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To
Presidential Commission on the Supreme Court of the United States
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The following comments reflect conclusions drawn from almost fifty years of studying the U.S. Supreme Court, including close examination of the papers of numerous justices from the 1930s to the 1990s. After graduating from Yale Law School in 1971 I served as a law clerk to Judge George Edward of the U.S. Court of Appeals for the Sixth Circuit and then as a law clerk to Justice Thurgood Marshall (1972 Term). I began my academic career at the University of Wisconsin in 1973 and completed it last year when I retired from the faculty of the Harvard Law School. Over the course of my career I have written a fair number of books about the practice of constitutional review in the United States, both historically and today, and around the world.

My perspective from the beginning has been one of skepticism about the contributions of constitutional review to the system of democratic governance in the United States, a perspective that I bring to this submission. I note as well that I am the co-chair of the Advisory Board to Take Back the Courts, an advocacy group urging Court expansion as the most effective available response to current concerns about the Court's operation. (Of course I agree with that policy position, though it is not the focus of my comments here.)

I divide my comments into four parts, which in shorthand are: (1) law clerks; (2) the possibility of a generalized stance of judicial deference to implicit congressional judgments about the constitutionality of the statutes Congress enacts ("Thayerian deference," even more briefly); (3) the question of judicial review of the constitutionality of state and local legislation; and (4) the relation between review of statutes for constitutionality and the interpretation of statutes that "touch on" constitutional rights, for example by seeking to enforce (merely) those constitutional rights the courts independently recognize. For reasons of length I have refrained from providing citations to support many of the assertions I make, but would be happy to supply them on request.

I. Law Clerks

Over the past several decades there's been a dramatic reduction in the number of cases decided after oral argument – arguably, the Court's most important output.[1] For example, in the 1972 Term when I clerked, the Court decided about 150 cases and the Justices had three law clerks each; this past Term it decided 58, and the

[1] Although not a focus of his submission, Professor Vladeck's graph (p. 21) illustrates the decline.

Justices had four law clerks each.[2] A chart produced by the Federal Judicial Center indicates that from 1970 to around 1988 the Court granted review in roughly 140 cases per year; from the mid-1990s on it granted review in about 90 cases per year, and from 1995 until now there's been a gradual but almost steady decline in the number of cases granted review.[3]

Yet, there's been no relevant alteration in the staff available to each Justice; since the 1980s, as indicated above the Justices with individual exceptions have chosen to hire four law clerks each Term. In other settings that would prompt an inquiry into whether the staffing levels of the institution were too high. For example, in colleges and universities large enrollment drops in a department's courses, or a sharp reduction in research output, typically generates an examination of whether staffing should be reduced as well. I believe that it would be productive to ask whether the Court is, in some sense, "over-staffed" with law clerks, and whether the number of authorized positions for law clerks should be reduced from four to three or even two, commensurate with the Court's reduction in its own docket of argued cases.[4]

Of course opinions in argued cases aren't the Court's only output. The Court also decide whether to grant or deny review, and the number of petitions for review has grown somewhat over the same period. In addition, as someone whose career benefited from having been a law clerk, I understand that law clerks contribute to the production of more than their chambers' opinions. They learn things about the Court and the Constitution that they bring to their later careers. For example, they can bring that knowledge to bear when they act as educators of the public about the Court and the Constitution.[5] But, most important, it's possible that by reducing the number of cases decided after oral argument the Court has improved the quality of the opinions it does produce.

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[2] I believe it would be misleading to present hard numbers rather than rough averages, because it's too easy to cherry-pick Terms to get the answer you want, and because there are ambiguities in the readily available statistics that make precise comparisons across time tricky.

[3] https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015 (chart at conclusion of the page).

[4] Because Supreme Court clerkships are an important benefit to recent law graduates, I feel compelled to note that some members of the Commission – those who regularly recommend former students to Supreme Court Justices – have an interest in maintaining or even modestly increasing the number of Supreme Court law clerks. And in this connection I think it also worth noting the recurrent concerns that the law-clerk population isn't appropriately diverse in terms of, among other things, the law schools from which clerks have graduated.

[5] I do note, though, that for completely understandable reasons former law clerks have a tendency to "pull their punches" when discussing the work of the Justices for whom they clerked, which reduces the public-education value of their comments on the Court.

