



Social Media and Public Health: A Conversation Featuring State Attorneys General

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[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people.

[00:00:22] This week, the National Constitution Center hosted a conversation with two state attorneys general, Doug Peterson, Republican, of Nebraska, and Phil Weiser, Democrat, of Colorado, to discuss social media and public health. It turned out to be perfect timing as the Supreme Court just blocked Texas from enforcing a law that would prohibit social media platforms from removing posts based on viewpoint.

[00:00:50] Today on We The People, we discuss the role of state attorneys general and state law in addressing the potential harms posed by social media platforms to public health, privacy and competition, as well as constraints on regulation imposed by the First Amendment.

[00:01:06] This conversation was presented in partnership with the Center for Excellence in Governance at the National Association of Attorneys General, and was streamed live on June 1st, 2022. Enjoy the show.

[00:01:20] Thank you so much for joining, Attorney Generals Peterson and Weiser. All of us are learning in real time about this Texas decision that just came down yesterday. So I'm just gonna read a broad summary from it. The court issued, uh, an order which has a separate statement by Judge Samuel Alito. And then we'll read through it in real time and discuss its possible implication.

[00:01:46] So, uh, reading from the New York Times summary, the Supreme Court on Tuesday blocked a Texas law that would ban large social media companies from removing posts based on the views they express. Uh, the court didn't give reasons, um, and in fact there was an unusual coalition with ... in dissent with the most conservative members, Justices Alito, Thomas, and Gorsuch, joined by Justice Kagan, that had more to do with the question of when the court should intervene, not their views on the merits.

[00:02:15] But Justice Alito wrote a separate statement where he said the issues were so novel and significant that the Supreme Court would have to consider them at some point and he actually laid out some arguments for and against the Texas law.

[00:02:27] So the question is a groundbreaking Texas law that addresses the power of dominant social media companies to shape public discussions on important issues of the day. It applies to social media platforms with more than 50 million active monthly users, so it's the big ones: Facebook, Twitter, and YouTube. And it essentially requires platforms to be treated common carriers that have to convey all of their users' messages and it's an attempt to combat what critics call, uh, censorship of conservative views.

[00:03:00] So with that very broad introduction, uh, General Weiser, based on what you know about the case, and I know we're all learning about it in real time, what can you tell us about this Texas law, how unusual it is, and what you think the legal arguments for and against it are?

[00:03:16] **Phil Weiser:** So, Jeff, with the appropriate caveat that I've not had the chance to really analyze it carefully, I do want to highlight a few points. The first point is, the dominant role of these social media platforms in our discourse, in our economy, in our society, is gonna warrant increasing conversations about how they play a role in shaping our politics. Media, uh, attention on this is deserved. The mental health of our kids is affected and something that, uh, General Peterson and I work closely on, the competition innovation in the internet age.

[00:03:50] This case is obviously about what type of open discourse can happen and what kind of editorial role can be played. Um, I do wanna underscore that the argument made by those challenging this law is that the First Amendment is a shield, if you will, against public regulatory oversight. And what's interesting about the Alito opinion is the level of deference towards public oversight and the skepticism of this First Amendment, I'll call it Lochnerism, which is a threat. And this is a threat that's not new. I've written about this 20 years ago. If the First Amendment means you can't have public regulation, be it for competition purposes or protecting privacy or kids' mental health, um, you're basically gonna have the internet as a regulation-free zone because the First Amendment will be used as a complete shield.

[00:04:42] There's a lot of skepticism in this dissent citing, um, favorably a case involving must-carry rules that were upheld by the Supreme Court and an earlier decision involving a shopping center, um, the PruneYard case which allowed for some rules of the road to protect public discourse. And so I think what is significant about this is, A, it acknowledges something that General Peterson and I have been working on. These dominant social media platforms warrant public attention and oversight, number one. And number two, to the extent they thought that the First Amendment will be a full shield and will immunize them from any public oversight or accountability, there sure seems to be a lot of reasons to think twice about that, at least based on this Alito opinion.

[00:05:27] **Jeffrey Rosen:** Thank you very much for that opening intervention, for calling our attention to what you call First Amendment Lochnerism. Lochner was the case that struck down maximum hour laws for bakers under the due process clause and- and General Weiser is saying

that, uh, the court in some cases is employing the First Amendment to strike down regulations of the platforms, um, in similar ways, and he knows that Justice Alito seems, without committing himself, to be more sympathetic to state regulation of the platforms.

[00:05:56] General Peterson, if you could share your initial thoughts on the Texas decision and Justice Alito's opinion, that would be great.

[00:06:05] Doug Peterson: Jeff, if you can just give me about 10 minutes of dead time, I will [inaudible 00:06:09].

[00:06:12] Jeffrey Rosen: [laughs] Absolutely. Sorry to ambush you. And w- you know, this is-

[00:06:13] Doug Peterson: No.

[00:06:13] Jeffrey Rosen: ... constitutional learning in real time here at the NCC.

[00:06:16] Doug Peterson: No, I- I read the article and it was my understanding that the Supreme Court was saying that they would go ahead and stay the application of the Texas law at this time pending further review. Is- is it not simply a stay?

[00:06:29] Jeffrey Rosen: Correct.

[00:06:30] Doug Peterson: Yeah. Which the fact that the court wants further time to analyze the case, uh, or further time to deliberate doesn't surprise me, because I think this is a very complicated issue. Uh, have not read, uh, this, uh, opinion by Justice Alito. It is interesting that Justice Kagan joined in the vote but did not join in Alito's opinion. I think it's interesting also that I think the Supreme Court, uh, has- has signaled a couple times now that they are concerned, uh, as to the concentrated ability of these platforms to control speech in such a way. I know T-, uh, Justice Thomas, uh, also e- entered a- a dissent opinion probably about eight months ago with regards to the, uh, the Trump and, uh, uh, Instagram, I believe it was, with regards to the power of these platforms and how this needs to be addressed.

