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Building the Bottom Up From the Top Down

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Abstract: "Bottom up" governance. "Self-organization." These are among the most talismanic virtue-words of modern political discourse. Yet the reality is that in politics, "self-organization" is rare, being hard to initiate and even harder to sustain. As Oscar Wilde once complained about socialism, it "requires too many evenings." Governance as we tend to know it depends primarily on hierarchical institutions, or on close coordination within small groups. True partnerships, conversations among engaged equals, do not seem to scale. Indeed, whether one believes the fundamental problem to be something about the economics of group formation, the iron law of oligarchy, or something in between, experience demonstrates repeatedly that the problem of group self-organization, not to mention self-governance, is all too real both in politics and other walks of life. Enthusiasts of modern communications have not been slow to point out the ways in which the Internet (and the cell phone) change the ways in which all types of groups form and communicate. For example, Internet-based 'social software' drastically lowers the cost of group formation and offers at least the potential of tools that may make group self-governance more practicable.

While this optimism is valuable and may some day be realized, the current reality falls far short of the ideal and seems likely to do so for the foreseeable future. This paper suggests that existing institutions could be harnessed to grow the tools and nurture the conditions that promote self-organization of groups and democratic decentralized self-governance. I identify eight specific governmental policies that could usefully be adopted in any relatively wealthy liberal democracy to promote the formation of groups and assist them once they are formed:

1. Democratizing access to communication by ensuring that the communications infrastructure is widely deployed, inexpensive, and of suitable quality.

2. Enact legal reform (if not already in place) to prevent cyber-SLAPP lawsuits.

3. Apply competition law aggressively to markets for communications technologies in order to ensure that no software or hardware maker can exert control over citizens' means of communication.

4. Provide reliable data, and act as honest archivist.

5. Assist those who desire aid (but only them) to fight spam and other forms of discursive sabotage.

6. Ensure that Meetup-like services are available at low (or no) cost (if demand for these key services proves to be elastic as to price) and subsidize facilitative technologies, such as group decision-making software.

7. Enact a digital workers rights policy including a component that encourages digital or even physical meetings.

8. Provide a corps of subsidized online neutrals to settle non-commercial disputes among members of virtual communities.

I. INTRODUCTION

> At the start of this campaign we had a very simple idea
> which is: Change in America doesn't start from the top
> down, it starts from the bottom up. That change is brought
> about because ordinary people do extraordinary things.
>
> — Barack Obama, Aug. 27, 2008[1]

"Bottom up" governance and "self-organization" are among the most talismanic virtue-words of modern political discourse. Yet the reality is that in politics, "self-organization" is rare, being hard to initiate and even harder to sustain. As Oscar Wilde is reputed to have complained about socialism, it "requires too many evenings."[2] Governance as we tend to know it depends primarily on hierarchical institutions, or on close coordination within small groups. True partnerships, conversations among engaged equals, do not seem to scale. Indeed, whether one believes the fundamental problem to be something about the economics of group formation, the iron law of oligarchy, or something in between, experience demonstrates repeatedly that the problem of group self-organization, not to mention self-governance, is all too real both in politics and other walks of life.

Enthusiasts of modern communications have not been slow to point out the ways in which the Internet (and the cell phone) change the ways in which all types of groups form and communicate. For example, Internet-based 'social software' such as Facebook, Meetup, and MySpace[3] drastically lowers the cost of group formation and

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[1] Kevin Vaughan, *Stormy Primary Season Left Behind as Clinton Throws Votes to Obama*, ROCKY MOUNTAIN NEWS, Aug. 28, 2008, http://www.rockymountainnews.com/news/2008/aug/28/stormy-primary-season-left-behind-as-clinton-to.

[2] OSCAR WILDE, A LIFE IN QUOTES 238 (Barry Day ed., 2000).

[3] There is a growing legal literature looking at the legal and social consequences of these tools, including Dina Epstein, *Have I Been Googled?: Character and Fitness in the Age of Google, Facebook, and Youtube*, 21 GEO. J. LEGAL ETHICS 715 (2008) (exploring the ways in which traditional bar admission standards interact with the way current law students share information online); Robert P. Latham, Carl C. Butzer & Jeremy T. Brown, *Legal Implications of User-Generated Content: Youtube, MySpace, and Facebook*, 20 INTELL. PROP. & TECH. L.J. 1 (2008) (discussing issues of intellectual property rights, defamation, and privacy rights as related to user-generated content); Matt Maher, *You've Got Messages: Modern Technology Recruiting Through Text-Messaging and the Intrusiveness of Facebook*, 8 TEX. REV. ENT. & SPORTS L. 125 (2007) (addressing the use of

offers at least the potential of tools that may make group self-governance more practicable. In its current form, social software has many virtues, and some vices, but aiding self-governance does not seem to be chief among either.

In November 2004, the British think tank Demos, an influential advisor to then-Prime Minister Tony Blair and the New Labor Party, issued an iconoclastic paper entitled *The Pro-Am Revolution*.[4] Demos argued that advances in technology and culture increasingly are being driven by a new breed of serious hobbyist: "amateurs who work to professional standards."[5] Accordingly, the paper was infelicitously

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text messages, Facebook, and MySpace in the recruitment of high school athletes by NCAA athletic coaches); Cheryl J. Eisner, *MySpace in a Post-Grokster World: Digital Finger Pointing for Offenses Perpetrated Through Use of Social Networking Sites After MGM v. Grokster*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 467 (2008) (using the case of MySpace v. Doe to determine whether or not courts should impose secondary liability on interactive computer services for illegal acts committed through the websites); Matthew C. Ruedy, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J. L. & TECH. 323 (2008) (discussing the issues and challenges associated with creating cyber bullying laws, from the decision to create such laws in the first place, to the difficult First Amendment restrictions posed by the "true threat" and "imminent incitement" doctrines); Ryan Lex, *Can MySpace Turn Into My Lawsuit?: The Application of Defamation Law to Online Social Networks*, 28 LOY. L.A. ENT. L. REV. 47 (2008) (applying the history of defamation on the Internet to the current generation of MySpace users); Patricia Sanchez Abril, *A (My)Space of One's Own: On Privacy and Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73 (2007) (putting forth reasons why privacy and personality should be protected on online social networking sites); James Grimmelmann, Facebook and the Social Dynamic of Privacy (August 25, 2008) (unpublished manuscript, on file with New York Law School), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1262822 (describing the social privacy dynamics on social sites like Facebook and then evaluating various policy interventions); Adam Thierer, *The MySpace-Ag Agreement: A Model of Conduct for Social Networking, available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092206 (raising questions of privacy and security in the aftermath of the Principles of Social Networking agreement between MySpace and the forty-nine state Attorney Generals); Sheerin N. S. Haubenreich, *Parental Rights in MySpace: Reconceptualizing the State's Parens Patriae Role in the Digital Age, available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1217872 (postulating the government should act to ensure minors do not cause themselves any long term harm from their internet social activities).

