

# Articles

## CERTIFYING QUESTIONS TO CONGRESS

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## INTRODUCTION

Congress frequently enacts legislation containing gaps or inconsistencies that cannot be resolved through techniques of statutory interpretation.<sup>1</sup> The typical judicial reaction is to try to force meaning from the statute by applying some canon of construction or interpretive theory, even when the statute and its legislative history are silent or conflicted on the issue.<sup>2</sup> Occasionally, judges will openly admit the impossibility of ascertaining legislative meaning and conclude their opinions by calling for Congress to clarify statutory language.<sup>3</sup> Yet because they must resolve the cases before them, judges are still faced with the task of extracting meaning from an inscrutable statute.

Legal scholars have engaged in a vibrant discourse about the best methods of resolving statutory ambiguity. Much of the debate has focused on the two most widely accepted interpretive theories—textualism and intentionalism.<sup>4</sup> Both schools incorporate the canons of construction, which have themselves been the subject of long debate. More recently, proponents of dynamic statutory interpretation have moved beyond discussion of hermeneutics and have claimed that courts have the authority to update vague or open-ended statutes to acknowledge changed circumstances or to better accord with evolved social standards.<sup>5</sup> The scholars in all these

<sup>1</sup> See, e.g., Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't And Legislators Who Won't*, 63 COLUM. L. REV. 787, 792 (1963) (“My criticism is directed rather at cases in which the legislature has said enough to deprive the judges of power to make law even in such subordinate respects but has given them guidance that is defective in one way or another, and then does nothing by way of remedy when the problem comes to light.”); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1420 (1987) (“The national legislature expresses itself too often in commands that are unclear, imprecise, or gap-ridden; in too many cases, as Chief Justice Rehnquist once wrote, “[t]he effort to determine congressional intent . . . might better be entrusted to a detective than to a judge.”); John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1280 & n.43 (1996) (“[T]he courts complain of ambiguous statutory language daily.”).

<sup>2</sup> See, e.g., discussion *infra* Part II.B.

<sup>3</sup> See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2624 (2005) (noting that 28 U.S.C. § 1367 may contain an “unintentional drafting gap” but concluding that “[i]f that is the case, it is up to Congress rather than the courts to fix it”); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 603–04 (1995) (Ginsburg, J., dissenting) (“If adjustment [of the statute] is in order, as the Court’s opinion powerfully suggests it is, Congress is equipped to undertake the alteration.”); *Reves v. Ernst & Young*, 494 U.S. 56, 63 n.2 (1990) (“If Congress erred, however, it is for that body, and not this Court, to correct its mistake.”); *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 76 (2d Cir. 2005) (noting that sentencing statutes raise separation of powers and federalism concerns, and “invi[te] congressional consideration of these statutes”).

<sup>4</sup> See, e.g., John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–20 (2005) (describing the two dominant interpretive methodologies as textualism and intentionalism).

<sup>5</sup> See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994) [hereinafter, ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*]; RICHARD POSNER, *OVERCOMING LAW* (1995); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002) [hereinafter Elhauge, *Preference-Estimating*].

camps base their critiques of the status quo and proposals for change on their view of the role judges should play in the American system of government.<sup>6</sup>

This Article proposes another solution to the problem of intractable statutory ambiguity—a solution that reflects a different normative view about the place of the judiciary in our constitutional structure. When a federal court must construe a statute that leaves important issues about its application unclear, the court should have the option to stay the case and refer the question to Congress, much in the same way that courts now use abstention and certification to obtain answers about the meaning of state law from state courts. Congress may then resolve the ambiguity by amending the law in accordance with Article I’s bicameralism and presidential presentment requirements, after which the court can (in fact, usually must) apply the new law to the pending case.<sup>7</sup>

Sending truly ambiguous statutes to Congress for clarification is the best use of courts’ and Congress’s institutional competences. Federal judges, valued for their independence from politics and public opinion, have neither the expertise nor the authority to engage in the kind of substantive lawmaking that is required when they must apply a statute containing significant gaps or conflicting language. The legislative branch, on the other hand, has the investigative capabilities and connections with the community to assist it in policymaking, and its members can be held accountable for their choices by the electorate. Furthermore, sending questions about statutory meaning to Congress is a more honest response to truly opaque statutes than attempts at interpretation; when courts use the canons of construction or theories of interpretation to find meaning where there is none, they undermine the legitimacy of these important interpretive tools. Finally, sending questions to Congress provides Congress with an incentive to take immediate action to avoid a judicial decision that might establish new law and create new stakeholders, making a congressional override difficult. At the very least, the process will alert Congress to the problems in legislative texts and hopefully inspire it to do a better job when drafting future legislation.<sup>8</sup>

When judges devote so much of their time and energy to ascertaining congressional intent and parsing meaning from indeterminate statutory lan-

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<sup>6</sup> As one scholar in this area has declared, “[i]n the end, the quest for statutory meaning in the absence of formal legislative evidence reduces to a debate over the proper role that courts should play in construing statutes.” Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1437 (2005).

<sup>7</sup> See discussion *infra* Parts III–IV. As discussed in more detail in Part IV, there is some tension between the principle that courts must apply new law to pending cases and the presumption against retroactivity. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994). However, if Congress is clear that it wishes the law to apply retroactively, and Congress has not transgressed the “modest” constitutional limitations on its power to do so, then the Court must apply the new law to pending cases. *Id.* at 272.

<sup>8</sup> See discussion *infra* Part V.A.

guage, it is strange not to at least consider bringing the problem to the attention of the very political branches imbued with the authority to resolve that ambiguity definitively. Yet courts have never referred ambiguous statutes to Congress for amendment, and the academic literature contains only a few passing references to the concept.<sup>9</sup> The reluctance to entertain the idea may stem from a sense that courts should not be asking Congress to enact laws that resolve pending cases; the U.S. Constitution carefully separates the lawmaking and judicial functions, and those lines might be blurred if Congress is encouraged to craft legislation concerning a dispute in a case before a court.<sup>10</sup> But even as courts and commentators have overlooked or rejected the possibility of referring ambiguous statutes to Congress, on many occasions Congress has recognized judicial confusion about the meaning of legislation and amended unclear statutory language.<sup>11</sup> Considering that Congress is already assisting courts by amending legislation at issue in pending cases—albeit in an informal and ad hoc way—this Article argues in favor of a formal certification process that would give the courts a role in selecting the cases in which congressional assistance would be helpful.

Part I of this Article provides a detailed description of the certification process that courts should employ when faced with a truly inscrutable statute.

Part II.A discusses the causes of statutory ambiguity, ranging from innocent drafting errors to deliberate legislative choices to leave language unclear, and describes the different schools of statutory interpretation that courts employ to resolve ambiguities. Part II.B then illustrates the problems posed by truly opaque statutes by describing three Supreme Court cases from the October 2004 Term in which the Court struggled to resolve the meaning of unclear statutory language using these traditional methods of statutory interpretation.

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<sup>9</sup> See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2180–81 (2002) [hereinafter Elhauge, *Preference-Eliciting*] (commenting that a “more straightforward approach” to the problem of statutory ambiguity might be to certify questions to Congress); Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 173 (1992) (suggesting at the end of an article on the costs of statutory ambiguity that federal courts might consider certifying questions of statutory meaning to Congress).

<sup>10</sup> See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219–34 (1995) (holding that the Constitution did not permit Congress to enact legislation that would set aside the final judgment of an Article III court); Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislatures and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1093 (1991) (raising the concern that “the active involvement of judges in legislative forums [could] affect the judges’ ability to resolve disputes from the bench”); Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 2–3 (1998) (“Traditionally, most academics and judges have viewed the legislative role as quite separate and distinct from the judicial role: judges are not to exercise directly legislative powers and legislators are not to mandate the outcome of particular cases or controversies pending before the federal courts.”).

<sup>11</sup> See discussion *infra* Part III.C.

Part III proposes certifying questions to Congress as an alternative method of dealing with ambiguous statutes. This Part draws a connection between judicial referrals to Congress and the theories supporting federal courts' use of abstention and certification to provide an opportunity for state courts to decide difficult questions of state law. Although there are important differences between the two types of abstention, sending questions to Congress can be justified by many of the same rationales that underlie certifying questions about the meaning of state law to state courts. This Part concludes by describing Congress's long history of taking notice of judicial confusion and acting to resolve statutory ambiguity—sometimes on the eve of a circuit court or Supreme Court decision on the matter. In light of this well-established practice, it makes sense to develop a system by which courts can seek congressional assistance in cases of their choosing by certifying questions to Congress.

Part IV addresses the constitutional concerns raised by certifying questions to Congress, and describes the ways in which the process could be structured to avoid an impermissible intermingling of the functions of the legislative and judicial branches.

Part V engages in a normative analysis of the proposal: Assuming that certifying questions to Congress can be structured so as to pass constitutional muster—as I argue it can be—would giving Congress an opportunity to weigh in on pending cases be wise? Judicial referrals to Congress are a more democratic, and more honest, means to address statutory ambiguity than the current system under which courts employ complex and conflicting canons and theories of statutory interpretation to arrive at a statutory meaning that no elected body enacted into law. On the other hand, Congress may not be at its best when legislating in the shadow of pending cases, and transferring cases from the (relatively) apolitical judicial branch to the nakedly political legislative branch puts unpopular and unsophisticated litigants at a disadvantage. Furthermore, certification will inevitably cause delay in the resolution of the cases in which it is used. To illustrate these points, this Part returns to the three cases discussed in Part II to describe how certification might have resolved the questions about statutory meaning raised in those cases.

I conclude that certifying questions to Congress would be a valuable addition to the judicial arsenal, but that it should be used sparingly and with caution. Certification is worthwhile when it would allow a court to avoid difficult constitutional questions or would give Congress and the President a role in deciding significant issues of policy best addressed in the first instance by the political branches. On the other side of the spectrum, certification might also make sense in cases in which the statute contains a minor technical error that can be quickly and easily resolved through an amendment. Congress should not be consulted, however, when the litigants possess widely differing degrees of political influence or when Congress might be expected to act hastily to satisfy shifting and tyrannical majority prefer-

ences. Admittedly, distinguishing these cases will not always be easy, but I argue that it is a more honest exercise than one in which the courts seek to glean meaning from a statute that contains none.

The Article closes by discussing the problem of congressional inaction. If a court certified a question to Congress that Congress chose not to answer—a situation that might occur frequently—I contend that Congress’s silence would serve as an implicit delegation of legislative power to the courts. Judges could then engage in more freewheeling and creative reading of legislation than would be justified had Congress not first turned down the opportunity to amend ambiguous statutory language. Moreover, simply by referring questions to Congress, judges will have bought themselves some political cover against charges of judicial activism for filling gaps and reconciling inconsistencies in ambiguous statutes. For that reason, the value of certification is two-fold: In some cases, Congress will step in to provide a legislative solution; in all the rest, Congress’s silence will empower courts to openly legislate rather than do so in the guise of “statutory construction,” as occurs now.

## I. THE PROPOSAL

Judicial certification to Congress could be established either by legislation or possibly through adoption of a new rule of judicial procedure. Either way, the procedures governing certification would have to ensure that it provides an efficient, fair, and useful method of resolving questions of intractable statutory ambiguity. The guidelines below outline a process by which courts could stay cases and send questions to Congress without transgressing constitutional boundaries or needlessly disrupting the judicial and legislative functions.

### *Courts Authorized to Certify Questions to Congress.*

Only the U.S. Supreme Court and the U.S. Courts of Appeals acting en banc should be given the authority to abstain from deciding cases before them and send questions about statutory meaning to Congress. They could do so either sua sponte or in response to a motion by one or both of the parties, and only when a majority of their members voted to do so. If the process were abused or overused, then they could be required to act through a supermajority of at least two-thirds, or the practice could be restricted to the Supreme Court alone. The goal is to limit certification to those cases in which congressional assistance would be most useful, and to prevent Congress from being inundated by such requests from the federal judiciary.<sup>12</sup>

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<sup>12</sup> Another possibility is for Congress to create a specialized judicial body to make decisions about which statutory construction questions should be certified to Congress. For example, these decisions could be made by an inter-circuit committee of chief judges, or by a smaller group of rotating judges assigned to the task. See 28 U.S.C. § 49 (2000) (establishing a rotating three-judge panel responsible for appointing independent counsels). In a related context, Chief Justice Burger called for the creation of a

*Criteria Governing Certification to Congress.*

In deciding whether to certify a question about statutory meaning to Congress, these courts should rely on some of the same criteria they employ when considering whether to grant petitions for review. At a minimum, the case must raise a question about statutory meaning on which the Courts of Appeals have differed, and that question should be important and likely to recur.<sup>13</sup> In addition, the statute involved must be either silent or internally inconsistent on the issue, because it is in such cases that the traditional tools of statutory interpretation provide no judicial guidance.

Ambiguous statutes raising constitutional questions are particularly good candidates for certification because Congress is the more appropriate institution to rewrite statutes to avoid the constitutional problems.<sup>14</sup> Statutes with minor, technical defects would also be worth bringing to Congress's attention through certification. Courts could not certify questions about the meaning of criminal statutes, however, because constitutional limitations such as the Ex Post Facto and Bill of Attainder Clauses prohibit retroactive alterations to criminal law.<sup>15</sup> Nor should courts certify to Congress questions about statutory meaning that Congress has delegated to another institution. For example, courts should continue to give *Chevron* deference to agency interpretations of ambiguous statutes rather than send questions about those statutes to Congress.<sup>16</sup>

*Judicial Communication of the Question to Congress.*

If a court decides to certify a question about statutory meaning to Congress, it should send its request for congressional assistance to the Chairs and Ranking Members of the House and Senate Judiciary Committees.<sup>17</sup> The certifying court should identify the statute at issue and clearly state its question about statutory meaning.<sup>18</sup> In addition, the court should inform Congress that it believes the statutory ambiguity would best be addressed

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National Court of Appeals that would screen those cases that the Supreme Court would hear on review. Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 590 (1972). The proposal would have created a new court, consisting of seven appellate judges who would decide which cases were worthy of Supreme Court review.

<sup>13</sup> See, e.g., SUP. CT. R. 10 (listing grounds for granting a petition for writ of certiorari); FED. R. APP. P. 35 (listing grounds for granting rehearing en banc).

<sup>14</sup> See *infra* Parts IV–V for discussion about the kinds of cases for which certification would be most useful.

<sup>15</sup> See discussion *infra* Part IV.C.3.

<sup>16</sup> See *infra* notes 129–32.

<sup>17</sup> Cf. *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 75–76 (2d Cir. 2005) (noting that circuit courts have disagreed over the meaning of federal sentencing statutes and directing the Clerk of the Court to forward the opinion to the Chairs and Ranking Members of the House and Senate Judiciary Committees).

<sup>18</sup> See, e.g., MASS. SUP. JUD. CT. R. 1:03 (stating that a certification order must state the question of law to be answered and provide a statement of “all facts relevant to the question certified”).

by Congress in the first instance, and consequently it is abstaining from deciding the case so that Congress will have an opportunity to resolve the issue by amending the statute. Finally, the court should inform Congress of the date on which it will proceed with the case should Congress not respond.

*Congressional Response to a Certified Question.*

A court may not compel Congress to reply to its question about a statute's meaning. If Congress chooses to respond, however, it must do so by enacting a new piece of legislation amending the statute at issue in the pending case, because courts will give little weight to post-enactment legislative history.<sup>19</sup> Thus, as will be discussed in more detail in Part IV, Congress is under no obligation to "clarify" the statutory ambiguity in accordance with the enacting legislature's intent, but rather may resolve the ambiguity as it thinks best.

*Length of Time that a Certifying Court Should Abstain While Awaiting Congressional Response.*

Certifying questions to Congress will inevitably delay resolution of the case. To minimize this problem, courts should abstain only for as long as reasonable to allow Congress to take action. If Congress wishes to respond by amending the legislation, it must indicate a serious intent to do so within six months—for example, by scheduling hearings on the issue, or drafting legislation that is under active consideration. If Congress has not taken any concrete steps to amend the statute within six months of receiving the certified question, the court should proceed with its own consideration of the case. And even if Congress does take action to fix the legislative problem within the six-month window, the court should not wait indefinitely for Congress to enact the proposed legislation into law. If Congress has not succeeded in enacting a legislative fix within two years of receiving the court's request, the court should lift its stay and hear and decide the case on its own.<sup>20</sup>

*Effect of a Congressional Response to a Certified Question.*

If Congress amends the statute in response to a court's certified question, the certifying court should presume that Congress intended that the new legislation be applied to the pending case unless doing so would be so unfair to one of the litigants as to raise due process concerns—a rare occurrence.<sup>21</sup> The certifying court may either resolve the case in the first instance

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<sup>19</sup> See, e.g., *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (refusing to consider post-enactment legislative history).

<sup>20</sup> See discussion *infra* V.B.

<sup>21</sup> See discussion *infra* Part IV.D.

or remand the case to a lower court with instructions to apply the new law to the case.

## II. THE PROBLEM OF STATUTORY INDETERMINACY

To evaluate whether certifying questions to Congress is a useful method of resolving statutory ambiguity, we must first understand why Congress drafts ambiguous statutes and how courts currently deal with that problem. Part II.A addresses the causes of statutory indeterminacy and the interpretive methods courts employ in response. As any student of the law knows, this is an area of extensive discussion among not just scholars, but practitioners and judges as well. The summary below is not meant to be comprehensive or to address the nuances of the problems of statutory drafting and interpretation—topics that could each take up an entire law review article by themselves. Rather, my goal here is to outline a debate over how to locate statutory meaning that has been richly explored in other sources. I then turn to my proposal to send at least some of these hard cases of statutory construction back to Congress for consideration, which would provide courts with a new tool to address statutory indeterminacy.

Part II.B then looks closely at three decisions from the Supreme Court's 2004 Term to observe these methods of interpretation at work, and to illustrate how frequently they fail to locate meaning in truly ambiguous legislative text.

### A. *The Judicial Response to Statutory Ambiguity*

Statutes are ambiguous for a variety of reasons. Sometimes the rush to enact a needed piece of legislation will result in sloppy or inconsistent language or even outright drafting errors.<sup>22</sup> Sometimes Congress will rationally conclude that it is not worth its time to attempt to predict and address every potential wrinkle in a statute's implementation.<sup>23</sup> And sometimes the ambiguity arises from application of the law to a new or unusual circumstance that Congress could not have foreseen.<sup>24</sup> Less benignly, Congress

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<sup>22</sup> See, e.g., Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 83 (1998); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 418–22 (1989) [hereinafter Sunstein, *Interpreting Statutes*].

<sup>23</sup> Joseph A. Grundfest & A.C. Pritchard, *Statutes With Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 640 (2002).

<sup>24</sup> Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983) [hereinafter Posner, *Statutory Interpretation*]; see also ROBERT A. KATZMANN, COURTS AND CONGRESS 61 (1997) [hereinafter KATZMANN, COURTS AND CONGRESS] (discussing the different reasons for statutory ambiguity). As Judge Posner wrote:

[The] basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted—though many are—and not that the legislators failed to agree on just what they wanted to accomplish in the statute—though often they do fail—but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.

may choose to enact an ambiguous statute as a compromise to ensure the statute's passage; by being purposely vague, legislative drafters can generate sufficient support for a statute that would fail to become law were sensitive issues definitively resolved through clear and detailed statutory language.<sup>25</sup>

Whatever the causes, courts have to deal with the problem of applying unclear statutes. Interpreting ambiguous statutes has been the focus of an extraordinary amount of academic discussion<sup>26</sup> and judicial debate.<sup>27</sup> Although "theories of statutory interpretation have blossomed like dandelions in the spring,"<sup>28</sup> two dominate the field: textualism and intentionalism.<sup>29</sup> In addition to general interpretive theories, most jurists also turn to various canons of statutory construction to help them construe opaque statutes. Below is a thumbnail sketch of these approaches, followed by a summary of

Posner, *Statutory Interpretation*, *supra*, at 811.

<sup>25</sup> See ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 2, 20–22 (1997) ("Some compromises . . . result in clear statutory language purposely being made unclear."); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 261 (1994) ("It is entirely possible—indeed, highly probable—that, because it was unable to resolve the retroactivity issue . . . Congress viewed the matter as an open issue to be resolved by the courts."); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 594 (2002) (noting that legislation often contains "deliberate ambiguity").

<sup>26</sup> *See, e.g.*, Elhauge, *Preference-Estimating*, *supra* note 5, at 2029; William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation and Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Maggs, *supra* note 9, at 136 ("Modern legal scholarship has perhaps dealt with no single subject more thoroughly than statutory interpretation."); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) ("For as long as there have been statutes, lawyers and laymen have puzzled over their inevitable ambiguities."); Sunstein, *Interpreting Statutes*, *supra* note 22.

<sup>27</sup> Antonin Scalia, *Common Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 14 (Amy Gutmann ed., 1997) ("By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations. Thus the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers.")

<sup>28</sup> ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 5, at 1. For an overview of schools of thought regarding statutory interpretation, see KATZMANN, COURTS AND CONGRESS, *supra* note 24, at 46–64 (discussing canons of statutory construction, public interest theory, public choice theory, positive political theory, textualist theory, and contextualism).

<sup>29</sup> *See supra* note 4. A few scholars have noted that textualism and intentionalism are not as distinct as they first appear because even textualists assume that the statute they are interpreting was enacted with some purpose in mind. *See, e.g.*, Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348–49 (2005); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 826 (1994). For an interesting interchange regarding the theories of textualism and intentionalism, see *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610, n.4 (1991). In *Mortier*, eight justices joined a footnote stating that "[l]egislative history materials are not generally so misleading that jurists should never employ them in a good faith effort to discern legislative intent." *Id.* The footnote was in response to a sole concurrence by Justice Scalia which, in addition to stating that it would be better "not to use committee reports at all," urged the Court "to give the text its fair meaning, whatever various committees might have had to say—thereby affirming the proposition that we are a Government of laws, not of committee reports." *Id.* at 621 (Scalia, J., concurring).

the debate about their effectiveness in locating the meaning in an ambiguously worded text.

Finally, I include in this section a discussion of dynamic statutory interpretation, a relatively new approach which stands apart from these other interpretive techniques. Although few jurists would claim to practice dynamic statutory interpretation, some scholars claim it is a descriptively accurate account of how judges deal with indeterminate statutes.<sup>30</sup> Because dynamic theory has some explanatory force, and because a certification procedure addresses many of the criticisms of this theory, it is included in this background section.

