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The Tug Between Private and Public Power Online

Evelyn Douek*

I. INTRODUCTION

Professor Zittrain’s article describes, in his characteristically vivid and engaging way, one of the most consequential tugs of war of the internet age: the battle over the rules for what can and cannot be said online. The legal centerpiece of Zittrain’s story is the Skokie case from the late 1970s, which held that Nazis had a First Amendment right to march in a Chicago suburb with a large population of Holocaust survivors.¹ Zittrain calls the case “a near-perfect encapsulation of mainstream late twentieth century characterization of the right to free speech in America.”² And he’s right—there is perhaps no more iconic decision in the First Amendment canon.³ It is considered by many to be one of the “truly great victories for the First Amendment.”⁴ And the Skokie case matters to the tug of war over online speech because “the ethos of American civil libertarianism that reached apogee in the 1960s and 70s political and legal establishments in turn infused the mainstream use of the Internet.”⁵ No other case so neatly encapsulates the spirit of the early internet era.

Except, perhaps, one. Because there is another case—equally famous (or infamous)—that exemplifies the way American law approached speech regulation during the internet’s formative era and was the legal backdrop against which social media platforms grew

* Assistant Professor, Stanford Law School. Thanks to Genevieve Lakier for helpful comments, and to the editors of the Duquesne Law Review for their work on my piece. But thanks most especially to JZ, from whom I have learnt so much—about the internet, of course, but also, more importantly, about being a scholar, mentor, and friend.

³. Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, 24 CARDOZO L. REV. 1523, 1537 (2003) (“If one case [came] to symbolize the contemporary political and constitutional response to hate speech in the United States, it is the Skokie case . . . .”).
⁵. Zittrain, supra note 2, at 192.
up: *Citizens United v. FEC.* Citizens United is another icon of First Amendment law; “arguably the most important First Amendment case of the new millennium.” Citizens United post-dates the early internet, but it is a neat encapsulation of a First Amendment values system that gave us the internet we have today. That is because when the Court in Citizens United struck down restrictions on political campaign spending by corporations, it reaffirmed the protection that American law provides for corporate power, including over quintessential democratic public discourse.

*Citizens United* is the apotheosis of a free speech jurisprudence that is not cautious about corporate power over speech—far from it. It is highly solicitous of such power. If the Skokie case is about the idea that bad ideas should be defeated in the marketplace of ideas, *Citizens United* really emphasizes the marketplace part of that ethos. It makes evident that the “Rights Era” that Zittrain identifies was not only an era defined by protection of individual speech rights—it was also an era defined by the protection of corporate power over speech. Our internet is a product of both tenets: corporations got a lot of protection from the law for how they protect, promote, or select speech, and those corporations tended to think that the best way to wield that power was in the manner Zittrain describes—that is, by being relatively hands-off.

But the two positions carved out in these cases have recently been on a collision course when it comes to online speech. Because, as Zittrain recounts, our corporate overlords started to retrench from the view that “The Tweets Must Flow.” As a result, civil libertarianism and “the laissez-faire regime which the First Amendment sanctions” no longer necessarily point in the same direction when it comes to online speech governance. And just as First Amendment culture infused the approach of private actors to content moderation, now the way those corporations have exercised that power is reverberating back into the First Amendment firmament. Zittrain’s essay describes the most visible part of today’s debates about content moderation—that is, the turn against the civil libertarianism that the early internet’s speech rules embodied. But

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there is also an iceberg underneath those debates—a shifting understanding of the role of law in deciding those rules.¹⁰

In this short essay, I therefore hope to supplement the important story that Zittrain tells of the tug between rights and public health understandings of online speech governance with a story of how law, including American constitutional law, has sanctioned, and now perhaps is turning against, the corporations that are the agents of Zittrain’s story. Where Zittrain focuses on those actors, this essay focuses on the scenery that set the stage for the drama they have been embroiled in. Part II will describe *Citizens United* and its place in the First Amendment canon. I will show how the ethos the case represents was also a pillar of the legal architecture under which platforms operated in their formative years. Part III will describe how this pillar is also being destabilized as platforms are changing their own approaches to speech governance. The relationship between private and public power over online speech is dialogic and dynamic—they influence each other and are constantly changing. As Zittrain shows, First Amendment law influenced private actors’ content moderation; and now the effects of private actors’ content moderation are ricocheting back onto the First Amendment. This dynamism means nothing is stable—not content moderation, nor the legal environment it operates in. The story of the tug of war between rights and public health is also a story of the struggle over public and private power online. Both stories will determine the future of online speech, and both are still being written.

