

A Roundtable Discussion with Lawrence Lessig, David G. Post & Jeffrey Rosen

Moderated and Edited by
*Thomas E. Baker**

PROFESSOR BAKER: When I imagined the schedule for this morning, I looked forward to this portion of the program very much. I wanted to have an opportunity to hear our speakers interact with each other and with us. This is a chance to get inside their heads. My role as a moderator reminds me of a story, perhaps apocryphal, which is told about General Thomas Jonathan "Stonewall" Jackson during the Civil War. Jackson had a lieutenant on his staff who was obviously not very talented. He did not have any kind of battle experience and he was a rather dull fellow. All the other officers on Jackson's staff were razor-sharp, talented, and battle-tested. Someone finally got up the courage to ask Jackson why he kept this fellow around, and the General replied, "Well, when I write out a field order I show it to him before I send it out. If he can understand it, then anyone can." That is how I see my modest role as the moderator. We are taping this program, as you may have noticed, so I would ask you to speak loud enough for others to hear and for the microphones to pick up your question or comments. Who will begin our Roundtable Discussion?

QUESTION: I have a question for Professor Rosen, and perhaps the others, too. You talked about the "legalized self." I want to ask about what we have been talking about more generally this morning—how is Internet going to impact upon the political self—on our political institutions, the institutions of representative government?

PROFESSOR ROSEN: I guess there is some connection between the legalized self and the erosion of political authority. This was one of Tocqueville's points, although I think he didn't anticipate the degree to which courts themselves would be undermined and polarized, as they increasingly were forced to take sides in

* Thomas E. Baker, James Madison Chair in Constitutional Law and Director, Constitutional Law Center at Drake University Law School. This transcription of the sound recording of the Roundtable Discussion has been edited and modified by the moderator to improve readability and understanding in this printed format. Every effort has been made to preserve the content and the spontaneity of the Roundtable Discussion. Cf. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).

these social disputes. He envisioned lawyers as being a respected class—with their focus on backward-looking events in history, being able to adjudicate things that political passions couldn't resolve. I noticed there was a bit of a start in the room when I talked about the self-immolation of the Supreme Court in *Bush v. Gore*¹ because this is, of course, an issue about which people have very polarized feelings. But it is an example of the fact that when the courts do declare themselves in these increasingly controversial issues, they may find their authority undermined. So, I would fear that we can look forward to more polarization, more erosion of governmental authority. It's a phenomenon, to the degree that it's linked to the logic of democracy, that will get worse and worse. The solution to this problem? I think the same self-restraint I was talking about in the sphere of personal manners might counsel some form of judicial restraint as well and a recognition that it is really by conserving and hording its authority that the Court has been most respected. It has been when it has spoken unanimously in cases like *Nixon*² and *Brown*³ that it has been able to summon contending sides of the country to some mutually acceptable resolution. So, I would hope that deference in the face of contestable social judgments would be something that courts would take from this experience and courts would resist the inclination to continue to interject themselves into these essentially social disputes.

PROFESSOR POST: I have a comment—a somewhat different perspective on that question. One of the things I think that is happening on the Net is that it is a global medium, and we are all sort of coming to terms with what that means. You know, my Web site is accessible to anybody all over the globe, and all points on the Net are sort of equidistant from one another and boundary crossing and all that. It has already become somewhat of a cliché, but it is true. And I think when we talk about representative democracy and representative institutions, one of the things I think about is that in a global place like this there has been enormous pressure, and there will continue to be enormous pressure, for global lawmaking institutions of some kind. Harmonizing law across boundaries. There is going to be and has been enormous pressure to do that, for example, on the copyright front, on the trademark front, and with respect to securities regulation. Everybody is talking internationally and globally. We don't have good existing institutions to do that. I think that there is a problem, again. The Founders thought a lot about this problem of scale. Can you design institutions—they had these institutions for the 13 colonies, and there was a serious discussion about whether they would scale across the United States.

