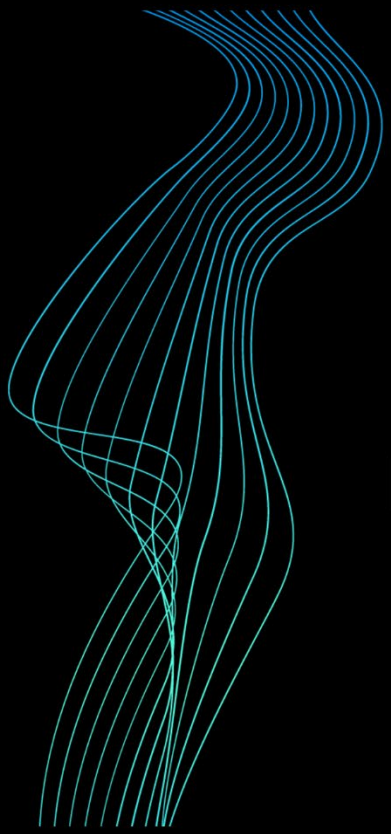

EPPC

BIG TECH SYMPOSIUM

TUESDAY, JUNE 29, 2021

Introduction

Ryan Anderson (00:00:00):

Good morning, and thank you for joining us for this important event today. I'm Ryan Anderson and I have the privilege of serving as the president of the Ethics and Public Policy Center, and I'm delighted to welcome you to our Big Tech symposium. This symposium was borne out of the Big Tech project that EPPC launched in April. The goal of our project and of our event today is to help conservatives come together to clearly identify and articulate the problems that Big Tech poses to our society and our republican form of self-government, and to think critically about targeted, constitutionally sound policy solutions to these varied problems. At EPPC, we work to advance the best policies we can to hold Big Tech companies accountable for their practices that threaten the interests of the American public and we want to bring an end to Big Tech censorship of conservative voices and speech.

Ryan Anderson (00:01:16):

I can speak to this censorship personally. Shortly after taking over as the president of EPPC in February, Amazon disappeared one of my books, When Harry Became Sally. After selling my book on transgender issues for three years, Amazon decided it now violated their content policy, conveniently waiting until after President Trump and Attorney General Barr had left office and Republicans no longer held the majority and committee power in the Senate. Amazon wouldn't tell me or my publisher what page of the book committed the offense, or, at least at first, what aspect of their content policy the book had violated. Eventually they claimed that the book says something that it doesn't in fact say, and that this is what runs afoul of their content policy.

Ryan Anderson (00:02:01):

Of course, the timing was, let's just say, suspicious. They disappeared the book the Sunday before the House of Representatives was set to vote on the so-called Equality Act, a piece of legislation that the book criticizes at length. The attempt to discredit me, however, has broader implications. With Amazon's market dominance, future authors and publishers will think twice before writing a book that might run afoul of the Amazon censors, especially if they won't be able to garner any media attention. And, of course, it doesn't matter how rigorously and charitably we make our case, as it's not how we say it, but what we conclude that Big Tech objects to. Beyond censorship, the EPPC Big Tech project focuses on Big Tech companies' consolidation of market power and potential violations of antitrust law, the ways in which Big Tech products and services can harm America's children, and the illicit and potentially criminal content they host on their platforms.

Ryan Anderson (00:03:03):

Just last Friday, there was a ruling from the Texas Supreme Court, holding that Facebook can be held liable for sex trafficking recruitment that occurs on its platform. This is an encouraging step in the right direction on these issues and we intend to hold Big Tech companies accountable and work to protect women and children from these harms. Now, there's a debate on the right about all of these issues. Are the problems as bad as I suggest? Are there any effective solutions? Can we trust the government to not just make things worse? Answering these questions and more is the point of today's event. As conservatives rightly fear big government. We can't allow that concern to lead us, to turn a blind eye to Big Tech. After all, we regulate businesses all the time. Some are prudent and effective and necessary regulations, and some are not. We need not apply to Big Tech all of the features of an existing system of regulation that was designed for other contexts, whether it be non-discrimination law, antitrust and monopoly law, or the legal rules for common carriers and utilities.

Ryan Anderson (00:04:12):

But policy makers need to take seriously the questions of what limits should be placed on the power of Big Technology. Absolutism about market freedoms is untenable. After all, all of our liberties have limits and to take just one example, antitrust law is at the service of making markets work better. None of this is to suggest that crafting good, effective constitutional policy in this space is easy, nor is it to downplay the importance of economic freedom and property rights. It's just to say that while those freedoms are important, so too are other things. The common good is multifaceted, and there's no reason to believe that granting Big Tech unlimited liberties is how we best protect human flourishing and human dignity. We hope today's event will be an important step in our work building a diverse coalition committed to holding Big Tech companies accountable and developing policy solutions that realign Silicon Valley's incentives with the best interests of all Americans.

Ryan Anderson (00:05:09):

To that end, we have brought together a truly tremendous lineup of scholars, experts, and members of Congress who are conducting research and drafting legislation on the issues surrounding Big Tech. First, we'll hear from five members of Congress who will describe the legislation that they've drafted and introduced, what problems they intend to solve and how their bill goes about addressing it. Then we'll hear from three panels of law professors and other policy experts to discuss the strengths and weaknesses of three general approaches to Big Tech reform: Section 230, antitrust law and common carrier law. All of the hard work in organizing today's symposium has been done by, and the credit for pulling it off so successfully goes to, Clare Morell who heads up EPPC's Big Tech project. Thank you, Clare, and thank you to all of our speakers for making the time to be with us today.

Ryan Anderson (00:06:00):

Thank you also to two generous benefactors who have made the Big Tech project a reality without receiving any Big Tech money. Without further ado, I want to introduce our first speakers, five lawmakers who will be discussing the legislation they have introduced to address the issues they see with Big Tech. First, we'll hear from Senator Josh Hawley of Missouri. Before being elected to the U.S. Senate in 2018, Senator Hawley previously served as Missouri's attorney general. He has litigated at the Supreme Court of the United States, the Federal Courts of Appeals and in state court. Senator Hawley serves on the Senate Committee on the Judiciary and recently introduced the Trust Busting for the Twenty-First Century Act, intended to address Big Tech's monopoly power. He also recently published the book, The Tyranny of Big Tech.

Ryan Anderson (00:06:48):

Next we'll hear from Senator Bill Hagerty of Tennessee. Prior to his election to the U.S. Senate in 2020, Senator Hagerty served as the U.S. Ambassador to Japan. A lifelong businessman, Senator Hagerty has served on many corporate boards, including NASDAQ and the New York Stock Exchange. Senator Hagerty serves on the Senate Banking, Housing and Urban Affairs Committee, and recently introduced the 21st Century Speech Act that repeals Section 230 and regulates large internet platforms as common carriers. Third, we will hear from Congressman Ken Buck of Colorado's fourth congressional district. Congressman Buck was first elected to Congress in 2014 and serves on the House Judiciary Committee and as ranking member of the House Judiciary Subcommittee on antitrust commercial and administrative law. Congressman Buck has recently co-sponsored six bills, all of which were advanced out of the House Judiciary Committee last week, intended to update antitrust laws in order to protect consumers and promote competition in the digital markets being dominated by Big Tech platforms. Most importantly, though, he's a fellow graduate of Princeton.

Ryan Anderson (00:07:57):

Fourth, we will hear from Senator Marco Rubio of Florida. First elected to the Senate in 2010, Senator Rubio is a member of the Senate Committee on small business and entrepreneurship, and he recently introduced the DISCOURSE act, intended to hold Big Tech responsible for complying with preexisting obligations in Section 230, and to clarify ambiguous terms that allow Big Tech to engage in censorship. Then lastly, we'll hear from Senator Mike Lee of Utah. Prior to his election in the U.S. Senate in 2010, Senator Lee was a two time clerk for judge and then Justice Samuel Alito. Senator Lee serves as the ranking Republican on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumers' Rights. He has introduced the PROMISE act intended to hold Big Tech accountable for the promises it makes to consumers, especially in terms of its content moderation policies.

Ryan Anderson (00:08:50):

Most recently, Senator Lee introduced the TEAM act, intended to strengthen anti-trust enforcement against Big Tech by improving the legal standards and remedies under the antitrust law, increasing funding and consolidating antitrust enforcement under one agency, the U.S. Department of Justice. I thank the members of Congress for speaking to us today, and I turn it over to Senator Hawley.

Congressional Remarks

Sen. Josh Hawley (00:09:15):

Hey, Josh Hawley here. Thank you so much to the Ethics and Public Policy Center for inviting me to take part in this conversation. I'm really glad you're having the conversation. I think it's really, really timely. When we think about the influence of these Big Technology companies on our economy, on our lives and really on our democracy, this has been an issue that has been one I've worked on since I was attorney general of the state of Missouri, and the more that I've gotten into it, the more work that I've done in this area, the more concerned I've become about the effects on our republic and about what it means for these giant, oligarchic corporations. And that's really what they are. I mean, we should be honest here. These are the most powerful corporations in American history, probably ever, but certainly since the railroad barons of a century ago, and they are exercising as those railroad companies tried to do, the Big Tech companies similarly are exercising an amount of political control and political influence that is dangerous to republican government, lowercase R.

Sen. Josh Hawley (00:10:17):

It's really dangerous and this is one of the reasons why conservatives and Republicans with an uppercase R were big trust busters a century ago. You think about it. The policy, the agenda of trust busting really was invented by Republicans. It was the populace actually who first really put it on the national agenda, but it was the Republican party who picked it up and made it a central part of our platform over a century ago. We were at the time a pro-worker, pro-free market and also pro-trust busting party. That's a pretty good combination. I think there's a great historical analog, or that is a great historical analog for us that we ought to look to, an example that we ought to look to. The reason that I want to suggest to you that we should be for trust busting in this new century is because it is market reinforcing. Trust busting is about allowing the free market to actually do what we want the free market to do, which is to support robust competition, which is to support actual control by individuals, by citizens over their lives. But yes, also over their government. That's why I've come to believe over the years that we need a new trust-busting agenda for the 21st century. So I want to just mention three proposals. I've introduced a lot of proposals on tech, but I want to put forward three for your consideration as you have your discussions. The first is I think we need to take a hard look at unwinding and then banning what I call conglomerate mergers. What I'm thinking here is Amazon, for example. All the Big Tech companies do this, but take Amazon. It is the combining of multiple disparate businesses under one company or one, quote unquote, holding company.

Sen. Josh Hawley (00:11:56):

So Amazon, of course, has the dominant e-commerce platform in the world, but they also own a pretty much dominant share of the cloud with AWS, and they also own a grocery store chain. That's Whole Foods. They also have a trucking business. Now they want to buy MGM and they have all manner of other subsidiary businesses that are nevertheless unrelated to each other as well. There's very little economic benefit, economists tells us, from these sort of conglomerate mergers, but they're also dangerous for competition because what you can do is you can cross-subsidize from one business to another in order to undercut competitors, get a corner on the market and then get a monopoly in multiple markets at the same time. Of course, the political influence of these companies only grows as their market power grows. So I think that we need to pass new legislation that will prohibit these kind of conglomerate mergers by these tech companies where they're combining multiple different unrelated lines of business under the control of one company.

Sen. Josh Hawley (00:13:01):

So I suggest that to you as something that whose time has come and that I think would make a real difference immediately in terms of stimulating competition and putting control back into the hands of American citizens, American consumers. The second proposal I would put forward for your consideration is a limit on mergers and acquisitions for any company, regardless of whether they're in the tech sector or not, if they're of sufficient size. I'm thinking companies that have a market cap of over 100 billion. If you are that size, then you don't need to be any bigger. I think that we've got to get serious about the effect of consolidation. We're seeing mass consolidation in our economy across multiple industries, and globalization is driving a lot of this, but American law is permitting it and we're seeing mass consolidation.

Sen. Josh Hawley (00:13:50):

There's lots of economic data to suggest that this kind of consolidation creates monopsony power in the labor market, it helps keep down, hold flat wages for working class individuals. Of course, it's also bad for competition when you see increasing concentrations of market power. So for these mega corporations, I think it's time, again, whether the tech sector or outside the tech sector, that we straight up limited their ability to get bigger and to acquire additional companies or lines of business. So proposal number one is to actually break up the different lines of business that the tech giants, Amazon, Google, Apple, Facebook, have consolidated under one roof, and the second proposal is to limit going forward, in every sector to limit truly mega corporations, mega multinationals from acquiring new lines of business and consolidating those.

Sen. Josh Hawley (00:14:41):

The third and final thing I would put forward for your consideration is Section 230, the famous, now infamous, Section 230. I hope that you understand that Section 230 as it currently exists is not the Section 230 Congress wrote back in the 1990s, back in 1996. The courts have substantially rewritten Section 230. I talk about this in my book, The Tyranny of Big Tech, and if you don't trust me and you want even a shorter treatment, go to Justice Thomas. Justice Thomas has a great opinion in the Malwarebytes case where you can see him lay out some of this history, the history of the redrafting of Section 230 by the courts, often with the cooperation of the Big Tech companies, sometimes at the behest of the Big Tech companies. You can see that evolution there, how Section 230 went from being supposed to be a competition protecting measure that would allow Congress to say, "We need to take down content that is obscene. We need to take down content that is pornographic," in some cases.

Sen. Josh Hawley (00:15:46):

That's the original purpose of the Communications Decency Act, "And yet allow these companies to not be liable when they do so." That was the initial idea. Now it's become something quite different. It's become a broad immunity shield for these dominant corporations, and you can see how the courts have rewritten it to get there. My view is we need to allow individuals to sue these corporations, the dominant social media platforms, when they do not follow their own terms of service. It's really a simple idea. The terms of service you and I all agree to, to open a Facebook account, to have Gmail, you've got to click, I agree, to the terms of service, but guess what? They're not enforceable. If Google or Facebook violates those, what can you do? Nothing. That's because of Section 230, I think we ought to make those terms of service enforceable by allowing people to go to court.

Sen. Josh Hawley (00:16:36):

What good would that do? Well, it's really a matter of countering the censorship and the control over speech, the control over communication that these companies have. They say in their terms of service they don't engage in political bias. They don't engage in political viewpoint discrimination and yet we all know that they do. I mean, the evidence suggests strongly that they do. My view is that why not allow their own terms of service to be enforceable, and then we'll find out real quick and those companies will have a massive incentive to actually follow what they say they're going to follow, to actually do what they say they're going to do. By the way, this doesn't prevent alternatives, conservative based alternatives, from coming into being, from being founded and competing for market share.

Sen. Josh Hawley (00:17:23):

So I think this would actually increase the amount of speech on the internet. It would increase competition in the social media realm by holding these companies accountable and making them apply or play rather by the same rules as every other media platform. If you really wanted to, you could limit that ability to sue. You could say that smaller new startups would enjoy a brief period of immunity from suit, but the mega corporations, the dominant platforms would not, if you're really concerned about encouraging new innovation, new competitors, and I think that ought to be one of our main goals. So there are three ideas for your consideration as to how we might tackle Big Tech's influence. I think the bottom line is this: I strongly believe that as conservatives we have to be for competition and we have to be for popular sovereignty. We have to say that the American people should control their own data, they ought to control their own speech and they absolutely need to control their own government. We need to recognize that Big Tech has become a barrier to all three. Thank you so much for having me.

Sen. Bill Hagerty (00:18:31):

I want to first thank the Ethics and Public Policy Center for hosting me and for holding this Big Tech symposium on a very important topic. Americans today communicate with one another and consume information using technology platforms that function as the modern public square. Yet this public square is controlled by Big Tech corporations like Twitter and Facebook, not a government responsive to the people. Increasingly, Big Tech is exercising this authority in a way that is inconsistent with the foundational principles reflected in the First Amendment to our constitution; free speech, freedom of belief and the open exchange of ideas. In recent months, Big Tech has removed news that was inconvenient for their loudest users' preferred candidates. They've silenced the president of the United States and they suppressed politically unfashionable facts regarding the origins of COVID-19, which hampered discovery of the facts regarding the virus's origin when those facts were fresh and were more discoverable.

Sen. Bill Hagerty (00:19:32):

The question is not whether the Constitution permits them to do so. It's whether the law should permit them to discriminate in this way, given the effect that it has on the free exchange of ideas. Big Tech is

filtering information through its political and cultural lens before Americans get to see it. It's an attempt to control what Americans think. This sounds like the game plan of the Chinese Communist Party, not the United States, and it can no longer be ignored. That's why I recently introduced the Twenty-First Century Free Speech Act, which puts the American people, rather than Big Tech corporations, in charge of what they say or hear in today's public square. My bill would first abolish Section 230's license to censor. It would treat Big Tech like a common carrier that must provide reasonable, non-discriminatory access to all consumers to prevent political censors. Finally, it would require consumer transparency regarding content moderation.

Sen. Bill Hagerty (00:20:31):

As Justice Clarence Thomas noted in a recent Supreme Court opinion, certain industries, known as common carriers, with the function of connecting people and information and having a central status in everyday life have historically been subject to special regulations, including a general requirement to serve all comers without discrimination. Over the years, these industries have included telegraphs and telephones. Access to a telephone line doesn't depend on what political views you express through it. The same logic should apply today to Big Tech platforms, defined in my legislation as platforms with more than 100 million worldwide active monthly users. These are today's common carriers. The Twenty-First Century Free Speech Act would also require Big Tech to publicly disclose its content management and moderation practices to users to ensure basic consumer transparency. So that these common carrier and consumer transparency requirements are enforceable, my legislation would allow consumers and states attorneys general to address violations via civil action. Finally, this legislation would abolish Section 230 in favor of a liability protection framework that matches that section's original intent.

Sen. Bill Hagerty (00:21:44):

At the behest of Big Tech and its army of lawyers, courts have stretched Section 230 well beyond its design, which was to promote the free exchange of ideas online and to encourage family-friendly moderation. The Twenty-First Century Free Speech Act would make clear that protection from liability for third-party speech does not apply to the platform's own conduct, either manually or through use of an algorithm. And it would define terms like obscene, lewd and excessively violent that governed the family-friendly moderation immunity. This would prevent Big Tech from stretching this provision into a license to censor speech on political, religious, or other grounds. The question isn't whether everything on the internet is true. It's whether Facebook and Twitter should decide what's true. I believe the American people are smart enough to figure out what to believe for themselves. This freedom to think, discuss and determine one's own beliefs is the foundation for over two centuries of American Liberty and opportunity. We must fight to preserve these freedoms. Thank you.

Rep. Ken Buck (00:22:54):

For too long, Big Tech has been taking a baseball bat to the free market, crushing competitors, buying up innovators and building an increasingly unassailable position atop the digital economy. Amazon, Apple, Facebook, and Google began as American success stories highlighting the benefits of free market capitalism and the American economic system. However, once they achieved sustained success, Big Tech decided to flip the script. The innovation and dynamism that allowed these companies to prosper became an enemy to be bought or killed. Decades of congressional lethargy and judicial misinterpretation enabled these digital kings to transform from exciting startups to hulking behemoths that swallow up every startup in their path. Congress has failed to update antitrust laws to deal with the robber barons of our era and as a result, courts have slipped further and further from the original intent of laws passed during the trust busting days of Teddy Roosevelt.

Rep. Ken Buck (00:23:55):

I've worked with my congressional colleagues on both sides of the aisle to introduce six bills that will update our antitrust laws and deal with the most harmful anti-competitive behavior we witnessed from Big Tech during our 18 month long bipartisan investigation. This narrowly tailored approach empowers consumers, protects small business and restores competition. This legislation, the State Antitrust Enforcement Venue Act, will allow state attorneys general to pursue antitrust cases in the venue where they filed. Big tech has a history of attempting to relocate cases to more favorable jurisdictions and this bill puts an end to that practice. The Merger Filing Fee Modernization Act will improve funding for the FTC and the DOJ without imposing additional costs on taxpayers by increasing the filing fees for large mergers for the first time, since 2001.

Rep. Ken Buck (00:24:54):

Apple, Amazon, Facebook and Google have all engaged extensively in the M&A market to eliminate potential competitors. Similar bipartisan legislation passed out of the Senate Judiciary Committee with support from members like Josh Hawley, Ted Cruz, and Marsha Blackburn on May 13th, 2021. The ACCESS Act is focused on empowering consumers and reinforcing private property rights. Users, not Big Tech, should control the data they generate as well as be able to use and move their data as they see fit. Data portability and interoperability address this problem by allowing users to control their data and requiring platforms to speak to each other so that this data can be easily transferred when a consumer decides he or she wants to.

Rep. Ken Buck (00:25:43):

In addition to benefiting consumers, this legislation eliminates data as a barrier to entry in digital markets and allows smaller platforms like DuckDuckGo and Parler to compete against Big Tech. The Platform Competition and Opportunity Act addresses the overly burdensome evidentiary standard currently faced by antitrust enforcers. Between 2000 and 2019, the dominant platforms collectedly engaged in several hundred mergers and acquisitions, but antitrust enforcers did not block a single transaction. Among the most egregious examples of inaction, Facebook acquired two large competitors, WhatsApp and Instagram, just two years apart, cementing its already dominant position in social networking and related digital advertising markets. By establishing a rebuttable presumption against mergers and acquisitions of potential competitors by Big Tech, this legislation ends their "kill or buy" approach to competitors.

Rep. Ken Buck (00:26:46):

The American Innovation and Choice Online Act prohibits dominant platforms from acting as gatekeepers and favoring their own products or services in downstream markets, or economically discriminating against firms to pick winners and losers online. Big Tech has engaged in extensive self-preferencing. Whether it's Google favoring YouTube videos in its search results or Amazon discriminating against Parler based on political disagreements, conservatives have seen the end result of this discrimination firsthand and this legislation prevents it from continuing on an economic or political basis in the future. Finally, the Ending Platform Monopolies Act utilizes the longstanding divestiture remedy to break up Big Tech. The bill identifies three circumstances when a business unit would have to be broken off, including when a covered platform uses their own platform for the sale or provision of products or services, when a covered platform requires a third party to purchase another good or service to use the platform, or when a covered platform's ownership of the business gives rise to a conflict of interest.

