

# [***What Makes Speech Truly Free? It's Not the Government | Opinion***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6BF7-91F1-DY68-13P6-00000-00&context=1516831)

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**Highlight:** In Moody v. NetChoice and NetChoice v. Paxton, the Court is faced with two cases involving state laws regulating content moderation on social media platforms.

**Body**

On Monday, the [*Supreme Court*](https://www.newsweek.com/topic/supreme-court?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) heard four hours of oral arguments in two major social media cases—one from Florida and one from Texas.

In [*Moody v. NetChoice*](https://casetext.com/case/netchoice-llc-v-moody) and [*NetChoice v. Paxton*](https://www.oyez.org/cases/2023/22-555), the Court is faced with two cases involving state laws regulating content moderation on social media platforms. The cases raise the question of whether these state laws regulating social media companies' content moderation practices comply with the First Amendment of the U.S. Constitution

In 2021, Florida and Texas pioneered U.S. state legislation regulating social media platforms, with numerous states following their lead. These laws, aimed at limiting social media giants' ability to moderate content and mandating them to disclose specific information publicly, now find their fate subject to Supreme Court scrutiny.

Initially, federal courts in both states blocked the laws, siding with the social media companies' First Amendment claims. However, appeals led to mixed rulings. As Florida lawyer [*Charles Cartwright*](https://www.gonzalezcartwright.com/) explains "In the Florida case, the 11th Circuit ruled that the law (S.B. 7972) likely violated the First Amendment, while the Fifth Circuit created what's known as a "circuit split" by ruling differently on a similar Texas law (H.B. 20)."

The Supreme Court agreed in September to review both cases.

It's factually true that both laws were passed in 2021 and share a similar design—to stop large social media companies (the Texas law references 50 million active users) from removing or blocking content. But ultimately, these cases may answer an infinitely larger and more critical question: Whether the government (particularly in the form of state legislatures and, perhaps, [*Congress*](https://www.newsweek.com/topic/congress?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships)) can use the Constitution as a shield and a sword against Big Tech and, by implication, against us.

Here's where things really get interesting:

Last week, self-labeled "progressive legal scholar and activist" Zephyr Teachout [*published a compelling piece in The Atlantic*](https://www.theatlantic.com/ideas/archive/2024/02/social-media-netchoice-texas-supreme-court/677494/) on how they "never would have expected to end up on the same side as [*Greg Abbott*](https://www.newsweek.com/topic/greg-abbott?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships), the conservative governor of Texas, in a Supreme Court dispute."

Teachout's argument is rife with what so much analysis today of things that sit at the intersection of ***politics*** and law lack: nuance. I agree with Teachout, who was party to [*an amicus (friend of the court) brief*](https://www.theatlantic.com/ideas/archive/2024/02/social-media-netchoice-texas-supreme-court/677494/) authored in the Texas case, that both the Texas and Florida laws in issue here are simply bad laws.

But (and it's a massive "but"), as Teachout explains, "the Texas law is based on a kernel of a good idea." That idea is that these massive social media and search engines have a lot of control over what we see and talk about. When they block someone or don't share certain ideas, it can really change public conversations and ***politics***.

So, it follows that letting a few big, unwatched companies have this much power isn't good for democracy, right?

As lawyers love to say, "maybe."

[*The Knight First Amendment Institute at Columbia University*](https://knightcolumbia.org/documents/ememodiphx) filed another amicus brief in these cases, in which they argue against the extreme positions on how the First Amendment applies to social media regulation. The brief supports the notion that while social media platforms' content moderation is a form of protected editorial judgment, this protection has its limits.

The institute contends that the "must-carry" provisions, which force platforms to host content against their editorial discretion, are unconstitutional. It also differentiates between the states' disclosure requirements, advocating for the rejection of Florida's for imposing undue burdens on speech and suggesting Texas's could be constitutional as it does not overly burden the platforms' editorial decisions.

