The Burger Court Opinion Writing Database

Brown v. Hartlage

456 U.S. 45 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 7, 1982

Re: No. 80-1285 - Brown v. Hartlage

Dear Bill:

I continue to have difficulty with the analysis you advance and had hoped the other exchanges would resolve them.

Please show me as joining in the judgment.

Regards,

WEB

Justice Brennan

1st Printed DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–1285

CARL W. BROWN, PETITIONER v.
EARL J. HARTLAGE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[March ——, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether the First Amendment, as applied to the States through the Fourteenth Amendment, prohibits a State from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that "fixed by law."

I

This case involves a challenge to an application of the Kentucky Corrupt Practices Act. The parties were opposing candidates in the 1979 general election for the office of Jefferson County Commissioner, "C" District. Petitioner, Carl Brown, was the challenger; respondent, Earl Hartlage, was the incumbent.[1] On August 15, 1979, in the course of the campaign, Brown held a televised press conference together with Bill Creech, the "B" District candidate on the same party ticket. Brown charged his opponent with complicity in a form of fiscal abuse:

"There are . . . three part-time county commissioners.

[1] Although respondent filed a brief in opposition to the petition for writ of certiorari, he did not file a brief on the merits. At the invitation of the Court, L. Stanley Chauvin, Esq., submitted a brief and argued in support the judgment below as *amicus curiae*.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 5, 1982

RE: No. 80-1285 Brown v. Hartage

Dear Sandra:

Thank you very much for your suggestions which I am happy to adopt with one revision. I think I'd prefer the change on page 16 to read as follows:

> "In this case, no showing has been made that petitioner made the disputed statement other than in good faith and without knowledge that it was false or with reckless disregard whether it was false or not. Moreover, he retracted the statement promptly after discovering that it mgiht have been false. Under these circumstances, voiding petitioner's election victory would be inconsistent with the atmosphere of robust political debate required by the First Amendment."

Sincerely,

BJ

Justice O'Connor

Brennan 81

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–1285

CARL W. BROWN, PETITIONER v.
EARL J. HARTLAGE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[March ——, 1982]

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This case involves a challenge to an application of the Kentucky Corrupt Practices Act. The parties were opposing candidates in the 1979 general election for the office of Jefferson County Commissioner, "C" District. Petitioner, Carl Brown, was the challenger; respondent, Earl Hartlage, was the incumbent.[1] On August 15, 1979, in the course of the campaign, Brown held a televised press conference together with Bill Creech, the "B" District candidate on the same party ticket. Brown charged his opponent with complicity in a form of fiscal abuse:

"There are . . . three part-time county commissioners.

[1] Although respondent filed a brief in opposition to the petition for writ of certiorari, he did not file a brief on the merits. At the invitation of the Court, L. Stanley Chauvin, Esq., submitted a brief and argued in support the judgment below as *amicus curiae*.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 16, 1982

RE: No. 80-1285 Brown v. Hartlage

Dear Lewis:

Thank you very much for your very helpful comments. Did you have any specific suggestions in mind?

Sincerely,

Bill

Justice Powell

cc: The Conference

7, 11, 12, 15

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–1285

CARL W. BROWN, PETITIONER v.
EARL J. HARTLAGE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[March ——, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether the First Amendment, as applied to the States through the Fourteenth Amendment, prohibits a State from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that "fixed by law."

I

This case involves a challenge to an application of the Kentucky Corrupt Practices Act. The parties were opposing candidates in the 1979 general election for the office of Jefferson County Commissioner, "C" District. Petitioner, Carl Brown, was the challenger; respondent, Earl Hartlage, was the incumbent.[1] On August 15, 1979, in the course of the campaign, Brown held a televised press conference together with Bill Creech, the "B" District candidate on the same party ticket. Brown charged his opponent with complicity in a form of fiscal abuse:

"There are . . . three part-time county commissioners.

[1] Although respondent filed a brief in opposition to the petition for writ of certiorari, he did not file a brief on the merits. At the invitation of the Court, L. Stanley Chauvin, Esq., submitted a brief and argued in support the judgment below as *amicus curiae*.

16

4/2/82

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1285

CARL W. BROWN, PETITIONER v.
EARL J. HARTLAGE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[April ——, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether the First Amendment, as applied to the States through the Fourteenth Amendment, prohibits a State from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that "fixed by law."

I

This case involves a challenge to an application of the Kentucky Corrupt Practices Act. The parties were opposing candidates in the 1979 general election for the office of Jefferson County Commissioner, "C" District. Petitioner, Carl Brown, was the challenger; respondent, Earl Hartlage, was the incumbent.[1] On August 15, 1979, in the course of the campaign, Brown held a televised press conference together with Bill Creech, the "B" District candidate on the same party ticket. Brown charged his opponent with complicity in a form of fiscal abuse:

"There are . . . three part-time county commissioners.

