A Call for an Overhaul of the U.S. Federal Court System

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Prologue

In the June of 2015 decision on gay marriage, the Supreme Court of the United States ("SCOTUS") confirmed a phenomenon that anyone familiar with the Supreme Court system knows but also that any lawyer would hate to admit. The U.S. Constitution is no longer the Law of the Land, but Mr. Justice Kennedy is. By posing himself between four liberal Justices and the other four conservative Justices, Justice Kennedy holds the key to the interpretation of the U.S. Constitution. By doing so, Mr. Justice Kennedy, who swore to preserve and protect, is committing the act that the very Constitution was designed to prevent: the dictatorship.

1. SCOTUS – the System of Constitutional Despotism

Let us keep the discussion concrete and relevant by using a contemporary issue as an example for the discourse at hand. Gay marriage, it is. The Constitution gives SCOTUS and other federal courts their jurisdiction on cases relating to the U.S. constitutional laws. The 14th Amendment of the Constitution says, “No state shall make or enforce any law which shall . . . deny any person within its jurisdiction the equal protection of the laws.” In a nutshell, gay rights lawyers argue that banning gay marriage is depriving equal protection on gay people, and they managed to convince five SCOTUS Justices.

It is incumbent on us to conduct a careful and thorough analysis on the plain textual language of the 14th Amendment- “equal protection of the laws.” To say the conclusion ahead, hypothetical state law that bans gay marriage does not violate the equal protection of the law principle. A person, no matter what s/he thinks s/he is, can marry under such law, as long as s/he chooses an opposite sex. Such law does not say that a gay man cannot marry a woman. The law simply says that, to marry, the man should choose a woman. This law is no different from any other law. A law, by definition, is about prescribing a human behavior. If a state decides that a marriage between a man and a woman is better for the health and wellbeing of

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2 See Obergefell v. Hodges, 576 U.S. ___ (2015). In the 5 to 4 decision, the SCOTUS declared that state governments cannot ban gay marriage.
3 See U.S. Const. art. VI.
4 See U.S. Const. art. III §§ 1-2.
5 See U.S. Const. amend. XIV § 1.
the state’s citizens, the state has the right to prescribe what a marriage is. This right of a state, also known as the police power, is guaranteed by the 10th Amendment\(^6\).

Of course, there is a counterargument. Gay rights advocates (“progayists” hereafter) argue that homosexuality (“gayism” hereafter) is an inborn trait like race and gender. Whether such ‘born-this-way’ theory of gayism is true or not, they have right to think that way and the five SCOTUS Justices and the President may think that way as well. But if they think that way, they should do so as private citizens. If these progayists, by judicial and political means, force every citizen to think the same way, they are depriving the freedom of thinking. SCOTUS is now dictating that no state shall ban gay marriage, that everyone should accept gay marriage as a legitimate marriage. Why? Because gay people should be as happy as straight people? Because gay marriage is harmless, or even, beneficial to society? How do they know?

No society in human history has legitimized and institutionalized gay marriage in an open and wide manner as the contemporary West. Thus, there is no empirical evidence for either sides of the gay marriage debate. This is why such social experiment of the first impression, i.e., the viability and desirability of institutionalized gay marriage, should be left to individual states. That is the gist of the 10th Amendment: leave the states alone, let the experiment in diverse ways, see what works and what not, in time. By going against such prescient wisdom and spirit of the drafters of the Constitution, the five Justices are precluding the diversity of 50 states’ individual social experimentation. Non-diversification is a dangerous system. If an experiment fails, all 50 states will be harmed by it. Isn’t progayism all about diversity? Apparently not.

The Constitution says, “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land\(^8\).” The SCOTUS decisions are NOT the supreme law of the land, especially when such decisions violate the Constitution itself. Justices are humans too, and by definition, they are fallible. What should we do if a SCOTUS decision violates the Constitution? Shouldn’t it be better if SCOTUS be checked and balanced? Otherwise, how can we prevent America from falling under the potential tyranny of SCOTUS? There should be an explicit legal mechanism to overrule SCOTUS decisions. The U.S. Congress, historically and impliedly, has many times enacted federal laws designed to overrule SCOTUS decisions. Thus is won’t be a totally new thing if Congress enact a law that says, “if the majority of Congress decides that SCOTUS decision violates the Constitution, Congress shall have power to declare the SCOTUS decision invalid due to its unconstitutionality.”

