SCOTUS Gerrymandering Case: Roberts Didn't Defend Constitutional Democracy

Bruce Ledewitz
Aside from numerous doctrinal differences, the fundamental disagreement between the five justice majority and the dissent in Rucho v. Common Cause, the gerrymandering case decided last week, was not legally technical, but politically existential.

Chief Justice John Roberts’ majority opinion agreed with the dissent that extreme gerrymandering is unjust. The difference between the majority and the dissent, Roberts wrote, was Justice Elena Kagan’s implication, on behalf of the court’s four liberal Justices, that the court can remedy political gerrymandering “because it must.”

Roberts rejected this urgency as a basis for judicial action, holding for the conservative majority that gerrymandering represents a political question, beyond the reach of federal court jurisdiction even to consider. Roberts pointed out that state courts and Congress could remedy the problem. But, as far as the federal courts are concerned, it is open season for gerrymandering.

The question, then, is whether Kagan is right. Does gerrymandering represent a serious threat to democratic legitimacy? The answer depends on how close you think America is to the actual end of democracy. If there are signs that it can happen here, the high court’s majority should have shared Kagan’s urgency.

The 2018 book, ‘How Democracies Die,’ by Harvard political scientists Steven Levitsky and Daniel Ziblatt, argues that democracies end in a failure of
legitimacy. People no longer accept rule by their opponents. To prevent that outcome, politicians bend or break long-accepted norms of restraint. Politics becomes war.

By these measures, Kagan is quite right to worry about the future of democracy here.

On the Republican side, Michael Anton called the 2016 Presidential election ‘The Flight 93 Election’ — charge the cockpit or you die.

On the Democratic side, undoubtedly many would fear exactly the same thing if President Trump were reelected in 2020. As Ben Shapiro warned two years ago in National Review, “we,” that is, both sides, “are in love with the apocalypse.”

Because we expect the unimaginable, we are ready to do the unthinkable.

During the period 2011 to 2014, rogue elements in the Republican Party, led by the American Legislative Exchange Council, plotted to game the Electoral College by moving blue states temporarily under Republican control, like Pennsylvania and Virginia, to congressional district distribution of Presidential electoral votes, while leaving Republican states like Texas and Florida winner-take-all.

The result would have been to make electing a Democratic candidate for president much more difficult.

This plot against democracy might have succeeded, but honorable Republicans, such as then-Gov. Tom Corbett put a stop to the effort behind the scenes.

Since then, however, voter ID laws, voting list purges, even changes in government structure when Democrats are elected, have increasingly dominated GOP planning. We even see headlines like this recent one from The Week: The Religious Right: Reconsidering Democracy?

On the Democratic side, the rejection of traditional norms is even more open. Half of the current candidates for president support ending the independence of the Supreme Court, and thus the rule of law, by various forms of court-packing to eliminate or dilute the current conservative majority.
Opposition to these reckless plans, even by those who dare to voice reservations, has been timid.

America did not come to this crisis of democratic legitimacy suddenly. Constitutional democracy requires a set of commitments that many Americans no longer believe: that rights are real and discoverable; that the people can be trusted to make reasonable judgments; that the arc of history, to paraphrase Dr. Martin Luther King, Jr., bends toward justice and that the universe is, in some sense, on our side.

All those beliefs were originally grounded in Biblical religion, which was the foundation from which constitutional democracy and the classic liberal tradition grew. With the death of God, a new foundation for these beliefs needed to be found. But none has been.

Now, we are more likely to believe that rights are subjective human constructs; that people are irrational; that history is contingent and that the universe is just material forces indifferent to us. This mishmash of relativism, materialism and nihilism is proving toxic to American public life, and the public life of the West in general. We have lost confidence.

This movement of belief has led to the tribal nationalism and identity politics we see all around us. It is why Vladimir Putin can so confidently say that the tradition of western liberalism is obsolete.

Recognizing this real danger should cause all of us to stop seeking short term victories that weaken constitutional democracy as a whole. That means as a first step, not taking every advantage that the law permits. Politicians have to become heroes of democracy, by holding to the traditional norms of public life even when their base demands otherwise.

But the crisis also requires that the courts reinforce those norms with law whenever possible. The Rucho decision was an opportunity to do that. It was a test that the high court’s majority failed.

In the end, if the people reject constitutional democracy, no court can save us. But even a modest standard for the constitutionality of gerrymandering—that partisan advantage prevailed over traditional districting standards, for example—would have preserved some level of judicial review.

That, in turn, would have helped politicians reject at least the most extreme redistricting plans. Now that Roberts has removed every judicial restraint, even politicians who would like to do the right thing, will likely give in to the demands of their base. They will have no threat of lawsuits to hide behind.

The Supreme Court cannot right every wrong. But we can ask that the court not make things worse. That is what Roberts has done in the Rucho decision.

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