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MCLE

To speak or not to speak: Supreme Court must decide if hosting another's speech is the same as posting it oneself

By Mitchell Keiter

Stanford Law students who shouted down Judge Kyle Duncan last year contended they were "exercising our 1st Amendment rights." Is that correct? Does subtracting speech from public debate deserve the same protection as adding it?

This question is central to two cases the Supreme Court will decide this week. The Eleventh Circuit, rejecting a Florida law that bars social media platforms from deleting speech based on viewpoint, held that subtracting speech is itself protected speech: "[R]emoving … posts constitute[s] 'speech' within the meaning of the *First Amendment." NetChoice, LLC v. Attorney General, Florid*a, 34 F.4th 1196, 1223 (11th Cir. 2022). By contrast, in upholding a Texas analogue, the Fifth Circuit distinguished *expressing* ideas from *suppressing* them: "We reject the Platforms' attempt to extract a free wheeling censorship right from the Constitution's free speech guarantee . …Their censorship is not speech." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 494 (5th Cir. 2022).

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The competing First Amendment imperatives

The *NetChoice* cases present competing imperatives. The First Amendment has both a public and private function: it is a means and an end. *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023). The end is individuals' self-determination as to which ideas they will embrace and express (*Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)), and forcing an unwilling speaker to advance a message infringes personal conscience. As Thomas Jefferson famously declared, "To compel a man to furnish contributions of money for the propogations of opinions which he disbelieves and abhors is sinful and tyrannical."

Free speech's *means* are the robust exchanges of ideas needed to discover truth and optimal policy. In John Milton's formulation, "Let [Truth] and Falsehood grapple; whoever knew Truth put to the worse in a free and open encounter?"

Both speech and silence can further the private function, but the public function favors more speech, not less. "The remedy for speech that is false is speech that is true." *U.S. v. Alvarez*, 567 U.S. 709, 727 (2012). That is why government may engage in public debate by speaking but not by silencing others. See also *Associated Press v. United States*, 326 U.S. 1, 20 (1945): "Freedom to publish is guaranteed by the Constitution, but freedom to … keep others from publishing is not."

The *NetChoice* cases reveal the tension between the two imperatives. Platforms like Facebook, Twitter, and YouTube contend their autonomy is infringed when they are forced to display content they prefer to delete. Florida and Texas contend the public debate is stunted when corporate gatekeepers decide which ideas to permit and which to forbid. How should the Court rule?

The platforms cite cases where the infringement on speaker autonomy outweighed any public benefit. In *Wooley v. Maynard*, 430 U.S. 705 (1977), New Hampshire drivers needed to display a license plate proclaiming "Live Free or Die" as a condition for driving. In *NIFLA v. Beccera*, 585 U.S. 755 (2018), California required pro-life pregnancy clinics to post notices describing state abortion subsidies. And *Elenis* concerned whether Colorado could compel a website designer to promote same-sex weddings. As these cases concluded speakers could not be forced to present a message against their will, the platforms contend they too may not be forced to "disseminate" speech they oppose.

Other cases favored the public function. *Marsh v. Alabama*, 326 U.S. 501 (1946), protected the right to speak on the streets of a company-owned town. The public imperative was paramount, as citizens "must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed." Similarly, petitioners had a right to seek signatures at a privately-owned shopping mall, which the California Supreme Court had deemed an "essential and invaluable forum" for exchanging ideas. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899 (1979).

Hosting vs. Posting: Whose speech is it anyway?

PruneYard distinguished *Wooley*, on grounds that could apply in *NetChoice*. Unlike the *Wooley* vehicle, both the *PruneYard* mall and the platforms are open to the public. Observers thus would not attribute the message to the mall (or platform) as they would link it to the driver. And in *Wooley*, the law prescribed a specific governmental message ("Live Free or Die"), but *PruneYard* and *NetChoice* concern users' own messages.

The platforms seek to distinguish *PruneYard* by asserting "the owner of the shopping center did not claim that the center was engaging in any expressive activity of its own." But the right to not express a message extends to both those who wish to say something else and those who wish to say nothing at all. The *Wooley* driver was not engaging in his own expressive activity but still could be free from compelled speech.

The salient question is whether *hosting* another's speech is tantamount to *posting* it oneself. The mall in PruneYard argued it was, contending that if the owner "could not be forced to sign a petition condemning Syria, … he cannot be required to devote his private property to [petitioners' speech]." The Court unanimously rejected that claim.

