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Opinion: Republican response to Facebook's Trump ban threatens free speech more

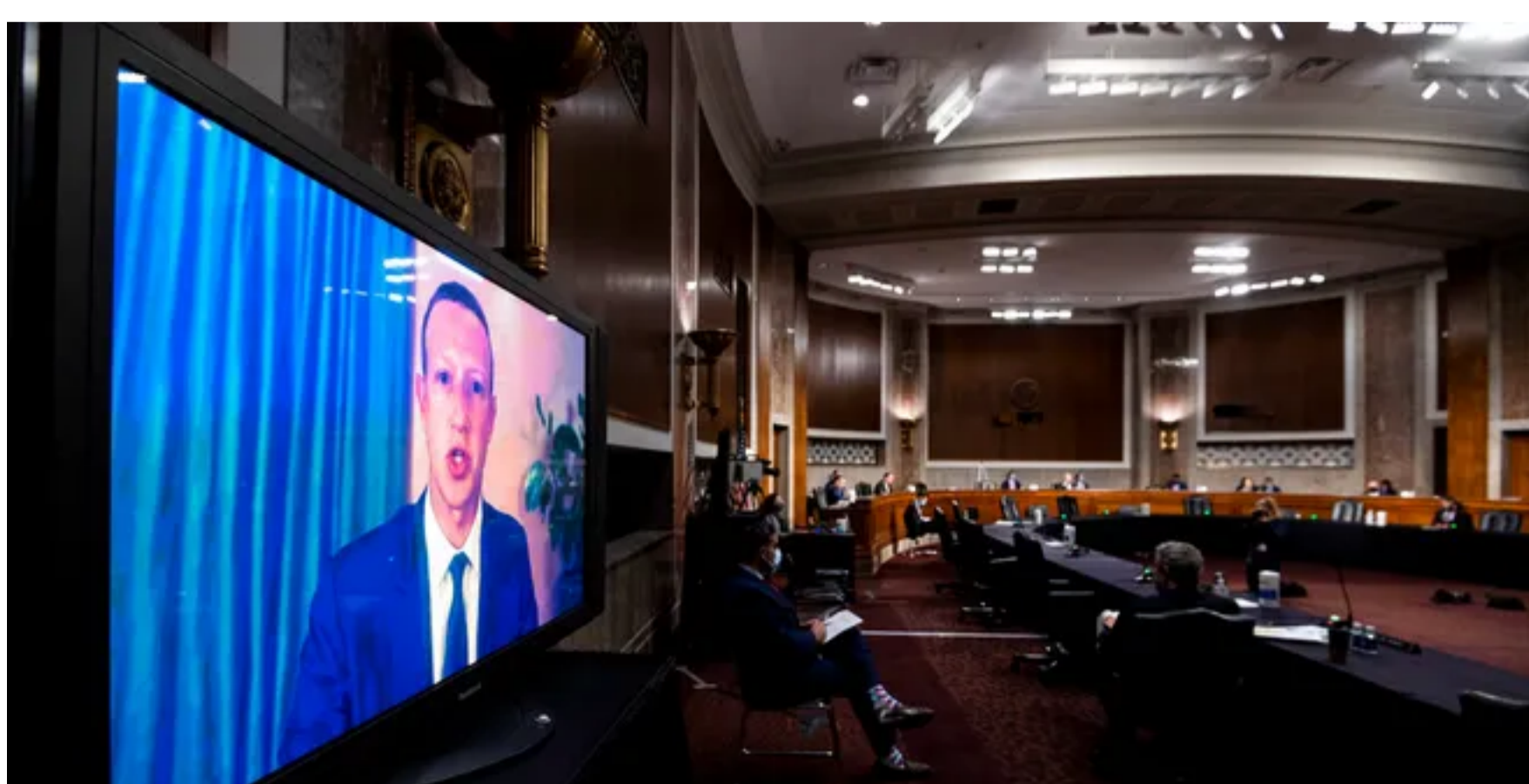
Matthew Feeney
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Last week, Facebook's Oversight Board upheld the company's [decision to ban](#) former president Donald Trump from its Facebook and Instagram platforms. The decision is of no legal or policy significance, but the response to it provides more evidence of a schism in the conservative world that could result in the Republican Party embracing populist government intervention as a central ideological commitment. Such a change is bad news for those who value online free speech.

A few years ago, Facebook CEO Mark Zuckerberg suggested a company "[Supreme Court](#)" that would review Facebook's content moderation decisions. This led to the Oversight Board, which launched last year.

The board's decision to uphold Facebook's Trump ban is its most prominent so far. The case concerned Facebook's decision to indefinitely suspend Trump's accounts after his comments in the wake of the Jan. 6 Capitol riots. Although the board upheld the ban, it [said](#) it was inappropriate for Facebook "to impose the indeterminate and standardless penalty of indefinite suspension" and urged Facebook to review its decision within six months.



