

# Media Law Notes

46.3  
Summer 2018

## Head Notes

## AEJMC Law & Policy Division



Jason Martin  
Division Head

### Head Notes: Reaching goals and setting new ones for 2018-19

My term as Division Head concludes in August at the annual conference in Washington, D.C., and I want to express what a privilege it has been to serve the division. This year marks my fifth consecutive year on the executive committee, and I share my predecessors' sentiments that the experience deepens one's appreciation for the opportunity.

Before I look forward to sustaining our division's tradition of The Peaceful Transfer of Power by passing the gavel to Vice Head Kearston Wesner at the business meeting, I want to recap what our division accomplished in 2017-18.

The goals I set for the division this year were:

- (1) Improve on diversity and inclusion among membership and conference participants;
- (2) Increase use of social media to expand the reach of the division;
- (3) Expand our high-quality pre-conference and continue to have a balance of insights from major figures in legal world, key developments in the field, and teaching development opportunities; and
- (4) Increase membership.

I'm pleased to report we saw measurable success on the first three. LAWJ leadership prioritized seeking diverse demographic representation at each stage of conference planning, leveraging interpersonal and virtual social networks to include more scholars of diverse gender, race, and country of origin backgrounds as reviewers, submitters, panelists, moderators, and discussants.

This year also saw an increase in followers and interaction on our social media channels at [https://twitter.com/aejmc\\_lawj](https://twitter.com/aejmc_lawj) and <https://www.facebook.com/groups/281106198661787/> with plans to continue to increase sharing and exposure for the division at the annual conference in Washington, D.C.

Our pre-conference has expanded an hour this year to five hours in length to pack in more opportunities to connect with our membership and the communication law and policy world. We offer the most robust free pre-conference among all of AEJMC's divisions and interest groups.

This year's slate includes individuals at the forefront of media law policy (Mignon Clyburn, who recently departed as a commissioner of the FCC), important media law figures, and journalists who cover the courts from the national outlets like the Washington Post, New York Times, and New York magazine.

Thanks to the great organizational work of division members such as Kyu Ho Youm, Joseph Russomanno, Jonathan Peters, Jared Schroeder, and Kearston Wesner, our pre-conference annually helps our members return directly to the classroom with fresh teaching and research insights from the scholarly and professional communities.

Unfortunately, the division did not make significant progress this year on our final goal to increase membership, and so it continues as a goal for 2018-19 with top priority under Dr. Wesner's leadership. Membership and paper submissions were down in our division for reasons not easily explained despite increasing outreach via social media and through channels such as our graduate student liaison and our division newsletter. I hope it's an anomaly and we return to growth next year.

Our second and third goals for 2018-19 are reaching more graduate students and boosting visibility of the Stonecipher Award. Success on those measures should also bolster increased membership.

Division leadership also asks for your help in reaching more potential members as a means of facilitating greater inclusion and diversity. The more commitment our members make to connecting with new and potential members and sharing personal stories of the benefit of involvement, the more likely we are to increase and retain our numbers.

## Head Notes: Reaching goals and setting new ones for 2018-19

(cont from page 1)

Increased membership numbers for the division bring opportunities for more research sessions, more accepted papers, and more standing for LAWP within the broader context of AEJMC and our field. Here's how you can get involved in the first place, get more involved, or share with others the benefits of membership in our division beyond reviewing and submitting papers to the annual conference.

- Introduce yourself – Our division's executive leadership has made a multi-year commitment to service and enjoys getting to know many or most of our members through that process. We're glad to meet new members and tell them more about what we do.
- Propose a panel session – AEJMC in recent years has prioritized a planning process that includes finding partner divisions/interest groups and getting to plot our six co-sponsored panels at the previous year's convention. Have an idea for a timely panel? Share it with next year's leadership. Have connections to partner with another division but not set on an idea? Share those insights as well.
- Volunteer – LAWP needs its annual slate of officers, including the four-year leadership latter that culminates with Division Head. But there also are one-year commitments for spots such as webmaster, social media administrator, and Stonecipher Award reviewer. If the coming year is bad for you personally or professionally, but you'd be more open in 2019, let us know that as well.
- Attend the business meeting and LAWP social – We stack our Top Papers session, our annual business meeting, and our off-site social consecutively by time on the same day as a strategic means of creating a focal point of the conference for LAWP, so please join us.

