Google, Twitter, Section 230, and the Future of the Internet

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[00:00:00] Jeffrey Rosen: Three decades ago in the early days of the internet, congress put language into section five of the Telecommunications Act of 1996 that gave broad protection to website platforms that host information from third parties. Section 230 of that massive law has been called the 26 words that created the internet. Congress said that platforms in the new digital frontier are not like traditional media. They're not publishers. Instead, they're distributors of information, and therefore they shouldn't be held liable for offensive, violent or unlawful content posted by users. But what happens when algorithms created by companies like Google or Twitter promote or recommend terrorist material? Should the companies be held accountable for aiding and abetting terrorism?

[00:00:46] 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 non-partisan, non-profit, charted by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, section 230 and the future of the internet. We'll break down the arguments in the Supreme Court cases, *Gonzalez v. Google* and *Twitter v. Taamneh*. We'll reach back to understand the history and purpose of section 230 and how it's been interpreted over the years, and we'll look forward to how the case could impact companies like Facebook, Google, Twitter, and the future of the internet itself.

[00:01:26] Jeffrey Rosen: Joining us are two of America's great scholars of technology and law. Mary Anne Franks is the Michael R. Klein Distinguished Scholar, Chair and Professor of Law at the University of Miami School of Law. She filed a friend of the court brief supporting Gonzalez in the Google case. Welcome, Mary Anne Franks.

[00:01:44] Mary Anne Franks: Thank you for having me.

[00:01:45] Jeffrey Rosen: And Kate Klonick is Associate Professor of Law at St. John's University Law School. She signed a friend of the court brief in the same case on the opposite side, supporting Google. Kate, it is wonderful to welcome you back to *We The People*.

[00:01:57] Kate Klonick: Thank you so much for having me, Jeff.

[00:01:59] Jeffrey Rosen: Mary Anne, could you describe the stakes of the Google case? What's the central issue, and what's going on?

[00:02:05] Mary Anne Franks: *Gonzalez v. Google*, what the question is really for the court is, does section 230 protect Google when it does things like recommend videos use algorithmic targeting to present to a user, things that it thinks the user is going to want to see? And so, what's really at stake here, in addition to a very sort of complicated set of facts about the relationship between Google or any other tech company or tech platform, and illegal conduct is the proper scope and interpretation of this law section 230, which courts have I wouldn't say unanimously, but has been, have been protecting in a certain way that is very expansive, that they have interpreted section 230 to provide a really, really broad sense of immunity when it comes to harms that flow from services and platforms by interactive computer service providers.

[00:03:00] Mary Anne Franks: And so, what the court is trying to do in *Gonzalez v. Google* is to figure out whether that scope has been properly interpreted, or whether there needs to be a correction made.

[00:03:09] Jeffrey Rosen: Kate, how would you describe the stakes in the case? And what is the sanction the court's being asked to look at between publishers and distributors, and, and how does that apply to algorithms?

[00:03:22] Kate Klonick: Yeah. I think that one of the things that we're seeing in the Gonzalez case is something that the court has been tiptoeing up to for a long time, not the court, but courts generally, around section 230, a question that has been really been prompted by the expansive use of technology in the 25 years since section 230 was upheld by the Supreme Court in *Reno v ACLU*.

[00:03:49] Kate Klonick: And that's really kind of like whether or not this role is servicing or providing content and recommending content to its users creates kind of its own voice, its own product, such that it can be held liable as more than just like a bulletin board, so to speak, in which you, Jeff, or, you, Mary Anne, kind of post your content and they don't have any say over it.

[00:04:12] Kate Klonick: But once you start kind of really having a role in curating something and creating a cohesive message and recommending certain types of things through algorithm ranking and recommendation, are you creating enough of your own product that you should be held liable for its promotion? And, I disagree with Mary Anne in the outcome of this, but I think that it is a reasonable question for the courts to be asking right now given kind of the sophistication around the technology.

[00:04:42] Jeffrey Rosen: Well, let's discuss the areas of agreement and disagreement between you. Section 230, I'll read the text, which came up in the oral arguments several times. It says, "No provider or user of an interactive computer services shall be treated as the publisher or speaker of any information provided by another information content provider." And then it goes on to say that, "No provider or user of an interactive computer service should be held liable on account of any action voluntarily taken in good faith to restrict access to, or availability of

material, that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

[00:05:25] Jeffrey Rosen: And then tell us about what Congress intended when it passed that language and how that created the current disagreement about its meaning.

[00:05:34] Mary Anne Franks: So, as you mentioned before, when people speak about section 230, they sometimes refer to the 26 words that created the internet, but as your reading just told us, there's a lot more than 26 words there. The 26 words is the section C1, which is the emphasis in the *Gonzalez v. Google* case, that language about not treating an interactive computer service provider as the publisher or speaker of another information content provider, but then the actual part of the statute that does explain explicitly what civil liability immunity is for says something very different. And it says, "You are not going to be liable on account of removal of restrictions."

[00:06:15] Mary Anne Franks: So, one way of looking at the two provisions is to say that the first provision is about what you are allowed to, uh, leave up, and the second provision is about what you're allowed to take down. And what has happened in the Gonzalez v. Google case is that most of the emphasis has been on C1, and what has gotten sort of lost in the mix is the C2 provision.

[00:06:36] Mary Anne Franks: As far as I see it, and this is what we argued in the amicus brief, you cannot read the statute coherently if you don't think about C2, that part about restriction of access, if you don't see that as central to the entire provision. So, I pointed to the title of the provision, which is the Good Samaritan Blocking and Screening of Offensive Material Provision, and pointed also to the legislative history where the sponsors were pointing out that what they really wanted to do with section 230 was to incentivize tech platforms to do good in the world, like a good Samaritan would, to intervene against harmful content even if they didn't have a legal obligation to do so.

[00:07:19] Mary Anne Franks: On our read, what that means is, if that's what C2 clearly states, and C2 is very, very explicit about how it's an exchange, you try to restrict it, harmful content, you get the immunity from civil liability. That means that if you take C1, that part about no provider or user as a publisher or speaker, and you interpret it as many courts have interpreted it, which is you get the civil immunity provision even if you do nothing to help, even if you stand by and let every bad thing happen, and you could have intervened and you didn't, and even, in some cases, if you actively encourage that harm to happen on your platforms and services, you get exactly the same benefit as a, as a provider that attempted to intervene and attempted to restrict content.