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1. *Bush v. Gore*, 531 U.S. 98 (2000).
 2. *United States v. Nixon*, 418 U.S. 683 (1974).
 3. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Could we have a federal union that stretched from the Atlantic to Pacific? And a lot of people, smart people, thought we could not. Hamilton among them. They really didn't see how these institutions could work—you know, people out there in Ohio are going to be boozing it up, and they won't pay their taxes, and how will we ever And I think the problem of scale in governmental institutions is one we have to think about again, because I don't see any good solutions, right now at least, to how we build global institutions that have the trust of the people who are subjected to their rules and regulations. I think this is related to what we might call the Seattle phenomenon (or the WTO protests), if you will. I think there is a very real phenomenon that is going to play itself out on the Net as people ask themselves: Who or what are these international institutions who have the authority to make the rules for this global environment? It's an essential problem and a very difficult one.

QUESTION: Along the lines of talking about globalization, I want to ask Professor Post whether or not we can expect that there will be an increasing source of international regulations, regulations by foreign countries that might affect us here in the United States. Let me give you two specific examples: the Yahoo incident with Nazi memorabilia and the French government saying "you can't make that accessible to the people in France because it violates our laws"—and Yahoo's response. And also an example that Professor Lessig has written about: the "icraveTV" situation in which a Canadian company that, consistent with Canadian law, rebroadcast television shows on the Internet.⁴ Then some Hollywood interests go into a federal court in Pittsburgh saying that some Americans had access to that despite blocking efforts. And they argued that the only way to prevent Americans from having access to that was to shut down the site altogether. Is that the sort of thing we can expect to be affected by in this country, and also will our government's decisions in similar situations affect other countries?

PROFESSOR POST: I think the answer is "yes." "Yes" in the sense that what you are describing is something we can expect a great deal more of—that's going to be a central source of tension and debate and conflict on the Net for the foreseeable future. In the Yahoo case—most of you probably know—Yahoo was sued in France for violating a French law that prohibits the exhibit of Nazi memorabilia. The French court issued an injunction against them, reaching out beyond its borders and at least asserting that the injunction reached the operation of Yahoo, Inc., which is a California corporation and a California Web server,

4. Lawrence Lessig, *The Standard, Cyberspace Prosecutor* <http://www.thestandard.com/article/article_print/0,1153,10885,00.html> (Feb. 21, 2000).

saying that, because you are sending this material into France, we can reach out over our borders and grab you and make you subject to our laws. I think that's a very serious threat to two values. One is the value of free expression, although, of course, the French will say, "we believe in free expression. We just draw a line differently than you might in America, but we have good reason to do that." And it is a threat to the value of the consent of the governed. The assertion of extraterritorial jurisdiction like that, I think, always raises the question: What gives the French authority over someone who is outside their borders and has had no participation in making that law about Nazi memorabilia? I think that those efforts should be resisted for the sake of the spread of expression on the Net. If the French want to put filters on their own Internet service providers, I have nothing to say about that, quite frankly. That's their business. But if they want to stop Yahoo from displaying this, which affects me in the United States because now I can't get access to this material either, then I think that ought to be resisted.

PROFESSOR LESSIG: The resolution, though, that happens in the case of icraveTV and also is being proposed in the Yahoo case is the use of technologies that make it possible to identify where something comes from, so the result would be: if you are a French citizen using Yahoo, then you could not get access to Nazi paraphernalia, but if you are a United States citizen, you could get access. Now, in some sense, that responds to part of what David Post is concerned about. But I think both David and I are anxious about that response itself, because one feature of the Internet that many people celebrated originally was the sense in which it created a space where people could communicate and exchange ideas independent of local geography. And I think the central argument in the first part of my book is, basically, that is a dying characteristic of cyberspace. Increasingly, cyberspace will become a place where your rights and abilities will be a function of your citizenship or the citizenship you are able to demonstrate you hold, and that will make it increasingly "zoned" in the way that real space is zoned, to have different rights depending on where you come from.

