Brigham Young University Journal of Public Law

Volume 33 | Issue 1 Article 4

2-28-2019

A Modest Proposal on Supreme Court Unanimity to Constitutionally Invalidate Laws

Dwight G. Duncan

A Modest Proposal on Supreme Court Unanimity to Constitutionally Invalidate Laws

*Dwight G. Duncan**

I. INTRODUCTION

There is a problem in our constitutional history: the problem of split U.S. Supreme Court decisions invalidating democratically enacted laws. From *Dred Scott*[1] to *Lochner*[2] to *Roe v. Wade*[3] to *Citizens United*,[4] and even the recent Second Amendment decisions of *Heller*[5] and *McDonald*,[6] these patently fallible decisions on controversial political and social issues have divided the nation, politicized the Court, poisoned the U.S. Supreme Court nomination process, and thwarted the balance of power created by the three branches of government which maintains democracy. Because of these consequences, this paper proposes requiring U.S. Supreme Court unanimity to overturn legislation on constitutional grounds, an alternative which is morally and politically desirable. 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 U.S. 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 the argument.

Before expounding on the subject of this article, however, I think it important to share some personal background and beliefs. I have

---

* 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 editor Ethan Dazelle. More recently, my good friend Edward Boyer has helped with the editing and ideas, and my law students David Melanson and Christopher Leazott have helped with the footnotes.

1. Dred Scott v. Sandford, 60 U.S. 393 (1856).
2. Lochner v. New York, 198 U.S. 45 (1905).
3. Roe v. Wade, 410 U.S. 113 (1973).
4. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
5. District of Columbia v. Heller, 554 U.S. 570 (2008).
6. McDonald v. City of Chicago, 561 U.S. 742 (2010).

taught, or tried to teach, Constitutional Law for over a quarter century. By Constitutional Law I mean U.S. 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. I must admit I have become more cynical about a subject where the U.S. Constitution means just what a majority of nine appointed lawyers say it means, for better or worse, regardless of what the text actually says and originally meant. After all, the Justices interpret the U.S. Constitution through lenses colored by their own personalities and political perspectives. So do we all, of course.

But I also have been frustrated by the U.S. Supreme Court's questionable basis for deciding constitutional 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 laws[7] and campaign finance regulation[8]—also decided by split vote, even by 5-4 vote of the U.S. 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, regardless of whether the U.S. Constitution and the laws actually address those issues. And 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 before them. As the Pulitzer-Prize winning musical *Of Thee I Sing* noted in song in the early 1930s,[9] "On that matter no one budges, for all cases of the sort are decided by the Judges of the Supreme Court."[10]

The text of the U.S. Constitution, though, cannot be shoehorned into being made capable of resolving every case. To the extent that the

7. *Heller*, 554 U.S. at 570.

8. *Citizens United*, 558 U.S. at 310.

9. *The 1932 Pulitzer Prize Winner in Drama*, THE PULITZER PRIZES, http://www.pulitzer.org/winners/george-s-kaufman-morrie-ryskind-and-ira-gershwin (last visited Nov. 3, 2018).

10. GEORGE GERSHWIN & IRA GERSHWIN, TRUMPETER BLOW YOUR HORN, *in Of Thee I Sing*, (1931) (it sounds better if Ira Gershwin's lyrics are sung to the music of George Gershwin, of course).

U.S. Constitution does not decide the question at hand, freedom prevails, or should prevail. 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,"[11]— but applying it to constitutional interpretation.

II. Constitutional Invalidation

My concern is solely with U.S. 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, state legislatures, new executive orders, or regulations formulated by the executive or administrative agencies, whether federal or state. So, if the U.S. Supreme Court makes mistakes in deciding such matters, the mistakes can be corrected fairly simply through representative government and the democratic process.

