

COMMON LAW S5 EP. 6: ALISON GOCKE EPISODE

[THEME MUSIC IN, THEN UNDER]

Risa Goluboff: In the middle of the 20th century certifying natural gas pipelines inspired huge political fights. Today, those pipelines are mostly rubber-stamped. What changed? We'll be talking in this episode with UVA law professor Alison Gocke, to learn more about the evolution of an important federal agency and what it can mean for the nature of regulation itself.

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[THEME MUSIC UP, THEN UNDER AND OUT]

Risa Goluboff: Welcome back to Common Law, a podcast of the University of Virginia School of Law. I'm Risa Goluboff, the dean, and I'm so delighted to have Danielle Citron back in the co-host seat.

Danielle Citron: Thank you so much for having me back.

Risa Goluboff: Oh, it's great. So, Danielle, our guest today is an expert on energy law and its regulation, which has some crossover with your work on law and technology and also I think the two of you may share a certain wariness of monopolies and hard-to-surmount market forces as well.

Danielle Citron: Yes, we are both thinking about how to regulate these powerful economic forces, and in Alison's case, the energy industry, and in mine, I guess it's everything from social media companies to everyday companies that benefit from the amassing and sale of personal data.

Risa Goluboff: Well, this is going to be a great conversation. So tell us more about Alison and why you invited her.

Danielle Citron: Alison joined our faculty this summer after serving as a Bigelow Fellow at the University of Chicago. She also directed the Environmental Protection Clinic at Yale Law School, and before that, served as a legal fellow with the National Resources Defense Council. And Risa, like you, she's a former clerk for Judge Guido Calabresi on the Second Circuit Court of Appeals.

Risa Goluboff: I'll also tell you, Danielle, another thing that we have in common is that when Alison was a student, an undergraduate history student at Princeton, she was my research assistant and she helped me access archives at Princeton that I was trying to get my hands on. So, Alison and I go way back.

Danielle Citron: Yeah. those roots are deep. And also, Alison and I had a meeting of the minds recently when we wrote an op-ed together for Slate, in which we sort of pitched the idea that we can have federal comprehensive data protection, privacy legislation, and have a sidebar of California's special sauce or or more protective legislation — and I got the idea from Alison. We were having lunch, and I was describing her our struggles with. getting the passage of this comprehensive data protection law, which was like kind of a first in a long time, and she said, “I have an idea for you! We can borrow from environmental law.” So I feel so lucky to have Alison as my colleague, co-author, and of course guest on the podcast.

Risa Goluboff: What will we be talking about with Alison today?

Danielle Citron: Today we're going to be talking about her paper "Pipelines and Politics," which is coming out in the Harvard Environmental Law Review.

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Risa Goluboff: I can't wait to see what she has to say, and we will be right back with Alison Gocke.

[THEME MUSIC UP, THEN UNDER AND OUT]

Risa Goluboff: Alison, thank you so much for being with us today. It's such a pleasure to have you on our podcast.

Alison Gocke: Thank you so much for having me. I'm so excited to be here.

Danielle Citron: Alison, it's so great to see you and welcome. So what gave you the idea to look into natural gas pipelines and the history of their regulation?

Alison Gocke: I was working at the Natural Resources Defense Council, which is an environmental NGO, and I had actually been placed — I was working with the climate change team — but I had been placed in their FERC section.

Danielle Citron: Okay. For listeners who might not know, tell us what FERC is.

Alison Gocke: FERC, Federal Energy Regulatory Commission. For any energy or environmental nerds out there, it is a very important agency in energy regulation. And so I got assigned to work on some of the pipeline cases that NRDC was bringing associated with FERC.

Danielle Citron: So the NRDC was suing to stop the construction of interstate natural gas pipelines that FERC had already approved?

