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**BENJAMIN WITTES:** So welcome to the Brookings Institution. My name is Benjamin Wittes. I'm a senior fellow in governance studies. And thank you to all of you who braved the the difficult weather. And we few we plucky few who actually made it here in person. And to everybody who is joining us remotely because the weather scared you off. I just want to say welcome as well. But may the day comes when you you all hold your man, hoods and woman hoods cheap that you were not here with us if not on St Crispin's Day and whatever that on Wednesday. We're here to talk about a Section 230 online speech after Gonzalez and Taamneh. And we've got an incredible group to talk to about it. On my left is my colleague, Quinta Jurecic. To her left is Alex Abdo of the Knight Institute. And to his left is my other colleague, Tom Wheeler. This is a diverse set of expertise on the subject from rather different points of view, and we're going to get right into it. So I want to start, Quinta, by having you set up the conversation a little bit. What were. I think it's fair to say that most people saw, at least in the Internet community, saw the Gonzales and Tom decisions as something of a big letdown for those who are not intimately conversant in what is actually a technical set of subjects. What happened and where does the pair of decisions leave us?

**QUINTA JURECIC:** Yeah. Thanks, Ben. This is what.

**BENJAMIN WITTES:** I cannot tell. Can people here, Quinta?

**QUINTA JURECIC:** Hello? Hello.

**BENJAMIN WITTES:** Now we've got we need. We need audio on Quinta. Yeah. No, no, we're we're going to we're going to make sure the try Now.

**QUINTA JURECIC:** Testing, testing.

**BENJAMIN WITTES:** Out. Let me see you.

**QUINTA JURECIC:** Here we go. Here we go. Sorry about that. Everyone was being silenced. So the two the two cases that we mentioned are Gonzales versus Google and Twitter versus talk of the court handed and handed down decisions in both of them the other month. So just to give a super quick high level overview, I'll I'll just walk through them and then I'll be interested to know what thoughts Alex and Tom might have to add. So both cases have to do with the same set of facts. There were terrorist attacks carried out by people affiliated with ISIS and victims families, sued social media companies, essentially arguing that those companies should bear some liability under the Anti-Terrorism Act in the Justice against Sponsors of Terrorism Act for these attacks, for not doing anything to stop ISIS propaganda from being spread on their platforms. The causal link between ISIS propaganda appearing on these platforms and the attacks in question is not particularly clear. But that is the argument that's being made that there's there's some kind of connection there. So in these these cases came to the Supreme Court and each addressed a separate but related issue, even though they had a very similar fact pattern. So, Tom, their Twitter verse this time, they had to do with the substantive question of liability. Can Twitter be held liable under this pair of statutes, the HRA, and dressed up for the fact that, according to the petitioners, terrorist content was not only on their platform that they failed to take down, but it was also boosted by the algorithms on the platform. They're arguing that Twitter contributed to the application of this material in some way. Then. Gonzalez Again, it's the same substantive liability question. But the issue there was whether Section G30 prevented the platforms from facing any liability. So Section 230, as many of you probably know, is the statute that very, very, very high level shields platforms from liability for third party content on their services. And the argument made by the petitioners and Gonzalez was essentially, you know, that Google YouTube didn't have liability for the actual, you know, the videos themselves that were posted by ISIS affiliates. You know, that's third party content that's shielded. But because the algorithms on the platform boosted, amplified that content that that moved it out of the space of 230 protection and that the company could therefore be held liable. So what the court did was it essentially used time there to avoid having to decide? Gonzalez It looked at this question of substantive liability and said under these statutes, we do not think that the petitioners in either of these cases have alleged a harm that would make these platforms liable,

assuming that Section 230 was not in play. And because of that, that meant that they were able to look at Gonzalez and say, We're just going to set this aside. We're going to come back to it another day. And this is why we end up in this situation that that ban is referencing, where a lot of folks in sort of Internet law, technology policy community were expecting that Gonzalez was going to really change the way that the Internet worked by altering Section 230. Instead, the court basically punted. And so we're now in this sort of uncertain space where I think we were all really bracing for impact. And it turned out that nothing happened.

**BENJAMIN WITTES:** All right. So. First of all, do either of you guys have anything to add to that by way of background? If so, please do. If not, I will delve deeper before we move on. Go ahead.

**ALEX ABDO:** I'll just add one bit of background, which is that the free speech community thought that and more than just the free speech community, a lot of people thought that those cases were going to be a referendum on the scope of Section 230, and it's just worth putting it into a little bit of context. You know, for at least the last ten years, people on both sides of the political aisle have focused on Section 230 as the object of, you know, fixing the Internet. Some people think that the platforms moderate too much and they think that Section 230 gives them license to do so. Some people think that the platform is moderate too little and that the immunity that two thirds provides is a barrier to holding them accountable for their failure to moderate. And so both sides of the debate have seen Section 30 as a target. And we all kind of expected that this case would be a referendum on 230 and whether the Supreme Court was going to step in to cut back on some of the very broad interpretations to the law that the lower courts have given it, because they have, for the most part, shielded platforms from just about any kind of liability that they might face based on speech that their users post. And again, whether you think that's a good thing or a bad thing may depend on your on your priors, but 230 have been given that interpretation. And so that's why, you know, people were set up, you know, to think that the court was going to weigh in in a meaningful way. Then you said that people felt let down. I breathed a sigh of relief. I'm not sure if that's a thing.

**BENJAMIN WITTES:** Like that let down, not in the sense that they were hoping for. I think most most analysts were breathed a sigh of relief. But I, I think there was an expectation that something big was going to happen. And then there was like, oh, you know, well.

**TOM WHEELER:** Well, let me pick up on that. Yeah, okay. Because, I mean, Alex and Quinta done a great job describing the cases. The thing that and I agree with your anticipatory, something's going to happen. Okay? And then they punt in such a classic, Oh, how don't we decide this kind of manner? And when you go back and you think that there are about 2% of the cases that are appealed to the Supreme Court that are granted certiorari. And that it takes four justices to vote to grant cert. I was walking in saying, Oh, the third thing is and that there was this was not the kind of classic circuit conflict that Supremes frequently deal with that we'll talk about in a minute. And I was saying to myself, boy, there are at least four folks who want to make a statement. Because they've been watching what's been going on, going on out here. And not only did they not make a statement, but they ran the other way. And so you scratch your head well, and then and then they just what, a week ago in the denying cert on Reddit and the foster case, same thing, Hyde saying we're not going to take and I'm trying to figure out what was going on here.

**BENJAMIN WITTES:** Okay. So let's talk about that, because it seems to me there are two broad theories of this. And there's a million iterations of each theory. But I'm going to sketch out two broad theories and ask you, each starting with Tom and working back in this direction. Which one you buy and why, or whether you buy neither. So theory number one is the Supreme Court was itching to get its hands on 230 and maybe the conservatives were itching to get their hands on it because, you know, they by the the platforms are discriminating against conservatives theory and the liberals are eager to get their hands on 230 because, you know, maybe they're they want to prevent hate speech. But there's a kind of eagerness on the part of maybe a lot of justices to grab this issue and then they grab it and they get 50 amicus briefs and and they realize, oh, my God, this is really hard. And you can see the difficulty at oral argument where they are just lost. And Justice Kagan even at one point says, you know, we're not exactly the nine biggest experts on the

Internet here. And so they find a way to effectively get rid of the case using Tom as the vehicle for that. That's theory number one. Theory number two, which I will admit I am a subscriber to and I was before the oral argument was that Tom was always going to govern the outcome here. And I did say this before the oral argument that Tom is a 90 case, which it turned out to be, and Gonzalez is a really freakin hard case. And so when you have two cases that are paired, one of which will get nine votes and one of which is a really hard case, look to the easy case to resolve the hard case. And all of my friends, not in the Internet community, but in the anti terrorism world, all thought this was likely to happen. And so my question is, which theory is right? Is this a case where the Internet community looked at a thing and just didn't think hard about the terrorism law because they went straight to the Internet law? And so they saw a hard case where there is an easy case or is this case where the justices got cold feet?

