Alida Kass ([00:08](https://www.rev.com/transcript-editor/shared/b69PPGmMB_fqeWtmvyFL5Qw-usZbmilAU0UJglwshr9FXPFOCtsgk5ynqjYQL5BcSpP96YtGDRdA3Ex3vbEcIgW3-zQ?loadFrom=DocumentDeeplink&ts=8.25)):

All right, well, welcome to our lunchtime program. I'm Alida Kass, Vice President of Strategic Initiatives at the Federalist Society and Director of the Freedom of Thought Project. This program really needs no title--it really is, it just completely rises on the names of the people who are going to be having this conversation. It is Judge Paul Matey interviewing recently confirmed Federal Trade Commissioner Andrew Ferguson. That's pretty much all you need to know. I will say just a couple words about Judge Matey, who, of course, serves on the Third Circuit Court of Appeals and is a great friend to the Freedom of Thought Project, and in his capacity on the Third Circuit has had the opportunity to write some really thoughtful, compelling opinions and dissents addressing many of the freedom of thought themes. On the other hand, this is a gig that comes with living in New Jersey, so you can't have everything. But I will just turn this over to Judge Matey and Andrew Ferguson. The floor is yours.

Hon. Paul B. Matey ([01:26](https://www.rev.com/transcript-editor/shared/EQj6z9YqZAj888jcK4MZAsKJNcQX0-IGzBrclkGX_bKa6o40C37vJBa5EIUpvoRT5yC1g3wc3MIkdZjirbLdbizHnQY?loadFrom=DocumentDeeplink&ts=86.43)):

Well, thanks, Alida, for that kind and welcome introduction. It's a delight to be here with everyone today. Normally, when I am asked to suffer through five hours of delayed Acela to arrive in Washington for nearly one-hundred degree heat at the end of a week in June, the answer would be no. No. But being able to be part of the Freedom of Thought initiative today and on so many other occasions is an absolute privilege. So I want to thank Alida and the Federalist Society for this continued commitment to innovative and diverse programming that allows us to debate topics of consequence and significance. It's also a pleasure to be with my friend Commissioner Ferguson. It's a pleasure to sit with you again. The last time we sat together was in your office in the United States Senate after the United States Senate had just finished saying nasty things about me. So this is much, much more enjoyable. Thank you for taking the time to speak with us today. So let's start a little bit with your biography. How did you wind up being in the seat that you are today? Is this something you planned or did it just sort of happen?

Hon. Andrew Ferguson ([02:44](https://www.rev.com/transcript-editor/shared/vff4Yl4ghMDg6UhKt6WeEB9M9NPnRgCtrrqoqweFSJrMJGfByiQcfuGSWBuJcnL_o6tRYDbvsOmTyhKOE7qYrmN2MBc?loadFrom=DocumentDeeplink&ts=164.94)):

Thanks, Judge Matey, before answering--just a couple of things. First, I'm also just really honored to be here and, Alida, I'm super grateful for the invitation. For most lawyers--conservative lawyers--my age, Fed Soc been sort of a north star in our development as lawyers and in our ideological development. And I think that the Freedom of Thought Project is one of the most exciting things Fed Soc has going for it right now, and one of the most exciting things it's had going forward in a while. So I, I'm just really pleased to be part of this. And then, of course, the customary government caveat: I'm here in my individual capacity. I do not speak for the Commission. I do not speak for my fellow commissioners. Okay, that aside, no, I didn't plan this. So I went to law school, took antitrust with Tom Nachbar. Actually, I learned a couple weeks ago.

Hon. Andrew Ferguson ([03:40](https://www.rev.com/transcript-editor/shared/lVtNFm68sbnfSoYORsWjbH-lHorFkKRzo5x5478BuEo0Pv54a-OOPVbVTF2LKP4ybvuVfd7TH-B7fv-_ghhuJ9Ay3xI?loadFrom=DocumentDeeplink&ts=220.63)):

I was in the same class as one of the lawyers that works for me, a couple seats apart from one of the lawyers that works for me now. Really liked it was super interesting. Antitrust law is sort of within its own silo. It's very interesting. Went and clerked on the DC circuit, which has had some very interesting antitrust cases in its day, although we didn't have any then. And then I went to the private sector where I practiced antitrust law representing, or as my mother used to explain to people when she told them what I did, "I was a pro-trust lawyer," representing large commercial interests as they attempted to comply with the antitrust laws.

Hon. Andrew Ferguson ([04:24](https://www.rev.com/transcript-editor/shared/xB5kLUzQjYaUEko8v-0mrrUsW0hcn7WFEk8ILZaw5GR2ffnNQZZt9nA77s6vM1jqtLA4FRTkq72HTjenBsY5e01Q2L4?loadFrom=DocumentDeeplink&ts=264.13)):

And from there I went to Bancroft and was the only--I was at Covington practicing antitrust law for about a year and a half, and then went to Bancroft, Paul Clement's appellate firm, where I went not to do any antitrust law--but I was the only lawyer who had ever had on their resume having practiced antitrust law. So I was often introduced by one of our bosses to clients as the firm's antitrust expert and did some state bar malpractice research to make sure that I wasn't going to get in trouble for being presented that way. And then I clerked for Justice Thomas. And that was sort of the first post law school major ideological formation experience for me. I clerked for Justice Thomas in OT 2016, which was an election year, which was I think a formative ideological year for a lot of us even if you weren't clerking on the court. It was the term Justice Gorsuch arrived. We had a big antitrust case, but it was dismissed as in providently granted when arguments raised in the brief were very different than arguments raised in the cert petition. But that was my first sort of experience with politics in a very general sense because people who get to the court get there in very large part because of their own abilities and their experiences. But it's the product of a political system. All of us have been around to know that politics produces the justices because they have to go through the political branch to get there. And it happened while I was clerking. And so that was sort of my first taste of politics was being on an eight justice court and then a nine Justice court, which felt very different by the time the Ninth Justice got there.

Hon. Andrew Ferguson ([06:12](https://www.rev.com/transcript-editor/shared/283bDCwjJcMLecoe9Fl3Msn5-_iDHzW_lnoF7sKt_O_xBla3ljLcJLCM0PTDVf6sDWX8aGB59u-blr86Y51nV17HGdk?loadFrom=DocumentDeeplink&ts=372.41)):

And then I went to Sidley and practiced antitrust law again. I went to Sidley in order to practice antitrust law and was on the giant litigation team for the AT&T Time Warner merger, which in my view the lawyers executed very well. And then the businesses not so well. The merged firm collapsed almost immediately after the merger, but that was, I spent seven uninterrupted months just working on that. And to date, it was the biggest vertical merger challenge to that date was the biggest vertical merger challenge in US history. And so I spent a lot of time with antitrust, but I had been raised in a family that wasn't very political except for life issues and guns in the Shenandoah Valley. And by the time I had finished clerking on the court had come of the view that the two things in politics that I sort of cared about the most were bringing an end to abortion and protecting the right to keep and bear arms.

