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Panel I: The Changing Landscape of Jurisprudence in Light of the New Communications and Media Alliances

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Panel I: The Changing Landscape of Jurisprudence in Light of the New Communications and Media Alliances

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MR. GOODALE: It is a great pleasure to be back at Fordham University to moderate one of these panels. There is nothing more important than understanding the information and telecommunications revolution. I am honored to have been a member of the Fordham University School of Law faculty over this last decade when the revolution has really been taking off, and I am indebted to Fordham for giving me the opportunity to teach some of the law as it is developing in this fast-moving field. And here we are today, right on the moment when President Clinton apparently is going to sign perhaps one of the great pieces of legislation of this century and certainly of this decade—the Telecommunications Act of 1996 (the "1996 Act").[1] Nothing could be more timely than this

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. § 56 (to be

Symposium, and I think it is thus a very exciting event.

Before I tell you how we are going to proceed, I want to introduce the panelists. Robert Joffe, a partner at Cravath, Swaine & Moore, is our principal speaker today. He has been heavily involved in communication industry mergers acquisitions and the litigation that has followed and has led the charge attacking the constitutionality of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] a real expert in our midst. Nicholas Jollymore is my colleague at Fordham University School of Law and the Deputy General Counsel of Time Magazine, Inc. He has taught a course on the media at Fordham for many years and is a well-known expert in the field. Creighton Condon is a partner at Shearman & Sterling and is a member of the Mergers and Acquisitions group. Shearman & Sterling has been very active in the media mergers and acquisitions game, particularly by representing Viacom International, Inc. John Tyler is senior trial counsel for the Department of Justice ("DOJ"). He is a government warrior in the media mergers and acquisitions wars. He and Mr. Joffe have been up against each other many times, and today we will see them dueling again.

The issue today is "The Changing Landscape of Jurisprudence in Light of the New Communications and Media Alliances." The way we have decided to organize this is to make Bob Joffe the principal speaker. He is going to address the issue of whether, in fact, we have a changing landscape of jurisprudence or not.

We are going to refer to two articles in this panel: one is by Robert Pitofsky, former Professor at the Georgetown University Law Center and current Federal Trade Commission ("FTC") Chairman, in which he argues that the antitrust laws might have something else to consider in terms of values other than merely the

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codified in scattered sections of 47 U.S.C.) [hereinafter the "1996 Act"]. The 1996 Act was signed by President Clinton on February 8, 1996. *See* Peter H. Lewis, *Protest, Cyberspace-Style, for New Law*, N.Y. TIMES, Feb. 10, 1996, at A16.

2. *See, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994), *reh'g denied*, 115 S. Ct. 30 (1991); Time Warner Entertainment Co. v. FCC, 56 F.3d 151 (1995).

economics of the free marketplace,[3] and the other is a speech given in December by Sumner Redstone, the Chairman and CEO of Viacom, in which he adopts Mr. Pitofsky's reasoning that First Amendment values should apply to acquisitions.[4]

After we hear from Mr. Joffe, we are all going to respond. We all have particular positions that relate to the clients that we are connected with. Mr. Jollymore, fortunately, is at *Time* magazine, so he can supposedly and hopefully back up Mr. Joffe. On the other side we might say we have the Viacom side, because Mr. Condon has represented Viacom and Mr. Tyler represents the public interest. We will hear more from them in a moment, but now let us hear Bob Joffe.

MR. JOFFE: Thank you, Jim. The last time I presented a paper somewhat like this, the moderator told me in advance that it is usually a good idea to start with a joke. When I looked a little blank, he then said to me, "Bob, if you tell a good joke nobody will care what else you say." Even with that tempting possibility, I could not come up then, and cannot come up now, with any good jokes. Instead I will talk about something that is clear, unambiguous and subject to rational analysis—the United States antitrust laws.

My topic today is media mergers in the marketplace of ideas and the application of antitrust analysis. Today's marketplace of ideas is a high-technology information superhighway, on which an explosion of new services provides people with access to information, entertainment and ideas.

This explosion is part of a technological revolution which, it has been said, rivals the printing press revolution of the 15th century in its impact on our future development. It is not a highway controlled by particular toll takers, nor is it a highway capable of being owned in any conventional sense.

The diversity of sources and views that have come into being

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3. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

4. Sumner M. Redstone, *Mergermania*, Lecture at Harvard Law School (Dec. 4, 1995).

has occurred by allowing competition to proceed within traditional antitrust constraints. However, special restrictions on the normal competitive market processes, which are designed to protect the so-called market for ideas, could have just the opposite effect.

First, and very briefly, I wish to outline the general antitrust concerns in corporate mergers. Second, I wish to address a line of thinking which quite radically disrupts conventional approaches to the application of antitrust law, and suggest why this line of thinking is fundamentally flawed. Third, I would like to make a few comments regarding what I believe to be the appropriate application of contemporary antitrust law to media mergers.

Turning first to general concerns, Section 7 of the Clayton Act forbids an acquisition if it may substantially lessen competition in the relevant market.[5] The first step in any antitrust analysis of a merger is to determine the nature and scope of the relevant markets.[6] The next step is to evaluate the impact of the acquisition on competition in these markets.[7]

So-called horizontal mergers involve firms within the same product and geographic market. When two firms that compete in the same horizontal market merge, there is necessarily a resulting increase in market concentration. The lawfulness of an acquisition turns on the purchaser's potential for creating, enhancing or facilitating the exercise of market power.[8] Market shares and market concentration are generally taken to be the most visible indicators of market power, as well as the ability to collude. However, courts will also look to other factors in order to rebut inferences for market share. In particular, the courts examine ease of entry, concen-

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5. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (current version at 15 U.S.C. § 18 (1994)).

6. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962) (quoting United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957) (discussing vertical mergers)); *see also id.* at 335 (discussing horizontal mergers).

7. *Id.* at 328, 339 (addressing, respectively, vertical and horizontal mergers). *See generally* Richard G. Price, *Market Power and Monopoly Power in Antitrust Analysis*, 75 CORNELL L. REV. 190 (1989).

8. *See Brown Shoe*, 370 U.S. at 332; United States v. Archer-Daniels Midland Co., 866 F.2d 242, 246 (8th Cir. 1988), *cert. denied*, 493 U.S. 809 (1989).

tration ratios, factors affecting the likelihood that the firm can enforce collective understandings, and any procompetitive effects or efficiencies of the merger.[9]

Next, let me turn to the issue of vertical mergers, which has been much more controversial. Vertical mergers essentially involve the joining of firms which have or could have supplier-customer relationships.[10] Foreclosing competitors from a segment of the market otherwise open to them may clog competition. This is a concern that has been raised since the 1962 Supreme Court decision in *Brown Shoe Co. v. United States*.[11]

The theory that vertical mergers are anticompetitive has been seriously questioned despite the revived interest in vertical analysis.[12] It is worth noting that how one analyzes the antitrust implications of vertical mergers is the subject of scholarly debate. There has been an acknowledgement that vertical mergers often involve efficiency benefits.[13] Indeed, the recently appointed chairman of the FTC, Professor Robert Pitofsky, has written, "[i]t is difficult to identify rules defining the legality of vertical mergers because the

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9. *See* United States v. FCC, 652 F.2d 72, 106 (D.C. Cir. 1980) ("Freedom of entry is the single most important guarantor of competition in a concentrated industry."); Oahu Gas Serv. v. Pacific Resources Inc., 838 F.2d 360, 366 (9th Cir.) (high market share does not imply monopoly power "in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors"), *cert. denied*, 488 U.S. 870 (1988). It should be noted that for an entity to be a monopolist it must have control over prices and entry into the market. *See* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1956). Control over prices will not be effective over any substantial period unless entry can also be blockaded. *Id.*

10. *See Brown Shoe*, 370 U.S. at 323; *see also* for a general discussion of vertical merger issues: Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, 1988 QUARTERLY J. OF ECON. 345; Barbara A. White, *Black and White Thinking in the Gray Areas of Antitrust: The Dismantling of Vertical Restraints Regulation*, 60 GEO. WASH L. REV. 1 (1991); Michael W. Klass & Michael A. Salinger, *Do New Theories of Vertical Foreclosure Provide Sound Guidance for Consent Agreements in Vertical Merger Cases?* ANTITRUST BULL. 667 (Fall 1995).

