DEFERRING TO CONGRESSIONAL INTERPRETATIONS OF AMBIGUOUS STATUTORY PROVISIONS

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The notion that the judiciary might ask Congress for help interpreting a statute is decidedly disfavored. The interpretive process is primaritly the province of the courts and a place where the legislature is not welcome. And yet ambiguous provisions pervade legislation, imposing real costs on the judiciary, litigants, and private actors.

This Note argues that statutory ambiguity persists as a result of legislative market failure. Congress fails to craft optimally unambiguous (or ambiguous) legislation because it does not fully internalize the costs of ambiguity. As a solution to this enduring problem, this Note proposes that courts delegate a modicum of interpretive power to Congress, deferring to reasonable interpretations of ambiguous legislation offered by all of the statute's original sponsors and co-sponsors. By granting members of Congress a limited and conditional interpretive right, courts will be able to shift the interpretive burden to Congress. In turn, members of Congress will have an incentive to better internalize the costs of statutory ambiguity.

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INTRODUCTION: THE INTERPRETIVE POWER

"Do not gloss the Statute; we understand it better than you do, for we made it."[1]

For students of legislation and statutory interpretation, it is a familiar hypothetical: a housekeeper tells her servant to go to town to buy soup meat.[2] It seems like a simple task, but the servant, faithful and diligent soul that he is, encounters no end of problems. Should he go immediately or wait until he has finished his other tasks? Should he buy as much meat as the money given to him will allow, or perhaps stick to a certain quantity and look for the best deal available? What kind of meat should he buy? Which store should he shop at? What if the meat he thinks he should buy is unavailable or the store is closed? Should he go somewhere else or buy a different kind of meat? If this

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1. Aumeye v. Anon., Y.B. 33 & 35 Edw. I, 79, 82 (Hengham, C.J.) (Horwood ed., 1879), *quoted in* Felix Frankfurter, Foreword, *A Symposium on Statutory Construction*, 3 VAND. L. REV. 365, 366 (1950).

2. *See, e.g.*, FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 18–19 (William G. Hammond ed., 3d ed. 1880); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 40, 53–57, 125–38 (1994); KENT GREENAWALT, *From the Bottom Up*, 82 CORNELL L. REV. 994, 1002–08, 1017–33 (1997).

is a standing order, what happens when unforeseen circumstances arise—say, it turns out that the usual meat is unhealthy, or one of the soup-eaters is allergic to it? By the end of the exercise, besides losing her appetite for soup, a student cannot help but feel sorry for the Jobean servant, suffering for lack of clearer instructions.

We also need to look at things from the housekeeper's perspective; what kind of servant might she want? Surely not an Amelia Bedelia, too literal-minded to be trusted without infinitely explicit instructions.[3] But perhaps also not a Mary Poppins, whose creative freedoms might yield some truly unexpected results. Nor would she want a servant whose deep thinking and diligent research might lead to the right meat but at the price of a late dinner or other tasks neglected. The housekeeper's situation becomes even more sympathetic if we change the hypothetical to require more than one servant—imagine trying to devise a set of instructions that both Amelia Bedelia and Mary Poppins would agree upon and abide by. Imagine also that these servants—like federal judges—can't be fired, and our poor housekeeper seems as pathetic a character as her coworkers.

But what if, when the servants encountered some difficulty, they just picked up their phones and asked the housekeeper for guidance? All of a sudden, the soup meat problem gets easier. The servants don't need to spend as much time and energy trying to figure out what to do. The housekeeper can worry less about her instructions being misunderstood. And everyone is less likely to have to endure a return trip to town, which no one wants.

It may seem like a reasonable option in the context of the soup meat story, but the idea that judges might sometimes ask the legislature for help construing ambiguous statutory provisions is decidedly disfavored. The latest edition of Sutherland's *Statutory Construction* puts it succinctly: "In construing a statute the courts refuse to consider testimony about the intent of the legislature by members of the legisla-

3. Amelia Bedelia is "a literal-minded maid who cuts a mistake-prone swath through 11 [children's] books . . . . When told to help the children plant bulbs, she buys light bulbs. When told to weed the garden, she plants row upon row of big weeds. When her employers . . . ask her to stuff stockings for the neighbors' children, she wonders why they want stockings full of turkey stuffing, but she dutifully obeys. When she is asked to make a spongecake, she snips a sponge into small pieces and drops it into a cake." Edwin McDowell, *Peggy Parish, 61, Author of Books on Inept Maid, Amelia Bedelia*, N.Y. TIMES, Nov. 22, 1988, at B8. This is not the first time "America's favorite literal-minded housekeeper" has turned up in the legal literature. *See, e.g.*, Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CALIF. L. REV. 1573, 1629 n.90 (2003).

ture which enacted it."[4] The modern cases that have dealt with the issue agree with Sutherland, at least in regard to the opinions of individual legislators.[5] The general feeling is that "in construing a statute . . . the worst person to construe it is the person who is responsible for its drafting."[6] This position is consistent with the way courts generally treat post-enactment legislative history.[7]

It was not always this way: "In its early stages it seems to have been the practice if not the theory of English law that the maker of a statute should also be its interpreter if need be."[8] This approach was consistent with canon law, which held "unde jus prodit, interpretatio quoque procedat" (roughly, he who makes the law may also interpret it), and with civil law, which held, "[e]ius est interpretari cuius est condere" (it belongs to him to interpret who enacts).[9] As the quotation at the beginning of this Note indicates, for a time some English judges would consult statute-makers to construe ambiguous provisions. One of the earliest English treatises on statutory interpretation described an episode where the judges of the Court of Common Pleas "demaunded of the statute makers" how to interpret an ostensibly ambiguous provision: "And so, in our dayes, have those that were the penners & devisors of statutes bene the grettest lighte for exposicion of statutes."[10]

Hoary as these maxims seem, the interpretive approach they represent has endured. In the modern era, it may have reached its high

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4. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:16 (7th ed. 2007); *see also* United States v. Phila. Nat'l Bank, 374 U.S. 321, 348–49 (1963) (noting that views of Congress "form a hazardous basis" for inferring legislative intent); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means.").

5. *See* Badeau v. United States, 21 Ct. Cl. 48, 49–50 (1886); Central Soya Co. v. United States, 15 Ct. Int'l Trade 35, 41 (1991); Friedman v. United States, 364 F. Supp. 484, 488 (S.D. Ga. 1973); State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 154 F. Supp. 471, 484–85 (N.D. Ill. 1957); Williams v. Garcetti, 853 P.2d 507, 510 (Cal. 1993); *In re* Marriage of Bouquet, 546 P.2d 1371, 1374 (Cal. 1976); Barlow v. Jones, 294 P. 1106, 1107–08 (Ariz. 1930).

6. Hilder v. Dexter, [1902] A.C. 474 at 477 (Eng.).

7. *See, e.g.*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (post-enactment legislative history is "a 'hazardous basis for inferring the intent of an earlier' Congress" (quoting United States v. Price, 361 U.S. 304, 313 (1960))).

8. THEODORE F.T. PLUCKNET, STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 21 (Harold Dexter Hazeltine ed., 1922).

9. *Id.* at 21 n.10. For a helpful exposition on the Roman origins of the practice, see A. Arthur Schiller, *Roman Interpretation and Anglo-American Interpretation and Construction*, 27 VA. L. REV. 733, 742–58, 761 (1941).

10. A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES 151–52 (Samuel E. Thorne ed., 1942); *see also* Raoul Berger, *Original Intent and Boris Bittker*, 66 IND. L.J. 723, 728–29 (1991) (providing similar early modern era examples).

water mark in the *référé législatif* (legislative referral), a somewhat short-lived innovation of the French Revolution. Concerned with maintaining legal uniformity and constraining the political power of the courts,[11] the legislature required judges, when faced with ambiguous statutory language or gaps in the law, to refer to the legislature for an interpretation.[12] Jeremy Bentham proposed a similar idea in his *General View of a Complete Code of Laws*: "[I]f any judge or advocate . . . see occasion to remark anything in it that appears to him erroneous . . . , let him certify such observation to the legislature."[13] Today the civil law canon of "ejus est interpretari cujus est condere" survives in international law[14]—and is regularly employed in World Trade Organization (WTO) proceedings[15]—and, in a diluted form, in some European legal systems.[16]

Although the idea of asking the legislature for assistance interpreting statutes may seem foreign to American lawyers, the principles behind legislative referral are familiar to the American legal system. Somewhat counterintuitively, legislative referral is grounded in a strict, formalistic idea of the separation of powers and the limits of the judicial function. The concept is that legislatures *create* law (legislating) while judges apply it. Since interpretation is essentially an act of lawmaking,[17] judges should be no more than "the mouth that pro-

11. *See* Martin Vranken, *Statutory Interpretation and Judicial Policy Making: Some Comparative Reflections*, 12 STATUTE L. REV. 31, 33 (1991) ("[T]he literal approach to interpretation in the civil law was adopted against a backdrop of distrust directed towards the judiciary (rather than the legislator, as was the case in the common law world).").

12. *See* Peter Tiersma, *The Rule of Text: Is it Possible to Govern Using (Only) Statutes?*, 6 N.Y.U. J. L. & LIBERTY 260, 285 (2011); *see also* John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 112 (1996).

13. 3 JEREMY BENTHAM, *General View of a Complete Code of Laws*, *in* THE WORKS OF JEREMY BENTHAM 157, 210 (John Bowring ed., 1843).

14. *See, e.g.*, OPPENHEIM'S INTERNATIONAL LAW 1268–69 (Robert Jennings & Arthur Watts eds., 1992).

15. *See* EVANDRO MENEZES DE CARVALHO, SEMIOTICS OF INTERNATIONAL LAW 149–52 (Luciana Carvalho Fonseca trans., 2011).

16. *See* R.C. VAN CAENEGEM, *The Common Law Seen from the European Continent*, *in* LEGAL HISTORY: A EUROPEAN PERSPECTIVE 175–79 (1991).

