

## Notes

### THE DEPENDENCE OF CYBERSPACE

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O, that this too too sullied flesh would melt—Thaw and resolve itself into a dew!<sup>1</sup>

The fantasy that law works like a computer code, in sum, undergirds the denial of history, social structure, and political struggle that is central to the libertarian faith in markets . . . .<sup>2</sup>

#### INTRODUCTION

In 1996, John Perry Barlow, the founder of the Electronic Frontier Foundation, published *A Declaration of the Independence of Cyberspace*,<sup>3</sup> a response to the Telecommunications Act of 1996,<sup>4</sup> that President Clinton, “that great invertebrate in the White House,”<sup>5</sup> had just signed into law. Barlow vehemently rejected the right of any national government to create laws for cyberspace: “You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. . . . [C]yberspace does not lie within your borders.”<sup>6</sup> It is a mark of the tremendous influence of libertarian ideology in cyberspace that a few years later President Clinton too en-

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1. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 2, lines 129-30.
2. Thomas Streeter, “*That Deep Romantic Chasm*”: *Libertarianism, Neoliberalism, and the Computer Culture*, in *COMMUNICATION, CITIZENSHIP, AND SOCIAL POLICY* 49, 58 (Andrew Calabrese & Jean-Claude Burgelman eds., 1999).
3. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Electronic Frontier Foundation, at <http://www.eff.org/barlow> (Feb. 9, 1996) (on file with the *Duke Law Journal*).
4. Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 153 (Supp. 2000)).
5. Barlow, *supra* note 3.
6. *Id.*

dorsed a conception of a regulation-free Internet.<sup>7</sup> “For [the Internet’s] potential to be realized fully governments must adopt a non-regulatory, market oriented approach to electronic commerce.”<sup>8</sup>

Many legal scholars have expressed similar skepticism about the appropriateness and feasibility of traditional state-enforced regulation of activities within the new virtual landscape.<sup>9</sup> These commentators describe the knotty problems of jurisdiction, legitimacy, notice, and enforcement on the Internet. Many legal scholars express faith in private or self-enforced regulation of cyberspace as a preferable alternative to state-created laws.<sup>10</sup> In the last couple of years, however, some strong dissenting voices have emerged. Professor Jack Goldsmith’s important article, *Against Cyberanarchy*, effectively punctured some of the most common myths about the feasibility and legitimacy (in the limited, legal sense) of state regulation of the

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7. It is important to note a significant difference between the Clinton administration’s variety of libertarianism and the Barlow variety. While Barlow sees intellectual property as a potential threat to the development of the Internet, the Clinton administration viewed improved intellectual property protection as the key to the Internet’s growth. For Barlow’s view, see John Perry Barlow, *Selling Wine Without Bottles: The New Economy of Mind on the Global Net*, at [http://www.eff.org/pub/Publications/John\\_Perry\\_Barlow/HTML/idea\\_economy\\_article.html](http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/idea_economy_article.html) (last visited Apr. 7, 2001) (on file with the *Duke Law Journal*). The Clinton administration approach is reflected in its *Framework for Global Electronic Commerce*, President William J. Clinton & Vice President Albert Gore, Jr., *A Framework for Global Electronic Commerce*, at <http://www.ecommerce.gov/framewrk.htm> (July 1, 1997) (on file with the *Duke Law Journal*), and in its legislative handiwork, the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C. (Supp. IV 1998)) (amending the copyright law as a response in part to the signing of the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty).

More than a policy disagreement, this difference expresses a fundamental philosophical tension within libertarianism. James Boyle, *Net Total: Law, Politics and Property in Cyberspace* (2000) (unpublished manuscript, on file with the *Duke Law Journal*):

This isn’t just a disagreement as to tactics among people who might be said to share the same ideology: it is a fundamental set of disputes over the very social construction and normative significance of a particular phenomenon—as if the Libertarian party couldn’t agree on whether its motto was to be “Taxation is theft” or “Property is theft.”

8. Clinton & Gore, *supra* note 7.

9. *E.g.*, Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1096 (1996) (describing the impact of Internet regulation on federalism); I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993, 994 (1994) (addressing whether the existence of cyberspace really raises novel legal issues); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (arguing that “new rules will emerge to govern” cyberspace).

10. *E.g.*, David Post, *What Larry Doesn’t Get: Code, Law, and Liberty in Cyberspace*, 52 STAN. L. REV. 1439 (2000) (offering a critique of Lessig’s warning about the role of commerce in the rise of control mechanisms in cyberspace and advocating a reliance on spontaneous, organic methods of regulation).

Internet.<sup>11</sup> Professor Lawrence Lessig's book *Code*<sup>12</sup> is certainly the most prominent of such critiques. Lessig argues that digital libertarians are blind to the way the Internet is moving towards an architecture of control.<sup>13</sup>

The project of this Note is slightly different. Building on the important groundwork that dismantles some of the claims made by digital libertarians, this Note sets out to understand the philosophical underpinnings of Internet libertarianism. It therefore is attentive to the language and narratives offered by digital libertarians as much as it is attentive to their substantive arguments. This Note aims to suggest the limits of self-regulation claims for the Internet and to examine how particular notions of individuality and freedom undergird the libertarian model. I argue that the apparent natural kinship between the Internet and libertarian philosophy reveals as much about libertarianism—which is, ultimately, at the heart of most American political philosophies—as it does about digital communication media.

This Note grows out of two experiences during my time in law school. In my first semester as a law student, my property law professor assigned a few pages from an essay titled *Law, Boundaries, and the Bounded Self*.<sup>14</sup> The author argued that our conception of property rights is not inevitable but is, instead, historically contingent on the political forces that were at work during the founding of the nation. Moreover, the notion of property as a metaphor for human liberty produces a particular notion of individualism that sees the individual as a self-enclosed, separate entity.<sup>15</sup> This essay gave me a framework and language to articulate my inchoate, intuitive responses to certain individualistic assumptions within liberal legal thought. The second experience was the summer I spent at the Federal Trade Commission's Consumer Protection Bureau. At the FTC, I

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11. Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1200-01 (1998) (offering a descriptive critique of the skeptical view of territorial regulation of cyberspace).

12. LAWRENCE LESSIG, *CODE* (1999); see also James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997); Julie E. Cohen, Lochner in Cyberspace: *The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 494-95 (1998) (describing the revived romance with laissez-faire economics within the digital realm); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 405-06 (2000) (arguing that self-governance is inconsistent with liberal ideals).

13. LESSIG, *supra* note 12, at 5.

14. Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, in *LAW AND THE ORDER OF CULTURE* 162 (Robert Post ed., 1991).

15. *Id.*

saw how the challenges to consumer protection law enforcement posed by new digital technology were compounded by political confusion over who would enforce the law.<sup>16</sup> A newly visible high-tech lobby had emerged, and political pressures against regulation added to the logistical difficulties facing consumer protection efforts.<sup>17</sup>

I offer these biographical tidbits in the interest of full disclosure: I am dissatisfied with an individual-centered notion of liberty, and I am a believer in corny, New Deal institutions like the Federal Trade Commission. My world view shapes my reading of libertarian arguments. But claims to hardheaded realism notwithstanding, libertarian descriptions of the Internet are colored by a particular world view, too. In *Code*, Lessig argues against “is-isms.”<sup>18</sup> The Internet, he argues, can be many things. Although this Note focuses on the power of narratives rather than the power of computer code, I echo the claim that the Internet is at a crossroads. This Note is a signpost pointing in another direction.

In Part I, I discuss the contested meaning of the history of the Internet. I ask whether we read the Internet as a successful example of government-private cooperation fueled by a non-proprietary ethos or as the final frontier of the free market. Part II considers the arguments against government intervention and the claim that cyberspace does not require regulation by states because, left to its own devices, it will be self-ordering. Part III situates today’s digital libertarianism within an American historical context. In particular, I suggest that the American conception of individual freedom derives from a metaphoric pairing of rights with property ownership developed and relied upon by the Framers of the Constitution. Although this metaphor helped ground an abstract idea, it is important to consider the limits the metaphor has imposed on the conception of the individual. Although the digital libertarian argument relies heavily on the intangibility of the Internet, I will argue that its assumptions are based upon a particular notion of the individual that is grounded in the metaphor of the natural self, the self as property. Part IV offers a few counter-

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16. See Glenn R. Simpson, *Clinton Is Unlikely to Back FTC Efforts for New Power to Regulate Web Privacy*, WALL ST. J., May 22, 2000, at A3 (describing a dispute between the FTC and the White House over expanding the FTC’s powers).

17. See *Liberty.com*, ECONOMIST, Oct. 30, 1999 (describing the boom in presidential lobbying by the high-tech industry).

18. LESSIG, *supra* note 12, at 25 (“There is no single way that the Net *has* to be; no single architecture defines the nature of the Net.”).

narratives which situate the Internet within, rather than beyond, the world of politics and history.

