Freedom of Speech in the United States

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Annual Update — Autumn 2019

This update summarizes the free speech decisions issued by the U.S. Supreme Court during the 2018–2019 term, as well as related developments. It also includes one consequential appellate court decision involving President Donald Trump's Twitter account. The complete text of this update and a library of landmark free speech decisions can be found on the web site for the book:

http://www.tedford-herbeck-free-speech.com

Confirmation of Justice Brett M. Kavanaugh

Death of Justice John Paul Stevens

Chapter 3: Political Heresy: Sedition in the United States since 1917

Julian Assange Charged with Violating the Espionage Act
Knox v. Penn (appropriate legal standard for assessing true threats)

Chapter 4: Defamation

McKee v. Cosby (whether a person who publicly accuses her alleged assailant of sexual assault is a limited-purpose public figure)

Chapter 10: Special Problems of a Free Press

Nieves v. Bartlett (retaliatory arrests and the First Amendment)

Chapter 11: Constraints of Time, Place, and Manner

Knight First Amendment Institute at Columbia University v. Trump (President Donald Trump's Twitter account as a public forum)
Developments Related to Flag Burning

Chapter 13: Copyright

Iancu v. Brunetti ("immoral" or "scandalous" matter provision of the Lanham Act)

Chapter 14: Access

Manhattan Community Access v. Halleck (private operator of a public access cable channel and the First Amendment)

Confirmation of Brett M. Kavanaugh

Anthony Kennedy served as an associate justice on the U.S. Supreme Court from 1988 until his retirement on July 31, 2018. To replace him, President Donald Trump nominated Brett M. Kavanaugh, a judge on the U.S. Court of Appeals for the District of Columbia (2006 –2018). Kavanaugh, who earned his undergraduate and law degrees from Yale University, had clerked for Justice Kennedy (1993–1994), served as White House Staff Secretary for President George W. Bush and worked as a lawyer for several government offices. After contentious hearings involving allegations of sexual assault, Kavanaugh was confirmed by the Senate on a 50-to-48 vote on October 6, 2018. He is the 114th justice to serve on the Supreme Court.

The confirmation of Justice Kavanaugh is important because it has the potential to change the ideological balance of the Court. Justice Kennedy played a significant role in that balance, as he often cast the deciding vote on a Court that was evenly divided between four liberal justices (Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan) and four conservative justices (Clarence Thomas, John Roberts, Samuel Alito, and Neil Gorsuch).

During the 2018–2019 term, Justice Kavanaugh provided the decisive vote in eight 5-to-4 rulings, including cases dealing with the death penalty, immigrant detention, and sovereign immunity. It is impossible to know, of course, how a particular justice might evolve over time. Many have not decided cases as expected. President Dwight Eisenhower, for example, once claimed that his appointment of Chief Justice Earl Warren was "the biggest damn fool mistake that I ever made." No doubt, Eisenhower was referring to liberal decisions such as *Brown v. Board of Education* (1954), in which the Warren Court ordered desegregation of public schools.

Justice Kennedy was widely recognized as a speech-protective justice. For example, in his first year on the Court, he joined with Justice William Brennan's opinion in *Texas v. Johnson* (1989), holding that flag burning was protected by the First Amendment. This commitment to free speech did not waiver over time. Commenting on Justice Kennedy's record, law professor Jonathan Adler observed, "His expansive conception of the First Amendment's protection of freedom of speech is among his most important judicial legacies, marking his jurisprudence from his first days on the Court to his last."

Based on his record on the Court of Appeals for the District of Columbia, Justice Kavanaugh appears to share his predecessor's commitment to free speech. Like Justice Kennedy, for example, Justice Kavanaugh consistently voted to strike down campaign finance laws on First Amendment grounds while serving as a federal judge. For the moment, it does not appear that replacing Justice Kennedy with Justice Kavanaugh will change the Roberts Court's legacy with respect to the First Amendment.

Death of Justice John Paul Stevens

John Paul Stevens was one of the longest-serving justices in the history of the Supreme Court. A graduate of the University of Chicago, he served as an intelligence officer in the U.S. Navy during World War II. After the war, he attended Northwestern University Law School and distinguished himself in private practice as an expert on antitrust law. President Richard Nixon nominated him to the Seventh Circuit Court of Appeals in 1970. Five years later, President Gerald Ford nominated Stevens to the Supreme Court. Although it seems impossible in today's partisan political world, Stevens was confirmed by the Senate on a unanimous 98-to-0 vote.

