

Can Government Help Save the Press?

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I. Introductions

Adam Thierer, President, The Progress & Freedom Foundation (moderator): Well, good morning everyone and welcome to today's Progress & Freedom Foundation event, "Can Government Help Save the Press?" My name is Adam Thierer. I'm the president of the Progress & Freedom Foundation. I want to welcome you here.

* This is an edited transcript of a PFF briefing that took place on May 20, 2010, in Washington, D.C. The edited transcript has not been reviewed by the program participants. Speaker biographies are available at the end of this transcript. The views expressed in this report are their own. Audio and photos from this event are available at: www.pff.org/events/Can_Government_Help_Save_the_Press/index.html.

Well, it goes without saying that when it comes to the future of the media, the press, and the profession of journalism, we live in some very interesting times. And depending on who you ask, we live in the best of times or the worst of times.

There are optimists who play up that we live in an age of abundance and intense competition, unprecedented innovation and opportunities. There are folks a bit more pessimistic who talk about the uncertainty and turbulence we're experiencing today in this area or at least the journalistic profession is experiencing. They worry about the ramifications of that for the future of deliberative democracy.

Many, many academics, organizations, and institutions are studying this question right now. There are so many task forces and working groups and other things going on that it's hard to even count them all, though the Federal Communications Commission (FCC) has done a wonderful job compiling all of those as part of its Future of Media Proceeding.¹

And speaking of that, of course, we have federal agencies looking into this question: the Federal Communications Commission (FCC), the Federal Trade Commission (FTC), and even Congress have had hearings, considered legislation, so on and so forth.

So we're going to be discussing these efforts here today and wondering what role it is that government can and should play in potentially assisting journalism or the press in some way in turbulent times.

It's going to be my great pleasure in just a moment to welcome Ellen Goodman up here to the podium to say a few words about what's happening at the Federal Communications Commission. And after I introduce her and she has some thoughts for us, I'll come back up and introduce our all-star panel to you.

Before I do so, please as a courtesy to our speakers, mute your cell phones or other mobile devices. So let me introduce Ellen. Ellen is currently serving as a Distinguished Visiting Scholar with the FCC and is assisting in their effort in the Future of Media Proceedings that got underway earlier this year.

Prior to signing on with the FCC on this front she was serving as professor at Rutgers University School of Law in Camden, where she specializes in Information Law and Media Policy issues. She's got a particular focus in the field of public media policy and has done some really seminal work in that area.

She previously served as an adviser to President Obama's Presidential Campaign and transition team on communications and media policy issues. She's held various other positions with American University, the University of Pennsylvania's Annenberg School of Communications and Penn's Wharton School. She's practiced information technology law at Covington & Burling and is a graduate of Harvard College and Harvard Law School.

¹ Christopher Clarke, *A Collection of Studies on the Future of Media*, FCC Future of Media blog, June 17, 2010, <http://reboot.fcc.gov/futureofmedia/blog?entryId=107343>.

What I really enjoy most about Ellen's work is the way she thinks out loud about some really difficult issues. I remember when I read some of her early work on these issues, it struck me that we were thinking about the challenges of an age of information abundance and what it means for democracy, for media policy, so on and so forth.

Even though I don't always agree with her conclusions, I always enjoy being along for the ride and watching how she gets there. So, without further ado I give you Ellen Goodman. Ellen?

[applause]

II. Ellen Goodman

Ellen Goodman, Distinguished Visiting Scholar, Federal Communication Commission's Future of Media Team: Good morning. It's a special pleasure for me to be here with these six men, each of whom has been... I didn't mean that as a joke.

[laughter]

You are men. Each of whom has been a teacher to me at some point. Let's see, I've known Adam Thierer's work for more than 15 years. I think he wrote a monograph on public broadcasting that I carried with me in a treasured file folder of best writing from office to office at Covington & Burling.

Down the hall at Covington was Kurt Wimmer, only a teeny, tiny bit older than me but someone I've always looked on as a mentor. There's no more fierce or reasonable advocate for First Amendment rights than Kurt. Kurt usually represents the best in the news business and I can't help but think that he calls his clients to higher levels of public service.

Practicing law with Kurt, you learn that sometimes regulation retards public service and sometimes judicious government intervention is just what's needed to open and supplement markets.

Did I say that there was no fiercer advocate for first amendment rights than Kurt? Well, at least equally fierce is Robert Corn-Revere who has taught me, not only through his advocacy for free speech at every tribunal I think from the FCC to the Supreme Court, but who continues to teach me every time I crack open his treatise on Communications Law.

For as long as I've been around Washington there's been Andy Schwartzman fighting for the enactment and enforcement of public interest standards. He did it again at the recent FCC's Future of the Media workshop on public interest and obligations in March this year,² making the point that some of Kurt's clients may perform well without public interest obligations, much as speed traps are unnecessary for the compliant driver. But alas, just as we are not all careful drivers, we are not all Kurt's clients.

² See FCC, *The Future of Media & Information Needs of Communities: Serving the Public Interest in the Digital Era* (press release), Feb. 12, 2010, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296254A1.pdf.

Wimmer: Although, we're available.

[laughter]

Goodman: In a perfect world. I met Craig Parshall recently in connection with the latest Future of Media workshop on non-commercial media and felt that we were all lucky to get his challenge to traditional views of journalism and narrow conceptions of public service media.

Charlie Firestone has what I think is the hottest venue in town in his Aspen Roundtables. I've learned a lot of substance as a participant in and an observer of those gatherings. Gatherings that I think more efficiently produce knowledge than any other methods I've seen. One of the other things I've learned about is the importance of convening. Aspen hasn't given away money or built businesses or passed regulation. But it has generated a ton of policy business and public service ideas that are now circulating and are very influential in the media space, just by getting people together and asking the right questions.

This brings me to the Future of Media Project.³ So I'll begin by saying that I'm here expressing my own opinions only, not those of the Future of Media Project or the FCC. And I'll largely be confining my opinions to the thing that I know most about which is the policy directions for public media. As you know, and as Adam reminded us, questions about the future of journalism and new business models for the production of news are circulating broadly.

In fact, most conferences on this topic start with a joke about how many conferences on this topic there are. The future of media inquiry is significantly broader, I think, than most of the other inquiries on what has been billed as the journalism crisis.

It starts from the very simple premise that the new media ecosystem is changing rapidly and dramatically and we should understand what these changes mean in terms of the flow of information to individuals and communities. We all know that there are bound to be gains and losses. We all know that there is a great deal of uncertainty.

I think that [FCC] Chairman Genachowski's premise in starting this project is not necessarily to dispel that uncertainty because who could, but rather to acknowledge that the FCC has a responsibility to understand the present currents in media and that requires a wide angle look.

So there has now been more than 1,000 comments submitted to the FCC in response to, what is it, Adam, about more than 100 questions?⁴

Thierer: Yes. 115.

³ See FCC, *FCC Launches Examination of the Future of Media and Information Needs of Communications in a Digital Age*, GN Docket No. 10-25, Public Notice, DA 10-100 (OSP, rel. Jan. 21, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-100A1.pdf ("FCC Launches Examination of the Future of Media").

⁴ To view comments filed in the Future of Media Proceeding, GN Docket No. 10-25, visit the FCC's Electronic Comment Filing System (ECFS) at <http://fjallfoss.fcc.gov/ecfs/>.

Goodman: 115 questions. I only asked a few of them. And I was thinking it would be great to generate a word cloud based on the comments that have been filed so far as well as the blogs and other online material.

I wasn't able to weight the words, but you have, I have a slide, and I think you have sort of my candidates for big bubble lettering and things like accountability, link economy, aggregation, community hub, new public media, public service, etc.

So you can see that the ideas and concerns range across traditional areas of regulatory focus like broadcast localism and diversity all the way to the implications of cloud computing and audience fragmentation, from the commercial media world to the non-commercial world and all the spaces in between.

Some of these questions and if you have the slides I'm going to do number two now. Some of these questions overlap with FCC rulemakings, past and future. Some are new and obviously deal with issues beyond the FCC's jurisdiction to regulate. So what you see here is the agency acting as a thought leader, much as the FTC has done in the past.

Chairman Genachowski generally and I think Steven Waldman in this project are committed to getting fresh ideas and more voices into FCC processes. And one way to do this is as Charlie knows is to convene parties, start conversations and provide an impetus and a forum for the exchange of ideas that might otherwise not be generated or not be channeled fruitfully.

Interestingly, despite all this activity about the journalism crisis, there's a lot of information we don't have. Really simple questions like how many PEG channels are there and what do they do? Where are the online news startups that we're hearing so much about? How might we map them? And what are they producing? What factors lead to the most productive public media ventures and why do so many falter? Slide three. So what the Future of Media Project is doing is trying to take a blue sky approach to these questions.

We're gathering information, generating new ideas. And another thing that's notable about the project is that it crosses the silos that usually exist at the FCC. Silos that I think most of us would agree make no sense in today's converged world. They're usually questions about media policy that arise in the context of specific proceedings. Ownership limits on broadcasters, public interest requirements on broadcasters, satellite set aside requirements, etc.

And, of course, this is the way the world looks if you're looking at it from the perspective of content delivery technologies, not from the perspective of the consumer. Naturally, all these pipes, broadcast, mobile, satellite, cable, broadband, etc., they all bear on the Future of Media. And the consumer doesn't really care what pipe is being used to deliver her blogs for Facebook, Wall Street Journal, etc., to her iPad, Android, Kindle, Hi-Def TV, etc.

So, the Future of Media Project – and I think it may be unique if not extremely unusual in the FCC or in any government agency to do this – provides the opportunity for cross cutting and cross sector inquiry into the production, delivery, and impact of information. So what's the point? Well, the point will be a report at the end of the year.

Neither I nor anyone else is in a position to make predictions about what it will say. But I can offer you some observations about the policy principles that appear in many of the comments and will undoubtedly inform the report. Slide three, final slide. So these are, first of all, of course, the First Amendment. The First Amendment is the guiding light for this and any inquiry into media.

As we know, the light of the First Amendment is not perfectly focused. It enjoins the government from making any law abridging freedom of speech. In other words, the government should get out of the way of information circulation. In communications policy, it's also the foundation for proactive policies that support a robust market for information.

Diverse, local and competitive. Second principle concerns the role of the government in the information and media sphere. There's widespread agreement that this role is to ensure competitive markets. Also, this role is to identify where there might be public goods that enhance welfare, but are also under-produced by the market. And I think on this point, the Left and the Right agree.

This is probably where we do agree, Adam. But the disagreement comes in identifying where these market failures might be. In these cases, cases of market gaps, it's government's job to support or require the provision of public goods. Things like lighthouses and basic scientific research. The third principle on which most people seem to agree is that there's a lot of creative destruction going on in the media marketplace.

Old business models falling and new ones arising. There's less agreement on whether these are disruptions and what currently look like losses in local and international reporting are temporary or maybe signs of long term market gaps. There's also agreement on the fact that news and information are not just another product. They are foundational to the exercise of all liberties and responsible citizenship.

And it's difficult to measure their values simply by consumers' willingness to pay. And finally, I think there's at least a lot of agreement that the use of public resources spectrum, rights of way, entails some obligations. It may be that what these obligations are and how they are structured should change to meet new information needs and capabilities. My particular focus, as I said, has been on non-commercial and public media.

And here there really are a lot of interesting things going on. There's a lot of energy within the community to increase the contributions in this sector to news and information production. What's been most striking to me is the degree to which the major players in the field, both in the public media field and in the foundations that support them and other stakeholders, believe that the FCC has an important role to play in the future of public media.

Because so much of public media policy has been set by CPB, Corporation for Public Broadcasting, it's easy to forget that it was the FCC that reserved spectrum for non-commercial broadcast service. In the public media community, and also in community media comments to the FCC's Future of Media Project, there's an unmistakable plea, if sometimes sort of soft-peddled, for more involvement by the FCC.

