

## GOVERNING CYBERSPACE: LAW

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### *Abstract*

*As explained in the “Note to the Reader,” this article is excerpted from Professor Post’s forthcoming book, In Search of Jefferson’s Moose: Notes on the State of Cyberspace (Oxford University Press, 2008).*

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*We hold these truths to be self-evident, that . . . governments are instituted among men, deriving their just powers from the consent of the governed . . . The present King of Great Britain . . . has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws . . .*<sup>1</sup>

*The inhabitants of the several States of British America are subject to the laws which they adopted at their first settlement, and to such others as have since been made by their respective Legislatures, duly constituted and appointed with their own consent. No other Legislature whatever can rightly exercise authority over them; and these privileges they hold as the common rights of mankind . . .*<sup>2</sup>

#### I. A NOTE TO THE READER

What follows is the penultimate chapter of a forthcoming book entitled *In Search of Jefferson's Moose: Notes on the State of Cyberspace* (Oxford, 2008). Because it wasn't written to be read on a stand-alone basis, it probably loses—at least, I hope it loses!—something from being taken out of context, and a few words about where it stands in relation to the rest of the book would probably be helpful.

The book looks at the Internet by following the outline of Jefferson's "Notes on the State of Virginia." A Prologue sets out the plan: to put Jefferson's ideas to work, to use them to help think about cyberspace, following his blueprint—asking the questions he asked about his complicated, strange place to help us understand ours: "Notes on the State of Cyberspace."

Part I of the book ("Chaos") is a kind of natural history of the TCP/IP network – what it is, how it works, and most particularly why and how it (rather than some other network) became "the Internet" – i.e., why and how it got to be so big. An "Interlude" introduces the central problem of scale facing the Founders as they contemplated the growth of the new nation, the so-called Problem of the Extended Republic: How could a government remain true to "republican" principles – that the governed rule their governors, and that ultimate

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1. THOMAS JEFFERSON, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. Thomas Jefferson, Resolution of Albemarle County (July 26, 1774), in 2 THE WORKS OF THOMAS JEFFERSON 42, 43 (Paul Leicester Ford ed., 1904).

power is lodged in the people themselves – when spread over large territories and large numbers of people?

Part II of the book (“Order”) contains three chapters on law and governance: the first expands on Lawrence Lessig’s now-familiar idea that “code is law” (and that institutions like the Internet Engineering Task Force are “law-makers”) in cyberspace, the second focuses on ICANN and the scope of its law-making activities exercised via control over the Internet’s naming system, and the third – the one that follows – on broader questions of jurisdiction and the law of virtual worlds.

In addition, because the book is intended for a non-scholarly audience, you will forgive, I hope, the absence of the usual appurtenances of scholarly writing in this article. Finally, note that everything in *italic type* is quoted directly from Jefferson.

## II. INTRODUCTION

Code may be law in cyberspace, but law – ordinary law, the rules contained in the statutes and ordinances and municipal regulations and constitutions and court decisions and all the rest – is also law in cyberspace. It, too, constrains – at the very top of the protocol stack, as it were – what you may or may not do on the inter-network.

The tricky part, though, is: Which law? Whose law? The international legal system is premised, at bottom, on the existence and mutual recognition of the physical boundaries that separate sovereign and independent law-making communities – nation-states – from one another. These boundaries matter, in that system, and they matter a great deal. But on the inter-network, information moves in ways that seem to pay scant regard to those boundaries, and mapping them onto network activity is a profoundly difficult challenge.

This problem is well-known to, and often-debated by, anyone who spends his or her time thinking about law and the Internet. Most discussions of the problem begin with something that looks like this:

A, in Austria, posts a file to the World Wide Web using a service provider in the Netherlands. The file is transported from the host machine in the Netherlands to C’s service provider, located in Virginia, by way of intermediate machines located in Great Britain and Mexico. C retrieves the file and displays it on her screen in California. The file contains something that may be unlawful (either criminally or civilly) in California, Austria, the Netherlands, Great Britain, and Mexico, or in some of them but not others – a threat, perhaps, or an offer to sell securities, or a hard-

core pornographic image, or the complete text of a poem that has fallen out of copyright in some countries but not others.<sup>3</sup>

Whose law applies here? Which country can rightfully assert “jurisdiction” over this communication and these parties? Can California prosecute or punish A, under California law? Can Mexico, under its law? Austria? If C has suffered harm as a result of this communication, where can she bring suit against A?

“The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”<sup>4</sup> A generation of law students around the globe has been plagued by puzzles like these. And because life tends to imitate law school hypotheticals, as most law professors can attest, an actual case, involving a challenge to material available on Yahoo!’s website, teed up these issues so neatly that the whole bundle of questions is now known as the “Yahoo! Problem” among cyberlawyers and cyberlaw scholars.

### III. THE YAHOO! PROBLEM<sup>5</sup>

The facts of the actual Yahoo! case couldn’t be much simpler – one of the reasons why it has been so useful as a focus for discussion and debate. Yahoo!, Inc. is the well-known provider of information and services over the World Wide Web. It operates – or used to operate – an auction website, at “Auctions.yahoo.com,” at which sellers could offer goods of all sort for sale and buyers could bid on those goods. Yahoo! is a United States corporation, incorporated under the laws of one of the United States (Delaware), and with its principal place of business (and web servers) in another (California).

French law prohibits the display or sale of Nazi-related memorabilia; more precisely, it provides that anyone exhibiting, in

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3. This hypothetical is adapted from Jonathan Zittrain, *Be Careful What You Ask For: Reconciling a Global Internet and Local Law*, in WHO RULES THE NET?: INTERNET GOVERNANCE AND JURISDICTION 13, 14-15 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003).

4. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

5. On the “Yahoo! Problem” generally, see Joel R. Reidenberg, *The Yahoo! Case and the International Democratization of the Internet*, Fordham Law & Economics Research Paper No. 11 (2001), available at <http://ssrn.com/abstract=267148>; Center for Democracy and Technology’s Jurisdiction Collection, <http://www.cdt.org/jurisdiction> (last visited Apr. 6, 2008); Center for Democracy and Technology’s Policy Posts, <http://www.cdt.org/publications/policyposts> (last visited Apr. 6, 2008).

public, the uniforms, insignias, or emblems that were worn or exhibited by members of any organization declared criminal [by] the International Military Tribunal of 1945, or any such items worn by persons accused of crimes against humanity can be punished by a fine and/or imprisonment.<sup>6</sup> United States law does not similarly prohibit the display or sale of this material; indeed, it would almost certainly violate the First Amendment to the U.S. Constitution were the federal government, or any State government, to try to enact or enforce such a prohibition.

Nazi memorabilia of various kinds – medals, swords, printed publications – were available for purchase at auctions.yahoo.com. French Internet users could access the website at auctions.yahoo.com and display these items on their computers. A group of French plaintiffs – led by LICRA (“La Ligue Contre Racisme et Antisemitism”) , an organization devoted to fighting racism and Nazism – brought an action in the civil court in Paris, seeking an injunction against Yahoo!’s continuing display of these items to French users.

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Simple facts, but very hard questions arising out of them: Can Yahoo! be prosecuted or punished for having violated French law when it exhibits this material on its website? Does French law apply outside of French borders – “extraterritorially” – to reach Yahoo!’s actions? Should it apply? Is it reasonable for France to regulate Yahoo’s conduct? Who decides that question?<sup>7</sup>

Conflicts like these, involving differing judgments made by different law-making communities about how to order their respective legal worlds, are ubiquitous on the inter-network. They’re not unheard of in realspace, of course; border-crossing transactions of all kinds have been steadily increasing in frequency over the past several centuries, hand-in-hand with improvements in information and transportation technologies that have combined to make the world a “smaller” place.

But on the Web, they are ubiquitous, because the Web is the application through which everyone can communicate, instantaneously and simultaneously, with everyone else on the inter-

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6. Reidenberg, *supra* note 5, at 4.

