Unpacking the Supreme Court's Tech Term

Thursday, January 25, 2024

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[00:00:00] Jeffrey Rosen: Hello friends, 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.

[00:00:20] Jeffrey Rosen: There are several cases before the Supreme Court that raise important questions at the intersection of law and technology. In this episode, I was honored to have Alex Abdo, Clay Calvert and David Greene join me for a wide-ranging conversation exploring the key tech cases before the court this term. This episode was originally aired on America's Town Hall. Please enjoy the conversation.

[00:00:45] Jeffrey Rosen: This is the beginning of our 2024 Winter Town Hall season. We've got some great programs coming up, including conversations on David Hume, Harriet Tubman, Abraham Lincoln, the State of American democracy, and more. I'm thrilled to share as well that on President's Day, I'm launching my new book, and I can't wait to share it with you. It's called The Pursuit of Happiness, How Classical Writers on Virtue Inspired the Lives of the Founders and Defined America.

[00:01:49] Jeffrey Rosen: Jeffrey Goldberg, the editor-in-Chief of the Atlantic, will join me in a conversation at the NCC on February 19th, and then we will be often running to talk about it throughout the winter. So excited to talk with you about the pursuit of happiness and this wonderful moral philosophy that inspired the founders to think of happiness, not as feeling good, but being good, not the pursuit of pleasure, but the pursuit of virtue. We will have a great discussion today about a crucial topic, and that is technology and the future of the First Amendment. The Supreme Court is hearing a series of important cases that may redefine the nature of First Amendment rights online, and we've convened a dream team to help us think through the issues in the cases. Alex Abdo is inaugural litigation director of the Knight First Amendment Institute at Columbia University. For that, he worked at the ACLU and is a frequent commentator on the First Amendment.

[00:02:48] Jeffrey Rosen: Clay Calvert is non-resident senior fellow in Technology policy studies at the American Enterprise Institute. He's also a professor of Law Emeritus at 11 College of Law and Brechner Eminent Scholar Emeritus at the College of Journalism and Communication. And those are both at the University of Florida. He's written many books and articles and is the author of the textbook Mass Media Law, and also author of Voyeur Nation Media Privacy and Peering in Modern Culture. And David Greene is senior staff attorney and civil liberty's director at the Electronic Frontier Foundation. He's also an adjunct professor at the University of San Francisco School of Law. He has significant litigation experience on the First Amendment and was lead staff counsel for the First Amendment project where he worked on many cases, including BUNNER versus DVDCCA. It's an honor to welcome you, Alex Abdo, Clay Calvert, and David Greene.

[00:03:44] Jeffrey Rosen: In our conversations, you've helpfully defined the issues that we have to talk about by dividing the cases into three broad categories. First, there are the two net choice cases, which raise the question. Does the First Amendment protect social media's company's content moderation decisions? Second, there's the jaw boning decision, Murthy versus Missouri, and the question is, can the government pressure social media companies to take down or hide content? And finally, we have Lindke and O'Connor-Ratcliff, two cases that raise the important question, can government officials block private citizens on social media? Let's begin with the net choice cases. Does the First Amendment protect social media's companies content moderation decisions? This involves two laws from Texas and Florida. Alex Abdo, why don't you tell us what those laws say and broadly whether or not you think they are constitutional?

[00:04:41] Alex Abdo: Sure. I'll start by saying it's great to be here, Jeff. Always a pleasure to talk about the Constitution with you. So these laws differ in their particulars, but at the highest level, both Texas' and Florida's laws do two things. First, they limit the ability of social media platforms to take down speech that the platform or speech or users that the platforms would prefer not to leave up. And they also require the platforms to disclose a significant amount of information about how they work and about decisions they make to take down or suppress user accounts or user content. To get a little bit more specific Texas's Law has a must carry provision that forbid social media platforms from censoring users on the basis of viewpoint.

[00:05:30] Alex Abdo: So a platform subject to that law could not, for example, take down speech on the basis of its disagreement with that speech if it, for example wanted to take down what it considered to be disinformation about some particular topic that would likely violate Texas's law, because that would be a removal of speech on the basis of viewpoint. Florida's law is a little bit different. It forbids the platforms from censoring candidates for office and from censoring journalistic enterprises. So it's not as broad a must carry provision as Texas is, but it is nonetheless a must carry provision in that it requires platforms to carry, again, certain accounts or speech that they would prefer not to.

[00:06:11] Alex Abdo: These two different elements of each of the laws, I think raise slightly different questions for the Supreme Court to resolve. I'll put my cards on the table just quickly so folks know where I am and I'll give a little bit of explanation. I think both of the must carry provisions of the laws are unconstitutional because I think they override the platform's own editorial decisions about the speech that they want to leave up or take down. And the Supreme Court has recognized in a long line of cases that the government needs a very, very good justification before it can force individuals or companies to carry speech that they would prefer not to carry. And I don't think either of the states has come anywhere close to justifying their must carry provisions.

[00:06:56] Alex Abdo: I think that transparency provisions of the law are subject generally to a slightly different constitutional framework because the Supreme Court has said that commercial disclosures, so long as they're limited to the compelled disclosure of purely factual and uncontroversial information about commercial products can be constitutional if the government has has justified them and if they do not impose an undue burden on speech. I think there's a decent argument that at least one of Texas's transparency requirements satisfies that framework. And I'm happy to get into the specifics later.