## I. THE CONTESTED HISTORY OF THE INTERNET

### A. *Call Me ARPANET*

Internet history is a problem for digital libertarians. The claim that cyberspace is a stranger to government intervention founders on the actual history of the medium and the role the United States government played in establishing the Internet. The story begins in the 1950s, when the Eisenhower administration created the Advanced Research Project Agency (ARPA) to coordinate military research and development.<sup>19</sup> The first incarnations of e-mail and hypertext were developed within ARPA-funded research projects at MIT and the Stanford Research Institute.<sup>20</sup> Together, these organizations and other ARPA-funded institutions linked their computers into the first collaborative research network called the ARPANET.<sup>21</sup> In 1969, there were four nodes on this network; at its first public demonstration, in 1972, there were twenty-nine.<sup>22</sup>

The ARPANET was a product of the Cold War. The Department of Defense's goal was to create a communication medium that was decentralized and therefore less vulnerable to attack.<sup>23</sup> The computers in the network were linked so that if one computer was damaged the network could route around it. The computers were able to share information because they all used the same language or protocols: TCP/IP.<sup>24</sup> To decrease travel time, information was broken up into smaller packages that traveled independently and were reassembled at their final computer destination.<sup>25</sup> The new network became

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19. Ironically, digital libertarians mocked Al Gore's term for cyberspace, the "information superhighway," as redolent of Eisenhower-era big government construction projects. *E.g.*, Esther Dyson et al., *Cyberspace and the American Dream: A Magna Carta for the Knowledge Age, Progress & Freedom Found*, at <http://www.pff.org/position.html> (Aug. 22, 1994) (rejecting the metaphor of the information superhighway as misleading and not descriptive of the nature of cyberspace) (on file with the *Duke Law Journal*).

20. Nathan Newman, *Storming the Gates*, AM. PROSPECT, Mar. 27-Apr.10, 2000, at 35.

21. *Id.*

22. *Id.*

23. *Id.*

24. Jane Kaufman Winn, *Open Systems, Free Markets and Regulation of Internet Commerce*, 72 TUL. L. REV. 1177, 1188 (1998).

25. *Id.* at 1188-89.

so popular among researchers and academics that traffic became unmanageable on the ARPANET, and the National Science Foundation (NSF)<sup>26</sup> created a compatible network for nondefense research. Under NSF sponsorship, the Internet became a federally funded network for the academic and research communities.<sup>27</sup> However, due in part to NSF's Acceptable Use Policy, which prohibited commercial uses of the network backbone, the Internet remained a commerce-free zone through the 1980s.<sup>28</sup>

In fact, while the NSF was developing the Internet as a non-commercial communications network, commercial enterprises, particularly banks, developed their own electronic data interchanges, which spawned credit card processing systems and then ATMs.<sup>29</sup> When the Internet was opened to commerce in the 1990s, mainstream corporations (including the largest player in the computer industry, Microsoft) were unprepared. "[T]hey had spent the previous decade investing in proprietary commercial on-line services like Prodigy, and yet suddenly here was this superior system they neither controlled nor understood."<sup>30</sup> In the 1960s, AT&T predicted that a packet-switched network could not work and turned down the request from scientists to help build the Internet.<sup>31</sup> These egg-on-your-face stories conflict with, and thus are omitted from, the story of the Internet as a triumph of private entrepreneurialism.

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26. The National Science Foundation was created in 1950 "to foster and support the development and use of computer and other scientific and engineering methods and technologies, primarily for research and education in the sciences and engineering," among other purposes. 42 U.S.C. § 1862 (1994).

27. Walt Howe, *A Brief History of the Internet*, at <http://www.walthowe.com/navnet/history.html> (last visited May 12, 2001) (providing a brief and readable history of the Internet and the people involved in its creation) (on file with the *Duke Law Journal*).

28. *Id.*:

Since the Internet was initially funded by the government, it was originally limited to research, education, and government uses. Commercial uses were prohibited unless they directly served the goals of research and education. This policy continued until the early 90's, when independent commercial networks began to grow. It then became possible to route traffic across the country from one commercial site to another without passing through the government funded NSFNet Internet backbone.

29. Adriel Bettelheim, *New Era in Digital Trade*, CONG. Q. WKLY., Feb. 2, 1999, at 18.

30. Streeter, *supra* note 2, at 47, 49. Founded in 1984 and rolled out nationally in 1990, Prodigy was one of the first online services. Prodigy.com, Company Information, at [http://www.prodigy.com/pcom/company\\_information/company\\_index.html](http://www.prodigy.com/pcom/company_information/company_index.html) (last visited April 1, 2001) (chronicling Prodigy's milestones) (on file with the *Duke Law Journal*). Until 1993 it offered proprietary content to its members only. In 1993 it added a gateway to the Internet. *Id.*

31. LESSIG, *supra* note 12, at 44.

B. “*The Private Sector Should Lead*”

The development of the World Wide Web, a user-friendly browser, and the introduction of commerce in the 1990s profoundly changed the nature of the Internet.<sup>32</sup> Lessig differentiates these two Internet epochs by referring to the pre-commercialized Internet as “Net95.”<sup>33</sup> According to Lessig’s argument, the expansion of commerce on the Internet created a need for new technologies to enable secure transactions.<sup>34</sup> These developments include methods of authentication, such as passwords and cookies, and encryption for security and confidentiality. Encryption and authentication changed the Internet from a hard-to-regulate space to an ultra-regulated, or at least ultra-regulatable, space.<sup>35</sup> Ironically, as the nature of the Internet shifted toward both greater controllability, with the arrival of encryption and identification tools, and greater significance in people’s lives (thus creating more potential need and demand for regulation), the rhetoric around the Internet became more militantly libertarian. At the same time, it should be noted that despite the high-tech lobby’s insistence that the Internet should not be subject to regulation, it has not been shy about lobbying Congress for desired legislation, such as

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32. Saskia Sassen, *On the Internet and Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 545, 546 (1998). An economist, Sassen says that we are currently in the third phase of the Internet. The first and second phases, which Part I of this Note describes, were (1) the emergence of the Internet when it was “confined largely to a community of insiders” and (2) the moment when it opened up to a larger community. *Id.* at 547. The “large scale discovery [of the Internet and particularly the Web] by business by 1995” created the third phase, “characterized by attempts to commercialize [the Internet].” *Id.* at 547-48.

33. LESSIG, *supra* note 12, at 27.

34. *Id.* at 30-42 (arguing that commerce requires architectures of identification that make behavior on the Internet regulable).

35. *Id.* Although Lessig offers a pessimistic view of these changes, he does not oppose regulation of cyberspace. His concern is that important regulatory decisions about the Internet are being ceded to private parties. The overarching argument of *Code* is that the nature of the Net is about to flip from an architecture of freedom to an architecture of control.

increases in visas for foreign-born high-tech workers<sup>36</sup> and indemnity from Y2K liability.<sup>37</sup>

The first major battle between defenders of Internet freedom and legislators was fought over the Communications Decency Act (CDA).<sup>38</sup> In 1996, as part of a massive telecommunications reform bill, Congress passed the CDA, which prohibited obscene and indecent speech made available to minors on the Internet.<sup>39</sup> The CDA was immediately challenged in two lawsuits: one brought by the ACLU and other civil libertarian groups and the other brought by a collection of high-tech industry vendors such as America Online and Microsoft.<sup>40</sup> Ultimately the Supreme Court struck down the CDA as a violation of the First Amendment.<sup>41</sup>

Although supporters of the rejected CDA passed a revised version, the Child Online Protection Act,<sup>42</sup> the focus in the media shifted shortly thereafter from pornography to commerce, and the Congress's attitude shifted from interventionist to laissez-faire. Only one year after the CDA was passed, Representative William Tauzin, Chairman of the Commerce Subcommittee on Telecommunications, introduced the Internet Protection Act of 1997, which stated that "to support rapid and efficient technological and commercial innovation,

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36. In October 2000, Congress approved the American Competitiveness in the Twenty-First Century Act of 2000, a bill to temporarily boost the number of available H-1B visas through fiscal year 2003. 146 CONG. REC. S9651 (daily ed. Oct. 3, 2000). The rush to pass the bill before the November 2000 elections suggests the current power of the technology industry. Congress Clears H-1B Legislation in Surprise Move; President Clinton Expected to Sign, 77 No. 39 Interpreter Releases 1437 (Oct. 9, 2000) ("[L]awmakers can now rest a little easier knowing that the powerful technology industry has been appeased, with just days to go before the November elections.").

37. Alan K. Ota, *With Clinton Agreeing to Caps on Damages, Y2K Liability Legislation Clears Senate*, 57 CONG. Q. WKLY. 1616, 1616-17 (July 3, 1999).

38. 47 U.S.C. § 223(d)-(h) (Supp. IV 1998); Sarah Varney, *Senate, House Pass Telecom Bill with CDA*, CNET NEWS, at <http://news.cnet.com/news/0,10000,0-1005-200-310555,00.html> (Feb. 1, 1996) (on file with the *Duke Law Journal*).

39. The CDA adopted the definition of indecency created by the Supreme Court in *Pacifica v. FCC*, 516 U.S. 1043 (1996). H.R. REP. NO. 104-458, at 188 (1995), reprinted in 1996 U.S.C.C.A.N. 174, 201-02. The Act made it illegal to "use an interactive computer service" to either send or "make available" to persons under 18 any material that "depicts or describes in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. § 223(d) (Supp. IV 1998).

40. Rose Aguilar, *Industry Leaders Pile on Decency Act*, CNET NEWS, at <http://news.cnet.com/news/0-1005-202-310775.html> (Feb. 26, 1996) (on file with the *Duke Law Journal*).

41. *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (voicing concern that the vagueness of the CDA would chill protected speech).