This year's social has been generously funded by a combination of academic programs, media law centers, and division members so that it's free of charge for food and drink without any cost to members or use of the division's operating funds.

The social is a great time to reflect on the year while expanding and strengthening your professional network. Put in the time to meet folks who might be your next research partner, external reviewer for tenure, or contact on a hiring committee.

This year's social starts at 8:30 p.m. Tuesday Aug. 7 at The Loft at The Hamilton, 600 14th Street NW, a half-mile walk from the conference hotel. (<http://www.thehamiltondc.com/>)

Please join us as we continue our division's rich traditions and prepare to meet the challenges of the year ahead.

# AEJMC 2018 CONFERENCE

August 6 - 9 • Washington, DC • The Renaissance Hotel Downtown



# AEJMC Law and Policy Division programming for Washington, D.C.

**Sunday Aug. 5**

**1 to 6 p.m. Law and Policy Division Preconference: Emerging Issues in Media Law**

**Part I (1-2:15) — Globalization of Teaching Media Law**

Moderating/Presiding  
**Kyu Ho Youm**, Oregon

Panelists

**Michael Epstein**, author, *Mass Media Law: A Survey of Content and Culture*, Southwestern Law School

**Mike Farrell**, co-author, *Media Law and Ethics*, University of Kentucky

**Ashley Messenger**, author, *A Practical Guide to Media Law*, American

**Amy Reynolds**, co-author, *The Law of Journalism and Mass Communication*, Kent State

**Part II (2:20-3:30) — Inside the FCC with Commissioner Mignon Clyburn**

Moderating/Presiding  
**Joseph Russomanno**, Arizona State

**Part III (3:30-4:45) — Key Developments in Communication Law, 2017-2018**

Moderating/Presiding  
Jonathan Peters, Georgia

Panelists

**Robert Barnes**, Supreme Court correspondent, *The Washington Post*

**Chuck Tobin**, partner, Ballard Spahr

**Katie Townsend**, legal director, Reporters Committee for Freedom of the Press

**Tony Mauro**, Supreme Court correspondent, *The National Law Journal*

**Part IV (5-6) — LAWP Teaching Award Winners**

Panelists

**Genelle Belmas**, Kansas

**Ben Holden**, Illinois

**Nina Iacono Brown**, Syracuse

Moderating/Presiding  
**Jared Schroeder**, Southern Methodist

# **AEJMC Law and Policy Division programming for Washington, D.C.**

**Monday Aug. 6, 2018**

**10 to 11:30 a.m. Law and Policy and Electronic News Divisions**

**PF&R Panel Session 1**

**FCC v. Pacifica Foundation at 40: Is Its Legacy an Enduring One?**

Moderating/Presiding:

**Joseph Russomanno**, Arizona State

Panelists:

**Clay Calvert**, Florida

**Angela Campbell**, Georgetown

**Harry Cole**, Heath, Heald & Hildreath

**Robert Corn-Revere**, Davis Wright Tremaine

**Bill Davie**, Louisiana-Lafayette

**Ian Punnett**, Scholar/Author

The 40th anniversary of the landmark FCC v. Pacifica Foundation ruling is an opportune moment to not only look back at the case, but also to assess its impact and legacy.

**3:15 to 4:45 p.m. Law and Policy and Media Management, Economics and Entrepreneurship Divisions**

**PF&R Panel Session 2**

**Net Neutrality: The Digital Intersection of Access, Speed, Expression, Policy, and Commerce**

Moderating/Presiding

**Christopher Terry**, Minnesota

Panelists

**Tim Brennan**, Maryland

**Laurie Thomas-Lee**, Nebraska-Lincoln

**Gigi Sohn**, Georgetown Law Institute for Tech & Society

**Chris Lewis**, Public Knowledge

**5 to 6:30 p.m. Public Relations and Law and Policy Divisions**

**PF&R Panel Session 3**

**How Robust Should a Company's Social Media Policy Be?**

**A Debate on Employee Privacy Versus the Need to Protect Corporate Reputation**

Panelists

**Karen Freberg**, Louisville

**Jack Karlis**, Georgia College

**Jasmine McNealy**, Florida

**Cayce Myers**, Virginia Tech

**Daxton "Chip" Stewart**, TCU

**Tuesday Aug. 7, 2018**

**7 to 8 a.m. Law and Policy Division**

**Business Session**

**Executive Committee Business Meeting & Publications Committee Meeting**

Moderating/Presiding

**Jason Martin**, DePaul

**10 to 11:30 a.m. Law and Policy Division Refereed Paper Session 1**

**Technology, intellectual property and the law**

Artificial Authors: Making a Case for Copyright in Computer-Generated Works, **Nina Brown**, Syracuse University