11. 370 U.S. 294 (1962).

12. *See* U.S. Dep't of Justice & Fed. Trade Comm'n., Horizontal Merger Guidelines § 0 (1992) [hereinafter "1992 Merger Guidelines"], *reprinted in* 57 Fed. Reg. 41,552 (1992).

13. *See* Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffer and Vita Comment*, 63 ANTITRUST L. J. 943, 944 (1995).

anti-competitive effects of vertical mergers are more uncertain while their efficiencies are more frequent."[14]

There have been two principal schools of thought that have governed antitrust jurisprudence. The first, which might be called the Multivalued Approach, was substantially endorsed by the Warren Court.[15] The Multivalued Approach views Section 7 of the Clayton Act[16] as a mechanism both for preserving the type of economic structure and for safeguarding the social and political values by looking toward a broader meaning of the term "competition." This may have concerned Congress in the Clayton Act's passage.

Under the second approach, inspired by the Chicago School, mergers are judged primarily, if not exclusively, by their economic effect. This defines competition solely in an economic context and disregards noncompetitive concerns.[17]

I do not intend today to try to resolve the respective merits of these approaches, and it is safe to conclude that for the foreseeable future, both views will have roles to play. I do, however, wish to indicate that even under the broader Multivalued Approach, antitrust laws should not be the tool used to address political concerns about the role of the media, or, as the chairman of Viacom has recently suggested,[18] become a tool of the First Amendment. These suggestions are wrong not only as a matter of theory, but also as a matter of practical application. Perhaps it is for these reasons that they are not supported by either case law or scholarly analysis. It is true that a Chicago School approach considerably narrows the range of antitrust enforcement.[19] However, neither the Multivalued nor the Chicago School approach seeks to give antitrust enforce-

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14. Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 201 (1992).

15. *Cf.* Lawrence A. Sullivan, *Antitrust, Microeconomics and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 4 (1980).

16. 15 U.S.C. § 18.

17. This approach received support in Continental Television, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977).

18. *See* Redstone, *supra* note 4.

19. Contrast the broader concerns also referred to in Steven Axinn, Panel Discussion, *Merger Enforcement and Practice*, 50 ANTITRUST L. J. 233, 237-38 (1982).

ment an independent political mission to oppose corporate mergers in order to construct a particular political environment.

In much lay theorizing about antitrust law, there is a pervasive myth that antitrust is primarily concerned with keeping firms small. In fact, the core question for the courts and the relevant agencies is a prediction of the merger's effect on competition.[20] Competition, fortunately for the sake of efficiency and innovation, does not require smallness. In his influential article in 1979, Professor Pitofsky stressed that smallness was itself a mythic virtue.[21]

Today the media business is not a small cottage industry, and even a start-up company rarely begins in a garage. This is not a reality from which we should retreat. Chairman Pitofsky noted in his recent Senate confirmation hearings that we should acknowledge the reality of the new business environment of modern industry.[22]

So now we turn to the question of whether there is a role for the First Amendment in antitrust analysis. The suggestion has been made by Sumner Redstone that media mergers will restrict the scope of democracy. It is this political concern that triggers the involvement of the First Amendment.

When addressing free speech concerns, we must not think only of old-style analogies of the desirability of a speaker on every street corner; rather we need also to think in terms of the desirability of a World Wide Web site for every speaker, and fast, effective, and efficient ways to draw on global information and to communicate interactively. E-mail, fiber optics, cable television, satellite, microwave transmitters, and the digital revolution create a new cultural space—a cyberspace. We must adjust our thinking if we are to protect the competitive process in some way beyond

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20. *See, e.g.*, FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967). The consistent motivation for antitrust law and its interpretation and enforcement by the courts is to preserve robust competition. *See* United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972) (describing antitrust law as the "Magna Carta of free enterprise").

21. Pitofsky, *supra* note 3, at 1051, 1058-59.

22. *Nomination of Robert Pitofsky: Hearings before the Senate Comm. on Commerce, Science and Transportation*, 104th Cong., 1st Sess. (1995) (statement of Robert Pitofsky).

Luddite-like reactions to the business which makes this technology widely available.[23]

Let me turn specifically to the suggestions that antitrust principles invoke the First Amendment to apply special scrutiny to vertical and horizontal media concentration. First, the very suggestion is grounded on a fundamental point of confusion. The First Amendment is a restraint on the government's powers to restrict speech—its terms proclaim that "Congress shall make no law abridging the freedom of speech."[24] The words of the Free Speech Clause do not mandate a positive government program of action. They are meant to be, and have always been construed to be, a restraint on governmental—not private—action.

In a recent speech, the chairman of Viacom, Sumner Redstone, argued that antitrust laws must prevent media companies from undermining the rights of speakers to reach an audience, and the rights of listeners to hear them. It seems that Viacom's own mergers with Paramount and Blockbuster and the sale of its cable systems to TCI-related companies[25] presented no such concerns. However, in surveying the activities of its competitors, Mr. Redstone thinks there may be other dangerous increases in concentration which the FTC should devote itself to in the name of free speech.[26]

The arguments the Viacom chairman based his case upon seem to be wide of the mark. He enthusiastically referred to the new FTC chairman's article of the late 1970s, when Professor Pitofsky made the case for a political dimension to antitrust.[27] As I indicated, neither of the two approaches to antitrust provide support for Redstone's position. Chairman Pitofsky has made this explicit by recently saying that the traditional antitrust principles guide the analysis of mergers in any industry.[28] Professor Pitofsky's 1979

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23. *See* Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L. J. 1619 (1995).

24. U.S. CONST. amend. I.

25. TCI refers to Tele-Communications, Inc.

26. *See* Redstone, *supra* note 4.

27. *See generally* Pitofsky, *supra* note 3.

28. *See* Kirk Victor, *Merger Man*, NATIONAL J., Jan. 20 1996, at 121 (quoting Robert

article was a reply to the growing dominance of the strict economic approach in the late 1970s. It was an attempt to refocus the debate with a multilayer of concerns. It did not aim to radically usurp the debate and lay it on an altogether different foundation.

Let us turn to Professor Pitofsky's argument. His thesis advanced that there was a political content in interpreting antitrust laws stemming from the broad political concerns motivating passage of the Sherman and Clayton Acts.[29] The concerns were that an excessive concentration of economic power would produce antidemocratic pressures, reduce individual freedom, and incline governments to direct intervention in the marketplace.

Professor Pitofsky was at pains to point out that his approach was not diametrically at odds with the Chicago School views, but sought to supplement them. Professor Pitofsky's objection was to an exclusively microeconomic analysis of antitrust.[30] He is clear that non-economic concerns should not be dispositive, but merely that there may be circumstances where they might properly be taken into account. Political considerations, he said, may come into play in extreme situations where market domination of a firm approaches being total: where there is a danger that firms will become the sole voice in the marketplace, or worse, extra-governmental.[31]

These are not the normal circumstances of a merger. Certainly no one—critics and proponents alike—suggest that the current media mergers raise such concerns. The sort of language quoted in the Congressional debate on the Sherman and Clayton Acts and the Cellar-Kefauver anti-merger amendment,[32] regarding the fears of nationalization and totalitarianism,[33] is not and need not be the concern of antitrust authorities today. As Professor Pitofsky wrote, "that kind of language is not helpful in deciding whether a merger

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Pitofsky).

29. Pitofsky, *supra* note 3, at 1057, 1060-64.

30. *Id.* at 1052.

31. *Id.* at 1056.

32. *Id.* at 1056 n.17 (discussing legislative history of Sherman Act).

33. *Id.* at 1061-65.

between two companies of given size in specific markets is legal."[34]

The political role of antitrust law cannot be the result of some far-off and speculative concerns. Competitive realities certainly must be taken into account, such as the explosive growth of the information superhighway. Although antitrust laws are designed to prevent anti-competitive concentration, the acquisition itself must be the proximate cause of the injury or threatened injury.[35]

There are very good reasons why this should be the case. First, using antitrust law as a political tool would be an inefficient way to address social concerns, particularly those involving fundamental questions involving the number and nature of speakers.[36]

Second, such an ideological approach would contain its own political dangers. Deciding at what point concentration leads to anti-competitive effects is always uncertain. The role of the merger guidelines and how they guide the DOJ, the FTC, and court interpretations is complex and unsure, even where it only involves legal and economic theory.[37] Political and ethereal concepts like the marketplace of ideas would pose further problems. It bears frequent repetition that intervention to favor a certain outcome in the marketplace of ideas is plainly beyond the scope of the First Amendment and beyond the reviewing function of our antitrust agencies.