During his 35 years on the court (1975–2010), Justice Stevens slowly emerged as a champion of the freedom of speech guaranteed by the First Amendment. He is best known for defending the principle of toleration, the idea that society needs to appreciate the importance of protecting offensive or unpopular speech. His position is exemplified in a lecture he delivered at Yale Law School in 1992, which ended: "Let us hope that whenever we decide to tolerate intolerant speech, the speaker as well as the audience will understand that we do so to express our deep commitment to the value of tolerance—a value protected by every clause in the single sentence called the First Amendment."

In 1978, Stevens authored the Court's plurality opinion in *Federal Communications Commission v. Pacifica Foundation,* a decision upholding the FCC's authority to fine a radio station for airing a George Carlin monologue titled "Filthy Words" during daytime hours, when children might be in the audience. Although the monologue was not legally obscene, Justice Stevens held that it could be regulated because it was indecent.

Twenty years later, however, Justice Stevens was willing to extend more protection to indecent speech in *Reno v. American Civil Liberties Union* (1997). Writing for the majority, he held that the Communications Decency Act, a law criminalizing the online transmission of indecent or patently offensive expression, was unconstitutional. He argued that the government's interest in protecting minors did not justify restrictions on adults' freedom of expression. In a key passage, Stevens distinguished the case from *Pacifica,* arguing that the latter was a narrow holding that only applied to broadcasting over the public airwaves. Previous cases, he concluded, "provide no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet.

Justice Stevens's growing willingness to extend more protection to speech is also evident in his rulings on low-value speech. In 1976, he used the idea of "secondary effects" to uphold a Detroit ordinance that regulated the location of adult businesses. In his opinion for the majority in *Young v. American Mini-Theatres,* he explained that the ordinance was not intended to silence offensive speech. Rather, the city was acting to address the secondary effects associated with adult businesses, such as increased crime in the surrounding neighborhood. Over time, however, he came to question the secondary effects doctrine. In *City of Erie v. PAP's A & M* (2000), when the majority of justices invoked the doctrine to regulate the content of adult expression such as nude dancing, Justice Stevens warned, "Never before have we approved the use of [the secondary effects] doctrine to justify a total ban on protected First Amendment expression."

John Paul Stevens retired from the Court on June 29, 2010, and died on July 16, 2019. He served for 12,611 days, trailing only William O. Douglas (13,358 days) and Stephen Johnson Field (12,614 days).

Chapter 3: Political Heresy: Sedition in the United States since 1917

Julian Assange Charged with Violating the Espionage Act

On June 11, 2019, the U.S. government asked the United Kingdom to extradite Julian Assange, the founder of WikiLeaks. Assange is facing an 18-count indictment that charges him with soliciting and publishing classified information about U.S. military operations in Iraq. The source of this information, former Army private Chelsea Manning, was convicting for leaking 750,000 classified or sensitive military and diplomatic documents, which WikiLeaks published between April 2010 and April 2011. Manning pled guilty to some charges, was convicted

of some charges, and was acquitted on other charges at a court martial in 2011. She was sentenced to serve 35 years in the Disciplinary Barracks at Fort Leavenworth, but President Barack Obama commuted her sentence at the end of his second term.

In addition to punishing Manning for leaking the documents, the Obama Administration sought to target WikiLeaks for releasing classified information. At the same time, the government of Sweden asked the United Kingdom to extradite Assange so he could be questioned about rape and molestation allegations. When Assange lost his legal battle against extradition in the United Kingdom, he requested and received asylum in Ecuador's embassy in London. The Ecuadoran government granted Assange citizenship in 2018, but revoked it in April 2019 and evicted him. Assange was promptly arrested by the British government.

