WHAT IT TAKES TO CURB THE COURT

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It is that time again, as it seems to be every several generations, when Court-curbing is in the air. And yet, this period of Court-curbing is importantly different from prior times in which Court-curbing was successful. Start with this obvious point: in prior instances in which attacks on the Court succeeded in some fashion, the challengers had the political muscle to threaten the Court. Now, to be blunt, they don't have the votes. For that reason alone, much of today's talk of curbing the Court is overly optimistic at best.

The central question I pursue here is what it would take for the Court to be in actual jeopardy? Drawing from history, I derive a simple set of requirements. There must be a well-defined crisis, as opposed to diffuse frustration and dread about the Court. There also must be a focused, close fit between the nature of the crisis and the proposed remedy. Both of these are necessary to get public support behind a Court-curbing measure. And third, of course, is the votes: support in the political branches is essential to take action against the Court, for the public—no matter how discontent it might be—cannot punish the Court alone.

None of this is the case at present. There is indeed a crisis surrounding the Court, but it is a collection of varied concerns. There is no one focal remedy, but a mélange of proposals. Some Court decisions are out of line with public sentiment and have engendered majoritarian controversy, but other decisions, while unpopular on the left, still have majority support in the country. Perhaps most important, the political system has slid into dysfunction such that it no longer represents majority will anyway—making it extremely difficult to challenge the Court, even if the justices slide over the line.

The final question I take up is what the future might hold. I explore a range of possibilities, from bipartisan support for structural change around the selection system for Supreme Court justices to the justices moving so boldly that they get in hot water and are disciplined. Ultimately, though, I fear outcomes such as these are unlikely, ultimately driving the country toward constitutional crisis.

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https://doi.org/10.59015/wlr.GXEA6246

INTRODUCTION

It is that time again, as it seems to be every several generations, when Court-curbing is in the air. Conservatives—dare one say Republicans—have gained a solid majority on the Supreme Court, and if October Term 2022 is any indication, shy and slow are two things this majority will not be.[1] Having seen this coming for some time, though perhaps not quite anticipating the freight train it has turned out to be, progressives have been arguing for reining in the Court, and looking for ways to do so. The result has been a veritable flood of words, thoughts, threats, and ideas that rivals prior attempts to control the Court.[2]

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1. *See* Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html (discussing the Court's increasingly conservative bent).

2. For a sampling of both the criticisms of the current Court and the proposals to rein in the Court, see, for example, Daniel Epps, *Major Supreme Court Reform Is Unlikely. But These Changes Would Be a Good Start.*, WASH. POST (July 15, 2021, 1:32 PM), https://www.washingtonpost.com/outlook/supreme-court-reform-minor/2021/07/15/e34729d6-e417-11eb-8aa5-5662858b696e_story.html [https://perma.cc/7MFG-YZD2] (discussing various, less sweeping reforms to the Supreme Court); Ryan Doerfler & Elie Mystal, *The Supreme Court Is Broken. How Do*

And yet, this period of Court-curbing is importantly different from the past, in ways that are receiving too little attention.[3] People angry with the Court and its direction are quick to cite Abraham Lincoln, or Franklin Roosevelt, and draw parallels between our time and prior instances of when political forces sought to discipline the justices.[4] The quotations

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We Fix It?, NATION (June 6, 2022), https://www.thenation.com/article/society/how-to-fix-supreme-court/ (proposing both stripping the Court of jurisdiction and expanding its membership as possible solutions to overreach); Ryan Doerfler, *The Supreme Court Rules Us. Here's How to Curb its Power.*, WASH. POST (Sept. 29, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/09/29/supreme-court-reform-packing-jurisdiction-democracy/ [https://perma.cc/78EH-V4QJ] (discussing solutions to the Court beyond court packing); Ian Millhiser, *10 Ways to Fix a Broken Supreme Court*, VOX (July 2, 2022, 8:00 AM), https://www.vox.com/23186373/supreme-court-packing-roe-wade-voting-rights-jurisdiction-stripping [https://perma.cc/W69A-4KBN] (proposing term limits and supermajority voting requirements among other solutions); Ryan Cooper, *The Case Against Judicial Review*, AM. PROSPECT (July 11, 2022), https://prospect.org/justice/the-case-against-judicial-review/ [https://perma.cc/EH2S-86TN] (proposing a wholesale attack on judicial review); Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), https://www.bostonreview.net/articles/samuel-moyn-resisting-juristocracy/ [https://perma.cc/MU2E-A7Q2] (detailing the problems of the new conservative Court and detailing how progressives must adopt a political strategy which does not rely on the Court); Joshua Zeitz, *How the Founders Intended to Check the Supreme Court's Power*, POLITICO (July 3, 2022, 9:02 AM), https://www.politico.com/news/magazine/2022/07/03/dont-expand-the-supreme-court-shrink-it-00043863 [https://perma.cc/289T-URW6] (detailing the history and potential of jurisdiction stripping); Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ (detailing how Congress can reduce the Court's power); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1704–08 (2021) (discussing the benefits of jurisdiction stripping and supermajority requirements in contrast to court packing or partisan balance schemes).

3. This Essay relies heavily on references to historical events. I have written about these events extensively in BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009). That work is replete with specific citations to the relevant historical events (overly replete, my publisher may have said). Because this is a Symposium piece, I have been loath to impose upon the editors the task of cite-checking numerous historical sources, some that may be difficult to find, and all of which I have cited previously. For that reason, I'm going to cite to *The Will of the People* copiously. Think of the citations not so much as relying on myself for the claim (except when I am explicit about this) but more about using the book as a reference source directing readers to all the needed support.

4. *See, e.g.*, Cooper, *supra* note 2 (mentioning Lincoln's attacks on judicial review and FDR's court packing scheme); Bowie & Renan, *supra* note 2 (discussing Lincoln's "platform of repudiating the Court with national legislation"); Richard Pildes, *The Court and Politics: What Is the Lesson of FDR's Confrontation with the Court?*, JOTWELL (Sept. 23, 2010) (reviewing Jeff Shesol, Supreme Power: Franklin Roosevelt vs. The Supreme Court (2010)), https://conlaw.jotwell.com/the-court-and-politics-what-is-the-lesson-of-fdrs-confrontation-with-the-court/ [https://perma.cc/P8BJ-B2C8]

may on their face seem apt, but the historical analogies are not necessarily so.

Start with this stark matter of realpolitik: In prior instances in which attacks on the Court succeeded in some fashion, the challengers had the political muscle to threaten the Court.[5] Now, to be blunt, they don't have the votes.[6] In fact, I would venture to say, if they had the votes—*really* had the votes—the justices would be acting somewhat more gingerly.[7] Given this reality, much Court-curbing talk that we hear today is bluster.

Critics are quick to point out that in important ways the Court's work seems to fly in the face of public opinion, but it is unclear, to the extent it even is true, what the significance of this fact is.[8] The diffuse public does not and largely cannot discipline the Court; that requires action from the political branches. The public can goad politicians into acting, but more commonly, they put the brakes on political retribution.[9] This only adds to the complication that those who would seek to discipline the Court do not have the votes.

It is possible that an attack on the Court could succeed in the future. I have argued elsewhere that over time, on salient issues, the Court tends to come into line with public opinion.[10] That is not a normative statement,

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(discussing the failure of the FDR court packing plan and the subsequent derailment of the progressive domestic agenda).

5. *See infra* notes 140–45 (discussing political muscle of prior Court-curbing events).

6. *See* Sahil Kapur, *Democrats to Introduce Bill to Expand Supreme Court from 9 to 13 Justices*, NBC NEWS (Apr. 14, 2021, 8:00 PM), https://www.nbcnews.com/politics/supreme-court/democrats-introduce-bill-expand-supreme-court-9-13-justices-n1264132 [https://perma.cc/MW45-ADWP] (detailing the long odds of court-packing legislation after the 2020 election).

7. This is the idea, prominent in political science, of "anticipated reaction." If an institutional actor can anticipate a negative reaction, it takes that into account in formulating its own moves. *See* FRIEDMAN, *supra* note 3, at 376, 584–85 & nn.67–68.

8. *See infra* Part I, notes 23–27 and accompanying text.

9. *See infra* Section I.C.

10. That is the descriptive thesis of *The Will of the People*, which has developed in the Conclusion. *See also* FRIEDMAN, *supra* note 3, at 14–15. It stands in sharp contrast to the case-by-case majoritarian claim, which Pildes rightly criticizes. Richard H. Pildes, *Is the Supreme Court A "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 116, 122–23. As I have said, it is very hard to justify a claim that the Supreme Court should use majority opinion as a guide to decide individual cases. *See* FRIEDMAN, *supra* note 3, at 373, 381–83. Pildes dramatically misreads me in suggesting otherwise. Pildes, *supra* note 10, at 124 ("Friedman comes close to suggesting that the Court's decisions, one by one, necessarily will reflect 'majoritarian view.'"). Indeed, he concedes this elsewhere, citing me for the proposition that "[i]t is hardly the case that every Supreme Court decision mirrors popular will—even less so that it should." *Id.* at 127 n.79. The concept of anticipated reaction I have described only works on cases that are salient over some period of time. As I discuss throughout this piece, however, he is correct that my argument rests on the Court's understanding that if it strays too far from

but a descriptive one. There are a variety of mechanisms that drive this observation, among them the appointments process and the ability of the political branches to discipline the Court.

At the moment, however, as Margaret Lemos and I have explained, all avenues to regulating the Court are largely out of reach, given broader dysfunction in our political system.[11] This makes the path for Court opponents all the more difficult. The Court is not coming into line with public opinion because it does not have to.

The question I pursue here is what it would take for the Court to be in genuine jeopardy? What are the conditions that would imperil the Court? To get at that question, I want to contrast the present with those times in history in which the Court has indeed proven to be in trouble. If the Court's critics hope to succeed in bringing the justices to heel at some point, they would do well to know that history at a somewhat deeper level than the casual citation of past incidents would suggest. The past is not the present, of course, and what was true then may not be true now. But then again, it might be, and it is certainly worth considering.

The short version of the argument I will draw out at greater length (in Part II) goes like this: In the past, when Court-curbing was successful, there was an identifiable and describable complaint about the Court's decisions. Something was understood to be grievously, immediately, wrong. The matter was framed with sharp precision for the public, often by a leading political figure or figures. The remedy proposed to deal with the crisis tended to fit the problem as it had been framed. Ironically, it was not necessary that the Court attack be stated openly and honestly as an attack *on* the Court. Often it was put rather disingenuously, which is to say some reason for "reform" was offered having nothing to do with discontent with judicial decisions. Nor was it necessary that the attack on the Court even succeeded on its own terms. Rather, it was enough for

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the mainstream in salient cases, over time, the Court can be disciplined. *Id.* at 125. Still, to the extent the Constitution is indeed uncertain, deference to democratic decision-making may well be warranted. *See* FRIEDMAN, *supra* note 3, at 322. Indeed, the problem progressives face is that our democratic institutions are so far from majoritarian at present, stultifying the ability of majorities to enact their preferences into law. *See* Jamelle Bouie, *What if We Let Majoritarian Democracy Take Root?*, N.Y. TIMES (Oct. 21, 2022), https://www.nytimes.com/2022/10/21/opinion/minority-rule-majoritarian-democracy.html.

11. Barry Friedman & Margaret H. Lemos, *Dysfunction, Deference, and Judicial Review*, 29 GEO. MASON L. REV. 487, 490 (2022). For a source in accord, and deeply important on this critical point, see Pildes, *supra* note 10, at 139 ("[T]he constraints political institutions impose on the Court today might be much less than some majoritarian theorists suggest."); *id.* at 157 (explaining how constraint imposed by Congress's "ability to enact, or credibly threaten to enact, laws to rein in the Court" diminished "if we continue to experience the kind of deeply divided political system that has characterized American politics since the 1980s").

the justices to understand they and the institution were in serious peril, such that they altered their behavior. Still, for this to happen, the opponents had to be able to mount a real threat, which means having the votes in the political branches.

Almost none of this is true today. There is widespread frustration with the Court, but there is no single focal point. The President—a critical leader of the Court opposition—is largely silent. He appointed a Commission to look at Supreme Court reform, the result of which was a lengthy examination of the pros and cons of various options, which recommended nothing.[12] Abortion rights may head the list of grievances at the moment, but everyone seems to have their particular favorite—from voting rights to affirmative action to over-support for the police to threats to a Green New Deal, and much more.[13] Nor is there a focus for

12. *See Draft Final Report*, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S. (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/T7YZ-57WZ]. Proposed to help Biden "avoid taking a position on court expansion," there is debate about whether this Commission can be called reforming at all. *See* Mark Joseph Stern, *Biden's Supreme Court Reform Commission Shows He Doesn't Really Want Court Reform*, SLATE (Apr. 9, 2021, 5:37 PM), https://slate.com/news-and-politics/2021/04/joe-biden-supreme-court-reform-commission.html [https://perma.cc/KM8R-4RAZ]. Nevertheless, the Commission pointed to strong backing for implementing non-renewable eighteen-year term limits for the justices, while disagreeing on the merits of other reforms such as court packing. *See* Ellena Erskine, *Presidential Court Commission Approves Final Report, Identifying Disagreement on Expansion*, SCOTUSBLOG (Dec. 8, 2021, 3:34 PM), https://www.scotusblog.com/2021/12/presidential-court-commission-approves-final-report-identifying-disagreement-on-expansion/ [https://perma.cc/VR2W-4PTK]. This endorsement has been criticized as too weak for the moment. *See* Jay Willis, *Supreme Court Term Limits Are Not Going to Cut It*, BALLS & STRIKES (Oct. 19, 2021), https://ballsandstrikes.org/court-reform/supreme-court-term-limits-commission-lol/ [https://perma.cc/QP66-ZS9D].

13. *See, e.g.*, Adam Liptak, *Supreme Court Seems Ready to Throw Out Race-Based College Admissions*, N.Y. TIMES (Nov. 1, 2022), https://www.nytimes.com/2022/10/31/us/supreme-court-harvard-unc-affirmative-action.html (detailing the Court's hostility to affirmative action); Doerfler & Moyn, *supra* note 2, at 1710 (fearing the Court's reaction to potential progressive legislation on climate like the Green New Deal); Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. REV. 833, 846–52 (2022) (discussing the Roberts' Court's hostility to voting rights, and the bleak outlook of the current Court for affirmative action); *see also* Brandon Hasbrouck, *Big Police Energy Unleashed by Supreme Court a Sign of (Very Bad) Things to Come*, BOS. GLOBE, https://www.bostonglobe.com/2022/06/27/opinion/big-police-energy-unleashed-by-supreme-court-sign-very-bad-things-come/ [https://perma.cc/N3NW-2L27] (June 27, 2022, 1:05 PM); Brandon Hasbrouck, *American Horror Story: The Supreme Court*, BOS. GLOBE, https://www.bostonglobe.com/2022/10/03/opinion/american-horror-story-supreme-court/ [https://perma.cc/EU37-MD6L] (Oct. 3, 2022, 12:51 PM). *See generally* Eric Segall, *The Week from Hell*, DORF ON L. (June 27, 2022), http://www.dorfonlaw.org/2022/06/the-week-from-hell.html [https://perma.cc/S3A3-J4J4] (critiquing *Carson v. Makin*, *Bruen*, and *Dobbs*).

reform; the list of proposals for what to do about the Court seems at least as long as the list of complaints.[14] Rather than seizing on a focused strategy, cloaked in some plausible even if disingenuous frame, we have a frontal attack that may feed the faithful, but is unlikely to pull in those needed to make the whole thing plausible.

And then, there is that other matter of not having the votes. In repeatedly stressing the need for votes, I do not mean to cheat all these other factors. To the contrary, I mean to emphasize them. Having votes means mustering them. Mustering them requires a careful strategy, executed in a way that garners political and popular support. That could happen, but it is not happening today.

I do not care to minimize the dire times we are in. The situation is bad. A solid Supreme Court majority, achieved by shameless political manipulation, is acting too often in cahoots with the Republican Party, advancing the ideological agenda of both, and deciding cases regarding the political process in a way calculated to keep that party in power in the face of oppositional majorities.[15] I do not think I overstate things to say that this dynamic is one of several factors that at the moment and taken together are imperiling our democracy. Unfortunately, fixing the broken part of this system that is the Supreme Court is going to be exceptionally difficult, for the very reasons my theory about the relationship between long-term popular opinion and judicial outcomes is under some pressure.

In Part I of this Essay, I provide a historical overview of prior Court-curbing times. My frame for this will be the periodization I developed in *The Will of the People*. That structure allows me both to place prior moments of Court-curbing in context and ultimately suggest how the times in which we live are different from the past. In this Part, I simply accept Court critics' arguments that it is acting inappropriately by interfering with popular majorities, even though—as I indicated above—the argument has its difficulties.

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14. *See* sources cited *supra* note 2.

15. The "shameless manipulation" to which I refer is refusing to fill Antonin Scalia's seat, relying on a supposed practice of dubious provenance, then filling Ruth Bader Ginsburg's seat in a mad rush inconsistent with that supposed practice. *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. As for the Court acting in cahoots with the Republican Party, think what you will, but I am surely not the first to observe this. *See* Scott Lemieux, Opinion, *Supreme Court Justice Alito's Federalist Society Speech Shows How Political the Court Will Get*, NBC NEWS (Nov. 13, 2020, 3:40 PM), https://www.nbcnews.com/think/opinion/supreme-court-justice-alito-s-federalist-society-speech-shows-how-ncna1247751 [https://perma.cc/K7TC-T766] ("Alito expects the new 6-3 Republican majority on the court to go to war on numerous fronts with Democratic elected officials.").

Part II is devoted to explaining what it takes for a successful attack on the Court but also what it does not. The paradigm of success may be Roosevelt's threat to pack the Court in 1937.[16] True, his Court-packing plan did not get adopted, but having lost that battle he won the war over the meaning of the Constitution for well over seventy-five years.[17] All legislative failures should be so successful. On the other hand, today looks a lot like the *Lochner* era. That was one of the most reviled periods in the history of judicial review but very little was done to bring the Supreme Court, or any court for that matter, into line.[18]

Part III looks to the future. Which, at the moment, is bleak, not just for judicial review, but for the country. Indeed, the two are linked, in a way that bodes well for neither.

I. WHY (AND WHY NOT) CURB THE COURT

It is hardly a secret that many, particularly progressives, are unhappy with the Supreme Court, so much so that they wish to see action taken.[19] The most prominent target may be the Court's decision in *Dobbs v. Jackson Women's Health Organization*.[20] But there are plenty of others.[21]

Among the arguments advanced to support curing the Court, one of the most prominent is that the justices are handing down decisions that fly in the face of majority preferences. The Court is out of line with public opinion, critics say, and must be stopped.[22]

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16. *See* DAVID S. SCHWARTZ & LORI A. RINGHAND, CONSTITUTIONAL LAW 71–72 (3d ed. 2021).

17. *See* Rivka Weill, *Court Packing as an Antidote*, 42 CARDOZO L. REV. 2705, 2734 (2021); SCHWARTZ & RINGHAND, *supra* note 16, at 71–72.

18. *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 5 n.12 (2003) ("*Lochner* was so reviled that, between the demise of *Lochner* in *West Coast Hotel v. Parrish* in 1937 and the publication of Bernard Siegan's *Economic Liberties and the Constitution* in 1980, it appears that only a single article that expressed even mild support for *Lochner* was published.").

19. *See* sources cited *supra* note 2 (discussing progressive anger at the Court and proposals for reform).

20. 142 S. Ct. 2228 (2022).

21. *See supra* note 13 (detailing various causes of progressive ire at the Court).

22. *See, e.g.*, Spencer Bokat-Lindell, Opinion, *Is the Supreme Court Facing a Legitimacy Crisis?*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/opinion/supreme-court-legitimacy-crisis.html ("Accusations that the Supreme Court has gone 'rogue' are often another way of saying that it has tacked too far to the right of public opinion."); Stephen Jessee, Neil Malhotra & Maya Sen, Opinion, *The Supreme Court is Now Operating Outside of American Public Opinion*, POLITICO (July 19, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/07/19/supreme-court-republican-views-

That argument is not without its problems. The criticism that courts are flaunting the popular opinion has been with us since the beginning of the Republic.[23] Sometimes, as now, it is not clear if that actually is true. For example, opinion polls suggest the *Dobbs* decision was perfectly anti-majoritarian, whereas decisions on issues ranging from guns to affirmative action are more complicated, and a decision like *West Virginia v. EPA*[24] simply may lack the salience in the general public for us to know.[25] It is also challenging to map the counter-majoritarian

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analysis-public-opinion-00046445 [https://perma.cc/68S9-GM74] (discussing the Court's recent departure from public opinion); Charlotte Klein, *The Supreme Court is Out of Step with America on Abortion*, VANITY FAIR (June 27, 2022), https://www.vanityfair.com/news/2022/06/the-supreme-court-is-out-of-step-with-america-on-abortion [https://perma.cc/RMX4-57JM] (examining Americans' opposition to the *Dobbs* ruling).