**TOM WHEELER:** Well, far be it for me to disagree with Ben and his analysis.

**BENJAMIN WITTES:** No, no, I do I'm just saying I'm right.

**TOM WHEELER:** You're right. I believe believe me, that's that's just the suck up before I tell you where you're wrong. No, the the they could have granted cert on time period, which would have gone to your issue here. Okay. I go back to the existential question, I believe is why did they bring Gonzales up? I think that there was a demand. There was a feeling to want to do something to address this to 30 morass. But then when they discovered just how thick the molasses in the morass was. They punted.

**ALEX ABDO:** I don't think that your two theories are mutually exclusive, and I tend to believe a little bit of both of them. I think the justices did have buyer's remorse. I think Tom know was always going to govern, at least the first question, because the cases are tied. The plaintiffs had stipulated below that if, Tom, that came out the way that they ultimately did a finding of no liability, that the Gonzalez case would also go away. And so the court couldn't get to the question in Gonzalez without deciding against the plaintiffs, at least a little bit in times like that, siding with the plaintiffs at least a little bit. And Tom, which I didn't do, but I still would have expected some members of the court to say something about Gonzales. But they were very careful. They didn't say anything. It was a per curiam short opinion that said, we resolved, Tom, that in this way. So we don't need to touch the 230 questions and we'll leave them for another day. Somebody could have filed the concurrence saying, here are my tentative views on the subject. And we had good reason to believe that they might do that. Justice Thomas, in an entirely unrelated case, you know, filed a concurrence saying that he had questions about the breadth with which Section 230 immunity had been interpreted and you might have expected him to, you know, repeat those concerns. He asked the very first question, which is kind of the custom nowadays, given seniority. And his questions were immediately skeptical of the plaintiffs positions in Gonzales during the oral argument. He didn't ask a single question. That's the, you know, if memory serves, that was sympathetic to the concerns that he had set out in this concurrence a couple of years prior.

**BENJAMIN WITTES:** It was so a couple of years ago.

**ALEX ABDO:** Yeah, right, exactly. He was he was all right, I guess. But I think they had buyer's remorse. I think they realized that if they want to pare back on Section 230 protections, this is the wrong case in which to do so. And I think that's actually right. If you if you want to pare back on Section two three protections, I don't think you should do so in the context of algorithmic recommendations. You know, that is that that's not cutting with a scalpel that's, you know, cutting with a hammer. And if you undo section two thirds protections in this context, you're going to see a lot of the unintended consequences that provoked the 50 amicus briefs, you know, in the case. And I think, you know, you'd be better served by looking for a case where the dispute over two thirds protections is a little bit more combined and a little bit, you know, a little bit sharper than than they were in these cases.

**QUINTA JURECIC:** Yeah, I think I agree. I think that the role of Justice Thomas is really important here for all the reasons that we've that we've said, particularly because as as Alex said, you know, this is we were so used to oral arguments now where the questions that the justices ask, you know, if you saw them typed out on the page, you could probably guess with like a 75, 80% accuracy rate, the party of the president who appointed them. And this oral argument was so far away from that you would have had absolutely no idea, which I found particularly interesting, because as Alex says, you know, Justice Thomas had written this before or before, you know, really setting out his view that the statute was had been interpreted way too broadly by the lower courts. We had some indication in the way that the court had handled the natural gas litigation, which we're going to talk about in a little bit, that there was at least some agreement with a sort of interest in rolling back protections of some kind for social media platforms, let's say, among other members of the court. And so for me, it was really striking that the justices who I would have expected to potentially be sympathetic to those arguments on the on the right just did not seem to be on that wavelength during oral argument and really seemed to have engaged with the briefing, you know, were asking questions that spoke directly to the arguments that were made in this mountain of amicus briefs that was filed. And I'm focusing on the conservatives here not to be unfair, but because the liberals have just not spoken publicly about this issue. I think you certainly saw that Justice Jackson was very skeptical of the Broad Shield from liability for platforms at many points in oral argument. And she did. She sort of filed she filed a concurrence in Tamny that doesn't quite say, you know, I'd like to take another crack at section 30, but essentially says, you know, my my view here is confined to the specific facts of this case, which is kind of like a wink and a nod, you know, come back and try again. But overall, it just struck me that, you know, the sudden disinterest in the petitioner's argument and Gonzales was so closely tied to all of the concerns that were set out in the briefing that it seemed to me that, you know, whatever the intention was in dealing with it to address the issue. That there really was a certain degree of getting cold feet.

**QUINTA JURECIC:** If you can add one thing to that. So I think the tunnel decision was an enormous victory for free speech. And I and I it's important not to understate this, you know, what the stakes were in that case. The question was whether you could hold the platforms liable for their generalized knowledge that terrorists were using the platforms. And the theory was that they were aiding and abetting terrorists by allowing them to propagate their propaganda on, you know, on on the platforms. And if the court had come out the other way, I think we would see a lot of prophylactic censorship by the platforms of speech, by, you know, by terrorists or about terrorism. And I think that would have been, you know, dangerous in a democracy for free speech. I did not think the outcome was, as you know, was likely to be nine zero, at least based on the oral argument. You know, the last time terrorism and the First Amendment were before the Supreme Court, we had the Holder versus Humanitarian Law Project case, which I think to this day is still the only case in which the Supreme Court has held that a law survives strict scrutiny under the First Amendment, which is the highest form of scrutiny. You know, the standard quip about it is that it is strict, in theory fatal, in fact, because no law survives it. But this law did. And so a lot of people in the, you know, Free Speech Committee were concerned that the court was going to carve out another narrow exception to the First Amendment protections in the Tomlin case. And they you know, they didn't really actually address the First Amendment. They dealt with it entirely on statutory grounds, which was interesting in and of itself. But the oral argument did not give me hope that this was the decision we were going to give. There are a lot of justices who are skeptical of the position fully embraced.

**BENJAMIN WITTES:** So to be precise, I, I said before the oral argument that this was a 9-0 case, and I think that was deeply shaken by the oral arguments, but turned out to be correct. Okay. So let's talk about where this leaves us. Everybody expected the Supreme Court to do something and whether they felt let down or a sigh of relief, there was a sense of a big event that didn't happen. But a lot of the same people who were looking for the Supreme Court to upset the law of 230 are presumably not happy with the Supreme Court not only not doing it, but not addressing the question meaningfully at all. So where does this leave us? Does it a I mean, go to Congress for inaction or action on the subject? Does it go to the lower courts for until there's some or is it just

there kicking the can down the road and eventually the Supreme Court is going to have to address it?

**TOM WHEELER:** So I used to say back in the day when I was doing things in Congress, I don't count noses, I count votes because those counts are very difficult. But I don't think that there is a nose count or a vote count in the Congress to seriously take on two three. There is, I think, the opportunity to deal with components such as children's online safety and questions such as that. But that sets up the following reality that if there is not going to be a federal statute addressing the issues that have now been defined by 230. That that leaves to red states, blue states and nation states. How that question will be answered. And that getting harmony out of those out of the first two units, let alone adding the third unit in there, is only going to confuse this issue further and magnify the questions that will ultimately have to be dealt with either by Congress or the courts, or we're going to sit back here and let other nations make our rules for us.

**BENJAMIN WITTES:** So break break that down a little bit for us, because you've packed a lot into that. What are the differences between, broadly speaking, between the way red and blue states are going to regulate in this area? And what is what are the foreign state actors that are going to write our laws for us if we don't do it for ourselves?

**TOM WHEELER:** Well, I mean, let's I think the best example of red state, blue state is to jump out of 230 for a second and look at how privacy's being dealt with that that red states pass are passing privacy laws that are supported by the industry and significantly watered down in that effect. Blue states are not. It's the classic is Virginia, Connecticut and various states following that. And so we end up I think that is the topic we come to next, which is look what the red state of Florida and the red state of Texas did to deal with the question of online speech leaping our borders. The the European Union and the Digital Services Act, as well as rules that they put out in 2002. Trying to deal with these kinds of of of issues has, interestingly enough, come pretty close to what Alex was describing a minute ago of the court saying, well, you can't be you can't be held liable just because all of this is going on out there. You got to know is something is happening specifically before you can be held responsible for it. The UK having left the EU is moving with its own processes and trying to pass a bill right now, the online safety bill through through Parliament, which gives to a regulatory agency. Authority to oversee practices of platforms and to get to content through practices. Which is something that is also being tried in Texas. And and it seems to me that as we sit here and have interesting discussions like this, but no action by national leaders, that we invite our rules being made by others. And the classic example of that is the GDPR, the European privacy regulations, which have even been adopted in China with a little spin favoring the state. But that's a detail. But but the point of the matter is that in an interconnected world. There are consequences to us being unable to resolve this issue in the United States of America.

**ALEX ABDO:** I think we're likely to see more litigation that gets up to the Supreme Court on Section 230. I don't think the court will avoid the question forever. If I were, you know, a litigator interested in challenging the breadth of Section two thirds interpretation, I would just look for narrower cases. I also think we're likely to see litigation over applications of Section 230 that have not yet been addressed by the lower courts. And so, you know, one of the difficulties in getting the Supreme Court to take one of these cases is that, as you alluded to earlier, then there are relatively few circuit splits, right on Section 230. And that's normally, you know, if the percentage is only about 2% across the board for the Supreme Court taking a case, it's significantly higher in the context where there is a circuit split. It's one of the jobs the court thinks that it has to resolve splits between the circuits. So they're not that many circuit splits, but there are still some unresolved questions. So there are, you know, some cases that are now being litigated that argue that the platforms can be held liable when there are algorithmic decisions, have the result of discriminatory targeting, things like housing ads or employment ads. And but for Section 230, that conduct would likely violate the anti-discrimination laws. And the question in those cases is going to be, does Section 230 give the platforms a defense? Nonetheless, that's a kind of algorithmic amplification. It's a very different kind of amplification than what was taking place in Gonzalez And Taamneh, it's a kind that I personally think the platforms ought to be susceptible to liability for.

Whether the courts agree, I think, is an open question, and we'll see. But that's the kind of case that the court could weigh in on. And it wouldn't surprise me. But I absolutely agree with Tom's point that the rest of the world is lit is, you know, legislating. Even if we're not, I think the reality is we're going to see that foreign legislation, whether or not we legislate and, you know, there are going to be conflicts in law. The Internet is transnational, but each state is going to exercise what it thinks of as its sovereign authority to regulate within its borders. And that's going to result in some conflicts, whether we participate in the conflict or not. There are going to be conflicts. And, you know, the platforms already deal with this, right? They have limits on the kinds of information they can share with outside parties on the basis of the US privacy laws. We have some not the general kind that Europe now has, but we have the Electronic Communications Privacy Act, which says, you know, these companies can't share certain information about their users, but you have foreign governments demanding that they turn over certain information and they have to navigate these conflicts already. I think they're going to become more pronounced, especially if the U.S. steps in with with legislation. We may benefit from that or we may suffer from it, depending on your view of, you know, the legislation that is being enacted around the world. And depending on whether the platforms think it's in their interest to implement those laws across the board or instead to try to isolate their compliance to particular geographies. And so far, I think they have, at least with the right to be forgotten. At least Google has complied within geographies by using, you know, by limiting its enforcement of the right to be forgotten by IP address, which is a rough proxy for your location. Whether courts go along with that compromise in other contexts, I think remains to be seen. You know, Google is able to do so because the European court said if you limit your compliance in that way, that's consistent with the law. But other courts may not say that. Germany may say its courts may say, if you're going comply with our hate speech law, you have to take down the hate speech around the world, which would provoke a clear conflict.

**TOM WHEELER:** What about Utah?

**ALEX ABDO:** Well, yeah, that's a it's a great quote. You know, I don't know that it seems unlikely to me that Utah's courts are going to interpret their laws to apply outside the country, let alone outside the state. I think you'd have.

**TOM WHEELER:** You're making stuff available to residents of Utah. All they have to do to get the porn is use a a, you know, express VPN or whatever, you know, location obscuring program they want. You're not complying with Utah all you're creating a shell of apparent compliance.

**ALEX ABDO:** I mean, to be really technical about it, I think there would be a commerce Clause problem with Utah trying to enforce its law in a way that affected conduct outside of the state. This is what lawyers called the dormant commerce clause, which limits state power to regulate commerce outside the state.

**TOM WHEELER:** But is increasingly being challenged in the courts. Right.

**ALEX ABDO:** But if it's not Utah, it's the U.S.. And we're going to see conflicts and how we resolve those and how the companies resolve them when they're sometimes between a rock and a hard place, I think is really challenging. And I don't envy their lawyers the job of figuring out how to comply.

**BENJAMIN WITTES:** Quinta.

**QUINTA JURECIC:** Yeah, I think all that's right. I mean, the Utah example is really interesting and you can also look at the Montana Tech talk ban, for example. You can also look at the Texas legislation that is now up for the Supreme Court to decide whether they want to take a look at it or not. And I point to those examples because they're all instances of states attempting to regulate in ways that I personally don't agree with in the absence of some kind of federal legislation. But they're also examples of state legislation that is fundamentally impossible to put into practice. You know, you can see there are statistics about once this Utah Age gaming law goes into effect. VPN

downloads go up in the state of Utah. You know, people are using these systems to, you know, pretend that they're outside of Utah. So then, you know, you can go on social media without your parent's permission or something like that. In the case of the Montana Tik Tok ban, like I have seen nothing that indicates that the state has any plan about how to actually implement that other than just to kind of declare that Tik Tok is not allowed in Montana, But it's actually not clear how you would implement that just because of how IP addresses work in the Texas example. So Texas, the the law as I think we'll probably discuss, really sharply limited how major social media platforms could moderate content within the state of Texas and also impose certain transparency reporting requirements. And there was the law was put on hold essentially by courts and is on hold now. It's not enforced. But there was about, I want to say, like a two week window, if that's right, Alex, where the law was technically enforced and there was a lot of discussion ahead of time about, you know, what is metta, for example, going to do about Facebook and Instagram in the state of Texas? Are they going to create like a Texas only version of their services where.

**TOM WHEELER:** The Texas law says you can't.

**QUINTA JURECIC:** Which the Texas law says that you can do? Are they going to rebuild their entire platform from scratch for just those two weeks? Like what is going to happen? And what ended up happening, at least from the outside, is that they just didn't do anything and just didn't bother trying. And so I do wonder whether, you know, we we end up in this sort of weird space where just on the state level, legislatures are more and more trying to kind of assert their their power. I focus here on legislation coming out of red states, but I would certainly expect we would see this from blue states, too. But just because of the way that the Internet works are impossible to comply with and that perhaps nobody actually expects anyone to comply with, that there is this kind of performance like kayfabe aspect to the whole thing where, you know, Montana passes the TikTok ban and then TikTok sues and we'll see what happens, essentially. But so things are just on a fast track to the courts, essentially to get this worked out without anyone actually ever intending that these things will be put into practice.

**BENJAMIN WITTES:** All right. So before we move on to all three of the panelists have now teased that we're going to discuss naturally. So we're going to move on to Matt Trace. But before we do, I just want to ask, do any of you think there is any realistic probability or a possibility of, if not comprehensive, 230 reform? I don't want to sound too much like an immigration lawyer, but but significant piecemeal reform at this stage, or is this just a kind of Supreme Court civics lesson kind of thing where they say, well, if somebody wants to reform to 30, don't come to us to do it? That's a congressional exercise. Is there is there any realistic everybody in Congress says they don't like to throw. Alex, what do you think? Is there any serious chance of legislation?

