FALL 2017 NEWSLETTER

U.S. SUPREME COURT CONSTITUTIONAL AND CIVIL RIGHTS LAW UPDATE

By Frank Valenzuela

***North Carolina v. Covington*, 137 S.Ct. 1624 (June 5, 2017)**

In redistricting cases, courts must undertake an "equitable weighing process" in selecting a fitting remedy for identified legal violations.

In this case, the court found for the plaintiff-voters holding that the 28-majority black districts were unconstitutional racial gerrymanders. Because of the proximity of the November 2016 election, the court did not order North Carolina to re-draw its lines for that election, but ordered the re-drawing before any other future election. Subsequently, the court ordered additional relief, including (1) setting a March 2017 deadline for the drawing of the new districts; (2) shortening the legislative terms of legislators from districts that were modified; (3) ordering that newly elected legislators elected in special court-ordered elections would serve only a one year term; and (4) suspended the North Carolina constitution as to district-residency requirements for legislators.

The Supreme Court vacated the district court's relief because it found that the district court had not addressed the balance of equities in fashioning its remedies and did not engage in the "careful case-specific analysis" that is required. The Court remanded the case for further proceedings consistent with the Court's decision.

***Sessions v. Morales-Santana*, 137 S.Ct. 1678 (June 12, 2017)**

A law under which only one year of continuous physical presence was required before unwed mothers could pass citizenship to their children, but five years of continuous citizenship were required for unwed fathers is an unconstitutional, gender-based description under the equal protection clause.

8 U.S.C. § 1409 prescribed two different rules applying to mothers and fathers, making it a gender-based classification which the government can only impose by showing that the classification serves important governmental objectives *today* and that the discriminatory means are substantially related to achieving those objectives. The federal government was unable to meet this burden, and the statute's gender-based classification was found to be unconstitutional.

***Packingham v. North Carolina*, 137 S.Ct. 1730 (June 19, 2017)**

A law that forecloses access to social media altogether prevents the user from engaging in the legitimate exercise of First Amendment rights.

This case arose out of a North Carolina law prohibiting registered sex offenders from accessing social media sites that permit minors to be members. Packingham, a registered sex offender, won a legal challenge to a traffic ticket, logged on to Facebook to express his thanks to God for his victory, and then logged off. His statement of thanksgiving was noticed by law enforcement, and he was charged and convicted for accessing Facebook, a social media site that permits minors to be members. Packingham challenged his conviction, arguing that the charge and the North Carolina law prohibiting him from accessing social media sites violated his First Amendment rights.

Noting that this case was "one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet," the Court advised that it must "exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." Indeed, the Court used *very* expansive language concerning the internet and social media in particular:

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See *Ward v. Rock Against Racism*, 491 U. S. 781, 796 (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.
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> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, *Reno v. American Civil Liberties Union*, 521 U. S. 844, 868 (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service...One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users…This is about three times the population of North America.

To compare the internet, and social media in particular, to quintessential public forums, such as parks and streets, establishes Facebook, and social media sites in general, as areas of significant First Amendment concerns.

The Court found that the North Carolina statute violated the First Amendment. The Court appeared to be greatly disturbed by the breadth of the North Carolina statute, which prohibited convicted sex offenders from accessing a vast array of internet sites, noting that social media websites "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard" and explaining that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." However, the Court also explained that "this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue," and that "it can be

assumed that the First Amendment permits a state to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime."

***Matal v. Tam*, 137 S.Ct. 1744 (June 19, 2017)**

A law that allows government to restrict speech that gives offense is unconstitutional viewpoint discrimination. In reaching its decision, the Court noted the "dangerous" nature of the government speech doctrine.

This case concerned a "disparagement clause" that gave employees of the Patent and Trademark Office authority to deny trademarks that may disparage persons, institutions, beliefs, or national symbols, or bring them into contempt or disrepute. Tam, the lead singer of a band called "The Slants" sued when he his trademark for his band's name was declined because a "substantial composite of persons…find the term in the applied for mark offensive." Tam argued that the "disparagement clause" violated the First Amendment, and the Supreme Court agreed.

