

CHAPTER TWO

REFORM CONGRESS, NOT THE COURT

Public approval of the Supreme Court has fallen to historic lows.¹ The Court is not alone. Trust in government has collapsed.² Only twenty-six percent of Americans have a favorable view of Congress.³ Four percent of Americans believe that our political system is working very well.⁴ Our body politic is not healthy, and we can feel it.

Something has got to give. But structurally reforming the Supreme Court is not that something. Institutions garner public trust when they perform a particular task and mold their members in the process.⁵ Institutions lose public trust when they are perceived as stepping outside their lane.⁶ The Supreme Court's lane is law.⁷ The Court itself is cognizant of the fact that when a court of law plays politics, it loses public trust.⁸ Despite the precipitous drop in the Court's public approval rating as of late, this Chapter argues that the Supreme Court has in fact stayed in its lane. In recent years, the Court has been engaged in interpretive bouts — as it always has been. Within the Court and the legal community more broadly, there exist long-running, good faith disagreements about how determinate our legal texts are. While the conservative majority on the Supreme Court today is more apt to interpret the Constitution as, in the words of then-Judge Kavanaugh, “a document of

¹ Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), <https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low> [<https://perma.cc/9SAX-UE5J>].

² See *Public Trust in Government: 1958–2023*, PEW RSCH. CTR. (Sept. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023> [<https://perma.cc/Q6DP-58ZN>].

³ PEW RSCH. CTR., *AMERICANS' DISMAL VIEWS OF THE NATION'S POLITICS* 34 (2023), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2023/09/PP_2023.09.19_views-of-politics_REPORT.pdf [<https://perma.cc/54D9-7WVB>].

⁴ *Id.* at 5.

⁵ Yuval Levin, Opinion, *How Did Americans Lose Faith in Everything?*, N.Y. TIMES (Jan. 18, 2020), <https://www.nytimes.com/2020/01/18/opinion/sunday/institutions-trust.html> [<https://perma.cc/A9HS-GTJN>].

⁶ See *id.*

⁷ See STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* 85 (2021) (tying “the public’s confidence in the Court itself” to its role “as a legitimate interpreter of laws”); *id.* at 64 (“The job of constitutional judges is to interpret or to apply the legal phrases that we find either in a statute or in the Constitution itself.”); see also LAWRENCE LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* 42 (2019) (“If a court decides a case one way on day one and a different way on day two, it erodes confidence in the court as an institution applying the law in a proper manner.”).

⁸ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“The Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”).

majestic specificity,⁹ the Court's critics have long read our Constitution as instead marked by what Justice Robert Jackson famously termed "majestic generalities."¹⁰ The divide centers on how determinate a legal text the Constitution is. And these disputes are not confined to questions of constitutional law; they reappear in the context of statutory interpretation and administrative deference as well. This Chapter terms these disagreements "disputes about determinacy."

But if the Court is staying within its lane as it fights the same old fights over legal determinacy, why has the public lost so much faith in it? Because as Congress fades from the policymaking scene, the Court's legal rulings amount to the last word on the most politically salient issues of the day.¹¹ "Congress has become a 'parliament of pundits,'" incapable of legislating on what citizens care most about.¹² Although Congress steps up to the legislative plate here and there to respond to crises¹³ and to authorize certain crucial government programs and activities,¹⁴ Congress has grown incapable of responding to the most politically salient issues of our time in the form of legislation.¹⁵ Meanwhile, as Congress lies dormant, the Court has grown less solicitous of the Executive's attempts to leverage old statutes to resolve new social problems.¹⁶ As a result, when the Supreme Court hands down a constitutional holding or reverses executive action on issues like abortion,

⁹ Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, 2017 Walter Berns Constitution Day Lecture at the American Enterprise Institute (Sept. 18, 2017), <https://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf> [<https://perma.cc/5NZD-BW48>]; see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 846 (2015) (Roberts, C.J., dissenting) ("Justice Jackson once wrote that the Constitution speaks in 'majestic generalities.' In many places it does, and so we have cases expounding on 'freedom of speech' and 'unreasonable searches and seizures.' Yet the Constitution also speaks in some places with elegant specificity." (citations omitted) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); U.S. CONST. amends. I, IV)).

¹⁰ *E.g.*, *Barnette*, 319 U.S. at 639.

¹¹ Cf. Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, THE ATLANTIC (Nov. 16, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/> [<https://perma.cc/VQS5-BL6W>] ("[T]he reality is that the Court plays a large role in the policy process because of how difficult it is for Congress to act.").

¹² SARAH ISGUR, DAVID FRENCH & JONAH GOLDBERG, NAT'L CONST. CTR., RESTORING THE GUARDRAILS OF DEMOCRACY: TEAM CONSERVATIVE 5 (2022), https://constitution-center.org/media/files/Team_conservative_final.pdf [<https://perma.cc/W46H-P5BU>].

¹³ See Philip Wallach, *Crisis Government*, 44 NAT'L AFFS., Summer 2020, at 31, 31.

¹⁴ See, e.g., *Congress Passes Contentious Defense Policy Bill Known as NDAA, Sending It to Biden*, CBS NEWS (Dec. 14, 2023, 10:53 AM), <https://www.cbsnews.com/news/senate-passes-defense-policy-bill/> [<https://perma.cc/YB94-CZY6>].

¹⁵ For discussions and empirical proof of Congress's growing inability to pass legislation that is responsive to the most politically salient issues of the day, see, for example, SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003); Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 91–94 (2015); Sarah Binder (@bindersab), TWITTER (Mar. 3, 2022, 2:58 PM), <https://twitter.com/bindersab/status/1499474222271320071> [<https://perma.cc/B852-T3Y8>].

¹⁶ See generally Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014). For a recent example of the Court preventing an executive agency from leveraging an old statute to respond to a new problem, see *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

affirmative action, guns, gay rights, health care, student loan debt, and the like, the Court's decision threatens to amount to the final word from the federal government not only regarding the concrete case or controversy at hand, but also regarding the relevant subject matter more broadly. Even if the Court's conclusions are the product of good faith legal reasoning, Congress's retreat from relevance leaves the Court as having occupied the field of politics.

In short, Congress's fecklessness hurts the Court's legitimacy and engenders public distrust in the Court because it leads the public to wrongly perceive the Court as having stepped outside its legal lane and into the realm of politics. This Chapter contends that such perceptions are misguided; the divides on the Court are fundamentally legal disputes — specifically, disputes about the determinacy of legal texts. Then, the Chapter explains why structurally reforming the Court will not help resolve those legal disputes or the crisis of confidence in the Court. Instead, reform advocates should direct their efforts toward strengthening Congress as an institution.

Section A contends that today's arguments surrounding the Court's holdings boil down to interpretive disputes. It draws upon Roberts Court case law and contemporary academic debates. By surveying academic writings, it underscores that the Court is not alone in fighting over the determinacy of legal texts. The very fact that some of the most consequential fights in the academy collapse into disputes about determinacy indicates that such disputes are a core feature of legal disagreement today — whether in the pages of law reviews or the *U.S. Reports*.

Section B pinpoints three principal reasons why it would be a mistake to impose structural reforms on the Supreme Court. First, implementing the most common reform suggestions — increasing the number of Justices, imposing term limits, and restricting the Court's jurisdiction¹⁷ — would do nothing to resolve the underlying dispute over how to properly interpret the Constitution and statutes. Second, imposing these types of reforms would impair the Supreme Court's independence and send a clear (and dangerous) message to the judiciary: interpret legal texts as political majorities see fit or there will be consequences. As Justice Breyer has explained, such reforms would have the perverse effect of labeling the Court as a political institution and hampering its legitimacy in the long run.¹⁸ Third, to the extent that citizens and elected officials care about disputes about determinacy because the Court's current approach to such disputes may result in unsatisfactory legal and political arrangements, We the People are not powerless. The

¹⁷ See, e.g., PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 20-21 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/N9GR-KME8>]; cf. *supra* ch. I, section A, pp. 1637-43 (summarizing popular arguments for and against structural reform).

