

## SYMPOSIUM

### NOTES FROM THE NEW WORLD: THE FUTURE OF THE INTERNET

#### *Editors' Foreword*

This Symposium centers on two important recent books on the Internet: David Post's *In Search of Jefferson's Moose: Notes on the State of Cyberspace*<sup>1</sup> and Jonathan Zittrain's *The Future of the Internet—And How To Stop It*.<sup>2</sup> Last December, the authors were joined by other scholars for a discussion of these books and other topics related to the Internet. Presentations by Post and Zittrain were followed by presentations from and discussions among the group. The pieces that comprise this collection reflect this discussion, which can be characterized, in broad terms, as an exchange on theories of Internet governance.

As Professor Post recounts in his piece, *The Theory of Generativity*, the two authors used to joke that they were both working on different versions of the same book.<sup>3</sup> Indeed, there is significant overlap. Broadly speaking, both Professors Post's and Zittrain's books deal with the concept of generativity—“*a system's capacity to produce unanticipated change through unfiltered contributions from broad and varied audiences*”<sup>4</sup>—and the bottom-up, Jeffersonian democratic power of the Internet to bring communities together. Professor Post's book is largely retrospective, investigating why the Internet developed in the decentralized and self-governing manner that it did; Professor Zittrain's, as the title of his book directly tells us, is forward looking. He questions how and whether the Internet can and will preserve its generativity in the future.

In *The Future of the Internet*, Zittrain discusses various phenomena—from censorship to cybersecurity—according to both how “generative” a given mechanism is and how non-generative (“sterile”) it is.<sup>5</sup> In *The Fourth Quadrant*, Zittrain adapts this framework and puts forth a model for conceptualizing the governing mechanisms of the Internet.<sup>6</sup> In Zittrain's

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1. DAVID G. POST, *IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBERSPACE* (2009).

2. JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* (2008).

3. David Post, *The Theory of Generativity*, 78 *FORDHAM L. REV.* 2755 (2010).

4. ZITTRAIN, *supra* note 2, at 70.

5. *Id.* at 70, 73.

6. Jonathan Zittrain, *The Fourth Quadrant*, 78 *FORDHAM L. REV.* 2767 (2010).

“fourth quadrant” we find communitarian solutions to some of the threats to the generativity and openness of the Internet.

In his own analysis of the theory of generativity, Professor Post underscores the need for Jeffersonian communities to band together in order to save the Internet’s unique generative qualities. He reminds readers that “[g]enerativity is part of the nature of this network because this network would not be what it is—‘the Internet’—were it not generative in the ways Zittrain describes.”<sup>7</sup> He draws a parallel between Zittrain’s call for higher ideals of “netizenship” and the “Civic virtue” advocated by the American revolutionaries of Jefferson’s age.<sup>8</sup>

This Symposium collection highlights a more pronounced common theme between Professors Post and Zittrain. In their respective pieces, *The Theory of Generativity* and *The Fourth Quadrant*, both arrive at similar conclusions about how to save the Internet from itself—that the power of communitarian groups, coming together to “participate in online interactions and within online communities” of users assuming their role as “netizens,” is the way for the Internet to continue to be a place of innovation, creativity, and openness.<sup>9</sup> Both authors’ pieces in this collection focus on these groups. These groups comprise the hierarchical but bottom-up communitarians in Zittrain’s fourth quadrant.<sup>10</sup> They also form the analogue in Post’s essay to Jefferson’s vision of a democratic republic—groups marked by “a disinterested concern for the common good and a sense of connectedness to one’s fellow citizens in the new polity”<sup>11</sup>—which Post examines in both *Jefferson’s Moose* and *The Theory of Generativity*.

In the essays that follow, James Grimmelmann of New York Law School, and Fordham Law professors Jeanne Fromer and Mark Patterson touch on some of the themes addressed by Post and Zittrain. In addition to their discussion of Professors Zittrain’s and Post’s recent books, the accompanying essays in the collection explore a variety of topics: the use of patent law to maintain innovation on the Internet;<sup>12</sup> the Internet as a semicommons;<sup>13</sup> and the number of important ways that various outposts and highways on the Internet are not network neutral.<sup>14</sup>

First, Professor Fromer explores how and whether patent law can be structured to support—or alternatively, stifle—innovation on the Internet. She concludes that patent law, through the promotion of innovation in

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7. Post, *supra* note 3, at 2760.

8. *Id.* at 2764.

9. *Id.*

10. Zittrain, *supra* note 6, at 2770.

11. Post, *supra* note 3, at 2764.

12. Jeanne C. Fromer, *The Compatibility of Patent Law and the Internet*, 78 FORDHAM L. REV. 2783 (2010).

13. James Grimmelmann, *The Internet Is a Semicommons*, 78 FORDHAM L. REV. 2799 (2010).

14. Mark R. Patterson, *Non-Network Barriers to Network Neutrality*, 78 FORDHAM L. REV. 2843 (2010).

software,<sup>15</sup> can be compatible with the Internet's core values of decentralization and generativity "if care is taken to tailor the application of patent law to encourage the sort of software innovation underlying much of the Internet's success."<sup>16</sup> In his piece, Professor Grimmelmann examines the way in which the Internet as a "semicommons"—mixing private and public use—contributes to the qualities of the Internet that Post and Zittrain celebrate. Building on Professor Post's argument that decentralization made the Internet successful and Professor Zittrain's argument that generativity was the source of that success, Professor Grimmelmann adds a third reason: that the Internet operates as a semicommons. The Internet, he argues, "gets the property boundaries right,"<sup>17</sup> by "mix[ing] private property in individual computers and network links with a commons in the communications that flow through the network."<sup>18</sup> With the right balance, "the Internet as a semicommons elegantly transforms the small-and-private versus large-and-common antithesis into a compelling synthesis."<sup>19</sup> Next, Professor Patterson's piece investigates the "shibboleth"<sup>20</sup> of network neutrality. His essay evinces a tension in Post's and Zittrain's approaches to network neutrality, and he seeks to move outward from their discussions in order to engage in a "general, rather than application-specific"<sup>21</sup> inquiry of the ways in which users of the Internet are affected by deviations from neutrality. Patterson thus focuses on the Internet's "intermediating role"<sup>22</sup>—the means through which users find their "way on the Internet."<sup>23</sup> Professor Patterson concludes that "[a] truly neutral Net would require more than technical neutrality; it could be ensured only by regulating or restricting the ways in which those intermediaries operate."<sup>24</sup>

The Fordham Law Review is honored to publish the exceptional contributions of these scholars. The Law Review owes thanks to Professor Abner S. Greene for organizing this Symposium, which follows a tradition of capturing exchanges by scholars on significant recent books.<sup>25</sup>

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15. Fromer, *supra* note 12, at 2787.

16. *Id.*

17. Grimmelmann, *supra* note 13, at 2799.

18. *Id.* at 2799–800.

19. *Id.* at 2800–01.

20. Patterson, *supra* note 14, at 2843.

21. *Id.*

22. *Id.* at 2870.

23. *Id.* at 2849.

24. *Id.* at 2845.

25. Symposium, *Minimalism Versus Perfectionism in Constitutional Theory*, 75 FORDHAM L. REV. 2865 (2007); Symposium, *Theories of Constitutional Self-Government*, 71 FORDHAM L. REV. 1721 (2003); Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1341 (2005).