Timid Restraint

Theodor Shulman 2019-07-01T09:45:06

In *Rucho v. Common Cause*, the Supreme Court of the United States finally laid to rest any hope it might lend citizens a hand in their struggle against partisan gerrymandering. That does not necessarily come as a surprise: The man to whom most people had looked for help no longer sits on the bench, and the new "swing vote," Chief Justice John Roberts, never seemed particularly inclined to lead his Court into battle against the undemocratic practice that is partisan gerrymandering. Nevertheless, *Rucho* was worth the wait because it throws into relief many of the characteristics that distinguish the Supreme Court from other apex courts. My aim in this post, which follows up on this week's *Verfassungsblog* Editorial, is to point out some of these characteristics and to make some general comparative observations. Thus, I believe the ruling demonstrates that the Court continues to display the hallmarks of a private-law, first-generation constitutional court, albeit one that is well aware it is part of a wider, "vertically differentiated" constitutional system.

First things first, however. In *Rucho*, the Court held that federal courts are barred from adjudicating claims that legislative maps drawn with the intent to favor or disfavor a political party violate the Constitution of the United States. Because there is no "judicially manageable standard" to ascertain at what point partisan gerrymandering—which is *per se* constitutional—has gone too far, gerrymandering claims present a "political question," which renders the issue non-justiciable.

The plaintiffs had hoped to avert this finding, of course. They had asserted, first of all, that partisan gerrymandering violates the Equal Protection Clause of the Fourteenth Amendment because it dilutes the vote of citizens who support the disfavored party. Second of all, they claimed infringement of their right to free speech: gerrymandering, they argued, punishes citizens for voting in a certain way and depresses their future political involvement. Their final claim went beyond the Bill of Rights: in their opinion, partisan gerrymandering violates Art. I, § 2, whereby the House of Representatives "shall be […] chosen […] by the *people*," and exceeds the states' power under Art. I, § 4, to prescribe the "times, places and manner of [congressional] elections."

In response to the first argument, the majority opinion reminds us that the Framers were aware of gerrymandering. That they nevertheless entrusted the states with the regulation of congressional elections must mean, therefore, that some degree of partisan gerrymandering is constitutional. The state legislatures in charge of map-drawing are inherently political, after all. As a result, partisan gerrymandering is *generally* constitutional. Unfortunately, there are no manageable standards, the majority argues, to tell apart extreme (and hence unconstitutional) from benign, constitutional gerrymandering, because there is no baseline of constitutionally mandated "fairness" that can act as a watershed.

Contrary to what the Court claims, political decision-making is not tantamount to partisanship, however. James Madison's famous disdain for factionalism belies the idea that the Framers condoned partisan gerrymandering. And one can easily imagine political map-drawing that doesn't focus on parties; for instance, the decision to prioritize contiguity and compactness over the creation of "safe seats" is inherently political. It makes more sense, accordingly, to treat every instance of partisan gerrymandering as unconstitutional and to limit judicial *remedies* to egregious cases. That may seem like a difference without a distinction, but it isn't. For a court will always struggle to deny remedying a violation it has already found, as it has to explain why it doesn't do anything to combat conduct that is *a priori* unconstitutional. By contrast, refusing to ascertain a constitutional violation in the first place is far easier because the court can claim it is merely refraining from policing the boundaries of generally constitutional behavior. In my opinion, the majority's decision to settle for the second option exemplifies the Supreme Court's long-standing reluctance to be a full-blown "public-law court"—that is, a court that has a robust approach to gathering evidence and calibrates its restraint vis-à-vis the political process not through declarations of non-justiciability but through flexible remedies.

The majority's analysis of the plaintiffs' second and third argument likewise gives rise to comparative observations. For instance, the justices write that the First Amendment claim is unfounded because any burden that gerrymandering imposes on future political activity is largely conjectural. But that is hardly convincing, not even from a doctrinal perspective. As the dissent rightly points out, the majority conveniently focuses on the potential burden for future campaigns (which is indeed conjectural) and neglects the punishment that partisan gerrymandering inflicts for *past* exercises of free speech (which isn't).

What is more, the justices' next contention, whereby Art. I, §§ 2, 4 does not restrict a state's political considerations in drawing legislative maps, demonstrates that the Supreme Court continues to prefer analyzing problems of democratic government as a question of individual rights—such as the First or the Fourteenth Amendment—and not of constitutional structure. (The Court also sold short the law of constitutional structure when it restricted legislative standing in inter-government disputes and when it declared the Guaranty Clause non-justiciable, to name but a few examples.) I do not wish to overstate this point: The American separation-of-powers doctrine, after all, complicates overt interferences in the political process; US lawyers tend to be skeptical of stand-alone legal concepts ("democracy", the "rule of law"); the German Constitutional Court uses an individual right, which it arguably interprets beyond recognition, to facilitate its examination of democratic legitimacy in the European Union; and apex courts generally seem more at ease with rights cases than with complex issues of constitutional structure. Nevertheless, *Rucho* teaches us once again that first-generation constitutional courts are much less concerned about ensuring that a constitution is "fully effective," as it were, than courts of the second and, notably, third generation. Cass Sunstein famously warned Eastern European countries that guaranteeing welfare rights would "undermine the prospects for a form of constitutionalism that offers firm protection to basic rights" and suggested holding these rights non-justiciable. Yet one wonders why free speech deserves

“firmer” protection than constitutional provisions that were originally intended as a bill of rights of their own. Saying that “the people” elect their representatives even when the government gerrymanders their voting districts may be correct. But it is also very formalistic.

None of this is to say that determining a standard for restricting remedies to egregious cases of partisan gerrymandering is easy. The majority is right when it argues that eliminating partisan gerrymandering completely, including the few safe seats it grants the disfavored party, could theoretically make that party come up short in every district. Nevertheless, its assertion that there is no judicially manageable standard is counterintuitive, given that lower courts believe to have found one. The Court’s argument, furthermore, that the case would have turned out differently if only the Constitution explicitly forbade partisan gerrymandering (as does the Florida constitution) simply doesn’t make much sense: By the justices’ own admission, the problem isn’t knowing whether (extreme) gerrymandering is unconstitutional but finding a way to expose the unconstitutional cases. An explicit ban on partisan map-drawing would do nothing to change that.

This post has been predominantly critical of *Rucho*. That is why it ends with two more emollient observations. (Admittedly, the dissent sounds a more skeptical note with regard to both.) First of all, I doubt anybody can say with any certainty whether the ruling will entrench partisan gerrymandering for decades to come or bury it under an avalanche of new initiatives in the states. Second of all—and relatedly—the majority’s insistence that *state* courts may step up to the plate reminds us that American constitutional law is more than the US Constitution: If (some) states, following the conservative turn on the Court, indeed amend or re-interpret their constitutional law in order to combat problems the Supreme Court refuses to fight, they will lend fresh support to the notion that multitiered constitutionalism exists not only in Europe but also in the United States. That will facilitate academic and judicial cross-fertilizations from which (pan-)European public lawyers will be able to learn a lot.