Third, one must ask how a political antitrust analysis of concentration could apply to the so-called marketplace of ideas. The suggestion has been made by Redstone that antitrust laws can keep the marketplace of ideas competitive. The marketplace of ideas

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34. *Id.* at 1064.

35. McKeon Construction v. McClatchy Newspapers, 1969 WL 226, at *4 (N.D. Cal. Nov. 24, 1969).

36. *Cf.* Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1195-96 (1977).

37. *See generally* Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1153 n.6 (W.D. Ark. 1995) (discussing court's acceptance and use of the Department of Justice Merger Guidelines in antitrust analysis); Steven A. Newborn & Virginia L. Snider, *The Growing Judicial Acceptance of the Merger Guidelines*, 60 ANTITRUST L.J. 849 (1992) (evaluating the pros and cons of the courts' use of the Department of Justice Merger Guidelines).

encompasses the expression of all thoughts, images, and messages with which people communicate with one another. It is not restricted to particular institutions or settings, or to particular forms of communication. Its breadth and depth are enormous.

There is a pervasive misunderstanding about the marketplace of ideas, which treats ideas as if they were fungible products, and people who come to believe ideas as if they were traders who merely buy and sell their beliefs. The inaptness of this view is revealed when one considers how the efficiency of such a marketplace might come to be judged. Good or important ideas do not have prices whose worth is subject to supply and demand. A good idea does not have a higher price than a bad one. This is why in the jurisprudence of the First Amendment, the term "marketplace of ideas" is used, not to denote the actual workings of a market, but is a descriptive analogy for the free flow of ideas.[38]

The question is whether antitrust laws should be used to regulate this free flow of ideas. The suggestion that they should is novel and completely contrary to established First Amendment and antitrust jurisprudence. In First Amendment terms, it would require the government to determine which speakers are too powerful, which should be silenced or disadvantaged competitively, and which information listeners should be listening to more. However, the traditional focus of the First Amendment has been to protect private citizens against such government determinations.[39]

The Supreme Court has forthrightly said: "The concept that the government may restrict the speech of some elements in our soci-

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38. The confusion regarding the meaning of the "marketplace of ideas" has stemmed, in part, from Justice Holmes' first use of the concept as "free trade" in ideas in Abrams v. United States, 250 U.S. 616, 630 (1919). He suggested that free trade in ideas would lead to "truth." *Id.* Justice Holmes equated this notion of truth with whatever ideas came to be accepted. *Id.* For the use of the phrase "marketplace of ideas" as a descriptive analogy, see American Assoc. Inc. v. Hudnut, 771 F.2d 323, 327 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 949-58 (1993). *See generally* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 6-8; C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 89-91 (1989).

39. *See, e.g.*, Cohen v. California, 403 U.S. 15, 25 (1972); Brandenburg v. Ohio, 395 U.S. 444, 447 (1965); *see also* Boos v. Barry, 485 U.S. 312 (1988).

ety in order to enhance the relative voice of others is wholly foreign to the First Amendment."[40] The thrust of the First Amendment, especially in relation to the freedom of mass communication, is to be suspicious of government manipulation of the terms on which communication proceeds.[41]

The government may have, in confined instances, a positive role to play in providing public fora for speakers and ensuring that certain public resources are equitably available.[42] However, under the First Amendment, if the government does have any role with respect to speech, it must ensure it remains strictly neutral between the parties affected.[43]

Now to antitrust analysis. It is certainly true that the mass media market forms part of the marketplace of ideas. There has never been any suggestion in the cases that antitrust analysis of concentration among mass media providers bears any special constitutional concerns or heightened Clayton Act scrutiny. Let us call this the "greater stringency" thesis.

There is no line of authority that Section 7's concern with market power of an acquiring company should be especially stringent in relation to media mergers. The test remains the same: "Acquisitions are proscribed only if they will probably result in a substantial anti-competitive effect."[44]

The government's 1960s case against Columbia Pictures was one of the early actions considering the effect on market competition of the then-new media technology.[45] Even then, it was held that the vigor of competition in this fast-changing industry requires

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40. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

41. C. Edwin Baker, *Private Power, the Press and the Constitution*, 10 CONST. COMMENTARY 421 (1993).

42. *See* Red Lion Broadcasting Co. v. FCC, 295 U.S. 367, 400 (1969); R. Randall Rainey, *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269 (1993).

43. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 793-94 (1988).

44. United States v. Columbia Pictures Corp., 189 F. Supp. 153, 196 (S.D.N.Y. 1960).

45. *Id.*

a more subtle analysis than merely looking to market share percentages at a given point in time. The case indicated that courts should look to many other factors relating to the maintenance of market position and to competition with other media. There is no indication whatsoever of the greater stringency thesis in any of the cases that follow.[46]

So let us turn now to what is the proper role of mergers in the modern media business. What sort of concerns should inform the antitrust analysis of the media mergers that have attracted so much attention as of late? Let me briefly mention some of the general points which should be kept very much to the forefront of any discussion. They have been overlooked by many of those such as Mr. Redstone, who claim a zealous regard for the public interest in media matters. The recently announced media mergers are indeed important, but they are important in highlighting how our framework for judging media companies must be applied if it is to keep up with the technological change which is their life blood. Much of the recent talk claiming that media mergers are anticompetitive or impede access to the marketplace of ideas fails entirely to acknowledge the modern reality of a marketplace wrought by rapid technological change. A number of factors need to be stressed in constructing an appropriate antitrust analysis of industries fueled by advanced technology. The configuration of the markets involved in the intersection between ostensibly different markets is changing rapidly. Additionally, in industries exhibiting constant product and process innovation, the market position of incumbents, leaders and laggers will change rapidly. New entrants can easily appear or quickly be rendered obsolete.[47]

Moreover, the information superhighway is becoming so diverse and international that the number and types of competitors are

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46. *See, e.g.*, Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146 (W.D. Ark. 1995); Cable Am. Corp. v. FTC, 795 F. Supp. 1082 (N.D. Ala. 1992); United States v. Loew's Inc., 705 F. Supp. 878 (S.D.N.Y. 1988); United States v. Columbia Picture Indus., 507 F. Supp. 412 (S.D.N.Y. 1980); United States v. Times Mirror, 774 F. Supp. 606 (C.D. Cal. 1967).

47. *See* James J. Anton & Dennis A. Yao, *Standard-Setting Consortia, Antitrust High-Technology Industries*, 64 ANTITRUST L.J. 247, 258 (1995).

rapidly expanding. Nothing illustrates this better than the competition between telephone companies and cable operators, or that between satellite dishes and cable opened up by the new digital technology. How about the fact that a World Wide Web site in Zaire is as accessible to me in my office as one across the street in midtown Manhattan? In addition, other writers argue that high technology industries are practically immune to the potential for cartelization because of the uncertainties generated by domestic and international competition.[48] Finally, mergers, joint ventures, and cooperation among competitors have increasingly become a competitive necessity in order to invest in and exploit research and development. Of course, in a large marketplace with wide boundaries and a greater number of players, the antitrust concerns of such cooperation are lessened, not heightened. This environment militates against the finding of any antitrust concerns, not in favor of their presence.

Joseph Kattan has written that markets characterized by rapidly changing technology are certainly less susceptible to anti-competitive harm.[49] We should also recall the holding in *United States v. General Dynamics*,[50] where the Supreme Court stressed that historical market share may not be a good indicator of the ability to raise prices in the future where there are material changes in the pattern and structure of the industry. More recently, in *FTC v. PPG Industries, Inc.*,[51] the Court of Appeals for the D.C. Circuit held that in rapidly changing markets, the market shares may not be able to be readily assessed.

