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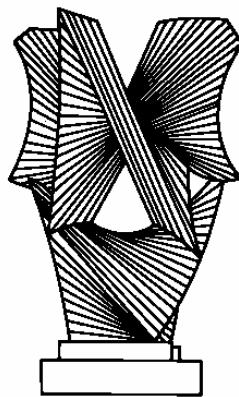
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## POLITICAL CONSTRAINTS ON SUPREME COURT REFORM

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## Political Constraints on Supreme Court Reform

Adrian Vermeule\*

Many proposals to reform the rules of the Supreme Court game are currently under discussion.<sup>1</sup> Which of these proposals lie within the politically feasible set, and which are ruled out by political constraints? In what follows, I will sketch the shape of those constraints and describe the main political mechanisms that produce them. I use the failure of Roosevelt's court-packing plan in 1937 as a running example, supplemented by comparisons with the flurry of reform plans – mostly unsuccessful – offered during Reconstruction. The main thesis is that reform of the Court requires political conditions that have a self-negating tendency. The very conditions that produce demand for structural reform of the Court also tend to produce counterforces that block the movement for reform. The point is not of course that structural reform is impossible, in the sense that it is always ruled out by political constraints. In particular cases, the demand for reform may be just strong enough, and the counterforces produced by that demand just weak enough, that a reform proposal can slip through. Yet reform cannot be predicted in advance, or relied upon; it is systematically unlikely to occur. The stronger the movement for reform, the higher the obstacles that must be surmounted.

My principal interest is in detailing the mechanisms that produce political constraints on Supreme Court reform, regardless of how tight those constraints turn out to be. However, I will also suggest, without attempting to provide systematic evidence, that the constraints are in fact quite restrictive. The ash-heap of history is piled high with reform proposals that have attracted no supporters (other than those who formulated them); attracted academic supporters but no political backers; or attracted political backers but no popular following. Almost all ideas for Supreme Court reform die in committee, literally or metaphorically. The constitutional and statutory rules governing the Court – the number of its members, their terms of tenure, the voting and quorum rules that govern their actions, and so on – have in most cases remained unchanged at least since Reconstruction, and in some cases since the first Judiciary Act of 1789. Not everything has held constant – the switch to discretionary cert jurisdiction in 1925 is a salient example – but in the broad, structural reform of the Court is exceedingly rare. All else equal, the higher the stakes of a reform proposal, the more opposition it will generate

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<sup>1</sup> See, e.g., Paul Carrington and Roger Cramton, “The Supreme Court Renewal Act: A Return to Basic Principles,” July 5, 2005, available at <http://paulcarrington.com>.

and the less likely it is to succeed. The reform proposals that do succeed, conversely, are likely to be of marginal importance, at least when compared to the ambitious model of the court-packing plan.

Section 1 defines reform as structural change in the constitutional and statutory rules that govern the Supreme Court game, as opposed to substitution of new players for old ones (through appointments) or new behavior by old players under the old rules (a “switch in time”). Sections 2 through 5 turn to the mechanisms that constrain reform by provoking counterforces to the reform movement. Although some of these mechanisms apply to institutional reform generally, some apply only to reform of the Court. Court reform both partakes in the general difficulty of institutional reform, and presents additional difficulties of its own.

Section 2 discusses the problem of multidimensional politics. The large national coalitions necessary for Supreme Court reform will typically be assembled on other issue-dimensions, and will fracture when judicial reform comes to the fore. Section 3 discusses the problem of the optimal majority. Reform movements must steer between Scylla and Charybdis: a majority that is too small will be blocked at the vetogates of the legislative process, while a majority that is too large will provoke a backlash spurred by fears of tyranny. Section 4 discusses the basic tradeoff between impartiality and motivation. Structural reforms that would be adopted behind a veil of uncertainty will be and seem impartial, but in general no politically influential group will be motivated to support them. Conversely, proposals that produce short-term benefits for particular groups will attract motivated supporters, but will also provoke opposition. Section 5 suggests, more generally, that political crisis is both a precondition for and an obstacle to reform of the Court. In a brief conclusion, I consider the relevance of political constraints from the standpoint of both analysts and advocates of reform. Although analysts should consider political constraints, advocates of reform should not.

## 1. “Reform”

We may define reform both by reference to paradigm cases and at the conceptual level. I will take as the paradigm of reform Roosevelt’s 1937 court-packing bill. So far as relevant here, the proposal would have added one Justice for each Justice over the age of 70 who had served ten years and who did not retire within six months of his 70<sup>th</sup> birthday, up to a total membership of fifteen Justices.<sup>2</sup> Roosevelt had carried 48 states in the 1936 election, and commanded filibuster-proof majorities in both the House and senate (although we will see that the Democratic coalition would fracture along the fault line of Supreme Court reform). My main thesis about the episode will be that the very conditions that produced such obvious potential for reforming the Court also produced the political constraints that blocked reform.

