**Happy new – and old – year: 2020 just won’t go away when it comes to First Amendment issues in 2021**

By Gene Policinski

2020 is the challenging year that just won’t go away, however much we wish it would, as many current issues over First Amendment freedoms flop over into the new year.

In the broad realm of freedom of speech, there’s little doubt debate will continue in the new Congress around the tangential First Amendment controversy over legal protections for companies hosting content on the web — aka Section 230 of the 1996 Communications Decency Act.

The law largely removes liability from companies for user-posted content on their sites. While not directly a First Amendment issue, the fight does have major implications for users’ free speech on the web, as we know it today, as well for as social media companies’ rights.

President Donald J. Trump and conservatives claim the provision is being used to hide partisan discrimination by major technology companies against right-wing voices. Liberal critics say the law removes incentives for such online operations to seriously fight misinformation.

Advocates for keeping the law “as is” say that without it, social media companies would face a myriad of potential lawsuits and thus dramatically limit what users can freely post on sites like Facebook, Twitter, YouTube, WhatsApp and Instagram. No company will be able moderate the web’s current traffic, they say, estimated by multiple sources at 500,000 hours of user video uploaded to YouTube, 188 million emails and 18 million texts *every minute.*

Controversy will also continue surrounding the First Amendment’s two least-known freedoms — petition and assembly — as multiple state legislatures consider increasing criminal and civil penalties for demonstrators who block streets or sidewalks or simply participate in events where, at some point, a violent act occurs.

Critics of the proposals, many of which have been introduced over the past five years, say their real motives are the stifling of dissenting or minority views, though advocates claim the new provisions are rooted in legitimate law and order concerns about violence and property damages.

In the area of religious liberty, the U.S. Supreme Court is expected to rule this spring on Fulton v. City of Philadelphia, involving both the First Amendment’s free exercise and establishment clauses. In the case, a religious-backed foster care agency is challenging a city decision to cancel a contract because the agency refused to provide services to married same-sex couples, citing religious grounds.

There is no doubt that as COVID-19 pandemic restrictions on public gatherings continue into the new year, so will legal challenges rooted in the First Amendment’s protection of religious liberty.

There are some new First Amendment issues for 2021 as a result of the incoming Biden administration, though even here, many are tinged by actions or views from the Trump years.

A top concern for free-press advocates is the potential for the Supreme Court’s new conservative majority to review the 1963 New York Times v. Sullivan decision, which provided wide protection from defamation claims by government officials and other public figures if actual error was inadvertent or not caused by reckless disregard for the truth.

A longstanding target of press critics and Trump, the decision is rooted in the theory that such protection is needed to foster the widest possible debate on public issues. Trump and others claim the decision makes it virtually impossible for officials and public figures to successfully repair deliberate damage to their reputations and that it gives journalists free license to report so-called “fake news.”

Of concern for some is the potential return to Obama-era regulations reversed by Trump that were aimed at combatting sexual harassment on college campuses, which critics said stepped on free-speech protections, particularly where online comments were deemed to be “sexual in nature.”

The Supreme Court is expected to decide in January whether to hear an appeal of a decision by the U.S. Court of Appeals for the Third Circuit that public school authorities may not punish student speech made away from school grounds. Other circuits have made differing decisions.

Some First Amendment experts also are concerned the incoming administration may be open to reducing or eliminating the First Amendment protections for what some deem “hate speech” or speech demeaning to women or minority religious groups. At present, such speech generally is protected, with some arguing that in addition to a core right to voice one’s own views, it is necessary to hear such speech to effectively argue against it.

Free-press supporters are already calling on President-elect Joe Biden to actively repudiate the Trump claim that mainstream news media are the “enemy of the people,” with some calling for new legislation to aid financially ailing local news operations — seen by some as counterintuitive for a “free press” — along with an international-U.S. effort to support free-press principles and journalists globally.

Welcome to the First Amendment in 2021 — with its echoes of 2020’s year of pandemic, protest and presidential-political turmoil.