Jeffrey Rosen: [00:00:00] I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people.

The Supreme Court recently vacated the second circuit's ruling that President Trump violated the first amendment by blocking people on Twitter. Justice Thomas authored a fascinating concurring opinion, where he expressed concern about the power of social media companies over free speech. To discuss justice Thomas' concurrence and the broader impacts of the case I'm joined by two of America's leading first amendment experts and scholars.

Katie Fallow is a senior staff attorney at the Knight first amendment Institute at Columbia university. She is one of the lead lawyers in this case now known as Biden vs. Knight. Katie, it is wonderful to have you back on the show.

Katie Fallow: [00:01:04] Thanks for having me. It's great to be here.

Jeffrey Rosen: [00:01:07] And Eugene Volokh is Gary T. Schwartz distinguished professor of law at UCLA law school, where he teaches first amendment law. He blogs at the Volokh Conspiracy on Reason.com, where he wrote the piece " Justice Thomas suggests rethinking legal status of digital platforms." Eugene, thank you so much for joining.

Eugene Volokh: [00:01:26] Thanks very much for inviting me.

Jeffrey Rosen: [00:01:28] Katie, we joined on We the People about a year ago to discuss this important case, which you've been part of since the district court level. Tell us about the constitutional stakes in the case. What did the district court and the appellate court hold and why did the Supreme court vacate the ruling?

Katie Fallow: [00:01:46] Yeah. So the Knight Institute filed a lawsuit in the summer of 2017 against president Trump and his social media advisor, Dan Scavino his former golf caddy and then became white house social media director. And we filed the lawsuit on behalf of seven individuals who were blocked by president Trump from his, @realDonaldTrump Twitter account, which as everybody knows was a private account that he used while he was campaigning for president.

And then once he became president, he continued to use it to engage in official actions, make official announcements, et cetera. So in may of 2017, we discovered that the president was blocking people from his Twitter account, which means if you're blocked from a Twitter account, that you cannot view the president's tweets, or very importantly, in our case respond directly to him.

So you cannot participate in the comment threads, and he blocked our seven plaintiffs and a number of other people. Purely based on their viewpoint. Not because they said anything vulgar or outrageous, but because they criticized him or his policies. So we filed the lawsuit in federal court in New York and we argued that this action violated the first amendment and we won it at all levels of the court until we got to the Supreme court, but I can get to

that in a second. But the district court agreed with us that in reviewing the record that the president was using his at real Donald Trump account for official purposes. And the reason why this was critical to the case is because the first amendment only constraints actions by the government or government officials, not by private individuals.

And so, because he was using his personal account, the DOJ had argued on his behalf that it wasn't government action and thus wasn't subject to the first amendment. But we argued in the courts, agreed, that because he used this account in so many ways for official purposes, it was essentially an instrument of government --and notably, he was assisted in running this account by Mr. Scavino. So the district court ruled in our favor, granted declaratory judgment that he had, that Trump had violated the first amendment. And then shortly after that in 2018 Trump and the defendants unblocked all of our plaintiffs and also unblocked a number of other people that had contacted us because they had also been blocked from his account based on viewpoint.

At the same time, the government did appeal to the second circuit. And the second circuit then held in, I believe 2019, although I may be losing track of time, but agreeing with the district court holding once again, that president Trump and Mr. Scavino were using the account for official purposes. And thus it satisfied the state action requirement to apply the, the requirements of the first amendment-- and that when he used this account, even though when he spoke via his tweets that the re the entirety of the account, including the ability for people to reply and participate in the comment threads constituted, what is known as a public forum. And this is drawing on decades of case law establishing a public forum doctrine, which says that when the government owns or controls space, and it makes that space available to members of the public to engage in speech, then the government has created a public forum, and there are certain limitations on what the government can do.

And the principle limitation on that is that the government may not exclude people from a public forum based on viewpoint. So we wanted the second circuit... The government sought rehearing from the second circuit and the entire court denied that request for rehearing in March of 2020. And then the solicitor general on behalf of president Trump and Mr. Scavino filed a petition for cert in the Supreme court last summer. We opposed it. And then we all waited for many, many months. And there was a lot of speculation about why it took so long for the court to act on the cert petition. You know, the court started considering whether or not it would take the case, you know, they were asking to reverse the second circuit it started con conferencing on that in last November, but we did not hear any action until last week.

And in the meantime, as we all know two very important events happened, or at least two, which is that president Trump lost his bid for reelection and president Biden was inaugurated in January and also now former president Trump lost his @realDonaldTrump account Twitter account, which was closed by Twitter permanently after the events of January 6th.

So after those things happened, the government asked the Supreme court to dismiss the case as moot. And so what technically happens is, you know, at first, the government is saying, please grant cert, meaning accept jurisdiction over this case and reverse the second

circuit. But what the government then asked to do was to grant cert for the purpose of declaring that the case is moot because president Trump was no longer president and that the lower court decisions should be vacated under a doctrine that has been around for many decades.

We oppose that because we thought that the court should let the lower court decisions stand because it was in the public interest. And because we argued that some of the mootness surrounding the case was actually brought on by Trump's own actions, but we did not carry the day. And last Monday, the Supreme court did do what the government had asked in the sense of it granted cert, but just for the purpose of vacating, the decision-- not on the substance, but because it was moot.

Jeffrey Rosen: [00:07:38] Thank you for that extremely clear and very helpful summary of the case at every stage, Eugene, in his concurring opinion, Justice Thomas said because of the change in presidential administration, the court correctly vacates the second circuit, but he went on to say, respondents, have a point that some of Mr Trump's accounts assemble a constitutionally protected public forum, but it seems rather odd to say that something is a government forum when a private company has unrestricted authority to do away with it.

And Justice Thomas went on to say, we will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure, such as digital platforms. Just as Thomas said much in his concurrence , how would you describe his central point that it's odd to describe something as a public forum when a private company has unrestricted authority to do away with it?

