17, at 855.

\(^{83}\) Id.

\(^{84}\) Id. at 861.

\(^{85}\) The Court has explained that legislative acts “[h]ave 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).

\(^{86}\) Jellum, supra note 17, at 870.
a Nation capable of governing itself effectively.”\textsuperscript{87} Instead, actions should be evaluated for whether they run the risk of making one branch too powerful in relation to the others: “[f]unctionally, the doctrine may be violated in two ways. One branch may interfere impermissibly with the other’s performance of its constitutionally assigned function,” or when “one branch assumes a function that more properly is entrusted to another.”\textsuperscript{88}

Skeptics of a legislative certification procedure, especially those coming from a ‘formalist’ perspective, may argue that the legislature would not be “acting within its assigned sphere”\textsuperscript{89} when voting in response to a Court-framed and certified question about a statute’s meaning. After all, the Court has recognized that the legislature has power to “prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,” but the power of “[t]he interpretation of the laws” is “the proper and peculiar province of the courts.”\textsuperscript{90} Responding to a certified question by voting on Court presented alternatives might be viewed as an inherently judicial-type function.

While no Court decision articulates principles that squarely address this question, the Court has upheld an enactment (attached to an appropriations statute) that referred to two pending cases by name and caption number, and was specifically targeted to change the outcome of those cases.\textsuperscript{91} This suggests that a less controlling (in that it is voluntary and non-binding) legislative certification procedure could comport with separation of powers values. The \textit{Robertson} plaintiffs challenged the Forest Service and Bureau of Land Management’s failure to comply with four federal statutes governing resource and

\textsuperscript{87} Buckley v. Valeo, 424 U.S. 1, 121 (1976).
\textsuperscript{89} \textit{Id.} at 951-52.
land management (including the National Environmental Policy Act, the Migratory Bird Treaty Act, and the National Forest Management Act) by proposing timber harvesting in protected habitats of the spotted owl. In response to this litigation, Congress passed an appropriations Act that specifically addressed timber harvesting in these habitats of the spotted owl, and codified particular, less extensive administrative guidelines, with which the agencies were already compliant, to govern the permissibility of this timber harvesting. The last provision of the Act announced that “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. This essentially announced that the agencies’ compliance with the management requirements set forth in Congress’ new appropriations act were deemed to automatically satisfy all other federal statutory requirements under NEPA, MBTA, and NFMA. Plaintiff’s claims could not lie under those statutes so long as the agencies were compliant with the less extensive requirements set forth in the appropriations act. 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.’” The Court

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92 Id.
93 Id. at 436. In U.S. v. Klein, 13 Wall 128 (1871), the Court invalidated an enactment overturning its preexisting rule that presidential pardons would be taken as presumptive evidence that the pardoned individual had not aided or abetted the enemy during war. Miller v. French, 530 U.S. 327, 348-49 (2000)(describing Klein, 13 Wall at 133-34). The Court “concluded that the statute was unconstitutional because it purported to ‘prescribe rules of decision to the Judicial Department of the government in cases pending before it.’” Miller, 530 U.S. at 348-49 (describing Klein).
unanimously reversed, finding Congress’ case-specific enactment constitutional as an act of legislating, since it “compelled changes in law, not findings or results under old law.”\textsuperscript{94} The Court reasoned that the case-specific enactment was constitutional as a statutory directive that “binds both the executive officials who administer the statute and the judges who apply it in particular cases,” and “what Congress directed-to agencies and courts alike-was a change in law, not specific results under old law.”\textsuperscript{95} This analysis implies that legislative input, even if specifically directed at a particular case, is constitutional so long as it does not, on its face, make case-specific findings or announce case-specific outcomes.

This certification procedure does not forcibly interfere with the judiciary’s decision in a pending case to the extent of the appropriations act upheld in \textit{Seattle Audobon}. It also differs significantly from cases where the Court \textit{has} found legislative encroachment upon judicial functions.\textsuperscript{96} In \textit{INS v. Chadha},\textsuperscript{97} one house retained the automatic and absolute power to review and veto, case-by-case, the Executive’s determinations to grant pardons from deportation under its immigration law. This essentially gave one house absolute authority to dictate and constrain Executive implementation of the law. The legislative veto at issue in \textit{Chadha} differed critically from the Act in \textit{Seattle Audobon} (or at least the Court’s characterization of it), in that it retained ongoing authority for the House to make case-specific determinations about the

\textsuperscript{94} \textit{Id.} at 438.