\(^6\) U.S. Const. amend. X.
\(^8\) U.S. Const. art. VI.
A while ago, Ms. Justice Ginsburg authored an opinion that tried to shut down a well-running school in Virginia. The school in issue was the famed Virginia Military Institute (“VMI”), an all-male school that the state of Virginia established to foster the future leaders of the nation, military or otherwise. It is no secret that Justice Ginsburg was, and still is, a fervent feminism activist. Once an activist, one is an activist forever. A judicial cloak doesn’t hide it, and Justice Ginsburg doesn’t even bother to hide her activist nature—hence enters the hero of the modern American feminism, on the highest court of the land, expressly exercising the judicial activism in every decision that shows up on the big table.

It is a good diversity if some schools are all-male, some all-female, the rest male-and-female. This feminist Justice was extreme in her activism enough to shut down the tradition of an all-male military school just because there was no equivalent all-female military school in the same state of Virginia. Isn’t it obvious, let alone reasonable, to expect that there will be more males than females in a military school? Is the gender composition in any voluntary military branch a 50-male-and-50-female? The fact is, no matter how truth-defying feminists argue otherwise, that there is a thing called gender difference, both in physicality and mentality. That is why most armed services people are male. And if the state of Virginia has a limited budget to invest in military school establishment, it serves the purpose the best, gets the biggest bang for the buck so to speak, when the one school the state can afford to fund is all-male. Why all male? It’s all about strict discipline. When sexuality is precluded, and when the standard of physical training is not a diluted and averaged middle of the two genders, the disciplinary measure can achieve its maximum potential. This feminist Justice destroyed all that, all out of her personal activist ideal, practiced in the highest court of the land. Again, SCOTUS, a federal institution, is violating a state’s right to diverse experimentation, in violation of the 10th Amendment.

3. Federal Courts – the System of Anti-democracy

Let us bring our attention back to the example a la carte, the problem of gayism. It is a political question, no doubt. The left and right are sharply divided. And it is so because the answer is not clear. And that is why SCOTUS and other federal courts should have left the question to political arena, where it belongs. Let democratic system of our politics play out. Let Congress think about it, debate it out, and let the time pass by as they thoroughly discuss the options. Federal courts, or any courts in this regard or any regard, are not supposed to be political institutions. For one, not every judges or justices are elected officials, and thus they are not all politically accountable. Of course, judges and justices are people too, they have political affiliations, personal biases, religious or anti-religious biases, and perhaps, political and

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activist ambitions. This is why it is crucial for courts to leave political questions out of courts, and refuse to take politically hot-buttoned cases such as gay marriage. A doctrine called ‘political question doctrine’ is a judicially developed common law that SCOTUS Justices should be well aware of, but always fail to live by, especially this day and age. Is the temptation too strong to resist, to put their hands on the issue, to voice out their political convictions loud and clear from the highest bench for everyone on earth to hear? Then somebody or some system should check and balance such will to rule the universe, if our democracy is to survive. Let the Congress enact a law that gives itself the authority to vacate a SCOTUS decision based on the case’s definite politicality.

Remember, citizens of 32 states like Colorado, Alaska, and even California among other states voted against gay marriage. Gayists and progayists sued the states in federal courts and federal court judges overruled the will of the people, invalidating the democratically decided political solutions to the problem of gayism. Americans are so quick to criticize Fascism, Nazism, Hitler, Former Soviet Union, North Korea, China, for their dictatorial practices. Is America any different? If a baker, a florist, a photographer have to lose their jobs because they refuse to serve a gay wedding based on their religious conviction, if federal judges ‘order’ them to modify their religion, this is not America the land of the free, the home of the brave. Progayism is, little by little, wearing down this country’s democracy. And federal judges and justices are spearheading the campaign.

