

# USING COMMUNICATION THEORY TO UNDERSTAND CYBERLAW AND ITS DISCONTENTS

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*I believe that if we were forced to select the principle that supports and infuses all human aspiration we would find it in the objective of maintaining communication with our fellows.<sup>1</sup>*

## I. INTRODUCTION

The emergence of technologies permitting cheap, high-speed digital communication and nearly costless information distribution has disrupted traditional legal approaches to regulating information and communication. Do these new technologies and their users need new law—Cyberlaw<sup>2</sup>—to solve the problems that these technologies might pose to traditional social relations in the production and distribution of information?<sup>3</sup> Not everyone agrees that new law is needed for new

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1. LON L. FULLER, *THE MORALITY OF LAW* 185 (1964).

2. The origin of the word “Cyberlaw” is unclear, but the term was inspired by William Gibson’s novel *Neuromancer*, which coined the word “cyberspace.” WILLIAM GIBSON, *NEUROMANCER* 51 (1984). Jonathan Rosenoer subsequently published a newsletter called *CyberLaw* in the early 1990s, and the neologism began to appear in law review articles shortly thereafter. See JONATHAN ROSENOER, *CYBERLAW: THE LAW OF THE INTERNET*, at vii–viii (1997) (discussing his *CyberLaw* column); I. Trotter Hardy, *Electronic Conferences: The Report of an Experiment*, 6 HARV. J.L. & TECH. 213, 232 (1993).

3. Recent scholarship on Cyberlaw’s justifications has focused on structural regulation, arguments from democracy, intellectual property, the Constitution, and cultural studies. See, e.g., Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 173, 176–77 [hereinafter Benkler, *Public Domain*] (discussing how constitutional constraints on the creation of private rights in information are needed to protect democracy and autonomy); Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 717–18 (2003) (arguing that an international intellectual property regime governing uses of domain names conflicts with the integrity of other cultures); Dan Hunter, *Cyberspace as Place and the*

technologies. Cyberlaw's detractors believe technology plays a conceptually neutral part in providing for individual well-being and robust democracy.<sup>4</sup> The anti-Cyberlaw argument generally admits that existing protection of rights in the production and distribution of information is adequate.<sup>5</sup> That a technology is new is never a justification for degrading the status quo of social relations common to uses of old media.<sup>6</sup> Conversely, Cyberlaw adherents claim that users of new media need law that considers the novel effects of digital communications. Such law might reflect sensitivity to ways in which new media endanger viewpoint diversity.<sup>7</sup> Alternatively, Cyberlaw might be needed to provide efficient access to copyrighted works<sup>8</sup> or to regulate uses that endanger privacy.<sup>9</sup>

The purpose of this Article is not to vindicate the corpus of Cyberlaw, though the Article does advance an argument that such law is needed. Rather, this Article is interested primarily in how Cyberlaw opponents and proponents justify their relative claims. Surprisingly,

*Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 509–19 (2003) (arguing that the “metaphor of place” in describing rights in cyberspace creates an “anticommons” in which all resources are excluded as private property); Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1, 5 (2003) (arguing for the development of new media to accommodate contexts of democratic deliberation); Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534, 536 (2003) (suggesting a “competitive platforms model” that would “guide intellectual property policy in the Internet age”).

4. See, e.g., JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 3 (1994) [hereinafter RAZ, *ETHICS*]. Raz argues that “[i]n large measure our well-being consists in the (1) whole-hearted and (2) successful pursuit of (3) valuable (4) activities.” *Id.* Therefore, democracy should improve the conditions for improving well-being. *Id.* at 102

5. Cyberlaw's detractors often look to stare decisis as a suitable means to resolve conflicts between traditional law and new media. See, e.g., Jack E. Brown, *New Law for the Internet*, 28 ARIZ. ST. L.J. 1243, 1258 (1996) (arguing that the rush to legislate new media is prone to mistakes and that “judicial rulings tailored to meet individual, discrete factual situations” produce more rational solutions).

6. New media might present difficulties for the application of established law, but these can be overcome. See *Pavlovich v. Superior Court*, 109 Cal. Rptr. 2d 909, 912–13 (Cal. Ct. App. 2001) (“The Internet, as a mode of communication and a system of information delivery is new, but the rules governing the protection of property rights, and how that protection may be enforced under the new technology, need not be.”); cf. *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000) (“[C]yberspatial communication may create difficult legal issues . . .”).

7. For example, Sunstein argues that operators of a political Web site should provide links to other Web sites offering different political opinions, reasoning that this would expose people to alternative viewpoints. CASS SUNSTEIN, *REPUBLIC.COM* 186–90 (2001) [hereinafter SUNSTEIN, *REPUBLIC.COM*].

8. In this sense, the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA) are Cyberlaw. See 17 U.S.C. § 1201 (2000). These provisions prohibit, in many cases, the novel use of software to circumvent access barriers which are intended to prevent unauthorized uses. *Id.* Although § 1201(c)(1) seems to protect fair use, defenses against a § 1201 DMCA claim are weakened because the action need not allege copyright infringement. Therefore, a declaration of a fair use is irrelevant. See, e.g., *Universal Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001) (“Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.”).

9. For example, the Communications Assistance for Law Enforcement Act (CALEA) requires providers of electronic services, like Internet service providers, to assist law enforcement in the installation of pen registers and wiretaps. See Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended at 18 U.S.C. §§ 2510–2522 (2000)).

many of the justifications (on either side) do not adequately interrogate the value of communication and information exchange in a global society increasingly interconnected by digital communication. Legal scholarship on Cyberlaw has not adequately denied or defended basic principles of communication or the specific value that communication and information exchange has for individual well-being and democracy. This Article is critical of Cyberlaw because its justifications frequently do not acknowledge the novelty of emerging digital communications as technologies that can expand general access by directly assailing elite control over the production and delivery of information.<sup>10</sup> This assessment of elite control considers whether access can and should be improved for cultural production (the creation, distribution, and storage of knowledge); the legitimation of institutional authority and the validation of law and other norms; and improvement in the access that individuals have to new media. Together, these forms of access can be referred to as “symbolic reproduction.”<sup>11</sup> Too frequently, the justifications used to advocate or deny the importance of Cyberlaw fail to acknowledge the potential for new media to radically countervail the traditional social relations of symbolic reproduction that mostly favor elite control.

This is no trivial problem. When the arguments for or against Cyberlaw fail to acknowledge how radically new media differ from old media, the implications of these new technologies for autonomy, legitimation, culture, and, indeed, democracy may be overlooked. Often, the only argument left between lovers and haters of Cyberlaw is whether the law, applied in the usual way to new media, deserves to be called Cyberlaw.<sup>12</sup> Elite control of communications via new media is seldom defended or challenged in the many debates over the validity of Cyberlaw; rather, elite control of symbolic reproduction is simply taken for granted.

This Article concerns itself primarily with the lack of adequate justifications in the debate over Cyberlaw. Secondarily, this Article is

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10. According to Mills, “elite” refers to the “higher circles” in which power—primarily the power to allocate and appropriate productive resources—is withheld and enacted. See C. WRIGHT MILLS, *THE MARXISTS* 117–18 (1962). Mills’s conception is adopted here as a way to unload any traditional intellectual expectations that remain in an analysis that sticks to the formulation of ruling class.

11. See 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 137–48 (Thomas McCarthy trans., 1987) (1981) [hereinafter HABERMAS, *LIFEWORLD AND SYSTEM*]. Habermas divides symbolic reproduction into cultural reproduction, social integration, and socialization. *Id.* This Article will refer to symbolic reproduction as encompassing these three forms of achieving social cohesion through interaction. It will restrict such reference to the utility of symbolic reproduction in understanding what is at stake when symbolic reproduction is controlled by elites via uses of new media. No attempt is made here to strictly apply Habermas’s theory of communicative action to the value of Cyberlaw.

12. See, e.g., Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 208 (arguing that Cyberlaw is unnecessary because new media are subject to applications of existing laws).

concerned with introducing a theory of communication into legal analyses of new media. Such a theory aims to privilege communication that is “dialogical,” that is, interaction that promotes two-way communication and seeks to prevent mediation of communication by third parties. Dialogical communication is moral to the extent such contexts of interaction promote communication oriented to agreement. New media permit, in their own modified way, the least-mediated form of dialogical communication found in ancient orality. That is, with new media, anyone can be Pericles, just as much as anyone can be a member of Pericles’s audience. Legislative and judicial attempts to limit dialogical communication damage individual well-being and democratic participation, especially where communication technologies offer nearly costless digital access to culture.

Part II provides an overview of Cyberlaw’s precursors. First is a description of the ways in which the law has ordered social relations with respect to emerging communication technologies to favor the control of information by elite producers of culture such as government, corporations, and wealthy individuals. Second is an analysis of the role technology has played in historic conceptions of democracy. Thus, Part II provides a “communication-theoretic”<sup>13</sup> base for an examination of the Cyberlaw debate.

Part III examines several views of Cyberlaw from both supporters and opponents. Included among these are conservative assaults on the need for Cyberlaw, libertarian defenses of the “unregulability” of cyberspace, Lessig’s legal-coherency critique of Cyberlaw, and Sunstein’s intricate argument from democracy for cyberspace regulation. Although varied, the justifications these theorists bring to condemn or defend Cyberlaw prove inadequate.

Part IV provides a justification for Cyberlaw. Because new media permit dialogical, low-cost communication, a radical departure from the traditional protection of, in particular, intellectual property and the technology-specific applications of First Amendment protection may be warranted to diminish elite control. This Article, however, does not provide a policy formulation for such regulatory departures. Rather, this Article focuses on how numerous commentators justify new media uses to support or oppose Cyberlaw. An analysis of these views is then used to argue the need for a certain moral treatment and regulation of new media uses. This Article will show that recognizing the value of least-

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13. “Communication-theoretic” is a term borrowed from Habermas. The emphasis here is on the way that communication is inherently a moral activity achieving agreement. Communicative interaction is basic to consciousness, individual well-being, and democracy. Habermas provides numerous definitions in his work; for example, he states, “[W]e take a concept of the individual as essentially socialized as our point of departure and regard the moral point of view as implicit in the structure of reciprocal recognition among communicatively acting subjects.” JÜRGEN HABERMAS, JUSTIFICATION & APPLICATION: REMARKS ON DISCOURSE ETHICS 60 (Ciaran Cronin trans., MIT Press 1993) (1991).

mediated communication in a democracy is crucial to any argument offered to improve cultural access or to justify the continued or expanded elite control of symbolic reproduction. Whatever Cyberlaw should be, if potential uses of new media are acknowledged and protected, even the most basic, constitutional defenses of elite control of symbolic protection should perish.

## II. CYBERLAW'S PRECURSORS AND THE LEGAL ACCOMMODATION OF ELITE CONTROL

Cyberlaw's core concern has been to justify a legal strategy that can best address the problems that new media pose for First Amendment and intellectual property jurisprudence.<sup>14</sup> To this end, new media—disparate digital communication technologies providing access to the Internet—are said to so unsettle traditional social relations as to require a new jurisprudence to comport with the emergent technologies' radical potential.<sup>15</sup>

The goal of communications law has been to balance private ownership of the means of communication with democratic access to speech.<sup>16</sup> Cyberlaw is a species of communications law. As such, it is centrally concerned with an assessment of the functional capacities of new media and whether these media should provide, on the one hand, greater private or governmental control of symbolic reproduction or, on the other hand, expanded individual access to communication and

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14. One would expect that First Amendment and intellectual property rights would be implicated centrally in reducing elite control. However, Cyberlaw encompasses many other concerns. *See, e.g.*, Paul Ehrlich, *Cyberlaw: Regulating Conduct on the Internet: Communications Decency Act § 230*, 17 *BERKELEY TECH. L.J.* 401, 401–02 (2002) (arguing that Congress never intended to release Internet service providers from defamation liability); Nicolas P. Terry, *Cyber-Malpractice: Legal Exposure for Cybermedicine*, 25 *AM. J.L. & MED.* 327, 366 (1999) (arguing that cybermedicine “will wreak a sea change in health care provider liability law”).

15. *See* BRIAN WINSTON, *MEDIA TECHNOLOGY AND SOCIETY* 11–13, 82 (1998). Winston explains that, historically, a modality of power has been the “law” of the suppression of radical potential. *Id.* at 13. For example, new technologies provide more access to communication, which often disrupts the power relations of social communications. *Id.* Those in power often suppress such technologies. *Id.*

16. To a substantial degree, communications laws reflect evaluations of specific technologies, including an assessment of a technology's First Amendment standing, to determine how this balance should be obtained. For example, due to inefficient use of the electromagnetic spectrum (which causes a scarcity of broadcast frequencies), broadcasting is given less First Amendment protection than print media. The Supreme Court justifies this by finding that the broadcast audience's First Amendment right to receive diverse opinions is “paramount” to the station owners' rights. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388, 390 (1969). Other technologies, such as cable television, receive more First Amendment protection. *See* JAMES C. GOODALE, *ALL ABOUT CABLE* §§ 2.06–.10 (rev. ed. 1988). However, a cable operator's “control over most (if not all) of the television programming that is channeled into the subscriber's home . . . [creates a] potential for abuse . . . over a central avenue of communication [that] cannot be overlooked.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656–57 (1994). The convergence of mass media, telecommunications, and computers has raised further questions about ownership and access. *See, e.g.*, Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 *B.C. L. REV.* 1067, 1069 (1994).

information.<sup>17</sup> Cyberlaw is sensitive to the possibility that new media may unsettle the status quo of justifications and applications of traditional communications law. This is not to claim concurrently that new media are irreversibly unsettling in any technologically determinative way; rather, it is merely to say that Cyberlaw is both prepared to acknowledge such potential and to formulate reasonable responses.

What follows in Part II.A is an enumeration of the ways that the law regularly has been used to enable elite control of emergent communication technologies. Such tedium is necessary to prove the connection to doubtful readers. More important, Part II.B then explains why such control is inimical to individual well-being and democracy.

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17. There are, of course, other justifications for regulating cyberspace. For example, a balance between privacy and collective security is needed with respect to uses of new media. See Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1752 (1995) [hereinafter Lessig, *Path of Cyberlaw*]. Additionally, regulations might seek to increase diversity in communications to protect individuals from racism, particularly with respect to marketplace associations. See, e.g., Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1131, 1137 (2000) (noting how emergent technologies can affect the “racial mechanics” of interpersonal and collective communications and how regulation of new media can promote zoning that assures racial diversification). Such mediation may be necessary even as Cyberlaw does the moral work of reducing elite control of new media to promote dialogical communication.

### A. *Communication Law and Elite Control*

Much like technology, the human voice<sup>18</sup> long has been regulated in its use. For example, laws prohibit fighting words<sup>19</sup>; speech that is an incitement to crime, like blackmail or threats<sup>20</sup>; perjury<sup>21</sup>; and defamation.<sup>22</sup> Additionally, there are time, place, and manner restrictions on speech,<sup>23</sup> as well as some rare constitutionally acceptable prior restraints of speech.<sup>24</sup>

Numerous attempts to regulate the uses of emergent communication technologies conceptually predate Cyberlaw:

- Print technology has been regulated by anti-sedition legislation<sup>25</sup> and laws intended to assure the economic viability of competing newspapers.<sup>26</sup> Print benefits from a lack of required access: unlike broadcasters,<sup>27</sup> newspapers are not required to provide a forum for an individual to respond to a personal attack.<sup>28</sup>
- For postal technology, the law established structural regulation on private carriage of the mails and mandated government oversight of route construction and uniform postage rates.<sup>29</sup>

18. “Human voice” includes action as a form of speech. *See, e.g.,* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–14 (1969) (holding that a school could not punish students for wearing armbands to protest the Vietnam War unless the school could show that such action disrupted school activities); *see also* *Texas v. Johnson*, 491 U.S. 397, 417–18 (1989) (holding that burning an American flag in political protest is constitutionally protected symbolic speech).

19. *See, e.g.,* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942) (upholding as constitutional a state statute prohibiting public speech “likely to cause a breach of the peace”); *see also* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that speech intended and likely to incite imminent lawless action is not constitutionally protected).

20. *See, e.g.,* *Rankin v. McPherson*, 483 U.S. 378, 386–87 (1987) (stating that a threat to kill the President of the United States is not protected speech).

21. *See, e.g.,* 18 U.S.C. §§ 1621–1623 (2000).

22. *See, e.g.,* *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002) (noting that slander is a “false and unprivileged publication, orally uttered”); *see also* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964) (holding that defamatory statements are not immune from constitutional scrutiny).

23. Governmentally imposed content-neutral speech restrictions are held to a lower level of First Amendment scrutiny. *See* *United States v. O’Brien*, 391 U.S. 367, 376 (1968). In *O’Brien*, the Court held:

it [is] clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377. *See also* *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (holding that a municipal noise regulation was content-neutral and constitutional).

24. *See, e.g.,* *United States v. Noriega*, 917 F.2d 1543, 1551–52 (11th Cir. 1990) (per curiam) (upholding temporary restraint on CNN presenting tapes of prison conversations between former Panamanian leader Manuel Noriega and his lawyers).

25. *See, e.g.,* Seditio Act, ch. 74, 1 Stat. 596 (1798) (no longer in force as of 1801).

26. *See, e.g.,* Newspaper Preservation Act, 15 U.S.C. § 1801 (2000).

27. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373–75 (1969) (upholding “personal attack” rule applied to broadcasting stations).

28. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that “right of reply” statute violated newspaper’s First Amendment rights).

29. *See, e.g.,* Act of Feb. 20, 1792, ch. 7, §§ 1–2, 9, 1 Stat. 232.

Laws also designated railroads as carriers,<sup>30</sup> permitted the free exchange of newspapers between editors<sup>31</sup> as well as franking of congressional materials,<sup>32</sup> and cross-subsidized letter postage by delivery of printed matter.<sup>33</sup>

- For telegraphic technology, the law has regulated the government subsidy of an initial line between Washington, D.C., and Baltimore<sup>34</sup>; required that transcontinental railroads allow the installation of telegraph lines<sup>35</sup>; and enforced federal jurisdiction over interstate telegraph route construction.<sup>36</sup>
- For telephony, the law has intervened to assure common carriage and universal service by a regulated monopoly,<sup>37</sup> accessibility of networks for surveillance,<sup>38</sup> structural separation of information services from telecommunications services,<sup>39</sup> and deregulation of service providers.<sup>40</sup>
- For wireless or broadcast technology, the law has licensed frequencies to users,<sup>41</sup> assured American ownership of broadcast stations,<sup>42</sup> favored commercial broadcasting in allocating spectrum,<sup>43</sup> required that broadcasters operate in the public interest,<sup>44</sup> suspended spectrum licensing to encourage ownership

30. The designation of railroads as post roads occurred in 1838. *See* Act of June 8, 1872, ch. 335, § 201, 17 Stat. 308; Act of July 7, 1838, ch. 172, § 2, 5 Stat. 283.

31. Act to Establish the Post-Office and Post Roads Within the United States, ch. 7, § 21, 1 Stat. 232 (1792).

32. 39 U.S.C. §§ 3210–3213, 3215–3216, 3218–3219 (2000).

33. *See* RICHARD B. KIELBOWICZ, *NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700–1860s*, at 18 (1989).

34. *See* Act of Mar. 3, 1843, ch. 84, § 1, 5 Stat. 618.

35. *See* Act of July 24, 1866, ch. 230, § 1, 14 Stat. 221.

36. *See* *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 13 (1877) (holding unconstitutional a Florida grant of monopoly to Pensacola Telegraph Company).

37. *See* Act to Amend Section 407 of the Transportation Act of 1920 (Willis-Graham Act), ch. 20, 42 Stat. 27 (1921). The law effectively exempted AT&T from antitrust laws and granted the company a monopoly in tacit exchange for providing universal telephone service. *See generally id.*

38. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 212–25 (codified at 18 U.S.C. §§ 2510–2520 (2000)).

39. *See* *United States v. W. Elec. Co.*, No. 17-49, 1956 U.S. Dist. LEXIS 4076, at \*5–9 (D.N.J. Jan. 24, 1956).

40. *See, e.g.*, *Wash. Util. & Transp. Comm'n v. FCC*, 513 F.2d 1142, 1145, 1169 (9th Cir. 1975) (authorizing competition in private line services).

41. Act to Regulate Radio Communication, ch. 287, 37 Stat. 302 (1912).

42. 47 U.S.C. § 310 (2000).