Rep. Ken Buck (00:27:55):

I'm proud to have bicameral support on many of these bills from courageous leaders like Representatives Lance Gooden, Madison Cawthorne, Burgess Owens, Victoria Spartz and Chip Roy. Conservatives are working through a paradigm shift in antitrust law and I urge all of you to examine these bills in the

context of Big Tech's anti-competitive practices. We can't eliminate monopoly power through Section 230 alone. The legislation my colleagues and I have proposed is necessary, targeted, and will finally hold Big Tech accountable. Thank you.

Sen. Marco Rubio (00:28:32):

Thanks for having me. As we confront the challenges that Big Tech poses to America's economy, our discourse, our way of life, I don't think there's any need for me to dwell on the countless examples of the censorship of dissenting voices, as well as the freezing effect that it's had on political speech. You know the issue very well. So today I want to talk solutions. How do we solve this? Specifically, I want to talk about my plan to reform Section 230 of the Communications Decency Act. When it was first conceived, Section 230 was designed to enable internet companies to host third-party content and to engage in targeted moderation of the worst content without being treated as publishers, which are generally held accountable for that content. But since the bill's passage 25 years ago, the once scrappy internet companies that benefited from Section 230 protections, now they're monopolistic Goliaths.

Sen. Marco Rubio (00:29:18):

Today, Section 230 gives these companies immunity from nearly all liability, a benefit no other industry enjoys, and their mission has changed as well. They're no longer the neutral bulletin boards of the past. Today these tech giants employ complex algorithms and teams of moderators to manipulate America's new public square to their world view. It's clear that companies like Twitter and Facebook play the role of publisher, speaker, political activist, and I think they need to be treated as such. We can no longer accept the legal framework in which openly biased gatekeepers of the public square are now immune to any legal consequences. So that's why I introduced legislation meant to end these exemptions that incentivize corporations to act against the common good and free speech. It's called the DISCOURSE Act and it would modernize and limit the immunity granted by Section 230 to tech firms that comply with existing obligations to inform users of screening options and parental controls.

Sen. Marco Rubio (00:30:16):

Currently, companies routinely ignore these modest requirements while taking full advantage of the protections. My bill would also drop the vague, the subjective language that has allowed tech firms to bend the rules, as proposed by the Department of Justice under Attorney General William Barr. Section 230 c(2) provides immunity from civil liability to Big Tech platforms as long as they do not engage in publishing of content. However, they are allowed to moderate and to amplify content posted on their platforms and they still have full liability protection. One justification for moderation, or as we've seen recently, censoring certain speech, is if the content is "otherwise objectionable." Well, my bill would replace that vague language with concrete categories, including promoting terrorism and unlawful content. My legislation also includes a religious liberty clause stating explicitly that Section 230 doesn't extend liability protection to decisions that restrict content because of its religious nature.

Sen. Marco Rubio (00:31:18):

More importantly, my bill would broaden the scope of practices that make a company liable for the content on their platform. My bill would remove protections for firms that engage in the following three manipulative practices. First, engaging in algorithmic amplification to target users who have not requested or searched for the content. Second, engaging in moderation activity that promotes or censors a discernible viewpoint like demonetizing a YouTube channel because of its political lien. Finally, it would make providers responsible for information creation and development, including when they solicit, comment on, fund, contribute to and modify information provided by another person. We've all seen the bizarre editorializing on the Twitter sidebar as the company seeks to demonize viral stories about conservatives. If a company establishes a pattern of these behaviors, it would become liable for all of the

content on the site. The bottom line is that when a major tech firm engages in systematically-biased content moderation or algorithm amplification, it's no longer acting as an impartial host of its content.

Sen. Marco Rubio (00:32:24):

By pressing its thumb on the scale, it clearly has a hand in developing the content and my DISCOURSE Act would ensure that our laws finally reflect that common sense distinction. Americans, they should be able to make informed choices for themselves and for their families. For that reason, my DISCOURSE Act would force providers to issue public disclosures related to content moderation, promotion and curation. Look, this is a dangerous moment for America, at which Big Tech has assumed what are essentially authoritarian governmental powers, the power to decide what views you're allowed to see, what you're allowed to post and with whom you're allowed to share it with, and policy makers made it possible by giving these Big Tech companies near complete immunity from civil liability.

Sen. Marco Rubio (00:33:08):

... by giving these big tech companies near complete immunity from civil liability. Think about it. A group of unelected, anonymous and unaccountable people. They now have the power to determine what can and can't be said in today's public square and it's our job as policymakers to hold big tech accountable because no one else is going to do it. Our democracy depends on it. Thank you.

Sen. Mike Lee (00:33:28):

Hello and thank you for inviting me to speak today. I want to say at the outset that I'm so encouraged that the Ethics and Public Policy Center has launched its Big Tech project. Holding Big Tech accountable for its behavior is essential to protecting our social fabric and American self-governance. In 1996 Congress wisely pursued a light touch regulatory framework for the Internet, which created incredible opportunities for free speech and innovation, but with the countless benefits of the Internet have come many evils and challenges, like the spread of pornographic content accessible to people of all ages, the trafficking of women and young children and, now, increasing censorship by Big Tech companies of conservative viewpoints. For conservatives our strong belief in free speech means that Big Tech censorship strikes us at our very core. Like so many of you, I believe our country is better off when Americans can engage in open, honest and informed debate about our society, and for better or for worse social media sites have become a common tool for Americans' engagement in public discourse.

Sen. Mike Lee (00:34:48):

Of course, we know the First Amendment protects us against government actions that abridge freedom of speech and not against actions undertaken by private parties. But, nonetheless, as conservatives, we still question why and how this could be happening. Certainly the American public does not want to be silenced. So why hasn't the market corrected?

Sen. Mike Lee (00:35:14):

There are two possible explanations that I'd like to discuss today: the first is that Big Tech has deceived its consumers, the American people. How often do we hear tech CEOs defiantly claiming that they allow free expression and that they don't censor political viewpoints. Jack Dorsey from Twitter testified to Congress that Twitter doesn't, "Consider political viewpoints, perspectives or party affiliation in any of our policies or enforcement decisions." Such a statement is laughable on its face and yet he says this to his own consumers and then continues to police his own platform trolling for any conservative who would dare to challenge or question a liberal position.

Sen. Mike Lee (00:36:08):

To address this very problem I've proposed the Promoting Responsibility Over Moderation In the Social Media Environment or PROMISE Act, which is designed to hold tech companies accountable to the promises that they make. Essentially, under my bill, social media platforms would be required to implement and disclose the details of their content moderation policy to their consumers. Then if these tech CEOs say anything to the public or take actions that deviate from the company's written content moderation policies, they would have committed a deceptive trade practice actionable under section five of the Federal Trade Commission Act.

Sen. Mike Lee (00:36:50):

The second problem we face in the realm of antitrust law and policy is also worth considering here. The magnitude of the threat from Big Tech is directly tied to the magnitude of the firm's market power: Google, Facebook, Amazon, Apple and others are able to get away with their blatant censorship and discrimination because there's little or no risk that we'll abandon their platforms for competing alternatives. And that's because there simply aren't any. When new platforms try to compete, they're either acquired or silenced. Companies with market power buying up their competitors and squashing competition is exactly what our antitrust laws were meant to prevent. So what went wrong? When it comes to Big Tech I think a lot of the blame falls on antitrust enforcement leaders during the Obama administration, but that's not to say that there's no room for improvement in our antitrust laws themselves.

Sen. Mike Lee (00:37:52):

And, to that end, I just recently introduced the Tougher Enforcement Against Monopolies Act, or TEAM Act, along with Senator Chuck Grassley from Iowa. The TEAM Act would strengthen antitrust enforcement by consolidating enforcement at just one agency, the Department of Justice, and duplicative efforts at the Federal Trade Commission, the other agency that has a much worse track record. The TEAM Act would also roughly double funding for antitrust enforcement and make a series of improvements to the legal standards and available remedies under the antitrust laws.

Sen. Mike Lee (00:38:30):

For example, the TEAM Act includes a provision requiring courts to find that conduct or a merger is anti-competitive where there is direct evidence of a clear intent to harm or prevent competition. When Mark Zuckerberg writes in an email that Facebook needs to buy Instagram because Instagram is going to threaten Facebook's core business, there's no reason to bring in economists to try to explain what would really happen. When a monopolist says that he wants to harm competition we should take him at his word and prevent it from happening. The TEAM Act also codifies the consumer welfare standard to ensure that the antitrust laws will not be politicized to pursue Woke social policy, but will instead continue to focus on the economic effects on actual consumers. In addition, the bill narrows the types of evidence that antitrust defendants can rely upon to justify potentially anti-competitive conduct requiring that any benefit or efficiency be tied to the market and conduct at issue, be quantifiable, have a high likelihood of being achieved, and actually benefit consumers and not just the company's bottom line.

Sen. Mike Lee (00:39:45):

Finally, the TEAM Act allows the government to recover treble damages on behalf of consumers, imposes hefty civil fines for knowing violations of the antitrust laws and prohibits awarding federal contracts to companies that violate the antitrust laws. There are many more provisions in this bill, all of which I believe serve to strengthen and improve antitrust enforcement to give us the best possible chance of avoiding the mistakes of the past that allowed Big Tech to amass so much market power through anti-competitive conduct and serial acquisitions. Our goal here should be to restore fair and free markets for conservatives and liberals alike so that we can get back to competing in the marketplace of ideas as vigorously as businesses compete in the marketplace for goods and services.

Sen. Mike Lee (00:40:40):

Thank you for your time. And I look forward to conversations to come.

Panel 1: What to Do About Section 230?

Clare Morell (00:40:55):

Well, thank you to our members of Congress for those remarks that you shared with us this morning. If you are just joining us, my name is Clare Morell. I head up the Big Tech project at EPPC and we are going to get started with our first panel today discussing what to do about section 230. And I will introduce our four distinguished panelists who are joining us live via Zoom this morning. So thank you all for tuning in and thank you to our panelists for sharing their time and expertise with us this morning.
Clare Morell (00:41:30):

So without further ado, let me go ahead and introduce our first panelist, who is Matthew Feeney, the director of the Cato Institute's project on emerging technologies, where he works on issues concerning the intersection of new technologies and civil liberties. Before joining Cato, Mr. Feeney worked at Reason Magazine as assistant editor of reason.com. He's also worked at the American Conservative, the Liberal Democrats and the Institute of Economic Affairs. His writing has appeared in The New York times, The Washington Post, Huff Post, The Herald, the San Francisco Chronicle, the Washington Examiner and others. Mr. Feeney received both his BA and MA in philosophy from the University of Reading.

Clare Morell (00:42:15):

Our second panelist is Josh Hammer. Josh Hammer is the opinion editor of Newsweek and a research fellow with the Edmund Burke foundation, as well as counsel and policy advisor for the Internet Accountability Project. He's also a syndicated columnist through Creators and a contributing writer for American Compass. Mr. Hammer is a frequent pundit and essayist on political, legal and cultural issues and is a constitutional attorney by training. He is a graduate of Duke University and the University of Chicago law school, and he previously clerked for the honorable James C. Howe of the US Court of Appeals for the Fifth circuit and was a John Marshall fellow with the Claremont Institute. In addition to publishing with many leading lay outlets, he has published formal legal scholarship with the Harvard Journal of Law and Public Policy and the University of St. Thomas Law Journal.

Clare Morell (00:43:08):

Our third panelist this morning is Annie McAdams, who exclusively represents victims nationwide who have been harmed due to the negligence or acts of others. She is the founder of Annie McAdams PC and Ms. McAdams is currently the lead trial attorney in the sex trafficking cases against Facebook, Instagram and Salesforce. She had an exciting victory in her case against Facebook this past Friday from Texas' Supreme Court that Ryan touched on in his opening remarks and I will let her share more about that shortly.

Clare Morell (00:43:40):

And our final panelist this morning is Russ White, who is a well-known voice in computer networking, where he advocates for simplicity, privacy and a decentralized Internet. He co-hosts the Head and the History of Networking Podcasts, serves on the Internet Architecture Board and in a leadership role in the FRRouting open source community. Mr. White has co-authored many software patents, books and hours of video training in computer networks. He holds a PhD in apologetics and culture from Southeastern Baptist Theological Seminary. An MACM from Shepherd's Theological Seminary and an MSIT from Capella University.

Clare Morell (00:44:22):

So those are our distinguished panelists this morning. And just to open our conversation, just for those who might be joining us today that aren't familiar with what section 230 is, what this law is that governs the Internet, can I ask Mr. Feeney from the Cato Institute, would you just give us a very brief, simple explanation of what section 230 is and what it does for someone who might not be familiar? And then I'll ask all of you your opinion on section 230.

Matthew Feeney (00:44:53):

Sure. Yeah. Happy to. And thank you for the invitation. It's a pleasure to be with you today. I think section 230 probably has to be one of the most discussed federal laws in contemporary politics. And that's, in most part, I think, a feature of the role of these Big Tech companies in the modern world and in our political discourse. Section 230 arose thanks to a string of court cases in the early 1990s as courts were trying to figure out how courts should deal with illegal content on this emerging sector of the economy run on the Internet, full of bulletin boards and forums and newsletters and things like that. Then members of Congress ... Senators ... Sorry, Congressman Chris Cox from California Republican and his democratic colleague, Ron Wyden, wrote section 230, which is a pretty simple law, sometimes called the Magna Carta of the Internet for the 26 words that created the Internet.

Matthew Feeney (00:45:56):

And, basically, in a nutshell, it states that you, not the platform where you post content, are responsible for that content. So if I post a defamatory tweet, I can be sued for that tweet, but you can't sue Twitter, is basically it. Those are the 26 words. But there's also another provision of the law that states that interactive computer services such as Facebook, but also common sections and other online entities, cannot be sued over content moderation decisions.

Matthew Feeney (00:46:32):

Now, I think, two things too to point out: one is section 230 is not the law that allows for interactive computer services to disassociate with content. The law just clarifies where the lawsuits can be brought because of that. And also something that I think is important to point out is that the law does not make a distinction between publishers or platforms. The law applies to, certainly, companies in the Big Tech space, but the law does not apply just to either the Internet industry or to social media sites. And, indeed, traditional publishers do enjoy section 230 protection.

Matthew Feeney (00:47:08):

But I'll stop there. That's a basic summary of it. I'm happy to explain my own thoughts on the law, but in a nutshell, that's what the law does.

Clare Morell (00:47:15):

No, thank you. Thank you for just giving that overview. And now just to get started, I would love to hear from each of you just a quick summary of your basic position currently on section 230, if you think that there's reform necessary and what that would be, or if you are in support, at this point, of a full repeal of section 230, or if you would argue to leave it as is. And so we'll start and we'll just go in reverse order.

Clare Morell (00:47:41):

So, Mr. White, if you would just share your opinion, a brief summary on what you think should be done about section 230, if anything, and then I'll go to each of you and turn on that question.

Russ White (00:47:53):

Sure. Thank you for inviting me for this panel. I would start by saying, I don't think section 230 as it stands is necessarily flawed. I think the problem is, that we have fallen into a false dichotomy of definitions. Facebook is neither a platform nor a publisher. They're closer to a publisher than a platform, but we somehow want to treat companies like Facebook as a platform rather than a publisher. And I think the intent of section 230 has been subverted in a way that has become very, very dangerous and bad for our polity, for our public culture.

Clare Morell (00:48:31):

Okay. Thank you for that. And then Ms. McAdams, would you just share what you see is necessary in terms of what we should do about section 230.

Annie McAdams (00:48:40):

Basic level, I do not believe that section 230 really is the problem. It is absolutely, as Senator Hawley pointed out, a problem with the judicial interpretation of section 230, that I think everything has gone off track. So I do think we might be at a point where if the courts are not able to right the course of 230, that there might be a necessary amendment to provide clarity so that the next counsel that challenges section 230 doesn't spend three years wrapped up in appeals just arguing over definitions. But I do have ultimate faith in the judicial system and I'm hoping that ultimately the federal court system can right the course of 230 without amendment.

Clare Morell (00:49:24):

Thank you so much. That's that's really interesting. Mr. Hammer, would you share with us what you think should be done about section 230?

Josh Hammer (00:49:33):

Yeah. So thanks so much, Clare. Thanks, Ryan. Thanks, EPPC. This is a very timely symposium on a very timely issue, of course. I'll start off just on a quick note of quasi to large agreement. Actually, I share what seems to be the consensus here, that section 230 is hardly a panacea. In fact, of the three policy remedies they've been discussing in today's symposium, I think it's probably the least effective, frankly. Or it's the smallest potatoes, so to speak. That does not mean that it is not important. I do think the long-term solution to our Big Tech woes does lie more in the areas of antitrust and common carrier, but which remedy applies to which specific platform, of course, is going to be an ad hoc case by case assessment. And, in general, these are not mutually exclusive, right? The way I phrased it in a short essay for the American Conservative in February was I called for, "All of the above strategy to confront the Big Tech threat to the contemporary 21st Century American way of life."

Josh Hammer (00:50:31):

Having said that, I think I do depart from my panelists in thinking that section 230 is flawed and is in need of reform for at least two reasons: one is, during his introductory remarks, Senator Hawley mentioned Justice Thomas' writing in the Malware case. To a slightly lesser extent he followed up on that in his April concurrence in the Biden vs Knight First Amendment case, which had more to do with common carrier, but there was some language in there on 230. And Justice Thomas is echoing something similar to that of Professor Phil Hamburger of Columbia Law School, who I know is joining a later panel today. He had a fabulous Wall Street journal essay in January entitled The Constitution Can Crack Section 230, explaining just how this has been traditionally misinterpreted. So I would strongly encourage those of you who are interested enough to tune into this symposium, to check out what Justice Thomas and, for that matter, Professor Hamburger have both written on just the strict judicial interpretation side of this.

Josh Hammer (00:51:25):

But holding aside the judicial interpretation side because I think the people here are more interested probably in policy than in law, I do think that section 230 is in need of statutory reform. What's interesting is if you could go back to section 230, of course, this was passed as part of the 1996 Communications Decency Act. The Internet was in a fundamentally different place, right? There were 25 to 30 million Americans at that time who had dial-up Internet service at that time. Silicon Valley was at its great wellspring. It was both geographically on the west coast, was, proverbially speaking, the wild, wild west. It was a bipartisan thing to woo Silicon Valley technologists to try to innovate.

Josh Hammer (00:52:08):

And what's interesting is if you go back and look at the defacto preamble language that Congress put in subsection (a) of the statute, they put their findings in there and kind of aside, totally unrelated to Big Tech and work that I'm doing in the realm of jurisprudence, I'm trying to emphasize the preamble of statutes, constitutions, things of that nature. Sir William Blackstone, the great common lawyer, would have referred to this as a ratio legis. In Latin that means the reason of the law. It is the reason that a law comes into its being, and that doesn't mean that that's necessarily going to God in a granular level or subsequent interpretation or have any concrete, positive ramifications necessarily, but it certainly ought to, at least, imbue the word with some degree of meaning.

Josh Hammer (00:52:51):

And what's interesting here is if you go into the preamble of section 230, I'm just going to read it real quick, Congress says ... One of their findings is, "The Internet and other interactive computer services offer a forum for a true diversity of political discourse," et cetera. So all of this that we're talking about here, this liability shield, was predicated. It was expressly predicated on Congress hoping to achieve a "Forum for a true diversity of political discourse." So the question then is whether or not Big Tech has upheld its end of what I view as a fairly straightforward quid pro quo proposition. I think the answer in the year 2021 is obvious. The answer to that is no. So there's any number of ways to go about concretely, statutorily modifying the relevant language.

Josh Hammer (00:53:37):

Senator Marco Rubio, his very recent bill that came out just last week called the DISCOURSE Act, I think is an excellent place to start, frankly. He would go in there in the so-called Good Samaritan provision of a statutory subsection C2(a). He would replace the very vague quote, "Otherwise objectionable language." That's the hook of the Good Samaritan provision that allows these Big Tech oligarchs to censor content effectively without any accountability whatsoever. Senator Rubio would go in there and he would replace the "Otherwise objectionable language" with things such as "Promoting terrorism, unlawful self-harm," just more concrete language in there.

Josh Hammer (00:54:16):

And then there's other places as well. Our friends at the American Principles Project have suggested that there should be a First Amendment standard. And there's ... I'm rambling a little bit here so I'm going to cut myself off, but there's any number of concrete tools again there. But two things are true. I want to recap here: one is that section 230, I agree with what seems to be the sense of the panel, it is small potatoes in the grand scheme of things compared to antitrust and common carrier. On the other hand, it is flawed both as a matter of law and policy and we should rectify that on both fronts.

Clare Morell (00:54:48):

Thank you. And then lastly, Mr. Feeney, I know you gave us a summary of section 230, but could you just share what your opinion is on if anything should be done to reform section 230? Or why or why not?

Matthew Feeney (00:55:02):

Sure. Thank you. Well, I mean, all of my fellow panelists have given me a lot to chew on that I hope we can discuss at length later. But in summary to your specific question, I don't view section 230 as an untouchable religious text or anything like that. It's just a law and it can be amended, changed, revoked, repealed, all of the above. I think if you are concerned about political bias on the Internet, if you are concerned about harassment, the spread of deep fake, selection interference, all of the concerns that people across the political spectrum have raised, I have yet to see legislative proposals that I think were good, either address those concerns within bounds of the constitution, or that don't pose significant anti-competitive risks.

Matthew Feeney (00:55:47):

I think, in this discussion, we have to keep in mind that the Internet is a lot larger than social media companies based in California, and these companies have pretty significant political power. And what we should expect is some degree of regulatory capture. These companies will oppose section 230 reform or amendment until they view such reform as inevitable. And the problem I foresee is that these powerful market incumbents entrench themselves in the market as these proposals emerge. It shouldn't be a surprise, I think, to anyone that last year Mark Zuckerberg came out publicly during a congressional hearing saying that Facebook now supports a section 230 reform, and I'm sure many people have seen Facebook's ads recently talking about how the Internet law hasn't been updated recently.

Matthew Feeney (00:56:35):

So I'll hold off on specifics on the actual lines of the bill, but that's my basic position. But happy to get into details later in the panel.

