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A Modest Proposal On Supreme Court Unanimity To Constitutionally Invalidate Laws

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A MODEST PROPOSAL ON SUPREME COURT UNANIMITY TO CONSTITUTIONALLY INVALIDATE LAWS—Dwight G. Duncan¹

There is a problem in our constitutional history: the problem of split Supreme Court decisions invalidating democratically enacted laws. From Dred Scott² to Lochner³ to Roe v. Wade⁴ to Citizens United,⁵ and even the recent Second Amendment decisions of Heller⁶ and McDonald,⁷ these patently fallible decisions on controversial political and social issues have divided the nation, politicized the Court, poisoned the Supreme Court nomination process and thwarted the political branches and democratic governance. Requiring Supreme Court unanimity to overturn legislation on constitutional grounds would therefore be morally and politically desirable. Why that is so is the subject of this article. I leave for another occasion the legal and practical questions of how to implement such a unanimity requirement.

While the audacity of this idea is perhaps remarkable, flying as it does in the face of our unbroken history of Supreme Court cases decided by majority vote of the Justices, I would ask the readers' indulgence or suspension of disbelief for long enough to at least consider my argument. Since I have no power to implement this idea, which depends solely on the cogency of the reasons which support it – and I invite discussion and contestation of the idea – the proposal can truly, if somewhat ironically, be called “modest.”

¹ Dwight G. Duncan is a professor at the University of Massachusetts School of Law in Dartmouth, MA. I wish to gratefully acknowledge the help I have received on this article from various colleagues and friends, starting with our Dean Eric Mitnick, Professor Richard Peltz-Steele, and ace student editor Ethan Dazelle. More recently, my good friend Edward Boyer has helped with the editing and ideas, and my current law student David Melanson has helped with the footnotes.

² Dred Scott v. Sandford, 60 U.S. 393 (1856).

³ Lochner v. New York, 198 U.S. 45 (1905).

⁴ Roe v. Wade, 410 U.S. 113 (1973).

⁵ Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

⁶ D.C. v. Heller, 554 U.S. 570 (2008).

⁷ McDonald v. City of Chicago, 561 U.S. 742 (2010).

Before expounding on the subject of this article, however, I think it important to share with the reader, briefly, some personal background and beliefs. I have taught, or tried to teach, Constitutional Law for over a quarter century. By Constitutional Law I mean Supreme Court case law purporting to interpret the U.S. Constitution. This can be a challenge, partly because familiarity can breed contempt, or at least a kind of jaundice; and I must admit I've become more cynical about a subject where the Constitution means just what a majority of nine appointed lawyers say it means, for better or worse, regardless of what it actually says and originally meant. After all, the Justices interpret the Constitution through lenses colored by their own personalities and political perspectives. So do we all, of course.

I also have been frustrated by the Supreme Court's questionable deciding on the basis of the U.S. Constitution issues like abortion and gay marriage. The effect is to remove these contentious issues from the political process and make them unamenable to democratic compromise by deciding them as a matter of constitutional right in which the prevailing side takes all. Likewise, objections could easily be raised to the questionable invalidation, on constitutional grounds, of gun control laws⁸ and campaign finance regulation⁹ – also decided by split vote, even by 5-4 vote of the Supreme Court. Count me as skeptical of rule by judge.

Moreover, I find constitutional expectations to be unreasonable at times. Parties to cases, and even the general public, somehow expect the U.S. Supreme Court to resolve all the issues presented to the Court, and ultimately all the issues of the day, irrespective of whether the Constitution and the laws actually address those issues. So, the Justices can dragoon the Constitution, by hook or by crook, in the event no ordinary legal basis is at hand, to resolve cases

⁸ See *Heller*, 554 U.S. at 570.

⁹ See *Citizens United*, 558 U.S. at 310.

before them. As the Pulitzer-Prize-winning musical "Of Thee I Sing" noted in song in the early 1930's,¹⁰ "On that matter no one budges, for all cases of the sort are decided by the Judges of the Supreme Court"¹¹ (It sounds better if Ira Gershwin's lyrics are sung to the music of George Gershwin, of course).

