



FREE SPEECH IN THE DIGITAL AGE: CONSTITUTIONAL BATTLES OVER SOCIAL MEDIA CONTENT MODERATION

Shreyas Sudhakaran *

ABSTRACT

*This article studies the constitutional challenges relating to social media content moderation laws. It emphasizes recent legislation in Texas and Florida and analyses key Supreme Court cases such as *Murthy v Missouri* and *NetChoice LLC v Paxton*. The research aims to explore the legal reasoning and area behind these laws, the conflicting circuit court rulings, and the implications of the First Amendment. The paper evolves around the approach of the Supreme Court in dealing with these cases and discusses the potential outcomes while considering their consequences on platform governance and online speech. It also examines precedents, to highlight the task of integrating modern technology with traditional constitutional principles. The study also discusses the need to balance the protection of free speech, respecting the rights of private enterprises, and ensuring public safety. By exploring these multifaceted issues, this article furnishes valuable insights into the challenges of regulating the new “public square” and the constantly ripening nature of free speech jurisprudence.*

Keywords: Free Speech, Constitutional Challenges, Content Moderation.

INTRODUCTION

In the digital age, social media has taken over the world and has established itself as the new “public square” by diffusing information, hosting intellectual events and debates, and shaping public opinions on a large scale never seen before. The size and importance of Such platforms entail obligations and certainly some controversies. The question of who regulates the content of these platforms now seems to be one of the most hotly debated and intricate problems faced by civil society, the judiciary and democratic structures around the world.

*BBA LLB, FIRST YEAR, SYMBIOSIS LAW SCHOOL, HYDERABAD.

With time, social media companies' prominence and their reach increased which attracted criticism towards their content moderation. According to some scholars, such practices tend to be opaque, erratic, and perhaps biased against some political patterns. Such sentiments have demanded regulation, especially from conservative politicians whose perspectives are said to be the ones predominantly affected. Consequently, a number of states have enacted legislation to limit social media content moderation in response to that attitude, setting off a series of constitutional skyscrapers.¹

THE LEGISLATIVE LANDSCAPE²

Florida enacted one of its laws referred to as "Stop Social Media Censorship Act", which is also known as the act to stop social media censorship in the year 2021. This law was initiated by Ron DeSantis and its primary aim was to protect anti-demos media sites as well as media houses and political aspirants. Key provisions of the law include:

1. Forbidding any of the candidates running for office to be banned from social media platforms
2. Private censorship of statewide candidates could cost social media platforms \$250,000 a day, according to the Florida Election Commission.
3. This also holds for those who promote content about them and also promotes clear standards for content moderation.
4. Finally, disabling all "Post- Prioritization" and "Shadow Banning" algorithms for political aspirants.

Texas passed Senate Bill 12 which is strikingly similar to the law in Florida. The Texas law states the following:

1. Prohibits social media services with a subscribing base of over fifty million active users from restricting or censoring users based on individual opinions.

¹ Paradigm Press, 'Privacy, Free Speech and Content Moderation: A Literature Review and Constitutional Framework Analysis' <<https://www.paradigmpress.org/ist/article/view/303/263>>

² PerkinsCoie <[\[www.jlrjs.com\]\(http://www.jlrjs.com\)](https://perkinscoie.com/insights/update/supreme-court-finds-first-amendment-barriers-tx-and-fl-social-media-regulation#:~:text=Texas%20and%20Florida's%20laws%20broadly,removing%20or%20altering%20users'%20posts.></p></div><div data-bbox=)

2. Requires platforms to explain the policies of content management and moderation that they hold.
3. The users who feel that their content has been taken down incorrectly should be able to complain through a complaint system that the platforms should make available.
4. Enabling individuals to file lawsuits against the platforms based on state laws. Both bills constitute remarkable attempts by state politicians to regulate how social media companies moderate the content on their platforms. The bills show that some legislators are increasingly concerned that these platforms have gained an excessive ability to control what is said on the public forum and as such may be detrimental to some political views.

CONSTITUTIONAL CHALLENGES

The Florida and Texas laws quickly faced legal challenges from trade associations representing social media companies, primarily on First Amendment grounds. These challenges have led to a complex legal battle that has now reached the Supreme Court.

