## Essay

# Political Constraints on Supreme Court Reform

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Many proposals to reform the rules of the Supreme Court game are currently under discussion.[1] 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.

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1. *See, e.g.*, Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467 (Roger C. Cramton & Paul D. Carrington eds., 2006).

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.[2] Not everything has held constant—the switch to discretionary certiorari jurisdiction in 1925 is a salient example[3]—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 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.

Part I 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"). Parts II through V 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.

Part II 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. Part III

2. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

3. *See* Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1364 (2006).

considers 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. Part IV discusses the basic trade-off between impartiality and motivation. Structural reforms 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. Part V suggests 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 standpoints of both analysts and advocates of reform. Although analysts should consider political constraints, advocates of reform should not.

## I. "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, up to a total membership of fifteen, for each Justice over the age of 70 who had served ten years and who did not retire within six months of his 70th birthday.[4] Roosevelt had carried forty-eight 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).[5] 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 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

4. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 134 (1995).

5. *Id.* at 158–59.

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 like-minded Justices.[6] 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.[7] (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).[8] 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 during both Reconstruction and the New Deal, to require a two-thirds vote of the Justices to invalidate legislation on constitutional grounds.[9] 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.[10]

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6. *See id.* at 220.

7. For a discussion on the "switch in time," see generally *id.* at 142–47.

8. On the question whether a switch in time occurred, see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 45–105 (1998); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 11–163 (2000). 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 & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 INT'L REV. L. & ECON. 45, 53–65 (1992). 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.

9. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 307 & n.144 (1985); David E. Kyvig, *The Road Not Taken: FDR, the Supreme Court, and Constitutional Amendment*, 104 POL. SCI. Q. 463, 470–71 (1989).

10. *See* CURRIE, *supra* note 9, at 307 & n.144.

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 lost the court-packing battle, he won the broader war.[11] 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,[12] it may have been bad for the polity in the long run.

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."[13] Although no such switch back 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 originalist movement that some say aims to reinstate the pre-1937 "Constitution in Exile."[14] 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

11. *See* Kyvig, *supra* note 9, at 466.

12. For discussion and references on whether the outcome of the fight was in Roosevelt's interests (short-term or long-term), see generally Jamie L. Carson & Benjamin A. Kleinerman, *A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan*, 113 PUB. CHOICE 301 (2002).

13. LEUCHTENBURG, *supra* note 4, at 144.

14. This phrase stems from Douglas H. Ginsburg, *Delegation Running Riot*, 18 REGULATION 83, 84 (1995). For debate about whether any such "Constitution in Exile" movement even exists, see Cass Sunstein & Randy Barnett, *Constitution In Exile?*, LEGAL AFF., May 2, 2005, http://www.legalaffairs.org/webexclusive/dc_printerfriendly.msp?id=41.

years old or more, an issue that has arisen again in recent years.[15]

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 Justices' ability 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.

## II. 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 Supreme Court reform is put on the table. Given huge majorities in both Houses of Congress and a landslide victory in 1936,[16] 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.[17] In the latter election, Roosevelt had campaigned on a largely backward-looking platform that asked for a national referendum on the first wave of New Deal reform.[18] The issue of judicial reform was not raised.[19] The court-packing plan of 1937 then split the Roosevelt coalition by introducing a new issue dimension.[20] Southern and western Democrats who supported the New Deal on other grounds were opposed to tampering with the Court.[21]

15. *See, e.g.*, Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 1, at 15; David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000).

16. *See* LEUCHTENBURG, *supra* note 4, at 132.

17. *Id.* at 158–59.

18. *Id.* at 107.

19. *Id.*

20. *Id.* at 158–59.

21. *Id.*

In general, conservative Democrats and Republicans found a common cause in opposing court packing.[22]

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 when 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 in order 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.[23]

However, this is generally 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 about the reform because the benefit to them is small, but there is strong opposition because

22. *Id.*

23. Thanks to Mark Tushnet for emphasizing this possibility.

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. Consider in this regard the history of jurisdictional reform of the Court. Despite many proposals for stripping the Court of jurisdiction over one policy area or another, no important jurisdiction-stripping measures have been enacted since Reconstruction.[24] The important jurisdictional changes that have occurred, such as the abolition of most of the Court's mandatory appellate jurisdiction in 1925,[25] have uniformly expanded the Justices' power and discretion.

## III. 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 re-

24. For an overview of jurisdiction-stripping proposals since Reconstruction, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.1 (4th ed. 2003) (noting that "few jurisdictional restrictions have been adopted thus far in American history"). It has been argued that, contrary to the conventional wisdom, jurisdiction stripping is common. *See* Dawn M. Chutkow, Jurisdiction Stripping: Ideology, Institutional Concerns, and Congressional Control of the Court 2 (Oct. 19, 2005) (unpublished working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=828906. This thesis seems to depend upon an overly broad definition of jurisdiction stripping. Although it is difficult to be sure, the author's definition seems to conflate jurisdiction stripping with preclusion of judicial review in the first instance and seemingly does not distinguish between cases of genuine jurisdiction stripping and cases in which Congress simply transferred jurisdiction from one court to another.