¹⁸ BREYER, *supra* note 7, at 63.

legal texts at the center of the determinacy debate can be revised to be more or less specific. To be sure, such revisions seem unthinkable right now. But our seeming inability to enact such meaningful legal changes should nudge us toward reforming Congress, not the Supreme Court. With Congress reformed and resurgent, the political stakes of the Court's inescapable disputes about determinacy will lower. The Court will remain in its lane; the public will be more apt to perceive the Court accordingly; and Americans' judgment that the Court isn't trustworthy can be reversed.

A. Roberts Court Case Law & Academic Debates

i. Defining Disputes About Determinacy. — At the outset, we must define “disputes about determinacy.” Disputes about determinacy entail disagreements between interpreters about just how many legal questions a good faith reading of legal texts (like the Constitution and statutes) answers when those interpreters consult the same pieces of evidence. Consider disputes about determinacy in the constitutional context. When confronted with the same set of evidentiary materials (like Founding-era debates, historical context, and early political practice), two camps engaged in a dispute about the Constitution's determinacy emerge: (1) those who view the Constitution as an open-textured document that provides a flexible framework for government and few clear-cut answers to contemporary legal questions; and (2) those who view the Constitution as a document filled with provisions of rich, constraining meaning when read in context — which, in turn, offer fixed answers to many contemporary legal questions.¹⁹

The first camp reads the Constitution as an inherently indeterminate document. This camp points out that the Constitution was written well over two centuries ago in deliberately imprecise language, making it difficult — if not impossible — to find many concrete answers within its general provisions, no matter how hard one looks.²⁰ According to this camp, there are few concrete answers. And even if there *were* more concrete answers that could somehow be mined from the document, applying those answers to twenty-first-century legal and social problems would still involve making discretionary judgments.²¹ Temporal hurdles aside, this camp believes that the Constitution is fundamentally a charter for governance — a document that should be interpreted so that

¹⁹ Of course, determinacy runs along a spectrum, and different members of the two “sides” or “camps” fall along different points on that spectrum. But for purposes of clarifying the nature of the dispute, articulating the two poles is most helpful. That is, oversimplification helps clarify the concepts.

²⁰ See, e.g., Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1498–99 (2021) (collecting such critiques).

²¹ Cf. *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (arguing in favor of an “interest-balancing inquiry” weighing the interests protected by the Second Amendment against the government's interest in modern public safety).

it “really truly can last over time.”²² Under this view, the Constitution established a basic framework of government, and the document’s Framers expected the Constitution’s many indeterminacies to be worked out over time.²³ This side of the divide’s operating premise has long been constant: the Constitution is fundamentally indeterminate, and it has some play in the joints. But members within this camp often disagree about the upshot of this insight: Should judges fill in the Constitution’s gaps themselves? Or should judges instead take a deferential view and allow the political process to fill in the gaps?

By contrast, when canvassing the same historical and legal materials, the other camp is likely to ascribe more determinate answers to the Constitution. They are less apt to find irresolvable ambiguity in legal texts — regardless of whether they are looking at the Constitution or at a statute. On this view, there is a singularly correct, findable answer to most legal questions. The Constitution either prevents the government from doing something or it does not. A statute either empowers an administrative agency to promulgate a particular regulation or it does not. It will require hard work, but there is an answer to be found. And the tools available to find that answer — dictionaries, canons of construction, corpus linguistics, deep dives into the historical context in which the text was drafted and ratified, inferences from the structure of the constitutional or statutory scheme at issue — are up to the task more often than not.

Across several different areas of constitutional law, the dividing line between majority opinions and dissents often closely tracks the question of just how determinate our Constitution is. The fact that these same disputes routinely surface in fights over statutory interpretation further supports framing these constitutional bouts as legal, interpretive disagreements. And it is no coincidence that these very same arguments are reproduced in the legal academic literature focused on constitutional interpretation: both the law reviews and the U.S. Reports overflow with disputes about determinacy.

By putting a finger on a dynamic that’s long been percolating beneath the surface of interpretive debates, perhaps this Chapter can help both sides of those debates better grasp one of the primary drivers of their disagreements. That enhanced understanding could lead to more fruitful dialogue, and most importantly for present purposes, it cuts against the notion that these disputes — which undergird so much of the disagreement with the Supreme Court’s recent holdings — warrant structural reform of the Supreme Court.

²² Sandra Knispel, *Justices Appear in Oxford*, MISS. PUB. BROAD. (Feb. 3, 2020), <https://www.mpbonline.org/blogs/news/justices-appear-in-oxford> [<https://perma.cc/H87H-KUXV>] (quoting Justice Kagan).

²³ See, e.g., *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

2. *Roberts Court Case Law.* — With a conservative majority on the Court that tends to be more comfortable reading the Constitution as determinate,²⁴ dissenting Justices are often left contending that this centuries-old document's answers to the questions at hand are far less clear than the majority acknowledges. For the dissenters, the Constitution has more play in the joints than the majority credits, and either judges or the political branches have leeway to make decisions and craft doctrine within those gaps. This dispute about constitutional determinacy holds true across different areas of constitutional law, from unenumerated constitutional rights to structural questions. Nor is the dispute confined to constitutional questions; it routinely bubbles to the surface in the context of fights over statutory interpretation and judicial deference to administrative agencies.

(a) *Unenumerated Rights.* — Recent case law regarding the scope of unenumerated constitutional rights and the provisions that give rise to them, such as the Due Process Clause of the Fourteenth Amendment, have laid bare disputes about determinacy. With the Privileges or Immunities Clause long dormant as the mechanism for enforcing individual rights against state infringement under the Fourteenth Amendment,²⁵ the Due Process Clause — particularly substantive due process — has filled the void.

Substantive due process is an area where the side that sees more determinacy in the Constitution — a perspective that commands a majority on the Court today²⁶ — sees *fewer* answers and thus fewer constraints on the political branches. More determinacy does not always result in more governmental constraints. For those on this side of the determinacy divide, when read in its historical context, the meaning of the phrase “due process of law” is clear enough: it primarily provides for procedural due process (fair notice, an impartial decisionmaker, and so forth). One wrinkle to that clear-cut rule is that the Due Process Clause can also protect certain well-defined, long-recognized fundamental rights.²⁷

²⁴ An interpreter's assessment of a text's determinacy might flow from, or at least be wrapped up with, the interpreter's other commitments and predilections. For example, judicial conservatives' willingness to read the text of the Constitution as largely determinate might itself be wrapped up with or flow from conservatives' traditional reticence toward judicial discretion. Compare Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1125–26 (1998) (advocating strict textualist interpretation for judges, but not necessarily for others engaged in interpretation, like Congress, students, and the like), and 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 3, 9–12 (Amy Gutmann ed., Princeton Univ. Press 2018) (1997), with Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947) (“In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment.”).

²⁵ See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–80 (1873).

²⁶ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240, 2242 (2022).

