CHAPTER ONE

CONFUSION AND CLARITY IN THE CASE FOR SUPREME COURT REFORM

Supreme Court reform is in the air.[1] Different people want different changes for different reasons, but they come together in an excited buzz about changing the Court. This excitement is out of the ordinary. Over at least the last fifty years, people have supported the Court more than they have Congress or the presidency,[2] and movements to reform the Court rarely win the attention of politicians, let alone ordinary people.[3]

The current, unusual interest in reforming the Court did not appear overnight. It grew in the late 2010s and early 2020s, as the public's relationship to the Court changed. Faith in public and private institutions had declined for Americans across the political spectrum.[4] Justices Scalia and Ginsburg were dead.[5] President Trump had appointed three

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[1] For examples in academic literature, see generally Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022). For examples in popular discourse, see generally Keeanga-Yamahtta Taylor, *The Case for Ending the Supreme Court As We Know It*, NEW YORKER (Sept. 25, 2020), https://www.newyorker.com/news/our-columnists/the-case-for-ending-the-supreme-court-as-we-know-it [https://perma.cc/DX8W-3AZG]; Jamelle Bouie, Opinion, *This Is How to Put the Supreme Court in Its Place*, N.Y. TIMES (Oct. 14, 2022), https://www.nytimes.com/2022/10/14/opinion/supreme-court-reform.html [https://perma.cc/H378-8Y2P]; Ezra Klein, Opinion, *What a Reckoning at the Supreme Court Could Look Like*, N.Y. TIMES (July 10, 2022), https://www.nytimes.com/2022/07/10/opinion/supreme-court-biden-reform.html [https://perma.cc/45V3-CLKT]; Ryan Doerfler & Elie Mystal, Opinion, *The Supreme Court Is Broken. How Do We Fix It?*, THE NATION (June 6, 2022), https://www.thenation.com/article/society/how-to-fix-supreme-court [https://perma.cc/Q7UM-C3TR]; Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, THE ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212 [https://perma.cc/96D7-CFKR]. For examples in government, see generally PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021) [hereinafter PRESIDENTIAL COMMISSION REPORT]; *Supreme Court Ethics Reform*, U.S. SENATE COMM. ON THE JUDICIARY, https://www.judiciary.senate.gov/supreme-court-ethics-reform [https://perma.cc/2G9B-BSP9].

[2] *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 156 (2018).

[3] *See* Adrian Vermeule, Essay, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1155 (2006); *cf.* J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 MD. L. REV. 181, 181 (1959) ("More than most institutions of American government, the judiciary has commanded the respect and reverence of the American nation.").

[4] *See* Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), https://news.gallup.com/poll/508169/historically-low-faith-institutions-continues.aspx [https://perma.cc/6TH6-MMA6].

[5] Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html [https://perma.cc/2J37-Z9ZE]; Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html [https://perma.cc/U7HL-BBZ7].

Justices, each to the outrage of liberals and progressives: Justice Gorsuch (after Senator Mitch McConnell stalled consideration of President Obama's nominee to replace Justice Scalia),[6] Justice Kavanaugh (after Professor Christine Blasey Ford testified before the Senate that he sexually assaulted her in high school),[7] and Justice Barrett (under circumstances similar to those invoked by Senator McConnell to delay consideration of President Obama's nominee).[8] Most importantly, as its membership changed, the Court started a new era in which it declined to protect abortion[9] and voting rights[10] and invalidated affirmative action,[11] environmental protection,[12] and gun control[13] policies, among other cases with profound consequences for the nation.

Because the pro-reform moment coincides with the Court's rightward turn, one might think that Supreme Court reformers are progressives who lost the judicial game and want to change its rules so that they win — not that different from the conservative congresspeople who objected during the count of Electoral College votes in 2020.[14] Selfish disregard for the rules would not be a very persuasive reason to change the Court, so an important question for reformers is why, other than competing political interests, the Court ought to be changed.

That question can be answered by two kinds of arguments. Formal arguments are abstract ideas about the Court's structure and role in our democracy. They answer questions like: *How much power should the Court have over other branches of government? How should Justices be*

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[6] *See* Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html [https://perma.cc/9879-NJFQ].

[7] *See* Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html [https://perma.cc/BQ5X-EQ7N]; Adam Liptak, *Confirming Kavanaugh: A Triumph for Conservatives, But a Blow to the Court's Image*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/conservative-supreme-court-kavanaugh.html [https://perma.cc/5DJX-PT2B].

[8] *See* Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/VHQ4-JU2V].

[9] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

[10] Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

[11] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2162–63 (2023).

[12] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

[13] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022).

[14] *See* Jason Willick, Opinion, *The "Next" Jan. 6 Is Happening, And the Supreme Court Is the Target*, WASH. POST (June 9, 2022, 6:16 PM), https://www.washingtonpost.com/opinions/2022/06/09/next-january-sixth-target-supreme-court [https://perma.cc/LET4-ZQCR]; Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html [https://perma.cc/8P9V-RZ7S]; *cf.* KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT 1 (2019) (observing a contemporary trend in favor of the position that "[c]ourts should be restrained from doing the wrong thing, but they should be active in doing the right thing").

appointed? How and when can the Court's power or membership be changed? Substantive arguments are reactions to the Court's actual decisions, both in the past and anticipated for the future. They answer the question: *Is the Court doing the right thing?*

Many reformers focus on formal arguments.[15] They begin with principles that are widely accepted in our democracy, citing support from the Constitution,[16] historical practice,[17] or political design,[18] and they persuasively explain how those shared principles favor Court reform. Formal arguments have nothing to do with the Court's current decisions, so they make Court reform into a politically neutral project. They refute the objection that Court reformers are nothing but sore losers. However, the formal debate is complicated, with reasonable perspectives on all sides. By itself, it does not provide a conclusive answer to how the Court ought to be structured — or why that structure ought to change.

This Chapter argues that looking to the substance of the Court's decisions brings a more complete case for Court reform into view. The complete argument for Court reform has two parts: First, the Court's recent decisions have been substantively wrong, so wrong that some intervention is needed to undo them and to avert similar decisions in the future. Second, the existing formal arguments for Court reform identify a set of potential changes, consistent with widely held political values, that would answer that need.