[00:07:39] Alex Abdo: I don't think the Florida provision that is before the Supreme Court satisfies that even that lower standard of review, because Florida's transparency requirement is extremely burdensome. I don't think satisfies even the lower level of scrutiny the Supreme Court has set out for commercial, for commercial disclosures. There's more in the details there, but I'll start out at the high level.

[00:08:03] Jeffrey Rosen: Thank you for that very helpful introduction to both cases and for distinguishing between the Texas and Florida law, which as you note differ in the amount of disclosure that they require. You suggest that Florida would require a huge amount of notice and Texas, less so. Clay Calvert in your piece, friends of the court, friends of the First Amendment exploring amicus briefs, worked for platforms editorial independence, which you published at the end of December. You really helpfully summarize the major amicus briefs and talk about their contribution to what the effects of the decision would be, starting with the Anti-Defamation Leagues brief, which says that the, the cases would unconstitutionally deprive social media platforms of content moderation tools they urgently need. Maybe tell us more about the highlights from, from some of those other briefs that you discussed in that piece, and broadly your take on the cases.

[00:08:56] Clay Calvert: Sure. So I agree with Alex on the first part. I believe that the content moderation provisions or the must carry provisions as we're referring to them are gonna be declared unconstitutional. Really we can think of this as a, as a right not to speak case, as another way of thinking it, that the Supreme Court is recognized not only that the First Amendment explicitly protects freedom of speech, but also the right not to be compelled by the government to host objectionable speech. So that's one way of thinking about the content moderation or must

carry provisions that really they are, it's a right not to speak case, and you're compelling social media platforms to host content that they otherwise would not, that violates their terms of user terms of service.

[00:09:36] Clay Calvert: So in terms of those briefs, what the Anti-Defamation League is really concerned with is the proliferation of hate speech, racist speech, anti-Semitic speech on the internet. As Alex was suggesting, that the viewpoint prohibition, basically, you can't remove somebody based upon their viewpoint. What the Anti-Defamation League is suggesting then is that if somebody has a racist, hateful viewpoint you couldn't remove that type of hate speech under the terms of Texas' provision, as I think they make clear the ADL makes clear in that case, the Anti-Defamation League.

[00:10:09] Clay Calvert: Other provisions the Media Law Resource Center focuses on this notion of the marketplace of ideas and that platforms have a very important role to play as gatekeepers in the marketplace of ideas. The marketplace of ideas, of course, is the underlying notion that fair competition, free and fair competition of ideas will produce the truth in our society. And that requires whittling away or whittling away and false ideas. And so what the Media Law Resource Center focuses on, and its brief, is this notion that platforms actually play a very vital role in this process by discarding or jetting some speech in some users that really don't go to that goal of producing the best test of truth or, or the best ideas.

[00:10:55] Clay Calvert: Another one of the briefs was filed by National Security experts and that particular brief was very concerned about how extremist terrorist organizations lurk and proliferate on social media platforms, and that both the Florida and Texas laws would hinder and hamper the ability of social media platforms to remove such speech that may threaten and jeopardize national security interests. Other briefs focus on the question of are platforms common carriers? And the answer to that is no, they simply are not common carriers. So there were multiple friend of the court briefs filed in this case on behalf of or neutrally the net choice in CCIA.

[00:11:37] Jeffrey Rosen: Thank you so much for that and for summarizing the position so well. Da- David Greene in the spirit of the NCC, can you make the strongest argument in favor of the constitutionality of the Texas laws which at least claim to be attempting to hold the platforms to First Amendment standards and refusing to allow them to discriminate on the basis of content or to ban speech on that basis? And then give us a sense, you, you, you've talked about how for several terms now, folks have been saying that the court is eager to say something about social media and content moderation. Might these particular cases be that occasion? And if so, what might the court say?

[00:12:20] David Greene: Well, you've given me the hard one trying to defend these laws. I've been writing about how wrong these efforts are since before Texas and Florida. But let me just say this. I think the only way to defend, the best defense of these laws is to actually have a view

of social media that doesn't reflect what social media actually is. So I think the best defense of these laws is that social media is, are sites that are open for anybody where people can freely publish to the audience of their choice. And because of that, there's some type of function that guarantees people access.

[00:12:59] David Greene: That really is the, whether you frame that as common carriage or, or something else I don't know, but I think that's at least sort of the best, the best defensive framework. I think that fails though, because first of all, that's not really what social media is. Social media always has been really from its very inception, been a curated process. And these laws actually directly attack and, and really you could say are most concerned with recommendation systems which are really inherently not open and passive and free flowing, but really controlled top down by, in a very typical editorial, editorial function. So I have a hard time defending the must carry provisions here.

[00:13:45] David Greene: In terms of what I think why I think the court is interested in this topic, I think we've seen several efforts over the last few terms by the court to want to say something about the current state of First Amendment and the internet and maybe social media in particular. And they seemed to have the past really chosen bad cases to do that. And then when they finally get into the cases, they end up going someplace else with them. And I think we probably saw that most clearly last term with Gonzalez versus Google and Taamneh versus Twitter, where they seem to have taken these cases, you know, to finally say something about Section 230 and maybe even say something about first Amendment rights of social media companies.