The text of the Constitution, though, cannot be shoehorned into being made capable of resolving every case. To the extent that the Constitution does not decide the question at hand, freedom prevails or should. One might even cite the religious maxim, "In necessariis unitas, in dubiis libertas, in omnibus caritas" – "Unity in necessary things, freedom in doubtful ones and love in everything,"¹² only applying it to a constitutional interpretation.

CONSTITUTIONAL INVALIDATION

With this in mind, I return to the subject of this article. My concern is solely with Supreme Court split or non-unanimous decisions that purport to invalidate laws, regulations, decrees or government practices—whether legislative, executive, or judicial in character—on the grounds that the said rules or practices—whether national, state or local in scope—violate the U.S. Constitution. Cases decided on the basis of federal laws and regulations, or for that matter state laws or regulations, in contrast, do not generate the same concerns. For these purely statutory or regulatory cases can always be reversed in the ordinary course by new laws passed by Congress or state legislatures or new executive orders or regulations formulated by the executive or administrative agencies, whether federal or state. So, if the Supreme Court makes mistakes in deciding such matters, the mistake can be corrected fairly simply through representative government and the democratic process.

¹⁰ *The 1932 Pulitzer Prize Winner in Drama*, The Pulitzer Prizes, <http://www.pulitzer.org/winners/george-s-kaufman-morrie-ryskind-and-ira-gershwin>.

¹¹ Ira Gershwin, "Of Thee I Sing," (1931).

¹² Marco Antonio de Dominis, *De republica ecclesiastica* 676 (1617).

But where unelected Justices invalidate contested laws as a matter of constitutional right, and they get it wrong, then they remove effective sovereignty from the people; for there is no reasonably practical way to undo the harm. The ruling is the final word, un--appealable to, and un-amendable by, the political branches. Apart from the Supreme Court eventually overruling itself, for example as it did when the Supreme Court overturned Lochner v. New York in the 1930's (allowing the regulation of working hours, in spite of Lochner's ruling that freedom of contract prevented such regulation),¹³ there is no democratic recourse short of attempting to amend the U.S. Constitution or to impeach the offending Justices. And that recourse is rarely possible (never in the case of impeachment of Supreme Court Justices).

Now that I have clarified what I am and am not writing about, let's narrow in on the assertion that unanimity is both morally and politically desirable. It has already been suggested earlier, but let me hone in on it a bit more. The Constitution begins with the words "We the people," and the theory is that sovereignty ultimately comes from the people:¹⁴ government "of the people, by the people [and] for the people," in the immortal words of Lincoln's Gettysburg Address.¹⁵ However, if the Court can invalidate laws and regulations enacted by the political branches through the democratic process on the grounds that they violate the Constitution, even if that is just on the say-so of a bare majority of Supreme Court Justices, it renders decisions morally suspect; in that this admittedly arguable exercise of judicial review is undemocratic, unless the majority rule is based on a constituency of nine.

I call this feature of judicial review a central paradox because this tug-of-war between people and elites over what rules should govern them and who gets to decide is at the heart of

¹³ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁴ U.S. CONST. pmb1.

¹⁵ Abraham Lincoln, Gettysburg Address (1863).

our political and legal history, from civil war to civil rights to culture wars to political correctness. In other words, non-unanimous constitutional decisions short-circuit the political and legislative processes. Where legislation is overturned based on a 5-4 split vote, the problem is magnified. It means that the constitutional issue has been settled by the swing vote, usually Justice Kennedy in recent history.¹⁶ This gives new meaning to the principle of “one person, one vote.”¹⁷ It means that his is the only vote that ultimately counts.

The Massachusetts Constitution says that our government should be one of laws and not of men.¹⁸ But this 5-4 stuff means that it is palpably one of men (or women, since Justice Sandra Day O’Connor was also the swing vote in her day)¹⁹ and decidedly not the rule of law. If a constitutional interpretation is truly correct as a legal matter, as opposed to a political matter, then it should be able to convince the entirety of the Court, irrespective of political affiliation. Constitutional decisions that are less than unanimous reflect merely political choices, policy preferences of the Justices.

A related problem with non-unanimous and thus non-authoritative Supreme Court decisions invalidating legislation is, as touched upon earlier, the practical difficulty of overturning them. Because, under Article V, repeated super majorities are necessary to amend the Constitution (two thirds of both houses of Congress and three-quarters of the states, apart from the never-employed state-initiated convention route).²⁰ It has only happened a handful of times in our history.²¹ That recourse is virtually impossible for any socially controversial issues,

¹⁶ See, e.g., *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

¹⁷ *Reynolds v. Sims*, 377 U.S. 533, 576 (1964).

