

JEFFERSON'S NATURE
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Draft 1
University of Virginia
Charlottesville, Va
November 19, 1998

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JEFFERSON'S NATURE

“If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possess the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement, or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.” IV Jefferson 180-81.

We are at a moment in our history when we are going to learn lots about nature. We are going to learn just what values nature had. We will learn this now because in ways we can't begin to see, nature is about to change. Or rather the world, and its values, given to us by nature, will be a world, and values, that we will have only if we choose.

And this will be a problem. This, for us, for Americans, for Americans in these last moments of a century—this, for us, will be problem. Because as I want to argue here today, we are at a moment in our history when choices need to be made; yet we are at a moment in our democracy when we have lost the capacity to make these choices.

I am to talk here about cyberspace: About a space you've heard too much about; about a space that has invaded your home or your office; a space that pesters with its email; a space that sucks credit from your credit cards; the next insanely great thing this space is said to be; this space that slowly enters our life in ways we don't yet fully understand. Enters our life, and occupies it. As it occupies us.

Now the strange thing about cyberspace is that it too is said to have a nature. It too is said to have features about it that inhere in its essence. It too is said to be a space that has values implicit; values that we find there; values that can't change. These values are different. They are different, that is, from the values we find in real space. But they are said, like Jefferson said of the nature of an idea, to be cyberspace's nature.

What is this nature? Cyberspace, it is said, is the libertarian's paradise. It is an unregulable space. It is that place where governments cannot control; that space where behavior is free of the state's reach. And not just that it should be free of the state's control. Cyberspace is that place that *can't* be subject to government's control. It is, in the words of James Boyle, the locus of the great libertarian-gotcha: Nations of the world, libertarians exclaim, this new and amazing space is a space you can't live without. But nations of the world, these libertarians exclaim, it is a space you will not control.

My aim in this talk is to challenge this thought. It is to challenge this view about nature and cyberspace, as well as challenge this view about nature in real space. My aim, you might say, is nature talk all around. Not so much because I'm against nature; but because I'm against the security this talk about nature gives us. Nature, in my view, is just the way things are when it's too hard to imagine how they might be different. But these natures — these natures about cyberspace and about the nature of "inventions" and "property" are natures that we can easily imagine being different.

So let us return to Jefferson's nature — To the story that Jefferson wants to tell about "inventions" and property. As Jefferson said, there is something special about ideas, or about inventions, the domain of what today we could call, intellectual property. For even economists understand there is something special about such property. IP, they would say, is "nonrivalrous"—meaning if you take some, there's just as much left for me. Jefferson had a much more vivid image of the same point. "Its peculiar character, too, is that no one possesses the less, because every other possess the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me."

Now this feature of IP is its beauty, in Jefferson's mind. "That ideas should freely spread from one to another over the globe, for

the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point.” It was god’s conspiracy against the property holder that this property wouldn’t take care of itself. Try as he might to bottle ideas into property, ideas would still flow free; fight as we might to create property in such things, our fight would be a fight against nature.

Now nature is not always like this. It is not always against property. Intellectual property is vulnerable, as a car might be said to be vulnerable, or as an unlocked bike is vulnerable: All these can be taken and moved; stolen quite easily. So we have special laws to protect the holders of such property — copyright to protect against the misuse of my expression, laws about theft of cars, and bikes to protect against their taking.

But think about skyscrapers for a moment. We don’t have special laws about the theft of skyscrapers. Skyscrapers pretty much take care of themselves. While nature makes it relatively easy to capture and run with a car, nature is the skyscraper’s best friend.

So Jefferson’s point can’t be that nature IS against property; his celebration was just a celebration of nature’s respect, or lack of respect, for one kind of property, and of nature’s conspiracy with the thieves to make protection of that property hard. Intellectual property is not like skyscrapers; it needs the help of law; but even that help is to be limited. It is to be limited because the feature of ideas that Jefferson spoke of is extraordinarily valuable. It is important that ideas not be subject to property. It is important that they not be fully subject to control. Laws can protect — Copyright, and patent, and trade-secret laws, these laws do, but from the start of our republic, we have understood with Jefferson that this protection was to be limited. We have understood that it is to be balanced with rights of public use — rights protected, for example, with ideas of a limited term, and the ideas of fair use.

