[Music]

**Alida Kass:** Welcome to today's Federalist Society virtual event. This afternoon, Monday, November 6, we will be considering why there is not a larger conservative plaintiff's bar. I'm Alida Kass, Vice President for Strategic Initiatives at The Federalist Society and Director of the Freedom of Thought Project, an initiative addressing new challenges and questions involving freedoms of thought, conscience, and expression.

Through the project, we've discussed how ideological coercion might be operating in some key sectors, including our law schools and law firms, as well as the tech sector and the business world more generally. And these discussions sometimes raise questions of why conservatives still tend to work predominantly on defense-side litigation. Has that long-standing alignment affected incentives on private institutions? And is that alignment likely to change?

As we will see from our panelists today, there is an interesting range of perspectives within the right on these questions. And we are delighted to have Andrew Ferguson directing the conversation. Andrew's bio is available on the FedSoc website, so I'll just note that he currently serves as the Solicitor General for the Commonwealth of Virginia and has been nominated to serve as a republican commissioner on the FTC.

As always, please note that all expressions of opinion offered today are those of the experts on today's panel. We encourage our audience to submit questions for our panelists through the Q&A feature at the bottom of your screen. Thank you all for being with us today. Andrew, the floor is yours.

**Andrew Ferguson:** Thank you, Alida. I'm really happy to be here. We have a super-interesting lineup of panelists to talk about a super-interesting topic. So, I'm going to get out of the way as quickly as I can, and we can hear from the panelists on this issue. But, before I do, two things. First, I will reiterate what Alida said. As a state official, I'm speaking only in my personal capacity. I don't represent anyone from the Governor's Office or from the Attorney General's Office. I'm just here to talk as me.

And then, I'm going to briefly introduce our panelists. I'll go in alphabetical order. Mark Behrens is the co-chair of Shook, Hardy, Bacon's D.C.-based Public Policy Practice Group. He's been involved in public policy and legal issues for more than a quarter century. He is a member of the ALI, is affiliated with the Washington Legal Foundation and the Chamber of Commerce, and has authored over 150 amicus briefs and more than 50 scholarly articles and chapters.

We're then joined by James Burnham, who is the founder and president of Vallecito Capital. He graduated from University of Texas for his undergrad and University of Chicago Law School for Law School, clerked for then-Chief Judge Alex Kozinski, was a long-time associate at Jones Day before joining the Trump administration, where he held senior positions in the White House Counsel's Office and the Department of Justice. He then clerked for Justice Gorsuch before returning briefly to Jones Day as a litigation partner, and then left Jones Day to found Vallecito Capital. And I won't spend too much time talking about what Vallecito Capital is, because I think that's much of what James will talk about today.

And then, Ashley Keller is a partner at Keller Postman, went to Harvard for undergrad and the University of Chicago for his MBA and his JD, clerked for Judge Posner on the Seventh Circuit and Justice Kennedy on the Supreme Court, was a partner at Bartlit Beck, before leaving Bartlit Beck to get into the litigation finance game, and now runs one of the most important up-and-coming plaintiff-side firms in the country, and in the world. Because last time I was in London, I saw some of your ads for one of your cases on TV. So, an international presence for Keller Postman.

And, finally, Brandon Smith, like me, works in state government. He is the Chief of Staff to Jonathan Skrmetti, the relatively recently minted Attorney General and Reporter of Decisions for the State of Tennessee. Before that, he was the Deputy Solicitor General in the Tennessee AG's Office. He held positions in the Kentucky AG's Office as well, and went to George Washington University Law School, and previously worked in The Federalist Society. So, we're really pleased to have all four of you. Thank you all for taking the time to do this today.

So, I think I'm of the view that the best way to kick this off -- because all four of you are in really different positions, but many of you have substantial overlap. James, you were in big law. Ashley, you were in, like, big-small law. You were at a boutique law firm, but you represented a lot of the same clients that the white-shoe bar in D.C., New York, and L.A. represent. And, Mark, you remain at a prominent big D.C. law firm, in one of their most prominent leadership positions.

And, Brandon, you have worked largely in state government. But I'm sure that, like me, you were at least tempted, at one point, by the call of big law. I fell for that temptation briefly. But now, all four of you are in pretty different positions. So, I think it would be helpful, to kick us off, if each of you could explain how you got there, particularly in relation to the big defense bar. So, Mark, that will be how you've remained in the big defense bar. James and Ashley, it will be how you left the big defense bar and why, and, Brandon, why you elected not to join the big defense bar.

And I think that that is how we'll lead it off, as a way to get into sort of shifting views on the right of the defense bar, whether those views are shifting, whether there are generational differences, etc. So, Mark, we'll just do it in alphabetical order again. We'll kick it off with you. How did you wind up in big law? And why did you decide to stay?

**Mark Behrens:** Great question. First of all, thanks to The Federalist Society for putting this on. I'm very interested to hear what my co-panelists have to say. And, Andrew, I appreciate your work today, as moderator. I think, for me, my particular interest has been in the tort liability field. I've worked for 30 years with my senior partner Victor Schwartz. Most of you probably used his torts case book in law school: *Prosser, Wade, and Schwartz*. And what attracted me to tort law, in particular, and then life at a big law firm, is trying to find what I call a sweet spot in society with regard to product safety, product utility. We all want products that are safe, that don't harm us. But we also need products that are affordable.

We need to encourage pharmaceutical companies to go into research, for example. And I've always just been fascinated about the role of tort law in trying to find, again, what I call a sweet spot, where we're trying to reach a level of safety that's reasonable for people and also achieve affordability and access to products that people need. And it's really that policy issue that has attracted me. And I've continued to work in this area now for 30 years, trying to continue to work on finding that reasonable place for products to be.

**Andrew Ferguson:** Thanks, Mark. James, why don't you talk about how you got from Jones Day to the government and back again, and now where you are. And tell us a little bit about what Vallecito is.

**James M. Burnham:** Yes. And I'll try to do this relatively succinctly. So, I clerked for Kosinski out of law school, and then was at Jones Day for six or so-odd years, and then was lucky enough, when I was there, to work with Don McGahn, who was, at the time, an election law partner at the firm. Obviously, everyone knows who he is now. He became White House Counsel. And I was one of the folks that he brought into the White House, which was really cool.

I got to work on judicial selection. I got to help fill the Scalia seat with then-Judge, now-Justice Gorsuch — it was a really cool experience — and then spent a few years at the Justice Department in the civil division, basically defending all manner of lawsuits against the administration, and a little time at the end with Bill Barr, helping him with speeches and stuff, although COVID came and that kind of interfered with the speech-giving. Clerked for Gorsuch at the back end of that. And then went back to Jones Day, where I was a partner for about two years, almost two years.

So, first, I just want to say that I love Jones Day. It's the greatest firm in the world. I fully expected that I would spend the rest of my career there, except maybe for other stints in the government, and really only left for this unique opportunity. And I'll talk about that, because I think that will help explain what Vallecito is. But my departure — I mean, I love the firm — it has nothing to do with Jones Day. As a lot of people have commented on — this is not some unique observation — corporate America, in the last, I don't know, five, eight, maybe ten years, has taken a really sharp left turn, both on cultural issues and on wanting to be involved in all kinds of deeply political social issues.

And they've done it in all kinds of ways, from making corporate statements about all kinds of things, whatever issue of the day you want to talk about, to actually devoting corporate resources to political ends. So, obviously, Twitter, Google, Facebook, these are very famous examples. Removing Trump from all the social media, censoring conservative voices during COVID. It was just out of control. YouTube was pulling down videos from professors. So, there's a million examples. And I won't get into all of them. But, for whatever reason — and I think there's a multitude of reasons that we can talk about, if folks want — corporate America is not a friend, in many ways, to the conservative movement.