At the conceptual level, I will generalize from the court-packing example to stipulate that reform means a proposal for change in the rules of the Supreme Court

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<sup>2</sup> See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in The Age of Roosevelt* (New York: Oxford University Press, 1995), p. 134.

game. This definition makes reform synonymous with structural reform, including the number of Justices, their tenure, voting rules and so forth. It excludes both (1) a substitution of new players for old players through the appointments process and (2) a change in the actions that the old players take under the old rules.

This definition has the consequence that the indirect effects of the court-packing plan did not produce reform, in the structural sense I have indicated. Roosevelt eventually obtained no less than seven Supreme Court appointments, producing a cadre of likeminded Justices. For reasons discussed below, however, this does not count as reform. Furthermore, if the selection of new players does not count, a change in the behavior of the old players does not count either. Suppose that the threat of court-packing – or the anticipation of some threat of that kind – produced a “switch in time,” in which Justice Roberts changed his vote to uphold politically controversial economic and social legislation. (Here I am bracketing a set of historical controversies over whether there was any such switch, and whether, if there was, it was caused by the court-packing plan).<sup>3</sup> This change in the actions taken by old Justices under the old rules is not structural reform; it is tacking with the prevailing political winds. Besides the court-packing plan, another example involves the proposal, floated both during Reconstruction and the New Deal, to require a 2/3 vote of the Justices to invalidate legislation on constitutional grounds. During Reconstruction, the proposal lacked a critical mass of support, in part because the Court ducked many of the central constitutional issues posed by Reconstruction legislation and thus vented away the growing pressure for reform.<sup>4</sup>

Why define reform so narrowly? If Roosevelt obtained much of what he wanted through the switch in time, and through appointments, why classify the court-packing plan as a failure? Roosevelt himself said that although he had lost the court-packing battle, he had won the broader war.<sup>5</sup> From an even broader perspective, however, the problem is that changes not amounting to structural reform are only a temporary palliative. As long as the rules themselves remain unchanged, later periods can see a recurrence of the problems that motivated reform in the first place. Even if the outcome of the court-packing fight was good for Roosevelt or the New Deal in the short run,<sup>6</sup> it may have been bad for the polity in the long run.

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<sup>3</sup> On the question whether a switch in time occurred, see Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), Part II: “A New Trial for Justice Roberts”; G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000), Part I: “Complicating the Conventional Account.” Another view is that there was a switch, but it predated the court-packing plan and was caused by the Justices’ anticipation of a threat of constitutional amendment following the 1936 election. See Rafael Gely and Pablo T. Spiller, “The Political Economy of Supreme Court Decisions: The Case of Roosevelt’s Court-Packing Plan,” *International Review of Law and Economics*, 12 (1992), 45-67. Presumably one might also hypothesize that the switch predated the court-packing plan but was caused by the Justices’ anticipation of that plan or another plan with similar effects.

<sup>4</sup> See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years* 307 & n. 144 (1985).

<sup>5</sup> See, e.g., David E. Kyvig, “The Road Not Taken: FDR, The Supreme Court, and Constitutional Amendment,” *Political Science Quarterly*, 104 (1989), 463-481, p. 466.

<sup>6</sup> For discussion and references on the question whether the outcome of the fight was in Roosevelt’s interests (short-term or long-term), see Jamie L. Carson and Benjamin A. Kleinerman, “A Switch in time

This point holds whether one considers the actual aim of the court-packing plan or its nominal aim. (Below, I will discuss the divergence between the plan's actual aim and its nominal aim, which produced the contemporary perception that the plan was a thinly-disguised ploy for packing the Court with ideologically compatible Justices). As for the actual aim of the court-packing plan – clearing away judicial obstruction to New Deal policies – some of Roosevelt's advisers “argued that Justices who could switch so easily in his favor could just as easily jump back once the pressure was off.”<sup>7</sup> Although no such switchback took place in the period, the advisers were right in a larger time frame. The absence of a formal New Deal amendment to the Constitution permits or at least encourages the Court to flirt with retro-restrictive interpretations of the Commerce Clause, in line with a broader movement to reinstate the pre-1937 “Constitution in Exile.”<sup>8</sup> As for the nominal goal of the court-packing plan – reducing the fraction of Justices whose sell-by date has passed -- the direct effect of the Roosevelt plan would have been to place a structural cap on the fraction of the Court's membership that was 70 years old or more, an issue that has arisen again in recent years.<sup>9</sup>

The narrow definition of reform makes clear the first sense in which Supreme Court reform tends to be a self-negating enterprise. The conditions that produce a real threat of reform will also, for the same reasons, tend to produce a switch in time that reduces the demand for reform. The threat of reform tightens the political constraints on the Justices, but a switch in time can buy off the threat. Of course, if it is clear *ex ante* that reform will be blocked by political constraints, then the threat of reform is not credible from the Justices' standpoint. From the standpoint of reformers, however, the ability of the Justices to tack as the winds set against them is itself another political constraint on reform. The judicial *volte-face* saps the political demand for structural change.

