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Note and Comment

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THE PATH OF E-LAW: LIBERTY, PROPERTY, AND DEMOCRACY FROM THE COLONIES TO THE REPUBLIC OF CYBERIA

***223 Introduction**

One century ago, Oliver Wendell Holmes, Jr., then an Associate Justice of the Supreme Judicial Court of Massachusetts, announced to the legal community that “[w]e are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds.”¹ At the time Holmes penned those words, he was more than a half-century old and had witnessed the electrification of the American landscape; the explosive growth of the railroads; the advent of the communications age, in the form of telegraphy; the rise of the modern corporation;² and the closing of the American ***224** frontier.³ In addition, during that time, a series of legislative enactments, judicial decisions, and Constitutional amendments radically transformed the concept of property in America and the legal rights which flowed therefrom.⁴

The philosophical reaction to which Holmes referred directly implicates those technological and structural developments that reweaved the entire fabric of the American political economy--from the way in which Americans secured their survival needs, to the way in which American society was organized. America was reacting, generally, to the rise of the modern business corporation, made possible by the development of faster forms of communication and transportation.⁵

Today, we are at the beginning of another philosophical reaction--a reaction spurred by the development of even faster forms of communication and “transportation” of commodified (and non-commodified) communications goods. America is reacting, generally, to the omnipresence of cyberspace,⁶ made possible by the rise of new forms of electronic communication. Specifically, the Internet, now past its nascence, comprises the “backbone” of American academic, governmental, and economic information ***225** systems.⁷ This note will examine the changing concept of property in both Justice Holmes’s time and the present day and delineate how, as Holmes noted, the law must evolve to encompass more diverse forms of property as it relates to the other fundamental Constitutional guarantees of life and liberty in securing survival needs.

Part I of the note will examine the centrality of private property in the early American political economy and how the late-nineteenth-century legislative and judicial responses to American industrialism--particularly to corporate property ownership, electrification, railroads, and the telegraph-- became increasingly out-dated and ineffective. It will further explore Holmes’s recognition of the inadequacy of applying old forms of law to a revolutionary new political economy. As such, the note will examine Holmes’s attack on natural rights theories of property and his insistence that property rights are human constructs that cannot be viewed outside the context of the political economy and culture that give rise to them.

Part II of the note will examine the development of governmental regulatory power in an increasingly complex political economy. As the laissez-faire economic theory, apparently chosen by early nineteenth-century American society, proved

increasingly inadequate in ensuring that working citizens could secure their subsistence needs, scholars and legislatures began to look elsewhere for guidance in crafting policies governing commerce. This section will examine the legislative response to the great economic rifts which exposed the fallacy that the notion of self-adjusting, unregulated markets was based on a priori truths and the growing recognition that the market--and the law, for that matter--was socially, not scientifically, constructed. Finally, this section will focus on the regulation of the emerging commercial and communications infrastructure.

Part III will provide a broad overview of the legislative and judicial responses to the arrival of the information age, particularly to computer databases, the information superhighway, and electronic communications, and how Holmes's observations might *226 be of assistance in initiating a necessary paradigm shift. If we accept the premise that our Founding Fathers placed a heavy emphasis on protecting private productive property because it ensured that citizens could meet their subsistence needs, then we need to re-examine what form this protection should take in the Age of the Internet. By examining various contemporary theories concerned with establishing a framework in which property rights in cyberspace might be situated, the article will point toward a reconsideration of doctrines by which laws are now applied in the new frontier of cyberspace, or the Republic of Cyberia.

I. The Revolutionary Yeoman Meets Nineteenth-century Technology and the Corporate Reconstruction of American Capitalism

A. The Primacy of Private Property in American Political Dogma

1. Real Property in a Property Paradigm

In 1787, those who framed the Constitution of the United States (the "Framers") instituted a republican form of government whose "first object" was to protect not property per se, but "the faculties of men, from which the rights of property originate."⁸ The Framers drew heavily from John Locke's theories of political economy which made land central to political foundation, but only as it was made productive by human agents. In his *Second Treatise on Government*, Locke wrote,

[L]abour makes the far greatest part of the value of things we enjoy in this World: And the ground which produces the materials, is scarce to be reckon'd in as any, or at most, but a very small part of it. . . . 'Tis Labour then which puts the greatest part of Value upon Land, without which it would scarcely be worth any thing.⁹

It was not merely the labor of the individual yeoman, nor the labor of his wife, children, servants, or slaves, but the labor of all *227 who had a part in everything which touched the yeoman's life:

'[T]is not barely the Plough-man's Pains, the Reapers's and Thresher's Toil, and the Bakers Sweat, is to be counted into the Bread we eat; the Labour of those who broke the Oxen, who digged and wrought the Iron and Stones, who felled and framed the Timber employed [sic] about the Plough, Mill, Oven, or any other Utensils, which are a vast Number, requisite to [[the] Corn, from its sowing to its being made Bread, must all be charged on the account of Labour, and received as an effect of that: Nature and the Earth furnished only the almost worthless Materials, as in themselves.¹⁰

Property in the form of land, in Locke's formulation, was thus important, but it was not made vital until a large number of people worked upon it.¹¹ Republican ideology, which formed the basis of most American colonial and Revolutionary thought and which conceived of society in organic terms, viewed promotion of virtue and advancement of the common good as among the legitimate ends of government.¹²

In the colonial period, governmental grants of land, either from the Crown or from colonial legislatures themselves, were largely conditioned on the grantee's making such property productive.¹³ If *228 a grantee failed to develop his property, ownership might be forfeited or transferred to another person.¹⁴ Alternatively, the property could be "taken" by the colony for public purpose.¹⁵ Distrust of the monopolization of property and wealth was based upon the notion that such concentrations

might deny others the minimum property they needed to become participants in the polity.¹⁶

In a less complex economy based on the productivity of private land, farmers and artisans ensured the acquisition of their survival needs of food, comfort, and reproduction through their direct labor, or the labor of their dependents (i.e., wives, children, slaves, and servants), on the soil or in nature's abundant natural resources. The opportunity to acquire land, and the right to use that land to meet survival needs, led courts and legislatures to establish land as the key determinant of selfhood.¹⁷

When the Constitution was adopted, only white, land-owning men¹⁸ could stake a claim to suffrage and, thus, to the legal benefits of citizenship; all others were arbitrarily barred from property ownership.¹⁹ If one owned productive property, one *229 established the necessary condition for rational self-determination, according to the classical republican political theories from which the Constitutional fathers had drawn their defense of the government they established.²⁰ Rationality, in this context, is merely an arbitrary condition and not a way of being and reasoning in the world.²¹

Early American legislatures knew how vital it was to keep the opportunity to own land open to all who were "qualified" to own and develop it. James Madison recognized that "the most common and durable source of factions, has been the various and unequal distribution of property."²² Specifically, Madison observed that the freeholder and the wage worker; the monied, mercantile, and landed interests; and the creditor and debtor were all driven by their own sentiments and views.²³ Regulating those various interests should form "the principle task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government."²⁴ Madison recognized that the "causes of factions cannot be removed,"²⁵ because it is *230 precisely those causes or conditions that create the interest brought before government in demanding justice. The proper role of government, then, is to provide "relief" which might only be sought "in the means of controlling [the] effects [of unequal distribution of property]."²⁶

The legal creation of tracts of land was a federal policy that opened the Northwest Territories and ultimately settled the entire continent.²⁷ Thus, from the start, the federal government had been in the business of providing means of production of survival goods to its citizens, arguably, to relieve the effects of what Madison deemed the various and unequal distribution of property. Property was only one of the corollaries of the faculties of men because it was an instrument by which men could secure their survival needs. Government fostered property ownership through policies such as land grants and the Homestead Act,²⁸ which supplied men with land on which they were then free to organize and supply labor.²⁹

Land represented a man's ability to meet his "little commonwealth's" productive and reproductive needs; moreover, a man stood, at law, to represent the sovereign interests of his realm *231 of necessity, the domestic sphere over which he held dominion.³⁰ Property, however, consisted of more than just the deeded land; chattel property, which was also vital to meeting a man's survival needs, included personal possessions such as tools, farm equipment, furniture, animals, slaves, and--implicitly--wives and children.³¹ Thus, theft of or damage to a man's property, real or chattel, was punishable by law, presumably because it interfered with his ability to secure his survival needs.

*232 2. Early Shifts in the Federalist Property Paradigm

Property was not a fixed concept in American society, even before Independence. Moreover, since it is socially and legally constructed, private property changes with the organizational changes in society.³² When the traditional sovereignty of the English king came into conflict with the widely-held view that actual settlement, i.e., possession and development, was the true basis for claims to land, a variety of legal disputes erupted in the colonies.³³ With these subtle issues of legitimacy already deeply embedded in colonial common law traditions, the expanding population, particularly in New England, compounded the anxieties of freeholders.³⁴

The patrilineal transfer of productive property, and the father-son relationship contained within such an inheritance system, was transformed when the family farmlands, subdivided over the generations, became too small to continue the practice of property legacy on such a broad scale.³⁵ By the time the Framers met in *233 Philadelphia in 1787, property, which had long provided stability and security for families and communities, was in a state of flux. Fears of the growing masses who did not own property, fueled by the issuance of paper money and passage of debtor relief laws by the new state legislatures, drove many of America's political leaders--freeholders all³⁶--to rethink the Articles of Confederation.³⁷ The Constitutional Convention might be viewed as an attempt to create a governmental system which could protect the competing political, personal, and property rights of American citizens.³⁸ The federal system of government, which emerged as the blueprint for

American society, sustained the tensions between civil and political rights of persons, property, and participation.³⁹ Furthermore, the Constitution managed to encompass all of these competing rights by deliberately failing to clearly subordinate one to another.⁴⁰ The balance that was struck among them, however, tilted heavily in favor of property, as evidenced by the centrality of property in the debates.⁴¹

Property, although not formally institutionalized in the original document, had a profound effect on the structure of the *234 Constitution and became an implicit priority.⁴² The later-added Bill of Rights, under the influence of James Madison, secured the primacy of individual property rights in the Fifth Amendment's "takings clause."⁴³ The development of judicial review in the early nineteenth century tipped the balance even further in favor of the primacy of property rights, around which the law-politics distinction was constructed.⁴⁴ By claiming that property rights belong in an exclusively legal--rather than political--realm, courts invested property rights with the legitimacy of common-law *235 tradition and protected such rights from legislative encroachment.⁴⁵

Nineteenth-century Constitutionalism's emphasis on the primacy of the rights of private property--a perspective that was rarely challenged before the Civil War--was based on the notion that productive property was the site upon which man built his character in civil society.⁴⁶ During the years of the Marshall Court, major jurisprudential controversies erupted over the scope of federal court jurisdiction. The term "common law" was transformed by early nineteenth-century jurists from non-constitutional and non-statutory doctrinal precedents to a broader notion of discretionary methodology applied by judges who "found, declared, and applied legal principles, employing a variety of sources."⁴⁷ This type of methodological adjudication enhanced judicial power and judicial discretion, paving the way for total consolidation of legal authority at the federal level.

The property and contract disputes which came before the Marshall Court raised questions about the basic terms of entitlement and exchange.⁴⁸ The Court seemed to settle these disputes in favor of the Federalist vision of a powerful central government and market economy. In *Fletcher v. Peck*,⁴⁹ Chief Justice John Marshall established the Court's authority to define property at the Constitutional level by denying to the Georgia legislature the power to revoke state land grants.⁵⁰ By defining and asserting the concrete principles it hoped to set as limits to legislative action, the Court further enhanced the general view of the sanctity of property. This view, in the Federalists' vision, was necessary to a strong central economy and a free, secure society.⁵¹ Court-defined property rights served a dual purpose: to construct a *236 framework for a commercial republic and to justify the assertion that constructing such a framework was "neutral, apolitical, and properly entrusted to the courts."⁵²

Judicial review effectively placed the power of defining property rights within the realm of federal courts, and thus the power of shaping the limits of government became vested in what Alexander Hamilton had envisioned as the "least dangerous [branch] to the political rights of the constitution; because it will be least in a capacity to annoy or injure them."⁵³ Judicial review also added another barrier between the fundamentals of the system and the popular political process, further limiting the democratic process and embracing the non-majoritarian values upon which the system was founded within the realm of Constitutional authority.⁵⁴ Thus, the most salient and fundamental issues of debate since the American Revolution--rules of property, the structure of government, and basic rights, all of which were required for prosperity, economic liberty, and justice--were removed from the realm of politics, the democratic process, and public debate.

Antebellum jurisprudence was heavily influenced by James Kent's *Commentaries on the Law* (1826-1830), reinforcing the centrality of property rights, which Kent described as being situated among the "absolute rights of individuals."⁵⁵ Kent believed that although certain situations could arise in which the general welfare outweighed an individual's property rights, the *237 legitimate commitment to encouraging economic growth required limitations on governmental authority over private property and corporate enterprise.⁵⁶

Other types of property also underwent legal codification in the Marshall years. Specifically, during this era of rapid technological change, patent and copyright laws magnified property rights issues.⁵⁷ Moreover, the courts had to reconcile the claims of monopoly rights in the property of literary works and inventions with the dichotomous public disdain for special privilege and a penchant for disseminating knowledge widely.⁵⁸ The Supreme Court first ruled on an intellectual property issue in *Wheaton v. Peters*,⁵⁹ once again firmly placing the power to define property within federal subject-matter jurisdiction. In limiting the manner in which a person might secure a property right in literary works, the Court accurately reflected the prevailing hostility toward monopoly, particularly where information was concerned.⁶⁰

Thus, even before Oliver Wendell Holmes, Jr. began his study of the law at Harvard in the late 1860s, American constitutional law had developed through a prevailing viewpoint among antebellum jurists which envisioned property rights as the basis for ordered liberty and economic development. Property-based substantive due process first appeared in federal jurisprudence in *Dred Scott v. Sandford*.⁶¹ Chief Justice Roger Taney's opinion in the *Dred Scott* case, infamous for its institutionalization of white supremacy in Constitutional doctrine, interpreted the due process clause as placing a substantive limitation on the power of Congress with respect to slave property in the territories.⁶² Although the ruling was effectively superseded by the Civil War, the Emancipation Proclamation, and the Fourteenth Amendment, the concept of substantive due process became a mainstay in postbellum federal and state jurisprudence.

The most significant "property" transformation arose in the context of the Emancipation Proclamation, the Civil War Amendments,⁶³ and the Civil Rights Act of 1868.⁶⁴ Specifically, Southern plantation owners lost millions of dollars in slave "property," a taking justified as the spoils of war and which bypassed the Constitutional guarantee of "just compensation" under the Fifth Amendment's Just Compensation Clause.⁶⁵ Because such property taking did not fit neatly into the concept of eminent domain, which was based on a real property paradigm, such property rights were simply extinguished.

More importantly, the denial of a right to legal ownership of one person by another became a fixed principle in legal theory. This development would finally uproot the firmly-planted natural rights justification for denial of the full rights of citizenship to freed slaves, women, and others marginalized in the older American society in which political and economic power rested upon ownership of real property. A Supreme Court dissenting opinion, in *The Slaughter-House Cases*,⁶⁶ first recognized that depriving citizens of employment violated Fourteenth Amendment protections.⁶⁷ That minority position first appeared in the majority **239** view in *Bradwell v. Illinois*.⁶⁸ Whereas the *Bradwell* Court examined and upheld the denial to women of the privilege to enter the legal profession available to men,⁶⁹ justification for the denial of woman suffrage is found in *Minor v. Happersett*.⁷⁰

The Court, in the latter cases, implicitly recognized a woman's difference in the social order of the time. This difference did not entitle her to the same rights that, in Lockean terms, flowed from the faculties of men,⁷¹ even though the Fourteenth Amendment unequivocally defines citizens as "[a]ll persons born or naturalized in the United States."⁷² This exposure of a multi-tiered citizenry in Constitutional terms became the foundation of the postbellum suffragist position: If women could not claim the right to represent themselves and their separate liberty interests, then they were denied the liberty interests guaranteed to "[a]ll persons born or naturalized in the United States."⁷³ The liberty interests of citizens, as they only applied to men, allowed a man to protect the means by which he met his survival needs--through representative government and through the right to employment-- but denied women the same citizenship right.

Real property lines could no longer define the key determinant of a citizen's political and economic worth. His representative value in the political and economic realms included the right to **240** vote for and lobby his legislators; to become a legislator, a lawyer, a jurist, or an owner of corporately held property; to earn a living; and to "own" other human beings in the form of chattel property.⁷⁴ An expanded, less concretely-based form of property emerged as the first instance of rights protected by the Constitution, which was more in concert with the changed conditions of life and liberty in a transforming political economy.⁷⁵ The right to secure one's survival needs was and is the fundamental interest of citizens standing independently at the law.⁷⁶ This interest can assume a number of forms: in the form of employment, as defined in *The Slaughter-House Cases*;⁷⁷ in a newer contract paradigm; or in the **241** more traditional terms of ownership of productive property that informed the conscious experience of the Framers of the Constitution.⁷⁸

The definition of "citizenship," taken literally from the plain language of Section 1 of the Fourteenth Amendment, moves the boundaries of Constitutional citizenship from the condition of owning land, measured in metes and bounds, to the condition of being "born or naturalized in the United States."⁷⁹ Section 2 of the Fourteenth Amendment sets a concrete limit on the right to suffrage by first introducing the word "male" into the text of the Constitution,⁸⁰ which would necessarily be superseded, if at all, in the form of a Constitutional Amendment. This latter event finally occurred in 1920, with passage of the Nineteenth Amendment, granting to Congress the power to mandate protection for, and enforcement of, women's suffrage rights, commensurable with **242** those of men.⁸¹

As the Supreme Court carved out its major role in shaping economic development, it simultaneously developed Constitutional doctrines that guided the development of a national market and protected property rights.⁸² The very inventions

and legal entities upon which the Court had bestowed legitimacy during the antebellum years accelerated economic development and growth after the Civil War and posed new constitutional challenges, while transforming the very complexion of American society. Yet, as transportation and communication industries continued to transform the way in which Americans organized and conducted business, and productive property became consolidated in Northern corporate entities and the land-lien system in the South,⁸³ the antebellum focus on economic individualism and the free market continued to inform Constitutional jurisprudence.⁸⁴ Such a focus placed limits on the nation's response to industrialism.