25. *See* Chutkow, *supra* note 24, at 2.

form—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.[26] On paper, the vetogates had already been unlocked, yet the reform plan failed ignominiously.[27]

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 nonjudicial 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.[28] In the general case, a majority that is too large may provoke a backlash by creating fears of untrammeled 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."[29]

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."[30] The number of Justices had been set at nine since 1869, when the Reconstruction Congress increased the number from seven in order to give Ulysses S. Grant extra appointments.[31] Such longstanding

26. *See* LEUCHTENBURG, *supra* note 4, at 132.

27. 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*, 1985 DUKE L.J. 673, 673. I touch upon the second plan in Part IV, *infra*.

28. *See* LEUCHTENBURG, *supra* note 4, at 137.

29. Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 276 (1988).

30. *See* LEUCHTENBURG, *supra* note 4, at 137–42.

31. Conversely, in 1866, Congress reduced the number of Justices from ten to seven in order to deny appointments to President Andrew Johnson. *See*

rules or invented traditions,[32] whose dubious origin is usually lost in the mists of time, 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."[33]

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,[34] or to the phenomenon of status-quo bias.[35] The norms that arise from institutional arrangements seen as longstanding, however, tend to support an inference that actors who contravene such norms are 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.[36] 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.[37] 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.[38] By that time, however, the damage had been done.

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ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 2 n.7 (7th ed. 1993).

32. *See* Eric Hobsbawm, *Introduction* to THE INVENTION OF TRADITION 1, 1–4 (Eric Hobsbawm & Terence Ranger eds., 1983).

33. LEUCHTENBURG, *supra* note 4, at 139.

34. *See, e.g.*, Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 277–80 (1979).

35. *See, e.g.*, William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988).

36. *See* LEUCHTENBURG, *supra* note 4, at 138.

37. *See id.*

38. The famous fireside radio chat of March 9, 1937, is an example. *See* President Franklin D. Roosevelt, Fireside Radio Chat Defending the Plan to "Pack" the Supreme Court (March 9, 1937), *in* FDR'S FIRESIDE CHATS 83, 90 (Russell D. Buhite & David W. Levy eds., 1992), *available at* http://www.hpol.org/fdr/chat.

This episode illustrates the dilemmas inherent in "the civilizing force of hypocrisy."[39] 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 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,[40] Roosevelt offered a neutral principle, in the form

39. Jon Elster, *Alchemies of the Mind: Transmutation and Misrepresentation*, 3 LEGAL THEORY 133, 176 (1997).

40. 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 (and similar state programs) before 1937 were issued by a vote of 5–4. *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936) (finding a New York minimum wage law unconstitutional), *overruled by* Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236 (1941); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 374 (1935) (holding the Railroad Retirement Act unconstitutional). But the Court was divided into three camps, not two. The Four Horsemen (Justices Van Devanter, McReynolds, Sutherland, and Butler) were reliable anti-New Deal votes, whereas Justices Brandeis, Stone, and Cardozo were reliable in the other direction. LEUCHTENBURG, *supra* note 4, at 132–33. Justices Hughes and Roberts were, in the view of ardent New Dealers at least, unreliable weather vanes. *Id.* at 133. 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 overshot the mark.

of an age cutoff of 70,[41] that would have given him no less than six additional appointments. With an age cutoff of 75, only five more seats would have been added,[42] but that figure would have made the plan appear even more obviously pretextual. Because three Justices were clumped at age 75, it was not possible to propose a cutoff 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.[43]

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 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?

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.[44] (I bracket here the well-known

41. LEUCHTENBURG, *supra* note 4, at 134.

42. On February 5, 1937, the date of the plan's formal introduction, *see* CUSHMAN, *supra* note 8, at 11, the ages of the Justices were 80 (Brandeis); 77 (Van Devanter); 75 (Hughes, McReynolds, and Sutherland); 70 (Butler); 66 (Cardozo); 64 (Stone); and 61 (Roberts). *See generally* ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 11 (1956); 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS (Leon Friedman & Fred L. Israel eds., 1997). Ignoring Hughes and Roberts as unpredictable, any cutoff less than 71 and greater than 66 would maximize the difference between the number of conservatives covered (four) and the number of liberals covered (one). However, a cutoff at age 70 also possessed the other benefits discussed in text.

43. *See* William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 391–92.

