Alida Kass ([00:01:21](https://www.rev.com/transcript-editor/shared/hySJVmzf206HgOJfCy2zWAK0404R1t0XCYwQ-pXGwcUk1JuD5rAB2TlOjtjHgPYxnKkeO3ayDtCsIpHS3I28bVRb4wM?loadFrom=DocumentDeeplink&ts=81)):

All right. Welcome back. I'm Alida Kass, Vice President for Strategic Initiatives and Director of the Freedom of Thought Project. Panels this morning focused on the evolution of corporate rights and privileges from the founding era to today. This afternoon, we are now going to focus on the flesh and blood humans. What are the natural rights of citizens and what responsibility does the state have in securing those rights? To moderate this fantastic panel, we have Judge Kyle Duncan. Judge Duncan is known to many of you. He's a great friend of the Federalist Society and of the Freedom of Thought Project. His impressive bio is on the Federalist Society website. I invite you to take a look and I guess I will just sort of like delicately allude, he has had his own personal experiences with insufficient appreciation for freedom of thought, perhaps. Judge Duncan, thank you so much for being with us. The floor is yours.

Hon. Kyle Duncan ([00:02:21](https://www.rev.com/transcript-editor/shared/Xycn5V-6ZXvCcgqF5lerP1R7Wdo9euziVqq0lzG9i3L9lUBfxjvrn_6-_fVbYnF2QX6BRTzKO_zWQIDnZJR3Yk5R3T8?loadFrom=DocumentDeeplink&ts=141.25)):

Thank you, Alida. I really appreciate you not reading my bio out loud. It is a delight to be with you and to moderate this wonderful panel. I will get to their comments as quickly as I can because they're much more informed and interesting than mine, but let me introduce the esteemed panelist to my immediate left. Professor Maimon Schwarzschild is a professor of law at the University of San Diego School of Law where he's taught since 1982. He's published extensively on constitutional law, jurisprudence law and religion and civil rights. He is an English barrister and an American lawyer. He was in the Civil Rights Division of DOJ from '76 to '81. He has been a visiting professor at the Sorbanne and Hebrew University in Jerusalem. He's the Director of the Institute of Law and Religion at the University of San Diego, and to his left is a professor who's well known to me and to all of you as well. Professor Randy Barnett, who is the Patrick Hotung Professor of Constitutional Law at the Georgetown University Law Center. He wanted me to mention that his most recent book, which is coming out soon--

Prof. Randy Barnett ([00:03:35](https://www.rev.com/transcript-editor/shared/B3cMnil9InfDRO8x9RlWK_XW7O-qQrhCd_3FF7HoQhjJ6dSFqS3qd-VEMq9Kd9JtlVUrtGANQa8rWeWvv90hJzBNZbE?loadFrom=DocumentDeeplink&ts=215.35)):

July 2nd!

Hon. Kyle Duncan ([00:03:36](https://www.rev.com/transcript-editor/shared/PLKTf4R6kuelkHl6l_JG8330WZbtvYmqrWtzJLAf2oVts32jQ7ImvwggYC4GMTH7BhLcKkjHM0uvrWD0mIdjPpjGU00?loadFrom=DocumentDeeplink&ts=216.16)):

July 2nd, which he may mention himself,

Prof. Randy Barnett ([00:03:41](https://www.rev.com/transcript-editor/shared/oPegRlllH23EgKOh-xXM-KzBM3PeUep8qS3MTYHngl389oEhgqmKrkR9yKxUO-tBcPLJy5X14BCxNvXodxTDbNwauEs?loadFrom=DocumentDeeplink&ts=221.8)):

Count on it!

Hon. Kyle Duncan ([00:03:44](https://www.rev.com/transcript-editor/shared/_aDjBZ3R4zwsAzVVCjXdFNjKBHX2olFm-DdVsxjEV1bGBVkZMx1XmFK9v52-xFJC7UPaZtpCYT9z_aHgB1b8rGG2Q5A?loadFrom=DocumentDeeplink&ts=224.5)):

And others, is called A Life for Liberty, the Making of an American Originalist, which sounds fabulous. I was going to mention your other book from 2021, which I have, but I'll just mention that--

Prof. Randy Barnett ([00:03:55](https://www.rev.com/transcript-editor/shared/eAoXVeV26b_0iV0fK5jJ7iKzse-dJz-Y8fPtLP4ZB2g62I9CG9vwOKYlYJLrNy9B8fNRb_aSd6Ddk7UNWihyfeCYp9Q?loadFrom=DocumentDeeplink&ts=235.15)):

Go ahead. Don't feel inhibited.

Hon. Kyle Duncan ([00:03:58](https://www.rev.com/transcript-editor/shared/fPcyPjnluCFbJx71BRb_xdcuSxsMZIQE9MQ49ZIlCYSmqAldcyoHxNlxaAEKEH_kTYp2XwFxFDDZVgB0IW3Y44uqvdE?loadFrom=DocumentDeeplink&ts=238.48)):

Right. Professor Barnett, let's see. He told me to keep it short. He did argue the Gonzalez v. Raich case in the United States Supreme Court. He was one of the lawyers involved in the NFIB v. Sibelius case, and he portrayed a prosecutor in a 2010 science fiction feature film, "Inalienable," the movie. I have no idea what that means, but it is in your bio and I wanted to read that and I'm going to go stream that as soon as I can.

Prof. Randy Barnett ([00:04:26](https://www.rev.com/transcript-editor/shared/yrAlBw6fr5UvC28yaBpIe_t_izCYXyAZSNaRPevqhcwfhTrAkeVAqJt1lF-HA99RtcpU9lFR8huPjYmnDvetOR-N51Y?loadFrom=DocumentDeeplink&ts=266.39)):

On YouTube, you can watch it for free on YouTube.

Hon. Kyle Duncan ([00:04:27](https://www.rev.com/transcript-editor/shared/nyJK4ORlTX41S8AMTIj0vzGtyQy7AZ0rgH-4RM8wmsXSkiUN_yWawnlhqNZ9SUgj0HQo4cv05Bvs7D5XPKt5He3bsUI?loadFrom=DocumentDeeplink&ts=267.94)):

Free on YouTube. Excellent, excellent. Great. We have to his left, Jonathan Urich, who is Assistant Chief Counsel of the United States Chamber of Commerce Litigation Center. He joined the chamber after helping launch the national litigation boutique, Latsky Keller, LLP, which is up and coming or by now a very well established litigation boutique. Before that, he was at McGuire Woods in Richmond. Jonathan served as law clerk to an amazing roster of all-star judges starting with Judge Amul Thapar when he was on the Eastern District of Kentucky and then moving on to Judge Jeff Sutton of the Sixth Circuit and then to the late Justice Antonin Scalia and then Justice Clarence Thomas of the United States Supreme Court. He as a graduate of University of Virginia Law School.

Hon. Kyle Duncan ([00:05:31](https://www.rev.com/transcript-editor/shared/x4Uf0gF8EDQtDPRKPPmyQi_6-I1Iqq_FAf3ZHKVvjuNVfhAQ9w3DwS9bCS7LQaguftBsIdjaxXm3l4Sm6kWJC90aO1g?loadFrom=DocumentDeeplink&ts=331.45)):

To his left we have the Honorable Rohit Chopra, who is the director of the Consumer Financial Protection Bureau, which is a unit as you all know, a unit of the Federal Reserve system charged with protecting families and honest businesses from illegal practices by financial institutions and ensuring that markets for consumer financial products services are fair, transparent, and competitive. In his capacity as director, he is also a member of the board of directors of the FDIC and the Financial Stability Oversight Council. In 2018, he was unanimously confirmed by the US Senate as a commissioner on the Federal Trade Commission. He previously served with the CFPB from 2010 to 2015 and prior to government service worked at McKinsey and Company.

Hon. Kyle Duncan ([00:06:23](https://www.rev.com/transcript-editor/shared/2t3ngykhuq0mBSo7SJ2uhsYhUzjklL087koJ5AsV2LyrIyc7YOKn7g5FSRQC00ATGzHafgEn02CO8k6y1_hlQJ4NlzI?loadFrom=DocumentDeeplink&ts=383.24)):

And last but not least, is Professor Josh Kleinfeld, professor of law at the Northwestern University Pritzker School of Law who teaches and writes about political, legal and moral philosophy, criminal law and criminal procedure. He also practices with Northwestern's Juvenile Criminal Defense Clinic. He is also a professor by courtesy in the philosophy department at Northwestern. He has been a visiting professor at Harvard and Stanford and he's a recipient--I could keep reading, but I won't--He has been a recipient of the Paul Beto Award, and he holds a JD from Yale Law School, a PhD in Philosophy from the Goethe University of Frankfurt, a BA in philosopher from Yale College. He clerked for J. Harvey Wilkinson on the Fourth Circuit, Judge Janets Rogers Brown, the DC Circuit, and President Chief Justice Aaron Barack of the Supreme Court of Israel. What a great panel we have here and I'm going to immediately turn it over to Professor Schwarzschild to lay the initial theoretical framework for our discussion. Thank You.

Prof. Maimon Schwarzschild ([00:07:30](https://www.rev.com/transcript-editor/shared/9VOqA0biG_hx-Ubfcedimve_B4cUq9UXrkXU9JQWckLD9L_q-JsylCB3elau2PuX2yu8SSa164nIxzLVwWlmxCE4Kh8?loadFrom=DocumentDeeplink&ts=450.17)):

Thank you, hugely Judge Duncan, and it's an honor to be here and also pleasure to be among friends, and it's especially good to be on this panel. The threat to freedom of thought and of speech and to the life of a free society generally, threats to which do not come only from government, are not exactly a newly discovered concern. John Stewart Mills on Liberty, a foundational text in liberal thought, published in 1869, this is not a first edition though I actually have one at home, and to this day, an extraordinarily good read. On Liberty confronts this problem explicitly and a dominant theme of On Liberty is that social pressure, pressure from private persons and institutions, can be as much or more of a threat to freedom as any legal sanction or government censorship. Recent decades in America and not only in America, have seen widespread growth of private institutional and corporate efforts to suppress free expression. Censorious speech codes appeared at universities and colleges in this country by the 1980s in some cases at public universities, but in many cases at private ones. Stanford was a dubious pioneer in this dubious field, but it was by no means alone.

Hon. Kyle Duncan ([00:09:15](https://www.rev.com/transcript-editor/shared/pd0UEOEkOZSUHUsyisUg5rOra3XPbubDV9XaYWqySIxEEAq-TEw1_QR9Lav-3Ri7k5trXb4j6wmH_n47MrF2L2tyL98?loadFrom=DocumentDeeplink&ts=555.45)):

They've kept it up.

Prof. Maimon Schwarzschild ([00:09:19](https://www.rev.com/transcript-editor/shared/5ACQj-C2Ec5QKHEpssVScB4i0HevEBrGo_VymBVJTvsPWR2kiJrDXe_xWQmhnJ-rzzHJT8rnEtKF-k1SRYCYXOA1f8E?loadFrom=DocumentDeeplink&ts=559.11)):

They did indeed, but over the last decade or two, the situation changed somewhat. At the time in the 1980s when the speech codes first appeared, and even into the 1990s, it could still be taken for granted off campus that you were more or less free to think and say what you liked. Over the last decade or two, it could no longer be said that "the campuses of the universities and colleges were islands of repression in a sea of freedom," in a sharp and apt phrase that was used actually first by Abigail Fernstrom, the Civil Rights scholar about the university and campus situation in the 1980s and beyond. In the new century, privately owned media and publishers, tech companies, entertainment companies, banks, arts associations, museums and many others, many other private bodies, have canceled or suppressed the expression of ideas or facts that are out of line with the ideology that prevails among the leaders of these institutions or among the activists to whom these leaders bow.

Prof. Maimon Schwarzschild ([00:10:37](https://www.rev.com/transcript-editor/shared/bl1z1z6_yLrrKun4GaSVyMjIUIuRaDnPujqVnieFZBy_0nPSoJRyxawwqViF4r_Tu74H1fqldvkYIC_y0a6_Khk1FbM?loadFrom=DocumentDeeplink&ts=637.65)):

There have been more than enough examples of this, some widely publicized, many more, not publicized, but well known to the people involved with them. So the phenomenon is widely understood in the country, and many Americans now routinely self-censor and worry that they might say something, a wrong word or the wrong idea or opinion that could get them into serious trouble. This was just the sort of climate imposed socially and at least not directly by government or by law, that John Stewart Mill worried about. Climate that On Liberty argued, impeded both good decision making and a search for truth and also personal self-development and autonomy. That was the theme of On Liberty, that a free way of life promotes, promoted and promotes, human flourishing, both in the sense that the search for truth in a broad sense, including the capacity to make good decisions, promotes human flourishing. And that autonomy itself and the ability of people and the fostering of people to be something more than one of the crowd is of the essence for human flourishing. And the climate that has appeared very much more sharply in this present century and perhaps at the very end of the last one, is precisely that censorious and suppressive climate coming at least in very substantial part from private sources and corporate sources and institutional sources that are not merely government. That was the concern of Mill. It's not a new concern, but it's a highly timely one.