So the constitution gives Congress an important power:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries;

Congress has always exercised this limited power — limited because as the framers saw, this was the power to create a state

supported monopoly. From the start, IP has *for a limited time* been protected; so long as that protection was *for the advancement of the sciences and useful arts*. The power was to create limited monopolies, balanced by the interest in public use.

The copyright law thus states a balance. On the one side is a right to create something like a property right, to give producers an incentive; on the other is public use — an assurance of a limited right; the guarantee that this power would only be exerted if to exert it would be to benefit the public; an assurance that public would have some access — either after the incentive period had run, or through limited access during the period of incentive, through concepts such as fair use.

Now though the framers were fairly clear about the limited nature of Congress' power — though they understood that the protection should be only the amount needed to inspire the creation, and then once the creation is made, it should come back to the public — our current Congress has apparently forgotten all this.

Here's one example: Though the only justification for granting protections is to create an incentive to new production, Congress has passed retroactive copyright protection. It has extended the term of copyright protection from life plus 50 to life plus 70, and for older works, now 95 years. But if we know anything, we know that no matter the incentive, Hawthorne is not going to write anything more. You can't incent a dead person.

Congress's greatest terror however is the internet. For the fear is that the nature of the internet is Jefferson's story squared. That however right Jefferson was about the freedom of ideas in real space, cyberspace makes his ideas all the more powerful. For in cyberspace, ideas don't just flow, they fly.

Consider: There's a technology called MPEG3 that allows for the compression of digital audio and video at a very high rate. A company called MP3 has made it a business to promote this technology. The technology is public; its use is free. And using MP3 technology, I can copy a CD recording of Beethoven from my CD drive to my hard disk; I can then attach it to a post on USENET, and within a couple days, millions of copies of this recording will be floating on computers across the net — millions of perfect copies, all copied for free. This picture of course terrifies the producers of CDs.

Their fear is that cyberspace will be their death. That the power of the space will make protection of their property impossible there. That more laws — more severe laws — are necessary to compensate for the increased danger the space presents.

Why the danger: But we should pause a moment to ask just why there's a danger to copyright in cyberspace. What about its nature makes this danger so great? *Why* is it that copyrighted material can be copied without limit; why is it that it can be distributed to millions of machines in a couple days. What makes it such that the nature there is the world Jefferson spoke of but more?

It takes just a moment to understand what laws of nature make this so. It takes just a reflection to understand why things are as they are. We can give this nature a name — a name that will identify just why the space is as it is. The name is *code*.

What makes it possible for ideas to be copied to millions across the world; what makes it possible for a copyrighted CD to be duplicated many times over; what makes it possible is the software and hardware that makes cyberspace as it is. What makes it possible is the code that defines the space that cyberspace is. If Jefferson dreamed of the world where ideas can flow, cyberspace is that space because the code of the space makes it so. Code makes cyberspace as it is. And code can change.

For when we locate as I have the source of this power of unlimited copying; when we isolate its source and point to its authors, then we see that this source is something we could very well change. The code of cyberspace might make it Jefferson's Paradise. But though Jefferson did a lot, he certainly didn't write the code, he didn't write this code. And he won't be there to protect it as its authors work to change it.

So while the cyber-libertarians celebrate the impossibility of control here, code writers are architecting this space to be very different. Code writers are developing architectures for cyberspace that will make possible perfect control of distribution there. There are many examples, but one will do.

Think about the work of Mark Stefik of Xerox PARC. Stefik wants to give producers of IP control over the use of IP. He is designing a system to that end called "trusted systems." Trusted

systems are systems that will enable the author to decide what rights to a given work she wants to sell. If you have an electronic book, you can sell the right to read it once, or the right to read it 5 times. The right gets built into the code of the system; the code is the controller that makes sure you don't exceed your rights.

In this world that Stefik would build, code replaces law. In this world that trusted systems would construct, perfect control over IP could be achieved, more perfect than the law now permits. The law of copyright might protect fair use; but to the code writers — companies that develop this software to protect IP — fair use is a bug. Code would replace law, and by replacing law, replace the values of this space as well. We would move from a place where law imperfectly controlled nature to a place where code effected a perfect control, quite without the law.