17. *See, e.g.*, ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION 275 (1917) (describing interpretation as "supplementary legislation"); *see also* Francis v. S. Pac. Co., 333 U.S. 445, 450 (1948) ("[W]e find the long and well-settled construction of the Act . . . has become part of the warp and woof of the legislation."); Douglass v. Cnty. of Pike, 101 U.S. 677, 687 (1879) ("After a statute has been settled by judicial construction, the construction becomes . . . as much a part of the statute as the text itself . . . ."); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1363 (1988) (describing the "super-strong presumption against overruling statutory precedents" and explaining the canon as, in part, a defense of judicial lawmaking).

nounces the words of the law."[18] This constrained approach, though extreme (and unworkable[19]), has some consonance with American principles of judicial restraint and legislative supremacy, which counsels the judiciary against aggrandizing its power by appropriating that of the legislature.[20] In *The Federalist 47*, Madison approvingly quoted Montesquieu: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*."[21] At least two generations of American reformers, influenced by Bentham and the Enlightenment, argued for codifying the common law on these same grounds.[22] Today, the charge of "legislating from the bench" is a familiar refrain in the ongoing debate over so-called "judicial activism."[23]

On the other hand, there are good reasons to vest ultimate interpretive authority in the judiciary. Considered from a system-wide perspective, judges are downstream actors in the legislative process and the judiciary is "an intermediate body between the people and legislature."[24] Judges deal with legislation only after it is created and, with some exceptions, applied. Just as federal agencies regulate sectors of the economy, judges often act as regulators of the legislative system

18. Charles de Secondat, Baron de Montesquieu, The Spirit of the Laws 163 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans. & eds., 1989) (1748).

19. *See* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 257 (1970) (Black, J., dissenting) ("The Court undertakes the task of interpretation, however, not because the Court has any special ability to fathom the intent of Congress, but rather because interpretation is unavoidable in the decision of the case before it.").

20. *See generally* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237 (2002) (tracing, *inter alia*, judicial modesty in the use and evolution of the political question doctrine). For one of the strongest criticisms of judicial aggrandizement, see Thomas Jefferson, Autobiography of Thomas Jefferson 122 (Paul Leicester Ford ed., G.P. Putnam's Sons 1914) (1821) ("[C]ontrary to all correct example, [judges] are in the habit of going out of the question before them, to throw an anchor ahead and grapple further hold for future advances of power.").

21. The Federalist No. 47, at 326 (James Madison) (Jacob Ernst Cooke ed., 1961).

22. *See generally* Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (1981); *see also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation 10 (Amy Gutmann ed., 1997); Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 Fordham L. Rev. 983, 984–94 (2004).

23. *See* Kennan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 Calif. L. Rev. 1441, 1471–75 (2004).

24. The Federalist No. 78, at 525 (Alexander Hamilton) (Jacob Ernst Cooke ed., 1961).

itself. In the legislative context, the judicial function is very much about accounting for externalities—the costs and benefits that the other branches have not considered.[25]

In this Note, I argue that judicial intervention can be justified by a theory akin to legislative market failure. Such a theory holds that, at least in the short run, Congress and the President cannot be counted on to adequately consider the full impact of their actions on the constitutional scheme. As the Framers understood, the cost that legislators bear in enacting legislation may not reflect the full cost that legislation will have on society.[26] That is, assuming that a relative balance of power is optimal, each branch, acting alone, cannot be reasonably counted on to preserve that balance.[27] In pursuing what seems like a laudable policy, Congress may find itself aggrandizing its own power and encroaching upon that of the other branches.[28] Or Congress might try to give up its power.[29] Congress may not feel the negative consequences of its unbalancing encroachments or relinquishments—such

25. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226 (1986) ("The judiciary, using traditional methods of statutory interpretation, *inevitably* checks legislative excess by serving as a mechanism that encourages passage of public-regarding legislation and impedes passage of interest group bargains."); *see also* Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1821–33 (1992). *But see* William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953, 969 (1998) ("Judicial review of legislative action . . . acts not as a counterweight to the tyranny of the majority, but as a prop to the tyranny of the minority.").

26. *See* THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob Ernst Cooke ed., 1961) ("If angels were to govern men, neither external nor internal controls on government would be necessary."); *see also* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 43–51 (2000) (describing the Founders' intent that the judiciary act to constrain democratic excesses not otherwise felt by the legislature). For influential scholarship regarding the "market" for legislation, see William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975), and Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

27. *See* John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706 (1997).

28. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 734 (1986) ("By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress . . . has intruded into the executive function. The Constitution does not permit such intrusion.").

29. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 448 (1998) (invalidating the Line Item Veto Act because "it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature"); *see also* Daryl J. Levinson, *Empire-Building Govern-*

effects are external. In effect, the Court must step in because Congress has a natural monopoly on national legislation.

It is time to find a more effective way to regulate the legislative market. Even if "it is the function of the courts and not the Legislature . . . to say what an enacted statute means,"[30] courts should reconsider the wisdom of the current allocation of the interpretive burden. This may be an era of legislation,[31] but it is also an era of relatively static judicial resources. Ambiguity in legislation imposes costs on the courts, on litigants who interpret statutes, on the private interests that cannot rely on a predictable interpretation, and on the electorate in the form of reduced democratic accountability for legislators who can shield their positions behind ambiguous language. Courts should shift some of the interpretive burden to Congress by adopting an interpretive rule that forces the legislature to internalize more of those costs of ambiguous legislation.

I propose that courts delegate some interpretive authority over ambiguous legislation to Congress by creating a regime of deference to the original sponsoring coalition of the statute in question. Part I explores the nature and relative merits of statutory ambiguity. Part II expands this consequentialist analysis by critiquing two recent articles proposing variations on legislative referral. Part III introduces and explores my proposal that the Court can incentivize Congress to internalize the costs of ambiguity by delegating interpretive authority to Congress. Part IV addresses the constitutional concerns my proposal raises.

I.
The Causes, Benefits, and Costs of Statutory Ambiguity

Ambiguity has far-reaching institutional and societal implications—some of which legislators are less likely to consider, but all of which should be considered when addressing the problem of statutory ambiguity. Determining both the benefits and costs of ambiguity is essential to deciding how to allocate the interpretive burden of resolving that ambiguity. Since the fact that the benefits of ambiguity accrue to legislators—while its costs are shifted to the judiciary, among other actors—is the driving cause of the prevalence of ambiguous legisla-

ment in Constitutional Law, 118 Harv. L. Rev. 915, 950–60 (2005) (arguing that Congress is more inclined to abdicate responsibility rather than aggrandize).

30. Pierce v. Underwood, 487 U.S. 552, 566 (1988).

31. *See* Scalia, *supra* note 22, at 13 ("We live in an age of legislation, and most new law is statutory law.").

tion, let us start on the benefit side of the balance sheet before turning to the costs.

A. Potential Benefits of Ambiguity

Ambiguity has its benefits. To be sure, some ambiguous provisions can be justified and some cannot, and if we were to examine each piece of ambiguous legislation individually, ambiguity might seem sometimes beneficial and sometimes detrimental. But if we consider the problem of ambiguity as an aspect of the legislative system itself, ambiguity is unequivocally a useful tool.

1. Freeing Legislative Resources

In general, ambiguity reduces the opportunity cost of legislating.[32] If an ambiguous provision is easier to draft and/or enact, then a legislator can spend her resources on other projects, such as more legislation, agency oversight, constituent services, or campaigning.[33] All other things being equal, a rational legislator will prefer ambiguous provisions if the value of a clearer statute is less than the value of the resources saved by adopting an ambiguous interpretation. And in a situation where legislative resources are more or less fixed, the value of ambiguity significantly increases. As the country grows and the world becomes increasingly complex, legislators must do more with less.

The potentially positive value of statutory ambiguity can be seen in a scenario where Congress is working under a time constraint and must make do with its existing legislative resources.[34] As often happens, extrinsic circumstances may force legislative action on a less than ideal schedule. The economy may stumble. War might break out. Other bills may deprive legislators of the time for a drawn out debate. An important problem or policy matter may be noticed only once a bill clears the relevant committees. Under any of these circumstances,

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32. For a helpful collection of literature addressing the reasons legislators draft ambiguous statutes, see Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036 n.1, 1037 nn.2–5 (2006).

33. *See* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 12 (2008) ("A rational legislator will allocate her limited resources among these activities so as to maximize her ability to achieve her objectives, which will typically include reelection or career advancement, ideological or policy goals, prestige, and leisure.").

34. *See, e.g.*, Robert A. Katzmann, Madison Lecture, *Statutes*, 87 N.Y.U. L. REV. 637, 653 (2012) ("The key point is that the expanding, competing demands on legislators' time reduce opportunities for reflection and deliberation.").

the question becomes whether it is better to legislate ambiguously than never to legislate at all. From the perspective of the legislature and our system of government as a whole, the answer should be clear.

2. *Enabling Legislative Compromise*

Ambiguity can be beneficial even in situations where time is not a major constraint. The structure of the legislative process may incentivize ambiguity. To use Professor Victoria Nourse's phrase, ambiguity may be "structurally induced."[35] As Nourse explains, "[f]or a legislator, legal ambiguity may be quite rational, not because he or she individually prefers it, but because the institution we know as Congress produces conditions demanding it."[36]

For example, an ambiguous provision may be part of a crucial compromise. Statutes are usually compromises between legislators, the President, and the groups they represent;[37] that is, they are legislative bargains struck by the coalition members who overcame their potentially conflicting preferences and collective action problems.[38] The members of an enacting coalition may decide that a clearly-worded provision is not worth their while.[39] Faced with disagreement about a specific provision, they may decide on ambiguous wording in order to save both the bill as a whole and the provision itself.[40] Ambiguity may simply be the price of passage.[41]

From a congressional perspective, appearances may be somewhat misleading. A facially ambiguous bill may be accompanied by either implicit agreements regarding the methods by which downstream ac-

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35. Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1129 (2011).

36. *Id.*

37. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63 (1988).

38. *See* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 705–706 (1992); *see also* Eric Schickler, Terri Bimes & Robert W. Mickey, *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and* Bush v. Gore, 16 J.L. & POL. 717, 726–27 (2000).

39. *See* McNollgast, *supra* note 38, at 713–15.

40. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2409 (2003) ("[B]ecause legislators may sometimes craft statutory language very broadly or very narrowly to elide or avoid disagreements over specific application, one cannot take for granted that the legislature would be able to enact a more precise statement of the majority's aims, even if those aims could be known.").

41. *See* Nourse, *supra* note 35, at 1129, 1150 ("If legal ambiguity is the necessary cost of passing a crucial budget resolution, rational legislators will choose legal ambiguity. From the stance of a court looking at the budget statute, this may not be virtuous, but from the position of the legislator or members of the public, who need a budget more than they need semantic precision, it may be both right and necessary.").

tors—the agencies and courts—will interpret that ambiguity,[42] or an understanding that the coalition members are playing a "policy lottery . . . giving the courts a free shot at policymaking."[43] Balancing all these considerations, legislators may prefer an ambiguous provision over no provision at all—depending on the value of the legislation, they may be willing to take their chances.