\textsuperscript{95} \textit{Id.} at 439. The Court has explained that “[w]hatever the precise scope of \textit{Klein}, ... later decisions have made clear that its prohibition [on enactments prescribing specific outcomes] does not take hold when Congress ‘amend[s] applicable law.’” \textit{Miller v. French}, 530 U.S. 327, 349 (2000).

\textsuperscript{96} In \textit{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.

outcome of each individual deportation pardon. Justice Powell’s concurrence argued that the law should be invalidated on separation of powers grounds, as opposed to bicameralism and presentment. It focused on this individualized case-by-case adjudication as the main problem. 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.”  

The constitutional enactment in Seattle Audobon did not have the characteristic of retaining ongoing power to decide individual cases, it made an abstract pronouncement about the legal requirements for agency action under the four environmental statutes at issue – they need only comply with the new set of administrative guidelines set out in the appropriations act. This was permissible even though that pronouncement was clearly aimed at defining the law as it applied in pending litigation.

There are two main reasons that a multiple-choice legislative certification procedure comports with separation of powers. First, the legislature, voting between two meanings of the statute in abstract, framed and constrained in advance by the Court, would not be doing case-by-case adjudication akin to Chadha. It is likely permissible under Seattle Audobon because the legislature’s response does not order a certain outcome in any case, instruct the judiciary how to apply the law to a particular case, nor instruct the judiciary to make specific findings in particular cases (factors found to be

98 Id. at 965-66 (Powell, J. concurring).
99 Id. at 960 (Powell, J. concurring) (“When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers.”).
decisive in *Seattle Audobon*). Most critically, the multiple-choice procedure proposed here better comports with separation of powers than a proposal like Frost’s, which allows Congress absolute discretion to amend the law, because it is wholly within the control of the Court. It is voluntary for the Court and Congress. The voluntary aspect of the procedure ensures it does not enable the power-grabbing identified by Justice Powell as functionally violating separation of powers: the legislature is not empowered to “interfere[]” with or “assume[]” a function” of the Court. The Court predetermines the possible outcomes based on conclusions it would otherwise reach itself, and therefore provides Congress with no greater discretion to change the law than the Court would when issuing its own interpretation.

Part of Justice Powell’s concern in *Chadha* was that allowing Congress to make case-by-case determination might compromise safeguards for individual and procedural rights. This risk exists because “[u]nlike 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.”100 Frost’s proposal does not resolve this problem. However, this proposal does: the Court retroactively determines the appropriate weight to attribute to legislative preferences. If the Court becomes convinced that the legislature is responding specifically to a given case, rather than providing guidance as to its understanding generally, it is free to adjust the weight afforded the legislative response, including disregarding it entirely (i.e., if it becomes suspicious after certifying a question that a decision was highly politicized). Accordingly, this process would not grant the legislature any additional discretion.

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100 Id. at 966.
power to change, control, or elaborate on the law. If the legislature wants to change the law more than one of the Court’s proffered interpretations, it must go through proper amendment procedures. Hence, this procedure preserves the principle that “[t]he judiciary is the final authority on issues of statutory construction.”

Considering the constitutionality of statutory directives on statutory interpretation that have been passed by a number of state legislatures further suggest that certification would not violate separation of powers. Numerous state legislatures have enacted statutory default rules, instructing courts how to construe statutes, and have been proposed for federal legislation, also. Commentators have concluded that legislative rules for statutory construction would be unlikely to violate separation of powers, and that Congress could enact federal rules of governing statutory interpretation in federal courts. Enacting rules governing how courts should interpret legislation gives the legislature more control over judicial decisions than the certification procedure proposed here. Not only are these rules binding on the courts, they mandate a particular judicial process, and therefore intrude far more concretely on the province of courts. The certification procedure asks for congressional input on the substantive content of the legislation at issue, a subject much more within Congress’s policymaking domain.

b. Presentment clause

There might be concern that the accepting a congressional vote on a statutory interpretation question without the President’s approval would violate the Presentment

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102 Glucke, supra note 2.
Clause. It is not clear that the Presentment Clause is implicated here because “[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 effect.” With this procedure, Congress is not passing law, but expressing its non-binding preferences between judicially proffered outcomes. Indeed, whenever the Court interprets an ambiguous statute in a case, the “[t]he meaning of the law before and after a judicial decision is not the same,” and these changes based on judicial interpretation are not ‘lawmaking’ subject to the requirements of the Presentment Clause.