7. For general treatments of the jurisdictional problem(s) in cyberspace, see WHO RULES THE NET?: INTERNET GOVERNANCE AND JURISDICTION (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003); BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE (Brian Kahin & Charles Nesson eds., 1997).

network. Substitute “your daughter’s junior high school newsletter website” for the Yahoo! auction site, and “material violating Saudi Arabian head-scarf law” for Nazi memorabilia, and multiply by 100 million, and you get the idea.

Given the ubiquity of the problem, it is perhaps surprising (or perhaps not) that legal scholars who spend their time thinking about these questions are in sharp disagreement about how they should be resolved. The rhetoric has gotten heated – perhaps over-heated – at times, but that’s understandable, because there’s a lot at stake in this debate. Wars have been fought over seemingly arcane questions of “jurisdiction” – our own Revolutionary War among them – because seemingly arcane questions of jurisdiction are, at bottom, questions about who gets to make law for whom, and questions about who gets to make law for whom raise fundamental questions of power and order and right.

### A. *The Unexceptionalists*<sup>8</sup>

Cyberspace Unexceptionalists – a category in which a majority of my colleagues, I think it fair to say, would place themselves – see nothing illegitimate in France’s exercise of legal authority over Yahoo!’s website. To Unexceptionalists, as their name suggests, there is nothing exceptional – nothing warranting an exception – in the fact that this interaction is taking place on the Internet. Here’s how a leading Unexceptionalist, Prof. Jack Goldsmith, put it:

Transactions in cyberspace involve real people in one territorial jurisdiction either (i) transacting with real people in other territorial jurisdictions or (ii) engaging in activity in one jurisdiction that causes real-world effects in another territorial jurisdiction. To this extent, activity in cyberspace is functionally identical to transnational activity mediated by other means, such as mail or telephone or smoke signal.<sup>9</sup>

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8. Major Unexceptionalist writings include: Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) [hereinafter Goldsmith, *Against Cyberanarchy*]; Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475 (1998); Timothy S. Wu, Note, *Cyberspace Sovereignty? —The Internet and the International System*, 10 HARV. J.L. & TECH. 647 (1997); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395 (2000); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT’L LAW. 1167 (1998); JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2006) [hereinafter WHO CONTROLS THE INTERNET?]. The Exceptionalist position is laid out in: David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996); Henry H. Perritt, Jr., *The Internet as a Threat to Sovereignty? Thoughts on the Internet’s Role in Strengthening National and Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 423 (1998); David G. Post, *Against “Against Cyberanarchy”*, 17 BERKELEY TECH. L.J. 1365, 1366 (2002); Robert Corn-Revere, *Caught in the Seamless Web: Does the Internet’s Global Reach Justify Less Freedom of Speech?*, in WHO RULES THE NET?: INTERNET GOVERNANCE AND JURISDICTION 219 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003); Daniel Benoliel, *Law, Geography and Cyberspace: The Case of On-Line Territorial Privacy*, 23 CARDOZO ARTS & ENT. L.J. 125 (2005).

Other useful references to the jurisdictional and governance debates in cyberspace include: Susan P. Crawford, *The Ambulance, the Squad Car, & the Internet*, 21 BERKELEY TECH. L.J. 873 (2006); Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974 (2006); Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT’L LAW. 991 (1998); Patricia L. Bellia, *Chasing Bits across Borders*, 2001 U. CHI. LEGAL F. 35 (2001). I have also benefited greatly from the work of Paul Berman on these questions. See Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485 (2005); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005).

9. Goldsmith, *Against Cyberanarchy*, *supra* note 8 at 1239-40.

A government's responsibility for redressing local harms caused by a foreign source does not change because the harms are caused by an Internet communication. Cross-border harms that occur via the Internet are not any different than those outside the Net. . . . [N]ations have a right and a duty to protect their citizens from harm, whatever the source and whatever the medium.<sup>10</sup>

For all intents and purposes, say the Unexceptionalists, the Yahoo! Problem is just like the many old-fashioned border-crossing problems that have been around for centuries. Yahoo! might just as well have been conducting its auctions, and displaying the prohibited items, by means of catalogs, or magazines, or newspapers, or television signals, sent into France. There are well-settled principles of international law to deal with these problems, the Unexceptionalists point out, and it is perfectly reasonable to apply those principles here.

One of those well-settled principles permits nations to regulate conduct occurring outside their borders – “extraterritorial conduct” – if that conduct has “significant effects” within those borders:

[I]t is settled with respect to real space activity that a nation's right to control events within its territory and to protect its citizens permits it to regulate the local effects of extraterritorial acts. . . . [I]n modern times a transaction can legitimately be regulated by the jurisdiction where the transaction occurs, [and] the jurisdictions where significant effects of the transaction are felt . . . .<sup>11</sup>

When French citizens are on the receiving end of an offshore communication that their government deems harmful, France has every right to take steps . . . [to] check and redress the harm . . . whether it is sold on Yahoo's servers or by mail-order catalogue.<sup>12</sup>

When Nepali scam-artists defraud Indian investors in India, the Indian government must act, regardless of whether the fraud occurred in a magazine from Nepal or an email from there. The United States wants to stop the local consumption of child pornography produced in Russia regardless of the medium – World Wide Web, magazine, or video – in which the porn appears.<sup>13</sup>

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10. GOLDSMITH & WU, WHO CONTROLS THE INTERNET?, *supra* note 8, at 156.

11. Goldsmith, *Against Cyberanarchy*, *supra* note 8, at 1208, 1239.

12. Jack Goldsmith, *Yahoo! Brought to Earth*, FIN. TIMES, Nov. 26, 2000, *quoted in* Robert Corn-Revere, *Caught in the Seamless Web: Does the Internet's Global Reach Justify Less Freedom of Speech*, CATO INST., July 24, 2002, at 5, *available at* <http://www.cato.org/pubs/briefs/bp71.pdf>.

13. GOLDSMITH & WU, WHO CONTROLS THE INTERNET?, *supra* note 8, at 156.



In the Unexceptionalist view, then, the Yahoo! Problem isn't really all that difficult. Yahoo!'s conduct, though taking place outside of French borders, caused harm, as defined by French law, in France; French law provides a remedy for that harm; French citizens have a right, recognized under international law, to protect themselves against those who have caused them harm, even if they are standing outside of French territory when they did so. It is therefore reasonable and just to demand that Yahoo! take steps to comply with French law, and to punish it if it fails to do so.<sup>14</sup>

*B. The Exceptionalists*

On the other hand . . . To Exceptionalists, it does matter that Yahoo!'s actions took place on the Internet. Yahoo!'s website is not the "functional equivalent of mail, or telephone, or smoke signals," (or television broadcasts, catalogs, magazines, newspapers, or other realspace analogues), and applying jurisdictional principles that were developed to deal with realspace border-crossing transactions to network transactions leads to troubling, and perhaps even absurd, results.

The problem is that everything on the Web can affect everyone else simultaneously; website content appearing anywhere on the inter-network can have "significant effects" anywhere else on the inter-network, *i.e.*, pretty much anywhere else on the planet.

It's not really a "problem," of course – not a bug but a feature, one of the things that makes the Web so extraordinary a medium for human communication. But it is a problem for the Unexceptionalist view of things. A place where just about everybody can have significant effects on just about everyone else, everywhere, simultaneously, is a place where the "significant effects principle" can't sensibly resolve jurisdictional questions. Unexceptionalist logic leads inexorably to the conclusion that (just about) everything you do on the Web may be subject to (just about) everybody's law. Simultaneously. If the French can legitimately assert that their law applies to the Yahoo! auction website (because it was accessible from within France), so, too, can the Brazilians, and (simultaneously) the Japanese, and (simultaneously) the Kenyans, and (simultaneously) the

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14. This was, in fact, the outcome of the first court action in France – Yahoo! was ordered to take all steps necessary to prevent the display of the offending items on French computers, whether that entailed removing the material from the website or "filtering out" incoming file requests that were likely to have come from within France, or face a fine of up to 10,000 Euros per day.

inhabitants of pretty much every other place on earth; the web page can be accessed just as easily from within those countries as from within France, and it is just as likely to be deemed to be causing “significant effects” in those countries as it was in France.