And what then of Jefferson's nature. What then of values of the world that he describes? Will we simply stand by as the code of this space gets rewritten to sap from it the values it once embraced?

BOLSHEVIKS

Before the revolution, the Tsar in Russia had a system of internal passports. The people hated this system. These passports marked the estate from which you came, and this marking determined the places you could go, with whom you could associate, what you could be. The passports were badges that granted access, or barred access. They controlled what in the Russian state Russians could come to know.

The Bolsheviks promised to change all this. They promised to abolish the internal passports. And soon upon their rise to power, they did just that. Russians were again free to travel where they wished. Where they could go was not determined by some document that they were required to carry with them. The abolition of the internal passport symbolized freedom for the Russian people — a democratization of citizenship in Russia.

This freedom, however, was not to last. A decade and a half later, faced with the prospect of starving peasants flooding the cities looking for food, Stalin brought back the system of internal passports. Peasants were again tied to their rural land (a restriction that remained throughout the 1970s). Russians were once again restricted by what their passport permitted. Once again, to gain

access into Russia, Russians had to show something about who they were.

We are entering the autumn of cyberspace's Bolshevik revolution. We are coming to the end of the time when people will live there with the kind of anonymity that they knew in Bolshevik Russia. We are coming to the end of the time when people there are free to travel without showing who they are; where anyone can go anywhere, without showing a credential about who one is.

For that was the space's original nature. That was how it was understood. When the web was born, one surfed anonymously. Nothing in the initial architecture of the space demanded that one reveal who one was. It didn't matter whether one surfed from New Jersey or California; it didn't matter whether the server one visited was in Carolina or the Caymans. As the net was, you were everywhere if you were anywhere. Cyberspace was that place that was everywhere if anywhere.

Now this feature of the space is the feature most protective of speech there. One can say what one wants there, because one can't easily be tracked; one can say what one wants there, because it is hard for those who would punish to find who to punish. Think about it like this: For 50 years we've been selling a conception of free speech to the rest of the world, and for the most part, no one has adopted it to the extreme we have pushed it. But then without even a whisper, we wired into their phones a network whose very architecture protects speech far more completely than even our own first amendment.

Now again, there were many who thought this feature of the space was a feature built into its nature. But as we've seen about property, nature in this space is just the constraints imposed by code. And these features of anonymity — features crucial to the freedom the space will create — these features could be different. Could be, indeed will be, as the architectures of the net change.

And how. Well again there is a similar pattern. While the cyberlibertarians sing about the impossibility of control, control is being built into the system. While they tell of how impossible control in this space is, those who have an interest in control are building the architecture that would make this control possible. While we marvel at the power of this *cyber-nature*, those who aren't stopped by nature are making nature different.

The word is commerce. As the world goes by believing the anonymity of this space is somehow inherent, business is working furiously to lay onto the architecture of cyberspace technologies that would facilitate identity, and therefore technologies that would facilitate control. Technologies that would facilitate the ability to know who someone is, where someone comes from. The ability to automatically know this; and the capability, then, to make decisions about access and liability based on this information.

The details of this technology are not critical. The basic structure includes something called digital certificates — encrypted objects that reside on one's machine, or on a profile directory somewhere in one's control, and which, automatically, converse with a server as one enters a site, verifying facts about you, as well as facts about the site.

Objects of identification sitting inside your machine; internal passports of the information superhighway. No doubt you already have the beginnings of this on your machine just now; certificates that authenticate facts about you. And there's even less doubt that you'll give up more of such identity, as life on the screen becomes easier to navigate the more one's willing automatically to give up.

And then where will we be? Where will we be when these basic facts about you — age, sex, citizenship, name, whether you're a lawyer, etc. — when these facts are known, and knowable; when showing then becomes condition of entry; when the "built in anonymity" of the original space passes into the most efficient system for filtering and zoning that social life has ever known? Where will we be when this space of no control becomes the space of perfect control?

