Opinion
News

A protester holds a sign outside the U.S. Supreme Court June 27 after the court ruled on adding a citizenship question to the 2020 census. (CNS/Carlos Barria, Reuters)

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Two Supreme Court rulings last week warrant attention because they have to do with the state of our democracy. A case can be made that both were correctly decided, although one was regrettable and the other not from a political point of view.

In one case, the court ruled against the Trump administration, which has sought to include a question about citizenship on the constitutionally mandated census. The fear is that such a question would cause non-citizens to refuse to take the census, which serves as the basis for representation in Congress, and apportionment of federal funding. States with large numbers of non-citizens would, consequently, have fewer members in Congress and receive less financial aid.

The relevant text of the Constitution — Article 1, Section 2, and the 14th Amendment — does not mention citizenship. Originalists on the court sided with Trump. But, the majority, in an opinion written by Chief Justice John Roberts, nicely called Trump's Secretary of Commerce Wilbur Ross a liar. "Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case," Roberts wrote. Leaked documents indicated that the Trump administration's motivation in asking about citizenship was specifically to lower the counting of non-citizens. The court did not preclude permitting a citizenship question if a future rationale was presented.

Related: Supreme Court stops citizenship question in census, for now

The other decision dealt with redistricting and stemmed from cases in Maryland and North Carolina. In Maryland, Republicans argued the state's 6th Congressional District was redrawn to make sure a Democrat won it, which is what happened in 2012. Ironically, the Democrat who won it was none other than John Delaney, who is now a candidate for the presidency. SCOTUSBlog's Amy Howe summed up the decision and the dissent in the twin redistricting cases here. Essentially, the court ruled 5-4 that the federal courts have no constitutional authority to intervene in cases where congressional lines have been drawn in an excessively partisan

manner. It may be wrong. It may make a mockery of democracy, because it allows the politicians to choose the voters, rather than the voters the politicians. But, it must be resolved in the legislatures or in Congress.

It is one of the maxims of our constitutional jurisprudence that political decisions should be left to the political branches, not the courts. It is also one of the hardest things for someone steeped in Catholic social teaching to grapple with. The founders may have mentioned "promote the general Welfare" in the preamble to the Constitution, but they did not understand that the common good was among the principle end of politics the way we Catholics do. For them, because no one is disinterested, and whatever conception of natural law they had did not lead them to think there were absolutely correct and incorrect conclusions, the Constitution had to rely on competing interests to serve as a guarantee of liberty. It is why politicians draw congressional districts and why elections are run by a partisan official, a secretary of state.

One of the first cases of gerrymandering involved one of the founders, who lent his name to the phenomenon. Elbridge Gerry was a signer of the Declaration of Independence, representative at the Constitutional Convention, member of Congress and vice president of the United States. While serving as governor of Massachusetts, he approved a state Senate map that included a district that was satirized in a cartoon, and made to look like a salamander. The cartoonist labeled it a "Gerry-mander" and the name stuck. So, it is hard to argue that the idea of partisan redistricting was alien to the Founding Fathers.

That said, Gerry and his colleagues in early federal Massachusetts did not have computer modeling programs and did not yet recognize the way racial and political divisions can overlap. In her dissent, Justice Elena Kagan focused on these points: "These are not your grandfather's – let alone the Framers' – gerrymanders."

Kagan wondered why the court said, in advance and in all instances, that there could be no redress in the courts. "For the first time in the Nation’s history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply." It is one of the things that is not too difficult to notice about the Roberts' court: They find judicial restraint when it is convenient to find it.

Still, while we can all recognize the harm caused by examples of extreme partisan gerrymandering, and I likely would have joined Kagan's dissent, the left needs to wean itself from the belief that it can get what it wants in the courts. One of the reasons many Americans resent the left is because it believes the courts, which almost by definition are elite institutions, wield too much power. Certainly, judicial intervention has not always worked well: *Roe* v. *Wade* short-circuited the political discussion that might have found a compromise most Americans could live with on that issue. At this moment in our nation’s history, when democratic norms are being challenged, the left needs to refresh its ability to win debates in the public square and write fewer checks to the ACLU.

[Michael Sean Winters covers the nexus of religion and politics for NCR.]

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