23. This is the history I detail in *The Will of the People*. *See generally* FRIEDMAN, *supra* note 3, at 12–14 (detailing the history of criticism against the Court for going against popular opinion). I also wrote five law review articles, infelicitously but eponymously named, on the subject. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002). Remind me never to do that again. *See also* Doerfler & Moyn, *supra* note 2; Bowie & Renan, *supra* note 2.

24. 142 S. Ct. 2587 (2022).

25. In recent polling, sixty-two percent of respondents agreed that abortion should be legal in all or most cases, while fifty-seven percent disagreed with the Supreme Court's decision to overturn *Roe v. Wade*. *Majority of Public Disapproves of Supreme Court's Decision To Overturn Roe v. Wade*, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2022/07/PP_2022.07.06_Roe-v-Wade_REPORT.pdf [https://perma.cc/B6W8-N5ZE]. Public opinion on guns is more nuanced. While a November 2022 poll indicated that sixty-four percent of respondents favored or somewhat favored a Supreme Court decision holding that the Second Amendment "protects the right to carry a gun outside the home," a separate June 2022 poll found that fifty-six percent of respondents agreed that "states should be allowed to limit who can carry a concealed handgun by requiring permit applicants to demonstrate that they need the weapon for their work or for protection." Andrew Willinger, Bruen*, Public Opinion, and Survey Design*, DUKE CTR. FOR FIREARMS L. (Dec. 8, 2022), https://firearmslaw.duke.edu/2022/12/bruen-public-opinion-and-survey-design/ [https://perma.cc/W8TE-XNE3]. Similarly, while a 2018 Gallup poll found that sixty-one percent of respondents were in favor of affirmative action programs, in a 2018 NORC General Social Survey, seventy-two percent of respondents opposed giving preference to Black Americans in hiring and promotion decisions. Frank Newport, *Affirmative Action and Public Opinion*, GALLUP (Aug. 7, 2020), https://news.gallup.com/opinion/polling-matters/317006/affirmative-action-public-opinion.aspx [https://perma.cc/W6U6-CN6L]. Finally, while sixty percent of likely voters believe the EPA should be allowed to regulate

complaint to theories of how judicial review should be exercised. After all, some leading theories of judicial review count on the Court protecting minorities from majorities.[26] I want to put all that aside, however, and take critics' complaints seriously, asking how—if the Court should be curbed for acting contrary to the popular will—it might be.

In my book, *The Will of the People*, I argue that curbing the Court—or at least the threat of doing so—might serve to keep the justices within the bounds of public opinion.[27] Indeed, the subtitle of the book is "How Public Opinion Influences the Supreme Court and Shapes the Meaning of the Constitution." There, I argue that, at least in the period following the New Deal, Court decisions have tended over time, in salient cases, not to wander outside the bounds of mainstream public opinion.[28]

To be clear, my argument in *The Will of the People* was a descriptive (not normative) one, and for reasons I will explain presently, I am not sure it is a functional argument at the moment. In *The Will of the People,* I divide the history of the Court and country into three periods. In the third period, which ran from the aftermath of Franklin Roosevelt's Court-packing plan until 2005 (when I finished the book, when Sandra Day O'Connor left the Court, and William Rehnquist died), I explain how an equilibrium was reached in which the Court typically stayed within the bounds of public opinion.[29] But since 2005 we may well have entered a fourth period, in which political dysfunction is wreaking havoc with that equilibrium.

In the balance of this Part, I am going to use the periodization from *The Will of the People* to sketch the history of the relationship between public opinion and Supreme Court decision-making. That allows me to relate briefly the key events of Court-curbing throughout the Nation's history, events I will draw upon in Part II. It also permits me to set the stage for the period of disequilibrium and dysfunction we may well be in.

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air pollution that contributes to climate change, this does not reflect public opinion on the specific deference principle at issue in *West Virginia v. EPA*. Carly Berke & Danielle Deiseroth, *Voters are Concerned About Upcoming SCOTUS Ruling on* West Virginia v. EPA, DATA FOR PROGRESS (June 21, 2022), https://www.dataforprogress.org/blog/2022/6/21/voters-are-concerned-about-upcoming-scotus-ruling-on-west-virginia-v-epa.

26. The most famous of these is John Hart Ely. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–36 (1980). But he is hardly alone. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting heightened judicial scrutiny for laws disadvantaging "discrete and insular minorities").

27. FRIEDMAN, *supra* note 3, at 370–71.

28. *Id.* at 374–76.

29. *Id.* at 14–16.

A. Period 1: Defiance

For the first period of the Nation's history, the Court was not particularly a problem to the public or the political branches, because if the public disagreed with the Court's decisions, they ignored them.[30] That is why in *Marbury v. Madison*,[31] Chief Justice John Marshall's lecture to the Jeffersonian Republicans about the rule of law, he ultimately concluded the Court did not have jurisdiction, and did not order anyone to do anything.[32] Because he knew full well that such an order would be ignored.[33] During this same period, the Republican-controlled Congress repealed legislation adopted by the Federalists as they were leaving power, creating a new set of Article III judgeships, which the Federalist quickly filled with appointees of their liking.[34] The Repeal Act threw the Federalist judges out of their jobs.[35] This would seem a clear violation of Article III's admonition that judges were to hold their positions "on good Behaviour."[36] Yet, when a case challenging the constitutionality of the Repealer made its way to the Court, the justices basically ignored it, focusing instead on another question in the case, whether the justices could be made to ride circuit.[37] As Marshall put it in a private note to one of his colleagues, the "consequences of refusing to carry the law into effect may be very serious."[38] Similarly indicative was President Andrew Jackson's perhaps apocryphal reaction to the Court's decision in *Worcester v. Georgia*,[39] which held that Georgia was wrongfully incarcerating two missionaries residing on tribal land for failing to obtain a license from the state.[40] "John Marshall has made his order, let him

30. This sort of defiance is described in detail in Chapter 3 of *The Will of the People*. What follows are simply some specific examples, plucked from that chapter and the preceding one, on the Marshall Court's struggle for independence. There are many more. *See* FRIEDMAN, *supra* note 3, at 72–104.

31. 5 U.S. (1 Cranch) 137 (1803).

32. *Id.* at 138.

33. *See* FRIEDMAN, *supra* note 3, at 58–62 (describing the peril the Court faced and Marshall's avoidance of trouble by holding there was no jurisdiction).

34. *See id.* at 48–50.

35. *See id.* at 52–55 (describing the debate over the repeal of the Circuit Judges Act and its passage).

36. U.S. CONST. art. III § 1.

37. *See Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 303–05 (1803). *See generally* FRIEDMAN, *supra* note 3, at 62 & 413 nn.147–48.

38. FRIEDMAN, *supra* note 3, at 411 n.129 (citing Letter from John Marshall to William Paterson, (Apr. 19, 1802), *in* THE PAPERS OF JOHN MARSHALL, 6:109 (Charles F. Hobson & Fredrika J. Teute eds., 1990)).

39. 31 U.S. (6 Pet.) 515 (1832).

40. *See generally id.*; FRIEDMAN, *supra* note 3, at 90–91. For more on the Cherokee controversy, see *id.* at 88–101.

enforce it," Jackson was reputed to have said.[41] Whether he actually said it or not, he said plenty of other things dismissive of the Supreme Court's authority, including noting that "[t]he decision of the supreme court has fell still born, and . . . it cannot coerce George to yield to its mandate."[42] And, when the justices stayed the execution of Corn Tassels, in the State of Georgia's hands, the Georgia legislature authorized the governor to "disregard any and every mandate and process" from the Court.[43] Which he did; Tassels was executed despite the Court's order.[44]

B. Period 2: Supremacy and Control

But in the second period, judicial supremacy took hold, posing a problem for the country and its political leader. In the midst of the controversy over the removal of the Cherokee from Georgia, in 1832, South Carolina nullified the federal tariff law, claiming it was "null, void, and no law," and prohibiting an appeal in any tariff case to the Supreme Court.[45] It threatened to leave the Union if the law was enforced.[46] Jackson, always a Union man, reacted strongly: "The laws of the United States must be enforced."[47] His proclamation on nullification and his Farewell Address pointed especially to the Supremacy Clause, and stated clearly that the path to challenge an unconstitutional law was to the Supreme Court.[48] By the time of the 1857 decision in *Dred Scott*, it was clear that the notion of judicial supremacy had taken root. Critics today like to quote Abraham Lincoln's First Inaugural, in which he said:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary ligation between parties, in personal actions, the people will have ceased, to be their own

41. FRIEDMAN, *supra* note 3, at 92–93 & 428 n.167. Technically, there was nothing for Jackson to do until such time as Georgia defied the mandate. *Id.* at 92. That ultimately was avoided when, during the Nullification Crisis, the matter was settled out of court and the missionaries were released. *Id.* at 101–02.

42. *Id.* at 93 & 428 n.169.

43. *Id.* at 89 & 426 n.139.

44. *Id.* at 89–90 & 427 n.141.

45. *Id.* at 99.

46. *Id.* at 99 & 431 n.223.

47. *Id.* at 101 & 432 n.240.

48. *Id.* at 101 & 432 n.241, 103 & 433 n.257.

> rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.[49]

These words, carefully parsed and fairly read, suggest Lincoln was *accepting* of judicial supremacy. He did not like it, and he certainly loathed *Dred Scott*. But he said in various speeches some version of the following: "We think [the Supreme Court's] decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself."[50] His remedy, as he made clear in this and other speeches, was Congress enacting legislation that hopefully would cause the Court to reconsider. "[W]e mean to do what we can to have the court decide the other way."[51] And other than in one moment of genuine peril to the nation, Lincoln did not overtly ignore Court rulings. The exception was when Chief Justice Taney, sitting as a Circuit Justice, ordered the military to bring before him a Confederate saboteur, John Merryman, pursuant to a writ of habeas corpus.[52] Lincoln had claimed to suspend the writ habeas corpus, despite that power sitting in Article I of the Constitution, defining Congress's power.[53] On the basis of that claimed suspension, the military simply refused to produce Merryman.[54]

Lincoln's statements were similar to the approach taken by most of the country hostile to *Dred Scott*. Republicans, after all, were longtime successors of the Federalists, and so abandoning the Court entirely would have been awkward. Martin Van Buren noted that "it would certainly not be difficult to show that the Federal party and its successors are very clearly estopped from objecting to the action of the Supreme Court."[55] *Dred Scott* was met by critics not with calls to defiance, but with waves of claims that the part of *Dred Scott* that barred Congress from dealing with the slavery question was dicta, that the case presented a political question the Court should not have decided, and that the decision was illegitimate because it was the product of a vast conspiracy of slaveholders.[56]

If supremacy was a problem, the answer was controlling (or curbing) the Court to make sure one did not get pronouncements that

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49. *Id.* at 117 & 440 n.96.
50. *Id.* at 117 & 441 nn.99–100.
51. *Id.* at 118 & 441 n.102.
52. *Id.* at 122 & 444 n.139.
53. Congress later ratified Lincoln's actions. *Id.* at 123 & 445 nn.143–44.
54. *Id.* at 121–22.
55. *Id.* at 114 & 438 n.68.
56. *Id.* at 113–16.

would prove problematic. During this period, Congress came up with a variety of ways to avoid the Court handing down decisions with which it would have to grapple or decide to defy. Part of this was the appointments process. As Lincoln said, given that he could not "ask a man what he will do," once on the Court, it was necessary "to take a man whose opinions are known."[57]

The Court also was controlled through jurisdiction stripping, the most famous case of which occurred during the litigation in *Ex parte McCardle*,[58] which challenged Union military control of the rebel states.[59] *McCardle* came to the Court during a race to see the Fourteenth Amendment ratified before the 1868 elections, and before the Supreme Court could declare congressional Reconstruction unconstitutional.[60] Rather than risk an unfavorable judgment in the *McCardle* case, Congress passed legislation stripping the Court of its statutory jurisdiction over the case.[61] In the face of the congressional action, the *McCardle* Court held that it lacked jurisdiction, implying that Congress, under the "Exceptions and Regulations" clause could deprive it of jurisdiction, but at the same time hinting there were other jurisdictional grounds to reach it.[62] By then, though, it was too late—the Fourteenth Amendment was ratified.[63]

In addition, three times during the Civil War and Reconstruction, Congress changed the size of the Court to make sure the justices were loyal to the Union cause and rendered judgments favorably to the will of Congress. In 1863, while the Civil War raged, Congress increased the size of the Court to ten.[64] According to the *New York Times*, and referring to the hated Chief Justice who presided over *Dred Scott*, this would "speedily remove the control of the Supreme Court from the Taney school."[65] Then, to ensure that Andrew Johnson got no

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57. *Id.* at 134 & 450 n.235.

58. 74 U.S. 506 (1868).

59. FRIEDMAN, *supra* note 3, at 130.

60. *Id.* at 129–30.

61. *Id.* at 131.

62. *Id.* at 133 & 450 n.231 (citing *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1869)).

63. Joint Resolution Proposing an Amendment to the Constitution of the United States, 15 Stat. 708, 710–11 (1869). For a discussion of the *McCardle* case and surrounding events, see FRIEDMAN, *supra* note 3, at 129–33 and accompanying notes.

64. FRIEDMAN, *supra* note 3, at 134 & 451 n.236 (citing Act of Mar. 3, 1863, 12 Stat. 794, 794–95).

65. *Important from Washington: The Closing Hours of Congress*, N.Y. TIMES, Mar. 4, 1863, at 1, https://www.nytimes.com/1863/03/04/archives/important-from-washington-the-closing-hours-of-congress-great.html. *See* FRIEDMAN, *supra* note 3, at 134 & 451 n.237.

appointments, Congress reduced the size of the Court to seven.[66] When Johnson was on his way out the door, and Union General Ulysses S. Grant was on his way in, Congress increased the Court's size back to nine.[67] *The New York Herald* put it bluntly: "by increasing or diminishing the number of judges, the Court may be reconstructed in conformity with the supreme decisions of the war."[68]

Congress basically invented these mechanisms to ensure Supreme Court decisions did not frustrate what was, in its view, essential. There is no evidence that in drafting Article III the members of the Constitutional Convention were embedding escape valves for judicial supremacy. I am firmly in the camp of those who believe the Framers anticipated judicial review—though likely nothing as it is wielded today.[69] But still I see no hint that they foresaw using Congress's control over the Court's size as a way to control outcomes, or that the somewhat perplexing language of the Exceptions and Regulations Clause was designed to allow Congress to pull the plug on jurisdiction when it felt threatening. Rather, throughout this period, when the Court was a problem, political leaders engaged in bricolage to come up with the means to assure political control. Necessity being the mother of invention, Congress found solutions to the immediate problem during times of focused crisis.

It was in just this spirit of controlling the Court that Roosevelt, also quotable in his disdain for the justices who were shredding his New Deal agenda, aggressively took on the Court. Responding to the Court's decision in *A.L.A. Schechter Poultry Corp. v. United States*,[70] striking down the National Industrial Recovery Act, Roosevelt asked: "Does this decision mean that the United States Government has no control over any national economic problem?"[71] Relying on the prior precedents changing the size of the Court, he put forth a plan that would enable him to appoint enough new justices to obtain a favorable majority on the Court.[72] As is

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66. FRIEDMAN, *supra* note 3, at 134 & 451 n.238 (citing Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 180–81 (2003)).

67. Act of Apr. 10, 1869, 16 Stat. 44, 44–45. These events are described in FRIEDMAN, *supra* note 3, at 133–35.

68. *The Late Decision of the Supreme Court on Military Trials During the War*, N.Y. HERALD, Dec. 20, 1866, at 4, https://chroniclingamerica.loc.gov/lccn/sn83030313/1866-12-20/ed-1/seq-4/ [https://perma.cc/F2SG-T8FV]. *See* FRIEDMAN, *supra* note 3, at 135 & 451 n.246.

69. *See generally* FRIEDMAN, *supra* note 3, at 19–43.

70. 295 U.S. 495 (1935).

71. *Id.* at 551; FRIEDMAN, *supra* note 3, at 202 & 482 n.54 for Roosevelt's remarks.

72. FRIEDMAN, *supra* note 3, at 216–17.

well known, Roosevelt's plan went down in defeat.[73] And yet in that defeat he also saw victory: faced with institutional peril, the swing justices changed their tune about the New Deal and economic regulation.[74]

C. Period 3: Equilibrium

The New Deal "switch in time" ushered in the third period, one in which—mediated by public officials—public opinion does have an impact on the Court. The lesson of the Court-packing fight was that when the justices wander outside the mainstream on truly critical issues, Congress and the president can (and potentially will) act together to solve the problem. As I argue in *The Will of the People*, the justices got the message.[75] Other than the occasional bump, over time, in salient cases, the Court has come into line with public opinion. The book is replete with examples. The justices flipped on their opposition to the death penalty when, after striking every state's death penalty in *Furman v. Georgia*,[76] there was an uproar, and by the time the Court confronted the death penalty again, thirty-five states and the federal government had reinstated the death penalty.[77] *Casey v. Planned Parenthood*[78] was itself an example. Although in my view there was a majority that wanted to do away with *Roe*, there was jeopardy in doing so, and the centrist justices picked a middle course.[79]

One of the most interesting examples of the justices getting the message about their need to stay within the mainstream is the little-known second "switch in time" that occurred around the decision of domestic security cases during the 1950s.[80] In the late 1950s, the Court angered many by a number of decisions that seemed to favor Communism and communist sympathizers. During the 1956 Term the Court decided no fewer than twelve cases involving issues around communist activities and investigations of same, and the government lost each case.[81] Anger over

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73. *Id.* at 228–29.

74. *Id.* at 225–27, 234–36. I detail the fight over the Court-packing plan in *The Will of the People*, Chapter 7 (Acceptance). There, I argue that whether the justices believed they were "switching" the public perceived their actions as such, and had they not, the Court-packing plan may well have succeeded. *See id.* at 231–34.

75. I advance this argument throughout Chapters 8–10 and the conclusion of *The Will of the People*. *See id.* at 237–385.

76. 408 U.S. 238 (1972).

77. *Id.* at 239–40; FRIEDMAN, *supra* note 3, at 285–87.

78. 505 U.S. 833 (1992).

79. *See id.* at 979; *see also* FRIEDMAN, *supra* note 3, at 328–30.

80. FRIEDMAN, *supra* note 3, at 250–58.

81. *Id.* at 252.

the domestic security decisions, especially coming on the heels of *Brown v. Board of Education*[82] and the Court's desegregationist agenda, moved Congress to action. The issue came to a head around two pieces of congressional legislation aimed at stripping the Court's jurisdiction over aspects of domestic security cases. The votes were so close they shocked the Master of the Senate Lyndon Johnson, and required procedural machinations to tamp the revolt down.[83] But sure enough, in the aftermath of those close votes, the Court began to uphold activities to investigate or punish accused communists that the earlier decisions would seem to have called into question.[84] Once again, though little was done to it, the Court had learned its lesson.

Were we living in this third period, the highly activist current Supreme Court would have to mind its p's and q's or run the risk of congressional discipline. It is not entirely clear we have come to that point. But we might be approaching it.

D. A Fourth Period? Dysfunction and Lack of Constraint

However, the justices are perfectly well aware that there is no way at the moment to muster the votes in Congress to raise a credible threat against the Court. This is not so much because of public support for the Court as it is that our political system has become dysfunctional. This is an argument Lemos and I advanced recently. Congress is locked up and often unable to act, given close margins and distorting effects like the filibuster.[85] This is made all the worse by hyper partisanship. And it is too often the case that a majority of the public cannot even elect the officials it wants, as a result of gerrymandering and packed districts.[86] As a result, getting Congress to reflect the popular will generally, let alone on something as contentious as Court-curbing, seems deeply challenging. That is not to say disciplining the Court is impossible, only that it is not going to happen easily.