So, let me conclude with a few specific observations about the public and non-commercial media spheres. First, the discourse around public media is changing quickly. Most of the stakeholders, and here I'm talking not just about public broadcasters, but about PEG channels, non-profit news startups, foundations, are talking about public media, something very different from the legacy public broadcasting system. It's larger, more diverse, multiplatform, etc.

And there seems to be some consensus that the way that public broadcasting has been structured is not necessarily conducive to the most productive public service. So you have CPB Chairman Ernie Wilson saying at the future of media and non-commercial workshop that, "we're at a moment when we have to move beyond public broadcasting as it's traditionally defined into something else—public service media that we are still in the process of defining. We're between the old and the new."⁵

He and others have called this a 1967 moment alluding to the enactment of the public broadcasting act,⁶ and looking ahead to a reinvention of public media as something that functions very differently. Second observation: The watch-words of the day are collaboration and partnership. In the past, they were really very different worlds of non-commercial media.

There were PEG channels and things that people called community media. And then there was public broadcasting. And then there were those in this other category. Things like the journalistic ventures at universities and journalism schools and other non-profit contributions to news gathering. And now all these entities are talking about working in partnership with each other to produce better and more news more efficiently.

Also, everyone wants to be more connected to their communities. So, where as in the past you had community media that was very focused on the community and public media, public broadcasting that was more top down, delivering high quality news and information. Because of citizen journalism and the role of the user and social media, everyone is now talking about being more community facing.

Third observation: If you look at some of the leading foundation and academic reports on the future of journalism, including The Knight Commission report,⁷ which I think Charlie can talk about, and the Columbia Journalism Review Report,⁸ there seems to be a strong desire to put

⁵ FCC, *Workshop on the Future of Media & Information Needs of Communities: Public and Other Noncommercial Media in the Digital Era*, Transcript, at 31 (April 30, 2010), http://reboot.fcc.gov/c/document_library/get_file?uuid=5272966f-441c-48dd-9c66-a6c8b1f8cc5d&groupId=101236 ["Workshop on the Future of Media"].

⁶ 47 U.S.C. § 396.

⁷ The Report of The Knight Commission on the Information Needs of Communities in a Democracy, *Informing Communities: Sustaining Democracy in the Digital Age* (Oct. 2, 2009), <https://secure.nmmstream.net/anon.newmediamill/aspen/kcfinalenglishbookweb.pdf> ("Knight Commission Report").

⁸ Leonard Downie, Jr., & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. (Oct. 19, 2009), www.journalism.columbia.edu/cs/ContentServer/jrn/1212611716674/page/1212611716651/JRNSimplePage2.htm.

more resources into public media in the hopes that public media institutions will themselves produce more local news and other news where people see market gaps.

What these reports raise and do not entirely answer is—how do you fund non-commercial media efficiently and with incentives to innovate? How do you do it consistent with First Amendment concerns and with the robust heat shield between the money and the government? Who's eligible for funding?

How do you ensure that funded efforts are networked and made maximally useful and publicly accessible? All questions that our panel will answer. Number four: This is not all just talk. What you're beginning to see is that although they're rather strapped for cash, leading public media organizations are challenging themselves to do more.

So, for example, NPR CEO Vivian Schiller described at our workshop how NPR and its member stations are intensifying their news commitment with more reporters, more bureaus and a stronger focus on investigative journalism.⁹ The other piece of this, so it's all local, local, local. That's where there's most consensus that there has been a reduction in news gathering. But there also should be more analysis of complex issues like health care, finance reform, energy and climate change.

My fifth observation is that... So, that's all the good news. The bad news is that a number of public media leaders acknowledge that many of their members and colleagues are stuck in an under-performing trough and funding is not the only problem. There are problems of leadership and structure, etc. Bill Kling of American Public Media, at our workshop, asked the FCC and CPB to actually impose tougher requirements on public broadcasters to get more public service from them.¹⁰

Finally, what I'll say in conclusion is that one can draw from this moment in the noncommercial media world a number of conclusions, and they probably go in different directions. I'll just conclude with two points.

One is that you can see from CPB's recent \$10 million investment in local journalism centers, NPR's creation of an investigative reporting unit, and other system investments in news, that the public media is really viewing the current turbulence and uncertainty in the media space as a challenge to fill market gaps in accountability journalism.

Secondly, and finally, you can also see a clear call for new thinking in the field and government, and in the foundations about what a public media network structure for the digital age should look like, how it could prove its value, how its value should be measured, and how it can be supported.

And I'll stop there.

⁹ *Workshop on the Future of Media*, *supra* note 5, at 56-58.

¹⁰ *Workshop on the Future of Media*, *supra* note 5, at 363-365.

Thierer: Thank you Ellen. That was a wonderful overview of what's going on right now at the FCC, and your views on the issue.

I'm going to turn now to our all-star panel to talk a little bit about what's happening in this area, or comment on what Ellen had to say, or the FCC's Future of Media proceeding, or anything else that they're interested in.

You've got their complete bios in your conference material, so let me just give you one line about each of these gentlemen so we can move right in to our interactive discussion. I've asked each of them to say just a few things to kick it off—some very high level thoughts on these issues, and then we'll get into a round of some questions and interactive discussion.

We have with us Charlie Firestone here today. He's the executive director of the Aspen Institute Communications and Society Program. As Ellen mentioned, Charlie's been doing Aspen roundtables I think since I was in the third grade or something like that.

I went to my first one in, I think, '94 or '95. I think we were talking about all these same issues then, and he's been doing countless reports on these issues. He's recently been doing some really important work with The Knight Commission that I'm sure he's going to talk about, so I won't steal any of his thunder there.

We also have Kurt Wimmer here who's a partner at Covington & Burling. He filed comments in the Future of Media Proceeding on behalf of some broadcast station groups, and has done extensive work in this field, both as a practitioner and with industry. He is about to receive an important award, up in New York, for his work in First Amendment advocacy and the shield law. I asked him if he was going to win, if the award was actually a big shield.

[laughter]

Thierer: Like a Captain America kind of thing. It'd be great to hang that one on the wall.

Kurt Wimmer, Partner, Covington & Burling: They could turn me out on the shield.

[laughter]

Thierer: Craig Parshall is here. He's the Senior Vice President and General Counsel of National Religious Broadcasters. He filed some really lively comments, to say the least—some real fire and brimstone stuff, if you will, with the FCC in the Future of Media Proceeding.

Craig Parshall, Senior Vice President and General Counsel, National Religious Broadcasters: My specialty.

[laughter]

Thierer: Yes... They are well worth reading if you haven't had the chance to do so. So, I'm sure he'll talk about that today.

Andy Schwartzman is here, my frequent debating partner at D.C. policy events. We always have fun together, and I love having Andy at events, despite the fact we always disagree. He's

the Senior Vice President and Policy Director of the Media Access Project. He filed major comments along with Free Press, New American Foundation, and a broad coalition of other groups, some very beefy comments that I encourage you to check out.

And last, but certainly not least, my dear friend Robert Corn-Revere, who is a partner at Davis Wright Tremaine. As I often, half-jokingly tell people in introducing Bob, he is my friend, mentor, and the corrupter of my morals.

[laughter]

Thierer: He's been a real influence on me throughout my life, and as Ellen mentioned, his *CommLaw Treatise* is really a Bible for many of us in this field, among the countless other things Bob has written, filed, or argued before courts.

A great panel we've got here today. Gentlemen, why don't you kick us off with a few minutes of just a broad overview of your thoughts on this issue, then I'm going to follow up with some questions. Charlie, why don't you take it away?

III. Charlie Firestone

Charlie Firestone, Executive Director, Aspen Institute Communications and Society Program: Great. Thank you. And thank you for those kind words and Ellen as well.

This topic, "Can Government Help Save the Press" reminds me of a story of a man who was hiking, and he tripped and fell over this precipice. Just before he fell down this steep incline, he grabbed onto a bush. And he's hanging there, over a 500 foot precipice, and down there are these rocks. He looks down there, and he looks up, and says "Is anyone up there? Save me! Is anyone there?"

He hears this deep voice. It says, "Harry, it's the Lord. I'm here to save you. Let go of the bush." He looks down, and he sees these sharp rocks below, and he looks up and he says "Is there anyone else up there?"

[laughter]

That's kind of the plight of... As the media looks at government, or maybe it's the marketplace. I don't know.

The Aspen Institute is a non-profit and non-partisan organization that holds these various forums. One led to the creation of The Knight Commission on the Information Needs of Communities in a Democracy.¹¹ I put the brochure of the report out there. If we've missed anybody... we've tried to get this report out to everybody that we could.

Wimmer: It came with the Census.

¹¹ Knight Commission Report, *supra* note 7.

[laughter]

Firestone: But for the rare person who might have missed it, we'd love to get you involved. The commission was not necessarily experts. We had people who were involved, but the idea was to have a spectrum of intelligent people who would look at this.

They really covered the political spectrum: From Ted Olsen, you probably know was former Solicitor General, to Danah Boyd, a 31 year-old researcher; from Michael Powell to Reed Hundt; from a couple of media CEOs, Mary Junck and Robert Deckert, to Google's Marissa Mayer. We had a community organizer from Chicago, not President Obama, and a librarian, and that kind of thing.

They came up with the unanimous report, which might have been easier because they did not delve into those answers that Ellen was asking for, in terms of, for example, in public media. But they did come up with some general principles, recommendations. Generally, the idea was to look at the whole question from essentially the demand side.

What, in a democracy, does the community need in terms of information? I really like this statement, which says "Information is as vital to the healthy function of communities as clean air, safe streets, good schools and public health."¹² When you look at that, and you say "the importance of information." And then they went back and went a little further and they said, "and journalism is absolutely key to that"—especially in the world of information abundance.

The first two recommendations really go to journalism and what we're speaking of here. The first, I call it a little bit schizophrenic, because it starts off saying that we have to support media policy that supports innovation, competition, business models that provide marketplace incentives for quality journalism, and they meant that really, for both for-profit and non-profit, that the market forces in journalism are important.¹³ The importance of the subscriber looking at the reader, you know, allows those market forces to work.

But maybe, like the guy hanging on the twig or the branch, then they say, "...but you might consider some content neutral government policies" that might help. Without endorsing, they cited a few tax ideas, such as credit for subscriptions.

We've seen the effort by Geoffrey Cowan and David Westphal suggesting that there's been a history of government efforts that are mostly content neutral.¹⁴ Certainly this Commission would say that if you adopt anything, that they be content neutral, and not get into picking sides.

Then they went on to talk about public media, and as Ellen indicated, did say that this is important, that news and information is a public good. You need to have some public support

¹² *Id.* at XIII.

¹³ *Id.* at 33.

¹⁴ Geoffrey Cowan & David Westphal, Univ. of S. Cal., *Public Policy and Funding the News* (Jan. 2010), www.fundingthenews.org/pdf/public_policy_report.pdf.

for media. That our tradition was to have public media independent of government. That they haven't abused that situation. But they suggested more money conditioned on public media being more local, more inclusive and more interactive.

Now, what we're doing now is we do have a website Nicon.org where we're hoping to have a little more dialog and we're happy to have people get on and give their opinions and suggestions. We're also commissioning right now some white papers that will look at how we get from these broader recommendations to some specific actions that might bring them about.

One of the interesting things of this Knight Commission was that something we didn't expect to get a lot of attention has gotten more of our attention, certainly more than we expected which was the Appendix One. Usually the footnotes, as the lawyers know, you always look at the footnote. Our footnotes aren't that great.

But there is an appendix that does give eight elements of what we think a healthy informed community would look like and we really want to pursue that in more force of how do we get communities to self-assess how they are doing as informed communities, as information healthy communities I should say.

Then, how then they can improve in whatever areas? Now if I have, do I have just a little bit more time...

Thierer: Sure.

Firestone: ... just to mention one other thing that I personally have done as I've looked at these questions over time and as Ellen mentioned and Adam as well? I've been holding venues forever. It's actually 20 years I've been doing this, which is just amazing to me.

But I like matrices and as I've thought about this question more and more and I think of how the digital revolution has changed industry after industry, from the music industry going from the album to the song. I think television may be headed that direction with over the top programming, but certainly you see other instances of the fractionalization and the movement down the chain of the unit of consumption.