PROFESSOR POST: Forgive me for thinking this is not unlike carving up the new world. I mean, they did that too. They drew a line. They imported old boundaries, in a sense—the old sovereignty of the old world was simply mapped onto the new world, and they drew a line—Spain gets this territory and Portugal gets that territory. We have a medium in which those lines are not apparent, and it has shown us in ten years that that is extraordinarily powerful. How wonderful it is that we can communicate across boundaries and form new forms of fluid communities of interest across national boundaries. To reimpose the boundaries of the "real world," if you will, onto this medium, we can probably do it—I think that is correct. We have the technology. We could re-jigger this network so that

there is a French part of cyberspace and there is an American part of cyberspace and there is a Philadelphia part of cyberspace, so that it looks like the real world. I can't imagine why we would want to do that. Why would we forego the opportunity of seeing what a truly global world is like and the opportunities that it presents?

QUESTION: I am curious about the panelists' own theories and arguments. What do you believe are the ramifications from the fact that there is some resistance to technology and also some lack of accessibility to technology? Resistance from people like my Grandma, who doesn't necessarily want to get on the computer, and the concerns being expressed about the lack of accessibility of people in lower socioeconomic groups. What are the ramifications from those two facts?

PROFESSOR ROSEN: Well, to the degree that this democratic space relies on the participation of all, I suppose we would really worry about growing class divisions between the wired and the not-wired. I'm not a Net utopian. There is no reason not to have some pluralism here. If the studies are correct, which suggest that the Net is more of an amplifier rather than a substitute for real space interactions, then it is just as foolish to assume that putting a terminal in every classroom is a substitute for traditional learning as it is to assume that free access is a complete solution. So, I would tolerate some diversity of usage, at least in the beginning.

PROFESSOR POST: Consider this. We know over 99% of American households have television. It is extraordinary, really, when you think of it. It is ubiquitous. It's cheap. People seem to like it. I have one. I like it. I think we always should be worried about any unequal distribution of resources, but, quite frankly on this one, I am not all that worried. Since the issue surfaced two or three years ago, and people started talking about it, the price of a machine to have Internet access has dropped dramatically. You can get a \$399 box now. That is practically like a TV, almost. It will be there in a couple of years. Many people who don't have one don't think there is anything out there that they are terribly interested in, and maybe they are right. The choice not to participate always is open to people. I think most people will not make that choice over time. In a sense, to me, this is a simple problem because it is largely about whether to spend money, whether to subsidize the purchase of Internet-ready boxes. I think that is probably unnecessary because I think this is one place where the market is functioning incredibly well. And it is the best way to drive cost down and get 99% of the American households to have Internet access in a few years, which is what I suspect will happen.

PROFESSOR LESSIG: I want to disagree. There is one flaw in where we are going that I think will make this increasingly a problem. There is a guy named Nicholas Negroponte, who is a theorist from MIT, who came up with the idea called the "Negroponte switch."⁵ He said that everything that is going across the wires will soon be wireless, and everything that is wireless will soon be on the wires, and that is what the future is about. That is true in the context of Internet access, too. There already are technologies for sharing spectrum—spread spectrum technology or ultra-wideband spread spectrum technologies—that could give very cheap, very, very fast Internet access to a large group of people almost immediately. One guy pushing this is a guy named Duane Hendricks, who used to work for the FCC. He finally got tired of the FCC's bureaucracy and said, "I'm going to go out and build myself a spread spectrum network." His lawyers said, "You can't do it in the United States." So, he went to the Kingdom of Tonga, and he persuaded the prince of Tonga that he should be allowed to use spectrum as he wants in Tonga, and he did. They set up this system to give faster Internet access over the air than you can buy from AT&T or from any broadband supplier right now. The essence is that, in Tonga, you just pay for the equipment, which is falling very quickly, as the market supports it, to \$100-\$150. Then you get fast, 11-megabits-a-second Internet access for free. Now, Duane then says, in effect, "we should be able to have this in the United States." He and my clinic at Stanford are now going to six Native American tribes in the United States and, as part of their college programs, we are going to set up these spread spectrum networks on these Native American reservations and then go to the FCC and say to the FCC, "We are sovereign nations and we can order our spectrum the way we want, and we are just telling you that this is the way we are ordering our spectrum." And they will get essentially free Internet access across the air. This is being resisted outside of Tonga and outside of these Native American tribes because there is an alternative way the spectrum is being allocated right now. The big move was to get away from the government licensing spectrum and to get to the market licensing spectrum. Both of these are ways of allocating spectrum use, as opposed to the way the Internet allocates access to resources, which is just to open it up and let people use it as they need it. And so there is this race to sell off spectrum, which will be used by existing businesses like Lucent Technologies and Motorola to protect their way of doing business against the Duane Hendricks types and ideas like his. There is a very particular example where this is happening currently in the bill that finances Net