[00:08:04] Mary Anne Franks: On our view, that simply doesn't make any sense. You cannot interpret C1 in such a way that completely guts C2. And in a way, that would completely negate the idea of a Good Samaritan statute, which just to state it in layperson's terms, a Good Samaritan statute in the offline context, we're probably all familiar with, based on the biblical parable of the Samaritan who stops and renders assistance to the person who is by the side of the

road having been beaten by robbers, and the priests and the Levite have walked past, they don't care about this poor person. It's not their responsibility. The good Samaritan stops and helps.

[00:08:42] Mary Anne Franks: In the legal context, what that means is, if you stop and help someone, like the good Samaritan, you won't be sued if you did it imperfectly, if you may be made a mistake or cause some minor harm while you were trying to render assistance. But at the same time, if you did not attempt to help at all, you would not get the civil liability immunity benefit because it wouldn't make any sense to do so. There's no incentive there unless it's a trade-off between what you have done to help and the fact that you're getting this kind of immunity. So when I read the way that the courts have wrongly interpreted section 230 up to this point has been to say, you get this benefit if you, if you help, if you don't help and even if you actively encourage or profit from harm and we think that that's an unintelligible position.

[00:09:27] Jeffrey Rosen: Kate, you heard Mary Ann's position. Tell us why you interpret section 230 differently and you think the court should do the same.

[00:09:35] Kate Klonick: So, I understand Mary Anne's argument is basically saying that historically for the last 25 years, and Mary Anne acknowledges, is that the court has not put a lot of empha- that, not the court. I should be clear that there really have, um, not been 230 cases to the court, the high court, the Supreme Court during those 25 years. So there hasn't been the opportunity for this to be heard and we can get into, into how deeply it was ... Or Mary Anne's argument was heard by the court later.

[00:10:06] Kate Klonick: But, I do think that from going from what, how the lower courts have interpreted, the plain meaning of section 230, um, over the last 25 years, there just isn't any precedent and there is not a ton of use of the Good Samaritan provision, um, kind of against C1. And so, as cast against the liability, um, provided in C1. But it makes a pretty simple argument, which is essentially that C1 which defines interactive computer services has accompanying definitional text, um, in 234, which basically says to the contrary of all of this that the picking of, choosing on content, which is specifically given and, and imagined by the court even in 1996, um, the picking and choosing content is part of what is imagined as the role of the interactive computer service and the picking and choosing content on its, truly on its own kind of continued definition today applies to automated recommendation, uh, services.

[00:11:09] Kate Klonick: And so, it's really a very straightforward argument in my opinion. I don't, I think that there are lots of reasons that C2 could potentially play a larger role. I think that that ... it is not supported in past definitions of this and it's not supported in the kind of the fallout, that would be created and having to adjudicate the type of knowledge and understanding that would have to go along with some of the, the use of C2 in everyday use in its scale.

[00:11:42] Jeffrey Rosen: Let's talk about the oral arguments in the Google case. Right out of the gate, just as Thomas expressed skepticism about the idea that algorithmic promotion counts as aiding and abetting. And he made an analogy between promoting cooking videos and terrorism videos.

[00:11:57] Justice Clarence Thomas: You're interested in cooking, say you get interested in rice and pilaf from Uzbekistan. You don't want pilaf from some other place, say Louisiana. And I don't see how that is any different from what is happening in this case and what I'm trying to get you to focus on is if…we talking about the neutral application of an algorithm that works generically for pilaf and, and it also works in a similar way for Isis videos. Or is there something different?

[00:12:34] Jeffrey Rosen: Mary Anne, several of the justices seem sympathetic to Justice Thomas's suggestion that if the algorithm is neutral and promotes cooking videos or terrorist videos on a principle of user interest then therefore it shouldn't be considered a promotion. What's your response?

[00:12:51] Mary Anne Franks: It's an interesting line of argument especially coming from Justice Thomas, who had seemed among the justices to be the most eager to take a case that would review section 230 and potentially limited scope. But what I think Justice Thomas'sline of questioning indicated was skepticism among many of the justices that neutral as they put it, algorithms could be considered to have aided and abetted in the sense that has argued in this particular case. This is a tricky line of argument in the *Gonzalez* case because that's not actually what was really before the court, that's more of a preview or was more of a preview of the *Taamneh* argument.

[00:13:33] Mary Anne Franks: And what you found throughout the oral arguments was the slippage back and forth between what, are we talking about section 230 coverage or are we talking about liability under the anti-terrorism statute? And it really seemed like the Justice was ha- Justices were having a hard time separating the two, one of the most important and I think insightful lines of questioning came from Justice Jackson, who I think kept reminding us, all of us that the question of whether Google's actions, whether we call them neutral algorithms or something else, whether that constitutes aiding and abetting is a separate question, from whether or not they get immunity under Section 230.

[00:14:10] Mary Anne Franks: That is, you might just decide that on the facts of this case, this isn't a good claim. On the merits, that is whatever Google did, you look at the harm that is, that has resulted this horrific murder and you say, there's just not a good connection between these two and therefore the defen- the petitioner should lose on that basis. But the question of whether or not section 230 is either necessary or proper defense is separate from that so that you could completely consistently say you are not covered when you use these kinds of algorithms under Section 230, but it's also not the case that you are liable in the way the plaintiffs are attempting to hold you accountable because it did not rise to what they're acting, of what their actions actually were in this case.

[00:14:55] Mary Anne Franks: And what you heard the solicitor general say and try to emphasize was that's the right distinction. That is Section 230 may not protect a lot of things and that could sound really alarming. It could sound really big. This is the concern people had about how algorithms are everything online now and you heard some concessions about how yeah, that could be true but it isn't actually all that alarming to say you don't get Section 230 protections for

those things because there isn't going to be a cause of action that's plausibly going to link you to liability for an underlying cause such as the violation of the anti-terrorism act.

[00:15:31] Jeffrey Rosen: Kate several of the justices seemed skeptical of the idea that holding that 230 doesn't protect algorithms would be a modest holding and both Justice Kavanaugh and Justice Kagan in a dramatic exchange said that reading 230 in this way might break the internet because there'd just be an explosion of lawsuits every time an algorithm promoted arguably illegal conduct from defamation to other offensive videos. Tell us about those justices and whether or not you share their concerns.