For this much should be clear about the change this will mark. The space is transforming — it is being transformed — into a space that is no longer unregulable; it is changing from a space that was inherently free into a space that has the greatest potential for control. The space is transforming — it is being transformed — as its nature gets remade. Its nature. For its nature is simple its code, and its code can be different.

CODE

So here's the central point: This space — this space that cyberspace is — this space is constituted by its code. Its nature, its values, the freedoms it protects, all these things are things only

because of the architecture of the space. The architecture, the design, the constitution, the shape — these features that someone, some code writer, builds. This architecture makes cyberspace as it is; and here's the point: This architecture can be different.

But it is as if we've been brainwashed to forget this. The nature of this space is not determined by god; the nature of this space is ours to set. Whether, in Jefferson's words, ideas will be free to flow is a decision we must make, not a decision that nature has made. Whether one may travel in this space with the right of anonymity is a choice that we must make, not a choice that the nature of the space will assure. The space has the nature that its code writers give it; yet we are the codewriters, and we can do things differently.

But an is-ism reigns in this space. An is-ism that says the way the net is is the way the net has to be. An is-ism that makes it seem as if the values of that space are values we will simply find. As if the values of that space were given to us by the laws of quantum physics. But the first point to see is that it is we who chose the values; it is we who should decide what this space will be. It is we who should decide this, and yet this is just what we are unable to do. Unable, because we think incapable; incapable because collective choice is something in which we no longer believe.

GEORGIANS

At a conference in Georgia — former Soviet Georgia, that is — sponsored by some western agency of Democracy, an Irish lawyer was trying to explain to the Georgians just what was so great about a system of judicial review. "Judicial review," this lawyer explained, "is wonderful. Whenever the court strikes down an act of parliament, the people naturally align themselves with the court, against the parliament. The parliament, people believe, is just political; the Supreme Court, they think, represents principle." A Georgian friend was puzzled by this response, puppy-democrat that he is. "So why," he asked, "is it that in a Democracy, the people are loyal to the court, a non-democratic institution, and repulsed by parliament, a democratic institution?" Said the lawyer: "You just don't understand democracy."

There is much talk these days about something called governance in cyberspace — much talk, followed by obscure questions, and puzzles. It is said that this idea — this idea of governing cyberspace — is anathema to our tradition. Who is cyberspace? Where would it vote? And it is said that this idea —

this idea of governing cyberspace — is abhorrent to cyberspace itself. As John Perry Barlow put it, in his (maybe our?) Declaration of the Independence of Cyberspace:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

But our problem is not the problem of governance *in cyberspace*. Our problem is a problem with governance. There isn't a special set of dilemmas that cyberspace will present; there's just the familiar dilemmas that modern governance confronts—familiar problems in a new place. Some things are different; the target of governance is different. But the difficulty doesn't come from this different target; the difficulty comes from our problem with governance.

Here's what I mean.

The net is governed already. It is governed in places by people — by people who set the protocols of the space, people who enforce rules on the space; and it is governed everywhere by code — by the software and hardware that sets the architecture of the place, and sets the terms on which access to the space is granted.

These governors — these rulers both human and tech — impose values on the space. Their actions reflect the values of the space. Their rules are expressed primarily through code, but their rules are expressed also as rules. They give the space the character it has.

The most famous of these governors are bodies such as IETF — rulers with humility, who express their law in requests for comments — RFCs. These governors, by the way they act, by their humility, by their respect for excellence—these governors give their rules, and the spaces that they constitute, a certain value. A collective value, that has earned it respect.

But these governors are slowly being replaced. Or not so much replaced, as displaced. Displaced by codewriters of a different sort — code writers who answer to suits, to commerce, to the business they work within, not code writers who answer to the elegance of an argument.

Now in their place — in the place of governors of the sort of IETF — in their place has emerged an idea, not much of an idea, more a grunt than an idea, but an idea nonetheless: It says this:

“The single unifying force is that we don’t want the government running things.”¹

And the result then is that we are establishing bodies to govern, but are calling them “private.” We are privatizing governing functions, and then pretending that the government has nothing to do with them.

Let’s take a very particular example — the governing of the domain name system, that system that determines who gets McDonalds.com, or whether the EU or Palestine gets to have a top level country code.