5. See Nicholas Negroponte, *Wireless Revisited* <<http://www.media.mit.edu/~nicholas/Wired/WIRED5-08.html>> (Aug. 1997).

access for schools—the McCain bill.⁶ The proposal says, “we’re going to wire the schools”—and they mean literally “wire” the schools. So, people would come forward with wireless technology and say, “Instead of spending half a million dollars running wires from a certain place into a school and running it around the school, let’s set up this spread spectrum technology.” It was written into the bill that this was not possible, however. You had to use actual wires, and that meant that the program was going to send money back to the cable providers or to the telecom companies instead of paying anyone using the spectrum technology. So, that’s a way of tilting the market to create scarcity that might cause this problem when, right now, so long as it is on the regulated wires, it doesn’t matter.

QUESTION: Our record predicting the impact on society from technologies—the automobile, the phone, and so forth—has not been particularly good. I want to ask each of you what gives you the most concern about what you have talked about today—where you might be wrong or where you might end up years from now and say, “why didn’t I see it coming”? We’ve had fairly optimistic reports, or notions that what we are doing seems right. But what are the red flags that you see in your own thoughts?

PROFESSOR POST: My thought is completely free of all red flags.

[LAUGHTER]

PROFESSOR POST: That is a hard question.

PROFESSOR LESSIG: There is a great essay by Bill Joy in *Wired Magazine*. If there is a “foundational father” in this stage, he is certainly one. He worked for Sun. He sort of developed Unix as a standard that was spread widely among universities. Joy wrote this piece about the dangers of the future, and it’s a really terrifying piece.⁷ He talks about how the technologies we are developing for the control of nano-technologies—the control of things at the smallest level—are liable to get out of hand so quickly as to completely redefine what it means to be human. So, he talks about devices that get integrated into humans that are out there and being developed right now. Very quickly, before we realize it, we will have transformed the meaning of things that are to us, right now, very taken-for-

6. FY2001 Labor, Health and Human Services and Educations Appropriations Act, H.R. 4577, 106th Cong. (2000).

7. Bill Joy, *Why the Future Does Not Need Us* <http://www.wired.com/wired/archive/8.04/joy_pr.html> (Apr. 2000).

granted. Now, sometimes I try to convince myself to be worried the way Joy is, because he certainly is smarter than I am, and he knows this stuff much better. Although maybe it is just a rare moment of optimism that I have, I sort of ignore it and say that's not really something that we have to worry about any more than people worried about whether to stop science 20 years ago, or 50 years ago, or a hundred years ago.

PROFESSOR ROSEN: I am worried about the phenomenon of group polarization. I painted a kind of sunny picture about how democratic shaming can operate in a world where people disagree about standards of behavior merely because of the incentives to get good reputations. But this recent experience that we see with the Supreme Court is not only distressing because it is bad when a trusted branch of government finds its authority undermined. It just may be harder and harder as society gets more democratic for people to escape from the prisons of their own partisan preconceptions. So, Cass Sunstein, in his interesting new book *REPUBLIC.COM*,⁸ discusses the surprising phenomenon that juries, after deliberations, will often arrive at damage verdicts higher than that named by any individual juror before the deliberations began. People get more extreme after deliberations. Why is this? There are two reasons, he says. Ordinarily, when groups without strong positions deliberate, people in the extremes can move to the middle. That's why in presidential campaigns we have centrist candidates. But when you have groups where people have pretty strong positions in advance, after deliberations the opposite happens. The means move to the extremes for two reasons. First, because people in polarized groups don't want to be unpopular with their friends. They like to signal that they are a member of the "good group." And even if they have doubts about the legal merits of the position, or the political merits, they will emphasize their certainty. That's why after Election Day we saw the country behaving like polarized molecules moving more firmly towards the positions they were only tentative about on November 4th. And the second is an informational problem. When you have isolated groups, people just don't get to hear arguments from the other side. So, once the dispute becomes legalized, the different teams will form into armed camps, and they just won't listen to opposite information that might change their points of view. This is a strong challenge to my more hopeful notion that democratic reputation mechanisms on the Net can lead to healthy social consensus and to the new formation of manners. Because if it is true that we are able to self-select and become more atomized, to basically interact only in spaces that confirm our preconditioning and biases, and if these biases do become more extreme as we spend time in these isolated groups, then the very social costs of

8. CASS SUNSTEIN, *REPUBLIC.COM* (2001).

the "legalized self" that I discussed might become all the more acute on the Net as we become more separate, resentful, polarized, and exaggerated. The laments about the criminalization of politics, the increased acerbicness and the lack of civility in public life have all become trite now. But it would be distressing, wouldn't it, if this logic of democracy were to infiltrate not only our political life, but social life, and to make us more separate, more resentful, and more polarized as a result? So, I am very concerned about this.

PROFESSOR POST: I was only kidding, by the way. Let the transcript reflect that when I said there are no red flags in my thinking I was just joking. Will I be able to amend my remarks?

PROFESSOR BAKER: Yes. Just like in Congress. . . .

PROFESSOR POST: Thank you. There is the Orwellian vision that I think we have to keep in mind. I mean, we have to keep that in front of us. I think the technologies do allow a kind of control that can be monopolized—whether or not it is the state, Big Brother, that is, whether it is in public or private hands, I sort of agree is not the central question. The central question is whether there is some central authority that is in control of how this network develops. But then I think there could be. I'm worried about internationalization of law for that reason. Imagine a "world's copyright law"—if there were such a thing—that would resemble the copyright law of individual countries which already exist on behalf of individuals to protect and enforce property rights for private gain. The pressure at the international level will be a hundredfold greater, and the institutions at the international level are a hundred times less likely to resist that pressure because they really haven't been built to do that, and they haven't faced that kind of pressure before. So, I'm deeply concerned about a world copyright law that would fix some particular principles in place in the future and forever afterward. I want to say one thing, too, when you ask what might be wrong with my own thinking, where am I going to look back and say, "I screwed that one up." One does get a kind of humility immersing oneself in Thomas Jefferson's work, not the obvious humility as "Geez, he's ten times smarter than I am." It's not even that. It's that Jefferson was so wrong about a lot of things. He was an indispensable party, if you will, to the formation of the United States. But on the other hand, if it all went his way—there was a lot of wacky stuff in what he was proposing. A lot of it. He needed Hamilton, who himself had a lot of wacky stuff in what he was proposing. He needed Madison. They needed each other. There is a wonderful book by Joseph Ellis, *Founding Brothers*,⁹ about the

9. JOSEPH J. ELLIS, *FOUNDING BROTHERS—THE REVOLUTIONARY GENERATION* (2000).

network of relationships among the people who were most instrumental in forming the United States. And I think this notion of everybody playing-off one another is critical, because no one vision has it right. No one vision will ever have it right. And I'm sure mine doesn't have it right. And even to the extent that I am capturing Jefferson's vision, I am sure there are terrible holes in it. There is an inevitable need for a kind of tension and playing-off of other visions. When I was talking to my son the other day about the environmental movement, I said there are a lot of wacky things going on in the environmental movement. But you need them. They redefine the debate. You need people going out there and chaining themselves to the trees. I wouldn't do it. I think it's not good public policy. But it moves the debate along in a way. It is a vision that gets introduced into the debate, notwithstanding the fact that there are plenty of holes in it. It makes other people look at the debate in different ways. That's all one can hope to do in a sense. I'm sure that if I were running the Internet, it wouldn't be a particularly great place. I'm sure of it because I don't understand what's coming over the next hill any better than anybody else does. But it is in the interplay of people with individual coherent visions that are different through which everybody gets to have their own vision of what the spaces should look like.

QUESTION: You have suggested that it is possible for existing governments to assert their sovereignty onto cyberspace. You have mentioned the possibility that some international entities, that might broker competing sovereignties, might prove equal to the task of "governing the Internet." What are these entities and how will they work? What is the source of law that we will apply to the Internet? Who will decide these individualized disputes?

PROFESSOR POST: I think that's a very good question, a very important question. The existing international system that we have provides a source of law, and the temptation is to rely upon that because I can't point to other institutions in the sense that work better. I sort of put myself at a disadvantage. I don't know what the other institutions are that might work better. Think for a moment about the uniform dispute resolution procedure that ICANN (Internet Corporation for Assigned Names and Numbers) has set up for trademark law. For the disputes between trademark owners and domain name holders, there is now a private system of arbitration that, in effect, is mandatory for all domain name holders worldwide. If someone claims a domain name is infringing their trademark, the dispute goes into this private system, at least for an initial resolution. That's a source of law. That's a new kind of institution that did not exist a few years ago. It makes a tiny slice of global trademark law—just the trademark law that deals with domain names—but it is still a little slice of global trademark law. I continue to think it was an experiment worthy of undertaking to

see how it would work. Is it a good institution or a bad one? Is it making good law or is it making bad law? Is it set up well or is it set up poorly? That's all we can do. I happen to think that the way that the UDRP (Uniform Domain Name Dispute Resolution Process) has functioned up to now—I could go on for hours about things I think are wrong with it—I think we could design it better—I think its skewed toward trademark holders—I think it has no precedent—there are a lot of problems with the way it has been designed. But, nonetheless, the experiment I think was a noble one in a sense. I mean, that's the thing. We have to have lots of that kind of activity and innovation going on in order to help us think about institutions which can plausibly make legal rules in this environment. Many will be failures. We will come upon some that are not failures, and eventually by consensus we will build upon those. This is new territory. So, no one can point to a set of alternatives that is particularly good right now. I don't think that is a reason for saying, "Well, then, I guess we'll go with the horse that brung us." We should not impose the legal system that is already in place—a sort of geographical sovereignty—onto this network. I don't think that's the right answer either.

QUESTION: Regarding the regulation of content on the Internet, the existing technology allows both for monitoring sites and for gathering information about users, to limit or to allow access to certain types of information—about sex, about triple-X pornography, for example. And the technology will exist on "Internet2" to create an individual passport that reveals whether or not that particular person should have access to this or that sort of site. Is that the direction we are heading?

PROFESSOR LESSIG: Well, first, "Internet2"¹⁰ facilitates identification, but doesn't mandate it. And "Internet1"—the one we've got right now—is capable of certain kinds of identification, but has not yet matured to require it. Your intuition, though, about how to think about solving the problem, I think, is a good one. My sense of where the discussion about this is right now is that, first, you've got to fear both bad laws and bad code. Bad laws are like the Communications Decency Act, which was wildly overbroad and imposed severe burdens on Web sites.¹¹ That is bad law. But what we've gotten in response to the fact that there has been no law is a lot of really terrible code. Censor-ware code, like Cyber-sitter or Net-nanny, censors wildly beyond what you would really expect it to be censoring, and it also keeps its censorship lists secret. If you are well-

10. See Katie Hafner, *As Net Turns 30, the Sequel is Still in Progress*, N.Y. TIMES, Oct. 7, 1999, at G1.

11. See *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down certain provisions of the Communications Decency Act of 1996).

known as a critic of any of these sites, then you'll find your own Web site on their censored list. So, we've had no law for awhile, then we've had the market create lots of terrible code out there that goes beyond what the legitimate interest of the state would be. A legitimate interest of the state, it seems to me, is understood to be empowering parents to protect their children from material which is deemed "harmful to minors." Now, there are conceptually two ways you might do that. One is that you could say Web sites that have material that is deemed harmful to minors—and of course now we have to have a long discussion about whether or not we can really figure that out—must put some kind of identifying mark on their site. And if they did that, then the market would develop browsers as a trivial matter that could block out all sites that have that mark on it. So, you would have a G-rated browser that would essentially make it so that you couldn't see any of these non-conforming sites. The other way of doing it is that G-rated browsers would basically broadcast "this is a G-rated browser," and so the sites would be required to block out G-rated browsers who try to visit sites that are deemed harmful to minors. The problem with the second solution, although it could be worked around, is that it is as if children on the Net were waving their hands and yelling—"Here I am, a child"—and that makes it easy for predators to prey on them. The burden of the first one, people will say, is that the state would be telling the Web sites what they must say. It is forced speech. Now, because I'm so concerned about bad censor-ware out there that is doing much more censoring than the state legitimately should be, I'm less concerned about the fact that it is the state telling Web sites what they must put on their site. First of all, you wouldn't have to actually put it on the Web site. It's a hidden tag. It would, basically, be in the HTML code signaling what kind of site it is. You wouldn't be rating according to seventeen different ways of rating. You'd only have to make a judgment in the same way that stores selling pornography right now must make a judgment about whether their material is subject to any number of state laws. I think there are 36 different state laws that regulate materials harmful to minors. So, it seems to me preferable to have a state burden that is relatively minimal, which would then facilitate a wide range of market solutions to take advantage of this additional bit of information in cyberspace identifying what kind of material this is—and thus facilitate people blocking that kind of material—without also facilitating the censor-ware companies efforts to block out people who criticize Net-nanny or Cyber-sitter, etc.

QUESTION: I'm curious to hear your perspective on the Commerce Clause. I have in mind the state laws and regulations that affect Internet commerce. For example, living in Iowa it may be illegal for me to purchase wine from a California winery. This applies to state taxes and outright state prohibitions on

commerce that is interstate commerce for products like alcohol, cigarettes, and gambling and other goods and services. Is this a Commerce Clause problem?

PROFESSOR LESSIG: It's a good question for everything except alcohol, because the Twenty-first Amendment expressly reserves to the states the authority to regulate in that area. It is not absolute, and there has been a constant question about how to interpret it and what the scope of it is. But this is a carve-out to the ordinary rules governing interstate commerce. Right now, what you see is that many states have structured it so that they do permit sales into their state from out of state. So, if you go to *evineyards.com*, you will have to say where you are coming from and that will determine whether in fact they can sell to you, depending upon whether they have these permissions from these different states. I do think in the other areas you are talking about that the states' ability to interfere with interstate commerce becomes much less significant to the extent people can just use this technology to evade the taxes and the prohibitions.

PROFESSOR POST: An increasing amount of state regulation becomes at least subject to challenge on Commerce Clause grounds. It was, of course, the *American Library Association v. Pataki*¹² case, which is, I think, still a sleeper in Internet jurisprudence. I think it was an important case and is an important opinion. It's growing, like a little mushroom. It's at the bottom of the forest floor. It's not yet been appropriately fertilized and gone into bloom yet, but it might. New York State had its version of the Communications Decency Act, in effect, that prohibited Web sites from transmitting material that was "indecent," and the district court in that case struck it down, not on First Amendment grounds, but on grounds that it was a violation of the Commerce Clause. It was interfering with this national network, very much like the analogy that was made to the interstate highway network. States cannot put-up barriers in the interstate flow of goods and services. The district court, I think quite plausibly, interpreted this law as such a barrier and held it unconstitutional. And I think there will be more challenges of that kind. The dynamic is very interesting and very complicated. At the same time there is, of course, this rebirth of federalism politically, the whole movement for devolving more regulatory authority to the state. And even now, within that movement, there is a small group of people who are saying with respect to the Internet that regulatory authority should be moved to the state capitols in a sense, insisting that would be an affirmatively good thing. And I think it's complicated because, in a sense, I'm looking for mechanisms to increase the diversity of rule making, if you will, to preserve the diversity of rulemaking on the Net in the face of this enormously powerful

12. *Am. Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

harmonization dynamic and internationalization. I think it would be very important to find institutions which can build their own regulatory regimes. And if states serve that purpose, maybe that's a good thing. But at the same time we have a sort of end-to-end Commerce Clause notion that states shouldn't be interfering with the movement of bits around this network. It's a complicated, but a very important issue. I think we'll see a lot more. Those of you who are students in the room, if you didn't pay attention to all that dormant Commerce Clause stuff in Con Law—I understand, believe me, I understand—but go back to it. To understand the Net, I think it will be important that we are more conversant with the kinds of issues that the Commerce Clause raises.