It may seem that invoking substantive disagreements to justify Court reform amounts to an admission that Court reformers are simply sore losers. But the kind of substantive emergency that would require Court reform is different in kind from mere political disagreement. It represents a claim that the Court is crossing a moral line, beyond which its decisions can no longer be respected. For an extreme example, consider a world in which the Court repudiated *Brown v. Board of Education*: those calling for reform would be invoking a substantive disagreement with the Court, but one different in kind from mere political squabbling. Of course, many would dispute that this Court has transgressed that kind of boundary. They may be correct. The bottom line, however, is that the current movement for Court reform arises from a belief that the Court is causing grave substantive harm — and that belief must be

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[15] *See* Doerfler & Moyn, *supra* note 1, at 1722–25 (surveying proposals justified on grounds of ideological moderation and depoliticization); *id.* at 1721, 1737 (surveying proposals justified on grounds of promoting democracy). As Professors Ryan Doerfler and Samuel Moyn note, even court packing, despite being "nakedly partisan," *id.* at 1721, purports to "promote democracy in the short term," *id.* at 1737 (emphasis omitted), by "get[ting the judiciary] out of the way of progressive majorities," *id.*

[16] *See, e.g.*, Bowie & Renan, *The Separation-of-Powers Counterrevolution*, *supra* note 1, at 2024–26.

[17] *See, e.g.*, *id.* at 2041–47.

[18] *See, e.g.*, Epps & Sitaraman, *How to Save the Supreme Court*, *supra* note 1, at 167–69.

considered on its terms, rather than be reduced to a proxy argument about form.

The Chapter proceeds in three sections. Section A surveys the major formal arguments for Court reform and shows that the formal debate on reform is complicated and unresolved. Section B looks to historical context to explore the role of substantive disagreement with the Court in past moments of national interest in Court reform and in the present moment. Section C argues that the notion that the Court could be so wrong that it needs to be stopped by disruptive means is not new or radical — rather, it has a long history in law and academic discourse.

A. Formal Reasons for Reform

Reformers identify several formal reasons to reform the Court — that is, abstract reasons that the Court's structure and role in our system of government could or should change.[19] Disempowerment arguments take the position that the Constitution permits or even requires reducing the Court's power to invalidate actions of the other branches of government. Procedural-fairness arguments take the position that the way that Justices are currently selected is too partisan or arbitrary to be consistent with justice. Political-power arguments take the position that it is acceptable for the Court to be directly contested and controlled by political parties.

This section surveys these arguments and the reasons given for them. It then describes counterarguments to those potential reforms. In general, formal arguments for reforming the Court are well supported, but so are counterarguments against it. The few reforms that have consensus support face other hurdles, including the need for a constitutional amendment or skepticism from progressives. In total, this debate does not clearly resolve the question of whether or how the Court should be reformed. It shows that favoring reform is reasonable, but so is opposing it — and that the proposals that are most exciting to the pro-reform camp also meet the strongest objections from the anti-reform camp.

1. Disempowerment. — Since the 1950s,[20] the Supreme Court has claimed to be and has been treated as the "ultimate expositor of the Constitution."[21] This practice, which treats the Court as having the final word on constitutional meaning, is called judicial supremacy. It is an expansion of the Court's judicial review power to interpret the Constitution,[22] which it first asserted in the 1803 case *Marbury v.*

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[19] The categories proposed here are a modification of those proposed by Professors Doerfler and Moyn. *See* Doerfler & Moyn, *supra* note 1, at 1720–21.

[20] *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958). Professors Nikolas Bowie and Daphna Renan suggest that at least where the separation of powers is concerned, the "juristocratic turn" began earlier. *See* Bowie & Renan, *The Separation-of-Powers Counterrevolution*, *supra* note 1, at 2077.

[21] *See* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1062 (2010).

[22] *See* Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886, 888 (2008).

Madison.[23] Today, judicial supremacy empowers the Court to undermine or entirely invalidate legislative and agency action as inconsistent with the Constitution.[24]

Because judicial supremacy gives the Court a trump card over the popularly elected legislative and executive branches, reformers object that it is antidemocratic[25] and likely to slow the pace of change.[26] In order to address these problems, reformers propose a variety of modifications to the Court's power of judicial review.[27] These include exempting certain federal statutes from judicial review[28] and giving the legislative or executive branches greater voice in debating the limits of constitutional meaning.[29]

Debate on disempowering reforms raises two questions: whether disempowering the Court would be constitutional and whether it would be a good idea. Many scholars have weighed in on the constitutional debate, applying legal reasoning tools to decide whether and how the Court's power could be taken away without amending the Constitution. The debate around so-called jurisdiction-stripping proposals "defies brief summary because . . . [it] encompasses diverse elements."[30] The methods used to resolve the constitutional question include original intent, textual meaning, and historical practice.

There are varying perspectives on the intent of the Constitution's drafters. Professor Larry Kramer concludes that the power of "judicial review was never imagined."[31] Professors Saikrishna Prakash and John Yoo disagree, concluding that "there is a wealth of evidence that the Founders believed that the courts could exercise some form of judicial review over federal statutes."[32]

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[23] 5 U.S. (1 Cranch) 137, 177–78 (1803).

[24] *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022); Shelby County v. Holder, 570 U.S. 529, 556–57 (2013); Citizens United v. FEC, 558 U.S. 310, 365 (2010).

[25] *See* PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 152; Bowie & Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, *supra* note 1; Doerfler & Moyn, *supra* note 1, at 1735; Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160, 162, 201–02 (2021) ("There is nothing democratic about giving five lawyers — chosen for life because of their educational backgrounds and their relationship to the governing elite — . . . discretion to decide the meaning of our fundamental law . . . . It is, instead, a profoundly aristocratic power premised on a deep distrust of democracy." *Id.* at 201.).

[26] *See* Doerfler & Moyn, *supra* note 1, at 1739–43.

[27] *See id.* at 1725–28 (surveying proposals).

[28] *See* Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1780–85 (2020).

[29] *See* Bowie & Renan, *The Separation-of-Powers Counterrevolution*, *supra* note 1, at 2107–08 (outlining a "republican" approach to the separation of powers, *id.* at 2107); Nicholas Stephanopoulos, *The Case for the Legislative Override*, 10 UCLA J. INT'L L. & FOREIGN AFFS. 250, 261–69 (2005) (describing a hypothetical congressional-veto model).

[30] Fallon, *supra* note 21, at 1133.

[31] Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4, 24 (2001).

[32] Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 891 (2003).