Most of the charges against Assange were brought under the Espionage Act of 1917, which was adopted on the eve of World War I and used by President Woodrow Wilson's administration to silence critics. When prosecutions brought under the act were challenged, the Supreme Court unanimously upheld convictions in *Schenck v. United States* (1919), *Frohwerk v. United States* (1919), and *Debs v. United States* (1919). By the fall of 1919, Justice Oliver Wendell Holmes and his protégée, Justice William Brandeis, came to the realization that the "best test of the truth is the power of the thought to get accepted in the competition of the market." This view, set out in a dissenting opinion in *Abrams v. United States* (1919), was eventually embraced by the Supreme Court in *Brandenburg v. Ohio* (1969).

The Espionage Act has been used to prosecute government officials for leaking classified information to the press, but these cases did not involve prosecuting the media outlets that published the documents. Writing in *The Atlantic,* attorney Bradley P. Moss warned, "If Assange can be prosecuted merely for publishing leaked classified documents, every single media outlet is at the risk of prosecution for doing exactly the same thing." The Editorial Board of *The New York Times* went even further, arguing that Assange's prosecution for violating the Espionage Act "is aimed straight at the heart of the First Amendment."

At the time this update was published, Assange was being held in a London prison while the Trump administration tried to convince a British court that he should be extradited to the United States for trial. If Assange is extradited and the administration pursues the prosecution, the courts will be forced to consider whether a journalist or a media outlet can be prosecuted for reporting on or publishing classified information.

U.S. Supreme Court

Case: *Knox v. Pennsylvania,* 139 S.Ct. 1547, 2019 U.S. LEXIS 2793 (April 15, 2019); cert. denied, *Commonwealth v. Knox,* 190 A.3d 1146, 2018 Pa. LEXIS 4272 (Pa. Sup.Ct., August 21, 2018).

Subject: Whether a "reasonable person" or a "subjective intent" standard should be used to determine whether a threat is protected by the First Amendment.

Summary of Decision: After fleeing a traffic stop, Jamal Knox was arrested and charged with gun and drug crimes. While the criminal charges against him were pending, Knox, who rapped under the name "Mayhem Mal," wrote and recorded "F[uc]k the police," a rap song that was uploaded to YouTube and promoted with a link on a Facebook page titled "Beaz Mooga." In the song, Knox named and threatened to kill the two police officers who had participated in his arrest and who were scheduled to testify at his trial. When an officer monitoring the

Facebook page reported the posting, Knox was charged with two more crimes: terroristic threats and witness intimidation.

A bench trial was held on the new charges. The court took the lyrics literally, concluded that they constituted a true threat, and convicted Knox, who appealed on the grounds that his song was protected under the First Amendment. The Pennsylvania Supreme Court denied his appeal, rejecting Knox's claim that his song was "artistic in nature" and "never meant to be interpreted literally." Writing for the majority, the chief justice noted, "The song's lyrics express hatred toward the Pittsburgh police," adding "They do not include political, social or academic commentary, nor are they facially satirical or ironic." Knox appealed to the U.S. Supreme Court, but the justices denied certiorari, thereby affirming his conviction.

Although unsuccessful, the appeal in Knox is interesting for two reasons.

First, it gave the Supreme Court the opportunity to resolve an emerging split in the federal circuit courts and the state courts over the appropriate standard for assessing threats. Some courts have applied a "subjective" standard, whereby the speaker's intent is used to distinguish true threats from exaggerated expression. Other courts have argued for an "objective" standard that asks whether a "reasonable person" would find a statement to be threatening. By most analyses, the objective standard is deemed more protective of speech, as the government would need to prove both the subjective and the objective element to demonstrate a true threat. Absent a definitive Supreme Court ruling, the appropriate standard in true threat cases remains a mystery. "If one First Amendment doctrine screams out the loudest for clarification," communication law professors Clay Calvert and Matthew Bunker have argued, "it may well be true threats."

Second, the appeal in Knox challenged a line of cases holding that rap music, especially gangsta rap, is inherently threatening. Rather than reading raw or violent lyrics as literal or autobiographical, the appeal argued, rap is a distinct art form that expresses an important perspective. To illustrate this argument, one of the amicus briefs filed on Knox's cited "Fuck the Police," a rap song by Niggaz Wit Attitudes (N.W.A.). The song is better understood, the brief argued, as both a political protest and as a meaningful piece of music.

