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100th Anniversary of Modern First Amendment

The year 2019 marks the 100th anniversary of several Supreme Court cases that are identified as providing the doctrinal basis for the "modern" First Amendment. The cases emanated from actions taken before and during World War I to combat dissent and the spread of radical political ideologies in the United States, including the passage of the Espionage Act in 1917 and the Sedition Act of 1918. In four decisions in 1919, the Supreme Court upheld the convictions of so-called "radical" speakers but began to articulate the "clear and present danger" standard for when free expression gives way to legitimate government regulation. An important new book celebrating the 100th anniversary of pivotal Supreme Court cases was published in 2019 titled *The Free Speech Century*, edited by preeminent First Amendment scholars Lee Bollinger and Geoffrey Stone.

The First Amendment and Public Opinion

Levels of public support for the First Amendment show signs of confidence and concern, at least in two surveys of college and high school students conducted in 2018. Titled "Free Expression on Campus: What College Students Think About First Amendment Issues," a Gallup-Knight Foundation study in March 2018 "reveals that U.S. college students show strong support for the First Amendment, but favor some restrictions on free speech rights to foster an environment where diverse perspectives are respected." "The Future of the First Amendment" a study of high school students and teachers released in December 2018 by the Knight Foundation, also found strong support in First Amendment rights but "low levels of trust in the media."

The U.S. Supreme Court

In 2018, President Trump secured his second appointment to the Supreme Court of the United States with the successful nomination of Brent Kavanaugh to replace Anthony Kennedy. Justice Kennedy, the California native appointed by President Ronald Reagan often referred to as a "swing vote" in key 5-4 decisions, announced his retirement in June 2018 after serving for 30 years on the Court. Kavanaugh was a sitting judge on the Court of Appeals in the District of the Columbia at the time of his nomination. During his nomination process, Kavanaugh was accused of having committed sexual assault in 1982, and many Americans watched live the shocking and tense Senate hearing in which the accuser, Dr. Christine Blasey Ford, testified about the alleged assault. In angry and combative testimony, Kavanaugh strongly denied he played any role in Blasey Ford's alleged assault, and he accused Democrats and the Clintons of being behind the allegations. In October 2018, the Senate confirmed Kavanaugh on a vote of 50-48.

SCOTUS First Amendment Cases

The Supreme Court decided several media law and First Amendment decisions in 2018. Two major precedents include:

> ***Janus v. AFSCME,*** *No. 16-1466 (2018):* Do mandatory union dues violate the First Amendment? The U.S. Supreme Court said yes, in a 5-4 decision written by Justice Alito that overturned the precedent in *Abood v. Detroit Board of Education (1977)*. The majority said it was a violation of the First Amendment to force individuals to endorse through union dues ideas with which they disagreed, and they applied "exacting scrutiny" to determine that the state interests in regulations weren't important enough to outweigh the First Amendment interests. In dissent, Justice Elana Kagan said the decision was an example of conservative ideology "weaponizing" the First Amendment.
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> ***Carpenter v. U.S****, No. 16-402 (2018):* Is it a violation of the Fourth Amendment to allow the government to conduct warrantless seizure and search of historical cell-phone records? Yes, the Supreme Court ruled in a 5-4 vote. The Court ruled that police must get a warrant before accessing cell phone tracking data collected by cell phone companies.

Last term, other cases involving the First Amendment included:

> ***Masterpiece Cakeshop v. Colorado Civil Rights Union***: Is there a First Amendment right to refuse service to gays and lesbians? The Court sidestepped the broader clash between religious freedom and discrimination in public accommodations and ruled 7-2 that the Colorado Civil Rights Commission's actions did not treat the case properly in its proceedings because it demonstrated "hostility" to the religious beliefs of the baker who refused to create a wedding cake for a same-sex couple.
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> ***Lozman v. City of Riviera Beach:*** When is the government impermissibly retaliating against a citizen for exercising his First Amendment rights? The Court ruled 8-1 that a citizen was not barred from advancing a First Amendment retaliatory arrest claim despite police having probable cause for the arrest. The case was sent back to the lower courts for resolution on the facts.
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> ***Minnesota Voters Alliance v. Mansky:*** In a 7-2 decision, the Supreme Court ruled that a Minnesota law banning citizens from wearing clothing with "political" terms in polling places on election day was "unreasonable" under the Court's standards for regulating speech in nonpublic forums.
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> ***National Institute of Family and Life Advocates v. Bacerra:*** Can the state require anti-abortion counseling centers to post signs about the state's contraception and abortion services? Unlikely, SCOTUS ruled in a 5-4 decision that remanded the case but ruled that the law likely impermissibly requires "compelled speech" by anti-abortion "crisis pregnancy centers" with a requirement that they inform patients about abortion services by the state.