42. 47 U.S.C. § 231 (Supp. V 1999), available at Center for Democracy and Technology, <http://www.cdt.org/legislation/105th/speech/copa.html> (on file with the *Duke Law Journal*).



deployment and adoption of Internet information services, it shall be the policy of the United States to rely on private initiative and to avoid, to the maximum extent possible, government restriction or supervision of such services.”<sup>43</sup> Senator John McCain proposed the Internet Regulatory Freedom Act, designed to “prohibit the FCC and state commissions from regulating . . . Internet access or online services.”<sup>44</sup>

The Clinton administration was even more enthusiastic in its desire to prove itself a friend to the high-tech industry. The *Framework for Global Electronic Commerce* insisted that “the private sector should lead.”<sup>45</sup> The principal force behind the Clinton administration’s Internet policy was White House Internet “Czar” Ira Magaziner,<sup>46</sup> who began his White House career as the head of the committee that produced the much-maligned Clinton national health care plan.<sup>47</sup> The failure of the national health care initiative marked a turning point for the Clinton administration and for Ira Magaziner. “Initially, when health care failed I actually offered to resign,” Magaziner told *The New York Times*.<sup>48</sup> Instead he turned his attention to the emerging Internet. “There really was almost no electronic commerce on the Internet then . . . . But it became very clear to me that if we set the right environment, the Internet and electronic commerce were going to explode.”<sup>49</sup> The policy Magaziner developed for the Clinton administration was entirely laissez-faire: “For [the Internet’s] potential to be realized fully governments must adopt a non-regulatory, market oriented approach to electronic commerce.”<sup>50</sup>

It would be wrong to suggest that the libertarian cast of cyberspace came only from conservative think tanks or pocket-lining

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43. Internet Protection Act of 1997, H.R. 2372, 105th Cong. § 2 (1997).

44. Internet Regulatory Freedom Act, S. 1043, 106th Cong. § 231 (1999).

45. Clinton & Gore, *supra* note 7.

46. John M. Broder, *Man Behind Doomed Health Plan Wants Minimal Regulation of Net*, N.Y. TIMES, June 30, 1997, at B1.

47. Magaziner’s conflicted political biography encapsulates a shift in the broader political discourse. The failed national health insurance policy was the grandchild of a particular, “New Dealish” conception of government. It is possible to read the destruction of Clinton’s health care plan as the final curtain on the era of major publicly funded government initiatives, an end that, one might argue, led ineluctably towards the nonregulatory approach advocated in *A Framework for Global Electronic Commerce*. See Clinton & Gore, *supra* note 7.

48. Jeri Clausing, *Internet Commerce Study Stresses Self-Regulation*, N.Y. TIMES, Nov. 30, 1998, at B10.

49. Broder, *supra* note 46, at B1.

50. Clinton & Gore, *supra* note 7.

CEOs. In fact, most of the original programmers and users of the Internet probably subscribe to some version of antigovernment suspicion. But in the transition from an idiosyncratic domain of a cyber-intelligentsia to a highly commercialized mainstream medium, libertarianism shifted quietly from its countercultural roots to a free-market philosophy. As the first part of this Note illustrated, the “rapid global spread” of the Internet was due in large part to “principles of open cooperation that are to some degree built into its design.”<sup>51</sup> And yet, since the 1990s, when the Internet first became a significant part of life and politics, it has become a symbol “not of nonprofit principle or of cooperation between government and the private sector but of a kind of romantic marketplace entrepreneurialism—a ‘frontier.’”<sup>52</sup>

## II. ARGUMENTS FOR SELF-REGULATION

There are three parts to the digital libertarian critique of regulation. First, there are descriptive arguments that focus primarily on the nature of the Internet, its intangibility, and the absence of geographic boundaries in virtual space.<sup>53</sup> The network’s “structural indifference to geographic position” is said to be “incongruous with the fundamental assumptions” of both personal jurisdiction and sovereignty that underpin traditional territorially based laws made by national governments.<sup>54</sup> Electronic communications are said to “play havoc with

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51. Streeter, *supra* note 2, at 51.

52. *Id.*; see also Dyson et al., *supra* note 19 (“The bioelectronic *frontier* is an appropriate metaphor for what is happening in cyberspace, calling to mind as it does the spirit of invention and discovery that led ancient mariners to explore the world, generations of pioneers to tame the American continent . . . . Cyberspace is the latest American frontier.”). The use of the concept of the frontier in discussions of new technology merits its own entire discussion. On the surface it appears to call up two important libertarian ideals: first, that there is infinite, or at least vast, space for individuality, and, second, that it is a space of great economic promise for risk-takers. In other words, the image of the frontier marries stalwart individualism with entrepreneurial capitalism. But the frontier has another meaning, according to many Western historians. It is a word used to cover up a history that is less congenial to the story the nation wants to tell about itself. In a sense, then, the word “frontier” names neither a place nor a time but a narrative act of rewriting the past. Patricia Nelson Limerick, *The Adventures of the Frontier in the Twentieth Century*, in *THE FRONTIER IN AMERICAN CULTURE* 66, 68 (James Grossman ed., 1994) (“Clear and predictable on most occasions, the idea of the frontier is still capable of sudden twists and shifts of meaning, meanings considerably more interesting than the conventional and familiar definition of the frontier as a zone of open opportunity.”)

53. See generally Johnson & Post, *supra* note 9 (arguing that cyberspace presents a challenge to traditional law because it is not bounded by territorial or physical borders).

54. Burk, *supra* note 9, at 1009.

geographic boundaries.”<sup>55</sup> Some of the most interesting and far-reaching theorizing about the proper rules (and rulemakers) has occurred in a series of articles by David Post and David Johnson, who together form the Cyberspace Law Institute.<sup>56</sup> Post and Johnson advocate that legal critics and policymakers should “take cyberspace seriously” by abandoning traditional territorial borders and making use of the already existing technological borders within cyberspace.<sup>57</sup>

Two more classical libertarian precepts build on the belief that state regulation of the Internet is either infeasible or illegitimate: distaste for government and faith in market regulation. Antagonism towards government gets an added boost in the high-tech arena because government is perceived as antithetical to the rapidly changing, highly versatile character of the computer industry.<sup>58</sup> Faith in the superiority of the market as a regulator,<sup>59</sup> of course, is not new to digital libertarianism. What is new is that, according to digital libertarians, cyberspace, because it appears to solve some of the market failures that justify state intervention in real space, makes a uniquely strong candidate for self-ordering.<sup>60</sup> Aspects of these separate theories often cooperate within particular articulations of digital libertarianism. Although this Note is primarily interested in the positive claims made about the capacity of the Internet to be self-ordering, this part begins with a discussion of the major criticisms of state regulation made by digital libertarians and responses to those criticisms.

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55. Johnson & Post, *supra* note 9, at 1367.

56. Cyberspace Law Institute, at <http://www.cli.org/default.html> (last visited Dec. 1, 2000) (on file with the *Duke Law Journal*).

57. Johnson & Post, *supra* note 9, at 1381.

58. John Perry Barlow, for instance, describes the world's industrial governments as “weary giants of flesh and steel.” Barlow, *supra* note 3.

59. Louis Rossetto, *Re: Californian Ideology*, Hypermedia Research Centre, at <http://ma.hrc.wmin.ac.uk/ma.theory.4.2.6.1.db> (Sept. 18, 1998) (“The engine of development of the Digital Revolution was not state planning, whether you call that an industrial policy or a defense policy. It was free capital markets and venture funds which channelled savings to thousands upon thousands of companies, enabling them to start, and the successful to thrive.”) (on file with the *Duke Law Journal*).

60. See generally David R. Johnson, *Let's Let the Net Self-Regulate*, Cyberspace Law Institute, at <http://www.cli.org/selford/essay.htm> (last visited Apr. 19, 2001) (describing numerous forms of successful Internet self-regulation and arguing that there is currently no need for new government protections) (on file with the *Duke Law Journal*).

A. *Technology—Parents Just Don't Understand*<sup>61</sup>

The simplest argument against government regulation of cyberspace rests on a widely shared conception of government and its laws as, frankly, passé. According to this argument, even if the Internet originated as a government program, its success has occurred despite, not because of, the government. Eric Raymond,<sup>62</sup> an Internet developer and important figure in the Open Source movement, claims that “most Internet policy has been made by default, often by individuals within the government *against* the government’s stated intentions. . . . A few far-sighted individuals at the DARPA [Defense Advanced Research Projects Agency] deliberately flouted the ARPANET’s charter, which restricted access to those directly working on research and government contracts.”<sup>63</sup> According to Louis Rossetto, the editor of *Wired*, “Far from building the Digital Revolution, the US Defense [D]epartment sucked up 6 to 7 percent of US GNP for 40 years.”<sup>64</sup> Corporate leaders in the high-tech industry assert that government is too centralized and slow, unable to move at “Internet rather than Washington speed.”<sup>65</sup> “Bottom up” private regulation in the form of contracts or “netiquette,” the informal rules of behavior in cyberspace, are seen as more flexible, and thus better-suited to “the technology of computer communications [which] is rapidly changing.”<sup>66</sup>

But the notion that governments are inherently slow is unconvincing, because governments presumably can be made more efficient by the very technology that requires such speed. Moreover, increasing numbers of technically savvy young people are choosing to work in politics.<sup>67</sup> If digital libertarians want to insist that imperfections such

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61. “You are terrified of your own children, since they are natives in a world where you will always be immigrants. Because you fear them, you entrust your bureaucracies with the parental responsibilities you are too cowardly to confront yourselves.” Barlow, *supra* note 3.

62. For more information on Eric Steven Raymond, visit his website, <http://www.tuxedo.org/~esr/> (last visited Apr. 19, 2001) (containing links to open-source software, his writings, and background information).

