Alida Kass ([00:00:09](https://www.rev.com/transcript-editor/shared/D728a18YCu-hLDI_we6sJABeUBdi8s7h0ovAyLiDyBvJFVty3bHworYv8cEd71ow6fWDDz6JkrpErb-8TGLw_Yk4Ops?loadFrom=DocumentDeeplink&ts=9.84)):

Final panel of the day and I do just want to take this moment to thank everyone who has been just such a tremendous help and resource internally within the Federalist Society for supporting this conference and allowing it to happen and all of the friends who helped spitball ideas and sort of figure out which ones were sort of a little too crazy and which ones were in that sort of that sweet spot of just crazy enough. I just think it's been a great day and I can't wait to have the final conversation where we take all of these threads and tie them together. We've talked about corporate rights, we've talked about individual liberties. The question for this panel is how to synthesize all of that. Looking ahead to the challenges of the moment, the tension between, in this competing claims to freedoms of speech and conscience. Is there something new about this moment? Do we need to be refining our thinking about power and liberties and how do we go about doing that? Moderating this, the very fantastic judge Trevor McFadden, who is doing the difficult work on the DC Court, District Court for the District of Columbia. I will again, in the interest of time, refer you to his fantastic bio on the Federalist Society website. Judge McFadden, floor is yours.

Hon. Trevor McFadden ([00:01:39](https://www.rev.com/transcript-editor/shared/Onw4ReYltVjxvQBeqRv_0zcDi4A9MIOOmleBQcNd47P2sGqyCBI9sy6byWgI-TJelcjpOzVlZcJM-4phtEces7dNz60?loadFrom=DocumentDeeplink&ts=99.12)):

Thank you Alida, and really great to be with you all. As Alida suggested, this is the moment you all have been waiting for. This is where we synthesize everything that you've heard over the last few hours and think about where do we go from here. This term, the Supreme Court is considering a pair of cases that deal with the government's ability to regulate corporate America. The two NetChoice cases involve state laws that prohibit social media companies from banning certain speech on their platforms. Each law was enacted in response to a perception that platforms like Facebook and X, formerly known as Twitter, were systematically disfavoring specific viewpoints while allowing others to be shared unchecked. That is states believe that the platforms were engaged in viewpoint discrimination, but the platforms have challenged the laws arguing among other things, that they have their own rights under the First Amendment to promote or suppress whatever speech they like on their own platforms.

([00:02:47](https://www.rev.com/transcript-editor/shared/Njs_Fx3ofdH0PPae3Ch8h-UVQDlao216UDAsXvmhbzlWC8YAZjIyxeFA7HXpfQMrbp5FkEWqg_xjg5GzUDgdlKM3P34?loadFrom=DocumentDeeplink&ts=167.82)):

In short, there's a clash between competing claims to liberty between natural persons and corporate persons. Cases like net choice pose a number of hard questions. Should those interested in free speech focus on government coercion or can massive corporate power pose an equally significant threat? Are corporate efforts to suppress speech entitled to First Amendment protections at all? What do areas of the law that deal with the use and abuse of corporate power like antitrust have to say about all this and should large publicly traded corporations have the same first amendment rights that closely held companies possess? Our panelists today will help shed some light on these questions and clarify where we go from here. I'm joined on the stage by five prominent attorneys, each of whom brings a unique and important perspective on these issues. So without further ado, I'll go ahead and introduce our panelists.

([00:03:48](https://www.rev.com/transcript-editor/shared/aAPvngqqiH5Ns6M2vcVvfbHlbUR3pm2nNo6JRkwQzprJZ-s-fDXP9u4UkwsQ0plKNWwKg4JKV67DrFx7p_v6m2USmnw?loadFrom=DocumentDeeplink&ts=228.88)):

As Alita said, I'm just going to hit the highlights of their biographies, which are long and distinguished despite their young ages. You can learn more about them and your program materials. Jonathan Berry, to my immediate left or your immediate right, is the managing partner of Boyden Gray, PLLC. A law firm focused on constitutional and administrative law. His practice focuses on complex constitutional and administrative appeals, especially in the area of labor and employment law. He has developed a practice relating to problems stemming from the emerging overlap between government, corporate America, and capital markets, particularly around ESG initiatives. His commentary on these issues and others involving complex constitutional questions has been published in the Wall Street Journal, the New York Times, and First Things, James Burnham. Next down the row is the president of Vallecito Capital, LLC, A firm, which helps finance important public interest litigation by plaintiffs who may lack the means to fund it themselves.

([00:04:57](https://www.rev.com/transcript-editor/shared/i0uBXafuf5CZJuEx1VRZmDnL3eW_Tdi_idZfoFGKFA05cpgkOnar7X4CDF33zXiCFltT-8jMpptqR_LsksbnbtheLY8?loadFrom=DocumentDeeplink&ts=297.04)):

He's also a principal at King Street Legal, a boutique law firm that he founded after leaving Jones Day, apart from his private practice, he served in numerous roles within the Department of Justice and the White House, including as a senior official in the Justice Department, civil division, and in the office of the Attorney General. Next is Erin Hawley, who serves as the senior counsel to the appellate litigation team at Alliance Defending Freedom. Before joining a ADF, she was an appellate litigator at Kirkland and Ellis, Bancroft, and King and Spalding. Her practice is often focused on issues of religious liberty and conscience protection, including in cases before the Supreme Court such as FDA versus Alliance for Hippocratic Medicine. Erin is also served as counsel to Attorney General Michael Mukasey and is an associate professor of law at the University of Missouri where she's taught among other subjects, constitutional law.

([00:05:56](https://www.rev.com/transcript-editor/shared/pVuaS4dVlcDlxs432R29jFWR-wT2avH0uPcbYrPvK3Lc1lcLYugczdenij3amomD12HWzmKHaDUmP664W4CId7rHQxg?loadFrom=DocumentDeeplink&ts=356.53)):

Next up is Todd Zywicki. He's the George Mason University Foundation professor of Law at the Antonin Scalia Law School. He is a leading scholar in law and economics and antitrust law. He's testified numerous times before Congress in these areas and has been published in the Wall Street Journal, New York Times, and Washington Post. Professor Zwicky is a former chairman of the Competitive Enterprise Institute and currently chairs the Academic Advisory Council for the Bill of Rights Institute. And finally at the far end is Casey Maddox. He's the Vice President for Legal Strategy at Stand Together and a senior advisor at Americans for Prosperity. Before that, he was a litigator who practiced in 35 states and many federal courts with a focus on defending the First Amendment rights of students, faculty, healthcare workers and religious organizations. He's also served as senior counsel at ADF. My first question is to you John.

([00:06:55](https://www.rev.com/transcript-editor/shared/KXurGnIs5RQ-TN3qqySqaZMPIC3Fi2OP7pVpOAGI5_QqII9joNUIeCsrX8b04Irhr7ikcgBNWrEzXBNw16VDtK5VuiA?loadFrom=DocumentDeeplink&ts=415.85)):

I want to start with some of your ideas to address the concerns about too much corporate power. One solution that has been floated is returning corporations to their historical routes like turnpike and bridge corporations from days gone by. Traditionally, these corporations had to be individually chartered by a state legislature and identify a public purpose that they pursued rather than just chasing profits. And I think Professor Barnett touched on some of these ideas earlier today. What kind of an approach would that kind of an approach helped fix some of these problems we're seeing now? If not, what else? What's better?

Johnathan Berry ([00:07:35](https://www.rev.com/transcript-editor/shared/lpRGjDTd4DuyMzMAI0AwDF24Fy02opik7XCHPGJBrDZtWbXIxrZhgrL34zQBzC2eZlgWE_SiYjbqNU8XO1D6nXUpMTY?loadFrom=DocumentDeeplink&ts=455.96)):

Wonderful. Thank you Judge McFadden, thank you to Alita and the Freedom of Thought Project for having me. It's great to be back for some really fascinating conversations. So cases like NetChoice, they present the question of how far state regulation of corporate persons like tech companies can go, but that of course assumes the fact of corporate personhood. Another way to come at the issue is to think about how state action creates the corporation. Something we've hit on from a couple different angles, and I'm going to try to advance the conversation here. I'll start with an analogy that's come to mind over the course of the day talking about corporate rights, that corporate rights are to corporate governance internally as individual human rights are to human virtues. It's a far from perfect analogy, but the conversation sort of entirely about external corporate rights and maybe limits there too is incomplete if we don't think about internal self-regulation as well, which itself is a real question of how the law is structured.

([00:08:58](https://www.rev.com/transcript-editor/shared/OPn4sHgy-tIcEL7Vs5GSf5tYnoWZjXNAolZMHnuQvBOeb3b-bmf9VVh55Fmmbxz6nbjlQjgFh4mfEa5Jr4hMmXDtkfc?loadFrom=DocumentDeeplink&ts=538.35)):

Corporations in the founding generations illustrates how of course, these are creatures of state charter. They're originally individually chartered to serve these certain public purposes bridges, turnpikes and usually always they were limited and public purposes usually for enterprises requiring more capital than held by any individual person such as public infrastructure even after special incorporation gave way to general incorporation statutes in the later part of the 19th century in the US. States, then before and after limited corporate powers to the purposes the corporation stated in its charter and enforcement of which would occur under the ultra vires doctrine, states could even invoke the remedy of quo warranto to revoke a corporation's charter where it abused or neglected its franchise states also imposed many charter based limits that reflected public policy. So these are limits like retaining the state's power to amend a corporate charter after it was issued.

([00:10:09](https://www.rev.com/transcript-editor/shared/Sz1UbNXYG3_0I-xGnRYhzb1edUVZ0InoNfwunugydyqxLt9adFbPjjZRAvCo6INdH3GI6Teroutfgb7xyfN40usmYlU?loadFrom=DocumentDeeplink&ts=609.27)):

Dissolving charters after a period of time, unless it was affirmatively renewed by the state, requiring majority of directors to be residents of the chartering state, privileging small vote small shareholders votes over those of large and limiting the total capitalization of the corporation. This comes out of the Anglo-American traditional view that corporate privileges were suspect not per se, inappropriate but suspect. They conferred these superhuman capacities, things that allow the expansion of these artificial persons beyond anything resembling human scale with concentrated capital, perpetual existence later limited liability that inevitably encroached on those capacities would encroach on the liberties of natural persons in ways that were explored on the panel which is previous. Accordingly, these privileges were only bestowed when they were needed to accomplish public purposes that individuals could not. So do I think that this very brief summary of the history unpacked in greater detail by previous panels?

([00:11:17](https://www.rev.com/transcript-editor/shared/pD40p7tVnlDI1QZX3RzXB47AgGy7M_2-Q4RBfcN8GMI2-tYtpzEb0JBprOpoEbZ4EUPEvB2P19SJ8ABWfHpLT4kmheg?loadFrom=DocumentDeeplink&ts=677.79)):

Do I think we can just go back to or should we go back to special incorporation statutes? No, I don't, but I want to emphasize this history because I mean it shows that the current state of affairs is not inevitable, that alternatives are possible and have existed in our own traditions and to get us thinking about the law governing the internal affairs of corporations. Again, thinking in terms not just of individual rights or corporate rights, but also even corporate virtues in a way that conservatives already understand that individual virtue is at least as if not more important to deliberations about the good life than rights are. Many of the problems we have with corporate power today come from internal governance gone awry. ESG and DEI for example, they often lead to unlawful external conduct and federal and state positive laws can regulate that like Title VII for example, often restricts a lot of DEI practices, but external these bad fruits of ESG and DEI, those are not causes in and of themselves. They are fundamentally corporate governance ideologies that permeate entire institutions.

([00:12:40](https://www.rev.com/transcript-editor/shared/sS-LDZ8hL47PLs-2CbWDn8xASaiu7BwuEOMHHiC5iLjPwAqJLpMR74t8PVDEuIV4oDZ7rCefNBz3zvqaSkr56sa777Q?loadFrom=DocumentDeeplink&ts=760.84)):

They reflect more systematic harms when embodies ideologies. Things like simply making shoddy products. I'm not saying that Boeing's problems are reducible to DEI, for example, but there are some interesting parallels. Or, working other systemic harms the way that DEI perpetrates a vision of race essentialism that is toxic to a healthy polity. A lot of these things though are not prohibited by external positive laws like Title VII and many of them just in prudence should not be like that. External laws on restraints on corporate conduct are simply not effective or not cost justified or burden justified. What we need instead is better corporate governance. And in order to do that, we've got to go back to the internal law of corporations what governs how corporations are run and who runs 'em. One advantage of this approach is it should put states on firm or regulatory terrain.

([00:13:45](https://www.rev.com/transcript-editor/shared/U4wT5nDb6eNPMOuPVJ0kgclWkvrqO6G46BfjAhgKTF1ktlrhTHMfgq_RLugm5qlChKUEAGA4qOGd9adSo9-twTF_77o?loadFrom=DocumentDeeplink&ts=825.85)):

I think relevant to NetChoice states should have more latitude to regulate corporate charters which define the corporate person for the purpose of asserting any constitutional rights that that person may hold. Then maybe more of that compared to latitude to regulate the external conduct of already constituted corporate persons. So, I think some ideas for consideration along these lines, one is to ask should corporate charters in some way privilege the views of flesh and blood retail investors over institutional investors and asset managers, or should they continue to be treated identically? Should corporate charters impose greater qualification requirements for board candidates such as for their character or real world experience or liking America?

([00:14:42](https://www.rev.com/transcript-editor/shared/hxWt04EO5hgajvwea7w-gKonhOlZIinVvsUpkOsK01eXVJANTK2vYivkgAFj4tkU7m2wSmXCp4qU8vL_aFItisAhNSU?loadFrom=DocumentDeeplink&ts=882.39)):

Should corporate charters prohibit or limit the use of ESG and DEI and business management or should corporate charters limit corporate size? The main problem here for reinvigorating regulation via internal corporate affairs is a jurisdictional problem. For our purposes, most of the corporations that would be the subjects of regulatory attention are our incorporated in Delaware. And so regulating internal affairs requires addressing Delaware's monopoly on corporate law. Two ways to look to this are alternative states. Red states could recruit other companies to their jurisdictions or attempt to regulate the internal affairs of Delaware companies. The first option is in the news. Of course, Tesla just successfully voted, its shareholders voted to reincorporate in Texas. Texas and multiple other red states are setting up business courts which are now about in Texas. They're going to get a doozy of some corporate cases. These are natural experiments. My hope is that these states are going to find ways to attract companies while achieving their public policy goals.

([00:15:57](https://www.rev.com/transcript-editor/shared/gR7L23mxRvzimnbNDD2PpkkjSWHce3OxaSwWMHghygMYqR6WDxCWRwKAxxzk7w0kEiQC3XAsx8u4Tk0LLUQsg-ZUnp8?loadFrom=DocumentDeeplink&ts=957.95)):

Texas, for example, has some, is contemplating some significant anti ESG legislation. They're going to be companies that won't like those restrictions on their ability to operate. And so there's a natural experiment there. The second option that Ryan Newman and others have alluded to today is regulating corporate internal affairs. Even without corporations moving their charters, you could push, the states could push the envelope on the current doctrine with state specific shareholder inspection laws, exercising a right to jury trial by suing in local state court and not in Delaware chancery where there are no juries or even securities disclosures. Although, that raises the question of federal preemption in the security space and this of course runs into some current conceptions of internal affairs. And then, second and last I'll say at the opening is that states could also require potentially a state specific corporate charter for doing business in the state. That's, Ryan mentioned the article that Steve Sachs at Harvard has written about after Mallory; states could potentially achieve their policy interests by requiring foreign corporation to accept, to file local charters with all the limits that accompany those charters. So, those are just some opening thoughts to help with the conversation.

Hon. Trevor McFadden ([00:17:26](https://www.rev.com/transcript-editor/shared/FQBs6xXQxeMz5Nk4_jdLMlmtFdq_vRdlkI1fWPETO0CN30xbx26No4GQT_0KMuNJaFnMuCv5v-N4EEoNhuqIGx7Lah8?loadFrom=DocumentDeeplink&ts=1046.96)):

Thanks John. I want to pause. Anybody want to respond to that? I've got questions for the rest of you, but if anybody want opportunity to engage with John's idea, I'd love to hear you.

Todd Zywicki ([00:17:40](https://www.rev.com/transcript-editor/shared/TVE42FJloJ3eAZDOIbqH5wm6_REBwuStqXBBBPz7D405V5_X9ZYGo0bYWwwfvdisv3-JWDROfbzQ6mr3AGTXyau_1zs?loadFrom=DocumentDeeplink&ts=1060.94)):

John, are you concerned about, on your last proposal, about internal corporate charter, are you concerned about the effect on interstate commerce?

Johnathan Berry ([00:17:50](https://www.rev.com/transcript-editor/shared/V06EkdULn2U98KyfW5ohfuUXP9rTVKpPXxuImOHRvyhiB34PYXJI4XFFj4WqZAI7J4FxIYGbO7gBgXYaVEE0oLDd63o?loadFrom=DocumentDeeplink&ts=1070.79)):

Yeah, I think the answer is yes. I think there are, Todd, I think there are meaningful trade-offs here in the sense that all else equal sort of greater assertions of state sovereignty in the way that I'm proposing are going to, I think they will create some frictions on interstate commerce that otherwise wouldn't exist. But those, in the absence of those frictions, we don't want to assume that simply allowing frictionless interstate commerce is the only value we want to vindicate. So it's a real issue.

