No. 22-1088

In The

Supreme Court of the United States

JOHN T. MORRIS,

Petitioner,

v.

STATE OF TEXAS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

JOHN T. MORRIS
5703 Caldicote St.
Humble, Texas 77346
832-978-8943
Johnmorris1939@hotmail.com

QUESTIONS PRESENTED

1. Are frequent elections implied in Article 1, Section 2 Clause 1 of the United States Constitution that were meant by the Framers of the Constitution to allow voters, sooner then later, to use their accumulated knowledge of a candidate from a previous election and term of office to vote in a subsequent election imply that a redistricting must allow as many voters who voted in a previous election to vote in a subsequent election and, if not, violate their First Amendment rights?

2. Do districts, to the degree, they are not drawn to conform to Court recognized criteria, burden, to this same degree, the First and Fourteenth Amendment political rights of parties and their adherents?

3. Is a right to honest information implied in the democratic process, in Article 1, Section 2, Clause 1, and the First Amendment of the United States Constitution, obligate the State of Texas to use its police powers to sanction the press that purports to print the news, in behalf of its citizens, in respect to falsehoods and misinformation, and/or allow the citizens to treat this same press as a product purchased from a corporation operating in a for-profit, competitive market place subject to liabilities in respect to these same falsehoods and misinformation, and also require a reconsideration of *N.Y. Times v. Sullivan*?

RELATED CASES

John T. Morris v. State of Texas; No. 4:21-CV-3456; United States District Court, Southern District of Texas, Houston Division; Judgement Entered, June 08, 2022

John T. Morris v. State of Texas; Greg Abbott, Governor of the State of Texas; John B. Scott, in his official capacity as Sec. of State of the State of Texas, No. 22-20348; United States Court of Appeals for the Fifth Circuit; Judgement rendered, February 6, 2023

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OPINIONS AND ORDERS

A memorandum opinion and order dismissing the petitioner's case in the District Court – Notice Number: 20220608-100.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. section 1254(1), cases in the courts of appeals may be reviewed by the Supreme Court by the following method:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree.

BASIS FOR FEDERAL JURISDICTION IN DISTRICT COURT

Constitutional issue Pursuant to 28 U.S.C. Section 1331 and Civil Rights issues pursuant to Section 28 U.S.C. Section 1343(a)(3), and 42 U.S.C. Section 1983 and 1988. And request for three-judge panel pursuant to 28 U.S.C. Section 2284.

CONSTITUTIONAL PROVISIONS

Article 1, Section 2, Clause 1 of the United States Constitution

> The House of Representatives shall be composed of Members chosen every second year by the People of the several states

First and Fourteenth Amendments

> "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble"

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"

This brief addresses only Case Number 22-20348, *John T. Morris v. State of Texas, et al.*

STATEMENT OF THE CASE

The petitioner filed a complaint for declaratory and injunctive relief and request for designation of a Three-Judge Court on October 20, 2021 after the redistricting of the State of Texas that same year, for a violation of the plaintiff's First and Fourteenth Amendment rights and these same rights implied in Article I, section 2, Clause 1 of the U.S. Constitution in respect to the characteristics of the plaintiff's new district. Shortly after the initial filing the state filed with the court agreeing that the plaintiff's complaint correctly requested a three-judge court and that the

petitioner's case should either be dismissed pursuant to 12(b)(1), (6) or in the alternative, transfer the case to the Western District of Texas where seven other federal redistricting cases had been consolidated before a three-judge panel in *LULAC v. Abbott*, No. 3:21-cv-259. There were a number of missteps on the part of the plaintiff after the initial filing due to the fact that he was 82 years old at the time and found it difficult to motivate himself to take on another stressful Gerrymandering court ordeal which had previously lasted for eight years from 2011 to 2017. The complaint was subsequently dismissed due to an FRCP 12(b)(1), lack of subject matter jurisdiction, and the defendant's sovereign immunity issue that the defendants stressed was relevant in which the judge agreed.

The plaintiff appealed the decision to the Fifth Circuit Court of Appeals which subsequently dismissed based on Federal Rule of Civil Procedure 12(b)(1) due to lack of subject matter jurisdiction.

SUMMARY OF THE ARGUMENT

Part 1. Frequent Election Principle

Gerrymandering that effectively prevents any voter who voted in a previous election from using their accumulated knowledge, and experiences with an incumbent and/or candidates, by altering the district boundaries, and consequently placing them in a different district, and thus preventing them from voting in a subsequent election in their same district, or when

the incumbent is placed in a different district, without good cause, is a violation of the frequent election objective embedded in Article I, Section 2, Clause 1 of the U.S. Constitution as understood by the framers of the Constitution and the representatives who ratified it, and also, an abridgement of the First and Fourteenth Amendment rights of the voters.