43. *See* THOMAS G. KRATTENMAKER, *TELECOMMUNICATIONS LAW AND POLICY 72–73* (3d ed. 1998). Common law solutions to spectrum ownership established a rights regime respected by Federal Radio Commission licensing practices. *See, e.g.*, *Tribune Co. v. Oak Leaves Broad. Station* (Ill. Cir. Ct., Cook County, Nov. 17, 1926), *reprinted in* 68 CONG. REC. 215–19 (1926).

44. *See* *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943).

consolidation,<sup>45</sup> and attempted to mandate access to political speech.<sup>46</sup>

- For cable television, Congress imposed “must-carry” rules that enable broadcast television stations to require cable television system operators to retransmit television signals, ostensibly to protect local programming.<sup>47</sup>

This summary emphasizes that regulation regularly has been used to organize technologies to determine specific relations of access to symbolic reproduction. Arguably, some regulation promotes access that does not, in any obvious way, diminish elite accumulation. This has been true with universal service for telephony<sup>48</sup>; the “e-rate” subsidization of high-speed digital access for schools, libraries, and health clinics<sup>49</sup>; and telecommunications access for persons with disabilities.<sup>50</sup> It must be remembered, though, that cross-subsidies (for example, from above-cost long-distance provision to local telephone access) and customer surcharges continue to fund all these attempts to expand access. Such practices have helped telecommunications providers to avoid internalizing the costs of such subsidies.

This list also must include regulation that has *not* occurred for communication media. Commercialization of communication leaves the

45. The television licensing freeze of 1948–1952 was lifted by the Sixth Report and Order, 41 F.C.C. 148 (1952), effectively assuring network dominance. See ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* 182–86 (1989).

46. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 370–75 (1969). Provisions of unlicensed spectrum could advance the cause of greater access; several authors point to the advantages of a “spectrum commons” in distributing Internet access more efficiently than licensed spectrum. See, e.g., Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 290–93 (1998) (arguing for development of unlicensed spectrum as an information commons and for competition in receiving and transmitting equipment); Stuart Buck, *Replacing Spectrum Auctions with a Spectrum Commons*, 2002 STAN. TECH. L. REV. 2. Yet the history of this movement has been plagued by frequency congestion, demands by government and industry for more bandwidth, and the unwillingness of service providers to enter the unlicensed market. Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase’s “Big Joke”: An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 493–509 (2001). Though the debate over efficiency continues, it is too early to know whether the spectrum commons approach will work, especially as this model confronts the usual private accumulation—indeed, the regulatory maintenance—of scarce spectrum.

47. 47 U.S.C. § 534 (2000).

48. The universal service charge paid to the common carrier subsidizes rural and low-income service, as well as Internet access for schools, libraries, and rural health care providers. See generally James Alleman & Paul N. Rappoport, *Universal Service: A Policy Survey, Review and Critique*, in 1 THE INTERNATIONAL HANDBOOK OF TELECOMMUNICATIONS ECONOMICS 315 (Gary Madden ed., 2002); Jerry Ellig, *Intercarrier Compensation and Consumer Welfare*, 2005 U. ILL. J.L. TECH. & POL’Y 97, 99 (examining consumer welfare in light of proposed intercarrier compensation reform).

49. See 47 U.S.C. § 254(h) (2000).

50. Rehabilitation Act, 29 U.S.C. § 794(d) (2000); see Americans with Disabilities Act (ADA), 42 U.S.C. § 12182(a) (2000); 47 U.S.C. § 255 (2000). The ADA provides that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . services, . . . privileges, advantages, or accommodations of any place of public accommodation.” *Id.* Whether the Internet qualifies as a “place of public accommodation” within the meaning of the statute is unclear. See Leah Poynter, *Setting the Standard: Section 508 Could Have an Impact on Private Sector Web Sites Through the Americans with Disabilities Act*, 19 GA. ST. U. L. REV. 1197, 1209–11 (2003).

allocation of speech resources to private ordering; and, presumably, each person's willingness to pay determines the distribution of such resources. This has led to ownership concentration, stemming primarily from network effects<sup>51</sup> (especially for telegraphy and telephony) but also caused by the mixture of liberalization, privatization, and commercialization<sup>52</sup> that has facilitated elite control of symbolic reproduction.<sup>53</sup>

Communication law historically has allocated speech resources in ways that benefit elites. The postal service was exclusively for business uses until the rate reforms of the 1840s,<sup>54</sup> which included the distribution of the mass medium of newspapers and led to corresponding growth in advertising and audience commodification.<sup>55</sup> Business uses also dominated telegraphy. According to the president of Western Union, "social telegraphing" accounted for only five to six percent of all telegrams sent in the United States, compared to eighty percent for commercial uses.<sup>56</sup> Moreover, the marriage of infrastructure ownership and content distribution led to Western Union's dominance in national news and market information.<sup>57</sup> Commercial interests also ruled regional distribution of news, although there was marked competition well into the mid-twentieth century.<sup>58</sup> However, advertiser-driven content eroded such competition and gradually displaced the editorial function.<sup>59</sup>

51. "Network effects" refers to the way in which a good's value increases with the consumption ("demand-side effects") of the same good by others. Actual network effects occur when the whole value of a good depends on the interconnection of users of the same good, such as telephone networks. The producer of such a good internalizes this value. See Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 488-96 (1998).

52. "Liberalization" refers to state intervention intended to increase market competition. "Privatization" refers to the selling off of state enterprises to non-state actors and the elimination of state subsidies for the development and operation of networks. "Commercialization" refers to the creation and maintenance of networks that primarily serve business, rather than interpersonal, communications. See VINCENT MOSCO, *THE POLITICAL ECONOMY OF INFORMATION: RETHINKING AND RENEWAL* 202-04 (1996).

53. Exploitation of network effects helps to establish such elite control, and the "deregulation" of markets often exacerbates the problem.

54. See Act of Mar. 3, 1845, ch. 43, §§ 1-3, 5 Stat. 732. In 1845, it would have cost a laborer's entire daily wage to send a letter from Ohio to New York. See RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 159 (1995).

55. "Audience commodification" describes the delivery of audiences to advertisers. See DALLAS W. SMYTHE, *DEPENDENCY ROAD: COMMUNICATIONS, CAPITALISM, CONSCIOUSNESS, AND CANADA* 13 (1981) (explaining how "Consciousness Industries" of mass media produce audiences as an intermediate commodity to market goods and services).

56. S. REP. NO. 48-577, pt. 2, at 21 (1884) (statement of Norvin Green, President, Western Union Telegraph Company).

57. See S. REP. NO. 48-577, pt. 1, at 17 (1884).

58. See Paul M. Hirsch & Tracy A. Thompson, *The Stock Market as Audience: The Impact of Public Ownership on Newspapers*, in AUDIENCEMAKING: HOW THE MEDIA CREATE THE AUDIENCE 142, 145-46 (James S. Ettema & D. Charles Whitney eds., 1994) (arguing that the post-World War II trend in public newspaper ownership spurred concentration).

59. See generally C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 45-48 (1994). Baker notes the diminution of the editorial function and the tendency of concentrated ownership owing to the advantages of reduced competition for advertising. *Id.* These trends are detrimental to democratic access to political debate and also create limited viewpoint diversity.

Broadcasting has shown a similar degree of elite uses and ownership concentration. Licensing effectively destroyed amateur uses of the spectrum and greatly limited non-commercial uses.<sup>60</sup> Cable and satellite broadcasting did not solve the spectrum scarcity issue. It was inevitable these forms of new media would further centralize distribution of mass entertainment and news given the traditional oligopoly's stranglehold on television content distribution.<sup>61</sup>

Face-to-face communication might be seen as evading this trend toward elite control, but this view would discount the immeasurable effects of ideology. There is reason to believe that elite control of symbolic reproduction via mass media reduces the fund of knowledge from which individuals can draw to inform even the most mundane communication contexts.<sup>62</sup> Although elite cultural dominance could never fully exhaust dialogical communication,<sup>63</sup> the intellectual impoverishment caused by such dominance can limit available knowledge and thereby diminish viewpoint diversity and damage citizens' abilities to develop informed opinions.<sup>64</sup>

### B. *Communication Theory and Democracy*

An explanation of why elite control is bad for well-being and democracy now follows. Here, "communication theory" is limited to what has been called "elite theory." As such, communication is first evaluated as fundamental to well-being and democracy. Next, elite theory establishes why concentrated control over symbolic reproduction is bad and why such control decreases individual well-being and

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60. The Federal Radio Commission's General Order 40 of 1928 reassigned the vast majority of stations to different frequencies, locations, and permissible broadcast times but excluded six percent of licenses owned by chains such as CBS and NBC, along with their affiliates. See ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY* 14-37 (1993). There is direct evidence that AT&T, even in its earliest days, withheld popular access to fairly inexpensive transmitters. See WILLIAM PECK BANNING, *COMMERCIAL BROADCASTING PIONEER: THE WEAFF EXPERIMENT 1922-1926*, at 55 (1946).

61. See generally *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 17 F.C.C.R. 26,901, 26,959-60 (2002).

62. In Giddens's terminology, this would be the duality of structure in which everyday activity confirms or reproduces structures of social relations bound by time and space constraints and opportunities. Agency operates through the medium of structure, and both agency and structure—this duality—are reproduced and changed even in the course of the most mundane activities. See 1 ANTHONY GIDDENS, *A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM* 19-20 (2d ed., Stanford Univ. Press 1995) (1981) [hereinafter GIDDENS, *HISTORICAL MATERIALISM*]. Limits on access to information (resources of significance) shrink the opportunities of action and increase domination ("permitting dominion over") while decreasing autonomy. *Id.* at 50-51.

63. RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 113-14 (1985).

64. See C. WRIGHT MILLS, *Mass Media and Public Opinion*, in *POWER, POLITICS AND PEOPLE* 577, 586-88 (Irving Louis Horowitz ed., 1963). The Decatur study's famous media effects research ostensibly showed a "two-step" process in opinion formation. *Id.* Community "opinion-leaders" (1) received information from available media, and (2) filtered it to other individuals. *Id.* Mills shows that this research could not account for the cultural dominance of concentrated media ownership. *Id.* at 688-90. Rather, such dominance could be inferred only from the general critique of the political economy of media institutions. *Id.*

democracy at the expense of the “generalizable interests of all individuals.”<sup>65</sup> Normatively, elite theory advocates the distribution of resources in order to decrease content mediation between speakers and audiences. Importantly, technology mediates communication; the normative approach of elite theory focused on the use of communication technology seeks the deployment of technologies that distribute the power of symbolic reproduction and reduce mediation.

Whether traditional elite control of communication threatens democracy and individual well-being depends on the extent to which such control damages social solidarity and individual autonomy.<sup>66</sup> Typically in communications law, the conflict between access and control—including the examinations and resolutions of such conflict—has orbited the principle of property rights in the means of communication and information exchange. For example, the law usually defends strong property rights in the means of mass communication.<sup>67</sup> Generally, this concern in the law has linked solidarity and autonomy to access as defined by the social relations of consumerism. Whether this has been inimical to democracy greatly depends on how the analysis examines not only the effects of traditional forms of ownership and control on uses of emergent technologies, but also how these new media might realize forms of autonomy and solidarity that further improve well-being. The role that elite control plays in the construction and maintenance of public opinion and the force of the political legitimation of such control further confounds this inquiry.

Much communication theory concerns itself with the conjunction of social, individual, and ideological conflict in addition to the uses of communication technologies to construct, maintain, and even destroy elite control. What follows is a limited survey intended only to capture the generalities of a communication-theoretic approach to well-being and democracy as well as an elite theory declaiming elite control.

Ong assesses “primary orality”<sup>68</sup> for the kind of social consciousness that arises out of interpersonal communication. To impart and retain meaning under orality requires a high degree of immediate interaction.<sup>69</sup> Havelock, in particular, further demonstrates how orality shaped the

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65. JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 123 (Thomas McCarthy trans., 1975) (1973).

66. For purposes of this Article, “social solidarity” means the ways in which social action is collectively coordinated and legitimated. In democracies, this coordination should permit the greatest degree of individual participation in the determination of action. “Autonomy” is meant here as both the experience to which only the person has access and as a form of life, the content and form of expression of which are, to the greatest extent possible, not coerced by other persons or structures of power.

67. See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 367 (1999) [hereinafter Benkler, *Constraints*] (arguing in favor of government intervention to preserve an open marketplace of ideas).

68. See WALTER J. ONG, *ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD* 1–3 (1982) [hereinafter ONG, *ORALITY*]. “Primary orality” refers to societies in which the technology is limited to face-to-face communication.

69. See generally WALTER J. ONG, *INTERFACES OF THE WORD* 92–120 (1977).

moral foundation for a democratic polis.<sup>70</sup> Orality thus provides a basic model for broad access to symbolic reproduction.

Innis shows how elite uses of emerging communication technologies degraded this model.<sup>71</sup> The use of print technology by elites to centralize the storage of knowledge caused popular access to dwindle.<sup>72</sup> Eisenstein, for example, shows how print technology complexly served elite interests by strategically diffusing Enlightenment literature.<sup>73</sup> Schudson demonstrates the democratizing effects of lower-cost printing techniques, which permitted the emergence of mass media and the rise of audience commodification in the nineteenth century.<sup>74</sup> Habermas shows how print technology in the short-lived bourgeois public sphere roughly emulated principles of opinion formation idealized in classical democracy.<sup>75</sup> Giddens explains the relation of democratic freedoms to principles of “presence-availability” and the extent to which modern state power depends on the technical obstruction of access to information and communication.<sup>76</sup> Williams demonstrates how such control, as “cultural materialism,” is grounded in organizing material resources of speech in ways that favor elite accumulation.<sup>77</sup> Similarly, Mills devotes much time to explaining how elite control of the “cultural apparatus” legitimates inequities in, and limitations on, democratic access to speech.<sup>78</sup> Numerous other authors show how control of specific communication technologies has negatively impacted democratic access to expression.<sup>79</sup>

This partial review helps to emphasize the important relation of technology to both the implementation of democratic ideals and the accrual of elite control. Note that the law has defended elite interests

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70. See generally ERIC A. HAVELock, *THE MUSE LEARNS TO WRITE: REFLECTIONS ON ORALITY AND LITERACY FROM ANTIQUITY TO THE PRESENT* 79–97 (1986) (explaining that Greek plays and poetry were repositories of knowledge accessed in the immediacy of performance).

71. See HAROLD A. INNIS, *EMPIRE AND COMMUNICATIONS* 10 (Mary Q. Innis ed., Univ. of Toronto Press 1972) (1950). The concept of “empire” historically has been owed to efficiencies in communication and elite storage of knowledge. *Id.* at 9.

72. *Id.* at 9–10.

73. See, e.g., 1 ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 23 (1979).

74. See MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 14–31 (1978).

75. See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 161–180 (Thomas Burger et al. trans., MIT Press 1989) (1962).

76. See GIDDENS, *HISTORICAL MATERIALISM*, *supra* note 62, at 40–41. Giddens refers to “presence-availability” as high in oral culture. The time-space meshing of communicative interaction is short in oral culture. One crucial means of creating and sustaining elite power is to expand the distance in time and space in which such interaction takes place. This time-space “distanciation” increases the likelihood for the mediation of communication and the control (storage capacity) of information needed to supervise subjects. Anonymous communication is inimical to the managed distanciation of communication. *Id.*

77. See WILLIAMS, *supra* note 63, at 18–19.

78. See C. WRIGHT MILLS, *The Cultural Apparatus, in POWER, POLITICS AND PEOPLE*, *supra* note 64, at 405, 411–13.

79. See generally, e.g., MENAHEM BLONDHEIM, *NEWS OVER THE WIRES: THE TELEGRAPH AND THE FLOW OF PUBLIC INFORMATION IN AMERICA, 1844–1897*, at 174–75 (Thomas K. McCraw ed., 1994).

more aggressively than general access. Some communication theory empirically demonstrates why and how this happens. To be sure, orality is not immune from the presumed pollutions of mediation,<sup>80</sup> and print technology or other media are not necessarily poorly suited to the transmission of communications crucial to democracy. Yet orality remains a pole star for optimal, least-mediated communication essential in some way to individual well-being and democracy. This is precisely because orality represents a state of access to communication in which the resources for speech have been the most widely shared.

Just as important, much communication theory has concerned itself with a normative evaluation of the uses of technologies to improve individual well-being and pursuit of the “good life.”<sup>81</sup> This evaluation often includes a philosophic critique of reason that analyzes the role of communication in reasoned deliberation. Such analysis attempts to develop a theory of moral reason in communication<sup>82</sup> or a rejection of foundational reason based on a complex view of communication as the strategic means by which reason dominates.<sup>83</sup> In either case, communication becomes essential to human freedom in the pursuit of the good life, even when communication itself is understood always to engage struggles for power.<sup>84</sup>

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80. See, e.g., JOHN DURHAM PETERS, *SPEAKING INTO THE AIR: A HISTORY OF THE IDEA OF COMMUNICATION* 267 (1999).

81. The term “good life” is the answer given to the question, “How should one live?” The answer is reducible not to universalistic morality but to ethical and shifting conceptions of what kinds of collectively acknowledged identities are good. See HABERMAS, *LIFEWORLD AND SYSTEM*, *supra* note 11, at 110. Morals are universally accepted means of resolving competing normative claims regarding the good life. Habermas finds the moral point of view in intersubjective agreement reached without coercion. See JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION*, at vii–ix (Christian Lenhardt & Shierry Weber Nichol森 trans., 1990) (1983) [hereinafter HABERMAS, *MORAL CONSCIOUSNESS*].

82. An example is Habermas’s Communicative Action Theory. The basis of moral reason is found in intersubjective relations bound by communication. Habermas sees in communicative action a universal assent to the validation of norms that generally satisfy all participants’ interests. See HABERMAS, *LIFEWORLD AND SYSTEM*, *supra* note 11, at 65.

83. That is, the rationality of sovereign power is replaced by the “micropolitics” of discrete private surveillance and discipline of bodies. This view on reason sees rationality as the internalization of discipline by individuals. The individual reflexively monitors activities to conform to the obligations that intermittent surveillance enforces. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200–01* (Alan Sheridan trans., 1977) (1975). Communication, as “discourse,” performs a similarly rationalizing function by forming the objects of the discourse and by giving the individual the belief that what is said is the “majestically unfolding manifestation of a thinking, knowing, [and] speaking subject,” which is an illusion. See MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 55 (A.M. Sheridan Smith trans., 1972) (1971).

84. However, Foucault seems to see the struggle for domination in all discursive relations, such that human freedom can never be found in intersubjectivity. See GIDDENS, *HISTORICAL MATERIALISM*, *supra* note 62, at 50–51. Giddens points to the “knowledgeability” of actors in the reproduction of social structures. See ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* 25 (1984) [hereinafter GIDDENS, *CONSTITUTION*]. Communication is essential to such knowledgeability, without which autonomy would not be possible. See *id.* Giddens criticizes Foucault for holding a functionalist view of systems of domination (like psychoanalysis and prisons) as having a logic of operation that eludes human control. See *id.* at 145–46. But somewhat similar to Foucault, Giddens views domination as “the very condition of existence of codes of signification.” *Id.* at 31. These contrasts are raised here to note that even as expounded by Giddens, communication, though never free from

New media offer forms of interaction that Arendt, following Kant's formulation, referred to as "moral-practical."<sup>85</sup> This interaction promotes universal assent and is the kind of interaction oriented to agreement most easily achieved in dialogic, oral communication. Democracy depends upon undistorted communication and the distribution of communicative power,<sup>86</sup> or what this Article prefers to call access to symbolic reproduction. The submission of all social communication technologies to the rationality of the marketplace<sup>87</sup> is undemocratic to the extent that this means of generating communicative power favors elite speakers.

Courts have tailored communications law to accommodate the unique challenges posed by the introduction of new communication technologies.<sup>88</sup> However, one should not underestimate the

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domination, is a resource that can contribute much to the accumulation of power, as both the power over resources ("allocative power") and meaning ("authoritative power"). See GIDDENS, HISTORICAL MATERIALISM, *supra* note 62, at 94–95. This is especially true where mass media can increase the time-space distanciation of communication. See *id.* at 90–92.

85. For purposes of consistency, this Article equates communicative power with the power of symbolic reproduction. The model of communicative power originates in the publicly rendered agreement of opinions, in that "[p]ower springs up between men when they act together, and it vanishes the moment they disperse." See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 146–47 (William Rehg trans., 1996) (1992) [hereinafter HABERMAS, LAW AND DEMOCRACY] (quoting HANNAH ARENDT, THE HUMAN CONDITION 200 (1958)).

