



USA

## United States of America

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### Country Summary

In the United States, Congress has introduced measures that impact freedom of speech. The country ranks 3rd in public support for free speech but 22nd in global expression rankings. Legislative proposals focus on social media content control, campaign finance reform, critical race theory bans, and limiting public protests, all with potential implications for First Amendment rights. Five notable federal legislative developments between 2015 and 2022 target issues such as Section 230 immunity, child exploitation facilitation, privacy protection, disinformation, and health misinformation on digital platforms, indicating attempts to regulate "Big Tech." Public protests, driven by social justice issues and COVID-19 restrictions, prompted restrictive legislation through acts like the Holding Rioters Accountable Act and the Support Peaceful Protest Act, withholding federal funding for accountability and making protesters financially liable for damages. While federal legislative activity poses a threat to First

Amendment freedoms, state-level laws regulating social media and content also spark constitutional concerns, with ongoing legal challenges. Such legislation seeks to ban the teaching of "divisive concepts" and critical race theory, impacting educational freedom. These measures, influenced by evolving technology and societal challenges, intersect with free speech concerns in the digital age, prompting debates over the balance between protection and restriction.

**Note:** Given the fact that this report seeks to have an overview of the state of free speech in democracies around the globe and taking into account the length and extent of analysis that would be required to incorporate every development between 2015-2022 on a State level, the report on the United States of America considers developments on a federal level with some mentions of State laws made for narrative purposes. As such and given that at State level there are restrictions to free speech (for example, between January and August 2022, 36 different states introduced a total of 137 educational gag order bills, an increase of 250 percent over 2021<sup>693</sup>), we note the restrictions that may arise in terms of a holistic overview of the state of free speech in the US. We hope that, in due course, we are able to draft a report depicting the situation in the US on both a federal and State level as a single piece of research.

## Introduction

The U.S. Congress has been active in introducing measures that impact freedom of speech. The U.S. came 3rd out of 33 on Justitia's 2021 Free Speech Index on the public's support for free speech with a score of 78.<sup>694</sup> The country ranks 30/161 for 2022 in Article 19's Global Expression Report.<sup>695</sup> In its 2022 freedom of the Net report, Freedom House ranks the U.S. 12th out of 72 countries ranked with a score of 76 on internet freedom.<sup>696</sup>

The four most common areas of speech restriction include (1) measures restricting expression on social media and digital platforms, (2) regulation of campaign finance and speech, (3) measures that prohibit the alleged teaching of "critical race" theory; and (4) measures targeting public protests. All four of these categories of proposed federal legislation impact First Amendment freedoms. Many of the measures related to social media platforms call for content moderation or content control of some sort. The regulation of campaign finance triggers First Amendment protection, particularly when the U.S. Supreme Court for nearly 50 years has determined that money is speech for purposes of First Amendment analysis. Next, the bans on the teaching of critical race theory trigger one of the most important First Amendment doctrines --- the right to receive information and ideas. Finally public protests directly threaten

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<sup>693</sup> <https://pen.org/report/americas-censored-classrooms/>

<sup>694</sup> <https://futurefreespeech.com/interactive-map/>

<sup>695</sup> <https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf>

<sup>696</sup> [https://freedomhouse.org/sites/default/files/2022-10/FOTN\\_2022\\_Country\\_Score\\_Data.xlsx](https://freedomhouse.org/sites/default/files/2022-10/FOTN_2022_Country_Score_Data.xlsx)

not only freedom of speech but also the cognate First Amendment freedoms of assembly and petition. Each of these three areas of proposed legislation is summarized below.

## I. Legislation

### Social media and digital platforms

It should come as no surprise that measures to limit freedom of expression involve social media and digital platforms. After all, that is the way that people communicate, and it is a relatively new medium of communication. As Justice Anthony Kennedy expressed:

While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.<sup>697</sup>

Couple that with the indelible reality that every time there is a new technology, closely behind follows what Robert Corn Revere famously called a cycle of regulation.<sup>698</sup> Every time throughout history that there has been a new technology, closely behind has been the hand of censorship. Consider that the abhorrent English licensing laws followed the printing press, the censorship of motion pictures followed shortly after that new technology. There are many other examples.