Scholars also differ on whether the text of the Constitution clearly empowers the Court to engage in judicial review. Professor Keith Whittington writes: "It is a bit of an embarrassment that [judicial review,] such a fundamental aspect of American constitutionalism[,] was not explicitly incorporated into the [Constitution's] text[] . . . ."[33] Prakash and Yoo differ: "A careful examination shows that the constitutional text and structure allow — indeed require — the federal and state courts to refuse to enforce laws that violate the Constitution."[34]

Finally, there is disagreement on whether the Court exercised a judicial review power in the nation's early years. Professor Michael Klarman notes that, after *Marbury*, "[t]he Court[] . . . fail[ed] to invalidate a single state law until 1810 and a second federal law . . . until 1857. Thus, the judicial review power . . . mattered little until the Court had acquired sufficient political clout."[35] Whittington disagrees, writing that accounts like Klarman's are "[not] true. The power of judicial review developed gradually during the first half of the nineteenth century . . . through the back-and-forth dialogue between the branches over time."[36]

Regardless of whether taking away the power of judicial review would be constitutional, scholars also differ on whether judicial review is a good idea in the first place. As long as the other branches function properly,[37] Professor Jeremy Waldron thinks that "judicial review is inappropriate for reasonably democratic societies . . . . Ordinary legislative procedures [are enough, and] . . . an additional layer of final review by courts adds little . . . except . . . disenfranchisement and a legalistic obfuscation of the moral issues at stake."[38] Professor Richard Fallon disagrees: as long as some assumptions are true, "judicial review is reasonably defensible within the terms of liberal political theory."[39]

Read in its conflicting entirety, the evidence on whether the Court's current power of judicial review could or should be altered does not resolve the question beyond doubt in either direction. One could reasonably conclude, supported directly or indirectly by robust scholarship, either that jurisdiction-stripping would be a constitutionally permissible good idea or that it would be an unconstitutional bad idea.

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[33] Keith E. Whittington, *The Power of Judicial Review*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 387, 387 (Mark Tushnet et al. eds., 2015).

[34] Prakash & Yoo, *supra* note 32, at 890.

[35] Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1125 (2001) (footnotes omitted).

[36] WHITTINGTON, *supra* note 14, at 61.

[37] *But cf. infra* ch. II, pp. 1654–55 (arguing that Congress has failed to fulfill its duty, exposing the Court to misplaced criticism).

[38] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006).

[39] Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1735 (2008).

2. Procedural Reform. — Another reason for reforming the Court is that the process for selecting Justices causes the Court's decisions to be influenced by the wrong factors. A few trends underlie this argument. Regarding the selection process, a potential nominee's partisan affiliation plays an important role in judicial selection in both the Supreme Court and lower federal courts.[40] Politicians now treat the Court as a prize to be contested, which they do by engaging in gamesmanship,[41] appointing younger judges to maximize their life tenure,[42] and framing nomination hearings as political contests.[43] Perhaps as a consequence of the politicization of the Court, the Justices often divide according to the party of the President who appointed them when deciding cases.[44]

To address these problems, scholars and politicians have advanced a variety of proposals. One popular idea is to implement staggered eighteen-year terms for Justices, which would regulate the number of Supreme Court Justices that each President is able to appoint.[45] Another is to create a nonpartisan committee to select Supreme Court Justices[46] or, somewhat relatedly, to have five Republican- and five Democrat-appointed Justices appoint five visiting Justices annually.[47] One more idea is to divide the Court's business among panels of Justices or, relatedly, to compose the Court of a rotating set of judges.[48] What all of these proposed reforms have in common is that they seek to standardize the "ideological makeup of the Supreme Court" in one way or

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40 *See* Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL'Y 521, 524–33 (2018); *cf.* Emma Green, *How the Federalist Society Won*, NEW YORKER (July 24, 2022), https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won [https://perma.cc/B5CP-Q3Q9] (highlighting the power of the Federalist Society in securing clerkships and judgeships for conservative lawyers). Partisan affiliation may now be more important than conventional measures of judicial qualification. *See* Patrick L. Gregory, *Trump Picks More "Not Qualified" Judges (1)*, BLOOMBERG L. (Dec. 19, 2018, 1:11 PM), https://news.bloomberglaw.com/us-law-week/trump-picks-more-not-qualified-judges-1 [https://perma.cc/Y9KZ-8KMA].

41 *See* Robin Bradley Kar & Jason Mazzone, Essay, *The Garland Affair: What History and the Constitution* Really *Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 55–58 (2016).

42 *See* Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [https://perma.cc/84MP-PR9A].

43 *See* Molly Ball & Tessa Berenson, *Brett Kavanaugh's Confirmation Fight Exposes Major Problems with the Nation's Most Powerful Court*, TIME (Sept. 27, 2018, 6:13 AM), https://time.com/5407920/supreme-court-problems [https://perma.cc/89DK-DDHM].

44 *See* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301, 309, 317–21 (2017).

45 *See* PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 111; ALICIA BANNON & MICHAEL MILOV-CORDOBA, BRENNAN CTR. FOR JUST., SUPREME COURT TERM LIMITS 1–4 (2023).

46 *See* Doerfler & Moyn, *supra* note 1, at 1724 (discussing Theodore Voorhees, *It's Time for Merit Selection of Supreme Court Justices*, 61 ABA J. 705 (1975)).

47 *See id.* (discussing Epps & Sitaraman, *How to Save the Supreme Court*, *supra* note 1, at 193–200).

48 *See* PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 84; Doerfler & Moyn, *supra* note 1, at 1723.

another[49] and as a result reduce the link between partisan politics and judicial interpretation.

The potential benefits of procedural reforms are clear. However, procedural reforms face two serious hurdles: they may be impossible without amending the Constitution, and they are not favored by progressive advocates of reform. The Constitution may prohibit any change to the Court's status as an "apex juridical body that operates in some meaningful sense as a single court,"[50] that shortens Justices' terms of service,[51] or that alters the process by which Justices are selected.[52] Amending the Constitution would moot the issue, but it would also require immense political will. Further complicating matters is the fact that some progressives, who are enthusiastic supporters of Court reform more broadly,[53] might not be mobilized by reforms that prioritize a Court whose membership simply splits the difference between conservative and liberal.[54]

A separate category of proposals is ethical reforms, which are also procedural in the sense that they seek to regulate the factors that influence the Court's decisionmaking. Reporters have described close relationships between Justices or their family members and parties who sometimes have direct or indirect interests in cases before the Court.[55] Ethical reforms target the rules governing Justices, including more rigorous disclosure obligations for Justices, external oversight of Justices' finances, and more stringent recusal rules.[56] These efforts are in their early stages and may yet succeed, but they have already been met by

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[49] Doerfler & Moyn, *supra* note 1, at 1723. As Doerfler and Moyn note, the particular ideological makeup of the Court under each proposed reform would be different.