Clare Morell (00:56:44):

No, excellent. That is really helpful. Yes. And I would like to unpack a lot of the different things that you all just shared. So I think just to frame our conversation today for everyone attending and for you all to know, we'll dig into a couple of the issues currently with section 230 and, hopefully, then spend most of our time discussing possible solutions to that, both legislative solutions and, as Ms. McAdams mentioned, solutions through the courts and through their interpretation and in various cases in case law, as well as potentially considering maybe even structural solutions, which I know is an area of more expertise for Mr. White. So that's the arc of our conversation this morning.

Clare Morell (00:57:27):

So I wanted to ask a little bit more, just some of the current issues and things being debated where people seem to be looking at section 230 to blame or to use to solve some of these issues. I think both sides seem to invoke the First Amendment a lot. And, Mr. Feeney, you mentioned that section 230 is not the law that empowers these companies to take down content. It's a liability shield.

Clare Morell (00:57:53):

And so, Mr. Feeney, we'll start with you, could you explain a little bit about just that distinction of what exactly does section 230 do and as it relates to the First Amendment? Perhaps you could just disentangle a little bit for us just how the First Amendment relates to section 230 and what effects, if any, section 230 as it's currently operating, might have in terms of the First Amendment being invoked by some saying no

private companies have a right to free speech and other people saying the censorship of these platforms is inhibiting their First Amendment rights to free speech.

Clare Morell (00:58:33):

So it's a big question and I'd love for all of you to weigh in on your thoughts on the First Amendment issues around section 230.

Clare Morell (00:58:39):

But, Mr. Feeney you had mentioned that. So I wanted to see if you could explain that further.

Matthew Feeney (00:58:45):

Yeah. Thank you. I think we're fortunate to be in a country with what I would argue is the most permissive free speech protections in the world. And the United States is fortunate I think to have a wide range of legal speech. There are no hate speech laws, a lot of speech that would be illegal in many other liberal democracies is legal here. And I think that's great. I mean, the First Amendment is a prohibition on government action, that the government cannot mandate certain speech or engage in censorship. Exceptions apply, of course, but the basic point here though is that private companies, such as Facebook and Twitter, although they are legally allowed to host a lot of speech, they understandably choose not to because it's not consistent with their values or the business they're trying to grow. So, for example, videos of animals being crushed to death or videos of beheadings, proclamations of racism, all these things are legal speech under the First Amendment, but it's understandable why a private company might choose to disassociate from that content.

Matthew Feeney (00:59:53):

And I think you asked an excellent question, which is, "Well, what does the First Amendment have to do with section 230?" And I think this gets to a misunderstanding many people have, which is that the First Amendment isn't the entitlement to a platform, right? That the speech you might want to put out into the public, whether it's online or in a pamphlet, or if you want to yell it in a public park, that speech isn't entitled to a platform, whether it's Facebook, Twitter, or any other. And Facebook and Twitter have the right to disassociate with legal speech.

Matthew Feeney (01:00:28):

Now, I hope that what I was trying to say after this panel, so here's a conversation about common carriage, of course, something I've written about before. There are ways in which private companies can be compelled to treat all speech equally. I don't think common carriage regulation makes sense in social media. But the important thing to remember is that the First Amendment is a restraint on government and these companies are not private actors. PragerU tried to make the arguments in a case against YouTube arguing that YouTube was the modern day equivalent of a company town. I think the courts correctly rejected that argument. So, yes, I think it's important in this conversation to remember that the First Amendment is a restraint on government and that there's a lot of legal speech that private companies may understandably wish to disassociate from.

Clare Morell (01:01:20):

And just to jump in. So what do you all think, why then is 230 necessary as a liability protection? Why don't we just rely on the First Amendment and the other case law that's developed around the First Amendment. I guess I'm thinking of the traditional publisher liability cases are things where they go to court to argue their First Amendment. Why then leave section 230 in place? Why not just get rid of it and rely on the First Amendment?

Matthew Feeney (01:01:57):

Do you want ... I'm happy to answer but-

Clare Morell (01:01:59):

Anyone can answer.

Matthew Feeney (01:02:01):

... don't want to monologue. Someone else can jump in. I'm happy to answer but I feel I gave a lot already.

Russ White (01:02:03):

So, I think the main reason is, is because when these platforms first came about there was not a clear distinction between a platform and a publisher in the traditional sense. I would argue that that did exist in American law but it wasn't codified very well. And so what they wanted was they wanted protection against their users saying something so that they could not be held liable for what their users might say or do. And I'm not sure that that is fully addressed under First Amendment case law in any way. Maybe I'm wrong on that. But that seems to be my impression.

Josh Hammer (01:02:43):

Well, I think part of the issue is-

Matthew Feeney (01:02:44):

Well-

Josh Hammer (01:02:45):

No, jump in Matt.

Matthew Feeney (01:02:49):

No, please go ahead. I'll jump in after you.

Josh Hammer (01:02:50):

No, I think part of the issue is that we do want these companies to be liable for monitoring some conduct that may or may not be permissible under First Amendment jurisprudence, which, frankly is all over the map. I mean, depending obviously on the specific court or the specific issue or anything. But if you want to go in there again to statutory subsection C2(a), we're talking here before we get to the vague, otherwise objectionable, the catch-all provision that Senator Rubio was trying to statutorily modify, and that's the nexus of a lot of current reform efforts, I think, properly so. But before we get to that very controversial, otherwise objectionable language, we're talking here about obscene, lewd, lascivious, filthy, excessively violent, harassing content.

Josh Hammer (01:03:33):

I mean, Ryan in his introductory remarks was talking about this new case out of Texas with respect to Facebook being held liable for possible sex trafficking. I mean, that's a good thing. We want these companies to be held liable, irrespective, I would say, of what the possible First Amendment implications of that are.

Josh Hammer (01:03:49):

The other thing that's going on here though, look, I'm happy that Matt mentioned the PragerU lawsuit. There's going to be similar lawsuits like that that are going to continue to play out, okay. I mean, in constitutional law, when you go to law school, you learn about this very famous case called Marsh versus Alabama. I believe it's from the late 1950s. A town effectively tries to make itself private and then tries to shield itself from First Amendment protection. I don't remember the fact pattern super well, to be honest with you, but the court more or less says you can't do that.

Josh Hammer (01:04:21):

Really, another, just interesting short essay that I'll cite, there was another interesting Wall Street Journal essay from January that Vivek Ramaswamy, who's really making waves in these circles, co-wrote with Professor Jed Rubenfeld, and he tries to make the argument that, constitutionally speaking, the tech platforms actually cannot do this. And he has some interesting quotes in there. I'll just read one for the sake of time. He's quoting here a 1973 case called Norwood vs Harrison. And he says, "It is axiomatic." This is the Supreme Court speaking, by the way. Sorry. Not the co-authors. The Supreme court says it is, "Axiomatic." So it is self-evident, "That the government may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."

Josh Hammer (01:05:08):

So what the court is saying is that you effectively cannot immunize putatively purportedly private actors to constitutionally do that which the government itself cannot do. Now, again, we've seen some of those arguments lose in court, that's the PragerU YouTube litigation, but we're only going to continue to see this play out, I think. And I, for one, am very interested to see how that does play out in the court system.

Clare Morell (01:05:30):

Yeah, no, that's helpful. For the sake of time, we might just keep moving on. There's a lot of ground to cover. I wanted to circle back on something that Ms. McAdams had mentioned just about how ... I think the issue not necessarily being with section 230, but more how courts have interpreted that. And Justice Thomas really explained that in his Malwarebytes opinion. And so I wanted to just ask if you could summarize or comment on that Ms. McAdams, and then anyone else can jump in, on the ways that you have seen, and Justice Thomas has explained some of those, the courts have misinterpreted and over expanded the immunity that was originally intended in section 230

Clare Morell (01:06:12):

Expanded the immunity that was originally intended in [inaudible 01:08:04].

Annie McAdams (01:06:13):

Absolutely, and it kind of dovetails into your original question. When we looked at the first interpretations of section 230, it was based in a defamation, all of the language in 230 kind of mirrors the defamation world of the law and part of it was, can we really hold a platform responsible in judging the truth of something or the falsity of something from a defamation standpoint? But, what we quickly saw with the Zeran opinion, really being the first big step in distortion of section 230, was this immunity shield being extended, not just to trying to hold a platform accountable for something, a content creator or user posted on their site, but actually to the acts of the platform or the company. The definition of an interactive computer service alone has been distorted so extraordinarily across the country in litigation that in our Salesforce case, we're really challenging that and seeing our ability to say, should this extension go?

Annie McAdams (01:07:13):

What I think is really important is when I first started to put some... I'll just put some color on the paper. When I first started looking at these cases, I was approached about handling and looking at the civil side of sex trafficking cases. I had no idea what section 230 was, I had really no idea what sex trafficking was at the time, but as I started to talk to these victims, the one thing that 100% tied them all together across the country was the role of tech and social media and in not only their recruitment, but their exploitation. As we continued to investigate, we started to see that tech played this independent role, it wasn't just simply letting the trafficker access the platform to access the victim. We started to look at these actual independent actions of benefiting from the facilitation of sex trafficking.

Annie McAdams (01:08:01):

When I started to look at the case law, I started with Zeran and I could not believe how far the courts had extended looking at Roommates, looking at the MySpace case right here in Dallas, Texas, that that could be the law. When we started, I was walking into the courthouse with my appellate lawyer and I said, so is it really just Annie on the law at this point? Because we had nothing to stand on. There was not a case, maybe slightly the Roommate's case started to chip away at this immunity matter in 230 and it was. I mean, we went into the trial court, argued for 10 hours and said that this is a law that doesn't really serve us and the judicial interpretation doesn't serve the community anymore. So, it was basically Annie on the law through the 14th court of appeals. Then, we see the Justice Thomas opinion.

Annie McAdams (01:08:49):

I will share with y'all a kind of funny story about it. We didn't know what to do with it, because it's not really an opinion, it's just a statement on not accepting cert. We were sitting there and I was with my appellate team and I'm like, well, what is this? Can I use it as authority? We have the senior conservative justice making a comment basically on our cases and so, it's no longer just Annie on the law, but what weight does that hold? I will tell you that tech took care of it for me because they filed a brief that had four pages of arguing as authority. So, then we were then, okay, well, if you say so, it's authority and were able to use it.

Annie McAdams (01:09:28):

I think it's given guidance, but as you see in the Texas Supreme Court opinion, if you've had a chance to read it, as the court very eloquently and very rightfully said, wait a minute, we, Texas, are allowed to regulate this public health crisis through our own laws, through chapter 98, that controls sex trafficking facilitation in Texas, but the Federal Courts need to fix this problem because there is an overwhelming sense of authority that we're not, Texas Supreme Court, cannot overturn.

Annie McAdams (01:10:00):

They have put Facebook in a very precarious situation because you have Justice Thomas saying, Hey, we think there needs to be some reform, you have a win for my team here in Texas. And so , the question becomes, is Facebook going to appeal it? Is Facebook going to give the US Supreme Court the opportunity to right this court... right this course? I disagree, that negligence and so forth should be dismissed. I do think that the US Supreme Court should have a shot at it. I can tell you that my team is avoiding me because I'm saying I want to appeal the win. I want to give the US Supreme Court, but I'm hoping Facebook makes that decision for me and appeals it so we get the opportunity to do so.

Clare Morell (01:10:42):

No, that's really helpful and that was actually going to be my next question is what kind of case do you think it would take for the Supreme Court to want to take this on, in terms of correcting how section 230 has been interpreted. So, we'll have to follow along. I wanted to just circle back a little, it's still related to what we were just discussing with court's interpretation. On the kind of issues being kind of thrown

around about distinguishing between like platforms and publishers, Justice Thomas explains that the Zeran case eliminated the kind of distributor liabilities that he said were intended to not be protected by section 230, that section 230 was only supposed to protect for publisher liability, but that it has expanded it to also give immunity from distributor liability.

Clare Morell (01:11:31):

He also explains how platforms also now get protection for some traditional publisher functions like editing or removing content, adding commentary, things like that. So, anyone can jump in, is it important to distinguish between platforms and publishers? Mr. White, I know in what he's written has said that they're actually this third thing, they're not a platform, or a publisher, we need to treat them as something different. So, I'd love to hear your thoughts on that, too, Mr. White. So, yeah, just wanted to open it up to that question in terms of, is this important to distinguish? What are Big Tech companies? Are they platforms? Are they publishers, should they be something else, and how does that then, affect how 230 would apply?

Russ White (01:12:13):

Yeah. So, from my perspective, part of the problem we have here in this realm is that we want to say that a publisher, is someone who creates content, and we want to say that a platform is somebody who just carries content and this kind of falls within the traditional... I have a printing press, I have a company that just prints books and they print whatever and they're allowed to do some editorial filtering or whatever. The problem with Big Tech is when you get a million, 2 million, 10 million people, 50 million people writing a book's worth of content every day, you get into the million monkeys with typewriters and they're typing whatever they're typing and the filter becomes the publishing. We don't have anything in law that allows us to think about that situation, where you have so much content being thrown out there, that it's the filter that makes the difference and the amplification through the filter that makes the difference. We have a very bifurcated view, it's a platform or it's a publisher. So, I think this is part of where the problem falls in this whole situation, so maybe that's helpful.

Matthew Feeney (01:13:29):

I was just going to mention that the part of the reason we have section 230 to begin with is that the traditional treatment of publishers didn't seem to be working. There was this... The moderator's dilemma that has emerged in the 1990s was these court cases that seem to say, well, look, you can either not engage in content moderation and you'll be treated like a traditional public library or a news vendor, or following from Prodigy, if you engage in some kind of content moderation, then you could be considered the publisher of third party content. I think it's understandable that Cox and Wyden when they read about the Prodigy case, saw that this was very problematic for the emerging tech industry because as I mentioned earlier, we shouldn't think of section 230 as a law about social media or even the tech industry.

Matthew Feeney (01:14:19):

It's about interactive computer services. Then, traditional publishers, like say the Wall Street Journal it is like, it uses the printing presses that Russ alluded to earlier. They print a paper made of dead trees and they distribute it around the country, but it also runs a website that has a comment section. That comment section is a interactive computer service covered by section 230. Now, some people might say, this is conceptually confused, and that doesn't make sense, but as I said at the beginning with my remarks is, I'm not sure I've seen an alternative that would be better because we're in a world where thousands of websites with hundreds and hundreds of industries rely on third party content and interactive computer services. It's not just a social media problem, per se.

Josh Hammer (01:15:11):

So, I think... I think part of the problem is that Big Tech clearly wanted to be treated as a platform and not as a publisher, right? But, again, to kind of go back to my early remarks, that was more or less from my perspective, like expressly predicated on this defacto quid pro quo that Congress... It's not even defacto, it actually expressly says it in the statue where this is all predicated upon Big Tech ultimately agreeing as it has been very nascent industry, again, back in kind of the Halcyon days in 1996, as it would... As it were to develop that it would continue to host a quote "true diversity of political views." Increasingly, not just anecdotally, but some people have begun to compile like real hard data on this. It seems clear that that is just less and less the case.

Josh Hammer (01:15:52):

Now, I mean, I agree that maybe we are in kind of a brave new world of sorts where kind of this hard dichotomy between publisher and platform, maybe perhaps doesn't make sense, maybe there is some sort of third category that we kind of need to statutorily codify and will have to work its way through the courts from an interpretation perspective. But, certainly it seems to me that they are getting much closer to the realm of publisher, than platform. I think it's very difficult obviously to look at things, like the Facebook oversight board, the two year ban of President Trump, things of that nature and not come to that conclusion, and what's interesting, again, just kind of mentioned some developments in Capitol Hill on this front.

Josh Hammer (01:16:34):

One thing that the Senator Rubio bill does, that I mentioned last week, is it modifies the definition of what an information content provider is, for liability purposes in statutory subsection F3 and it basically says that if you engage in algorithmic amplification, moderation activity, or information creation and development, then you effectively lose your liability shield. That's just... That's just one possible way to look at this. So, there's kind of a firmer grounding in the First Amendment, I'm not sure that we want necessarily directly and explicitly marriage to First Amendment jurisprudence for the same reasons that I was getting at earlier, as but one example here, the incitement of violence standard or under current First Amendment law, holding aside whether or not it's originalist or anything like that, is extremely lax.

Josh Hammer (01:17:28):

We saw that kind of play out in the aftermath, of course, of January 6th and all the op-eds that ran about that day. So, anyway, there are lots of possible ways to tweak the language there, but to kind of answer your question, Clare, I think Big Tech wanted to be treated like a platform, but from my perspective, especially over the past five, six years or so, it is increasingly clear to me that, I think what Senator Hawley accurately refers to as the Silicon Valley oligarchs, these woke oligarchists are increasingly acting more like publishers than platforms.

Clare Morell (01:18:03):

No, no, you have the... You have one more word and then, I'm going to transition to talking actually asking you all about the DISCOURSE Act. So, please go ahead, Mr. Feeney.

Matthew Feeney (01:18:13):

Okay. Sure, yeah. I'll quickly.... I'm sorry for interrupting. I just... Just two points. I mean, the first is, Josh is citing section 230 a3, right? Which is an interesting case of the law saying, the internet and other interactive computers services offer a form of true diversity of political discourse. So, two things on that one, I think... I don't think it's true as a matter of historical fact that Cox and Wyden wrote this law as a prid quote pro and Jeff Kosseff wrote a whole history of the drafting of this law that I urge everyone to check out, called the Twenty-Six Words That Created the Internet, where I think he outlined the history behind the drafting and that such an exchange was not part of the deal.

Matthew Feeney (01:18:53):

Secondly, I would argue the internet still is a... Provides the kind of diversity of views that they discuss in the law, a forum for true diverse political discourse. That's still true, it seems to me. It seems if you have a political view in the United States, there's a home for it on the internet somewhere. Now, some may argue that it doesn't have a home on the largest of these social media sites, that's a different question. The section 230 a3 doesn't say that every interactive computer service has to offer that form. It says the internet, right? That's just something worth considering, I think. But, yeah, I just wanted to respond to Josh's point there, sorry for interrupting.

Clare Morell (01:19:33):

No, you didn't interrupt at all, but this is a perfect kind of transition. I want to now spend the rest of our time, really focusing in drilling down into some of these solutions we've kind of been touching on. So, specifically we heard from Senator Rubio this morning about the DISCOURSE Act that he introduced, which Mr. Hammer has just explained a little bit further for us already, which is great. I wanted to ask you all, is this a foreseeable kind of path forward, like if we are waiting on the courts to kind of right the interpretation of section 230, could the DISCOURSE Act, which I think really does seek to kind of clarify some of the vague language in section 230-C2, removing that otherwise objectionable term and replacing it with unlawful and promoting terrorism and content that promotes self-harm, but then also really trying to take away section 230 immunity for platforms that are engaging in the three specific behaviors that Mr. Hammer mentioned, algorithmic amplification or content moderation, promoting, or suppressing a particular viewpoint, as well as information creation and development, modifying or commenting on materials.

Clare Morell (01:20:46):

Because I think what he... It seems like what Senator Rubio is trying to distinguish is that those three types of behaviors that platforms engage in really are more like traditional publisher functions. So, then they shouldn't get 230 immunity for that. So, what do you all think of that as a potential approach forward, kind of in the meantime, as a potential legislative solution to try and I think clarify the original intent of the statute of section 230 with the internet we have today?

Russ White (01:21:17):

I like this because, sorry, sorry.

Matthew Feeney (01:21:21):

Go ahead, Russ.

Russ White (01:21:21):

Yeah, that's fine. I like this because I think it places a burden back on these big companies that the more they filter, the less likely they are to get immunity and the more they do amplification and algorithmic amplification, I think is a big part of it that we don't really think about. It's not just filtering, it's not just dumping Trump, President Trump for two years, it's that these companies can actually, out of a million posts a day, select, I want this to be the story that's told about this particular thing that just happened, put it at the top of everyone's news feeds and therefore amplify that one version of the story and leave everything else out. They didn't create that... Create that content, but they created the situation where they're amplifying it and I think that's where we run into... Sorry, Matthew, go ahead.

Matthew Feeney (01:22:11):

Oh, I just want to stress as a caveat, I haven't read the bill and I missed Senator Rubio's remarks this morning, so my comments may not be that useful, but what I'll just mention is I think we have to be careful with this word algorithm. It seems like many people in tech, in tech policy, they seem to treat it like a sort of, like a talisman, but it just means rules, right? But, I suppose the question is, what does it mean for there to be no algorithmic filtering or amplification? If a company, like Yelp knows that I like, let's say a certain cuisine over another and when I did this, an algorithm decides that it's going to show certain content associated with that, that's thanks to an algorithm, amplifying content.

Matthew Feeney (01:22:58):

If Google knows my location, when I search for a certain thing, it's going to amplify content closer to my location. YouTube learns what kind of videos I like and imagine what Google, Yelp, and YouTube might look like without that ability, that... It'd be a very difficult thing to navigate.

Matthew Feeney (01:23:15):

So, I understand the concerns, but there are, especially if you're concerned about political bias while you might not like the fact that certain content is amplified over others, but what social media looks like absent algorithms that cater to individual users looks like is difficult to imagine. I mean, I can imagine it, but it doesn't look like a product anyone would use, but this is all, like I said, I'm coming from someone who hasn't read the bill or the exact language, but I think when we use words like algorithms and algorithmic functions, we should be careful and precise.

Clare Morell (01:23:47):

Hm, that's helpful.

Josh Hammer (01:23:52):

[crosstalk 01:23:52] Go ahead, Annie, sorry.

Annie McAdams (01:23:52):

Okay. I was going to say, well, I, and my team support any kind of clarification of language, I think it's very important that we look at the practical application. How does this in fact get executed? Because I mean, we can sit here and develop laws and have all these intellectual conversations about the definition and clarity, but what in reality, what we need to see is how are these laws put into effect? The reality is they're not. I mean, enforcement... Laws without enforcement or accountability are worthless and being one of the only teams to have reached this far and defeat the section 230 immunity motion to dismiss is really slim and it is really... Really unacceptable. I mean, we're... Now, we're living in a time where these companies are absolutely making a mockery of our country. They are running ads about, let's reform this law while they're snickering out the back and forcing and putting defenses in place against our cases.