So far in its 2018-2019 term, the Supreme Court has accepted several cases with potential precedent for media law and the First Amendment. The Court is expected to issue decisions in these cases before the end of the current term in June 2019.

FOIA: In ***Food Marketing Institute v. Argus Leader Media***, No. 18-481, the Supreme Court is asked to rule on the meaning of "confidential" in exemptions to the federal Freedom of Information Act (FOIA) in a case involving a FOIA request from a newspaper about how much money retailers receive from taxpayers through the federal food stamp program. The *Sioux Falls Argus Leader* filed a FOI request for records showing how much businesses received in food stamps, but the government denied the request, saying the data was exempt from disclosure under exemption 4 of FOIA, which allows the government to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Federal appellate circuits have split on the meaning of "confidential" and the scope of exemption 4.

Offensive Trademarks: In ***Iancu v. Brunetti***, No. 18-302, the Supreme Court will decide whether the Lanham Act's ban on "immoral" or "scandalous" trademarks is facially unconstitutional under the First Amendment. The case involves the denial of a trademark to the streetwear brand of clothing called "Fuct," created by Los Angeles designer Erik Brunetti in the 1990s.

Copyright: The Supreme Court accepted two copyright cases raising narrow questions of statutory interpretation that could resolve disputes among federal circuits. In ***Fourth Estate Public Benefit Corp. v. Wall-Street.com***, No. 17-571, the Court is asked to decide the meaning of when the registration of a copyright "has been made" within the meaning of the federal copyright statute. While copyright law does not require one to register for a copyright with the federal copyright office to obtain a copyright, a copyright must be registered in order to file a copyright infringement lawsuit. Federal circuits have split on whether a copyright registration "has been made" by the act of filing, or after the office has acted on the application. In ***Rimini Street Inc. v. Oracle USA Inc.***, No. 17-1625, the Supreme Court is asked to define what costs the winning party is able to recover, resolving potential conflicts between two separate parts of the copyright statute whose interpretations have varied among the federal circuits.

Retaliatory arrest: In ***Nieves v. Bartlett***, No. 17-1174, the key question presented is whether probable cause defeats a First Amendment retaliatory-arrest claim. The case involves the arrest of an Alaskan man at a festival who claims the officers intended to suppress his protected speech by arresting him. Police said the man, Russell P. Bartlett, was drunk, yelling at police and refused to identify himself. The case is the third since 2006 to reach the Court raising similar questions, and the Court may use the case to issue clarity to cases involving clashes between probable cause for arrest and free expression protections.

Freedom From Religion: In ***The American Legion v. American Humanist Association***, No. 17-1717, the Supreme Court is asked to rule whether a 93-year-old memorial of World War I is unconstitutional because it is shaped like a cross.

Libel and Privacy Court Decisions

Transgender not defamatory: Richard Simmons and American Media, Inc. settled a libel lawsuit in December 2018, after a California Superior Court judge ruled against Simmons on a preliminary question and ordered him to pay $130,000 for legal fees under the state's anti-SLAPP laws. Simmons sued the publisher of the *National Enquirer* and Radar Online in May 2017, for stories published in June 2016 claiming Simmons had undergone gender reassignment surgery and was now a woman. Simmons claimed the stories were "a particularly egregious and hurtful campaign of

defamations and privacy invasions." AMI's defense included the claim that even if the stories were false, they were not defamatory per se and such claims were not injurious to Simmon's reputation. The judge, Los Angeles Superior Court Judge Gregory Keosian, said the question in the case was: Does falsely reporting that a person is transgender have a natural tendency to injury one's reputation? He said the question was one of first impression, and concluded that it did not, writing in a decision, "This court finds that because courts have long held that a misidentification of certain immutable characteristics do not naturally tend to injure one's reputation, even if there is a sizeable portion of the population who hold prejudices against those characteristics, misidentification of a person as transgender is not actionable defamation absent special damages." Because the judge dismissed the case, California's anti-SLAPP statute allows defendants to recover legal fees. Simmons appealed, and several media companies filed briefs in support of AMI. The appeal was dropped as part of the settlement, and it's unknown how much Simmons paid AMI in the settlement.