3. Liberty of Contract: A Challenge to the Primacy of Real Property Ownership

By the mid-nineteenth century, a liberty of contract doctrine challenged the primacy of private property rights, as the agrarian economy was marginalized by proprietary capitalism.⁸⁵ The *243 United States Supreme Court began to note this in its decisions. The focus on property rights, however, retained its hold on Constitutionalism, even as the labor contract more or less supplanted land as the symbolic representation of a man's ability to secure his survival needs and those of his dependents. Primacy of property rights in land was, perhaps, merely habit, and it grew particularly anachronistic after the Supreme Court announced the creation of corporate property rights in 1886, in *Santa Clara County v. Southern Pacific Railroad Co.*⁸⁶ Chief Justice Morrison R. Waite made this arbitrary and curious announcement, which was not even within the main body of the opinion, without even attempting to justify such a bold interpretation of the Constitution:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion it does.⁸⁷

B. Cooperative Capitalists on Iron Horses: The Development of a National Transportation and Communications Infrastructure

During Oliver Wendell Holmes's pre-law years, phenomenal changes unrolled throughout the country. The decade of the 1840s witnessed the perfection of rail transportation technology, a development which would have profound effects not only on the economy, but on all relationships in society. The railroad boom came to Holmes's New England in mid-decade and thundered south and west in its race across the continent.⁸⁸ In the first half of the 1850s, the intersectional trunk lines linking east and west, and the rail networking of the Midwest, were completed.⁸⁹ During this latter decade, railroad and telegraph companies began to experiment with the organizational structures and accounting *244 procedures which would become the central feature of the modern business corporation.⁹⁰

Speed, or the collapse of time and distance, plays an important part in the history of the late-nineteenth century. The railroads and electrified urban rail systems provided faster, more economical, and more reliable transportation for people and goods; the telegraph provided faster and more reliable communications in the world of commerce; machine technology provided faster, cheaper, and more reliable production in the factory, in the foundry, and on the farm. Speed was further enhanced by the structural reorganization of industries which relied on the new local, regional, or national transportation and communications infrastructure.⁹¹

The railroads and the telegraph thus revolutionized the way in which Americans conducted business, but they also had another significant impact on American society. The railroads were corporate entities that owned vast amounts of land, a development which is directly implicated in the devaluation of private productive property and the Constitutional anointment of corporations as natural persons with full benefit of Fourteenth Amendment "liberty" rights.⁹²

Oliver Wendell Holmes, Jr., like many thinkers of his time, recognized that interests were being reorganized into national or corporate forms: the nationalization of the economy,⁹³ the completion of proletarianization,⁹⁴ the proliferation of coalition-driven social and political movements,⁹⁵ the rise of corporate *245 capitalism, the creation of transcontinental transportation and communication systems, and the explosive growth of the middle-class consumer culture.⁹⁶ This reorganization challenged the central representational theories of classical liberalism based on land ownership and the assumption that there only existed independent, self-interested, but publicly-minded, individuals who comprised the body politic.⁹⁷ The nineteenth-century economic revolution had effectively displaced the site of rational interest from land to labor

in a variety of old and new forms, including the mental labor of investing and organizing wisely. Simultaneous revolutions in mechanization, transportation, and communications technology (which had the effect of collapsing conceptions of time and distance), along with the “closing” of the American frontier (which altered the perceived boundaries of space--Thomas Jefferson’s “safety valve” for democracy⁹⁸), forever changed the blueprint of American society. Combined with the increasingly interdependent and complex network of trade relationships in an expanding national and international economy and, perhaps most significantly, the rapid turn-of-the-century development of corporate capitalism, these changes created new interests central to survival which individuals and groups sought to protect. Holmes *246 introduced critical democratic principles into Constitutional jurisprudence that made room for freed slaves, women, wage workers, and others who had been arbitrarily excluded from the polity under a strictly classical economic interpretation of the Constitution,⁹⁹ expounded by Chief Justice John Marshall and embraced by the Supreme Court’s majorities throughout most of the nineteenth century.¹⁰⁰

II. Recognition of the Social Construction of Economic Power

A. Upheavals in the Social Order: Laissez-Faire Constitutional-ism in an Increasingly Complex and Interdependent Political Economy

At the turn of this century, Henry Adams, great-grandson of the second President and a contemporary of Holmes, was troubled by a vague sense of dislocation or disequilibrium which arose in a rapidly changing world of mechanization and corporatization and from the compression of time and space in new communications and transportation technology. Adams feared that the Constitution was no longer the proper engine to drive America. He wrote: “The fathers had intended to neutralize the energy of government and had succeeded, but their machine was never meant to do the work of a twenty-million horse-power society in the twentieth century, where much work needed to be quickly and efficiently done.”¹⁰¹

*247 If the Constitution, as it had been ratified in 1789, was the machinery of American political economy, it had been powered by the force of men, and “invisible” women, children, wage laborers, and slaves, working the land, crafting their environments with their hands, and generating ideas from lessons they learned through their encounters with the physical, political, economic, and social environments of late-eighteenth century pre-industrial America. By the end of the Civil War, however, political economy and society itself were being driven by the forces of powerful organized energies which Adams believed the Constitution was too primitive to synthesize.

Many observers of the turn-of-the-century American scene, including Holmes, shared with Adams a sense that the nation had reached a legal and constitutional crisis. Holmes, and thinkers who shared his pragmatic views, looked beyond the personal economic interests in productive property that had, in part, motivated the Framers of the Constitution. Holmes focused instead on the original purpose for establishing an independent nation, embedded in the democratic principles of the Declaration of Independence and explicit in the defenses of republican government, within the context of the new conditions of his time.¹⁰²

*248 The story of postbellum jurisprudence is the development of laissez-faire constitutionalism, a hybrid of the antebellum property-based jurisprudence with which it increasingly came in conflict.¹⁰³ As state and federal courts redefined property in the interests of the general welfare,¹⁰⁴ they contemporaneously insisted on inviolable individual rights.¹⁰⁵ As legislatures began to respond to the social and economic dislocation created by rapid economic development, the issues raised worked their way into the courts in the last decades of the nineteenth century. Laissez-faire constitutionalism invalidated a good deal of legislation designed to cope with the imbalances created by concentrations of wealth, power, and property.¹⁰⁶ Under this jurisprudential philosophy, the *249 “private” property rights of big business often took precedence over the claims of individuals seeking a right to shape their own economic lives.¹⁰⁷ Legislatures noticed what the courts generally failed to acknowledge: the unmitigated power of large-scale property in a market economy was devastating laborers and small producers, pushing them to the margins of subsistence. Consequently, the Sherman Anti-Trust Act of 1890 declared illegal every contract, conspiracy, or combination in restraint of trade among the states.¹⁰⁸

*250 The Sherman Act, however, did not completely survive judicial review. In *United States v. E.C. Knight Company*,¹⁰⁹ for example, the Supreme Court examined the federal government’s prosecution of the American Sugar Refining Company. The company, which had purchased the controlling stock in Philadelphia’s four largest sugar refineries, effected a national monopoly over the production of refined sugar and created a restraint on interstate trade.¹¹⁰ The Court found that the federal

government could not regulate the manufacturing or production aspects of business and declared that “[c]ommerce succeeds to manufacture, and is not a part of it.”¹¹¹ In addition, Justice Stephen Field, concurring in *Pollock v. Farmer’s Loan & Trust Company*,¹¹² complained that “[t]he present assault upon capital is but the beginning. It will be but the stepping stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.”¹¹³

Justice Field’s reasoning stood in direct conflict with Holmes’s view of the role of the courts as arenas for civil debate. Dissenting in *Northern Securities v. United States*,¹¹⁴ Holmes wrote, “I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the bellum omnium contra omnes¹¹⁵ and disintegrate society as far as it could into individual atoms.”¹¹⁶

B. The Possibilities for Controlled Democracy within a Modern Technology-Based Economy

1. The Rise of Regulation to Promote Access to Markets

Law is fundamentally concerned with the complexities of social *251 and personal relations.¹¹⁷ Precisely which relations are considered to be within the province of the law’s domain, though, became the subject of intense debate when Justice Oliver Wendell Holmes began to challenge his Brethren’s views of social and economic relations. This debate signaled a revolution which owes some debt to Holmes’s insistence that the law is “not mathematical formulas having their essence in their form”; rather, “the provisions of the Constitution” are “organic living institutions transplanted from English soil,” whose significance is “vital not formal.”¹¹⁸

If a law was no longer vital, if the fundamental value promoted or protected was no longer served by the metaphor in which it was written, Holmes believed it should be examined and either discarded or appropriately remedied to make it vital again.¹¹⁹ Holmes asserted that the law, not morality, must be viewed pragmatically:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind *252 imitation of the past.¹²⁰

As early as 1881, Holmes began to attack “natural rights” theories based on alleged a priori truths about the operation of the economy and the structure of society. Specifically, Holmes argued in *The Common Law*¹²¹ that in determining rules by which men should be governed, one needed to examine not the logic, but rather the “felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men.”¹²² By recognizing that “[t]he substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient,”¹²³ Holmes exposed the reality that laws are human constructs, based not on a priori truths, but on the social desires and cultural preferences of a given society.¹²⁴ Language itself, Holmes found, was invested with the social values of a specific time: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”¹²⁵

Holmes recognized the inadequacies of laissez-faire constitutionalism almost from the moment it was first articulated. *253 He declared, in *Otis v. Parker*,¹²⁶ that judges should exercise caution in considering the validity of a state law on the basis of their beliefs that the law is “unsuited to its ostensible end, or based upon conceptions of morality with which they disagree.”¹²⁷

Holmes consistently pressed his colleagues on the Court to examine their reasons for invalidating state legislation designed to address the monumental changes in the structure of American society.¹²⁸ He manifested a certain faith in scientific progress *254 through his insistence on upholding legislative experiments in public policy aimed at addressing the inequality of position, determined by the conditions of inherited gender, race, religious faith, or national origin.¹²⁹ Holmes sustained his faith in these *255 legislative experiments, however, only insofar as they did not unduly discriminate or interfere with the fundamental privileges of citizens.¹³⁰

Holmes suggested that “condition” created a claim on the law if that condition was not the result of failing to fulfill some civic or social duty. Since, in his theory, legal duties were antecedent to legal rights,¹³¹ the interests of civil society preceded the claims of individuals to rights granted by that society. Holmes defined a legal right as “nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right.”¹³²

Statutory law, developed in legislatures and interpreted in courts that relied on common law principles, created titles to property, marriage certificates, or other government issues, including paper money. These entitlements constituted basic rights regulated by some governing body seeking to maintain order among its constituents. Persons who obeyed the law, that is, performed their civil duty, by entering into contracts (i.e., marriage, property, employment, etc.) in good faith (i.e., not fraudulent, coercive, or illegal), in a society organized through contractual relationships, should expect, with reasonable confidence, that the laws in turn would protect their interests. This was one of Holmes’s basic propositions, and although he tended to view the development of large-scale corporate enterprises in a positive light¹³³ because they *256 had succeeded in resolving the production problem and in strengthening the national economy, he remained aware of the coercive potential of consolidated capital against the individual laborer seeking a living wage.¹³⁴

When federal and state legislatures began to address the new kinds of problems created in a complex, industrialized economy, they were, in effect, helping to correct the tremendous imbalances *257 of power that state action had helped to create.¹³⁵ But as the legislatures began to respond to the changes wrought,¹³⁶ the Court was much slower in abandoning doctrines that had their basis in the simpler, more individualistic political economy of the early *258 nineteenth century.¹³⁷ While the legislatures recognized the new dangers workers faced in factories and mines, and that the workforce itself was changing with the infusion of women and new immigrant groups, whose bargaining power was even more impaired than that of the typical white male worker, the Court frowned on protective legislation designed to combat these ills. By framing the argument in terms of “liberty of contract,” the Court obscured the fundamental interest for which protection was sought: securing survival needs.¹³⁸

In *Bunting v. Oregon*,¹³⁹ a divided Court sustained a law which established a maximum ten-hour day for factory workers but permitted up to three hours a day overtime, provided employers compensated the overtime at time-and-a-half rates. The ruling seemed to indicate an abandonment of the position in *Lochner*.¹⁴⁰ *259 Only six years later, however, in *Adkins v. Children’s Hospital*,¹⁴¹ the Court struck down a District of Columbia minimum wage law for women, noting that since *Muller*,¹⁴² which upheld maximum hours legislation for women, women had gained the right to vote, and, thus, it was no longer necessary to restrict liberty of contract on their behalf.¹⁴³ Justice Sutherland, for the majority, found that the mere adoption of the 19th Amendment erased the civil inferiority of women.¹⁴⁴ Sutherland’s failure to comprehend that the regulation was fundamentally concerned with access to jobs that paid a living wage--and without which women would remain civilly inferior--is most apparent in his pronouncement that women were legally as capable of contracting for themselves as men,¹⁴⁵ without considering the still-unlevel playing field on which women and men competed for wages.

Likewise, Sutherland and the three remaining justices from the *Adkins* majority¹⁴⁶ were joined by Justice Roberts in striking down New York’s minimum wage law in *Morehead v. New York ex rel. Tipaldo*.¹⁴⁷ Finally, in 1937, the Constitutional crisis, first noted by thinkers such as Henry Adams and Holmes at the turn of the *260 century, came to an end when the Court abandoned the primacy of liberty of contract, finding that the “Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.”¹⁴⁸ The Court, in *West Coast Hotel*, found that a state’s power to restrict freedom of contract, which “may be exercised in the public interest with respect to contracts between employer and employee[,] is undeniable” and that “peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.”¹⁴⁹ Significantly, the Court found that:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless [sic] against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.¹⁵⁰

Since the landmark *West Coast Hotel* case, the Supreme Court has assumed a special role in protecting access to the means

by which citizens secure their survival needs, largely by overseeing access to the political process;¹⁵¹ promoting freedom of speech, press, and association;¹⁵² and guarding against invidious forms of *261 racial and non-racial discrimination, particularly where they interfere with access to the fundamental necessities of life.¹⁵³ This recognition is part of the legacy of Holmes and the 1937 Supreme Court that finally vindicated Holmes's observations. This development might be explained by the fact that while open and unfettered markets are essential to the type of free market economy the United States has chosen, the economy itself is merely the "place" in which citizens secure the goods to meet their survival needs. Access to the markets in which citizens can secure their survival needs is, thus, the fundamental liberty interest of citizens in a republican political economy. Efforts to apply traditional laws for promoting economic growth that developed in a private property-contract regime to the new vehicles of mass commerce and communication proved problematic, perhaps because the type of rights protected in a yeoman agrarian republic are fundamentally at odds with the needs of organized, mass society.

2. Regulating the Early Communications Infrastructure

The great technological changes in communications and transportation that occurred during Holmes's day fundamentally altered the structure of American society, as well as the everyday *262 lives of American citizens. Implicit in Holmes's theories was the notion that property, contract, and employment "rights" were fundamental only insofar as they secured tools necessary to promote life and liberty.¹⁵⁴ By the end of the nineteenth century, those traditional instruments of securing survival needs had been joined by other forms that had taken on greater importance through technological advances and the changes in the organizational structure of the political economy.

The great technological advances accompanying the development of computers and other forms of electronic communications have initiated another sea change in our global society.¹⁵⁵ Just as legislatures and courts in Holmes's time responded slowly and inconsistently to the changes wrought by technological development, the law's response to the advent of the telecommunications age has also been sluggish and largely ineffective.¹⁵⁶ Likewise, just as legislatures and courts initially responded in piecemeal fashion to the growth of modern business and industry, those institutions have responded in similar fashion to the growth of mass communications, vis-a-vis radio and the *263 telephone, and, later, television and computers.

The earliest attempts to regulate interstate broadcasts and telecommunications, for example, had an adverse impact on the new technologies and resulted in virtual monopolies over those media forms.¹⁵⁷ The Mann-Elkins Act empowered the Interstate Commerce Commission ("ICC") to regulate interstate telecommunications, the providers of which were characterized as "common carriers," like the rail and waterway transportation carriers traditionally within the ICC's purview.¹⁵⁸ The authority over radio regulation was, perhaps, even more disjointed. The Radio Communications Act authorized the Department of Commerce and Labor to exercise limited control over interstate radio broadcasting through licensing and by requiring stations to designate wavelength frequencies.¹⁵⁹

Fifteen years later, Congress repealed the 1912 Radio Act and enacted in its place the Radio Act of 1927, which placed radio networks under the regulatory control of a five-member Federal Radio Commission and the Secretary of Commerce.¹⁶⁰ The following activities were included in the Commission's purview: classifying radio stations, prescribing services to be rendered by stations, assigning frequencies, locating stations, regulating apparatuses, and designating call letters.¹⁶¹

The inefficiencies and adverse impact of such a disjointed approach became increasingly apparent, prompting Congress to *264 create the Federal Communications Commission ("FCC") in 1934.¹⁶² The FCC's responsibilities included regulating telephone communications and radio broadcasting (and later the telegraph and television), as well as promulgating and enforcing its own rules (e.g., maximum time limits for commercials, minimum requirements for news and public affairs programming, limitations on co-ownership of various media) or other statutory requirements, such as the antitrust laws.¹⁶³ Congress acted upon a public perception "that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field,"¹⁶⁴ specifically targeting the rapidly expanding American Telephone and Telegraph Company ("AT&T"), which owned all of the long-distance market and approximately two-thirds of the local business.¹⁶⁵ One of the main goals of the 1934 Act was to ensure universal access to telephone service at "just and reasonable prices."¹⁶⁶

Among the regulations imposed by the FCC on the radio and television industry were those requiring "equal time" for opponents of political candidates¹⁶⁷ and the "fairness doctrine," which required stations to notify and provide air time for

persons whose characters were attacked or made the subject of political editorials.¹⁶⁸ Although the FCC's regulatory policies, at first ***265** glance, seem supportive of the notion of free competition in the marketplace of ideas, its institutional culture has generally favored protection of existing broadcasters over competition.¹⁶⁹ In the past decade or so, however, both Congress and the FCC have exhibited a tendency toward deregulation, which is appropriate if government and industry are correct in their predictions that the separate media-- telephone, cable television, and computers--"will converge to offer what is dubbed as 'multimedia,' 'interactive,' and 'personalized media services,'" for which the national information infrastructure is the backbone.¹⁷⁰

As our economy has, over the past century, become increasingly information-based, an unequivocal consequence is that the information infrastructure itself has become an integral and necessary part of our daily lives. Consequently, the information infrastructure itself might be viewed as a tool necessary for securing certain survival resources. In keeping with our nation's constant historical theme of providing access to and protecting the tools necessary to secure survival needs, lawmakers must first identify the tools necessary to secure survival needs in the Information Age.¹⁷¹ It may be argued that one such tool vital in today's world is the Internet.

***266 III. America's Adventures in Cyberland**

A. The Internet and Personal Computers: New Tools for Old Wrongs and New Kinds of Crimes

1. Development of the Internet

The Internet is not one system or network, but rather is comprised of thousands of local, interconnected networks.¹⁷² Users gain access through commercial service providers or through private institutional services, such as those provided by businesses and universities.¹⁷³ This "network of networks" has no central authority or central routing station.¹⁷⁴ While this relative autonomy has been generally effective, the potential for abuses, such as privacy violations and defamation, requires at least some type of governmental regulation.¹⁷⁵

The Internet developed out of two earlier computer networks. In 1969, the Department of Defense established the Advanced Research Project Agency Network ("ARPANET") in order to provide an effective and uninterrupted communications system in the event of nuclear war.¹⁷⁶ To reduce its vulnerability to unauthorized access, this system of linked mainframe computers was deliberately designed without any central authority.¹⁷⁷ In the mid-1980s, the National Science Foundation established a network, the "NSFNET," to link the technical and scientific research ***267** communities in government and academia.¹⁷⁸

Following the establishment of this "national backbone network," in 1986, state and regional computer networks that were linked to NSFNET founded the Federation of American Regional Networks ("FARNET") to "promote Internetworking to support and enhance education, research, library access, health care, economic development, and citizen empowerment."¹⁷⁹ FARNET, a private association, built the core of the Internet with which computer users today are familiar. The NSFNET architecture consists of three component parts: the federally-funded NSFNET backbone service; the linking mid-level, or regional, networks; and local organizations, such as universities, libraries, schools, and hospitals.¹⁸⁰

Universities have also provided enormous contributions to the development of the Internet, including a number of computer and network applications that are familiar to most online users. These innovations include: Internet e-mail services such as Eudora (University of Chicago) and Pine (University of Washington); the Berkeley Unix operating system, which introduced Transmission Control Protocol/Internet Protocol ("TCP/IP"), software which manages communications between computers (University of California-Berkeley); CU-SeeMe, which provides low-cost video conferencing and is used extensively by the Global Schoolhouse Project (Cornell University); the Gopher information retrieval tool (University of Minnesota); and the Mosaic multimedia interface for information retrieval (University of Illinois).¹⁸¹ Although these ***268** innovations would not likely have come about without the institution of the government-funded NSFNET, most of these applications were developed without direct government support.¹⁸²

Although the NSFNET began as a network solely for the education and research communities, it has evolved into the general purpose network we know today as the Internet, which now includes commercial access providers and a growing number of

international networks.¹⁸³ FARNET relies on a process of consensus resolution to coordinate international protocols, equipment selection, and traffic routing policies.¹⁸⁴ A compelling justification for at least minimal government involvement arises in the context of non-discriminatory access, one of the basic reasons that the federal government is committed to the development of a National Information Infrastructure (“NII”)¹⁸⁵ and the Global Information Infrastructure (“GII”).¹⁸⁶

Another non-profit organization dedicated to providing local access to the Internet is the Interactive Services Association *269 (“ISA”), which is comprised of over 300 member organizations from the advertising, broadcasting, cable, computer, financial services, marketing, publishing, telephone, and travel industries.¹⁸⁷ Both the ISA and FARNET have identified a significant obstacle to universal national access in that most consumer commercial online services are only available through a local telephone number in about 80% of the country.¹⁸⁸ In addition, only 20% of the nation’s public libraries have some type of connection to the Internet.¹⁸⁹

Explicit in some of the testimony before Congress and implicit in some legislation contemplated and enacted by the House and Senate is the recognition that market forces alone will not ensure the equal access to information that is and should be a goal in the development of the NII.¹⁹⁰ In an increasingly information-based political economy, it can be argued that access to the Internet takes on similar importance to access to private productive property in an agricultural political economy, access to employment opportunities in an industrialized political economy, and equitable bargaining power in a corporate political economy.