Alison Gocke: Yeah. And I remember thinking both that these were very weird cases. The reasoning that FERC had in some of its decisions that it was making on some of these pipelines seemed very odd to me. It was rote. You'd go back and read some of these decisions, and they sounded like the same ones that they had said over and over again. But it also was strange to me that we were litigating, sort of, FERC approving natural gas pipelines, because they do this under what's called the Natural Gas Act. And so in my naive mind, I was, like, well, the Natural Gas Act is probably all about approving natural gas pipelines, so it seems like this is what the agency ought to be doing, and maybe we have some objections to that, but that it seems sort of natural that they would approve these. So I was just sort of curious about what these cases were and why they were popping up and where it had come from. And as I started digging into that, I realized actually, despite being called the Natural Gas Act, FERC has a much broader authority under this statute than I initially thought. And it is not just its job to permit natural gas pipelines.

Risa Goluboff: So before we dive into these stunning statistics that you've compiled about FERC's recent rubber-stamping of natural gas pipelines, I would love to have you explain a little about the agency's history, which as you've described, has at least one surprising twist.

Alison Gocke: It was established in the 1920s and 1930s, and it was around a time when we had seen sort of the appearance of public utility regulation, initially at the state level and then at the federal level. This

idea that there were certain industries like natural gas or electricity that require a particular kind of regulation, mostly because those industries are often associated with monopolies. And so when I was diving into this, I thought, well, FERC is a regulator, sort of according to our traditional system of public utility regulation, one of the authorities that it has is to issue these certificates of public convenience and necessity to allow the construction of infrastructure like natural gas pipelines. And that tool is a pretty standard tool that you find in public utility regulation at the state level.

Risa Goluboff: So someone comes to them, says, “I want to build a natural gas pipeline, I need a certificate, will you give it to me?”

Alison Gocke: Correct.

Risa Goluboff: Okay.

Alison Gocke: Yeah. So these are private pipeline companies coming to FERC requesting to build this infrastructure.

Risa Goluboff: Okay.

Alison Gocke: And this ties back to our sort of idea that these are monopolies. We're going to regulate them pretty heavily, so we're going to police ...

Risa Goluboff: You can't just go build your own pipeline wherever you want.

Alison Gocke: Exactly. We're going to control entry and exit. Exactly. But when it opens its proceedings and private pipeline companies are coming to FERC in the 1930s and saying, “We want to build interstate natural gas pipelines,” all of these other players show up in their proceedings that FERC was not expecting to see. So there are representatives from the coal industry, there are representatives from the railroad companies, there are labor union representatives. And they all show up in these proceedings. Then they say, “We want to have a say over whether this pipeline actually gets permitted or not.” And it turns out that actually made a lot of sense because at the time, the biggest energy fight in the country was between coal and natural gas. Coal was the predominant supplier of energy in the United States. It was a huge source of power, both physical power and political power, and the

appearance of these pipelines threatened the coal industry. And so if these pipelines were going to be built and they were allowed to go into sort of coal territory, then the coal companies could potentially go under, which would affect the railroads and the labor unions.

Danielle Citron: So they were upstarts is what you're telling us. That is, the pipeline and gas producers were the little folks, not the mammoth companies that we think of today.

Alison Gocke: Yeah.

Risa Goluboff: They were disrupting the status quo in a big way.

Alison Gocke: Exactly. They were disruptors. By that point in time, they had become quite big themselves. And so there were like four major pipeline companies that ran the industry. So they're not really small businesses breaking in, but they were certainly a new energy technology that was the disruptor in energy.

Risa Goluboff: Okay.

Alison Gocke: So FERC sees these come into their proceedings, these other representatives and participants, and it says, "Well, we have no ability to take your interest into account. We're not here to consider those things. We don't care about your other competing fuel interests. We don't care about the long-term success or growth of your labor unions."

Risa Goluboff: What did they think their role was supposed to be?

Alison Gocke: They thought it was a standard certificate of public convenience and necessity. If you can demonstrate that there is a need for the construction of this pipeline, there's demand that needs to be served, you have the financial resources and the capability to construct a pipeline, then we will approve it. Keeping in mind, of course, that this is regulating a monopoly, so there's a tendency to deny permits, and to, sort of, select one party to provide a pipeline and then heavily regulate that party. So that's what they thought they were doing, and that's what they told these people who appeared in their proceedings. And then, FERC realizes very quickly that's not going to work well to say that it can't actually take these other interests into account.

Risa Goluboff: So in 1942, just four years after the Natural Gas Act was first passed, Congress amended it to give FERC this broader authority. What did they change?

Alison Gocke: They actually changed the Natural Gas Act to say more explicitly that FERC has the ability to take into account the long-term interests of competing fuels and transportation industries, as well as this idea of, sort of, the long-term health of the energy supply of the country. So that was specifically related to a concern that natural gas was a limited fuel supply. There were thoughts that we would have only about sort of 30 years of supply of natural gas in the United States, but it was an incredibly valuable fuel source and it could be used really productively, particularly by residential consumers. And so they were concerned that if FERC didn't think, sort of, about the long-term implications of its permitting, we would just quickly use up natural gas, exhaust our supply, in the process devastate the coal industry and then we'd be left 50 years from now with no energy system, our social system disrupted, and sort of nothing to provide for our economic or social health.

Danielle Citron: You were just talking about a lot of things, but none had to do with environment – concerns about the health and welfare and safety of our streams, our air. When does that come into play, and is that always part of the convenience or necessity analysis?

Alison Gocke: It's a little tricky because I think sort of our traditional conception of environmental regulation, comes about in the 1970s with, like, the Clean Air Act and the Clean Water Act and these bigger federal statutes, and that's how we tend to think about environmental issues. But you see snippets of that appearing in FERC, you know, in the 1930s and the 1940s, decades before those statutes appeared. Part of that is because one of the concerns with the certificate of public convenience and necessity, even at the state level, was actually to control for some, what we might think of is environmental externalities. So if you had multiple pipelines being constructed in a particular area, you would disrupt the land use across that area. You would affect surrounding communities. So the idea was, well, you would just permit one pipeline to sort of minimize the disruption to the surrounding environment. That was one thing that was considered in that process. Something else that happens when FERC starts thinking about conservation of natural gas is they start thinking well there's different benefits that come from different fuel sources. So if we allow natural gas to be providing energy in one area, that actually may reduce the air pollution associated with the

existing fuel source, which could be coal. And so they started evaluating the different air pollution benefits or problems associated with energy resources. So it's not thinking in like the 1970s sense of we're going to clean up our water system — that's not FERC's job — but they are thinking about these sort of knock-on consequences of energy consumption and the long-term impact and the sort of political development of the country.

Risa Goluboff: So in the early decades when they're considering these applications for natural gas pipelines, what do the outcomes look like?

Alison Gocke: Yeah, it's hard to get a sense of this from the record just because there are not sort of consistent record keeping from FERC. But you see decisions where FERC denies requests to build a pipeline because there are alternative fuels available, like a coal supply already exists. You see FERC conditioning its certificates. So they say, “Well, you can build natural gas to supply this particular area, but only for certain uses. We're going to preserve coal consumption in that area because we think it's important to continue to support coal, and you can use natural gas for limited purposes.” So there is more, sort of, balancing and weighing of the different interests that are at stake.

Risa Goluboff: So you wrote that FERC got better at record keeping in the late 1990s, so you had an easier time gathering data about the pipeline rejections and approvals that have occurred since then. What did you find when you looked at these past 20 years of FERC's work?

Alison Gocke: I isolated 425 projects that came before FERC in the last 20 years and I found that FERC approved 423 of those and denied two of those.

Risa Goluboff: Wow.

Danielle Citron: That's so many!

Alison Gocke: And I think if you work in the pipeline area that may not actually be surprising. It's sort of a well-known trope that FERC tends to just approve these projects. So I wasn't shocked when I found that, and in fact, there was sort of a FOIA discovery that the House has been doing on FERC and they found similar things. But for me, the interesting thing was the reasoning that FERC had on each of those decisions, what it was thinking about when it was evaluating these pipelines and

what had changed from the, sort of, historical period that I was looking at. And there, for me, the really remarkable thing was the balancing that I had seen, this interest in sort of the effect of pipeline approvals on competing fuel sources or the long-term sustainability of various fuel sources, —that had all disappeared. And the idea that there were sort of considerations to be taking account for like the social impacts of pipeline developments on labor unions or things like that, that was not in any of these approvals anymore.