[00:14:32] David Greene: And then realized, I think very, once they got into, you know, the briefing and look at the cases closely, that the cases really presented a poor opportunity for that. And they, and they dodged the issue, and just as they had dodged the issue largely in, in cases in previous terms. Here, I think, you know, they've taken five cases, and we'll talk about the other ones later, and I really think they're hoping that maybe at least one of them will give them the opportunity to say something, you know. I, with this court, there's always the possibility of them wanting to take a closer look at a case decided that has been seen to be established law.

[00:15:06] David Greene: And so I don't know if this, there are at least one or two justices on this court who want to reconsider. They're the seminal holding in ACLU versus Reno that we treat online speech in an unqualified manner, that it's not treated, it's not considered exceptional in the way that broadcast radio and television were considered exceptional. It's not an issue that's being, it's not an argument that's being directly pushed by anybody in these cases, but I wouldn't completely discount at least one Justice wanting to say something about that. So I do think that these cases really will, it's gonna be difficult to avoid the First Amendment issues in these cases. I think we'll find out something about what the court thinks.

[00:15:57] Jeffrey Rosen: Many thanks for that. Alright, well, let's turn now to the next case, Murthy and Missouri. The question is whether the government efforts to pressure social media platforms to take down speech often referred to as jaw boning, violates the First Amendment. The Biden administration had talk to pressured or coerced, depending on your view, the companies to take down speech involving COVID disinformation as well as some election disinformation. And the question is when, if at all, that violates the First Amendment. Alex Abdo, tell us about that case and why you think that the court should make clear the claims of unconstitutional jaw boning should be evaluated according to a coercion test that the court introduced in a case called Bantam Books.

[00:16:42] Alex Abdo: Well let me start there. You know, that is one of the hardest conceptual parts of this case is just figuring out what the right legal framework is for a principle that seems obvious. And the principle that seems obvious is the government is not permitted to censor individuals or to censor views or speech directly through legislation or through you know, the exercise of its official power. And the Supreme Court made clear in the Bantam Books case in 1963 that the government can't do that indirectly either. It can't do it through informal government action that is designed to have the effect of suppressing views.

[00:17:23] Alex Abdo: And the tests that the Supreme Court gestured at in Bantam is what we think of as the coercion test. It said that the government cannot coerce private intermediaries for speech. In that case it was book distributors into taking down protected speech and that the Supreme Court hasn't said anything about that test in the 60 years, 61 now I suppose since Bantam Books. And the lower courts have applied a kind of smattering of different legal tests to this question. To my mind this is a good opportunity for the Supreme Court to clarify the constitutional doctrine because it's a little bit unclear.

[00:18:03] Alex Abdo: There are some circuits that apply the coercion test, but there are other circuits that apply a state action test from Blum versus Yaretsky, which was not a First Amendment case. It was a case about when governmental coercion or encouragement reaches the point that you can actually hold the government accountable for the private action of private actors. In other words the question of when private action becomes state action, which is also a really important question, but it's a very different one than the question of when the government violates the First Amendment by coercing private actors into suppressing speech.

[00:18:41] Alex Abdo: It is an important opportunity for the court to clarify the doctrine that applies and to give guidance to, to lower courts. Because even if the court settles on coercion versus persuasion, which again is the kind of tests that lower courts have understood Bantam to stand for, these two things are not a binary, they exist on a spectrum. Some persuasion is in effect coercive, and some people may experience you know, coercion as a form of persuasion, and where you draw the line between the two is not, you know, not entirely obvious. What we encourage the Supreme Court to do in our amicus brief was to set out some of the constitutional principles that underlie the distinction.

[00:19:22] Alex Abdo: The first and most obvious principle that underlies it is that, you know, intermediaries for speech and their users have a right to participate in forums of their own creation and their own making free from government coercion. That's the kind of most obvious principle that's a direct derivative of the First Amendment. The second, which is a little bit less obvious, but we think very important is that the public actually has an interest, a constitutional one, in having a government that is empowered to attempt to shape public opinion through persuasion.

[00:19:55] Alex Abdo: And that's a First Amendment interest because the public has a right to hear what its government has to say. And in a representative democracy, majorities have a right to elect a government that is empowered to govern, and that includes the power to try to convince people of the government's views you know, even when the government takes a view, it takes a position on, on a contested issue. And then the final constitutional principle that we think these kinds of cases raise is the threat that the government will be able to circumvent constitutional limitations by acting informally or surreptitiously.

[00:20:29] Alex Abdo: Especially when the government is communicating with platforms behind closed doors. The threat is that the government will be able to effectively suppress speech without anybody knowing and without anybody knowing it's very difficult to hold the government accountable either politically or judicially through litigation to its suppression of constitutionally protected speech. If the court agreed with us and articulated the, these three constitutional principles as underlying the coercion test, that would by no means resolve all of the uncertainty in the application of that test.