And one of the questions that came up in The Knight Commission is: what is the unit of consumption? Is it the newspaper or is it the story? This question came from Marissa Mayer who from Google of course they think it's the story and that means that search advertising is what you need. But be that as it may, I don't have to suggest that but I would suggest that we also have seen an unbundling as we go along, and the unbundling of functions of journalism.

If you look at a typical story and what the functions are and essentially someone digs up the facts and composes a story. There are sources for the story. The facts are verified. They're authenticated. The sources are authenticated. If it's well written it contextualizes the facts. And either in the story itself or hopefully in a separate editorial there is some opinion expressed. They analyze the consequences. They then aggregate in some way and distribute to the customer.

All those functions used to be performed and still are to a large extent, performed by one entity. I mean the newspaper does all that. The broadcast station hopefully does all that. But more and more those functions are unbundling. When Dan Rather announces a story or presents a story, the bloggers are now going and saying, yeah, but that letter wasn't really authentic.

And whereas ProPublica comes up with an investigative piece, the *Washington Post* is publishing it. So these functions are just aggregating. Then I put the functions of journalism on one side of a matrix and across the other side would be the sources of income that are available for a journalistic piece.

And just quickly to go over, you know, you can get advertising, subscriptions, fees, sales of information, micro-payments, barter, or cooperative system of some sort, corporate underwriting, philanthropic gifts, voluntary contributions, tip jars, endowments, and government. Those are all potential sources.

My suggestion is that over the next five to ten years, equivalent to 50 to 100 years after the printing press, but now as we condense time over the next five to ten years that the matrix is, what I call, "pixelizing." There will be different sources of income for different functions. And that there's going to be this period of experimentation and that we have to really watch this experimentation play out.

Now, some of the sources are non-profit sources, the philanthropic to the extent we don't have these L3Cs that come along.¹⁵ Corporate underwriting, of course, there is always corporate advertising. But those are really unique to non-profits, but you could see that if you're getting into any of these functions or all of them if you want to have a totally integrated system, you're going to look for whatever sources you can. This doesn't resolve anything but Adam says he always disagrees with me but I think those sources are always content neutral and when it's government.

I think maybe we're in agreement on that, maybe you don't want any government support whatsoever, and I can understand that, too. By the way, the media people in the Commission, privately, and I'm just saying this, at least one of them, I won't say which one, basically said even that tax thing, look we're losing 30% of our revenues. A little tax help isn't going to help us all that much.

So, I don't know how much those tax remedies are really going to help but, at this point, I think any little bit is great because it couldn't be more important.

Thierer: Thanks Charlie, and don't take the fact that I disagree with you personally. It seems to be a trend in this town. Nobody agrees with me. So...

¹⁵ An L3C is a low-profit limited liability company (LLC) that combines the financial advantages of an LLC with the social advantages of a non-profit company. The focus of an L3C is to achieve socially beneficial goals, with profit making as a secondary aim.

Firestone: I didn't say I didn't agree with you. I agree with you a lot.

Thierer: By the way gentlemen, do for folks who are watching this online, please do define your terms like LC3.

Firestone: Oh, I'm sorry.

Thierer: That's OK. But when you're getting into the weeds, please do that. Kurt Wimmer.

IV. Kurt Wimmer

Wimmer: Thanks. First thanks very much Ellen and Adam for those great introductions. Over our years at Covington, I will say that I think I learned a lot more from Ellen than she ever learned from me. And we miss you but applaud your current work.

Adam, I'm really thrilled to be here. I'm glad that I'm following Charlie because The Knight Commission report which I think is just a really remarkable project and piece of work was one of the reasons that a lot of our commercial television clients wanted to become involved in the Future of Media Proceeding, because as you look at it, and this is perhaps because it's focusing on the demand side, it focuses a lot on a newspaper.

It focuses a lot on public media. Not a lot of focus on commercial television broadcasting, probably because of the demand side focus, but a lot of commercial broadcasters sort of read the covers and said, well, hold off. We're part of the ecosystem as well. And so that was one of the reason that we filed what was essentially kind of a factual set of comments at the FCC just to say this is what the commercial television journalism infrastructure is about. This is what we're doing.

This is where we're important for our communities. These are places where we're providing service that new media providers aren't providing now and maybe won't be equipped to provide in the future, particularly in the areas of emergency journalism, investigative work that because of the size of the platform a local TV station may have, may actually provoke some change in the law or in how business work.

And in coalescing audiences around the concept. We all remember the Walter Cronkite moment... some of us. Some of us don't remember, maybe the panelists, probably.

[laughter]

Wimmer: The moment where it seemed as if the American public coalesced around the notion that the war was unwinnable. You still see that today. There's a great example in our comments of when a Gannett newspaper, the *Detroit Free Press*, had a long investigative piece about the Mayor of Detroit and found that he had possibly violated law. He was indicted for perjury.

There was a moment where the Post-Newsweek television station in Detroit, with an African American anchor said, it's time for a change for Detroit and that had the same sort of Walter Cronkite moment effect of coalescing community opinion. So you end up with the possibility,

because there are still audiences to be aggregated and everything is not yet fragmented on all platforms, the potential for coalescing community opinion in a way that's unusual.

The other thing that we tried to point out in the comments is the division between old media and new media is sort of a five-year ago concept. Everybody is new media now. It doesn't make any sense to say, OK, you guys are the dinosaurs. You guys, ProPublica, other new media entities, you guys are the shiny new stars. In fact, everyone is working towards the same set of goals, which is to provide the audience with the information it wants, when it wants it, where it wants it and on whatever device it wants to read it on or view it on.

So, you have now broadcast journalists who are crowd sourcing information using new media techniques, working on the website, putting lots of information on the website that might otherwise not fit within the linear TV channel that they're using through their license. You have television journalist consistently blogging, tweeting. This raises very interesting legal issues, which Bob and I really enjoy.

But it's a different world and we were really trying to point out that if you haven't looked at local television journalism lately you should look again and see exactly what it's doing. So that was really the point of our comments and I think the NAB has struck some of those same notes.

So it's legitimate to then ask: why exactly should we care? Is it, should we be saying that the government really shouldn't be looking into what journalism is about in the United States? Is that a first amendment issue? I'd have to say that the way the Future of the Media Proceeding at the FCC has been structured makes sense to me.

We just have to concede I think... My friend Ron Suskind has this term. As a member of the reality based community you have to concede. You have to concede that the reality is the government is knee-deep in the media. We're regulated in what we can own. We're regulated in what can say. It's not meant to be content regulation. It's not meant to be deep regulation, but clearly it has an impact on how the media will succeed in the future.

So to me it seems like a responsible government action for the Commission to start the Future of Media Proceeding.¹⁶ I know if some people read the 44 questions, or however many it was, and were a little alarmed.

Thierer: 115.

[laughter]

Wimmer: And a little alarmed at the breadth. This might be because it didn't alarm me too much because I did spend some time practicing in Europe and this is the sort of thing as Ellen knows. What the European Commission loves to do is launch these "What is the future going to look like?" proceedings. And frankly I think it's a good thing here.

¹⁶ See *FCC Launches Examination of the Future of Media*, *supra* note 3.

I think it's a good thing that you got somebody as conscientious as Steven Waldman with people like Ellen Goodman and others working alongside, sort of saying let's put together a report and have the Commission in a position to take a look at reality.

Because there are a lot of things going on at the Commission in the future and not too distant future, including the Quadrennial Review of Ownership regulations, where all of this is going to matter, it seemed to me that this made a lot of sense.

I think it's also important to look at other Future of Media Proceedings. You guys are right there are a ton of them. And I think there may be more on the horizon. The Federal Trade Commission and the Department of Justice have an important role. As we think of ownership regulation, everyone thinks just about the FCC, but in fact, the Department of Justice and the Federal Trade Commission and how they define markets has an incredible impact on the media landscape. The way they have traditionally looked at the newspaper market as being separate from the television market, etc., has had a significant impact.

And I think it's time for them to look at broadening the way they look at media marketplace. So I think that also is an interesting and important step. I don't know if too many people notice the irony of the Future of Media Proceeding at the FTC backing right up to the behavioral advertising proceeding.

[laughter]

Thierer: It's in my comments. I noticed it.¹⁷

Wimmer: I was waiting for the workshop on how the behavioral advertising restriction shouldn't hurt the future of media, but of course that's an important area for the future as well.

So, I do think that all these solutions are important to look at. Public media side, Ellen and I talked about this. I spent a few years at Gannett which has a large chain of community newspapers in the United Kingdom. And one of the fire storms that occurred with the BBC in the United Kingdom was it decided to become more relevant in the digital age.

It had to launch a lot of community websites and put some of the extraordinary resources that the BBC has at its disposal, far exceeding the resources available to public media in the United States toward creating community websites with video and lots of other interactive features.

This, of course, sent alarm bells throughout the community newspaper industry which basically said, look we understand funding public television. But if you're going to get into competing directly with us for these audiences at a time when we're working very hard to figure out exactly how to compete with everyone else we're competing with, it becomes an issue. But I

¹⁷ See Adam Thierer & Berin Szoka, *Chairman Leibowitz's Disconnect on Privacy Regulation & the Future of News*, Progress Snapshot 6.1 (Jan. 2010), www.pff.org/issues-pubs/ps/2010/ps6.1-Leibowitz-disconnect-on-privacy-and-advertising.html ["Chairman Leibowitz's Disconnect"].

do think there is certainly a huge role for public media in the future as well. So I think it's an interesting time to look at all these issues.

Thierer: Thank you, Kurt. Craig.

V. Craig Parshall

Parshall: As I look around and I see the likes of people like Ellen Goodman and the gentlemen on this panel, I find myself sort of surrounded by journalistic and jurisprudential pundits and real heavyweights. This means I guess my role is to be the agitator, so pardon me while I do some agitating.

The National Religious Broadcasters really is kind of a misnomer because we're distinctly Christian in terms of the communicators, webcasters, publishing houses, agencies that are members of our organization. So that having been said, we are in kind of a unique position in having a trifecta of concerns that center in the first amendment. By trifecta, I mean first of all because we're religious in our worldview. We of course have grave concerns for the free exercise clause.

We're also communicators, which means that we zero in on the free speech clause. And then, of course, we're also a form of the media, which means it implicates the free press clause as well. The way I look at this proceeding it seems to me to crystallize that there are two major concerns.

One is the declining quality of journalism. One example is the failure to provide local coverage for the local needs of local communities. The other is the declining economics of journalism. But the interesting thing is I don't think these are new concerns. In my comments before the FCC on this issue I mentioned the speech I came across from Clare Boothe Luce back in 1961. She spoke at the Press Club to the Women's Press Association. That will tell you how times have changed.

She was bemoaning the decline in quality journalism. But then she had the remark that as she was going around town spreading the gospel of trying to improve journalistic standards. And an editor came up to her and said, you're forgetting that the number one job of journalism is to survive, and by survive they meant economically.

So, those two aspects of quality and economic survival of course have been around for a while. I look at this in our organization and our business looks at this as a seminal and fundamentally first amendment issue. I don't just mean from a strictly legal standpoint. We don't see the First Amendment, free press clause as some kind of barrier that has to be overcome to then get to solutions for what's happening out there in journalism.

We see freedom of the press as the DNA of what journalism does. If the press isn't free, the press is by definition dysfunctional. So that then means we have to go to some presuppositions. Our presuppositions begin with a review of history. English common law...

I'm a fan of John Milton. I guess it has to do with my being an English major. We waded our way through *Paradise Lost*.¹⁸

I realize that John Milton was not just a great poet. He was also a well-known defender of the Christian faith, but he was also an ardent proponent of freedom of the press and so I came across the *Areopagitica*, which is his essay on why parliament should not license and regulate printing presses, which was their Internet of the day.¹⁹

Now most of it's unreadable to my basic mind in its arcane 17th century language. It's just impossible to read. But one phrase that he used really jumped out for me. And that was the phrase where he said, "The state may be my governor, but shall not be my critic."