## 2. The Problem of Multidimensional Politics

I begin, in this section, with the well-known problem that majority coalitions organized along other lines may fracture once reform of the Supreme Court is put on the table. Given huge majorities in both Houses of Congress, and a landslide victory in 1936, how could Roosevelt have failed to secure enactment of the court-packing plan? In a standard account, the New Deal coalition that had been created in and for the elections of 1932 and 1936 splintered badly over the court-packing issue. In the latter election,

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Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan,” *Public Choice*, 113 (2002), 301-324.

<sup>7</sup> Leuchtenburg, *The Supreme Court Reborn* at p. 144.

<sup>8</sup> The phrase stems from Douglas H. Ginsburg, “Delegation Running Riot,” *Regulation*, 1995 (Washington D.C.: Cato Institute). I mean the formulation in text to be agnostic on the direction of causal relationships, if any, between the Court's recent federalism jurisprudence and the movement to restore the Constitution in Exile.

<sup>9</sup> See, e.g., David J. Garrow, “Mental Decrepitude on The U.S. Supreme Court: The Historical Case for a 28<sup>th</sup> Amendment,” *The University of Chicago Law Review*, 67 (2000), 995-1087; Steven G. Calabresi and James T. Lindgren, “Term Limits for The Supreme Court: Life Tenure Reconsidered,” forthcoming *Duke Law Journal* (2005).

Roosevelt had campaigned on a largely backward-looking platform that asked for a national referendum on the first wave of New Deal reform. The issue of judicial reform was not raised. The court-packing plan of 1937 then split the Roosevelt coalition by introducing a new issue-dimension. Southern and Western Democrats who supported the New Deal on other grounds were opposed to tampering with the Court. In general, conservative Democrats and Republicans found common cause in opposing court-packing.

Stipulating to the validity of this account, the important point is that it captures more than the happenstance of 1936 and 1937. Generally speaking, reform of the Supreme Court is rarely a central organizing issue in national elections. The Court is just not that important, viewed in a larger perspective, and compared to the bedrock issues of wages, taxes, housing and other policies that do determine national political elections. Occasionally, as in 1968, the Court will come to be loosely associated with a national political issue, such as “crime,” but political platforms will be vague about what to do about the Court, as a means to paper over differences within the majority coalition. By and large, national coalitions must be organized on other issue-dimensions, which means that they will be inherently unstable when reform of the Supreme Court becomes the central issue. The conditions that make Supreme Court reform possible – that a large national majority be organized – also tend to militate against the success of the reform proposal. The majority coalition will tend to come unglued when faced with the reform issue itself.

So far I have mentioned two possibilities. First, straightforwardly, a coalition may be organized around an issue and have intense preferences concerning that issue, as with the Roosevelt coalition and the New Deal economic program. Second, as in the case of the court-packing plan, a coalition that is organized around one issue may fracture when faced with a different issue, as to which coalition members have intense preferences in opposite directions. Thirdly, however, there is another important possibility: a coalition may be organized around one issue and, on a separate issue of court reform, hold only weak preferences or even be indifferent. In this scenario, reform is possible because the coalition’s leaders, elected on another program, may seize the opportunity to implement reform if they happen to favor it, without fracturing their political base.<sup>10</sup>

However, this is in general possible only with reform proposals that provoke no strong opposition, which will also tend to be low-stakes proposals for marginal reforms. Where the governing coalition is indifferent because the benefit to them of the reform is small, but there is strong opposition because the costs to others are high, leaders will be unable to mobilize enough support to secure enactment. More generally, the higher the stakes in a reform proposal, the more opposition it will tend to provoke. To be sure, reform can and does occur, but this tendency means that most of the reforms that do succeed will be marginal accomplishments.

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<sup>10</sup> Thanks to Mark Tushnet for emphasizing this possibility.

