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ABSTRACT

This special issue is intended to help teachers educate students about today's important U.S. Supreme Court and other judicial decisions, the legal issues they involve, and their impact on students' lives. The issue focuses upon the 1995 term of the Supreme Court and the tendency for the justices to vote unanimously. An overview of the cases and decisions are presented with analysis of the types of cases heard and the points of origin. Special issues highlighted are racial gerrymandering, election law and advertising, and election law and patronage. Teaching strategies are offered for use in the classroom. (EH)

The Supreme Court: 1995. Special Edition! Summary of Supreme Court Year

By: Kenneth F. Fenske, Ed.

Update on the Courts, Vol. 5 No. 1, Fall 1996
American Bar Association
Special Committee on Youth Education for Citizenship

SPECIAL EDITION!
SUMMARY OF SUPREME COURT YEAR

$2.00

FALL 1996 / VOL. 5 NO. 1

UPDATE ON THE COURTS

American Bar Association Special Committee on Youth Education for Citizenship

The Supreme Court: 1995

Update on the Courts 5.1, 1996, pp. 1–3.

During the 1995 term, the Supreme Court again displayed a tendency to vote unanimously. The Court decided without dissent or separate opinion in 37 percent of the cases before it. But, as the majority and dissenting opinions in two of the more controversial cases demonstrated, there are still sharp, even bitter, disagreements between the so-called moderate and conservative wings of the Court. In one, the justices, in a 6–3 decision, held that a state statute invalidating all local laws designed to protect homosexuals from discrimination was itself invalid as a violation of the Equal Protection Clause. *Romer v. Evans,* 64 U.S.L.W. 4353 (U.S. May 20, 1996). In the other, the majority ruled that the male-only admissions policy of Virginia Military Institute was another example of discrimination, which is prohibited by the Equal Protection Clause. *United States v. Virginia,* 64 U.S.L.W. 4638 (U.S. June 26, 1996).

IN THIS ISSUE

77 ORAL ARGUMENTS

In the 1995 term, the Court had one case on its original jurisdiction docket. The Court has original jurisdiction over a few specified types of cases such as those involving disagreements between state governments and those involving representatives of other national governments. This means that the case does not go first to lower courts. The dispute in this instance involved Louisiana and Mississippi. The Court was asked to decide which state owned an island that had "moved" from the Mississippi side of the Mississippi River and attached itself to Louisiana. Mississippi's historical claim was affirmed. *Louisiana v. Mississippi,* 64 U.S.L.W. 4003 (U.S. Oct. 31, 1995).

The court also heard arguments in 76 cases on its appellate docket. Three of those fell within the Court's mandatory appellate jurisdiction, which means that the Court must hear them. All three arose under the Voting Rights Act of 1965, and two of those specifically addressed the constitutionality of race-conscious redistricting (see more on racial gerrymandering on page 4).

The remaining 73 cases on the Court's appellate docket were discretionary, which means that the Court is not required to hear them. While the Court accepts these discretionary cases for a number of reasons, the most common reason is to settle the law when different lower courts make conflicting decisions on the same issue. This term, 31 of the 73 cases fell into this category, amounting to almost 43 percent of the discretionary caseload. This rate tracks the 1994 term, in which 40 percent of the discretionary cases were taken to resolve conflicts between circuit courts.

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Update on the Courts helps classroom teachers and law-related education program developers educate students about today's important U.S. Supreme Court and other judicial decisions, the legal issues they involve, and their impact on students' lives.

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IMPORTANCE COUNTS

Other cases the Court takes often involve issues of such importance that it is difficult for the Court to refuse to take them. One of these cases involved a state ban on advertising the prices of alcoholic beverages by liquor stores. The state, Rhode Island, alleged that the ban had been circumvented by one chain of stores that placed a newspaper ad listing low prices for snack foods and mixers and showing pictures of alcoholic beverages (without prices) accompanied by the word "WOW." The state liquor control board concluded that the ad implied low liquor prices and fined the chain. The Court held that the ban on price advertising violated the protection afforded by the First Amendment to truthful, nonmisleading commercial speech. *44 Liquormart, Inc. v. Rhode Island*, 64 U.S.L.W. 4313 (U.S. May 13, 1996).

BMW also had its day in Court. The company had been found liable for selling as new an automobile that had been damaged by acid rain and repainted. A jury awarded the purchaser $4,000 in actual damages (the amount that reflected the reduced value of the car) and another $4 million in punitive damages (punishment imposed on the company for selling as new an estimated 1,000 repainted vehicles nationwide). Although the punitive damages were reduced to $2 million on appeal to the state supreme court, the U.S. Supreme Court found that even that amount violated the Due Process Clause because the punishment far exceeded the harm done. The Court sent the case back to the lower costs to determine a just punitive damage. *BMW of North America, Inc. v. Gore*, 64 U.S.L.W. 4335 (U.S. May 20, 1996).

