



The Future of TikTok

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[00:00:00.6] Jeffrey Rosen: This week, the Supreme Court hears oral arguments in TikTok versus Garland, a case that will determine whether TikTok, the social media platform used by an estimated 170 million Americans can continue to operate in the United States under the ownership of a Chinese holding company. Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate. The National Constitution Center's a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode of We The People, we will debate whether or not the law that forces TikTok to be sold or banned violates The First Amendment. Joining me are two leading constitutional scholars who've filed important amicus briefs in this case, Jameel Jaffer of Columbia Law School, and Zephyr Teachout of Fordham Law. Jameel Jaffer is executive Director of the Knight First Amendment Institute at Columbia University. Before joining the Knight Institute, he was Deputy Legal director at the American Civil Liberties Union and director of the ACLU's Center for Democracy. Jameel wrote a brief in support of the petitioners. Jameel, it's wonderful to welcome you back to We The People.

[00:01:21.9] Jameel Jaffer: Thanks so much for having me, it's great to be here.

[00:01:26.3] Jeffrey Rosen: And Zephyr Teachout is Professor of Law at Fordham Law School, where she focuses on the intersection of corporate power and political power. She teaches corporations election law, antitrust, and prosecuting white collar crime. Zephyr wrote a brief in support of respondents. Zephyr, it's wonderful to welcome you to We The People.

[00:01:41.0] Zephyr Teachout: Oh, it's really wonderful to be on, thank you so much for having me.

[00:01:45.2] Jeffrey Rosen: Let's begin with both of your important briefs in the case. Jameel Jaffer, your brief argues that the law in question violates the First Amendment. Tell us what the law is and why it violates the First Amendment.

[00:02:00.6] Jameel Jaffer: Yeah, so in essence the law would ban TikTok from operating in the United States and more important from our perspective would ban American users of the platform from accessing the platform, sharing information on it, viewing videos on it, participating in the expressive community that TikTok has created. And the brief that we filed is actually principally about history. It's an argument that we should look at this particular case as one of a long line of cases involving government efforts to restrict Americans access to information and ideas and media from abroad. And we point in particular to a case called *Lamont versus Postmaster General*, which is a 1965 Supreme Court case that involved a federal law that required Americans who wanted to receive communist propaganda from abroad to register with the post office in order to do so.

[00:03:17.5] Jameel Jaffer: And the Supreme Court struck down that law. Actually, I learned this recently. It was actually the first time the Supreme Court had ever struck down a federal law under the First Amendment. But the court struck it down, holding that the registration requirement imposed an unconstitutional burden on America's right to receive information from abroad. And I see the TikTok ban as a kind of digital age equivalent of that law that the Supreme Court struck down in 1965. And in some ways it's more offensive from a First Amendment perspective, because it's not just a burden that the government is imposing here, it is categorically foreclosing Americans from participating in this particular expressive community. And there are 170 million or so Americans who are participating in this community. So this is an extremely broad restraint on speech.

[00:04:15.6] Jameel Jaffer: Some might call it a prior restraint on speech. And I think we should see this case through that lens. There are a number of other historical examples we point to in our briefcases in which the courts have considered government efforts to restrict Americans from accessing information from abroad. And we also, in our brief point to the practices of other countries. I do think that it's a relevant thing that this practice of restricting individuals from accessing information from abroad is one that has historically been associated with the most repressive regimes. This is what the Soviet Union did, it's what China does, it's what Iran does, it's what Saudi Arabia does. And I don't take the position that there are no circumstances in which the government should be limiting our access to media from abroad, but I do think that we should be very careful about going down this road, and we should require the government to meet a high bar, evidentiary bar to justify these kinds of restrictions. And I don't think it's done here.

[00:05:24.3] Jeffrey Rosen: Thank you so much for that. Zephyr, your brief also focuses on history, you begin with Alexander Hamilton of the Constitutional Convention warning that foreign powers will interpose the confusion will increase in a dissolution of the union ensue. Tell us why you think history does not support striking down this ban on First Amendment ground.

[00:05:48.9] Zephyr Teachout: Yeah. I just wanna sort of rehearse my understanding of what the case is about. The case is about a law recently passed called PADACA. How do you pronounce it? How do you describe it Jameel? I've written about it more than I've listened to the radio, so.

[00:06:11.2] Jameel Jaffer: I don't know how to pronounce it.

