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## Panel I: The First Amendment Implications of Convergence

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## Panel I: The First Amendment Implications of Convergence

Moderator: James Goodale\*  
Panelists: Andrew Jay Schwartzman\*\*  
Nicholas Jollymore\*\*\*  
Janine Jaquet\*\*\*\*  
Jonathan Zittrain\*\*\*\*\*

MR. GOODALE: Well, I have to tell you—this is one of my more exciting moments, because I have taught a course on this very subject ever since I came to Fordham Law School. And no one could teach a more exciting course, because every year the technology changes, which means every year the law is subject to change. It does not always change. Nor does it change the way I would like it to change.

You are guaranteed to get out of here by four o'clock, because at four o'clock I will be teaching the Fairness Doctrine,<sup>1</sup>—whatever

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1. The fairness doctrine, imposed by the FCC on radio and television broadcasters, required them to broadcast discussions of public issues. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 368 (1969). The doctrine required that broadcasters give adequate

happened to it? And that gives me a segue into the introduction on my left. I would think of Andrew Jay Schwartzman as Mr. Fairness Doctrine, but that would be unfair to him, because he is really the access expert of all time. He is director of the Media Access Project, and as I recall, has been there since 1978. He has spoken on my Practicing Law Institute panel on communications law. We are very lucky to have him here.

As we are to have Nick Jollymore, who is sitting next to Andrew. Adjunct Professor at Fordham and Deputy General Counsel at Time, Inc. Nick has been around the media game as long as I have been, and that means for probably four or five decades. And, he has been teaching at Fordham for quite a while. We are fortunate, indeed, to have Nick with us.

Next is Janine Jaquet, who is sitting in for Mark Crispin Miller, and we are very fortunate that she can do that. She is the Research Director at the Project on Media Ownership. Mr. Miller's articles in *The Nation* provide the basis for what she is going to say. In those articles he attacked concentration of ownership, with the negative implication that First Amendment rights were being assailed.

And last to join us is Jonathan Zittrain, Executive Director of Harvard's Berkman Center for Internet and Society. Jon has been a good sport today, because we do not have any pro-media people, I guess, except for me, and he is going to take a stance, as a good lawyer-type would, to represent the media.

So now we are going to start, first of all, with you, Andrew. You are on.

MR. SCHWARTZMAN: Thank you very much, Jim, and I am very pleased to be here. This is a distinguished gathering, and the *Journal's* done a wonderful job over the years with this thing.

I guess I would quibble a little bit with your otherwise kind, entirely kind, introduction Jim, but quibble nonetheless. I think we are all pro-media, and that extends to my ongoing advocacy for the Fair-

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coverage to public issues and reflect all views. *See id.* at 377. In 1987, the FCC abolished the doctrine. *See* 63 R.R.2d 541 (1987) (concluding that the fairness doctrine violated the First Amendment and contravened public policy). *See also* Symposium, *Current Issues in Telecommunications Law and Cable Television*, 6 FORDHAM INTELL. PROP.MEDIA & ENT. L.J. 465, 514 (1996).

ness Doctrine.<sup>2</sup> In fact, I just filed a brief supporting retention of the personal attack to a rules subset of that, which is now in the D.C. Circuit, and we are pressing on with that.<sup>3</sup>

I guess I do not like being pigeonholed as being anti-media. I think I am pro-speech. And the difference is that I represent the rights of the public, and their interest in receiving information from the media. And I bow to no one in saying that we have got the best system in the world, bar none. I would say it is because of, not in spite of, the system we have employed over these years in broadcasting for example, the 1934 Act.<sup>4</sup> But I do not like to view myself as a

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2. *See id.*

3. *See* Radio-Television News Dir. Ass'n and Nat'l Ass'n of Broad. v. Federal Communications Comm'n, No. 98-1305, 98-1305 (D.C. Cir. filed Dec. 1, 1998). The Radio-Television News Directors Association ("RTNDA") and the National Association of Broadcasters ("NAB") petitioned the United States Court of Appeals, D.C. Circuit to review a ruling by the Federal Communications Commission that indicated that the agency was deadlocked on the issue of whether to repeal the personal attack and political editorial rules. *See* Richard E. Wiley, *Competition, Consolidation, Convergence and Challenge: Development in Communications Law*, 544 PLI/PAT 7, 66 (1998). The personal attack and political editorial rules were adopted in 1967. *See id.* The personal attack rule requires broadcasters to give notice and free response time to individuals or groups whose "honesty, character or integrity" is "attacked" as part of a controversial broadcast. *See id.* The political editorial rule requires television and radio stations that endorse a political candidate in an editorial to notify and give free rebuttal time to that candidate's political rival. *See id.* at 66-67. RTNDA and NAB, among other groups, desire to have the two corollary rules repealed. *See id.* The Media Access Group, on the other hand, supports the retention of the personal attack and political editorial rules. *See* Media Access Project, *The FCC has Authority under Existing Law to Establish a Free Time Plan for Candidates* (visited Apr. 9, 1999) <[http://www.citizen.org/public\\_city...es/reform/free\\_tv/freetv\\_memo.htm](http://www.citizen.org/public_city...es/reform/free_tv/freetv_memo.htm)>.

4. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. 221(a) (1994)) (enacted for the purpose of regulating interstate and foreign commerce in communication by wire and radio and creating the FCC). The Act has been amended repeatedly through the years. Most notably, in 1992 Congress passed the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1995) (codified in scattered sections of 47 U.S.C.) which was enacted to: (1) promote the availability to the public of a diversity of views and information through cable television and other distribution media; (2) maximize availability to ensure continued expansion of capacity of programs offered on cable systems; protect consumer interests in receipt of cable service; and (3) ensure cable television operators do not have undue market power. Finally, the Act was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. 151 (West Supp. 1996)). *See* Symposium, *Current Issues in Telecommunications Law and Cable Television*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 517, 520 n.7 (1996).

naysayer, and I hope I would not be this afternoon.

One thing I do not do, however, is international. I always say: “I do not do international.” People come around with international law questions. As the technology goes transnational, and the Internet respects no borders, I would make one observation from a lot of discussions in this area. I am acutely conscious of the fact that we are putting all of this in an American framework, and in a First Amendment framework, which I care about passionately. But, as Professor Lessig’s observations about Eastern Europe suggest, we can no more export our legal framework than we can our ideas. We can present them, but they do not have to take them.

And I do find that a lot of these discussions act as if we can set the tone and pattern for the whole rest of the world. Yes, we are dominant. Yes, we are leading the world in these technologies; yes, we are setting the stage. But, I think as the rest of the world looks at it, they may have a different take on it. Now, I do wonder if that is not something we need to pay more attention to.

My second qualification is, much of what I want to say in a couple minutes really is the mass media equivalent of the Internet—the high-end intellectual property designed for mass exploitation and high profitability. That is what is going to drive us all, in terms of speech, democracy, commerce, to be sure. CBS is to a pamphleteer as Yahoo! is to the Usenet.<sup>5</sup> One of the wonderful things about this

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5. See David Wille, *Personal Jurisdiction and the Internet – Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95 (1999). Usenet services have been referred to as the “bulletin board of the Internet.” *Id.* at 190. Usenet provides:

[A] number of newsgroups organized topically to allow Internet users from all over the world to communicate on a variety of subjects. Internet users may access these newsgroups and make contributions to ongoing discussions about a topic or simply monitor the discussions. These newsgroups allow what amounts to worldwide roundtable discussions. Internet users may share information, discuss politics, and address questions about particular topics to other people interested and knowledgeable about those topics.

Usenet operates similarly to e-mail. Each posting to Usenet comprises an individual message like a textual e-mail message that may be read and shared by many users. In addition, these messages may contain graphics, pictures, sound, software applications, etc., that may be downloaded by others accessing Usenet. Unlike e-mail, however, Usenet does not automatically provide the user with a personal copy of each newsgroup message. Instead, many users retrieve

is that there is a whole underlayer that bubbles up, that replenishes the gene pool of ideas and thought, that can be substantially unaffected by a lot of intellectual-property and other issues we are talking about. But not entirely, as I was going to say.

I have one thought about Professor Lessig's presentation or contribution this morning. I think that he is an extremely important philosopher of the age, and somebody whose wisdom has taken us a long way, and will take us a long way. And I was very honored to be here for his presentation, and I really do look forward to his book, and I believe some of the articles that he has been writing are going to be reflected in there.<sup>6</sup> I think it is going to be a very major contribution.

I would say that, heuristically, his discussion of broadcast technology and the spread spectrum is absolutely right, and I run the risk here of sounding as if I find some merit in George Gilder,<sup>7</sup> who has been writing and talking about this a great deal for some time. But it is technologically possible and will undoubtedly have some important impact in the years to come, that spread spectrum really does change the importance of control and dominion and ownership of

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the information from a Usenet server that acts like a bulletin board. Another difference is the life of the message. Normally, an e-mail message is not deleted until the user chooses to do so. Usenet messages, however, are automatically deleted by the server after they reach a certain age.

User interaction with Usenet, however, is similar to interactions involving e-mail. A user has a newsreader application that operates on his computer to allow both the reading of material posted to newsgroups as well as the creation of his own contribution to a newsgroup. Newsreader applications can provide a number of features to save the user time, such as keeping track of which news items the user has already read. To access Usenet, a user usually needs an account with an organization that maintains a Usenet server. Usenet servers are a bit complicated. When a user generates a contribution to a newsgroup, that contribution is sent to a Usenet server. That server then distributes that message to other Usenet sites throughout the world. Thus, copies of the newsgroups are stored in various locations around the world. In addition, the server receives copies of messages from other Usenet sites and stores them locally. A copy of each message theoretically is maintained on every Usenet site in the world.

*Id.* at 190-91 (citations omitted).

6. See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (forthcoming 1999) [hereinafter LESSIG, *CODE AND CYBERSPACE*].