Even taking these other aspects of the law clerks' work into account, though, I think it worth considering seriously whether the Court has become "overstaffed" as a result of inertia in the face of changes in the Court's workload, as of course occurs in other institutions. In 2006 Judge Richard Posner wrote that "a large quality-adjusted increase in inputs, mainly having to do with the increased quantity, quality, and efficiency of the law clerks, seems not to have yielded a quality-adjusted increase in outputs."[6] I believe that a disinterested inquiry would reach the same conclusion today.

What would a reduction in the number of law clerks accomplish? First, it's a feature of such a proposal that it wouldn't have predictable effects on case outcomes; as compared to other proposals that might count in this one's favor. Second, it would require that the Justices adjust the allocation of work within their chambers. At present – and no matter what the number of law clerks – Justices decide how to organize the work of their chambers to produce what each Justice regards as the best results possible. As is well-known (though only occasionally acknowledged in journalistic accounts), most Justices believe that giving their law clerks significant responsibilities for drafting opinions does so.[7] I emphasize that in my judgment there's nothing particularly problematic about such choices in general; each Justice is almost certainly the best evaluator of what allocation of work produces the best outputs from the chambers.

Whether they are the best judges of the *socially* best allocation of work is a separate question.[8] And, third, one effect of reducing the number of law clerks might be to induce some reallocation of tasks within the chambers,[9] moving back in the direction of a world in which Justices could boast that they differed from members of Congress because, as Justice Brandeis said, "we do our own work."[10] I believe that moving in that direction would be good for our system of governance.

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[6] Richard A. Posner, "The Courthouse Mice," The New Republic, June 7 & 14, 2006, at p. 34.

[7] This allocation of work varies from one chambers to another, and, perhaps more important, appears to vary over time, with newly appointed Justices giving less opinion-drafting responsibility to law clerks and then gradually increasing that responsibility as the years pass.

[8] To make the point in an over-dramatic way: Suppose the Justices had *no* law clerks. The opinions they personally wrote might be of lower quality than ones written with the assistance of (or to some extent by) law clerks, but the increase in personal responsibility for opinions might be an offsetting social benefit.

[9] One effect might be a reduction in the extra-record social-scientific and historical research that Professor Larsen's scholarly work identifies, which would, as she argues, reduce some opacity associated with the Court's work.

[10] That's not an inevitable effect, of course: A Justice might distribute the work previously done by the fourth law clerk to the remaining three without absorbing any himself or herself.

I have framed this proposal as a quite modest "good government" measure about the proper allocation of public resources to the Supreme Court. It would be disingenuous to contend that it is only that, though – at least in the sense that I doubt that the proposal would have much purchase were there not some degree of concern about how the Court is functioning today.[11] In today's environment, reducing the number of law clerks would be a signal to the Justices of congressional dissatisfaction with their performance.[12] There's some empirical evidence that the Justices respond to such signals by changing their behavior, though the reasons for the effect are obscure.[13]

My first proposal, then, is: **Reduce the number of law clerks each Justice is authorized to hire**.

II. Judicial Acknowledgement that Many Federal Statutes Implicitly or Explicitly Reflect Reasonable Congressional Judgments About Constitutional Meaning

In 1893 Harvard law professor James Bradley Thayer delivered what is arguably the most important address ever about constitutional interpretation. Thayer argued that courts should apply what has come to be known as the "clear mistake" rule – that they should uphold congressional legislation unless its unconstitutionality was clear beyond a reasonable doubt. Similar formulations can be found in other constitutional traditions: A statute should be invalidated only if it is "manifestly unconstitutional" or its unconstitutionality "evident."

Thayer's justification combined an account of the nature of litigated constitutional provisions with an account of democratic responsibility. Litigated constitutional provisions were often general, abstract, or vague, susceptible of quite different but reasonable meanings with respect to specific controversies. The general terms' meanings had to be brought to ground in connection with specific problems. Congress could and, in Thayer's view not infrequently did, have one of those

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[11] Whether it has such purchase is of course something that will be apparent only as time passes.

[12] It's part of the lore of the Supreme Court budget process that for several years in the 1960s Congress refused to *increase* the Court's budget because of dissatisfaction among relevant congressional leaders with Warren Court decisions, though I've been unable to confirm such claims.