Some of the recent measures seek to rein in "Big Tech" by abrogating Section 230 immunity<sup>699</sup> --- a federal law<sup>700</sup> that provides immunity to interactive service providers such that they are not liable for third-party generated content. Section 230 stipulates that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." In a 2023 case against Google, the Supreme Court rejected efforts to restrict the use and application of Section 230 of the Communications Decency Act.<sup>701</sup>

Another measure allows victims of child sexual abuse to bring a civil cause of action against tech platforms for facilitating child exploitation.<sup>702</sup> Other measures focus on the privacy of personally identifiable information<sup>703</sup>, suspicious transmissions that might help in

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<sup>697</sup> *Packingham v. North Carolina*, 582 U.S. \_ (2017).

<sup>698</sup> See generally, Robert Corn Revere. *The Mind of the Censor and the Eye of the Beholder* (2021).

<sup>699</sup> See, e.g., H.R. 2635 (118<sup>th</sup> Congress) – called "The Big Tech Accountability Act of 2023."

<sup>700</sup> 47 U.S.C. §230; see. e.g. the Safe Tech Act of 2023, S. 560 (118<sup>th</sup> Cong.).

<sup>701</sup> [https://www.supremecourt.gov/opinions/22pdf/21-1333\\_6j7a.pdf](https://www.supremecourt.gov/opinions/22pdf/21-1333_6j7a.pdf)

<sup>702</sup> Stop CSAM Act of 2023, S. 1199 (118<sup>th</sup> "Congress).

<sup>703</sup> See, e.g., Online Privacy Act of 2023, H.R. 2701 (118<sup>th</sup> Congress).

counterintelligence activities,<sup>704</sup> and the creation of the Federal Digital Platform Commission.<sup>705</sup> Still other measures would target the spread of disinformation through deep-fake video alterations<sup>706</sup> and punish social media platforms that allow for the proliferation of health misinformation.<sup>707</sup>

### Campaign Finance Reform and Attempts to Overturn Citizens United

One of the more controversial First Amendment decisions by the U.S. Supreme Court in recent memory is *Citizens United v. Federal Election Commission*.<sup>708</sup> Critics have decried the decision as one that increased the influence in elections of corporations and wealthy donors.<sup>709</sup> However, others defended the decision as a victory for freedom of speech.<sup>710</sup> In *Citizens United*, the U.S. Supreme Court by a 5-4 vote invalidated a provision of the Bipartisan Campaign Reform Act that prohibited corporations and unions from using their general treasury funds for express advocacy or electioneering purposes.<sup>711</sup> Justice Anthony Kennedy, in his majority opinion, reasoned that the corporate status of a speaker should not impact whether the speech is protected. The decision flows from the Supreme Court's seminal decision in *Buckley v. Valeo* back in 1976 that both political expenditures and contributions are a form of speech – though the Court found more free-speech protection for expenditures.<sup>712</sup>

Ever since the Supreme Court's decision in *Citizens United*, there have been attempts to either chip away at the Court's ruling through additional legislation or to overrule by constitutional amendment. This has continued in more recent years. For example, in 2015, Senator Bernie Sanders introduced a resolution calling for a constitutional amendment to overrule *Citizens United*.<sup>713</sup> Later that year, there was a House Resolution that called for Congress to pass a constitutional amendment that declared that money is not speech, corporations are not persons, and that *Citizens United* should be overturned.<sup>714</sup> Similarly, in 2017, there were at

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<sup>704</sup> See Something, Say Something Online Act of 2023, S. 147 (118<sup>th</sup> Congress).

<sup>705</sup> Digital Platform Commission Act of 2022, H.R. 7858 (117<sup>th</sup> Congress).

<sup>706</sup> Deep Fakes Accountability Act, H.R. 2395 (117<sup>th</sup> Congress)

<sup>707</sup> Health Misinformation Act of 2021, S. 2448 (117<sup>th</sup> Congress).

<sup>708</sup> 558 U.S. 310 (2010).

<sup>709</sup> Tim Lau, "Citizens United Explained," Brennan Center for Justice, Dec. 12, 2019. Citizens United Explained | Brennan Center for Justice

<sup>710</sup> David Bossie, "Supreme Court's 'Citizens United' decision still protects the First Amendment 10 years later," Fox News, Jan. 21, 2020. <https://congress.gov/116/meeting/house/110456/documents/HHRG-116-JU10-20200206-SD005.pdf>

<sup>711</sup> See David L. Hudson, Jr. Citizens United, First Amendment Encyclopedia, Citizens United v. Federal Election Commission | The First Amendment Encyclopedia (mtsu.edu)

<sup>712</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>713</sup> S.J. Res. 4 (114<sup>th</sup> Cong..)