[00:07:35] So I think this is gonna be one of the key economic issues that's gonna be in front of the court in a variety of different ways, whether it's state laws that are trying to open up platforms to free speech, or whether it's in the antitrust area or the privacy area. I think this is coming to ... quickly to a head for the Supreme Court to hopefully give some guidance a- as to the ramifications in the area of antitrust and in the areas of free speech.

[00:08:02] Jeffrey Rosen: Thank you so much for that excellent introduction and signaling the importance of the case. I think it might be helpful in the spirit of reading the text, which we always wanna do, to actually take a beat and read parts of Justice Alito's opinion together and ... 'cause- 'cause we're all learning about it in real time. And friends who are watching, dear National Constitution Center friends, remember, it is always crucially important to read the

opinion yourself, both the majority, if there is one, and the concurrences or the dissents, so that you can make up your own mind.

[00:08:30] But after reviewing the, uh, parties and, uh, some of the procedural issues that our friends have flagged, Justice Alito emphasized that the law is novel and then he cites some previous cases. He says appellants claim that the law interferes with their exercise of editorial discretion and they maintain that this interference violates their right not to disseminate speech generated by others. So that's a core of their free speech claims, namely that the platforms should have a editorial discretion to disseminate whatever, uh, speech they think is best and to not, uh, disseminate, uh, speech generated by others that they find hateful or- or contrary to their policies.

[00:09:09] And he says, under some circumstances, we let organizations define themselves, like the Boy Scouts can exclude gays and lesbians from their parade, and then a newspaper doesn't have to admit all comers to its pages. Then there are cases on the other side. General Weiser mentioned them. A shopping mall is allowed to be required under some circumstances to open itself up to all comers and- and cable operators have their editorial discretion lessened because they're common carriers.

[00:09:36] Justice Alito said it's not clear how, you know, we should apply this to the age of the internet, which is different from cable and different from a shopping mall, but this raises hard questions and the main question that he flags is whether the platforms are like cable operators, just conveying ideas that they've endorsed, in other words of a neutral platforms, or do they exercise editorial responsibilities. And then he says there's this irony that the platforms are claiming that they're just neutral, uh, disseminators invoking immunity under the Communications Liability Act Section 230. This is his footnote number two. But then they're turning around in this case and saying, "Hey, we should have editorial discretion to ban hate speech if we think that that's right."

[00:10:20] I haven't found a definitive view, but I think this is a really important case. All right, General Weiser, we were reading that together and you're better at reading decisions in real time than I am. Take another beat. First, give us more about the argument on the other side. That the platforms themselves do have a First Amendment right not to be forced to disseminate, uh, the speech of others, and then more on- on Justice Alito's dissent.

[00:10:44] Phil Weiser: Sure thing, Jeff, but I have to underscore you passed over one of any state attorneys general favorite cases. If you go down just a little bit. New Ice Age versus Liebmann, which-

[00:10:55] Jeffrey Rosen: Excellent.

[00:10:55] Phil Weiser: ... has the famous phrase of the idea that states are laboratories of democracy. Here though, uh, it's a different proposition that's being cited for, that the states are often addressing changing social and economic conditions. And that is very much what's happening in the internet age. Uh, Colorado for example has passed a law that is governing, uh,

internet privacy issues. The federal government has not passed that law. Uh, as Brandeis put it, in that case, we're conducting a brave experiment. So I couldn't resist acknowledging that as well.

[00:11:25] Um, back to your question, which is an important one, what is the First Amendment argument? And- and I wanna underscore back to the cable case I mentioned, that's the, uh, must-carry case, Turner, there was a First Amendment argument there too, which is a very similar argument, which is when you are providing a service to the public, how you package your service reflects an editorial judgment. And there is something that is easy to do here, which is, how do you package a service about a social media platform? Is there a role you can play in saying, "There're rules of the road that we are going to have that are part of our brand. Part of our speech interest," if you will. And companies have the right in the First Amendment to, again, convey that they are a certain type of platform. Or to use the example you said, they might have a certain type of parade, if you will, and they don't want to be told they've got to include something else.

[00:12:19] What this court held, by the way, in that cable case, was arranging your channels in a particular way wasn't such of an absolute speech interest that you couldn't be told you gotta carry certain channels, uh, that otherwise could be excluded for reasons that raise competition concerns. So, there's a real tough a priori question here, which is, where's the cart, where's the horse? Is there a public interest in ensuring that certain voices can get heard? Or is there a private interest in having your own brand not be diluted or otherwise changed by requirements to allow certain type of speakers who might not be consistent with what you stand for.

[00:13:05] Jeffrey Rosen: Wonderful. Thanks for articulating those two interests so well. General Peterson, now that we've read a little bit more of it together, further thoughts both on Alito's, um, reflections and does your state take a position on laws like this? And do you think that the Texas law is a good idea or not?

[00:13:21] Doug Peterson: It's very interesting to see some of the states leading out. Start with California and then Colorado. Phil, I believe Virginia and Utah are other states that have passed privacy laws and the industry somewhat gets frustrated by the fact that, "Well, wait a minute. We need uniform laws. We don't need, uh, you know, 50 different versions of what we need to comply with." But frankly, uh, this goes to very much the state labs and the ability to see how we can address these issues. So that's why I'm not surprised that Texas stepped forward with- with this type of law. We have not in Nebraska considered a similar law.