The justices declined to hear Knox's appeal. One hopes, however, that the Supreme Court will eventually clarify the appropriate standard for assessing true threats. So too, the justices might productively consider whether rap music is artistic expression, not meant to be taken literally.

Chapter 4: Defamation

U.S. Supreme Court

Case: *McKee v. Cosby,* 139 S. Ct. 675, 2019 U.S. LEXIS 827 (February 19, 2009); cert. denied, *McKee v. Cosby,* 874 F.3d 54, 2017 U.S. App. LEXIS 20380 (1st Cir. Mass., October 18, 2017).

Subject: The Supreme Court declines to hear an appeal from an alleged victim of sexual assault who argued that she was not a limited purpose public figure who needs to prove actual malice to recover damages for defamation.

Summary of Decision: Katherine McKee alleged that comedian Bill Cosby raped her in a Detroit hotel room in 1974. Cosby and his attorney Martin Singer responded by sending a letter to the New York Daily News, denouncing McKee as "an admitted liar, not credible, unchaste, and a criminal." McKee then filed a defamation lawsuit, but the U.S. District Court

for the District of Massachusetts dismissed her complaint as a nonactionable opinion. McKee appealed the dismissal, but the First Circuit Court of Appeals affirmed on alternate grounds. By detailing her own rape and saying "me too," the First Circuit reasoned, McKee had "thrust" herself into an ongoing public controversy and transformed herself into a limited purpose public figure. As such, she needed to prove "actual malice" to recover damage for defamation. Applying this standard, the First Circuit dismissed McKee's lawsuit.

McKee hired Charles Harder, the attorney who represented Hulk Hogan in his successful lawsuit against Gawker, to appeal to the Supreme Court. The petition for certiorari argued that McKee's decision to go public with a rape allegation did not transform her into a limited purpose public figure. She was not trying to influence public policy; McKee had simply added her name to the list of Cosby's victims.

The Supreme Court's decision to deny certiorari drew national attention, however, because of a lengthy concurring opinion authored by Justice Clarence Thomas. Although he agreed with the decision not to hear McKee's appeal, Justice Thomas favored reconsidering the Supreme Court's landmark decision in *New York Times v. Sullivan* (1964). He denounced *Sullivan* and subsequent decisions as "policy-driven decisions masquerading as constitutional law," continuing, "It is time to carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits then neither should we."

None of the other justices joined the Thomas opinion in McKee, but Justice Antonin Scalia, who died in 2016, had been publicly critical of the *Sullivan* decision. President Donald Trump has also called for changes to libel laws to make it easier for public figures to win defamation suits against media defendants. However, there is no evidence to suggest a majority of justices favor changes to the actual-malice rule.

Chapter 10: Special Problems of a Free Press

U.S. Supreme Court

Case: *Nieves v. Bartlett,* 139 S.Ct. 1715, 2019 U.S. LEXIS 3557 (May 28, 2019); reversing and remanding *Bartlett v. Nieves,* 712 Fed. Appx. 613, 2017 U.S. App. LEXIS 20682 (9th Cir. Alaska, Oct. 20, 2017).

Subject: The demonstration of probable cause generally defeats a retaliatory arrest claim brought under the First Amendment.

Summary of Decision: Robert Bartlett attended Arctic Man, a snow-themed race in interior Alaska known for extreme sports and excessive alcohol consumption. In 2014, during Arctic Man's last night, Alaska State trooper Sergeant Luis Nieves asked a group of partygoers to move their beer keg inside their RV to prevent underage drinking. Angered by this request, a seemingly inebriated Bartlett began yelling at the group and exhorting them not to talk with the police. Nieves approached Bartlett and attempted to explain the situation, but Bartlett refused to engage in a conversation, loudly shouting that the officer should leave. Rather than escalating the situation, Nieves disengaged and continued his patrol of the campground. Moments later, Bartlett approached trooper Bryce Weight, who was questioning a minor about whether he had been drinking. According to Weight, Bartlett inserted himself between the officer and the minor and yelled in slurred speech that the minor should not talk with the police. The confrontation quickly escalated into a series of shoves. Nieves returned and assisted

Weight in wrestling Bartlett to the ground and applying handcuffs. Bartlett was charged with disorderly conduct and resisting arrest, taken to a holding tent, and, several hours later, released from custody. Citing budgetary reasons, prosecutors eventually dropped the criminal charges.