Daniels loses libel suit against Trump: Porn star Stormy Daniels sued President Donald J. Trump for libel in April 2018 after he belittled Daniels' claim that a man threatened her in 2011 to keep quiet about her affair with Trump. After Daniels (whose real name is Stephanie Clifford) and her celebrity attorney Micheal Avenatti released a composite sketch of the man who allegedly threatened her, Trump tweeted: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!" Trump moved to dismiss Daniel's libel lawsuit under Texas' anti-SLAPP statute (where Daniels resides). In October 2018, U.S. District Court judge S. James Otero of the Central District of California ruled for Trump, writing, "The Court agrees with Mr. Trump's argument because the tweet in question constitutes 'rhetorical hyperbole' normally associated with politics and public discourse in the United States … The First Amendment protects this type of rhetorical statement." The judge said Trump's tweet was a "one-off rhetorical comment, not a sustained attack on the veracity on the Plaintiff's claims." Under Texas' anti-SLAPP statute, defendants are allowed to seek legal fees when a lawsuit is dismissed, and in December 2018 the judge ordered Daniels to pay Trump's legal fees, totaling nearly $300,000. Trump was represented by Charles Harder, the lawyer who represented Hulk Hogan in his landmark privacy lawsuit that bankrupted Gawker.

Zervos v. Trump: A woman who alleged Donald Trump "forcibly kissed and groped her" in 2007 is suing him for libel after he labeled as "liars" women who were accusing him of sexual assault. Summer Zervos, a former contestant on Donald Trump's reality television show "The Apprentice," said Trump made unwanted sexual advances on her at his office in New York and at the Beverly Hills Hotel in Los Angeles. Zervos sued Trump following his repeated comments denying the allegations. Zervos lawsuit has proceeded in New York state courts despite several attempts for dismissal, including Trump's arguments that a president is immune from state court lawsuits. A New York judge also said Zervos demonstrated a reasonable case that Trump's repeated statements calling the allegations "phony stories," "totally false," and "fiction" are not protected statements of opinion or rhetorical hyperbole. "His statements can be proved true or false, as they pertain to whether plaintiff made up allegations to pursue her own agenda. Most importantly, in their context, defendant's repeated statements … cannot be characterized as opinion, heated rhetoric or hyberole," Judge Jennifer G. Schecter wrote in a decision. Media reports indicate discovery has proceeded, and Trump has been required to turn over documents.

Cosby denials and libel standards: The Supreme Court in February 2019 declined to review a First Circuit Court of Appeals decision dismissing a libel lawsuit filed against Bill Cosby by one of his alleged sexual assault victims, Katherine McKee. In 2014, McKee alleged Cosby had assaulted her in a Detroit hotel room in 1974. After Cosby's attorney denied the allegations, McKee filed a lawsuit for defamation. A district court ruled Cosby's denial was protected opinion, while the appellate

court upheld the dismissal on other grounds, saying that McKee would be a limited purpose public figure and therefore would have to prove Cosby's statements were made with actual malice – a standard McKee was unlikely to meet (*McKee v. Cosby*, No. 1256, Oct. 18, 2017). Notably, in denying a petition for certiorari in *McKee v. Cosby*, No. 17-1542, Justice Clarence Thomas wrote a concurring statement calling on the Court in an appropriate case to reconsider the *New York Times v. Sullivan* actual malice standards, saying the precedent and subsequent opinions applying it "were policy-driven decisions masquerading as constitutional law."