[00:13:59] I think to a certain extent, the industry brought it on themselves, 'cause some of the examples that you become, uh, aware of as how restrictive they've come on speech, pulling people down who expressed opinions that it seemed very much within the public debate and reasonable. They weren't the extremes, uh, the some would clearly identify as dangerous. They were simply opinions. And so for the, for the platforms that take such a strong hand in controlling it, I'm not surprised that they brought on state re-, uh, action like this. And then the question becomes whether the state action falls within the appropriate, uh, constitutional authority to do that.

[00:15:02] I think this other real challenge to the court is this, um, it's almost like a bipolar response by these platforms. They throw up Section 230 as protection but then again say that they should be entitled to be the deciders of truth and information. And it's kind of like we're really getting far removed from what the purpose of Section 230 was when it was passed back in l- the late '90s.

[00:15:03] Phil Weiser: If I could follow up on that, the- the 230, if you will, immunization from liability was premised on two things. This was a nascent industry where regulation would interfere with their growth, and secondly, there would be responsible self-regulation so we can trust them as good stewards of the platform with the public interest in mind.

[00:15:26] The first point is so plainly not the case. These are the largest companies in the world. So the idea that, to take Facebook as an obvious example, needs to be protected from any public oversight because it could squelch its development as an entity is- is a laughable proposition.

[00:15:43] The second one about responsible self-regulation, it's worth noting, and this is implicit what Doug said, there's two types of harms. There's you have content that's taken down based on some standard that, upon some reflection or even at the time, is really questionable, or second, there's content that's left up that's really harmful and could be injurious to the public in any number of ways. And the hard question for society right now is, how do you oversee both types of decisions in a way so it's not only up to a company or self-regulation, but there's some sense of a broader public interest so that ... I'll give you an example. When someone says I wanna suggest there was a chance that the COVID-19 pandemic started in a lab in China. That was a controversy that, today, there's still questions about. At one point, people suggesting that might have been the case, the lab leak theory, if you will, that content got pulled down because some of the companies said that was problematic.

[00:16:43] Now, that is a, to me, a different issue than someone saying vaccines are, uh, planting microchips in your brain. Um, you know, something we have every scientific reason to believe is just not happening and is dangerous. But the lab leak hypothesis, you know, as some articles have noted, is something that warrants discussion. That's the hard question is how do you figure out what's the dangerous misinformation, disinformation, and what's legitimate discourse?

[00:17:10] Jeffrey Rosen: What do you think of that distinction, General Peterson, between the tough questions about what to leave up and what to take down and General Weiser's suggestion that it's laughable that Section 30 is working the way it was intended to and that the platforms actually are just neutral hosts?

[00:17:23] Doug Peterson: Well, certainly on the Section 230, I really agree. I think a lot of people who evaluated that said the original intent of that no longer applies and it needs to be re-examined. As to, um, content and the- the ability of platforms to basically exclude those thoughts that they disagree with and- and the COVID lab, uh, origin is a good example, I think what the, uh, the industry did is it prompted such a frustration certainly in the state of Texas to say we're not gonna let you be the gatekeeper of information. When they're playing such a heavy hand, and as Phil noted, there's a, there's a real distinction of real crazy stuff and just stuff you disagree

with. And what they did w- is they went and they closed down stuff they disagreed with. And people said, "What a minute. This ..." Or the citizens of Texas, I assume, certainly said, "Wait a minute. This ... If you're gonna have the platform, let us express our opinions. And as long as we're not harming or putting out serious misinformation, uh, in the state of Texas, you can't be the arbitrator of what is true and not true."

[00:18:30] And, uh, I think it's not a surprising, uh, response by the state to do that and, uh, I think it's gonna be really interesting to see how the Supreme Court analyzes this whole issue.

[00:18:41] Jeffrey Rosen: What's so interesting about the ... our discussion so far is that both of you from different perspectives are in some broad agreement about the need for state regulation, about the inadequacy about the existing federal statutory framework, and about the idea of the First Amendment, uh, shouldn't necessarily serve as a bar.

[00:18:58] General Weiser, all of us are kind of reading this in real time but what would you say if I said, if I suggested, you know, the Supreme Court, once it finally decides this on the merit, may well disagree with you and invalidate the Texas law on First Amendment grounds on the idea that the platforms do have a First Amendment right to set their own content policies, and also that it's not appropriate for states to be serving as laboratories of democracy here because these are international platforms and requiring, uh, different regulatory regimes state by state doesn't make sense, what would your response be?

[00:19:36] Phil Weiser: So, on the first point, I agree. The First Amendment applies. The question is whether the First Amendment is an absolute shield, that's what I called First Amendment Lochnerism, or allows for what was the case in the Turner must-carry decision, intermediate scrutiny or as some have referred to it, the O'Brien test of a sort. So, I'm, I'm a believer of leaving some room for regulatory oversight over these social media platforms whether your purpose is competition, that was the case in the Turner case, privacy, or other interests around ensuring that the public is not harmed. If you give them full immunity under the First Amendment, I believe you are making a mistake.

[00:20:16] Number two, if you're giving them full immunity against state regulation on some theory that these can only be federal rules, you have overturned the case I noted. Um, the, uh, New Ice Age case that, uh, Justice Brandeis famously decided. And you have taken a position that I believe is antithetical to the American system of federalism that allows for experimentation by states. The idea that you can't experiment in online data privacy, I believe, is wrong, because we are doing it right now. Cal- California has a different model and a different law than Colorado and we're committed in Colorado to allowing compliance with both regimes, or interoperability with both regimes. That's a challenge we have to take on. I'm also aware that part of what we're doing is incubating alternative models that could be adopted by the federal government. We can talk about ultimately what that might look like. And that has happened in a range of regulatory regimes and is healthy.