Many contracts involve performance of a service in return for (usually) compensation. In the 1980s, Savings and Loan Associations (S & Ls) began to fail because of high interest rates fueled by inflation. The failing S & Ls were holding low interest loans at a time when they had to pay high interest rates to attract new deposits and to keep the existing ones. The U.S. government moved in to protect the thrifts. After expending an estimated $140 billion on an S & L bailout, the government implemented a plan under which solvent thrifts could acquire their troubled counterparts in return for tax breaks. Congress later repealed many of the tax advantages, and, as a result, a number of solvent S & Ls that had taken over insolvent ones failed. This was a breach of contract, the Court ruled, and, even when the government is a party to an agreement, a contract must be upheld—that's the law. *United States v. Winstar*, 64 U.S.L.W. 4739 (U.S. July 1, 1996).

SIGNED OPINIONS

Continuing a recent trend, the Court continued its practice of hearing fewer oral arguments—77 in 1995. This was the first time in recent memory that the justices heard fewer than 80 cases—and issued fewer signed opinions: only 75 in the 1995 term. One of the unsigned decisions resulted when eight justices (John P. Stevens sat out) split evenly, with four to affirm and four to reverse, on an appellate court decision giving an alleged copycat company the right

to mimic Lotus software. As a result, the Court issued an unsigned order affirming the appellate court. *Lotus Development Corporation v. Borland International, Inc.*, 64 U.S.L.W. 4059 (U.S. Jan. 16, 1996).

In the second unsigned order, the Court was asked to determine whether Congress had violated the First Amendment rights of local telephone companies by prohibiting them from providing video programming to their customers. The Court sent the case back to the lower courts to consider whether the issue had been mooted (meaning that the issue is no longer in dispute) by the recently enacted Telecommunications Act. *United States v. Chesapeake & Potomac Telephone Company of Virginia*, 64 U.S.L.W. 4115 (U.S. Feb. 27, 1996).

As in the 1994 term, the task of writing the Court's signed opinions was divided fairly equally among the justices. Interestingly, Chief Justice Rehnquist, who has many administrative responsibilities, was again the most active writer in the 1995 term, being credited with 10 of the Court's signed opinions.

Court Opinions

William H. Rehnquist	10
Sandra Day O'Connor	9
Antonin Scalia	9
Ruth Bader Ginsburg	8
Anthony M. Kennedy	8
David H. Souter	8
John P. Stevens	8
Clarence Thomas	8
Stephen G. Breyer	7
Total	75

LOWER FEDERAL COURTS

Of the 76 cases on the Court's appellate docket, 66 came from the federal court system—63 from circuit courts of appeals and three (voting rights cases) from district courts. All 14 of the federal appellate courts had cases before the Court.

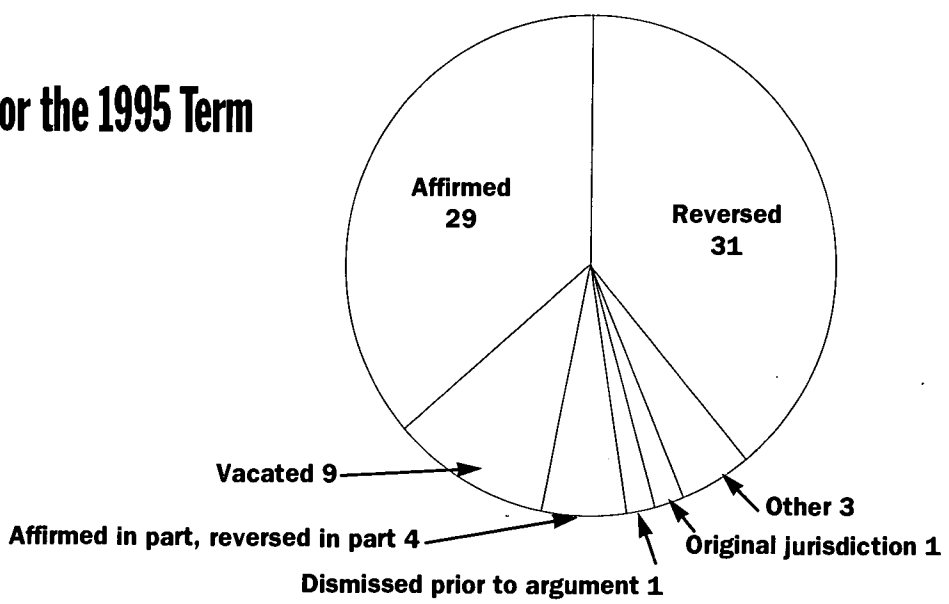
Mirroring the Court's 1993 and 1994 terms, the Ninth Circuit was once again the most reviewed and reversed during the 1995 term. Twelve of its cases were reviewed, eight reversed, two affirmed, and two had other actions taken. The Fourth Circuit, with eight reviews, also fared poorly: one affirmed, four reversed, and three other actions.

The Federal Circuit boasted the best record, having been affirmed in all four of its reviewed cases. The Third Circuit also had a perfect record, going two for two. And the United States Court of Appeals for the Armed Forces was affirmed in the only case brought before the Court.

STATE COURTS

The Court heard only 10 state cases in its 1995 term, about the same as 1994 (12), but well under the 27 reviewed in 1993. Only three state supreme courts—California, Colorado, and Michigan—had their decisions affirmed. Five state courts suffered reversals: twice for Alabama and Montana and once each for Illinois, North Carolina, and Oklahoma. ◆

Total Dispositions for the 1995 Term



Adapted from Preview of United States Supreme Court Cases, *no. 8 (July 8, 1996): 78–81.*

Racial Gerrymandering: Another Look

Update on the Courts 5.1, 1996, p. 4. © American Bar Association.