Eugene Volokh: [00:08:35] So I think there are at least two things going on in that concurrence. One that's particularly focused on this case that was brought against president Trump over his moderation decisions and that's something that it's an interesting question. Should we say, [it] would normally be perhaps a limited public forum if a government official is opening things up for people to comment, and then you can't block them based on viewpoint, but it's different if it's done on a private service where the private company reserves the right to block things based on viewpoint all at once? You could argue that, well, once it's done on this private site, that's no longer really a limited public forum, or you could argue, I think quite plausibly, that even if the private entity is allowed to block things, the government still can't discriminate based on viewpoint.

These interesting questions, but ultimately, while they're conceptually interesting and have some importance, they're not tremendously important because ultimately, however way this case would've come out with regard to president Trump's blocking of of critics and his Twitter feed, I don't think that's tremendously significant for public debate.

The second kind of thing, though, that justice Thomas was talking about was the broader question of, is there something the government could do if it wanted to, not necessarily that it should, but if it wanted to to limit the ability of companies like Twitter and Facebook to exercise this sort of power and in particular whether the government could basically say look, phone companies are common carriers.

The post office, which is run by the government is essentially a kind of common carrier. FedEx and ups, which are private entities, are common carriers. That means that they can't pick and choose based on content and certainly based on viewpoint of whom they'll serve so a phone company can't say, oh, we really don't like the KKK, or we really don't like Antifa.

So they advertise some phone line as being as being the recruiting line. We're just gonna cancel that phone line. They can't do that because they're common carriers. Ups can say, we are going to refuse to deliver books that are sent out by this publishing company, because we think this publishing company is spreading fake news. Ups, FedEx, are common carriers. They have to serve everyone.

So one question is. Could digital platforms be treated like common carriers as well?? Could Congress pass such a statute without violating the first amendment rights of, of the platforms? Could states passed such a statute without violating the first amendment rights to the platform and without being preempted by this section two 30, statute 47, USC section two 30 which by its terms does seem to give platforms a right to pick and choose whatever they want to carry, but maybe there's a first amendment objection to that statute.

Those are the kinds of things that justice Thomas was talking about. I don't think he purported to resolve those questions, but I think he wanted to signal to lawyers and to lower court judges and eventually to his colleagues or that this is a live and important issue. And perhaps even also to legislators who are considering whether to enact these kinds of statutes, this is a live and important issue, and that the matter is not settled. That maybe egislators are allowed to treat social media platforms as these kinds of common carriers, maybe not, but that's something that needs to be discussed.

Jeffrey Rosen: [00:11:56] Thank you very much for breaking down Justice Thomas' concurrence into those two separate issues.

The first is there a difference between the blocking allowed by a private company or a government official on the platform and the second, what could Congress or the states do to treat the companies as common carriers? Let's take a round on that first question.

Katie, you argued throughout the case that the Twitter should be treated like a public forum to the degree that president Trump was using it to express official views. What is your view on the difference between the ability of the platforms and government officials using the platforms to regulate speech.

Katie Fallow: [00:12:38] Yeah, well, going back somewhat to some of the issues that we were taught, I was talking about at the outset. I think the big difference in terms of how we were viewing the legal landscape when we filed this lawsuit is it was very clear that we were filing the lawsuit against president Trump and his aides, not against Twitter.

So we never were saying that Twitter itself writ large was a public forum. And the reason why we didn't say that in part is because of this requirement of state action and the flip side rule that the Supreme court has repeatedly emphasized, which is private entities, private companies, or private property owners cannot be treated as the state for purposes of a first amendment claim.

Meaning someone can't come in and say, you know I deserve to be able to place my law, my, a sign on your front lawn. A private property, owner can say no, because the first amendment only constrains, in this instance, the actions of the government. So we were saying, however, that when a government official or a government agency is opens up a Twitter account or a Facebook account and controls access to that account in meaningful ways-- the biggest one being whether or not you block someone and whether that person can then view your tweets and be able to reply-- and that when they do that, that is sufficient government control for purposes of the public forum doctrine. So just, you know, when professor Volokh was describing Thomas' concurrence and he said that, you know, Thomas was making this argument that, oh, well, president Trump just blocked a few people, but when Twitter shut down his account, they shut down, you know, 89 million people's access to president Trump's speech. You know, as a matter of scale, certainly that's true about whether it's important. Of course, as you're not surprised to know, you know, as someone who litigated this case, we think that the issue of whether public officials can block people from their social media accounts or how public officials and government entities use social media is actually very important.

And it's not to say that that, oh, those other questions aren't as well, but that as more and more public officials use social media as the primary way to talk to and hear from constituents, it's important that they follow the first amendment, because just as the first amendment would say, you can't kick someone out of a town hall because you don't like their viewpoints that should apply when a public official uses a social media account for the same purposes.

Because otherwise, if you don't apply the first amendment, then going forward, you could essentially see the government privatizing its public forum functions by conducting them all on private property. So I'll just put the plugin for, I think that it is actually a very important principle. And even though the second circuit's decision has been vacated because it was moot, the fourth circuit and other court of appeals courts of appeals have also applied this same framework.

And I think going forward, it's going to be increasingly applied and then hopefully public officials will know that and just comply with it at the outset. And then I also finally think that, you know, in terms of his concurrence, it was of course, you know, people say, you know, I didn't expect the writers to throw this twist to us, you know, in the last season of our, of our case, in the sense of, I would have never expected that the case would have been dismissed as moot under the caption "Biden vs. Knight first amendment Institute" with a Thomas concurrence that really didn't have very much to do with our case at all. So I do agree that it's more of a roadmap. It's not the concurrence is not so much justice Thomas saying how he would come out on any particular legal issue, but it is certainly a very pointed roadmap for possible legislative and legal action.

Jeffrey Rosen: [00:16:39] Eugene, on the substance of the second circuit's framework. Do you agree with the second circuit's framework? Do you think a majority of the court would have agreed with it if the case hadn't moved it out and what are the arguments, the constitutional arguments on the other side?