Hon. Trevor McFadden ([00:18:39](https://www.rev.com/transcript-editor/shared/J5URubWuQ3Btlx8ZZgN5ujNUKeEM2Omck3HSfpHk0-nklqdtTGR5FteW__r6vi6jeayM5d50tROj9TMSsiYTV7pkyH8?loadFrom=DocumentDeeplink&ts=1119.72)):

I guess something that occurs to me there, John, is I'd imagine with every state that is looking to impose values that you might agree with, you can imagine another state looking to impose values that you would disagree with.

Johnathan Berry ([00:18:58](https://www.rev.com/transcript-editor/shared/kq-R4uc-GLkRWJ6_Son-DXlbuEmPmn9wIMATULYh43HNkQ7nM8GBgUnu8QClxXMMg-oB5Nk0nHFpIOWbKlwHkkd6cl0?loadFrom=DocumentDeeplink&ts=1138.98)):

They already do that.

Hon. Trevor McFadden ([00:19:01](https://www.rev.com/transcript-editor/shared/Ir0zJk9RGVcvTxtR6aG0G2SJ5bTjPPbIoToj5Xxwx_yVA5wEWQbtU84sWO-cfcNXxQhLHXocxtdQsUccXYCNSHaX4_Y?loadFrom=DocumentDeeplink&ts=1141.5)):

Okay, and so is that your kind of sense that one side is already doing this and so time for the rest to join the parade?

Johnathan Berry ([00:19:11](https://www.rev.com/transcript-editor/shared/_qTd0hL0eCCeBvPOTJVAGSYmIH60uY_JSt8TP7m9qUQ4PltubDG6uzDoCAhlbkKQYYK9FW84rKYcuBgKEPK_xvVuKh4?loadFrom=DocumentDeeplink&ts=1151.25)):

I mean a little bit, yeah, that you have. So, Delaware law and a lot of complimentary federal law is already in the hands of a relatively narrow class of people who have pretty specific views, out of which ESG and DEI are just these natural overflows. And so having, allowing alternative visions, real breathing room to operate I think would be a very healthy thing.

Hon. Trevor McFadden ([00:19:45](https://www.rev.com/transcript-editor/shared/LX-hz5qgt7wpHsJ1x1DVW3Q975ZQIlHMTYl36NOb0cu3PCBZVs_sOPDRaF2c6zBdhNK3LK1a_iqncWhVhQNeIPgGJR4?loadFrom=DocumentDeeplink&ts=1185.96)):

It strikes me that when we're, to Todd's point, when we're talking about really interstate commerce with these very large corporations, that maybe Congress is the right place that we should be looking to. Do you have thoughts about going there as opposed to looking to the laboratory of states?

Johnathan Berry ([00:20:11](https://www.rev.com/transcript-editor/shared/gHojjlslMbeiDVgHGe9dTFIpTNDcfdCOgtplS3tjFeaXuC6OSk_0-UbRjBb6IVaWr30OjP5Ou41vkIwjupO5JoY2jhw?loadFrom=DocumentDeeplink&ts=1211.46)):

Potentially the challenge, the challenge with congressional action in something like this is that's going to impose a degree of standardization that's going to limit, that could potentially limit pretty seriously the amount of local variation that's permitted. I think I said a version of this last year between the efficiencies that come oftentimes from economies of scale, greater market access, there are real trade-offs on issues like resiliency, like all of these corporations succumbing to a kind of groupthink as I believe is happening with ESG and DEI, and then also subsidiarity allowing if there was all else equal, a little more friction on interstate commerce that would tend to read down to the benefit of local companies for whom compliance with only a single state jurisdictions rules actually allows it to be a comparative advantage. Businesses that end up being more human scale and kind of closer to the communities that they serve.

Hon. Trevor McFadden ([00:21:22](https://www.rev.com/transcript-editor/shared/VZ-SMlW08txYj55NMjdixRVZ8iUOXq7ZuWQF0qXJGyL8zsLTMdiR9OtHri3NOA0ci7P3qBM2mifm70pBM9BfApC8wXo?loadFrom=DocumentDeeplink&ts=1282.06)):

Thank you. So James, I think in the fifth circuit net choice case, judge Edith Jones referred to David versus Goliath litigation and kind of welcomed that and suggested that this reversing the preliminary injunction would help facilitate that. I think regardless what the Supreme Court does, we are certainly likely to see more of this David versus Goliath litigation coming where individuals are suing corporate BMS over their policies. What kinds of legal challenges do you think are most likely to be successful in addressing some of the current concerns we've talked about today? Are we going to see new originalist critiques of the ideas of corporate speech rights? Are we more likely to see state legislatures act and corporations suing to enjoin those laws?

James Burnham ([00:22:16](https://www.rev.com/transcript-editor/shared/2JJqvGGACeiBN69s1kjg7lmhb-2LU7EJxNkpNnogDv11p70MlNlMgUamAnHqa-P-OWraOpqGRB0qw2YrcpE8b4xIO0M?loadFrom=DocumentDeeplink&ts=1336.45)):

Yeah, thanks judge for the question. And before I answer, just thanks to the Federalist Society for this great event. I've been coming to Federalist Society events for 20 years since I was kind of a weird college kid and went with my mom to the old separation of power seminar at Veil. You remember, this was Justice Scalia and John Baker. It was awesome. It was me and a bunch of 80 year olds watching Justice Scalia talk about separation of powers and it really, it sort of set me on the path I am today. For better or worse, some of you are probably happy, others are probably not so happy like John Ulrich.

Johnathan Berry ([00:22:50](https://www.rev.com/transcript-editor/shared/11WWSJhpksT5WFsxsc42vcCLIXN1WWOyBhQsZ8gYishl2luENhmc9WjOhnr8agOuY3ifhqkHqGLUcBSmLrGfzuAgCio?loadFrom=DocumentDeeplink&ts=1370.68)):

Now you're weird and middle aged.

James Burnham ([00:22:52](https://www.rev.com/transcript-editor/shared/M58DZpTc2dLDH9eZ_e3rHlgrmKNEYjH0ujRL0Q9ldxBR2O-c68YTH0LObA4Zds9zmyCv782fN25iLbgoWkyKvgza4Wc?loadFrom=DocumentDeeplink&ts=1372.12)):

That's true. But now I'm just eccentric.

Hon. Trevor McFadden ([00:22:54](https://www.rev.com/transcript-editor/shared/c6wu64ftD9h6MmgfczvZbNmSNjHsOW6saj8AJSHdXK0xTukzpwg8rS9-Em-rUPFCX_eTqIESgw5qwG_yW15IH8wAzCc?loadFrom=DocumentDeeplink&ts=1374.76)):

You still look like a college student.

James Burnham ([00:22:55](https://www.rev.com/transcript-editor/shared/t9bky37d6617GtUG2IzfJMJF_wNkQGOu2-fyXgUz-VAnQxZPwO9GNZMWFtjaGj3PTlktWm2BhwIRkRKncI51JQklpiw?loadFrom=DocumentDeeplink&ts=1375.9)):

Well, thank you so much, judge. But in all seriousness, I think that the society's ability to stay relevant and to sort of always be aware the conversation is why it's the most successful nonprofit in probably our country's history. And so I'm just glad to be here. So now to answer your question and all that. So yeah, I mean look, obviously I think you're going to see increased interest from conservatives in holding mega corporations to account, you already are. That's basically the theme of today. We sang the national at the beginning. This is a new world that we're in, and we can debate why that's the case. I think one reason is a sort of obvious reason, which is the political posture corporate America has adopted for the last seven or eight years, political advocacy, woke policies, et cetera. Corporate America on a pretty uniform scale has taken side in politics and conservatives have noticed that, but I do think there's more than that.

([00:23:49](https://www.rev.com/transcript-editor/shared/8VvHx0VdKJ4NNyCIrFVJ1vhTznPghVudG_FMT8SDtIFWu9Neuy4ssTSc3wR9wiLtSQH-kleHdG7odqyJQ0XRAD6zZ1U?loadFrom=DocumentDeeplink&ts=1429.07)):

So the anti woke stuff is the gateway drug, I think for many conservatives to be like, well, wait a minute, maybe all these guys actually are not our friends toward what has become a much broader rethinking of the problems with concentrated corporate power. And I don't know how many of y'all were at Commissioner Ferguson's lunchtime remarks, but I think that kind of captured what I'm talking about and that's an intellectual journey that I, and I'm sure many others here are going on right now. So let's turn to speech rights and net choice as an example. I do think originalists have a lot to say here, in large part because the sort of chamber of commerce originalism that prevailed in the 1990s, punitive damages are unconstitutional. Corporations are people too. I think that stuff is probably not the most theoretically grounded doctrine you could imagine. A lot of those are Justice Kennedy opinions, love Justice Kennedy, not probably the greatest originalist in US legal history.

([00:24:40](https://www.rev.com/transcript-editor/shared/OimH3bdACsj89_RkMpDF3CcXbuEYp_3GXEQNsT_xExyluxmp3K6JCdeR1OGaMQaGEpRPOjchVvJ0sV_ebI7B-1heZf4?loadFrom=DocumentDeeplink&ts=1480.85)):

And now that the court has shifted away from the Souter, Kennedy, O'Connor Court where that kind of doctrine is predominant, I think you're going to see a lot more revisiting. So let's talk about NetChoice. So, just to state the obvious, James Madison did not live tweet the constitutional convention, and I think it is very hard to claim that an original understanding of the First Amendment has really anything to do with Facebook or Twitter. These are modern innovations that are just completely a thousand degrees separated from anything that existed at the founding or during the reconstruction amendments when they, when it was incorporated against the states or well, we can debate how that happened. But anyway, that's what the Supreme Court has said. So it must be right, if the original meaning of the Constitution doesn't resolve an issue, originalists are supposed to say, well, okay, then the democratic process takes the reins.

([00:25:30](https://www.rev.com/transcript-editor/shared/mamNIc_3R5171eXzNOBQ6Q0UEjBT2Zt6OqIh7xKGP3aOjxqBuJIFu4VtTPaOX4mknTGsTUU4TyupzRIJEb_173ArKAk?loadFrom=DocumentDeeplink&ts=1530.89)):

That was one of Justice Scalia's many refrains. As he put it, quote, you don't need a constitution to keep things up to date. All you need is a legislature and a ballot box. That's what we used to say. That was the mantra that Underlayed Dobbs, that was the whole point. The Constitution has nothing to do with abortion so you guys can go fight about it and the state legislatures, which we're doing right now, and so in net choice we're talking about state laws and if the social media companies don't like the laws, they don't have to offer Instagram and Facebook and TikTok and all these products in Texas or Florida. Paul Clement, one of the best Supreme Court advocates there is said, and I'm sure he is right, at the Supreme Court, that they could geo-fence the states. Of course they can. And if the people of Florida really want their TikTok, they can vote for a new governor who's not Governor DeSantis and they can get their TikTok back.

([00:26:17](https://www.rev.com/transcript-editor/shared/xeWWxMXDU2ca2VDavo5p0C7OYDjHWoEbxhAV28oKxjqgmWntHbVrWdrOHK5dHknCFqFVbxF0Wbcu-bvCzNBZdugl-OI?loadFrom=DocumentDeeplink&ts=1577.09)):

Well, they can't get TikTok back, that one's going away, but they could probably get Instagram back. This is just basic stuff. This is stuff that we all used to agree about. And also, look, I also don't want to be mechanical about it. Someone's going to come up and say, oh, the second amendment, and we had muskets, and now people say that means you can't have a Glock and no, that's not what I mean. Muskets and Glocks are the same in the sense of the Second Amendment. The Second Amendment protects the right to bear arms, the right to self-defense. Okay, self-defense at the framing meant the thing with the stick or whatever, and now it means, I'm not a real big gun guy, as you might be able to tell, but it means a cool pistol, and you can carry that around. And so the nature of the arms required for self-defense keeps up with the times.

([00:27:01](https://www.rev.com/transcript-editor/shared/yyJWrbava5aioLZwG5YieyUEuStiHXC_KleROH3ihzrzicrCHsAHAROe0k-swL6zDOggyg-AesURyaQTWkXwaO5vJe0?loadFrom=DocumentDeeplink&ts=1621.59)):

That's the right is self-defense. The nature of the arms is different, but the right clear, established, easy, this just does not work for social media. The First Amendment protects the right, let's just start it another basic. The First Amendment protects the right of free expression for humans like us, people like real people, not for platforms and not for algorithms. Okay? No one knew what an algorithm was, and certainly not for disembodied algorithms that just operate on their own without any human input. If you extend the principle of free expression for humans to free expression for public companies, which has been in Supreme Court doctrine in one form or another for a while, that's already a big step. But I think it becomes a step that is really difficult to justify when we're talking about companies that are conduits for information. So we're talking like the Telegram or the Telegraph rather phone companies, and particularly when those companies that are conduits for information are invoking their sort of corporate First Amendment to tell people to shut up.

([00:27:58](https://www.rev.com/transcript-editor/shared/_uW4BvUpIrs8WzppGwDBKGxng-u-u-J7RvkXCuq_hlKhdz2bezQMfXPCTPFiEkM9d0yDZ25B_fXH9LvgjAPyVkHTFpk?loadFrom=DocumentDeeplink&ts=1678.68)):

I mean, it's just bizarre. I mean to state it, I mean it's not as bad. Maybe it is as bad as Morrison versus Olson, but to describe this case is to decide it. I think because you're talking about something that has very tendentious claims to constitutional rights, which is the Instagram platform versus real people talking about matters of public concern that the platform that they used to talk to each other, like a phone wants to silence that conversation. Okay, now let's say, oh, sorry. So that's kind of my thesis on the originalism. Now let's get outside of originalism. So let's just say you're not an originalist, which plenty of people are not originalists. I think that's totally fine, but then you have to justify your constitutional rule on the merits, right? Then we have to have a policy discussion about whether it's a good idea to have the constitutional rule that comes in and preempts the field.

([00:28:46](https://www.rev.com/transcript-editor/shared/qkhOa2Np6P-TLIMhEzkIkQIolX0qosV-gGiGflCorTzUU_IXWLB7GmHSr7uLR0b5wAGEZXDekx7ZfVLdDeQ4whwq4Fs?loadFrom=DocumentDeeplink&ts=1726.26)):

It's a cliche. I think that everybody's heard that the people who run and found social media companies don't let their kids use social media. Why? Because social media is really bad. It is dangerous. It is novel. It is harmful to kids. It causes all kinds of problems. It is not necessarily a good thing for the world that we can all tweet at each other, even though stoller really likes to yell at people on it. Probably not good for his opponents. That may not necessarily be a good development, I don't know. But it's something that we have to have a policy debate about if we're going to go outside of originalism, and more importantly, if we're talking about just constitutional law. The platforms have developed powerful algorithms based on just incalculable amounts of data that are unlike anything we've ever had before that they use to keep people focused on the platform by fostering addiction, depression, extremism, and more.

([00:29:36](https://www.rev.com/transcript-editor/shared/JgqPbfHA7Ich4SL78U-1QB7F5RQcUOYtCfqAwdzCnW3v41i7G1e6tvHhL4B-x3qylBy_JtpvkVPEy95skoToaKmuPdc?loadFrom=DocumentDeeplink&ts=1776.78)):

They want you looking at it. They don't care if you're sad, they don't care if you're happy, they don't care if you're radicalized. They just want you to look at it. It's all that matters to them. That's what they're for. And it's been well documented Now that leads to teenage depression, teenage suicide and all of that. So these are the consequences that we have to debate if we're going to go outside of originalism and say that this is something that can be regulated. I mean, just today, today there was a Wall Street Journal story about Instagram that says they push sexual content to anybody who signs up with a new account that says they're 13 years old. Immediately, immediately, it's like all the sex stuff shows up, and then according to the journal, I think we trust the journal. Within 20 minutes, adult entertainers are messaging kids, offering them nude pictures.

([00:30:20](https://www.rev.com/transcript-editor/shared/XYJF-NJjvajWGlq1gofy7uWKckAljGsBvWlx5ER_Wj4PbMZj_vZ4iB_DHR5wtuGmUGlXR8CwwGz03p6EGLAjaLdzaY8?loadFrom=DocumentDeeplink&ts=1820.41)):

Look, I don't know. I mean, that seems kind of bad. I don't know that. I think it's a great idea to say, well, the Constitution, gosh darn it, we fought a revolution maybe, and I'm almost done, I promise, but there's a little more. And that's just like the human component, there's also sort of a democratic component to all of this. Look, we all lived through the Covid Pandemic and we all sat in our houses with our masks on, and the doors locked while the social media companies got together.

([00:30:55](https://www.rev.com/transcript-editor/shared/qT6YaZiW67OLgoLNnjhArmBaKTtXN-Ep3p6e3XAx6WO33flSkmsjgkI4LKHV3lo5ovX5Y2zuD5hzUZeSOeavfPYtmzw?loadFrom=DocumentDeeplink&ts=1855.12)):

Well, maybe I was very scared. I was spraying the boxes. Do you remember spraying the boxes with Lysol? I was weird, man. I told you I was a weird kid. When the social media companies got together and distorted the public flow of information in ways that imposed massive, massively destructive policy consequences, it led to schools being closed.