[4] DEMOS, THE PRO-AM REVOLUTION (2004), http://www.demos.co.uk/proamrevolutionfinal_pdf_media_public.aspx (last visited Jan. 21, 2009) [hereinafter Demos].

[5] *Id.* at 12. Others have questioned the claim that this is new, and also the claim that it is any greater than it used to be. *See, e.g.,* Stuart Cohen, *No Renegade Group Behind Linux*, BUSINESS WEEK, May 6, 2005, http://www.businessweek.com/technology/content/may2005/tc2005056_1017.htm, which argues that as regards open source programming, this story is largely a myth:

titled "The Pro-Am Revolution." The work of these Pro-Ams, Demos argued, increases 'cultural capital': "when Pro-Ams are networked together they can have a huge impact on politics and culture, economics and development. Pro-Ams can achieve things that until recently only large, professional organisations could achieve."[6] It follows, argued Demos, that if this new class is valuable, it should be encouraged, even subsidized, by the British government.

While I disagree with several of Demos's specific suggestions—notably the idea of direct subsidies—the underlying idea motivating the *Pro-Am* paper offers a healthy challenge: if we do generally agree that the public sphere, or civil society, or our life together, would be improved by having more self-organized groups and self-governing institutions, then how exactly does one get from here to there? More specifically, what role is there for government to play in encouraging the rise of new groups and new self-governing institutions? Does it even make any sense to think of building the bottom up from the top down, or is the role of academics and especially policy-makers limited to that of participant-observers and cheerleaders waiting for the public to spontaneously organize itself? This paper is an attempt to respond to that challenge.

Good discourse is at the center of liberal democratic theory. Many modern democratic theorists, such as Jürgen Habermas, rely on the right sort of discourse as a fundamental justification for the legal or political system.[7] Many other democratic theories treat discourse—whether labeled political speech or the marketplace of ideas—as an essential element of a healthy, functioning polity.[8] If discourse is so

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the romantic notion that Linux is the product of a freewheeling, loosely affiliated band of thousands of independent hackers collectively turning their backs on the status quo is no longer an accurate description of the Linux community– and hasn't been the case for many years.

Looking at the top 25 contributors to the Linux kernel today, you'll discover that more than 90% of them are on the corporate payroll full-time for companies such as HP Latest News about HP, IBM, IntelRelevant Products/Services from Intel, Novell Latest News about Novell, Oracle Latest News about Oracle, Red Hat Latest News about Red Hat and Veritas Latest News about Veritas, among many others.

[6] Demos, *supra* note 4, at 12.

[7] *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996).

[8] *E.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (stating that the First Amendment is designed "to preserve an uninhibited marketplace of ideas in which truth

central to democratic government, then finding ways to enable and
improve the quantity and quality of the sorts of groups that nurture
good discourse should be one of our very highest priorities.[9]

In the United States today, there is widespread concern that
communitarian institutions are weakening. Robert Putnam's thesis
that Americans are now "bowling alone" instead of in leagues[10]
captures an intuition that the nation which was once famously a
"nation of joiners" is now in the grip of a suburban anomie. The
substantial weakening of the union movement in the U.S. and
elsewhere, the decline of the workingmen's clubs in the UK, these and
many parallel developments remove occasions for people to organize,
although some new movements and occasions such as school Parent-
Teacher Associations partly replace them. More recently, changes in
the nature of the workplace—the rise of the home-office[11] and the
increase in call-out bid markets for even professional services[12]—
suggest that increasingly people will interact with the market as
individuals rather than as part of a team. In the future we may not
just be bowling alone, but working alone. This seems unlikely to help
groups to form, much less inculcate people in the habits of community
and cooperation that make self-governance practicable.

There is a problem here, and it needs solving. It would be nice to
provide a comprehensive roadmap for the creation and nurturing of
self-governance among spontaneously formed groups, a Habermasian
community in a box. Unfortunately, this paper is, at best, a stepping

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will ultimately prevail"); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (Harper Press
1960); THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (Random House
1970); *but see* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (rejecting
right-of-reply requirement for non-scarcity media).

[9] Works that do address these issues include CHARLES J. FOX & HUGH T. MILLER,
POSTMODERN PUBLIC ADMINISTRATION: TOWARDS DISCOURSE (Sage Publications 1995);
and BRUCE ACKERMAN & JAMES FISHKIN, DELIBERATION DAY (Yale University Press 2000)
(unpublished manuscript, presented at the Deliberating About Deliberative Democracy
Conference, University of Texas), *available at*
http://www.la.utexas.edu/conf2000/papers/DeliberationDay.pdf. Communications
lawyers inevitably face these questions when debating FCC policy, and election lawyers
confront them in the context of campaign finance reform.

[10] *See* Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J.
DEMOCRACY 65 (1995).

[11] *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS (Cambridge University Press
2004).

[12] *E.g.*, Freelance Auction, www.freelanceauction.com (last visited Nov. 19, 2008).

stone in that direction. Part of the problem is that we know too much about what does not work, but too little about what does. However, there is a more fundamental problem: before one can talk about the details of self-governance one must confront the dilemmas of self-organization. Unless groups are forming there is nothing to (self-) govern. This paper, therefore, concentrates on the first steps needed to get from where we are to where one might seek to be: the encouragement and nurturing of self-organized groups.

Fortunately, the Internet and the cell phone offer a platform for the deployment of new tools and practices that hold out the hope of overcoming some of the obstacles that tend to hold back group formation, and to a lesser extent their endurance, and healthy self-governance. Unfortunately, self-organization of groups does not always mean self-governance in any important sense, and the growth in the variety and number of groups does not necessarily translate into anything with effects outside those groups. Civil society is a very broad tent; a book club may be rewarding to its members but it translates at best imperfectly to any greater form of social action. Nevertheless, the experience of participation in a type of self-organizing and self-regulating organization may incubate habits and practices that could find wider application even if the initial groups themselves remain insular and inner-directed, that "a multitude of subspheres of interlocking, cross-pollinating, discourses would provide an environment in which an informed citizenry could revitalize the public sphere as a whole."[13] In the service of that objective, many important broader questions of self-governance, such as how the habits of self-organization are translated into more outer-directed social movements and practices, are of necessity left to another day.[14]

If it is generally agreed that the world, or even part of it, would be better off with more self-organized groups and self-governing

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[13] A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 871 (2003) (citing John Keane, *Structural Transformations of the Public Sphere*, in DIGITAL DEMOCRACY 70, 77–78 (Kenneth L. Hacker & Jan van Dijk eds., 2000)), *available at* www.law.miami.edu/~froomkin/discourse/ils.pdf.