Recognition of the importance of universal access by the executive and legislative branches of the federal government¹⁹¹ should instill confidence in the citizenry that every man, woman, and child will one day have an equal opportunity to become both a consumer and provider of the vast body of information accessible *270 through the Internet.¹⁹² As long as the courts continue to recognize the authority of legislatures to act as “laboratories for democracy”¹⁹³ and resist any challenges to the constitutionality of congressional authority to formulate laws which promote universal access, the possibilities for greater democracy in cyberspace might be realized. Framing the political questions that arise over the future of cyberspace in terms of democratic theory might provide a foundation for the laws enacted by legislatures and for the doctrines developed by the courts.¹⁹⁴

2. Cyberspace Crimes

Legal regulation of access is but one aspect of the law’s regulatory function in cyberspace. The point of access is the first “place” in cyberspace where laws can be broken. Unauthorized access has been a security problem since the first computers were put into use for defense, engineering, and science in the 1940s.¹⁹⁵ As computers became more widely used, beginning in the 1960s, the potential for abuse and actual misuse increased. Attempts to prosecute individuals for theft of data or programs proved problematic; most state penal codes defined stolen property as tangible items that are physically removed from the possession of *271 their owners, i.e., “carried away.”¹⁹⁶

The more difficult questions thus arise in developing laws to regulate behavior with respect to often intangible property in this frontier with no discernible borders. On a basic level, the types of punishable behavior that can occur in cyberspace are the same types of legal and equitable wrongs that occur in “realspace.” In one sense, computer crimes are merely old crimes with new tools:¹⁹⁷ violations of copyright and other intellectual property rights; invasions of privacy; defamation; industrial espionage, and theft, all of which can occur with or without authorized access to a computer database. The application of laws designed to deal with these realspace torts and crimes, however, has proved problematic in cyberspace.¹⁹⁸

*272 For purposes of this note, “cybercrimes” will be divided into two categories: activities in which a computer, including its physical shell and database, is the object of illicit behavior (computer-directed wrongs) and activities in which a computer is used to commit injurious acts (computer-generated wrongs).¹⁹⁹

a. Computer-Directed Wrongs

Damages to or theft of the physical components of a computer are punishable under traditional realspace laws, as the object of the crime is categorically similar to a person’s house, car, or other personal or business property. While assessing the losses an individual or entity sustains might be more problematic, depending upon what information might have been stored

on the hard drive or recording device (e.g., disk, CD-ROM, tape) stolen, damaged, or destroyed, the loss is nevertheless akin to a physical property loss. Thus, the kinds of crimes that are considered computer-related must have some other component. The United States Department of Justice defines computer-related crimes as those which are “violations of criminal law that involve a knowledge of computer technology for their perpetration, investigation, or prosecution.”²⁰⁰ In a sense, then, for a crime to be computer-related, the perpetrator him or herself must theoretically venture into cyberspace. The physical location of the criminal activity is more difficult to fix once the perpetrator crosses the threshold into the Internet.

One scholar has placed the methods of attacking others through the improper usage of computers into twelve categories: *273 asynchronous attacks;²⁰¹ data diddling;²⁰² data leakage;²⁰³ logic bombs;²⁰⁴ piggybacking and impersonation;²⁰⁵ salami techniques;²⁰⁶ scavenging;²⁰⁷ simulation and modeling;²⁰⁸ superzapping;²⁰⁹ trapdoors;²¹⁰ Trojan Horse;²¹¹ and wiretapping.²¹²

Cyberlaw, or e-law (electronic law), faces novel legal problems because of the intangible nature of the electronic information which is the object of computer-related crimes and torts, and because of the difficulty in precisely pinning activity in cyberspace to a fixed, physical location.²¹³ The federal government made computer-related offenses distinct federal offenses in 1984 with the passage of the Counterfeit Access Device and Computer Fraud and Abuse Act.²¹⁴ The Act, in its original form, was a national security *274 measure designed to prevent unauthorized access to information regarding defense and foreign relations,²¹⁵ financial records of financial institutions and consumer reporting agencies,²¹⁶ or damage to a protected computer.²¹⁷ The 1986 amendments additionally criminalize computer fraud affecting interstate or foreign commerce.²¹⁸ Because proving elements of these crimes is difficult, however, few prosecutions have resulted.²¹⁹

One of the few cases to reach the courts is *United States v. Morris*,²²⁰ in which the Court of Appeals for the Second Circuit upheld the conviction of a Cornell University graduate student who released a “worm” onto the Internet, causing computers at various military installations, medical research facilities, and educational institutions to crash.²²¹ Although Morris admitted that he intentionally accessed the Internet to prove a theory, he argued on appeal that his computer account at Cornell authorized his use and that the damage was unintentional.²²² The court nevertheless found that Morris’s authorization was limited to e-mail and obtaining certain information about the users of other computers.²²³

In reaching its conclusion, the court looked to the legislative history of the Act,²²⁴ and determined that Congress intended to prevent those with access to some federal interest computers from gaining access to other federal interest computers.²²⁵ The Court upheld Morris’s conviction under section 1030(a)(5)(A), which, prior to the 1994 amendments, provided criminal penalties for anyone who “intentionally accesses a Federal interest computer without authorization, and by means of one or more instances of such conduct alters, damages, or destroys information, and thereby *275 causes loss to one or more others of a value aggregating \$1,000 or more during any one year period. . . .” In 1994, Congress broadened the scope of section 1030(a)(5) to proscribe any conduct which alters, damages, or destroys data, or interferes with authorized use of a computer either intentionally or recklessly.²²⁶

The Morris case illustrates the existence of a problem which will likely arise frequently in cyberspace: What constitutes authorized access? The tension inherent in balancing the importance of information and free speech against the security and privacy needs of individuals and enterprises is nothing new.²²⁷ In the United States, access to information has been viewed as a necessary condition for republican government, which requires its citizens to make intelligent choices in the public interest.²²⁸ Only where access to information clashes with some overriding public interest is speech or publication sometimes restrained.²²⁹

*276 b. Computer-Generated Wrongs

Since early 1996, the number of cases claiming violations of statutory and common law rights involving the Internet has increased dramatically. A particularly hot area of litigation involves the use and registration of Internet domain names²³⁰ in the *277 context of federal and state trademark and unfair competition statutes. Domain name disputes have arisen in a number of situations, including a practice known as “piracy” or “cybersquatting,” in which individuals and companies have *278 registered well-known trademarks as domain names in order to extort money from the rightful trademark owners.²³¹

3. Personal Jurisdiction over Cyberians

One of the more pressing issues facing the courts is where jurisdiction lies to adjudicate a civil claim arising from activity in cyberspace.²³² In order for a state court (or federal court sitting in ***279** diversity) to exercise personal jurisdiction over a non-resident defendant in certain civil suits, statutory authority to do so must be granted to the court, and assertion of jurisdiction must comport with the Due Process clauses of the Fifth and Fourteenth Amendments. State “long-arm” statutes generally authorize state courts to extend their territorial jurisdiction over a defendant in claims arising from certain enumerated activities within the state, such as business transactions, tortious acts, or property ownership, possession, or use.²³³ Under most long-arm statutes, a state court ***280** may exercise either general jurisdiction²³⁴ or specific jurisdiction²³⁵ over a non-resident. If the state court has statutory authority to exercise jurisdiction, it must then determine whether doing so comports with the due process clause.

Under this analysis, the court’s jurisdiction is proper if the non-resident has established sufficient “minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional norms of fair play and substantial justice.’”²³⁶ Additionally, the nonresident’s “conduct and connection with the forum” must be “such that he should reasonably anticipate being haled into court there.”²³⁷ Courts generally find minimum contacts if the nonresident entity “purposefully availed” itself of the benefits of doing business in the forum state.²³⁸

In determining whether exercise of personal jurisdiction meets the International Shoe requirements of fair play and substantial justice, courts have considered a number of factors, including the burden placed on the defendant, the forum state’s interest in obtaining relief, the plaintiff’s interest in obtaining relief, the ***281** overall nationwide goal of obtaining the most efficient resolution of disputes, and the shared interests of the states in furthering fundamental substantive social policies.²³⁹ Mere presence in the forum state²⁴⁰ or simply placing a product into the general stream of commerce may not be enough; rather, additional activity by defendants toward the forum state is required to satisfy minimum contacts.²⁴¹

As early as 1958, the Supreme Court recognized that issues of personal jurisdiction would increase as technology advanced.²⁴² Today, the Internet’s effect on commerce, communications, and transportation requires courts to reconsider the scope of their personal jurisdictional reach.²⁴³ In one of the first cases to consider an Internet jurisdictional issue, *CompuServe, Inc. v. Patterson*,²⁴⁴ the United States Circuit Court of Appeals for the Sixth Circuit applied due process reasonableness and fairness ***282** standards to Internet contacts in a common-law trademark infringement case. Defendant Patterson was a CompuServe subscriber who entered into a shareware agreement with the commercial online service provider.²⁴⁵ Under the terms of the agreement, Patterson agreed to provide CompuServe with software for sale over the Internet.²⁴⁶ The court found that Patterson, a Texas attorney, purposefully availed himself of the privilege of doing business in Ohio by entering into the shareware contract with CompuServe, sending his computer software to Ohio for sale on CompuServe’s service, and exchanging e-mail communications with CompuServe in Ohio.²⁴⁷

The court found that Patterson’s ongoing activities in the forum state, including placing software into the stream of commerce, marketing exclusively through CompuServe in Ohio, and sending to Ohio e-mail communications in which Patterson accused CompuServe of trademark infringement, satisfied the requirement that a claim arise out of activities in the forum state.²⁴⁸ In further determining whether Ohio’s exercise of jurisdiction met the “fair play and substantial justice” standard, the court found that even though defending a law suit in Ohio substantially burdened Patterson, other factors outweighed the burden.²⁴⁹ These factors included CompuServe’s interest in \$10 million in potential damages, the substantial impact the ruling would have on other contracts such as the one between CompuServe and Patterson, and Patterson’s knowledge that by entering the shareware agreement he purposefully availed himself of the benefits of Ohio law.²⁵⁰

Other cases in which courts have analyzed the exercise of personal jurisdiction over Internet defendants²⁵¹ involve securities ***283** fraud,²⁵² trademark dilution or infringement,²⁵³ breach of ***284** contract,²⁵⁴ copyright infringement,²⁵⁵ and defamation.²⁵⁶ In many of these cases, the courts have been forced to consider whether the presence of a Web site in cyberspace can be fixed to some geographical location for the exercise of personal jurisdiction without violating statutory or due process requirements. At least two judges have expressed reluctance to find jurisdiction over a Web site owner who resides in another state because of the potential for nationwide or even worldwide jurisdiction.²⁵⁷

***285** In one of the most recent cases that considered a motion to dismiss a tort claim for lack of personal jurisdiction, a federal district court in New Jersey provided a sensible approach for categorizing Internet activity that might give rise to jurisdiction over a non-resident defendant. In *Weber v. Jolly Hotels*,²⁵⁸ District Court Judge Alfred Wolin divided Internet cases into three categories.²⁵⁹ The first category is cases involving defendants who actively transact business on the Internet;

in those cases, courts have personal jurisdiction because the defendants knowingly and repeatedly establish contacts with the foreign jurisdiction.²⁶⁰ The second category involves Internet users who simply exchange information; in those cases courts must examine “the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”²⁶¹ The third category involves cases with defendants who maintain a passive Web site, that is, a site that merely provides information to users about the defendant’s business.²⁶² In these cases, the assertion of personal jurisdiction would be “[in]consistent with traditional personal jurisdiction case law.”²⁶³ Whether state courts, other federal district courts, or the circuit courts will follow this useful and sensible approach remains *286 to be seen.

4. Agency Issues

Other issues, such as the liability of employers or online services providers for the tortious or illegal conduct of their employees or subscribers, are reaching the courts with increasing frequency. Courts are only now resolving the question of whether the operator of a bulletin board service may be liable for defamatory, obscene, pornographic, harassing, or otherwise offensive statements made by subscribers.²⁶⁴ In addition, technological advances increasingly *287 require businesses to provide intranet and/or Internet access to their employees. This development creates the need for additional legal advice on crafting employee e-mail and computer usage policies that limit the employer’s exposure to lawsuits arising from employees’ online behavior.

*288 B. Controlling Illicit Behavior in Cyberspace

1. Traditional Law in Cyberspace

Online users interact in a non-physical universe called cyber-space, which bears little resemblance to the physical and political geography that delineates borders under traditional laws.²⁶⁵ To date, the cultural community in cyberspace has largely relied on self-imposed rules of conduct and protocol to control behavior, rather than on the formal legal system.²⁶⁶ As more users log on, however, the sense of shared values which gives rise to effective community self-governance is eroding.²⁶⁷

In realspace, physical borders are logically related to the legal rules that govern the actions of individuals or entities within.²⁶⁸ These borders generally set out the territorial boundaries within which a particular body of law applies. The logic of geographic borders for law is based on considerations of power, effects, legitimacy, and notice.²⁶⁹ The same logic applies to property ownership.

Power, or control, over physical space or a material object is a distinct characteristic of sovereignty and statehood,²⁷⁰ as well as of property ownership.²⁷¹ The relationship between the effects of particular behavior and physical location also demonstrate a logical nexus between physical and legal boundaries.²⁷² In addition, the United States has adopted the ideology of the “consent of the governed,” by which persons within specific boundaries are the ultimate source of the laws governing activities within those *289 borders.²⁷³ This notion also applies in the property context: since property owners are the ultimate authorities on who may or may not enter the physical boundaries of their property, they define who is a guest and who is a trespasser. Finally, physical borders provide notice that a different set of rules may apply once the boundary is crossed.²⁷⁴

These logical links between geographic borders and legal sovereignty are significantly weakened in cyberspace. Because the global nature of cyberspace transcends state and national jurisdictional borders, those considerations underlying the logical relationship between law and physical borders are less salient.²⁷⁵ “Geographical” location in cyberspace consists of an address and domain in virtual, not physical, space, and little, if any, correlation exists between an Internet address and a physical location.²⁷⁶ Thus, the connection between the power to control behavior and physical location is tenuous.²⁷⁷ This conclusion is best illustrated by the fact that a person with an Internet address can physically remove his or her portable notebook to another physical territory without changing his or her address or the procedure by which he or she logs on.

Efforts to stop or control the flow of information crossing a particular governing body’s territorial borders arise out of fear of losing control over the transactions which occur within a sovereign’s borders.²⁷⁸ On the other hand, such efforts infringe the *290 privacy of citizens, upset property interests in information, and impede the free flow of communications.²⁷⁹ Cyberspace, in this sense, magnifies the tension between democratic principles, such as those embodied in the Bill of Rights and its

penumbras, and the need for laws that maintain social order, protect individual and commercial interests, and promote economic stability.

2. Proposals for New Legal Regimes

a. Law Cyberspace

A number of legal scholars have proposed that cyberspace be regulated the same way the flow of concrete commerce is regulated. I. Trotter Hardy, a professor of law at the Marshall-Wythe School of Law at the College of William and Mary, has likened the development of customary rules in cyberspace to the medieval Law Merchant.²⁸⁰ Hardy argues that the rise of the Law Merchant paralleled the growth of international commerce as a supplement to the laws of the particular jurisdiction in which a trade fair was held.²⁸¹ Special merchant courts evolved to resolve disputes arising in commercial transactions, the judges for which were chosen on a merit-seniority basis from the merchants' own ranks.²⁸² Speedy resolution gave the Law Merchant an advantage over national systems of law in coordinating trade activities across ***291** regional boundaries among diverse groups of traders.²⁸³ The Law Merchant thus served as a method for controlling behavior by binding merchants to reasonable commercial standards, mercantile values, and interests that were expedient to trade.²⁸⁴

Hardy suggests that the parallels between medieval trade and cyberspace are strong.²⁸⁵ In cyberspace, like the Law Merchant's milieu, diverse groups of users interact freely and transactions occur between strangers; the practicality of advance contractual relations is thus impaired.²⁸⁶ Hardy believes a "Law Cyberspace" that handles transactions that frequently cross national borders and implicate different bodies of governing laws would be most practical and efficient.²⁸⁷

The Law Merchant was not without its problems, though. Over time, diversity arose in trade practices, adjudicative values, general economic conditions, backgrounds, attitudes, and needs of the different trade communities.²⁸⁸ In addition, the influence of local customs or cultural preferences for domestic solutions, created a growing mistrust of the Law Merchant.²⁸⁹ Although early cyber-space might have shared some of the characteristics of the medieval merchant trade--a homogenous community of scientists and researchers with similar goals and interests--today's cyberspace is already full of producer/consumers with diverse backgrounds, needs, and cultural values, which makes the possibility of reproducing such a system tenuous. The question of whose customs prevail, especially since competing customs have already developed, is a political question which begs juridical solutions. Leaving it solely to the market is likely to produce the same serious inequalities that arose under laissez-faire constitutionalism at the turn of the century.

David Post and David R. Johnson, Co-Directors of the ***292** Cyberspace Law Institute, suggest that cyberspace should be treated as a jurisdiction unto itself, wherein distinct "cyberlaws" apply.²⁹⁰ Entry into cyberspace is never inadvertent; there is a line (comprised of a computer screen and password boundary) that separates activities in cyberspace from those in realspace.²⁹¹ Because individuals must deliberately cross the electronic boundary into cyberspace, they are effectively on notice that they have entered a new jurisdiction in which new laws apply.²⁹² The ultimate question of who should establish the rules in cyberspace still remains unanswered. Post and Johnson suggest that regulatory structures like the "terms of service" established by commercial service providers would provide adequate guidance about appropriate behavior to users who venture into their systems.²⁹³

Although it is likely, as Post and Johnson suggest, that conceiving of cyberspace as a separate place for purposes of legal analysis would simplify the promulgation of rules, the enforcement and deterrence problems remain. The type of regime suggested by Hardy, Post, and Johnson currently operates in cyberspace and employs a system-level boundary model. In his comment, Property in Cyberspace, Harold Smith Reeves discusses this model and two others: the open-system model and the individual-level boundary models.²⁹⁴

The current system-level boundary model uses "firewalls" to exclude others from private computer systems and individual areas within systems.²⁹⁵ Under this model, the system administrator regulates both the external and internal firewalls and possesses the discretionary authority to monitor access in order to protect his or ***293** her domain.²⁹⁶ Reeves argues that this system-level approach may not be the best method for protecting property in cyberspace, however, because the consequences of actions are unpredictable and difficult to measure in the space beyond a particular system.²⁹⁷

Reeves next raises the possibility of employing an “open-system” model, in which legal rules would focus on the motivations for and consequences of actions rather than on the “property” boundary crossed.²⁹⁸ Although this system seems to be the preferred model of many current Internet scholars, Reeves points out that the inconsistent decisions that would result would not provide clear rules for behavior and regulating activity in cyberspace.²⁹⁹ As an alternative, Reeves describes a system in which individual users establish boundaries, based on their choice to exclude or welcome others.³⁰⁰ Such a model, however, would only amplify the problems Reeves notes in the open-system model.

The system-level boundary model, currently reflected in federal privacy and security laws, such as the Electronic Communications Privacy Act of 1986³⁰¹ and the Computer Fraud and Abuse Act of 1986,³⁰² has several advantages over both the open-system model and the individual-level boundary model.³⁰³ Adoption of penalties, however, would still need some formalization.

While self-regulatory systems such as Reeves’s systems-level boundary model, in which system administrators patrol the virtual borders, might have worked well when Cyberia was a smaller, more homogeneous “society,” the population of this virtual republic has now surpassed forty million new-age travelers.³⁰⁴ The *294 informal, common understanding which previously prevailed among those navigating in cyberspace can no longer reliably control behavior.³⁰⁵

b. Contract Law in Cyberia

Robert Dunne, of Yale University, argues that contract law principles have advantages over a criminal law paradigm in controlling the behavior of online users.³⁰⁶ Dunne would appoint system administrators as “judges” who would determine the fate of users who violate a “model code of network conduct,” which enumerates offenses and penalties.³⁰⁷ Only those providers and host sites formally endorsing the code of conduct would be permitted into this realm. Users would be required to register their names and enter into a formal agreement, promising to abide by the code.³⁰⁸

In this contractually-based realm, system administrators would examine the evidence of attempted unauthorized access and impose penalties ranging from probation to banishment. Dunne maintains that this would initially result in many “convictions” and withdrawals of privileges that would serve as a deterrent to subsequent user violations.³⁰⁹ Dunne argues further that this contractual model overcomes most of the practical problems in enforcing realspace laws in cyberspace, such as: jurisdiction (the individual user would be subject to the “police power” of the jurisdiction of his or her local site); proving intent (for example, creating a rebuttable presumption that three or more unsuccessful log-ins is evidence of attempted unauthorized access); law enforcement (a special cyberpatrol force would not be necessary, since system administrators can already monitor use); and courts *295 (no surge in caseload for realspace courts and no problem of lack of technical expertise on the part of jurists and jurors).³¹⁰ Dunne argues that if hackers faced the threat of banishment from this large state in Cyberia, most mischievous hacking would be curtailed.³¹¹

Dunne concedes that the use of a contract paradigm will not stop all undesirable activity in cyberspace. He contends, however, that it will deter misbehavior and low-level criminal activity in much the same way as the criminal law paradigm deters undesirable behavior in realspace.³¹² Such a solution might be viewed as a step up from a Wild West, self-help mentality.³¹³ Moreover, because users already enter into an agreement of sorts when they subscribe to a particular service or system, a contract paradigm would engender low transaction costs and would preserve users’ choice among the various degrees of control offered by different providers.³¹⁴

The large commercial service providers already contain contract mechanisms for users, who must agree to fixed usage terms and rates. Thus, the addition of a requirement that users adhere to an agreement specifying proscribed and acceptable conduct would not be difficult to implement.³¹⁵ Similarly, universities and other institutional entities with intranets could also incorporate such an agreement into employment contracts or policies and into student policies.³¹⁶

At present, the security of users navigating in cyberspace is far from ensured. A contract solution for low-level illicit behavior would, however, address many of these concerns when combined with existing criminal sanctions for high-level security crimes. The issue of proprietary rights of “authors” in cyberspace, however, is still largely contested territory.