And that's not to say it doesn't create tremendous value and do lots of productive things. But there are a lot of things it's doing that are clearly, I think, bad, and inimical to our greater interests in a good society. And so, the idea with Vallecito Capital was, like, okay, so companies are doing bad and unlawful things that everyone on this call and most of the folks listening to this call would condemn. Should we start figuring out if there's ways to actually litigate those issues?

And when you sue companies, you get damages, not injunctions. And so, shouldn't we find a way for investors to use their money — people who care about these issues — to basically fund cases for a return, that also seek to penalize what I would describe as unambiguously bad behavior? My guess is Ashley has a much broader definition of unambiguously bad behavior than I do, which I will let him talk about.

Our theory is, can you basically file lawsuits that stay within a conservative mission, a policy mission, that also seek damages and make a return for investors? Because, if you can, we're going to, I think, have a lot of people who want to invest in that product, which could have all kinds of benefits for the legal profession. And we can talk about those more later.

**Andrew Ferguson:** Thanks, Burnham. So, thus far, we've gotten a very policy-wonkish answer for staying in big law, and then an unambiguously ideological reason for getting out of big law. Ashley, what is yours on this?

**Ashley Keller:** I'm a capitalist through and through. So here comes the venal, "I did it for the money" speech. So, the initial part of my career, where you said I was sort of in big-small law at Bartlit Beck, that was pure happenstance. I was coming off the Supreme Court, where, by luck, I got the privilege of working for Justice Kennedy. And, back then, the big law firms and the small ones that wanted to follow their lead were foolish enough to pay a quarter of a million dollars to people coming straight off the court. We were not worth that. We're still not worth that. And now they pay even more.

And so, I just couldn't, as a relatively young person with a family, turn down that filthy lucre. So, I went to Bartlit Beck. And, like James, I have nothing but amazing things to say about my former partners there. It's a tremendous firm. They do awesome work. I'm still very good friends with so many of them. Adam Mortara, former Bartlit Beck alum, is my middle daughter's godfather. So, nothing but singing the praises of Bartlit Beck, which, for a defense-side firm, is pretty entrepreneurial. They have a model where they don't bill by the hour, which sort of taught really good lessons about incentives and the pros and cons of working at a place where you measure your life out in six-minute increments.

But, eventually, I just got bored, to put it very frankly. I had an MBA. I had an entrepreneurial itch that I needed to scratch, which is what ultimately caused me to leave that great firm and to go start a litigation-funding business at the time that I did that, unlike James' niche model, which I think is fascinating and has a lot of opportunity, just given what we all know about corporate America today.

But, at the time I started Gerchen Keller Capital, there really wasn't an ideological bent. There was just a huge market opportunity for this nascent specialty finance product that really hadn't penetrated the marketplace yet. There's now a lot more growth in the industry. But I still think we're in the relatively early innings of basic modern finance principles coming to the legal profession. So, I started that business to sort of deal with my boredom. Ultimately sold it to Burford Capital, which is a great litigation funder. They're the largest in the world, doing sort of similar things on both the commercial and the consumer side.

And when you sell a business, you typically have to sign a non-compete. And we did so. And part of the terms of the non-compete essentially kept me from starting another litigation finance business, which was understandable. But, given my sort of entrepreneurial bent, I wasn't really made for sticking with the bigger combined entity. And so, I left to start Keller Postman about a year after we sold to Burford. And, hopefully, we lawyers have regulated, from an ethical perspective, in a way that prohibits a non-compete from stopping me from practicing law so I can start Keller Postman, which is what I did.

It's a plaintiff-side firm. We sue big companies, predominantly. Most of our work is in mass torts and mass actions. We have an arbitration practice. And we have, also, a government practice where we do some antitrust work on behalf of states, including a Texas case against Google and the Texas case against Meta for biometric privacy violations. We don't really have an ideological bent. We don't have one, not we don't really have one. We're just sort of doing traditional plaintiff-side law.

But, obviously, speaking only for myself and not for my firm, like the rest of you, I'm a proud member of The Federalist Society. And I'm noticing all of the things that James noticed. And I think that is causing a sort of an "ah-ha" moment amongst a lot of more conservative lawyers who would traditionally go to the Jones Days and the Gibson Dunns and the Shook Hardies of the world, who are saying, "Wait a minute. Maybe going after these companies is a pretty good idea."

I think the ideological seeds for that were planted a long time ago. Milton Friedman was a huge fan of plaintiff's law and viewed it as the private market solution for going after corporate misbehavior. Some legal giants, like Brian Fitzpatrick, at Vanderbilt, have written *The Conservative Case for Class Actions*, for example, and have talked about why plaintiff's law is an important part of conservative thought. But it's really the sort of wokeness that has infected the chamber crowd that I think is causing a lot of people with resumes that look like ours to question their career choices and say maybe plaintiff-side law is a good place for us to land. It's not why I got into plaintiff-side law. But it's a happy coincidence that's making it easier for me to recruit high-caliber people.

**Andrew Ferguson:** Thanks, Ashley. You said some stuff in there I'm going to want to come back to. Same with you, James and Mark. All right, Brandon, you have the most unique, the resume least like the other three. So, I'm most interested to hear how you wound up where you are and why.

**Brandon Smith:** Yeah. Thanks. Just, first of all, I'll start by echoing, Andrew, your own disclaimer. I am, of course, speaking on behalf of myself, and not for the State of Tennessee in any capacity. But I started out as a young FedSoc chapter guy, wanting to be a prosecutor and go after bad guys. And that incentive was what drove me to law school in the first place. But, being a good Madisonian, and trained well at my FedSoc chapter in law school, I came quickly to realize that the biggest threats and the biggest bad guys were just the federal government.

And I think, like a lot of conservative and libertarian lawyers in the early 2000 aughts, we just instinctively realized that the greatest threats to democracy and to the market, to our individual communities, came from the growth of the administrative state. And so, a lot of us got into that fight pretty heavily, especially at the state level, where, as a dual sovereign and exercising the authority of a state, you could really go after that.

And I think what's been the "ah-ha" moment on our side, I think has already been alluded to, is sort of the rise of woke capitalism and the effect that that's had, not just on the market, but on individuals living in our individual states. When we talk about the democratic process and what it is to create laws and enact laws, what we keep finding is that corporate America is often trying to find ways to circumvent that. It's usually due to some sort of virtue signaling or some sort of profit interest, or whatever it is. But that interest has resulted in corporate actors becoming more and more aggressive in a lot of spaces.

So, on the state AG side, one of the things that we really have in our arsenal, or two of the things we have in our arsenal: one, concurrent antitrust enforcement, which is probably a topic for another panel, and, two, is our basic consumer protection laws. Every state has these basic statutes that let us go after and investigate corporations that are acting inappropriately. Tennessee has been in the lead on two of these major investigations: first, the opioid manufacturing litigation that's sort of winding down, but has been going on for several years.

The Wall Street Journal famously called this the most complicated litigation in U.S. history. We kind of bandy that around a little bit here as a badge of honor. And, second, about a week and a half ago, Tennessee launched a 40-plus state lawsuit, after a couple years of investigation into Meta for the harm that's inflicted on our youth across the country. And we're talking big law.

There's no bigger law than going after some of these big targets. And states and state governments have really unique opportunities to engage on the consumer protection side, in particular, while also still waging a war on the administrative state. So that one-two punch really coalesces around a very similar principle, which is a defense of the rule of law, defense of the constitutional order.

And, for a long time, it felt like the biggest threat to that constitutional order was the federal government itself. And now we're just seeing that there's also a large threat on the corporate side. And if you want to be a litigator, then this is really fun litigation to engage in, for sure.