[14] One other limitation deserves mention: this paper addresses civil society enhancement in terms of primary applicability to relatively wealthy democratic countries. While some of this discussion may happen to apply elsewhere, this should not be seen to suggest that these issues claim any priority over other, more basic, problems of elementary public health, clean water, nutrition, cessation of armed hostilities or even the provision of basic communications.

institutions, then it makes sense to explore how we can nurture and promote them. Paradoxically, it may be that existing institutions can be harnessed to grow the tools and nurture the conditions that promote self-organization of groups and democratic decentralized self-governance. This essay examines the extent to which government action might promote group formation, and identifies eight specific governmental policies that could usefully be adopted in any relatively wealthy liberal democracy to promote the formation of groups and assist them once they are formed.

II. IF GROUPS ARE GOOD WHY DON'T WE HAVE MORE OF THEM?

"That involvement and participation in groups can have positive consequences for the individual and the community is a staple notion, dating back to Durkheim's emphasis on group life as an antidote to anomie and self-destruction and to Marx's distinction between an atomized class-in-itself and a mobilized and effective class-for-itself."[15] Or, as Demos puts it, "The fact that people can pursue amateur hobbies and interests without state censorship or interference is a good measure of freedom. People with passions that draw them into civic life are more likely to have a stake in a democratic process that defends this freedom of association."[16]

While many groups—bridge clubs, reading groups—form to serve private ends, many others, notably political and charitable organizations, exist to provide goods that benefit non-members. Group formation is especially important to a healthy political culture. It has long been recognized that small, spontaneous, citizen-organized fora,

> incorporate[] the republican idea of self-defining or public good-constituting discourses as one key aspect of politics. Given pluralism, different self-defining discourses must occur at both the societal and group level. This implicitly requires different 'public spheres'– those in principle open to all and also those open to all who are members of, or who identify with, smaller, pluralistic groups.[17]

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[15] Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. OF SOC. 1, 2 (1998).

[16] Demos, *supra* note 4, at 54.

[17] C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 340 (1998).

Indeed, a number of economists and sociologists treat various forms of small group interaction collectively as representing 'social capital.'[18]

Jürgen Habermas has suggested that citizen participation in a variety of groups is necessary to establish the conditions for legitimate lawmaking. Membership in groups is an important opportunity for discursive interaction with others. This encourages citizens to view life from a variety of perspectives, and to respect each other enough to engage in honest discourse. This, one hopes, will lead participants to recognize each other as persons entitled to sufficient basic rights so as to create the personal autonomy needed to make discourse possible.[19] These understandings, Habermas argues, are all prerequisites to legitimate collective lawmaking, and a society that has these prerequisites in place makes rules entitled to relative legitimacy, even if the actual decisions are not the ones that discourse theory would demand.

In Habermas's view, decentralized and pluralistic decision-making are also required for the revitalization of the public sphere. Decentralization counteracts the "generation of mass loyalty" sought by mass institutions such as political parties and states.[20] Subject to the barrage of nationalist pressure, subgroups must break off to form smaller discourse communities, either to practice good discourse or to create the conditions under which some day a coming together of many parts may produce a suitably discursive whole. The aspiration is that over time the members of each subgroup will build good discourse habits in the hothouse of their own distinctive community where the commonalities of experience and tastes make good discourse, and perhaps agreement, easier. Once inculcated in the practices of proper discourse, the participants in these small communities can venture out and engage in dialogue with others from different backgrounds who have undergone similar (re)formative experiences.[21]

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[18] *See, e.g.*, Samuel Bowles and Herbert Gintis, *Social Capital and Community Governance*, 112 THE ECONOMIC JOURNAL F419 (2002). The claim that social capital is a useful concept is far from unanimously accepted. *See, e.g.*, Steven N. Durlauf, *On the Empirics of Social Capital*, 112 THE ECONOMIC JOURNAL F483 (2002). For a more mixed view from a sociological perspective, see Portes, *supra* note 15.

[19] *See* JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 41–42 (Thomas McCarthy trans., Beacon Press 1984).

[20] KENNETH BAYNES, THE NORMATIVE GROUNDS OF SOCIAL CRITICISM: KANT, RAWLS, AND HABERMAS 179–80 (State University of New York Press 1992).

[21] *See* Habermas, *supra* note 7, at 165–67.

That is the hope, but reality tends to be a little messier. Group membership does not inevitably lead to good discourse. Groups do not inevitably grow or cross-pollinate. Nor does group membership inevitably lead to personal growth for their members. Worse, in some cases, groups may encourage their members' worst tendencies. As with the KKK and the Nazi Party the fact remains that group identification may in some cases lead to pathologies.[22] Even if groups are not inherently pathological, otherwise healthy groups may find themselves twisted by struggles with other similarly situated parties. It would be foolish to deny the existence of these and other related social dysfunctions. The question is, which tendencies predominate in groups, the good or the bad. (The view that democracy functions best as an aggregation of ordinarily atomistic participants—all men and women are, or should be, islands—is theoretically possible but has so little connection to reality that it need not detain us.) One who believes that when people congregate bad things tend to happen is likely one who lacks a basic faith in democracy as a social form. The next step in that chain of reasoning is as likely to be Lenin as Leo Strauss. For the rest of us, whether we are misty-eyed or realists, a commitment to democracy as the means to govern ourselves ought to carry with it a willingness to trust that more often than not, maybe even much more often than not, when our fellow citizens come together for some shared purpose at the very least nothing bad will happen, and that some good things often will.

So, (almost) everyone loves groups. And it's not just connections within groups that are healthy, but also between them.[23] Thus, if there is any truth to either the "social capital" vision or to the argument that participation in any form of group activity serves as a sort of apprenticeship in democracy and discourse, then the output of a self-organized group can be characterized as a collective good, for we all benefit from a society in which our fellow citizens are equipped with the rights and habits that equip them to engage in a Habermasian discourse as to how we should be governed.

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[22] For example, identifying oneself as a soccer hooligan might make one more violent.