([00:31:18](https://www.rev.com/transcript-editor/shared/yCI3rP-TwRlWihKHeXBakuPTJiwozMzTwuhOzUa_y9DnM_kfWe8MndFcpREFJ1ix9moc_FwetxQjZNJWQDXJVOZrMjg?loadFrom=DocumentDeeplink&ts=1878.19)):

It ruined kids' lives and more. And by the way, while they're all up here beating their chest about the First Amendment, where was this First amendment when the government was trying to get them to suppress misinformation about covid, right? Everyone's going to talk about the government. They do so much damage when they interfere. Well, that was back in the world where the social media companies had their first amendment rights and they didn't do anything with it. They were like, heck yeah, we're happy to kick all these people off Twitter. That's the order of the day we're all in. We also lived through the 2020 election where these same companies conspired to suppress derogatory information about Joe Biden, particularly in the form of his son Hunter Biden's laptop, the same laptop that now underlies three felony convictions in Delaware. So to me, that's like a real problem, and it's not hard to imagine, by the way, if the phone companies were armed with the same First Amendment doctrine that we have today, why they wouldn't claim the same thing and they could easily do it.

([00:32:11](https://www.rev.com/transcript-editor/shared/Jf9ZMDkh3bEtcF1LIVycRrCxoTC_xf9VfW0dvc1S35xMV8ApsU-UFqpsWeA4nzrLrB9S-rM77XTKGBcgrzg9Z7OUJWI?loadFrom=DocumentDeeplink&ts=1931.59)):

I'm sure there's an AI out there somewhere that could hop into my phone and censor out any conservative stuff I say when I call John Barry, and I don't know why that argument, I mean, I think Paul actually said it, the argument to Justice Alito that they have a First Amendment right to censor Gmail, but they, that's their speech. It's not your speech. So when you send an email, that's Google talking there. I find that to be just extraordinary, and I find it very hard to justify on original list or practical grounds. I think I'm, oh, last thing. The one other point people do make is, oh, the market, the market's going to solve it. And the only example I think anyone really has of this is Twitter because of Elon. I mean, guys, I don't know that we can rely on an eccentric guy with $60 billion from South Africa losing a ton of money buying one of the platforms because he's angry about Covid or whatever, and think that's going to hold the rails together for us as a society.

([00:33:06](https://www.rev.com/transcript-editor/shared/QIWBr1SSgqezp0nU_XZCF6ccV6B5seyU44ALEzcU37QawE1La9mam3vBdY_3JQ-miuxJXYseRw2FTlzcLPc7Th8dBmA?loadFrom=DocumentDeeplink&ts=1986.98)):

It is obviously fortuitous that that happened. I don't know that that's really something that free market economics can explain because it has not by any means been a profitable acquisition for him, and no rational economic actor would do it for the direct reasons. And so I think the last thing you asked about Judge is what can we do about it? Well, I think it's pretty simple. We can start suing these companies so we can start holding them accountable when they do bad stuff. So when companies violate the law, when they violate privacy law, when they violate antitrust law, when they hurt kids, when Instagram is trying to get 13-year-old boys hooked on pornography by pushing stuff at them when their parents thought if it was set at 13, that meant there was some sort of parental control and it was filtered whether they thought that reasonably or not, I don't know. I'm not on Instagram, so you can't look at my posts. I think that's the kind of stuff that they can be sued for. And look, guys, guys, it's fun. It's just suing the government, which we all do that a lot, except at the end you get money instead of an injunction. And so it's actually even more fun. That's all I have.

Hon. Trevor McFadden ([00:34:12](https://www.rev.com/transcript-editor/shared/toOGCY8BO-TEjd7l-4UNTV9BqO8_emG2z6Ir-KmHgABxfljtrWyOEp5jP8MUQs1AIFhyUq9uCAsj5zarHX7TPIaPl2c?loadFrom=DocumentDeeplink&ts=2052.26)):

James will be performing during the happy hour as well.

James Burnham ([00:34:15](https://www.rev.com/transcript-editor/shared/H8xQB7A5Macr-c_RDAFOJSrvv8eNTh4YmKr9OiRQZz83xZa4WeHSeJbGyWvKcjz6G-dSWux8PuM-ShOrgCJavQVEBsk?loadFrom=DocumentDeeplink&ts=2055.62)):

Alita promised to hand out drinks at five.

Hon. Trevor McFadden ([00:34:19](https://www.rev.com/transcript-editor/shared/q_rUa877L1c7OZfK7Fjiav8dsxWJx325baWt8ZSGYdZkAkGUDtwDzvE4jA3etiOeoCSOnXHc2UreuSYn3Rg6YbokXcE?loadFrom=DocumentDeeplink&ts=2059.37)):

Any thoughts to that from the panel?

Casey Mattox ([00:34:24](https://www.rev.com/transcript-editor/shared/mm8yeTHNhedQnC-6B5SvSQK6_XuYQaUrPBLlMVa_nCqjoIRHuYewSgJ-m0SyKT717rp8M6WNf4iN-4uEuDFtqi6o-c0?loadFrom=DocumentDeeplink&ts=2064.08)):

Alright, so I'll be that guy. So first of all, you stepped on my question. I was already ready to go on the Second Amendment question, so I heard an answer. I'm still not quite sure why that works. The distinction that you're creating between, the approach you were taking to originalism was basically, "oh, come on, the founding fathers surely didn't mean Facebook and Twitter," I don't understand why that doesn't mean, doesn't lead you. I mean anyone else from the left would make exactly the same argument. They make it all the time and say, oh, come on, the founding fathers clearly weren't talking about AR 15s, and so therefore, right?

James Burnham ([00:35:03](https://www.rev.com/transcript-editor/shared/2s2PmbKG5HwBNtOGH-8vQFDhZtPpAq9CetgGA460m32kUVDqC2G_nODxluHa9OFPBxtV4ro612092IW_3DajrTAtIL4?loadFrom=DocumentDeeplink&ts=2103.14)):

Yeah, I mean, look, just because a bad argument in one context doesn't make it a good argument or I'm actually not sure I'm saying that correctly, but lemme just answer the question. So in the Second Amendment context, look, the right is the right to self-defense. That's what it's for humans for us. And so that means you have whatever a weapon, a reasonable weapon, commensurate with what you would've been able to carry at the time to go defend yourself when you're out on the town. Okay, maybe now it's a Glock, back then it was a musket. Maybe it was a hatchet. I dunno what they were using in 1787 or whatever. The First Amendment is the right to people, us humans to express. I don't think there's really any helpful analogy between the right of people to talk and the right of the Instagram algorithm or the disembodied Instagram platform to tell people they can't talk to each other through this mechanism that we've built that has an enormous amount of people using it just to communicate with each other.

([00:36:00](https://www.rev.com/transcript-editor/shared/I93aid9BBwIPENbfVtjX3hU6vSl7UZdymLVQZt0L204RGGc484HNk4D33rJRAhGcDNiQ84qIyGrg85ChzGW7pLETcjw?loadFrom=DocumentDeeplink&ts=2160.06)):

They're just totally different. So like Citizens United, we had a panel about Citizens United. Citizen United is obviously right in my opinion because it is just people, it's like five guys got together and said, we're going to do a movie about Hillary. And so yeah, of course those humans have First Amendment rights and they don't forfeit them because they've gotten together through an LLC any more than they would forfeit them if all of us on this thing got together and formed a little club to put out videos. But I think in the social media context, it's like originalism really has run out. I mean, we really are just outside the scope of what this right was meant to, or what this right was understood to protect. So that's my, I mean, I dunno what you think, but

Casey Mattox ([00:36:36](https://www.rev.com/transcript-editor/shared/8Qb-TML7RpZTTU_aZ2DNjMyNiJTemZg372qq2jz1AQZzry9ROBOC71m6LklsXtoPZr6U67c3T5Apjyew0_zAxkpswSI?loadFrom=DocumentDeeplink&ts=2196.48)):

Well, I mean, the other thing I potentially raise there is it feels to me, I mean I've always thought social media platforms to me look much more like the very undeveloped press basically. I think there's a much better argument that, look, Facebook and Twitter look a whole lot like the traditional use of press, which is not the way we talk about it now as if it's like the New York Times and news gathering, but basically mass communication of ideas platforms, right?

James Burnham ([00:37:08](https://www.rev.com/transcript-editor/shared/H8hoN0xQf2Ez6AHKHCRVAJNZDj8Zy8O_ml5lixfFHVUHxjSyUphh8R4P0GdiLKBX03xAmYJVP8YHpteLnFEtWTtJVn0?loadFrom=DocumentDeeplink&ts=2228.01)):

Yes. I guess

Casey Mattox ([00:37:09](https://www.rev.com/transcript-editor/shared/nt39oebb1ndjbuzTo8OaZtVGJ0sMf80ZzAuR11kfDGMKRCxnSv3ivRZytgyfv1O-m4-aiVyW4xiu6trJyTd364_zu3A?loadFrom=DocumentDeeplink&ts=2229.03)):

Pamphlet here. I'm just here to print your pamphlet. You bring me your pamphlets and I'm printing your pamphlets. And that was the freedom of the press.

James Burnham ([00:37:17](https://www.rev.com/transcript-editor/shared/-J5ATp-JU3PvVuskAqWsI4H8A42TIstLFxuk17KhkrKXytWxAjkkh9fRzdjtXG9C7rp9Ig2Xk-DbIQw7GzGl1JPDt70?loadFrom=DocumentDeeplink&ts=2237.31)):

Oh, you mean like Gutenberg so not, right?

Casey Mattox ([00:37:19](https://www.rev.com/transcript-editor/shared/WHtZyT8jJOOmPAT8mhuEuovejuovBmfAOMdUi-nkEXtOcWw6F4tgkBIyyztbiyFvGMk_ijIzd4VEdQGURsTcPmDHWEQ?loadFrom=DocumentDeeplink&ts=2239.17)):

Exactly. Right. I mean that was what the freedom of the press was at the founding. It had nothing to do with people on TV offering breakdowns of the news.

James Burnham ([00:37:31](https://www.rev.com/transcript-editor/shared/gpyVuYSSGYh2T-YBMekSuXIrTKd65mTullx2K_iYSVH7z3CnJTIMXtZyxXuAY7zz35-WHuhUqK4B1r4Cg2MnEWpw_uY?loadFrom=DocumentDeeplink&ts=2251.29)):

I think there's two, look, I thought you were drawing an analogy to newspapers, which I don't find persuasive at all, because newspapers are predominantly their own speech. It's just people saying their own thing. If you're talking about the guys that operate the thing with the typeface, I mean, I don't know. I'm not sure. Wait, so your view is that the printing press guy has a First Amendment to decide whose pamphlet his machine will? I mean,

Casey Mattox ([00:37:55](https://www.rev.com/transcript-editor/shared/LlW4xsRM4t4eVfTPNM_LNSm2zM4G_xfcxstqSwyy1JsC4nibeSb9YojhoSMnIyFzfMr7P_Bx09q1aJyA5a3ic_lidMo?loadFrom=DocumentDeeplink&ts=2275.86)):

Yeah, absolutely mean, they certainly did at the time Ben Franklin had the choice to decide whether or not to print your print your pamphlet.

James Burnham ([00:38:03](https://www.rev.com/transcript-editor/shared/rFANRYD7XNNuePT2keyA8Dg-O3SmEAGcFFCPbNGttPDXucf-JaaEcBkS2y8ua19Eh_OujPGHSvWLtQioJgrrWLX85DM?loadFrom=DocumentDeeplink&ts=2283.06)):

Well, I thought that Ben Franklin, I'll have to look at this on my phone using Google, but I thought with Ben Franklin it was more direct than that. It wasn't just like he was saying, you can't use the factory to print your stuff because I don't like your speech, but I could be wrong about that. I'll have to look into that. That might be an excellent counterpoint. I'll look into it as soon as you're done with me.

Hon. Trevor McFadden ([00:38:21](https://www.rev.com/transcript-editor/shared/FucL4bRRzjhRBuPWxYoR37IoU_D8_Q3cqtPfEc2iVoRx_Gjii1mReH5qtkBhg1B-hpb4Z1p2fWfa_XofCZOfKxbALzg?loadFrom=DocumentDeeplink&ts=2301.54)):

Let me ask you, just kind of thinking about the Green family and their desire to honor their religious views through their company, Hobby Lobby, or Elon Musk and whatever his desires are through X or Mark Zuckerberg and Facebook, whether or not these are closely held companies or not, billionaires have rights too, and the fact that they're super rich and want to exercise their rights through a company, are you concerned at all that we are, if we took your view, we would be impinging on their rights, including religious rights that some of these cases?

James Burnham ([00:39:12](https://www.rev.com/transcript-editor/shared/hr2AbEHnMAcTiHH4_JFQvEsxpJzyzafb9alI2e-pOYLmI-a7q1ZB9MaPvtR-vlXtB1o-hYMa0UyLpPXt68g5SkhDnqo?loadFrom=DocumentDeeplink&ts=2352.77)):

So to me, the touchstone is humans have rights, people have rights to speak, and so of course billionaires have rights too. And so I think the Hobby Lobby example is actually pretty easy. You have a closely held company where the owners are, it's the owners' rights through the company that they run that we're vindicating here or that they own rather and run. And so I actually think that's quite easy. So you've sort of got two possible distinctions, both of which I think have some merit, and neither of which, by the way, is fully theorized, which is why I hope the Supreme Court and NetChoice doesn't just try to flip the table on this and do some broad constitutional rule. The two distinctions would be, I think that these are public companies. The idea that Mark Zuckerberg is speaking in any meaningful way through what appears on Instagram is farcical because he has no idea what appears on Instagram.

([00:40:03](https://www.rev.com/transcript-editor/shared/PEISFGUrV_BZI6lu70XGTHtRMkng0LsQCQJR1mHLTVtUK8_2YDBuARBg0_U5xCwecL_9K8vTli59pmTZ716SpWA2XKs?loadFrom=DocumentDeeplink&ts=2403.1)):

It's not him speaking. Mark can say whatever he wants, wherever he wants, whenever he wants. It's just, it's too removed in any meaningful way from him as a person to count as some sort of derivative of his own speech. That's one. And then the other I think is that that's especially acute when we're talking about a product that is method of communication. And so I need to look into what Casey said about the printing prints, printing press, because there was a bunch of litigation about telegrams at the beginning of the 20th century where the Telegraph guys, you'd be shocked to hear, said "no union messages on the telegraphs, you unions, you guys could build your own telegraphs." And everyone was like, that's ridiculous. And that got squashed, and they had to let the union people talk on the telegraphs, and then we had FDR and the whole country fell apart. But that's a separate panel. And so I think those are the two distinctions though, right? Separation from humans and sort of conduit for information versus a thing that has its own expressive message. And those are both ones where I think the social media companies fail, probably.

Hon. Trevor McFadden ([00:41:09](https://www.rev.com/transcript-editor/shared/mYbpREhN4hDuKG8mDKo2rtfJy1O8DIxT-Dvu2V9Q2UjUAUXkPFp8O0RTgM-DKVfMFEuZUr76gGDRaRU_RZZC3NHMJYE?loadFrom=DocumentDeeplink&ts=2469.79)):

Erin, can I ask you to, I've got a different question for you, but you've thought a lot specifically about the religious freedoms and cases like Hobby Lobby. I'd love to get your impression on what James has laid out.

Erin Hawley ([00:41:22](https://www.rev.com/transcript-editor/shared/Omie4OK2_-zoc5KoLMrp9E4qFY0aoFCCHFFEywwltfArUChYeoMmW692p-6DhyVB1I3jZDlX3fkRdbuJw_7Z0vRkOY8?loadFrom=DocumentDeeplink&ts=2482.99)):

Yeah, I agree with a lot of that. And of course in Hobby Lobby, the Supreme Court was applying RFRA, and RFRA does define, or the Dictionary Act defines corporations or persons to include corporations. So that question wasn't directly presented, but I agree that you don't lose your religious liberty rights, you don't lose your First Amendment rights to speak by forming corporation. So I think closely held corporations are the easiest example to see where a business is exercising the rights of its owners. So it's directly tied to those owners. I think it gets more difficult for sure. I don't think anyone would suspect that a Fortune 500 company has religious liberty rights, that its shareholders would have a wide variety of beliefs. So I don't think you could bring a free exercise claim for a Fortune 500 company. So I think there are some limits to that base, probably on corporate size, but probably corporate size rather than corporate form, I would think.

Hon. Trevor McFadden ([00:42:16](https://www.rev.com/transcript-editor/shared/u_zOctaBRF_4KvvIRlofL4AXxplIn2JK9Lx33ik2WAJ2-zie0svW0vze-2QgRJZXwiC5Q_Bh6aZ9hjDRYRW7MEYn11A?loadFrom=DocumentDeeplink&ts=2536.19)):

What about Walmart? I am not super up on their corporate structure, but definitely huge company, but also very much associated with the Walton family or Chick-fil-A for instance. I mean, these are massive companies.

Erin Hawley ([00:42:33](https://www.rev.com/transcript-editor/shared/Ox_LatT-uDZ8L8o_nmQ4VsZ4s5WtYJ3Dm4bkojdRGEb0ob4K9tsDMqKLZEqnyrkj_dLan1lPSw7_y6ghu33TcFg83Fs?loadFrom=DocumentDeeplink&ts=2553.53)):

Yeah, Chick-fil-A is a good example. I think my understanding Walmart, and I could be wrong, but my understanding is that there are a wide variety of shareholders. So I don't think Walmart would have First Amendment rights that it could exercise, Chick-fil-A might. If it's held by a family, which I think it is, then I think it would have those rights.