<sup>714</sup> H. Res. 311 (114<sup>th</sup> Cong.)

least two resolutions introduced in the House of Representatives declaring that Congress should pass the 28<sup>th</sup> Amendment to the U.S. Constitution overruling *Citizens United*.<sup>715</sup>

Other measures related to campaign finance focus more on disclosure requirements for super PACS<sup>716</sup> or target deceptive messages during political campaigns.<sup>717</sup> Another measure targets the influence of foreign nationals in political campaigns.<sup>718</sup>

### Critical Race Theory

In recent years, Congress has been quite active in introducing legislation targeting the teaching of critical race theory --- a school of thought that originated in law schools in the 1970s and 1980s that called for a "fundamental reorientation of legal studies on race."<sup>719</sup> However, critical race theory in recent years has become a bogeyman of sorts, garnering legislative proposals for its regulation, a form of politically popular legislation that presents serious First Amendment concerns.<sup>720</sup>

Congress has introduced a host of bills related to the banning of teaching "divisive concepts" and "critical race" theory. These include measures such as the "Combating Racist Training in the Military Act of 2023,"<sup>721</sup> "the Warrior Act,"<sup>722</sup> and "Securing Our Schools Act of 2023."<sup>723</sup> The measures either flatly prohibit the teaching of critical race theory or they deny federal funding to a public institution that teaches critical race theory in the curriculum.

### Limiting Public Protests

The limitation of public protests flows from the reaction to many public protests involving challenges to social justice/BLM (Black Lives Matter)/ death of George Floyd and, to a lesser extent, protests related to those who have been upset with COVID-19 restrictions. For example, the Holding Rioters Accountable Act of 2020 would withhold federal funding to those state and local authorities who refuse to hold rioters accountable.<sup>724</sup> Likewise, the Support Peaceful Protest Act of 2020 would hold those convicted of federal offenses while protesting financially liable for the expenses and damage caused by their disruptive activities.<sup>725</sup>

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<sup>715</sup> See Restore Democracy Resolution, H. Res. 343 (115<sup>th</sup> Cong.); H. Res. 377 (115<sup>th</sup> Congress).

<sup>716</sup> S. 4822 (118<sup>th</sup> Cong.)

<sup>717</sup> For the People Act of 2021, S. 1 (117<sup>th</sup> Cong.)

<sup>718</sup> We the People Democracy Reform Act of 2017 (115<sup>th</sup> Cong.)

<sup>719</sup> See David L. Hudson, Jr. "Nonexistent critical race theory curriculum is caught in the crosshairs," *ABA Journal*, Feb. 1, 2022. <https://www.abajournal.com/magazine/article/nonexistent-critical-race-theory-curriculum-is-caught-in-the-crosshairs>

<sup>720</sup> *Ibid.*

<sup>721</sup> S. 556 (118<sup>th</sup> Cong.)

<sup>722</sup> H.R. 2378 (118<sup>th</sup> Cong.)

<sup>723</sup> S. 1082 (118<sup>th</sup> Cong.)

<sup>724</sup> H.R. 8301 (117<sup>th</sup> Cong.)

<sup>725</sup> H.R. 289 (118<sup>th</sup> Cong.)

## II. Non-Legislative Developments

Congress has forced the CEOs of notable social media companies to testify before Congress in both 2020 and 2021. Most notably, Mark Zuckerberg of Facebook, Jack Dorsey (the former head of Twitter), and Google's Sundar Pichai had to appear before a House committee in March 2021 to answer questions from legislators about how they deal and police disinformation online.<sup>726</sup> In July 2020, the Big Tech giants faced tough questioning from Congress, though that focused more on antitrust issues than freedom of expression.<sup>727</sup> But, real enforcement has not occurred in the form of comprehensive legislation at the federal level.<sup>728</sup> Section 230 has long been a target of federal legislators but somehow Section 230 remains intact. But federal legislators continue to inveigh against the immunity the federal law provides social media platforms.<sup>729</sup>

## III Enforcement

The below are cases heard before the US Supreme Court:

### Political Speech

*Minnesota Voters Alliance v. Mansky (2018)*<sup>730</sup>

The Supreme Court held that a ban on wearing political insignia such as badges in a polling area on Election Day violated the First Amendment of the U.S. Constitution.

*Heffernan v. City of Paterson (2016)*<sup>731</sup>

Heffernan sued after he was demoted for picking up a campaign sign for his mother. The Supreme Court ruled that an employer could be sued for violating an employee's First Amendment rights even if the employer mistakenly thought the employee was exercising those rights.