7. See James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hard-wired Censors*, 66 U. CIN. L. REV. 177, 180 (1997) "George Gilder of the Conservative Manhattan Institute, [is] a fervent booster of capitalism and laissez faire economics" *Id.*

spectrum. But in practice and, again, at least within this country, network economics, imposition of standards, the existence of an installed base of equipment and patterns that derive from the allocation choices when we had spectrum are going to drive us for a generation.

We are, wisely or not, and I think not, we are rushing headlong into a digital television regime.<sup>8</sup> Industry is investing billions and billions of dollars; standards are being chosen; the sets are going to be forced down our throats. We are going to have this, however wisely or not, come at us. It is going to take a long time to work that through. And somebody coming up with a spread-spectrum means of providing video is going to have a lot of legal and political problems making it happen. That does not change the value of what Professor Lessig said. It is just a cautionary note. Do not go out there and buy spread-spectrum stock and expect it to displace terrestrial television anytime soon.

I pray at the Madisonian Church of the First Amendment. I think that government has a very important role in promoting the discussion of issues and ideas—creating opportunities for those discussions.<sup>9</sup> The government's role is not, to my mind, best done when it is passive and leans back and lets the marketplace simply decide what is going to be done, because the marketplace does not always take into account certain values that I think we ought to hold dear, like democracy, and free speech and self-expression.

We tend to suspect old problems that can be solved with old solutions, so we look on, and try to focus, then, on the new problems, and look for new solutions. I think it is something of a mix. But the old problems do come up, and they come up in ways that are more difficult and more tractable than we think. Technology just cannot fix them so easily—filtering software being a very good example.<sup>10</sup>

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8. See G. Christian Hill, *Counting on Digital: The Good Guys Chain Hopes New Products Leave Consumers Intrigued*, WALL ST. J., June 15, 1998, at R26. One commentator notes, “we’re embarking on a period of chaos and confusion, in which consumers will be assaulted with competing claims for dozens of gadgets.” *Id.*

9. See James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792 reprinted in 14 THE PAPERS OF JAMES MADISON 266-68 (Robert A. Rutlands et. al. eds., 1983) (arguing that freedom of speech is a property right and government’s role should be limited to ensuring that right).

10. See generally Kimberly S. Keller, Comment, *From Little Acorns to Great Oaks Grow: The Constitutionality of Protecting Minors from Harmful Internet Material in*

It is a nice solution, which we pushed very hard, and I played a, stress here, a minor role in the litigation, which became *ACLU v. Reno*.<sup>11</sup> But certainly, one thing that I did do in that case was press very hard for making sure the Supreme Court understood the availability of filtering software and other means the parents could use to control access to the Internet, and that the government should not be substituting its judgment for that of parents in deciding what children should see.<sup>12</sup> But, you get civil actions pretty fast when you take that same software, and you put it in libraries and public institutions. And the role of the decisions that get made in designing that software can take on some constitutional dimensions pretty quickly. It does not really solve the problem, it creates new ones.

I wanted to speak for a moment about commercial speech in this context. The Supreme Court's jurisprudence on commercial speech is, I think it is fair to say, muddled.<sup>13</sup> And I think that cyberspace

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*Public Libraries*, 30 ST. MARY'S L.J. 549 (1999). (discussing the need to use filtering software to protect minors on the Internet while still maintaining adults' rights to access materials on the Internet). Filtering software was created by the computer industry to permit a user to regulate the reception of Internet transmissions. See *id.* at 562. Filtering software is used to block minors from receiving information that is of an obscene or indecent nature. See *id.* at 562-63. Currently three approaches shield minors from obscene or indecent material on the Internet. See *id.* at 563 n.58. First, specialized Internet service providers are created that specifically provide Internet access to minors, allowing users to retrieve information only from friendly Web sites. See *id.* Second, minors may be shielded from indecent material by computer filtering programs that, once installed onto the terminal, block access to certain adult Web sites. See *id.*; see also Karen J. Bannan, *Cybersitter 97 Makes the World (Wide Web) a Safer Place for Children*, COMPUTER SHOPPER, Nov. 1, 1997, at 560 (illustrating the process by which Internet filtering programs select and remove material inappropriate for children). Third, a prototype Internet V-chip, which follows along the lines of television V-chip technology, unites filtering software with an Internet rating system, allowing the most efficient form of supervision to minor surfers. See Taylor Lincoln, *Protecting Young from Cyber Smut: Software Babysitters Can Help, but None Has Perfect References*, BALTIMORE SUN, July 16, 1997, at 1A (describing an Internet V-chip currently in the works).

11. 521 U.S. 844 (1997).

12. *Id.* at 846 (arguing that a reasonably effective method by which parents can prevent their children from accessing material which the parents believe is inappropriate will soon be widely available).

13. Compare *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer*, 425 U.S. 748 (1976) with *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). In *Virginia Pharmacy*, the Court said commercial speech is more durable than other types of speech and therefore receives an intermediate level of protection. 425 U.S. at 762-63. Whereas, in *44 Liquormart* four Justices in a plurality openly advocated for full First



and the new technologies are going to complicate it even more. Something that has been going around in the trade press for a little while made it to the mainstream publications over the weekend and today, which is: Surprise, Amazon.com is actually selling its reviews.<sup>14</sup> Well, you know, Amazon.com can publish a magazine, and it has a First Amendment right to put stuff in. And there is a long tradition of buying reviews, and bribing reviewers, and cajoling in lesser and greater ways. That is First Amendment-protected activity.

Why is this different? What are the implications? Well, they are kind of confusing. On the Internet you can convince somebody you are a dog—and I think that the implications of consumer-protection principles gets very fuzzy when you are talking about something that is a review of a book. And what kind of editorial decisions are made, and enforcing it, and working it through. These are going to be very, very dicey areas to deal with, and they are areas of convergence that I think have been under appreciated.

Similarly, just coming in on the train this morning, looking at *Advertising Age*, I am not surprised to discover that shopping-bots are becoming problematic for advertisers.<sup>15</sup> These things actually tell you the best price, they are going to cause balance between the needs of consumers with those of their retail advertising partners in the portals. Shopping agents threaten to aggravate retailers who paid millions for a cite, only to see consumers lured away from a site by a bot that shows users where they can find lower-priced merchandise. It trains the customer to think that price is the foremost value. It also conflicts with the fact that the seller is the exclusive provider, the author said.<sup>16</sup>

So now you have got technology that can provide the efficiency, reduce transaction costs, and drive the growth of the economy. You

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Amendment protection for commercial speech that is not deceptive. 517 U.S. at 500.

14. See AP, *Refund Offered on Books Sold by Amazon.com Ethics: Offer Applies to Titles The Online Seller Recommended. Firm Denies Assertion that Publishers Could buy an Editorial Endorsement*, L.A. TIMES, Feb. 10, 1999 at C1.

15. See Patricia Riedman, *Portals Rethink Retail Strategies, Shopping Agents: Bots Can Create Advertiser Tensions*, ADVERTISING AGE, Feb. 1, 1999 at 28 (discussing shopping “bots” which are secret services that search the Internet for the lowest priced item of a particular good).

16. See *id.*

also have this massive merger frenzy going on with portals now. There was another one today, with Lycos.<sup>17</sup> Now, what are the speech implications of that? What are the traditional, I will call, FCC consumer protection issues of that? Where does speech become commercial speech? Where does it become journalistic speech?<sup>18</sup> The implementation of this thing is going to be a lot dicier, I think, than people suspect. The simple answers may not work.

Finally, the issue *du jour*, and I am glad we have got Time Warner here, is access to the cable television plant for Internet. We are very concerned with the way the cable industry is set up, and gone into the Internet business, and have just acted as if they are, for purposes of the communications, video services. The significance being, like your cable-television channels, the cable system decides what gets on, what selection is made. A content provider gets on only if the cable service feels like putting them on. Which is an okay political choice in many respects.

We have been very concerned that the Internet poses big problems. We raised it in the context of the ATT-TCI merger.<sup>19</sup> It changes the very character of the Internet if you have one ISP available to you, bundled. In the case of Time Warner, it is Road Runner; in the case of TCI it is At Home, which is basically controlled by TCI. If they do not want you on the front page, if they do not want your button there, you are not there.

There are technological choices. There are small ISP's whose basic business involves bundling of Web page design and Web posting for niche markets, for travel agents, for real estate agents, for neighborhoods, for areas. For example, one of the ISP's we are working with, their principal asset is the domain named <venice.com>, which, in the Los Angeles area, says something. It is a message, sort of like Chelsea or Silicon Alley is. It is a neighborhood; it is a feeling.

That has First Amendment expressive elements, and they cannot

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17. See Eben Shapiro & Jon G. Auerbach, *USA Networks to Merge Unit with Lycos*, WALL ST. J., Feb. 9, 1999, at A3.

18. See *supra* note 13 and accompanying text.

19. See Paul Farhi, *AT&T Deal May Be in Peril; Malone Cites Fall in Stock's Price*, WASH. POST, July 14, 1998, at C2.

make that offering available if the customer is accessing the Internet through cable. At Home has restricted video-streaming files to five minutes in length. If I have an important message to deliver—political, or artistic expression that takes six minutes, it is not going to make it through the cable-head end, into the cable system, because it is too big a file and they do not like it.

This has First Amendment expression dimensions. If the Internet is the place that has organically, spontaneously, synergistically driven the new economy; if it has broadened our base of understanding; if it is giving us new ideas of political speech and discourse in commerce—and there is a gatekeeper sitting there saying, no, you cannot—that has a tremendous political dimension.

If you have portals selected by At Home—that says Amazon.com, which sells its reviews, is going to be the preferred book provider—or a portal that is not permitting bots to make it through their head end, the customer, because it interferes with their preferred supplier of whatever product it is. God forbid, you do not want your customers being able to use electronic commerce to find something at the best price. I think you have got a lot of interference with the First Amendment goals we have thought that the Internet was supposed to bring us.