¹⁸ M.A. CONST. Pt. 1, art. 30.

¹⁹ See, e.g., *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003).

²⁰ U.S. CONST. art. V.

²¹ See *The Constitution: Amendments 11-27*, Nat’l Archives (Oct. 6, 2016), <https://www.archives.gov/founding-docs/amendments-11-27>.

which are often the subject of the most divisive and invidious Supreme Court decisions. And while impeachment of sitting Supreme Court Justices have been attempted several times in our history, it never actually succeeded.²² So, the threat of impeachment is a paper tiger at most.

No, if the Supreme Court makes a mistake in interpreting the Constitution to invalidate laws, significant time amounting to decades, or even a Civil War, must intervene as happened, for example, to overturn the notorious 1857 Dred Scott decision²³ via the Thirteenth²⁴ and Fourteenth Amendments.²⁵ In contrast, the requirement of unanimity would assure that the Court's reading of the Constitution was truly unimpeachable and authoritative. It would also depoliticize the current bitterly partisan judicial nomination and confirmation process of presidential appointments to the Supreme Court;²⁶ and for these reasons it would be both morally and politically desirable. The country is currently very divided and polarized.²⁷ The U.S. Constitution, as our fundamental law, should be a force that unites Americans and inculcates respect for law. Split constitutional decisions that invalidate democratically enacted laws do not help.

WHAT WOULD HAPPEN IF A RULE OF UNANIMITY WERE ADOPTED?

In order to test the accuracy of this assertion, we will examine our history. In reviewing the judicial history, I would like to consider the cases that were decided unanimously – separately and apart from the cases marked by dissent, sometimes decided 5-4. This is because

²² See Samuel H. Smith & Thomas Lloyd, Trial of Samuel Chase, An Associate Justice of the Supreme Court of the United States, Impeached by the House of Representatives, for High Crimes and Misdemeanors, Before the Senate of the United States 5-8 (1805), reprinted in Stephen B. Presser & Jamil S. Zainaldin, Law & Jurisprudence in American History: Cases & Materials, 252-276 (6th ed., 2006).

²³ See *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

²⁴ U.S. CONST. amend. XIII, § 1.

²⁵ U.S. CONST. amend. XIV, § 1.

²⁶ See The Editorial Board, *The Supreme Court as Partisan Tool*, N.Y. Times (Apr. 4, 2017), <https://www.nytimes.com/2017/04/04/opinion/the-supreme-court-as-partisan-tool.html?mcubz=0>.

²⁷ *Id.*

unanimous cases have unimpeachable authority: cases like Brown v. Board of Education, which declared segregation in the public schools to be a violation of equal protection of the laws;²⁸ as did its companion case of Bolling v. Sharpe,²⁹ for schools in the District of Columbia. Brown is the gold standard for good constitutional decision-making by the Court, and Chief Justice Warren was appropriately careful to work to ensure its unanimity.³⁰

Another example of unanimous constitutional decision-making invalidating laws is Marbury v. Madison,³¹ which established the principle of judicial review of the constitutionality of legislation and in the process invalidated section 25 of the Judiciary Act of 1789.³² These cases, while not technically infallible, are considered to be definitive, even if they were not originally, and widely accepted throughout our history as truly authoritative. The same note of unimpeachable authority extends also to the unanimous decision in McCullough v. Maryland³³ defining the reach of the “necessary and proper clause”³⁴ of Article 1, section 8 and the consequent unconstitutionality of Maryland’s attempt to tax the Second Bank of the United States.³⁵

THE HORROR, THE HORROR

The split decisions are obviously more problematic. On a number of occasions, the original minority view,³⁶ with the passage of significant time, became the eventual majority

²⁸ Brown v. Bd. of Educ., 347 U.S. 483 (1954).

²⁹ Bolling v. Sharpe, 347 U.S. 497 (1954).

³⁰ See Alden Whitman, *For 16 Years, Warren Saw the Constitution as Protector of Rights and Equality*, N.Y. Times (July 10, 1974), <http://www.nytimes.com/1974/07/10/archives/for-16-years-warren-saw-the-constitution-as-protector-of-rights-and.html?mcubz=1>.