Hon. Trevor McFadden ([00:42:51](https://www.rev.com/transcript-editor/shared/_fUzdmtddhQbv3StUdv6M85dZtXVUY28Akd5ciBVMJDJFnL51GCAsBXHRCaM1Xa5kb02JPR3CJW-vDKDMhdepPb9qIc?loadFrom=DocumentDeeplink&ts=2571.92)):

But, I mean Walmart would have, they'd have First Amendment rights in some context, right?

Erin Hawley ([00:42:59](https://www.rev.com/transcript-editor/shared/tvI8t63Mvlwqu-fO9NQKEU8SbHoxp0s08-5b8bARjrW7x6GMdh7OPp-t3kXXOK4nfMNoMQgeRehICwlaIQSbYY-JgSI?loadFrom=DocumentDeeplink&ts=2579.27)):

Well, they'd have RFRA rights for sure.

Hon. Trevor McFadden ([00:43:00](https://www.rev.com/transcript-editor/shared/uWNokx3r7n96KjoMT8icvcFtUG0CfcdUeSroc6GaxBbiGnDmbsjpFRELOhY9SINIibxn-4CiSqSV7R5TFDxrqtllCvw?loadFrom=DocumentDeeplink&ts=2580.8)):

Okay. Alright. So let me get to the question I wanted to ask you. Can you talk a little more about whether we should be worried about the government or just power from whatever source? And I think this is something Professor Barnett spoke about earlier as well. Obviously, a reoccurring theme is when the government collaborates with powerful private interests, as in the Murthy case, we have particular combination of coercion there. So is our core, should we particularly be concerned about the accumulation of too much power in one set of hands? Or is it that intersection of power with the government? And what are some things litigators can be thinking about when they address this?

Erin Hawley ([00:43:50](https://www.rev.com/transcript-editor/shared/GCAPp83BIO-LbR1kXTdz1yLlDUq4j0SJT2Y287rZYfJ9iA6IzhwW12X59bRdj25xN2hScR6yx4P6VjPL8e2Q5eGEdEc?loadFrom=DocumentDeeplink&ts=2630.12)):

Sure. So I think both are really important, the accumulation of power and how that power is exercised. But even more so when the government comes alongside as a collaborator, as Ronald Reagan famously quipped, the nine most terrifying words in the English language are, I'm from the government and I'm here to help. And the previous panel I think discussed the Vullo versus NRA, the gun case. And in that case, you had the financial director of New York who came to Lloyd's and said, Hey, we've noticed you violated however many upteen number of state regulations. Would you like to be prosecuted or would you like to de-bank the NRA? So as the Supreme Court found rightly in those sort of circumstances, there is a coercion as the court said, of the private banks to perform the state's dirty work. So you have this sort of constellation of cases in which you have actual state coercion.

([00:44:46](https://www.rev.com/transcript-editor/shared/TpXTPTZezhJ9begFik-AUNZeiJx-DqFOEJBidujVhaK7FFtsE4D8klkgl3gklQsUJ9fBeS43DkbOZXMnrq4tFeeDaAg?loadFrom=DocumentDeeplink&ts=2686.8)):

The NRA case was not difficult. Again, Justice Sotomayor wrote the case, it was unanimous. And the opinion does point out that it was just that the 12 B six stage. So the court had to accept all of the allegations as true, but assuming they were, the court found an easy First Amendment violation. Now that said, I am not so optimistic. I'm afraid, as James is, on the NetChoice cases, I re-listened to the oral arguments this week in those cases, and there was an awful lot of talk about standing, and there was also an awful lot of talk about the fact that the plaintiffs had brought a facial challenge. I read both of those things as suggesting that the court is not quite sure about how the rights shake out, at least in part, particularly the emphasis on the facial aspect of the case. And the question about whether the law was, there was actually sort of this weird debate there were sort of getting off topic, but it's a weird debate whether in the First Amendment context you had to meet Salerno.

([00:45:47](https://www.rev.com/transcript-editor/shared/4BoOODrsJlW9eRZ5aq7-B5GM9dI1TJMoDeYolEAgLPtC1A0wfdp9ZfbaZ6N3YaSEL1rHvVpxRaIu6cN-wE0HZrOwwW4?loadFrom=DocumentDeeplink&ts=2747.7)):

Typically you don't. But the court was debating whether you had to prove in every set of circumstances that the law was unconstitutional or whether it just had to be constitutional in a broad sweep of cases. But this sort of heated discussion by a number of justices on sort of both sides of the traditional aisle, I think suggests that they weren't putting to one side the idea that Facebook and NetChoice might in fact have those sort of First Amendment rights. And I think if court, I think certainly some members of the court will find that those First Amendment rights do attach to entities like Facebook. However, some of us might dislike that. And my guess is that they would do it on the lines of that they're acting sort of in the function of editors. As Paul Clement said, they are content moderators. And I wouldn't be surprised if some justices think that is enough.

([00:46:37](https://www.rev.com/transcript-editor/shared/LxWZiDvfDEkR54v_1i4QCOA7CwHBdSsfqIYjpW2A3nrzrO3vX4mHx7tSC4oFN2MNidwL_S5I6lFqo7459OQmKudFI44?loadFrom=DocumentDeeplink&ts=2797.26)):

We'll see. But given that this sort of background will net choice succeed, will the state law succeed? I think we have another constellation of cases that are similar to Vullo, but not quite as, the facts aren't as stark, they're not as thuggish as the prior panel said, and one of those is Murthy versus Missouri. Although if you read the complaint in those cases, there are some pretty thuggish emails back and forth from the White House to the various social media companies. For instance, one of the emails says that we noticed that there was an RFK tweet, we want it taken care of asap. We are directing you to take down this tweet, the first amendment rights of RFK or anyone else. To the contrary, in another set of circumstances, the complaint lays out how that there was, I think that a group of advocates, individuals known as the disinformation dozen who promoted information about covid or vaccines that the Biden administration disagreed with.

([00:47:39](https://www.rev.com/transcript-editor/shared/IFiZk49jQlUSB81h3XJNE7nzPI2uwvF-IOd40Qc5Q7BmZNL4FjWBxtjwwbIFfARWv2h396XR5IOYUHAgr2mWVu7-7P4?loadFrom=DocumentDeeplink&ts=2859.7)):

And so there's this long drawn out email exchange back and forth between the White House, between the administration and these various public, or excuse me, social media companies. And basically at the end of the day, they said, look, they're not violating our policies. We're not going to take them down. Then Press Secretary comes out and says, we're really thinking hard about Section 230. Maybe there's something we can do there. And by the way, maybe antitrust laws apply to companies like the social media companies. Guess what happened? The disinformation dozen lost their platform. So we see these sorts of questions coming up, and as those of you that listen to the Murthy versus Missouri argument, it didn't go particularly well, I don't think, for Missouri or Louisiana. So I'm not sure how the Supreme Court will come out on that. I think the question will be, Louisiana Solicitor General was really pushing for the line of encouragement or maybe significant encouragement from the government and others.

([00:48:43](https://www.rev.com/transcript-editor/shared/p3XA51RDkgx73qpGyPRrjMhxLbhNDm1AYu01XOjSqKZUL-uphIMhBVh3F1rz-yF7JoCfXNqngUFq_G4cSB4hwmxuRY4?loadFrom=DocumentDeeplink&ts=2923.18)):

Justice Kagan, Justice Kavanaugh, who'd worked in the White House, were really saying it has to be a lot more than that. Maybe it has to be coercion as in Vullo. And I actually looked through the Vullo opinion, and did a Control F, and encouragement is nowhere in that opinion, not even significant encouragement. So that may be the line that the Supreme Court draws. I think that line is incomplete. I think one of the Supreme Court's most noble tasks is that it is liberty enhancing. The founders envisioned the three branches needing to work in concert in order to constrain individual liberty. And I think this is really an area in which courts and the Supreme Court could give rise to protect these sorts of rights. The last case I'll mention is one that's winding its way through the lower courts, but it's another example in which I think just a straight up coercion test is insufficient.

([00:49:34](https://www.rev.com/transcript-editor/shared/2FHw_mnf-hiSq8YLC32Jf8pukoc-TBShsTAdT9cNbx3_mYEI_pjZFSli3m7SdJ1QMQ8-GvlW12F0IBa4rqA3SMTdqa0?loadFrom=DocumentDeeplink&ts=2974.87)):

And this is the case, the Stanford Information Observatory. So back in 2020, I believe there was a group of, so-called Information Gurus, Stanford, Washington State, other folks who got together with cisa, CISA, which is a department in DHS a newly created agency, and these folks together that the federal bureaucrats, along with the information gurus decided that they would set up a program to monitor disinformation. The way the program works is that the federal regulators would send concerning emails to Stanford, to Washington State, Stanford and Washington State would scour the internet for similar content and then would tell the social media companies "Hey, take this stuff down." So you have an active concert between federal government and private entities. You don't necessarily have the sort of coercion you saw in Vullo, you have these private entities really doing this thing. I think because that they wanted to help with censoring speech in these sorts of ways.

([00:50:42](https://www.rev.com/transcript-editor/shared/jwlKM9DQZgjeTnd_oTu1eB7DbJ7KQQ6Uh8HZQuPSHRBInPb6QlxctzrXSgjfOnGCy58EhcFBijJ9WNuHTy77OXhKc-Q?loadFrom=DocumentDeeplink&ts=3042.2)):

So we think we need to think creatively about as litigators, what sort of legal doctrines. Maybe it's borrowing from the state action framework in terms of when a state actor is sufficiently involved in a project, then that can count as state action. So something the courts will have to sort out. But I think I guess to sort of, bottom line, I'm not as optimistic about the net choice cases. I think Vullo is great, but I don't know that we'll get that result in Murthy. And I think the Stanford Information Observatory shows that we need a more robust doctrine than just coercion in order to get at this sort of interplay between government and private entities.

James Burnham ([00:51:26](https://www.rev.com/transcript-editor/shared/-ascDeWLK5LA8wgkTzbI1WuakfSk_XeQXyjkzwr5nXl8y5IRUIX1lq_M-O1tIeO2W2hWt1jnhrB_kxNHGBVafOVUrhE?loadFrom=DocumentDeeplink&ts=3086.18)):

And just to be clear, I don't think we're going to win. I view a win as Justice Barrett writing some super narrow thing that gets rid of the case and lets us fight another day. I'm terrified that Justice Kavanaugh is going to write some free charter of Liberty for big tech that ends the debate forever. So I just want to be, I love Justice Kavanaugh usually, but on that one... Also, I figured out the answer to the Ben Franklin thing. Do you want to know what it is, so the late great Ben Franklin is not Facebook, right? So Ben Franklin is Jack Smith, right? This is honest Ben, he's in his thing. He's got his press. You can't make some guy who's sitting there with his press print your pamphlet, right? That is a very different thing from the nationwide global communications platform. Along the distinctions I said to you, but was not smart enough to think of immediately in response to Judge Maddox's question.

Todd Zywicki ([00:52:12](https://www.rev.com/transcript-editor/shared/mllgBogcmmoVNACrjr8ERTkpLNv1haAXC_35-aa2YY0MAEwpOD1G0AQJ47lUPS5Q5Unu1gVYEhub-JaKFd-ooZPSWpk?loadFrom=DocumentDeeplink&ts=3132.89)):

You mean Jack Phillips?

James Burnham ([00:52:14](https://www.rev.com/transcript-editor/shared/9s532fa1yEL6Rw-fLJ79Eo75zer_bX8hi2x-N4jYR4z910DRnOU4ZdHw6eX36AjswE7Y1kTcQ1wD0DiEnmuUYAQomsw?loadFrom=DocumentDeeplink&ts=3134.45)):

Yes. Not Jack Smith. He's definitely not Jack Smith.

([00:52:17](https://www.rev.com/transcript-editor/shared/xoZwWq62nFsQssT9UFpNS09v6LsvZEIJ1-95flP08kIOy7PEu_7DED0IvqQcy4GG_U2mGONbh8lw48Pp0eYYCNPYcQc?loadFrom=DocumentDeeplink&ts=3137.48)):

No, wrong Jack. There were other founding people who were well-known who I would compare to Jack Smith, none of which were fighting on our side.

Todd Zywicki ([00:52:26](https://www.rev.com/transcript-editor/shared/UR-bjnbLj0Ho3KCICovMwCQhMRGtGcRxmGNf0TZXlUp_dVfmrwOKtsEvA7UD6A4yilCeWyMC4-Uv7AYt-8pttFezh0Y?loadFrom=DocumentDeeplink&ts=3146.75)):

I was confused

James Burnham ([00:52:27](https://www.rev.com/transcript-editor/shared/LCnsQKUYuQhFSm17c5b2Ia_vnM6mg-O7NGZeNhOLMSnTYoqMH1pBqTXNrvCPhHk8cCqw-vjp91g6vW_I4dA6proJRzM?loadFrom=DocumentDeeplink&ts=3147.59)):

Yes, Jack Phillips. Thank you. Thank you.

Todd Zywicki ([00:52:31](https://www.rev.com/transcript-editor/shared/sCAXp1kWT8eqUe0OuuEAcxkzBEUrVd-txGqvwWTu0meJPbB8epPmoiBoBBGThe-og3f8aKwgEeb5_KmE1Oe3RLyx7Zg?loadFrom=DocumentDeeplink&ts=3151.59)):

Team McDonald veterans.

Hon. Trevor McFadden ([00:52:37](https://www.rev.com/transcript-editor/shared/HLVTM0yMW9x9eruqRq0lto8ww6z70hfIVcsMCSlbGdWrQZH9S8jSzeIVvgg4dy5MfG4jAM_XZwW2-6V0pgALvkpfv4g?loadFrom=DocumentDeeplink&ts=3157.43)):

Todd, piggybacking off my question to Erin. It seems like a lot of the critiques of corporate power boil down to the idea that some companies have just gotten too big and wield too much power, if that's the crux of the issue. How much do existing different areas of the law, like antitrust, unfair or competition law have to say about this issue? And do you see that as a better way to get to these underlying concerns?

Todd Zywicki ([00:53:04](https://www.rev.com/transcript-editor/shared/KtoRqmaDZVyqoJORbu8wzmST_YomMtjCB0TwZKxseAEcMQE_4Kb7JR5s9lfkoAKYVZWVHzbptbXYuV6-T-hDwCzHrak?loadFrom=DocumentDeeplink&ts=3184.22)):

I wouldn't necessarily a better way, but one way to be considered thinking about this, and before we think about whether maybe antitrust is the solution, we need to really think about what is the problem. Before I say that, I just want to say James said he's been involved with the Federal Society a mere 20 years, and Josh is a mere babe at 21 years involved with the Federalist Society. I am well beyond that. But I do want to echo James's point about how exciting this is. And there's no other place that does what the Federalist Society does, which is brings together this kind of level of dialogue among different ideas, addresses the ideas of the era from all these different perspective, all sort of thinking about these questions of freedom, the rule of law, and the like. And so I just want to echo my voice to the importance of the work that's going on here and the value this program.

([00:54:04](https://www.rev.com/transcript-editor/shared/rYgg_sxrnE6855XpKtPuyWFeNHLsUA_0YVa8JvJB0kxCMNSGY0Hxnxpqb3V5ccx84UpCfzBcgr65qCEaA0HRsrspJH0?loadFrom=DocumentDeeplink&ts=3244.11)):

And so what's the problem and what's the solution? I think if all we think of is an economic problem and the only thing antitrust addresses is economics, then I think it's a pretty good case here to leave it alone. It's like, I mean, it's an economic product. Twitter's free, Facebook is free, YouTube is free, right? In that sense, it's a pretty simple question. So really the only question is are there other values here that are implicated by this? And should those values be a concern of antitrust laws? So let's think about the free speech issues. It relates to this, censorship, whether by the government or by private actors, has real implications for people's lives. People were fired because they were sending out misinformation about vaccines stopping infection transmission. My students were expelled from George Mason because of this garbage. How many people would've thought differently about leaving schools closed if they knew the truth about what was going on with kids, rather than basically having the great Barrington Declaration suppressed, and everybody who was trying to bring this out suppressed?

([00:55:21](https://www.rev.com/transcript-editor/shared/f2aGHigUBjuuA9yUuvYJ6r54sQPCOKII98pM9Ju-NLYf_OtqH_OI-UvsDQ7Lqo1T6PtC4kydSgPIy9SderfCZN48eN8?loadFrom=DocumentDeeplink&ts=3321.78)):

How many people in this room might've made different decisions about getting vaccinated if you knew that six months later they're going to tell you had to do it all over again, or that it wasn't going to be one and done four or six months later, you're going to have to get a booster shot if you wanted to not get fired. This has real implications for people's lives, regardless of whether the government suppresses it or whether private actors have the ability to suppress and manipulate information. As James said, it affected, it affected elections through the way that they manipulated this and the like. And so start with that premise, which is there are real values here. And I think the thing to think about here is this isn't just an economic question. This isn't just how much it costs for a can of peas or hubcaps or whatever we're talking about now is an economic something that's delivered through a market, but has important spillover effects on people's ability to make decisions about their health, to make decisions about their children's futures and the like.

([00:56:32](https://www.rev.com/transcript-editor/shared/D8sUhxRYy-u4rlac8A80nWpEb44jff_uikRzFx4DiVXcDlD-3CglenObfdBu6F98ohzaCTuMeAQa-Lp_giKY0iRz0CM?loadFrom=DocumentDeeplink&ts=3392.05)):

And so this really matters. I would also add, if you go back and you read Virginia Pharmacy Board, this is the canonical commercial law speech. What do they talk about there? You don't just have a right to speak. You also under the First Amendment have a right to listen. You have a right to receive information that is important to you. These are all things that are important to people. When I sued my university, I couldn't get good about the vaccine mandate. Where was I going for information? I was going to Twitter to try to find these renegade doctors who would actually provide the truth about vaccines and natural immunity. And that one by one, they would disappear as they were eliminated.