3. Providing Ex Ante Flexibility

Ambiguity may also make for more effective and long-lasting legislation. It may be difficult for Congress to write a law that perfectly conforms to the problems it was meant to address, ex ante. Unanticipated permutations are a fact of policymaking. If legislation is too narrowly drafted, Congress may have to frequently re-legislate or let a problem go unaddressed. If legislation is too broad, Congress may delegate away too much (perhaps unconstitutionally too much) of its policymaking power. Ambiguity may serve as something of a middle ground. For example, assume the proverbial housekeeper tells the servant, "buy skinless chicken breast from Eskridge's deli. If he's out, come home." The housekeeper risks a meatless soup. But if she tells her servant "you decide what to get for dinner," she may end up serving pancakes on soup night. "Go to town and get some soup meat" maximizes the chances of soup with meat.

Ambiguity may also improve legislation because it shifts decisionmaking authority to more institutionally capable actors. If we consider ambiguity to be an implicit delegation, an ambiguous provision allows the courts and/or federal agencies greater latitude in applying the law. In some cases, this delegation might result in better outcomes. A highly technical statute might be better left in the interpreting hands of an agency with relevant expertise.[44] A statute that skirts constitutional limits might stand a better chance of surviving if the courts could interpret a provision to avoid constitutional difficulty rather than invalidate it.[45] Rather than try to guess what a court, whose composi-

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42. *See* McNollgast, *supra* note 38, at 707–11.

43. Miriam R. Jorgensen & Kenneth A. Shepsle, *A Comment on the Positive Canons Project*, 57 L. & CONTEMP. PROBS. 43, 45 (1994).

44. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so . . . .").

45. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594 (2012) ("The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.").

tion and constitutional jurisprudence are both subject to change,[46] might decide, Congress can simply shift the burden to the judiciary itself.

Even aside from constitutional considerations, ambiguity is an important part of any delegation to the judiciary.[47] Statutes granting administrative authority to an agency frequently contain explicit delegation provisions. In contrast, Congress often delegates discretion to the courts through a reasonably clear jurisdictional grant and broad statutory language that gives judges leeway to define the applicable standards of review.[48]

These very benefits of ambiguity—freeing of resources, enabling compromise, and providing lasting effectiveness through flexibility—are the incentives that cause ambiguity in legislation to persist.[49] Unless Congress internalizes the attendant costs of ambiguity—discussed below—the benefits will continue to drive the coalition crafting any new piece of legislation to tolerate ambiguity in its provisions.

B. *The Costs of Ambiguity*

Legislative ambiguity also generates significant costs. These costs are perhaps most evident in the judicial context. Ambiguity can seriously reduce legal predictability, forcing citizens to anticipate possible litigation. Clear, stable legal rules "enhance[ ] predictability and enable[ ] stakeholders to organize their affairs with greater confidence."[50] To the extent that ambiguity upsets these reliance interests, ambiguity has a serious cost. One function of the judiciary is to main-

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46. *See, e.g.*, Pamela S. Karlan, Foreword, *Democracy and Disdain*, 126 HARV. L. REV 1, 3–14, 11 (2012) (arguing that a majority of justices on the Roberts Court "wants to reverse or limit much of the Warren Court legacy"); *see also* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 813 (1982) (arguing from public choice theory that "[i]nconsistency is inevitable, in the strong sense of that word, no matter how much the Justices may disregard their own preferences, no matter how carefully they may approach their tasks, no matter how skilled they may be").

47. Arthur S. Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 VA. L. REV. 23, 30 (1956) ("[A] congressional use of ambiguous language . . . amounts to a delegation of power to the courts to construct a perimeter around the ambiguous terms."); *see also* Stephenson, *supra* note 32, at 1037 (noting that Congress can delegate to the judiciary "explicitly or via statutory ambiguity").

48. The antitrust laws provide a good example of delegation through vague language. *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, *in* THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS 39, 61–64 (E. Thomas Sullivan ed., 1991).

49. *See* Stephenson, *supra* note 32, at 1036–37.

50. Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 136 (2011).

tain stability and continuity in the face of ambiguity, thereby lowering reliance costs.[51] Legislative ambiguity also increases judicial decision costs. As the Federal Courts Study Committee noted in 1990, unclear legislation "increases judicial workload."[52] Almost by definition, ambiguity increases complexity, and complexity usually increases the cost of litigation. To define costs, I borrow from Professor Adrian Vermeule's explication of decision costs: ambiguity increases the out-of-pocket costs to litigants and the judiciary, the opportunity costs of litigation (the costs of forgoing whatever else judges and litigants could do with time spent dealing with the ambiguities), and the costs to trial and appellate courts of achieving and maintaining some degree of uniformity.[53] The incremental decision cost of ambiguity can be high. Consider for example, AT&T's assertion that it was protected by the Freedom of Information Act's "personal privacy" provision.[54] If Congress had clearly included or excluded corporations from the Act's definition of "personal," it would not have required the Supreme Court to decide the matter or the litigants to incur the considerable costs inherent in such a decision.[55] It should be no surprise that judges sometimes complain about ambiguous statutory language.[56]

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51. *See* Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1393 (2005) (discussing the "guardian role" judges play and defending that role against dynamic theorists).

52. FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 89 (1990).

53. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 166–67 (2006).

54. The Freedom of Information Act (FOIA) exempts from disclosure law enforcement records which may lead to an "unwarranted invasion of *personal* privacy," if released. 5 U.S.C. § 552(b)(7)(C) (2006) (emphasis added). In response to an investigation, AT&T produced documents to the FCC's Enforcement Bureau which AT&T's competitors later sought to obtain through a FOIA request. AT&T objected, arguing that the documents had been compiled for a law enforcement purpose, and were therefore covered by FOIA's (7)(C) personal privacy exemption. The argument turned on AT&T's assertion that, as a private corporate citizen, it had *personal* privacy rights which were protected. *See* FCC v. AT&T, Inc., 131 S. Ct. 1177, 1181 (2011) (noting AT&T's argument that it is a private corporate citizen with privacy rights, and should be protected from embarrassing disclosures).

55. *AT&T*, 131 S. Ct. at 181–86; *see also* Lyle Denniston, *Analysis: A word game over "privacy"*, SCOTUSBLOG (Mar. 1, 2011, 12:35PM), http://www.scotusblog.com/?p=114729 (describing the Court's decision as a "teacher-like explanation of the varying meaning of words" which ultimately concluded that business corporations are not entitled to the same privacy rights as natural persons under FOIA).

56. *See* John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1280 (1996) (stating, perhaps too strongly, that "the courts complain of ambiguous statutory language daily").

Ambiguity also draws criticism from some positive political theorists.[57] Ambiguity may serve as a type of rent seeking by legislators. By keeping controversial provisions unclear, legislators may be able to claim credit for a "victory" even though the battle has at best been moved to the agencies and courts.[58] A legislator might be able to use an ambiguous provision to shield the fact that she has been captured by a special interest group.[59] Alternatively, a legislator might use an ambiguous provision to continue to extract value from a constituency. For example, a member of Congress who has strong oversight authority over a relevant federal agency might prefer an ambiguous provision so that she can shape the rulemaking process in exchange for support from a valuable interest group.[60]

In the same vein, if a policy issue is particularly controversial, members of Congress might draft unclear statutory provisions in order

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57. "Positive political theory" is notoriously hard to define. *See* Daniel A. Farber & Philip P. Frickey, *Foreward: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 459–63 (1992) (noting wide disparity in beliefs about the definition of the term within the academic community). However, positivists can generally be said to be concerned with "non-normative, rational-choice theories of political institutions," such as public choice theory. *Id.* at 262. For a sample of positivist critiques of statutory ambiguity, see, e.g., Daniel B. Ortiz, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 232, 232–35 (1992) (diagramming a "policy lottery" equation to explain why legislators delegate when a range of possible policy outcomes are possible); David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 432 (2002) (arguing that the instability of legislative majorities necessitate delegation to agencies); Stephenson, *supra* note 32, at 1036, 1049–66 (modeling the "decision calculus of a rational, risk-averse legislator who must choose between delegation to an agency and delegation to a court" and noting that the question "Why do legislator delegate?" is closely related to the question "Why do legislators draft ambiguous statutes?").

58. *See, e.g.*, Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 218 (1992) ("[S]tatutory ambiguity . . . . is but one facet of legislators' interests in claiming credit for addressing the demands of interest groups by enacting a statute . . . while simultaneously shifting blame for a future interpretation of the statute to another institution.").

59. *See* Macey, *supra* note 25, at 232 ("Interest groups and politicians have incentives to engage in activities that make it more difficult for the public to discover the special interest group nature of legislation. This often is accomplished by the subterfuge of masking special interest legislation with a public interest facade.").

60. *See* Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process*, 39 PUB. CHOICE 33, 53–54 (1982) (noting that delegation to agencies creates the need for "legislative ombudsman services" and "offers more extensive opportunities for legislators to facilitate their constituents' dealings with the regulatory process"). For an example of an economic model explaining this behavior, see Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

to pass responsibility downstream to agencies and courts.[61] The legislators will be able to take credit for passing the legislation and will blame the downstream actors for any unpopular implementations.[62] The voting public, suffering from a serious information deficit born from high collective action costs, may not hold the legislator accountable for her bad faith.[63]

From a constitutional perspective, ambiguity gives rise to concerns about the rule of law and due process. In order for our system to be a government of laws and not of men, the laws must be reasonably clear.[64] "If the meaning of statutes . . . is indeterminate, the very rule of law is called into question."[65] If a provision is vaguely worded, the law can seem to be a "function of the predilections of particular judges, whose decisions may be unpredictable."[66] Ambiguity increases the possibility that the law will be applied arbitrarily or erratically by agencies and courts and formulated opaquely—by courts, as well as agencies and legislatures.

Ambiguity can also raise concerns about the separation of powers, discussed below.[67] Absent a clear delegation of lawmaking authority, ambiguous legislation threatens to turn agencies and courts into pseudo-legislatures—in effect, ambiguity blurs the distinction between interpreting law and writing legislation.[68] Further, ambiguity

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61. DAVID H. RONSENBLOOM, BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION 133–35 (arguing that delegation allows Congress to avoid "particularly nettlesome political issue[s].").

62. *See* FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 37 (1997).

63. *See* Macey, supra note 25, at 232.

64. *See, e.g.*, Landgraf v. USI Film Prod., 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . .").

65. FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION viii (2008).

66. *Id.*

67. *See infra* notes 157, 167–177 and accompanying text.