Unexceptionalists are well aware of this problem of multiple overlapping simultaneous jurisdictional claims, of course – they just don’t think that it matters very much, as a practical matter. They acknowledge that courts in Malaysia, and Mexico, and Latvia, might each (simultaneously) do what the French court did in the Yahoo! case: assert that its law applies to the auction website (or your daughter’s newsletter), enter a judgment that the “wrongdoers” are violating that law, and order (on pain of some punishment) the offending conduct to cease immediately.<sup>15</sup> But, Unexceptionalists contend, that’s not really a problem, because Malaysia, and Mexico, and Latvia have no way to enforce those judgments and orders (unless the wrongdoer is located in, or has assets (property, or a bank account, or the like) located in, Malaysia, Mexico, or Latvia).<sup>16</sup> For those of us who aren’t located in, and don’t have assets located in, Malaysia, Mexico, or Latvia, the mere “theoretical possibility” that Malaysia or Mexico or Latvia can take action against us can, for all intents and purposes, be ignored. Prof. Goldsmith again:

A nation can purport to regulate activity that takes place anywhere. The Island of Tobago can *enact* a law that purports to bind the rights of the whole world. But the effective scope of this law depends on Tobago’s ability to *enforce* it. And in general a nation can only enforce its laws against: (i) persons with a presence or assets in the nation’s territory; (ii) persons over whom the nation can obtain personal jurisdiction and enforce a default judgment against abroad; or (iii) persons whom the nation can successfully extradite.

A defendant’s physical presence or assets within the territory remains the primary basis for a nation or state to enforce its laws. The large majority of persons who transact in cyberspace have no presence or assets in the jurisdictions that wish to regulate their information flows in cyberspace. . . . [F]or almost all users, there will be no threat of extraterritorial legal liability because of a lack of presence in the regulating jurisdictions.<sup>17</sup>

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15. See *supra* note 8 and accompanying text.

16. *Id.*

17. Goldsmith, *Against Cyberanarchy*, *supra* note 9, at 1216-17.

So as long as you keep yourself, and your assets, out of Malaysia, and Mexico, and Latvia, you don't really have to worry about the ever-present, but entirely theoretical, problem of being hauled into a Malaysian, or Mexican, or Latvian courtroom and forced to defend yourself against a charge arising out of something arising out of the material on your website.<sup>18</sup>

It's not, to my eyes, a terribly satisfying resolution of the problem. It turns law, and the question of legal obligation, into something that looks more like a game – 3-Card Monte, or Jurisdictional Whack-a-Mole: If you (or your assets) pop up in Singapore, . . . **Wham!!** Singaporean law can be – can legitimately be – applied to you. Once posted to the Web, your daughter's junior high school newsletter is subject to Malaysian and Mexican and Latvian law simultaneously, because it may indeed be having "significant effects" in each country, and each of them can legitimately apply its coercive powers against the school or its officers or the newsletter editors (if it turns out to be in a position to do so); the school's obligation to comply with those laws is defined by the likelihood that it has assets in any one of them, or that any of its officers might travel to any of them.<sup>19</sup>

It's a strange kind of law being served up by the Unexceptionalists – law that only gets revealed to the interacting parties *ex post*, and which can therefore no longer guide the behavior of those subject to it in any meaningful way.

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18. As Jonathan Zittrain, with whose hypothetical ("A, in Austria, posts a file . . . retrieved by C, in California . . .") I began this discussion, puts it: "[T]he practical answer . . . [is that] C can sue (and A can be prosecuted) wherever a jurisdiction decides it cares to exercise its power—and can realistically make the defendant's life worse for failing to show up to contest the case, or for showing up and losing." Zittrain, *supra* note 3, at 15.

19. Or turn the interaction around. Suppose Jane wants to know whether she is being "defrauded" by something posted on a website that she has just visited – Oops! There I go again, with the spatial imagery. I should have said: Suppose Jane wants to know whether she is being "defrauded" by something contained within a file that was posted on a web server somewhere and that she has just downloaded to her machine. Whose law of fraud does she look to? She's in the U.S., say, so her reasonable guess is that U.S. law applies, at least if the website owner/operator is located in, or has assets in, the U.S. The website operator faces the same calculus. He's in \_\_\_\_\_, so his only reasonable guess is that \_\_\_\_\_'s law of fraud will apply (at least if Jane is located in, or has assets in, \_\_\_\_\_). Jane doesn't know where the website operator or his assets are located; the website operator doesn't know where Jane or her assets are located. Neither knows what the other's guess is; Jane doesn't know that the website operator might reasonably try to haul her into an \_\_\_\_\_-ish courtroom, and the website doesn't know that Jane might want to haul him into a courtroom in Ohio. There's no way for Jane or the website operator to conform their behavior to "the law" because there's really no way for them to know what the law might turn out to be.

Stripped of all technicalities, [the rule of law means] that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.<sup>20</sup>

What, though, is the alternative? What other answers might there be? There is one obvious and straightforward “solution” to the Yahoo! Problem, but it is one that few people on either side of this debate think much of: international harmonization, a single global law for copyright, or “hate speech,” or fraud, or libel, or pornography, or consumer protection, or data privacy, or . . . If the nations of the world were to agree, by treaty or some other multi-lateral act, to such law, the entire Yahoo! Problem disappears; no more conflicts between the laws of different jurisdictions, no more concerns about the difficulties of complying with 175 different legal regimes. Global law for a global Internet.

There has been a good deal of movement in the international legal system in recent years in the direction of increasing global harmonization,<sup>21</sup> and it is almost certain to pick up speed in the future. But, most Unexceptionalists and Exceptionalists agree, this cure is worse than the disease. Countries have different laws because people have different histories, different cultures, different customs, and different views on important matters. Goldsmith and Wu themselves, in the leading Unexceptionalist manifesto, put it well:

[P]eople with different values disagree about the type of information they want to receive and the type of information they deem harmful. Some societies tolerate Nazi goods; others don't. Some like privacy warning labels; others don't. Some accept online gambling; others don't. Some want strong protections for intellectual property; again, others differ. These differences are reflected in different national laws . . . .

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20. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

21. Just in the areas of law with which I am familiar—intellectual property law and the law of commercial transactions and commercial contracts—there has been extensive movement in the last several decades to develop uniform international rules for patent, copyright, trademark, and contract law, through a variety of international treaties and conventions managed and coordinated by the World Intellectual Property Association (WIPO), the U.N.'s Committee on International Trade Law (UNCITRAL), and the World Trade Organization.

The advantage of decentralized governance is that it can better reflect differences among peoples. . . . Imagine a global law in the form of a world government or a world treaty. Set aside the insurmountable problem of creating a legitimate and reliable global executive to enforce such global norms. A more fundamental problem is that the global norms would often be unattractive, even if they could be enforced. When you choose a single rule for six billion people, odds are that several billion, or more, will be unhappy with it.<sup>22</sup>

So at least there's a common project, uniting Unexceptionalists and Exceptionalists: how to bring law to the inter-network while preserving the diversity of values and viewpoints that characterize the global community. To Unexceptionalists like Goldsmith and Wu, the "bordered Internet" – the Internet onto which the existing territorial boundaries between sovereign nation-states are projected, and in which the laws of those nation-states are applied as best we can – remains the best, and perhaps the only, hope for accomplishing that goal:

[W]hat we once called a global network is becoming a collection of nation-state networks . . . [L]ike the international system itself, [the bordered Internet] lets many different peoples coexist on the same planet while maintaining very different values and ideas of the good life. In this diversity lies a happier world than one governed by a single global law for all matters. When dreaming of a better society centered on the Internet, the many virtues of a bordered system must not be overlooked.<sup>23</sup>

[T]he decentralized territorial system itself promotes diversity and self-determination, even with regard to Internet communication. . . . The question about the optimal form of Internet governance must always be "compared to what?" While it is easy to criticize traditional territorial government and bemoan its many failures, there is no reasonable prospect of any better system of governmental organization.<sup>24</sup>

"No reasonable prospect of any better system of governmental organization"? Perhaps – but I'm not quite so ready to give up on that yet.