Hon. Andrew Ferguson ([07:20](https://www.rev.com/transcript-editor/shared/DAnFJgOQuDU0c8uyxfwcj_OkXht6BMLYhgS_U_LTmxPeh7rr3BG1qX2mNxeZysdYI1EGFULIf8P-v-xx3PdzG96mlPo?loadFrom=DocumentDeeplink&ts=440.03)):

And both of those had become uniquely judicial questions. The former, because of a judicial decision, the latter because of other judicial decisions trying to protect a written right. And so long story short, when Justice Kennedy retired, I took a job with now famous Twitter personality, Mike Davis helping run Judge Kavanaugh's confirmation. And that was on the Senate Judiciary Committee. And I thought I was going back to Sidley. I thought I was going to pick up being an antitrust litigator and deal lawyer again and just didn't leave for several years. And in those couple years we had two impeachments, the confirmation of Bill Barr, the confirmation of Justice Barrett and Covid and George Floyd. And that was sort of the crucible. It formed a lot of my big views about politics and then with Solicitor General of Virginia for two and a half years. And this vacancy opened up and it seemed exciting for reasons I think we're going to get into a little bit and then went through the same, or not the same, but a similar long drawn out confirmation process like the one that you and others went through, although mine much less acrimonious, which is also an interesting thing about antitrust today.

Hon. Andrew Ferguson ([08:43](https://www.rev.com/transcript-editor/shared/5Oww5lmUQX8Dqg5N8j0I2r6W5xhMJM-HPxx2FxUKZ0Avv2ew0SrKeAITxm0sH4LnAp4eLDkdxUFNnR0ahkm8d5w37h4?loadFrom=DocumentDeeplink&ts=523.37)):

But no, this wasn't planned at all. And if you had asked me when I was leaving law school, if I would a have ever been up for something like this or be taken it if offered, I almost certainly would've said no.

Hon. Paul B. Matey ([08:54](https://www.rev.com/transcript-editor/shared/fMxNzMxWJs3okKoS2FtuXZ4RsboHs0tISTb958RAN01bv3H0V-H6XEzjV7UiV647RrUMVYO2J1KMtYmU1K2ksifRRnQ?loadFrom=DocumentDeeplink&ts=534.63)):

But you represented clients before the Commission, right? So what was that like and what lessons did you bring from that when you started moving towards this position?

Hon. Andrew Ferguson ([09:04](https://www.rev.com/transcript-editor/shared/DXuSeN6gvMKVWN0QDLd7ID1tJFHM5EC9O5UDlqbSCLkMmxAueKPb7pkx1i3O30wNv_MJlNXhK4igYzBULstkl4IWc9Q?loadFrom=DocumentDeeplink&ts=544.68)):

Good question. So for any of you all who have practiced in front of the commission or frankly any of you all who have practiced in front of any federal enforcer in the private sector defending clients, you end up--I think sort of naturally and unavoidably--at least adopting in some sense the attitudes of your clients toward the enforcers, which are staff is making us come in. It's making us turn over the crown jewels of the company to try to get them not to enforce the law. This is very aggravating. And if you're at the level that I was, I'm in my office at three o'clock at night reading hot docs before we send them over to FTC staff. "I can't believe they're doing this to us." "This is tyranny unbounded."

Hon. Andrew Ferguson ([09:47](https://www.rev.com/transcript-editor/shared/EVBiF41y55nAMG59TWoiHkqSKhY9_8A3muONwkH1ycJxoLhGQ-MzMLfWsXKuMSXva0xW4QTqP9Ngu0slfnfbCIfkb1w?loadFrom=DocumentDeeplink&ts=587.04)):

My views on that have changed substantially. But my experience was going in basically pitching staff not to enforce or to stop investigating. And I always sort of thought that this was a weird dynamic where especially because the agency has what I'll call for shorthand, its own internal judicial system, where it both decides whether to enforce the law and then decides whether the enforcement decision was proper because it sits as the judge as well. But I always thought this was very strange, where you'd go in and basically pitch staff not to enforce it. And I always felt a lot more comfortable doing it in front of judges because the judges are at least ostensibly neutral as to the parties. They're bounded by rules. Whereas the staff, it often seemed like they weren't bounded by anything, and it always seemed like it was sort of just kind of shouting into the void. I understand that's not true. I now really understand that's not true. The staff take their jobs incredibly seriously and they don't like losing enforcement actions and they tend to be more circumspect about the recommendations than I would've thought from the outside. But then again, I was representing clients who thought the FTC was always out to get them, and you sort of adopt those attitudes over time.

Hon. Paul B. Matey ([11:00](https://www.rev.com/transcript-editor/shared/MUnDCW_ZOOeV_q36nXZPcdU-b6bbRPoVx7uJFVjmyaw-8ErTOwXDuTqxiw8iNU95GhH0nO6P0SBbuO2-QXEX2hoH2qk?loadFrom=DocumentDeeplink&ts=660.51)):

So you're an accidental antitrust lawyer who sort of wanders into politics through chance and you don't have skepticism regarding the commission's mission because of the clients you're representing. So then why answer this call?

Hon. Andrew Ferguson ([11:16](https://www.rev.com/transcript-editor/shared/fPQ4EPC0a9sPkrI3dePNtifcXgS4J3F9Xvu0Bw5Dj5xb-rE35desdwQVg09xQub8Hf9SeFwL-3glBxuL8Bl4lVZdEaw?loadFrom=DocumentDeeplink&ts=676.77)):

So I would say that I was an antitrust lawyer that accidentally wandered into politics. I mean, when I left law school, I sort of had envisioned a career doing antitrust, mostly litigation because clerkships and stuff had sort of trained me for that. But antitrust interested as far as big law practice goes, antitrust sort of interested me more than others. And I kind of wandered into politics and I like a lot of, I think young, conservatively inclined lawyers coming out of law school sort of had a deep natural suspicion of government power, which I still have, but as I think is especially true with a lot of young lawyers full of vim and vigor, my suspicion of government power, I sort of wanted to carry to its logical extent, which was like presumptive suspicion, not just of the government exercising power, but even having institutions for its exercise.

Hon. Andrew Ferguson ([12:15](https://www.rev.com/transcript-editor/shared/uKTctYiGDkaZTYoy-5ffN3aSyMp_Bc6OePQLU35KlYO0_z0--1eUNEsatpImmIWRCmoBRnYfngp56S7RQJCCWoyMxcU?loadFrom=DocumentDeeplink&ts=735.79)):

The commission was one of them, of course, coming up within the Fed Soc world, one of the first cases I learned about as a first year law student was Humphrey's Executor and why it was wrong before I learned the doctrine, and that was the FTC. And so basically my introduction as a young law student to the FTC was Humphrey's Executor. And so with that in mind, it would be a little odd that I would've taken a job on the commission. I think a couple things, and also with all respect to the antitrust lawyers in the room, antitrust is kind of boring. It's very, very thick and involves lots of graphs. It's litigation is unbelievably document heavy. I mean it was tens and tens of millions of pages in AT&T Time Warner, all of the features that young lawyers, young up and coming lawyers hate about big litigation, antitrust just kind of has it in spades, almost worse than any other except for maybe insurance litigation.