68. The Supreme Court has made it clear that Congress may delegate authority to coordinate branches of government, such as administrative agencies within the executive branch, only if it "shall lay down by legislative act an intelligible principle to which the person or body authorized [to exercise the delegated authority] is directed to conform." *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)) (internal quotation marks omitted). It is true that the Court has not rigorously scrutinized legislation for evidence of a clear intelligible principle. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 420, 426 (1944) (holding that statute contained intelligible principle because it instructed that prices set by agency be "generally fair and equitable"); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (holding that statute contained intelligible principle because it instructed agency to regulate "in the public interest"). Nevertheless, Congress is still prohibited from delegating "something approaching

effectively shifts lawmaking away from the legislature into less democratically accountable branches, a transfer that runs counter to our conception of democracy and the Constitution.[69]

II.
ALTERNATIVE PROPOSALS

The unbalancing effects of a legal environment characterized by widespread statutory ambiguities has somewhat sustained the call for a reallocation of the interpretative right. Indeed, even in an era of judicial interpretive supremacy, the unease with judicial lawmaking has persisted.[70] Two recent articles explore variations of legislative referral. In *Certifying Questions to Congress*, Professor Amanda Frost argues that the Supreme Court and circuit courts sitting en banc should explicitly certify questions to Congress.[71] *A* Chevron *for the House and Senate*, a recent student Note in the *Harvard Law Review*, pro-

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blank-check legislative rulemaking authority." Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099 (2004).

When a statute lacks much of an intelligible principle, agencies are granted exceptionally broad discretion to change or reverse policies over time without consulting Congress—conduct which blurs the line between interpreting law and effectively writing new legislation. *See* Jonathan Adler, *Placing "REINS" on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 11 & n.57 (2013) (noting that the Administrative Procedure Act places no heightened standard on agencies that reverse their own policies); Philip A. Wallach, *When Can You Teach an Old Law New Tricks?*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming 2013) (manuscript at 26–35, 46–54) (describing efforts by the FDA and EPA to use statutory ambiguity to reverse course and assert regulatory control over tobacco and greenhouse-gasses, respectively) (on file with the *New York University Journal of Legislation and Public Policy*).

69. Adler, *supra* note 68, at 11 (arguing that broad grants of interpretive authority to agencies has resulted in a "loss of political accountability for regulatory decisions [that] has allowed regulatory agencies to adopt policies at odds with congressional intent or contemporary priorities"); *cf.* J. Harvie Wilkinson III, *The Lost Arts of Judicial Restraint*, 16 GREEN BAG 2D 51, 52–55 (arguing that judges should resist the temptation to use constitutional ambiguity to "proclaim the divine right of judges" and instead exercise judicial restraint). *But see* Elana Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001) (arguing that the administrative state is accountable to the President and therefore democratically accountable to the public as well).

70. *See* Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 8 (2007) ("Over the last couple of decades, scholars, judges, and lawyers have become increasingly concerned with the possibility that judges might abuse their discretion in statutory interpretation.").

71. Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 6 (2007).

poses that courts defer to unicameral interpretations approved by either the full House or Senate.[72]

Both *Certifying Questions to Congress* and *A* Chevron *for the House and Senate* are innovative in that they offer "first branch solutions."[73] Instead of going it alone or relying on a federal agency, courts would turn to Congress for interpretive assistance. And both proposals would increase the interplay between the judiciary and Congress, which could improve both the legislative and interpretive processes.[74] But both proposals have serious functional shortcomings.

A. Unicameral Deference

A Chevron *for the House and Senate* proposes that courts grant *Chevron*-style deference to interpretations approved by *either* house of Congress. At base, this is a variation on the legislative veto invalidated by *INS v. Chadha*[75]: the unicameral interpretation would overrule a contrary lower court ruling and would cancel out a contrary agency interpretation, requiring the reviewing court to construe the statute de novo.

The author writes from the perspective of a proponent of dynamic interpretation, which rejects conservative rules in favor of standards that allow statutes to be updated via interpretation rather than legislation.[76] Specifically, the author attaches his or her proposal to Professor Einer Elhauge's theory that statutes should be construed to reflect the "enactable preferences" of Congress and the President.[77] Professor Elhauge views *Chevron* as a preference-estimating default rule on the argument that an agency's interpretation should roughly mirror the presently-enactable preferences of the political branches because those branches control the agency.[78] The Note offers unicameral

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72. Note, *A* Chevron *for the House and Senate: Deferring to Post-Enactment Congressional Resolutions that Interpret Ambiguous Statutes*, 124 HARV. L. REV. 1507, 1508–09 (2011).

73. *See* Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1430 (1987).

74. For an early example of the (albeit limited) benefits of greater Congress-judiciary communication, see Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for "Statutory Housekeeping": Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131, 131–41 (2007).

75. INS v. Chadha, 462 U.S. 919, 959 (1983) (holding unconstitutional the practice of unicameral legislative veto).

76. *See* Note, *supra* note 72, at 1507.

77. *See generally* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008). Professor Elhauge defines enactable preferences as "the set of political preferences that would be enacted into law if the issue were considered and resolved by the legislative process." *Id.* at 7.

78. *Id.* at 84–85.

deference as a supplement to *Chevron*, acting as a congressional counterbalance in circumstances when agency deference applies and as a gap-filling rule when it does not.[79]

A Chevron *for the House and Senate* only lightly explores the practical consequences of unicameral deference, and therein lies its major weakness. For example, because even unicameral resolutions can be difficult to pass, Congress might exercise its interpretive right at suboptimal levels. Or, because it is much easier to pass legislation in the House than the Senate, the Note's proposal may become a de facto rule of deference to the House of Representatives. Furthermore, because the House tends to be more politically polarized than the Senate, unicameral deference might significantly increase compliance costs—stakeholders who must comply with a statute over more than one session of Congress would have to prepare for sharp, partisan swings in the meaning of a preexisting statute if the composition of the House changes. The Note also fails to consider the judicial costs of addressing conflicting Senate and House interpretations. The Note simply assumes that a court would adopt whichever interpretation more closely matches its own preference. But without a principled rule to support it, the court's choice could seem arbitrary or politically motivated, compromising the judiciary's reputation and demoralizing potential litigants.

The unintended consequences of unicameral deference are especially significant given the author's dynamic approach to interpretation. In the hands of the legislature, dynamic "interpretation" begins to resemble substantive legislation. Indeed, the author intends in part for unicameral deference to allow Congress to "continually update the *policies* that implement various statutes."[80] Such an approach conflates administration and interpretation; it appears that one house could pass a resolution prescribing a specific policy approach. Thus, in addition to serious constitutional concerns (congressionally-mandated binding deference could be viewed as a violation of bicameralism and presentment akin to the legislative veto[81]) a rule of binding unicameral legislation would have far reaching practical consequences.

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79. Note, *supra* note 72, at 1514–17.

80. *Id.* at 1508 (emphasis added).

81. *See* INS v. Chadha, 462 U.S. 919, 959 (1983) (holding legislative veto unconstitutional).

B. Certification

Professor Frost proposes that the Supreme Court should send statutory questions to Congress for certification, delaying a decision to give Congress time to enact legislation to clarify the ambiguity.[82] Any congressional "interpretation" would come in the form of new legislation, passed by both houses and signed by the President. Professor Frost argues that while Congress could legislate such a practice, the Supreme Court could also simply announce it.[83] In doing so, Professor Frost adroitly sidesteps the problem that high legislative enactment costs likely foreclose congressional leadership on this issue.

Professor Frost demonstrates how certification comports with current judicial practice and constitutional restraints. She describes how "the federal courts have long accepted, and even welcomed, the involvement of other institutions in decisionmaking."[84] Federal courts increasingly refer state law questions to state courts[85] and "regularly rely on federal agencies to assist in the interpretation of ambiguous federal laws."[86] Congress periodically amends legislation to resolve statutory questions that are being litigated—a practice that courts "have accepted, and at times eagerly embraced."[87] Consistent with these other doctrines of judicial requests for (or acquiescence to) assistance, certification would promote transparency, democratic accountability, and inter-branch communication and cooperation.[88] In order to avoid uncertainty, certification would not obtain where *Chevron* deference applies.[89]

Professor Frost carefully constructs her certification proposal to satisfy constitutional restraints.[90] Referrals are discretionary—neither the Court nor Congress is required to act—in order to avoid unconstitutional encroachment by one branch upon the other.[91] Congress's response must be broadly applicable, satisfying equal protection principles.[92] Criminal statutes are categorically excluded in order to avoid violating the Ex Post Facto Clause and the Bill of Attainder

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82. Frost, *supra* note 71, at 6–9.
83. *Id.* at 6 (arguing that certification process could be established through adoption of rule of judicial procedure).
84. *Id.* at 24–25.
85. *Id.* at 25–26.
86. *Id.* at 28.
87. *Id.* at 29.
88. *Id.* at 54–64.
89. *Id.* at 7, 73.
90. *Id.* at 36–53.
91. *Id.* at 53.
92. *Id.*

Clause.[93] The Court would require Congress to clearly state whether it intends the legislation to apply retroactively.[94] Finally, Congress must respond to certification via ordinary legislation in order to satisfy the constitutional requirement of bicameralism and presentment.[95]

Ultimately, Professor Frost's insistence on full legislation takes the teeth out of her proposal. Given the high cost of legislating, Congress's incentive to pass certifying legislation decreases, especially since the Court has already signaled that it will settle the matter itself. Frost demonstrates that Congress already can and does pass legislation to resolve statutory questions that are in the process of being litigated.[96] But she does not explain why discretionary certification would induce Congress to intervene more than it currently does, since costs of intervention remain fixed. It is clear that, from a congressional perspective, the cost and benefits of legislative intervention generally weigh in favor of a wait and see approach that results in congressional inaction. Professor Frost's proposal does not significantly alter that cost-benefit analysis; therefore it is unlikely that it will do much to alter the status quo.

III.
The Proposal

"We will advise with our companions who were at the making of the statute."[97]

Under the current system of congressional exclusion from the interpretive process, legislative enactment costs do not fully account for the judicial decision costs and societal and institutional costs elaborated above. Put another way, the enactment costs do not incorporate interpretive costs. Passing legislation is generally "expensive," but the currency is measured in political utils that do not necessarily reflect the full value of the constitutional, societal, and judicial concerns at play. As it stands, Congress operates under circumstances of legislative market failure.

I propose that we treat legislative market failure as akin to economic market failure. At heart, "market failure" is really the failure of

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 28–36.

97. Bygot v. Ferrers, Y.B. 33 & 35 Edw. I, 585 (1307) (Eng.), *quoted in* Theodore F.T. Plucknett, Statutes & Their Interpretation in the First Half of the Fourteenth Century 50 (Law Book Exchange 2005) (1922).

a governing institution to appropriately assign property rights.[98] In the legislative context, the relevant "property" rights are the right to create and interpret ambiguous legislation. Currently, the interpretive right is inadequately assigned. Once, perhaps, early in the age of legislation when statutes were scarce and judicial and legislative resources relatively abundant, it made sense for Congress to pass vague laws and for courts to hold tightly to their interpretive rights. No longer. In an environment of many statutes and scarce judicial and legislative resources, the external costs of ambiguity should be internalized into the legislative market.