But where unelected Justices invalidate contested laws as a matter of constitutional right, and they get it wrong, they remove effective sovereignty from the people; for there is no reasonably practical way to undo the harm. The ruling is the practical final word, unappealable to, and unamendable by, the political branches. Apart from the U.S. Supreme Court eventually overruling itself, such as when it overturned *Lochner v. New York* in the 1930s (allowing the regulation of working hours, in spite of *Lochner*'s ruling that freedom of contract prevented such regulation),[12] there is no democratic recourse short of attempting to amend the U.S. Constitution or to impeach the offending Justices. And such recourse is rarely possible and never successful in the case of impeachment of U.S. Supreme Court Justices.

Now that I have clarified what I am and am not writing about, let us narrow in on the assertion that unanimity is both morally and politically desirable. The U.S. Constitution begins with the words "[w]e

11. Marco Antonio de Dominis, De Republica Ecclisiastica 676 (1617).
12. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

the people," and the theory is that sovereignty ultimately comes from the people[13]: government "of the people, by the people, [and] for the people," in the immortal words of Lincoln's Gettysburg Address.[14] 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 when it is just on the say-so of a bare majority of U.S. Supreme Court Justices, decisions are rendered morally suspect. This exercise of judicial review is undemocratic, unless the majority rule is based on a constituency of nine.

This feature of judicial review is 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 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 on a split 5-4 vote, the problem is magnified. It means that the constitutional issue has been settled by the swing vote, usually Justice Kennedy in recent history.[15] This gives new meaning to the principle of "one person, one vote,"[16] meaning that the individual with the swing vote is the only vote that ultimately counts.

The Massachusetts Constitution says that a government should be one of laws and not of men.[17] But 5-4 splits mean that our government is palpably one of men (or women, since Justice Sandra Day O'Connor was also the swing vote in her day)[18] 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.

A related problem with non-unanimous and thus non-authoritative U.S. Supreme Court decisions invalidating legislation is, as touched upon earlier, the practical difficulty of overturning them. This is because, under Article V, repeated supermajorities are necessary to amend the U.S. Constitution (two-thirds of both houses of Congress

13. U.S. CONST. pmbl.
14. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).
15. *See e.g.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
16. Reynolds v. Sims, 377 U.S. 533, 558 (1964).
17. MASS. CONST. pt. 1, art. 30.
18. *See e.g.* Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

and three-quarters of the states, apart from the never-employed state-initiated convention route).[19] Amendments have only happened a handful of times in our history.[20] This recourse is virtually impossible for any socially controversial issues, which are often the subject of the most divisive and invidious U.S. Supreme Court decisions. And while impeachment of sitting U.S. Supreme Court Justices has been attempted several times in our history, none have actually succeeded.[21] So the threat of impeachment is a paper tiger at most.

Now, if the U.S. Supreme Court makes a mistake in interpreting the U.S. Constitution to invalidate laws, significant time amounting to decades, or even a Civil War, must intervene. For example, it took the ratification of the Thirteenth[22] and Fourteenth Amendments[23] to overturn the notorious 1857 *Dred Scott* decision.[24] In contrast, the requirement of unanimity would assure that the Court's reading of the U.S. Constitution was truly unimpeachable and authoritative. It would also depoliticize the current bitterly partisan judicial nomination and confirmation process of presidential appointments to the U.S. Supreme Court;[25] and for these reasons it would be both morally and politically desirable. The country is currently very divided and polarized. The U.S. Constitution, as our fundamental law, should be a force that unites Americans and inculcates respect for law. Split constitutional decisions which invalidate democratically enacted laws instead divide the American people.

III. WHAT WOULD HAPPEN IF A RULE OF UNANIMITY WERE ADOPTED?

In reviewing judicial history, I will consider unanimous U.S. Supreme Court decisions separate and apart from 5-4 cases and other

19. U.S. CONST. art. V.

20. *Additional Amendments of the Constitution*, BILL OF RIGHTS INSTITUTE, https://www.billofrightsinstitute.org/founding-documents/additional-amendments/ (last visited Nov. 3, 2018).

21. *Senate Prepares for Impeachment Trial*, UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/minute/Senate_Tries_Justice.htm (last visited Nov. 3, 2018).