### 3. The Problem of the Optimal Majority

In this section, I turn to a more speculative account of the failure of the court-packing plan. It is obvious that a reform movement may fail because it commands no majority or commands a majority that is too small; the foregoing account, based on the fracturing of the Democratic coalition, suggests that the rump of Roosevelt supporters was too small to overcome the opposition. The problem of an excessively small majority, however, is matched by an equal and opposite problem: the majority favoring reform may also be too large.

The first risk, that of an insufficient majority, is familiar. At the level of national public opinion, even a clear majority may fail to translate into a majority in national lawmaking institutions, given certain distributions of voters in a first-past-the-post electoral system. Even if there exists a majority coalition in Congress that is organized on the issue of judicial reform – thus bracketing the problem of multidimensional politics – vetogates in the legislative process, including bicameralism, congressional committees, and the filibuster, may allow minorities on the reform issue to block change. The puzzle of the court-packing episode, however, is that after the 1936 election, Roosevelt held the presidency and partisan majorities in both Houses of Congress so large as to negate the threat of a partisan filibuster. On paper the vetogates had already been unlocked, yet the reform plan failed ignominiously.<sup>11</sup>

Crucially, the very size of the Roosevelt majority itself seems to have produced widespread public concern about the court-packing plan. In this perception, it suddenly became clear that Roosevelt effectively controlled the non-judicial branches of government, that the narrow Court majority was one of the few remaining focal points for resistance to the New Deal program, and that a risk of executive tyranny had arisen.<sup>12</sup> In the general case, a majority that is too large may provoke a backlash by creating fears of untrammelled power among those who distrust government in general or the executive in particular, and by increasing the underlying distrust itself. As Senator Henry Ashurst put it, “[e]ven many people who believe in President Roosevelt . . . were haunted by the terrible fear that some future President might, by suddenly enlarging the Supreme Court, suppress free speech, free assembly, and invade other Constitutional guarantees of citizens.”<sup>13</sup>

On this view, proposing a plan to enlarge the number of Justices played a crucial role in sharpening public concern about executive despotism generally and Roosevelt’s intentions in particular. Two factors may explain why this was so. The first is the “normative power of the factual.” The number of Justices had been set at nine since 1869, when the Reconstruction Congress increased the number from seven in order to

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<sup>11</sup> Actually, there were two reform plans, both of which failed. See William E. Leuchtenburg, “FDR’s Court-Packing Plan: A Second Life, A Second Death,” *Duke Law Journal* (1985), 673-94. I touch upon the second plan in Section 4 below.

<sup>12</sup> See Leuchtenburg, *The Supreme Court Reborn* at p. 137.

<sup>13</sup> Quoted after Michael Nelson, “The President and the Court: Reinterpreting the Court-Packing Episode of 1937,” *Political Science Quarterly* 103: 267-293, at 276.



give Ulysses S. Grant extra appointments.<sup>14</sup> It is a maxim of political psychology that such longstanding rules or invented traditions,<sup>15</sup> whose dubious origin is usually lost in the mists of time (from the standpoint of later generations), often come to seem normatively significant. “Although the number of Justices had been changed several times before, many believed that the Constitution specified nine. One writer encountered an elderly lady who protested, ‘If nine judges were enough for George Washington, they should be enough for President Roosevelt.’”<sup>16</sup>

The precise mechanisms that generate the normative power of the factual are as yet poorly understood; conjecturally, there is some relationship to the endowment effect, under which subjects value what they have more than what they lack,<sup>17</sup> or to the phenomenon of status quo bias.<sup>18</sup> The norms that arise from institutional arrangements seen to be longstanding, however, tend to support an inference that actors who contravene such norms are generally untrustworthy. Partially-informed publics or voters may use the following heuristic: any political actor who seeks to change the rules in the middle of the game is untrustworthy, presumptively motivated by partisan advantage or a desire for unchecked power.

The second factor was a widespread perception that the court-packing plan was a disingenuous proposal. Although purportedly based on a concern about the competence of aging judges, the plan was widely seen as a gambit to increase the number of New Deal supporters on the Court. When it became clear that the initial reaction to the plan was negative, Roosevelt tried to link the two issues, suggesting that antiquated judges would also have obsolete and socially harmful views.<sup>19</sup> By that time, however, the damage had been done.

This episode illustrates the dilemmas inherent in “the civilizing force of hypocrisy.”<sup>20</sup> Those who were unsure about the merits of the plan seem to have relied upon another political heuristic: that disingenuity implies bad motives. On this view, dictatorship was the real face behind the mask of the court-packing plan. It does not follow, however, that the same voters would have seen Roosevelt as well-motivated had he openly confessed to the goal of removing ideological opponents from the court; that goal could in turn be condemned as partisanship. Political actors are constrained to offer a public-regarding justification for reform, one that does not map too obviously onto their

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<sup>14</sup> Conversely, in 1866 Congress reduced the number of Justices from 10 to 7, in order to deny appointments to Andrew Johnson. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice*, 7<sup>th</sup> edition (Washington, D.C.: The Bureau of National Affairs, 1993), p. 2.