Prof. Maimon Schwarzschild ([00:12:34](https://www.rev.com/transcript-editor/shared/BPpnu9I-Giu3Q4uO3pYyl5eQCQUtxCfLfBetjtkl4zXP1MlPQeZ2aj3ylLg7E4k0Guvdq28-sWPKVivUtH-ZhIydoMI?loadFrom=DocumentDeeplink&ts=754.18)):

There is, however, increasingly a phenomenon, and certainly the threat of a phenomenon, that Mill did not foresee, at least not On Liberty and I think not elsewhere, namely extensive collusion between government and private institutions, including corporate ones, to censor or discourage speech unwelcome to the government or out of line with the preoccupations of the administrative state. There's considerable evidence, growing evidence, that this has already happened on more than a minimal scale. One case, the Murthy case that Andrew Ferguson just referred to over lunch, now before the Supreme Court, involves claims, which the lower federal courts found likely to succeed on the merits of federal contacts with tech platforms to censor criticism of COVID policies and much else. A House subcommittee on the weaponization of the federal government has published extensive evidence of what the subcommittee calls, "the censorship industrial complex". The extent, at least so far, and also the culpability of this of government and private collaboration along these lines, might be debatable.

Prof. Maimon Schwarzschild ([00:13:54](https://www.rev.com/transcript-editor/shared/bu4byfdKt72w9Q7qmexN-z0xmeVVe4bWbGZywMBd6GylSPQgO6j6cVCWELp0MoKXIshXhzh4AFbDoqjTN9PADNX0j0Y?loadFrom=DocumentDeeplink&ts=834.64)):

In the Murthy case, the government says it was just expressing its opinion about misinformation online. It turns out that much of that alleged misinformation in particular about masks and mass COVID lockdowns and prominently the origins of the COVID coronavirus in the Wuhan lab turns out not to be, at least on very strong evidence, not to have been misinformation at all. But in any event, it is clear that the technological capability now exists and is fast developing further for unprecedented social surveillance, including social surveillance and censorship of expression managed at least in part through private channels that can claim to be exempt from First Amendment constraints. When government collaborates with private corporations to censor or suppress speech, it obviously opens the door whenever the government is then challenged or sued for impeding free speech to say, oh, it's not us, and to point the finger at the corporation, adding that the corporation isn't bound by the First Amendment and indeed that the corporation is just exercising its own free speech rights. This has some of the sinister aspects of a corporatist regime. The idea developed by Mussolini's fascist movement as an alternative to state ownership of everything, the Bolshevik model that instead there should be collaboration between government, corporate industry, labor unions and other civil organizations, of course, to do the government's will. Mussolini famously summed this up with the phrase, everything within the state, nothing outside the state, nothing against the state.

Prof. Maimon Schwarzschild ([00:16:00](https://www.rev.com/transcript-editor/shared/iPAlvp35cGRWA9LiY2tGrG08lkLrm9xe6tk3Jdn7qbUT3lqSCJ3xqSTJe30TBLxitbnWyz0OtqYcztpANsuY843gA2I?loadFrom=DocumentDeeplink&ts=960.93)):

"Tutto all'interno dello Stato, niente fuori dallo Stato, niente contro lo Stato." It's more musical in Italian, but no less sinister. A social credit society is now or will soon be technically quite feasible. The question is whether it'll be politically, socially, and legally feasible as well. It seems to me that there are two possible safeguards or antidotes against such corporate censorship and such a corporate censorship regime and that they are either competition from differently oriented private institutions or legal regulation. Each it seems to me has theoretical and practical advantages and strengths and also disadvantages and weaknesses. Competition is obviously desirable in as much as it fosters freedom of choice, but if tech companies in particular, and as a good example, are as a practical matter natural monopolies or natural oligopolies, then successful competition may not be feasible. There've been various conservative startups. Parler was one that's been mentioned here and there've been a few others that have been started with the hope of competing with the major players.

Prof. Maimon Schwarzschild ([00:17:35](https://www.rev.com/transcript-editor/shared/YVw6rEmkw6UODtq22zbQqLdUKV2lPsmh3QiaSBx0ZrkSEz33j_cWAWMr6hvB1LLZ_HzxgqBZRYjKcH035i8t0MkibtM?loadFrom=DocumentDeeplink&ts=1055.96)):

They have not on the whole being successful. The alternative, and it's a question whether it is the only alternative, is government regulation. Yet, over weening government power is prototypically the problem and not a solution, and government regulation is clearly no solution if it's the very government, the party in power, that's colluding or initiating the censorship. There are, at the moment, state federalist efforts to restrain social media censorship. There are two cases before the Supreme Court at the moment where the constitutionality of these is in question: the net choice cases from Florida and from Texas. We will presumably soon know how these cases turn out, unless there's news today, which not today, not today, but it seems to me that the efforts of a few states to regulate tech platforms and social media not to censor the political speech of their users may be a step in the right direction or a shot across the bow, but surely not a full fledged solution to government collusion with private bodies at the expense of John Stewart Mill's ideal of robust and free debate. Perhaps most importantly. Mill might add that a society whose members, at least in the necessary ways and numbers who do not value freedom, will be a society all too easily prone to losing whatever freedom it may have had.

Hon. Kyle Duncan ([00:19:12](https://www.rev.com/transcript-editor/shared/2YOdylNMmjnmvxS9Tav4LeJj2RFnGSjRm8IqwY8TP5az9sbWNwS5tyhMiRuTU2ojndfd3OVRVIJGQnq4HxOdGOCUbB8?loadFrom=DocumentDeeplink&ts=1152.27)):

Thank you, and I'm sure we'll return to many of these themes in our crosstalk and in questions. I'll hand it over to Professor Barnett now. Now we've just heard from Professor Schwarzschild about liberty and about some challenges to liberty, to freedom from concentrations of private power. You are well known as to identify as a, quote, "libertarian". What does libertarianism say about such issues?

Prof. Randy Barnett ([00:19:42](https://www.rev.com/transcript-editor/shared/qQdAOWTY_Ib8IC8IT-mNaeFQgiGxDl7ioEQdiDKfiw0DXwsK3YGcdf15RBGgqa2cRCEDIV2UTa4Ejp2LVjvwvnBvbTs?loadFrom=DocumentDeeplink&ts=1182.78)):

Well, thank you Judge, and thanks to the Federal Society and to Alida Kass for having me here. As I describe in my soon to be published memoir, a Life for Liberty, the Making of an American Originalist, which all of you can and should now pre-order on Amazon. I've always been on the right. In 1964 at the age of 12, I debated on behalf of Barry Goldwater in front of my entire grade school student body. In my 12-year-old heart, I knew he was right, but in my junior year at Northwestern University, I went from being a William F. Buckley conservative to being a libertarian. In my senior year, I organized and taught an accredited seminar on libertarianism at Northwestern. Then in the fall of my first year of law school, I met and was befriended by Murray Rothbard and the entire New York circle of libertarian intellectuals. By my second semester, I had joined the board of directors of the Center for Libertarian Studies, which held its annual libertarian scholars conferences. The papers from which were published in our journal, the Journal of Libertarian Studies. Libertarianism in the 1970s was an internally contested intellectual project, not a rigidly fixed set of policy positions. But unlike originalism, which has benefited from 20 years of internal intellectual debate among originalists, libertarianism has largely been frozen in amber since the 1970s. I see five distinct ways that libertarian theory needs to up its game. First, the need for natural law ethics in addition to natural rights. Second, the need to distinguish between libertarian ideal theory and second best libertarianism in the world of governments and competing nation states that would yield a libertarian theory of nationalism. Third, the need for a libertarian theory of citizenship and civil rights. Fourth, the need to separate the public private binary from the government, non-government binary, and fifth, the need for a more refined theory of corporate power and corporate rights.

Prof. Randy Barnett ([00:21:55](https://www.rev.com/transcript-editor/shared/m_Q8VSF7Het_jUdB2jwbXlJ8CBQKGvZ8mVCB_jTCyU3Ci1P5T0i3kluVvMqpUf6b-U3I8qG_WbKIEj2rREfhKj78MyA?loadFrom=DocumentDeeplink&ts=1315.78)):

Let me offer a few words about each of these, and I offer them, each of these five, in sort of declining levels of confidence or certainty about what should be done first. I'm most confident about this. The Lockean conception of natural rights needs to be supplemented by a more Aristotelian Thomist conception of natural law and the good for humans. I have in mind the kind of approach taken by my teacher, Henry Veatch in his 1987 book, "Human Rights: Fact Or Fancy," which provides a persuasive account of how the common good relates to the natural and inalienable rights to life, liberty, and property. This position closely resembles that of National Review's, Frank Meyer, who has commonly been misunderstood to have advocated a fusion between libertarianism and conservatism. Meyer explicitly repudiated this aim and stressed that his actual intent was to create a fusion between libertarianism and the idea of virtue.

Prof. Randy Barnett ([00:22:59](https://www.rev.com/transcript-editor/shared/sCn6gZXeQh54MEUUxHvod1wCSZeU97gRVNtrPdNRiE_NvOH69iXg00VQKCeVKA_DsDFfH51Z1OSeW9RMN5wjZAY6_s8?loadFrom=DocumentDeeplink&ts=1379.71)):

No less radical a libertarian as Murray Rothbard recognized the same relationship. As he wrote in 1981, only an imbecile could ever hold that freedom is the highest or indeed the only principle or end of life freedom is necessary to and integral with the achievement of any of man's ends. Freedom, he continued, quote, "is the highest political end, not the highest end of man per se". Indeed, it would be difficult to render such a position in any sense, meaningful or coherent. A conception of natural rights that is informed by natural law ethics can offer a coherent account of the common good and a rebuttal of conservatives like Adrian Vermule and Patrick Deneen who assert that government should simply pursue the common good directly rather than protecting the individual natural and civil rights of the people. Second, libertarianism in its more radical varieties should be seen as a form of what philosophers call ideal theory. The natural rights that libertarians insist are primary adhere to persons by virtue of their humanity and independent of any government.

Prof. Randy Barnett ([00:24:07](https://www.rev.com/transcript-editor/shared/RcXEQb33mfGjRt7DuEBv1IOwEb40rxX0vvhtI-3F4m6_qRIs2ot0Dglajk7-8K74shz8DC80oSvTMd5BKSrJLO7UvGE?loadFrom=DocumentDeeplink&ts=1447.67)):

In this regard, libertarianism is a theory of ideal justice in the state of nature without any government, such a world would by definition lack any national borders. What libertarianism also needs is a theory of the second best. Libertarianism needs to be better accommodated to the non-ideal world, that is, the real world of competing nation states or competing nations. A libertarian approach to nationalism, for example, would take seriously the competition among differing forms of government, which are better and worse from a libertarian perspective. Third, the separateness and diversity of competing forms of government entails a need for a theory of citizenship that libertarianism now lacks because the ideal theory of libertarianism is based on natural rights, that is, the rights that all persons can claim in a state of nature or pre-political state. Libertarianism lacks a conception of civil rights. Civil rights are those legally enforceable rights one receives when one leaves the state of nature and enters into civil society with others.

Prof. Randy Barnett ([00:25:15](https://www.rev.com/transcript-editor/shared/nYvyNce7hPjUNmCEfi174pSwiRTiWBG1okw5bwXOqrOHC4QbyChmd9sMmYbwUHrVtJoeAO0QKPJUdXkbjGwsoGJeK9o?loadFrom=DocumentDeeplink&ts=1515.56)):

These are the rights privileges and immunities that members of each civil society holding the status of citizens can claim against their fellow citizens as well as against the government. While modern libertarianism lacks a theory of citizenship and civil rights, both concepts were understood and asserted by 19th century libertarian abolitionists and eventually by the anti-slavery Republican party. While continuing to assert the importance of natural rights, these 19th century libertarians developed a conception of citizenship and civil rights, privileges, and immunities that came with membership in one of many competing regimes. Fourth, to flesh out the conception of citizenship and civil rights, libertarianism needs to recognize that public, private, and government, non-government are not one but two distinct binaries. Free citizens may rightfully be excluded from private non-governmental spaces such as our homes and our beds, and also from private governmental spaces such as military based, but free citizenship may carry with it the privilege of accessing public spaces and services, whether governmental like streets, sidewalks and parks, or non-governmental like places of public accommodation and common carriers without being subject to arbitrary discrimination.