The appropriate way to accomplish this goal is to reallocate the interpretive burden by dividing and reassigning the right to interpret ambiguous legislation. The courts should grant members of Congress a modicum of authority to interpret ambiguous legislation. The ultimate right to interpret should remain in the hands of the judiciary, but the courts should afford some degree of deference to a reasonable interpretation put forward by a relevant subset of legislators.

Put another way, when faced with a tricky problem of statutory interpretation, the courts should ask Congress for help. In doing so, legislative enactment costs will more adequately reflect downstream and systemic costs, lightening the judicial workload and making the lawmaking process more efficient.

Because the costs and benefits of ambiguity in any regulatory regime are difficult to quantify, the courts should tread lightly, establishing clear baseline rules but leaving space for the regulatory regime to develop over time. As long as the courts put forward a rule that gives legislators a right that is clear enough to bargain around and valuable enough to actually induce bargaining, Congress should be left to develop self-organized collective-choice arrangements that reflect the political environment.[99] Taking a hands-off approach is "ecologically rational"[100] in that it shifts much of the decisionmaking burden to Congress, which is far more competent at playing politics than the courts (and interpretation is political).

98. *See* Steven N.S. Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 J.L. & ECON. 49, 67–68 (1970); *see also* Justin M. Ross, *What Should Policy Makers Know When Economists Say "Market Failure"?*, 14 GEO. PUB. POL'Y REV. 27, 28–29 (2009).

99. *See* Edella Schlager & Elinor Ostrom, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis*, 68 LAND ECON. 249, 255 (1992).

100. *See* GERD GIGERENZER & PETER M. TODD, SIMPLE HEURISTICS THAT MAKE US SMART vii (1999).

A. Features of the Interpretive Right

I propose that the bill's sponsor should hold the interpretive right. The right should be one of limited alienation: the sponsor will share interpretive power with any other legislators whose names are on the bill at the time it is introduced (original cosponsors). And once the right vests, it is held in common: the courts will only defer to an interpretation supported by the entire sponsoring coalition. But the right should also be defeasible, limited to sitting members of Congress. At least at first, the courts should grant moderate deference to the cosponsoring coalition's interpretation, which I suggest could be submitted in an amicus brief.

As to the specifics my proposal, I offer the details as conversation starters and make no claim that they are clearly optimal versus other cost-internalizing allocations of the interpretive right. My focus is on the merits of a rule of deference supported by a property-right model. Establishing the precise level of deference or the nature of the sticks in the interpretive bundle can be left to future work.

With that said, any rule should have the following qualities: the rule should be simple, constitutional, and based on familiar principles. That is, it should be relatively easy to administer (as well as abandon), should not violate any constitutional strictures, and should minimize legal transition costs by disrupting background legal principles and institutions as little as is practicable. Because of the institutional and informational constraints inherent in any statutory interpretation and legislative-judicial collaboration, the rule should allow for private ordering and innovation.

Judges, like everyone else, are boundedly rational and imperfectly informed; which is to say, judges are neither infinitely wise nor omniscient.[101] In dealing with the problem of external ambiguity costs, judges should not spend too much time searching for a perfect solution. Rather, they should adopt a solution that is simply "good enough"—an acceptable solution need only "satisfice."[102] Here, affording deference is a low risk option, less risky than the status quo of disuniform interpretive approaches. The worst possible outcomes of the current approach are severe: a policy lottery. In contrast, the worst possible outcome of the rule I propose would be its rejection, either by

101. VERMEULE, *supra* note 53, at 154.
102. *Id.* at 176–79.

Congress or by the judiciary. Relative to the status quo, granting Congress an interpretive right maximizes the minimum possible payoff.[103]

1. First Possession

At base, I propose a rule of first possession: initially, the bill's sponsor should hold the interpretive right. A first possession rule is easy to assign and easy to understand. It is "the dominant method of initially establishing property rights."[104] It is familiar to society as a whole and the legal world in particular; it is, after all, "tightly woven into the fabric of Anglo-American society."[105] It is also consistent with the prevailing rules of Congress. Both houses require that all bills bear the name of a sponsoring member.[106] The sponsor holds a number of formal and informal powers over her bill. For example, she can decide who else will be allowed to attach their names to the bill as cosponsors. More importantly, she becomes associated with the bill—vulnerable to criticism and able to take credit.[107] If the bill becomes law and is challenged in court, she may play a role in its defense via an amicus brief. Granting the sponsor the initial interpretive right fits easily into existing congressional practice.

The rule of first possession should apply to the sponsors in both the House and Senate. Often, identical bills are introduced in both houses. In that case, the sponsors would hold the interpretive right concurrently and jointly. The legislative process is often complicated by friendly and unfriendly amendments, omnibus legislation, and conference reports. Although it is beyond the scope of this Note to analyze each permutation, I would propose that in the interest of certainty and simplicity the rule of first possession should obtain in all circumstances: the person whose name is on the *bill*, not the amendment, should hold the interpretive right. A simple rule would facilitate bar-

103. *Id.* at 175–76 (discussing the principle of maximin, which holds that under conditions of uncertainty decisions should be made that maximize the benefit of the worst possible result).

104. Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 393 (1995).

105. *Id.* at 394.

106. *See House Rule XII – Receipt and Referral of Measures*, COMM. ON RULES, HOUSE OF REPRESENTATIVES, *http://www.rules.house.gov/singlepages.aspx?NewsID=133&rsbd=165* (last visited Apr. 20, 2013). "The Senate's rules make no mention of the multiple sponsorship," and the practice is sustained by custom alone. ROBERT B. DOVE, U.S. SENATE PARLIAMENTARIAN, ENACTMENT OF A LAW (1997), *available at* http://www.senate.gov/legislative/common/briefing/Enactment_law.htm.

107. For a good summary of the literature regarding the reasons for cosponsoring a bill, see Brian M. Harward & Kenneth W. Moffett, *The Calculus of Cosponsorship in the U.S. Senate*, 35 LEGIS. STUD. Q. 117, 118–22 (2010).

gaining.[108] In situations where the bill is utterly changed—as may sometimes happen in a conference committee—a number of potential solutions present themselves. Congress can always amend the list of "original" cosponsors. Courts could decline to give deference. Or the judiciary could simply stick with a clear rule and let Congress sort out its implications.

2. *Limited Alienation*

The right should be one of limited alienation: the sponsor will share interpretive power with any other legislators whose names are on the bill at the time it is introduced (original cosponsors). The sponsor can trade her exclusive rights for political support.[109] Perhaps other members are uneasy with the sponsor holding exclusive interpretive power—perhaps that member is too extreme, is somehow considered unreliable, or is too likely to leave office in the near future. Or perhaps other members want a share of the credit for introducing and passing the bill.[110] Or perhaps the sponsor needs cosponsors in order to navigate the legislative process.[111] These considerations are familiar to anyone with experience in a legislature; adding an interpretive right to the mix would simply grant members another stick in the bundle of rights attached to a bill. I propose limiting the right only to original cosponsors because original cosponsors are a smaller group of stronger supporters who may be considered more familiar with the details of the bill.[112] Limiting alienation to a small, better-informed group will help keep down collective action costs.

A rule of limited alienation will also increase the salience of the interpretive property right. Assuming that members of Congress are as human as the rest of us, we cannot expect them to have perfect information or make perfectly rational choices. Members of Congress must legislate under uncertainty, are constrained by their lack of informa-

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108. *See, e.g.*, Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577–78 (1988) (discussing the values of clear property rules); *see also* Cheung, *supra* note 98, at 67–68.

109. For recent analysis of the political benefits of adding cosponsors, see James H. Fowler, *Legislative Cosponsorship Networks in the US House and Senate*, 28 SOC. NETWORKS 454, 458–59 (2006).

110. *See, e.g.*, Michael S. Rocca & Stacy B. Gordon, *The Position-Taking Value of Bill Sponsorship in Congress*, 63 POL. RES. Q. 387, 393 (2010).

111. *See* Daniel Kessler & Keith Krehbiel, *Dynamics of Cosponsorship*, 90 AM. POL. SCI. REV. 555, 556 (1996).

112. *See* William Bernhard & Tracy Sulkin, *Commitment and Consequences: Reneging on Cosponsorship Pledges in the U.S. House* 9 (Am. Political Sci. Ass'n Annual Meeting Paper, Aug. 13, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643038.

tion and time, and are apt to use heuristics—cognitive shortcuts that are not strictly rational.[113] For example, a member of Congress may *know* that an ambiguous law will be interpreted by courts whose preferences may not reflect her own, but that possibility may *feel* remote, a future occurrence by an unfamiliar actor. If, however, that member of Congress knows that an ambiguous law will be construed by another member, perhaps a bitter opponent or longtime ally, the value of the interpretive right will be much more vivid.

3. Held in Common

Once the right vests in the sponsor and original cosponsors, it should be held in common: the court should only defer to an interpretation supported by the entire sponsoring coalition. A limitation like this is important because it increases the value of the coalition-building process essential to the legislative process and helps to keep down judicial decision costs. If every original cosponsor could expect deference for his or her interpretation, a court could face a cacophony and Congress would risk some degree of embarrassment. At minimum, the interpretative right would be vulnerable to many of the common criticisms leveled at legislative history.[114] Instead, the interpretation should be unitary, like the bill itself. Since every member of the introducing coalition can veto an interpretation, the sponsor must choose her original cosponsors with care.

This veto rule also significantly reduces the risk that Congress will aggrandize itself by passing vague laws. A veto by one member of the coalition would effectively restore the status quo—the agencies and courts would interpret the ambiguous provision without input from Congress. Indeed, the veto rule could incentivize members of Congress to reduce ambiguity, since the sponsor should be able to anticipate the possibility of a veto and modify legislation to forestall it.[115]

4. Defeasible

The right should be defeasible, limited to sitting members of Congress. If a member of the introducing coalition leaves office, she

113. For a discussion of heuristics and their use in the law, see generally RICHARD H. THALER & CASS. R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

114. For a discussion of legislative history and criticisms of its use in statutory interpretation, see discussion *infra* Part III.C.

115. *Cf.* CHARLES METZ CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER 9 (2000).

forgoes her claim to authentic interpretation. The purpose of this proposal is not to grant deference to a bill's "authors" because their interpretation is somehow intrinsically better. Rather, the goal is to internalize the costs of interpretation in the legislative market. When a member of Congress exits that market, the reason for granting her an interpretive right is extinguished. Members of Congress can be expected to be held accountable via their colleagues and constituents—without either, a former member of Congress has no claim to deference.

