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Must Joe Robinson Die?: Reflections on the 'Success' of Court Packing

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History may be radically contingent or it may be overdetermined. Crushing a small creature may have drastic results,[1] as may saving the life of a person meant to die.[2] On the other hand, shooting a *Tyrannosaurus rex* may have no discernible effect on history.[3]

Are various constitutional episodes more like the butterfly, seemingly slight, but producing dramatic effects, or like the dinosaur, seemingly grand, but which may be erased without a trace? One need not find textualism extinct to conclude that in this regard, constitutional language may be more dinosaur than butterfly. A brief detour into non-counterfactual history presents the evidence. How would constitutional law change if the words "equal protection of law" were removed from the Fifth Amendment? Presumably, not very much.[4] What if the drafters of the Eleventh Amendment had specified that the provision barred only suits against states by citizens of other states?

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1. See Ray Bradbury, *The Sound of Thunder*, in *The Golden Apples of the Sun* 144 (Greenwood Press, 1953) (the killing of a pre-historic butterfly changes the course of history).

2. In the Star Trek episode, *The City on the Edge of Forever*, Dr. McCoy goes back in time and saves the life of a social worker, Edith Keeler. Keeler goes on to delay the entry of the United States into World War II, allowing Germany to conquer the world. Captain Kirk's grim task is to return to the past and ensure that Keeler dies on schedule.

3. See Bradbury, *The Sound of Thunder* (cited in note 1). The story suggests that the fabric of time would not be disturbed by shooting a dinosaur that would have died shortly from other causes.

4. Compare U.S. Const., Amend. V (containing no equal protection clause) with *Bolling v. Sharpe*, 347 U.S. 497 (1954) (finding equal protection component of due process clause). State constitutional interpretation demonstrates a similar tendency. See, e.g., Hans A. Linde, *Are State Constitutions Common Law?*, 34 Ariz. L. Rev. 215, 220 (1992) (discussing the New Jersey Supreme Court's use of due process and equal protection principles despite the absence of such textual provisions in the New Jersey Constitution).

Again, *res ipsa loquitur*.[5] In neither instance has the particular constitutional language proved especially significant. But what about grander constitutional events? Can altering one historical conjuncture transform all that follows? To explore this question, I consider one of the most notorious aspects of the twentieth century's greatest constitutional moment:[6] President Franklin Roosevelt's failed plan to "pack" the United States Supreme Court.

Buoyed by a landslide victory in the election of 1936 and increasingly frustrated by a Supreme Court that was striking down key features of the New Deal, President Roosevelt decided to launch a frontal attack on the judicial opposition. On February 5, 1937, President Roosevelt presented a judicial reorganization bill to Congress. The proposed legislation would have allowed him to appoint an additional Justice to the United States Supreme Court for every member of the Court who refused to retire or resign within six months after turning 70.[7] The plan would have given Roosevelt six appointments immediately and would have permanently increased the size of the Court to 15.

In early July 1937, it appeared that some version of the "court-packing" plan would likely become law.[8] But all that changed with an unexpected passing. On July 14, 1937, Joe Robinson, the Majority Leader of the United States Senate who spearheaded the President's congressional efforts, was found dead in his bedroom, the apparent victim of a heart attack.[9] The reorganization plan died with the Majority Leader.[10] What if Senator Robinson had survived the grueling congressional debates and the torrid Washington summer and had shepherded the President's proposal safely through Congress?

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5. Compare U.S. Const., Amend. XI with *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) ("Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says . . . .' " (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991))).

6. I follow here Bruce Ackerman's typology of the three great constitutional moments, the Founding, Reconstruction, and the New Deal. See Bruce Ackerman, 1 *We the People: Foundations* (Harvard U. Press, 1991).

7. See 81 Cong. Rec. 880-81 (1937).

8. See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 148-50 (Oxford U. Press, 1995). Opinions on this matter vary. See Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 24-25 (Oxford U. Press, 1998) (suggesting that the bill could not have survived the opposition in both the Senate and the House).

9. See Joseph Alsop and Turner Catledge, *The 168 Days* 266-67 (DaCapo Press, 1938).

10. See Leuchtenberg, *The Supreme Court Reborn* at 152 (cited in note 8).

The warnings of the bill's opponents could not have been more dire. The Report of the Senate Judiciary Committee cautioned:

> [The bill's] ultimate operation would be to make this Government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is–an interpretation to be changed with each . . . administration.[11]

Would passage of the bill have succeeded in undermining the constitutional order? Would it have safeguarded the wishes of the majority against an out-of-touch Court?

As it was, the proposal itself produced both substantial benefits and extraordinary harms for the President. I would like to suggest that a different disposition of the bill would not have altered these consequences.

The plan exacted a heavy political toll, hindering the President's domestic and foreign policy agenda.[12] President Roosevelt's dogged efforts to pass the court-packing plan energized his opponents and alienated his friends.[13] An ultimate legislative victory would not have appeased either group, nor would congressional approval have lessened the charges of interference with the judiciary.