One can say that the information superhighway breaks the nexus between the size of firms and the control of ideas. The central point is that the information superhighway has many entry points. The communications which pulse through it are two-way, interac-

48. Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 ANTITRUST L.J. 937, 965 (1993) (quoting Thomas Jorde & David Teece, *Innovation Cooperation and Antitrust*, 4 HIGH TECH L.J. 1, 3 (1989)).

49. *Id.*

50. 417 U.S. 486 (1974).

51. 798 F.2d 1500 (D.C. Cir. 1986).

tive, broadband and digitally switched. The capacity of this information superhighway is potentially unlimited. The analogy to the highway is not like being stuck without exits on an expressway; it is like being faced with an untold number of possible exits, possible routes, possible vantage points, and even possible forms of transport on a great, flowing, multidimensional stream.

It is overly simplistic to think that cable owners will control by whim the availability of programming and have a stranglehold over the content of programs available to consumers. What drives the provision of newer and better technology is the impetus of the high technology revolution itself. What drives the creation of programming are the demands of increasingly educated and informed consumers.

The race to provide the most extensive range of, and access to, information technology in entertainment has a natural competitive check. Any player in the media market is ultimately in check to the demands of consumers who will vote either with the switch of a button or the click of a mouse to control the services they insist upon.

Even if some control could be exercised over access to a package of service, there are two crucial caveats to keep in mind. First, the marketplace of ideas is broader than just any one entry point into the market or delivery of any one type of information or entertainment product. In addition to cable, there are satellite and telephonic entry points to the media marketplace. Indeed, AT&T's recent announcement of an investment in Direct TV highlights the convergence of these technologies. There is also a universe of outlets outside the home: schools, colleges, the workplace, cinemas, and even Internet cafes.

Second, even if the delivery conduit of one type of information or entertainment product could be controlled by a so-called gatekeeper, the control over the content of that product is powerful, and competitive forces keep that control diversified and imperfect. The content of the product must be constantly reinvented and reproduced. If the public watches a video program provided by one media company, it in no way guarantees that the public will watch that company's programs in the future.

In this way the provision of video programming and movies is unlike the selling of soap powder, which has a monopoly position in the marketplace. Media companies cannot coast along on the basis of having locked up a section of the market. A soap powder seller only competes with other soap powder sellers. A movie distribution service competes with all other suppliers of entertainment and communication services from satellite to the Internet. Yesterday's sale tells you very little about tomorrow's.

Monopolists restrict output, and that is not consistent with the explosion in services and outlets that we are seeing today. Nor is it consistent with the inability of media companies to stifle the production of ideas. The current media mergers show that there is a race to provide information and entertainment as effectively and as efficiently as possible. Only when competitive forces allow the most efficient business to thrive will the plethora of opportunity work for us and not drown us in the surfeit of choice. Modern media businesses themselves must be allowed to cooperate, to form joint ventures and strategic alliances, and to consolidate so that they may productively exploit the opportunities which will benefit us all.

That is not to say that industry should not be constrained by the antitrust law; it should be. It does not mean that government should not be constrained by the First Amendment; it should be. However, there is no need for novel draconian theories or interpretation of existing laws. What there is a need for, as always, is attention to the facts of each particular transaction and not to the political hype. There is a need for openness to the reality that in a fast changing, high-tech world the facts will, in all probability, demonstrate an environment on which competition thrives and monopoly is impossible.

I will conclude by saying that there is no incompatibility among traditional antitrust rules, a vibrant marketplace of ideas protected by the First Amendment, and the efficient delivery of media services in the modern high-tech world. Distorting economic regulation or legal intervention under the fanciful guise of protecting First Amendment concerns is not only contrary to settled law and constitutional principles, but could easily disrupt that healthy balance.

MR. GOODALE: Well that is a provocative beginning. Creighton Condon, perhaps you would like to make some responses. While you are getting ready, I just thought I would make a bridge between what Bob has said and what can be said on the other side—the argument that is made by Sumner Redstone, who, as you know, is the chairman of Viacom. As he points out in his speech,[52] he is a Harvard Law School graduate and was a practicing lawyer. Even though he is known as a businessman, he can never stop being a lawyer. One of his greatest joys was drafting a complaint against Time Warner to make the argument that his pay service had been excluded from the local cable system, a case which he points out, they won.[53]

MR. JOFFE: Well he did lose it.

MR. GOODALE: He did not win. We will come back to that in a moment. I guess he did draft the complaint, though.

MR. JOFFE: The case was settled on far more favorable terms to Time Warner than to Viacom.

MR. GOODALE: The record has now been made clear. Redstone's argument on the antitrust and First Amendment grounds is that the antitrust concept of a bottleneck can be applied against the cable industry because the cable industry is a monopoly.[54] The societal rationale for such application is that if it is applied successfully against a cable bottleneck it will create diversity.

I just want to say, before we go around the panel, I wonder if what we are really talking about here is the government's role in creating a diversity of speakers and speech. It is an issue that never seems to leave the communication law arena, and, as Mr. Redstone points out, it reappeared in the "must-carry" case *United States v. Turner*.[55] As Redstone says, the basis of that decision was that if sufficient proof could be shown of a failure of the broadcast industry, the concept and value of diversity should be served by

52. *See* Redstone, *supra* note 4.
53. Viacom Int'l Inc. v. Time Warner Inc., 785 F. Supp. 371 (S.D.N.Y. 1992).
54. *See* Redstone, *supra* note 4.
55. 819 F. Supp. 32 (D.D.C. 1993).

having the broadcast speakers speak on cable.[56]

I did not mean to speak that long and I hope I did not take away some of your best shots, but I did want to make a bridge because the Redstone speech is not available to all of you.

MR. CONDON: Just by way of introduction, I am unshackled by being a mergers and acquisitions lawyer and not an antitrust lawyer. Therefore, I approach this from a little different perspective: more from the fundamental question as to what role government has in this area—whether it's through the antitrust laws, the Federal Communications Commission ("FCC") approaches, or through the 1996 Act.[57]

What role does the government have in trying to ensure that there continues to be a diversity of ideas and of ownership in the marketplace of ideas? I think, at some level, clearly it is appropriate for the government to have a role.

I think Redstone is essentially stating that you do not want a situation where there is undue concentration of ideas anymore than you want to look at the traditional antitrust analysis from strictly an economic point of view; to struggle with that, and to suggest that one possible way of dealing with this issue is to look at it from an antitrust perspective.

Pitofsky, in his 1979 article, points out that in fact, if you look through the legislative history, there are three political values that

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56. *See* Redstone, *supra* note 4.

57. The history of communications regulation began with the Communications Act of 1934, 48 Stat. § 1064 (Jun. 19, 1934) (enacted for the purpose of regulating interstate and foreign commerce in communication by wire and radio, and creating the FCC). The Act has been amended repeatedly through the years. Most notably, in 1992 Congress passed the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. § 1460 (1995) (codified in scattered sections of 47 U.S.C.) which was enacted to: promote the availability to the public of a diversity of views and information through cable television and other distribution media; maximize availability to ensure continued expansion of capacity of programs offered on cable systems; protect consumer interests in receipt of cable service; and ensure cable television operators do not have undue market power. Most recently, the Act was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. § 56 (to be codified in scattered sections of 47 U.S.C.).

were reflected in the antitrust laws.[58] First, there is a fear that excessive concentration of economic power will breed anti-democratic political pressures. Second, there is a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. The third, and overriding political concern, is that an economy so dominated by a few corporate giants will make it impossible for the state not to play a more intrusive role in economic affairs. A number of the antitrust laws at various points in time were drafted against the backdrop of fascist or communist systems where there was a concern that, in fact, one of the factors leading to those systems was a concentration of economic power.[59]

Redstone points out that in fact, the same dangers exist in media mergers. These dangers are present to the extent that we permit any significant concentration in methods of distribution of ideas, whether it is in the cable area or other areas where there is significant market power and an ability to keep out competing voices by blocking access to that method of communicating.

Obviously, there are different ways of communicating in different voices or different distribution methods. It would be a mistake though, at this point, to look at the entire spectrum of ways to deliver ideas as the appropriate marketplace. If you do that, you get to an extreme where almost no merger could be anti-competitive because you are judging it against, for example, the ability of Fordham law students to get ideas in class. There is an intermediate position and, as the technology develops, one of the challenges for the antitrust regulators is going to be defining those markets.