4. Judicial Clerkship – the System of ‘Tail Wagging the Dog’

There is a secret that lawyers are privy to and people outside the legal industry would be, and should be shocked to find out. It’s called the clerkship system. Here is how a court works in a simplified version. A person goes to law school, study for three years, and graduate in mid-twenties. Freshly out of law school, without practical legal experiences except a few summer internship or legal clinic courses, the law graduate goes ahead and becomes a clerk for a judge or justice in a state court or even the U.S. Supreme Court. It is this inexperienced, twenty-some year old law graduate who writes the first draft of a court decision. The judge or justice looks over the draft, edit if s/he wants, then the law-graduate-written draft becomes the court opinion, and the opinion of this young person becomes the common law, or case law, of the land. This is like a 22-year-old college graduate becoming the vice president of a nationwide corporation right off the commencement ceremony. No wonder our judiciary is heavily

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10 See Wikipedia, *Same-sex Marriage Legislation in the United States*, https://en.wikipedia.org/wiki/Same-sex_marriage_legislation_in_the_United_States#Efforts_to_ban_same-sex_unions_by_constitutional_amendment (last visited July 1, 2015, 3:40 PM). The earliest of the state-wide vote against gay marriage was the state constitutional amendment Alaska in 1998 (68% approving the ban on gay marriage), and the latest is the one in North Carolina in 2012 (61%). A special recognition should be given to the federal appellate court of the 6th Circuit, which exceptionally supported the will of the people to ban gay marriage. See *Obergefell v. Hodges*, 576 U.S. ___ (2015).

leaning toward liberalism: the majority of young, hot-headed college graduates are liberals. There is a saying, ‘if you are not liberal in your twenties, you have no heart. If you are still liberal in your forties, you have no brain.’

It should be acknowledged that not every judge or justice perfunctorily overlook the clerks’ opinion drafts. But it is undeniable that the young clerks who are inexperienced both in law and in life are exercising an alarming sway and undue, unreasonable influences in court decisions in all levels in our judicial system. What’s the solution? It’s simple. Let Congress enact a law that prescribes the qualification of judicial clerks to lawyers who have practiced law outside law schools for at least five years. We cannot let twenty-some youngsters liberal at heart decide what the law is. That is… beyond reasonable preposterousness.

5. Appellate Courts – the System of Know-it-all

Nobody knows it all. This absolute common sense is being, have ben being, defied by our appellate court system. A federal circuit court hear cases from all issues: criminal, civil, commercial, familial, intellectual property, real property, and even tax litigations. Why was there a dispute in the first place? It’s because there was no easy and clear-cut answer to the dispute. Because the problem was so hard to solve even between two parties, who have been practicing experts in the industry for decades, they disagreed and sued in court. Now, a judge, whose only job qualification is three years in law school where s/he took whatever area of law decided to study, such as civil rights, is presiding over a complex business transaction between two international corporations. Does it make sense for that judge, that clerk, to decide who is right and who is wrong? It better not.

For an appellate system to make sense, an appellate court should be divided into at least three sub-courts, e.g., criminal, civil, and commercial. Each sub-court should be presided by judges who have been practicing in each area of law for at least ten years. And the clerks under such judges should be lawyers who have also been practicing in the same area for at least five years. This way, law will make sense.

5. Solution to the Federal Court Nonsenses

The dry study of law may have clouded all the common senses in law professionals. The perceived prestige of legal profession may have made lawyers think that they can defy conventional wisdom and that they are immune to common pitfalls that other human beings are subject to. That is not the case. Young and inexperienced law graduates cannot, and should not be expected to, make an impartial and balanced case law of a state and of a nation. A judge who studied and practiced a limited, specialized area of law should not be allowed to
hear ALL the cases there is. Make no mistake: three years of law school does not make a
human being an omniscient deity.

Such narcissistic delusion about law profession is the source and origin of the SCOTUS
Justices megalomania attitude that they are the supreme law of the land. As expressed in
various parts of the previous sections, the U.S. Congress should legislate a federal law that
provides checks and balances on judicial errors and arrogances.

Epilogue

America has a long way to become the de facto model of democracy of the world. The
American democracy has been improving and functioning until the federal judiciary has
encroached, trespassed into the constitutionally drawn boundary line of politics. Unless the
federal courts realize where it erred, admit their errors, and support the proposed Congress’
legislation against judicial despotism, federal court system shall not survive. But let us end in a
positive note. Not every lawyer is stupid, evil, sellouts. Despite all the lawyer jokes and the
hatred and despise that we get from our society, we are, after all, lawyers, not liars. Let us
keep it that way.