Prof. Randy Barnett ([00:26:39](https://www.rev.com/transcript-editor/shared/WPi1MGyX3cPX85qXfj59KxulvcTAYvSkVIxsdedsJ9yMCF2z5EE8jhfflZ_2SKXZEJsgJhjmoPzdJ49QRF3IFAllrRg?loadFrom=DocumentDeeplink&ts=1599.59)):

This too was recognized by Republicans when they enacted the Civil Rights Act of 1875, which barred such discrimination on the basis of race. Finally, libertarians need to be as concerned with corporate state fascism as they are with state socialism, which we just heard Maimon tell us about the Italian variety of. There are no corporations in the state of nature. As some 19th century libertarians recognized and some left libertarians insist today, there comes a point at which the size and scope of private corporations can pose as great if not greater threat to liberty than government power, especially as the two become intertwined in ways that are difficult to disentangle in practice as we have witnessed in recent years. Imagine for example, if the current handful of cell phone providers began electronically screening our calls for subversive communications, canceling those who were found to transgress some alleged moral norm. Would the fact that they are non-governmental make them any less a threat to individual liberty?

Prof. Randy Barnett ([00:27:44](https://www.rev.com/transcript-editor/shared/ei7eurzdFkMRoIC-xLVI5nWzdoa05i0XvQrnTRBVL6lxtTC5YNA8pGcvMQn8sSCfK0Kn6Qrt03CbgfKRt4hyD_-dqRs?loadFrom=DocumentDeeplink&ts=1664.1)):

I admit that this may be the most challenging of the five possible refinements to libertarianism that I am emerging. A first step might be to recognize that not all corporations are created equal. We heard a little bit about this earlier. Some like Citizens United, the Boy Scouts, and the Little Sisters of the Poor truly are associations of natural persons whose natural and civil rights should be legally protected from the government, but others like publicly traded corporations where ownership and control have been separated are more akin to artificial creatures of the state, the exact nature of which is subject to public regulation to protect the freedom of the individual. So if libertarianism is updated or revised to incorporate some or all of these five features, is it still fair to call it libertarianism? To answer this, let me close with an anecdote that I relate in A Life for Liberty.

Prof. Randy Barnett ([00:28:39](https://www.rev.com/transcript-editor/shared/10RGg9ON5WNW7a_F-7X8SqD5X7hj25D6VFiFqxTm3buhaH5XEDJsVUBS9nPyCNHYXyO-jB9CCPnC7b6zwMxRyB41WLI?loadFrom=DocumentDeeplink&ts=1719.45)):

When I was a three L, I did an independent study with Ronald Dworkin who was visiting Harvard Law from Oxford. I wrote a paper criticizing a chapter of Dworkin's, newly published book, "Taking Rights Seriously". In that chapter, he argued that it is, quote, "absurd to suppose that men and women have any general right to liberty at all. At least as liberty has traditionally been conceived by its champions". There is no general right to liberty, Dworkin and contended because, quote, "I have no political right to drive up Lexington Avenue". This is because, quote, "if the government chooses to make Lexington Avenue one way downtown, it is sufficient justification that this would be in the general interest, and it would be ridiculous for me to argue that for some reason it would nevertheless be wrong". In my paper entitled, "Taking Liberty Seriously," I contended that this was no refutation of a general right to liberty because liberty needed to be defined by the background scheme of property rights.

Prof. Randy Barnett ([00:29:40](https://www.rev.com/transcript-editor/shared/kjrx6j1fLWx8z4KHCA3syAYGizEmfbfuD6SLpgYa_BwjIEz-ioF-r56pOQDZM2s9rqI-SIHqvfxHLo5G2sNCN7CBAEw?loadFrom=DocumentDeeplink&ts=1780.86)):

In a libertarian world, you do not have the right to do anything you will. One only, you only have the right to do anything you will with what's yours. Our meeting to discuss the draft of my paper was taught in the style of an Oxford tutorial. What impressed me most was that Dworkin did not push back directly against this criticism of his work. Instead, he got inside my argument to analyze what I needed to make it work. One of his points has stuck with me to this day. He asked quote, "if you had a choice between a world of more liberty and less property or more property and less liberty, which would you choose?" After pausing a moment, I said, "More property". "Well," he replied, "then you're not a libertarian, you're a propertarian".

Prof. Randy Barnett ([00:30:36](https://www.rev.com/transcript-editor/shared/EWiJNtaAldrNPZHNHCu_d3xMNmqNzWhxfVJnf_FJJOpd_jen7fiBM-PuHvqzj6zYeKpVFLECSOCL4_KJlIQkKhdjaS0?loadFrom=DocumentDeeplink&ts=1836.1)):

Now, I think I'd answer this question differently. Libertarians need to be more concerned about the threats to human freedom that come from private as well as from public power, from non-governmental, as well as from governmental actors. Unlike the left, however, who seek to collapse the public private distinction and make everything public, libertarians, conservatives and even modern liberals need to preserve the public private distinction. That poses a bigger challenge for us to identify exactly what limits on power wielded by non-government actors are warranted. But that makes it no less important for libertarianism to come to grips with how liberty that is needed for human flourishing marriage protection in the real world from both government and non-government and actors. Libertarians may need to be a bit more libertarian and a bit less propertarian. Thank you.

Hon. Kyle Duncan ([00:31:33](https://www.rev.com/transcript-editor/shared/E6phNYhrrTm056ZVIz1R6muCi0fBTTnRGVSVaDq1KMVDqGmtMa4zRTStWvD786xNHUI4oCdlwbYz742s0SltFe-1bL8?loadFrom=DocumentDeeplink&ts=1893.28)):

Thank you, Randy. I will now pass it to Jonathan Urick. Jonathan, we just heard from Randy and from Maimon about concentrations of private power, and of course those are often going to take the form of corporate power, and so do you see an inherent tension or conflict between corporate rights and individual natural rights, and do corporations warrant some kind of special treatment because they're creatures of the state? What do you think?

Johnathan Urick ([00:32:11](https://www.rev.com/transcript-editor/shared/2QLresrKCw77Ou6HhZT88bqITzMQlQ0x8-tfKKXpUGiNu8TXK-NJ6fwAQBCvaeXooCIWKZlrk1bUh6fMjp7M9fWqxf0?loadFrom=DocumentDeeplink&ts=1931.47)):

Thanks, Judge Duncan, and for the kind introduction and many thanks to Alida and the Federalist Society's Freedom of Thought Project for including me on this wonderful panel. Just before I get to the substance of my remarks, I just need to start with a brief but important disclaimer. I'm here today purely in my personal capacity. My remarks do not necessarily reflect the views of the US Chamber of Commerce or its members, but with that out of the way, let's talk about natural rights. So since the panel is about natural rights, I think it's appropriate to address more theoretically the general implications of such rights for corporations and their regulation by the state. I'll definitely touch on law and legal history, but I want to mostly talk natural rights theory. The panel description poses the question, "whether rights primarily limit governmental power or whether they protect the natural rights of individuals".

Johnathan Urick ([00:33:06](https://www.rev.com/transcript-editor/shared/esTHQl3hmRvUtp-aJW3LqYv_ON8Q9tHkTlX69aV2_orpAok8TXlfR0Wmzm1paQ-RGpFFWnkyhrzmDBJVQBAnNXz1XH8?loadFrom=DocumentDeeplink&ts=1986.41)):

And I think the obvious answer to that question is of course, obviously both. Rights such as free speech, protect the natural rights of individuals against both governmental and private interference, for example, by violence, but each individual's natural rights end where others' natural rights begin. There is no natural right to violate the rights of others, for example, by compelling their involuntary association or contract with you. So I thus reject any abstract theoretical conflict between the natural rights of individuals and the rights of corporations, and for reasons I will describe, the modern business corporation is not merely a creature of the state, so to speak, warranting special regulation because of its supposedly unique privileges that are in conflict or tension allegedly with natural rights. On the contrary, as some of the prior panelists indicated, there is no such conflict or tension at all because the natural rights of individuals and the rights of corporations are one and the same.

Johnathan Urick ([00:34:14](https://www.rev.com/transcript-editor/shared/Hj2I6nWA5Jb1TfHHG8fUXdn4ChGq-9CN6-lNroSPCTuqkWHaX5kZDQTwjLMwznwrBeZO2ufAtz6-3uc3U8rMHpiu63U?loadFrom=DocumentDeeplink&ts=2054.09)):

That doesn't make corporations completely unregulable by the state. That's not what I'm suggesting at all. It just means that the corporate form does not lower the theoretical bar for such regulation. So state regulation of corporations is not somehow easier to justify then regulation of individuals because corporate rights are individual rights just exercised collectively. Protecting the latter cannot justify flipping, just for business corporations, the ordinary conservative and libertarian presumption against restricting the exercise of natural rights. Some other justifications outside natural rights for regulating corporations are required to overcome that presumption such as the public good or social welfare or economic efficiency. But those justifications must be the same sort of reasons that justify restrictions on the natural rights of individuals. As a theoretical matter of natural rights, in my view, corporations are not uniquely susceptible to state regulation simply because of their legal form. Individuals have natural rights to own property, to contract, to speak among many other natural rights that Randy's taught us cannot be listed, and they have a corollary natural right, I think to associate with others to exercise these natural rights collectively and to empower representative agents to exercise their natural rights on their behalf.

Johnathan Urick ([00:35:44](https://www.rev.com/transcript-editor/shared/Q-dBNEO8cBc7r-X4BeyxKTI1nxA1aewrRPLyXiOrrV2kPlPIsygrRxyDB56UqEM-J7KDn-RcjleCHldcV_tz8sOqIME?loadFrom=DocumentDeeplink&ts=2144.7)):

So I see no significance from a natural rights perspective in the separation between ownership and control, even at a very, very large scale, at least as a theoretical matter, you have a natural right to hire agents and appoint them to exercise the natural rights of very large diffuse collective groups. Every organization, regardless of its legal form or features, consists only of individuals. So whatever we call it a group or association is only a concept. It's a mental construct, a stand-in that we use to classify different types of relationships between individuals and the rights of any organization or association are thus the rights that it derives from the individuals who create and sustain that organization. So as a matter of natural rights, a group can acquire and exercise only those natural rights, which its members possess as individuals, nothing more, nothing less. So when individuals join together in a voluntary venture, they neither gain nor lose any rights.

Johnathan Urick ([00:36:50](https://www.rev.com/transcript-editor/shared/1cfAfn6gU7YnldmDOrY-oXsfK3_GZ1Ew-1VIqmGBy2LDGke2QwxryvCdsOA9PzPNHLDptqbJnsHp5QK7OzEvbie36Ys?loadFrom=DocumentDeeplink&ts=2210.79)):

I think these associational implications of individual natural rights are fairly straightforward and uncontroversial, and so in my view, what we refer to today as a "corporation" is simply a collective body in which individuals come together to exercise their natural contract and property rights as investors, managers, employees and suppliers. So to use a term from the law and economics academic literature that Professor Miller referenced earlier, the modern business corporation is simply a "nexus of contracts" among these various groups. So for purposes of natural rights, then this nexus of contracts is the same, should be treated the same as other ordinary contracts between individuals. The state, in my view, thus only creates, so to speak, corporations in the limited sense that it creates other types of private contractual relationships, that is by recognizing them and enforcing them. I thus respectfully disagree with Randy's claim that there are no corporations in the theoretical state of nature. Look to be sure I'm not making a ridiculous claim that there are corporate charters issued in the pre-political state of nature.

Johnathan Urick ([00:38:09](https://www.rev.com/transcript-editor/shared/lKpW6ibtkArG85bP7wuWFaxKfltNQ4WS-zG2R1_RmqtVqfNljmBJwsoZBGZUkKPWIp1aJHUQmhAEtZSJBzF6ULERdmM?loadFrom=DocumentDeeplink&ts=2289.03)):

That's not the claim I'm making, but a state granted corporate charter merely recognizes the existence of this nexus of private contracts that we refer to as a corporation, just as a marriage certificate, for example, recognizes a private relationship among two people that we call a marriage. But I don't think we would say that the state creates, so to speak, marriage, the relationship that is marriage. So, far from being a creature of the state, the corporation's salient features which we've discussed a little bit on earlier panels, in my view, can arise through the voluntary contractual association of individuals independently of the state without violating anyone's natural rights. And interestingly, in the late 17th century, British businessmen actually discovered this on their own that they could, through private contract and trust law, they could create joint stock associations copying closely the structure of the companies which held royal or parliamentary charters of incorporation without obtaining government permission.