[00:16:06] Kate Klonick: Yeah, I'm actually kind of mixed in this. Here's what I think, is essentially that if you allow there to be an opening in section 230, you bring down the shield a little. You create a couple of different reactions. On the one hand as Mary Anne points out there is the chance that you still have these high pleading standards. You still have to have some type of hook to be able to make your case and have a successful suit, right? It's not just that you lose the affirmative defense of section 230 and then the, the game is over, right? There is still a second hurdle procedurally, of course.

[00:16:38] Kate Klonick: And so, to a certain extent I'm sympathetic to that argument and I think that there is actually still a pretty high burden to succeeding against a motion to dismiss and that there's a pretty high burden bringing suit generally. Although I'm sure that there will be some type of cottage industry of some sort that springs up to sue kind of these giant deep pockets of tech companies. But what I think is actually kind of potentially the most damning thing is that tech companies regardless of whether more suits get files or whether anything else or maybe there's just, there is an increase in sues maybe it's minor. Who knows? Maybe they can observe it, who knows?

[00:17:18] Kate Klonick: But that in order to semi avoid this, they just start over censoring content and what I do know about, you know, tech companies and how they work and how they do content moderation in their private governance is that the decision to over censor content doesn't mean you do more and better review of content. And you look closer at things and you say, "Oh yes, this is a terrible tragedy that's about to unfold." And this, you all of a sudden have visibility into like a teenager, potentially being, becoming anorexic because they're watching too many eating disorder videos or someone about to commit suicide because they're being bullied.

[00:17:52] Kate Klonick: No, I don't think that that's more likely to happen. What I think is more likely to happen, is they're more likely to deploy automated tools that automatically remove any type of questionable content that they cut back on human review of content that is taken down. And that people just are over censored, and we have a very different, very over censored internet and there are tons of what we call false positives. Basically, the type of material that we don't want censored that is otherwise good or that might be shared for protest reasons for reasons that even, you know, Mary Anne would support that the, like that the, the things get shared, that I would support things get shared.

[00:18:31] Kate Klonick: Those get caught up like dolphins in the net. And I think that that's unfortunately kind of the grim reality of this argument and so that's kind of how I balance the,

that question, so to speak, maybe there won't be a huge uptick, maybe won't be the flood. But I think that even if there's a minor uptick, that should be protective a lot of these platforms will just essentially start to take down a lot more content.

[00:19:02] Jeffrey Rosen: Let's listen to Justice Kagan's quip when she raised the suggestion that she and her colleagues might be ill-equipped to reform section 230.

[00:19:09] Justice Elena Kagan: I could imagine a world where you write that none of this stuff gets protection and you know, every other industry has to internalize the costs of this conduct. Why is it that the tech industry gets the pass? A little bit unclear. On the other hand, I mean we're at court, we really don't know about these things. These are not the nine greatest experts on the internet. [laughs]

[00:19:38] Jeffrey Rosen: So, Mary Anne, you heard Justice Kagan says that she and her colleagues are not the nine greatest experts on the internet. And Lisa Blatt in the Google argument shared Kate's concern that were the court to perform section 230, there would be tremendous incentive to take down too much stuff and that that might, uh, break the internet. What's your response to that concern which was shared by several justices?

[00:20:06] Mary Anne Franks: I think that Justice Kagan's self-deprecating remark there was a nice note of judicial humility. But I also would point out that it is not as though the fact that they're not the most expert in any particular field has ever stop the court from delivering decisions that are going to affect people who are experts and against the advice and maybe understanding of many experts. And also, that if we're thinking about two different kinds of institutional competence that is, if the implication is not the Supreme Court, leave it to Congress. I think the very same reasons to be concerned about the Supreme Court's competence, you would want to raise in the context of Congress to. There is in both bodies, a kind of bias towards people who are older, to people who are as a demographic, just more homogeneous, right? So there are, there are lots of reasons to be worried about their technical competence there too. And a lot of reasons to be worried about the lack of sensitivity or maybe less sensitivity to the, the kinds of harms that we're talking about that are created by the status quo.

[00:21:15] Mary Anne Franks: In other words, if you are someone who is fairly well insulated from the kinds of harms that may flow from terrorism or from stalking or from non-consensual pornography or for conspiracy theories, you just may not be in a great position to properly adjudicate, to use that word very loosely here about the kind of balancing between the stuff that gets left up and the things that should be taken down. So, I think that we should be equally concerned about congress's ability to do right here, as much as the Supreme Court and would also emphasize too though that the Supreme Court's job is in some ways to tell us what a statute's proper interpretation is or at least some of the time it is.

[00:21:56] Mary Anne Franks: And so, I think that some guidance here might be useful because it is not, I think, as the, the side that supports Google would have it, it is not as though the current status quo is non-controversial or that it is ideal in the eyes of many people. So, when we get to the question of well, what will change? It's certainly true that things will have to change if in any sense, section 230 is narrowed, that means that tech companies now will have to

make different calculations than they have made before. Now one version of that is to say, "Well, they're just going to take down everything and the internet as we know it will grind to a halt."

[00:22:33] Mary Anne Franks: I think the first thing we would say is that well one would want to ask if the internet as it is right now shouldn't grind somewhat to a halt because it is causing such extraordinary damage, um, everything to being responsible or playing a, a huge role in genocide and murder, sexual assault, sexual exploitation, all of these things that we really should be paying attention to if we're going to calculate ideal states. So that's on the one hand, do we not want some kind of change? And then secondly, what would the flood of litigation or the uncertainty look like? I think again, we would want I think at the end of the day an industry that is responsible, that draws some kind of balance between its own profit interests.

[00:23:18] Mary Anne Franks: And this is something that I think also gets lost in these conversations that many of the drivers of this debate are corporations whose bottom line is fundamentally going to be profit, not safety, not, uh, good product products necessarily. They're not necessarily invested in democracy or truth or anything that we might want them to be invested in. They're primarily concerned about profits, do we want them to continue to have what is effectively a, a blank check to say be as reckless as you want, you will basically never get sued for it and you will keep reaping profits even if you, uh, engage in incredibly destructive behavior that has been shown time and time again to have terrible results.