Sandy Hook parents suing Alex Jones: Families of the 20 children and six adults who were killed in a mass shooting at the Sandy Hook Elementary School in Newtown, Connecticut in 2012 are suing Alex Jones, the host of the InfoWars show and website, for libel. For years, Jones claimed the Sandy Hook shooting was faked by actors. Viewers of InfoWars have harassed and threatened the Sandy Hook families. One woman was sentenced to five months in prison for her threats to the families. "Jones knowingly peddled false and malicious narratives in order to make money at the expense of the Sandy Hook families' grief, safety and security," attorney Josh Koskoff said. In February 2019, Jones was ordered to submit to a deposition as part of the lawsuit.

Revenge porn laws challenged: The Cyber Civil Rights Initiative said in a 2017 study that one in eight adults have been victims of, or threatened with, revenge porn, or the public posting of sexually explicit pictures without the person's consent. In the last several years, at least 40 states and the District of Columbia have passed some form of a law prohibiting the distribution of "nonconsensual pornography." In 2018, challenges to so-called "revenge porn" laws have resulted in disparate rulings in the courts. A Vermont law was upheld by the state Supreme Court as being narrowly tailored to serve a compelling government. However, in Texas, an appeals court struck down the state's law because it said it was too broad. One of the major differences is whether a revenge porn law can punish someone only when they distribute nonconsensual pornography with an intent to harm an individual (i.e., seek revenge). There is currently no federal law punishing revenge porn. At the federal level, California Senator Kamala Harris has introduced a federal revenge porn bill, called the Ending Nonconsensual Online User Graphic Harassment (ENOUGH) Act that would criminalize the distribution of nonconsensual pornography.

Public figures can't control docudrama portrayals: Producers of so-called docudramas – fictionalized films and series based on real people and events – closely watched a lawsuit in California over the acclaimed FX series Feud: Bette and Joan. The series, nominated for 18 Emmy awards in 2018, portrayed the frayed relationship between film stars Bette Davis and Joan Crawford, and featured Catherine Zeta-Jones portraying the actress Olivia de Havilland, a two-time Oscar winner and star of Gone with the Wind. The real life de Havilland, age 101, filed a lawsuit over the series, arguing that FX violated her right of publicity and sued for misappropriation and false light invasion of privacy. The actress said the false portrayal damaged her "professional reputation for integrity, honesty, generosity, self-sacrifice and dignity." She sought damages for emotional distress and harm to her reputation, among other things. FX sought dismissal under California's anti-SLAPP statutes, which require plaintiffs establish the merits of their case early in the legal process to avoid unnecessary chilling of free expression. A trial court ruled de Havilland established a meritorious case but a three-judge California appeals court panel overturned the trial court and dismissed the lawsuit under the SLAPP statute. The appeals court said the trial court decision left authors, filmmakers, playwrights and television producers with a Catch-22. It would allow individuals depicted in entertainment to sue for right of publicity violations if they were portrayed accurately, but also sue for false light if not depicted accurately. That would create a chilling effect on entertainment media, the court determined. The Feud series "is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life –

including the stories of real individuals, ordinary or extraordinary – and transform them into art, be it articles, books, movies or plays," the appeals court wrote. The court said that while filmmakers may negotiate rights with individuals portrayed, "the First Amendment simply does not require such acquisition agreements." As a public figure, in order to succeed on her false light claim, de Havilland would have to prove FX maligned her reputation with actual malice, the court said – a bar that de Havilland could not meet. The California Supreme Court declined to hear an appeal, and in January 2019, the U.S. Supreme Court rejected a writ of certiorari.