[00:21:13] So on both the points you noted, should the First Amendment give full immunity and bar any public regulatory oversight of social media platforms? I believe that would be a mistake.

Like I said, First Amendment Lochnerism. Should the states be barred from acting in the area on the theory that you need only national action? I- I believe that would be a mistake as well.

[00:21:34] Jeffrey Rosen: Wonderful. Thank you for that. Thank you for invoking Justice Brandeis, uh, my- my own hero as- as- as well as yours, who of course might have found this a tough case. On the one hand, as you say, he emphasized the importance of experimentation in states as laboratories of democracy, and then in his Whitney and California case, he also wrote the greatest free speech opinion of the 20th century, if I may be so bold as to suggest that, suggesting very strong protection for freedom of conscience and speech.

[00:22:03] Gen- General Peterson, your thoughts on those two points. First, what do you make of my suggestion that the court may be likely to strike down the Texas law on First Amendment grounds? And second, should states be able to reach different regulatory, uh, decisions in this area?

[00:22:19] Doug Peterson: I'll start with your second question. I do think it's important that concepts of federalism, that states be allowed to address how they believe platforms should operate within their states, and then, um, in our privacy areas. Um, I think it's real frustrating for the industry because they say, you know, to operate in such a way, but frankly, they're global operators and they're dealing with numerous, uh, laws in other countries and, uh, in the European Union.

[00:22:48] So, um, I support the concepts of federalism and each state being able to address particularly privacy issues. And I think we're gonna see more of that. And it'll be interesting to see how, uh, states can protect themselves.

[00:23:00] With regards to the opinion of the court in the First Amendment issues, as I said, I think the courts already indicated that they have a real concern of the dominant, uh, position that some of these platforms have and how much control they have. And so, I think it's going to ... That's why I bring up the antitrust issue because I think that's another factor in this type of control and dominance, uh, messaging.

[00:23:25] I- I found this one somewhat interesting. That, uh, Justice Kagan, uh, joined, although she wasn't a part of the opinion, the ... I think it's very common for all of us to kind of step back when we look at votes and try to speculate as to what it might mean. I frankly think that, um, although the federal authorities, uh, have been trying to address as both the, uh, the FTC and the Department of Justice and Congress, I think all of us are somewhat, uh, as it comes with regards to First Amendment, we're all very, um, curious as to how the Supreme Court's going to play this out. And I th-, I think we can take stabs at it from the state side or we take from federal legislation but this is ultimately gonna rest with court's analysis of how the First Amendment applies to social media platforms and big tech.

[00:24:20] Phil Weiser: Jeff, I can just quickly comment. I'm not familiar with the exact requirements of the Texas law, but let me just mention an imagined law which could be a federal

law, that says any dominant social media platform defined in a certain way has to have some procedure to allow ... an appellate procedure of some, um, outside, you know, neutral decision makers to evaluate either leaving content up that they decide not to take down, or taking content down that arguably, uh, is fair game.

[00:24:53] And Facebook has done that. They've created their own kind of ... call it Facebook Supreme Court, without a requirement. My point though is a procedural requirement like that I mentioned is in service of free- free speech interests. So the free speech interests are not only on the platform to say, "We wanna do what we want they're for the speakers who use the platform," and that was part of what PruneYard recognized as well.

[00:25:16] Jeffrey Rosen: Very important model that the Facebook Supreme Court offers, as you say. I think the Texas law had a disclosure and transparency requirement, although not a requirement of, uh, review. But you're right to suggest that, um, that might well affect the First Amendment analysis and as you suggest, further First Amendment values rather than thwarting them.

[00:25:38] General Peterson, you mentioned antitrust. And both of you have been involved in a nationwide effort to push antitrust law into the First Amendment area and you and General Weiser joined in submitting joint comments on the FTC's and Jus- Department of Justice's joint initiative to revise the horizontal merger guidelines in April, which are used by federal antitrust agencies and state attorneys general to review proposed mergers. Tell us about that nationwide initiative and why it's important.

[00:26:11] Doug Peterson: Well, you know, the guidelines and our- our comments that it's just a part of, I would say, Phil, probably a three-year process that, uh, both Republic and Democrat AGs have been going through together. Uh, and it all comes back to what we originally talking about. The- the dominant position of these platforms, the ability to control markets.

[00:26:32] Um, and so I think this coalition, and I've appreciated, uh, how well the states have worked together in this, and I've appreciated working with my neighbor, Phil, on these issues because I think they are really common, uh, concerns for both Republic and Democrat AGs with regards to proper competition within our markets, uh, proper opportunities for new businesses to have the ability to enter into the market without being excluded by a dominant player.

[00:27:00] So a lot of these issues go to the- the, I guess the one simple word is power, and the state's ability to make sure that, uh, dominant power does not affect not only our markets, uh, but also our ability for people to, uh, participate in public debate in a f- open and free way.

[00:27:00] The antitrust case has a variety of different cases going. We- we have, um ... Ours is focused, uh, on search is what Phil and I've been working on quite a bit. There's the, uh, lawsuit going on against Facebook, uh, which is led out by New York and- and some of the a- acquisitions that they acquired and the impact on markets.

[00:27:48] I think these are important cases, uh, because frankly, what I've found within the Republic AG world, that we've been pretty proactive in trying to make sure in federal courts that the federal state authorities, uh, stay within their proper constitutional authorities. Uh, making sure that balances of power stay balanced. And we've been doing that quite a bit. But frankly, the third pillar or the fourth pillar of the three pillars of- of government, the fourth pillar I think that's now a power play question is, uh, the application of our antitrust laws to companies that are developing power that we think is dangerous to our overall economy and to our overall, uh, states and country.