Gerrymandering is the practice of making the lines of a voting district very irregular, based on some political objective. Gerrymandering lately has become a means of creating districts for a variety of reasons including increased minority representation in Congress. To achieve specific goals, some states have developed districts that are not geographically compact.

Some of the districts were drawn to keep a political party in control. Some were drawn to ensure the election or reelection of a given individual; others were strictly racial in intent—designed to ensure that African Americans or Hispanics were represented in Washington. The Supreme Court has frowned on this practice. Since 1993, the Court, in a series of 5–4 rulings, has invalidated no fewer than eight predominately minority -controlled congressional districts in three states. More challenges are pending, and state legislative maps and even school districts are being subject to strict scrutiny across the country.

In the most recent cases, the Court has struck down three minority districts in Texas, *Bush v. Vera*, 64 U.S.L.W. 4452 (U.S. June 13, 1996), and one in North Carolina, *Shaw v. Hunt*, 64 U.S.L.W. 4437 (U.S. June 13, 1996). Both states had been assigned additional representation in the House of Representatives as a result of population increases registered in the 1990 census. Both decided to create new congressional districts with a majority of minority voters. In Texas, the majority in two of the districts was African American and in the third Hispanic. North Carolina's single new district was designed to ensure an African-American majority.

VOTING RIGHTS ACT CONSIDERATIONS

Both states contended that the Voting Rights Act's requirements mandated the creation of congressional districts with targeted populations. They argued that racial and ethnic minorities should have the same opportunity as other citizens to elect representatives of their choice and that electoral processes may not be changed to dilute the voting strength of minority groups. The opposing view was that minority-based redistricting violates the Equal Protection Clause because of an impermissible use of race. To be legitimate, the state responsible for redistricting plans must (1) establish a compelling interest for according a dominant role to race or ethnicity and (2) show that a plan is narrowly tailored to achieve that interest.

The Court assumed that compliance with the Voting Rights Act is a compelling interest. It also held, however, that the statute does not permit states to fashion minority voting enclaves out of dispersed, noncompact minority populations. At the same time, the law requires only that the prevailing voting strength of a minority must not be diminished, not that it be enhanced.

In the Texas case, the justices struck down predominately African-American districts in Houston and Dallas and a mostly Hispanic district in Houston. In the North Carolina case, a mostly African-American district that snakes for almost 160 miles along Interstate 85 was rejected by the Court.

ELECTIONS LOOM

The rulings in these cases cast doubt on the 1996 political maps in these two states and reminded state legislatures that they must be exceedingly careful when using race as the main factor in redistricting. After focusing last year on districts' race-related configurations, the Court stressed that districts so contorted to scoop up minority communities would most likely be found unconstitutional based on the district's lack of "compactness."

The effect that these decisions will have on the November elections is not clear. States may, if they choose, redraw invalidated plans in such a way as to skirt the legal issue of minority-loaded districts while still protecting their original intent. A mostly African-American district in northern Florida, for example, was struck down but replaced with one that was about 40 percent African American, making the incumbent a good bet for reelection.

Adapted from Preview of United States Supreme Court Cases, *no. 8 (July 8, 1996): 53–55.* ◆

Election Law—Advertising

Colorado Republican Federal Campaign Committee v. Federal Election Committee

64 U.S.L.W. 4663 (U.S. June 26, 1996)

Update on the Courts 5.1, 1996, pp. 5–6. © American Bar Association.

Petitioner: Colorado Republican Federal Campaign Committee.
Respondent: Federal Election Commission.

FACTS

In 1986, Colorado Congressman Timothy Wirth announced that he was a candidate for the Democratic nomination for the United States Senate. However, at that time, neither the Colorado Democratic Party nor the Republican Party had chosen a nominee for the Senate position. In his speeches, Wirth maintained positions that the Republicans believed were at odds with his voting record in the House of Representatives. The Colorado Republican Federal Campaign Committee reacted by placing radio advertisements detailing asserted discrepancies between Wirth's past views and the positions he was advocating on the campaign trail. One of the radio spots said in part:

> I just saw ... where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against a balanced budget amendment. Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

This particular radio spot cost the Colorado Republican Committee $15,000—pocket money in most national elections, but the expenditure prompted the state's Democrats to file a complaint with the Federal Election Commission. They alleged that the Committee had already used up its authorized maximum allotment for "coordinated expenditures" for 1986 and that the extra $15,000 was spent in violation of federal law.

There are some competing values in this case. On the one hand, there is the First Amendment, which protects political speech and political association. On the other, there are federal statutes that attempt to counter political corruption, particularly the use of money to "buy" elections. The preeminence of free speech and association means that government-imposed restrictions on these rights, if challenged in court, are given the most exacting scrutiny. To withstand a First Amendment challenge, the government must have a compelling interest that is served by a restriction on political speech or association. The restriction also must be narrowly tailored to achieve the identified interest.

Battling political corruption and the appearance of corruption are compelling governmental interests. In a narrowly tailored approach to achieving these ends, federal laws place limits on contributions made to a candidate or to a candidate's campaign.

Similarly, laws also impose limits on so-called coordinated expenditures. These are moneys spent on behalf of or against a particular candidate or in consultation with a candidate or his or her campaign.

