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Thinking Clearly and Speaking Freely – Part 12: Shining a Spotlight on Big Tech's Section 230 Immunity

by

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In this Part 12 of my series, "Thinking Clearly and Speaking Freely," which is focusing on censorship actions by the Big Tech social media platforms, I want to examine a recent decision of the Court of Appeals for the Fifth Circuit in *NetChoice, L.L.C. v. Paxton*. But first some background.

We're all familiar with the suppression of the *New York Post's* Hunter Biden laptop story as well as information related to the origin of COVID-19 and to the various pandemic responses. There are countless other examples, of course, ranging from removal of users' posts discussing gender, race, and education to downgrading of posts debating the meaning of the term "recession," as I discussed in "Unnecessarily Flagging the 'R' Word."

The problematic nature of Big Tech's censorship practices – you're welcome to call them "moderation" practices if you like – resulting in squashing information that should remain within

the realm of legitimate public debate is widely acknowledged, even if there's disagreement about the remedy.

Thus far, sensitive to their First Amendment claims, I have been reluctant to embrace the oft-suggested notion, including in an opinion by Justice Clarence Thomas, that perhaps major platforms like Twitter, Facebook, and YouTube should be treated as common carriers required to carry all lawful content in a nondiscriminatory fashion. In other words, that these social media websites should be required to post all lawful messages in the same way telephone and telegraph companies, classified as common carriers, must carry all messages.

At the same time, so far I have not endorsed any material changes to the notorious Section 230 of the Communications Act which broadly immunizes the social media platforms from liability for any claims related to restricting users' posts. It accomplishes this by declaring the platforms "shall [not] be treated as the publisher or speaker" of content developed by other users.

In *NetChoice*, the Fifth Circuit, in a 2-1 split decision, rejected the argument that the Texas law prohibiting large social media companies from censoring content based on the viewpoint of the user violates the First Amendment free speech rights of the platforms. The Texas law requires major social media companies to function like common carriers. In his opinion for the majority, Judge Andrew Oldham declared that "the platforms offer a rather odd view of the First Amendment." According to Judge Oldham, the First Amendment "protects every person's right to 'the freedom of speech," but instead the platforms argue that "buried somewhere in the person's enumerated right to free speech lies a corporation's *unenumerated* right to *muzzle* speech."

After an extensive review of First Amendment jurisprudence, Judge Oldham rejected "the idea that corporations have a freewheeling First Amendment right to censor what people say." In his view, the Texas law neither forces the platforms to speak or interferes with their *own* speech in a way that infringes their free speech rights.

It's important here to note that the Eleventh Circuit Court of Appeals has reached the opposite conclusion regarding a challenge to a similar Florida law requiring viewpoint neutrality by the platforms. Most observers expect the Supreme Court likely will consider the constitutionality of at least these two state laws in the next couple of years.

But now back to Section 230. Without relying on the immunity provision, the Fifth Circuit determined the Texas law doesn't violate the platforms' First Amendment rights. But it said that if any doubts existed, Section 230 would extinguish them. This is because "Section 230 reflects Congress's judgment that the Platforms do not operate like traditional publishers and are not 'speak[ing]' when they host user-submitted content. Congress's judgment reinforces our conclusion that the Platforms' censorship is not speech under the First Amendment."

The platforms contend, by virtue of their moderation actions, that, in fact, they are speakers and publishers, even though Congress explicitly said they shouldn't be treated as such with respect to their actions censoring user-posted information. Judge Oldham explains that the platforms repeatedly have told courts that they are mere "conduits" for user speech. And that what might

look like the exercise of editorial discretion is simply the application of "neutral tools" to moderation actions. Thus, Judge Oldham says, "the Platforms' frequent affirmation of Congress's factual judgment underlying § 230 makes us even more skeptical of their radical switcheroo that, in this case, they *are* publishers."

In her concurring opinion, Judge Edith Jones agrees that the "business of the regulated large social media platforms is hosting the speech of others," and that, "[f]unctioning as conduits for both makers and recipients of speech," they do not analytically resemble publishers like newspapers. She concludes the Texas law allows a multiplicity of voices to contend for audience attention on the platforms, "a pro-speech, not anti-free speech result."

While I'm not prepared here to conclude that the Fifth Circuit reached the correct result, the majority opinion is persuasive in many respects. It's likely the Supreme Court will provide some much-needed clarity to the law in this area in the next two years.

In the meantime, by shining a spotlight on Section 230 in the context of evaluating the platforms' First Amendment challenge, the Fifth Circuit's opinion highlights the tension, if not the contradiction, between the platforms' claim, on the one hand, that they are mere *conduits* for the speech of others, and their claim, on the other, that they must be treated as *speakers* and *publishers* with regard to their censorious actions.

There may have been good reasons for adopting Section 230 in 1996 at the dawn of social media, but it's not clear it's necessary to retain the immunity provision today, at least in its present form. As the Fifth Circuit's spotlight on Section 230 highlights, it may require more than a little cognitive dissonance to square the platforms' claimed entitlement to First Amendment protection with their claimed entitlement to sweeping immunity.

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