The frequent election objective or principle, as these first citizens understood it, was meant to allow only a limited period of time between elections in order to give voters the opportunity, sooner than later, to remove an incumbent when they had learned of unacceptable behavior. This objective is obviated, though, when gerrymandering places the voter in a different district or places the incumbent in a different district. And there is an additional First Amendment burden on voters when after having to discard their knowledge of their former incumbent they are required to learn the history of a new incumbent or candidate.

A First Amendment violation can also occur when voters with knowledge of a candidate become a minority in their own district due to gerrymandering and it suddenly becomes difficult for them to communicate with the new majority, whether or not they are of the same party, who lack a knowledge of the history of the incumbent.

Though there is normally a ten-year period between redistricting there still should not be even one election where voters are required to discard their knowledge of an incumbent or be burdened to acquire

new candidate knowledge in haste. And with mid-decennial redistricting this time frame may become irrelevant.

Part 2. Burdens on Citizens Absent Court Recognized Redistricting Criteria

Districts that are politically gerrymandered rarely conform to Court recognized criteria in terms of compactness, communities of interest and geographic integrity, etc., and tend to have a highly irregular configuration that is often long and narrow and drawn with an erratic boundary. Districts that are drawn in this manner burdens political parties and their participants in their efforts to communicate and associate with potential adherents. By contrast districts that are compact with a symmetrical configuration and relatively uniform borders will often have a central location equidistant from the borders allowing for communication and association efficiencies. A district that is compact and does not extend an inordinate distance from on end to the other will tend to have fewer communities of interest. Such a district will create a more focused understanding of the relevant issues and lessen possible confusion and dissension between party adherents. And there are also efficiencies when districts have fewer governmental institutions and a more uniform geography. On the other hand, when districts are not drawn to conform to recognized criteria to this same degree they burden party participants if only in terms of travel time. And any burden or excess demands on parties and their active adherents is clearly

an abridgement of their First and Fourteenth Amendment rights. Districts drawn to conform with Court recognized redistricting criteria minimize this abridgment.

Part 3. False and Misleading Burdens on Citizen's Voting Rights

The integrity of the press was a serious problem decades before the founding of the republic and has become an extremely serious problem presently. Dishonest press information is a severe burden on the First and Fourteenth Amendment rights of the citizens and cannot be tolerated in a democracy. Citizens must have the honest information from the press they have a right to as implied in Article I, Section 2, Clause 1 of U.S. Constitution and as they should expect from a First Amendment speech and press clause that was meant for their benefit.

A review of the expectations of those who ratified the Constitution and their influence which led to the initiation of the First Amendment and particularly the speech and press clause makes it clear that it was to be for the benefit of the sovereign citizens in respect to self-government and not to allow the press the uninhibited freedom to print what it pleases. There is though, an alternative understanding of the First Amendment that allows the press inadvertently to abandon the truth, mislead the public and withhold essential information, an alternative understanding of the press that was the result of the opinion in *N.Y.*

Times v. Sullivan. An understanding of press freedom that should not apply to publications that are purchased for factual information.

Publications that purport to print the news should be sanctioned by the state, in respect to Court opinions that justify such regulation, when they mislead the public, or should be allowed to be treated as the for-profit products they are, that operate in a competitive free-market, and as with all other such products, subject to normal liabilities. The fact that commercials are sanctioned when they are false and the far more important and essential news publications are not is a conundrum.

ARGUMENT

I. Standard of Review

The issues presented are new to the court and require *de novo* review.

II. Frequent Election Principle

To be able to vote for your representative from one election to the next based on his or her performance in office is what the framers of the U.S. Constitution, and those who ratified it, believed they had established when they debated whether to adopt a two-year term or a one-year term for congressional representatives. This controversy involved the knowledge a voter had acquired about a candidate or incumbent since a

previous election to be used in a subsequent election – in an election term that was short enough to allow the voters to remove someone from office before they fell into corruption or was no longer responsive to them. They used the expression "frequent elections" to refer to the representational security the voter obtained from a short election term and saw this as a fundamental principle of democracy.

The framers of the Constitution and representatives to the Constitutional Conventions who ratified it, knew of the ancient Saxon understanding of government where "[l]arger government when needed by the Saxons . . . had grown out of their small communities, out of their continuous consent . . . never granted 'to any man for a longer time than one year.' Indeed, the Saxons made annual elections the 'quintessence' of their constitution, 'the basis of the whole fabric of their government.'"[1] This according to historian Gordon Wood was drawn from a pamphlet meant to instruct the Pennsylvania Constitutional delegates in 1775 and known to Thomas Jefferson at the time. So, when they had the opportunity in 1776 to write their own state constitutions, "[a]nd since these Americans were familiar with the radical Whig maxim, 'Where annual elections end, Tyranny begins,' all the states except South Carolina provided for the yearly election of their houses of representatives."[2] This concern with tyranny was reflected in the Constitution of Virginia's

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[1] *The Creation of the American Republic 1776-1787*, Gordon S. Wood, 1996, p. 228.