Therefore, I think that it *is* important for government to look at these things, evaluate it, and take the necessary steps to create, maintain, promote and enlarge the Madisonian ideal of the marketplace of ideas.<sup>20</sup>

MR. GOODALE: Next, we have Nick Jollymore.

MR. JOLLYMORE: I have some prepared notes that really do not address Mr. Schwartzman's points—and I am not going to attempt to, but maybe we will get into a discussion as the panel progresses.

Media convergence can mean a lot of things. In preparing for this panel I looked at some of Mark Crispin Miller's writings, and I came away with the feeling that one of the things that we are talking about is the growth of media conglomerates, such as Time Warner,

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20. See *supra* note 9 and accompanying text.

Disney, and the others.<sup>21</sup>

It could mean a number of other things, as well, but I would like to talk about my thoughts on media conglomerates in the First Amendment context. There are a lot of critics of mass media that point out its many deficiencies: it is not educational enough; it does not educate voters; it does not educate kids; it is too much like entertainment; the mass media needs to build audiences to satisfy advertisers, therefore, it panders to violence and sex and gossip; it does not allow everybody to speak; it acts as a gatekeeper, in some sense, because it controls large markets, so many points of view go unnoticed; and, there is a lot of important information that the public should know, that it does not have access to in the mass media.<sup>22</sup>

There are many causes of these problems, and the causes are complex. We could talk for a couple panels about the causes. A couple thoughts come to my mind. Private ownership is probably one of the causes since the media is privately owned and constitutionally required to be separated from government.<sup>23</sup> Publishers operate as private businesses motivated by the pursuit of profits. This, say critics of the mass media, gives advertisers undue influence. I guess that is all necessary, in some sense, because the larger the audience, the larger the profit, and the motivation, therefore, is to become mass.

There is another asserted cause of problems with the mass media from the First Amendment perspective, that Professor Miller points out, which is the growth of conglomerates.<sup>24</sup>

Conglomerates, media conglomerates, are said to wield enormous power, which is vested in the hands of the corporate chieftains who control what information we get and, therefore, in some sense, control the political agenda and control our thought on the social agenda.<sup>25</sup> And that, say the critics, is as bad as government control

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21. See generally, Mark Crispin Miller, *Free the Media*, NATION, Jun. 3, 1996, at 9 (discussing the sway of media conglomerates and the need for diversity in the rising tide of corporate monoculture).

22. See *id.*

23. See C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 363 (1998).

24. See Miller, *supra* note 21, at 9.

25. See *id.*

of the press that the First Amendment, after all, was drafted to prevent.<sup>26</sup>

I find this argument unpersuasive, and I would like to share my thoughts with you on why I find it unpersuasive. I am not saying that the mass media does not often fail in its mission, but I think the failure has many causes which are complex, and rooted in the culture that we live in, and very, very difficult to address. Among the causes in my view, is not the growth of conglomerate ownership of media outlets.

Why do I say that? There are really two reasons. One is actually sort of the other side of the profit motive. Editors of mass-media vehicles cannot risk alienating their audience by showing a bias. That is a proposition that I am just throwing forward. I believe that it is true, based on my observation of editors at my company and others. Their goal is to provide information and gather as large a readership as they can, in the case of the print media, or viewership, in the case of other media. If they are going to truly become a mass media, they have to convince their readers that they are a reliable source of objective information. That is one reason, and I will elaborate a bit on that.

The other reason, in my view, why the growth of conglomerates per se—as opposed to the many other causes of problems with the mass media—is not a concern from a First Amendment perspective is because the people who make up the editorial part of the mass media are journalists, and they consider themselves a professional institution, and they are self-policing. High on their list of priorities is maintaining an independent and objective viewpoint, except when they choose to editorialize; then they label it as such or they endeavor to do so.

They also answer to their peers, their readers, their viewers, to the *Columbia Journalism Review*. Because they are mass, they are very visible to all of us, and all their counterparts in other media organizations who are ready to criticize their behavior when they step out of line.

Let me use the company that I am employed by, and have been

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26. *See id.*

for about fifteen. Time, Inc., as an example and Mr. Schwartzman sort of classifies me as Time Warner. It is true that Time, Inc. is a wholly owned subsidiary of Time Warner. But, in some senses—I think very real senses—it is a very independent company. Time Warner is a holding company that owns HBO, Cinemax, and other pay-cable operations; the Warner Bros. studios and the television operations; CNN; and, cable operations.<sup>27</sup> They are all operated quite on a decentralized basis. I sit in the Time & Life Building on Sixth Avenue; HBO is downtown; the Warner Bros. studio is on the West Coast; cable is up in Connecticut. What am I missing? Music has now moved to the West Coast. We do not operate as a group.

In my building we have magazines, books and a lot of the Internet operations of Time Warner. And we have an institution that is—and nothing I am saying here is not public information—referred to within our building as “Church and State.” Maybe somewhat presumptuously, but I think more accurately, because it reflects the strength of the perceived division among the people who work there. “Church” is the editorial part of our magazine operations while the “State” is everything else.

Take *Time* magazine, for example: the managing editor, all of the editors, picture editors, writers, correspondents, reporters, and fact-checkers are all part of what they refer to as “Church,” the editorial part of the company. They report up, through the managing editor of the magazine, to a person we call the editor-in-chief. He does not report to the CEO of Time, Inc., he reports up to the Time Warner board.

And that is a very significant piece of corporate structure, because the CEO of Time, Inc. does not have the authority, unless he maybe goes out for drinks with the editor-in-chief, to fire or to discipline anybody on the editorial side. He may express some displeas-

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27. See Johnnie L. Roberts & Mark Robichaux, *Time Warner, Viacom Settle HBO Suit, Clearing a Cloud from Cable's Horizon*, WALL ST. J., Aug. 21, 1993, at B1 (discussing the history of Time Warner's acquisition and settlement of the suit over HBO). Viacom's Showtime pay-TV channel had charged that Time Warner's HBO waged a “systematic and aggressive campaign” to put Showtime out of business. *Id.* It alleged that HBO intimidated cable systems into refusing to carry Showtime, “pressured Time Warner's own extensive cable systems to forgo the rival service, and cornered the market for top Hollywood films to dry up the supply to rivals.” *Id.*

ure. But because the institutions of “Church and State” are so ingrained in our corporate culture, intermeddling by anybody on the “State” side is viewed with a great deal of contempt and wariness by people on the “Church” or edit side.

Additionally, their day-to-day functions are not commingled. For a long time, they used to be on entirely separate floors. If you talked to editorial people at our magazines, they would not know who the general manager was and many would not know who the publisher was. They would not know who the people in finance were unless they were in an editorial finance department serving the “Church” side exclusively.

The Editor-in-Chief, and the managing editors who report to him—one for each magazine—have a mission that is distinct from the “State,” or business, side of the corporation. Their mission is to produce good journalism, to serve readers, and to have successful magazines from an editorial standpoint, but they do not have any responsibility for the bottom line of the company financially. Whereas, on the “State” side, ad-sales reps have clear bottom-line responsibility for ad sales revenues; they are compensated on the basis of how many ads they sell. Publishers and Presidents, we call them, of our publishing divisions have real bottom line responsibility that is reflected not only in their assignments, but in their compensation.

Now, why do we have this structure? Because the founder of the company, Henry Luce, recognized that readers distrust biased news sources.<sup>28</sup> When we want accurate information, we do not read travel brochures. We tend to read travel magazines. When we want accurate information on businesses, we may look at the annual reports, but we will turn to the business press for information we trust more.

The institution Luce created embraced this notion. The idea was: we are going to create quality publications, and are going to isolate the editorial operations from business influences as much as possible. Our editors understand this. They cannot pull their punches on corporate criticism. *Time* magazine did a series that the magazine is jus-

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28. See generally, ROBERT HERZSTEIN, HENRY R. LUCE: A POLITICAL PORTRAIT OF THE MAN WHO CREATED THE AMERICAN CENTURY (Scribner's Sons 1994) (discussing Luce's contribution to the editorial culture of *Time* magazine).

tifiably proud of last fall on the folly of corporate welfare. They took shots at Borden, General Electric, Uniroyal, Exxon, among many other Fortune 500 companies, many of whom were advertisers in one or more of our magazines.<sup>29</sup>

*Fortune* did a cover story on IBM which offended IBM's CEO, Louis Gerstner, so much that at least, according to press reports, he pulled \$6 million in advertising from *Fortune*.<sup>30</sup> Do you think the publisher of *Fortune* was not upset about that? She was, indeed, I am sure. But she had no authority to require the managing editor to publish a complimentary article the next issue of *Fortune* magazine. *People* magazine included not only Rupert Murdoch but also Time Warner's number-two executive, Ted Turner, in its cover story about men behaving badly, including a quote from Rupert Murdoch's *New York Post*: "Has Ted come off his medication?"

And let me share with you just three little excerpts that I pulled off our online library of *Entertainment Weekly*'s reviews of Warner Bros. films. *Entertainment Weekly* is owned by Time, Inc., which is owned by Time Warner; Warner Bros. is owned by Time Warner—so they are under common control. A review of *Jack Frost*: So treachery and fake, it makes you feel like you are trapped in a winter wonderland paperweight.<sup>31</sup> *Addicted to Love*: Wearing heavy dark eye shadow, that makes her look like a blonde raccoon, later-day Doris Day Meg Ryan is ludicrously miscast as a tough-talking biker chick in this distasteful romantic comedy.<sup>32</sup>

And this one is a little longer, *The Glimmer Man*: Steven Seagal

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29. See generally, Donald Barlett & James Steele, *Special Report: Corporate Welfare, a System Exposed*, TIME, Nov. 9, 1998 (reporting that hundreds of companies received some type of "welfare" from the U.S. Government); *Exposing the Folly of Corporate Welfare*, TIME, Nov. 9, 1998 (introducing the results of *Time*'s eighteen month investigation into corporate welfare); *Fantasy Islands: And Other Perfectly Legal Ways that Big Companies Manage to Avoid Billions in Federal Taxes*, TIME, Nov. 16, 1998 (discussing various tax evasion schemes of large corporations). All articles are available at <<http://www.cgi.pathfinder.com/time/magazine/1998/dom/981109/cover1.html>>.

