

## WOULD YOU, COULD YOU, CHANGE A THING?

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This game has two parts: pick some aspect of constitutional law or constitutional history and change or erase it; then explain what difference it makes. The first part of the invitation is irresistible. Gone with a blink are *Dred Scott*, *Korematsu*, the slavery clauses of the Constitution, defiance of the Supreme Court's decisions in *Worcester v. Georgia* and *Brown v. Board of Education*. Indeed, because constitutional law and constitutional history are so tied up with all of our history, maybe it would also be fair game to eliminate the Trail of Tears, the assassinations of Kennedy, King, Kennedy, and Lincoln, lynchings of countless African-Americans, of Leo Frank, race riots, Vietnam, Kent State. What awesome power, to remove all those mistakes, all that pain and suffering in an instant.

It's the second part that is the problem. Parlor games are fun, and I don't mean to be a spoilsport. But having been granted the awesome power to change the constitutional past, it may be worth considering the relationship of that constitutional history to who we are today as a people. We are fundamentally formed by our history. Change our history and we necessarily are changed.

There are three parts to this argument. They are self-contradictory in certain ways, although their ultimate point is the same. First, I argue that the premise of the game may be flawed: we may be so fundamentally who we are that we do not have the choice of eliminating any one untidy aspect of our past. Second, I suggest that because we fundamentally are who we are, it is possible that even if particular changes were made, the future would have remained much the same. Finally, I explain that because the very events we most would like to eliminate likely

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were quite important, their elimination is equally likely to be most consequential in ways we cannot predict.

My point is this: we should be cautious of changing anything even if we could. There is an intimate relationship between America as a people and our constitutional history. It would require an extraordinary degree of confidence to eliminate even the most horrible of tragedies and remain certain that in the long run it would not change us for the worse.

## I

We have been invited to change some aspect of the past. That presumes that we can. The power we have been granted is, for example, to take an eraser and rub out that which is troubling, abhorrent, wrong-minded or tragic.

But can we truly change the past? Even in the context of a parlor game, it is worth examining whether the events and forces that brought us to the point we would like to excise themselves leave way for the surgery.

Certainly some things we would like to change appear to be serendipity and are susceptible to alteration or even "correction." Any 5-4 decision of the Supreme Court could seem an accident of when the case arose. A good choice for this parlor game is the fact that Franklin Roosevelt got no appointments to the Court during his first term in office: replace one of the four Horsemen with a Roosevelt appointee and the entire Court-packing brouhaha might have been eliminated.

But there are other events that are so ingrained in who we are that it is impossible to think we can pluck them away given all the history that brought us to that point in the first place. Another obvious candidate for this game is removing the slavery clauses from the Constitution. Yet, the clauses that were placed in the Constitution recognizing and regulating government authority over the slave trade were put there after serious debate and reflection. They are the product of a long history of events that preceded the decision. Those clauses represented a compromise of sorts, albeit a regrettable one. As unfortunate as it seems to us, it might have been impossible for our forebears to have resolved the matter in any different way.

How then, can we claim the ability to achieve what they could not? Some aspects of constitutional history were the inevitable result of the forces that brought our ancestors to that point.

This game must work backward as well as forward. If changing some aspect of constitutional history has forward-looking consequences that require chronicling, it also behooves us to explain the course of events that could have brought us to the changed pass. For the very reason that changes at time X influence X+1, it may be impossible to imagine moving from a fixed X-1 to a changed X.

## II

The game also presumes that we can change the course of history by changing any one event. Because some aspects of our constitutional being are so fundamental, however, even some of the most dramatic events in our history may not have mattered as much in the long term as we think. In other words, give or take any event, we still might be who we are and where we are.

Suppose there had never been a Constitutional Convention. Would we stand on very different turf? The problems the country faced were serious ones and needed to be solved. Perhaps the union would have dissolved into chaos, but the more likely result is that Constitution or not, the confederation of states in the original union would have found ways to develop stronger central structures to hold the whole together. We might today not have a Constitution of 1787, but some other seminal solution might have presented itself.