Bartlett then filed a civil-rights lawsuit against Nieves and Weight for violating his First Amendment rights. When Nieves arrested him, Bartlett alleged, the officer told him, "Bet you wish you would have talked to me now." The lawsuit argued that this remark proved that Nieves and Weight had retaliated against Bartlett for exercising his freedom of speech; that he had been singled out for his initial refusal to speak with Nieves and his intervention in Weight's conversation with the minor. Responding to Bartlett's complaint, the officers asserted they had had probable cause to arrest Bartlett because he had interfered with their investigation of underage drinking and because he had initiated the physical confrontation.

A federal district court dismissed the lawsuit on the grounds that the officers had had probable cause to arrest Bartlett, thus precluding his retaliatory arrest claim. The U.S. Court of Appeals for the Ninth Circuit disagreed, arguing that there was enough evidence of retaliation to warrant a trial. According to the Ninth Circuit, Bartlett had demonstrated (1) that the officers' conduct would "chill a person of ordinary firmness from future First Amendment activity," and (2) that he had sufficient evidence to prove that the officers' desire to chill his speech was the cause of his arrest. The officers appealed to the Supreme Court, which agreed to hear the case.

On a 6-to-3 decision, the justices held that there was probable cause to arrest Bartlett and that, therefore, his retaliatory arrest claim failed as a matter of law. Writing for the majority, Chief Justice John Roberts (joined in full by Justices Stephen Breyer, Samuel Alito, Elena Kagan, and Brett Kavanaugh; and by Justice Clarence Thomas in all but one part) acknowledged that, "As a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." To prove a retaliation claim, he continued, "a plaintiff must establish a 'causal connection'" between the arresting officer's presumed desire to retaliate and the plaintiff's arrest. In other words, the Chief Justice concluded, "it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive."

Applying that standard to this case, the chief justice dismissed Bartlett's retaliation claim. He noted that there was no evidence on record of retaliation by Trooper Weight because there was no evidence that Weight was aware of Bartlett's earlier interaction with Nieves. For his part, Sergeant Nieves had acted with probable cause because he had suspected Bartlett was inebriated; he had observed him speaking in a loud voice to Weight; and he had witnessed the exchange between Bartlett and Weight that led to the physical confrontation. In other words, Nieves had arrested Bartlett for his behavior during the event, not for exercising his freedom of speech.

Chief Justice Roberts did add one "narrow qualification" to his opinion, which cost him Justice Thomas's support. There might be limited circumstances, the chief justice acknowledged, in which a police officer might have probable cause to make an arrest, but declined to do so. "In such cases," he explained, "an unyielding requirement to show the absence of probable cause could pose a risk that some police officers may exploit the arrest power as a means of suppressing speech." He offered the example of a protestor complaining about police conduct while illegally crossing a public street; in response, an officer cites the protestor for jaywalking, although jaywalking laws are seldom enforced. Chief Justice Roberts reasoned that "the no-probable-cause requirement should not apply when a plaintiff presents objective evidence

that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." In this situation, he concluded, it would be reasonable to infer that the citation was issued in retaliation to the protestor's complaints about the police.

Justice Clarence Thomas, in a concurring opinion, rejected the qualification that the chief justice had set out. He was willing to go ever further than the five justices in the majority: he held that probable cause should always defeat a First Amendment claim. Justices Neil Gorsuch and Ruth Bader Ginsburg also contributed opinions that concurred in part and dissented in part. Justice Gorsuch agreed with the majority opinion, but argued that it was possible to imagine circumstances in which a probable cause claim might be insufficient to defeat a retaliatory arrest claim. Justice Ginsburg also agreed with the majority opinion, but concluded that there was enough evidence of a retaliatory motive to justify a trial.

The lone dissenter, Justice Sonia Sotomayor, began by identifying the points of agreement among the justices. Most of the justices recognized that there were circumstances in which a finding of probable cause might be insufficient to defeat a retaliatory arrest claim brought under the First Amendment. Justice Sotomayor, however, worried about whether the constrained exception contained in the majority opinion offered sufficient protection. To her way of thinking, Chief Justice Roberts's reasoning "will breed opportunities for the rare ill-intentioned officer to violate the First Amendment without consequence—and, in some cases, openly and unabashedly."

