Governance

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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, is principle." A Georgian friend was puzzled by this, puppy-democrat that he is. "So why," he asked, "is it that in a democracy, the people are loyal to a non-democratic institution, and repulsed by the democratic institution in the system?" "You just don't understand democracy," said the lawyer.

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We have no problem of governance *in cyberspace*. We have 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:

Cyberspace is that space constituted by code — by software and hardware that together makes up the architectures that cyberspace is; architectures that settle what's possible in a particular place; architectures that define what values will be imbedded in a particular place; architectures that determine the regulability of behavior in a particular place. These architectures are many; the values that they imbed — privacy, anonymity, access, control — are varied; and hence the choice about these architectures is a choice about these values. Yet we are at a time when we are strangely disabled from making choices about these architectures.

We are disabled for two very different reasons. One is quite local, particular to lawyers; a limitation in the way we lawyers think about the scope of constitutional law; the other is quite general, a symptom of modern democracy; our strangely Irish aversion to the products of democracy; our exhaustion, or resignation, about how democracy works.

Consider the constitutional point first. Architectures constitute cyberspace; these architectures are varied; they variously imbed political values; some of these values have constitutional import. Yet for the most part — and thankfully — these architectures are private. They are constructed by universities, or corporations; they are implemented on wires no longer funded by the defense department. They are private and therefore outside the scope of constitutional review. Traditional constitutional values of privacy, or access, or rights of anonymity, or equality — these values need not trouble this new world.

Why this should be is not clear to me. For this code functions as law, and not all constitutional democracies would be so limited in the reach they grant their constitution over such "law." Yet none seem eager to extend the governance of constitutional law to the building of this new space. We are creating the most significant new jurisdiction we've known since the Louisiana purchase, yet we are building it just outside the constitution's review. We are building it so that the constitution will not govern, and this, I suggest, is our first problem of governance.

But it not the more important. The more fundamental problem is the problem of the Irish. The skepticism that we all bring to this question of collective governance.

I share this skepticism; I am not a naïve New Dealer; but we should think more about its source; we should understand its nature.

Our skepticism about governance is not a point about principle. We are not, most of us 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. We are, in the main, as my friends like to call it, techno-realist[1] — committed to the idea that collective values should regulate this emergingly technical world.

Our problem is that we don't know by whom. We, like the Irish, 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, than collective value. So while we believe that there is a role for collective judg-

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[1] See http://www.technorealism.org/.

ments, we are repulsed by the idea of placing the design of something as important as the internet into hands of governments.

The White House's recent domain name proposal perfectly reflects the point. To regulate policy for domain names, the White House has proposed the 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 made. In exchange, the government will give up continuing control over the domain name system, and support its transition to an autonomous, separate entity.

Now I think there's merit in the proposal. There are parts I would quibble with, but the general structure seems right. 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 suppose 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.

Now again, I like the proposal, but isn't it really quite odd? What does it say about us? Imagine we established a non-profit corporation to make highway policy, with the board members initially chosen from the stakeholders of highways, and then given the authority to set policy from that moment on. And if the highways, why not the telecommunications industry in general. And if them, why not the air transportation industry. Why not just carve up the government into many private nonprofit corporations, and be done with it.

Putting aside the constitutional questions of this for a second, the point to notice is just how bizarre all this is for a democracy. The fact that the idea that a governmental body, whether American, or international, should set this policy, was not even considered, is profoundly interesting about us. It says something about us — about where we have come in this experiment with democracy. It reflects a pathetic resignation that most of us feel about the product ordinary government. And while I completely share the skepticism, and even disgust, I think it is important to notice how

infectious it has become. We have lost faith in the idea that the product of representative government might be something more than mere interest; that, to steal the opening line from Justice Marshall's last opinion on the Supreme Court, 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 role in governing cyberspace.

Good that it didn't, I say. I'm with the Irish people, and against the parliament. But we should not miss — we, who live our life using reason rather than power to persuade others, we should not miss — what this loss really means; what this says about our intuitions about governance.

In a critical sense, we are not democrats anymore. Cyberspace has shown us this, and it should push us to figure out why.

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