<sup>15</sup> See *The Invention of Tradition*, eds. Eric Hobsbawm and Terence Ranger (New York: Cambridge University Press, 1983).

<sup>16</sup> Leuchtenberg, *The Supreme Court Reborn* at p. 139.

<sup>17</sup> See, e.g., Daniel Kahneman and Amos Tversky, “Prospect Theory: An Analysis of Decisions under Risk,” *Econometrica*, 47 (1979), 263-91.

<sup>18</sup> See, e.g., William Samuelson and Richard Zeckhauser, “Status Quo Bias in Decision Making,” *Journal of Risk and Uncertainty*, 1 (1988), 7-59.

<sup>19</sup> As in the famous Fireside Radio Chat of March 9, 1937, available at <http://www.hpol.org/fdr/chat>.

<sup>20</sup> Jon Elster, “Alchemies of the Mind: Transmutation and Misrepresentation,” *Legal Theory*, 3 (1997), 133, p. 176.

ideological views or partisan interests. Roosevelt failed by offering a plan that was too transparently motivated by other considerations, but sincerity about those other considerations would not have improved the situation.

Moreover, the constraint that one must offer a purportedly neutral criterion for reform was far from toothless; it actually caused Roosevelt to overshoot the mark set by his political interests. Needing at most four more loyalist votes to gain control of the Court,<sup>21</sup> Roosevelt offered a neutral principle, in the form of an age cutoff of 70, that would have given him no less than six additional appointments. With an age cutoff of 74, only five more seats would have been added,<sup>22</sup> but that figure would have made the plan appear even more obviously pretextual. Because three Justices were clumped at age 74, it was not possible to propose a cut-off that would have given Roosevelt exactly four more appointments. Even were such a criterion possible, however, it would have been so precisely tailored to Roosevelt's interests as to be suspicious in its own right. The overshooting plausibly contributed to the impression that Roosevelt sought dictatorial powers. On the other hand, the 70-year figure was a neutral-seeming round number, and had the political advantage of using the civilizing force of hypocrisy as a sword: Roosevelt's most intractable opponent among the horsemen, Justice McReynolds, had at an earlier time himself proposed a retirement age of 70 for all federal judges.<sup>23</sup>

The puzzle for this whole line of explanation is why the same voters, or a decisive fraction of the same voters, who supported Roosevelt and congressional Democrats in the 1936 election would react against the Roosevelt's large majority after the fact. The multidimensional character of coalition politics would supply an answer to this, but we are assuming away that issue here. Assuming, counterfactually, that the 1936 election had been organized as a referendum on the courts, why would ex ante supporters of the New Deal become opponents of Rooseveltian tyranny ex post?

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<sup>21</sup> In fact, there is a plausible case for picking any number from one to four as the magic number needed to gain control; which answer is correct depends on how the question is specified. The simplistic argument for one is that many of the salient decisions invalidating New Deal programs before 1937 were issued by a vote of 5-4. But the Court was divided into three camps, not two. The Four Horsemen (Butler, McReynolds, Sutherland and Van Devanter) were reliable anti-New Deal votes, whereas Brandeis, Cardozo and Stone were reliable in the other direction. Hughes and Roberts were, in the view of ardent New Dealers at least, unreliable weather-vanes. Even if one of the Horsemen were replaced with a Roosevelt loyalist, a coalition of Hughes, Roberts and the remaining three horsemen could still defeat New Deal programs by a 5-4 vote. Assuming a court with a constant membership of nine, Roosevelt needed two new appointments to be certain of success. However, if new appointments were additions rather than replacements, no less than three appointments would be necessary to ensure a 6-6 tie (which would become a 7-5 majority whenever either of the two waverers joined the liberals), while four appointments would be necessary to ensure a 7-6 victory. Under any scenario, however, six new appointments would be excessive, so the criterion Roosevelt offered overshoot the mark.

<sup>22</sup> On February 2, 1937, the date of the plan's formal introduction, the ages of the Justices were Brandeis (80), Van Devanter (77), McReynolds, Sutherland and Hughes (74), Butler (70), Cardozo (66), Stone (64), and Roberts (62). Ignoring Hughes and Roberts as unpredictable, any cut-off less than 71 and greater than 66 would maximize the difference between the number of conservatives covered (4) and the number of liberals covered (1). However, a cutoff at age 70 also possessed the other benefits discussed in text.