[50] PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 85; *see* U.S. CONST. art. III, § 1. *But see* PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 89 ("[W]e cannot conclude that the Constitution precludes rotation and panel reforms, at least as long as processes exist to ensure that a juridical body operates in some meaningful sense as a single 'Court.'").

[51] *See* Doerfler & Moyn, *supra* note 1, at 1754–55; U.S. CONST. art. III, § 1.

[52] *See* Doerfler & Moyn, *supra* note 1, at 1755; Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J.F. 93, 99 (2019); PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 89; U.S. CONST. art. III, § 1.

[53] *See, e.g.*, Russ Feingold, *The Heart of the Progressive Legal Movement*, AM. CONST. SOC'Y (Sept. 28, 2023), https://www.acslaw.org/inbrief/the-heart-of-the-progressive-legal-movement [https://perma.cc/889P-6T42].

[54] *See* Doerfler & Moyn, *supra* note 1, at 1752.

[55] *See infra* ch. III, pp. 1680–83; Justin Elliott et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/7A2F-V3BP]; Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/WK7H-BV2E]; Karl Evers-Hillstrom, *Supreme Court Justices Continue to Rack Up Trips on Private Interest Dime*, OPEN SECRETS (June 13, 2019, 6:05 PM), https://www.opensecrets.org/news/2019/06/scotus-justices-rack-up-trips [https://perma.cc/443Q-NH2D]; Carl Hulse, *Senate Panel Approves Supreme Court Ethics Bill with Dim Prospects*, N.Y. TIMES (July 20, 2023), https://www.nytimes.com/2023/07/20/us/politics/senate-supreme-court-ethics-rules.html [https://perma.cc/4866-FQ2J].

[56] *See* Hulse, *supra* note 55; *Supreme Court Ethics Reform*, *supra* note 1.

arguments that the judiciary should be free to regulate itself.[57] Further, because they regulate only the way the Court conducts its business, they are unlikely to satisfy those seeking a larger-impact reform.

3. Political Power. — Lastly, there is a camp of arguments for reform that treat the Court through a political lens, as just another source of law that should be contested, manipulated, and controlled according to the same scruples (or lack thereof) as are outcomes in Congress or the White House.[58] Proponents of these ideas reject that the Court's business can be removed from politics.[59] They would alter the Court to preserve their own political interests because politics are already governing the Court — and, presumably, permit their opponents to do the same.[60] This theory of Court reform justifies proposals such as packing the Court[61] or obstructing judicial nominations.[62] Political-power justifications have something of a tit-for-tat quality: one side played politics with the Court, so now the other side will do the same. Progressives point to Senator McConnell's chicanery in the failed confirmation of then–Chief Judge Merrick Garland[63] and the successful confirmation of Justice Barrett[64] as an example that Republicans are playing this game; conservatives point to past statements by Democratic officials in favor of similar strategies[65] as evidence that the thinking goes both ways.

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57 *See* Olivia Gotham, *Avoiding Institutional Corruption Through a Self-Regulating Federal Judiciary*, 33 GEO. J. LEGAL ETHICS 517, 519–21 (2020).

58 *See* Doerfler & Moyn, *supra* note 1, at 1746 ("[S]o long as Supreme Court justices continue to wield tremendous authority, it is both predictable and *appropriate* that political actors will fight aggressively for control of the Court.").

59 *See, e.g.*, *id.* at 1708 ("Saving the Supreme Court is not a desirable goal; getting it out of the way of progressive reform is.").

60 *See id.* ("Both parties, and the rival sets of judges, concurred more than they differed, above all about elevating the Supreme Court, even at the price of making judicial appointments national politics by other means.").

61 *See* Kermit Roosevelt III, *I Spent 7 Months Studying 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/U3BL-578U]; Quinta Jurecic & Susan Hennessey, *The Reckless Race to Confirm Amy Coney Barrett Justifies Court Packing*, THE ATLANTIC (Oct. 4, 2020, 3:50 PM), https://www.theatlantic.com/ideas/archive/2020/10/skeptic-case-court-packing/616607 [https://perma.cc/RN8A-9VTC].

62 Carrie Budoff Brown, *Schumer to Fight New Bush High Court Picks*, POLITICO (July 27, 2007, 5:33 PM), https://www.politico.com/story/2007/07/schumer-to-fight-new-bush-high-court-picks-005146 [https://perma.cc/2SSV-UUPK].

63 *See* Kar & Mazzone, *supra* note 41, at 55–57.

64 *See* Caitlin McFall, *Dem Sen. Markey Claims Trump, McConnell "Stole Two Supreme Court Seats,"* FOX NEWS (Oct. 27, 2021, 2:01 PM), https://www.foxnews.com/politics/markey-claims-trump-mcconnell-stole-supreme-court-seats [https://perma.cc/T9S5-HFLQ].

65 Top congressional Democrats had considered similar approaches under the two Republican presidencies that preceded President Obama — Presidents Bush Senior and Junior. *See* Julie Hirschfeld Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, N.Y. TIMES (Feb. 22, 2016), https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html [https://perma.cc/XKE2-834G] ("As a senator more than two decades ago, Vice President Joseph R. Biden Jr. argued that President George [H.W.] Bush should delay filling a

The political-power justification for reform is emotionally resonant, especially with those who feel wronged by the Court's change in membership over the last decade and a half. But it is reasonable to worry about a race to the bottom.[66] For this reason, political-power arguments for reform are volatile: they invite one's opponents to engage in the same behavior should they lose power,[67] and they remove the Court as a safeguard to uphold the rule of law when a majority seeks to ignore it.[68] Because the future allocation of political power is uncertain, even people who find themselves in the majority now could be wary of normalizing that behavior in the future.

B. Substantive Reasons for Reform

Asking value-neutral questions about the abstract form of the Supreme Court — what it does and how it is structured — results in a mixed picture. There are good reasons to reform it, but most can be met with reasonable, good faith disagreement, and the ideas that achieve the most consensus might require amending the Constitution and enjoy little enthusiasm from progressives. If the reasons that are most exciting to reformers can all be met by plausible counterarguments, the case for Supreme Court reform is somewhat murky.