86. See, e.g., HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 43 (1982) ("[S]elf-interest . . . according to Kant, is not enlightened or capable of enlightenment but is in fact limiting. The greater the reach—the larger the realm in which the enlightened individual is able to move from standpoint to standpoint—the more 'general' will be his thinking."). This is a basic way of thinking about communicative power. Habermas elaborates on this by referring to such power as the development of "informal formation of public opinion" into a consensus manifested in elections. See HABERMAS, LAW AND DEMOCRACY, *supra* note 85, at 148–50. Similarly, Rawls's notion of conditions permitting persons to decide and agree on principles of justice—what he calls "reflective equilibrium"—is helpful to understanding the importance of least-mediated contexts of communication in a just society. JOHN RAWLS, A THEORY OF JUSTICE 42–43 (rev. ed. 1999). Another way to conceptualize communicative power is Finnis's notion of "practical reasonableness." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 138–39 (1980). In a just society, people need contexts of interaction that permit a reasonable assessment of what they ought to do. *Id.* This Article uses "communicative power" in the sense of the ability to publicly use one's reason to promote collective action. To do so requires contexts of communication and information exchange that allow for mass publication by individuals as well as dialogical communication. Again, access to symbolic reproduction defines such power.

87. Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1158–60 (2000) (arguing that Cyberlaw is unnecessary and even dangerous "futurology" because it neglects that law and technology are "socially mediated"). Sommer writes, "[T]he business of today's Internet is business." *Id.* at 1194.

88. See, e.g., *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654, 2003 U.S. Dist. LEXIS 6483, at \*20 (C.D. Cal. Mar. 6, 2003) (copying hyperlinks is permissible because there is not sufficient originality in URLs to make them copyrightable); *cf.* Digital Millennium Copyright Act, Pub. L. No. 105-304, §§ 103–202, 112 Stat. 2860, 2863–86 (1998) (indicating that Congress also has needed to amend laws in order to accommodate new communications technologies as shown by the addition of § 512 and §§ 1201–1205 to the Copyright Act of 1976). Section 1201 of the Copyright Act, which prohibits the circumvention of technological measures used to control access to copyrighted works and the manufacture of devices that are designed to circumvent such measures, is particularly interesting because it does not enumerate violations of copyright, but prohibits forms of *access* to protected content. 17 U.S.C. § 1201 (2000).

constitutional relation of law to the functions of emergent social communication. The enactment and enforcement of norms does reinforce the ways in which technologies serve elite control. One can imagine many alternative, legally mandated uses for technologies. For example, what if:

- letter postage had not been used to subsidize mass media?
- Morse had compelled Congress to “postalize” telegraphy?
- the law had not required the symbiosis of telegraphic route and railroad construction?<sup>89</sup>
- spectrum had been allocated to amateur uses?<sup>90</sup>
- there was no television licensing “freeze” from 1945 to 1952?<sup>91</sup>
- the Fairness Doctrine had been enforced consistently and still was in effect?<sup>92</sup>
- children’s broadcasting had been regulated more rigorously?<sup>93</sup>
- there was adequate public funding available for non-commercial broadcasting?<sup>94</sup>

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89. See *supra* notes 34–36 and accompanying text.

90. See *supra* note 60 and accompanying text.

91. See *supra* note 45 and accompanying text.

92. See Jerome A. Barron, *What Does the Fairness Doctrine Controversy Really Mean?*, 12 HASTINGS COMM. & ENT. L.J. 205, 207 (1989) (asserting that part of the fiduciary responsibility of licensees is to operate in the public interest, else they get “something for nothing”). The Federal Communications Commission (FCC) formulated the doctrine “to provide coverage of vitally important controversial issues of interest in the community served by the licensee [and to provide] a reasonable opportunity for the presentation of contrasting viewpoints on such issues.” *In re Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licenses*, 2 F.C.C.R. 5272, 5272 (1985). The FCC doubted the doctrine’s efficacy and, uncertain whether Congress had mandated the doctrine, questioned its constitutionality. *Id.* at 5274–75. In a case where the FCC was asked to determine whether a radio station had complied with the doctrine, a district court noted an earlier decision finding that Congress had not mandated the doctrine. *Meredith Corp. v. FCC*, 809 F.2d 863, 873 n.11 (D.C. Cir. 1987) (citing *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986)). In 1987, the FCC said that the doctrine “chills speech and is not narrowly tailored to achieve a substantial government interest,” effectively ending the FCC’s role in enforcing the doctrine. *In re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043, 5057 (1987), *aff’d sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

93. The Children’s Television Act of 1990, Pub. L. No. 105-220, 104 Stat. 996 (codified at 47 U.S.C. § 303(a)–(b), 394 (Supp. II 1990)), has been under-enforced. See Dale Kunkel & Julie Canepa, *Broadcasters’ License Renewal Claims Regarding Children’s Educational Programming*, 38 J. BROADCAST & ELECTRONIC MEDIA 397, 406–08 (1994) (finding that licensees offered *G.I. Joe*, *The Jetsons*, *Teenage Mutant Ninja Turtles*, and *Yogi Bear* as programming to fulfill obligations under the Act). The FCC attempted to strengthen the Act by defining mandatory standards for broadcasters. *In re Policies and Rules Concerning Children’s Television Programming*, 11 F.C.C.R. 10,660, 10,661 (1996).

94. See A PUBLIC TRUST: THE REPORT OF THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING 41–50 (1979) [hereinafter PUBLIC TRUST]. See generally CARNEGIE COMM’N ON EDUC. TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION (1967) (calling for governmental funding for a nationwide public television network). By 1979, it was clear that underfunding by the Nixon administration and a lack of long-term funding for the Corporation for Public Broadcasting had hurt the system. See PUBLIC TRUST, *supra*, at 41–50.

- packet switching had been developed not for Defense Department needs for redundancy in information exchange, but for user anonymity?<sup>95</sup>

To enter an old debate—whether societies determine technologies or technologies determine societies—one can posit that both are true. Elite control seeks self-valorizing deployment of technologies. Conversely, the structural requirements of these social relations gain historical momentum that often proves difficult to detour or reverse. On the one hand, it is clear that new media offer the distribution of culture (i.e., the distribution of human experience) at zero marginal costs. On the other hand, new media can be and increasingly are mobilized for surveillance, obstruction of access, and endless commercialization. It is equally clear that the plasticity of new media deployments is intrinsic to the technology inasmuch as digital communication permits uses not possible with old media. It is the business of Cyberlaw to resolve debates over how and why new media will be used in symbolic reproduction.

In any case, Cyberlaw defends specific access to symbolic reproduction. Cyberlaw legitimates uses of digital communication, the current means of producing and distributing knowledge needed to assure social cohesion. Even if this area of the law is condemned as redundant, there is little doubt that new media challenge the traditional application of communications law. Arguments about Cyberlaw's relevancy distill to the view that the status quo of power—in the creation of culture, the establishment of norms, and the maintenance of autonomy rooted mostly in consumerism—should remain unchallenged. When detractors condemn the pretense of Cyberlaw's theoretical and practical novelty, they mean only that old law is sufficient to regulate new media.

We offer the forgoing references to communication theorists only to justify why elite control is bad and why justifications or denunciations of Cyberlaw must take this into account. To be sure, not everyone agrees that various kinds of elite control are bad for well-being and democracy. Indeed, the legal scholars criticized below share some degree of accommodation for such control. Yet the lack of justification for accommodating elite control is troubling, particularly because consensus exists among so many theorists about the values of communication and the dangers of elite control. An important criticism of elite theory, as Habermas points out, is that it lacks a research method needed to demonstrate the range of institutional and intersubjective

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95. See JANET ABBATE, *INVENTING THE INTERNET* 17–19 (1999). The combination of inexpensive, vastly distributed network switching “nodes” would “route” fixed-size “packets” of data. *See id.* at 16–17. Each packet would contain a “header” or uniform portion of data that would provide control information, including numerical addresses of the sender and recipient. *See id.* at 17–18. This would create redundancies in the network to assure survivability of both nodes and data. *See id.* at 18. If one link were destroyed, the data could be re-routed anywhere else in the network. Working separately, British scientists proposed a similar solution, but there the problem of communications was time-sharing: How could multiple users share the same network resources simultaneously and inexpensively? *See id.* at 18–19.

pathologies afflicting persons in modern capitalist democracies. For example, elite theory is not sufficiently facile to know why or how action is directed intersubjectively or how money differentiates such action.<sup>96</sup> While this may be true, even Habermas's more subtle distinctions do no better to justify accommodations of elite control. Rather, what is needed is a basic faith in the value of distributing communicative power as widely as possible because doing so provides better reasons for integrating action and achieving solidarity. Checking elite control is thus moral because doing so removes distortion in the effort to achieve agreement. Finally, new media should be permitted to emulate primary orality, as least-mediated communication provides a basis for improved well-being and democracy.

While we offer a moral basis for democracy and individual well-being found in least-mediated communication, it is not necessary to adopt such a view in assessing the value of Cyberlaw. More necessary at this point is acknowledging that new media do indeed provide communicative contexts that can be least mediated by elites. What follows is an overview of how some debates about Cyberlaw justify or deride elite mediation.

### III. CYBERLAW AND ITS DISCONTENTS

This Part reviews positions taken by several opponents and supporters of Cyberlaw. The debates discussed here show the limitation of Cyberlaw's rationale absent a consideration of communication theory. Specifically, the following views do not adequately justify why new media do or do not require special merit as objects of regulation. Failure to identify the novelty of communications via new media and how such novelty affects traditional social relations in symbolic reproduction initially accounts for this lack of justification. Without such basic communication-theoretic analysis of new media, the following critiques of Cyberlaw also fail to fully justify their respective normative claims about how new media ought to be used. To be sure, this is not an exhaustive overview; rather, the examples provided here are chosen for their illustrative and provocative positions.

#### A. *The Conservatives and the Libertarians*

For Judge Easterbrook, Cyberlaw is unjustified because it presumes new media have a special quality to transform "general rules" of settled law.<sup>97</sup> This argument against Cyberlaw is embedded in liberal economism: markets in information exchange that reflect individual preferences for information goods must be made to work. Such logic is a

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96. See HABERMAS, *LIFEWORLD AND SYSTEM*, *supra* note 11, at 376.

97. See Easterbrook, *supra* note 12, at 207–10.

familiar contention based on creator incentives. Bargaining in information, preferably conceived by private ordering via contract, encourages information production. The inappropriateness of technology-specific law (any “law of the horse,” to use Easterbrook’s term<sup>98</sup>) finds its justification in this ideology of incentive. So natural is the need to spur incentive via economic reward that the emergence of communication technology that makes information “free as the common air to use”<sup>99</sup> merits no special legal recommendation for its deployment. That is, the “general rules” of economic reward in the exploitation of information scarcity must be preserved. For Easterbrook, then, Cyberlaw deserves no status. This is because technology that frees information is technology that presently creates ambiguity in property rights, and nothing more.<sup>100</sup> The fact that new media decommodify information is unimportant; what the law must do is clearly define property rights in information.

But, is the classical economic argument of efficient allocation of resources, especially when applied to information goods, unassailable? Boyle has examined the difficulty of this argument, finding fault with its basis in the mythology of perfect information needed for rational choice and the clearing of markets.<sup>101</sup> It turns out that Easterbrook’s argument is not so reasonable when perfect attainability of market information is properly understood as inimical to the interests of elite control. What is particularly notable about Easterbrook’s argument is how it is inextricably guided by the novelty of technology, precisely because new media offer conditions of perfect access to information. This is a problem for Easterbrook where the private ordering of free transactions of information does not take place.<sup>102</sup>

What is most troubling about this argument is the belief that incentives must be preserved even when the marginal costs of creating information approach zero. Brandeis’s “common use” aphorism provides an analogy.<sup>103</sup> One can imagine that the greatest justification for free transactions in information would occur under conditions of telepathy. According to Easterbrook, such a wondrous technology

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98. *See id.*

99. *See generally* Benkler, *Constraints*, *supra* note 67, at 354 (stating that once information is voluntarily communicated, it is free for others to use).

100. Easterbrook, *supra* note 12, at 208–09.

101. *See* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 35–46 (1996). Boyle explains that, in the most basic sense, neo-classical faith in the equitability of universal commodification is aporetic: perfect information is needed for markets to clear, but information commodification *ipso facto* creates imperfect information access. *Id.* Commodifying information creates barriers to access because of the increase in transaction costs. *Id.* at 39.

102. *See* Easterbrook, *supra* note 12, at 211.

103. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (“The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”).

would require “countervailing changes”<sup>104</sup> to the freedom that telepathy suggests to assure that producers can “attach strings” to bargaining.<sup>105</sup>

The general rule is that property rights provide the best allocation of resources.<sup>106</sup> The claim is that free distribution of information harms the incentive to produce information. What is the proof of this assertion? To wit, there is more historical proof that the reverse is true. Oral cultures do not suffer disincentives to create.<sup>107</sup> Why should it be true that under the conditions of a “secondary orality” made possible by new media<sup>108</sup> no one would produce information? The open source software movement gives a clue,<sup>109</sup> as does the interesting research in Internet “peer production.”<sup>110</sup> Moreover, if one were to consider the foundations of pragmatic philosophy,<sup>111</sup> there is a persuasive argument that the incentive to create is exactly what makes us all human—the compulsion to what Dewey famously called “consummatory activity.”<sup>112</sup> If anything, both the commercialization of information and the artificial

104. Easterbrook, *supra* note 12, at 208.

105. *See id.* at 210.

106. *See id.* at 208. Thus, “[d]evelop a sound law of intellectual property, then apply it to computer networks.” *Id.* (emphasis omitted).

107. *See* GIDDENS, HISTORICAL MATERIALISM, *supra* note 62, at 94–95; CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 138 (1993) [hereinafter SUNSTEIN, FREE SPEECH]. Orality is distinguished by a high degree of “presence-availability,” or proximity in time and space between speaker and audience. Others, like Marshall McLuhan, refer to orality as less-mediating and -mediated communication. *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 22–33 (1964). In McLuhan’s analysis, orality is a “cool” medium because meaning is generated dialogically between speaker and addressee—that is, the medium does less to control the contexts of meaning-making. *See id.* (arguing that to be “disincentivized” from making meaning in oral culture would merely mean an unwillingness to speak).

108. *See* ONG, ORALITY, *supra* note 68, at 3, 136–38. “Secondary orality” is an orality “based permanently on the use of writing and print, which are essential for the manufacture and operation of [new media] equipment and for its use as well.” *Id.* at 136. Ong used the term to describe how electronic communications share some of the psychodynamics of primary orality. *See id.*

109. Richard Stallman’s GNU license requires that source code be provided freely so that programmers can modify it for private or public distribution. *See* GNU Project—Free Software Foundation, The Free Software Definition, <http://www.gnu.org/philosophy/free-sw.html> (last visited May 23, 2006). The source code may not be commodified. *Id.*

110. *See* Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 374–81 (2002) (arguing in favor of “characteristics that make large-scale collaborations in many information production fields sustainable and productive in the digitally networked environment without reliance either on markets or managerial hierarchy”); *see also* Benkler, *Public Domain*, *supra* note 3, at 196 (“At their core, Article I and the First Amendment claim that both democracy and autonomy are better served by an information production and exchange system built around a robust public domain, rather than one built around extensive regulation of the use of information and cultural materials through the creation and enforcement of exclusive private rights.”).

111. “Pragmatic philosophy” is philosophical acknowledgement of knowledge and experience as useful in the attainment of desired outcomes. *See* JOHN DEWEY, ETHICS (1908), *reprinted in* 4 THE MIDDLE WORKS, 1899–1924, at 31, 36 (Jo Ann Boydston et al. eds., 1977) (title changed to *Intelligence and Morals*) [hereinafter Dewey, *Intelligence and Morals*] (“[I]ntelligence has descended from its lonely isolation at the remote edge of things, whence it operated as unmoved mover and ultimate good, to take its seat in the moving affairs of men.”).

112. Communication is always consummatory because it constantly strives for “cooperation, domination and order.” JOHN DEWEY, EXPERIENCE AND NATURE 202 (1925) [hereinafter DEWEY, EXPERIENCE].

restraint on access to culture intended by “countervailing changes” in the use of new media burden human creativity.

Easterbrook’s implicit argument against Cyberlaw is an argument against the free distribution of speech made possible by emergent technology. Though Easterbrook declaims law driven by technology, a vestigial defense of the forms of social life determined by print technology rules his argument. Again, this can be described best by using the notion of incentive. What Easterbrook laments is that new media unsettle the old system of recovering information production costs. He divides distribution from production to analytically support his theory of incentive as applied to new media, rather than admitting that print technology determined access costs, which surely is true. Easterbrook suggests that the costs of production must be recovered by distribution because this method of mediation has urged persons to create, and so this same method must be recapitulated by new media.<sup>113</sup>

But this conclusion is specious for two reasons. First, going back to the orality model, no such valorization of information was possible because no division of information distribution and production exists in primary orality. New media, as “secondary orality,” are no different in this regard. A theory of incentive or motivation must consider this potential. Second, no transhistorical, formal theory of incentives or motives is possible given the radical potential of specific communication technologies. This relativism for incentives is to be expected given the range of experimental uses of new media that realize different kinds of both individualism and collective practice. It is this ontology of praxis that Easterbrook’s analysis misses.

Just as Easterbrook divides distribution from production of information in order to vindicate traditional power, the dualism between theory and practice of communication serves the same end. The theory is ensconced in the received “general rules”<sup>114</sup> determined both by technologies (mostly print) and by elites’ deployment of such technologies to improve their accumulation of speech resources. The practice consists merely in technologies subordinated to the theoretical defense of elite control. Concretely, this mystification of technology as a neutral mediation of communication comports with the historic use of social communication technologies by elites to naturalize and reify the consumer.<sup>115</sup> The “general rules” support naturalizing a life characterized by consumerism through deployment of communication technologies

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113. See Easterbrook, *supra* note 12, at 208 (“Yet how can we tackle the question whether copying has become too easy, and therefore should be met by countervailing changes, when we have not solved the problems posed by yesterday’s technology?”). It would seem his economism defends against the old problem of orality.

114. *Id.* at 207.

115. The literature examining audience commodification is immense. Schudson’s analysis of the American penny press is a terse example. See SCHUDSON, *supra* note 74, at 17–18 (discussing the emergence in the 1830s of cheaply produced daily newspapers that traded lower subscription revenues for higher circulation to attract advertising).

intended to maintain that reification of the consumer. Broad distribution of speech resources would demythologize these social relations by permitting users to define the ends of communication (the theory) through myriad experimentations, or consummatory uses, of new media (the practice).

The instrumental form of reason propelling Easterbrook's argument is inadequate.<sup>116</sup> His economism is based on the classic liberal view that human freedom can only be obtained in the uncoerced choices of marketplace agents. To be sure, such subjective reason or purposive-rational behavior is a form of life in modern capitalist democracies.<sup>117</sup> Yet strategic behaviors manifested in the ritual of commodity exchange account for only one kind of integration of interests. Other non-economic values based on moral and aesthetic reason play a regular role in all aspects of life not subsumed by the activity of exchange. That subjective reason rules so much of life, both private and public, not only confirms the "nature" of social relations, but also celebrates and assures elite control.

Easterbrook and those who agree with his arguments cannot be accused directly of technological determinism in their social theory. Rather, it is the preconceived ideal of "rational" economic action in the marketplace that determines technology uses. This objective idealism long has been a theme in the vindication of elite control, partly manifested in the dualisms of production and consumption, idea and action, and theory and practice.<sup>118</sup> In this idealism, conservatives reject any "social mediation" that, for example, discovers in new media uses the means of distributing the power of symbolic reproduction—practices that collapse the integrity of the formidable dualism of producer and consumer social relations.<sup>119</sup> Even the threat that private ordering<sup>120</sup>

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116. Instrumental reason, particularly in policy-analytic and legal practices, is fixated on the description of how ends are achieved. It is much less, or not at all, concerned about what the ends should be (the ethical and moral components of action). See Laurence H. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 641 (1973). The deployment of new media to controvert the status quo of social relations of communication is also an example of the "constitutive" question that Tribe describes. *Id.* at 658–59.

117. See MAX HORKHEIMER, *ECLIPSE OF REASON* 55 (Seabury Press 1974) (1947). The subject's orientation to the object is based on the understanding by the subject of what the object is and what it should be. Consumerism creates a subject, qua consumer, whose relation to the object is predetermined by the producer. The consumer believes that in the exercise of choice, the consumer exercises a subjective authority over objects for purposes of self-direction when, in fact, the consumer is merely an object of manipulation for the producer.

