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Cyberplace: Defining a Right to Internet Access through Public Accommodation Law

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TABLE OF CONTENTS

** Associate Professor, Georgia State University College of Law. Thanks to Raymond Ku, who planted the seed that became this article. Arthur Cockfield, Charles Cohen, Dan Hunter, Raymond Ku, Arnold Rosenberg, Steven Semeraro, Joseph Singer, Eugene Volokh and Ellen Waldman provided helpful comments, as did participants at a Thomas Jefferson School of Law faculty roundtable at which an early version of this article was presented. The bulk of work on this article was completed while I was a member of the faculty of Thomas Jefferson School of Law, San Diego. Thanks to Dean Kenneth Vandevelde and the Thomas Jefferson faculty for their support. At various stages, Dorothy Hampton, Jeffrey Hunt, June MacLeod, Christine Powell, Matthew Sarnowski and John Simone provided research help, and Cindy Marciel provided secretarial support, for which I am grateful. Landscape architect Dale Wall helped me think about conceptualizing space. Special thanks to Patrick Dreher for his support.

I. INTRODUCTION: AN ARGUMENT FOR INTERNET ACCESS AMIDST CYBERSPACE PRIVATIZATION

In the once wild and untamed world of cyberspace, fences are being put up all over the place. Using a variety of theories based in property, contract, tort, and criminal law, lawyers are helping make sure that public interests give way to private, proprietary concerns.[1] The concern driving much of this defensive, circling-the-wagons legal activity is the preservation of commercial advantage. A consequence of the enclosing of cyberspace[2]—the erection of boundaries and the delimitation of borders—is that some persons are excluded from portions of cyberspace where they were previously free to roam.

This Article's point of departure is a concern about the implications of Internet exclusion. Historically, the assertion of the right to exclude has been a powerful tool of the Anglo-American private property owner, a right that is at the very core of what it means for an individual to hold private property.[3] Simultaneously, however, the right to exclude has constituted a means to assert economic and social privilege, such as laws that systematically kept the descendants of African slaves or Jewish immigrants—to cite but two groups of excluded persons—from gaining access to resources enjoyed by the descendants of Christian European settlers.[4] One reason that the increased propertization of cyberspace need concern us, therefore, is that a property owner's right to exclude others has in our nation's history served to promote discrimination and inequality as much as it has protected individual rights. And, as this article suggests, one way to guard against increased exclusion on the Internet is to articulate a right of public accommodation in cyberspace.

For the average Internet user, this proposition may, at first glance, seem anything but intuitive. That is, with its endless banner ads and pop-up screens imploring us to buy this or that, offering a special one-time offer if only the user

1. Dan Hunter, for example, has pointed to "the recent rise of the 'trespass to chattels' action, the extension of criminal liability to competitors' legitimate investigation of rivals' websites, and the increasing importance of website 'Terms of Use,'" and a number of other online developments. Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 446 (2003).

2. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 J.L. & CONTEMP. PROBS. 33, 34 (2003).

3. *See, e.g.*, Uston v. Airport Casino, Inc., 564 F.2d 1216, 1217 (9th Cir. 1977) (holding no common law duty of casino owner to provide would-be gambler with access to casino owner's facility).

4. For example, racially or religiously restrictive covenants of sale are commonly used to exclude certain persons. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 23 (1948) (holding that neighborhood's covenant restricting owner's sale of home to African Americans violated Fourteenth Amendment).

takes just a minute and acts now, the increasingly commercialized Internet seems to be all about trying to *include*—or to invite a purchase—rather than to exclude. But on examination, it is easy to identify examples in different areas of Internet use in which Internet exclusion is a central aspect of the legal battle over Internet control.

The most celebrated such example is, of course, the United States government's case against the Microsoft Corporation, in which the government successfully prosecuted the computer giant on antitrust grounds for tying its browser software to its Windows Operating System.[5] Doctrinally, the case is about antitrust law and not the common law of property. Nonetheless, for my purposes it merits noting that, fundamentally, Microsoft's claim was about its entitlement to assert its proprietary interest, which had the effect of excluding others.

In fact, many sites deliberately discriminate as to access. The banner ads or pop-up ads that I see are dictated by my other choices on-line—by the purchases I make or the other sites I visit.[6] To the extent that those choices reflect my relatively privileged status as a highly educated white male in this society, such practices constitute a form of discriminatory exclusion, since someone without my demographic profile gets directed elsewhere. That person may never have the opportunity to know of, much less apply for, credit cards or insurance services or mortgage financing—or any number of other goods and services—on the terms and conditions I might receive.

Because exclusion is deeply tied to discrimination in our society, such exclusion should concern us. Such practices raise an important question, namely: should Internet users be guaranteed some level of access to its contents, to the goods and services it provides, and to the facility it constitutes? This article argues that such a right of access needs to be recognized and that, furthermore, a key tool to facilitate this end is the law of public accommodation.

Internet exclusion is a real and troubling phenomenon. Suppose, for instance, that you were blind, and that as a result of your disability, you could not access the Internet, with all of its wealth of information, goods, and services, without special software. Or suppose that you wanted to explore the contents of a major news source, but could not do so without first providing your income information and agreeing to have your personal Internet browsing habits tracked—presumably for future commercial solicitations. These examples reflect actual exclusion of some persons (the blind and those unwilling to sacrifice privacy in exchange for Internet access) from the Internet.[7] This article advances the view that such exclusion runs counter to long-established values

5. United States v. Microsoft Corp., 215 F. Supp. 2d 1 (D.D.C. 2002).

6. Vendors are, unsurprisingly, keen to preserve their right to use e-technologies to identify their ideal customers and have, as a result, made various self-regulatory proposals. *See Network Advertising Initiative*, http://www.networkadvertising.org (establishing privacy policy for Internet advertisers) (last visited August 26, 2003).

7. See *infra* notes 35-38 and accompanying text for a discussion of the exclusion of blind persons and *infra* note 8 and accompanying text for a discussion of the news source example.

embedded in our legal tradition that support openness and access for entities that, like the Internet, hold themselves out to do business with the public.

Following this introduction, Part II makes the case that public accommodation law is an appropriate legal vehicle to establish a right of Internet access. Part III begins with a brief review of the current state of public accommodation law followed by a consideration, in light of that review, of some of the possible limitations of public accommodation principles for regulating the Internet. I will then identify which aspects of the Internet should be classified as places of public accommodation. In this connection, I will examine debates about the nature and scope of public accommodation principles as they apply to persons with disabilities—the area in which the most vigorous debates about public accommodation are occurring.

The discussion will not, however, be limited to the disabilities rights context. As noted above, the concern about discrimination in cyberspace extends not only to disadvantages suffered by the disabled. On the contrary, the medium uniformly discriminates on the basis of income,[8] and, as the article will explore, there is every reason to suppose that it actively discriminates on other bases as well. Part III will therefore conclude by comparing questions of Internet access to the justifications for access to goods and services in other areas of the law.

Part IV will further develop an analytical justification for regulating the Internet by means of public accommodation law. To this end, Part IV will begin with a challenge to the increasing dominance of the private contract model for Internet governance. Following the lead of Thomas Grey's seminal article on the "disintegration" of property,[9] I suggest that recent property law scholarship provides useful frameworks for thinking about the questions that will drive this debate, namely how to secure public access and rights to the Internet, while also respecting concerns about control and private ownership of the Internet's complicated physical infrastructure. Part IV then explores justifications for the argument in modern property theory, and advocates a legislative effort explicitly to include Internet access in federal and state accommodation law.

II. FROM CYBERSPACE TO CYBER*PLACE*: WHY PUBLIC ACCOMMODATION LAW?

A notable aspect in the development of the Internet[10] is the vocabulary it

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8. *See* CASS SUNSTEIN, REPUBLIC.COM 57-61 (Princeton 2001). See also *infra* notes 59-60 and accompanying text for a discussion of the digital divide.

9. Thomas C. Grey, *The Disintegration of Property*, *in* 22 NOMOS XXII 69 (J. Roland Pennock & John W. Chapman, eds. 1980). As Grey famously noted, in words of precise relevance to the argument put forward here, "most property in a modern capitalist economy is intangible." *Id.* at 70. The reach—one might say the specter—of this article continues to trouble property scholars. *See, e.g.*, Peter S. Menell & John P. Dwyer, *Reunifying Property*, 46 ST. LOUIS U. L.J. 599, 600 (2002) (noting numerous scholars have questioned Grey's arguments).

10. The Internet is, of course, a much larger and more comprehensive entity than is suggested by the activities I have just described, most of which relate to the most commonly-used feature of the Internet, namely the World Wide Web, which is, in fact, "a set of protocols for displaying hyperlinked documents linked across the Internet." LAWRENCE LESSIG, THE FUTURE OF IDEAS 41 (2001). *See also* ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS

has generated. Gertrude Stein famously said of Oakland, California, that "[t]here is no ***there*** there."[11] Similarly, at first glance it may appear as if there is no "***there*** there" with the Internet. It is, perhaps more than anything else, characterized by its decentralization: its riches mined from millions of computer terminals, which gather information and transmit it across phone lines and cables that literally span continents, cross oceans, and move across outer space, undetected by the naked eye. And if decentralization correctly describes the Internet's defining physical aspect, the variety and diversity of uses to which this resource can be put is similarly dizzying: many millions of people access widely divergent kinds of information and documents, play games, and "chat" online with their friends and total strangers. They access this information and take advantage of the Internet's opportunities and resources via different servers, each of which connects to Internet service providers ("ISPs") and, in turn, search engines owned by widely divergent individuals, corporations, and governments.

Nonetheless, despite the absence of a centralized location, we continue to describe the Internet as if there is a "***there***" there. That is, we describe the Internet as if it is—or perhaps is a multitude of—places. We try and find things in cyber***space***; if I want to chat with friends and family, I may enter a chat ***room***. Information is collected and in turn accessible on Internet ***sites***. Real property metaphors are commonly used to describe cyber-activity, including ***turf***,[12] the construction of ***firewalls***,[13] and references to the "***building***" of sites.[14] Lawrence Lessig, perhaps the leading legal analyst of cyberspace, relies upon the property-based metaphor of the "***architecture***" of the Internet to advance his most recent argument about the proper distribution of Internet ownership rights.[15] Like many Internet analysts, Lessig refers frequently to "***communities***" of users.[16] Scholars of cyberlaw evince a fondness for a cyber-pun on a place name, and refer to the Internet with the whimsical label "Cyberia."[17] One commentator worries about "forces internal and external to cyberspace [that] are taming the electronic frontier by establishing the first legal ***footpaths*** for 'our'

IN CHARGE AND CHANGING THE WORLD WE KNOW 14-15 (1999) (pointing to increasing difficulty of defining Internet).

11. BARTLETT'S FAMILIAR QUOTATIONS 627 (Justin Kaplan, ed., 16th ed. 1992) (emphasis added) (quoting GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY (1937)).

12. I. Trotter Hardy, *The Proper Legal Regime For "Cyberspace,"* 55 U. PITT. L. REV. 993, 994 (1994).

13. LESSIG, *supra* note 10, at 172 (emphasis added).

14. *Id.* at 125 (emphasis added).

15. *See, e.g., id.* at 120 (emphasis added) (using architectural metaphor to describe differences between real space and cyberspace). See also Lessig's unfortunate neologism (at least to my ears), by which he transforms the noun architecture into the verb "to architect." *Id.* at 139; Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 526 (1996) (asserting commitment to an open network provides economic incentives for compromises) (emphasis added).

16. LESSIG, *supra* note 10, at 162 (emphasis added).

17. Hardy, *supra* note 12, at 994. *See also* Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J. OF L. AND PUB. POL'Y 475 (1997) (referring to "cyberia" and "cyberians" descriptions of Internet's conceptual location).

convenience."[18] And if we want to share information about ourselves or our endeavors with the computer-connected world, we do so by means of an electronically transmitted place, the ***home*** page.[19]

In other words, the default metaphor set used to describe the Internet does so as if it is a—or as if it is characterized by—physical location.[20] Indeed, the fence-building and boundary-drawing that characterize today's Internet suggest that the undefined realm that was once "cyberspace" has rapidly been colonized and defined so that it is appropriate to begin to speak instead of "cyberplace," a neologism that implies a more fixed notion of property and property ownership.

One might argue that not too much should be made of the phenomenon of property metaphor in the electronic world—language often uses metaphor when faced with new technology for which no established vocabulary exists.[21] Yet, in response, it need be said that when faced with new technology, language may also be chosen that reflects what seems to users to be the most reasonable way of

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18. Gibbons, *supra* note 17, at 478 (emphasis added).

19. *Cf. id.* (describing metaphorical use of 'cyberia' and its inhabitants, 'cyberians'); *see also* Trotter Hardy, *The Ancient Doctrine of Trespass to Web Sites*, 1996 J. ONLINE L., Oct. 1996, *available at* LEXIS, Academic Library ("Perhaps it is no accident that people are so fond of the term 'home page' it invokes strong emotional feelings. For that matter, anyone who has experienced a physical break-in of their home understands in a way that others cannot just how strong is the emotional sense of insecurity and helplessness that results.").

20. *Cf.* Hardy, *supra* note 19, at 1 (similarly observing real place metaphors used to describe cyberspace). A notable aspect of the cyber-experience is, of course, its double-ness. That is, one's spatial experience of cyberspace use is both "there" and "here" at once. Lessig memorably captures this double-ness in the opening words of one of his many pleas for keeping cyberspace open and uncontrolled instead of highly regulated:

> Cyberspace is a place. People live there. They experience all the sorts of things that they experience in real space, there. For some, they experience more. They experience this not as isolated individuals, playing some high tech computer game; they experience it in groups, in communities, among strangers, among people they come to know, and sometimes like.
>
> While they are in that place, cyberspace, they are also here. They are at a terminal screen, eating chips, ignoring the phone. They are downstairs on the computer, late at night, while their husbands are asleep. They are at work, or at cyber cafes, or in a computer lab. They live this life there, while here. And then at some point in the day, they jack out, and are only here. They step up from the machine, in a bit of a daze; they turn around. They have returned.

Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1403 (1996).

21. *See* Gibbons, *supra* note 17, at 486 (adopting view that, despite prevalence of spatial and, one might add, geographic vocabulary, the appropriate metaphor to describe cyberspace is biological). Gibbons claims:

> Culturally, socially, religiously, and economically diverse communities come together so that "the whole system is propagating and evolving, . . . Cyberspace [is] a social petri dish, the [Intern]et [is] the agar medium, and virtual communities, in all their diversity, [are] the colonies of microorganisms that grow in petri dishes. Each of the colonies of a microorganism—the communities on the [Intern]et–is a social experiment that nobody planned but that is happening nevertheless.

Id. (quoting Howard Rheingold, *The Virtual Community– Homesteading on the Electronic Frontier* 6 (1993)). *See also* Internet Business Network, *Customer Intimacy: How Websites Learn and What They Have to Teach*, www.interbiznet.com/custint/map.html (last visited Jul. 16, 2002) (Site no longer available).

conceptualizing that technology. And that language carries with it a pre-existing set of values and norms. On occasion, organic metaphors have also been used to describe cyberspace,[22] but organic metaphors have not taken hold as the default metaphor set. The fact that physical metaphor—it might be called the "metaphor of place"—has instead taken hold as the default metaphor set in cyberspace requires our attention. My premise here, then, is that the language we have chosen to describe the Internet reveals not only how we conceptualize the Internet, but also, and more importantly, how we decide the legal rules and standards that we want to govern it.

George Lakoff and Mark Johnson famously examined the power of metaphor as a tool that both orders and creates reality.[23] Dan Hunter, applying Lakoff's theories to cyberspace regulation, laments what he concludes is the "default principle of exclusion" now operating in cyberspace.[24] Somewhat wistfully, Hunter even proposes supplanting the "Cyberspace as Place" metaphor "with another one which leads to more palatable public policy results."[25] For Hunter, a more palatable public policy would allow for maximum Internet access in the form of an unrestricted (or less restricted) e-commons. Ultimately, however, Hunter rejects a non-spatial metaphor set as unrealistic, recognizing that it is hard to imagine an alternative.[26] Hunter's analysis thus underscores the significance of the metaphor choice we have chosen for cyberspace. His preference for cyber-regulation, given a physicalized conception, would be to see the Internet regulated as a commons, as a pooled resource, rather than by application of private property principles like the law of public accommodation.[27] The argument that follows is, by contrast, less hopeful than Hunter that we can turn back the clock to break down e-fences and open up cyber-resources. That is, unlike Hunter, this article accepts that the Cyberspace Enclosure Movement is with us to stay.[28] Like Hunter, however, it aims to insure openness and access, and to do so by an established property law principle.

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22. *See* Gibbons, *supra* note 17, at 486 (arguing that evolution of Internet makes biological metaphors appropriate to describe cyberspace); *see also* Arthur J. Cockfield, *Designing Tax Policy for the Digital Biosphere: How the Internet is Changing Tax Laws*, 34 CONN. L. REV. 333, 356-59 (2002) (analyzing Internet as "man-made biosphere").

23. *See, e.g.*, GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 3-4 (1980) (presenting theory that metaphor is not peripheral, but fundamental to conceptualization and understanding language); *see also* GEORGE LAKOFF AND MARK TURNER, MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR xii (Univ. of Chicago, 1989) (analyzing role of metaphor in poetry by addressing questions of rhetoric, meaning, and reasoning).

24. Hunter, *supra* note 1, at 511.

25. *Id.* at 514.

26. *Id.* at 465-72 (following Lakoff, Hunter distinguishes between "cognitive" and other metaphor, such as literary metaphor, for example. In his analysis, cognitive metaphors are those by which we order and create reality).

27. *Id.* at 507-14.

28. *Id.* at 506-7.

A. Public Accommodation and Property Law

The larger concern of this article is to enter into the debate over the legal consequences of conceiving cyberspace as a physical location or series of locations. To this end, I argue for a fully integrated, holistic view of new information technologies, one that necessarily (because of the nature of the activity) must blur the lines between public and private. This is not to say that appropriate lines cannot be drawn, that boundaries cannot be defined. It is to propose, instead, that the Internet's boundaries must be understood as situational and not as fixed, physically permanent ones.[29] In a different context, the Italian architect and urban theorist Aldo Rossi wrote of the city as follows:

> [I]t must be understood that the city represents the progress of human reason, is a human creation par excellence; and this statement has meaning only when the fundamental point is emphasized that the city and every urban artifact are by nature collective. I am often asked why only historians give us a complete picture of the city. I believe the answer is that historians are concerned with the urban artifact in its totality.[30]

By extension, Rossi's observations about the collective nature of cities, and his appeal to examine them in their totality, applies equally to the way we need to begin as members of a larger society charged with crafting and applying its laws, to think of cyberspace: as an extension of the total artifact that is our society and its laws. And if one ventures to think broadly and creatively about this issue, there are bases in decided case law for so conceptualizing the law of public accommodation.