*1. Textualism.*—Textualism is an interpretive theory that seeks to find meaning in the language of the statute as it would have been understood by an observer at the time of its passage.<sup>31</sup> Textualists look only for the objective understanding of the statute’s language, and thus do not try to ascertain the intent of the enacting Congress.<sup>32</sup> Indeed, textualists contend that there is no such thing as congressional “intent” because a multimember body such as Congress cannot have one unified understanding of the law being enacted.<sup>33</sup> Accordingly, textualists strictly limit the sources they rely on to assist them in interpreting unclear statutory language: a contemporaneous dictionary definition of a statutory term is useful, but committee reports and floor statements are not.<sup>34</sup> Textualism has gained prominence as its leading proponents—Justices Scalia and Thomas on the Supreme Court, and Judge Easterbrook on the Seventh Circuit—have risen in the ranks of the federal judiciary.

Proponents consider textualism to be the theory of interpretation most consistent with democratic values and the rule of law. As Justice Scalia has explained, textualists focus on the language of the statute and the objective understanding of that language because “it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.”<sup>35</sup> Government by unexpressed legislative intent is “tyrannical” because it is the *law* that should govern, and not the

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<sup>30</sup> See, e.g., ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 5, at 9–106.

<sup>31</sup> A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW vii (Amy Gutmann ed., 1997).

<sup>32</sup> See, e.g., Scalia, *supra* note 27, at 17 (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law. . . .”). *But see* Nelson, *supra* note 29, at 348–49; Redish & Chung, *supra* note 29, at 826.

<sup>33</sup> Sunstein, *Interpreting Statutes*, *supra* note 22, at 433.

<sup>34</sup> To be fair, Judge Easterbrook has not entirely scuttled the use of legislative history. He has conceded, perhaps begrudgingly, that “[l]egislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood.” *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989). After opening the door somewhat, he quickly closes it—noting that “[t]he process is objective; the search is not for the contents of the authors’ heads but for the rules of language they used.” *Id.*

<sup>35</sup> Scalia, *supra* note 27, at 17.

intent of the lawgiver.<sup>36</sup> Furthermore, textualists view intentionalism as a cover for judges to slip their own policy preferences into statutory interpretation.<sup>37</sup> Judges should not enact legislators' unexpressed intent into law, but even more so judges should not enact their own policy preferences into law.

Critics of textualism point out that it is a terribly thin method of gleaning statutory meaning, and they believe that textualists simply ignore the fact that the statutory language alone does not always provide the answers.<sup>38</sup> They contend that certain judges have “begun to use textualist methods of construction that routinely allow them to attribute ‘plain meaning’ to statutory language that most observers would characterize as ambiguous or internally inconsistent.”<sup>39</sup> Mirroring textualists' critiques of intentionalism, opponents charge that textualists insert their conservative policy preference into statutes under cover of “plain language” analysis.<sup>40</sup> In sum, textualism's critics think it lacks the sophistication needed to find meaning in unclear statutes, and they dispute the textualists' assertion that it provides a neutral and value-free method of statutory interpretation.

2. *Intentionalism.*—Intentionalists construe statutes in an effort to realize the enacting legislatures' intent.<sup>41</sup> Accordingly, intentionalists will rely on legislative history and floor debates, and they are willing to construe statutory text in light of the legislature's stated goals. Purposivists, who practice a variation on intentionalism, go a step further and require that judges interpret statutes in light of the spirit of the legislation, even if that interpretation were not one that the enacting legislators would have predicted or embraced.<sup>42</sup> Intentionalists and purposivists—just like textualists—also claim that their enterprise is consistent with democratic values because they are enforcing the commands of elected representatives; it is just that intentionalists and purposivists view courts as agents of the legislature, while textualists want courts to serve as agents of the statute itself.<sup>43</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *See, e.g., id.* at 17–18.

<sup>38</sup> Daniel A. Farber & Brett H. McDonnell, “Is There a Text in this Class?” *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 656–57 (2005) (“[A] leading criticism of textualism” is that “in too many situations, the statutory text just does not provide enough guidance.”).

<sup>39</sup> Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995).

<sup>40</sup> William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994) [hereinafter Eskridge & Frickey, *Foreword*].

<sup>41</sup> *See* Sunstein, *Interpreting Statutes*, *supra* note 22, at 428–29.

<sup>42</sup> *See* *United Steelworkers v. Weber*, 443 U.S. 193, 200–02 (1979) (engaging in a purposivist interpretation of Title VII); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, 166–67, 1148–79 (tentative ed. 1958) (describing purposivism).

<sup>43</sup> Sunstein, *Interpreting Statutes*, *supra* note 22, at 415.

Intentionalism and purposivism, like textualism, cannot rid statutes of all ambiguity. The legislature may not have anticipated every situation in which the statute comes into play, and thus there will be no legislative purpose to guide the court in its application of the statute in unforeseen circumstances. And it does not always make sense to discuss the “intent” of a multimember institution like a legislature, which may have many different and sometimes conflicting purposes in mind when enacting a statute.<sup>44</sup> As public-choice theorists have pointed out, if the statute is a jumble of trade-offs among interest groups, then it is impossible to extrapolate from some nonexistent consensus about the statute’s end goals to fill gaps or reconcile inconsistencies.<sup>45</sup> In such cases, there is no “spirit” to be attributed to the legislation, but rather a legislative middle ground in which each side got some, but not all, of what it wanted. To interpret the law in light of some greater purpose would then undermine the compromise that allowed the legislation to be enacted into law in the first place.<sup>46</sup> In short, critics contend that the very idea of a discoverable legislative intent or statutory spirit is a chimera that often serves as a cover for judicial lawmaking.

3. *Canons of Construction.*—Another method of resolving statutory ambiguity is to employ canons of construction that set default rules to assist in interpretation. Some canons are valued simply as common-sense guides to the reading of any text—for example, the canon that specific statutory provisions qualify general ones or that words in a statute should not be rendered superfluous.<sup>47</sup> Some canons incorporate presumptions about how the legislative process works—for example, repeals by implication are disfavored, and appropriations statutes are presumed not to modify substantive law.<sup>48</sup> More generally, canons are valued as providing a set of default rules against which Congress legislates, so that courts are simply applying the same tools to interpret that Congress used in drafting.<sup>49</sup> In addition to incorporating these values into the process of statutory construction, canons are praised as a method of limiting judicial discretion because they require judges to rely on something other than their own policy preferences when interpreting unclear statutes.

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<sup>44</sup> *Id.* at 433.

<sup>45</sup> Nelson, *supra* note 29, at 370–71.

<sup>46</sup> Sunstein, *Interpreting Statutes*, *supra* note 22, at 427 (“The characterization of legislative purpose is an act of creation rather than discovery.”).

<sup>47</sup> See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001); *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992).

<sup>48</sup> *United States v. Will*, 449 U.S. 200, 221–22 (1980).

<sup>49</sup> Eskridge & Frickey, *Foreword*, *supra* note 40, at 67 (“The usefulness of the canons . . . does not depend upon the Court’s choosing the ‘best’ canons for each proposition. Instead, the canons may be understood as conventions, similar to driving a car on the right-hand side of the road; often it is not as important to choose the best convention as it is to choose one convention, and stick to it.”).

Yet the claimed benefits of the canons of statutory construction have been repeatedly challenged. As Professors William Eskridge and Philip Frickey rather bluntly put it: “almost everybody thinks that canons are bunk.”<sup>50</sup> Judge Richard Posner has questioned the logic of many of the canons and argued that they do not, in fact, embody common-sense interpretive rules.<sup>51</sup> Some of the assumptions about how the legislative process works are overly idealistic and inaccurate. As Posner noted, why should repeals by implication be disfavored when there is no evidence that Congress “combs the United States Code for possible inconsistencies with the new statute, and when it spots one, it repeals the inconsistency explicitly?”<sup>52</sup> And why should words in a statute never be read to create a redundancy when we know that Congress can be sloppy when drafting statutory language?<sup>53</sup> Most vociferously refuted is the idea that canons prevent judges from enacting their policy preferences. Professor Karl Llewellyn famously demonstrated that for every canon one could find an opposing canon, allowing judges to justify any result by citing to some purportedly neutral canon of statutory construction.<sup>54</sup>

The canon of constitutional avoidance has been the subject of particularly close scrutiny. The benefits of the canon are oft-cited by courts: It enables the judiciary to resolve cases without having to expound on constitutional meaning or risk the direct conflict with Congress that would occur were the court to strike down legislation as unconstitutional.<sup>55</sup> Yet commentators have questioned judicial authority to construe statutes to avoid *potential* constitutional issues—at least without first determining with certainty that the most straightforward reading of the statute would be constitutionally problematic. Critics contend that when courts skew the reading of statutes to avoid considering hard constitutional questions, they are essentially making a legislative, not a judicial, choice.<sup>56</sup>

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<sup>50</sup> WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 639 (1988).

<sup>51</sup> Posner, *Statutory Interpretation*, *supra* note 24, at 805–06.

<sup>52</sup> *Id.* at 812.

<sup>53</sup> *Id.*

<sup>54</sup> KARL LLEWELLYN, *THE COMMON LAW TRADITION* 521–35 (1960); Posner, *Statutory Interpretation*, *supra* note 24, at 816 (“Vacuous and inconsistent as they mostly are, the canons do not constrain judicial decision making but they do enable a judge to create the appearance that his decisions are constrained.”). *But see* Scalia, *supra* note 27, at 26–27 (contesting Llewellyn’s view that for each canon there is an equally well-accepted opposing canon).

<sup>55</sup> *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936).

<sup>56</sup> *See, e.g.*, Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405 (2002) (criticizing the avoidance canon as “a roving commission to rewrite statutes to taste”); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 400–01 (2005) (noting that critics claim that the “avoidance canon produces a judicially rewritten statute without democratic legitimacy”); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 98 (1995).

4. *Dynamic Statutory Interpretation.*—Professor William Eskridge, one of the leading proponents of dynamic theories of statutory interpretation, has argued that courts should, and in fact already do, construe statutes “dynamically,” by which he means “in light of their present societal, political and legal context.”<sup>57</sup> Eskridge has mustered evidence to show that courts seem to take into account signals of current congressional preferences, perhaps to avoid a congressional override of a judicial decision about statutory meaning that Congress does not like.<sup>58</sup> Eskridge is joined by many other commentators who advocate incorporating public opinion and current social norms into statutory interpretation.<sup>59</sup> Guido Calabresi has gone a step further and called for courts to “update” statutes in the same ways that courts adjust and amend the common law to take into account changing times.<sup>60</sup>

Dynamic statutory interpretation theory also has its critics. Some argue that the judiciary does not have the institutional competence to determine current societal preferences because it lacks the ties to constituents and the investigative capabilities that legislatures use to gauge public opinions.<sup>61</sup> Furthermore, when judges update statutory meaning to accord with current views of the public good, they blur the distinction between the legislative and judicial functions delineated in the Constitution. The very vagueness of the task will lead judges to insert their own policy preferences into the statutory text because they cannot locate public opinion.

Seeking to address these concerns, Professor Einer Elhauge has recently published a series of articles suggesting that when judges are faced with statutory indeterminacy they should look to evidence of what the current Congress would do, rather than amorphous “societal preferences” on which other dynamic theorists would have courts rely.<sup>62</sup> Although Elhauge’s proposal has the benefit of narrowing the sources to which a court can look to update statutes, there will likely be little or no evidence of what a current legislature thinks of a statute enacted decades ago. If a court is truly unable to determine current legislative preferences, Elhauge proposes that the court adopt a construction of the statute designed to elicit a con-

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<sup>57</sup> William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987).

<sup>58</sup> William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 336–41 (1991) [hereinafter Eskridge, *Overriding*].

<sup>59</sup> RONALD DWORKIN, LAW’S EMPIRE 313–54 (1986); Sunstein, *Interpreting Statutes*, *supra* note 22, at 451.

<sup>60</sup> CALABRESI, *supra* note 5, at 81–90.

<sup>61</sup> See JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 31–36 (1938); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 60 (2003) (“Judges are relatively poorly equipped to identify social problems or undertake their own factual investigations into those problems.”).

<sup>62</sup> Elhauge, *Preference-Estimating*, *supra* note 5, at 2084.

gressional response—his goal being to replace indeterminate statutory language with that approved by a majority of the current Congress.<sup>63</sup>

In turn, Elhauge’s proposal has been criticized by Professor Amanda Tyler on the ground that it “erodes core separation of powers principles” by asking judges to “divin[e]” current legislative preferences before they become law.<sup>64</sup> She rejects his presumption that courts can issue opinions that will provoke legislatures into enacting legislation to override them, and, even if they could, pursuing this goal would be an evasion of judicial interpretive responsibilities and a usurpation of legislative power.<sup>65</sup> This debate, as Tyler recognizes, turns on one’s views regarding the role of the judge: Tyler values judges as “guardians” of “continuity and predictability” in statutory interpretation; she is concerned that dynamic theories of statutory interpretation value the judge’s creative role too highly, and at the expense of the judge’s role in providing legislative stability.<sup>66</sup>

### B. *The Limits of Interpretation*

As many academics and some judges have openly admitted, no technique of interpretation can resolve every question of statutory ambiguity.<sup>67</sup> Posner acknowledged the problem when he asked: “[W]hat if a judge’s scrupulous search for the legislative will turns up nothing? There are of course such cases, and they have to be decided some way.”<sup>68</sup> Each term, the Supreme Court grapples with questions about statutory meaning that have divided the courts of appeals because there is no meaning that can be extracted from the legislative text or history. Such cases demonstrate the limits of traditional methods of statutory interpretation and, consequently, the need to find alternative ways to ascertain the meaning of ambiguous statutes.

To illustrate the problem, three cases from the Supreme Court’s 2004–2005 term are described below. Each presents what I believe is an intractable statutory construction problem that cannot be resolved by any interpretive technique. In addition, in none of the cases was there a clear societal or congressional preference that could guide the Court. Yet in each case, the majority and dissent both claimed to find meaning in the statute by employ-

<sup>63</sup> Elhauge, *Preference-Eliciting*, *supra* note 9, at 2165.

<sup>64</sup> Tyler, *supra* note 6, at 1392.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1389–90 (quoting ROBERT F. KEETON, *VENTURING TO DO JUSTICE* 11 (1969)) (internal quotation marks omitted).

<sup>67</sup> See, e.g., Elhauge, *Preference-Estimating*, *supra* note 5, at 2029 (“Statutory interpretation involves two crucial issues. (1) How should courts divine the meaning of statutes? (2) How should courts decide what to do when they cannot divine a statute’s meaning?”).

<sup>68</sup> Posner, *Statutory Interpretation*, *supra* note 24, at 821. Posner advocates that in such cases the judge can permissibly rely on considerations unrelated to legislative purpose, such as judicial administration or “considerations drawn from some broadly based conception of the public interest.” *Id.*

ing textualism, intentionalism, a canon of statutory construction, or some combination of the three.

*I. Jackson v. Birmingham Board of Education.*—*Jackson v. Birmingham Board of Education*<sup>69</sup> raised the question whether the private right of action in Title IX extends to retaliation claims. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>70</sup> The Court framed the issue as being whether “retaliation is discrimination ‘on the basis of sex,’” and thus is a cause of action that can be brought under Title IX.<sup>71</sup> The Court of Appeals for the Eleventh Circuit had dismissed the retaliation claim on the ground that “[n]othing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations.”<sup>72</sup> The Supreme Court granted certiorari to resolve the conflict between the circuits on that point.<sup>73</sup>

The Supreme Court was closely divided on the question, with the five justices in the majority holding that the language of Title IX included retaliation claims and the four dissenters concluding that it did not. Although the majority acknowledged that other civil rights statutes specifically refer to retaliation claims, it determined that this omission from Title IX was insignificant in light of the fact that Title IX is broadly written: “Because Congress did not list *any* specific discriminatory practices when it wrote Title IX,” the majority reasoned, “its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.”<sup>74</sup> Further support for this interpretation came from *Sullivan v. Little Hunting Park, Inc.*,<sup>75</sup> a Supreme Court case decided three years before Title IX was enacted that held that a general prohibition on racial discrimination covered retaliation against those seeking to protect the rights of people directly covered by the statute. The majority stated, “it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [*Sullivan*].”<sup>76</sup> Furthermore, the majority concluded that “[r]eporting incidents of discrimination is integral to Title IX enforcement

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<sup>69</sup> 125 S. Ct. 1497 (2005).

<sup>70</sup> 20 U.S.C. § 1681(a) (2000).

<sup>71</sup> *Jackson*, 125 S. Ct. at 1504.

<sup>72</sup> *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1344 (11th Cir. 2002).

<sup>73</sup> *Jackson*, 125 S. Ct. at 1503 (citing to the conflicting decisions in *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 252 (5th Cir. 1997), and *Preston v. Virginia ex rel. New River Community College*, 31 F.3d 203, 206 (4th Cir. 1994)).

<sup>74</sup> *Id.* at 1505.

<sup>75</sup> 396 U.S. 229 (1969).

<sup>76</sup> *Jackson*, 125 S. Ct. at 1506 (quoting *Canon v. University of Chicago*, 441 U.S. 677, 699 (1979)) (internal quotation marks omitted).

and would be discouraged if retaliation against those who report went unpunished.”<sup>77</sup> Thus, the majority’s argument relied on all the traditional intentionalist methods of statutory construction—such as reliance on the text’s broad language, the context of the statute’s enactment, and the statutory purpose—to conclude that Congress intended to cover retaliation.

The dissent disagreed with the majority’s analysis, flatly declaring that “the natural meaning of the phrase ‘on the basis of sex’ is on the basis of the plaintiff’s sex, not the sex of some other person.”<sup>78</sup> The dissent then relied on a number of equally well-accepted tools of statutory interpretation to bolster its interpretation of the text. For example, the dissenters pointed to canons of construction requiring Congress to speak clearly when imposing liability on states through the spending power, and the presumption against implying a cause of action when Congress has not made such a remedy clear.<sup>79</sup> Because these canons counseled against finding a cause of action for retaliation, and because the dissenters found the text unclear at best, they could not agree that Title IX allowed claims for retaliation.

In the final analysis, *Jackson* presented a question of statutory construction for which there was no clear answer. Whether a private cause of action could be brought for retaliation divided the Supreme Court five to four and the circuit courts two to one. Each side could muster arguments based on theories of interpretation and canons of construction, but ultimately none could provide a satisfying response to the question whether the statute allowed claims for retaliation.

*Jackson* was also a case with clear ideological battle lines: liberals favored the conclusion that there is a cause of action for retaliation, while conservatives did not. Four of the five justices in the majority—Breyer, Ginsburg, Souter, and Stevens—are commonly perceived to be the liberal members of the Court, while three of the four dissenters—Thomas, Scalia, and Rehnquist—are considered the Court’s conservatives. Justices O’Connor and Kennedy played their usual role as swing voters, with O’Connor’s decision to join the liberals giving them the majority. Unsurprisingly, it was criticized as an activist decision by liberal judges willing to ignore statutory text in favor of their policy preferences.<sup>80</sup>

2. *Exxon Mobil Corp. v. Allapattah Services, Inc.*—The Supreme Court’s decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.*<sup>81</sup> addressed longstanding questions about the meaning of 28 U.S.C. § 1367, the statute giving federal courts supplemental jurisdiction. Specifically, the

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<sup>77</sup> *Id.* at 1508.

<sup>78</sup> *Id.* at 1511 (Thomas, J., dissenting).

<sup>79</sup> *Id.* at 1514 (Thomas, J., dissenting).

<sup>80</sup> Jonathan R. Siegel, *The Polymorphic Principles and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 373 n.180 (2005) (describing *Jackson* as a decision that “mistakenly departs from statutory text in order to achieve what the Court regarded as a desirable policy outcome”).

<sup>81</sup> 125 S. Ct. 2611 (2005).

case raised the question whether federal courts can exercise supplemental jurisdiction over plaintiffs in diversity cases who seek to join the action pursuant to Federal Rules of Civil Procedure 20 and 23 and whose claims do not satisfy the amount-in-controversy requirement. The issue had created a deep circuit split: The Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits held that § 1367 provides for such jurisdiction over additional plaintiffs as long as one plaintiff satisfies the amount in controversy requirement, while the First, Third, Eighth, and Tenth Circuits concluded that all plaintiffs had to meet the minimum. The Supreme Court had attempted to resolve the question five years earlier, but had split 4–4 on the question.<sup>82</sup>

The Supreme Court was again closely divided on the issue, with five justices holding that § 1367 provides for such jurisdiction and four concluding it does not. The majority began by describing the judicial precedents that governed up until Congress’s enactment of § 1367 in 1990. Particularly relevant was the Court’s decision in *Zahn v. International Paper Co.*,<sup>83</sup> establishing that federal courts lacked jurisdiction over class members’ claims that did not meet the amount-in-controversy requirement, and *Finley v. United States*,<sup>84</sup> which held that courts could not exercise supplemental jurisdiction over state-law claims against additional defendants in federal question cases. All agreed that § 1367 overruled *Finley* by providing jurisdiction over related state-law claims against additional defendants in federal question cases, but lower courts differed about whether it had also overruled the decision in *Zahn*.

In concluding that § 1367 did displace *Zahn*, the majority purported to apply “[o]rdinary principles of statutory construction” that took into account the statute’s “context, structure, and related statutory provisions.”<sup>85</sup> The majority quoted § 1367(a), which provides, in relevant part:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.<sup>86</sup>

The case turned on the question of whether a diversity case in which some plaintiffs plead the amount in controversy and others do not is a “civil action of which the district courts have original jurisdiction.”<sup>87</sup> The majority concluded that “the answer must be yes,” declaring that if a district court has jurisdiction over any claim in the complaint, then it has “jurisdiction

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<sup>82</sup> *Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000).

<sup>83</sup> 414 U.S. 291 (1973).

<sup>84</sup> 490 U.S. 545 (1989).

<sup>85</sup> *Allapattah*, 125 S. Ct. at 2620.

<sup>86</sup> *Id.* (citing 28 U.S.C. § 1367).

<sup>87</sup> *Id.* at 2620.

over a ‘civil action’ within the meaning of § 1367(a).”<sup>88</sup> The only question left to be answered was whether below-the-threshold claims by plaintiffs joined in the action under Rules 20 or 23 fall within § 1367(b), which carves out exceptions to the jurisdiction granted in § 1367(a). Because § 1367(b) does not exclude claims by plaintiffs joined under those rules, the majority held that the claims could be heard in federal court.