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22. GOLDSMITH & WU, WHO CONTROLS THE INTERNET?, *supra* note 8, at 150, 152.

23. *Id.* at 149.

24. *Id.* at 153-54.

[W]e must avoid the two opposite social deaths of a global monoculture and a set of isolated cults . . . and the fractal patterns found in nature seem to present themselves as a good compromise. It seems that the compromise between stability and diversity is served by there [being] the same amount of structure at all scales. . . . [I]t seems from experience that groups are stable when they have a set of peers, [and] when they have a substructure. . . . This seems to be a general rule which can guide our design, and against which we can measure actual patterns of use.

It is in fact another aspect of the tension between many languages and one global language. Locally defined languages are easy to create, needing local consensus about meaning: only a limited number of people have to share a mental pattern of relationships which define the meaning. However, global languages are so much more effective at communication . . . .<sup>25</sup>

Self government today . . . requires a politics that plays itself out in a multiplicity of settings, from neighborhoods to nations to the world as a whole . . . . The civic virtue distinctive to our time is the capacity to negotiate our way among the sometimes overlapping, sometimes conflicting obligations that claim us, and to live with the tension to which multiple loyalties give rise.<sup>26</sup>

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*I know that the acquisition of Louisiana has been disapproved by some from a candid apprehension that the enlargement of our territory would endanger its union. But who can limit the extent to which the federative principle may operate effectively?*<sup>27</sup>

Jefferson's plan to bring republican government to the West, and to solve the Problem of the Extended Republic, was so out-of-the-box that it is difficult even to see the outlines of the box any more.

When Great Britain and the newly-formed United States of America signed the Treaty of Paris in 1783, formally ending the

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25. Tim Berners-Lee, The Fractal Nature of the Web, <http://www.w3.org/DesignIssues/Fractal.html> (last visited Apr. 7, 2008).

26. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 350 (1996).

27. Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in THE INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, 1789-1985, at 11.

hostilities between them, the new nation found itself sitting on a gigantic swath of new territory from the Alleghenies west to the Mississippi River, territory that the British had previously claimed. One of the first things the new Congress of the United States did, shortly after convening for the first time, was to establish a Committee to “prepare a plan for temporary government of the western territory.” It appointed Jefferson, then one of Virginia’s Congressional representatives, its Chairman.

The Federalists and their allies, as we saw earlier, were deeply apprehensive about the prospects. George Washington himself, still the Commander-in-Chief of the Continental Army, summarized their concerns and fears in a remarkable letter he sent to Col. James Duane when he heard of Congress’ plans to take up the issue of the western lands. As Washington saw it, the principal object of the plan should be to establish order and regulation in the new territories: “To suffer a wide extended Country to be over run with Land Jobbers, Speculators, and Monopolisers or even with scatter’d settlers, is, in my opinion, inconsistent with the wisdom and policy which our true interest dictates . . . [and would be] pregnant of disputes both with the Savages, and among ourselves.”<sup>28</sup>

Washington favored the idea of setting out a line of demarcation just west of the Alleghenies, and making it a felony to settle, or to perform surveys, beyond the line; otherwise, he wrote, “the settling, or rather overspreading the Western Country will take place by a parcel of Banditti, who will bid defiance to all Authority.”<sup>29</sup>

Jefferson’s plan, embodied in the Proposal the Committee drafted and submitted to Congress (a proposal that was, historians agree, almost entirely Jefferson’s handiwork) proceeded along very different lines. At its core were three simple, but revolutionary, principles – none of which, standing alone, was uniquely Jefferson’s, but which had never been put together in quite this way before.<sup>30</sup>

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28. Letter from George Washington to James Duane (Sept. 7, 1783), in *GEORGE WASHINGTON: A COLLECTION* 260, 260-61 (W.B. Allen ed., 1988).

29. *Id.* at 263.

30. On the Ordinance of 1784, see Report on Government for Western Territory (Mar. 1, 1784), in 4 *THE WORKS OF THOMAS JEFFERSON* 251 (Paul Leicester Ford ed., 1904); PETER S. ONUF, *JEFFERSON’S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* (2000); MERRILL D. PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* (1962); Report of a Committee to Establish a Land Office (Apr. 30, 1784), in 7 *THE PAPERS OF THOMAS JEFFERSON* 140 (J. Boyd, ed., 1953); CLAUDE G. BOWERS, *THE YOUNG JEFFERSON* (1945); Peter S. Onuf, *Thomas Jefferson, Missouri, and the “Empire for Liberty”*, in *THOMAS JEFFERSON AND THE CHANGING WEST* 111 (James P. Ronda ed., 1997); PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* (1987); MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE*

The first principle was that the settlers in the western territories were *free and independent of all the world*, possessing, as a natural right common to all, the right to form self-governing communities and to live under law of their own choosing.<sup>31</sup> They didn't need to be ruled, they could rule themselves; in Merrill Peterson's words, "while others distrusted westerners as banditti and wanted them ruled by military force, Jefferson wanted them to govern themselves."

*[T]he question . . . 'How may the [western] territory be disposed of so as to produce the greatest and most immediate benefit to the inhabitants of the maritime states of the union?' . . . is a question which good faith forbids us to receive into discussion. . . . [S]tate the question in its just form: 'How may the territories of the Union be disposed of so as to produce the greatest degree of happiness to their inhabitants?'*<sup>32</sup>

*The moment we sacrifice [the settlers'] interests to our own, they will see it better to govern themselves. The moment they resolve to do this, the point is settled.*<sup>33</sup>

Jefferson's plan, incredibly – almost unthinkably, really, for the late 18th century – contained no provisions for colonial administration, no process for the appointment of colonial Governors or administrative officials, no provision for the deployment of military force or other agents of the United States to maintain order. "Conquest is not in our principles; [it is] inconsistent with our government."<sup>34</sup> Instead, the Committee's Proposal contemplated that the (free, male) settlers themselves would "meet together for the purpose of establishing a temporary government," that such temporary government would "continue in force in any state until it shall have acquired 20,000 free inhabitants," at which point the settlers would "call a Convention of representatives to establish a permanent constitution and government for themselves."<sup>35</sup>

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NEW NATION (1970); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776 – 1787 (1969).

31. Report on Government for Western Territory, *supra* note 30.

32. Letter from Thomas Jefferson to James Monroe (July 9, 1786), in 5 THE WORKS OF THOMAS JEFFERSON at 131 (Paul Leicester Ford ed., 1904) (underlining added).

33. Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), in 5 THE WORKS OF THOMAS JEFFERSON at 225 (Paul Leicester Ford ed., 1904).

34. Thomas Jefferson, Travelling Notes for Mr. Rutledge and Mr. Shippen (June 3, 1788), in 17 THE WRITINGS OF THOMAS JEFFERSON at 306 (Albert Ellbry Bergh ed., 1907).

35. Report on Government for Western Territory, *supra* note 30, at 252.



*I consider the people who constitute a society or nation as the source of all authority in that nation, free to transact their common concerns by any agents they think proper, to change these agents individually or the organization of them in form or function whenever they please . . . .*<sup>36</sup>

Principle #2 was that government would emerge in the new territories from the bottom up.<sup>37</sup> Jefferson's Plan called for dividing up the entire expanse of new territory, "when the same shall have been purchased of the Indian inhabitants," into lots one mile square; lots would be combined into "hundreds" or "townships" (consisting of 100 contiguous lots), townships would be combined into "districts," and districts combined into States.<sup>38</sup> Each smaller unit would participate in the governance of the larger units – "*a gradation of authorities, standing each on the basis of law, holding every one its delegated share of powers, and constituting truly a system of fundamental balances and checks for the government.*"<sup>39</sup>

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36. Thomas Jefferson, *Opinion on French Treaties* (April 8th 1793), in 6 THE WRITINGS OF THOMAS JEFFERSON 219, 220 (Paul Leicester Ford ed., 1895).