[00:21:03] Alex Abdo: But I think it would provide some guidance which is sorely needed because as with any totality of the circumstances test, which I think the coercion test will have to be there's murkiness, it's gonna depend on the facts, and it would be great if the Supreme Court could at least give some more guidance than what we have had so far, which is coercion on the one hand, persuasion on the other, which unfortunately doesn't resolve hard cases.

[00:21:28] Jeffrey Rosen: Many thanks for that. Clay Calvert, you have a really helpful piece, persuasion or coercion, understanding the government's position in Murthy versus Missouri. You published it on January 8th, you note that Justices Alito, Thomas and Gorsuch dissented from a decision postponing enforcement of the Fifth Amendment's injunction. Justice Alito worried that delaying enforcement will be seen by some as giving the government a green light to use heavy-handed tactics to skew the presentation of views on a medium that dominates the dissemination of news. Maybe tell us more about what exactly the Biden administration was doing that provoked Justice Alito's comments. And then you really helpfully sum up General Prelogar's central thesis about drawing a line between persuasion and coercion, which I won't summarize the whole thing, but you, but you describe it as being based on the idea that so long as the government seeks to inform and persuade rather than to compel its speech poses no First Amendment concerns. Tell us more about her position, whether or not you agree with it.

[00:22:27] Clay Calvert: Sure. Back to the Alito part, your first part of that question. It simply illustrates the political divisiveness of this case that conservatives and liberals see it in very different fashion. I think many conservatives see that narratives that ran counter to the Biden administration stance on COVID vaccines, mask mandates and, and business shutdowns, election fraud are being unfairly censored by the government in this case. So that's, that's how many conservatives typically see it. Many liberals would frame it on the other hand, is that the government is doing good here, trying to have platforms take down misinformation, disinformation, falsities regarding vaccinations, vaccine efficiencies and other things.

[00:23:10] Clay Calvert: So I think that what Alito was getting at is postponing the fifth Circuit's injunction against enforcement or stopping the Biden administration officials. And there, there, by the way, there are hundreds, right? I mean, this affects so many people, it's very broad, right? That, essentially was a political decision. So it's a very politically divisive case. And to go back to, I think one of my concerns too is, is exactly, I mean, Alex has the terms exactly right, you know, persuasion versus coercion. I think one of my fears is that the court, all nine justices could adopt those exact same terms, and this is the grayness in the middle, and reach very different conclusions about whether it was persuasion or coercion.

[00:23:51] Clay Calvert: And on a court that as we know today is six to three or wherever you want to cut it, really politically divided. And losing support from, among many people in the population a decision where they adopt the same terms and same language and split and disagree on it along political or perceived political ideological lines that's gonna be divisive and harmful for the court.

[00:24:13] Clay Calvert: To get back to Justice Prelogar the Solicitor General's brief that she filed, she suggests that simply what the Biden administration officials were engaging in was nothing more than routine back and forth that they are allowed to criticize even in strong terms the actions of social media platforms such strong criticism using strong language even repeatedly does not rise, however, to the level of actual coercion. In her mind, you have to actually have a threat. It either has to be an explicit threat of an adverse consequence. In other words, if you don't do this, if you don't do something, there has to be indirect relation to that, some negative or adverse consequence that will befall.

[00:24:55] Clay Calvert: So one thing that in this case Missouri and Louisiana have argued is that Section 230 was kind of put into play during some of the discussions by Biden administration officials. Section 230 is the federal statute that protects platforms from liability for others' content that others post. They're not typically, again, there's some exceptions, but typically the platforms are not liable for that. And so what many conservatives fear is, feel is that by putting Section 230 into play, that that was a threat that unless you take down this information that we don't like Section 230 is going to be revoked or repealed or somehow reformed in a way that is not beneficial to the platforms.

[00:25:40] Clay Calvert: So I think that gives a little bit insight into her brief, that it was simply the routine back and forth. She also talks about the power of the bully pulpit a lot that all presidents whether it was President Biden, but going back in time and the brief does a good job of articulating about six prior presidents who've used the power of the bully pulpit to influence their position and try to get their way that this, again, is routine. In other words, for justices who like historicism or take things over history, there's a historical pattern of administrations engaging in this type. So this is not new. So that gives you a little bit of insight, I hope on her brief in this case, on behalf of the federal government.

[00:26:18] Jeffrey Rosen: Great summary, very helpful, and thank you for helping us understand it so well. David Greene in your piece is in jaw boning cases, there's no getting away from textual analysis published on November 7th. You note that if only direct coercion were forbidden, the court could decide these cases by looking for an explicit threat. But you say the Supreme Court rightfully recognized the unconstitutionality of indirect coercion and set out a test in Bantam Books, and you kind of helpfully lay out the four relevant factors in Bantam Books. One word, choice and tone. Second, the existence of regulatory authority. Third, whether the speech was perceived as a threat, and most importantly, perhaps whether the speech refers to adverse consequences. Might the court stick with the Bantam Book tests and where would that lead the government in this case?

