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SYMPOSIUM

INTRODUCTION: "WHAT IF" COUNTERFACTUALS IN CONSTITUTIONAL HISTORY

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Counterfactual reasoning is a staple of legal analysis. When juries are asked to determine whether "but for" causation exists in a tort suit, they must imagine that the defendant's wrongful conduct did not occur and decide whether the plaintiff still would have been harmed. When appellate courts review an error in a criminal trial to determine if it was harmless, they must pretend that the error never happened and ask themselves if the jury would have acquitted the defendant. And when judges construe a contract following an event that was not foreseen by the agreement, they frequently approach the case by thinking about what the parties would have done if they had known about the problem during the drafting process.

When we turn to constitutional law, counterfactuals might seem more whimsical than practical. Of course, it is fun to consider whether the Constitution would have survived if George Washington had died of the anthrax that he contracted a few months after he was inaugurated in 1789.[1] Or whether President Franklin D. Roosevelt's Court-packing plan would have become law if Justice Owen Roberts had been stubborn in the first half of 1937.[2] And exploring a fun set of topics is a perfectly good reason to hold a symposium. My claim, though, is that asking "what if" is also a handy tool for attorneys and scholars grappling with complex constitutional issues and should be embraced here just as it is in torts, criminal law, and contracts.

The most difficult challenge for constitutional lawyers is the scarcity of precedent. That assertion might sound odd. More than two centuries of constitutional practice should have produced many relevant authorities, and certainly there are some doctrinal areas that are dense. Unfortunately, that is not the case with respect to the most controversial issues. They involve extremely low probability events that need a much longer time horizon to occur enough

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I want to thank all of the panelists and the student organizers for making this Symposium such a terrific event.

1. *See* RON CHERNOW, WASHINGTON: A LIFE 586 (2010) ("[N]o sooner had the federal government been formed than its president lay in mortal peril.").

2. *See generally* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010) (providing an excellent account of the "switch in time").

times to yield meaningful guidance. A disputed presidential election that turned on the recount procedures in a single state, for instance, was the legal equivalent of a five-hundred-year flood and generated unsatisfying Supreme Court opinions partly because people felt that the Justices followed their partisan preferences in the absence of law.[3]

A common response to novel constitutional issues is the use of hypotheticals. Take the ongoing litigation over the individual health insurance mandate enacted in 2010.[4] There is no case that addresses the main claim against the provision; namely, that Congress may not require activity (or regulate inactivity) under the Commerce Clause, in large part because this is an unprecedented exercise of that power. Consequently, lawyers have spent a great amount of time arguing about whether Congress can force people to buy broccoli as a public health measure.[5] That is not because a broccoli statute is imminent. Instead, the hypothetical gives people something concrete that they can use to evaluate the legal theories being advanced to support or undercut the constitutionality of compulsory health insurance.

Counterfactuals are just another type of hypothetical. They are, though, superior to a fictional example because they are grounded in actual facts. While care must be taken to avoid making unreasonable assumptions or extrapolations in a "what if" scenario, these kinds of case studies can greatly multiply the interpretive resources available to lawyers who need help. The wide range of topics covered by the participants in this Symposium illustrate the potential of this method, which I think is destined to become more prevalent in constitutional discourse over the coming years. And even if I am wrong about that, these essays are still fun to read.

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3. *See* Bush v. Gore, 531 U.S. 98 (2000).

4. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

5. *See* Liberty Univ., Inc. v. Geithner, No. 10-2347, 2011 WL 3962915, at *40 (4th Cir. Sept. 8, 2011) (Davis, J., dissenting) ("[R]ecognizing that the uninsured's passing on $43 billion in health care costs to the insured constitutes a substantial effect on interstate commerce in no way authorizes a purchase mandate for broccoli or any other vegetable."), *petition for cert. filed*, (U.S. Oct. 7, 2011) (No. 11-438); Florida *ex rel.* Attorney Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1351 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) ("The parade of horribles said to follow ineluctably from upholding the individual mandate includes the federal government's ability to compel us to purchase and consume broccoli, buy General Motors vehicles, and exercise three times a week."), *petition for cert. filed*, (U.S. Sept. 27, 2011) (No. 11-400).