The majority’s decision was classically textualist. The majority’s analysis was limited to the text of § 1367, for which it concluded there is only one “plausible” reading.<sup>89</sup> Because the majority found the language unambiguous, it refused to be shaken from its position by contradictory statements in the legislative history.<sup>90</sup> In any event, the majority found the legislative history to be “murky” and “contradictory,” and it viewed some of the statements in committee reports as efforts to circumvent the legislative process.<sup>91</sup>

Writing for the dissenters, Justice Ginsburg rejected the majority’s suggestion that the statute is clear, commenting that § 1367’s “enigmatic text”<sup>92</sup> is “hardly a model of the careful drafter’s art.”<sup>93</sup> Contrary to the majority, the dissenters concluded that a case in which some plaintiffs do not satisfy the amount-in-controversy requirement is *not* a “civil action” over which the district courts have “original jurisdiction.”<sup>94</sup> In the dissenters’ view, a district court will have diversity jurisdiction over a civil action only if each plaintiff satisfies the dual requirement that they be of diverse citizenship and bring claims satisfying the statutory minimum. Justices Stevens and Breyer joined Justice Ginsburg’s dissent, but also wrote separately to note that the legislative history supports the conclusion that § 1367 was not intended to grant federal courts jurisdiction over plaintiffs whose claims do not satisfy the amount-in-controversy requirement.<sup>95</sup>

In sum, the key issue in the case for both the majority and dissent was whether district courts have original jurisdiction over a “civil action” raising claims by some plaintiffs below the amount-in-controversy threshold. The text of the statute is silent on that point, the legislative history contains some contradictory statements, and the context in which the statute was enacted fails to supply the answer. Although both the majority and dissent

<sup>88</sup> *Id.* at 2620–21.

<sup>89</sup> *Id.* at 2625.

<sup>90</sup> But the majority did observe that § 1367 withheld jurisdiction over plaintiffs joined as parties “‘needed for just adjudication’” under Rule 19 even while allowing “supplemental jurisdiction over plaintiffs permissively joined under Rule 20”—an “anomaly” that the majority suggested was the result of an “unintentional drafting gap.” *Id.* at 2624 (quoting from *Meticare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 221 n.6 (1999)).

<sup>91</sup> *Id.* at 2626.

<sup>92</sup> *Id.* at 2640 (Ginsburg, J., dissenting).

<sup>93</sup> *Id.* at 2632 (Ginsburg, J., dissenting).

<sup>94</sup> *Id.* (Ginsburg, J., dissenting) (internal quotation marks omitted).

<sup>95</sup> *Id.* at 2628–31.

purport to interpret the language of the statute, the fact that so many judges have divided on the question suggests that it cannot be resolved by the text. No technique of statutory interpretation can locate meaning in a statutory provision that fails to address a question on which the entire case turns.

3. *Clark v. Martinez*.—*Clark v. Martinez*<sup>96</sup> required the Court to address for a second time ambiguous wording in the Immigration and Nationality Act regarding detention of aliens ordered removed from the United States. The statute at issue provided that “[a]n alien ordered removed . . . may be detained beyond the removal period.”<sup>97</sup> This provision applies to several categories of aliens, including: (1) inadmissible aliens ordered removed; and (2) aliens who were originally admitted to the United States and later ordered removed. The question in *Zadvydas v. Davis*,<sup>98</sup> decided in 2001, was whether § 1231(a)(6) permitted indefinite detention of aliens in the second category. The question before the Court in *Clark* concerned the permissible length of detention for aliens who fell into the first category because they were never legally admitted to the United States.<sup>99</sup>

*Zadvydas* concerned two aliens admitted to the United States but then subsequently ordered removed. No country would accept them, however, and as a result the aliens were kept in detention by the government for years with no reasonably foreseeable chance of being deported. The aliens argued that the statute did not permit their indefinite detention by immigration authorities, while the government contended that it did because the text “sets no limit on the length of time . . . that an alien . . . may be detained.”<sup>100</sup> By a vote of five to four, the Court held that the statute did not permit indefinite detention but rather allowed detention “only as long as ‘reasonably necessary’ to remove [an alien] from the country.”<sup>101</sup>

The Court explained that the statute’s use of the word “‘may’” in the provision stating that aliens “‘may be detained beyond the removal period’” “‘suggests discretion’” regarding the length of detention, but “‘not necessarily . . . unlimited discretion. In that respect, the word ‘may’ is ambiguous.’”<sup>102</sup> Because the indefinite detention of aliens who had been admitted to the country raised serious constitutional concerns, the Court interpreted the statute to permit only detention necessary to accomplish removal; “once removal is no longer reasonably foreseeable, continued detention is no longer authorized . . . .”<sup>103</sup> The Court further held that “the presumptive period during which the detention of an alien is reasonably necessary to effec-

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<sup>96</sup> 125 S. Ct. 716 (2005).

<sup>97</sup> 8 U.S.C. § 1231(a)(6) (2006).

<sup>98</sup> 533 U.S. 678 (2001).

<sup>99</sup> *Id.* at 720.

<sup>100</sup> *Id.* at 689 (internal quotation marks omitted).

<sup>101</sup> *Clark*, 125 S. Ct. at 722 (quoting *Zadvydas*, 533 U.S. at 688–89).

<sup>102</sup> *Id.* at 722.

<sup>103</sup> *Zadvydas*, 533 U.S. at 699.

tuate his removal is six months; after that, the alien is eligible for conditional release if he can demonstrate that there is ‘no significant likelihood of removal in the reasonably foreseeable future.’”<sup>104</sup> In sum, the Court concluded that the statutory language was unclear as to the amount of time aliens could be detained, and it applied the canon of constitutional avoidance to limit that period.

The question in *Clark v. Martinez* was whether *Zadvydas*’s interpretation of § 1231(a)(6) also applies to the first category of aliens—that is, those ordered removed who were never admitted to the United States. The Ninth and Eleventh Circuits had split on this issue.<sup>105</sup> Seven Justices concluded that they must give the provision the same meaning as they did in *Zadvydas*. The two dissenters, Justice Thomas and Chief Justice Rehnquist, argued that the presumptive six-month limit imposed by the Court in *Zadvydas* rested largely on an interpretation of the language required by the canon of constitutional doubt—a canon that was not applicable in the case of an alien who had never been legally admitted to the United States and whose detention could thus not implicate the same pressing constitutional questions.<sup>106</sup> The majority responded that this reasoning “cannot justify giving the *same* detention provision a different meaning when [a different category of] aliens are involved.”<sup>107</sup> The ambiguous statutory language, coupled with the constitutional concerns raised by its application to at least one category of aliens, led the Court to impose a presumptive six-month limit onto the detention provision.

*Zadvydas* and *Clark* are classic constitutional avoidance cases. The statutory language was not perfectly clear, and the result of one reading was constitutionally suspect, so the Court applied the canon to avoid addressing whether the Constitution would permit indefinite detention of an alien. Applying that canon further required that the Court invent an amount of time that the aliens *could* be detained. The Court concluded that six months was a reasonable period, after which the government had to either demonstrate a foreseeable chance of removal or release the aliens. As is obvious from reading the statute and the opinions, that six-month period was entirely the creation of a Court struggling to avoid striking down an ambiguous statute as unconstitutional.

4. *Conclusion.*—The three cases discussed above all involved questions about the meaning of unclear statutes that divided the circuit courts and the Supreme Court justices. As these cases illustrate, no theory of interpretation or canon of construction can help courts resolve truly inscruta-

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<sup>104</sup> *Clark*, 125 S. Ct. at 722 (quoting *Zadvydas* 533 U.S. at 701).

<sup>105</sup> *Id.* at 722.

<sup>106</sup> *Id.* at 729–30 (Thomas, J., dissenting); see also *Zadvydas*, 533 U.S. at 693 (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic boundaries.”).

<sup>107</sup> *Id.* at 719.

ble statutes. By accident or by design, Congress left unresolved whether Title IX creates a cause of action for retaliation, whether federal courts have jurisdiction over plaintiffs' claims below the amount in controversy requirement, and the length of time that aliens can be detained under the Immigration and Nationality Act.

Absent congressional assistance, courts have no choice but to plow ahead and do their best to resolve cases in a principled manner. In some of these cases, however, the courts might be wiser to abstain from searching for meaning where there plainly is none, and instead ask Congress to step in and amend ambiguous or poorly written text. Considering that Congress created the problem, and that Congress is capable of undoing any judicial decision about the meaning of statutory text, it follows that Congress is the institution best-situated to resolve disagreements about the meaning of statutes. Just as important, the judiciary will have gained even if Congress does not respond to its query. If the language of a statute is unclear, and if Congress chooses not to assist a court after being requested to do so, then a court is empowered by that congressional silence to make law to replace the ambiguous text before it.<sup>108</sup>

### III. THE JUDICIAL TRADITION OF SEEKING ASSISTANCE FROM OTHER POLITICAL INSTITUTIONS

As illustrated in *Jackson*, *Exxon Mobil*, and *Clark*, judges continue to use the techniques of statutory interpretation described in Part II.A. However, these techniques are criticized as providing cover for judicial overreaching, and none can locate the meaning of truly ambiguous statutes. This Article proposes that courts consider an alternative method of dealing with at least some types of statutory ambiguity: Courts should have the option of referring questions about statutory meaning to Congress, much the same way courts now certify questions about the meaning of ambiguous state law to state courts.

As described in Part I, when a court concludes that a statute it is asked to address is unclear, it could choose to stay the case, refer the problem to Congress, and await a response that would apply to the pending case. If Congress does not respond within a reasonable period of time, the court could then decide the case with newfound freedom because Congress's inaction signals the implicit delegation of its power to fill gaps and reconcile inconsistencies in statutory text. Hypothetically, had certification been available in the 2004–2005 term, the Court could have granted certiorari in *Jackson*, *Exxon Mobil*, and *Clark*, and then referred its questions about the meaning of the statutes in those three cases to Congress. If Congress had not taken up the question, the Court could have decided the cases on its own; if Congress responded by amending the statute at issue to eliminate

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<sup>108</sup> See discussion *infra* Part V.B.4.

the ambiguity, the Court could then remand the case and allow the lower court to apply the amended statute in the first instance.<sup>109</sup>

Although a few scholars have briefly raised the possibility of certifying questions to Congress, there has been no detailed discussion in the academic literature about whether such a process would be constitutional or useful to the courts.<sup>110</sup> Several prominent judges have supported the different, but not entirely unrelated, idea of establishing committees that would focus on identifying problem legislation and proposing legislative solutions. Justice Benjamin Cardozo recommended the creation of a Ministry of Justice composed of law professors, judges, and practitioners to perform that task.<sup>111</sup> Judge Henry Friendly revived Cardozo's idea in 1963, though he thought the committee should be located in the legislative rather than the executive branch.<sup>112</sup> Further elaborating on these proposals, then-Judge Ruth Bader Ginsburg suggested the creation of a "second look at laws" congressional committee that would engage in "statutory housekeeping" by fixing grammatical problems and ambiguous language identified by courts.<sup>113</sup> None of these proposals was ever acted upon, however, most likely because they required adding a layer of bureaucracy to an already over-burdened system. Moreover, these committee-based proposals address problems only after a court has been forced to issue a decision regarding the meaning of the statute—setting in stone an interpretation that may be difficult for Congress to undo. Nor would these committees give Congress the same incentive to take action as a court's request for clarification during a pending case.

Permitting courts to certify questions to Congress thus has significant advantages over a roving committee, but it raises separation of powers concerns that the committee-based solutions avoid. Part IV analyzes the ways in which a certification process must be structured to avoid overstepping constitutional boundaries. Part V addresses how and when certification should be used: that is, which courts should have the power to certify questions to Congress, which type of questions they should refer, and how they should deal with a congressional response (or non-response). Before delving into the nuts and bolts of how certifying questions to Congress would work in practice, however, this Part describes how the federal courts have

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<sup>109</sup> The proposal discussed here is limited to federal courts and Congress. Conceivably, federal courts could certify questions about state law to state legislatures, and state courts could certify questions about federal law to Congress. Because federal courts already have the option to certify questions about state law to state courts, there is a less pressing need for federal courts to obtain legislative assistance with the interpretation of state law. Allowing state courts to certify questions to Congress would be problematic because it would significantly increase the number of courts seeking Congress's attention and possibly disrupt its legislative agenda—a problem addressed in Part IV.A of this article.

<sup>110</sup> See *supra* note 9 and accompanying text.

<sup>111</sup> Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921).

<sup>112</sup> Friendly, *supra* note 1.

<sup>113</sup> Ginsburg & Huber, *supra* note 1, at 1428, 1432.

long accepted, and even welcomed, the involvement of other institutions in decisionmaking. In light of this history, certification to Congress can be understood as an extension of current practice rather than as a radical new concept.

*A. Drawing on the Tradition of Certification to State Courts*

The idea of certifying questions to Congress might at first seem anomalous. Courts are supposed to decide the questions that come before them, not abstain and await a decision on the matter from another branch of government. And yet the concept has a preexisting analogue in the certification and abstention procedures regularly used by federal courts to obtain state-court clarification of state law. Although certifying questions to state courts is relatively new, “the use of certification is on the rise.”<sup>114</sup> For the most part, federal and state courts, as well as state legislatures, have embraced the practice for reasons that should make certifying questions to Congress similarly attractive to federal judges and Congress.

In *Railroad Commission of Texas v. Pullman Co.*,<sup>115</sup> the Supreme Court first established that federal courts should abstain from deciding the meaning of ambiguous state laws that raise federal constitutional concerns, and should instead issue a stay and order the parties to litigate the state law issues in state court.<sup>116</sup> Only after the state court system establishes the meaning of state law will the case return to the federal court for resolution of the federal question, if necessary.<sup>117</sup> Because abstention often resulted in significant delays, most of the states have now established streamlined certification procedures that allow a federal court to retain jurisdiction of a case while sending a question about the meaning of state law directly to the state supreme court.<sup>118</sup> After the state supreme court decides the issue, the case returns to the federal court for a final decision on the question of federal law, which typically delays resolution of a case for no more than six months.<sup>119</sup>

Certifying questions to Congress would follow the same basic form as certification to a state court: the federal court would stay the case, retain jurisdiction, inform Congress of the question of statutory interpretation at is-

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<sup>114</sup> RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1201–02 (5th ed. 2003) [hereinafter FALLON, HART & WECHSLER’S] (noting that forty-seven jurisdictions (including the District of Columbia and Puerto Rico) had adopted a certification procedure, and stating that “[f]ormal and informal studies confirm that the use of certification is on the rise”).

<sup>115</sup> 312 U.S. 496 (1941).

<sup>116</sup> *Id.*

<sup>117</sup> Although in some cases the federal court will order the case dismissed without prejudice, in most cases the federal court retains jurisdiction to ensure the prompt resolution of the state law issue, and to address and resolve the federal questions in the case if need be.

<sup>118</sup> FALLON, HART & WECHSLER’S, *supra* note 114, at 1200–01.

<sup>119</sup> *Id.* at 1202.

sue, and then await a congressional response that the court will use to resolve the case. The federal court could lift the stay and decide the case if Congress did not appear inclined to respond.

Many of the rationales for using abstention and certification to resolve questions about the meaning of state law also support certifying questions of federal law to Congress. Sending questions to state courts is justified on the ground that state judges are better situated to resolve state-law issues: state judges are more familiar with state law and state interests and they carry the legitimacy to construe and apply state law that comes from having been selected through the state political process.<sup>120</sup> Leaving hard questions about the meaning of state law to state courts also makes practical sense; state courts retain the last word on any state law matter, and thus a federal judge's interpretation of state law might be immediately reversed by a state-court pronouncement.

The same can be said of Congress and its role in establishing the meaning of federal law. As discussed in greater detail in Part V, Congress, not the courts, is the proper institution to fill gaps in legislation and to clarify intractable ambiguities or inconsistencies in statutory language.<sup>121</sup> These are essentially acts of lawmaking, not law construction or implementation, and thus are best performed by the policy-making legislative branch. There is no debate that Congress, not the judiciary, is the institution best-suited to write laws in the first instance; Congress has the relationship with constituents, access to information, and accountability to the general public that make it better qualified to engage in lawmaking.<sup>122</sup> Considering their relative institutional competencies, Congress, not courts, should take the lead in supplying statutory meaning when litigation reveals that a piece of legislation leaves some significant question unanswered. Like state courts, Congress is also the institution with the last word on statutory meaning; Congress can, and often does, override judicial construction of federal statutes.<sup>123</sup> Accordingly, when federal courts supply meaning for unclear statutes, they risk having wasted time and effort if Congress immediately overrides the judicial decision through a legislative amendment.

Certification to state courts is also justified as a means by which federal courts can avoid making pronouncements about the constitutionality of legislation.<sup>124</sup> A state court may construe state law to sidestep a constitutional problem that a federal court might otherwise have to address and resolve. Certification to Congress can serve the same purpose. If Congress receives a question about statutory meaning from a federal court, and it

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<sup>120</sup> *Id.* at 1201–02.

<sup>121</sup> See discussion *infra* Part V.A.1.

<sup>122</sup> See discussion *infra* Part V.A.1.

<sup>123</sup> Eskridge, *Overriding*, *supra* note 58, at 338.

<sup>124</sup> See *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 498–500 (1941) (noting that abstention might prevent the court from having to address the constitutional question).

learns that the court is concerned that the statute may be unconstitutional, Congress can alter the statutory language to steer clear of the constitutional conflict.

The analogy is not exact, however. Abstention and certification procedures in the context of questions about state law are intended to promote principles of federalism and comity—goals that judicial referrals to Congress obviously do not share. State sovereignty is highly valued in our federal system, and certification and abstention permit states to maintain some control over interpretation and administration of their own laws. Not incidentally, many of the cases in which abstention was first established concerned sensitive state policies (such as the question of race discrimination in *Pullman*<sup>125</sup>) and issues concerning state governance (such as the state’s eminent domain powers in *Louisiana Power and Light Co v. City of Thibodaux*<sup>126</sup>). Allowing state courts to decide these types of questions demonstrates respect for state judicial systems and avoids the friction that might result from a federal court decision on a delicate question of state law.

But even though comity and federalism are not at stake when a federal court refers a question to Congress, such referrals do promote similar goals by demonstrating judicial deference to, and respect for, a co-equal branch of government. Ideally, Congress and the courts would work together to make laws clear and easily administrable. When a court seeks Congress’s input before construing ambiguous statutes, it is both notifying Congress of problems in statutory drafting and providing Congress with the opportunity to take the lead in clarifying the legislation. Just as federal courts’ deference to states reduces friction between state and federal systems, similar deference to Congress may serve to limit the occasions on which courts and Congress come into conflict over the meaning of a statutory text. Easing tensions between Congress and courts, always important, is particularly vital at a time when the two branches are clashing on a regular basis.<sup>127</sup>

Despite these parallels between certification to Congress and to state courts, sending a statute to another court for its interpretation is admittedly different from sending it back to the legislature with a request that the language be rewritten. The analogy is useful, however, if only to show that courts have accepted, and even embraced, a procedure that allows them to delegate the task of statutory construction to an outside entity, suggesting

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<sup>125</sup> 312 U.S. 496.

<sup>126</sup> 360 U.S. 25 (1959).

<sup>127</sup> See, e.g., William Bunch, *Santorum Rips Liberal Judges*, PHILA. DAILY NEWS, Jan. 9, 2006, at 7; David D. Kirkpatrick, *Conservative Gathering Is Mostly Quiet on Nominee*, N.Y. TIMES, Aug. 15, 2005, at A15 (describing a “Justice Sunday” telecast that “took aim mainly at the power and decisions of the Supreme Court”); Donald Lambro, *DeLay Slams Court Activism as ‘Autocracy’: Republican Sees Breach of Democratic Process*, WASH. TIMES, Aug. 15, 2005, at A4 (“House Majority Leader Tom DeLay [] accused left-leaning courts of imposing a ‘judicial supremacy’ over the country to implement liberal policies that cannot win a majority in the legislative process.”).

that certifying questions to Congress is not so foreign to current federal court practice as it might first appear.

*B. Delegating Questions of Statutory Interpretation to Federal Agencies*

Courts regularly rely on federal agencies to assist in the interpretation of ambiguous federal laws. *Chevron U.S.A v. Natural Resources Defense Council* and its progeny have established that courts should defer to a reasonable agency construction of an ambiguous statute if that interpretation was generated through a rulemaking proceeding carrying the force of law.<sup>128</sup> Although *Chevron* asserted that Congress had delegated the interpretive authority to agencies by enacting statutes that agencies are responsible for administering, it was the Supreme Court itself that declared that reasonable agency interpretations of ambiguous statutes should trump reasonable judicial interpretations.

*Chevron* demonstrates that courts are comfortable giving the lead in statutory “clarification” to another institution. Courts limit agency authority by deferring only when a statute is truly ambiguous, the agency’s reading is reasonable, and the agency has acted through a deliberative process to produce a rule carrying the force of law.<sup>129</sup> Courts have nonetheless given away a significant aspect of what had formerly been viewed as the judiciary’s sole power “to say what the law is.”<sup>130</sup> Moreover, the rationale for doing so is that agencies are institutionally better suited to fill gaps and resolve ambiguities in their governing statutes because they have more expertise and greater political accountability than courts—a rationale that similarly supports giving Congress the first opportunity to resolve intractable statutory ambiguity when there is no agency interpretation to assist the court.

*C. Congress’s Longstanding Practice of Amending Unclear Legislation in Pending Cases*

Certifying questions to Congress would formalize a long tradition of cooperation between the two branches. Even though no certification process is currently in place, Congress nonetheless amends legislation at issue in pending cases, often after becoming aware of judicial confusion about the meaning of statutory language.<sup>131</sup> Throughout their history, the federal

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<sup>128</sup> 467 U.S. 837, 865–66 (1984).

<sup>129</sup> Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1939–40 (2006) (describing the conditions under which a court will grant *Chevron* deference). See also *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (informal agency pronouncements generally are not granted *Chevron* deference); *Christensen v. Harris County*, 529 U.S. 576 (2000) (same).

<sup>130</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>131</sup> See, e.g., *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 476 (1990); *Dep’t of Treasury v. Galioto*, 477 U.S. 556, 559 (1986); *Dep’t of Justice v. Provenzano*, 469 U.S. 14, 15 (1984).

courts have accepted, and at times eagerly embraced, congressional assistance in statutory interpretation. *United States v. Schooner Peggy*<sup>132</sup> established early on that courts must apply current law to pending cases even when Congress amends the law after the case was brought, and even when Congress's express purpose is to affect the results in that case.<sup>133</sup> In at least two cases the Supreme Court deferred issuing a decision to give Congress more time to consider a proposed amendment that would moot the case, thereby actively helping Congress to resolve the question before the Court was forced to address it.<sup>134</sup>

Legislative involvement in pending cases is thus a longstanding aspect of legislative-judicial interactions.<sup>135</sup> Because this practice is relevant to the feasibility, desirability, and constitutionality of a formal process of certifying questions to Congress, it is investigated in some detail here. First, this section reviews the data on congressional efforts to amend statutes that have caused judicial confusion. Although Congress does not always enact legislative fixes into law, these efforts demonstrate that Congress will attempt to clarify statutory language when it sees courts struggling with a statute's application. Second, this section examines the Supreme Court's reaction to Congress's efforts to amend confusing statutory language to assist it with a pending case.