Eugene Volokh: [00:16:56] Well, the chief argument, I think the chief issue in the litigation before justice Thomas' opinion had more to do with whether this real Donald Trump account should be viewed as an account being handled by Trump as president or Trump as person. So let's just take a slightly different hypothetical. Imagine that this was an account that was run, not by a politician, but by a governmental body. So for example, by a city council, there are such cases, where the city council runs this account and it's on Facebook or Twitter, which is a privately owned platform, but it's controlled chiefly as a practical matter of by the government body.

I think it would be pretty broadly accepted, notwithstanding Justice Thomas's criticism of this approach but it will be pretty broadly accepted that when the when the city council is deciding to block certain viewpoints, that is unconstitutional viewpoint discrimination because the city council is running a government- run limited public forum, even though it's running it on private property. Let's take another hypothetical, but the different end of the spectrum, let's say that somebody is running for re-election and sets up an account that's this person's reelection account. And in that account, it's expressing his views about why he should be reelected.

There it's a government official that's running it, but I do think it would be pretty broadly agreed that that is that officials private speech. And by the way, you know, that the federal law, as I understand it, the official couldn't use government funds for that, for example precisely because it's for electioneering, but the flip side is that then the official, I think, could block whomever he wants because that's private speech.

And again, that's whether that, whether he's running it on Twitter or otherwise so he could block people from his campaign rallies generally speaking. But so here, what we've got is a situation where somebody, where it's not a government body, so this is a government official who could be wearing these two hats but at the same time, this was, as I understand that run by the government employee together with the president. I think government funds were used for this. Some government government decisions were being announced there. I'm not sure that alone will be enough because I think if somebody announces a government decision at a re-election rally, that's still private speech non-government speech, but at least makes, maybe makes it closer.

So I think again, that debate is an interesting debate. I at first thought that really well, Donald Trump should be seen more as a as a, as a government, as a president's private speech. It pre-existed his election. It's not the white house. On the other hand, you know, I do think it's a powerful argument that it's being run as I understand it, it was run by the president from his office with the help of government. And please make that makes a government speech, but just the president, excuse me. But Justice Thomas's focus, wasn't so much on that spectrum or other as on whether you could have a limited public forum at all on this account, that's run on a private platform.

And justice Thomas expressed some doubt. I actually think that the second circuit was more right on that particular point, but justice Thomas thought it might not be-- but that's, again, that first question from justice Thomas's opinion, which is most directly on point to the litigation of the Knight Institute, but . Is in many ways not what I think is really important and

exciting-- whether exciting, good or exciting, bad about, about the debate that, that justice Thomas was entering into here.

The more interesting question is what if the government decided to to require the platforms to be more like a phone company, more like UPS or FedEx and therefore required not just government run entities like the post office to be viewpoint- neutral in their selection decisions, or even content neutral, but required privately run entities like Facebook and Twitter to be a content- neutral as well. That would be the really interesting and important question. Tremendously important question.

Jeffrey Rosen: [00:20:55] Thank you so much for that. We'll let us turn to that really interesting and important question. , Katie, justice Thomas notes two doctrines that have traditionally limited company's right to exclude-- first, the common carrier doctrine, and second, the public accommodation doctrine.

Tell us about what he said about each of those doctrines and how they might apply if Congress or the states chose to regulate the speech of the platforms.

Katie Fallow: [00:21:24] Yeah, well , as professor Volokh earlier mentioned this common carrier doctrine and then also the public accommodation doctrine... what justice Thomas said is-- and this is not surprising because he is a originalist --and he says, you know, you can, you, you, when you look into see whether the government can regulate speech, you see whether there were any exceptions to its regulatory power over speech present at the time of the founding.

And so he mentioned that at the time of the founding, there was already a recognized ability for the government to regulate common carriers. Like you know, not the time, but, you know like the post office, although it was a government run entity and like later on, telephone companies or trains or , private companies that provide Service to the public in a way, and have potentially a such monopoly power or a strong economic power that it provides a justification for government to regulate them and essentially the company and the regulators get Benefits.

So often when you have a common carrier like trains or telephone companies, the government will regulate things like rates and the terms of service. And in exchange, the companies will often get some kind of regulatory or government benefit like immunity from certain lawsuits. And so justice Thomas is suggesting that social media platforms now play a role, very similar to telephone companies or telegraphs or you know, utilities because they're providing service to such an enormous amount of people that they have a great amount of market power, and they. And he expresses concern about concentrating so much power over speech in the hands of so few. And he goes, he even goes on in the concurrence to talk about saying that, you know, all of Facebook's decisions and all of Google's decisions are essentially in the hands of three people. Regardless of whether that's, you know, factually accurate, Thomas goes on to say, none of this was in the record of the lawsuit against Trump for blocking. Of course it wasn't because those weren't issues that were raised in our lawsuit.

But what he's suggesting is that if you recognize this enormous power and the importance of people being able to engage in speech, it's not as much of a first amendment argument, if you assume that the first amendment doesn't, you know regulate private companies. But it's an, it's an argument about the greater speech speech environment and the suggestion that maybe this is the time for government to start regulating these platforms in this way for the public good.

Thomas doesn't come out and say it, but it's hard to read it without thinking that it is greatly informed about a current and you know, well aired concern among conservatives that the social media platforms are biased against conservative voices. And so he suggests that perhaps the government could regulate the social media platforms as common carriers, and then maybe in exchange they would get some kind of immunity from certain kinds of liability-- or under this doctrine of places of public accommodation, which again would be, you know, hotels or restaurants or places of business where it's private property owners, but the government has traditionally required them to open their property to, you know, the general public, you know, without discriminating in certain ways-- there is a question whether this public accommodations doctrine would even apply to digital spaces. So that's, he doesn't go into that as much as he does with the common carrier idea.