Yet there is another explanation for the current excitement about reform. In this moment, and in other notable moments in the last century, calls for reform resound powerfully because the Court is at the center of deep substantive disagreements about the future of American life. Using the examples of President Franklin D. Roosevelt's court packing plan and Southern politicians' attempt in the Southern Manifesto[69] to reject the Court's ruling in *Brown v. Board of*

Supreme Court vacancy, should one arise, until the presidential election was over, and that it was 'essential' that the Senate refuse to confirm a nominee to the court until then."); Brown, *supra* note 62 ("[Senator Schumer] said his 'greatest regret' in the last Congress was not doing more to scuttle [Justice Alito's nomination]. . . . 'I think we should have twisted more arms and done more.'"). And in 2016, Kathryn Ruemmler, who previously served as White House Counsel to President Obama, reportedly told an ABA panel that she would have advised Democrats to pursue the strategy employed by Senator McConnell if the tables were turned. *See* Eugene Volokh, *Former Obama White House Counsel Would Have Advised Blocking Scalia's Replacement If Tables Had Been Turned*, REASON: VOLOKH CONSPIRACY (Nov. 18, 2016, 4:45 PM), https://reason.com/volokh/2016/11/18/former-obama-white-house-couns [https://perma.cc/LEQ2-J9ZC].

66 *See* Frederick A.O. Schwarz, Jr., *Saving the Supreme Court*, BRENNAN CTR. FOR JUST. (Sept. 13, 2019), https://www.brennancenter.org/our-work/analysis-opinion/saving-supreme-court [https://perma.cc/3P2Z-A8QT].

67 *See id.* ("Any possible court packing would be correctly perceived as a partisan power grab. And when party fortunes change, the party that lost the first packing vote would proceed to pack the court in its favor.").

68 *Cf.* Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 80–86 (2022) (asserting that the Court's countermajoritarian makeup is a feature rather than a bug).

69 102 CONG. REC. 4459–61 (1956) (statement of Sen. Walter George) [hereinafter Southern Manifesto].

Education,[70] this section argues that moments of Supreme Court reformism arise when a large part of the country perceives a crisis between its deeply held values and the Court's course of action. It then traces the multiple stories that gave rise to the current moment of interest in Supreme Court reform. It concludes that the unstated context for today's Court reformism is the fear that the Court is causing grave and irreversible harm.

1. Twentieth-Century Reformism. — The paradigmatic[71] attempt to reform the Supreme Court occurred in the late 1930s, when President Roosevelt proposed a bill that would have added six new seats to the Court.[72] The basic problem facing President Roosevelt was this: he was elected by an enormous share of the country and controlled both chambers of Congress,[73] yet the Supreme Court repeatedly invoked the Constitution to constrain his implementation of landmark planks of his platform.[74] President Roosevelt's court packing proposal never came to pass, perhaps in part because its novelty and perceived radicalism[75] made it politically unwise,[76] and in part because the Court, when faced with overwhelming political threats to its structure, reached outcomes that released enough pressure to avoid structural change.[77]

The proposal's ultimate failure is less relevant to understanding our current moment than is the social and political context in which it arose. A few points are worth emphasizing about President Roosevelt and the New Deal era. At that time, the nation was confronting the perceived excesses of the Gilded Age and the vast disparities in wealth and income that arose from the monopolies, automation, and labor-force transformation of the Industrial Revolution.[78] The United States was emerging from the Great Depression, and many Americans were struggling financially.[79] The late-1930s policies that President Roosevelt pursued were part of a second phase of the New Deal that moved from immediate,

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[70] 347 U.S. 483 (1954); Southern Manifesto, *supra* note 69, at 4460. These two moments are identified by the Presidential Commission on the Supreme Court of the United States as key reform epochs of the twentieth century. *See* PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 54–59.

[71] Vermeule, *supra* note 3, at 1156.

[72] *See id.* at 1156, 1165.

[73] *Id.* at 1156.

[74] *See* Alex Badas, *Policy Disagreement and Judicial Legitimacy: Evidence from the 1937 Court-Packing Plan*, 48 J. LEGAL STUD. 377, 384 (2019) ("While Roosevelt and the Democratic Congress faced little political opposition to passing their legislative agenda, they were consistently rebuked by the Supreme Court."); *see also* Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1140–41 (1987) (reviewing the history).

[75] *See* Badas, *supra* note 74, at 386–87.

[76] *See* Vermeule, *supra* note 3, at 1160–61.

[77] *See id.* at 1159.

[78] *See* KIRAN KLAUS PATEL, THE NEW DEAL 10–12, 43 (2016).

[79] *See* Aaron D. Purcell, *Historical Interpretations of the New Deal and the Great Depression*, *in* 2 INTERPRETING AMERICAN HISTORY: THE NEW DEAL AND THE GREAT DEPRESSION 4, 5 (Aaron D. Purcell ed., 2014).

experimental attempts at relief to more pragmatic, less experimental reform and regulation programs.[80]

Public opinion of Supreme Court reform was directly related to whether a person favored the second-phase New Deal programs.[81] Professor Alex Badas, using contemporary methods to analyze 1937 survey data,[82] finds that "individuals who had high support for New Deal policies were more likely to support . . . [Supreme] Court-packing."[83] Examining the relationship of results from the same 1937 survey[84] to trends in the media, judicial decisions, and presidential speech,[85] Professor Gregory Caldeira finds that public support for the Supreme Court–packing plan diminished after (1) the Court ruled in favor of the President's agenda in *NLRB v. Jones & Laughlin Steel Corp.*[86] and (2) Justice Van Devanter, the "intellectual leader of the Supreme Court's conservatives"[87] and a staunch opponent of the New Deal agenda,[88] retired.[89] As a result, he concludes that public opposition to the Court in the New Deal era was driven in large part by the Court's blocking of policies by the legislative and executive branches that were popular with the public — and that public support began to rebound once the Court "retreat[ed]" on those issues.[90]

All told, the New Deal era is one prominent example of rare public interest in Court reform, which arose out of a sense that the Court was getting things wrong in a moment where the stakes were especially high. Yet it is not the only such moment. In 1956, nineteen senators and seventy-seven congresspeople signed the Southern Manifesto.[91] The Manifesto declared that *Brown v. Board of Education* represented the Supreme Court "substitut[ing] naked power for established law,"[92] and it pledged to "use all lawful means to bring about a reversal of [*Brown*] . . . and to prevent the use of force in its implementation."[93]

Although the gesture at "all lawful means" was the closest the document came to a concrete proposal for Court reform, it nonetheless

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[80] *See* Jennifer Egolf, *The Economy and the New Deal*, *in* 2 INTERPRETING AMERICAN HISTORY: THE NEW DEAL AND THE GREAT DEPRESSION, *supra* note 79, at 81, 85.

[81] *See* Badas, *supra* note 74, at 400–01.

[82] *Id.* at 389–90.

[83] *Id.* at 401.