***296 3. Implications for Democracy, the First Amendment, and Copyright in the Technological Revolution**

The new information technologies are not simply tools or communications devices, but are components of a new cultural space with radical implications for the future of the First Amendment.³¹⁷ With every user a potential producer, publisher, and distributor of information in cyberspace, as well as a consumer, serious political questions about how best to facilitate participation become nearly as critical as the questions faced by the Framers regarding participation in the political economy. A significant difference, however, is the heterogeneity of the potential polity of Cyberia, in terms of how participating citizens secure their survival needs, and particularly in terms of gender, race, and ethnicity. It is just possible that the physical distinctions that have delineated class in American society (i.e., gender and color) will be rendered moot in Cyberia. Still, however, because computers are the gateways through which individuals enter cyberspace, and using computers requires some skill and knowledge, the costs involved might serve as economic barriers.

One of the more promising aspects of Cyberia is the potential for increased active discourse, rather than the inconsistent, passive participation which has become the norm since voting became the primary means of political participation.³¹⁸ Niva Elkin-Koren, a law professor at University of Haifa School of Law, argues for a model of deliberative, rather than liberal, democracy; the latter is a narrow view of politics as democratic institutions, while the former sees ideal politics as primarily “discursive will formation processes.”³¹⁹ In such a system, preferences, interests, and identities would no longer be shaped by the political process; rather, an ongoing transformative dialogue concerning the preferences and needs of individuals is the process.³²⁰ The *297 flexibility and interactivity afforded in cyberspace greatly enhance the possibility of access to relevant information and, thus, the possibility of conducting this ongoing transformative dialogue.³²¹ Present barriers to political participation, such as distance and distribution costs, or the screening process whereby editors and publishers determine which ideas are worthy of being heard, would be eliminated.³²²

Although transformative dialogue is a worthy democratic goal, the risk of uncontrolled copying or adaptation, or of exploiting the mental and creative labor of authors in cyberspace, presents a problem in such a vast domain. Another problematic aspect of Cyberia is the increased threat to creators’ ability to control the use or abuse of their creative works. Musical and visual creations, as well as writings, can be transmitted through cyberspace in much the same way those works can be sent through the mail or over radio or television.

No new problems concerning the copyrightability of these works should arise, since it is only the mode of transportation that has changed, not the work’s format.³²³ Copyright infringement, however, presents some difficult problems in cyberspace. A copyright owner claiming infringement usually targets the individual who copied and distributed the work. This individual is usually a public entity, such as a newspaper or book publisher, and is thus easy to identify and clearly separable from the ultimate consumer.³²⁴ In cyberspace, however, the copier, distributor, and consumer are likely to be the same individual.³²⁵ If the work happens to be made available without authorization on a bulletin board or network, the copyright owner’s task of discovering and *298 combating the infringement would engender high opportunity costs, which might stifle the incentive to use the Internet.³²⁶ Jane C. Ginsburg proposes two complementary approaches: a collective licensing approach, similar to that used by composers and publishers of musical works, and strict liability for system operators who allow unauthorized dissemination.³²⁷

In cyberspace, Ginsburg argues, a copyright licensing collective might have the responsibility of monitoring bulletin boards and networks for unauthorized postings.³²⁸ Monitoring all of these sites might be impractical, however, because cyberspace is so vast and changeable.³²⁹ Instead, each bulletin board system and network operator would be in a better position to monitor and control her own jurisdiction, i.e., her own system.³³⁰

The second approach, strict liability for system administrators where copyright infringement has occurred, is more controversial. The viability, and even the constitutionality, of such an approach is questionable in light of recent developments in the law. In 1996, Congress passed the Communications Decency Act (“CDA”), two provisions of which sought to protect minors from harmful materials on the Internet.³³¹ One section criminalizes the “knowing” transmission of “obscene or indecent” messages to any recipient “under 18 years of age.”³³² Another section prohibits the “knowing” transmission or display to a person under 18 of any message “that, in context, depicts or describes, in terms patently *299 offensive as measured by contemporary community standards, sexual or excretory activities or organs.”³³³

The Act also provides affirmative defenses for those who take “good faith, . . . effective. . . actions” to restrict access by minors to prohibited materials,³³⁴ and those who restrict access by requiring proof of age, such as a verified credit number or an adult identification number.³³⁵ The former affirmative defense was provided specifically to supersede a New York trial

court's finding in *Stratton-Oakmont, Inc. v. Prodigy Services Co.*³³⁶ that bulletin board system operators purporting to exert some editorial control over their system are publishers, rather than distributors, and are thus held to a strict liability standard.³³⁷

Immediately after President Clinton signed the statute into law on February 8, 1996, twenty plaintiffs³³⁸ filed suit against United States Attorney General Janet Reno. The plaintiffs challenged the constitutionality of sections 223(a)(1) and 223(d) and requesting a temporary restraining order enjoining the federal government from enforcing those provisions the plaintiffs found vague and *300 overbroad.³³⁹ The plaintiffs further claimed that the provisions might have a chilling effect on constitutionally protected communications on the Internet.³⁴⁰ A federal district judge issued a temporary restraining order against enforcement based on his conclusion that the term "indecent" was too vague.³⁴¹

Another twenty-seven plaintiffs³⁴² filed a second, similar suit, and the two cases were consolidated and heard before a three-judge District Court panel convened pursuant to a provision under the Act.³⁴³ The unanimous panel granted the preliminary injunction against enforcement and held that the CDA was unconstitutional on its face.³⁴⁴ On June 26, 1997, the Supreme Court of the United *301 States affirmed the District Court's ruling that the challenged provisions of the Act were facially overbroad and vague in violation of the First Amendment.³⁴⁵

The significance of the Court's ruling has many dimensions, not the least of which is that the Internet will continue to enjoy broad speech protections because of its unique characteristics.³⁴⁶ After its extensive fact-based summary of how the Internet serves as an unfettered marketplace of ideas,³⁴⁷ the Court examined earlier cases that "recognized special justifications for regulation of the broadcast media that are not applicable to other speakers."³⁴⁸ In the earlier cases, the Supreme Court had relied on the history of extensive government regulation of the broadcast medium;³⁴⁹ the scarcity of available frequencies in the early years of broadcast;³⁵⁰ and the invasive nature of the medium.³⁵¹ The Court found that "[t]hose factors are not present in cyberspace," and, more specifically, that the "democratic fora of the Internet" have never *302 been subject to the type of regulation that has been applied to the traditional broadcast industry; the conditions present when Congress first regulated the broadcast spectrum, i.e., the scarcity of available frequencies, are not present in the Internet; and the Internet is not as invasive as radio and television.³⁵² The Court concluded that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."³⁵³ In so concluding, the Court reaffirmed the principle that content-based speech regulations cannot be applied to any medium without impeding the free exchange of ideas, which "in a democratic society outweighs any theoretical but unproven benefit of censorship."³⁵⁴

Conclusion

As the United States stands poised to enter the twenty-first century, its citizens are only at the beginning of a philosophical reaction to a brave new world with no concrete borders or logical ties to the geographical jurisdictions that set the legal limits on the behavior of their inhabitants.³⁵⁵ Scholars, legislatures, and courts have begun to reconsider the worth of doctrines that might be logical in realspace but defy practical application in cyberspace.³⁵⁶ Much as the technological advances in the nineteenth century transformed the social, political, and economic structures of American society,³⁵⁷ electronic, digital communications technology is transforming the manner in which commerce is conducted, people interact, and information is disseminated.³⁵⁸

Oliver Wendell Holmes, Jr. exposed the fallacy that the law is a body of truths external to reality and charged the legal community *303 with conducting a scientific evaluation of legal doctrines crafted in a society that no longer existed.³⁵⁹ While Holmes often personally disagreed with the results of legislative action, he nevertheless applauded the efforts of state legislatures' experiments with policies designed to protect the privileges of citizens and to correct the serious imbalances caused by both technological and organizational change and the rapid growth of corporations in the years following the Civil War.³⁶⁰ At the same time, he admonished his colleagues for inventing doctrines to protect instrumentalities that no longer played the significant role they once did.³⁶¹

Although the words "property" and "contract" do not take center-stage in the original Constitution, nineteenth-century courts invested both words with a significance far beyond that contemplated by the Framers of the Constitution. At the dawn of the United States, property and contract were but tools for securing the resources that were necessary for subsistence; autonomous control over those resources is the fundamental right coexistent with life and liberty.³⁶² Today, a variety of tools is necessary for securing survival resources. One of these tools--the information infrastructure--grows more important as our

society moves toward an information-based economy.

Legislatures, universities, and private enterprise today have already begun experimenting with ways in which to promote access to the global information infrastructure and to control the behavior of the new “citizens” of Cyberia who venture into this borderless domain.³⁶³ Scholars, scientists, and lawmakers have contributed to the reconsideration of doctrines and have proposed a number of possibilities for the type of paradigm cyberspace requires.³⁶⁴ What happens in the future, however, will depend, in part, on how the courts determine which bodies of government possess the authority over activities in cyberspace and whether the laws created by those bodies protect the rights of citizens.

An activist Supreme Court, for example, might look unfavorably on requirements pressed on private enterprise designed to promote universal access, much like the activist Court from the 1890s to the late 1930s second-guessed the wisdom of legislatures trying to cope with dire economic imbalances and invalidated legislation designed to promote access to a living wage.³⁶⁵ Alternatively, a Court dominated by textualists, such as Justice Scalia, might not find the protection afforded “property” in the Constitution merely to be the historical expression of the fundamental right to secure one’s subsistence needs, nor might it find a constitutional grant of authority to Congress to regulate cyberspace, which was surely not contemplated by the Framers. However, because of the global nature of cyberspace, Congress’s authority under the Commerce Clause, and through the basic notion that the nation is the sovereign unit in international affairs,³⁶⁶ the Court should not find such regulation problematic where fundamental civil liberties are not impaired.

There can be no doubt that we must react philosophically to the sea change called cyberspace. Just as thinkers and scholars at the turn of the twentieth century contemplated the broader implications of the changes wrought by technological advances and the reorganization of power structures into corporate forms, and were instrumental in crafting new public policies that better reflected these changes,³⁶⁷ the citizens of Cyberia at the brink of the twenty-first century can still have a voice in shaping the future of e-law. Perhaps our own system of federalism will provide the model for a global union of independent nations navigating the democratic information superhighway, interacting in the Republic of Cyberia.

Footnotes

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¹ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457 (1897), reprinted in *The Essential Holmes* 160, 169 (Richard A. Posner ed. 1992).

² Railroads, telegraphy, electrification, and other nineteenth-century technological advances revolutionized social, political, and economic relationships in the United States. For a thorough analysis of the development of the railroad and telegraphy and their impact on the political economy, see generally Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (1977). Chandler argues that railroads, as the first modern business enterprises, became the model for other developing transportation and communication activities, which together comprised the “infrastructure of a modern advanced economy.” *Id.* at 188. Railroads provided rapid and reliable transportation needed by industries that employed emergent production and distribution techniques, in addition to the right-of-way for telephone and telegraph lines. Railroads, therefore, provided a means by which to modernize the postal system and helped to establish a working model for the development of modern corporate capitalism. See *id.* at 79-80, 188. See also David E. Nye, *Electrifying America: Social Meanings of New Technology* (1992) for a discussion of the political and social upheavals that accompanied the public policy responses to the development of the electrical infrastructure.

³ See generally Frederick Jackson Turner, *The Significance of the Frontier in American History*, in *The Frontier in American History* 1-38 (collected essays 1947) (1893).

⁴ See *infra* notes 46-84 and accompanying text.

⁵ Railroads were forming the backbone of American industry. See, e.g., Chandler, *supra* note 2, at 188. The railroads, at the center of a rapidly growing transportation and communication infrastructure, contributed the following: all-weather transportation that

facilitated modern mass distribution and production; the development of the modern postal system; coordinated operation of domestic shipping lines; stations used as hubs in new urban traction systems; and the model for other new forms of transportation and communication, such as steamship lines, the telegraph, and local and long-distance telephones. See *id.* at 188-89.

⁶ The term “cyberspace” appears to have been coined by science fiction author William Gibson in his novel *Neuromancer*. See Edward A. Cavazos & Gavin Morin, *Cyberspace and the Law: Your Rights and Duties in the On-Line World I* (1994). The Internet is one “area” in cyberspace; private bulletin boards services (“BBSs”), corporate networks (sometimes referred to as intranets), and commercial online services are other areas which may or may not be connected to the Internet. See [William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 Wake Forest L. Rev. 197, 200 \(1995\).](#)

⁷ See Byassee, *supra* note 6, at 201.

⁸ The Federalist No. 10, at 43-44 (James Madison) (Bantam Classics 1988).

⁹ John Locke, *Two Treatises on Government* 196-97 (The Classics of Liberty Library 1992) (1698).

¹⁰ *Id.* at 197.

¹¹ In addition, it has been argued that Thomas Jefferson, in crafting the Declaration of Independence, rejected Locke’s standard liberal formulation of “life, liberty, and property,” and adopted in its place “life, liberty, and the pursuit of happiness,” because Jefferson did not view property as an inalienable right, only as an instrument for securing fundamental subsistence needs. See Gary Wills, *Inventing America* 229-39 (1978). Autonomous control over this instrument would keep men virtuous by giving them a stake in the political economy. See *id.*

¹² See generally Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 53-65 (1969).

¹³ See generally Paul W. Gates, *History of Public Land Law Development* (1968). Except in New England, colonial Americans usually became landowners through the headright system. See *id.* at 35. Before 1618, for example, Virginia’s headright system allowed each person who came to the colony, and lived there for three years, 100 acres in fee simple title. See *id.* This system, however, was fraught with abuses, despite attempts throughout the eighteenth century to reform it. See *id.* at 36. Gates further notes that most colonial Americans sought land outside the urban centers primarily for development of productive farms. See *id.* at 38. In response to the problems which arose when speculators and squatters presented competing land claims, the Virginia legislature enacted an adverse possession law in 1646, which provided for forfeiture upon failure to improve land within a specified time period. See *id.* at 38-39.

¹⁴ See Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 *Buffalo L. Rev.* 635, 646-47, 664-65 (1982).

¹⁵ See Morton J. Horwitz, *The Transformation of American Law 1780-1860*, at 63-64 (1977).

¹⁶ See generally, J.E. Crowley, *This Sheba, Self: The Conceptual-ization of Economic Life in Eighteenth-Century America* 101-10 (1974).

¹⁷ Before, during, and after the Revolutionary War, personal virtue and individual rights remained dependent upon property ownership; essentially, loss of title was tantamount to losing one’s political liberty and personal identity. See Joan Hoff, *Law, Gender, and Injustice* 49-50 (1991).

¹⁸ “Men,” as used throughout this paper, is a gender-based description of American persons “born or naturalized in the United

States.” U.S. Const. amend. XIV, § 1 (defining “citizen”). By social custom, men could own land, hold office, serve on juries, bring suit in their own names, and vote; women and slaves could not. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973); Hoff, *supra* note 17, at 22 (arguing that because the assumptions underpinning the liberalism upon which our legal system was built manifested a gendered social construct of reality, the legal system and the political economy masked patriarchal notions of power relationships as immutable truths or “functional ‘givens’” in denying women and minorities full citizenship rights until as late as the 1960s).

¹⁹ See generally Leo Kanowitz, *Women and The Law: The Unfinished Revolution* 5-6 (1969). To the Whigs, those who did not own property did not “have a will of their own,” and they were thus believed to be incapable of exercising consent. Wood, *supra* note 12, at 168. Denying those property-less individuals suffrage, therefore, did not violate the principle of consent of the governed. See *id.* at 169.

²⁰ See, e.g., Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* 67-68 (1980). McCoy asserts that Revolutionary Americans believed that every man had a right to productive property because every man “was entitled to autonomous control of the resources that were absolutely necessary for his subsistence.” *Id.* at 68. This fundamental right to secure one’s survival needs was almost exclusively tied to real property in the agrarian Revolutionary society and, thus, formed the basis for declarations of rights tying property to the fundamental guarantees of life and liberty. See *id.*

²¹ Today, rationality is generally viewed in terms of demonstrated behavior. This particular view of rationality, however, was apparently an arbitrary, gender-based and race-based distinction at the time of the Founding, in that only men were considered to be capable of rational action in the political economy, because only they could own property and enter into contracts. Since women and slaves were arbitrarily prohibited from owning property or from entering into contracts, they were considered to lack the capacity for rational behavior. In this context, then, rationality is merely a code word for being white and male, which has little, if any, relation to how persons actually behaved or thought.

²² Madison, *supra* note 8, at 44.

²³ See *id.*

²⁴ *Id.*

²⁵ *Id.* at 45.

²⁶ *Id.*

²⁷ For a comprehensive discussion of the historical development of property law in America, government land surveys and grids, and the systematization of the process of property transfer by surveyed deed, see generally John Opie, *The Law of the Land: Two Hundred Years of American Farmland Policy* (1989).

²⁸ Homestead Act of 1862, 12 Stat. 392 (1862).

²⁹ Land bounties promised to soldiers of the Continental Army and state militias exemplify these governmental land-grant policies. See generally Gates, *supra* note 13, at 59. These bounties led to the creation, in 1785, of the million-acre United States Military Tract, the distribution of which provided no revenue to the United States. See *id.* at 68. In 1796, Congress authorized the public auction of all public lands, and in 1800, authorized the private sale of all land unsold after auction, at a minimum of two dollars an acre. See *id.* at 126-27. In 1820, however, the minimum price for sale of “offered” lands dropped to \$1.25 per acre. See *id.* at 127. In order to encourage these land sales, Congress extended credit to purchasers. See *id.* at 131. Up until 1870, Congress made land grants for railroads and internal improvements to states and private corporations, with the result that more than 176 million acres were given away by Congress and the states. See *id.* at 379-81. The Homestead Act of 1862 entitled every citizen, who was either a head of household or had reached the age of twenty-one, to claim 160 acres of surveyed land for a mere ten dollar filing fee, title of

which was to pass upon proof of residence and improvement within five years. See *id.* at 394-95.

³⁰ . See generally Eli Zaretsky, *Capitalism, the Family, and Personal Life* (1976). Zaretsky describes the early bourgeois family as a “little commonwealth,” which was a “self-contained production unit,” an ideal which “obscured two contradictions... the oppression of women and the family’s subordination to class relations.” *Id.* at 39, 44.

³¹ Wives are included in this category of chattel property because the laws treated them no differently than such property. This type of gender-based discrimination, which enjoyed a “long and unfortunate history” in the United States, was “rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.” *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). The paternalistic attitude prevalent in the United States, at least through the nineteenth century, is reflected in the following statement from the majority opinion in *Bradwell v. Illinois*: “Man is, or should be, women’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.” 83 U.S. 130, 141 (1872).

Consider additionally William Blackstone’s work, which was a mainstay of legal authority in America both before and after the Revolution. See 1 William Blackstone, *Commentaries on the Laws of England* (Thomas M. Cooley, ed., 2d ed. 1872) (1765). Blackstone made the following comments on “The Principle of the Unity of Husband and Wife”:

By marriage, the husband and wife are one person in law:... that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a *feme-covert*... or under the protection and influence of her husband, her baron, or lord...

But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion.

Id. at 441, 443-44.