Alternatively, there is no reason that the legislature’s response to the certified question could not also be presented to the President for approval. The President could have the option of vetoing the legislature’s response, in which case the court could consider the veto in determining how to weight the legislative response, and potentially discrediting it as a basis for decision. Because a veto would counteract legislative preferences, it would have the same meaning in terms of power dynamics, as vetoing a piece of legislation. I’d imagine that the President would be hesitant to veto the legislature’s response to a Court-certified question, and do so rarely.

c. Ex Post Facto

There may be a concern that certification would enable the legislature to retroactively alter the statute’s meaning as applied to actions in a pending case that

105 Id. at 952.
106 Barak, supra note 12, at 23.
occurred before the certification, and this might violate the prohibition on *Ex Post Facto* laws. However, retroactive changes in the law are accepted in many cases where a court adopts a meaning of a statute contrary to one party’s understanding, or the legislature enacts a law changing rules applicable to parties presently litigating prior events.\textsuperscript{107} Hence, the Court has long policed its own decisions against retroactive effects by avoiding interpreting statutes in ways that would impose unpredictable or unforeseeable burdens retroactively.\textsuperscript{108} Whether retroactive application is unconstitutional depends on “the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.”\textsuperscript{109} The Court has acknowledged that judges are particularly adept at detecting and avoiding retroactivity problems: “retroactivity is a matter on which judges tend to have sound ... instinct[s], and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.”\textsuperscript{110} The judicially predetermined multiple choices allow the Court to guard against *Ex Post Facto* problems just as it would in its own interpretive decisions. If the Court would invoke substantive cannons such as the rule of lenity, presumption of consistency, or other reliance problems to preclude a particular reading of a statute, then it should not present that interpretation as an option to the legislature.

\textit{d. Intra-branch tension – subsequent vs. enacting legislature:}

This certification procedure takes into account the will of the contemporary legislature, and therefore raises the question of whether enacting or contemporary legislative preferences should be determinative in interpreting statutes. It may be argued

\begin{footnotes}
\item[107] Landgraf v. USI Film Products, 511 U.S. 244, 269-70 (1994).
\item[108] Landgraf, 511 U.S. at 270-71.
\item[109] Id.
\item[110] Id. at 270-71.
\end{footnotes}
that “[t]he later Congress is a separate decisionmaking entity, which has no constitutional role in explaining or interpreting what the earlier body has done.”\textsuperscript{111} It is not clear that the Constitution mandates any particular balance of power within the legislature itself, between enacting subsequent legislatures. Separation of powers is concerned with “the distribution of powers among the three coequal Branches; it does not speak to the manner in which authority is parcelled out within a single Branch.”\textsuperscript{112} Article I says nothing about balance of power between previous and subsequent Congresses, and charges Congress with designing its own procedural rules.

Commentators have argued that the preferences of the contemporary legislature should dictate the outcome. Deferring to contemporary legislative will, as opposed to the will of past enacting legislatures, best maximizes political satisfaction, the goal of deference to the democratic branches.\textsuperscript{113} Given the choice, most legislators (and their constituents) have stronger interest in shaping the present-day interpretation of all existing statutes, since they experience and benefit from those results, than they do in controlling all future interpretations of particular laws they enact.\textsuperscript{114} Other commentators have observed that this normative argument seems to play out in practice: judges deferring to ‘legislative will’ tend to consider evidence of preferences of contemporary, post-enactment legislators, when available, with the goal of avoiding their interpretation being corrected or overridden.\textsuperscript{115} Because straightforward interpretation and application