Danielle Citron: What was the basis for most of these permissions and then in the two cases that you found where they didn't, that so rare case, what was really driving the certification decisions?

Alison Gocke: It says it engages in a balancing analysis. But when you dig into the decisions you find that, in basically every decision, FERC's evidence for what the public benefit of a pipeline is going to be is the presence of a precedent agreement between the pipeline company and someone who will ship gas along the pipeline. So this is a pretty standard contract, and the contract is just that there's going to be a shipper who will ship gas across that pipeline.

Danielle Citron: So it's almost like a business concept analysis, right? I've got a real business, I have someone who's going to ship the gas, and that's really where the interest is. So it's like solely on the one side of the ledger, which is you're going to provide the benefit that it's a feasible business model. You have a shipper. But it seems like everything else as you described it falls away.

Alison Gocke: Yeah, and in the two cases that I found where FERC denied the applications, they were two cases where the applicants had not come forward with a precedent agreement. And in fact, there's one case, the Jordan Cove case, where the applicant had initially not come forward with a precedent agreement, then their application was rejected by FERC and then they came back and had signed a precedent agreement with an affiliate company that was going to ship the gas along the pipeline and FERC said, "Great, that was what you needed."

Danielle Citron: Interesting.

Risa Goluboff: Why the change?

Alison Gocke: My first thought, and anyone who works in energy might think this as well, we went through a deregulatory period in the energy space in the 1970s and that included FERC and natural gas. Starting in the 1980s we deregulated portions of our natural gas industry, most notably our regulation of pricing of natural gas in the field. And so I thought maybe this shift to kind of a focus on market need might just be a result of that. And maybe there was actually a, a point in time when FERC said, you know, we're becoming more market-oriented and so that's why we're embracing this new more market-need approach. But the problem with that was, first of all, for all of the movements that were initiated by both Congress and FERC to deregulate the natural gas industry, they kept saying, "We are not deregulating pipelines." This goes back to the initial justification for public utility regulation in the first place, the presence of a natural monopoly. We still think of pipelines as natural monopolies, even through that deregulatory period. So there was a belief that we still needed to regulate pipelines under, sort of, traditional public utility regulation. And then FERC says that over and over again, it says, "We're not deregulating pipelines." And in this 1999 policy statement that I talked about, they say, "We're going to continue doing our balancing test here. We're going to take into account a wide array of interests, and if the public benefits outweigh the adverse effects, then we'll approve a pipeline." So with all of that, the idea that this was just something related to the deregulation movement, I think, is not a sufficient explanation for what's going on.

Danielle Citron: And the explanation for it isn't necessarily the fact that we were waiting on long lines in the '70s, you know, with our parents in the car to get gas, that there has to be something more ...

Risa Goluboff: Alison doesn't remember that, Danielle. You and I remember that.

Danielle Citron: I know, you're too young.

[LAUGHING]

Risa Goluboff: I remember sitting in the Ford station wagon on our day waiting, waiting with the wood panels.

Danielle Citron: Right? Yes!

Risa Goluboff: Oh yeah.

Danielle Citron: Oh my golly. And the, like, the nylon seats and you're like scrunching and it's hot out and your parent wakes you up at 6:00 AM to say, 'Come sit with me in line.' Right. Okay. Sorry. So we're having this like vivid ...

Risa Goluboff: I'm with you.

[LAUGHING]

Danielle Citron: Yeah, we're having a visceral moment on the like, market explanation for why, you know, the deregulatory moves is cause we needed gas. Right. So, what's interesting you say is that, all right, we've had some, like, failures to challenge — like, they put out this policy statement, they're saying we're going to be balancing, right? And then in the last 20 years you find that, well, they're basically just looking at whether there is a market need and ability to fill it. Why aren't institutions up to the challenge of holding FERC to the fire? Like why are we failing to push them on their own policy statements? Why is it that the different levers that could press them for accountability aren't working?

Alison Gocke: I think it actually goes back to you guys sitting in your car and waiting in lines in the 1970s for gas. There is a real political force that exists in the natural gas arena. And I think despite the fact that we have environmental organizations and landowner groups and community groups intervening in these pipeline cases and trying to tell FERC you have to take our interest into account, FERC is very reluctant to do so.