[84] *See* Caldeira, *supra* note 74, at 1140. Both Badas and Caldeira use responses from a 1937 Gallup survey that included questions about Court packing. Caldeira relies on responses collected from February 3 to February 10, *see id.*, whereas Badas relies on responses collected from February 17 to February 22, *see* Badas, *supra* note 74, at 389.

[85] *See* Caldeira, *supra* note 74, at 1141–42.

[86] 301 U.S. 1 (1937); *see* Caldeira, *supra* note 74, at 1148.

[87] Caldeira, *supra* note 74, at 1142.

[88] *Id.*

[89] *Id.* at 1148.

[90] *Id.* at 1150.

[91] *See* Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1054 (2014).

[92] Southern Manifesto, *supra* note 69, at 4460.

[93] *Id.*

evoked two pro-reform ideas. First, "all lawful means" could reasonably be interpreted to include the kinds of pressure, including proposals for structural change, that President Roosevelt had mustered two decades prior in order to change the Court's direction. Second, the Manifesto's stated commitment to preventing the forceful implementation of the Court's ruling could be restated as an objection to the Court's exercise of jurisdiction over the states[94] — the vertical separation of powers analogue to current proposals that would adjust the horizontal separation of powers and prevent the Court from interfering with federal legislation.[95] And in the Manifesto's aftermath, proposals for Supreme Court reform abounded,[96] many of which paralleled those in currency today.[97]

As one author writing shortly after the Southern Manifesto's publication observed, there was a certain "irony that liberals and conservatives . . . adopted views completely the reverse of those each held in the constitutional crisis of the 1930's."[98] Unlike Roosevelt-era Supreme Court reformers, who objected to the Court's hampering of the national will for greater federal government involvement in the recovery from the Depression,[99] the Southern Manifesto signatories objected to the Court's enforcement of national trends against the racist habits of their region.[100] Their movement was abhorrent. But the fact remains that both moments of reformism arose from deep substantive disagreement with the policies being enacted by the Court.

2. Court Reform Today. — The above accounts have suggested that moments of excitement about Supreme Court reform begin not because people suddenly care deeply about the formal structure of the Court but because they suddenly regard the Court as dangerous. Today, the Court experiences near-record-low popularity[101] as a result of several distinct narratives. Underneath them all, however, is a sense of alarm about the results that this Court has and will likely continue to reach.

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94 *Cf.* White, *supra* note 3, at 185 (describing "the South's immediate purpose of frustrating for the indefinite future total compliance with the law of the land").

95 *See* Doerfler & Moyn, *supra* note 1, at 1725–28 (surveying various proposals that would "disempower[]" the Court).

96 *See* White, *supra* note 3, at 187 (surveying proposals); PRESIDENTIAL COMMISSION REPORT, *supra* note 1, at 57–58 (same).

97 *Cf.* Doerfler & Moyn, *supra* note 1, at 1724–25 (providing an overview of modern Court reform proposals).

98 White, *supra* note 3, at 196.

99 *See* Badas, *supra* note 74, at 383–86.

100 *See* White, *supra* note 3, at 196–97.

101 *See, e.g.*, Megan Brenan, *Views of Supreme Court Remain near Record Lows,* GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx [https://perma.cc/483C-UGT5].

Some people are angry because, they claim, the current Court is the product of improper maneuvering by actors in the elected branches.[102] Regarding then–Chief Judge Garland's failed nomination, followed by the successful confirmation of Justice Gorsuch, the popular narrative goes: "Mitch McConnell stole a Supreme Court nomination from Barack Obama and gave it to Donald Trump."[103] In stalling consideration of Chief Judge Garland, Senator McConnell cited the imminence of the 2016 election — which led to a second claim of stolen seats when, in October 2020, Justice Barrett was confirmed to replace Justice Ginsburg days before the 2020 election.[104] But Democrats have previously endorsed similar strategies to those employed by Senator McConnell,[105] suggesting that the fervor against Republican gamesmanship comes more from the ends it advances than the means by which it does so.

Others believe that the Court has structural features that make it more likely to produce undemocratic outcomes, and its recent results have simply thrown those features into stark relief.[106] Proponents of this "antidemocracy"[107] view emphasize that recently, the Court has reached conservative results and wielded the Constitution to hamper popular legislation,[108] but they believe that those actions result from its inherently antidemocratic nature.[109] Proponents point out that even when the Court reached consistently progressive results under Chief Justice Warren, it "struggle[d] to legitimate" its actions with regard to democracy.[110] Progressive proponents of this view contend that, like a benevolent king being replaced by an evil one, today's Court is using its antidemocratic power to cause bad effects in the world.[111]

Whereas the above stories of discontent with the Court do not explicitly state concerns about consequences, others are openly motivated by fear of what the Court will do. These objections, which parallel the

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[102] *See, e.g.*, David Daley, Opinion, *Republicans Have Hijacked the US Supreme Court. It's Time to Expand It*, THE GUARDIAN (June 27, 2022, 2:27 AM), https://www.theguardian.com/commentisfree/2022/jun/27/us-supreme-court-abortion-roe-v-wade-justices-expansion [https://perma.cc/4YBF-EYC3].

[103] John Nichols, *McConnell Explains How He'll Steal Another Supreme Court Pick from Another Democratic President*, THE NATION (June 15, 2021), https://www.thenation.com/article/politics/mcconnell-biden-supreme-court [https://perma.cc/H9YU-ZN6H].

[104] *See* McFall, *supra* note 64.

[105] *See* sources cited *supra* note 65.

[106] *See, e.g.*, Doerfler & Moyn, *supra* note 1, at 1711 ("[T]he problem is . . . not only . . . institutional capture by the right . . . . Rather, the problem is that the institution is undemocratic in role and output.").

[107] For a discussion of the antidemocracy view, see Bowie, *supra* note 25.

[108] *See id.*; Doerfler & Moyn, *supra* note 1, at 1718–19.

[109] *See* Doerfler & Moyn, *supra* note 1, at 1719–20.

[110] *Id.*; *cf.* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 927, 939–40 (1973) (arguing *Roe* was unjustifiable because it resolved a contested moral and political question about which the Constitution said nothing).

[111] *See, e.g.*, *Supreme Court Reform*, AM. CONST. SOC'Y, https://www.acslaw.org/projects/supreme-court-reform [https://perma.cc/RS5Q-Y78V] (connecting the Court's structural problems to "harm imposed" by it).

