

Political Portents

Latest Supreme Court rulings on election law may foreshadow a far more conservative approach.

BY RICHARD L. HASEN

Amid the flurry of end-of-the-term activity at the Supreme Court came decisions in two major election-law cases, *Randall v. Sorrell*, addressing the constitutionality of Vermont's campaign financing law, and *LULAC v. Perry*, considering the legality of the controversial Texas redistricting plan.

The nine justices issued a staggering 12 opinions in the two cases, leaving even seasoned election-law scholars scratching their heads over the intricacies of the opinions.

My aim here is to make some sense of the rulings and to consider what they portend for the future of political regulation in the United States. In short, these opinions show a Supreme Court in transition, and there are warning signs that the new Roberts Court could take a much more conservative approach to the law of politics than the Rehnquist Court did.

Before I begin the analysis, an explanation. Some might take exception to the idea that the Court in deciding these cases is engaging in "political regulation." The Supreme Court obviously does not create law the way a legislature does, through the passing of statutes. It decides cases before it.

But make no mistake: The Court has served as the chief political regulator in the United States since the 1960s. It has imposed the one-person, one-vote requirement on congressional state and local districting; banned the practice of political patronage; allowed states to impose limits on campaign contributions but forbidden limits on campaign spending; and required that states take race into account—but not too much—in the drawing of district lines.

Since the 1960s, the Court has decided an average of 60 political-regulation cases per decade, and though the absolute number of cases appears to be declining this decade, the opin-

ions that the Court has issued this decade have been far-reaching and important.

VERMONT LIMITS

Since 1976, when the Supreme Court decided *Buckley v. Valeo*, the Court has generally stuck with a distinction between campaign contributions (money given to candidates or others) and campaign expenditures (money spent by candidates or others on election-related speech).

Though limits on both contributions and expenditures implicated speech and association rights under the First Amendment, the Court held that the burden was too great—and the value in preventing the corruption of candidates too attenuated—to justify limits on campaign spending. Contribution limits, on the other hand, could be regulated to prevent the corruption of candidates or the appearance of corruption.

In recent years the Court had shown remarkable deference toward new (and increasingly restrictive) campaign finance laws. In *Nixon v. Shrink Missouri Government PAC* (2000), the Court upheld Missouri's low contribution limits against a charge that they were so low as to prevent candidates from engaging in effective advocacy. Indeed, it appeared after *Shrink Missouri* that virtually all contribution limits would be upheld against an argument that the amounts were so low as to deprive candidates or voters of their First Amendment speech and association rights.

In the new campaign finance case from Vermont, *Randall v. Sorrell*, decided at the end of this term, the Court pulled back from the extreme deference of *Shrink Missouri*. The Court basically divided into three camps. Three justices (Ruth Bader Ginsburg, David Souter, and John Paul Stevens) would stick with the old *Shrink Missouri* formula. Three justices (Antonin Scalia, Clarence Thomas, and possibly Anthony Kennedy) would strike down all (or most) contribution limits as a violation of the First Amendment. And three justices (Samuel Alito Jr.,

Stephen Breyer, and John Roberts Jr.) took an intermediate position, which would strike down contribution limits as unconstitutional when the Court believed the limits were too low to prevent challengers in elections from mounting effective campaigns. The test set forth in Breyer's plurality is going to be a fact-intensive one, focused on the role of money in politics in each jurisdiction.

TEXAS REDISTRICTING

In 2004 the Supreme Court considered the constitutionality of partisan gerrymandering—the practice of one political party drawing legislative district lines to maximize its electoral advantage. For example, if redistricting could pack Democrats into a small number of districts, Republicans could elect more representatives to Congress or to a state legislature.

In *Vieth v. Jubelirer* (2004), the Court fractured badly on the constitutionality of political gerrymandering. No majority held either that these cases could not be brought at all (a position held by four justices) or that there was a standard to separate the permissible from the impermissible use of voter party-registration information to draw district lines (a position held by four other justices). Kennedy left the door open for the development of a standard some time in the future, but held that the plan at issue could not be declared unconstitutional.