²⁷ See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

By contrast, the camp that interprets the Constitution as more of an indeterminate document reads the Due Process Clause as home to open-ended, grand language. The Fourteenth Amendment’s prohibition on depriving persons of “liberty” without “due process of law” is said to be a central piece of the Constitution’s implied promise of “liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”²⁸ The guarantee’s contours are far more indeterminate (and thus potentially more extensive) than, say, its protection against being thrown in jail without fair notice of the alleged crime and a hearing before an impartial tribunal.²⁹ Instead, the liberty it safeguards “extend[s]” to an undefined range of “personal choices central to individual dignity and autonomy.”³⁰

Consider how this divide came to the fore in recent years in the context of abortion rights. The *Roe*³¹ right rested on a premise of indeterminacy: the Court viewed the “right of privacy” as “founded in the Fourteenth Amendment’s concept of personal liberty,” and reasoned that the privacy right was sufficiently broad and open-ended — not fixed — to encompass “a woman’s decision whether or not to terminate her pregnancy.”³² Then-Justice Rehnquist’s dissenting opinion critiqued the majority for resorting to “judicial legislation.”³³ The majority and concurring opinions drew upon precedents that called on the Court to work out what they took to be the inherently open-ended meaning of the Due Process Clause. The liberty protected by the Due Process Clause was a “rational continuum” that protected against “all substantial arbitrary impositions and purposeless restraints”;³⁴ it provided a broad “concept of liberty” that, in conjunction with the penumbral emanations from the specific guarantees of the Bill of Rights, protected a right to privacy whose contours would be fleshed out gradually.³⁵ In reworking *Roe*’s framework while still retaining constitutional protection for the core of the abortion right, the plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*³⁶ adopted a similar view of the Due Process Clause’s guarantee — one that is imprecise and

²⁸ *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015).

²⁹ See, e.g., *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

³⁰ *Obergefell*, 576 U.S. at 663 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)).

³¹ *Roe v. Wade*, 410 U.S. 113 (1973).

³² *Id.* at 153.

³³ *Id.* at 174 (Rehnquist, J., dissenting); see also *Doe v. Bolton*, 410 U.S. 179, 221–22 (1973) (White, J., dissenting).

³⁴ *Roe*, 410 U.S. at 169 (Stewart, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

³⁵ *Id.* at 152–53 (majority opinion) (citing, inter alia, *Griswold*, 381 U.S. at 484–85; *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

³⁶ 505 U.S. 833 (1992).

inconclusive. According to *Casey*, the “liberty” of which the Due Process Clause speaks entails “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”³⁷

In overturning *Roe* and *Casey*, *Dobbs v. Jackson Women’s Health Organization*³⁸ returned to the *Roe* dissenters’ original premise — that the relevant constitutional language had a more well-defined, more historically bounded, and less woolly meaning. Justice Alito’s majority opinion began by stressing that “the Constitution makes no mention of abortion.”³⁹ That mattered because according to the majority, the Constitution’s text “offers a ‘fixed standard’ for ascertaining what our founding document means.”⁴⁰ Nor did abortion satisfy the test for unenumerated rights laid out by Chief Justice Rehnquist in *Washington v. Glucksberg*⁴¹: the abortion right was not sufficiently “deeply rooted in this Nation’s history and tradition” so as to be “implicit in the concept of ordered liberty.”⁴² *Glucksberg*’s restrictive standard helps resolve the indeterminacy that stems from opening the door at all to constitutional protection of unenumerated rights: the otherwise vague concept of ordered liberty is bounded by discrete historical facts.⁴³ The *Dobbs* majority explicitly noted *Glucksberg*’s capacity to cut down on indeterminacy (and thus judicial discretion): the tightly bounded historical inquiry is “essential” to hem in judges and prevent them from reading their own preferences into the Constitution when they interpret a term as potentially “capacious” as “liberty.”⁴⁴ Thus, the answer was straightforward for the *Dobbs* majority: without a textual basis or a strong historical pedigree, the abortion right fell outside the Fourteenth Amendment’s protections.⁴⁵

In their defense of the *Roe-Casey* line of cases, the *Dobbs* dissenters stressed how *Casey* had recognized the open-ended nature of “liberty” under the Due Process Clause: “That guarantee encompasses realms of

³⁷ *Id.* at 851.

³⁸ 142 S. Ct. 2228 (2022).

³⁹ *Id.* at 2240; *see also id.* at 2304 (Kavanaugh, J., concurring) (“The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion.”).

⁴⁰ *Id.* at 2245 (majority opinion) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 399, at 383 (1833)).

⁴¹ 521 U.S. 702, 720–21 (1997).

⁴² *Dobbs*, 142 S. Ct. at 2242 (quoting *Glucksberg*, 521 U.S. at 721).

⁴³ *See Glucksberg*, 521 U.S. at 721 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

⁴⁴ *Dobbs*, 142 S. Ct. at 2247–48; *cf. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166 (2023) (quoting *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2211 (2016)) (requiring asserted interests be “sufficiently measurable” to facilitate judicial review under the strict scrutiny standard); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (“[I]t is easier to arrive at categorical rules if one acknowledges that the content of evolving concepts is strictly limited by the actual practices of the society.”).

⁴⁵ *Dobbs*, 142 S. Ct. at 2242–43.

conduct not specifically referenced in the Constitution,”⁴⁶ and it “encompasses conduct today that was not protected at the time of the Fourteenth Amendment.”⁴⁷ In other words, the clause’s vague contours are not fixed and defined; they evolve over time as judicial precedent, social norms, and political practice fill in the gaps.

(b) *Separation of Powers*. — Disputes about determinacy have not been confined to matters of individual constitutional rights. These fights permeate majority and dissenting opinions regarding the separation of powers, too. One camp — more willing to read legal texts as determinate — relies on history and constitutional structure to infuse terms like “legislative power” and “executive power” with thick meanings so as to constrain contemporary political actors’ ability to establish novel governing arrangements.⁴⁸ That camp’s detractors accuse them of using these open-ended phrases as “textual hooks” upon which they hang more meaning than such sparse text can bear.⁴⁹

Consider the Court’s removal cases, including *Free Enterprise Fund v. Public Company Accounting Oversight Board*⁵⁰ and *Seila Law LLC v. CFPB*.⁵¹ The dividing line in these cases tracked the Justices’ answers to an underlying dispute about determinacy: Was the combination of the Take Care Clause and Vesting Clause sufficiently determinate so as to constitutionally bar Congress’s for-cause removal protections for certain executive branch officers? Or was there sufficient play in the joints in the meaning of these provisions — coupled with Congress’s extensive authority under the Necessary and Proper Clause — to enable Congress to insulate the executive officers from presidential removal?

In *Free Enterprise Fund*, Chief Justice Roberts’s majority opinion began from the premise that the “Decision of 1789” largely controlled the question: in setting up the new federal government, the First Congress concluded that a broad presidential removal power flowed from the text of Article II and the overarching structure of separated powers.⁵² So too in *Seila Law*, where the Chief Justice — again writing for the majority — reiterated that a broad removal power was grounded in “the text of Article II, was settled by the First Congress,”⁵³ and had

⁴⁶ *Id.* at 2321 (Breyer, Sotomayor & Kagan, JJ., dissenting) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–48 (1992)).

⁴⁷ *Id.* at 2321–22 (citing *Casey*, 505 U.S. at 848).

⁴⁸ See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment); *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

⁴⁹ See Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1319–22 (2019).

⁵⁰ 561 U.S. 477 (2010).

⁵¹ 140 S. Ct. 2183 (2020).

⁵² *Free Enterprise Fund*, 561 U.S. at 492 (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)).

⁵³ *Seila Law*, 140 S. Ct. at 2191.

been confirmed by longstanding precedents like *Myers v. United States*.⁵⁴

The dissents in *Free Enterprise Fund* and *Seila Law* rejected the notion that the meaning of the Take Care and Vesting Clauses was thick enough to cover a presumptive presidential removal power.⁵⁵ For example, at the outset of her *Seila Law* dissent, Justice Kagan stressed that “[n]othing in [the Constitution’s text] speaks of removal.”⁵⁶ Thus, explained Justice Kagan, in the face of this “telltale silence,” the majority was really drawing inferences from the structural separation of powers.⁵⁷ Not only were those inferences unfounded,⁵⁸ but also “the separation of powers is, by design, *neither rigid nor complete*.”⁵⁹ This constitutional silence — paired with Congress’s power under the Necessary and Proper Clause⁶⁰ — should have left Congress with extensive leeway to “structure administrative institutions as the times demand.”⁶¹ Given that “the Constitution . . . does not lay out immutable rules” in this context, “then neither should judges.”⁶² On this point, Justice Kagan was mounting arguments reminiscent of her well-known *Presidential Administration* article, published in these pages.⁶³ There, then-Professor Kagan noted that “[t]he original meaning of Article II is insufficiently precise . . . to support the unitarian position” regarding the President’s removal power.⁶⁴

(c) *Statutory Interpretation: Textualism, Purposivism, and Chevron*. — The claim that so many of the most heated legal disagreements about the Constitution’s meaning boil down to disputes about the

⁵⁴ 272 U.S. 52 (1926); *Seila Law*, 140 S. Ct. at 2192.