*I. Congressional Efforts to Amend Unclear Statutory Language.*—A pair of scholars, Stefanie Lindquist and David Yalof, studied the frequency with which Congress reacted to circuit court conflict over statutory language by passing legislation to resolve the question, thereby obviating Supreme Court review.<sup>136</sup> They discovered that between 1990 and 1998, Congress “sought to amend existing statutes or to pass new legislation to resolve at least 19 instances of conflict among the circuits.”<sup>137</sup> Lindquist and Yalof conclude from this data that “Congress adopts some role in ensuring that its statutes are applied uniformly throughout the country, al-

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<sup>132</sup> 5 U.S. (1 Cranch) 103 (1801).

<sup>133</sup> See *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974) (holding that “a court is to apply the law in effect at the time it renders its decision”).

<sup>134</sup> *United States Nuclear Regulatory Comm'n v. Sholly*, 463 U.S. 1224, 1225 (1983) (Blackmun, J., dissenting from the Court's denial of respondent's motion for reconsideration) (noting that the Court “twice postponed oral argument while Congress considered the proposed legislation”); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). In addition, the Supreme Court has on occasion stayed its judgment in cases striking down legislation as unconstitutional to give Congress time to fix the problem. See, e.g., *N. Pipelines Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982). Although such stays serve a different purpose, they are further evidence of the judiciary's willingness to work together with Congress to resolve problem legislation.

<sup>135</sup> In contrast, the frequency of congressional overrides of judicial decisions has been widely studied. See, e.g., Eskridge, *Overriding*, *supra* note 58.

<sup>136</sup> Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61 (2001).

<sup>137</sup> *Id.* at 66.

though Congress is not nearly as active as the Supreme Court in this area.<sup>138</sup>

Lindquist and Yalof note that Congress is more likely to get involved in resolving intercourt splits when the Supreme Court appears unwilling to resolve the conflict.<sup>139</sup> However, because Congress may not be able to react to a circuit conflict with sufficient speed to address the issue before the Supreme Court does, congressional silence does not necessarily suggest a desire to let the Supreme Court resolve the issue in the first instance. At the very least, the fact that Congress takes an interest in reacting to circuit splits, even though it does not always manage to enact legislation to resolve them, suggests that Congress is willing to play a role in clarifying unclear statutes.

2. *Judicial Reaction to Congressional Interference in Pending*

*Cases.*—Congress frequently affects the results in pending cases when it amends legislation. Courts have developed doctrines to deal with this recurring situation—for example, courts generally hold that an amendment to a relevant statute will moot a pending case that turns on the now-altered provision.<sup>140</sup> On occasion, courts have actively assisted Congress in its efforts to moot pending cases by staying a case to await passage of a proposed bill. Indeed, the Supreme Court's decision to grant a writ of certiorari may turn on whether it appears that the statute at issue will be amended in the near future.

As is evident from the cases discussed below, judicial reaction to congressional interference in pending cases is generally positive. Courts appear to welcome Congressional assistance in resolving disputes over statutory meaning, and express concern about Congressional interference only when it appears that Congress is legislating to control the outcome of a specific case rather than to clarify the law generally.

a. *Hayburn's Case.*—*Hayburn's Case*,<sup>141</sup> which concerns Revolutionary War veteran William Hayburn's efforts to obtain a pension for his military service, has become a constitutional chestnut; it is one of the oldest cases still regularly cited by courts. Yet the Supreme Court never actually issued an opinion on the merits, choosing instead to postpone a decision in the hope that Congress would amend the legislation at issue, as Congress ultimately did. The case is a classic example of judicial effort to avoid a confrontation with Congress—especially important at this early stage in the nation's history when the federal courts had not yet established their authority to strike down acts of Congress as unconstitutional.

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<sup>138</sup> *Id.* at 66–67.

<sup>139</sup> *Id.* at 66.

<sup>140</sup> See, e.g., *Dep't of Treasury v. Galioto*, 477 U.S. 556, 559–60 (1986).

<sup>141</sup> 2 U.S. (2 Dall.) 409 (1792).

Hayburn had claimed eligibility for a federal pension under the Invalid Pension Act of 1792. The Act required injured veterans of the Revolutionary War to petition the judges of the United States Circuit Courts, who were to determine whether the petitioner qualified for a pension. The judges were then to submit the name and a recommendation for the amount of the pension to the Secretary of War, who would review the evidence and could reverse the court's conclusion about whether the petitioner qualified for a pension.<sup>142</sup>

Hayburn petitioned the United States Circuit Court for the District of Pennsylvania for his pension. The panel of judges refused to hear his case and instead wrote to President Washington to explain that they believed the Pension Act was invalid because it provided that the executive branch could reverse a decision of the judicial branch. The court explained that “[s]uch revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts . . . .”<sup>143</sup> In August 1792, Attorney General Edmund Randolph asked the Supreme Court to issue a writ of mandamus compelling the federal circuit court in Pennsylvania to act on Hayburn's petition. The Court did not issue a decision on the merits, however, but instead agreed to hold the motion under advisement until the next term—apparently concerned about offending Congress by declaring the law unconstitutional.<sup>144</sup> As two legal historians explain, “[t]he justices clearly hoped that Congress would change the Invalid Pension law before the Court actually issued an opinion on the mandamus motion.”<sup>145</sup>

Congress did just that. A few days before the Court's next term ended, Congress passed “An Act to regulate Claims to Invalid Pensions” that amended the procedures to be followed by petitioning veterans and eliminated the constitutional problems.<sup>146</sup> The Supreme Court never issued a decision on the merits of the case, apparently viewing the amended law as mooting the issue and requiring Hayburn to follow the amended procedure in order to receive his pension.

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<sup>142</sup> Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)).

<sup>143</sup> Letter from James Wilson, John Blair and Richard Peters to George Washington (April 18, 1792) in 1 AMERICAN STATE PAPERS, MISCELLANEOUS 51 (1834). The letter is also printed in an unnumbered footnote in *Hayburn's Case*, 2 U.S. (2 Dall.) at 411.

<sup>144</sup> *Hayburn's Case* predated *Marbury v. Madison*, and thus the Court's authority to strike down legislation as unconstitutional had not yet been established.

<sup>145</sup> Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 539.

<sup>146</sup> Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793). Under the amended law, circuit courts no longer played any role in the process. Injured veterans presented evidence of their status to a judge of the district in which they lived, and the judge did not issue any decision, but instead simply transmitted a list of claims along with the evidence to the Secretary of War, who would check to make sure that the claims were proper. The Secretary then forwarded the information to Congress, which ultimately decided whether the veterans would receive a pension. *Id.*

*Hayburn's Case* is an early example of the Court's willingness to avoid issuing a decision while awaiting congressional legislation that would obviate the need to address the constitutionality of a piece of legislation. It also demonstrates Congress's ability to amend statutes that are raising problems for courts in pending cases. As described further below, Congress and the Court have continued to work together to resolve issues in statutes without either branch expressing concern that the other has overstepped its constitutional bounds.

*b. United States Nuclear Regulatory Commission v. Sholly.*—

*Sholly* provides a more recent example of a case in which the Court purposely postponed a decision while awaiting an amendment to the legislation at issue in the case. Respondents opposed the Nuclear Regulatory Commission's determination that the Atomic Energy Act permitted it to approve an amendment to the Three Mile Island nuclear reactor's operating license without a hearing. On appeal, the Court of Appeals had agreed with Respondents that the Commission lacked the authority to do so. The Commission sought review in the Supreme Court, and at the same time proposed to Congress legislation authorizing the Commission to amend a license without a hearing. The Supreme Court granted certiorari on May 26, 1981,<sup>147</sup> but twice postponed oral argument to give Congress the opportunity to consider the legislation.<sup>148</sup> Finally, in January of 1983, Congress enacted the Commission's proposed legislation, and the Supreme Court remanded the case so that the lower court could consider whether it was now moot.<sup>149</sup>

*Sholly* demonstrates the benefits of judicial-legislative cooperation to resolve a dispute over unclear legislation. The Court must have believed that the issue would be better addressed by Congress in the first instance, which is why it postponed issuing a decision to await forthcoming legislation. Indeed, had the Supreme Court gone ahead and decided the case in favor of respondents, and had Congress then amended the legislation shortly thereafter, the entire judicial process would have been an unnecessary waste. With the new legislation in place, the Commission would have been free to amend the license without a hearing, just as it had attempted to do earlier. Of course, if the Supreme Court had decided the case in favor of the Commission, then the legislation would have been unnecessary. But the Court (and possibly also Congress) appears to have believed that it would be better for this determination to be made through a clear legislative directive rather than a judicial construction of an ambiguous statutory provision.

*c. Additional recent cases.*—In a number of other cases, Congress amended legislation after the Supreme Court granted certiorari but be-

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<sup>147</sup> 451 U.S. 1016 (1981).

<sup>148</sup> 463 U.S. 1224 (1983) (Blackmun, J., dissenting).

<sup>149</sup> 459 U.S. 1194 (1983) (vacating judgment and remanding for further consideration of mootness).

fore it issued a ruling. The legislative history reveals that Congress was aware that the Supreme Court was on the verge of deciding a case regarding statutory meaning and sought to resolve the issue before the Court did.

*Department of the Treasury v. Galioto*<sup>150</sup> concerned an equal protection challenge to a statute prohibiting firearms sales to anyone adjudicated a mental defective or committed to a mental institution, but permitting such sales to convicted felons. The lower court struck down the statute after concluding that there was no rational basis for the distinction.<sup>151</sup> The Supreme Court noted probable jurisdiction over the appeal on November 4, 1985,<sup>152</sup> and the case was argued on March 26, 1986.<sup>153</sup> Meanwhile, Congress redrafted the legislation so that felons and the mentally ill were treated alike, and the House Report accompanying the legislation noted that this amendment should resolve the issue in the pending Supreme Court case.<sup>154</sup> In its subsequent opinion a month later, the Court commented that this “enactment significantly alters the posture of this case,” and concluded that the case was now moot.<sup>155</sup>

*Department of Justice v. Provenzano*<sup>156</sup> questioned whether the Privacy Act of 1974 qualified as an exemption to the Freedom of Information Act and thus permitted withholding information from the public. The Third and Seventh Circuits had issued conflicting decisions, and on April 2, 1984, the Supreme Court granted certiorari and consolidated the cases for argument.<sup>157</sup> On October 15, 1984, the President signed into law an amendment to the Privacy Act stating: “No agency shall rely on an exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under [the Freedom of Information Act].”<sup>158</sup> The House Report commented on the pending Supreme Court case and stated that “[w]hatever ambiguity exists will be removed by this change in the Privacy Act.”<sup>159</sup> The parties agreed that this amendment mooted their dis-

<sup>150</sup> 477 U.S. 556 (1986).

<sup>151</sup> *Id.* at 559.

<sup>152</sup> 474 U.S. 943 (1985).

<sup>153</sup> 477 U.S. 556.

<sup>154</sup> The House Report of March 14, 1986, stated:

The failure of the Gun Control Act to provide a procedure for relief of former mental patients resulted in a challenge to the validity of th[e] disqualification for mental patients that was upheld by the United States District Court for the District of New Jersey, and which is now on appeal to the United States Supreme Court.

H.R. REP. NO. 99-495, at 29 (1986). The House Report then explained that the amendment would resolve the problem by treating convicts and the mentally incompetent the same. *Id.*

<sup>155</sup> *Galioto*, 477 U.S. at 559.

<sup>156</sup> 469 U.S. 14 (1984).

<sup>157</sup> *Dep’t of Justice v. Provenzano*, 466 U.S. 926 (1984).

<sup>158</sup> *Provenzano*, 469 U.S. at 15 (quoting The Central Intelligence Information Act, Pub. L. 98-477, § 2(c), 98 Stat. 2209, 2212 (1984)) (internal quotation marks omitted).

<sup>159</sup> The House Report, issued on September 10, 1984, commented that “[s]everal federal circuits have held that the Privacy Act is a statute within the meaning of the third exemption of the [Freedom of

pute, and the cases were remanded for final resolution under the new legal standard.

*United States v. New Jersey State Lottery Commission*<sup>160</sup> concerned the application of 18 U.S.C. § 1304, a federal statute that prohibited radio stations from broadcasting information about lotteries. Jersey Cape, a radio station, had sued for declaratory relief arguing that § 1304 should not apply to the broadcast of a winning number in a lawful state-run lottery such as the one conducted in New Jersey. The Third Circuit reversed the Federal Communications Commission and ruled that § 1304 did not prohibit broadcast of lawful state lottery results.<sup>161</sup> This decision conflicted with an earlier Second Circuit ruling, leading to the Supreme Court's decision to review the case.

After the case had been briefed and argued, Congress, aware of the Supreme Court case, passed a new statute, 18 U.S.C. § 1307, which stated that "[t]he provisions of section . . . 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under authority of State law."<sup>162</sup> The Court noted the change in the law and remanded the case to the court of appeals to determine whether the case was moot.<sup>163</sup>

3. *Conclusion.*—These cases demonstrate that Congress has the institutional capacity to resolve statutory ambiguity after the Supreme Court has granted certiorari but before the Court has an opportunity to rule on the question. Just as interesting, the Court appears to welcome Congress's efforts to moot pending cases by clarifying the legislation at issue. As

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Information Act] . . . ." H.R. REP. NO. 98-726(II), at 13 (1984). The Report reviewed the Third, Fifth, Seventh, and D.C. Circuit decisions, and concluded by noting that the "circuit courts [are] evenly divided on this question" and that "the Supreme Court has agreed to decide the issue." *Id.* at 14 & n.23. Turning to the amendment, the Committee explained that it "specifically rejects the interpretation set forth in the decisions of the Fifth and Seventh Circuits." *Id.* The Report continued:

While this Committee has no doubt about the true intent of the law, some have found sufficient ambiguity in both the law and its history to fuel the current disagreement. Whatever ambiguity exists will be removed by this change in the Privacy Act.

*Id.*

<sup>160</sup> 420 U.S. 371 (1975).

<sup>161</sup> *Id.* at 373 (citing *N.J. Lottery Comm'n v. United States*, 491 F.2d 219 (3d Cir. 1974)).

<sup>162</sup> Appended to the House Report describing the amendment was a letter from the Federal Communications Commission ("FCC"). The FCC commented on the litigation and its own difficulty construing 18 U.S.C. § 1304, and it noted the conflicting Second and Third Circuit decisions. H.R. REP. NO. 93-1517, at 19 (1974). The FCC also informed the Committee that the Department of Justice had petitioned the Supreme Court for review. *Id.* at n.3. Presumably, then, Congress was aware of the pending Supreme Court case when it chose to amend the statute to rid it of any ambiguity on this point.

<sup>163</sup> Interestingly, Justice Douglas dissented from the per curiam opinion. He thought the statute, prior to amendment, clearly violated the First Amendment, and argued that Congress had overstepped its bounds by seeking to moot the dispute. He analogized the legislation to an unconstitutional bill of attainder and stated that "[f]or Congress to hold that the radio station in the present case was or was not guilty of violating 18 U.S.C. § 1304 would be a flagrant usurpation of Art. III powers." *N.J. State Lottery Comm'n*, 420 U.S. at 374 (Douglas, J., dissenting).

Lindquist and Yalof's study reveals, Congress also takes notice of judicial confusion in the lower courts and seeks to resolve such conflicts by clarifying legislation. Congress may step in because it wants to assist courts in applying unclear statutes, or, more likely, because it wants to wrest control of statutory meaning from the judiciary. Whatever its reasons, Congress is already responding to judicial confusion through amendments that affect results in pending cases, albeit in an inconsistent and ad hoc fashion. In light of this practice, we should establish a more structured and formalized process by which courts may refer hard questions about statutory meaning to Congress.

Admittedly, however, there is a darker side to this legislative practice of amending legislation to affect results in pending cases. During some of the most unstable periods of American history, Congress has passed legislation seeking to ensure that it would obtain the judicial outcomes it desired. In *Ex parte McCardle*,<sup>164</sup> for example, Congress enacted legislation stripping the Supreme Court of jurisdiction to hear McCardle's habeas corpus petition just a few days after the case was argued in the Supreme Court. McCardle was challenging the constitutionality of provisions of the Military Reconstruction Act—a challenge that Congress had reason to think the Court might decide in McCardle's favor—and so Congress sought to prevent the Court from hearing and deciding the issue.<sup>165</sup> The Court agreed it no longer had jurisdiction over the case as a result of the legislation.<sup>166</sup>

The Court did not permit Congress to control the results in *United States v. Klein*,<sup>167</sup> a case from the same post-Civil War period in which Congress sought to prevent the Court from awarding compensation for the Union's seizure of property during that war. Congress was unhappy with the Court's previous decisions granting compensation, so it enacted legislation attempting to force the Court to reach a different result in Klein's case. This time, the Court refused to defer to Congress, although the constitutional grounds for its refusal to do so have remained unclear.<sup>168</sup>

The legislation enacted on the eve of the Supreme Court's decisions in *McCardle* and *Klein* was not intended to clarify statutory ambiguity or eliminate constitutional problems in legislation, but instead sought to strip the Court of power to decide these cases in ways that Congress did not like.

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<sup>164</sup> 74 U.S. (7 Wall.) 506 (1869).

<sup>165</sup> FALLON, HART & WECHSLER'S, *supra* note 114, at 328.

<sup>166</sup> *McCardle*, 74 U.S. at 515.

<sup>167</sup> 80 U.S. (13 Wall.) 128 (1872).

<sup>168</sup> See, e.g., Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of United States v. Klein*, 100 NW. U. L. REV. 437, 437–38 (2006) (“[United States v. Klein] is a case whose importance to the shaping of American political theory has never been fully grasped or articulated by scholars, and whose meaning has been comprehended by the federal judiciary—including the Supreme Court itself—virtually not at all.”). For a more detailed discussion of the facts of *Klein*, the Court's holding, and limits on Congress's power to control results in pending cases, see *infra* notes 200–09 and accompanying text.

These attempts by Congress to aggrandize itself at the expense of the judiciary can be distinguished from cases such as *Hayburn's Case* or *Sholly* in which Congress enacted legislation intended to assist courts with statutory construction. Nonetheless, it is important to recognize that Congress's power to alter the results in pending cases gives Congress the ability both to aid courts and to undermine their authority. Any certification procedure must take into account the troubling possibility that Congress might misuse an enhanced ability to affect pending cases.

#### IV. STRUCTURING CERTIFICATION TO SATISFY CONSTITUTIONAL RESTRAINTS ON THE ROLES OF COURTS AND CONGRESS

Before discussing the normative implications of encouraging courts to certify questions about statutory meaning to Congress, the first question to be answered is whether such a practice would be constitutionally permissible. Judicial referrals to Congress raise significant separation of powers concerns. The formalist view of separation of powers requires that each branch perform its assigned tasks with rigid independence from the others.<sup>169</sup> Functionalist theories are more flexible, conceding that the branches may engage in activities outside of their narrow, constitutionally assigned tasks, but only so long as they do not diminish the constitutional stature of another branch by taking over its essential functions.<sup>170</sup> Under either view, a process by which courts stay cases and refer specific questions about those cases to Congress for resolution comes dangerously close to impermissibly mixing the legislative and judicial functions.<sup>171</sup> The discussion below seeks to show that judicial referrals to Congress are constitutional as long as referrals are structured so that neither the court nor the legislature crosses boundaries that delineate the judicial from the legislative power.

From the very beginning of the Union, courts have concluded that they are compelled to apply the law as it exists at the time of the decision, even if that law has recently been altered by Congress.<sup>172</sup> Accordingly, even

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<sup>169</sup> See, e.g., Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1524 (1991).

<sup>170</sup> See *id.* at 1527. Professor Brown goes on to describe “the scholarly debate about separated powers” as “polarized, for the most part, between the formalists and the functionalists—a battle between those who would pay the price of rigidity in order to achieve an elusive determinacy on the one hand, and those who would pay the price of indeterminacy in order to achieve unguided flexibility on the other.” *Id.* at 1530.

<sup>171</sup> As the Supreme Court stated when striking down the legislative veto, “even useful ‘political inventions’ are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.” *INS v. Chadha*, 462 U.S. 919, 945 (1983).

<sup>172</sup> *U.S. v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (“[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed.”); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974) (“[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.”).

without any formal certification system in place, it is clear that Congress may amend legislation to resolve a dispute pending before a court—indeed, as just discussed, Congress has often done so.<sup>173</sup> This long tradition demonstrates that legislation intended to resolve pending court cases is not, per se, unconstitutional. The only question, then, is whether a formal certification process under which courts encourage Congress to pass such legislation transforms a constitutionally permissible practice into an impermissible one. This Article concludes that certifying questions to Congress does have constitutional implications that must be addressed in the structure of the certification process. As long as these limits are in place, however, judicial referrals to Congress do not transgress constitutional boundaries. Below is a description of the constitutional concerns raised by certification of questions from courts to Congress, and then a discussion of the ways in which the process can be shaped to fit within constitutional parameters.

#### A. *Judicial Communication with Congress*

A certification process would allow judges to communicate with the legislative branch about pending cases. Communication between the judiciary and the other branches of government is not by itself unusual or suspect; indeed, it happens all the time.<sup>174</sup> Federal judges frequently appear before Congress to answer questions about their work and discuss the need for funding, staff, and other resources. And judges regularly communicate with the executive branch during litigation. The Supreme Court will seek the Solicitor General’s views on the merits of petitions for writs of certiorari, and federal judges are required by statute to inform the U.S. Attorney General or the relevant state attorney general whenever they are asked to decide a case challenging the constitutionality of an Act of Congress or a state statute. Courts must “certify such fact” to the requisite executive officer and then must allow the executive to intervene and participate as a party in the case.<sup>175</sup> Permitting judges similarly to communicate with Congress during pending cases would therefore not appear to present any particular constitutional problem.

Constitutional questions would arise, however, were Congress to *require* judicial consultation during pending cases, because then Congress would come dangerously close to inserting itself into the judicial process and taking over the judicial power to decide “cases” and “controversies.”

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<sup>173</sup> See *supra* notes 131–63 and accompanying text.

<sup>174</sup> See, e.g., Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 279 (1991) (“History suggests that dialogue between the legislative and judicial branches of government was anticipated by the framers of the Constitution.”).