**Andrew Ferguson:** Thanks, Brandon. That was really interesting. So, I think that gave us a fair amount of fodder for discussion. So, I'm going to ask a couple questions. Some of them will be directed. Others, I'm just going to open to the floor. But, Mark, I'd like to start with you.

So, we heard substantially from Brandon and from James, and, to a somewhat lesser extent, from Ashley — but it still factored into his account — that one of the chief drivers for, in state government, a shift toward republican states exercising enforcement powers — we're unaccustomed to seeing them used in the previous decades to go after large business concerns, and then, people with James' impulse to use an objection to woke capital as a reason to shift one's entire career trajectory.

The consistent theme here is woke capital and businesses doing things that don't seem to have a lot to do with what we would have expected to be their [inaudible 00:21:25]. I think we saw this sort of in waves, first in -- not first, but quite substantially in 2020 when you had giant businesses weighing in on Georgia's kind of run of the mill election laws, businesses taking and spending millions of dollars to advertise on things like qualified immunity. It just seemed very strange for businesses to do those sorts of things.

But, at the same time, businesses are still making widgets. They're still making Tylenol. And they're still making cars. And they're still doing the things we traditionally associate businesses with doing. So, I guess my question is, from the defense bar side, when you've got a client who's simultaneously calling for boycotts of the state because of its election laws, but also making its widgets, if they're your client, how do you parse that out? And, James, I want you to answer this too. But money's fungible. So, money spent advertising against Georgia's election laws is money not being spent on dividends or reinvestment into the business or other price efficiency widget investment.

For a big law lawyer, do you parse that out and say, "Look, I'm just representing the part of the business that makes widgets. This other stuff, weighing in, for example, on big debates about sex and gender, that's a different part of the business." Or, do you say, "We have the First Amendment. We have Citizens United. They get to speak their mind like anyone else. And that's their right. And I just focus on their business needs." Mark, how do you see that? And, James, how do you see that? Because I think the answers might be a little different. And Mark, you're on mute.

**Mark Behrens:** Sorry. It's a great question. And, through The Federalist Society, I've taught some civics classes to high school students. And I hear the same questions from them. It's amazing. I think some of this is generational. When I've talked to high school kids or college students these days, law students, the first question they ask me is "How can you defend corporations?" There's this feeling in America, among some, that profits are evidence of wrongdoing. There are really people that think like that.

And I take a very different position on it. I think one is, at a big law firm, in particular, the type of work that you're going to be asked to do probably has nothing to do with the political issues that companies may be involved in. If you're a lawyer in a large law firm, you're going to be defending a company, whether it's in a product liability case or in an intellectual property case, maybe an employment law class action. It would be unlikely you would be ever asked to weigh in on what the company policy on some social issue should be. It's just not the kind of thing that big law firms are asked to do.

We're involved to defend them when they get sued. And so, some of it is compartmentalized that way. The work you're doing just doesn't come -- you don't come across these issues in the work. The other is that I think some of the attacks that I've seen against corporate America today do have to be balanced with the good that companies do. Let's just take COVID, for example. Whether people should get vaccinated became very politically charged. But the fact is that, if you're a pharmaceutical company, this is how they look at it.

They say, "There are people dying. There is science available to solve this problem. It's our job to help solve the problem." And they are making money doing it. So, they're solving a social problem and making money at the same time. Now, people could weigh in whether you should get vaccinated or how you feel about vaccines. But the fact is that the companies, when they get involved in these issues, are doing it to try to make everybody's life better. And, for the most part, that's what they're in business to do.

They're not in business to take on social issues. They're investing in products to make safer and better cars, life-prolonging drugs, and things like that. And so, that's how I look at it when I look at the company people that I work for. Across the board, in any different industry, I'd say they all have had great integrity. They're all very committed to their jobs. And they're all very, frankly, committed to doing what they think is the right thing, both for their companies, and for society. James wants to react, I think.

**James Burnham:** I think you're on mute too, Andrew. But I just unmuted. And I think I know the question.

**Andrew Ferguson:** Sorry, James. Please.

**James Burnham:** So, look. On the sort of woke capital things, I think there's just a couple of buckets here. So, the first is that there are woke things they're doing that might, themselves, be actionable for damages: potentially, substantial damages. So, it's not just making statements about the Georgia election law or whatever, but policies they're adopting that, themselves, could give rise to legal liability.

I think the most obvious example, for anyone who's interacted with corporate America in the last decade in a professional setting, is racial discrimination. Because it is rampant, it's open, it's promoted. It is really egregious, the degree to which it happens at many — I don't want to say all, because I haven't studied all of them — but at many large public companies. And that's just one example of something where I think the mission and the money can align, and so, to use Mark's words, where you can solve a social problem by making money at the same time.

So, that's one category. Another category, though, I think, is companies that, for whatever reason — and, again, we can talk about the causes — but they have dedicated their businesses, in some ways, to sort of pushing a leftwing agenda, and, perhaps as importantly, because it's zero sum, subverting the conservative side. So, what comes to mind here is big tech, where, for whatever reason — maybe they have a business reason, they probably do have a business reason, or at least think they do, I don't know — but they have dedicated themselves to pushing a certain perspective using the extraordinary amount of market power they have.

It should not take Elon Musk. It should not take some billionaire from South Africa buying Twitter to be able to have some semblance of open and free-flowing information on the internet. But that's what happened. And so, in that category, I think you've got a more serious problem. Maybe you're at your law firm and you're just doing whatever, Google's compliance work for some tertiary issue that doesn't matter.

But I do think a good conservative has to stop and think for a second, "God, I am really facilitating something here that is not a good thing. This is a company that is really taking a lot of steps to make life harder for the conservative movement in the United States, and, in some ways, should be seen as a hostile political actor." And I do think that's something you at least need to think about in a way that 10 or 15 years ago -- you know, when I was a young associate, I thought the tech companies were really cool. They were generating all this value. It was great. It was all the stuff Mark said at the beginning.

And now I think it's a much harder decision. The other corollary to that is you've got companies that are making weird business decisions seemingly for woke reasons. I don't know. So, a good example of this is Ford. Ford has been building these Ford Lightning Trucks, $90,000 electric trucks. You know who wants a Ford Lightning Electric Truck? Like, nobody. Because the people who buy Ford Trucks are not suburban people who are trying to drive around in an electric vehicle. It's guys that actually have real work to do, a long way to drive. And they don't want to fool around with charging this stupid electric truck.

Ford has lost billions of dollars building these ridiculous trucks that nobody wants. And I don't understand what they were thinking. Now, one of the things they were trying to do is lobby for, they support, the Biden administration's increased fuel economy standards because that will squeeze out everybody who's still making combustible vehicles that people want. So, I don't know what to make of that. But you've got a woke company doing something bad for business and then trying to get the government to come in and bully its competitors to help protect its bad decision or whatever, minimize the downside.

The last thing I'll say, the other problem with this sort of woke thing, is there's really serious second-order effects. So, one example that I think is really becoming evident throughout big law, you know, when I was a young associate, law firms tended to be liberal, because lawyers tended to be liberal. So liberal partners would do liberal pro bono stuff. And that was fine. They want to do what they believe in. Now, it's almost as though all the law firms are only allowed to do liberal pro bono stuff. And it's extraordinary if they're going to do anything on the conservative side.

And nobody knows this better than Brandon, because he's living through defending Tennessee's ban on transgender surgery for children where, basically, the Am Law 20 all showed up on the side of the ACLU and the people who think that you should be allowed to mutilate kids. And nobody from the Am Law 100 was going to come within 50 miles of the other side of the case, which is, by the way, obviously the correct side and the one that, God willing, will win at the Supreme Court eventually.