30. See C.J. Satterwhite, *Private Sector: Let the Inner Poet Emerge*, N.Y. TIMES, Nov. 15, 1998, at C2.

31. Owen Gleiberman, *Jack Frost*, ENT. WKLY., Jan. 8, 1999 (movie review) <<http://cgi.pathfinder.com/ew/review/movie>>.

32. Bruce Fretts, *Addicted to Love*, ENT. WKLY., May 30, 1997 (movie review) <<http://cgi.pathfinder.com/ew/review/movie>>.



is the Glimmer Man—a Vietnam vet turned cop who is supposedly so fast you only catch a glimmer of him before he nails you.<sup>33</sup> But Seagal’s Jack Cole is actually just a beefy lunk whose big shirts look like garish bedspreads.<sup>34</sup> He is more like Mattress Man.<sup>35</sup> Cole’s police partner is played by Keenan Ivory Wayans, who is in the wrong movie, surrounded by clumsy martial-arts scenes, dumb jokes, and a plot that mixes serial killers with CIA conspiracies, Wayans actually tries to give a performance.<sup>36</sup> He gives his soft punch lines some bite, looks hurt when he is hit, and knows that when another actor is talking to you, it is only polite to appear as if you are listening.<sup>37</sup> Wayans deserves better than this insulting variation of “48 Hours.” “D -” that is the grade what was assigned.<sup>38</sup>

Now, the question I ask is: where was the corporate chieftain of Time Warner, protecting the considerable revenues that Warner Bros. expected to make from these movies, when the reviewers at EW were writing these reviews? The fact is, the incentive to the editorial people at our magazines is to resist corporate influence. They are suspicious of corporate intermeddling, and the corporate executives on the business side understand this. They also understand that the appearance of objectivity is also important—the appearance in *addition to* the reality—and cannot be sacrificed. This is my observation of the first reason why I think that the growth of media conglomerates per se, that is, the joining together of Time, Inc. and the Warner Bros. studio, under common corporate control did not raise a First Amendment problem for the magazines the company publishes.

The second reason is that journalism is an institution. There are canons of journalism, there are professional associations and publications, and there is an ethic among journalists. I have seen this in our Internet operations, sometimes to my surprise, among people like sysops. There is a dedication among journalists to trying to find the truth, whatever it is. They will admit that they fail, but they will tell

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33. Ken Tucker, *The Glimmer Man*, ENT. WKLY., Oct. 16, 1996 (movie review) <<http://cgi.pathfinder.com/ew/review/movie>>.

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

you that their mission revolves around that central simple concept.<sup>39</sup> Journalists put a high priority on their independence, especially in conglomerates. The journalists at Time, Inc. feel like they operate in a fishbowl, because any editorial peccadillo will appear in *The New York Times* or *The Washington Post*, or *The Columbia Journalism Review*. They are very visible magazines, and they know that they set standards for the industry, and that they will be held accountable to public scrutiny. So they cannot afford to be corporate lackeys, they must be professionals.

Now, I know this is true, to some extent, in all media conglomerates. I think that critics simply deny it. They distrust bigness, as all of us—including our journalists do to some degree as well. They see themselves as champion of the little guy. However, I think that journalists in any large organization cannot afford to yield control to their corporate masters.

I would like to add one last reason why I think the growth of media conglomerates does not pose a threat to the marketplace of ideas in America. This is short and easy, and you will not be surprised by it. I think there is more information available to day than at any day prior in the history of the human race. I am, as I am sure a lot of you are, dazzled daily, or at least weekly, by the power of the Internet.

MR. GOODALE: Thank you, Nick. Well, Janine, I do not know. We have the answer to the question—it is called “Church” and “State.” So maybe we just move on to the next speaker, or do you want to get a word in here?

MS. JAQUET: I am ready. I do have some prepared remarks, although I feel compelled to tell you—as has already been indicated—I

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39. See *Mass Media Codes of Ethics and Councils: A Comparative Study on Professional Standards*, UNESCO REPORTS AND PAPERS ON MASS COMMUNICATION 41 (1980). Commentators offer:

Practically every University has its journalism faculty; the books; magazines and articles devoted to one or another aspect of the media of mass communication would fill a large library. The Codes are numerous . . . [T]he journalists, the editors, the newspaper proprietors, radio and television workers, script writers, advertising people, motion picture people and a few more who are on the fringes of mass communication, all have their special Codes. It is a moot point, however, how many of them are worth anything than are worth anything more in practice than the paper upon which they are written.

*Id.*

was a last-minute addition, so I am sort of scratching out some things this morning that I wanted to talk about.

Am I the only non-lawyer on the panel? Am I the only non-lawyer in the room?

MR. GOODALE: But I am in my dotage, so I do not count.

MS. JAQUET: I am a journalist—first in newspaper reporting then in local news, television reporting, and then as a television documentarian. So I feel outclassed in this room to talk about this from a legal perspective. So I, instead, am going to talk to you as a journalist.

Let us first back up. Let us look at the whole situation with media conglomerates, Time joining Warner, and then joining Ted Turner's company is one of the major mergers in this era.<sup>40</sup> Disney and ABC,<sup>41</sup> and so on, you are familiar with all of these, I am sure.

We want to, I think, be careful when we look at the effect of these mergers on journalism, because, as Mr. Jollymore has pointed out, there are many consequences of these conglomerates, and there are many things wrong with the mass media that have nothing to do with mergers. There have been problems. Advertisers have been breaking through that "Church-State" wall, there has been anything, and you do not need to look very hard for examples there.

There is something about private ownership, whether it is a large multinational corporation conglomerate, or whether it is a local owner, that is going to exert a certain amount of pressure for profits. That is part of the problem if you have private ownership. But what is the alternative,<sup>?</sup> So, I think we need to keep that in mind, that all of the problems with the mass media do not stem from conglomeration.

I would argue, though, that the very structure of the modern media corporation, with its conglomeration of many different pieces—all of which are expected, on the top corporate level, to help one another—encourages choices to be made that enhance the bottom line, rather than those that protect the integrity of journalism and the vital-

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40. See Eben Shapiro et al., *Combining Media Giants Could Create Static*, WALL ST. J., Aug. 31, 1995, at B1.

41. See *id.*

ity of entertainment programming. I am speaking now of television, particularly.

I think it was in the paper not too long ago that poor Michael Eisner, who is the CEO of Disney, had his nine million dollar bonus cut in half, because Disney's profits only increased by four percent last year.<sup>42</sup> Only increased by four percent. That is just not good enough for Disney's board, or presumably, for its stockholders.

There is ample evidence of quite a number of these large corporate parents demanding certain profit levels from parts of the media that have *never* generated those kinds of profits. Book publishing, for instance, has never generated large profits. People who ran publishing houses years ago did it because they loved books. Yes, they published a certain number of books that we would say are pretty poor, because they knew it would make money. But they did this with the idea in mind that if they made money on *this* project, they would put it into *that* project; for example, to the young novelist who has written a first-time book and someone wants to give him or her a shot. You cannot do that unless you are making money somewhere. And I think that it is fair to say that while there was no golden era of media ownership when all of the good guys were the ones who were the book publishers and were the chiefs of the networks, there was a greater balance between the bottom line and that which preserved the integrity of the journalism and the vitality of the entertainment industry.

I think that when we look at what is happening today, we do see journalists—and I am quite sure there are a large number of them at Time, Inc.—who are very concerned about the erosion of the wall between “Church” and “State,” but who are very ill-equipped to deal with this. Sure, the *Columbia Journalism Review*, the *Washington Post*, the *New York Times* might jump all over *Newsweek* for darkening O.J. Simpson's skin color on the cover. That will get written up. But what about all those stories that do not get written up? What about stories that do not get done because journalists are self-censoring? Journalists know that if you want to get ahead in this company, if you want to get the choice beats, you do not do things

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42. See Geraldine Fabrikant, *Disney Plans to Reduce Chairman's Bonus*, N.Y. TIMES, Jan. 7, 1999, at C17.

like Brian Ross did.<sup>43</sup> You do not say: ABC—we want to do a story on Disney World’s problem with pedophiles.<sup>44</sup> Brian found out in a big hurry that it was a nonstarter. So we still do not know what that story is, because ABC still has not aired it.<sup>45</sup>

Just as there are lots of examples of the media reporting on things like corporate welfare there are, I would imagine, just as many stories that go unreported.<sup>46</sup> For instance, the FCC has *given* a corporation that now owns broadcast licenses, television licenses, additional spectrum space. Valued at seventy billion dollars.<sup>47</sup> This is space to allow this conversion to digital television that Andy was talking about.<sup>48</sup>

Not one of the major television news programs, except for one episode of *Nightline*, reported on a seventy billion dollar corporate-welfare plan.<sup>49</sup> Why? I do not know why. But if I was a journalist working for one of these networks, I might think about whether or not suggesting such a segment would adversely affect my career. Journalists are, after all, just like us. These are people with kids; these are people with mortgages; these are people with professional futures, they hope. Now, that is not going to be a really good move if you want to go somewhere, or if you just want to stay right where you are.

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43. See Howard Kurtz, *ABC Kills Story Critical of Owner Disney; Official Denies Corporate Link Influenced Decision*, WASH. POST, Oct. 14, 1998, at C01. Brian Ross investigated and was to report a story on ABC’s *20/20*, based on a book alleging incidents of hiring, safety problems, and pedophilia at Disney World. See *id.* *Disney: The Mouse Betrayed* written by Peter and Rochelle Schweizer, alleged, among other things, that Disney World in Florida fails to perform security checks that would prevent the hiring of sex offenders, and has problems with peeping Toms. See *id.* David Westin, ABC News President, “killed” the story. See *id.* Disney is ABC’s parent company.