Jeffrey Rosen: [00:25:03] Eugene tell us what you make of justice thomas's fascinating suggestion that the platforms might exercise some of the powers of common carriers. It's a very rich discussion where he notes that if market power is a predicate for common carriers, there's nothing in this record that suggests Twitter's market power. And, and the second circuit, of course, hasn't identified regulations that restrict Twitter from removing an account that would otherwise be a government controlled space. But give us a sense of what justice Thomas argued and, and also what you make of Katie's suggestion that it might be motivated by concern about the regulation of the speech of conservatives.

Eugene Volokh: [00:25:41] Well, so let me turn to the second point. And I do think that right now, we're seeing a lot of concern about conservatives to bite on the part of conservatives about platforms having too much power to restrict speech. Conservatives worry it's going to be used to restrict conservative speech, but you can the fact is that they have very broad power to restrict all sorts of speech.

But I think that even though this is a conservative argument, these days, it fits very well with a very traditional liberal argument about corporate power. Let's go back just 11 years to Citizens United, where the court held that corporations have a first amendment right to speak about elections.

So they have the first amendment right to express support for a position or candidates, .Media corporations like newspapers and such have that power, but also business corporations or mixed ones. Like in that case, it would involve the corporation that wasn't media corporation under federal law, but was putting out videos.

And liberals were, I think by and large, up in arms about Citizens United; they thought that in fact, corporate power, even to speak about candidates, express their own views about candidates, risked unduly leveraging this economic might of corporations into political

might. That was certainly a big part of the dissent that justice Stevens writing for the four liberals on the court and a lot of commentators afterwards, sharply, sharply, condemned Citizens United as failing to see this potential threat, the corporate economic power has to a democratic debate.

But that just had to do with corporations speaking. And by the way, I agree with the majority of Citizens United that corporations, or whether media corporations or business corporations, should have the right to speak. But I would think that this concern about leveraging of economic power into political influence would be especially great when it's a corporation doing that, not just by speaking, not just by being one of very many voices with regard to a campaign.

And by the way, usually a small minority of of a spending in election campaigns is from corporations-- as best I could tell it's like five, 10%. But rather when we have with Twitter and Facebook, where they can control public debate by actually blocking others' speech. So even if the first amendment protects corporations ability to speak, it's not clear to me that it protects their ability to block other speech, at least when it comes to just removing somebody from being hosted on a on a platform. So I think that liberals, as well as conservatives should be concerned here today. Conservatives sort of see what appear to be liberal- run large corporations that are blocking conservative voices.

But there certainly are people on the left who are complaining that Facebook and Twitter is buttoning their voices too. And I don't see any reason why liberals should always assume that these large businesses run by very rich people who are business people first and foremost are always going to be on the liberal side-- that maybe if they have this power, they're going to have power. They're going to use it to block liberal voices or progressive voices or whatever else as well.

So I do think that it should be something that everybody, regardless of whether they're on the left or the right, [should be] thinking about. Is it right that these large powerful, super in some situations super wealthy-- Facebook is the fifth wealthiest American corporation from the statistics that I've seen-- are run by super wealthy people, that they they should have this ability to decide which political officials, which political candidates, which which ideological perspectives are given access to what has become a tremendously, tremendously important medium of communication?

And the answer by the way might be, that's fine. it's their private property rights. And we really believe in private property, whether it's corporate or otherwise, whether it has to do with politics or not. Or an answer might be that it's not great, but better that than allow the government to try to regulate that. You know generally speaking, my view is there's no problems that's so great that it can't be made worse by, by regulation. So maybe any regulations that are going to be proposed are actually only make things worse-- perfectly possible. But I do think it's an important debate that people should have without just sort of focusing, oh, I'm a conservative and by I care about it because conservative speech is being blocked; or I'm a liberal, and I don't care about it because I don't see liberal speech being blocked.

I think this is part of our enduring debate about the proper constraints, if any, on economic power, especially when that economic power is being used to block speech

Jeffrey Rosen: [00:30:08] Katie, as Eugene says, although the concern of the moment is conservatives who feel that they're being blocked on the platforms, it is true that even a few years ago, we had episodes of We the People with progressives from Tim Wu to Barry Lynn invoking Louis Brandeis about the dangers of corporate power over speech, as well as of course the Citizens United argument that corporate speech could drown out other voices. So setting aside the what about ism, what about the substance of the arguments? Are you more persuaded by the argument that because of the power that they can exercise over a speech some sort of regulation of the platforms as common carriers would be good for first amendment values or not?

Katie Fallow: [00:30:54] Well, that is obviously an enormous question and I think it ultimately turns on well, many things, but one is what kind of regulation you think would be justified or would, would fix the problem that we think exists. And that's the other huge question, because what the problem is, is often very different depending on who you're talking to, both including where they are on the political spectrum or otherwise.

I certainly agree. I share justice Thomas's and I think, you know, many other people, including many people on the progressive side's concern about this concentration of power over speech in particular, in the hands of so few-- and, and in the hands of people who are motivated by profit, not a concern about, you know self democracy and public discourse necessarily.

So. I mean, I think what was fascinating about justice Thomas's concurrence, separate from the fact that it didn't have anything really to do with our case, was that he is saying many things in the concurrence, that many people on the left, and a lot of progressive academics have been saying for a while, which is we should regulate these social media companies.

And to some extent, I, I think that those people who have called for it in the past may have been laughed down-- not because it might not be a good idea in the abstract, but because in the light of the Supreme court's jurisprudence over the past several decades, there has been such an emphasis on the first amendment rights of companies themselves, not just in a, in the situation of Citizens United in terms of campaign expenditures, but the court repeatedly saying that private companies or private property owners have a first amendment right not to carry the speech of other people, not to host the speech of other people.

And whether you consider it a property, right or their own first amendment, I would've said before the Thomas concurrence and potentially after the Thomas concurrence that, in light of the Supreme court's case law over the past, you know, several decades, I think that if the government were to try to regulate based on content or viewpoint, the moderation decisions of Facebook and Twitter-- meaning their decision to allow someone to have an account or not based on what that account holder has been saying-- that the Twitter and Facebook could challenge that as violating their own first amendment rights about what kind of speech they want to host on their platform.