[00:06:15.8] Zephyr Teachout: Okay. But it's this law the Protect Americans From Foreign Adversary Controlled Applications, which then defines foreign adversary controlled applications to include TikTok and any other website that has more than a million users and is owned by a company in one of a series of foreign adversary designated countries. And the statute it refers to for defining foreign adversaries is a pre existing statute. So it says basically if you're gonna have a social media app, and there's some technical definitions, but it's a pretty brief description. It can't be controlled by foreign government, that is a foreign adversary as defined by this pre existing statute under the ACT app stores and hosting services cannot distribute this foreign adversary controlled app unless it is divested. So to be precise and, I'm sure we'll talk about this more, the act does not ban TikTok.

[00:07:26.8] Zephyr Teachout: It requires its divestiture from ByteDance, a Chinese government controlled company. And I think that's important before I get into history, because this is fundamentally a law about regulating the ownership structure of communications infrastructure. The briefs that I filed also really relies on history and goes back to history, because there is a long deep tradition in this country. And yes, in other countries, a tradition that is steeped in a vision of sovereignty. And before I get to history, Jeffrey, I'd just like to briefly talk about sovereignty, 'cause that's really, to me what's at stake here is that the idea of self-governance is to me, essential for freedom, essential for human liberty, essential for democracy. And self-governance requires sovereignty, which requires a nation that is self-governing. And an essential feature of sovereignty includes the ability to restrict foreign governments from interfering in domestic affairs.

[00:08:35.8] Zephyr Teachout: So at the constitutional convention, it's not just that Hamilton talked about the threat of foreign interference, it was close to a constant conversation. The Emoluments Clause, unfortunately, is rearing its head again as Donald Trump is poised to enter office with, again, looking to be violating the foreign emoluments clause. Embedded in our constitution is a law that prohibits foreign governments, in particular, from giving gifts or anything of value to presidents. There's been restrictions on foreign banks since the founding of the country, restrictions on foreign ownership of shipping, and in particular, the greatest area of activity has been restrictions on ownership of communications infrastructure. So the Radio Act and various amendments to that, up to this current day limit foreign ownership of radio,

television, and other infrastructure. You may remember that Murdoch had to become an American citizen in order to run his media empire here.

[00:09:55.0] Zephyr Teachout: And so, what I see as a core regulation of ownership by foreign governments is a core feature of sovereignty and doesn't implicate the First Amendment, but rather falls directly in line with a 240 odd year history of protecting American democracy. Now, whether or not you agree with a particular law, and I actually do think I do support the particular law, I think that history is extremely important. So when we think of like the cluster of cases we put it with, I put this with, not just with the history of cases, upholding foreign restrictions, but with then Judge Kavanaugh saying it's okay to limit, foreign contributions to campaigns in the United States with the series of efforts around the country to limit foreign corporate Super PACS. That there's a sort of series of efforts that I think are more urgent, because of the nature of technology to protect American democracy from foreign governmental interference.

[00:11:08.1] Jeffrey Rosen: Thank you very much for that and for establishing the terms of the argument. So well, a central first question in the case is whether or not the statute implicates the First Amendment and whether or not some kind of heightened scrutiny applies. Jameel you argue in your brief that the act does implicate the First Amendment because it restricts the right of Americans to access ideas, information and media from abroad. And you say that, strict scrutiny should apply. Tell us more about why you think the First Amendment applies and why the court should apply strict scrutiny?

[00:11:52.7] Jameel Jaffer: So I will do that, Jeff, but I wanna say one thing about sovereignty and self-government because maybe weirdly I use kind of the same terms as Zephyr does to defend my position here. Like I think this is a case about self-government too. But to me a central principle in First Amendment jurisprudence was intended to make it possible for us to govern ourselves, and it makes it possible for us to govern ourselves in part by committing to individuals rather than to their government. The power to decide which information is worth listening to and which ideas are persuasive. All of that is committed to individuals rather than to the government. That's what we mean by self-government, at least when we talk about it in the context of the First Amendment right. We mean that the government doesn't get to decide which ideas are true and which are false. The government doesn't get to decide what media we read.

[00:13:02.4] Jameel Jaffer: We get to decide those things and we get to decide those things because it's our job to decide what the government should look like. We have sovereignty over the government and not the other way. We have power over the government and not the other way around, and I think Madison said something along those lines that it's the people who have sensorial power over the government and not the government over the people. And what I see here is the government trying to manipulate domestic political discourse by restricting what we can read and which expressive communities we can participate in. I actually, I think Zephyr

makes really good points about control of communications infrastructure. But to me, there's a real difference between, say fiber optic cables.

[00:13:02.4] Jameel Jaffer: We're talking about fiber optic cables, and we're talking about Huawei rather than TikTok or ByteDance. This would to me more naturally fall into the tradition that you have described. But TikTok seems to be closer to the BBC or The Guardian than it seems to fiber optic cables. And it's really hard to separate this question of China's right to operate communications infrastructure in the United States from American's right to participate in expressive communities of their choosing here. And for the same reasons, I would be very skeptical if our government said we need to protect Americans from foreign interference in domestic political discourse by restricting Americans from accessing the BBC's website or the CBC's website, or the Guardian's website.