<sup>175</sup> 28 U.S.C. § 2403 (2000); see, e.g., *Merill v. Town of Addison*, 763 F.2d 80, 82 (2d Cir. 1985) (certification to state attorney general that action had been filed in federal court challenging the constitutionality of state statute is “duty of court that should not be ignored, even if the claim is obviously frivolous or may be disposed of on other grounds”).

Accordingly, the impetus for referrals must come from the courts, not Congress. Likewise, judges cannot order Congress to respond to their questions about statutory meaning. A recognized attribute of the legislative power is the “exercise [of] discretion in determining whether and what legislation is needed”;<sup>176</sup> consequently, courts cannot dictate the legislative agenda by demanding Congress clarify statutes in response to judicial questions.

A formal procedure of certifying questions to Congress need not go so far, however. To ensure its constitutionality, both branches must take part only if and when they choose to do so. This flexibility would be essential to ensuring the procedure did not improperly intrude into either branch’s constitutionally-assigned realm.

### B. *The Form of Congress’s Response*

If Congress did choose to respond to a judicial inquiry into the meaning of an ambiguous statute, what form must that response take? *INS v. Chadha*<sup>177</sup> makes clear that Congress can “clarify” statutory meaning only in accordance with the bicameral passage and presidential presentment requirements of Article I. As the Supreme Court declared in *Chadha*, “[t]hese provisions of Art. I are integral parts of the constitutional design for the separation of powers” and cannot be compromised.<sup>178</sup> In short, Congress must enact a new law if it wishes to clarify the meaning of an existing one.

Of course, individual members of Congress would be free to issue statements proclaiming their own understanding of the meaning of the statutory language at issue in a pending case. And Congress as a whole could pass a non-binding resolution on the question. But a court can give such statements no more weight than it gives to any other post-enactment legislative history—that is, virtually none at all.<sup>179</sup> Unless Congress actually amends the law at issue, the court has received no congressional guidance as to the meaning of the statute and should go ahead and decide the case on its own.

In essence, then, a 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. Congress is not bound to clarify the statute to accord with what it thinks the enacting Congress would have wanted. Just as Congress is always free to change laws by amendment, the Congress that receives a judicial referral may choose to radically alter, rather than to clarify, the statute at issue.

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<sup>176</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

<sup>177</sup> 462 U.S. 919 (1983).

<sup>178</sup> *Id.* at 946.

<sup>179</sup> *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.* 496 U.S. 633, 650 (1990) (“[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress.”) (internal citation and quotation omitted).

Some might argue that this process gives the current legislature too much control over the meaning of legislation, and does so at the expense of the wishes of the enacting legislature. Although Congress always has the power to amend legislation, Congress is busy and has limited resources, and so more often than not would leave even problematic legislation in place. But if Congress is notified by the courts of a legislative ambiguity and then given a limited window of time in which to fix the problem so as to affect the results in pending cases, Congress is more likely to take action. The influence of the enacting Congress will be diminished, while the Congress in power at the time of a judicial decision will have a greater say in the meaning of the legislation.

One response to this concern is that the enacting legislature retains all of its power over the meaning of its legislation as long as it speaks clearly in the first instance. It is only when the enacting legislature passes unclear statutes that courts could certify questions to be resolved by the current Congress. Moreover, even without a certification procedure in place, an enacting legislature risks frustration of its purpose when it fails to speak clearly in a statutory text—the only difference being that it is judges with cases before them, rather than the current Congress, who determine the statute’s meaning. Furthermore, although most judges purport to resolve statutory ambiguity with reference to the enacting legislature’s preferences, legal scholars have observed that judges frequently interpret statutes in light of current political preferences—perhaps out of a desire to avoid congressional overrides, or perhaps because judges are not as insulated from political pressures as their lifetime appointments might suggest.<sup>180</sup> And maybe this is for the best. Professor Elhauge has suggested that each legislature would prefer that courts apply statutes in accord with the current legislature’s preferences rather than those of the enacting legislature, reasoning that “[a]s a general matter, political preferences for a given statutory result are likely to be stronger in the present because those who hold those preferences (and elect the government) are those who experience that result.”<sup>181</sup> As Elhauge notes, the political preferences of those very same politicians (and electors) might have changed by the time the statute is being construed years in the future, and thus the enacting legislature might not even wish a court to interpret its legislative acts as it would have originally intended.<sup>182</sup>

Elhauge’s critics question how courts are to “divine” current legislative preferences. As Professor Amanda Tyler noted in her critique, “sources for ascertaining such [legislative] preferences are limited and we deal by definition with an area in which the current legislature has *not* acted (at least not in any formal way).”<sup>183</sup> More often than not, the current Congress will not

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<sup>180</sup> ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 5, at 75.

<sup>181</sup> Elhauge, *Preference-Estimating*, *supra* note 5, at 2039.

<sup>182</sup> *Id.*

<sup>183</sup> Tyler, *supra* note 6, at 1407.

have given the legislative question before a court any thought at all. Do we really think that members of Congress spend their time pondering the complexities of supplemental jurisdiction, for example? If Congress has not even thought about the issue—as will often be the case when courts address minor technical questions about a statute’s application—then there will simply be no legislative preference for courts to discover.<sup>184</sup> Tyler is also concerned about the merging of legislative and judicial functions that would likely occur were courts seriously to attempt to “track[] current political maneuvering” and monitor the “ebbs and flows of the legislative process” in an effort to guess Congress’s preferences regarding a statute’s interpretation.<sup>185</sup> She cites these problems as serious flaws in Elhauge’s proposal.

Certifying questions to Congress avoids these issues by requiring the current legislature to enact its preferences if it wishes to assist courts in applying ambiguous statutes. Courts will not be second-guessing Congress based on the statements in committee reports attached to bills that never become law, as Elhauge suggests, but will instead be applying statutory text directly addressing the problem in the case at hand. At the same time, certification realizes Elhauge’s primary goal of incorporating the current legislature’s preferences into the meaning of unclear statutes. It does so by alerting Congress to the problem and giving Congress time (through abstention) and an incentive (in the form of a pending case in which the meaning of the statute must be resolved) to take action.

### C. *The Substance of Congress’s Response*

The fact that Congress may pass an amendment that changes the meaning of a law, rather than merely clarifies an ambiguity, raises a more troubling concern: Congress may use the referral process to control the outcome in a specific case, arguably usurping the judicial power to resolve cases and controversies.<sup>186</sup>

*1. Separation of Powers Concerns.*—The constitutional structure that separates judging from legislating impliedly forbids this type of legislation. As Chief Justice John Marshall declared: “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules . . . would seem to be the duty of other departments.”<sup>187</sup> Moreover, specific constitutional provisions, such as the Bill of Attainder,<sup>188</sup> Equal Protection,<sup>189</sup> Due Process,<sup>190</sup> and Ex Post Facto<sup>191</sup>

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1408.

<sup>186</sup> See, e.g., *INS v. Chadha*, 462 U.S. 919, 961–62 (Powell, J., concurring); J. Richard Doidge, Note, *Is Purely Retroactive Legislation Limited by the Separation of Powers?: Rethinking United States v. Klein*, 79 CORNELL L. REV. 910, 941–42 (1994).

<sup>187</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

<sup>188</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>189</sup> *Id.* amend. V; *id.* amend. XIV, § 1.

Clauses all seek to protect individuals from this type of targeted legislation. In *The Federalist No. 47*, Madison explained that under the U.S. Constitution the “Legislature can perform no judiciary act,” and he quoted Montesquieu’s declaration that “[w]ere the power of judging joined with the Legislative, the life and liberty of the subject would be exposed to arbitrary control . . . .”<sup>192</sup> In sum, as Professor Martin Redish put it, “Congress may not, through legislation, dictate the resolution of an individual litigation.”<sup>193</sup>

At least three separation of powers values are implicated by legislation targeting specific cases. First, dividing judging from legislating protects the litigants by ensuring that laws are applied by politically-insulated judges through safeguards that accompany the judicial process, such as notice and an opportunity to be heard.<sup>194</sup> When Congress enacts legislation affecting large categories of the population, it has incentives to draft laws that are just and reasonable; conversely, when its laws single out only a very narrow category of people or cases, Congress is unrestrained by political pressures and, of course, need not adhere to the structures of adjudication. To the contrary, the pressures to please the majority may push Congress to target individuals for disfavored treatment. As Justice Powell observed: “Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to ‘the tyranny of a shifting majority.’”<sup>195</sup>

A second, and related, concern is that Congress can often avoid being held accountable for legislation favoring individuals and small groups. Although retroactive legislation is often feared because of its potential to target individuals for punishment, it can just as easily be used to provide

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<sup>190</sup> *Id.* amend. IV, § 1.

<sup>191</sup> *Id.* art. I, § 10, cl. 1.

<sup>192</sup> THE FEDERALIST NO. 47, at 268–69 (James Madison) (E.H. Scott ed., 1898).

<sup>193</sup> Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 718 (1995); see also Doidge, *supra* note 186, at 941 (“Intuitively, the legislature’s ability to manipulate the results of pending litigation undermines the ideal of ordered liberty and the protections against tyranny for which divided government strives.”); Redish & Pudelski, *supra* note 168, at 445 (“The resolution of individual cases—including the process of the application of general law in fact-specific contexts—clearly falls within the concept of ‘judicial’ power, as a definitional matter. Thus, Congress may not constitutionally adjudicate individual disputes, because to do so would constitute the performance of a nonlegislative function, in violation of Article I’s vestiture in Congress of nothing more than the ‘legislative power.’ If Congress may not itself resolve individual litigations, its direction to the courts as to how to resolve specific disputes is constitutionally problematic.”) (internal footnotes omitted).

<sup>194</sup> *INS v. Chadha*, 462 U.S. 919, 966 (Powell, J., concurring) (“Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or agency adjudicates individual rights.”) (internal footnote omitted).

<sup>195</sup> *Id.* (Powell, J., concurring). See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 998 (1978) (The legislature may not “pick and choose only a few to whom they will apply legislation and thus [] escape the political retribution that might be visited upon them if larger numbers were affected.” (quoting *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949))).

benefits to the influential.<sup>196</sup> For example, Congress has a history of inserting last-minute riders in appropriations bills that command the outcome in a specific case “notwithstanding” the statutes governing that area of law.<sup>197</sup> These case-specific amendments to legislation enable Congress to target individuals for special treatment without taking the political heat that would accompany passage of a law enacted after hearings and a committee vote.<sup>198</sup>

Third, by enacting case-specific legislation, Congress usurps the judiciary’s power. The Framers were generally concerned that one branch of government might seek to aggrandize its own power at the expense of the others, and in particular worried that the legislature—whose “powers [are] at once more extensive, and less susceptible of precise limits”—would encroach on the functions of the other two branches.<sup>199</sup> When Congress legislates to control the outcome of the particular case, it appears to be doing just that.

Despite these constitutional concerns, there is no clear precedent forbidding Congress from legislating to control the outcome in individual cases. Strands of reasoning from the few cases to address this problem do strongly suggest, however, that Congress is walking on constitutional thin ice when it passes legislation targeting specific pending cases. In addition, various constitutional provisions prohibit Congress from singling out individuals for legislative penalties.

2. *Caselaw Addressing Limits on Congress’s Power to Control the Outcome in Individual Cases.*—The Court’s decision in *United States v. Klein*<sup>200</sup> came close to establishing that Congress cannot enact legislation to control the results in specific cases. The case arose from the turmoil of the post-Civil War period. Klein, administrator of the estate of V.F. Wilson, sued the United States in the Court of Claims pursuant to the Abandoned and Captured Property Act of March 3, 1863. That Act permitted the owner of property seized during the Civil War to receive compensation for the loss of property “on proof to the satisfaction of [the Court of Claims] . . . that he has never given any aid or comfort to the present rebellion . . . .”<sup>201</sup> President Lincoln had proclaimed that “certain persons who had been engaged in the rebellion” would be pardoned and have their prop-

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<sup>196</sup> See THE FEDERALIST NO. 44, at 248–49 (James Madison) (E.H. Scott ed., 1898) (expressing this concern); see also *Landgraf v. USI Film Products*, 511 U.S. 244, 267 n.20 (1994).

<sup>197</sup> Nagle, *supra* note 1, at 1283–84.

<sup>198</sup> In its amicus curiae brief in *Robertson v. Seattle Audubon Society*, Public Citizen listed a number of examples of such case-specific riders, which it said exemplified the type of legislative overreaching that the Court should strike down as an unconstitutional encroachment on the judicial branch. Brief of Public Citizen as Amicus Curiae Supporting Respondents, *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992) (No. 90-1596).

<sup>199</sup> THE FEDERALIST NO. 48, at 275 (James Madison) (E.H. Scott ed., 1898).

<sup>200</sup> 80 U.S. (13 Wall.) 128 (1872).

<sup>201</sup> *Id.* at 131 (internal quotations omitted).

erty restored to them upon taking an oath of allegiance to the Union; Wilson had taken this oath.<sup>202</sup> The Court of Claims ruled that Wilson's pardon entitled his estate to compensation under the statute, and the government then appealed that decision to the Supreme Court.<sup>203</sup>

Shortly thereafter, the Supreme Court heard an appeal in *Padelford v. United States*<sup>204</sup> concerning a similarly-situated claimant. The Supreme Court agreed with the Court of Claims that the presidential pardon entitled Padelford to the proceeds of his property. In response, Congress enacted a law providing that: (1) a Presidential pardon would not be admissible evidence in favor of a claimant seeking compensation under the Abandoned and Captured Property Act; (2) the Supreme Court was to dismiss for lack of jurisdiction any appeal from a judgment of the Court of Claims in which the claimant established his loyalty through a pardon; and (3) the Court of Claims was to consider evidence that the claimant had received a pardon as "conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion," and to dismiss any lawsuit on a claimant's behalf for lack of jurisdiction.<sup>205</sup>

In a wide-ranging opinion, the Court struck down the new law. The Court articulated several grounds for its holding, and so it is impossible to know which, if any, would have been decisive alone. Most relevant here is the strand of the Court's opinion establishing that Congress cannot "prescribe rules of decision to the Judicial Department of the government in cases pending before it."<sup>206</sup> By stripping the Court of jurisdiction over any case in which a pardon was granted, and ordering that a pardon be considered evidence supporting a conclusion contrary to the one the Court had previously reached, Congress was seeking to control the outcome of a pending case and thus had "passed the limit which separates the legislative from the judicial power."<sup>207</sup> In a recent discussion of *Klein*'s holding, the Court again emphasized that a key problem with the legislation was Congress's attempt to lay down rules to control the outcome of a case currently before the Supreme Court (and, not incidentally, to obtain an outcome in the government's favor).<sup>208</sup>

Although *Klein* declares that there are constitutional limits on Congress's ability to legislate so as to control results in individual cases, the opinion was muddled, and came at a particularly tense moment in congressional-judicial relations. Its conclusion has rarely been revisited. It is thus

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<sup>202</sup> *Id.* at 131–32.

<sup>203</sup> *Wilson v. United States*, 4 Ct. Cl. 559 (1869).

<sup>204</sup> 76 U.S. (9 Wall) 531 (1869).

<sup>205</sup> *Klein*, 80 U.S. at 134.

<sup>206</sup> *Id.* at 146.

<sup>207</sup> *Id.* at 147.

<sup>208</sup> *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980).

only shaky precedent to support the conclusion that Congress is not permitted to enact legislation seeking to control the outcome in a pending case.<sup>209</sup>

The Supreme Court again set limits on Congress's power to change results in specific cases in *Plaut v. Spendthrift Farms*.<sup>210</sup> Congress had enacted legislation extending the limitations period for certain securities actions. The Court held that the legislation violated separation of powers by purporting to reopen final judgments to permit previously dismissed cases to be re-filed under the new limitations period.<sup>211</sup> Thus, *Plaut* established that Congress's power to affect the results in pending cases does not extend so far as to permit it to undo the results in cases that have been finally resolved by the judicial branch.

*Robertson v. Seattle Audubon Society*<sup>212</sup> provides the most recent guidepost in this area.<sup>213</sup> Environmental groups and companies in the tim-

<sup>209</sup> In a recent article, Redish and his co-author, Christopher Pudelski, argue that the constitutional problem in *Klein* was not a Congressional attempt to control the outcome in a specific case, but rather "legislative deception" arising from Congress's efforts to achieve the results it wants through jurisdiction stripping. See Redish & Pudelski, *supra* note 168, at 438–439. As these scholars point out, the legislation at issue in *Klein* appears to apply to *all* cases involving pardons issued to former Confederate sympathizers seeking compensation for their property, and not just Klein's case. *Id.* at 445.

<sup>210</sup> 514 U.S. 211 (1995).

<sup>211</sup> *Id.* at 240.

<sup>212</sup> 503 U.S. 429 (1992).

<sup>213</sup> The most recent and well-known example of targeted legislation was inspired by the case of Theresa Marie Schiavo, a brain-damaged Florida woman. Schiavo had been in a vegetative state for thirteen years when a Florida state judge found that Schiavo would not have wanted to continue living in such a state and ordered that her nutrition and hydration be discontinued. See *In re Guardianship of Schiavo*, No. 90-2908GD-003, 2000 WL 34546715, at \*7 (Fla. Cir. Ct. Feb. 11, 2000). Schiavo's parents were strongly opposed to the order, which they believed reflected the wishes of Schiavo's husband but not Schiavo herself.

The U.S. Congress responded to the state court order by passing an Act, signed into law at approximately 1:00 A.M. on March 21, 2005, entitled, "An Act for the relief of the parents of Theresa Marie Schiavo." Pub. L. No. 109-3, 119 Stat. 15 (2005). The law was explicitly limited in application to Schiavo. It ordered the United States District Court for the Middle District of Florida to "hear, determine, and render judgment" on any claim of "alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of foods, fluids, or medical treatment necessary to sustain life." *Id.* The law gave standing only to Schiavo's parents to bring such a suit, and permitted the district court to give relief "to protect the rights of Theresa Marie Schiavo" alone. *Id.* Anticipating barriers to a federal lawsuit, the Act required that the district court review all claims "de novo," that it not abstain in favor of state court proceedings, and that it not await exhaustion of state law remedies. *Id.* To limit its effect to Schiavo, Congress declared that the new law "shall not be construed to create substantive rights not otherwise secured by the Constitution and the law of the United States or of the several States" and did not "constitute a precedent with respect to future legislation." *Id.*

Schiavo's parents immediately filed a complaint and motion for a temporary restraining order. Most of the federal judges asked to address the motion simply assumed the constitutionality of the legislation and denied the motion on other grounds. One exception was Judge Birch, of the U.S. Court of Appeals for the Eleventh Circuit, who concurred in the denial of rehearing en banc to declare that the law violated separation of powers because Congress "arrogat[ed] vital judicial functions to itself." Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1270, 1275 (11th Cir. 2005). Although he focused his arguments on

ber industry had challenged the government's regulation of harvesting and sale of timber in old-growth forests in the Pacific Northwest, which were home to the endangered northern spotted owl. The environmental groups argued that the regulation was too lax, the timber industry that it was too restrictive. In response to the litigation, Congress enacted the Northwest Timber Compromise, which established new requirements for the Forest Service's management of the forests at issue—requirements that (supposedly) represented a compromise position between the demands of the environmental groups and the loggers.<sup>214</sup> The law then provided that compliance with these new statutory requirements would be considered “adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases,” and cited the names and docket numbers of both cases.<sup>215</sup> Loggers argued that the new law mooted the pending cases, while environmental groups challenged it on separation of powers grounds.

The Ninth Circuit was troubled by the law's specificity, and particularly its attempt to control the outcome of the explicitly-referenced pending cases. Citing *Klein*, the Ninth Circuit explained that the Northwest Timber Compromise crossed the constitutional line between legislation and adjudication. According to the Ninth Circuit, the “critical distinction” is “between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible.”<sup>216</sup> Because the Ninth Circuit concluded that Congress had done the latter, it invalidated the law.<sup>217</sup>

The Supreme Court rejected the Ninth Circuit's description of the effect of the Northwest Timber Compromise, finding that Congress had changed the underlying legal standard.<sup>218</sup> The Supreme Court thus had no occasion to address the correctness of the “critical distinction” that the Ninth Circuit drew from *Klein*. Although that ultimate question was postponed, the decision demonstrates that Congress can enact legislation limited

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the law's alteration of the standard of review and abrogation of the rules of exhaustion and abstention, his real concern seemed to be that Congress changed the rules for a single individual. He concluded by stating, “because the Act applies to only this case it lacks the generality and prospectivity of legislation that comports with the basic tenets of the separation of powers.” *Id.*

Judges Tjoflat and Wilson dissented from denial of rehearing en banc. The dissenters argued that Congress had the constitutional power to change the standard of review and other procedural rules: “Congress has prescribed a particular approach to a particular problem in the general domain of federal jurisdiction, without presuming to dictate—in any respect—our performance of a court's *essential* function: ‘to say what the law is.’” *Id.* at 1281.

<sup>214</sup> Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, 103 Stat. 701, 745 (1989).

<sup>215</sup> *Id.* § 318(b)(6)(A), 103 Stat. at 747.

<sup>216</sup> *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1315 (9th Cir. 1990).

<sup>217</sup> *Id.* at 1317.

<sup>218</sup> *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).

to explicitly-identified pending cases and yet the Court will conclude that it did not cross the line into exclusive judicial territory.<sup>219</sup>

Also left unresolved was the issue raised in the case by Public Citizen, a nonprofit public interest group acting as amicus curiae. Public Citizen contended that even if the law did change underlying legal standards, it might still be unconstitutional “if the change [in law] swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases.”<sup>220</sup> That is, Public Citizen argued that Congress overstepped its bounds when it enacted legislation targeting a few cases, even if that legislation purports to change underlying legal standards. The Supreme Court specifically noted this objection in its opinion, but did not address it on the ground that it had not been raised below.<sup>221</sup>

The unanswered Public Citizen objection in *Robertson* goes to the heart of constitutional concerns raised by the process of certifying questions to Congress. Normally, the legislature enacts general rules that affect large classes of the population, while courts apply those general rules to individual cases.<sup>222</sup> If Congress responds to a judicial referral by seeking to control the outcome in a pending case, it might well cross the constitutional line that separates legislating from judging, as well as violate constitutional principles intended to prevent the abuses that can occur when legislation targets individuals. *Klein* and its progeny address the separation of powers concerns and suggest that there are constitutional limits on Congress’s power to legislate for specific cases, but leave the exact parameters of Congress’s authority unclear.