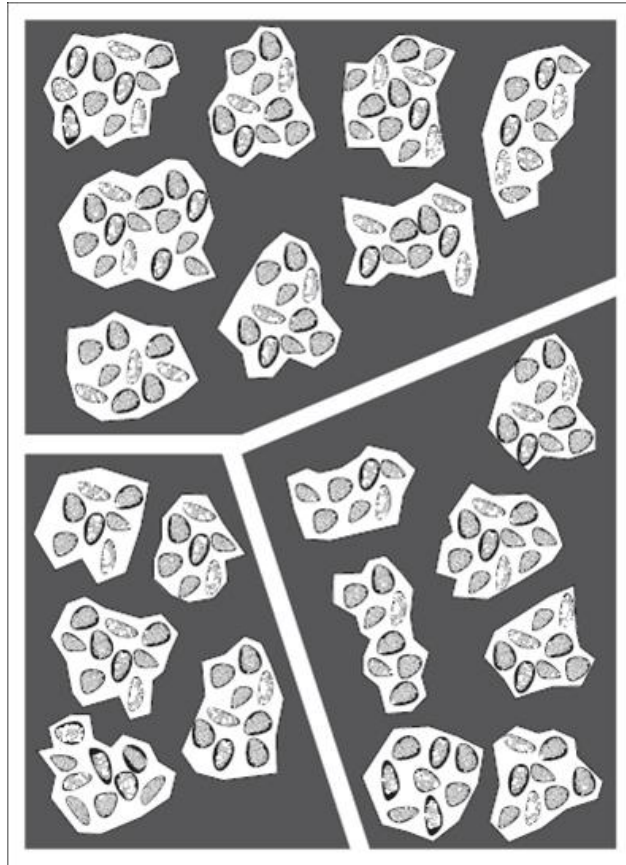
37. See Letter from Thomas Jefferson to James Monroe, *supra* note 32.

38. Jefferson's plan called for division of the western territory "by lines to be run and marked due North and South, and others crossing these at right angles" into lots one mile square – "each mile containing 6086 feet and four tenths of a foot," the so-called "geographical mile," which Jefferson preferred to the more familiar "statute mile" of 5,280 feet. [In a characteristically Jeffersonian touch, the Report also decreed that "the Surveyors shall pay due and constant attention to the variation of the magnetic meridian" – the variation between true North and magnetic North – when laying out these boundary lines]. Report of a Committee to Establish a Land Office, *supra* note 30, at 140-41.

Each group of 100 lots (10 x 10 square) would be designated a "hundred" (later called a "township") – with the lots in each township "numbered from 1 to 100, beginning at the Northwestern lot of the Hundred and applying the numbers from 1 to 10 to the lots of the first row from West to East successively, those from 11 to 20 to the lots of the second row from West to East, . . ." *Id.* at 141. Each group of nine hundreds (3 x 3 square) would constitute a "district," and each district would be placed within one of 16 new States carved out of the territory. [Jefferson chose an odd collection of names for the new States in his Plan: among them Sylvania, Michigania, Cherronesus, Assenisipia, Metropotamia, Illinoia, Saratoga, Washington, Polypotamia, Pelisipia, which were greeted derisively by most of his colleagues in Congress] "Beginning with the hundreds most in demand," lots would be sold for a fixed price of not less than \$1 per lot, with the money raised by such sales "to be applied to the sinking of such part of the principal of the national debt as Congress shall from time to time direct, and to no other purpose whatsoever." *Id.* at 141, 145.

39. Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), in LETTERS AND ADDRESSES OF THOMAS JEFFERSON 248, 249 (William B. Parker & Jonas Viles eds., 1905).

A stylized view of the grouping of lots into townships, townships into districts, districts into counties and counties into States.



*[T]he secret . . . [is] in the making [each individual] himself the depository of the powers respecting himself, so far as he is competent to them, and delegating only what is beyond his competence by a synthetical process, to higher and higher orders of functionaries, so as to trust fewer and fewer powers in proportion as the trustees become more and more oligarchical.*<sup>40</sup>

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40. *Id.*

Small pieces, loosely joined.<sup>41</sup> He referred to it as a system of “ward republics.”<sup>42</sup>

*As Cato, then, concluded every speech with the words “Carthago delenda est,” so do I [conclude] every opinion, with the injunction, “Divide the counties into wards.”*<sup>43</sup>

*What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or France, or of the aristocrats of a Venetian Senate.*<sup>44</sup>

*No, my friend, the way to have good and safe government, is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to. Let the national government be intrusted with the defence of the nation, and its foreign and federal relations; the State governments with the civil rights, laws, police, and administration of what concerns the State generally; the counties with the local concerns of the counties, and each ward direct the interests within itself. It is by dividing and subdividing these republics from the great national one down through all its subordinations, until it ends in the administration of every man’s farm by himself; by placing under every one what his own eye may superintend, that all will be done for the best.*

*Where every man is a sharer in the direction of his ward-republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; when there shall not be a man in the State who will not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than let his power be wrested from him by a Caesar or a Bonaparte.*<sup>45</sup>

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41. See DAVID WEINBERGER, *SMALL PIECES, LOOSELY JOINED: A UNIFIED THEORY OF THE WEB* (2002).

42. On Jefferson’s plans for his “ward republics,” see the excellent treatment in GARY S. HART, *RESTORATION OF THE REPUBLIC: THE JEFFERSONIAN IDEAL IN 21ST-CENTURY AMERICA* (2002).

43. Letter from Thomas Jefferson to Joseph C. Cabell, *supra* note 39, at 250.

44. *Id.* at 249.

45. *Id.* at 248-49. Jefferson often referred to the New England townships as the closest approximation to his vision of “ward republics.” “These wards, called townships in New England, are the vital principle of their governments, and have proved themselves the wisest invention ever devised by the wit of man for the perfect exercise of self-government, and for its preservation.” Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 12 THE

And finally, Principle #3 was what Jefferson called the *federative principle*, the principle under which these new self-governing units would be joined to the existing Union as equals.<sup>46</sup> The Proposal declared that whenever the population of one of the new States reached a number equal to “the least numerous of the thirteen original States,” it could petition to be admitted into the United States “on an equal footing with the original States . . . subject to the government of the United States, and to the Articles of Confederation, in the same manner as the original States.”

Nothing like this had ever been seen before. It would create an “empire,” but *an empire built not on conquest, but on principles of compact and equality*.<sup>47</sup> Westward expansion would proceed not by recapitulating the European model and establishing a despotic, colonial regime held together by military force, but by adding new branches – voluntarily and consensually – to the growing tree of the Union.<sup>48</sup> An *empire of liberty*, Jefferson called it, held together by

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WORKS OF THOMAS JEFFERSON 3, 9 (Paul Leicester Ford ed., 1905). It was no accident, Jefferson believed, that the New England States had been so well organized in their resistance to the British:

*We owe to them the vigor given to our revolution in its commencement in the Eastern States . . . General orders are given out from a centre to the foreman of every hundred, as to the sergeants of an army, and the whole nation is thrown into energetic action, in the same direction in one instant and as one man, and becomes absolutely irresistible.*

Letter from Thomas Jefferson to John Tyler (May 26, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 391, 394 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905). And he felt the brunt of that power himself, when, as President, he ordered the ill-advised embargo of 1807, which prohibited U.S. individuals and firms from engaging in commercial relations with the British and which was widely despised in New England:

*How powerfully did we feel the energy of this organization in the case of embargo? I felt the foundations of the government shaken under my feet by the New England townships. There was not an individual in their States whose body was not thrown with all its momentum into action; and although the whole of the other States were known to be in favor of the measure, yet the organization of this little selfish minority enabled it to overrule the Union. What would the unwieldy counties of the middle, the south, and the west do? Call a county meeting, and the drunken loungers at and about the court houses would have collected, the distances being too great for the good people and the industrious generally to attend.*

Letter from Thomas Jefferson to Joseph C. Cabell, *supra* note 39, at 250.