Annie McAdams (01:24:50):

So, I think looking at Senator Rubio's law, we have to look at getting past the motion to dismiss stage. If you give them any language of immunity, that's the motion to dismiss, on the pleadings. It doesn't give us the opportunity to put on evidence. Right now, we have, just yesterday in light of the FTC decision, Facebook statement was we're going to continue to develop products, yet in my litigation, they filed with the court that they're not a product. So, until we get past this initial immunity barrier and actually get into the cases and allow litigants to show the evidence, it's for not, all of it.

Josh Hammer (01:25:31):

I think what's really important is getting to the proverbial discovery phase, right? What litigators would call it there, I want to kind of just talk about a little bit of an area of pushback that I hear from certain circles is that things like what Senator Rubio is trying to do here, would necessarily empower either Article 3 judges or the FTC, deep state bureaucrats or any, or anything like that. Look, I obviously am sympathetic to an extent to some of those concerns, but I guess the bigger problem from my perspective, just kind of take like a broader view of what's actually happening here, is that over the course of 25 years, I mean, again, I just want to emphasize this point, we are so far removed from the time, place and context of 1996, when Congress drafted this statute. 25 to 30 million Americans at the most, I think had dial up internet, the old school kind of AOL, like du, du, du, du, and the modem, whatever, it was really just a different era.

Josh Hammer (01:26:27):

I mean, it might as well just be the Pony Express, honestly, for all present purposes here, and what's actually going on here is that Congress has kind of a failure to take any action whatsoever on this front, which comment as in incidental aside is more or less kind of a good argument for kind of mandatory sunset clauses, I think, in legislation in general, but holding that kind of pontification aside. What's happening here, both from a congressional perspective and to go back to the judicial misinterpretation perspective is that I think we, the people, the sovereigns in our constitutional order, that we the people, which the constitution so famously speaks, have effectively delegated large swaths of our own kind of self-governing civic, republicanism of our own sovereignty to these woke unaccountable oligarchists who, hide in like in their offices, out in San Francisco and the Bay area, and can just tweak their terms of services and their algorithms however they want.

Josh Hammer (01:27:24):

Yes, to make an obvious point, but just to kind of make this... Say this very clearly and unequivocally, these are the means to the 21st century public square, they just are. I don't see a way around that obvious reality here. So, do I have some like objections with language that might empower judges and, or kind of FTC commissioners to kind of adjudicate possible disputes, get into the proverbial discovery phase of all this, and actually get into the weeds? Sure. I mean, of course I do. I mean, I remember kind of taking antitrust law in law school and looking at judges who are not necessarily experts kind of trying to divine and decipher markets, but it's unclear to me what the better alternative is. I rather... I, frankly rather we go that route and then you continue down the rabbit hole of what the status quo is and where it looks like we're continuing to going absent reform, which is to only embolden these totally unaccountable increasingly oligarchic or monopolistic actors, and not make any attempt whatsoever to reclaim the sovereignty that we have delegated to woke technologists.

Clare Morell (01:28:27):

Thank you. I want to fit in two quick questions. So, we might have to answer these quickly just... And then we can kind of keep discussing other things, but we had remarks from Senator Hawley and Senator Lee this morning, as well. Both of them kind of shared similar approaches on section 230, Senator Lee has introduced his bill called the PROMISE Act, which would make it an unfair deceptive trade practice to basically have companies not follow their own kind of disclosed policies on content moderation. Senator Hawley likewise shared that it seems that we need to make their terms of service enforceable, to hold them accountable for their terms of service. These might be more modest solutions in the sense they're not actually reforming section 230, but were trying to say that these companies should be held accountable for their terms of service as they disclose how they'll moderate content and things like that.

Clare Morell (01:29:25):

I wanted to see, do you think that would be another possible approach that should be pursued? Particularly, Ms. McAdams, as it comes to illicit activity on these websites, their facilitation of trafficking, would enforcing their terms of service and making that enforceable by either the FTC with Senator Lee's act as an unfair trade practice or Hawley's approach seems to suggest like it would create a path for civil actions to be brought, would that help at all with the kind of issues you're seeing in terms of trafficking on the platforms?

Annie McAdams (01:29:58):

Yeah, I would definitely think that it would help. At this point, anything past the immunity wall is going to be able to help us from a practical standpoint, because again, being the only team that has ever been able to defeat that section 230, right out the gate, anything that was going to allow us to enforce any type of standard of care is going to be important going forward. Building on what Mr. Hammer said, I mean, you talk about this oligarchy language, it all returns back to the seventh amendment, the tools to fix this problem exist, but somehow the seventh amendment has been circumvented with this immunity shield. So, anything that's going to get us past that shield, nonsense shield of immunity and get us to accountability is going to be important for the safety of our children.

Clare Morell (01:30:46):

Thank you. Does anyone else want to weigh in at all on Senator Lee's PROMISE act or Senator Hawley's suggestion about enforcing their terms of service, before I move on to another question on solutions?

Josh Hammer (01:31:03):

I was just going to say, I think it's basically a good idea. I mean, I don't have much... I don't have much else to add to that. I mean, part of the problem here, just to go back to my previous comments is that these companies are completely unaccountable. They can change these terms of services, their algorithms, et cetera, on a whim. So, I mean, just getting some sort of accountability whatsoever, I think is a good initial threshold to get past. So, that's what I want to say. So, Matt, go right ahead.

Matthew Feeney (01:31:27):

I was just going to add that I think there's a potential risk that have resulted in less speech online. If companies have to think more and more about a lack of flexibility in there content moderation rules... This kind of stuff is really difficult. I think it's a cliche and oftentimes people think it's glib when a lot of people say that the content moderation is really difficult, but a lot of rules sound sensible. So, for example, you might say if you wanted to set up something like Facebook, well, we're going to prohibit images of nude children, sounds like a perfectly sensible rule. Then, someone posts a photo from the Vietnam War, of the small children running away from a napalm bombing where one of the children is naked and Facebook, this isn't a hypothetical, it's after thinking, well, are we going to say that one of those famous images from the 20th century is not allowed on the platform?

Matthew Feeney (01:32:18):

Do we make a historical significance exception to this rule? Do we say that it doesn't... Maybe if the people aren't children anymore, and I only raised this just because this kind of stuff is actually rather difficult, even very simple sounding rules for content moderation can... Can be very difficult to enforce or cause all kinds of headaches. There are examples of at least one Holocaust remembrance charity being taken off Facebook because it featured images of dead people, some of whom were naked. So, if you want to say that you can hold companies accountable, if they're not consistent, or if they don't adhere to the terms of service or the content moderation rules all the time that I think causes a few headaches. Although again, it depends on the way that the law is written. Most of these content moderation rules on terms of service per se, but I just raise that as a potential issue.

Clare Morell (01:33:12):

Okay. No, that is helpful, thank you for that. Yeah, and that was actually kind of transitioning to the last question I just wanted to ask briefly is in thinking about, okay, well, if we aren't able to achieve a legislative solution and get something passed through Congress and even what you shared initially, Ms. McAdams, that the issue really might not be the statute as much as just courts interpretation, perhaps courts can just right this themselves. What approaches then, do you all think should be taken in terms of litigation that is pursued to hold Big Tech accountable, to bring these types of cases to courts, to potentially then rule and clarify this immunity? Perhaps there's also alternative pathways in litigation that won't even run up against kind of 230 immunity, like cases of trying to argue consumer protection or product liability issues.

Clare Morell (01:34:06):

I... There was a recent reversal by the ninth circuit, in the Snapchat case, saying it was the design of the app. So, that the company could be held liable for that harm. Does anyone want to speak to potential solutions in terms of just litigation going through the courts to try to have them clarify this immunity? Yeah, anyone can jump in.

Annie McAdams (01:34:31):

[crosstalk 01:34:36] go ahead. No, no, no, Matthew.

Matthew Feeney (01:34:33):

Please, please, please. I defer to the lawyer, here go ahead.

Annie McAdams (01:34:36):

I think that we, again, need to... Encourage private sector litigation. If you look at who's successful and who is not in this type of Big Tech litigation, it is always going to be your private-driven teams that are going to get there. I think more collaboration between attorney generals and private sector lawyers who are pursuing this litigation because you're going to see success from the private sector versus these governmental actions that seem to continually stall. So, I think encouraging that, and then I'll just tell you all my hope is that Facebook appeals. I'm already drafting my counter appeal in my brain and I think it's just getting that right case, getting that test case in front of the US Supreme Court, so that we can get the clarity we need.

Josh Hammer (01:35:25):

I guess I'm partially a little pessimistic as I guess I am on most things judicial courts related for better, for worse. I mean, the reality is that these two Justice Thomas... Whatever the procedural posture is with respect to the cert denial, the concurrence is there. He was... He wrote those both, solo. He was not joined by anyone else, if I recall in either case. So, the only justice on the current court who is kind of writing at length about how section 230 has likely been misinterpreted. Now, admittedly Justice Alito does not normally sign on to those sorts of procedural posture writings. So, there's... We have no idea if he actually agrees with it or not, but the point is, as we saw with that case Justice Thomas is kind of putting himself out there in no man's land without a whole lot of support at the current moment.

Josh Hammer (01:36:14):

I guess kind of surveying the landscape here, this recent ruling out of Texas, with respect Facebook and sex trafficking seems to be like, to me, like a big deal. I have not dug in yet and kind of looked over the details, but from my perspective, kind of the biggest possible victory on a 230 front that could be had is if a kind of Prager U YouTube style litigation ultimately came out the other way. Now, Prager U... I didn't

follow the litigation that closely, I think that was a couple of years ago, if I'm not mistaken, but I presume, I think it's a California company, so that's getting up to the California Federal Courts and ninth circuit, et cetera. I would be really curious to see if we could get some sort of parallel litigation from kind of a similarly big company with Prager U-esque clout and perhaps a slightly friendlier jurisdiction, like the fifth circuit, the eighth circuit, something like that.

Josh Hammer (01:37:08):

So, I'd have to kind of go look and see what companies are there, I mean, just think of the fifth circuit. I mean, that's Texas, that opens up obviously a whole panoply of possible options there. Glenn Beck's, the Blaze, media empire obviously is based right there in the Dallas Fort-Worth area, but just one example. So, anyway, I would be really curious to see that kind of style of litigation in a slightly friendlier, more right-leaning jurisdiction to see if we can kind of get back to what I was talking about earlier and kind of revitalize some of this decades old Supreme Court language about how the government cannot immunize putatively private actors to ban that, which the government itself can not constitutionally ban.

Clare Morell (01:37:47):

Hmm. Well, we are kind of coming up on time. [crosstalk 01:37:52] Go ahead. No, no, go ahead.

Matthew Feeney (01:37:52):

I was... Just to quickly add, I do think that attempt to raise some kind of Prager U case in the fifth or eighth circuit, relying on Marsh or Pruneyard or these other cases, I think you would still have a bit of an uphill climb. If you're interested in 230 litigation, I think the most interesting cases and those that may have the best chance of success would be those similar to Snapchat where... The creation of filters that's oftentimes rely on user action, raises this kind of difficult question about content, I think very interesting, but other than that, I think it's an uphill climb, but I've been wrong about most of my political and judicial predictions for the last few years. So, this might be another one.

Clare Morell (01:38:37):

No, well, this was all really, really interesting. Thank you so much to all of you for giving us your time and your expertise today. It was interesting discussion, I feel like we could continue talking for hours about all these items related to section 230, but we're going to wrap up for today because we have another panel following this, but in case anyone didn't get to say anything that they wanted to say, I will allow a minute, in case anyone else wanted to share something that didn't get touched on or that they didn't get to share before we had moved on to something else, if anyone had anything. No? Everyone is set? Well, thank you all so much and to all the attendees, we're going to take a brief, just three minute break and then, we'll jump into our antitrust law panel at 11:00 AM. So, thank you all.

Matthew Feeney (01:39:24):

Thank you.

Josh Hammer (01:39:24):

Thanks Clare.

Russ White (01:39:25):

Thanks, Clare.

Panel 2: Antitrust Law and Big Tech

Clare Morell (01:39:36):

Hello. If you're just joining us, I'm Clare Morell. I am leading up the Big Tech project at the Ethics and Public Policy Center. We are going to kick off our second panel this morning, which is going to focus on antitrust law as it relates to Big Tech.

Clare Morell (01:39:52):

I will go ahead and introduce our three distinguished panelists, that we have joining us this morning to discuss antitrust laws.

Clare Morell (01:39:59):

So without further ado, let me introduce Roger Alford is our first panelist. He is a professor at Notre Dame Law School. He joined the faculty there in January of 2012.

Clare Morell (01:40:12):

Professor Alford teachers and writes in a wide range of subject matter areas, including international trade, international arbitration, international antitrust and comparative law. He also served as the Deputy Assistant Attorney General for International Affairs, with the Antitrust Division of the U.S. Department of Justice from 2017 to 2019.

Clare Morell (01:40:35):

Before entering the legal academy, he served as a law clerk to Judge James Buckley of the United States Court of Appeals for the DC Circuit and Judge Richard Alison of the Iran-United States Claims Tribunal in the Hague, Netherlands.

Clare Morell (01:40:49):

In addition to publishing widely in leading law reviews and journal, Professor Alford is the general editor of Kluwer Arbitration Blog and on the executive committee of the Institute for Transnational Arbitration. He earned his BA with honors, from Baylor and his JD with honors from New York University.

Clare Morell (01:41:06):

Our next panelist is Dr. Mark Jamison. He is the director and Gerald Gunter Professor of the Public Utility Research Center and director at the Digital Markets Initiative at the University of Florida.

Clare Morell (01:41:21):

He provides research and international training on business and government policy, focusing primarily on information technology, antitrust technology development and adoption and regulation. He's also currently a visiting scholar with the American Enterprise Institute.

Clare Morell (01:41:37):

Prior to joining the University of Florida, Dr. Jamison was the manager of regulatory policy at Sprint and head of research for the Iowa Utilities Board and a communications economist for the Kansas Corporation Commission.

Clare Morell (01:41:51):

He received his PhD in economics from the University of Florida and a master of science in agricultural economics from Kansas State University.

Clare Morell (01:42:00):

Our third and final panelist this morning is John Newman, who's a professor at the University of Miami School of Law and an affiliate fellow with the Thurman Arnold Project at Yale and a member of the advisory board of the Institute for Consumer Antitrust Studies and the American Antitrust Institute.

Clare Morell (01:42:17):

He also regularly consults with private sector clients on a variety of antitrust-related matters.

Clare Morell (01:42:23):

Professor Newman's research, which has appeared in the University of Pennsylvania Law Review, Vanderbilt Law Review, George Washington Law Review and other leading journals, focuses primarily on antitrust issues involving digital markets.

Clare Morell (01:42:35):

He's credited with coining the term "zero price markets". His scholarship in zero price markets has been cited by regulators and legislative bodies around the world.

Clare Morell (01:42:46):

Before joining academia, Professor Newman was also an honors program trial attorney in the U.S. Department of Justice Antitrust Division.

Clare Morell (01:42:55):

Without further ado, I would love to just ask if someone would like to just give a brief statement of what antitrust law is for those who are tuning in, who might not be as steeped in antitrust law and its general kind of purpose.

Clare Morell (01:43:14):

Why do we have antitrust law? What is it. If anyone wants to just volunteer to give a brief summary before, I have some further questions about your opinions on how it relates to Big Tech.

Mark Jamison (01:43:31):

I'll let one of the law professors take the lead on that.

Clare Morell (01:43:36):

Yeah. Professor Alford or Professor Newman, do you want to give us a brief summary?

Roger Alford (01:43:39):

John, do you want to do it or you want me to?

John Newman (01:43:43):

I'll let you at least start it off and I'm sure you'll do an excellent job.

Roger Alford (01:43:46):

It's really straightforward, in that it simply is the law that was developed to promote competitive markets. There's a recognition that competitors should vigorously fight in the marketplace for market share and to enhance their market power.

Roger Alford (01:44:10):

Yet, there's a recognition that there is essentially three types of conduct that are potentially problematic in the world of antitrust.

Roger Alford (01:44:18):

One, agreements between competitors, so various types of price fixing or market allocation agreements. Two, monopolistic behavior that is abusive or exclusionary. And then the third major category are mergers between competitors that lead to significantly high concentrations, such that they are likely to harm competition.

Roger Alford (01:44:42):

Generally speaking, the world of antitrust law focuses on one of three things, illegal mergers and acquisitions, price fixing or market allocation agreements between competitors or abusive monopoly practices.

Clare Morell (01:44:58):

That is a great summary. Thank you so much. Now, I do want to ask each of you in turn, to just share what you think the greatest challenges that Big Tech and maybe digital markets more generally pose to current antitrust laws and why.

Clare Morell (01:45:17):

I don't know if we want to start with Professor Newman, would you be willing to go first and just share what you think the challenges are that Big Tech and digital markets kind of pose to current antitrust law?

John Newman (01:45:30):

Sure. Yeah. I'd be happy to take a crack at it. It's of course, a big topic. It's the topic of the day.

Clare Morell (01:45:36):

It is. Well, unpack it please [crosstalk 01:50:25] but go ahead.

John Newman (01:45:43):

All right. I think at least one of the challenges that Big Tech firms... We're speaking at a very high level of generality, of course, because a lot of these firms have really very different business models.

John Newman (01:45:52):

The things we lump together under Big Tech, to an economist like Dr. Jamison, might look actually very different.

John Newman (01:46:00):

Speaking then, at a very high level, I would say one of the biggest challenges that Big Tech firms and those business models and markets pose for antitrust regulators today is, how do we pick which constituency within US society is the favored one from an antitrust lens?

John Newman (01:46:22):

For a long time, dating back at least to 1979, consumers were said to be the favored constituency from an antitrust lens. So, we look at conduct through this lens of consumer welfare. Conduct is good if it leaves consumers better off, it's bad if it makes them worse off, basically. So then, a big challenge that these businesses, a lot of them pose is, who are the consumers? So you take something like Facebook, I'd argue the primary consumers are advertisers. Facebook's business model is basically harvesting attention from us and then selling it to the ultimate consumers of attention. Those are advertisers.

John Newman (01:47:05):

Now, Facebook also makes another product. It's not attention. It's social media or something like that. That's consumed by us. So right off the bat, you've got two potential products floating around. You've got multiple groups of consumers. Their interests are not always aligned, sometimes they're directly opposed and that poses a problem.

John Newman (01:47:25):

Even if we want to stick with this consumer welfare kind of paradigm, which is a little bit narrow relative to what things were historically, you've got a problem as an antitrust regulator. Who's the consumer?

John Newman (01:47:38):

We used to do things like just assume that, say if output is going up, that's good for consumers because if consumers are buying more, they must be happier.

John Newman (01:47:46):

That gets harder when you have multiple products floating around and the same conduct could push output of a one up and output of another down. All of this just gets a lot messier. It's not as obvious who the favored constituencies that we're supposed to be protecting is.

Clare Morell (01:48:02):

Hmm. That's really helpful. Professor Alford, do you have thoughts building off of that, on the challenges-

Roger Alford (01:48:10):

Yeah, Clare, I think it's really important that you distinguish between the different types of companies. The concerns that are raised by some companies are very different than the concerns raised by others.

Roger Alford (01:48:20):

Take Amazon, for example. Probably the biggest concern about Amazon is that they are the platform for third-party marketplaces, third party vendors that provide services and goods on the marketplace.

Roger Alford (01:48:34):

Yet, they also compete directly with those third-party vendors. Unlike other analogs in the brick and mortar world, they have just enormous data about how those third-party companies are doing and they can see which ones are going viral and which ones are stagnant. They can immediately decide when to compete and how to compete with the situation.

Roger Alford (01:49:01):

So Amazon, probably the biggest concern is that they are a platform for third-party vendors and they compete with those vendors on their own platform, and then they have the ability to use data in a way that is not traditional in other situations. That's probably the biggest concern with respect to Amazon.

Roger Alford (01:49:20):

With respect to things like Facebook, as we saw in the decision yesterday, it's a very unusual situation for monopolization because normally monopolization is looking at monopoly pricing behavior.

Roger Alford (01:49:34):

At least as framed in the complaints by the FTC and the DOJ, the main concern was in so-called zero price markets. The zero price markets are unusual because you don't normally look at quality degradation as the same metric as monopoly pricing behavior, even though you certainly could do that.

Roger Alford (01:49:53):

But to show monopoly power in the Facebook model is going to be different when, at least on the consumer-facing side, you can't just show the traditional monopoly pricing behavior. You have to show other sorts of things.

Roger Alford (01:50:08):

I think Google is a very complicated model. Full disclosure, I'm advising the state of Texas in their ad tech case. There's a variety of different concerns with respect to Google.

Roger Alford (01:50:20):

The DOJ case is primarily about search and search advertising and the ability of Google to monopolize search advertising.

Roger Alford (01:50:29):

The Texas case is primarily about the ad tech stack and the display advertising and advertisements that appear on websites or throughout the internet and the pricing behavior and other sorts of behavior that happens with respect to publishers and advertisers.

Roger Alford (01:50:46):

Apple is a whole other category. I think the Epic Games is a concern about the app store as a separate market. They can charge monopoly pricing, 30% for in-app purchases, as well as downloading apps.

Roger Alford (01:51:06):

So, there's essentially this argument similar to the Kodak case from many years ago, that there's a special market for apps in the Apple ecosystem, essentially.

Roger Alford (01:51:19):

It's really difficult to sort of say there's one major concern or one major issue. They're all very different. There are common themes, which is data is overwhelmingly significant with all of these types of companies.

Roger Alford (01:51:37):

There is a network effect that happens with most of these companies, where essentially there's either a winner take all or winner take most scenario, where the network effects of having friends and colleagues and family members be part of the network creates a tilting effect.

Roger Alford (01:51:57):

Or in the case of say, app stores, all the app developers realize they have to have apps for Android and for the iPhone. So, there's a network effect that happens.

Roger Alford (01:52:10):

There are many aspects, I think, that are different about this. Probably the biggest concern is simply the overwhelming amount of power that these companies have. That would be the overwhelming issue, I think, that unites Republicans and Democrats.

Clare Morell (01:52:25):

No, that's very helpful. I think you're right in distinguishing the kind of... There's distinct issues, there might be common themes, but it's helpful for you to kind of clarify some of those distinct kind of issues related to Big Tech with antitrust.