[00:28:32] So, I've- I've found it very interesting. In the application we can, we can look at making sure the executive branch is not exceeding their authority or the administrative ... or that, uh, you know, the states have proper state rights. But now, frankly, we see the extent of power held by these, uh, monopolies, and feel that that's also something that we have to be engaged in to protect our c-, our- our citizens.

[00:28:58] Jeffrey Rosen: Thank you very much for introducing this bipartisan initiative. It's really striking that you and General Weiser and other AGs, uh, both Rs and Ds, have been working together to curb, as you say, the power of the platforms and I'd love our, uh, listeners to learn more about it.

[00:29:14] General Weiser, uh, give us a high-level introduction to this bipartisan antitrust initiative. Once again, I- I m-, I might have thought before learning from both of you that this ... that antitrust was just a federal concern. W- what ... You know, how is it that the states are bonding together to push, uh, curbs on the power of the platforms? And what are the ... some of the main highlights of this antitrust initiative that you're doing with General Peterson?

[00:29:39] Phil Weiser: Jeff, let me offer four points on this. First, the, uh, opinion you referred to earlier also cites the Associated Press case. Knowing that these entities ... uh, in that case it was the Associated Press. Here's it's, uh, social media entities ... are not, um, immune from public oversight and competition protecting measures like the antitrust laws.

[00:30:00] In the Associated Press case, there was an effort to say the First Amendment pre-vents the Associated Press from having any antitrust scrutiny. That was turned away.

[00:30:08] Um, number two, to your point about cooperative federalism, the antitrust laws quite deliberately empower state enforcers to enforce the antitrust laws alongside the federal government. In fact, the National Association of Attorneys General had their first meeting ever in Denver, Colorado to discuss, yes, wait for it, antitrust issues and oversight of, back then it was Standard Oil. Today, it's Google, Facebook, and other, um, behemoths who are in a position to undermine competition.

[00:30:39] So state AGs in this world of antitrust is not a new thing. Uh, and the very purpose of our federal antitrust laws is to authorize a cooperative federalism where both the states and the federal government have the authority to enforce federal antitrust laws.

[00:30:54] Third, to your point about the bipartisan nature, it's, I think, a credit to the culture around state AGs. Something that Doug and I have talked a lot about is an initiative I'm leading as head of a group called the Attorney Generals Alliance called the Ginsburg/Scalia Initiative, something that, I think, fans of the National Constitution Center can appreciate, which is, we have a commitment to respectful engagement around the rule of law. And bipartisan problem solving, whether it's these issues of privacy, of competition, or of the impact of these social media dominant firms on teen mental health or our democratic discourse, we're not gonna agree on everything. But the culture is one that we will have respectful engagement. A commitment to ever- wherever we can, collaborative problem solving and a respect for the rule of law.

[00:31:42] Um, we are not seeing that level of collaboration, that res- level of respectful engagement, um, in our United States Congress, unfortunately. It has existed in times passed. Um, think, you know, President Reagan and Tip O'Neill, or Orrin Hatch and Ted Kennedy. But I'll tell you, in the world of state AGs, um, the relationship of Doug and I is not an exception. I think it's more the rule, that we have a culture of this engagement and antitrust is a critical area we work together, but opioids and others are high on- on the list as well.

[00:32:12] Finally, on the substance of the work we're doing, we need to recognize that our economy has changed. Technological change, right now, has put these internet companies, Google, Facebook, others, into an incredibly important position. And Doug's point is one I would totally subscribe to. With that level of market power, it's like significant market power, there is an ability to undermine competition, to thwart new entry, to put a thumb on the scale, to hurt innovation. That's all bad for consumers. And so it's our job to be vigilant in this area. And I give Doug huge amounts of credit for seeing this concern and proactively building a coalition to do something about it.

[00:32:56] **Jeffrey Rosen:** This is so inspiring to learn about the Scalia/Ginsburg Initiative, which as you say is very much in the spirit of the National Constitution Center and it is so meaningful to learn about your joint efforts. Absolutely wonderful. That idea of concentrated power is of course crucially, uh, Brandeisian. As Brandeis said, nothing could demonstrate more clearly the concentrated power of corporate interests than antitrust incidents, uh, that arose during his own confirmation hearings.

[00:33:26] And I want to now return to some of the other aspects of this joint initiative that, uh, you're both a part of. Uh, General Peterson, you'd mentioned Facebook. You said New York is leading the effort here, um, but several states including, uh, yours and- and General Weiser, have joined in this multi-state investigation into alleged willful practices by Facebook that harm children. Uh, tell us about this aspect of the initiative and what issues it raises.

[00:33:53] **Doug Peterson:** Yeah. I think one of the things that allow attorneys general to- to come together in a bipartisan way is a lot of times we identify the harm. Uh, it's a mutual harm. It's- it's not a, uh, a harm that is distinguished between red and blue. It's pretty clear. Uh, one of the, uh, issues that we've moved forward on is social media platforms and what type of a harm, particular harm done to our young people.

[00:34:23] Well, frankly, it's pretty, uh, easy to get buy-in by all the AGs. In that particular case, we have all the states and, uh, many of the territories joined in in- in an investigation. So that's what I think Phil and I have found and why his, uh, the Ginsburg/Scalia Initiative is just a- a- a better form, I think, to, uh, really encourage us as AGs not to allow this partisan world to affect our ability to take on real mutual challenges.