Hon. Andrew Ferguson ([13:26](https://www.rev.com/transcript-editor/shared/va3EIzn9cM1NG_rryjGj8I-KcF32ga3IsDE1SjPPmvM6thVhJSL7OhpbdE5AFy-tj7voqfd6HGDDQgxEItyKCdj15rI?loadFrom=DocumentDeeplink&ts=806.08)):

And so combine sort of a natural suspicion of government power with antitrust not being the most interesting thing in the world. It's weird to wind up here. A couple things happened I think out in the world and in my own life, the first was, I'm just going to call it 2020. A lot happened in 2020, I think more happened to the United States in 2020. It's at least in the running, it's the top five most eventful years in American history. And I, working on the Hill was the first job I'd ever had where I interacted with sort of big business interests on the other side of the ledger. All my interactions with sort of giant businesses had been as their lawyer. And you sort of approach that very workman like, this person is paying me. They have these interests. They're paying me to vindicate these interests.

Hon. Andrew Ferguson ([14:24](https://www.rev.com/transcript-editor/shared/wkYYNPrENR5zK8s10wTqTqZFnAQWed5ZCUDxjqysnYqAz-v3Q9IPdm1aX11xxsI4O3Cmgab4E6l4o7OvGBRZhAUey6s?loadFrom=DocumentDeeplink&ts=864.43)):

I'm not going to think about this as a general or systemic question that I get a paycheck and I do this thing. And as long as it's not violating my conscience off I go. And then working on the hill, the whole point, and working for Leader McConnell in particular because leadership staffs are sort of see the whole picture in so far as anyone on the hill does, was the first time I spent meaningfully thinking about questions of government power and private power apart from having worked for large aggregations of private power. And I started really thinking about this in 2018 and 2019 and then this sort of crashes into 2020. And I think one of my formative experiences that sort of began both to change my views on aggregations of private power and their moral position and on government in relation to that private power were the George Floyd riots.

Hon. Andrew Ferguson ([15:26](https://www.rev.com/transcript-editor/shared/EeUCbzWw37yufst2CkL03wxetAjldneMeAslLMgYwDGqqzB1lmCDBCDI3Vj38gVlFmqiP0eAuHXWK1qV8Sa09yzWGo8?loadFrom=DocumentDeeplink&ts=926.12)):

I gave presentations and took calls with CEOs and general counsels from giant firms who were calling to pitch me on getting rid of qualified immunity or defunding police departments. And I would take these calls and hang up and go, what in the world does this have to do with widget making? I thought that the whole system under which we operated was we grant corporations big business interest, tremendous latitude, big liability shields in order to maximize the efficiency with which they produce the thing we've asked them to produce, or which they've told us they're good at producing: widgets, for short. Why am I getting calls about qualified immunity from the Chamber of Commerce? A, what do they know about it? And B, how on earth does it have anything to do with what we've sort of asked the business community to do? And then I gave presentations on why businesses shouldn't destroy the economy of Georgia because of its voting laws.

Hon. Andrew Ferguson ([16:32](https://www.rev.com/transcript-editor/shared/64GS7bJuPEjfHUfkJOvc2EY1BrOGytWy5savZtPM-jvee52R0dIxG0g2rHBuX5zuekdlGaigl_vPpSpaQbgH0AdCuqw?loadFrom=DocumentDeeplink&ts=992.66)):

And I would end these presentations and go, something is either broken or I have been wrong about the deal that the American system was supposed to have struck with businesses, which I had always understood to be private people will do their private things, they'll do them sometimes in groups. We'll call those groups corporations and we'll let them get together and give them all sorts of basically privileges because we need them to do the thing we set them up to do. We need them to make widgets, we need them to service the widgets. And then I started getting these calls where these big companies are exercising tremendous or using economic power to achieve social and political objectives totally unrelated to the widget making. And I went, something is either broken and it needs to be fixed, or the system may never have worked this way and I just had it wrong the whole time.

Hon. Andrew Ferguson ([17:26](https://www.rev.com/transcript-editor/shared/CleBuDtW0jS02bGfB1dynd1_UXnxKT4HsIi5LzIhYQ8JVxEWlyonlo1xOa6OyaWHaHwC-ZnT9TY2HCmk8qdJTAYezW4?loadFrom=DocumentDeeplink&ts=1046.63)):

And this was sort of my first experience where I began to wonder if the sort of cosmology I had developed where government power and its exercise was almost always bad or at least entitled to substantial suspicion. And the use of private power, aggregated private power was at worst, morally neutral and probably morally praiseworthy might not be correct. And that there might be some circumstances in which society should want to deploy the government to address abusive uses of private power. And then when I became SG, this became a very real thing because I started to realize the political reality, which I think is healthy, good appropriate and normal, which is Americans are as suspicious of big business as they are of big government. I mean, I'm an Appalachian, I'm a fighting Scot's Irish. We sort of have this preternaturally, but I think most Americans share this instinct, which is, I don't want to be told what to do by Pennsylvania Avenue or by Wall Street or by K Street.

Hon. Andrew Ferguson ([18:33](https://www.rev.com/transcript-editor/shared/EfgXpUWVxUP11324qkH0t7eXnLgU2irgKsmEEw5r4kXImmL1hhomJ8BUpiyYlpBkGYdvX08RvXMVXtmOCLpNX4x7rQc?loadFrom=DocumentDeeplink&ts=1113.81)):

And at the end of the day, in so far as any of them are able to sort of coerce me, I don't like it. Now that is not to say that I think private aggregated power is the same as government power. It's not because government Google can't drive a tank to my house and the government can, and that makes it meaningfully different. But the way that I had always understood the world was we have two categories of power, government power, which we should always be suspicious of at least, or condemn it and private power, which is just the result of market forces. And as long as the markets are operating the results they produce, we should just sort of accept. A, that's not how most Americans think. B, it's not how Americans have ever thought. The sort of anti-monopoly impulse goes back to the founding. And C, I think as a conservative who focuses more on pragmatism than dogmatism, I think the experience of the last couple of decades have taught that treating the world that way just doesn't work.

Hon. Paul B. Matey ([19:37](https://www.rev.com/transcript-editor/shared/Kh8Uwu8ooqWr5-ajjGaBsPpr0PpQ6wVUL4XWYQk4B7MGgZ49IqBAei4F6QYZfaUb-S_PacWlUnXQTc8EEHGaVtxCW68?loadFrom=DocumentDeeplink&ts=1177.86)):

I saw an article titled terrifyingly recently, the Coming Conservative Assault on Capitalism. Assuming you don't agree that that's the work of the Commission, which--what is the work of the Commission in the 21st century?