46. Report on Government for Western Territory, *supra* note 30, at 253.

47. Letter from Thomas Jefferson to Monsieur Barré De Marbois (June 14, 1817), in 15 THE WRITINGS OF THOMAS JEFFERSON 129, 130-31 (Albert Ellery Bergh ed., 1907).

48. The Ordinance was styled as an irrevocable promise, on the part of the existing States, to maintain equality among all States that might thereafter join the Union, a:

[C]harter of Compact, . . . duly executed by the President of the U.S. in Congress assembled, . . . [which] shall stand as fundamental constitutions between the

consensual bonds and adherence to republican principles, not coercive power, an ever-expanding union of self-governing commonwealths joined together as peers. As Jefferson saw things, there was really no other choice:

*Upon [my] plan we treat them as fellow citizens, they will have a just share in their own government, they will love us, and pride themselves in an union with us. [Other plans] treat them as subjects [in which] we govern them, and not they themselves[;] they will abhor us as masters, and break off from us in defiance.<sup>49</sup>*

*A forced connection is neither our interest nor within our power.<sup>50</sup> If they declare themselves a separate people, we are incapable of a single effort to retain them. Our citizens can never be induced, either as militia or as souldiers, to go there to cut the throats of their own brothers and sons . . . . Nor would [the western] country pay the cost of being retained against the will of its inhabitants, could it be done. But it cannot be done.<sup>51</sup>*

An “epochal moment in the history of political civilization,” historian Peter Onuf has called it:

The United States would be something new under the sun, a new political order that Europe, should it ever achieve sufficient enlightenment, might one day emulate. In sharp contrast to Old World regimes, the independence and prosperity of the new

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thirteen original states, and those now newly described, unalterable but by the joint consent of the U.S. in Congress assembled and of the particular state within which such alteration is proposed to be made.

Report on Government for Western Territory, *supra* note 30, at 255.

In Jefferson’s original draft, there were only five conditions placed on a new State’s entry into the Union: first, that its government must be “in republican form”; second, that it would “admit no person to be a citizen who holds any hereditary title”; third, that each new State would “for ever remain a part of the United States of America”; fourth, that each new State would pay a portion of the federal debt “to be apportioned on them by Congress,” so long as Congress used the “same common rule and measure by which apportionments thereof shall be made on the other states”; and finally (and most remarkably), that after 1800 “there shall be neither slavery nor involuntary servitude in any of the [new] states, otherwise than in punishment of crimes whereof the party shall have been convicted to have been personally guilty.” *Id.* at 252-53.

The anti-slavery condition never made it into the final statute, defeated by a single vote. “*Thus we see,*” Jefferson later wrote, “*the fate of millions unborn hanging on the tongue of one man, and heaven was silent in that awful moment!*” Observations on the Article État-Unis Prepared for the Encyclopédie (June 22, 1786), in 5 THE WORKS OF THOMAS JEFFERSON 32, 65 (Paul Leicester Ford ed., 1904).

49. Letter from Thomas Jefferson to James Monroe, *supra* note 32, at 133.

50. Letter from Thomas Jefferson to James Madison, *supra* note 33, at 228.

51. Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in 5 THE WORKS OF THOMAS JEFFERSON 254, 256-57 (Paul Leicester Ford ed., 1904).

republican empire did not depend on the massive concentration of coercive force but rather on ties of affectionate union and harmonious interest . . . [A]n empire without a center, [based on the] paradoxical premise . . . that the recognition of the equal rights of political communities, and therefore of their complete independence of each other and of “all the world,” was the necessary precondition for creating enduring, consensual bonds of union among them. . . . Dynamic and expansive, it would spread, diffuse, and equalize benefits through the vast system of inland waterways, improved and extended by the art of man, to its farthest reaches . . . .<sup>52</sup>

It was beyond audacious; we’d call it the work of some crazed Utopian dreamer, except for the fact that its principles would end up guiding U.S. territorial policy for the next several hundred years.

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While writing this chapter in the autumn of 2007, I received the following email, which I reproduce here in its entirety:

Dear Luigi Paz:

Chiaretta Charron has invited you to join a group in Second Life. There is no cost to join this group.

Gruppo:

ECONOMIA & INVESTIMENTI in SL: Studiamo e discutiamo dell’Economia di SL per investire al meglio e moltiplicare i vostri Linden Dollars (L\$)

Deposita da noi i tuoi L\$ e investili con sicurezza guadagnando ogni settimana interessi fino all’1,4% !!

Per informazioni contatta CHIARETTA CHARRON

Log in to accept or decline this invitation.<sup>53</sup>

My rough translation from the Italian: “Group: Economics and Investing in Second Life: We will study and discuss the economics of Second Life by investing well and multiplying your Linden Dollars. Deposit your Linden Dollars securely with us, watching your money

52. PETER S. ONUF, *JEFFERSON’S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* 67-69, 75 (2000).

53. Email from Group: Economics and Investing in Second Life, to David Post, Professor of Law (Aug. 27, 2007) (on file with author).

grow at up to 1.4% per week!! For information, contact Chiaretta Charron.” The email, as you can see, was addressed not to “David Post” but to “Luigi Paz” – the name of an “avatar” I control in the virtual world “Second Life.”

Now, I have a number of things to say about this invitation. But first, for those of you who may be unfamiliar with Second Life or the concept of a “virtual world” (a category that will contain large numbers of readers only, I suspect, for the next year or two) a few words of description are in order.<sup>54</sup>

The best way to understand the world of virtual worlds is to experience one or more for yourself, for which my description is an inadequate substitute. But here’s the basic idea. Imagine, first, an ordinary video game, of the kind one can find on any Nintendo or Xbox player. The game lets you wander through some imaginary, programmed landscape projected onto the screen – a landscape that can be, in the best of the games, a vivid and seemingly 3-dimensional space – looking for bad guys to shoot, cars to steal, aliens to do battle with, or what-have-you. You’re not really “wandering” anywhere, of course; it’s just electrons bouncing onto a 2-dimensional screen. But the game simulates the experience by changing the visual display in response to your actions. It’s like watching a movie – another form of entertainment consisting of electrons bouncing onto a 2-dimensional screen – but a movie in which you’re one of the characters, in (partial) control of the events taking place in the movie. They’re great fun – I’m not a big fan, to be honest, but hundreds of millions of people think they’re great fun – and they’ve spawned an immense worldwide industry that is already a good deal larger than the movie industry in terms of the dollar volume of sales, and growing a good deal faster to boot.

Now imagine that the actions of all the other characters in the game – those creatures you’re chasing, or the ones who are throwing obstacles in your way or driving their cars into yours, etc. – are themselves controlled by other users just like you, people who are, at

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54. On virtual worlds generally, see the work of Edward Castronova, notably his books *SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES* (2005) and *EXODUS TO THE VIRTUAL WORLD: HOW ONLINE FUN IS CHANGING REALITY* (2007). On law in virtual worlds, see F. Greg Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 CAL. L. REV. 1 (2004); JACK M. BALKIN & BETH SIMONE NOVECK, *THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS* (2006); Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005); James Grimmelman, *Virtual Worlds as Comparative Law*, 49 N.Y.L. SCH. L. REV. 147 (2004); David G. Post & David R. Johnson, *The Great Debate: Law in Virtual Worlds*, [http://firstmonday.org/Issues/issue11\\_2/post/index.html](http://firstmonday.org/Issues/issue11_2/post/index.html); and the excellent blogs at <http://terranova.blogs.com/> and <http://virtuallyblind.com/>.

that very moment, playing the same game that you're playing. That dog, sitting in the window of the building across the street, is not just a little string of dog-simulating computer code programmed to respond when you call it, or throw a stone at it, or put a leash on it; it's a little string of dog-simulating code that is actually controlled by another user, a user who sees, on her screen, the same scene you see on yours, except from her perspective: you're a character in her game, on her screen, just as she's a character in yours. Same for that Viking you just walked by on the sidewalk, and the woman who just drove by in what looked a lot like a mint condition '57 Ford Thunderbird 2-seater convertible. They're all playing the game at the same time, too.