A defeasible condition would mean that the remaining coalition members' power increases as their colleagues leave office. There is always the possibility that an interpretive right might end up in the hands of a subset of the introducing coalition that may not reflect the viewpoints of the departed members. To the extent that this possibility is in fact a problem, members of Congress should be capable of taking this consideration into account when they constitute the introducing coalition. Politicians should be especially attuned to electoral consequences. In addition, even as the coalition diminishes, the remaining members will not be able to exercise their interpretive right without consequences. They remain in office and subject to political pressures from their colleagues and constituents. Furthermore, the longer the coalition sits on its interpretive rights, the weaker (or less persuasive) that right would likely become. Agencies and courts might provide their own interpretations, which could become part of the legal fabric and which a reviewing court would be reluctant to overturn.[116]

B. Level and Form of Deference

1. Level of Deference

What level of deference should the courts afford an interpretation put forward by the introducing coalition? Here, I confess to be (boundedly) agnostic. The level of deference need only be significant enough to make the interpretive right sufficiently valuable to legislators. No deference means that there is no property right; with absolute deference, the right goes unregulated. Between those extremes, it is hard to tell what result would obtain. A higher level of deference reduces judicial decision costs, whereas a lower level of deference might lower the probability of the introducing coalition making bad

116. *See supra* note 17. For an insightful examination into the force of longstanding interpretations, see generally Anita S. Krishnakumar, *Longstanding Agency Interpretations* (St. John's School of Law Legal Studies Research Paper Series, No. 13-0002, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224066.

faith interpretations. A low level of deference increases uncertainty. A high level of deference seems unjustified, since the coalition's interpretation lacks some of the procedural safeguards that help justify deference to an agency's interpretation.[117] The level of deference can change over time as the doctrine develops. Courts might borrow a familiar deference standard or might fashion a new one. For the purposes of this Note, let us assume that the court will grant something akin to a skeptic's version of *Chevron* deference to the cosponsoring coalition's interpretation: assuming that the provision in question is in fact ambiguous, courts will accept the coalition's reasonable construction of the provision—but will evaluate the interpretation with an unsympathetic eye.

A significant objection to a high level of deference—and this proposal—is that a strong deference rule will encourage Congress to pass ambiguous legislation. The argument appears sound: once Congress has the power to self-interpret, the perceived benefits of ambiguity increase. Professor John Manning provides an excellent example of this rationale in his critique of *Seminole Rock* deference (also referred to as *Auer* deference or *Auer/Seminole Rock* deference), which grants agencies the power to interpret their own ambiguous regulations:

> The right of self-interpretation under *Seminole Rock* removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean (unless the agency's view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision. As Justice Frankfurter said in another context, "[l]oose judicial reading makes for loose legislative writing."[118]

As strong as Manning's argument may be in the agency context, it does not translate well when applied to Congress. An agency can be considered a unitary entity, whereas Congress cannot; in Kenneth Shepsle's oft-repeated words, Congress is a "they", not an "it."[119] Granting Congress the right of "self"-interpretation is something of a

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117. For example, procedures such as notice and comment rulemaking provide a stable, relatively predictable process through which agencies interpret their statutory authority and issue regulations. *See* LISA SCHULTZ BRESSMAN ET AL., THE REGULATORY STATE 400–01 (2010). Notice and comment rulemaking, in particular, also ensures that the public has an opportunity to participate and comment on proposed regulations. *Id.*

118. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 655 (1996) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545 (1947)).

119. Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

contradiction in terms. Congress is made up of 535 potentially independent actors split into two independent bodies riddled with functional veto points. Depending on the type of legislation and the use of the filibuster, something like 278 members must agree with each other in order to pass legislation. A statute is usually the product of a coalition, and a coalition is almost always the result of a bargain.[120]

Under these conditions, granting a limited, conditionally alienable interpretive right to some of these members is unlikely to result in an increase in ambiguous legislation over the status quo. Counterintuitively, the concern should be that such a rule will result in either too *little* ambiguity or too much interpretive power to the courts and agencies. To see why, it is useful to imagine a hypothetical, highly-simplified scenario where Congress operates under the new rule. Imagine that Senator Radin decides to introduce new legislation to regulate widgets. Seeking to maximize the chance of passage, she leaves a number of controversial provisions ambiguous. When Senator Radin circulates a draft of her bill, powerful Senator Corbin reads the draft and realizes that, in its current form and without any cosponsors, Radin would have substantial power to interpret the statute. Corbin promises to oppose the bill unless Radin clarifies the ambiguous provisions and/or adds Corbin as an original cosponsor. If Radin decides to redraft the bill, the ambiguity is significantly reduced. If instead Radin admits Corbin as an original cosponsor, Corbin can veto any interpretation Radin might propose, which will force the Senators to either negotiate a mutually agreeable interpretation or sit on their interpretive right, thereby allowing the courts and agencies to construe the ambiguous provisions (the status quo).

Under my proposal, the court would "pay" Congress not to produce too much ambiguity (understanding that "too much" and "enough" are difficult to quantify) by delegating a portion of the judiciary's interpretive power. With an interpretative "market" thus created, Congress "pays" the courts whenever it exercises its interpretive right by taking the time to develop and present an interpretation reasonable enough for the courts to rely upon. Rather than as a blank check to Congress, the level of deference is better seen as a method to cap the value of the interpretive right (subject to judicial modification) that members of Congress can bargain around.

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120. *See, e.g.*, Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 Nw. U. L. Rev. 1207, 1215–19 (2007).

2. *Amicus Brief*

Courts should receive the introducing coalition's interpretation via an amicus brief. The amicus brief appropriately cabins the scope of the coalition's rights before the court, avoids constitutional concerns by preserving judicial control over the interpretive process, and keeps the cost of interpretation within a range that maintains the value of the court's new rule.

The amicus role is a particularly well-suited mode of delivery. The "friend of the court" traditionally played an advisory role, "of his own knowledge mak[ing a] suggestion on a point of law or of fact for the information of the presiding judge."[121] Although the role has changed with time, the baseline assumption has persisted: the amicus should provide the court with useful information.[122] A reasonable interpretation by sponsors of an ambiguous statutory provision certainly qualifies under this rule.

There is also substantial precedent for members of Congress acting as amici.[123] In 1925, the Court sua sponte appointed Senator George W. Pepper to present Congress's viewpoint in the *Myers* case, now famous in administrative law circles for establishing that the President's power to remove appointed Executive officials cannot be limited by Congress.[124] In modern times, members of Congress frequently—and usually unsuccessfully[125]—participate as amici.[126] As a number of political scientists have shown, the processes for developing a brief and deciding to file or join a filing are familiar and not particularly different from the rest of the legislative process. Indeed,

121. Samuel Kirslov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 694 (1963) (citing 1 BENJAMIN VAUGHAN ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 62 (Boston, Little, Brown & Co. 1879)).

122. As the Rules of the Supreme Court of the United States put it: "An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored." SUPREME COURT OF THE UNITED STATES, RULES OF THE SUPREME COURT OF THE UNITED STATES R. 37 (1997).

123. *See* JUDITHANNE SCOURFIELD MCLAUCHLAN, CONGRESSIONAL PARTICIPATION AS AMICUS CURIAE BEFORE THE U.S. SUPREME COURT 151 (2005) ("Members of Congress most frequently participate as *amici* in cases 'To challenge the Executive Branch,' defending the power of Congress vis-à-vis the Executive Branch in order to level the playing field between the President and Congress in cases before the Supreme Court.").

124. *See* Myers v. United States, 272 U.S. 52, 176 (1926).

125. *See* Eric Heberlig & Rorie L. Spill, *Congress at the Court: Members of Congress as* Amicus Curiae, 28 SE. POL. REV. 189, 191 (2000).

126. *Id.* at 189.

they often consider filing or signing an amicus brief as akin to introducing or cosponsoring a bill.[127]

The amicus brief is also advantageous in that it firmly keeps the ultimate interpretive power in the hands of the judiciary. As Professor Nourse has pointed out, *where* an argument is made will affect *how* it is made: "the structure of the institution plays an important role in how the individual speaks and acts."[128] Unlike legislative history, the amicus mode falls clearly within the province of Article III. An amicus appears before the court at the pleasure of the court, agreeing to play by the court's rules. A statutory argument made in Congress may not fit the legal methods and conventions that a judge is used to. In contrast, an amicus brief is a creature of the courtroom: "Take a Senator out of the Senate chamber and ask him to appear before a court, and he will speak in the language of the expert lawyer."[129] A "reasonable" argument made on the House floor could seem quite thin if presented the same way in a written brief put before a judge. It is nearly tautological to say that that a poorly-reasoned amicus brief is not reasonable enough to merit deference from the court.

Using the amicus method would also alleviate constitutional concerns that a binding congressional interpretation of its own statutes violates the separation of powers. One concern is that "[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."[130] A related problem is the implicit norm against congressional self-delegation some commentators—most prominently Professor Manning—find in the Constitution's bicameralism and presentment requirements.[131]

If Congress were actually legislating without bicameralism or presentment, there would indeed be cause to consider my proposal unconstitutional. But the rule I propose is not one of *self*-delegation. Instead, the judiciary is delegating its own interpretative authority to members of a coordinate branch. As they do in the context of *Chevron* deference, the courts would be seeking input from well-positioned authorities and deferring to their reasonable interpretation of ambiguous provisions. This kind of delegation is generally tolerated. The fact that

127. McLauchlan, *supra* note 123, at 144; *see also* Rorie L. Spill Solberg & Eric S. Heberlig, *Communicating to the Courts and Beyond: Why Members of Congress Participate as* Amici Curiae, 29 Legis. Stud. Q. 591, 594 (2004) (arguing that legislators file amicus briefs as a means of communicating stances on issues).

128. Nourse, *supra* note 35, at 1129.

129. *Id.*

130. Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

131. Manning, *supra* note 27, at 710–24.

an introducing coalition exercises its interpretive right as a power delegated and supervised by the *judiciary* should also address the broader concern about the separation of powers. This is not a case where one branch aggrandizes itself by encroaching upon another branch's constitutionally-bestowed powers.

C. Relationship to Chevron *Deference*

The practical and constitutional merits of my proposal are especially evident when viewed in light of the courts' deference to executive agencies' interpretations of the statues they are authorized to administer. The rule of *Chevron v. NRDC* has three conditions: an agency's interpretation controls if the relevant statutory provision is ambiguous, if the agency promulgates its interpretation under a congressional grant of lawmaking authority, and if the agency's interpretation is reasonable.[132] So long as these conditions are satisfied, an agency has interpretive discretion. An agency's interpretation can change with time and politics, and may even overrule a judicial interpretation as long as the court did not find the statutory language to be unambiguous.[133] An amicus brief from the sponsoring coalition of an ambiguous provision in a given case could go a long way toward helping a court decide whether an agency's interpretation is reasonable.