<sup>23</sup> See William E. Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan," *Supreme Court Review* (1966), 347, p. 391-92.

I conjecture that the striking turnabout occurred because electoral decisions are uncoordinated. Rational voters, conditional on having entered the voting booth, vote expressively rather than instrumentally.<sup>24</sup> (I bracket here the well-known prior puzzle of why rational people would vote in the first place.) Any particular individual voter or group of voters, if assured with certainty of being the decisive voter, might prefer a division of partisan power across national lawmaking institutions, including the Supreme Court. Given that any individual voting decision has effectively zero chance of being decisive, however, voters will indulge expressive statements of loyalty – to Roosevelt or to the Democratic party -- that are effectively costless. Once appraised that other voters have done likewise, however, the very voters who supported Roosevelt and the congressional Democrats seem to have become concerned that the collective outcome of uncoordinated choices had produced total Rooseveltian dominance of the national government.

The upshot of all this is that reform proposals need an optimal majority to succeed – one that is neither too large nor too small. In the court-packing episode, the political conditions that produced a sufficient congressional majority to unlock the vetogates and surmount the hurdles of the lawmaking process also caused the reform movement to overshoot the mark, producing a backlash animated by fear of executive tyranny. The very factors that made reform possible also produced counterforces that blocked its accomplishment. Again, this is only to identify a mechanism that tends to block reform, not an iron law that reform can never succeed. In some cases, reform proposals can slip between Scylla and Charybdis; the Reconstruction-era changes to the Court’s composition are an example. In general, however, it is much more likely that any given proposal will be sucked into the whirlpool of vetogates or swallowed up in a political backlash against an excessive majority.

#### 4. The Veil of Uncertainty, Delay, and Motivation

A standard idea in constitutional design is that less information can be better than more. Depriving political actors of information about how to promote their narrow self-interest will cause them to behave as though animated by impartial motives. The veil of ignorance,<sup>25</sup> or uncertainty,<sup>26</sup> subjects decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision. This distributive uncertainty can take one of two basic forms. In the Rawlsian veil of ignorance, decisionmakers are placed under a constraint of ignorance about their own identities and attributes. This introduces uncertainty by allowing the decisionmaker to know the distributive consequences of a decision across citizens—call them A and B—but denying the decisionmaker the knowledge of whether she herself occupies A’s position or B’s position. The more common and less radical version, however, is the veil of uncertainty.

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<sup>24</sup> See Geoffrey Brennan and Loren Lomasky, *Democracy and Decision, The Pure Theory of Electoral Preference* (Cambridge: Cambridge University Press, 1993), ch. 3: “The Nature of Expressive Returns.”

<sup>25</sup> See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), ch. 24: “The Veil of Ignorance.”

<sup>26</sup> See John Harsanyi, “Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility,” *Journal of Political Economy*, 63 (1955), 309-21; Geoffrey Brennan and James M. Buchanan, *The Reason of Rules: Constitutional Political Economy* (Cambridge: Cambridge University Press, 1985), p. 30.

Although the relevant decisionmakers know their own current identities and interests, the veil introduces uncertainty about who will reap the greater gains from the decision.

How is the veil of uncertainty produced? One technique<sup>27</sup> is to enact reforms at a certain time that will not take effect until a later time, perhaps years or even decades hence. Delay takes advantage of a preexisting uncertainty—the inherent unpredictability of the decisionmakers’ long-term interests—that would otherwise be overwhelmed by the incentives to focus on short-term considerations. By confining the range of the decision’s application to cover only the period (beyond the delay period) in which decisionmakers’ interests are unpredictable, a delay rule ensures that the only period current decisionmakers can affect is one that is, from their *ex ante* standpoint, subject to a veil of uncertainty.

By diluting current decisionmaker’s ability to assess where their own interests lie, delayed enactments might be thought to ease the path of reform. One might imagine a variant of Roosevelt’s proposal in which the legislation, although enacted now, would not take effect until after the 1940 election.<sup>28</sup> In the general case, delayed implementation might buy off the opposition that would otherwise be offered by political actors whose interests would be harmed by a proposal with immediate effect. In a similar vein, the recent proposal for reforming the Justices’ tenure to a fixed term of years, offered by Paul Carrington and Roger Cramton, in effect delays the proposal’s onset date by grandfathering currently sitting justices. The grandfathering presumably buys off self-interested opposition on the part of sitting Justices.<sup>29</sup>