[00:24:02] Mary Anne Franks: If we say that's the status quo and then the, the warnings are, "Oh no, that's going to change." I think one answer should be to say, "Well that's right that it should change because the current status quo is broken and it's very bad for vulnerable groups in particular." The other thing to be said is it's not as though we don't actually know what it looks like for an industry to think about these things carefully because in the examples that the Google lawyer was bringing up for instance about television broadcasting or booksellers and she was saying, "Well they make all kinds of choices that are like what Google did here." And she clearly thought that that was a strong point for her but the next step should have been to point out that those individuals, the bookseller or the television broadcaster, they can get sued they don't have section 230 immunity.

[00:24:50] Mary Anne Franks: So, if we're all acting in the same sort of way and there are people who are taking these chances on speech, well then why is it that the tech industry uniquely or users of tech uniquely get this kind of preemptive immunity that no one else gets? And I think especially about Dominion versus Fox going on right now, Fox News has always been potentially liable for something like a defamation suit that is coming out with Dominion. Has it meant that Fox has stopped its process? Does it mean that Fox News has been really nervous about putting out crazy ideas in front of the public even if it knows that it's lies?

[00:25:24] Mary Anne Franks: So, we've already seen. We know how industries can handle the threat of litigation and it doesn't necessarily mean that they're going to err on the side of taking things down. And I think the fox example in particular shows that no, in fact as long as they know their corporate bottom line is served by it, they will continue to do exactly as they have always done.

[00:25:43] Jeffrey Rosen: Kate, what are your thoughts about the potential for legislative action? At the moment there's a disagreement between conservatives who are more concerned about content discrimination against the conservative voices and progressives more concerned about hate speech and the under removal of offensive content. Is there any consensus you could imagine emerging in congress? And what is your position about what kind of legislative reforms make sense?

[00:26:16] Kate Klonick: Yeah, I actually take a slightly different interpretation of Kagan's quote about the nine justices. First of all I think it kind of was about this, the frustration with petitioner attorney who had been chasing his tail for 60 minutes to the embarrassment and frustration of the justices who were really trying to like clear the fog to figure out what the heck, the claim was that they were hearing and get some direct answers to their direct questions and just were frustrated to be perfectly honest. And I think that Kagan's question was a little bit of a direct plea just to, for those who weren't listening and had it in context. It was very much kind of a direct plea to the like, "No, you're here to tell us kind of the expert to tell us what to think on this stuff. [Laughs] We're just like nine guys in black robes." She's famous for her sense of humor also. So, I want to give her credit for that. [laughs]

[00:27:09] Kate Klonick: But, I think that there's also something that really deeper in her comment and that you're kind of tilting out in your question Jeff, which is that it's a question of judicial capacity. And she asked this directly in some of her follow-up questions, which was very much whether or not we deciding this why are we here asking this question about life for a statute. This was not a constitutional interpretation question. This was not something about the First Amendment. I really want to be clear. Those will be the NetChoice cases that are coming up in the court in a couple of months, hopefully. And I believe that they'll probably granted certain next term but this was a question of statutory interpretation and in this sense, Kagan had a very kind of predictable approach, I think both for her, for her general tenor as a justice and her legal scholarship to date, which is just that this is not the role of the court to be doing this. Congress should do this.

[00:28:07] Kate Klonick: Now to your point about what the heck can congress do, that's more of a political question. And to your observation we're seeing what political scientists would call a horseshoe effect, which is that the left has gone kind of all the way. The progressives on the left have gone in this way, i.e. "they're not taking down enough content. There's not enough censorship" to the other effect of, like, the right and, and hyper-conservatives…maybe even not hyper but just conservatives being on the other side of, "no, we have to have must carry provisions that are over censoring conservative viewpoints." That actually you see those two sides with completely different rationales and completely different outcomes both clamoring for reform of section 230.

[00:28:53] Kate Klonick: So on the surface of things, it looks like they're close together but in fact, the gap is very large. And when it comes to actually pulling something together to draft it for legislation, there is going to be almost notice, no agreement. And, I think that they're just completely opposed. I will make one very, slightly cynical point, which is that there is also I will point out not a ton of political incentive for any political party to resolve these issues, which is

that basically as long as it's a live issue to beat up on technology companies and to have this Boogeyman, they can raise money off of it they can vote on it and...and because congress is where it is politically and so little is moving, they have a get-out-of-jail free card.

[00:29:42] Kate Klonick: And so, I do think that actually like kind of darkly, there isn't going to be a resolution on this because it's not in and just from a pure reality standpoint and politicians best interest to try to resolve this issue and to really reach resolution.

[00:29:58] Jeffrey Rosen: You both teed up an issue in the NetChoice case. It's an important issue that Justice Clarence Thomas has raised about whether or not section 230 has been interpreted too broadly to allow discrimination against conservative voices and in particular, whether or not laws arising from Texas and Florida that would require the platforms to respect the First Amendment and treat them as common carriers about whether or not those laws should be upheld. The court as you said may consider that question next year. Mary Anne, tell us about Justice Thomas's argument and what its implications might be.

[00:30:40] Mary Anne Franks: From what I understand of Justice Thomas's, I don't know if it's so much an argument but is signaling that he thinks that there's something really important about the section 230 cases, what he has written on the subject and what he has indicated on this subject seems to really make an illusion between the two points that were just articulated before, the kind of there's not enough that the companies are doing to stop certain harmful kinds of content to the sudden ... These companies need to be required to leave certain content up.

[00:31:14] Mary Anne Franks: He does it almost in the same breath, right? So, there's a part of his dissatisfaction with Section 230 that sounds a lot like some of the progressive complaints of 230, which is there's harm involved, right? And he even cited *Herrick v. Grindr* to say there, it seems like in some situations, section 230 is being used far beyond anything that could have been anticipated in 1996. For instance, to leave or completely immunized from liability, a dating app that effectively stood by and did nothing while its app was used to harass and sexually stalk and exploit an individual. And then going straight from that into ... and big tech does something, exerts too much influence over whose voices get amplified and have been too quick to censor conservative voices.