Newsgathering Rights and Journalist's Privilege

Journalists face prior restraints: Various news organizations faced prior restraints in 2018, although the right to publish ultimately prevailed in all of the cases. The cases serve as a reminder that fundamental principles of American press freedom need vigilant defense, even when it comes to reporting truthful, lawfully obtained information about public affairs. The *Los Angeles Times* faced three injunctions in 2018 prohibiting it from reporting about the criminal justice system. One case involved a court order barring the newspaper from reporting details of a plea agreement reached by a police officer who had pleaded guilty to bribery, obstruction and lying to the FBI. Two other orders prohibited journalists from publishing photos or describing the appearance of murder suspects from open court proceedings. Judges in all three cases reversed themselves after attorneys for the LA Times intervened. Across the country, journalists have faced similar injunctions recently. The *Las Vegas Review-Journal* was barred from publishing information from publicly released autopsy reports from the 58 victims of the deadliest mass shooting in the United States. The South Florida *Sun Sentinel* faced an injunction from reporting on a publicly released report about the mass shooting at Marjory Stoneman Douglas High School. In Wisconsin, the attorney general sought an injunction to prohibit a former student journalist from publishing documents released to him in response to a public records request. And closer to home, the city of Greenfield in Central California sued to keep the *Monterey County Weekly* from publishing leaked memos between the city and its attorneys about the firing of its city manager. The good news is the journalists prevailed in all cases, thanks in part to media lawyers defending core First Amendment principles.

Press pass denied for CNN reporter: In November 2018, the White House denied a CNN reporter's access to White House grounds after he asked questions at a press conference the President did not like. CNN quickly filed a lawsuit in federal court claiming the actions violated the First Amendment. In *CNN v. Trump*, U.S. District Court Judge Timothy J. Kelly issued a preliminary ruling, ordering the Trump administration to restore the credentials of the reporter, Jim Acosta, ruling that the denial was likely a violation of Acosta's due process rights. CNN dropped its lawsuit after the White House restored Acosta's access rights and issued new guidelines for reporters actions during press conferences.

DOJ seizes reporter's emails and phone records: A reporter for the *New York Times* had her email and phone records secretly subpoenaed as part of a federal investigation into allegations of leaking by James Wolfe, a 57-year-old senior aide to the Senate Intelligence Committee. The reporter, Ali Watkins, had a three-year affair with Wolfe while she was in her early 20s and working for McClatchy, HuffPost, Politico and BuzzFeed. After Wolfe was indicted on a charge of lying to investigators about his contacts with journalists, it was revealed that federal prosecutors had seized Watkins' email and phone records. In December 2018, Wolfe was sentenced to two months in prison after pleading guilty to lying to investigators.

Leakers get stiff prison sentences: A government contractor and an FBI agent were sentenced to prison sentences under the Espionage Act for leaking confidential government information to the

website *The Intercept* in 2018. In August 2018, Reality Winner was sentenced to more than five years in prison for leaking information about Russian attempts to hack state voting systems during the 2016 presidential election. Her leaks came at a time when officials were denying there were serious efforts to hack into election voting systems, and they provided some of the first public evidence of the efforts. In October 2018, Terry J. Albury was sentenced to four years in prison for sending confidential documents about FBI practices in recruiting confidential informants. Albury had been the only African American agent assigned to a counterterrorism unit focusing on Minnesota's Somali-American community, and he had grown disenchanted with what he viewed as "widespread racist and xenophobic sentiments" in the FBI. He took photos of documents and sent them to *The Intercept*, which published a series of stories titled "The FBI's Secret Rules." As of October 2018, at least five journalists' sources have been indicted by the Trump administration. One of them, a senior official in the Treasury Department named Natalie Mayflower Sours Edwards, was charged with two counts of unauthorized disclosure of financial records, for allegedly leaking to BuzzFeed information from financial records involving Trump's former campaign manager Paul Manafort and his associate Rick Gates.

Secret Wikileaks indictment revealed? The publisher of the controversial Wikileaks website, Julian Assange, may be facing a secret criminal indictment in the U.S., news that was inadvertently revealed in an unrelated court filing in November 2018. Assange is a central figure in the investigations into Russian collusion in the 2016 election of Donald Trump. Since 2012, Assange has lived in the Ecuadorian embassy in London, facing potential arrest if he leaves the building. An arrest of Arrange for publishing truthful information has long been a concern for American press freedom defenders for the potential precedent such a prosecution could set. "Any prosecution of Mr. Assange for Wikileaks' publishing operations would be unprecedented and unconstitutional, and would open the door to criminal investigations of other news organizations. Moreover, prosecuting a foreign publisher for violating U.S. secrecy laws would set an especially dangerous precedent for U.S. journalists, who routinely violate foreign secrecy laws to deliver information vital to the public's interest," said Ben Wizner, director of the American Civil Liberties Union's Speech, Privacy, and Technology Project, in a statement.