In fact, however, successful delayed enactments are quite rare. A major reason is the basic tradeoff between impartiality and motivation.<sup>30</sup> Delay may buy off opposition, but it also eliminates the short-term, self-interested benefit that would accrue to the political actors who would otherwise support the proposal and incur the costs of shepherding it through. In the language of 18<sup>th</sup>-century political psychology, delay replaces self-interested motivation with impartial reason, but the latter motivation is frequently too feeble to produce action; the pallid claims of reason rarely provoke the same degree of energy and activity as the prospect of self-interested gain. In general, the high opportunity costs of political action, constricted agenda space in Congress, sharp limits on the amount of time the executive can spend on any one project, the horizon of re-election, and the tendency to discount the future, all push political actors to rank

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<sup>27</sup> For discussion of “delayed-effect” rules, see Adrian Vermeule, “Veil of Ignorance Rules in Constitutional Law,” *Yale Law Journal*, 111 (2001), 399-432, at 419-424; Ariel Porat and Omri Yadlin, “Promoting Consensus In Society Through Deferred-Implementation Agreements,” forthcoming *Toronto Law Journal* (2005).

<sup>28</sup> In fact, Roosevelt’s second court-packing plan embodied a partial delay mechanism. It authorized the President to “appoint an additional Justice per calendar year for each member of the Supreme Court who remained on the bench after the age of seventy-five.” Given the distribution of the Justices’ ages, “the bill would empower [Roosevelt] to name four new Justices, as well as a Justice to fill the Van Devanter vacancy, but the total of five would not be reached until the beginning of 1940.” Leuchtenburg, *The Supreme Court Reborn* at p. 148.

<sup>29</sup> This is my interpretation of the proposal’s effect; I do not assert that Carrington and Cramton intend this effect.

<sup>30</sup> For other explanations, see Porat and Yadlin at 29-34.

projects by the amount of benefit they produce in the near term. Projects that will produce large collective benefits in the long run, but whose distributive valence is uncertain, will be subordinated to projects that produce larger factional benefits in the short run. In the case of Roosevelt, a court-packing plan with a delayed effective date would not have advanced Roosevelt's immediate goal of clearing judicial obstruction to New Deal programs. In the case of the Carrington and Cramton proposal, the safe prediction is that it will never be enacted. The delayed onset of the proposal makes its political valence uncertain, which in turn means that no current political actor will be strongly motivated to shoulder the burdens of enactment. Political action oriented towards the long run tends to occur only where the political valence of the proposal is clear ex ante, as in proposals for environmental regulation with long-term effects.

Overall, the tradeoff between impartiality and motivation creates another Scylla and Charybdis through which reform proposals must slip. On the one hand, stipulating that a proposal should have a delayed effective date helps to remove the taint of self-interested or partisan motives, and avoids triggering the heuristic that one should not try to change the rules in the middle of the game. On the other hand, delaying the proposal's effect means that concrete problems of the here and now, the sort of problems most likely to motivate reform, cannot be addressed. The delaying tactic makes reform possible by creating an appearance of impartiality and buying off current opposition, but the tactic also makes the reform less likely to be proposed and pursued. Conversely, the short-term interest that motivates reform itself tends to create self-limiting political constraints. Proposals that produce short-term benefits for particular groups will attract motivated supporters, but will also provoke opposition.

## 5. Crisis, Reform and Constitutional Amendment

In this section, I will briefly generalize some of the foregoing points. A standard idea is that political constraints limit institutional reform until some exogenous shock creates a crisis that destabilizes extant institutions.<sup>31</sup> The resulting uncertainty can promote reform, as previously discussed. Exogenous shocks or crises, however, are a necessary but insufficient condition for reform. This is because crisis has two effects pulling in opposite directions: crisis destabilizes institutions, but it also tends to create new political constraints that shore up those institutions against change. As relevant here, times of crisis both increase the demand for Supreme Court reform and also tend to create political obstacles to that reform. For concreteness, I focus on a dilemma that plagued Roosevelt: should reform of the Court be attempted through the process of constitutional amendment or through the legislative process? The latter path better suits the conditions of urgency that give rise to the demand for reform, yet also creates an appearance of partisan manipulation. The former path seems more suitable for structural reform, yet may take too long to be an effective response to a crisis.

Roosevelt and his advisors ultimately chose the legislative path, in large part because they feared that the amendment process would unduly delay reform. The sense

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<sup>31</sup> See, e.g., Thrainn Eggertsson, *Imperfect Institutions: The Possibilities and Limits of Reform* ch. 10 (2005).

of national economic crisis that gave rise to the New Deal agenda also implied that immediate action was necessary. As Attorney General Homer Cummings said, “the Administration cannot very well let its social program bog down because of adverse Supreme Court decisions, and, on the other hand, the delays incident to amendment are rather appalling.”<sup>32</sup> However, the decision to proceed legislatively also created or strengthened opposition to the substance of the reform proposal.