But expenditures made by an individual or an organization to support or oppose a particular candidate that are made independently of any particular candidate cannot be limited under the First Amendment. This is because the limits would infringe on free speech and association rights without advancing a compelling interest.

Applying these general principles to the facts, the question becomes whether a Republican-sponsored radio advertisement suggesting that a Democratic congressman misrepresented his voting record—before any Democratic or Republican candidate had been nominated—is an independent expenditure protected by the First Amendment from federal limits on campaign expenditures. The very fact that there were no nominees at the time brought forth the corollary question of whether the expenditure was made in connection with a campaign of candidates for federal office.

Siding with the Democrats, the Federal Election Commission (FEC) proposed that the Colorado Republican Committee admit it violated the law and pay a $4,000 civil penalty. When the Republicans said no, FEC filed suit for $45,000 in penalties. A federal district court sided with the Republicans, ruling that the radio ad did not expressly advocate the defeat of a candidate and, therefore, was not aired in connection with a general election campaign.

An appeals court reversed, saying that the "in consultation with" language applies to any communication that contains an "electioneering message" and involves a clearly identified candidate—even if it does not expressly advocate defeat of the named candidate.

Arguments by Republicans before the Supreme Court reopened the First Amendment issue. They contended that freedom of speech is more important than limits on campaign spending. Also, according to them, the money spent for the ad was not analogous to campaign contributions or to coordinated expenditures. The expenditures were not made to secure favored treatment for a candidate since at the time there were no candidates.

The FEC, for its part, urged the Court to affirm the appeals court's decision. The FEC reasoned that there is as much danger in appearing to condone political corruption through "soft sell" messages as there is in "hard sell" messages.

DECISION

The Court vacated the appeals court decision and sent the case back to the lower courts for further proceedings. A majority of the justices did agree that the money spent on the anti-Wirth ad was an independent expenditure protected by free speech and not subject to the limits imposed by federal law on coordinated expenditures. The justices could not agree, however, whether federal limits on coordinated expenditures also run afoul of the Free Speech Clause. This is the major issue yet to be resolved.

Adapted from Preview of United States Supreme Court Cases, *no. 8 (July 8, 1996): 69–70.* ◆

Other Supreme Court Decisions

Update on the Courts 5.1, 1996, p. 6.

The Supreme Court decided two other cases that were previewed during the 1995–1996 School Year.

Lewis v. Casey—see Vol. 4, no. 3 (Spring 1996), pp. 7–8. 64 U.S.L.W. 4587 (U.S. June 24, 1996)

The Supreme Court recognized that prisoners do have the right to access the courts in order to present specific challenges to convictions and sentences and to conditions of confinement. However, the Court found, contrary to what was held by lower courts, that prison officials do not have to provide generalized access to law libraries or to specific forms of legal assistance. There is no mandated approach to ensuring the opportunity to present challenges. The lower courts, therefore, went too far in decreeing that prisoners in lockdown status—separated from others because they pose a danger to the general prison population—and prisoners who are illiterate or do not speak English must have access to law libraries and to legal counsel. The Court's decision means that it will be much more difficult for prisoners to challenge court-access procedures.

Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe—see Vol. 4, no. 3 (Spring 1996), p. 11. 64 U.S.L.W. 4045 (U.S. January 8, 1996)

Congress has specified a maximum of 12 hours of duty time for railroad crew members to ensure safe operation of trains. After this maximum number of work hours, a crew member must be given a certain amount of time off before he or she can return to work. This case involved the issue of whether waiting for transportation from a train by railroad employees following their on-the-clock hours should be considered "work" for the purposes of calculating the required off-time following their shifts. The Court concluded that it is not. The Court determined that all of the time (including waiting for transportation) going to work contributes to fatigue and so must be included in the 12-hour limit, but waiting for transportation from a point of departure to some off-duty site has no bearing on the safety of the railroad.

TEACHING STRATEGY

Color Conscious or Colorblind: A Factor in Political Representation

Nisan Chavkin

INTRODUCTION

This exercise explores the role of race in political representation. Through facilitated discussion focused on a series of quotations, students will discuss multiple perspectives, share alternative views, and identify points of agreement and disagreement on this profoundly divisive issue.

To become responsible citizens in an ideologically diverse society, students need to know how to discuss and debate controversial issues. Law-related education often asks students to identify reasons for supporting different sides of controversial issues and to construct arguments that justify their views. Yet because ideas, options, and even vocabulary are often associated with one side of an issue, students have few opportunities for a thoughtful exchange of ideas. This lesson is an example of how to use reflection in law-related education.

OBJECTIVES

After completing this lesson, students will be able to

- Identify varying viewpoints on an issue.
- Recognize the facts used to support viewpoints.
- Compare and contrast differing viewpoints.

Target Group: Secondary level students

Time Needed: 1–2 class periods
Materials Needed: Student Handouts 1 and 2

PROCEDURES

1. Explain to students the purposes of the exercise: to draw out multiple perspectives on the texts, to support all interpretations by textual evidence and clear reasoning, to explore alternative views, to think about substantive agreement and disagreement, and to gain new insights.

2. Distribute copies of "Enforcement of Voting Rights" (Student Handout 1) and "Discussion Texts" (Student Handout 2). Give students a few minutes to read each of the texts and the "Discussion Guidelines."