On the other hand, President Roosevelt believed that the proposal achieved much of its purpose, even in defeat. He termed his message of February 5 "a turning point in our modern history. . . ."[14] A leading historian of the period agrees that "in the long history of the Supreme Court, no event has had more momentous consequences than Franklin Roosevelt's message of February 1937."[15] In the famous "switch in time that saved nine," the then-existing Court upheld important New Deal legislation.[16] Deaths and retirements allowed Roosevelt to name

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11. S. Rep. No. 711, 75th Cong., 1st Sess. 96 (1937) (reprinted in Louis Fisher and Neal Devins, *Political Dynamics of Constitutional Law* 96 (West, 1992).

12. See Leuchtenberg, *The Supreme Court Reborn* at 156-61 (cited in note 8).

13. See id.

14. See 6 *Public Papers and Addresses of Franklin D. Roosevelt* (1937) reprinted in Fisher and Devins, *Political Dynamics* at 86 (cited in note 11).

15. Leuchtenberg, *The Supreme Court Reborn* at 162 (cited in note 8).

16. Some evidence suggests that the court-packing plan did not influence the Court's decisions in these cases. See Cushman, *Rethinking the New Deal Court* at 18-25 (cited in note 8). Overall, the evidence as to the motivations for the "switch" has been termed "equivocal." See Bruce Ackerman, 2 *We the People: Transformations* 343 (Harvard U. Press, 1998).

seven Justices in the next five years. Ten years after his death, a majority of the Justices remained Roosevelt appointees. It seems hard to believe that a legislative success could have translated into a more favorable judicial reception for Roosevelt's policies.

What would have been the longer term effects had Roosevelt's plan been enacted? With regard to the composition of the Court, it is almost impossible to predict the consequences of either Roosevelt's initial proposal or a later compromise plan, which would have allowed one additional appointment each calendar year for every Justice over 75.[17] One guesses that a larger Court with more frequent appointments would dampen the influence of any single President, but reckoning the results requires a greater quantum mechanic than I. The effects of a plan that did not change the size of the Court permanently might be easier to trace. Consider for example, if the additional appointments at age 70 expanded the Court only temporarily until the elder Justice departed. If one engages in some further simplifying assumptions, a dramatic effect does occur.[18]

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17. See Leuchtenberg, *The Supreme Court Reborn* at 148 (cited in note 8).

18. For purposes of the next paragraph, I assume that a President could have appointed an additional Justice for every member of the Court who turned 70, but did not step down during that presidency. For example, Justice Black's turning 70 in 1956 would have given President Eisenhower an additional appointment. However, Justice Reed's turning 70 in 1954 would not have given President Eisenhower an *additional* appointment because President Eisenhower actually did appoint the replacement when Justice Reed retired in 1957. Similarly, because President Nixon did name Justice Harlan's successor in 1971, President Nixon would not have received an additional appointment on account of Justice Harlan's turning 70 in 1969.

Further, in view of the potential for the opposition party to delay an appointment, I assume that when a Justice attains the age of 70 after September in a presidential election year, the President elected that November makes the appointment. Thus President Eisenhower receives the benefit of Justice Frankfurter's turning 70 in November, 1952, and President Nixon nominates an additional Justice because Justice Douglas turned 70 in October, 1968. On the other hand, because Justice Brennan attained 70 in April, 1976, I give an additional appointment to President Ford. Transferring the Brennan appointment to President Carter would magnify the Carter windfall described later in the text.

Finally, I ignore the capacity of prior appointments to subtract from appointments actually made. For example, President Kennedy's additional appointment when Chief Justice Warren turned 70 in 1961 might have interfered with President Nixon's ability to make an appointment when the Chief retired in 1969, but that problem is not taken into account. In effect, this proviso unrealistically assumes that the additional appointee would retire at the same time as the Justice who triggered the appointment.

My defense for these assumptions is that I believe they magnify, as well as clarify, the effects of the plan, and my argument is that even these effects, though interesting, are not ultimately substantial.