These games – known as a “massively multi-player online game,” or MMOGs – are as different from ordinary video games as writing is from reading. Now, instead of being in someone else's movie, you, along with all the other participants, are creating the movie, on-the-fly, in real time. You're part of everyone else's game, and they're part of yours; what you see and experience and encounter on-screen at any moment is a function of what you are all, collectively, doing at that moment. Just like real life.

It's not too much of a stretch to call these, as people have taken to calling them, “virtual worlds.” They certainly feel like true “worlds”; game designers call them “immersive environments,” and most people, when they're playing, have the feeling that they're “in” a 3-dimensional “place” (even though they know very well that they're not), a sense that they're moving around and acting and talking to and interacting with others who are in that place at that same moment. And they feel like true “worlds” because, unlike ordinary video games, they're persistent: They keep going, even when you're not there. The game landscape constantly changes via the actions of other players, whether or not you're logged on, just as your actions at any time change the landscape for the others who are not “there” at the moment. Should you accumulate enough points to become a Jedi knight while I'm offline, you will appear to me as a Jedi knight when I return. If you form a coalition with others while I'm away, I will have to face that coalition when I resume play. If you obtain a car, or build a house, in my absence, when I log back on I might see you drive the car into your driveway. I can unplug my machine, but the game goes on without me, and what I encounter tomorrow depends on what you and others did while I was elsewhere.

Again, just like real life.

Like the video games from which they are derived, MMOGs have proven to be wildly popular – the latest Next Big Thing. Though



today's versions will undoubtedly seem as hilariously primitive in 20 years as Pac-man or Pong seem to us today, tens of millions of people across the globe play one MMOG or another on a regular basis.<sup>55</sup> Not surprisingly, many people are working hard, and some are making prodigious amounts of money, serving that demand.

The numbers alone are enough to catch one's attention. But it's not just the numbers that make these multi-player games so interesting. In the past few years, a few of them have eliminated most, or in some cases all, of the things that made them "games" in the first place. There are no points to be accumulated, no levels of achievement to ascend, no "winning" and no "losing," no agreed-upon rules about what "moves" are allowed and what moves aren't. The only point to these games – and it's not at all clear that they're properly called "games" anymore – is to interact with other players, in whatever manner the game/world designers allow and with whatever tools the game/world designers provide.

You might not think that people would be much interested in these no-game games, but you'd be wrong. Second Life – at the moment, the most interesting, and the most popular, of these new no-game game worlds – is, as I write this, reportedly adding a million new subscribers each month.

What draws people there? What do they do there, if there's no "game" to play?

They gather together and communicate with one another. They make stuff – clothing and jewelry for their avatars, huge buildings, paintings to put on the walls of those buildings, automobiles or airships that can transport them from one "place" to another in the virtual world, videos, . . . And they exchange what they make with others; if you like the virtual clothing or the virtual jewelry I'm wearing, or the virtual picture I've painted, or the virtual building or virtual airship that I've created, you can try to persuade me to give it to you.

Or sell it to you. For money. Not "real money," of course – play money, game money, Monopoly™ money, the fake currency known, in Second Life, as "Linden Dollars" (L\$).

But here's the thing: It turns out that it is real money. Linden Dollars can be exchanged for things of value, including, if you visit

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55. The names of the most popular MMOGs at the moment—Guild Wars; Ragnarok Online; Star Wars Galaxies; RuneScape; City of Heroes; Ultima Online; Final Fantasy XI; Dark Age of Camelot; The Lord of the Rings Online; World of Warcraft—give a pretty good idea of their subject matter.

the (very active) Second Life currency exchange, real, green, physical, tangible, U.S. dollars (or, if you prefer, Euros).

It is, according to Ted Castronova, an economist who has done the ground-breaking economic analyses of virtual worlds, an online economy that's about the size of Bulgaria's, in dollar terms.<sup>56</sup> And growing, at the moment at least, at a rate Bulgaria can only dream of. Many hundreds or thousands or hundreds of thousands of people (precise statistics are not easy to come by here) are, at the moment, earning some or all of their living in Second Life, buying and selling virtual "things," – strings of code representing real estate, clothing, jewelry, buildings, furniture – to and from one another.

It does seem odd, at first glance, that people are paying real money for virtual objects. But it's not really so odd at all; we do it all the time, in realspace. Whole industries, employing millions of people and turning over tens of billions of dollars every year, are built on the exchange of real money for strings of code – the television, movie, music, and videogame industries, just to take the most obvious examples.

The prospect of being able to make "real money" – real money as in "significant amounts of money," and real money as in "money that is convertible into legal tender" – concentrates the collective mind. Predictably, as word gets around, lots of other people are thinking about how they might get in on that. Might I actually be able to earn my living – or even part of my living – teaching classes in the virtual world? Practicing law? Teaching Chinese? Selling my CDs? Providing architectural advice? Doing accounting for others? Showing movies? Etc.

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56. In 2001, Castronova estimated the per capita productivity of participants in Sony's Everquest MMOG at approximately \$2,000—on a per capita basis, somewhere between Bulgaria and Russia. See Edward Castronova, *Virtual Worlds: A First Hand Account of Market and Society on the Cyberian Frontier* (Center for Economic Studies & Institute for Economic Research, Working Paper No. 618, 2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=294828](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=294828). With 60,000 or so players, at the time, Castronova estimated the total GDP for "Norrath"—the virtual world inhabited by Everquest players—at around \$120,000. There are now, in 2008, across all virtual world platforms, probably more than 20 million active participants—World of Warcraft alone has over 10 million current paying subscribers, and Lineage, Second Life, and Everquest have numbers that are probably around that order of magnitude. If Castronova's per capita estimate is anywhere near correct, that would represent an economy generative around \$40 billion annually—around the size of Bulgaria's, according to the World Bank's most recent figures. See WORLD BANK, SELECTED INDICATORS, [http://siteresources.worldbank.org/INTWDR2008/Resources/2795087-1192112387976/WDR08\\_24\\_SWDI.pdf](http://siteresources.worldbank.org/INTWDR2008/Resources/2795087-1192112387976/WDR08_24_SWDI.pdf).

Which brings us back to Chiaretta Charron. It turns out that there are dozens of investment pools like hers (his? its?) now operating in Second Life, organized enterprises where individuals pool their money together in the hopes of seeing it grow by means of wise investment decisions. Some call themselves “banks,” and, at least if they’re doing what they say they’re doing (a point to which I’ll return below), they really are banks – pools of money collected from willing depositors and lent out to others at interest. Others call themselves “banks” but are actually little more than Ponzi schemes – paying off the initial suckers with the money from later-arriving suckers, and closing up shop and absconding with the dough when the supply of suckers runs out. (You could make a lot of money on Second Life, I suspect, if you could tell the one from the other).

Whose law governs? What happens when something goes wrong – to what law can the individuals concerned look for a possible remedy? What if I – or rather, what if “Luigi Paz” – deposits 500 L\$ into this fund, and the money disappears? What if Luigi Paz promises to put money in later, and then reneges on the deal? What if the fund puts money into a Second Life storefront jewelry store that vanishes – literally! – the next day? Whose law determines whether Chiaretta Charron, or Luigi Paz, or the store owner, did anything unlawful or not? By what standards will we decide whether Chiaretta Charron committed “fraud,” or merely made “unwise investment decisions”? Whether Luigi Paz is, or is not, allowed to revoke promises that are not in writing? Whether the store owner was making a good faith effort to get business and simply ran out of customers, or was scamming us the whole time?

And what if, say, Korean banking or securities law prohibits any and all investment pools of this kind, while French banking or securities law allows them but only if they register with the relevant government authorities, and Russian law requires them to place a percentage of their funds into an insurance account, and U.S. law requires that once the fund reaches a certain dollar threshold the managers of the fund must make particular kinds of information available to the public about the compensation of the fund’s managers, and . . .? Does Chiaretta Charron have a legal obligation to comply with all of these laws?