([00:57:21](https://www.rev.com/transcript-editor/shared/O75FnYNWkAwUN8XPBdHwYSWMuQvtKo3-Jzlq-3b-Yy_qgKXCx8ye3APG1ukmDIjqRyCxnavZusP8uMkOMwgoKn_0bws?loadFrom=DocumentDeeplink&ts=3441.94)):

And I lost access to those sources of information because they would basically be liquidated. And if you don't know, I know I've talked about it before. I myself, when I went out to talk about my case, when I went out to talk about my civil rights case and the importance of understanding all this, I had videos removed from YouTube. I was censored on YouTube, taken down for vaccine or some sort of misinformation to this day, I don't know what that information supposedly was because everything I said was true. I don't know whether it was something I said, something somebody else said on those broadcasts or the like. And so start with the premise. There's spillover effects here from these things that affect people's lives in very important ways. And the traditional way we've thought about that is let people speak and allow the competition of ideas to allow the truth to come out and people to be able to hear what they want.

([00:58:17](https://www.rev.com/transcript-editor/shared/ngzMNI6DSqduICiD8CqA6Cvhmoq56tLTVzwRgVkIhBXHTzzu_QUm5l8hfVBaL-2jnsFGh2ff7RshaQxPA7x4TqaLieI?loadFrom=DocumentDeeplink&ts=3497.65)):

So what about the market solution? Well, as we know, basically what they said for the longest time was, well, if you don't like Twitter, start your own Twitter. Well, they did start their own Twitter and it was called Parler. And I doubt anybody's on parlor right now because as far as I know, it doesn't exist anymore. Why? Because all the other tech companies ganged up and killed Parler. And the icing on, the cherry on the top was when Jack Dorsey of Twitter tweeted the day that Parler was liquidated. I don't know if you saw this. He tweeted that for the first time in three weeks, Parler was not the most downloaded app on the Apple app store. And he just tweeted a screenshot of the app store that day with I think, a heart on it, right? Basically, thank you for killing my competition. So that was the experience, right? So now we have the fallback position that James alluded to, right? Well, the market is self-correcting. Now look, Elon Musk, Musk bought Twitter, right? I'll echo James's point, eccentric billionaires willing to buy social media companies and lose billions of dollars, that's not a strategy for

James Burnham ([00:59:32](https://www.rev.com/transcript-editor/shared/I_7Km2YESKv7x0XppP2u_gXtl3-jYe6-KZY5MsrXMILCKKGhPdXoXqd4v4ukcgknulgtsPWMh2kGfJ1kqOXKM7Sxw6A?loadFrom=DocumentDeeplink&ts=3572.39)):

The framers did not anticipate Elon.

Todd Zywicki ([00:59:34](https://www.rev.com/transcript-editor/shared/btrnDlFUXNuhiiYUGDvCFWb1TDUfSMCprzgDysuVNP2BdcC0kjLncRsNRZ_RVblA74uUifIR2u5Gr1wsEWm5eUyyztY?loadFrom=DocumentDeeplink&ts=3574.02)):

What's that? And why is Elon Musk losing billions of dollars? Because woke activists and woke corporations are ganging up and have basically decided to boycott Twitter and not advertise on Twitter. Why? Because Elon Musk allows free speech. Oh goodness. The world is going to end. But more than that, what is it? It's a signal. It's a signal. It's a signal that anybody out there who's thinking about being Elon Musk, don't be Elon Musk or the same fate awaits you. Every one of these things are a signal. Even when they try to cancel somebody speaking on campus, when the lift tries to cancel, whatever it is, it's always a signal. Even when they lose, they win because they raise the cost so much from anybody trying to do it again in the future, it's just purely a deterrent. But even that point, it still doesn't address these spillover effects. It still doesn't address these necessarily address these spillover effects. Third, why might antitrust be relevant? A small number of companies are simply easier to coerce and to collude than a large number of companies. It's as simple as that, right?

([01:00:45](https://www.rev.com/transcript-editor/shared/dHywoIRcbsprW6xvpXODEwGN7R0B5BQ_uZyObrrOCPp0ka_X9uya07sAzZktw-vIN3TovD-Bq7MOmd5jmPtgsIBTIrM?loadFrom=DocumentDeeplink&ts=3645.68)):

A few weeks ago, I testified in Congress before the House weaponization committee about my experience with censorship, and they actually managed to get the two censors in chief from the White House, Andy Slat and Rob Flaherty, to show up. And one of the things that came out during that hearing that was very important was, it came out through the emails and the questions, they did not care whether they were censoring was true or not. They did not actually care whether it was misinformation. In that hearing, those gentlemen were constantly expressing miss or disinformation about things themselves actually about what the vaccines could do and that sort of thing. They didn't care whether it was true or not. What they cared about was whether it obstructed their political agenda. I.e. promoted vaccine hesitancy, obstruct their policies on masks or whatever the case would be right now.

([01:01:42](https://www.rev.com/transcript-editor/shared/JLWOWzXSWzrGpZIJo-EWy96G9xKEPwS9oo1difNnTcrM3T3IQ1_wgy2Kpkk3o-zMlkcWo_cutYF-YhxZqS_MThHNQvQ?loadFrom=DocumentDeeplink&ts=3702.17)):

That's a lot. And one of the things that came out was in the email correspondence was one of the things they said to Facebook, because Facebook was reluctant to get in the censorship game. They said, "why can't you be more like YouTube?" YouTube's on the cutting edge here of shutting down all this stuff. "Why can't you guys be more like them? They're the gold standard?" And basically use that as a cudgel to beat 'em up. It also came out, they announced that hearing that Amazon the whole time that this was going, I was like, Amazon must have been in on this racket, right? There's no way. And of course it came out, Amazon was in fact manipulating search results, bearing books, hiding books that obstructed the official narrative. Now that's really important. If Amazon refuses to carry a book because it's politically incorrect or Amazon is suppressing discovery of a book that's equivalent to essentially meaning it can't be published if they can keep book A from being bought, no publisher's going to publish book a Prime.

([01:02:48](https://www.rev.com/transcript-editor/shared/nFVUBCQRCiRTESOAzyomryU_vguvV6Yb_GgHmPXM4_wCQ9W5xI9kiEbHZkxFOOB8US_psL5Uv0YgqMwPH8bKIhrcR6Q?loadFrom=DocumentDeeplink&ts=3768.12)):

And so Amazon, because of its market dynamism actually has the ability to essentially act as a sensor on what books get published and they were effectively engaged in virtual book banning at that particular time. So what's the answer here? Which is, as I said, if we just think of this as an economic thing, then I think these are pretty high value companies. I think whether it takes five years, 10 years, whatever, if they start doing a bad job, we all know the MySpace, Facebook legacy and all that sort of stuff, that's great, but in the meantime, what are we going to do about that? In the meantime, what are we going to do about their ability to manipulate information? How many people have already been harmed by their censorship policies during Covid? How many elections are they allowed to affect by basically suppressing certain speech at the expense of other speech?

([01:03:51](https://www.rev.com/transcript-editor/shared/dloHIUkv6-8foQftc9T-Jpp0oQXaJsBB1BaGRLuuUjRiioZSfhCwmJ52wTx2AUXzAkbJJXCsayfLIs7RBVBkGUegtvo?loadFrom=DocumentDeeplink&ts=3831.12)):

I don't know about you, but 10 years seems like a long time to me and understand they will do it again. They've never apologized for what they did during Covid. They've never apologized during what they did during Covid. They've never admittedly did anything wrong. They never will. They keep lying and saying that they were just suppressing misinformation when in fact they weren't. Right? And so I think that we should consider these options, right? Antitrust seems like a reasonable solution if we know, and Justice Gorsuch mentioned this in the Murthy argument. One of the questions you asked was is it the case that the highly concentrated nature of these industries should be relevant? And the answer was kind of, well, maybe no, I think maybe it should be relevant. I think some of these things, right? NRA versus Vullo is or should be an easy case from this perspective why banking is an easy case because of the essential facilities essentially that Director Chopra talked about.

([01:04:49](https://www.rev.com/transcript-editor/shared/lwIobw2r0COwYkyCmcw_-ItFBDZ6H3xeCN84qLjEr3JyPGUqPH-1MQaGW2Iac9aqPCSMogvugOtLS956wIAVR-hsUMo?loadFrom=DocumentDeeplink&ts=3889.77)):

But also because the government controls entry into that industry, they have this sort of soft power ability to use guidance to tell these companies what to do, and they're still engaged in de-banking as far as I can tell, right? NetChoice I think is a reasonable solution. What's a concern about net choice? I do worry a little bit that can be a pretty heavy handed government intervention comparing net choice to antitrust. In that sense, maybe antitrust is a less invasive, less intrusive remedy than something like net choice. I'm not saying they're necessarily either-or, but it could be that might be a solution. And I think the chips are really going to be down on the Murthy case, because I think that's a really important case if the court allows 'em to get away with what they're doing there. And I think it is important. As Aaron mentioned, the SG was mentioned by Mayman in the last panel. The SG was on the side of the NRA in that case, but specifically so they could be on the other side of the Murthy case. And so to the point that Erin made, that's exactly the line the SG wanted to draw, that's why they intervened. It wasn't about the NRA, it was about preserving their ability to bully and coerce companies under the Murthy case more than it was I think, about protecting the NRA's rights and it was precisely to try to get them to buy into that particular particular idea.

Hon. Trevor McFadden ([01:06:32](https://www.rev.com/transcript-editor/shared/45hCsPujlPeZ8t7KlY7qOA5N6hGfeqoKSxEsoSap-pfEGWFc_p6BW5g-0FAFIFmQTUoN6xokNHyFD3tTE3P_LOMZYr4?loadFrom=DocumentDeeplink&ts=3992.71)):

Thank you, Todd. Thanks. Anybody want to respond to the kind of potential for antitrust as a solution here? Anybody have concerns about that?

Casey Mattox ([01:06:43](https://www.rev.com/transcript-editor/shared/tp3viGHErC5D27-OvTpjdwp6kKi9ge2CxPUzXzsa69MzKJLiL-ntURPiYuOmHziOewDJ1JdEkvLD6d63I6_ZUXAJepw?loadFrom=DocumentDeeplink&ts=4003.24)):

I just had a question on it, so just maybe you can say a little bit more. I'm trying to understand how antitrust would work here. So if you've got, so say you use antitrust, basically if you've got free speech problems with social media platforms, censorship issues with social media platforms, and you break up platforms in response to that so that there are multiple, there are smaller platforms, right? You've got, I dunno, whatever the Southwest Bell version of Twitter is, but you sort of break it up. How does that actually get us to more respect for free speech just by sort of divert increasing the number of platforms? How does that actually get us to more free speech?

Todd Zywicki ([01:07:30](https://www.rev.com/transcript-editor/shared/QP9jyDIRK_Bme_eLzFz_fAutTdSZLuINeRFE7dTaFPwZSb4KTj5B_B-BWSmNNGE5WJ6d8B5sBwKZi4wqYkrN5Fw4B-M?loadFrom=DocumentDeeplink&ts=4050.76)):

I would say, well, obviously it doesn't guarantee free speech. They could all just be little carbon copies of Google running around implementing the same strategy. What I do think is that it is potentially a structural protection for Liberty, structural protection for freedom, which is it is clearly the case. I think that collusion among a large number of platforms or coercion or persuasion or whatever the government wants to do it sort of leaning on these companies is much more difficult with multiple platforms. Does that guarantee that we would get free speech? No, not necessarily, but I think it's worth at least thinking about the possibility, and I'm not committed to any of these things. Every proposal we have as both an intended and an unintended consequence, I think it is relevant in thinking about antitrust. Well, what would be the economic implications? What are the economic trade-offs in terms of this stuff?

([01:08:37](https://www.rev.com/transcript-editor/shared/EW3wzq4q7Ko7D3azhn3Ug1ArvH9zdH7h9pmCJ8ZDuaeq2GSKmHs3O2wHVxWupySDQRk3T9sbVzeXziTKCAR3mnhM0sA?loadFrom=DocumentDeeplink&ts=4117.1)):

These are global companies. They're kind of these uniform companies that are unicorn companies that are very powerful global companies for the United States. They do provide valuable services to consumers and I'm very concerned about those economic implications. I'm concerned about, as I said, about net choice and potentially government being more involved in these things. What I know though is that do nothing is not a strategy that just because there's unintended consequences of all these potential things that were possibly going down and there could be unintended consequences, I am not persuaded anymore that simply doing nothing at all is going to solve the problem. If we do nothing, this is the world we're going to live in. If we do nothing, we're going to live in the world of corporate censorship, period. And so that's not a world I want to live in and if that means we do things that might end up not working potentially backfiring, I'm willing to... This is a case of which I'll take the devil I don't know, or the devil I know.

Hon. Trevor McFadden ([01:09:50](https://www.rev.com/transcript-editor/shared/j8pRig3w2aT8rU3bV0fobPHJX6gGnaqKZ2hF775aEnehdDd-VrO7-Z-B6p58F7RC7hDmy2n_DpTu4OjX7G4dFQ82noI?loadFrom=DocumentDeeplink&ts=4190.84)):

Well, I think that tees us up well for Casey. I think you've heard from your panelists all looking for different ways, but feeling like we've got to do something. Are they right? Is the devil that we don't know actually worse than the devil we know?

Casey Mattox ([01:10:07](https://www.rev.com/transcript-editor/shared/7XHyC6HNYNSM4CkQefvRc8gr3NytKioRaXMinyAWcbblgP-N2-8Li-vm1PWesTgN_ngX84fx0CP99BkTq1nf6uryHI0?loadFrom=DocumentDeeplink&ts=4207.19)):

Well, so apparently I get to be the libertarian on this panel, which if you know me at all is kind of hilarious given my background, but I will do my best. Yeah, I think government is the problem. I think government is always the problem. That's the beginning and end. And that'll sort of sum up everything I'm going to basically say, and I'll begin with this point is I think in order to be able to figure out what the right solutions are, I think we have to have maybe a clear-eyed understanding of where we really are and I think viewed through the lens that I'm going to provide, I think there's a very good argument that the market is in fact working a lot better than we are giving it credit for.

([01:10:58](https://www.rev.com/transcript-editor/shared/rV_PS-SYJbU391shehsx9P8yIQdy11HT_Xp6dCmdGBccM3xZp1GeY5QN3lKNLZpkamn7EoeQ0cF3agyzuo3-qxxOwyI?loadFrom=DocumentDeeplink&ts=4258.97)):

Everybody hates Mark Zuckerberg. We just can't agree why. But it's worth considering why the mainstream media and so many people on the left hate Mark Zuckerberg, and it's not because he's radical right winger, it's basically because he cut in on their business. They were gatekeepers over information, they controlled who had access to information and Mark Zuckerberg messed that up. We used to complain about media bias for most of my life. The concern on the right, the very correct concern on the right was about media bias. I would argue that media bias is worse now than it has ever been, but it occupies a lot more less of my mind concerned about media bias because of the existence of social media. And so this is not to say at all that social media doesn't have its own bias problems. They have very large bias problems, and I'll talk about some of that in a moment, but it has never been easier for any individual to be able to have an audience and be able to speak.

([01:12:13](https://www.rev.com/transcript-editor/shared/qcWVXu5sJknf70yZMFVX9gU2GzcN_XuT4SzpVd4o2e281xjzcGN2A9jWdN5dLWt3dmbIUH279Xq5oeDtcJiJNW-XkUY?loadFrom=DocumentDeeplink&ts=4333.17)):

And it's both because the Supreme Court has been so protective of free speech rights, literally it takes a little bit of work to try to think through the five First Amendment decisions that the Supreme Court has gotten wrong in the last couple of decades. I can do that for you. Christian Legal Society versus Martinez needs to be overturned, but it's hard to work through that list because they keep getting the First Amendment cases. And then on top of that, we have social media platforms of all kinds. Most of us probably have four or five different apps on our phone that allow us to be able to communicate. And there are problems with those apps. There are problems with the decisions that are made, but we have an ability to be able to reach an audience that we otherwise would not have in prior times. If I say Cat turd, you know who I'm talking about in all other times in human history, that would be a preposterous sentence, right? For that matter, I have people come up to me and tell me that they know me from Twitter, which is both horrifying. No, I'll just leave it there. It's horrifying.

Hon. Trevor McFadden ([01:13:21](https://www.rev.com/transcript-editor/shared/xVf3znmFT-B1nqjPrva8Hbp5JEtxgj2kE-mZmAnRt3a9tXcw5RAiuTO37gEzHywJRPxU29-Vt-UXswhdV-xALsTZH0o?loadFrom=DocumentDeeplink&ts=4401.24)):

Wait, are you Cat Turd?