[00:15:09.5] Jameel Jaffer: I'm skeptical of it here, and I'm especially skeptical of it because many of the legislators who were most enthusiastic about this law made it very clear that what they were enthusiastic about was shutting down particular categories of content that they found objectionable. Like in our brief catalog, many of these statements, there's a long list of them, but some legislators pointed to speeches about drugs, others to speeches about immigration. Many of them were upset about posts on TikTok that highlighted the aftermath of Israeli airstrikes in Gaza. And it was for that reason that they wanted to shut down TikTok. They thought TikTok is spreading content that is inconvenient for us or objectionable to us, and we need to ban it for that reason.

[00:16:10.1] Jameel Jaffer: And obviously I'm paraphrasing, but all the statements in our brief start on page 19. Anybody who's interested can read them. And they're pretty direct. Even the main sponsors of the law said our main reason for pursuing this ban has to do with TikTok's algorithm, which we think is amplifying content like the content I just mentioned. And that makes me especially skeptical of this law. And that I guess is a maybe nice segue into Jeff's question, which is why should this be subject to strict scrutiny? I think it should be subject to strict scrutiny, because first of all, it shuts off an entire medium of expression. Just the scale of the ban it is, that that's what the ban is all about, shutting off this medium of expression. And also it's targeted at a specific platform. The only platform that's actually named in the law is TikTok. And again, many legislators who supported the ban made it very clear that it was specific categories of content that they were worried about. So for all of those reasons, I think the ban should be subject to heightened scrutiny.

[00:17:35.0] Jameel Jaffer: Zephyr, in your brief, you argued that the ban should not be subject to heightened scrutiny at all, because it's a restriction on conduct, not speech. Tell us why you think strict scrutiny does not apply.

[00:17:47.6] Zephyr Teachout: Yeah, again, and I do wanna, I'll both answer your question and respond to Jameel's thoughtful comments to explain our difference. I think it is a ban on ownership structure by a foreign government. And I will continue to insist, because I do think it's very, very important that it is a divestiture requirement not a ban on TikTok. And in their brief Jameel and his colleagues say in a footnote, it's effectively a ban but I do not think that is the job of the court to deal with the practical questions of how and whether there can be a sale. China has said it will not go through with a sale. We don't know if that's true. I don't think the Supreme Court should be analyzing it. I think it should be treated this much like it treated, say, Arcara, the Supreme Court case, which said, yep, you can shut down a bookstore, which of course, a bookstore, what is more free speech than being able to read and share and discuss books for health violations?

[00:19:07.1] Zephyr Teachout: And in our care, the court talks about how restrictions that are not about speech are going to have incidental effects on speech. But our job is to look at the essential nature of the restriction and the essential nature of the restriction here is who owns the communications infrastructure. So this leads to my desire to engage in a few of Jameel's points. One, the fact that 170 million Americans use it is actually evidence of its infrastructural role. It is not like the BBC or a newspaper or a radio. And it has a lot of the features as Ganesh Sitaraman explained in a beautiful paper, not about this particular law, but about the history of restrictions on foreign infrastructure in the United States. It has a lot of features of the infrastructure that has traditionally been banned, that on which other businesses rely, where there's a strong degree of dependency. That degree of dependency is what increases the sovereignty risk because it increases this powerful leverage point, the sort of too big to fail quality that is very different from, say, banning an individual news organization.

[00:20:38.9] Zephyr Teachout: And this, the algorithm, regardless of what sponsors may have said, the algorithm can continue to be used under new ownership. The law does not ban any particular viewpoint, any particular content or any particular algorithm, some of which I think implicate speech, some of which I don't. That it's just sort of more design questions. But to be clear, then the question is, okay, and this leads to a question I have question Jameel. If this law were in place pre-TikTok, it was basically a ban on ownership without reference to TikTok before it had arisen 12 years ago, would you have the same concerns or is there something about the moment in time? So I put that question aside.

[00:21:33.4] Zephyr Teachout: Now, to agree with you, I think the law would be better if it didn't reference any particular company. And I take the question of motive seriously. And I think it's tricky. Like the question of what motivates foreign ban? So if we looked at the debates around the various radio acts and early proposed around 1904 and then 1912, and then later in the 1920s, I'm sure you would see lawmakers calling out particular forms of content that they didn't like, but the overall gist of the law, I think is plausibly about sovereignty. The radio Acts

law, and I'd say the same is true here. So I do take it seriously, there would be a point at which you'd say, oh my gosh, there's something, this really does look like a sham to target particular viewpoints. And I took a look at the comments you listed. Most of them are concerns about the Chinese government and I think that sort of points to a real puzzle in this area, or puzzle.