3. Begin discussion with some opening questions, such as these:

- What does Congress want to accomplish in the text selected from the Voting Rights Act (Student Handout 1)? Can you give an example to support your view?
- What do you think the terms "color conscious" and "colorblind" mean in this context? How do they apply to quotations 1–4 (Student Handout 2)? Do you think these texts are valid? Do you think they are accurate?
- What might you assume about the authors of the texts?
- Do you see any long-term effects that this issue might have on the fabric of our democracy? Would you consider these effects positive or negative? Can you offer an example for discussion?

4. Help students analyze the quotations in Handout 2. Encourage them to identify the opinion expressed in each quotation and the information used to support the opinion. Have them examine ways in which the opinions are alike and different.

5. Conclude by identifying the authors of all the quotations in Handout 2 (see box below). Ask students whether their responses might have been different had they known this information, and have them reflect on why this knowledge sometimes changes opinions.

Discussion Texts Sources for Page 9

1. Newt Gingrich, *To Renew America,* Chapter 13, "Individual Versus Group Rights," New York: Harper Collins, 1995

2. Justice Stevens, *Shaw v. Reno,* 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993)

3. Justice O'Connor, *Shaw v. Reno,* 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993)

4. Clarence Page, "Supreme Court Adds Confusion to Racial Redistricting" (editorial), *Chicago Tribune,* December 10, 1995.

"Enforcement of Voting Rights"—United States Code (1994)

42 U.S.C. 1973 (a)
"No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color ... as provided in subsection (b) of this section."

42 U.S.C. 1973 (b)
"A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that **its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.** The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population."

42 U.S.C. 1973 (c)
"[W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973(a) of this title are ... in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 ... [or November 1, 1968, or November 1, 1972, as the case may be] ..., **such state or subdivision may institute an action in the United States District Court for the District of Columbia for a declamatory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. ..."**

Emphases added.

DISCUSSION GUIDELINES

1. Refer to the text when needed during the discussion. The conversation is not a test of memory. You are aiming at understanding ideas, values, and issues.
2. Discuss ideas rather than each other's opinions.
3. It's OK to "pass" when asked to contribute.
4. Don't stay confused; ask for clarification.
5. Stick to the point; make notes about ideas you want to come back to.
6. Speak up so that all can hear you.
7. Listen carefully.
8. Talk to each other, not just to the leader. Everyone is responsible for the discussion.

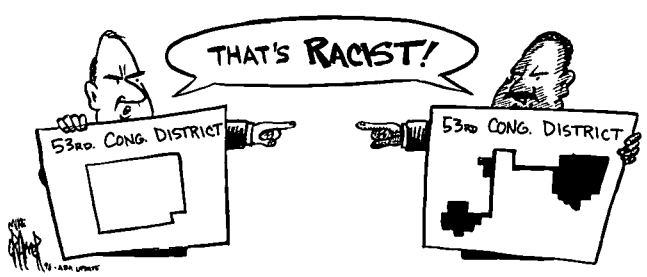
Discussion Texts

1. "One of the great debates of the near future will be individual versus group rights. It is a debate that must end decisively in favor of the individual. ... The very concept of group rights contradicts the nature of America. America is about the future, about 'the pursuit of happiness,' while group rights are about the past. America asks who you want to be. Group rights ask who your grandparents were."

2. "If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause. A contrary conclusion could only be described as perverse."

3. "Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. ... By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract. ... This is altogether antithetical to our system of representative democracy."

4. "When Sen. Phil Gramm (R-Texas) ... was a U.S. representative, his district stretched all the way up to Dallas and all the way down to Houston, conveniently offering Gramm two major media markets in which to publicize himself. ... Some of today's deep thinkers argue that any form of ethnic gerrymandering is wrong. Even if that were true (although it seems to have worked well up until now) I wonder suspiciously why that challenge is being heard now that finally, after years of hard-won victories, it is beginning to benefit people of color? Could it be R-A-C-I-S-M?"



Election Law—Patronage

O'Hare Truck Service v. City of Northlake, Illinois

64 U.S. L.W. 4694 (U.S. June 28, 1996)

Update on the Courts 5.1, 1996, pp. 10–11.

Petitioner: O'Hare Truck Service.
Respondent: City of Northlake, Illinois.

FACTS

To the victor belong the spoils! is a philosophy with a long tradition in American politics, but its impact on elections was limited by the enactment of civil service and low-bid contracting laws by federal, state, and local governments. Buying votes through promises of employment or the award of government business is supposed to be a thing of the past—but the practice lingers on.

The Northlake, Illinois, police department maintains a list of towing companies that it uses whenever a vehicle must be moved. When there is an accident or a vehicle is abandoned, a police dispatcher calls the company at the top of the list, and that firm is then rotated to the bottom to ensure that all of the named towing companies receive an equal share of the work. That is the extent of the department's involvement; companies are compensated from the towing fees that are paid directly by the owner of the vehicle.

O'Hare Truck Service, owned by John Gratzianna, was placed on the list in 1965. During the 1993 Northlake mayoral campaign, the incumbent's re-election committee asked Gratzianna for a contribution; he refused and openly supported the opposition. After the incumbent won, O'Hare Truck was removed from the rotation list.

