

ROLL CALL

Two Cases, Two Approaches, One Principle

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The late, great legal scholar John Hart Ely conceived of judges as referees. Rather than taking sides in political or cultural disputes, Ely believed that the judicial branch should police the political process to ensure fairness and thwart powerful in-groups' inevitable efforts to stack the deck against their out-of-power rivals.

This week, the U.S. Supreme Court will hear oral arguments in two cases that will test its ability to effectively police the political process.

The first case is a challenge to a 1997 Vermont law providing public financing, low contribution limits and, most controversially, caps on candidate spending. Opponents of campaign finance reforms will argue that the law's contribution and spending limits are "incumbent-protection" measures, intended to entrench powerful officeholders at the expense of challengers.

The next day, the court will hear arguments about whether it should intervene in Texas' unprecedented mid-census redistricting, a maneuver that many have labeled "re-redistricting." Lawyers for the Democratic Party will contend that shifting the lines every time a new party gains power sets a dangerous precedent that serves partisan interests at the expense of the public interest.

It may seem at first glance that a principled "referee" must intervene in both cases or in neither. Not so. To promote robust political competition and participation, the court may choose to intervene in the Texas case, while definitely staying its hand in Vermont.

First, there is no evidence that the provisions of Vermont's law serve incumbents or any party. A 2002 study of thousands of state elections concluded that lower contribution limits reduced incumbents' margins of victory. Federal elections, by contrast, are an incumbent's dream. With unlimited spending and contribution limits well beyond most Americans' means, only five Members out of 435 lost their elections in 2004.

When assessing the danger of entrenchment, the court should look not just to the substance of a law but also to the process by which it was enacted. Laws passed quickly in the dead of night without much public debate should be viewed skeptically. By contrast, measures that generated significant public comment and were debated at length on the floor should garner more deference from the justices.

Texas' unusual redistricting can be seen as an example of back-room dealing by incumbents looking to boost the national clout of the controlling political party. Although there was extensive public debate on the concept of "re-redistricting," there was by no means consensus in favor. The final plan, which targeted out-party national Representatives and left minorities with less clout, was unveiled just two days before it was sent to the governor's desk. From soup to nuts, the whole affair was a partisan battle. In fact, a Republican Congressional aide commented that the plan would have "a real national impact that should assure that Republicans keep the House no matter the national mood."

The process by which Vermont's campaign finance law was enacted could not have been more different. After then-Gov. Howard Dean (D) stated publicly that "money does buy access," the Vermont Legislature held an extraordinary 65 hearings on the need for reform. In addition to the 145 witnesses before five different committees, Vermont lawmakers heard from the public who voiced their overwhelming support for the policies that eventually became Act 64.

The final vote was bipartisan and the law actually allows challengers to spend up to 15 percent more than sitting officeholders. Incumbents are not often seen running off into the dead of night to pass comprehensive campaign finance laws while no one's looking. Indeed, campaign reforms are notoriously difficult to pass through the Legislature precisely because incumbents enjoy huge fundraising advantages.

What emerges is a clear contrast between a backroom partisan power grab in Texas and a bipartisan effort to heed the public's call for change in Vermont on the other. The notion that Vermont's law is meant to entrench the "ins" and cripple the "outs" simply doesn't pass the laugh test. The best referees know when not to blow the whistle.

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