II. WHAT HISTORY TEACHES ABOUT COURT-CURBING

Which brings me to the second Part of my argument, which is that especially given the times, Court opponents would do well to see what they can tease out of history as lessons on how to curb the Court—or at

82. 347 U.S. 483 (1954).

83. FRIEDMAN, *supra* note 3, at 253–54.

84. *Id.* at 254–55.

85. *See* sources cited *supra* note 11; *see also* Pildes, *supra* note 10 (making a similar argument, presciently, in 2010).

86. *See* Friedman & Lemos, *supra* note 11, at 492–93.

least threaten to do so credibly. Despite the zeal for Court-curbing, my sense is these are not arguments that Court-critics are considering.

This Part contains five lessons for successful Court curbing, three that are necessary and, perhaps equally important, two that are not.

A. Lesson 1: It takes focused grievance and leadership to curb the Court

A defining aspect of successful Court-curbing is that it involves a well-defined grievance. The Supreme Court does not get curbed absent such focus. Virtually every successful Court-curbing instance in history depended on a clear problem definition. And in many cases, it involved a major national figure—typically the president or the president's proxies—to bring home the case to the American public.

This clarity was true in the first successful attempt at punishing the Supreme Court, and indeed the entire federal bench, through the Repeal of the Circuit Judges Act.[87] The election of 1800 was a deeply partisan affair, but Republicans lost all patience when that partisanship followed into the judiciary.[88] It began before the election. Federalist judges eagerly enforced the Sedition Act against Republicans, and gave political harangues in speeches to the grand jury.[89] After Republicans won the election, Federalists passed the Circuit Judges Act, which created new judgeships that were packed with Federalists.[90] They reduced the size of the Supreme Court in the face of a vacancy to deny Jefferson the appointment, and John Marshall became Chief Justice while still serving as Secretary of State.[91] The Federalist Gouverneur Morris was candid in explaining that Federalists "are about to experience a heavy gale of adverse wind. Can they be blamed for casting many anchors to hold their ship through the storm?"[92] Jefferson, the Republican party leader and the country's new president, was furious: he accused the Federalists of having "retired into the judiciary as a stronghold," worrying "from that battery all the works of republicanism are to be beaten down and erased."[93] It was not just the passage of the Circuit Judges' Act. The lame

87. FRIEDMAN, *supra* note 3, at 54.

88. *Id.* at 46–50.

89. *Id.* at 48–49.

90. *Id.* at 49.

91. *Id.*

92. Letter from Gouverneur Morris to Robert L. Livingston (Feb. 20, 1801), *in* 2 THE DIARY AND LETTERS OF GOUVERNEUR MORRIS 404, 405 (Anne Cary Morris ed., 1888); *see* FRIEDMAN, *supra* note 3, at 49 & n.50.

93. FRIEDMAN, *supra* note 3, at 50, 407 n.51 (quoting Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 301, 302 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903)).

duck Federalist Congress also created forty-two "justice of the peace" positions, which they hurriedly filled with Federalists as well.[94] One of these was William Marbury.[95] When Madison failed to deliver Marbury's commission after power switched, Marbury filed a mandamus action.[96] Although Republicans had hesitated at first to do something as dramatic as move the repeal of the Circuit Judges Act, when the Supreme Court issued its show cause order in Marbury's case, suggesting the Federalist judiciary was going to meddle in Republicans' political affairs, the Republicans had enough. They moved the Repeal of the Circuit Judges Act and passed it, therefore depriving those judges of their offices.[97]

The same was true of the successful Court-curbing events during the Civil War and Reconstruction. Especially after Lincoln was assassinated and Andrew Johnson succeeded him, the important action shifted to the Republican leadership in Congress.[98] The Supreme Court had shown it could be a threat by holding the use of military tribunals unconstitutional in *Ex parte Milligan*,[99] and by invalidating some of the loyalty oaths imposed on former Confederates as a condition of regaining the ability to participate in the Union's affairs.[100] Getting the Fourteenth Amendment ratified before the election of 1868 was seen as absolutely vital. This sort of meddling was not to be tolerated. *The Nation*, a Republican publication that generally supported judicial independence explained, "if there is any lesson which history teaches clearly, it is that there never has existed, and there never is likely to exist, a nation which will allow constitutions or any forms of any kind on paper to stand between it and such a change in policy as it deems necessary to its safety."[101] So, when the Supreme Court indicated it would hear McCardle's case, threatening military rule of the South, Republicans in Congress moved aggressively to deprive the Supreme Court of jurisdiction in *Ex parte McCardle*.[102] The Court acceded; said former Justice Benjamin Curtis, "Congress, with the acquiescence of the country, has subdued the Supreme Court."[103] The same determination

94. *See id.* at 49–50.

95. *Id.* at 50.

96. *Id.*; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 153–54 (1803).

97. FRIEDMAN, *supra* note 3, at 50, 52.

98. For a discussion on legislative supremacy, particularly following the election of 1866, see *id.* at 124–29.

99. 71 U.S. 2 (1866).

100. FRIEDMAN, *supra* note 3, at 126–27.

101. *Id.* at 128–29 (quoting *The Lesson of the Crisis*, NATION, Jan. 17, 1867, at 50).

102. FRIEDMAN, *supra* note 3, at 130–33.

103. *Id.* at 133 (quoting 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 205 (1922)).

was true of Court-packing by Congress during the Civil War and Reconstruction. Given *Dred Scott*, and the dread threat to the Union, Union leadership was unprepared to risk a contrarian Court.[104] During the debate over jurisdiction-stripping in *McCardle*, Senator Charles Buckalew of Pennsylvania referred back to these Court-packing events, asking, "Have we not sought to mold and to conform it, to some extent at least, to our own will?"[105]

And it was true of FDR's proposal of the Court-packing plan as the country was in the grip of the Great Depression. In the face of widespread, almost unfathomable suffering, Roosevelt was blunt during the 1932 election: "[w]e are in the midst of an emergency at least equal to that of war," which required the government "provide at least as much assistance to the little fellow as it is now giving to the large banks and corporations."[106] As Congress passed measure after measure, ostensibly trying to do just that, the Supreme Court struck down those measures.[107] Notable were two decisions handed down in the spring of 1936, *Carter v. Carter Coal Co.*[108] (limiting Congress's power over the interstate economy), and *Morehead v. New York ex rel. Tipaldo*[109] (limiting states' ability to impose minimum wages). The election of 1936 was a plebiscite, not only on FDR, but on whether Congress (and the states) was to have the power to deal with new economic circumstances, or whether the Constitution was to be seen as a barrier to this legislative experimentation.[110] FDR won by a landslide, one of the country's greatest electoral victories.[111] And so, after that election, knowing that his ability to achieve his promised goals rested in the hands of a hostile Court, and choosing to eschew the path of constitutional amendment, FDR proposed his Court-packing plan.[112]

What seemingly distinguishes the present is that, rather than one focused problem, there are a litany of different complaints against the Court. Some are angry about the appointments process and how

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104. *Id.* at 133–25.

105. *Id.* at 135 & n.247 (quoting CONG. GLOBE, 40th Cong., 2d Sess. 2127 (1868)).

106. *Id.* at 197 & n.14 (quoting Franklin D. Roosevelt, Radio Address, *The "Forgotten Man" Speech*, Apr. 7, 1932, *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 626–27 (Samuel I. Rosenman ed., 1938)).

107. *See id.* at 200.

108. 298 U.S. 238 (1936).

109. 298 U.S. 587 (1936).

110. The debate over this issue often took place in constitutional terms. *See* FRIEDMAN, *supra* note 3, at 205–12.

111. *Id.* at 211–12.

112. The deliberations of FDR and his team over what means to challenge the Court's rulings are described in FRIEDMAN. *Id.* at 212–17.

Republicans captured seats on the Court.[113] Some see unfairness in the uneven flow of appointments by Democratic and Republican presidents.[114] Some are deeply concerned about what look to be ethical lapses by the justices, be it fiery speeches to the Federalist Society, or Clarence Thomas's voting on election issues while his wife apparently was involved in efforts to deny the outcome of the 2020 election.[115] Some are angry about recent decisions involving abortion or guns.[116] Some are angry about the drift of non-deference to administrative agencies pursuing progressive ends.[117] Some have an existential sense of dread about the direction of the Court (if not the Republic, and the Court's role in it).[118]

These all are justifiable causes for concern, but the difficulty is that it is hard to muster public outcry to the height required without one clear target at which to aim. In fact, in most of those periods opponents not only had a clear target, they also had leadership that could shine a light on that target. For the early Republicans it was Thomas Jefferson.[119] For New Deal Democrats it was Roosevelt.[120] Today, on the other hand, President Biden has done all he can to sidestep addressing the question

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113. *See* Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSP. 119, 126 (2021) ("A further complaint about the court is that appointments are allocated unevenly across presidential terms.").

114. *Id.* at 127 ("Some scholars view the uneven allocation of appointments across presidencies as ipso facto problematic.").

115. *See* Lemieux, *supra* note 15 (critiquing Justice Samuel Alito's speech to the Federalist Society in 2020); *see also* Nina Totenberg, *Legal Ethics Experts Agree: Justice Thomas Must Recuse in Insurrection Cases*, NPR (Mar. 30, 2022, 5:00 AM), https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases [https://perma.cc/755F-DGG2] ("Ginni Thomas crossed the line, and so very likely did her husband in not recusing himself from cases that came to the court involving election challenges.").

116. *See generally* Segall, *supra* note 13 (critiquing *Carson v. Makin*, *Bruen*, and *Dobbs*).

117. *See* Timothy Noah, *The Supreme Court May Soon Shut Down the Regulatory State. Let's Use It While We Still Can*, NEW REPUBLIC (Mar. 22, 2022), https://newrepublic.com/article/165802/supreme-court-chevron-deference-biden-regulatory-state [https://perma.cc/L8HE-RMH6] (detailing conservative hostility to Chevron deference); Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1615–17 (2019).

118. *See* Mary Ziegler, *If the Supreme Court Can Reverse* Roe*, It Can Reverse Anything*, ATLANTIC (June 24, 2022), https://www.theatlantic.com/ideas/archive/2022/06/roe-overturned-dobbs-abortion-supreme-court/661363/ (expressing concern that *Dobbs* represents a new, and terrifying "constitutional partisanship" with a Court untethered by any guardrails).