[00:27:07] David Greene: Yeah, so that four part test is a test that several of the lower courts used but the court in Bantam did not frame it those way. The Second Circuit, the Ninth Circuit, and even the Fifth Circuit below in Murthy used those four factors. And importantly, they're not, they're not exclusive factors. I think they were identifying them as among the most important, but certainly not the only ones. I think many of us who follow this issue and have been following it for a long time are really thirsty for some type of skeleton to hang this, to hang this analysis on. And the four part of, on some type of four-part test it seems to give some shape to the totality of circumstances analysis.

[00:27:52] David Greene: I think that will be attractive to this court, especially the members of this court who'd like tests who'd like multi-part tests. I do think we'll see something come outta the court that is less amorphous than what we have now. But I do think there are other factors that, and that are, that are important. And I'd like to see the court look at those, look at those factors as well. The things we talk about in our brief we filed are sort of our power imbalances sometimes the court.

[00:28:24] David Greene: This might depend on who the governmental speaker is, and even within the context of the executive brands, there seems to be a very, a qualitative difference between someone from the White House making very strong requests and somebody from the CDC, which is very, very limited regulatory authority or someone from an, from an agency like CISA, which is inherently advisory in its functions. So when you have some the name plaintiff here is the surgeon general whose job essentially is to be sort of a public scold on public health.

[00:28:57] David Greene: It would seem to be a odd to take out the public scold part of the job. And it's uncertain what would be left of the surgeon general's job if they weren't allowed to sort of lecture everybody on, on, on public health advice. I do think there are two very interesting things happening in this case. One is this doctrinal question that we as lawyers are very interested in, and I actually don't know that there'll be a lot of dispute among the court around this. And part of that is because the totality of the circumstances test is so flexible. I do think we'll get a coalescing of the justices around some type of framework, whether it's those four factors or something based on those four factors. In our brief, we urge the court to really look at two essential questions that those four factors help to answer.

[00:29:44] David Greene: One is the government's intent. Does the government have an intent to replace its editorial judgment with that of the platforms? And the second being the perception of the platform, would a reasonable person perceive that they really had no choice to substitute the government's editorial decisions for their own? The second part, which is much more interesting, which the court might not get to 'cause they could just remand, is actually how do you apply that test to the numerous, very, very different interactions that took place in this case. I don't see us getting five votes on most of those things just because again, what stating a multi-factor test is much, far easier than applying it.

[00:30:29] David Greene: So I think it'll be really interesting to see what, how the court treats the individual examples. And I think if you read the amicus briefs, there's a great range, those who engage with the facts, there's a really great range of whether of which types of interactions people think were permissible, crossed the line from, I don't even know if the lines have the dream persuasion and coercion as much so as permissible persuasion and impermissible persuasion.

[00:30:57] Jeffrey Rosen: A helpful distinction indeed. Well let's now turn to the final set of cases. They're called O'Connor-Ratcliff versus Garnier and Lindke versus Freed. The question is, to what degree can government officials block or restrict people from commenting on their social media accounts? And there are different facts in these cases. In Lindke, an official was using a private account created before he became an official. In the other case, O'Connor-Ratcliff, we have the opposite with the accounts were designated as official government accounts. And the question is, to what degree can blocking or editing be allowed? Alex Abdo, how do you think we should think about these cases?

[00:31:44] Alex Abdo: Well, the most important legal question presented by the cases is when public official use of social media is subject to the First Amendment, which is actually a state action question. Unlike the main question at issue in the Murthy case is the question of when public officials who are interacting with their constituents or furthering their official duties using their social media accounts, you know, when or whether and when their use of those accounts is subject to First Amendment limitations with the main one that we would care about being the prohibition on on viewpoint discrimination.

[00:32:21] Alex Abdo: Because if the First Amendment is held to apply to public officials who are using their accounts in this way, then they can't silence their critics much in the same way that public officials can't silence their critics in town hall meetings or other traditional public forums. What the plaintiffs in these cases are arguing for is very similar to what the Knight Institute was arguing when it filed a suit against when former President Trump, when he used his Twitter account very much as an extension of his office and began blocking critics which is an, an order forbidding public officials from silencing their critics in these forum you know, on the basis of viewpoint.

[00:32:58] Alex Abdo: Unfortunately, one of the two circuits, the Sixth Circuit in the decision below in one of the decisions below adopted a very formalistic understanding of when public official use of social media is subject to the First Amendment. And it essentially held that it, you know, public officials in their use of social media are subject to the First Amendment only when they use state resources or have an explicitly set out duty in regulation or in law requiring them to use social media in furtherance of their official responsibilities. And those are very narrow circumstances.

[00:33:39] Alex Abdo: Most public officials who engage with the public using social media are not doing so because there is a law that requires them to do so. Some use state resources. Former President Trump relied on official federal employees to help him administer his account. But many public officials, especially at the local level, don't have the resources to rely on in their offices to help administer their accounts, even if, and even when those accounts become an important tool of governance or an important avenue through which they disseminate important official information to the public.

[00:34:18] Alex Abdo: And so what I would like to see the court do is adopt the standard test the court uses to distinguish between state action and private action in other contexts, which is to look to see whether the official is you know, using their account as a tool of governance, whether, and whether their use of it is fairly attributable to the state.

