We Can't Ignore Racial Redistricting


FULL TEXT

The Supreme Court decision on Thursday in Rucho v. Common Cause purports to take federal courts out of the business of policing partisan gerrymanders and leave the issue for states to handle. But the decision will instead push federal courts further into the political thicket, and, in states with substantial minority voter populations, force courts to make logically impossible determinations about whether racial reasons or partisan motives predominate when a party gerrymanders for political advantage. It didn't have to be this way.

For more than a decade, federal courts have struggled with the question of whether there are standards for separating permissible from impermissible partisan considerations in drawing district lines. They struggled because Justice Anthony Kennedy had kept the door open to having federal courts hold some districting plans unconstitutional.

With Justice Kennedy's retirement, a solid five-justice conservative majority firmly shut the door in the Rucho case, saying that there were no judicially manageable standards to apply. For a court that regularly uses court-created standards -- such as those determining when someone has acted with racially discriminatory intent or when a monopolist created "substantially anticompetitive effects" -- the opinion written by Chief Justice John Roberts is disingenuous.

As Justice Elena Kagan's dissent explained, lower courts had been converging on a standard for judging when some redistricting plans were such extreme outliers that they should be declared unconstitutional. The majority on Thursday declined to adopt a standard not because these unconstitutional outliers don't exist but because it believed that courts have no business making judgment calls about them. And while he condemned gerrymandering in the abstract, the court embraced it as a practical matter, stressing that states can engage in "constitutional partisan gerrymandering."

The decision comes as the problem of gerrymandering has grown much worse, for two reasons. First, technological improvements have allowed line drawers to use sophisticated software and demographic analysis to create ever more effective gerrymanders. Even in wave elections, some of these gerrymanders will let a party preferred by a minority of voters capture a majority of seats. This is not theoretical. It has happened again and again.

Second, we are in an era of hyperpartisanship, when a politician pays no political consequences (and indeed gets rewarded) for publicly declaring a partisan purpose. Indeed, Rucho involved a Republican gerrymander of North Carolina's 13 congressional districts, and David Lewis, one of the Republican legislative leaders, said in 2016 that even though the state was about evenly divided between the parties, he was proposing a map drawn with the aim of electing 10 Republicans and three Democrats -- and that was only because he didn't "believe it was possible to draw a map with 11 Republicans and two Democrats."

Mr. Lewis's conduct will now become de rigueur, not only because naked partisanship has been approved by the court, but because his outrageous comment gave him legal cover for the gerrymander. North Carolina was forced to redistrict in 2016 because the Supreme Court found its earlier congressional map to be a racial gerrymander. Since 1993, the Supreme Court has held that making race the predominant factor in drawing district lines without a compelling reason for doing so violates the equal protection clause of the 14th Amendment. By so openly
declaring he was engaged in partisan politics, Mr. Lewis was trying to prove that race did not drive the North Carolina General Assembly’s decisions.

The entire exercise is nonsensical in a place like North Carolina, where about 90 percent of African-American voters support Democratic candidates and about two-thirds of white voters support Republicans. One cannot discriminate against Democrats without discriminating against African-Americans in North Carolina, and vice versa.

So we know what we can expect in North Carolina in 2021, if Republicans still control the legislative branch and thus redistricting (in that state, the governor, who now is a Democrat, plays no role in approving the plans). Republicans will use sophisticated technology to draw a very effective partisan gerrymander. They might even keep redrawing lines every few years to keep their advantage. They will proclaim loudly and often that their purpose is to help the Republican Party. They will all be instructed not to talk about race.

Democrats and minority voting advocates will sue in federal court and claim that this is a racial gerrymander in disguise. And federal courts will have to figure out whether it was race or party that motivated the decision of the state’s Legislature.

In the case of North Carolina, there may be an apparent out. Thanks to earlier Republican overreaches attempting to manipulate elections to the State Supreme Court, elected Democrats now have a majority there. So perhaps voting rights advocates will go to state court and get a ruling that partisan gerrymandering violates the state Constitution.

If the state court holds that Republican gerrymanders violate the Constitution, I expect there will then be calls to get the Supreme Court of the United States involved, for example by arguing that the state court is interfering with the Legislature’s constitutional prerogative to draw congressional district lines as it sees fit. An argument that the State Supreme Court is usurping the Legislature’s powers in an election case has echoes of the Supreme Court’s 2000 decision in Bush v. Gore ending the contested Bush-Gore presidential race. Just as conservative justices in that case stepped in to stop what they saw as an overreaching Florida Supreme Court helping the Democratic candidate, the court’s current conservatives may want to step in to stop state supreme courts from blocking Republican legislative gerrymanders.

Other paths to redistricting change also raise problems. In some states (but not North Carolina), there are voter-approved redistricting commissions, as Chief Justice Roberts mentioned in his Rucho opinion. But Chief Justice Roberts was also the chief dissenter in a 2015 case out of Arizona that had allowed voters to adopt such commissions for congressional redistricting. His dissent argued that commissions adopted to shut out partisan legislators also violate the State Legislature’s prerogative to draw those lines. With Justice Kennedy gone, the court could well reverse this 5-4 holding in the next few years, and block the use of redistricting commissions for federal elections.

The bottom line is that the Rucho opinion has not ended courts’ involvement in redistricting cases -- far from it. The opinions yet to come will enmesh the federal courts in ugly battles over race and partisanship, and they are likely to solidify the court’s growing reputation as a partisan institution.

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