Give Me a ©: Refashioning the Supreme Court's Decision in Star v. Varsity, **Jared Schroeder**, Southern Methodist University; **Camille Kraepelin**, Southern Methodist University; **Anna Grace Carey**, Southern Methodist University; **Lauren Hawkins**, Southern Methodist University

Internet Memes and "Cultural Flourishing": A Democratic Approach to Copyright, **Yoonmo Sang**, Howard University

Considering Fair Use: DMCA's Takedown & Repeat Infringers Policies, **Amanda Reid**, UNC Chapel Hill

Moderating/Presiding

**Kathy Olson**, Lehigh

Discussant

**Jasmine McNealy**, Florida

**11:45 a.m. to 1:15 p.m. Media Ethics and Law and Policy Divisions**

**PF&R Panel Session 4**

**The Ethics of Weedvertising: Duties and Obligations of Ad and PR Professionals**

Moderating/Presiding:

**Margaret Duffy**, Missouri

Panelists:

**Lee Wilkins**, Wayne State

**Lee Peeler**, president & CEO, Advertising Self-Regulatory Council; executive vice president, Council of Better Business Bureaus, Inc.

**Kati Berg**, Marquette

**Erik Ugland**, Marquette

**Derigan Silver**, Denver

Under the assumptions of utilitarianism, W.D. Ross's moral theory and feminist theory, the panel responds to the question, how should ethical professionals create editorial and marketing communication for marijuana, a recreational and medicinal drug?

(cont from page 5)

Marijuana use is on the rise, with 21% of the U.S. population living in a state where marijuana is legal, and the marijuana industry is on the rise, projected to be a \$50 billion-dollar industry in 2026. As an emerging industry, ethical standards have yet to catch up, which influence marketing, advertising and public relations practices, as well as news coverage. Do the ethical codes offered by the 4As and PRSA inform the marketing communications of marijuana? What can we learn by comparing the marketing of marijuana to direct-to-consumer advertising? How should audiences be treated and stereotypes of the pothead as lazy, lethargic and unmotivated be overcome? What are our duties as practitioners and what are the intended and unintended consequences of our actions as media professionals? Guided by various moral theories, and practical and legal insights, this panel will explore these various questions and suggest next steps for media practitioners considered with the ethics of marijuana.

### **5 to 6:30 p.m. Law and Policy Division**

#### **Refereed Paper Session 2: Top Papers in LAWP**

“Walk” This Way, Talk This Way: How Do We Know When the Government is Speaking After Walker v. Sons of the Confederacy?, **Kristen Patrow**, University of North Carolina Chapel Hill (Top Student Paper)

Journalists’ Access to 911 Recordings: Balancing Privacy Interests and the Public’s Right to Know about Casualties, **Erin Coyle**, Louisiana State University; Stephanie Whitenack, Louisiana State University (Third Place Faculty Paper)

The Artificial Marketplace: Examining Potential Changes to Marketplace Theory in the Era of AI Communicators, **Jared Schroeder**, Southern Methodist University (Second Place Faculty Paper)

Report and Repeat: Investigating Facebook’s Hate Speech Removal Process, Caitlin Carlson, Seattle University; **Hayley Rousselle**, Seattle University (First Place Faculty Paper)

Moderating/Presiding

**Daxton “Chip” Stewart**, Texas Christian University

Discussant

**Paul Siegel**, University of Hartford

### **6:45 to 8:15 p.m. Law and Policy Division**

Business Session

Members’ Meeting

Moderating/Presiding : **Jason Martin**, DePaul

### **8:30 to 10 p.m. Law and Policy Division Off-site Social**

Hosting: **Jason Martin**, DePaul

The Loft at The Hamilton, 600 14th Street NW, Washington DC 20005, 202-787-1000  
From Renaissance, walk 3 blocks south on 9th Street, then west to 14th Street (1/2 mile total)

# Interview with First Amendment attorney Floyd Abrams on his book “The Soul of the First Amendment”

by Jack Breslin, Iona College

Considered one of the nation’s most prominent First Amendment attorneys, Floyd Abrams has argued several landmark cases before the Supreme Court, including the Pentagon Papers case, as a senior counsel at Cahill Gordon & Reindel LLP in New York City. In 2015, Abrams was honored with AEJMC’s First Amendment Award, when he spoke at the annual conference in San Francisco. The author of two previous books *Friend of the Court: On the Front Lines with the First Amendment Press* (2013) and *Speaking Freely: Trials of the First Amendment* (2005), Abrams did an email interview with Jack Breslin about his new book *Soul of the First Amendment* published by Yale University Press.