44. See *id.*

45. See *id.*

46. See Donald Barlett & James Steele, *supra* note 29.

47. See Paul Taylor, *Superhighway Robbery: America’s Broadcasters v. The Public Good*, NEW REPUBLIC, May 5, 1997, at 20. Since 1992, the United States government has been auctioning spectrum space, raising more than \$20 billion from wireless phone and direct-broadcast satellite companies. See *id.* The new spectrum space has been referred to by the FCC Chairman Reed Hundt as “beachfront property on the Cyber Sea.” *Id.*

48. See *id.*

49. *Nightline: Coming Soon to a TV Near You, Possible Effects of Latest Television Technology* (ABC television broadcast, Apr. 21, 1997) (transcript on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*).

There have been some people who have challenged, or have been pushed into a position where they have challenged the network owners about content, and I would like to give just a couple brief examples. You may remember Arthur Kent. I think he was best known as the “Scud stud” in the last Persian Gulf war. He was an NBC News correspondent. He sued NBC after he left there, and the case has been settled out of court.<sup>50</sup> But he, has written a book about his experiences there, and other experiences, called *Risk and Redemption: Surviving the Network News Wars*.<sup>51</sup>

In his book, Kent talks in there about the “Church-State” problem. He talks about the entertainment division suggesting segments; about the entertainment division suggesting other segments maybe should not be done.<sup>52</sup> This is, on the State side, commercial speech having its effect. Without knowing much about it, there has been some debate about: just what do we say when we mean free speech? Do we mean the free speech of an individual, or do we mean this commercial speech, which I am sure all of you know better than I was, for many years, not protected by the First Amendment.

At any rate, getting back to its effect on journalism. I am reading something that Kent wrote, which was taken from his book, in which he says: “Any statistical or anecdotal sampling of program content demonstrates the quest for rating now outweighs virtually all the traditional editorial ideals of broadcast news—such as practicing restraint instead of sensationalism, and establishing each day a responsible balance between domestic and foreign coverage.”<sup>53</sup>

The forcing of entertainment values onto news managers, especially at NBC, owned by General Electric, has produced some revealing miscues. Three examples. The attempt by GE-appointed network president, Bob Wright, to introduce Jerry Springer as a commentator on Chicago’s once-respected WMAQ newscast. You may also remember that one of the anchors there quit in protest.<sup>54</sup>

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50. See Barry Layne, ‘Scud Stud’ Settles with NBC, HOLLYWOOD REP., Mar. 17, 1994 available in LEXIS, Nexis Library, MAGSPLUS file.

51. See ARTHUR KENT, *RISK AND REDEMPTION: SURVIVING THE NETWORK NEWS WARS* 14 (Skywriter Comm. Inc. 1997).

52. See *id.*

53. See *id.*

54. See Robert Feder, *Ron Magers Questioning Channel 5’s Blame Game*, CHI. SUN

The signing by Wright and GE chairman, Jack Welch, of Geraldo Rivera as NBC correspondent,<sup>55</sup> and the fostering of self-censorship among NBC news staffers regarding GE's massive environmental liability.<sup>56</sup> Kent notes that NBC's *Nightly News with Tom Brokaw* has failed twice in the past six months to join other mainstream news organizations in covering major new PCB-related actions against GE by the federal government.<sup>57</sup>

Kent's argument is that the news, as just another player in the ratings game, is at odds with the nation's broadcasting law, which requires broadcasters to serve the public.<sup>58</sup> Kent and other journalists are questioning whether or not the balance has now tipped in favor of the bottom line and away from what is best for journalism. Whether it has tipped in favor of what is best for entertainment programming—the sex and violence stuff that we are inundated with—and away from what is best for citizens.<sup>59</sup> We do not know how many other stories we are not being told because someone has crossed that “Church-State” line.

But clearly it happens, even though many earnest, hardworking journalists do not want it to. It is simply a fact. And if you have a corporation that holds as its most important mission delivering profits to its shareholders, then it seems to me you have to have a very strong countervailing force. And there are many ways to address this.

Mr. Jollymore talked about the many problems of the mass media and how complex they are, and I would agree with that. But, unlike him, I do not see them as being difficult to address, or at least not difficult to begin to address. Broadcasters, for instance, could be forced to divorce their news operations from the rest of the corporation and operate entirely independently. Television broadcasters could, and I think should, be required to support noncommercial broadcasting, both on other stations, public broadcasting, and on their

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TIMES, Jan 15, 1998, at 39.

55. See Lloyd Grone, *Geraldo's Makeover; Rivera's Gone From Tabloid TV Talker to Serious Journalist, Just Ask Him*, WASH. POST, Dec. 12, 1997, at C1.

56. See Arthur Kent, *Bringing Down the Barriers*, THE NATION, June 8, 1998, at 29.

57. See KENT, *supra* note 51, at 14.

58. See *id.*

59. See Kent, *supra* note 56, at 29.

own channels.

There is, of course, the larger antitrust question, which I know the next panel will talk about. These are just some of the ideas that have been suggested. I am sure there are many other good ones. So I would encourage all of us to think about the problems that are inherent in the current system and to begin to address them in some of these ways and perhaps others.

MR. GOODALE: Next, we have Jonathan Zittrain.

MR. ZITTRAIN: Thank you. I understand my charge to be that of defending the media, a thankless task, but one I will warm up to briefly. The first thing I would do if representing the media is just say: “Do not criticize me or I will ruin you all.” This is really the power of the media as we all know it to be. The second thing I would do is conduct an insta-poll, with no clear relevance to the topic at hand. That is what the media would do. Let me do so, and perhaps tie it into to something I am going to say later.

How many of you all have encountered in the software you use a channel bar?<sup>60</sup> Do you know what this thing is?

MR. GOODALE: What is it?

MR. ZITTRAIN: It is part of the active desktop. When you run Microsoft Windows—during the install—you get this little channel bar. You may have seen this. I see some nods. How many of you actually regularly use it? Does anybody want to fess up to this? We have one customer of the channel bar, wonderful. I will come back to that in a moment. It sounds very much like the media, does it not?

The second thing I will do—representing the media—is actually give you my capitulation of what has come before. Because often, by the time you get to the final panelist, you may have lost a grasp on what the first panelist said, regardless of how interesting and gripping it was. Please, do not get me wrong. Mr. Schwartzman started us off by being the grand marshal of a parade of horrors. He told us all the terrible things that may happen if you have the market running free, without any particular public-interest way of steering it this way

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60. See Stephen H. Wildstrom, *Neck and Neck in the Browser Race*, BUS. WEEK, Mar. 29, 1999, at 20. In the authors view, “the ‘channel bar,’ [is] a silly and little-used feature . . . that provide[s] automatic downloads.” *Id.*



or that when it comes to the provision of news or information that is vital to public discourse. He said quite clearly that he was the Lorax, that he speaks for the public interest.<sup>61</sup> That was his view about the power of markets and how they are not the be-all and end-all with respect to the core things we care so much about.

Mr. Jollymore warmed to the challenge of defending the media. He basically said: There is nothing to see here, folks. Believe me, the fact that these particular journalists ultimately get their paychecks from Time Warner in no way would prevent them from criticizing Time Warner. Journalists will do what they want, as we know. And there is this fire-wall that is enforced, somewhat like the Constitution. It is Church and State, and it is very respected in the profession. And, in fact, Mr. Jollymore presented some examples of movies that have been produced by one arm of a given octopus that had been criticized by another. *Jack Frost* was called abominable, so we know, then, that public discourse is alive and well. That was Mr. Jollymore's view. Again, I may not be doing it complete justice, but it is something that we heard in defense.

Now, I will say, for those who believe in the wall, and think that there indeed are, all joking aside, structures in place within a corporation to keep the news division, for example, independent of the entertainment division, this is exactly the view they would have. To those who are skeptical of it, it may be difficult to simply reduce the skepticism by saying: "Well, trust us. There is no connection." This points out that it is very hard to verify, one way or the other, what is the right news and what is not. When all of the sources that the skeptic looks at are difficult to trust, you have no easy way of verifying what is the truth and what is not. The best you do have is maybe the *Columbia Journalism Review*, which is going to say: "Okay, we will trust them to tell us what went right or wrong." Interestingly, the *Columbia Journalism Review* itself is an artifact of the free market, not of government; a sort of watchdog that, the claim is, normatively affects journalists as they go about their business, and forces them to not just hew to the market-based bottom line.

Our third presenter, Ms. Jaquet, agreed that convergence was not necessarily the problem. At least, that alone was not really the big

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61. Not to be confused with Dr. Seuss' Lorax who "Speaks for the Trees."

deal. The problem simply was the basic structure of the media as we know it—at least, the big media as we know it—and the fact that so much of it is profit-driven. Even four percent is not enough. And if you are trying to squeeze out every last penny of profit, to the extent that journalistic independence will go against profit in the market, you may choose the latter over the former as a structural matter.

That said, I guess I want to speak for the Internet, not the media. That was my second charge—to bring the Internet angle into this. My speaking for the Internet, in some sense, has me say I actually agree with Mr. Jollymore to say: “There is nothing to see here, folks.” If TV were all there were—if that is what people spent most of their time doing (some average eight hours a day in front of the tube)<sup>62</sup> and if and that were the primary source (“more Americans get their news from ABC News than from any other source”)<sup>63</sup>—and if that were the source of information, then you have a real concern if you think that ABC is not giving the straight dope. I am saying that is the old problem. We now have the Internet, which is, right now, a wonderfully heterogeneous and diverse source of news. It is the kind of thing where you can go on, and so long as you are willing to key in the right URL, you will hear from a multiplicity of voices; you will hear from a diverse set of people. Some of them are accountable to, or may have relationships with, advertisers or, in some other way, be inclined to slant what they present as news. Others may not. Indeed, it may be hard to know whom to trust or not on the Internet.