Of course, spoken as a published author, he didn't want anybody in the government, the Dane, to try to criticize the content of what he was saying. But I think what he was saying was important.

What he was saying is government may have the power to govern our conduct in certain areas. And that's certainly true. But it has no right to pretend to be a critic of our ideas, or our beliefs, or our philosophies, or religions.

Or in the case of editors and journalists, decision making in the editorial realm of journalism. And I think the courts have said that, repeatedly. So, then I go from John Milton to the Founders, who, according Archibald Cox,²⁰ and I'm going to rely on his conclusion, they continually went back to Milton's *Areopagitica*, about the freedom of the press.

So, you look at the Founders, and Edmund Randolph wrote a letter to James Madison talking about freedom of the press. It's interesting. In the letter, he was bemoaning the fact that they were being smeared by the press and all the scandals in the press.²¹ But despite that fact, which shows times don't change, he said, freedom of the press, liberty of the press he said was a great blessing that we must not surrender but by blood. So it was one of those things that they were willing to lay down their lives and their fortunes.

So, I think we need to take it seriously. So then we hop forward 200 years to what the Supreme Court's been doing in a couple cases. Just a few that stand out for me that are pertinent to this.

¹⁸ John Milton, *PARADISE LOST* (A. W. Verity, M.A. ed., Cambridge University Press 1918) (1674).

¹⁹ John Milton, *AREOPAGITICA* (Edward Arber ed., A. Constable & Co. 1903) (1644).

²⁰ Archibald Cox, *THE COURT AND THE CONSTITUTION* (Houghton Mifflin 1987).

²¹ See *Comments of Nat'l Religious Broadcasters, Future of Media and Information Needs of Communications in a Digital Age*, GN Docket No. 10-25, p. 15 (Feb. 18, 2010), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020391058> (citing *Letter from Edmund Randolph to James Madison*, March 27, 1789, in *CREATING THE BILL OF RIGHTS—THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS*, (Helen Veit, Kenneth Bowling & Charlene Bickford, eds., John Hopkins University Press 1991).

The *Miami Herald* case, in the state, I think it was Florida, had a right to reply requirement, that if a politician was attacked, they have a right to reply in the newspaper.²²

And they struck that down. But interestingly, at the same decision, the Supreme Court did note at that time, and I think that was a decision in the '70s, if I remember correctly, '74. They said we note the possible decline in newspapers. In other words, the industry was under attack, and one of the arguments was maybe this right to reply makes sense in terms of improving the market.

But despite that, they ruled that the First Amendment would prevail. Then, we come to the Turner case, the must-carry case. That's kind of interesting in light of the Supreme Court recently denying cert. on Cablevision's attempt to overturn must-carry.²³ In the first must-carry case, in 1994, in the Turner decision, the Supreme Court ruled in a five to four decision, of course.²⁴

There were four dissents. But it said pretty clearly, the majority did, that the mirror risk, even the probability of market failure in an area broadcast, or in the field of communications that was being regulated, is not an excuse to lower the level of scrutiny demanded as part of the paradigm to protect first amendment rights.

That even market failure, now that's what we're really talking about here. People are saying, well, we're having a possible market failure, and we're not looking at it just as a matter of economics, we're saying, the survival of the republic may be in jeopardy. That's even more important than mere profit or loss of newspapers. By the way, I find it interesting that Moody Investor Service in April re-rated the newspaper industry from negative to stable, I guess.

So, I guess the patient is still in the critical part of the hospital and on IVs, but may survive. The other case that I think about is the *Pittsburgh Press* case, where the Supreme Court did regulate newspapers in terms of how they could advertise.²⁵ They had to succumb to general laws of discrimination in terms of not having statements for male or female preferences in want-ads.

But they distinguished the advertising part of the newspaper from the journalistic content. And here's what they said. They said we will not regulate content, layout, stories, or commentary. So I think that's a very good standard to remember.

Now, obviously a lot of the suggestions in this proceeding have not been going directly to content. Except that proposals to fund, or in my way of thinking, super fund the Corporation for Public Broadcasting. You are funding an entire journalistic enterprise of which content is a major part of that. So I see some real problems with that.

²² *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974), www.law.cornell.edu/supct/html/historics/USSC_CR_0418_0241_ZS.html.

²³ *Cablevision Sys. Corp. v. F.C.C.*, 2010 U.S. LEXIS 4118 (May 17, 2010).

²⁴ *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994).

²⁵ *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (1973).

To me, I think that there's a real irony in the fact—and I don't know whether president Obama has signed the Free Press Act. I think it's called the Daniel Pearl Freedom of the Press.²⁶

Thierer: Yeah. He signed it last week.

Parshall: Did he sign it? So, here we are exporting an idea of unfettered press freedom abroad, and yet we're talking about heightened regulation of press at home.

To me, that's not just ironic, I think that's troublesome. So, I think the way this town looks at this problem, and I may be wrong, but this is my humble opinion, is in a paradigm of three options. That one is to federalize, which means federal regulations, pretty much what the FCC has done in terms of broadcasting. Obviously, I see some problems in my organization. I see some problems with increased federalization, not just constitutionally, but in terms of good policy.

Number two, subsidize. Then we get into the question of some of the suggestions of creating a super trust where people pay extra taxes, and we have a huge trust fund, and much of it will go to the Corporation for Public Broadcasting or community media, and so forth. I have a problem with subsidizing as well because I think that federalizing and subsidizing ignores the best and the third alternative, which is to fertilize the landscape, but don't subsidize and don't federalize.

And I'll talk about what I mean by that in a couple minutes when I can find my remarks to my script, which is what I do to keep myself from getting into more trouble. So here are my concluding remarks. I see a grave constitutional problem with the federal government presuming that it can or should help a flagging media industry. The best thing it can do particularly regarding non-commercial broadcasters, a majority of our members are non-commercial broadcasters. The best thing they can do and I would say not just the FCC but the Federal Trade Commission as well, is to un-strap the media and in particular non-commercial broadcasters, from the yoke of unreasonable or illogical regulations that impact their ability to number one, raise revenue, and number two, serve the public interest.

As for commercial broadcasters, and we have a number of them in our organization as well, the FCC should refrain from its natural instinct to regulate or over regulate in areas like localism or expansion of the public interest obligation. Public interest is embedded in the Communications Act.²⁷

It's the law of the land. And talk about clarifying public interest really means that we're going to load the chambers. And the more we load the chambers in terms of additional definition, the more expansive that's going to nationally become.

I think the Founding Fathers envisioned a horizontal relationship between the press and the people, which means that the press was to be an indigenous part of the people in the sense

²⁶ Daniel Pearl Freedom of the Press Act of 2009, Pub. L. No. 111-166, 24 Stat. 1186 (2010).

²⁷ Communications Act of 1934, 47 U.S.C. § 151.

that number one, private enterprise privately owned, and, number two, that pragmatically, they would have to respond economically to the people that paid the subscriptions.

The idea of creating a super-funding of the Corporation for Public Broadcasting or some other mechanism to insure that we have the news covered in an adequate way, I think would be anathema to our Founding Fathers.

At best, it smacks of not a horizontal relationship but a vertical relationship with the press, is up there with the federal government, above the people, not among the people.

And of course, at worst, it really does, in my way of thinking, create a specter of a 21st Century version of Pravda. Thank you.

Thierer: Thank you, Craig. Now for something completely different, Andy Schwartzman.

VI. Andrew Jay Schwartzman

Andrew Jay Schwartzman, Senior Vice President and Policy Director, Media Access Project: Well, not totally different. Because I think it's very important to understand that everybody has the same goals here. And we have different roots to get there but we have fundamentally the same goals.

The differences such as they are on this panel are to a large measure a function of one's basic political beliefs and philosophy. If you believe that government should not mandate health insurance or shouldn't mandate motorcycle helmets, that expanded 401K's are a better solution than Social Security, perfectly legitimate views, though not mine, you probably don't think that government ought to take on an affirmative role in promoting a robust media.

I don't take that view. Under the First Amendment, as I understand it and as Ellen alluded to, I think that government has a role in making sure that we have a well-informed electorate, that there's robust debate in society, and there are indeed serious questions as a result of the creative destruction that Ellen talked about, of some genuine market failure. Whether it is permanent or impermanent and the nature of it and the depth of it, I can't answer those questions yet. But that's why I'm very glad that the FCC is looking into it.

I don't think that those who have challenged the FCC's jurisdictional legitimacy in asking these broad questions are correct. I think that in order to understand the ecosystem of debate in journalism and the platform for discussion of issues and ideas and creative expression in American society, it's necessary to look at the whole picture.

And that doesn't mean the FCC has the right, the responsibility, or should be taking a hand in fixing all of those problems. But in order to understand how the FCC should address the areas within its jurisdiction, it needs to look holistically. And I think that it's very worthwhile to do that so long as the FCC understands the limits of its power, which I think there's a lot of indications that they do.

Local journalism, and this is really the more difficult problem; I think that the market for national journalism, particularly on the evolving platforms, national journalism is going to find its support. But local journalism is threatened.

And it is entirely appropriate to view this function as a public good, something that may not be supported by the changing economies of journalism. And that's why I think The Knight Commission has done such an important job in trying to identify some of those functions. So I do believe the government ought to take an affirmative role in stimulating and creating a platform.

Public support is not really a novel function, as allusion made to Jeff Cowan's very useful work of a couple of months ago. Certainly postal subsidies, going back to the earliest days of this country, which were expressly intended to create a robust and highly opinionated newspaper journalism in this country. Various tax benefits that are provided, not that I approve of it, in the Newspaper Preservation Act.²⁸ We've done a lot of things over time. So this is not a novel idea. I think it is possible to come up with content neutral models to funnel public resources into fulfilling this journalistic function.

Nor is this a unique problem to the United States. Countries that we generally regard as democracies, Western Europe, Scandinavia, Great Britain, France, New Zealand, all have various schemes for funneling large amounts of resources to both commercial and non-commercial media.

To pick one of many ways to do this and to address some of the commercial as well as non-commercial media, one scheme would be a voucher system on which every American taxpayer would be given a voucher of, say, \$10, which they could direct to any newspaper or website or broadcasting station as a subscription fee. And certainly it would be content neutral. The entities would have to compete for it. I think that's one of a million ways to try to do it, so long as you agree with my premise that this local journalism is a public good and we may not have it.

And market failure is a real problem. I'd just like to briefly point out that radio is an interesting model here. For all practical purposes, we no longer have a serious competitive environment for local journalism, for that matter, national journalism, provided by the radio industry. In the largest markets like this one, there is typically one station that has anything resembling a commercial broadcasting format that provides significant amounts of news. Opinion, we got plenty, although local opinion, a lot less.

This has largely been abdicated to public radio. And we have a robust non-commercial radio medium that, with some quibbles that people can argue about, fundamentally provides throughout the country the best and highest quality local radio journalism. And at the local level, there is not significant complaint about bias or difficulty.

²⁸ Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801-1804 (1970).

I think it is supplanting, actually, I don't think it's supplanting something that is providing competition, and I'm acknowledging Kurt's point about local websites and the BBC, I think it's filling a gap that was left by the wholesale abandonment of local radio news by the commercial media, simply because the economies, in a kind of foreshadowing of what's happening with the Internet, the economies over the last 10, 15, 20 years in radio just made it more profitable to do other things.

But I want to try lots of things. Charlie made reference briefly, I think, to the L3C, which is a low-profit, Limited Liability Corporation.²⁹ This may become a useful mechanism for altruistic investors to assist flagging commercial media properties. Without getting too deeply into the weeds, you can set up classes of stock and you may have investors who are willing to take less than a market rate of return in order to make sure that there's important local journalism being provided.

You may take a company that's not making it, it's coming out of bankruptcy, and you can combine some philanthropic investment in one class of stock, and some altruistic investment in a second class of stock, and some non-altruistic investment in a third class of stock, each of which would get different rates of return, ranging from zero to market rates of return. Maybe that's a useful model. I'd like to see it tried. I'd like to see a lot of things tried.