What was your motivation behind writing this book? How does it differ from your previous books and articles? Why should media law attorneys, professors and students read it?

*I wrote the book because I did not (and do not) believe the public, however educated, has any idea about the degree to which American First Amendment law protects freedom of expression far more than is true in other democratic nations. As a result, the book focuses on those differences. In some cases, I try simply to present the differences without direct advocacy of the US position—hate speech, for example. In others, I urge that the more protective US position better serves the public in a variety of ways—i.e. rejecting Europe’s right to be forgotten and (more controversially) adopting the view of the Supreme Court in the Citizens United case. My earlier books either focused on cases I had been involved in or articles on a variety of topics that in some way involved the First Amendment. I hope scholars and students alike will find the book informative and (as I think it is) different in its overview of the subject than any other.*

Do you think that the Supreme Court rulings will continue to grant more expansive First Amendment protection of speech and press rights?

*I think the Supreme Court will continue to provide extremely broad protection to First Amendment rights. I think this is one of the most protective Courts that we’ve ever had in terms of First Amendment rights and that the members of the Court are proud of their role in protecting freedom of expression in all its forms. Of course, I don’t mean that the Court will invariably rule in favor of what are claimed to be First Amendment rights. But I think that viewing this Court’s record thus far that there is good reason for hope that the Court will continue to be a significant protector of those rights.*

Do you feel that the First Amendment is thriving or threatened – why?

*Is the First Amendment threatened? Sure. By a variety of statements by the President that either suggest he would like to introduce anti-free press legislation or, by daily denigration of the press, causing the public to lose faith in it. Additionally, there are areas of particular concern about which he has not yet spoken—the hundred-year-old Espionage Act, for example, which may yet be wheeled into play in a freedom-threatening manner. There are also rising threats from libel suits in places ranging from South Dakota (“pink slime”) to West Virginia (John Oliver) in addition to the involvement of billionaires financing company threatening litigation (Gawker). So there are plenty of threats and much need for fortitude in facing them.*

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## Abrams Interview (Continued from Page 7)

Looking back on your legacy, what do you think is your contribution to First Amendment law?

*I've been fortunate to have been involved for half a century (!—ugh) in defending the First Amendment in cases ranging from the Pentagon Papers to Citizens United and to have engaged in a good deal of public advocacy about the need to protect it via articles, speeches, testimony, teaching and the like.*

If you met someone knew nothing about the First Amendment, what would you tell them about its role in our democracy and that person's life? Why is it necessary?

*I would describe the critical anti-censorial role the First Amendment has played throughout—but hardly always—our history. I would compare the US to foreign nations that have lost their freedoms. I would describe great cases that vindicated First Amendment rights and discuss how different, in a dangerous and threatening manner, the US would be if the cases had gone the other way. And I would tell them that such information should have been given them in now too often abandoned civics classes at an earlier stage in their lives.*

Editor Note: This piece was originally intended for the spring edition of the newsletter, my apologies to Jack Breslin for the delay.



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## Morgan N. Weiland is 2018 Harry W. Stonecipher Winner

The winner of the 2018 Harry W. Stonecipher Award is Morgan N. Weiland, a Junior Affiliate Scholar at the Stanford Center for Internet & Society, for her article “Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition.” It was published in May 2017 in the Stanford Law Review (link at end). Weiland earned a J.D. from Stanford in 2015. She is currently a Ph.D. candidate in the Stanford Communication Department.

In nominating her, Stanford Law professor Theodore Glasser wrote, “Ms. Weiland’s article offers a genuinely original account of the consequences of a narrowly libertarian view of speech and press rights. ... Provocatively, Ms. Weiland argues that ‘speech rights must have limits.’ ”

There has been no shortage of writing about the Supreme Court’s commercial and corporate speech doctrines, and Weiland is not the first to note that the Court continually finds new ways to strengthen protection for types of speech that, initially, only merited intermediate protection. Yale’s Jack Balkin has described the process as “doctrinal drift,” while University of Virginia’s Frederick Schauer has complained of “First Amendment opportunism.”