**ALEX ABDO:** I mean, setting aside the political reality of how difficult it is to get a law passed right now, I just haven't seen a proposal that has garnered any consensus around it. And that's a real problem. You know, I think if you want to throw reform, you need to have a proposal that makes sense that's going to solve whatever problems you're trying to solve through 230 reform and avoids the challenges that supporters of to 34, you know, legitimately point to. And my own view is that I think there's room for two three reform. I don't think most of the problems at least that I see people focusing on with online speech. Are going to be solved by Section two three reform. At least if your concern is, you know, if you're for the kind of conservative who thinks the main problem is the platforms are moderating too much and need to be held to be common carriers so that they can't kick people off the platform and can't moderate speech, then what you want is that section to throw reform. You want a common carrier law. I don't think anybody federally has proposed that. Maybe I'm wrong. And if you're a progressive or a liberal, you know, your concern might be that the platforms are not moderating, moderating speech enough and they're not getting rid of disinformation and hate speech. Here, though, I think the problem is not section two thirds is the First Amendment. The First Amendment, by and large, protects that kind of speech, with narrow exceptions, exceptions for things like defamation and maybe certain kinds of misinformation about the time and location of voting in the media that lead up to an election. But relatively narrow categories of speech, not general disinformation, not covered disinformation, things like that. And I



don't see how any of the, you know, regulatory proposals are going to get around, you know, the First Amendment challenges to that kind of regulation. So I think it's unlikely because I don't think there's a real proposal out there. And I also don't know that it's worth as much attention as people have been giving, because I don't think we're going to solve most of the problems that people seem to want to solve by tinkering with with 230.

**BENJAMIN WITTES:** So do either of you disagree with that and see a plausible likelihood of congressional action?

**TOM WHEELER:** I think pathway, but, Quinta, I don't.

**QUINTA JURECIC:** Yeah, just one one quick thought, and I'm curious for your thoughts on a pathway because I don't know if I see one either. So two points I think that building on my Alex said, I wonder on the progressive side of the aisle how much Dobbs And the overturning Roe v Wade complicates the picture there, because as you say, there's, you know, people on the left who will sometimes argue for rolling back to 30 to allow greater liability for companies or, you know, push them to take down more stuff. Dobbs, Can you can see how it creates kind of a problem there. For example, there were a lot of conversations about the Texas SB eight, the law that's sort of become known as the abortion bounty law in a whether if you roll back to 30 protections, if, say, Google, you know, you put in reproductive care and you're in Texas, you search something and Google sends you a result for Planned Parenthood clinic, maybe one that's just across the Texas border. Whether somebody could sue Google for assisting, you know, you and in finding a place where you could get an abortion, which is illegal. So that I think, you know, often what you see in discussions around 230 is that people will kind of flip their positions depending on the content, that underlying content that's at issue. And I do think that any conversation about potential to throw reform people in the left or I would hope would need to grapple with that as a potential complication and that that may make things even more difficult. One one more point onto that. I would also worry that because there's so little agreement between left and right about what the end outcome that we would want would be. And because there's so much, frankly, confusion on both sides about, you know, what levers you need to pull to get to what outcome, I would be really worried that what you might end up with any kind of compromise legislation would just be a sort of very poorly defined mush. And we've seen what happens when you have a law rolling back to throw protections that is vaguely written and poorly defined. That's foster the 2018 legislation that carved out holes in Section 230 liability protection for certain content related to sex trafficking, broadly defined. We've seen that that created a huge amount of censorship, frankly, online of platforms that just didn't want to have anything to do with content that wasn't wasn't sex trafficking, but was just, you know, conversation about sex word, for example, and that that was a real problem. And so I would worry that any sort of high altitude compromise could potentially lead us down that path again.

**BENJAMIN WITTES:** Tom, you you promised us a pathway.

**TOM WHEELER:** And a let me take a slightly orthogonal approach here. I spent a couple of decades representing new technology companies in the Congress. The most. Section 230 has been described, as we all know, as the 26 words that created the Internet. It's a bad description. It's the 26 words that created the business model of the Internet. If I were one of the companies enjoying that high margin business model right now, looking at what's going on out here, I'd be scratching my head and saying, how can I get in front of this in order to protect what the Internet has given me, which is an unfettered playing field of creators and consumers. And to do that, I've got to clarify this question in a way that doesn't destroy my business. That's kind of point one. Point two is and I'm looking across the Atlantic and I'm seeing ideas such as notice and action, where if you have notice that there is something that is illegal. Then you have to take it down. Much like we already have to do with copyright law in this country. And I would be saying to myself, maybe the time is now to come in and preempt the debate with an industry position that says, Here's how we fix to 30 and don't harm my business at the same time.

**BENJAMIN WITTES:** Can I ask you a quick follow up on that? It seems to me you're describing something very similar to what Philip Morris did with FDA regulation, which is as the industry leader in Cigaretts. They said, please come regulate us because we're in a position to to handle any regulation. And boy, you know, our our competitors, this will lock in our place as the industry leader. And it kind of did. And so my question is, is it as cynical as Philip morris seeking FDA regulation of tobacco for the big tech companies to say, oh, please come regulate us?

**TOM WHEELER:** Well, what I want of the first reaction I've got is I love the way that big tech companies are always worrying about the small guys that they spend every day trying to kill. Okay. Oh, this is going to be so hard on those small competitors.

**BENJAMIN WITTES:** Oh Tom, it's not kill, it's acquire.

**TOM WHEELER:** Right. Same difference. And and and so my answer without we don't want to belabor this point, but I think that there are ways of designing around that.

**ALEX ABDO:** And you're seeing that in the EU, right? The there's an escalating set of obligations that applies depending on whether you're a very this is a technical term, a very large online platform or just a large online platform. And, you know, the responsibility shift and you could imagine something similar.

**BENJAMIN WITTES:** I think we call them Grande online, some online platforms.

**TOM WHEELER:** But at some point in time, somebody is going to say, I can't allow this uncertainty because the thing that businesses hate the most is uncertainty. I can't allow this uncertainty to exist. I do have this certainty in the EU, in the UK. Let's just bring that over. I know I can live with it. Let's just bring that over. Thank you.

**ALEX ABDO:** One nice thing about the regulation in the EU, no matter what you think of the merits of it, is that we're going to see some experimentation. The platforms are going to have to build infrastructure, right, to enforce, you know, whatever requirements are of those laws, and they'll have that infrastructure. It'll be harder for them to say, you know, in response to U.S. legislation that it's too burdensome for them to comply because they will have already built up this presumably very expensive infrastructure to comply, whether it works out or not. You know, I don't know. I mean, it may end up fundamentally changing the way people talk online, you know, which may open up new pathways to to regulating the tech companies. I don't know.

**BENJAMIN WITTES:** All right. Let's talk about that choice. So, Quinta, get us started. For those who have heard the word net choice but are now scratching their heads and saying, wait a minute, what? What is he talking about? What are the Texas and Florida laws and what are the nature of the challenges to them?

**QUINTA JURECIC:** So I've described the Texas law a little bit. So just for a refresher, it's essentially restricting how platforms in Texas can moderate content and also imposing certain transparency requirements about their moderation practices. The Florida law is pretty similar. It differs in some particular ways, like there's a particular focus on platforms, not removing the accounts of people running for political office, for example, whereas, say, the Texas law focuses more on saying that you can't have you can't discriminate between viewpoints in your moderation. But the basic idea is similar. It's saying, you know, here are ways that you might be moderating material now on your platform that you can't do. And again, as with the Texas law, there's also a big slate of transparency requirements. Both of these laws were challenged by that choice, which is a consortium of tech companies challenging them on First Amendment grounds, or that that's the posture that they're now before the Supreme Court on, essentially saying, you know, we when we talk about the First Amendment in social media platforms, usually colloquially we talk about it in terms of the users. Right. You know, people sometimes will say, you know, Twitter took my post down. Right, that my First Amendment rights are being violated. That's that's not right. But people

say it. In this case, though, we're focusing on the First Amendment rights of the platforms, which as a private entity, you know, they have their own expressive rights and they're essentially saying, you know, look, these state governments are trying to tell us what we can and can't say what we can and can't host, and that that's a First Amendment violation. They're also arguing that the transparency requirements are also a First Amendment violation insofar as it infringes on their editorial discretion and how they decide to run their platforms. So these cases, they're currently up before the Supreme Court. There is a circuit split between how the U.S. Court of Appeals for the Fifth Circuit in Texas and the U.S. Court of Appeals for the 11th Circuit in Florida handled these bills. The Fifth Circuit put its stamp of approval on the Texas legislature, and the 11th Circuit was a bit more circumspect, said that the moderation restrictions were not constitutional. And so now these cases are before the Supreme Court. The court has asked the U.S. solicitor general to weigh in and give the point of view of the U.S. government. And we're still waiting for that. And the clock is ticking for the end of the term. But I think it is it's fair to say it is widely expected that the court will grant search priority areas, agree to hear both these cases at some point and that we'll be able to see how the justices hash these questions out and perhaps give them another crack at some of the issues that they they dodged from and Gonzalez. Gonzalez, of course, is about to throw not the First Amendment, but it touches on similar issues insofar as it has to do with the ability of a platform to sort of use its own discretion and how it curates what's on its services.