I think it is dangerous to assume that there's no problem and wait until local journalism and this important function disappears and then try to fix it. I think we need to be working on it now. So, I welcome the FCC's examination of the problem.³⁰ I hope everybody will approach this with a view towards finding content-neutral means of assuring that this important function in a democratic society is preserved.

Thierer: Thank you Andy. Bob, bring us home.

VII. Robert Corn-Revere

Robert Corn-Revere, Partner, Davis Wright Tremaine LLP: I don't know if I can do that, but I'll give it a shot.

Thanks Adam for inviting me and for having me be part of this conversation. It's a very high-level panel. I appreciate being here. Ellen, thank you for your remarks, very generous.

Adam, for you, what can I say? It's not often you're introduced as being the creator of some kind of Bible and at the same time a corrupter of morals.

[laughter]

²⁹ An L3C is a low-profit limited liability company (LLC) that combines the financial advantages of an LLC with the social advantages of a non-profit company. The focus of an L3C is to achieve socially beneficial goals, with profit making as a secondary aim.

³⁰ See *FCC Launches Examination of the Future of Media*, *supra* note 3.

And while I can't really claim to have much connection to a Bible of any kind, I will proudly accept the mantle of being a corrupter of morals, if by that you mean that it starts with a traditional understanding of what the First Amendment is supposed to mean, something that I think Craig and I have very much in common.

In doing that, I guess I should start with my usual disclaimer: any remarks here are just things that I've come up with. They have nothing to do with any clients. They shouldn't be blamed for this. This is all my fault and purely just a matter of opinion.

Speaking as a former journalist, I have to say that it is really heartening to see the level of interest and concern with investigative reporting, or, I guess, as the current label goes, "accountability journalism."

I haven't seen this kind of concern about investigative reporting in Washington since 1973, which, as it turns out, is a fairly pivotal date for how we should frame the discussion about the future of media.

There was a lot of interest and concern with media during those times, including what happens when the government funds media. But I'll get back to that in a little bit.

I agree with Andy, too. Actually, we should probably put a marker on that, because the number of times I get to say, "I agree with Andy," is depressingly small, although when we do agree, we agree completely.

But I will agree with the statement that you made that we all agree on the same objective. That I think everyone on this panel and the people involved in the FCC's proceeding all have a concern with the future of journalism. All see a profound value in having robust and ethical and deep roots in the journalistic enterprise and look for ways to maintain the health of journalism.

However, there will be significant disagreements about, sometimes what the problem is and also disagreements about ways to get to some kind of solution.

First of all, just a word about whether or not everybody agrees with the problem. It wasn't all that long ago, for example, that [FCC] Commissioner Copps wrote that, "We shed crocodile tears for the financial plight of newspapers. Yet, the truth is that newspaper profits are about double the Standard & Poor 500 Average."³¹ In the same proceeding, he went on to write, if I can find the quote here, "Let's also be careful not to get too carried away with the supposed premise for all this contortionism, namely the poor state of local newspapers. The death of the traditional news business is often greatly exaggerated. The truth remains that the profit margins for the newspaper industry last year averaged about 17.8%; the figure is even higher for broadcast stations."³²

³¹ Statement of Commissioner Michael J. Copps, *2006 Quadrennial Media Ownership Review*, MB Docket 06-121, *et al.* (Dec. 18, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A3.pdf.

³² *Id.*

And he goes on to talk about how newspapers are just doing fine. Now, of course, that was written a few years ago, so things have changed.

But the bottom line of that is that for policymakers that take that view, the answer is not in reducing regulations that would affect the financial health of the news business, but rather looking for other ways to promote the policies that they favor. And in this case, we now see a growing interest in D.C. in finding ways to save the newspaper industry, although not the same zeal for eliminating and reducing regulations that have similar or even worse effects.

You noted the irony earlier of having, or, I guess, Kurt noted the irony, of having both the FTC and the FCC looking at the future of journalism, while at the same time the FCC is looking at ways to restrict behavioral advertising.³³ The FCC has pledged to ban interactive advertising that has anything to do with kids and is looking at other restrictions on advertising.

And so we're stuck in that same sort of policy conundrum: how do we save the business while at the same time chipping away at the economic foundations that support that business?

I think it is a good idea for the Commission to be looking at this in a broad way. I don't know if I'd go as far as you do, Andy, to say that they should look at everything, even if it's outside their jurisdictions.

But again, I think knowledge is good. Having the Commission get itself educated and to investigate these important questions is a very good thing. And for that reason, I think it is really an opportune time, for the Commission to take a close look at the limits of its regulatory jurisdiction, something that Professor Goodman has written very knowledgeably about and very presciently about, for example.³⁴

In talking about regulatory models, it is to say that the existing justifications for differential regulation of broadcasting and other electronic media are done.

That the consensus among scholars, at least, is that those justifications for imposing more rigorous regulations on broadcasting no longer have any rational support. That at some point, those justifications are going to fade away. Not just the scarcity rationale for imposing public interest mandates on broadcasters, but also the rationale that animates the indecency regulations, the so-called pervasive presence, or the uniquely pervasive presence of the medium. Neither of those legal fictions really can be sustained. I think most people believe that it's just a matter of time before they fade away.

³³ See *Chairman Leibowitz's Disconnect*, *supra* note 17. See also, Thomas Rosch, *Some Reflections on the Future of the Internet: Net Neutrality, Online Behavioral Advertising, and Health Information Technology*, Remarks at U.S. Chamber of Commerce Telecommunications & E-Commerce Committee Fall Meeting (Oct. 26, 2009), www.ftc.gov/speeches/rosch/091026chamber.pdf.

³⁴ See, e.g., Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=590425 ("Media Policy Out of the Box"); Ellen P. Goodman, *Spectrum Policy and the Public Interest*, Working Paper Series (June 26, 2008), <http://ssrn.com/abstract=1299636>.

This would be a good time for the Commission to step up and say, “We’ve taken a look at the media ecosystem”—I’ll use that word. “There really is no way to apply 20th-century rationales, or, in fact, 19th-century rationales when you get down to the public interest standard, to a 21st-century medium that is fully converged and that is only going to change and become more complex in the future.” This really would be an opportune way for the Commission to make a bold statement about how the media marketplace has completely changed.

Now, what do you do with those other policy goals? Professor Goodman has written about proactive regulation and not the sort of command and control regulatory structures of the past. That’s where I think we get into the disagreement part of the panel about how helpful it would be or how dangerous it could be for the government to take a more active role in promoting, not First Amendment rights, but First Amendment values, that is if you select what the First Amendment is supposed to do and you design a policy around it. That, by definition, according to some, is consistent with the First Amendment.

The problem is: there is a price for every aid that you provide that can be exacted or measured in traditional First Amendment terms. For example, subsidies: are they benign? We’ve been hearing a lot about that lately, particularly if you read Professor McChesney’s and John Nichols’ new book, *The Death and Life of American Journalism*,³⁵ we hear that, in fact, if you really think about what the Framers of our Constitution intended, they intertwined postal subsidies with the First Amendment. So, it was always assumed that the government would have an important role in journalism.

Well, it is certainly true that the Postal Clause of Article 1, Section 8, Clause Seven of the Constitution, in seven words, gives Congress the power to create post offices and post roads. And it’s true; it’s adjacent to the Copyright Clause. And it’s one of the three provisions in the Constitution that speaks to speech. The one that we are concerned with most often is the First Amendment, which says, “Congress shall make no law abridging freedom of speech or the press.”

I think it is over-reading the Postal Clause to suggest that this was intended for the government to be embedded with the press. I think a fair reading of that history suggests that there are real First Amendment dangers in trying to do so.

For example, the first years of our Republic were dominated by, when the government interacted with the press, providing postal subsidies and also providing printing contracts. This was before there was a well-established business in newspapers. The way most newspapers stayed afloat was by taking on printing contracts.

The way government interacted was to provide those contracts to favored publishers, or denying them to disfavored publishers. This is one of the reasons why we had a very partisan

³⁵ Robert W. McChesney & John Nichols, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* (Nation Books 2010).

press at the beginning of the United States—because those who got the contracts, those who were favored, wrote very partisan articles in favor of their patrons.

This changed over time as journalism became more of a profession and as the businesses were able to stand on their own. But it represents part of the danger. It wasn't until 150 years later that the Supreme Court developed doctrines to deal with the government denying benefits on behalf of or because of a position someone had taken. But I think it underscores the danger there. The same is true if you look at the history of control of the post office. For example, in the 1830s.

Well, actually, the administration of Andrew Jackson proposed a law to prohibit the mailing of abolitionist literature. And while that law wasn't adopted, it became the practice for decades to deny the mailing of abolitionist literature to the South.³⁶ One of the things that has been attributed to building up pressure that because the abolitionists focused on the North for the conflict that ultimately became the Civil War.

It's an interesting thing. If you pick up a copy of the McChesney book, *The Death and Life of American Journalism*, one name you won't find in this book is Anthony Comstock. You know, all this talk about how the postal service really is the model and how intertwined the government has always been with the press. And there is no mention of the person who was really the godfather of censorship in America.

He's a person who was responsible for passage of the Comstock Obscenity Act³⁷ and who got himself appointed as a special agent of the postal service with the power to make arrests. And he went on raids of publishers to make sure that that law was enforced. He held sway over publications in the United States for decades. And his shadow is still cast across First Amendment and communications law in this country.

The Communications Decency Act of 1996 was really a tribute to the memory of Anthony Comstock.³⁸ And it included provisions prohibiting the transmission of information on contraception that were so unconstitutional that the Justice Department refused to enforce them. Now my friend Andy talks about having content neutral policies. But I maintain that when you're talking about intertwining government and the press, that that is a practical impossibility.

And we've seen that time and time again with postal subsidies and the mail-ability of postal information in the 40s with the attempt by the postmaster general to deny mailing privileges to Esquire Magazine because it focused on what the postmaster gingerly described as the smoking

³⁶ See, generally, Junius P. Rodriguez, *SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA* (ABC-CLIO, Inc. 2007).

³⁷ Comstock Law of 1873, 42 Cong., ch. 258, 17 Stat. 598 (1873), *struck down by Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983).

³⁸ Communications Decency Act of 1996, 47 U.S.C. § 231 (1996), *struck down in part by Reno v. ACLU*, 521 U.S. 844 (1997).

room type of humor. And we see that tradition carried forward in current FCC regulations in broadcasting decency. Certainly looking at what has happened through the use of subsidies as a tool may not be as egregious as some other examples of censorship in America.

But it is no doubt present and it is an inherent part of the system. Take a look at public broadcasting. And again, I have nothing but admiration for public broadcasting. I think that it is a shining example of what can be done in a government supported system. But it would be irresponsible to ignore the dangers that come with that. If you look, again, let's go back to 1973 and look at what was happening at the White House. Richard Nixon was personally monitoring broadcasts on PBS.

And when he saw commentary about the war and believed that the commentators were too slanted to the left, he threatened to cut off all funding for PBS instantly. And it set in motion a series of maneuvers to restrict what the Corporation for Public Broadcasting could do to restrict the ability of PBS to serve as a journalistic organization. It led to a number of restrictions that we still live with. And even though you don't plan for every administration to be a Nixon administration, the problems are inherent.

One case that I worked on for public broadcasting involved the state of Idaho, where the legislature in its wisdom decided to cut off funding to any broadcast that supported or condoned the violation of any law of the state of Idaho. And what they meant by that was sodomy laws.

So broadcasts that were insufficiently homophobic were intended by the legislature of Idaho to be cut off from state funds. Or who can forget "Postcards from Buster" from the previous administration, where a children's show had more or less of a cameo appearance by a gay couple.

And because of that it created a firestorm over that program. There are other more direct restrictions. For example, public broadcasters can't endorse candidates, can't have advertising and so on. That may go with the territory with public broadcasting, but when you think of structuring government policies in a way to institutionalize that for a broader segment of the media, you're automatically talking about restricting areas of First Amendment protection.