New Deal–era objections to the Court's interference in President Roosevelt's agenda, reveal the true emergency of the current moment. What makes the push for Court reform so potent in this moment is not a sudden interest in the intricacies of Senate procedure or a philosophical take on the institutional competence of the Court. It is that the Court has already sanctioned "the further erosion of environmental protections . . . during a climate crisis . . . [and the] authoriz[ation] [of] expansive state intrusion into the lives and medical decisions of those who can give birth,"[112] and that such rulings "presage[] . . . harmful outcomes on issues ranging from contraception to same-sex marriage to immigration to climate change."[113] In other words: the Court is simply "[b]roken."[114]

As one illustration of how facially neutral justifications for reform are paired with substantive fear of the Court, consider the following preamble to Court reform proposals by the American Constitution Society:

> Put simply, we no longer have a Supreme Court that can be trusted to uphold constitutional rights, democratic principles, and judicial norms in this country. This is the result of . . . the Court's . . . conservative supermajority being driven by a staunchly partisan agenda that is increasingly hostile to fundamental rights and judicial norms.
>
> . . . [O]ur right to vote is in jeopardy . . . .
>
> . . . [The] Court is a proven threat to fundamental rights. It has already . . . wip[ed] out the federal constitutional right to abortion . . . . The Court's decision in *Dobbs v. Jackson Women's Health* also effectively serves as an invitation for states and plaintiffs to pursue litigation to rewrite constitutional law in this country in the interests of white supremacy, sexism, and misogyny. This could include efforts to overturn the Court's previous decisions on same-sex marriage, inter-racial marriage, and contraception.[115]

A sense of alarm about the consequences of the Court's actions is palpable, and although language about "rights" and "norms" makes an appearance, it is secondary to fear about the Court's "staunchly partisan agenda."[116]

C. Substantive Fear of the Court Is a Valid Reason to Reform It

The previous section argued that our current moment of reformism exists because a significant portion of the population simply believes that the Court is reaching results that are dangerously wrong. At first glance, the idea that the Court should be disciplined for nothing more than offending some people's consciences seems to lack rigor and

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[112] Kaitlin Byrd, *The Supreme Court Is Profoundly Broken*, DAME (June 13, 2023), https://www.damemagazine.com/2023/06/13/the-supreme-court-is-profoundly-broken [https://perma.cc/6SZH-GAA3].

[113] Doerfler & Mystal, *supra* note 1.

[114] *Id.*

[115] *Supreme Court Reform*, *supra* note 111.

[116] *Id.*

neutrality, an inference that may be particularly appealing when substantive objections are contrasted with neutral, formalist justifications for reform. But society and legal academia alike have long recognized that there are external, justice-based limits on what the Court may do. There exists a basic principle that the Court must receive a minimum amount of buy-in from citizens in order to validly impose its law on them, and there exists another that some decisions can be wrong not because of improper legal reasoning but because of despicable consequences. The first principle is called "moral legitimacy" in legal and political philosophy, and the second describes what legal scholars call the "anticanon."

1. Moral Legitimacy. — Moral legitimacy explains what one can do when the Court transgresses basic moral requirements. It starts by asking if the Court has the power to alter people's moral obligations — whether, and why, one really *ought* to follow the law announced by the Court, even if she disagrees with it.[117] The difference between a Court with moral legitimacy and one without it is whether one follows the law because she feels she ought to or because she is coerced to. For example, someone residing in the United States must follow the law announced by the government,[118] but so must someone living under a totalitarian dictator. What sets the United States apart is that it seeks to secure compliance with its laws not through the threat of state violence but by a lawmaking process that earns the buy-in of those it governs.[119] (The story of its founding is, in part, the story of getting out from under

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[117] *See* FALLON, *supra* note 2, at 23–24. The word "legitimacy" serves two other related purposes in discussion of the Court. *Id.* at 21. Sociological legitimacy refers to whether people approve of the Court and adhere to its rulings. *Id.* at 21–22. Legal legitimacy refers to whether the Court's interpretations are permissibly within the rules of the legal system. *Id.* at 35.

[118] *See id.* at 23–24. For an illustration of the coercive power behind the Court's proclamations, see Conor Friedersdorf, *Enforcing the Law Is Inherently Violent*, THE ATLANTIC (June 27, 2016), https://www.theatlantic.com/politics/archive/2016/06/enforcing-the-law-is-inherently-violent/488828 [https://perma.cc/S2RE-GZE9], quoting Professor Stephen Carter for the proposition that:

> Every law is violent. . . . [E]ven a breach of contract requires a judicial remedy; and if the breacher will not pay damages, the sheriff will sequester his house and goods; and if he resists the forced sale of his property, the sheriff might have to shoot him.
>
> . . . .
>
> . . . Behind every exercise of law stands the sheriff . . . . Is this an exaggeration? Ask the family of Eric Garner, who died as a result of a decision to crack down on the sale of untaxed cigarettes.

Id. (quoting Professor Stephen L. Carter). There are several recent examples of the coercive power of law. *See* Jones v. Hendrix, 143 S. Ct. 1857, 1877 (2023) (Sotomayor & Kagan, JJ., dissenting) ("[T]oday's decision yields disturbing results. . . . A prisoner who is actually innocent, imprisoned for conduct that Congress did not criminalize, is forever barred . . . from raising that claim, merely because he previously sought postconviction relief."); Morgan Carmen, *Abortion Snitching Is Already Sending People to Jail*, MS. MAG. (Sept. 23, 2023, 8:15 AM), https://msmagazine.com/2023/08/19/celeste-burgess-abortion-snitching-privacy-police-illegal [https://perma.cc/D82Q-FNVB] (describing a mother who is serving a two-year prison sentence for helping her seventeen-year-old daughter obtain and use abortion pills).

[119] *See* FALLON, *supra* note 2, at 29.

the thumb of a strange and alien ruler.[120]) When the Court faithfully gives effect to laws that are the result of public deliberation, even people who are disadvantaged by its interpretations can recognize their moral persuasiveness.[121]

The concept of moral legitimacy can support compliance with the Court's decisions, but only if the Court is, in fact, morally legitimate. Scholars generally assume that it is,[122] because, they reason, "decent human lives would be impossible without government and law," so we have a "moral duty to support any . . . legal regime" that is "reasonably just."[123] But for this to be true, the government must provide "rights of democratic participation," "fair[] . . . application" of laws, and, crucially, a "set of institutions and rights guarantees [that is] reasonably just."[124] Those are real limits, and if the Court is failing to meet them, people can reasonably call on it to change. In a moment when the Court's decisions are opposed with language of moral outrage[125] and decried for eroding basic rights,[126] such objections can be conceptualized as claims that the Court has failed to provide the minimal justice necessary to receive the moral respect of its citizens.