[00:34:40] Alex Abdo: And again, as with the Murthy case, the legal lines here are a little bit mysterious, you know context dependent. I understand the instinct that some may have in the face of an uncertain totality test to gravitate toward a test that is maybe easier to administer, but loses some of the nuance. I understand that, but I think that'd be a mistake in this context because it would be a roadmap for public officials to create echo chambers in their online engagement with their constituencies, which is now, you know, one of the most important ways that public officials engage with the public.

[00:35:21] Jeffrey Rosen: That idea of an echo chamber is powerful. And thanks also for the analysis of the Sixth Circuit decision. Clay Calvert, how would you look at these two social media cases?

[00:35:33] Clay Calvert: I agree that the Sixth Circuit test is really too limiting in terms of citizen participation by making it too hard to overcome that state action hurdle, essentially, that they have to be acting pursuant to their official duties in some way to trigger state action. So given, as Alex said, this is how people communicate today, often with their public officials, their representatives in government to hinder that by saying, "Oh, there's no state action because the test we've created limits it so much," that's gonna be very problematic. So yes, while that's much, the Sixth Circuit has a much more bright line, are you acting pursuant to your official duties or apparent duties when, when you operate this website, even though it appears to be private, but are you doing it that way? That's a very narrow test.

[00:36:20] Clay Calvert: So yes, the court will probably adopt much more of a totality of the circumstances, test with multi-factors multiple factors. It'll be more messy to apply. Probably much more subjective to apply. If you go back to the O'Connor-Ratcliff test, things that they focused on were things like the appearance of the website. Do I have indicia that I'm using it? I've got a picture of myself at a government event. I've posted my office location. I communicate with my constituents for the purpose about it. In other words, how do I use it? Am I using it a lot to communicate with my constituents, to convey information, to solicit feedback, to interact with them? Or am I using it much more in a private capacity?

[00:37:02] Clay Calvert: So one thing I usually tell my students is, there's nothing in these cases that says you can't just have your own, if you're a government official, and I can have my own, you know, social media account where I talk about movie reviews, right? Or my family. And that's not gonna trigger state action. The question is then, once I start using it for other purposes, when do we get there? So again, there's gonna be a lot of gray area there. So I agree the Sixth Circuit test is too limiting given the realities of how people communicate with their representatives today.

[00:37:31] Jeffrey Rosen: Many thanks for that. Well, we now turn to the Knight Institute's position, and you filed a really comprehensive brief in the case, David Greene in both O'Connor-Ratcliff and Lindke, where you argue that when an official chooses to mix government and non-governmental conduct and an individual account, they must accept the First Amendment obligations that go with doing so, and the court should apply well-established bans on viewpoint discrimination. Tell us about that position, and then tell us about the case that's been mentioned a few times, which involved the Knight First Amendment Institute versus Trump, which was a lawsuit filed at the end of the Trump administration involving whether or not President Trump could ban folks on Twitter, and the court ended up sending that case back to the Second Circuit with instructions to dismiss it as moot.

[00:38:26] David Greene: Yeah. So I'm happy to, I'm happy to talk about our brief and I can, I can, which we filed, which we at EFF filed jointly with, with Knight. And let me just say, I actually don't think that the gray area is as gray and murky with this test as it is with the jaw boning test. I think it's a tremendously common practice for governmental officials to use social

media to do their jobs to make official announcements, to have to have the type of discussions with constituents that they formerly would've had at public gatherings. This is really common.

[00:39:11] David Greene: The only thing that's unusual about it is that two things, occasionally, some of them also like post photos of their children, which again, is also not completely unusual in other contexts. And we're, what we really see a lot of, which I think is a really dangerous manipulation of the system are officials who've had, who've had campaign accounts, which they consider to be private. And then once they get elected to office, they use that campaign account to then essentially could do their jobs to talk about their accomplishments, to talk, to discuss the issues, to to make announcements and to communicate with their constituents.

[00:39:53] David Greene: And then they claim when they start to silence their critics on those sites, that this is still part of campaigning. I think that's a very dangerous practice, and I think that's something that the court can directly say is that they're not acting as candidates then but they're acting as officials. And that's really one of the most common scenarios we've seen here. I think the type of scenario that's raised in the Lindke versus Freed case where someone really has a, seems to have a private account that very occasionally, rarely uses it for governmental purpose, is actually the outlier in what we see in these cases.

[00:40:33] David Greene: So I'm hopeful that this actually presents a case where the court could actually give a fair amount of clarity. I think the Nine Circuits test actually really reflects and looks at the factors that are really obvious in common at how government officials use, so use the interactive spaces of their social media accounts. And I think the Sixth Circuit says, just doesn't reflect at all. It's far too narrow. It captures a tiny slice of how government officials use it.

[00:41:01] David Greene: The Alex's case that they brought at Knight against Trump had both of these issues, right? You had the issue of whether Trump's previously existing account, RealDonaldTrump was being used for the purposes of the presidency and there was actually an official account, the @POTUS account that he rarely used. But it was very clear from the facts of that case that the president was conducting the business of the presidency over primarily Twitter. He was firing people over Twitter. That was the only place it was, you know, over at the RealDonaldTrump account. That was the only place, for example, that was being publicly done.