PROFESSOR BAKER: We have time for one more question.

QUESTION: In terms of looking at all the issues of asserting state court sovereignty and thinking about the international community, as well, on the Internet, how do you propose solving the complicated issues of personal jurisdiction?

PROFESSOR BAKER: It is time to close, we've moved from constitutional law to civil procedure. . . .

PROFESSOR POST: There is, of course, a constitutional dimension to personal jurisdiction, at least in this country. I hope that question wasn't directed at me. Did I give any idea that I would solve the problem? We can go back to the Yahoo-Nazi memorabilia episode, I suppose. It is related, although it is not identical to this problem of reaching out over one's borders in order to assert your control or your power over them, your law-making power and the power of your courts to actually grab people. Right now, the answer internationally to the jurisdiction problem is actually quite simple. If I am a lawyer for a multinational corporation, or a lawyer for somebody who has a Web site, which makes you multinational in some sense, and my client were to ask me, "Am I subject to personal jurisdiction in—name your country—Singapore because I'm on the Net? Does that mean they can sue me for violating some Singaporean law of which I'm not even familiar or have never even heard of?" My answer is a relatively simple one, which is to answer the question, as always, with a question. And the question I would ask my client is, "Do you have assets in Singapore?" And if the answer is "no," then I would tell my client "Don't worry about Singapore anymore." That is, as a practical matter, the answer to the jurisdiction problem right now. If you have assets in a foreign country, they can be seized. And the court can exercise jurisdiction. If you don't, it is far more difficult—not impossible, but nearly impossible—under the current legal regime. I don't know if that's a good answer or a bad answer. It's the one we have. I guess my

instinct—Larry Lessig was talking about going slowly—this might be an area where we do want to go slowly. We want to see how these jurisdictional rules play out in this Internet environment. There has been a move—there is an international convention on jurisdiction. The Hague Convention¹³ on the enforcement of judgments would allow Singapore—even if you have no assets there—to render a judgment against you and then come to the United States and say, “I want the courts in the United States to enforce it against you where you reside and against your assets located in the United States.” There has been an enormous controversy, a healthy controversy, I think, about the Hague Convention, because allowing countries to do this too easily, I think, really does threaten some kind of balance out there on the Internet. I think that is a very worrisome trend. Iowa and Pennsylvania have that agreement—you can get a judgment in Iowa, you can go to Pennsylvania, and you can get my bank account. But that’s because we have a common Constitution. I mean, we agreed to that, you and I. We need to think a bit more about it, whether we agree to that, really and truly, in the international context or not. I am heartened by the fact that the Hague Convention has run into all sorts of objections on both sides of the ocean, and we are not rushing headlong into a solution of that problem. I don’t think anybody knows what the solution to that problem is.

PROFESSOR BAKER: Thank you. That brings us to the conclusion of our Symposium this afternoon. We are out of real time. I want to draw your attention to the flyer in your materials, however, because there is going to be a follow-up virtual Symposium, sponsored jointly by the Constitutional Law Center and law.com, on *The Constitution and the Internet*. This online seminar will include the three papers and presentations that we heard today from Professors Lessig, Post and Rosen. These three distinguished panelists and several other prominent commentators and lawyers will participate. Registration is free. If you are interested in continuing today’s discussion, please join us for the online seminar, which begins February 26th. Now, please help me thank our speakers and everyone who contributed to making this Symposium possible. Thanks again to the Belin law firm. Thank you to Editor-in-Chief Brian Fagan and the law review. Thank you to Linda Quinn and the staff. Most importantly, thank y’all for attending. I hope to see you next year.

[APPLAUSE]

13. See *Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* <<http://www.hcch.net/e/conventions/draft36e.html>> (amended version adopted Oct. 30, 1999).

