

## THE CONSTITUTION, THE COURT AND THE FIRST MONDAY IN OCTOBER

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This fall season marks two important dates in our constitutional system. On September 17, we celebrate Constitution Day, the anniversary of the day in 1787 when the delegates to the Constitutional Convention in Philadelphia put the finishing touches on their handiwork, a remarkable document that would be ratified one year later. This year is the Constitution's 230<sup>th</sup> anniversary. The "first Monday in October" is the date specified by the Congress (in 28 United States Code, Section 2) for the start of each new Supreme Court Term.

This article is taken from my remarks at the law school's Constitution Day program where I participated in a panel discussion with my faculty colleagues, Dean Nick Allard, Professor Bill Araiza and Professor Susan Herman. In these observations I survey the future to see how the Court may decide some critical constitutional questions of Free Speech, Free Press and electoral democracy.

I will consider three cases, two decided this past June and one to be argued the first week in October. They deal with the nature of elections in our democracy, the future of the internet as the 21st century's technological gift to the 18th century First Amendment, and the continued adherence to the understanding that there is no hate speech exception to that First Amendment.

I think it is fair to say that the men who wrote the Constitution may not have envisioned that the Supreme Court would wind up playing such a pivotal role in our governance.

One of those men was Elbridge Gerry, who helped write, but refused to sign, the Constitution. He was a prominent Massachusetts politician who did sign the Declaration of Independence AND the Articles of Confederation, but wouldn't sign the Constitution because it did not include a Bill of Rights. He was probably a card-carrying member of the

ACLU. Despite these accomplishments, he is mostly known as father of the not-so-nice “Gerrymander” - a way of creating legislative districts to maximize your party’s chances of winning the election and minimizing the other side’s. Since one of the Massachusetts election districts he helped design was shaped like a salamander, some pundit referred to the process of doing so as “Gerrymandering” and that has stuck.

And they’re still doing it today. And it’s relentlessly bi-partisan. Democrats do it to Republicans; and the latter return the favor when they are in a position to do so. As the old joke goes: in elections, the voters chose their representatives; in gerrymandering of electoral districts, the representatives choose their voters. For a long time the Supreme Court refused to enter the “political thicket” of second-guessing this process. But then it decided that gross numerical malapportionment of the number of voters in different districts violated the principle of one person one vote, and that racial gerrymandering was likewise unconstitutional, where proven.

But the Court has never held that partisan gerrymandering is unconstitutional. Some Justices have said that the proof was not strong enough in a given case, other Justices have said that the matter was a classic Political Question to be resolved by the political branches since the Court could not come up with a standard to determine when partisan gerrymandering went too far. And Justice Kennedy said there was no useful standard yet, but maybe someone could come up with one in the future, reminiscent of the remark of Justice Potter Stewart that “I can’t define obscenity, but I know it when I see it.”

In two weeks, the Court will hear GILL v. WHITFORD, a case where a lower court ruled there were intelligible standards available and that the Republicans in Wisconsin had violated them with a gerrymander of state legislative districts that entrenched them unjustifiably and indefinitely, and therefore unconstitutionally. The Court said that the challengers had proven the

Republicans intended to do that, accomplished what they intended and could point to no normal redistricting policies which justified what they had done. Through a process of putting Democratic voters into various districts, the Republicans had caused democrats to “waste” their votes and made it virtually impossible for them to win a majority of state legislative seats, despite a larger overall vote total. The Republicans claim this was all speculation, that they won because they had better candidates and issues, and that the lower court was just trying to make it easier nationwide for Democrats to win over Republicans. “Political thicket” indeed.

How the case will come out is anyone’s guess at this point, though we’ll know more after oral argument on October 3. The four more conservative Justices are probably inclined to try to keep the courts out of the thicket; the four more liberal Justices lean toward a willingness to find equal protection or First Amendment violations. And, as often is true, Justice Kennedy is likely to control the outcome, and he may be receptive to the constitutional arguments made by the Democrats. No wonder Justice Ruth Bader Ginsberg has suggested that this may well be the most important case of the upcoming term. We will know by June.