[2] *Supra* at 166.

1776 Bill of Rights where one of the rights listed was entitled "Frequent elections," and which stated "[t]hat the legislature and executive powers of the State . . . may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to private station . . . by frequent, certain, and regular elections."[3] The idea was not frequent elections for its sake alone. The objective embedded in the term "frequent elections" was clearly defined numerous times by the framers of the Constitution and by the men who represented the citizens of the states at the ratification conventions. The objective being that before the reelection of representatives, their record, and behavior must be examined based on the citizen's accumulated knowledge, to see if they kept their promises and were obedient to the needs of their constituents. In considering the means by which the new Constitution "will maintain a proper responsibility to the people." James Madison, in Federalist Paper number 57, further stated, in referring to the requisite requirements for public service, that "[a]ll these securities, however would be found very insufficient without the restraint of frequent elections," when the power of representation "is to cease, when their exercise of it is to be reviewed," and "a faithful discharge of their trust shall have established their title to a renewal of it." And, of course "[t]he Federalist has always been regarded as entitled to weight in any discussion

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[3] *Source of Our Liberties*, Ed. R. L. Perry & J.C. Cooper New York University Press, 1972, p. 311.

of the Constitution." *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U.S. 273 (1878).

Speaking in respect to the acceptance of a two-year term, Fisher Ames, elected to the First Congress, said during the Massachusetts ratification debates that "[t]he people will be proportionally attentive to the merits of a candidate. Two years will afford opportunity to the member to deserve well of them, and they will require evidence that he has done it."[4] The frequent election objective as Fisher Ames understood it would have no meaning if voters in a previous election were forced to discard their knowledge of their incumbent as a result of them not be able to vote in a subsequent election. Faith in a representative is established over time, from the initial election be a group of voters and over subsequent elections by these same voters. Gerrymandering that shuffles citizens in and out of districts aborts this process and continuous mid-decennial redistricting can put an end to it all together.

Shortly after Massachusetts ratified the Constitution a pamphlet was published which was written by Mercy Warren, the sister of James Otis, whose argument against British-imposed writs of assistance initiated the first tendencies of the colonists towards independence, wherein she stated that the "annual election is the basis of responsibility . . . a frequent

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[4] The documentary History of the Ratification of the Constitution (DHRC), State Historical Society of Wisconsin, Ed. J.P. Kaminski & G.J. Saladino, 1986, Vol. V. p. 1192.

return to the bar of their [c]onstituents is the strongest check against the corruption to which men are liable."[5] A frequent return to the bar to be judged whether they kept their promises and proved their responsibilities to their constituents. In respect to a citizen who voted in previous elections and has been gerrymandered out of a district, this surely must be considered an abandonment of this frequent election objective. This principle, in terms of the citizen's accumulated knowledge of his or her representative, is clearly implied and at the heart of Article 1, Section 2, Clause 1 of the U.S. Constitution, in respect to elections, and certainly a First Amendment freedom of speech right that must be understood to be a part of the redistricting process.

In a speech before the Connecticut ratification convention the Governor, Samuel Huntington, expressed his agreement with the new Constitution in respect to a two-year term of office for the representatives by saying that, "[i]t is sufficient, if the choice of representatives be so frequent, that they must depend upon the people, and that an inseparable connection be kept up between the electors and elected."[6] Surely Huntington would not have approved of gerrymandering that moved groups of voters away from there incumbent into another district to then have a new incumbent they were unfamiliar with.

Rufus King, another representative at the Massachusetts convention, and one of the framers of the

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[5] DHRC, Supra, Vol. XVI, Commentaries, Vol. 4, p. 278.

[6] DHRC, Supra, Vol. XV, Commentaries, Vol. 3, p. 312.

Constitution, believed it "proper, that the representatives should be in office time enough to acquire that information which is necessary to form a right judgement; but that the time should not be so long as to remove from his mind the powerful check upon his conduct, that arises from the frequency of elections, whereby the people are enabled to remove an unfaithful representative or to continue a faithful one."[7] These words make it emphatically clear that there must be a continuum where faith in a representative is established and then renewed from one election to the next, certainly implying that those who voted for a candidate previously must have the opportunity to vote once again in a subsequent election.

A Rev. Samuel Stillman also spoke at the same convention and again expressed the matter succinctly. "In all governments where officers are elective, there ever has been and there ever will be competition of interests. They who are in office wish to keep in, and they who are out, to get in: The probable consequence of which will be, that they who are already in place, will be attentive to the rights of the people, because they know that they are dependent on them for a future election, which can be secured by good behavior only."[8] In respect to all of the above "[t]he historical necessities and events of the English constitutional experience inform the United States Supreme Court's understanding of the purpose and meaning

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[7] Supra at 1203.