Hon. Andrew Ferguson ([19:58](https://www.rev.com/transcript-editor/shared/h1ei_4v__FWMus66Ha3Nxi2cffAG1PvLUYcW-EzDCyb6rQR5SPk5N0Y1tiPJv_LBOBsevbmEjnqaoEuog3p8KMbOMIs?loadFrom=DocumentDeeplink&ts=1198.17)):

That's a good question. So sometimes I do think that the Commission, like all organs of government,--I mean look, the public choice folks are right. All institutions want to maximize their power within whatever domain they operate. That's true of businesses. It's true of the government. And so I do think that government often does spill the banks of the authority it should exercise and can be very dangerous to markets. Although again, I say markets, what I mean is I think the whole point of society is to promote human flourishing. I think markets assist in that. But I do not think markets are kind of an end and sort of the shibboleth chant of "markets, markets, markets," I think sort of conflates means and ends, but that's a different question.

Hon. Andrew Ferguson ([20:51](https://www.rev.com/transcript-editor/shared/k5W08imTbs4TdKIX4fXguRg9R_eVyhX-pybO3lOPCOzRl5HgJQkW-kg7GueQL9bXlKfXrMm4Lhu74xbCmBF30PC3Eyg?loadFrom=DocumentDeeplink&ts=1251.43)):

And I think that the FTC has, even since I've been on the commission, done things quite unlawfully. I mean, the non-compete rule in my view as an example, there are lots of good arguments for regulating non-competes. Every state in the country regulates them extensively. But as I said in my dissent, I think that the commission doing this is just a gross derogation of powers. So it definitely happens. Government infringes on individual liberty all the time. That's inconsistent with human flourishing. But I do think the commission has a role in the 21st century, an important role. And I don't think it's dissimilar to what the role it has played before, as long as it sort of remains within the channels of authority that we the people have given to it through our elective representatives, which is protecting Americans and the markets in which we all have to participate from private aggregations of power that abuse those market channels and deny us of the opportunity to flourish.

Hon. Andrew Ferguson ([21:51](https://www.rev.com/transcript-editor/shared/i9s0YpOcWngeYxxwUmosB7kf3BeiR5913yZiynw_QUwut5eDLI_KG0ni-x2E1n7gDkcZi-Dl3uAd3Oxim-UucPUE_28?loadFrom=DocumentDeeplink&ts=1311.25)):

I'll give an example that's really meaningful to me and is sort of in the commission's bailiwick. And I think the commission is generally pretty good at it. I don't know how many folks here are rural. I imagine a lot more rural raised folks here than at ACS for example. But I grew up in a small town that had only one hospital anywhere near around and not that many physician practices. There is overwhelming evidence that when rural hospitals get bought up by conglomerates, prices go up, and it is very difficult price of healthcare goes up and it's very difficult for rural people to sort of participate in a market where you have to drive a long way to find competitors. And if you're sick, that can be very difficult. The commission has been safeguarding the healthcare markets by enforcing the antitrust laws with regard to hospital mergers for decades and is really good at it.

Hon. Andrew Ferguson ([22:44](https://www.rev.com/transcript-editor/shared/ZZpR2S13PjiVo2BBgYDyi0lwLiq987NwgDyn85Qj0D5V35JrvQ_nOrtLRB3MQasbYOey1fL1Zl7XgIDVavbap8OkqXc?loadFrom=DocumentDeeplink&ts=1364.92)):

It's one of the best things the commission does and was really good at it for decades, then it got bad at it, and then Republican commissioners basically told the FTC, "revisit our strategy, revisit strategy," and they got really good at it. Again. But this is an example. It's a market we all have to participate in. You don't have a choice. All of us are going to go to the hospital. All of us are going to go to physician's practices at some point in our lives. It is overstated obviously, but one of the refrains as states and the federal government have tried to sort of confront the challenge of big tech is build your own internet. You can't build your own hospital. We all have to engage in this. And if private aggregations of power can combine to extract monopoly rents from grandmothers who have to go in for dialysis treatments or when you have to take your five-year-old child in for emergency surgery, that isn't a system any of us should want to live in, even if it's the result of a series of private choices.

Hon. Andrew Ferguson ([23:42](https://www.rev.com/transcript-editor/shared/k_vdVMR2ZcygY8Zt6afITuJPGEvoI5eUnmHBr7IxGj1SQ9SsqehmF7jF1LvHmb6jTuMep95u98GT2p4J1sxlJ9iUd_k?loadFrom=DocumentDeeplink&ts=1422.34)):

And so I think that the commission's chief job is to protect Americans from the effects of over concentration and not because of their market effects, but because the whole goal of society is human flourishing. And if we allow over concentration, we're basically saying we are going to allow these aggregations of power to flourish at the expense of the individual and of families. And I think that that's the commission's chief job is basically to say is to sort of fulfill the American promise of no, the unit that we care about in America are families and individuals and promoting their flourishing. And we are not going to, even if it's the result of a series of private choices, we aren't going to allow private choices to deprive Americans of the flourishing, which was the whole point of the constitutional compact.

Hon. Paul B. Matey ([24:33](https://www.rev.com/transcript-editor/shared/QjpIFvdogS7jilqx9y86xgg5lq8oDTksfJ5IM7GYBpN9K1_m2fj36oV0dO_Gz_sPX0dLTSoirP9IRxmNXp9tLc5QKs4?loadFrom=DocumentDeeplink&ts=1473.32)):

And the criticisms of the mission of the commissioner. Certainly nothing new. Coolidge talked about this back in 1925, that being the business policeman is never going to be particularly popular. So let's talk a little bit about the mechanisms that the commission uses to fulfill that police function. You're an antitrust lawyer recovering, so you might know that interpretations of the Clayton Act sit somewhat uncomfortably with the doctrine of Textualism. Herbert Hovenkamp had recently noted the tendency of courts to ignore the statutory text altogether or to use the language as stating no more than a general principle, of free enterprise rather than a set of rules governing distinct practices. What do you make of that?

Hon. Andrew Ferguson ([25:25](https://www.rev.com/transcript-editor/shared/hhuTghmsbLEWB-OkV8rKnc5YXX7KpE8qR9ozju4xCQrWfJqTQ0tOOSdXkpewDAfZKnGUwrffbDuWcsKzaf6iv4mF5LA?loadFrom=DocumentDeeplink&ts=1525.61)):

So I said this in a different interview recently, but I'm, I think it'll land even better here, but I'm going to keep beating the drum, which is I am not a policymaker and the commissioners are not and should not think of themselves as policymakers. I'm a law enforcer, which means my ultimate job is interpreting texts. It's different than being a judge. I have an added layer of, I have to decide how to allocate resources in a way you all decide the cases as they come, you issue your decisions out the door, they go, we have stuff come in and we have finite resources and we have to decide how to spend them. But I see my principal job is basically taking the FTC Act, the Sherman Act, the Clayton Act, and the dozens of other sort of industry specific statutes that the Commission enforces and doing what I would do as a law clerk or what you would do as a judge, which is opening them up, looking at text, and figuring out what that text was understood to mean when the words were adopted, divining what the principle of that text or the principle of that original public meaning lays down and applying it to the facts.