Johnathan Urick ([00:39:20](https://www.rev.com/transcript-editor/shared/ZJONnCMYr-lHtZOcCfNOzXZJnLfgweuJMfZ28ifatdnX2h5cg5tCZVW-qsoi_2_8tud3ank-slMXmQFdhuCQsuLgkrk?loadFrom=DocumentDeeplink&ts=2360.29)):

And these joint stock associations are pretty close predecessor of the modern business corporation. Indeed, in my view, they're closer in substance to the modern corporation than the specially chartered corporations of old that predate the modern shift to general incorporation. Laws, and parliament actually did attempt to crack down in the 18th century on these joint stock associations, but they nevertheless flourished on both sides of the Atlantic. And so the most important features of the modern business corporation that are commonly identified as so-called special state, created privileges are entity status, perpetual duration and limited liability. We basically covered the first two in the prior panel, so I won't go over them again. Both of those features can more or less be created through private contract and agreement. So I'll skip right to limited shareholder liability. Limited liability with respect to voluntary creditors is super easy to justify under and reconcile with natural rights.

Johnathan Urick ([00:40:19](https://www.rev.com/transcript-editor/shared/N9-pbEx1BmYu3_2BrVrzv6B8shyNq-4TWoIV275pNFSQ6Pxo5MFYuoRDji2MDt3sVWnfpurZFXIQsXSj4VGiVFK92gU?loadFrom=DocumentDeeplink&ts=2419.15)):

It's just an implied contract. If you contract with the corporation, lend it money, you implicitly agree to that limited liability, that's easy. So what about limited liability to involuntary tort creditors? I would argue that this is also consistent with natural rights, even though it affects third parties for two reasons. One, investors actually can already contract for such limited liability in other forms. For example, you can contribute to a partnership as a non-partner creditor, right? And you get limited liability with respect to torts. Indeed, limited liability with respect to torts is not even unique to corporate shareholders. It's actually the default rule, the general rule for creditors overall. And so I don't think it's a special privilege for just one class of investors, for shareholders, right. So that's the first response. And then my second response is perhaps a little spicier, which is that in my view, any strict shareholder liability, meaning liability without fault for the torts of corporate actors seems to be an exception to the natural rights of shareholders rather than an exception to the rights of tort victims, right. Now, again, I'm not saying there may be other good bases for justifying the rule of vicarious liability for shareholders or otherwise, whether it's public good or economic efficiency, but it seems to me inconsistent with natural rights to have pure, strict vicarious liability for the torts of others for principles on behalf for the torts of their agents

Johnathan Urick ([00:42:01](https://www.rev.com/transcript-editor/shared/FI_dBWpOQWjndTfy2UIRaYdEnI60Af6tOf4d1ZmPiStsP9chJJwZk8RJ3mtpEvzv3ecTNwJFwofB92fXGUIPMbRlJrI?loadFrom=DocumentDeeplink&ts=2521.77)):

because property doesn't commit torts, only people commit torts. So I don't think what the natural right of a tort victim to a remedy for wrongful conduct requires strict vicarious liability. So from a natural rights perspective for these two reasons, I think it's not a special state created privilege. And so is this consistent then? Is this picture, if I'm correct, that as at least as an abstract theoretical matter, that the modern business corporation is consistent with natural rights? What about American legal history? Well, look, as we've discussed, I think sure, the corporations that existed in the special legislative charter era before the adoption of general incorporations laws, those were largely corporations granted monopoly privileges, other special legal privileges, sometimes even the powers of the state like eminent domain or certain police powers. Sure, I think it makes perfect sense to treat them differently theoretically as a matter of natural rights.

Johnathan Urick ([00:43:07](https://www.rev.com/transcript-editor/shared/6R07uoMB-9uc6TrOQVY7Ldw3qVhKzmvPJdb1LSzlyDxUzqZYkrpNtPHj_BTWQaEmM_hdkcvAGrsjsFZ49cVSq-Itl0I?loadFrom=DocumentDeeplink&ts=2587.04)):

And thus it made sense at the time for courts to have a different model of the corporation. But by the late 19th century when there was widespread adoption of general incorporation laws, I think the judicial understanding of the corporation aligned with the associational model that I'm describing now by the 19th century. I have a bunch of case quotes, I won't quote 'em right now because I'm running short on time, but I think by the time of the Modern business corporation emerged at the end of the 19th century where it was no longer this special grant of a charter by a legislature with special monopolistic and other privileges, the associational model of the corporation won out legally. And so I think it would be a huge mistake to just import that old model of the corporation during the special legal charter era to these new entities that we call corporations, but that are totally different, right?

Johnathan Urick ([00:44:04](https://www.rev.com/transcript-editor/shared/PnqYfnqjTz8aacYxZTDiSHf96a9m8LRKRoqiZeB_3BENacmigcq5VsbUZH6fiOP6lFUH34bwxY-ScnX3oEQOVLC8aYI?loadFrom=DocumentDeeplink&ts=2644.19)):

I just think as a matter of original meaning, I think it makes no sense to say, well, they're named the same thing and they look a little similar. So as a matter of the original meaning of how we do legal and constitutional rights, they should be treated just the same. I think that makes no sense given that modern business corporations are just categorically very different. With that, I was going to talk about how this applies to free speech, but I've run a little bit on time, so we cover that. We'll hit that in the follow up questions I'm sure. Thank you.

Hon. Kyle Duncan ([00:44:31](https://www.rev.com/transcript-editor/shared/d606iQn_cIu574As7vgANBdCnoc_VamDNnHuFAIEp3pUALa1BhqFmCoUhPAU0a7v-mcwi-EChDgCQvV-u_xgoM4IkUQ?loadFrom=DocumentDeeplink&ts=2671.2)):

Thank you. Alright. Jonathan reminded me that I should also offer a disclaimer that nothing I say here is reflective of the court that I sit on, which should be of great comfort to the panelists. It means that we're not going to get reversed by the Supreme Court anytime soon. Rohit, I will turn it over to you. Thank you. I know you wanted to talk about concentrate, you want to comment on this idea of concentrations of private power rivaling government power.

Hon. Rohit Chopra ([00:45:03](https://www.rev.com/transcript-editor/shared/S4STxIEwYPfbjT-MPj-jytkpdgKVShgWts0YYc8-OpOIwwHsowJB5m_tAM5SC_dlrKVdIB-ZYIo-pYGE-d1VMNZ3yRw?loadFrom=DocumentDeeplink&ts=2703)):

Well, thank you so much Judge Duncan and I especially want to thank everyone who put this together, especially Alida and her team for inviting me back to The Freedom of Thought Conference. Let me just start with, again, the prompt about what should be the great threat that we are always thinking about: government power, private power, or both. And I think there's an emerging consensus that increasingly in our lives there are private regulations and laws being decreed outside of the democratic process. We have more and more firms throughout the economy who have unusually an enormous power to dictate the way in which we interact as humans, the way we connect in the commercial context and so much more. So I actually want to really build on what Professor Barnett said and Professor Schwarzschild talked through in their remarks with potentially a little bit of a finer point on some specifics around concentration and regulation as we heard earlier.

Hon. Rohit Chopra ([00:46:19](https://www.rev.com/transcript-editor/shared/BQrxNK9mbDTx83Gu2WAYSTkxJ7hNUH5N1jYoLH_PRJtRj2hA0tJeRl0Hrf__Y5dWR9XwGEfekEHKCHE21kqnkFsu0-c?loadFrom=DocumentDeeplink&ts=2779.47)):

So let me start by saying that we learn in our economics textbooks and from the economists that firms will essentially produce until marginal revenue equals marginal costs. This of course, it does not bear out in any conception of the modern economy where firms are actually maximizing on returns on equity. Returns on equity are maximized under a series of strategies, but what many in our private economy realize is that return on economy and equity is not maximized through some sort of output or other types of traditionalist economics textbooks. It's really about figuring out ways to agglomerate a certain must have or gatekeeper power. Often with certain types of network effects over switching costs are nearly impossible. So where do we see the capital investment directed in our economy? To investment pieces that are primarily driven on what is not replicable or where there is first mover-advantages to the point of creating dominance.

Hon. Rohit Chopra ([00:47:35](https://www.rev.com/transcript-editor/shared/6RsDKWzq9oRErdaQhEYjVBS1qs6w92ahzJbVkiJAyG8FJkwX4PYEYueUKFNi7OWV2ucdPbq9VoZi3mKZjbQirAF7N1g?loadFrom=DocumentDeeplink&ts=2855.47)):

We have seen this in our history, but we see this very close up in the way our digital economy is evolving, and the title and moniker of Freedom of Thought really has focused a lot of the discussion. And we heard this earlier about the oppressive and censorious ways in which speech can be exchanged. We certainly know that the agglomerations of communications in today's digital economy, of course they have the power to prioritize or deprioritize or censor, but I think what I also want us to think about is as commercial beings, what are the other ways in which there are opportunities for other forms of censorship? So the CFPB has been undertaking a very significant analysis and multi-year study of modern day payment networks. One module focused on what we see in the Chinese economy. In the Chinese economy, there are two dominant payment systems, one called WeChat Pay and one called Alipay, both affiliated with large Chinese tech conglomerates.

Hon. Rohit Chopra ([00:48:51](https://www.rev.com/transcript-editor/shared/nJpsYbY7hkeaJXTV99VjxmDbIa7ziFNUqjnPILuGyn7HcXreF8V5H2J1A3whC-imKid01Jk4AkPrcf3mSq8aO7SCOyk?loadFrom=DocumentDeeplink&ts=2931.55)):

They really traffic the vast majority of point of sale payments as well as a considerable amount of digital payments. Now, these two individual firms, many people examine their enormous power to be able to dictate who gets to participate in the Chinese commercial markets and think that power derives purely from loose affiliations official or unofficial affiliations with the CCP. But I think it's important for all of us to think about what power would they have even if they were separate and apart from the Chinese government, they would still, in fact, I would argue, have the ability to create the private laws that could determine winners and losers in the society, cutting people off from the ability to exchange money. We have started that process and looked broadly in the United States of where are there similar types of choke points? Of course, we know that in the US two of the main payment networks, Visa and MasterCard, outside of legislation or regulation, set the parameters and rules whereby merchants and purchasers, issuers, and others are able to participate.

Hon. Rohit Chopra ([00:50:17](https://www.rev.com/transcript-editor/shared/Irr0O0yOLA6KHKR_Mn-73L_BPT8Cb_nc4W1QTjaX1v5VLlh1iFpcy6EPXqWO9OX2uqR0CYQykr7v1W0KCTQAd6U01hc?loadFrom=DocumentDeeplink&ts=3017.38)):

We will of course always wonder when will those rules become the place that could determine the winners and losers, even in our commercial economy? But as we lurch into the future, we are increasingly seeing greater and greater dominance of big tech firm or other payment networks that have that type of power. We have been assessing very large dominant tech firms like Google's Google Pay, Apple Pay, others, as well as some examples of where there has been network effects and tipping points such as the commonly used Venmo and PayPal services. Many of you might recall how a year and a half, two years ago, many people who were users of PayPal's Venmo service received some communications and there was news about this, about the ability of that company to be able to sanction or fine you, taking money and confiscating it out of your account, for your activities or speech that may have been unrelated to payments.

Hon. Rohit Chopra ([00:51:31](https://www.rev.com/transcript-editor/shared/bV_7X1OYqa-SMy2_xP-DTZmLhT-_br7OSFwWGeCarZeKoWCLzpavZbDrmcInyBF0LLC323R8UsJLFBslBdxW-re1VHo?loadFrom=DocumentDeeplink&ts=3091.25)):

In other words, creating a way in which they're setting laws or conditions outside of the democratic process that deny or foreclose access to what is essentially essential payments infrastructure in the society. So I think we should all really worry about how modern day business practices that encourage the accumulations of capital for these businesses with difficult switching costs that cannot really be easily replicated, that are sometimes referred to as winner take all markets. At what point do those entities start becoming lawmaking bodies, regulators on their own? And I think I run a regulatory agency that is subject to all of the ways in which the Congress can simply pass a law to change through the democratic process that is not necessarily what we have with these enormous agglomerations of power today. So I want to briefly talk about where are the places we should be most concerned about private power?

Hon. Rohit Chopra ([00:52:45](https://www.rev.com/transcript-editor/shared/C3suPuAZKjOK0O4WNN8UurfkUZvwjRx6Ds2eotxDAbUmGvpmrqcjiUqcmP5V4DPMWKUvQRicjeh1nEgjynCFwAHOoUI?loadFrom=DocumentDeeplink&ts=3165.56)):

So there's of course the emergence of the concept of the economic termite, the concentrations of power that have crept their way into the entire economy, extracting rents through the process, through a must have input. There is also the type of business that is a network based business that we might also think of as social infrastructure, critical infrastructure. And I think if we reflect on the past hundred years and generations ago, there was a time in which, and I think this was mentioned earlier on a bipartisan basis, a real recognition about those threats, especially when it comes to speech, but it's also more I would draw your attention to the Packers and Stockyards Act, which really raised serious concerns about the coercive power of some of the concentrated meat packers and stockyards operators where there was natural oligopolies and the ability to set rules in ways that a producer had no meaningful option to exit.