Chapter 11: Constraints of Time, Place, and Manner

Second Circuit Court of Appeals

Case: *Knight First Amendment Institute at Columbia University v. Trump,* 928 F.3d 226, 2019 U.S. App. LEXIS 20265 (July 9, 2019); affirming *Knight First Amendment Institute at Columbia University v. Trump,* 302 F.Supp. 3d 541, 2018 U.S. Dist. LEXIS 87432 (S.D.N.Y., May 23, 2018).

Subject: Second Circuit Court of Appeals holds President Trump's Twitter account is a public forum, and the president cannot block tweets posted by his critics.

Summary of Decision: Donald Trump established a Twitter account in March 2009, using the handle @realDonaldTrump. At the time, Trump was a private citizen, and used the account to voice his opinions on a wide range of topics. Since his inauguration to the presidency in January 2017, he has used the account "as a channel for communicating and interacting with the public about his administration." The header photograph sometimes shows the president performing official duties; the administration has acknowledged that the account is one of the White House's main vehicles for communication; and the National Archive has concluded that the president's tweets are official government records that must be preserved.

President Trump has 62 million followers. His posts sometimes generate tens of thousands of replies.

Starting in May 2017, he blocked individuals who posted replies that criticized him or his policies. Once they were blocked, critics were unable to view the president's tweets, reply to them, or use the @realDonaldTrump web page to view comment threads. Although several "workarounds" would allow blocked individuals to engage with the account, such as opening new Twitter accounts of their own, the president's critics deemed them burdensome or inefficient.

In July 2017, seven blocked individuals joined with the Knight Institute (which was not blocked) in a lawsuit claiming that President Trump had violated their freedom of speech. A federal district court granted summary judgment in favor of the plaintiffs in May 2018, on the grounds that "the blocking of the individual plaintiffs from the [Account] because of their expressed political views violated the First Amendment." President Trump appealed the decision to the Second Circuit Court of Appeals on the grounds that he was simply exercising control over his private Twitter account. Consequently, the appeal argued, the plaintiffs had no right of access and President Trump did not violate the First Amendment when he blocked his critics.

The Second Circuit Court of Appeals denied the appeal on a 3-to-0 decision. At the outset, the court noted, there was "overwhelming" evidence that the president was using his account to conduct official business. Furthermore, President Trump's attorneys conceded that he had blocked the plaintiffs because they posted tweets that criticized the president or his policies. Thus, the court reasoned, the only question was whether the president had acted as a private citizen or in an official government capacity. To the Second Circuit, the answer was clear: the president was using the account as a means for communicating with the public.

Having dispensed with the private account argument, the Second Circuit considered whether the president's Twitter account qualified as a public forum. To the court, it was clear that "the Account was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation. The Second Circuit concluded, "We hold that this conduct created a public forum." Once "the president has chosen a platform and opened up its interactive space to millions of users and participants, he may not selectively exclude those whose views he disagrees with."

This is the second decision in 2019 in which an appellate court held that a government official's social media account functioned as a public forum. In *Davison v. Randall* (2019), the Fourth Circuit Court of Appeals held that a county supervisor's Facebook page was being used for official purposes. It was therefore a public forum, and blocking self-appointed government watchdog Brian Davison from posting on the page constituted viewpoint discrimination.

President Trump will likely appeal the Second Circuit decision to the Supreme Court. In the meantime, critics have already cited *Knight First Amendment Institute and Davison* as precedents to sue public officials who block their access. Two lawsuits, for example, have already been brought against Representative Alexandria Ocasio-Cortez, accusing her of blocking people for their political views. While waiting for the courts to rule on the First Amendment's reach into social media, politicians might remember the words of Justice Louis Brandeis in *Whitney v. California* (1927), "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

Developments Related to Flag Burning

Flag Day is observed on June 14 to commemorate the Second Continental Congress's decision to adopt the flag of the United States. Shortly before June 14, 2019, the city of Cleveland paid $225,000 to settle a lawsuit, brought by Gregory "Joey" Johnson, claiming that the police had retaliated against him for exercising his constitutional right to free expression by burning an American flag outside the 2016 Republican National Convention. Johnson alleged that

Cleveland police had pushed him to the ground and used fire extinguishers to prevent him from burning a flag outside the convention hall.