With regard to viewpoint discrimination, a plurality of the Court (four Justices) wrote that:

> Our cases use the term "viewpoint" discrimination in a broad sense, see *ibid*., and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

In a concurring opinion, four other Justices echoed the same idea:

> A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.…The logic of the Government's rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

Regarding government speech, the Supreme Court rejected the federal government's argument that issuing trademarks was government speech. The Court emphasized the danger of the government speech doctrine and the potential for its use to limit protected First Amendment speech:

> But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

The Court noted that the government neither creates nor edits the marks sought to be registered, and, other than through the disparagement clause, the government cannot reject the marks based on their viewpoint. Once registered, a mark is not reviewed by a higher official unless the mark is challenged, and the mark cannot be removed unless a party moves for cancellation, the registration expires, or if certain legal proceedings are initiated.

Based on these facts, the Court found that "it is far-fetched to suggest that the federal registration mark is government speech." If it was government speech, "the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things…[i]t is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public." Moreover, the Patent and Trademark Office is clear that trademark registration does not constitute government approval of a mark.

Additionally, the Court examined its government speech precedents and noted that none of them support the idea that trademark registration is government speech. Indeed, the Supreme Court limited the application of *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. __ (2015). The license plates at issue in *Walker* were government speech because: (1) license plates have long been used by states to convey state messages; (2) license plates are often associated by the public with the state, as they are manufactured and owned by the state, generally designed by the state, and serve as a form government identification; and (3) Texas maintained direct control over the messages conveyed on its specialty plates. The Court referred to *Walker* as the "outer bounds of the government-speech doctrine."

***McWilliams v. Dunn*, 137 S.Ct. 1790 (June 19, 2017)**

When there is an indigent defendant, whose mental condition is relevant to the punishment he might suffer, and his mental condition is seriously in question, *Ake v. Oklahoma*, 470 U.S. 68 (1985) requires the state "to provide the defense with 'access to a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense.'"

In this case, Alabama, at most, provided the defense a psychiatrist to examine McWilliams, the indigent defendant, but nothing more. For these reasons, the Supreme Court held that the Alabama court decision affirming McWilliams' conviction and sentence was "'contrary to, or involved in an unreasonable application of, clearly established Federal law.'"

***Ziglar v. Abbasi*, 137 S. Ct. 1843 (June 19, 2017)**

Government officials are entitled to qualified immunity on a claim asserting that a 42

U.S.C. § 1985(3) conspiracy can arise from official discussions between or among agents of the same entity because the law on the point is not clearly established.

The *Ziglar* case is related to prior cases brought by alien detainees held on immigration violations after the September 11th terrorist attacks. As relevant here, the plaintiffs asserted a civil rights conspiracy under § 1985(3) against several officials. Section 1985(3) imposes liability on two or more persons who conspire for the purpose of depriving any person of the equal protection of the laws.

The Court conducted its standard qualified immunity analysis noting that officials only lose qualified immunity for violating clearly established law. In other words, the "'dispositive question is 'whether the violative nature of *particular* conduct is clearly established.''" The Court found that, not only has Congress not approved the intracorporate-conspiracy doctrine – that an agreement between two agents of the same legal entity acting in their official capacity is not a conspiracy – in the context of § 1985(3), but a split exists among the courts of appeal on this very issue. Because the violative nature of the particular conduct was not clearly established, the defendants are entitled to qualified immunity.

***Weaver v. Massachusetts*, 137 S.Ct. 1899 (June 22, 2017)**

Closing a courtroom to the public during jury selection is a structural defect that, on direct appeal, merits a new trial. However, Weaver's assertion of a violation of his rights to a public trial was not made on direct appeal, but instead on a claim of ineffective assistance of counsel. In such a context, Weaver had to show prejudice—that his counsel's failure to object resulted in an unfair trial—which he was unable to do.

Due to space restrictions in the court room and the size of the pool of potential jurors, the courtroom was closed to the public, prohibiting Weaver's mother and her minister from being present for the jury selection. Weaver's counsel did not object, and based on strong evidence, Weaver was convicted. Weaver did not raise an argument that his right to a public trial had been violated. Five years later, Weaver filed a motion for a new trial in state court, arguing the ineffective assistance of counsel due to the failure to object to the closure of the courtroom.