[00:22:39.9] Zephyr Teachout: I think it is presumably, I think the court should presumably defer to restrictions on foreign governmental ownership, which you could say then, well, that means they're presumably deferring to restrictions on that foreign government speech but I just think that's the nature of sovereignty. And so if I put those aside, the language of Pelosi and others that is around concerns about the PRC's speech, but concerns about American speech, then yes, then I would look through that seriously. And I guess I would suggest when, if I'm maybe not daydreaming, 'cause the court really hasn't answered questions about foreign governmental control here, I would suggest you have a slightly different constitutional structure, which is presumed deference. So in this case, rational basis review but if there is clear evidence that there is an effort to target a viewpoint and to use on its face content neutral law like this to target particular content, then I think some form of heightened scrutiny applies.

[00:23:53.6] Zephyr Teachout: I just don't think the Mike Lawler and Mitt Romney statements rise to that level given the overwhelming, plausible, other justifications and given the, I think fairly uncomplicated view that a foreign government having access to both spy and manipulate the content of 170 million Americans is a threat to sovereignty. I don't think it rises to a level that's beyond that. So we're all stuck in a late 20th century, three tiered scrutiny world. And one of the reasons I filed this brief is I'm concerned. I think the government will win. And I like filing briefs about things I care about, but remember, this was over a winter holiday with a small child. The reason I filed this, chose to file this brief, and the reason I chose to engage is that I'm really concerned that the court will in the same way it did way back when in Buckley versus Vallejo, another hastily decided case kind of hastily used language of strict scrutiny that has implications for all kinds of other laws, including restrictions on foreign Super PACs restrictions on foreign contributions to campaigns. That it will sort of casually heightened scrutiny in a way that actually undermines sovereignty.

[00:25:21.6] Jeffrey Rosen: Jameel, your responses to Zephyr's interesting points, and let's put on the table the question of what kind of heightened scrutiny will apply if the court applies it? You argue Jameel along with TikTok that strict scrutiny should apply because restrictions on curated content are content based restrictions on the DC circuit. Judge Sheena Vasani said that intermediate scrutiny applies 'cause the act seeks to prevent secret curation of content flowing to the US. The Biden administration says that most intermediate scrutiny applies because it might be analogized to a time, place or manner restriction. And Zephyr, this says that no heightened scrutiny applies. So tell us how you imagine the court will analyze the question of what kind of heightened scrutiny to apply.

[00:26:12.1] Jameel Jaffer: So I think that Zephyr was arguing, although Zephyr, you correct me if I got this wrong. Not just that no heightened scrutiny applies, but that the First Amendment isn't implicated here at all. Isn't that.

[00:26:23.2] Zephyr Teachout: That's correct.

[00:26:28.5] Jameel Jaffer: So that makes me really, really nervous, this idea that the First Amendment isn't even implicated here. And Arcara to me seems like a totally inappropriate case because that was a case in which the government's interest had nothing to do with speech. It was, as you said, Zephyr, health violations. Now, if the government's concern with TikTok is that it had violated the health code, then I wouldn't be concerned. I wouldn't be arguing that the First Amendment applied here. But the government itself is pointing to a kind of speech infused justification as even the DC circuit recognized the concern that TikTok's algorithm will be hijacked by the Chinese government and used to promote content that is favorable to China and unfavorable to the United States. That is an interest that relates very closely to speech. It's a speech related interest.

[00:27:33.6] Jameel Jaffer: And so I don't think Arcara applies. I think it would be like Arcara would be a good analog if in that case the government had been trying to shut down the bookstore because it was selling Zephyr Teachout books. And if that had been the case, then I think it would be a good analog but I don't know. That wasn't the case. So then there's this question about, well, is it intermediate scrutiny or strict scrutiny? I think I've already sort of given you my best argument for why it should be strict scrutiny. So let me spend my time instead responding to a couple of Zephyr's as usual, very good points.

[00:28:16.3] Jameel Jaffer: One is this idea of the ban, really what I'm calling the ban, being focused on ownership structure and so not really being a ban at all. I guess I don't find that ultimately persuasive, because to me, it sounds like if the government said we're gonna pass a law, Congress passes a law that says, Fox News has to have new ownership. It can still be the same content. We're not complaining about Fox News's content. We just want the ownership to be different. If the new ownership wants to continue with the same editorial policies it can, all of us would see that for what it was, it transparently an effort to change what Americans see on Fox News.