44. *See* GEOFFREY BRENNAN & LOREN LOMASKY, DEMOCRACY AND DECI-

prior puzzle of why rational people would vote in the first place.) Any particular individual voter or group of voters, if assured 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.[45] 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.

## IV. 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,[46] or uncertainty,[47] subjects decision

SION: THE PURE THEORY OF ELECTORAL PREFERENCE 32–53 (1993).

45. In 1866, Congress reduced the number of Justices from ten to seven, in order to deny appointments to President Andrew Johnson. *See* STERN ET AL., *supra* note 31, at 2 n.7.

46. *See* JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999).

makers 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, decision makers are placed under a constraint of ignorance about their own identities and attributes.[48] This introduces uncertainty by allowing the decision maker to know the distributive consequences of a decision across citizens—call them *A* and *B*—but denying the decision maker 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.[49] Although the relevant decision makers know their own current identities and interests, the veil introduces uncertainty about who will reap the greater gains from the decision.[50]

How is the veil of uncertainty produced? One technique is to enact reforms at a certain time that will not take effect until a later time, perhaps years or even decades hence.[51] Delay takes advantage of a preexisting uncertainty, the inherent unpredictability of the decision makers' long-term interests, that would otherwise be overwhelmed by the incentives to focus on short-term considerations.[52] By confining the decision's application to the remote future in which decision makers' interests are unpredictable, a delay rule ensures that the only period current decision makers can affect is one that is, from their ex ante standpoint, subject to a veil of uncertainty.[53]

By diluting current decision makers' 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

47. *See* GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 30 (1985); John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309 (1955).

48. *See* RAWLS, *supra* note 46, at 118–19.

49. Harsanyi, *supra* note 47.

50. *See id.*

51. For discussion of "delayed-effect" rules, see Ariel Porat & Omri Yadlin, *Promoting Consensus In Society Through Deferred-Implementation Agreements*, 56 U. TORONTO L.J. (forthcoming 2006), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1022&context=taulwps; Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 419–24 (2001).

52. Vermeule, *supra* note 51, at 419–20.

53. *Id.*

enacted now, would not take effect until after the 1940 election.[54] 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, Paul Carrington and Roger Cramton's recent proposal for reforming the Justices' tenure to a fixed term of years[55] 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.[56]

In fact, however, successful delayed enactments are quite rare. A major reason is the basic trade-off between impartiality and motivation.[57] 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 the legislative process. 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 reelection, and the tendency to discount the future, all push political actors to rank projects by the degree 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

54. 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." LEUCHTENBURG, *supra* note 4, at 148. 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 could not be reached until the beginning of 1940." *Id.*

55. *See* Carrington & Cramton, *supra* note 1.

56. This is my interpretation of the proposal's effect; I do not assert that Carrington and Cramton intend this effect.

57. For other explanations, see Porat & Yadlin, *supra* note 51, manuscript at 29–34.

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 toward 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 trade-off 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.

## V. CRISIS, REFORM, AND CONSTITUTIONAL AMENDMENTS

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.[58] 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

58. *See, e.g.*, THRAINN EGGERTSSON, IMPERFECT INSTITUTIONS: POSSIBILITIES AND LIMITS OF REFORM 152–73 (2005).

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 advisers ultimately chose the legislative path, in large part because they feared that the amendment process would unduly delay reform. The sense 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, "[t]he 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."[59] 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.[60] Others said that the proposal should not or could not be enacted legislatively, but could and should be enacted as a constitutional amendment.[61] Within the latter group, we may distinguish those who held their position in bad faith from 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."[62] However, the bill was also opposed by some, such as Senator George Norris, who genuinely favored the substance

59. Kyvig, *supra* note 9, at 476 (quoting Diary of Homer Cummings, Attorney Gen. (Nov. 15, 1936)). 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). *See id.* at 479 & n.68.

60. *Cf. id.* at 466 (discussing the battle that ensued after Roosevelt announced his plan to reorganize the judiciary).

61. *See id.* at 467.

62. *Id.* at 477 (quoting Letter from Franklin D. Roosevelt, President, United States of America, to Charles Burlingham (Feb. 23, 1937)).

of the proposal but who also genuinely thought that constitutional amendment was the proper path.[63]

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.[64] 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."[65] 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 tend to arise in times of crisis in which waiting is an unaffordable luxury."[66] The crisis that produced the demand for reform also constrained the choice between available paths to reform by ruling out the 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 de-

63. *See id.* at 480.

64. *See, e.g.*, STERN ET AL., *supra* note 31, at 2 n.7 (discussing Congress's reduction of the number of Justices from ten to seven to deny appointments to President Johnson).

65. Kyvig, *supra* note 9, at 480.

66. JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 145 (2000).

mand 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.[67] 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.

67. *See* U.S. CONST. amends. XX, XXV.