³² See, e.g., Letter from Benjamin Franklin to Robert Morris (Dec. 25, 1783), in Benjamin Franklin, *Writings 1079* (Library of America 1987):

All Property, indeed,... seems to me to be the Creature of public Convention. Hence the Public has the Right of Regulating Descents, and all other Conveyances of Property, and even of limiting the Quantity and the Uses of it. All the Property that is necessary to a Man, for the Conservation of the Individual and the Propagation of the Species, is his natural Right, which none can justly deprive him of: But all Property superfluous to such purposes is the Property of the Publick, who, by their Laws, have created it, and who... therefore by other Laws dispose of it, whenever the Welfare of the Publick shall demand such Disposition. He that does not like civil Society on these Terms, let him retire and live among Savages. He can have no right to the benefits of Society, who will not pay his Club towards the Support of it.

Id. at 1081-82.

³³ See generally James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights 11-18* (1992); Mensch, *supra* note 14, at 660-91.

³⁴ See Ely, *supra* note 33, at 26-29.

³⁵ . See, e.g., Robert A. Gross, *The Minutemen and Their World* (1976). Gross asserts that an impending shortage of land as early as the 1720s in Concord, Massachusetts, posed a threat to traditional family life. See *id.* at 78. Since a farmer’s children were his basic labor resource, seventeenth and early-eighteenth century patriarchs found it economically necessary to delay their sons’ independence by exploiting control over the eventual distribution of the family’s property legacy. See *id.* When family farms had been subdivided over a number of generations, however, a father could convey a property legacy to his sons only if he invested in speculative property on the Western “frontiers,” which in the early eighteenth century was about thirty miles from Concord. See *id.* at 78-79. Middle-aged men of the Post-Revolutionary era could no longer “continue the family political dynasty in [[[their] own right nor assure [their] son’s fortunes in the world.” *Id.* at 181.

³⁶ The freeholder statesmen, who were members of the social and economic elite, provided the philosophical and moral justifications for the Revolution. They felt themselves and their positions threatened by the “majoritarian tyranny” of the rising mercantile interests. See Wood, *supra* note 12, at 411-13.

- ³⁷ See, e.g., Madison, *supra* note 8, at 49 (asserting that “a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project” would be less likely to pervade the politics of a large body of government, and, thus, the Federalist “remedy for the diseases most incident to Republican Government” in the form of a national Union would best overcome the evils of faction).
- ³⁸ See Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 5 (1990).
- ³⁹ See *id.* at 6.
- ⁴⁰ See *id.*
- ⁴¹ Although property rights were established in order to promote the general political economy, the primacy of individual property rights developed later. See Wood, *supra* note 12, at 61.
- ⁴² See James Madison, *Notes of Debates in the Federal Convention of 1787* (W.W. Norton 1987). Life and liberty were generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property was the main object of Society. The savage State was more favorable to liberty than the Civilized; and sufficiently so to life. It was preferred by all men who had not acquired a taste for property; it was only renounced for the sake of property which could only be secured by the restraints of regular Government.... If property then was the main object of Govt. [sic] certainly it ought to be one measure of the influence due to those who were to be affected by the Governmt [sic].... Property was certainly the principle object of Society.
Id. at 244-45.
In addition to property in the form of land, other provisions of the Constitution are related to other property interests. Congress has the power to “coin Money, regulate the Value thereof,” *U.S. Const. art. I, § 8, cl. 5*; to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States,” *U.S. Const. art. I, § 8, cl. 6*; to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” *U.S. Const. art. I, § 8, cl. 8*; and “[t]o establish... uniform Laws on the subject of Bankruptcies throughout the United States,” *U.S. Const. art. I, § 8, cl. 4*. Congress is also barred from enacting bills of attainder and from levying export duties or taxes, see *U.S. Const. art. I, § 9, cl. 3, 5*, and from declaring a forfeiture of property for treason “except during the Life of the Person attainted,” *U.S. Const. art. III, § 3*.
The Constitution additionally circumscribes the power of the states with respect to property, prohibiting states from levying taxes on imports and exports, exacting bills of attainder, issuing bills of credit, or impairing the obligation of contracts. See *U.S. Const. art. I, § 10, cl. 1-2*. Finally, the fugitive slave clause provided that any person “held to Service or Labor... shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” *U.S. Const. art. IV, § 2, cl. 3*, repealed by *U.S. Const. amend. XIII*.
- ⁴³ *U.S. Const. amend. V*; see also Ely, *supra* note 33, at 52-55; William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L.J.* 694, 708-12 (1985).
- ⁴⁴ See Nedelsky, *supra* note 38, at 7-8.
- ⁴⁵ See *id.* at 8.
- ⁴⁶ . See Hoff, *supra* note 17 and accompanying text; see also Wood, *supra* note 12, at 52 (arguing that “[f]rugality, industry, temperance, and simplicity--the rustic traits of the sturdy yeoman”--comprised the character and spirit which made “republics great or which ultimately destroyed them”).
- ⁴⁷ G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, at 119 (1991).
- ⁴⁸ See, e.g., *infra* notes 49-53 and accompanying text.

⁴⁹ [10 U.S. \(6 Cranch\) 87 \(1810\)](#).

⁵⁰ See [id.](#) at 132-37.

⁵¹ See Nedelsky, *supra* note 38, at 194.

⁵² *Id.* at 195.

⁵³ The Federalist No. 78, at 393 (Alexander Hamilton) (Bantam Classics 1988).

⁵⁴ See Nedelsky, *supra* note 38, at 197-98. Nedelsky argues:
When an issue is designated as law, it is insulated not only from the clashes of politics, but from the attention of public debate. First, the language of the law is inaccessible in its technicality. More importantly, it is the language of individual rights, of neutral, immutable principles. It hides the assumptions, values, and judgments about the nature of the good society which underlie the conception of rights. It obscures the decision to designate some issues as rights and other as mere interests. The language of law takes these assumptions as given and replaces debate on them with the fine points of rule application.
Id. at 198.

⁵⁵ Ely, *supra* note 33, at 80 (quoting James Kent, 2 Commentaries on American Law 1 (O.W. Holmes, Jr. ed., 12th ed. 1873)).

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.* For an example of this dichotomous view, compare the monopoly rights created under [U.S. Const. art. I, § 8, cl. 8](#) (granting Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”), with the preference for broad access to information in [U.S. Const. amend. I](#) (denying Congress the power to “abridg[e] the freedom of speech, or of the press”).

⁵⁹ [33 U.S. \(8 Pet.\) 591 \(1834\)](#). Ironically, this case involved the copyright of Supreme Court opinions. Henry Wheaton, a Supreme Court reporter, did not have a statutory copyright; the Court found that his successor, Richard Peters, could reprint Wheaton’s work without compensating him. See [id.](#) at 594-95. The Court held that an author could not rely on the common law to perpetually and exclusively protect his literary property; it could only be protected under the federal copyright statute. See [id.](#) at 659-62. The Court additionally found that no reporter could secure a copyright in the written opinions of the Court. See [id.](#) at 668.

⁶⁰ See Ely, *supra* note 33, at 80.

⁶¹ [60 U.S. \(19 How.\) 393 \(1856\)](#).

⁶² See *id.* at 614-15, 632-33.

⁶³ [U.S. Const. amends. XIII, XIV, XV](#).

⁶⁴ [18 U.S.C. § 1983 \(1868\)](#).

- ⁶⁵ U.S. Const. amend. V (guaranteeing that no private property may be taken “for public use, without just compensation”).
- ⁶⁶ 83 U.S. (16 Wall.) 36 (1872).
- ⁶⁷ See *id.* at 90, 110 (unnumbered footnote) (Field, J., dissenting).
- ⁶⁸ 83 U.S. (16 Wall.) 130, 140-41 (1872) (Bradley, J., concurring) (finding no commensurable protection for women).
- ⁶⁹ See *id.* at 141-42.
- ⁷⁰ 88 U.S. (21 Wall.) 162, 178 (1874) (finding that the privileges and immunities guaranteed by the Fourteenth Amendment did not include suffrage; therefore, states were free to extend that “important trust” to men alone).
- ⁷¹ See *supra* notes 9-11 and accompanying text.
- ⁷² U.S. Const. amend. XIV, § 1.
- ⁷³ *Id.*; see, e.g., *United States v. Anthony*, 24 F. Cas. 829 (N.D.N.Y. 1873) (No. 14,459). Susan B. Anthony, arrested for exercising a voting right not extended to women, referred the trial court to the experience of those who broke the law by escaping slavery or by helping black Americans escape the tyranny of slavery, and argued, [a]s then, the slaves who got their freedom must take it over, or under, or through the unjust forms of law, precisely so, now, must women, to get their right to a voice in this government, take it; and I have taken mine, and mean to take it at every possible opportunity. *United States v. Anthony*, 24 F. Cas. 829 (record), reprinted in 1 *Women in American Law*, at 202-04 (Marlene Stein Wortman ed. 1985).
- ⁷⁴ See *supra* note 31 and accompanying text.
- ⁷⁵ An example of these changes is the emergence of, and constitutional protections afforded to, the corporation, which is not property per se, but an organization of individuals, whose “owners”, i.e., stockholders, are granted a property right. Increasingly during the late nineteenth century, the Court began to view a fair return on capital investment as among the fundamental property rights protected by the Constitution. See, e.g., *Smyth v. Ames*, 169 U.S. 466, 547 (1898).
- ⁷⁶ See *McCoy*, *supra* note 20, at 67-68.
- ⁷⁷ 83 U.S. (16 Wall.) 36, 90 (1872) (Field, J., dissenting) (finding that “[t]he abolition of slavery and involuntary servitude was intended to make every one born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor”). The irony in justifying the confinement of women to labor in the private, non-compensated, domestic sphere can be found in the contrast between the following passages of cases decided in the same term: the first, Justice Bradley’s concurring opinion in *Bradwell v. Illinois*, in which Justice Field joined; and the second, Justice Field’s dissenting opinion in *The Slaughter-House Cases*. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of the system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband’s consent, of making contracts which shall be binding on him or her. This

very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.

[Bradwell v. Illinois](#), 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

A prohibition to [the freeman] to pursue certain callings, open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude.

The [Slaughter-House Cases](#), 83 U.S. at 90-91 (Field, J., dissenting).

78 See, e.g., Treanor, *supra* note 43, at 699 (asserting that property ownership was a prerequisite of participation in the polity).

79 [U.S. Const. amend. XIV, § 1.](#)

80 [U.S. Const. amend. XIV, § 2.](#)

81 [U.S. Const. amend. XIX, §§ 1, 2.](#)

82 See generally Ely, *supra* note 33, at 82-100; David Schultz, [Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding](#), 37 *Am. J. Legal Hist.* 464, 489-90 (1993) (arguing that mercantile, interventionist policies prevailed at the Founding but were joined by Adam Smith's laissez-faire economic theory during the Jacksonian Era).

83 See generally C. Vann Woodward, *Origins of the New South, 1877-1913* at 180-84 (1951).

84 See generally Ely, *supra* note 33, at 82-100.

85 See generally Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 33-45 (1993). Gillman describes the economic condition at the time of the Founding in terms of the self-reliant farmers or artisan-craftsmen who owned their own tools, lands, or workshops and controlled virtually all areas of production. See *id.* at 39. The Industrial Revolution's introduction of new technologies, which brought about a factory system of production--new sources of fuel and expansion of markets--made ownership and control of production more expensive, resulting in "the emergence of the merchant-capitalist as employer in place of the master craftsman." *Id.* at 39-40 (citation omitted). As the market was increasingly price-driven, the yeoman or master craftsman found it more difficult to compete with lower-priced, mass produced goods. See *id.* at 40. During the Jacksonian age, "the first signs of discontent over the maturation of capitalist forms of production began to appear." *Id.*

86 [118 U.S. 394 \(1886\).](#)

87 [Id. at 396.](#)

88 See Chandler, *supra* note 2, at 83.

89 See *id.*

⁹⁰ See *id.* at 90.

⁹¹ See *id.* at 79-80.

⁹² See *supra* notes 84-85 and accompanying text; see also James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956). Hurst argues that the business “corporation was the most potent single instrument which the law put at the disposal of private decision makers.” *Id.* at 15.

⁹³ See, e.g., Horwitz, *supra* note 15, at 4.

⁹⁴ See, e.g., James Livingston, *Pragmatism and the Political Economy of Cultural Revolution, 1850-1940* (1994), particularly at 21-23.

⁹⁵ See generally Richard Hofstadter, *The Age of Reform* (1955). In addition to his general survey of the changes in political economy that resulted from industrialization, Hofstadter posits that because corporations became so large, individuals could not deal with them on equal terms. See *id.* at 247. As a result, they began to act in collective capacity through government and through private combinations, such as trade unions and farmers’ associations. See *id.*; see also Lawrence Goodwyn, *The Populist Moment* (1978) (discussing the flowering of the farmer’s revolt, which has been called the largest democratic mass movement in United States history); Virginia Sapiro, *The Gender Basis of American Social Policy*, in *Women, the State, and Welfare* 36 (Linda Gordon ed. 1990) (stating that in the last quarter of the nineteenth century, thousands of women attempted to actively promote the general welfare by becoming increasingly organized).

⁹⁶ See generally Martin J. Sklar, *The United States as a Developing Country: Studies in U.S. History in the Progressive Era and the 1920s* (1992). Sklar enumerates these developments among the long-term trends generally recognized as having distinctly emerged in the last decades of the nineteenth century and the first decades of the twentieth century. See *id.* at 39-40.

⁹⁷ See Wood, *supra* note 12, at 65-70.

⁹⁸ See, e.g., Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in Thomas Jefferson, *Writings* 918 (Literary Classics of the United States 1984). Jefferson, commenting on the benefits and drawbacks of the new Constitution, believed “our governments will remain virtuous for many centuries; as long as they are chiefly agricultural; and this will be as long as there shall be vacant lands in any part of America.” *Id.*

⁹⁹ This economic theory embraces laissez-faire, as well as the notion of separate private and public spheres. The former, to which women, children, and slaves were confined, entailed uncompensated, or indirectly compensated, labor; and the latter, which was comprised of men, was a realm in which labor had public exchange value. In addition, the concept of republican citizenship reinforced the inferiority of the private sphere by only granting representation, and thus a stake in the economy, to male heads of household. See Hoff, *supra* note 17, at 81, 117.

¹⁰⁰ See generally, Ely, *supra* note 33, at 80-91. Consider additionally [Plessy v. Ferguson](#), 163 U.S. 537, 548-49 (1896) (finding that laws preventing the commingling of the races did not infringe the civil or political rights of African-Americans); [Bradwell v. Illinois](#), 83 U.S. (16 Wall.) 130 (1878), discussed *supra* notes 31, 77; and [Dred Scott v. Sanford](#), 60 U.S. (19 How.) 393 (1857), discussed *supra* notes 61-62 and accompanying text.

¹⁰¹ Henry Adams, *The Education of Henry Adams* 375 (Houghton Mifflin 1961) (1918).

¹⁰² Holmes believed that in examining any law, one should look to the social history of the time in which it was enacted:

Everyone instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants. And when a lawyer sees a rule of law in force he is very apt to invent, if he does not find, some ground of policy for its base. But in fact some rules are mere survivals. Many might as well be different, and history is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old.... The true science of the law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition.

Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 *Harv. L. Rev.* 443 (1899), reprinted in *The Essential Holmes* 185, 191-92 (Richard A. Posner ed. 1992).

¹⁰³ For example, in the antebellum period, the courts upheld mercantilist policies adopted by the states to promote economic growth. See Ely, *supra* note 33, at 59. This practice often altered existing property relationships to accommodate new businesses and technologies, as well as policies regulating business and the use of private property. See *id.* The development of the liberty of contract doctrine, on the other hand, especially after the Civil War, placed limits on regulatory laws, while still promoting economic growth through unbridled private enterprise. See *id.* at 82-85.

¹⁰⁴ See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887) (sustaining a state prohibition law on the principle that the state, within its powers of police regulation, may enact such legislation on the grounds that public health, safety, and morals may be endangered by the use of intoxicating spirits, and that such legislation did not deprive citizens of constitutional rights); *Munn v. Illinois*, 94 U.S. 113, 126 (1876) (upholding an Illinois law requiring operating licenses and setting the maximum rates that grain warehouses and elevators could charge for storage of grain on the basis that grain elevators were “clothed with a public interest,” and, thus, owners “must submit to be controlled by the public for the common good”).

¹⁰⁵ See, e.g., *Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655, 662-63 (1875) (overturning a Kansas tax designed to help local industries as an “unauthorized invasion of [the] private right [of property which grows]... out of the essential nature of all free governments”); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870) (invalidating the Legal Tender Act of 1862, partially on the grounds that it deprived creditors of property without due process of law); *Wynehamer v. State*, 13 N.Y. 378 (1856) (striking down a law prohibiting the possession of liquor, on the basis that the due process guarantees of economic liberties and property rights were denied).

¹⁰⁶ The most famous case illustrating this form of constitutionalism, which is often characterized as substantive due process economic protectionism, is *Lochner v. New York*, 198 U.S. 45 (1905). A bare majority of the Court struck down a New York labor law limiting the hours bakers could work. Despite the fact that the New York legislature, before enacting the legislation, heard extensive testimony on the health problems experienced by bakers from inhaling flour dust, see *id.* at 69-71 (Harlan, J., dissenting), the Court found that the law “involves neither the safety, the morals nor the welfare of the public,” *id.* at 57. There was, thus, “no reasonable ground [for the state to interfere] with the liberty of person or the right of free contract,” *id.*, which was “part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution,” *id.* at 53. Holmes, dissenting separately, pointed out that the majority’s decision rested “upon an economic theory which a large part of the country does not entertain,” *id.* at 75 (Holmes, J. dissenting), and that “a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views....”, *id.* at 75-76.

Compare this conclusion with the Court’s decision in *Muller v. Oregon*, 208 U.S. 412 (1908), in which the Court unanimously upheld a state law limiting the workday for female industrial workers to ten hours per day, on the ground that long hours endangered the health of women. The only apparent difference in these results is that *Lochner* involved a male baker and *Muller* involved the female industrial worker, whose “physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.” *Muller*, 208 U.S. at 420 (emphasis added).

¹⁰⁷ See, e.g., *Vegelahn v. Guntner*, 44 N.E. 1077 (Mass. 1896). The Supreme Judicial Court of Massachusetts upheld an injunction against organized labor strikers restraining them from interfering with the plaintiff’s business by “patrolling” in front of the store. Justice Holmes, in dissent, noted that “[i]t is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast,

means an ever-increasing might and scope of combination.” *Id.* at 1081. Holmes believed this tendency was inevitable; when carried out in the also inevitable struggle between “the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return,” the combination of laborers “is the necessary and desirable counterpart [to consolidation of capital], if the battle is to be carried on in a fair and equal way.” *Id.*

¹⁰⁸ Anti-Trust (Sherman) Act, ch. 647, 26 Stat. 209, (1890) (codified as amended at [15 U.S.C. §§ 1-7, 15 \(1994\)](#)).

¹⁰⁹ [156 U.S. 1 \(1895\)](#).

¹¹⁰ See *id.* at 3.

¹¹¹ *Id.* at 12.

¹¹² [157 U.S. 429 \(1895\)](#).

¹¹³ *Id.* at 607.

¹¹⁴ [193 U.S. 197 \(1904\)](#).

¹¹⁵ Rough translation: the war of all against all (alluding to Thomas Hobbes’s *Leviathan*).

¹¹⁶ [193 U.S. at 411](#) (Holmes, J., dissenting).

¹¹⁷ See, e.g., I. Trotter Hardy, [The Proper Legal Regime for “Cyberspace,” 55 U. Pitt. L. Rev. 993, 996 \(1994\)](#) (observing that “all [[legal questions] involve human conflict”).

¹¹⁸ [Gompers v. United States, 233 U.S. 604, 610 \(1914\)](#).

¹¹⁹ In *The Path of the Law*, an 1897 Harvard Law Review article, Holmes wrote:
The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battlegrounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place.
Holmes, supra note 1, at 167.

¹²⁰ *Id.* at 170.

¹²¹ .Oliver Wendell Holmes, *The Common Law* (Mark DeWolfe Howe, ed. 1963) (1881).

¹²² *Id.* at 5.

¹²³ Id.

¹²⁴ In his chapter on “Early Forms of Liability,” Holmes wrote:
 A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.
 Id. at 8.

¹²⁵ [Towne v. Eisner](#), 245 U.S. 418, 425 (1918).

¹²⁶ 187 U.S. 606 (1903).

¹²⁷ Id. at 608. Holmes argued further that:
 [c]onsiderable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus. [[Rough translation: present always and everywhere].
 Id. at 608-09.

¹²⁸ Holmes’s dissent in [Lochner](#), discussed supra note 105, is illustrative of this position. Holmes insisted that whether or not a judge agreed with a particular economic theory should be irrelevant in determining the validity of laws, embodying the preferences of a majority, to regulate maximum hours. See [Lochner v. New York](#), 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
 It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

Id.