[00:41:45] David Greene: So in those cases, there were some really obvious examples there. Knight did a really excellent job of actually discovering this case and finding out some of the details about who, how those decisions were made and things like that, that really support that idea. And then the second part of the case, which it would've been really which the lower courts I thought dealt with really well, was once there is a First Amendment right, then what does it mean? What does that limit? And certainly at a minimum, it limits viewpoint discrimination.

[00:42:13] David Greene: Whether it also limits content-based decisions would really, I think, depend then on a very difficult factual scenario about whether the forum that created is a, you

know, is a non-public forum. Is some type of limited public forum or some type of public forum, like a designated, designated public forum, that's much more and I think that is the much more fuzzy area. I think it's unlikely the court could take that up. In these cases, I think it's far more likely that the court will pick a test and then remand both of these cases for the court's supply, apply those tests.

[00:42:48] David Greene: And I think looking at these, all these cases, really broadly, what you're really seeing is the Supreme Court really needs to understand content moderation, really needs to understand what this process is of how things end up being seen by the public on social media. These cases really deal with user controls, how a user can control their own account and the other cases really deal with how the platforms make those decisions. And the, what's critical is the courts really need, gonna need to understand this. And I hope they really understand this in a way they don't... What we frequently see in technology cases, the court, these very sort of pithy laugh lines of the oral arguments. Like, "We're not the best nine people to make these decisions." and I really hope we don't get, I hope we're done with that. And we really get the court really seriously engaging with something that's actually understandable and which they've had a ton of help with an amicus briefs in these cases.

[00:43:46] Jeffrey Rosen: Many thanks for that, and for that really helpful distinction between user control and how platforms make the decisions. Well, it's time for some closing thoughts in this great discussion. And Alex Abdo in mooting out the Trump Twitter case, which, which Knight brought, Justice Thomas said that applying old doctrines to new digital platforms is rarely straightforward, and the justices will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructures such as digital platforms. One important insight I've gotten from this great discussion is that it's impossible to apply a single simple rule to all of these cases, such as no viewpoint discrimination in any circumstances, but each of you has distinguished among different uses of the platforms by the platforms themselves and by users in a context specific way. As you try to identify some broad principles for the justices to apply in all three categories of cases, what would you say?

[00:44:53] Alex Abdo: It is a really great question. Maybe I'll even step back, and answer the question at an even higher level. And this goes maybe you can put this in the bucket of helping David answer the impossible question you gave him earlier, which is trying to defend Texas's and Florida's laws. I understand what I think motivated Justice Thomas and writing that concurrence and what motivated some of the other justices in implying in the lead up to the Gonzalez case that they were interested in revising section, the judicial interpretation of Section 230. What I think motivates that concern is the fact that a relatively small number of companies seem to exercise a significant amount of control over what can be said online today. I don't think that's unique to this moment. I think media organizations have also played historically an outsized role in deciding what views get aired publicly and spread among the public.

[00:45:56] Alex Abdo: But this is the latest version of, of you know, of that example where relatively small number of companies seem to, you know, have outsized power over public discourse. And I think that is maybe the most charitable explanation for why regulators are targeting the social media platforms for essentially common carriage laws as David was saying earlier, you know, must carry laws. I think that effort is misguided for the reasons David was saying earlier. These platforms are not, in fact, the public square. They are privately curated spaces for people to join in communities that the platforms have a heavy hand in organizing. And that people go to, in large part because of the benefit they see in the close curatorial control that the platforms exercise over those very different speech environments.

[00:46:47] Alex Abdo: You know, most people don't want to go on Facebook and see hate and toxicity and pornography. They go on there because Facebook spends an enormous amount of money curating you know communities and conversations that are different, that are different than those. I'm a critic of the platform. I don't think they're serving, you know democracy especially well at the moment. But I don't think the answer to the problem of concentration of power over public discourse is to concentrate that power in the hands of the government. I think if you're genuinely concerned about that concentration of power, then the solution is to attack the concentration to look at potential legislative solutions that make it easier for competitors to come into the market that more closely align the incentives of the platforms with the interests of their users. Laws directed at competition or interoperability or privacy or transparency, I think are a much better model to pursue than laws that are directed at content moderation directly.

[00:47:51] Alex Abdo: And so it may be that when the court took the Gonzalez case, it had that kind of buyer's remorse that David was gesturing at. I really hope that's not what motivated the court into taking the net choice cases. And I don't actually don't think that's what motivated the court into taking those cases. I don't think it had a choice. It had two very conflicting circuit decisions. The Fifth Circuit that was an outright conflict with a very long line of Supreme Court cases. I don't think it really had a choice but to take those cases. And hopefully but hopefully I'm predicting correctly that the court will invalidate the must carry provisions as I think it should.

[00:48:26] Alex Abdo: So if I have a broad takeaway, it's that I agree with David that content moderation is not generally where the legislature should be focusing on their efforts. I'd much prefer that they focus on some of the structural problems with competition in the social media market.

[00:48:41] Jeffrey Rosen: Thank you so much for that. Great and very brandeisian insight about if the central problem is concentrated power in the hands of the platforms, don't solve it by concentrating power in the hands of the government. Clay Calvert final thoughts and are there any overarching principles you'd urge to the justices to consider that unite all of these cases?