³¹ Marbury v. Madison, 5 U.S. 137 (1803).

³² *Id.* at 178.

³³ McCullough v. Maryland, 17 U.S. 316 (1819).

³⁴ U.S. CONST. art. 1, § 8.

³⁵ McCullough. 17 U.S. at 436-437.

³⁶ See Lochner v. New York, 198 U.S. 45, 75 (5-4 decision) (Holmes, J., dissenting).

view.³⁷ It is in this category of cases that one finds the really problematic precedents. We can start with Dred Scott, and add Lochner in for good measure. (The academic consensus on those cases is unanimous, or virtually so.)

Dred Scott v. Sandford, of course, decided that African Americans were not citizens and could not sue in federal court.³⁸ Furthermore, it held that the right of slaveholding was protected by substantive due process of the Fifth Amendment (in what was the first substantive due process case),³⁹ and that therefore the Missouri Compromise of 1820 (which outlawed slavery in federal territories north of a certain latitude) was unconstitutional.⁴⁰ This decision was only the second time the Supreme Court had constitutionally invalidated a law passed by Congress. It provoked, not to put too fine a point on it, the American Civil War. It took the war and both the Thirteenth⁴¹ and Fourteenth Amendments⁴² to the Constitution to undo the damage that the Dred Scott decision had done. But the decision was not unanimous, as it occasioned two dissents, by Justices Mclean and Curtis to their everlasting credit.⁴³ Had we only recognized as authoritative constitutional decisions that are unanimous in invalidating laws or regulations, Dred Scott would not have had this horrific effect because it was not unanimous, and the debate over slavery would have remained in the political branches.

Lochner v. New York, decided in 1905, decided that maximum hour legislation for bakers was unconstitutional because such legislation violated freedom of contract,⁴⁴ substantively protected from state interference by the Due Process clause of the Fourteenth

³⁷ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

³⁸ *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856).

³⁹ *Id.* at 450.

⁴⁰ *Id.*

⁴¹ U.S. CONST. amend. XIII, § 1.

⁴² U.S. CONST. amend. XIV, § 1.

⁴³ *Dred Scott*, 60 U.S. at 529 (7-2 decision) (McLean, J., Curtis, J., dissenting).

⁴⁴ *Lochner v. New York*, 198 U.S. 45, 64-65 (1905).

Amendment.⁴⁵ It took thirty years for this economic era of substantive due process to be overturned by the Supreme Court,⁴⁶ and in the meanwhile, the Lochner precedent prevented the enactment and enforcement of progressive social legislation for the workplace. Lochner was decided 5-4 and featured a famous dissent by Justice Oliver Wendell Holmes.⁴⁷

Indeed, virtually all the substantive due process cases invalidating legislation, starting with Dred Scott and proceeding through Lochner and Meyer v. Nebraska (invalidating law restricting foreign-language teaching), Griswold v. Connecticut, Roe v. Wade and Obergefell v. Hodges, were split decisions and thus non-authoritative in my view and would disappear as precedent if unanimity were required.⁴⁸ The only substantive due process case that was unanimous and would stand was the 1925 case Pierce v. Society of Sisters,⁴⁹ to be discussed below.

THE GOOD CASES DECIDED UNANIMOUSLY

Leading the parade of great unanimous constitutional decisions that invalidated legislation is, as I have noted, Brown v. Board of Education.⁵⁰ The holding of that case, of course, was enforced unanimously in Cooper v. Aaron, which rejected, “a claim by the Governor and Legislature of a state that there is no duty on state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution.”⁵¹ Pierce v. Society of Sisters, another great unanimous decision, ruled that a statutory state monopoly on education violated the parent’s substantive due process rights to direct the upbringing and

⁴⁵ *Id.* at 52.

⁴⁶ See W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

⁴⁷ Lochner, 198 U.S. at 65 (5-4 decision) (Holmes, J., dissenting).

⁴⁸ See Dred Scott, 60 U.S. at 393; Lochner, 198 U.S. at 45; Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

⁴⁹ Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).

⁵⁰ See Brown v. Bd. of Educ., 347 U.S. 483 (1954).