Holmes reiterated this position, again in dissent, in [Tyson & Brother v. Banton](#), 273 U.S. 418 (1927), a case in which the Court invalidated a New York law regulating ticket-scalping.

I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

Id. at 446 (Holmes, J., dissenting).

Holmes argued further that although lotteries were once considered useful means for raising state revenue, the current social order considered them immoral; the same was true of wine, which had “been thought good for man from the time of the Apostles until recent years.” Id. Thus, laws prohibiting certain activities were often enacted when public opinion changed, and “if the people of the State of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.” Id. at 447.

Holmes’s perhaps strongest admonishment to his colleagues on the Court came at the end of his tenure, dissenting in [Baldwin v. Missouri](#), 281 U.S. 586 (1930):

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions.

Id. at 595 (Holmes, J., dissenting).

¹²⁹ See, for example, [Adkins v. Children’s Hosp.](#), 261 U.S. 525 (1923), discussed infra notes 141-45 and accompanying text. Holmes dissented from the majority, which struck down a District of Columbia minimum wage law for women, arguing that:

The earlier decisions upon [the Due Process Clause] in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not especially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living.

Id. at 568, 570-71 (Holmes, J., dissenting).

¹³⁰ See, e.g., [Nixon v. Herndon](#), 273 U.S. 536 (1927). Holmes, for the unanimous Court, held unconstitutional a 1923 Texas statute barring “Negroes” from voting in Democratic primaries, finding that “States may do a good deal of classifying that is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right” to access to the political process. Id. at 541.

¹³¹ . See Holmes, supra note 121, at 173.

¹³² . Id. at 169.

¹³³ Holmes’s admiration for the modern corporate economy is best captured in a speech he made to the Bar Association of Boston in 1900:

Now I believe that the greatest thing is a matter that comes directly home to us all.... [T]he chief worth of civilization is just that it makes the means of living more complex; that it calls for great and combined intellectual efforts, instead of simple, uncoordinated ones, in order that the crowd may be fed and clothed and housed and moved from place to place. Because more complex and intense intellectual efforts mean a fuller and richer life.

Speech at a Dinner Given to Chief Justice Holmes by the Bar Association of Boston (Mar. 7, 1900), in *The Essential Holmes* 77, 79 (Richard A. Posner ed. 1992).

¹³⁴ Holmes articulated this viewpoint in a number of opinions, usually in dissent. For example, in [Adair v. United States](#), 208 U.S. 161 (1908), the majority struck down a section of the Erdman Act of 1898, ch. 370, 30 Stat. 424, which was designed to prevent disruption of interstate commerce by labor disputes. The Act made it a criminal offense for an agent or officer of an interstate carrier to discharge or blacklist employees because of their membership in a labor organization. William Adair, an agent of the Louisville & Nashville rail line who discharged an employee, O.B. Coppage, for membership in the Order of Locomotion Firemen, challenged the constitutionality of the statute. See [Adair](#), 208 U.S. at 170-71. Writing for the majority, Justice John Marshall Harlan posited equal bargaining power between employer and employee:

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.... [T]he employer and the employe[e] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

Id. at 174-75. Harlan held the law to be an unreasonable invasion of personal liberty and property rights guaranteed by the Due Process Clause of the Fifth Amendment. See id. at 180. He also found the Act to be outside the scope of congressional commerce power. See id.

Holmes, dissenting, viewed the concept of “contract” as a vital property interest in the emerging corporate society of the twentieth century. See id. at 190 (Holmes, J., dissenting). To Holmes, “liberty” in an economic context was relative, and he found that the Court had become entrapped in doctrines in which the word “liberty... has been stretched to its extreme....” Id. at 191. Holmes found that the Act merely prohibited the more powerful party in the employment context from threatening to dismiss or unjustly discriminating against those already employed by contract. See id. The Act did not unduly interfere with the freedom to enter into contracts. See id. Because the employees were vitally connected to common carriers in interstate trade, Holmes found that regulation of the employer-employee relation fell squarely within Congress’s authority. See id. at 190.

¹³⁵ Federal and state grants of land to railroad corporations are one example of redistributive state action which directly placed large concentrations of wealth into the hands of private citizens. See Gates, supra note 13. Additionally, grants of corporate charters by the states, and, in some cases, by the federal government, contributed to the overwhelming inequalities of bargaining position that individual workers faced in trying to secure fair wages and decent working conditions. Historian Richard Hofstadter has called the Progressive movement, which developed during this era, “the complaint of the unorganized against the consequences of organization.” Hofstadter, supra note 95, at 216. The governments of the states and of the nation had, in part, contributed to

organization by redistributing public funds to private entities and allowing large capital combinations that, in effect, forced individuals to adopt a new way of life.

¹³⁶ At the federal level, the first independent regulatory agency, the Interstate Commerce Commission (“ICC”), was established under the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified at 49 U.S.C. §§ 501-507, repealed 1995), the first modern regulatory policy, which was designed to control the monopolistic practices of the railroads. The Act granted the ICC the authority to regulate rates, eliminate favoritism to clients, and stop conspiracies in restraint of trade among railroad companies. The Sherman Anti-Trust Act of 1890, discussed supra notes 108-11, extended federal regulatory power to all combinations or conspiracies in restraint of trade; the regulatory agency charged with regulating such practices, the Federal Trade Commission, was established in 1914, under the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-57, 57a, 57b, 57b-1-57b-4, 57c, 58 (1994)), which was further strengthened by the Clayton Act, ch. 311, § 1, 38 Stat. 730, 730 (1914) (current version at 15 U.S.C. §§ 12-14, 19-27 and 29 U.S.C. §§ 52-53 (1994)).

Other agencies designed to regulate various segments of the economy were established over the next several decades, such as the Federal Reserve Board (banking industry), see Federal Reserve Act, ch. 6, 38 Stat. 260 (1913) (current version at 12 U.S.C. § 241 (1994)); the Securities and Exchange Commission (investment market), see Securities Act, ch. 38, 48 Stat. 85 (1933) (current version at 15 U.S.C. §§ 77a-77bbbb (1994)); the Agricultural Adjustment Administration (commercial agriculture), see Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933) (current version in scattered sections of 7 U.S.C. (1994 & Supp. II 1996)); and the National Labor Relations Board, see National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 451 (1935) (current version at 29 U.S.C. §§ 151-157 (1994)).

These agencies were designed, in most instances, to regulate practices and prices or rates, to ensure fairness and access necessary to promote fair competition among businesses in the particular industries, including those seeking to gain entry, and to promote reasonable access to the goods or services offered to consumers.

¹³⁷ See, e.g., infra notes 138-46 and accompanying text.

¹³⁸ Blame for this doctrine does not lie entirely with the Court; rather, it rests in large part with the emerging elite corporate bar, which vigorously defended “liberty of contract” in the interests of its corporate clients. See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 47 (1976). That same professional bar, however, was quick to abandon the so-called principles of liberty of contract, the most unrealistic of which was that employers and employees possessed equal bargaining power, when it constructed the new American Bar Association (“ABA”) Canon of Ethics. See *id.* at 42, 47. In its crusade for professional purification, meant to reassert White Anglo-Saxon Protestant values, the ABA urged lawyers not to utilize contingent fees and insisted upon court supervision of such fees in order to “protect” clients from allegedly aggressive lawyers. See *id.* at 47. Auerbach argues that:

[a]s the debate over contingent fees demonstrated, reverence for liberty of contract could vanish as quickly as a magician’s rabbit. Rather than permit personal injury victims to contract freely with negligence lawyers for a contingent fee, bar associations “protected” these victims by singling out their fee arrangements for special attention and supervision. The presumption of bargaining equality, the core of the doctrine when miserable working conditions at minuscule wages were in question, disappeared when a negligence lawyer negotiated a contingent fee with his client. Attorney and client, the argument ran, were unequal partners in the bargaining process. The client, in his ignorance [and] physical distress, would acquiesce in an unfair fee arrangement. Therefore, courts must intervene to protect those who could not protect themselves from “unconscionable bargains” extracted by greedy lawyers.

Id. at 47-48.

¹³⁹ 243 U.S. 426 (1917).

¹⁴⁰ See generally supra note 106.

¹⁴¹ 261 U.S. 525 (1923).

¹⁴² *Muller v. Oregon*, 208 U.S. 412 (1908).

¹⁴³ See *Adkins*, 261 U.S. at 553.

¹⁴⁴ See id.

¹⁴⁵ See id.

¹⁴⁶ Justices Sutherland, McReynolds, VanDeventer, and Butler became known as the “Four Horsemen” because they had formed a voting bloc against corrective New Deal economic legislation on the grounds that such legislation violated liberty of contract. See generally G. Edward White, *The American Judicial Tradition 178-99* (1988). Reed Powell, professor of constitutional law at Harvard Law School, once wrote of the four justices:

The four stalwarts differ among themselves in temperament. I think that Mr. Justice Butler knows just what he is up to and that he is playing God or Lucifer to keep the world from going the way he does not want it to. Sutherland seems to me a naive, doctrinaire person who really does not know the world as it is. His incompetence in economic reasoning is amazing when one contrasts it with the excellence of his historical and legal.... Mr. Justice McReynolds is a tempestuous cad, and Mr. Justice VanDeventer an old dodo.

Letter from T.R. Powell to J.N. Ulman (Jan. 27, 1937), Powell Papers, in Arthur M. Schlesinger, Jr., *The Politics of Upheaval* 457 (1960).

¹⁴⁷ 298 U.S. 587 (1936).

¹⁴⁸ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

¹⁴⁹ *Id.* at 392-93.

¹⁵⁰ *Id.* at 399-400.

¹⁵¹ See, e.g., *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding the provision of the Voting Rights Act Amendments of 1970 which banned the use of literary tests to determine voter qualification); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (sustaining provisions of the Voting Rights Act of 1965 directed at racial discrimination in the South as a proper exercise of congressional power under the 15th Amendment); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that a white primary established by the state convention violated the 15th Amendment).

¹⁵² See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (striking down Ohio’s Criminal Syndicalism Act because it punished mere advocacy of certain activities aimed at political reform and forbade assembly with others merely to advocate certain actions, in violation of the First and Fourteenth Amendments); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (declaring unconstitutional, on First Amendment grounds, a board policy requiring students to salute the flag and recite the Pledge of Allegiance); *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940) (“The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”).

¹⁵³ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down a federal law which permitted male members of the armed forces an automatic dependency allowance for their wives but required female members to prove that their husbands were dependent); *Reed v. Reed*, 404 U.S. 71 (1971) (striking down an Idaho law which preferred men over women in the appointment of administrators of estates as a denial of equal protection, and holding that no such preferences may be mandated solely on the basis of gender); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down, on 14th Amendment grounds, a Virginia statute that prohibited interracial marriages); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (finding that segregation of children in public schools solely on the basis of race deprives the children of the minority group equal educational opportunities, in violation of the Fourteenth Amendment’s Equal Protection Clause); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that the Equal Protection Clause prohibits judicial enforcement by state courts of restrictive covenants based on race).

¹⁵⁴ In *Natural Law*, an article published in the *Harvard Law Review* in 1918, Holmes wrote:
It is true that beliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary. You cannot help entertaining and feeling them, and there is an end of it. As an arbitrary fact people wish to live, and we say with various degrees of

certainty that they can do so only on certain conditions. To do it they must eat and drink. That necessity is absolute. It is a necessity of less degree but practically general that they should live in society. If they live in society, so far as we can see, there are further conditions. Reason working on experience does tell us, no doubt, that if our wish to live continues, we can do it only on those terms. But that seems to me the whole of the matter. I see no a priori duty to live with others and in that way, but simply a statement of what I must do if I wish to remain alive....

The most fundamental of the supposed preexisting rights--the right to life-- is sacrificed without scruple not only in war, but whenever the interest of society, that is, the predominant power in the community, is thought to demand it.

Oliver Wendell Holmes, Jr., *Natural Law*, 32 *Harv. L. Rev.* 40 (1918), reprinted in *The Essential Holmes* 180, 181-82 (Richard A. Posner ed. 1992).

¹⁵⁵ See generally Byassee, *supra* note 6.

¹⁵⁶ . See, e.g., Darryl C. Wilson, *Viewing Computer Crime: Where Does the Systems Error Really Exist?*, 11 *Computer L.J.* 265 (1991).

¹⁵⁷ See Ilene Knable Gotts & Alan D. Rutenberg, *Navigating the Global Information Superhighway: A Bumpy Road Lies Ahead*, 8 *Harv. J.L. & Tech.* 275, 279 (1995). Gotts and Rutenberg further argue that:

Telecommunications has [been]... both an experimental guinea pig for federal regulation of technology as well as an opportunity to develop fully an array of... technology services [on a national scale]. [The] regulatory regime [of telecommunications] has evolved from early regulatory neglect to rigid regulation of presumed natural monopolies to today's environment in which competition is eliminating the need for some of the regulation.

Id.

¹⁵⁸ Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910) (codified as amended in scattered sections of 49 U.S.C.).

¹⁵⁹ Radio Communications Act, ch. 287, 37 Stat. 302 (1912) (repealed 1927).

¹⁶⁰ Radio (Dill-White) Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934).

¹⁶¹ See *id.* § 4, 44 Stat. at 1165.

¹⁶² Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-613 (1994)).

¹⁶³ See *id.*

¹⁶⁴ *Federal Communications Comm'n v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940).

¹⁶⁵ See Gotts & Rutenberg, *supra* note 157, at 280.

¹⁶⁶ See *id.* (quoting 47 U.S.C. § 201 (1994)).

¹⁶⁷ See Communications Act of 1934, ch. 652, § 315, 48 Stat. 1088, 1132 (codified as amended at 47 U.S.C. § 315 (1994)) (requiring any licensee who permits a legally qualified political candidate for a federal elective office to use a broadcasting station to afford an equal opportunity to all other competing candidates, and prohibiting censorship over the material broadcast). Broader than this requirement is the "right of access" granted to qualified candidates for federal offices, announced by the Supreme Court in *CBS, Inc. v. FCC*, 453 U.S. 367, 379 (1981). The Court determined that CBS should not have refused to sell air time to the Democratic National Committee for President Carter's reelection bid because CBS deemed it too early for the 1980 presidential campaign to begin. See *id.* at 392-94.

- ¹⁶⁸ See, e.g., Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, 558 (codified as amended at 47 U.S.C. § 315 (1994)) (stating that nothing in the news exemptions should be construed as relieving broadcasters from the obligations imposed upon them under the law to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance); [Red Lion Broad., Inc. v. FCC, 395 U.S. 367 \(1969\)](#) (upholding an FCC ruling that ordered a Pennsylvania radio station to give an author the opportunity to reply to allegations by a religious commentator that he had Communist affiliations, on the grounds that free speech of a broadcaster does not embrace the right to silence others); [In re Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1251 \(1949\)](#) (stating that a licensee has “an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities... [and to ensure the fair and] balanced presentation of the opposing viewpoints.”).
- ¹⁶⁹ For a fuller discussion of the historical development of the FCC’s anti-competitive policies, see generally [Jim Chen, The Last Picture Show \(On the Twilight of Federal Mass Communications Regulation\), 80 Minn. L. Rev. 1415 \(1996\)](#).
- ¹⁷⁰ [Gotts & Rutenberg, supra note 157, at 276-77.](#)
- ¹⁷¹ Recall, for instance, that at the dawn of the United States, property (in the form of productive land) and contract were vital tools protected toward that end. See [supra pt. I.A.](#)
- ¹⁷² See [Giorgio Bovenzi, Liabilities of System Operators on the Internet, 11:1 Berkeley Tech. L.J. 93, 97 \(1996\)](#); see also [Reno v. ACLU, 117 S. Ct. 2329, 2334 \(1997\)](#) (“The Internet is ‘a unique and wholly new medium of worldwide human communication’ within an ‘international network of interconnected computers.’” (quoting [ACLU v. Reno, 929 F. Supp. 824, 844 \(E.D. Pa. 1996\)](#), [aff’d, 117 S. Ct. 2329 \(1997\)](#))).
- ¹⁷³ See [Bovenzi, supra note 172, at 98.](#)
- ¹⁷⁴ See [id. at 97.](#)
- ¹⁷⁵ See [id. at 99.](#)
- ¹⁷⁶ See [Richard Raysman & Peter Brown, Liability on the Internet, N.Y. L.J., Nov. 8, 1994, at 3](#); see also [Gary Anthes, The History of the Future: As the Arpanet Turns 25, Its Founders Reunite to Talk About the Network That Became the Internet, Computerworld, Oct. 3, 1994, at 101.](#)
- ¹⁷⁷ See [Raysman & Brown, supra note 176, at 3.](#)
- ¹⁷⁸ See [id.](#)
- ¹⁷⁹ [Hearing on Internet Access Before the Subcomm. on Science of the House Comm. on Science, Space, and Technology, 103d Cong. 126 \(1994\) \(statement of Jim Williams, Executive Director, FARNET, Inc.\) \[hereinafter Hearing on Internet Access\].](#)
- ¹⁸⁰ The network now includes universities, inter-exchange carriers (e.g., AT&T, MCI, and Sprint), local exchange carriers (e.g., Ameritech), affiliate organizations (e.g., Bellcore), Internet technology manufacturers (e.g., Cisco), and mid-level networks. Mid-level networks are awarded connections to the NSFNET through a competitive, peer-review process, and their initiatives in connecting K-12 school systems, libraries, and hospitals to the Internet have greatly increased the number and variety of communities that now have access to the Internet. See [id. at 127-28.](#)
- ¹⁸¹ See [id. at 128-29.](#)

¹⁸² See id. at 129.

¹⁸³ See id. at 127.

¹⁸⁴ See id.

¹⁸⁵ See, e.g., The National Information Infrastructure Act of 1993, H.R. 1757, 103d Cong. (1993), 139 Cong. Rec. H5084-02 (enacted) (stating that the federal government should “support wider access to network resources so that the benefits of applications so developed can reach the intended users throughout the Nation, including users with disabilities...”); James H. Billington, Librarian of Congress, Delivering Electronic Information in a Knowledge-Based Democracy (July 14, 1993) (unpublished summary of conference proceedings) (finding that one of the goals of the NII should be to sustain the role of libraries as agents of democratic and equal access to information), quoted in Information Infrastructure Task Force, Dep’t of Commerce, Putting the Information Infrastructure to Work: Libraries and the NII (1994) (visited Nov. 18, 1997) <<http://nii.nist.gov/pubs/sp857/library.html>>.

¹⁸⁶ See, e.g., William J. Clinton & Albert Gore, Jr., A Framework for Global Electronic Commerce (July 4, 1997) (visited Nov. 21, 1997) <<http://www.iitf.nist.gov/elecomm/ecom.htm>>. “The Global Information Infrastructure (“GII”), still in the early stages of its development, is already transforming our world.... As the Internet empowers citizens and democratizes societies it is also changing classic business and economic paradigms.” Id. One of the “principles that the U.S. believes should be the foundation for government policy... [is] guaranteeing open access to networks on a non-discriminatory basis, so that GII users have access to the broadest range of information and services....” Id. pt. III.7.

¹⁸⁷ See Hearing on Internet Access, *supra* note 179, at 145 (written statement of Mark Walsh, Chairman, Interactive Services Association).

¹⁸⁸ See id. at 134, 151.

¹⁸⁹ See id. at 178 (statement of Charles R. McClure, Distinguished Professor, School of Information Studies, Syracuse University).

¹⁹⁰ See id. at 134-35, 153, 182; see also H.R. 1757, 139 Cong. Rec. at H5086.

¹⁹¹ See generally, National Telecomms. & Info. Admin., The New Universal Service: NTIA’s Guide for Users (June 24, 1997) (summarizing the Federal Communications Commission’s commitment to universal Internet access), in New Universal Service Guide (visited Nov. 18, 1997) <<http://www.ntia.doc.gov/opadhome/uniserve/univweb.htm>>; see also President’s Address Before a Joint Session of the Congress on the State of the Union, I 1994 Pub. Papers 126, 128 (Jan. 25, 1994) (stating “we must also work with the private sector to connect every classroom, every clinic, every library, every hospital in America into a national information superhighway by the year 2000”).

¹⁹² Margaret Jane Radin, a professor of law at Stanford University, posits that in a utopian vision of the Internet, in which “undominated dialogue and collective creativity” thrive, the worldwide digital network that comprises cyberspace is a “two-way street where all recipients are also producers of information,” a condition which forms the basis for ideal democracy. Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & Com. 509, 513 (1996).

¹⁹³ Cf. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (“There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.”).