More specifically then, this article examines one aspect of the conceptualization of cyberspace in physical property terms, namely whether the Internet should be understood to be a place of public accommodation. By "public accommodation," I refer to that major exception to the right to exclude—that proverbial "biggest stick" in the bundle of sticks that constitutes the rights and obligations of property ownership. That is, I understand the term public accommodation to refer to the legal obligation of a private business or

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29. What I have in mind here is not far from the "muddy" cyberspace entitlements advocated by Dan Burk, although it need be said that his conception appears to me to be a more free-wheeling, Wild West model than what I have in mind. *See* Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 164 (1999) (arguing that complex rules regulating Internet will lead parties using Internet to enter into informal agreements and to resort to self-help). It bears emphasizing, too—an important, if rather obvious point—that the implications of new technologies are transforming the way we conceive of business relations in many ways. *See, e.g.*, Jennifer E. Doty, Note, *The Effects of Electronic Commerce on the Traditional Shopping Center Lease*, 6 TEX. WESLEYAN L. REV. 85, 92-96 (1999) (stating that electronic commerce can cause lease breaches by vendors with operations in shopping centers because traditional shopping center leases typically contain geographic covenants not to compete); Barbara Spillman Schweiger, Note, *The Path of E-law: Liberty, Property, And Democracy From The Colonies to The Republic of Cyberia*, 24 RUTGERS COMPUTER & TECH. L.J. 223, 225 (1998) (discussing legislative response to industrialism outdated, laissez-faire economic theory as inadequate and addressing new legislative response to arrival of information age).

30. ALDO ROSSI, THE ARCHITECTURE OF THE CITY 57 (Diane Ghirardo & Joan Ockman trans., Oppositions Books 1982).

service to provide the public with reasonable access to its business or service despite the private character of its operation. My aim is not only to advance the view that the Internet is a place of accommodation but also to suggest that we would do well to listen to metaphor and, because property metaphor is so widely used to describe Internet activity, to rely more heavily than we have on property law to guide the regulation of cyberspace. In so doing, I come down firmly on the side of those who believe that many of the issues raised by the legal regulation of cyberspace are not terribly different from those raised by the earlier regulation of other kinds of property.[31] Therefore, I reject the views of the cyber-exceptionalists, those who assert the novelty of and therefore the virgin regulatory universe that they claim is the Internet.[32]

This is more than an academic question. On the contrary, it arises out of real struggles over Internet use that have occurred in the past and are likely to occur again in the future. Consider, for instance, a lawsuit brought in federal court against an ISP on the grounds that the ISP breached its customer agreement with and violated plaintiff's public accommodation rights under Title II of the Civil Rights Act of 1964 when it failed to prevent chat room participants from engaging in language that degraded and insulted plaintiff's religion.[33] Plaintiff, a Muslim, complained to defendant AOL about anti-Muslim postings in a chat room available on defendant's service, but to no avail. With respect to the Title II claim, the Court found that "'places of public accommodation' are limited to actual, physical places and structures, and thus cannot include chat rooms, which are not actual physical facilities but instead are virtual forums for communication provided by AOL to its members."[34]

Or consider a lawsuit brought in a different federal court against an airline on the grounds that its website's "'virtual ticket counters' are inaccessible to the blind."[35] A non-profit group representing the disabled and one of its members

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31. *See, e.g.*, Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1239-50 (1998) (concluding transitional legal tools can resolve regulatory problems associated with Internet); Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1148 (2000) (noting that information technology raises few novel legal issues).

32. *See* David R. Johnson & David Post, *Law and Borders—the Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1379 (1996) (arguing that cyberspace forms new boundary requiring its own laws and legal institutions separate from existing doctrines). *But see* Arthur J. Cockfield, *Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation*, 85 MINN. L. REV. 1171, 1202-06 (2002) (agreeing in part with Johnson and Post, but arguing they overstate case that Internet cannot be effectively regulated). *See also generally* Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH L. REV. 395, 395-96 (1999) (concluding 'real space' laws do not apply to cyberspace within context of free speech).

33. Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 545 (E.D. Va. 2003).

34. *Id.* at 541 (concluding Title II's list of public accommodations only includes physical structures).

35. Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002) (arguing that Title II of Americans with Disabilities Act mandated that airline's website be accessible to blind). *See also* Nat'l Fed'n of the Blind v. Am. Online, Inc., No. 99CV12303EFH (D. Mass., filed Nov. 4, 1999) (asserting Internet service provider's browser and services did not comply with Title III of ADA); *Blind Group Sues AOL*, FACTS ON FILE WORLD NEWS DIGEST 965, col. 3 (Dec. 31, 1999). The form of the complaint is available at 1 AMERICANS WITH DISABILITIES: PRACTICE AND

sued Southwest Airlines under the Americans with Disabilities Act of 1990 ("ADA"),[36] claiming that Southwest discriminated against the blind because its system neither removed barriers to communication nor provided satisfactory auxiliary aids and services to make its website accessible to sight-impaired persons.[37]

Concluding that "the Internet website, southwest.com, does not exist in any particular geographical location" and that, therefore, "Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency," the Court dismissed Plaintiffs' complaint with prejudice for failing to state a claim upon which relief could be granted.[38]

Such highly location-bound conceptions of public accommodation law are both wrong-headed and out of step with the historical development and purposes of public accommodation law. In his thorough review of the modern law of public accommodation, Joseph Singer identifies a notion that today would be characterized as a public accommodation principle. The concept isolated by Singer, however, is very different from the "common law" principles now handed down as black letter law in our law schools. Specifically, the current standard narrative about the common law of public accommodation provides that, historically, the right to exclude was absolute, except for two classes of persons only, specifically "common carriers" and "innkeepers."[39]

Singer, however, effectively questions the authenticity of today's standard

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COMPLIANCE MANUAL 6:551 (1994 & Supp. 2000). *See also* Peter David Blanck, Leonard A. Sandler, *ADA Title III and the Internet: Technology and Civil Rights,* MENTAL & PHYSICAL DISABILITY L. REP. Sept./Oct. 2000, at 855 (reporting National Federation lawsuit eventually settled and finding case has spawned several treatments in law reviews, limited to question if Internet is place of public accommodation with respect to disabilities). *See also generally* Jonathan Bick, *Americans with Disabilities Act and the Internet,* 10 ALB. L.J. SCI. & TECH. 205, 211-17 (2000) (proposing language of Act should be broadly construed to effectuate goal of eliminating discrimination against disabled); Paul Taylor, *The Americans with Disabilities Act and the Internet,* 7 B.U. J. SCI. & TECH. L. 26, 40 (2000) (concluding economic effects of applying ADA to Internet should be carefully evaluated); Dana Whitehead McKee & Deborah T. Fleischaker, *ADA and the Internet: Must Websites be Accessible to the Disabled?,* 33 MD. B.J. 34, 36 (2000) (concluding that Internet and Websites should be viewed as public accommodations under ADA Title III); Justin D. Petruzzelli, Note, *Adjust Your Font Size: Websites Are Public Accommodations Under the Americans with Disabilities Act,* 53 RUTGERS L. REV. 1063, 1067 (2001) (claiming websites must be recognized as place of public accommodation under Title III to satisfy general mandate of ADA); L. Kim Tan, *Pact Leads Group to Drop Suit vs. AOL,* BOSTON HERALD, July 27, 2000, at 29 (reporting that National Federation of the Blind withdrew suit against AOL because AOL planned to release software which made Internet accessible to blind); Ritchenya A. Shepard, *Net Rights for the Disabled? AOL Suit By Blind Could Impact Online Firms - and Others,* NAT'L L.J., Nov. 22, 1999, at B8 (discussing potential impact on making Internet accessible to the substantial number of blind computer users).

36. 42 U.S.C. §§ 12101-12213 (1995 & Supp. 2003).

37. Access Now, Inc., 227 F. Supp. 2d at 1314.

38. *Id.* at 1321.

39. *See, e.g.*, Madden v. Queens County Jockey Club Inc., 72 N.E.2d 697, 698 (N.Y. 1947) (holding that race track operator had absolute right to exclude, so long as he did not exclude on grounds of race, creed, color, or national origin).

narrative account. His analysis demonstrates that the alleged common law categories are not as fixed as recent generations of U.S. law students have been led to believe. Instead, he suggests, today's standard narrative is likely a post-Civil War creation, one designed to reinforce the racially-based categories and exclusions of Jim Crow. Thus, Singer identifies a pre-Civil War norm, one that, he shows, has in some form held sway in some jurisdictions since the Civil War—that those who engage in business with the public possess a duty to serve all who come to use or enjoy their service. Singer's analysis thus reinforces the usefulness of clarifying principles of Internet access in public accommodation terms inasmuch as cyberspace unquestionably provides services to the public. His discussion further reveals the extent to which the modern "common law" of public accommodation developed in order to cement the emerging and legally-enforced racial caste system that developed following the Civil War. Simultaneously, refinements in the law of public accommodation sought to provide for some racially integrated uses of private property, but also to limit and control the right of access.[40] Singer's examination of the historical legal record explores:

> the fact that the postbellum laws clearly enshrined a right of access to places of public accommodation [for both whites and blacks] and that, in many Northern states and some Southern states, this declaration had the effect of promoting both access and integration at least some of the time. At the same time, this fact generated a backlash. Other courts reacted to the newly asserted rights of access by rejecting the idea that access implied integration and by strictly limiting the categories of businesses subject to the *duty to serve*.[41]

This, he further indicates, reveals something unexpected about the common law exceptions to the sacrosanct right to exclude that has been learned and perpetuated by generations of law students and lawyers, namely the exceptions for common carriers and innkeepers.[42] These exceptions may actually represent a post-Civil War *narrowing* of an earlier common law requirement of a duty to serve when an entity opened itself up to the public.[43]

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40. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1348 (1996) (citing role of public accommodation laws as battleground in post-Civil War reconstruction era and beyond).

41. *Id.* at 1382-83 (emphasis added). The ideological tug-of-war Singer describes is still very much with us, as reflected, most recently, by the decision of the United States Supreme Court finding that the Boy Scouts was not a place of public accommodation and, as such, could exclude gays and lesbians from its membership. Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000). *Dale* reflects the continuing struggle over how much access is required when extending services or facilities to the public inasmuch as it came to the Court following contradictory decisions from the California and New Jersey Supreme Courts. *See id.* (discussing conflicting California and New Jersey Supreme Court decisions); *see also* Curran v. Mount Diablo Council, 952 P.2d 218, 239 (Cal. 1998) (holding organization not precluded from rejecting gay applicant on basis of sexual orientation because it was not a business establishment within meaning of Act); Dale v. Boy Scouts of Am., 734 A.2d 1196, 1230 (N.J. 1999) (holding organization violated law against discrimination for expelling openly gay member on basis of sexual orientation and application of anti-discrimination law did not violate First Amendment rights).

42. Singer, *supra* note 40, at 1292.

43. *Id.* at 1351-57.

With respect to the emerging importance of the Internet, the force of Singer's observations is tremendous. They suggest, for example, that blind individuals were correct to worry about their lack of a right of access to websites on public accommodation grounds. As Singer has shown, the history of public accommodation laws demonstrates that, as a legal and historical matter, those laws have been used to *limit* access in a discriminatory fashion as much as to provide for a right of accommodation.[44] If, however, one focuses on the pre-Civil War common law tradition, with its duty to serve principle, it becomes clear that even when some feature of the Internet is privately owned, there is a basis for assuring a degree of public access to it, and to do so on public accommodation grounds. My argument aims, moreover, to consider the Internet not just as a place of public accommodation for the disabled, but as a place that must accommodate the public generally.[45]

B. The Propertization of the Internet and Limits on Access

Given the rapid propertization of cyberspace, this is an especially urgent time to evaluate the proposition that the Internet is a place of public accommodation for all. Lessig is the most prominent legal analyst of cyberspace, issuing ominous, Cassandra-like calls lamenting the increasing concentration of ownership in cyberspace.[46] Moreover, as Lessig and others have also documented, the legal regulation of this newly concentrated ownership increasingly is governed by private law principles.[47] For instance, Lessig worries about the social effects of a highly privatized, contract-controlled Internet,

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44. *Id.* at 1390-1400.

45. That being said, it seems unquestionably true that disabilities law is the arena in which these questions are likely to prove most contentious. This is hardly surprising inasmuch as disability law is the crucible on which the limits of modern public accommodation principles are being tested. *See, e.g.*, Lawrence Berliner, *An Evolving Americans With Disabilities Act: A Survey of Decisions Involving Public Entities and Places of Public Accommodation From Courts Within the Second Circuit*, 17 QUINNIPIAC L. REV. 633, 683 (1998) (concluding that ADA will constantly evolve as people with disabilities encounter public accommodations); Matthew A. Stowe, Note, *Interpreting "Place of Public Accommodation" Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications*, 50 DUKE L.J. 297, 316-29 (2000) (arguing for broad construction of ADA to apply not just to exclusion of disabled from physical spaces, but from non-location based membership organizations as well).

46. *See* LESSIG, *supra* note 10, at 117 (asserting that world of cyberspace is far closer to world of ideas than world of things).

47. *See id.* at 221 (encouraging rapid transition to regime of regulation-free right to innovate); *see also* Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 470 (1998) ("The emerging market for digital works displays a similar emphasis on private ordering of entitlements and obligations . . . made possible by the growing use of "click-through" contracts for the online delivery of digital works and by new "rights management" technologies that will allow copyright owners to set unilaterally and enforce automatically the terms and conditions of access to digital content."); Mark A. Lemley, *The Law And Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1260-61 (1998) (arguing for ordering Internet according to public rather than private norms); SHAPIRO, *supra* note 10, at 80-82 (noting expanding use of copyright law and various forms of digital technology, such as "trusted systems," "clickwrap contracts," and "digital watermarks" for protecting digital information on the Internet).

pleading that it is essential to strive to find the ideal balance between public and private control.[48] In this he is not alone. Mark Lemley has observed that "a spirit of openness and sharing, and a hostility to intellectual property and exclusion" that characterized the early Internet (or, at least, is widely said to have characterized it) may likely no longer prevail among the majority of its users.[49] Moreover, establishing private norms tends, in the natural ordering of such things, to favor the economically mighty over the economically weak.[50] Julie Cohen expresses concern that "the economic case for assigning strong, undivided property rights in digital works is inadequate at best,"[51] arguing for a propertized conception of entitlements in cyberspace that embraces *all* citizen-consumers.[52]

It is then small wonder, that a central concern of much current legal debate about Internet use focuses on conditions of access. Importantly for purposes of the argument advanced in this Article, this is true for both the most and the least tangible aspects of the Internet's structure. Consider the following recent examples, all of which underscore the increasing concentration of social and economic power on the Internet—with its potential to exclude those wishing to gain unrestricted electronic access:

In 2002, Microsoft Corporation signed an Agreement and Consent Order with the Federal Trade Commission, in which it agreed to cease monitoring of "Microsoft7 .NET Passport." Microsoft introduced Passport in 1999, allegedly as a convenient and secure way for users to authenticate their identity and thereby navigate the Web for communication, information, and commercial purposes. Microsoft was widely criticized, however, on the grounds that it was thus attempting to create "an online tollbooth" that would both secure its control of Internet resources and fail to provide consumers with promised privacy and security protections.[53] The Agreement and Consent Order obliges Microsoft to

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48. LESSIG, *supra* note 10, at 204. Lessig even quotes, to this end, as surprising a source as Judge Alex Kozinski, of the United States Court of Appeals for the Ninth Circuit, to the effect that "reducing too much to private property can be bad medicine." *Id.* at 203.

49. Lemley, *supra* note 47, at 1268.

50. *Id.* at 1276-77 (noting, for example, desire of some firms to prevent "unauthorized" links to clients' websites against "impecunious defendants," even though no legal basis for such claim exists). It is worth adding, as well, that Lemley's observation is likely even more true today, four years after publication of his paper.

51. Cohen, *supra* note 47, at 496.

52. *Id.* at 514-18. *See also* Gibbons, *supra* note 17, at 482-84 (identifying contract and tort principles as those that will control delineation of rights over Internet).

53. Katherine Pfleger & Brier Dudley, *Microsoft Settles Case on Privacy with FTC; Deal Forces Audits for 20 Years*, SEATTLE TIMES, Aug. 9, 2002, at C1 (reporting that Federal Trade Commission ordered Microsoft to increase protection of user privacy). *See also* MICROSOFT.NET, PASSPORT: BALANCED AUTHENTICATION SOLUTIONS FOR BUSINESSES AND CONSUMERS (2002), *available at* http://www.microsoft.com/presspass/features/2002/aug02/08-08passport.asp (last visited Sept. 9, 2003) (providing company's view of the advantages of Passport); Q&A: MICROSOFT'S AGREEMENT WITH THE FEDERAL TRADE COMMISSION ON PASSPORT, *available at* http://www.microsoft.com/presspass/features/2002/aug02/08-08passport.asp (last visited Sept. 9, 2003) (setting forth company's view of advantages of Passport).

submit to close scrutiny of the way in which it collects and uses information gained from consumers, as well as respecting the security guarantees it makes.[54]

In 2002, DoubleClick Inc., an online advertising agency, signed an agreement with the Attorneys General of ten states after charges that it was using consumer information gained from tracking individual users' Internet meanderings without their permission.[55] The agreement required DoubleClick to pay $450,000 and limit its future use of such information. The settlement was instantly characterized as a victory by consumer privacy advocates.[56]

In the much-watched case of *Intel Corporation v. Hamidi*,[57] a California appellate court affirmed that disgruntled former Intel employee Hamidi was liable for committing a trespass to chattels when he used Intel's internal e-mail system to share his critical views of the company with thousands of company employees.[58] It merits noting here that the finding of defendant's liability was premised upon property damage by an intangible means, namely an electrical signal that directed messages to plaintiff's employees on their computers.

The much-discussed "digital divide" separating haves and have-nots in both this country[59] and abroad[60] also raises, at its most fundamental level, a question about whether barriers to access (a form of boundary) are tolerable. This example does not, like the previous three, address a specific legal dispute.

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54. Federal Trade Commission, Agreement Containing Consent Order, In the Matter of Microsoft Corporation (Aug. 8, 2002).

55. In the Matter of DoubleClick Inc., Agreement Between the Attorneys General of the States of Arizona, California, Connecticut, Massachusetts, Michigan, New Jersey, New Mexico, New York, Vermont, and Washington and DoubleClick Inc. (Aug. 26, 2002).

56. *See, e.g.*, Robert O'Harrow Jr., *Web Ad Firm to Limit Use of Profiles*, WASH. POST, Aug. 27, 2002, at E01 (reporting that DoubleClick dropped plans to merge on-line and off-line information, agreed not to use personally identifiable information about sexual orientation, social security numbers, or medical or financial data, and agreed to alert computer users to placement of cookies).

57. 114 Cal. Rptr. 2d 244 (App. 2001).

58. The decision was subsequently reversed by *Intel Corp. v. Hamidi*, 71 P.3d 32 (Cal. 2003). At its simplest, the case pitted the company's right to exclude against an individual's right of access. I do not here mean to suggest that *Hamidi* raises a public accommodation question. What I am saying, however, is that the tension it makes evident between exclusion and access points to the normative value of public accommodation law for the Internet.