63. Eric S. Raymond, *Controversy: Should Public Policy Support Open-Source Software?*, AmericanProspect.org, at [http://www.prospect.org/controversy/open\\_source/raymond-e-1.html](http://www.prospect.org/controversy/open_source/raymond-e-1.html) (last visited Apr. 19, 2001) (on file with the *Duke Law Journal*).

64. Rossetto, *supra* note 59.

65. *Liberty.com*, *supra* note 17, at 23 (quoting Andy Grove, the head of Intel).

66. *Id.*

67. Lawrence Lessig, *Innovation, Regulation, and the Internet*, AM. PROSPECT, Mar. 27-Apr. 10, 2000, at 26 (describing a meeting on Capitol Hill with a group of young, Internet-savvy staffers).

as the “digital divide”<sup>68</sup> are merely passing phases, why should the presence of some technical illiterates in government be any more permanent?<sup>69</sup> The computer culture’s conviction that politicians never really “get” technology relies on a particularly rigid conception of legislation—one that sees only unimaginative laws based on today’s technological realities with no room for growth. Digital libertarians fail to explain why legislation would have to be inflexible and uniform. The argument also assumes that the private sector is not subject to the same traps of rapidly obsolescing technology and failure of creative vision to which the government supposedly is prey.<sup>70</sup> “The legislative process may (indeed must) be imperfect but it does not follow that the market is always preferable.”<sup>71</sup>

*B. Locality in Cyberspace: Do You Know the Way to  
www.sanjose.com?*

Many legal critiques of state-based regulations focus on the problems of geography in cyberspace.<sup>72</sup> As we saw in the first part, the Internet’s “indifference to geographic position”<sup>73</sup> creates problems for legal systems that rely heavily on physical location to establish jurisdiction. The Internet is designed to look for logical addresses, domain names, which have no direct relation to the location of a particular server. Although some domain name addresses give clues about location (www.law.duke.edu, for example, may be assumed to belong to Duke University School of Law, which is located in Durham, North Carolina), many make no reference to geography. Moreover, a site

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68. See *infra* notes 145-66 and accompanying text.

69. See *infra* note 154 and accompanying text (referring to a divide between “have-nots and have-laters”).

70. An example is the way that corporations, including Microsoft, failed for years to “get” the Internet before scrambling to catch up once sites like Amazon.com and e-Bay proved that there was a consumer market on the Internet.

71. Cohen, *supra* note 12, at 491. She goes on, “An equally important lesson . . . is that all real world institutions, including markets, are imperfect.” *Id.* This is an obvious point, however. It is markets, not legislation, that are premised on the concept of perfection. Democratic processes do not claim to smell sweet or bloom in spring.

72. David Post and David Johnson’s article, *Law and Borders*, articulated this critique early in the development of cyberlaw. See generally Johnson & Post, *supra* note 9. Although the focus of their analysis has changed somewhat, it is always founded on the absence of geographical and physical constraints in cyberspace. See David G. Post & David R. Johnson, “*Chaos Prevailing on Every Continent*”: Towards a New Theory of Decentralized Decision-Making in Complex Systems, 73 CHI-KENT L. REV. 1055, 1057 (1998) (making an argument for organic regulation based on complex-systems theory).

73. Burk, *supra* note 9, at 1109.

with a name like [www.I-love-NYC.com](http://www.I-love-NYC.com) could actually be coming from a server in New Jersey, Delaware, or Saudi Arabia.<sup>74</sup> Not only would a user not know this information, the user would not care because the information would arrive in exactly the same form regardless of geography. The network is designed to be indifferent to geography.

The problem with borders has a descriptive side, which raises questions about feasibility and efficacy of regulation, and a normative side, which focuses on the legitimacy of state-based regulations of cyberspace.<sup>75</sup> On the descriptive side, it is argued that any nation that wishes to participate in the digital age will not be able to prevent the flow of electronic information.<sup>76</sup> Some nations may attempt to control the flow of electrons, but “the determined seeker of prohibited communications can simply reconfigure his connection so as to appear to reside in a location outside the particular locality, state, or country.”<sup>77</sup> Moreover, the digital libertarians query, how will nations determine whose rules apply when, as will be common, a transaction crosses one or more borders?

Even if there were a way to sort out what law applies, to detect crimes, and to locate the offender, libertarians insist that imposing the order of any sovereign nation on cyberspace would be illegitimate for two reasons: notice and consent. One of the functions of borders is to notify new residents that they are entering a new physical and legal space with new rules. Because in cyberspace one can cross national boundaries without direct knowledge or control of the passage into a new national territory, one will not have the essential due process right to notice of the territorial laws in force.<sup>78</sup> In addition to notice, digital libertarians worry about what Jack Goldsmith calls “spillover effects.”<sup>79</sup> This is the fear that one nation will effectively impose its

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74. *Id.* at 1371.

75. Goldsmith, *supra* note 11, at 1200.

76. Johnson & Post, *supra* note 9, at 1372.

77. *Id.* at 1374.

78. *Id.* (arguing that protective schemes will fail if based on the notion that a webpage being accessed by a local resident can subject activity that occurs on a foreign webpage to local regulation).

79. Goldsmith, *supra* note 11, at 1212. Although I am using the term “spillover” here to refer to negative externalities or harms to third parties, there is nothing inherently negative about spillover. In fact, Professors Post and Johnson have written about the importance of spillover between different rule regimes in moving towards optimal systems. Post & Johnson, *supra* note 72, at 1085 (“[A] system in which “neighbors” (in the *geographical* sense) are most likely to affect the welfare of each other than they are to affect the welfare of those less physically

laws on all of cyberspace by attempting to prosecute the owners of websites that violate that country's laws, regardless of whether the website or its authors are citizens of that particular nation. Under this scenario, "[a]ll such Web-based activity [would be] . . . subject simultaneously to the laws of all territorial sovereigns."<sup>80</sup>

An infamous example is the conflict between Germany and CompuServe in 1995. Germany threatened to prosecute CompuServe for carrying discussion groups that violated its antipornography laws.<sup>81</sup> When CompuServe attempted to block access to those sites to German users, it effectively blocked access to users worldwide,<sup>82</sup> confirming the worst fears of those who oppose regulation: one country's standards became the censorship standard for the world. According to the digital libertarians, imposing national laws on noncitizens is illegitimate, because the foreign user does not have a voice in the sovereign's lawmaking process. State-based regulation of cyberspace is therefore said to be fundamentally antidemocratic.

### C. *Response to the Critics*

Critics of regulation emphasize the technical and doctrinal problems presented by the application of a traditional nation-based regulatory system to behavior that occurs "in" cyberspace. At the same time, these critics downplay the harms produced by failure to regulate. The claim that governments are powerless against cyberspace crime (unless the government removes itself from the global market by shutting down the whole pipe)<sup>83</sup> is based on an absolutist conception of regulation. Cyberspace is more material than critics of regulation admit. There are many ways for a nation legitimately to reduce behavior it has determined to be harmful: by imposing screening obligations on in-state Internet service providers (ISPs), by regulating in-state hardware, or by regulating financial intermediaries.<sup>84</sup> As the libertarians observe, these pressures will not be perfectly effective: "[T]he determined seeker of prohibited communications can simply

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proximate . . . will produce largely congruent decision-making units, allowing more effective searching for the system-wide optima.").

80. Johnson & Post, *supra* note 9, at 1374.

81. Goldsmith, *supra* note 11, at 1222.

82. *Id.* at 1224.

83. See Johnson & Post, *supra* note 9, at 1370 (noting that states that wish to control information flows risk being left out of the global electronic market).

84. Goldsmith, *supra* note 11, at 1224-28.

reconfigure his connection.”<sup>85</sup> However, the less-determined seeker might find something else to do, which, if one believes that some individual behaviors are socially harmful enough to warrant regulation by the state, is a gain. The function of regulation is to decrease incidents of socially harmful behavior.<sup>86</sup> The goal may be to end the behavior, but we would have few laws on the books if we eliminated any law that fails to wipe out all the behavior it targets.<sup>87</sup>

The law also can be useful in stimulating private industry to produce its own solutions.<sup>88</sup> In the case of the Internet, many of these private “fixes” to public policy problems have been technical solutions such as filters to block problematic content, or other methods of limiting access to certain groups. When Germany pressured CompuServe to block pornography from popular chat sites, the company began investigating ways to create new technology that would allow it to block access selectively.<sup>89</sup> In fact, the technology exists to filter information flows in many ways. Pornographic content sites use a variety of means, including passwords and credit card requirements, to prevent underage users from accessing the site. Critics of regulation vastly overstate the difficulty of limiting one’s electronic communications, either geographically or to particular categories of users such as children, through the use of filters.<sup>90</sup>

Another example of the productive effect of government intervention is the Federal Trade Commission’s investigation of website privacy policies.<sup>91</sup> The FTC found that many sites were selling their users’ information without their consent or knowledge.<sup>92</sup> Congress authorized the FTC to implement a policy to improve privacy on-

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85. Johnson & Post, *supra* note 9, at 1372.

86. Goldsmith, *supra* note 11, at 1238.

87. “[R]egulation need not be perfect in [the sense of eliminating regulation evasion] to be effective.” *Id.* at 1223.

88. Environmental laws have demonstrated that government can stimulate new market demands. This is overlooked by critics who claim that the effect of laws only inhibits creative development.

89. *Id.* at 1225.

90. *Id.* at 1229. Technological solutions can never be more than one piece of the governance puzzle. For an excellent discussion of the dangers of relying on technological solutions, see generally Boyle, *supra* note 12.

91. Federal Trade Commission, Privacy Online: A Report to Congress, at <http://www.ftc.gov/reports/privacy3/toc.htm> (June 1998) (on file with the *Duke Law Journal*).