118. "Objective idealism" makes practice rigid through a strict observance of rationale. For example, Easterbrook emphasizes the ideal of exchange via contract as a necessary condition for creative praxis. See Easterbrook, *supra* note 12, at 214–15. Applications of this precondition are persistently challenged by objective uses of communication technology. The crux of Easterbrook's idealism is that the ideal of exchange is a priori to experience. But this cannot be true because the possibility for such regimes of exchange in information were only made possible, in any systematic way, by the emergence of print technology.

119. Easterbrook abhors unspecified property rights in information except where individuals decide not to engage in such transactions. See *id.* at 209–10. That is, the idea of strategic bargaining

poses via new media uses (i.e., uses that disintermediate traditional media control) with respect to elite control offends this idealism, as it appears that some kinds of “social mediation” that threaten elite power are unacceptable.

The strange defense of elite control made by Easterbrook mistakes as reality the map of what he believes to be the proper economic management of civilization. Put another way, the conservative and exclusive faith in markets is idealism. From this idealism, technologies are subordinated to practice, and the effort is later defended as a part of human nature. The same goes for the libertarian response to Cyberlaw, but with modification. Here, the marketplace and the commodification of symbolic reproduction are dutifully reified, but the technological mediation of the resulting social relations is believed to be uncontrollable by the law. This modification to the conservative view produces an even more enthusiastic mystification of capitalism’s access to new media to assure elite control.

Johnson and Post’s controversial work suggesting a technological determinism seems to embody this view.<sup>121</sup> Johnson and Post have become frequent targets of conservatives and even Cyberlaw supporters<sup>122</sup> who challenge the novel notion the Internet is “unregulable” by traditional territorial sovereigns. For Johnson and Post, cyberspace destroys jurisdictional authority and replaces it with sui generis cyberspace rules for trademark enforcement, professional credentialing, defamation, fraud, and so on.<sup>123</sup> Important here is the notion that new media create new spaces to which old law is ill-suited. Thus, what is needed is a new legal regime to accommodate the lack of borders in cyberspace.<sup>124</sup>

Johnson and Post’s position that the Internet cannot be regulated successfully by traditional law<sup>125</sup> rankles critics. Johnson and Post’s

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always precedes the experience of intersubjectivity no matter what technique is used to accomplish that experience.

120. See Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1307 (1998) (arguing that the anarcho-cyberlibertarian’s faith in sui generis jurisdiction for the Internet must depend on a background baseline of due process and public policy).

121. See, e.g., David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1387–91 (1996).

122. See, e.g., Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1200 (1998); Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1404–05 (1996) [hereinafter Lessig, *Zones of Cyberspace*]; Radin & Wagner, *supra* note 120, at 1297–98.

123. See Johnson & Post, *supra* note 121, at 1387–91.

124. *Id.* at 1384 (“But treating Cyberspace as a distinct place for purposes of legal analysis does more than resolve the conflicting claims of different jurisdictions: it also allows the development of new doctrines that take into account the special characteristics of the online ‘place.’”).

125. See David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 158 (1996) [hereinafter Post, *Governing Cyberspace*] (“Cyberspace is more fundamentally intractable in regard to determining the applicable legal constraints on this activity: the geographical borders—lines separating physical spaces that define law-making power in the ordinary sense—are not, and cannot be made, operative on the global network.”).

contention is arguable because new media are always the object of normative controls. Empirically, Johnson and Post fail to defend their view of the Internet's novelty, which is based on a formulation of the lack of space and time constraints.<sup>126</sup> The claim that Internet addressing eludes detection is not correct given the difficulty of masking Internet protocol (IP) addresses.<sup>127</sup> The problem of hiding IP addresses also hurts the more general view that the Internet is unregulable—based on territoriality, absence of time constraints (information is everywhere), and the accessibility of all users despite territorial regulation disparities (the problem of user notification).<sup>128</sup> And while the Internet presently may seem unregulable, the law may defer regulation until technology, such as filtering,<sup>129</sup> precludes the need for direct state action.<sup>130</sup>

Although Johnson and Post's position has been vilified,<sup>131</sup> one normative claim for new media—invoked in “Jeffersonian” conceptions of the decentralization of power<sup>132</sup>—merits consideration. The claim proposes that norms should be allowed to arise out of the emergent technology's uses to realize new media's full potential in norm-consensus creation.<sup>133</sup> That is, laws should protect the untidy generation of norms in civil society.

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126. See Lessig, *Zones of Cyberspace*, *supra* note 122, at 1404–05 (stating that Johnson and Post's assertion “feels more like slogan than argument”).

127. The IP address is included in every packet's header. The packet is a small collection of binary data that includes address information, the IP information that coordinates how the packet is to be delivered, and the “payload” or message content. It is difficult to hide the IP address without degrading the efficient delivery of packets. E-mail remailers, which are intermediary delivery methods that strip the originating header information, are available. Other proxy server methods are used to allow individuals to surf the Web anonymously, but often at the cost of efficiency and speed. See André Bacard, Anonymous Remailer FAQ, <http://www.andrebacard.com/remail.html> (last visited May 23, 2006).

128. See Goldsmith, *supra* note 122, at 1230 (“Private legal ordering, the limitations on enforcement jurisdiction, indirect regulation, and effective information flow control, taken together, go a long way toward redressing the skeptics' descriptive claims about the infeasibility of cyberspace regulation.”).

129. See Paul Resnick ed., PICS, Censorship, and Intellectual Freedom FAQ, <http://www.w3.org/PICS/PICS-FAQ-980126.html> (last visited May 23, 2006).

130. See *Reno v. ACLU*, 521 U.S. 844, 855–57 (1997) (holding the Communications Decency Act unconstitutionally overbroad, in part because the technology needed to comply with the statute's age verification requirement was not economically feasible for Internet service providers to implement).

131. Goldsmith, *supra* note 122, at 1201; Lessig, *Zones of Cyberspace*, *supra* note 122, at 1403–06 (criticizing Johnson and Post's arguments).

132. See David G. Post, “*The Free Use of Our Faculties*”: *Thomas Jefferson, Cyberspace, and the Language of Social Life*, 49 *DRAKE L. REV.* 407, 419–22 (2001) [hereinafter Post, *Free Use*] (stressing, by reference to selected writings of Jefferson, a preference for creation of language by the “mob,” i.e., the democratic creation of common culture).

133. See Post, *Governing Cyberspace*, *supra* note 125, at 167 (“The ‘law of the Internet’ thus emerges, not from the decision of some higher authority, but as the aggregate of the choices made by individual system operators about what rules to impose, and by individual users about which online communities to join.”).

The position that new media resist regulation is unsupportable.<sup>134</sup> But the claim that new media should be deployed to realize new forms of life is raised almost as an afterthought by Johnson and Post: “Cyberspace may be an important forum for the development of new connections between individuals and mechanisms of self-governance by which individuals attain a sense of community.”<sup>135</sup> This allusion to the socially integrative quality of communication extends no further than a problematic tribute to communitarian notions of communicative solidarity. It is problematic because this justification for bottom-up approaches to legitimizing norms exalts the marketplace’s private-ordering of symbolic reproduction.<sup>136</sup> Given new media’s tendency to concentrate speech resources, private-ordering can be just as tyrannically hegemonic as governmental regulation.<sup>137</sup>

Notwithstanding the “marketplace of ideas” fallacies, Post raises the pragmatic interest in communication as the principal tool of democratization.<sup>138</sup> Certainly new media may help create forms of social organization and interaction that were inconceivable under the old media’s time and space constraints. Post argues, in an unsystematic way, that the law and its unexceptionalist protagonists should permit users to experiment with this potential for unparalleled access to symbolic reproduction by average users.<sup>139</sup>

The libertarian thus dismisses Cyberlaw as unneeded because of new media’s resistance to regulation. The conservative judgment of Cyberlaw is no less dismissive, holding that new media should not challenge the status quo of elite control. In both cases, symbolic reproduction is chained to commodification.

Easterbrook’s view of the role of communication technology seems to be ascendant. The “dilettantism”<sup>140</sup> of Cyberlaw is surely true in a world in which these technologies should serve only the “general rules” of elite accumulation. Though proponents too often claim that Cyberlaw is needed to distinguish the peculiar fit of new media from received

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134. Even Post’s riposte to Goldsmith still does not make the case. *See generally* David Post, *Against “Against Cyberanarchy,”* 17 *BERKELEY TECH. L.J.* 1365 (2002). New media are different (the marginal cost of distribution is zero), but this does not prove that new media cannot be regulated. *See id.* at 1386–87.

135. Johnson & Post, *supra* note 121, at 1397.

136. *See, e.g.,* Post, *Governing Cyberspace, supra* note 125, at 167–71. For example, Post refers to AOL’s solution to spam as a form of power distribution in the formulation of norms. *Id.* at 169.

137. *See* David G. Post, *What Larry Doesn’t Get: Code, Law, and Liberty in Cyberspace*, 52 *STAN. L. REV.* 1439, 1440 (2000) (“We don’t need ‘a plan’ but a multitude of plans from among which individuals can choose, and ‘the market,’ and not action by the global collective, is most likely to bring that plenitude to us.”). Given the efficacy of user anonymity, enforcement of norms requires centralized means of user authentication. Such a “plan” is susceptible to abuses. *See* Niva Elkin-Koren, *Copyrights in Cyberspace—Rights Without Law?*, 73 *CHI.-KENT L. REV.* 1155, 1171 (1998).

138. *See* Post, *Governing Cyberspace, supra* note 125, at 171 (“The Jeffersonian mode of law-making has, at its heart, the sovereignty of the individual, the recognition that individual choice—consent of the governed—is the firmest basis on which to build political order.”).

139. *See* Post, *Free Use, supra* note 132, at 412.

140. *See* Easterbrook, *supra* note 12, at 207.

communications law, the enthusiasm subtends a more central issue of countermanding elite control. It is true that Cyberlaw sees in cyberspace “just another battleground for some very old wars.”<sup>141</sup> An overview of some of these battles follows.

Before reviewing Lessig’s Cyberlaw justifications, however, it is important to note where the argument for Cyberlaw will not counter the conservatives successfully. The arguments for Cyberlaw risk sublation by the conservative view—that is, the arguments will be accommodated by the conservative view in order to justify elite accumulation—if these arguments are premised on the supposed neutral role of technology in the achievement of social cohesion. It is true, as the conservatives say, that the Internet creates no problems for the law not existing before.<sup>142</sup> But this is true only if one agrees with Sommer, for example, that market forces “drive” law and technology.<sup>143</sup> It bears repeating that technology’s inherent neutrality is true to the extent that technology is “socially mediated.” But this mediation, expressed in terms of purposive-rational action in the marketplace, is reified in the conservative argument as incontrovertibly natural—any other view is “futurology.”<sup>144</sup>

Cyberlaw adherents must avoid this trap and present a theory of the role of technology, law, and society that can meet several standards. First, the theory must justify uses of emergent technologies that countervail elite control (those traditional modes of “social mediation”). Second, the theory must avoid the opposite of technological determinism or risk being accused of “technophilia.”<sup>145</sup> Third, while it is appropriate to claim a political and ethical motive for Cyberlaw as an instrument to reform access to democratic practice and improved well-being, the Cyberlaw advocate’s theory must present a more fundamental argument of communication’s importance, preferred here as moral action, to avoid the label of “dilettante.”

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141. Sommer, *supra* note 87, at 1149.

142. See Goldsmith, *supra* note 122, at 1201 (1998) (“Cyberspace transactions do not inherently warrant any more deference by national regulators, and are not significantly less resistant to the tools of conflict of laws, than other transnational transactions.”); Timothy Wu, *When Law and the Internet First Met*, 3 GREEN BAG 2d 171, 171 (2000) (arguing against the metaphor of cyberspace as a place, and in favor of cyberspace as a means of communication); see also Sommer, *supra* note 87, at 1213 (arguing that, apart from the problem of retail transactions between secrecy and non-secrecy jurisdictions, the Internet does not create any problems that have not existed before).

143. See Sommer, *supra* note 87, at 1219.

144. See *id.* at 1158. Sommer’s objection is that Cyberlaw supporters’ devotion to the discrimination of technologies in order to confront the status quo fetishizes technology and ignores history. *Id.* But this is true only if the historical method of enforcing social relations is unrelated to technology, which is a form of objective idealism.

145. That is, if Cyberlaw obsesses over a form of life that is unachievable via uses of the new media, then it too risks objective idealism. An example of this kind of “technophilia” might have occurred in McLuhan’s views about the ways in which television, like orality, is a “cool” medium. See MCLUHAN, *supra* note 107, at 22–32. New media, unlike television, really do approximate orality’s accessibility to communication and information exchange. Such a claim about the utility of new media is not, therefore, technophilic.

### B. Lessig and Control

For Lessig, the software code—the technology or “architecture”—that creates cyberspace also creates novel problems for the law.<sup>146</sup> Cyberlaw is needed only to distinguish modestly the use of emergent technologies that present problems with which traditional law cannot cope. What distinguishes cyberspace from physical space is the former’s de facto regulation by code. Code’s creation of cyberspace challenges the norm-creating functions of the law, the market, and society,<sup>147</sup> most prominently because cyberspace problems can be programmed away with code.<sup>148</sup>

Thus, regulating technology uses may implicate law when private ordering of code and the market (such as the private ordering of information<sup>149</sup>) fails to increase public welfare—when the invisible hand of de facto regulation by code fails to create architecture that functionally improves welfare.<sup>150</sup> Importantly, the choice of the mode of regulation is never limited merely to “anarchy or totalitarianism,”<sup>151</sup> but to the balance of competing public and private interests—the free against control.<sup>152</sup> On the one hand, technologies open up new possibilities (the “intellectual commons”<sup>153</sup>) and new dangers (“perfect pricing and perfect control”<sup>154</sup>). On the other hand, received methods of “balancing” incentives against access, intellectual commons against access, and the free against control need careful accommodation in any Cyberlaw scheme. Reconciling access and the “invisible hand” of control thus will occupy the law as code.

But there is ambivalence in the way Lessig accounts for the relation of this legal tradition to new media that makes him especially vulnerable to conservative attack and to a charge of theoretical insufficiency about the necessary “balance.” In part, this vulnerability results from the way in which the incentives concept arises as a response to emergent technology. Moreover, the legal proceduralism and sociology of the law that Lessig favors delay moral reasons for improving access.

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146. See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 15 (1999) [hereinafter LESSIG, CODE] (illustrating potential problems in Cyberspace through hypothetical examples). Lessig’s main point in this book is that code can create networks that are more or less “regulable.” *Id.* The criticism of Lessig presented here focuses on the problems that Lessig has in deciding what kind of “place” we want cyberspace to be. See *id.* at 61.

147. See generally Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) [hereinafter Lessig, *Law of the Horse*].

148. See LESSIG, CODE, *supra* note 146, at 20–21.

149. See generally Lessig, *Law of the Horse*, *supra* note 147, at 537–38.

150. See LESSIG, CODE, *supra* note 146, at 60.

151. See Lessig, *Law of the Horse*, *supra* note 147, at 544.

152. LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 97 (2001) [hereinafter LESSIG, FUTURE OF IDEAS].

153. See LESSIG, CODE, *supra* note 146, at 141 (“The greatest work in the law of cyberspace has been written in the field of intellectual property.”).

154. See LESSIG, FUTURE OF IDEAS, *supra* note 152, at 230.

Regarding the first point, the conservative answer as to how new media ought to be used is an honest one: all technologies must be servile in their utility to the status quo of power as defined through property rights. Although the ideologies of consumer choice and the efficient allocation of resources obfuscate this view, conservatives believe the best social relations—relations vindicated by the ideology of economic efficiency—are ones that just happen to favor elite control. Accordingly, conservatives maintain that this accumulation should be preserved even in the face of techniques that logically displace (“disrupt”) such control. For example, it is trivial for the conservative that print technology offered inherent limitations on access and that new media do not. Rather, it is more important that technologies swiftly be subjected to the traditional forms of private ordering and resource scarcity, and that elite power be extended.<sup>155</sup>

Lessig concedes to the conservatives the importance of striking the balance between incentives and control and access and, by doing so, does not discount this feature of the status quo. He recognizes that new media enable exploitation of rapidly declining costs of information production, costless distribution, and rapidly declining costs of infrastructure.<sup>156</sup> But the compromise that burdens Lessig’s analysis is the abstract legitimacy of such a balance given the novel potential of new media. By this compromise, Lessig hopes not so much to dislodge elite control as to retain some of the status quo power that existed before the onslaught of new media. He does this by use of that power’s own nebulous and endlessly ductile language of “balance.”

According to the argument, balance with respect to communication is needed because of the technical mediation of communication. Works have value because of their tangibility; such value may be measured by the costs to produce and distribute the works as commodities. This mediation is what makes enforcing the balance possible and necessary. For conservatives, new media must serve the same mediating function so peculiar to print technology. The problem for Lessig is that he must make concessions to retain this goal, however partially, while at the same time providing justifications for uses of new media that confront traditional elite control, as this power seeks to extend mediation even further via its own deployments of new media.

But why seek such an accommodation of elite control, even that of the print technology status quo? Why prevent use of new media in a manner that permits all users to realize desired access to symbolic reproduction?<sup>157</sup> Code can do many things. Thankfully, Lessig’s work is

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155. *See id.* at 216–17 (stating that old-media controls were the result of real world scarcity, but new media are far less scarce).

156. *See id.* at 240–44 (stating that this phenomenon is seen particularly with respect to wireless communication).

157. This is central to philosophic pragmatism—that communication, as the tool-of-tools, must be consummatory if it is to promote freedom. The incentive is to consummate meaning, and freedom is

devoted to carefully creating new media that progressively expand an information commons, or at least delay its diminution. The problem is in answering why this use of code to even partly accommodate elite control should be pursued.

It might be helpful at this juncture to explain what code could, in the most radical sense, provide. With respect to communication, the technical mediation of speech defines access. Without such mediation, the concept of a balance between incentive and access to speak becomes nonsensical. Consider the case of orality. Unsurprisingly, the technical baseline for equitable access—the baseline of the freedom to speak—is grounded in the moral reason of dialogical communication, the ur-technology of which is primary orality. This technical baseline conflates “incentives to speak” with “access to speak” just as much as it conflates what is “necessary” with what is “free.” As a technology of speech, orality greatly limits the possible mediation between speaker and audience.<sup>158</sup> With respect to new media, the law—or code itself—could similarly limit the intercession of print-like mediation in communicative practices that do not require a self-evident balance between property and access.

Lessig does not go so far. Rather, he accepts the reification of the traditional forms of mediation even where emergent technologies make it possible to erase such traditional elite control. In this sense, Lessig is wholly invested in the vindication of a system of domination, a system of needs, defined by capital accumulation. Based on the constant technical expansion of needs, incentive is aligned with the production of consumer goods. The generalizable interests thus are associated with consumer “freedom” of choice.<sup>159</sup> With respect to communication, value accrues disproportionately to producers who can mediate communication. This is not a conspiracy, but a direct limitation of technologies of speech, such as print, that cannot emulate the functionality of ideal orality. But for this same reason, orality is just as much feared by a system of resource accumulation that has benefited by the creation of the scarcity of speech. Although code could replace consumer “freedom” with the freedoms of consummation and consociation typical of orality, Lessig seems unwilling to do so.

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dependent on preferably unlimited access to the store of knowledge—human culture—that provides the content for individual consummation of meaning. Thus, the dualisms of freedom and necessity as well as incentive and access are only expressions of constraints on consummative uses of communicative activity. Therefore, seeking a “balance” between access and incentive can only harm consummatory activity. See DEWEY, *EXPERIENCE*, *supra* note 112, at 167; *see also supra* note 11 and accompanying text; *infra* text accompanying note 312.

158. One cannot underestimate the mediation of communication by domination in the household as opposed to the realm of freedom cultivated by the polis. See HANNAH ARENDT, *THE HUMAN CONDITION* 32–33 (2d ed. 1998). Domination may always exist in communication, even where communication is interpersonal and dialogical. The general idea here is that least-mediated communication promotes the greatest deliberation and the greatest autonomy.

159. See FRANK WEBSTER & KEVIN ROBINS, *INFORMATION TECHNOLOGY: A LUDDITE ANALYSIS* 209–13 (1986).

It may be ridiculous to expect Lessig to demand more of new media. After all, the technology of print, with its inherent mediating function based on ownership of the means of production, has earned the “best” form of symbolic reproduction. But why should this be the “best?” We should demand, at the very least, an explanation of why property rights in information are “best.” New media can emulate orality, and this acknowledgment is crucial to understanding when and where traditional legal regulation is undertaken to manage social relations vis-à-vis symbolic reproduction. With respect to new media regulation, Lessig does not question whether the balance between access and incentives—“the free against control”—is worth striking. Rather, without sufficient explanation, Lessig retains the need for the balance.