[23] A typical example: "The fact that several groups and organisations were networked through the Project ... appeared to be important for three reasons. First, they did not feel so isolated and unsupported. Second, learning was reinforced by peers. Third, since these participants, and particularly the chairs, were often involved in other groups and organisations, any individual learning had a wider impact." SARABAJAYA KUMAR & KEVIN NUNAN, A LIGHTER TOUCH 18 (2002), *available at* http://www.jrf.org.uk/bookshop/eBooks/1842630954.pdf.

But if groups are so wonderful, and have all these external benefits, why do we not have more of them? One very plausible account of the obstacles to group formation is found in the path-breaking work of Mancur Olson. [24] Olson's work focused on identifying the conditions required for groups to form. Olson begins by theorizing that many groups come into being in order to provide members with a collective good, and that these collective goods will often be public goods— that is, goods which, if they are provided, are non-excludable: one person may not be able to prevent others from sharing in the benefit once it exists. [A further complicating factor, one that has taken on increased importance since Olson first wrote in 1965, is that many public goods, notably information goods, are non-rivalrous, which means that one person's enjoyment of the good does not increase the cost of another enjoying too.[25]]

Olson's *The Logic of Collective Action*[26] distinguishes between large and small groups, noting that the motivations for self-organization of groups, and for the endurance of groups, will often differ substantially depending on the size of the group. Working from basic micro-economic theory, Olson suggested that, even when it

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[24] Olson was of course not the first person to attack the problem. Philosophers since at least de Tocqueville (if not Aristotle, who famously remarked that man is by nature a political animal) have remarked on what they considered to be man's natural tendency to form groups.

Twentieth-century interest-group theorists suggest that a primary motivation for the formation of large groups is a desire to influence political, and especially electoral, outcomes. The positive theory of pluralism assumes factions are a fact of political life, views power as dispersed, and, therefore, sees conflict as inevitable. The normative theory views this as a largely desirable state of affairs, because different groups are able to bargain for what they most desire and because tyranny is less likely, and concludes that the government's role is to regulate the bargaining among interest groups. Thus, for some, the political arena is best understood as a sort of marketplace— variously a marketplace of ideas, a market for influence, or simply a market for votes. From this somewhat common positive base, however, comes an even greater variety of normative visions. Certain theorists understand the competition between groups to be the democratic system at its finest; others decry the triumph of faction and to create, or return to, a small-R republican vision of governance in which deliberation would play a greater role and the naked competition for influence or resources would be subordinated to reason.

[25] *Cf.* Brad DeLong & A. Michael Froomkin, *Speculative Microeconomics for Tomorrow's Economy, in* INTERNET PUBLISHING AND BEYOND: THE ECONOMICS OF DIGITAL INFORMATION AND INTELLECTUAL PROPERTY 6 (Brian Kahin & Hal Varian eds., MIT Press 2000), *available at* www.law.miami.edu/~froomkin/articles/spec.htm.

[26] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (Oxford University Press 2d ed. 1971). Hereinafter "LOGIC."

would be economically efficient for them to do so, large groups will tend not to form to produce collective goods because it is too easy for individual members to shirk their contributions and yet benefit from the community's provision of the non-excludable public good. As for small groups, even when they do form, theory suggests that they will tend to produce less than the socially optimal amount of the collective good. Thus, for both large and small groups, in theory:

> The necessary conditions for the optimal provision of a collective good, through the voluntary and independent action of the members of a group, can, however, be stated very simply. The marginal cost of additional units of the collective good must be shared in exactly the same proportion as the additional benefits. Only if this is done will each member find that his own marginal costs and benefits are equal at the same time that the total marginal cost equals the total or aggregate marginal benefit. If marginal costs are shared in *any* other way, the amount of collective good provided will be *sub*optimal. It might seem at first glance that if some cost allocations lead to a suboptimal provision of a collective good, then some other cost allocations would lead to a supraoptimal supply of that good; but this is not so. In any group in which participation is voluntary, the member or members whose shares of the marginal cost exceed their shares of the additional benefits will stop contributing to the achievement of the collective good *before* the group optimum has been reached. And there is no conceivable cost-sharing arrangement in which *some* member does not have a marginal cost greater than his share of the marginal benefit, except the one in which every member of the group shares marginal costs in exactly the same proportion in which he shares incremental benefits.[27]

Even when the would-be participants can identify each other, belonging takes effort, and the material benefits are diffuse. Worse, "the larger the group, the farther it will fall short of proving an optimal amount of a collective good."[28] This effect is particularly severe if all

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[27] LOGIC, *supra* note 26, at 30–31 (footnotes omitted).

[28] *Id. at* 35.

members of the group have an approximately equal interest in the production of the collective good.[29]

Important and fundamental as Olson's rule about non-optimal group formation remains, it is essential to note its limitations. First, this principle applies only to group formation "through the voluntary and independent action of the members of a group." In other words, Olson's rule describes a problem which can be overcome by outside action, such as action by government; the rule does not say that solutions capable of changing the incentive structure are doomed to fail. Indeed much of Olson's work consisted of explaining features of various social institutions, such as labor unions, as originating from a need to provide attractive services to members that were not collective, but just ordinary goods.

Second, as Olson himself admits in *The Logic of Collective Action*, the behavior of small groups remains very sensitive to the group's institutional arrangements, to the point that the general rule might not always apply.[30] In small groups, relationships matter, but traditionally large groups are less driven by personal relationships— although that does not mean that personal feelings are irrelevant.[31] Indeed, smaller groups are more effective at "action taking" while larger groups are better for seeking a diversity of views.[32] Even in a small group, however, where the possibility of consensus is the greatest, there remains the constant danger that agreement will not translate into action, since most participants have an incentive to shirk in the hopes that others will do the work or bear the costs.[33] Small, action-oriented, groups can overcome this tendency with forms of social commitment, but that works progressively less as the group grows, unless it can break itself into component cells. (Consider, for example, religious congregations, which are small enough to police their memberships but may be part of a national or international denomination.)

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[29] *Id.*

[30] *Id.* at 30. There is also the somewhat special case of a group in which one member of the group gains a disproportionate benefit. This situation makes it very likely that the group will form, but does not change Olson's conclusion that the group will still produce a socially suboptimal quantity of the public good.

[31] *Cf.* the third part of ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (Harvard University Press 1970).

[32] LOGIC, *supra* note 26, at 56.

[33] *Id.* at 33–35, 42.