[13] See for example Tom Clark, The Limits of Judicial Independence (2011). The signals Clark identifies come from the introduction of jurisdiction-limiting bills not enacted into law and similar actions not resulting in enacted statutes. (I can imagine an argument that enacting a statute – as distinct from introducing a bill – for the acknowledged purpose of signaling dissatisfaction with the Court is an unconstitutional interference with judicial independence even if the statute has some "good government" justification. I don't think that such an argument would be a good one, though.)

reasonable meanings "in mind" when enacting a statute. And, where the reasonable interpretation of a general provision is implicit in an enactment (or explicitly adverted to during the process of enactment), the meaning comes to the court with a democratic imprimatur that the Supreme Court's different (reasonable) interpretation lacks. For Thayer, judicial deference to implicit or explicit congressional constitutional interpretations fit better with the nation's overall theory of democratic constitutionalism than the alternative of giving ultimate effect to the Justices' independent assessment of constitutional meaning.[14]

Many of the concerns that I and others have about the outsized role the Supreme Court plays in the nation's political life would be significantly reduced were a consistent majority of Supreme Court Justices to adopt a posture of deference to congressional constitutional interpretations. That posture, to shift the metaphor, is a cast of mind that can't be guaranteed by any institutional mechanisms.[15] Each Justice must choose to adopt it. And, for understandable reasons it has proven difficult if not impossible for even a single Justice to sustain that cast of mind. We occasionally find a Justice saying, as Justice Stewart did, that a statute reflects an "uncommonly silly" policy that is nonetheless constitutional or, as Justice Kennedy did (though not quite in these terms), that a statute reflects a sound policy that is nonetheless unconstitutional.[16] But, with the exception of a stray comment by Justice Souter,[17] I can't recall any statement by a Justice that a statute embodies a reasonable constitutional interpretation that should be respected even though the

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[14] Fleshing out Thayer's account produces many "bells and whistles," for example about whether deference is more justified when Congress expressly adverts to the Constitution at some point during the enactment process than when its constitutional interpretation is "merely" implicit in the fact that it enacted that statute against a background of general knowledge that statutes must comply with the Constitution. Spelling out those details would take this submission too far afield.

[15] Requiring a super-majority to invalidate a federal statute, as proposed in other submissions to the Commissions, might have an effect similar to the adoption of a Thayerian cast of mind, though through a quite different mechanism. Issues associated with such proposals are fleshed out elsewhere, so I simply note two: (a) As with other statutory regulations of the Court's deliberative procedures, this one might be thought inconsistent with judicial independence or the inherent judicial function; and (b) crafting a super-majority requirement requires attention to some technical details. As to the latter, if the required majority is seven out of nine and the Court retains the Rule of Four for granting review, the proposal would have to place appeals from decisions invalidating federal statutes in the Court's mandatory jurisdiction; otherwise a six-person majority could effectively invalidate a statute by refusing to grant review. Supermajority requirements do exist or have existed at the state level; I believe that the view of those who have studied such requirements is that they are at best a mixed success in inducing a Thayerian cast of mind.

[16] For Justice Stewart, see Griswold v. Connecticut, 381 U.S. 479 (1965); for Justice Kennedy, see Texas v. Johnson, 491 U.S. 397 (1989).

[17] See Walter Nixon v. United States, 506 U.S. 224 (1993) (Souter, J., concurring in the judgment).

Justice's own independent analysis of the Constitution leads him or her to conclude that the statute is unconstitutional.

This psychological difficulty has been exacerbated, I believe, by the rise of "constitutional theory," be it originalist, justice-seeking, or pragmatic theories of constitutional interpretation.[18] Such theories provide Justices with what they take to be sources outside themselves or Congress for determining the Constitution's meaning. Suppose a Justice thought that the fact that someone – Congress or one's colleagues – believed that a statute was constitutionally permissible, contrary to the Justice's own best judgment that it was unconstitutional.[19] In a Thayerian world, the fact of disagreement is a datum that the Justice should take into account in assessing whether the statute is justifiable according to some reasonable constitutional interpretation. That's not so, or so it might seem, in a world of constitutional theory.[20] Suppose the Justice's theory of interpretation is a justice-seeking one, and she finds herself opposed by a person holding an originalist theory. The Justice might treat the disagreement is irrelevant to her assessment because the person on the other side isn't (as the Justice sees it) thinking about the problem in the correct way.[21]

I doubt that there are any institutional mechanisms that can induce Justices to have a Thayerian cast of mind, or that can select only Justices who would have and sustain that cast of mind. In the genre of "signaling" rather than structuring outcomes, though, I have two suggestions.