In 1937, opponents of Roosevelt’s proposal for statutory court reform fell into three camps. Some flatly opposed the content of the proposal, whatever its legal form. Others said that the proposal should not or could not be enacted legislatively, but could and should be enacted as a constitutional amendment. Within the latter group, we may distinguish those who held their position in bad faith and those who held it in good faith. Roosevelt suspected pervasive bad faith, saying that “the same forces which are now calling for the amendment process would turn around and fight ratification on the simple ground that they do not like the particular amendment adopted by the Congress.”<sup>33</sup> However, the bill was also opposed by some, such as Senator George Norris, who genuinely favored the substance of the proposal, but who also genuinely thought that constitutional amendment was the proper path.<sup>34</sup>

The rationale for the last position was never clearly stated. Although an amendment would be necessary if the bill were unconstitutional, the arguments to that effect were quite weak, given the Reconstruction precedents in which Congress had manipulated the number of Justices at will. In any event, the principal concerns motivating good-faith opposition to the statutory path seem to have been nonlegal. Norris worried that anything short of an amendment would “plague our descendants” because “it does not strike permanently at the evil we want to remedy.”<sup>35</sup> As suggested above, this concern applies even more strongly to nonstructural reform accomplished by constraining the Justices to execute a switch in time. Another, vaguer intuition seems to have been that it was inherently more suitable to pursue structural reform of the judiciary by amendment rather than by statute. The intuition, similar to the heuristics described above, is that changing the rules of the judicial game by legislation is an attack on the referee by one of the players, and thus presumptively arises from partisan or self-interested motivations.

Overall, the choice of legal instruments for judicial reform presented Roosevelt and his advisers with a dilemma. On the one hand, the New Dealers knew from personal experience that “[d]emands for . . . constitutional revision tends to arise in times of crisis in which waiting is an unaffordable luxury.”<sup>36</sup> The crisis that produced the demand for reform also constrained the choice between available paths to reform, by ruling out the

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<sup>32</sup> Quoted after Kyvig at p. 476. The delay might not have been as protracted as the New Dealers feared, see id. at 479, but the fear was certainly reasonable in light of the salient example of the 1924 Child Labor Amendment, which was still unratified as of 1937 (and which eventually failed).

<sup>33</sup> Quoted after Kyvig at p. 477.

<sup>34</sup> Kyvig at p. 480.

<sup>35</sup> Quoted after Kyvig, p. 480.

<sup>36</sup> Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge: Cambridge University Press, 2000), p. 145.

more protracted amendment process. On the other hand, the statutory avenue itself provoked political opposition that would not otherwise have arisen. That opposition came both from bad-faith opponents who were enabled to argue for the amendment path, and were thus given an extra arrow for their rhetorical quivers, and also from good-faith opponents, whose preference for the amendment path put them in unwilling coalition with the bad-faith opponents. The very crisis that produced the demand for reform, by constraining the feasible paths to reform, also produced endogenous opposition to the alternative path. In this sense, the impetus to Supreme Court reform that arose out of the New Deal crisis had a self-negating tendency.

Again, this conjunction of forces and counterforces is not inevitable. Occasionally, reform will slip through because there is an evident structural problem, because all concerned are uncertain about the future effects of the reform, and because no group will lose much from current enactment; the constitutional amendments that have restructured presidential succession may count as an example.<sup>37</sup> In general, however, such a constellation of happy circumstances is both fortuitous and rare. Structural reform, especially of the Court, is systematically unlikely and unreliable.

### Conclusion

I have suggested a range of mechanisms that systematically tend to make Supreme Court reform a self-negating enterprise. The very conditions that give rise to the demand for reform also tend to create political constraints on reform. Whether valid or not, this thesis would be relevant from the standpoint of the external analyst, such as the academic social scientist. I hasten to add, however, that the shape of the politically feasible set is not obviously a relevant consideration for practical advocates of reform (who may also happen to hold academic posts). A plausible division of labor is that the reformer should deliberately ignore political feasibility; she should simply propose first-best plans and programs and then let politics itself filter the feasible from the infeasible. The reformer is typically an expert in the substantive area at hand, not in politics, so self-censoring in light of the reformer's estimate of political feasibility carries the risk that the reformer will mistakenly filter out an ideal solution that would actually have been enacted. By contrast, the opposite error – the proposal of ideal solutions that are politically infeasible – is solved automatically by the operation of the political filter. For these reasons, reform proposals such as that offered by Carrington and Cramton are socially very valuable, even if, from the analyst's standpoint, they are systematically likely to fail.

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<sup>37</sup> See U.S. Const. Amdts XX, XXV.

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