Matt Drudge is a good example of somebody who has a Web site that thanks to no artistic skill of his—if you have seen his Web page, it is not particularly appealing to the eye—is incredibly well-trafficked.<sup>64</sup> That it is because he dared to break a story that *Newsweek* held. I do not think *Newsweek* held that story because it was afraid of some issue with its parent company and what it had to do with selling soap. I actually credit that *Newsweek* did not think it had

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62. See News Service, *TV Free America Says Not Watching Has its Rewards*, FLA. TIMES UNION, Apr. 29, 1997, at C7. The executive director of TV Free America, a non-profit organization, has calculated that the average American watches over four hours of television a day. See *id.*

63. ABC News has used this advertising slogan extensively throughout the 1990's.

64. See Amy Harmon, *Gossip on Web Gives News Novel Spin*, N.Y. TIMES, Feb. 27, 1998, at A18.

yet fully verified such an explosive story. This is the Lewinsky story. It sat on top of it for a while. Matt decided that it was time for the story to go and went ahead and presented it on his Web site, thus catapulting his Web site into the spotlight.<sup>65</sup> Of course, the media promptly covered Matt Drudge, and still does so, in not very well-spoken terms. Yet, his site is very popular.

You might see his site as a problem. He is not a journalist in the sense of the word. In fact, in a legal opinion issued by D.C. District Court, his site was derided as “mere gossip,” not actual news.<sup>66</sup> Matt responds: “Fine, call it what you want. I am going to report what I want; you can read it or not read it.”

I suggest that on the Internet as it exists today there is a way of seeing all sorts of sites. You are left to your own devices as to whom to trust, and reputation is something else. You may sooner trust what you see on <cnn.com> than you would on <drudgereport.com>, but all of those sources are out there. That, I suggest, given the increasing popularity and use of the Net, represents one of the best reasons why picking over the carcass of television is not the most productive way to worry about how to keep public discourse in some kind of “good,” First Amendment-style shape.

I was trying to think about what homogeneity would look like if it were applied to the Internet, and, again, I assert the Net is not homogeneous. Let me run down again why it is not homogeneous. First, there are multiple functions that are accomplished by it. Surfing the Web is only one thing you do once you let the Net into your home. You can send e-mail. You also can engage in chat with people. The bounded set of functions can keep increasing.

Second, anybody, any high school nerd, can develop a new application that will run over the Internet, and that may or may not catch on. This is quite interesting. It makes you think of Central Park not just as a place where you can do a diverse set of jogging,

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65. *See id.*

66. *See* Blumenthal v. Drudge, 992 F. Supp 44, 47 (D.D.C. 1998). In *Blumenthal v. Drudge*, Sidney Blumenthal, Assistant to the President of the United States, brought suit for defamation against Matt Drudge, the creator of the electronic publication the “Drudge Report,” and AOL in the United States District Court for the District of Columbia. *See id.* at 46-47. The Drudge Report available on AOL on August 10, 1997, accused Blumenthal of having a history of spousal abuse. *See id.* at 46.

from slow jogging to fast jogging. With Central Park, you would measure its heterogeneity as: There is a volleyball court here; there is a band shell here; there are running paths over here; there are horses you can ride there. There is actually a great multiplicity of activities that can be done. Ultimately, commons though it may be, Central Park is run by a city that says: The volleyball court will go here and the jogging trails will go there. There is no such traffic director, yet, for the Internet, despite the fact—perhaps because of the fact—that it is not publicly owned. It is held by a diversity of private interests, diversity being important and something we can come back to in terms of convergence.

Television is quite homogeneous in the sense that you watch stuff on it, and occasionally you listen. That is what you do. Most of the stuff you see is funded by a common business model: The advertising model. Sure enough, the structural deficiencies that are pointed out about it lead television to consistently produce one thing or another. To me, even if you have a diversity of voices or owners of television outlets, they are still going to be, by and large, subject to the very same pressures that will make Fox indistinguishable from CBS and indistinguishable from NBC. A multiplicity of voices alone is not enough to guarantee diversity if you have a common business model running throughout.

To me, the best innovations we have seen in television have been pay-per-view, which nobody likes unless they are watching it; the home-shopping club; and evangelism—the use of television to spread the religious word and to have a ministry. *The 700 Club* has a nightly news program, in which “highly placed” sources are said to predict Armageddon. They may not be double-checked, but the television program is still free to put that out, package it as news, and nobody worries that, somehow, *The 700 Club* has been compromised by its particular biases.

Back to the Internet. I have said that it is heterogeneous, because there are all sorts of different applications and an ever-growing set of them; there are multiple viewpoints; there is cheap entry. Now, I am not making the following up. On my way here from the airport the taxi driver asked me what I do. I said: “I am the Lorax—I speak for the Internet.” We got into a talk about the Internet, and he said: “That is funny, I have a Web site.”

It turns out he has a Web site. He does it out of his house and he does not collect any money out of it. It has Punjabi poetry, writings, and novels on the site. He has not written any of it, he just collects it from other sources that he meets through e-mail, and then places it up on the site. He uses Microsoft Front Page. He has an ISP. He says: "Twenty-five bucks a month, no problem, I can afford that." And there he goes.

That, actually, was amazing—a survey sample size of one. It is significant that there is somebody, again, early 1999, able to take Punjabi poetry and put it up. I asked him how many he hits he gets. He said: "Well, the first few months I got four hits, now I get twenty-one hits a day." And he says: "You know, I am listed, too—I am in the search engine. You go to Yahoo!, you type 'Punjabi,' you will see my site." I actually wrote down the URL. I can share it if people are interested later. I think he would actually be delighted to see a sudden spate of hits on the site.

The right question is: "What is the parade of horrors we truly need to worry about?" I do not think they are marching yet. But they may be organizing in the armory and about to stream out. This utopia I am describing could suddenly be rained upon.

I guess I would term the horrors as the following. The first—the ultra-libertarian view, which I only convey to you in my view as a media advocate rather than actually believing this—is government regulation. The government can come in and start to regulate what is on the Internet. Government regulation is typically fairly crude. It is going to say: "You cannot do this." Or it will put a floor and a ceiling on what you can do.

To my mind, if you look at the Net right now as a haven of heterogeneity, what government regulation is going to do is say: You can be as diverse as you like, but do not fall below this level. You can say what you want, but if the picture looks like this, it is out of there. Or, you can say what you want, but if you are saying it to *children*, we cannot have that; we have got to get rid of the Web site.

Government regulation exists for good reasons. You do worry about libel; you worry about threatening speech; you worry about consumer protection. You do not want sites selling things and then not delivering them. But it is important to realize that every regula-

tion designed to tame the true diversity of the Net is going to carry with it a cost. If the taxi driver that I met today has to have a privacy policy on his Web site—because the Federal Trade Commission is going to be mad at him if he does not—it will possibly be the straw that causes him to throw in the towel and forget the site. For any given policy, there are going to be burdens that come about.

Justice Scalia, in oral argument over the Communications Decency Act,<sup>67</sup> bought into this quite clearly.<sup>68</sup> He said: Look, there

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67. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133-36.

68. The Supreme Court heard oral argument in *Reno v. ACLU* on March 19, 1996. See 1997 WL 136253, at \*40 (U.S. Oral Argument—DIGEST). In oral argument, Bruce J. Ennis, on behalf of the ACLU, addressed the issue of access and cost:

JUSTICE REHNQUIST: Well, what about the first radio people, you know, before the Federal Radio Act in 1927? I'm sure that imposed a lot of operating requirements on radio stations. And before that, they could just say, well, we like it the way it is. The Government shouldn't have to tell us we've got to have all this equipment. But, nonetheless, the Government did tell them, and that's certainly been upheld.

MR. ENNIS: Chief Justice Rehnquist, there is an enormous difference between some burden, some cost—which this Court has upheld in other contexts—and a burden or cost that is economically prohibitive. Let me continue to answer your question by saying that, for example, there is evidence in this record that the Carnegie Library, which has been used as an example, in order to classify which of its speech is indecent and which is decent within the meaning of this law, that would require a human judgment and it would cost about \$3 million to do that.

JUSTICE REHNQUIST: And that's prohibitively expensive for the Carnegie Library?

MR. ENNIS: Yes, it is, Your Honor. There is no dispute on that in the record.

JUSTICE SCALIA: Well, I suppose it depends on how—I mean on whether—what is prohibitively certainly depends to some extent upon the goal to be achieved. I mean we do stop individual citizens from running radio stations, because of all the regulations, say it's prohibitively expensive, you can't run your own radio station. And we say, well, you know, that's tough luck. The goal to be achieved is everybody can't talk at once, so we have to limit the numbers and we have to have all of these technological requirements. It's going to cost you \$3 million, and we say that's too bad. Now, how valuable, how important is the goal to be achieved here? Is it equivalently important? Isn't that very much a policy judgment that Congress is able to arrive at?

MR. ENNIS: Let me answer that, Justice Scalia, first, by saying and emphasizing that we did not challenge this law insofar as it prohibits obscene speech, child pornography, solicitation of minors, harassment of minors. That kind of speech was not challenged and is not enjoined by the injunction below. We are only talking about a much different subset of speech that is called patently of-

used to be an era where you had plenty of people broadcasting freely. This was before the Radio Act.<sup>69</sup> Then they started stepping all over each other, and the hobbyists, who just hooked it up in their attic, because they had a little speech they wanted to give, were driven out by regulation. Scalia is saying: Surely you are not saying that free speech requires that every hobbyist be able to set up an antenna, even if it were possible. I am not sure that that is the case on the Net. It may well be that we want to encourage this whole range of speakers that do not have a hope of being on television.<sup>70</sup>

There are never going to be enough channels to have a nationwide broadcast of Punjabi poetry, perhaps, but there is enough bandwidth on the Net to support it. My taxi driver actually said he has a ten megabyte account and uses a floppy disk. He said the text compresses really nicely. Hence, government regulation is one thing that could be one member of this parade of horrors.