Suppose there had never been a Bill of Rights. Is it reasonable to assume we would be without the liberties that we enjoy today? Doubtful. Even the Bill of Rights we do have had little content and affected few lives until relatively recently. The First Amendment was slight relief in the face of the Alien and Sedition Acts. Indeed, the First Amendment did not receive serious attention from the Supreme Court until early in this century, and even then, the record was none too impressive. The Fourth Amendment did not require exclusion of evidence until the *Weeks* decision in 1914. That Amendment still didn't have much bite until the exclusionary rule was extended to the States in the 1961 decision in *Mapp v. Ohio*. Indigents did not receive counsel until the *Gideon v. Wainwright* decision in 1963. The liberties evolved when we needed them or when we were ready to recognize them; their development had little to do with the supposedly momentous event of adding them to the constitutional text.

Consider as well how quickly after Reconstruction and ratification of the Reconstruction Amendments the Supreme Court abandoned any pretext that those Amendments had made a difference. In the *Slaughter-House Cases* the Supreme Court denied that the Reconstruction Amendments had in them “any purpose to destroy the main features” of the pre-existing federal system. Similarly, the *Civil Rights Cases* took a narrow view of Congress’ powers under those amendments, ensuring remarkable fidelity to the “provisions of the original constitution.” It is as though the fundamental changes of those amendments did not even begin to occur until over half a century later. The Radicals were visionaries in a sense, but their vision turned out to be one quite far off in the future, and who is to say we would not have ended up in that future anyway?

The point is not that important events like the framing of the Constitution, the ratification of the Bill of Rights, or of the Reconstruction Amendments did not matter. Rather, they mattered so much that even if history had unfolded differently, we might still be where we are. Our fundamental nature, and the events that preceded, brought us to where we are. Any one thing might not have made a difference.

### III

Alternatively, changing any one event might have made too much of a difference. Although science fiction often has it to the contrary, in theory one would imagine that the greater the event, the more dramatic its impact on history. The betting would be that news-grabbing moments were those that had the most impact on the future.

Suppose I was wrong in the prior section, and that changing some past events might affect the future. And suppose further, as we’ve been asked to do, that we could pick an event and change it. My guess is that many people would choose to change tragic moments in constitutional history: recognizing slavery in the original Constitution, or Supreme Court decisions that seem on reflection to be immoral, such as *Dred Scott*. The most traumatic of events shape us in ways that are sometimes admirable and sometimes troubling. Can we be so certain of which would result?

Take the Civil War, surely one of the most traumatic events of our history. Hundreds of thousands of lives were lost, the country ravaged. But out of that war emerged central ideas of

human equality. As the prior section argued, implementation of many of these ideas was too long delayed, and some still elude us. Nonetheless, can we be certain of the progress absent that horrible conflagration? And the war served to strengthen resolve not to permit sectional differences to divide us, altered our politics, relocated our people. It is impossible to tease out the changes that were wrought, let alone to be certain of where we would be without this horrible tragedy. If nothing else the war ended formal slavery, a debt that even today we pay off.

Take the assassination of a beloved President. Lincoln's assassination gave us Andrew Johnson, the turmoil of Johnson's presidency, an impeachment trial, and a great struggle over Reconstruction. If Lincoln had remained, the path might have been smoothed considerably. By the same token, having Johnson in the opposite corner from the Radical Republicans sharpened the issues, raised the stakes, ensured the relevant principles were enshrined in constitutional language. With Lincoln, absent Johnson, compromise might have been the watchword of the day, with less lasting effect.

Of course, it is not possible to know if the happy stories I am telling here are necessarily true. It is equally likely Lincoln's death slowed the return to peaceful relations, and that the conflict over Reconstruction between Andrew Johnson and the Congress created wounds that festered for a long time. All this is unknowable, but that only serves to underscore the humility with which we might face sweeping any of it away.

#### IV

There is a great deal that we can learn from engaging in games like the one we are playing. Although "just a game," it forces us to think seriously about what was good and bad in our constitutional history, about how that history might have been different, about what we regret, and about what we cherish. Most important, because the Constitution is not a finished document and never will be, it asks us to think seriously about what we might do differently.

But in playing this game one thing we might consider is the relationship of constitutional history to who we are as a constitutional people. We are shaped by that history, and all of our history is embodied in how we see the Constitution. Some of that constitutional history has been profoundly troubling, desperate and unhappy. People have suffered, needs have gone unmet, we

have made bad decisions. Other parts of that experience have been ennobling. We have fought for democracy, for equality, for the rights of self-determination. But today, we are the sum total of that history, and anyone anxious to change the history must consider both what course could have taken us to the juncture that is to be changed, and how that change in the past would alter us today.