**BENJAMIN WITTES:** All right. So, Alex, I'm going to put you on the spot here as as the First Amendment lawyer among us. If you change the name platform to think tank and you said, Oh, the think tank has, you know, 150 odd scholars, each of whom are entitled to post what they want on the Think Tanks website. Maybe you called the think tank the Brookings Institution. You could also call it if you wanted, you could call it lawfare, right? And say it has a bunch of contributors and its editor, Ben Wittes, what its contributors say what they want. But then contributor Quinta Jurecic wrote, writes an essay and sends it to Lawfare and she's a senior editor at Lawfare. She's really entitled to post what she wants, but she writes an essay about how all red haired people should be buried alive. And then.

**QUINTA JURECIC:** I've never written this, for the record.

**BENJAMIN WITTES:** Of a better sense. You know, I actually don't want to publish that outset. And I know you're entitled to say what you want. As a senior editor of Lawfare, there would not be a question that I get to make that decision or that Brookings gets to make that decision about its website. If I, as a senior fellow at Brookings, I'm entitled to publish what I want on the Brookings website decided that I wanted to run that Buried Alive essay on the law. I'm on the Brookings website. And so my question is, why is this even a little bit different?

**ALEX ABDO:** So let me preface it by saying that I think the constitutional answer at the end of the day as to whether a state can force the Brookings Institution or the platforms to host particular speech or to curate particular speeches is going to be the same, notwithstanding what I'm about to say, which is that the argument is that these are very different things that a newspaper or a think tank is very different than a social media platform. They have a different relationship to the people who post speech on the platform. They have a different manner of exercising the editorial judgment that they exercise. They have much looser control over the speech on their platforms. And so the argument that the states are making is that because of that different relationship, there's greater regulatory authority. And I'll say one positive thing about that, and then I'll say what I think the constitutional answer is. The positive thing is I think the states are right that there are differences between platforms and think tanks and platforms and newspapers, and those differences can matter. Sometimes they matter in terms of thinking through or analyzing the kind of burden that any particular government regulation would impose on the platforms exercise of editorial judgment. And they matter in terms of figuring out what the state interest is in imposing that kind of burden. And so in that way, it matters to the First Amendment analysis that these things are slightly different. And it has always mattered that the specific context of a government regulation, what the nature is of the speaker in the speech that is being regulated, I don't think it ultimately changes the First Amendment answer in this case. But I think it's important to point that out because there may be

more thoughtful regulation down the road where those differences do matter. And let me give, you know, people who might be initially skeptical of my point, a concrete example. The Supreme Court has extended the same kind of First Amendment protection to, you know, what First Amendment litigators call editorial judgment to parades. If you run a parade and this happened, you know, in a case in front of Supreme Court, if you if you run a parade, you decide who's in the parade, you decide the general message of it. Anti-Discrimination laws still apply to. You can't exclude people from your parade on the basis of things like race or gender or in some states sexual orientation. But you can't exclude specific messages as the parade organizer because that's your editorial judgment. And the Supreme Court has, as you know, upheld that First Amendment right. But there are still regulations of parades that apply that you couldn't ever imagine applying to the Brookings Institution. For example, if you want to run a parade, you need to go seek the city's permission. You have to get a permit and an ordinary, you know, First Amendment law. You would think of that as a prior restraint. And you can't imagine a law that would be constitutional, that would require the Brookings Institution to go and get a permit from, you know, the city of Washington, D.C., before it ran. You know, Quinta's proposed. It is a very strange article proposed. You can't imagine that kind of a lobbying constitution, but it is constitutional in the context of.

**BENJAMIN WITTES:** A public street to do it, if you wanted to, to have that argument, you know, shut down public streets in order to blanket them with the.

**ALEX ABDO:** Then you might need a permit. Right. And the point is that the context matters and the nature of the burden on the speech and the speaker is relevant to the First Amendment. Analysis. I like I said, I don't think it changes the outcome for the net choice cases. I think the must carry provisions in both of those states laws are unconstitutional. But I don't I also don't think that the states in the case are wrong to point out that there are differences between.

**BENJAMIN WITTES:** Okay. So let's throw from the from the ridiculous to the sublime. Let's leave aside Quinta's radical proposal for red haired people and talk about what is a concrete example of of an area where you think, for example, a state may have a legitimate regulation of a platform under the First Amendment, a content regulation of a platform.

**TOM WHEELER:** Give you an example.

**BENJAMIN WITTES:** Of that would not be reasonable to apply to the Brookings Institution.

**TOM WHEELER:** Let me give me an example that that that that has a long and sordid history about it. But first, I need to point out that that it is important to the three people, three other people on the panel with Quinta that her proposal was not for gray haired people.

**BENJAMIN WITTES:** Correct. Look, I chose red hair, you know.

**TOM WHEELER:** But yeah. It doesn't affect present company.

**QUINTA JURECIC:** I'm being defamed.

**TOM WHEELER:** So so you know, an example of what you're talking about is the Fairness Doctrine in which the Congress of the United States empowered the Federal Communications Commission to come up with a requirement that said that broadcasters who were the principal way of reaching the American people at the time had to provide both sides of an issue. Now, the fascinating thing is we need to look at it in the context that was 1949, just coming off the Second World War, watching how Hitler had used the new media, a period of the Red Scare. Oh, my God. We got to make sure that the commies don't take over this. And so and it went to the Supreme Court, interestingly, not for a couple of decades, went to the Supreme Court. And the Supreme Court said, yeah, that's not a violation of the First Amendment thinking. The kind of things I just mentioned about the need to protect democratic structures, activities, but then twisted itself to say because the airwaves are owned by the people and the people have a right to make sure that their

airwaves are not misused by skewing information to the to their fellow citizens. So there is an example of how government. Has and has been upheld. It was repealed during the Reagan administration but upheld Supreme Court scrutiny.

**BENJAMIN WITTES:** So, Alex, I want to go to audience questions, but I want to push you on a specific example of of this point that I think you have raised elsewhere, which is I think if you've tried to force the Brookings Institution or Lawfare to disclose a whole lot of transparency information about its contributors that would face prohibitive First Amendment problems under ACP membership list like theories. But you've argued, I think correct me if I'm wrong, that the transparency provisions of the Florida and Texas laws are plausible. First of all, am I remembering that right? And secondly, is that an example of this point that you were making that and that Tom just made with respect to the Fairness Doctrine, that there are actually important First Amendment differences between the Brookings Institution and Twitter?

**ALEX ABDO:** Yeah. So what we argued was that the transparency provisions should be subject to a different kind of analysis. And this is an example of where I think the differences may matter. So there's the corollary of the right to speak protected by the First Amendment is the right not to speak. And the Supreme Court has for a very long time, pretty consistently struck down laws that compel people to speak against their wishes. It's become known as the compelled speech doctrine. There's a Dorman.