92. *Id.*



line.<sup>93</sup> The Commission invited private industry to participate in creating solutions, and, within a couple of years, many more websites provided users with published privacy policies (although the FTC ultimately determined that self-regulation alone was insufficient to ensure consumer privacy).<sup>94</sup> Private industry advocates who tout this kind of example as evidence of industry solving its own problems conveniently forget that it was the pressure of government intervention that produced the corporate commitment to protecting consumer privacy.

The jurisdictional argument made by libertarians relies on an outmoded nineteenth-century conception of jurisdiction that was made obsolete by commerce and industrialism.<sup>95</sup> Today, according to American and widely accepted international law, behavior of foreign entities that has a harmful effect on a citizen of another state can be prosecuted legitimately (as long as that entity has had “minimum contacts” within the sovereign’s borders).<sup>96</sup> Under modern jurisprudence, an array of choice-of-law regimes exists to help sovereigns regulate actions of foreign entities. The spillover feared by critics of cyber-regulation is not a new problem produced by the Internet but, as Goldsmith notes, “a commonplace consequence . . . in our increasingly interconnected world.”<sup>97</sup>

#### D. *Self-Ordering in Cyberspace*

Digital libertarians claim that cyberspace does not require regulation by states because, left to its own devices, cyberspace is capable

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93. *FTC Seeks Measure to Protect Privacy on Web*, WALL ST. J., May 23, 2000, at A4; *FTC to Suggest Privacy Guidelines to Govern Internet*, WALL ST. J., July 21, 1998, at B17; *Online Advertisers are Negotiating Deal on Privacy Rules with U.S. Regulators*, WALL ST. J., June 13, 2000, at A8.

94. Gwendolyn Mariano, *FTC to Recommend Stronger Privacy Legislation to Congress*, CNET NEWS, at <http://news.cnet.com/news/0-1005-202-1926088.html> (May 22, 2000) (on file with the *Duke Law Journal*).

95. Goldsmith, *supra* note 11, at 1205.

96. *Id.* at 1207 (describing the twentieth-century shift towards less rigid jurisdictional borders both in interstate and international law).

97. Goldsmith, *supra* note 11, at 1212. It should be a source of some comfort to those who fear overregulation of the Internet that “minimum contacts” still are required. In the current state of technology, it is highly doubtful that merely having a website that is accessible in a particular jurisdiction would form the basis for personal jurisdiction. But if the technology develops to make it possible to control accessibility, then perhaps that might change. Although there are valid reasons to protect against the potential chilling effect on the development of this new medium due to uncertain legal liability, at the same time there remain real third-party harms that must be addressed.

of self-ordering. Through informal interactions and contractual arrangements between parties, the libertarians argue, a form of spontaneous law will develop. In fact, some point out that this self-ordering law has already begun in cyberspace. It is called “netiquette.”<sup>98</sup> According to the libertarian view, cyberspace is amenable to self-regulation for several reasons: First, greater access to information levels the playing field between consumers and sellers and, therefore, promotes fair, arms-length bargaining. Second, normally prohibitive transaction costs that prevent parties from reaching mutually beneficial private agreements—including distance, lack of information, and the cost of negotiations—are reduced or eliminated by digital communication. Finally, cyberspace lets users choose between websites and Internet service providers based on their rules and practices and, if the users cannot find a site with policies they like, they can establish their own. In economic terms, cyberspace reduces the costs of exit and entry.

The chief advantage of a self-ordering system for libertarians is that it is noncoercive: all parties choose to accept the conditions of the agreement. Any reduction in the individual’s perfect liberty is accepted voluntarily and, presumably, only because the benefits to the parties exceed the costs. Moreover, self-ordering systems are seen as reflecting a natural order, because they arise spontaneously rather than through a planned set of policy objectives. Harboring a distinct mistrust of plans, and possessing a correspondingly high level of trust that unplanned systems will naturally move towards harmonious balance, libertarians prefer the invisible hand to any elected decision-maker.<sup>99</sup>

The self-ordering system *par excellence* is the free market. In the free market, all resources are said to be naturally channeled to the highest-valuing consumer through the effects of competition and rational profit-maximizing choices.<sup>100</sup> The free market has two advantages: first, it allocates resources efficiently and, second, it achieves this efficiency by allowing a natural order (expressed through rational profit-maximizing behavior) to reign and by eliminating the distraction of emotional or political preferences. Classical economic theory

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98. Johnson, *supra* note 60.

99. *E.g.*, Post, *supra* note 10, at 1454 (“We don’t need a ‘plan’ but a multitude of plans from among which individuals can choose, and ‘the market’ and not action by the global collective, is most likely to bring that plentitude to us.”).

100. NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 57 (1997).

dreams of a “perfect market,” an ideal allocation of resources to their most efficient owners through perfect competition.<sup>101</sup> But such a market exists only in theory.<sup>102</sup> In the real world, markets are plagued by market failures. Different economic theories describe these failures differently. For traditional microeconomics, there are several types of market failures: monopolies, asymmetrical information, and public goods.<sup>103</sup> Public goods also are known as “positive externalities”: activities that generate a benefit that cannot be internalized (such as the national defense or the cleaning of a public space). The reverse of positive externalities, negative externalities, occur when one’s activity imposes costs on others (such as pollution). Within a Coasian model,<sup>104</sup> all market failures are understood under the broad rubric of “transaction costs,” be they the cost of gathering information or the costs of negotiating a deal.<sup>105</sup>

Digital communication appears to reduce significantly traditional market imperfections by offering nearly costless transactions and by placing greater information at the user’s fingertips. Take the example of e-Bay. By creating a global garage sale, the Internet allows one person to sell what she considers clutter to another person who considers it collectible. Goods move to their highest-value user. To use another example, it may not be cost effective for a person to travel across the city comparing prices before making a small purchase, but

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101. See *id.* at 59 (describing Pareto efficiency and Kaldor-Hicks efficiency, the standard definition of efficiency within the Chicago law-and-economics approach); see also Niva Elkin-Koren & Eli M. Salzberger, *Law and Economics in Cyberspace*, 19 INT’L REV. L. & ECON. 553, 555 (1999) (“The fundamental tenet of the Chicago approach is that competition within a perfect market will lead to efficiency, which is the desirable normative goal of the legal system.”).

102. Elkin-Koren & Salzberger, *supra* note 101, at 577 (“Economic analysis, unlike natural science, does not even pretend to analyze the real world. It seeks to analyze a simplified world.”).

103. Consider Elkin-Koren and Salzberger’s description:

Central intervention within the market is justified, according to the Chicago analysis, only when there is a market failure. Such a failure exists when there are no multiple players on both sides of the market . . . when these players do not have symmetric and full information relevant to their market activities . . . or when the traded commodity is a public good.

*Id.* at 555.

104. See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960) (“If factors of production are thought of as rights, it becomes easier to understand that the right to do something which has a harmful effect (such as the creation of smoke, noise, smells, etc.) is also a factor of production.”).

105. See Elkin-Koren & Salzberger, *supra* note 101, at 567 (summarizing transaction cost analysis as a school of law and economics and describing transaction costs as overlapping with other market failures, especially externalities and lack of information).

on the Internet a person can direct her shopping “bot” to find precisely the item she wants at a price she is willing to pay.

From a law-and-economics standpoint, therefore, the reduction in externalities in cyberspace justifies the reduction in state intervention. According to the influential microeconomics-based Chicago school of law and economics, the purpose of law and government is to correct market failures, thus allowing all goods to be distributed efficiently to their highest value user.<sup>106</sup> Legal rules, in other words, establish prices for behavior when the market, for some reason, cannot. When the market fails, legislation or courts are supposed to produce the results the parties would themselves have reached through private agreements in the market but for externalities.<sup>107</sup>

The Internet seems not only to make the traditional economy function more efficiently but also, by bringing producers and consumers together, to offer an even more perfect form of free-market exchange.<sup>108</sup> In the digital age, economies of scale are replaced by individualized production.<sup>109</sup> For example, a person can customize a standard webpage like Yahoo to create “My Yahoo,” which only displays the information she wants. In a mass-production economy, desires must be shaped to be similar. In other words, we all are ordering from the *prix fixe* menu. Cyberspace lets everyone into the kitchen to cook whatever they want. This ability to serve individual rather than group desires goes by several names, such as “granularization” or “demassification.”<sup>110</sup>

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106. See MERCURO & MEDEMA, *supra* note 100, at 57.

107. Market theory defines an externality as anything that causes a market to fail to reach pareto optimalism. Although most strong free-market proponents see minimum wage, antidiscrimination, and consumer protection laws as unnatural interference in the free market (or even an unconstitutional invasion of property rights), in the post-*Lochner* era one might defend such government programs as corrections of market failures.

108. This implies, interestingly, that the “perfect” market of pre-digital times was not perfect. People were not expressing their true natural desires, but instead were having their round desires forced into square holes. Because the preference model is relied upon in the self-ordering system, it should be somewhat alarming to free market boosters that the old system was not actually doing what was claimed for decades.

109. See Dyson et al., *supra* note 19 (“Inexpensive knowledge destroys economies-of-scale.”). Other theorists have expressed more concern over the balkanization potential which Andrew Shapiro calls “oversteer.” ANDREW SHAPIRO, *THE CONTROL REVOLUTION* 104 (1999).

110. Dyson et al., *supra* note 19 (using the term “demassification”). However, it may be that granularization completely ignores such effects as the pleasure one gets from owning the same Britney Spears compact disc as all of one’s friends—the peer pressure network effect.