Why? Because in-house corporate people are colluding with liberal partners to award corporate work based on what kind of pro bono work the law firms do. Doing left-wing pro bono work is business development. Doing right-wing pro bono work is a business risk. The law firms have no choice — they are economic actors — but to succumb to that pressure. That, I think, is a relatively new phenomenon of corporate lawyers using corporate resources to push an agenda throughout the Am Law 100, and one that is very troubling to me.

**Andrew Ferguson:** Brandon, could you take a minute to address that phenomenon? You and I have both litigated cases for our respective states where it does seem, generally, that, insofar as the white shoe bar and large companies want to weigh in, they're normally on the other side of us. And when our states are trying to defend laws that I would — in my case, for example, felon disenfranchisement laws — laws that I would say are not particularly controversial, there's a pretty limited number of firms that we can look to to even do this sort of work.

Which suggests that either there's something more than the bottom line driving large law firm behavior, or the way they calculate the bottom line might be ideologically neutral, but the calculations are so stilted toward one side because they think that's the way to make profits that it's sort of crowding out the rest of us. Even if that's rational, it's still not good for those of us who hold our views and for the citizens of our states who want their popular laws defended. So, Brandon, what perspective do you have on that?

**Brandon Smith:** For context, in the case that was referenced earlier, we had six attorneys, four in-house and two outside advisors that we brought in, lining up against about 20 or 40 attorneys from Akin Gump, the ACLU, and the U.S. Department of Justice. That's a disproportionate power dynamic in any piece of litigation. And I think one of the positions states keep finding themselves in is that we really do go at this alone.

There's a number of small firms that are willing to engage in our side of some of these more controversial issues, in particular. But that number is pretty limited. We're talking maybe less than 100 attorneys across the country. And so, I think what states are doing is filling that gap, often, on the defense side, for some of these issues. But, in doing so — you specifically asked about the profit incentive — I think there's just a cultural issue within corporate America, both in big law and in in-house counsel shops, where everyone has just kind of let their DEI directors run the show. And I'm not even sure that these folks realize that they're making decisions that could potentially harm their bottom line.

There's just an ideological commitment to these positions that seems to go beyond any sort of market incentive. And I think that's why we're seeing a lot of corporations line up against us regularly. But, also, just within the private law practice, it's difficult for my office, for example, to even hire out outside counsel when they come back to us with sort woke-related contract provisions that they won't be outside counsel unless we agree to certain things or to provide certain benefits, or to pay for abortions out of state, things that have nothing to do with the context of the work.

And this isn't even on the controversial stuff. This is difficulty finding an outside firm to help us out with a recent consumer investigation. And that sort of replacement of incentives with the ideological instead of the market incentive, I think, is really just having a number of effects, down the line, on how this works. And something Mark said, it's one thing for the companies to be focused on making the widgets and separating a little bit from their ideological positions. And, sure, Citizens United, I've got into a number of arguments defending that on college campuses over the years. But there's a difference in exercising rights of speech, and campaigning, and fundamentally distorting the constitutional order.

I'm less concerned about a company deciding that it wants to have a strong position on a certain social issue, whatever is the du jour topic. And I'm more concerned about corporations acting and operating together to exercise market power to enact policies that aren't popularly enacted by the people's representatives, to enforce policies or restrict the rights of individuals who would otherwise be able to enter the marketplace, or to otherwise use their market capital or their market powers to undermine the normal democratic process.

That's, I think, why this is so much different. And, why it's ramping up — in the last ten years or so, especially — is because we're not just in a "Oh, the widget guy wants to vote for a democrat." We're in "Oh, all the widget makers have gotten together and decided we're not going to provide services to people we don't like, or whose political views we don't like." That's a step too far, I think, in my opinion.

**Andrew Ferguson:** So, Ashley, I want to use this to segue to asking you a question that can let you weigh in on this. But, also, I want to give you a chance to sort of distinguish what your firm does, from this debate, if it needs to be distinguished. Is all of the discussion we're having now about the sort of ideological valence of corporate behavior, is that relevant to how your firm runs?

And, if it's not, other than you guys having spectacular lawyers and getting good results, do you all see your firm as distinguished from any other high-powered plaintiff-side firm? And, if you have a market differentiation, other than your ability, does it have anything to do with these politics?

**Ashley Keller:** Yeah. It's only tangentially related to what we do at Keller Postman. And the reason is a lot of red states now are more willing to sue big companies because their eyes have been opened to the woke policies and the misbehavior. And so, that spurred them to work with outside counsel. And we're a firm that's ideologically diverse. You all know where my politics lie, but we don't make hiring decisions that way. But being an ideologically diverse plaintiff's firm is relatively unusual. I think that's going to change over time. And that's kind of the prompt behind this discussion.

But, historically, plaintiff's firms were monolithically liberal and democrat. That's the number one contributor to the Democratic Party. And so, if you're a red state, and you're looking for outside counsel to go after Google or to go after Meta or whatever, you don't have as many firms to choose from. And so, we get put on a list that's relatively short. Obviously, I think we differentiate ourselves based on the quality of our lawyers, our human capital, the sort of approach that we bring to cases.

You can take this with a pinch of salt. But I think we're the best. But we're also one of the few firms where a red state AG is not going to be uncomfortable retaining us, and worrying that we're going to achieve this great success for them and promptly put a significant portion of the contingency fees that we earned into the coffers of their political opponents. So that's where I would say it's relevant, in that practice area.

But when I go after one of Mark's clients for making a drug product that harms people, or for a medical device that harms people, or for a gig economy company that is engaged in wage and hour theft, that's really sort of traditional plaintiff's law that we think we bring a better perspective to that doesn't really turn on a lot of the issues that we've been talking about, except in the sense that, again, tangentially relevant, it's a lot easier for me to recruit high-caliber talent, particularly from those who lean to the right, who may have previously been happy to have their entire career at Gibson Dunn or Jones Day or any of those other really terrific firms, who are now saying, "Wait a minute. I don't want to do the things that Mark did when he started out in his career."

He sort of started with the premise that part of why he landed in the job that he did is he wants to make sure that widget companies can make cheaper widgets that they allocate to society in an efficient manner. Plaintiffs, to the extent they're bringing cases that don’t deserve compensation because the widget company wasn't actually negligent or what have you, that's just raising the costs on consumers. It's a very sort of Milton Friedman supply and demand economic-based perspective that I think used to have a lot more currency.

But if you're a young conservative lawyer and now looking at these companies making decisions -- and I think Brandon was far too charitable. I think he said they're not even sure that it's not maximizing the bottom line. That's hogwash. They know perfectly well that it's not maximizing the bottom line. They know perfectly well that they're taking other people's money, shareholder's money, and putting it into their pet woke liberal causes. That's not lowering the price of widgets for consumers.

That might give self-satisfaction to the C-suite that they're supporting causes that make them popular at the New York Times cocktail hour. But that's not actually lowering the price of widgets. That's not good corporate behavior. That's not maximizing profits, to Marks' earlier point. I am not one of the people who thinks that there's a problem with profit. I think these companies should be making more profit, and not spending their money against conservative causes and against voter ID laws and supporting the mutilation of children and everything else.

But they are spending shareholder money doing that. And it's a perfectly reasonable thing for a conservative lawyer to say, "You know what? I don't want to make my career defending these sorts of people. I don't want to make my career saying, 'I'm lowering the price of widgets,' when what I'm really doing is supporting corporations that engage in abusive behavior with billions and billions of dollars of other shareholders' money."