22. U.S. CONST. amend. XIII, § 1.

23. *Id.*

24. Dred Scott v. Sandford, 60 U.S. 393 (1857).

25. The Editorial Board, Opinion, *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.

cases marked by dissent. This is because unanimous cases have unimpeachable authority. For example, the landmark case of *Brown v. Board of Education*, is viewed as one of the most authoritative U.S. Supreme Court decisions, in part because it was unanimously decided. It also declared segregation in public schools to be a violation of equal protection of the laws;[26] as did its companion case of *Bolling v. Sharpe*,[27] 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.

Another example of unanimous constitutional decision-making invalidating laws is *Marbury v. Madison*,[28] 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.[29] 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 *McCulloch v. Maryland*[30] defining the reach of the "necessary and proper clause"[31] of Article 1, Section 8 and the consequent unconstitutionality of Maryland's attempt to tax the Second Bank of the United States.[32]

IV. THE HORROR, THE HORROR

Split decisions are obviously more problematic. On a number of occasions, the original minority view, with the passage of significant time, became the eventual majority view.[33] We can start with *Dred Scott* and add *Lochner* for good measure.[34]

Dred Scott v. Sandford decided that African Americans were not citizens and could not sue in federal court.[35] Furthermore, it held that

26. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
27. Bolling v. Sharpe, 347 U.S. 497 (1954).
28. Marbury v. Madison, 5 U.S. 137 (1803).
29. *Id.* at 178.
30. McCulloch v. Maryland, 17 U.S. 316 (1819).
31. U.S. CONST. art. 1, § 8.
32. *McCulloch*, 17 U.S. at 436–37.
33. Dred Scott v. Sandford, 60 U.S. 393 (1856); Abrams v. United States, 250 U.S. 616, 624–31 (1919).
34. The academic consensus on those cases is unanimous, or virtually so.
35. *Dred Scott*, 60 U.S. at 404.

the right of slaveholding was protected by substantive due process of the Fifth Amendment (thus making it the first substantive due process case),[36] and that therefore the Missouri Compromise of 1820 (which outlawed slavery in federal territories north of a certain latitude) was unconstitutional.[37] This decision was only the second time the U.S. Supreme Court had constitutionally invalidated a law passed by Congress. It provoked the American Civil War.[38] It took the war and both the Thirteenth and Fourteenth Amendments to the U.S. 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.[39] 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,[40] a liberty substantively protected from state interference by the Due Process clause of the Fourteenth Amendment.[41] It took thirty years for this economic era of substantive due process to be overturned by the U.S. Supreme Court,[42] and in the meanwhile, the *Lochner* precedent prevented the enactment and enforcement of progressive social legislation for the workplace.[43]

36. *Id.* at 450.

37. *Id.*

38. History.com Editors, *Dred Scott Decision*, History.COM (Oct. 27, 2009), http://www.history.com/topics/black-history/dred-scott-case.

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

40. Lochner v. New York, 198 U.S. 45, 64–65 (1905).

41. *Id.* at 52.

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

43. *Lochner*, 198 U.S. at 65. *Lochner* was decided 5-4 and featured a famous dissent by Justice Oliver Wendell Holmes where he stated that our Constitution does not enshrine any particular economic theory, like laissez-faire.

Indeed, virtually all the substantive due process cases invalidating legislation—starting with *Dred Scott*[44] and proceeding through *Lochner,*[45] *Meyer v. Nebraska*,[46] *Griswold v. Connecticut*,[47] *Roe v. Wade*[48] and *Obergefell v. Hodges*[49]—were split decisions and thus non-authoritative in my view and would have vanished if unanimity were required. The only substantive due process case that was unanimous and would stand was the 1925 case *Pierce v. Society of Sisters* to be discussed below.

V. 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, 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 substantive due process rights of parents to direct the upbringing and education of their children.[52] Also in line with these cases is the 1960s 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 Amendment,[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]

44. *Dred Scott*, 60 U.S. at 393.

45. *Lochner*, 198 U.S. at 45.

46. Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (invalidating law restricting foreign-language teaching).

47. Griswold v. Connecticut, 381 U.S. 479 (1965).

48. Roe v. Wade, 410 U.S. 113 (1973).

49. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

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

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

52. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925).

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

54. *Id.* at 279–80.

55. *Id.* at 283–84.

One could argue with the textual basis in the U.S. Constitution for unanimous decisions, of course, but the fact that they were unanimous and widely accepted in practice makes them authoritative nonetheless. For example, 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 required a ministerial exemption from employment discrimination laws, so that churches rather than government would ultimately decide who authorized teachers of their religion.[56]

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 criminal proceeding.[57] There was also the Court's unanimous decision in *Loving v. Virginia* in 1967 that bans on interracial marriage violated the Equal Protection Clause.[58] Or *Shelley v. Kraemer* from 1948, invalidating the enforcement of racially restrictive covenants under the Equal Protection clause of the Fourteenth Amendment.[59]

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 U.S. Supreme Court unanimously decided in 1995 that the application of state public accommodation law to a parade violated the private parade organizer's freedom of speech and expressive association.[60] These unanimous decisions have stood the test of time and have been accepted both morally and politically.

VI. The Bad Split Decisions

In contrast, however, the controversial non-unanimous decisions like *Roe v. Wade*[61] and *Planned Parenthood v. Casey*[62]—the abortion

56. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188– 89 (2012).

57. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

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

59. Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948).

60. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 581 (1995). This case is a personal favorite because I wrote the briefs for petitioner Wacko Hurley in the case. Under my suggested approach of recognizing only unanimous constitutional decisions invalidating laws as authoritative, all these previously mentioned judgments invalidating laws or their application would stand.

61. Roe v. Wade, 410 U.S. 113 (1973).

62. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

cases—and *U.S. v. Windsor*[63] and *Obergefell v. Hodges*[64]—the gay marriage cases—would not stand as authoritative. The effect would be to return these divisive subjects to the political arena, where compromise could be reached, rather than an all-or-nothing judicial approach based on the inflexible rights-based assertion of individuals.

While some social conservatives might argue, "that's all well and good for social conservatives like you," they should not lose sight of the fact that the recent controversial 5-4 decisions of *Citizens United*—invalidating campaign finance regulations under the First Amendment as applied to corporations[65]—and the *Heller*[66] and *McDonald*[67] decisions—invalidating gun control legislation under the Second Amendment—would also be non-operative because they are non-unanimous. Indeed, the split Court decisions invalidating affirmative action plans,[68] or invalidating some of the Voting Rights Act extension,[69] would also fail.

Of course, this *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 neither discriminate against out-of-state commerce, nor excessively burden interstate commerce, if the burden clearly exceeds the putative local benefit,[70] would no longer hold sway. Similarly, cases like *Miranda v. Arizona*,[71] that have become fairly settled features of our legal landscape, would no longer control if my proposal was applied retroactively. But if such rules like the *Miranda* rights are a good idea—and time has indeed demonstrated their wisdom—then there would be no problem with legislatively and democratically enacting them. Admittedly, these split constitutional decisions changed the political dynamic. But it seems important that ultimate responsibility for constitutional social change rests with the elected, democratically re-

63. United States v. Windsor, 570 U.S. 744 (2013).
64. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
65. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010).
66. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).
67. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).
68. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No.1, 551 U.S. 701 (2007).
69. Shelby Cty., Ala. v. Holder, 570 U.S. 29 (2013).
70. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
71. Miranda v. Arizona, 384 U.S. 436 (1966).

sponsible branches. The same might be said of gay marriage or permissive abortion laws, if that is what the political reality is—as opposed to a judicially mandated fiat supposedly grounded in the U.S. Constitution.

Indeed, the enactment of laws from split Court decisions would represent a solemn democratic ratification of the wisdom of the U.S. Supreme Court; as happened, for example, when the Civil Rights Act of 1964[72] effectively ratified and extended the U.S. Supreme Court's unanimous 1954 decision in *Brown v. Board of Education*.[73] 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.