⁵¹ Cooper v. Aaron, 358 U.S. 1, 4 (1958).

education of their children.⁵² Also in line with these cases is the 1960's case of New York Times v. Sullivan, which said that freedom of speech and of the press under the First Amendment, as applied to states via the Fourteenth,⁵³ entailed a higher standard of proof before libel damages could be recovered by public officials,⁵⁴ regardless of state law which established a lower standard of proof.⁵⁵

One could argue with the textual basis in the Constitution for such decisions, of course, but the fact that they were unanimous and widely accepted in practice makes them authoritative nonetheless. In the freedom of religion area, the Court recently and unanimously decided that both the Establishment clause and the Free Exercise clause of the First Amendment require a ministerial exemption from employment discrimination laws, so that churches rather than government would ultimately decide who are authorized teachers of their religion.⁵⁶ That was in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC in 2012.⁵⁷

Gideon v. Wainwright, a unanimous 1963 decision, extended the right to counsel to state proceedings and ruled that the government had to pay for legal representation for indigents in a criminal proceeding.⁵⁸ Of course, there was also the Court's unanimous decision in Loving v. Virginia in 1967 that bans on interracial marriage violated the Equal Protection clause.⁵⁹ Similar was Shelley v. Kraemer from 1948, invalidating the enforcement of racially restrictive covenants under the Equal Protection clause of the Fourteenth Amendment.⁶⁰

⁵² Pierce, 268 U.S. at 534-535.

⁵³ New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

⁵⁴ *Id.* at 279-280.

⁵⁵ *Id.* at 283-284.

⁵⁶ Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188-189 (2012).

⁵⁷ *Id.*

⁵⁸ Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963)

⁵⁹ Loving v. Virginia, 388 U.S. 1, 12 (1967).

⁶⁰ Shelley v. Kraemer, 334 U.S. 1, 20-21 (1948).

Furthermore, if I may be permitted a personal favorite, another unanimous constitutional decision striking down the application of a state law would be Hurley v. Irish – American Gay, Lesbian and Bisexual Group of Boston, wherein the Supreme Court unanimously decided in 1995 that application of state public accommodation law to a parade violated the private parade organizer’s freedom of speech and expressive association.⁶¹ It is a personal favorite because I wrote the briefs for petitioner Wacko Hurley in that case. Under my suggested approach of recognizing only unanimous constitutional decisions invalidating laws as authoritative, all these previously mentioned unanimous judgments invalidating laws or their application would continue to stand.

THE BAD SPLIT DECISIONS

In contrast, however, the controversial non-unanimous decisions like Roe v. Wade and Planned Parenthood v. Casey, the abortion cases,⁶² and U.S. v. Windsor and Obergefell v. Hodges, the gay marriage cases,⁶³ would not stand as authoritative. The effect would be to return these divisive subjects to the political arena, where compromise could or would operate, rather than an all-or-nothing judicial approach based on the inflexible rights-based assertion of individuals.

While some might argue, “that’s all well and good for social conservatives like you,” they should not lose sight of the fact that the recently controversial 5-4 decision of Citizens United invalidating campaign finance regulations under the First Amendment as applied to corporations,⁶⁴ and the Heller and McDonald decisions, invalidating gun control legislation

⁶¹ Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 581 (1995).

⁶² *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

⁶³ *See* U.S. v. Windsor, 133 S.Ct. 2675 (2013); Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

⁶⁴ Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 372 (2010).

under the Second Amendment,⁶⁵ would also be non-operative because non-unanimous. Liberals would presumably rejoice at that turn of events (Fairly recently, Justice Ruth Bader Ginsburg expressed her hopes along these lines in an interview with the New York Times).⁶⁶ Indeed, the split Court decisions invalidating affirmative action plans,⁶⁷ or invalidating some of the Voting Rights Act extension,⁶⁸ would also fail.