- ¹⁹⁴ See Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright in Cyberspace*, 14 *Cardozo Arts & Ent. L.J.* 215, 216-17 (1996).
- ¹⁹⁵ See, e.g., Maj. John T. Soma & Elizabeth J. Bedient, Note, *Computer Security and the Protection of Sensitive but Not Classified Data: The Computer Security Act of 1987*, 30 *A.F. L. Rev.* 135, 138 (1989).
- ¹⁹⁶ See Wilson, *supra* note 156, at 268; see also *Lund v. Commonwealth*, 232 *S.E.2d* 745, 747-48 (Va. 1977) (reversing the conviction of a defendant who allegedly stole computer services on the grounds that the services were not actually carried away and, thus, did not come within the purview of the grand larceny statute).
- ¹⁹⁷ See Gotts & Rutenberg, *supra* note 157, at 295.
- ¹⁹⁸ See, e.g., *United States v. LaMacchia*, 871 *F. Supp.* 535 (D. Mass. 1994). David LaMacchia, a computer hacker/MIT student, used MIT's computer network to gain access to the Internet, where, via pseudonyms and an encrypted address, he set up a BBS. See *id.* at 536. Subscribers to LaMacchia's BBS were encouraged to upload commercial software applications, which were then transferred to another encrypted address, where they could be downloaded by users who had password access. See *id.* The heavy traffic generated through this scheme attracted the attention of university and federal authorities; LaMacchia was indicted by a federal grand jury for conspiring with "persons unknown" to violate the Wire Fraud Act, 18 *U.S.C. § 1343* (1994), by devising a scheme to defraud that had as its object "facilitation 'on an international scale' of the 'illegal copying and distribution of copyrighted software' without payment of licensing fees and royalties to software manufacturers and vendors." *LaMacchia*, 871 *F. Supp.* at 536. District Judge Stearns granted LaMacchia's motion to dismiss. See *id.* at 545. Judge Stearns found that no fiduciary relationship existed between LaMacchia and the manufacturers whose software copyrights he allegedly violated; no independent statutory duty of disclosure existed, because there is no compulsory licensing scheme in the Copyright Act, 17 *U.S.C. § 117* (1994), which explicitly extends to computer software; and LaMacchia's conduct was not criminalized under the Copyright Act, 17 *U.S.C. § 506(a)* (1994). See *LaMacchia*, 871 *F. Supp.* at 542-43. The court, thus, found no basis to support a wire fraud prosecution on the grounds that LaMacchia's non-disclosure or concealment to copyright holders served as a basis for a fraudulent scheme to deprive them of their royalties because he had no fiduciary duty to make an affirmative disclosure and his conduct was not illegal under the Copyright Act. See *id.* at 542. In order to close this liability loophole in the Copyright Act, which allowed LaMacchia's activity to escape punishment, Congress is currently considering an amendment to the Copyright Act that would impose criminal liability on those who reproduce or distribute, including by electronic means, copyrighted works for commercial or private financial gain. See *Criminal Copyright Improvement Act of 1997*, H.R. 2265, 105th Cong. The Senate's version of the bill defines "financial gain" broadly to include "receipt of anything of value, including the receipt of other copyrighted works." S. 1044, 105th Cong. (1997).
- ¹⁹⁹ The author acknowledges that these categories are imperfect in that many behaviors directed toward computers and databases also involve the use of a computer as an instrumentality of the illicit behavior.
- ²⁰⁰ .National Inst. of Justice, U.S. Dep't of Justice, *Computer Crime: Criminal Justice Resource Manual 2* (1989).
- ²⁰¹ See Irving J. Sloan, *The Computer and the Law* 14 (1984) (programming that instructs a computer to execute tasks in a different order than that in which instructions are given).
- ²⁰² See *id.* at 9-10 (changing data, such as through forgery or counterfeiting, before or during input into a system).
- ²⁰³ See *id.* at 15 (removing or copying data from a computer system).
- ²⁰⁴ See *id.* at 13-14 (executing programs that perpetrate malicious and unauthorized acts at periodic intervals or when certain conditions arise).
- ²⁰⁵ See *id.* at 16-17 (gaining access to a system by sending electronic signals simultaneously with an authorized signal or using

another's access authorization, e.g., code, password, magnetic key).

206 See *id.* at 11 (stealing small slivers of assets from many sources and transferring them to a favored account).

207 See *id.* at 14 (retrieving residual information left in a computer after a job has been executed).

208 See *id.* at 18 (simulating an existing process or modeling a plan in order to execute a crime such as insurance fraud or embezzlement).

209 See *id.* at 11-12 (using a computer's universal access program without authorization to modify or disclose the system's contents).

210 See *id.* at 12-13 (creating or using, without authorization, debugging aids that may compromise computer programs by executing unanticipated functions).

211 See *id.* at 10 (covertly placing computer programs, such as worms or viruses, in a program to cause execution of unauthorized functions). Worms and viruses are computer programs that migrate through computer systems; the latter attach themselves to the operating system and the former do not. See [United States v. Morris](#), 928 F.2d 504, 505 n.1 (2d Cir. 1991).

212 See Sloan, *supra* note 201, at 17-18 (intercepting electronic communications between two or more computers).

213 See Xan Raskin & Jeannie Schaldach-Paiva, [Computer Crimes, Eleventh Survey of White Collar Crime](#), 33 *Am. Crim. L. Rev.* 541, 543 (1996).

214 [Pub. L. No. 98-473](#), 98 Stat. 2190 (1984) (codified as amended at 18 U.S.C. § 1030 (1994)).

215 See 18 U.S.C. § 1030(a)(1) (1994).

216 See *id.* § 1030(a)(2)(a).

217 See *id.* § 1030(a)(5).

218 See [Pub. L. No. 99-474](#), 100 Stat. 1213 (1986) (codified as amended in 18 U.S.C. § 1030 (1994)).

219 See Gotts & Rutenberg, *supra* note 157, at 296.

220 [928 F.2d 504](#) (2d Cir. 1991).

221 See *id.* at 505.

222 See *id.*

223 See *id.* at 509-10.

- 224 . See generally [H.R. Rep. No. 98-894, at 9 \(1994\)](#).
- 225 See [Morris, 928 F.2d at 510](#).
- 226 Computer Abuse Amendment Act of 1994, [Pub. L. No. 103-322 § 290001, 108 Stat. 2097, 2098-2099](#) (codified at [18 U.S.C. § 1030\(a\)\(5\)\(A\), \(B\) \(1994\)](#)).
- 227 Within a short time after Johann Gutenberg created the first mass printing system in the Western world in 1450, the publication of information came to be viewed as an infringement on the prerogative of the Church and the State to control the information people should have, thereby threatening the security of their power. See Anthony Smith, *Goodbye Gutenberg* 9 (1980).
- 228 See, e.g., [Associated Press v. United States, 326 U.S. 1, 20 \(1945\)](#) (finding that the importance of freedom of the press is based on “the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of free society”); cf. [Near v. Minnesota, 283 U.S. 697, 716 \(1931\)](#) (“No one would question but that a government might prevent... the publication of the sailing dates of transports or the number and location of troops.... The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.”).
- 229 See, e.g., [Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 \(1991\)](#). In *Simon & Schuster*, the Court struck down New York’s “Son-of-Sam” law, which required publishers to deposit with the Victim’s Crime Board all royalties and earnings from its contracts with accused or convicted criminals, so that victims or their survivors could attach any civil judgments. See *id.* at 108. Justice Kennedy, concurring, found that “[h]ere, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional rights, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent.” See *id.* at 124 (Kennedy, J., concurring). In the absence of any of those compelling state interests, Kennedy concluded, the State’s argument that the statute should be upheld should be rejected. See *id.* at 124-25. See also [Randolph S. Sergent, Note, A Fourth Amendment Model for Computer Networks and Data Privacy, 81 Va. L. Rev. 1181, 1181 \(1995\)](#) (arguing that the tension “between individual privacy and society’s need for information is apparent in the clash between data privacy and law enforcement’s need to gather evidence in criminal investigations”).
- 230 All interaction on the World Wide Web relies on uniform resource locators (“URLs”), each of which is generally comprised of a protocol identifier and a domain name defining a physical host. See, e.g., *New Riders’ Official Internet Yellow Pages*, at 15-16 (1997 ed.) [hereinafter *Internet Yellow Pages*]. A sample URL is: <http://www.rutgers.edu>. The protocol identifier segment is “http:”, which means hypertext transfer protocol, an international standard developed specifically for the World Wide Web by a Swiss physics research facility, CERN. See *id.* Other protocol identifiers include “gopher,” and file transfer protocol (“ftp”), which is a method of transmitting computer files between computers over the Internet. See *id.*; see also John R. Levine & Margaret Levine Young, *The Internet for Dummies Quick Reference* 53, 80 (1994). The double slashes (//) indicate that a user is requesting information from a Web server, rather than a local computer, which would be indicated by triple slashes (///). See *Internet Yellow Pages*, *supra*, at 16. The prefix “www” is standard for all addresses on the World Wide Web. See *id.*
The domain name is “rutgers.edu”. Each domain name is a unique set of words that corresponds to a unique, assigned numerical address, known as an Internet protocol (“IP”) address. See *id.* The domain name itself is divided into levels. In the sample address, “rutgers” is the second-level domain name, which is usually a business or product name or other word or mnemonic. The international top-level domain name (“iTLD”), “.edu,” serves to place the site within one of several broad categories, in this case indicating that the site is affiliated with a higher educational institution, Rutgers University. See *Fee for Registration of Domain Names Policy § 1.2* (visited Sept. 1, 1997) <<http://rs.internic.net/domain-info/fee-policy.html>>. Currently, there are seven recognized iTLDs in use, in addition to country codes such as “.us,” “.uk,” and “.jp”:
See *id.*
In February 1997, the International Ad Hoc Committee on Domain Names (“IAHC”) recommended the addition of seven iTLDs:
See Sheldon H. Klein, *New Attempt at Domain Name Accord*, *Nat’l L.J.*, May 5, 1997, at B11; see also *IAHC Proposal* (visited July 5, 1997) <<http://www.iahc.org>>.
The federal Internet Assigned Numbers Authority (“IANA”) assigns its authority to issue domain names in the United States to Internet Network Information Center (“InterNIC”). A private company under exclusive contract with InterNIC, Network Solutions, Inc., maintains the registry for most iTLDs in the United States. Network Solutions assigns the domain names on a first-come, first-served basis via e-mail or an interactive application at Network Solution’s InterNIC site, at <http://rs.internic.net>. All applicants

must represent and warrant that: they have a bona fide intention to use the domain name on a regular basis; they will not use the domain name for any unlawful purpose, such as to mislead or confuse others, unfairly compete, defame or otherwise injure the business or reputation of another, or tortiously interfere with a contract or prospective business advantage; and use of the domain name will not interfere with or infringe the rights of any third party in any jurisdiction. See *Network Solutions, Inc. Domain Name Registration Agreement* (visited Sept. 1, 1997) <<ftp://rs.internic.net/templates/domain-template.txt>>.

Applicants must additionally agree to defend, indemnify, and hold harmless Network Solutions and the agencies that comprise InterNIC for any legal claims regarding their use of the name. The initial charge for registering a domain name is currently \$100, which covers updates required during the first two years of use. See *id.* Network Solutions will not arbitrate disputes arising out of the registration and use of domain names, although the company has adopted certain procedures for dealing with trademark disputes. See *Domain Name Dispute Policy* (visited Sept. 1, 1997) <<http://rs.internic.net/domain-info/internic-domain-6.html>>. A registered trademark owner can file an objection with Network Solutions if another party is using the trademark as a domain name. See *id.*

For a fuller discussion of the domain name/trademark infringement issue, see generally Robert M. Frank, *The Evolution and Future of Internet Domain Names*, *Law Journal Extra!* (visited June 26, 1997) <<http://www.ljextra.com/internet/frankdom.html>>.

²³¹ See, for example, *Panavision Int'l v. Toepfen*, 945 F. Supp. 1296 (C.D. Cal. 1996), and *Intermatic, Inc. v. Toepfen*, 947 F. Supp. 1227 (N.D. Ill. 1996), two of several cases involving the same defendant. In *Panavision*, the defendant had registered the domain name “panavision.com” and created a Web site displaying aerial views of Pana, Illinois. See 945 F. Supp. at 1300. *Panavision*, a California-based camera and photographic equipment business, subsequently tried to register the domain name and, when it was unable to do so, notified Toepfen that it wished to use its registered mark as its domain name. See *id.* Toepfen allegedly demanded \$13,000 to discontinue his use of the name. See *id.* The court held that registering a famous mark as a domain name for purposes of trading on the value of the mark by selling the name to the trademark owner violates federal and state trademark dilution statutes. See *id.* at 1303. Toepfen reportedly registered more than 200 Internet domain names without seeking permission from any entity that previously held the name. See *Intermatic*, 947 F. Supp. at 1236. In *Intermatic*, the court held that Toepfen’s use of the *Intermatic* name on the Internet satisfies the use in commerce requirement of minimum contacts analysis and that his registration of the name and use on his Web page violated the Federal Trademark Dilution Act, 15 U.S.C.A. § 1125(c) (West Supp. 1997). See 947 F. Supp. at 1239.

Another recent case, which deals with the more traditional issue of trademark infringement where there is a likelihood of confusion, involved a defendant, doing business as Catholic Radio, who registered the domain name “plannedparenthood.com” and set up a Web site under that name. See *Planned Parenthood Fed’n of America, Inc. v. Bucci*, No. 97 Civ. 0629, 1997 WL 133313, at *1 (S.D.N.Y. Mar. 24, 1997). The defendant, an active participant in the anti-abortion movement, established his Web site to promote an anti-abortion book, *The Cost of Abortion*, with the intention of reaching people sympathetic to the pro-choice position who might be looking for information from Planned Parenthood. See *id.* at *1-*2. The court found that Bucci’s use in commerce of Planned Parenthood’s mark is likely to cause confusion and that an injunction preventing his further use is the appropriate remedy. See *id.* at *3-*5.

²³² Questions arising in this context include whether a Web site owner can be subject to personal jurisdiction wherever her Web site can be accessed, regardless of the realspace location of the owner’s computer. Similarly, problems arise in fixing the location of injury from harmful e-mail messages or bulletin board postings, because the computer through which the harmful communication may be accessed might be anywhere in the world, even at a geographical location the sender never intended to “enter.” For example, individual A might post a message on a bulletin board that individual B, a stock broker, believes casts her in a “false light,” thereby giving rise to a possible invasion of privacy claim. See, e.g., *Restatement (Second) of Torts* § 652E (1977) (stating that liability for this form of privacy invasion arises when a person “gives publicity to a matter concerning another that places the other before the public in a false light [and]... the false light in which the other would be placed would be highly offensive to a reasonable person”). If B has access to a bulletin board for New York stock brokers through her employer in New York, she might not have a cause of action, since New York does not recognize a “false light” claim. See, e.g., *Kane v. Orange County Publications*, 649 N.Y.S.2d 23, 26 (App. Div. 1996) (stating that a cause of action sounding in invasion of privacy based on publicity that allegedly places plaintiffs in a false light is not cognizable in New York). If B, however, resides in New Jersey and accessed the bulletin board message from a remote computer located in that state, she might have a cause of action, since New Jersey does recognize “false light” invasion of privacy claims. See, e.g., *Romaine v. Kallinger*, 537 A.2d 284, 293-94 (N.J. 1988) (recognizing a common law cause of action in New Jersey for invasions of privacy involving “publicity that unreasonably places the other in a false light before the public” and distinguishing between the “false light” tort, which protects “the individual’s peace of mind,” and defamation, which protects “a person’s interest in a good reputation”) (citations omitted). Leaving aside the possible choice of law issue, the question that must be answered is toward which jurisdiction did A aim her conduct.

²³³ For example, New York’s long-arm statute reads, in part, as follows:
(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court

may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

N.Y. C.P.L.R. § 302(a) (McKinney 1990).

²³⁴ General jurisdiction arises where the defendant is physically located in the forum state or where he or she conducts routine, continuous, or systematic business in the forum; i.e., there must be substantial forum-related activity on the part of the defendant. See, e.g., [Helicopteros Nacionales de Colombia, S.A. v. Hall](#), 466 U.S. 408, 414 n.9 (1984).

²³⁵ Specific jurisdiction is the state court's authority to exercise jurisdiction over nonresidents for causes of action arising out of the nonresidents' sporadic forum-related activity, such as business transactions in the forum, or committing tortious acts in the forum or outside the forum, if the acts result in injury within the forum; i.e., the cause of action must arise out of defendant's contacts with the forum state. See, e.g., [id.](#) at 414 n.8 (citing [Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis](#), 79 Harv. L. Rev. 1121, 1144-64 (1966)).

²³⁶ [International Shoe Co. v. Washington](#), 326 U.S. 310, 316 (1945) (citation omitted).

²³⁷ [World-Wide Volkswagen v. Woodson](#), 444 U.S. 286, 297 (1980); see also [Shaffer v. Heitner](#), 433 U.S. 186, 218 (1977) (Stevens, J., concurring) (stating that a nonresident must have "fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign").

²³⁸ See, e.g., [Keeton v. Hustler Mag., Inc.](#), 465 U.S. 770, 774 (1986).

²³⁹ See, e.g., [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 477 (1985).

²⁴⁰ See [International Shoe](#), 326 U.S. at 316, where the Supreme Court stated:
"Presence" in the state... has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.... Conversely, it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.... To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great a burden on the corporation to comport with due process.
Id.

²⁴¹ See [Asahi Metal Indus. Co. v. Superior Court](#), 480 U.S. 102, 112 (1987) (holding that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State"; rather, a defendant must exhibit some additional conduct which manifests "an intent or purpose to serve the market in the forum State, for example,... advertising in the forum State, establishing channels for providing regular advice to customers in the forum State....").

²⁴² See [Hanson v. Denckla](#), 357 U.S. 235, 250-51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase.").

²⁴³ See [CompuServe, Inc. v. Patterson](#), 89 F.3d 1257, 1262 (6th Cir. 1996).

244 89 F.3d 1257 (6th Cir. 1996).

245 See *id.* at 1260.

246 See *id.*

247 See *id.* at 1264-66.

248 See *id.* at 1267.

249 See *id.* at 1268.

250 See *id.*

251 For a more comprehensive look at the issue of personal jurisdiction on the Internet, see, for example, Corey B. Ackerman, Note, *World-Wide Volkswagen, Meet the World Wide Web: An Examination of Personal Jurisdiction Applied to the New World*, 71 St. John's L. Rev. 403 (1997); Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications*, 65 Fordham L. Rev. 2241 (1997); David L. Stott, Comment, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site*, 15 J. Marshall J. Computer & Info. L. 819 (1997); Leif Swedlow, Note, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 Okla. City U. L. Rev. 337 (1997); David Thatch, Note, *Personal Jurisdiction and the World-Wide Web: Bits (and Bytes) of Minimum Contacts*, 23 Rutgers Computer & Tech. L.J. 143 (1997).

252 See *Cody v. Ward*, 954 F. Supp. 43 (D. Conn. 1997). In *Cody*, the court found that a non-resident's transmission of fraudulent representations to a Connecticut resident by e-mail and through an online computer service financial forum constituted "tortious act[s] within the state." *Id.* at 45. The non-resident's purposeful actions in inducing the resident to buy and hold securities therefore established sufficient minimum contacts for personal jurisdiction. See *id.* at 47.