⁵⁵ See, e.g., *Seila Law*, 140 S. Ct. at 2227 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (“The majority relies for its contrary vision on Article II’s Vesting Clause, but the provision can’t carry all that weight.” (citation omitted)); *id.* at 2228 (“Nor can the Take Care Clause come to the majority’s rescue.”).

⁵⁶ *Id.* at 2225.

⁵⁷ See *id.* at 2228–29; see also *id.* at 2237 (“The [Constitution] — with great good sense — sets out almost no rules about the administrative sphere.”).

⁵⁸ *Id.* at 2226 (“The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance — all stand against the majority’s opinion.”).

⁵⁹ *Id.* (emphasis added); cf. Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2028–29 (2022) (“As a principle of constitutional governance, the separation of powers is historically contingent, institutionally arbitrary, and inherently provisional. It comprises a set of broad, vague, conflicting, and contested political ideas (thinly connected to sparse and ambiguous constitutional text) and a set of overlapping, interacting institutions that participate in the messy work of national governance. There is no essential or immutable separation of powers.” (footnotes omitted)).

⁶⁰ *Seila Law*, 140 S. Ct. at 2228 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (citing John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1967, 1971 (2011)).

⁶¹ *Id.* at 2226.

⁶² *Id.* at 2237; cf. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 858 (2015); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 386 (2013).

⁶³ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

⁶⁴ *Id.* at 2326.

extent of the document’s legal determinacy rings equally true in other areas of interpretive contention. Disputes about determinacy in the context of constitutional interpretation are just one piece of a much broader, comprehensive legal fight. The battle lines largely remain the same, but now the differences of opinion are brought to bear on statutes, not the Constitution. The very fact that constitutional arguments can be framed as pieces of a broader interpretive debate provides further evidence that many modern constitutional bouts are interpretive ones at their core.

To begin with, the underlying divide between textualists and purposivists can be framed in part as a dispute about determinacy. As then-Judge Kavanaugh once observed in these pages, a “critical difference between textualists and purposivists is that, for a variety of reasons, textualists tend to find language to be clear rather than ambiguous more readily than purposivists do.”⁶⁵ As purposivists are more apt to find statutory text ambiguous, they more readily “resort . . . to ambiguity-dependent canons and tools of construction such as constitutional avoidance, legislative history, and *Chevron*.”⁶⁶ Textualists like Justice Kavanaugh, by contrast, are more apt to find a sufficiently clear legal answer after bringing the very same tools of statutory interpretation to bear on the question at hand.⁶⁷

*Chevron*⁶⁸ deference is one especially contentious area in statutory interpretation that showcases a deep dispute about determinacy. *Chevron* teaches that judges should defer to the reasonable statutory interpretations of an administrative agency when the agency’s organic statute is too indeterminate to clearly support or preclude an agency’s regulation.⁶⁹ *Chevron*’s domain extends to questions about which Congress has *not* expressed an intent, such that Congress has empowered the agency to fill gaps and exercise its discretion within whatever bounds the statute does set.⁷⁰

⁶⁵ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2129 (2016) (book review); see also Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 269 (2022) (noting textualists’ “continuing assurances . . . that their method brought . . . determinacy to statutory cases”).

⁶⁶ Kavanaugh, *supra* note 65, at 2129.

⁶⁷ See Denise Wager, *ND Law Review Symposium Features Q&A with Supreme Court Justice Brett Kavanaugh*, UNIV. OF NOTRE DAME (Jan. 26, 2023), <https://law.nd.edu/news-events/news/2023-law-review-federal-courts-keynote-justice-brett-kavanaugh> [<https://perma.cc/FK62-NV5E>] (quoting Justice Kavanaugh referring to himself as a “footnote 9 *Chevron* person”); see also Doerfler, *supra* note 65, at 270 (arguing that textualists are “left to act as if statutory language admit[s] of only one plausible reading,” having abandoned *Chevron*). As Professor Caleb Nelson points out, even when textualists do concede that statutory language is ambiguous, “textualists tend to be quicker than intentionalists to settle upon the more rule-like meaning.” Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 350 (2005).

⁶⁸ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁶⁹ See *id.* at 845.

⁷⁰ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516; see also Transcript of Oral Argument at 12–13, *Relentless, Inc. v. Dep’t of Com.*,

Disputes about determinacy undergird disagreements about when and whether *Chevron* deference should be triggered. When confronted with the very same statute, one judge may see a fundamentally indeterminate provision allowing for agency discretion and gap-filling, while another judge may see an admittedly complex statute but nonetheless one with clear-cut legal meaning — meaning with which the agency has no choice but to comply.⁷¹ As then-Judge Kavanaugh once put it: “One judge’s clarity is another judge’s ambiguity.”⁷² Indeed it is.⁷³ While Supreme Court Justices have at times chided their lower court colleagues for too readily concluding that statutes are indeterminate,⁷⁴ some lower court judges profess to have *never* found a statutory ambiguity warranting resort to *Chevron* Step Two.⁷⁵

(d) *Stare Decisis*. — In addition to motivating so many of our interpretive disagreements in the constitutional and statutory contexts, disputes about determinacy also shape emergent conflicts over the role that *stare decisis* should play in our law: How much respect is precedent due? As Professor Caleb Nelson explains, “the more determinate one considers the external sources of the law that judicial decisions seek to apply, the less frequently one might deem precedents binding.”⁷⁶ If one is more apt to view a particular legal provision’s meaning as clear and determinate, one will more readily set aside precedent in tension with that constitutional or statutory provision’s supposed meaning. One need look no further than the jurisprudence of Justice Thomas to grasp that this intuitive point plays out as expected in the real world.⁷⁷ By contrast, if one believes that a legal provision’s meaning deduced from the work of interpretation can only take us so far, then when deciding the case at hand one is more ready to look to the weight of precedent to help tip the scales.

No. 22-1219 (U.S. Jan. 17, 2024), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-1219_e2p3.pdf [<https://perma.cc/E77C-9SKJ>] (Justice Kagan stating that “sometimes law runs out. Sometimes there’s a gap. Sometimes there’s a genuine ambiguity.”).

⁷¹ See, e.g., Transcript of Oral Argument, *supra* note 70, at 65–66 (Justice Jackson voicing a concern that some judges will mistake policymaking for legal interpretation).

⁷² Kavanaugh, *supra* note 65, at 2137.

⁷³ Granted, it is unclear whether the divergence always tracks with partisanship or ideology. Disputes about determinacy in the constitutional realm often track with judicial ideology (with “conservatives” reading the document as more determinate and “liberals” reading it as less determinate). Though often presumed to be true in the *Chevron* context as well, see, e.g., Scalia, *supra* note 70, at 521, this connection between determinacy and judicial ideology might not always hold true in that context, see Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1515–17 (2018).

⁷⁴ See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

⁷⁵ See, e.g., Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323 (2017).

⁷⁶ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 4 (2001).

⁷⁷ See, e.g., Jeremy Rozansky, *Precedent and the Conservative Court*, 46 NAT’L AFFS., Winter 2021, at 34, 37.