Danielle Citron: But you wrote that there had been some promising signs recently.

Alison Gocke: There had been recent movements in the last year or two where it sounded like maybe FERC was going to reevaluate what it was doing. President Biden had appointed two new FERC commissioners and a new chair, and they had released sort of draft statements saying they were going to change their approach to pipeline certification. Those were pulled back, particularly during the war in Ukraine. And the commissioner that President Biden had appointed as chair at FERC, was not able to be renominated and have a hearing before the Senate because Senator Joe Manchin said he would not review him as a potential candidate again. And a lot of the discussion was that is because of this more aggressive stance that was being taken by FERC against the permitting of natural gas pipelines.

Risa Goluboff: Your theory that this is being driven by politics has been borne out.

Danielle Citron: Yeah.

Alison Gocke: I think that's correct. It seemed a moment there, like we were going to get some changes in FERC's approach to natural gas pipeline permitting and I doubt that we're going to see that now.

Risa Goluboff: So we have a, um, rather famously canceled pipeline right in our backyard.

Alison Gocke: Yes.

Risa Goluboff: It faced a lot of public opposition, a lot of legal battles, right? The Atlantic Coast Pipeline. And before the project was canceled, it had obtained some FERC approvals and 98% of the easements that it needed along the route, and there were more than, I think 31 miles of pipe had already been installed. So what lessons do we take from the Atlantic Coast Pipeline episode?

Alison Gocke: Yeah, so the Atlantic Coast Pipeline is one of the pipelines that I talk about in the paper as an example of FERC not really conducting the holistic review that it ought to. So, FERC looked at sort of the project application for the ACP, said, "There are precedent agreements. We think this looks good to go. We're not concerned about environmental impacts or any of the other problems that were raised in the process." Then it turns out that there were subsequent challenges to the pipelines. In particular in Buckingham County, Virginia, there were activists who organized around a predominantly African-American community where the compressor station for one of the pipelines was going to be located. And they organized and said, "This is going to have a unique impact on our community. Um, this is an environmental justice issue." And were able to raise some of those issues before the Fourth Circuit. And I think some of that pressure slowed down the process with ACP. Then when ACP actually canceled the project, they said – well, one of the predominant reasons for them canceling it was Dominion was going to switch to more renewable energy and was going to rely less on natural gas, and so didn't actually need this pipeline to the degree that it thought it had initially. All of that to me is like if you have a permitting process that is supposed to evaluate these sorts of questions in the very beginning, if you do this process correctly, you ought to be able to figure

that out and you don't end up with sort of years of litigation and pushback and economic change until it ultimately ends.

Danielle Citron: Yeah, we wouldn't have spent all that money in litigation and cost for courts.

Alison Gocke: Yes.

Danielle Citron: Is the problem that, you know, as they're reviewing these permit requests, that it's on an ad hoc basis and that's all they see, unlike in rule-making where they have a much broader sense of the landscape and the questions and issues.

Alison Gocke: These decisions are made in individual proceedings, so they're essentially adjudications. And so even though FERC has this policy statement that is ostensibly something akin to like, it's not a real rule-making, but it's sort of their general approach of how they do these things. The rubber hits the road in these pipeline adjudications, and those are the things that are reviewed by courts on an individual basis. And when you look at them individually, I think it's a little hard to see that FERC is not necessarily being as holistic as we would want it to be. They reiterate that they're doing this balancing, they list sort of the same factors that they consider and then at the end of the day, they come to the same decision every time. And I think if you're from a court, even if you're from the D.C. Circuit, who sees these pretty regularly, it's hard to get a view of the broader picture of there's 425 pipelines and FERC has approved 423 of them. So I think the courts have a problem where they can't quite see what's happening, and even when they do see what's happening, all they can do is, sort of, vacate or remand an individual pipeline decision. And this happened actually in the Spire case that I talked about in the paper. It was a big deal cause the D.C. Circuit actually vacated a certificate that FERC had granted, which they really never do. And they vacated it on the grounds that they thought that there was like self-dealing happening in this pipeline application. They vacate the certificate, they send the case back to FERC. FERC reissued the certificate. They said, "Well, the pipeline is actually now built. So whether or not it was needed initially, they've now built up a natural gas infrastructure that relies on this pipeline. So we have to certify it."