[00:34:58] And so we're far better off having 50 states looking into social media platforms. And we're far better off to have so many states that are engaged in our antitrust efforts because we've stayed focused on both the law and the harms being caused and what we can do and our responsibilities, uh, in our offices as attorneys general.

[00:35:18] Um, and so what I've appreciated about working with Phil is, I- I ... it's rare that I can ever think of a time where he and I were not focused on harm. Basically focused on mission. And that's what's made the relationship, uh, so advantageous, uh o- ... Now, don't bring up marijuana because that's a whole different issue. [laughs]

[00:35:41] Phil Weiser: [laughs]

[00:35:41] Doug Peterson: But, uh, we can agree on, um, we can really agree on the importance that this tech ... The digital economy is a real concern as to the harms that could be caused. And so it's allowed us, uh, to do that. And with regards to the social media platform, the harm to our young people, I think we're becoming more and more aware of, uh, and it concerns all of us, because we have children and grandchildren, and we see them looking at those phones and we know the mental health issues that are starting to arise. And more study is needed in that area, but that's very easy to get, uh, uh, cooperation and cohesion among the AGs in addressing those things.

[00:36:21] Jeffrey Rosen: Wonderful to hear about. General Weiser, in May, you pressed Facebook to explain its plans to launch a version of Instagram for children under the age of 13. We've posted in the chat a New York Times piece which says state attorneys general open an inquiry into Instagram's impact on teens. Tell us about that initiative and- and what kind of regulations you think might be a good idea.

[00:36:43] Phil Weiser: For those who've been following this issue, I- I fair ... I think it's fair to say the whistleblower who testified before Congress and talked about the impact of algorithms gave everybody a valuable education. For those who are not as in the weeds as Doug and I, it's worth explaining. An algorithm is the, um, method by which a online platform will figure out, "If you liked watching this video, you'll like watching that video."

[00:37:12] And so, the benign version is, I'm watching a video about the Colorado Rockies' chances this year, and they say, "Oh, you might also like to see about the Denver Nuggets 'cause you're a Colorado sports fan." It's a pretty benign use of an algorithm. Or think about Amazon. "You liked this book that was a James Bond book. You might like this other book which is another spy thriller."

[00:37:34] However, for kids, if you're a young girl and you're on Instagram, and you're looking at videos around how I might lose weight, and you start getting videos sent to you, suggested for you, because of the algorithm, that say, "Here's how you can harm yourself. Here's how you can engage in bulimia. And here's how you can commit s- ... take your own life and die by suicide." All of a sudden, we're in a whole different situation where the platform and its algorithms are directly suggesting, encouraging dangerous behavior.

[00:38:13] Now, why would that happen? It doesn't necessarily mean that the platforms are willfully trying to harm people. The algorithm can be automated, machine learning, and what the algorithm may teach itself is that users who think about losing weight also might be vulnerable to self-harm or bulimia or to take their own lives. And if you give them the content of their darkest thoughts, they will be engaged for longer. And the goal of the algorithm is keep people engaged.

[00:38:44] To the extent the companies know that is happening and are doing nothing, shame on them. What I would say is the worst form of capitalism is when a company says, "I can make money and I'll be hurting people but I'm looking the other way." So I mentioned earlier, opioids was an example of a company, Purdue Pharma, making money by encouraging, enabling addiction that cost lives.

[00:39:11] To the extent Instagram or TikTok is making money by keeping people engaged for longer by taking them down a dark hole, shame on them. And your question is, what to do about it? Well, there's a lot you can do about it. Obviously age verification is a concern. Parental awareness is a concern. And a level of awareness about the type of content that's being, um, suggested to people, and is it content that is harmful to teen mental health? We are in a teen mental health crisis right now. That's the Surgeon General's words. These social media platforms, as Doug noted, are part of the problem. I'd like to see them stopping part of the problem and actually become part of the solution.

[00:39:51] **Jeffrey Rosen:** Thank you for that, uh, very much. General Peterson, d-, uh, General Weiser just noted a bunch of solutions, from age verification to learning about the harm of the content. Uh, w- what do you see as some of the possible solutions to harms of teens on Facebook and Instagram?

[00:40:05] **Doug Peterson:** Yeah, Jeff. One of the things that's so interested is, um, the suggestion that, for example, when Facebook tried to do the Instagram for kids, and that they wanted to partner with parents to show how best, uh, to engage in the internet, that's so disingenuous. Uh, as Phil said, the whole business model, the whole business model is about engagement. And the engineers are awarded for designing greater and greater engagement. And they're being very successful at it. The average you ... It's increased with the, uh, period of COVID, but the period of time the kids average on the internet is now around six hours a day.

[00:40:46] And think about that. You know, of the waking hours, for a lot of kids, it's even worse. Um, the harm caused by that, the lack of engagement and in normal, uh, uh, engagement with friends and with community and with interests, uh, are all compromised to people looking at their screens. Um, and it's by design because engagement allows the extraction of data. And

data allows the accumulation of profiling this person in such a predictable way they don't even themselves know how predictable it is with the accumulation of that data.

[00:41:22] So it's really a- a concerning process. And it's not limited to young people. All of us are subject to the fact that they're pulling out data and developing our profiles and then seeing where they can manipulate it here or there for- for their own benefit.

[00:41:36] One of the things that I think is still in the, uh, I think more and more evident, it's a little bit early to come out with conclusive studies but there's some pretty good, uh, work that's going on right now as to the impact on the mental health and the correlation. Because right now, it- it appears to be a very interesting correlation of the mental health issues increasing, the suicide rates increasing, and the amount of engagement, uh, correlating. And that needs to be further developed with study on that. But the harms that I think so many of us see and the stories we hear about the shaming and, uh, sex extortion that goes on, uh, and kids taking their lives, it's just incredibly troublesome.