Lessig’s argument as plaintiff’s counsel in *Eldred v. Reno*<sup>160</sup> evidences his failure to explain the need for this balance. On appeal to the Supreme Court, Lessig referred to the efficacy of the constitutional language of the balance but excluded historically specific uses of communication technologies and how such uses determined the need for balancing property rights and public access.<sup>161</sup> Those opposing the Sonny Bono Act<sup>162</sup> have referred to this language—“limited Times”<sup>163</sup>—as a somewhat static concept and argued that Congress’s grant of the monopoly is constitutionally restrained. The strategy of Lessig’s *Eldred* brief was to meet the conservatives on their own ground, within the dualist abstraction of “general rules” on the one hand and technology’s supposed neutral influence on the other. Therefore, he argued that congressional extensions of copyright term basically mean a perpetual grant to copyright owners.

This is not to say that Lessig’s *Eldred* brief should have been expected to do more. It is merely to suggest how reference to the capacity of emergent technologies to eliminate speech scarcity might reduce the ambiguity surrounding the constraint of the “limited Times” language. If new media’s radical potential was considered, then Lessig might have argued that little or no constitutional protection of intellectual property is needed. That is, because new media emulate the conditions of least-mediated orality, the “balance” argument is irrelevant because the rational Framers would not have been motivated to grant monopolies to speech if speech were not made scarce by the prevailing uses of technologies of speech.<sup>164</sup>

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160. *Eldred v. Reno*, 239 F.3d 372, 376–78 (D.C. Cir. 2001), *aff’d sub nom.* *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding the constitutionality of Congress’s extension of copyright term for material currently under copyright).

161. Reply Brief for Petitioners at 10–12, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 32135689.

162. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

163. U.S. CONST. art. I, § 8, cl. 8.

164. *See generally* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 180–81 (1968) (explaining that, during the early stages of copyright legislation, the state statutes, constitutional copyright provision, and federal copyright laws were variously concerned with four core

This point may seem ludicrous given the naturalization of intellectual property rights in contemporary consumer culture. The general rules of appropriation connected with the Framers' intent to encourage creativity instead have been applied to all forms of expression. This is surely a mistake where media emulate orality. The result only can be protection of elite control against forms of speech that make speech less scarce—of emergent forms of speech that seem to dissolve the need for the general rules of resource accumulation and the balance between incentives and access common to laws originating at the height of print culture.

How would the Framers have dealt with new media? Or, what if the prevailing technology in 1789 had been global telepathy? That is, how would incentives be derived conceptually from a technology that already permits perfect access to all information? Incentives, then, must mean something only with respect to the scarcity of the means of speech. "Incentives to create" would serve only to destroy the technology of perfect information access. If one were to take seriously the insight that the Framers were concerned with freedom of speech, press, and assembly,<sup>165</sup> then the rhetoric of incentives would merit no respect when emergent technologies slouch toward the utopia of perfect information and perfect democracy.

There are problems in eliding technological potential from any regulatory conception of speech. When this is done, the ambiguities of justification and application proliferate. For example, Lessig advocates the design of social communications that permit access,<sup>166</sup> but the extent of access is limited. Lessig says that if free music means artists are not paid, then he cannot support regulation that permits free music.<sup>167</sup> While Lessig offers no justification for this admonition, one would not expect a justification since remuneration for creating art is essential to encouraging art's creation—this is the received wisdom. Thus, we have the answer to why musicians should be paid: because they always have been. At least, this is the argument conservatives advance as common sense—that compensation is just not because musicians deserve remuneration, but because eliminating an obstruction to accessing art means, absurdly, an end to art.<sup>168</sup> Lessig intends to be sensitive to the

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principles: authors' rights, promotion of learning, creation of order in publishing and book trades, and the prevention of print monopolies).

165. This sets aside the greater likelihood that the Framers were concerned primarily with prior restraint. See LEONARD W. LEVY, *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON*, at lv (Leonard W. Levy ed., 1966) ("What did the amendment mean at the time of its adoption? First of all (if the amendment is analyzed by focusing on the phrase, 'the freedom of the press'), it was merely an assurance that Congress was powerless to authorize restraints in advance of publication.").

166. This is the admirable goal throughout Lessig's *The Future of Ideas*. See generally LESSIG, *FUTURE OF IDEAS*, *supra* note 152.

167. See Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1064 (2001).

168. This was Easterbrook's principal lesson: no one should be prohibited from "attach[ing] strings." Easterbrook, *supra* note 12, at 210.

ways that emergent technology unsettles traditional mediations of culture, but, like the conservatives, he is doggedly committed to the property interests of authors as the cultural fuel that keeps the creative engine running.<sup>169</sup> Lessig is adamant these property rights are essential even as emergent technologies seem to make such interests dull and artificial.

In consumer culture, incentives correlate to individual wants that measure only the set of preferences made available to the individual to “want.” This is why there are disincentives to create music that does not appeal to fans of Britney Spears. The balance that emerges to favor elite control is always vindicated by consumer demand, a happy fact for conservatives. Indeed, Lessig knows this,<sup>170</sup> but in order to convince conservatives to give up a little control, he must work within this consumerist logic of incentives and access. This is no easy task, particularly because Lessig eschews foundational principles of access other than the paramount need to protect cultural property in some way. In other words, Lessig needs to formulate clearly why, if at all, code and other norm-enabling entities should, or should not, make new media in the image of old media. He does not necessarily need to do this to mollify those who treasure the possibilities of low-cost access, open-source software, and costless information distribution.<sup>171</sup> For those looking to play in the fields of the word, Lessig has become an acceptable shepherd. However, his semi-bold proposal to limit copyright to seventy-five years may not be the kind of sweet grass his sheep would most like to eat.<sup>172</sup> Indeed, Lessig needs to be clear why elite control should in any way be accommodated in order to make it clear to elites where and when they transgress the justice of communicative access that new media could give to all users.

But, again, why does Lessig want to accommodate, even partially, elite mediation of symbolic reproduction? One must go beyond his books for an answer. In his most thorough attempt to examine the

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169. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 64–65 (2004) [hereinafter LESSIG, *FREE CULTURE*] (“If we have a property system, and that system is properly balanced to the technology of a time, then it is wrong to take property without the permission of a property owner. That is exactly what ‘property’ means.”).

170. See LESSIG, *FUTURE OF IDEAS*, *supra* note 152, at 162.

[C]onsumers’ preferences might not be enough to motivate the market . . . . A closed network creates an externality on innovation generally. It increases the cost of innovation by increasing the range of actors that must license any new innovation. That cost is not borne directly by the consumer. In the long run, of course, if it is a cost, it is borne by the consumer. But in the short run, the consumer doesn’t notice the innovation that the closed model chills. Thus the consumer does not completely internalize the costs imposed by a closed system. And hence the pressure the consumer puts on closed systems to open themselves up is not equal to the costs that such closed systems impose on innovation generally.

*Id.*

171. See *id.* at 162–65.

172. Presently though, he is willing to entertain more “radical” terms. See LESSIG, *FREE CULTURE*, *supra* note 169, at 292.

sociology of action and law—the “social construction” of structures limiting individual action—Lessig shows the limitations of his theory of communication with respect to a more radical justification for his claims about the need to regulate new media.<sup>173</sup> It is useful to examine this work and Lessig’s theory of adjudication to see how these positions delay moral reasons for improving access. Examination of Lessig’s sociology of law and theory of adjudication also reveals the reasons for his compromise with the conservatives.

In terms of a sociology of law, Lessig is concerned with how the law can steer systems of action that, in turn, steer individual behaviors in an uncritical and habitual way.<sup>174</sup> For example, in the case of language, the system of control in which Lessig is interested is the power of communication, as a system, to cut through individual intentions (as “background”) to guide action.<sup>175</sup> That is, he is interested implicitly in control by hegemony—that is, how individuals internalize norms and, specifically, how government regulates action hegemonically to induce either orthodoxy or heterodoxy in action and belief.<sup>176</sup>

Rather than giving an account of how the legitimation of norms occurs in communication or an explanation of freedom based on some moral principle of action, Lessig gives a primer on how cultural hegemony (the “meaning management”<sup>177</sup>) can be used to affect behavior positively to improve social welfare.<sup>178</sup> He recognizes the structural manifestation, or the “constructive dimension”<sup>179</sup> of reality, that conservatives like Easterbrook reify as the natural marketplace. Yet Lessig reifies this system of control at another level through an awareness that such hegemony always will avail itself to elite control for purposes of symbolic reproduction—what Lessig calls “meaning remaking.”<sup>180</sup>

Lessig’s approach sometimes focuses overarchingly on the theoretical aspects of systems, particularly when he theorizes about the responsibility of the judiciary. In the process, Lessig tends to glorify what Habermas refers to as power—the administrative power that guides a person’s behavior automatically.<sup>181</sup> For Lessig, the “link between

173. See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) [hereinafter Lessig, *Social Meaning*].

174. See *id.* at 956–57.

175. See *id.* at 976–77.

176. For example, about education Lessig says, “The pattern of these constructions is familiar. Whether negative or positive, the invented tradition begins with a certain kind of learning through inculcation. The learning proceeds from an authority—a government, or a university, or a church—that purports to report the facts of the past, learned as uncontested.” *Id.* at 979.

177. *Id.* at 1012.

178. Lessig uses smoking as an example. *Id.* at 1025–34.

179. *Id.* at 1044.

180. “Meaning is a function of both token and context.” Lawrence Lessig, *Plastics: Unger and Ackerman on Transformation*, 98 YALE L.J. 1173, 1176–77 (1989).

181. See 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 342 (Thomas McCarthy trans., 1984) (1981) (“The legitimacy of the

individual action and social meaning” consists primarily of exchanges of value, or structures of “self-interested incentives” based, of course, in property,<sup>182</sup> that issue from the ways in which strategic interests impel interaction.<sup>183</sup> But the rationality of marketplace agents is steered not so much by subjective reason as it is by subjective preferences mediated by structures of control. “Meaning architects” author such structures, constructing reality via two modalities of symbolic reproduction (“tying” and “ambiguation”) and two modalities of behavior modification (“ritual” and “inhibition”).<sup>184</sup>

Assigning control to these “meaning architects”—well-positioned legislators, jurists, and non-governmental actors—enables Lessig to avoid functionalism, i.e., the theory that systems are reified and operate outside human agency.<sup>185</sup> Although Lessig does not completely disregard the role that morality plays in determining action<sup>186</sup> or the ways in which systems may become functionally resistant to change,<sup>187</sup> his approach emphasizes the top-down, essentially paternalistic architecting of a substantial amount of social reality by elites. It is this structure of control Lessig perceives not as optional, but as ineluctable. His attempt at a social theory of law is to work out ways that such elite control can be put to good use.<sup>188</sup>

This is not meant to suggest that Lessig is remiss about the necessity of having the law design the distribution of power in communication. As a public intellectual, hardly anyone has done more to champion access via the strategic use of code and other norm-making institutions. What is problematic are the concessions that Lessig makes to his opponents and the degree to which these concessions compromise the rhetoric of his solutions.

This can be seen in a different way—that systemic control of meaning should be reduced as much as possible. We should be grateful that new media endanger property rights in information, such that the power of symbolic reproduction can be widely distributed. For example, Lessig uses Bourdieu to explain how meanings are contested in the law between laypersons and lawyers.<sup>189</sup> Unlike Bourdieu, however, Lessig stops short in seeking uses of communication technologies that diffuse this contestation in order to reduce class conflict.<sup>190</sup> Lessig seems little

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legal order and the moral-practical foundation of the realms of action that are regulated by law—that is, formally organized—form the links that connect the economic system (differentiated out via money) and the administrative system (differentiated out via power) to the lifeworld.”). Power in this sense automatically “unhinges” “communicatively established consensus” and “steers” individual behavior. See HABERMAS, *LIFEWORLD AND SYSTEM*, *supra* note 11, at 184.

182. Lessig, *Social Meaning*, *supra* note 173, at 1015.

183. *Id.* at 992.

184. *Id.* at 1014–15.

185. *Id.* at 1008–09.

186. *Id.* at 999–1000.

187. *Id.* at 1007.

188. Referring to Unger, Lessig explains how these plastic structures of social meaning are “remade.” See *id.* at 963 n.51.

interested in how the law can be used to reduce class conflict by radically diffusing the technologies of meaning-making to decommoify culture. Rather, he seems to believe that such struggle is as futile as it is inevitable and necessary. Thus, traditional kinds of regulation (i.e., the “balance”) and the design of a more benevolent hegemony must be central to any version of Cyberlaw.

Despite his eagerness to use law to order social relations that improve welfare—for example, to protect the end-to-end principle (“e2e”) of networking<sup>191</sup>—Lessig’s belief in the structure of semiotic domination entails an analytical theme characteristic of the conservative view. For the conservative, law is non-activist and non-normative.<sup>192</sup> Lessig accepts this, but intends to fulfill more progressive interests—applications of positive liberty—with this political and legal orthodoxy.<sup>193</sup> The problem, however, is that the locus of “meaning-management” for conservatives is ideologically manifested in the sanctimony of self-interests, and the law merely facilitates the power of agents to bargain. This ideology helps to soften the notion of the law as an elite manager of social construction, even though the law actually functions in this manner.

Although Lessig spurns this ideology up to a point, he also seemingly feels a need to accommodate it in an effort to placate elite control. But why defend elite hegemony by yielding to conservatives an old media right (defined by the balance) to “make meaning”? Why not counter hegemony, erasing the terrain of symbols that the meaning-managers occupy, rather than construe a new and improvingly benevolent hegemony? Why not defend what freedoms the new media can give, even when these freedoms injure elite control by wrecking elite property?

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189. *Id.* at 1000.

190. “Competition for control of access to the legal resources inherited from the past contributes to establishing a social division between lay people and professionals by fostering a continual process of rationalization.” See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 817 (1987). Bourdieu is careful to note that the taxonomic representation of people in discourses invokes in every case class conflict. See Loïc J.D. Wacquant, *Toward a Social Praxeology: The Structure of the Logic of Bourdieu’s Sociology*, in PIERRE BOURDIEU & LOÏC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 1, 14 (1992).

191. The term “e2e” refers to the architecture of networks that conform to the basic principles that the protocols of the network that permit users to communicate must remain open and simple and that the intelligence and innovation of communication occur at the end of the network. See Written Ex Parte of Professor Mark A. Lemley and Professor Lawrence Lessig at 6–7, 20, Application for Consent to the Transfer of Control of Licenses MediaOne Group, Inc. to AT&T Corp., 15 F.C.C.R. 774 (2000), available at <http://cyber.law.harvard.edu/works/lessig/lem-lesd.pdf> (arguing that merger of TCI and AT&T cable systems would endanger “open access” because the combined ownership likely would not comport with the e2e principle).

192. See, e.g., CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 6–7, 35 (1996). Sunstein has referred to the role of law to adhere to “incompletely theorized agreements.” *Id.*

193. Thus, the “meaning architects” apply the law to construct society. See Lessig, *Social Meaning*, *supra* note 173, at 1008.

One can agree with the ends that Lessig seeks in the architecture of the Internet yet reject his justification for the accommodation of elite control via the defense of balance. Again, though, Lessig offers no justification for this accommodation. Beyond general respect for the value of an information commons and concerns for the harms of concentrated control,<sup>194</sup> Lessig is not convincing about why access should be advanced. For conservatives, this ambivalence means only that, at worst, new media will constrain accumulation no more than does print or broadcasting. Lessig wants to arouse the excitement for possibilities of new media uses, uses perhaps unafraid of new forms of democratic life. But without better reasons, conservatives will be uninspired to offer even an objection to Lessig, and others with Lessig will feel certain the reasons to appease elite interests are lacking justification. Given Lessig's reasons, neither group will know why outcomes are usual or wrong or why meanings ought to be managed as they are.

Lessig would benefit from a clear, concrete, and moral justification for unleashing new media to distribute access to symbolic reproduction. In this, he also is restrained partly by a legal methodology developed in his early articles.<sup>195</sup> The analytical strategy Lessig employs has been to understand how to read text and context in order to "translate" received law to apply to new contexts.<sup>196</sup> The method of translation intends to read the law in light of new contexts so as to maintain fidelity of legal interpretation.<sup>197</sup>

Such fidelity is necessary to sustain the integrity of constitutional law. Properly, the Constitution is the body of general rules that require ongoing translation by jurists. All provocations of the received law must refer to what the Framers first intended the law to be.<sup>198</sup> Stated differently, it is up to contemporary jurists to communicate with the

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194. See generally LESSIG, *FUTURE OF IDEAS*, *supra* note 152, at 19–23.

195. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1173–74 (1993) [hereinafter Lessig, *Fidelity in Translation*].

196. The "text" is the artifact of meanings. "Context" refers to the peculiar "collection of understandings" that gives meaning to a text. Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 402 (1995) [hereinafter Lessig, *Fidelity and Theory*]. The principle of fidelity reflects an attempt to retain meaning across contexts. Changed "readings" can be true to the fidelity principle—like the changed readings of the New Deal—when readers agree that textual modifications are needed to preserve meaning in new contexts: "The interpreter of fidelity seeks readings of legal texts in the current interpretive context that preserve the meaning of an earlier reading in an earlier context." *Id.* at 410 (emphasis omitted). Whether readings are contestable depends on the context of values in time that permit contestation. Lessig uses the shifting values of homosexuality as an example. *Id.* at 415–19. Homosexuality is no longer seen as a pathology, but some continue to believe it is immoral. Thus, readings of homosexuality as immoral can be true to fidelity. *Id.* at 415.

197. See Lessig, *Fidelity in Translation*, *supra* note 195, at 1178–79.

198. However, the law is an ideological field and judges are ideological actors who use the rules ideologically, i.e., to justify political preferences. A critical legal theory criticism of Lessig's form of legal reasoning is that he tends not to offer reasons for the existence and application of the "general rules" in order to deny that the law is ideological. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 158–60 (1997).

constitutional text and precedent by interpreting and then translating the meaning to apply to a present context.<sup>199</sup>

Beyond this theorization of a fidelity principle is a normative dimension of understanding original intent, and it is a place that Lessig does not visit. Presumably, the Framers used certain pre-legal moral reasons as motivation for adopting constitutional rules, but these reasons are left unquestioned by Lessig's fidelity principle. These moral reasons should be the subject of translation, even though jurists should loathe normative judgments. Morals are for legislatures, and Lessig wants to leave it that way.<sup>200</sup>

It may be inapposite to use Lessig's legal theory writings as a way to question his failure to consider the basic premises of communication (in this Article, we hesitantly refer to those premises as a "moral conception" of communication). Doing so might have given Lessig a better justification for the regulation of code. After all, fidelity is a concept of jurisprudence properly removed, in the tradition of classical positivism, from morality.<sup>201</sup> According to this tradition, evaluation of what the law *should* do should be the province of civil society and its political representation.<sup>202</sup> Without these principles, the kind of legal positivism in Lessig's take on fidelity always runs the risk of legitimating elite control. This occurs for precisely the reasons that conservative jurists have used "interpretivist" positivism as a vindication of such control.<sup>203</sup> The status quo of marketplace relations is easily justified by

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199. See Lessig, *Fidelity in Translation*, *supra* note 195, at 1190.

200. The law accommodates changes in discourse from uncontested to contested. Lessig refers to this as the "Erie effect," referring to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *Erie* contested the federal judiciary's role in common law rulemaking by noting that applying common law is a political and not a scientific practice. As a result, the Court reallocated common law decision making to the state courts. Thus, according to the *Erie* effect, when discourses become contestable, the law recognizes their political content and defers resolution to institutions that are "politically responsible." See Lessig, *Fidelity and Theory*, *supra* note 196, at 433, 438.

201. Lessig's fidelity principle seems a hybrid of American legal positivism and originalism. The "sources thesis" of positivism is followed by Lessig's insistence on historical and socially contingent contexts as determinates of the legal interpretation. The "command thesis" is supported by Lessig's view that the law is an expression of institutional authority that is constrained in supporting a translation. Lessig follows positivism's "separability thesis" to the extent that morals are excluded as an evaluative tool. To this Lessig adds a kind of originalism in which the original meaning of the constitutional text is found and then applied to the context. See Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 483 (1997) (book review) (arguing that, despite the modification of originalism as a two-step process of discovering meaning and applying it to the context, Lessig's fidelity principle still cannot answer why jurists should be faithful, a problem that leads to the legitimacy of the authority of "a dead generation").

202. This claim is not beyond argument. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 141 (1977) (arguing that the deferral of moral and political issues to the legislature by the courts is supported only by tradition and not the Constitution). Lessig needs to square such principles of "social organization" with the potentials of new media.

