In Search of Jefferson's Moose: Notes on the State of Cyberspace

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While Thomas Jefferson was the United States Ambassador to France, he arranged for an entire carcass of a moose to be sent to France. This large, impressive, and majestic animal was calculated by Jefferson to wow the French. In the book *In Search of Jefferson's Moose: Notes on the State of Cyberspace*, David Post uses this story as a backdrop to explain the conflicting world views of Jefferson and Alexander Hamilton, and how their arguments about the future of America pertain to the future of cyberspace.

David Post, though he purports to merely start the discussion, advocates for the Jeffersonian view that small self governing units, loosely linked together as peers, is the ideal form of governance for the internet. In this review, I will concisely explain Post's viewpoint, and disagree with several aspects of his Jefferson-centric view of the future of cyberspace. Just as the future of America was based more on a Hamiltonian model, so should the future of cyberspace be based on such a model. Jeffersonianism should be relegated to the same place as Plato's Forms, as an idealistic and interesting mental exercise, with little practical application in the real world.

Throughout the book, David Post compares individual aspects of cyberspace to Jeffersonian thought. For example, he speaks of Jefferson's love of maps, and then goes on to describe how the internet cannot be mapped. He uses these sections to expound on Jeffersonian

thinking, so as to apply his thinking to the problems which are presenting themselves in cyberspace.

The first cyberspace problem addressed is the problem of scale. The problem of scale involves how to make something small grow bigger. Some systems are not capable of scaling up, others scale up exponentially. As Post points out, turning small into big can be tricky because scaling problems "can be…profoundly difficult to solve."[1] To solve this problem, the TCP/IP network became decentralized. Being able to add any machine to an existing network, at any point on the network, "sounds like a good way to grow big in a hurry."[2]

While the first problem deals with numbers and growth, the second problem deals with bringing order to the chaos. How should the internet be governed? "The code is law on the network in the sense that, like law, it constrains what you may or may not do there."[3] Post explains that the rules of the internet are set by anyone who "wants to participate in the process of setting them, through an organization that has no formal legal existence or fixed place of operation or salaried employees, that is open to anyone who wishes to join, that has no dues or other membership requirements, and that takes action only when there is consensus among everybody involved that it should do so."[4] The body that he is describing is the Internet Engineering Task Force (IETF). This group publishes and maintains the set of documents that, collectively, make up the "official" protocol set for the global TCP/IP network. This group, however is not created by any government, and is not given a sanction for their functions. Post also describes the Internet Corporation for Assigned Names and Numbers (ICANN), a California nonprofit corporation, that was formed to govern the distribution of domain names. This group

[1] Post at 60
[2] Post at 89
[3] Post at 129
[4] Post at 134

was formed, by mandate of the U.S. government, when the problem of "cybersquatters" became pronounced. These squatters would take over the domain names of already established businesses (such as McDonalds.com), and then sell them for a great deal of money. ICANN was given gatekeeper power, "the power to decide who gets in and who doesn't, the power to make machines vanish from the inter-network".[5]

But while Post discusses at length how code is law, there is real-life law that also governs the internet. Which jurisdiction's law governs in the internet? Post breaks this conflict of laws question into two schools of thoughts: Unexceptionalists and Exceptionalists. Unexceptionalists see nothing unique in the fact that the interactions are taking place in the internet. If harm is caused within the borders of a jurisdiction, then it is reasonable for that jurisdiction to attempt to exert legal authority.[6] Cross-jurisdictional law suits will not become a widespread problem because unless someone is actually in a place, or has assets in a place, it will be impossible for that jurisdiction to enforce their laws. On the other side are the Exceptionalists. These people argue that "applying jurisdictional principles that were developed to deal with real space border-crossing transactions to network transactions leads to troubling and perhaps even absurd results" in the context of cyberspace.[7] This is a place where "the 'significant effects principle' cannot sensibly resolve jurisdictional questions."[8] Post's solution: global law for the internet; a set of laws that everyone across the globe agrees upon. This law would be set up, not by the United Nations or any other state, but instead of those within the internet community. These self-

[5] Post at 162
[6] Post at 167
[7] Id.
[8] Id.

governing communities would make their own law, "deciding for themselves how they'd like to order their affairs".[9]

Post wants to use Jefferson to help think about cyberspace; "asking the questions he asked about his complicated, strange places to help us understand ours."[10] However, Jeffersonian thinking is idealism to the extreme and does not function well in the real world. Post would dispute that idea, but just as America is basically a country based on Hamiltonian principles, so will the internet continue to thrive by following those principles, rather than Jefferson's utopian model.

Jefferson believed that the strength of the republic was located in the "diffuse energies of a free society…[and] feared the irresponsibility of rulers independent of [the people]"[11] Jeffersonians think centrifugally, outwards from the center. The Internet is, according to Joseph Ellis, "the perfect Jeffersonian environment."[12] It is "all decentralization and disorder, growth and expansion, a frontier that is constantly expanding and seemingly illimitable."[13]

Jeffersonians envision a hands off, decentralized, internet. The interested parties should work things out among themselves, without interference from the government. Only recently has the government gotten involved in the problems of internet governance. Post looks at Jefferson's principles for governing the West and wants to apply them to the Internet. Jefferson's principles consisted of the following: 1) settlers were free and independent of all the world, possessing, as a natural right common to all, the right to form self-governing communities and to live under law of their own choosing; 2) government would emerge in the new territories from the bottom up, as settlers created their own law to govern their affairs; and 3) eventually,

[9] Post at 185
[10] Post at 18
[11] Post at 107-108
[12] Joseph Ellis, Founding Brothers (2000)
[13] Post at 117

these new, self-governing, units would join the existing Union as equals.[14] Post would have this same pattern proceed in the internet "community," with the members of the community setting their own laws and rules, with government inevitably emerging from nature.