In the Texas redistricting decision the Court issued in June, Kennedy remained unwilling to find a “manageable” standard to police partisan gerrymandering, allowing the controversial Texas redistricting plan benefiting Republicans (and engineered by former House Majority Leader Tom DeLay) to remain in effect. The two new justices did not weigh in on the new standard, but presumably one of them would have done so if he agreed that there was a manageable standard under which the Texas plan was unconstitutional.

The Texas decision was also noteworthy in its analysis of the Voting Rights Act. Kennedy, joined by the four more liberal members of the Court, held that one of the Texas districts had to be redrawn because it illegally diluted the power of Hispanic voters in the area. Chief Justice Roberts issued a strong dissent, noting, “It is a sordid business, this divvying us up by race.” Kennedy, joined by the four more conservative members of the Court, rejected a voting-rights challenge to another district in which African-American voters argued their rights to “influence” the outcome of the elections were unfairly diluted by the Texas plan.

MOVING RIGHT?

In some ways, these two election-law opinions do not make much new law. In the campaign finance area there certainly was room to distinguish Vermont's limits, which were the lowest in the nation, from the limits upheld in the *Shrink Missouri* case.

In the Texas case the status quo on partisan gerrymandering stands—the courthouse door remains open for claims, and plaintiffs will lose when they bring them, because no standard exists for judging an impermissible partisan gerrymander.

But beneath the surface, both decisions (and the six fractured opinions in each case) reveal a Supreme Court in transition, a Court that may move in the coming decades in a much more conservative direction from the Rehnquist Court on both campaign finance and voting rights.

In the campaign finance area it is telling that Alito issued a separate opinion making clear that he did not view the parties in the case as having presented a frontal attack on the precedential value of *Buckley v. Valeo*. Alito basically invited future litigants to bring such an attack, presumably to argue that *Buckley's* upholding of *any* contribution limits should be overruled on First Amendment grounds.

There is nothing in the Breyer opinion that Roberts joined that would prevent the chief justice from striking down contribution limits in a future case. Together with Kennedy, Scalia, and Thomas, there may ultimately be a bloc on the Court to strike down all campaign finance regulations (other than disclosure) as inconsistent with the First Amendment.

It is hard to say how likely that is. That's where Scalia and Thomas are now, and it is unclear whether the other three justices would be willing to go that far, especially Roberts, who has expressed a belief in “judicial minimalism” and respect for precedent.

The long-term implications of the Texas case could be staggering, as well. There does not seem much of a prospect on the horizon that the Court will rein in partisan gerrymandering anytime soon.

Moreover, there may be an emerging bloc on the Court (the same five more conservative justices) who will begin to read the Voting Rights Act in narrow ways. Even though Kennedy and Roberts divided on a particular question, Kennedy's own opinion expressed concern about the constitutionality of expansive interpretations of the act. And the Court's rejection of the “influence” claim indicates that the days of voting-rights plaintiffs going to court seeking generous readings of the Voting Rights Act to help minority voters are over.

Perhaps most important is the chief justice's comments about the “sordidness” of divvying up voters on the basis of race. These comments suggest he and Alito, who joined this opinion, as well as Thomas and Scalia, may be poised to strike down the expiring provisions of the Voting Rights Act after they are renewed by Congress (likely later this year). Just as Kennedy held the key vote on the voting-rights issues in the Texas case, he's likely to hold the key vote on the constitutionality of a renewed Voting Rights Act.

When Justice Sandra Day O'Connor retired from the Supreme Court, I believed it would portend great change in the Court's regulation of the political process.

The signs are that the transition has begun and a lot more change is yet to come. It is not change that supporters of campaign finance regulation or strong minority voting rights should cheer.

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