59. *See, e.g.*, Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology* 69 U. CHI. L. REV. 263, 324 (2002) (concluding we must take steps to close the digital divide); Symposium, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1, 1 (2002) (noting digital revolution has left many lives untouched); www.digitaldividend.org (aiming to promote widespread digital access and website of the World Resources Institute's Digital Dividend project) (last visited Sept. 12, 2003). Although these concerns are not central to the topic of this paper, they are peripherally related to the argument advanced here. *See, e.g.*, FEDERAL COMMUNICATIONS COMMISSION, IN THE MATTER OF INQUIRY CONCERNING THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY TO ALL AMERICANS IN A REASONABLE AND TIMELY FASHION, AND POSSIBLE STEPS TO ACCELERATE SUCH DEPLOYMENT PURSUANT TO SECTION 706 OF THE TELECOMMUNICATIONS ACT OF 1996, CC Docket 98-146 (Third Report) (concluding that broadband technology is being made available in a reasonable and timely fashion).

60. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, UNDERSTANDING THE DIGITAL DIVIDE 8 (2001) (noting "digital divide reflects various differences among . . . countries").

Rather, it concerns the social and economic distinctions reinforced by the economic structure of Internet service. Nonetheless, this example of the digital divide does, like the previous three examples, beg the question of how best to prevent unlawful status discrimination on the Internet.

For purposes of the argument advanced here, the importance of these examples is that they highlight the ongoing struggle over Internet access. The struggle, moreover, is everywhere, from the dispute over whether one can commit a trespass to chattels on the Internet[61] to the prohibitions on disturbing another's cyberspace with "spam" e-mail.[62] The question of whether a party's property interest "resides" in her Internet domain name so as to raise a takings claim under the Fifth Amendment of the United States or comparable provisions of state Constitutions provides yet another example that is likely to recur.[63] Yet the focus of most commentators interested in these developments has been on the privacy implications of crossing boundaries—in these instances the appropriate boundaries to which consumers are entitled to protect their personal data.[64] And to the extent that the cases have considered property law issues, such as in the domain names takings context, the concern has been with the deprivation of rights rather than guarantees of access.

Property law, however, provides that there are occasions when individuals should be entitled to access private property—at least on a limited basis—should they wish to do so, and to be able to do so without suffering discrimination. The Microsoft Passport and DoubleClick examples mentioned above both grew, in part, out of the increasing difficulty consumers have had with accessing the Internet if and when they refuse to be profiled. When consumers attempt to disable "cookies," files that track a person's web surfing and shopping preferences, it can be difficult to continue surfing or shopping. Thus, a Microsoft user's refusal to use Passport or to be tracked by DoubleClick could have limited the extent of their Internet access. One way to prevent such a restraint on access is, of course, to guarantee some access—as, for example, by articulating a right of public accommodation. Furthermore, to do so would prevent a form of discrimination, inasmuch as profiling is, after all, a form of discrimination. The discrimination here is to track and direct individuals on the basis of consumer

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61. *See, e.g.*, CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1020-23 (D. Ohio 1997) (mailing unsolicited emails could constitute trespass to chattels); *see generally*, Richard Warner, *Border Disputes: Trespass to Chattels on The Internet*, 47 VILL. L. REV. 117 (2002) (contending that applying trespass to chattels on Internet has tremendous implications).

62. *See, e.g.*, Monsterhut, Inc. v. Paetec Communications, Inc., 741 N.Y.S.2d 820, 821 (App. Div. 2002) (claiming that ISP cannot terminate services for engaging in "spamming").

63. *See, e.g.*, Dluhos v. Strasberg, WL 1720272, at *1-6 (D.N.J. 2001) (addressing plaintiff's argument that defendant's use of domain name violated constitutional provisions).

64. See *supra*, note 50 for an example of one website's attempt to protect privacy. *See also* Rick Whiting, *Developing a Policy to Protect Customers is Only the Beginning*, INFORMATION WEEK, Aug. 19, 2002, at 30 (arguing that website privacy policies are insufficient to protect user's privacy and that websites need to develop advanced privacy protection technology and increase spending on privacy); *Go On, Watch Me—Surveillance, Privacy and the Electronic Society*, THE ECONOMIST, Aug. 17, 2002, *available at* 2002 WL 7247127 (arguing that data collection systems could avoid hacker's abuse of systems to invade consumer's privacy).

preferences and personal interests. Granted, this is unlike what we may now think of as "traditional" discrimination—that is, discrimination on the basis of race, ethnicity, or religion, for instance—but it is discrimination nonetheless. An individual should be able to obtain at least limited access without also being subject to such discrimination.

A striking characteristic of the above examples is that they validate the concerns about the concentration of private power on the Internet, with no corresponding access guarantee for those who lack the social and economic capital to control the Internet's "architecture." As Singer's historical analysis of United States public accommodation law confirms, whenever this sort of disequilibrium occurs between those who control a resource and those who lack control, the tendency is to exclude those who lack control unless they agree to adhere to the terms of the powerful entity.

This is not, I should emphasize, merely a question of Internet control by the biggest e-players, such as Microsoft and Intel. Smaller players participate in the act of exclusion every day as well. By contrast to the examples detailed above, one can easily point to a wide variety of situations where, if it may not ultimately be appropriate to assure the public a full right of access, it is at least worth assuring some degree of access, and delimiting the terms on which access is available. In this connection, the following examples serve as well as any others:

The *Los Angeles Times* provides free registration for Internet users who wish to access its website. Registration requires, however, that the user's Internet browser accept cookies, and requires the user to submit information about her annual household income.[65] What is questionable here, from a public accommodations standpoint, is the theoretical justification for exclusion on these bases.

Community of Science ("COS") bills itself as "the leading Internet site for the global research and development community." Access to COS, which is privately held, is free, provided that one is an individual associated with an institution or a corporation.[66] In other words, individuals with no such affiliation have no possibility for accessing information on COS about sources of research and development funding in the sciences, not to mention information about who is currently conducting such research and development, even though a large number of such persons are state-funded. In at least two respects, then—education and professional affiliation—the site discriminates against individuals. Arguably, it may also discriminate on the basis of income. None of these, of course, are protected classes, although it seems likely that the ranks of such excluded persons are disproportionately filled with members of classes frequently receiving special protections—racial and ethnic minorities, women, and the disabled, to cite just a few.

The Vietnam Helicopter Pilots Association ("VHPA") has private spaces on its website for "members only."[67] Although the VHPA receives the privileges

65. http://www.latimes.com/services/site/registration (last visited Sept. 12, 2003).

66. http://www.cos.com/about (last visited Sept. 12, 2003).

67. For private areas of the website of the Vietnam Helicopter Pilots Association, which is a

accorded by the state to non-profit entities, it excludes people on the Internet who did not share in the experiences of its members, even though the members' experiences had national and state-sponsored aspects. Of course, private associations are traditionally accorded exclusion from the reach of the public accommodation laws,[68] and arguably the VHPA fits the profile of such an association. Yet it is also worth questioning why a status derived from service to the country permits exclusion of those who did not serve the country in exactly the same way.

The National Association of Medical Communicators ("NAMC") aims to "represent all professionals interested in communicating about health and medicine," and so represents the interests of its 285 medical and health journalist members through funding from the Bayer Corporation.[69] The information made available to its members with Bayer's support presumably does not make its way into print under Bayer's trademark, but rather under that of mainstream media outlets. As with the VHPA example above, the exclusive portions of the NAMC's e-spaces raise concerns about what information is being denied to the public, and why.

Notably, in each of the above examples, the discrimination is not based on what might be called a person's "visible" status—race, gender, or disability (some of the traditional categories deemed to merit specific public accommodation protection.) But it is status discrimination nonetheless, and likely has the effect of creating a highly segregated and differentiated society. Maybe a newspaper should be permitted to provide its online services only if a user agrees to provide income information, but maybe not. Perhaps a medical journalist and a Vietnam War helicopter pilot are entitled to share their benefits, goods, and privileges only with one another, but perhaps not. The point is that it is essential to establish norms for when people can exclude and when they must include (must provide access) even if only on a limited basis. Interestingly, the examples above suggest that the Internet privileges access based on income, occupation, or other factors, in much the same way that the post-Civil War public accommodation laws differentiated white from black in determining the terms of access to commercial establishments.[70] And if in our society it is not knowledge but access to information that makes power possible, this discrimination must concern us.

These examples raise two concerns relevant to the theme of this paper. First, they suggest exclusion on the basis of ability to pay—a common feature of much current Internet activity. Quite unlike the traditional patron-customer relationship, a great deal of what is available on the Internet is available only if one pays first and looks second.

501(c)(18) under the Internal Revenue Code, see http://www.vhpadata.org/index.htm (last visited Sept. 12, 2003).

68. See *infra* Part II.C.2. for a discussion of which entities are public accommodations.

69. http://www.ibiblio.org/namc/index.html (last visited Sept. 7, 2003).

70. *See* Singer, *supra* note 40 at 1351-57 (discussing post-Civil War racial segregation laws denying access to public accommodations such as railroad cars).

Second, and for my purposes even more troubling, the examples suggest exclusion on some less obvious criteria. The increasingly centralized and privatized Internet makes possible the arbitrary or deliberate exclusion of classes of individuals large and small.[71] Although status discrimination has not to date been a central feature of cyber-interaction,[72] there is no necessary impediment to this happening, and given the tendency of humans to be parochial and xenophobic when it suits their interests, the possibility is a real one.[73]

There is no reason to suppose that the Internet is not being or will not be used to perpetuate status discrimination of a sort that we have witnessed before in our national history, from credit redlining[74] to job discrimination[75] or housing opportunity violations.[76] Indeed, our very sorry national history in these areas suggests that the Internet provides but the newest avenue to perpetuate such forms of status discrimination.[77] I do not mean to suggest here that evidence of

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71. Hardy considers, for example, the use of "technical access restrictions" to exclude potential patrons on the basis of some preordained criteria. *See* Hardy, *supra* note 19, at par. 5 (considering use of "technical access restrictions" to exclude potential patrons on basis of preordained criteria). Mark Lemley notes the non-homogenous character of community on the Net by its denizens, "Netizens" in his telling, citing examples of the way in which the Internet serves to bring together like-minded types. Lemley, *supra* note 47, at 1271 n.75. *But see* Developments, *The Law of Cyberspace, Part IV: Internet Regulation Through Architectural Modification: The Property Rule Structure of Code Solutions*, 112 HARV. L. REV. 1634, 1634-57 (1999) (applying Calabresi/Melamed liability-or-property rule framework, arguing for "code solutions" to problems of cyberspace instead of government regulation); Lawrence Lessig, *Open Code and Open Societies: Values of Internet Governance*, 74 CHI.-KENT L. REV. 1405, 1408 (1999) (stating "the code of cyberspace—whether the Internet, or a net within the Internet—defines the space. It constitutes that space. And as with any constitution, it builds within itself a set of values and possibilities that governs life there."); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 517-19 (1999) (noting ability to regulate Internet is highly dependent on architecture or code of cyberspace and successful regulation will likely involve alteration of system design); Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 BERKELEY TECH. L.J. 759, 762 (1999) (developing notions of Internet space and values); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX L. REV. 553, 557 (1998) (noting technology imposes its own set of rules for regulation of communication networks).

72. Or, at least, status discrimination has not emerged as a regulatory or legal question. It merits observing, however, that discrimination in other aspects of electronic institution-building have come to widespread public attention, such as in concerns about the so-called racial, ethnic and economic "digital divide." *See supra* notes 59-60 and accompanying text for a discussion of the digital divide.

73. *See* Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 453-60 (2000) (discussing likelihood of status discrimination in cyberspace).

74. *See, e.g.*, Am. Bankers Ass'n v. Nat'l Credit Union Admin., 93 F. Supp. 2d 35, 57-58 (D.D.C. 2000) (finding defendant liable for engaging in credit redlining on basis of race).

75. *See, e.g.*, McCroan v. Bailey, 543 F. Supp. 1201, 1202-03, 1208 (S.D. Ga. 1982) (permitting lawsuit alleging violation of federal employment discrimination).

76. *See, e.g.*, Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1293 (7th Cir. 1977) (noting zoning decision can constitute violation of federal fair housing laws); 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 379 N.E.2d 1183, 1188 (N.Y. 1978) (finding legal violation for failure to rent on basis of race).

77. Gary A. Hernandez, Katherine J. Eddy & Joel Muchmore, *Insurance Weblining & Unfair Discrimination in Cyberspace*, 54 S.M.U. L. REV. 1953, 1971-72 (2001) (arguing Internet has led to

status discrimination in any of these areas would not trigger liability under applicable statutes.[78] The problem is that existing statutes are insufficient to bring within their reach all of the participants who help deliver the goods and services now characterized as the Internet.[79] What I suggest, therefore, is that actors in cyberspace—even if not the direct provider of the good or service—need to be recognized as playing a part in such actual or potential status discrimination.[80]

One possible means to combat such activity is through the reach of public accommodation laws. For public accommodation purposes, the law should respond similarly to an airline that prevented the blind from accessing its website[81] and to the owner of a food convenience store who refused to permit members of a protected class to play video games inside the store.[82] Put another way, as Justice Black reaffirmed nearly forty years ago, no matter how limited one's role might seem in the provision of goods and services, the larger consequences of an activity must be considered as within the reach of the public accommodation laws.[83]

The point here is that the ISPs, along with the other parties who construct the architecture and maintain the electronic infrastructure that is cyberspace, play a key role in the delivery of information—and thus to its accessibility. It follows that if an entity assists access for one consumer of goods, services, or facilities available through its operation, then it should assist the access of all such takers, and on equal terms. As our descriptive vocabulary for cyberspace suggests, at the most basic conceptual level, we conceive of cyberspace as little different from the kinds of physical entities now routinely understood to be places of public accommodation.[84] In short, given the current trend of

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unfair discrimination in insurance industry); CENTER FOR DEMOCRACY & TECHNOLOGY, PUBLIC WORKSHOP ON ONLINE PROFILING: TESTIMONY OF THE CENTER FOR DEMOCRACY & TECHNOLOGY BEFORE THE FEDERAL TRADE COMMISSION (Nov. 8, 1999), *available at* http://www.cdt.org/testimony/991108mulligan.shtml (last visited Sept. 7, 2003); Marcia Stapanek, *Weblining*, BUSINESSWEEK, Apr. 3, 2000, *available at* http://www.businessweek.com/2000/00_14/b3675027.htm. (last visited Sept. 7, 2003).

78. See, for instance, Equal Credit Opportunity Act, 15 U.S.C. § 1691a (2003); Age Discrimination in Employment Act, 29 U.S.C. § 62 (2003); Equal Employment Opportunity Act, 42 U.S.C. § 2000e (2003); Fair Housing Act, 42 U.S.C. § 3604 (2003).

79. See *supra* Part II.C.2 for a discussion of the scope of entities under the reach of public accommodation statutes.

80. *See, e.g.*, Ragin v. New York Times Co., 923 F.2d 995, 1004-05 (2d Cir. 1991) (finding newspapers within reach of Fair Housing Act when they printed advertisements showing only white, European-American models offering new homes).

81. *See* Access Now, Inc., 227 F. Supp. 2d at 1314 (arguing that Title II of Americans with Disabilities Act mandated airline's website be accessible to blind).

82. *See* U.S. v. Baird, 85 F.3d 450, 452-55 (9th Cir. 1996) (finding 7-11 store place of public accommodation under 42 U.S.C. § 2000a(b)(3) even though video game machines in store were not installed with intention to create place of exhibition or entertainment, and even though minimal revenue was generated).

83. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273-74 (1964) (Black, J., concurring) (holding local operations inside scope of Title II because of interstate commerce implications of the activity).

84. Consider, for example, the Court's description of a motel in downtown Atlanta:

concentrating ownership on the Internet and the related emergence of a contract-based regime for regulating that power,[85] the likelihood that not only Cohen's "citizen-consumers," but also citizens *qua* citizens could be excluded from some or all portions of the Internet looms very large indeed.[86]

In what follows, then, it is my aim to outline the ways in which the property rules known as the law of public accommodation offer one powerful means to secure public entitlements in the ever-expanding cyber-territory of the Internet, while simultaneously not infringing upon valid private interests. To that end, the remainder of this paper will consider the relevance of the law of public accommodation to Internet regulation.

C. Some Private Concerns: The First Amendment

First, however, key private concerns regarding control of the Internet's layers need to be acknowledged. Of course, "public" accommodation only has meaning if the public-ness of a thing is placed in opposition to its "private" qualities. Chief among these are concerns about free speech guarantees and the related need to protect truly private associations from the requirement that they be deemed places of public accommodation.

1. Free Speech

In public accommodation law, much of what drives the concern to protect individuals' rights of both free speech and association arises in light of

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> The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State.

Heart of Atlanta Motel, 379 U.S. at 243.

The Court's emphasis on the accessibility of the motel, as well as its advertising efforts and visibility are equally true, in terms of commercial and social role, of cyber-commerce today.

85. *See, e.g.*, Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1134 (2000) (citing views of "[a] number of commentators" who "have observed that, in an information economy, an increasing commodification of information and a creation of new property rights seems almost inevitable"). Samuelson herself rejects a property model for the protection of privacy in cyberspace in favor of a more contract-like licensing model. *Id.* at 1172. Her worries about the shortcomings of a property regime to protect personal information on the Internet include restraints on alienability and civil rights claims. *Id.* at 1138-44.

86. See *supra* notes 47, 51-52 and accompanying text for a discussion of Cohen's analysis. The concern that exclusions from cyberlife will have deleterious consequences for the democratic process increasingly concern constitutional scholars as well. Cass Sunstein, for one, worries about what he perceives about the hyper-individualized (as opposed to socially-engaged) nature of the dot.com experience, worrying that, for instance, it will undercut freedom, which "consists not simply in preference satisfaction but also in the chance to have preferences and beliefs formed under decent conditions—in the ability to have preferences formed after exposure to a sufficient amount of information, and also to an appropriately wide and diverse range of options." Sunstein, *supra* note 8, at 50.

guarantees provided by the First Amendment to the United States Constitution. As with concerns about protecting rights of private association discussed below, it is not the ambition of this article to answer here complicated questions about free speech in cyberspace. This requires a nuanced analysis looking at, for example, the nature of the Internet speech and the circumstances under which it is made.[87] For my purposes, it is sufficient here to note the validity of these concerns and to argue that they not be used—in cyberspace as in real space—as a ruse to perpetuate unlawful status discrimination against persons or groups that society deems worthy of access guarantees.[88] In addition, I am arguing for a right of access only, and not for a right to be protected from a hostile or offensive public accommodations environment. The point needs to be made because many recent public accommodations claims have argued that an abusive public accommodations environment constitutes a violation of public accommodations protections.[89] It would inhibit robust debate to insist that anything electronically accessible would be guaranteed not to offend anyone, and, therefore, at least provisionally, I am arguing here only for a right of access. That being said, it is also surely true that scenarios can be imagined where e-content was so repellent—for example, a public website offensively and abusively critical of members of a protected class—that it might be deemed violative of public accommodations principles. Until such a case and its particular facts are present, however, I would insist only on a right of access.