Now, again, I do recommend that you read Professor Goodman's article. And this is a 2004 article and here comes the plug. It is entitled: *Media Policy Out of the Box, Content Abundance, Content Scarcity, and the Failures of Digital Markets*.³⁹ And it talks about taking various proactive policies. And one of the points that it makes in addition to the fact that traditional justifications for media regulation are a thing of the past.

Is that when you regulate using subsidies, or when you use subsidies, that there are fewer First Amendment problems. Good news if you're looking to circumvent the First Amendment. Bad

³⁹ *Media Policy Out of the Box*, *supra* note 34, at 1389-1472.

news if you think of ways in which subsidies can be used to hobble what ordinarily would be considered a traditional First Amendment right. I've gone on longer than I had planned to.

I can talk about some of the specific examples of cases in recent times in which the subsidies have been directly used as a way to circumscribe First Amendment rights. But I don't think that's really necessary. I think the opportunity, though, is for the Commission to straightforwardly recognize that things have changed—that the media of the future is a free medium. And that while there may be certain government policies, that it is absolutely essential to recognize the danger of too much government involvement in First Amendment terms.

VIII. Discussion Among Panelists

Thierer: Thank you, Bob. And thanks to everyone here on the panel for these opening remarks. I see once again my 5 to 6 minute limit became 10 to 12, but that's OK. That's OK. Good stuff. I'm going to turn in a moment and ask if there are any questions. But I just want to ask one.

There's so many I could ask and also, if there's anything anyone on the panel wants to say in response to anything else they heard from another panelist, please do. But let me ask just one question. Kurt Wimmer, you mentioned living in the reality-based community. I sometimes fear I'm not living in that world enough.

[laughter]

Thierer: But here's where I think I am. The FCC's proceeding here is called the *Future of Media and Information Needs of Communities in a Digital Age*.⁴⁰ And talking about reality here is challenging because there's two things that are always so amorphous in these discussions or abstract when we talk about information needs and the needs of a deliberative democracy, so on and so forth.

But I always get back to this question: What's your metric? How do you measure? How do you define it? I know Charlie spent a lot of time thinking about this with The Knight Commission and I welcome anyone commenting on that. But here's the bigger issue that I always get to that I really struggle with, which is: what's the demand? And what do we do about it when people don't demand what we sort of want them to consume?

There's a subtle undercurrent of elitism, if you will, that pervades a lot of policy debates. And I am guilty of it a bit myself. I think we all probably may have a different demographic when it comes to the media we consume. And it may not be what everybody else does. I used this uncomfortable factoid when I was testifying in front of the FCC recently. And I said, you know, the average Nielsen rating for a PBS prime time show is 1.5, which is half the rating of Friday Night SmackDown Wrestling. You know, sad but true.

⁴⁰ See *FCC Launches Examination of the Future of Media*, *supra* note 3.

[laughter]

Thierer: These are facts. And so I can't get away from this fact. And no one has crystallized this better than Ellen. In one of her recent pieces she says, and I've quoted this line now a dozen or so times and I'm going to do it again, Ellen.

Goodman: Payment.

[laughter]

Thierer: Yeah, there's a royalty associated with each quote. "Given the proliferation of consumer filtering and choice, these kinds of interventions are of questionable efficacy. Consumers equipped with digital selection and filtering tools are likely to avoid content they do not demand no matter what the regulatory efforts to force exposure." And that really succinctly explains, I think, the problem I have with a lot of the policies being considered today.

Which is a sort of the "If you build it they will come" part of this. And, you know, I could have a lot of disagreements on First Amendment grounds or sort of expense grounds, like taxpayer money being used for these things. But my question is, will any of this work? Public media vouchers, increased postal subsidies, public media financing, any of the above?

How do we get people to "eat their greens," if you will? How do we even measure what the greens are with communities?

Corn-Revere: You've really put your feeling on the fundamental shift in the way we were looking at the media policy. It used to be the Holy Grail of media policy to create choice and abundant diversity. Now we find the problem is choice and abundance and diversity and all the viewers have gone elsewhere. They're not all reading their daily newspapers. They're not all watching the nightly newscast. They're watching YouTube and they're watching a monkey scrub a cat.⁴¹

Thierer: I love that one.

[laughter]

Corn-Revere: It is a great video.

Firestone: The audience for newspapers is larger than ever. It has combined newspaper and online. There is a great demand and our at least in The Knight Commission when there was... of course there was testimony, it wasn't scientific, but they found that there were great amounts of un-served needs particularly at the local level.

There were people who were craving for information in their community, but because of the mass market institutions of the larger institutions they were ignored, whether it was the local what they're now calling hyper-local but the very local neighborhood news.

⁴¹ Video available at www.youtube.com/watch?v=M6JB3riPJU8.

Thierer: So you're suggesting it's still a supply problem more than a demand problem? That's what I'm hearing.

Firestone: I think it's that there is plenty of demand, that there is unmet demand.

Thierer: OK, alright. I know Andy wants to jump in here at this point.

Firestone: And whether it's a supply or demand problem, I think it's sorting out. I think we've got problems at both ends frankly.

Thierer: OK, Andy, do you want to say something?

Schwartzman: Yeah, again, we're talking about a moving target here and the way things will look a few years from now as compared to now may be very different. But there's a very interesting and useful piece of work that Pew's Project for Excellence in Journalism did a couple months ago in tracking news stories in Baltimore.⁴²

And basically two television stations and the Baltimore Sun were tracked back as the source of virtually all of the local news that addressed stories in Baltimore's repurposing of the same information and the same stories from a handful of reporters that got mirrored and echoed and published and republished and was the topic of blogs. It was the topic of community bulletin boards and so forth. But the amount of original reporting that was being done—the amount of it was much less than had been in times in the past.

Indeed, go to any city hall. Go to the district building right next door to here and look at how many reporters are covering city hall today compared to just a few years ago. So there is a supply problem and there is indeed a great demand and the other point without getting too far into it and again, this goes to this core philosophical difference about the role of government that I think underlies a lot of this discussion. There is a difference between public wants and public needs.

Mark Fowler who was extremely effective in leading deregulation at the Federal Communications Commission famously said: "The public interest is what the public is interested in."⁴³ I don't agree. I think there are things that are necessary and important to put out there, even if more people want to watch Worldwide Wrestling Federation SmackDown. I think we need to create a function and the world government has a role in creating media literacy and helping create a demand for serious discussion of news and information as well.

Again to make the point that I started with, people who don't believe the government should have a role in addressing...obesity and don't think that...school lunches should be a major focus of public policy are not going to agree with me.

⁴² Pew's Project for Excellence in Journalism, *How News Happens: A Study of the News Ecosystem of One American City* (Jan. 11, 2010), www.journalism.org/sites/journalism.org/files/Baltimore%20Study_Jan2010_0.pdf.

⁴³ See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 207 (1982) (arguing that broadcast regulation policy should adhere to a deregulated marketplace approach).

Thierer: OK, we got that point. Anybody else on that point really quickly? Craig?

Parshall: There's a bifurcation, news and information. I'm just speculating but it seems to me that perhaps in terms of talking points, the word information is much more benign than news control. Information control is what we need for a republic to survive. News, well that's the province of journalism so we'll kind of give that up and steer clear.

But news and information is distinctly the province of editorial judgment of the media. For instance, I've heard that and I've read some of the statistics about underserved communities and local communities saying local needs are not being met in terms of news and information. What I'd like to know and maybe there's been a study on this but if there is I'm not aware of it.

Are we talking about people specifically being asked, are you getting the information you need to live your life locally in an effective way? Or do you feel that your viewpoint of whatever your demographic happens to be, your community interests, your viewpoint is underrepresented in the media that you have?

Has that question been asked? Because I suspect that a large number of those that are dissatisfied as an underserved community are really saying I don't see my viewpoint adequately contained in media as opposed to I can't find out how I vote or become a nationalized citizen or where the post office is located in terms of basic information.

Thierer: I think that's an interesting set of questions, Craig. I would add a third to that, which is: is there distinct demand for non-local, national, or international content that maybe has grown in recent times? It's an organic thing that maybe has resulted in a preference shift in the demand curve, if you will, away from local affairs and information.

Bob and I grew up in rural Illinois on farms. You know, when I was there in the '60s and '70s, I had all the local news I wanted. But I wanted national news. I was screaming to get away from the local stuff of what the farmers were telling me was happening in their local field. I think there's a demand shift problem. I think the person who probably did more to destroy localism in this country, and God bless him for doing it, was Ted Turner.

I'll never forget the epiphany when all of a sudden the Turner network was beamed into my little rural community. It was a whole different world, plus Braves baseball. It was awesome! All of a sudden I wasn't watching local...

Corn-Revere: I just remember craving to see a newscast that didn't have a farm report in it. [laughs] As a local beat reporter in a small town, a small community in Illinois, I remember that speaking of the "Golden Days," Andy, I would be driving to work as a reporter the next day and I'd hear the local radio reporter reading my report from the school board meeting from the previous night on the local radio station.

That was localism. But when you talk about this in media policy terms, I see this continuum where on one end of the continuum, the bad end of the continuum, you have every one watching Worldwide Wrestling SmackDown and Project Runway, and at the other end of the continuum...

Schwartzman: What's wrong with Project Runway?

[laughter]

Corn-Revere: You see you put your fingers exactly on the...

Parshall: I'm a Celebrity Apprentice fan, myself.

Corn-Revere: At the other end which I guess is the perfect media policy you have one channel and you strap people in with lid locks like in the "Clockwork Orange" so that they can only watch that one thing, that thing that is good for them. Now I'm not saying that that's what you're advocating, but what you're saying is that if public needs and public wants are not the same thing then somebody, a civil servant, which when defined means civil master, describes for you what you should be watching, what would be good for democracy.

Now, I might agree with you on what programming would fall in that category, but where we disagree is whether that is a matter of government policy.

Wimmer: I think Charlie really got it right in terms of The Knight Commission report. Readership is up. I was actually at a Silicon Valley conference last week where someone with a straight face said only two newspapers in the United States made a profit last year, absolutely wrong! Readership is up. Television journalism continues to be watched and trusted at an extraordinary high level. It's a monetization issue and that's the reason why a lot of the more grandiose ideas that are being floated around are fascinating to discuss.

But are going to take a lot longer than it's going to take the industry to figure out a lot of the monetization issues, but if you could step into a board room in a major media company and watched the efforts that are going on around figuring out things like effective advertising, targeting advertising, things that people really do want to pay for, will pay-walls work, will they not work? The monetization effort is really moving ahead and that I think is where it's going to be solved.

We don't really have a crisis of people not wanting information. They're reading what newspapers put out. People still want anyone to speak truth to power; it might be Jon Stewart instead of Walter Cronkite. But they're looking for someone to provide information. It's often cloaked in viewpoints, it's often cloaked in entertainment, but they really are looking for information.

One thing that the Gannett newspapers did when I was at Gannett is they started to look at all the new media things that they were doing, which was a lot and is a lot, and what consumers really wanted from the newspaper. And one of the top things that consumers wanted from the newspaper was investigative journalism. That was put up as a priority that really can't be taken away from it.

Are there fewer reporters? Certainly. Does anyone like that fact? No. But investigative journalism is still a huge goal that they have.

Thierer: There's a whole another debate we could have here. A lot of new media gurus say, "What is a journalist? What's investigative journalism? Is the raw data of democracy being delivered in new ways by new constituencies?" All of a sudden the audience is the producer as well as a consumer.

There is another angle to this in terms of are we getting enough information. I'm not sure I totally buy into that. I still believe there's a role for professionalism in journalism.

Wimmer: Oh, I agree.

Thierer: I went to journalism school for a reason; I want to pretend that it's still an important degree!

Wimmer: I actually think that at some point, after we've had the experience that other countries have had, where...just an anecdote. I was in Bulgaria. I was involved in something and I said, "Well, how did this play in the press?" And so they pulled out eight newspapers and said "Well, we've got to read all these and then we'll triangulate it and tell you." That is where we're going with blogs and opposing cable channels on different sides of an issue.