NetChoice LLC v Moody (Florida)³

NetChoice, LLC v. Moody is a legal case involving a trade association that represents social media companies, which challenged a law in Florida. In the Northern District of Florida's U.S. District Court, a preliminary injunction was issued, preventing most of the law from being enforced. The court suggested that the law might infringe upon the First Amendment by forcing speech and restricting platforms' ability to make editorial choices. On appeal, the 11th Circuit Court of Appeals largely upheld the district court's decision. The court's unanimous opinion stated that the content moderation practices of social media companies are protected under the First Amendment, arguing that these practices are similar to the editorial decisions made by newspapers and other traditional media in exercising their editorial discretion. In its opinion, the 11th Circuit noted several key points:

1. Social media platforms engage in constitutionally protected expressive activities when moderating content.
2. The content moderation provisions of the Florida law are subject to strict scrutiny and are likely unconstitutional.

³ Supreme Court of the United States, No 22-227, (07/01/2024)

3. The law's disclosure requirements may pass a lower standard of scrutiny.

NetChoice LLC v Paxton (Texas)⁴

Instead, the challenge in NetChoice, LLC v. Paxton to the Texas law encountered a different result at the appellate level than the challenge in the Florida case. The Texas law was upheld by the 5th Circuit Court of Appeals, which rejected the claim that decisions to moderate content are protected speech.

The 5th Circuit's ruling departed sharply from how the 11th Circuit has approached this:

1. It described social media platforms as "common carriers" like companies that telephone companies and so subject to tighter regulation
2. The court concluded that there is no First Amendment violation in the Texas law since the law does not compel platforms to host specific speech.
3. It rejected the platforms' claim that the law impermissibly compels speech

Supreme Court Intervention

In 2024, the Supreme Court heard arguments in the consolidated cases of *Moody v. NetChoice, LLC*, and *NetChoice, LLC v. Paxton*, which challenge the laws in Florida and Texas, respectively. The Supreme Court is faced with several critical issues:

1. Does the moderation of content by social media platforms qualify as protected speech under the First Amendment?
2. To what extent can states regulate the content moderation practices of private companies?
3. How can we balance the free speech rights of social media companies with the states' interest in preventing viewpoint discrimination?
4. Can social media platforms be required to host content that they would typically remove?
5. How do existing First Amendment doctrines apply to the unique context of social media?

⁴ Harvard Law Today <<https://hls.harvard.edu/today/supreme-court-preview-netchoice-v-paxton/>>

In an initial ruling, the Supreme Court carefully remanded the cases back to the lower courts for further review. However, the Court provided some important guidance:

1. It dismissed the states' argument that content moderation does not raise First Amendment concerns and affirmed that platforms have some level of First Amendment protection regarding their content curation decisions.
2. Lower courts are instructed to conduct a more rigorous analysis of the laws and their implications, considering the specific characteristics of different platforms and how each provision of the laws would be implemented in practice.
3. Justice Elena Kagan, writing for the majority, emphasized that there should have been a much more thorough examination of the legal issues and their implications under the First Amendment.

This indicates that the Court recognizes the complexity of the issues at hand and the potentially far-reaching consequences.

PRECEDENTS

There are several other cases and precedents that are relevant to the constitutional issues surrounding social media content moderation laws:

A. *Packingham v. North Carolina* (2017)⁵:

In this ruling, the Supreme Court struck down a North Carolina law that barred registered sex offenders from accessing certain social media websites. The Court emphasized the importance of constitutional protections that extend to the "modern public square" of social networking, asserting that access to social media is a crucial aspect of First Amendment rights, even if it is indirectly related to content moderation. This case highlighted the significance of social media in First Amendment jurisprudence.

B. *Manhattan Community Access Corp. v. Halleck* (2019)⁶:

This case examined whether a private entity operating a public access channel could be considered a state actor for First Amendment purposes. The Court determined that simply

⁵ Mitchell Hamline School, 'Packingham v. North Carolina (US 2017)' <<https://mitchellhamline.edu/sex-offense-litigation-policy/2017/07/20/state-of-north-carolina-v-packingham/>>

⁶ Supreme Court of the United States, No 17-1702, (06/17/2019)

hosting speech does not qualify a private organization as a state actor. This precedent may influence how social media platforms are classified as state actors or public forums.

C. *Lindke v. Freed* (2024)⁷:

In this case, the Supreme Court acknowledged that government officials' actions, such as deleting user comments or blocking users on social media, could infringe upon First Amendment rights. This case primarily focuses on the conduct of government actors and illustrates the Court's expanding perspective on First Amendment issues in the digital realm.