[00:42:20] And one, um, video that I would suggest to listeners, uh, that I think is really very interesting is one put together called Childhood 2.0. And what it does is it contrasts three generations of what life was like. Uh, the quality of their young life. And it starts with, like, a- a 80-year-old woman and then goes to some parents in their 30s, uh, and then goes to their children. And you have six young women and six, uh, young men explaining the impact, the depression, the, uh, the social s- shaming and things of that nature. Uh, and it was just an eye-opener of how our kids' lives have been impacted so much and how it's important.

[00:42:43] Now, we ... Phil and I could be engaged in doing, uh, you know, the investigations and the legal effects that we have authority to do as AGs, but really, we as a culture, I think, need to step back and look at our young people and see how we as parents and as communities can get better engaged to let these young people understand that there's so much more to life than, uh, not sitting and trying to be an influencer on TikTok.

[00:43:22] Jeffrey Rosen: Thank you so much for that. Thanks for suggesting the, uh, Childhood 2.0 video and for your poignant reminder that now that kids are spending six hours a day on screen, it is transforming their lives in ways that we're just beginning to understand.

[00:43:43] I would like to put on the table, if I may, General Weiser, the nationwide investigation into TikTok, which you and General Peterson joined. Um, TikTok is being investigated for promoting its platform to children, uh, in ways that may cause harms and AGs are examining whether the company violated state consumer protection laws that put the public at risk.

[00:44:07] Tell us about the investigation and the way that state consumer protection laws may provide redress.

[00:44:10] Phil Weiser: So, we were just talking about Instagram. Basically, take everything we just said and change the central character to TikTok. And so, this is not about one specific company. It's about, as I think Doug put it well, a business model. Business models need regulation because if you allow people to say, "I'm gonna do whatever I can within the law to make money," but there are no laws limiting conduct which harms teen mental health, that's a problem.

[00:44:41] To your point, there is a law. It's general ... you sometimes hear the phrase UDAP. Unfair and deceptive trade practices. That's a broad category that we are able to act in. And the question is, is it fair to keep young people on a platform suggesting dangerous content that their parents don't know about, with potentially having given people a very different impression. Because TikTok, you hear, "Oh, it's fun dance videos." But then, there's a lot of other content on TikTok too. And some of it, like the situation I mentioned with the, um, person looking for diet-dieting tips ending up getting self-harm tips, you can see that same story playing out on TikTok, which also has algorithms which also keep people engaged.

[00:45:33] And so, we use this broad authority that goes after any unfair, um, and/or deceptive trade practice, and use it to investigate business activity which can have the effect of harming people, um, in these very, um, impactful ways. And- and Doug said it so well. With how much time people spend online, um, the ability for harm, encouraging self-harm for example, is something that demands our attention.

[00:46:01] Jeffrey Rosen: Fascinating. Um, General Peterson, you joined this nationwide investigation into TikTok, and one thing that the investigation is looking into is whether techniques utilized by TikTok to boost user engagement, including increasing the duration of time spent on the platform and frequency of the, uh, engagement, it sounds like the very business model that someone called enrage to engage, is being investigated as a potential violation of consumer protection laws. Uh, d- do I have that right? And tell us more about the TikTok investigation.

[00:46:32] Doug Peterson: Well, I think one of the important things is i- in the investigation, our primary focus is young people, um, and that there's a lot of questions there. There's the federal COPA law issues of, uh, what are they doing to monitor the age. There's, uh, there's also questions of consent. When they, uh, allow their data to be utilized, do they have the legal capacity to make that determination?

[00:46:57] I think one of the things that, uh, in the investigation we wanna learn, is the methods they use to increase engagement. What are the tactics that they use? There's- there's so much involved in the psychology of what goes on on the internet. And the developers know that. Tristan Harris in The Social Dilemma makes the comment, and I think it really strikes home with a lot of us, is when you compare a 15-year-old girl who's, uh, going through some maybe some depression or some issues on body image and she sits at that screen and she starts watching the TikTok videos and, uh, s- and then maybe Instagram and looks at the ability to how some edit photos and things of that nature, and it's ... they- they pick that up in the algorithms. And the machine learning says, "Okay, to keep her engaged, we're gonna take her down this road."

[00:47:46] The- the type of harm that's done there is so, uh, concerning in the fact that the reason they're doing that is simply to enhance their ability to gather more data. And that's why when we, uh, issued the letter on Instagram for kids, is that we said, "Wait a minute. Uh, this is clear that what you're doing is there's business value to you as a tech company to gather data on the young people and then go into the market and say to the marketers that, 'Hey, we have the ability and the intel on these young people that we know how to target very well, and we can use the data.'"

[00:48:23] And it ... To use it for business purposes while understanding, get them to be engaged that long, they're harming people, it's pretty reprehensible. And it's why we've become so engaged in this is because it's not a fair fight. It's not a fair fight for that 15-year-old has no idea if she's being manipulated in this way. Uh, and she's so ... she's very vulnerable. Frankly, adults seem to, uh, be just as vulnerable sometimes as far as their own psychology and how th- that's manipulated.

[00:48:54] That process has been around for a long time. Uh, there's, uh ... Stanford University has, uh, trained a lot of these developers in the persuasion lab as to the different techniques to use to keep people. So likes become important. They know just ... our subconscious of how to continue to keep us engaged. And, you know, some of it's really age-old psychology, uh, but s-, but it's, it's ... But with machine learning, it's getting so much more, uh, out of balance among the user and the, uh, the developer. And so I think that's a point in which you have to step in to try to stop the harms using the authority that we have under our consumer protection laws.