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[18] Under current political conditions this position is likely to be interpreted as directed against originalism, but in my view it is equally valid when directed against any other constitutional theory (justice-seeking or – with a minor qualification – "living constitutionalism" [the qualification being that a living constitutionalist might take it to be relevant that Congress recently enacted a statute reflecting its judgment that the statute is consistent with the Constitution properly interpreted].)

[19] I use the awkward locution "constitutionally permissible" to indicate that most of the statutes of interest are allowed but not required. And, in the context of review of state legislation the locution indicates that there's nothing problematic about a world in which the Court defers both to a legislature that finds some policy unconstitutional (and bans it for that reason) while another legislature finds the same policy constitutionally permissible.

[20] "So it would seem" because even in a world of constitutional theory, a truly Thayerian judge would treat reasonable disagreement about which constitutional theory is correct – a second-order form of disagreement – as an indication of the possibility that a statute not justified by the judge's preferred constitutional theory might be reasonable according to a reasonable alternative theory. Again, it wouldn't be surprising to find that judges wouldn't be able to sustain that cast of mind.

[21] Disagreements *among* adherents to a single constitutional theory might generate Thayerian doubt, though that would depend upon whether the judges thought that both were using the "right" version of that theory.

So far I have discussed the Thayerian proposition that, given a specific substantive statute Justices should ask whether the statute reflects a reasonable interpretation of the Constitution. Congress might embody that question in a more global Joint Resolution (or statute) asserting Congress's view that the Court should (or may) find a statute unconstitutional only if it is not defensible under any reasonable interpretation of the Constitution.[22] Depending upon its wording, such an enactment might purport to impose a legally binding rule on the courts, though of course as such it would subject to constitutional evaluation (and as a matter of prediction rather than analysis likely invalidation.)[23] But, as with my proposal about law clerks but even more forcefully,[24] such an enactment would serve as a signal to the Court of congressional dissatisfaction with its performance.

My second proposal, then, is : **Congress should enact a Joint Resolution stating that the Supreme Court has the power to invalidate federal legislation only if it concludes that a statute is manifestly unconstitutional**.[25]

The next suggestion operates at the stage of selecting judges. In selecting nominees and in confirmation hearings the President and Senators might take into account the nominee's views about deference to congressional determinations about the constitutionality of the statutes it enacts. And, in particular, questions might be directed to whether or the degree to which a nominee believes that some specific theory of constitutional interpretation is the only proper one (or the primary one to displaced only under special conditions). Answers that depart from Thayerian deference might then count against nomination or confirmation, though in my view they should rarely be completely disqualifying (because the nominee might have such strong additional qualities as to outweigh her or his commitment to the constitutional theory).

We know that confirmation hearings have become an exercise in what some have called "kabuki theater," in which nominees evade difficult questions and give the

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[22] I am not familiar enough with congressional practice to know whether a Joint Resolution or a statute is the better vehicle for this assertion, though my sense is that a Joint Resolution would be more consistent with prior practice.

[23] I note that there has been scholarly support (and legislative support in state codes) for enacting statutes directing courts to adopt a specified method of *statutory* interpretation, supported by arguments that such a directive would not be inconsistent with either judicial independence or the "inherent" judicial function. The latter arguments might not carry over to a statute directing that the courts adopt a specified method of constitutional interpretation.

[24] And subject to the constitutional objection noted in the parenthetical comment in note 13 above.

[25] As already noted, the precise form and wording of the congressional action isn't the important point here.

answers expected of them. No doubt, nominees would adapt to the proposed lines of questioning by offering answers that wouldn't count against them. So, once again, this isn't a proposal whose effect would likely be the appointment only of Thayerian judges. But, once again, the questions would signal to the nominee and to sitting Justices as well, Congress's views about the Court's performance.