Hon. Rohit Chopra ([00:53:54](https://www.rev.com/transcript-editor/shared/euG3-sD4dYnSgRf3-DW5mHDd9PTeBOjYe5aapJRvfFkqaYZjW0-XquL379clR0KlYkKgNewuRFI-g6zSvsP7zQpMIsU?loadFrom=DocumentDeeplink&ts=3234.75)):

Similar to some of the ways we would think about how speech is increasingly limited through certain channels today, I believe the Communications Act of 1934 was mentioned whereby we would not permit certain telecom operators to be able to make determinations on which calls were able to go through or not or to be able to monetize and snoop based on the content of those calls. We have other laws, the bank holding Company Act where there is actually in some degree a less of an issue of network effects, but major issues around public subsidy and the extraction of public subsidy in the ability to then set those types of rules for the economy. I think we should be looking at all of these as some degree of place of how do we think of the modern economy in those contexts and where is it going to be more technically feasible for there be threats to liberty, which I think is a real big question right now as we move and lurch more and more toward a digitized world with fewer and fewer gatekeepers around that.

Hon. Rohit Chopra ([00:55:08](https://www.rev.com/transcript-editor/shared/W4X3XR1g9fotS1rkAdBj2627r6G74u3s00LE0cJ77vOCMZZGvJIs4MaG9kGbJ6vSXe13cAxBoCdPobePFpWb1GSBWVg?loadFrom=DocumentDeeplink&ts=3308.13)):

I believe Professor Barnett raised the issue of the Civil Rights Act, and I wanted to just build on something he said where he used the term discrimination, and in fact, when we think of anti-discrimination in the 1960s era of protected class, that word actually derives from the common carrier tradition of not discriminating against those who are moving goods, those who are moving information, and others. So I think we in some ways need to think of how those agglomerations of power really do pose some similar threats. So here's how I would like to say that we should be thinking about competition and regulation, which I think you really importantly framed up. Obviously both play really important roles, stimulating competition and decentralization has a number of liberty enhancing effects. And I think as we think about regulation, we should also think about how we can make regulation rights enhancing.

Hon. Rohit Chopra ([00:56:16](https://www.rev.com/transcript-editor/shared/CP3Fwd-VjtP33dpGNaBoGEacemGzHUVPxzhySo2SKxVyRyAr_57mn3bFpxRU6imbLvvNoteXJ7RnVhaqdqQ6IEDFzNY?loadFrom=DocumentDeeplink&ts=3376.17)):

So what are the ways in which those types of gatekeeper power or choke points can be ameliorated? One of those ways is there are ways to do it. We are going to be finalizing some rules later this year that essentially allow individual consumers to switch and fire their bank or other financial company more easily and switch their business elsewhere. In other words, lowering the friction and reducing the switching costs to reduce people being trapped by a dominant incumbent who is laying down more private laws and regulations that may in fact pick winners and losers. And there's a lot of other examples about how we can think about arming people with more rights and more ability to control their destiny rather than allowing private actors with concentrated power to be able to dictate that. So I don't want to go over my allotted time, but just again, I really want to thank everyone for putting this together and I really appreciate some of the comments we heard earlier because I think there's a lot that we can learn from it.

Hon. Kyle Duncan ([00:57:29](https://www.rev.com/transcript-editor/shared/VErLS5e1wFR-ol1A4lSRkRg8zP2UqANn2-IMWl9n7AS6VKjpMfybLIgWq_SeGBQ3Q8GDaBjWcFBpCXcw4CrU-opZTdk?loadFrom=DocumentDeeplink&ts=3449.47)):

Thank you, Professor Kleinfeld. You told me before the panel that all I needed to do to get you going was to tap you, so I'm tapping you right now.

Prof. Joshua Kleinfeld ([00:57:45](https://www.rev.com/transcript-editor/shared/uxll8jpkDVDbWQIJLKI6069TN3DOmM_MW3wpoiis9pIVYh3nBZCchfTs8iNXWUbJhwTwVsAvnB2BR8w0R1fG79fzv94?loadFrom=DocumentDeeplink&ts=3465.1)):

Well, thanks Judge, and thanks, Federalist Society. Thanks above all to Alida. I just want to echo what Andrew Ferguson said at lunchtime about the remarkable things you're doing and have built with the Freedom of Thought project. I value it as a person who's been in the Federalist Society for 21 years now. So I'd like to tell a story. It's a hypothetical story. It starts a few months in the future and goes a few years into the future, and I just want to tell a story with a point at the end. So, story starts in July, 2024. The Supreme Court has decided that Florida and Texas may not tell private social media companies who to platform. They're private corporations, they have free speech rights too, they're like newspapers. They don't have to platform everyone. And their rights include deciding when to allow someone who in their view is engaging in hate speech or misinformation to be on their site and they can exclude them if they want.

Prof. Joshua Kleinfeld ([00:58:45](https://www.rev.com/transcript-editor/shared/CeFq3jIGse4HXFxeYknznNocqX2Z6NciVT9sfU7sPZnjrJTLoizX8b2OSHFIyfauv6fg0p8KRlb9HtcL2fn5A7NnM0k?loadFrom=DocumentDeeplink&ts=3525.55)):

There's another SCOTUS case decided about a month from now. Let's imagine where they decide that the government is free to encourage social media companies to take misinformation off their websites about the pandemic, for example, or about climate change. Now, to be sure government can't coerce social media companies, coercion is wrong, but they're free to remonstrate, they're free to correct the record, they're free to express their opinion as the government. Officials do this all the time. And of course there are big events happening outside of SCOTUS this summer, number of institutional and cultural developments. For example, many private health organizations and educational institutions, governmental organizations too agree, there are 34 genders, 34, and the struggle against systemic racism goes on. The current manifestation is just the problem of the existence of Trump voters, of course, and their racist anti-immigration policies. And worryingly, that racism is spreading across Europe with the rise of the far right.

Prof. Joshua Kleinfeld ([00:59:51](https://www.rev.com/transcript-editor/shared/Ipo6QMcqAJFoByMB0i7vqyh-ps_s0-p5vSd_Yop3-ouqp5rSUCD31RUaPlejs-LHPMBLzsfHn-jxrHT59_z9nVeMYsM?loadFrom=DocumentDeeplink&ts=3591.47)):

There are learned articles on whether fascism is back. Yet, and of course there are yet more revelations of powerful men sexually assaulting women, showing the presence of systemic sexism as well. So fast forward, it's 2026, as everyone now knows there are 41 genders. Lemme get this down, the AMA Harvard Medical School, and California state government all agree. There are some who complain about it, but increasingly they are recognized for the transphobic hatemongers they are, and particularly because social media companies recognize that denying gender identity as a form of hate speech. They use their content moderation policies to remove people who engage in hate speech with the permission given them by the Supreme Court. In 2024, Biden has been re-elected and due to health problems has replaced two Supreme Court justices, justices Thomas and Roberts, and the new Supreme Court has repudiated the SFFA v. Harvard case.

Prof. Joshua Kleinfeld ([01:00:52](https://www.rev.com/transcript-editor/shared/YepLTmmj-gcJDw262OCUuA2JUKM_6rz71juBweucs3Hoz3IN2kiW4ovBiWopz7PmH6AiBElGf1Ibq18ySO6JmHPam9Q?loadFrom=DocumentDeeplink&ts=3652.07)):

They haven't quite said that the case was racist, but they've said it was sort of racially insensitive or tone deaf and have given permission to engage in positive forms of racial affirmation. Another thing that happened in 2026 was yet another police killing of an unarmed black man. And the BLM movement has redoubled in response. And at this point, all the institutions that dominate American life are determined that every admission to a university, every scholarship, every prize and every job opportunity should take account of the need to fight systemic racism everywhere. Of course, there are objectors to this, people who say it's wrong, but they're not on social media because their speech constitutes hate speech. They have a shadowy network of communications with one another on things like Signal and WhatsApp and Snapchat, and they try to communicate with the public through sub stacks and other forms of communication to the extent they can.

Prof. Joshua Kleinfeld ([01:01:56](https://www.rev.com/transcript-editor/shared/7UhqerjnmTHHL7AqLpQCk5fNmSJjD1PYDUPINceGxZFMtVCgH5scKIWSD-cCexfkrMSi6eG44S-ohSAKSnHd_vsDKJ8?loadFrom=DocumentDeeplink&ts=3716.99)):

It's 2028. There are 53 genders, everyone knows. The problem of racist transphobic, climate change denying speech is getting worse, and it's an election year. The candidate of the fascist right is J.D. Vance, and as all institutional leaders know, this is a unique threat to democracy. They thought Trump was a unique threat to democracy, but this is a doubly unique threat, ultra unique. It's a threat to true democracy, and it's a threat by the populace who are really fascists. And it's urgent that our institutions defend democracy from the voters. And thankfully, Google owns WhatsApp and Facebook owns Signal, and so they close 'em down. Now, some people say, wait, that doesn't make sense in light of the profit motive. Those are very profitable alternative forms of communication, but there's a phalanx of economically minded lawyers who say, no, no, no. These businesses only do what is profitable. And so they must have had a profit motive. It follows analytically that they had a profit motive from the fact that they did it, and they are businesses.

Prof. Joshua Kleinfeld ([01:03:10](https://www.rev.com/transcript-editor/shared/hAOJBt7XpM5DDrlTvWNQjgbgGJbSGd3n5lHcGw7G0vdAzuIu4YrFQepxD9UsqnGZ05O6MK1kMltQ9GJH8Qge5aEH5e4?loadFrom=DocumentDeeplink&ts=3790.14)):

The biggest thing that might happen in 2028 is actually that the Vance campaign was de-banked. Since they are after all engaging in hate speech and generally in hate, they have been de-banked. It's hard to give them money to contribute to them and hard for them to spend it on advertising or whatever else, and that successfully defeats the Vance campaign. It's 2030, there are 67 genders, everyone knows, and the Stop Hate movement has taken off. The stop hate movement is the biggest movement in recent American life, and the Stop Hate movement has found that de-banking was quite effective against the Vance campaign. And AI is improving, and increasingly we can identify not just the Vance campaign as being a hate organization, but just individuals who have a propensity to hate. People who are prone to engage in hate speech and misinformation, and they're banked too.

Prof. Joshua Kleinfeld ([01:04:14](https://www.rev.com/transcript-editor/shared/IlVR9P2rIFTVVLL16Cfzyu52kqP-qROXxOh68Il1B1g3g7QVHsZgTQIPjeX4X4lYOK7HgYjCTDvi3ezHErsqC-iGdRA?loadFrom=DocumentDeeplink&ts=3854.07)):

Kind of like the truckers in Canada. Private universities insist that they too have a right to create a safe and respectful educational space, and they use these same AI technologies to enforce DEI norms against hate speech and misinformation. Social ostracism is then joined to a network of formal sanctions, and it's joined to various job consequences because of course, employers want to know in advance if they're going to employ someone who might engage in hate. And so gradually this students are afraid to speak in school and they keep their mouth shut. Private universities only, by the way, not public universities, although there doesn't seem to be too much airspace between public and private universities in 2028-30, okay, it's 2032, there are 77 genders, everyone knows. AI makes it easy to score people for their propensity to hate, and other communications networks join what the social media companies did long before. So emails just fail if you are prone to hate.

Prof. Joshua Kleinfeld ([01:05:19](https://www.rev.com/transcript-editor/shared/gZ0vtBuKwS08XodrJTT_AnAku-Zuz5gXw_ZV8iSfpjLvGSZ_kM7--MG15yCsBBuZPmC3YjDRQT7W4yOvvDl-5aDAkAg?loadFrom=DocumentDeeplink&ts=3919.87)):

Cell phones just drop calls. And some people say this is outrageous, but others point out quite correctly that the principle underlying it is the same as the principle under underlying the social media companies de-platforming people who they have no responsibility to platform because they're private corporations with their own free speech rights. Verizon is a private corporation with its own free speech rights, and so is Gmail. Other institutions follow suit. After all, universities have done so. So why not K-12 institutions? They no less than universities have an interest in a safe and respectful learning environment. And why not airlines along with banks? Why not hotels? People get a known traveler number, and your known traveler number doesn't identify your propensity to terrorism, but your propensity to hate, and that affects your ability to travel. It is 2034. There are 83 genders.

Prof. Joshua Kleinfeld ([01:06:16](https://www.rev.com/transcript-editor/shared/MR3jo5OVjlrhuMNRD_SnGfSEIszy2f8Cs-4ElhEZKL-rB4RFxjHBidrN6Kx25l43EroX-7Id84WcZ4lZ6Ugs-ShPrn8?loadFrom=DocumentDeeplink&ts=3976.66)):

The United States is indubitably the freest country in the world. It must be. All our political philosophers and constitutional lawyers agree. There has been no state action to invade free speech rights. In fact, alone among the western countries. The United States recognizes that private corporations are rights bearers, and their rights must be respected too. Private companies can be who they are, and if you don't like it, hey, start your own. Wisdom has prevailed. Corporations are a nexus of contracts. Their freedom is an extension of the freedom of all natural persons, and on a larger level, we recognize that state oppression is unlawful, but oppression just is state oppression. Conceptually, analytically, no other kind of oppression is possible. Oppression is the state. The state is the only oppressor. So if you limit the state, you expand freedom. It's necessarily so. To limit the state is to expand freedom, and by the same token, we recognize that all rights are limitations on the state.