For the past year or so in earnest, and for some time before that, the government has been scurrying to find a way to pass off its role in running the domain name system to a private, nonprofit corporation. It has been scurrying because its contracts with Network Solutions and the late Jon Postel’s IANA were about to run out, and scurrying to privatize because the theme of the day for both Democrats and Republicans seems to be that government cannot run things.

“The single unifying force is that we don’t want the government running things.”

The history of this recent privatization of governance is important; the facts are important. For they should drive us — this history, and the facts it tells — to relearn something our grandparents learned half a century ago. They should drive us, that is, to understand what government is for. To understand government’s role not as some unnecessary appendage — the appendix of social life, waiting to be excised by an overeager surgeon — but as an institution that makes possible a certain perspective on social life.

We have lost this idea, we inheritors of the 21st century. We have lost the ideal that there is a role for government here. We — especially we who spend too much of our life using electrons to

¹ Bloomberg Business News, “Internet Control Compromise Could Keep US Regulators At Bay,” September 30, 1998.

interact; we — especially we, who still stand amazed at the potential of this wired world; we — especially we, who can't remember a time when there wasn't an underbelly to every story about a hero. We — children of David Lynch, who can't help but believe that, just underneath the surface of the sensible, there is a decay that can't be avoided. We listen to the promises of our governors no differently than Soviet citizens listened to the promises of their governors. We, like Soviet citizens, have heard it before. "Hope" is not a place; "Hope" was a television commercial.

I want to think about this fact about us. I want to think about this reality that all of us know — whether Republican or Democrat, whether political or not. I want to think about its meaning. For we are at a moment of history where hope would come only if we could get beyond this despair. We are at the cusp of a moment when collective judgment should matter. But we are disabled from making that judgment; we are convinced no such judgment could be made. And so we resign ourselves to the religion of antigovernment — to this absurdly naïve thought that if we just privatize everything, all of our problems will go away.

For what's bizarre about this thought — this thought that "the single unifying force is that we don't want government running things" — is that it pretends as if that means no one is running things. It pretends that if we just get government out of the way, things will take care of themselves. It is as if the laws of nature were being written; it is as if they were being written while we stood by and watched; and as if we could see how these laws will affect us — affect us more completely than any laws of man — yet we still stand wondering, should we have a role in this writing?

One would think the answer was obviously yes. But the fact is that most of us would say that here the government should stay away. We modern democrats from our well-developed representative Democracy—we, you and I, we and the Irish I spoke of — we who otherwise sing of the virtues of Democracy and freedom and control by the citizen, we have no faith in what we might do. We are at a time when the most important judgments about how this new world will be made are being made. And yet, we are strangely disabled — immobilized by ourselves — from making choices about that new world. Laws are being written in the code that that space will be, yet we have no idea how we might participate in the writing of those laws, and little desire to do so.

We are disabled for two very different reasons. One is very lawyerly and, almost by definition, the less interesting of the two. That reason goes like this: In the main the net is private — thankfully so, thankfully built (not funded) by someone other than government — but whether thankfully or not, formally the net is not government's creation. And so because the Internet is not government's creation, constitutional values that restrict government need not restrict actors on the net.

This limitation in our thought — given to us by lawyers — drives me nuts in its silliness. We are building the most important jurisdiction since the Louisiana Purchase, yet we are building it wholly outside of our constitution's tradition. The values of that tradition don't limit its design; the values of that tradition don't test whether one design is better than another. That tradition is said to be irrelevant because this space is said to be private. The constitution doesn't run here, because law doesn't run here, because the “single unifying force is that we don't want government running things.”

There's no reason for this limit in constitutional thought — no reason compelled by our history, or compelled by reason itself.

If our objectives, as a society, are to protect ideals such as liberty, then my claim is that we should focus on liberty, and not so much on these obsessively legalistic distinctions about who or what is responsible for the absence of liberty.

This is a very old thought. John Stuart Mill, for example, was keenly concerned with liberty in Great Britain. But his primary concern was not the liberty threatened by government. Mill's concern was the threat posed by social norms, or stigma, to personal liberty. His book, *On Liberty*, was a corrective — not just to excessive government censorship of ideas and speech but to excessive private censorship of ideas and speech. He argued for a world where liberty was protected from the threats of both private and public action — from both laws and from norms. For him the value was liberty and his method directed him against threats against liberty, whatever the sources.