Proponents of demassification, however, promise much more than just improved shopping:<sup>111</sup> “Accelerating demassification creates the potential for *vastly increased human freedom*.”<sup>112</sup> But what does this mean? How does the breakdown of economies-of-scale to “just-in-time production” contribute to human freedom? One way to understand the connection is to see the Internet as producing a more competitive market in rule regimes just as it supplies smaller niches in consumer demand. In the real world, living in a civil society requires each one of us to relinquish some of our individual liberty. Applying a classical economic framework to the social contract, one might posit that each citizen gives up only the amount of freedom required to obtain the requisite benefits of social living. As with the market for consumer goods, an individual does have some choice between different rule regimes. I can choose to live in Salt Lake City, or to live in the Castro district of San Francisco, or to live in Amsterdam, and each will offer me different communities with different rules. However, there are obvious market failures that are going to force the individual into inefficient regimes in which one gives up more (or less) freedom than one gains in civil values.

Extremely high costs of entry and exit give territorial governments a form of monopoly within the “market” of regulatory regimes. The entrance problem is produced by the limited number of states and the nearly impassable barriers to creating one’s own state if none of the available alternatives suffices. Barriers to exit are a much greater problem. Most people will not leave their nation because they do not like the laws until the laws become extremely oppressive. Thus, in the physical world there is not a very effective market in regulations.

Here, again, cyberspace appears to reduce market failure significantly by enabling the development of a market in rule regimes.<sup>113</sup> In one version of this market in rule regimes, different rules will arise at

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111. Demassification, or customization, has several implications. First, it turns out to be an argument against the need for some property laws, particularly intellectual property laws. When all property is custom-made, the need for the state to protect ownership decreases. John Barlow’s version of this argument is that creators of intellectual property will be paid the same way as (if not as well as) lawyers or doctors: based on a service or performance model rather than a static property model. Barlow, *supra* note 7.

112. Dyson et al., *supra* note 19 (emphasis added).

113. Some dispute this claim of easy exit. *E.g.*, Netanel, *supra* note 12, at 426 (noting that under some circumstances “exit is far from costless”). See generally LESSIG, *supra* note 12 (disputing the claim that cyberspace cannot be regulated effectively).

different sites, and users will choose sites based on their individual rule preferences. The rules will be promulgated and enforced by each Internet service provider's systems operator (or "sysop"), who dispenses passwords and manages the site.<sup>114</sup> These sysops are the natural enforcers of cyberspace law because they have the power to control access. Sysops are able to set the specific policy of a particular site and require users to abide by the site's policies. In fact, most ISPs already have "Authorized Use Policies" which ban certain Internet behavior like spamming<sup>115</sup> and flaming.<sup>116</sup> But the development of laws in cyberspace is not envisioned as a one-way street with sysops imposing behaviors on users. The tremendous variety of sites available on the Internet and the ease of both exit (to other sites) and entry (the ability to launch cheaply your own website) is supposed to shift the power to determine desirable policies to the user. If sysops try to enforce unpopular policies, users will find, or create, more hospitable sites.

The beauty of this system, according to its proponents, is that it eliminates the need for agreement on a single solution. There is no more choosing from national legal systems the way consumers are forced to choose from the limited range of consumer products forced upon them by mass production. For example, one of the major points of conflict on the Internet thus far has been the debate about offensive language and defamation.<sup>117</sup> According to proponents of the self-regulation model, systems operators will establish rules about acceptable content. A variety of less and more restrictive sites will eventually develop to serve the different groups.<sup>118</sup> There will be a site for those who are willing to accept a higher degree of offensive language in exchange for the freedom to say and hear almost anything. There will be another with a more restrictive code of conduct for those who are willing to relinquish some freedom to avoid encountering what offends them.<sup>119</sup> Similarly, in the arena of copyright there will be sites

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114. Johnson & Post, *supra* note 9, at 1389 ("System operators (sysops) have an extremely powerful enforcement tool at their disposal to enforce such rules—banishment.").

115. Unauthorized commercial e-mail.

116. Electronically communicated insults.

117. See David R. Johnson & David G. Post, *The New "Civic Virtue" of the Internet*, in INST. FOR INFO. STUDIES, *THE EMERGING INTERNET* 23, 44-45 (1998) (describing the problem of online defamation).

118. *Id.* at 44 ("The problem of online defamation . . . might be dealt with more successfully by a decentralized, emergent model of law-making.").

119. Consider Johnson and Post's statement:

Assume that various people have thinner or thicker skins and worry to a greater or lesser degree about the free flow of robust discussion. Some will favor online areas

that are known for taking a liberal attitude. By posting to such a site the user would be considered to have “consented” to having her work freely used. Another site will be available for those who wish to protect their work, and users of that site will understand that copying work posted there violates the site’s rules and could result in banishment from the site.<sup>120</sup>

The self-ordering model seems to solve all the problems associated with state regulation: centralization, uniformity, lack of legitimacy, and absence of notice. A self-ordered Internet would be responsive to the unique nature of the medium, because it would arise organically at the hands of Internet users, those “who care most deeply about this new digital trade in ideas, information and services.”<sup>121</sup> Users and systems operators would create rules through “principled discussions” and “a collective conversation about online participants core values.”<sup>122</sup> Most importantly, a self-ordered Internet would be more democratic because its laws would be selected and endorsed by those who are subject to them. The consent of the governed, however, requires that the effects of online behavior stay within the boundaries of cyberspace. In other words, the self-regulation model of cyberspace requires a conception of cyberspace divorced from the real world.

### III. A PLACE CALLED CYBERSPACE

#### A. Spillover

Digital libertarians strongly press their own concerns about spillover. They argue that one nation’s regulation of cyberspace will invariably affect the entire global digital sphere. Examples of this kind of spillover include the CompuServe controversy cited earlier<sup>123</sup> and the early efforts of states to apply their own pornography laws or

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that strictly limit apparently unreliable and derogatory comments. Some will favor areas that make no attempt to regulate false and damaging comments.

*Id.*

120. This system requires a well informed citizenry, and there is currently no method by which to insure that this information is well-distributed. While acknowledging this limitation, it does not appear to be considered a significant obstacle by the cyber-lawmakers.

121. Johnson & Post, *supra* note 9, at 1367.

122. *Id.*

123. See *supra* notes 81-82 and accompanying text.

antigambling laws against sites accessed by their citizens.<sup>124</sup> Critics of state-based regulations express great concern for spillover effects *flowing into* cyberspace but express far less concern for the costs of spillover effects *flowing out* of cyberspace.<sup>125</sup> Even if we acknowledge that regulation of cyberspace by one nation will have some impact on users within other jurisdictions, this claim does not absolve critics from the need to answer their own question in a reversed form: Should a sovereign like Germany or Minnesota be required to permit and absorb the costs of my freedom to download dirty pictures or gamble online?<sup>126</sup> Digital libertarians claim that Net users should not be subject to the laws of a government that does not represent or recognize their preferences. But the argument can be turned around. To the extent that there is spillover from online activity (harms in the real world, such as invasions of privacy, consumer fraud, copyright infringement, or the social costs of addictive gambling), the self-order created by Internet users illegitimately imposes costs on nonusers. Unless libertarians can address the problem of offline spillover—their own argument against regulation—they risk hypocrisy. Of course, some libertarian purists do not consider offline spillover to be a problem, because they do not consider regulation useful in any space, real or virtual. To remove cyberspace from the libertarian argument, however, undercuts a central claim made by digital libertarians—that cyberspace is uniquely suited to self-regulation: “Global computer based communications . . . create[] a new realm of human activity. . . . [and] define[] a distinct cyberspace that needs and can create its own law and legal institutions.”<sup>127</sup> If digital libertarians do not evade the problem of spillover by prescribing self-regulation as a model for the offline world, what solutions do they offer?

The libertarians’ response to the spillover problem is twofold. It places the problem outside of the system and minimizes its importance. Post and Johnson repeatedly insist that their system is only in-

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124. Johnson & Post, *supra* note 9, at 1374 (noting that the Minnesota Attorney General has asserted the right to regulate gambling on foreign web pages which local residents have accessed).

125. Goldsmith, *supra* note 11, at 1242.

126. Goldsmith has noted that:

Fairness does not require Germany to yield local control over its territory in order to accommodate the users of a new communication technology in other countries. Nor does it require Germany to absorb the local costs of foreign activity because of the costs that the German regulation might impose on such activity.

*Id.* at 1242.

127. Johnson & Post, *supra* note 9, at 1367.



tended to apply “to online conduct that principally affects others engaged in online commerce and communities.”<sup>128</sup> This insistence, however, begs the question. It presumes that the effects of online conduct will, in large part, remain in cyberspace. In the end, Post and Johnson are stuck with spillover and can only insist that the problem is “less important than the impact of the rules on those who choose to participate.”<sup>129</sup> This response is unsatisfactory. If it turns out that the impact is greater than anticipated, does that mean that we return to the much-maligned state regulation? Or, are cyberlibertarians actually recommending a tradeoff between the benefits of remaining regulation-free and the costs of new or increased social problems introduced by an unregulated cyberspace? If the latter, we need to consider the nature of this exchange and who its main beneficiaries (and losers) will be.

I would argue that it is no accident that digital libertarianism cannot solve the spillover conundrum. Indeed, it is only when one begins to consider the implications of spillover that one gets close to what is most radical, and problematic, with digital libertarianism. The dilemma of spillover is a question about where cyberspace “is,” where we are when we are “there,” and, ultimately, *who* we are when we are “there.” This story begins not in the 1960s with the ARPANET, but in the 1780s with the United States Constitution.