**ALEX ABDO:** Speech.

**ALEX ABDO:** The Dorman speech clause. There's a a narrow but important exception to the way that doctrine applies, which is to compel disclosures in the commercial context. You can think of things like nutrition labels, where the Supreme Court has said that a slightly more lenient framework applies when a state is requiring a commercial actor to publish purely factual and uncontroversial information about their commercial offerings. And what we argued in that choice cases is that that framework should apply to at least some of the disclosure requirements in Florida and Texas as law applies. We didn't take the position that there, constitutional or not, because how you apply that framework or whether the law is satisfied, that framework turns on the kind of burden they impose on the platforms. And we didn't have much of a record on that burden. And it also turns on the interests that the state is trying to serve. And we had almost no record of Florida and Texas interests that they were trying to serve through their transparency laws. And you can imagine obvious ones that they didn't they didn't do much of a job defending, defending, you know, those aspects of the laws. But I do think there is room for states and for more importantly, probably Congress to require the platforms to disclose certain information about the ways in which they operate, probably the kinds of information that would be unconstitutional for a state or a Congress to require a newspaper to disclose.

**BENJAMIN WITTES:** All right. We are going to go to audience questions. If you have a question, please flag for me and state your question in the form of a question. And please remember that this question does not imply a long press urging speech. And I got you. And I will. In the meantime, start with a question from our audience who asks. Everything we've been talking about so far involves human produced third party content. But as we all know, that's so 2022. Our humans don't produce content anymore. They merely asked Chat GPT three to produce content. Does any of this have anything to do with the means by which we're going to produce content in the future? I will, whoever wants to take that.

**TOM WHEELER:** It's interesting that Senator Ron Wyden, who was one of the co-sponsors of Section 230 when he was in the House, has recently come out and said that he does not believe that it covers GPT. And and you could see that in the amicus brief that he filed in the 230 case and the famous footnote that was dropped that said, well, it's not all algorithms that get protected.

**ALEX ABDO:** I think I think Senator Wyden is probably right about that. As a statutory matter that Section 230 probably doesn't protect open AI from liability for what chat? He says. But if I were

Open AI's lawyers, I would make sure that we'd include a lot of disclaimers about what is being outputted and you shouldn't rely on this is not factual statements, etc., etc. to try to disclaim as much liability as possible to your First Amendment question. You know, I don't think we know how exactly the Supreme Court is going to analyze this. My instinct is that the court will say if there is something that is produced through a relationship between a human and a computer, I mean, a creative relationship between a human and a computer that, you know, that is going to be protected by the First Amendment because artists have for a very long time relied on, you know, things that we don't think of as having expressive agency to create artistic, artistic works. And it is, you know, a very new form of that. And it's kind of hard to wrap your mind around what exactly is going on inside these large language models. But it's not different in theory from, you know, Mandelbrot coming up with a beautiful fractal through the use of math that most people wouldn't understand and then creatively coloring it and publishing it and, you know, claiming that it's human expression.

**ALEX ABDO:** Sir.

**AUDIENCE MEMBER:** Yes. So the question is to do with the idea of sort of scaling regulation and the idea of taking posts or content that has a wide reach and treating that as a broadcast for publication for those platforms that are large enough to handle that kind of thing, so that it only imposes that burden when say, it's going to reach like 10,000 people. A hundred thousand people has an opportunity to really have an impact and a compelling state interest to have that regulated.

**ALEX ABDO:** So I think scaling regulatory responsibility is one way of limiting, you know, limiting this downside risk of giving an incumbents an advantage. Because, you know, Ben was absolutely right in his observation earlier that anytime you impose a cost on on this particular business, you're going to favor the people who have a lot of money. What I would like to see, you know, rather than efforts to directly regulate content, especially lawful content on the platforms, I'd like to see a speech environment where we don't have three companies with three CEOs who get to decide the vast majority of what can be said online and who can decide what is likely to be heard in online discourse. And to get there, I think you need policies that promote competition. And, you know, first, among that set of potential policies, I'd like to see an interoperability requirement, a requirement that large platforms make their services interoperable or at the very least, don't stand in the way of people who try to interoperate with their services so that users have genuine choice and are not locked into a small handful of platforms that benefit from a network effect that makes it hard to defend that benefit from the enormous masses of data that they've collected that make it more profitable for them to sell ads than for incumbents to do so.

**TOM WHEELER:** Yeah, So. Let me just pile on there for a second.

**BENJAMIN WITTES:** I want to follow up on that.

**TOM WHEELER:** But and verily. Right. Email works because it's interoperable, right? I got Outlook. Outlook. You've got Gmail. You know, Quinta is still using AOL.

**QUINTA JURECIC:** I don't know why.

**TOM WHEELER:** And they all and they all interoperate. That creates a competitive environment in in in email and and opportunities for new entrants as well as for consumers. Facebook and YouTube are not interoperable. They could be the exact same way. So that it's not the question that I have to go over to YouTube and copy the URL and move it over here and put it on my Facebook post. No, they could they could work together, but it doesn't work for the business model for either of them to do that. And so the key to getting to the point that I think you're talking about is where is there a broadcasting like analogy here? Is interoperability.

**BENJAMIN WITTES:** All right. So I want to ask you both a question about interoperability, because it sounds great, but it also assumes that the entities in question are doing the same thing. And one

of the thing about things about the social media sites is they're actually not doing the same thing, which is why when I got kicked off of Twitter, I could not simply go to Instagram and replicate my Twitter feed because, you know, Twitter, you can just use text and enter and Instagram. There kinda needs to be a picture or a video, preferably of oneself at the center of every post. I don't really take pictures of myself and YouTube. They're kind of has to be a video and Facebook has all this crazy functionality that the others don't have. And so my question is, doesn't interoperability assume some some common functionality? And if you regulate toward interoperability, are you regulating the the substance of what of what a post can and can't support?

**ALEX ABDO:** You don't have to it depends on the kind of interoperability or trying to mandate into existence. So to deal with this problem with the fact that the companies do fundamentally different things or, you know, or by and large do different things. The legislation could just require that the platforms make their protocol open so that people who want to interoperate with them can choose how exactly to interoperate.

**BENJAMIN WITTES:** You could call it open API.

**ALEX ABDO:** Yeah, that's great. Yes. And these are these are, you know, APIs for people who are not in the know, these application programming interfaces are basically the common language that developers can use to work between services. And, you know, folks may remember that maybe it's 20 years ago now back when instant messengers were first becoming prominent. You used to be able to aggregate your instant messaging services using, you know, a piece of software. The one that I remember using was called ICI. Q And I if anybody remembers that, I think it had an icon like a little flower, you know, that kind of very pleasingly colored when you connected and you could, you know, chat with folks on Google, you could chat with folks on AOL. I don't remember what the other ones were at the time, but you could aggregate them because they were open because they had open APIs. And you can imagine something similar for Instagram and Facebook and YouTube. Some developers are going to have to figure out what the piece of software looks like that makes sense of these different platforms. But you can imagine an interface that gives you access to all of your platforms in one way so that when you want to message, you know, your grandmother in Kentucky, you don't have to worry whether she's using your particular platform and whether you've signed on to the right one. You can just messenger and you know, this service that you've signed up for will figure out how to route it and do that work for you. I think that's what I would like to see.

**QUINTA JURECIC:** One point on that. I mean, it feels like on the one hand, where we are in this moment, where we're having all these interesting discussions about interoperability, you know, visions for what's often called federated social media platforms, platforms that aren't based on, you know, sort of one core structure. You can hop from one to another. On the other hand, we're also seeing, I think, on a lot of the big platforms kind of a crackdown. So Twitter recently set the pricing for their API quite prohibitively high for most academic researchers and is also asking for people to return data that they'd already received from the platform. Reddit, of course, is in the middle of a huge battle with its user base over their plan to massively increase pricing for their API, which will essentially likely cut off most, if not all, third party apps for the using the platform. So I think there's there's kind of this tussle that you see going on right now between the user bases of a lot of these platforms, which really wants that kind of capability. And the people who are running them day to day who are trying to wall them off. And as Tom is saying, you know, cement their place in the market.