O'Hare Truck then filed suit, alleging that its elimination from the list was solely in retaliation for Gratzianna's political support for the mayor's opponent. This was a violation of his right of free speech and political association as guaranteed by the First Amendment. Both the district and the appellate courts dismissed the case. The courts held that the rule protecting a government employee from retaliation for political views does not extend to independent contractors.

The Supreme Court has in the past made it clear that "political belief and association constitute the core of those activities protected by the First Amendment," but only as they apply to employment. The argument against extending civil service to contracts revolved around the difference in the magnitude of the harm caused by the patronage-based action. When government employees lose their jobs, they generally lose their sole source of income and face the prospect of sustained unemployment. Contractors, on the other hand, normally have other customers besides the government. Those in favor of bringing contractors under the anti-patronage rules suggest that the degree of economic harm is irrelevant as far as First Amendment rights are concerned.

Another issue over which the parties disagreed was the importance of the role of political patronage in society. Patronage may promote stability and facilitate the social and political integration of previously powerless groups. Patronage practices may also play a part in broadening the base of political participation by providing incentives to take part in the process.

Northlake argued that patronage in contracting further serves the interest of government efficiency by ensuring that the contractors hired have an interest in performing well. An independent contractor who supports the political opposition could undermine incumbents through inefficient performance. And because independent contractors are not subject to direct government supervision, the only way to control them is through termination. Any limitation on the power to terminate a contractor would destroy the ability of elected officials to control the delivery of public services, according to Northlake.

But those in favor of extending employment principles to contractors said that there is no basis for assuming that political differences lead to poor performance. If a contractor performs poorly, the contract can be terminated, but there is no reason to assume that inadequate performance will result simply because of a difference of opinion.

DECISION

Reversing the lower courts, the Supreme Court held that the First Amendment protects independent

contractors from termination taken in retaliation for supporting the political opponents of an elected official. Central to the Court's decision was the value that debate has in a democratic society. It held that government retaliation in the form of terminating employment or a contract chills that debate. More fundamentally, the Court concluded that the issue was what the First Amendment protects, not who is more in need of the amendment's protections.

Adapted from Preview of United States Supreme Court Cases, *no. 8 (July 8, 1996): 72–73.* ◆

Rights of Government Contractors

In a related case, the Supreme Court in *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr* (64 U.S.L.W. 4682, U.S. June 28, 1996) affirmed a Tenth Circuit holding that independent government contractors have the same First Amendment protections as government employees. Umbehr, in this case, had a contract with the county to collect and remove trash. The contract was to be renewed automatically unless terminated or renegotiated. After about seven years, and in the wake of Umbehr's public criticism of the Board of Commissioners, the Board terminated its contract with Umbehr. The Tenth Circuit ruled that independent contractors have the same First Amendment Rights as government employees. The court also noted that the extent of protection afforded by the First Amendment depended on a balancing of interests of the governmental unit as a contractor against the free speech interests of the independent contractor.

TEACHING STRATEGY

Analyzing Campaign Statements

Ronald A. Banaszak

Update on the Courts 5.1, 1996, pp. 12–13.

OBJECTIVES

Students will be able to

- Analyze campaign rhetoric to identify examples of positive and negative campaigning and use of propaganda techniques.
- Propose revised campaign rhetoric.
- Compose a newspaper editorial suggesting ways to improve or maintain the quality of a political campaign.
- Evaluate the truthfulness of campaign statements.

Target Group: Middle and secondary level students
Time Needed: 2 to 3 weeks
Materials Needed: Newspapers, magazines, campaign literature, Student Handout
Resource Person: Reporter, political candidate

PROCEDURES

1. Ask students why candidates engage in political campaigns. Point out that they are trying to convince voters to vote for them, not their opponent(s).

2. Write the following two statements on the board or overhead. Ask students to identify which is a negative campaign statement. Have them explain why. Then ask students to revise the negative statement into a more positive one.

"I have voted for every civil rights bill since I was elected to Congress."

"My opponent was born into wealth. He has never soiled his hands with the dirt of hard labor."

(For example, "I have worked hard throughout my life and I understand the issues and problems facing the average American.")

Be sure students understand that the second statement is negative because it says something bad about the opponent. Negative campaigning is characterized by statements of why an opponent is not a good choice. This may vary from publishing factual information about an opponent or distorting information about an opponent to create an unfavorable impression to name-calling. ("My opponent is untrustworthy.") Positive campaigning tells why a candidate is a good choice.

Point out to students that election campaigns should educate voters about candidates, political parties, and public issues. All too often, however, they include negative statements, and candidates may spend more energy tearing down each other than informing the public. If one candidate begins negative campaigning, the other candidate(s) often feels compelled to begin negative campaigning as well. Unfortunately, negative campaigns seem to influence voters and win elections.

3. Distribute the Student Handout "Propaganda in Campaigning." After students read it, discuss the different propaganda techniques. Ask students why candidates would use propaganda techniques. Unfortunately, appeals to emotion (propaganda) may exceed appeals to reason in a campaign. This is particularly true in short television and radio spots that are designed to "sell" the candidate to the voters. An informed electorate that can see through negative campaigning and the use of propaganda is empowered to make more rational and less emotional decisions about candidates.