**Andrew Ferguson:** All four of you, thank you. That was excellent. I want to shift, now, more directly, to the topic today, which is shifting views on this subject. Mark, I want to start with you. It sounds like from James, Ashley and Brandon, there is a uniformity of view that corporate behavior over the last 10 to 15 years — we could probably debate over the window — has changed, but, arguably, measurably, and that a conservative lawyer response is both expected and a necessary reaction to changes in business behavior as businesses wade into social debates that I think we are generally unaccustomed to seeing them wade into.

From where you're sitting, though — because you've kind of been at the same vantage point the longest of anyone on the call — do you think that's right? Do you think corporate behavior has changed over the last 15 years, either in the intensity with which they advocate for policy positions, sort of unrelated to widget-making, or the direction in which all that advocacy is aimed? It does seem to be quite intentionally and uniformly aimed in the left's direction, against the right. Or do you think this is much ado about nothing? Or maybe somewhere in between?

**Mark Behrens:** Again, separate the work that people would be doing at big law, where you're not going to be weighing in on these issues. But I do think there has been a change in corporate behavior. And there is some shifting that's going on. I think companies are trying to find where they should land. This discussion seems to be about corporate America leading the charge on what people think of woke ideology. I tend to see the opposite, that they're trying to find where their constituencies are, the people that use their products. Where is society?

And they're trying to find that place where they should be for the people that are buying their goods and services. And sometimes they swing and miss. I think that's something we've seen with Anheuser-Busch. They thought that the market was moving in a certain way. They made a bet, and it didn't work out. So now they've pulled back. I think other companies see that now, and are going to say, "Well, that's an example. Maybe I should just go back to selling widgets and not get involved in these types of issues."

There are other times when companies are going to feel compelled to weigh in. And I think that, again, is a debate that's happening in corporate America. "When do we weigh in on issues? How do we weigh in on issues?" And, also, frankly, whether it's in the corporate interest to weigh in on a certain issue. Can they have an impact in a particular area? I think this is a place where the companies are trying to find a place to land. It's kind of a newer environment for them, I think. And some, quite frankly, I think, are struggling to find the place where they should be.

And, I think that, because of that, it's happening because it's happening in society around them. And the companies are trying to react to changes that are occurring around them very quickly in society. And, right now, it's hard to tell where you should come down on some issues. They try to do what they think is right. But, more, I think, are going to focus on going back to making products and focus less on politics.

**Andrew Ferguson:** For James and for Brandon, there's this debate — and I think Mark highlighted it very well — which is, are these businesses rationally responding to market forces like people's market preferences? People want companies that weigh in on these things. They want to feel like, when they're buying from companies, they’re making ethical choices. And they measure that by how willing the companies are to voice a position on stuff totally unrelated to the widgets that they manufacture.

Or, the other perspective is, is this largely an elite C-suite-driven behavior that doesn't reflect any of their customer preferences, in fact, doesn’t reflect it? It's unrelated to it entirely. It's like a series of internal elite virtue signaling. They want to be able to go to the cocktail hours with the other C-suite folks and be like, "Oh, yeah. We put out our ad for this social cause or that social cause. Glad you guys did too. We can all feel good about it."

Ashley, James, Brandon, do you think this is driven by the market and businesses reacting to customer expectations? Or is this sort of top-driven? Is this like astroturfing; this is imposed by the top on the rest of the business?

**Ashley Keller:** It's that. I'll tell you my strong view as to why it's that. Number one, show me a rigorous economic analysis, done by anybody respectable, demonstrating that these sorts of policies are good for the bottom line. You will not find it. And you would think, before companies have allocated tens and tens and tens of billions of shareholder dollars to these sorts of initiatives, if they really thought it was going to improve the bottom line, or they just wanted to protect themselves under the business judgment rule, they would have some analysis demonstrating that this is really going to improve profitability. And they haven’t done it.

The second piece of evidence that I think that this is not really driven by maximizing the bottom line is you have all of these people virtue signaling all of the things that they're doing. If you really had a secret mousetrap that was going to make you more money and differentiate you amongst your peers, you would not be sharing with the entire world your ESG policies and saying, "Hey, look. These are the checklists that you can follow to make more money." You would be secretly making more money following those checklists and not telling anybody about it.

But these people broadcast it to the world because they're virtue signaling. They want a certain group of other elite sorts that populate C-suites and went to fancy schools where a lot of us went, but not a lot of customers tend to go to, to see that they're doing the right thing, which is always supporting the liberal cause and not supporting the conservative cause. So, I have very little doubt that this is not really driven by profitability and that it's, instead, sort of the woke ideological agenda that companies have decided that they have the ability to spend money on.

And there are a couple of questions in the comments that sort of ask about whether there are shareholder suits that could be brought here. And there is a possibility that you could do that, under Delaware law. But my big concern is that Milton Friedman has lost and Marty Lipton has won. Wachtell has sort of pioneered the stakeholder capitalism, as opposed to shareholder capitalism, which is supposed to give CEOs and boards of directors lots of discretion to spend money, not just to maximize the bottom line, but to help the community, to help the employees, to help all of the different constituents that might be touched by a company.

And that's just a big multi-factor balancing test recipe to empower these people to never have their decisions second-guessed. If we focus on just profitability, you can allocate capital to try and maximize profits. But it doesn't mean you're not allowed to swing and miss, as Mark was saying. Sometimes you try to maximize profits and you make a mistake. And we don't want to penalize corporate leaders for engaging in risk-taking behavior that doesn't pan out. But that's not what's happening here. These are people who I think are not even hiding it anymore. They're saying that they're making these decisions because it's the right thing to do, even if it doesn't maximize profits.

And the final point that I would make about this, that Mark didn't touch on because he's a good zealous advocate for his clients, but James did bring this up before. There's zero justification for breaking the law, zero. And so, to the extent these companies are allocating tens of billions of dollars — for example, to race-based loan programs where you get a lower cost of capital if you come from a certain racial group — that's just a flagrant violation of our civil rights laws. I don't care if their customers think that it's good.

And, by the way, I don't think that their customers think it's good. I don't think it's maximizing profits. But even if they could prove to me that that was maximizing profits — and I'm a capitalist — you've got to put your profits to the back and let the law trump profitability. Engaging in flagrant race-based discrimination, for instance, is never acceptable. And corporate officers and directors should be held accountable for it.

**James Burnham:** Yeah, all I would add is a few small things. First, one, I do think part of the problem is that a lot of the companies have just gotten so big and so concentrated that they can essentially extract rents in the social space, because what are their customers going to do? Nobody's more frustrated with Google and YouTube than I am. But I have a Gmail account, because I've had it for ten years. I don't know what Hotmail's up to these days, but I don't even know if it still operates. Or people are still using Google search because of the defaults and it's very hard to get to the other ones.

Anyway, the point is, you have a consolidation problem that exacerbates all of it because they can act with impunity. I would love to think that the Bud Light experience is some sort of model for the future. But that was just a unique example of an incredibly stupid decision in a perfectly competitive market with a product that, let's be honest, basically sucks anyway. And so, it was really all about branding anyway. So that's just one. So, in other words, they behave like governments. The big companies behave the way the government behaves.

The people who run it, the bureaucrats, the managers, do whatever they want. And there's no accountability because the profit machine that is Google Search continues to run and it doesn't matter. The one other thing I wanted to say, though — and this is an example, I think, of how smart the left is, and something that I feel like we are way behind the eight ball, because I think we're just starting to understand it — is the way they've used the public capital markets to take control of these companies and force them and push them — and Brandon, I think, will have a lot to say on this, if I had to guess, too — to do more left-wing stuff.