Hamiltonians of the world would disagree. The debate between Hamilton and Jefferson remains relevant hundreds of years after the debate was won by Hamilton. We are essentially living in a Hamiltonian country. Jefferson's vision led to chaos and civil war. Hamilton's vision led to world dominance and a 233 year old democracy. It stands to reason that the internet debate should be won by the Hamilton school of thought.

Hamiltonians, generally, favor increased centralized power over cyberspace. They think centripetally, towards the center. To forsake a strong government would be to bring about "despotism or anarchy….dismemberment or dissolution."[15] Such complex systems as the internet require coordination to function effectively, and the government needs to take responsibility for that, "or the whole system will spin out of control and the Internet will fragment."[16] In the area of domain names, the Hamiltonians have already won. ICANN, discussed above, was designed to take control of a system that was spiraling out of control. Hamilton would say this is what needs to happen to the internet as a whole in order to keep it under control. Hamilton rejected the Jefferson idea of self-governing communities. The Louisiana territory only came under control and became part of the Union after the government and the army made their way west to protect settlers from Indians, French, Spanish, and British. Government did not emerge from nature, as Jefferson postulates, it came with the help of the U.S. government.

[14] Post at 172-176. *See* "Plan for the Government of the Western Territory", Papers of Thomas Jefferson.
[15] *See* Richard Brookhiser, Alexander Hamilton: American (1999).
[16] Post at 156

Jefferson's ideas have very little practical effect in the world, and are not applicable when talking about the future governance of the internet. The first problem that Post discusses is the problem of scale. He claims that Jeffersonian decentralization allowed the internet to scale up ever bigger. He attempts to take Jefferson's purchase of Lousisiana and compare it to distributed routing, but the analogy does not hold up. Jefferson bought Louisiana to give yeoman farmers more room to grow their food and river-ways to ship the products of their labor. He did not do it, primarily, to increase the size of the country. Jefferson cared nothing about the size of the United States. In fact, he preferred a European set-up of many different independent states. Jefferson was not attempting to "scale up" the American Republic, because the prevailing assumption of the day was that only small, city size, republics could function effectively. The United States "scaled up" because Americans got to the West first, and were able to start from scratch. The Native Americans in the area were not there in large populations, nor were there substantial European populations, with the exceptions of New Orleans and Mobile. Grecian Republics were not able to expand because they did not have a blank slate to expand out to. Athens had Sparta in its way. Not so with the American Republic. It was more of a Hamiltonian expansion than a Jeffersonian one.

The second problem is the governance of cyberspace. Post stresses that the internet has worked well using decentralized governance, without government interference. However, this glosses over the problems that have occurred. These problems include intellectual property disputes, conflicts of jurisdiction for crimes that occur on the internet, and scandals involving domain names. All of these disputes, and more, have arisen because of the lack of government oversight. The government has slowly taken a stronger hand to solve the problems through our representative, democratic, system.

When you allow people to do what they want, without governance, you get chaos and mob rule. In a Lockean state of nature everyone is good and virtuous. For Locke and Jefferson, government is best which governs least because it is society that has introduced evil into the world: an interesting theory in the abstract. The Hobbesian and Hamiltonian view of the world, however, is more correct. People need to have structure and guidance or the result will be fragmentation. Representative government, devoted to the collective interest, must rule in the internet. When government steps aside, "it is not as if paradise prevails."[17] We should ask whether freedom is protected, "not whether government threatens freedom."[18]

Hamilton's views need to be instituted in the governance of cyberspace. As Post points out, the internet is expanding exponentially. This geometric growth is incredible and leads to many legal implications. In this growing area of cyberspace, who is to adjudicate disputes, and enforce laws? Is cyberspace to be a lawless, anarchic, region? It cannot be; the stakes are too high. Beginning with ICANN and the domain name controversy, government has begun to move into the internet. With so many people on-line, government regulation is necessary. Otherwise, how will people who are harmed on the internet seek redress? Utopian self governance will not work, as has been shown by Napster. If self-governance had its way, Napster would still be around, and there would be no intellectual property protection. We stand on the edge of an era when "fundamental choices about what life in cyberspace, and therefore, life in real space, will be like. These choices will be made; there is no nature here to discover."[19] Jeffersonians pretend that "if we just get government out of the way, things will take care of themselves."[20] Eventually, government came to the West. It is time for government to come to the Internet.

[17] Lawrence Lessig, Jefferson's Nature, at 16, November 19, 1998.
[18] *Id.* at 13.
[19] *Id.* at 16.
[20] *Id.* at 12.

This is an interesting, though ultimately wrong-headed, book. I recommend it, if only to give guidance as to what not to do in terms of internet governance. David Post over idealizes a man who contradicted himself in words and actions throughout his career. One quote David Post uses from Jefferson states as follows: "Everyone takes his side, according to his constitution and the circumstances in which he is placed. Opinions, which are equally honest on both sides, should not affect personal esteem or social intercourse."[21] While this is what Jefferson wrote, he did not practice this honorable dictum. Instead of having an honest debate with President Adams and Mr. Hamilton, he dragged their good names through the mud, paying newspapermen to write slander about them and their ideas. That is the true Jeffersonian legacy; partisan politics and deception. His version of governance led to the Civil War. Hamilton's vision led to prosperity and democracy. Cyberspace as it is now might be a Jeffersonian place. But Jefferson didn't write the code, and he won't be there to protect it "as its authors work to change it."[22] Take this book with a grain of salt and read it along with Hamilton's own words, which are given short shrift in this forum. The internet has been a Jefferson place, now it needs a Hamilton to lead it into the real world.

[21] Post at 206.
[22] Lessig, *supra* note 17, at 5.