3. *The Mirror of Academic Debates.* — Disputes about determinacy are not unique to the Supreme Court; they pervade our legal discourse. Upon close examination, some of the most consequential fights in the academy — like the merits of originalism — collapse into disputes about determinacy. The centrality and importance of disputes about determinacy to academic debate indicate that judicial dialogue about determinacy is just one piece of an ongoing, broader conversation within our law.

Consider the countless pages of law review articles penned by legal academics about constitutional interpretive theory, such as the merits of originalism. Opposing sides in this debate often share certain interpretive premises in the abstract yet reach fundamentally different conclusions about legal outcomes based on how determinate a text they believe the Constitution to be. Professor Jack Balkin, for example, claims the mantle of originalism. He emphasizes that “fidelity to *original meaning* does not require fidelity to *original expected application*.”⁷⁸ On this front, Balkin is aligned with most modern-day originalists.⁷⁹ As leading originalist Professors William Baude and Stephen Sachs explain in response to Professor Adrian Vermeule’s recent critiques of originalism,⁸⁰ as a legal rule’s “designated inputs change, the outputs change accordingly.”⁸¹ In the past, such claims would have been more apt to come from the likes of Professor Lawrence Lessig rather than mainstream originalists.⁸² But now most modern originalists take no issue with the distinction between original meaning and original expected application.⁸³

⁷⁸ Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009).

⁷⁹ See, e.g., Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution> [<https://perma.cc/CK7Y-Q9FY>] (“Originalism teaches only that the Constitution’s original meaning is fixed; meanwhile, of course, new applications of that meaning will arise with new developments and new technologies.”).

⁸⁰ See, e.g., ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 97–98, 105, 110–11 (2022).

⁸¹ William Baude & Stephen E. Sachs, *The “Common-Good” Manifesto*, 136 HARV. L. REV. 861, 879 (2023) (reviewing VERMEULE, *supra* note 80).

⁸² See Jack Goldsmith (@jackgoldsmith), TWITTER (Oct. 31, 2023, 6:30 PM), <https://twitter.com/jackgoldsmith/status/1719482120890921048> [<https://perma.cc/R9UU-M3HQ>] (characterizing Professor Robert Leider’s proffered “distinction between replacing old law with new law and adapting old law to new situations” as “[s]ound[ing] like @lessig originalism from three decades ago” (quoting Robert Leider (@LeiderRob), TWITTER (Oct. 31, 2023, 10:57 AM), <https://twitter.com/LeiderRob/status/1719368020630675948> [<https://perma.cc/DCQ2-UGN8>])).

⁸³ See, e.g., Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 564 (2006); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 27, 184 (2021); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 20–21 (2015).

Although Balkin and most originalists now share this interpretive premise,⁸⁴ they soon sharply diverge. The root of that divergence is a dispute about determinacy. To use his own phrasing, Balkin is a framework originalist.⁸⁵ Skyscraper originalists see the Constitution “as more or less a finished product,” albeit one amendable by way of the Article V process.⁸⁶ “Framework originalis[ts], by contrast, view[] the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction.”⁸⁷ Thus, “these two types of originalism differ in the degree of constitutional construction and implementation that later generations may engage in.”⁸⁸ In other words, skyscraper originalists read the Constitution as a more determinate document than framework originalists do.

Skyscraper and framework originalists’ dispute about determinacy is at the heart of their disagreements about the most consequential legal questions of our day. Balkin contends, for example, that a right to abortion is grounded in the Constitution’s original *meaning*, if not its original *expected application*.⁸⁹ Interestingly enough, this is a paradigm case to which Baude and Sachs, in rebutting Vermeule, point as evidence of progressives reading the Constitution as too abstract and too vague:

Perhaps . . . *in practice*, progressive activists are likely to read general provisions in excessively abstract ways, and then to use their incorrect political morality to fill in the abstractions. But the proximate cause of this problem is the excessively abstract reading. One can say that the Equal Protection Clause adopted an anticaste principle extending to abortion rights and same-sex marriage, but saying it doesn’t make it *true*, and for originalism the truth matters very much. How general a provision really was, and which abstractions it really invoked or ignored, are falsifiable claims about the law of the past.⁹⁰

Faulting others for reading the Constitution “in excessively abstract ways”⁹¹ is a way of saying that one’s interpretive foes are reading the Constitution as excessively indeterminate.

The disagreement here does not center on the point that legal outcomes may sometimes change as social facts and norms change. The divergence takes root at a later step in the analytical process, when one must decipher just how determinate the legal rule in question is. The more determinate the provision, the less room it leaves for

⁸⁴ See, e.g., Sachs, *supra* note 62, at 852.

⁸⁵ See Balkin, *supra* note 78, at 550.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007).

⁹⁰ Baude & Sachs, *supra* note 81, at 881.

⁹¹ *Id.*

“construction”⁹² or updating with new social facts.⁹³ No matter how hard one tries, new social facts are not going to change the constitutional requirement that the President be at least thirty-five years old; the text is too clear, too determinate.⁹⁴ But if a provision is particularly indeterminate, its legal meaning may be nominally “fixed”⁹⁵ yet give rise to novel and unforeseen legal outcomes as the legally relevant norms and social facts change. Thus, as Professor Thomas Colby recognizes, if “originalists” read the Constitution as an *indeterminate* text, then there is often very little difference in practice between such originalists and living constitutionalists.⁹⁶ This, of course, is the very same point Vermeule was making that in turn triggered Baude and Sachs’s response.⁹⁷ And it is the ground upon which mainstream originalists critique Balkin specifically.⁹⁸

The upshot is that these interpretive disagreements ultimately revolve around the determinacy of the Constitution’s text. After all, “[M]ost non-originalists treat the original meaning as the starting point for any interpretive inquiry, but are willing to look elsewhere . . . to construct constitutional meaning *when the text is vague or indeterminate*.”⁹⁹ The more willing originalists grow to read the Constitution’s text as indeterminate,¹⁰⁰ the less daylight is left between originalists and their alleged foes. That conundrum is explicitly why originalist Professors John McGinnis and Michael Rappaport argue that “[w]hile many constitutional provisions seem to be indeterminate,” when “the Constitution is properly understood . . . these provisions become more determinate.”¹⁰¹ And perhaps it helps explain the prevalence of originalist scholars examining what have long been thought of as open-ended, indeterminate constitutional provisions and infusing them with more definite, determinate original meanings.¹⁰² In sum, these disputes boil down to disputes about determinacy. The less determinate a document the Constitution

⁹² See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 495–99 (2013).

⁹³ See John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 *NOTRE DAME L. REV.* 919, 920, 922 (2021); Balkin, *supra* note 78, at 553 (“If the text states a determinate rule, we must apply the rule in today’s circumstances. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle.”).

⁹⁴ See U.S. CONST. art. II, § 1, cl. 5.

⁹⁵ See Solum, *supra* note 83, at 1.

⁹⁶ Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 754–55 (2011).

⁹⁷ See VERMEULE, *supra* note 80, at 97–98, 105, 110–11; Baude & Sachs, *supra* note 81, at 879.

⁹⁸ See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 *UCLA L. REV.* 1343, 1371 (2009).

⁹⁹ Peter J. Smith, *How Different Are Originalism and Non-originalism?*, 62 *HASTINGS L.J.* 707, 723 (2011) (emphasis added).

¹⁰⁰ Cf. Sachs, *supra* note 62, at 858.

¹⁰¹ McGinnis & Rappaport, *supra* note 93, at 921.

¹⁰² See, e.g., John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 *NW. U. L. REV.* 1739, 1767 (2008).

is, the more decades-long interpretive battle lines begin to collapse into one another.