Freedom of Information

Twitter designated public forum: Can government officials block critics on their social media accounts? In three recent cases, federal judges have said no. The decisions could have ramifications across the country for how citizens interact with their elected officials. The cases pit competing First Amendment principles against each other: the rights of speakers to control their messages and the rights of citizens to be free from viewpoint discrimination in being shut out of public forums. The decisions are victories for important democratic values, including unfettered access to politicians' communications. But they also may make it more difficult for individuals, including politicians, to moderate reasoned, civil discussion on their social media feeds. In May 2018, a U.S. district court judge ruled that Donald Trump's practice of blocking critics on Twitter violated the First Amendment. The lawsuit was brought by the Knight First Amendment Institute at Columbia University. Trump is appealing the decision to the Second Circuit Court of Appeals. In January 2019, the Fourth Circuit Court of Appeals ruled that a county official in Virginia violated the First Amendment when she briefly blocked constituents on her Facebook page. And in Wisconsin, a federal judge in January 2019 ruled that the First Amendment prohibited elected officials from blocking constituents on Twitter.

FOIA lawsuit filed over Khashoggi death: Following reports that the U.S. government was aware of threats to the life of *Washington Post* columnist Jamal Khashoggi before he was murdered inside the

Saudi consulate in Istanbul in October 2018, the Knight First Amendment Institute at Columbia University filed a lawsuit seeking government records about its knowledge. The lawsuit sought the release of records under the Freedom of Information Act that would shed light on whether the U.S. government notified Khashoggi of threats, as it is required to do so under intelligence agency rules. "It is hard to imagine a more brazen assault on press freedom than the murder of Jamal Khashoggi, or an instance in which the duty to warn would have been more urgent," said Ramya Krishnan, a staff attorney for the Knight First Amendment Institute. "For the sake of journalists carrying out their work at great personal risk, we are asking the U.S. government to make clear that it stood with Khashoggi, and that it stands today with journalists around the world."

Copyright and Trademarks

Congress passes Music Modernization Act: President Trump signed into law the Music Modernization Act on October 11, 2018. The legislation was intended to create new systems for royalty distribution for music and audio creators as a result of new technologies and digital streaming services. The bill created a non-profit governing agency to establish a database of owners of the mechanical license of sound recordings (the owner of the copyright to the composition and lyrics); set blanket royalty rates under a compulsory license for various copyright holders; modified the process to resolve royalty disputes; and extended federal copyright to songs recorded prior to 1972 until 2067. The law was supported by digital streaming services and leaders of the recording industry. "With the president's signature today, the Music Modernization Act is officially the law of the land. As we celebrate the harmony and unity that got us here, we applaud the efforts of the thousands of performers, songwriters, and studio professionals who rallied for historic change to ensure all music creators are compensated fairly when their work is used by digital and satellite music services. We thank the members of Congress who championed this issue throughout the past several years to bring music law into the 21st century," said Neil Portnow, president and CEO of the Recording Academy.

New works enter public domain: Because of regular extensions of copyright duration in recent generations, Jan. 1, 2019 marked the first date in years that a mass body of work – works published in 1923 – entered the public domain of copyright law. The last time this occurred was in 1998, when works published in 1922 entered the public domain. An extension of copyright duration passed in 1998 created a 20-year drought. As Smithsonian Magazine pointed out:

> "We can blame Mickey Mouse for the long wait. In 1998, Disney was one of the loudest in a choir of corporate voices advocating for longer copyright protections. At the time, all works published before January 1, 1978, were entitled to copyright protection for 75 years; all author's works published on or after that date were under copyright for the lifetime of the creator, plus 50 years. *Steamboat Willie*, featuring Mickey Mouse's first appearance on screen, in 1928, was set to enter the public domain in 2004. At the urging of Disney and others, Congress passed the Sonny Bono Copyright Term Extension Act, named for the late singer, songwriter and California representative, adding 20 years to the copyright term. Mickey would be protected until 2024—and no copyrighted work would enter the public domain again until 2019, creating a bizarre 20-year hiatus between the release of works from 1922 and those from 1923."