The Court considered its precedents and noted that a violation of the right to a public trial is a structural error, but one subject to legitimate exceptions, suggesting that not every public-trial violation results in fundamental unfairness. The Court concluded that, when a defendant raises a public-trial violation through an ineffective-assistance-of-counsel claim, the burden is on the defendant to either show a reasonable probability of a different outcome in his case or that the particular public trial violation was so serious as to render his trial fundamentally unfair. Weaver was unable to meet this burden.

***Hernandez v. Mesa*, 137 S.Ct. 2003 (June 26, 2017)**

The Fifth Circuit erred in granting qualified immunity concerning a Fifth Amendment claim because the decision was based on information unknown to the officer at the time of the incident in question.

Hernandez, a 15-year old Mexican national standing on Mexican soil was shot by Mesa, a Border Patrol agent standing on American soil. Hernandez had been playing a game with some friends in which they would cross the border-culvert separating Mexico from the United States. The Department of Justice investigated and determined that Mesa had acted according to policy, as the shooting occurred while smugglers attempting an illegal border crossing hurled rocks to the agent who was trying to detain a suspect. Hernandez's parents brought suit claiming, in part, violation of Hernandez's Fifth Amendment rights.

With respect to the Fifth Amendment claim, the Fifth Circuit, sitting *en banc*, held that Mesa enjoyed qualified immunity from the claim because Hernandez was "an alien who had no significant voluntary connection to the United States." The Supreme Court noted, however, that it was undisputed that Hernandez's nationality and the extent of his ties to the United States were unknown at the time of the shooting. Restating prior precedent, the Court wrote that, the "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Furthermore, the "qualified immunity analysis thus is limited to 'facts that were knowable to the defendant officers' at the time they engaged in the conduct in question." Information an officer learns after the end of the incident is not relevant in determining whether those facts support granting or denying qualified immunity.

***Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (June 26, 2017)**

Missouri's policy discriminating against Trinity Lutheran Church because of its religious character violated the Free Exercise Clause of the First Amendment.

Missouri's Department of Natural Resources offers grants to public and private schools, nonprofit daycare centers, and other entities to assist with the purchase of rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for a grant for its preschool and daycare center and ranked fifth among 44 applicants, but was not one of the 11 grant applicants to be awarded a grant. The Department had a policy categorically prohibiting the awarding of grants to religious institutions.

In reaching its decision, the Court noted that the Free Exercise Clause protects religious observers against unequal treatment and requires that the government satisfy strict scrutiny when its decisions target the religious for special disabilities based on their religious status. Considering its own precedents, the Court noted that it has repeatedly confirmed that the denial of a generally available benefit only on account of religious identity imposes a penalty on the free exercise of religion, justifiable only by a state interest of the highest order. In essence, the Department required Trinity Lutheran Church to choose between its religious character and eligibility for a state benefit, which the Court found to penalize Trinity Lutheran Church in violation of the Free Exercise Clause.

In response, the Department argued that its policy was justified by Missouri's policy preference "for skating as far as possible from religious establishment concerns." The Court was unconvinced that this met strict scrutiny, citing one of its prior decisions that held "the state

interest asserted here—in achieving greater separation of church and State that is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." The Court concluded that, "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution…, and cannot stand."

***Pavan v. Smith*, 137 S.Ct. 2075 (June 26, 2017)**

An Arkansas law prohibiting a female spouse from having her name listed on a birth certificate along with that of the birth mother, but which requires a male spouse to be listed on a birth certificate along with the birth mother, in the context of birth mothers who are artificially inseminated, violates *Obergefell v. Hodges*'s commitment to provide same-sex couples "the constellation of benefits that the States have linked to marriage."

Arkansas law generally requires, with exceptions not relevant here, that, when a married woman gives birth, the mother's male spouse's name appears on the birth certificate. This requirement governs the situation when the birth mother conceives by means of artificial insemination with the assistance of an anonymous sperm donor, a situation in which the mother's husband is definitively not the biological father. In the present case, the Arkansas Supreme Court, interpreting Arkansas law, allowed officials to omit a married woman's female spouse's name from her child's birth certificate, even though the child had been conceived through artificial insemination and the married woman's female spouse was obviously not the biological father.

The Court held that *Obergefell* prohibits "such disparate treatment," that excludes same-sex couples from civil marriage on the same terms and conditions as heterosexual couples.