4. Divide the class into groups of two to four students. Each group will collect the campaign statements from a local, state, or national election campaign. If possible, have each group work on a different campaign. Students should be able to find campaign statements in newspaper ads, television ads, campaign literature, and interviews with candidates on television and radio. They may also be able to contact or visit the campaign offices of state and local candidates.

5. Local or state candidates may be willing to serve as resource persons. If so, have students prepare interview questions before the candidate visits the class. Students may also wish to invite a news reporter to the class. The reporter could provide the students with information about how the news organization covers a political campaign. Make sure students

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Propaganda in Campaigning

Political campaigns have one goal: to convince as many voters as possible to cast their votes for a certain candidate or issue. While campaigns should educate voters about candidates, political parties, and public issues, organizations often find it easier to "sell" their candidates using propaganda techniques. These campaign tactics appeal to emotions rather than to reason. Voters knowledgeable about propaganda techniques may be able to resist them.

Glittering Generality. When candidates use broad, vague words to give a person or a cause a good name, they are using glittering generalities. It is difficult to know what they mean, but it sounds good. Mayor Paul Gotya claims he is in favor of "getting tough on crime to make the streets safe." Sounds good, but what does he mean? Since he does not define or explain what he means and provides no evidence, he is using a glittering generality. Voters should not be satisfied with nice-sounding words. They should ask for details.

Testimonial. Mayor Gotya has hit it lucky. Sylvester Stallone has agreed to appear in a TV commercial saying he believes the mayor is tough and the best anti-crime candidate. This is a testimonial. Voters who like Stallone may believe him. Voters should ask whether Stallone is knowledgeable enough to express such an opinion, whether his endorsement was purchased, and whether his statement was quoted fully and correctly.

Transfer. "A Vote for Mayor Gotya Is a Vote for America" is the mayor's slogan. The mayor hopes that voters' positive feelings for the country will be transferred to positive feelings for him. Candidates often use patriotic songs and slogans for the same reason. Voters should ask what the song or slogan has to do with the candidate's qualifications for the office.

Name-calling. Name-calling is one type of negative campaigning. One candidate gives another a bad label. Mayor Gotya has declared on numerous occasions that his opponent is unqualified, but he never explains why. Instead of explaining why he is a better choice, Mayor Gotya attempts to damage the reputation of his opponent. Voters should ask for evidence to back up any charges one candidate makes against another.

Plain Folks. Mayor Gotya's staff has arranged a variety of photo opportunities for him. He has been photographed holding a hammer at a construction site, beating dough in a bakery shop, eating at a local cafe, and buying groceries at a local market. When the candidate tries to convince voters that he or she is just an ordinary person, voters should ask what the candidate is really like. And how does this plain-folk image relate to his or her policies?

Bandwagon. Candidates often try to convince a voter that everyone is voting for them so that voter should too. The implication is that a vote for another candidate is a wasted vote. The bandwagon technique is working when candidates release polls that show they are winning or when they claim that they are the choice of the majority of the people. Voters should focus on making their own decisions about which candidate they believe is best.

Card Stacking. Mayor Gotya declared recently in a speech that he supported the building of new highways through town and worked aggressively to repair existing streets. He did not mention that using the city funds for these purposes meant there was less funding for buses and several bus lines had to be eliminated. Card stacking means the candidate presents only information favorable to him or her. Voters need to explore all sides of an issue thoroughly before believing a candidate.

More Court News

Update on the Courts 5.1, 1996, pp. 14–15.

Pistol Packin' Means Just That

Criminals should be thankful, if not overjoyed, that the majority of the Supreme Court is considered to be conservative—even though conservatism usually connotes a tough law-and-order stance. Being conservative, the Court is committed to a broader ideal than punishing criminals; that the primary business of a reviewing court is not to create new law but rather interpret the Constitution and federal statutes, generally in the context of resolving conflicts that regularly crop up in the lower federal courts.

In this role, the Court under Chief Justice William H. Rehnquist has shown a willingness to rule in favor of criminal defendants when their arguments are supported by the plain meaning or clear history of a particular law. For example, in the consolidated cases of *Bailey v. United States* and *Robinson v. United States*, 64 U.S.L.W. 4039 (U.S. December 6, 1995), the Court set aside five-year sentence enhancements that had been imposed under a 1988 federal law. The statute reads, in part, that "whoever, during and in relation to any drug trafficking crime ... uses or carries a firearm, shall, in addition to the punishment for such ... crime, be sentenced to imprisonment for five years."

In Bailey's case, the five-year enhancement was added to a 51-month sentence imposed for possession of 30 grams of cocaine after the arresting officers found a loaded pistol in the trunk of his car. Robinson received the enhancement to her 157-month sentence for possessing 10 grams of cocaine because police found an unloaded single-shot derringer in a locked trunk in a bedroom closet in her apartment.

The Supreme Court unanimously struck down the sentence enhancements on the grounds that, under the circumstances, neither Bailey nor Robinson was guilty of carrying or using firearms while committing drug offenses. Looking to the plain language of the law, the Court held that "using or carrying" a firearm is not the same thing as storing one in a car trunk or closet.

Congress could have written the law differently, the Court observed, but it did not. The bottom line in this type of decision is that Congress writes the law, while the Court interprets and applies it. The "law" part of *law and order* is just that: law as written.