Under the law as it stands today, Congress has the ability to enact laws targeting pending cases, and courts have the obligation to review those laws to determine whether Congress has strayed too far into judicial territory. Permitting courts to refer questions to Congress admittedly provides more opportunities for Congress to misuse its power, but it does not change any fundamental aspect of the legislative process to give Congress more leeway to do so. If Congress were to respond to certified questions by seeking to control the outcome of specific pending cases rather than to amend the legislation generally, the Supreme Court could revisit the parameters of Congress’s power to do so and perhaps more clearly define those limits for Congress and the lower courts.

3. *Constitutional Provisions Prohibiting Targeted Legislation.*—In addition to the general restrictions on Congress dictated by separation of

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<sup>219</sup> See Redish & Pudelski, *supra* note 168, at 457 (criticizing the Court for leaving this an open question).

<sup>220</sup> *Robertson*, 503 U.S. at 441 (citing amicus brief of Public Citizen).

<sup>221</sup> *Id.*

<sup>222</sup> William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1089 (1999).

powers principles, specific constitutional provisions such as the Bill of Attainder, Ex Post Facto, and Equal Protection Clauses prohibit Congress from singling out individuals for disfavored treatment in a pending case.<sup>223</sup> These provisions serve as an additional bulwark against targeted legislation, and they provide another source of authority under which courts can strike down such legislation. Because their application is narrow, however, they would likely have only a minimal role in policing congressional responses to judicial referrals.

*a. Bill of Attainder Clause.*—The Constitution specifically prohibits Congress and the states from passing a bill of attainder,<sup>224</sup> defined as “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.”<sup>225</sup> This provision, along with the Ex Post Facto Clause, serves to protect individuals from the misuse of legislative power and is often cited in support of the separation of powers principle that Congress should not stand as judge in individual cases.<sup>226</sup> As the Supreme Court declared in *United States v. Brown*, “the Bill of Attainder Clause was intended . . . as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.”<sup>227</sup>

The Supreme Court has interpreted these prohibitions narrowly, however. In *Nixon v. Administrator of General Services*,<sup>228</sup> the Court addressed

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<sup>223</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 242 (1995) (noting that “the Constitution’s ‘separation-of-powers’ principles reflect, in part, the Framers’ ‘concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person’” and that this principle was expressed “both in ‘specific provisions, such as the Bill of Attainder Clause,’ and in the Constitution’s ‘general allocation of power’” (citations omitted)).

<sup>224</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>225</sup> *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 468 (1977).

<sup>226</sup> As Justice Stevens declared in *Richmond v. J.A. Croson Co.*:

Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed.

488 U.S. 469, 513–14 (1989).

<sup>227</sup> 381 U.S. 437, 442 (1965). The criticality of separating the legislative and the judicial functions also did not escape the Framers. As Madison noted in *The Federalist No. 57*, a central protection against legislative tyranny was the fact

that [the House of Representatives] can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny.

THE FEDERALIST NO. 57, at 316 (James Madison) (E.H. Scott ed., 1898).

<sup>228</sup> 433 U.S. 425.

former President Nixon's bill of attainder challenge to the Presidential Recordings and Materials Preservation Act. Although the Act applied only to Nixon, establishing special burdens that only he had to bear, the Court upheld it because "the mere specificity of law does not call into play the Bill of Attainder Clause."<sup>229</sup> The special circumstances of the storage of Nixon's presidential papers justified Congress's creation of a "legitimate class of one," and so the Act's singling out of Nixon for special treatment was not a violation of the Clause. Moreover, even if the Act's specificity had triggered the Bill of Attainder Clause's application, the Court concluded that Congress had not "inflicted punishment" on Nixon simply by burdening him with obligations under the Act.<sup>230</sup>

The Court contrasted the Act at issue in *Nixon* with the one struck down in *United States v. Lovett*, where a House Report expressly characterized the named individuals as "subversive . . . and . . . unfit . . . to continue in Government employment."<sup>231</sup> Although a formal legislative condemnation of specific people is not a prerequisite to finding a law an unconstitutional bill of attainder, there must be some evidence of legislative intent to penalize the individual affected. The Court concluded that such evidence of legislative malice went to the heart of the Constitution's bill of attainder prohibition, which arose from "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge—or, worse still, lynch mob."<sup>232</sup>

As *Nixon* and *Lovett* demonstrate, only in fairly extreme circumstances will laws be struck down as unconstitutional bills of attainder. Even legislation that imposes special burdens on named individuals will not be invalidated unless there is evidence of a clear congressional intent to judge and punish. Accordingly, even though the Bill of Attainder Clause serves as some measure of protection against targeted legislation, it applies only in fairly extreme cases of congressional malice toward an identified few.

*b. Ex Post Facto Clause.*—The Ex Post Facto Clause prohibits Congress from enacting laws that retroactively impose punishment by changing the criminal legal consequences of completed acts.<sup>233</sup> "Critical to relief under the Ex Post Facto Clause is . . . the lack of fair notice and government restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated."<sup>234</sup> Like the Bill of Attainder Clause, it applies only to laws that penalize, and prevents legisla-

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<sup>229</sup> *Id.* at 471 n.33.

<sup>230</sup> *Id.* at 472.

<sup>231</sup> *Id.* at 480 (quoting H.R. REP. NO. 78-448 (1943)) (internal quotation marks omitted).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 468 n.30; *Miller v. Florida*, 482 U.S. 423, 429–30 (1987); *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981).

<sup>234</sup> *Weaver*, 450 U.S. at 30.

tures from criminalizing previously innocent acts.<sup>235</sup> Retroactive changes to procedures at criminal trials, or to civil penalties, are not violations of this limitation on Congress's power to legislate. So, for example, the Court held that the Clause did not bar a state from passing legislation civilly committing sex offenders who had completed their prison sentences.<sup>236</sup>

*c. The Equal Protection Clause.*—The Equal Protection Clause also prohibits Congress from targeting individuals for disfavored treatment. A legislative classification will be upheld as long as it is supported by some rational basis, but that basis cannot include an animus toward one person, or even a small group of individuals. As the Supreme Court declared, “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>237</sup> Thus, the Equal Protection Clause serves as a slightly broader textual prohibition against legislation singling out specific individuals or groups for special treatment.<sup>238</sup>

*d. Conclusion.*—The trio of constitutional provisions discussed above seeks to protect individuals from becoming the targets of legislative penalties. But their scope is narrow. Clearly, they prohibit Congress from passing legislation that retroactively criminalizes previously innocent conduct, but otherwise they are decisive only in the most extreme cases of legislative animus. Perhaps they are most useful for the way in which they support and establish the vague ideas discussed but not resolved in *Klein*—whatever it is Congress is allowed to do, it must legislate broadly enough to avoid the charge that it has sought to punish a specific few.

These limits provide some parameters that courts can use to police Congress's response to a certified question. If Congress seeks to control the results in the pending case rather than clarify the law for all current and future litigants, courts can disregard the legislation as either a violation of one of these specific constitutional provisions, or more generally as an overstepping of legislative authority and an impermissible intrusion into the judicial power to decide specific cases.

#### *D. Limits on Retroactive Legislation*

If courts were permitted to certify questions to Congress, they would have to grapple with the extent to which a congressional response to a certified question would be applied retroactively to pending cases. One of the

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<sup>235</sup> See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *Weaver*, 450 U.S. at 30.

<sup>236</sup> *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

<sup>237</sup> *Dep't of Agric. v. Moreno*, 413 U.S. 528, 543 (1973).

<sup>238</sup> Litigants challenging laws on bill of attainder grounds will often assert an equal protection violation as well. See, e.g., *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 471 n.33 (1977); *Consol. Edison Co. of N.Y. v. Pataki*, 117 F.Supp.2d 257, 270 (N.D.N.Y. 2000).

theories underlying the proposal is that Congress is more likely to respond to a judicial inquiry about statutory meaning when it knows it can change the result in all pending cases. Sometimes, this might require that Congress's legislation be given retroactive effect.

The Ex Post Facto and Bill of Attainder Clauses, together with the Due Process Clause, suggest that there are constitutional limits on the retroactive effect of legislation.<sup>239</sup> "Retroactivity is not favored in the law," and thus the default rule is that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."<sup>240</sup>

The presumption against retroactivity is in tension, however, with the rule established in *Schooner Peggy* that a court is to apply the law in effect at the time it renders its decision.<sup>241</sup> In *Landgraf v. USI Film Products*,<sup>242</sup> the Supreme Court attempted to reconcile these potentially conflicting doctrines. *Landgraf* reaffirmed that congressional intent is the touchstone. If Congress makes clear it wants legislation to be applied retroactively, then the Court is required to apply the law to pending cases, save in a few rare circumstances when to do so would violate an individual's constitutional rights.<sup>243</sup> If the statute contains no express statement about its application, then the court must determine whether the statute has retroactive effect—that is, "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."<sup>244</sup> Determining whether a law operates retroactively is often a difficult question, and it requires that judges decide whether there was fair notice, reliance on old law, or disruption of settled expectations.<sup>245</sup> If the law does have retroactive effect, then it should not be applied to pending cases, but all other new legislation should—even in cases that have been adjudicated in the lower courts under the old legal standards.

Ideally Congress would respond to a certified question by clearly specifying if it wishes the clarifying legislation to be applied retroactively. Certified questions from courts create an unusual situation, however, in which a court is asking Congress to clarify an existing law to assist the court in deciding a pending case. Accordingly, Congress has reason to presume that its response will be applied retroactively.

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<sup>239</sup> See *INS v. St. Cyr*, 533 U.S. 289, 316 (2001); *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

<sup>240</sup> *Landgraf*, 511 U.S. at 264 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)) (internal quotation marks omitted).

<sup>241</sup> *Id.* (quoting *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974)).

<sup>242</sup> *Id.* at 244.

<sup>243</sup> See *infra* notes 251–52.

<sup>244</sup> *Landgraf*, 511 U.S. at 280.

<sup>245</sup> *Id.* at 270.

That was the conclusion reached by the California Supreme Court in *Western Security Bank, N.A. v. Superior Court*.<sup>246</sup> Shortly after that court had granted review, the California Legislature passed legislation for the explicit purpose of “clarify[ing] the law” at issue in the case and overturning the court of appeal’s decision.<sup>247</sup> The California Supreme Court then had to determine whether the new legislation constituted a “substantial change in existing law,” and, if so, whether the Legislature intended the statute to operate retroactively.<sup>248</sup> That court concluded that the legislature’s statement that it intends an amendment to “clarify” an existing law is equivalent to a statement that it intends the amendment to be given retroactive effect.<sup>249</sup>

Arguably, every law explicitly enacted to “clarify” existing law should be applied retroactively, whether or not the court thinks it accurate to describe the amendment as a clarification. Likewise, when a court stays a case and seeks congressional clarification of ambiguous legislation, it would be reasonable to presume that Congress intends its response to apply to that case and other pending cases—that is, to have retroactive effect.<sup>250</sup>

In rare cases, constitutional limits will require that the court disregard even an explicit instruction by Congress to apply a law retroactively. Retroactive legislation may violate due process “if it is particularly harsh and oppressive,”<sup>251</sup> and legislation that purports to free the government from previous contractual commitments is particularly suspect.<sup>252</sup> But the Due Process Clause forecloses retroactive legislation only in the most extreme cases, for as the Court explained in *Landgraf*, “the constitutional impediments to retroactive legislation are now modest.”<sup>253</sup> There are few constitutional hurdles, then, to incorporating Congress’s response to a certified question into the resolution of pending cases.

Furthermore, it would be difficult for congressional clarification of an ambiguous statute to disrupt settled expectations so as to implicate due process or even to raise the fairness concerns that troubled the Court in *Landgraf*. If a statute is so unclear that numerous courts have disagreed as to its meaning and there truly is no way to determine what the original Congress intended, then individuals had no reason to rely on one particular

<sup>246</sup> 933 P.2d 507 (Cal. 1997).

<sup>247</sup> *Id.* at 513 (quoting Stats. 1994, ch. 611, § 6 (Cal.)) (internal quotation marks omitted).

<sup>248</sup> *Id.* at 513.

<sup>249</sup> *Id.* at 514–15 (“Moreover, even if the court does not accept the Legislature’s assurance that an unmistakable change in the law is merely a ‘clarification,’ the declaration of intent may still effectively reflect the Legislature’s purpose to achieve a retrospective change.”).

<sup>250</sup> Congress, of course, could state clearly if it wants to alter that presumption.

<sup>251</sup> *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (internal citations and quotations omitted).

<sup>252</sup> This type of interference with contracts may also offend the Contracts Clause of Article I, § 10. *See, e.g., Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938) (holding that the repealing of legislation that created a contractual relationship between the state and teachers violated Contracts Clause).

<sup>253</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994).

interpretation of the statute over another. Could the plaintiffs in *Exxon Mobil* have been counting on the availability of supplemental jurisdiction when the statute itself was so muddled on that point? Could the school board in *Jackson* have assumed that it could retaliate against the basketball coach without fear that it would violate Title IX, despite the conflicting precedent on that question? It is hard to imagine any individual relying on an understanding of the law that neither the text nor legal precedent clearly supports. In short, if the law is unclear enough to justify certifying a question to Congress, it cannot have created the kind of reliance interests that the presumption against retroactivity seeks to protect.

#### E. Judicial Authority to Abstain

To give Congress a chance to respond, a court certifying a question about the meaning of an ambiguous statute to Congress would need to stay the case in which the question arose for some set period of time—perhaps for no more than six months, with the possibility for extension if Congress appears to be on the verge of taking action. This judicial abstention might be challenged on the ground that courts have no constitutional authority to forgo the exercise of their jurisdiction. Federal courts are obligated to resolve the cases or controversies over which Congress grants them jurisdiction; they are not supposed to evade that task by asking some other government institution to resolve cases for them. Professor Martin Redish made that point in his article challenging the judicial practice of abstaining from deciding difficult questions of state law to allow state courts to resolve the issue first.<sup>254</sup> He argued that courts may not evade their obligation to assume jurisdiction and decide cases simply because, in their view, federalism and comity concerns make remand to state courts the wiser course of action. Yet despite the strength of this criticism, courts continued to abstain under the *Pullman* and *Younger* line of cases—even when it means depriving litigants of the federal forum that Congress intended to provide.<sup>255</sup>

Certifying questions to Congress is no more an evasion of the judicial obligation to hear and decide cases than abstaining to allow state court resolution of questions of state law, and thus no more constitutionally objectionable. By staying its hand, the court is postponing, but not abdicating, the exercise of its jurisdiction. Furthermore, the delay caused by certification to Congress would be considerably shorter than the average six-year delay in cases remanded to state courts for resolution, and would be more

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<sup>254</sup> Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); see also Anthony J. Dennis, *The Illegitimate Foundations of the Younger Abstention Doctrine*, 10 U. BRIDGEPORT L. REV. 311 (1990).

<sup>255</sup> See *Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (stating that federal court may decline jurisdiction “where denying a federal forum would clearly serve an important countervailing interest”); *Can. Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 422 (1932) (“[T]he proposition that a court having jurisdiction must exercise it, is not universally true.”).

akin to that involved in certifying questions to state supreme courts.<sup>256</sup> A six-month to two-year delay seems like a small price to pay to definitively resolve a troubling issue of statutory interpretation. And, of course, if Congress itself were to enact a law permitting courts to send it questions in pending cases, then there could be no complaint that the court's staying of the litigation was in any way an evasion of its congressionally mandated jurisdiction.

#### *F. Conclusion*

The discussion in this Part demonstrates that certifying questions to Congress raises significant separation of powers concerns and could impinge on individual rights protected by other constitutional provisions. Yet the discussion also reveals that these problems occur only at the margins, and that the Constitution does not prohibit all judicial attempts to seek congressional input on pending cases. Accordingly, certification must be structured to comply with constitutional limitations. The guidelines below provide general principles for a certification process that take into account these problems and seek to insulate it from constitutional challenge:

- (1) Referrals must be discretionary: Courts must never be required to refer cases, and Congress must never be required to respond.
- (2) To be given any legal weight, Congress's response must be in the form of legislation enacted in accordance with Article I's bicameralism and presentment requirements.
- (3) Congress must respond through broadly applicable legislation, rather than by enacting a statute that seeks to control the result in only a handful of cases.
- (4) Courts should not certify questions about the meaning of criminal statutes. It is in the area of criminal penalties that constitutional limitations such as the Ex Post Facto Clause, Bill of Attainder Clause, and Due Process Clause provide the clearest, and most needed, limits on Congressional power to legislate for pending cases.
- (5) Congress should specify whether it wants the amended legislation to apply retroactively to pending cases, although courts would probably be safe to assume that Congress intended any response to a referral to be applied retroactively.
- (6) Congress should pass, and the President should sign, a law permitting courts to certify questions to Congress so that when a court re-

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<sup>256</sup> For further discussion of the problems caused by delay, see *infra* notes 288–306.

fers a case all three branches of government will have given the procedure their imprimatur.

If a certification process followed these broad principles, it should pass constitutional muster. Whether adopting such a procedure would be a good policy choice is a harder question to answer, however. Satisfying constitutional minimums is a necessary prerequisite to adopting a certification procedure, but is certainly not sufficient reason on its own to establish a formal structure through which courts ask Congress to weigh in on pending cases. Moreover, even if certification can be shaped to fit within constitutional parameters, it comes close to certain constitutional lines that we might think better to give wide berth. Part V examines these normative questions and draws conclusions about the kinds of cases in which certification would be a useful tool for courts, and those for which the delays and the potential for abuse of the legislative process would outweigh the benefits.

#### V. CERTIFYING QUESTIONS TO CONGRESS: A POLICY ANALYSIS

The constitutional analysis in Part IV suggests that certification is less radical than it might first appear. Yet is it wise? A formal system by which courts seek congressional input would give courts and Congress an opportunity to communicate about the cases in which legislative assistance would be most useful. But when courts stay cases and notify Congress that they are seeking clarifying legislation, they push Congress to take a more active, and possibly troubling, role in pending cases. If we are concerned that Congress may act irresponsibly when faced with an unpopular litigant, or that Congress may not enact its best legislation in the shadow of the facts of specific cases, then we may question whether Congress should be given this opportunity. Alternatively, judicial certification to Congress could be criticized as entirely unnecessary. Considering that Congress already has the power to amend legislation at issue in pending cases, what would a formal certification process accomplish?

This Part first discusses in greater detail the policy arguments for and against establishing a procedure by which courts send questions to Congress, using the three recent Supreme Court cases discussed in Part II—*Jackson v. Birmingham Board of Education*, *Exxon Mobil v. Allapattah Services*, and *Clark v. Martinez*—to illustrate the possibilities and pitfalls of sending questions about statutory meaning to Congress. This Part then addresses the very real possibility that Congress would often not respond to a court's request for clarification of legislative meaning. Congressional silence need not be viewed as a failure of the certification process, however, because Congress's refusal to clarify legislation can be understood as an implicit delegation to courts of the lawmaking authority that they otherwise lack. If courts ask for Congress's input and receive no answer, they can then legitimately engage in lawmaking that they should otherwise avoid. Indeed, this is one way in which certification changes the relationship be-

tween courts and Congress; although today Congress has the authority to amend legislation under judicial review, its failure to do so does not carry with it the delegation of lawmaking authority that is implied when Congress fails to respond to a certified question. This Part concludes by identifying the types of hard cases in which judicial referrals would assist judges grappling with the meaning of ambiguous statutes.

#### A. *The Benefits of Certifying Questions to Congress*

1. *Making the Best Use of Courts' and Congress's Institutional Competences.*—Judicial referrals of ambiguous statutes to Congress would free courts from filling gaps and reconciling inconsistencies in statutory language—functions that the judiciary is comparatively less well-situated to perform than Congress. Congress has the staff and the resources to investigate problems that need legislative fixes, and then to deliberate about the best policy to be enacted into law. Members of Congress represent constituencies with whom they remain in close contact, and thus have a view of the interests and problems of those they represent. Judges, on the other hand, cannot investigate policy choices because they do not have the resources or authority to conduct hearings, nor do they have a constituency to consult or to whom they are accountable. To the contrary, the defining characteristics of the federal judiciary are that its members have life tenure and salary protections that enable them to protect individual rights and apply laws fairly and consistently to all members of the population, even when doing so is politically unpopular. For all these reasons, Congress is the better institution to draft laws, and the judiciary is the better institution to apply them.<sup>257</sup>

Yet when Congress enacts statutes that are unclear, or contain gaps or inconsistencies, then courts are required to get into the business of making, rather than interpreting, the law.<sup>258</sup> For example, when the Supreme Court decides that Title IX creates a cause of action for retaliation (as it did in *Jackson*), or construes 28 U.S.C. § 1367 as expanding federal jurisdiction (as it did in *Exxon Mobil*), or determines how long deportable aliens may be detained (as it did in *Zadvydas* and *Clark*), it is acting more like a legislature than a court. Courts are less equipped to enact policy decisions than Congress because they lack all the resources and information that Congress has at its disposal. These cases force courts to go beyond interpretation, a task for which they are well suited, and engage in lawmaking, a task for which they are not.

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<sup>257</sup> See MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 29–46 (Carolina Academic Press 1991).

<sup>258</sup> The line between judicial lawmaking and statutory interpretation is not always clear, of course, and so determining whether a judicial decision has gone beyond law-interpretation to law-creation is usually a matter of debate. See Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 *NOTRE DAME L. REV.* 1891, 1901 n.61 (2004).

Furthermore, Courts are accused of judicial activism when they make these sorts of substantive policy decisions because their critics fail to recognize that when statutes leave important questions unanswered—as did Title IX, 28 U.S.C. § 1367, and the Immigration and Nationality Act—courts have to reach *some* conclusion about how the statute should be applied, and any decision forces courts into the position of legislating rather than interpreting. In other words, judges cannot avoid being activists when faced with ambiguous statutes that must be applied to the case at hand. Instead of being criticized for making these hard decisions, courts should be given the alternative of referring questions of statutory ambiguity back to Congress so that Congress can assume the lawmaking responsibility for which it, and not the judiciary, is best suited.

2. *Promoting Transparency.*—Certifying questions to Congress provides a more straightforward method of dealing with statutory ambiguity than the interpretive theories and canons of construction that courts normally employ. The latter techniques simply cannot resolve every statutory interpretation problem.<sup>259</sup> As discussed in Part II, there are times when Congress has not foreseen the situation presented to the court, or perhaps has deliberately chosen to leave an issue unclear, and thus neither the statutory text nor the legislative history can guide the court's construction. In such cases, courts generally make up an answer in the guise of “interpreting” the statute, often bending or breaking traditional interpretive tools to do so.<sup>260</sup> On other occasions, courts will misuse these techniques to avoid constitutionally troubling or obviously unfair outcomes. Judges may succeed in convincing most casual observers that Congress, rather than the judge, has enacted a law that the judge is merely “interpreting”—a judicial deception that arguably undermines the democratic process.<sup>261</sup> Those who recognize that judges are making law, however, accuse the judiciary of imposing their own policy preferences while purporting to interpret statutes, which undermines the legitimacy of all judicial decisionmaking.<sup>262</sup> As a result, even those who approve of the results in such cases contend that courts are perverting important tools of statutory construction by suggesting that the meanings they arrive at are compelled by these interpretive techniques.