[00:29:08.8] Jameel Jaffer: And you asked me, I think it's a good question, Jeffery, like, what I feel differently, this law had been passed 10 or 12 years ago before TikTok was even on the scene. I think I would feel very differently about a law that was a kind of general intervention in the sphere of communications, infrastructure and not something that was targeted on its face, and by its timing at a particular company associated at this particular moment with particular kinds of

content. Like me, that makes this a very different case. If it were just a law that said foreign adversaries of the United States shouldn't own, can't own more than 25% of a corporation that holds a social media company that a hundred million or more Americans use. I would feel very differently about it.

[00:30:05.1] Jameel Jaffer: Although even that kind of law I think raises really challenging questions, because while none of us wants China or I don't know, Saudi Arabia or any other country to be interfering in our elections or even in our political discourse more broadly, separating that interference from American's right to explore ideas and access information and media from abroad is difficult. I can't remember who it was that was sending this communist propaganda into the United States in 1965 in the Lamont case. But you had a supplier of the media and then you had American readers of the media. And every restriction on the foreign government's ability to distribute information in the United States is also a restriction on America's ability to access that information. So even that law, I think, would present challenging questions, but I would feel much differently about that law than I do about this one.

[00:31:20.9] Jameel Jaffer: Maybe part of the reason I come to this case with a different perspective than Zephyr does. So I spent several years at the ACLU, maybe a decade at the ACLU, litigating cases involving the government's denial of visas to foreign citizens who had been invited to speak in the United States but were foreclosed from doing that because of their political views. And there's a long history of this in the United States. During the Cold War, there were all sorts of foreign writers and artists and activists who were denied entry to the United States because of their suspected soft spot for communism.

[00:32:10.0] Jeffrey Rosen: Those people included Pablo Neruda, Gabriel García Márquez, Pierre Trudeau, who later became the Canadian Prime Minister, Doris Lessing. I mean, really, it's an incredible list of people who were foreclosed from entering the United States because of their political views. And then I worked on some cases post 911 involving people who were barred from the United States often, because of their criticism of American foreign policy. One of them was Adam Habib, who was a South African activist at the time, later became the chancellor of the University of Johannesburg, he's currently the vice chancellor at SOAs in London, but he was barred from the United States because of his criticism of the Bush Administration's policies. And in each of those cases, the government took the position that it was necessary to bar those people from the United States to protect Americans, to protect the United States from the dangerous ideas that those people would disseminate if they were allowed to come here. And I saw that kind of authority being abused over and over and over again. And it's hard for me not to see some of that in what's going on in this case here.

[00:33:29.2] Jeffrey Rosen: Zephyr, responses to those thoughtful points. And then I wanna ask you, if the court does apply heightened scrutiny, will the law pass? And in particular, what are

the compelling or important interests that might justify? The government argues that there are two compelling interests in banning TikTok, preventing Americans' data privacy protection from exploitation by the Chinese government, and preventing algorithms from being manipulated to show pro-Chinese propaganda. On the DC circuit, Judge Ginsburg, distinguished between preventing Americans from sharing propaganda, which is not a compelling interest in preventing China from manipulating algorithms, which he says is a compelling interest. What do you think the compelling interest is, and why should a court uphold the law if it does apply heightened scrutiny?

[00:34:21.7] Zephyr Teachout: Great. So first I just wanna say, Jameel your work on those cases was critical. And I see the cases where the US government is abusing authority to shut out individual political viewpoints. And I take a very different lesson here, which is that the advantage of this law, which is a law as opposed to a somewhat opaque administrative process, is a pretty bright line rule with pretty clear applications and a clear scope. And takes it out of the kind of dangerous abuse of individual viewpoint based work and says, no, this is an ownership regulation. So I do see it as critically different. When we talked about what ifs, as Grindr was recently, required to be divested from a Chinese owned company under the foreign investment procedure law.

[00:35:27.5] Zephyr Teachout: And I think that was the right decision, the concerns about spying and concerns about manipulation existed there as well. Perversely, advocates who are supporting TikTok would say that if you get in and you're big enough, then these divestiture laws wouldn't apply. And I think that's actually upside down, I think that the risks are greater the more you become like big infrastructure. And for Grindr, there's a harder argument to say that it's infrastructure as opposed to a standalone app. I just wanna say one other thing, 'cause when you're thinking about how do I think about this case? What are the other cases that this brings up? To me, this is too close to Citizens United where there's a long, long history of rules on corporations not being able to spend money in elections in a particular way.

[00:36:27.3] Zephyr Teachout: And the court, then the argument says "yes, but if we use the right to hear, we're going to" Even if we look at the right to receive information, basically corporations are gonna get the reflected glow of that right to hear. And I do worry that this is an expansion of that kind of Citizens United like thinking. Which sounds reasonable, but in effect, in that case, undermines sovereignty by diminishing individual's power, and in this case undermines sovereignty by diminishing the power of those who are here in this polity. So, to your question Jeff, there's an interesting suite of briefs here, and I think they reflect a suite of views. One set of views that you might think that I align with is there's kind of a technocratic national security, set of justifications.