And I would think that they would win. The question is, you know, if they were to do it in a different way-- so, you know, Thomas suggests this common carrier -- I don't believe that is something where someone would, would just file a lawsuit tomorrow and say, there its is. Twitter's a common carrier, boom.

Instead it would have to be, you know, either legislative, well, legislative action and probably a regulatory action, like the way that the FCC had administered the communications act that applied to phone companies. If they were to do that, the question is, and then what kind of law?

I mean, I think what Thomas is somewhat suggesting is you would have a rule that you have to carry everyone in non-discriminatory manner, meaning you can't discriminate potentially based on viewpoint. But then, so if Twitter is then sued, [with someone] saying you have to carry Q Anon accounts that violate Twitter's own content moderation policies and violate its own view of what kind of speech environment it wants, I think Twitter could challenge that and would have a very strong and probably successful first amendment argument, at least as it stands now.

Jeffrey Rosen: [00:34:41] Many thanks for all that-- and for raising the potential first amendment arguments of the platforms against potential government regulation. Eugene, in the course of discussing those first amendment issues, justice Thomas cited you. Congratulations for the great cite.

And he said that it's not that the first amendment is irrelevant until the legislature imposes common carrier or public accommodation restrictions. Some commentators he said, had suggested that immunity provisions like section 230 could potentially violate the first amendment to the degree these provisions preempt state laws that protect speech from private censorship. See, Volokh, "might federal preemption of speech protective state laws violate the first amendment?"

And that was on the Volokh Conspiracy on January 3rd, 2021. So, first of all, unpack for We the People listeners, what you are arguing, remind us what section 230, is what your argument was, and in what context justice Thomas was citing it.

Eugene Volokh: [00:35:35] Sure. If I could unpack things even a little bit more broadly, there are two kinds of articles as to why I say a statute-- federal statute or state statute-- that requires platforms to be common carriers like the phone company, why that might be in fact. One argument, which we, well we've just heard about is the first amendment argument. Maybe platforms have the first amendment right not to be compelled to carry speech that they disapprove of. And that's a very interesting and complicated question. I'm inclined to say that they probably don't have such a right, at least when it comes to their hosting function; they're just deciding whether to allow or disallow a particular say Twitter account.

But again, it's quite complicated. So you might look at a spectrum. On one end is newspapers. We know from a case called Miami Herald versus Tornillo that the government can say "newspapers, you must publish replies to criticisms of candidates that you publish."

Cortez interferes with the newspapers' decision of what newspaper to publish --a newspaper that has all of these extra things are just the things that it wants.

And newspapers have the editorial discretion to omit as well as include. And that's particularly, we're particularly familiar with that with regard to magazines that are ideologically minded, like New Republic or National I Review. The reason people subscribe to them is precisely because of what they exclude as much as what they include.

Likewise parades. According to a case called Hurley, parade organizers are entitled to exclude whatever floats they want to exclude. So a St Patrick's day parade organizer could, if you wanted to exclude a pro gay rights float, because he doesn't want that to be part of the message of this parade.

So that's quite clearly first amendment right of private entities to exclude. On the other hand, there's a trio of cases which say that sometimes property owners can be required to include a speech on their property they disapprove. The first one is called prune yard and it involved at a California rule that required large shopping malls to allow signature gatherers and leafing leaders on their property.

And the shopping mall owner said, Hey, that violates my first amendment right to exclude. And the court said, "you're a shopping mall and you don't have a First Amendment right to exclude; you're not presenting to the world, like a newspaper, this coherent product that you get, the editorial control over. you have your own speech, of course in, in the shopping mall, you're entitled to say whatever you want to, but if the state says you have to allow speakers on your property, you have to allow speakers on your property. you don't have a first amendment right to exclude."

A second case was called Turner broadcasting. And that involved so-called must carry rules where cable operators cable systems like spectrum, for example were required by Congress to carry certain channels, certain broadcast channels, even if they didn't want to carry them, and they to raised first amendment objections.

And there too, the courts said: cable operator doesn't have a first amendment right to exclude. Maybe a cable programmer like CNN or like Fox news would have the right to choose what to include there, because they are in a sense providing a coherent speech product, kind of all of the programming from midnight to midnight on the particular channel.

But the cable operator, it's just a bunch of different channels. And the government could say, you have to carry this kind of channel, even if you drop them off. And the last such case of these three cases, Rumsfeld versus fare involved a federal law that required universities to allow military recruiters, even when they had ideological objections to military recruiters because at the time the military was discriminating based on sexual orientation.

Now that particular statute actually did that as a condition of government funding, but the court said we're going to uphold this law. We would have upheld it, even if it had been a categorical mandate. We don't have to figure it out how much the government can use its

spending power here, because it could have enacted this law, just, just as a mandate that all universities have to allow military recruiters.

And of course, universities speak a lot. That's the main purpose in life is to speak through their faculty and and through the administration and otherwise, but they did not have the first amendment right to exclude from their campus, exclude from their buildings, exclude from their classrooms and meeting rooms after hours, when there were opened up generally for recruiters, to exclude military recruiters.

So I think those cases put together suggest that likewise the the the government could say Twitter or Facebook-- when people set up Facebook pages, when people set up Twitter feeds, that's their speech. It's not your speech shirts on your property. But, but we're going to require you to host it.

Just like we require phone company, just like we may require cable systems or shopping mall owners or universities to host some speech they dislike. Now, I don't think the government could do that when it comes to the things that Twitter or Facebook recommends. It's like on the right hand side of of the Twitter page.

There are there are things that are trending or in for some services it's you might like, or I'm sorry, in a Twitter it's called what's happening. So basically trending information or for some social media platforms is you might like this following stuff. Those are the services recommendations.