The second is taxes. To the extent that we think: Wait a minute—there is money to be made here. ISP's are charging this guy twenty-five dollars a month. Why do we not take out three dollars? That drives out those players for whom twenty-eight dollars is too much and twenty-five dollars was just right. You could see that which makes it more expensive to participate on the Internet as a speaker is another thing that could be within the parade.

A third thing. You could imagine a consolidation among information-service providers. I think Mr. Schwartzman's point was very well taken: To the extent that cable modems are so great that nobody really needs to use dial-up anymore, dial-up withers away and dies, because nobody's using it. You are left with just the one conduit into your house. It would be worrisome if that conduit operator were then

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fensive or indecent speech. I want to emphasize that that standard is broader than any standard this Court has ever upheld even with respect to sale or display directly to a minor, and is vastly broader than the standards applied in the 48 States which use a "harmful to minors" standard, which requires that the speech be not only patently offensive for minors, but also appeal to a prurient interest for minors and lack serious value for minors.

*Id.* at \*39-42.

69. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162, *repealed by* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934).

70. *See Reno v. ACLU* Oral Argument, 1997 WL 136253, at \*40 (U.S. Oral Argument—DIGEST).

to tell you: “By the way—you can do this, you cannot do this. Here are all the rules.”

The most recent cyberstory this week is the Nuremberg Files site—the anti-abortion site, which was said, by a civil jury, to have amounted to a threat, thanks to having the names of various abortion physicians on the site and lines crossed through them as they were assassinated.<sup>71</sup> A one-hundred-and-seven-million-dollar judgment was awarded against the site<sup>72</sup>—a tax on speech. Perhaps a legitimate one, but a tax nonetheless. And while no formal injunction has yet been issued—the government has not yet told them to get rid of the site—there actually has been a blocking of their speech. Mindspring, their ISP, has kicked them off.<sup>73</sup> It said: We are Mindspring, we are private, we do not want you anymore, go away!

Now, if you happen to think they do not belong on the Net, you are happy about this. If you happen to think that heterogeneity is the best thing, and really the lodestone, then you say: Well, it is probably a good thing. Probably by now they have already found somebody else crazy enough, or dedicated enough, to free speech, depending on your view, to give them a new home. But if there is only one Mindspring, and there are no competitors, you could see their decision to terminate your site would have much different ramifications than now, when there is basically a common-carriage market where you can fly another airline if you do not like the first one.

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71. See Patrick McMahon, *Doctor Unlikely to Collect Jury Award, Web Site Will Stay, Creator Says*, USA TODAY, Feb. 3, 1999, at A3. Planned Parenthood and the four doctors brought action against two anti-abortion organizations and the twelve individuals affiliated with “The Nuremberg Files,” the Web site that stated that “abortion doctors were no better than Nazi war criminals.” *Id.* “The Nuremberg Files” Web site contained the list of two hundred-plus doctors. *See id.* The Web site’s stated purpose was “to solicit personal information about the doctors so they could be prosecuted if abortion were ever banned.” *Id.* The Web site drew national scrutiny when Dr. Barnett Slepian was shot to death at his home near Buffalo in 1998 and his name was immediately crossed through on the Web site. *See id.* The plaintiffs were victorious and awarded a \$107 million judgment being found to have threatened the doctors. *See id.* Unfortunately for the plaintiffs, the defendants are considered “judgment proof.” *See id.*

72. See Elisabeth Amon, *Antiabortionists Liable for Threats*, NAT’L L.J., Feb. 15, 1999, at A8.

73. See *Anti-Abortion Site Loses Internet Spot*, ORLANDO SENTINEL, Feb. 6, 1999, at A11. Mindspring President Michael McQuary said the site was shut down for violating the company’s appropriate-use policy. *See id.*



Another thing that could happen is search engines could change. It was to me very important that the taxi driver said: By the way, I am listed. The hits he gets are thanks to the fact that somebody goes up to Yahoo! and types in “Punjabi poetry,” and his site pops up. There is a lot of worry to be had about just how transparent the rules are by which Yahoo! may list sites. We do not know what we do not know. As a result, we do not have anybody to tell us when Yahoo! is not listing sites that would bear on the search, but that they have, for whatever reason, chosen not to list.

I think for market forces to say—“Well, Yahoo! wants to be as helpful as they can”—may not be enough to assure diversity there. At the moment, though, we have a variety of search engines, and we have a meta-search engine that searches all the search engines.<sup>74</sup> You can still type in Punjabi poetry in one place, and, sooner or later, one of the various bots that crawl the Web, again, at this moment, will have found it.

This is another thing about the channel bar—let me bring that back: Nobody uses it, luckily. Well, almost nobody uses the channel bar. But to the extent that we start using the channel bar and we get used to it, we do not use the search engines and the search engines wither away, etc. You then have created, within the architecture of the Internet, a nice bottleneck, a nice way that this guy no longer has a chance of getting listed. Whoever controls the channel bar controls what you see. It might be Microsoft, it might be the cable company as your ISP, it might be a third-party filter that you signed up for when you first got your computer and then forgot about it. This, I agree is a concern.

Those are the ways in which I could see the utopia that I somewhat crudely describe being rained upon. In some ways, the solutions that are called for to fix the problem of the media as it pertains to modern-day television are exactly the solutions that may be causing problems in the Internet context. That is why being able to navigate freely between the two seems, to me, of such importance.

The other solutions that I would look for are the following. First,

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74. See Eyal Rabinovitch, *Your Complete Guide to Search the Net – Meta Search* (visited March 29, 1999) <<http://zdnet.com/pcmag/features/websearch/ms.htm>> (describing meta searches and how to conduct such a search).

subsidize the diversity. If you really believe in it, give some money to the person that is willing for that donation of money to come up with the site that will express the view. You could imagine even subsidizing a foundation that subscribes to the particular journalistic principles you think are important, holds the people who are employed by the organization to those principles, and then creates a site that reflects those principles.

Second, watch the coders. I think Larry's point was incredibly well taken. The people who are writing the software, in a way, are going to be controlling those floors and ceilings of the heterogeneity of the Net. Right now it is really easy to put up Web site. Front Page lets you do it in a flash. You could imagine the next version of HTTP and HTML<sup>75</sup> being really difficult to use—even more so than it is now. You can imagine Front Page not working so well. Suddenly the ease with which you can enter the market of speech decreases, just because the code has changed.

If there is no money in it—if the people who put up the sites are not willing to pay a lot, or do not have a lot to pay—you could imagine the market again withering up for that code which easily introduces their speech to the Net. The fact that the Internet has been developing on open standards—ones not necessarily controlled by a given company—I think has contributed wonderfully to its development and to the fact that people can so easily get in and out.

That being the case, I would say you should be at the meetings of the World Wide Web Consortium, funded by all the companies, to see just what they are brewing up. You should be at the meetings of the Internet Engineering Task Force,<sup>76</sup> which used to have it easy—they just had to see to it that the packets ran as fast as they could—

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75. Free Online Dictionary of Computing (visited Apr. 1, 1999) <<http://wombat.doc.ic.ac.uk/foldoc/index.html>>. Hypertext Transfer Protocol (HTTP) The client-server TCP/IP protocol used on the World-Wide Web for the exchange of HTML documents; Hypertext Markup Language (HTML) A Hypertext document format used on the World-Wide Web. *See id.*

76. Gary Malkin, The Tao of IETF—A Guide for New Attendees of the Internet Engineering Task Force (visited Apr. 1, 1999) <[http://www.ietf.org/tao.html#What\\_Is\\_IETF](http://www.ietf.org/tao.html#What_Is_IETF)>. The Internet Engineering Task Force is a loosely self-organized group of people who make technical and other contributions to the engineering and evolution of the Internet and its technologies. It is the principal body engaged in the development of new Internet standard specifications. *See id.*

and now has it hard. Now that the packets are flying, they have to decide how to make some packets go faster or slower than others, and who shall be in the fast car and who shall be in the slow car. These are obviously political decisions that I would think the various relevant interest groups would want to be having a hand in.

With that, thank you.

MR. GOODALE: Now, as the last speaker, my job is to recapitulate what the previous speaker said, and I want to know, if he does not mind a bit of teasing, that on his assigned role he did not recapitulate what the previous speakers said about the media. Because he preferred to capitulate on the task that was given to him. And the reason he did was, he concluded that where the real action is on the Net. And so I propose to ask, for the rest of the time, whether he is correct or not. And if you look at the way the discussion has broken out thus far, we are looking at the First Amendment consequences of convergence, okay? And there are two ways to look at it.

One is economic convergence, which is what every speaker spoke about, until we got to the last speaker, conglomeration. Or we can look at, inferentially, the impact of technological convergence, as to which the last speaker says: That is where the real action is, and keep your eye on the ball. He is saying, implicitly: Hey—let us not pay that much attention to the old media, effectively, because the new media is going to subsume it.

So the first question is, to those panelists who have not had a chance to speak in the last few minutes: Is he right? Are wasting our time thinking about these old modes of conglomeration. And what we really ought to be thinking about is new media, which means the Net.

MR. SCHWARTZMAN: Well, I suppose I should, rather than express my opinion about what was already said, let him say so. But I do not think, Jim, that he is of the view that this is entirely a technological issue. Certainly, I do not understand it to be such, that is certainly my opinion. And I think Professor Lessig was also speaking to this. Politics drive technology and technological choices. We have made lots of technological choices along the way, for one reason or another, that may not have been technologically perfect. I think that, I alluded to network economics as a driving element. I do not know

that network economics is technology, or economics or politics, really.