Casey Mattox ([01:13:23](https://www.rev.com/transcript-editor/shared/bA6yoCYG6yCueQ3JrD5x_9lzCOqLY9_lBJOs9r1X9SMEQWA6bq8SXlK1DhWsuV-hIjVHpuHbIfCi1UmPUJDysfhH9s4?loadFrom=DocumentDeeplink&ts=4403.27)):

Not in fact. And Donald Trump himself said that the fact that I have such power in terms of numbers with Facebook, Twitter, Instagram, et cetera, I think it helped me win all these races where they're spending much more money than I spent. The gatekeepers can't gate keep anymore. That's why the left and the mainstream media, that's why they don't like social media platforms. And then of course Elon Musk exists, which is another good argument for that. I agree. It's not a strategy, it's also not nothing. It's a data point that demonstrates that, okay, well it is possible. In fact, there is change that has in fact occurred. I'm not here to tell you again, social media platforms are getting everything right. I'm a former ADF attorney, I was awake in October, 2020, but it's worth considering where we are before we think about where we should go. So we described this problem, the legislators moderating competing rights claimants to zoom out a little bit beyond net choice specifically as a net choice problem, but it could also be the Jack Phillips problem.

([01:14:35](https://www.rev.com/transcript-editor/shared/3mqR8NlISoPWwHwJlIs5pAQuaf5Z-l1c_M36dVhO1xztg_KSgXlnffGD9ebtKJzw16mfMEVOMuFILmCPcHXEUZMJ5lk?loadFrom=DocumentDeeplink&ts=4475.65)):

It could be the 303 creative problem. It could be the Little Sisters of the Poor Problem. It could be the Christian Legal Society versus Martinez problem. That's two mentions of that terrible decision. In other words, there's nothing here in my mind that's really a brand new thing. And mentioning those examples should immediately lead you to two conclusions, at least it does for me. Government does a very poor job of deciding between competing rights claimants; who's going to be the winners and losers between whose rights get prioritized over whose rights? It does a very bad job of that. And even when government picks the right winner, it often doesn't produce the result that the winner even wants. So on the first point, let's think about 303 creative specifically. Yes, before I start, there are obvious differences between 303 creative and Facebook and Twitter and everyone else.

([01:15:32](https://www.rev.com/transcript-editor/shared/nkTUgaeQnhX2UEK1sdHpu6CrkR7WmdNvpB4-eaOcCFlK9yxYCdWVcK8CXjM0rMYb8u2h7juxD0J1erEix3oEEi8-q1E?loadFrom=DocumentDeeplink&ts=4532.56)):

303 is not a global speech platform. It's not a massive publicly traded company with tens of thousands of employees. Although, I will say that I think that Jack Phillips' rights should not depend upon how many cakes he sells. If Jack Phillips, in my view, if Jack Phillips has a thousand storefronts all over America, even in California, then Jack Phillips's rights should be completely unaffected by that reality. So the number of sales, the size of his company, in my mind should not matter. I would even say if he begins to sell stock. And coincidentally, if you have not bought Jack Phillips' cookies, you can buy them on his website and they are very, very good and quite affordable and you would be supporting Liberty while at the same time purchasing cookies from Jack Phillips. So I would encourage everyone to go do that.

James Burnham ([01:16:25](https://www.rev.com/transcript-editor/shared/uHCl-EHCtgvkLC6ESGF82YP-dGnWZVUY-2QpR9foSoaXL63jIVw_5wGVRrHE4YEb_bJuIOT8WzGs0QTc3PtRRYjnLKY?loadFrom=DocumentDeeplink&ts=4585.57)):

How are Jack Smith's cookies?

Hon. Trevor McFadden ([01:16:29](https://www.rev.com/transcript-editor/shared/rnW-6XuxHpHh1n8khKsfatnujGcOt1Uxd5EBqMVeuK0WBr659bLWaOzni8UzBHatcDOkYfTpgponKIWwZGcK4WS3BPU?loadFrom=DocumentDeeplink&ts=4589.17)):

Please do not buy anything from Jack Smith.

Casey Mattox ([01:16:31](https://www.rev.com/transcript-editor/shared/WMSLFMNazHbA_Al_6T9zgPZVre6JXXQHaMJk3ZmHpB2yZStlnKhzF1SAmT1n7i4AkYjMvxQ75J0L7xpGMfV_rTShIV0?loadFrom=DocumentDeeplink&ts=4591.39)):

That's right. So I think, look, Colorado took a view, so let's just compare 303 creative and the NetChoice case. Colorado also had a non-discrimination law, Colorado's non-discrimination law said was going to compel people not to discriminate on certain bases, including in the speech creation context, and they apply that or would've applied that to Lori Smith and 303 Creative. Even when we're talking about a content creator online, someone hosting a website online, which at least facially sounds a whole lot like what's at issue in Texas and in Florida, except for the size of the company, but the hosting of a website, hosting a website for someone else whose speech you don't want to host. The argument from Texas in NetChoice was "yes, but this isn't speech. The platforms aren't engaged in speech. The platforms are engaged in censorship" and Colorado's argument was, "but 303 creative isn't engaged in speech 303 creative is engaged in discrimination. I would argue that in both of those two cases, all that is doing is essentially taking a free speech claim and labeling it something else in order to justify an imposition on speech. The only difference I think in these stories in my view is basically that one is a large company and one is a smaller company... Colorado... So anyway, so I'll sort of skip on.

([01:18:24](https://www.rev.com/transcript-editor/shared/4O0bcDnNdcWlgqFmuVarFN-NU6PVKx2JzGoyKtMEA2AFy5i17vKDH-XlARBtVhgtXuXhjLV0YLsV20J4c64ERhtczVc?loadFrom=DocumentDeeplink&ts=4704.38)):

If we had that federal social media regulation, if we had government compelled carriage of speech, I think that would ultimately, or for that matter at the state level, I think there's no way to have government compelled carriage of speech that doesn't immediately lead you to the opportunity for government restricted speech. And given the recent history with the Biden administration and NRA v. Vullo, I think that is a very real concern we need to be taking very seriously. I think maybe one of the main points that I would make is simply that I think the NRA v. Vullo case and Murthy are both cases that we've had a lot of conversation here about today. And I think one of the mistakes we can make is to treat those cases as if they are one-offs as that. "Well, that's an example of where the government did something really bad and we need someone to step in" instead of the alternative, rather horrifying possibility, which is that NCLA and the NRA in NRA v. Vullo discovered something that is actually far more common than any of us would've ever hoped was real, and that we're all here talking about what do we do about private power as if the private power is truly just these private companies that are out there doing things on their own completely unaffected by anything happening in any federal agencies.

([01:19:51](https://www.rev.com/transcript-editor/shared/vbBRX37CuPWy4sncY17DGPuWq1s7DcJEPu3Q5aZG5tG5K5Be3jwOndCt81Cu25HgX-LKAKDlQOnhcBOhenb8hj5NoIU?loadFrom=DocumentDeeplink&ts=4791.86)):

And maybe it's actually a lot more common than we thought. Maybe a lot of the things we're concerned about coming from private companies are actually connected through not six degrees of Kevin Bacon, but maybe a couple of degrees at the most of Kevin Bacon, if you know the reference, back to some federal agency or federal regulator somewhere who is pushing companies. I mean, one of the examples, well, so, and if that's the case then the story here about well, what do we do to fix it is, well, let's think about the things we've been talking about for the last 40 years at the Federalist Society, which is maybe the government's the problem. Maybe the real story here isn't that there's this rise of private power and it's this brand new thing that's completely separate from everything else that we've ever talked about, about being concerned about government power. Maybe the actual answer is that the government is the one pulling the strings either directly or indirectly behind the scenes. And that the ultimate answer is going to be we've got to deal with the federal Leviathan and until we do, we're going to be back in this exact same position. I'll stop there.

Hon. Trevor McFadden ([01:21:15](https://www.rev.com/transcript-editor/shared/0YQO0-MYYND4ygFeujpSvBCgkrhDUQBGfSHcIhWqORj7wYx3LmuC4boUxsXXQ0G8DDeRKA3-dxgIk5phvd67v8DL9nM?loadFrom=DocumentDeeplink&ts=4875.63)):

Let me ask you a quick question there, Casey, one of Judge Oldham's justifications for his holding NetChoice was on common carrier consideration. What do you think about that as, I mean we really is a lot of the agita here just about this particular role that these platforms play, and as he points out, there's a very long tradition of common carrier regulation. What do you think about that?

Casey Mattox ([01:21:46](https://www.rev.com/transcript-editor/shared/2fIqcZZYg9eTaPLoBwNcE-59umg6VmAlJ2EnKUb5MMX5RwBEf00jqMRfaZcu4R7P5X_waNYwMzgkwsgzj_FE6YNxvkE?loadFrom=DocumentDeeplink&ts=4906.17)):

Yeah, so I mean there is a long tradition of common carrier regulation, but first of all, you don't get to declare, I mean in a Michael Scott sort of sense, "I declare you common carrier." Common carriers are something that it just hasn't worked that way in the past. And there's not an example of a common carrier like this, right? I mean the platforms, they have their own editorial ability unlike anything that would even be remotely similar, which would be phone companies and things like that. I just don't think the common carrier example or argument...

Hon. Trevor McFadden ([01:22:31](https://www.rev.com/transcript-editor/shared/KbaWz-QF-X0wKepHooIvfXABagwEBQSyZiqQgCuC2t12nm4-DPdxR3-xxQqNIGaGoIMLWCfv17GqQBfFVanPmkhFnIY?loadFrom=DocumentDeeplink&ts=4951.39)):

I mean I thought he kind of pointed out telegraphs though. I think to James's point, well what if the Telegraph carrier said we're not going to take pro-union messages or we'll only take...

Casey Mattox ([01:22:41](https://www.rev.com/transcript-editor/shared/_blXvHtT2vpXADjCXqniyQqY9U6KPvjZCBSZiiG3tio5g99SpkfjlTy6Ob5LymZSpN-oudLjl3ePqXFnZ6ks7bd5SQ4?loadFrom=DocumentDeeplink&ts=4961.46)):

I mean one of the other arguments there too though is that, so one of the pieces of the common carrier test is whether people would treat, would assume that the common carrier is actually endorsing the speech that's at issue. Look around at the way that people treat social media platforms. When speech is on a social media platform, I mean, you have entire hearings in front of Congress, repeatedly, where people are dragging people up in front of the platforms and slamming the platforms over speech that was uttered on the platform. I think it's hard to say that clearly no one is going to attribute to the platforms the speech of people on them in the same way that people would know that someone made a phone call on Verizon. Obviously no one is going to treat Verizon as responsible, even for the most heinous phone conversation that happened on a Verizon phone. People do treat social media platform that way.

Hon. Trevor McFadden ([01:23:49](https://www.rev.com/transcript-editor/shared/eR_b-C9J0Y_-DxCZyxKufiR2NV8b-BA9NPi2-mlDi7wcKCvXsqr22l-DcCiucFSvtaE4Xrn2iiZfmZAOknDLzCnPQrs?loadFrom=DocumentDeeplink&ts=5029)):

To James's question, what about Gmail?

Casey Mattox ([01:23:52](https://www.rev.com/transcript-editor/shared/pb8_uNn7BoYXcD2-CfKwb4pJA2mhzroIkPkvUmdOVH5SKoCC9fqV0OxmQvCSVjh69jYaUvp3R5vVGCCe5Gy23u2xhKo?loadFrom=DocumentDeeplink&ts=5032.24)):

Gmail as a...

Hon. Trevor McFadden ([01:23:53](https://www.rev.com/transcript-editor/shared/UG7kfZPNUtbZpna9nd6NW-VddQEfcvdoPm3FGrGEO0lwMJzze3X535gCrDRtWpvRmnviW1ttvtd_it-fwvMxqyrMt5I?loadFrom=DocumentDeeplink&ts=5033.73)):

Would Gmail be a common carrier?

Casey Mattox ([01:23:55](https://www.rev.com/transcript-editor/shared/dmTFUT8oIaSchM4qUqd7HZdcc4j9SYWUvAwMmOmkgvQVscG-me_EaMKayrH-Rk60_6hhrgiyp_XrV7GOVmTE4-Uhtpo?loadFrom=DocumentDeeplink&ts=5035)):

Yeah, I still don't think so. No.

Hon. Trevor McFadden ([01:23:58](https://www.rev.com/transcript-editor/shared/b86PFCLSz2iwizCe9__FMKS_HQSFSf9qla0s_n80UrKigbugqZCiIo2tatiEh8sRYAGUTAc2DcyS0s_KEi9reUWIDoU?loadFrom=DocumentDeeplink&ts=5038.39)):

Okay, we're going to have questions from the audience here, so get your hardest questions ready, but not quite yet. I want to get some reactions. Erin, did you want to...

Erin Hawley ([01:24:07](https://www.rev.com/transcript-editor/shared/g7u8OaYrDhlSOj1KQSY7ulvDeYLXYxG-6gGyT7rGoomp87iwN3L32YdznE0tP0LbL0s6_tJ18HfEKhYeQPeF-ojgg8s?loadFrom=DocumentDeeplink&ts=5047.51)):

Sure, I'll jump in real quick. So I don't think... I think there is there is a dichotomy between Laurie Smith and 303 Creative and Facebook, and not because of size, but because of the nature of the speech. The Colorado actually stipulated that Lori Smith's websites were pure speech. There was this dialogue between the Colorado Solicitor General and Justice Gorsuch. And Justice Gorsuch is talking about the things she does such as design pictures, put phrases on there, she makes the entire collage of the wedding website. She doesn't just host it, and Justice Gorsuch leans in and says "I would call that speech." On the other hand, what you get even from Paul Clement who is defending that choice is simply content moderation. No one is talking about what Facebook is saying itself. They're talking about editorial choices at most. So I think those are quite different. And then I agree with the Gmail question. The solicitor general made a distinction in the NetChoice argument and carved out Gmail as well as direct messages and says those would not be a Facebook or Twitter speech, but rather than their creator speech. But it sounds like you would even sweep in that sort of thing like Paul Clement did.

Casey Mattox ([01:25:23](https://www.rev.com/transcript-editor/shared/jDyUGqFqAV4LwNv1oEg_x56J57H3rmugfPlx-69XWMOGZOuXzjXd3yz1w4z_4_eEmHIZZ8oPUy_2oohsuggPVZLvv1s?loadFrom=DocumentDeeplink&ts=5123.86)):

Well, so I mean, thinking about Gmail, Gmail does in fact right now exclude all kinds of emails out of my inbox that I am very grateful for. If you ever go over to your junk folders and everything else, I mean they have algorithms that they use that.

Erin Hawley ([01:25:42](https://www.rev.com/transcript-editor/shared/9ucc2vmZ2x8KTys_GDSPBxnqr-pEHLTfWepTmXMMoIh7K_sLj9LPzI2F397irTHyUeX7_zo-3CmGmLwVd_tNWrHLBlI?loadFrom=DocumentDeeplink&ts=5142.47)):

So your emails are their speech?

Casey Mattox ([01:25:44](https://www.rev.com/transcript-editor/shared/WQ7Ad5LtrHFgY6hXI8u2j7kvAkxLGiMhaFNjlmQFKPIQZOaou_JAD8V7vemg1DVvx74_ab9c1WGcZkzb4EOgX1LbkYs?loadFrom=DocumentDeeplink&ts=5144.32)):

No, my emails aren't their speech, but they are moderating content.

James Burnham ([01:25:48](https://www.rev.com/transcript-editor/shared/bxD_glCCg01VTWlxj9tU6_KY3fqIJBJuWDTYX8t9Nf8k8aN6nqonOyIzTY1Bbb9MfPlmiJXB1uua5t13ZLhj4agpLVI?loadFrom=DocumentDeeplink&ts=5148.1)):

I mean, I'm glad to hear Google endorses everything you say.

Casey Mattox ([01:25:50](https://www.rev.com/transcript-editor/shared/iLGbzILCUamcUqa5Inh0WgMeRxz6QGUbGAOmdzhyQl0Gg8oRkym7sPCW_Ib4Mq0U7Jw46XfL0ixsdhNW6qxKcNcJzc0?loadFrom=DocumentDeeplink&ts=5150.44)):

It's right, seriously

James Burnham ([01:25:52](https://www.rev.com/transcript-editor/shared/o3c9DSDvja9mgz6aVf3l82ZNz-9Xml7KkmclB00eQyDqghRmnHnKW4xym80gf1ZIyGHJFPWasudILmLGKaYkkQOt5vg?loadFrom=DocumentDeeplink&ts=5152.78)):

But can I actually just ask you another related question on that? So AT&T, Verizon and Sprint tomorrow joined the Responsible Telephone Alliance and they'd say "We're not going to allow any more hate speech on the phones." Its, January 6th was the national calamity on the level of the fall of Rome and "we're going to let that happen again with our phone companies gosh darn it." And by the way, right now I bet I don't know this for sure, they get a lot of spam. They have technology right now that filters out spam calls. I'm sure they could do this. This would not be very hard. In your view, would that mean I'm back to the tin can with the rope if I want to talk about Trump on the phone or where...

Casey Mattox ([01:26:30](https://www.rev.com/transcript-editor/shared/kSl7TfD0afOI1i0MkY8qI4PZnqejAbEtVQsW_s_EdIZsREcdckBa6PRy-cWLW9pegC52_0Ei_SfGEV5KokcLRnOZ440?loadFrom=DocumentDeeplink&ts=5190.08)):

No, I mean I think my answer would be, okay, there's a federal regulator around here somewhere...

James Burnham ([01:26:34](https://www.rev.com/transcript-editor/shared/ivmQxxWwR7sjB43C8ZmOz8EqW2dwNf8WoSjGW-G0CMAm5YtgEIxxRYXSfpIlq7aPIAbulKiH1KpdOwKtfG1PuueFoZg?loadFrom=DocumentDeeplink&ts=5194.67)):

But you just said they would have a First Amendment right to do that if they have editorial control. I thought that's what you said. I could be wrong, like the email then they are First Amendment protected from any regulation of any kind, period. We're done. The constitution has resolved this and I'm just going to have to go hang out at the Federalist Society to talk to my friends, which is fine.