I think as to that, the services are more like newspapers where they're actually speaking, they're actually deciding what to include, they say what to include in their own speech. So there, I don't think that the government could say you have to recommend things that you that you disapprove of, but I do think it could say you have to host it.

So that's the first amendment argument. But there's a second argument, for this federal statute, 47 USC section 230 on its face, protects platform's ability to exclude whatever they want to exclude, although only protects them against state laws. It's just the statute. So Congress could repeal it or modify it.

But right now, most of this action towards towards treating social media platforms as common carriers is the state-level and on its face 47, USC 230 seems to protect social media platforms against such laws. It says no provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to material that the provider considers to be... there's a list of things, or otherwise objectionable, whether or not such material is constitutionally protected.

Now creative lawyers have come up with all sorts of readings of this, but my sense is that on its face, the statute essentially says that you can't hold Twitter or Facebook liable, notwithstanding any state statute, you can't hold them liable because they decide to restrict access to president Trump's account or to any other account.

So then the question is whether this 47 USC 230, specifically the subsection C two a, might itself be preempted by the first amendment. And that's, that's the argument that I explored

tentatively explored in my blog posts, that justice Thomas mentions in that footnote. So the argument there is, there are some precedents, at least two precedents from the U.S. Supreme Court, which basically say, more or less when a state provides extra protection for people's speech, including protection against private suppression, then Congress 's attempts to repeal or to overcome, to preempt that state law protection are themselves interference with the freedom of speech. They are interference with the freedom of speech as secured by state law. So as a result, Congress preempting those state common carrier type laws might itself be violating the first amendment. That would take section 230 C 2A out of the picture. And then the only question is whether the state laws apply and whether they are themselves forbidden by the first amendment.

This issue, the first issue that I just talked about before, it's a complicated argument. And you know, it's far from it from clear how the court would ultimately resolve it. At first I thought the second argument that the state protections can't be preempted by federal law... I just thought it was just zany, but then the more I looked at it, Jed Rubenfeld and Vivek Ramaswamy had written an op-ed about this on the Wall Street Journal, I probed the argument and read some of the cases and I thought they might have a good point there.

So that's an issue that justice Thomas just briefly touched on that's going to need to be considered by courts.

Jeffrey Rosen: [00:44:13] Thanks for summarizing that argument. It is complicated, as you say, and I want to make sure that I, and We the People listeners understand it.

Katie, when Justice Thomas cites Eugene's argument about section 230 potentially violating the first amendment because it could preempt state laws that protect speech from private censorship, how does that fit into the broader arguments for and against section 230, which defenders argue after all promotes free speech by immunizing the platforms for liability from speech they host, as long as they don't review it?

And is this just a technical claim that section 230 would be okay if it applied to federal as well as state regulations, or is it a broader argument against the constitutionality of section 230? Help us understand this.

Katie Fallow: [00:45:00] Well, obviously Eugene is in the best position to fully explicate his theory, but as I read it, and I also was not familiar previously with the decisions that were cited in that is the idea that first of all, you need to have conflicting state laws that for instance, impose some kind of common carrier non-discriminatory carriage requirement on the social media platforms.

I actually don't, I'm not aware of those. And so maybe Eugene can talk to them, but I think you would first have to have that. And then I believe his theory is, based on the op-ed, also that if you wanted to challenge it, so you wanted to have the state provision apply, that you can essentially look to the preemptive impact of section 230 C(2) , right.

I'm forgetting the section number, but anyway, the part that basically protects the ability of social media companies and other websites to engage in content moderation without facing

liability for their content moderation decisions, meaning taking down content or leaving it up.

I mean, I will say as a side note, I'm not always sure when people talk about this, people say, you know section two 30 gives us broad immunization to the social media companies' content moderation decisions. I don't know what cause of action you would have, necessarily, unless it's based on this common carriage or public accommodations theory. If for instance, Twitter shuts down your account, I don't know what your legal cause of action is.

So people talk about it a lot, but I think it's helpful if you get into the details. But in any event, I do think that's a very interesting idea of essentially, you know, in this somewhat complex way, bringing a first amendment challenge, if you do have this conflicting state law, to the provisions of section two 30. I also think it's important to note, as we've been talking about, both that on the instance of two 30 and the legal liabilities of the social media companies, it has brought the left and the right together in a way that is not usual in these days in the sense that everybody seems to think that it's a problem. However, that goes back to the fact that what is the problem?

So you have some basically people saying the problem is, is that they are de platforming or suspending accounts of people based on their viewpoints or based on them talking about things like disinformation about the pandemic or about the election that might be viewed as viewpoint discrimination. So that's one theoretical problem. And then the other problem often for people on the left is there's too much disinformation up there. There's too much horrible hate speech or, you know, Holocaust denialism or whatever the thing is, that's harmful speech that is fully protected by the first amendment, but we think the social media companies should take it down because they're not the government and it creates a bad, you know, speech environment.

And then they want to either, you know, amend section two 30 or challenge it in some way. So I think when you're considering whether or not these, any of these potential actions would survive, you know, judicial review, you know, it's also important to keep in mind, regardless of the free speech rights of the social media platforms themselves, what would be the impact of the regulation? So for example, some people say we should remove the immunity that social media companies enjoy under section two 30 against defamation claims. A lot of people say they get the special immunity, and we should remove it because they're not you know, doing the kind of public good service that we want.

Most people think, and I think they're right, that if they were to do that, the social media companies and other internet companies will be incentivized to take down a ton of content for fear that they could be held liable for defamation. And, and on the other side, you know, if you're going to argue that they have to carry all speech in a non-discriminatory way, are you going to then have the internet or social media companies, you know, as kind of the worst of the worst of human impulses as reflected on the internet, like pornography or hate speech, et cetera?

Jeffrey Rosen: [00:49:12] Eugene, one more beat on, on your very important argument, and then we'll, we'll have closing arguments. Justice Thomas introduced it in the context of saying that some speech doctrines might apply in cases where the government is threatening the platforms. The government can't accomplish through threats of adverse action with the constitution, prohibits it from doing directly.