Hon. Andrew Ferguson ([26:29](https://www.rev.com/transcript-editor/shared/t4v-PXpDv8bt8F2nezw-MGLqqPsu5mYBPzDf9D0-eNc9peaqT-JfVKdcQEuSdfeEHTTjVijhRTbThPxSAvuekZhm_CI?loadFrom=DocumentDeeplink&ts=1589.45)):

Now that sounds very easy. The antitrust laws are very difficult to do this in because they're stated at sort of comical levels of generality. I mean, I will give you an example. Section one of the Sherman Act purports to ban all combinations and contracts and restraint of trade. You guys have probably all heard this. If you had antitrust law, that's every contract that ever existed because anytime two people agree about something, they're removing the thing they agreed about from competition. If John Barry and I sell a house, we have removed that house from the market and restrained trade about it. And so the court has developed over the years a series of doctrines in order to sort of confine that. But it's not obvious that that confining has anything to do with the text. It needs to be confined. The text is not trying to ban every contract in America, nor could it, but the way it was constrained was not obviously text driven.

Hon. Andrew Ferguson ([27:20](https://www.rev.com/transcript-editor/shared/u7PIj3TLw5EYQ58O4HXqH-DmgeM81fztX8J9R-YQObo8IfEmv3tZgCuOf9Q6euGXRYmQICEmfFlyS6iyHrJA8L8bxVs?loadFrom=DocumentDeeplink&ts=1640.52)):

It seems to be largely policy driven. And then the FTC Act prohibits unfair methods of competition. The court in Shekter said that's okay because it understood the agency's power to be mostly about sort of common law style case by case adjudication. But when you're doing rulemaking and setting anti rules of conduct of private conduct, I don't know what unfair methods of competition are. I bet, I mean, as Judge Hand very famously said, unfair is an evasive term and it's meaning is normally dependent on the eye of the beholder. And my job at the end of the day is to try to take the methods with which we are all familiar and apply it to those statutes. But it's difficult. I don't think the difficulty is a reason not to do it. And I think for example, judge Borks famous book in the 1970s, the Antitrust Paradox is sort of doing something like that or at least it's aimed in that general direction.

Hon. Andrew Ferguson ([28:24](https://www.rev.com/transcript-editor/shared/rWPc_VPxgPJ4mcsrtsbw0V3id4XN3eRxJeiDF0C4T7-xzu3yKBNv1cliX6191DUUKJB54voS-3si-jBymClvOoTqCmo?loadFrom=DocumentDeeplink&ts=1704.81)):

But I agree that I don't think it's my job, and I think it would actually be inconsistent with the oath that I took the day that I was sworn in, to just sit with the laws, consult the economists, read the blogs and be like, well, here's the efficient or pro-business outcome. I'm a Republican, I'm going to achieve the efficient or pro-business outcome. I think the question is what was Congress prohibiting? What was the mandate that it laid down when it adopted these three laws? How does it apply to the weird markets with which we now deal and try to do it that way?

Hon. Andrew Ferguson ([29:05](https://www.rev.com/transcript-editor/shared/YiugtBGbQyCvj56jN_aUKscZp6yX3Ir2ZjMZQZVfDFmJJ-XyHoEXom40eCJrUKsVUODw_J7rmfQXwj9r-QjqrzL-H0I?loadFrom=DocumentDeeplink&ts=1745.07)):

I think there's a real possibility that going forward, especially as scholars begin to apply our, rigid is the wrong word, but our very intentional method of originalism that we have today, which was different than what we had in the seventies and eighties, that there's a real chance that our understanding of the Sherman and Clayton acts will evolve in ways that will not sit perfectly comfortably with precedent. But I think that's the job is what do these words mean? How do they apply? And take the Justice Thomas approach, which is get the right answer and the rest is for the birds.

Hon. Paul B. Matey ([29:43](https://www.rev.com/transcript-editor/shared/e613nhdD72INyfGTVCmGsjyBAHueO-a_sY2Z5efInNflo5EJ0BUwq5vsiUfnyUtklhGtj630Q5C60xKuW1kNIj-7uLU?loadFrom=DocumentDeeplink&ts=1783.33)):

So you mentioned Judge Bork's seminal work. I don't think any could question his enormous influence and impact on competition theory, but this place was his salon and he was not one to shy from a fight. So, what would you say to him today should be in the sequel to the Anti Trust paradox? What did he get wrong? What should still remain?

Hon. Andrew Ferguson ([30:10](https://www.rev.com/transcript-editor/shared/7xL52BfxQK947k2QFIg13Hc6FGpnHJNT6wNp9EmL5av9cMXAuPPMskIV4kAn71qhjfyXw1rM8GMkSLFx6QYFYMPBjsM?loadFrom=DocumentDeeplink&ts=1810.81)):

That's a good question. So on the first point, it is arguably within its field the most single, most influential monograph in American legal history. I mean he basically on his own, that's actually overstating it. Some work has been done recently actually by someone in this room showing that Judge Bork sort of did not produce this work on his own and it was part of a intellectual movement, but at least as far as lawyers go, he sort of rewrote the theory of American antitrust law, at least as judges see it kind of on his own. It's sort of unbelievable. But I think one of the things with which Judge Bork was most focused in all of his writing was constraining judicial discretion. And it makes really good sense given what was happening in all of American law at the time. By the 1970s, I mean I'm preaching to the choir, I know it's Fed Soc, but by the 1970s we were in some ways kind of just ruled by judges.

Hon. Andrew Ferguson ([31:04](https://www.rev.com/transcript-editor/shared/BQeqMB-jPHRUFRbA9gwtFtEKrNgPUMtlzeu92ghwtkhm_1ff4cAiNMG5UHQpU7VlDXU3GlXaG7IMCLXlM1PKNSTso00?loadFrom=DocumentDeeplink&ts=1864.54)):

I mean, especially in the South. There were whole cities basically ruled by single district judges enforcing a series of either consent decrees or decrees obtained in the course of insistent litigation that governed huge swaths of daily activity of local governments and of the people who lived there. And we were in the midst of the sort of constitutional revolution that the Warren and Berger courts had wrought and in antitrust say, what you will about it if one is a neo-brandeisian. But the law had become at least difficult. It was difficult to predict in advance how a case might come out. And it seemed to turn a lot on the identities and preferences of judges. And Judge Bork sort of saw this across the whole landscape and said, this is not self-government at all. A robed tyranny is about as dangerous a tyranny as you can have because we have no chance of voting these people out.