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<sup>259</sup> See, e.g., Maggs, *supra* note 9, at 137 (“Statutory interpretation, however, can only do so much. Once an ambiguity enters a statute, a court may never resolve it perfectly. Lawyers argue about many issues not because they disagree about how to interpret statutes in general, but because, at bottom, the issues have no clear answer under any method of interpretation.”).

<sup>260</sup> See *supra* notes 67–107 and accompanying text.

<sup>261</sup> See, e.g., Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 116–18 (arguing that Federal Rule of Civil Procedure 23 creates new substantive rights while purporting to operate as a transsubstantive procedural mechanism).

<sup>262</sup> See *supra* note 80 and accompanying text.

By sending an ambiguous statute to Congress for clarification, a court is declaring that it can find no answer to the question in the case before it through traditional hermeneutic inquiries and that it thinks the issue is better addressed in the first instance by the political branches. As a result, the canons of statutory construction and other interpretive techniques will not be devalued by being pressed into use in such cases, and the court will be more honest with itself, the parties, the public, and Congress if it concedes the impossibility of the interpretive task and asks Congress for assistance.

In *Jackson*, *Exxon Mobil*, and *Clark*, the majority and dissent reached the opposite conclusions about the meaning of the statutes at issue after engaging in a careful parsing of the text, examination of legislative history, and application of interpretive theories and canons of construction.<sup>263</sup> A review of those decisions leaves the reader unconvinced that there was any answer to be found using those sources. A more honest approach would have been for the Court to throw up its hands, declare the impossibility of the task, and seek congressional assistance.

Moreover, the possibility of judicial certification may keep Congress more honest and transparent when enacting legislation. Legislators sometimes consciously choose ambiguity to mask their goals, or to be able to claim to constituents that they accomplished something they did not, or to build majority support for legislation that would otherwise fail to be enacted into law.<sup>264</sup> When courts are honest about ambiguity, they identify that the problem is the legislature's drafting of the original statute, rather than judicial failure to find and apply politically neutral and effective techniques of statutory interpretation. By bringing the problem back to Congress's attention, legislators will either have to face up to the hard choices required of them, or, through silence, concede that they are unwilling to make legislation clear. In addition, the potential for referrals back to Congress may inspire the legislature to be clearer in the first instance—in part, because referrals will draw their attention to drafting problems they will seek to avoid in the future, and in part because the enacting Congress would rather retain control of the statute's meaning than cede that task to whichever future Congress receives the referral.

3. *Promoting Democracy.*—Certifying questions about statutory meaning to Congress is more consistent with democratic ideals than the current practice, which transforms judges into legislators whenever Congress enacts ambiguous statutes. Instead of an unelected judge simply drafting

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<sup>263</sup> See *supra* notes 69–107 and accompanying text.

<sup>264</sup> Grundfest & Pritchard, *supra* note 23; Maggs, *supra* note 9, at 132 (“To avoid controversy, for instance, lawmakers may choose to leave key issues unresolved in hopes that the judiciary will supply an answer and absorb the political consequences.”); FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 90 (1990) (“Some statutory ambiguities are, of course, intentional, required by the realities of the legislative process.”).

the missing language or altering the meaning of words to undo an absurdity or inconsistency, elected members of Congress get to take the first shot at clarifying statutory meaning.

Although Congress now has the option of overriding judicial interpretations that it does not like—and, as Eskridge demonstrated,<sup>265</sup> Congress sometimes chooses that path—legislative overrides are not a fail-safe method for ensuring that elected branches have the last say about a law's meaning. Without the time pressure involved in the certification process, Congress might not be able to overcome the legislative inertia that often-times prevents it from acting. Moreover, Congress might not be able to override a judicial interpretation even when that interpretation is contrary to the original intent of the enacting legislators *and* is disliked by the majority of current legislators. As scholars of the legislative process have explained, judicial decisions are hard to reverse because if even a small proportion of the original legislative coalition prefers the court's reading of the statute to the legislative agreement, and if those lost votes cannot be replaced with legislators who were originally opposed to the statute, then the judicial ruling will stand.<sup>266</sup> Furthermore, the court's opinion declaring the meaning of the statute will change the default position and create new stakeholders who are happy with the court's view of the law, inhibiting the legislature's ability to enact a statute to reestablish the original understanding of the legislation.

In contrast, when a court certifies questions about statutory meaning to Congress, it encourages Congress to legislate before the court issues an opinion (and enables Congress to do so by staying the case), leading to statutes that are drafted as a majority of elected members of Congress prefer rather than as unelected judges choose to interpret them. Members of Congress will be inspired to amend the statute at issue, knowing that otherwise the court will be forced to decide the question for it. Because legislators cannot be certain how a court would decide the case without their assistance, they will be able to enact clarifying legislation free from a judicial interpretation that skews legislative coalitions.

Certifying questions to Congress accomplishes many of the same goals lauded by dynamic statutory theorists, who recommend interpreting ambiguous statutes in light of current congressional preferences and social norms rather than looking backward to glean the intent of the enacting legislature.<sup>267</sup> Critics of this school of interpretive thought claim that it poses an impossible task—how are judges supposed to determine the preferences

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<sup>265</sup> Eskridge, *Overriding*, *supra* note 58.

<sup>266</sup> Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and Political Control of Agencies*, 75 VA. L. REV. 431, 437–45 (1989) (explaining that “ex post reestablishment of a coalitional agreement, after a judicial opinion has upset the status quo, is likely to be difficult”).

<sup>267</sup> See *supra* notes 57–60 and accompanying text.

of legislators, the general public, or both?—and so they suggest that dynamic theorists are really just empowering judges to craft new legislation in accord with their own policy preferences.<sup>268</sup> Certifying questions to Congress realizes the dynamic theorists' goals, but does so in a way that should satisfy these critics. Courts would no longer be trying to guess at current legislative preferences, but instead would be asking for a clear statement from the current Congress about how the interpretive problem should be resolved. If Congress does not respond, however, then courts have a new-found freedom through the implied delegation of legislative power to engage in lawmaking that would otherwise be Congress's prerogative.<sup>269</sup>

4. *Improving Inter-Branch Communication.*—Referrals would provide a new avenue of communication between courts and Congress, and would do so in a manner likely to draw congressional attention to problem statutes and generate legislation to resolve those problems.

Judges, members of Congress, and academics all agree that the judiciary and Congress do not communicate well. As Judge James L. Buckley of the D.C. Circuit commented: “It is self-evident that these two institutions will impact on one another in a dozen different ways. Yet, for whatever strange reason, each institution tends to be miserably unacquainted with the problems faced by the other.”<sup>270</sup> Judge Frank M. Coffin, when serving as Chair of the U.S. Judicial Conference Committee on the Judicial Branch, observed that “[t]he judiciary and Congress not only do not communicate with each other on their most basic concerns; they do not know how they may properly do so.”<sup>271</sup> Studies reveal that neither members of Congress nor their staffs are cognizant of the great majority of judicial decisions addressing legislation within the jurisdiction of their committees.<sup>272</sup>

In the mid-1980s, Robert Katzmann—now a Second Circuit Judge, but at that time head of a non-profit organization engaged in examining relations between Congress and the Judiciary—began studying the interaction between the D.C. Circuit and Congress, focusing on how Congress responded to D.C. Circuit opinions discussing problems with statutory language.<sup>273</sup> He examined twenty cases in which the D.C. Circuit had issued opinions that commented on a statutory gap, ambiguous language, a gram-

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<sup>268</sup> See *supra* notes 61–62 and accompanying text.

<sup>269</sup> See discussion *infra* Part V.B.4.

<sup>270</sup> James L. Buckley, *Remarks at the Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit*, 124 F.R.D. 241, 313 (May 22–24, 1988).

<sup>271</sup> Frank M. Coffin, *The Federalist Number 86: On Relations Between the Judiciary and Congress*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 21, 22 (Robert A. Katzmann ed., 1988).

<sup>272</sup> See, e.g., Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge of Positive Political Theory*, 80 GEO. L.J. 653 (1992) [hereinafter Katzmann, *Bridging the Statutory Gulf*].

<sup>273</sup> *Id.* at 656–57.

matical problem, or invited Congress to deal with a substantive issue in the legislation. He then contacted staff members at the relevant House committees and discovered that in most cases the congressional staffs were unaware of the court's decisions.<sup>274</sup> Yet there is general agreement that Congress would craft better statutes if judicial decisions addressing legislative problems were brought to staff members' attention. Indeed, every staffer interviewed by Katzmann thought that they should be aware of these judicial decisions so that they could consider whether statutory revisions were necessary.<sup>275</sup>

Certifying questions to Congress in pending cases is likely to capture Congress's attention and spur Congress to take immediate action to resolve statutory ambiguity before a court issues a definitive decision on the issue. As discussed in Part III, Congress already has the authority to amend statutory language whenever it feels it necessary to do so, yet Congress only rarely uses its power to assist courts with statutory ambiguity.<sup>276</sup> No mechanism currently exists to draw Congress's attention to judicial confusion about statutory meaning and at the same time push Congress to take action quickly. Certification could accomplish those goals. If the Supreme Court grants a petition for writ of certiorari and then stays the case to seek Congress's assistance with the statutory question, members of Congress and their staffs will be alerted to the statutory problem and will know that if they do not address it immediately, the Court will answer the question—perhaps in ways that Congress does not prefer and yet that will be difficult to override. The added publicity and time pressure that accompanies certification should provide the catalyst for congressional action that is lacking from a Supreme Court decision to grant review alone.

Professor Elhauge has suggested that the granting of a petition for writ of certiorari can be viewed as the “certification” of a question to Congress.<sup>277</sup> In theory, the certiorari grant alone might inspire Congress to address the issue before the Court does and, as discussed in Part III, on occasion Congress has taken action to preempt a Supreme Court decision. But it is difficult for Congress to enact legislation within the short period between the grant of certiorari and the issuance of a decision, and the new stakeholders created after a decision is issued may make a congressional override impossible.<sup>278</sup> Moreover, it simply may not occur to members of

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<sup>274</sup> *Id.* at 662.

<sup>275</sup> *Id.* at 662–63. Katzmann also suggested that courts should be more cognizant of congressional activity relevant to the cases before them. Katzmann described a situation in which both the courts and Congress were addressing the same issue at the same time without realizing it. *Id.* at 664. As Katzmann concluded, “both branches would benefit from having some knowledge of each other’s thinking on matters of such obviously mutual interest.” *Id.* at 664–65.

<sup>276</sup> See Lindquist & Yalof, *supra* note 136, at 68 (noting that Congress often tries to amend legislation causing circuit splits, but fails to enact proposed bills into law).

<sup>277</sup> Elhauge, *Preference-Eliciting*, *supra* note 9, at 2180–81.

<sup>278</sup> See *supra* notes 265–66 and accompanying text.

Congress that they can and should take action at the very moment when another branch of government appears to have taken on the task of resolving the problem. Establishing a formal certification process would alter the presumption that the judiciary, and not the legislature, will resolve questions about statutory meaning at issue in pending litigation.

Even if Congress never responds to the judicial query, some members of Congress and their staffs will be put on notice that a piece of legislation is posing interpretive challenges. The communication from the court will provide useful information to Congress about the issues courts grapple with in interpreting and applying legislation, and may improve legislative drafting as a result. At the very least, then, referrals will make Congress aware of the problem of statutory gaps or ambiguities, enabling Congress to avoid repeating those drafting errors in future legislation.<sup>279</sup>

Suppose, for example, that rather than issuing an opinion in *Jackson*, the Supreme Court instead asked Congress to clarify whether Title IX contained a cause of action for retaliation. Once the problem was brought to Congress's attention, it is possible that Congress could act quickly to establish whether such a claim existed, putting to rest the dispute that had split the circuits. Moreover, courts frequently face questions about the content and scope of private rights of action in federal statutes. Even if Congress did not resolve the question in *Jackson*, the certification might alert Congress to the need to clarify these questions in future legislation.

5. *Reducing Inter-Branch Conflict.*—Referring questions of statutory ambiguity to Congress has the potential to reduce inter-branch conflict. Courts are more easily accused of “legislating from the bench” when they are filling gaps or finding meaning where, in truth, none exists.<sup>280</sup> Members of Congress are more likely to criticize courts when they see judges interpreting ambiguous statutes in ways that they would not.<sup>281</sup> The tension between the judicial and legislative branches is at its zenith when a court concludes that a statute is unconstitutional and strikes it down.

Some of these problems could be avoided if Congress clarified ambiguous statutes in response to certified questions from courts, thereby obviating the need for courts to engage in quasi-legislative activity. The more important the question of statutory meaning, the more likely Congress is to take up the question and resolve it for the court. Consequently, divisive questions of statutory meaning—such as whether Congress intended to create an implied private right of action or to allow for the indefinite detention

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<sup>279</sup> In this respect, referrals provide the same sort of notice as Katzmann's program—except perhaps in a manner that is likely to generate more legislative interest at the outset.

<sup>280</sup> Maggs, *supra* note 9, at 129 (“[W]hen courts make rules in the absence—or perceived absence—of delegated authority, they may find themselves in the midst of controversy for ‘legislating from the bench.’”).

<sup>281</sup> See, e.g., Nagle, *supra* note 1, at 1278 n.38 (1996).

of deportable aliens—would no longer be subjects that the judiciary is forced to decide on its own.

Admittedly, courts might send questions to Congress that are so controversial that Congress would prefer to punt the issue back to the judicial branch. For example, members of Congress might not want to make a decision about whether a retaliation claim can be brought under Title IX or the length of time an alien can be detained under the Immigration and Nationality Act out of fear of alienating some part of their constituencies. Conversely, some referrals might concern minor or technical questions of statutory meaning—such as the complex applications of supplemental jurisdiction—that Congress simply does not have the time to address. But even when Congress does not respond to a judicial inquiry, courts will forestall some criticism by first seeking congressional input. If a court asked Congress to resolve the issue and Congress never responded, then the court cannot be blamed for filling in gaps or assigning meaning to unclear language that Congress failed to fix. By making a good faith effort to obtain a resolution of the problem through the political branches, the court will deflect some of the accusations of activism.

Referrals to Congress would be particularly helpful in avoiding the inter-branch conflict that arises whenever the judiciary confronts an ambiguous statute raising constitutional concerns. Because the court is being asked to strike down legislation enacted by a co-equal branch of government, these cases pit the judicial and legislative branches against one another. The courts' current method of dealing with this problem is to construe the language to avoid the constitutional question<sup>282</sup>—a practice to which Alexander Bickel referred as one of the “passive virtues” that encourages Congress to give a “second look” to problem legislation.<sup>283</sup> Only when Congress makes crystal clear its intent to push the constitutional limits will courts have to address the question whether the statute is unconstitutional, and perhaps take the ultimate step of striking down the legislation. In other words, courts use this interpretative technique as a method of side-stepping a clash with Congress.

Yet, as was discussed in Part II, the constitutional avoidance doctrine itself has been criticized as an example of judicial overreaching.<sup>284</sup> Commentators question whether courts have the right to refuse to apply statutes as they can most logically be read without definitively deciding whether that construction would be unconstitutional. By purposely skewing the meaning of statutes without first addressing whether the more straightforward reading is unconstitutional, critics contend that courts are essentially

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<sup>282</sup> *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936).

<sup>283</sup> Alexander M. Bickel, *The Supreme Court 1960 Term Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

<sup>284</sup> See *supra* note 56 and accompanying text.

rewriting laws even when the Constitution might not require it—something that courts have no authority to do.<sup>285</sup>

Sending questions about statutory meaning to Congress is a better method of addressing ambiguous statutes that push constitutional limits. These certified questions would give Congress the opportunity to decide whether it wishes to tread near constitutional lines *before* the court rewrites the statute.<sup>286</sup> Because this is the goal, the Court should explain to Congress that one interpretation of the statute may violate the Constitution so that Congress is alert to the problem. Hopefully, Congress will then amend the statute to avoid the constitutional problems that concern the court, thereby circumventing a constitutional showdown.

As a result, courts would not have to distort the meaning of statutes to avoid a constitutional problem that they might eventually conclude did not exist in any case. For its part, Congress, not the courts, should be responsible for “clarifying” (or altering) statutes to avoid constitutional issues—certifying questions about the meaning of ambiguous and constitutionally-suspect statutes to Congress allows Congress to take on that role.<sup>287</sup>

Were certification available, the Court could have granted the petition in *Clark v. Martinez*—or, even better, in its precursor *Zadvydas v. Davis*—

<sup>285</sup> See *supra* note 56 and accompanying text.

<sup>286</sup> Again, parallels can be drawn to the doctrines of certification and abstention to resolve hard questions of state law; avoiding constitutional questions is one of the primary purposes of *Pullman* abstention. See *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) (abstention permits court to “avoid . . . the friction of a premature constitutional adjudication”); *Propper v. Clark*, 337 U.S. 472, 490 (1949).

<sup>287</sup> In a recent article on the Warren Court’s use of constitutional avoidance, Professor Frickey noted that the doctrine can be an effective way of avoiding a showdown with a political branch of government during times of national crisis. Frickey explained his view of the important role the avoidance canon played in keeping the country close to its constitutional values while evading a direct conflict with a public and a Congress that did not give the same priority to those values:

By generally deciding these cases at the subconstitutional level through the rules of avoidance, the Court used techniques that might defuse political opposition while incrementally adjusting public law to better respect individual liberty. Employing avoidance also shifted the burden of overcoming legislative inertia to those opposing the Court’s understanding of public values. The canons allowed a divided and besieged set of Justices to avoid the sharpest confrontations with Congress and each other so as to preserve the Court’s stature and integrity. They also gave the Court time for the political furor to subside, for First Amendment and due process values to reemerge in the general consciousness, and for Congress, and, indeed, the Court, to change composition and move past a crisis.

See Frickey, *Getting from Joe to Gene*, *supra* note 56, at 401.

Admittedly, the availability of certification might make it harder for the Court to play such a role in the future—but only slightly. As discussed above, certification could never be mandatory, so a court would always be free to simply decide the case rather than send questions about statutory meaning to a Congress that it believes would ignore constitutional norms. Of course, if certification were available, then the court might be criticized for not sending the question to Congress for a legislative resolution. But the end result would still be the same: the court would have “shifted the burden of overcoming legislative inertia” to those opposing the court’s understanding of public values.” Thus, a court that has become concerned by the political branches’ overreaction to a national security threat could continue to protect constitutional values despite the availability of certification.

and then stayed the case and asked Congress to establish a clear limit on the length of time that aliens could be detained. Certification would have allowed the Court to avoid the constitutional problem created by a statute that appeared to permit indefinite detention. The judicial query would have notified Congress of the ambiguity in the statute and at the same time alerted Congress to the Court's constitutional concerns. Congress might have reacted by enacting legislation that clearly stated the permissible length of detention in most cases, clarified whether that period applied to admitted and inadmissible aliens alike, and provided grounds for extending detention under certain extraordinary circumstances. Alternatively, if Congress had responded with legislation clearly permitting indefinite detention, then the Court could have squarely addressed the constitutional question presented by the statute.

### B. *The Costs of Certifying Questions to Congress*

Certification does not come without costs. Certification will cause delays. It may politicize the judicial process. It may produce ill-considered and hastily drafted legislation, or legislation driven by base majority preferences or the desire to please narrow interest groups. For these reasons, I advocate that only the Supreme Court, and possibly also circuit courts acting en banc, be given the authority to certify questions to Congress, and that these courts use this tool only in cases of truly intractable statutory ambiguity where it appears that Congress will do a better job of legislating a solution than a court.<sup>288</sup>

1. *Delay.*—Without question, certification to Congress will delay resolution of cases in which the procedure is used. If Congress does not respond to the referral, then the delay will be minimal; a court should not halt the case for any longer than six months without some indication that Congress intends to clarify the legislative ambiguity. If a bill to amend the statute is proposed and starts working its way through the committee process, however, then the delay could end up being two years or more to allow for the kind of deliberation the legislative process often demands.<sup>289</sup> This addi-

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<sup>288</sup> As mentioned previously, Congress could also create a specialized court to make certification decisions. See *supra* note 12. The benefits of doing so would be that such a court might have more time and a better perspective with which to make the decision as to whether to certify the statute to Congress for a legislative fix. And a specialized court would more quickly gain some expertise in determining which questions of statutory construction were best suited for certification. But there are drawbacks to such a proposal as well. The creation of a specialized court would disrupt the normal operation of the judiciary and perhaps lead to larger numbers of referrals than would otherwise occur.

<sup>289</sup> Congress is capable of responding to a court's referral in a reasonable period of time. Even without the pressure of a pending case to resolve, "Congress tends to respond to appeals court statutory decisions with alacrity." Lindquist & Yalof, *supra* note 136, at 65. Lindquist and Yalof's study determined that almost 50% of all congressional initiatives to override statutory decisions were reported out of committee within two years of the court's decision. *Id.* Certainly, two years is a significant amount of time, but it is far less than the average six-year wait that accompanies the process of abstaining while

tional time is significant and rightfully a reason for courts not to certify questions lightly.

But delay is not a reason to reject judicial referrals to Congress out of hand. The use of abstention and certification to seek state-court views on state law also slows down the judicial process—in the case of abstention, by an average of six years<sup>290</sup>—and yet the consensus is that the benefit of obtaining state-court input justifies the added time it takes to decide the case.<sup>291</sup> The delay is considered worthwhile because these procedural devices give the ultimate, authoritative decision-maker the first chance to answer hard questions about statutory meaning—potentially even saving time in the long run by avoiding the need for a state court to override a federal court’s decision about state law. For the same reasons, the delay caused by referring questions of statutory ambiguity to Congress is justified. Better to have Congress make clear how it wants the statute to be applied than leave a federal court to guess at the meaning in an unclear text, and then be overridden by a dissatisfied Congress.

Even though a referral to Congress postpones the resolution of a single case, referrals have the potential to increase the overall speed of judicial decisionmaking. The referral may inspire Congress to enact a clarifying amendment much earlier than it would have if left to address the issue on its own timetable. In law, certainty and finality are beneficial.<sup>292</sup> The sooner Congress clarifies an unclear statute, the more quickly and easily courts can resolve all current and future cases concerning that issue. Indeed, some cases will never be filed simply because there is no longer any debate about what the law means.<sup>293</sup> Imagine, for example, that the Supreme Court or one of the courts of appeals had certified a question to Congress about the meaning of 28 U.S.C. § 1367 soon after the issue began to perplex the courts. If Congress had responded, it could have prevented more than a decade of litigation. Even though certification would have delayed resolution of an individual case, an early response by Congress would have saved many future litigants a lot of time.