253 Applying minimum contacts analysis, courts have drawn opposite conclusions concerning the appropriateness of exercising personal jurisdiction in online trademark cases. Compare *Digital Equipment Corp. v. AltaVista Technology, Inc.*, 960 F. Supp. 456, 470 (D. Mass. 1997) (finding that a California corporation's operation of a Web site that reached Massachusetts residents provided the basis for exercise of personal jurisdiction and that the defendant "should have anticipated being haled into a Massachusetts court to answer for its acts"); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125 (W.D. Pa. 1997) (holding that a California online news service purposely availed itself of doing business in Pennsylvania by creating "an interactive Web site through which it exchanges information with Pennsylvania residents in hopes of using that information for commercial gain later"); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 5 (D.D.C. 1996) (finding that a New York-based charity that purposefully availed itself of the forum by soliciting donations via its Web page "always available to District [of Columbia] residents" could reasonably anticipate the possibility of being haled into court there and that the Web page itself constituted "persistent contact" with the forum); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1334 (E.D. Mo. 1996) (finding that exercise of personal jurisdiction in Missouri over a California Internet operator who maintained a mailing list of Internet users for advertising, and who knew that its information would be transmitted into the forum, did not violate "traditional notions of fair play and substantial justice"); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164 (D. Conn. 1996) (finding that a Massachusetts corporation's "advertising via the Internet is solicitation of a sufficient repetitive nature to satisfy" the "solicitation of business" requirement of the Connecticut long-arm statute); *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616, 620 (C.D. Cal. 1996) (finding that an Illinois resident who ran an enterprise demanding money for discontinuing use of domain names he owned that infringed federally registered trademarks "expressly aimed" his tortious activities at California and engaged in conduct that was intended to, and did, result in harmful effects in California and, thus, "fair play and substantial justice" would be served despite the defendant's travel expenses), with *IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258, 1268 (N.D. Ill. 1997) (finding that general advertising and use of the Internet is "not the type of purposeful activity related to the forum that would make the exercise of jurisdiction fair, just or reasonable") (quoting *Rush v. Savchuk*, 444 U.S. 320 (1980)); *Bensusan Restaurant Corp. v.*

[King](#), 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (finding that “[c]reating a site, like placing a product into the stream of commerce may be felt nationwide--or even worldwide--but, without more, it is not an act purposefully directed toward the forum state”; thus, a Missouri jazz club that had the same name as a New York jazz club and placed information about ticket purchases on its Web site, but provided no national toll-free number and stated that the information was for local use only, did not cause the plaintiff injury in New York), aff’d, No. 96-9344, 1997 U.S. App. LEXIS 23742 (2d Cir. Sept. 10, 1997).

²⁵⁴ See, e.g., [EDIAS Software Int’l, LLC v. BASIS Int’l Ltd.](#), 947 F. Supp. 413, 418-22 (D. Ariz. 1996) (finding that the court’s exercise of jurisdiction over a nonresident software producer would not be unreasonable where the software producer had, among other things, disseminated allegedly defamatory e-mail and Web site postings that were directed at, reached, and caused harm to Arizona customers in addition to contacting the employees of the Arizona offices of the plaintiff’s company via telephone, fax, and e-mail); [Hall v. LaRonde](#), 66 Cal. Rptr. 2d 399 (Dist. Ct. App. 1997) (concluding that the use of e-mail and telephone by a nonresident licensee may establish sufficient minimum contacts with the forum to support personal jurisdiction).

²⁵⁵ See, e.g., [McDonough v. Fallon McElligott](#), No. Civ. 95-4037, 1996 WL 753991, at *1, *3 (S.D. Cal. Aug. 5, 1996) (rejecting a California sports photographer’s argument that personal jurisdiction could be established over a Minnesota advertising agency merely because the advertising agency maintained a Web site, with the court rationalizing that “[b]ecause the Web enables easy world-wide access, allowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists”).

²⁵⁶ See, e.g., [Naxos Resources \(U.S.A.\) Ltd. v. Southam, Inc.](#), No. CV 96-2314, 1996 WL 662451, at *2-*6 (C.D. Cal. Aug. 16, 1996) (finding that, while nonresident defendants purposefully availed themselves of the privileges of conducting activities in California, allegedly defamatory statements which referred to a Naxos corporation in Canada did not necessarily target the plaintiff; and the defendants thus would not have reasonably anticipated being haled into court in California).

²⁵⁷ See [McDonough](#), 1996 WL 662451, at *3; see also [Hearst Corp. v. Goldberger](#), No. 96 Civ. 3620, 1997 WL 97097, at *7-*18 (S.D.N.Y. Feb. 26, 1997) (finding that a nonresident defendant, who operated a Web site that would in the future provide attorneys with legal support services, had not yet offered or sold any products or services through the site, and thus had not established sufficient contacts with the forum to support a finding of personal jurisdiction under the New York long-arm statute; and that exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice because it would lead to nationwide jurisdiction over the Internet).

The cases cited supra notes 252-56 have been decided only at the state or federal district court level, thereby producing no binding authority on other states faced with the same questions. It is difficult to predict how the circuit courts of appeal, and ultimately the Supreme Court, will resolve the issue of applying minimum contacts analysis to cyberspace activities. Whether those courts will agree with the Hearst Corp. and McDonough courts’ determination that finding jurisdiction over a distant, non-resident cyberian may be inherently unfair or whether the federal appellate courts will agree with the majority of the district courts is still an open question.

²⁵⁸ No. Civ. A. 96-2852, 1997 WL 574950 (D.N.J. Sept. 12, 1997).

²⁵⁹ See id. at *5.

²⁶⁰ See id.

²⁶¹ Id. (quoting [Zippo Mfg. Co. v. Zippo Dot Com, Inc.](#), 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

²⁶² See id.

²⁶³ Id. (quoting [Hearst Corp. v. Goldberger](#), No. 96 Civ. 3620, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997)).

²⁶⁴ Under common law defamation, for example, one who “repeats” the statements of another is liable for the defamatory content as

the original speaker. See *Cianci v. New York Times Publ'g Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980). Newspapers and publishing houses have been held strictly liable as “publishers” for content that injures another. See, e.g., *Restatement (Second) of Torts § 578 (1977)* (“[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he originally published it.”). Booksellers and libraries, on the other hand, are mere “distributors,” and liability is found only where the distributor knew or reasonably should have known he or she was aiding the dissemination of offensive materials. See, e.g., *id.* § 581(1) (“[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.”); see also *id.* § 581 cmt. d (stating that unless special circumstances exist that should warn the distributor that a particular statement is defamatory, he or she is under no obligation to ascertain its innocent or defamatory nature). The same type of liability analysis applies to most publication torts; the determination often turns on whether the person or entity involved in disseminating the offensive materials exercises editorial control over the content of speech.

In *Cubby Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), a federal district court applying New York’s defamation law found that a service provider was not liable for defamatory statements, where the provider had no opportunity to review the contents of its bulletin boards before posting. See *id.* at 139-40. The court thus held CompuServe to the standards of a distributor and found that its service was in essence “an electronic, for-profit library” and that CompuServe had no more editorial control over publication than does a public library, bookstore, or newsstand. See *id.* at 140.

Four years later, however, a New York trial court, applying the same law, held an online service provider to the publishers’ standard in *Stratton-Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995). In *Stratton-Oakmont*, the defendant online service provider, Prodigy, offered a bulletin board service, Money Talk, to its subscribers. An anonymous user posted a message that contained disparaging remarks about the plaintiff, a brokerage firm. *Stratton-Oakmont* claimed it tried to have the message removed to no avail, and filed a suit against Prodigy. See *id.* at 1795. The court determined that because Prodigy promoted itself as a family-oriented service that removed offensive materials and because it promulgated a content guideline, used “[b]oard [l]eaders” to enforce those guidelines, and used a software screening program, Prodigy was a publisher, like a newspaper editor, and was thus liable for defamatory material posted on its bulletin board. See *id.* at 1797-98.

Because both cases focus on the degree of editorial control exercised, the incentives for service providers to screen content disappear. Congress recognized this problem when it adopted the Communications Decency Act of 1996 (“CDA”), and included a “Good Samaritan” provision, which would not turn those who screen content for any reason into publishers. See Communications Decency Act of 1996, 47 U.S.C.A. § 230(c)(2) (West Supp. 1997). Indeed, the Act’s legislative history indicates that Congress explicitly intended to supersede the ruling in *Stratton-Oakmont*. See *infra* note 337 and accompanying text. Another provision of the Act provides that “[n]o provider of interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” See 47 U.S.C.A. § 230(c)(1). Although certain provisions of the Act were struck down as unconstitutional in *Reno v. ACLU*, see discussion *infra* notes 338-54 and accompanying text, the Supreme Court did not address the publisher liability provisions.

The Court of Appeals for the Fourth Circuit recently applied section 230 to bar a claim by an allegedly defamed individual who argued that the commercial service provider America Online “unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter.” *Zeran v. America Online, Inc.*, No. 97-1523, 1997 WL 701309, at *1 (4th Cir. Nov. 12, 1997). The court found that applying “notice-based liability for interactive computer service providers would provide third parties with a no-cost means to create the basis for future lawsuits.” *Id.* at *7. This development might create an “impossible burden for service providers” and affect the “vigor of Internet speech,” *id.*, in direct contradiction of Congress’s purpose in enacting the CDA and of promoting “unfettered speech on the Internet,” *id.* at *8.

Liability of service providers or bulletin board operators for copyright infringement, an issue not covered under the CDA, is currently the subject of legislation introduced in the House of Representatives in July 1997, that would, in effect, classify service providers as distributors for liability purposes, thus placing an additional burden on a plaintiff to prove the service provider or bulletin board operator knew or should have known of an infringing posting. See On-Line Copyright Liability Limitation Act, H.R. 2180, 105th Cong. (1997).

²⁶⁵ See Byassee, *supra* note 6, at 198-99.

²⁶⁶ See Robert L. Dunne, *Deterring Unauthorized Access to Computers Through a Contract Law Paradigm*, 35 *Jurimetrics J.* 1, 8 (1994).

²⁶⁷ See *id.* at 8-9.

²⁶⁸ See David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 *Stan. L. Rev.* 1367, 1368 (1996).

269 See id. at 1368-69.

270 See id. at 1369.

271 Among the “bundle of rights” that comprises property ownership are the rights to possess, use, and manage the physical space or object in question. See, e.g., A. M. Honore, *Ownership*, Oxford Essays in Jurisprudence: A Collaborative Work 107, 112-24 (Anthony Gordon Guest ed. 1961).

272 See Johnson & Post, *supra* note 268, at 1369.

273 See id. at 1369-70.

274 See id. at 1370.

275 See id.

276 See id. at 1371.

277 See id.

278 See id. at 1372. An example of these efforts includes the Minnesota Attorney General’s (“AG”) assertion of criminal and civil jurisdiction over any persons physically outside the state who transmit information over the Internet that can be disseminated in the state. This assertion was tested when the AG brought suit against Granite Gate Resorts, Inc., d/b/a On Ramp Internet Computer Services, a Nevada corporation which advertises sports betting on the “Vegas.Com” World Wide Web site, through a service through WagerNet. See [Minnesota v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *1 \(Minn. Dist. Ct. Dec. 11, 1996\)](#). A consumer investigator for the Minnesota AG’s office responded to On Ramp’s advertising on the Internet, which claimed its operation was legal, because the betting actually took place in Belize. See id. at *4. Because interstate or foreign transmission of betting information and bets through wire communication facilities is a federal offense, see [18 U.S.C. § 1084 \(1994\)](#), and commercial sports betting violates state law, see [Minn. Stat. §§ 609.75, 609.755\(1\), 609.76, and 609.02 \(1996\)](#), the AG claimed defendants violated the Minnesota Consumer Protection statutes which forbid false advertising, deceptive trade practices, and consumer fraud, see [Granite Resorts, 1996 WL 767431, at *5](#). The court denied defendant’s motion to dismiss for lack of jurisdiction, finding instead, under minimum contacts analysis, that since the acts of WagerNet consisted of placing its ad on the Internet twenty-four hours, seven days a week, 365 days a year, minimum contacts had been established. See id. at *12.

279 See Johnson & Post, *supra* note 268, at 1372.

280 See I. Trotter Hardy, [The Proper Legal Regime for “Cyberspace,” 55 U. Pitt. L. Rev. 993, 1019-20 \(1994\)](#) (defining the Law Merchant as “an enforceable set of customary practices that inured to the benefit of merchants, and that was reasonably uniform across all the jurisdictions involved in the trade fairs” of medieval Europe).

281 See id. at 1020.

282 See id. at 1021.

283 See id. at 1022.

284 See id.

285 See *id.*

286 See *id.*

287 See *id.*

288 See Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* 19-21 (1983).

289 See *id.*

290 See Johnson & Post, *supra* note 268, at 1379.

291 See *id.*

292 See *id.* at 1379-80.

293 See *id.*

294 See Harold Smith Reeves, *Comment, Property in Cyberspace*, 63 *U. Chi. L. Rev.* 761 (1996).

295 There are two types of firewalls. An external firewall is a “collection of components placed between two networks” that allows only authorized traffic to pass between them. See *id.* at 799 n.9 (quoting William R. Cheswick & Steven M. Bellovin, *Firewalls and Internet Security: Repelling the Wily Hacker* 9, 53 (1994)). Internal firewalls exclude the users of a particular system or network from accessing certain parts of the system. See *id.* at 764.

296 See *id.* at 765.

297 See *id.* at 767.

298 See *id.* at 766.

299 See *id.* at 766-67.

300 See *id.* at 767.

301 Pub. L. No. 99-508, 100 Stat. 1848 (codified at 18 U.S.C. § 2701 (1994)).

302 Pub. L. No. 99-474, 100 Stat. 1213 (codified as amended at 18 U.S.C. § 1030 (1994)).

303 System administrators are more likely to possess the technical expertise necessary for effective security and protection of privacy, current technology operates best at the system level, and clear rules for conduct and regulation exist in such a model. See Reeves, *supra* note 294, at 771-72.

- 304 See, e.g., [Reno v. ACLU](#), 117 S. Ct. 2329, 2344 (1997) “The Government estimates that “[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.”” *Id.* (alteration in original) (quoting [929 F. Supp. 824, 831 \(E.D. Pa. 1996\)](#), *aff’d*, 117 S. Ct. 2329 (1997)).
- 305 See Robert L. Dunne, [Deterring Unauthorized Access to Computers: Controlling Behavior in Cyberspace Through a Contract Law Paradigm](#), 35 *Jurimetrics J.* 1, 11 (1994).
- 306 See *id.* at 12.
- 307 See *id.* at 12-13.
- 308 See *id.*
- 309 See *id.* at 14-15.
- 310 See *id.* at 14.
- 311 See *id.*
- 312 See *id.*
- 313 See Hardy, *supra* note 255, at 1028.
- 314 See *id.* at 1029.
- 315 See *id.* at 1029-30.
- 316 See *id.* at 1030.
- 317 See Owen Fiss, In [Search of a New Paradigm](#), 104 *Yale L.J.* 1613 (1995).
- 318 See Elkin-Koren, *supra* note 194, at 218.
- 319 *Id.* at 221.
- 320 See *id.* at 221-23. Elkin-Koren cites Jurgen Habermas’ observation that informal public opinion becomes influence, which becomes communicative power, which ultimately becomes administrative power through legislation. See *id.* at 224-25 (citing Jurgen Habermas, [Three Normative Models of Democracy](#) 13 (1994)). Indeed, this notion fits comfortably with the earlier suggestion that gender and race lines blur dramatically, and may even disappear, on the Internet.
- 321 See Elkin-Koren, *supra* note 194, at 236.

322 See *id.* at 256-57.

323 See Jane C. Ginsburg, [Putting Cars on the “Information Superhighway”: Authors, Exploiters, and Copyright in Cyberspace](#), 95 *Colum. L. Rev.* 1466, 1469 (1995).

324 See *id.* at 1488.

325 See *id.*

326 See *id.*

327 See *id.* at 1489. Ginsburg describes collective licensing as a means by which composers and publishers pool their copyrights and resources and delegate the policing of broadcasters, concert halls, clubs, etc. See *id.* (citations omitted). This “private law” practice has also been extended to written works. See *id.* at 1490 (citing [American Geophysical Union v. Texaco, Inc.](#), 60 F.3d 913 (2d Cir. 1994) (rejecting defendant’s fair use defense for photocopying articles from a scientific journal where licensed copying was available through a photocopy rights collective, on the grounds that the unauthorized copying diverted the market for the journal)).

328 See *id.* at 1492.

329 See *id.*

330 See *id.*

331 See [Pub. L. No. 104-104](#), 110 *Stat.* 56, 133 (to be codified at 47 U.S.C. § 223).

332 See 47 U.S.C.A. § 223(a)(1)(B)(ii) (West Supp. 1997).

333 *Id.* § 223(d).

334 See *id.* § 223(e)(5)(A).

335 See *id.* § 223(e)(5)(B).

336 [23 Media L. Rep. 1794 \(BNA\) \(N.Y. Sup. Ct. 1995\)](#); see discussion of this decision *supra* note 264 and accompanying text.

337 See [H.R. Conf. Rep. No. 104-458](#), at 194 (1996) (“One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”). For a more thorough discussion of the implications of the rulings in *Stratton-Oakmont* and *Cubby* and Congress’s language in the CDA, see generally [Keith Siver, Good Samaritans in Cyberspace](#), 23 *Rutgers Computer & Tech. L.J.* 1 (1997).

338 The plaintiffs were the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., Declan McCullagh (d/b/a Justice on Campus), Brock Meeks (d/b/a Cyberwire Dispatch), John Troyer (d/b/a The Safer Sex Page), Jonathan Wallace (d/b/a

The Ethical Spectacle), and Planned Parenthood Federation of America, Inc. See [ACLU v. Reno](#), 929 F. Supp. 824, 827 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

339 See [ACLU v. Reno](#), No. CIV.A.96-963, 1996 WL 65464 (E.D. Pa. Feb. 15, 1996) (mem.).

340 See *id.*

341 See 929 F. Supp. at 824.

342 The second set of plaintiffs, collectively known as the Citizens Internet Empowerment Coalition (“CIEC”), consisted of American Library Association, America Online, Inc., American Booksellers Association, Inc., American Booksellers Foundation for Free Expression, American Society of Newspaper Editors, Apple Computer, Inc., Association of American Publishers, Inc., Association of Publishers, Editors, and Writers, CIEC, Commercial Internet Exchange Association, CompuServe, Inc., Families Against Internet Censorship, Freedom to Read Foundation, Inc., Health Sciences Libraries Consortium, Hotwired Ventures LLC, Interactive Digital Software Association, Interactive Services Association, Magazine Publishers of America, Microsoft Corp., The Microsoft Network, LLC, National Press Photographers Association, Netcom On-Line Communications Services, Inc., Newspaper Association of America, Opnet, Inc., Prodigy Services Co., Society of Professional Journalists, and Wired Ventures, Inc. See *id.* at 828.

343 See *id.* at 824 (consolidating *American Library Ass’n v. United States Dep’t of Justice*, No. 96-1458, with *ACLU v. Reno*, No. 96-963).

344 See *id.* at 883. The judges additionally found that “the Internet may fairly be regarded as a never-ending worldwide conversation,” and the federal government “may not, through the CDA, interrupt that conversation.” *Id.* True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation of Internet content.. produced a kind of chaos, but as one of plaintiffs’ experts put it with such resonance at the hearing: “What achieved success was the very chaos that the Internet is.” The strength of the Internet is chaos. Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects. *Id.* (citation omitted).

345 See [Reno v. ACLU](#), 117 S. Ct. 2329, 2351 (1997), *aff’g* 929 F. Supp. 824 (E.D. Pa. 1996).

346 The Court defined the Internet as a “unique and wholly new medium of worldwide human expression,” *id.* at 2334 (quoting 929 F. Supp. at 844), the characteristics of which, thus, militate against extensive government regulation, see *id.* at 2343. The Court, speaking through Justice Stevens, further characterized the Internet as an open, decentralized network, free of government censorship, the kind of market place of ideas essential to the Framers’ vision of American society and where the free exchange of ideas necessary to democracy can thrive. Justice Stevens said:

Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, the “content on the Internet is as diverse as human thought.” We agree with this conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

Id. at 2344 (quoting 929 F. Supp. at 842).

347 See *id.* at 2334-36.

348 *Id.* at 2343 (citing [FCC v. Pacifica Found.](#), 438 U.S. 726 (1978); [Red Lion Broad. Co. v. FCC](#), 395 U.S. 367 (1969)).

349 See *id.* at 2343 (citing [Red Lion](#), 395 U.S. at 399-400).

- 350 See id. (citing [Turner Broad. Sys., Inc. v. FCC](#), 512 U.S. 622 (1994)).
- 351 See id. (citing [Sable Communications of Cal., Inc. v. FCC](#), 492 U.S. 115 (1989)).
- 352 See id. at 2343-44.
- 353 Id. at 2344.
- 354 Id. at 2351.
- 355 See supra notes 1, 268-79 and accompanying text.
- 356 See discussion supra pt. III.B.2.
- 357 See discussion supra pt. I.B.
- 358 See, e.g., Clinton & Gore, supra note 186 (“Over the next decade, advances in the GII will affect almost every aspect of daily life--education, health care, work and leisure activities. Disparate populations, once separated by distance and time, will experience these changes as part of a global community.”).
- 359 See supra notes 102, 119-35.
- 360 See discussion supra pt. II.
- 361 See supra note 129.
- 362 See supra pt. I.A.
- 363 See supra pt. III.A.1.
- 364 See discussion supra pt. III.B.2.
- 365 See supra notes 104-17, 129-51 and accompanying text.
- 366 See supra text accompanying notes 270, 278.
- 367 See discussion supra pt. II.A.

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