Of course, my “modest” proposal is not without a few hiccups, bumps and limits. It would, for example, rob certain constitutional cases of their precedential value, since they were split decisions. And so the dormant commerce clause cases, which establish the principle that states may not discriminate against out-of-state commerce,⁶⁹ nor excessively burden interstate commerce,⁷⁰ if the burden clearly exceeds the putative local benefit,⁷¹ would no longer hold sway. Likewise, cases like Miranda v. Arizona,⁷² that have become fairly well-settled features of our legal landscape, would no longer control if my proposal were applied retroactively. But if rules like the Miranda warnings are such a good idea that time has indeed demonstrated their wisdom, then there would be no problem with legislatively and democratically enacting them.⁷³ The same might be said of gay marriage or permissive abortion laws, if that’s what the political reality is—as opposed to a judicially mandated fiat supposedly grounded in the U.S. Constitution.

⁶⁵ See *D.C. v. Heller*, 554 U.S. 570, 635 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

⁶⁶ See Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. Times (July 10, 2016), <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html?mcubz=0>.

⁶⁷ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁶⁸ See *Shelby County, Alabama v. Holder*, 133 S.Ct. 2612 (2013).

⁶⁹ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁷⁰ See *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

⁷¹ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁷² *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷³ See generally *id.*

Indeed, the enactment of such laws would represent a solemn democratic ratification of the wisdom of the Supreme Court; as happened, for example, when the Civil Rights Act of 1964⁷⁴ effectively ratified and extended the Supreme Court's unanimous 1954 decision in Brown v. Board of Education.⁷⁵ Such cases have become "constitutional bedrock." It would be inconceivable for these to disappear now that the source of sovereignty, the people, so ardently demand such things from their government.

I fully recognize that some legislators rather like having controversial issues (e.g., gun rights, abortion rights, gay marriage rights and freedom from campaign finance limitations) being decided by the courts, because then they do not have to take a stand pro or con and can claim that this matter is out of their hands and rests with the courts. But allowing the shirking of personal responsibility by politicians, and passing the buck to the courts, are not an acceptable form of representative democracy. Indeed, resting ultimate responsibility for our laws with the political branches as opposed to the courts may help cure legislative dysfunction.

A CASE TO THE CONTRARY

One split constitutional decision that was of enormous importance and precedential value is Baker v. Carr,⁷⁶ the Warren Court decision from the 1960's that subjected the apportionment of legislatures to judicial review under the equal protection clause.⁷⁷ In so doing, it reversed a longstanding holding that apportionment was a political question and thus not justiciable by the courts.⁷⁸ The case involved vigorous dissents from Justices Frankfurter and Harlan.⁷⁹ In

⁷⁴ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

⁷⁵ Brown v. Bd. of Educ., 347 U.S. 483 (1954).

⁷⁶ Baker v. Carr, 369 U.S. 186 (1962).

⁷⁷ *Id.* at 237.

⁷⁸ See Colegrove v. Green, 328 U.S. 549 (1946).

⁷⁹ Baker, 369 U.S. at 266 (6-2 decision) (Frankfurter, J., Harlan, J., dissenting).

overturning the egregiously disparate state legislative districts in Tennessee, the decision rectified an obvious unfairness—departure from the equal principle of "one person, one vote."⁸⁰ Following a rule of unanimity to invalidate the practice on that constitutional basis, however, would mean there would be no such result. Is that really defensible? How can a non-representative legislature be expected to reform itself in the direction of more equal representation? In all honesty, I do not think that the rule of constitutional unanimity would be cost-free.

Under my proposal the Supreme Court would have to wait until the judgment of unconstitutionality became unanimous. I suspect that would not be difficult nowadays, of course, after the path-breaking precedent of Baker v. Carr.⁸¹ But one of the progeny of that precedent of Supreme Court oversight of equal voter strength was Bush v. Gore,⁸² a split decision on constitutional grounds that rightly lives in judicial infamy. To have the 2000 election be resolved by the political branches, and not by the Court, would be a historical bonus. The fact that it would annoy the winners is just a perk.

As suggested above, there is a practical issue that needs to be addressed: would such a rule of constitutional unanimity in order to invalidate laws, be applied retroactively? Since the reason for such a rule is based on the "bloopers" of history, the whole point of the proposal is to clear up the mess retroactively and not just on a going-forward basis. I assume the answer to this would depend upon how many people are, like I am, tired of leaving life-changing issues in the hands of one appointed lawyer. But, as a practical matter, the Court could simply refuse to follow such non-unanimous precedent in future cases.

⁸⁰ See Reynolds v. Sims, 377 U.S. 533, 576 (1964).

⁸¹ Baker, 369 U.S. 186.