Mill's method should be our own. We should ask whether freedom is protected, not whether government threatens freedom. We should ask whether the architectures of cyberspace protect traditional values of liberty, and speech, and privacy, and access — not whether government is interfering with liberty, and speech,

and privacy, and access. The primary good here is a set of values, not absence of governmental interference independent of those values. For quite often — more than the Libertarians seem keen to admit — these values are only protected by a government acting — acting against tyrannies imposed by individuals, and by groups.

But this limitation in the imagination of lawyers is just the first reason that we were disabled from imposing collective values on this space. We can blame lawyers for it, but we can't blame lawyers for the second.

For this second reason is the reason of the Irish. It is this skepticism that we all bring to the question of collective governance. It is our unwillingness to think about how “we” should influence this space; our preference just to let the space take care of itself; because we have so little faith in any structure of collective control.

I share this skepticism; I am not a naïve New Dealer; I don't have a 100 day plan for regulating the Internet; most of the regulation that I have seen I abhor. But what I find interesting — and the point I think we should focus — is why we have such skepticism. What is its nature; what accounts for its source? Why are we, like the Irish, so exhausted by government? Why doesn't government seem like the solution to any problem that we now have?

I don't believe that our skepticism about governance is a point about principle. We are not, most of us, really Libertarians. We may be anti-government, but for the most part we do believe that there are collective values that ought to regulate private action.

Our problem is that we don't know by whom, or how. We are weary with governments. We are profoundly skeptical about the product of democratic processes. We believe, whether rightly or not, that democratic processes have been captured by special interests more concerned with individual rather than collective value. While we believe that there is a role for collective judgments, we are repulsed by the idea of placing the design of something as important as the Internet into the hands of governments.

The battle over domain names is a perfect example. The White Paper called for creation of a non-profit corporation, devoted to the collective interest of the net as an international whole, with a board to be composed of representatives of stakeholders on the net,

and charged with making essentially the policy judgments that IANA had been making. In exchange, the government was to give up continuing control over the domain name system, and support its transition to an autonomous, separate entity.

But think for a second about the kinds of questions my Georgian friend might ask. A “non-profit corporation devoted to the collective interest”? Isn’t that, he might ask, just what government is supposed to be? A board composed of representatives of stakeholders? Isn’t that what a Congress is? Indeed, if he thought about it, my Georgian friend might observe that this corporate structure differs from government in only one salient way — that there is no on-going requirement of elections. This is policy making, vested in what is in effect an independent agency, but an agency outside of the democratic process.

This is extremely odd behavior for democrats. That the idea that a governmental body, whether American or international, should set this governing policy was not even considered is a profoundly interesting fact about us. It says something about us — about where we have come in this experiment with Democracy. We have lost faith in the idea that the product of representative government might be something more than mere interest. To steal the opening line from Justice Marshall’s last opinion on the Supreme Court, we believe that power, not reason is the currency of deliberative democracy.² We have lost the idea that ordinary government might work, and so deep is this thought that even the government doesn’t consider the idea that government might actually have a role in governing cyberspace.

I say all this not to excuse. I am explaining how we got here, not justifying it. I understand the resignation, and the impatience, with governance. But it is an impatience that we must overcome. We must isolate its cause, and separate it from its effect. If we hate government, we hate it not because the idea of collective values is anathema; if we hate Government, we hate it because we have grown tired of the corruption of our government. We have grown weary of its betrayal, of its games, of the interests that control. We have grown weary, but we must find a way to get over it.

² See *Payne v. Tennessee*, <http://supct.law.cornell.edu/supct/html/90-5721.ZD1.html>, Marshall, dissenting.

For we stand on the edge of an era when fundamental choices about what life in cyberspace, and therefore, life in real space, will be like. These choices will be made; there is no nature here to discover. And when these choices are made, they will be made either with the values that we hold sacred influencing the choices that are made, or they will be made ignoring these values. There are values that we have in this space — values of free speech, or privacy, values of due process, or equality, values that define who we are, and which should lead us to ask — if there is not government to insist upon them, then who?