Prof. Joshua Kleinfeld ([01:07:17](https://www.rev.com/transcript-editor/shared/EdLDF45p8bS7ZtDa3hjbkiAk9lN4E96JXuvAZovOqB5JfTTWYY1VIVQSIXTWf7PN_irKKQ9hBeWNZnaf7mFEmUNYDUk?loadFrom=DocumentDeeplink&ts=4037.59)):

And again, that's just a conceptual truth. That's what a right is, is a limitation on the state. There are children and there are rubes who think silly things about rights, like being free to speak means you can't be fired for what you say, but they're just unenlightened. They don't understand that rights are limitations on the states. It's a curious thing. As of 2034, we know we're the freest country in the world, but no one feels free. Even in 2024, foreign visitors to the United States, our students in our universities, for example, say that American free speech is a joke. They feel more controlled than they do in their home country. By 2034, 98% of Americans say that saying wrong things in class or at work will lead to sanctions they cannot endure. In a sense everyone knows, but in another sense it's always changing. On the one hand, there's a general understanding that the unsayable things are broadly about identity plus special topics like climate change.

Prof. Joshua Kleinfeld ([01:08:18](https://www.rev.com/transcript-editor/shared/g1APPgEJvdD7w0tZynVrILlPxf-Gqye_hzPvyMixppb7gnb68bwGkIy6T9Rasa5JFtoSQIkgGEnaCRXSdjogkYYXOhE?loadFrom=DocumentDeeplink&ts=4098.35)):

On the other hand, the lines keep moving, and so occasionally people without meaning to mess up, they say something they didn't realize was unacceptable and they get spanked or really destroyed. But that's the educational process. That's how the rest of us learn what's unsayable and what's not. In terms of how people live of course, people fall into line. There's a few rebels, of course, they're almost all male. They're the kind of people who don't like to make eye contact and talk your ear off about cryptocurrencies. They're not quite live off the grid types, but they're getting close. Socially normal people do not rebel against the entire structure of their society. In fact, they don't even disagree with the entire social structure of their society because that's an impossible cognitive burden to sustain. They modify their thinking to live within the social norms that they experience. I'm going to end the story here in 2034.

Prof. Joshua Kleinfeld ([01:09:11](https://www.rev.com/transcript-editor/shared/Ef3EzcWek3ZNvQdB6kKjXt4APQMsWY0x1LlZtVJr9FCLGmBu2GEeQtspFh8qxbWwqDDLAScgSE4dDZYbfyhvKEy95gI?loadFrom=DocumentDeeplink&ts=4151.63)):

I'll let you imagine what happens on the way to 2044. A dystopian story is an invitation to see something that is going wrong in the present day, but what has gone wrong? After all in all of my story, there is no state action. There are some things when you feel them, when you're in love, when you're having fun and when you're free, but you still need to make sense of how you feel. You still need to make sense of whether you're free with what justification. What I want to suggest is that what's gone wrong in my dystopian story is a fundamental mistake, a philosophical mistake about the nature of rights. A right is a functional capacity to live in a certain way. The freedom of religion means to be sure that you can't be told by the government who and how to worship, but it also means you can't be stoned for blasphemy.

Prof. Joshua Kleinfeld ([01:10:10](https://www.rev.com/transcript-editor/shared/1XjHgp1ehbJYHODYauADvsrZAswmuo2WzX2AVZEl6fUJK6B-hD1HtPZvIOK5ot5XAPbLPHQb-nNFfuE1t_dJJeh3uFc?loadFrom=DocumentDeeplink&ts=4210.94)):

The right to free speech is a right to speak without consequences so severe as to overwhelm a reasonable person's willingness to speak. Can only the state infringe free speech? Is the legal right to free speech only a right against the state? No, there's no foundational structure as to who can infringe speech or other natural rights. This is my contention as a philosopher, a right, is a right to a functional capacity to live in a certain way, but there's no foundational structure to how those rights can be invaded or how we can defend them. It's not as though the constitution applies only to the states or statutes or common law, whatever else can apply only to state action. The legal protection of the right, the way it needs to be protected depends on the circumstances in which we find ourselves and over the course of historical time, those circumstances are extremely variable.

Prof. Joshua Kleinfeld ([01:11:12](https://www.rev.com/transcript-editor/shared/yVq3aVVAdvYyhkxWHiFZhiv74TENOKRt7781IAJx4DRG24GBuUthxuxSIibjy-Egsxsbt0d4AosWzLFRdSOazyXe4uY?loadFrom=DocumentDeeplink&ts=4272.29)):

Maybe the threat is state tyranny, and what we need is a system of constitutional rights against the state. Maybe the threat is violent criminal gangs. If you can shoot me, I don't have rights. And so we need a vigorous criminal law. Maybe the threat is violent ideological gangs like the Reconstruction Congress found with the KKK. And then, if you lynch me for voting, I don't functionally have a right to vote, and the solution is to extend federal protection, federal statutory protection to what would otherwise be matters of state assault. In other words, there is no philosophical structure to how we redeem rights in given circumstances. It is a question of the contingent circumstances in which we find ourselves. The greatest error in modern political or legal philosophy is that a right is conceptually defined as a limitation on government that has no support in the foundational thinking on the origins of rights, the early enlightenment thinking that inspired Locke, the idea that we're beings made in the image of God and endowed by God with certain inalienable rights.

Prof. Joshua Kleinfeld ([01:12:17](https://www.rev.com/transcript-editor/shared/XMxaJR5mIZa7x3SfoRKd4MMl80zwQ_LQUFmiwos1JWR3jJKGfxz0HQ0da0hIy6lBGCireCPSHR9WMpJkcsA2hIQkj54?loadFrom=DocumentDeeplink&ts=4337.52)):

It has no foundation in utilitarian enlightenment thinking that we are beings who have the capacity to suffer and our rights exist to prevent certain kinds of suffering. It has no foundation in the deep Kantian or deontological thinking that we are beings with the capacity for freedom and that our freedom has to be defended. It has no support at the American founding. It wasn't part of the natural rights tradition that the founders believed in or the common law tradition they inherited. It was not part of their conception of rights that they were fixed, that rights were purely limitations on the state. In fact, they innovated things like common carrier doctrine precisely because they didn't think that. It has no support at reconstruction. There was a recognition then that it was private actors interfering with rights and that securing the rights meant using the government against institutions like the KKK or private hotelieres or the like to secure people's natural rights, and no support in the modern civil rights era, which developed the ideas of places of public accommodation to defend rights.

Prof. Joshua Kleinfeld ([01:13:23](https://www.rev.com/transcript-editor/shared/weAazFwVvcE-g_eI4pC5PBDLAo32Q7M1ubxD_fRu6FewJhkP83xlN8kdWY6vhU4n_loTZhCZSh05RUyQNn_gFZXLjwQ?loadFrom=DocumentDeeplink&ts=4403.46)):

Now in our era, there is a great threat to rights from those who would create systemic oppression in the name of a comprehensive ideology. And there's a phalanx of defenders of this new threat to liberty from two sides. From the left, of course those who agree with the ideology being imposed, not all of those on the left, but some. And from some of those on the right, there are those who cannot conceive of a right except as a limitation on the state. But I say again, a right is a functional capacity to live in a certain way, and our goal is to organize society in such a way, is to make sure people can live lives characterized by the enjoyment of certain rights. How we realize that those rights depends on the circumstances of our time. Thank you.

Hon. Kyle Duncan ([01:14:10](https://www.rev.com/transcript-editor/shared/u-7qxK3RTZ82CneHQYamRS-gAGa8W1zB0xRRpps0_REqtQvYq62vrMwwMzKG8q0YepEDnYHk-bv_JhdxMjqnbnzXK6A?loadFrom=DocumentDeeplink&ts=4450.17)):

Thank you. I should say if the professor thing doesn't work out, you could get a job writing for the TV show Black Mirror, and yes, of course, of course you say you were describing the future, Professor Kleinfeld, but it sounded like modern day Scotland to me was what you were describing.

Prof. Maimon Schwarzschild ([01:14:35](https://www.rev.com/transcript-editor/shared/H-6hk5hG_-gNe-8vi7m9a23Oix4c1HZcI8wYx9Q2yWnmuhgKku6nmELSuOLZeXKQ_fi8iZ1-wU6H1c43I0UH5juPleQ?loadFrom=DocumentDeeplink&ts=4475.77)):

Canada too.

Hon. Kyle Duncan ([01:14:37](https://www.rev.com/transcript-editor/shared/X-S8rDmZD0dRzfUxYkqoSqsNTmMYfAXGH5DjBNp457_aK-gvQ7VHdv2fd6Y0SyXuFINPeJBCqXKzkeCBWBMqB8zqcJE?loadFrom=DocumentDeeplink&ts=4477.27)):

And Canada, yes. No disrespect of course to those great nations. Alright now, so I have let everyone run over because I believe in spontaneous ordering. And so what I think what we'll do is we have just a few minutes left. I'd like each of you, if you want, to just add something to your presentation in response perhaps to something that you heard, if you wish. And then if we have a few minutes after that, we can take one or two questions. Why don't I come back to you, Maimon?

Prof. Maimon Schwarzschild ([01:15:05](https://www.rev.com/transcript-editor/shared/6d7fj3PLryrljH429vXE72s_RKJ0jHJA7sL_lLotp_EGwC80lLvE6sPIuQZNKzI6ljWhlEmYFcresWUu5ehiaU0Y_CY?loadFrom=DocumentDeeplink&ts=4505.8)):

Well, I think to some extent all of us, on the panel at least, are grappling with much the same issue, namely in a world in which Josh's dystopia is very imaginable and in which, as Judge Duncan says, to some extent you don't have to wait until 2034 or 2044 because there's an awful lot of it going around in 2024. The question is to what extent both government and private institutions, including corporations, and then third of all, the collusion of government and private corporations all can be dealt with in ways that don't impede human flourishing and in particular that don't create a censorship regime and a regime of the suppression of freedom of thought and freedom of speech. And that's really that's the dilemma. And it seems to me there are two possibilities. One is that government is unique, and the government can drive a tank into your drawing room, into your bedroom.

Prof. Maimon Schwarzschild ([01:16:35](https://www.rev.com/transcript-editor/shared/MMP77H1R3CH6eq7HuaOxzY6M_Mw3u_hI9kz06VF3Zn0XNr9bJ73jPklJyWDMTMDeZVpChPdIgaZfSMsLbEIOljil9hU?loadFrom=DocumentDeeplink&ts=4595.89)):

And a private corporation can't do that and therefore that it makes sense to treat government as a uniquely suspect threat to freedom. And that private ordering is less threatening and more compatible with human flourishing. And the trouble is that there's an awful lot of evidence going around that it isn't necessarily. So we see in the Supreme Court term this year examples of private abuse, some of it promoted by government. The Vullo case, which the Supreme Court very interestingly decided a couple of weeks ago, involved essentially, pressure from rather thuggish New York state agencies on banks and insurance companies to de-bank and De-insure the National Rifle Association. And interestingly, it was so thuggish on New York's part and so overt and so subtle that not only was the Supreme Court unanimous that this was a violation of free speech by the state of New York in violation of First Amendment, but the opinion was written by Justice Sotomayor.

Prof. Maimon Schwarzschild ([01:18:07](https://www.rev.com/transcript-editor/shared/umeJn-d5ffwmXTGb5NKPryF9_Az4hBM3bQikZ0Nui9qyfPgvx-_EKKCyutRWEBsCB0GQGg3dIWD-9ujklN154UNM-ks?loadFrom=DocumentDeeplink&ts=4687.67)):

The Biden administration felt constrained to come in on behalf of the NRA, as did the ACLU. And implicitly the Biden administration, I think it was visible to everybody, was coming in on behalf of the NRA in order to vindicate the Biden administration's own slightly more subtle position in the Murthy case and in other contexts where the government wants to claim, oh, we're just expressing our opinion to the tech platforms and the social media companies, and we're not actually bullying them or strong arming them in order to suppress misinformation. And so the Supreme Court came out unanimously with the backing of the Biden administration against that kind of government collusion with efforts to De-bank people for their ideas and their thoughts in more subtle context. It's more subtle and it's predictable that however the Murthy case comes out, it's not going to be unanimous.