Now I’d like to discuss two cases from this past Term which I think have great consequence for the future of the First Amendment. The first case involves the Internet, that 21<sup>st</sup> century technological marvel which helps bring the 18<sup>th</sup> century First Amendment up to date by enhancing the exercise of its guarantees of freedom of speech, freedom of the press and freedom to assemble and petition the government for a redress of grievances.

In a landmark case 20 years ago, the ACLU persuaded the Supreme Court that the Internet was a vital new public forum and that normal First Amendment principles should apply to limit government censorship of the “vast democratic fora of the Internet.” The case was a powerful Magna Carta for the Internet. This past June, in *PACKINGHAM V. NORTH*

CAROLINA, the Court reaffirmed the critical function the Internet performs to facilitate First Amendment rights, treating cyberspace as “the most important place...for the exchange of views...the vast democratic forums of the Internet.” The result was to invalidate an overbroad North Carolina law which made it a felony for a registered sex offender to access social media sites where minors had unrestricted access, like, for example, Facebook and Twitter. Though noting the power of the State to take more focused actions to protect against crimes by sex offenders, the Court found the law “unprecedented in the scope of First Amendment speech it burdens” by foreclosing access to social media. But three of the Court’s more conservative members cautioned that the Court should be careful in too readily comparing the Internet to streets, parks and other traditional public forums. More regulation of the Internet may be permissible.

Despite the majority’s praise for the Internet, there may be storm clouds ahead. People at various ends of the political spectrum have begun to criticize giant organizations like Google and Facebook for wielding too much power of censorship. Just yesterday, former House Speaker Newt Gingrich said perhaps they should be regulated like “gigantic public utilities” because of the power they have. The amassing of information about all of us seems a certain threat to our privacy. And the New York Times told us yesterday about “How the Kremlin built a vast network of TV stations, online media outlets, and social media accounts to wage a new kind of information war.” Of course the claim of Russian meddling and “collusion” in the Presidential election seems a bit quaint to those of us of a certain age who remember when it was Republicans, not Democrats, who were looking for Russians under every bed and claiming that they were subverting our democracy. And the Senate just held hearings on whether to impose Internet restrictions to help guard against sexual trafficking. Those who think that the Internet is

an indispensable medium for the exercise of First Amendment rights are rightly concerned by all of these threatening developments and proposals.

The last case I will discuss is the one where the Court, unanimously, reaffirmed that there is no hate speech exception to the First Amendment.

In *MATAL v. TAM*, the Court struck down a federal law disallowing the use of trademarks which “disparaged” any person. A rock band comprised of Asian-Americans wanted to call themselves “The Slants,” a derogatory racial term, in order to reclaim the term and drain its denigrating force. The Court held that the law “violates the FSC... It offends a bedrock FA principle: Speech may not be banned on the ground that it expresses ideas that offend.”

Allowing such a restriction “strikes at the heart of the First Amendment. *Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”* (emphasis added) Or as Voltaire was supposed to have said: “I disagree with what you say, but I will defend to the death your right to say it.”

Perhaps even more interesting is that the Court’s most liberal Justices joined a separate opinion by Justice Kennedy, the Court’s most speech friendly Justice, which re-affirmed the “fundamental principle of the FA that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.” Likewise, he said, there can be no heckler’s veto as a way around this principle: “The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker’s audience.”

Finally, in case you missed the point: “A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to

the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society."

I believe that. I think the ACLU believes that, from representing the Nazis in Skokie a generation ago, to representing the white power marchers in Charlottesville a month ago. At the core of the principles of free speech is the right of the most loathsome speakers to communicate their message in a peaceful, non-violent way, without forceful interference and threats by private vigilante groups and with the most rigorous official protection. From Skokie to Charlottesville, the most important lesson to be learned is that if we do not protect the free speech rights of everyone, we will wind up having no free speech rights for anyone. But, sad to say, I don't know if a majority of the American people believe that. So, we may be on a collision course between what the Court powerfully tells us the First Amendment requires and what speech the public thinks the government should be able to limit. Is that why our leaders find it easier to condemn the deplorable speakers than to "defend to the death" their right to speak deplorably? In this season, when we rightly celebrate the Constitution which all public officials swear an oath to uphold and defend, I think that is an important question.