[00:37:27.9] Zephyr Teachout: And I think they're extremely persuasive. That the evidence of the Chinese government having an interest and opportunity to directly insert itself and a habit of directly inserting itself in American domestic affairs is quite strong. There's evidence of direct engagement in American elections, hacking scandals, something every week basically in terms of the Chinese government aggressively using the tools that it has. So I think it's a very easy and likely finding for the court to say, this law is justified on national security grounds. I wrote this brief in part because I don't love the idea of national security being a free speech national security exception, I'll maybe slow down a little bit. Basically, you've got a free speech issue, we're gonna have heightened scrutiny, but we're gonna overcome that with national security and the national security plays this kind of unique get out of First Amendment jail card.

[00:38:39.5] Zephyr Teachout: And I don't think it should, that's why I keep talking about sovereignty. I do think the court may, whether explicitly or implicitly, engage in some degree of scrutiny, but I really hope it doesn't. And I hope it doesn't, because I think you may see a new category of not strict in theory, fatal in fact, but strict in theory, upheld in fact, but just for national security. And I think that would be a dangerous direction to go. So the justifications, the history of the Chinese government involvement, the opportunity, I think those are all quite strong. But given the hasty briefing schedule and the vast implications for a whole suite of other laws, I really hope the court does everything it can to punt on, not deciding on a final standard of review for these kinds of cases because, I'll tell you the brief that isn't here. The brief that isn't here is like the brief in the moody versus NetChoice case of the 150 laws that would be implicated if the court struck down those laws on facial grounds. The brief that wasn't able to be drafted in the hasty briefing schedule was the 150, federal laws and state laws governing foreign ownership that will be implicated by a new decision on standards of review. So I'm really hoping for a duck here.

[00:40:16.2] Jeffrey Rosen: And Jameel, how do you analyze the strict scrutiny analysis? You dispute that there are compelling interests in this case, you say there's no legitimate government interest in shielding Americans from dangerous speech, and on narrow tailoring, you argue that there are less restrictive alternatives to show that the act is over-inclusive. In particular, you say the government could require platforms to disclose certain information about their recommendation algorithms and content moderation practices, or it could make the case to the American people that the speech they're consuming is foreign propaganda. Why do you think that this law should fail strict scrutiny?

[00:40:56.2] Jameel Jaffer: Yeah, I don't think the government has any legitimate interest in protecting us from ideas that we want to hear or information that we wanna receive. And I think that the Lamont case that I mentioned earlier is good support for that proposition. Now, the government says that look, our concern here isn't that Americans want to receive foreign propaganda but the covertness of it, Americans are never gonna know that TikTok's algorithm

has been hijacked by the Chinese Communist Party. But I think if that's the government's concern, it's a concern that can be addressed through counter speech and disclosure. It's not clear to me why the president at a press conference couldn't just make the case to the American people that this platform is propaganda or might be propaganda and should be avoided for that reason.

[00:42:02.0] Jameel Jaffer: And then Americans can make their own decision whether to access it or not, just as they can make their own decision about whether to read books by Karl Marx or access propaganda of other countries, that's a decision that individuals can make with the information that the government gives them. Or the government could require TikTok, like if the concern is that TikTok is effectively operating as an agent for the Chinese government, the government, the US government can require TikTok to register as a foreign agent, there's already a law that I think would require TikTok to register as a foreign agent in those circumstances. And TikTok's officers and directors could be prosecuted if they didn't register, and I think that law is perfectly constitutional, at least as applied to these circumstances.

[00:42:53.9] Jameel Jaffer: And it seems to me that those kinds of things, counter speech and disclosure, would address the concern about the covertness of the feared propaganda. Now, Zephyr in this conversation, I think to some extent, Zephyr and I have been talking past each other because I keep focusing on the concerns about propaganda and foreign manipulation. And Zephyr focuses on the concerns about data collection. Zephyr's right that TikTok collects a ton of information about Americans. I agree with Zephyr that something should be done about that. I think where we disagree is about whether this particular law is the thing that should be done about it. This is a law that focuses on TikTok specifically, it's a law that was animated by concerns about content, not by concerns about data. I think that if Congress were really interested in protecting Americans from the Chinese government's collection of their data, Congress would pass the kind of privacy law that Zephyr and others have been proposing for many, many years.