I think that Redstone is suggesting that the same political dangers that exist from allowing economic concentration also exist in the media to the extent that it is controlled by a small group of companies. That is, the danger that the government will feel it imperative to intercede with respect to free speech matters. It increases the likelihood and the possibility of government intervention. The concentration of control in the marketplace of ideas also

58. Pitofsky, *supra* note 3, at 1051.
59. *Id.* at 1060-65.

raises the specter that the government could step in and, through the co-opting of a limited number of players, in effect control that marketplace for ideas.

I think Redstone's suggestion is that the appropriate way to deal with such dangers is to stop in the first instance an over-concentration so that everyone can be assured that such government intervention will not occur. That is a different analysis than how you would apply this as a practical matter in enforcing the antitrust laws, which is a different issue and more difficult.

I would suggest that to a certain extent political considerations already are taken into account in enforcing the antitrust laws. If you look over the last 20 or 30 years, it seems fairly clear that whether you couch antitrust enforcement strictly in terms of economics, you are, in effect, following a political agenda. If you look at enforcement during the 1980s compared to enforcement of the Clinton administration, there is a political difference and a political philosophy in how that enforcement is proceeding.

As Professor Pitofsky points out in his article, economics only gets you so far.[60] There is only so much precision that you can build into an economic model. The issue is how explicit to make the existence of the political factors when enforcing antitrust laws.

Redstone points out in his speech, as an example, the type of situation that he thinks would cause concern here in the United States: Rupert Murdoch's control over newspapers and cable television in the United Kingdom ("U.K."), which has become an issue in the U.K. with respect to whether or not he has an inordinate influence over the marketplace of ideas.[61] In that respect, Pitofsky himself alludes to the possibility that the antitrust laws should have the flexibility to deal with such a situation.[62] He illustrates a hypothetical situation in which a single wealthy family acquires the leading newspaper in each of the 20 largest cities in the United States.[63] He points out that one possible response to that situation

60. *See generally id.*
61. *See* Redstone, *supra* note 4.
62. *See* Pitofsky, *supra* note 3, at 1054.
63. *Id.*

would be the enactment of special legislation to head off that development. If a bill were to become bottled up in committee, however, under Pitofsky's view, the Sherman Act should be sufficiently flexible to take into account that threat to political values.

The political values in the above example clearly are not of the same nature as the political values that were contemplated when the antitrust laws were put into effect. But Redstone is suggesting that there is a role in antitrust to expand beyond the political values that were specifically in mind when the antitrust laws were enacted, to take into account existing developments.

MR. GOODALE: Is not Creighton Condon right that there is a risk in having one family own the leading newspaper in each of the 20 largest cities, and is not one of the problems the situation we have seen recently which has involved the concept of "corporate journalism?" This is a pejorative term to describe journalism which is not really springing from the heart of the journalist, but springing from the pocketbook of the journalist's owner. One of the best examples of that phenomenon is the CBS action in *60 Minutes* in which the network turned the Brown and Williamson story off,[64] although it later got turned on again.[65] It's also alleged the same instincts and purposes led to ABC's settlement of a huge libel case.[66] So Sumner Redstone has really put his finger on some major problems.

MR. JOLLYMORE: That fear, Jim, is not a new concern. Back in 1966, ITT entered into negotiations and came close to consummating a deal to acquire ABC, and that acquisition was challenged before the FCC.[67] One of the central points of opposition to the acquisition was that ITT, a large conglomerate with

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64. *60 Minutes*: *CBS says "No" to interview regarding tobacco industry due to possible lawsuit* (CBS television broadcast, Nov. 12, 1995).

65. *60 Minutes*: *Jeffrey Wigand discloses information on Brown and Williamson and attempts are made to rebut the claims* (CBS television broadcast, Feb. 4, 1995); *see*, Rita Ciolli, *Tales About Tobacco?/ Former exec. called to testify*, NEWSDAY, Nov. 18, 1995, at A04.

66. Alix M. Freedman & Elizabeth Jensen, *Capital Cities, Philip Morris Settle Lawsuit*, WALL ST. J., Aug. 22, 1995, at A3; *see* Ciolli, *supra* note 65, at A04.

67. *In re* American Broadcasting Co., 7 F.C.C.2d 245 (1966).

interests that span many different industries and the globe, would use this organ of communication, ABC, to promote its own corporate interests.[68]

The FCC, acting on submissions from the DOJ and others, upheld the transfer of the broadcast licenses in that case, but not without dissent.[69] But I think the publicity surrounding the case eventually forced ITT to back away from the merger and the acquisition, for the acquisition never happened. So the fear that Sumner Redstone raises is one that has been kicking around for a long time.

However, I, as a lawyer for a publishing company, Time, Inc., which is owned by a large media company, Time Warner, am somewhat skeptical of this notion that the growth of large media companies will result in less speech. Since the Time Warner merger about seven years ago, I have watched our publications, our Internet operations, and our on-line services very closely. I personally have not seen anything that would indicate to me that the large corporate ownership of our magazines has influenced the way the magazines cover the news.

Time magazine, overall, has presented coverage of its corporate parent, Time Warner, that is at least as balanced and accurate as the media in general, and is often very critical. Our magazines seem to feel very free to pan Warner Brothers motion pictures. This week, *Entertainment Weekly* reviews *Big Bully*,[70] which is a Warner Brothers release. It says it belongs to the genre of corny dumb-dumb comedies, and gave it a rating of "C."[71] Even though Time Warner is engaged in consummating a merger with Turner, when *People* magazine, another one of our magazines, did a profile of Ted Turner in December, it felt free to point out that Turner was once on lithium for manic-depression.[72] They were not exactly

68. *Id.* at 252.

69. *Id.* at 262-330 (dissenting to the approval of the transfer-merger transaction).

70. Lisa Schwarzbaum, ENT. WKLY., Feb. 16, 1996, at 48.

71. *Id.*

72. *Ted Turner; The Titan Once Known As Captain Outrageous Pulls Off His Most Surprising Year*, PEOPLE, Dec. 25, 1995, at 87.

pulling their punches.

I would like to follow up on a point that Bob Joffe made. There are reasons, I think, that publications like ours resist any insidious influence from a corporate parent. We live in an advanced technological society, and we rely on the media for accurate, objective, up-to-date information in making political decisions, business decisions and decisions affecting scientific matters. Publications which do not provide accurate, up to date, and unbiased information will lose in the marketplace.

Time Warner's executives, I am sure, are well aware of the contribution which the publication company, Time, Inc., makes to the bottom line. The financial figures released on February 6, 1996 in the papers showed that Time, Inc. contributed $175 million to Time Warner's bottom line.[73] I think there's a clear realization that for publications to survive, they must serve their markets well. In my view, there would be a huge financial disincentive to have corporate executives tinker around with the journalistic content of those publications.

In fact, it may well be that the opposite is true. Because there are substantial assets behind a publishing company like Time, Inc., it is more able to resist the typical pressures put on publishers by political institutions and advertisers.

Another safeguard against a conglomerate influencing the control of the publication is the professionalism of the journalists. The journalists see themselves as a profession, having shared values across publications and companies, and recoil at the notion of corporate control of content. That is exactly what happened in the CBS case. The journalists from *Sixty Minutes* went to the *New York Times* and complained publicly that the lawyers for CBS were attempting to control the program's content.[74] The lawyers did not

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73. *Time Warner Inc. <TWX.N> 84 EBITDA Grew 26 Pct*, REUTERS, LIMITED FINANCIAL REPORT, Feb. 6, 1996 ("Fourth-quarter EBITDA [(Earnings Before Interest, Taxation, Depreciation, and Amortization)] for Time Inc., the company's publishing division, rose over 11 percent to $175 million from $157 million a year earlier.").

74. Howard Kurtz, *'60 Minutes' Kills Piece On Tobacco Industry; CBS Fears Lawsuit, Cites ABC Settlement*, WASH. POST, Nov. 10, 1995, at A03.

make that decision for a corporate political agenda; it was because, as I perceived it, the lawyers felt there was a legal risk.

For those reasons, I'm very skeptical of the argument that Sumner Redstone makes.

