



A Dance Between Content Moderation and Free Speech:

Section 230 and the First Amendment

Panelists

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Poll #1

You see that the social media platforms you're using had demoted your posts on certain viewpoints or tagged them as "misinformation." What would be an ideal counter response?

- a) You do nothing because the social media companies have the right to moderate user content.
- b) You sue the social media companies with hopes that the Supreme Court will limit their rights in excluding individuals from speech.
- c) You lobby your congress person to impose certain restrictions and transparency requirements on social media companies.
- d) You join the Department of Justice to enforce and encourage competition among social media companies.

Select Laws Affecting Content Moderation

- 47 U.S.C. § 230
(part of the Communications Decency Act)
- First Amendment of the U.S. Constitution
- Fight Online Sex Trafficking Act of 2017
- European Union's Digital Services Act
- European General Data Protection Regulation
- California AB 587

Poll #2

What can Section 230 of the Communications Decency Act do?

- a) It can protect Wikipedia from defamation liability for allowing user-generated content to publish on its platform.
- b) It can protect Yelp from liability for removing a questionable user review.
- c) It can protect YouTube from liability from federal criminal law.
- d) It can protect Instagram from liability from intellectual property law.
- e) All of the above.
- f) a and b

2024 Supreme Court Cases

Moody v.
Netchoice –
Florida
legislation

Netchoice v.
Paxton – Texas
legislation

Murthy v.
Missouri

First Amendment

- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”
- State Action Requirement – Who is impeding free speech?
 - Regulation by Government
 - Owners of Digital Infrastructure
- Beneficiaries of First Amendment
 - Internet users
 - Internet Companies
 - United States v. Abroad

First Amendment Analysis

1. Assess the Scope of the Texas or Florida Law (Facial Challenge)
 - What activities, what actors, what prohibition or regulation will apply in different circumstances?
2. Assess whether there is a violation of the First Amendment
 - Undue burden on expression? Intrusion on protected expression?
 - A. Intermediate Scrutiny
 - the law must further a “substantial governmental interest” that is “unrelated to the suppression of free expression.” *United States v. O’Brien*, 391 U.S. 367, 377 (1968).
 - B. Strict Scrutiny
 - the law is the “least restrictive means” of advancing a “compelling” governmental interest. *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989).

First Amendment Precedents

- What is Protected Speech?

Yes on First Amendment Rights	No First Amendment Rights Implicated or Violated
Miami Herald Publishing Co. v. Tornillo, 418 U. S. 241 (1974) (Tornillo)	<i>Turner Broadcasting System, Inc. v. FCC</i> (Turner I, Turner II)
<i>Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.</i> , 475 U. S. 1 (1986) (PG&E)	<i>PruneYard Shopping Center v. Robins</i> , 447 U. S. 74 (1980)
<i>Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc.</i> , 515 U. S. 557 (1995)	<i>Rumsfeld v. Forum for Academic and Institutional Rights, Inc.</i> , 547 U. S. 47 (2006) (FAIR)

Summary

(from *Moody v. Netchoice* and *Netchoice v. Paxton*)



First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech.

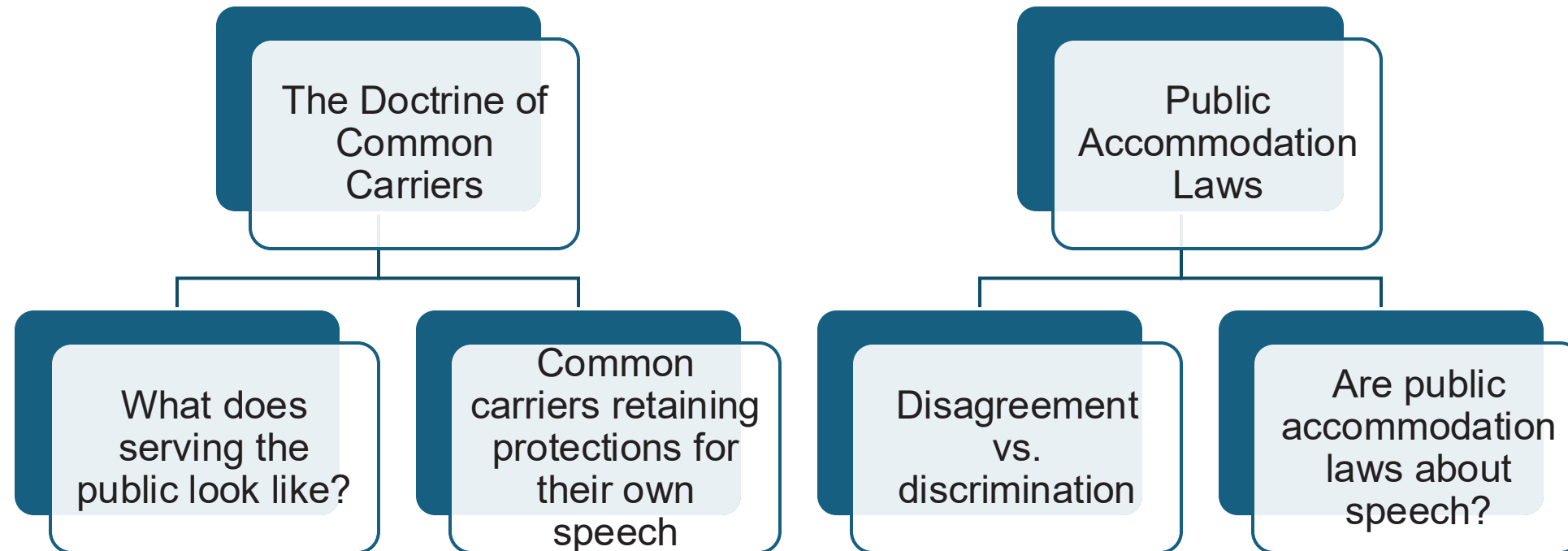


The protection does not change just because a compiler includes most items and excludes just a few.



The government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas.

Food for Thought



Food for Thought

- Section 230 Proposed Bills – Those who seek to amend Section 230 have often pursued one of two distinct goals
 - Focusing on specific types of content
 - Exceptions for certain types of legal claims (such as lawsuits brought under drug trafficking or nondiscrimination laws)
- Over 25 bills to amend Section 230 were introduced in each of the 116th and 117th Congresses, and Members of the 118th Congress (current session ending on 1/3/2025) continued to introduce such proposals
- Conditioning immunity on prerequisites

Poll #2

TBD (see word document)

References (continued)

- *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U. S. 1 (1986)
- *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994) (*Turner I*)
- *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180 (1997) (*Turner II*)
- *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U. S. 557 (1995)
- *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980)
- *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47 (2006) (FAIR)
- CASE-IT Act, H.R. 8719, 116th Cong. § 2 (2020)
- PACT Act, S. 4066, 116th Cong. § 7 (2020)
- Cong. Rsch. Serv. (2024) *Section 230: An Overview* (CRS Report No. R46751)
- Killion, Victoria L., Cong. Rsch. Serv. (Jan. 10 , 2023) *Free Speech: When and Why Content-Based Laws are Presumptively Unconstitutional* (CRS Report IF12308)
- Spandana Singh, *Everything in Moderation, an Analysis of How Internet Platforms are Using Artificial Intelligence to Moderate user-Generated Content*, NEW AMERICA (July 22, 2019), <https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/>



Thank You