[00:43:58.9] Jameel Jaffer: That would be an appropriate and effective and constitutional way to protect Americans' privacy, and it wouldn't restrict anyone from accessing speech that they want to access. Now, that said what's gonna happen in this case. I fear that Zephyr is right that the court is gonna uphold this ban. The slippery slope I'm worried about is different from the one that Zephyr just described. What I'm worried about is, the court upholds this law, and as a result, legislatures around the country have new power to "protect" Americans from foreign propaganda by restricting their access to information and media. And that kind of power I think, will have implications far beyond TikTok, and we know that because we've seen how that kind of power is used in other places. It's one of the things that has historically distinguished open societies from closed societies. Does your government restrict you from accessing information from abroad? And I worry that by putting us on the other side of that line, the court will put us on a new path

here that will result in, many, many more restrictions on our ability to access ideas and information from elsewhere.

[00:45:27.8] Jeffrey Rosen: Zephyr, Jameel identifies two possible interests and says there are less restrictive ways of dealing with them. One is, if you're concerned about data collection, you could pass a privacy law as opposed to letting foreign adversaries get the data from private companies, which they can currently get under the existing loose protections for privacy. And second he says if the concern is manipulation of algorithms, then you could just have disclosure requirements rather than restricting algorithms. What is your response? And do you share Jamal's concern or not that if the court upholds this law, then legislatures might have new authorities to protect Americans from foreign propaganda?

[00:46:13.6] Zephyr Teachout: No unsurprisingly, I have the inverse reaction first. There are, yes, we need. Thank you for the acknowledgement. We need new data collection and regimes in general for us companies, which are extremely abusive. We need better laws governing, a defective design especially for children across the board, we need all those things. There is a unique threat involving foreign adversaries collecting data, and there is a unique threat, even though I have been focused on the data collection with foreign adversaries, and it is a pretty new one in terms of the, scalability, there's a unique threat in being able to use that in combination with the ability to target content to individuals in a way to directly interfere and shape American politics. And I think I wrote about this about 12 years ago.

[00:47:12.5] Zephyr Teachout: That this problem was coming. And it is a real problem, like the neo, the sort of tech libertarian vision of the open internet actually undermines sovereignty globally, undermines sovereignty, not just in the US globally undermines sovereignty. And I think this is recognizing that unique threat. It's naive to think that transparency is FARA which I love. One of my favorite laws, the Foreign Agent Registration Act, but it is a transparency law. I probably have a more expansive view than the government itself about the purposes here, it is not a law that fundamentally protects sovereignty. I think we should be proud to join countries like France, Canada, India, and the United States that have restricted foreign ownership of communications and that have stood tall to protect the sovereignty of that country against foreign involvement.

[00:48:07.7] Zephyr Teachout: I do not associate restrictions on foreign government ownership. And my fear, my parade of horrors Jameel, is that this actually affects my biggest fear here, we've talked mostly about the foreign part. My biggest fear here is that there was a case this past summer NetChoice versus Moody in which the court, I think, refused to answer any questions about First Amendment rights of platforms, because I think those are very complicated. I think the question of whether a platform is more like a railroad or a newspaper is not straightforward, we're not gonna get into that now. And I think the implications are huge.

And my biggest fear in this case actually has more to do with that, that there will be dicta that suggests that platforms not just TikTok, but, Meta, YouTube, Twitter, are insulated from regulation that is sort of thrown off, while the court is upholding this law in a way that, gets in the way of the significant AI regulation, products liability regulation and open fair platform regulation that I think we need.

[00:49:27.5] Jeffrey Rosen: Jameel, Zephyr just mentioned the NetChoice case, as she noted the key question of whether algorithm management is speech is unresolved by the NetChoice case. Will the court bite this time? And what's your advice to the court about how to avoid carving out an exception for foreign speech while at the same time reaching the wrong result on the question of whether or not algorithm management is speech?

[00:50:00.6] Jameel Jaffer: Yeah. I think that the court was right in that choice to hold that, social media platforms, content moderation practices reflect editorial judgment and are protected by the First Amendment for that reason. I think the hard question is the next one that follows, which is what forms of regulation are nonetheless permissible? And there was a real division in what people sometimes call the First Amendment community on that question, with some organizations taking a pretty categorical approach and arguing that the fact that content moderation decisions reflect editorial judgment means that any regulation that touches on content moderation must be viewed as per se, unconstitutional. And then there are others, and the Knight Institute was among this much smaller group that argued that, notwithstanding the fact that content moderation often reflects editorial judgment, there's still regulatory possibilities that the First Amendment should be viewed, not just possibilities that are consistent with the First Amendment, but possibilities that further First Amendment values. And I would point to privacy law, certain forms of transparency, interoperability mandates and all that stuff to me is not just consistent, assuming that it's sort of carefully drafted. All that stuff is not just consistent with the First Amendment, but necessary to protect First Amendment values in this very new digital context.