[8] Supra at 145.

of provisions of the Federal Constitution." *Loving v. United States*, 517 U.S. 748.

If we return to the circumstances which brought this complaint, where a voter with knowledge about his incumbent, had now decided to vote against him because he believed he did not display good judgement, and the voter's district was gerrymandered, the voter's knowledge is now swamped out by a large number of citizens, regardless of the party, who know little of the incumbent. Gerrymandering defeats the purpose of the frequent election principle. The knowledge this voter acquired, based on his First Amendment, and Article One implied rights, is now useless which is contrary to the objective where "[t]here can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will on a general election." *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983).

"Divide the largest State into ten or twelve districts and it will be found that there will be no peculiar local interests in either which will not be within the knowledge of the representative of the district." James Madison, Federalist Paper Number 56. These "peculiar local interests" that Madison stated should be the manner in which districts are set apart from one another, also corresponds with the frequent election objective. Boundaries that are maintained due to peculiar local interests enable the citizens to consider the representative's behavior in respect to these interests and act accordingly at the ballot box. The connection between a group of voters and their representative

must remain unaltered in order to allow the frequent election objective to function. This of course is not always possible in terms of population distribution, and movement when redistricting. But when it becomes necessary to alter a district the procedure should allow as many of the voters who voted in a previous district election to be given the opportunity to vote again in that district election. In terms of adjudication, this would give the Court a constitutional tool by which to determine whether a state has been gerrymandered illegally.

It could be argued that a large number of citizens gerrymandered into a newly drawn district would still be inclined to familiarize themselves with the former behavior of their new incumbent. But since most voters get their day-to-day news about their representatives through newspapers or, more commonly now, by means of the internet or television, it would require research into archives of one kind or another, something that is time consuming and unlikely to happen. And since there is a partisan slant on almost every issue in the media it would take time to know who and what to believe. Rather than doing a historical review of their incumbent's behavior they would likely simply focus on the larger issues and/or take a cue from their party leaders. This is well and good and possibly all they have ever done, but this is still a betrayal of the interests of an incumbent's long-time constituents who have knowledge of him or her that was gained through the years. And it is also a burden on the First Amendment

rights of those same voters who were taken from an incumbent.

III. Burdens on Citizens Absent Court Recognized Redistricting Criteria

Party adherents, and particularly party activists, are always burdened with demands to some extent in pursuit of party objectives. Some of them will work full time in the party's behalf while the majority will be men and women with everyday family obligations or students with educational requirements. For all of these individuals spare time is a precious commodity. For some, money is not an issue, but for most it is always something that must be considered. Any degree of political activity requires a certain amount of time and/or money. In this respect the manner in which a voting district is drawn can have a pronounced effect on a party participant's time and, to some extent, their money. And, in addition, time and money demands are often just enough to affect a participant's motivation to be more or less active. A properly drawn district, whether a large rural district or a relatively smaller urban district, that conforms to Court recognized criteria as enumerated in *Bush v. Vera*, 517 U.S. 952 (1996) – districts that are compact, contiguous, etc., will minimize these demands. Demands based on First and Fourteenth Amendment and Article 1, rights of communication and association.

The district most often referred to when one is given an example of a gerrymandered district is a

district that is noticeably long and narrow. A district of this kind creates a multiplicity of inordinate demands on the average party participant. The most obvious factor will be the distance he or she would be required to travel from one point to another within the district in pursuit of party objectives. In an effort to persuade voters in their district, and motivate them to turn up at the polls on election day, activists may have to travel the length and breath, of a district many times. They may have to canvas door to door in an area far from where they live. The telephone and internet are useful, but almost invariably used to reach those who are already party adherents, and used primarily to ensure that they will vote on election day. To persuade someone who is wavering between one party and another almost always requires a face-to-face meeting that can often be time consuming. And in a district that is not compact, the time it takes to travel from one place to another reduces the amount of effective work that can be done.

This same long and narrow gerrymandered district also often tends to have existing political organizations that are loyal to the same party but far from one another. And due to the configuration of the district, rather than one or two central locations where these groups can all meet and coordinate their efforts, they must meet with the group nearest them, and not have the benefit of a large meeting where all points of view may be heard.

A gerrymandered district with a different configuration might have one large area and a long narrow

appendage. A district drawn in this manner could easily tend to lead to the dominance of those in the large area over those in the narrow appendage since time once again would inhibit overall participation. A long and narrow circular district can put the shortest distance common to all of the activists outside of the district altogether although there may be more cost effective and familiar locations within the district. For these reasons the degree to which a district is not drawn in a compact manner is the degree to which it places excessive monetary and time constraints on political activists and party adherents in their efforts to efficiently communicate. And it should be noted once again that there are some adherents who cannot offer money in support of their party but only their time.