### II. CORPORATE OVERLORDS

As Zittrain observes:

> Although we don’t have consensus about what we want, no one would ask for what we currently have: a world in which two unelected entrepreneurs are in a position to monitor billions of expressions a day, serve as arbiters of truth, and decide what messages are amplified or demoted. This is the power that

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¹⁰. This paper draws on, and is heavily indebted to, the following blog post and its co-author: Evelyn Douek & Genevieve Lakier, *First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus*, UNIV. OF CHI. L. REV. ONLINE (June 6, 2022), https://lawreviewblog.uchicago.edu/2022/06/06/douek-lakier-first-amendment/.
Twitter’s Jack Dorsey and Facebook’s Mark Zuckerberg have.\textsuperscript{11}

And it is hard to argue with the fact that this is not the ideal way to run a public sphere. But it is, in fact, the choice that has been repeatedly made by those writing First Amendment doctrine. Private actors have been gifted all sorts of expansive control over public discourse. Jack and Mark (or Elon, for that matter) were not the first such corporate overlords, and \textit{Citizens United} is the poster child of how the First Amendment created a world where corporations hold so much power.

\textbf{A. The Other Emblematic Case}

\textit{Citizens United} probably needs little introduction, and its particulars are not important for the argument of this essay. When the Court struck down limits on corporate campaign expenditures, it did so by explicitly overruling the idea that the government had a compelling interest in preventing the distorting effects extreme corporate wealth (and therefore power) could have on public discourse.\textsuperscript{12} Justice Kennedy’s opinion for the Court was surprisingly preoccupied with potential effects on media corporations—that is, speech intermediaries. Although the challenged provisions in the case \textit{exempted} media corporations, Kennedy argued that upholding a principle that the government had an interest in preventing corporate wealth from distorting public debate “would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations.”\textsuperscript{13} It is anathema to the First Amendment, he argued, that the government could regulate speech intermediaries and publishers, and this was so regardless of their immense aggregations of wealth.

No one thinks about \textit{Citizens United} as an internet regulation case (because it’s not!). But it applies to internet platform corporations just as it does any other. Indeed, future technological development was an explicit justification for refusing to permit the government to draw lines between different kinds of speakers. Kennedy was not blind to the effects the ruling would have on online public discourse. He noted that “[r]apid changes in technology—and the creative dynamic inherent in the concept of free expression—


\textsuperscript{12} \textit{Citizens United v. FEC}, 558 U.S. 310, 348 (2010).

\textsuperscript{13} \textit{Id.} at 351.
counsel against upholding a law that restricts political speech in certain media or by certain speakers.” 14 And that while television ads may have been the core medium of political campaigning in 2010, soon “it may be that Internet sources, such as . . . social networking Web sites, will provide citizens with significant information about political candidates and issues.” 15 That is, the decision was explicitly written so as to ensure that the protection for corporate rights that it was articulating would apply to future speech intermediaries like the internet platforms of today.

Just as the Skokie case is the most famous case symbolizing American free speech absolutism, Citizens United is the most famous case symbolizing the way the First Amendment has protected corporate power in political debates. But it is far from the only one, and when it comes to content moderation, the corporate solicitude of Citizens United should be read alongside long-standing string of Supreme Court precedents that firmly establish that editorial discretion, like campaign spending, is a protected form of expression under the First Amendment. 16 The most famous of these cases is Tornillo, in which the Court held that newspapers could not be forced to publish replies to critical editorial content from political candidates. 17 The Court held that decisions about what to publish, fair or unfair, constitute protected editorial control. 18 Again, the Court rejected any appeals to the idea that the government should be permitted to regulate the media even if the result of market consolidation had been “to place in a few hands the power to inform the American people and shape public opinion.” 19 That is, Tornillo and like cases also explicitly upheld corporate autonomy regardless of their vast and perhaps disproportionate power over the public sphere.