As reported in ABA Journal, *August 1996, pp. 50–52.*

Beyond Litigation: Mediation?

Some 20 years ago, a Harvard Law School professor made this observation: "One might envision by the year 2000 not simply a courthouse but a dispute resolution center, where the grievant would first be channeled through a screening clerk who would then direct him to the process, or series of processes, most appropriate to his type of case."

Twenty years later, that vision of a multidoor courthouse for the most part remains unrealized. But modern alternative dispute resolution, including mediation, is at least moving up the ladder of respectability. Critics have long condemned alternative forms of dispute resolution as just another assault on juries and the civil justice system. They contend that secret decisions made by "kangaroo courts" deliver a skewed brand of justice that fails to provide adequate remedies for "weaker" parties such as women and minorities, giving the more powerful a way around the law.

A fundamental difference between mediation and binding resolution—litigation or arbitration—is that mediation permits the parties to decide for themselves how to resolve their dispute by talking out their differences, with a mediator helping them get beyond hard-line positions so that their real interests may be addressed. While there is little room for a simple, sincere apology in litigation—other than as an admission to be used as a tactical advantage—such empathy can be the turning point in mediation. And mediation is apparently gaining ground over litigation and arbitration as the dispute resolution method of choice. Consider the results of a scientific sample of ABA members who have been involved in

alternative dispute resolution hearings during the last five years:

- 51 percent favor mediation over litigation for resolving disputes, while 31 percent prefer litigation. When the choice is litigation or arbitration, 43 percent prefer litigation and 31 percent chose arbitration.
- 39 percent say clients find mediation more satisfying than litigation, and 25 percent say clients find arbitration more satisfying than litigation.
- 77 percent say that clients willingly use mediation and 64 percent say that clients willingly use arbitration.
- 51 percent say mandatory alternative dispute resolution programs should be encouraged, 18 percent say they should be discouraged, and 28 percent take no position.
- 70 percent are at least somewhat concerned about personal biases or qualifications of arbitrators or mediators.
- 53 percent think that alternative dispute resolution procedures are immune from manipulation that could make them as time-consuming and expensive as litigation.
- 37 percent, however, say that the possibility for manipulation is available.
- 85 percent say they simply do not worry that the less expensive mediation procedures will reduce their own revenues.
- 53 percent think their training and experience as lawyers have prepared them for arbitration, and 47 percent say the same for mediation.

As reported in ABA Journal, *August 1996, pp. 55–62.*

Batter Up?

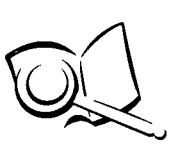
Baseball parks and courtrooms have quite a lot in common. Inside both, there are rules that govern the behavior of participants. While no two parks or courtrooms are the same, the rules are interchangeable throughout each system. Participants in either situation expect the rules to be applied fairly, regardless of where the game is played or the trial is held. (Although justice is blind, it is critical that the umpire is not.)

Unlike football or basketball, baseball is a game of equal turn, not time. A baseball team cannot run out the clock to sit on a lead. Each team has to give its opponent a turn at bat, just as lawyers must give their adversaries their day in court. The game, like legal proceedings, has its own rhythm and pacing. The game is over when the last batter is out, and not before the player has had a chance to snatch victory from defeat. Every player is entitled to three strikes, every team to 27 outs; every player, like an agile attorney, alternates between offense and defense.

Law is not usually practiced in front of the large crowds drawn to baseball games—and few attorneys are revered by children clutching "lawyer cards." The legal profession, however, could do worse than to follow some historic lessons from the baseball diamond, where game rules, hard work, fair play, and team effort have served as guideposts for generations of Americans.

While winning—whether on the diamond or in court—is always nice, it is not the only thing. As Grantland Rice, sports reporter, once said, it is "not that you won or lost, but how you played the game." So long as rules still count in baseball and law, both will continue to be played out on long afternoons when time seems to stand still and all things seem possible.

As reported in ABA Journal, *August 1996, p. 140.*



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inquire about the differences between reporting on a campaign and providing editorial coverage of the campaign.

6. After they have gathered a number of campaign statements, ask group members to analyze the statements. They should decide whether each statement is negative or positive. When they find a negative statement, they should revise or replace it with a positive statement that deals with the same topic. Each day provide a few minutes for students to report on their campaign statements.

7. The groups should look for statements that use propaganda techniques. Students may find that a candidate uses few or all of the techniques in his or her campaign. When they have identified the propaganda techniques used by their candidate, have students read or display on poster board the examples of propaganda they found, explaining what type of propaganda each is.

8. Ask students individually to write an editorial about the quality of the campaign being conducted by their candidate and ways to improve or maintain the quality of the campaign. These editorials should be specific, including examples of campaign statements, analysis of them, and proposals for future campaigns. Duplicate the best of these editorials and give them to the class.

Vocabulary

Any summary of a Supreme Court year is bound to contain unfamiliar terms. Here is a list of some legal terms used in this summary. Encourage students to look for these terms and to use a dictionary to confirm the definitions.

actual damages
affirmed
appellate docket
color conscious
commercial speech
compelling interest
coordinated expenditures
discretionary cases
dissenting opinions
Due Process Clause
Equal Protection Clause
gerrymandering
hard sell
independent contractor
patronage
punitive damages
reapportionment
soft sell
unsigned order
vacated

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