**BENJAMIN WITTES:** Yeah, it's a really interesting point. But one of the other things that's going on concurrently. Is that Elon Musk made a decision to destroy Twitter and thus, without an interoperability requirement, created something of the proliferation of services, Alex, that you were describing. So you have posts, news and sport, a bowl and video, the growth of Mastodon stunted as it may be, and Blue Sky and all these other new entrants, all spurred by the fact that, you know, I think, you know, Twitter became a rotting cesspool all of a sudden. And so my question is, is the

regulatory requirement necessary or is there actually just more diversity in platform ownership and policies and sort of fluidity in the market than we under we believe at any given time?

**ALEX ABDO:** I think unfortunately, some kind of mandate will become necessary. I you know, as much as I love the experimentation that we're seeing now with things like Blue Sky and Mastodon, these alternative social media platforms, I don't think any of them is going to reach the scale, the size of the dominant the current dominant platforms at least anytime soon, just because of the network effect. It's easy for somebody who has been kicked off of one of these, you know, who is so ignominious that they've gotten kicked off of one or two sources.

**BENJAMIN WITTES:** I have my own Mastodon server now, if you know, it's called the Cool Table. If anybody wants a really cool Mastodon instance where, you know, just hit me up, we're we're open for business. I Yeah, but you're right. You are isolated from your conversations. Yeah.

**ALEX ABDO:** And you've been fought. You've been forced to, you know, look at these alternative platforms and most people, you know, are just still puttering happily along on the current ones. And it's hard to escape the clutches of the platforms who benefit from from the network effect. I will say I think the biggest challenge to interoperability and Daphne Keller at Stanford has written a lot about this is privacy. As soon as you open up these platforms and make the APIs accessible, they're going to be privacy risks. And, you know, I used to be primarily a privacy advocate, less of a free speech one. And I worry a lot about those privacy risks. And I think we would need we would need a comprehensive privacy law to go along with an interoperability mandate. I believe if we wanted to do a responsible, you know, responsibly. And so, you know, these are both big, big lists. We may not see it in the U.S. It may be that we get it through EU regulation. But I think we need both if going to have you there.

**BENJAMIN WITTES:** Sir.

**AUDIENCE MEMBER:** The library community is upset that basically individual parents can determine what gets censored at specific libraries. You know, Amanda Gorman poem can't be read in Miami or whatever the hell it is. All of the restrictions you're talking about have been national and state on social media. Is there anything that actually prevents like an individual city or whatever from restricting social media access to their specific micro area?

**BENJAMIN WITTES:** If you mean at their own like like a city library, the city is subject to First Amendment limitations, have the right to choose, you know, what their libraries make accessible to their populations. And I think there are First Amendment limits to a city's ability to say, take these books off the shelf. It's not my area of expertise. But I mean, setting those aside, I think cities can generally do what they want at the local level. That's different than a city saying within our jurisdiction, the public can't access this information. You know, that's, I think, almost always going to be unconstitutional. But if it's about what's available at the city run library, that's, you know, more subject to local control.

**TOM WHEELER:** In the days in the days when cable television was growing out of rural America into suburban and then urban America, cities in the franchising process would say, this is the channel you can carry. You can't carry that channel. And they would exercise that authority. It ended up being preempted as well and upheld as being unconstitutional. So the cities have exercised that kind of authority before, but it hasn't always been sustained.

**TOM WHEELER:** Ma'am, and then passed the mic forward to the gentleman in front of you.

**AUDIENCE MEMBER:** [Inaudible].

**TOM WHEELER:** Okay. Thank you. My name is Divya and I'm a Stanford student interning at CISA this summer. And my question for you has to do with legislation on a variety of different platforms. Do you see a world where there is platform specific legislation, specifically like thinking



about TikTok versus Snapchat, looking at Facebook Messenger versus an algorithmic feed based platform?

**BENJAMIN WITTES:** Who has thoughts on platform specific legislation.

**QUINTA JURECIC:** Yeah, I'll just say, I mean, I have been really struck by how the focus in Congress and on state legislatures has shifted toward tech talk. I do wonder if part of that is that everybody was kind of sitting back waiting for the Supreme Court to weigh in and. Gonzalez, and now that that is sort of the way that we might see a shift back toward 230 specifically. But it also strikes me that TikTok is a very compelling adversary politically in some ways. I think, frankly, a lot of that has to do with cultural and political anxieties over the fact that in many ways, the dominant social media platform right now is not a US based platform and in fact is based on our biggest competitor. And there are very legitimate concerns about access that the Chinese government might have to user data. But it does seem to me that the sort of locus of the conversation in the last, I don't know, six months, eight months has kind of moved from 230 Internet platforms generally to tick tock specifically. And I will be very interested to see whether that continues to have legs or not. I mean, that may depend on how the litigation in Montana, for example, since TikTok has sued Montana over its ban, whether or not the courts agree with the state legislature and the governor of Montana, that that's that that passes muster under the First Amendment. But it does seem to me like there's a real shift in interest there.

**ALEX ABDO:** I'd be shocked if the courts don't invalidate Montana's ban. It seems to me like a fairly straightforward First Amendment case. It may be that the federal government has a national security justification that it hasn't yet made public that would justify banning tech talk that would survive First Amendment scrutiny if they do. I don't think we've seen that yet. But it seems to me that that that if the federal government are considering a TikTok specific ban, you know, that they clear a pretty high hurdle, you know, in order to justify and I don't think we've seen that showing yet. I'm not this hypothetical couldn't make that showing. And it's not to say that there aren't concerns about TikTok. I think, you know, TikTok does collect a lot of private data. I think a lot of platforms collect a lot of private data. I think it's a concern is privacy. We should have a privacy law in this country rather than going after a single company that engages in this practice. You know, there's obviously a specific concern with Tik Tok because of its relationship to China and the possibility that China might get access to this data, You know, but China can get access to a lot of that data with or without TikTok. Right. It can buy a lot of that data from data aggregators whose practices are not currently regulated in a country as a general matter. So I think we're serious about that concern in particular. There are a lot of, you know, more effective routes, you know, that we should, you know, we should be pursuing. Maybe there's some other justification, though, that's specific to TikTok, again, that the intelligence community hasn't made public. And if there is, I think they should make that public right. If they want to ban TikTok more generally on platform specific regulation, I think it just depends on what the government justification is. If there's a particular harm that the government has a legitimate interest in regulating or in addressing. And that harm is, you know, specific to a platform or a kind of platform, then sure, you know, maybe the government could justify platform specific regulations, but I haven't seen that case made more generally in outside the context of Tik Tok.

**BENJAMIN WITTES:** Yeah, I would just say if you're I if you're Congress, I mean, TikTok raises some very specific issues, but the courts are going to look much more skeptically at regulations that seem to be targeted at a specific company, then they will generally applicable. Ah, rules, sir.

**AUDIENCE MEMBER:** Awesome. Hi. I was wondering if instead of focusing on section two liability, if the goal is to balance free speech with accountability, why not instead approach social media platforms as information fiduciaries like Professor Zittrain, a number of other scholars have proposed in which we treat the relationship between consumers and social media companies like doctors or lawyers and their patients.

**ALEX ABDO:** I mean, I think that, you know, Balkin's and the train proposal is a really interesting one. And I think if you're interested in it, you should read Dave Posner and Lina Khan's critique of it, which I think is also pretty good. I think there's still something to their proposal as a way of thinking about privacy. I'm not sure it would address all the privacy concerns that I have with the companies, in part because they have a fundamentally different relationship with their users than most fiduciaries have with their customers. You know, their relationship is, in its essence, extractive. It is about the exchange of goods there. The the exchange is this service for your data, which is generally not the case. And the other fiduciary context is not the case with doctors. It's not the case with your accountant or your lawyer. And that creates a kind of tension in trying to apply fiduciary law to the platforms. I'm not opposed to I just don't know that it would accomplish as much as we need it to. And I just, you know, would maybe prefer to see, you know, privacy law, know direct privacy law.