[00:32:03] Mary Anne Franks: Now I think that those two things are very far apart but I think Justice Thomas is using them together. And it's very nerve-wracking to see someone do that because I do think they are in fact two separate things. So my concern is that the real target here and that potentially why the court took up this very weird case in Gonzalez was that it was trying to set up the field in some ways for this case that was going to come, that is almost inevitably going to come to the court about whether or not C2, uh, particularly has a problem because C2 once again is the provision that says you are immune from civil liability if you take things down that you find objectionable.

[00:32:41] Mary Anne Franks: And one way of phrasing the conservative complaint against section 230 is really it's a C2 complaint. But I would I guess I would add to this the, the strange thing about Justice Thomas's complaint is that C2 is not what really allows these companies to engage in this behavior as in taking down accounts, suspending certain figures. That's a backstop

of sorts but it's the First Amendment that allows these companies to take these things down. And this is why I'm, in some ways, so concerned about the use of the term censorship being applied to private companies and Twitter and Google when they take things down because it really does make it easy for, I think, conservatives to come and say, yes, we mean censorship not in a cultural sense.

[00:33:25] Mary Anne Franks: We mean legally that you are engaging in impermissible behavior which gets it completely backwards of course because it's the government that is restrained from prohibiting speech and from a bridging speech but private actors as Justice Kavanaugh sort of resoundingly said in a case called *Halleck* a few years ago, private actors have the liberty to ignore speech or to not assist associate with speech, make their own choices about what they want to promote.

[00:33:51] Mary Anne Franks: And so, I think the concern that I have about Justice Thomas's setting his sights on C2 and it's certainly what you see Florida and Texas trying to do, they're not just attacking section 230 C2, they're attacking the very First Amendment rights of private companies not to speak. They're attacking their rights against compelled speech as well as their rights of association and just this fundamental liberty that gives us all the right to say we don't want to associate with whatever that content is. Whether it's white supremacist content or something else that one finds objectionable.

[00:34:28] Jeffrey Rosen: Kate, Mary Anne has well-articulated the claim that requiring the companies to respect First Amendment values arguably violates their own First Amendment rights not to speak. Can you articulate Justice Thomas's counter view, which is that as common carriers, companies can be required to respect First Amendment values and therefore Florida and Texas are within their rights to impose a First Amendment standard? And to the degree that section 230 clashes with that vision, section 230 has constitutional difficulties.

[00:35:08] Kate Klonick: Can I? Yes. [laughs] Do I want to? Um, okay. [laughs] Yes, I think that no one is more ... I mean maybe Mary Anne is pretty surprised. I think that we, I think that Mary Anne and I have been doing this for a while. Mary Anne far longer than I have, but I think that it's a pretty surprising turn of events to have Justice Thomas in this role. It makes sure, this business is like 230 has made some strange bedfellows and a lot, especially in the last three or four years.

[00:35:42] Kate Klonick: Which by the way, we didn't really get to talk about it but, um, having, um, Justice Brown Jackson bring up the arguments and articulate the C2 arguments was actually very refreshing, um, because I think, uh, I think that frankly, Thomas has them quite muddled and at least from what I can tell and as Mary Ann just articulated and so it was actually kind of intellectually refreshing even though I disagree with it in a lot of ways to hear Brian Jackson's very sharp incisive kind of questioning about these things and her channeling some of, um, the work of Mary Anne and, and Daniel Citron over the last couple of years.

[00:36:18] Kate Klonick: But to your argument, I guess that the traditional, I think you're asking basically for the argument around common carriage and like why he sees it as not conflicting with First Amendment, which is essentially just a very oversimplified view of the

First Amendment, which is that everyone should get a chance to speak and there should be no kind of viewpoint discrimination of any kind, that it's viewpoint-based discrimination and that this is…that's just not, when we just have well-established First Amendment cases coming, in fact, coming out of Florida, the *Miami Herald v. Tornillo* case, which essentially said *that Miami Herald* does not have a must carry provision to carry a rebuttal for example as a newspaper to carry a rebuttal to an op-ed that someone else published.

[00:36:59] Kate Klonick: So, someone writes an OpEd saying don't vote for Jeff Rosen for Congress and Jeff Rosen wants to write a rebuttal saying do vote for me for Congress and they don't have...you don't have any type of right to the *Miami Herald* space because they're not a must carry provider. They are their own editorial voice and that has its own First Amendment. That is its own First Amendment protected right for them to curate their editorial space.

[00:37:23] Kate Klonick: I think there is almost no ... This has been happening for years and, when I first started in the space and I am much younger in this space, Mary Anne, I should say just because and I don't mean that as a slander, Mary Anne, that is as in acknowledging you're a giant in the field. But basically, that people were tiptoeing around the edges of describing platforms, speech platforms as having their own First Amendment rights. So yeah, maybe they do, maybe the court will see them as ... And I would say that like at least in the academic chatter I'm hearing in like litigation circles, like this is just seeming like it's going to bea pretty sure outcome I guess at this point. Maybe like seven or eight years.

[00:38:08] Kate Klonick: So, I think that essentially, and that's essentially what the 11th circuit said with the NetChoice case that they heard, um, that is the opposite of what the Fifth Circuit said. But, we can get into that. We can have this back when the NetChoice cases are granted search up and we can talk about that then. [laughs]

[00:38:26] Jeffrey Rosen: Well, it would be wonderful to have you both back and really look forward to that conversation. Mary Anne, you've mentioned Justice Jackson's questions about the original understanding of section 230, which is Kate says channels your work. Let's hear Justice Jackson.

[00:38:41] Justice Ketanji Brown-Jackson: When we look at 230C, it says protection for Good Samaritan blocking and screening of offensive material, suggesting that Congress was really trying to protect those internet platforms that were in good faith blocking and screening offensive material. Yet, if we take Justice Kagan's example, you're saying the protection extends to internet platforms that are promoting offensive material. So, it suggests to me that it is exactly the opposite of what Congress was trying to do in the statute.

[00:39:20] Jeffrey Rosen: Tell us more about Justice Jackson's argument, why you think she was correct and what its implications are.