Hon. Andrew Ferguson ([32:00](https://www.rev.com/transcript-editor/shared/MOWT20U3tbvfx9koxe23V32VMElgjJ2GpnDZ5NmwwYXAvJYdaS4iUkBDDW-xUnsjFc_IMogFEleiLuZWUG2N5VgozHM?loadFrom=DocumentDeeplink&ts=1920.1)):

And so his life's work was a form of originalism that focused primarily on constraining judicial discretion. I mean, you remember what he very famously said about the Ninth Amendment. He was very worried about that ever becoming a rule of decision for judges because it would be such an opening of judicial discretion. And I think that the chief focus of the antitrust paradox, with which I'm pretty sympathetic, is we need some sort of objective measurement against which we can test enforcement decisions by the government and judicial decisions by judges. And the best way to do that is a very economic focused analysis about price and output. And I think when a lot of people use the phrase consumer welfare standard today, they basically mean it in sort of a price and output essentialist way. That's a, it's not what Judge Bork advocated in his book B, it's definitely not what he was advocating by the end of his career.

Hon. Andrew Ferguson ([32:56](https://www.rev.com/transcript-editor/shared/xWGpFJS0_wUGYWKH8JxHAp81XM2N1ESqdcDKIERYKKHwztdEOTTjMYzY-EKwNVAcvjCMn4_Eyg1Sss0U_KHCGf47e1I?loadFrom=DocumentDeeplink&ts=1976.46)):

And C, it's not actually what the cases say, but a lot of the consumer welfare standards, kind of most fervent advocates say the way this should go is you consult the economists, have them predict price and output effects of the merger or the combination or the restraint, and then make a decision on that basis. Again, I don't think that's what Judge Bork was calling for, but he definitely wanted to move the law in a direction where we could measure objectively if courts and enforcers were getting it right because it had become such a subjective personality driven enterprise. I think if one were to write a sequel, and I hope that original scholars are really thinking about this now, I think some of them are would be, okay, let's take what we have from Judge Bork and then layer on top of it in insistence on getting original public meaning.

Hon. Andrew Ferguson ([33:49](https://www.rev.com/transcript-editor/shared/vLXzRS-NrndiYxpSbSMcvQQNGRkwU_imDlQPyYHaFRwChUsvWXB-wOmpz6ihrqGNQB8j_Xyh8qOlrtyEtmgWe1IbGWo?loadFrom=DocumentDeeplink&ts=2029.49)):

Let's dig into what the common law understood about restraints of trade and monopoly. Let's dig into sort of the historical and intellectual milieu into which these laws emerged and figure out what were the concerns about restraints in trade and monopoly that were animating these laws. What principles can we define from the historical environment in which these were adopted? And are those historical concerns limited primarily to price and output? I think there's some good evidence that although price and output were chief concerns, they were not exclusive concerns. And so we shouldn't discard The Antitrust Paradox, set aside its monumentality. I think much of it, first of all, he was focusing on the right thing, which was trying to figure out what Congress meant. But I think if one is writing a sequel, we try to figure out what the words were understood to mean and set aside concerns about sort of judicial restraint as a theory of interpreting the law. If Congress understood that it was creating a sort of open-ended standard and it was drawing on lots of different legal sources and encouraging enforcers to think about more than one thing and a sort of weighing sometimes seemingly in commensurate values, that's call and it'll be difficult. But I think that at the end of the day, the question is what was Congress after, what did the receiving public understand the law to prohibit, and how does that apply in our unique markets today?

Hon. Paul B. Matey ([35:14](https://www.rev.com/transcript-editor/shared/BlNiOHmao9nszifTBASkiKD2EtSkhshSXaDzF8OmDghHBG6f8tYfgXpBhMqyfrD_VTxuC-mh_ULqNcZPFzaAD2pvNn4?loadFrom=DocumentDeeplink&ts=2114.87)):

Yeah, we take for granted so often as I think you've just outlined that we stand on the shoulders of Judge Borg's work. We are asking these questions now because of the insights that he and his contemporaries brought. So too with the originalist inquiry. And one of the things that seems to naturally raise is where does antitrust begin and where do corporate rights start? There's this kind obvious tension between doctrines of state substantive corporate law and federal competition law. And we heard at one of the panels this morning, Professor Mahoney talked about the founder's obsession with corruption, not the kind of crass political sense we might think of it now, but systemic power: monopolies. So how does the shifting role of the corporation in America, or even since the late 20th century, affect how you think about restraints on competition?

Hon. Andrew Ferguson ([36:10](https://www.rev.com/transcript-editor/shared/7tP7S_HqqTV5Ag7P6A6PBF-BZwPDpVatJHXYjnhY5VuMzK_8-nrD8Mr7YOH_GROwRkrtv6BnCfDunftTP6UZHf2GMVw?loadFrom=DocumentDeeplink&ts=2170.71)):

Yeah, that's a really good question. I'm sorry I missed the first panel. So not an expert, but obviously the corporations as we talk about them today, are quite different creatures from what they were at the framing. I mean, I'll defer to Professor Mahoney, but I think the general incorporation revolution is probably one of the most meaningful legal changes in American history. And at the framing, corporations were more or less monopolies conferred to achieve a public good, like some sort of public purpose. And today they're just the default system of business association. And I think that was largely a consequence of what legal historians have called the regulatory race to the bottom where states were competing for business and so they kept loosening their corporate regulations and weren't try to get people to incorporate in the state. But from my perspective, so there is this tension. You're right where, and it's a healthy tension, it's part of our system. States are the primary regulators of corporations. Corporations are creatures of state law. We don't have federal incorporation, but they are subject not just in competition, but in all sorts of domains to all sorts of federal legislation. And the thing I think we often forget, especially when we're doing stuff here in Washington, they are subject to super intense state regulation.

Hon. Andrew Ferguson ([37:46](https://www.rev.com/transcript-editor/shared/aJ8b5R69_5_GPAIKhbD-isfsiFmGwuueOgsfhyxTsRBKE95qQM1R86-7NOoRoJUmmhBlhLMOetDmn5gCYfM-982QdJ0?loadFrom=DocumentDeeplink&ts=2266.77)):

President Coolidge very famously was of the view that being the business policeman would not be popular. It definitely isn't popular with the police. It is super popular with the American people. If you ask an attorney general, what excites a state attorney general, what excites constituents the most about what they do? It's two things and they're intimately related. It is the enforcement of the criminal laws and it is consumer protection work. And consumer protection work means suing businesses or threatening to sue businesses because of the way that they're treating consumers. That is what consistently polls among Americans as the most important thing state governments are doing for them are throwing bad violent people into jail and bad corporations into corporation jail. And the impulses are identical. It is the little guy subject to the depredations of the strong and they expect the government to interpose itself between them.