Something like — I don't have the number at my fingertips — 75% of the shares traded in the public capital markets, public companies, are controlled by institutional investors. So, BlackRock, Vanguard, guys like that. Those companies that are managing my money, your money, everybody's money, pension fund money, are, all together, pushing companies to do all sorts of things on social issues.

So, whether that's pushing the energy companies to drill less and invest all their money in carbon capture, or pushing Ford to burn money, throw money down the well of electronic trucks that nobody wants, all kinds of things like that that they can push. And then the executives are caught in a tricky place where they do have a business justification to do bad stuff because the company, the "shareholders," are telling them that they have to do it.

That is a huge problem, and one that I think is really an existential one for our movement over the next five years, is how to force the asset manager either to get rid of the asset managers, or, more likely, find a way to discipline them so that all they're doing is neutrally seeking returns, not using the trillions of other people's dollars that they manage to sort of push an agenda that is not in the interests of their shareholders and certainly is not aligned with what their shareholders want.

**Brandon Smith:** James is right. I definitely have a lot to say about ESG in the asset manager space. But I think the first thing I want to say about it is the fact that we're seeing this sort of coordination with groups like Climate Action 100 or the Net Zero Asset Managers Alliance is prima facie evidence that this is not a market-based incentive. If you think your firm can make money embracing an ESG approach to investing, you don't then go around and use every tool you have of persuasion to make sure all your competitors do the same thing so that you don't lose money in comparison to them.

They only are taking these actions — or, rather, they're taking these sort of aggressive policy stances more frequently — when they have everyone agreeing to do it at the same time, which, by the way, really starts to look like a hub-and-spoke conspiracy. We could talk about that later, I suppose. But the rise of the institutional investor/ownership, though, really is a fundamental part of this.

]

In 1950, institutional investment in ownership of stock was somewhere around 6% of all U.S.-traded companies. Today, it's over 80%. It's something like 78 - 80% of companies that make up the Russell 3000, the S&P 500, the S&P 1500, the 400 MidCap. It's hard to overstate the level of influence that the asset managers — and, I think, by extension, the proxy advisors, as well, who help vote these shares — are having on our overall market.

So, it's not even just, okay, Target wants to do something silly with their kidswear anymore. It's the major shareholders of every airline company, oil producing company, grocery store chain in the country, are now being told their CEOs and boards of directors are going to be fired by the institutional shareholders if they don't embrace these woke policies to begin with. So, maybe Kroger doesn't want to be a lefty grocery chain. But when 60% of its shares are voted by the big three dominant major asset managers, what choice do they have, at that point?

I think the ESG side and the financial markets are going to be really interesting. Tennessee has kind of been on the forefront with several other states and looking at a lot of these. And we've been kind of out there publicly talking a little bit of what that looks like. But not to spill too much, I guess, now. But there's going to be some interesting developments on this front. Shareholder lawsuits are one thing. But Tennessee has been out there pretty publicly in letters stating our overall concerns. And that does have an effect. We've taken a pretty big whack at the Net-Zero Insurance Alliance. And that's been successful.

But there's a lot of fight to have here, which is another — to kind of get back to what we were originally talking about, and that prompted this whole panel — which is why we need more conservatives to become plaintiff's bar-type lawyers in the first place. I think one of the biggest problems that I'm seeing as a movement in this fight is we have just not armed up enough young attorneys to be able and interested and realize that it is a good career choice to become just a regular litigator.

I think The Federalist Society has largely created a fantastic network of excellent constitutional appellate lawyers. But I'm someone who's in the fight on this and trading emails with corporate counsel every day. What we really need is somehow to develop a pipeline for just folks who want to be knife-fighting litigators in the courtroom, who can walk in and argue a summary judgment motion or respond to a discovery request or depose a witness. That skill set, I think, is lacking in the legal profession writ large. But it's especially lacking on our side. And we need to increase our arms production, so to speak.

**Andrew Ferguson:** I want to start with Mark. Before we move to the Q&A, I want to address exactly that question. So, when I was coming up in law school — it feels like a long time ago, but in the grand scheme of things, it's not that long ago — the plaintiff's bar were ambulance chasers. Mark, I think I've heard you refer to them at one point as "the billboard lawyers." And we all see it in every big city. In my neck of the woods, it's Allen, Allen, Allen & Allen. They've got boards everywhere offering what can feel like “get rich quick” schemes for injured people.

And that was the very traditional view of the plaintiff's bar that, frankly, cut across ideologies. Democrat donors in big law firms, and republican donors in big law firms, would all just generally agree that the plaintiff's bar were a problem. They were, on their best days, a dead-weight lost cause, and on their worst days, were the great enemy of all mankind. It seems, from where I am sitting, that that view is changing substantially and incredibly quickly, on the right. Mark, you may have become sufficiently senior where you don't have to deal with this that much.

But, I bet, in some ways, you're still dealing with hiring over at Shook. And Ashley, you're dealing with hiring at Keller Postman. So, Mark, I'll start with you. And then, James, you can weigh in on this too, since you just left a big law firm to do something else that's more plaintiff's bar related. Are views changing on plaintiff's work, number one. And number two, is this being reflected in the ideological composition of young lawyers willing to do this kind of work? Mark, we'll start with you.

**Mark Behrens:** Yes. And Ashley may agree with me on it. I just wrote down four reasons why I think people traditionally, law students, have gone to big law firms. One is prestige. The names we've talked about, they're prestigious. Have a summer associate position at a Gibson Dunn or Jones Day or Bartlit Beck. Traditionally, the plaintiff's bar wasn't thought about that. In fact, over at the trial lawyers' main organization used to be ATLA, the Association of Trial Lawyers of America. They changed it to American Association of Justice because they recognized, themselves, that "trial lawyer" had bad connotations.

That's changing, as some firms now get away from being billboard lawyers and taking on big companies and social issues. I think that that improves the public perception of the plaintiff's bar. And we're, in fact, seeing that in polling. Where, ten years ago, again, "trial lawyer" had a bad connotation, now the polling has shifted. And now we're seeing negative numbers on the corporate side. The other reason is pay. And, still, if you come out of law school, and you go to a better law school and you do reasonably well, you can come out and make good money and have a very comfortable life.

But there's nobody on the defense bar, anywhere in the United States, that's flying a jet. If you really want to make generational wealth, it's not going to happen at the biggest defense firms. So, I think the pay is going to shift some people over to the plaintiff's side. And we're already seeing, with two people here, some of the best and brightest that have made that jump. The other is politics. It used to be, and it probably still is for most plaintiff's firms, that if the firm has a PAC, that you're going to be writing a check to the most progressive members of Congress.

And people on our side, on the conservative side, would not have a philosophical alignment with the people they'd be probably asked to support. But, again, that is changing. As Ashley mentioned, now we're seeing, on the far right, an anti-corporate, populist movement. And firms like Ashley's can now feel comfortable writing checks to conservatives who are also aligned with them on their business issues.

And the last is pipeline. People go to big law firms because they go to campus. They have on-campus recruiting. There are more senior students that have gone into those firms. And people are familiar with that. I think, over time, as plaintiff's firms get larger, that some of this pipeline may start occurring on the other side, as well. So, I am seeing many of the factors that traditionally have driven people to the defense side are being eroded. It's creating more opportunities, I think, on the plaintiff's side, and more opportunities overall for conservative lawyers to find what is the best fit for them.

**Andrew Ferguson:** Ashley?

**Ashley Keller:** Yeah. I agree with everything Mark said. It's anecdotal. I don't have any statistical evidence. But I sort of see it, smell it, taste it. And the best illustration I would give is my firm has a table at MLC coming up this week, and we're going to fill it with people from Keller Postman. I don't think that, 10 or 15 years ago, you would have a lot of plaintiff's firms that would be able to fill a table at the convention with FedSoc types.