He talks about the especially problematic context of threats at the digital platforms, but then he said goes on to say, no threat is alleged here. What threats would cause a private choice by a digital platform to be deemed that of the state remains unclear and no party has sued Twitter. So tell us about the relationship between his notion that there has to be some sort of threat for the first amendment to be triggered. And just in, in plain English, what would you say to listeners who may be inclined to think that section two 30 protects free speech on the internet and want to know what to make of your arguments that at least part of it might violate the first amendment?

Eugene Volokh: [00:50:10] Sure. So I think there are three things at least going on here. One is, when would some limits, whether by first amendment limits or free speech limits, be imposed on the platform's ability to police. So, one thing as you pointed out that justice Thomas points out is if the platforms are being coerced into blocking certain things, let's say a government official says, essentially, look, we're going to start a antitrust investigation of you. We're going to raise your taxes. If you don't block these views, then at that point, that itself is a speech restrictive government action that coercion is. And there are precedents that say that you could then Sue the platform, because the platform is now becoming maybe this involuntary cat's paw-- this voluntary agent of the government because of this coercion. And therefore the first amendment does apply. So that he says might happen in some situations, but presumably fairly narrow situations; you really have to show this kind of coercion as opposed to just government talk. And that ties in to, to this question of, what would it usually take potentially to have a claim against the platforms?

What he's pointing to, setting aside this coercion, is possible new statutes. I don't know of any that have been enacted so far, except maybe some public accommodation statutes that might apply in certain ways, but rarely have been tried. But there is talk in many state legislatures about passing laws that do treat platforms as common carrier.

So the question is, what happens if one of them is enacted? Is that, is it blocked by the first amendment? Is it blocked by section two 30? Another question is, what about the speech protective features of section two 30? And I think it definitely has plenty of them, even setting aside this platform discretion that section two 30 C1 says platforms are immune, essentially for lawsuits, for libel, invasion of privacy and such, based on what their users post. That's what makes Facebook and Twitter potentially liable.

If Facebook and Twitter were liable, the way that traditional print newspapers were for libelous material posted on them, then you know, maybe they couldn't have started up at all because of nobody would sell them insurance. But all, but at least whenever anybody demands that something be taken down because they claim it's libelous, the platform would have to take it down because otherwise there's just too much of a risk.

So I do think that two 30 C one, that protection is very important protection. It has its downsides and among other things, it means there's a lot of libel online. There's very little that can be done about it. But it definitely, I think is an important protection for speech. So the question is to what extent though, might the first amendment preempt section two 30 C two, which empowers platform blocking speech rather than two 30 C1, which allows platforms to essentially protect speech and keep it up. Now, the third question, which I think came up was, well, what about, what about all the platforms becoming platforms for kind of the worst speech, oldest, hate speech, all this disinformation, all this anti-vax stuff and such.

Well, what about the post office? It carries a lot of speech. Much of it is perfectly fine and you know, people can send hate speech through the post office. People can, people can spread fake news through the post office, and it's not up to the post office to try to block that. In fact, the first amendment protects people's right to do that. Likewise phone system is used routinely by all sorts of people.

Most of us are doing perfectly proper first amendment protected things that people wouldn't object to. Some of us are engaging in hate speech. Some of us are actually committing crimes. We're recalling each other or to arrange criminal conspiracies or maybe sending texts in the middle of a riot, telling people where to go and, and to riot more effectively.

But we usually don't say that is horrible that the phone company should have the discretion to decide to block this phone line or that phone line. Generally speaking, we say, you know, if it's criminal, it should be subject to criminal law enforcement. If it's bad speech, well, it's protected by the first amendment.

And as to the, as to the phone companies now becoming this cesspool world of bad speech, which can happen, that's one of the features of free speech-- that even bad speech is free, including free from domination by these communications corporations. So I'm not saying necessarily that the phone company analogy is quite the right one for social media platforms.

You can come up with lots of distinctions, but the mere fact that that social media platforms would have to allow some white supremacist account or some communist account or some pro rioting account, I'm not sure that that should be something that particularly troubles us.

Just as it doesn't particularly trouble us with phone companies having to carry all sorts of speech. One last thing I should mention though: remember I mentioned there's a distinction between social media platforms as hosts. There's the Twitter account for our blog posts.

They're Hosting it; then they're recommending it or not. They may say we never want to promote an item from Volokh Conspiracy, but they're also a functions as kind of conducting conversations with comments, like this all started out, right? With the, with the lawsuit about, comments and a Twitter feed. You might say that maybe it's important that platforms have the power to control comments on other people's feeds because that's really important to maintain those feeds as kind of useful, because you need some sort of moderation of the conversation to keep it readable, to block the spam or even block the

very nasty insults or whatever else. So maybe you might say that we don't want to preempt their power to block comments. But when it comes to just hosting, they just provide a place where people can put up stuff that is going to be read only by people who voluntarily come to read it. Then maybe they should be more like the phone company and subject to common carrier treatment if state legislature so decide.

Jeffrey Rosen: [00:56:03] Many thanks for that. Thank you for clarifying. And I'm going to restate it just to make sure I understand it. You just told us that section two 30 C one has to do with allowing the platforms to host content and immunizing them from liability and then C2, which allows the platforms to block contents that may raise first amendment issues in your view.

And then you distinguished between what platforms host and then what they recommend and the comments on what they post. All right. It's time for closing arguments of this really rich, technical, but deeply useful discussion about the future of online free speech. And Katie I'll leave the first one to you.

Justice Thomas invites free speech defenders to think about treating the platforms as common carriers and regulating them as such. Do you think that would be good for free speech values or not? And why?

Katie Fallow: [00:57:04] Well, maybe this is an answer, that would not satisfy a court in an argument or potentially our listeners, but I think it really depends.