D. *Murthy v. Missouri* (2024)⁸:

This case raised concerns about government pressure to remove specific content from social media. The Court ruled that users may not have the ability to sue the government under the First Amendment unless it can be demonstrated that the content removal was a result of governmental coercion rather than the platform's editorial discretion. This ruling clearly delineates the boundaries in this context.

IMPLICATIONS OF RULING FOR SOCIAL MEDIA COMPANIES

If the laws are enacted, social media platforms will be unable to moderate their content. This could lead to several potential outcomes:

1. A complete transformation of the user experience on these platforms.
2. An increase in the presence of content that these platforms deem dangerous or objectionable.
3. The potential for shared platforms to face liability issues for not adhering to state regulations.
4. The need to create new content moderation standards that align with state laws.
5. Possible adjustments to platform algorithms and recommendation systems to prevent claims of viewpoint discrimination.

Conversely, if these laws are overturned, it would reinforce the platforms' authority to make editorial decisions about the content they host, which might result in:

⁷ Supreme Court of the United States, No 22-611, (03/15/2024)

⁸ Supreme Court of the United States, No 23-411, (06/26/2024)

1. More stringent content moderation practices.
2. Increased investment in AI and human moderation systems.
3. More defined and transparent content policies.
4. The development of specific alternative platforms that cater to diverse viewpoints.

IMPLICATIONS OF RULING FOR USERS

The outcome of these cases could significantly impact what users encounter on social media platforms:

1. If the laws are upheld, users may be exposed to a wider range of opinions, including those that are currently limited by the content moderation policies of the companies involved.
2. However, this could also lead to an increase in misinformation, hate speech, and other types of problematic content that these platforms are currently working to limit.
3. As a result, users would need to be more discerning consumers of online content instead of relying solely on the curation provided by the platforms.
4. This would create a vastly different user experience depending on the state in which one lives, highlighting the fragmented nature of the online ecosystem.

BROADER CONSTITUTIONAL IMPLICATIONS⁹

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⁹ Tara Davis, 'SOCIAL MEDIA CONTENT MODERATION AND LIMITATIONS ON FREEDOM OF EXPRESSION: THE ROLE OF THE STATE' <<https://wiredspace.wits.ac.za/server/api/core/bitstreams/7889beaa-e9ae-4a78-9ed3-85face164a82/content>>

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THE FUTURE OF CONTENT MODERATION

Content moderation will persist regardless of the Supreme Court's final ruling on the matter:

1. Additionally, social media companies will find themselves increasingly entangled in intricate regulatory environments that they must navigate, balancing legal requirements with user and business expectations.
2. Users will keep voicing their demands—for instance, for new ways to collectively govern platforms or for greater involvement in moderation decisions, whether collectively or individually.
3. Policymakers will face significant challenges in balancing free speech with public safety and protecting private interests in an ever-evolving digital landscape.
4. The rise of new technologies that could alter the content-dependent nature of moderation will require careful legal and ethical consideration.
5. The differing legal frameworks and cultural norms across countries will continue to pose challenges for companies as they work to create and enhance their social media platforms.

CONCLUSION

This is a pivotal moment in the evolution of free speech law, particularly regarding the constitutional issues tied to social media content moderation. The Supreme Court must carefully consider the traditional protections afforded to private entities in light of the unique role these platforms play in contemporary discourse. The outcomes of these cases will have significant implications for the future of online speech and will also establish important interpretative precedents concerning the Constitution in our digital era.

In this context, various competing interests must be weighed, including:

1. The First Amendment rights of social media companies to make editorial choices.
2. The public's right to access a diverse range of viewpoints and information.
3. The government's responsibility to prevent discrimination and uphold free expression.
4. The practical challenges of managing global platforms that cater to billions of users.

As technology continues to advance and social media evolves, the legal and ethical challenges surrounding content moderation will only grow more complex. While the Supreme Court's rulings in these cases will undoubtedly provide essential guidance, they will not be the final word on this dynamic issue.

Moving forward, it is crucial for all stakeholders social media companies, lawmakers, users, and the judiciary to engage in continuous dialogue and adaptation. The task of balancing free speech, public safety, and the interests of private enterprises in the digital landscape will necessitate ongoing evaluation and refinement of our legal and regulatory systems.

Ultimately, the results of these constitutional challenges will play a significant role in shaping the future of online discourse.