2. Private Association

As noted earlier, antebellum common law in the United States found a duty to serve only when an entity was "holding oneself out to the public."[90] Conversely, of course, when an entity does not hold itself out as open, there is no such duty. This thinking is the basis for the modern exemption from the reach of public accommodation laws of, for instance, "a private club or other establishment not in fact open to the public."[91]

What exactly it means for an entity not to be "in fact open to the public," is

87. *See, e.g.*, Ku, *supra* note 59, at 269 (examining whether copyright protection for digital works is necessary and addressing role of copyright in production of Internet speech). Furthermore, the importance of such questions seems likely to continue to engage the attention of the Supreme Court. *See generally* Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 585 (2002) (finding Child Online Protection Act not constitutionally overbroad on First Amendment grounds); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002) (holding virtual child pornography distinguishable from child pornography depicting real persons); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874-79 (1997) (striking down overly broad sections of Communications Decency Act on First Amendment grounds).

88. *See, e.g.*, Lauren J. Rosenblum, Note, *Equal Access or Free Speech: The Constitutionality of Public Accommodation Laws*, 72 N.Y.U. L. REV. 1243, 1272-73 (1997) (concluding that public accommodation law should be upheld, since it is content-neutral and cannot be deemed an invalid infringement of First Amendment rights).

89. *See, e.g.*, Eugene Volokh, *Freedom of Speech, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299, 302 (2000) (examining several cyberspace speech controversies involving hostile environment harassment law).

90. Singer, *supra* note 40, at 1318.

91. 42 U.S.C. § 2000a(e) (West 1994).

not always a question with a ready answer. Suffice it to say, however, that the analysis used to answer this question in the Internet context need be no different than that used for clubs with far more fixed physical locations. Thus, for example, questions such as the exclusivity or shared interests of members might be grounds for exclusion under the private association exemption.[92]

It should be noted that, in Cyberspace, concerns about an entity's size present particularly vexing questions with respect to the possible cover to be provided by the private association exemption. Given the potentially universal reach of cyberspace, the traditional justification for those seeking application of the private association exemption, namely that the lines dividing associational interests can be drawn by arbitrary numerical distinctions, will likely not prove especially serviceable. Where Internet chat rooms can have many thousands of members, for instance, it would be ludicrous to suggest that such a cyberspace was private if it had 399 members, but not 400.[93]

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92. *See, e.g.*, New York State Club Ass'n Inc. v. City of N.Y., 487 U.S. 1, 5 (1988). (involving a challenge to New York City's anti-discrimination ordinance, Local Law 63, which was "adopted . . . [s]oon after the Federal Government adopted civil rights legislation to bar discrimination in places of public accommodation"). The Supreme Court concluded that Local Law 63 "merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership." *Id.* at 13. *See also* Tillman v. Wheaton-Haven Recreation Ass'n Inc., 410 U.S. 431, 438 (1972) (noting that club that adopted racially-discriminatory guest policy was not "a truly private association because we found 'no plan or purpose of exclusiveness'") (quoting Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969)); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (holding exclusion of black man from service at private club restaurant did not entitle plaintiff to assert state action doctrine and, thus, a Fourteenth Amendment Equal Protection claim merely because club received a liquor license from the state); *supra* notes 85-86 (discussing potential for exclusion from Internet when property or individual-centered model prevails).

Moose Lodge illustrates a concern about the scope of this exemption that continues to plague public accommodation law and will likely be repeated with respect to cyberspace and public accommodation law. As dissenters Justices Douglas and Marshall pointed out in *Moose Lodge*, the number of liquor licenses granted by the State of Pennsylvania was limited and doled out on a restricted basis by state authorities, and so may effectively have precluded blacks who wanted them from obtaining them:

> This state-enforced scarcity of licenses restricts the ability of blacks to obtain liquor, for liquor is commercially available *only* at private clubs for a significant portion of each week. Access by blacks to places that serve liquor is further limited by the fact that the state quota is filled. A group desiring to form a nondiscriminatory club which would serve blacks must purchase a license held by an existing club, which can exact a monopoly price for the transfer. The availability of such a license is speculative at best, however, for, as Moose Lodge itself concedes, without a liquor license a fraternal organization would be hard pressed to survive.

Moose Lodge, 407 U.S. at 182-83.

In cyberspace, the *Moose Lodge* dissenters' concerns could be replicated, for example, in the allocation of bandwidth, arguably a limited resource. *See, e.g.*, LESSIG, *supra* note 10, at 46-47 (arguing that controlling bandwidth allocation with pricing system would solve problems of overcrowding on Internet without treating different types of data differently); Cohen, *supra* note 47, at 480 (criticizing neoliberal economic view that Internet resources should be allocated according to those who value them most highly in economic terms).

93. The example is drawn from *New York State Club Ass'n*, 487 U.S. at 19. In the Internet

III. THE RELEVANCE OF PUBLIC ACCOMMODATION PRINCIPLES TO INTERNET ACCESS

At first glance, the Internet presents a serious conceptual hurdle for those who, like me, wish to argue that it is a place of public accommodation. In brief, the difficulty can be reduced to a problem of directional prepositions: one has to go *to* most places of public accommodation. By contrast, one invites the Internet *into* one's own home or workplace. That is, unlike say, a restaurant, railroad car, or casino, the Internet is typically accessed in the most protected—and thus, in some sense, the most "private" spaces.[94] And even some public accommodation laws with broad coverage do not require businesses other than retail establishments to open themselves up to the public, much less private homeowners.[95]

This very problem is one, for example, that has bedeviled the recent history of Title III, the public accommodations section of the Americans with Disabilities Act of 1990 ("ADA").[96] In brief, the federal appellate courts are sharply split on the question of whether there must be a "there" there for purposes of triggering Title III coverage.[97] That is, the courts are divided as to

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context, Justice O'Connor's observation in her concurrence proves especially prescient.

94. For instance, the U.S. Census Bureau reports that 51% of U.S. households now have one or more home computers, a 42% increase since December 1998, which at least suggests that more people access computers at home than at the public library. *See* U.S. CENSUS BUREAU, HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES: AUGUST 2000 (Sept. 2001).

95. *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000a6 (West 1994) (prohibiting discrimination or segregation in places of public accommodation). *But see, e.g.*, Unruh Civil Rights Act, Cal. Civ. Code § 51(b) (West 1982) (providing that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."); Human Rights Act, Minn. Stat. § 363.03, Subdivision 3 (a) (2002) (making it "an unfair discriminatory practice: (1) to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex, or for a taxicab company to discriminate in the access to, full utilization of, or benefit from service because of a person's disability"); Law Against Discrimination, N.J. Stat. § 10:5-4 (2003) (guaranteeing "all persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."). *See generally* Singer, *supra* note 40, at 1478-95 (comparing scope of federal and state public accommodation laws); *see also* Steven B. Arbuss, Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 U.C.L.A. L. REV. 443, 443 (1983) (criticizing inherent vagueness of statute's protection for "business establishments"). Although nearly 20 years old, the language remains, as does the potency of this critique.

96. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (West 1995). See also *infra* notes 127-35 and accompanying text for a discussion of the historical development of the notion of places of public accommodation.

97. *Compare, e.g.*, Johnson v. K Mart Corp., 273 F.3d 1035, 1056 (11th Cir. 2001) (holding denying long-term disability benefits because claimants disability mental, not physical, prohibited by

whether a place of public accommodation must be a fixed, physical location. This split is reflected in the federal district courts as well,[98] and dueling law review articles further mirror this disagreement.[99] Although I will return below

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ADA unless discrimination exempted under ADA safe harbor provision), McNeil v. Time Ins. Co., 205 F.3d 179, 187-88 (5th Cir. 2000) (holding insurer not in violation of Title II when offering insurance policy limiting coverage for AIDS), Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 564 (7th Cir. 1999), *and* Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998) (finding plaintiff failed to state claim under Title II of ADA because provisions of disability benefits not public accommodation), *with* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 33 (2d Cir. 2000) (holding Title III regulates sale of insurance policies in insurance offices subject to ADA's safe harbor provision) *reh'g denied* 204 F.3d 392, *and* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994) (holding establishments of public accommodation not limited under Title III to physical structures). The question of whether the Internet is a "place" recurs in other areas of the law as well. *See* Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345-1406 (2001) (discussing developing standard determining Internet jurisdiction).

98. *Compare, e.g.*, Baker v. Hartford Ins. Co., 1995 WL 573430 (N.D. Ill. Sept. 28, 1995) (following *Carparts* rationale to hold that physical place is not required for Title III coverage) *with* Leonard v. Israeli Discount Bank of N.Y., 967 F. Supp. 802, 804-05 (S.D.N.Y. 1997) (rejecting *Carparts* rationale and holding that physical place is required for Title III coverage). District Courts are similarly split. *See, e.g.*, Wai v. Allstate Ins. Co., 75 F. Supp. 2d 1, 8 (D.D.C. 1999) (finding Title III of ADA applicable to denial of insurance policy based on disability); Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185, 1193 (N.D. Cal. 1998) (holding insurance underwriting covered by ADA Title III); Cloutier v. Prudential Ins. Co. of Am., 964 F. Supp. 299, 302 (N.D. Cal. 1997) (finding ADA Title III applicable to company's denial of application from HIV-positive applicant); World Ins. v. Branch, 966 F. Supp 1203, 1209 (N.D. Ga. 1997) (finding Title III claim when insurance company capped AIDS related coverage); Lewis v. Aetna Life Ins. Co., 982 F. Supp. 1158, 1165 (E.D. Va. 1997) (concluding Title III prohibits insurance company from discriminating on basis of disability policies available through employer); Shultz v. Hemet Youth Pony League, Inc., 943 F. Supp. 1222, 1225 (C.D. Cal. 1996) (holding youth baseball league operated place of public accommodation); Kotev v. First Colony Life Ins. Co., 927 F. Supp 1316, 1320-21 (C.D. Cal. 1996) (finding ADA Title III applicable in denying insurance application based on association with HIV-positive spouse); Doukas v. Metro. Life Ins. Co., 950 F. Supp. 422, 427 (D.N.H.1996) (finding Title III applies to insurance company's coverage denial). But see cases from federal district courts endorsing the opposite *Carparts* rationale, including: Matthews v. Nat'l Coll. Athletic Ass'n, 79 F. Supp. 2d 1199, 1206 (E.D. Wa. 1999) (holding NCAA not place of public accommodation because only regulate eligibility and membership criteria of member institutions and student-athletes); Erwin v. Northwestern Mutual Life Ins. Co., 999 F. Supp. 1227, 1233 (S.D. Ind. 1998) (holding Title III not applicable to long-term disability plan because insurer not a place of public accommodation); Pallozzi v. Allstate Life Ins. Co., 998 F. Supp. 204, 207 (N.D.N.Y. 1998) (holding Title III not intended to address insurance underwriting policies); Nearhood v. Freestate Health Plan, Inc., 1997 WL 151545, 2 (D. Md. 1997) (finding "insurer" not "employer" under ADA); Cortez v. Nat'l Basketball Ass'n, 960 F. Supp. 113, 117 (W.D. Tx. 1997) (finding no NBA violation of Title III when game occurs without captioning or interpretive patron in stadium operated by City of San Antonio); Good v. Blue Cross & Blue Shield of Md., Inc., 1996 WL 815373, 1 (D. Md. 1996) (finding insurer not employer under ADA); Elitt v. U.S.A. Hockey, 922 F. Supp 217, 223 (E.D. Mo. 1996) (concluding youth hockey league not place of public accommodation); Pappas v. Bethesda Hosp. Ass'n, 861 F. Supp. 616, 620 (S.D. Ohio 1996) (holding hospital association employer and employee benefits administrator not place of public accommodation); and Schaaf v. Ass'n of Educ. Therapists, 1995 WL 381979, 1 (N.D. Cal. 1995) (finding organization without nexus to particular physical facility for holding meeting not public accommodation).

99. *See* Kelly E. Konkright, Comment, *An Analysis of the Applicability of Title III of the Americans with Disabilities Act to Private Internet Access Providers*, 37 IDAHO L. REV. 713, 745 (2001) (adopting view of *Parker* and its progeny); Justin D. Petruzzelli, Note, *Adjust Your Font Size: Websites*

to the disabilities cases, it is not my intention here to enter into that doctrinal debate.[100] Instead, my purpose is to endorse the view that from a theoretical, historical, and normative perspective, the Internet—from its physical structure to the rules embedded in the code that makes it operate—should be understood to create property rights that are subject to public accommodation principles. In short, as I shall argue in this section, because the Internet represents an expanded method for transmitting information, providing opportunities for social interaction, and generating commerce, it is appropriate to apply public accommodation principles to its regulation. This is vitally important, furthermore, by virtue of the actual and potential scale and reach of the Internet. With each passing day, the dizzying volume of commercial transactions and interpersonal interactions made possible by the Internet add to its importance in our social and economic life. As a result, it is essential to establish clear terms for access. First, however, it is necessary to review briefly the history and trend of the modern law of public accommodation in order to provide context for a full discussion of the Internet as a place of public accommodation.

A. The Modern History of Public Accommodation Law

Three things characterize the modern law of public accommodation in the United States. First, as the New Jersey Supreme Court memorably put it: "The denial of freedom of reasonable access in some States following passage of the Fourteenth Amendment, and the creation of a common law freedom to arbitrarily exclude following invalidation of segregation statutes, suggest that the current majority rule may have less than dignified origins."[101]

The New Jersey court referred to the metaphor that most law students learn, namely that the right to hold property can be conceptualized as a "bundle of sticks" of which the "biggest stick" in the bundle is the right to exclude. In its standard incarnation, this doctrine provides that the sole exceptions to the absolute right to exclude are imposed upon "innkeepers" and "common carriers." The standard justifications for these exceptions include the quasi-public nature of these activities, protection against monopoly control, assurance

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Are Public Accommodations under The Americans with Disabilities Act, 53 RUTGERS L. REV. 1063, 1080 (2001) (advocating reasoning of *Carparts* and its progeny); *see also* Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH., 205, 214 (2000) (noting that Internet should be understood as a place of public accommodation under ADA Title III); Stowe, *supra* note 45, at 299 (arguing for broad construction of ADA to apply not just to exclusion of disabled from physical spaces but from non-location based membership organizations as well).

100. Answering the question of whether, as a matter of current law, the ADA can be understood to apply to insurance purchased through one's employer instead of from the insurer directly, as the case law considers, is not my goal. See *supra* notes 97-98 and accompanying text for a discussion of the exclusion of this issue.

101. *See* Uston v. Resorts Int'l Hotel, Inc., 445 A.2d 370, 373-74 (N.J. 1982) (expanding common law exceptions to right to exclude to include places of entertainment and recreation) (quoting Bell v. Maryland, 378 U.S. 226, 296 (1964)); *see also* Singer, *supra* note 40, at 1393-1400 (discussing legal narrowing of duty to serve to reinforce racial segregation).

of a "fundamental right" to travel, and reasons of safety and public health.[102]

Second, it is indisputably true that the modern law of public accommodation has, principally since the Civil Rights reforms of the 1960s, been expanded to declare all private operations that serve the public in any way as open to the entire public, regardless of, for example, race,[103] gender,[104] marital status,[105] sexual orientation,[106] or disability.[107] The tendency of modern public accommodation law has been to find that most activities are considered public accommodations, regardless of whether the accommodation is provided in a fixed physical location.[108] Furthermore, braced with support from the United States Supreme Court, federal courts have found that places that are private for most purposes may still, under special circumstances, be deemed places of public accommodation.[109] The modern law of public accommodation thus tends to confirm that, to qualify as a place of public accommodation, the "there" there

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102. Singer, *supra* note 40, at 443.

103. *See, e.g.*, 42 U.S.C. § 2000a (2002) (prohibiting discrimination or segregation on basis of race in places of public accommodation).

104. *See, e.g.*, TENN. CODE ANN. § 4-21-101 (2001) (prohibiting gender based discrimination).

105. *See, e.g.*, VA. CODE ANN. § 2.2-3900(B)(1) (West 2002) (prohibiting discrimination based on marital status in places of public accommodation).

106. *See, e.g.*, CONN. GEN. STAT. §§ 46a-81d(a) (2002) (prohibiting discrimination based on sexual orientation in places of public accommodation, resort, or amusement).

107. *See, e.g.*, MISS. CODE ANN. § 43-6-5 (West 1999) (requiring equal access to all public conveyances, public accommodations, resorts, amusements, and other places open to general public for visually and physically disabled persons subject to federal or state regulations as similarly applicable to all persons).

108. The best known examples in support of this view are Roberts v. United States Jaycees, 468 U.S. 609 (1984) and Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987). Arguably, the reach of these decisions has, however, been cut back by the Supreme Court's most recent major public accommodations case, Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000) (finding that Boy Scouts of America was entitled to define terms of its membership and therefore exclude, e.g., homosexuals and atheists). *See also* Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1269-70 (7th Cir. 1993) (rejecting claim under Title II of Civil Rights Act of 1964 that Boy Scouts can be an "establishment" that "serves the public" as a membership organization: "The Boy Scouts is as different from the facilities listed in Title II as dogs are from cats.").

109. For example, golf courses that are usually closed to all but their members, can be considered places of public accommodation for Title III of the ADA purposes when a public tournament is being held there. *See* Martin v. PGA Tour, Inc., 204 F.3d 994, 1002 (9th Cir. 2000), *aff'd*, PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (holding golf course place of public accommodation during PGA tournament).; s*ee also* Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926, 937-38 (N.D. Ind. 1999) (holding while operation of tournament was place of public accommodation under ADA, use of golf cart not required because would fundamentally change nature of tournament). I do not mean to suggest, however, that the private club exemption is without force. *See, e.g.*, Kelsey v. Univ. Club of Orlando, Inc., 845 F. Supp. 1526, 1531 (M.D. Fla. 1994) (holding that private men's club which fired barber after his heart bypass operation could do so as a private club, and was not liable to fired employee as a place of public accommodation under Title III of ADA). *See generally* Tracy Elizabeth Walsh, Note, *The PGA is Subject to the ADA Because it is Not a Private Club and its Tournaments Are Place of Public Accommodation—Martin v. PGA Tour, Inc.*, 9 SETON HALL J. SPORT L. 599, 624 (1999) (arguing *Martin* decided correctly); Scott A. Weinberg, Note, *Analysis of* Martin v. Professional Golfers' Ass'n Tour, Inc.*—Applying the ADA to the PGA is a Hole in one for Disabled Golfers*, 38 BRANDEIS L.J. 757, 776 (2000) (arguing Martin situation as one Congress intended ADA to apply to).

need not be permanent. What is more, modern public accommodation law suggests that what is private may not always be so when there are larger public interests at stake.

