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How to Avert a 2024 Election Disaster in 2023

With a clear decision in a redistricting case, the Supreme Court can head off dangerous litigation.

David B. Rivkin Jr. and Andrew M. Grossman

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Pennsylvania lawmakers in 2019 decided to allow mail-in voting for the first time. They enacted a statute providing that "a completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." In 2020 the state Democratic Party went to court, arguing that in light of the Covid pandemic, the deadline "results in an as-applied infringement" of the right to vote.

The Democrat-dominated Pennsylvania Supreme Court—its members are chosen in partisan elections—sided with the party and ordered a deadline extension, even as it acknowledged the statutory language was clear and unambiguous. The U.S. Supreme Court declined to hear an appeal, so the 2020 election was conducted under this and other new, judge-imposed rules.

Usually there's no reason for the high court to review a state-court decision about state law. But election law is different. The U.S. Constitution mandates that state *legislatures* make the laws governing federal elections for Congress and the presidency. The Pennsylvania ruling was therefore unconstitutional. But the justices in Washington, perhaps chastened by the enduring political controversy over *Bush v. Gore* (2000), seem reluctant to take up such cases close to an election. Fortunately, they will soon have an opportunity to address the issue and to avert the possibility of an electoral meltdown in 2024.

Pennsylvania wasn't alone in 2020. Faced with Republican control of many state legislatures, the Democrats and their allies took advantage of the pandemic to upend that year's voting process. Longstanding wish-list items like near-universal voting by mail, ballot "harvesting," drop boxes, extended deadlines, and loosened identification and signature-match requirements came to pass in much of the country, often by state court order.

The pandemic disruption may be behind us, but litigation over election rules continues. One reason is the success of the Democrats' 2020 efforts, which their current cases treat as setting a new legal baseline. Returning to ordinary pre-pandemic procedures, they claim, amounts to unlawful "voter suppression."

But there's another reason for the state-court litigation explosion: redistricting after the 2020 Census. If state judges are willing to second-guess voting laws, why not the maps too? New maps are often litigated, but what's different this time is the number of cases asking courts to

toss out alleged partisan gerrymanders. The U.S. Supreme Court closed the door to such claims under the federal Constitution in *Rucho v. Common Cause* (2019), reasoning that there was no "clear, manageable, and politically neutral" standard for courts to apply. The same objection applies to suits brought under state law, but *Rucho* didn't address that question.

So they proliferated. Many states where Democrats could pick up House seats with a different map have faced lawsuits based on open-ended state constitutional provisions, such as North Carolina's proclaiming "all elections shall be free." Several states' top courts have tossed out legislature-enacted maps; the North Carolina justices even authorized a lower court to hire its own mapmakers. Republicans won state-court decisions against Democratic gerrymanders in Maryland and New York state.

None of this passes constitutional muster. State courts can interpret and apply laws governing federal elections and consider challenges to them under federal law, including the Constitution. But they have no authority to strike those laws down under state constitutions, let alone a freestanding power to contrive their own voting rules and congressional maps. The U.S. Constitution often assigns powers and duties to the "states" generally, but Article I's Elections Clause directs that the "times, places and manner" of conducting congressional elections shall "be prescribed in each state by the legislature thereof," unless overridden by Congress. The Electors Clause similarly vests the "manner" of choosing presidential electors in "the legislature."

In *McPherson v. Blacker* (1892), the U.S. Supreme Court recognized that the Electors Clause "leaves it to the legislature exclusively to define the method" of choosing electors and that this power "cannot be taken from them or modified by their state constitutions." In *State Legislature v. Arizona Independent Redistricting Commission* (2015), it held that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking."

Still, it's no wonder plaintiffs and state judges have felt emboldened to buck these limitations. The decision of a state supreme court can be appealed only to the U.S. Supreme Court, which has shied away from such cases. Around the same time the justices declined to hear the 2020 Pennsylvania case, they turned back a request to block North Carolina officials from altering legislatively enacted mail-in ballot deadlines. This year, they denied emergency requests to block judge-made maps in North Carolina and Pennsylvania from being used in November.

Election-law cases present unique timing considerations, given the potentially disruptive consequences of changing laws or maps with an election approaching. When courts make changes weeks before a filing deadline or Election Day, the justices' ability to right the wrong is severely constrained. There's rarely a serious basis to press the issue after votes have been cast. Those circumstances apply in most election-law cases.

But unlike state-court orders meddling with voting procedures, which typically apply to one election only, congressional maps remain in place until they're altered, which usually isn't for a decade. So there's no timing issue to prevent the court from hearing a redistricting case.

Justices Samuel Alito, Clarence Thomas and Neil Gorsuch dissented from last month's denial of the North Carolina stay application, arguing that the case was a good vehicle to consider the power of state courts to rework federal-election laws. Justice Brett Kavanaugh wrote separately

to say that the court should take a case raising the issue, but this one came too close to the 2022 election. North Carolina's House speaker has petitioned the court to take the case in its next term. If it does, a decision would likely come next summer, nearly a year and a half before the 2024 election.

The court's failure to resolve this issue could spell catastrophe. If the 2024 presidential vote is close in decisive states, the result will be an onslaught of litigation combining all the worst features of the 2000 and 2020 election controversies. The court's precedents in this area all point toward legislature supremacy but leave the door cracked enough for canny litigants, abetted by state judges, to shove it open and seize electoral advantage. To avoid a constitutional crisis, the justices need to articulate with clarity that state courts can't rely on state constitutions or their own judicial power to alter either congressional redistricting maps or voting rules in federal elections.

Mr. Rivkin served at the Justice Department and the White House Counsel's Office in the Reagan and George H.W. Bush administrations. Mr. Grossman is an adjunct scholar at the Cato Institute. Both practice appellate and constitutional law in Washington.