The most recent affirmation by the Supreme Court of private actors’ control over the public sphere was the 2019 case Halleck, 20 about the rights of private cable operators to exclude certain film producers’ access to their channels. Justice Kavanaugh’s majority opinion was clearly concerned about the threat to “private enterprise” by any finding that such corporations’ discretion in their

14. Id. at 364.
15. Id.
18. Id. at 258.
19. Id. at 250.
editorial choices could be at all constrained. As Professor Genevieve Lakier put it, the case protected “the liberty of the property owner to make whatever use of its property it desires, rather than the liberty of the speaker to participate in public debate.”21 This appeared to be a decisive rejection of the idea that social media platforms’ content moderation decisions could be subject to constraints, despite their centrality to democratic discourse.22 That question had been in the air since Justice Kennedy had called platforms “the modern public square,” a few years earlier.23 But Halleck said no—the fact that platforms are powerful does not justify any restrictions on their power to control the speech of others. The Court has therefore affirmed again and again that corporate power over public speech is a fixture of the world the First Amendment has created.

Of course, this was not the only possible world. The pro-corporate free speech project was a political project, and one to which there were many alternatives. Citizens United itself is indicative: the elevation of corporate speech rights was a victory for the conservative wing of the Court, over loud liberal dissent. The victory has been decisive and has appeared relatively entrenched for decades.

B. Private Power and Online Expression

For a while the ethos of these cases happily co-existed with the First Amendment precedents that Zittrain identifies as reflecting the Rights framework. Both created the architecture of early internet regulation. The principle of protection for corporate power upheld in Citizens United, if not its letter, allowed platforms to bring the vision of free speech represented by the Skokie case to their online domains. The formative legal battles about how the First Amendment applied to the internet illustrate this co-existence.

Zittrain tells the story of the Communications Decency Act (CDA) and the Court’s declaration of its invalidity in Reno24 as a story of the “enshrinement of online speech rights.”25 But the story of the CDA is also a story about the enshrinement of corporate power over online speech rights. When the American Civil Liberties Union (ACLU) challenged the provisions of the CDA that sought to censor

25. Zittrain, supra note 2, at 192.
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indecent material, it did not challenge what is now the only provision of the CDA to remain standing: the famous section 230. Section 230 is mostly famous for the immunity from liability it gives platforms for the content that users post on their services. But it has another, equally important, effect, which is to protect platforms’ content moderation choices to restrict access to users’ posts. As Judge Wilkinson noted in the first decision interpreting section 230, one clear purpose of the provision was to immunize providers to ensure they did not over-restrict users’ posts, but “[a]nother important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services.” That is: section 230 was intended to empower platforms, not just to immunize them.

Section 230 is undoubtedly an important provision for the protection of individual expression online. Without it, platforms would be far more risk averse, and users would bear the cost of platforms’ over-removal. But even if section 230’s most important role is not the protection of corporate power but the protection of individual speech, it remains true that the fundamental way the law works is to empower private corporations to decide their own rules, guided by their own business incentives, in the belief that this is the best way to defend free speech. In this way, section 230 is also an expression of faith in corporate power and the market to manage the public sphere. As Professor Anupam Chander put it, “Law Made Silicon Valley” by intentionally giving platforms a wide berth in how they treated content on their website.

III. THE TUG BETWEEN PRIVATE POWER, PUBLIC POWER, AND POLITICS

And thus, like a fairytale, during the period that Zittrain describes as the Rights Era, the civil libertarianism of the Skokie case happily lived alongside the corporate solicitude of Citizens United. The corporations in charge of the online public sphere were staffed by “American lawyers trained and acculturated in American free speech norms and First Amendment law [who] oversaw the development of company content-moderation policy.” Following the

27. § 230(c)(2)(A).
American free speech tradition, platforms exercised their power in the spirit of the Skokie case. Constitutional law infused the private law that platforms created, and those platforms were—as Zittrain says—all too happy to “but out.”