[00:49:37] Jeffrey Rosen: Uh, well it's time for closing thoughts in this extraordinary discussion. I- I- I have to say how struck I am and how impressed I am by the, by the depth of the bipartisan engagement and the rigor of- of both of your engagement with this really complicated policy issue is. And learning about the range of initiatives is illuminating.

[00:49:56] So I'm gonna just ask each of you to give us a map of the regulatory horizon and to identify a number of potential, uh, lawsuits or state regulations or other regulatory approaches to the question of social media that you think might attract bipartisan support and that might be productive. And General Weiser, the first closing thoughts are to you.

[00:50:03] Phil Weiser: So, I outline a number of these points in a Denver Post op-ed. Maybe your folks will find it, where I talked about competition, teen mental health. I talked about privacy and I talked about ... and here I would go meta. Not capital M but small M. Uh, democratic discourse. Something I mentioned before.

[00:50:39] What you've seen here today with General Peterson, myself, is what respectful engagement looks like. I mentioned the Ginsburg/Scalia model. It is worth underscoring that social media platforms and their algorithms don't tend to encourage fact-based, reality-based problem solving discussions with respect. The norm often encourage, again, by the algorithms, and there's lots who've written about this, is polarization. Is demonization. Where people are seeing rising hate for people they don't know based on characteristics which could include their political party, their religion, et cetera.

[00:51:18] That is a threat to e pluribus unum, from many we are all. That is a threat to the concept that we the people will govern together through a democratic republic. And so, social media as a changing landscape for our information environment is a very big deal. We need public oversight to ensure we protect the public on a range of these realms. And right now, that's not happening at the federal level. I hope it does. We've ... Doug and I have pushed for federal action that's appropriate in this area. But we're seeing experiments at the state level on competition, on protecting kids, on protecting democracy and our democratic discourse, and on protecting our privacy. Uh, it's critically important work.

[00:52:08] Jeffrey Rosen: Thank you so much for all that. Uh, General Peterson, last words to you. Some future initiatives for our We The People listeners to learn about.

[00:52:18] Doug Peterson: Well, Jeff, I wanna thank you at the, uh, at the conclusion here, of your organization and the important work that you do. I would have to say, I've been in this office 7.5 years and, uh, the importance of the Constitution and the liberties and the freedoms that they give to us here in the United States are so, um ... The- the insight and wisdom of the Founding Fathers is amazing, uh, when it looks at the structure of government they created, the balance of power, and the importance we have of maintaining those freedoms. Um, I think now more than ever, the work you do is very, very important.

[00:52:54] And I wanna thank Phil because, uh, Phil's not only a peer but we're friends, uh, and Phil has always been what I would call mission-focused in the work that we do together. And his bipartisan, um, perspective has, uh, made our working relationship excellent and, uh, just appreciate that he understands that the- the rule of law and- and the s- state rights issues and things like that are- are all important foundational elements of our Constitution. And so he's been a pleasure to work with and it makes it very easy to be ... I don't think Phil and I think much, uh ... Well, occasionally do in forums like this, but think bipartisan. "Gee, that was a nice bipartisan phone call." No, that was a nice, uh, mission-focused call that Phil and I were jointly working on.

[00:53:43] But I would say with regards to, um, my initial comments about the importance and the wisdom found in the Constitution, I- I really think under the digital, uh, economy, we've got to hold on to those anchors because they are the anchors to our civil society. And, uh, just, uh, pray for wisdom for these justices who have to kind of, uh, give us those guidelines or give us those, uh, rulings as to how this digital economy, the Information Age, is going to play out. And so we, uh, as AGs, do the best we can to- to try to apply those principles. Uh, but it's going to be a- a little bit of a difficult time period because these, uh, issues from a factual and legal standpoint are not simple.

[00:54:28] Jeffrey Rosen: Very well said indeed. I must thank you so much, Generals Weiser and Peterson, not only for the rigor, depth, and thoughtfulness of your work together, but just for providing America with a model of how people of different perspectives can thoughtfully engage with each other and work together productively on behalf of what you just called, General Peterson, mission-focused solutions. It is urgently important, as you say, to provide models of just this kind of civil dialog. That's what the Constitution Center exists to provide and we are honored to provide a platform for this discussion. I'm so looking forward to our next one, uh, on

matters involving the Scalia/Ginsburg Initiative or anything that you both are working on, and I'm also grateful for the Center for Excellence and governance of the National Association for Attorneys General for co-sponsoring this program with the National Constitution Center and providing you, dear National Constitution Center listeners from around the country, with a model of civil dialog at its best. Thanks to all, and look forward to re-convening soon. Thank you.

[00:55:35] Doug Peterson: Thank you, Jeff. See you, Phil.

[00:55:36] Phil Weiser: See you, Doug. Thanks, Jeff.

[00:55:38] Jeffrey Rosen: Bye.

[00:55:42] Today's show was produced by Tanaya Tauber, John Guerra, and Melody Rowell, and engineered by Dave Stotz. Research was provided by Colin Thibault, Sam Desai, and Lana Ulrich. Please rate, review, and subscribe to We The People on Apple Podcasts and recommend the show to friends, colleagues, or anyone who's eager for a weekly dose of constitutional learning, illumination, and debate. And if you're interested in future town halls, visit constitutioncenter.org/debate to find the full line up of our upcoming shows. You can always join us on Zoom, watch us on YouTube, and watch the recorded videos after the fact in our media library.

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[00:56:42] On behalf of the National Constitution Center, I'm Jeffrey Rosen.