Groups also fail to form because there are cost barriers to self-organization. Surmounting the cost barrier is made more difficult by the incentives of group members to avoid the costs of joining the group (and to shirk from bearing the costs of production once they are in it), especially if the good being produced is non-excludable. In the familiar[34] tragedy of the commons, rational economic actors hope someone else will do the work. New technologies, discussed below, greatly reduce the cost of group formation. In so doing, they greatly blunt the cost obstacle to group formation, both by reducing search time for like-minded participants and, in the case of virtual groups, by reducing the actual cost of meeting.

Large groups, unless organized around the personality of a charismatic leader, tend to be less affected by the vagaries of personality. But the lack of the personal element also means that there is less to mitigate the negative incentive effects described by Mancur Olson. Groups respond to these challenges with a variety of strategies. One, described by Olson, is to attempt to provide excludable goods to members; the classic examples include insurance or pension schemes for union members. Another strategy is to federate, to try to achieve the personal relationships that drive small groups by having the big organization made up of myriad small chapters. Unfortunately, this tends to spawn a bureaucracy that at best mediates between local needs and national (or international) objectives, but more commonly becomes subject to Michel's iron law of oligarchy.[35]

In contrast to the rich amount of theory and evidence about the mechanics of group formation, useful generalizations about the mechanics of self-governance of small groups seem surprisingly hard to come by. There are, of course, exceptions to this generalization, but the well-studied practices appear in particular formalized contexts that raise doubt about their general applicability, and especially their applicability to less formal contexts. For example, there is extensive literature about how to pick and organize corporate boards, which are certainly small groups. It's not at all obvious, however, how this work translates to less formal contexts where there is no corporate charter

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[34] Familiar, but perhaps somewhat over-sold? For an argument that empirical evidence for over-grazing of commons land is in fact rather scant to non-existent, see Ian Angus, *Debunking the 'Tragedy of the Commons,'* INT'L J. OF SOCIALIST RENEWAL, Aug. 24, 2008, http://links.org.au/node/595.

[35] ROBERT MICHELS, POLITICAL PARTIES 15 (Eden Paul & Cedar Paul trans., The Free Press 1962) (arguing that "oligarchy . . . is an intrinsic part of bureaucracy or large-scale organization").

and, indeed, sometimes no written agreement setting out the organization's formal structure. Even clubs with rules will often tend to have a lighter organization, perhaps one with a leader or two. Nor is it evident that these bodies should be encouraged to adopt corporate-style formalities or that they would benefit if they did.

The management problem is even more acute in the virtual context where, due to the newness of the medium, there are fewer existing traditions and folkways to rely on. Mailing lists are perhaps the most venerable Internet-based technology for self-organization of groups, but even here there are, as yet, few models of how a group can organize itself. I can testify from personal experience that mailing lists can engender a sense of community. But, it's a fragile community and can easily fall apart when there are disputes. For example, mailing lists sometimes fall prey to "flame wars" or find that their community is being distracted by procedural wrangles, most often over what ground rules should govern posting rights to the list. Basic mailing list software is often configured so that one person, the 'owner' of the list, can control who can join it and who can post to it, a practice often called "moderating." Social expectations are not yet widely shared as to how that potentially dictatorial power should be used or shared; if anything, the libertarian tendencies of many internet pioneers (combined with the availability of free mailing list software) has bred an attitude that if people don't like the way this list is run, they should go off and found their own. The result is that lists are vulnerable to schism and often seem to have a fixed life cycle.[36]

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[36] There is enormous truth to this famous internet post describing the "natural life cycle of mailing lists":

> 1. Initial enthusiasm (people introduce themselves, and gush a lot about how wonderful it is to find kindred souls).
>
> 2. Evangelism (people moan about how few folks are posting to the list, and brainstorm recruitment strategies).
>
> 3. Growth (more and more people join, more and more lengthy threads develop, occasional off-topic threads pop up).
>
> 4. Community (lots of threads, some more relevant than others; lots of information and advice is exchanged; experts help other experts as well as less experienced colleagues; friendships develop; people tease each other; newcomers are welcomed with generosity and patience; everyone—newbie and expert alike—feels comfortable asking questions, suggesting answers, and sharing opinions).
>
> 5. Discomfort with diversity (the number of messages increases dramatically; not every thread is fascinating to every reader; people start complaining about the signal-to-noise ratio; person 1 threatens to quit if other people don't limit discussion to person 1's pet topic; person 2 agrees with person 1; person 3 tells 1 & 2 to lighten up;

The mailing list governance problem is symptomatic of a more general problem that is found both on and off-line: small groups don't have good governance structures. As one British study of small group governance put it:

> Unsuitable legal frameworks and poor constitutions were a root cause of many governance problems. An off-the-shelf constitution may be inadequately understood, while effort expended on a tailor-made document may divert the organisation from its purpose. In many cases, an ideal constitution might be unattainable because of the absence of a suitable legal framework.[37]

What is needed is models and advice that respond to the actual needs of a very heterogeneous set of groups of varying size, purpose, and diversity. And that's not easy.

III. ENHANCING GROUPS WITH SOCIAL SOFTWARE

Before making any case for government intervention, one should understand the important—but still limited—ways in which recent technological innovation and the ordinary workings of the markets for software and attention contribute to group formation. The Internet, and software that relies on it, make it easier for both physical and

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more bandwidth is wasted complaining about off-topic threads than is used for the threads themselves; everyone gets annoyed).

6a. Smug complacency and stagnation (the purists flame everyone who asks an 'old' question or responds with humor to a serious post; newbies are rebuffed; traffic drops to a doze-producing level of a few minor issues; all interesting discussions happen by private email and are limited to a few participants; the purists spend lots of time self-righteously congratulating each other on keeping off-topic threads off the list).

OR

6b. Maturity (a few people quit in a huff; the rest of the participants stay near stage 4, with stage 5 popping up briefly every few weeks; many people wear out their second or third 'delete' key, but the list lives contentedly ever after).

Michael Forster, The Natural Life Cycle of Mailing Lists, http://oii.org/lists/lifecycle.html (last visited Jan. 25, 2009).

[37] SARABAJAYA KUMAR & KEVIN NUNAN, STRENGTHENING GOVERNANCE OF SMALL COMMUNITY AND VOLUNTARY ORGANISATIONS (2002), http://www.jrf.org.uk/knowledge/findings/socialpolicy/052.asp (last visited Jan 21, 2009).

virtual groups to form, and provide new tools to assist them in managing their own affairs. So-called 'social software,' such as Facebook, MySpace, Meetup and others, makes it possible for potential group members to find each other both online and offline. Mailing lists and more sophisticated tools that have community-run filtering make asynchronous conversations easy, even among very large groups. Although the talking tools are many and increasingly robust, the doing tools (other than those that bring people together in the first place) remain conspicuously underdeveloped, especially for any but the smallest groups.