**TOM WHEELER:** Yeah. Let's go back just for a second. How many times have we heard that? Right. Yeah. So let's understand the context in which this kind of discussion is taking place. There is no privacy law meaningful, broad based digital privacy law. There is no updating of 20th, 19th and 20th century competition laws to deal with the reality. There are the issues that we've been talking about today that there are no meaningful rules insofar as content is concerned. So if you're talking about privacy, competition and truth and we have no basis anywhere and they all relate to each other, right? And we've got no federal rules on any of them. We're in a in a mess because the solution Alex just said the a really key thing. You can't just grab this one without dealing with this one. Right. Because they relate to each other. Sorry.

**BENJAMIN WITTES:** Sir.

**BENJAMIN WITTES:** I think you Ryan Wesley from the EU delegation and thank you for giving some visibility to our European regulations. And obviously I couldn't agree more than all this is very much interlinked migration. I guess that that goes mostly to Alex is if you look at our solution on the DS, a which is sometimes portrayed as a portrayed as a content moderation organization, which it is not, it is basically making sure that that these companies, that the blobs are the very large online platforms and the large ones have processes and procedures in place. Would you think that a similar solution and I've seen that in Congress, there have been bills introduced that are very, very close to the DSA would be compatible with the First Amendment protections or would you see any friction there?

**ALEX ABDO:** I think it's a good question. So you have to set aside one. One important difference, which is where European countries draw the line on protected expression versus where. But setting aside that, there's a you know, it's an important difference. But setting that aside, if you were to import the DSA but change hate speech to obscenity and, you know, and harassment to true threats or things like that or to that's actually not a good comparison. But if you were to update those definitions with that general framework of, you know, of having processes in place, be compatible with the First Amendment. I still would have some real concerns, mostly around prophylactic censorship. You know, so the the best comparator in the U.S., I think is the Digital Millennium Copyright Act, which Ben alluded to earlier, which creates a notice and takedown process for, you know, alleged copyright violations in the US. And the big critique of it that you see from the free speech community is that it makes it very easy for people who want to shut down conversations online to exploit the processes of the DMCA to do so. And you see, for example, I mean, here's a really interesting, you know, example. You see police officers who wear body cameras, play copyrighted music in the background alongside the recordings, so that if those videos are uploaded to YouTube, YouTube automatically identifies as a copyright violation of whatever the song is that's being played and takes it down. You know, that's not something that the drafters of the DMCA had in mind when they created this process. But there are real risks to putting those kinds of obligations on large intermediaries. That's not to say that we shouldn't do so. It's to say that you have to be really careful in how you do it. And I also, you know, I'm much more excited to see how the transparency provisions of the DMCA play out, because I think that's what's most sorely needed right now is a greater transparency into how the platforms operate and with

what effect on society and public discourse. And I think there are really hard questions about how you act, you know, draft transparency requirements and enforce them. And I think it's a good thing that we're seeing some experimentation and, you know, maybe we can improve on it and iterate.

**BENJAMIN WITTES:** I will just say on the DNCA, as somebody who posts a lot of stuff to YouTube of a public affairs nature, it's a nightmare. And, you know, it may have all kinds of protective copyright effects, but it has all kinds of speech inhibiting vectors, which you would never think of that are sometimes completely incidental and actually prevent things from being said. So we have time. What I want to do is collect the two additional questions, one from the gentleman there and one from the woman two rows ahead of him, and then just go down the row to give final thoughts in response to whichever questions you want.

**AUDIENCE MEMBER:** I'm just wondering what thoughts you might have about 303 creatives effect on the net choice cases.

**BENJAMIN WITTES:** Okay, just pass the mic ahead and whoever addresses that, please pause for a moment over saying what 303 creative is.

**AUDIENCE MEMBER:** Hi. I wanted to ask about I know we're talking about the role of U.S. as a rule taker because legislations are not being done here. And we've talked about them coming from the European Union. But what does that happen when there are legislations that are meant to regulate speech or whatever? And now. Are used in a way to actually really censor speech. So like we have India, we have Turkey, we have all over the place, Vietnam, whatever. So just, you know, thinking about the scope of that because in a way of another, we're also exporting this model. And then what happens when the legislation is done there, like the companies here have to decide, okay.

**BENJAMIN WITTES:** Tom, get us started.

**TOM WHEELER:** Well, I want to finish up responding to the gentleman from the EU and say thank you on behalf of all Americans, because you're doing what we're afraid of doing, which is try. You haven't got perfection. You're just putting the rules in place. You're going to be going through all kinds of judicial review and administrative review and all kinds of barriers and burdens to implementing things. But you're doing it. And that is something that we ought to recognize. Salute. Don't have to agree with everything you're doing, but thank God you're doing something.

**TOM WHEELER:** All right. Three cheers for the EU. Alex.

**ALEX ABDO:** I'll pick up the 303 creative question. So 303 creative is are cases pending in the Supreme Court now? It's a challenge to the application of an anti-discrimination law to a website designer who wants to refuse to make web wedding websites for same sex couples. And this is picking up on the Masterpiece Cakeshop case, which people may remember from a few years ago. And answering a question that the court kind of sidestepped and Masterpiece Cakeshop analyst at the expectation of what will happen. And I suppose your question is, if the court thinks about a website designer as engaged in core protected expression, does that give us insight into how the court will think of the platforms when, if and when the NatWest cases reach the Supreme Court? I take that to be the kind of upshot of your question Will they see them as being in a similar place? And I guess my instinct is that, no, I, I don't see I think the court is likely to side with the website designer and through or through creative. I don't think we know. And, you know, I think it might be different if Kennedy were still in the court, but I think they're likely to side with the designer. But I think there are reasons to think that the court might not go along with the platforms entirely. And in that choice cases and you see this in Thomas's opinion in the Tomana case, where, you know, he kind of went out of his way to characterize the platforms as having almost no concern with the content that was being published on their sites as a way of, you know, buttressing his argument that the platforms were not aiding and abetting ISIS because they didn't even know what the content was on their site and they had only this arm's length relationship to it, which seems kind of

teeing up a claim that what they're doing is not editorial in nature, but more like the relationship of a pipe owner to the water going through it. Right. They're just you know, they're just displaying widgets. They don't care what the widgets are, so they don't have it. So if anything, you know, I think that, Tom, the decision maybe gives us a little bit more insight into how at least Thomas is thinking about the platforms. And in that choice cases. Even then, though, I think at the end of the day they're going to side with the platforms on the main question and then that choice case. But that's my effort at answering the threat through creative question.

**BENJAMIN WITTES:** Quinta, you get the last word.

**QUINTA JURECIC:** Sure. I'll speak to the last question. So the question was about the how we think about the role of authoritarian governments or governments that are more interested in repressing speech and interacting with otherwise possible platforms. I think this is a hugely important issue. You did see it come up in Tom, and in the argument. There was a point where it was suggested, I believe, by the assistant solicitor general, that perhaps if the government of Turkey alerted Twitter to the fact that there was, you know, a potential post by someone affiliated with a terrorist organization on its platform, that would count as knowledge if there was later a terrorist attack. For the purposes of of the statute in question. And that, I think, sent chills down a lot of people's spines because, of course, the government of Turkey has become increasingly notorious for its willingness to jail journalists for all kinds of speech to be taken down. We recently saw in the run up to the Turkish election. Twitter under Musk took down a bunch of content in Turkey that was critical of the government. And so I think that that that moment in time is a really good demonstration of why I think the the nine zero opinion the other way really helped us dodge a bullet and how important it is to think about, you know, how could this be used by a government that wants to shut something down? I will also say, I think that the the Musk example points to how crucial it is and how dependent we are on the willingness of these big private platforms to fight. And what we have seen from Twitter pre mosque, which was not perfect by any means on Twitter under mosque is that they just put way less energy and resources into fighting these kinds of requests there. The Twitter's legal department used to really go to the mat a lot of times on fighting these things. They were in a protracted battle with the Indian government and the ruling party, the BJP, over requests to take down material. And we just don't see that anymore. Now, the fact that we are so dependent on private platforms to be the ones that are kind of taking the stand against these requests is, you know, raises a lot of questions in its own. Way. But I do think that the comparison from now to, you know, to a previous iteration of Twitter is really striking and really concerning in that respect.

**BENJAMIN WITTES:** We are going to leave it there. Please join me in thanking our panel.