Third, recent scholarship, notably that of Joseph Singer, has demonstrated that the alleged genealogy of the common law right to exclude may not only be less than dignified, it may be less than exact. Singer's exhaustive review of 19th and 20th century public accommodation law suggests that the controlling criterion for what makes something a place of public accommodation should not be evaluated along some private/public axis, focusing on the rights of private property owners to exclude. Instead, there is good reason to believe that, even under the principles of *stare decisis*, the case law supports a focus instead on the *nature* of the enterprise. For example, an early 18th century British court explained that "[i]f one held oneself out as open to the public . . . then one was necessarily engaged in a 'public trade or employment.'"[110] Similarly, "Blackstone treated the act of hanging out a sign as an invitation to come on the premises to do business of a certain kind, the act of stepping inside and offering money as an acceptance, and the refusal to do business as a breach of contract."[111] In this country, no less a commentator than Justice Story emphasized "that common carriers 'exercise . . . a public employment' when they 'undertake to carry goods for persons generally' and when they 'hold [themselves] out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation.'"[112] If, therefore, an operation undertakes to serve the public, it has a duty to do so in a thoroughly non-discriminatory fashion.[113]

Singer's legal-historical analysis implies that the trend to expand the coverage of public accommodation law[114] may well be wholly consistent with the common law tradition, rather than an amendment of it. In this light, recent ADA Title III case law affirming a broad reading of the law's public accommodation principles is wholly appropriate. For instance, a line of ADA Title III cases demonstrates little sympathy for parties seeking cover under the "private club" exemption that is a standard feature of most accommodation laws.[115] The courts' resistance to allowing litigants to find safe harbor in such an

110. Singer, *supra* note 40, at 1307 (quoting Gisbourn v. Hurst, 91 Eng. Rep. 220 (K.B. 1710)).

111. *Id.* at 1310.

112. *Id.* at 1324-25 (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW § 495, 322 (1832)).

113. *Id.* at 1297.

114. *Compare* Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)(1-4) (West 1994) (including only four categories of public accommodation), *with* Americans with Disabilities Act 42 U.S.C. § 12181(7)(A-L) (West 1997) (including over twelve categories of public accommodation).

115. *See, e.g.*, Indep. Living Res. v. Oregon Arena Corp., 982 F. Supp. 698, 760 n.84 (D. Or. 1997) (operators of athletic stadia cannot claim that limited access luxury suites are entitled to private club exemption under ADA Title II when located inside a place of public accommodation and operators are not even leaseholders); United States v. Landsdowne Swim Club, 713 F. Supp. 785, 823 (E.D. Pa. 1989) (holding swim club that excluded African-Americans not entitled to protection as private club under Title II of Civil Rights Act of 1964); Harford v. City of Santa Clarita, No. B144255, slip op. at 37 (Cal. Ct. App. 2d Dist. Jan. 10, 2002) (finding Alcoholics Anonymous was not private club and was

exemption is fully in line with the antebellum common law right of access. Similarly, ADA cases finding that cost is not a satisfactory defense to statutory compliance is consistent with the common law origins of public accommodation law as Singer describes them,[116] as are cases finding a denial of a service merely because it was not provided in a particular, physical location.[117]

With respect to the argument advanced in this article, Singer's analysis deserves to be understood in light of the concerns of those who fear the consequences of excess private ordering on the Internet noted above.[118] Given such contemporary concerns and the history of public accommodation laws used after the Civil War—not to prevent exclusion but rather to permit property owners to exclude in all but a limited number of instances—the applicability of public accommodation laws to cyberspace needs to be established.

B. Where's the There *There? Determining What Aspects of the Internet Should be Deemed Places of Public Accommodation*

It is essential to clarify precisely which Internet resources might be subject to regulation as places of public accommodation. Lessig provides a useful conceptual model in this regard with his description of the "three contexts where resources in the Internet are held in common."[119] Lessig argues that commonly held resources constitute the "*innovation commons*" that is the Internet.[120] For purposes of the argument advanced here, the crucial feature of the innovation commons is formed not merely through the development of social norms "but also through a specific technical architecture." This technical architecture, Lessig proceeds to explain, consists of three essential "layers."[121] Drawing upon the work of Yochai Benkler, Lessig describes the layers as follows:

At the bottom is a "physical" layer, across which communication

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bound by local anti-smoking ordinance); Hilands Golf Club v. Ashmore, 39 P.3d 697, 702 (Mont. 2002) (holding private golf club cannot provide women with different membership than those provided men).

116. *See, e.g.*, Long v. Coast Resorts, Inc. 267 F.3d 918, 923 (9th Cir. 2001) (finding costs to hotel of providing wheelchair access to disabled patrons no barrier to statutory compliance, and where no special characteristics to the terrain exist, no such objection is permissible).

117. See *supra* notes 97-98 for a discussion of *Carparts* line of cases at federal appellate and district court levels. *Cf.* Note, *A Public Accommodation Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 HARV. L. REV. 904, 910 (1999) (finding that Title II of Civil Rights Act of 1964 should be used to challenge the use of Indian monikers by professional sports teams since, even though teams may not have specific physical location, "[a] professional sports team ... cannot function without a physical facility. A stadium and team are mutually interdependent.").

118. *See* LESSIG, *supra* note 10, at 156 (commenting on efforts of cable companies to restrict "end-to-end" access); SHAPIRO, *supra* note 10, at 88-101 (discussing efforts by Microsoft to dominate consumer options); Lemley, *supra* note 47, at 1257 (advocating for public ordering of Internet).

119. LESSIG, *supra* note 10, at 15.

120. *Id.* at 23. It should be noted that Lessig's use of the word "commons" is a bit loose. He seems to use the word as much in a hortatory, political sense, than as a term of art referring to a collectively-shared resource.

121. *Id.* (explaining "the layers that I mean here are the different layers in a communications system that together make communications possible").

> travels; this is the computer, or wires, that link computers on the Internet. In the middle is a "logical" or "code" layer—the code that makes the hardware run. Here we might include the protocols that define the Internet and the software upon which those protocols run. At the top is a "content" layer—the actual communications that get said or transmitted across these wires. These three layers function together to define any particular communications system.[122]

This three-tiered description of the Internet's structure provides a useful starting point for a consideration of the practical and conceptual challenges facing the suggestion that the Internet is a place of public accommodation.[123] At every stage, the balance to be struck is a familiar one: public access versus private control. It is to each of these structural "layers," therefore, that I now turn. As will be seen in the discussion that follows, as one ascends Lessig's structure from the most physical to the most ephemeral, the difficulty of making a public accommodation argument—at least in light of the post-Civil War common law categories—becomes ever greater. The public accommodation argument is considerably easier to make, however, if one conceives of it in terms of the pre-Civil War "duty to serve" rationale, a rationale that, arguably, is increasingly reflected in today's understanding of accommodations questions—as for example, in the ADA's extensive accommodation categories.

1. Physical Layer

Conceptually, the physical layer is the least problematic aspect of the Internet in terms of public accommodation analysis. Computers are now widely available and relatively inexpensive. Unless a particular manufacturer or distributor discriminates against a class of persons in the sale or distribution of its products, the need for a public accommodation claim is unlikely. A manufacturer who refuses to sell a computer or computer component would be subject to a standard public accommodation claim in which a party's cause of action arises from its exclusion from access to a physical place or the opportunity to use and enjoy some physical good.[124] Providing that the prospective buyer is not a member of a protected class, inability to pay would constitute the sole defense to such a claim.

The cables across which information travels, however, present a somewhat more difficult case. Internet services are delivered across wire or cable like telephone wire or electric or television cable, usually along granted easements. Although judicial support for the unequal provision of such public services is

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122. *Id. See also* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999) (exploring how code regulates cyberspace and effect on liberal ideals).

123. Surprisingly, many of those who have looked at the question of whether public accommodation principles apply to cyberspace, at least in the disabilities rights context, limit their analysis almost exclusively to consumer-ISP relations. *See, e.g.*, Konkright, *supra* note 99, at 741-43 (discussing accessibility to "public accommodation" as Internet access provider issue).

124. The nature—and limits—of such claims are sketched in Singer, *supra* note 40, at 1286-1303, 1412-48.

well established,[125] the basis for decision is not on public accommodation grounds.

This is not to say, however, that there is no basis for applying public accommodation principles to this feature of the Internet's physical structure. As Singer explains, 18th century common lawyers, including notables from Lord Holt[126] to Sir William Blackstone,[127] considered the service obligations of those engaged in "public employments" or "common callings."[128] It would be anachronistic to label these categories "public accommodations," and Singer does not do so. His explication, however, suggests that these categories formed the bases for modern notions of public accommodation. What exactly constitutes such a "public employment" or "common calling" is not crystal clear.[129] Nonetheless, the notions can be linked analytically in that, to be embraced within one of these definitions, a business need not be a monopoly whose smooth operation affects public service or that caters to the needs of travelers.[130] On the contrary, what links the categories is that such businesses "hold ... [themselves] out to the public."[131]

Singer further links the English common law "holding out" rationale to the justifications offered for similar American decisions, some of them by celebrated American jurists like Justice Story.[132] Taken together, these decisions demonstrate "the most plausible construction of antebellum legal materials," a construction that "would extend the right of access to all businesses that hold themselves out as ready to serve the public."[133] The antebellum "right of access" is thus roughly analogous to the modern "public accommodation" notion.

Implicitly, Singer links access and accommodation with an analysis of what he calls the "distributive norms in current property law."[134] Specifically, he focuses on the notion of entitlement. He writes:

> [B]y substituting the concept of "entitlement" for the concept of "title," we can better express the inherent distributive component of a private property system and the defeasible quality of property rights. . . . The entitlement idea brings within the property concept itself the notion that *property is a social system that organizes access to and control over valued resources in order to create and maintain universal ability to obtain access*

125. *See, e.g.*, Hawkins v. Town of Shaw, Mississippi, 437 F.2d 1286, 1292 (5th Cir. 1971) (holding that unequal provision of municipal services to town's African-American residents violated Fourteenth Amendment Equal Protection guarantee).

126. Singer, *supra* note 40, at 1305-06.

127. *Id.* at 1309-10.

128. *Id.* at 1305-10.

129. *Id.* at 1304.

130. See *supra* note 40 for a discussion of typical rationales for the "innkeepers and common carriers" exceptions to the right to exclude.

131. Singer, *supra* note 40, at 1318.

132. *Id.* at 1324.

133. *Id.* at 1331.

134. *Id.* at 1470-76.

to the system by which property rights are acquired.[135]

In the context of a public accommodations analysis reached in light of his examination of the history of public accommodation law, Singer's conclusions suggest that it is fully appropriate to conceptualize the Internet's physical layer as a place of public accommodation. If, in light of both antebellum common law and modern entitlement theory, the Internet's cables are viewed as instruments that help organize questions of control and access—where access is a universal value, as important as the potential to control property—then the cable portion of the Internet's physical layer, created and maintained by businesses that "hold themselves out as open to the public," reasonably should be subject to public accommodation principles. For the cable provider, such a requirement would demand little in practical terms. Legally, however, the provider would be required to insure that individuals were not being excluded from information traveling across their cables. To avoid liability, a cable provider thus might require cable providers to resist efforts by code and content providers to act so as to control access and thus exclude possible users.

2. Code Layer

By contrast to the physical layer, the code layer, which includes both the technical protocols on which the Internet operates[136] and the software that in turn runs them, is not easily squared with a physicalized conception of "places" of public accommodation, at least not at the most shallow level of analysis.[137] That is, computer engineers create the protocols, and software engineers design the software that runs them. If a consumer tries to log onto a website, protocols can prevent her from accessing the site or conducting a transaction there. The protocols themselves, however, are not doing the excluding. To make a physical analogy, a protocol is more like the physical doors and windows of a building through which people may enter than it is like the merchandise and special fittings, for example, that make a place a shoe store instead of a coffee shop. And, just as doors and windows can be bolted to keep others out, protocols—rules—can be written to exclude, whether because the credit card of the person seeking entry is invalid, or on the basis of some other status identification (the failure to provide an institutional affiliation, for example). The point here is that the ostensible form—whether it be physical architecture or technical architecture in the form of code—can determine access and that it is essential to identify who is making decisions to use that architecture to exclude, and why. Form is dictated by substance or, to be more exact, by a substantive choice. As with a building, someone both designs the protocol and monitors it or gives

135. *Id.* at 1473 (emphasis added). *See also* JOSEPH W. SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 74 (2000) (discussing ways in which public accommodation laws limit, yet create property rights).

136. *See* LESSIG, *supra* note 10, at 41 (suggesting that best known of such protocols are hypertext transfer protocol ("http") or hypertext markup language ("html")).

137. Lessig, *supra* note 10, at 120-21(noting that cyberspace differs from reality because content in cyberspace can be replicated instantaneously in many different places through use of code).

responsibility to others to do so. Thus, when a protocol denies a person access to a website, the exclusion is accomplished at someone's direction—the owner or operator of a website and related business, for example—or perhaps by the architect of the protocol herself.

The above analysis reveals the conceptual errors in ADA Title III cases requiring discrimination at a fixed, physical "place" of public accommodation in order to trigger liability. One line of such cases deals with insurance plans that discriminate in their coverage with respect to disability.[138] When an insurance plan is provided through an employer and is not directly solicited by an individual, some courts have held that there can be no Title III violation. As the most discussed of these cases held:

> While we agree that an insurance office is a public accommodation as expressly set forth in § 12181(7) [of the ADA], plaintiff did not seek the goods and services of an insurance office. Rather, [plaintiff] accessed a benefit plan provided by her private employer and issued by [a private insurance company]. A benefit plan offered by an employer is not a good offered by a place of public accommodation.[139]

A problem with this reasoning, however, is that it artificially distinguishes between form and substance. By concentrating on the form of the insurance coverage transaction—here through the intermediary of an employer—the court was able to find that the disabled individual whose coverage was limited by her disability cannot claim Title III protection.

Not only is this reasoning highly artificial because it effectively precludes coverage for the disabled individual seeking independent coverage will likely be denied insurance for "pre-existing conditions,"[140] it is artificial in the same way that the post-Civil War narrowing of public accommodations principles was artificial. That is, it justifies a result that runs contrary to the original substantive intent of public accommodation law, which focused on the nature of the service and, one might add, on the service relation between service provider and consumer. The better analysis as applied to the Internet is found in that line of cases holding that the nature of the service is the thing requiring public protection, and not on the method of providing the service—whether in a physical office, by phone, mail, or the Internet.[141] Such an analysis is consistent

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138. See *supra* notes 97-98 for a discussion of these cases.

139. Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir. 1997).

140. *See, e.g.*, Price v. Tanner, 855 F.2d 820, 824 (11th Cir. 1988) (holding that where disability occurred because of occupational aggravation of pre-existing condition, state law limiting recovery was not unconstitutional). *But see* 26 U.S.C. § 833(c)(3)(iv) (West 2002) (requiring that Blue Shield and Blue Cross organizations not discriminate in coverage provision on basis of pre-existing conditions).

141. As the *Carparts* court observed: "It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994). Even Judge Posner, the author of two decisions adhering to *Parker*'s physicalized conception of the term place of public accommodation, wrote of 42 U.S.C. § 12182(a) (2003), the ADA Title III's public accommodation provision, as follows:

[T]he *core meaning* of this provision, plainly enough, is that the owner or operator of a store,

with the earlier common law "duty to serve" rationale.

Nonetheless, many courts insist on a demonstrated physical connection to an accommodation, typically labeling this a "nexus" requirement.[142] A failure to establish "a nexus between southwest.com and a physical, concrete place of public accommodation" was, for example, a central ground upon which a federal district court rejected the inaccessibility claims brought by blind plaintiffs against Southwest Airlines under the ADA.[143] The court's analysis reveals, however, the analytical weakness of a "nexus" requirement. The district court relied upon dicta of the 11th Circuit in which the appellate court observed that a Title III claim requires a demonstrated "nexus between the challenged service and the premises of the public accommodation."[144] In fact, however, in the decision stating that requirement, the 11th Circuit found that the plaintiffs, disabled individuals who could not compete in a telephone selection process for a game show, had stated a claim for public accommodation under ADA Title III, inasmuch as the game show to which the telephone lines were connected was conducted in a "concrete [place, namely the] television studio."[145] By contrast, the district court in the Southwest Airlines case concluded, relying upon dicta in another United States Supreme Court case, that the southwest.com website was "located in no particular geographical location but available to anyone, anywhere in the world."[146]

The weakness of the reasoning here is that the website is possible, of course, only because of codes that have been programmed from a place. That is, it is hard to understand why a television station is more "concrete" than a corporate office where the particular form of website is developed and authorized. In other words, the "nexus" concept is so malleable as to be rather meaningless.[147] Moreover, this point underscores a central concern of this article, namely that questions of Internet access, and specifically of public accommodation in cyberspace, need to look as much at the purpose of public accommodation

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> hotel, restaurant, dentist's office, travel agency, theater, *Web site, or other facility whether in physical space or in electronic space* [*Carparts* cite omitted] that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.

Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (emphasis added).

142. *See* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 33 n.3 (2d Cir. 2000) (discussing nexus requirement); *cf.* Andrew M. Perlman, *Public Accommodation Laws and the Dual Nature of the Freedom of Association*, 8 GEO. MASON U. CIV. RTS. L.J. 111, 124 (1998) (stating that "the ultimate question should be whether an organization provides the kinds of goods, services, or advantages that give public accommodation statutes their value").

143. Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (quoting Voyeur Dorm, L.C. v. City of Tampa, 265 F.3d 1232, 1237 n.3 (11th Cir. 2001)).

144. *Id.* at 1321 n.11.

145. *Id.* at 1321.

146. *Id.* (quoting *Voyeur Dorm*, 265 F.3d at 1237 n.3 (quoting Reno v. Am. Civil Liberties Union, 521 U.S. 844, 851 (1997))).

147. *Cf.* Anita Ramasastry, *The Americans With Disabilities Act in Cyberspace: Should Web-Only Businesses Be Required to be Disabled Accessible?*, *available at* http://writ.findlaw.com/ramasastry/20021106.html (last visited Nov. 17, 2002) (arguing ADA applies to websites).

principles as at the physical characteristic of the allegedly discriminatory entity. If, for instance, one applies Singer's "duty to serve" rationale, there is no basis for distinguishing between telephonic exclusion from a television game show pool and Internet exclusion from a corporate website, since both are offered to the public as goods or services.

Another line of relevant ADA Title III cases adhering to a physicalized conception of public accommodation law, this time alleging discrimination by sports organizations that have no fixed place of business, repeats the artificial distinctions of the insurance cases.[148] Consider, for example, the claim of hearing-impaired individuals who sought access to special decoding technology for National Football League games that were "blacked-out" and would not be televised locally (because the games were not sold out) and so could not be enjoyed by hearing-impaired individuals.[149] The court in that case found that even though hearing-enabled persons could listen to radio broadcasts unavailable to the hearing impaired, there was no discrimination for Title III purposes because both hearing and hearing-impaired persons were denied the opportunity to enjoy the televised games.[150] In reaching this conclusion, the court maintained that:

> [t]he televised broadcast of football games is certainly offered through defendants, but not as a service of public accommodation. It is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers which fall within the scope of Title III . . . . Although a game is played in a "place of public accommodation" and may be viewed on television in another "place of public accommodation," that does not suffice [to make the game itself a public accommodation].[151]

Much like the post-Civil War narrowing of the duty to serve for entities that hold themselves out to the public, such a case has the effect of appearing to exclude on equal bases while in fact assuring discrimination against a specific group of individuals. That is, because of the decision to focus on physical location, hearing-impaired persons who could neither enjoy a game by buying a ticket nor

148. See *supra* note 109 and accompanying text for a discussion of suits by disabled golfers against the Professional Golfers Association.