Clare Morell (01:52:39):

Dr. Jamison, I want you to have a turn to answer this question and then I'll jump into my next question.

Mark Jamison (01:52:45):

Sure. Thank you very much. I'll take a little bit different perspective on it. I don't think we have necessarily problems with the antitrust laws. It's more the mechanisms we use to try and to enforce them, that I think we have challenges with now.

Mark Jamison (01:53:00):

It doesn't bother me that there are multiple customers groups for these companies. We've been through that before. We know how to either say, these customers are more important than those, or to say they're all equal and simply add up how they're effected.

Mark Jamison (01:53:16):

The network effects aren't necessarily new to us either. We can look at those from a multi-market perspective or look at, just like I did with Microsoft, that this group of customers leverages what a company can do with another set.

Mark Jamison (01:53:31):

I think we can deal with all those. I think the two main challenges we have are how fast these markets move, and then also, how all of these companies that people are worried about are actually managing ecosystems.

Mark Jamison (01:53:47):

That is different for us. We've seen some of those things before, but this is different. The way that we try to enforce antitrust today is we first try to identify what is a market, and then we look to see if there is power in that market. Someone is able to behave without paying much attention to customers and rivals.

Mark Jamison (01:54:09):

Those bounds, defining what that market is, requires historical data. You have to have a few years worth. But in today's world, by time you've gathered that data and analyzed it, markets have moved on. So, we don't have that historical system, that historical approach to be able to identify the markets and actually measure if there's power within them.

Mark Jamison (01:54:34):

And then with respect to the systems, what we see are that, Facebook has an ecosystem within which a lot of people operate, Google does as well, Amazon does as well, Apple does as well.

Mark Jamison (01:54:48):

This is now companies managing systems. So, we have competition between the systems, as opposed to necessarily competition between different products. The product competition still occurs, but it's the system that matters.

Mark Jamison (01:55:04):

Historically, the way we've been able to view this over the years, you probably heard a Metcalfe's Law. We have Bell's Law, which kind of works in the same way. Those laws says that every 10 years a system turns over and a new system comes into place.

Mark Jamison (01:55:20):

So during that time, who's ever managing the system has a lot of influence. But once we move on from like what we had with the Nokia type phones that were giving us our broadband access on mobile, to the iPhone, Android world, that was a complete change in what the system was going to look like.

Mark Jamison (01:55:42):

That's the kinds of things that we should be thinking about and dealing with. Our current techniques for antitrust don't deal with these very well.

Mark Jamison (01:55:51):

What I think we need to do is kind of go back to our roots, things that were talked about 200 years ago, which is, where does market power really come from?

Mark Jamison (01:56:00):

Right now, we have kind of an ex-post view. We say, "Oh, there it is," but it's elusive now. What we want to know is, where does come from and try to deal with those source issues, as opposed to, I found it, then whoops, it just slipped out of my hands.

Clare Morell (01:56:16):

Hmm, no, this is really interesting. Well, I want to unpack some of those different issues that you raised, a little bit further. So, we'll spend a little time talking about some of these current issues and challenges that Big Tech poses in these markets.

Clare Morell (01:56:30):

And then we'll move, in spending the rest of our time discussing some possible solutions, particularly some of those that were proposed and raised by the senators in their remarks this morning. I want to just circle back to something that you said, Dr. Jamison, about the issue of these private ecosystems.

Clare Morell (01:56:49):

Professor Newman, I know this is something that you wrote on in your Vanderbilt Law Review article as well. So, this is open to all of you to talk about, but wanted to just ask, what is the private ecosystem issue, in terms of these companies acquiring other firms that aren't necessarily direct competitors in their markets, but allow them to create these private ecosystems and then that kind of becoming a harm to consumers and in harming competition?

Clare Morell (01:57:22):

If either of you would like... any of you would like to speak to that, I would be curious just to hear about how those private ecosystems are presenting challenges in the anti-trust space.

John Newman (01:57:37):

Well, I can take a brief crack at it, at least since I've written a little on this topic. It is a thorny one, I would say.

John Newman (01:57:47):

I think I called it at one point, the Google antitrust paradox. That is when a company like Google builds out what we're calling an ecosystem, they don't just offer search, a kind of core product where they started. But now, search is sort of tied into Maps and Flights and Gmail and YouTube, et cetera, et cetera, in a way that makes it very easy for a user like you or I to navigate among those arguably different products. Right?

John Newman (01:58:17):

All of this is, by the way, challenging what we even are referring to when we use words like product. But anyway, so what happens when Google acquires a company like, oh, I don't know, Waze, and then builds out Google Maps, is that it makes it easier to stay within that ecosystem, but it does reduce some form of competition at the same time.

John Newman (01:58:42):

I think it's oftentimes, in cases like that one, or YouTube would be another example, it can be kind of hard to prove a user harm. Because part of what we're saying here is, the ecosystem is powerful because it's easy for users to navigate within it. So, there's a kind of arguable consumer benefit right off the bat. It's a little harder to see in some of these cases, the consumer harm, at least in traditional dollars and cents terms.

John Newman (01:59:09):

I think you can point to things like a loss of choice. That's a slippier concept. I don't think we define that quite as well in the antitrust community.

John Newman (01:59:18):

I think, when we start talking about ecosystem markets, I guess hearkening back to my first set of comments here, it does get a little... it does force the issue. It does force us to ask, what are we really trying to do here with antitrust?

John Newman (01:59:34):

Are we just trying to make the world a kind of seamless consumer experience and we don't really care if one company does all of that, as long as there's consumer benefits that are quantifiable? Or are we trying to preserve some kind of democratic, I guess, dispersal of power across the market landscape?

John Newman (01:59:55):

I just think there are questions like that, that we haven't really wrestled with firmly, in recent years. And I think events like this one are evidence that we are starting to do that again.

Clare Morell (02:00:06):

Hmm. That's helpful. Yeah. Senator Hawley kind of recognized this a bit in his remarks this morning, just that there's a danger of, I guess he used the term cross-subsidizing these businesses and kind of pushing out competitors in multiple markets. So, it sounds like this is something that the antitrust law might need to grapple with more.

Clare Morell (02:00:33):

On that note, it's been raised by many of you, just the issue of, who is the constituency? Who's being harmed? How do we measure that?

Clare Morell (02:00:44):

I guess this is a kind of big question, but do you think that the consumer welfare standard, the current antitrust approach, is up to handling these kind of Big Tech issues with antitrust? How do we then measure harms to consumers? Is the consumer welfare standard enough to protect and promote competition in these markets? Yeah, anyone who wants to jump in on that.

Roger Alford (02:01:19):

That issue, that's a very complicated question. This is an area of intense debate. I think that there is an appetite from our friends on the left, to try to rethink the consumer welfare standard and suggest that maybe we should go to a broader approach, such as perhaps a public interest standard.

Roger Alford (02:01:42):

I think among Republican and conservatives, generally, there is a very strong desire to maintain the consumer welfare standard. And then the only question is, how do you define the consumer welfare standard when you have not only price concerns, but also quality concerns or other sorts of concerns that are not easily captured by traditional economic measurements?

Roger Alford (02:02:06):

So, we have a situation I think, in these markets, where there are both price concerns and quality concerns that are part of the consumer welfare standard.

Roger Alford (02:02:17):

I think, for example, privacy could well be part of the consumer welfare standard. It's simply a quality experience that consumers care about. There's no reason to say that the consumer welfare standard is incapable of addressing privacy concerns. You simply have to frame it from the perspective of not only price, but also quality.

Roger Alford (02:02:41):

The difficulty is when you're trying to balance pro-competitive and anti-competitive measurements and they're incommensurate.

Roger Alford (02:02:53):

Economists really struggle. They very openly struggle, with how to measure the harm to quality from something like privacy, which obviously, each individual consumer has a slightly different view about protecting privacy. And then how do you counterbalance that with economic analysis of pricing behavior?

Roger Alford (02:03:14):

So, I think I would generally say that the courts and most experts on the right are going to continue to maintain a consumer welfare standard, but it is definitely up for debate, about whether or not there should be a broader standard.

Clare Morell (02:03:32):

Mm-hmm (affirmative). No, that's helpful. And yeah, go ahead, Dr. Jameson.

Mark Jamison (02:03:37):

Yeah. If I could just add to it, I think Roger is exactly right, that there is a vigorous debate over, what's really our standard here? Is the economy really about consumers or is it about dividing up the economic rents among whoever is filing court cases?

Mark Jamison (02:03:54):

He's right. There's a lot people more on the left side of things, that would really like to do away with the rigorous analysis that we've had before and just kind of have some rules of thumb, if you will, that if a company is really successful, there's got to be something bad going on. So, let's try to deal with the company.

Mark Jamison (02:04:16):

You mentioned earlier about the cross-subsidization going on. I don't think antitrust has dealt very well with ideas of cross-subsidization. We tend to be very loose with that kind of language. We're very loose with words like privacy.

Mark Jamison (02:04:34):

My colleague at the American Enterprise Institute, Jim Harper, has written a whole book about this, that it's just this potpourri of ideas. That's why Roger's exactly right. It's really hard to measure because everybody means something different by it. So, I think we want to think very carefully about when we're talking about something like a cross-subsidy is going on. We want to be rigorous in what we're talking about.

Mark Jamison (02:05:01):

The economic definition to date is that a cross-subsidy is happening if someone is part of an ecosystem or an economy, and everybody else would be better off if this person just wasn't even around. Then, that person is being subsidized.

Mark Jamison (02:05:17):

If we stick with that standard, then we can deal with that issue pretty easily. If we allow it to just mean things I don't like, then we'll continue to struggle.

Roger Alford (02:05:28):

Well, can I speak to the cross-subsidization issue? Because this is, I think, a really interesting and important issue.

Roger Alford (02:05:34):

Traditionally, courts and economists are skeptical about predatory pricing because there is a sense that low pricing behavior for a significant period of time is unlikely to be harmful to consumers, unless there is evidence that that low pricing behavior drives out competition, and then there's a recoupment that happens through higher pricing, after they've successfully driven out their competition.

Roger Alford (02:05:57):

That's the classic model of concerns about predatory pricing. When you have a monopoly across different segments of a market, it is quite possible to arbitrage your pricing behavior. So that where there is competition, you have very low price behavior, and then where there is almost no competition, you increase your prices.

Roger Alford (02:06:19):

You can arbitrage your pricing behavior across segments, contemporaneously. You don't need to wait for a future date to seek recoupment. You're essentially going to recoup your low pricing where there's competition elsewhere.

Roger Alford (02:06:33):

For example, you can have very, very high prices on search advertising and lower prices on display advertising, if there's competition. Or you can have very, very low prices, almost commodity pricing in one segment of the stack, and then very high prices where there's almost no competition in another segment of the stack.

Roger Alford (02:06:52):

I think that's an example of recoupment that's different than the traditional metric that we have for predatory pricing.

Clare Morell (02:06:59):

Hmm, that's helpful.

Mark Jamison (02:07:01):

If I could just add, and that's an illustration of where we need to be very careful about what we mean by cross-subsidization. Because if I'm that monopolist and I've got a monopoly in this market, I don't in this market, if I can charge a monopoly price over here, I can do it whether I'm trying to deal with competitors over on this more competitive market or not.

Mark Jamison (02:07:23):

So, I'm not necessarily driving a cross-subsidy. I am, just as the predatory pricing literature tends to say, losing money in this other market, with the hopes of getting it back someday.

Mark Jamison (02:07:36):

My trying to drive out competitors over in this other market doesn't really affect my profitability in the market where I'm charging a monopoly price. I can do that anyway.

Mark Jamison (02:07:47):

We want to tease those concepts apart and make sure we think about them carefully.

Clare Morell (02:07:53):

No, that's helpful. Just circling back a little bit to the consumer welfare standard and some of the issues right now in antitrust, how can we measure harms to consumers in these digital attention markets?

Clare Morell (02:08:09):

If these are zero price markets and price has been the traditional measure of harm to consumers, what other measures are available? Can we be creative in thinking about other types of harms? How would we kind of quantify those, in terms of these attention/digital markets?

John Newman (02:08:31):

Well, I think for starters, I guess again, we'd have to think about which sort of group of people we're trying to assess harms to. If it's advertisers, of course, we could look at traditional price harms. We could also look for things like lower quality, et cetera, but you could treat that side or downstream or whatever part of a market, as a fairly traditional one, I think.

John Newman (02:08:58):

When it comes to the zero price side, things get a little trickier. I guess my preferred metric would be looking for a sort of traditional overcharge, a monopoly overcharge, but just in the form of attention costs rather than the form of money.

John Newman (02:09:16):

So if you could, say, demonstrate that before a merger, you had two firms competing head to head, let's say it's two companies that are kind of like Facebook and Instagram, but not exactly those two.

John Newman (02:09:28):

That's a hypothetical. Before the merger, you see advertising load set at a certain level for users. It's going to vary user to user. But let's say, post-merger, you see overall advertising loads go up and you find some internal documents, communications that suggests once this merger happens and we don't have the competitive constraint of that other company, we'll be able to jam more ads down people's eyeballs.

John Newman (02:09:55):

That, to me, seems like a pretty traditional anti-trust case in theory of harm. It might be a little trickier to quantify, but I think you can do it, if you had a good econometrician.

Clare Morell (02:10:07):

Hmm. That's helpful. I want to keep moving because I know our time is limited. So getting towards solutions, Professor Newman, I know you've written that it seems that the current antitrust approach to digital markets has been very pro-defendant and hands-off. You argue for a kind of more interventionist approach.

Clare Morell (02:10:32):

So, just a question for all of you. What do you think needs to be done in terms of... Before we get to some legislative solutions... I do want to talk about Senator Lee's and Senator Hawley's legislative solutions, as well as the House Judiciary bill with Congressman Ken Buck and other co-sponsors. But I want to first

ask, before we get to legislation, what do you all think could be done better in terms of antitrust enforcement?

Clare Morell (02:10:58):

The way our laws are today, as it comes to these digital markets, is a more interventionist approach needed and what would it take to increase that enforcement?

Roger Alford (02:11:12):

I can speak to that issue.

Roger Alford (02:11:13):

Due to that issue, putting aside for the moment legislative proposals, I think that there should be more vigorous enforcement. I think there should be more funding available. The budgets for the FTC and DOJ were flat for several years, even decades, and they were not even adjusted to the CPI. So you could definitely say that budget increases for more vigorous enforcement for the DOJ, for the FTC, for the state AGs. All of those things would be welcome, I think, and helpful. State AGs, there's very few states that actually have large antitrust departments. Most of them have one or two antitrust lawyers and that's it. No economists and more significant funding by state legislatures or perhaps by the federal government for state AGs would be welcome.

Roger Alford (02:12:11):

I also think that the attitude of enforcers should be slightly different. I think there's a general sense of we should only bring cases that we're quite confident that we're going to win, whereas I think the attitude should be, we should take cases that we have genuine concerns about the competitive markets, but we know that it might be difficult to succeed on those. So there should be, I think, a change in mindset that we should not view losing a case as a failure, but rather we should view the need to bring more cases as a point of trying to tell the market that we're very concerned.

Roger Alford (02:12:52):

I also think on mergers that there is an increased interest in more vigorous enforcement on mergers. I can think of, for example, nascent competition. Everyone talks about Instagram as the example of ... It was quite clear that it was purchased right before they became a full blown competitor so that they could get through the merger process, and that's an example, I think of nascent competition. Perhaps in need of more vigorous enforcement. So I would say the most obvious solution is more enforcement powers and also more vigorous enforcement by the federal and state AGs.

Clare Morell (02:13:38):

That's really helpful. Anyone else?

John Newman (02:13:38):

I would say, if I could offer just one thought. Again, like all of these, a really rich question, but maybe just one thought is I think to some extent, regulators back themselves into a corner over time by endorsing, particularly in the horizontal merger guidelines that they issued jointly, so the U.S. FTC and DOJ antitrust division, by endorsing increasingly hyper-technical approaches to legal questions, like how do you define a market, right? And this gets back a little bit to some of the things that Dr. Jameson was discussing earlier. In these contexts, those hyper-rigid, hyper-technical approaches, like trying to ask what a hypothetical monopolist would do in a hypothetical world to a hypothetical price that doesn't even exist

because we're in a zero price context, for instance, just makes very little sense. Now those guidelines start to bleed over into all types of antitrust cases pretty much.

John Newman (02:14:40):

So I think part of regulators' job now is to educate courts on when those approaches might make sense and when they don't. And I think you're seeing things like this FTC, the Facebook case, running into that question of market definition of running aground a little bit. So I think it's going to take regulators themselves endorsing more flexible approaches, not suggesting to abandon economics or anything like that, but to explain to courts when and why more qualitative factors might be important when a more flexible approach to market analysis might be necessary, if we're going to even have antitrust at all.

Clare Morell (02:15:24):

No, that's really helpful.

Mark Jamison (02:15:24):

I can chime in.

Clare Morell (02:15:24):

Go ahead, Dr. Jameson.

Mark Jamison (02:15:28):

Yeah. Just to talk about that a little bit. The problem with stepping away from actually analyzing markets is that then we fall into folklore, which we see a lot of going on today in antitrust. People just know that there's market power. They just know that these companies are bad. They just know. And so you go right back to what Brandeis did when he was doing antitrust. He just picked out people he didn't like and went after them. It was very personal. And that is the way that things will go if we don't have some sort of rigorous analysis, rigorous standards. Relating that to the current case for Facebook that just got kicked back to the Federal Trade Commission and some of the state attorneys general that the problem there was that they really did pick a bad market to try and analyze.

Mark Jamison (02:16:24):

They said that they were going to pick personal social media and claim that there's a 60% market share, and by golly, that looks a lot like market power to us. The judge says I'm not convinced, and the judge was quite correct in that, because if you look at actual people's actual use of social media, Facebook occupies about 8% of people's personal social media time. That doesn't sound like a large market share. It certainly doesn't sound like market power, and it's important to understand that that time and attention market is actually an input market. It's not a product market. It's an input for the advertising, and so you want to start looking then at the advertising market. That's where I think they should have been looking and saying, "Is the market power there?" And if there is, then we can maybe say something about how the inputs are acquired, et cetera, rather than try to talk about whether people had enough options for social media, which clearly according to the behavior, they have quite a few.

Clare Morell (02:17:30):

No, this is all really helpful. I would love to start moving into some of the legislative solutions that we have heard proposed by the Congress members and just starting off with Senator Lee's TEAM act, which really seeks to codify and update the consumer welfare standard. I wanted to ask what you all think of his approach in particular, in terms of trying to really codify the consumer welfare standard. I guess a question I would also ask is how then does codifying that standard ... What does that mean in terms of

competition in these markets? How is competition considered then as a factor? Is it only in the sense that the lack of competition affects consumers and drives up price or is codifying the consumer welfare standard going to limit how we look at competition as well as a factor in these markets? So that was my first question just around Senator Lee's TEAM act and any other thoughts that you might have on that approach.

Roger Alford (02:18:41):

I think that that consumer welfare standard is very well-established in the jurisprudence of the courts. We haven't really said this explicitly, but it's very clear that the antitrust law common law approach that is grafted onto a very vague statutory requirements. And so I think that that legislation is simply trying to crystallize what is already the existing law. To that extent, it doesn't really change the status quo at all. I think what it might do is try to anticipate efforts to modify the consumer welfare standard through the courts. And so I think that if it were to pass, it would simply, I think, maintain the status quo with respect to consumer welfare standard. That's my impression. I would be curious if John or Mark have different views about that.

John Newman (02:19:36):

You know, one, one part of it that really piqued my attention, or my interests, and that I strongly agree with that Senator Lee, Mark mentioned this morning, was the idea of requiring defendants in antitrust cases ... And here, I think we're talking about rule of reason cases, not garden variety, price-fixing cartels, to actually quantify and actually offer actual evidence, real-world evidence, of their claimed efficiencies, right? So the way most antitrust litigation works these days is the plaintiff bears the initial burden, and they have to come forward with actual evidence that tends to prove that the conduct at issue was harmful and then the burden shifts to the defendant. And recently, although you can trace this back a little ways, but most recently in the Supreme Court's 2018 Ohio v American Express decision, a majority of the court suggested a defendant can carry its burden not with actual proof, but by just asserting efficiencies. Basically just saying there's some nice explanation out there that might make sense of our conduct. That's, I think, wrongheaded for all kinds of reasons. So the idea that this TEAM act would require defendants, instead of just saying something like "Ooh, free riding" to require them to actually come forward with some evidence. They're in the best position to do that since it's their conduct, that's at issue. I think that makes a lot of good sense to me. I think other parts of the act, abolishing the FTC, I disagree with pretty vigorously, but that one in particular strikes me as very right and justified.

Clare Morell (02:21:10):

So that's helpful. Yeah, and I think other parts of the TEAM act ... I didn't mention this in my initial question, but were trying to really clarify some of the types of evidence that are required or at issue in these antitrust cases. I know another part of it would require that courts do find a conduct anti-competitive if there is direct evidence. And so I don't know if either of you or any of you want to speak to that standard that the act tries to impose. If there is direct evidence that a merger acquisition was taken to clearly limit competition, like the CEO of this company said it in their own words, and we have that email that the court would need to then find that that conduct is anti-competitive. Do any of you have thoughts on that new standard that the act would create in terms of that type of evidence?

Mark Jamison (02:22:11):

I can chime in first on this one. So I apologize. I've not read that specific bill. I'm a little skeptical of gathering CEOs', and et cetera, emails and memos and such, and using those as evidence. I've worked in a corporation before. There's a lot of hubris in corporations. There's a lot of arguments that in a context, people are trying to make to sound persuasive. They may say ... They say all kinds of things. One of my favorite characterizations of our corporate strategy people is they were the only people I'd ever met that

sitting in a chair they are still swaggering and strutting. That's just the culture that you have, so I take a lot of the things that are said with a grain of salt. I really would, as John and Roger were talking about earlier. I'd like to require some real evidence that there's some harm. Now, it is hard to do because we're talking about counterfactuals. And as we saw in the AT&T Time Warner, Carl Shapiro is a brilliant economist. He did a great job of trying to say there could be real problems here, and he's right. There could've been real problems there, but clearly even AT&T and Time Warner did not realize how difficult it was going to be to even have a successful company, let alone one with market power.