Prof. Maimon Schwarzschild ([01:19:16](https://www.rev.com/transcript-editor/shared/8aTHywFSBeLVJIhsn7B1J3-hx3IkWToPKMIZCRWQLvmFBOU6-vkUUCY666JqFrjUb-Dmv8zOK7bgDSMSfCFQ85v4wL8?loadFrom=DocumentDeeplink&ts=4756.91)):

And that's the problem really that confronts the courts in the country and those of us who are concerned in Federalist Society about maintaining a free society. And the tension is between seeing government alone as a threat, and the idea that pluralism, including pluralism of corporate entities is an effective counterweight and an effective antidote to creeping tyranny. And the question of whether corporations and private ordering will successfully do that or whether they too are culturally and in other ways so prone at this point to attacking freedom rather than promoting it, is the problem, I think of, perhaps the greatest problem that those of us concerned with freedom are going to be needing to wrestle with now and in the foreseeable.

Hon. Kyle Duncan ([01:20:35](https://www.rev.com/transcript-editor/shared/3Yghcm_yUUuj8rqPgeaPPN7g_ehacQ_8_3pbX3t2FEJvzTX6ijQ4xdPadmsAua4q_E7sRCnU3TRoSxE7sVO23N3u5lg?loadFrom=DocumentDeeplink&ts=4835.94)):

Thank you. Why don't we let, Randy, would you like to add?

Prof. Randy Barnett ([01:20:38](https://www.rev.com/transcript-editor/shared/PxO9Nwm5YLulnZMQFnKFqIyDcIF9KILdxNu3d8zf7tqUV7OEi4ipE3RhKQJMxrFdGDYPecs2CKH9IEupE4mX_gw3Jxs?loadFrom=DocumentDeeplink&ts=4838.76)):

We don't have much time left. I'm going to make two basic points. One is that our history says that rights first and foremost are rights that we have against each other and not against the government. I cite first of all the Declaration of Independence, which after affirming the natural rights to life, liberty, and the pursuit of happiness says to secure these rights, governments are instituted among men deriving their just powers from the consent of the government. In other words, what it's saying is that governments are established to secure these rights. Governments are not established to secure these rights against government. Governments are established to secure these rights against each other. That's the first duty of government. Then you need a constitution to protect us from the protector. So you create a new problem when you create government to secure these rights.

Prof. Randy Barnett ([01:21:24](https://www.rev.com/transcript-editor/shared/n5ZRAiSQA2wLxxtO3rUj2KRSf1e0_FmW8TvFg5WowEOl00hAHA1kYJrKBLe2Gs9CwqCfOx8_o4S983_H9Y3uk9Vfuqk?loadFrom=DocumentDeeplink&ts=4884.33)):

But the first duty of government is to secure these rights. The equal protection of the laws that is protected by the 14th Amendment was put into the 14th Amendment because southern states were failing to protect the rights of its people from private violence and from private rights violation as well as later on from private discrimination in places of public accommodation, places of public amusement and common carriers. And it was the failure of state protection that gave rise to the need for a constitutional amendment and a section five power in Congress to fill in the gap that states were leaving open. So this is an example of how rights can't possibly be limited. Natural rights are not possibly limited to government, especially in the state of nature when there is no government. The second thing I'll just say very briefly is a plea for theory. Now I know that lawyers don't like theory and a lot of people don't like theory, but the issues that we've been talking about on all of these panels are very complicated.

Prof. Randy Barnett ([01:22:22](https://www.rev.com/transcript-editor/shared/UINzS5VTr-bHfYxB-YdAGhBipeGzIU3pZoTGU5AUddxBD5YuR8-dm2zxHQSL43jksqfNGrYUrEIM9XAaw-KOyvuCllU?loadFrom=DocumentDeeplink&ts=4942.5)):

And it's not enough just to take a dystopian view of the kind that Josh so eloquently described and say, alright, there's a problem here. You have to do something else that Josh started doing. And that is you have to have a theory about what the problem is, and the theory, he formulated a theory of rights. Well, he has to do that in order to figure out what's wrong with what's going on. So this is where academics come in. This is where scholars come in. We need this. And it's not just enough to legislate by the seat of your pants. It's okay to try because in the meantime the house is on fire. You might want to try to do something to put it out, but we have to think harder about exactly what liberty is and where the threats for liberty lie and how to distinguish between corporate power when corporate power is simply being used to make profits and when simply being used to protect itself and when corporate power is being leveraged to affect the decision making and conduct of all the rest of us.

Hon. Kyle Duncan ([01:23:18](https://www.rev.com/transcript-editor/shared/77IJjNk8Q-ggd8dVtpFBCTLV8Jwhko4PLLcmCdad8aBYSKhNHxI0Wttlad8CEn-6s76qu7K82DJgnGj7gB8v6_surT4?loadFrom=DocumentDeeplink&ts=4998.91)):

Thank you. I've been given permission by the powers that be to take an extra five minutes for questions.

Prof. Randy Barnett ([01:23:24](https://www.rev.com/transcript-editor/shared/WisVHNkulgsn9v9P-SH9VQ2FyEywFZ34PifZVnfksvfPH6IpARh5LXBU4LTLp39iGcZRsQM_h74azJFmG2X-ifP8bTA?loadFrom=DocumentDeeplink&ts=5004.61)):

Oh, well, in that case.

Hon. Kyle Duncan ([01:23:25](https://www.rev.com/transcript-editor/shared/XGq4uhruV1RC6BNGLDp7nMFxOoIc-dsHXKTAqzBVrLM3HxVyUJiY6JVZef7AInQAU4DKcD2naYTAbe7zPSf3irKrLT0?loadFrom=DocumentDeeplink&ts=5005.48)):

Well, and so we'll move on to Jonathan. I know you wanted to--

Johnathan Urick ([01:23:31](https://www.rev.com/transcript-editor/shared/1D59GRSAWmEaUQulIchDPjhHj9hboWMettuZCB7EHQLTZnsgNwc0CEjjFwhVc9sD9t_3Wdv4ZaAmhVNJYc96SeoT4Xw?loadFrom=DocumentDeeplink&ts=5011.05)):

No, no, no, please.

Hon. Kyle Duncan ([01:23:31](https://www.rev.com/transcript-editor/shared/ga6zJMt0O3jg7qhCQ2V9OAymFRtZR0nVUFCuQFH8l6qqGEpJj7nc-LHevicVjavQfbqWLiAInFyc45IAHEOYV1_vmeI?loadFrom=DocumentDeeplink&ts=5011.66)):

No, no, you go right ahead and I know you had something else you wanted to say about free speech or--

Johnathan Urick ([01:23:35](https://www.rev.com/transcript-editor/shared/54FEvN1CKqJ8ttClCvjMx7fnBS1nlZzdRBJc2qJThACFMzoPmFd794tqBUZG_0rENhIkcG9rNogeTGjKGfV2Y6SkrsI?loadFrom=DocumentDeeplink&ts=5015.38)):

Yeah, I mean I think this actually follows from what Randy and Maimon were discussing, which is that I totally agree in the theoretical framework that Randy just laid out, that I concede that I think it's obvious that natural rights are rights against private as well as public interference. I think the question is there are lots of different natural rights, and the right to contract and the right to associate are also natural rights. And so again, put the original meaning of the First Amendment aside for a second. There are conflicts between the natural right to speak and someone else's natural right to refuse to contract or associate with you. Again, those are not rights that are inviable or never subject to state regulation. I don't think they can be justified by a theory of natural rights. I think they need a theory of the public good or social welfare or something else, some theory of constraining rights rather than the rights themselves. Because at least I think as conservatives and libertarians, maybe we don't all share this, but I think as conservatives and libertarians, we basically accept the premise that you have a natural right to associate or contract or not with certain people. And we restrict those rights for very good reasons, anti-discrimination law, lots of things, but we need a theory of why.

Hon. Kyle Duncan ([01:24:59](https://www.rev.com/transcript-editor/shared/f5eI5nuvBXLuXQDKfaWWSNJSt33iPYz_O4Tmt9sWYXK17h7f5-ZDooOxbx1UsTDCVSEoTc_-iw3bXC9JwTxX3NcZXEo?loadFrom=DocumentDeeplink&ts=5099.47)):

Okay,

Hon. Rohit Chopra ([01:24:59](https://www.rev.com/transcript-editor/shared/q4hAqmmlPd3QhEwTjp8BC-or0yFamBzFLdijruWEj3YXkU6Zuj_qxPMt3Ur9OfosjzsRDXzNCIH1U3Z4Fy-936tTPBY?loadFrom=DocumentDeeplink&ts=5099.77)):

Let me just comment very briefly on a few people have raised the threat of de-banking and I think both as we think about the various ways in which people can be foreclosed from living their life that is beyond just some of the enumerated protections we have in our constitution. And I think the ways in which that power can be weaponized should be very, very concerning. And the general school of thought over the past 40 years is do whatever on whatever basis you want. You can even use an algorithm now to do it. And I think that the technical feasibility of implementing ways to foreclose people from living their life are greater than ever. And there's a number of ways in our existing statutes, I believe, to protect against that, that we should all be thinking about using.

Hon. Kyle Duncan ([01:26:04](https://www.rev.com/transcript-editor/shared/IicHhxg5KO7WIc_uxuLGCPvaTRURfH112bvMcIRDii148xdguiz3f0to7Y7o1nUnVeXZms_i_ynK2cSJMJTA0rL-i5w?loadFrom=DocumentDeeplink&ts=5164.43)):

When in the future is my court going to be abolished? I'm just curious when I need to start looking for another job. Forget it. That's just a joke. Go ahead.

Prof. Joshua Kleinfeld ([01:26:11](https://www.rev.com/transcript-editor/shared/eCRUHbF40JMFLk9BoMJwPok8T7RJFYYTZ9ux-hBpsHlMHioDaZKEIAZ7nSkism7_eZr-wfU5Jki9hYB9sYNa95O6Smc?loadFrom=DocumentDeeplink&ts=5171.75)):

Sorry, I didn't mean to interrupt the joke. As I said, just tap me and I get going. Sorry I jumped the gun.

Hon. Kyle Duncan ([01:26:17](https://www.rev.com/transcript-editor/shared/Ys_CzDfYdejjeTjstx9J3zJxmPTf9JD6nz83dgGud8L8sJmjpVGjXNVTCIWqIJdtqCxTD7BMkNLCdv9fXVEy438CL9A?loadFrom=DocumentDeeplink&ts=5177.78)):

No, that's all right.

Prof. Joshua Kleinfeld ([01:26:19](https://www.rev.com/transcript-editor/shared/RaWypNBYGqmfqvYqbxKhE4OY3vUgT3TFrFMiHLwCOLPTXs6E-h4b7LIXp1mYuFiSiAKZxI56Xk4Ea756-FCV50P_yIs?loadFrom=DocumentDeeplink&ts=5179.52)):

I want to take up the invitation that Randy presented at the end to start thinking theoretically about rights. I think he's right. I think Randy's right that we need to engage in some high level theory to reconsider some basic premises to face challenges that our society didn't face or didn't know it was facing before. And the place to focus our theoretical fire, at least at the beginning, is what is a right? What do we mean by a right? We want to be a rights respecting country. What does it mean to respect a right? I've heard it said that every right polices a value, that the right to life protects the value of life, that the right to freedom of religion protects the value of religion. I think that's right. I think we could add every right polices a certain way of life. So we can ask what does it mean to set up a legal regime by which we protect lives characterized by the right to life?

Prof. Joshua Kleinfeld ([01:27:23](https://www.rev.com/transcript-editor/shared/vQRmWnvkbFSFazpbp4UHOIgPi4Zmd52W_3FUz0Kcb9x0C6DN6G-ZOOI9_Vz4g7krgjbg6DWDK7z1njVz-hG9KFHNXyg?loadFrom=DocumentDeeplink&ts=5243.3)):

And I think the first thing we would all think of is protections against various forms of arbitrary violence. As Randy intimated, the first idea of the right to life as a protection against certain kinds of criminality. What does it mean to have a right to religious freedom? Well, it means that no one can tell you, the government can't tell you who to worship, but it also means that you're not propagandized or indoctrinated to such an extent that you cannot have a faith that's authentically and truly your own. You have the capacity to, or for example, read the Quran and read the Talmud and read the Torah and read a New Testament and decide which faith resonates with you. What does it mean to live a life characterized by the right to be free of arbitrary discrimination? Well, as we've long since discovered, discovered in the 1870s and rediscovered in the 1950s and sixties, that doesn't just mean a right to be free from governmental discrimination.