Girl Scouts sue Boy Scouts: The Girl Scouts of the USA don't want the Boy Scouts of America to recruit girls, and the dispute has ended up in federal court. In November 2018, the Girl Scouts filed a lawsuit in the U.S. District Court for the Southern District of New York, claiming the Boy Scouts is violating trademark law by using names for programs like "Scouts BSA" and "Scout Me In" in an effort to be gender neutral in its recruitment and programming. The use of the generic term "Scout"

is causing consumer confusion undermining the Girl Scouts business interests, according to the complaint. As part of its lawsuit, the Girl Scouts is seeking an order requiring the Boy Scouts to stop using the term "Scouts" without "Boy" before it, based on trademark law in New York and under the federal Lanham Act.

California Law Developments

California sues FCC, passes state law in battle for net neutrality: California passed the nation's strongest net neutrality law in September 2018 after federal net neutrality rules passed during the Obama administration in 2015 were rolled back by the Federal Communications Commission in 2018 under President Trump's administration. California joined other states to sue the federal government over the new FCC rules, in addition to passing its own net neutrality law. Broadly speaking, the concept of net neutrality rules prohibit broadband and wireless companies from slowing service speeds for certain content or providing faster speeds for others. The California law prohibits companies from blocking, slowing down or charging more for some websites over others. The law was strenuously opposed by telecom companies. California's actions were criticized as being a potentially unconstitutional violation of supremacy clause of the constitution, which has been interpreted to mean that in cases of interstate commerce, federal law preempts state law. The Justice Department immediately filed a lawsuit against California over the law, and the state agreed not to enforce the law while the lawsuit is pending.

California passes new data privacy laws: California passed the nation's toughest data privacy law in 2018. Titled the California Consumer Privacy Act of 2018, the law grants consumers a right to know what information websites collect and share about them. Citizens can also bar websites from selling data about them, although websites can charge more for services to citizens who don't want their data shared. The California Legislature passed the law in part to avoid a ballot measure that could have imposed even stricter data privacy regulations on the tech industry, which is based in the state's Silicon Valley region. The law is set to take effect in 2020, and some watchdogs say additional fixes are needed. "The exact impact remains in flux, since the new rules will not take effect until 2020 and we anticipate that the California legislature will consider many changes to the new law in the months and years to come," said Lee Tien, a senior staff attorney at the Electronic Frontier Foundation.

Yelp not required to remove defamatory review: The California Supreme Court ruled in July 2018 that the website Yelp was not required to remove a user's post that had been adjudicated as unprotected defamation. The decision in *Hassell v. Bird* (5 Cal 5th 522), was celebrated by Internet freedom groups because it further immunized websites from legal liability from content posted by others. The case began when San Francisco attorney Dawn Hassell sued a former client, Ava Bird, for defamation over reviews Bird posted on Yelp that Hassell said were false and injurious to her business. A judge sided with Hassell after Bird failed to present a defense in court, entering a $558,000 judgment against Bird. The judge also ordered both Bird and Yelp to remove the posts, prompting Yelp to file a motion to vacate the judgment. Yelp argued that it should be protected by Section 230 of the Communications Decency Act, which provides websites with broad immunity from liability for user-generated content. An appellate court found the order did not violate Section 230 because it was not holding Yelp liable for the content; it was simply ordering it to remove content adjudicated to be unprotected speech. A narrow majority of the California Supreme Court ruled that Section 230 protected Yelp from facing liability, including injunctions requiring content removal. "The extension of injunctions to these otherwise immunized nonparties would be particularly conducive to stifling, skewing, or otherwise manipulating online discourse," the majority wrote.

Additional Readings/Watching:

The Free Speech Century, Lee C. Bollinger and Geoffrey R. Stone (Oxford University Press, 2019).

Video: Lee C. Bollinger and Geoffrey R. Stone discussing book at Carnegie Council for Ethics in International Affairs, Feb. 5, 2019.

Video: A Conversation with Chief Justice John Roberts, Belmont Law School, Feb. 7, 2019.

Study: "Free Expression on Campus: What College Students Think About First Amendment Issues," Gallup-Knight Foundation, March 2018.

Study: "The Future of the First Amendment" Knight Foundation, December 2018.

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