Hon. Andrew Ferguson ([38:44](https://www.rev.com/transcript-editor/shared/-zogFp8ZW8dsBYqyE-2aKgQGouqy2X5dOaaeobg3ELhKITlI3reuu-ZfXYHuo6ALFHF_0s5i1k_I-N_0wIYXS25w40I?loadFrom=DocumentDeeplink&ts=2324.02)):

And I could go off on a tangent on why I think the criminal justice reform as it calls itself is barbarism because it flips that inquiry on its head. But we will set that aside. I think states are, at least for the foreseeable future, going to tell us what corporations are, what rights they have under state law and what their purposes are. And so the evolution of the corporation is interesting to me as an intellectual matter. And I also think potentially a cautionary tale about American law, but as a federal competition enforcer, my general view is I don't particularly care what state law tells you about your purpose or your composition or the extent of your liability. I do care about whether you are colluding with your fellow corporations across or up and down the supply chain in order to deprive the American people of the promises of the Constitution, which ultimately were the blessings of liberty, and monopoly rents are not the blessings of liberty. Yeah, yeah. I'll just sit on that one

Hon. Paul B. Matey ([39:59](https://www.rev.com/transcript-editor/shared/SjFrHAI_VT91f_3QrvQxiN89ECHTmKvbGZbhXwt6jnEm5rHluttwed1MdP_5OW1fb9SVS4FH5UKvQFdpXWATX2Hcac0?loadFrom=DocumentDeeplink&ts=2399.38)):

Of the blessings of a long lived republic is the chance to see change and much of your docket now involves technology. And we're not talking about those horseless carriages. We're starting to see out on the roads something that looks a bit different, but basically does the same thing. We're talking about the sort of stuff that when I watched TNG obsessively as a kid was it seemed like a fantasy. If you don't know what TNG is then shame on you go look that up. So are the technological advancements of the late last and present century different in kind when it comes to regulatory challenges? And if so, what kinds of new tools do you think are going to be needed to meet that challenge?

Hon. Andrew Ferguson ([40:45](https://www.rev.com/transcript-editor/shared/xBoZi77LQeKGVVPTxw-X-oW9nl8Ha0fLN_nskDwx07nwLLLSNs3CKX9XwbRV6u2map1dB7ppsPL1klczd1VSLHO2wAk?loadFrom=DocumentDeeplink&ts=2445.61)):

Another really good question. So one of the great things about America is that we're very young and we encourage people to come here and sort of forget their histories, kind of start over the new world, a new beginning for everyone. You're not tethered by the history of your people or the place that you come from. That's great. It's part of what makes us so dynamic and innovative, but it also can generate some myopia where everything that hits the American, every new thing that hits American politics, it's very often a reaction. This is the biggest version of whatever this is, or it's the worst version or it's the best version. It's very rarely true. So from where I sit, I go, gosh, AI, the techno-revolution, this is surely the most formative, most important, most difficult to grapple with thing that's ever happened. It seems to me that that is probably a phrase that has been repeated over and over and over and over since Sumerians first started scribbling things on stone tablets.

Hon. Andrew Ferguson ([41:44](https://www.rev.com/transcript-editor/shared/bA_Wx1M3j7pcrOXUloOlZR39-Abv1eXOJ0r1o4-P-t-ZXX2xhvAYYL4yIVajmhc-DxvrPSu0D7kHH6dSU4jMPBnj07k?loadFrom=DocumentDeeplink&ts=2504.51)):

And so I try to have a little, I try my best. I think it's hard for everyone, but to have a little epistemological humility about whatever is happening at the moment. And I think most conservatives, like you said, or Russell Kirk said, I'm just a midget standing on the shoulders of giants. And so as new things come, my instinct is not to look forward. It's to immediately look backwards and see how did other societies grappling with big changes that seem to be coming organically and sort of terrifyingly, how did they confront these? What lessons may we learn about what worked and what did not? And so these do seem different and kind. They seem to be moving at sort of an unprecedented pace. I mean that is one thing about change in previous millennia is they seem like they happened in a moment when we read about them, but that's because we're reading about the moments they tended to take a long time to come. And these seem to be moving pretty dramatically. And my reaction to this is a regulator on the one hand is they terrify me personally. But again, applying some humility to this, I also don't want to sort of take my ignorance or personal terror and be like, well, we have to regulate this. We have to get our arms around this. I think AI is a good example. AI seems in equal parts, amazing, terrifying and stupid.

Hon. Andrew Ferguson ([43:10](https://www.rev.com/transcript-editor/shared/WaO3gttUX1Dfaz1bgPxhXTmT4Z6CdXyShVzk88CliddpPJ6KZ-nFrYzLQVQkG7Be5d3-QENW3MOZ9P-otWEFDrPn_Xo?loadFrom=DocumentDeeplink&ts=2590.37)):

Any of you all who have tried to go on one of the generators and ask for a painting and it comes out with 17 hands and all sorts of crazy stuff, you go, this seems dumb. But it also has incredible opportunities for innovation and more fundamentally like this is here, it's happening. Our allies and adversaries around the world are going to use this. And so we can't just bury our head in the sand. And so on the one hand I look at it and say, gosh, this is scary. All sorts of dangerous implications. But on the other hand, you look at it and go, are there any more recent tools that would be better for challenging big tech dominance than AI? How many little competitors who couldn't break into these markets on their own with the tools available might be able to break in and challenge incumbent dominance because of things like AI?

Hon. Andrew Ferguson ([43:57](https://www.rev.com/transcript-editor/shared/azVquWcBuk-xDQO4ohaNPkDOMx29AOwUVOI1YghXEKzxnoWPFJNEIPG4wq1YK9M1aVw9xm8IqgLh_KiWKL4a5y0uhKk?loadFrom=DocumentDeeplink&ts=2637.47)):

And so my general view about big technology changes is yes, they feel different. I bet they have always felt different to whomever they were being inflicted on. I think we should look backwards to see how great civilizations, which I still think we are, dealt with changes that came on organically and seemingly terrifyingly what they got right, what they did not, and then going forward, exercise some humility and recognize, A, this is going to happen. We can try to channel it, but we can't arrest it. And B, there are good and bad. The bad is it gives all sorts of opportunities. I mean, AI is being used every day, can tell you this firsthand, to create all sorts of scams that are unbelievably terrifyingly sophisticated. That's the bad part. The good part is all sorts of little upstarts, what Google was 25 years ago with this tool in their hands may suddenly have the opportunity to challenge incumbents. And I think that's a good thing. And so we should be very careful about however we're going to confront this challenge.

Hon. Paul B. Matey ([45:02](https://www.rev.com/transcript-editor/shared/nBbVoIUAfhH2SYlZQs4_8ztpi4KMm7TZ1buYlZfnJGr6gHlh8dYds2uqR6EoVNAbw4n52f4bL5q4V7k-l56C26szjBk?loadFrom=DocumentDeeplink&ts=2702.37)):

You drew a hand painting, I was the nerd who put in, write me something about Humphrey's executor and the several paragraphs, check the sites.