These developments are occurring without government intervention, but as we will see there remains scope for government to nurture them and especially to facilitate solutions to specific problems that participants have not as yet been able to solve themselves. Even more importantly, however, the government's role should first be to do no harm.[38] Modesty is called for, in part because we know so little about what works. [39] Thus, whenever possible, government interventions need to be facilitative, not constraining.[40]

If the problem of access to the network can be overcome,[41] "social software" opens up a world of possibilities for people seeking to interact with their neighbors– and with people far away. "Social software" has been defined as encompassing "all uses of software that supported interacting groups, even if the interaction was offline."[42] Alternately, "[s]ocial [s]oftware can be loosely defined as software which supports, extends, or derives added value from, human social

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[38] *Cf.* Demos, *supra* note 4, at 57 ("The main goal of public policy should be relatively modest: to avoid policy interventions that might stifle the growth in Pro-Am activity. Powerful social and economic trends are likely to promote Pro-Am culture, without government intervention.").

[39] "Despite the rhetoric of 'building social capital,' the government knows remarkably little about which policies help to generate social ties." Demos, *supra* note 4, at 58.

[40] *See* Kumar & Nunan, *supra* note 23, at 20.

[41] On the access question, see *infra* text at– Section IV(1) (discussing need to improve communications infrastructure).

[42] *See* Christopher Allen, Life with Alacrity, http://www.lifewithalacrity.com/2004/10/tracing_the_evo.html (Oct. 13, 2004, 23:40 EST) (quoting Clay Shirky).

behavior– message-boards, musical taste-sharing, photo-sharing, instant messaging, mailing lists, social networking."[43]

Social software vastly reduces the cost of group formation in two ways: It nearly eliminates search costs for like-minded people to find one another, and—if the group is virtual rather than organized around physical meetings—social software greatly lowers the cost of participation. For those whose lives are too full to make the meeting, and for groups that are geographically diffuse, the Internet offers a plethora of asynchronous discussion fora ranging from mailing lists to chat rooms to community-moderated fora. Indeed, in places where there is free government-sponsored internet access, or where access is offered under 'all you can eat' plans common for DSL, the marginal cost of participation in virtual communities is only the opportunity cost of not doing something else.

A. MEETING TOOLS

One of the major barriers to group formation is finding other people who share your interests. Internet tools not only expand the universe of possible interlocutors, they make finding them much easier. People with unusual or specialized interests may be the only one in their respective areas, but can join online virtual communities. People with a more popular interest can quickly find information about meeting locations in their area; if none exists they can organize one. Thus, the Internet greatly lowers the fixed costs of group formation, eliminating, or at least greatly ameliorating, one of the factors that Mancur Olson noted inhibits group creation.

The Internet's ability to facilitate traditional formation of affinity groups, clubs, and traditional in-person organizing should not be underestimated. Group formation tools such as meetup.com [44]

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[43] Tom Coates, An addendum to a definition of Social Software, http://www.plasticbag.org/archives/2005/01/an_addendum_to_a_definition_of_social_software.shtml (Jan. 5, 2005, 12:06 EST); see also Tom Coates, My Working Definition of Social Software, http://www.plasticbag.org/archives/2003/05/my_working_definition_of_social_softwar e.shtml (May 8, 2003, 12:34 EST).

[44] Meetup, http://www.meetup.com. An example of a more social, less politically oriented site is www.friendster.com. Friendster had 975,000 unique visitors in the entire month of March, 2005. "11.3 million users visited MySpace that month, and 4.1 million people visited Thefacebook." Gary Rivlin, Skeptics Take Another Look at Social Sites, N.Y. TIMES, May 9, 2005, available at http://www.nytimes.com/2005/05/09/technology/09network.html?pagewanted=2&ei=5 090&en=7a1d7b2855a83edf&ex=1273291200&partner=rssuserland&emc=rss. By 2008,

provide an easy matching service for like-minded people in a physical community to get together in person as well as online. Anyone can propose a topic for a meeting and a general area (e.g. Miami-Dade County). The Meetup service then advertises the existence of the proposed groups, collects interested parties, brokers a poll of possible meeting locations, announces the result, and then reminds everyone who has expressed interest to come. Other services, such as friendster.com and many dating sites, promote social contacts.

Although it has been suggested that time spent online might detract from time spent in face to face interactions with others, research fails to support this claim.[45] Indeed, "[r]esearch evidence on middle class or wealthier neighborhoods suggests a virtuous circle between [Information and Communication Technology (ICT)] use and more traditional neighborly relations," [46] thus validating the

Facebook had about six million visitors *per day*, while MySpace's daily tally ran about eight million. *See* Google Trends, http://trends.google.com/websites?q=facebook.com%2C+myspace.com&geo=US&date=al l&sort=0 (last visited Jan. 21, 2009).

[45] Another popular hypothesis is that Internet usage comes at the expense of TV viewing, *see, e.g.,* NORMAN H. NIE & LUTZ ERBRING, INTERNET AND SOCIETY A PRELIMINARY REPORT, STANDFORD INSTITUTE FOR THE QUANTITATIVE STUDY OF SOCIETY (2000), http://www.stanford.edu/group/siqss/Press_Release/Preliminary_Report.pdf; Waipeng Lee & Eddie C. Y. Kuo *Internet and Displacement Effect: Children's Media Use and Activities in Singapore*, J. OF COMPUTER-MEDIATED COMM. 1 (2002), *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN013634.pdf; Press Release, IBM, IBM Consumer Survey Shows Decline of TV as Primary Media Device (Aug. 22, 2007), *available at* http://www-03.ibm.com/press/us/en/pressrelease/22206.wss; *but see* David Goetzl, *M Census: TV Consumption Is Up*, MEDIA DAILY NEWS, May 30, 2008, http://www.mediapost.com/publications/index.cfm?fuseaction=Articles.san&s=83680&N id=43281&p=368626; *New Online TV Services Helping to Expand TV Viewing Time*, THINKBOX, Aug. 12, 2008, http://www.thinkbox.tv/server/show/ConWebDoc.1331.

However, new research suggests that internet consumption has not had a negative effect on TV viewing, and that Americans actually watch more TV than ever before– 127 hours and 15 minutes of TV per month per person, five an half hours more than in 2007. Meanwhile, the average time on the Internet grew nine percent, to 26 hours and 26 minutes a month. Nick Mokey, *Nielsen: Internet Hasn't Hurt TV Viewing*, DIGITAL TRENDS, July 8, 2008, http://news.digitaltrends.com/news-article/17216/nielsen-internet-hasn-t-hurt-tv-viewing.