Thirty years previously, Johnson had been the lead plaintiff in *Texas v. Johnson* (1989), concerning his conviction for burning a flag during a political protest outside the 1984 Republican National Convention in Dallas. He successfully appealed his conviction for the desecration of a venerated object to the Texas Court of Criminal Appeals. The state of Texas appealed to the Supreme Court. Writing for the five-justice majority, Justice William Brennan held that flag burning was "expressive conduct" protected by the First Amendment.

Congress responded to the *Johnson* decision by adopting the Flag Protection Act of 1989, which was held unconstitutional in *United States v. Eichmann* (1990). Since then, there have been many unsuccessful attempts to amend the U.S. Constitution to ban flag desecration.

Between 1995 and 2006, constitutional amendments to protect the flag were introduced in Congress on a regular basis. One such amendment almost passed in 2006; it fell only one vote short in the Senate. On June 14, 2019, Senators Steve Daines (R-MT) and Kevin Cramer (R-ND) introduced a constitutional amendment that would allow states to outlaw the desecration of the American flag. The next day, President Donald Trump tweeted his support for the amendment, which he called a "no-brainer."

If both Houses of Congress approve the measure, a constitutional amendment must then be ratified by three-fourths of the states. It would be up to Congress to determine whether the amendment is sent to the state legislatures or to state conventions for ratification.

One leading opponent to such a constitutional amendment is Senate Majority Leader Mitch McConnell (R-KY). In 2006, McConnell cast one of the deciding votes. Although he said, "I don't share the slightest shred of sympathy with any who would dare desecrate the flag. . . . They deserve rebuke and condemnation—if not a punch in the nose," he argued that flag burning was an expressive act protected by the Constitution: "The First Amendment, which protects our freedom of speech, is the most precious part of the Bill of Rights. As disgusting as the ideas expressed by those who would burn the flag are, they remain protected by the First Amendment."

Chapter 13: Copyright

U.S. Supreme Court

Case: *Iancu v. Brunetti,* 139 S. Ct. 2294, 2019 U.S. LEXIS 4201 (June 24, 2019); affirming *In re Brunetti,* 877 F.3d 1330, 2017 U.S. App. LEXIS 25336 (Fed. Cir., December 15, 2017).

Subject: The prohibition on the registration of "immoral" or "scandalous" trademarks contained in the Lanham Act infringes on the First Amendment.

Summary of Decision: Erik Brunetti started a streetwear clothing line named Fuct (stylized "FUCT") in 1990. Although he recognized that the name of his brand sounded like the expletive "fucked," Brunetti claimed the initials actually stood for "Friends U Can't Trust." The apparel proved popular and by 2010, Brunetti found knock-offs with the "Fuct" label being sold on the Internet. To protect his trademark, he tried to register his brand with the United States Patent and Trademark Office. His application was refused, however, because the examiner concluded "Fuct" was "totally vulgar" and "therefore unregistrable." Under the terms of the 1946 Lanham Act, the Patent and Trademark Office could deny registration to a trademark if the subject consisted of "immoral, deceptive, or scandalous matter."

With the support of the American Civil Liberties Union, Brunetti appealed the decision, and his case progressed through the federal courts. From the outset, many commentators predicted Brunetti would prevail. In *Cohen v. California* (1971), the Supreme Court had held that a jacket emblazoned with the phrase "Fuck the Draft" was protected by the First Amendment. More recently, the Court had ruled that the Lanham Act's ban on disparaging trademarks constituted unconstitutional viewpoint discrimination. In that case, *Matal v. Tan* (2017), the Court had held that an Asian-American rock bank from Portland, Oregon, known as "The Slants" could register the band's name as a trademark.

On a 6-to-3 decision, the justices held the ban on "immoral or scandalous" trademarks constituted viewpoint discrimination and violated the First Amendment. Writing for the majority, Justice Elena Kagan (joined by Justices Ruth Bader Ginsburg, Samuel Alito, Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh) argued that the decision to deny registration distinguished between two opposing sets of ideas: "those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation." To Justice Kagan, the decision to deny registration to "Fuct" resulted in a "viewpoint discriminatory application."