### B. *The Constitutional Self in Cyberspace*

In *Private Property and the Limits of American Constitutionalism*, Jennifer Nedelsky offers a counternarrative about the development of the American property-based notion of liberty.<sup>130</sup> Nedelsky’s story is extremely helpful for understanding the current enthusiasm for private-ordering of the Internet. In brief, the story goes like this. In the early days of the Republic, the fragile post-Revolutionary consensus began to fray due to conflicting interests (both between the states and between groups of citizens).<sup>131</sup> In particular, a struggle de-

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128. Johnson & Post, *supra* note 117, at 24. *But see* Hardy, *supra* note 9, at 1048-51 (suggesting that anonymous mailers are not susceptible to self-help or contract-based solutions and should be banned).

129. Johnson & Post, *supra* note 117, at 41.

130. JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 1 (1990) (“The framework of our political institutions and the categories through which we understand politics developed around the problems of making popular government compatible with the security of property.”).

131. *Id.* at 4 (describing a conflict between property owners and others).

veloped between the minority population of property owners and the popularly elected lawmakers, who enthusiastically adopted anti-property statutes such as debtor-relief bills and paper-currency legislation.<sup>132</sup>

The resolution of private property rights was a critical issue for the young nation. Such economic issues and their impact on the confederation's capacity for commerce and international relations were the catalysts for the Constitutional Convention.<sup>133</sup> Nedelsky argues, however, that the Framers erred gravely by treating private property rights as a metaphor for the protection of rights more broadly: "The inherent vulnerability of all individual rights became transformed into a fear of 'the people' as a threatening propertyless mass whose power must be contained."<sup>134</sup> The materiality of land gave the abstract notion of limited government a spacialized and concrete symbol. "Property was the ideal symbol for this vision of autonomy, for it could both literally and figuratively provide the necessary walls."<sup>135</sup> The analogy of human autonomy to private property shaped the American conception of the individual as perpetually under attack by the majority (due to the unequal distribution of property which Madison saw as inevitable within a free society).<sup>136</sup> Moreover, the property-rights conception of individual freedom confuses freedom with isolation. At the extreme, "the most perfectly autonomous man is the most perfectly isolated."<sup>137</sup>

Property concretizes the abstract concept of limited government. *This here* is the sphere into which the government may not interfere. Property rights, and, by extension, all individual rights, were understood, through the use of the natural metaphor of land, as themselves natural and prior to the state. Although the organic, pre-state conception of property rights has long been replaced by the legal realist notion of property as a bundle of rights negotiated between the collective (the state) and the individual, the natural model of property rights proves a hard faith to shake, as the revived discourse of private-

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132. *Id.*

133. *Id.*

134. *Id.* at 2.

135. *Id.* at 272.

136. *Id.* at 18 (quoting Madison as saying that "in all populous countries, the smaller part only can be interested in the rights of property"). Madison fully anticipated the resentment property would produce, as an increasing portion of the population would "labor under all the hardships of life, and secretly sigh for a more equal distribution of its blessings." *Id.*

137. *Id.* at 272.

ordering illustrates.<sup>138</sup> I argue that the property myth remains vital at least in part because it undergirds a more fundamental notion of selfhood. If property is just a bundle of rights, what does that mean for the conception of the autonomous self as symbolized by property? Are we too just bundles of entitlements granted by the state? Are we engendered by the collective? By the real? If so, what prevents the state from redefining individual rights in the same way nuisance law redefines property rights? The presumed antagonism between the state and the individual required a limiting mechanism. But if the metaphor of property is understood as a politically and historically determined construct, its function as a symbolic limiting mechanism is undercut. Our traditional conception of individual autonomy as threatened by the collective provides no method, and no narrative, with which to negotiate a new, safe relationship. The flight back to the pre-realist conception of property through the dematerialism of cyberspace is, I suggest, a response to this anxiety about safety of the self.<sup>139</sup>

### C. *Privilege and Prejudice in Cyberspace*

Who are we in cyberspace? In a classic *New Yorker* cartoon, a dog sits grinning at a computer terminal and the caption reads, “In cyberspace, no one knows you’re a dog.” The joke captures what is uniquely liberating about going online, the opportunity to be someone else, or to be multiple someone elses.<sup>140</sup> It is this freedom that John Perry Barlow celebrates when he describes cyberspace as a place without “privilege or prejudice.”<sup>141</sup> Privilege and prejudice are envisioned as problems of the material world; there can be no discrimination without bodies.<sup>142</sup> Interestingly, Barlow’s “no privilege or

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138. See Cohen, *supra* note 12, at 464 (describing “a growing body of argument and scholarship concerning the relative superiority (as compared with copyright) of common law property and contract rules for protecting and disseminating digital works”).

139. For an excellent discussion of how anxiety shapes politics and jurisprudence, see PRISCILLA WALD, *CONSTITUTING AMERICANS* 4 (1995) (discussing the “anxiety surrounding the conceptualization of personhood” in American literary and political culture).

140. LESSIG, *supra* note 12, at 67 (describing how America Online gives each subscriber five identities).

141. Barlow, *supra* note 3.

142. The problem with this ideal of equality through the escape of bodies is that it relies on a concept of self without raced, gendered, or otherwise inflected identity. As many critical race theorists have observed, colorblindness is problematic because it unconsciously assumes white (and male) to be the default. See, e.g., Margaret Chon, *Erasing Race?: A Critical Race Feminist View of Internet Identity-Shifting*, 3 J. GENDER RACE & JUST. 439, 441-42 (2000) (describing

prejudice” is a progressive mirror image of the neoclassical claim that cyberspace eliminates transaction costs. Recall that, according to law and economics, the reason for laws is to solve imperfections in the market. In a post-*Lochner* age it can reasonably be said that American courts treat social factors—“privilege and prejudice”—as hindrances to the equal bargaining power required for a functioning competitive market. Barlow’s phrase, “privilege and prejudice,” in other words, is a remarkably compressed expression of the justification for a large percentage of the laws passed within the second half of the twentieth century. Through legislation such as labor laws and civil rights laws, the government seeks to ease privilege and prejudice and, moreover, to protect its victims from further injustices at the hands of a market economy. In the brick-and-mortar world, it is generally accepted that laws are needed to adjust for a lumpy playing field, a field cratered by material conditions like economic status, prejudice, and lack of education, for which laws attempt to compensate. The question is whether it is correct to assume that the absence of material presence on the Internet (“There is no matter here.”)<sup>143</sup> in fact produces the absence of material conditions to which the market theory aspires.

An idealist conception of cyberspace rooted in a particular conception of the individual is what I understand Post and Johnson to articulate in their imperative, “[T]ake cyberspace seriously.”<sup>144</sup> The libertarian vision of cyberspace in fact requires that spillover not be considered a problem, because spillover, conceived of broadly as the interrelation between the physical and digital worlds, defeats the escapist fantasy. The desire to escape the messiness of real life, which on the Internet seems possible, is at the heart of the libertarian hope. But, as I will discuss in the final Part, spillover undercuts the cyberspace escapist dream.

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how virtual race is coded as white and claiming that the “movement into virtual Whiteness is not one that lifts everyone up, but rather one that subtly obscures the enduring nature of material racial categories”).

143. Barlow, *supra* note 3.

144. Johnson & Post, *supra* note 9, at 1381 (“Once we take Cyberspace seriously as a distinct place for purposes of legal analysis, many opportunities to clarify and simplify the rules applicable to online transactions become available.”).

## IV. EVERYWHERE AND NOWHERE

The belief that cyberspace produces an absence of material conditions (geography, gender, and race, to list just a few) is implicit in the oft-repeated claim that cyberspace is “everywhere and nowhere.”<sup>145</sup> There is a sense in which “everywhere and nowhere” is an accurate description of one’s experience in cyberspace. But the statement also tells us something about the privileged social position of the speaker. Cyberspace, in fact, is not everywhere. According to a Department of Commerce study, less than one in ten households with incomes under \$20,000 has Internet access (compared to 60% of households earning \$75,000 or more).<sup>146</sup> In the United States, the so-called “digital divide” can be measured along income, racial, and educational lines, as well as between urban and rural populations.<sup>147</sup> There is also an enormous international gap in access to new communications media. In South Asia, one person in 10,000 uses the Internet.<sup>148</sup> Countries like Pakistan and Yemen have fewer than two telephone lines per hundred citizens.<sup>149</sup> And the World Bank estimates that developing countries will require \$60 billion to develop their telecommunications networks.<sup>150</sup> Despite its largely laissez-faire approach to technology, the Clinton administration in 1999 took an active role in addressing the issue of uneven access. At the behest of President Clinton, the Commerce Department held a Digital Divide

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145. *Id.* at 1376 (“[E]vents on the Net occur everywhere but nowhere in particular . . .”).

146. Kevin Poulsen, *Summit Wrestles with ‘Digital Divide’*, ZDNET NEWS FROM ZD WIRE, Dec. 9, 1999, available at 1999 WL 14538439.