Clare Morell (02:23:29):

No, that's helpful. I want to touch on a couple of the house bills. So I don't know how much you've been following that there were six different antitrust bills that passed out of the house judiciary committee last week. And we heard from Congressman Buck this morning, who's a co-sponsor of those particular bills. If you've followed along, if you have, first of all, any general thoughts on some of these bills, but also I just wanted to highlight a lot of them seem to be focusing on trying to prohibit dominant firms from giving their own products or services advantages over their competitors, or disadvantaging the products of others on their platform. Senator Lee's TEAM act also does this, trying to prohibit basically discrimination in these kinds of distribution markets, that someone with a monopoly in the distribution market that also offers a product or service that competes in that distributed, in that market, can't engage in discrimination against other competitors that might be competing with their product. I know that we touched on some of these harms earlier, but do you all have thoughts on those bills approaches in trying to prevent that type of discrimination in preferencing of their own products, disadvantaging others, and if these bills are going to correctly address some of those concerns?

Roger Alford (02:24:51):

Well, it's important to emphasize that those bills are limited very, very narrowly to the largest of the Big Tech companies. So it doesn't cover the vast, vast majority of companies that might engage in discriminatory practices. And I think it's a recognition. The reason I think they do that is because they recognize that the power of those companies are of greater concern than the typical competitor. So in that context, I think the price discrimination concerns are legitimate. There are other sorts of discriminatory practices are legitimate, that there is in fact, this ability that they have to bring everyone to their platform and then to act in a way that discriminates against other actors on their platform and then use the data to advantage themselves. And so I would suspect that the discriminatory practices that are concerned in those house bills could get some real traction. It's very similar to the French authority settlement with Google earlier this month. If you look at what the settlement was about, it essentially concerns about discriminatory practices in which Google always self preferences within the ad tech stack. So I think that that particular legislation could get traction because it's targeted to the largest companies.

Clare Morell (02:26:20):

Hmm. That's helpful.

John Newman (02:26:22):

I think too, if I could add just a word on that, that it's important to remember, and I feel like it's sometimes gets lost in the Twitter debates that happen on these things, that that particular piece of legislation also does include an opportunity for these companies to come forward with good explanations for their discrimination, right? It's not a hard and fast ban of all self-preferencing. So you're not going to see iPhones come with no apps anymore. They're not going to be just little bricks that you get at the Apple store. I think some of the sky is falling mentality that you see among certain commentators is probably unjustified. I think there's still a chance for companies to, if they're doing these things for good reasons, to explain why.

Mark Jamison (02:27:06):

Yeah, and I think that that's a fair point that there can be very good reasons for just looking like you're discriminating against arrivals and probably actually are. So we want to think about that carefully. I'm concerned about some of the things I've seen out of Europe for several years in this regard. So for example, let's just take Google, for example. It does self-preference, my understanding is. I've not actually examined the evidence. My understanding is it does self-preference some of its businesses that it provides: hotels, airlines, et cetera. If the profitability of doing that incentivizes Google to drive more customers to its search engine, that actually can be very good for the customers because then it really wants to make that search engine good. It has to make that search engine even better. Do you actually get the customers there, which may or may not help the rivals, but certainly does end up helping the customer. So that's the kind of thing you want to analyze. Not all discrimination is bad. It actually can be quite beneficial in the end.

Clare Morell (02:28:14):

No, that's helpful. I want to ask you briefly about some legislative purchase around mergers and acquisitions. So Senator Hawley's bill really tries to basically place a cap that if you're over a hundred billion as a company, then you're banned from any type of merger and also seeks to break up some different lines of businesses that these companies may have already acquired. And I think in general, it seems that his approach is moving away a little bit from the traditional consumer welfare standard. It seems to be he's reached a point of basically saying big is just bad. And even if that means that consumers may have benefits from some of these mergers, that at a certain you're just too big and it's harmful. And so we talked a lot about the economics and I'm wondering, is there ever, in any of your minds, a place in antitrust law where at a certain point we say it's not just economics. There might be legitimate political concerns for our country, for our democracy, for our society where companies have just gotten too big and have too much power and control of our society, whether or not you can prove all the kind of economic harms to consumers.

Clare Morell (02:29:36):

That's a bigger philosophical question, but then also specifically wanted to hear what you would think then of Senator Hawley's bill, really trying to break these businesses up, prevent any kind of acquisitions for companies over a hundred billion. What you think of his approach.

Roger Alford (02:29:55):

With respect to prohibitions on acquisitions, I think rather than using a market cap number, I think it's better to use a market share number. I think that market cap numbers have the potential to be arbitrary. For example, Amazon acquisition of Whole Foods could very arguably be pro-competitive because prior to that, there was not a robust, effective distribution mechanism for food delivery, right? And so you could say that Amazon's ability to deliver and leverage its distribution channels in the food market could actually be pro-competitive and they're in clearly separate markets. That's an example where I don't think this pure market cap makes the most sense. I think the other option is once you have a certain market, I think this is a Klobuchar bill, once you have a certain market share, then there may be limitations that should be imposed on your ability to acquire either nascent or actual competitors. That to me comes closer to what is the heart of the concern.

Clare Morell (02:31:05):

That's interesting. Anyone else have anything?

John Newman (02:31:10):

Just without weighing in on whether that particular proposal is good or not, I guess I would say, I think the traditional concern here of course is that if we prevent these tie ups, that we'll lose out on all these wonderful efficiencies that come from combining companies, right? For sometime in antitrust history, the general thought was that big is bad. For another period of time in antitrust history, the general thought among a lot of people is that big is good, right? That's a gross overgeneralization, of course. But if you look at speaking to the economics, and if you look at the actual industrial organization, even more the management, strategic literature that's out there, it really doesn't back up that story that mergers generally yield efficiencies, right? People have looked hard for mergers that actually yield efficiencies across various sectors. And the general consensus seems to be that mergers on average, again, generally speaking here, don't yield recognizable efficiencies. They often yield a bonus for the target firm's shareholders, but that's about it. And we've seen a lot of these high profile mergers that just fall apart. They fail. What causes these mergers, maybe getting back to Dr. Jameson suggestion, that there's a lot of hubris that floats around these companies. That could be an explanation. I would just suggest that whether or not that particular proposal is a good one or not, I'd have some concerns about it. The downside risk is probably not as big as some people would have us believe.

Clare Morell (02:32:44):

No, that's helpful. And do any ... Oh go ahead. Dr. Jamison, please.

Mark Jamison (02:32:49):

Sure. So the idea that we should have take down the size of firms because they may control the country is not new. Actually, that was one of the drivers between how Judge Harold Green thought about the AT&T breakup. And I'm skeptical that that is actually a good application of antitrust. Clearly the content companies, the social media companies, can influence dialogue, and they certainly believe they can influence dialogue in the country. We can see that in the actions that they take. That I think is a separate issue from antitrust. That we want to take care of. Section 230 may be a place to take care of it. Thinking in some dimensions of common carrier may be a place to take care of it. I was skeptical of using antitrust for it. And as John was implying, mergers and acquisitions happen for a lot of reasons.

Mark Jamison (02:33:44):

He's right that it's pretty rare for shareholders to benefit from these. Management tends to benefit, but shareholders tend to not so much. So I don't worry a lot about mergers and acquisitions. And one of the things too to keep in mind, I think with respect to those, especially the tech industry, is a lot of times what you're buying, if you're buying another company, is the people. You're not necessarily buying a product. There was a case, and I had forgotten this name. I recently read the history of artificial intelligence, and there was a few professors put together an AI firm. They thought about going to the Big Tech companies and saying, "Here's our idea." Couldn't get much of an audience. Didn't really want to work for a Big Tech company. So they formed their own firm. Fairly little. It lasted for about a year, became worth a few billion dollars, and was bought by one of the tech firms.

Mark Jamison (02:34:33):

I don't remember which one, but that's how that particular idea got into how we do artificial intelligence. It had to be through somebody starting up a firm and saying, "Look, I demonstrated this idea has some value. Nobody else can figure this out as well as we can, because this is our academic research." And then that becomes a new addition to how we do AI in this country. So the mergers and acquisitions can be quite diverse. And I think it's problematic to have a broad brush and say they're all going to be bad or particular threshold.

Roger Alford (02:35:11):

Can I speak to the political power issue? I do think that the one thing that clearly does unite Democrats and Republicans on these Big Tech companies power is that they can exercise their power, not only in the market, but also in the political sphere as well. And there are examples of that, that alarm those on the left. And there's examples of that, that alarm those on the right. Things like Cambridge Analytica, things like Parler taken down, not only an individual user, but an entire alternative platform. All of those kinds of concerns do in fact evidence the overwhelming political power. And there's even some suggestions that I think are quite plausible that certain companies can influence public opinion and the way that they raise or lower the dial with respect to advertisements, political advertisements, and that, that can actually have a measurable impact on the voting behavior of individuals. There's actually literature and research on that. And all of those sorts of things I think should be cause for concern. And exactly how we deal with that, as Mark is suggesting, is very complicated. It's not clear that that political power translates into the traditional understandings of concerns about consumer welfare, but that doesn't mean that there should not be genuine concern about that kind of political power.

Clare Morell (02:36:41):

That's very helpful. And then we are running up on time. So I want to ask my last question very briefly, but you were just segueing into it, Professor Alford. So I did want to just ask, I think antitrust seems to be an area of more bipartisan agreement that there is actually concerns by both the left and the right when it comes to some of the issues with antitrust. And so I just wanted to ask, in terms of that bipartisan consensus, do you think that there are areas of real agreement or should conservatives be wary of some of the approaches being put forward by the left? And one thing I just wanted to specifically highlight is I think there's been a debate between empowering the FTC versus empowering the DOJ. And I know that the house antitrust bills empower the FTC. Senator Lee's TEAM act would put all antitrust enforcement under the Department of Justice, because I think some conservatives are concerned that the left would grow the government's power. With the FTC through rulemaking trying to rule-make on antitrust issues.

Clare Morell (02:37:53):

And also that there can be a little bit more of the lack of political accountability between administrations. The FTC is a little bit more insulated in that way. So I know we don't have a lot of time, but if anyone would briefly, if you have any thoughts on areas of bipartisan consensus, but also areas that could be seemingly bipartisan where we as conservatives might want to be a little bit more cautious and particularly, maybe even in the area that FTC or DOJ debate in terms of enforcement powers.

Roger Alford (02:38:24):

I mean, I think that there is no doubt that there is an unusual amount of bipartisan consensus that these companies have too much power in the marketplace, and that there should be vigorous enforcement to address their most egregious types of conduct. If you look at the state AG litigations every single state in the country, I think with the exception of Alabama, has joined at least one of the various suits against big tech. If you look at the New York Facebook case, the Colorado Nebraska case, the Texas Google case, every single state has joined at least one of those cases. And that, I think, speaks to the level of concern.

Roger Alford (02:39:07):

I do think that some of the arguments on the left are not going to be accepted by those on the right. I think the elimination of consumer welfare standard is the most obvious example, but others, I think on the legislative front very well could be accepted, shifting the burden of proof on mergers or limiting nascent competition mergers. Those kinds of things very well could be accepted, I think, by both sides. I think the one great unifying factor though, is we need to be bringing more cases to address these concerns. And we need to send a clear signal to some of these companies that the business as usual is not going to be allowed. That there actually are genuine concerns about some of their practices.

Clare Morell (02:39:54):

Does anyone else have a last word on this, and then we'll conclude?

John Newman (02:39:58):

Maybe a last word or two, I guess. Stepping back for a minute, even from that, this is a big question. Stepping back, I think it's worth remembering that antitrust itself has always been, in a sense, a kind of compromise between the left and the right. Antitrust was a middle road between a true socialism, national ownership of various industries, or heavy, heavy regulatory management to include price regulation. That would be the left, left position. And on the right, a kind of ultra laissez-faire. Companies can do no wrong of course. I'm actually not that surprised to see some bipartisan consensus emerge in the way that it kind of did back in the forties and fifties. We had just gone through a period in which just letting the market do whatever it wanted, didn't seem to work very well.

John Newman (02:40:52):

On the other hand, in the early to mid-thirties, we tried a heavy regulatory overlay in a bunch of industries, and that didn't seem to work very well. And then we saw this period of more or less bipartisan consensus around a strong antitrust approach to include both agencies, right? The FTC with its unique ability to really gather facts about entire industries, rule make if necessary, and a DOJ, a real law enforcement agency. I guess I would say that this is, to me, a return to a historical moment that is not so unusual. And I don't think there's a lot of need to be overly concerned about what's happening for those on the right.

Clare Morell (02:41:33):

No, that's really helpful.

Mark Jamison (02:41:35):

I would just add, maybe I'm just repeating, but there is a lot of political will to attack the Big Tech companies. No doubt about that. That's on both sides. I'm skeptical that either side would improve our laws beyond what they are. I do think the practitioners have a lot of work to do because the way things work today within these industries are different than what we've experienced before.

Clare Morell (02:41:59):

That's really helpful. I'm so sorry we're at time, but fascinating conversation. Thank you all so much for your time and for sharing your expertise and research in this area with us today. And with that, we'll conclude this panel and we'll take a brief two minute break before resuming our third and final panel on common carrier. So thank you all so much for the conversation. Appreciate it.

John Newman (02:42:23):

Thank you.

Panel 3: Is Common Carrier the Solution to Big Tech's Censorship?

Clare Morell (02:42:38):

Hello. All right. I think we have everyone. If you are just joining us for our event this morning, we are about to start our third and final panel, which is a panel with the question is common carrier the solution to big tech's censorship, and I will introduce. We have four distinguished panelists. [crosstalk 02:48:36]

Clare Morell (02:43:00):

We have four distinguished panelists with us today, and I will go ahead and start introducing them. I know ... I think we're waiting.

Philip Hamburger (02:43:08):

Can you guys hear me?

Clare Morell (02:43:10):

Yeah, we can. And I can't see you though. I think we're trying to pull up your video Professor Hamburger. I'm going to go ahead and start introducing everyone. And hopefully we'll, we'll get Professor Hamburger's video up shortly. So first off we have Adam Candeub, who is a professor of law at Michigan State University and also a senior fellow at the Center for Renewing America. He was previously the acting assistant Secretary of Commerce for Communications and Information, and he joined NTIA as the deputy assistant secretary in April of 2020, and then later joined the Department of Justice as a deputy associate attorney general. In his work at the Michigan State law school, he is their director of intellectual property information communications law program. And he holds a JD Magna Cum Laude from Penn Law and a BA Magna cum Laude from Yale University. Professor Candeub's scholarly interests focus on the law and regulation of communications, internet technology, and he is widely published in the areas of communications regulation and anti-trust

Clare Morell (02:44:25):

in federal courts, including the US Supreme court have cited, and relied upon his work. Our next panelist is professor Richard Epstein, at the New York University school of law, where he is the inaugural Laurence A. Tisch Professor of Law, at NYU school of law. He's also served as the Peter and Kirsten Bedford Senior Fellow, at the Hoover Institution, since 2000. And he is also the James Parker Hall, distinguished service Professor of Law Emiratis, and a senior lecturer at the University of Chicago. And he has been a member of the American Academy of Arts and Sciences, since 1985, and a Senior Fellow of the center for clinical medical ethics at the University of Chicago division of biological sciences. And Professor Epstein researches and writes in a broad range of constitutional, economic, historical, and philosophical subjects. And has taught administrative law, antitrust law, communications law, constitutional law, and the list goes on. And Professor Epstein also writes a legal column, The Libertarian, and is a contributor to ricochet.com, and the SCOTUSblog.

Clare Morell (02:45:34):

Our third panelist this morning is Professor Philip Hamburger, who is the Maurice and Hilda Friedman Professor of Law at Columbia Law School, and president of the New Civil Liberties Alliance. Before joining Columbia, he was also the John P. Wilson Professor, at the University of Chicago Law school. He writes on constitutional law, and its history, with particular emphasis on religious liberty, freedom of speech in the press, the judicial office, administrative power, and unconstitutional conditions. And he has published several books, The Separation of Church and State, Law and Judicial duty, Is Administrative Law Unlawful, The Administrative Threat, and Liberal Suppression Section 501(C3), and the Taxation of Speech. And he has a forthcoming book this year, called purchasing submission conditions, power and freedom. He's a member of the American Academy of Arts and Sciences, and has also served on the board of directors, of the American Society for Legal History. And he has twice received the Sutherland prize, for the most significant contribution to English legal history.

Clare Morell (02:46:37):

And our fourth and final panelist is Professor Eugene Volokh, who teaches First Amendment law, and a First Amendment Amicus brief clinic, at UCLA School of Law, where he has also often taught copyright law, criminal law, tort law, and a seminar on firearms regulation policy. Before joining UCLA, he clerked for Justice Sandra Day O'Connor, on the US Supreme Court. And for Judge Alex Kozinski, on the US Court of Appeals for the Ninth Circuit. Professor Volokh is a member of the American Law Institute, a member of the American heritage dictionary usage panel, and the founder and co-author of the Volokh Conspiracy, a leading legal blog. And his work has been cited by opinions in eight Supreme court cases, and several hundred court opinions in total, as well as several thousand scholarly articles.

Clare Morell (02:47:24):

As you can see, we have a very distinguished panel today, of these law professors, who are legal scholars in this field. And our conversation today focuses on common carrier law, particularly asking the question, is common carrier the solution to big tech censorship? First I wanted to just ask, if someone would be willing to just give us a brief summary of what common carrier law is? For those tuning in who might not be as familiar with this field of law. And then I'll ask all of you to share briefly what your opinion is in terms of how common carrier law could be applied to social media platforms, and big tech companies. First would someone just be willing to give [crosstalk 02:53:48]

Richard Epstein (02:48:10):

I'm happy to do that, since I've done a lot of the history on this particular subject.

Clare Morell (02:48:14):

Thank you so much.

Richard Epstein (02:48:15):

The basic intuition is as follows, there are many competitive markets, and in those circumstances, the refusal to deal is thought to be the essence of competition. Or otherwise, if you could force somebody to take your business, then it turns out that you get some kind of a dictatorship. But starting very early on, with Sir Matthew Hale, it became perceived that there were certain industries that were called quote effected with the public interest. And it meant that these applied to essential services, a debated term, and those essential services had no close substitutes. And what the law said is, if you have the only coach that takes you from London to Oxford, you cannot leave people behind. If you have the only in, you cannot leave them on the street.

Richard Epstein (02:48:57):

They developed a body of law, which says that a common carrier is required to take customers on a reasonable, non-discriminatory basis, to avoid these kinds of outcomes. These terms, each have some meaning to it. The term reasonable means that you have to give them enough money so that they could remain in business. But at the same time, you're not going to allow them to extract the monopoly profit. And the phrase non-discriminatory means that you can't play favorites amongst your customers, and decide willy-nilly, that you're going to give one the rate at half the other, is a fear of a discretion. It gets complicated when the cost of provision of services are different for different people. And you are allowed generally speaking, to make cost justified adjustments. But this creates essentially a very common regulatory scheme. As you move forward in time, the common carriers do not just cover inns and so forth.

Richard Epstein (02:49:49):

They cover railroads. They cover essentially electrical grids, gasoline companies, pipelines, and so forth, telecommunications. A huge portion of the economy is embedded in this. And the modern question is, is

technology constantly allows you to come up with close substitutes. You have to ask, is this a durable common carrier type situation? Is it one that can be destroyed and so forth? And the intuition, which I sometimes share, is that if the common carrier said that you can't refuse to deal, if these particular companies have that kind of power, then even on non-price interests, taking people whose views are adverse to yourself, are they under a duty to serve? That's the basic problem. And the solution is different, but to put it mildly, very widely, of course, different individuals, with different presuppositions as to what the right or wrong solution is. I'll leave it at that.

Clare Morell (02:50:42):

No, that was extremely helpful. Go ahead, Professor Hamburger. You were going to add.

Philip Hamburger (02:50:46):

Thank you. I greatly respect my former colleague Richard's view of common carriers. I've learned a lot about it from him. I just want to draw out a little distinction that he alluded to, but strengthen it if you will. The distinction between the public function justification, and the market dominance justification, and they have different implications. The public function justification note would even apply to a small bus company. It's the public character of the enterprise that really matters. There's also a market dominance justification, which Richard emphasized, and notice that applies to really private companies engaged in what might not seem public functions. What I want to emphasize here is that the government has actually aided these companies. And therefore the arch of dominance is not really private. It's not as if we should say, oh, we shouldn't punish these people for being successful. And Section 230 is central in this, amongst the other ways in which government subsidizes companies. Is it's helped establish tech company dominance, Section 230 privileges tech communication, over print communication, and in-person communication.

Philip Hamburger (02:51:57):

And so we're not in the realm of private individuals being punished for their success. It's partly government established dominance.

Adam Candeub (02:52:09):

And also if I could. Look the question of what problem common carriage is supposed to solve is an old one. It goes back to the beginning of the 20th century, the debate between Bruce Wyman, and Burdick. And, Burdick took the, it's all economics, it's as do we have easily substitutable products. Wyman took the broader view. Actually one that we find in, let's say the dissent from Justice Harlan, the civil rights case, that common carriage is really about certain types of industries and activities. Harlan said it was public highways, public commute, post offices, turnpikes, places of public amusement. I'm not a historian, and I'm not exactly sure what that would refer to in the 19th century, but that you couldn't, as he said, you couldn't really... What does he say? In a public blacks and whites, whites together in public buildings of whatever race, for the purpose of hearing political discussions of the day discussed.

Adam Candeub (02:53:13):

And, for better or worse, I mean this area of the law does have a non-economic aspect to it. And that makes things more difficult. I mean, we like economic regulation, because it's precise, because it gives us nice answers. But the historical reality is that common carriage has this other aspect of equal, and meaningful, social, and political participation.

Eugene Volokh (02:53:39):

Can I just add something a little bit more concrete? To the very helpful, general analysis that was offered. Here's an example. Let me give you examples of things that are common carriers and that are not. Not a common carrier, a newspaper, however, dominant in its market. However important it may be. Not a common carrier, a broadcaster. Broadcasters have historically been subjected to certain kinds of obligations to carry things they dislike, such as the latent by me, unlamented fairness doctrinals, the personal attack rule, rules that are still in place that not quite require them to, but more or less pushed them towards running candidate ads. Those are not common carriers.