Danielle Citron: So the self-dealing part is kind of irrelevant. Does that just fall by the wayside?

Alison Gocke: It was a hard case for FERC to then have to reevaluate because the pipeline was already built and the pipeline applicant had sort of redone all of its contracts with this pipeline in mind. So if that's your tool – sending things back on a remand or a vacatur – in most cases, FERC is just going to approve the pipeline again. And that's just not a really effective means of saying, FERC, no, it's your entire holistic approach to these across the board that is actually the problem.

Risa Goluboff: So what do you make of the fact that FERC continues to say “We're doing this whole balancing.” What would change if they were to say, “Actually we're just thinking about whether we need gas and whether somebody's willing to provide it.” And what role does that play, if any, in your view?

Alison Gocke: Yeah. I think of it a little bit as like magic words. Like you read this and you're like, oh, those are the words you need to say in order for this decision to actually stand up in court later. And the D.C. Circuit in the Spire case called some of FERC's language ipse dixit. It's just empty rhetoric without evidence underlying it. I think that they are doing it in part because they want to survive judicial review. If they say this stuff, the D.C. Circuit and courts are very deferential to FERC's ultimate determination as to whether a pipeline is actually required by the public convenience necessity. And so if that language is there and FERC says this is needed and it says it in sort of typical terms that it's used before, I think the courts will defer to it. If FERC actually came out and said, “The only thing that we're taking into account is whether there's a market need for this pipeline,” then that violates the Natural Gas Act. So there's multiple cases out there saying FERC is supposed to be taking into account the public interest, all factors that are affected by the public interest or go into the public interest. And if the only thing they're thinking about is market need, particularly for these cases like the Spire pipeline, where there are some questionable self-dealing issues, then I think that's in violation of the Natural Gas Act.

Risa Goluboff: What do you hope to achieve with your paper? Now that you've said, “Hey, look at the 423 out of the 425,” do you think courts will continue to say, “Oh, you're compliant with the act just cause you say the magic words?” Or do you think something more might be required?

Alison Gocke: FERC has been an ongoing proceeding to reevaluate how it approaches pipeline approvals for years now. As I was writing this paper, I thought it might be helpful for them to know, particularly the

history, which I think very few people are aware of, and that might change their approach. It could be that a court looks at it and thinks that, oh, this is actually much more expansive authority, that FERC is essentially shirking now. My sense, though, is this is driven a lot by politics. And if that's the case, then what you need is an equally countervailing force on the other side in our political institutions. So if we're actually going to effectively transition to a decarbonized economy, it's not just that you're going to diminish natural gas, but you actually need renewable energy to come in and fill some of its prior role. And we probably need integration of various resources. So I think for me, you have to change the political economy before you can actually change some of these legal outcomes. And that's a much harder task. But I think that is something like the Inflation Reduction Act is actually trying to do that rather than just doing these one-off lawsuits and hoping that the D.C. Circuit is going to change how FERC practices.

Risa Goluboff: So, Alison, what's next for you and your scholarship? What's the next project look like?

Alison Gocke: Well, I am working on something right now that is digging into this public utility regulation. And there's been renewed interest in it, not just in my field, but also in Danielle's. There's discussion of public utilities in technology and in finance and Amazon and Google. And I think there is a renewed interest because it gets at some of the economic problems that originated this form of regulation and that we're dealing with now. This idea that there's concentration of economic power in certain areas, in certain sectors that is not just a threat economically but could also be a threat democratically or to our political system. So my current work is digging into some of these stories, and there were actually early debates about how to regulate these industries and public utility regulation was just one way to do it. And there were a whole range of different options that were on the table and we sort of settled on this one. And I have a sense that actually that was not a great decision and we might want to go back and look at some of those earlier models.