MR. GOODALE: Let me just rephrase it, just for a moment interrupt. Convergence can mean all media comes out of one box. I think we have got it now. Anyone who watches NBC can listen to radio and television. You can watch television from anybody, okay? That is my idea of technological convergence. So if, in fact, the media of the future is all one box, why worry about the old media, which is divergent?

MR. SCHWARTZMAN: Well, there is no such thing as old media and new media. We do not do flash-cuts. And as we transition from one to the other, we have to bear in mind that this media is not only driving commerce, it is also the mechanism by which we govern ourselves. It is the mode of expression and the mechanism of self-governance. The political decisions that are consequences of convergence, cost, access, differential access who is connected, who is not? If we connect everybody at one high level of connectivity and leave others off, it affects the democratic process, as well. I am just not sure that you can suddenly say that it is all the same. I think we are going through a process not of an old media and a new media, but, rather, a preexisting media, changing and transforming to accommodate new technologies.

MR. GOODALE: Okay. Well, so basically you are saying that even though scarcity drove the philosophy and the law with respect to the old media, you are still going to have similar problems where you have abundance in the new media.

MR. ZITTRAIN: I guess more fundamentally, then, where our disagreement is, Jim, is the notion that we are going to have abundance. We may have more bids out there, and more information out there, but I am not sure that that abundance necessarily reflects a lot of different voices. And this is what Janine was talking about, certainly in the context of broadcasting, but no less in the context of what I referred to as the “mass media of the Internet,” where you have the ability to buy audiences, where you have the ability to drive into the home where you have the channel bar and Netscape has “What is Relevant,” which is doing essentially the same thing. It does skew the speech and the supposed abundance, and narrow it down—after all, you have to manage it—for the people who are

connected. Again, I reassert; what about the people who are not connected?

MR. GOODALE: Well, I suppose it is unfair to say that you probably see “scarcity” there, even though it may not be technical scarcity. And I guess you would probably agree with Professor Lessig, who says that we ought to have a Commons there—even though all these things that are going on, that Mr. Zittrain said. Mr. Jollymore, you have any views?

MR. JOLLYMORE: Well, I was thinking about your question, Jim. I think, as I understand it, the worry is that one conglomerate or one company would control when we switch to cable access to the Internet, would control the portal. And so home, for example, would be the only portal available on Time Warner’s cable systems, and, therefore, At Home would be in a position to direct everybody to Amazon.com, and you could not buy books elsewhere.

But I cannot imagine that would happen, for one of two reasons. First of all, nobody would want to subscribe to At Home if the diversity of the Internet were so limited, they would go back to using copper wires. And I have got to believe it would even be more economic for another fiber-optic cable to be laid in Manhattan, for example, because there would be such an opportunity to capture customers if, say, Time Warner’s cable system were so limited. Or, if it did work out that way, I guess there would be a strong regulatory argument for resurrecting, *Red Lion Broadcasting Co., v. FCC*,<sup>77</sup> or applying the scarcity doctrine to cable TV. If it were truly monopolistic in that sense, I think the First Amendment would not prohibit regulatory action. But I do not think it is going to happen.

MR. GOODALE: Well, Janine, what do you think about this point of view? I guess what the future is, again, as you converge into one box—so the idea that you have got economic convergence over here with all these conglomerates becomes less and less relevant. But anybody can come out of the new box, the new computer—so why do we care? Are we just getting ahead of the game too fast, and

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77. 395 U.S. 367, 386 (1969) (applying a flexible First Amendment standard to broadcast media due to its unique problem of scarcity, and stating that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them”). See *supra* note 1 and accompanying text.

you still see problems?

MS. JAQUET: Well, I think that Jonathan brought up a number of things that we should be concerned about, about how expensive it is to get access, and other issues. But I think what is most interesting to me is this whole notion of gatekeepers, whether it is At Home, or whether it is a search engine like Lycos. In the paper today they have a deal now with USA Networks,<sup>78</sup> which, as you may know, brings us Home Shopping Channel and Jerry Springer, and Sally Jessy Raphael.

Now, how long is it going to be before you go onto Lycos' home page and find Jerry right there. And there is something that is intriguing. So you think: Well, I will just click here, and I will just check this out. Then, because of the ways of cyberspace, there you go, off and running. There is also a way that gatekeepers, even if they do not absolutely screen out everything that they do not want you to see—I agree, I do not think that would really happen. But it can be easier, and more difficult, through gatekeepers to find these different things.

Of course, there is also the point that I think we, the elite, tend to lose track of the fact that not everyone is online. I was struck by Jonathan's tone of surprise that the taxi driver had his own Web site. It is mostly people who have more money and more education, who are online talking with one another, it is everybody who subscribes to *The New York Times*. Well, there are a lot of people in this country who never read *The New York Times*, and they are not online. So, for the short term, I think we have to be careful about that.

MR. GOODALE: Jon, let us pick up on the gatekeeper question. Because it is been part of all the remarks that have gone around the table, and you talked about it, too, in your last two examples. So I am the only person who was kept out, apparently, with channel bar, and with search engines—were your two examples of gatekeepers. The question of what to do about all we have been talking about is a generic question that applies to the sides of the issue that we have seen. It applies, for example, as to whether the government should come in and split up the conglomerates, and on what basis.

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78. See Shapiro, *supra* note 17, at A3.

Therefore, the same question applies. When you ask yourself, for example, a search engine became so popular that, effectively, it was a gatekeeper, and it could not keep up with all the Web sites going on. And there were Web sites left off, the more unpopular ones. Your example would be the Nuremberg Files, but there are probably even better examples than that, with all due respect.<sup>79</sup>

What do you think government should do? Or what should be done in this situation?

MR. ZITTRAIN: First I would note that we are looking now at government as the helper here, rather than as the problem, and, for a lot of the online libertarians, it is a real leap for them to realize that the biggest threat to true diverse freedom of speech may not be coming from the government and its rules, but from the entities that we are talking about here.

I think the best way to stave off the scenario you describe is to see to it that we have a vibrant commons—a vibrant public domain—that is the complement to the corporate domain. .COM should be given its due. It is okay to have large swaths of the boundless Internet be shopping malls, or be reviews that are influenced by the people that want you to buy one thing or another. But if you have the vibrant counterpart—if there were a search engine that subscribed to principles of, true separation of Church and State, and this is how we do it, and this is how our board monitors what we do, and this is how you can watch the algorithm by which the search is done—then you truly do have, in the hands of the Net surfer, a choice.

MR. GOODALE: Okay. Well, now is the chance for the head of the public-access world to comment as to that hypothetical, and anything else he wants to talk about.

MR. SCHWARTZMAN: Well, I certainly agree with the idea of forcing search engines to index is unnecessarily aggressive in any kind of First Amendment environment.

MR. ZITTRAIN: It is as bad as must-carry.<sup>80</sup>

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79. See *supra* note 71 and accompanying text.

80. “Must –carry” provisions mandate that cable operators carry certain channels, usually local broadcasts, as part of their cable packages. See Christopher M. Kelly, *The Spectre of a ‘Wired’ Nation: Denver Area Educational Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace*, 10 HARV. J.L. & TECH. 559 (1997).

MR. SCHWARTZMAN: Well, that is my point. Although the idea—somewhat analogous to having public broadcasting, because we need a noncommercial alternative—does suggest that there might be an opportunity for some sort of quasi-public function of a broader index, if you will, or some sort of broad index—and that, after all, really is pretty close to the domain-name issue. Really, in effect, domain names subsume some of the issues that you just raised, Jim, and how you locate it and where you locate it. I alluded to this at the beginning, as well, that, you know, I was not here talking about Usenet, and this whole other world that exists, and it is very important, assuming people are connected to it.

I did want to respond directly to Mr. Jollymore. I do not have time to address his principal presentation, which I thought was very important, and with which I am in more agreement than he may realize. But I do want to say that the specter of the Fairness Doctrine comes along.<sup>81</sup> This is not *Red Lion*, this is not the Fairness Doctrine. In a context of how we deliver it, now we are talking just the technology of getting it there, stringing the wires, we do not know what is going to work.

We do not know if the DSL world, with the separate subsidiaries that the Federal Communication Commission may impose, is going to impose the same access problems. The <nogatekeepers.org> is going to deal with those issues. If there is a single head end through which all the packets have to transfer between the backbone and the cable, and there is software operated by Road Runner, or At Home, that filters out, removes, does not transmit video streaming files beyond a certain size, or filters out certain words or certain concepts, we have a problem.

Now, the history of cable is of using economic power to defeat competing technologies. We had to pass a 1992 Cable Act<sup>82</sup> to per-

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Current “must-carry” provisions came into being with the 1992 Cable Act, which requires that all cable operators provide a basic package of channels that includes all local broadcast signals. *See* Cable Act of 1992, Pub. L. No. 102-385, 2 (16), 106 Stat. 1460, 1461-62 (codified at 47 U.S.C.A. §§ 534-535 (West 1998)). The Federal Communications Committee sought to enforce “must-carry” provisions in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622 (1994), *aff’d*, 520 U.S. 180 (1997).

81. *See supra* note 1 and accompanying text.

82. Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, 106



mit existing technologies to happen, and to permit cable overbuilding to happen. In short, Turner and Time Warner leased access. We are not talking here about opening the whole thing, forcing editorial judgments. We are talking about taking a chunk of the bits and saying that: This has to be available for public social expression as a function of government. There is strong constitutional power to do that.

MR. GOODALE: Well, I am going to close by saying that we have talked about the old media and we have talked about the new media—and I think the panel, generally speaking, has found somewhat comparable problems in each. And I would suppose, if I were to tally the panel, they would disagree as to what the solution is. I suppose the libertarian solution is, you look to antitrust laws, which are content-neutral, for the solution. The liberal solution might be to have some incursions on the First Amendment. But, in any event, we cannot solve that here, because the next panel's going to solve that, because they are going to deal with antitrust. Thank you very much, panelists.