Facebook CEO Mark Zuckerberg testifies remotely during a Senate Judiciary Committee hearing on Facebook and Twitter's actions around the closely contested election on Tuesday, Nov. 17, 2020, in Washington, D.C. Bill Clark, AP File

While sometimes called "Facebook's Supreme Court," the Oversight Board's decision to uphold Trump's ban reveals important differences between it and a Supreme Court opinion. The decision is unsigned. We don't know which members, if any, dissented from the decision and if so, what their views are. Nor do we know if all the members who supported the outcome agreed with its reasoning.

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To conservatives worried about Facebook and other "big tech" companies, the board's decision is unlikely to be reassuring. An unsigned justification for Trump's ban issued by an independent Facebook organization made up of an international group of elites from academia, journalism and advocacy groups is perhaps the best example of the "cosmopolitan elites versus common folk" tension that now dominates Republican rhetoric.

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Republican lawmakers quickly complained about the board's decision on social media. Reviewing their commentary, you would be forgiven for thinking you were watching a strange version of "Whose Line is it Anyway?," where everything is made up and words don't matter.

Rep. Ken Buck, R-Colo., [tweeted](#) about the board's decision and Facebook's supposed monopoly power. Sen. Josh Hawley, R-Mo., who wrote a book on the "[tyranny](#)" of big tech, [criticized](#) the board while describing Facebook as one of the "monopolies." Sen. Tom Cotton, R-Ark., [asked](#) if there is anything more Orwellian than the board. He was not alone in alluding to George Orwell. His colleague Sen. Mike Lee, R-Utah, used "1984's" newspeak to describe Facebook's control over its own speech as "[double-plus-ungood](#)." Rep. Lauren Boebert, R-Colo., [tweeted](#): "I guess Facebook [thinks](#) the First Amendment only applies to leftists." Michigan Rep. Lisa McClain, R-Bruce Township, [called](#) for reform of Section 230, saying Facebook should be labeled a publisher. Sen. Ted Cruz, R-Texas, called the board's decision "[disgraceful](#)."

Facebook is not a monopoly. Nonetheless, it is common to see Facebook, Twitter, Google and other "big tech" companies described as "monopolies" although they compete with each other. A company achieves monopoly status when it is the sole supplier of what it sells, and Facebook is nowhere close to that. Most of Facebook's revenue comes from selling advertising. There are countless people and institutions seeking to place digital advertisements. Facebook, Google and others compete for their business.

The Facebook Oversight Board is not "Orwellian." The totalitarian Ingsoc party of Orwell's "1984" uses surveillance, torture and manipulation of language to make dissent not only impossible but incomprehensible. Describing competitors as "monopolies" and using Twitter to [share an Amazon link](#) to your book bemoaning the "tyranny" of big tech is not quite "Orwellian," but is closer to fitting the definition than a private social media company removing third party content. Facebook's decisions are not totalitarian because they are not totalizing. They apply only to a discrete piece of property, a digital publishing system. Proposed internet regulations, however, would apply across different platforms with an effect much more totalizing than any Oversight Board decision.

The board's decision does not violate the First Amendment, which is a restraint on government. Facebook is a private company and cannot be held civilly liable for removing content or banning users. Whether Facebook is a "platform" or "publisher" makes no difference. Section 230 of the Communications Decency Act, the widely cited and misunderstood law that shields interactive computer service from being held liable for the vast majority of third party content, applies whether the interactive computer service is owned by a social media company such as Facebook or a publisher such as The New York Times Company.

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Beyond Capitol Hill, some right-of-center legal theorists have expressed a willingness to consider whether social media companies should be regulated like common carriers. New York University Law School professor Richard Epstein said, as paraphrased by the [Wall Street Journal](#), that the "near-monopoly position of Twitter and Facebook" may require these companies to abide by rules that govern common carriers such as railroads and telecommunication services, which prohibit viewpoint discrimination. Epstein does concede that "Twitter's got some competition from Facebook," which is enough to jettison his suggestion that common carrier treatment is warranted.

Shortly after the Facebook board issued its Trump-ban decision, First Amendment UCLA law professor Eugene Volokh [wrote](#) that when it comes to content moderation, big tech companies should be treated like phone companies. Justice Clarence Thomas recently wrote in a [solo concurrence](#) that the most prominent social media companies "resemble traditional common carriers." Yet unlike railroads and phone companies, social media sites are not mere conduits of goods and services.

Republican lawmakers are furious with "big tech" and appear ready to find ways to ensure that prominent social media companies are compelled to carry more speech than they currently do. There are at least some legal theorists and judges who could do much of the intellectual heavy lifting required for these lawmakers to achieve their goals.