On the day the amicus brief was filed, Knight's executive director, Jameel Jaffer, [*released this statement*](https://knightcolumbia.org/content/in-cases-involving-florida-and-texas-social-media-laws-knight-institute-urges-supreme-court-to-reject-extreme-arguments-made-by-states-and-platforms):

"The question of what limits the First Amendment imposes on legislatures' ability to regulate social media is immensely important—for speech, and for democracy as well. Unfortunately, neither the states nor the social media platforms are offering the Court a compelling or defensible theory of the First Amendment in this context."

Now we must remember that this incarnation of the Supreme Court is a solid 6-3 conservative majority. If there was any recent version of the Court that would find a defensible theory of the First Amendment in these cases, this is almost certainly the one.

But that wasn't the case in oral argument, at least from where I sit. As I listened to what I thought was a fairly riveting few hours of arguments, I couldn't help but remember the words of Teachout—"The laws reflect their origins in hyperbolic ***politics***. They are sloppy and read more like propaganda than carefully considered legislation."

For context, it's worth remembering that while the fairly conservative Eleventh Circuit overturned the Florida law, the very conservative Fifth Circuit upheld the Texas law. Teachout and many Supreme Court observers agree that the longer-term result of upholding the Texas law might be worse than overturning it.

What this should mean, in purely practical terms, is that in 2024, the last thing the Supreme Court should do is err on the side of a law that has the power to tie the hands of the social media companies that have become the *de facto* if not *de jure* digital soapboxes on which we individually and collective exercise free speech.

And not just us—large chunks of the entire world. So, the more the government limits or dictates what Big Tech can and should do on the platforms they created, the more we are harming how we speak freely in this modern (or postmodern, if you prefer) era.

While Teachout passionately argues that what we really want to make sure we don't do here, is "give the likes of [*Mark Zuckerberg*](https://www.newsweek.com/topic/mark-zuckerberg?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) and [*Elon Musk*](https://www.newsweek.com/topic/elon-musk?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships) the inalienable right to censor their political opponents, if they so choose," having Big Government dictate to Big Tech is probably also not a stellar option.

Which brings us back to Monday, where the Supreme Court Justices spent a very long time (again, four hours for two related cases, which is far longer than the norm) asking the kinds of questions that frame the stakes these cases hold.

As Justice Kagan pointed out in oral argument in the first (Florida) case, what the internet has become today is so broad, that it goes far beyond the internet and even a social media platform, which she argued was remarkably broad. Parenthetically, this also speaks to how difficult it would be to "geofence," as several Justices noted, Florida and Texas here from the rest of the nation.

Espousing an interesting and profound understanding of how we spend time on the internet, Kagan even evoked Etsy as an example of something that is a supermarket of things—a free marketplace that limits users' content.

"We only want this kind of product. They have to do all kinds of things that your law says they can't do—all Etsy wants to do is enforce community standards for people looking to sell a product. If they're a public marketplace your (overbroad) law would regulate them."

Kagan later argued, "I'm afraid of all of these common law rules you (counsel for Florida) are trying to analogize here," as they are all leading to an exercise of the power of the state to limit what we can say in the public square.

That public square argument was revisited by multiple justices later on in arguments, including Justice [*Ketanji Brown Jackson*](https://www.newsweek.com/topic/ketanji-brown-jackson?utm_source=Synacor&utm_medium=Attnet&utm_campaign=Partnerships), who observed that the public square created by these massive technology companies is not only bigger than we imagine, but how it is ultimately regulated wouldn't be settled today in these two cases.

Whether the Court gets this right will be in the eye of the beholder. It won't be until we read the decision of the Court (and what I strongly predict will be at least one fascinating dissenting opinion) sometime in late spring for us to judge whether the justices have given our freedom of speech a net win or loss.

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*The views expressed in this article are the writer's own.*

[*Link to Image*](https://d.newsweek.com/en/full/2355055/supreme-court.jpg)

**Graphic**

At the Supreme Court

ANDREW CABALLERO-REYNOLDS/AFP via Getty Images

A stop sign as seen on traffic light near a statue at the Supreme Court in Washington, DC, Feb. 26.

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