119. *See* FRIEDMAN, *supra* note 3, at 49–51.

120. *See id.* at 197–98.

of the Court head on.[121] In this regard, his Commission seems to have done exactly what he wanted: suggest nothing.[122]

What the present time echoes more than any other Court-curbing period in history is the *Lochner* era, and that time was not a successful time for Court-curbing. Over a twenty-five-year period, many attacked the Court but for many varied reasons. The central one was courts overturning laws regulating the workplace, such as minimum wage and maximum hour laws. But there was more—the Supreme Court overturned the income tax, it upheld labor injunctions, and limited the utility of the new federal antitrust law. Complaints about the Court were plenty; none held center stage, and no notable Court-curbing remedy was successful.[123]

B. Lesson 2: Without a solution targeted to solve a well-defined grievance, it is difficult to curb the Court successfully

Closely related to the issue of problem definition is the fit of the solution. The closer the fit, the more likely support can be garnered to do something about the Court. The less tailored the fit—or perhaps even worse, having a plethora of proposals on the table—undercuts the ability to see something enacted.

Among the many techniques used to curb the Court over time, the most laser-like may be jurisdiction-stripping, as when the Court's jurisdiction was taken away in *Ex parte McCardle*. It is interesting that prior to stripping the Court's jurisdiction in *McCardle*, Congress debated measures to require a two-thirds vote or unanimous decision to hold congressional action unconstitutional.[124] Rather, under time pressure, Congress adopted a very focused remedy of stripping the Court of its statutory jurisdiction.[125] A case was fast approaching resolution. So,

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121. John Kruzel, *Biden May Face Midterm Reckoning on Supreme Court Reform*, THE HILL (Dec. 25, 2021, 12:00 PM), https://thehill.com/regulation/court-battles/586477-biden-may-face-midterm-reckoning-on-supreme-court-reform/ [https://perma.cc/DJH4-W63F] ("To critics, it was confirmation of their suspicions that Biden's commission was conceived of as a political dodge.").

122. *See supra* note 13 and accompanying text (discussing Commission Report generally and the arguments that the Presidential Commission has been designed to do nothing).

123. The tumultuous *Lochner* Era is described in *The Will of the People*, Chapter 6 including all the suggested Supreme (and other) Court-curbing measures, most of which failed. FRIEDMAN, *supra* note 3, at 173–87.

124. *Id.* at 131.

125. *Id.*

Congress simply said "you may not resolve it."[126] And the Court ducked.[127] Problem present; problem solved.

Equally well-defined is abolishing a court or a problematic judge. We have seen how the Jeffersonian Republicans, once they got into power, solved the problem of the Federalist judiciary acting in partisan fashion simply by "unpacking" it—repealing the Circuit Judges Act.[128] But there was more. Throughout the election of 1800 and after, as the Federalist party was using the judiciary to harass its Jeffersonian opponents, no one was seen as more of a thorn than Supreme Court Justice Samuel Chase. When he continued haranguing grand juries about the evils of the Republicans, in 1801, Congress impeached him for his rampant partisanship in his judicial duties.[129] Chase ultimately was acquitted by the Senate, albeit in a tacit deal in which judges came to realize that to avoid trouble they had to eschew partisanship.[130] But less fortunate was Pennsylvania state judge Alexander Addison, who was impeached and removed for what were seen as partisan activities.[131] Pennsylvania's Governor Thomas Kean wrote Jefferson: "[s]o you find sir we know how to get rid of obnoxious judges."[132]

Similarly, Court-packing was a remedy that would have solved FDR's problem. Court-packing may not have been the ideal long-term solution. It only works for a while and is likely to lead to a long-term game of tit for tat. Perhaps amending the Constitution would have been more appropriate. Not only was that a large uphill fight with a dubious ending, but Roosevelt emphatically did not believe an amendment was necessary.[133] In his 1933 inaugural address, he had explained his philosophy: "[o]ur Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form."[134] But Court-packing was

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126. *Id.* at 130–32.

127. *Id.* at 132–33.

128. *See id.* at 52–55.

129. For a description of the Chase impeachment sage, see *id.* at 64–71.

130. *See id.* at 67–71 (describing how Chase's acquittal provided a significant precedent regarding the independence of the federal judiciary).

131. *Id.* at 51, 60, 65.

132. IRVING BRANT, IMPEACHMENT: TRIALS AND ERRORS 60 (1972) (citing the letter from Thomas McKean to Thomas Jefferson from February 7, 1804); *see also* FRIEDMAN, *supra* note 3, at 65.

133. FRIEDMAN, *supra* note 3, at 213.

134. *See* Franklin D. Roosevelt, President, Inaugural Address of the President 7 (Mar. 4, 1933) (retrieved from U.S. National Archives); FRIEDMAN, *supra* note 3, at 213 (describing of Roosevelt and his team's examination of alternatives, while suggesting that Roosevelt did not believe constitutional amendment was necessary).

an immediate fix, and one Roosevelt and his advisors thought could be sold.[135] Even then, it ran into trouble.

In sharp contrast stands, once again, the *Lochner* era—a time in which there was, if anything, an overabundance of ill-targeted fixes to the Court. On the table were the election of federal judges, the recall of judges, the recall of decisions by legislative bodies, and much more. Although many people professed a desire to do *something* about the courts, no one solution seemed apt enough to the problem nor sufficiently laser-like in its approach to attract a workable majority to adopt it.[136] The fact that there were so many simply led to a contest among progressives about which to adopt, which—combined with a deeper faith in the judiciary—led to little adoption at the federal level.[137] The few federal measures that succeeded equally were laser-like, such as adoption of three-judge district courts to deal with concern over labor injunctions, and abolition of the disliked Court of Commerce.[138]

And again, today looks a lot like the *Lochner* era. Solutions to the Supreme Court problem abound. But maybe too much so. Some solutions, such as jurisdiction-stripping, would not address the manifold problems others point to with the Court, and jurisdiction might have to be stripped repeatedly.[139] Others, such as Court-packing, would address the problem, but appear to many to be overbroad or likely to lead to an escalating increase in the Court's size.[140] Others are quite tailored, such as addressing concerns about partisan appointment by adopting a system that would "balance" the membership of the Court, and these seem to have attracted the most support.[141] Overall, though, there are just too many, none gaining the sort of widespread consensus needed for success.

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135. FRIEDMAN, *supra* note 3, at 217.

136. *Id.* at 182–87 (describing these many proposals).

137. *Id.* at 182–85. There were measures adopted in a few states, including supermajority requirements to declare laws unconstitutional, and the recall of judges. *See id.* at 186.

138. *See id.* at 185–86. Unlike with the Circuit Judges Act repeal in Jeffersonian times, however, the judges on the Court of Commerce simply were moved to another court. *Id.* at 186.

139. *See* Doerfler & Moyn, *supra* note 2, at 1725–26 (discussing political and legal controversies of "Disempowering Reforms" such as jurisdiction-stripping).

140. *See id.* at 1762 ("[C]ourt-packing is the reform most imaginably subject to tit-for-tat acts of repeated expansion."); *see also* Kapur, *supra* note 6 (discussing even Democratic concern about Court expansion).

141. *See* Erskine, *supra* note 12 (discussing the Commission finding strong support for eighteen-year term limits for Supreme Court Justices).

C. Lesson 3: You can't curb the Court if you don't have the votes

And then, there are the votes—the political muscle to get the job done. History's most successful attacks on the Court had this all-important factor, and with comfortable margins. The election of 1800 yielded sufficient Republican majorities in both houses of Congress, and a Republican in the White House, that enabled Congress to repeal the Circuit Judges Act, and to make a creditable threat of removing Justice Samuel Chase.[142] Civil War and Reconstruction measures such a jurisdiction-stripping and changing the size of the Supreme Court were relatively easy given that Congress had excluded from its midst representatives of the rebelling states.[143] Significantly, in the election of 1866, enough Republicans were elected to Congress to override any veto by Andrew Johnson.[144] And following the election of 1936, Roosevelt had large majorities in both Houses of Congress: Democrats had 334 of the House's 435 seats, and three-quarters of the Senate.[145]

Of course, votes can be generated in Congress if the public is sufficiently aroused. This is the true relationship between popular opinion, and the political branches, which must do the actual work. It is possible that on rare occasion an aroused public can lead torpid political branches to act against the Court.

More commonly, however, an electorate resistant to fundamental change acts as a check on what the political branches might like to do. That surely was the case with FDR's plan to pack the Court. Roosevelt not only had the votes to do what he wanted done, but initial views were those votes would support him.[146] Announcement of the plan, however, kicked off a huge national debate, and many Members of Congress, returning to their districts, learned that the public—however much it may have supported Roosevelt and his policies—was loathe to see as veritable an institution as the Supreme Court fiddled with.[147] It similarly was the case with the Warren Court's reapportionment decisions. Constitutional scholars and commentators, including Alexander Bickel, predicted the Court's ruling would get it quickly into hot water.[148] And it is true that

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142. FRIEDMAN, *supra* note 3, at 51–52.

143. Woodrow Wilson, *The Reconstruction of Southern States*, ATL. MONTHLY, Jan. 1, 1901, at 1, 7 ("With the southern representatives excluded, there was a Republican majority in both houses, strong enough to do what it pleased . . . .").

144. FRIEDMAN, *supra* note 3, at 125.

145. *Id.* at 212.

146. *See id.* at 225.

147. *Id.*

148. *See id.* at 269 (describing various academics' doubts and disapproval over these decisions).

members of Congress, with vested interests, sounded off angrily.[149] But the public was enamored of the decisions and political opposition quickly quieted.[150]

The fact of the matter is that the United States is a rather small "c" conservative country, which is to say whatever party the people support, the electorate fundamentally is traditionalist in many ways. This is surely one reason our almost 250-year-old, difficult-to-amend, Constitution still is in in operation.[151] (Another is that the Court has indeed kept the Constitution consistent with the times.)

In light of this, calls from some critics for Congress to couple progressive legislation with anticipatory Court-curbing measures to protect that legislation seem overly optimistic at best.[152] It has proven exceedingly difficult to muster the votes, particularly in the Senate with its filibuster, to pass major Democratic initiatives, period.[153] Attaching to these measures a Court-curbing provision is likely to raise the necessary vote threshold for passage considerably, likely killing the primary measure itself.