\textsuperscript{113} Elhague, supra note \textsuperscript{111}.
\textsuperscript{114}Elhague, supra note \textsuperscript{111} (“Even for the enacting government a default [interpretive] rule that accurately tracks current preferences (rather than the preferences of the government that enacted each statute) will maximize its political satisfaction.”).
\textsuperscript{115} Edward P. Schwartz et al., \textit{A Positive Theory of Legislative Intent}, \textit{57} LAW \& CONTEMP. PROBS. 51, 54 (1994).
of a statute often becomes more problematic or unclear with time as social and legal paradigms change,\textsuperscript{116} indication from more contemporary legislatures will likely provide more valuable guidance on what a statute should mean in contemporary context, and therefore be more informative to a judge seeking to render an interpretation that is not overridden by the legislature. The relevance of contemporary legislative preferences is evidenced in that the Court has persistently recognized post-enactment legislative views as bearing on its interpretation of a statute, despite decisions suggesting the contrary.\textsuperscript{117}

The Court has looked to the will of legislators enacting post-enactment amendments, even though those amendments did not directly address the uncertainty at issue. The Court has also considered non-codified legislative statements, such as non-enacted proposals to amend legislation and statements made in deliberations on those proposals. The Court relied on understanding reflected in committee report statements of post-enactment legislators, that was not codified subsequent enactments. In \textit{Seatrain Shipbuilding Corp. v. Shell Oil}\textsuperscript{118} 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. Though the provision of the legislation in question was enacted in 1934, the 1971 and 1972 Congresses had proposed an amendment to the Act that expressly contemplated the Secretary having the

\textsuperscript{116} Eskridge, \textit{Post-Enactment Legislative Signals}, 57 L. \& CONTEMP. PROBLEMS 75, 78 n.14 (1994).
\textsuperscript{117} For instance, in \textit{Fishgold v. Sullivan}, 328 U.S. 275 (1946), the Court explained “[w]e consider the situation at the time the Act was passed …Today, in light of what has happened, the privilege then granted may appear an altogether inadequate equivalent…but we have not to decide what is now proper; we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which [the statue’s benefit provisions] were cast.” Thus, the idea of ‘imaginative reconstruction’ seems to imply that only the enacting legislature’s preferences matter. However, there was no suggestion of contemporary Congressional preference for a reading different from the enactment meaning.
\textsuperscript{118} Seatrain Shipbuilding Corp. v. Shell Oil Co. 444 U.S. 572, 596 (1980).
authority in question. 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.” 119 The Court relied on this non-enacted “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.” 120

The same year as Seatrain, the Court issued another decision that while
cautionsing against heavy reliance, credited the relevance of subsequent legislature’s
tviews. Contemporary legislative preferences should not be ignored when they stand to
inform judicial speculation: “[w]here the mind labours to discover the design of the
legislature, it seizes every thing from which aid can be derived.” 121 Hence, just as this
proposal advances, the views of the contemporary legislators should be taken into
account even though not dispositive: “arguments predicated upon subsequent
congressional actions must be weighed with extreme care, they should not be rejected out
of hand as a source that a court may consider in the search for legislative intent.” 122

119 Id. at 596.
120 Id. at 596.
122 Id.; see also Zipes v. Trans World Airlines, 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).
The Court has also relied on subsequently enacted legislation that suggests a
general orientation towards one interpretation over another, even though the new
legislation does not directly address the interpretive question. This also indicates concern
for the preferences of contemporary, post-enactment Congresses. The court used this
tactic in *F.D.A. v. Brown & Williamson*\(^{123}\) to conclude that tobacco products were not
“restricted devices” under the 1965 Food, Drug and Cosmetic Act. This was not based on
evidence of what the 1965 enacting Congress meant by the term “restricted device”, but
instead on the fact that laws enacted by subsequent Congresses regulating the sale of
tobacco acknowledged its importance to national industry. Thus the decision about the
1965 Act’s meaning was based on legislative intent expressed through contemporary,
post-enactment legislative policy: “Congress' [more recent] 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.”\(^{124}\) The Court’s opinion plainly speaks in the present tense of ongoing
congressional intent: describing ‘Congress’ decisions…to adopt the express policy…reveal its intent that tobacco products remain on the market.’ The Court
explained that expressions from more recent Congresses that provide more specific
guidance on the meaning of previously enacted legislation should inform reading of that
legislation, even if these expressions of meaning are not formally enacted amendments:
“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


\(^{124}\) Id. at 139.
embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.  