Eugene Volokh (02:54:30):

What are common carriers? Phone companies is a common carrier that could be a landline monopoly. It could be also the famously competitive cellular phone companies, they're common carriers. The post office is essentially a common carrier. Now that's run by the government. That's in part because of the First Amendment. But UPS, and FedEx are also common carriers.

Eugene Volokh (02:54:51):

So a newspaper is entitled to say, we don't want to carry views that we disapprove of. It's contrary to our editorial judgment, but what's more, we're providing a service to our customers. We are giving them good ideas, useful, thoughtful ideas, accurate factual accounts. And we're also fighting the problem of information overload. That if we gave them everything, they would be useless. We're picking and choosing. And we're entitled to do that. A bookstore is kind of like that too. Obviously, a bookstore doesn't pick and choose as much as the newspaper does, because it can have tens of thousands of titles, or maybe even hundreds of thousands for the biggest ones. But they're all set up to fight the problem, especially traditional bricks and mortar bookstores, of information overload.

Eugene Volokh (02:55:34):

On the other hand, if a phone company says, "we're so upset, that this phone number on our service is being used, publicly announced as the recruiting number for the KKK", or for Antifa, or for the communists, or for anti-Chinese government protesters. They're not allowed to say, "we're going to refuse to provide service", because they're a common carrier. Likewise, if UPS and FedEx says, "we refuse to deliver packages that we think contain Nazi propaganda, or communist propaganda." They can't refuse to carry that.

Eugene Volokh (02:56:10):

One question that arises is, where should social media fit within the spectrum? Perhaps a better question. Let me just finish one thing and then I'd love to hear Richard, what would you think, is where do the different functions of social media operate within the spectrum? Might it be for example, that there are the hosting function, where it just decides whether to carry a particular Twitter feed. Let's say a particular Facebook page. Could be a common carrier, but in the other hand, the recommendation function, where it decides what to promote as articles you might enjoy, might be more like a newspaper or more like a broadcaster or not. Richard?

Richard Epstein (02:56:51):

There's also another question here. If you go to the historical situation, times were primitive and alternatives were not only scarce, they were non-existent. So what you did is, you had a long and skinny essential service, which there was no close substitute. As you move forward in time, what happens is, you could get UPS, and you could get FedEx, you'll get three or four telecommunications carriers. You could get various boats, and airplanes that go on different routes, and you have to decide therefore, whether or not the presence of common carrier competition allows you to give back to the exclusionary model, or whether the traditional functions still apply. And there's a big debate over that particular situation. In

many cases, it really doesn't matter that much, because when you finally figure out whether or not you're going to take passengers on a plane, the basic norm is you could throw out the disorderly, and the unruly, and take everybody else. And nobody really wants to deviate from that equilibrium.

Richard Epstein (02:57:47):

But when you start having content, and information, then it turns out that if you regard these as competitors, like newspapers, they can exclude. If you regard them as traditional common carriers, they can't. And the definitions from the historical sources don't point unambiguously in either direction.

Philip Hamburger (02:58:07):

If I may? First, a framing point, and then I want to engage with what Eugene and Richard just said. The framing point is, I think we should always remember this conversation, that although we're focusing on common carriers, that is not the only justification for anti-discrimination laws in this context. There are other constitutional foundations for that, we needn't dig into that here. We've just got to keep in mind, this is one of many, and it's related to the others.

Philip Hamburger (02:58:34):

Now I want to get to the question that my colleagues raised, as to what is a common carrier? And I just want to point out that what's conceived to be a common carrier is a flexible thing, and it's expanded or contracted, depending on the regulation that's at stake. There's full common carrier regulation, which includes its price controls, and all the rest. I suspect most of us have some hesitancy to endorse that in most situations. But then there's a mild or common carrier regulation, which is simply the anti-discrimination element.

Philip Hamburger (02:59:05):

And when the anti-discrimination element has come into play, there've been very broad understandings of what is a common carrier, for in a 1701 case involving a farrier. The farrier could not refuse to shoe somebody's horse. Another hand. That didn't mean the farrier was subject to price controls and things like that. We've got to keep in mind here, is it depends what we're looking at. If we're talking about broad, common carrier regulation, this has happened to the phone companies. We might take a narrower view of what a common carrier is. If we're looking at anti-discrimination law, then you have a very broad understanding of what a common carrier is, that's been true in the anti-discrimination law throughout the past century in the United States. And it's also true when it gets to some of the First Amendment issues.

Philip Hamburger (02:59:45):

To the extent we're talking about anti-discrimination law, our sense of what a common carrier is, actually expands a little, is a little broader. And historically that's been true.

Richard Epstein (02:59:55):

Title II covers restaurants and movie theaters, neither of which comes close to the standard historical definition. And there's a real question, is that good or a bad kind of thing? Because the non-discrimination rule amongst other things will retard competition, may make it more difficult to get new entry, and so forth. One should never assume that the broader definitions comes without any kind of a parallel cost.

Clare Morell (03:00:20):

This is all very helpful. And I think we're already starting to get at this, but my next question is then, given those frameworks for thinking about defining a common carrier, and what would make a company, justified categorizing it as a common carrier, then what are the arguments? And, what do you all think, in

terms of why this classification could be applied to social media platforms? And I guess, even what you clarified, Professor Hamburger, on the public function justification, versus the market dominance justification. Are both present, as it comes to social media platforms? Is one a more compelling justification than another? And we can all go in turn, and you can all share what you think in terms of applying these, the common carrier framework to social media platforms. Why the argument exists, that they could be regulated as common carriers.

Richard Epstein (03:01:28):

Adam?

Adam Candeub (03:01:29):

Sure. Well, as has been pointed out, it's a vague, and it is a vague term, meant many things from, gristmills to places of public amusement, as Justice Harlan said. And I think that for lawyers, the vagueness of the category makes us nervous, because we like sharp categories that are adjustable and Judges can make decisions about. But, I think, go back to the Harlan dissent, is that people have to be involved in where public discussion is actually happening in a meaningful way. And for whatever reason, social media networks seem to exhibit extreme network effects, and they seem to solidify around a few points. And that for meaningful involvement in that, and in those places, there has to be some sort of mild non-discrimination requirement.

Adam Candeub (03:02:35):

Now, that that sort of exercise of state power, it makes people uncomfortable. On the other hand, virtually every institution in our society, our schools, medical provision, housing, they're suffused with these anti-discrimination requirements. Somehow we managed to get along, whether we're burning unspeakable inefficiencies, I don't know. But I think at very least the burden should be on the social media companies, to show what really will happen to them, other than Zuckerberg being upset, that certain people are having certain discussions.

Richard Epstein (03:03:19):

Look on the social media side. There's always been a category that you could get rid of unruly people. And Eugene and others have mentioned that, you can probably keep people who were trying to incite riots, steal military secrets, and inspire antisemitism, something like that, or. But the category of misinformation that is used by many of these companies, to justify the kinds of exclusions they make, is much more appliable, and much more dangerous. Generally, most of the things I believe would be described by somebody like Mark Zuckerburg as misinformation.

Richard Epstein (03:03:54):

And do you want to talk about the side effects of vaccines as a movement against the universal use of them? I think it's a perfectly legitimate topic, even though it may well be that the vaccination side is correct. Do you want to talk about the fact that the COVID virus originated in the Wuhan virus laboratory? I think that's a perfectly legitimate subject, and so forth. Do you want to take the people who wrote the great Barrington declaration, and throw them off the air, on the grounds that they're the wrong kind of sciences? I think not. And so what has happened is, the ire has come up, because the for cause requirement associated with removal, has been stretched to the point that it now looks as though partisans on one side are suppressing their rivals. When the taint of the legitimacy of crankiness doesn't seem to be part of the case. And I think that's what it is.

Richard Epstein (03:04:42):

And then going back to what Philip said, this is something that bothers people, even for small companies who are doing this. And it bothers you even more, if you think as may well be the case, that since many of these companies have the same kind of quote unquote, progressive liberal bias, they are doing it with tacit collusion, one amongst another. And that creates something that makes it look more like a monopoly by way of combination, or rather than a series of competitive, independent, free-thinking common carriers. And I think that's constantly in the background in this particular debate. And we don't know what the thing is. And the last ambiguity, I think that should be mentioned is, when are the other guys coming in? If there were a Parler out there to pick up the conservative stuff, you'd be much less willing to shut down, or to get angry at Facebook. But they are not available. When they come available, you may want to change. It may well be at the number of viable alternatives is a key issue.

Richard Epstein (03:05:35):

The definitions are going to start to go in and out. And from a policy point of view, it's just extremely difficult to say, you're on, you're off, in different periods going up and down, depending on who succeeds or fails. You'll have a lot of administrative problems, in addition to all the definitional ones that people refer to.

Clare Morell (03:05:51):

That's very helpful. Professor Volokh, Professor Hamburger, do either of you want to share your opinion on why we could argue that social media platforms should be regulated as common carriers?

Richard Epstein (03:06:08):

Come on, Eugene.

Clare Morell (03:06:11):

Hold on. He's muted.

Eugene Volokh (03:06:12):

I'm muted. Sorry. I think it's important to distinguish different functions of social media platforms. Let me just give you an analogy. If you look at the First Amendment case law, having to do with whether it's constitutionally permissible to require property owners, to allow speech on their property. There are several cases that say yes, sometimes, although not other times. One of them is Rumsfeld v. Fair, where I oversimplify here, but the court said it's constitutionally permissible to require universities to allow military recruiters into the recruitment program. Does that mean universities are common carriers? The court didn't use that terminology, but essentially we're talking about here, about the First Amendment law analog of common carrier doctrine. No, of course not. Universities have very broad authority to set their curriculum, to decide who to hire, to decide which speakers to invite, to decide which programs to run.

Eugene Volokh (03:07:11):

Especially when we're talking about private universities. But, as to one particular feature of what they do, which is the recruitment. The hosting of recruiters for their students. As to that, essentially, the court said they could be treated as common carriers. Likewise, in the Pruneyard case, shopping malls under California law now, in the law of a few other states, have been required to allow members of the public to go onto the property and leaflet, or gather signatures. And the US Supreme Court said, that's permissible. It's not required by the First Amendment, but it's permissible, if the state wants to impose that kind of rule. In a sense, that means that they're kind of common carriers for purposes of this kind of speech. It doesn't mean they have to rent to all shops. Doesn't mean they have to allow all murals that somebody may want to put up.

Eugene Volokh (03:08:13):

It's important to distinguish the functions. Here's my tentative sense. I think that there's a plausible argument to say that when we're talking about the hosting function, do you have, can Donald Trump have the at real Donald Trump account? Can Louis Farrakhan have a Facebook page? At least it's plausible to say that the social media companies should be treated like phone companies. Or like again, UPS or FedEx, and be told that essentially you have to carry that speech. I'm not sure that that's a good idea because, there's no problem, almost no problem so bad, the government regulation can't make it worse. Maybe it'll make the problems worse. But at least I think that's a plausible argument again, by analogy to the phone company.

Eugene Volokh (03:08:56):

On the other hand, if what you're concerned about is that platforms are not promoting certain kinds of speech, as much as they're promoting other kinds of speech, not including it in speech you might like, or other people have been viewing, or we recommend. There, it seems to me that the case for common carrier status is quite weak. Because again, I think those social media companies are performing an important function, and constitutional protection function of dealing with information overload problems for their users, and solving them that way. That's what I think is the main distinction, at least at the general level.

Richard Epstein (03:09:32):

I think they're too difficult. Go ahead. My fault.

Philip Hamburger (03:09:35):

Oh, thank you. I just have three quick points. First. I want to actually directly answer Clare's question, in the following way. Section 230 already partly treats platforms as common carriers, C1 protects them from being treated as the publisher or speaker. And this is similar to the old common carrier protection from liability, for harm caused by goods conveyed and the like. None of the tech companies objected to getting the benefits of sort of partial common carrier status. The problem with 230, is not that it treats them as a common carrier, but it only does it partly. It did not impose the corresponding duty not to discriminate. The statute secures them in the common carrier privileges without the corresponding responsibilities. And I think that it's important to remember, then therefor it's too late in the day for them to object that they're not common carriers. They wanted this, they coordinated with government to get it.

Philip Hamburger (03:10:31):

We should never, never forget that. Second. Adam mentioned that we all live with anti-discrimination law. And although there are complicated questions about this law that we're always exploring, and it's complicated, but we all live with it. And you and I, and everyone listening to this. None of us have legal departments to help us navigate this. And yet, somehow we manage to do it. These companies have the largest legal departments, and access to law advice than any anyone in the country. I think they can handle it. And then I wanted to get to Richard's point, which we're all worried about. I think it was very important to mention it. The term mis- information as if this is grounds for censoring people and shutting them up. I just want us to remember, Galileo was guilty of misinformation. Darwin was guilty of spreading misinformation, everything.

Richard Epstein (03:11:25):

Copernicus.

Philip Hamburger (03:11:27):

[crosstalk 03:11:27] misinformation. Thanks.

Richard Epstein (03:11:30):

But can I mention something? I'm going to take issue with Eugene, at least the qualification. You mentioned two cases, and I think each of them has another wrinkle. One of them is, can the military come on to recruit? Generally speaking, I think if the answer is, can the military just knock on the door and say, we want to be there. There's going to be a serious problem. Just the other day, when they had the Cedar Point case, they made it pretty clear that a state which requires you to accept the union, is going to basically fall to the per-se takings will want a case like Loretta. That would happen here, but what makes these cases much harder is it's the unconstitutional conditions doctrine. Is, we giving you money. And so therefore what we want to do is to say, if you want to get our cash, then you have to let the military come in, the Solomon Amendment.

Richard Epstein (03:12:14):

And they're just many complications with respect to that. But I think the government was prepared to say, I mean, they won in court saying, if we want to continue that we can do it. And they did it, not only for the unit inside a university that was engaged in the discrimination, they did it for the whole place. Your medical school, go down in flames, if your law school got very tough on military recruitment for JAG. And the other thing is on the Pruneyard case, one of the ways in which defendants actually got out of some of these problems, is they started using serious time, place, and manner restrictions, which are generally justified. And in certain kinds of shopping centers, it turns out you can shop if you have demonstrators. And in other cases you can't. And you get some stuff going on, that particular dimension as well.

Richard Epstein (03:12:56):

I mean, what happens is, it's not just the common carrier problem, not just the direct regulation problem. Also lurking in the background in many of these cases is the unconstitutional conditions problem.

Eugene Volokh (03:13:07):

If I could you just very briefly respond? Because this is one of the things that when I said I oversimplify Rumsfeld, this is one of the features. It is true. The Rumsfeld v. Fair involved the statute that said, as a condition of getting government funds, you have to allow military recruiters. But the decision was broader than that, because the court said, and I quote, "this case doesn't require us to determine when a condition becomes an unconstitutional condition." It's clear that a funding condition cannot be unconstitutional to be constitutionally imposed directly, because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment access requirement. The statute does not place an unconstitutional conditional on..

Richard Epstein (03:13:50):

But the question is, why would that be the case?

Eugene Volokh (03:13:52):

Well [crosstalk 03:13:53].

Richard Epstein (03:13:53):

And then what's the justification to say, the government has to come in for military stuff, and nobody else can come in? You have to have a government supremacy type argument, which really sits very uneasily

with the First Amendment. I'll perfectly concede that they're willing to say that. I don't think it's right. And I also think the First Amendment content constitutional issue argument, is as always extremely hairy.

Eugene Volokh (03:14:14):

[inaudible 03:14:14] I'm sorry.

Philip Hamburger (03:14:16):

I would just like to say, I think this is a bit of a sideline from our main conversation. But I do. I also want to say I think it's fascinating. And if you're interested in this topic, forgive the promotionalism. I have a book coming out in September, called Purchasing Submission, that re-explores unconstitutional conditions, but I actually don't think this is an unconstitutional condition situation we have here.

Adam Candeub (03:14:38):

A little historical perspective. Is it unconstitutional to require communications companies to carry messages? Certainly for common carriers. I mean, it's not. I mean, even in the 19th century, if physical interconnection was in fact ruled that it was unconstitutional, that it violated their views of substantive process. However, telephone companies were required to submit messages to competitors. The way it worked is, if I was trying to call Clare, and she was on independent telephone network, and I was AT and T, I call AT and T, and their operator will call the operator from the independent telephone company. And then they will call Clare, and says, "oh, Candeub is trying to reach you, get yourself to an AT and T telephone company." I mean, the notion that companies engaged in this sort of behavior, in this sort of business, had to carry other people's messages, at least for most of our history, did not raise constitutional issues.

Clare Morell (03:15:46):

That's helpful.

Eugene Volokh (03:15:46):

Can I just flag one other constitutional, unconstitutional conditions question here? I think that the government can indeed require social media companies to operate like phone companies, when it comes to their hosting function. And I think Rumsfeld is one precedent for that. Richard argues that it may be badly reasoned perhaps, but there it is. However, one interesting conditions question, is what happens if Congress says, as to the recommendation function, as to your deciding what to promote, and what to push out to people, as something we recommend or something you might like. We know we can't require you to be non-discriminatory, but we will provide that if you want immunity from libel liability, as to what you recommend, then you have to be viewpoint neutral in those recommendations. If you want to have complete discretion as to what you recommend, we totally understand that you have a First Amendment Right, to exercise that discretion. But at least as to that, you will not get immunity. If it turns out what you're recommending is something that's libelous, or invasive of privacy, or whatever else, then you might be liable.

Eugene Volokh (03:17:03):

I'm inclined to say that that would probably be constitutional and I can point to specific cases that so hold. I'm not positive that that's a great idea. I'm not positive any of this is a great idea. But that's where I think the conditions question comes in. I think as to the hosting function, the government can use just its sovereign power to say, look, you are like the phone company. Whereas as to the recommendation function, and there are some other functions as well, like the conversation management function, where it polices comments and the like and replies. There, it seems to me, there the government would have to use

the carrot of immunity, which now it offers categorically to everybody, and like provided [crosstalk 03:23:24]

Richard Epstein (03:17:46):

Eugene, what you've done is open happily a can of worms. Because what happens is you start off with these guys being publishers and transmission carriers. Then they start to remove things, and they put them on this favorite list. And then they put warnings, this stuff is contaminated and so forth. After a while, they cease to be somebody who's just stoking the stuff onto the situation. And people start thinking of them as editors in some way, state, or form. Or as commentators, or as moderators. And if there is a, now I am maybe inventing it, but I don't think so. A dual capacity doctrine, which limits the application of section 230, what your distinction does, is it's fortifies anybody who wants...

Richard Epstein (03:18:25):

What your distinction does is it fortifies anybody who wants to make that particular claim. And I'm not against that. Look, I think one of the noticeable things about this conversation amongst the people in very strong-willed times, is the amount of diffidence that we have with respect to the fact that we have the quote unquote, "one right answer." And I think that's actually a very healthy thing. But I do think what happens is the crystallization of really extreme cases of abuse, as defined by some, of what drives it, and say Donald Trump, there are people saying you're under a duty to keep them off, and there are other people saying you're under a duty to keep them on. And I don't really think that we have a strong enough theory to decide which of those two guys is strong enough so as to persuade the anti-Trump guy to go his way or the pro-Trump guy to go the other way either. So we are in a bit of a pickle.

Clare Morell (03:19:10):

Can I ask another question? This is so fascinating, but I kind of want to take us into a little bit more of the weeds of some of what this would look like.

Richard Epstein (03:19:19):

[crosstalk 03:19:20] Oh weeds, weeds.

Clare Morell (03:19:20):

So I know, Professor Hamburger, you mentioned this and Professor Candeub, your Law Review article talks about how common carriage is always a regulatory deal. And section 230 has already given them the carrot, if you will, without imposing a corresponding stick of a non-discrimination requirement to encourage these... And encouraging these platforms to enable users to block objectionable content for themselves. So I just want to ask what kind of language would a common carriage requirement kind of take? Senator Hagerty's bill, the 21st Century Speech Act, kind of puts forward some language on this that platforms that function as common carriers must be available to all users on non-discriminatory terms, free from public or private censorship of political or religious speech, and defines platforms as companies that have over 100 million worldwide active monthly users. So I wanted to ask you all what would common carrier language and requirements look like if they were to be imposed on these social media companies as a corresponding stick to the section 230 protections?

Philip Hamburger (03:20:34):

I think it's an important question, particularly because although these companies don't really realize it, it seems yet, they have a choice in front of them. They might get full common carrier regulation, which I don't think would be a good idea, and it would be very bad for them. And they could avoid that if they accede to a simple non-discrimination requirement in particular a bar against viewpoint discrimination. In

the Texas Bill, which I was somewhat involved with, we simply use the language about no discrimination on grounds of religion, race, or viewpoint. And the advantage of this is that you're buying into the whole host of doctrines, the knowledge we already have about what this is. And one avoids conflicting with section 230, not that it's constitutional, but one avoids conflicting with the statute because it really deals with content discrimination, not viewpoint discrimination. And if one merely seeks injunctions backed up with contempt proceedings, you don't even have to ask for damages. You don't run into the liability language there. So there's a way of doing this quite neatly without even running into the statute, let alone the constitution.

Richard Epstein (03:21:45):

Well, nothing is that neat. And so, I mean, there are a couple of things I'd like to make. One is, this hundred million subscriber figure. The moment you start using size as a condition on this thing, one could argue that it's a kind of a suspect categorization that will expose it to constitutional attack. Two, even if that's not true, you go from 99 to 102 million subscribers and all of a sudden the boom starts to fall upon you. Third you have the question is, well how do you count them anyhow? For example, trying to count full-time equivalents when you're dealing with how many workers do you have to have before you're subject to the union gets you into these endless disputes, and you're going to start to do something like that here.

Richard Epstein (03:22:25):

And the third thing is viewpoint discrimination, it's there. And I think Phillip is right, but we don't know how much it's going to carry over. Is viewpoint discrimination going to be sufficient to say that you have to let somebody go on there if they're going to exercise mass slaughter or child pornography or something. I think the answer he's going to say is, "No." And I think he's the right answer, but that depends upon your willingness to incorporate not just the non-discrimination part of the First Amendment, but all the other stuff which deals with categorical distinctions that we have. Open fields, non-discrimination rules, total ban rules, and you have to live with that as well. I think that the price is worth paying and so I would agree with Philip, and I would vote for his bill. I would want to take out the hundred million stuff. I would just kind of treat it as a general obligation rather than a monopoly, but I don't know whether I'm going to go to war over that because I don't even know whom I'm fighting.