For here's the obvious point: When government steps aside, it is not as if nothing takes its place. When government disappears, it is not as if paradise prevails. It's not as if private interests have no interests; as if private interests don't have ends they will then pursue. To push the anti-government button is not to teleport us to Eden. When the interests of government are gone, other interests take their place. Do we know what those interests are? And are we so certain they are anything better?

Cyberspace is constituted by its code; this code defines the values and the freedoms this space will protect; this code is written by codewriters, not Jefferson, not god; this code can change, and indeed is changing. And so when we imagine government out of the way, do we have any sense of the values that the new code, this emerging code, will embrace?

GOVERNANCE

In his rightly famous book,³ Senator John F. Kennedy tells the story of Daniel Webster, who in the midst of fighting a pact that he thought would divide the nation, said on the floor of the Senate, “Mr. President, I wish to speak today, not as a Massachusetts man, nor as a Northern man, but as an American.”

When Webster said this — in 1851 — the words “not as a Massachusetts man” had a significance that we are likely to miss. To us, Webster's statement seems perfectly ordinary. Who else would Webster be, except an American? How else would he speak? But Webster's words come on the cusp of a new time in America. They come just at the moment when the attention of citizens in the United States is shifting from their citizenship to a

³ **Profiles of Courage** (Memorial Edition, 1989).

state, to the question of citizenship for the nation. Webster is speaking just when it becomes possible to identify oneself apart from one's state; as a member of a nation.

For at the founding, citizens of the United States (a contested concept itself) were really citizens of particular states first. They had loyalty and connection to their own states first, because that's where they lived, and their life was determined by where they lived. Other states were as remote to them as Tibet is to us — indeed, it is easier for us to go to Tibet than it was for a citizen of Georgia to visit Maine.

Over time, of course, all this changed. In the struggle leading up to the civil war; in the battles over reconstruction after that war; in the revolution of industry that followed that — in all this, the sense of individual citizens as *Americans* grew. In all this, in all the exchanges and struggles which were really national, a national identity was born. When citizens were engaged with citizens from other states, only then was a nation created.

We stand today just a few years before where Webster stood in 1851. We stand just on this side of being able to say, "I speak as a citizen of the world," without the ordinary person thinking "What a nut." We stand just on the cusp of an existence where ordinary citizens come to know how the world regulates them. Where ordinary citizens begin to feel the effects of the regulations of other governments, as the citizens in Massachusetts came to feel the effects of slavery, and the citizens in Virginia came to feel the effects of a drive for freedom.

As we, citizens of the United States, spend more of our time, and spend more of our money, in this space that's not really part of any particular jurisdiction, but subject to the regulations of all jurisdictions — as we spend more time there, we will increasingly come to ask questions about our status there. We will increasingly feel the entitlement that Webster felt, as an American, to speak about life in another part of America. But for us, it will be the entitlement to speak about life in another part of the world.

What will we do then? What will we do when we *feel* that we are part of a world, and that the world regulates us? What will we do when we need to make a choice about how the world regulates us, and how we regulate this space?

My sense is that we will do is just what we are beginning to do now. We will create private, nonprofit corporations dedicated to the public interest. We will, that is, create bodies to govern. And when we do this, we will only do it well if we have abandoned this self-indulgent anti-governmentalism. We will only do it well if we develop again a capacity to choose. We will need the capacity to say what values this space is to have. And we will need to govern ourselves there.

We don't have this capacity just now. Instead we hide in the rhetoric of nature as the nature of this space changes. The nature that Jefferson rejoiced about Congress is now legislating against; the freedom that the initial internet gave — that amazing surprise of modern life — is now being transformed by the codewriters of commerce. The values of this space are changing to be the values of commerce. And this change will affect all of us. This change will make the regulation of cyberspace different; it will make cyberspace different; and in the face of this change, we must come to feel the entitlement to say how we want this space to be. We must learn how we can make a choice.

The single unifying force is not that government not run things. Whether government runs things or not, the single unifying force should be that *we* govern *ourselves*. Right now, we cannot. Right now, we are lulled by talk about nature as nature about us is changed.

We must learn to make choices about this nature. This much about us must change.