But the story does not end there and is not happily ever after. As Zittrain recounts, the Rights Era has been followed by a Public Health Era, when our corporate overlords have become more attentive to the harms that can come from completely unconstrained expression and that “Rights” do not have to only mean the rights of speakers. The major platforms have all developed new rules, including against hateful conduct, pandemic misinformation, and false claims about elections, that are intended to promote public health rather than let the marketplace of ideas operate unencumbered. There is perhaps no greater indicator of this shift than Facebook’s move, after years of pressure and after the other major platforms had also done so, to ban Holocaust denial. This was a direct repudiation of the holding and ethos of the Skokie case. The message was clear: the Skokie case was overruled in platforms’ jurisdictions. With their users and advertisers no longer so happy for them to keep butting out, platforms started butting in, and their rulebooks expanded from short webpages to substantial textbooks for moderators to study.

This is where Zittrain’s story leaves us: at the inflection point as tech giants struggle to determine how to balance competing rights and interests. But chapter two of this story will be even messier than Zittrain suggests. It’s not just that “we don’t know what we want” when it comes to content moderation. It’s also that there is no “we,” and the First Amendment floor on which content moderation stands may not survive the destabilization caused by many platforms’ new philosophies. The conservatives that championed the pro-corporate free speech project now find themselves unsure if that project still suits their goals: platforms’ increased content moderation has been widely understood on the Right (without evidence) to be motivated by anti-conservative bias. Elon Musk’s takeover

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31. I have also discussed this trend in Evelyn Douek, Governing Online Speech: From “Posts-As-Trumps” to Proportionality and Probability, 121 COLUM. L. REv. 759 (2021).


33. Douek, supra note 31, at 780.

34. Zittrain, supra note 2.
and reformation of Twitter could have been seen as “ironic vindication of the free-market thesis that has undergirded the traditional conservative interpretation of the First Amendment.” Instead, it seems to have only fueled conservative fears that Silicon Valley elites have abused their power and need to be reined in.

The lesson is that the relationship between public law and private power is dialogic. Law is not static and what the law giveth, the law can taketh away. While platforms have been losing faith in the ethos of the Skokie case, civil libertarians have been losing faith that corporations will uphold their vision of free speech. The corporate power bestowed by the *Citizens United* vision of the First Amendment is not an inevitable and fixed truth about the world, and there are rustlings in the conservative legal establishment that suggest change is afoot.

Conservative legislatures are passing laws aimed at curbing platforms’ power. Republican politicians are now saying that the need for such laws “has been apparent for years, as our country’s public square has become increasingly controlled by a few powerful companies that have proved to be flawed arbiters of constructive dialogue.” Legal reform is a necessary response to the “tyrannical behavior” of “Big Tech censors.” Conservative members of the Supreme Court, including two who signed on to Kennedy’s opinion in *Citizens United*, have called one-such reform “ground-breaking” in the way it “addresses the power of dominant social media corporations to shape public discussion.” Justice Thomas has expressed concern about and called “unprecedented” the “concentrated control of so much speech in the hands of a few private parties.” The constituency that protected corporate power in *Citizens United* is now worried that that power is being wielded against them.

In this climate, the authors of our current free speech regime may not sit idly by while “we” work out what we want. On some readings

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of what these laws or the Supreme Court might do, the Skokie case's role in online speech governance could be resurgent, and platforms will have no choice but to reinstate a more libertarian approach to free speech—and the Nazi accounts they suspended along with it. Even if this maximalist version does not come about, law may still set other constraints on how private companies get to decide on the rules that govern speech online.

These rumblings are an important reminder that there is no "ideal" or static understanding of free speech to be discovered after a careful balancing of all the relevant interests. How free speech is understood and realized is an ongoing struggle between law, politics, and private power, each of which will assert itself in different ways at different times. Even if we could decide what we want, you can't always get it. Zittrain's illuminating account of the shift from the Rights Era to the Public Health Era in online governance is one of the most important stories for free speech in the internet age. But focusing on this shift should not obscure the political and legal arrangements that made it possible—and may ultimately forestall or reverse it.