1. Inter-branch Deference and the Nature of Interpretation

There is an enduring debate over *Chevron*'s theoretical foundation.[134] Is *Chevron* a "counter-*Marbury*" that shifts the law-saying power from the judiciary to the executive,[135] or actually the *Marbury* of administrative law, "firm in the view that the Court, not statutes, determines the nature of judicial oversight of public administra-

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132. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

133. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. (*Brand X*), 545 U.S. 967, 983–86 (2005). Note that an agency's interpretation prepared solely as a litigation position will not merit *Chevron* deference, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988), but an interpretation promulgated in response to litigation may receive deference, Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 741 (1996).

134. *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1284 (2008) ("Disagreement persists to this day concerning *Chevron*'s optimal theoretical foundation.").

135. Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2584–89 (2006).

tion"?[136] When an agency "interprets" a statute, is it engaging in a judicial act of interpretation,[137] or is it making a policy choice?[138] Relatedly, does an agency's interpretive authority derive from Congress or from the Court? At base, the question of what a court is doing when it defers to an agency's interpretation is simply an aspect of the longstanding debate over the nature and proper allocation of the interpretive power.[139]

Some of the controversy surrounding *Chevron*'s foundation may be seen as an attempt to make crystals out of mud.[140] The interpretive power is inherently ambiguous, and necessarily so. If ambiguity is inevitable, both courts and agencies must be able to interpret the law. But just because both branches interpret the law does not mean that they possess the same kind of interpretive power. When a statute is ambiguous, the act of interpretation assumes a dual role: "finding" the law (a judicial function) becomes a policymaking enterprise (essentially a legislative act). *Chevron* can be viewed as a rule of accommodation, allocating the judicial and legislative elements of the interpretive function according to institutional strengths. The judiciary fulfills its role by saying whether the law is ambiguous, demarcating the limits of that ambiguity, and determining whether an agency's interpretation oversteps those bounds. The agency is relatively free to operate within that judicially fixed zone of ambiguity, "interpreting" the law in order to faithfully execute it. Indeed, the agency is better equipped to navigate that area, depending as it must on political acumen and policy expertise to make its way through the twilight.

The condominium arrangement between the courts and the agencies can be uneasy: the zone of ambiguity will vary with a judge's

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136. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 676–77 (2007).

137. *See* Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 894 (2007) ("[A]gencies are not only quantitatively more important interpreters, but they also interpret in the overwhelming number of contexts with complete finality.").

138. *See* Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 199 (2007) ("'Interpret' means 'to explain or tell the meaning of' something—such as a statutory text. That definition accurately describes the decisionmaking process that the Supreme Court instructed reviewing courts to use in applying step one of *Chevron*, but it is not an accurate description of the process the Court expects agencies to use in making decisions that courts review through application of step two of *Chevron*." (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 611 (10th ed. 2002)).

139. *See supra* Part I.

140. *See* Rose, *supra* note 108.

interpretive approach, and can seem like policymaking. By asking Congress for help in fixing the limits of that ambiguity in my proposal, the court would again allocate the interpretive burden according to institutional capabilities. In this context, the introducing coalition's brief would help the court determine whether an agency's interpretation is reasonable. Such an approach would allow an agency to remain the "authoritative interpreter" of ambiguous statutes,[141] but would prevent "an experienced agency . . . (with some assistance from credulous courts) [from] turn[ing] statutory constraints into bureaucratic discretions."[142] A court would simply turn to Congress for help in drawing the line between ambiguous and unambiguous.

2. *The Justifications for* Chevron *Deference and Congressional Deference*

Deferring to the introducing coalition will further many of *Chevron*'s goals while helping check the doctrine's unbalancing effects on the separation of powers. The *Chevron* line of cases justifies agency deference on grounds of democratic accountability, institutional expertise, judicial modesty (and legislative supremacy),[143] dynamic policymaking, and uniformity.[144] The first three categories support deference to congressional cosponsors as well.

a. *Democratic Accountability*

"The real basis for agency deference" is "a candid recognition, by judges, of the virtues of democratic accountability and of the limits of their own institutional capacities."[145] In terms of democratic accountability, if the choice is between a federal court or a federal agency, the federal agency wins every time. But it is hard to argue that federal agencies are more accountable than Congress. Some agencies are designed to be insulated from politics—indeed, there is a strong argument that the administrative state was born from a desire to separate policy from politics.[146] Even agencies that are not supposed to be "independent" may exercise considerable independence from their elected overseers, and may in fact be in the thrall of powerful interest

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141. *Brand X*, 545 U.S. 967, 983 (2005)

142. *Id.* at 1013 (Scalia, J., dissenting).

143. Manning, *supra* note 27, at 679.

144. ELHAUGE, *supra* note 77, at 87.

145. ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 155 (2008).

146. *See* Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (discussing the history of the administrative state and describing the benefits of insulating agencies).

groups. Those elected overseers may be captured themselves. They may influence the agency in ways that are difficult to detect or that mask the official's political motivations. For example, the White House might reject an agency rule on the grounds that its costs outweigh its benefits, but use controversial methodology to tip the scales in favor of a predetermined, politically motivated outcome.[147]

As long as the deference regime is properly structured, a congressional interpretation is more democratically accountable than an agency's. Legislators are bound by what David Mayhew calls "the electoral connection."[148] As Professor Nourse writes, "The 'legislature acts as the eyes, ears, and voice of the people.' A representative 'lives and dies,' as the great constitutionalist Charles Black observed, based on 'what [the voters] think of him [back home].' "[149]

To be sure, a congressional deference rule, like the legislative process itself, is vulnerable to many of the same accountability concerns that may afflict agencies. But congressional deference has significant democratic accountability advantages over agency deference. Unlike appointed agency personnel, some of whom are significantly insulated from electoral pressure, the members of the introducing coalition are "directly accountable to the people."[150]

Because the interpreting coalition is fixed before a bill is enrolled, members of Congress and the President can be held politically accountable for the composition of the coalition and any interpretive instructions agreed upon via legislative history. And because members of Congress are less politically insulated than agency officials, they would be less likely to adopt an interpretation that significantly diverges from the original legislative and interpretive bargain.

147. For a detailed discussion of the various ways that the White House may use oversight mechanisms to push for politically motivated outcomes, see Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 824–30 (2003) (noting, for example, that the Reagan and George H.W. Bush presidencies were accused of using the Office of Management and Budget as a "front for deregulation").

148. *See generally* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

149. Nourse, *supra* note 35, at 1125 (quoting GINA MISIROGLU, THE HANDY POLITICS ANSWER BOOK 331 (2003) and quoting Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 16–17 (1974)) (footnotes omitted).

150. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

b. Expertise

A statute's primary proponents, presumptively closely involved in its drafting and development, can be presumed to bring significant expertise to bear during the interpretive process. From a formal perspective, one aspect of congressional expertise is unique: while the other two branches may interpret legislation, only Congress can create it. Although the principle that the author's interpretation is entitled to special weight has faded from Anglo-American jurisprudence, courts should still recognize that the members of the legislature are especially capable at interpreting legislation because of their familiarity with the circumstances of its enactment.

c. Continuity

Deferring to the introducing coalition's reasonable interpretation could also cabin some of *Chevron*'s excesses by promoting continuity and balancing power between Congress and the President. Although *Chevron* doctrine helps ensure that statutes are administered uniformly across federal circuits,[151] it permits instability by allowing agencies to change their interpretations.[152] As Jonathan Molot describes, the lack of continuity may induce Congress to try to legislatively micromanage or, conversely to place less emphasis on statutory clarity and instead control agency interpretations through political pressure.[153] Micromanagement can lead to absurd and unfair legal decisions while ex post political control can be opaque and hard to predict. Judicially managed deference to the introducing coalition has the advantage of continuity, especially if it reduces ambiguity. In addition, because the makeup of the interpreting coalition is fixed (along with interpretation-guiding legislative history), the interpretive parameters are easier to predict. The coalition's interpretation will only be able to drift to the extent that Congress permits the coalition to renege on those parameters and the courts find the deal-breaking interpretation to be reasonable.

151. *See Brand X*, 545 U.S. 967, 980–86 (2005).

152. *See* Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. Rev. 1389, 1461 n.196 (2005) ("In light of the considerable tension between the *Chevron* doctrine and continuity norms in statutory interpretation, there may be some justification in, at a minimum, questioning *Chevron* deference to changed agency positions and agency positions that are difficult to reconcile with the broader governing statutory scheme.").

153. Molot, *supra* note 26, at 78–81.

d. Checks and Balances

In addition to preventing continuity, *Chevron* may disrupt the balance of power between Congress and the President. *Chevron* itself is clear that an agency's democratic accountability flows from presidential oversight,[154] and the doctrine increases executive power at the expense of both Congress and the judiciary. Because *Chevron* rests on a default rule, avowedly a "legal fiction," that Congress implicitly delegates interpretive authority to agencies (which are overseen by the President), Congress must expend resources to explicitly rebut or cabin such a presumption. To the extent that agencies and the President prefer to possess greater lawmaking discretion, the executive branch should be inclined to prevent Congress from legislating to defeat *Chevron*'s default rule. The possibility of congressional deference would reduce the Executive's preference towards ambiguity, thereby reducing the congressional costs of cabining an agency's lawmaking discretion. Congressional deference could rebalance *Chevron*'s disruption of the balance of power between the legislature and the executive branch.

D. Relationship to Legislative History

Beyond the *Chevron*-based objections to my proposal, another significant objection might be that it is nothing more than post-enactment legislative history, the lowest form of the most maligned species in the interpretive ecosystem. There are three principle objections to the use of legislative history in statutory interpretation: it is difficult to use reliably,[155] it expands rather than constrains judicial power,[156] and

154. *Chevron*, 467 U.S. at 865–66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

155. *See, e.g.*, Frank Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) (arguing that legislative history is unreliable because legislative intent is "elusive for a natural person, fictive for a collective body"); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 396–98 (1992) (arguing that legislative history is unreliable precisely because relying on it in a subsequent context provides an incentive for legislators to manipulate and manufacture legislative history favorable to their preferred interests).

156. *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1860–61 (1998) (arguing that legislative history of the Alien Contract Labor Act "provided ample scope for the operation of" Justice Brewer's possible preconceptions about the case in *Holy Trinity Church v. United States*); *see also* Jonathan R. Siegel, *The Use of*

it is an unconstitutional violation of the separation of powers.[157] Compared to legislative history, my proposal is easier to use and more clearly cabins a judge's interpretive power. However, it is vulnerable to many of the same constitutional attacks that lead some commentators to disfavor legislative history.

A common criticism is that judges use legislative history to construe statutes to conform to their preferences in ways the text alone might not allow. The argument is that legislative history uniquely broadens the interpretive playing field, "and there is something for everybody."[158] Granting deference to the introducing coalition's interpretation will have precisely the opposite effect. A deference rule narrows a judge's interpretive scope. If legislative history allows a judge to pick her friends out of a crowd, a deference rule empties the room.