⁸² Bush v. Gore, 531 U.S. 98 (2000).

THE LIMITS OF MY PROPOSAL

Moreover, my proposal would not solve all the problems of Supreme Court history. The Korematsu case, since it validated the Japanese exclusion order of the executive branch by a split vote, but did not invalidate it, would still stand.⁸³ So would Buck v. Bell, the notorious 1927 decision over Justice Butler's dissent upholding Virginia's compulsory sterilization law.⁸⁴ Indeed, the problem of Plessy v. Ferguson, the decision from the 1890's which upheld segregation in railroad cars,⁸⁵ since it validated the laws of segregation under the rubric "separate but equal",⁸⁶ would be untouched by my proposed rule requiring unanimity to constitutionally invalidate laws. Nor would the rule affect the split ruling in the controversial Kelo⁸⁷ decision involving the Supreme Court in upholding a dubious exercise of the power of eminent domain.⁸⁸

My rejoinder is that since these problematic regulations originated with the political branches, they could have been corrected by the political branches; for the Supreme Court was not the final word on these matters. The political reaction to the Kelo decision is instructive, as a number of states and municipalities amended their eminent domain laws to require a more specific public use rather than a catch-all public purpose, which Kelo's majority had allowed for.⁸⁹

Finally, there is also a possible problem with the approach: Conditioning the Court's ultimate power of invalidation on constitutional unanimity allows for a hold-out Justice to make unreasonable demands in return for his or her vote. This could lead to a kind of stalemate or

⁸³ Korematsu v. U.S., 323 U.S. 214 (1944)

⁸⁴ Buck v. Bell, 274 U.S. 200 (1927).

⁸⁵ Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

⁸⁶ *Id.* at 540.

⁸⁷ Kelo v. City of New London, 545 U.S. 469 (2005).

⁸⁸ Kelo v. City of New London, 545 U.S. 469, 484 (2005).

⁸⁹ See Dana Berliner, *Looking Back Ten Years After Kelo*, *The Yale L. J.* (July 7, 2015), <http://www.yalelawjournal.org/forum/looking-back-ten-years-after-kelo>.

paralysis of the Court, the inability to achieve unanimity. We could be trading one problem for another, as in “the devil you know” being better than the devil you don’t. But the cost of this would merely empower the political process to resolve the issue, as a practical matter. What would be so bad about that? Further, if a Justice holds out, frequently alone, then it could motivate a political outcry, giving bite to the paper tiger of impeachment or conceivably motivate a constitutional amendment.

Obviously, this modest proposal could not solve all the problems of Supreme Court history and it may not be practicable as a rule of decision-making by the Supreme Court. However, where the stakes are often so high and such serious implications may result from a decision, I urge the reader not to simply dismiss it as an academic exercise meant for the classroom. Recall again the horrifying consequences of assertions made by the majority in the Dred Scott case: 620,000 dead.⁹⁰ And while such a war is now inconceivable, the bad blood stirred and stewing in an already divisive and volatile political climate as a result of such decisions is a consequence civil society could well do without.

The Court’s greatest decisions have been unanimous ones and its lousiest decisions, the bloopers of constitutional history, have been split decisions. Contrast those split decisions invalidating laws on constitutional grounds with the huge success of Brown v. Board of Education where the Court spoke unanimously and authoritatively and eventually succeeded in convincing the country of the rightness of its decision,⁹¹ as evidenced, for example, by the eventual enactment of the Civil Rights Act of 1964.⁹²

⁹⁰ See Drew Gilpin Faust, *Death and Dying*, Nat'l Park Serv., https://www.nps.gov/nr/travel/national_cemeteries/death.html.

⁹¹ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁹² See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

Moreover, to empty split decisions of constitutional force will merely mean that the political branches will be able to deal with the controversial subjects. This will make our republican polity more democratic, legislators more accountable to the people and tend to favor practical compromises over ideological impasse. As one of my heroes Alfred E. Smith, Governor of New York during the 1920's used to say, "The only cure for the evils of democracy is more democracy."⁹³

⁹³ Oxford Dictionary of Modern Quotations 296 (Elizabeth Knowles ed., Oxford Univ. Press 3rd ed. 2007) (Stated by Alfred E. Smith at a speech in Albany, June 27, 1933).