[00:39:28] Mary Anne Franks: I was very gratified to hear Justice Jackson bring this up because it gets lost so often in these conversations about section 230 that what she is essentially stating and pointing to is we do know things about what this, what this law was meant to do and, and we know about not just the, the title of the act itself, which, which is some indication of what

was intended but also the cases that, that brought these members of Congress to feel that this intervention was necessary. And by highlighting this, I think she is putting us in the right track to say this is not a piece of the statute. This is a whole statute that was intended to do, something that is, is even more important today than it was in 1996.

[00:40:12] Mary Anne Franks: In short, provide an incentive for tech companies to do good. In 1996 already, there was a concern that there was going to be a flood of ... Essentially, the concern back then was pornography, that was the primary concern that people had, and that there wasn't going to be enough of an incentive on the part of these new burgeoning tech companies to try to regulate that or to restrict that. And now, we're now in 2023 and, and we can see that it's not just the question of, of whether you're worried about porn. It- it's a question of whether you're worried about insurrections and whether you're worried about terrorists getting to connect with each other and to plan their attacks together using online spaces.

[00:40:54] Mary Anne Franks: Worried about radicalization, worried about rampant misogyny and racism and it's spreading and being amplified by these tech companies that sometimes intentionally want this kind of chaos, right? If you think about a 4chan or for that matter, Parler, or Gab…that are intending to try to sow discord and intending to try to at least come up to the line of violence and in some cases, cross it. And then you have a lot of companies that say, "Well we're not intending to do that but we also don't spend a lot of time trying to stop it." And what I think her line of questioning was pointing out is that can't be, it can't be right that section 230 was intended to provide a kind of resistance to those market forces, that general tendency to not care about things that are not your problem, for us to interpret C1 in such a way that essentially tells you, you can do that. And you can profit from it, certainly not now that we have heard from whistleblowers and others that have confirmed what many people thought was the case, which is that these companies do know what's happening on their platforms. They do have easy ways of stopping it. They are literally choosing not to because it's less profitable to do so.

[00:42:04] Mary Anne Franks: And so by re-centering the question on that overall impact, I think Justice Jackson had it exactly right to say what is an interpretation of this particular aspect of the statute that would be, that would keep us from completely undermining what the rest of the statute says and what the entire purpose of the statute was intended to do going back to the Good Samaritan example that if you're trying to reward the good Samaritan, uh, giving the same, handing out the same benefit to the priest who passes by and the Levite and let's add a new character to the scenario. Mr Google comes by and starts shouting to the crowds, "Come and look at this guy lying by the road. Let's, let's all make him into a spectacle." So, the idea that you would give him as well the same benefit as the Good Samaritan, I think that's what she was trying to get us to see that that doesn't make any sense, that can't be a consistent way to read the statute.

[00:42:55] Jeffrey Rosen: Kate, I heard most of the other justices express a skepticism about broadening liability, because they were more focused on requiring a close connection between the speech and the violence. And in both the Google cases and the Twitter cases they suggested that you'd have to intend to and be likely to help a particular bad actor cause a particular act. And in that sense they were tracking the traditional First Amendment standard from *Brandenburg*,

which says that to be outside of First Amendment protection you have to intend and be likely to cause imminent lawless action. Uh, d- do you share that reading of the other justices? And, and how do you see the connection between, uh, the sort of imminence question and the apparent reluctance of the majority of the court to say that passive recommendations as several of the justices put it should count as, as promoting illegal activity?

[00:43:52] Kate Klonick: Yeah, I think that this was actually, um, something I, uh, you know ... I would say that every justice really had like kind of a little, like their own little kind of bone to pick about section 230 so to speak. Gorsuch picked up on the textuals argument. Kagan had this, let Congress decided this is under judicial issue. Sotomayor seemed much more concerned with the aiding and abetting and kind of the, the Nexus question that you're getting at, which she kind of, which is actually a much more linked much more relevant in the *Taamneh* case than it was in the *Gonzalez* case.

[00:44:27] Kate Klonick: Um, uh, so that was a little confusing, um, and then I think that you know, um, Coney Barrett played around with kind of the idea of user and what user means, um, and then, uh, Justice Jackson kind of picked up in his head in the C2 part of it. So it was kind of all over the map and I think the one thing that did seem to come up and I think that Mary Anne discussed this with Thomas's opening remarks in *Gonzalez* are opening questions to the petitioner was that he seemed to right off the bat acknowledged that there had to be some type of judgment and some type of legibility that was required based on data based on who you were based on whatever was going on that gave you a rice pilaf recipe.

[00:45:11] Kate Klonick: I if you were in Louisiana versus Uzbekistan for example, that it would have to take that you, you know, there's an infinite amount of stuff on the internet and so this is just a necessary part of a running a platform like this. It both enables this, all of this free speech and all of this access to information but it is functionally useless like if there's not some type of legibility or curation happening as part of it.

[00:45:38] Kate Klonick: So that was actually, I think all of them as you said kind of seem to express that and seem to kind of see that the attenuation between these bad acts were kind of maybe part of doing business as, um, some of these platforms and not necessarily, uh, directly related to the actions. That was a little bit refreshing to me although I do share sympathy for the plaintiff here and others. I think that there are, there is much more that these companies can be doing. I think the main thing to remember about section 230 is that essentially, it's trying to use tort reform as a means of kind of exacting change for what is essentially a speech platform and it was essentially a function, which does cause harms and does enable harms and scale them and do it but does all these other things.

[00:46:27] Kate Klonick: And so, the question Mary Anne said before like that she's careful about using censorship because we're talking about government but one of the things that, you know, that I think ... and this is a paper by Felix Wu Cardozo, which is excellent is he talks about the idea of collateral censorship. That if the government allows there to be all of these suits that arise for speech then essentially, the government is condoning some type of punishment for certain types of speech and therefore it is condoning kind of like, like it is like allowing the

censorship to take place or allowing this to happen. And that collateral censorship is just as damaging as direct censorship.

[00:47:08] Kate Klonick: And so, when you put, when you think of 230 is basically just some type of thing that's trying to prevent that collateral censorship. And you think about all of the other ways that in other aspects we allow reform to happen. There are so many other ways we can have reform for the bad things on the internet in my opinion. We can make it a regulated industry like with Congress. I mean that is actually something that we could do instead of trying to shoehorn this around 230. I just don't, it's just not an efficient way in my, in my opinion to get change on the internet. And it risks having a lot of bad repercussions at scale not just for you the United States, I also want to like really mention, of which like you know 7% of Facebook users in the world are in the United States.