Districts that are strangely configured and ignore common interests can burden party participants merely due to the fact that there can easily be confusion as to what constitutes the primary interests of the district as a whole. And this confusion could lead to friction which would be a development that a party trying to unify its political efforts could ill afford, and create an unnecessary burden on First and Fourteenth Amendment political rights. It is also conceivable that a district that is not compact could have numerous interests due to the fact that it covers a more diverse geography but have few interests with the needed overall political support that would make them district-wide concerns, and be addressed by the candidate. In a compact district these issues mentioned above are certainly present but are minimized.

There are burdens on party participants when the boundary of a district is highly irregular where activists cannot be certain, without a precise district map, which voters are in the district and which are not, and it is at least another unnecessary burden. Districts that are gerrymandered to be within the domain of more than one major governmental entity, that citizens look to for similar basic needs, could easily lead to conflicts. In a district such as this, constituents seeking demands from their representative, in behalf of their respective governmental entities, may find these demands are in opposition to the other governmental entity and possibly lead to friction and needlessly burden a party seeking political unity.

All districts no matter how much they conform to Court recognized criteria are going to create burdens and demands on party adherents and activists, and hence the primary objective in the redistricting process must be to minimize these burdens – burdens which impact First and Fourteenth amendment rights. "A State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the citizens." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). "To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments." Supra, at 214

A properly drawn district that is compact will provide a rough central location that is to some degree

equidistant for all party adherents. This can afford them a true sense of their relative political strength within the district, since most of them will be able to meet from time to time and convey a consensus of their concerns to their candidates. A compact district will minimize the demands on precious time constraints of the citizens wishing to do more to further the political objectives of their party. Travel costs, which may be a serious concern in rural districts would be minimized. A compact urban district would minimize the frustration and danger that is always present when traveling in a high traffic urban area. Districts that are compact, that limit the number of governmental entities within them, and remain within a given geographic area to the extent possible, would limit the number of issues that need be considered, enhance long term relationships between party faithful, and give them more time to find compromises with those adversaries that have not been gerrymandered out of their district.

And there is something in addition, that will almost certainly be a concern of the citizens in districts that have been gerrymandered, as it was a concern in 1812 when this method of redistricting was first used. "One of the habitual sentiments offended by this famous gerrymander was that of community. Voters did not think of themselves as mere numbers; the petitions complained that old connections had been sundered by

the new divisions. Genuine 'interests' had been divided. The only interest served was that of the party."[9]

IV. False and Misleading Burdens on Citizen's Voting Rights

The press since the founding of the republic has largely been a partisan animal. The growth of the newspaper industry in America has essentially paralleled the growth of the two-party system. In respect to the democratic system, the press has become an indispensable element of government as different newspapers became the mouthpieces of the different parties. Established during the first administration in 1789, the Federalist Gazette of the United States was considered a virtual branch of the government, and in 1791 the National Gazette was established as a Republican party response to it. As conflicts developed between the parties so to were these conflicts reflected in the press. It has been said that a party tends to act as if it were a nation, and as a nation it is concerned primarily with its survival. And when in conflict with another party, as in a war, the first casualty is the truth. The veracity of the press has been an issue since the beginning of the republic. In a letter to Walter Jones in 1814 Thomas Jefferson wrote, "[a]s vehicles of information and a curb on our functionaries, they (the newspapers) have rendered themselves useless by forfeiting all title to belief. . . . This has in a great degree,

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[9] Political Representation In England, and the Origins of the American Republic J. R. Pole, 1966, p. 247.

been produced by the violence and malignity of party spirit."[10]

By the end of the Nineteenth Century the press descended into what was called Yellow Journalism, a style of newspaper reporting that emphasized sensationalism over facts. Then in 1947, shortly after World War II, there was published *A Free and Responsible Press.*[11] A report by a commission chaired by Robert M. Hutchins, chancellor of the University of Chicago, which included three primary concerns. First of all was a concern that the "press as an instrument of mass communication (had) not provided a service adequate to the needs of society." Secondly, was the fact that the American people "do not appreciate the tremendous power which the new instruments and the new organizations of the press place in the hands of (just) a few men." A third concern, and most significant, is that "those who direct the machinery of the press have engaged from time to time in practices which the society condemns and which, if continued, it will inevitably undertake to regulate or control."

In a recent Gallup poll reported July 9, 2022, by Axios, a mere 5 percent of Republicans, 12 percent of Independents, and 35 percent of Democrats trust the newspapers for an average of 16 percent overall, and down 5 percent since 2021. The average for television

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[10] Thomas Jefferson to John Norvell, 1807. Memorial Edition 11:225.