149. *See* Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 582 (6th Cir. 1994) (holding NFL's blackout rule not discriminatory because it applies equally to hearing-impaired and hearing populations); *see also* Matthews v. Nat'l Coll. Athletic Ass'n, 79 F. Supp. 2d 1199, 1204 (E.D.Wa. 1999) (finding that NCAA is not place of public accommodation because it is not affiliated with specific public place); *cf.* Neff v. Am. Dairy Queen Corp., 58 F.3d 1063, 1069 (5th Cir. 1995) (holding that wheelchair-bound woman cannot sue franchiser Dairy Queen for failure of its franchisee to accommodate her because parent is not an "operator" under the ADA); Clegg v. Cult Awareness Network, 18 F.3d 752, 756 (9th Cir. 1994) (holding church member barred from membership in Cult Awareness Network chapter does not have claim under Title II of Civil Rights Act of 1964 because not affiliated with public facility or place); Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1269 (7th Cir. 1993) (rejecting claim under Title II of Civil Rights Act of 1964 that Boy Scouts can be an "establishment" that "serves the public" as a membership organization).

150. *Stoutenborough*, 59 F.3d at 582.

151. *Id.* at 583.

by watching its televised or radio broadcast forms are effectively excluded from the activity.

Courts in other sports association cases, however, have found that organizational control and not physical location classifies an entity as a public accommodation. In these cases, the courts focus on the connection between the organization and the location of the facilities where its teams play to guard against discrimination on public accommodation grounds.[152] Thus, like the antebellum common law duty to serve, these cases look to the purpose of the accommodation principle, which is to guarantee a right of access. This approach could usefully be applied to regulation of the code layer as a place of public accommodation—inasmuch as code protocols and the software used to run them are held out for public consumption. Following the antebellum common law duty to serve, it is not the place of service that matters as much as the fact that the service is offered to the public.[153] Thus, it is appropriate to conceptualize the Internet's code layer as a public accommodation, even if the code itself is not a fixed physical place.[154] Accordingly, as with the physical layer, what is needed is to open a discussion about the public accommodations duties of those associated with the code layer. In light of the foregoing analysis, a possible criterion for applying public accommodation principles to this layer of the Internet would be to examine the nature of the enterprise. Thus, for example, if the owners of the code held themselves out to the public, they would have to do so in a non-discriminatory manner. That is, their code would have to assure a pre-determined, minimum degree of access for all, and no exclusion of a person or persons for discriminatory reasons. The same logic might be extended to computer or software engineers, to the extent that their work prevented the targeted, discriminatory exclusion of some individual or group of persons from some part of cyberspace.

Thus, for example, it might be appropriate under a rewritten federal public accommodation law to find an ISP liable when it failed to take action against the perpetrators of religiously-based harassment in an Internet chat room,[155] or to assess liability against the designer of a commercial airline's website when that

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152. Tatum v. Nat'l Coll. Athletic Ass'n, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (holding that NCAA operates as place of public accommodation, and distinguishing from cases looking at organizations as organizations rather than operators of facilities); Bowers v. Nat'l Coll. Athletic Ass'n, 118 F. Supp. 2d 494, 516-17 (D.N.J. 2000) (finding that NCAA is an operator of public accommodation since more done than regulating eligibility of college athletes).

153. Singer, *supra* note 40, at 1292 (stating prior to Civil War all business holding themselves out as open to the public were likely required "to serve anyone who sought service").

154. This article does not deal with an important issue raised by my suggestion that U.S. public accommodation law should reach such places, namely the fact that some of the places referred to here will inevitably exist outside U.S. territorial jurisdiction. See Cockfield, *supra* note 32, at 1202-06 for a discussion of concerns about applying territorial-based rules in an international context and the limits of this approach for Internet regulations.

155. Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 542 (E.D. Va. 2003) (finding ISP not public accommodation and AOL had no Title II obligation to prevent discrimination on basis of religion).

website failed to provide facilities for blind patrons to access its website.[156]

3. Content Layer

As Lessig explains, the Internet's "content" layer refers to "the actual stuff that gets transmitted or said across the wires."[157] At its most extreme, if I were to argue here that all content should be deemed a place of public accommodation, I would be arguing for social ownership of all information, which would render meaningless the notion of public accommodation because the "public" adjective suggests that some property remain "private" and not accommodate the public. The actual content, after all, is the value that individuals have to offer—again, following Lessig: "digital images, texts, on-line movies, and the like."[158] If these types of content were all deemed equally consumable by all without respect to some ordering principle (such as the ability or willingness to pay), the incentives for organizations to provide a wide array of services on the Internet would doubtless sharply decrease. Similarly, the claim that all content should be deemed a place of public accommodation would almost certainly run afoul of constitutional free speech and association protections, since it would rob individuals of an important medium for personal expression and communication.

Yet as the earlier examples suggest, it is not the mere willingness and/or ability to pay that may be most problematic in cyber-exclusion.[159] On the contrary, exclusion on the basis of ability to pay *and* on the basis of something else—personal history, past or present employment, or, conceivably, some other personal characteristic or status—is what is most troubling about cyber-exclusion. Therefore, what is required is at a minimum to establish a limited right of access for all online content—at least to the extent that access is permitted by statute or common law in real space.

It is worth adding that the market has devised ways to provide access but also to limit copying, a concern of many scholars of Internet law in the not so distant past.[160] Websites offering pictures and other visual information for sale, for instance, now routinely insert blocks that preserve copyright and prevent unauthorized copying while also making full access possible for the curious or for those willing to pay for the product.[161] Such a development assures the

156. Access Now, Inc., 227 F. Supp. 2d at 1321 (holding that there is no Title II ADA claim when airline's website inaccessible to blind because no nexus between online website and physical location of public accommodation).

157. LESSIG, *supra* note 10, at 23.

158. *Id.*

159. *See supra* notes 46-50 and accompanying text for a discussion of exclusion from cyberspace on the basis of a tendency toward private control and a favoring of the economically mighty.

160. *See, e.g.*, Hardy, *supra* note 12, at 1030-31 (discussing contract approach to limiting copying on the Internet); Johnson and Post, *supra* note 32, at 1385 n.39 (noting impossibility of surfing net without copying); *see also* Pamela Samuelson, et al., *Toward a Third Intellectual Property Paradigm: Article: a Manifesto Concerning The Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2356 (1994) (discussing under and overprotection of traditional regulations).

161. *See, e.g.*, Hal R. Varian, *New Chips Can Keep a Tight Rein on Consumers, Even After They*

possibility of access that is both profitable and non-exclusive.

The question then becomes how best to guarantee that all individuals have access to the content and are not discriminated against in their efforts to gain access to content. Likely, the most costly manner in which such access will be provided is providing access for persons with disabilities. Federal agencies, however, have produced detailed guidelines requiring that such services be provided.[162] In other words, there exists strong evidence of some high degree of social consensus for bearing such costs.[163]

Similarly, it merits considering the extension of such prohibitions on exclusion for another reason. Particularly with the growth of e-technologies that will, for instance, authenticate signatures,[164] it is imperative that persons not be excluded from any aspect of Internet use or access because they could not similarly authenticate that they do not belong to a particular race, gender, political party, or any other group determined to merit special protection. The Internet is a powerful tool for establishing social connection but, as recent political events have reminded us, it is also a forum for fomenting parochial hatreds across wide distances.[165] As a matter of law, policy, and common practice, assuring the primacy of some public role on the Internet—by means of the operation of the public accommodation laws—is essential to foster the development of the Internet's desirable and benign aspects, as opposed to its

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Buy a Product, N.Y. TIMES, July 4, 2002, at C2 (examining vulnerabilities to computer copying copyright laws); *see also* LESSIG, *supra* note 10, at 150, 172-73 (discussing ways to control network and establish new norms on Internet and analyzing development of firewall technology); William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT. L. REV. 1203, 1255 (1998) (proposing use of encryption technologies to insure default entitlements); I. Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 236 (1996) (addressing likelihood that future technology will make it easier to draw and monitor boundaries in cyberspace).

162. *Federal Websites Face Redesign to Accommodate the Disabled*, N.Y. TIMES, Dec. 22, 2000, at A18 (describing effects to make federal websites more accessible for disabled).

163. And at least with respect to the design of websites, the costs arguably will not be overwhelming. See McKee and Fleischaker, *supra* note 35, at 36 for a description of initiatives to prevent website owners and designers from incurring costs in making their websites accessible to the disabled.

164. *See, e.g.*, Tzong-Sun Wu & Chien-Lung Hsu, *Convertible Authenticated Encryption Scheme*, 62 J. SYS. & SOFTWARE 205211, 2002 WL 16730367 (2002) (describing "digital signatures" and signature verification technology).

165. Andrew Higgins, *How al Qaeda Put Internet in Service of Global Jihad*, WALL ST. J. Nov. 11, 2002, at A1, col. 1; James Risen & David Johnston, *Agency Is Under Scrutiny For Overlooked Messages*, N.Y. TIMES, June 20, 2002, at A20, col. 5 (asserting that cryptic Internet messages possibly referring to September 11, 2001 terrorist attacks were intercepted by National Security Administration immediately prior to attacks); David Johnston, et al., *Qaeda's New Links Increase Threats From Far-Flung Sites,* N.Y. TIMES, June 16, 2002, A1 (commenting on terror network's use of electronic networks to try and regroup its forces). *See also* Netanel, *supra* note 73, at 449-500 (discussing U.S. law's historical resistance to self-governance and suggesting that reasons for such hostility are also applicable to cyberspace); Jason Krause, *Taking Aim at Cybersecurity*, ABA JOURNAL E-REP., Feb. 15, 2002, *available at* http://www.abanet.org/journal/ereport/fl5cyber.html (last visited Oct. 3, 2003) (addressing formation of Cybersecurity Privacy Task Force, an organization created in response to events of September 11th, 2001, formed for purpose of studying Patriot Act and how statute has changed landscape for lawyers).

more insidious ones.[166] A right of access, because it promotes the values of transparency and equal opportunity of use, would reinforce the Internet's more socially useful aspects. For the content layer, as with the physical and code layers, this right of access can be assured in a relatively straightforward manner. What is required is to initiate a public conversation about the extent of the popular right of access to cyber-content, defining clearly the degree of openness required when a party offers its content to the public. In addition, it is essential to provide legislative guarantees that no individual can be denied access to cyber-content on the basis of membership in a protected class. As a result, the logic advanced here suggests, for instance, that an airline should be held liable for failing to provide special facilities for blind persons who were unable to access the airline's website because of their disability.[167]

In this connection, it is worth stressing—although I cannot resolve it here—a particular concern in cyberspace, namely discrimination on the basis of economic status. Income is never a protected class in U.S. public accommodation law and one of—perhaps the—distinguishing feature of Internet access is that "accessing the Internet requires money."[168] As the digital divide[169] continues to become evermore apparent, its growth may demand re-thinking the very categories meriting designated public accommodation protection. In particular, should income discrimination become a proxy for racial or other forms of discrimination,[170] disentangling public accommodation discrimination based on one or another factor may prove insurmountably difficult in cyberspace, in turn necessitating our wholesale revision of the agreed-upon categories for designated public accommodation protection.

C. Overcoming the Conceptual Challenges

Some will likely protest that the Internet is empirically different from other goods and services we obtain and use. The extent of this difference, they will likely contend, precludes classifying cyberspace as subject to public accommodation principles.

1. Digital Cable Comparison

The nature of this concern is reflected in a case considering facts from a related technological area, namely the provision of digital cable television.

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166. *See* LESSIG, *supra* note 10, at 14 (exploring whether and how Internet as resource should be controlled); Lemley, *supra* note 47, at 1260-61 (advocating public ordering on Internet while recognizing benefits of private ordering).

167. Access Now, Inc., 227 F. Supp. 2d at 1319 (recognizing plaintiff's argument that Title II of ADA mandated airlines' website be accessible).

168. *See* Ku, *supra* note 59, at 324 (discussing digital divide).

169. See *supra* notes 59-60 and accompanying text for a discussion of the digital divide.

170. Ku notes that the "digital divide separates real space from cyberspace based upon race, income, education, and geography." Ku, *supra* note 59, at 91. See also *supra* notes 35-45 and accompanying text for a discussion of public access laws throughout history.

Torres v. AT&T Broadband[171] illustrates the difficulty that the argument advanced in this paper is likely to meet in the courts. *Torres* involved a claim by a visually-impaired digital cable television subscriber under the ADA. Specifically, the plaintiff alleged that defendants, providers of digital cable television, were "required to make the channel on which the defendants provide a list of available programs ('the channel menu') accessible to the visually impaired" under the public accommodation provisions of the ADA.[172]

The "contention that digital cable services constitute a place of public accommodation is contrary to the plain language of the statute and its implementing regulations," said Judge Breyer of the Northern District of California, insisting that "the plaintiff's home cannot reasonably be classified as a place of *public* exhibition or entertainment."[173] This is because, the court further explained, "[t]he defendants' digital cable system cannot be considered a facility, because in no way does viewing the system's images require the plaintiff to gain access to any actual physical public place."[174] The court thus firmly (if implicitly) came down on the side of the ADA Title III insurance cases that insist upon a physicality requirement for public accommodation laws to apply.[175]

The modern law of public accommodation provides the basis for understanding this decision's antiquated reasoning. To be exact, the decision focuses on a physicality requirement that fails to appreciate the dramatic changes in the provision of entertainment and in all manner of business communication, as well as the delivery of goods and services in the last generation. That is, why can't a person's home "reasonably" be considered a place of exhibition and entertainment?[176] The technology of, for example, a big-screen television

171. 158 F. Supp. 2d 1035, 1036 (N.D. Cal. 2001).

172. *Torres*, 158 F. Supp. 2d at 1036.

173. *Id.* at 1037-38 (emphasis added).

174. *Id.* at 1038 (citing Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114-16 (9th Cir. 2000)).

175. See *supra* note 97 and accompanying text for a discussion of the split among courts as to whether a physical presence is required for a group to qualify as a public accommodation under the ADA. Curiously, however, the *Torres* court did not cite those cases, relying instead only on a case from within the Ninth Circuit Court of Appeals, in which a Hollywood movie studio was not found to offer public accommodations to a disabled person who on a limited number of occasions had been granted access to studio facilities. *See* Torres, 158 F. Supp. 2d at 1038 (citing *Weyer*, 198 F.3d at 1114-16 (holding that place of public accommodation necessitates good or service provided on actual physical premises)); *see also Weyer*, 198 F.3d at 1114-16 (holding that term "place of public accommodation" suggests necessity of good or service provided in actual physical premises).

176. A relevant analogy comes from the erratic United States Supreme Court jurisprudence on the "public-ness" of privately-owned shopping malls. *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (holding no First Amendment right to distribute handbills in a privately-owned shopping mall); *cf.* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (stating state constitutional provisions allowing free speech exercise in publicly-owned shopping centers did not constitute federal constitutional violation). State courts have often worked, relying largely on state law, to distinguish their results from the *Lloyd Corp.* result. *See, e.g.*, Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas, 257 F.3d 937, 947 (9th Cir. 2001) (finding that although formerly public sidewalk was now part of private casino resort, it still must be accessible to public and was thus distinguishable from *Lloyd*); N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp.,

certainly suggests that Judge Breyer is quite wrong about this. The statute, after all, says nothing about "paid" exhibition or entertainment.[177] This begs the question: if an individual desires to participate in a public event such as a heavyweight boxing title fight that is available for viewing only in Las Vegas or in one's home on a pay-per-view basis, how is the home not rendered a place of public exhibition? The viewer is, after all, enjoying a public spectacle in real time, although in his own home. As usual, the court's choice of adverb—the lawyer's ultimate weasel word, "reasonably"—provides the clue that the result is far less clear cut than the court's opinion so confidently suggests.

Indeed, the slipperiness of the court's use of the word "reasonable" is revealed by precedent from within its own circuit. Judge Breyer neglected a case involving public accommodation claims under Title II of the Civil Rights Act that might have led him to an opposite result. *United States v. Baird*[178] held that the intimidation of an African-American man in the parking lot of a retail convenience store violated the public accommodations provisions of Title II because the store leased two video game machines for use by patrons.[179] As the appellate court observed:

> [a] place where people play video games differs from a "motion picture house, theater, concert hall, sports arena, stadium" in that the player generally acts alone rather than sitting with a crowd, and actively creates his own entertainment by putting money in the machine and manipulating the machine, rather than sitting in a crowd and watching other people. Nevertheless, it is a "place of entertainment" because people play video games in order to amuse themselves and pass the time agreeably. The evil addressed by the statute, in this instance, is segregation of places to which people resort for entertainment. People go to and remain in stores that have video games in order to play them.[180]

A striking feature of the above analysis is the circuit court's focus on the *nature* of the service. In *Baird*, what appears, as much as anything, to make the area around a pay-to-play video game machine a place of public accommodation is the fact that the machine has been offered to members of the public, for a fee, for their private enjoyment. This appears to be so despite the solitariness of the entertainment and despite even the place it occurred. As a justification for a public accommodation finding, this is not a far cry from the antebellum justification that deemed a business as having a duty to serve all who chose to take advantage of the service it offered.

Furthermore, it is arguably incorrect to assert, as Judge Breyer did, that

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650 A.2d 757, 750 (N.J. 1994) (finding that N.J. Constitution extends protection of speech to private property); JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 2.7.2 (2001) (surveying state court efforts to distinguish cases from *Lloyd*).

177. 42 U.S.C. § 12181(7)(C) (2000).

178. 85 F.3d 450 (9th Cir. 1996). See generally *supra* notes 94-95 and accompanying text for a discussion of the broad reading of public accommodation statutes.

179. *Baird*, 85 F.3d at 454.

180. *Id.* at 453 (emphasis added) (citations omitted).

access to a public, physical place is required in order to trigger the reach of ADA Title III. This relies on a rather arbitrary distinction between what is "public" and what is "private."[181] In fact, the statute says that private entities may be considered public accommodations "if the operations of such entities affect commerce."[182] Focus on the "affecting commerce" requirement helps direct attention to the new technology aspect of the *Torres* facts that the court overlooked. Unlike the advertising-based provider-consumer relation existing before cable television, fee-based cable television today is quite different. That is, advertisements do not pay for the service—subscribers do. Thus, the payment of monthly (and often additional) charges, depending on the nature of the service, certainly "affect commerce" and so should be enough to trigger ADA Title III coverage.[183]

This is particularly true if, to borrow from the analysis of the Internet that preceded the discussion in this subsection, one focuses on connection to a physical place. The cable company provided a service from a physical place—the physical layer. Its technology made possible the delivery of content—the equivalent of the code layer in the cyber-example. Finally, the content was received—usually by means of a special, provider-supplied device—into the place it was to be used. In short, by focusing on the physicality of the chain of connection, rather than the physical place itself, it is fully appropriate to apply a public accommodations analysis to cable television as well as to the Internet.