It depends on what, what is the purpose of regulating them as common carriers? It makes sense, for instance, with trains. You want, you know, rates a certain way. You want to make sure that people can ride the trains. So is the argument that they should be regulated as common carriers so then you can then impose certain regulatory requirements on them, and we will just determine that at a later date? Maybe, I mean, I think, you know, I think the fact that people and there appears to be, you know, growing consensus about the concern that these private companies are having an unwarranted amount of power over global speech.

I share that concern and I think it's real. And maybe this is an inflection point where Just as you know, other major industries have been regulated after an initial burst, where either the states or the federal government will seek to regulate the social media companies for the purpose of countering the negative effects that those powerful companies have.

I think that can be good and it could have a positive impact on the speech environment. But again, it depends on what the regulation is. I do think that if social media companies have You know, strict liability or are potentially subject to a lot of lawsuits based on common law defamation that I agree, they're likely to then take down a lot of content and that's going to result in less speech, not more.

If there were a requirement that they carry... you know, offer an account to everyone without regard to viewpoint, that's an interesting idea. I don't know how the Supreme court would interpret that. I can't think of an analogy. I mean, there are common carrier requirements like that for the phone company, but this seems different. And I'm somewhat skeptical of the analogy that the social media platforms are like the phone company in the

sense of they don't have an interest in the speech that's being carried because it does, I believe, have sort of more of an impact on the atmosphere of the platform.

You're, you're not just in your own phone conversation; you're also viewing other people's conversation. So that is something to consider. But you know, I do think that there is a reason to regulate, or consider regulation of the social media platforms and not just take the hands-off approach that the courts and Congress had taken in the early nineties when there was this hope about the great promise of the internet and a desire not to stifle it.

I think it's important to consider how it's functioning now. And we've obviously all identified a number of really serious problems, including the impact on public discourse. But again, the devil is in the details.

Jeffrey Rosen: [01:00:10] Many thanks for that. Eugene, the last word in this great discussion is to you. Justice Thomas invites us to think about the possibility of regulating social media companies as common carriers. Do you think that would be good for free speech values or not?

Eugene Volokh: [01:00:26] I don't know. I totally agree that the devil is in the details. At least I could imagine lots of regulations that would make things much worse, and it may be that ultimately all regulations will make things much worse.

And I do think it's important to remember these are private companies and the presumption ought to be in favor of private property owners being able to decide what to include them with textbook. I think that's that to me is a very important presumption. At the same time, I do think there are serious concerns, which, you know, one way or another, people have been thinking about for centuries about the degree to which economic power can be leveraged to to control the political process.

I'll tell you, for example, speaking of anti-discrimination laws, long before there were bans on discrimination based on race or religion in American employment, long before you even banned discrimination based on union status, there were bans of discrimination based on how someone voted. That was remember up until the late 18 hundreds.

So the, the voting was open. It wasn't a secret ballot and some employers would threaten their employees, if you vote a particular way we will fire you. And that was... at least many states banned that. And today all states ban that because again, shouldn't allow people to use economic power in certain ways including their private property rights, the paychecks that they're paying to people, as a means of controlling the political process.

So how that is best regulated and if it's best regulated is, I think, a very interesting and important question. I do find the analogy to phone companies at least moderately strong. It's true that platforms facilitate conversations and not just one to one communication, but of course, phone services do too, as we know, with texting or with various group phone calls and such. But if I am entitled to, to text a bunch of people from my phone without the phone company coming in and saying, oh, we saw that you're announcing this as a pro Antifa, let's say, or a pro NRA or pro Sierra club phone line, and we just don't want that... if I'm entitled to do that on my phone, I think it makes sense that I might be also entitled to

do that with my Facebook page. I do think that again, to the extent that of the platforms are going to control comments posted to this page by, by others, that might be a place where they have a special role. That's unlike the phone company, where it's really important that they be able to curate the conversation. But if it's just a matter of my speaking to the world, through my Facebook page or through my Twitter feed, right, I'm not sure it's that different.

Is there a difference in scale, of course, between that and my speaking to the world through a phone a conversation, but I'm not sure it's that different, especially since of course we know a lot of phone lines are used though with one caller at a time, but to be the, kind of the political way of spreading political messages with phone banks around election time.

And so, so I think that's an appealing analogy, but again, totally, the devil is in the details. Maybe the analogy is close, but not close enough. Or maybe the ways in which we regulate phone companies, which work for phone companies, would cause all sorts of problems for social media platforms that are best avoided.

I just think that this is a conversation we should be having and without "I'm liberal, what's the liberal answer," "I'm conservative, what's the conservative answer." I think we should be open to the possibility that both sides may have a lot of useful things to say both on the pro regulatory perspective and the anti-regulatory perspective.

So that's one reason I'm so glad to be on this podcast because I think this is a very valuable part of that conversation that we should all be having.

Jeffrey Rosen: [01:03:52] Thank you so much, Katie Fallow and Eugene Volokh for having precisely the conversation that Eugene just described, a thoughtful, civil and nuanced discussion of the deeply interesting issues raised by Justice Thomas's concurrence in the Biden versus Knight case. Dear We the People listeners, your homework this week is obvious. Read Justice Thomas's concurrence. And if you are inspired to write to me and tell me whether or not you feel that the social media companies should be regulated as common carriers, you can do that jrosen@constitutioncenter.org.

Katie, Eugene, thank you so much for joining.

Eugene Volokh: [01:04:32] Thank you so much for having us.

Katie Fallow: [01:04:34] Thank you.

Jeffrey Rosen: [01:04:38] Today's show was engineered by Greg and produced by Jackie McDermott. Research was provided by Mac Taylor, Jackie McDermott, and Lana Ulrich. Please rate, review, and subscribe to We the People on apple podcasts and recommend the show to friends, colleagues, or anyone anywhere who is hungry for a weekly dose of constitutional education, debate, and lifelong learning.

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On behalf of the National Constitution Center, I'm Jeffrey Rosen.