[11] Commission on Freedom of the Press, *A Free and Responsible Press* (Chicago: University of Chicago Press, 1947).

news is even lower at 11 percent overall. Under these circumstances how is it possible this is in the "interest of individual citizens seeking to make informed choices in the political market-place?" *McConnell v. Federal Election Comm.*, 540 U.S. 251, 251 F. Supp. 2d, at 237.

Truthful information is essential since "[t]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791. Therefore, "[w]e have consistently recognized the unique role the press plays in informing and educating the public." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 667. And in this respect, "the press serves and was designed to serve as a powerful antidote to any abuse of power by government officials elected by the people (and) responsible to the people who they were elected to serve." *Mills v. Alabama*, 384 U.S. 214, 219. There can be little doubt that the press is a powerful institution since it is the source of knowledge that serves to guide our actions day in and day out. But the press itself can be a detriment when it misrepresents the facts or withholds vital information. And this makes it clear that "[w]e must evaluate the media industry to ensure that we are receiving the benefits we expected or rather the Framer's expected."[12] But perhaps more important is to understand the influence the Court's interpretation of the First Amendment speech and press clause presently has on the behavior of the industry, and whether

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[12] Democracy as a Meaningful Conversation, Bennet, Robert W. Northwestern University of Law.

this interpretation is faithful to the history of the initiation of the amendment, and specifically to the expectations of the citizens who ratified the Constitution. In this respect the people at the time believed that the primary focus of the freedom given the press was the edification of the people in respect to their government. In a letter to Edmund Pendleton, Richard Henry Lee wrote, in a wide-ranging essay, that "the benefit to be derived from this system (of government) is most effectually to be obtained from a well informed and enlightened people" and "[t]here rises the necessity for the freedom of press."[13] Maryland's ratification convention proposed an amendment whereas "the people have a right to freedom of speech, of writing and publishing their sentiments, and therefore that the freedom of the press ought not to be restrained, and the printing presses ought to be free to examine the proceedings of government, and the conduct of its officers." In a Pennsylvania libel case, *Republica v. Oswald*, 1 Dall. 319 (Pa. 1788), Chief Justice McKean wrote, "[w]hat then is the meaning of the Bill of Rights, and constitution of Pennsylvania, when they declare, 'That the freedom of the press shall not be restrained,' and 'that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government? . . . there can be little doubt of the just sense of these sections." There is no reason to believe that these words would not be true of the soon to be written Federal Bill of Rights.

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[13] Richard Henry Lee to George Pendleton Debate on the Constitution, Part Two, p. 463, The Library of America, Pub. 1993.

It should be clear from these historical sentiments that preceded the creation of the Bill of Rights, that the First Amendment promise that the government will not abridge the press was, in their minds, a guarantee that the government would not conceal its activities from the citizens. There is also an obvious implication that the citizens expected honest information from the press. This apparent expectation of factual information from the press by those who participated in the ratification of the Constitution needs to be emphasized since there is a contemporary understanding of the First Amendment speech and press clause that runs counter to these expectations. It takes the words out of their broad historical context within which they were written, and finds a benefit that is derived primarily from the word freedom that allows for an uninhibited robust flow of ideas that due to their open-ended nature leads to a plurality of truths which hopefully provide answers to problems in our society and our government. But there is a problem with this view of the amendment since it accepts the occasional false statement or false fact and finds them inevitable. And views libel when filed against the press by a governmental official as an attempt to repress government criticism.

So, what is the true meaning of the First Amendment in respect to speech and press rights? Is it a matter of the government making a promise to the citizens who require honest information about their government and thereby does not use its authority to prevent the media from reporting this information to them? Or

is it an arrangement where the government, in effect, promises not to censor speech or the press even when in an effort "[t]o persuade others . . . the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement." *N.Y. Times v. Sullivan*, 376 U.S. 254, 271. In respect to this alternative understanding, Leonard W. Levy found "delicious irony" in the fact that his book *Legacy of Suppression* was relied upon by Justice William Brennan, to declare "If neither factual error nor defamatory content suffices to remove the Constitutional shield from criticism of official conduct, the combination of the two elements is no less adequate." Supra, 273.

To boil this dichotomy down to its simplest terms there is on the one hand a three-party relationship consisting of the government, the press and the citizens, and on the other, a two-party relationship between the government and the media where the people are incidental beneficiaries. The answer as to which is the true meaning of the First Amendment is to be found in the fact that the people who took part in the ratification of the Constitution were living with a press culture that was very often dishonest and licentious. For example, in a letter to John Norvell, Thomas Jefferson wrote, "[t]he man who never looks into a newspaper is better informed than he who reads them, inasmuch as he who knows nothing is nearer to the truth than he whose mind is filled with falsehood and error."[14] And in

[14] The Founder's Constitution, Vol., p. 170 Ed. By Kurland, Philip b. and Lerner, Ralph, Pub. University of Chicago 1987.