[00:49:00] Clay Calvert: Well, lemme just add something to which Alex said about the split of authority between the Fifth Circuit and the 11th Circuit on the net choice cases. The Fifth

Circuit, which upheld it's important to note Texas laws and said they were perfectly fine. That decision was bizarre for any traditional First Amendment analysis. It really reeks of a text history and tradition approach, which is designed to appeal. Jeffrey, as you started out to Justice Thomas increasingly the conservative justices in the Second Amendment cases at least, right, are all about what does the text say, what's the history and what's the tradition of this?

[00:49:34] Clay Calvert: And the Fifth Circuits the majority opinion really went down a text history tradition approach that creates an opening if Thomas wants to go there and maybe pull Alito in to take a very different analysis than we typically see in first Amendment cases, which is it speech? Does the speech fall into an unprotected category? If it doesn't, then it's protected. And then if it's content based law, you apply strict scrutiny. If it's content neutral, you apply intermediate scrutiny. The Fifth Circuits analysis really didn't do that, and I think it really helped to tee it up if the conservative justices want to go there.

[00:50:10] Clay Calvert: The bottom line I would say to go to have big picture principles here is, and it something somebody else mentioned earlier, the Reno versus ACLU case, maybe David mentioned that from 1996 where the Supreme Court or '97, the United States Supreme Court said that we're gonna treat the internet speakers, like speakers in the print medium and not narrow their first amendment rights like we have done with broadcasting and cable. And so I think that's another issue here. Are they gonna revisit that major principle? I don't think they'll reverse that. Some justices, again, Thomas might want to go there. I don't think that's gonna happen.

[00:50:45] Clay Calvert: The whole net choice cases are all about the ability of private businesses to create their own speech based communities that they want to enforce themselves. And now the government is telling them, mandating, you must host speech that you don't want to. So they're interfering with that. So one of the key things that's going to be, there's a case called Miami Herald versus Tornillo from 1974, which basically said the Supreme Court said, you cannot print, newspapers, cannot be compelled to host replies from candidates for public office that are attacked. And Florida had a statute saying that, "Well, okay, if you're a candidate for public office and you're attacked by the Miami Herald as Tornillo was, he gets free space." And the Supreme Court struck that down and said, "No, that violates the rights of editorial control and discretion that a print newspaper has." and that principle comes up in this case. And it's not a clear square analogy. They don't, they're, they're different, right? Print newspapers are different than social media platforms, but that's gonna be something that the court's gonna have to wrestle with here. So I'll stop there.

[00:51:47] Jeffrey Rosen: Thank you very much. David Greene, last word in this wonderful discussion is to you we're, we're almost at time, so if you could keep it tight and inspire our listeners by bringing together the big themes that you think should guide the court as they consider these important cases.

[00:52:03] David Greene: Yeah, I think it's useful just look at these five cases together to look at them as examining different facets of government's invi- interaction with social media. So the net choice cases really are the government as regulator. Does the government have any type of regulatory role over the content moderation process? I, I think, I think we all think the answer is no or very, very limited role. On the other end are the government social media accounts. So now you have the government as a user of social media. What is the government's role? Does it, does it have, does it how do we treat the government when it's a user of social media? Does it still have the limitations we typically place on the government when it participates in other forums?

[00:52:46] David Greene: And, and so to what extent does the public forum doctrine now apply to those? And then in the middle, really interestingly, is the jaw boning cases, both Murthy the online case as well as the other jaw boning case the court has taken NRA versus Vullo, which doesn't arise in the internet context. But again, what you have there is to what extent, what is the government's role when it's sort of standing in the place of other users? I think the important thing with the Murthy case is that the platforms get a ton of feedback, not just from the government, but from, but from their own users and from some trusted partners and, and civil society. And can the government play on equal grounds in that role? Or is the government again limited by have to function a limited function? What I think is interesting about all these cases altogether is really bringing them in totalities. You really have to a full spectrum of what is the government's proper role as it participates with social media and content moderation.

[00:53:48] Jeffrey Rosen: Beautifully put, and you bring us right in on time. Alex Abdo, Clay Calvert and David Greene, thank you so much for an illuminating and uplifting discussion of the court's role in discussing the First Amendment and social media. Alex, Clay, David, thank you so much for joining. Thank you friends for taking an hour in the middle of your day to learn about the Constitution and look forward to seeing you again soon.

[00:54:13] Alex Abdo: Thank you, Jeff. Take care.

[00:54:14] Clay Calvert: Thank you all.

[00:54:21] Jeffrey Rosen: This program was streamed live on January 16th 2024. Today's episode was produced by Lana Urich, Tanaya Tauber and Bill Pollock. It was engineered by Kevin Kilburn and Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith and Yara Darese. We The People, friends, I'm so excited that on February 13th, my new book is coming out, it's called the Pursuit of Happiness: how classical writers on virtue inspired the lives of the founders and define America. I can't wait to share it with you and if you read the book and like it, e-mail me and I'll send a signed book plate. That's JRosen@constitutioncenter.org.

[00:55:00] Jeffrey Rosen: Please recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional conversation and debate. And if you

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