New technology that allows time-shifting, such as DVR and online videos, may explain the increase. Nick Moke, *DVRs Boost TV Watching*, DIGITAL TRENDS, Feb. 15, 2008, http://news.digitaltrends.com/news-article/15755/dvrs-boost-tv-watching.

[46] GARY BRIDGE & SUSANNA GIULLARI, E-NEIGHBOURHOODS 31 (2004), http://www.bristol.ac.uk/sps/cnrpapersword/cnr25pap.doc.

hypothesis that "social capital and civic engagement will increase when virtual communities develop around physically based communities and when these virtual communities foster additional communities of interest."[47] As a Canadian study put it:

> We find that people's interaction online supplements their face-to-face and telephone communication, without increasing or decreasing it. However, Internet use is associated with increased participation in voluntary organizations and politics. Further support for this effect is the positive association between offline and online participation in voluntary organizations and politics. Internet use is associated with a sense of online community, in general and with kin. Taken together, the evidence suggests that the Internet is becoming normalized as it is incorporated into the routine practices of everyday life.[48]

Until recently, the cost of online search for those with access to the Internet has been equal to the cost of connection time. Meetup, for example, started as free, but then switched to a pay model in which it charged group organizers a monthly fee of $10–$20.[49] If Meetup were the only site of its kind rather than just the best known in the U.S., then this pricing decision would provide a historic test of the elasticity of the barriers to group formation described by Mancur Olson. Unfortunately for economists, but fortunately for those seeking to form organizations online, there are other similar services that currently operate at no charge.[50] Even without the benefit of a controlled test, however, anecdotal evidence and personal experience

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[47] ANITA BLANCHARD & TOM HORAN, VIRTUAL COMMUNITIES AND SOCIAL CAPITAL 5 (Ideas Group Publishing 2000).

[48] BARRY WELLMAN ET AL., DOES THE INTERNET INCREASE, DECREASE, OR SUPPLEMENT SOCIAL CAPITAL? SOCIAL NETWORKS, PARTICIPATION, AND COMMUNITY COMMITMENT (2001), *available at* http://www.chass.utoronto.ca/~wellman/publications/netadd/hungarian-article2.PDF.

[49] *See* Meetup.com, http://web.archive.org/web/20080120191653/http://www.meetup.com/changes (last visited Jan. 21, 2009).

[50] *See* Cliff Allen, *Meetup Meets the Replacements*, ALLEN.COM, http://www.allen.com/cgi-bin/gt/tpl.h,content=122 (last visited Jan. 21, 2009) (comparing Evite and SureToMeet).

make it clear that when Meetup moved to a pay model, many users lost their enthusiasm for it.[51]

B. TALKING TOOLS

Blogs, one of the newer types of online talking tools, seem to be creating new epistolary communities as bloggers debate each other and as readers deposit their comments and annotations.[52] The result is a great flowering of discourse, a sharing of expertise, a sphere of shared interests, rather than shared geography. The spate of blogs devoted to specialized legal topics is an excellent example of this phenomenon. It makes expert commentary available to a mass audience. While there is not much evidence that the mass audience cares directly, these blogs seem to influence traditional mediating institutions such as the established press, and thus influence a mass audience at one remove. One important exception is the Daily Kos site, which is more than a blog; by inviting users to create their own "diaries" (mini-blogs) within the site, and inviting readers to comment on each others' diaries, the site has turned itself into a true virtual community. The medium is still evolving rapidly.

Social software is perhaps best known for its creation of virtual communities. The tools range from mailing lists and bulletin boards to sophisticated community-governed discussion spaces. On the Internet, talk (in any quantity) is cheap. The challenge is to help people find the talk they want, and to help them structure their communicative institutions to enable valuable and productive discourses. One special problem is how to avoid discursive sabotage, without descending into any form of public or private censorship. What counts as discursive sabotage depends on the circumstances. Often, it is simply unsolicited commercial messages– spam. What in one case might be acceptable vitriol will be flaming or silencing in another.

The best social software tries to create virtuous circles– mechanisms that promote positive behaviors. Community discussion

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[51] *E.g.*, Posting of Dave Taylor to The Business Blog at Intuitive.com, *Change your business model and kill your business? Meetup.com*, http://www.intuitive.com/blog/change_your_business_model_and_kill_your_business_meetupcom.html (Apr. 14, 2005, 14:56 EST) ("When your business is a commodity service, how do you survive the transition from free to paid without sweetening the transaction? The answer: You don't.").

[52] *See* Froomkin, *supra* note 13, at 859–60.

tools such as Slash, PHP-Nuke, Scoop, Squishdot, and Zope enable the creation of virtual communities in which participants' interactions are structured to encourage speech that the community finds valuable without actual censorship.[53] These tools allow largely unfettered and almost unlimited discussion while enabling participants to prioritize their reading– for example, by limiting themselves to contributions that other members of the community have deemed as worth reading. Anyone can suggest a topic of discussion. In some implementations, a group of editors each have the ability to approve the creation of a new discussion topic, usually one suggested by a reader.[54] In others, the community itself decides what it most wants to talk about.[55] Slash software running at the Slashdot.org site manages a community of well over half a million participants. Zope software at DailyKos also supports a community measured in hundreds of thousands.

Software-based discourse systems help create virtuous circles of discourse in which the community majority serves simultaneously as author, cheerleader, scolder, and reader. To people invested in the issues or the community, the participation can resonate on several levels. Receiving a positive rating, a visible sign of community approval, serves as a reward for participation, and thus further helps overcome the collective action problem. Participation as a moderator democratizes the governance of the community. Meta-moderation simultaneously democratizes governance and provides feedback to moderators. By taking on each of these roles members of the community are at once jointly governing and educating each other, engaging in something that sounds suspiciously like the role communication is supposed to play in civic republican theories of the formation of civic virtue.

An important aspect of this self-reinforcing (dare one say, reflexive) process is that it is the community itself, and not some would-be Platonic guardian or even a Federalist elite,[56] that defines what constitutes praiseworthy discourse. The risks are obvious and inherent to democracy: if the community is depraved, its communal

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[53] *Id.* at 863–67.

[54] *Id.*

[55] At Kuro5hin.org, every article submitted for publication goes into a special "moderation queue," where members each get one vote to determine whether it should be promoted to the homepage.