Indeed, what some progressives seem to fail to appreciate is that if they had the electoral margins, they needed to adopt the legislation they wanted, Court-curbing itself might well be unnecessary. My argument in *The Will of the People* is that it is the threat of discipline that keeps the Court in line with public opinion, at least on salient issues. The justices are neither stupid nor politically naïve. They are undoubtedly aware of when they are in Dutch with Congress and the American people to an extent that they jeopardize their own institution. Surely, they realize there is little or no constraint in the system at present. It is possible that some in the majority have sufficient hubris and lack of regard for the institution that they'd stay their course even if it meant serious retribution from Congress. But it is less clear that is true of five solid votes.

The reality, though, is that political dysfunction has immunized the Court from such retribution, at least at present, which raises the question

149. *See id.* at 268–69.

150. *Id.* at 269.

151. Of course, that can change and has changed, including most notably during the New Deal, when economic turmoil led the country to agree with FDR that the Constitution could be interpreted to accommodate dramatic change in understandings of congressional power. *See* John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 208–11 (2018). The same could happen again in bad economic times.

152. *See* Doerfler & Moyn, *supra* note 2, at 1762 (discussing the difficulties of implementing Court expansion).

153. *See generally* KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 34–39 (1998) (describing the phenomenon of the gridlock interval, often after popular elections, during which a majority of a legislature may back a change of the status quo but no change actually happens because of the supermajority requirements to overcome either filibuster or veto threats).

I will pursue in Part III about where all this might be headed. But first, two more lessons, perhaps the most important for progressives who actually want to keep the Court from straying too far—as opposed to bringing the Court to book.

D. Lesson 4: You don't have to actually curb the Court or discipline the justices to see a shift in direction or a tempering of the justices' conduct

Roosevelt did not suffer from timidity, but was a political genius, and for that combination of reasons two features of his fight over the Court deserve highlighting. He lost the battle over his plan, and yet the Court moved in the direction he wished. This combination is not uncommon in the world of successful Court curbing, but it stands in sharp contrast to the approach of progressive manifestos at the present moment.

You might think Roosevelt lost, in that his Court-curbing bill never passed. And, in truth, when the New Deal Court "switched" in the spring of 1936, Roosevelt was furious, as he quickly perceived what that did to his aspirations of adding justices.[154] Time quickly showed, however, that Roosevelt may have lost a battle, but he most definitely won the war. Soon after the switch, enough of the justices retired to give FDR a sizeable majority.[155] Constitutional law began to change quickly.[156] First, the justices took a laissez-faire position on regulation of the economy, in sharp contrast to the way they had meddled repeatedly in the prior decades.[157] Then, they shifted their focus to protecting individual rights.[158] It is only in 2022, after some eighty-five years, that this "New Deal Settlement" seems to be unraveling.[159] That has to be a win, by any measure, in anyone's book.

The same was true of other successful Court-curbing measures. The justices do not need to be brought to the confessional or the guillotine to shock them into temperance, which is what many both in the past, and present, seem to want.

Take the Chase impeachment as another example. He was impeached but not removed by the Senate.[160] And yet, this proved another substantive victory, to the extent the issue was not just getting rid of

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154. *See* FRIEDMAN, *supra* note 3, at 227 ("Roosevelt threw a fit.").

155. *Id.* at 234.

156. *Id.*

157. *Id.* at 234–36.

158. *Id.* at 238.

159. Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 5, 122–24 (2001) (explaining the New Deal settlement).

160. FRIEDMAN, *supra* note 3, at 67.

Chase but ending partisan conduct by the judiciary.[161] Although Federalists defended many of his actions, they did not defend his partisanship.[162] Rather, in the face of the impeachment effort, partisan activity by Federalist judges—including or especially a chastened Chase—came immediately to a halt.[163] That largely has been the case ever since. *Bush v. Gore*[164] stands out as an exception.[165] The Court's present engagement with voting and election cases has been seen as another.[166] So, once again, a Court-curbing method failed, only to have the deeper cause remedied for an enormously long swath of time.

The same was true of the fight over the domestic security cases in the late 1950s. After the Court's gangbuster 1956 Term ended with twelve cases going against the government, the issue came to a head in the form of two jurisdiction-stripping bills.[167] For the most part, those measures failed.[168] Still, the justices fully got the message and started approving government actions yet again.[169] It does not take succeeding with Court-curbing for the justices to alter course and realign with political forces.

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161. *Id.* at 68–69.

162. *Id.* at 69–70.

163. *Id.* at 70–71.

164. 531 U.S. 98 (2000).

165. *See id.* at 104–11 (sparking national debate regarding the nature of judicial power and role of Supreme Court involvement in the political process for its holding in a contested presidential election). For examples of condemnation of the Court's decision in *Bush v. Gore*, see Mark S. Brodin, Bush v. Gore*: The Worst (or at least the second-to-the-worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563, 568 ("*Bush v. Gore* is unique in its crassly political (Republican vs. Democrat) agenda."); Joan Biskupic, *The Current Supreme Court's Partisan Moment Rivals Bush v. Gore*, CNN POL. (Dec. 16, 2021, 8:25 PM), https://www.cnn.com/2021/12/16/politics/supreme-court-political-moment/index.html [https://perma.cc/K9Y9-UQ4K] ("The case was decided 5-4 along ideological, if not political, lines.").

166. *See* David Daley, *Republicans Have Hijacked the US Supreme Court. It's Time to Expand It*, GUARDIAN (June 27, 2022, 2:25 AM) https://www.theguardian.com/commentisfree/2022/jun/27/us-supreme-court-abortion-roe-v-wade-justices-expansion [https://perma.cc/R2NJ-8EHC] (arguing that the Court's rulings on partisan gerrymandering is a "partisan favor" to Republicans); *see also* Ronald Brownstein, *The Supreme Court's 'Dead Hand,'* ATLANTIC (Feb. 11, 2022) https://www.theatlantic.com/politics/archive/2022/02/supreme-court-conservative-rulings/622050/ ("GOP Court majority is moving . . . to impose that coalition's preferences on issues such as abortion, voting rights, and affirmative action").

167. FRIEDMAN, *supra* note 3, at 253–54.

168. *Id.* at 254.

169. *Id.* at 253–58.

E. Lesson 5: A little disingenuousness can go further than a head-on attack

Finally, rather than being overt, successful attacks on the Court often are disingeuous. Politicians who go after the Court understand that the American people are in many ways traditionalists about institutions and do not cotton easily or well to overt attacks.[170] So, they shroud them in some other veneer, just enough to achieve plausible deniability.

FDR's Court-packing plan is the perfect example. It was wrapped in the disingenuous guise of helping an aging bench with its workload. This quickly was called out for what it was.[171] But had the Court not switched, the consensus at the time was that the plan may have succeeded anyway.[172] And the argument, though palpably false, gave the proponents just enough leeway to argue their motives were pure in a way some in the country could swallow.[173]

The same was true during the Civil War and Reconstruction, when congressional Republicans repeatedly altered the size of the Court to ensure they had a loyal majority. In each instance, an apolitical reason was offered up for what was happening, including the need to remove sectional imbalance, and tie the number of seats to judicial circuits.[174] Observers were not fooled, any more than they were when FDR drew on these precedents with his own Court-packing plan. Said Edward Bates, Lincoln's Attorney General, "[t]he Supreme Court is to be a mere party machine; to be manipulated, built up and pulled down as party exigencies require."[175] But the point is that opponents avoided a head-on rhetorical collision in favor of getting the job done.

The same might be true of the successful jurisdiction-stripping occasioned by *Ex parte McCardle*, the challenge to military occupation of the South while the Fourteenth Amendment was being considered. Proponents of the jurisdiction-stripping measure first tried to sneak it through as a rider to an uncontroversial piece of legislation.[176] When

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170. *See generally* STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURTS: OPPOSITION POLITICS AND CHARGING RESPONSES TO JUDICIAL POWER (2011) (describing the dynamics among presidential rhetoric, judicial independence and political influence on judicial power).

171. *See* FRIEDMAN, *supra* note 3, at 217–18 (describing the public reaction and initial criticism surrounding the announcement of the court-packing plan).

172. *Id.* at 232–33.

173. It was false in one sense and not in another. It had been FDR's constant complaint that the aged justices were simply not keeping the Constitution current with the times. *Id.* at 217–18.

174. *Id.* at 134.

175. *Id.* (citing Andrew Jackson, *Anti-Nullification Proclamation*, Dec. 10, 183, *in* STATESMANSHIP OF ANDREW JACKSON 235, 245(1909)).

176. *Id.* at 131.

caught, most Republicans in the Senate simply denied jurisdiction stripping was happening. Senator Lyman Trumbull, who actually was serving as counsel for the government in *McCardle*, nonetheless denied there was any case to which the jurisdiction repealing legislation applied.[177]

Of course, some curbing of courts can occur with proponents being candid about it. During the *Lochner* era, some reforms at the state level were pushed in overt terms and succeeded. Three states adopted super-majority voting requirements to overrule legislation. Seven states adopted recall of judges.[178]

But the many national reforms suggested during the *Lochner* era—which some have suggested is most apt to the present time—all failed, both in passage and in moving the Court off its reactionary stance. The challenges were quite overt in their purpose. But in their overtness, they generated significant controversy. Progressives themselves were split on the merits of disciplining judges.[179] And just as now, there were just too many proposals on the table.[180] A lack of a clear target, and just the right weapon with which to attack it.

Today, challenges to the Court are head on, and seem determined to achieve actual change regarding how the Court operates, rather than to get it to alter its behavior in some crucial way.[181] Critics want the Court brought to heel, and seemingly will settle for nothing less.[182]

III. LOOKING AHEAD

Things with the Court can turn around in a heartbeat—literally. Justice Antonin Scalia passed suddenly, making it appear for just one moment, that Democratic presidents would appoint a majority of seats on the Court.[183] That did not happen, courtesy of Senator Mitch McConnell and the Republican Party, when they refused to fill Scalia's seat, or even

177. *Id.* at 132.

178. *Id.* at 186.

179. *Id.* at 185.

180. *See id.*

181. Note the proclivity of proposals to expand the Court or otherwise strip it of its jurisdiction. *See* sources cited *supra* note 2.