Casey Mattox ([01:26:53](https://www.rev.com/transcript-editor/shared/T-uBBT0Bhv4sep6NotIBOigOU2muBV6-Az_-zUgYbkJkkxajHrAM3DdNYFG9qymrUOTDB-cscB2GvY5ctjkqrUQVyxk?loadFrom=DocumentDeeplink&ts=5213.69)):

Yeah, maybe I'm misunderstanding your point.

James Burnham ([01:26:56](https://www.rev.com/transcript-editor/shared/0o98vtnAFC8BiDv7qI30pjYI3RbvPRmXOZ2Cuz3wFkJrUbM1_LFEwK_htUCPFpNfWNJ2JLk4p-slF0Tzzlm7ZFpSj28?loadFrom=DocumentDeeplink&ts=5216.93)):

Yeah, well, so I thought, what is the line? So I guess what I'm saying is it would seem to me that all of your arguments apply equally to phone companies, telegraphs, and email and your distinction that you drew as well. The social media companies have some sort of vague editorial control over what appears on Twitter. And so therefore Elizabeth Warren gets mad at Twitter. I don't know if she actually does, but somebody gets mad at Twitter when they have Cat Turd on there. I'm just saying the phone companies could be the same thing tomorrow because they could just engineer it, totally search it. I mean the phone companies could get together and say "we are no longer going to platform through our telephone service anyone sympathetic to the January 6th criminals" and then we're all done, we're all kicked off. Not that I'm seeing.

Casey Mattox ([01:27:38](https://www.rev.com/transcript-editor/shared/D1rFZDzEM2AfHB-PYUoXYaZK9rHrS5c95AMKeaA7VmyBrJduI_lNiVcBYwF6V3vko4pNLU9Z8xjTWLAclNgdWi7YqAQ?loadFrom=DocumentDeeplink&ts=5258.18)):

Well, I think,

James Burnham ([01:27:39](https://www.rev.com/transcript-editor/shared/eLVdVbK_35Hhs8mUM5xTYaGlwjHAC4HWm_gTn4yZgeZSAatmYqGkQ_UNkj5hdczfDLUVYdhJw7nGRR_DEui5aiueC5g?loadFrom=DocumentDeeplink&ts=5259.73)):

I didn't mean to say that

Casey Mattox ([01:27:40](https://www.rev.com/transcript-editor/shared/hC22OH0Bc1iSZFiomhj0SsaQKBF0FGKbt-y0ZbW72muuiGBzRjBih881VIlqt3T1aV2Yao36PFMv4KKhSIfFKGvX1hE?loadFrom=DocumentDeeplink&ts=5260.79)):

There's only one reason why, I mean I think there are multiple reasons why phone companies, for example, are in a different position. One is that they use eminent domain to be able to get access to space, to be able, I mean, whereas social media companies are not.

Johnathan Berry ([01:27:56](https://www.rev.com/transcript-editor/shared/qXIfqj5nXiGeKOhmn3rz7CnLXjyxH1oO6LKkGhkqWLV8qiZXUSNoDHA479_4yk38kh8Lcj2h-tg80XLgzcguGPX3RP8?loadFrom=DocumentDeeplink&ts=5276.15)):

All the fiber optic lines comes from railroad companies.

Casey Mattox ([01:28:00](https://www.rev.com/transcript-editor/shared/7kXaDgvu5iqaryiZMW5aqrdLAetqAhhI2T-eDlDx_R8ngn_Hbs-qxWgzt2LmKaUv7u7vwwcsWgjv4CG612j-FHk5VHA?loadFrom=DocumentDeeplink&ts=5280.83)):

That'd be like a couple of layers up.

Johnathan Berry ([01:28:02](https://www.rev.com/transcript-editor/shared/CfqVNu-6XPEQwhXiIYhXJvlqxrz6ZYeKjxpI7LCERwZ4aEjm6PSdcXJhq43lKHH2LXhsAtIrG80Cdi_HHUAul95_iv8?loadFrom=DocumentDeeplink&ts=5282.3)):

They're relying on all that eminent domain.

Casey Mattox ([01:28:05](https://www.rev.com/transcript-editor/shared/p43EchjlV344fKPZtZtutGDvmEXfkmEWVfBLGIZV0GqFywKMyaeR-g4i7nM7M2iXXAZqY0w4MN4vst-GgovLsrWGWcI?loadFrom=DocumentDeeplink&ts=5285.39)):

I think that is potentially a good argument for saying look far enough.

James Burnham ([01:28:09](https://www.rev.com/transcript-editor/shared/vdLxhngf5rKQrnZBbqLvp8OJoQr5O9p-wvbwlfE1XnVAZUlRYoEQyl30z8XgbH3h8KdftB_jI2V3-JVTnL9aONKFkR8?loadFrom=DocumentDeeplink&ts=5289.47)):

But Al Gore built the internet so what, are we

Casey Mattox ([01:28:11](https://www.rev.com/transcript-editor/shared/6Qe32YCWq29EWLv1MnLbNZwUskrCnGCjv-UQF1HmgVMSI2J0A1PBdfPwHccualHm5rdjqnvjqgbvG0aFsQ62CNEEwrI?loadFrom=DocumentDeeplink&ts=5291.99)):

Far enough up the stack? There may be someone that's closer to being the same level of common carrier where the label fits in the same way that it does for the phone companies. But I think not. But I thought we'd been not at the website level, which is what social media companies are.

Erin Hawley ([01:28:30](https://www.rev.com/transcript-editor/shared/WFLRaKPvJcedCK2ss7vVLvmhv4d3NYR8Hq9-cIN9IBFM1tVx29Ve0Ms2JulJIl6j3Es1yAw52QrZp0-VliavgHPE-as?loadFrom=DocumentDeeplink&ts=5310.05)):

But it seems like there's a distinction between common carriers and the First Amendment. So even a common carrier might have a First Amendment right if they exercise editorial control, perhaps, maybe not. But it seems like you can't just say the telephone companies are common carriers and therefore they can't have First Amendment rights.

Casey Mattox ([01:28:46](https://www.rev.com/transcript-editor/shared/I2f4QXxAvW_HWptgytH3rxD8Ppf8xq_oPdTjJEEoBk3qUp_cft8MjpZisQMFMD8oAtJVmmxXig1l0E9fWhRgBjN2Ny8?loadFrom=DocumentDeeplink&ts=5326.82)):

Yeah, maybe we're going to talk ourselves in a circle. I'm trying to imagine whether or not you can be the common carrier who exercises editorial control. Sort of the whole point is that you can't, you're sort of stuck with.

Hon. Trevor McFadden ([01:29:00](https://www.rev.com/transcript-editor/shared/T5sIGgaVWtG-qeS4DV6AithXhpP2aUq3ExWxVcwVF-k4LEpxKzpiauIZbiPP0OVCs30QpZqPR3XTFyvh6npw_q5zXi4?loadFrom=DocumentDeeplink&ts=5340.29)):

Sorry, give John an opportunity to speak and Casey will give you the last word, but I do want to open...

James Burnham ([01:29:08](https://www.rev.com/transcript-editor/shared/B__d48oc9AVJYzPQV9Umm7emD1Q937D6InU5bfkhAkmTrz-R8efmugrlR8O3fbLiThpqE0rvnQ7Hhvlhd8eZEGn-kkg?loadFrom=DocumentDeeplink&ts=5348.25)):

I think we have 35 more questions for Casey

Johnathan Berry ([01:29:09](https://www.rev.com/transcript-editor/shared/D9gaA2BImHXbhsxG7rcysF3SQdTGI0CUQp6HRsqPa7jriI9uMTcxusoIuQQzBYiRxahSWYOJToB4bb59y45yvu6SI-E?loadFrom=DocumentDeeplink&ts=5349.94)):

I have a lot of opinions on a lot of things mostly about Jack Smith. So...

James Burnham ([01:29:17](https://www.rev.com/transcript-editor/shared/mCYp-CtaKoAHcqsacIeNnLIgN7brqbUzRVvKdCmedGhpK89-w_7Mp4WrIie1LclmBTwQRD_j5W76cruU-eFIaDdQ65I?loadFrom=DocumentDeeplink&ts=5357.16)):

That panel will be at the bar.

Johnathan Berry ([01:29:18](https://www.rev.com/transcript-editor/shared/6VgLo5AAMBfXUxbyAaGWR7oTG7MZpcXzzdwcOczrxyFlaaleK5-d7JeI4fXv681Ux47LDg6DH1Rc0Xy0uiUyNKtMbe4?loadFrom=DocumentDeeplink&ts=5358.75)):

Casey, I'm curious about something you may consider to be a friendly amendment here. One of the issues you identified about media bias and the like, is I think one of your implicit concerns is regulation meant to protect against the harms that I think a lot of folks at this conference have been complaining about may restrict innovative new entrants into markets and might've prevented the social media companies from presenting alternatives. Couldn't one way to address that issue be to essentially have some sort of size conscious or two tier system of regulation such that up to a certain market cap, for example, a billion dollars, whatever it is, you're going to be subject to lower regulation precisely so that it's easier for you to get off the ground and compete. This is, respond.

Casey Mattox ([01:30:19](https://www.rev.com/transcript-editor/shared/n37Z16usg6fsl64aqSgIFvq1X8lsVtfpmnbrpX0yfoBgqJwdofxtT7qVTRvMNS0uYCT6qpns2ynWEYY93oDdbvZjoJI?loadFrom=DocumentDeeplink&ts=5419.2)):

Yeah, I mean, so you could. I think I am allergic to the idea that because Texas does something like this, right? Texas basically tries to say, well, but this only applies above a certain size. The thing I don't like about that is the idea that if you build a successful website, then you sort of success your way into a brand new regulatory structure that completely changes everything that your company was built on. I think that's sort of a troubling approach to me that if you have success, then now your company has to completely change.

Johnathan Berry ([01:30:59](https://www.rev.com/transcript-editor/shared/KMhrt1iROlaHQsyj919kjow2MMRdzfe4OfO01OFvKi3ZKuw966YxBfXzdX6viNtaf7BfTpBtBSbN6Ho8eZV4AbbBoeI?loadFrom=DocumentDeeplink&ts=5459.19)):

What if we stick with purely existing regulatory regimes and simply create a carve out at the lower tier? So not

Casey Mattox ([01:31:07](https://www.rev.com/transcript-editor/shared/4V5Z2TCSIxovjG_lvLk07UvQXerkieOl4vHujbdB7jY9LbLBW9JOAv4Hg0m65sSQKkugg4Y-EvKOsDh5BpiluiNlfyw?loadFrom=DocumentDeeplink&ts=5467.14)):

Alternatively, we obliterate all regulatory regimes. That's my secondary approach.

Johnathan Berry ([01:31:12](https://www.rev.com/transcript-editor/shared/BhPNCEBVNxzpSVREtCmwViWiW1P1c0hvBvw21M019DpR5aYpWWy32dbEdSlkKn5BODvAMFSQLGq5ZDVLeR0h3upCukA?loadFrom=DocumentDeeplink&ts=5472.67)):

And corporate charters too.

Hon. Trevor McFadden ([01:31:14](https://www.rev.com/transcript-editor/shared/Cb6R_dN-AwNrPVFIm_o7CK4_53CSEcs8E01m-KgVMmnKhp4iTiPwO9bagOfB5k6rhd1wBucE51LxBOP7v0ih52DpY3s?loadFrom=DocumentDeeplink&ts=5474.28)):

Alright, I want to ask for hands from you on something that actually Casey mentioned. Raise your hand if you agree Jack,

James Burnham ([01:31:22](https://www.rev.com/transcript-editor/shared/FyOOVtjyceJYz6OSZFJl0dGoo3kmfgLSLhbc8i-o_oFXZbhd-fAaBm3jfbJ7xN-qM-RpLRDV9FCULQF9vLPjM4ABF3k?loadFrom=DocumentDeeplink&ts=5482.92)):

This is not a Republican debate.

Hon. Trevor McFadden ([01:31:23](https://www.rev.com/transcript-editor/shared/Vdlo3dA1c-dNWDyA9J1D9MCaa3VH_LwHFV2G_5XgWbV3sSUJ4igd35ENWfwFx8Ywdi9IzzFqJ8rxHC1Z3ramA1iJ-lE?loadFrom=DocumentDeeplink&ts=5483.85)):

This is just kind of lightning round. Jack Phillips has one cake shop, he has first amendment rights in running that privately held cake shop. Everybody agree? Alright, Elon Musk gives him a billion dollars and now he has a thousand cake shops, but all owned by him. Does he still have first, does that, those cake shops still have first amendment rights? Alright, and now he puts this on the stock exchange and it is publicly traded. Does that company still have first amendment rights? Okay. Alright, thank you. That's

Johnathan Berry ([01:32:06](https://www.rev.com/transcript-editor/shared/O0M4rxcsU2DRkpAkzjhOl6Cd3VC6Hx3mq3OgQdeL_nleZNKVSKKDosKcmOG2WOd2puI1mFXoiCp9ANaQtD0dz8SnIVc?loadFrom=DocumentDeeplink&ts=5526.13)):

Fewer.

Hon. Trevor McFadden ([01:32:09](https://www.rev.com/transcript-editor/shared/ivxv2t4TZDQGNp90zjyl9P723NxQ_s_XYOttHADy7W-QSsPAmvyilIN6qgUvV7b_5KpTEA7u4BUa9h-0kAa1A5gkQJY?loadFrom=DocumentDeeplink&ts=5529.37)):

I see people lining up.

Todd Zywicki ([01:32:11](https://www.rev.com/transcript-editor/shared/0Hf0XGdFyBNTihLhRAx6S3kvnUrRMLG5edT-8YNalHDBPv8yKQD2LFFuAAaq8oW6BhUqEp-40Fae1oAxhBO3V8zk3KU?loadFrom=DocumentDeeplink&ts=5531.08)):

Before we just one quick thought. I think the worst case scenario is that the court rules against the states in NetChoice. They rule for the government in Murthy and all we're left with, they basically shut off all avenues other than antitrust, because I think there's a mix here. I'm afraid the Supreme Court is going to shut off a lot of the potential avenues for experimentation on, to do this, which I think would be very bad.

Hon. Trevor McFadden ([01:32:40](https://www.rev.com/transcript-editor/shared/LtqxnCpGOjAjnoOgoj7k19nU165IEEBX8dPrMhZ-QAFMmbnpsf_5a1fBFc2k1BdcME8gqm6-F5tLVlvoT-n9dOFUnDM?loadFrom=DocumentDeeplink&ts=5560.48)):

Alright, love to hear from the audience. Remember questions are short and end with a question mark, sir.

Audience Question #1 ([01:32:46](https://www.rev.com/transcript-editor/shared/lK4unMDoW1PamAFLQo7RwIe8CSiCm0rAh0OQKeP6SwTY1fs0j42vVM_gaZeLecHK0XasOt-aPD9E3wfxP3QZfuosDBM?loadFrom=DocumentDeeplink&ts=5566.99)):

Sure. I'm Charles Miller with the students for free speech. Previously I was with Ohio when we launched the common carrier suit there against Google search. And so I'm wondering the discussion about common carrier, is it confused simply because of the term "common carrier?" This is something that was existed before that business is affected with the public interests and applied to toll bridges and bakeries and mills. And is it simply that the modern terminology that's causing confusion there? And then a second quick question with respect to Murthy, why is it that there's a need to find the government is coercing when they're asking someone to stop speech? Isn't the defensive enough that the government is asking the speech be taken down?

Hon. Trevor McFadden ([01:33:34](https://www.rev.com/transcript-editor/shared/VJ5KobMWmAZcuVjJ-AXHIojnI_Ctwoo2IgQ9VvomasL0RU0Ha7_WJbIITKSdjrxzTTntVx31uTYKGfCixenlJ3L3jZg?loadFrom=DocumentDeeplink&ts=5614.39)):

Erin, do you want to take the lead on that?

Erin Hawley ([01:33:36](https://www.rev.com/transcript-editor/shared/VPh3fW_r7PvRkC7OQAoc8kh9BfN6suAjTlAgnvsPgG34I9l7_55gSsREO35hzaOvH_0pW_RguWxHfCCWMZY96DRmdco?loadFrom=DocumentDeeplink&ts=5616.1)):

Sure. So I'll take the Murphy one and leave the common carrier. So I think that was Louisiana's argument that encouragement or at least significant encouragement should be enough. The SG got a lot of pushback on that point from the core, especially Kagan and Justice Kavanaugh were saying they'd served in administrations and they called up reporters every day and were encouraging them to change stories or take things down or those sorts of things. So I think that personal experience really suggested to at least those justices and potentially more that something other than persuasion was required. And that makes a little bit of sense in that the government does have its own right to speak and to convince about policy choices. But I agree with you that coercion is not enough. In Vullo the court said that coercion could be either inducement or threat. So that gets a little bit of a way there. But I think maybe that significant encouragement line that comes from prior cases would be helpful. I didn't see that in Vullo and I'd frankly be surprised if it's in Murthy, but hopefully that's too pessimistic.