Some of the foremost critics of originalism, like Professor Richard Fallon, have explicitly pointed out the centrality of disputes about determinacy in this context. Fallon concludes that Supreme Court Justices enjoy “significant authority to shape the law,”¹⁰³ as the ultimate legal rules governing the disposition of Supreme Court cases today are consistently “vague, indeterminate, or open-textured.”¹⁰⁴ He notes that this conclusion “will disturb other observers,” including originalists in particular, “who hold an ideal of the rule of law that calls for more legal determinacy.”¹⁰⁵

Finally, originalists themselves ground their preferred interpretive method in the determinacy of the Constitution’s original meaning. Consider the defense of originalism recently offered by Fifth Circuit Court of Appeals Judge Oldham in these pages:

The best (dare I say only?) way to define and defend originalism against its critics is to show that some (dare I hope all?) provisions of the Constitution have determinate or “thick” original meanings — that is, that we can find the true, genuine, and objectively correct meaning of a constitutional provision with greater ease than a hound blindly searching for a truffle.¹⁰⁶

Whichever side has the better of the argument, the point is that the two camps are battling it out on a playing field of determinacy. What is true in the *U.S. Reports* is true in the law reviews. Disputes about determinacy pervade our legal discourse. The Supreme Court is not alone.

* * *

One cannot propose a sound solution without correctly understanding the problem. That is why pinpointing disputes about determinacy as a critical motivator behind the actual battles on the Court matters. Understanding the tension as such — as a *legal* argument at its core — should shape any political response to that tension.

B. Disputes About Determinacy Do Not Call for Structural Reforms

Having pinpointed how criticisms of the current Court rest on disputes about determinacy in the end, this Chapter now assesses whether those objections justify reforming the Supreme Court. The Presidential Commission on the Supreme Court recently engaged in a similar endeavor.¹⁰⁷ Over the course of several months, the Commission

¹⁰³ Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1136 (2008).

¹⁰⁴ *Id.* at 1154.

¹⁰⁵ *Id.* at 1136.

¹⁰⁶ Andrew S. Oldham, *On Inkblots and Truffles*, 135 HARV. L. REV. F. 154, 156 (2022).

¹⁰⁷ See PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., *supra* note 17, at 12.

considered different ways to respond to those who believe that — in the words of one Commissioner — something about the Supreme Court is “broken.”¹⁰⁸ One idea was to change the size and composition of the Supreme Court.¹⁰⁹ Another was to alter the Justices’ tenure, such as by imposing term limits.¹¹⁰ A third involved limiting the Court’s jurisdiction so that it could not hear certain types of cases.¹¹¹ A fourth proposal that the Commission considered was whether the Justices should adopt new procedures regarding “judicial ethics and transparency with respect to recusals and conflicts.”¹¹² Several Justices have already weighed in on that topic.¹¹³ The first three proposals are ones that would alter the institutional *structure* of the Supreme Court. The fourth proposal, by contrast, is one that would alter the internal processes and procedures of the Court.

This Chapter focuses on the first three proposals — the structural ones — because the stakes of implementing these reforms are higher than the stakes of mandating an ethics code. In so doing, this Chapter does not mean to minimize the importance of judicial ethics. But the structural reforms that have been proposed could work serious and swift damage to the judiciary.

Recognizing that disputes about determinacy lie at the heart of structural reform proposals counsels against reform for three reasons. First, Court reform will do nothing to resolve that interpretive debate, which might be irresolvable at any rate.¹¹⁴ Second, Court reform will strike at the independence of the judiciary, as it attempts to coax the Justices to interpret legal texts not by their own lights, but by the lights of fleeting political majorities. Third, for those concerned with the real-world stakes of these legal fights, this Chapter proposes amending the legal texts in question as an alternative and more effective remedy. This path forward has the virtue of being responsive to the reality that disputes about determinacy compose the core of the current interpretive clash. And it helps focus attention on reforming the branch of government that most needs it: Congress.

¹⁰⁸ See, e.g., Kermit Roosevelt III, *I Spent 7 Months Studying Supreme Court Reform. We Need to Pack the Court Now*, TIME (Dec. 10, 2021, 7:00 AM), <https://time.com/6127193/supreme-court-reform-expansion> [<https://perma.cc/8TBT-ZMKW>].

¹⁰⁹ PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., *supra* note 17, at 20.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 21.

¹¹³ See, e.g., Adam Liptak, *Justice Kagan Calls for the Supreme Court to Adopt an Ethics Code*, N.Y. TIMES (Sept. 22, 2023), <https://www.nytimes.com/2023/09/22/us/supreme-court-kagan-ethics.html> [<https://perma.cc/NP9A-ARG2>]; Abbie VanSickle, *Justice Barrett Calls for Supreme Court to Adopt an Ethics Code*, N.Y. TIMES (Oct. 16, 2023), <https://www.nytimes.com/2023/10/16/us/politics/supreme-court-ethics-code-amy-coney-barrett.html> [<https://perma.cc/JA2L-5JE3>].

¹¹⁴ Cf. Kavanaugh, *supra* note 65, at 2137 (“Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way.”).

1. *Structurally Reforming the Court Would Not Resolve the Underlying Interpretive Dispute.* — Increasing the size of the Supreme Court would do nothing to close the gap between those who view the Constitution as more determinate and those who view it as less determinate. Nor would imposing term limits or stripping the Court of its appellate jurisdiction. Implementing these reforms would be like treating someone's broken leg with morphine. The pain may subside for a bit, but the underlying injury would still remain. Reforms that would reorient the Court away from a body that sees much determinacy in legal texts toward one that sees less would likely have an immediate impact. In concrete terms, several of the recent controversial cases likely would have come out the other way had there been a majority on the Court that viewed the Constitution as more indeterminate. But the impact would be fleeting. And it would do nothing to quell the underlying (and good faith) debate about the best way to interpret legal texts.

It is true that a structural reform like jurisdiction stripping could negate some of the determinacy debates simply by ensuring that the Court cannot decide questions in certain areas of law. This might even be viewed as a sort of democratic correction, allowing Congress more leeway to step up and legislate unchecked by judicial review. But this suggestion is susceptible to the same critique that can be leveled against this Chapter's overarching point that Congress should be crafting legal texts to be more or less determinate: How reasonable is it to expect that our current Congress can actually strip jurisdiction and then legislate in that area? Perhaps not very. Thus, even if one is firmly committed to structurally reforming the Supreme Court in order to vest *Congress* with more authority to shape the meaning of arguably indeterminate legal texts, that would likely also require reforming and reinvigorating Congress. And those congressional reforms would likely obviate the need for Supreme Court reform (including stripping the Court of jurisdiction), as a functional Congress could simply alter the legal texts at the heart of the most contested determinacy debates. Crucially, making those alterations would not entail threatening the Court's independence and legitimacy in the process. Before Congress strips another branch of power it has long held, Congress should first try passing substantive laws. That requires strengthening Congress as an institution. In short: before advocating that Congress play constitutional hardball,¹¹⁵ Americans should first reempower Congress to play ball at all.

2. *Structurally Reforming the Court Would Hamper the Court's Independence and Set a Dangerous Precedent.* — Imposing structural reforms on the Court like jurisdiction stripping and Court packing would hyperpoliticize an ostensibly apolitical branch of government,

¹¹⁵ See generally Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

thereby further imperiling its legitimacy.¹¹⁶ The proposed reforms amount to attempts to change the way in which the Court currently analyzes legal questions so that it ultimately reaches different outcomes. The reforms would therefore function as a heavy thumb on the scale favoring the legal methodology that is preferred by the political party currently in power.¹¹⁷ Allowing the political branches to have this much control over the Court would destroy the Court's independence and set a dangerous precedent: interpret legal texts as we see fit or there will be consequences. To be sure, the political branches are already able to promote their preferred legal ideology when they appoint new Justices to *replace* other Justices. But the process of replacing Justices does not serve to influence other Justices' decisionmaking in the way that the specter of jurisdiction stripping or Court packing would.