MR. GOODALE: Before I turn to the representative of the public interest, let me respond for a moment. Do you really think, Nick Jollymore, that *Time* magazine could run a hard-hitting article raising the issue that we're discussing today and taking the point of view of this side of the table—that concentration is really a problem for all publications, including *Time* magazine?

MR. JOLLYMORE: I think if there's a constraint to a magazine like *Time* magazine running such an article, it is not imposed by the fact that it's owned by Time Warner. I think the constraint is imposed by the market which it serves. *Time* magazine, like *Newsweek* and *U.S. News & World Report*, is a mass market publication, and there are constraints in serving a mass market. You don't find magazines that serve a mass market crusading for radical causes. They may represent points of view that are radical, but they're usually espoused by a party outside of the corporation. So I think if there is a constraint, it doesn't come from ownership by a corporate conglomerate.

MR. GOODALE: I'll pick on you once more. Sometimes, it's a little more fun than antitrust. Do you really think that the lawyers at ABC and CBS, each company being involved in a merger of the kind we're talking about today, were not influenced by the terms and conditions of that merger to do what they did—in the case of CBS, to not run the story; in the case of ABC, to settle a libel suit?

MR. JOLLYMORE: The short answer, Jim, is I don't know. But I can tell you from my experience at doing pre-publication review for libel issues and copyright infringement issues that it's seldom that dramatic. Seldom do the lawyers who are involved in the discussions with the editors get into such considerations. Actually, I should not say seldom; I've never seen it happen. It's a much more mundane process. You're focusing on exposure to libel law rather than what the executives at the Time Warner building

are going to think. So my guess would be, although I don't know, that the answer is no.

MR. GOODALE: Mr. Tyler, we can't let Mr. Joffe get away with this broad, sweeping J. P. Morgan type of definition of mergers. The antitrust laws apply, but it's hard to figure how, and certainly we should never have any other values besides antitrust anyway. He's absolutely correct about all that, isn't he?

MR. TYLER: Unlike my co-panelists in the private sector, I, as a member of the DOJ, must always begin with a disclaimer to the effect that my remarks this morning are just that—mine and mine alone. My employer very wisely retains the right to disavow everything I say in this discussion.

Bob Joffe and I have met many times in different fora, including federal courts. We always insist to our audience that at the very least, several grains of salt should be put on the other's remarks. If not, such remarks should just be disavowed entirely. I'm not going to break that tradition this morning.

But first, I have to begin with another disclaimer. The fact is, I haven't been involved with antitrust law since my second year of law school and that has been a purposeful decision. My experience is more in the First Amendment area at this time.

In that regard, Mr. Joffe speaks of various people who have opined as to the political content of antitrust law, questioning whether it should exist or not. Certainly the First Amendment screams it. The First Amendment, of course, stands for the proposition that we must have the widest possible diversity of opinions in any marketplace—diverse and, hopefully often, antagonistic opinions. That is one of the principles upon which our democracy depends.

Mr. Joffe speaks of the competition in our telecommunications markets. He speaks of the fact that, or the proposition that, cable companies cannot possibly have a stranglehold on ideas in the telecommunication markets, that they have enormous competition, not only from other cable operators or MSOs,[75] but from broadcast

75. Multiple System Operator ("MSO"). *See In re* Review of the Commission's

television. Now DBS[76] television has successfully arrived, and, possibly as a result of the 1996 Act, we will see the telephone companies come in with their own video programming. So basically the pitch is, why worry? There will be enormous diversity.

But in referring or responding to that, I always begin with technology. Remember, cable operators have the technology now to reach almost 70 percent of television households.[77]

As the Supreme Court remarked in the *Turner Broadcasting* case, once a cable company connects with your household, it can determine, using its technology, what you will and will not watch, because you are dependent upon that coaxial cable to receive your video fare.[78]

It is said that cable companies can and do produce a wide diversity of programming. I am not going to argue with that. But remember that they do not necessarily have an interest in providing competition to the programming they provide. If a cable company puts on a 24-hour news service, common sense tells us that it might not want an independent 24-hour news service carried on another one of its channels. Why? Because the independent news service would compete with the 24-hour news service that the cable company owns. Remember the cable company is carrying advertising on the 24-hour news service that it owns.

Taking those factors into consideration, why would a cable company invite an independent competitor to broadcast over its

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Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, 10 F.C.C.R. 3524, 3539 (1995) ("Cable operators, for example, operate at a local level, and are increasingly becoming composed of regional clusters. In addition many cable systems are owned or managed by cable multiple system operators ('MSOs'), which might operate these local franchises at a national level.") (footnotes omitted).

76. Direct Broadcast Satellite ("DBS"). *See* Eric T. Werner, *Something's Gotta Give: Antitrust Consequences of Telephone Companies' Entry into Cable Television*, 43 FED. COM. L.J. 215, 227 (1991) ("DBS . . . employ[s] high-powered satellites to transmit programming directly to viewers equipped with small receiving antennas.").

77. H.R. REP. NO. 628, 102d Cong., 2d Sess. § 16(a)(2) (1992) ("[C]able television service is available to more than 90 percent of American households, more than 62 percent of American households subscribe to such services, and the majority of viewers rely on cable as the conduit through which they receive terrestrial broadcast signals.").

78. Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2466 (1994).

coaxial cable? I believe that the government submitted evidence to this effect in the *Turner Broadcasting* case on remand, again concerning the "must-carry" issues.[79]

When Mr. Joffe speaks about diversity and competition, I think it is appropriate that we make the point that one does not necessarily follow the other. While there might be diversity in programming, there might not be competition in programming. That was really what the Supreme Court had in mind when it referred to diversity in the telecommunications area.[80]

I can fairly conclude here because what I am trying to do is challenge Bob Joffe—to see how he might respond. But it is worth noting how the rules have in fact changed in this area.

Back in the 1960s and the 1970s, the FCC and the government were given great leeway to insist upon diversity and antagonistic viewpoints because the telecommunication industry meant only radio and broadcast television. The Supreme Court said in *Red Lion*[81] that no one has a First Amendment right to be a broadcast television station.[82] The electromagnetic spectrum is limited. Therefore, the government must necessarily be a referee as to who can be given a license to provide broadcast television.[83] As a result, government has, and must have, the authority under the First Amendment to impose certain public interest conditions upon broadcast licensees.[84]

Since *Red Lion*, technology has changed. Whereas none of us have a First Amendment right to become a broadcast television provider, cable companies do have a First Amendment right to provide cable programming or content. Although we in the gov-

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79. Brief for Appellee at *17, Turner Broadcasting System, Inc. v. FCC, No. 95-992, 1996 WL 23280 (U.S. Jan. 22,1996) (motion to affirm) ("cable operators have the incentive and the ability to use their dominant position in ways that could be harmful to competitors").

80. *Turner*, 114 S. Ct. at 2466 n.8.

81. Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).

82. *Id.* at 388-96.

83. *Id.*

84. *Id.*

ernment argued that *Red Lion* should apply to the cable industry,[85] we did not succeed on that argument in *Turner*. The Supreme Court has become insistent on a higher standard of First Amendment scrutiny when an issue concerns cable content or cable programming.[86] Nonetheless, these diversity standards must be applied. We shall see what the Supreme Court will say in the *Turner* remand opinions[87] as to what discretion Congress must have in applying these principles. Having said that, I will conclude and wait for Bob Joffe to reply.

MR. GOODALE: Mr. Joffe, you can defend yourself in any way you want, but in so doing, I would appreciate your considering this question, which I think is important not only for the media but also for race relations and for a philosophical view of what the government's role is in our life.

Is it your view, Mr. Joffe, that the government has no role whatsoever in promoting diversity of speech in our lives?

MR. JOFFE: I don't have any problem with government promoting diversity, as long as it does so in a way that does not inhibit the speech of others. In other words, if the government wanted to give monetary grants to organizations that do not have the ability to buy time on television, or otherwise speak, that does not bother me at all. What I have a problem with is when government helps some by causing others not to speak. For instance, where government takes channels away from a cable operator and requires the cable operator to turn them over to others. It seems to me *that* is something the First Amendment *does* prohibit. John Tyler and I have just argued that case in the D.C. Circuit and are waiting for the outcome on the constitutionality of access laws.[88] That is a very different situation.