By marrying doctrinal analysis and theory, Weiland create a new lens through which to see the parallel paths that these doctrines have taken since the 1970s and where they might be headed. As one judge said, “It is the best explanation that I’ve seen so far for a phenomenon we’ve all felt.”

Weiland shows that the Court has radically transformed these doctrines since establishing them in Virginia Board of Pharmacy in 1976 and *Belotti* in 1978. Whether intended or not, the Court in effect has been “weaponizing the First Amendment,” to borrow Associate Justice Elena Kagan’s recent phrasing, as a tool to target any and all restraints on commercial and corporate speech.

At base, Weiland argues, this is a deregulatory project couched in free speech rhetoric. To pursue this project, she shows, the Court has had to make several doctrinal moves that, if seen in isolation, might seem subtle but when taken together reveal a concerted effort to create a pure speech right for corporations on par with, say, political or artistic speech. It proceeded in steps: 1) by abandoning the public-interest rationales that originally underpinned Virginia Board (right to receive information) and *Belotti* (marketplace of ideas); 2) by turning a concern for individuals and the public into a focus on mere consumers whose interests are, according to the Court, aligned with those of corporations; 3) by shifting its focus from quality of information to quantity (free flow of information); 4) by subordinating listeners’ rights to corporations’ rights; and 5) by abandoning robust rationales for freedom of speech in favor of what Weiland dubs a kind of bare-bones “thin autonomy.” Borrowing that phrase from the social sciences, Weiland sketches a theoretical framework to show that the Court’s embrace of an extreme libertarian approach was necessary to reach a deregulatory result without regard to how that approach might weaken or eclipse other values or traditions. She groups them into two categories that convey a robust sense of autonomy based on human striving: There is the liberal tradition, which encompasses such ideals as self-expression, self-actualization, freedom of conscience. Then there is the republican tradition, which encompasses such ideas as participation in self-government, the checking function, protection of dissent.

None of those traditional theories could help the Court justify elevating corporate speech rights, so a libertarian negative-right approach was the only plausible rationale. The problem with that, Weiland argues, is that it drains the blood out of the First Amendment by removing individuals and humanistic concerns from the equation. The “thin autonomy” created by this hyper-libertarian approach is but a minimal right to be let alone

## Stonecipher (continued from page 9)

when speaking, whether you are a human being or a bank.

“[B]ecause litigants no longer justify their deregulatory claims through the rubric of listeners’ rights—which, though imperfect, served as the tradition’s constraining force—it has potentially limitless applications,” she writes. To cite one example, she points to ongoing investigations of fraud against ExxonMobil for statements the company has made denying climate change. The company has claimed in more than one case that subpoenas related to the fraud charges are an attack on political speech and, therefore, unconstitutional. If plausible, would that argument mean that all statutes against fraudulent speech violate the First Amendment?

Perhaps, on Weiland’s account: “[T]he scale and scope of the types of behaviors that the libertarian tradition could seek to constitutionalize as ‘speech’ is unprecedented,” she concludes. “So too is the potential clash between the values undergirding a libertarian speech claim and the values animating the liberal and republican traditions.”



**Morgan N. Weiland**

The Stonecipher Award was created three years ago to honor the late Harry Stonecipher, who mentored many notable scholars in his 15 years at Southern Illinois University, Carbondale, starting in 1969. This year’s judges: Dean Smith, chair, High Point University; Katie Blevins, University of Idaho; Lucy Dalglish, University of Maryland; Tori Ekstrand, UNC Chapel Hill; Eric Easton, University of Baltimore Law School; Emily Erickson, Cal State Fullerton; Patrick File, University of Nevada, Reno; Michael Hoefges, UNC Chapel Hill; Jasmine McNealy, University of Florida.

Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017), available at <http://review.law.stanford.edu/wp-content/uploads/sites/3/2017/04/69-Stan-L-Rev-1389.pdf>.

Interested in a Service or Leadership Position in your Division?

Discuss with Kearston, Roy or Christopher

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If you have any news to share with the division or would like to contribute to the newsletter, please contact Clerk/Newsletter Editor Christopher Terry via email: [CRTERRY@UMN.EDU](mailto:CRTERRY@UMN.EDU)



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2017-18**