Some legislators rather like having controversial issues (e.g., gun rights, abortion rights, gay marriage rights, and freedom from campaign finance limitations) be 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 is 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.

VII. A CASE TO THE CONTRARY

One split constitutional decision that was of enormous importance and precedential value is *Baker v. Carr*,[74]—the Warren Court decision from the 1960s that subjected the apportionment of legislatures to judicial review under the Equal Protection Clause. In so doing, it reversed a longstanding holding that apportionment was a political question and thus not justiciable by the courts. The case involved vigorous dissents from Justices Frankfurter and Harlan. In 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."

Following a rule of unanimity to invalidate the practice on that constitutional basis, however, would mean there would be no such

72. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).
73. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
74. Baker v. Carr, 369 U.S. 186 (1962).

result. Is that really defensible? How can a non-representative legislature be expected to reform itself in the direction of more equal representation? The rule of constitutional unanimity would not be cost-free.

Under this proposal the U.S. Supreme Court would have to wait until the judgment of unconstitutionality became unanimous. I suspect that would not be difficult nowadays after the path-breaking precedent of *Baker v. Carr*. But one of the progeny of U.S. Supreme Court oversight of equal voter strength was *Bush v. Gore*,[75]—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.[76]

As suggested above, there is a practical issue that needs to be addressed: would such a rule of constitutional unanimity 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 going-forward. The answer to this would depend upon how many people are tired of leaving life-changing issues in the hands of one appointed judge. But, as a practical matter, the Court could simply refuse to follow such non-unanimous precedent in future cases.

VIII. The Limits of My Proposal

This proposal would not solve all the problems of U.S. Supreme Court history, like those posed by cases that did not invalidate laws on constitutional grounds. For example, 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.[77] So would *Buck v. Bell*, the notorious 1927 decision over Justice Butler's dissent upholding Virginia's compulsory sterilization law.[78] Indeed, the problem of *Plessy v. Ferguson*,[79] the decision from the 1890's which upheld segregation in railroad cars,[80] would be untouched by this proposed rule requiring unanimity to constitutionally invalidate laws. Neither would

75. Bush v. Gore, 531 U.S. 98 (2000).
76. The fact that it would annoy the parties is just a perk.
77. Korematsu v. United States, 323 U.S. 214 (1944).
78. Buck v. Bell, 274 U.S. 200 (1927).
79. Plessy v. Ferguson, 163 U.S. 537 (1896).
80. *Id.* at 551.

the rule affect the split ruling in the controversial *Kelo*[81] decision involving the U.S. Supreme Court upholding a dubious exercise of the power of eminent domain.[82]

Since these problematic regulations originated with the political branches, they could have been corrected by the political branches; for the U.S. 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 allowed for.[83]

Finally, there is also a possible problem with the unanimity 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 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 do not. 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 U.S. Supreme Court history and it may not be practicable as a rule of decision-making by the U.S. 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, the toll of the Civil War.[84] 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 a 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

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

82. *Id.* at 484.

83. Dana Berliner, *Looking Back Ten Years After* Kelo, 125 YALE L.J.F. 82 (2015).

84. Drew Gilpin Faust, *Death and Dying*, NAT'L PARK SERV., https://www.nps.gov/nr/travel/national_cemeteries/death.html (last visited Nov. 3, 2018).

largely been split decisions. Contrast those split decisions invalidating laws on constitutional grounds with the huge success of *Brown v. Board of Education*[85] where the Court spoke unanimously and authoritatively and eventually succeeded in convincing the country of the rightness of its decision, as evidenced, for example, by the eventual enactment of the Civil Rights Act of 1964.[86] Unanimity should be considered a stand-in for unquestioned authority.

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 and our legislators more accountable to the people. It will also 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."[87]

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

86. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

87. OXFORD DICTIONARY OF MODERN QUOTATIONS 296 (Elizabeth Knowles ed., Oxford Univ. Press 3d ed. 2007).