The First Amendment does not say anything about promoting diversity. It does not even say anything about the rights of listeners. It says "Congress shall make no law . . . abridging the free-

85. *Turner*, 114 S. Ct. at 2456.
86. *Id.* at 2449.
87. Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1996).
88. Turner Broadcasting v. FCC, 910 F. Supp 734 (D.D.C. 1995).

dom of speech."[89] Pure and simple, that is what it says. It restrains government action.

If the government has a role to play in promoting diversity, it comes from other government powers, not from the First Amendment. The First Amendment does not have a provision like the 14th Amendment which says the government has the power to make laws to further it.[90] The First Amendment is a constraint on the government. The government's right to promote diversity comes from its rights to promote the public good found elsewhere in the Constitution.

MR. CONDON: Can I interrupt you? I have one question. Isn't your concept—of not objecting to government assisting parties, who, for example, might not otherwise be in a position economically to make their voice heard—in some respects worse and more intrusive? Because what you really are doing, if you want to take the antitrust case, is looking at particular mergers and saying there is too much concentration of ideas here, we want to keep those levels lower in terms of concentration so that there will be other voices heard.

You are saying that the government is affirmatively stepping in and saying: "We are going to promote a single voice, which we think is not being heard." Doesn't that introduce government intervention into the marketplace of ideas affirmatively?

MR. JOFFE: I agree there could be a problem. The promotion of ideas through funding would have to be done in a very careful way. For instance, I do not think you could pass a bill that said, "Congress shall help unpopular ideas" anymore than you could pass a bill that says, "Congress shall fund popular ones." Grants essentially would have to be available to all on some kind of equal access basis. If CBS wanted to apply for a grant, so be it.

You cannot start creating means tests or other kinds of discriminatory ways of handing out these grants because I think that would raise very, very serious problems.

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89. U.S. CONST. amend. I.

90. U.S. CONST. amend. XIV, § 5.

On the other hand, I do not see why Congress could not do something else. For instance, the funding of the PBS station is perfectly constitutional. As far as I know, it has not been successfully challenged.

Let me make two other quick points. First, on this cable point, I think there are ways programming can get to the home other than through cable. But let me stress this point: a cable operator, even without competition from another cable operator, has a lot of incentives to give customers what they want. Only 50 percent to 60 percent of most areas subscribe to cable.[91] There is a great incentive on the cable operator to make his programming package as attractive as possible to the potential audience so it can get as many people as possible to subscribe for as much as he can charge. If it is only going to provide 12 channels, it is not going to be able to get as many people to subscribe if it were to provide 77. If it makes the price too high, fewer people will subscribe. Thus, there is a powerful incentive to provide programming that is attractive. That incentive increases now that you can buy a little 18 inch dish for $599 and get a package of 77 services for $34 a month.[92] You can put that dish in your apartment window in most parts of New York City. Outside of New York City, you can put it on your rooftop.

In Omaha, Nebraska, you can get television programming from U.S. West, the local telephone company, in a video dial tone experiment that is soon going to be spreading throughout the country. So cable operators have a tremendous incentive to provide good programming.

As far as the advertising point goes, cable operators get 25 times more revenue from subscriber revenues than they do from

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91. *Cf.* Alliance for Community Media v. FCC, 56 F.3d 105, 124 (D.C. Cir. 1995) (en banc) (explaining "[n]early fifty-six million households, more than sixty percent of all households with televisions, subscribe to cable service"); *see also*, H.R. REP. NO. 628, *supra* note 78.

92. *See* Geraldine Fabrikant, *A satellite is successfully launched, and the shares in a direct to home television company lift off*, N.Y. TIMES, Dec. 29, 1995, at D6 (explaining Echostar offers satellite dishes for approximately $599; the price for 75 channels ranges from $19.95 to $39.95 per month depending on service provided).

advertising.[93] Therefore, cable operators do have an incentive to provide different kinds of services.

Time Warner Cable of New York, for instance, provides several different news services. They provide CNBC and Turner Financial News Network. One source they have a partial ownership interest in through Turner, NBC, the other, they clearly do not have any interest in.

Let me say one final word about the media mergers. None of the three media mergers that have recently been in the news—the CBS,[94] the ABC,[95] or the Time Warner-Turner merger—involve any really significant horizontal overlap. These mergers do not provide any significant traditional antitrust problems. If they are going to be attacked under the antitrust laws, that can only be accomplished by changing those laws or by grafting other concepts into the antitrust laws.

Take the Time Warner-Turner situation, the one which with I am most familiar. At the moment, prior to the merger, Turner is approximately 20 percent owned by Time Warner and approximately 20 percent owned by TCI. Both have negative control provisions in the corporate papers governing the control of Turner. TCI is giving up that negative control over Turner in return for a very small, very diffuse interest in Time Warner. Under either proposal currently before the FCC, TCI would either have no voting power, would have the votes on their shares cast by the chairman of Time Warner, or would receive non-voting stock.

What one must compare is not the Time Warner-Turner merger

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93. *Cf. Tuned out and dropping off (Interactive TV)*, ECONOMIST, Nov. 4, 1995 (U.S. ed.) (explaining "the cable industry . . . raises less than 20% of its revenue from advertising").

94. *See* Stockholders of CBS, Inc., Memorandum Opinion and Order, FCC 95-469 (released Nov. 22, 1995) (FCC decision approving merger between CBS and Westinghouse); *see also* Paul Farhi, *FCC To Approve Takeover of CBS; Agency Resolves Fight Over Children's Shows*, WASH. POST, Nov. 22, 1995 at E1.

95. *See* Capital Cities/ABC, Inc., Memorandum Opinion and Order, FCC 96-48 (released Feb. 8, 1996) (FCC decision approving merger); *see also* Paul Farhi, *Walt Disney To Buy Capital Cities/ABC; $19 Billion Merger Would Create A Giant In Movies, Television*, WASH. POST, Aug. 1, 1995 at A1.

compared to some mythical situation of sellers of red wheat #2, but the Time Warner-Turner merger before and after. The "before" is a situation where Time Warner's operations are effectively blockaded by the negative control of TCI. TCI is giving that up for the "after," which would be an eight percent ownership interest in Time Warner, without any power to affect how those shares are voted. Under traditional antitrust analysis, this certainly would be no problem.

MR. GOODALE: Let me pick up on the question of horizontal overlap and ask you a hypothetical question. Perhaps the panel will chime in on it also, so we can focus on whether the landscape of jurisprudence has changed at all in light of the new communication and media alliances.

Under the 1996 Act, as I understand it, a broadcaster's ownership of stations can go from the present level of 25 percent of the national audience to 35 percent of the audience.[96] Let's suppose that the rule was not 25 percent or 35 percent but 100 percent. This would mean that a broadcaster, let us say, Fox could own a television station in every market in the United States, or certainly it could own one in every major market.

Would that violate the antitrust laws? I ask you as an antitrust expert, because it raises the issue of horizontal overlap because each city is separate. Is there anything in the panel's view of public policy that would militate against the adoption of such a rule? Mr. Joffe, do you want to take that on?

MR. JOFFE: This is the example that Mr. Condon read from Pitofsky's article where one family owned the only newspaper in 20 towns. Here we are talking about a television station owned by Fox in every town.

Now how do you analyze that? You look in two markets. You look in the market in which the television station sells, and you look in the market in which it buys.

In the market in which they sell advertising time, television stations face a tremendous amount of competition from other tele-

96. 1996 Act, § 202(c)(1)(B), 110 Stat 56, 111.

vision stations, radio stations, and newspapers. It is inconceivable that there would be an antitrust problem in the market in which they sell, except perhaps some local market—let's say some town in northern Louisiana—where Fox was the only television station. Even there, it would probably face competition from radio and newspaper. But putting that aside, generally there would be no problem in the market in which they sell.

Let's look at the market in which they buy—the programming market. The people who sell programming, the Warner Brothers and the other similar studios, sell into a market where there are many, many buyers on a national level. I am sure Fox, even if it owned a station in every town in the United States, would still be accounting for, at most, five percent of the programming material bought in the United States. I would see no antitrust problem there. I think it would be a significant problem to create some scheme under which that kind of acquisition would be unlawful.