And I do think at some point in the not too distant future, the killer application is going to be mediated, professional edited journalism and people will come back and say "We really had something, and we need to really focus on that."

IX. Questions & Answers

Thierer: Do we have any questions? Sir?

Frank Keegan: My name is Frank Keegan I am a scarred newspaper reporter, newspaper editor. Anyway, how do you cut through the background? I mean a state rep. told me you can put any exposé you want on a blog, the phone doesn't ring, nobody emails, nobody calls.

When I edited a paper that had 73% of the households in a community, we were the reality. Now, it's almost impossible to push a story above some critical mass threshold to, get above...

Thierer: So this is the desegregation or atomization problem or fragmented media problem?

Wimmer: More fragmented media.

Thierer: Fragmented media problem.

Wimmer: It's true, it's a different place.

Frank: No matter how you fund it or how much demand there is or supply...

Thierer: So is that a problem, or is that a benefit? You know Cass Sunstein wrote about this eloquently, in *Republic.com* back in 2000 or 2001. He talked about the loss of the universal campfire. We no longer sit around and watch Milton Berle on "Texaco Star Theater"; 60% of

the audience isn't tuning in.⁴⁴ To which my response is in my book review was, isn't it just as well we've got something else to watch besides Milton Berle?

Wimmer: It is interesting that there are fewer of those sorts of fireside experiences, which is why the NFL, and the Olympics have become such incredible franchises—because they're the one thing that really aggregates audiences, in that way.

It's an excellent point. The media is just more fragmented, there's more of it. There are some places where there's less of it, and more demand. I think everyone has talked about hyper-local journalism. The one newspaper, we get a lot of newspapers in my home, the one that really gets read cover to cover is the "Northwest Current," because they're going to tell us what's going on in the neighborhood. In the same way that the list serve that we're on is doing.

It is a more fragmented time, and it does mean, I think, that when something is uncovered that needs to be addressed you need a larger platform for it. And it's more difficult to get the attention of decision makers now.

Firestone: But just on that point, more things are coming out because you do have people who are serving a journalistic function in the fact-finding. You have non-profits and you have individuals getting it out. The good ones like the example of Detroit, where a scandal can bubble up, now that didn't come from a blog, but it can bubble up and get out. But it needs to get out through social media, through various other media. Kind of has a snowballing effect, I guess.

Frank: Stochastic resonance, something...

Wimmer: Yeah... Stochastic resonance is really good, that's a great phrase of it. It just, gains.

Thierer: Do you have any other questions? Berin?

Berin Szoka, Senior Fellow, The Progress & Freedom Foundation: Berin Szoka, Progress & Freedom Foundation and Adam's partner in crime on these issues, and I've suffered for it.

[laughter]

I want to ask about something that Bob touched on, that I think maybe the rest of you have something to say about, and maybe hinted at, but didn't get at, which is the social conflict that comes from, either outright subsidizing the media, or somehow indirectly deciding who qualifies for a benefit.

The example that I want to offer you is far more subtle than the historical examples that Bob gave which that, two weeks ago, this great piece in *The Wall Street Journal*, about complaints by some about the nature of depictions of manhood, and what it means to be a man on *Sesame Street*.

⁴⁴ Cass R. Sunstein, *REPUBLIC.COM* (Princeton University Press 2002).

And it was a very subtle and very thoughtful piece that basically suggested that it was really quite remarkable that *Sesame Street* has no young male characters, it has basically very old men, and women. This in some ways is part of a certain moral view and certain sociological attitude towards the danger [posed by] young males.

Whatever you think of that, the point is that there are lots of people who actually when they read a piece like that and think about it, would actually probably find it either pretty offensive, or maybe pretty good. That's what *Sesame Street* is doing. But it's an example of the very sorts of subtle, content and viewpoint discrimination that are inherent in all media. How you depict anybody. Whether you have gay characters on your show or not. Whether you run something like *The Huxtables*. How you describe each of those characters. I mean it comes down to authorship.

So, when we're really talking about art, and about depictions that are either going to offend or thrill somebody, anybody, don't we get into a problem when we politicize that? We just create this new dimension for cultural wars to fight over, just as we fought over abortion. Andy, please, I'd love to hear what you think.

Schwartzman: This may not be completely responsive. But I would say two things. First of all, nobody said that all of this is easy and that there won't be problems. In a democratic society, it's always bumpy. You're never going to address all the problems. But my short answer is, right now the problem in the public media space is we have one public television station that provides this non-local thing called PBS.

I think we need to create a platform where both commercial and non-commercial entities provide multiple sources so that people can choose. I hate to sound like a capitalist, maybe this surprises you.

Corn-Revere: It's OK, Andy, it's alright.

[laughter]

Schwartzman: But I want to see lots and lots of different competing formats out there so people can say "Hey, you know *Sesame Street* is really kind of, something doesn't feel right about it. Let's watch this other thing." And we have precious little of that right now.

Corn-Revere: Andy, I don't think you have to worry about sounding like a capitalist when your solution is more PBS.

[laughter]

Schwartzman: I'm including commercial, I want more commercial media.

Corn-Revere: OK. Again, getting to the subtlety of the way in which subsidies work, it doesn't even have to be directed towards editorial choices. Once you have the pull of money, you have the effect.

Sometimes you have it in a direct way that's tied to content like the NEA grants that ultimately went to the Supreme Court in the *Finley* case where the Court upheld the idea that if you were getting a grant from the government that you had to take into account standards of decency and I guess the other term was public sensibility, something like that.⁴⁵

You also have it in more subtle ways. For example, in the mid-80s when the *Detroit Free Press* didn't want to jeopardize its joint operating agreement, and was found to have backed off its coverage of Attorney General Ed Meese.

Because, after all, the Justice Department was going to have something to say about whether or not it was able to continue with its joint operating agreement. You can find examples throughout our history where once you have the government in control of purse strings, you have an effect on content whether or not there's any express link to what the content is.

Look at Huey Long's attack on newspapers struck down in the *Grosjean* case where he put a tax on big city newspapers but not small town newspapers.⁴⁶ Now he described it in his campaigns as a tax on lying because, after all, the big city newspapers editorialized against him. The small town newspapers were just fine with the Kingfisher.

Same with FDR when the newspapers were against the New Deal and he started reminding them that they got postal subsidies, and that they might have to clean their own houses. Now that little fact is contained without irony in the McChesney book,⁴⁷ and yet the solution we find is to have more public funding. I just find...

Firestone: Bob, Bob...

Thierer: Charlie wants to jump in here.

Firestone: You can find examples of news cowardice throughout, whether it's against government or against local business. The *Atlanta Constitution Journal* fired Bill Kovach because he was challenging downtown businesses. You know, it's not just fear of government, its fear of commercials. There are all kinds of examples.

You can't just throw out an example here and there and say well, therefore there's this pernicious government censorship going on. There's censorship of some editors, or some publishers, because they're trying to maximize their money. And there are some who are brave and some who are cowards.

But I don't quite understand the question. When you said "politicizing," who's politicizing the *Sesame Street* thing? I mean there are critiques and there's...

⁴⁵ Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

⁴⁶ Grosjean v. Am. Press Co., 297 U.S. 233 (1936).

⁴⁷ McChesney & Nichols, *supra* note 35.

Thierer: I think he was referring to the fact that if it was...

Firestone: If it were criticized...

Thierer: If there was more subsidies along those lines and we had those...

Firestone: But where are the examples? We've had a system where we have resisted. All those examples that you gave in terms of public broadcasting were basically resisted. The Nixon attempts at *The Washington Post* and on the one hand the commercial, or at cutting off public broadcasting, it was an aberration, it's horrible, we need to protect against it. But by and large the course was righted.

Thierer: I think the concern there though is that as the overall scope of potential public subsidization increases or involvement increases that the threat then increases in proportion to that potentially. I'm not saying absolutely. I know there's been resistance, strong resistance, by CPB and NPR and others.

Firestone: So let me give another example. The religious broadcasters, there are commercial religious broadcasters and there are non-commercial religious broadcasters. You could say that that's a subsidy. Are they changing what they say from the non-commercial versus the commercial or is there...

Parshall: This word "subsidy" I think has to be defined as an example. I think there are direct subsidies, Corporation for Public Broadcasting; there are indirect forms of subsidy like postal discounts and so forth. And let me address that for a minute. There is a way to look at that as deregulation.

At the founding, the government controlled the mail system, and newspapers were distributed through that platform. So government controlled the platform and said, "We're going to give you a pass on one aspect of that." That could be deemed not a subsidy but deregulation to keep hands off the press.

But I want to go back a minute to something that Bob said about the subtleties. When I was in college I worked as a part-time newspaper reporter for the local newspaper. And one of the things I learned very quickly is that while there are sins of omission that occur in newspapers and media, the greatest sins are the sins of omission, the stuff that lays on the editor's floor that the public never sees.

There is no way to empirically prove the causal relationship between subsidies and the sins of omission. And yet I believe that common sense tells us it probably occurs. So that common sense formula tells me that subsidies are not a good idea, and super subsidies would a very, very bad idea.

Thierer: We're running a little bit short on time here. I want to give everybody a chance, if they want, to have one final word. But I'd like the word to be this which is, what is it that you would like, whether it be the FCC, the FTC, members of Congress, whatever, to take away from this question about what they can, should or maybe should not be doing to really assist media, the press, the future of journalism, deliberative democracy, whatever else?

Just very brief, I don't want a laundry list. Maybe let's start on the opposite end and come down to Charlie. Bob, why don't you kick us off on that? Is there one thing you can think of? And I'm not saying proactive. It could be getting something out of the way as well.

Corn-Revere: No, and I'll just repeat things that I've covered but summarize them into two points. One is, recognition that the time for treating different media differently under the First Amendment is passed, and that there should be a simple and straightforward declaration from government that electronic press deserves the same First Amendment protection as the traditional printed press.

And then secondly, to look for ways to eliminate government policies that have impeded the ability for these media businesses to thrive and compete.

Thierer: Andy?

Schwartzman: Well, I'd like the FCC, FTC, whomever, to be bold. And the second thing I would say is simply this: avoid the inclination to find a solution because I doubt that there is a solution. I think there are multiple solutions and we need to try a lot of things. I'd like to see a lot of ideas, and a lot of experiments and a lot of incubation.

Thierer: Good. Craig?

Parshall: Don't federalize in terms of additional regulations. Don't subsidize in terms of taxpayer money. Fertilize the media landscape. And by that, I've given some examples in some of my talks in terms of non-commercial radio and television as an example. Right now the FCC prohibits non-coms from raising monies for legitimate 501(c)(3) organizations except in times of international or national crisis. Otherwise, they deny every request for a waiver. That simply doesn't make any sense.

So, we're advocating a rule change in that because I think the synergy between non-profit 501(c)(3)s and non-commercial radio doesn't cost the taxpayers any money, and it really is the spirit of volunteerism that I think can solve some social problems.

The other change that we think practically speaking is we need to liberalize the rules and sponsorship for non-coms—that would be television and radio. We need to liberalize the rules in terms of sponsorship and underwriting. The rules don't make any sense. And I think it prevents the economic growth of non-coms who I believe have a great public interest to serve but right now they're having economic woes.

Thierer: Kurt?

Wimmer: I agree with Andy. I hope the FTC and the FCC are bold. I think the best things that could happen are for rules to change so that we can have sufficient scale to provide the journalism that we really need to provide. Artificial limitations on, in many ways, ownership that go back to the 1970s don't make any sense now as we try to compete with behemoths like Google. So that would be at the top of my wish list.

I also think we need to continue to have the spectrum that we're operating on now so that we can extend into new platforms like mobile DTV. And I think that uncertainty around our ability to keep our spectrum is going to limit the future of journalism and we have to be careful.

Thierer: OK. Charlie, close it out.

Firestone: Just one point on Robert Corn-Revere's point which is if you were to treat them absolutely equal, then you would not have licensing of stations because you do have government coming in to protect stations.

My magic bullet would be not to score spectrum auctions. If Congress did not score, meaning put them into the budget 10 years in advance—then the next step would be—use the proceeds of spectrum auctions for resolving some of these issues, particularly the public media.