182. For an example of this phenomenon, see Doerfler, *supra* note 2 ("It is not enough . . . to question the decisions, the justices, or even the structure of the current court—we need to challenge . . . the foundation of its power to determine the law.").

183. *See* David G. Savage, *Justice Antonin Scalia's Death Shifts Balance of High Court, Creates Major Election Issue*, L.A. TIMES (Feb. 13, 2016, 9:49 PM), https://www.latimes.com/nation/la-na-scalia-death-impact-20160213-story.html [https://perma.cc/ZK6G-TMYM].

to consider President Obama's nomination of former Judge Merrick Garland.[184]

Then, Justice Ruth Bader Ginsburg died.[185] Shortly thereafter the Republican Party had the majority it had long sought to truly, truly, get some stuff done.[186] Progressives are leery.

And so, once again, it is Court-curbing time.

Given that things can turn on a dime, it is dangerous to speculate about where this all might be headed, but here are four possibilities, all worth considering.

Possibility 1: *The justices get the not-so-subtle message from their plummeting polling numbers and slow the heck down, taking the time to make their case and see if anyone is buying it.*

There's not much hope of this one. At the least, Justices Thomas, Alito, and Gorsuch have shown no such regard for tamping on the brakes.[187] So the question is whether in cases of moment, two of the three other conservatives will balk. If the past Term is any indication, the answer is no.

Possibility 2: *No real Court-curbing is adopted, but there is support for bipartisan solutions to some of the structural ills around the Court, slowing some of the controversy around the Court.*

There's not much hope for this one either, but it bears mentioning. Although conservatives relish the results in cases like *Dobbs* or *Bruen*, and leap to the defense of the Court, still there has been some bipartisan or cross-ideological recognition that the uneven pace of Supreme Court appointments, and the partisan conduct of the justices, is a concern to the long-term health of the institution.[188] There are a plethora of proposals on the table to even out the nomination process or balance the Court in ideological ways.[189] The obstacles here, though, are vast. First, some are

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184. *See id.*

185. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sep. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/KRP9-8WYV].

186. *See* Kathryn Watson, *Ruth Bader Ginsburg's Death Sets Up Tense Political Fight Over Replacement*, CBS NEWS (Sep. 19, 2020, 1:56 PM), https://www.cbsnews.com/news/ruth-bader-ginsburg-death-supreme-court-seat-senate-political-fight-2020-09-19/ [https://perma.cc/J8KL-G26Q].

187. *See* Liptak, *supra* note 1.

188. *See America's Supreme Court Faces a Crisis of Legitimacy*, ECONOMIST (May 7, 2022), https://www.economist.com/briefing/2022/05/07/americas-supreme-court-faces-a-crisis-of-legitimacy [https://perma.cc/B95J-DEAU].

189. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021) [hereinafter Epps & Sitaraman, *The Future*

of the view that these changes require constitutional amendment, and there is virtually no chance of that.[190] Second, even if adopted, most of the proposed solutions would not take effect for a long period of time.[191] And third, it is probably time to stop fantasizing about that sort of bipartisanship of bygone days. It is going to be hard to muster conservative or Republican votes for structural change to an institution that is delivering such consequential substantive wins.

Possibility 3: *The justices display such a lack of judgment that they bulldoze their way to empowering supermajorities that have had enough, leading voters to push for and actually achieve fundamental reform.*

This is not impossible, but the probabilities are much lower than Possibility 2. Some in the Republican Party will do anything to win, including fail to condemn even a blatant attack on our Democracy as happened on January 6, 2021.[192] And some of the justices on the Supreme Court seem sufficiently dismissive of any concept of moderation that they will just keep siding with those Republicans.[193] Thus emboldened, the

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of Supreme Court Reform]; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019) [hereinafter Epps & Sitaraman, *How to Save the Supreme Court*]; Hemel, *supra* note 113; Millhiser, *supra* note 2; Russell Wheeler, *Should We Restructure the Supreme Court*, BROOKINGS (Sep. 22, 2020), https://www.brookings.edu/policy2020/votervital/should-we-restructure-the-supreme-court/ [https://perma.cc/AV4T-HVEQ].

190. *E.g.*, Epps & Sitaraman, *The Future of Supreme Court Reform*, *supra* note 189, at 403 (noting that the ability to impose term limits or ethical codes on Justices via statute is controversial); Epps & Sitaraman, *How to Save the Supreme Court*, *supra* note 189, at 172, 178 (arguing that the constitutional problems to jurisdiction-stripping rather than court-packing, but noting that "there are commentators who believe even [Court expansion] would be unconstitutional"); Ian Millhiser, *9 Ways to Reform the Supreme Court Besides Court-Packing*, Vox (Oct. 21, 2020, 12:55 PM), https://www.vox.com/21514454/supreme-court-amy-coney-barrett-packing-voting-rights [https://perma.cc/562M-ZKTH] (arguing that the 15-person "balanced-court" plan—proposed by Epps and Sitaraman and endorsed by Pete Buttigieg—would likely be declared unconstitutional). *But see* David Orentlicher, *Supreme Court Reform: Desirable—and Constitutionally Required*, 92 S. CAL. L. REV. POSTSCRIPT 29 (2018) ("There is a sound argument to be made that Supreme Court reform is constitutionally required.").

191. *See, e.g.*, Epps & Sitaraman, *The Future of Supreme Court Reform*, *supra* note 189, at 402 (noting that "[t]he leading Democratic proposal would not impose term limits on currently serving Justices" and thus would take "years" to effect the Court).

192. *See* Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack 'Legitimate Political Discourse,'* N.Y. TIMES (Feb. 4, 2022), https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html ("The Republican Party on Friday officially declared the Jan. 6, 2021, attack . . . 'legitimate political discourse,' and rebuked two lawmakers in the party who have been most outspoken in condemning the deadly riot . . . .").

193. Chief Justice Roberts has gained a reputation of trying to steer the justices toward more incremental change but is losing his hold on the Court. *See* Adam Liptak,

two may operate in tandem to such an extent that voters will decide they have had enough.

But this is highly unlikely as well. The January 6th Committee's remarkable presentations have done little to move the overall structure of public opinion.[194] People live in their news silos and believe narratives that comport with them. It is hard to imagine the Court goring enough moderate voter oxen to motivate fundamental electoral change.

This one remains difficult to judge, however. It is possible that if the Court steps in it deeply enough, public frustration will mount not only with the Court, but with devices like the filibuster that empower the Court. It is also possible that a president more bent on reform than President Joe Biden has promised to be can muster the strength in the electorate and his own party to take action.[195]

Assuming, though, that any such dramatic change is likely to happen, we come to the final possibility.

Possibility 4: *The justices continue their current pace, remaking American law in fundamental ways, stripping rights from people that had them, but protecting themselves and the Republican Party from electoral retribution with legal decisions on voting rights and elections that stymie democratic action.*

This is the most likely outcome. And the only serious question is whether it provokes a political if not constitutional crisis (probably) and what the outcome of such a crisis would be. I have been in too many conversations of late that end with doomsday scenarios about the future of the country that I would rather not contemplate. Suffice to say, dire times appear ahead, with a Republican Party that cannot win in majoritarian politics being nestled safely under the wing of the Court it created, and a frustrated political majority looking for solutions that are not easy under our outdated and anti-majoritarian Constitution.

And I rue that fact. As frustration builds, and heated rhetoric with it, on both sides, the future may not prove pretty. The 2022 midterm

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John Roberts's Early Supreme Court Agenda: A Study in Disappointment, N.Y. TIMES (Nov. 21, 2022), https://www.nytimes.com/2022/11/21/us/politics/john-roberts-supreme-court.html (describing Chief Justice Roberts's failed goal of protecting the Court's legitimacy through encouraging narrow, unanimous rulings).

194. *See, e.g.*, *Jan. 6 Hearings Have No Impact on Opinion*, MONMOUTH UNIV. (Aug. 9, 2022), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_080922/ [https://perma.cc/V6JY-XN3E]; *see also* William A. Galston, *What Are Americans Thinking About the January 6 Hearings?*, BROOKINGS (June 23, 2022), https://www.brookings.edu/blog/fixgov/2022/06/23/what-are-americans-thinking-about-the-january-6-hearings/ [https://perma.cc/9SXW-527T] (describing multiple polls that showed "there is no evidence that the work of the January 6 committee is changing many minds").

195. Thanks to Ryan Doerfler for pressing this point.

election results gave some hope that enough Americans are not ready to drive this long-running experiment in democratic governance off a cliff. Certainly, it was not a good time for those who denied Donald Trump had lost the 2020 presidential election.[196] Even yet, it is hard to feel anything but disdain for those who cannot see past immediate ideological preferences to call out conduct—by political actors, out-of-control vigilantes, and yes even judges—that once would have been thought by wide majorities to be simply beyond the pale. Although there is reason to be slightly less pessimistic, it is difficult at the moment to be optimistic about the political future of the country.

CONCLUSION

I have largely said what I have to say. Throughout history, whether Court-curbing proved a good or a bad idea has been a function of what the Supreme Court is doing, and who is evaluating it. In general, it is regrettable that matters should come to pass that Court-curbing even appears necessary or is a serious possibility. There plainly have been moments in American history when it was. But in the third period of equilibrium, this rested largely in the Court's hands—a majority of justices exercised enough judgment to avoid straying beyond the pale of the national gestalt. There is good reason to lack confidence that the justices in the current majority have this sort of good judgment. With a political system largely unable to restrain the Court, it is an all-too-likely possibility that the Court is going to move sufficiently outside the mainstream on enough issues that it will provoke a constitutional crisis of some sort. Still, I very much hope this is incorrect.

196. *See* Daniel Dale, *How 2020 Election Deniers Did in Their 2022 Midterm Races: Who Won and Who Lost*, CNN, https://www.cnn.com/interactive/2022/11/politics/election-deniers-winners-losers-midterms-2022/ [https://perma.cc/X68S-9T8K] (Dec. 7, 2022) ("Nobody who denied the legitimacy of the 2020 election has won a 2022 race to run future elections in a swing state."). *But see* Blake Hounshell, *Was Election Denial Just a Passing Threat?*, N.Y. TIMES (Nov. 28, 2022), https://www.nytimes.com/2022/11/28/us/politics/election-deniers-2022-midterms.html (noting that while "election deniers were trounced at the ballot box . . . . in many places—and for the highest-profile candidates—but it was hardly the case everywhere").