My third proposal is: **Senators should ask judicial nominees about their understanding of the significance (if any) of the fact that a congressional statute reflects Congress's judgment that the statute is constitutionally permissible, and should count against a nominee a commitment to a foundational theory of constitutional interpretation, though such a commitment shouldn't in itself be disqualifying**.

III. The Issue of State and Local Legislation

Most of the submissions to the Commission focus on judicial review of national legislation, as this one has to this point. Much of the Court's work, though, deals with assessing the constitutionality of state and local legislation. And some submissions note that the questions posed by that practice differ from those posed by judicial review of national statutes. Justice Holmes observed that the nation would not fall were the Court to abandon judicial review of federal laws but would come under great pressure were it to do so with respect to state legislation. And, though Holmes's comment was made in the context of commercial regulations, in today's world the point, suitably adapted, holds with respect to individual-rights regulations: We as a people are uncomfortable with the thought that the rights guaranteed by the Constitution might vary from one place to another, that we might have a federal constitutional right to speak freely in North but not South Dakota.

Yet, judicial review of state and local legislation takes on a different shape if the Court adopted something akin to a Thayerian point of view. From that point of view Congress would have broad *power* to interpret constitutional rights by statute. For convenience, though with some inaccuracy, I'll call this a broad Section 5 power.[26] So, for example, Congress has a Section 5 power to enact regulations of social media so as to protect or balance the individual right to speak against the individual right to privacy (and other individual rights on both sides of the balance). In a Thayerian world the Court would decide whether such a statute was constitutionally permissible by applying a standard of reasonableness or, in my preferred formulation, manifest uncontitutionality.

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[26] The inaccuracy arises from the fact that some constitutional rights against state and local governments arise from provisions other than the Fourteenth Amendment. The term "Section 5 power" is a shorthand for the aggregate of all such powers no matter where they are found in the Constitution.

Suppose, though, that Congress has *not* enacted such a statute (though in principle it could do so) but a state legislature has. Drawing on an analogous body of law, we could say that there we are in a world with a "dormant Section 5 power." We would ask, What should the Court do when confronted with a constitutional challenge to such a statute?

The straight-forward answer, parallel to that given in the context of the dormant commerce clause, is that the Court should exercise its own best judgment about the state statute's constitutionality.[27] There's no modification of the current practice of judicial review so far.

Such a modification does come on the scene at the next step. Suppose the Supreme Court holds the state statute unconstitutional (or holds it constitutionally permissible). Congress's dormant Section 5 power might awaken, to push the metaphor perhaps a bit too hard. Congress could exercise that power to permit a state legislature that chooses to do so to enact the statute (in the dormant commerce clause context we would say that Congress consents to the regulation). Or Congress could exercise the Section 5 power to preempt the state legislation, leaving the domain unregulated or substituting a regulation that Congress prefers.[28] Then, again in the Thayerian world the question would be whether Congress's interpretation of the various rights (free expression, privacy, and more) is a reasonable one. If it is, the statute granting consent or preempting the state law would be constitutionally permissible.

The dormant commerce power is the flip side of Congress's power to regulate interstate commerce. The dormant Section 5 power is the flip side of Congress's enforcement power under Section 5 (where the latter is construed in a Thayerian way). Under both dormant powers Congress chooses to deploy the resources of the federal courts in the service of constitutional rights, and under both Congress has the power to intervene when it believes that the federal courts have made an interpretive error.[29]

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[27] As a technical matter we might say that statutes like 42 U.S.C. §1983 do so already (with respect to lower federal courts as well as the Supreme Court), as Professor Bowie noted in passing, and – more creatively – that the statutes conferring jurisdiction on the Supreme Court to review state court rulings do so as well.

[28] The best support for the proposition that Congress has the power to preempt state regulations on the ground that they violate individual rights is probably Pennsylvania v. Nelson, 350 U.S. 497 (1956), though there the Court's position didn't rest expressly on the argument that the federal anti-sedition act was structured as it was so as to protect free speech. With similar qualifications we could invoke Hines v. Davidowitz, 312 U.S. 52 (1941), and Arizona v. United States, 567 U.S. 387 (2012).