Todd Zywicki ([01:34:43](https://www.rev.com/transcript-editor/shared/gTMuZy-3_5G4iXlUpQUjTRMVCG0LnJWU9i7w-MitLUH9Tx2e6foPhlwDxjZD-0Y-tJNnf2XcSqQRF-G2FLP2aID0W2o?loadFrom=DocumentDeeplink&ts=5683.93)):

I think that line's stupid that they were trying to draw. Everybody understands the world of the regulatory state. In the world of the regulatory state, government doesn't make little suggestions. Everybody understands what it means when the government you and they ask you to do something. And this idiotic analogy that Kavanaugh and Kegan kept going to about reporters just totally misses the point, right? Which is, yeah, you can yell at a New York Times reporter and the New York Times reporter, they've actually, they've got the pen right? There is a power balance there. You can yell at them, but you don't yell at 'em too much because they'll just write an unflattering story, right? There's sort of a give and take there when they call up Google and say Get Zywicki off of YouTube. Why does Google, why is Google going to say no? Because it's really important that this no-name guy is able to spout off on YouTube? So in the regulatory state world, whereas Erin alluded to, everybody understands that there's something behind the curtain there. It's just a silly, stupid analogy to compare it, I think, to reporters to protect the speech of third parties, which is what this is.

Casey Mattox ([01:36:02](https://www.rev.com/transcript-editor/shared/f8GX3Z9b-V3YsYsDY9aEfmvwL0lwgqVd-n0SjBr6mzX_jBpBms5Y3vduMMAT01y_w-CWYNkw737lFs3bBiSqLuXeNEE?loadFrom=DocumentDeeplink&ts=5762.18)):

So I completely agree with that. I think if I'm looking for next steps, this is why I haven't been able to come up with what's the right First Amendment answer for this. I think this is, I view that this is why I view the Murthy case as much more a case about the administrative state than about the First Amendment because I just can't figure out how would you exactly craft the solution using the First Amendment. I mean, maybe even the example that immediately came to mind thinking about that case was what if you've got a merger pending and it means billions of dollars for your company and no one even has to say anything, they just call you the day before and there's no record evidence that says anything at all. It's just, hey, just wanted to give you a heads up that we saw some tweets or Facebook posts that we thought you should remove.

([01:37:00](https://www.rev.com/transcript-editor/shared/X8xP_IieI-_CYuDRSnJ62UNZdPaNZ68POvSkolK3BkQ37s5x8PZRYKmPS3NP-EizJVp0J_IN-pYK8T10sS1AmtR-eXk?loadFrom=DocumentDeeplink&ts=5820.8)):

The message is loud and clear, but there would be nothing for NCLA to then take and say, here you go, here is your evidence of coercion. But that's a real problem. And if government gets really good at time the phone call to take down the tweets or the Facebook posts at the right moment when they know that they're going to hear from us tomorrow and they'll do the right thing. I think that's still a big problem. It's just one that I don't know how you solve with the First Amendment, and that's why I think we need to return DC to the state of a swamp.

James Burnham ([01:37:34](https://www.rev.com/transcript-editor/shared/IYAlx4Z4I6VxFcSdy8SQ1EpF_TgsPwTUz_8xgE8OD-P_bA26J1kwFWKNOeX0xUztw5GDLvgVTb9_bk-gD8DlChezU8Y?loadFrom=DocumentDeeplink&ts=5854.34)):

Actually, judge, can I just add one thing? Yeah. The only other thing I would add to that is government imposed neutrality principles are quite different from government coercing the platform to silence a particular person. And so imagine a case that isn't that case but is instead Zywicki versus the social media companies and the government because all of them conspired to deprive him of his right to speak. That is a case that feels much more like a true First Amendment case and one that I think would make a lot more sense to people. And I think the problem with that case was the platforms were happy collaborators, not hapless victims, and that's why it just doesn't fit.

Hon. Trevor McFadden ([01:38:10](https://www.rev.com/transcript-editor/shared/mbwNqQgWNABodcyoToHLzYiE_-DU-nQF0xZgJEiG55wqclV48nT3H8iHhPmnEs8819ew5lYkJ7-MuGnKbvj5tNvAdns?loadFrom=DocumentDeeplink&ts=5890.05)):

Yes, sir.

Audience Question #3 ([01:38:10](https://www.rev.com/transcript-editor/shared/vNZbCcc10UzbzAkT0-sEtJDMdcyMBElZooHZbJGvI5v9fTAld6aUcW-1fpzU-31Uu9PR2moLqoO9lJKbbB6A5azuLcQ?loadFrom=DocumentDeeplink&ts=5890.77)):

So Ms. Hawley brought up earlier that press secretary, Jen Psaki said that maybe we should use antitrust law as a means of convincing these tech platforms to de-platform people from their platforms. So my question is why would we give the government more enforcement tools to de-platform, or to prevent the de platforming of citizens when they have already used enforcement tools in a way to encourage the de-platforming of citizens?

Hon. Trevor McFadden ([01:38:44](https://www.rev.com/transcript-editor/shared/_POydzGN-nl50K-nj1rnEsGUEEcG5Fq1xFckJpgW0AQrUdz-7y6ILvcGSDAIxLpVQmPOwh9PjktH79_1XYLIRAddeXY?loadFrom=DocumentDeeplink&ts=5924.85)):

Was that aimed at anyone in particular? Sir? You mentioned Mr. Hawley.

Audience Question #2 ([01:38:48](https://www.rev.com/transcript-editor/shared/Onz6StThuy9wcTEJ78Up8Xt6bAjcs-LN-AajfOftb_wL7-IiE7nHM80QEyOULjOctBO0tdEpYZVhZSgjqc6P8pWWNsQ?loadFrom=DocumentDeeplink&ts=5928.48)):

Probably not Mr. Maddox because...

Hon. Trevor McFadden ([01:38:55](https://www.rev.com/transcript-editor/shared/Mn03d2CoJzhGeAFpzZOYcFTxNZo3C1UCu5ty4jvnDI2KE95NRrCcUj_VD6n8MIWWxikR6yKBzlh0xAgqF9w8R40cNV4?loadFrom=DocumentDeeplink&ts=5935.5)):

Anybody want to take that one on?

Erin Hawley ([01:38:57](https://www.rev.com/transcript-editor/shared/8TwJHKxPfwX70nP9GMqIr396IytzSge8bmG_9UoySV81d3CpacqfQ-JFcEJnd8ndwC5K06c2UexQGa1P4iv4hLoyB-w?loadFrom=DocumentDeeplink&ts=5937.81)):

Go ahead.

James Burnham ([01:38:58](https://www.rev.com/transcript-editor/shared/1jhQuQHAHhUnO30F18eGz9t4hSExmto4BYXkw_DE1VmhDeGiG0AIZerkZSRfKHubXWLUq_BWAg4NTGqBeaAxG35Zc5c?loadFrom=DocumentDeeplink&ts=5938.05)):

Well, that's the thing is what I just said. So the historic common carrier rule has been non-discrimination. So in the civil rights era, there were all these hotels that wouldn't let African-Americans stay at the hotel and the government said, no, you can't do that. You have to let everyone who wants to stay at the hotel on the side. There's an old common law rule, Epstein's written about this. This goes back to England. I mean, this is not a new concept. And so the government's saying, no, you have to take all comers when you're a common carrier is totally different from the government saying, no, you have to keep the Republicans out. I shouldn't have used the J-sixth guys that two tedentious. So the simpler example is just the Republicans. The latter violates the first Amendment potentially because you have the government targeting through the company, individual people. And so I think it's very easy to say, yes, the government can require neutrality while not then saying, but they can also tell the companies basically Aaron's on James is off and Casey gets whatever he wants, which is what they would say. Not the government, the company.

Audience Question #3 ([01:39:53](https://www.rev.com/transcript-editor/shared/w1qDqM0GXc6wT8n3A0seLwwc-8FfnKZPC8VZIBSOccDnmju_QNwS47np-oy2FumKZZ6-DMg5_EWeaYWmFIdFgqjgFbw?loadFrom=DocumentDeeplink&ts=5993.22)):

Alright, a question about competition among the states. Mr. Barry suggested that that was a potential strategy, especially when you're talking about incorporation, but if at the same time you've got restrictions on foreign corporations and making them reincorporate and the atmosphere, I think legally has been to take away things that encourage competition among the states. Witness cross state taxation for whatever kind of ordering through various kinds of books and whatever. How much, but I didn't hear anything from the panel on this, so the question really is how much do we need to focus on that? How much should encouraging and fighting for competition, regulatory competition among the states figure into an overall strategy?

Johnathan Berry ([01:40:48](https://www.rev.com/transcript-editor/shared/yQ9PbvqrYlCuDgR0VzwLiwWMr1Zbi9vvvZbTemgA-wopsQECPK3aX2k8dJpn9ltFIffVNV_0X-O0At_Dmg51X11Pgwk?loadFrom=DocumentDeeplink&ts=6048.21)):

I'm a huge fan, obviously, and we should be very skeptical of federal rules, including judge made doctrines, what appear to be entirely judge made doctrines, like internal affairs that make that competition functionally very, functionally very difficult to pull off if we have instead essentially an enforced national market that really puts a thumb on the scale in favor of businesses that can scale and occupy the field.

Hon. Trevor McFadden ([01:41:30](https://www.rev.com/transcript-editor/shared/KBpvQckw8-OllNE8X_WxowtHb4xO-rSrtRGw_mie3o_FFGB9OGcMfpOeuVfW9My8lL03nLGOlxEIM_uOai39WEwRTDc?loadFrom=DocumentDeeplink&ts=6090.25)):

Gene

Todd Zywicki ([01:41:31](https://www.rev.com/transcript-editor/shared/8QevpzjjNFGCfNVD5qu1Dq8fpwlTfSYiOv0yZPunb9h31LzEufLF9gy5mUuvJU-wYVSDPxYZ2ne5JkzTGtn4hB-Rdm8?loadFrom=DocumentDeeplink&ts=6091.78)):

I'll just add, I'm less sanguine about this than Jonathan is. My earlier question suggested with due respect to Jonathan Hill at Bear Locke and GK Chesterton, I'm a little more enamored of interstate markets and that sort of Hamiltonian constitution I worry very much about a lot of what states do is just protect special interests at the expense of their consumers. And I think that's a real concern in kind of unleashing this power. I have real concerns about unleashing rent seeking at the local level, and so I'd have to think about it more.

Johnathan Berry ([01:42:12](https://www.rev.com/transcript-editor/shared/GTeZxM2Yv6Xyw48c1DYkrcSpgwEWcJVVi3MM0PPcjwJ94602aM9A_DckfTb8s4NXE4UgG6fOOZZow4QIER8zNxxqJhU?loadFrom=DocumentDeeplink&ts=6132.4)):

But Todd, I guess it's a balance what I'm saying. It seems like the scales are tipped entirely in favor of efficiency, maximum market size and the like. That's so that'd be the thing to think about. Yeah,

Todd Zywicki ([01:42:25](https://www.rev.com/transcript-editor/shared/TTNbXnFXrjqeC1tC36ymVhZ9tdHRnhyTmqEowGOLkaAZ4sng8oIROfmYpGdbfR3b70KWJSaiKIIQacimG5jK3eWxo90?loadFrom=DocumentDeeplink&ts=6145.6)):

I think it's a fair point.

Hon. Trevor McFadden ([01:42:26](https://www.rev.com/transcript-editor/shared/g9hVIte-vMiEdYjh3h6G4fe6XemVXiQMBtWq7zW3qKSLoD9c4YNk5ggrFEabwLl-ypUjdDPi5SlHIvKMtxesg6a5TEY?loadFrom=DocumentDeeplink&ts=6146.59)):

Go Gene

Eugene Meyer ([01:42:28](https://www.rev.com/transcript-editor/shared/QlfDOtSEVY_Pea2gjT20JkDHbPIJY0F4xgGzpwwJgM4NhpBmpadCCH5g-HfiK7qiaLX4ATcUdnyxn7urkNqyfoZzO78?loadFrom=DocumentDeeplink&ts=6148.24)):

on the overall question, I guess I have a very simplistic question, which is, okay, there's a problem, there's a problem with private companies. Why do the people who are sort of saying some of this think the government will in fact in practice, be a solution that will make things better?

Erin Hawley ([01:42:52](https://www.rev.com/transcript-editor/shared/kQ40eZNeuE2hhbBnB7lQ5_GdGfHfCRyU9Mzie6-bvuvzGTdhmw7BN0mrluZKY8sD86Hco_QTvzpQDo0bkH9AGaFtYdc?loadFrom=DocumentDeeplink&ts=6172.87)):

Go ahead.

Johnathan Berry ([01:42:53](https://www.rev.com/transcript-editor/shared/St1fef1WmrjPhsYcCnb2Gdpq1LCTbFHOyj3HpP83iQOai6KrrqxA1_EydwnK_U1wD8Zr1J5bmJ9CUNignH692WjVunY?loadFrom=DocumentDeeplink&ts=6173.5)):

Part of my initial response on that would be is aspects of this problem are government created in the first place. This was the upshot of my presentation, was the way that corporate chartering has evolved to loosen all the shackles on corporate power is that's a state act, that's a series of state acts that have licensed things that have no cognate in nature, like perpetual duration, separate personality and limited liability as well. Those are not natural conditions.

James Burnham ([01:43:30](https://www.rev.com/transcript-editor/shared/zLGtbb2GUkPDN7LZWt2wk7iGV0x0pLk5Scj2V4DxIgxuXOwcW8REUasiirhcqYSursDNcebcO5BipgM_9EYQ6WNV6ac?loadFrom=DocumentDeeplink&ts=6210.28)):

I think it's just really, it's a very complex system and I don't think we know yet how to make it work. And I am mostly just concerned about immediately constitutionalizing like a huge swath of social communications and economic activity based on really not strong analogies to things at the founding that are nothing like this.

Erin Hawley ([01:43:51](https://www.rev.com/transcript-editor/shared/ESNi9vr-pfmHXiM4rQjMsnK-uHqrJMdI8FC8S2oMXG1oqNQ2CAEBrWhw9Sv1fEfX2yZdfHEm5qCk6kgvDRBsnwZOCyc?loadFrom=DocumentDeeplink&ts=6231.44)):

Yeah, I shared that concern. And then also with the Vullo and Murthy cases, that wouldn't be additional government action that would just be hopefully backing the federal government off from censoring through third parties.

Todd Zywicki ([01:44:03](https://www.rev.com/transcript-editor/shared/QHVO2sb9OZPKWx0s1YgK6NxtXDAfejsS0ZV0os-I_IiAE5luhO1EhYg3nxByuMdVwVKzi3BapE34PD--QEwEJgtMVkw?loadFrom=DocumentDeeplink&ts=6243.71)):

Yeah, I'll say, I mean, I was in that camp for a very long time. My observation is that I agree that the government may not make it better, but I believe that we're at the stage where a lot of the government can't make it worse, which is once every institution starts tending in the leftist direction, it accelerates and just rolls downhill. Universities, corporations, the media, churches over and over and over, once the left gets a stronghold. Name one institution in this society that has gone from left to right and doing nothing. What's

James Burnham ([01:44:49](https://www.rev.com/transcript-editor/shared/d_3UsFCM1Q36jcZ7H45COjudLPCPXrxjJgn4onaOJ3tFUGNkflizaLKLT7EdjfrshWrYGs77x0batx6gEI6Ko6kwn1Y?loadFrom=DocumentDeeplink&ts=6289.82)):

I said, Florida,

Todd Zywicki ([01:44:52](https://www.rev.com/transcript-editor/shared/sQvxQvuAkfTFWZvFqZQO3YLDSpBOw9wRDRCZT-JCjeL48hjHE3rm2MzwX0PEUToUenh2xJ9Z2N_bBYW23RRBWsms9II?loadFrom=DocumentDeeplink&ts=6292.88)):

Except for politics. The only contestable institution left in this society is the political process. Everything else gets taken over by leftist elites and they, they're already, that's what they're going to do. They've taken over banking and thank God Vullo at least puts a little bit of a hold on there. And thank God for people like Director Chopra who are looking at that more from the left. But we know how this ends. If you do nothing with social media, with all, I agree with Cory said, there's some green sprouts, but if we do nothing with social media, it ends up like Harvard and Columbia because everything they touch ends up like Harvard and Columbia, including all the corporations and the like. And so my view again is that if we do nothing at all, it just gets worse. And so I'm willing to try some things in the one contestable arena, which is politics to perhaps potentially make it better. But I'm a pessimist and ready for the bar.

Johnathan Berry ([01:45:55](https://www.rev.com/transcript-editor/shared/1WEUQUaFmJmMjZUPrM0aMnvFCvkzBiQhNcnemv3snFcwA5WJQIYmAb6SJS70DaU9HE4RUL2ardJvLXyu2HXFlgKmns8?loadFrom=DocumentDeeplink&ts=6355.52)):

And I will just say that government can always make things worse.

Hon. Trevor McFadden ([01:46:00](https://www.rev.com/transcript-editor/shared/dTrTviZVzlBwHnb38OF7ZJGdLZK38HtUENCzovjMTXveRa2b49wzgDeZTEvRYtxdntAbuUxa1LxkyG7xytWVuGHCOkA?loadFrom=DocumentDeeplink&ts=6360.29)):

On that happy note, Alida.

Alida Kass ([01:46:03](https://www.rev.com/transcript-editor/shared/ZzQFucHQY_Hldp131qDWjAf_chjlLRXyjkfhTMQmpSH1fzaAB8x3c1sq2u5ecYO2y1iInQKod3i6Yu4T9ew4Xfat4hM?loadFrom=DocumentDeeplink&ts=6363.79)):

But at least today was the day where amongst ourselves we sort of maybe made things a little bit better. Please join me in thanking our panel for a fantastic conversation.