[00:47:59] Kate Klonick: When we do this when we were talking about this type of thing, it's only going to impact Americans a very small percent. There are a lot of downstream effects that I don't think people are thinking about. And so, I felt like that was a little bit what was a glimmer in the back of the brains of kind of the justices that they were talking and presenting their arguments.

[00:48:22] Jeffrey Rosen: Well, let's talk now about the *Taamneh* case. Justice Barrett introduces the idea that if petitioners lost their case in Twitter and *Taamneh*, the court might not have to rule in Google and Gonzalez after all because in other words, there'd be a fine that there was no liability of the platforms for promoting terrorism when their algorithms promoted these terrorist videos and therefore there's no need to find out whether 230 applies. Mary Anne, the, the *Taamneh* cases were complicated. They involved a case called *Halberstadt* with a six-part test about whether or not there was liability for aiding and abetting a crime but the, the core of it was how close the connection had to be and whether the platforms had to know that the videos would influence a particular person to commit a particular bad act or not. Tell us what, what the nub of the relevance of the *Taamneh* case is and, and how it might affect the Google case or not.

[00:49:20] Mary Anne Franks: Well, with the caveat that, um, not being an anti-terrorism expert, my, my commentary about *Taamneh* is somewhat limited. But what I do think is the connecting point between the two cases is that as, as you mentioned what the court seems really worried about if we step back from the, the nuances of this case, which are very complicated. What the court is really asking is, is about an issue that has always been fraught, which is how do we figure out when certain parties are responsible for the actions of other parties, right? It's really a third-party liability question.

[00:49:55] Mary Anne Franks: And so, no one argues in this case in *Taamneh* that Twitter is, directly fighting alongside Isis or that they are directly involved. Although, there were some direct liability claims but, but really more of the sense that you knew what they were up to and you did not stop them from using your services to further that enterprise and you know that they were doing things that were going to kill people. How much responsibility do you have?

[00:50:20] Mary Anne Franks: This is not a question that has suddenly sprung up alongside the internet, the question of who is responsible for someone else's actions comes up when we're

talking about the, the owner of a hotel that is aware that there are young girls going in and out of certain hotel rooms after short periods of time, right, and seem to be accompanied by no family members. How much is that hotel owner responsible if we find out that the people who are renting those rooms are, are handing him an extra fee that isn't required by the cost of the room.

[00:50:52] Mary Anne Franks: We always have to ask those really complicated questions about aiding and abetting conspiracy. All of them raise those questions and they implicate First Amendment concerns because so often what this will turn on is what did you say? What did you hear? Who did you introduce someone to? What did you know about the person before you gave them the service? So, this has always been controversial. The connection I think here is that section 230 makes it even more complicated or I should back up and say, it actually makes it less complicated in a way that is troubling, that is if section 230 really does absolve these companies of responsibility, it is cutting short an analysis that is normally very nuanced.

[00:51:34] Mary Anne Franks: In other words, it's really saying if the lower courts in their primary view of most of the lower courts that Google is immune or that Twitter would be immune for what it does, either in terms of letting people have accounts or feeding people certain information. If you just say out of the gate, they're just not responsible no matter how much they knew, no matter how much harm flows from it then you have really short-circuited this conversation. I think part of why the court took up these two cases is because it's, it's worried about that question of liability and third-party liability and how 230 potentially displaces the very complicated and fine analysis that you need to try to figure out people's responsibility.

[00:52:18] Mary Anne Franks: Those are the questions we would be able to ask of a hotel owner or the, um, the seller of a gun as, as Clarence Thomas was or sorry, someone who actually hands over a gun but a brick and mortar salesperson, all those questions that we would get into are foreclosed if we think that section 230 just says you don't even get to ask the question. You can't even start this line of analysis. So, I think the deep and, and, and abiding concern between the cases is how much law section 230 really displacing and the more complex we see the aiding and abetting question is I, in my view at least the more it seems troubling that section 230 could simply remove us from that analysis altogether.

[00:52:59] Jeffrey Rosen: Kate, as Mary Anne says so well, the court is debating when parties are liable for the conduct of other parties, third party liability. I was struck by how many justices in the *Taamneh* case wanted to have specific knowledge of particular bad actors and the connection between the video and specific bad acts. And I did think of the *Brandenburg* standard, which requires an intent to and likelihood of, of imminent bad actions. What, were your thoughts about the debate about third party liability in *Taamneh* and its relationship to the Google case?

[00:53:41] Kate Klonick: So, I agree. I was struck by that too I think the court seemed to me to be very kind of focused on kind of, will give and Brad Johnson really just like kind of did this, like give us these categories. So, there's levels of knowledge and then this happened and this level of knowledge and then this. And so, I kind of feel like there was really a desire to get, like, a structure around all of this. I mean it is generally knowledge all of these ideas are very soft.

And so I do feel like and especially when you're talking about scale like this and a huge company, it's hard to kind of pin down what exactly that means. But I do think that, like, one of the things that came out to me just as kind of in both these cases in the relation between them.

[00:54:27] Kate Klonick: And one of the things that you heard the justices saying in both cases to petitioners and respondents was why are we here? Tell us what the claim is. What is your claim? What are you asking us to do? And the inability for...and this is partly council's fault but it's also just because I think these cases are a little out over their skis in terms of their complicatedness and the facts of them that they weren't great cases for the court to take. And I think I said this when they picked the cases, generally speaking internet law experts were surprised. And SCOTUS experts were surprised when these cases got selected for cert.

[00:55:16] Kate Klonick: No one was watching these cases. Everyone was concentrated on the NetChoice cases, the social media cases out of Florida and Texas. No one is watching these. Everyone scrambled to get caught up with the facts and what the questions presented were and how serious these cases were. And I remember consistently, we would all read through them and think: these are weird. These are not like straightforward cases. These are not obviously like that, like kind of, um ... They're not super sharp articulated questions.