And secondly I would increase the amount given to public service media broadly writ. And I would give money not just through Corporation for Public Broadcasting grants that are formulized, but I would probably give money to local community institutions so that they could give out money at the local level.

Thierer: Good, good. Well thank you, gentlemen. There will be a transcript and a tape of this event up shortly. And I want to mention that our next major event is this coming Monday the 24th on the "Nuts & Bolts of Online Privacy, Advertising, Notice & Choice" and that will be in the Rayburn House Office Building, room 2123. Again, at noon, this coming Monday.

Won't you please all join me in thanking these folks for a wonderful discussion here today?

X. Speaker Biographies



Professor Ellen Goodman specializes in information policy law at Rutgers School of Law, Camden. She is also a Distinguished Visiting Scholar for the Federal Communications Commission's (FCC) Future of Media team. Her research interests include media policy, spectrum policy, the use of information as a policy tool, advertising law, and the informational aspects of sustainability policy. She is an animal law expert and pioneered the teaching of animal law at the law school. Professor Goodman has served as an expert before the National Academies of Science and Technology, the Brookings Institution, the Aspen Institute and the FCC, and as an advisor to the Obama-Biden transition team on technology and media issues. She is currently a Ford Foundation grantee, working on a project developing new policy principles for public media in a networked age. She is also a Research Fellow at American University's Center for Social Media, is a Visiting Scholar at the University of Pennsylvania's Annenberg School of Communications, and is involved with Penn's Initiative for Global Environmental Leadership on green marketing issues. Prior to joining the Rutgers faculty in 2003, Professor Goodman was a partner in the Washington, D.C. law firm of Covington & Burling LLP. Professor Goodman clerked for Judge Norma L. Shapiro on the U.S. Federal District Court for the Eastern District of Pennsylvania. From 2005 to 2006, she was a Fellow at the Rutgers University Center for Cultural Analysis; in 2006, a visiting associate

professor at the University of Pennsylvania School of Law; and in 2007, a visiting scholar at the University of Pennsylvania's Wharton School of Business. She lives outside of Philadelphia with her husband and three children, and enjoys running, swimming, biking, and the odd reality show.

Charles M. Firestone is executive director of the Aspen Institute Communications and Society Program. Since his appointment in December 1989, this Program has focused on the implications of communications and information technologies for leadership, the impact of new technologies on democratic and social institutions, and the development of new communications policy models and options for the public interest. He was also the Institute's executive vice president for policy programs and international activities from 1997-2000. Prior to his positions with the Aspen Institute, Firestone was director of the Communications Law Program at the University of California at Los Angeles and an adjunct professor of law at the UCLA Law School. He was also the first president of the Los Angeles Board of Telecommunications Commissioners, which advises the Mayor and City Council on all regulatory matters relating to the cable and telecommunications fields. Firestone's career includes positions as an attorney at the Federal Communications Commission, as director of litigation for a Washington D.C. public interest law firm, and as a communications and entertainment attorney in Los Angeles. He has argued several landmark communications cases before the United States Supreme Court and other federal appellate courts. Mr. Firestone is the editor or co-author of seven books, including *Digital Broadcasting and the Public Interest* (The Aspen Institute, 1998) and *Television and Elections* (The Aspen Institute, 1992), and has written numerous articles on communications law and policy. He holds degrees from Amherst College and Duke University Law School and resides with his wife, sculptor Pattie Porter Firestone, in Chevy Chase, Maryland.



Kurt Wimmer is a partner at Covington & Burling LLP, concentrating in media law and intellectual property. Wimmer's practice focuses on representing companies in the digital media, television, mobile, publication, and new technology sectors. His work includes intellectual property protection and strategy, content liability and newsgathering advice and litigation, television and digital content licensing transactions, privacy and data protection, international law, and public policy representation of companies and associations before Congress, the Federal Communications Commission, and international governmental entities. From 2006 to 2009, he was Senior Vice President and General Counsel of Gannett Co., Inc., and he was Managing Partner of Covington's London office from 2000-2003. Wimmer's clients have included Microsoft, Yahoo!, The Washington Post Company, Newsweek, National Geographic, and Gannett Co., Inc. He also has advised journalists, associations, and legislators in more than two dozen countries concerning new media laws, protection of journalists, and freedom of information. He is on the boards of the Media Law Resource Center, The Media Institute, the ABA Forum on Communications Law, and the Citizens Media Law Project of the Berkman Center at Harvard University.

Andrew Jay Schwartzman is Senior Vice President and Policy Director and has directed Media Access Project (MAP) since June 1978. He is recognized as one of the leading media attorneys and has appeared on behalf of MAP before the Congress, the FCC and the courts on issues such as cable TV regulation, minority and female ownership and employment in the mass media, “equal time” laws and cable “open access.” In recognition of his service as chief counsel in the public interest community’s challenge to the FCC’s June 2003 media ownership deregulation decision, *The Scientific American* honored Mr. Schwartzman as one of the nation’s 50 leaders in technology for 2004. Mr. Schwartzman is also the 1994 recipient of the United Church of Christ Office of Communication’s Everett C. Parker Award and the 2004 recipient of the Media Matters Life Achievement Award. Mr. Schwartzman is a faculty member of the Johns Hopkins University School of Arts and Sciences, where he teaches in its Communication in Contemporary Society Program. He serves on the International Advisory Board of Southwestern Law School’s National Entertainment & Media Law Institute and was the Distinguished Lecturer in Residence at the Institute’s Summer 2004 program at Fitzwilliam College, Cambridge University. His board memberships include the Advisory Board of the Center for Democracy and Technology, and the Board of Directors of the Minority Media Telecommunications Council. He was co-founder and President of the Board of the Safe Energy Communications Counsel from 1991 through 2003. After graduating from the University of Pennsylvania in 1968, and its law school in 1971, Schwartzman was staff counsel to the Office of Communication of the United Church of Christ. From 1974 until he took his current position, Schwartzman worked for the U.S. Department of Energy and predecessor agencies. He is married to Linda Lazarus, an attorney/mediator practicing in Washington, D.C.



Craig Parshall is the Senior Vice President and General Counsel for National Religious Broadcasters (NRB). As Senior Vice President, Craig oversees the communications and media efforts of NRB. As General Counsel, Craig heads the Office of General Counsel, and handles both the internal legal issues for NRB, as well as external legal and constitutional issues that implicate NRB’s mission to maximize freedoms for Christian broadcasters. Prior to coming to NRB, Mr. Parshall’s law practice emphasized on constitutional rights and civil liberties. He has been licensed to practice law in, and has represented clients before the U.S. Supreme Court, and the federal District Courts and federal Courts of Appeal in Washington, D.C., Chicago, New York, Philadelphia, Milwaukee, Denver, Dallas, New Orleans and Richmond, and has argued cases before the state supreme courts of Wisconsin and North Carolina, and before the highest court in Maryland, the Court of Appeals. Mr. Parshall has assisted leaders on Capitol Hill in drafting legislative language protecting religious liberties, and he has testified before Congress on constitutional issues. Craig has appeared on numerous national media outlets, including NBC’s Today Show, CNN, CBS radio, C-Span, PBS, NPR and Court TV. His cases have been profiled in the *New York Times*, the *Washington Post*, the *Washington Times*, the *Boston Globe*, the *National Law Journal*, the *Chicago Tribune*, the *Milwaukee Journal*, the *L.A. Times*, and the *Des Moines Register*, among others. As a writer, Mr. Parshall has authored seven legal suspense novels. Recently his legal thrillers have been translated into Dutch.

Bob Corn-Revere is a partner at Davis Wright Tremaine, LLP. He has extensive experience in First Amendment law and communications, media and information technology law. Corn-Revere regularly counsels clients and serves as litigation counsel in communications and Internet-related matters. He also speaks and writes extensively on First Amendment and communications policy issues. His career includes his positions as Chief Counsel to Chairman James H. Quello, Federal Communications Commission. Corn-Revere's clients include: A&E Television Networks, American Association of Advertising Agencies, Association of National Advertisers, American Advertising Federation, CBS Corp., ICM Registry, Motion Picture Association of America, National Association of Broadcasters, Playboy Enterprises and Viacom. In 2009, Corn-Revere was named as one of "Washington's Top Lawyers" in First Amendment law and Communications law by *Washingtonian Magazine*. And, he was selected to "Washington, D.C. Super Lawyers," Top in First Amendment/Media/Advertising, Law & Politics, 2008-2010. He holds a J.D., from The Catholic University of America, Columbus School of Law, an M.A. from the University of Massachusetts, and a B.A., from Eastern Illinois University.



Adam Thierer is President of The Progress & Freedom Foundation (PFF) and the Director of PFF's Center for Digital Media Freedom (CDMF). As Director of the CDMF, Thierer analyzes public policy developments that impact the economic and social aspects of the media industry, including related First Amendment issues. Prior to joining PFF in 2005, Adam was Director of Telecommunications Studies at the Cato Institute and a Fellow in Economic Policy at The Heritage Foundation. His work on communications, high-technology, and media policy has been featured in *The Wall Street Journal*, *The Washington Post*, *The New York Times*, *USA Today*, *Forbes*, *The Economist*, *Newsweek*, and others. He also writes regularly for The Technology Liberation Front blog. Adam is the author or editor of seven books on media regulation and child safety issues, mass media regulation, Internet governance, intellectual property, regulation of network industries, and the role of federalism within high-technology markets. Adam has served as a member of Harvard Law School's Internet Safety Technical Task Force, a "Blue Ribbon Working Group" on child safety organized by Common Sense Media, the iKeepSafe Coalition, and the National Cable & Telecommunications Association, and he is also an advisor to the American Legislative Exchange Council's Telecom & IT Task Force. He also serves on the National Telecommunications and Information Administration's Online Safety and Technology Working Group. In 2008, he received the Family Online Safety Institute's "Award for Outstanding Achievement." Adam earned his B.A. in journalism and political science at Indiana University, and received his M.A. in international business management and trade theory at the University of Maryland.



Related PFF Publications

- *A Media Welfare State?*, by Adam Thierer, Progress Snapshot 6.12, July 13, 2010.
- *Comments submitted to the Federal Communications Commission's Examination of the Future of Media and Information Needs of Communities In a Digital Age*, Adam Thierer, Berin Szoka, and W. Kenneth Ferree, May 5, 2010.
- *The Wrong Way to Reinvent Media, Part 5: Media Bailouts & Welfare for Journalists*, Adam Thierer, Berin Szoka & Ken Ferree, PFF Progress on Point 17.7, April 2010.
- *The Wrong Way to Reinvent Media, Part 4: Expanding Postal Subsidies*, Adam Thierer & Berin Szoka, PFF Progress on Point 17.5, April 2010.
- *The Wrong Way to Reinvent Media, Part 3: Media Vouchers*, Adam Thierer & Berin Szoka, PFF Progress on Point 17.4, April 2010.
- *The Wrong Way to Reinvent Media, Part 2: Broadcast Spectrum Taxes to Subsidize Public Media*, Adam Thierer, PFF Progress on Point 17.2, April 2010.
- *The Wrong Way to Reinvent Media, Part 1: Taxes on Consumer Electronics, Mobile Phones & Broadband*, Adam Thierer & Berin Szoka, PFF Progress on Point 17.1, March 2010.
- *Testimony at FCC's Hearing on "Serving the Public Interest in the Digital Era,"* Adam Thierer, March 2010.
- *Chairman Leibowitz's Disconnect on Privacy Regulation & the Future of News*, Adam Thierer & Berin Szoka, Progress Snapshot 6.1, Jan. 13, 2010.
- *Socializing Media in Order to Save It*, Adam Thierer, City Journal, March 2009.
- *A Manifesto for Media Freedom*, Adam Thierer & Brian Anderson, 2008.
- *Media Ownership Proceedings*, W. Kenneth Ferree, Testimony before the Federal Communications Commission, Nov. 3, 2009.
- *Media Myths: Making Sense of the Debate over Media Ownership*, Adam Thierer, June 2005.

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