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Is a 5-4 Ruling Really Enough to Undo Laws?

Amid an increase in the invalidation of statutes, some call for high court to follow states' leads.

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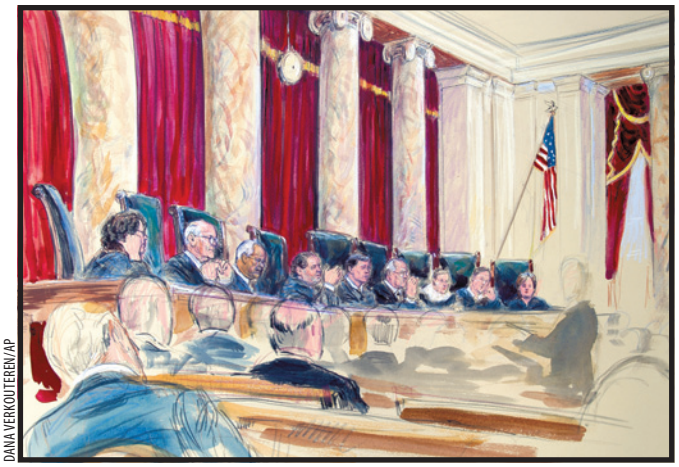
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In the past five years the U.S. Supreme Court has addressed some of the nation's most controversial issues, overturning acts of Congress by 5-4 majorities.

Many of these decisions have invalidated high-profile laws, including portions of the Voting Rights Act in *Shelby County v. Holder*, the section of the Defense of Marriage Act defining "spouse" to exclude same-sex partners in *United States v. Windsor*, and the section of the Bipartisan Campaign Reform Act restricting political contributions by corporations in *Citizens United v. Federal Election Commission*. In fact, on average over the previous five years, the Supreme Court has found at least one federal statute, or a portion thereof, to be unconstitutional by a one-vote majority. Now, a challenge to the Affordable Care Act, with constitutional implications, is pending before the court.

The rash of slim-majority decisions striking down statutes as unconstitutional is a relatively recent development. The court struck down federal statutes by a one-vote majority only 24 times from the court's founding through the Burger court in 1986, and 12 of those were decisions by the Warren and Burger courts. Since then, however, the Rehnquist court struck down federal statues by one vote 20 times, and the Roberts court, to date, has done this nine times.

Concern that many of these 5-4 decisions are insufficiently deferential to Congress and that they appear to the public to be politically motivated has led one scholar, Jed Shugerman, a professor at Fordham University School of Law, to advocate for a new rule requiring a vote of two-thirds of the justices to declare a statute unconstitutional.

Shugerman contends that the Supreme Court could adopt such a rule itself. He believes that Congress also has authority to enact the rule, though a congressional enactment would itself raise constitutional concerns, and, in any event, Congress has shown little interest in pursuing the issue.

A supermajority rule would be consistent with the general presumption of constitutionality of federal statutes and might inspire greater public confidence in Supreme Court decisions finding

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a statute unconstitutional. But it would create a host of problems as well, including allowing a minority of four justices to dictate the outcome of significant constitutional disputes.

STATE EXPERIMENTS

The likelihood of the Supreme Court adopting a supermajority rule is remote, to say the least. A few states, however, have experimented with such requirements. The North Dakota Constitution provides that at least four justices on the state's five-member Supreme Court must agree to declare a legislative enactment unconstitutional, even though a majority can make any other decision. Similarly, the Nebraska Constitution requires the concurrence of at least five of the seven judges on that state's Supreme Court to hold any legislative act unconstitutional.

Other states do not have a supermajority rule, but require a majority of the full appellate court, rather than a panel decision, to declare a statute unconstitutional. Under the Arizona Constitution, that state's Supreme Court can declare a statute unconstitutional only when sitting en banc. Similarly, the Utah Constitution and the Virginia Constitution provide that their high courts cannot declare any law unconstitutional except upon the concurrence of a majority of all of the justices. A no-longer enforced provision of South Carolina law took yet another approach: It provided for all of the state's circuit judges to join that state's Supreme Court in deciding on the constitutionality of a state statute, unless the high court was able to decide the issue unanimously.

Ohio until 1968 had a rather strange, two-track supermajority requirement. Its constitution allowed the Ohio Supreme Court to strike down a statute as unconstitutional if all but a single justice concurred, but only if the court was reviewing a court of appeals decision upholding the constitutionality of the statute. If the court was reviewing a statute that the court of appeals had declared unconstitutional, a simple majority of the Supreme Court could affirm the decision.

The Louisiana's Constitution addresses the decision-making of the state's intermediate court of appeals. It provides that a 2-1 decision of a panel of the court of appeals reversing or modifying a trial court or administrative agency decision must be reargued before a court of appeals panel of at least five judges. Georgia has a more complicated, and unusual, set of rules for its intermediate court of appeals. A decision of a three-judge panel of that court—on any matter—has full precedential force only if it is unanimous. By statute, if one of the judges dissents, the case must be reheard by a seven-member panel—the three original judges plus four other judges from the court of appeals. Even a unanimous, 3-0 decision by a panel is not fully binding as precedent if one of the judges concurs only in the judgment, but not in the written opinion. Such a decision is considered to be "physical precedent," which is not binding on future panels. Similarly, a majority decision by the full court of appeals or a seven-judge panel of the court is binding only if all of the judges in the majority concur in the written decision. .

These state law provisions requiring broad agreement to overturn statutes offer interesting alternative approaches to appellate decision-making, but they do not seem to offer a viable alternative for the U.S. Supreme Court. It is difficult to know whether these provisions even have had a significant effect on appellate jurisprudence in these states, where the appellate courts may normally operate more on the basis of consensus than does the U.S. Supreme Court and are likely to issue fewer closely split decisions on politically sensitive issues.