Supreme Court ruling makes U.S. even less democratic

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By Edwin D. Reilly Jr.

Illogic pervades the land, and has infected our Supreme Court. The United States, already the least democratic country of all those that call themselves democratic, is now even more so.

The illogic, or at least a glaring inconsistency, is that where the court continued to affirm that a corporation is a "person," it stated that such "persons" may contribute unlimited amounts to specific political candidates while leaving in place campaign finance laws that limit the amount that a human person may donate.

The 5-4 decision is not only logically absurd, it is an egregious example of legislation rather than adjudication, the very practice that the five conservative judges railed about during their confirmation hearings. It is also, equally surprising for alleged conservatives, a violation of states' rights. Because the Constitution does not even mention corporations, they are, and have been since the beginning of the country, creatures of the state in which they are allowed to incorporate.

Early ruling

The concept that a corporation is a person dates back to the reign of John Marshall (1755-1835), appointed Chief Justice by the defeated outgoing president John Adams in 1801. Marshall served in that capacity until 1835. Writing for the majority in the case of Dartmouth College vs. Woodward in 1819, Marshall stated that Dartmouth was in effect a person under contract, a private college that could not be converted to a public institution by the state of New Hampshire. While widely popular from that day to this, the decision was most certainly a de facto expansion of the power of the federal judiciary beyond that granted to the Supreme Court via Article III of the Constitution.

Ironically, Justice Marshall's most famous, and most significant majority opinion, rendered in the landmark case of Marbury vs. Madison in 1803, stated that Congress had no right to expand the role of the judiciary as defined in Article III. What he said was, in effect, "Congress, you may not do that; we'll do it for you." And thus, for the first time, 13 years after the first Congress assembled, the Supreme Court declared an act of Congress to be "unconstitutional."

Perhaps that unchallenged usurpation of authority was the best way to enhance the degree of checks and balances embodied in our original Constitution, the attempt to mimic the children's game of "Rock, Paper, Scissors" that intends to keep our three branches of government "separate but equal." But what is the check and balance that keeps the Supreme Court, most often through those infamous 5-4 decisions, from infections of illogic, especially ones injurious to democracy?

Ineffectual reforms

Some seem to think that setting term limits for Supreme Court justices would have a good effect. I do not. Nor would fiddling with the authorized size of the court. The Constitution does not specify the size of the Supreme Court, but in Article III it authorizes the Congress to fix the number of justices. By the Judiciary Act of 1789, the initial size of the court was set at six. After Democratic-Republican Thomas Jefferson's election of 1800, but before he could be sworn in the following March, Federalist President John Adams

persuaded Congress to reduce the number to five so as to deny his successor the opportunity to fill a vacancy. The court was expanded to seven members in 1807, nine in 1837, 10 in 1863, and reduced back to nine in 1869, the size it has remained ever since.

I submit that it would have a salutary effect if the Constitution were amended to require that Supreme Court decisions require the affirmative vote of two-thirds of the authorized strength of the court. With nine justices, that works out to a clean-cut 6-3 vote. Votes of 5-4 would cause the proposed action to fail, leaving in place the lower-court decision, if there was one, which reached the higher court for resolution.

Justices sometimes confound the expectations of the presidents who appoint them. Earl Warren disappointed Dwight Eisenhower; Byron "Whizzer" White, though remaining his friend, disappointed John Kennedy; and David Souter disappointed the first George Bush. But this is rare and becoming rarer. Since 1932, there have been nine changes of presidential administrations from Republican to Democrat or the reverse, an average of one every 82⁄3 years. And it is presidents who appoint justices.

So it is no wonder that the court is so often closely balanced among persons of differing ideology. Imposition of a supermajority requirement would reduce the democratic principle of majority rule within the Court, but would, in most cases, minimize the chances of an impairment of national democracy in the land in general.

I have set out to discuss three instances where our country is less democratic than most other democracies. One down, two to go, the first having been a missing check on court decisions that come out of left field (or more often lately, right field).

Electoral College

The second is embodied in the Constitution itself, the two-fold one of granting every state, regardless of population, two senators, and then setting up an Electoral College which, too often, has "elected" a president who earned fewer votes than an opponent. Again, the obvious remedy is a constitutional amendment that abolishes a "college" designed to cope with conditions that no longer prevail: poor communications in a sparsely settled county.

The third, and the most pressing now, is the crippling effect of the national Senate's self-imposed rule that 60 votes are needed for cloture. The Constitution does give each house of Congress the right to adopt its own rules of procedure, and since the rules are not laws of the nation, they cannot be declared "unconstitutional" by the Supreme Court. Those who adopted the cloture rule years ago did not envision that the Senate would ever become so polarized that not a single member of the minority will allow a major piece of legislation to be put to an actual vote, much less vote for it.

One of the Senate rules says that rules already in place stay in effect from year to year until changed. Sen. Tom Udall, D-N.M., has introduced a resolution that would give the Senate the ability to vote on its own rules and regulations every two years, when a new Congress convenes. In his remarks on the floor of the Senate, Udall said "While I am convinced that our inability to function is our own fault, we have the authority within the Constitution to act."

Ability to act

Of course they do. The Constitution does not even mention the word "filibuster." Except for the enumerated instances where it specifies a requirement for supermajority decisions, such as ratification of treaties and the override of presidential vetoes, the hallowed document embraces the principle of majority

rule. And it emphasizes that the power of the Senate as vested in the majority of those present to form a quorum is sacrosanct and remains in operation continuously.

Sen. Udall is wrong to think that the Senate needs to be granted the right to change its rules only every two years; the Constitutional authority to do so is there right now and cries out to be used to end "the tyranny of the minority." The Senate rule that a three-fifths majority is needed to change a rule is nonsense because the Senate's constitutional power to do so by majority vote is paramount. Someone please tell Harry Reid.

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