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<sup>726</sup> See, e.g., Shannon Bond, Facebook, Twitter, Google CEOs Testify Before Congress: 4 Things To Know, NPR.org, 3/25/2021. <https://www.npr.org/2021/03/25/980510388/facebook-twitter-google-ceos-testify-before-congress-4-things-to-know>

<sup>727</sup> Tony Romm, Amazon, Apple, Facebook, and Google grilled on Capital Hill over their market power," The Washington Post, July 29, 2020. <https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/>

<sup>728</sup> See Brian Fung, "The U.S. government is still trying to find ways to regulate Big Tech," CNN.com, Jan. 11, 2023. <https://www.cnn.com/2023/01/11/tech/jonathan-kanter-doj/index.html>

<sup>729</sup> Rosie Moss, "The Future of Section 230: What Does It Mean for Consumers?" National Association of Attorney's Generals, <https://www.naag.org/attorney-general-journal/the-future-of-section-230-what-does-it-mean-for-consumers/>

<sup>730</sup> <https://supreme.justia.com/cases/federal/us/585/16-1435/>

<sup>731</sup> <https://supreme.justia.com/cases/federal/us/578/14-1280/>

## Content Discrimination

*Reed v. Town of Gilbert (2015)*<sup>732</sup>

Content-based laws are presumed to be unconstitutional, and restrictions may be justified only if the government can prove that they are narrow and exist for an important state interest. Based on this, the Supreme Court invalidated a local ordinance which treated the positioning of signs differently according to their content. This case affirms the principle of content-discrimination as a central element in the application of the First Amendment.

## False Statements

*U.S. v. Alvarez (2012)*<sup>733</sup>

Alvarez publicly lied about being a retired member of the U.S Marines and that he was wounded in combat. He was prosecuted under the Stolen Valor Act which criminalizes lying about receiving military honor. Alvarez argued that the Act did not conform to the First Amendment. The question before the Supreme Court was whether the Act in question violated the First Amendment. The Supreme Court found that there is no general exception to the First Amendments for lies/false statements and that such statements occur in an open public or private conversation.

## **Conclusion**

Federal legislative activity remains a pervasive threat to First Amendment freedoms in the United States. However, there are arguably far more restrictions at the state level. Furthermore, for whatever reason, the state measures often do not seem to be as vetted nearly as well as proposed federal legislation. In other words, the starker and more flagrant affronts to freedom of speech take place at the state level. Florida enacted the Parental Rights in Education Act<sup>734</sup> - the "Don't Say Gay" law - restricting speech in public schools. This has spawned several copycat bills, as noted by PEN America<sup>735</sup>. PEN has been developing a tracker<sup>736</sup> of 'educational gag orders' – state legislative attempts to restrict teaching, training, and learning in primary and secondary schools, and higher education. These bills, generally targeting discussions of race, gender, sexuality, and US history, began to appear during the 2021 legislative session and quickly spread to statehouses throughout the country. By the end of 2021, 54 bills had been filed in 22 states, of which 12 became law. Between January and August 2022, 36 different states introduced a total of 137 educational gag order bills, an

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<sup>732</sup> <https://supreme.justia.com/cases/federal/us/576/13-502/>

<sup>733</sup> <https://supreme.justia.com/cases/federal/us/567/709/>

<sup>734</sup> <https://legiscan.com/FL/text/H1557/id/2541706>

<sup>735</sup> <https://pen.org/press-release/expanded-dont-say-gay-law-in-florida-is-a-flagrant-escalation-of-censorship-in-schools-says-pen-america/>

<sup>736</sup> [https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP\\_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870](https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870)

increase of 250 percent over 2021<sup>737</sup>. A few states have taken the bold step of passing laws that attempt to regulate content on social media. Most prominently among these are the Stop Social Media Censorship Act in Florida and a similar measure in Texas.<sup>738</sup> Federal lawsuits challenged both of these state laws and the issue is now before the U.S. Supreme Court. The Justices have asked the U.S. solicitor general to file a brief identifying their position on these state laws.<sup>739</sup> Many believe these laws are constitutionally problematic.

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<sup>737</sup> <https://pen.org/report/americas-censored-classrooms/>

<sup>738</sup> See David L. Hudson, Jr. "State laws targeting social media platforms face First Amendment challenges," ABA Journal, Dec. 2022. <https://www.abajournal.com/magazine/article/state-laws-targeting-social-media-platforms-face-first-amendment-challenges>

<sup>739</sup> Amy Howe, *Justices request federal government's views on Texas and Florida social-media laws*, SCOTUSblog (Jan. 23, 2023, 4:44 PM), <https://www.scotusblog.com/2023/01/justices-request-federal-governments-views-on-texas-and-florida-social-media-laws/>