Hon. Andrew Ferguson ([45:11](https://www.rev.com/transcript-editor/shared/wRiOt9uhoiCo5NJFv_lmmozhqeyPbvjx-sphcqy_9N6uk7F0boNq2iGqPLWm-wMF2GAasouJdcr29KZTz8aamm05o_8?loadFrom=DocumentDeeplink&ts=2711.55)):

I've heard that doesn't work well,

Hon. Paul B. Matey ([45:13](https://www.rev.com/transcript-editor/shared/woUXj9g_W6Ubnj6ZCnANmDGCL53476ZKY9DEIblCwIS2wSQl0AXg8G4F32Cmqrnc232DhGwSNARaRsRW826KU_K2l6g?loadFrom=DocumentDeeplink&ts=2713.44)):

But the several paragraphs I got back made me think this is going to change the way people prepare legal arguments because it wasn't bad. It wasn't bad. What role do the states play in all of this? Because you sit in this unique position where you were a state regulatory enforcer as well. Now being as a federal one, is it really one policeman or are there 50 who you were competing with?

Hon. Andrew Ferguson ([45:41](https://www.rev.com/transcript-editor/shared/N194yeOTM_7tBxmrgO863NtUJzvz8J9Fu9Ac88feJfIaa3yFudFWsStrbq_L4-UPWlqaJIBS6sevRTvVFaHhyF7QEpQ?loadFrom=DocumentDeeplink&ts=2741.88)):

So when I was in law school, I thought federalism was awesome because of Fed Soc. And then when I was on the hill, I thought federalism was really annoying and if the states would just recognize the superiority of the central government, there were so many things we could get done. And then I got down to the states as the state solicitor general and realized that the impulse that the framers had about, I mean you can call it subsidiarity, but the idea that government is best done by people closest to the governed: Unequivocally correct, not a close call. The distance of the central government to the governed, set aside mileage, the cultural and social distance of the central governments to the governed is an unbridgeable chasm, and local and state government has that problem so much less. And so I am super bullish about state government and I've also just given example: the net choice cases.

Hon. Andrew Ferguson ([46:43](https://www.rev.com/transcript-editor/shared/QSKiuw2C9ZHpJlgrYqPqMQugcSeNVM55Wv6KhDUIafRKCVeYKUwT3YP-AhwRls_GgOCJB35gKp8eKpmJ1oNLg2vT1tY?loadFrom=DocumentDeeplink&ts=2803.35)):

This is a problem the entire country is confronting and the central government for a variety of political reasons is basically incapable at this point of doing anything like Florida and Texas did in net choice and the states were like, people want it, the people got it and we'll defend it to the death. And it's the same with consumer protection work. The FTC does great consumer protection work, but it is appropriately, thanks to limited resources, big scammers that affect big swaths of the country, state enforcers, they find out about some little local community who got scammed, show up the next day because they are so close to the people they govern. So at points in my career, I've looked at the Constitution and gone, I don't know, Wickered had a national markets impulse. It's very efficient. It's so orderly. I don't know. It is got some arguments. And now having been in the states, the idea that the framers understood instinctively and we're totally right about, which is good government, is by those closest to the people they claim to govern is unequivocally correct. And the more that states assert themselves where the federal government is either unwilling or unable, the better.

Hon. Paul B. Matey ([47:59](https://www.rev.com/transcript-editor/shared/AJJOKXHIB1WXB4GTzhynIaGFcnrAHjrI9IrDj6KVFOzidCPOOtPqG5H7QAH0zyQT2fyGxKMaE0XAcSIjZ-l9PdDhdEU?loadFrom=DocumentDeeplink&ts=2879.5)):

I think we're almost out of time, so I'll take the prerogative to ask the last question if that's okay. Where do you ultimately make the final closing argument since you don't get to be a real lawyer anymore, for those who would say, listen, I am skeptical of government power. I am fearful of the concentrated impulse of agencies like yours to trample liberty. Why should I revisit that skepticism and be confident that the kind of interventions you're talking about are really going to be better for human flourishing in both the short and long run?

Hon. Andrew Ferguson ([48:44](https://www.rev.com/transcript-editor/shared/qHlqImT20rnuVbhOXJniY_dvXU1Pcu1NeNIvcJ0Nz4GllbijtCC02A66iJHBt5jazGxzXsEQfgQ5znRuMJjIQVFcQm8?loadFrom=DocumentDeeplink&ts=2924.89)):

Do not surrender the skepticism. The skepticism of power is I think, the greatest of the American traits. It's the same skepticism that leads to mass gun ownership, myself included. It makes us a free and innovative people. What I would say is, I urge you to abandon a Pavlovian opposition to all exercises of government power and to consider the dangers of aggregations and concentrations of private power because there are so many things that private power is able to do that you would hate if the government were doing it. And the fact that it's the result of private people doing it, in my view, very often should not matter, number one. Number two, I cannot overstate the danger of government colluding with concentrated private power to infringe the liberties of everyone in this room. Virginia was an amicus in Murthy, and so I'm a little bit biased on this, but read the district court's opinion in Murthy, which is the case in which several states accused the United States of effectively coercing or colluding with large tech firms to drive COVID skepticism out of the public square or ask someone who's ever been de-banked if they're flourishing because of the results of private choice.

Hon. Andrew Ferguson ([50:08](https://www.rev.com/transcript-editor/shared/5LQr2K5ZlwpLTjwAgnAvpblbMclMRj12nYeHtDC4zqUbpwK1xFFyjzY7jqnJ5aWfw6XQXH0ZVSfXXy93wlfJ3M9RFDE?loadFrom=DocumentDeeplink&ts=3008.14)):

There are so many things that we would be up in arms quite literally about if the government inflicted on us. I do not think we should take it supinely when the same conduct is inflicted on us by concentrated power. It is A not consistent with human flourishing. It is inconsistent with the impulse that has made America so great. We didn't all line up just in the revolution just because of a dislike of Parliament. We didn't like the East India company, which was a monopoly created by Parliament to carry out public or to carry out private conduct for a public good. They weren't just throwing tea into the harbor because of taxes. They hated the monopoly. And I think it is fake and inconsistent with American history and with the thing that made us the greatest civilization on our earth to say government power, always bad. Same thing about private power: result of market forces let it be. It's inconsistent with our history. It doesn't make any sense. And if we are real about being conservatives, that dogmatic view, throw it out the window. We should be pragmatic about protecting individual flourishing and human liberty.

Hon. Paul B. Matey ([51:16](https://www.rev.com/transcript-editor/shared/TFTBNCji5eDx_VnVGZ6iVUnO_4yYIbMayfEfnRPpFZrT8gJTbh2hMfjAAJkU6uwwaldzA_W1WkkpK0cGtJobPj8oNl0?loadFrom=DocumentDeeplink&ts=3076.58)):

The case is submitted.

Alida Kass ([51:29](https://www.rev.com/transcript-editor/shared/ufAFB1ZVoKLGUcwNxoowt6eBgYQTFiLuuC8CzRHqf7EXW-_NL9h6jDoD5T-8xzUAEDuC0C1qsU2fu85BWprLre46ujA?loadFrom=DocumentDeeplink&ts=3089.03)):

Thank you all so much. That was really fascinating. Fantastic. We went a little bit over. We will begin our next program at two o'clock back where we started the day. And we will take up the role of states in securing the rights of free people. Thank you very much.