2. Utility Comparison

The provision of utility services provides another example. Like the Internet, a utility—electricity or water, for instance—is provided to individual consumers, both commercial and residential. The good moves from one physical location and is transmitted through an infrastructure—one usually provided and maintained by the utility itself—for delivery in the home of the consumer.

Although not typically classed as "public accommodations," it is striking to note a public utility code speaking of the obligations of utility providers to *accommodate* their customers.[184] In other words, utility law focuses on the

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181. Opportunistic manipulation of the public/private distinction has, of course, a venerable history in U.S. property law. *See, e.g.*, Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV 1, 5 (1991) (discussing manipulation of the public/private distinction in native lands context).

182. 42 U.S.C. § 12181(7) (2002).

183. *Id.* (declaring that certain private entities are considered public accommodations if they affect commerce). This requirement mirrors that of other public accommodation statutes. *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(b) (1999) (including establishments affecting interstate commerce as public accommodation).

184. Bellotti v. Duquesne Light Co., 44 Pa. D. & C. 3d 425, 428-29 (Pa. C. P. 1987) (quoting 66 PA. CONS. STAT. § 1501 (1978)). Stating in pertinent part:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees and the public.

nature of the service, and not on the private, public or quasi-private and/or quasi-public character of the entity. A focus on the nature of the service, and the agreed-upon social goal of providing that service on an equal basis, necessitates conceptualizing of service provision as carrying a duty that it be provided equally to all patrons.

3. The Credit Access Comparison

Similar arguments can be made with respect to the provision of credit. Although "[t]raditionally, credit has not been thought to fit into the category of public accommodations.... access to lending institutions and the services they provide is most assuredly an access right of as great significance as admission to restaurants, hotels, and theaters."[185] For this reason, numerous federal and state laws have been enacted to assure consumer provision of credit. With the expansion of online credit services,[186] it becomes more important than ever to focus on the nature of the service rather than on the place it is provided.

Suppose, for instance, that an individual is unable to apply for a mortgage because he is sight-impaired and cannot read the mortgage comparison charts. Or suppose that an African-American living in a largely African-American neighborhood accesses the online mortgage provider from her home computer, types in her zip code, and is told that the provider does not service that zip code. Suppose further that either or both of these individuals were able to determine, through the use of trial and error, that surrounding zip codes in their city or zip codes inhabited overwhelmingly by either the sight-enabled or by white, European-Americans, are serviced by the online mortgage service. In either of the above examples, it would not only be appropriate, but also fully consistent with the trend of modern public accommodations law, to find that the failure to accommodate the disabled or racial minority consumers would constitute a violation of that law. This would be so even though there was no "public" physical location from which the hypothetical consumer was excluded, if "public" is understood to refer to a place outside of one's "private" home or business. But if one focuses on the public-ness of the nature of the service, application of accommodation principles is far less problematic.[187]

Id.

See also Singer, *supra* note 40, at 1319, 1401-11 (finding common law judgment that "common employments" had duty to serve and surveying theories concerning public obligations of public service companies). In the antebellum United States, a rationale like the duty to serve applied to "[p]ublic utility companies, such as gas companies, [who] were similarly required to serve the public because of their 'exclusive privileges.'" *Id.*

185. *Project Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 235 (1978). In the nearly 25 years since this survey was conducted, not much has changed. Lending institutions were not included, for instance, in the list of public accommodations that appears in the ADA. 42 U.S.C. § 12181(7) (2003).

186. *See, e.g.*, http://www.mortgageexpo.com (last visited Sept. 13, 2003) (providing online mortgage comparison shopping).

187. This is an especially troublesome issue in the case of Internet banks. For example, the Community Reinvestment Act of 1977 (CRA), 12 U.S.C. §§ 2901-2908 (1997) requires banks to lend

IV. FUTURE REGULATION OF THE INTERNET AS A PLACE OF PUBLIC ACCOMMODATION

Much of this article has been concerned with establishing that, despite appearances, there is a "there" there for the Internet. In fact, as I have aimed to suggest, there are many "theres." It is not sufficient, however, simply to say that at every level—physical, code and content—for all purposes and at all times, that the Internet is a place of public accommodation.[188] On the contrary, to complete the argument advanced here, it is necessary to identify the principles that should guide a consideration of cyberspace as a place of public accommodation. In so doing, the aim is to insure open access to the Internet for all persons—recognizing, importantly, that "open" does not, and cannot, mean "unrestricted" for all purposes.

Those who worry about excessive control of Internet resources by a limited number of individuals and institutions[189] may find comfort with a conception of property rights that admits of simultaneous, competing interests in property. In other words, the proverbial "bundle of sticks" metaphor may help diffuse the anxiety of analysts like Lessig about the fight for cyber-control.

Consider, by way of example, this concern of Lessig's, where he examines the consequence of changes to "the broadband environment" and "spectrum rules" in cyberspace:

> [a]nd in each [of these examples], the idea about property prevails. We race to empower networks to discriminate (after all, they are "their computers"); we race to empower owners of copyright to control new modes of distribution; we race to develop property in the air. Our single, overriding view of the world is that only property matters; our systematic blindness is to the lesson of our tradition—that property flourishes best in an environment of freedom, both freedom from state control and freedom from private control.[190]

Well, maybe. It all depends on exactly what is meant by "control." If by control

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money to borrowers within their "community." Regulations issued pursuant to the CRA have attempted to define "community," and set standards for the percentages of outstanding loans that should go to borrowers within that "community." *See, e.g.*, Thomas W. Beetham, Note, *The Community Reinvestment Act and Internet Banks: Redefining the Community*, 39 B.C. L. REV. 911, 915-16 (1998) (outlining regulations promulgated by Office of Comptroller of the Currency, the Board of Governors of the Federal Reserve System, The Federal Depository Insurance Corporation, and the Office of Thrift Supervision). But, for instance, the "community" in which an Internet bank is obligated to lend determined by its physical headquarters or by the places where it does business, which may have insignificant connection to that physical location? *See id.* at 927-28 (arguing Internet banking encourages CRA focus on equality of access to banking services rather than physical geography); Miho Kubota, Note: *Encouraging Community Development in Cyberspace: Applying the Community Reinvestment Act to Internet Banks*, 5 B.U. J. SCI. & TECH. L. 8, 40 (1999) (proposing new CRA should define internet bank's community as national in scope).

188. As noted *supra* Section II.C.1, First Amendment interests of free speech and truly private associations would, for instance, have to be recognized.

189. *See* LESSIG, *supra* note 10, at 236 (warning that traditionally open resources of Internet are increasingly controlled by smaller number of people).

190. *Id.*

one means a choice between nationalization (on the state side of the ledger) or corporate monopoly (on the private side of that same ledger), as Lessig seems to do in the language quoted above, he may be right.

But there also is "control" that provides guarantees of limited rights—such as control by means of public accommodation laws—and there is "control" in the form of a tight stranglehold over the widespread provision of goods and services by either the state or by a private corporation. The latter form of "control," necessitated by an unyielding, absolutist use of the word "property," is what Lessig seems to envision at either end of the public/private divide. In an effort to suggest, therefore, that while concerns about the loss of open access and resultant discrimination in cyberspace are real but nonetheless remediable, this article now turns to consider the appropriate scope of Internet regulation as a place of public accommodation.

An invaluable first step in finding the appropriate balance between public and private interests in cyberspace can be achieved by recognizing the applicability of "real" property principles, and specifically public accommodation principles, to cyber-realty.[191] As noted at the outset of this article, to do so responds to the ways in which we seem inclined—our metaphoric predisposition, if you like—to conceptualize the Internet, as a space, as cyber*place*.

In service of the regulation of the Internet as cyberplace, the remainder of this Part is divided into two principal sections. The first, more theoretical section, examines the argument that the Internet is a place of public accommodation in light of contemporary property scholarship. As this first section suggests, different strands of contemporary property scholarship—including commons analysis and a body of writing that endeavors to describe the complicated character of the thing we understand as "property"—support a finding that public accommodation principles should properly be applied to Internet regulation. The section that follows links the theoretical and practical goals of that scholarship with the earlier part of this article, notably the sections laying out the antebellum view of a "duty to serve" when an entity makes its goods and services available to the public. In sum, the aim of this Part is to demonstrate that modern property scholarship in fact redirects our attention to the validity and appropriateness of a broad definition of "public accommodation," one that should include the Internet's several layers.

A. Property Principles and the Closing of the Electronic Frontier

As noted previously, many Internet commentators fear the growing contractualization of Internet interaction, such as the increasing dependence on licensing agreements as a means of asserting control.[192] In the face of this development, numerous commentators have advanced pleas for a return—or at least of a partial preservation of—the halcyon days of the early Internet, when

191. And thus, I suggest, to cyber-reality.

192. *See* Samuelson, *supra* note 85, at 113 (discussing property rights approach to control of data collected on Internet).

code was always open and the aim of the Internet was to allow information to be shared.[193] This is Lessig's desire, for instance, when he makes his case that "[w]e therefore should move—as quickly as possible—to a regime where the right to innovate does not depend on the permission of someone else."[194]

Recognizing, however, that increased regulation of cyberspace is inevitable, some of these same commentators have argued that the answer is private ordering and norm creation with limited government oversight.[195] Still others have suggested that the government should take a more extensive role, perhaps by restricting Internet licensing.[196] Lessig, more utopian than most, continues to hearken back to the kinder, gentler rule of "open access," pleading for a minimum of control by either the state or by private interests. Thus, he laments of:

> a blindness that affects our political culture generally. We have been so captured by the ideals of property and control that we don't even see the benefits from resources not perfectly controlled. Resistance to property is read as an endorsement of the state. The challenge to extreme propertization is read as the endorsement of nationalization.[197]

This article has aimed to reinforce the view, however, that the "ideal" of property is more than a libertarian notion of property and the control that notion entails. Lessig's use of the word in the just-quoted language seems to envision

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193. *See, e.g.*, LESSIG, *supra* note 10, at 100-08 (noting that "[o]penness not property or contract but free code and access - created the boom that gave birth to the Internet that we now know. And it was this boom that then attracted the attention of commerce. With all this activity, commerce rightly reasoned, surely there was money to be made."); *see also* PAULINA BORSOOK, CYBERSELFISH: A CRITICAL ROMP THROUGH THE TERRIBLY LIBERTARIAN CULTURE OF HIGH-TECH 1-27, 73-114 (2000) (describing strong anti-government bias of hard-core "cyberpunks"); ESTHER DYSON, RELEASE 2.0: A DESIGN FOR LIVING IN THE DIGITAL AGE 103-04 (1997) (advocating minimal government intervention in Internet regulation and "privatizing government").

194. LESSIG, *supra* note 10, at 221.

195. *See, e.g.*, Hardy, *supra* note 12, at 252-53 (claiming efficiencies of "private property" regulation); Hardy, *supra* note 12, at 1054 (arguing for "presumption of decentralization" in Internet regulation); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1303 (1996) (arguing for cyber-regulation by working from background property rule entitlements to create collective—and private—"private liability rule" organizations instead of government-controlled compulsory licensing); Post and Johnson, *supra* note 32, at 1370-76 (asserting cyber-exceptionalism and seeking private ordering of cyberspace). *But see* Cohen, *supra* note 47, at 480-84 (criticizing what she calls the "cybereconomists" desire to privatize control over digital works); Lemley, *supra* note 47, at 1287-94 (reluctantly concluding that public rather than private ordering of the Internet is best); Netanel, *supra* note 73, at 410-12 (arguing that private ordering in cyberia can threaten liberal democracy and so government regulation, albeit narrowly circumscribed regulation, is best); Radin, *supra* note 15, at 525 (questioning result of different normative regimes in cyberspace, including open network, self-regulation and an increased government role); Margaret Jane Radin and R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI-KENT L. REV. 1295, 1295 (1998) (discussing relevance of legal realist and critical legal studies critiques of unmerited persistence of laissez-faire ideology in U.S. law).

196. Samuelson, *supra* note 85, at 1173 (advocating "modified licensing regime" in cyberspace).

197. LESSIG, *supra* note 10, at 237.

the sort of free wheeling, libertarian justifications for property associated with the likes of Milton Friedman and Frederick Hayek, advocates of what has been labeled "the power-spreading argument."[198] This is, however, but one of many possible property narratives, each of which can be told in countless permutations.[199] If one insists on a less unitary, more complicated and multi-dimensional notion of property than Lessig seems to do, his anxiety begins to seem just a tad overwrought, and maybe even premature.

In the face of the private fight for control of cyberspace by contract, government regulation of cyberspace also will continue to expand.[200] It is not the aim of this article to draw the exact boundaries for such government involvement. It is to argue that, when Internet access is precluded for any reason, it is essential not to exclude citizens and potential consumers *ex ante* and to insist upon reasoned deliberation as to the terms on which all potential Internet users will be guaranteed access. Otherwise, it seems likely that contract rights will be used to secure strong property rights of a highly individualistic sort. This could lead, in turn, to undesirable concentrations of information and, hence, economic power. If history is a reliable guide, particular classes of persons will then be excluded from sharing in that information.[201] However, a broad range of scholarship provides direction for ways to avoid excessive concentrations of information and power. The first useful body of scholarship is commons analysis; the second argues for a complicated, multi-faceted understanding of the term "property."

1. A Role for Commons Analysis

While some are perhaps too ready to see the adoption of Internet norms that leave little role for government, the argument advanced here endorses the suggestion that common law property rules provide the desirable framework for conceptualizing Internet regulation.[202] That is, we *should* be talking about entitlements and obligations. We *should* be discussing borders and the best means to monitor them.[203] In doing so, however, it is insufficient to suppose that

198. *See* Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 340-45 (1996) (discussing power spreading argument). Many of what Rose identifies as "keystone" rights are considered, albeit with different terminology and much more cursorily, in Grey, *supra* note 9, at 73-79.

199. *See* Rose, *supra* note 198, at 365 (counting seven main property narratives); *see also* Michael A. Heller, *The Boundaries of Private Property,* 108 YALE L.J. 1163, 1183 (1999) (exploring three distinct metaphorical property concepts and legal traditions they reflect); Singer, *supra* note 40, at 1462-65 (examining multiple property models).

200. See *supra* note 162 for a discussion of the regulations affecting government websites accessible by the disabled.

201. *See* Gibbons, *supra* note 17, at 495, 509 (discussing criticisms of self-governance of cyber-space); *id.* at 482 n.35 (noting equal accommodation issues with Internet access and all-male or all-female listserves).

202. *See, e.g.*, Hardy, *supra* note 12, at 252-53 (analyzing common law property doctrines as applicable to cyber-space).

203. *See, e.g.*, Warner, *supra* note 61, at 120 (finding so long as special features of e-commerce technologies are recognized, it is appropriate to apply doctrine of trespass to chattels in cyberspace). Courts have sanctioned the use of trespass to chattels in the Internet context. *See, e.g.*, eBay, Inc. v.

everyone with a vital stake in the future of the Internet should be left, like Maine lobster gangs[204] or groundwater users in southern California,[205] to decide amongst themselves how to manage our new information resources. The application of successful common pool resource ("CPR") self-governance models is problematic for purposes of the information resources available in cyberspace because "ownership privileges" are not "restricted to a closed, relatively homogeneous group."[206] Indeed, it is precisely because there are so many "'theres' there" in cyberspace that something more is required.

Cyber-scholars advocating a revived "commons" on the Internet[207] tend to overlook another central difference between the commons of Garrett Hardin's village pasture grazed by the local cows[208] and cyberspace, namely the unlimited quality of the potential space. The pasture cannot create more space; once the grass is eaten, the same land can regenerate more grass, not more land. By contrast, this is not true of cyberspace, where both the consumer resources (goods and services) and the spatial medium in which they are distributed are potentially infinite (limited only, of course, by the resources available to provide hardware or the intelligence available to design protocols.) This suggests that it may be unproductive to try to seek a balance between public and private interests in cyberspace by means of a commons analysis.

It would be rash, however, to learn no lessons whatsoever from analysts of common resource management issues, and particularly from Elinor Ostrom and those who apply her work on natural resource CPRs. In examining successful self-governance of groundwater supplies in several Los Angeles-area water basins, Ostrom observes that "the rules for engaging in microinstitutional choice related to the control of groundwater have encouraged investments in self-organization and the supply of local institutions."[209] She goes on to caution that "[a] similar set of individuals facing similar problems in an entirely different type of political regime might not be able to supply themselves with transformed microinstitutions"[210]—the "transformed microinstitutions" referring to

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Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1069-70 (N.D. Ca. 2000) (deciding trespass cause of action existed for electronic signal sent to retrieve information from computer system); Thrifty-Tel v. Bezenek, 46 Cal. App. 4th 1559, 1565-66 (1996) (employing computer technology to attain telephone long-distance carrier's access codes from database constitutes trespass). Trespass is, of course, a doctrine used to exclude when another intentionally interferes with one's possession. The right of access permitted by public accommodation laws are, therefore, an exception to that doctrine. Nonetheless, these cases ultimately reinforce the argument here, since trespass is about preventing unauthorized access. Public accommodation law is, at least in part, about setting the terms of access.

204. *See generally* JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE (1988) (exploring common management practices in Maine fishing communities).

205. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 104-39 (1990).

206. Cohen, *supra* note 47, at 500 (criticizing use of Ostrom's work on self-governing natural resource CPRs to analyze cyberspace governance).

207. *See* LESSIG, *supra* note 10, at 228-229 for a discussion of commons.

208. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968).

209. Ostrom, *supra* note 205, at 139.

210. *Id.*

successful self-governance structures. Importantly for purposes of the argument advanced here, Ostrom concludes her review of the CPR success stories with a discussion of the role of central government institutions: "[T]he difference between an active effort by a central government to regulate appropriation and provision activities and an effort to provide arenas and rules for microinstitutional change is frequently blurred."[211] Much of the remainder of Ostrom's analysis is devoted to the question of how best to provide "arenas and rules" for "microinstitutional change."[212]

If the various "theres" in cyberspace are conceived of as "microinstitutions," Ostrom's analysis provides insight into the questions explored in this article. Even if one takes the view that some minimal government regulation of the Internet is appropriate, it remains essential to "provide arenas and rules for microinstitutional change." And, as always when resources are at stake (here information rather than natural resources, of course), it is essential to consider the appropriate *public* role regarding what has rapidly emerged as a major—or perhaps many major—social and economic institution(s). In short, this is to argue that, when applied to the Internet, public accommodation principles can help define the "arenas and rules" for Internet use, including all aspects of control and access, while also permitting continued deliberations as to who—private or public parties or a mixture of the two—shall, to use Ostrom's vocabulary, "regulate appropriation and provision activities" on the Internet.