MR. GOODALE: That means it is not unlawful. The marketplace controls, the Chicago School triumphs, and the rest of us on the panel are sitting and wondering whether this is sound public policy, or even if it is sound legal policy. What are the rest of the views?

MR. TYLER: I can address horizontal concentration. In the cable market, as of March 1994, it was known that the top ten cable MSOs controlled approximately 63 percent of the market.[97] That is, they owned approximately 63 percent of the cable systems in the United States.

When we take that into account, we also have to take the effects of vertical integration into account. I think there is good argument for government intervention to ensure that other independents have access to the telecommunications market.

We have to remember that a cable company has an inherent interest in cable casting its own programming, that is the program-

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97. *See generally* Joseph S. Kraemer, *Local competition: Changing Ground Rules for Network Access*, BUS. COMMUNICATIONS REV., Sept. 1994 (explaining that the top 10 cable MSOs controlled more than 56 percent of the market).

ming it has an interest in. Taking that as true, as I think we must, when a big MSO buys a little "Mom and Pop" cable system who has, until then, carried its own independent mix of programming, this MSO will have the incentive to drop that independent mix of programming and, instead, put on its vertically integrated programming. That is how it can make more money in the advertising market. That is a factor that arose in the "must–carry" lawsuit.[98]

So when Mr. Joffe speaks of competition, he's pointing at DBS and he is pointing at newspapers and movies, but it must always be borne in mind that when you are talking about video programming, these large MSOs do control the programming conduit. They are gate keepers. They have incentives to discriminate against a competitor.

MR. JOFFE: I was not talking about a merger of all the cable companies in the United States. As I understood your hypothetical, Mr. Goodale, you were talking about one television station in every city owned by the same entity, with other television stations competing.

MR. GOODALE: His argument was responsive although the medium was slightly different. I understand your point.

MR. TYLER: I intended it to be as such. It has been predicted that in the near future only about five MSOs will own all cable systems in the United States.

MR. JOFFE: But if each cable operator is a local monopolist, and I am not conceding this for a second, even if you combined all the cable operators in the United States, in the market in which they sell (i.e., to the consumer), there is no change. Right now someone in the city of Buffalo, New York is facing a monopolist if a cable operator is a monopolist, and the person in the city of Dubuque, Iowa, is facing a monopolist. After this merger of all cable companies they would still be facing that same monopolist. There would be no difference.

In the market in which the cable operators buy programming, there might be an argument. The sellers of programming to cable

98. *Turner*, 114 S. Ct. at 2453-54.

operators, who before may have faced ten purchasers and now face 100 purchasers, would only face one purchaser. If the market in which cable operators buy is a separate market from the market in which television stations buy, then there would be an antitrust problem. The HBOs and the Showtimes of the world, instead of facing ten purchasers, would face one purchaser. That might raise an antitrust issue.

MR. JOLLYMORE: The question that Chairman Pitofsky's article raises is the important question. In your hypothetical Mr. Goodale, where Congress or the FCC allowed one entity to own as many licensees as would serve 100 percent of the market, should you look at the market which a broadcast licensee serves—the viewers? Should you consider the issue of whether ownership of such a large string of stations would affect the content of the information that is received by the market served?

Sumner Redstone hints that you should consider the viewers in an antitrust analysis,[99] but I think that would go far beyond what Pitofsky would advocate. If you look at the general position the FCC and our government takes, it does not appear that the government is prepared to take that step. The direction has been to reduce content regulations like the "fairness doctrine,"[100] to reduce the regulations that were aimed at increasing the multiplicity of voices by governmental action,[101] and to rely on the growth of different media outlets such as the Internet, cable television, and direct broadcast satellite transmissions to provide the kind of diversity of opinion and information that it is perceived society needs.[102]

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99. *See* Redstone, *supra* note 4.

100. *See* FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) (holding that the FCC could decline to enforce the Fairness Doctrine if the FCC found the doctrine inhibited speech); *see also* FCC Fairness Report of 1985, 102 F.C.C.2d 143 (1985) (FCC announces policy of discontinuing the enforcement of the Fairness Doctrine); Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) (affirming FCC's decision to discontinue enforcing the fairness doctrine).

101. *Syracuse Peace Council*, 867 F.2d at 657.

102. 133 CONG. REC. S8453-04 (1987) ("[W]e must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium . . . .") (statement of President Ronald Reagan vetoing S.742, an attempt by Congress to enact the

MR. GOODALE: Mr. Condon, I do not know what your view would be. I suppose Sumner Redstone's view would be that evidence of diversity of opinion and the impact of this merger on such diversity would be admissible.

MR. CONDON: I think that is right. I think what Sumner Redstone is suggesting is not that First Amendment values become a separate antitrust analysis, but that in applying the antitrust laws and making judgments on the margins as to which cases to pursue and which cases not to pursue, it is appropriate that one of the factors to keep in mind is this concept of diversification.

Clearly the direction which has been taken legislatively is to allow an increase in concentration of ownership in various distinct types of delivery systems.[103]

Thus, in some respects, Redstone's comments are contrary to the political direction in which we seem to be heading. But on the flip side you have to make judgments as to when you decide that newspapers are no longer an appropriate market or television stations are no longer an appropriate market. I would suggest that we are not so far along the information superhighway at this point that those distinctions are not still appropriate. From a market definition point of view, I would take issue with the breadth of the market Mr. Joffe would define. I would suggest that the concept of applying First Amendment values may be even more appropriate, given the flexibility that companies are now being granted to get into the cross ownership of various types of media outlets.

MR. GOODALE: Aren't you two like the captain of the *Titanic* who's rearranging chairs on the bow?

MR. CONDON: I would argue something different. I think

Fairness Doctrine).

103. 142 CONG. REC. H1078-03, H1121 (daily ed. Jan. 31, 1996) (Conference Report on S. 652, Telecommunications Act of 1996) ("Section 207b of the Senate bill requires the [FCC] to changes [sic] its rules regarding the amount of national audience a single broadcast license may reach. The current cap is 25% of the nation's households. The Senate bill raises that to 35%."); *see also* 142 CONG. REC. S687-01, S698 (daily ed. Feb. 1, 1996) (unanimous consent agreement) ("The conference report . . . expands the national limit on TV ownership to 35 percent national market reach.") (statement of Sen. Kerrey).

what Sumner Redstone is suggesting, and Redstone probably would not argue with the general direction of recent legislation because he has obviously participated in a number of significant merger and acquisitions transactions which have extended Viacom into other methods of distribution, is that we should make sure that in this changing technological world we are not providing significant economic entities the ability to concentrate to such an extent and across such a broad band of information supply so that in ten or fifteen years, there could be three or four players in the media world, and a lessening in diversity of ideas.

MR. GOODALE: Mr. Tyler, aren't you just rearranging the deck chairs on the *Titanic*? You start off with this great "must-carry" legislation when cable was a dominant medium. Now we have got the Internet which is going to take over everything. It looks like a little different piece of litigation now, doesn't it?

MR. TYLER: I would not predict litigation. It is interesting, of course, that the 1996 Act changes everything enormously but that Congress decided not to take up what some had advocated as far as required access under these various media.[104] For example, should the telephone companies, if they are allowed into the video market, be required to provide or act as a common carrier, at least to the extent of certain channels? That is, if they are going to provide their own video programming, should they be required to carry the video programming of independent programmers? Congress has allowed telephone companies to make their own mind up in that regard, and so choices have been made. We will see. Maybe we won't have to wait until ten years from now.

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104. *See House Subcomm. on Telecommunications and National Communications Competition and Information Infrastructure Act of 1993*, 1994 WL 213812 (F.D.C.H. Feb. 2, 1994):

> The Alliance for Community Media endorses Section 659 of H.R. 3636, which would require common carriers to provide PEG access capacity on the same basis to the current requirements of cable companies. However, the Alliance recommends that Section 659 be amended to require common carriers to provide equivalent "services, facilities and equipment" for access use, on the same basis that the 1984 Cable Act requires of cable franchisees.

Id. at *4 (testimony of Anthony Riddle, Chair of the Alliance for Community Media).

MR. GOODALE: Rearranging the deck chairs, Mr. Joffe?

MR. JOFFE: They have been rearranged.

MR. GOODALE: I want to thank you all for listening to this panel, and I want to thank the panelists.