By increasing political control over the Court, these reforms also risk making the Court appear even more political. In the words of Justice Breyer: “[S]tructural change represents a temptation better resisted. For if the public comes to see judges as merely ‘politicians in robes,’ its confidence in the courts, and in the rule of law itself, can only decline.”¹¹⁸ The more that politicians are seen as having sway over the Court's decisions, the more the Court will look like it is composed of quasi politicians.

Some have argued that structurally reforming the Court is a reasonable response to the Senate's inconsistent treatment of the Supreme Court nominations of then-Chief Judge Garland and then-Judge Barrett.¹¹⁹ Not so.

Our Constitution enshrines protections for federal judges so that they will not be unduly influenced by political considerations.¹²⁰ Specifically, Article III provides that federal judges “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”¹²¹ This means that (1) federal judges can be removed from office only if they are impeached by the House of Representatives and convicted by the Senate, and (2) Congress cannot cut federal judges'

¹¹⁶ See, e.g., James F. McHugh & Lauren Stiller Rikleen, *The Politicization of SCOTUS Threatens Its Legitimacy*, BLOOMBERG L. (June 30, 2022, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/the-politicization-of-scotus-threatens-its-legitimacy> [<https://perma.cc/AS4Z-RTNX>].

¹¹⁷ See Stephen Breyer, *Comments on Robert Post's Supreme Court History of the Taft Court, Part IV, The Taft Court as an Institution*, BALKINIZATION (Feb. 15, 2024, 9:30 AM), <https://balkin.blogspot.com/2024/02/comments-on-robert-posts-supreme-court.html> [<https://perma.cc/M8AE-WBRE>].

¹¹⁸ BREYER, *supra* note 7, at 63.

¹¹⁹ See, e.g., Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg's Death Revives Talk of Court Packing*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html> [<https://perma.cc/M6TA-YX7E>].

¹²⁰ See generally THE FEDERALIST NO. 78, at 463–71 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

¹²¹ U.S. CONST. art. III, § 1.

salaries. The purpose of these protections is to ensure that federal judges decide cases on the merits without fear of political retaliation.

Structurally reforming the Court to promote one judicial philosophy over another is the sort of political retaliation that Article III's protections were meant to prevent.¹²² To be sure, the Constitution does not specify how many Justices should be on the Supreme Court. Congress has changed the size of the Court several times throughout history.¹²³ And President Franklin D. Roosevelt famously sought to pack the Court before the "switch in time that saved nine."¹²⁴ But many of the early fluctuations in the size of the Supreme Court can be attributed to institutional concerns. For example, during the early years of the Court, each Justice "rode circuit" by serving as a judge on a lower federal court in different parts of the country.¹²⁵ "In 1789, Congress created a six-member Supreme Court" — one Justice for each of the existing federal circuits.¹²⁶ But as the country expanded, "it became clear that more judges were needed, particularly in newly admitted states such as Kentucky, Tennessee, and Ohio, and (later) Louisiana, Illinois, Alabama, and Missouri."¹²⁷ In response, Congress created a seventh federal circuit in 1807 and continued with an eighth and ninth in 1837.¹²⁸ For each new circuit created, one additional Justice was added to the Supreme Court.¹²⁹ These early expansions therefore served a practical purpose, ensuring that each federal circuit had a Supreme Court Justice.

This Chapter does not mean to suggest that previous structural reforms to the Court were completely apolitical. They were not. The reforms in the early 1800s may have been motivated by, first, the desire to prevent President Thomas Jefferson from appointing a Justice and then, second, by the desire to ensure that he could appoint a Justice.¹³⁰ And Congress's manipulation of the Court's size after the Civil War and the assassination of President Lincoln may have been "an effort to restrict President [Andrew] Johnson's power,"¹³¹ though it "may well . . . have been aimed mainly at producing a Court of more manageable size, evidently with the [J]ustices' support."¹³²

¹²² *But cf.* Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975) (arguing that Congress's ability to jurisdiction strip helps provide political legitimacy to the practice of judicial review).

¹²³ PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 17, at 67.

¹²⁴ *Id.*; John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine,"* 73 OKLA. L. REV. 229, 229 (2021).

¹²⁵ PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 17, at 68, 131.

¹²⁶ *Id.* at 68.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUD. CTR., *CREATING THE FEDERAL JUDICIAL SYSTEM* 14 (1989).

¹³² *Id.*

This Chapter *does* mean to suggest, however, that structural reform should not be taken lightly. And here it should not be undertaken at all. Not only would it threaten the Court's independence — the very independence that enables the Court to protect the individual rights our Constitution has placed “beyond the reach of majorities”¹³³ — but it would also set a dangerous precedent: get with the program or else. The party in power would be able to effectively bend the Court to its will by adding new Justices or by stripping the Court of jurisdiction to hear certain cases. Once that party is voted out of office, the new party in power would follow suit. And so on.

Whichever side imposes the first structural reform will certainly enjoy an immediate victory. For example, suppose that Congress is upset with the Court, and so it creates several new seats to be filled by judges whose judicial philosophies seem to most align with the governing majority's political objectives. That Congress will of course be happy when the newly constituted Court begins to issue rulings in line with its political objectives. But that happiness will be fleeting. Once control of the political branches inevitably switches hands, the other party will return the favor. The size of the Court will be changed to better suit *that* party's desires, and any jurisdiction that was previously stripped will be restored. And around and around we will go. Although structurally reforming the Court might provide a brief but immediate boost for the party in power — something of a sugar high — it always will prove to be short-lived. The other side will enjoy their own sugar high soon enough, and we will be right back where we started: disputing the determinacy of legal texts.

As a result, those seeking reform should focus on the heart of the issue: *the legal texts themselves*. Amending these texts would not only result in different substantive outcomes but would also preserve the judiciary's integrity, independence, and legitimacy.

3. *The Text Itself*. — The good news for those unhappy with the Supreme Court's interpretations of statutes and the Constitution is that the legal texts that the Justices are interpreting are not carved in stone. New statutes can be passed and old ones amended by congressional action and a presidential signature.¹³⁴ The Constitution is (unsurprisingly) much harder to amend, requiring the support of two-thirds of each chamber of Congress and then three-fourths of state legislatures.¹³⁵

Those seeking reform should focus their efforts on the legal texts at issue rather than the Supreme Court for two reasons. First, focusing on the underlying legal texts is directly responsive to the root of the dispute: How determinate are our legal texts? Congress cannot simply declare

¹³³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

¹³⁴ U.S. CONST. art. I, § 7.

¹³⁵ U.S. CONST. art. V. The Constitution also permits two-thirds of state legislatures to call a new constitutional convention. *Id.* That route has never been taken.

an answer to that question from on high. But Congress *can* change the texts that are being debated, making them either more or less determinate.¹³⁶ Congress cannot dictate legal outcomes to the courts, but it can change the law.¹³⁷ Judges are bound to follow those legal changes.¹³⁸

Second, focusing reform efforts on the underlying legal texts allows those unhappy with recent Supreme Court rulings to change the law without hampering the independence of a distinct branch of government in the process. Both structurally reforming the Court and amending existing legal texts are political fixes. But there is a critical difference. Focusing reform efforts on the law itself — rather than on those who interpret the law — allows reformers to achieve all the same goals without infringing upon the independence of the judiciary. To return to the same Fourteenth Amendment example from section A, both (1) adding new Justices who share one’s views regarding that Amendment’s determinacy as it relates to, say, abortion, and (2) codifying the abortion right will reach the same real-world result: the right receives legal protection. But while the destination is the same (at least while that same political party remains in power), the journeys differ in critical respects. In the codification scenario, the Court would remain independent. Congress would engage in lawmaking. And — assuming Congress were to draft statutes anywhere close to as carefully as it has proven able¹³⁹ — the determinacy dispute would be avoided altogether, as both sides of the dispute would agree on the meaning of clear text.¹⁴⁰

It may seem like cold comfort to respond to frustrations with the Supreme Court by saying “change the law” and “amend the Constitution,” in particular. At the time of the Constitution’s ratification, the fact that the Framers explicitly allowed for the possibility of legal change to our fundamental law was itself radical: “Americans had in fact institutionalized and legitimized revolution.”¹⁴¹ Even if the Framers thought popular sovereignty allowed for simple-majoritarian

¹³⁶ Cf. *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (plurality opinion) (quoting *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438 (1992); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)).