Another venerable objection to the use of legislative history is that it results in high judicial decision costs. Attorneys and judges must "wade through formidable mounds of materials" and "as the search time grows, the transaction costs increase."[159] And a judge who does not cherry pick from the legislative history is still at risk of misconstruing the material, given both the volume and the inherent ambiguities. Anyone who has worked with legislative history should recognize the truth in Justice Jackson's remark that "[l]egislative history here as usual is more vague than the statute we are called upon to interpret."[160]

The cost-based critique does not apply to my proposal. Just as it would cabin judicial discretion, so would it also reduce judicial decision costs. A judge would not need to pore over committee reports,

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Legislative History in a System of Separated Powers, 53 VAND. L. REV. 1457, 1459 (2000) (describing the argument that judges use legislative history as a "makeweight argument" to justify decisions taken on other grounds); Vermeule, *supra*, at 1861–76 (arguing that reliance on legislative history may induce judicial error in interpreting proper scope of statutes).

157. *See* Siegel, *supra* note 156, at 1459 ("Textualists observe that the Constitution vests the legislative power in Congress and that the power is nondelegable. If courts, in the process of statutory construction, consult legislative history created by mere committees or individual Members of Congress, they effectively approve an unconstitutional delegation of the legislative power. Moreover, textualists argue, the Constitution requires Congress to enact laws using a process of bicameral passage and presentment to the President. Legislative history has not run this difficult gauntlet; it is therefore not law and courts should not consult it.") (footnotes omitted).

158. Scalia, *supra* note 22, at 36; *see also* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376 (1987) ("It is often said that one finds in the legislative history only that for which one is looking.").

159. Starr, *supra* note 158, at 377.

160. United States v. Pub. Util. Comm'n of Cal., 345 U.S. 295, 320 (1954) (Jackson, J., concurring).

conference reports, hearings, floor statements, colloquies, and post-enactment actions (or inactions). Instead, the judge would merely evaluate the introducing coalition's use of those materials in their amicus brief (to the extent that they are used at all) and determine whether the interpretation offered is reasonable.

Another prominent attack on the use of legislative history is that it violates the separation of powers, in all its possible permutations. One formalist line of argument mirrors the *Chadha* objections described above—that the use of legislative history runs afoul of the requirements of bicameralism and presentment.[161] Another angle of attack, taken by Professor Manning, is that reliance on legislative history violates an implicit constitutional prohibition on self-delegation.[162] Still another argument is that legislative history leads a judge into the sphere of politics and policy, reserved for the Article I and II actors and forbidden to judges.[163]

My proposal will likely be anathema to formalists who can find in the Constitution's 4,543 words a clear prohibition on the use of legislative history. But judicially-controlled congressional deference may satisfy the constitutional requirements of those who take a less absolutist line regarding legislative history. As noted above, this rule should not be considered an act of *self*-delegation, since it is the judiciary who is delegating some of its interpretive authority to the Congress. And this proposal should help extricate judges from the task of translating political material into adjudicatory interpretive tools; that task shifts to Congress. In fact, a congressional deference rule could transform legislative history from a tool of judicial interpretation to a mechanism to hold the introducing coalition to any deals struck during the legislative process. Given the high costs of legislating and the procedural barriers to amending introduced legislation, members of Congress use legislative history to address ambiguities they identify. For example, one member might ask another to define a vague term or to affirm or disavow whether something might be covered by a specific provision. Acting under an interpretive property right, those on the record agreements could act as parol evidence, employed by Congress to prevent the introducing coalition from drifting beyond the parameters of any interpretive deals.[164] Under my proposal, legislative history

161. *See* Note, *supra* note 72, at 1524 (stating that "[u]nder the broader reading of *Chadha*, judges' use of legislative history to interpret statues violates the Constitution" and citing examples).
162. Manning, *supra* note 27, at 710–25.
163. *See* Starr, *supra* note 158, at 376.
164. *Cf.* Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195 (1998).

could be a meaningful mechanism of self-regulation: for example, an attempt by a cosponsor to advance an interpretation that is contradicted by the legislative history could cause another cosponsor to keep her name off an amicus brief (thus depriving the interpretation of any deference), or it might cause that faithless cosponsor to be somehow punished by other members of Congress. After all, "[l]egislative history is at its best when understood within Congress's own rules."[165]

IV. CONSTITUTIONAL OBJECTIONS

A. Bicameralism and Presentment

INS v. Chadha[166] presents a major obstacle to my proposal or anything like it. In *Chadha*, the Supreme Court invalidated as unconstitutional a statute that allowed one house of Congress to reverse INS decisions to suspend deportation proceedings. The Court found such legislative vetoes to violate Article I, Section 7's requirement that any congressional action "essentially legislative in purpose and effect" must pass both houses of Congress and be presented to the President for signature or veto.[167] The Court defined "legislation" as any action that alters "the legal rights, duties, and relations of persons."[168]

My proposal is vulnerable to a broad reading of *Chadha*. A binding congressional statutory interpretation is akin to passing new legislation, and so must satisfy the constitutional demands of bicameralism and presentment. As Professor Frost states, *Chadha* "makes clear that Congress can 'clarify' statutory meaning only in accordance with the bicameral passage and presidential presentment requirements of Article I."[169] Under this reading, it would seem that Congress cannot address legislative ambiguities without passing new legislation. Even legislative history becomes constitutionally suspect.

Even on its own terms, such a broad reading of *Chadha* fails when applied to judicially-delegated congressional interpretations of ambiguous statutes. A formalist must confront whether the interpretive power is a *legislative* power, derived from Article I, or a *judicial* power, inherent in Article III. If the right to interpret ambiguous legislation is legislative, as Montesquieu envisioned, then the Judiciary's authority to "say what the law is" must be viewed as a congressional

165. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 91 (2012).
166. INS v. Chadha, 462 U.S. 919 (1983).
167. *Id.* at 952, 983.
168. *Id.* at 952.
169. Frost, *supra* note 71, at 38.

delegation of legislative power. Although this view has an ancient and distinguished pedigree, it conflicts with more than two hundred years of American precedent. Not only would it subvert *Marbury v. Madison*, it would run afoul of the Court's long-held prophylactic rule requiring Congress to "lay down by legislative act an intelligible principle to which the person or body authorized to [exercise legislative power] is directed to conform," in order for the delegation to be constitutional.[170]

Given the wide variety of judicial approaches to statutory interpretation and the near-total silence from Congress on the subject, it would be difficult to find even an implicit intelligible principle to guide the judiciary's exercise of its supposed delegated interpretive power. If the interpretive power is legislative, and the legislature has not provided the judiciary an intelligible principle with which to wield that power, then the constitutionally mandated solution is for a judge to abstain from interpreting ambiguous statutory provisions.

If, however, we consider the interpretive power to be, consistent with *Marbury*, essentially judicial in nature, then *Chadha* becomes orthogonal to our discussion. If Congress passed legislation that required the courts to accept an interpretation promulgated by some subset of Congress, *Chadha* would likely apply, since such a scheme would be nearly identical to the legislative veto. But no such power grab occurs in my proposal. Instead, the courts simply delegate to Congress some of their own power. In construing legislation, the court is not *altering* legal rights or duties. Rather, it is saying what the law "is" (and, presumably has been since the statute's creation). Because a judicially-delegated congressional interpretation goes no further, it is not "legislative." The legislative nature of a congressional interpretation is especially lacking if the court adopts less-than-binding deference, since it becomes especially clear that the court is the final decision-maker.

B. Encroachment on the Judiciary's Power to Adjudicate

Courts would need to administer the congressional deference rule so as to avoid constitutional prohibitions on congressional attempts to control the outcome of pending cases, impermissibly specific legislation, ex post facto lawmaking, and retroactive lawmaking. Outside of criminal law, some of these doctrines can be vague,[171] but the general thrust is clear enough. They are safeguards "against legislative exer-

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170. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

171. Frost, *supra* note 71, at 46 (describing the unclear state of the law).

cise of the judicial function."[172] Congress cannot "assume the mantle of a judge."[173] As Chief Justice Marshall wrote in *Fletcher v. Peck*, "[i]t 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."[174]

Aside from impeachment, the Constitution forbids "trial by legislature." Generally, legislation must not target specific cases or individuals.[175] A general presumption against retroactivity complements the strong default against overly specific legislation. Although the Ex Post Facto Clause only applies to criminal law,[176] "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result."[177] The presumption against retroactivity should not be overstated, however. In the judicial context, retroactivity "is overwhelmingly the norm" because "courts are understood only to find the law, not to make it."[178] Even federal agencies "may announce new principles of law retroactively in adjudications."[179]

Judicially administered deference to the introducing coalition's reasonable interpretation does not in itself violate these principles. Congress is not usurping the judicial power; nor will it be suddenly able to target specific individuals or groups or legislate retroactively. Instead, the Court is merely exercising its own judicial authority to ask Congress for interpretive assistance in finding the law.

These prohibitions do not doom a rule of congressional deference, but they should help define it. Whatever the level of deference, a court should reject as impermissible any congressional interpretations that are unduly specific or unjustifiably retroactive. As Professor Frost writes, courts should refuse interpretations that "seek[ ] to control the results in the pending case rather than clarify the law for all current

172. United States v. Brown, 381 U.S. 437, 442 (1965).

173. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 480 (1977).

174. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

175. *Brown*, 381 U.S. at 440. Congress cannot "prescribe rules of decision to the Judicial Department . . . in cases pending before it." United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872). In the criminal context, Congress cannot enact bills that hold guilty and punish "named individuals or . . . easily ascertainable members of a group." United States v. Lovett, 328 U.S. 303, 315–316 (1946). And the Equal Protection Clause generally prohibits legislation designed to harm discrete groups. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–34 (1996) (discussing the Equal Protection Clause's protections).

176. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

177. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

178. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535–36 (1991).

179. Donald T. Hornstein, *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking*, 89 N.C. L. REV. 1549, 1551 (2011).

and future litigants."[180] As the doctrine develops, the courts could also adopt prophylactic rules to discourage unconstitutional interpretations. For example, courts could strongly disfavor repeated interpretations of the same provision. In the criminal context, courts could either bar congressional interpretations entirely or limit them—perhaps a court could only permit congressional interpretations arguing in favor of lenity.

Conclusion

By granting the introducing coalition the right to interpret its own ambiguous legislation, the courts will likely reduce the amount of ambiguous legislation Congress produces. In the process, courts may be able to curb some of *Chevron*'s unwelcome ancillary effects. The courts will remain the final interpreter of legislation, consistent with the Constitution's structure and current practice. But by asking Congress for help, the courts will take a welcome institutional turn in its approach to dealing with statutory ambiguity. And the sooner the better: people are hungry for soup.

180. Frost, *supra* note 71, at 49.