The following table lists the Justices who turned 70 after the Roosevelt administration, and the President who would have made the hypothetical additional appointments under the above assumptions:

Based on the ages of the Justices, such a plan, if adopted, would have granted no additional appointments to Presidents Truman and Johnson. Presidents Kennedy, Nixon, Ford, Reagan, Bush, and Clinton would each have gained one nominee. President Eisenhower would have gained two appointments. The most striking result would have been the change in the fortunes of President Carter, who was one of only four Presidents in history to make no appointments to the Supreme Court.[19] Under the plan described above, President Carter

Justice	Year Turned 70	Year of Actual Retirement	President Who Would Receive Hypothetical Appointment
Roberts	1945	1945	[no additional appointment]
Frankfurter	1952	1962	Eisenhower
Reed	1954	1957	[no additional appointment]
Black	1956	1971	Eisenhower
Burton	1958	1958	[no additional appointment]
Warren	1961	1969	Kennedy
Douglas	1968	1975	Nixon
Harlan	1969	1971	[no additional appointment]
Brennan	1976	1990	Ford
Burger	1977	1986	Carter
Powell	1977	1986	Carter
Blackmun	1978	1994	Carter
Marshall	1978	1991	Carter
White	1987	1993	Reagan
Stevens	1990		Bush
Rehnquist	1994		Clinton

19. The other three were Presidents William Henry Harrison, Zachary Taylor, and

would have been able to name four Supreme Court Justices.[20] It is exciting to speculate on how four Carter appointees might have reshaped some of the major decisions of the 1980s, such as *McCleskey v. Kemp*[21] and *Bowers v. Hardwick*.[22] Warren McCleskey and Michael Hardwick might have had their claims vindicated by a vote of 8-6.[23] Justice Powell would have been a simple dissenting voice, rather than a remorseful decisive vote.[24]

I have used various assumptions to construct a scenario involving dramatic shifts in Court membership. Even with these changes, though, would legal doctrine have been transformed fundamentally? Would the Court really have stood in the way of a nation bent on executing its fellow citizens? Perhaps a victory for Hardwick would have undermined various forms of social and legal discrimination, but again it is hard to say. At least in the currently debated context of the military, it seems doubtful, and outside of that context, *Bowers* provided no obstacle to *Romer*.[25] Moreover, while Carter appointments might have created precedential barriers for the Rehnquist Court, the Reagan judicial revolution fizzled anyway. Robert Bork might have been a revolutionary; Anthony Kennedy is not.[26]

Andrew Johnson. See John M. Lawlor, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. Pa. L. Rev. 967, 968 n.9 (1986). Of these, only President Carter served a full four-year term.

20. Perhaps it would be less convoluted merely to note that 1907 and 1908 produced a bumper crop of four Supreme Court Justices: Justices Marshall, Burger, Powell, and Blackmun. Justice Brennan, born in April, 1906, just missed this boom.

21. 481 U.S. 279 (1987) (5-4 decision rejecting challenge to alleged racially discriminatory administration of capital sentencing scheme).

22. 478 U.S. 186 (1986) (5-4 decision allowing criminal prosecution of homosexual sodomy).

23. This tally conservatively assumes that President Ford's hypothetical additional appointment would vote with the majority. President Ford's actual appointment, Justice Stevens, voted with the dissent in these cases.

24. See John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 451, 530 (Scribners, 1994) (discussing Justice's Powell's expressing regret at these decisions after his retirement).

25. *Romer v. Evans*, 517 U.S. 620 (1996) (striking down state constitutional amendment that prohibited laws barring discrimination based on sexual orientation); see id. at 640 (Scalia, J., dissenting) (noting that majority opinion fails to mention, much less distinguish, *Bowers*).

26. See Ackerman, *We the People: Transformations* at 394-95 (cited in note 16); see also Bruce A. Ackerman, *Transformative Appointments*, 101 Harv. L. Rev. 1164 (1988). It is also difficult to predict how President Carter's nominees actually would have shifted the Court. President Carter's Attorney General, Griffin Bell, spent much energy battling what he perceived to be the liberal wing of the Democratic Party, as embodied in Vice-President Mondale. See Griffin B. Bell with Ronald J. Ostrow, *Taking Care of the Law* 23-36 (William Morrow, 1982). These fights sometimes extended to the issue of judicial nominations. See id. at 40-42. As for Attorney General Bell's views on nominations, see id. at 40-41 ("So successful were we in placing women on the bench . . . that I thought the need for affirmative action in picking federal judges had run its course.").

Aside from specific nominees, would the adoption of President Roosevelt's proposal have undermined judicial independence, indeed threatened the rule of law? Again, the overwhelming message of the episode appears to be that the Court, through appointment or otherwise, eventually follows the lead of a President who helps to engineer a real constitutional revolution. A President who attempts to alter the appointment mechanism pays a steep political price.

Perhaps these brief reflections merely emphasize that if one looks for constitutional revolutions, particular nominations are dinosaurs, mattering much less than the fluttering political realities. I believe that this message, if true, should be reassuring to a democracy.

Let Joe Robinson live. The nation would survive.[27]

27. Indeed, had Robinson lived and managed to push the President's plan through Congress, this conservative southern Democrat might have received the Supreme Court nomination that Roosevelt had apparently promised to him, but gave to Hugo Black. See Leuchtenberg, *The Supreme Court Reborn* at 180 (cited in note 8). In view of the comparative political dispositions of Black and Robinson, a dead Senator Robinson thus might have done more to assure robust judicial support for the New Deal revolution than a living (Justice) Robinson.