addition, a press that prompted Jefferson to suggest, in a letter to Madison, in the middle of Congressional deliberations on the First Amendment, that it include "The people shall not be deprived or abridged of their right to speak to write or otherwise to publish any thing *but* false facts. . . ."[15] To make it clear what the people were living with at the time, in the preface of his book the *Infamous Scribblers*, Eric Burns describes conditions in respect to the press during this period:

> But in many ways the men and women who settled the New World were the best of people. Surely not the type to print lies in their newspapers when the truth was insufficiently compelling or contradictory to their causes; to smear sex scandals across their pages or raise invective to levels previously unknown outside a cockfighting den. Not the type to confuse hyperbole with facts or scatology with analysis; to be ill informed or uninformed or misinformed; to correct their mistakes rarely and grudgingly; to inflate a peccadillo into a crime; to condemn a lapse of judgment with a sentence of perdition; to encourage violence against those who disagreed with their views.
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> Yet they did it all, these best of people, all of it and more, time and again over the course of many decades. . . .[16]

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[15] Supra, p. 129.

[16] Infamous Scribbler, by Burns, Eric pub. Public Affairs, New York, N.Y., 2006.

Consequently to ask the question once again as to a choice between a First Amendment understanding that would prevent the government from abridging the press, and would consequently allow the people to claim before the Court that this amendment was written to prevent their government from denying them the vital information they required, or conversely an amendment that the media could take before the Court and claim that the government's restraint allowed them the freedom to do as they wished, even to the point of lying to the public and withholding information the public required. Given this choice there can be little doubt that the people who were instrumental in the requirement that there be a free speech and press amendment, would not have accepted a First Amendment that would have allowed the debased and licentious nature of the press, which they had to tolerate for decades, to be protected and hence become a constitutional right. That the First Amendment "was intended to secure to every citizen an absolute right to speak, write or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by a rational man." . . . [17] Consequently, the historical implications make it clear that the full meaning of the First Amendment speech and press clause provides that the citizens are to be the direct beneficiaries, and thereby the government shall make no law that prevents the press

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[17] Joseph Story, The Founder's Constitution, Supra p. 182.

from providing the sovereign citizens with the information they require in order to govern themselves.

There is though a set of circumstances where the alternative understanding of the First Amendment is applicable and desirable. Where factual information is not the primary concern. A manner of communication that benefits from "an uninhibited robust flow of ideas that due to their open-ended nature leads to a plurality of truth." A form of communication which is often extemporaneous or mentally exploratory and allows itself to be subject to the frailties of the human mind and emotions. A valid alternative understanding of the First Amendment that has its place along-side the full meaning of the First Amendment which directly benefits the people in their effort to govern themselves and almost invariably comes in the form of a product that is purchased in some manner, primarily, if not entirely, for factual information. And whereas both may be based on reasoning, research, observation and experience this latter form of communication is never published where there is not a period of time allotted before publication to allow for corrections and editing. And in this form of communication errors printed on the page, where there was time to correct misinformation, must not be tolerated without good reason, since the press, in this sense, functions as the source of truth. Which implies that a press that is not censored, that is not regulated in respect to its content, will not provide the citizen with their Constitutional right to factual information. A Constitutional right that can readily be found in Article 1, Section 2, Clause 1 of the

Constitution as one of the rights implied in the election process undertaken by the sovereign citizens based upon open debate, assembly, and information from a free press.

Honest information in a democracy is more than compelling it is absolutely essential. And consequently, it cannot be denied that "[s]tate and local governments have (a) valid interest preventing the dissemination of dishonest or misleading campaign literature and may impose narrowly tailored laws to regulate it." *Hodinka v. Delaware County*, 759 F. Supp. 2d 603. "[S]tates have an interest in preventing misrepresentation." *Norman v. Reed*, 502 U.S. 279, 290. And since the Court has made it clear that press freedom is not an absolute right and may be regulated, as it should be, if dishonest, since otherwise the people may be enslaved by their own ignorance. "The state interest in preventing fraud and libel . . . carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 349. And this "adverse effect" truly applies to our hyper-partisan system where there is coverage of candidates well before primaries and where presidential campaigns are never ending.

The press of course has been regulated, "[t]hese include the lewd and obscene, the profane, the libelous, and the insulting or fighting words . . . " *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. It was John Marshall's contention that "[a] punishment of the licentiousness is not considered as a restriction of the

press."[18] As stated above, fundamental rights are not absolute, and as long as there is a justified reason, they can and should be regulated. But why, with all that's been said has the press been allowed to outright lie, take facts out of context, misrepresent the facts, and worst of all, withhold factual information from the public, and not be held accountable by law, a set of circumstances that was evident in the Warren Court's opinion in *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

This claim makes a distinction, in respect to the First Amendment, where the full meaning of the amendment pertains to publications that purport to present factual news, in contrast to an alternative meaning of the amendment that pertains to an interchange of ideas where factual mistakes are excused.