Risa Goluboff: Well, that sounds terrific. I feel like it's up my alley and up Danielle's alley in different ways, but really interesting and, I can't wait to hear more about it. What a wonderful conversation. What a terrific paper. And thank you so much for being here.

Alison Gocke: Thank you guys so much for having me. I feel honored to be here. I respect both of you so much and your work, so I'm just happy that we get to chat.

Danielle Citron: Thank you so much. What a delight.

[THEME MUSIC UP, THEN UNDER AND OUT]

Risa Goluboff: So Danielle, I thought that was just a fascinating conversation and really at the intersection of both of many of our interests and for me, thinking historically, she's going to the origins of this agency and really trying to identify what they understood to be within the realm of consideration, within the realm of operations and how they understood themselves to go about their business and what changed over time. I wrote a book called "The Lost Promise of Civil Rights," so I'm interested in what do we lose from history, and I think she really does that in this paper. She's not only looking at today currently and what's happening, but how that compares to what happened before and asking, you know, is this how it has to be and what does it mean that we did this a different way in the past?

Danielle Citron: Those choices that we made, were they good ones? You know, we made this choice to go the public utility route. We have folks starting, and even lawmakers too, looking at public utilities as like the answer to big tech. And I think we have to be careful for what we wish for, and particularly in light of Alison's insights of what it could do if we ...

Risa Goluboff: Right. What are the consequences?

Danielle Citron: Yes. Like if we start saying, "Hey, big social media companies, Amazon, Meta, you are a public utility," that has all types of consequences that I think we haven't really thought through. And you have some lawmakers taking up the call and saying, "Okay, these social media companies have to carry – like a public utility – all comers." There are negative externalities that are in full view already – hate speech, spam, stalking, threats.

Risa Goluboff: Sexual violence.

Danielle Citron: Yes. Like we see it. So, in many ways, we're not learning any lesson in the tech field at all from the public utility model

and the pitfalls. And I do love how Alison says let's reconsider this model. Because at the beginning, we thought of it as something else. We may want to honor those early choices. In some ways her work is going to help, especially in my field, caution us before we rush into anything. It was fun to read the paper and think about all of our fields and how they sort of teach us something about kind of the beginnings and how we stray away from those beginnings and maybe those beginnings are wrong. You know, who's to say, at least in my world, what happened then was a choice of no regulation in many respects.

Risa Goluboff: I do think it's so eye-opening and possibility-creating and empowering for students and lawyers to not think that what exists was inevitable. What exists is how it has to be, right? When you look at the past and show there were choices made and the choices had consequences and they were constrained choices. Not that they were, you know, unlimited in, in, there are reasons why the choices got made as they did, but that there are contingencies and then there are consequences. And looking back really enables you to open up and say, "Hey, hey, this isn't the only way. It doesn't have to be the way, and let's really think about whether it is the right way or not."

Danielle Citron: Yes. We need that kind of deep thinking, lest we make really serious mistakes, bad choices, right? I hope we don't make those mistakes.

[LAUGHING]

Risa Goluboff: Me too.

Danielle Citron: For tools that are so important for democracy and speech and all of our life opportunities and of course for Alison, the environment. You know, the world that we inhabit. I want it to still be, you know, for our families and for the next generations to come.

[THEME MUSIC CREEPS IN]

Risa Goluboff: It's very exciting and I think Alison's work is so important.

Danielle Citron: Yeah, it's fantastic.

Risa Goluboff: Danielle, as always, it has been a pleasure to co-host this episode with you.

Danielle Citron: I'm so with you. Thank you so much, Risa.

[THEME MUSIC UP, THEN UNDER]

Danielle Citron: That wraps up this episode of Common Law. If you want to find out more about Alison Gocke's work, visit our website CommonLawPodcast.com. There you'll also find all of our previous episodes and more.

Risa Goluboff: We hope you'll join us next time and throughout the season with our Co-Counsel hosts for more explorations of how law shapes our lives. I'm Risa Goluboff.

Danielle Citron: And I'm Danielle Citron. Thank you for listening.

[MUSIC UP FULL, THEN UNDER]

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[THEME MUSIC UP FULL, THEN OUT]