2. Cyberspace and a Multi-Faceted Property Concept

By contrast to "the narrower vision of property" that prevailed for much of the last century and, in some circles, continues to enjoy enthusiastic support today,[213] a vigorous property scholarship has emerged since Grey's famous article about the "disintegration" of property, an article that will soon mark its 25th anniversary in print. That scholarship recognizes "property" as a multi-faceted, nuanced notion, one not strictly confined to a calculus that says "property" refers to the Blackstonian notion of "sole and despotic dominion."[214]

Applied to the focus of this article, this post-Grey property scholarship provides useful guidance for considering questions of control and access in cyberspace. Michael Heller, for instance, has advanced the case that, while optimal resource exploitation is a central goal of property institutions, there are other, social ends served by property as well. In particular, Heller has warned against the development of an "anti-commons" because property rights are re-

211. *Id.*

212. *Id.*

213. I refer specifically here to advocates of the "property rights" movement. A look at the website of, for example, the Washington Legal Foundation gives a flavor of the ideas associated with this movement. http://www.wlf.org/resources/wlfmission (last visited Sept. 6, 2003).

214. *See* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 602-04 (1998) (arguing successfully that Blackstone's famous epigram may have been taken wildly out of context).

allocated or created anew. "One path to well-functioning private property" in a manner that is both efficient and fair, he suggests, "is to convey a core bundle of rights to a single owner, rather than rights of exclusion to multiple owners."[215] In the context of the governance of cyberspace, for example, this suggests that rather than underutilize cyberspace by allowing widespread individual exclusion, the Internet will be sustained as a commercially vibrant collection of spaces that serves a robust democratic ideal if, prior to allocation, rights to it are "bundled" in such a way that insures the absolute right to exclude is neither a core right nor separately held from other rights.

Heller has further argued for a departure from the triadic conception of property that limits property talk to questions of private, state, or common ownership. This taxonomy is unsatisfactory "[b]ecause people are constantly creating new types of property," and he therefore suggests "that there remains substantial room for analytic innovation in property scholarship, innovation which, in turn, will carry normative punch when it redirects jurisprudential and practical debates to new questions."[216]

The particular innovations Heller offers up in service of his analytical redesign of the standard property taxonomy are what he calls the "constructive" and "integrative" approaches.[217] These are different sides of the same coin. The constructive approach aims to work outside the standard triadic conception of property, while the integrative seeks to work within it, drawing explanatory power from useful aspects of each category. A type produced by the constructive approach is, for instance, the "anti-commons," a notion conceived in light of but analytically distinct from existing categories. The integrative approach, by contrast, seeks to combine different analytical strands from existing notions of property. For instance, by recognizing the intertwined aspects of private and commons ownership in some types of property, and, in so doing, rejecting "the oppositions between private and commons property," Heller's analysis delineates what he and a colleague label the "liberal commons:"

> [a]n analytic tool [that] can be deployed wherever people want to work together but are prevented from doing so by background property rules premised on the old-fashioned Blackstonian image of private property and the unreflective hostility to cooperation built into the tragedy of the commons image. By showing how a liberal commons can integrate the benefits of private and commons forms, this dynamic approach to property analytics advances normative and practical

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215. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 688 (1998) (discussing Heller's "tragedy of the anti-commons" as redefining the theory, showing how when few persons have the right to exclude, the best use of others can be blocked). *See* also Hunter, *supra* note 1, at 89-93 (expressing Hunter's worry about development of anti-commons in cyberspace).

216. Michael A. Heller, *Contracts and Property Law: The Dynamic Analytics of Property Law*, 2 THEORETICAL L. 79, 82 (2001). *See also* Michael A. Heller, *Three Faces of Private Property*, 79 OR. L. REV. 417, 417-18 (2000) (discussing three types of property as outdated and overly simplistic, and suggesting new way of analyzing property rights).

217. *See* Heller, *Contracts*, *supra* note 216, at 82-91 (offering these approaches as alternative to traditional approaches to ownership forms).

property projects.[218]

The constructive approach, with its identification of a new category within the property taxonomy, namely the "anti-commons," might provide insight as to bundling of rights in cyberspace, including a rejection of widespread rights to exclude. The constructive approach could be further useful to the regulation of cyberspace. For example, it helps identify the fact that the private ownership of Internet resources need not mean exclusive control. Instead, the constructive approach suggests, guarantees of public access to private cyber-resources may not only be appropriate but consistent with some property law traditions.

The "integrative" approach arguably provides even more useful insights in order to insure Internet access.[219] Specifically, as regards cyberspace governance, the integrative approach could be used to outline a workable model for control of cyberspace by multiple claimants. As noted, the use of a commons analysis is largely inapplicable to regulation of cyber-property by virtue of the vast and far from homogeneous character of cyberspace.[220] Nonetheless, the "liberal commons" constitutes a descriptive tool that helps explain practical and normative realities in much property management, and specifically the coordination of common and exclusively private interests—as for example in the residential group ownership context.[221] The question then becomes whether this notion has any analytical usefulness for the regulation of property in electronic space.

Because of the vastness of cyberspace, an elaboration of Heller's notion of the liberal commons, namely a liberal commons mediated by state oversight, could prove useful. In this model, the state would play a familiar role: setting ground rules and terms of engagement for the players, who then would be left to allocate ownership interests among themselves, deciding for example, what resources (code for communicating between computer systems, for example) should be left to control by collective interests and what parts of the resource should remain under wholly private control (web page information, for instance). Thus, the state role need not be as intrusive as Lessig and others worry. Conversely, by application of principles like the law of public accommodation, the state role would help ensure that no one is excluded entirely

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218. *Id.* at 90. *See also* Hanoch Dagan and Michael A. Heller, *The Liberal Commons,* 110 YALE L.J. 549, 553 (2001) (advocating liberal commons).

219. Although his use of the term "integrative" is new (at least to me), as an analytical construct the notion advances the work of earlier scholars such as Carol Rose and Laura Underkuffler-Freund. See Rose, *supra* note 198 and *infra* notes 230-34 for an exploration of constitutional property rights as a source of political and economic power, and suggesting that the real allure of property rights is economic, not constitutional. *See, e.g.*, Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1034 (1996) (disagreeing in part with Rose, *supra* note 198 and arguing that property is both more complex and more contingent than other constitutionally-protected rights).

220. *See* Cohen, *supra* note 47, at 500 (noting heterogeneity will not lead to efficient allocation of property rights).

221. *See* Heller, *Three Faces*, *supra* note 216, at 429 (discussing how values particular to a "liberal commons" setting can point toward reform of property rights).

and, as a result, excessive private control of the resource that is cyberspace[222] would be significantly reduced. A concern here—and one beyond the scope of this paper—is that the collective not be captured by potentially monopolistic interests—Microsoft, Intel, Netscape, and Cisco, to cite four prominent examples. In short, to achieve Heller's aim, the liberal commons in this instance would need to strike a balance between all possible claimants to participation that did not hand over effective control to the major players.

The question is how to clarify the nature of rights both public and private in cyberspace. As with other aspects of intellectual property law and in the environmental regulatory context, "the Internet . . . appears to call for some balance of property and commons" in the way that it is legally administered and regulated.[223] Although achieving such a balance is fraught with difficulty, notably the effects of "partial propertization" and the resulting inefficiencies caused by over- or under-allocation of property rights,[224] to say nothing of enforcement or litigation costs,[225] agreement is nonetheless needed to find some role for simultaneous management of both commons and private property. This could be overseen by public authorities, by means of property law principles designed to protect common, public interests—principles like the law of public accommodation.

Property rules are by nature disruptive[226] and multi-featured.[227] As with real property, the forms of disruptions that would be most troublesome are "regulatory adjustments," a "category [that] includes instances in which property is affected by regulatory changes—changes that in some measure alter the scope and content of property rights."[228] Particularly troublesome is what Carol Rose calls "the Utilitarian Dilemma, a dilemma that underlies many of the claims that property has been unconstitutionally taken. The dilemma is that the essential goal of securing property expectations clashes with the equally essential goal of managing congested resources."[229] Without repeating the intricacies of her analysis, suffice it to say that recognizing this dilemma underscores the potential appropriateness of applying public accommodation principles to cyberspace regulation. That is, public accommodation law denies only the right to exclude absolutely and, thus, defines and therefore secures the property to which it is

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222. *See* Lemley, *supra* note 47, at 1293 (arguing for public, rather than private control of internet); Netanel, *supra* note 73, at 452 (discussing desire for freedom on Internet and potential areas where legislation appropriate).

223. Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1998).

224. *See id.* at 152-153 (discussing conflicts that arise from partial propertization).

225. *See id.* at 154 (discussing costs of enforcement and litigation arising from partial propertization).

226. *See* Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 6 (2000) (commenting on ways law can be used to disrupt property rights).

227. *See* Rose, *supra* note 198, at 330-31 (discussing expectations that property will do more than secure economic prosperity).

228. Rose, *supra* note 226, at 15.

229. *Id.* at 19.

applied. Moreover, in the cyberspace context, public accommodation law in this way may play a management role, since it may be used to help identify bedrock principles for the use of congested cyberspace.

Similarly, Rose's classification of multiple justifications for property stands as a useful typology for beginning to understand the varied and competing interests at stake in cyberspace. The "priority argument" she notes, namely the notion that "[p]roperty is the key to all other rights because it is prior to politics, and hence the basis upon which all other civil rights rest,"[230] may shed light on the way we seem to think about cyberspace. That is, as noted at the outset of this article, cyber-observers, even prior to the extensive regulation of the Internet, appeared to favor the property metaphor to describe cyberspace. This suggests a sense that whatever is "there" in cyberspace merits classification—and protection—as property.

Furthermore, other arguments identified in her typology, including the "power-spreading,"[231] "independence,"[232] and "luxury-good"[233] arguments, shed light on the appropriateness of conceptualizing cyberspace as regulable property, provided that such regulation is not understood as securing purely private rights to the exclusion of all other concerns. The power-spreading argument is associated with free market economics and the belief that the right of individuals to hold property acts as a bulwark against intrusive, monopolistic political regulation.[234] Individual property holding, however, also tends in time to lead to economic concentrations of power.[235]

Once again, a way to insure power-spreading through property entitlements is by means of rules that mediate among different interests—and in particular between those of private parties, those with limited group rights, and those of the public generally. And, once again, public accommodation law is one notable example of a legal principle that works precisely to strike a balance between those competing interests.

The same can be said of the "independence" argument, namely the belief that "property makes individuals independent and thus capable of self-government."[236] As with power-spreading, individuals cannot gain independence without access to property. And public accommodation law is one

230. Rose, *supra* note 198, at 333.

231. *See id.* at 340 (stating proposition that property diffuses power because holding property grants power to holder).

232. *See id.* at 345 (asserting that property allows people to be independent, making unencumbered political judgments).

233. *See id.* at 358 (finding that property protects other rights by making society wealthier).

234. *See id.* at 340-41 (discussing property as alternative to political power limiting suppression of other rights).

235. Rose, *supra* note 198, at 343-44. These concentrations, paradoxically, are not unlike in kind the political concentrations of power private property regimes were supposed to prevent in the first place. Thus, she concludes her analysis of the power-spreading argument with the acknowledgment that "[t]otally diffuse power is not really compatible with property at all; property can do little to help safeguard other rights in a regime where the governing principle is dog-eat-dog." *Id.* at 345.

236. *Id.*

such means to permit the possibility of accessing and, thus, potentially acquiring property. In the simplest terms, this is to say not that one must "pay to play" but rather that one can't pay if one doesn't know how to get inside and pay, or what one can pay for.

So too for the "luxury-goods" argument, the idea that "[p]roperty protects all other rights precisely by fulfilling its economic function, and by making a society wealthier."[237] In the context of the argument advanced in this article, this is to say, as with the independence argument, that maximum wealth creation is not possible without the maximum *opportunity* for wealth creation. Thus, a non-discriminatory right of access is an essential attribute of any property regime in cyberspace. In sum, contemporary property scholarship advances a way of approaching public accommodation law that is strikingly similar to antebellum approaches. That is, the emphasis of contemporary scholarship on the varied and multi-textured quality of what we classify under the "property" label focuses attention on the need for an expansive understanding of public accommodation. Specifically, contemporary scholarship reinforces the notion that the focus should not be on rigid doctrinal categories (e.g. common carriers and innkeepers) but, instead, on the nature of an enterprise. Thus, if an entity holds itself out to do business with the public—in cyberspace as in real space—it should be required to accommodate the public. How extensive that accommodation and the associated right of electronic access should be are matters for legislative determination. At a minimum, this article has endeavored to suggest, they should guarantee access to all classes of persons currently protected by public accommodation laws.

B. Why Public Accommodation

The argument advanced here risks, I know, making me something of a Johnny One Note.[238] And I certainly do not mean to suggest that public accommodation law is a be-all and end-all, the panacea for mediating between the competing interests claiming ownership of and the right to participate in cyberspace. What the article does aim to suggest, however, is that public accommodation is a potentially powerful tool that, if used judiciously in the regulation of cyberspace, will serve goals of both robust democracy and strong economic growth.

To that end, I have suggested a limited state role in the regulation of cyberspace by means of the law of public accommodation. This is to say that in the context of cyberspace regulation the application of public accommodation principles could be used as a bulwark against the concentration of control over information and the concomitant economic power that it represents, in keeping

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237. *Id.* at 358.

238. "Johnny could only sing one note/ And the note he sings was this/ Ah!/ Poor Johnny one-note/sang out with "gusto"/And just overlorded the place/Poor Johnny one-note/ yelled willy nilly/Until he was bleu in the face/ For holding one note was his ace." LORENZ HART AND RICHARD ROGERS, JOHNNY ONE NOTE, (Chappell Music, 1936).

with our richest democratic traditions.[239] As a result, such principles can, in the context of new technologies, inculcate virtues like transparency at a formal, legal level. Thus, public accommodation principles as applied to cyberspace can help maintain a threshold level of access for all persons so that the Internet continues to feed democracy rather than to promote parochialism.

Simultaneously, however, given blocking technologies now available for use on the Internet,[240] it will be possible to apply public accommodation principles without simultaneously compelling release of proprietary information. The point here is to use property law to assert a right of access and thus, for example, to minimize dangers like those posed by the "vertical integration" of the Internet.[241]

As intimated earlier, moreover, this would be in keeping with the original purpose of public accommodations laws and their historical antecedents, which was to insure access if the nature of the service was to perform a social role directed at the public.[242] It is appropriate to apply public accommodation law to the Internet context, furthermore, by virtue of our use of the property metaphor to describe cyber-institutions. That is, if one takes words seriously, and understands that the diction and metaphor adopted to describe the Internet are not merely matters of descriptive convenience but instead reveal something fundamental about the way we understand the medium,[243] property law is the clear default source for governance as it relates to cyberspace.

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239. *See, e.g.*, Netanel, *supra* note 73, at 461-65 (discussing regulation of mass media to create pluralism of voice); *cf.* Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND L. REV. 1607, 1612-16 (1999) (discussing desire for freedom on Internet and use of legislation to regulate it; reviewing author who states individual liberty is paramount and is skeptical about government regulation). *See also* SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP 40 (2000) (asserting wider ownership of property is value deeply embedded in our constitutional tradition). An observation of Singer's underlines the point I am making here:

> The law of property—the law governing the marketplace—depends on moral choices about the just contours of social life. Our views about minimum standards of decency and the requisites of an economic system compatible with human dignity are crucially influenced by the sources of our ultimate values and beliefs. The framers of the Constitution wanted to grant great protection for property, but they also wanted a nation with widespread ownership of property.

Id. at 40 (citation omitted).

240. I refer to what are often known as "filtering technologies." *See, e.g.*, Netanel, *supra* note 73, at 467-68 (discussing potential use of software to filter out Internet content the viewer does not want to see); *see also* Lisa Guernsey, *Welcome to the Web: Passport Please? Information May Want to be Free, but Courts and New Software Could Impose National Borders*, N.Y. TIMES, Mar. 15, 2001, at D1 (discussing use of filtering software as means of limiting access to Internet materials based on laws of certain countries).

241. LESSIG, *supra* note 10, at 165-66 (quoting, *inter alia*, NATIONAL RESEARCH COUNCIL, THE INTERNET'S COMING OF AGE (National Academy Press 2000)).

242. Singer, *supra* note 40, at 1308-15 (discussing laws requiring innkeepers and common carriers to hold businesses open to public).

243. *See, e.g.*, Susan W. Tiefenbrun, *Legal Semiotics*, 5 CARDOZO ARTS & ENT. L.J. 89, 116 (1986) (overviewing ideas of celebrated semiotician Ferdinand De Saussure and noting "Saussure continually stressed the importance of seeing language as a system of socially determined values.").

This is to endorse a view of Internet property then, as essentially no different in terms of regulatory demands from chattel or realty, and to endorse the claim that any such property constitutes part of a social institution that is designed to assure sociability and well-functioning community as much as to assure individual security and economic power.[244] Moreover, as noted previously, this view also recognizes that while these ends sometimes conflict, they are not mutually exclusive.[245]

V. CONCLUSION

Current and future regulation of cyberspace must proceed on several fronts. Regulators must deal not only with the Internet's physical layer, but also with its less concrete manifestations, namely the code and content layers. I have argued that this is not only possible, but essential. In particular, the argument put forth here has endorsed the view that property institutions, conceived in the widest sense, are the appropriate means to regulate cyberspace—as opposed to, for instance, ordering of cyberspace by private contract rules alone. Specifically, this article has endeavored to show that at every layer—physical, code and content—cyberspace can and should be regulated like physical space. If cyberspace is to serve both social and democratic ends as well as commercial ones, this includes, importantly, the regulation of cyber-spaces as places of public accommodation. It has been my further contention here that this notion corresponds with our metaphorical and descriptive vocabulary for the Internet, and the belief that this language need be taken seriously as a guide for the direction of present and future regulation. Thus, in future regulation of cyberspace it is my suggestion that we need not only apply principles of public accommodation to Internet regulation, but also draw from the full arsenal of property law doctrines and concepts.

This process will not always be either simple or uncontentious. As noted earlier, for instance, the widening of the "digital divide"[246] may demand reconsideration and further expansion of both the categories and types of status today deemed worthy of designated public accommodation protection. Without question, a possible prohibition on exclusion based on professional or economic status would lead to an especially lively, and perhaps even rancorous debate. Yet as the "holding out" justifications for the antebellum right of access indicates,[247] there are both historical and theoretical legal reasons to believe that

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244. *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723 (1986) (discussing use of public property for commerce as way of expanding wealth and increase sociability).

245. *See* Rose, *supra* note 198, at 363 (discussing fragility of property rights but long-term stability based on increase in cooperation and wealth).

246. See *supra* notes 59-60 and accompanying text for a discussion of why these problems are not new features of the information age. *See also* Vincent Mosco, *Introduction* to POLITICAL ECONOMY OF INFORMATION 11 (Vincent Mosco & Janet Waco eds., 1988) (worrying, for example, that "[t]oday you can add to the familiar "Why Johnny can't read?" the increasingly familiar "Why can't Johnny and Jane afford a dial tone?").

247. Singer, *supra* note 40, at 1318-24 (citing duty of innkeepers and common carriers to serve

such a debate is worth having. And while such a discussion might prove difficult and protracted, the historical struggle over the contours of what exactly constitutes a place of public accommodation affirms that the discussion is essential if all property—in cyberspace as well as on the ground—is to be widely accessible, not controlled by a few individuals and entities.

public stems from fact that they hold themselves out as ready to do so). See also *supra* notes 101-17 and accompanying text for a discussion of public accommodation law.