[1] Although respondent filed a brief in opposition to the petition for writ of certiorari, he did not file a brief on the merits. At the invitation of the Court, L. Stanley Chauvin, Esq., submitted a brief and argued in support the judgment below as *amicus curiae*.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 18, 1982

Re: 80-1285 - Brown v. Hartlage

Dear Bill,

Please join me.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 3, 1982

Re: No. 80-1285 - Brown v. Hartlage

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 9, 1982

Re: No. 80-1285 - Brown v. Hartlage

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Brennan

cc: The Conference

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 9, 1982

Re: No. 80-1285 - Brown v. Hartlage

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Brennan

cc: The Conference

To WJB Only:

P.S. In the first line of the paragraph beginning on page 16 there is a reference to the "State of Kentucky." They are as jealous out there of "Commonwealth" as are Massachusetts and the Old Dominion.

H.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 11, 1982

80-1285 Brown v. Hartlage

Dear Bill:

Although I agree with your holding, it seems to me that your opinion fairly can be construed as limiting severely the scope of "corrupt practices acts" designed - as was this Kentucky statute - to prevent campaign promises that may affect the basic integrity of the electoral process.

The draft characterizes the state's interest in election purity as "significant" and "legitimate" (p. 7). But when "a state seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment" requires it to show a "compelling" interest. I would have thought that the state's legitimate interests in election purity were as important as a candidate's interest in free speech.

Part III is divided in three subparts, each considering a possible justification for the Kentucky law. In Part A you conclude that there is no bribery if a promise to serve at a reduced salary is made openly and would benefit all taxpayers. I agree that the promise in this case was far short of a threat to campaign integrity. But it seems to me that the language of the draft reaches well beyond this case. In subpart B, the draft rejects the proposition that the state may consider the undue advantage that a wealthy candidate may have by promising to do good things for his constituents if elected.

A number of questions come to mind about both subparts A and B. What if a candidate offered to provide the entire budget of a county out of his pocket if elected? Or, take a more modest example: Suppose a candidate of adequate wealth campaigned on the promise of building at his own expense some needed public facility: e.g., a new library or a school for handicapped children? And what if a wealthy

candidate promised not only to serve on the County Board of Supervisors without compensation, but also personally to pay the salaries of the other supervisors? The entire community would be benefited in one sense, but would not the democratic system be adversely affected? In a very real sense, this would be buying public office.

In my view, none of the foregoing promises is properly classified as an "idea". There may, of course, be close questions. I have no doubt that a Rockefeller, once elected, properly could contribute funds for the library or school. If he were serving only for a single term, there could be little objection. But if he made the donation while seeking reelection, the question of whether he was trying to buy the office - as well as handicap less wealthy opponents - would be a serious one for me.

In sum, as presently written and if I understand your opinion correctly, I can join subpart C of Part III, but not subparts A and B thereof. As I would find the state interest in preserving the integrity of the electoral process as compelling as the First Amendment interest, I also am not able to join Part II. I agree with Part IV.

Sincerely,

Lewis

Justice Brennan

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LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 1, 1982

80-1285 Brown v. Hartlage

Dear Bill:

Please join me.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: APR 1 88

Recirculated: _____

ATEX DRAFT

Re: No. 80-1285 Brown v. Hartlage

JUSTICE REHNQUIST, concurring in the result.

I agree that the provision of the Kentucky Corrupt Practices Act discussed by the Court in its opinion impermissibly limits freedom of speech on the part of political candidates in violation of the First and Fourteenth Amendments to the United States Constitution. Because on different facts I think I would give more weight to the State's interest in preventing corruption in elections, I am unable to join the Court's analogy between such laws and state defamation laws. I think Mills v. Alabama,

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: APR 2 1982

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–1285

CARL W. BROWN, PETITIONER v.
EARL J. HARTLAGE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[April ——, 1982]

JUSTICE REHNQUIST, concurring in the result.

I agree that the provision of the Kentucky Corrupt Practices Act discussed by the Court in its opinion impermissibly limits freedom of speech on the part of political candidates in violation of the First and Fourteenth Amendments to the United States Constitution. Because on different facts I think I would give more weight to the State's interest in preventing corruption in elections, I am unable to join the Court's analogy between such laws and state defamation laws. I think *Mills* v. *Alabama*, 384 U. S. 214 (1966), affords ample basis for reaching the result at which the Court arrives, and I see no need to rely on other precedents which do not involve state efforts to regulate the electoral process.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 4, 1982

Re: 80-1285 - Brown v. Hartlage

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 4, 1982

No. 80-1285 Brown v. Hartlage

PERSONAL

Dear Bill,

I have two minor matters I would respectfully ask that you might consider. They relate to Part III-C.

On page 15, line 19, I suggest that it be amended to read "good faith and was quickly repudiated," which would be tailored more closely to the facts of this case.

On page 16, it occurs to me that we might leave some of the defamation analogy for a future case, since the ramifications may be a little uncertain. Perhaps the last two sentences could be modified somewhat along the following lines:

> "In this case, no showing has been made that petitioner made the disputed statement in bad faith. Moreover, he retracted the statement promptly after discovering that it might have been false. Under these circumstances, voiding petitioner's election victory would be inconsistent with the atmosphere of robust political debate required by the First Amendment."

I will circulate a joinder regardless of whether you adopt these suggestions, but I would be more comfortable with it if you feel you can accommodate them.

Sincerely,

Sandra

Justice Brennan

Brennan 81

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 8, 1982

No. 80-1285 Brown v. Hartlage

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference