

Exit, Voice, and Values on the Net

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1. Introduction

In *Code and Other Laws of Cyberspace*,¹ Professor Lawrence Lessig gives us a masterful analysis of the future of life and law in cyberspace. Lessig predicts that the Internet will be fundamentally transformed from an unregulable place into a place of unprecedented regulability. According to Lessig, the Net of the near future will be regulated primarily by the software or “code” written by commercial entities such as America Online (“AOL”) and IBM. This code will embody certain value choices—choices in favor of censorship or freedom of expression, for example. When the government exercises the power to regulate and embodies values within its laws, this power, of course, is held in check by the Constitution. No similar checks exist, however, on commercial entities’ power to embody (or reject) important values within their code. While the government cannot—consistent with the First Amendment—censor “indecent” speech on the Net, Internet service providers such as AOL can do so insulated from constitutional challenge. As commercial entities increasingly exercise the power to regulate conduct on the Net, does the code that enables such regulation stand in need of a constitution? How will our important values be translated and embodied in cyberspace, if the code writers and, therefore, the lawmakers are insulated from the checks on the power to regulate that are imposed by the Constitution?

One answer, provided by the Net libertarians, is that the power of commercial actors in cyberspace need not be checked by the Constitution because the market will accurately reflect the aggregate of our preferences in response to our individual acts of exit. If AOL does not respect freedom of expression (however that is appropriately defined) and if free expression is important to us, we will “vote” with our mice and choose another Internet service provider. Lessig expresses skepticism about the Net libertarian model, in which cyberspace is constructed on the model of the market, and contends that if we allow cyberspace to be constructed on such a model, important collective values will be sacrificed.

In Part I of this essay, I describe Lessig’s claims about the nature of Net regulation. I then set forth the Net libertarian responses to these claims in Part II, focusing on the issue of whether a cyberspace constructed on the model of the market would incorporate one important collective value—the protection of unpopular speech against majority tyranny. In Part III, I analyze the

preference-expressing mechanisms of exit and voice and examine the role of exit in both the libertarian utopian framework articulated by Robert Nozick and in the Net libertarian model. I consider the potential dangers that a model based on exit poses to the First Amendment value of protecting unpopular speech, and observe that the sufficiency of the exit model in protecting this important collective value is a function of the features and characteristics of the particular marketplace for speech under consideration. I conclude that Lessig has not shown that, given the present characteristics of the cybermarket, important collective values are endangered, nor that governmental (or other forms of) intervention to protect such values is warranted. Furthermore, I argue that a model of cyberspace that incorporates the preference-expressing mechanism of *voice*, which Lessig apparently favors, would not necessarily bring about a cyberspace that better reflects our important collective values—unless the meta-value of “deliberation” were somehow built into the expression of voice. I contend, however, that Lessig has not shown that governmental (or other types of) intervention to impose the meta-value of deliberation into the expression of voice is warranted.

In Part IV, I return to the consideration of a cyberspace constructed on the model of the market and examine Lessig’s claim that the government will be powerless to intervene if the characteristics of the cybermarket were no longer conducive to reflecting our important values. I argue that the state action doctrine does not prohibit courts from acting in circumstances where private regulation has threatened important collective values such as the protection of free expression. On the contrary, in interpreting the state action doctrine in circumstances where private parties have threatened free speech rights, courts have balanced the competing rights and interests at stake, examined the relevant features of the markets involved, and considered whether alternative meaningful avenues of expression remained available.

1. **The Cyberworld According to Lessig**

Lessig’s description of the future of regulation on the Net is essentially as follows:

Previously, we thought of the Internet as an unregulated and unregulable place.² What we failed to understand was that the Net’s unregulability was a product of conscious choice made by the Net’s early architects, who designed the architecture of the Net to make it an essentially unregulable place.³ The architects of the Net rendered the Net essentially unregulable by designing its fundamental protocols to be ignorant about the identity of the authors, senders, and recipients of information made available on the Internet.⁴ But, just as the Net could be (and was initially) designed and constructed to be an unregulable place, so too it could be designed and constructed to be a highly regulable place: “whether the Net is unregulable depends, and it depends upon its architecture.”⁵

Regulation on the Net is distinct from the types of regulation we have heretofore known because

it is effected through the Net's *code* or *architecture*. Of the four modalities of regulating behavior—law, social norms, the market, and code or architecture⁶—the latter is the most foolproof and effective form of regulation. Code is a uniquely effective form of regulation in that its constraints are self-executing and are imposed contemporaneous with the behavior being regulated.⁷ Furthermore, regulation via code allows behavior to be regulated by whoever is in charge of writing the code. Even though the architects of the Net designed the foundational architecture of the Net to make regulation difficult,⁸ layers of code—architectures of identification and credentials for users and architectures that label data—can be added on top of this foundation to enable an unprecedented level and type of regulation.⁹ Commerce can implement such regulation by adding layers of software of control in the application space of the Internet on top of the TCP/IP substratum,¹⁰ including architectures that enable control regarding users and architectures that enable control regarding Net content. Moreover, even if it turns out that Commerce cannot bring about the greater regulability of the Net by itself, Commerce can and will do so with the help of Government. In short, Commerce has the incentive to layer code on top of the Net's substratum that will enable identification of individuals and categorization of data, which in turn will transform the Net from an unregulable place to an extremely regulable place: “The ‘nature’ of the Net might once have been its unregulability; that ‘nature’ is about to flip.”¹¹

The code by which the Net increasingly will be regulated—and regulated largely by Commerce—embodies values. The AOLs and IBMs of the world will be increasingly responsible for writing the code of the Net, which means that such commercial entities will be increasingly responsible for regulating the Internet. As such, the values embodied in the code of the Net will increasingly be chosen by Commerce—and driven by Commerce's interests.¹²

Consider some of the values that are embodied in the architecture or code of AOL, the world's largest online service provider. Certain forms and forums of expression are regulated by AOL—not by laws or norms, but by AOL's code itself.¹³ First, AOL imposes certain limits on both the substance of its members' expression and the forums its members can use to express themselves.¹⁴ AOL's code, for example, imposes limits on the number of people with whom one can chat. While the president of AOL can and does write letters to all AOL members, AOL members can never chat with more than twenty-three people.¹⁵ In AOL space, there is no place where everyone can gather at one time, nor is there a place that everyone must, sooner or later, pass through.¹⁶ As a result, AOL's code embodies values that are not readily conducive to the ideal of the public forum, an ideal that undergirds our First Amendment right to free speech.¹⁷ Second, AOL also restricts the content of its members' speech as well as the viewpoints they may express—whether such speech occurs within AOL-space proper or anywhere else on the Net.¹⁸ It prohibits, for example, “crude” sexual references¹⁹ and “crude conversations about sex,”²⁰ as well as the expression of viewpoints about illegal drug use that imply such use is acceptable.²¹ AOL-space in this way embodies certain speech-regarding values that are chosen and implemented by

AOL via its code.

The speech-regarding values described above that are embodied in AOL-space are in conflict with the speech-regarding values embodied in the First Amendment. The First Amendment protects the expression of a diversity of viewpoints about drug use as well as the expression of “crude” sexual speech—at least against censorship by the government.²² The architecture of real space is constructed in conformance with the ideal of public forums.²³ In contrast, “AOL is a different normative world; it can create this different world because it is in control of the architecture of that world.”²⁴ As a member of AOL, “[y]ou enter AOL and you *find* it to be a certain universe. This space is constituted by its code. . . . You live life in AOL subject to its terms; if you do not like them, you go elsewhere.”²⁵

Through its code, AOL has the ability to create a vast online normative community in which it has an extraordinary regulatory power—the power to embody and enforce certain fundamental values and to regulate members’ behavior in accordance with these values.

If AOL does not like a certain behavior, . . . it can regulate that behavior by changing its architecture. If AOL is trying to control indecent language, it can write routines that monitor [and filter] language usage; . . . if there is stalking or harassing or threatening behavior, AOL can block the connection between any two individuals.²⁶

Just as AOL implements certain speech-regarding values in its cyberplace via code, so too will other commercial entities embody (or reject) other important values in their code, such as privacy, access, and equality.²⁷

The ultimate question Lessig puts to us is whether the shift in the power to regulate from Government to Commerce should go unchecked: “If we let the invisible hand work unimpeded . . . choices [about values] will be made according to the set of interests that are expressed by commerce on the Net.”²⁸ We must consider whether we can trust this market, and in particular, whether we can trust this market when doing so means entrusting it to embody (or reject) important values, such as free speech, privacy, access, and equality: “Effective regulation then shifts from lawmakers to code writers. The question for us is whether this shift should be unchecked.”²⁹

1. The Net Libertarian Response

The overarching question posed by Lessig is whether the shift in the power to regulate from Government to Commerce should go unchecked. In response to this overarching question, the Net libertarian answers that Commerce’s power to regulate on the Net is *already* sufficiently held in check—by users’ or customers’ power of “exit.” According to the Net libertarian, the power held by a Net business’s customers or a cybercommunity’s members to leave one cyberplace and

join another imposes a sufficient check upon the power of Commerce.³⁰ Because Commerce's power on the Net is sufficiently held in check, the Net libertarian continues, the Government has no legitimate role to play in further constraining Commerce's power on the Net.³¹

To explore this libertarian response, consider once again the speech-regarding values that AOL embodies in its code. Recall that AOL restricts the forms of expression that individuals can use while on the Net and restricts (among other things) what AOL considers to be inappropriate speech about sex and unsalutary viewpoints about drugs.³² What, if anything, should be done about the fact that the speech-regarding values AOL embodies in its code are in tension with those embodied in the First Amendment? The libertarian response is that if AOL members find that the speech-regarding values embodied in AOL's code are inconsistent with their own, they can always vote with their mice, leave AOL, and become members of an online community that better suits their preferences.³³ In this way, AOL's power to embody values in its code is already held in check by the power that AOL members have to switch to another Internet service provider ("ISP") and/or by the possibility that a competitor to AOL will respond with an alternative that better suits exiting AOL members' preferences.

On the Net libertarian's reading, institutions on the Net should be conceptualized in what Lessig labels as the "consumer" model:³⁴

If we don't like a particular cyber community, we can move—far more easily, in fact, than we can in real space. Because exit is so cheap, we should use exit as our ballot. . . . [On this model,] [t]he world of cyberspace would become a virtual menu, and if you don't like one selection, you simply pick something else.³⁵

Lessig, however, finds the Net libertarian model to be unacceptable—at least with respect to certain types of Net communities—because he believes that exit is an *inappropriate* preference-expressing mechanism with respect to such communities. He suggests that while exit may be an appropriate preference-expressing mechanism within the economic realm, it is ill-suited to the task of community-building (and further, democracy-building), because it is incapable of eliciting and expressing certain of our important collective values:

There is . . . a more fundamental criticism [of the Net libertarian's consumer model]. Even if we could construct cyberspace on the model of the market—so that we relate to spaces in cyberspace the way we relate to toothpaste in real space—we should not want to do it. An important and long-standing tradition argues that beyond their role as consumers humans need to increase the contexts where they are members. Both as a matter of justice and as a matter of human flourishing, we need these parts of our lives where we have control over the architectures under which we live.

In at least some ways then, we should relate to cyberspace as members rather than as customers.³⁶

....

Most of us . . . believe that there are collective values that ought to regulate private action. We are also committed to the idea that collective values should regulate the emerging technical world.³⁷

....

. . . [G]overnment is necessary to help establish the conditions necessary for liberty to exist. This is because *there are collective values that, acting as individuals, we will not realize.*³⁸

1. Exit, Voice, and Collective Values in Cyberspace

What might it mean for us to relate to cyberspace as “members rather than as customers”?³⁹ Is there a meaningful (or further, a necessary) alternative to the Net libertarian/consumer model, a model in which we do not “relate to spaces in cyberspace the way we relate to toothpaste in real space”?⁴⁰ Are there collective values that will not be realized in a cybermarket that responds solely to our individual preferences expressed via the mechanism of exit? In this Part, I explore the Net libertarian/consumer model and its underlying preference-expressing mechanism of exit, which Lessig dismisses as incapable of bringing about a cyberspace reflective of our important collective values. In particular, I consider how well the Net libertarian/consumer model might reflect one important collective value: the First Amendment protection of unpopular or minority speech against majority tyranny. I focus on this value because it presents a potential difficulty for a model that responds (merely) to the aggregate of our individual preferences. I then consider whether a model premised upon *voice* instead of exit would better serve collective values. I conclude that the Net libertarian’s claim that individuals’ power of exit will necessarily serve as a sufficient check on the power of the market regardless of the characteristics of the market is unjustified, because the exit model is *potentially* inconsistent with (at least) our First Amendment commitment to protecting minority speech. I conclude further that Lessig’s claim that a cyberspace governed by the exit model will fail to embody important collective values and will present circumstances justifying intervention to protect such values also stands in need of further support.

1. The Role of Exit in the (Net) Libertarian Model

To better understand the role of exit in the Net libertarian/consumer model, it will be helpful to consider the characteristics of the preference-expressing mechanisms of “exit” and “voice.” As outlined by Albert Hirschman in his influential work *Exit, Voice, and Loyalty*,⁴¹ “exit” and

“voice” are the two primary mechanisms by which individuals express their dissatisfaction with organizations, whether economic organizations like businesses, or political and communal organizations like school boards and political parties.⁴² The exit option, in which an individual simply stops buying a business’s products or services or stops participating in an organization with which she is dissatisfied, is characteristic of and most typically employed in the economic realm. Exit is an indirect, impersonal, and non-participatory mechanism for expressing one’s dissatisfaction. With exit, improvement of the exited organization comes about, if at all, courtesy of the invisible hand, and any such improvement does not redound to the benefit of the exiting consumer.⁴³ For example, if a consumer does not like the new and improved Colgate, she can exercise her exit option, switch to Crest, and leave it to Colgate-Palmolive to figure out why she left. In order for the preference-expressing mechanism of exit to be meaningfully exercised, the exiting individual must have an alternative institution to which to transfer her business or membership; exit can only be employed where there are at least two possible competing alternatives.

While the preference-expressing mechanism of exit is characteristic of the economic realm, the mechanism of voice is characteristic of the political and communal realm.⁴⁴ With the preference-expressing mechanism of voice, an individual expresses her dissatisfaction from within an organization. As between exit and voice, voice is the more direct, responsive, and participatory method of expressing one’s dissatisfaction with an organization, which one expresses while remaining within the organization.⁴⁵ Any resulting improvements in the organization benefit the dissatisfied member as well as her fellow members. If I am dissatisfied with the public schools in my area, for example, I can exercise my option of voice and become involved in and lobby the school board to bring about desired changes in the school (instead of exiting and transferring my children to a private school). Voice is most typically employed where exit is difficult or impossible to exercise, where alternative organizations are limited or non-existent, or where an individual has substantial investment in or commitment to a particular organization. Thus, in comparison to exit, voice is the more direct and participatory method of providing feedback, and expressing one’s preferences and values, to an organization. Individuals make the decision whether to exercise exit or voice based on a number of factors, including the likelihood that the organization with which one is dissatisfied will respond to one’s voice, how much one has invested in or is committed to the organization, and—importantly—whether viable alternative organizations exist.

Consider how exit is employed as a preference-expressing mechanism in the cybermarketplace. The Internet allows for the creation of a wide variety of value-sets or rule-sets, which offer users the option of choosing among such sets according to their preferences. By exercising their option of entering one value-set and exiting another, users thereby express their preferences vis-à-vis such value-sets. As David Post and David Johnson describe the role of exit in the Net libertarian model:

The separation of subsidiary “territories” or spheres of activity within Cyberspace . . . allow [s] for the development of distinct rule sets and for the divergence of those rule sets over time. . . . Content or conduct acceptable in one “area” of the Net may be banned in another. . . .

. . . .

. . . [As compared to real space, in cyberspace] any given user has a more accessible exit option, in terms of moving from one virtual environment’s rule set to another’s⁴⁶

For example, if AOL prohibits certain forms of speech, and if an individual is opposed to such prohibitions, she can vote with her mouse, leave AOL, and choose another ISP with a value-set better reflective of her own.

The competition among value-sets or rule-sets in the Net libertarian model is similar to that set forth in the libertarian utopian framework articulated by Robert Nozick in *Anarchy, State, and Utopia*. Within the libertarian utopian framework, individuals have the freedom to join together to form communities of common value-sets and to exit from communities that no longer reflect their value-sets. Nozick articulates two components of the libertarian utopian framework: (1) a “wide and diverse range of communities,” with a corresponding wide range of value-sets adopted by such communities;⁴⁷ and (2) a great liberty to choose among this wide range of communities⁴⁸ (and, what follows, ease of exiting one community and entering (or if necessary creating) another that better accords with an individual’s value choices). Within the libertarian utopian framework, government intervention into communities’ value-sets is unjustified because individuals can be trusted to act in their best interest in exercising their freedom to choose which communities to join and, accordingly, which values to live by.⁴⁹

Consistent with the libertarian utopian framework articulated by Nozick, the Net libertarian argues that in an unregulated cybermarketplace, different market actors will produce a wide and divergent range of code-sets, embodying different value choices (some consistent with the First Amendment, for example, others not), offering users the freedom to choose which value-set or code-set best accords with their preferences and values. If the speech-regarding values embodied in the First Amendment are truly important to an individual, then, according to the Net libertarian, she will not suffer any curtailment of such values—whether by private or public actors—and will vote with her mouse to express her preferences regarding such values. In short, the Net libertarian claim is that a market on the Internet that aggregates our individual preferences in response to individual acts of exit will be sufficient to reflect our important values. Although not always explicitly articulated, the premises of the Net libertarian claim are essentially those that undergird the libertarian utopian framework: (1) a wide and divergent range of value-sets will flourish on the Internet; and (2) exit from one value-set to another will be

sufficiently easy to exercise.

1. Exit, Individual Preferences, and Collective Values

If we accept that the Net libertarian premises obtain on the Internet—which Lessig apparently does not⁵⁰—we may go on to consider whether there are certain collective values that will not be embodied in a cybermarket that merely reflects the aggregate of our individual preferences. For example, consider how well a market premised upon the mechanism of exit will respect the commitment embodied in the First Amendment to protect unpopular or minority speech from majority tyranny.⁵¹ Suppose that only a small portion, say five percent, of the relevant population favors the protection of a certain form of speech (be it “crude” sexual expression, speech advocating illegal drug use, graphic depictions of abortion procedures, etc.). Suppose further that the First Amendment embodies the collective value of protecting the expression of such minority speech, even against the majority’s unwillingness to protect such speech. What can be said about how well a cybermarket that (merely) aggregates our individual preferences—in response to our individual acts of exit—would protect such countermajoritarian speech-regarding values?

Cass Sunstein, among others, has examined this issue in a related context, and contends that free speech values may be endangered by an unregulated market, a system of “laissez faire and the ‘invisible hand’ for free speech”⁵² He argues that a well-functioning system of free expression “is not intended to aggregate existing [individual] private preferences,” but rather must incorporate certain collective values, such as exposure to diverse views and deep attention to public issues, that will not necessarily be realized in an unregulated market.⁵³ Sunstein observes that,

In principle, it does seem clear that [a free market in communications] could generate a range of serious problems. . . . [If] the allocation of speech rights was decided through an ordinary pricing system, like the allocation of soap, or cars, or candy, . . . [s]uch a system would [fail to incorporate certain speech-regarding values, and for example, would] ensure that dissident speech . . . would be foreclosed.⁵⁴

Sunstein suggests that such problems with an unregulated market in speech are problems “in principle” or *potential* problems, not problems that will *inevitably* flow from an unregulated speech market. Rather, Sunstein’s analysis counsels in favor of a careful consideration of the actual features and characteristics of each particular marketplace for speech in evaluating whether potential problems are likely to materialize in any given unregulated speech market. Although it is possible that an unregulated speech market might be underprotective of minority speech, it is also possible that the characteristics of such a market would obviate such dangers. Careful attention to the features and characteristics of the marketplace for speech under consideration is therefore warranted.

In considering whether an unregulated cybermarketplace for speech is likely to suffer from the problems described above, it is important to consider whether a wide and divergent range of value-sets will actually be available for individuals to choose among. It is also helpful to compare the market for speech on the Net with other markets for speech, such as the broadcast television market or the metropolitan newspaper market. In the broadcast television market, before the creation of the Corporation for Public Broadcasting and the advent of cable television, the three major networks essentially controlled speech on the airwaves. If the networks declined access to the airwaves for a certain class of speech, it could plausibly be argued that this marketplace for speech was not well-functioning.⁵⁵ Similarly, if a metropolitan area supported only one or two major newspapers, and those newspapers refused to allow for the expression of diverse viewpoints on issues of public import, it could plausibly be argued that such a marketplace for speech was not well-functioning.⁵⁶ The marketplace for speech on the Net, however, has a very different set of salient features and characteristics than these other speech markets. On the Internet, the number of market players, the diversity of market offerings, and the ease of exiting one “organization” and entering another make exit a far more meaningful and trustworthy mechanism for expressing preferences and values in cyberspace. While the limited number of market players and the limited range of value-sets in the broadcast television and metropolitan newspaper markets support the argument that exit alone cannot be trusted to bring about a speech market that reflects our important collective values—and that government intervention into such markets to protect important collective values is warranted—this argument does not carry over well to the cyber-market, given the different features and characteristics of this market.

To see this, consider, for example, the likelihood that unpopular or minority speech will find an avenue of expression in the cybermarket for speech as compared to the broadcast television market. Suppose an individual wishes to advocate the use of illegal drugs or criticize a particular abortion procedure using graphic terms or images, or to otherwise engage in unpopular/minority expression. While it is likely that such minority speech will not find an avenue for expression in an unregulated broadcast television market, can the same be said of an unregulated cybermarketplace for speech? This depends, in part, upon how many vehicles for expression can be supported in the cybermarketplace and whether the value-sets adopted by such market actors will converge on a set of majoritarian values—i.e., on whether the libertarian premises in fact obtain on the Net.⁵⁷ If the cybermarket were to only support five commercial ISPs with roughly equal shares of the market,⁵⁸ and if protection of the minority speech under consideration were supported by only five percent of the relevant market, it is likely that none of the ISPs would choose to protect such minority speech and that such a marketplace would not appropriately reflect the collective value of protecting minority speech. Of further concern is the possibility that an ISP would not only prohibit such speech within its own cyberplaces (e.g., AOL-sponsored chat rooms), but would also prohibit its members from using or accessing such speech in other cyberplaces.⁵⁹ If each of the commercial actors in the cybermarketplace were to embody such speech-regarding values in its code, the collective value of protecting minority speech would be

endangered and some form of intervention would be warranted. But Lessig has not convincingly demonstrated that the features and characteristics of the cybermarket are or soon will be such that this important collective value, or other important collective values, will be endangered by a cybermarket that merely aggregates individual preferences. Rather, given the wide and divergent range of value-sets available in the cybermarketplace for speech, it appears that exit will remain a meaningful and viable option for individuals to exercise, that adequate avenues for minority speech will remain available, and that the collective value of protecting minority speech will not be endangered by an unregulated cybermarketplace.

1. Voice and the Expression of Collective Values on the Net

I have argued above that a cybermarket premised upon exit as a preference-expressing mechanism is *potentially* inconsistent with the protection of important collective values, but that Lessig has not shown that such problems are likely to materialize given the features and characteristics of the cybermarketplace. In this section, I consider whether a model of cyberspace premised upon voice as a preference-expressing mechanism—a model in which “humans . . . increase the contexts where they are members”⁶⁰ and “relate to cyberspace as members rather than as customers”⁶¹—would be better suited to bringing about a cyberspace more reflective of our important collective values. As discussed above, using the mechanism of voice, individuals are able to contribute to the value-sets of the organizations of which they are members. Rather than simply exiting when they disagree with an organization’s values, individuals employing the option of voice work from within to attempt to reshape those values. Consider, then, whether a model of cyberspace in which individuals exercised the preference-expressing mechanism of voice—and in which institutions responded to their members’ exercise of voice—would incorporate important collective values better than a model premised solely upon exit.

Let us return to the example described above in which five ISPs enjoy roughly equal shares of the market, a five percent minority is in favor of a particular type of speech, but now users express their preferences through the mechanism of voice rather than exit. Depending upon the configuration of voting blocs, a market based on the preference-expressing mechanism of voice (in the form of a majority voting rule) would also likely result in each of the five ISPs adopting value-sets that are hostile to minority speech. That is, a model in which users “increase the contexts where they are members”⁶² and enjoy the ability to vote for and exercise some control over the values embodied by commercial actors within their code would fare no better than the exit model on this score, in that both would merely reflect the aggregate of individual preferences. A model premised upon members’ exercise of their “ordinary” voice (as we might, paraphrasing Lessig,⁶³ call such an exercise of voice) would not move us any further toward the goal of building a cyberspace that embodies our important collective values. While Lessig favors a model of cyberspace in which individuals are conceptualized as “members rather than as customers,”⁶⁴ he at the same time expresses skepticism about the desirability of a cyberspace

reflective of our “ordinary” expressions of individual preferences. On this point, Lessig claims that “[i]t has never been our ideal . . . that democracy be a perfect reflection of the present temperature of the people . . . Democracy was [intended] to be more than a string of excited utterances of the people.”⁶⁵ And Lessig argues that, to make matters worse, technology tends to produce expressions of voice—the “flash pulse of the people”⁶⁶ or “a string of excited utterances of the people”⁶⁷—that are particularly ill-suited to eliciting important collective values, because such technology-facilitated expressions of voice are likely to be hastily made and ill-informed:

As the cost of monitoring the current view of the population drops, . . . we are producing a perpetual stream of data about what “the people” think about every issue. . . . We rarely ask, however, whether perfect monitoring is a good.

*There is an important reason to be skeptical of the flash pulse of the people. The flash pulse is questionable not because the people are uneducated or incapable of good judgment, . . . but because it is often the product of ignorance. People often have ill-informed or partially informed views that they simply repeat as judgments Technology encourages this sort of judgment.*⁶⁸

According to Lessig, then, a cyberspace in which organizations respond to and reflect individuals’ “ordinary” voice on the Net would be particularly unsupportive of our important collective values. Lessig contends, following Sunstein,⁶⁹ that we need somehow to move beyond this ordinary expression of voice, the flash pulse of the people, to a model that incorporates a more thoughtful, reflective, balanced, and deliberative voice of the people. In Sunstein’s words, the creation of a

[well-functioning system of free expression] is closely connected to the central constitutional goal of creating a *deliberative democracy*, [which] is not intended to aggregate existing private preferences. . . . Instead it is designed to have an important deliberative feature. . . . Through exposure to such information and perspectives, both collective and individual decisions can be shaped and improved.⁷⁰

Similarly, Lessig proffers a model for embodying values on the Net in which individuals exercise their power of voice, but a voice formulated and expressed in a deliberative key. Lessig contends that, in expressing our voice on the Net, we need to move beyond the techniques of the “flash pulse of the people”⁷¹ toward a method of eliciting important, collective, deliberative values:

There are techniques for polling that compensate for the errors of the flash poll and produce judgments that are both more considered and more stable.

An example is the “deliberative” poll devised by Professor James Fishkin. Rather than a pulse, Fishkin’s polls seek an equilibrium. [The deliberative poll] bring[s] a cross-section of people [and gives them] information before the poll that helps ensure that they know something about the subject matter. . . . [Those being polled] argue about the topic at issue and exchange views about how best to resolve it. At the end, they are asked about their

views, and their responses at this point form the “results” of the poll.

The great advantage of this system is not only that information is provided but that the process is deliberative. The results emerge out of the reasoning of citizens debating with other citizens. People are not encouraged to just cast a ballot. They give reasons for their ballot, and those reasons will or will not persuade.

....

Cyberspace might make this process where reasons count more possible It is possible to imagine using the architecture of the space to design deliberative forums

....

We could build some of this [deliberation] back into our democracy. The more we do, the less significant the flash pulses would be. And the less significant these flash pulses are, the more we might have faith again in that part of our tradition that made us revolutionaries in 1791—the commitment to a form of government that respects deliberation, and the people⁷²

Lessig appears to contend that voice is preferable to exit as a preference-expressing mechanism, but only if and to the extent that voice can be rendered more thoughtful, deliberative, balanced, and therefore better able to elicit important collective values. According to Lessig, even though we cannot trust a market based on exit, nor on *ordinary* voice, to reflect our important collective values, if the meta-value of deliberation were somehow built into voice, we would be more justified in trusting such a market. Because building the meta-value of deliberation into our articulation and expression of voice would be in society’s long-term best interests, the government (or some other vehicle for collective action) would be justified, according to Lessig, in intervening in the market to impose the conditions for deliberation in cyberspace.

In sum, Lessig argues that exit is an inappropriate method for individuals to express their preferences on the Net. But he also suggests that voice, if exercised in an ordinary and non-deliberative manner on the Net, is also insufficient to bring about the embodiment of our important collective values. He appears to contend that the only way for individuals to express preferences in a manner supportive of our important collective values is by building the meta-value of deliberation into our exercise of voice on the Net. Doing so, however, would require intervention in the market by the government or some other vehicle for collective action, which would be necessary to bring about the conditions under which true freedom will flourish. I have contended, however, that Lessig too hastily concludes that exit is an inappropriate mechanism for expressing preferences and reflecting our important values on the Net. Exit should not be dismissed out of hand as being insufficiently supportive of important collective values; rather, we

must consider the features and characteristics of the particular market in which exit serves as a preference-expressing mechanism and the particular collective values to be served in order to determine whether such values are actually likely to be embodied in an unregulated market. Lessig has not convincingly demonstrated that the features and characteristics of the cybermarket are (or soon will be) such that our important collective values will be endangered by a cybermarket that merely aggregates individual preferences. Nor has he shown that governmental (or other types of) intervention in the cybermarket is warranted for the purpose of securing collective values. While government intervention might eventually be necessary if the potential of the market model to disregard certain collective values were to materialize, we are not there yet.

1. **Government Regulation of the Private Regulators on the Net**

I have argued that, given the characteristics of the cybermarketplace—including the number of market players, the diversity of market offerings, and the ease of exit—intervention to enforce the recognition of certain collective values within commercial actors' code or to instill deliberation into individuals' formation and expression of preferences is unwarranted. Yet I have also argued that an unregulated marketplace could *potentially* lead to a state of affairs in which certain important collective values—such as the protection of minority speech from majority tyranny—are not respected. When and if such a state of affairs were to obtain—as it arguably did in the broadcast television market—would the government be able to intervene to remedy such problems? Lessig's answer is no—primarily because he believes that the state action doctrine as presently interpreted will prohibit courts from holding private actors in check by constitutional values (and because we do not trust the legislature to act on our behalf in this regard).⁷³ Lessig is ultimately quite pessimistic (if not despondent) about both the likelihood that a cyberspace premised upon the model of the market will embody our important collective values and the willingness of government to intervene to remedy such defects in the market if and when they arise. I have argued in Part III that Lessig has not made out the case that a cyberspace premised upon the model of the market will fail to embody our important collective values. In this Part, I argue that neither has he made the case that courts will refuse to intervene to check the power of private actors when and if necessary to protect our important collective values. On the contrary, doctrinal support exists for courts to impose checks on the power of private regulators where such regulation threatens important collective values.

The history of government regulation of private actors in emerging media and within new forums suggests that when there is justifiable reason for the government to distrust and insert itself into the market, action by various branches of the government will be forthcoming. Consider, for example, the government's involvement in regulating private actors' ownership and control of broadcast media. Throughout the past century, the government struggled to determine how best to structure ownership of the airwaves and how much autonomy to grant to private broadcasters in

order to protect free expression in and access to this medium. In *CBS, Inc. v. Democratic National Committee*,⁷⁴ for example, the Supreme Court considered a challenge brought by the Democratic National Committee and an anti-war group to private broadcasters' denial of their request to purchase air time to express their anti-war views. The Court's determination of the contours of the public/private dichotomy and application of the state action doctrine in this context involved an inquiry into the characteristics of the market for speech under consideration, as well as an intricate and complex balancing of the competing First Amendment interests of private broadcasters and members of the public seeking access to the airwaves.⁷⁵ Instead of simply abdicating its responsibility to protect individuals' free speech rights against regulation by private entities—as Lessig predicts of the cyberspace context⁷⁶—the Court in *CBS v. Democratic National Committee* carefully considered arguments in favor of and against allowing individuals to assert a First Amendment right of access and free speech against private regulators. (Furthermore, when other branches of the government found the Court's evaluation of these competing interests in *CBS v. Democratic National Committee* wanting, the legislature acted to secure important free speech rights against private regulators through the passage of the Federal Election Campaign Act of 1971.⁷⁷)

Consider also the Court's interpretation of the state action doctrine in the context of the denial by private “company towns”⁷⁸ and shopping malls⁷⁹ of access for purposes of expressive activities. There again, the Court balanced the free speech rights of members of the public against the property and free speech rights of private regulators. In both the company town and private shopping mall cases, the Court's decisions were premised in part on the consideration of whether those wishing to engage in expressive activity on private property had alternative avenues of communication open to them.⁸⁰ Although the Court (for the time being) has determined that the property rights of private shopping mall owners outweigh members of the public's interest in exercising their right to free expression within those malls, the balancing of interests undertaken by the Court and the importance the Court places on alternative avenues of communication suggest that courts will be sensitive to similar constitutional claims against private regulators in cyberspace. This is especially true if private regulators in cyberspace settle upon a uniform set⁸¹ of restrictive values in their code that leave no alternative avenues of communication open for certain types of expression.

In addition to the state action doctrine as a vehicle for balancing the First Amendment rights of market actors against the First Amendment rights of the public, the government has used other mechanisms to remedy defects in markets for speech. For example, in attempting to remedy the problems arising from a market in speech driven solely by the profit motive, the government used its allocative power in the 1960s to establish the Corporation for Public Broadcasting.⁸² In so doing, Congress attempted to introduce a voice into the broadcast market that would be more supportive of and more conducive to meaningful, deliberative, and collective self-governance.⁸³ It is quite plausible that, when and if necessary to secure adequate avenues of communication for

unpopular speech on the Net, or to secure other collective values, the government would act to establish a public ISP or other public channels for expression.

In short, the government has various means available to it to ensure that the market for speech on the Net will operate in a manner that is “uninhibited, robust, and wide-open.”⁸⁴ In applying the state action doctrine to private regulation in various mediums and forums, the Court has essentially balanced the rights of private regulators against the competing rights of individuals subject to such regulation. In undertaking this analysis, the Court has also considered whether the private regulation at issue leaves open alternative avenues of communication. The inquiry into whether alternative avenues of communication are available is substantially the same inquiry required of us in evaluating whether the exit model will suffice to reflect the important collective value of protecting minority speech on the Net.

1. Conclusion

Lessig’s overarching concern is that behavior in cyberspace will be regulated by Commerce and that such regulation will be driven by Commerce’s interests, not ours. He is deeply skeptical about a cyberspace constructed on the model of the market and about the market’s underlying preference-expressing mechanism of exit, because he believes that a cyberspace governed by exit will reflect, at best, the aggregate of our individual values and not our important collective values. I have argued that Lessig has not made the case that a cyberspace governed by the market mechanism of exit will fail to incorporate important collective values. The possibility certainly exists that markets governed by exit alone will fail to incorporate important collective values, such as the First Amendment value of protecting unpopular speech against majority tyranny. But whether such a possibility will materialize is a function of the features and characteristics of the particular market under consideration as well as the nature of the collective value at risk. Lessig has not shown that such a possibility is likely to materialize in the cyberspace of the near future. Lessig also claims that the government will fail to take any measures to remedy the cybermarket’s (potential) failure to embody our important collective values and that the state action doctrine will render courts powerless to remedy such problems. I have argued that doctrinal support exists for courts to hold in check the power of private regulators where such regulation threatens the important collective value of protecting unpopular speech. In short, Lessig has not shown that a cyberspace governed by the market mechanism of exit will fail to incorporate important collective values, nor has he shown that if and when cyberspace does fail to incorporate such values, courts will be powerless to act to protect such values.

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- 1 . Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999).
- 2 . *See id.* at 24 (“There’s a meme about cyberspace that marks natives from its first generation [I]f cyberspace exists, so first generation thinking goes, government’s power over behavior out there is limited. In its essence, cyberspace is a space of no control.”).
- 3 . *See id.* at 33.
- 4 . *See id.* at 32-33. (“The Internet is built on a simple suite of protocols—the basic TCP/IP suite. . . . These protocols . . . reveal nothing about the user of the Internet, and very little about the data being exchanged. . . . This minimalism in design is intentional, [reflecting in part] a political decision about disabling control”).
- 5 . *Id.* at 25.
- 6 . *See id.* at 235.
- 7 . *See id.* at 236-37.
- 8 . *See id.* at 27-29. Given the Internet as it existed, say, in 1995, there was “no simple way either to know who someone is or to classify data [and therefore there was] no simple way to make access to data depend on who the user is and on the data he or she wants to access. In a word, there is no simple way to *zone* cyberspace.” *Id.* at 28.
- 9 . *See id.* at 27-29.
- 10 . *See id.* at 32-42.
- 11 . *Id.* at 25.
- 12 . *See id.* at 83.
- 13 . *See id.* at 67.
- 14 . Some of AOL’s constraints are imposed via code, while others are imposed by norms. It is likely, however, that all or substantially all of such constraints will be imposed via code in the near future. *See id.* at 71.
- 15 . *See id.* at 68.
- 16 . *See id.*
- 17 . Throughout this essay, I confine my discussion to the values “we” share (or don’t share) as United States citizens

living in a constitutional democracy. Although one of the most fascinating features of the Net is its accessibility throughout the world—to people from many different cultural and political regimes—for simplicity’s sake, I focus (as Lessig essentially does) on the issues faced by U.S. citizens in translating and transforming our constitutional values in the context of the Internet.

18 . Lessig, *supra* note 1, at 252-53 n.14.

19 . *See id.*

20 . *Id.*; see also James Egelhof, *Guide Policies: Vulgarity Guidelines* (visited April 22, 2000) <http://www.aolsucks.org/censor/guide/vulgguid.html> providing a guide to “vulgar” words prohibited by AOL).

21 . *See* Lessig, *supra* note 1, at 252-53 n.14.

22 . *See, e.g.*, *ACLU v. Reno*, 521 U.S. 844 (1997).

23 . *See* Lessig, *supra* note 1, at 69.

24 . *Id.* at 70.

25 . *Id.*

26 . *Id.* at 71.

27 . *See id.* at 122-85, for Lessig’s discussion of the translation of intellectual property, privacy, and free speech values by private market actors in the cybermarketplace.

28 . *Id.* at 83.

29 . *Id.* at 207.

30 . *See, e.g.*, David Post, *What Larry Doesn’t Get: A Libertarian Response to Code and Other Laws of Cyberspace*, 52 *Stan. L. Rev.* (forthcoming 2000).

31 . *See id.*

32 . *See supra* text accompanying notes 19-21.

33 . As Lessig paraphrases the Net libertarian response, “[AOL’s] management can change the code to bring about a particular end [e.g., to filter out inappropriate comments about sex or drugs], but if that end is too far removed from what most members think the space is about, they may simply leave.” *See* Lessig, *supra* note 1, at 83.

34 . *See id.* at 201.

35 . *Id.*

36 . *Id.* at 203.

37 . *Id.* at 219.

38 . *Id.* at 209 (emphasis added).

39 . Lessig, *supra* note 1, at 203.

40 . *Id.*

41 . Albert Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970).

42 . *See id.* at 3-5.

43 . *See id.* at 16.

44 . *See id.* at 15-16.

45 . *See id.* at 16-20.

46 . David R. Johnson & David G. Post, *Law And Borders—The Rise of Law in Cyberspace*, 48 *Stan. L. Rev.* 1367, 1396-99 (1996) (emphasis added).

47 . Robert Nozick, *Anarchy, State, And Utopia* 307 (1974).

48 . *See id.* (stating that within the libertarian utopian framework, “alternative visions of the good can be individually or jointly pursued”).

49 . *See generally id.* at 297-334.

50 . Lessig apparently contends that neither of these premises obtain on the Net. He disagrees with the premise that a wide and diverse range of code-sets or value-sets will be available on the Net, and this disagreement undergirds in substantial part his distrust of the mechanism of exit as a check on commercial entities’ power to regulate. Rather, he asserts—unconvincingly, to my mind—that “[w]hat we will see . . . is the emergence of a fairly unified regulation through code. . . . [T]here will be a push toward convergence on a uniform set of rules. . . . [For example,] not a diverse set of policies governing privacy, but a single set of rules” Lessig, *supra* note 1, at 206. Furthermore, Lessig claims that, for an important set of cyberspace institutions, exit is more difficult to exercise than in real space. He considers the case of MUDs (Multi-User Dungeons or Multi-User Domains), virtual online text-based worlds

where individuals spend months building their characters within a community and develop and invest social capital in that community. He claims that when you leave one virtual community and go to another, “no assets are transferable [and] . . . you must start over again. . . . Paradoxically, then, we might say that it is harder to change communities in cyberspace than it is in real space. . . . Communities in cyberspace, then, may in the short run have more power over their citizens than real-space communities do.” *Id.* at 202. And, he contends that because it is more difficult for individuals on the Net to exercise their power of exit than for individuals in real space to do so, the Net libertarian’s promise that exit will serve as a sufficient check on Commerce’s power rings hollow. *Id.*

51 . I focus on the collective value of protecting minority speech because this value is among the most likely to be endangered by the Net libertarian/consumer model.

52 . Cass R. Sunstein, *Democracy and the Problem of Free Speech* at xviii (2d. ed. 1995).

53 . *Id.* at 18-19.

54 . *Id.* at 57-58.

55 . *See, e.g.*, Sunstein, *supra* note 52, at 53-92.

56 . *See, e.g.*, Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967).

57 . For a discussion of the (Net) libertarian premises, see *supra* text accompanying notes 46-49; for Lessig’s take on whether the premises will obtain as a general matter, see *supra* note 50.

58 . Of course, other vehicles for expression are available on the Net, but I focus my attention on commercial vehicles, since Lessig’s analysis centers on power of commercial entities to regulate via code.

59 . *See supra* text accompanying note 18.

60 . Lessig, *supra* note 1, at 203.

61 . *Id.*

62 . *Id.*

63 . *See id.* at 5 (arguing that we must strive to bring about a cyberspace that protects “*principles and ideals that reach beyond the compromises of ordinary politics.*” (emphasis in original)).

64 . *Id.* at 203.

65 . *Id.* at 227.

66 . *Id.*

67 . *Id.*

68 . *Id.* at 227-28 (emphasis added).

69 . *See* Sunstein, *supra* note 52, at xi-xx.

70 . *Id.* at 18-19 (emphasis added).

71 . Lessig, *supra* note 1, at 227.

72 . *Id.* at 228-30 (emphasis added).

73 . *Id.* at 213-18.

74 . 412 U.S. 94 (1973).

75 . In construing the state action doctrine, the Court balanced the broadcasters' right to control the content of their programs against the public's right of access to the airwaves, and found in favor of the former. *See id.*

76 . *See* Lessig, *supra* note 1, at 218.

77 . Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 101, 86 Stat. 3 (1972) (amended 1980). Several years after the decision in *CBS v. Democratic National Committee*, the Court held that the Federal Election Campaign Act of 1971 created a right of reasonable access to the airwaves for political candidates. *See* *CBS v. FCC*, 453 U.S. 367 (1981) (affirming the FCC's determination that the networks had failed to provide reasonable access to political candidates under the Federal Election Campaign Act of 1971).

78 . *Marsh v. Alabama*, 326 U.S. 501 (1946).

79 . *See Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968) (holding that state trespass law could not be applied to enjoin union picketing of supermarket in privately owned shopping center); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (holding that private shopping center's ban on handbill distribution applied to anti-war leafletters was not unconstitutional, where alternative means of communication were available); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (holding that actions of picketers in front of store in private shopping center were not protected by First Amendment).

80 . *See, e.g., Lloyd Corp.*, 407 U.S. at 566 (distinguishing *Logan Valley* on grounds that, in that case, denial of picketer's rights of access to the shopping center would deprive them of all reasonable opportunity to convey their message to the shopping center patrons).

81 . *See supra* note 50.

82 . *See* Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified as amended at 47 U.S.C. § 396).

83 . *See generally* Owen Fiss, *The Irony of Free Speech* 56 (1996).

84 . *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).