Perspectives from FSF Scholars
February 28, 2023
Vol. 18, No. 10

Section 230, Speech on the Internet, and the Supreme Court Dog That Might Not Bark

by

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Predicting case outcomes based on oral argument is usually a fool's game. But the U.S. Supreme Court's argument on February 21 in *Gonzalez v. Google*, which addressed the scope of liability granted by Section 230 of the Communications Decency Act to Internet companies for user-generated content, gave those who feared "the Supreme Court could destroy everything good about the Internet"[1] some reason for hope. There are important conversations to be had about the role Internet intermediaries can or should play in our public discourse. But as the *Gonzalez* case is showing, the Supreme Court is probably not the place to have them.

Gonzalez received reams of attention from dozens of amici, elected officials, and the mainstream media – much of it, especially the latter, based on the misguided claim that Section 230 is a

[1] Mike Masnick, *Next Week, The Supreme Court Could Destroy Everything Good About The Internet*, TechDirt (Feb. 17, 2023), https://www.techdirt.com/2023/02/17/next-week-the-supreme-court-could-destroy-everything-good-about-the-internet/; see also Issie Lapowski, *The internet's Supreme Court showdown is here, and the stakes couldn't be higher*, Fast Company (Feb. 20, 2023), https://www.fastcompany.com/90851896/the-internets-supreme-court-showdown-is-here-the-stakes-couldnt-be-higher; Tate Ryan-Mosley, *How the Supreme Court ruling on Section 230 could end Reddit as we know it*, MIT Technology Review (Feb. 1, 2023), https://www.technologyreview.com/2023/02/01/1067520/supreme-court-section-230-gonzalez-reddit/.

"subsidy to Big Tech." Before discussing the issues at stake or how the Court might (or might not) resolve them, it is important to understand why this characterization is wrong.

Section 230 is an immunity, not a subsidy, and this is a distinction that the law of both subsidies and immunities recognizes. No one claims that the actual malice rule in *New York Times v. Sullivan* subsidizes the media's defamation of public officials, or that sovereign immunity subsidizes the government's ability to commit torts. Rather, immunities are granted to protect activity that would be significantly chilled in the immunity's absence. Subsidies, by contrast, interfere with the ordinary functioning of markets, or, at best, in proper cases may be considered market "correctives" – the government gives aid to a specific entity or industry, in the form of money or relief from generally applicable legislation, until the point at which the reason for the subsidy no longer exists, at which point the subsidy itself becomes the market problem in need of correction.

And though Google and Twitter are the named parties in the two Section 230-related cases before the Court, the idea that Section 230 protects "Big Tech" is simply wrong as a matter of statutory construction and legislative history. As Sen. Ron Wyden and former Rep. Chris Cox, Section 230's co-sponsors, have maintained since the statute's passage in 1996 (including in amicus briefs to the Court in *Gonzalez*), the primary intended beneficiaries of 230 were not Facebook and Google, which didn't even exist then, but Internet users like you and me. If websites could face liability for their failure to remove user content, the obvious and rational response would be for the sites to either over-moderate or decide not to host user content at all (so long, comments sections). And 230 operates to immunize users as well; as Reddit told the Court in its amicus brief, individual users who play a role in moderating discussions online in user-driven systems like Reddit's currently can do so without fear of liability, but without 230, its volunteer moderators would be sued constantly by other users who disagreed with the moderators' decisions. The same goes for Wikipedia editors; without protection for Wikipedia's volunteer editors in the form of 230 immunity, it could not exist. So Section 230 protects moderation activity not just from the top-down, namely the largest platforms, but from the bottom-up as well.

In recent years, there has been bipartisan convergence around the idea that courts have been reading Section 230 to grant greater immunity than Congress intended. In several separate opinions and dissents from denials of certiorari in cases involving Section 230, Justice Thomas urged the Court to accept a case to rein in those courts, and his colleagues took him up by granting review in *Gonzales* and its companion case, *Twitter v. Taamneh.* Fortunately for 230's advocates, however, *Gonzalez* seems like a less than ideal vehicle for the Court to consider that question. In the *Gonzalez* case, several victims of ISIS terrorist attacks seek to hold Google liable for recommending ISIS videos on YouTube (which Google owns). They argue that once YouTube recommends videos for users to watch, YouTube is engaging in its own speech for which it can be liable, because 230 applies only to preclude websites' liability for carriage of *user* speech.

Reviews of the petitioner's counsel's performance at oral argument have been unkind, but the problem with his clients' position is not how it was lawyered. Rather, it is the fact that, as several Justices recognized, the line that the petitioners seek to draw with respect to the statute's reach is

an impossible one. If recommending user videos is not a basis for immunity under the statute because it is the platform's own speech, then neither is Google's providing search results, or Elon Musk's "For You" algorithmically sorted Twitter feed.

The primary role of algorithms used in connection with websites and social media platforms – in the case of the latter, their very reason to exist – is to recommend and sort third-party content, and there is no meaningful difference between recommending and sorting. There is no way to read an immunity statute whose statement of purpose says that the "development of Internet services represent an extraordinary advance in the availability of educational and informational resources to our citizens" could be read to permit holding social media websites potentially liable for organizing and recommending user content.[2] And revising that liability rule via statutory amendment, should revision be necessary, is a job that should be left for Congress, not the Supreme Court, whose members Justice Kagan joked at oral argument are, to say the least, "not the nine greatest experts on the Internet."[3]

But that does not mean issues related to moderation of content are not important, or that we should not debate them. The role of Internet intermediaries in our public discourse is one of the most pressing concerns of our time. As Free State Foundation President Randolph May notes in his "Thinking Clearly and Speaking Freely" series, platforms seem to have the best of both worlds: they are not treated as publishers under Section 230 when they host potentially tortious third-party content, but when states attempt to curb what the states view as the platforms' viewpoint-based censorship, the platforms also claim their moderation decisions with respect to that content is protected speech.[4]

For my part, I don't see any inconsistency. Asserting an immunity doesn't preempt the social media platform's preexisting constitutional rights; if Section 230 immunity went away, platforms would still have the First Amendment-based speech and associational rights to remove users or content for their own reasons. While others may differ, that is why I also believe and have argued that the censorship around the disclosures in the Twitter Files is wrong; the government has speech rights too, and unless it threatens private platforms with legal process for failure to take down a user or their post, it is as free as you or I to ask the platforms to remove things that it might not like.

But to have meaningful arguments around constitutional law, we need what Mr. May elsewhere in his series has also called a "constitutional culture" – a free speech-informed approach to debate that respects "more people with more diverse viewpoints,"[5] and whose first instinct is not to silence, but to listen – to let opinions collide out in the open in the Millian sense; to be receptive to those views even when they conflict with our preexisting beliefs, attitudes, and coalitions; and to have confidence enough in that process to believe that the truth wins out.

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[2] Sec. 230(a)(1).
[3] Supreme Court Oral Argument Transcript, *Gonzalez v. Google*, No. 21-133 (Feb. 21, 2023), p. 45, ll.23-24, https://www.supremecourt.gov/oral_arguments/audio/2022/21-1333.
[4] Randolph May, *Thinking Clearly and Speaking Freely, Part 13: A Reasonableness Standard for Fixing Section 230* (Oct 19, 2022), FSF Perspectives Vol. 17, No. 52, https://freestatefoundation.org/thinking-clearly-about-speaking-freely-2/.
[5] *Id.*, *Thinking Clearly and Speaking Freely, Part 16: Combatting Cancel Culture With a Reinvigorated Constitutional Culture*, FSF Perspectives Vol. 17, No. 64 (Dec. 28, 2022).

A constitutional culture does not need a legal rule that prevents the government from speaking to platforms about user content it doesn't like, nor does it need a shift in the current liability rule that would make it easier to sue platforms for hosting user content, which is their main reason to exist. Rather, what a constitutional culture needs is what we all need more of –some acceptance of the possibility that we might be wrong, and a greater willingness to listen to those who say we might be.

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