[00:55:45] Kate Klonick: Um, and so one of the things that I honestly think and this is like, I was kind of ... I think that why there was the five alarm fire around *Gonzalez*, the Google case, and there was just, I think someone counted over 500,000 words of Amici filed in *Gonzalez,* alone was basically because there was like a pretty solid chance that this was going to be kind of some crazy off-the-wall move by the justices to kind of make use this as an excuse to kind of go off book and make some rulings about the internet. And then, the other option was they really kind of screwed up and they didn't look at the cases. They had a surface level kind of understanding on 230. And then as they dug in, they saw what the rest of us kind of saw when we dug in and were familiar with the area. And they thought, maybe these cases are not really what we thought they were.

[00:56:42] Kate Klonick: And I think, you know, to, to whatever extent that this is telling, I think also Justice Thomas coming out with the exact opposite of what you would expect Justice Thomas to say given his prior writings was pretty confirming of that in my opinion. Steve Vladeck, professor and a supreme court expert at the University of Texas has been saying for the last day listening to these that he really thinks that court should dismisses and providently granted both of these cases without deciding them because they would both just answer either question would just be this huge mess and complication that not necessarily, that the justices don't necessarily want to get into.

[00:57:30] Kate Klonick: And I'm sympathetic to that actually after watching the oral arguments. I wonder if that's not going to be the outcome but, I know that was a kind of a not super, it's a little bit off the grid kind of response about how I think these are going to get resolved. I think that that could might be a serious possibility and based on listening to these royal arguments.

[00:57:53] Jeffrey Rosen: Well, it's time for our own closing arguments or closing thoughts in this great discussion of these complicated but important cases. Mary Anne, the first thoughts are to you. Why should *We The People* listeners care about the *Googl*e and *Taamneh* cases? And why do you think it's important that the court should consider holding internet companies liable for content that their algorithms promote?

[00:58:19] Mary Anne Franks: I think whether we like it or not, everyone is going to be affected by the decisions in these cases because what these cases are really about, uh, is really how the internet plays such a role in our lives. How much of our lives are structured by it, how much our lives are vulnerable, uh, because of it how many choices that, that we think we're making independently are really being sort of constructed for us by the choices that tech companies make. So, everyone I think should care about the implications of this case because it's, of these cases because they're trying to answer this question of how much responsibility comes with that kind of intense involvement that the, the tech, the tech companies now have in all of our lives.

[00:59:04] Mary Anne Franks: What I think is, is true if you look at the number of people who have been harmed by those status quo, if you look at the interpretation of section 230 that has gained so much traction, the real point is about incentives, that if section 230 continues to be interpreted as essentially, do whatever you like, help, don't help, make profit off of not helping, encourage harm, advocate for it, give it more of a platform. If that is going to be the message to the tech industry, there is no real incentive on the part of that industry. Whether you're a big company, a small company, somewhere in between, there's no incentive for you to worry about harm to others or about worried, worrying about threats or worrying about democracy. You can simply pursue profit and hope that nothing ever catches up with you because the, the law protects you so much.

[00:59:55] Mary Anne Franks: And I think that if you are satisfied with that, if you think that for the last 20 odd years we've lived in the best of all possible worlds when it comes to technology, and that the worst thing that could happen would be for that to change, then obviously there's going to be one view that you would have of this case, which is to, to hope that Google and Twitter are protected. But if you think they could do better, if you think that we shouldn't have to rely on their goodwill or someone helming, let's say a platform like Twitter and having I don't know, anything like a positive democratic pro-free speech, pro anything perspective, if you would not rather throw in your lot with the whims of billionaires who happen to own some of these platforms and you would like there to be some kind of responsibility on the part of these platforms in case they do harm. In case they intentionally profit from harm then I think that is the perspective that would lead one to say let's hope that the court pulls back a little bit and says, there was an original purpose to the statute. It was intended to make it so that this industry doesn't become completely reckless. The interpretation has gotten away from that and we need to return it to that.

[01:01:03] Jeffrey Rosen: Kate, the last word in this excellent discussion is to you. Why are the Google and Twitter cases important and why do you think the court should hesitate to hold that companies are responsible for content that their algorithms promote?

[01:01:20] Kate Klonick: Yeah - I'm listening to Mary Anne's response. I, as always, I'm compelled about how much we actually agree on, that the internet is ever present, that these companies are ever present, that they have this absolute control over huge, huge wads of our lives and our livelihood. And I think that they absolutely do perpetuate harms or allow people to harm each other at a scale that was not available before.

[01:01:51] Kate Klonick: I think that where I disagree is that I just do not believe that tort liability for...And I just want to just strictly say for speech platform, not for dating sites, not for things like Grindr and not for things like that…you know, some of the other things that have gotten tort, that have fallen under section 230, I disagree with the court with some of these distinctions, but for speech platforms like Google and Twitter, I really do think that these are, they are cutting a very fine line between providing really beneficial products for democracy and society. And that if we hold them accountable under tort liability or create that type of risk to their business, that they will not do a better job, uh, uh, providing those services to us.

[01:02:42] Kate Klonick: But actually, it will have really negative effects on the amount of information we have access to, the amount of things that we're able to do online, the rise in new businesses that can challenge these behemoths that can't be sued out of existence. Lots of other types of benefits that are provided by these companies and so I agree that we need to find answers to all of these harms that are perpetuated on the internet by these big companies and frankly, by a lot of the small ones as Mary Anne pointed out Parler, Gab, 4chan, a lot of these places that are real hotbeds for extremism and incitement.

[01:03:20] Kate Klonick: But, I think that those have to come in mechanisms other than reforming section 230, which I just think is a very indirect way of getting at the problem and I think would probably, very probably, have negative effects for all the things that we like about the platforms and the services they provide.

[01:03:43] Jeffrey Rosen: Thank you so much Mary Anne Franks and Kate Klonick for a, a deep, rich and illuminating discussion of these important and complicated cases involving the future of the internet. Mary Anne, Kate, thank you so much for joining I look forward to having you back to discuss the NetChoice cases next year.

[01:04:01] Kate Klonick: Thank you.

[01:04:02] Mary Anne Franks: Thanks Jeff.

[01:04:05] Jeffrey Rosen: Mary Anne Franks is Professor of law at the University of Miami School of Law and Kate Klonick of St John's University is visiting scholar at the Rebooting Social Media Institute at Harvard University. Today's episode was produced by Lana Ulrich, Bill Pollock and Julia Redpath who was engineered by Greg Scheckler. Research was provided by Adam Jackman along with Sam Desai and Lana Ulrich.

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