So, we're definitely seeing people from all ideological stripes, as opposed to just those who traditionally went into the plaintiff's bar, who really want to work on the plaintiff's side. And I think that's going to continue for the foreseeable future.

**James Burnham:** All I'll add is that I have seen the same thing, just since we started, in the number of people who have reached out. Someone in the comments, though, asked about the path. Like, how do you do this? You don't just wake up and become Ashley Keller in one day.

**Andrew Ferguson:** We're going to get there.

**James Burnham:** Oh, you are? Okay. Then I won't get ahead of that. But that's what I was going to answer.

**Brandon Smith:** Andrew, can I just add one thing, too?

**Andrew Ferguson:** Please, Brandon.

**Brandon Smith:** It's that it's not just about developing a conservative plaintiff's bar to do this type of conservative work. I think Mark would probably be able to discuss a number of the downsides of the trial bar over the decades. We probably all could. Those same downsides are still there. And from a consumer protection standpoint, consumers suffer when the priority in a negotiation over a settlement on some sort of case is "how much does the plaintiff's bar get?", instead of "how much are we being able to reimburse consumers who have been harmed?"

And I think that, from my experience anyway, some of what we're seeing on the right-of-center side in the plaintiff's bar, which is admittedly small, is that there remains a consistent commitment to not just the core principles of protecting our institutions and protecting the rule of law, but also to actually trying to protect consumers and to not have this just be a money grab for plaintiff's lawyers to mug companies. And I think that's important good work that can be done through the plaintiff's bar practice that I think is maybe something that's been lacking for several years.

**Andrew Ferguson:** We deal with this in the states, Brandon. But CPRA settlements are one of the most awful rackets that has ever been engineered by any lawyer anywhere. So, Ashley, if you guys can stay away from those, that would be ideal. Those things are terrible. Okay, so we've gotten, literally, dozens of questions. And the last one I want to ask — and I want to get all your perspectives, so we're going to ask that one in five minutes.

But, for the first five minutes, what do you all think can be done to boost the number of conservatives willing to do plaintiff side work? And not just plaintiff-side work that's ideological — like the stuff, for example, Consovoy McCarthy does so very well — but, like the stuff that Ashley does, the traditional plaintiff's work holding large business concerns accountable for bad behavior under existing law. And I think, without saying too much, one of the areas that I think the views on the right are changing most on this front is antitrust.

And that is potentially extremely lucrative for plaintiff's firms that can do it right. But what can be done to boost the numbers of conservatives who are doing plaintiff-side work? They're getting the skills that Brandon described. And they can help either build their own firms, like you have, Ashley, or help take over other firms to give an option for young associates who don't want to do big law, and for states who need representation against large companies that only these sort of high-power plaintiff firms can provide. And I'll open up to anyone who wants to weigh in. Mark, we'll start with you.

**Mark Behrens:** Well, I'm probably not the best person to talk about this because of where I'm coming from on here. But it seems to me that with the focus of the discussion so far, when people have talked about doing more plaintiff-side work, it seems to be doing more plaintiff-side work, that very big-stakes litigation, not doing more med-mal work, more slip-and-fall work, more car accident cases, things like that, but the type of mega-case that really is trying to influence or change corporate behavior. And I think some of that is happening because you've got really sophisticated lawyers that are making the jump over to the plaintiff's side.

And, also, frankly, the third-party litigation funding space, I think, is having a dramatic change on how civil litigation is occurring in the United States. It's very expensive when you're doing complex litigation against large companies. And I think the role of third-party litigation funding is having a substantial impact on that. And Ashley would be able to comment on that better than I can. But I think that is also having a role, and probably also opening up access for people to bring these types of cases on the plaintiff's side.

**Ashley Keller:** Yeah. I'll be brief. And I'll brandish my free-market bone fides to show you that, even though I'm a plaintiff's lawyer, I'm still a capitalist. I'm not sure we need to do anything. We can let the invisible hand work. I think the plaintiff's side is actually the side, now, that is really sort of adhering to meritocracy-type principles. And so, you can send me your resume, and I'd love to review it if you're a conservative watching this, looking to make a switch.

But some of the things that Mark ticked off before: prestige, the quality of the work that you get to do, it wasn't something that you necessarily associated with the plaintiff's side. But as firms continued to open, hopefully, like ours, and others that are similarly situated — and as Mark just mentioned, they're well-capitalized, so they can go toe-to-toe with the big firms and sort of match them, from a human capital firepower perspective — there's just going to be more job openings that let you get the things that you were traditionally looking for at a big law firm, at a plaintiff's shop. And so, I think, if we don't do anything, there's just going to be a natural shift of human capital talent going to the plaintiff's side.

**James Burnham:** So, all I would add is this is one of the reasons that I exist. And one of the reasons we started Vallecito Capital was to see if there's a way to exacerbate this change. I agree with Ashley that people are going to do this on their own because the money is so good. But I do think that there are probably, I suspect — in fact, I know — a lot of frustrated conservative lawyers at big firms who are tired of their apolitical corporate work subsidizing left-wing causes, who are really good, but are struggling with how they move over from the firm to the plaintiff's side without making no money for five years while they wait for their first case to pay off. That's a theory we have.

One of the things I would like to do is help foster that to create more firms — and Ashley's already talked about his firm — but more firms like Cooper & Kirk, which everyone knows Chuck Cooper and his firm. They have long done really great, ideological, important work for free or for very cheap. They represent DeSantis right now against Disney. I'm sure they're having a lot of fun. I doubt they're billing $2000 an hour for that. But they can subsidize it. What subsidizes that is a lot of their really lucrative plaintiff's work.

And so, I think that we need to have more firms like that. And I would love to help people who are in a position to either start a firm like that or want to move to a firm like that, to try to think of a way to come up with a capital path that makes sense. And if you work at Ashley's firm and you're at that table and he hasn't been sharing the plane enough and you want to come start your own firm, give me a call, and we can talk about it. Just kidding, Ashley.

**Mark Behrens:** Let me ask one question for you guys. If people make the jump from one side to the other, are you kind of locked in? I tell people, a lot of times, when they're college students and they're thinking about going to work on the hill, I say, "You've got to make a choice. Because if you go work in a democrat office, you're probably not going to be able to go work in a republican office later, or vice versa."

Do you guys see people -- how do you see this evolving, where people make the jump to plaintiff's work and they have to stay there? Or do you think that it's very possible that people could go back and forth? I don't think it's possible to go back and forth. But I'd like your take.

**James Burnham:** Here's my take, as someone who is just on the big law side. I think, if you go work at Cooper & Kirk, or you have a firm like that, it's really a mix of everything. So, like, they'll have some real plaintiff's work. Like Chuck and Ashley, I think, have some cases they're doing together right now, or they have. Chuck was involved in *Mallory*, for example. Great win. They'll have a mix of corporate clients. But they're only taking the corporate clients that they want, and only the stuff that they want.

So, they're not defending the most ridiculous behavior by the worst actors. And then, they'll have a mix of what I'll call, whatever, public interesty-type stuff. I think an associate or a partner from Cooper & Kirk could go work at Jones Day. I don't think that's some sort of beyond the Rubicon situation. I think that Ashley's firm is more of a pure plaintiff's firm. And that probably is more of a black-and-white situation. But I'll let him speak to that. I don't think that conservative boutiques are like a point-of-no-return situation.

**Ashley Keller:** Yeah. I'd sort of point the question back to you, Mark. My suspicion is, if someone came to work for us and then wanted to go back to a place like Shook, you might not want to take them back. Your clients might put a lot of pressure on you not to welcome them back to the defense side. We take people all the time who worked on the defense side. So, I think it's probably a one-way ratchet, because I don't care. I just want really high-caliber lawyers. And I don't view things in a white hat/black hat sort of way.