203. See generally ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 202 (1998) (explaining that interpretivism demanded that laws refer only to empirically verifiable terms, and where judges seem to be required to make a moral evaluation, like what constitutes cruel and unusual punishment, they should refer to what the authors of the Constitution intended). By this methodology, judges cannot challenge laws derived from naked preferences.

legal positivism. These relations are just as they always have been: “uncontested discourses” deserving respect from the law. Thus, it is much easier for the conservative jurist to adhere to the kind of “structural integrity” of the law that Lessig claims is central to fidelity.<sup>204</sup>

A moral and always uncontested basis of democratic participation<sup>205</sup> is that access to symbolic reproduction is essential to individual well-being and to the health of a democracy. This “discourse” is not to be disputed if one believes that access to political debate, cultural signification, and maintenance of an individual autonomy are preconditions to sustaining democracy.<sup>206</sup> However, the discourse was distorted by the inadequacy of print as a means of accomplishing symbolic reproduction. The Framers faced this dilemma by balancing property rights with access.<sup>207</sup>

Lessig’s theory—though meant only as a theory of adjudication—does not recognize that the fidelity principle is determined by the incontestability of the “discourse” of balance. That is, fidelity is owed to the received discourse of balancing access against control. However, this is not acceptable because a basis of democratic access, modeled on orality, is truly uncontested in the sense that it is universal. But the post-legal status quo of balancing property rights and access, necessitated by print technology, now conceals the model. When the law is constrained by fidelity, it cannot and does not challenge this “discourse” of property.<sup>208</sup> At first, then, Lessig yields to a kind of legal formalism<sup>209</sup>

204. See Lessig, *Fidelity in Translation*, *supra* note 195, at 1252.

*Structural humility* finds reason to limit the scope of translation in the nature of the presuppositions at issue—it restricts the extent to which the judge as translator may account for presuppositions of a particular *kind*. Structural humility says, for example, “Because this is a *political presupposition*, the judicial branch should not account for it.”

*Id.*

205. See, e.g., HABERMAS, MORAL CONSCIOUSNESS, *supra* note 81, at 120. Democratic participation depends on generally agreed-upon conditions for political debate, such as those embodied in the universalization principle needed to achieve consensus in a democracy: “For a norm to be valid, the consequences and side effects that its general observance can be expected to have for the satisfaction of the particular interests of each person affected must be such that all affected can accept them freely.” *Id.* (emphasis omitted).

206. Access to political debate, free expression, and public culture is a public good constitutive of a healthy democracy. See RAZ, ETHICS, *supra* note 4, at 141–42. Such freedoms and access to culture are a necessary precondition for democracy. One cannot bargain away “public validation” and keep a democracy. See *id.*

207. See PATTERSON, *supra* note 164, at 192–93 (explaining that the Constitution’s copyright clause was included foremost to promote learning).

208. It is reasonable to note that reality is socially constructed and therefore subject to the caprice of politics. See Lessig, *Fidelity and Theory*, *supra* note 196, at 412. It is unhelpful, however, to view the moral basis of communication oriented to resolving political arguments as merely political itself. In this sense, Lessig’s theory is afflicted by a deceptive phronesis. It posits that truth arises out of life, history, and tradition and is particularized in disparate common-sense application, i.e., fidelity. As such, none of the theory’s analysis can attain a universal and foundational status.

209. As defined here, “formalism” does not comprehend in any rigorous way the ideological content of its methodology, regardless of whether it argues from the point of view of policy or law. See KENNEDY, *supra* note 198, at 11–13. Lessig may risk this failure to comprehend where fidelity affirms the injustices of uncontested discourses: “Formalisms are a reflection of a certain stability, or relative uncontestedness, within a particular space in a legal culture . . . . They reveal what, at a particular time,

because his theory acquiesces to the demands of the “uncontested discourse.”<sup>210</sup> This changes, though, as the uncontested discourse, like the balance, can be contested. When a conflict delegitimizes the contexts of the discourse’s application, the courts, in structural humility, would defer the issue to the legislature for political and ideological reasons.<sup>211</sup>

The problem is that the foundational means of democratic participation—the access model of orality—is forgotten in a society in which property rights in symbolic reproduction have been mythologized as natural. This undermines democratic participation because the very process needed to contest meaning—least-mediated communication that emulates orality—is implicitly demoted in Lessig’s theory as either ideological or another contestable discourse.<sup>212</sup> Under this view, the foundational process of democratic meaning-making has not attained the status of an uncontested discourse and, therefore, is the substance of political conflict that the law should not touch. This is so because the social relations common to print technology hold an imperial, reified presence as the master discourse for all forms of communication regulation.

Again, there is one morality Lessig does defend. A typically uncontested discourse in modern capitalist societies is the subjection of information as property. The only end—the inquiry into which Lessig calls “a ‘moral question’”<sup>213</sup>—is to regulate new media to assure, for the

is relatively stable or taken for granted, and what, at a particular time, stands fundamentally contested.” Lawrence Lessig, *The Limits of Lieber*, 16 *CARDOZO L. REV.* 2249, 2255 (1995). The fidelity principle cannot expose the deceit of ideology that reproduces elite control. This would require, as is common among leftist-Marxist social critiques, a foundationalism—a universally acknowledged freedom—that Lessig’s fidelity principle cannot admit.

210. Fidelity is owed to the “differentially plastic” existence of uncontested discourses. See Lessig, *Fidelity and Theory*, *supra* note 196, at 412.

This, to say that a discourse is uncontested is not to say that no one questions it, or that it is incontestable for everyone, or that it has always been or always will be uncontested, or that it is recognized and acknowledged as uncontested. It is instead simply to pick out an ordinary point of view at a particular time. It is to refer to a fundamentally social understanding that operates to define and constrain discourse within that context.

*Id.* at 413.

211. See *id.* at 439 (“Where a discourse is rendered contested, if possible, judgments within that contested sphere will be shifted to those with the strongest political pedigree.”).

212. Cf. RAWLS, *supra* note 86, at 126. The “circumstances of justice” in the original position require communicating the principles of justice as well as unanimous agreement with those principles.

See *id.* Rawls compares the contractarian theory of justice with Adam Smith’s “impartial spectator”:

The impartial spectator definition makes no assumptions from which the principles of right and justice may be derived. It is designed instead to single out certain central features characteristic of moral discussion, the fact that we try to appeal to our considered judgments after conscientious reflection, and the like. The contractarian definition goes further: it attempts to provide a deductive basis for the principles that account for these judgments. The conditions of the initial situation and the motivation of the parties are intended to set out the necessary premises to achieve this end.

*Id.* at 161–62. Lessig could benefit from such an acknowledgement of both the necessary premises of communication and how new media differently enable those premises.

213. See LESSIG, *FUTURE OF IDEAS*, *supra* note 152, at 11.

This is a struggle about an ideal—about what rules should govern the freedom to innovate.

I would call it a “moral question,” but that sounds too personal, or private. One might call it a political question, but most of us work hard to ignore the absurdities of ordinary politics. It is

purpose of achieving competitive gains in innovation and productivity, the greatest possible access to content.<sup>214</sup> What is “moral,” then, is the legal, normative, architectural, and marketplace sustenance of competition that includes protecting the information commons. The views Lessig expresses about access via new media are in keeping, more than less, with conservative acceptance of the received law—in keeping with the “uncontested discourses” of the legal tradition.<sup>215</sup> What matters in this tradition is the defense of strategic self-interest. Crucially, technology must be deployed to defend such innovative self-interest. Technology must assure competition in the marketplace of ideas.

Conventionally steered by the fidelity to administrative power (all those “uncontested discourses”), traditional instruments of law are likely to refuse a proper hearing for any analysis of new media that cracks the domination of elite control of communication. Of course, Lessig sees in other institutions challenges to such control. If it is not the judiciary or the legislature, it is code or market forces or social norms that enable new kinds of uses and new ways of managing meaning. Yet, without a more systematic presentation of the value of communication facilitated by new media, Lessig remains unconvincing that the balance and marketplace competition—the cornerstones of the legitimation of elite control—should be protected even when the new media might make such control moribund.

One is tempted to see in Lessig’s theorization of the commons a radical moral view about the liberation of social relations, but this is not the case. Lessig writes, “The digital world is closer to ideas than things.”<sup>216</sup> The question remains, though, what is the justification for designing communication to steer action via more commodified, “scarcified,” “thing-ified” meaning? To paraphrase Moglen’s contentious reproach, what is it about Lessig’s theory that morally justifies even a partial obstruction to speech?<sup>217</sup> So far, nothing in

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instead best described as a *constitutional* question: it is about the fundamental values that define this society and whether we will allow those values to change. Are we, in the digital age, to be a free society? And what precisely would that idea mean?

*Id.* Lessig does not proceed to explain this idea, which essentially reflects the principles of communication.

214. See generally Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 574–75 (2000).

215. What is “moral” for Lessig is the authority of the law as it is received: the law is moral because its historical development has coherency in its application. There is a danger in this conception of moral duty of adjudication:

There is an attractive simplicity in holding that morality requires any person who joins an institution to respect both its letter and its spirit. If this simple doctrine does not apply to judges in this form, if their respect for their institution, the law, is weakened from its pure form . . . then one loses the theoretical motivation for such a duty, at least if it means more than saying that one ought to respect the legal institutions of a particular country because their structure and actions merit such respect, or to the extent that they do.

RAZ, *ETHICS*, *supra* note 4, at 208.

216. LESSIG, *FUTURE OF IDEAS*, *supra* note 152, at 116.

217. “The great moral question of the twenty-first century is this: if all knowing, all culture, all art, all useful information can be costlessly given to everyone at the same price that it is given to anyone; if

Lessig's corpus broaches this radical question. According to Lessig, "Ideas and expression must to some degree be free."<sup>218</sup> To "some degree"? It is this ambivalence that Lessig must confront and explain.

To sum up, Lessig has two associated problems. First is the retention of "balance" without adequate justification given the possibilities of disintermediating uses of new media. Second, both his sociology of the law and his theory of adjudication fail to adequately justify the kind of new media regulation that he supports. As for his sociological account, elite cultural hegemony is seen as inevitable; thus, the role of law is oriented to benevolent controls of the uses of new media for the purposes of symbolic reproduction. Lessig's sociological investigations support his later thesis that code is the meaning-maker *par excellence*. This is surely true, but the justification for such control fails to account for the principle of new media communication as a secondary orality. Code should be required to deconstruct points of mediation along the flow of information to ensure communication access—in other words, new media should be made to circumvent the paternalistic guidance of Lessig's cherished "meaning-architects."

It is important to note that Lessig correctly recognizes that the law and other norm-creating institutions are those points of control that must paradoxically control their own impulses to control. Put another way, it would be naïve to think that new media could be made to inherently resist such mediation. To believe in such intrinsicity of new media uses would be to collapse into the kind of technological determinism of Johnson and Post.

Lessig is fully aware of these dangers, but what he lacks is precise justification for the sanctioned uses of code. His theory of adjudication delays such justification even more than his sociology because the justifications are trapped in the conventionalism of post-legal practice. The fidelity principle refuses to confront elite control, which is borne and carried along by the policies of economic efficiency and consumer "freedom" protected by the Constitution's balance between access and property. Lessig needs a deeper communication-theoretic analysis that, from the very beginning, establishes what new media are and how uses of these technologies justify any elite control. Doing so will better help him to justify Cyberlaw.

### C. Sunstein: *The Argument from Democracy*

Thus far, this Article has attempted to show how communication theory might help guide the regulation of new media to curb elite control

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everyone can have everything, everywhere, all the time, why is it ever moral to exclude anyone from anything?" Eben Moglen, *The DotCommunist Manifesto: How Culture Became Property and What We're Going to Do About It* (Nov. 8, 2001), <http://mirrors.ibiblio.org/pub/mirrors/speakers/moglen/>.

218. LESSIG, *FUTURE OF IDEAS*, *supra* note 152, at 249.

of communication. The justification for this move has been accorded to the moral defense of new media uses. Such uses defend both dialogical communication and generally greater access to symbolic reproduction. Undoubtedly, law will play an exceptional role in accomplishing this task.

Cyberlaw scholarship demonstrates, in various ways, how justifications for regulating new media differently from old media might or might not be appropriate. The theories surveyed above posited by conservatives, libertarians, and Lessig have, in different ways, proven an inadequate explanation for this pre-legal moral dimension. In the conservative account, moral reason is locked into justifications for elite control, inasmuch as the logic of exchange in the marketplace establishes social relations as a given, or naturalized. By definition, the status quo is context-independent, and the conservative ideology of competition and consumer choice naturalizes elite control. This power is a context-free objective fact and thus serves as the basis of all moral reason.<sup>219</sup> The libertarian account offers a moral basis of regulation-free interaction based on the sanctity of self-interests.<sup>220</sup> But here, too, it is the invisible hand of the marketplace that is reified as the moral center of interaction. In Lessig's careful analysis, a moral basis of freedom is rejected for a proceduralism that neglects to give the best reasons for regulation of new media. Lessig assumes, without good reasons, that the "balance" of private-ordering and new media access is necessary.

With respect to Cyberlaw, new media pose new challenges to the achievement of solidarity in ways that threaten elite control. The emergent technologies of speech differ from old media in a decisive way, namely, new media permit secondary orality. New media effectuate social cohesion in a more direct way because, potentially, these media permit what Giddens has called high "presence-availability" of communication.<sup>221</sup> This potential also transforms the extent to which the technical limitations of speech posed by the old media inherently legitimate centralized control of meaning—what Giddens refers to as the

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219. Hayek offered one of the more famous expressions of this ideology: "Humiliating to human pride as it may be, we must recognize that the advance and even the preservation of civilization are dependent upon a maximum of opportunity for accidents to happen." FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 29 (1960).

220. This view, taken by Johnson and Post, is the same as Hayek's but differs from Easterbrook's view on the particulars of legal enforcement. Important for Johnson and Post is that "[c]yberspace may be an important forum for the development of new connections between individuals and mechanisms of self-governance by which individuals attain a sense of community." Johnson & Post, *supra* note 121, at 1397. Imposing traditional forms of regulation might stultify the potential for accidents and experimentation. *See id.* Johnson and Post go further to say that new media are unregulable. This is where they would part ways with Easterbrook. *See* Easterbrook, *supra* note 12, at 211 (stressing that property rights in information must be well-defined).

221. *See* GIDDENS, *CONSTITUTION*, *supra* note 84, at 142–43. This refers to the degree of co-presence in space and time of social interaction. *Id.* Electronic communication can be used to purposely reduce the need for contexts of co-presence in social interaction. *See id.* at 143. The mass media reduce the presence-availability of communication for all but a few speakers.

“storage capacity of information.”<sup>222</sup> New media threaten traditional social relations in the production of meaning, as marked by mass media commodification of content and audiences. Cyberlaw perhaps merits distinction for its mediation of these new media challenges to elite control. In short, Cyberlaw must decide whether new media should be permitted to limit elite control and to distribute symbolic reproduction.

A final view to be added here is the notion that new media are a problem because the new technologies harm democracy by permitting too many viewpoints and too much information. Thus, Cyberlaw ought to regulate new media to assure that everything worth saying is heard. This is a powerful argument from democracy for some degree of elite control, an argument most elegantly made by Cass Sunstein. Sunstein’s intentions deserve much respect because he cares deeply about the deployments of new media to improve democracy. However, his justifications are not so admirable. The most debilitating problem is Sunstein’s weakly justified obeisance to the private ordering of information resources. This devotion to the reification of capitalist, elitist, old-media controls of cultural reproduction dilutes the power of Sunstein’s “Madisonian” republicanism. This is because Sunstein imagines no other control as better for democracy and individual well-being. In the end, in spite of his erudite idealism about a kinder, gentler capitalist democracy, he complements the reality of conservative defenses of elite control. Sunstein adds a veneer of humility that “economic efficiency” is not always the *sine qua non* of democracy. But, as will be demonstrated, when new media appropriations of property seem to shove elite control away, Sunstein’s version of democracy pushes back. Sunstein defends economic interests, the usual historic principle of control, with the inadequately justified claim that people are confused by too much information.

It is not clear from Sunstein’s bulging oeuvre that he is a kind of recalcitrant positivist when it comes to reconciling new media’s potential with the status quo of power. This is because his liberalism, within which the values of economic efficiency and growth with representational equity are balanced, seduces the reader with a sense of obviousness about the virtues of marketplace freedoms and democracy. But this belies the default position, the core value for Sunstein: property. He is a positivist, because, like his hero Madison, freedom, democracy, and autonomy are defined in terms of the foundational interests of capitalist exchange. There is no freedom, democracy, or autonomy without capital, however humanely tempered capitalist democracy might be under the sober guidance of Madisonian democrats. For Sunstein, a fortuitous conjunction exists between the factionalized failures of

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222. See GIDDENS, HISTORICAL MATERIALISM, *supra* note 62, at 94. This is the basis of power for the allocation and appropriation of what Giddens calls “authoritative” resources. See *id.* at 95. Communication technologies are used to control and store information across space and time.

information distribution via new media and the defense of old-media economic interests. Rather than endanger social relations defined and sustained by property—for Sunstein, the “constitutional”<sup>223</sup> basis of American democracy—he discovers and exploits the view that old media were better for democracy because of their limited capacity to distribute information. Sunstein’s argument from democracy tends to deny uses of new media to destroy elite control. His argument regrettably dissimulates a passion for democracy in order to protect elite control of symbolic reproduction.

Before this regrettable position on uses of the new media is made apparent, Sunstein’s magisterial account of democracy and constitutionalism inspires even while it distracts. For Sunstein, the moral reasons for the law’s justification emerge from the primary acknowledgment and defense of Madisonian conceptions of deliberative democracy, shifting “core” conceptions of autonomy,<sup>224</sup> and welfare.<sup>225</sup> The first concern, deliberative democracy based on political equality, is strictly moral; the latter two, methods to assure autonomy and welfare, are given to the ethical *zeitgeist*. Democracy is deliberative when citizens, legislators, and jurists can discuss issues of importance openly and without coercion. Important in this republican conception of the exercise of public reason is the subordination of private (e.g., marketplace) interests to the political ordering of the common good.<sup>226</sup> Briefly put, the Madisonian concept of democratic freedom favors decentralized political power in a republic to assure political equality in representation<sup>227</sup>; an aversion to interest-group politics or

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223. See CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 13–14 (1997) [hereinafter SUNSTEIN, *FREE MARKETS*] (“[R]espect for private preferences, rather than collective deliberation about public values or the good life, does seem to be a distinguishing feature of American constitutionalism.”).

224. See SUNSTEIN, *FREE SPEECH*, *supra* note 107, at 138.

[A]utonomy is a form of self-mastery, through which people are permitted to be, roughly speaking, authors of the narratives of their own lives. This form of autonomy can be abridged not only by the obvious forms of government tyranny, but also by desperate need, lack of decent education, physical pain or poor health, insufficient opportunities in private and public life, exclusion from political processes, and even preferences, beliefs, or conceptions of the good that are produced by social deprivation.

*Id.*

225. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 63–67 (1999) [hereinafter SUNSTEIN, *ONE CASE*]. Welfare is conditioned by protection against unauthorized imprisonment; protection of political dissent, the right to vote, and religious liberty; protection against physical invasion of property and the rule of law; protection against police abuse of person or property; no torture, murder, or physical abuse by the government; protection against slavery and discrimination by the government; and substantive protection of the human body against government invasion. *Id.*; CASS R. SUNSTEIN, *DESIGNING DEMOCRACY* 97 (2001) [hereinafter SUNSTEIN, *DESIGNING DEMOCRACY*].

226. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985) [hereinafter Sunstein, *Interest Groups*]. Republicanism stresses civic virtue: “The prerequisite of sound government was the willingness of citizens to subordinate their private interests to the general good.” *Id.*

227. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 137 (1993) [hereinafter SUNSTEIN, *PARTIAL CONSTITUTION*].