Chief Justice John Roberts, Justice Sonia Sotomayor, and Justice Stephen Breyer filed three separate opinions, concurring in part and dissenting in part. All three justices had concerns with the "immoral, deceptive, or scandalous" provision of the Lanham Act and with the practical consequences of the majority reasoning. Justice Sotomayor, for example, anticipated a "rush to register trademarks for even the most viscerally offensive words and images that one can imagine." To prevent that from happening, she proposed distinguishing between "immoral" and "scandalous" matter. She argued that the government might narrowly define "scandalous" to refer to trademarks that are vulgar or obscene, thus allowing the Patent and Trademark Office to deny registration to scandalous trademarks such as "Fuct" without engaging in unconstitutional viewpoint discrimination.

Several justices invited legislators to address the problem. In his concurring opinion, Justice Alito observed, "Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas. The particular mark in question in this case could be denied registration under such a statute." Echoing this sentiment, Chief Justice Roberts noted that the First Amendment does not require "the Government to give aid and comfort to those using obscene, vulgar and profane modes of expression." It will be interesting, therefore, to see whether Congress embraces Alito's suggestion and adopts narrowly drawn language, allowing the Trademark and Copyright Office to refuse to register "lewd, sexually explicit, or profane marks." Based on the opinions in *Iancu v. Brunetti,* such a statute might withstand constitutional scrutiny.

Chapter 14: Access

U.S. Supreme Court

Case: *Manhattan Community Access Corporation v. Halleck,* 139 S. Ct. 1921, 2019 U.S. LEXIS 4178 (June 17, 2019); reversing in part and remanding *Halleck v. Manhattan Community Access Corporation,* 882 F.3d 300, 2018 U.S. App. LEXIS 3089 (2d Cir. N.Y., February 9, 2018).

Subject: A private operator of a public access cable channel is not a state actor and cannot be sued for violating the First Amendment.

Summary of Decision: DeeDee Halleck, an award-winning producer, and Jesus Papoleto Melendez, a poet and playwright, produced a film critical of the Manhattan Neighborhood Network (MNN), the private entity that operates the public access channels for Time Warner's cable system in Manhattan. The film aired, but the pair was subsequently suspended from using MNN's facilities and services. Halleck and Melendez sued, arguing that restricting their access because of the content of their film constituted viewpoint discrimination prohibited by the First Amendment.

A federal district court dismissed the claim, observing that only two of the thirteen members of the board of directors were appointed by New York City. To the court, that meant the city had not created a public forum and that Halleck and Melendez were not entitled to First Amendment protection. On appeal, the Second Circuit reversed, holding that New York City had "delegated to MNN the traditionally public function of administering and regulating speech in the public forum." Because MNN functioned as an agent of the state, restricting Halleck and Melendez's access violated the First Amendment.

On a 5-to-4 decision, the Supreme Court held that private operators of public access channels are not state actors. Writing for the majority, Justice Brett Kavanaugh (joined by Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch) acknowledged that a private entity could qualify as a "state actor" if it exercises "powers traditionally exclusively reserved to the state." He argued, however, that "very few" functions fall into this category and, further, that operating public access channels for a cable system was not a power "traditionally exclusively reserved to the State." "After all," Justice Kavanaugh continued, "private property owners and private lessees often open their property for speech. Grocery stores put up community bulletin boards. Comedy clubs host open mic nights." Because MNN was not acting as the state, the majority concluded, the network could suspend Halleck and Melendez without running afoul of the First Amendment.

Justice Sonia Sotomayor filed a dissenting opinion that was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan. She began by noting that the majority "tells a very reasonable story about a case that is not before us." To her way of thinking, New York City had granted a cable franchise to a private company that administered the public access channels. "Just as the City would have been subject to the First Amendment had it chosen to run [the channels]," Justice Sotomayor reasoned, MNN "assumed the same responsibility when it accepted the delegation." Accordingly, MNN was a state actor and could not deny access to Halleck and Melendez to the public forum it administered simply because it disagreed with the content of their film.