Furthermore in 2008, the Court again relied on the history surrounding a 1995 post-enactment amendment to interpret the scope of liability under a much older, preexisting section of the Private Securities Litigation Reform Act. Leading up to the 1995 amendment, the Senate subcommittee considered testimony recommending establishing aiding and abetting liability in private claims. However, the enacted amendment only authorized the S.E.C. to prosecute aiders and abettors. Because this suggested Congress’s desire to exclude private liability for aiding and abetting, the Court determined that the private right of action provided by a preexisting section of the Act did not allow private parties to bring actions against aiders and abettors. 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.  

The Court has also advanced a public policy rationale that subsequent and contemporary legislators’ understanding of the statute shapes their reliance on that law and in developing and enacting other legislation, thereby generating a ‘public reliance’ on that interpretation of the statute, even if the understanding arose post-enactment. Even Justice Scalia, who denies use of legislative history generally, has acknowledged the relevance of post-enactment legislature’s expressed understanding insofar as it shapes reliance on that law and in developing and

125 Id. at 143.
enacting other legislation, thereby generating a ‘public reliance’ on that post-enactment interpretation of the statute.\textsuperscript{127}

The Court also takes into account the preferences of contemporary legislatures by deferring to agency interpretations “drafted with the oversight and approval of Congress,” even though the interpretation is not compelled by language or original legislative history.\textsuperscript{128} Agency interpretations of statutes are subject to the ongoing influence of contemporary Congresses, and therefore more likely to reflect contemporary congressional preferences. In support of the idea of greater congressional input on judicial interpretations of statutes, Mikva notes that Congress maintains much more oversight on how the Executive branch interprets legislation, pointing out that congressional committees currently summon the heads of agencies to oversee and guide their interpretation of a statute. By considering legislative silence or inaction following a judicial or agency interpretation as legislative consent to that meaning, and as a reason to adopt or maintain that reading,\textsuperscript{129} the Court recognizes the relevance of contemporary legislative preferences. In \textit{Bob Jones v. U.S.},\textsuperscript{130} the Court upheld the IRS’ interpretation of the tax code that racially discriminatory private schools were not tax exempt non-profit, based on the fact that recent Congresses had considered and ultimately rejected amendments to override the agency’s interpretation. When it deferred to the agency’s interpretation because recent Congresses had declined to overrule it, the Court based its decision on the will of recent Congresses, as opposed to the enacting one. The Court

\textsuperscript{127} Gozlon-Perez v. United States, 489 U.S. 395 (1991); Justice Scalia also invoked post-enactment legislative views in Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 78 (1992) (Scalia, J. concurring)(recognizing that subsequent enactments “must be read” as an “implicit acknowledgement” of the chosen interpretation).
\textsuperscript{129} Flood v. Kuhn, 407 U.S. 258 (1972).
\textsuperscript{130} 461 U.S. 574 (1983).
explained that “the need for continuing interpretation of those statutes is
unavoidable…the IRS and its predecessors have constantly been called upon to interpret
these and comparable provisions.”\textsuperscript{131} Because contemporary Congresses had not
overruled this interpretation, they impliedly accepted it, and the Court would not
invalidate contemporary legislative preferences: “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.”\textsuperscript{132}

Furthermore, considering contemporary legislative will is consistent with positive
political theory, which provides an account of lawmaking as an ongoing and dynamic
collaboration between legislatures, agencies, and courts. With common law, courts have
flexibility to update the law as circumstances change and problems in its application
become apparent through litigation. In a system dominated by statutory law, the same
updating and adapting is desirable and necessary in order to make the law best fit present
reality. Congress, agencies, and courts, as they discover problems arising in the law’s
application, must cooperate in adjusting and adapting law, just as the common law is
constantly developing and adapting.\textsuperscript{133} Hence, it better maximizes political satisfaction –
presumably the objective of deference to political branches, especially when a statute is
genuinely ambiguous – to consider contemporary legislative will. The Court has adopted
cannons addressing the balance of power between Congresses over time: The last in time
rule provides that, when two pieces of legislation can not 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.

\begin{footnotesize}
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\item \textsuperscript{131} Id. at 597.
\item \textsuperscript{132} Id. at 599.
\item \textsuperscript{133} Eskridge, supra note 116.
\end{itemize}
\end{footnotesize}
Both of these rules reflect preference the views and actions of subsequent Congresses over former ones, and are thus consistent with the notion that the preferences of more contemporary Congresses should govern. If signals of contemporary, post-enactment legislatures (i.e., acquiescing to a post-enactment agency interpretation) are informative, though “weighed with extreme care,” contemporary legislative views expressed through a certification procedure should be equally relevant, and adduced more reliably.