“factionalism”<sup>228</sup>; a belief in positive liberty, particularly protection from material desperation<sup>229</sup>; the defense by government against political inequality that leads to creation of castes<sup>230</sup>; and a protection of deliberative democracy that will include regulating private property uses that pose threats to the guarantee of free speech.<sup>231</sup>

Factionalism, or what might alternately be termed political pluralism, often is harmful to deliberative democracy. The structural mechanisms in the Constitution, including bicameralism, separation of powers, indirect election (through the electoral college), and the federal-state relationship, combine to insulate representatives to some degree from constituencies.<sup>232</sup> Representatives are thus isolated from factions to the extent that elected officials can better deliberate to achieve consensus over the common good.<sup>233</sup> For the people, civic virtue is in part motivated by government through civic education and provision of access to public fora. Civic virtue of the citizenry is important so that private interests do not dominate the political process. Although legislators are accountable to their constituents, civic virtue plays a more decisive role among representatives insulated from disparate private interests.<sup>234</sup> Also important to note here is that access is favored to broadly defined political information and political speech.<sup>235</sup>

Sunstein also argues that, in the effort to subdue factionalism, there also should be an ongoing attempt to assure that the status quo of power not determine the course of democracy.<sup>236</sup> Sunstein uses the now widely accepted view in economics that individual preferences are not formed merely by self-regarding actors, but also are socially conditioned, endogenous, and never monadically fixed.<sup>237</sup> The law therefore plays an important part in the formation of preferences and should not respect individual desires in every context.<sup>238</sup> The law must avoid adjudication that is neutral to the status quo because the law already helps to form many preferences, including those reinforcing the status quo—those that assure elite control.<sup>239</sup>

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228. *See id.* at 125.

229. *See id.* at 138.

230. *See id.* at 138–39. Political equality is not the same as economic equality. *See* SUNSTEIN, ONE CASE, *supra* note 225, at xi. This is why Sunstein does not use the word “class.”

231. *See* SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 225, at 41.

232. *See* Sunstein, *Interest Groups*, *supra* note 226, at 44.

233. *See id.* at 46.

234. *See id.* at 47–48.

235. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 227, at 240. This includes music and art. *Id.*

236. *See id.* at 25–27. Sunstein refers to this as a “ban on naked preferences.” No person or group should be allowed to capture government to assure that their particular interests are satisfied. *See id.*

237. *See* GRAHAM BANNOCK ET AL., DICTIONARY OF ECONOMICS 127 (John Wiley & Sons, Inc. 1998) (1972).

238. *See* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 227, at 164–65.

239. *See id.*

Examples of preference formation by the law include entitlements of social security to prohibition of drug use to the defense of property rights. Sunstein stresses that an unswerving adherence to neutrality in the law toward the status quo may have perverse effects by naturalizing preferences. People come to believe that an entitlement—whether it is permission to pollute or to collect welfare—is unalterable. Or, they may believe that the values of the marketplace do not reflect the values of the most advantaged group, which is not true if the law defends the status quo.<sup>240</sup> This is because initial entitlements often continue to be preferred without legitimate intervention (such as the redress of affirmative action) by the state to alter this “endowment effect”<sup>241</sup> to improve welfare—improvements associated with both economic and non-economic values.<sup>242</sup>

The state’s ordering of the media industry culturally reflects this hegemony. Sunstein emphasizes that, short of anarchy, the state always orders social relations even where it agrees to allow for private ordering.<sup>243</sup> Media deregulation via relaxation of ownership restrictions,<sup>244</sup> for example, forms preferences by limiting diverse cultural fare<sup>245</sup> and by diminishing content in the public domain.<sup>246</sup> For Sunstein, this hegemony degrades autonomy by placing “unjustifiable constraints”

240. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 63–64 (1990) [hereinafter SUNSTEIN, *RIGHTS REVOLUTION*].

241. See generally SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 227, at 166–70.

242. See *id.* at 174–76.

When there is inadequate information or opportunities, decisions and even preferences should be described as unfree or nonautonomous. For this reason it is most difficult to identify autonomy or freedom with preference-satisfaction. If preferences are products of available information, existing consumption patterns, social pressures, and governmental rules, it seems odd to suggest that individual freedom lies by definition in preference-satisfaction or that current preferences should, on grounds of autonomy, be treated as the basis for settling political issues. It seems even odder to suggest that all preferences should be treated the same, independently of their origins and consequences or of the reasons offered in their support.

*Id.* at 176. Non-economic values also need to be considered in judging welfare: “A different conception of autonomy places an emphasis on the freedom of collectivities or communities—a freedom embodied in decisions, reached by the citizenry as a whole, about what courses to pursue. This view is closely associated with traditional republicanism, but it has resonances in Madisonian thought as well.” SUNSTEIN, *RIGHTS REVOLUTION*, *supra* note 240, at 35.

243. See SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 227, at 168.

244. See generally *In re 2002 Biennial Regulatory Review*, 2003 FCC LEXIS 4285 (July 30, 2003) (revising FCC media ownership rules).

245. McChesney contrasts the massive merchandising power that Disney can bring to a film like *The Lion King* with similar efforts to exploit *The Prince of Egypt* by DreamWorks, which lacks vertical ownership of media and retail distribution. See ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* 22–27 (1999). Large media conglomerates can piggyback on competitors’ goods to capture audiences. This was the case when AOL/Time Warner’s *Time* magazine devoted its cover story to coincide with the following week’s release of *Planet of the Apes*, an anticipated summer blockbuster movie from Fox Studios. See Michael D. Lemonick & Andrea Dorfman, *One Giant Step for Mankind*, *TIME*, July 23, 2001, at 54.

246. See generally Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 *INT’L REV. L. & ECON.* 81, 91 (2002) (noting that, as large firms like Disney simply use their own intra-firm inventories to produce new content, smaller firms will be disadvantaged by rising costs of inputs because these inputs will diminish as information in the public domain is diminished).

on preference formation.<sup>247</sup> Under the conditions of elite control of information, individuals are likely to have less information available to them to deliberate about what kind of democracy they want.<sup>248</sup> To the extent that this impoverishment can be identified,<sup>249</sup> the state may be justified in creating greater access in order to improve conditions for deliberative democracy.<sup>250</sup> Sunstein's scrutiny of the endogeneity of preferences<sup>251</sup> is a welcome critique of ideology. Sunstein is interested in how "consumer choice" ideologically vindicates elite control of communication.<sup>252</sup> Against this, Sunstein proposes that some communication be regulated to assure viewpoint diversity and political debate—precisely to assure the health of civic virtue.<sup>253</sup>

Few legal scholars have been more rigorous than Sunstein in noting how technological changes in communication disrupt traditional legal responses. For instance, Sunstein is sensitive to the ways in which new media, in particular cable television, provoke a different legal response to assure democratic access to diverse cultural fare and to protect the marketplace interests of cable network owners.<sup>254</sup> Similarly, Sunstein has offered solutions to the regulation of digital television broadcasting that would balance economic interests with the public interest.<sup>255</sup> Sunstein

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247. SUNSTEIN, RIGHTS REVOLUTION, *supra* note 240, at 41.

248. See generally SUNSTEIN, FREE SPEECH, *supra* note 107, at 18–19.

[Deliberative democracy] is not intended to aggregate existing private preferences, or to produce compromises among various affected groups with self-interested stakes in the outcome. Instead it is designed to have an important deliberative feature, in which new information and perspectives influence social judgments about possible courses of action. Through exposure to such information and perspectives, both collective and individual decisions can be shaped and improved.

*Id.*

249. Sunstein uses children's television as an example. See *id.* at 84–85.

250. SUNSTEIN, ONE CASE, *supra* note 225, at 203.

If the government wants to make sure that all consumers have access to communications networks, why should it not be required to pay to allow such access, on a kind of analogue to the food stamp program? The ordinary response to a problem of access is not to fix prices but instead to subsidize people who would otherwise be without access.

*Id.*

251. This critique is consistent throughout his work. See, e.g., SUNSTEIN, FREE MARKETS, *supra* note 223, at 17.

252. SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 227, at 220.

[I]t is important to be extremely cautious about the use, for constitutional and political purposes, of the notion of "consumer sovereignty." Consumer sovereignty is the conventional economic term for the virtues of a free market, in which goods are allocated through consumer choices, as these are measured by how much people are willing to pay for things. Those who invoke the notion of free choice in markets are really insisting on consumer sovereignty. But Madison's conception of sovereignty is the relevant one, and that conception has an altogether different character.

*Id.*

253. See *id.* at 214 (suggesting regulation, particularly where the marketplace proves to be unconstitutional).

254. See, e.g., Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1764–65 (1995) [hereinafter Sunstein, *Cyberspace*] (discussing the constraints on governmental regulation of electronic broadcasting in wake of the *Turner* decisions).

255. See generally Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 503–04 (2000) [hereinafter Sunstein, *Television*] (arguing that further regulation should avoid command-and-control solutions).

goes further than Lessig in establishing a moral basis to justify the regulation of media. For Sunstein, such regulation should carefully aim to create a polity organized around the essential need to sustain a deliberative democracy.<sup>256</sup>

Yet for all his sensitivity to the moral basis of deliberation, it is precisely the implementation of the technologies of communication—these ethically shifting matters of policy—that weakens Sunstein’s argument. Emergent technology offers means to strike at the heart of control and to lay bare realities about which people deliberate. The new media may be used to greatly proliferate information, so that elite gatekeeping of both political and cultural information is eliminated. The means of communication matter in the justification of power, which Sunstein circumscribes to include only the power constitutively limited by the old media and enshrined by the Constitution through copyright and the prohibition of state-sanctioned speech. What Sunstein faces are emergent technologies of communication that challenge these old arrangements of power and law that have arrogated control of cultural reproduction to elites for more than two centuries.<sup>257</sup> His response is to defend a moral quality of communication that one might say deserves defense only because no better means of communication could justify a check on elite control circa 1776. That is, Sunstein tends to defend a morality of deliberative democracy suitable for quill pens and printing presses.<sup>258</sup> Of course, he does not defend the effects of this morality coincident with eighteenth-century genteel white male power, which also discovered in this same morality justifications to prosecute the genocide of indigenes, sell slaves, and create and ruthlessly maintain a permanent working underclass: an American creed turned into nightmares and murder and so often legitimated by a wheedling free press.

We raise this record not to polemicize but to recognize the importance of recalling how badly some attempts to achieve democratic ideals have worked out in practice. Sunstein defends a principle of deliberative democracy and freedom that, for him, is always prior or foundational to any uses of emergent technologies—uses that threaten to abrogate the principle.<sup>259</sup> Sunstein’s analysis of new media is crippled by his belief that the principles he holds to be paramount are themselves effective responses to technical inadequacies of communication. Sunstein is correct in arguing that a principle of rational interaction exists; as has been argued here, however, that principle is Habermas’s notion of communicative interaction and the practice is Ong’s notion of primary orality. Advocating that principle and practice, we have argued here for deployments of new media that emulate these least-mediated

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256. Sunstein, *Cyberspace*, *supra* note 254, at 1804.

257. *See generally id.*

258. *See generally id.* at 1785–88.

259. *See generally id.* at 1781–96.

contexts of communication. Thus, the wrong principle guides Sunstein's arguments about new media uses, and so the practices he defends also are misguided. Deliberative Madisonian democracy's emphases on insulated legislatures and mass mediation of information critical to assure deliberation are reconciliations achieved by the Framers to balance the technological deficits of speech with the growth of democracy. Because Sunstein errs by assuming these reconciliations, he is forced to argue for new media uses that emulate old-media control. The relation of morality and technology is mutually defining. That is, an ideal is only worthy of the means to achieve it. Sunstein certainly realizes this<sup>260</sup> but, in the end, tends to accept as legitimate only the constitutive interrelation of technology and morality established in the late eighteenth century by the then-prevailing power structure.

That new media transform life by destroying social relations defined in part by elite control of cultural reproduction is rejected by Sunstein because new media uses may decrease deliberation by increasing "social balkanization."<sup>261</sup> Sunstein's vindication for this rejection is complicated. As noted, Sunstein places continuous value on "information" needed for "deliberation." But what information, how much, and produced by whom? Sunstein tries to answer these questions in two ways, producing a tautology of justification. The first is to assess the adequacy of information produced for exchange in the marketplace. The second is to support why information that enhances political debate is most important and how such information is best produced and distributed. However, the first method obscures justifications made by the second position. This is because Sunstein accepts the commodification of cultural reproduction as basic to democracy, even when tempered by Madisonian goals. That is, Sunstein prefers the modes of distributing information by old media as optimal in the pursuit of deliberation. His justifications for uses of new media are tautological because Sunstein takes as givens the primacy of property, the primacy of control, and that law guides uses of new media in order to reproduce relations of material and political power peculiar to the primacy of property and control. How this tautology unfolds can best be seen in *Free Markets and Social Justice*. Commodification and allegiance to "free markets" appear to constitute<sup>262</sup> the bases of American democracy.<sup>263</sup> The rest of the book aims to show how market failures challenge this belief. With respect to information, preference formation, because of its endogeneity, is crucial

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260. "Technological developments enjoyed by so many people bring with them extraordinary promise and opportunities from the standpoints of both Madisonianism and the marketplace. From nearly any point of view, nostalgia for preexisting speech markets makes little sense." SUNSTEIN, *FREE MARKETS*, *supra* note 223, at 183.

261. *Id.* at 185.

262. *Id.* at 14.

263. *See id.* at 3 ("In fact, a system of free markets seems to promise not merely liberty but equality of an important sort as well, since everyone in a free market is given an equal right to transact and participate in market arrangements.").

to freedom and democracy. Moreover, the contextual and discursive ways that preferences are formed with the greatest degree of rational response depends utmost on the availability of information to make good decisions and to broaden the range of choices. But Sunstein circumscribes the need for opportunities provided by better communication and information to a response to the failure of markets to create necessary access to information. Thus, regulation of markets is crucial, albeit limited, to assure greater welfare by requiring businesses to disclose vital information to the public.<sup>264</sup> Thus, Sunstein offers only uses of new media that reproduce the constraints of property and control characteristic of old media, rather than uses that attack such constraints on the production and distribution of culture necessary for a healthy democracy. His solutions tautologically recreate the very conditions responsible for the threats to deliberative democracy.

Delimiting a value of information by justifying regulation from the starting point of the essential value of the market illustrates a problem with Sunstein's social theory about access. The market is the titular value,<sup>265</sup> and, predictably for Sunstein, "preferences," "rationality," and "opportunity" are "ambiguously" derived from refractory "social norms."<sup>266</sup> Therefore, because the problem is always that individuals are guided by what norms have established as "cognitive dissonance,"<sup>267</sup> "information overload,"<sup>268</sup> and the "availability heuristic,"<sup>269</sup> law must tame the market to correct such failures.<sup>270</sup> The likelihood that the capitalist marketplace is the source of such ambiguities and individual pathologies—which Habermas says distort communicative interaction and rationality—is not broached by Sunstein. As Sunstein notes, "One of the best ways to destroy a democratic system is to ensure that the distribution of wealth and resources is unstable and constantly vulnerable to reevaluation by the political process."<sup>271</sup> For Sunstein, the foundation of liberty is the form of life limned by capitalism, with all its terrible misfortunes assessed as "ambiguities" or social norms heaped on the unassailable market.<sup>272</sup>

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264. *Id.* at 326.

265. *See id.* at 22 ("Respect for private markets is an important way of respecting divergent conceptions of the good and is thus properly associated with individual liberty. Respect for markets is also an engine of economic productivity, an important individual and collective goal.")

266. *Id.* at 60.

267. *Id.* at 27.

268. *Id.* at 284.

269. *Id.* at 338.

270. "[T]he need to provide diverse opportunities for preference formation suggests reasons to be quite skeptical of unrestricted markets in communication and broadcasting." *Id.* at 26.

271. *Id.* at 210.

272. "[C]hoices are a function of prevailing social norms and hence of context, which can activate particular norms." *Id.* at 16. Sunstein later remarks that "individual people have little control over these things." *Id.* at 66.

Sunstein further opines: “When there are no constitutional barriers, the democratic process is formally unconstrained.”<sup>273</sup> For Sunstein, these barriers are oriented around property.<sup>274</sup> The reification of constitutionally protected property is not a norm. That is, the market based on property rights “antedates” the Constitution, and the former’s primacy is respected not as a norm but as the basis of the law “simplified” by such facts that avert the “common ownership of property.”<sup>275</sup> The normative orientation of Sunstein’s social theory is to reduce constraints on deliberation, and doing so requires that society do battle with reified ideas—all these norms—“entrenched” by “market-ordering.”<sup>276</sup> Fighting against property, though, remains off-limits. The foundational value of property reifies individual consciousness about the naturalness of life defined by these social relations; the problems thus confronting this form of life, including inequality and injustice, often are irrationally confronted by failed regulation of the market.<sup>277</sup> Nevertheless, for Sunstein, only policy—and not an attack on the foundation of property and control—is needed to derive the best democracy and the greatest well-being. The problem is not the “market,” but rather bad “command and control” regulation.<sup>278</sup> Sunstein’s guiding principle in all of this is that economic inequality is a fact the regulation of which by redistribution of resources is “disastrous.”<sup>279</sup> Rather, only political equality should be assured by government.<sup>280</sup>

The division of politics and economy, as well as opportunities and material equity, sustains for Sunstein that policy recommendations be based principally on cost-benefit assessments of regulation.<sup>281</sup> Sunstein declares what he does as unlike Marxists, who describe social phenomena by their effects.<sup>282</sup> Marxists err by induction: specific examples of labor exploitation are related to the general problems of class conflict. Sunstein instead looks at the same terrain of conflict and positively deduces individual irrationality that distorts the operation of markets, produces castes, and diminishes political equality. This is how and why “class” becomes “caste” in Sunstein’s work. Marxists presumably are bad because they see in the fundamental organization of

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273. *Id.* at 90.

274. *Id.* at 104.

275. *Id.* at 204.

276. *Id.* at 160.

277. Markets too often adjust to the “imposition” of regulation, thus resulting in harm to poor people. *Id.* at 282.

278. Federal regulation has created a “Madisonian nightmare” of factionalism. *Id.* at 325.

279. *Id.* at 211.

280. *Id.*

281. “What will emerge for the nation remains in a process of development; but it may be described as a *cost-benefit state*, one whose performance will be assessed, both in particular and in general, by comparing the costs of government action against the benefits of government action.” *Id.* at 348.

282. *Id.* at 288.

capitalistic society the compulsive irrationality of consumption and destruction of individuality. If one were to generalize vulgarly, the mode of production for Marxists determines social relations. Technologies might be used in the effort to transform these social relations. Thus, class struggle is the effect, and the means of transformation are the prevailing technologies, of the mode of production. Certainly, not all technologies contribute equally to such transformation. Some unexpectedly useful technologies, like new media, may be used to smash traditional forms of control.<sup>283</sup> Sunstein, on the other hand, does self-admittedly good social research because the law's commitment to the protection of property seems already and always to have created the best society; so malefactions of this are remediable by good policy aimed at readjusting norms of individual behavior. "Caste" is thus a product of poor planning and not an effect of social relations determined by the mode of private production. Thus, Sunstein's legal formalism guarding the reification of property produces a kind of technological determination that subordinates uses of emergent new media to the continuous reproduction of material and political inequities.

Unsurprisingly, for Sunstein, print is the ideal technology to support Madisonian principles of democratization while retaining respect for property and control.<sup>284</sup> In other words, the print medium most faithfully exposes citizens to controversial issues and culture.<sup>285</sup> When compared to broadcasting, print technology has, according to Sunstein, better averted balkanization and deliberation deficits.<sup>286</sup> This devotion to print technology is problematic.<sup>287</sup> The fear of polarization and lack of deliberation puts Sunstein in the difficult position of defending some

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283. As Marx himself put it, "[I]f we did not find concealed in society as it is the material conditions of production and the corresponding relations of exchange prerequisite for a classless society, then all attempts to explode it would be quixotic." KARL MARX, GRUNDRISSE 159 (Martin Nicolaus trans., 1973) (1858).

284. See Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 675 (1993) [hereinafter Sunstein, *Informing America*] (explaining that viewpoint regulation to expand viewpoint diversity would not violate the First Amendment, especially in broadcasting, where political information is often subjected to the "distorting effects of 'soundbites'").

285. See Sunstein, *Television*, *supra* note 255, at 519.

One of the advantages of a well-functioning system of freedom of expression is that it supplies one or more genuinely public spheres, in which diverse points of view are presented and confront one another, and are exposed to people who have a willingness to learn. General-interest newspapers and magazines often do precisely this . . . .

*Id.*

286. Compare *id.*, with Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 293 (1992) ("Indeed, the broadcast media in many respects set out a new orthodoxy on social and political questions—making serious criticisms, from the left and the right, invisible or seem too silly or invidious to deserve consideration.").

287. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 719–20 (1999) (noting that print media provide greatest viewpoint diversity, but will nonetheless emphasize danger over security).

level of elite control—which Sunstein prefers to be governmental subsidization<sup>288</sup>—and other forms of regulation.<sup>289</sup>

The purpose here is not to prescribe what interactions in new media are needed most. Perhaps Sunstein is right about restrictions on pornography, for example.<sup>290</sup> Rather, the point is that Sunstein, for slightly different reasons than Lessig, is bullied by the immense reification of print technology as the best technology of communication. Thus, the point here is that the justification for Cyberlaw should not begin from abstractions about deliberative democracy based mostly on print technology's perceived advantages. Instead the focus should be on the forms of life—realized in practices of communication originating in primary orality—that inform our conception of democracy and, furthermore, whether emergent technologies can be deployed to emulate, as much as possible, less-mediated forms of free interaction.

Rather than embrace new media as means of secondary orality to be squared with liberal republicanism, Sunstein instead explores how new media should be made to accomplish the filtering function of print. In *Republic.com*,<sup>291</sup> Sunstein argues that new media are troubling because they allow “unlimited filtering” of content by consumers.<sup>292</sup> In the end, new media offer the “echoes of our own voices.”<sup>293</sup> New media decrease “chance encounters with diverse others”<sup>294</sup> because of filtering and the loss of traditional content intermediation by “general interest intermediaries.”<sup>295</sup> The encounter with communication's distributed power is decidedly a negative one for Sunstein. Deliberative democracy's need to produce heterogeneous viewpoints is countervailed by the polarization of viewpoints on the Internet and an absence of deliberation. Therefore, some filtering by intermediaries is preferable to expose individuals to diverse viewpoints. To this end, Sunstein proposes a kind of Internet public forum doctrine in the form of required hyperlinking.<sup>296</sup>

Sunstein has since retreated from his thesis that the Internet exacerbates isolation and viewpoint polarization.<sup>297</sup> Yet, *Republic.com* focuses on the problem of unlimited program options that spin the “consumption treadmill.”<sup>298</sup> Sunstein's solution is not legal accommodation of greater freedom in the exchange of information;

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288. Sunstein cites free broadcasting time to candidates as an example. See Sunstein, *Informing America*, *supra* note 284, at 675.

289. See Sunstein, *Cyberspace*, *supra* note 254, at 1796–1803. These might include increasing competition, universal access requirements, and content-based regulation to ensure educational programming. *Id.*

290. SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 227, at 241.

291. See SUNSTEIN, *REPUBLIC.COM*, *supra* note 7, at 3–10.

292. See *id.* at 10.

293. *Id.* at 16.

294. *Id.* at 24.

295. See *id.* at 34–37.

296. See *id.* at 186–90.

rather, he proposes general interest intermediation, requirements by disclosure, and Internet-specific must-carry regulation.<sup>299</sup> For Sunstein, filtering and other regulations are necessary to counteract the proliferation of consumer choices that fragment and polarize the public. However, it seems untenable that consumers have so much choice, given the reality that the bulk of Internet content is filtered by the giant information oligopolies.<sup>300</sup> But assuming it is true that consumers have unlimited consumption options, the danger that follows is that some kind of defense of mass mediation is necessary to ensure that everything worth hearing is said.

The concerns expressed in *Republic.com* recall the famous argument between Walter Lippmann's *Public Opinion*<sup>301</sup> and John Dewey's *The Public and Its Problems*,<sup>302</sup> the latter being an inspiration to Sunstein.<sup>303</sup> Lippmann's dim view of the "masses" caused him to recede to an anti-democratic political view.<sup>304</sup> He argued that the social construction of reality should not be determined by the confused citizenry, but by apolitical elite filterers of information.<sup>305</sup> Dewey harshly denounced this view.<sup>306</sup> But what was most central to Dewey's pragmatism was his belief in the scientific method of inquiry that declaimed the centralizing tendencies of elite control.<sup>307</sup> What was everywhere fundamental to autonomy and social welfare was the defense

297. See Cass Sunstein, *Cass Sunstein Replies*, BOSTON REV., Summer 2001, <http://bostonreview.net/BR26.3/sunstein.html>. Sunstein rejects the following claim:

The Internet is bad for democracy, because it is reducing common experiences and producing a situation in which people live in echo chambers of their own design. For those who accept this second claim, the current communications system is inferior to one in which general interest intermediaries dominated the scene.

*Id.*

298. See SUNSTEIN, *REPUBLIC.COM*, *supra* note 7, at 107.

299. This would be similar to the requirement for cable television. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 188–96 (1997).

300. See Robert W. McChesney, *Power to the Producers*, BOSTON REV., Summer 2001, <http://www.bostonreview.net/BR26.3/mcchesney.html>.

301. WALTER LIPPMANN, *PUBLIC OPINION* (Free Press 1965) (1922).

302. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (Alan Swallow 1960) (1927) [hereinafter DEWEY, PUBLIC].

303. *Republic.com* closes with an homage to *The Public and Its Problems*. SUNSTEIN, *REPUBLIC.COM*, *supra* note 7, at 191–92.

304. See John Durham Peters, *Reconstructing Mass Communication Theory* 126 (1986) (unpublished Ph.D. dissertation, Stanford University) (on file with authors).

305. See LIPPMANN, *supra* note 301, at 250–57. In place of access to the means of producing speech, Lippmann would argue for the control of information flows by apolitical technocrats. For a thorough discussion, see Peters, *supra* note 304, at 120–26.

306. This was the purpose of *The Public and Its Problems*. See DEWEY, PUBLIC, *supra* note 302, at 158.

307. This is a theme Dewey pursues throughout his work. See, e.g., GEORGE DYKHUIZEN, *THE LIFE AND MIND OF JOHN DEWEY* 71–72 (1973).

Dewey retained this faith to the end of his life never ceasing to urge men to adopt the knowledge and methods of science in solving their human problems. "Great as have been the social changes of the last century," he wrote in his seventies, "they are not to be compared with those which will emerge when our faith in scientific method is made manifest in social works."

*Id.* at 71 (quoting Dewey, *Science and Society*, in PHILOSOPHY AND CIVILIZATION 330 (Minton, Balch & Co. 1931)).

of an individual's access to and utility of knowledge to consummate individual conceptions of ends. Elite control—hypostatized in the factory system<sup>308</sup> of nascent consumer capitalism—was an enemy of “consummatory activity” precisely because elite control exploited persons as means to realize its own ends.<sup>309</sup>

Furthermore, Dewey's pragmatism stressed that, given the means, individuals will seek cooperation in the satisfaction of ends.<sup>310</sup> It is only through social activity that we come to perceive a self set apart from others:

[A] living human organism becomes a psychical or conscious being for himself in the degree in which he is socially treated as the author, through means of his emotional dispositions, of certain consequences. In ultimate analysis, a state of mind is a moral fact; that is, a spring of action valued in terms of its consequences.<sup>311</sup>

Mediation of persons in communication as ends (as commodified audiences, for example) destroys individuality and community. Provided with the means of communication, including access to knowledge, individuals naturally will seek communal acknowledgment and pursuit of the common good via practical, deliberative discourse. It is elite control of the “tool of tools”<sup>312</sup>—of language itself—that induces individuals into isolation.

The purpose of any democracy is to make available “consummatory activity” to individuals. For Dewey, the law is the means to assure such access to the good life based in “organized intelligence.”<sup>313</sup> Although Dewey underestimated the recalcitrance of elite control to forego the

308. See John Dewey, *Psychology and Social Practice*, 7 PSYCH. REV. 105 (1900), reprinted in 1 THE MIDDLE WORKS, 1899–1924, at 131, 149–50 (Jo Ann Boydston et al. eds., 1976). Dewey saw the “factory system” as opposed to household and neighborhood systems. See *id.*

309. Elitism in communication occurs when the instrumental functions of language are separated from the “final functions.” See DEWEY, EXPERIENCE, *supra* note 112, at 169.

310. Communication is the most basic of these means where it provides for local cooperation. See JOHN DEWEY, FREEDOM AND CULTURE (1939), reprinted in 13 THE LATER WORKS, 1925–1953, at 63, 177 (Jo Ann Boydston ed., 1988) [hereinafter DEWEY, FREEDOM AND CULTURE].

311. John Dewey, What Are States of Mind?, in 7 THE MIDDLE WORKS, 1899–1924, at 31, 32 (Jo Ann Boydston et al. eds., 1979); see John Dewey, *A Reply to Professor Royce's Critique of Instrumentalism*, 21 PHIL. REV. 69 (1912), reprinted in 7 THE MIDDLE WORKS, 1899–1924, *supra*, at 64, 69–70.

Life individuates itself, and particular individuations appear and disappear. But the individuation is a trait of life; it is not the mystery of a private, isolated somewhat which destroys all the natural traits of life to replace them with its own quite opposite traits. We are not to interpret “life” in accord with some psychological preconception of the merely personal; we are to interpret the personal in accord with the functions of life.

*Id.*

312. See DEWEY, EXPERIENCE, *supra* note 112, at 168.

313. See Dewey, *Intelligence and Morals*, *supra* note 111, at 49.

If there are to obtain more equable and comprehensive principles of action, exacting a more impartial exercise of natural power and resource in the interests of a common good, members of a class must no longer rest content in responsibility to a class whose traditions constitute its conscience, but be made responsible to a society whose conscience is its free and effectively organized intelligence.

*Id.*

mediation of experience and culture for purposes of improving democracy, which led him to cautiously accommodate elite control in general,<sup>314</sup> he undoubtedly would support legal sanctions of new media uses that permit unfettered access to symbolic reproduction. That is, there can be no justification, aside from limiting the harm that individual actions and interactions cause to third parties, to control individual access to the tool-of-tools of communication and information exchange. It is not at all certain that deliberative democracy, given unlimited access to information, would be confronted with the crises of viewpoint isolation (or group polarization) and an absence of deliberation that so concern Sunstein. In any case, it is difficult to imagine that these problems would exceed the perniciousness of the exploitative history of mass media—a history marked by red-baiting, Nazism, and other instances where politics have been sold as easily as soap.<sup>315</sup>

Dewey's approach may be characterized as a bottom-up faith in democracy generated in local, least-mediated action. This partly explains his lifelong commitment to education as the means of inculcating these values and defending individuals from elitism. Sunstein mostly shares these values,<sup>316</sup> but not as fully as Dewey. As Dewey showed, such ideals—which he thought of as Jeffersonian<sup>317</sup>—are realized in human activity and consociation freed from the constraints of consumerism. Consumerism offers little for an individual's availability to contribute to organized intelligence and disables the individuals' motivation to use organized intelligence to consummate experience.<sup>318</sup> The mediation of experience, which is the foundation of consumer capitalism, was the first evil against freedom. To the extent that Jeffersonian and Madisonian notions of liberty and public power can be distinguished, Jefferson believed in the inherency of democracy in domination-free interaction,

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314. That is, his belief in the scientific method was too sanguine. The method itself would not dissuade persons from using other persons as means.

315. For one of the more famous refutations of media effects research in the design of public information access policy, see Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 769 (1972) (arguing that the effects on the audience's political consciousness of the dissemination of information by television should not be overestimated in attempts to justify the fairness doctrine). Yet, research in "cultivation" of conceptions of social reality by a heterogeneous television audience shows empirically that television does sustain the values, ideologies, and desires of the mass public over time. Concentrated ownership of television content and delivery, however, greatly restricts this cultivation in its diversity. See generally GEORGE GERBNER ET AL., *Growing Up with Television*, in *AGAINST THE MAINSTREAM: THE SELECTED WORKS OF GEORGE GERBNER* 193, 193–213 (Michael Morgan ed., 2002).

316. The pragmatists, especially Dewey, are important for Sunstein. See SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 227, at 53. In particular, Sunstein notes that the value of experimentation in a democracy is to avert search for the "antecedently real," as Dewey put it. *Id.* The problem for Sunstein is balancing this need for broad access to experience with some degree of homogeneous exposure to important information.

317. See DEWEY, *FREEDOM AND CULTURE*, *supra* note 310, at 81.

318. See *id.* at 176–77.

while Madison saw a need for the government to enforce deliberation to some extent.<sup>319</sup>

Sunstein, an adherent of Madisonian democratic theory, tends to see the ideals of democratic life as set apart from private action—as an alien concept imposed by political and legal authority. Yet, a market based on private exchange is a foundation for a democratic form of life. This contradiction is noted by Sunstein, but he views the contradiction through eighteenth-century eyes. The division of democracy from the market is thoroughly mediated by technology, certainly to a substantial extent by prevailing communication technologies. Sunstein seems to forget the constitutive relation of technology and democracy: “In the area of free speech, markets are very important, since they facilitate the exchange and the production of information-scientific, political, medical, and much more . . . . In constitutional law generally, property rights and market ordering can diminish unwarranted political interference with the production of social wealth . . . .”<sup>320</sup> He too often seems to take what the Framers struck as a balance required to mediate the technological constraints on democratic life for a kind of indefatigable set of social relations never to be defiled by things like new media. In Sunstein’s work, there is little room for the notion of new media’s potential to transform these social relations.<sup>321</sup> As for Cyberlaw, Sunstein is explicit: “[T]he emerging technologies do not raise new questions about basic principle but instead produce new areas for applying or perhaps testing old principles.”<sup>322</sup> Sunstein thus lies far from Dewey’s progressivism and much closer to Lippmann’s paranoia and distasteful defense of the status quo of power.

#### IV. CONCLUSION

Is Cyberlaw necessary? Yes, Cyberlaw is necessary to compel uses of new media that reduce elite control while improving individual well-being and democracy. A communication-theoretic justification of such uses establishes a moral basis of communication needed to achieve agreement. The provenance of least-mediated communication is orality, and technologies like new media that emulate orality assure the moral pursuit of solidarity by distributing the power of symbolic reproduction. Elite theory then demonstrates how elite control and obstruction of

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319. Of course, the matter is far more complex than this, though if one were to demand a simple distinction between the two, this may be acceptable. See generally JAMES H. READ, *POWER VERSUS LIBERTY: MADISON, HAMILTON, WILSON, AND JEFFERSON 157* (2000). One could just as easily find textual evidence, especially from Jefferson, to make an opposite claim. *Id.*

320. SUNSTEIN, *FREE MARKETS*, *supra* note 223, at 384.

321. This can be seen in Sunstein’s careful defense of the *Turner* holdings. Sunstein agrees with the holdings that the declining scarcity of broadcasting, added to the problem of “bottleneck” control of cable access, justify content-neutral regulation to increase consumer access to more cable channels. *Id.* at 181. He admits, though, that *Turner* is inapplicable to other new media. *Id.* at 172.

322. *Id.* at 172.

least-mediated uses of technologies distort communication and subvert individual well-being and democracy. Is it moral to prohibit the use of communication technologies that enable unlimited access to information? This is an important question implicating legal, philosophical, and sociological concerns.

In the conservative view, the ideology of consumer choice sterilizes the morality of access. The cumulative protection of property rights that evolved out of the old media's relative scarcity of communication resources vindicates the status quo of elite control over information flows and communication uses, particularly those uses made by mass media. The ideology of consumerism naturalized the allocation, appropriation, and further accumulation of speech resources, as these were the preferred social relations expressed by consumer demand. According to the conservative view, new media deserve no exception from these established uses. What is moral is merely status quo neutrality with respect to new media, in spite of the access that these media can provide.

The libertarian view of Cyberlaw no doubt miscalculates the "unregulability" of new media, but makes the moral claim that new media uses should be oriented to the dissolution of concentrated elite control. But this view remains ensconced in the conservative rhetoric of consumer choice.

For Lessig, the moral argument devolves to designing networks to conform to the e2e principle to assure innovation and competition. Complementing this basic goal is the protection of an information commons contributing to innovation. Yet, justifications for regulating how "meaning" is made prove problematic. First, Lessig does not give good reasons for defending the minimal balance between incentives and access. Second, his sociology of law is developed to justify elitist hegemony such that control of meaning-making will be oriented to improving of innovation and welfare, generally. Third, the legal fidelity that Lessig adheres to in his brand of legal positivism tends to close off a more radical, pre-legal moral justification for the distribution of symbolic reproduction.

Sunstein gives the most attention to the morality of controlling new media uses. These uses revolve around the perceived harms to deliberative democracy caused by political isolation and group polarization of viewpoints that lead to fractiousness. For Sunstein, regulation that exposes individuals to alternative world views and increases access to deliberation best counters these threats. Whether a crisis of opinion-formation exists due to a lack of viewpoint diversity is an empirical matter; the centralization of information flows by elite production and distribution of content also may contribute. More important, it is the justification of control Sunstein offers that is contentious. Sunstein believes that new media will propagate social relations that become so cloistered and hermetic that they unwittingly will legitimate elite, even totalitarian, controls. Whether the state or the

market for information causes this fractiousness is a research problem, but the solution Sunstein offers is, strikingly, old media forms of “general interest” intermediation. As argued above, Sunstein is forced into this defense of old-media democracy because of his persistent devotion to property and the social relations defined by private, elite control of symbolic reproduction.

This is striking because it is not settled that democracy is alien to either action oriented to consummatory activity or interaction oriented to understanding. Dewey’s Jeffersonian critique of this problem shows instead that it is the commodification of culture—the distortion of experience by the private interests of exchange of value—that delays democratic life. For Dewey, unlimited access to communication and information always would promote democratic values because of the intrinsically social character of meaning-making born from the consummatory activity of individuals. Although greatly affected by Dewey’s pragmatism, Sunstein does not incorporate Dewey’s most basic contribution to pragmatic philosophy, i.e., the inherency of democracy in consummatory action. If Sunstein were to do so, he would find that viewpoint isolation is not one of the reasons to obstruct unlimited access to symbolic reproduction; at the very least, we should wait and see what new media might do with respect to deliberative democracy.

Debates over the merits of Cyberlaw have missed an opportunity to incorporate the insights of communication theory. Both supporters and opponents of Cyberlaw could benefit from such insights. First, incorporating communication theory would help focus the inquiry into Cyberlaw on the historically predictable capture of communication technologies to service elite control. This illumination would help critique the law’s own progressive complicity in assuring elite cultural hegemony, which includes the various modes, especially consumerism, of the ideological legitimation of such power. Second, communication theory could help to assess how communication itself is the basis of power. This insight would help the law understand the moral dimensions of access to communication and information exchange as the primary means of distributing symbolic reproduction in a democracy.

The theoretical justifications for Cyberlaw suggest a normative orientation to uses of new media. Theorists have done this. With respect to uses of new media, it is the means that these media are to serve that often defy coherency. Communication theory offers a normative framework that, as its salient objective goal, embraces the emulation of less-mediated orality as an end in itself to nourish democratic deliberation, improve access to cultural resources, and advance individual autonomy. Thus, what is moral and just are applications of the law that seek to disintermediate communication, and new media can incomparably perform this function. Toward this goal, law and regulation of new media that conform to old media alignments of elite interests must be scrutinized as attempts to protect elite control from

threats of distributed symbolic reproduction made possible by such new media.

Yet, though law is political and rules are never free from ideology, the basis of freedom in a democracy is derived from primary orality and the belief that less-mediated modes of communication advance democratic life. Though “shedding Reason’s dead skin”<sup>323</sup> is, in a sense, a radically rational project, the claim that least-mediated communication is essential to human freedom does not mean that emulations of secondary orality will hold dominion over final truths. Rather, what has been defended here is a kind of instrumental essentialism, that is, the means to procure freedom for the greatest number of persons to contribute to symbolic reproduction. What is needed is to assure a permanent means of countermending elite control—that greater access to communication and information might satisfy an ethical power, as Unger has put it, “without a hierarchy of ranks.”<sup>324</sup> This is not to say that such a configuration of values oriented to the distribution of symbolic reproduction is without its own problems. To wit, the claim that ideology, the micropolitics of daily life, and other such influences still mediate a secondary orality certainly complicates a devotion to democracy that strives to distribute access to symbolic reproduction.

Nevertheless, the justification for Cyberlaw proposed here discovers a formal means to secure democracy by assuring the greatest possible access to all communication and information for the purpose of deriving a universally accessible community of experience. This community is morally conceived because the process of finding such a community is immanently corrigible and is always the object of serial consummations by individuals. Only the greatest access to communication and information can assure a universal distinction of the actual and the ideal such that “the power of the self eternally to transcend the limited imaginative and social worlds that it constructs”<sup>325</sup> can be protected.

Giving good reasons is now more crucial than ever as elite control presses new media to perform heretofore unparalleled work in the concentrated accumulation of the resources of symbolic reproduction. Communication theory, as roughly presented here, tells us that this trend is inimical to human freedom. Thus, Cyberlaw proponents ought not vindicate such power. New media offer the potential to disrupt and displace traditional elite control of the means to make meaning; participants in the debate over Cyberlaw must not assume away this potential.

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323. KENNEDY, *supra* note 198, at 344.

324. See ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* 133 (1976).

325. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 26 (1986).