Philip Hamburger (03:23:19):

I would never want to go to war with Richard. He's a dear friend.

Richard Epstein (03:23:22):

We're on the same side Phillip.

Philip Hamburger (03:23:23):

Yes, but I must say given that you were emphasizing the market dominance justification-

Richard Epstein (03:23:29):

[crosstalk 03:23:29] Yeah, that would be 100 million.

Philip Hamburger (03:23:31):

I can't imagine that you really want to emphasize that the size of the company is irrelevant? But I'll stop there.

Richard Epstein (03:23:37):

I'm not... Look as I say, I'm not really sure. But I mean, my view about the antitrust stuff on price fixing and so-forth, size really matters. But when it comes to the sort of viewpoint discrimination, I'm much less confident that that part of the size issue is as important here as it is somewhere else. And so that's what gives me a little bit of pause. That is, the traditional antitrust concern with size and domination had to do with prices and rates. And now when that is no longer on the table, do we de-emphasize the size component and sort of emphasize the fact that you're a pipeline of some sort or not. I think it's a very hard question. I mean, let me put it this way, if the alternative were the status quo, I would vote for Phillip's bill.

Clare Morell (03:24:24):

Can I ask a question? [crosstalk 03:24:25] Oh, go ahead Professor Volokh.

Adam Candeub (03:24:26):

Eugene.

Eugene Volokh (03:24:27):

No, no. Adam.

Adam Candeub (03:24:28):

No please, go ahead Eugene, please.

Eugene Volokh (03:24:30):

So one question I think we might be asking is what's really wrong with these platforms making these kinds of decisions? Well, one thing maybe it's blocking their users posts, right? But you know, it's their property, why not have people go to other services. And that's why I think that size matters here. That the concern is that first of all, that for certain kinds of platforms, they are if not monopolies, something pretty close to it. But more importantly, the concern is basically the one that's raised by usually liberals, in particular for example, Justice Stevens in the Citizens United dissent and many people who back that dissent, which is that economic power is being used, is being leveraged into political power. And that at some point that becomes dangerous to democracy, especially when we're talking about close elections, where a large, vastly large corporation could sway enough votes to affect the outcome.

Eugene Volokh (03:25:34):

Now, I actually don't agree with Justice Stevens' dissent in Citizens United. Recall, Citizens United was about whether corporations have the right to speak about candidate elections. And I think they do. I think the majority got that right. And in particular, for example, it was came up whether Twitter should be able to label tweets as it thinks that they're wrong or suspect or whatever else. Yes, I think that's part of their free speech right. But when we're talking about corporations actually blocking people's speech, even speech on their own property, that's where I think Justice Stevens' argument is a pretty powerful argument. I think the left has it right. And you know, people on the right have long acknowledged in certain situations, certain kinds of excessively broad private power can indeed jeopardize democracy. So that's why I think size really does matter.

Eugene Volokh (03:26:23):

If you're talking about a small company that is running a small network, as a practical matter we're not quite as concerned that it'll leverage its very minor economic power into comparably minor political power. At the same time, we might be more concerned that even the risk of litigation is going to drown it in litigation expenses and is going to deter it from implementing even useful and valuable filtering

mechanisms and the like. So that's why I think if our concern is, and maybe it shouldn't be, but if our concern is the leveraging of economic power into political power, that's something that we should be particularly focused on those entities that have real measurable economic power.

Richard Epstein (03:27:05):

Let me mention a complication. Because I think one of the things that's going on in these particular cases, if I get up there and I say, "I'm just not carrying you," it's fine. But if I get up there and I say, "I'm not going to carry your salacious, immoral and controversy," and I make false statements about your position then it's a situation in which there's an overtone of defamation in cases like that. And if there's an overtone of defamation, in that body of law, size does not matter at all. And so if somebody were to say, "Oh, you know what these guys who wrote the Great Barrington Situation, they're mass murderers." Even if you said it to a small group of people off of the internet, you can sue them for defamation and have to establish the requirement, and you could do it here.

Richard Epstein (03:27:46):

So what makes this so hard is almost always all of the carriers who take somebody off never say, "Oh, we're just doing this on a whim." They always give you a reason. And sometimes the reason they give you is one that should put them in the soup. In other cases, it's a reason that should give them an award. And there's just no way with Philip's bill that you could handle the defamation side of this thing. And so long as that is not size sensitive, the entire question is again, much more complicated than we might otherwise have done. And I'll just ask you Philip, how many times has there been a controversial removal for something which has been done without any particular acknowledgement and so forth? Maybe there were a few of them, but a lot of them seem to me have a lot of hoopla around them.

Eugene Volokh (03:28:29):

So I think that's right, but a lot depends on what they say.

Richard Epstein (03:28:35):

Well, I agree. Defamation cases always turn on that.

Eugene Volokh (03:28:38):

Right, right, right. But let me be more specific. Rightly or wrongly, if a service says we're removing something or even we're not removing it and some other place we're criticizing it because it's a racist attitude, that is generally speaking, I oversimplify here, but generally speaking that's not actionable. That is viewed as opinion. Maybe it shouldn't be, but that's what it is. On the other hand, if they say we're removing this because it was paid for by the North Korean government, then in that case, that's a factual allegation that might very well be libelous. And by the way, is libelous even under the existing scheme, because section 230(c)(1) doesn't immunize platforms for what they themselves say.

Eugene Volokh (03:29:19):

So a lot of the removals, or if they just say, " We're removing it because we think this is not in the best interest of our readers," or "our opinion is that on balance this is contrary to the facts," or even "we're removing it because it is contrary to the World Health Organization's view of COVID-19," and it is contrary to that that view, that's not libelous either. So it turns out I think that it's pretty easy for them to explain the reasons for removal without being liable under existing law.

Richard Epstein (03:29:52):

Well under existing law, but one of the things that I've always taken strong umbrage at has of course been the New York Times against Sullivan doctrine, and I much prefer the older law which says that if you want to call somebody a racist, you give particular illustrations as to what he's done that is wrong, so people could form an independent judgment. But if you just simply use the term about somebody who's not in the popular domain, so there's no knowledge, the older view of that was now a false statement of fact that it could be actionable. I'm not a fan of New York Times against Sullivan-

Philip Hamburger (03:30:23):

[crosstalk 03:36:01] Can I just defend the bill for one second?

Adam Candeub (03:30:24):

[crosstalk 03:30:25] Say one thing is-

Richard Epstein (03:30:26):

So I mean, so I think it's actually even harder-

Clare Morell (03:30:29):

Let's hear from, go ahead Professor Candeub And then go ahead Professor Hamburger, briefly. And then I have another question.

Adam Candeub (03:30:36):

I mean one thing of the problem is, is that a lot of what seems to be statements by the platforms, what is now being immunized by section 230, so that statements concerning reasons for kicking people off, reasons that are violative of the contract are in fact being read by certain courts as protected under section 230. And that a lot of, when getting back to the initial point, which is that Clare pointed out, asked about, which is what sort of regime would you want, a lot of this would be better if we could, in fact, as Eugene pointed out, get the liability correct. Because common carriage is essentially very much a liability regime. And so being able to make sure that people are... The Platforms are being liable for their own statements and their own actions is a big first step in the form of section 230.

Adam Candeub (03:31:28):

Second, I'll be very brief, one of the big requirements of common carriage going back to the 18th century is the publication of tariffs and the idea that these companies had to be transparent in what they were charging people. I mean even before they were set by the government commission, they had to be public. I think a lot of these problems could be alleviated, certainly the power that these companies are exercising with political discourse, by just greater transparency about who they're removing, the algorithms they're using to promote certain kinds of discussion. I think that's a lot of the anger and frustration people feel is that they feel as if there's a puppeteer in our public discourse and we're powerless to figure out what they're doing. That's all.

Philip Hamburger (03:32:19):

I just wanted to say, I entirely agree with Adam that the comments of the companies should not really be viewed, I think that was your implication, should not really be viewed as protected by section 230. It's an utter misreading of the statute. And this gets to Richard's concern about the Texas statute. Richard, the statute's aimed at viewpoint discrimination. There's no bar to content discrimination. So in fact it would greatly reduce the number of instances in which companies would have to opine upon other people's speech and to which I'd merely add, we all live with defamation laws somehow, like anti-discrimination

laws Adam mentioned earlier, we can live with it. And again, I think their legal departments can handle it. So I'm not terribly worried about that.

Richard Epstein (03:33:03):

No, I mean, look, I'm just saying it depends, right. But what you say is obviously the right maneuver. You don't want to go after the content stuff, right? You want to go after the viewpoint stuff. But in the COVID kinds of cases and the vaccine cases and so forth, it has been viewpoint discrimination.

Clare Morell (03:33:21):

Can I ask just two quick practical questions? So the first is something that Professor Candeub brought up in his law review article, was about encouraging platforms to actually empower the users to block objectionable content for themselves. So requiring the non-discrimination requirement on platforms that they can't block and filter content, but they need to host and carry kind of all content that... But then kind of completing that, I guess, by empowering users themselves then. Because there might be lawful content that a user might not want to see. And so I'm wondering what you all would think about trying to encourage platforms to enable users to moderate their own experiences? So platforms required to host all content, not discriminate based on viewpoint, but then people could moderate their own experience.

Richard Epstein (03:34:22):

Don't we do that with child blocks?

Adam Candeub (03:34:24):

Yeah, I guess. I mean, of course it's a brilliant idea, Clare.

Richard Epstein (03:34:28):

Perfectly sensible. I don't know if brilliant. Maybe too obvious to be brilliant, but it could be sensible none the less.

Clare Morell (03:34:39):

And then finally, on the state level, so if this type of common carriage regulation isn't likely to necessarily pass through Congress anytime soon, Professor Hamburger you talked about the bill in Texas, should states be trying to pass their own kind of common carrier laws? And then the second part of that with regard to states is, are there other tools at states' disposal, maybe less than common carrier such as public accommodation law, that they should be utilizing. I know that we have some state participants on this call. So how would you kind of advise state legislators or state actors when it comes to common carrier approaches?

Philip Hamburger (03:35:18):

Yeah, I think we don't need full common carrier regulation. That's really jumping a little too fast to put it mildly. And I recommend folks just look at the Texas bill or variants thereof. The point is simply we live with anti-discrimination laws, another anti-discrimination law won't do much harm and may do a lot of good and it's perfectly appropriate for, how should I put it, 50 different common carrier flowers to bloom in different states-

Richard Epstein (03:35:47):

By the way is that true for a network industry when there's a Dormant Commerce Clause question-

Eugene Volokh (03:35:51):

Right. So it turns out that that's a hugely important and complicated question. I tried to look into it and it's not completely clear and I don't think I've exhausted all the possible research on this, but here is a rough version of what I found. Courts do indeed have some concern about extraterritoriality. That what happens when one state, could be Texas could be Wyoming to take a very small state, one state tries to impose a rule that basically affects behavior all over the country. And you know, there may be some people that are maybe legislatures in other states, want to encourage platforms to block based on viewpoint because they think it's in the interest of the users in those states. So turns out that there is a good deal of extraterritoriality that is allowed. For example, the libel law in one state is often applied to the speech in another state, so it's complicated.

Eugene Volokh (03:36:56):

But generally speaking, I think it's more likely that these things would be upheld against the Dormant Commerce Clause challenge. If the statute basically limits itself to speech, may be said by people in the state, may be read by people in the state, may be both. So the clearest example, imagine that Wyoming says, "Look, any speech that is posted by Wyoming residents has to be readable by Wyoming residents without regard to viewpoint." So if you wanted to impose a different rule in other states, we leave it to those state legislators to deal with. But if it's Wyoming, Wyoming speech, it has to be protected.

Richard Epstein (03:37:34):

Well then it's not interstate commerce. And so the question is not only do we have the state stuff, but we have the foreign stuff. There's that famous case in international conflicts of law, shall the courts of Tobago rule the world, right? And the question is whether or not Phillip Hamburger operating out of Austin, Texas, is the new court of Tobago. My inclination by the way, is to rise above principle and to think that this is okay and let me put it this way, it's a balancing test Philip. I think I would probably strike you down if you were trying to go after content selection. I don't think I would stop you down for going after the viewpoint discrimination, because I think that's something which is much more widely shared and so the conflicts across state lines are supposed to be less. So there is a line for your brief.

Clare Morell (03:38:20):

[crosstalk 03:38:20] Professor Hamburger did you-

Adam Candeub (03:38:20):

If I can just say one thing. Clare, just one thing. This issue has been addressed by the DC circuit in reviewing the Vermont network neutrality laws and by a district court in California in reviewing the California network neutrality laws. But California online privacy laws, which really do have an extraterritorial effect, and they got the... They said it was okay. And I think they present very similar issues. I think the bigger concern is if the FCC, this is based upon the idea that the FCC has in fact not regulated in this area because it's regulating under Title I and they explicitly refrain from regulating under Title II of the Communications Act. However, if the FCC were to write a network neutrality order, which the Dems seem to want to do, there would be a very good chance that that could preempt any state common carriage regulation of social media. So that's just, I think-

Clare Morell (03:39:25):

I just wanted to go back then to Professor Hamburger actually in light of what you just shared, Adam. So then is there a possibility, if the FCC starts regulating the internet under Title II again and preempts states from imposing their own common carry regulations, that states could turn to lesser vehicles like public

accommodation law? And I think you were saying something about that Professor Hamburger. So I don't know if that's another possible route at this issue.

Richard Epstein (03:39:54):

No. Phillip you're muted so I'm speaking for you.

Philip Hamburger (03:40:00):

Oh, thank you. Well, then I'll speak especially well, thank you.

Richard Epstein (03:40:02):

I said no. I think any if way you place this in the statutory book, has nothing to do with its legality.

Philip Hamburger (03:40:10):

I don't think the FCC can displace the state's capacity to regulate discrimination. And I therefore think any pf the FCC rules would not get very far. I'll go further. There are very interesting questions that the Supreme Court is aware of, but they have not discussed it yet, about the degree to which the expansion of the Commerce Clause has inflated federal control of speech. And that, although they may not turn back on the Commerce Clause, I think will get their attention as to the dangers of taking too expansive a view of any federal control of information or speech. That's a grave constitutional problem.

Philip Hamburger (03:40:50):

Any well drafted statute, and we'll see, but any well drafted statute should be able to avoid these problems, including the Dormant Commerce Clause doctrine, which by the way is itself unconstitutional but that's another conversation-

Richard Epstein (03:41:02):

That's a different conversation.

Philip Hamburger (03:41:03):

I want to explain. And yes, I just want to add finally that we can never forget the technological aspect of this, which is the use of VPNs. The reality is you don't have to go to Texas or South Dakota to be there for purposes of speech. There are all sorts of subtle ways in which a statute can set up opportunities for wide ranging speech without ever coming near another state's capacity to regulate.

Adam Candeub (03:41:31):

Yeah, just to possibly take another perspective on Professor Hamburger's point, I think the FCC v. Iowa Utilities, I mean I agree that the federal government can't limit the state's ability to regulate discrimination. So if the statute, as the Texas bill is phrased, is in terms of discrimination, more like a public accommodation statute, but in FCC v. Iowa Utilities, the court essentially said the FCC can regulate interstate communications if it affects in any way the interstate. So I mean, we'll see, but I mean, I think it's something that... There is a possibility.

Philip Hamburger (03:42:16):

It would be really... Forgive me. I think it will be really quite amazing, quite shocking, if it is to protect the tech companies that suddenly state anti-discrimination laws are held to be unlawful under federal law. I just don't see it happening.

Richard Epstein (03:42:29):

Well, I tend to think that the FCC probably, the preemption I think is going to be there. I think that's your position, isn't it, Adam?

Adam Candeub (03:42:38):

Yeah, I mean I think it's a problem.

Richard Epstein (03:42:39):

Certainly it may not be on the current statutes, but I certainly think you could fix the federal statute so as to have explicit preemption, so long as it's within the scope of the Commerce Clause. As regrettably it is, it's there. And a lot of what Phillip is saying, in effect, is what I said about defamation law. We're always in second best land. If we take the current law in defamation, you may be right. You take the good law in defamation, you may be wrong. You take the current law on the preemption document, you may be right. You take the correct view, it may be wrong. You take the current view on Dormant Commerce opposed to the correct view... I mean, one of the things that happens is there are so many fissures in the law that we live with with existing statutes, all which come to the fore when we try to put new legislation forward, which is why we have all commendably differed in response to your questions, Ms. Morell.

Clare Morell (03:43:24):

No, that was a wonderful conclusion. I was about to say, unfortunately we're at time. I feel like there's a million threads of this conversation that we could continue to pick up and dive into deeper, but for the sake of everyone's time and all of your time today, we'll wrap this up for now and thank you to all four of you for giving us your time and your expertise. We really appreciate it. It was fascinating. And you've given us a lot to think about, so thank you all.

Richard Epstein (03:43:50):

Good to see you again Gene and Philip and nice to meet you, Adam. And Clare, thank you for doing such a great job.

Eugene Volokh (03:43:57):

Thank you very much.

Clare Morell (03:43:57):

Thank you.

Philip Hamburger (03:43:58):

Thank you.

Concluding Remarks

Clare Morell (03:44:06):

Well, that was the conclusion of our third and final panel today. Thank you so much to all of you who've tuned in and joined us. And so in just closing out our event today, just wanted to offer just a brief remark and a few thank you's are in order. So first of all, thank you to all of you for joining us for EPPC's virtual Big Tech Symposium this morning. Thank you first of all to Ryan Anderson, our president and his tremendous leadership at EPPC and specifically of this Big Tech project and today's event. And thank you also to all the wonderful staff here at EPPC who have been working behind the scenes to make all of this

run so well today. And thank you to all the outstanding panelists and speakers that we had. We're grateful for the time you gave us today and just your wisdom and expertise in these difficult and complex topics.

Clare Morell (03:44:59):

Thank you in particular to the five members of Congress, Senator Hawley, Senator Hagerty, Senator Lee, Senator Rubio, and Congressman Buck for the important remarks they shared with us, and to also thank you to their fantastic staff members in working with us to coordinate them. And finally, thanks are in order to the two gracious donors whose funding made EPPC's Big Tech project and today's event possible. To any of you who have joined us today that are interested in supporting EPPC's work on Big Tech and helping us continue to advance good policy solutions for holding big tech accountable, please do visit our website at eppc.org to learn how you can support our work here.

Clare Morell (03:45:44):

Now, the goal of our event today, as Ryan stated in his opening remarks, was to help us as conservatives come together to clearly identify and articulate the problems Big Tech poses to our society and our Republican form of self-government today and to think critically about targeted constitutionally sound policy solutions to these varied problems. Well, after hearing from five members of Congress and three panels of law professors and experts on section 230, antitrust, and common carrier, I think we have done that. And I wanted to just highlight a few helpful themes in case you had to tune in and out during the course of the event today, that I think have emerged as possible areas of consensus for us all to keep thinking on as a path forward.

Clare Morell (03:46:30):

The first kind of theme that emerged is that section 230, the law itself might not per se be the issue behind big tech's current censorship and the illicit activity facilitated on their platforms, but rather the overly broad interpretation that courts have arrived at in terms of section 230's immunities. And so we discussed a lot of interesting possible solutions, whether that be through the legislature in clarifying the meaning of some of the terms in section 230 to get back to its original intent, as well as trying to remove, possibly remove some of their immunities when they exercise traditional publisher functions, such as Senator Rubio's DISCOURSE Act. And finally we discussed the possibility of courts really rectifying and clarifying how 230 immunities should apply if the right case comes along and makes its way up to the Supreme Court and they decide to rule on that to kind of correct the interpretation currently of section 230.

Clare Morell (03:47:35):

Secondly, the antitrust panel, a theme that emerged was that there is real bipartisan concern about antitrust violations in relation to Big Tech companies, particularly how they create private ecosystems and the political control that they have and exercise. And so it seems like some emerging approaches could be coming up with better ways to measure harms to consumers beyond the traditional measurement of price, but looking at potentially monopoly overcharges in other ways such as their attention. And also the idea of updating some of the standards in antitrust law and shifting some of the burden of proof to these companies to prove the efficiencies that their acquisitions would achieve for consumers and also shifting their burden to prove that the acquisitions they're undertaking are not unlawful. And so I think the main theme from that too, was just that greater anti-trust enforcement is needed in digital markets, both at the state and federal level.

Clare Morell (03:48:39):

And finally, you all may have just heard our common carrier panel. We had a robust discussion with, I think, themes emerging there about imposing non-discrimination requirements on these social media

platforms, as the counterpart to the section 230 liability protections that they already enjoy as the first part of a common carriage regulatory bargain and the need and possibility of then imposing the second half of that, which would be requirements to not discriminate. Particularly we focused on looking at viewpoint discrimination and anti-discrimination requirements around viewpoint. So those are just a few of the themes that have emerged and we hope will provide a helpful framework for conservatives to work together to bring an end to Big Tech's censorship of conservative voices in speech and the other harms big tech causes to our society, democracy and our children.

Clare Morell (03:49:36):

We hope that these solutions that you heard debated and discussed today will help each of you think better on these issues in your own lines of work. And if you're interested after today in continuing to follow along with the work of EPPC's Big Tech Project, you can find our project page on our website. I also send out a weekly, Big Tech wrap up newsletter each Friday with the most important items to be aware of and keep track of related to big tech from the past week and past issues are also available on the project page. So you can sign up for that there.

Clare Morell (03:50:07):

As I have mentioned previously too, we will also post the full video recording of today's event on our project page, in case you missed any part of it, or want to rewatch any particular segment. And you can also then share that recording link with colleagues who may benefit as well. We are most grateful for the time and attention that you gave us today to attend this important event. And we look forward to hopefully partnering with many of you as we work to build a diverse coalition committed to holding Big Tech companies accountable and developing policy solutions that will realign Silicon Valley's incentives with the best interests of all Americans. Thank you so much for joining us today. And that concludes our event.