2. The Anticanon. — Another way of describing the collective alarm that precipitates reformism is through the anticanon. The anticanon refers to a select set of cases that were "wrong the day [they were] decided."[127] "[A]ll legitimate constitutional decisions must be prepared to"[128] explain how they are unlike the anticanon cases. The anticanon cases are regarded as fundamentally wrong, despite the fact that they contained plausibly defensible legal reasoning,[129] because they violated ethical commitments that are essential to our national identity.[130]

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120 *Cf.* Boyd v. United States, 116 U.S. 616, 625 (1886) (describing England's colonial practice "of issuing writs of assistance . . . [empowering] revenue officers . . . to search suspected places for smuggled goods" without warrant, which John Adams called the birth of the Revolution).

121 *See* FALLON, *supra* note 2, at 26.

122 *See, e.g.*, *id.* at 31 ("In going forward, I shall assume, as I have said, that the American legal regime is morally legitimate in its relationship to most if not all citizens, but not without anxiety that the question, 'morally legitimate with respect to whom?' deserves more searching examination than I can give it here.").

123 *Id.* at 28.

124 *Id.* at 29.

125 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2350 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting); West Virginia v. EPA, 142 S. Ct. 2587, 2626–27 (2022) (Kagan, J., dissenting); Shelby County v. Holder, 570 U.S. 529, 593–94 (2013) (Ginsburg, J., dissenting).

126 *See, e.g.*, sources cited *supra* note 1.

127 Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); *see* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

128 *See* Greene, *supra* note 127, at 380.

129 *See id.* at 463.

130 *See id.*

The anticanonical cases — which denied citizenship to Black people,[131] affirmed the constitutionality of Jim Crow segregation,[132] invalidated a state's attempt to protect its workers from exploitation,[133] and permitted the internment of Japanese Americans under the President's executive power[134] — show that the Court can issue decisions whose *rejection* is essential to our nation's constitutional identity.[135] The wrongness of the anticanon has been affirmed and invoked by judges and politicians across the political spectrum.[136] People have rebuked those cases despite them being plausible as matters of legal interpretation and issued by the highest Court in the land, endowed with final authority on questions of constitutional meaning.[137] Therefore, it is possible for the Court to do something that, in time,[138] will come to stand for everything our nation *rejects*.

In this way, the current crisis of faith in the Court could come from a particular kind of duty to ethical commitments that support our constitutional order. Opposition to the Court's recent rulings is far from unanimous. Many have celebrated *Dobbs*, for example.[139] But opposition to each case in the anticanon was also far from unanimous.[140] Perhaps the current substantive outcry against the Court should receive the same admiration as would a historical attempt to thwart the Court that decided *Plessy*. Or perhaps not. Either way, the relevant question is whether what the Court is doing — for example, to women's bodily autonomy[141] — is fundamentally wrong as a matter of substance.

Conclusion

The purpose of this Chapter has been to change the kinds of reasons that are invoked in favor of stasis or change. If what is really at issue is a disagreement about values, talking in circles about the content or applicability of neutral principles is as pointless as is an argument between spouses about the dishes. And, like in arguments between spouses, getting down to the real, unspoken issue can yield several

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131 *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

132 *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

133 *See* Lochner v. New York, 198 U.S. 45, 64 (1905).

134 *See* Korematsu v. United States, 323 U.S. 214, 223–24 (1944).

135 *See* Greene, *supra* note 127, at 463.

136 *See id.* at 405; *see also id.* at 460 (explaining that the anticanon is referenced "by all sides of modern political and legal controversies").

137 *See id.* at 463.

138 *See id.* at 460.

139 *See, e.g.*, Sherif Girgis, Dobbs*'s History and the Future of Abortion and Privacy Law*, SCOTUSBLOG (June 28, 2022, 1:53 PM), https://www.scotusblog.com/2022/06/dobbss-history-and-the-future-of-abortion-and-privacy-law [https://perma.cc/Z5JX-MZVD].

140 *See* Greene, *supra* note 127, at 408–09, 415, 419–20, 425–26.

141 *See, e.g.*, Rachel Shelden, *What* Dred Scott *Teaches Us About the Draft Abortion Ruling*, WASH. POST (May 7, 2022, 6:00 AM), https://www.washingtonpost.com/outlook/2022/05/07/what-dred-scott-teaches-us-about-supreme-courts-abortion-ruling [https://perma.cc/4JV6-WJ3Y].

benefits, even if it does not immediately resolve the conflict. The process of deliberating the underlying merits can help both sides to reach consensus, and simply airing the equities can create a feeling of fairness and being heard.

This Chapter has argued that pro-reform movements arise from profound substantive disagreements with the Court. Although neutral arguments about the Court's formal structure provide the language through which reformers state their case, the reason why they advance those arguments is that they fear the Court. A person opposing this argument for reform can do one of two things. She can address the substantive objection directly, by explaining why the Court's actions are not substantively wrong (or at least not so substantively wrong as to require immediate intervention). Alternatively, she can explain why reform would not solve the substantive problem — or propose an alternative that would solve it more effectively. But it is not enough for opponents to reform to continue to fall back on neutral principles concerning the Court's structure.

What matters about today's Court is more than simply how many Justices sit on it, how and why they were appointed, or what role it occupies in our constitutional order. What matters is also what it is doing: forcing people, including children, to carry unwanted and dangerous pregnancies;[142] creating new limitations on the federal government's ability to address the climate crisis;[143] and hampering efforts to promote racial equality.[144] Proponents of reform should be clear that this is why they object — and defenders of the Court's status should be made to answer these objections directly.

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142 *See, e.g.*, Nicole Walker, Opinion, *My Abortion at 11 Wasn't a Choice. It Was My Life.*, N.Y. TIMES (Aug. 18, 2022), www.nytimes.com/2022/08/18/opinion/abortion-pregnancy-child-roe.html [https://perma.cc/29HU-879J]; David N. Hackney, Opinion, *I'm a High-Risk Obstetrician, And I'm Terrified for My Patients*, N.Y. TIMES (July 5, 2022), https://www.nytimes.com/2022/07/05/opinion/ob-gyn-roe-v-wade-pregnancy.html [https://perma.cc/MVM5-LT9W].

143 *See* David Wallace-Wells, Opinion, *The Supreme Court's E.P.A. Decision Is More Gloom than Doom*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/opinion/environment/supreme-court-climate-change-west-virginia-epa.html [https://perma.cc/WCN8-RBGH].

144 *See* Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done.*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html [https://perma.cc/V2TZ-4QSZ].