[29] Because it has come up in conversations about my analysis, I address the following concern: Recognizing a dormant Section 5 power would impose excessive burdens on Congress, an obligation

Note one implication of this analysis: Under it Congress *already* has the power to displace federal court interpretations of the Constitution (under a Thayerian view of Section 5). Some have called this a power to override the Court's constitutional interpretations. I believe that such a description is a mistake, and one with significant rhetorical effects. When Congress exercises its Section 5 power in response to a prior judicial interpretation, which was itself an exercise of the power Congress has given the courts through the dormant Section 5 power, it isn't "overriding" the Court's decision. It's substituting its own (reasonable) interpretation of the relevant constitutional provisions for the Court's.

Some submissions to the Commission, and some discussion at the Commission's hearings, suggest that good policy might support imposing some procedural requirements on an "override" power. Though that characterization is inapt, the policy reasons might support providing some procedural structure for congressional exercises of the awakened dormant Section 5 power. I have some thoughts about what such a structure might be (committees dedicated to selecting which if any court decisions should be followed up with possible consent-or-preemption statutes, for example), but for present purposes it is sufficient to note the possibility of procedural regulation of the Section 5 power.

Thus, my fourth suggestion: **Congress should consider adopting internal procedural rules for systematically evaluating whether and how its "Section 5 power" should be exercised to preempt or consent to state and local laws already evaluated by courts exercising (as they are authorized to) their independent judgment about constitutionality.**

IV. The Problem of Statutory Interpretation

My final concern is with statutes rather than the Constitution. As we know, important decisions about access to the courts have taken the form of interpretations of the Federal Arbitration Act, and important decisions about voting rights have taken the form of interpretations of the Voting Rights Acts. Here my point is a simple one. Proposals addressing the Court's power of judicial review have almost nothing to say about such decisions.[30]

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to survey and approve or disapprove every federal court decision dealing with individual rights. That's simply not so. The power at issue is just that – a power, not an obligation. And just as Congress need not and does not take up every decision finding that some state regulation interferes with (or doesn't interfere with) interstate commerce, so too here. To quote Justice Jackson in the dormant commerce clause context, Congress might conclude that the regulations at issue are "too petty, too diversified, and too local" to spend time on. Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J. concurring in the result).

[30] Even jurisdiction-stripping legislation doesn't address such decisions, because they are decisions that resolving ambiguities in statutes that seek to use the federal courts for purposes Congress

Yet, the courts often interpret statutes in light of constitutional concerns or, more important, what I call constitutionally-inflected concerns. A court might interpret a statute by over-valuing federalism even if interpreting the statute without reference to federalism wouldn't produce a statute the court was willing to hold unconstitutional. And it wouldn't be surprising to discover that a Court blocked from some constitutional holding by some reform would find ways of translating its constitutional concerns into statutory interpretation. Fully accomplishing the goals of those who seek Court reform because of dissatisfaction with the Court's decisions requires some attention to statutory interpretation.

I mention two uncontroversial possibilities. (1) Congress can always enact a new statute rejecting an interpretation with which it disagrees – a statutory override. Recent scholarship has revealed much about these processes, and it's sufficient here only to mention that statutory overrides, while not rare, are difficult to enact and inevitably consume some of Congress's limited time for legislating.

(2) Congress can avoid undesirable statutory interpretations by reducing the ambiguities that allow the courts to import their constitutional concerns into the statutes. Here the difficulty is that the term "ambiguous" doesn't attach to provisions as a purely linguistic matter. The ordinary course of interpretation is: "Because this term is ambiguous, we are authorized to interpret it light of our constitutionally inflected concerns (even if we don't think that the statute if interpreted otherwise would be unconstitutional)." More often than one would like, though, one sees something like this: "Because we have these constitutionally inflected concerns, we find the provision ambiguous."[31]

In the end, reformers concerned about the Court's decisions interpreting statutes implicating constitutional values such as access to the courts and voting rights (even if the values aren't full constitutional rights), and concerned as well that the uncontroversial techniques of statutory overrides and greater specificity will prove inadequate must, I think, direct their attention to what Professors Moyn and Doerfler call personnel-oriented strategies such as Court expansion or term limits.

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thinks important. The federal courts must have jurisdiction to do what congress wants, so the only remedy lies in eliminating ambiguity.

[31] The classic recent version of this argument was offered in Chief Justice Roberts's opinion in Bond v. United States, 572 U.S. 844 (2014).