The Court recently confirmed that owning property where speech occurs is not the same as speaking. When Boston allowed private groups to fly their own flags on a municipal flagpole, the flags, and thus the speech, belonged to those groups even though the flagpole belonged to the City. *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). The City could express its own speech with its own flags, just as the mall or platforms can speak for themselves. So a mall could choose which events to include on its daily schedule and which to exclude. But if a tenant store posted a message on its wall, that speech would belong to the store, not the entire mall. The Court may conclude a Facebook user's post on her "wall" is her speech, not Facebook's.

Newspapers and Section 230

The platforms pursue a newspaper analogy: "Just as Florida may not tell the New York Times what opinion pieces to publish … it may not tell Facebook and YouTube what content to disseminate." But the platforms told the Ninth Circuit they were unlike the New York Times: "Section 230 forbids … treat[ing] Google as the 'publisher or speaker' of content posted by others." Ans. Br. of Appellee 11, *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), rev'd on other grounds by *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (per curiam) (Apr. 5, 2019) Dkt. 27.

Newspapers are liable for their content, so when the platforms were sued for posting content that facilitated an ISIS terror attack (*Twitter v. Taamneh*, 598 U.S. 471 (2023)), they asserted they played only a "passive" role as they "transmit most content without inspecting it." (*Paxton* indicated the proportion is above 99 percent.) The Court agreed and analogized their function to cell service providers, which are not liable for content they host.

The platforms ask to be treated like newspapers so they can freely select or reject speech, but unlike newspapers so they can avoid responsibility for those selections. The Court has no reason to indulge them.

WWBFD (What Would Ben Franklin Do?)

The platforms repeatedly cite the observation that Benjamin Franklin's newspaper was not a "stagecoach, with seats for everyone." *MCAC v. Halleck*, 587 U.S. 802, 813 (2019). Franklin explained that his subscribers paid him to provide desirable content, and it would breach that promise to provide "Libelling and Personal Abuse." Benjamin Franklin, *Apology for Printers*, Pa. Gazette, June 10, 1731. But Franklin balanced the competing imperatives in a way that deserves emulation today.

Like Milton, Franklin celebrated speech's public function. He insisted that "when Men differ in Opinion, both Sides ought equally to [be] heard by the Publick," because "when Truth and Error have fair play, the former is always an overmatch for the latter." He squarely rejected the kind of bottleneck imposed by Jack Dorsey and Mark Zuckerberg in recent years. "If Printers ought not to print any Thing but what they approve … an End would thereby be put to Free Writing, and the World would afterwards have nothing to read but what happen'd to be the Opinions of Printers." And such suppression was not needed to protect autonomy, because it is "unreasonable to imagine Printers approve of every thing they print . . . since in the way of their Business they print such great variety of things opposite and contradictory."

Franklin's solution was to "separately" publish material unworthy of inclusion in his own paper. This served the public function by enabling consideration of other opinions—and his own private interest in avoiding reputational harm and legal liability. Today's platforms can achieve these competing goals by letting subscribers speak, providing a disclaimer, and invoking section 230 when needed.

Publishing is easier today. No longer does one need a printing press; writers can self-publish from their own desktop, which alters the balance between the competing imperatives. The Court favored autonomy in *Elenis*, so the website designer could not be forced to compose and express a message with which she disagreed. But a different balance should be struck if a customer leased desktop publishing software (or a Twitter page) from a company and used it herself to create speech the company disliked.

The *Southworth* model

The best model for optimizing the two functions may be *Board of Regents v. Southworth*, 529 U.S. 217 (2000). The University of Wisconsin imposed fees on students to subsidize organizations engaged in political speech, and some students objected. Citing Jefferson's dictum, the Seventh Circuit found the compelled support unconstitutional. The Supreme Court unanimously reversed, but insisted the school disburse funds on a viewpoint-neutral basis. The University could "require[] its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, [but] may not prefer some viewpoints to others." The Court essentially found the students were not funding particular ideas but their *exchange* in a forum for "open discussion" — from which everyone could benefit.

Viewpoint-neutrality can maximize the public benefits of speech while minimizing its private costs. The Court should uphold the challenged statutes.

Mitchell Keiter *a certified appellate law specialist at Keiter Appellate Law, filed an amicus brief in support of the Texas and Florida laws. He also is the author of "Forum for the Common Man: How* Robins v. Pruneyard *Integrated the Marketplace of Ideas With the Marketplace of Goods," California Supreme Court Historical Review, (Spring/Summer 2024) 10.*