

THE CONSTITUTION AS A BOX OF CHOCOLATES

*J.M. Balkin**

What makes a constitutional provision stupid?

To answer this question, we might turn to an acknowledged expert on stupidity: Forrest Gump. Mr. Gump is an expert on stupidity because he is the most famous stupid person ever to be the subject of a top grossing Hollywood movie. (The relationship of top grossing Hollywood movies to stupidity I leave to another essay.) To be sure, Mr. Gump's claim to expertise tends to undermine his claim to stupidity—and vice versa—but I shall let this difficulty pass for the moment. Mr. Gump informs us that "stupid is as stupid does."¹ Perhaps what makes a constitutional provision stupid is the stupid effects that it has in the real world.

Now there are several ways that a constitutional provision can have stupid effects. To borrow a line from First Amendment doctrine, something can be stupid on its face or stupid as applied. It might be unfair to focus on as applied examples of constitutional stupidity. After all, if you get the right justices ("right" here being a term with multiple meanings), almost any constitutional provision can become stupid as applied. And historically, we have often had the right justices. As a result, one could talk about constitutional provisions that are stupid as applied endlessly. In fact law professors have even developed special educational institutions for this purpose. They are called courses on constitutional law.

This leaves us with constitutional provisions that are stupid on their face. A notable example of a facially stupid provision is the Second Amendment. Professor Levinson finds the Second Amendment to be embarrassing rather than stupid,² but I don't think that the two categories are mutually exclusive. Spilling

* Lafayette S. Foster Professor, Yale Law School. My thanks to Professor Sanford Levinson for repeatedly kvetching at me to get this thing written. All errors in this essay are due to the flawed pentium chip in my computer.

1. Quote appearing somewhere in the movie. You look it up.

2. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989).

soup at a formal dinner party is embarrassing, drinking milk that has been left at room temperature for three months is stupid, and the contemporary Republican Party is both embarrassing and stupid. Now I've got nothing against guns (or so I would say if one were held against my temple). On the other hand, the Second Amendment does seem on its face to prevent some kinds of gun control legislation that might be socially desirable. Indeed, if Professor Levinson is right that the original purpose of the Second Amendment was to preserve the right of citizens to overthrow an oppressive government, it would seem to me that the types of weapons most protected for individual use would not be hunting rifles or even Saturday Night Specials but AK-47 assault rifles and tactical nuclear weapons.

Stupidity may rest on factors other than stupid consequences. Consider, for example, the slogan, "Keep it simple, stupid." It suggests that needlessly complicated passages of a constitution are signs of constitutional stupidity. Perhaps the best example would be the Twelfth Amendment, dealing with the complicated method by which the electoral college (or Congress, should a majority of the college not agree on a candidate) chooses a president and vice president.³ This elaborate reworking of an already elaborate system was occasioned by the election of 1800, in which the presidential and vice-presidential candidates received the same number of votes in the electoral college, and the election was thrown into the House of Representatives. Incidentally, this unpleasantness occurred because the electors voted on straight party lines, something which the Founders never imagined would happen. Now *that* was stupid.⁴

But I digress. The prolixity of the prose surrounding the institution of the electoral college (both in the Twelfth Amendment and elsewhere)⁵ suggests that there is something indeed very stupid about it. And this is confirmed by its effects. For example, the electoral college makes it possible for a person to win a majority of the popular vote and still lose the election. This actually happened in 1888, the result being that Grover Cleveland is the only person in American history to win a majority of

3. Some of these complications are the subject of Professor Levinson's contribution to this symposium.

4. Only in hindsight, of course. See e.g., Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States 1780-1840* (U. of Calif. Press, 1969) (describing how philosophical objections to political parties eventually gave way to a party system).

5. See e.g., Article II, § 1; Amendment XIV, § 2; Amendment XXIII, § 1; Amendment XXIV, § 1.

the presidential vote three times in succession but get to serve as President only twice. In compensation, however, they named a baseball player after him.

Now of course, replacing the electoral college will not be easy. And one might object that anything that would replace it would be more prolix in its delineation and thus even more stupid. But I doubt it. Besides, just because one can't work out all the elements of a replacement immediately doesn't mean that what needs replacing isn't stupid. As Justice Stewart pointed out, sometimes we know that things have certain properties when we see them.⁶

Unfortunately, the problem of constitutional stupidity is greatly complicated by the problem of compromise. Take, for example, the requirement of equal suffrage in the Senate. Both California and Rhode Island have two Senators, and there is very little that anyone can do about it.⁷ In fact, the equal suffrage principle is one of two unamendable provisions in the Constitution. (The other one is the requirement that the slave trade can't be abolished before 1808. Does this give you some idea of the Founders' priorities?)⁸ The equal suffrage provision looks stupid now, but it was actually necessary to forge a compromise that made the Constitution possible in the first place. This leads to the interesting question whether something necessary to produce a non-stupid document can itself be stupid.⁹ If it cannot be, then it is possible that neither of my two examples of constitutional stupidity—the electoral college and the Second Amendment—are really stupid. The electoral college was part of the Great Compromise of large and small states, and the Second Amendment was part of the Bill of Rights that was the price of eventual ratification.

Finally, from a postmodern perspective, there is something disturbing about the very question of the most stupid provision of the Constitution. (Indeed, from a postmodern perspective, there is something disturbing about everything. But I digress.) I do not mean simply that postmodernism might call into question

6. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

7. Although an earthquake could probably turn California into the size of Rhode Island. But I digress.

8. Actually, the equal suffrage provision *can* be amended if all states affected by it agree (which in effect requires unanimity), but the slave trade clause cannot be. Are you starting to get the picture? Can you say "Agreement with Hell and Covenant with Death?" I knew you could.

9. Cf. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), in which the abolitionist Justice Joseph Story defended the Fugitive Slave Clause, Article IV, § 2, cl. 3, on the grounds that it was necessary for the creation of the Union.

the stupid/nonstupid distinction (as well as the stupidity of calling the stupid/nonstupid distinction into question, and so on, and so on, and so on. . . .). Rather, a postmodern perspective calls into question the distinction between what is in the Constitution and what is not in it, and thus what can be said to be stupid about it. In contrast to many later examples of the genre, the Founding Progenitors left us a comparatively brief Constitution. Apparently they well understood the saying that it is better to keep silent and be thought stupid than to open one's mouth and remove all doubt. However, if the Constitution is understood to consist of both what is in it and what is not in it,¹⁰ then perhaps the Constitution really is stupid precisely because of what it leaves out; for example, the right to privacy, or the right to education.¹¹ If the inside/outside distinction can be thus deconstructed, the possibilities for constitutional stupidity appear virtually endless.

The Ninth Amendment further complicates the inside/outside distinction, because it makes the Constitution an open-ended text. It is entirely possible that some of the rights reserved to the people (or to the States under the Tenth Amendment) are quite stupid indeed. However, since no one really knows what the Ninth Amendment protects, your guess is as good as mine. As Forrest Gump might say, the Ninth Amendment converts the Constitution into a box of chocolates. You never know what you're going to find in it. And that may not be so stupid after all.

But I digress.

10. The Zen theory of the Constitution.

11. Unlike the right to education, the right to privacy appears in the Constitution courtesy of subsequent interpretation.