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# Rulings on Wisconsin Election Raise Questions About Judicial Partisanship

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WASHINGTON — In a pair of extraordinary rulings on Monday, the highest courts in Wisconsin and the nation split along ideological lines to reject Democratic efforts to defer voting in Tuesday's elections in the state given the coronavirus pandemic. Election law experts said the stark divisions in the rulings did not bode well for faith in the rule of law and American democracy.

"Election cases, more than any other kind, need courts to be seen by the public as nonpartisan referees of the competing candidates and political parties," said Edward B. Foley, a law professor at Ohio State University. "It is therefore extremely regrettable that on the very same day, on separate issues involving the same Wisconsin election, both the state and federal supreme courts were unable to escape split votes that seem just as politically divided as the litigants appearing before them."

Richard L. Hasen, a law professor at the University of California, Irvine, and the author of a recently published and prescient book, "Election Meltdown," said the pandemic had made a bad situation much worse.

"Monday's performance by the courts augurs a nasty partisan divide in the judicial branch," Professor Hasen said. "It threatens the legitimacy of both the election and the courts."

"Already before the coronavirus crisis, 2020 was shaping up to be a record-setting year for election litigation," he said. "Covid-19 means there will be even more lawsuits than before over issues like absentee ballot protocols and the safety of in-person voting."

When the Supreme Court rules on emergency applications, it almost never gives reasons. But the court's conservative majority on Monday spent four pages explaining why it had refused to extend absentee voting in Tuesday's elections in Wisconsin.

What prompted the break with the court's usual practices? It may have been the optics, which were certainly ugly, with the court's five Republican appointees outvoting its four Democratic ones to deliver a victory to Wisconsin Republicans.

The majority may have also felt a need to address Justice Ruth Bader Ginsburg's blistering dissent, which said the court's reasoning "boggles the mind."

In response, the majority methodically walked through what it called "a narrow, technical question about the absentee ballot process."

Justice Ginsburg said that approach trivialized "a matter of utmost importance."

The contrasting visions of the two sides, one viewing the case as minor and technical and the other as an effort to vindicate a fundamental constitutional value, amounted to a deep disagreement about the judicial role in voting rights cases.

In public comments, Chief Justice John G. Roberts Jr. often insists that the justices "don't work as Democrats or Republicans." But he and his fellow Republican appointees have frequently voted to restrict voting rights in ways that have primarily helped Republicans.

Chief Justice Roberts wrote the majority opinion, for instance, in Shelby County v. Holder, the 2013 voting rights decision that effectively gutted the Voting Rights Act by a 5-to-4 vote. Freed from the act's constraints, states controlled by Republicans almost immediately started imposing an array of restrictions on voting, including voter ID laws, cutbacks on early voting and purges of voter registration rolls.

Some scholars said the public should not assume that the justices were driven by partisanship rather than their judicial philosophies.

"It's unfortunate that both the Wisconsin and U.S. Supreme Court rulings broke down the way they did, because it lends credence to the perception that law is increasingly no different than politics," said Ilya Shapiro, a lawyer with the Cato Institute, the libertarian group. "But the decisions weren't partisan."

"Republican-appointed judges tend to want to apply the law as written, while Democrat-appointed ones want to see 'justice' done, even if it means bending the rules," he said. "In the Wisconsin context, Republican-affiliated judges would leave any decision to delay the election or change its operation to the Legislature, while Democrat-affiliated ones want to fix the problem themselves."

"I agree with the former approach," Mr. Shapiro said, "because, even in a pandemic, we shouldn't cast aside the rule of law or the separation of powers."

The Wisconsin Supreme Court's ruling, striking down an executive order from Gov. Tony Evers, a Democrat, that would have delayed Tuesday's elections, said it was adhering to neutral legal principles.

"The question presented to this court is whether the governor has the authority to suspend or rewrite state election laws," the unsigned opinion said. "Although we recognize the extreme seriousness of the pandemic that this state is currently facing, we conclude that he does not."

In dissent, Justice Ann Walsh Bradley said that reasoning ignored reality. "The majority gives Wisconsinites an untenable choice: Endanger your safety and potentially your life by voting or give up your right to vote by heeding the recent and urgent warnings about the fast-growing pandemic," she wrote. "These orders are but another example of this court's unmitigated support of efforts to disenfranchise voters."

Richard H. Pildes, a law professor at New York University, said judicial philosophy helped explain Monday's ruling from the U.S. Supreme Court. "I'd say 'liberal' judges are more comfortable with federal courts crafting what they see as pragmatic, ad hoc responses to extraordinary election circumstances," he said, "while 'conservative' judges believe that federal

courts should retain as much of the pre-existing rule structure — such as that absentee ballots must be postmarked on or before Election Day — as possible."

That was how the majority in Monday's decision from the U.S. Supreme Court framed the question before it, addressing only whether a federal judge was authorized to extend the deadline for mailing absentee ballots.

"The court's decision on the narrow question before the court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of Covid-19 are appropriate," the unsigned opinion said. "That point cannot be stressed enough."

In dissent, Justice Ginsburg broadened the lens. "While I do not doubt the good faith of my colleagues," she wrote, "the court's order, I fear, will result in massive disenfranchisement."

The court will almost certainly have many opportunities to weigh in on election disputes this year, and some scholars said Monday's decision was a worrying signal. "The court's decision is an ominous harbinger for what the court might allow in November in the general election," Leah Litman, a law professor at the University of Michigan, wrote in The Atlantic.

Cases on voting by mail are likely, as are ones on access to polling places. The nightmare scenario, some scholars said, would be litigation over recounts in the wake of a close election marred by irregularities.

Professor Foley said he feared a sequel to Bush v. Gore, the 2000 Supreme Court decision that handed the presidency to George W. Bush by a 5-to-4 vote. Any such sequel, he said, would be issued in the shadow of the Republican blockade in 2016 of President Barack Obama's nomination of Judge Merrick B. Garland to fill the vacancy created by the death that year of Justice Antonin Scalia.

"Is the nation really ready, 20 years after Bush v. Gore," Professor Foley asked, "for President Trump's re-election bid to turn on a 5-4 ruling from a Supreme Court whose composition is questioned by some because Trump, rather than President Obama, appointed Justice Scalia's successor after the Senate left that seat vacant for so long?"