Prof. Joshua Kleinfeld ([01:28:16](https://www.rev.com/transcript-editor/shared/OrTZehjo6TinUQK4NgxdFj1lKlv0RA_pDSk0IngySriQAAgCGYDo7G_fcP-ZYQc-OcEsn7obEEjzefoH64bSZP3dkMM?loadFrom=DocumentDeeplink&ts=5296.01)):

It means a right to be free from discrimination in the places of public accommodation, places of work and learning what does it mean to be a person? There's a freedom of thought conference. What are the societal presuppositions of being a free thinker? To some extent it's an immunity from certain kinds of imposition or propaganda, but it's also a right to be educated in such a way that we have the capacity to think for ourselves, which is a positive, right? That has to do with our education. In other words, every right that we care about invites us to think about the legal system by which we protect a person whose life is characterized by the enjoyment of that right. And that's the theoretical exercise that Randy has invited.

Hon. Kyle Duncan ([01:29:00](https://www.rev.com/transcript-editor/shared/px__Eok22SykANr4Hv-dhM1rEVNQrrOK3M1e3p3wt-Ol4reqh4uTTfpWNRcv2F3vXPwl66FlC_sVSxsUlLZt3mT3NQw?loadFrom=DocumentDeeplink&ts=5340.17)):

Well said. We can take a couple of minutes and if anyone has questions from the floor, we'd be happy to entertain them. Please.

Questioner (1) ([01:29:09](https://www.rev.com/transcript-editor/shared/xi1ZzhBfMZuSOWqihbSyKQCyoy2Jrbt5gegkpb1VwWwq4ZI-yaeImRBVX4MiN_RRYPrzUd_IEtc_W8Z0LIB7kYq2nDA?loadFrom=DocumentDeeplink&ts=5349.36)):

Hi. So first of all, I think the only thing wrong with Professor Kleinfeld's dystopia is the timeline is just far too optimistic. And so as somebody whose family comes from the other side of the Iron Curtain, I think it's worth remembering that even the late Soviet Union was not characterized primarily by state action and censorship. The Gulag was not in very heavy use by the late sixties and seventies in plenty of places in the Soviet Union or its satellites. Instead, what you saw things like if you were a painter, there was a guild, an artist guild, which was a private organization that then checked if you were in good standing with the party, which itself was only a quasi-governmental organization. And if you weren't, then you couldn't make the purchase of buying paints. Not to mention your work wasn't exhibited, et cetera, et cetera. Right?

Questioner (1) ([01:30:05](https://www.rev.com/transcript-editor/shared/BAoI8IoeavfnkkEDjY-jKK_pMv8x3wLCB5rKAVzhIoFayPSYQ1n5HbXQ4tXNHv_CjROBySrdMZjWEIuEtiNFvVFz3FM?loadFrom=DocumentDeeplink&ts=5405.28)):

But even the purchase of paint. So I don't know that there's such a huge gap between, I think people traditionally think of tyranny, even the more classic kind, the state kind. There's always sort of this private enforcement or at least has been some of this private enforcement. But my question is we've had with Murthy, with all the NCLA cases with just example after example with the Twitter files, whatever else, Professor Schwarzchild pointed to the collusion part of this where what we're seeing is that the structure of the kind of censorship or tyranny that we're seeing has a purely private component that Professor Kleinfeld laid out in his dystopia, has this mixed kind of component that Professor Schwarzschild pointed out with the collusion where there's influence and we have to decide exactly how much influence by government is coercive. Right? So what structure, because I can just in the previous panels plus recent Supreme Court cases, you can think of antitrust common carrier law, rethinking on the theoretical level what we think of as rights or this way of life kind of protection way of thinking about this. But what actual legal avenues do you think are the most likely to develop a body or a doctrine of law that recognizes what we, even if it doesn't currently connect with our various First Amendment jurisprudence or whatever else, what we all recognize as rights?

Hon. Kyle Duncan ([01:31:43](https://www.rev.com/transcript-editor/shared/o9RtkOwK4YWJjkqjbDKIwIiNEty8XjAWvlkPMVq6ocP9Nn21T5SGrnA5Zt4ZVQC-XDYuVkg2x54IC2dkfpfZebP6W4o?loadFrom=DocumentDeeplink&ts=5503.15)):

If I may, you're asking about remedies. So does anyone want to just add anything quick with respect to remedies that we haven't already touched on? No, anyone. Okay. But thank you, and I think you make an excellent point that we have all sorts of examples from sometimes recent history to hand about how these things play out. We don't need to watch Black Mirror necessarily.

Prof. Joshua Kleinfeld ([01:32:04](https://www.rev.com/transcript-editor/shared/WyoriZdcfjCHHX41PTj0rFwW1rAO77RZX88DFQLc_Z3HX6reKc5ntx2X23kMo1T-FNYXtdAoAP-43TOCjU705AiMHpY?loadFrom=DocumentDeeplink&ts=5524.18)):

Could I just say, yeah, go ahead. One very quick thing in response, not so much about the remedies, but about the experience of the Soviet Union. My wife is Armenian and we spent the summer of 22 in Armenia, and there I got to know a member of the Supreme Court who had grown up in the sort of echo of Soviet Armenia. And it was remarkable talking to him because no one I have ever met before, he'd never been to the United States, I have never met anyone before who caught on to what was happening ideologically and politically, particularly with the woke movement in the United States. It was remarkable to see, and it was remarkable because he understood all the moves on the chess board instinctively from the Soviet experience. We feel like the Cold War is a thing of the past or the lesson of the Cold War is the lesson of a free economy versus a state controlled economy. But there is a social history of how a pervasive ideology becomes a class ideology and dominates every facet of life, which is part of the story of the Soviet experience that we need to reabsorb to understand what's happening to us in the press.

Hon. Kyle Duncan ([01:33:19](https://www.rev.com/transcript-editor/shared/4CEXI_LAOTuTu7f6CPQUTmRpqMI49RLwc5cmHwI95YqpJm5QUZyZ0D0abfQ5gWhJW4ujm12P3kxF0AAAUYWpkPNo-No?loadFrom=DocumentDeeplink&ts=5599.6)):

Yeah, there's a book by a friend of mine named Rod Dreyer called, "Live Not by Lies," that is interviews with people who used to live behind their iron curtain commenting on sort of what they see happening. It's a very interesting book. Yes ma'am.

Questioner (2) ([01:33:32](https://www.rev.com/transcript-editor/shared/3p_7V9XHP4cpioXBX1DAdF3G-rNaj_2Hu_AQ3cm1xuafzROP_8qPOEywnJbYWIg18EStsim1J8RaSHy1a5DSQOympV0?loadFrom=DocumentDeeplink&ts=5612.92)):

I wanted to ask first a difficult question because even John Stuart Mill does envisage a limit to freedom of speech. And the question, the difficult question, which I think is how should we now define should there be any limits to freedom of speech and what exactly should they be? For example, to me, a limit on the freedom of speech, now a serious limit, is the freedom of certain people not to be offended, and they seem to spend their entire lives being offended. So that's an important question. I think when we are looking at these issues. Another point and quite a different point I would like to make, I take entirely what you were saying about self-censorship and other means of censorship. I think for those of us who are perhaps freer from constraints, it is more important than ever for us to resist all such forms of censorship, to have the courage to speak up. And in speaking up, don't forget that humor is a very powerful weapon, and that's the one that we should use.

Hon. Kyle Duncan ([01:34:48](https://www.rev.com/transcript-editor/shared/0X9H4aYdmSbl6KwKy91qPxNcY966kj6magKNCiodwTB8UBhDiCigfHuvmEPJDvTicvIHonDdEGgkptKl62T-LvASa4s?loadFrom=DocumentDeeplink&ts=5688.25)):

Well, very well said. Very well said. And let me just take a privilege of it and then we'll hear from Robert. I speak to student groups and sometimes young, sometimes high school kids about free speech all the time. For some reason I get asked to speak about free speech a lot. I have no idea why, but I tell them we have well-defined categories of free speech in American jurisprudence, and I tell them what they are: fighting words and true threats and all these things. And I asked them, how many of you think that we can criminalize hate speech? And half of them, and these are smart kids, usually half of them raise their hand and say, oh yeah, hate speech. That sounds terrible. Surely five years in the slammer for hate speech. And I say, my friends, you have a federal judge sitting in front of you. There is no such thing as a legal category of hate speech. And they're shocked and they probably go home and tell their parents that this mean guy came and said, there's no such thing as hate. But of course I'm not saying that. I'm saying there's no legal category of hate speech, at least not right now. It's a very important point. And it's amazing to me that people don't understand that. Last shot.

Questioner (3) ([01:35:52](https://www.rev.com/transcript-editor/shared/P5J98-L-0VNijzxU3v0wxPNxskYLguRhq1ikj6IQandjQxSaNnediWBwE3uXlXTKzaXdGhArZjUzEKkw8Ms0kCb3-LU?loadFrom=DocumentDeeplink&ts=5752.52)):

So this goes to my friend, Professor Kleinfeld's story. Imagine I go out and say something that offends somebody, and people don't like it. Shocker in my case, for those of you who know me. The government responds by coming and arresting me. We all agree that violates my right to free speech. My neighbor responds by saying, well, I'm not going to invite that guy Miller over ever again. No one thinks that violates my right to free speech.

Hon. Kyle Duncan ([01:36:18](https://www.rev.com/transcript-editor/shared/1iMombtCBTNLm1Z5vQbE-eQMJLmOMJ5PpGkZCVDOFf8BPEsRKXSQHkyGwt6aXZBTvjYx-Fg_xr3qR3oVn-D9wNQjXqs?loadFrom=DocumentDeeplink&ts=5778.62)):

It happens to me all the time.

Questioner (3) ([01:36:21](https://www.rev.com/transcript-editor/shared/Ga6fMvV84Rs8GdWVlGICz_0nlDa-j3Bf4mrLyqPzWzm_5U7MR_UMfDoy1L5bHOQH2Obnwa46YBp55f7HYXx3A-sJB60?loadFrom=DocumentDeeplink&ts=5781.41)):

Only the best judge, only the best. Now consider two intermediate cases. My baker responds by saying, I'm never going to bake another cake for that guy no matter what. That's the masterpiece cake case. Lots of people thought that baker should be permitted to not bake the cake for me because I can buy a cake somewhere else. The bakery industry is competitive. What drives Professor Kleinfeld's examples is that in each step there's either a company with monopoly power who shuts you out, or there's a cartel that forms such that the cartel collectively has monopoly power and shuts you out. Isn't the theory we need just come back to, we don't like monopoly power, whether it exists in one company or in a cartel.

Prof. Randy Barnett ([01:37:10](https://www.rev.com/transcript-editor/shared/K4PUU_Zd2Xl2Y-_5kedBBgPkH5u5uUrnI8wSQ4MPmuG81zZQt-zuNFk8_nJsPLHdmlsn_e4CEeBn5UsQBYfeAW-raaU?loadFrom=DocumentDeeplink&ts=5830.4)):

Lemme tell old libertarian hypothetical from back in the days when I was in law school, and you'll see my example kind of dates it. That is supposing in a libertarian world that the entire state of New York came to be owned by the Rockefeller family, and the entire state of Massachusetts came to be owned by the Kennedy family. Could they do whatever they wanted? Would that solve all the problems because they're now privately owned? And the answer from this hypothetical is that no, the problems would all be the same. It wouldn't matter that they were privately owned because they would have all the same power that the state would have.

Prof. Randy Barnett ([01:37:51](https://www.rev.com/transcript-editor/shared/M5H3IpU_5n0dIQV0m2lxNPkGJ37Lc1zQa9mmXj48bhcOR5WDWGOvd6iZEHtLjhxJpif5XLoOE5z6TKNteyqetyBHYf4?loadFrom=DocumentDeeplink&ts=5871.56)):

But even worse, all of our constraints that we have now built up to limit state power would not be applicable to the Rockefeller family, and it would not be applicable to the Kennedy family. So we would be worse off. And in some respects, I think what we're witnessing now is a workaround. The constraints that have been erected to protect us from government abuse, and it's a workaround by people who want to limit our freedom, and they do so by means that work around the constraints that currently exist by exerting, by engaging, by employing concentrated power that is not governmental and therefore they do the workaround.

Hon. Kyle Duncan ([01:38:31](https://www.rev.com/transcript-editor/shared/O_54evfighACket91ewkGC5S5jtR-u518oqW4O4MwWIBYoHLTfa4_Dd9_jWdzrHbBtT7fDJfPHriFtlzVu6L7cH182E?loadFrom=DocumentDeeplink&ts=5911.26)):

I think it's fitting that we end this panel by me censoring Randy, and I want everyone to join me in thanking this wonderful panel for this.

Alida Kass ([01:38:47](https://www.rev.com/transcript-editor/shared/tD7WtRdVfiOhZ5-h3wlDB4T0DO18XXVs-S9hKu0OEM8y-ANOFE1ltt9M9vQJJfA_FOWr10oBRbhHXks1JlIH9dBIxd4?loadFrom=DocumentDeeplink&ts=5927.88)):

It pains me so much to get up on stage and set this conversation down. We have five minutes and we will begin our next panel, the last panel of the day. We'll take a quick five minutes to replace the panelists and start again. Thank you.