[00:51:47.8] Jeffrey Rosen: Zephyr, how would you resolve the question of whether or not algorithm management is speech and how would you resolve the questions left open by NetChoice?

[00:51:58.9] Zephyr Teachout: Yeah, I have to deeply disagree with Jameel on this one. NetChoice or Dicta did not decide any of those questions. At first I thought they did, but it both was clearly Dicta, as it remanded the cases, with very limited guidance. It was basically a big no to the Fifth Circuit without any yeses, is the way that I read it. But it also peculiarly the majority opinion cites to the concurrence, which suggests that the First Amendment isn't even implicated at all and suggests to the part of the concurrence that suggests the First Amendment isn't even implicated at all in some aspects of content moderation. So I would say that the questions are far

more open after NetChoice than I would've possibly imagined. And I think the way to think about it is to look at the laws themselves, whether the laws themselves target, viewpoint, or don't.

[00:52:50.9] Zephyr Teachout: I'm actually quite grateful, even though I disagree deeply with Kagan's dicta, I'm quite grateful that the court functionally punted in a way that will allow states and the federal government to really experiment. Because right now with this experiment, unless they're specifically targeting specific viewpoints. So to experiment with, say rules that say that platforms must uphold their own guidelines to experiment with rules, as we are in New York, that ban the use of targeting for under 18 year olds. I think at heart Jameel and I have a disagreement about institutional rules, and I share his skepticism about the federal government. But I'm more concerned about the US Supreme Court jumping in, in cases that are on their face content and viewpoint neutral and inserting the sort of judicial analysis of what is and is not appropriate. And I would always put my thumb on the scale in the absence of really clear, viewpoint based restrictions of allowing for more trial and error in the elected branches.

[00:54:17.9] Jeffrey Rosen: Well, it is time for closing thoughts in this wonderfully illuminating discussion and, Jameel, first to you, sum up for our listeners why you think the TikTok ban violates the First Amendment and why and how you think the court should strike it down.

[00:54:31.6] Jameel Jaffer: Yeah, I think that this ban is an effort to restrict our access to speech from abroad. And again, I just don't think the government should be permitted to restrict our access to speech from abroad without very good reasons. And so then the question becomes, well, what are the government's reasons here? One of those reasons is that the speech might reflect Chinese government preferences as to what Americans should and shouldn't hear. And if that's the government's interest, I think the better way to address it is through disclosure and counter speech, the government can just tell Americans that it believes that TikTok, is a vector for Chinese disinformation, and that Americans can make their own decisions. And to the extent the government's interest is data privacy I think that's a very important interest. I'm sympathetic to the argument that TikTok is collecting all kinds of sensitive data about Americans, but I think the much better way to go about it, to protect Americans data, is by passing a privacy law that would protect Americans data without restricting their access to speech from abroad.

[00:55:51.1] Jeffrey Rosen: Many thanks for that. Zephyr's last word to you, tell us the people, listeners, why you think the TikTok ban does not violate the First Amendment and why and how you think the court should uphold it.

[00:56:01.5] Zephyr Teachout: We have a 240 year history of understanding that to be sovereign, to be self-governing, we need to protect core infrastructure including banking, including shipping, but most especially communications infrastructure from foreign ownership.

And so this divestiture requirement, which is not a ban, which says that TikTok can continue, but only if it isn't directed and controlled by a Chinese government entity, is falls sort of squarely in line with such a deep part of our history of sovereignty that to me, this should be an easy case, a pretty easy slam dunk. And in as much as there are real arguments about the nature of whether or not we should prohibit foreign governmental ownership of land, foreign governmental ownership of social media, foreign governmental ownership of radio stations, I do think the correct way to decide those questions is through the political process. And that political process will be more protected after January 19th when a foreign adversary doesn't own a platform, which such a huge portion of our country relies on.

[00:57:23.7] Jeffrey Rosen: Thank you so much, Jameel Jaffer and Zephyr Teachout for a superb, deep, and really illuminating discussion of this important issue. You're both models for how to approach these tough First Amendment issues in a thoughtful way, and I'm so grateful to both of you, thank you.

[00:57:38.8] Jameel Jaffer: Thank you.

[00:57:40.8] Zephyr Teachout: Thank you.

[00:57:46.5] Jeffrey Rosen: Today's episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, and Yara Daraiseh. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Check out the new Constitution 101 class at Khan Academy. That's constitutioncenter.org/con101. Sign up for the newsletter at constitutioncenter.org/connect. And always remember that the National Constitution Center is a private nonprofit, we rely on your passion and generosity. The beginning of the new year is a great time to support our efforts by donating today at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.