Yes!, the Unexceptionalists tell us, once again. This transaction, too, is unexceptional; smoke signals, the Web, telephones, virtual worlds, the telegraph, postal mail – they’re all pretty much the same, “functionally equivalent” ways that people in one place communicate with people in another.

Faced with the choice between changing one's mind and proving that there is no need to do so, almost everyone gets busy on the proof.<sup>57</sup>

The Unexceptionalists answer Chiaretta Charron's jurisdictional question ("Whose law governs here?") the same way they answered Yahoo!'s: If Korean law prohibits investing in schemes of this kind, and should you find yourself in Korea some day, or should you happen to invest in Korean real estate, or buy shares in a Korean corporation, then . . . **Wham!** And if some of the Linden Dollars being placed in Chiaretta Charron's custody are, unbeknownst to any of the other participants in the transaction, coming from trust accounts in Malaysia or Russia or Brazil, then . . . **Wham!**

That's the best we can do? I hope not. It has only irony to recommend it – the irony that law looks even more like a game – and a game of chance, at that – just as the "games" are themselves looking more and more like "real life." In the Unexceptionalist scheme, it is now no longer merely difficult for the participants in any transaction to know, in advance, what the law governing the transaction might turn out to be, it is completely impossible. The law can't possibly guide the participants in arranging their affairs, because the participants don't have the faintest idea in advance what that law might be. **Wham!** And any notion that governments derive, as Jefferson put it, their just power from the consent of the governed, or that the individuals to whom law is applied have the right to participate in formulating those laws, has been completely abandoned.

It won't work – by which I mean not just that some law professors (like me) think that it is theoretically unhinged, but that it won't do the things that law does when it does work, namely help people enter into complicated transactions involving lots of other people and with important things at stake, secure (to a degree) in their expectations of how others will behave and secure (to a degree) that they will be treated fairly in the event of a problem. The potential that these immersive virtual world environments hold for trade – for the exchange of goods and services and information and music and ideas and anything else that can be converted into digital form – on a global scale is enormous; nobody who spends a little time in one can fail to see that. There's real gold in those hills – but without a legal system

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57. JOHN KENNETH GALBRAITH, *ECONOMICS, PEACE AND LAUGHTER* 50 (1971)

that works, much of it will remain in the ground. How many people are going to give their hard-earned money – real money! – to Chiaretta Charron without some assurance that she (or he, or it) will behave reasonably with it? How many people will extend credit to anyone else without some way to enforce the obligation? How many people will invest large amounts of time or effort or money in any substantial undertaking – building a law school, say, or organizing a recording studio – without some assurance that it won't be destroyed by other participants in the "game," or by the operators of the virtual world themselves, for "no good reason" at all. (And what constitutes a "good reason" to take away someone's property in one of these virtual worlds, anyway?)

The answer, I think, is: not nearly as many people as would do so if there were a functioning legal system in place, one that could yield reasonable answers to these questions (and the thousands of other questions like them) without the need to consult the legal codes of every country in the world simultaneously. Are Ponzi schemes frauds, or are they instead just 'part of the game'? Can merchants go bankrupt? How? Is gambling permitted here? Do I have to reveal property defects known to me when I offer that property for sale? Can I sell Nazi memorabilia? Display pictures of naked people? Pictures of famous people? Can I copy the design of someone else's dress, or the features of someone else's building?

I'm reasonably certain that millions of people, perhaps hundreds of millions of people (*see* World Wide Web, growth of) are going to be entering virtual places of one kind or another, most for the first time, over the next few years. And some of them, at least, are going to be looking for – demanding, even – something that looks more like "law," something that more effectively helps them do the things they'd like to do there, than anything the Unexceptionalists, clinging to their "bordered Internet" and the law of geographically-based sovereigns like a drowning man to a life raft, can provide.

It would be a shame, the waste of a global resource of potentially enormous value, if Jurisdictional Whack-a-Mole is the best we can come up with, and I don't think it is. There is an alternative, staring us right in the face; as complicated as the jurisdictional problem is on the Web, it is so much more complicated in virtual world space that, paradoxically, it is easier to solve. The Unexceptionalists are right about one thing: it's all just people in one place interacting and communicating with other people in other places. So why not begin by recognizing their right – perhaps even their inalienable right? – to govern themselves as they see fit? Why not let those who choose to

enter, and to interact within, these online communities make their own law, deciding for themselves how they'd like to order their affairs?

What a crazy idea – self-governing communities!

Perhaps it is crazy – many of my colleagues seem to think so, and they are, generally speaking, sensible people. But it doesn't seem so crazy to me. Indeed, asking those who spend their time in Second Life for the answer to those questions (“Are Ponzi schemes ‘frauds’ in Second Life?” “Is a seller obligated to reveal defects when selling something in Second Life?” etc.) seems a lot more reasonable to me than asking the people of Malaysia how Malaysian law answers those same questions.

It doesn't seem so crazy to me because there's a “place-ness” to these virtual places – not just in the way they look but in the way they persist through time, and in the way they present opportunities for an infinite variety of repeated interactions between individuals, for collective decision-making, and for common enterprise – that enables us to think about them and talk about them the way that the people who spend lots of time there often do: as true communities, with shared norms and customs and expectations characteristic of each and continually being created and re-created by the members within each. I don't see why they are somehow inherently less deserving of less respect than the other communities – Topeka, Kansas, say, or Leicester, U.K., or Sri Lanka – within the international legal order.

So it doesn't seem so crazy to me to begin the conversation about Chiaretta Charron's scheme not by asking “how can we apply the law of 170 or so sovereign states simultaneously to this transaction?” but by asking “what's the law of the place where the transaction is taking place?”

That is, to be sure, just the beginning of the conversation. At the moment, there is no law of the place – nothing that can fairly be called “Second Life law” or “There.com law” or “Lineage II law” – because no institutions or processes for making “law” have been developed in any of these virtual worlds. They are, at the moment, truly law-less places – or, more precisely, places where code, and only code, is law.

But I'd be very surprised if that were a permanent condition. Like I said, there's real gold in those hills, and much of it can be unlocked only with a functioning legal system in place. I'm hardly the only one who realizes this; so there will be plenty of “law

entrepreneurs” who will seize on this problem and get to work; some have already begun.

I don’t know, to be honest, what they’ll come up with, what those law-making institutions and processes will look like, or should look like, in a virtual world – whether they’ll have representative assemblies or not, whether they’ll use juries or not, whether they’ll have separate executive and legislative powers or not, whether they’ll have paid judges or not, whether they’ll have different tribunals for different kinds of actions or not, . . .

What I do know is that people have the right to make those decisions and answer those questions for themselves.

And I just wish the Unexceptionalists would stop telling us that we don’t, that we’ve somehow given up our right to create new communities and to live under law of our own devising, or that we’ve somehow finished designing legal institutions, and are stuck, forevermore, with the ones we happen to have come up with by 1995.

I wish they’d stop telling people that because they’re standing in the way of the hard work and experimentation and innovation that will be required to create fair, well-designed, and effective law-making institutions and processes that are appropriate for these places. Law, like many other important social phenomena – money, for instance – has a strange, self-fulfilling element to it: its existence depends on people believing that it exists. To become a law-making community, participants must believe that they’re in a law-making community. If everyone believes that “real law” from “real sovereigns” is the only law that matters (or can ever matter) – that no matter what steps they take to set up a fair and reasonable system for resolving virtual world disputes in accordance with newly-created virtual world law, their efforts will come to nothing because they can’t create “real law” – then “real law” from “real sovereigns” will be the only law that matters, and we’ll be stuck with the chaotic nonsense of Jurisdictional Whack-a-Mole. It’s just play money until everyone believes it’s real money, and it’s just play-law until everyone believes it’s real law, and who will undertake the hard work required to set up a legal system if it’s just play-law?

Maybe the participants in these virtual communities don’t want to create anything more than play-law. But I’m betting that they do – and it would help if the Unexceptionalists would stop telling them that they can’t.