¹³⁷ *Id.*

¹³⁸ Cf. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (“Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”); Kavanaugh, *supra* note 65, at 2135.

¹³⁹ See, e.g., 33 U.S.C. § 1311 (precise statutory standards on effluent limitations); 26 U.S.C. § 132 (precise statutory standards regarding tax consequences of certain fringe benefits).

¹⁴⁰ Congress can also codify its preference for indeterminacy. For example, “Congress might assign an agency to issue rules to prevent companies from dumping ‘unreasonable’ levels of certain pollutants.” Kavanaugh, *supra* note 65, at 2152. Here, what counts as “unreasonable” is a policy judgment. *Id.* One can stare at the text as long as she likes and a clear numerical threshold will not jump off the page. Different presidential administrations can take different views of what rises to the level of an “unreasonable” level of pollution. And in these circumstances, as then-Judge Kavanaugh explained, “courts should be leery of second-guessing that decision.” *Id.*

¹⁴¹ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 614 (Univ. of N.C. Press 1998) (1969).

alteration of the Constitution in theory,¹⁴² they purposefully made the bar for constitutional amendment high.¹⁴³ Prudence demanded no less.¹⁴⁴ Today, that bar seems insurmountable. The means of institutionalized revolution have become a tool of stagnation.¹⁴⁵ But there is a solution to the perceived disconnect between the popular will and the legal regime under which We the People currently live. It lies in neither the Constitution nor the Court — but in Congress.

Conclusion

Much like fish do not realize they are swimming in water,¹⁴⁶ we do not appreciate how the weakness of Congress as an institution heightens the stakes of our disputes about legal determinacy. Renewed congressional capacity could blunt the salience of the Court's internal disputes about determinacy. Consider the Court's most controversial constitutional holdings as of late, relating to hot-button issues like abortion¹⁴⁷ and gun control.¹⁴⁸ Thanks to its Commerce Clause and Spending Clause powers, Congress remains capable of passing a good deal of national abortion legislation — on both the pro-life and the pro-choice sides of the ledger.¹⁴⁹ And even as the Supreme Court grows more protective of Second Amendment rights¹⁵⁰ — which elicits critiques of the Court, including from within,¹⁵¹ as gun violence spikes and mass shootings become an all-too-common facet of American life¹⁵² — some of the

¹⁴² See, e.g., Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1050 (1988); see also *id.* at 1051 n.21 (collecting primary sources).

¹⁴³ See THE FEDERALIST NO. 43, *supra* note 120, at 275 (James Madison) (“[Article V] guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (characterizing the Constitution as a document “intended to endure for ages to come”).

¹⁴⁴ See THE FEDERALIST NO. 43, *supra* note 120, at 275 (James Madison).

¹⁴⁵ Perhaps this is why those who read the Constitution as a particularly rigid, rule-like, determinate document have often called for lowering the bar for formal constitutional amendment. See, e.g., Sarah Isgur, Opinion, *It's Time to Amend the Constitution*, POLITICO (Jan. 8, 2022, 7:00 AM) <https://www.politico.com/news/magazine/2022/01/08/scalia-was-right-make-amending-the-constitution-easier-526780> [<https://perma.cc/MA9C-CF95>] (recounting Justice Scalia's support for lowering the bar for constitutional amendment).

¹⁴⁶ See David Foster Wallace, Commencement Speech at Kenyon College (May 21, 2005), in THIS IS WATER: SOME THOUGHTS, DELIVERED ON A SIGNIFICANT OCCASION ABOUT LIVING A COMPASSIONATE LIFE 3–4 (2009).

¹⁴⁷ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹⁴⁸ See *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

¹⁴⁹ See generally KEVIN J. HICKEY & WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10787, CONGRESSIONAL AUTHORITY TO REGULATE ABORTION (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10787> [<https://perma.cc/GQ8A-YDY2>].

¹⁵⁰ See, e.g., *Bruen*, 142 S. Ct. at 2156.

¹⁵¹ See *id.* at 2163–64 (Breyer, J., dissenting).

¹⁵² John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Apr. 26, 2023), <https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about->

most effective gun violence–reduction tools lie within Congress’s power (and do not run afoul of the Second Amendment).¹⁵³

Yet Congress has been rendered a dead letter thanks to a mix of partisanship and its own institutional rules. Reforming procedures like our first-past-the-post partisan primary structure and the de facto supermajority voting requirement of the Senate filibuster would do a great deal to open up space for citizens to achieve their policy objectives through congressional legislation — and thus take some pressure off the Supreme Court.¹⁵⁴ The Court would no longer effectively have the final say on the political issues that matter the most. If citizens are displeased with a Court ruling on one issue or another, there would be a more fruitful response available than lambasting the Supreme Court: Congress could be called upon to author the necessary changes in the relevant law.

In short, citizens are directing their frustrations toward the wrong branch of government. The very fact that the *Harvard Law Review’s* *Developments in the Law* series this year is focused on Supreme Court reform, as opposed to congressional reform, is part and parcel of a recurring mistake: We can feel that something is off with our law and politics, but we are misdiagnosing the illness. As a result, our proposed cures are consistently off the mark. The Court is not the problem. Congress is. If Congress were revived, disputes about determinacy in our courts of law would persist, as they always have.¹⁵⁵ But their real-world stakes would be lowered, and the undue strain on the Court would dissipate.

The Supreme Court does not need to be weakened. Congress needs to be strengthened.

gun-deaths-in-the-u-s [https://perma.cc/8AZJ-9ULE]; see also Roni Caryn Rabin, *Gun Deaths Rising Sharply Among Children, Study Finds*, N.Y. TIMES (Oct. 6, 2023), https://www.nytimes.com/2023/10/05/health/gun-deaths-children.html [https://perma.cc/CW9H-APGJ] (summarizing data finding that guns are the leading cause of death for Americans under the age of twenty, excluding certain infant deaths).

¹⁵³ See, e.g., Greg Sargent, *Why Expanding Background Checks Would, In Fact, Reduce Gun Crime*, WASH. POST (Apr. 3, 2013, 12:49 PM), https://www.washingtonpost.com/blogs/plum-line/wp/2013/04/03/why-expanding-background-checks-would-in-fact-reduce-gun-crime [https://perma.cc/C63B-VGNF]; John Yoo, *A Universal-Background-Check Law Would Not Violate the Second Amendment*, NAT’L REV. (Aug. 9, 2019, 6:30 AM), https://www.nationalreview.com/2019/08/universal-background-check-law-would-not-violate-second-amendment [https://perma.cc/3MVL-ZGLF].

¹⁵⁴ See, e.g., Thomas Harvey & Thomas Koenig, *The Case for Filibuster Reform*, 57 NAT’L AFFS., Fall 2023, at 86, 89–91 (tying filibuster reform and enhanced congressional capacity to reduced political pressure on the Supreme Court); Thomas Harvey & Thomas Koenig, *A Madisonian Proposal for Filibuster Reform*, THE DISPATCH (Oct. 2, 2023), https://thedispatch.com/article/a-madisonian-proposal-for-filibuster-reform [https://perma.cc/BZ3F-V8MT].

¹⁵⁵ Cf. THE FEDERALIST NO. 10, *supra* note 120, at 73 (James Madison) (“As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed.”).