VIII. Conclusion

Insofar as the Court is concerned with deferring to democratic preferences so as to avoid it’s interpretation being overridden by Congress, this certification procedure would enable it to do so more accurately, legitimately, and reliably than imagining the ‘will’ of legislators based on text, structure, or post-enactment legislative history. Because a legislative certification question is voted on by the entire legislature, it does not suffer the representational defects of legislative history. Textualists are skeptical of the democratic representativeness of legislative history (of both enacting and contemporary legislature). “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.” The certification procedure thus provides a way for textualists to ascertain the desire of the current legislature without looking to materials that suffer the potential representational defects associated with not being voted on by the entire legislature. Textualists whose main opposition to subsequent legislative history is its undemocratic, unrepresentative nature, may be less opposed to considering the current legislature’s will if garnered through a method that represents the preferences of the

134 Andrus, 446 U.S. at 666 n.8.
135 WILLIAM ESKRIDGE, PHILIP FRICKEY, ELIZABETH GARRETT, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1041 (4th ed.).
entire legislature. This procedure also avoids the critique that legislative history is selectively proffered by advocates, and because courts do not have the time or resources to evaluate the entire legislative record, they may not get a full picture when looking at legislative history proffered by the parties.

This certification procedure would allow the Court to assess the direction and strength of legislative preferences, in order to recognize and potentially avoid adopting an interpretation contrary to the overwhelming will of the present Congress that is likely to be overruled. It could achieve this more accurately, reliably, legitimately, and efficiently than current methods of speculating about legislative will. If, as I argue above, this procedure is constitutional, there are remaining reasons that it might be considered undesirable. 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 voting on a statutory interpretation question would be unlikely to dedicate the same reasoned thought and analysis to the matter that a court would – looking at the context of enactment, the problems that are playing out in administration, and how the interpretation comports with other portions of the law. Some disinterested legislators would lack this valuable contextual analysis, and instead would likely just voice instant reaction – what sounds right to them based on how the issue is presented on the face of the question. Second, in addition to being careless or lacking important contextual analysis, legislators might be too whimsical as a source for law’s meaning. They may be too heavily swayed by instant political preferences to value anything else
when voting on statutory interpretation. One could imagine lobbyists petitioning legislators to vote one way or another, or constituents otherwise pressuring for particular result. Legislators voting on statutory interpretation would be doing so ad hoc, based on whatever result is favored by their political constituency. This doesn’t seem illegitimate, per se, as a basis for defining the law, as it is also the climate in which laws are initially enacted. But considering legislators’ preferences, which might be instant responses to political pressure, it seems, could provide for short-sighted judgments, and cut against consistency or uniformity in the law.

This procedure addresses these problems through judicial oversight: the Court can weight the result of a legislative vote “with extreme care”136 or discount it entirely. Nonetheless, the Court has more accurate, majoritarian information about present day legislative preferences than it can adduce through speculation based on post-enactment signals or legislative history. Relying on judicial oversight to enforce substantive cannons and weight legislative preferences depending on politicization and strength of the vote, illustrates the desired partnership role judges play in constructing statutory interpretations, instead of purely mechanical deference to legislative choices. Even the strongest advocates of judicial restraint and deference, who see judges as ‘faithful agents’ of the legislature, might only accept a certification procedure if it preserves this role for judges. This shows universally recognition of the ‘value added’ by judges in constructing the meaning of statutes. While most judges themselves agree on values of deference and judicial restraint, they may be reluctant to ask for or consider the legislature’s own statement (even if judicially constrained on both ends, as in this procedure) on its preferred interpretation. Rejection of this procedure would suggest that judges must, on

136 Andrus, 446 U.S. at 666 n.8.
some level, recognize that they properly make independent contribution in interpreting statutes beyond faithfully adhering to what Congress desires.