Finally, Congress can minimize its response time to referrals about the most basic type of scrivener’s errors and similarly uncontroversial clarifications to statutory text. Congress can expedite the enactment of corrective legislation through procedures such as suspension of the rules or proceeding

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the parties wind their way through the state court systems. In any case, one hopes that Congress could and would act more quickly when a court has stayed a pending case for the purpose of obtaining legislative clarification.

<sup>290</sup> FALLON, HART & WECHSLER’S, *supra* note 114, at 1198.

<sup>291</sup> *Id.* at 1200–02.

<sup>292</sup> *Cf.* Friendly, *supra* note 1, at 793 n.39 (noting that legislative amendments might prove troublesome in pending cases, but concluding that “the need for ending the uncertainty for the future normally transcends the possibility of adverse decision of cases arising in the interim”).

<sup>293</sup> Ginsburg & Huber, *supra* note 1, at 1420 (“Because statutes sorely in need of more definite statements are susceptible of diverse interpretations, they inspire litigation.”).

under unanimous consent.<sup>294</sup> Even without those special procedures, one long-time judicial staff member explained that “when most everyone [in Congress] agrees to do something, legislation can be passed in a matter of days.”<sup>295</sup>

Because delays are a legitimate concern, however, only a limited number of courts should have the power to certify questions to Congress, and they should use that power only when presented with truly inscrutable statutes. Questions about statutory meaning should not be sent to Congress unless there has been significant judicial disagreement over the text at issue culminating in the kind of deep circuit split that the Supreme Court itself requires before it will hear most cases.<sup>296</sup> I recommend that the authority to certify questions to Congress be limited to the Supreme Court and perhaps also circuit courts acting en banc. A single district court, or even a single panel of three appellate judges, should not have the power to defer the resolution of disputes for the purpose of seeking congressional input. With such limits in place, certification should be an infrequent occurrence, and should arise only in the kinds of cases presenting intractable problems of statutory interpretation in which the benefits of certification outweigh the costs.

2. *Politicizing the Judicial Process.*—As previously discussed, certifying questions about statutory meaning to Congress promotes democracy by providing an additional opportunity for the members of the elected, politically-accountable branches of government to be clear about the meaning of the laws they enact.<sup>297</sup> The other side of the coin is that transferring issues in pending cases to the halls of Congress will politicize the judicial process. At least in theory—though admittedly not always in practice—courts are the one forum in which the political power of the parties is irrelevant. But if a case is referred to the political branches for resolution, then the relative political power of the parties comes back into play.<sup>298</sup> One can reasonably suspect that if a question of statutory ambiguity is sent to Con-

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<sup>294</sup> Nagle, *supra* note 1, at 1281.

<sup>295</sup> Interview with Robert Schiff, Chief Counsel for Senator Russ Feingold. Schiff cited as an example Congressional legislation giving the Federal Trade Commission (“FTC”) the authority to issue the Do Not Call list, which passed within five days of the District Court for the Western District of Oklahoma’s decision concluding that the FTC did not have the power to issue and enforce a Do Not Call list. See An Act to Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry, Pub. L. No. 108-82, § 1(a), 117 Stat. 1006 (2003) (enacted on September 29, 2003, five days after the decision in *U.S. Sec. v. Fed. Trade Comm’n*, 282 F. Supp. 2d 1285 (W.D. Okla. 2003)).

<sup>296</sup> Were certification put into practice, courts could adopt rules for certification similar to those that govern certiorari grants or rehearings en banc. See SUP. CT. R. 10 (listing grounds for granting a petition for writ of certiorari); FED. R. APP. P. 35 (listing grounds for granting rehearings en banc).

<sup>297</sup> See *supra* notes 265–69 and accompanying text.

<sup>298</sup> Maria Gabriela Bianchini, *The Tobacco Agreement that Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, 87 CAL. L. REV. 703, 706 (1999) (noting that defendants in mass tort litigation have vastly greater wealth and political power than the injured class members and that defendants may use this advantage to lobby for legislation that will free them from liability).

gress, the party with the most money, connections, and influence will be more likely to persuade Congress to “clarify” the ambiguous statute in a way that favors that party and their interests.

A partial response to this criticism is that certification does not create a new problem. Congress already can alter legislation to change the outcome of pending cases, and, as a result, Congress is already lobbied by those who fear they might lose in court.<sup>299</sup> Admittedly, an established process by which courts send questions to Congress would give Congress more notice, opportunity, and incentive to take action, and so it would likely increase the parties’ opportunities to apply political pressure to obtain the legislation that will allow them to win their case. But these are not grounds for criticizing certification per se, but rather are problems that infuse the process of democratic decisionmaking. Certification is a more democratic way of resolving statutory ambiguity, and thus it will be accompanied by all the downsides of the democratic process, including lobbying by special interests.<sup>300</sup>

Indeed, certification could be considered a fairer method of notifying Congress about problem legislation than the system we have now. Without referrals to Congress, a politically powerful losing party has the incentive and ability to get Congress to amend the legislation at issue, but losing parties without political influence will very likely be unable to do so.<sup>301</sup> In his study of the factors leading to congressional overrides of judicial decisions, Eskridge discovered that politically powerful losers in court are more likely to persuade Congress to override Supreme Court decisions than those who lack access and clout.<sup>302</sup> Judicial referrals give Congress notice and an opportunity to take action when a *court* decides that congressional input would be helpful, and not just when one party has the political muscle to bring the issue to Congress’s attention.

Moreover, a closer look at the relative political power of the parties in *Jackson* provides some reassurance, because this case demonstrates that even a single plaintiff will be able to call upon influential allies should the need to lobby Congress arise. Although the case was brought by a single, relatively powerless plaintiff against an institutional defendant, the plaintiff had plenty of *amici* supporting him who could be expected to join in the

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<sup>299</sup> See, e.g., Bianchini, *supra* note 298, at 746 (attorneys general and tobacco companies sought congressional approval for a settlement that they thought might not be approved by the courts); *Havana Club Holding S.A. v. Galleon, S.A.*, 62 F. Supp. 2d 1085, 1091, 1095 (S.D.N.Y. 1999).

<sup>300</sup> Moreover, because the wealthier party can afford the better attorney and can wage a “war of attrition,” the judicial process is not necessarily any fairer to the poor litigant than is the political process. See Bianchini, *supra* note 298, at 710–11 (describing tobacco companies’ litigation tactics).

<sup>301</sup> Cf. Nagle, *supra* note 1, at 1307 (making the same point in response to criticism that Corrections Day might allow special interests to take advantage of an expedited process of enacting legislation).

<sup>302</sup> ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 5, at 153.

lobbying effort should there need to be one.<sup>303</sup> Nor was the defendant school board so powerful and connected as to suggest that they would inevitably win the day in the halls of Congress—especially considering that the United States supported the plaintiff. *Clark*, however, poses a more worrisome problem, since it pitted an illegal alien against the executive branch of the United States. The executive always has the inside track in Congress, and particularly when the President’s party also controls both Houses of Congress, as was the case when *Clark* was decided. We might fear the power of the executive in a case like *Clark* to push through Congress a “clarification” that favors executive power at the expense of the individual litigant—particularly when the litigant is a politically powerless alien.

Courts should therefore be circumspect about the cases they refer to Congress. If they believe that one party has much greater political clout than its opponent, they should hesitate to send the question about statutory meaning to Congress out of fear that Congress will attempt to control the outcome in the particular case rather than legislate for the general public good. If the court is concerned that one party will out-lobby the other, or that Congress will be tempted to reward or punish the individual litigants in the case before the court, then the court should choose not to certify the question in that case. In addition, courts should police the congressional response to a certified question to ensure that Congress has not sought to take over the judicial function by controlling results in specific cases. As stated in Part IV, Congress must legislate so as to affect more than just the case before the court, which means that Congress should take into account the broader public interest rather than just the interests of the parties in the pending litigation. To ensure this result, courts must be vigilant in preventing Congress from encroaching on judicial territory by attempting to control the outcome of a pending case without effecting a change in the underlying legal standards.

3. *Undermining Legislative Coherence and Consistency.*—Judges are valued for their role as guardians of the law’s continuity and coherence. Judges integrate statutes into the greater fabric of the law and stabilize statutory meaning through binding precedent and the doctrine of stare decisis.<sup>304</sup> A practice of certifying questions to Congress might undermine these judicial attributes by giving Congress greater opportunity to alter statutory meaning or, should Congress fail to respond when courts certify

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<sup>303</sup> The *amici curiae* filing briefs in support of Jackson included the National Partnership for Women and Families (whose brief was joined by thirty-one other organizations and individuals), the American Bar Association, the United States, New York Lawyers for the Public Interest (whose brief was joined by the Southern Poverty Law Center and the Training and Advocacy Center of the National Association of Protection and Advocacy), former Senator Birch Bayh, the Leadership Conference on Civil Rights, and the Women’s Sports Foundation.

<sup>304</sup> See generally Tyler, *supra* note 6 (describing the benefits of statutory continuity).

questions, by permitting courts to engage in creative lawmaking that undermines the laws' consistency and coherence. Dynamic theories of statutory interpretation have been criticized for interfering with the development of consistent and coherent interpretation,<sup>305</sup> and a certification process could similarly be criticized for disrupting settled expectations about the law.

The values of continuity and consistency in statutory interpretation are at their least compelling in cases appropriate for certification, however. Only the truly intractable questions of statutory ambiguity should be sent to Congress; that is, only the questions for which reference to statutory structure, purpose, and history can provide no answer. In those kinds of cases, courts reach different results about statutory meaning, and litigants and experts in the field have no clear conception of what the law means or how it applies. Litigants cannot claim to have relied on amorphous statutory language for which courts had not adopted a consistent interpretation. For example, the defendant school district in *Jackson* could not have been certain that Title IX did not encompass a private right of action for retaliation in light of the circuit split on that question. Nor could the defendants in *Exxon Mobil* have counted on a finding of no jurisdiction considering that 28 U.S.C. § 1367 is so far from clear. Judges should resort to certification only when there is no stable, consistent legal interpretation to adhere to, and when appellate courts have failed to build a coherent understanding of how the statutory provision at issue can be interpreted so as to be situated within a larger body of law.

Admittedly, Congress may choose to respond to the certification by amending the law in ways that break from the spirit of the original, disrupting settled expectations. But this change in course cannot be criticized as a failure of continuity in the same way that one might criticize a *court* were it to overturn precedent and adopt a new interpretation of statutory meaning. To state the obvious, statutes should be construed consistently only if the statutory language remains unchanged; once Congress amends a statute, any benefit of consistency is immediately outweighed by the value of adhering to currently-expressed preferences of the political branches.

4. *Congress's Failure to Respond.*—If a certification procedure were established, Congress might ignore certified questions in a significant number of cases, leaving the ambiguous statute to be construed and applied by the court. The reality is that Congress has many legislative priorities and may not be interested in expending time, resources, and political will on a statute that a court finds confusing. Consequently, the certification process may not accomplish the hoped-for goal of giving the elected branches an opportunity to clarify indeterminate statutes. Indeed, many of the claimed benefits of certification described above would fail to materialize.

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<sup>305</sup> See generally *id.*

Yet even assuming Congress would not respond to most judicial queries, the very fact that Congress was asked to clarify a statute but did not do so will have bearing on the judicial approach to the interpretive problem. I contend that Congress's failure to assist the court implicitly delegates the lawmaking function to the courts, permitting judges to approach the ambiguous statute with greater flexibility and creativity and insulating them from charges of judicial activism when doing so.

Others might object, arguing that congressional silence should not be interpreted as giving courts free rein to engage in lawmaking. Legislative inaction is weak evidence of congressional intent. When a court issues a decision interpreting a statute and Congress never amends the statute to undo that court decision, should we assume that Congress agrees with the court's reading of the legislation? What if Congress amends the statute but does not alter the judicial construction? And how about if members of Congress drafted a bill seeking to override the judicial construction, but the bill never becomes law? Courts have been inconsistent in their treatment of these different types of legislative inaction, sometimes treating congressional silence as a near-dispositive factor and other times concluding it has no value whatsoever.<sup>306</sup>

The argument in favor of imbuing legislative inaction with legal significance is that, at least in some cases, it raises a strong inference that Congress approves of the judicial or executive branch's statutory interpretation.<sup>307</sup> But as the Court has conceded, "[n]onaction by Congress is not often a useful guide."<sup>308</sup> Courts frequently reject legislative acquiescence arguments, noting that members of Congress are likely to be unaware of the judicial or agency interpretation at issue.<sup>309</sup> And even when Congress is cognizant of another branch's reading of a statute, its failure to override that interpretation might be due to pressing legislative priorities rather than its approval. As one commentator noted, "[legislative] [a]cquiescence is the rule and not the exception, whatever Congress' feelings about a Supreme

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<sup>306</sup> See, e.g., William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988) [hereinafter Eskridge, *Interpreting Legislative Inaction*].

<sup>307</sup> For example, in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), the Court held that a statutory tax exemption for educational institutions was not available to a school such as Bob Jones that discriminates on the basis of race. To support its decision, the Court noted that Congress had never attempted to overturn a longstanding IRS interpretation rejecting application of the exemption to discriminatory institutions. *Id.* at 600. Although a number of bills had been introduced seeking to do just that, none had made it into law, even though other amendments to the charitable exemption provision had been enacted during that time. Moreover, Congress had overridden a judicial decision by enacting an amendment denying tax-exempt status to social clubs discriminating on the basis of race, which seemed to confirm Congress's approval of the IRS policy. *Id.* at 601. Taken in context, congressional inaction in the face of the IRS's policy to deny the exempt status to discriminatory educational institutions was strong evidence that Congress acquiesced in the IRS's interpretation of the law.

<sup>308</sup> *Id.* at 600.

<sup>309</sup> *Id.*

Court decision.<sup>310</sup> For these reasons, legal scholars have almost uniformly concluded that acquiescence is not a good indicator of legislative agreement with anything a court says.<sup>311</sup>

Reliance on legislative silence is also criticized as being at odds with the democratic process. Lawmaking should be transparent and produce results for which elected officials can be held accountable. Congressional acquiescence is a nonevent that occurs without fanfare or press coverage, permitting legislators to avoid responsibility because none will be on record as having voted for another branch's interpretation. Moreover, giving weight to legislative silence conflicts with the constitutionally prescribed roles of the legislative and executive branches in our system of government. Under Article I of the Constitution, Congress plays the primary role in enacting legislation, but to do so it is required to win approval of both Houses of Congress and the President (or override a presidential veto by a two-thirds majority of both Houses). If a judicial or agency interpretation of a statute is viewed as "law" simply because Congress did not pass a statute rejecting that interpretation, then congressional inaction can bypass the Constitution's procedural hurdles to enacting legislation, and can eliminate the President from the process altogether. "[I]n view of the specific and constitutional procedures required for the enactment of legislation, it would seem hardly justifiable to treat as having legislative effect any action or nonaction not taken in accordance with the prescribed procedures."<sup>312</sup>

These are powerful criticisms of legislative acquiescence arguments, and they have gained ascendancy along with the rise of textualism. But they do not require courts to ignore the significance of congressional silence in the context of certification. Congress's "non-response" to a judicial query about the meaning of a statute should be given legal weight by the certifying court *not* because it tells that court anything about Congress's view of statutory meaning, but rather because it gives the court information about the role Congress is willing to let the courts play in statutory interpretation.<sup>313</sup>

Normally, the judiciary serves as Congress's agent by construing the statute as instructed. Textualists believe that Congress can only instruct through statutory text while intentionalists are willing to look at legislative history as well, but under either theory courts are agents of the legislature. Dynamic theorists such as Elhauge would ask courts to be agents of the cur-

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<sup>310</sup> Eskridge, *Interpreting Legislative Inaction*, *supra* note 306, at 107.

<sup>311</sup> See, e.g., *id.* at 95; John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into 'Speculative Unrealities'*, 64 B.U. L. REV. 737 (1984); Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).

<sup>312</sup> *Cleveland v. United States*, 329 U.S. 14, 22 n.4 (1946) (Rutledge, J., concurring).

<sup>313</sup> Cf. Nagle, *supra* note 1, at 1317 ("[A]s Congress becomes aware of more alleged statutory mistakes, and as it becomes easier for Congress to correct such mistakes, the force of congressional acquiescence arguments increases.").

rent legislature by construing the law in the way the current legislature would prefer. When a court refers an issue of statutory ambiguity to Congress, however, it is in essence telling Congress that it does not have enough information to serve as a faithful agent (either to the enacting legislature or the current legislature), and that it cannot do Congress's bidding without clearer instructions. Congress's refusal to provide direction in these circumstances has meaning, I argue, because it forces the agent (the court) to act without guidance from its principal (Congress). Congressional silence lets the court know that it is free to craft its own substantive policy where Congress has given the court none to apply. That is, the agent has free rein to act in accord with its own views rather than those of its principal when the principal has been unclear and refuses to give the agent further instructions.<sup>314</sup>

Significantly, the argument that courts have greater latitude to engage in lawmaking when Congress has not responded to a judicial question about statutory meaning is based primarily on the legislative *action* that led to the court's review of the problem legislation. To get to the point where the court can, on its own, draft legislation to fill gaps or reconcile inconsistencies, Congress had to affirmatively enact two pieces of legislation. First, it had to enact the statute at issue that the court is now trying to decipher; and second, it had to enact legislation giving the federal courts jurisdiction over litigation concerning the statute. It is the combination of a grant of jurisdiction to decide the case, a federal statute that the court is required to administer, and Congress's refusal to answer the court's request to clarify the statute that leads to the inevitable conclusion that the court itself must legislate to resolve the ambiguity.

Congressional delegation of lawmaking authority, be it implicit or explicit, is nothing new. Courts view Congress as having delegated lawmaking power every time they give agencies deference to construe their governing statutes or apply one of the Federal Rules of Civil Procedure. Federal judges are often described as politically unaccountable, but because they are appointed by the President and confirmed by the Senate, they can claim at least some political legitimacy. Furthermore, judges often engage in lawmaking when they believe Congress has given them that leeway—for example, by enacting a broadly-worded statute such as the Sherman Act.<sup>315</sup> The same rationale supports the federal courts' authority to craft federal common law—an authority that arises from the need to fill interstices in federal statutory schemes and the reality that courts are the only federal institution capable, at the time the case is before it, of filling those gaps. So

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<sup>314</sup> Cf. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (recognizing that “[s]ometimes the legislative delegation to an agency on a particular question is implicit”).

<sup>315</sup> The Sherman Act has been described as “deliberately committing to the courts the task of evolving ‘more definite standards within the general mandate.’” Ginsburg & Huber, *supra* note 1, at 1420 (quoting Friendly, *supra* note 1, at 792).

there is nothing shocking about the judiciary taking over the lawmaking function when Congress has failed to clarify the meaning of the statutory text courts must apply.<sup>316</sup>

The proposal here does not require courts to seek congressional input when fleshing out the meaning of broadly-worded statutes like the Sherman Act.<sup>317</sup> But when Congress has enacted a detailed statute that does not appear to grant courts lawmaking authority, it makes sense for courts to seek congressional input before engaging in lawmaking. If an agent receives detailed directions from its principal, but some portions of those directions are less than clear, it is reasonable to think that the agent should first seek clarification before attempting to guess at, or manufacture, the missing pieces. Only when the principal refuses to clarify is the agent truly free to improvise.

As a pragmatic matter, a nonresponse to a judicial referral also provides the courts with political cover to engage in more freewheeling and creative statutory interpretation. Critics will find it less easy to criticize courts for “activist” interpretations of statutes if the courts have first sought legislative clarification of ambiguous statutory text. Although courts dealing with statutory ambiguity might be fairly described as “legislating from the bench,” it is clear that they are doing so out of necessity, and not because they are seeking to arrogate legislative power. Courts will never, of course, be free from criticism by those who dislike their rulings, but judicial efforts to seek answers from the political branches would blunt attempts to claim that judges are usurping the legislative role.

Imagine that in 2004 the Supreme Court had asked Congress to clarify Title IX, 28 U.S.C. § 1367, and the Immigration and Nationality Act to resolve the questions at issue in *Jackson*, *Exxon Mobil*, and *Clark*. And imagine that Congress had not responded and the Court had gone ahead and decided those cases just as it did. Would commentators have been as free with their criticism? Possibly. But the Court would have had the added legitimacy that comes with an attempt to defer to another branch of government that is unwilling, or unable, to fulfill its assigned constitutional role. And the opinions themselves would have made less of an effort to pretend to “construe” inscrutable statutes, and would have been more forthright in describing what the Court was actually doing—supplying law where Congress had failed to do so.

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<sup>316</sup> See, e.g., Redish & Pudelski, *supra* note 168, at 439 (describing statutory ambiguity as sometimes a result of “conscious legislative decision, embodied either explicitly or implicitly in the body of the statute, to delegate common-law-making power to the courts or, on occasion, to agencies empowered to administer the statute”).

<sup>317</sup> Nor should courts certify questions about ambiguous statutes that an agency is charged with administering, because under *Chevron* agencies are the institution delegated the authority to supply legislative meaning. See *supra* notes 128–30 and accompanying text.

## CONCLUSION

When courts are faced with truly inscrutable statutes, they currently have no choice but to apply the canons of construction and interpretive theories to justify reaching a result in the case before them. As a few judges admit, however, there are some cases in which the tools of statutory construction can supply no answer to the question at hand. Permitting courts to certify questions about statutory meaning to Congress opens a channel of communication with Congress and provides the judiciary with an alternative method of resolving hard cases. Certification seems particularly appropriate when it would allow a court to avoid deciding difficult constitutional questions or where Congress has left significant policy questions unanswered—questions that Congress, not the courts, is better suited to answer. Moreover, by seeking congressional input, courts protect themselves against charges of judicial overreaching that usually accompany judicial lawmaking.

Although turning to Congress to resolve pending cases appears at first glance to require a dangerous blurring of legislative and judicial functions, it merely harnesses Congress's already-existing authority to create new law to govern pending cases—a power that Congress has consistently exercised since the foundation of our constitutional democracy. For better or worse, Congress is already in the business of amending statutes that affect cases before the courts, and the parties to litigation are already lobbying Congress to change the laws at issue in their cases. Considering that Congress is currently assisting the courts by clarifying statutory language at issue in pending cases, albeit in an informal and ad hoc way, it makes sense to formalize the process and give the judiciary a role in determining when congressional input might be of assistance.