And so, the fact that you used to work on the defense side doesn't bother me if you're interested in what we're doing on the plaintiff's side. But I think the institutional conflict is probably going to be driven more from the C-suites, unless you're in one of those situations like James described where you're at Kellogg Hansen or at Susman Godfrey or Quinn Emanuel. You pick your spots where you're going to be a plaintiff and you just take on all of those conflicts and say "We're never going to represent a bank," for example, "and we're always going to sue them. But we're going to do mass tort defense work and we're always going to defend pharmaceutical companies."

I think you can pull that off with a certain boutiquey type of big firm feel. But my guess is that corporates won't really take kindly if you went to a pure plaintiff firm like ours, or Motley Rice or whatever, and then said, "Yeah, I'd like to go back to Jones Day." Probably not.

**Andrew Ferguson:** Okay. I want each of you to take, like, 45 seconds before we close, because I think this is a really good question. And each of you give the best advice you can in 45 seconds to young lawyers who are facing these choices. On the one hand, we have big law practice, which still is imbued with tremendous prestige. And if you're coming out of law school, like I did, with an unbelievable amount of debt, that initial opening salary can be very tough to pass up. It's guaranteed money. For an NFL rookie, you take that, even if you can make it big on some non-guaranteed money.

So, for each of you, given your own perspectives -- and Mark and Ashley, you're probably going to have totally different views on this. And that's great. That's what I want. Brandon, you'll also have a completely different perspective. Forty-five second career advice to a young law associate or lawyer, law grad, coming out of law school, trying to navigate the new opportunities on the plaintiff side for lawyers with our views, versus the traditional white-shoe defense bar.

**Mark Behrens:** I'll start.

**Andrew Ferguson:** Go for it, Mark.

**Mark Behrens:** I'll give you some advice that my dad gave me. At one point, I was a very young lawyer in my career at a different firm. And it was, then, a very progressive firm. I really enjoyed the people and the work that I was doing. But, in some ways, I didn't really feel, necessarily, politically aligned with many of the people. I wasn't sure that maybe Federalist Society folks, in that time, in that era, would have been welcome. And I was trying to decide what to do.

And my dad said, "Don't quit. You get involved, rise up in leadership, and change within. The easy thing to do is quit and walk away." He said, "Don't do that. Get involved. Become a leader and change it from within. If you see that there are things that can be done better, then work to make that happen. Don't just quit." And I followed his advice. I did. And I've had a very fulfilling career I've been happy with. And so, that would be my advice to folks that are having these issues that we're talking about today. Stick it out. Rise in leadership. And work to make change.

**Andrew Ferguson:** Burnham?

**James Burnham:** Yeah. I have nothing to disagree with there. Most of the best lawyers in the world are at big law firms. You're going to have a good time at a big -- well, you're not going to have a good time, necessarily, but you're going to learn a lot. And you're probably going to get to work on sophisticated work. Nothing wrong with that, particularly if you have debt.

That said, if you want to get the most bang for your buck, year after year — and, honestly, the first five to ten years of your career, in many ways, will define the rest of it unless you're willing to just keep reinventing yourself — the place to go is either a boutique law firm — it doesn't have to be a famous one, it doesn't have to be Keller Postman, Kellogg Hansen, Consovoy McCarthy, Cooper & Kirk, it could be a small law firm in whatever city you live in that does med-mal cases — but where you're going to be deposing people and doing real work.

The other thing you can do is go work for Brandon or one of the other state AG offices. The state AG's offices are doing the most interesting, cutting-edge, useful civil litigation that would be the easiest to translate to becoming a plaintiff's lawyer of anybody I know. The federal enforcers are too. But they don't have the same volume the states have.

I now look for lawyers all day. I'm trying to find people who want to work on the cases that I'm interested in and that we want to help finance. Half of them, a huge number of the really good ones, come out of state AG offices. It's a great opportunity, and not just the SG's office, the consumer protection divisions, and others. And I'll let Brandon elaborate on that, obviously.

**Andrew Ferguson:** Ashley?

**Ashley Keller:** So, advice that maybe doesn't go contrary to Mark's, but could be in tension, which is "maybe quit." And the real underlying advice that I would give is take some risk. You are all really capable attorneys. You have a lot of human capital. You are poised for more success than you believe. And I know the feeling of having those financial responsibilities and the debt and all of that. But, at the end of the day — it's easy for me to say, from my perch today, but I promise you it is true — you are going to do just fine, no matter what. You're going to have financial security, if that's what you desire.

You're going to have a more fulfilling career, as long as you go down the different paths to explore what you're most interested in. And I actually think you are much more capable of doing that as a relatively young lawyer than you are if you stay within the system, you rise up through the ranks, you become a partner. You're getting that partner draw. You have three kids and the house and the mortgage, and all of those things tying you down. And then it's much harder to responsibly take a risk and maybe do something that doesn’t come with the same financial security.

So, if you're coming straight out of law school, or you're a baby lawyer, you've been practicing for a year or two and you love it, stay within the system and do it for as long as you possibly can. And you'll do great. But if you don't love it, if you know that you would rather be doing something else, take the risk, explore, and do the something else. It doesn’t have to be at a plaintiff firm, obviously, whatever the something else is. And if it doesn't work, if you took that swing and you missed, you can find a stable job that will pay the bills and will give you some life satisfaction. I promise you that.

You're all very capable people if you're watching this Zoom. And so, I encourage you to take risk. Lawyers tend to be risk-averse, and that's why they went to law school. But you should fight that instinct. Because, over the long term, I think your human capital is going to serve you really well. And so, the most important thing is that you land in a seat that lets you fulfill your potential and have a good work-life balance, whatever that means for you.

**Andrew Ferguson:** Brandon, take us home as quickly as you can.

**Brandon Smith:** Ashley stole my first point, which was, take a risk. Nothing worth doing is ever easy. Every great leap forward in this country's history has been by people willing to take risks. So just embrace that uncertainty, say a prayer, and work hard. For those of you still in law school, or young in your career, learn how to actually litigate. Go depose a witness. Don't be afraid to walk into a courtroom. If you get that skill set, it doesn't really matter what context your professional career heads, you'll find success if you just have those basic skills of knowing how to whoop up on an opposing counsel in a deposition.

And then, finally, I would say go work at a state AG's office. Our folks have an easy time going either direction — defense or plaintiff side — when they leave here. You're going to do some of the most sophisticated, interesting work right off the bat. I have a first-year attorney right now who's on the Google antitrust trial team. Not many first-year associates are getting that kind of work. It's just a great place to land. It's a great place to develop a broad set of skills and do really important things. So, when in doubt, or you're looking for a change, just shoot me an email. We're definitely hiring here in Tennessee. I'm sure Virginia is too, right, Andrew? All right.

**Andrew Ferguson:** Absolutely right.

**Alida Kass:** Well, thank you. Thank you all very much for this conversation. I do want to flag, for those who will be in town for — and I'll see you later this week — the Freedom of Thought Project has a Saturday morning breakfast which will take a little bit of a more concrete look at the practical side of impact litigation. If you are interested, I'd encourage you to email us, info@fedsoc.org, and in the subject heading have "Impact litigation." And I'll make sure that you are connected to get an invitation for that morning breakfast.

On behalf of The Federalist Society, I do really want to thank our panelists and our moderator for their time and really thoughtful discussion today. And I want to thank our audience for joining and participating and submitting some fantastic questions. We welcome listener feedback by email at info@fedsoc.org. Thank you all for joining us today. We are adjourned.