Requiring social media sites to carry all legal speech would create an internet most users would find objectionable and difficult to navigate. Far from a triumph of free speech, this would reduce the number of people willing to create or consume content online. Pornography, conspiracy theories, spam and depictions of violence would likely proliferate across social media platforms that currently take steps to remove such content.

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Without the ability to set boundaries, online communities would collapse. Powerful market incumbents such as Google and Facebook would become more popular as they use their large pools of talent to make it easier for users to navigate this changing internet landscape. Smaller competitors and startups would not be so lucky.

Those concerned about Facebook's handling of Trump's account should be hesitant to reach for government intervention. The internet is much larger than the Silicon Valley giants. Those unhappy with "big tech" have venues for speech beyond Facebook, Twitter and YouTube. Some of these, such as Mastodon, embrace a decentralized model different from the centralized content moderation policies implemented by Facebook.

The success of alternatives like [Mastodon](#) depends on competition and the freedom of those building new platforms to decide what is best. We are still in the early years of the internet. It would be a shame if competition and innovation were stifled by regulations motivated by the content moderation decisions of a handful of centralized companies.

Matthew Feeney is the director of Cato's Project on Emerging Technologies, where he works on issues concerning the intersection of new technologies and civil liberties. Before coming to Cato, Feeney worked at Reason magazine as assistant editor of Reason.com. He has also worked at the American Conservative, the Liberal Democrats, and the Institute of Economic Affairs.

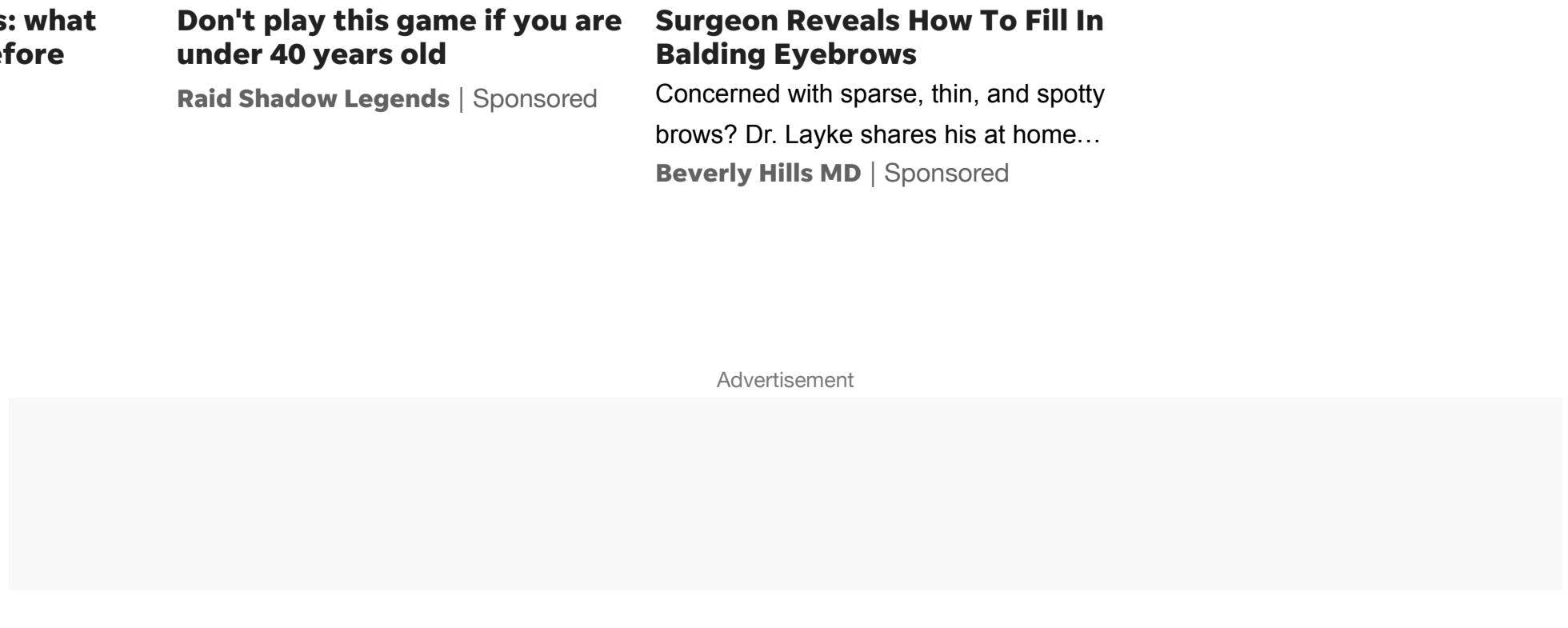
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