It seems that the New York Times Court should have been cognizant of the full meaning of the amendment, but on the contrary the Court did not, and found justification in a subjective belief that speech must be "uninhibited, robust and wide-open," supra 270, and allowed an advertisement full of lies from top to bottom to escape the prosecution it deserved when it libeled an individual and deceived millions of Americans. This was allowed, of course, since the Court required the citizens to accept the Court's opinion that the "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' they 'need . . . to survive.' supra,

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[18] John Marshall, Report of the Minority of the Virginia Resolution, 22 Jan, 1799.

272, quoting, *NAACP v. Button*, 371 U.S. 415. Yes, the "erroneous statement" between individuals spoken or in print or in unsolicited material where facts are not ultimately important, but surely not in the news media that the sovereign citizens look to and purchase as a product for factual information that they require in order to choose their representatives intelligently. And, in addition, the requirement that proof of malice, as the Court says "*we think*," is necessary to sustain a libel claim is a reminder of the Star Chamber libel law of the 1600's, where to charge a king's minister with libel required the case to be brought to court, where due to the "pressure or menace of public opinion"[19] there was, effectively, a barrier created which allowed the corruption to continue. And a similar barrier erected in *Speiser v Randall*, 357 U.S. 513, 526, where the Court's questionable interpretation of the First Amendment requires the State to bear the burden of proof even though the suspects had admitted guilt, and then uses this opinion as a rationale in *N.Y. Times*, supra, 271, to say that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth." The Court also refers to *Cantwell v. Connecticut*, 310 U.S. 296, 314, to claim that exaggerations used in personal argumentation, including false statements, is what we must expect from the press. And the Court uses the opinion in *Sweeney v. Patterson*, 76 U.S. App., D.C., 23, 24, to say that "[w]hatever is added to the field

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[19] *The Bill of Rights, Its Origin and Meaning*, by Irving Brant, Mentor Books, 1965.

of libel is taken from the field of free debate," as though we must excuse libelous injuries in order to increase talking points. And from the same case, "[c]ases which impose liability for erroneous reports of the political conduct of officials, reflect the obsolete doctrine that the governed must not criticize their governors," implying that we should tolerate false reporting about our representatives. And how can the Court in N.Y. Times justify the opinion in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 778, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." By protecting even some falsehood how can we know what matters? In a dissent by Justice Stevens, supra, 782, it was made clear that "[t]he preventive effect of liability for defamation serves an important public purpose." The results of libel cases are in fact a form of information the citizens require in respect to the veracity of their representatives.

The Court was also concerned with self-censorship or a "chilling" effect on the press due to the possibility of numerous libel cases being filed by government officials against various publications. The media industry is in fact a large number of corporations that operate in a capitalist, for-profit, competitive market place where there is a substantial demand for their products. The competition which was implied in the possibility of a monopoly in the industry which the Court addressed in *Associated Press v. U.S.*, 326 U.S. 1, in *N.Y.*

Times would certainly have discouraged any chilling effect or fear to print by the media.

Since when does the First Amendment require that we tolerate a press that is immune to liability and accept a press that has increasingly abandoned the truth? And in this respect, the government, which is derived from the constitutional democratic process, in order to justify its existence, in respect to honest elections, should be allowed no alternative but to sanction the press. And since redistricting is a vital part of the democratic process, since it establishes parameters within which the burdens on the sovereign citizens are minimized, in respect to the political process, the state is obligated to include in the redistricting process the possibility of sanctions on press information that can and has severely burdened the citizens. And in addition, in lieu of the above perspective on First Amendment press freedom, *N.Y. Times v. Sullivan* must be reconsidered, and no longer be allowed to be a barrier to the truth.

CONCLUSION

In order to minimize burdens on citizens in respect to their political activities within their districts, allow them to utilize their accumulated knowledge of their incumbents in a subsequent election and have access to the truthful information they require in order to fulfill their responsibilities as sovereign citizens, the redistricting process must include implementation of

Court recognized criteria in respect to compactness, contiguity, respect for municipal and geologic boundaries, avoiding contests between incumbents and preserving cores of prior districts, and allow as many citizens who voted in a previous election to vote in a subsequent election, and in terms of the full understanding of the First Amendment speech and press clause the state must utilize its police powers to sanction the press and/or allow the citizens access to the civil courts in respect to media products that purport to offer factual information, and the Court reconsider *N.Y. Times v. Sullivan* in respect to the inappropriate use of the alternative understanding of the First Amendment speech and press clause in respect to a newspaper that purports to offer truthful news.

Respectfully submitted
to the Honorable Court,

JOHN T. MORRIS
5703 Caldicote St.
Humble, Texas 77346
832-978-8943
Johnmorris1939@hotmail.com