147. The latest report from the National Telecommunications and Information Administration, *Falling Through the Net: Toward Digital Inclusion*, at <http://www.ntia.doc.gov/ntiahome/ftn00/contents00.html> (last visited Apr. 8, 2001) (on file with the *Duke Law Journal*) [hereinafter *Falling Through the Net*], shows progress in access generally. For example, Internet access among households earning \$35,000-49,000 increased from 29% in December 1998 to 46.1% in August 2000. *Id.* Black household access rose from 11.2% to 23.5%. *Id.* Hispanic households experienced a similar growth. *Id.* But, significantly, the report also found that the gap between black households and the national average rate had increased over the past two years by 3%, and the gap between Hispanic households and the national average rate increased by 4.3% points. *Id.*; see also *Closing the Digital Divide*, at <http://www.digitaldivide.gov> (last visited Apr. 19, 2001) (providing more information concerning the digital divide) (on file with the *Duke Law Journal*). Margaret Chon has observed that “[r]acial discrimination occurs when we reinforce and reinscribe the banality of social inequities that fall along racial fault lines.” Chon, *supra* note 142, at 451.

148. Tom Steinert-Threlkeld, *Some Are More Equal than Others*, ZDNET INTER@CTIVE WEEK ONLINE (Nov. 29, 1999), available at 1999 WL 14629317.

149. *Id.*

150. *Id.*

Summit to address the problem through a government–private sector partnership.<sup>151</sup> President Clinton also directed the Commerce Department to continue “to measure the level of connectivity of Americans to telecommunications and information tools.”<sup>152</sup> By contrast, in its first one hundred days, the George W. Bush administration proposed reducing government programs that provide computers and Internet access to poor and underserved areas of the country.<sup>153</sup> Libertarians view government intervention as a misguided failure of faith in competitive markets to bring down prices and increase access, a form of bleeding-heart impatience. According to Louis Rosetto, the founder of *Wired* magazine, the digital divide is not a question of haves and have-nots but haves and have-laters.<sup>154</sup> As an empirical question, whether competition alone is the best method of improving access is hard to answer.<sup>155</sup> But for the purposes of this analysis, the “digital divide” illustrates the significance of material conditions in and on virtual space. Social inequalities in the offline world shape the Internet while, at the same time, the Internet may intensify already existing social divisions.

A more chilling example is offered in an essay by Margaret Chon.<sup>156</sup> She describes a discussion in a “gender and cyberspace” class about Jake Baker, the University of Michigan student who was ar-

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151. Poulsen, *supra* note 146.

152. William J. Clinton, *Memorandum on Narrowing the Digital Divide*, 35 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 2554 (1999).

153. The George W. Bush administration’s Commerce Department budget proposal suggests cutting the Technology Opportunities Program from \$42.5 million to \$15 million—a 65% reduction. Ted Bridis, *Programs Set Up to Help Close ‘Digital Divide’ May Be Cut Back*, WALL ST. J., Feb. 15, 2001, at A20. Meanwhile, Michael Powell, the new chairman of the Federal Communications Commission, illustrated his attitude towards government intervention by analogizing the digital divide to a Mercedes divide. “I think there is a Mercedes divide,” he said. “I’d like to have one; I can’t afford one.” Stephen Labaton, *New F.C.C. Chief Would Curb Agency Reach*, N.Y. TIMES, Feb. 7, 2001, at C1.

154. Rosetto, *supra* note 59. Rosetto, in fact, sees wealthy consumers as martyrs, “people . . . who pay through the nose for the privilege of being beta testers, getting inferior technology at inflated prices.” *Id.* But see Chon, *supra* note 142, at 443 (suggesting that failure to recognize or act upon structural inequalities is a contemporary, post–civil rights movement form of discrimination).

155. The most recent reports on the digital divide herald great increases in connectivity generally, but also a widening gap in rates of connectivity between certain populations including blacks and Hispanics. See *Falling Through the Net*, *supra* note 147 (“Black and Hispanics . . . continue to experience the lowest household Internet penetration rates at 23.5% and 23.6% respectively.”).

156. Margaret Chon, *Radical Plural Democracy and the Internet*, 33 CAL. W. L. REV. 143 (1997).

rested for sending e-mail messages describing sexual fantasies of rape and torture.<sup>157</sup> A female student shares how her initial reaction (“that the government never should have brought the case against Baker”) changed after a personal experience: she was nearly raped after her car broke down.<sup>158</sup> It turned out that the American Automobile Association was posting the locations of stranded motorists on its website, making it easy for anyone to find them.<sup>159</sup> Chon’s story is not just about direct spillover. The story also is about the different ways in which the Internet will affect different members of society in their online and offline interactions. It strikes a stark contrast to Johnson’s blithe comment that “[y]ou might in theory be ‘psychologically raped’ online, but it just doesn’t happen very often in practice, because it’s a lot easier to leave a threatening or unwelcome virtual situation than a real one.”<sup>160</sup> The primary subject of Chon’s essay is the Internet’s expansion of the market for mail-order brides from the Philippines. Women forced by poverty to sell themselves into slavery offer an important counterpoint to the digital libertarian faith in easy exit.<sup>161</sup> Both examples offered by Chon point to the fact that the electronic space of the computer screen and the flesh-and-bone space of the users is a two-way street. As much as real-world conditions impact the Internet, the Internet is also itself a real-world condition.

The fallout over the Communications Decency Act (CDA) provides another angle on the overly narrow conception of government that reigns among Internet fans. The story of the CDA,<sup>162</sup> a poorly conceived, unconstitutional ban on Internet pornography that was strongly opposed by a wide variety of Internet and free speech defenders, is generally recounted as a libertarian parable of how government interference is inherently liberty-reducing. Admittedly, the CDA, if constitutional, would have been a threat to free expression on the Internet. But the narrative of its defeat obscures an equally instructive story about the narrowness of the libertarian conception of government. The CDA was a small part of the massive Telecommunications Act of 1996. A less-noted section of that act created a 3% excise tax on telephone companies to fund Internet access in schools

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157. *Id.* at 144; *see also* LESSIG, *supra* note 12, at 15-17 (discussing the Jake Baker story and its implications for thinking about law in cyberspace).

158. Chon, *supra* note 156, at 144.

159. *Id.*

160. Johnson, *supra* note 60, at 5.

161. Chon, *supra* note 156, at 148.

162. *See supra* notes 38-44 and accompanying text.

and libraries.<sup>163</sup> These two forms of intervention describe two very different activities that a government may pursue. The first, to which civil libertarians and defenders of the Internet reacted very loudly, was a vision of an Internet sanitized by congressional censorship. The second, entirely ignored by these defenders of the Internet, was a vision of the government taking active steps to broaden access.<sup>164</sup> Leaders within the Internet community who spoke out against the CDA,<sup>165</sup> but ignored the access funding provision, reduced these two capacities of government to a single one in which the government is the enemy of the free Internet. Three years later, House Republicans introduced two bills to kill or reduce the fund,<sup>166</sup> despite the fact that a 1999 Commerce Department study found that the gap between Internet haves and have-nots had widened during the last few years of Internet explosion. The claim that cyberspace is “everywhere but nowhere,” a utopian dream of human equality, turns out to mask political realities. These political realities, which do not simply vanish across the wire like a sent e-mail message, can only be addressed by turning utopian claims (“everywhere but nowhere”) into political goals.

#### CONCLUSION

The Internet does not exist apart from the world in which it was created and in which its users, and those who are not yet its users, re-

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163. The program is known as the E-Rate Program, 47 U.S.C. § 254 (Supp. IV 1998).

164. Streeter, *supra* note 2, at 60. Streeter describes how the computer community and the media misguidedly focused their entire attention on the CDA while missing the greater political implications of the bill's corporate welfarism and the single progressive provision, the universal service fund. Since the provision was passed unnoticed, it was an uncontroversial matter for Congress to quietly introduce a bill to slash the fund.

165. Janelle Brown, *CDA—The Sequel*, SALON, at <http://www.salon.com/21st/feature/1998/09/23feature2.html> (Sept. 23, 1998) (referring to the original CDA protests and the protestors' tendency to view themselves entirely opposed to government regulation of the Internet in any form) (on file with the *Duke Law Journal*).

166. See Schools and Libraries Internet Access Act, H.R. 1746, 106th Cong. (1999) (proposing to amend the Communications Act of 1934 to repeal provisions authorizing the FCC to take certain action to provide access to advanced telecommunications services for school, health care providers, and libraries, and reducing IRS and excise taxes paid for telephone and other communication services). The bill has been referred to the Ways and Means Committee. 145 CONG. REC. H2997 (daily ed. May 11, 1999) Another bill, known as the E-Rate Termination Act, was introduced in the same session to repeal a section of a bill (passed the previous year) that set aside a portion of the fee charged for registration or renewal of second-level Internet domain names. H.R. 692, 106th Cong. (1999) (proposing elimination of 47 U.S.C. § 254). For an excellent summary of the continuing controversy of the E-Rate program, see Jessica Malman, Note, *Connecting Students to 'The Net': Guiding Principles from State Constitutions*, 7 GEO. J. POV. L. & POL'Y 53, 82 n.174 (2000).



side. Claims of dematerialism are not just descriptively false, they are normative statements motivated by a particular political goal: the triumph of private, market-based decisionmaking. While one can sympathize with and even share in a fantasy of escape, via cyberspace travel, from the tediously fractious and difficult human condition, this fantasy is not a useful premise on which to base public policy. With growing political and economic realities such as the recent AOL-Time Warner merger, it is essential to acknowledge that power structures already exist in cyberspace. Acknowledging that politics is inevitable allows us to shift the discussion to the question of what style of politics is preferable. While there is certainly room for freedom from government intervention in some areas, and a need for protection of property in others, neither of these goals is currently at risk in the same way as the public aspect of the Internet. For this reason, it is critical that policymakers and other students of the Internet carefully consider the broader implications of the argument for privatization.