[56] *Cf.* Federalist No. 57 (rulers should be those who possess the most wisdom and the most virtue).

choices may be evil.[57] If the community is divided into sharply
disagreeing camps, it may be fissiparous rather than Fissian. Tools
that structure discourse can only do so much– they are only tools, and
while over time they can create solidarity, even empower a
community, and help it educate itself, this cannot happen overnight
and no tool can re-make a community. At best the right tools can
accentuate and propagate positive tendencies, and discourage
negative ones, but tools, like democracy, can only work when they
have something to begin with.[58]

Less progress has been made in breaking vicious circles then there
has been in creating conditions that tend to prevent their formation in
the first place. More elaborate types of software encode mechanisms
to regulate posting rights or to enlist the community in collectively
tagging the gold and ignoring the dross. But, once any sort of group
gets caught up in a procedural war (at least in my personal
experience) it is very hard to get it back to where it was before the
wrangles erupted.

A "wiki" is a special type of collaborative talking tool that allows
many people to collaborate on the production of linked documents.
"A defining characteristic of wiki technology is the ease with which
pages can be created and updated. Generally, there is no review
before modifications are accepted, and most wikis are open to the
general public– or at least anyone who has access to the wiki server.
In fact, even registration of a user account is not always required."[59]

Wikis are very vulnerable to sabotage, and rely either on escaping
notice or on having a critical mass of committed participants who scan
all new changes and 'roll back' those seen as destructive. This works–
up to a point. The cheerful version of the story is the Wikipedia's own
account of itself:

> A common defense against persistent 'vandals' is to simply
> let them deface as many pages as they wish, knowing that
> they can easily be tracked and reverted after the vandal has
> left. This policy can quickly become impractical, however,

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[57] Unless of course the community is made up of depraved hypocrites, which could lead to
interesting results.

[58] *Cf.* James Madison, *Remarks to the Virginia Convention* (June 20, 1788).

[59] *See* JOSEPH REAGLE, IN GOOD FAITH: WIKIPEDIA COLLABORATION AND THE PURSUIT OF
THE UNIVERSAL ENCYCLOPEDIA (2008) (unpublished Ph.D. dissertation, New York
University), *available at* http://reagle.org/joseph/2008/03/dsrtn-in-good-faith.

in the face of systematic defacements born out of anger or frustration.

As an emergency measure, some wikis allow the database to be switched to read-only mode, while others enforce a policy in which only established users who have registered prior to some arbitrary cutoff date can continue editing. Generally speaking, however, any damage that is inflicted by a 'vandal' can be reverted quickly and easily. More problematic are subtle errors inserted into pages which go undetected, for example changing of album release dates and discographies.[60]

Some Wiki users argue that because it takes time to create Wiki content, plus the relative ease with which it can be replaced, the Wiki medium actually welcomes and encourages deliberation– and discourages name-calling and tantrums, since these comments get deleted quickly.[61] In this vision, self-policing is an ongoing process, one in which the vandals are being held at bay and in which discursive values are being promoted. There is also, however, a darker account, in which Wikipedia is prey to substantial internecine strife. For example, the editing of the biographical content of living persons created recent conflict and controversy within the Wikipedia community when people began to notice and edit their own biographies.[62] Wikipedians ultimately settled the dispute by taking the matter to their own Arbitration Committee.[63]

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[60] Wikipedia: Wiki,
http://en.wikipedia.org/w/index.php?title=Special:Cite&page=Wiki&id=7578182 (last visited Jan. 21, 2009).

[61] See Reagle, supra note 59, at 112–36 for a particularly warm, yet careful, account of Wikipedean discourse virtues.

[62] See Andrea Forte & Amy Bruckman, Scaling Consensus: Increasing Decentralization in Wikipedia Governance, (Jan. 2008) (unpublished paper presented at the Hawaii International Conference on Systems Sciences), available at http://www.cc.gatech.edu/~aforte/ForteBruckmanScalingConsensus.pdf (discussing how the growth of the Wikipedia community has resulted in increasing decentralization of the final stages of dispute resolution and use of severe sanctions). Also, Wikipedia co-founder Jimmy Wales allegedly ordered changes to the biography of his then girlfriend in violation of the asserted principle that Wikipedia is a neutral encyclopedia in which articles are not to be edited by those with a personal interest. See Cade Metz, Jimbo Wales Dumps Lover on Wikipedia, THE REGISTER, Mar. 3, 2008, http://www.theregister.co.uk/2008/03/03/jimbo_wales_rachel_marsden.

C. TURNING TALKING TOOLS INTO DOING TOOLS

A few years ago, New York City Community Board member Thomas Lowenhaupt created the BeyondVoting Wiki[64] in order to provide what he calls "a place where people can gather to speculate on ways we might use the internet to improve our city."[65] Lowenhaupt described the goals of his project as to "empower individuals, community organizations, and community boards" whom he challenged to "ponder, research, discuss, and propose a new governance structure for New York City."[66] But these discussions, while they might inform Lowenhaupt's actions, or even that of other politicians, will not generate outcomes directly.

If the Internet excels at providing talking tools, its record at providing doing tools is more mixed. For smaller groups, Benjamin R. Barber and Beth Simone Noveck's "Unchat" program offers novel ways to structure small-group real-time online discussions by building in means for participants to choose (and un-choose) discussion leaders and moderators, to set many of their own ground rules, and to have private side-conversations about procedure that need not disrupt the discussion of substance. To encourage decision-making, the

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Other recent disputes include a philosophical struggle between those who welcome articles on almost any subject versus those who would prefer an editorial policy that banned articles on trivial subjects in the hopes of enhancing the Wikipedia's credibility. *See The Battle for Wikipedia's Soul*, ECONOMIST.COM, Mar. 6, 2008, http://www.economist.com/science/tq/displaystory.cfm?story_id=10789354.

[63] According to Forte & Bruckman, supra note 62:

> The Arbitration Committee wields considerable influence in the community. The Arbitration Committee (Arb Com) was conceived of as the last step in a formal dispute resolution process put into place in early 2004; however, today it appears to often serve as a more general decision-making body for the English language site. . . . Committee members are selected through a hybrid process of election by the community and appointment by Jimmy Wales. Arbitrators have no special authority with respect to content or any formal power to create policy, yet we will see that Committee action can play a role in influencing both policy and content.

Id. at 4.

[64] Beyond Voting, http://beyondvoting.wikicities.com (last visited Jan. 21, 2009).

[65] Tom Lowenhaupt, *BeyondVoting Wiki*, http://cic.si.umich.edu/node/276 (last visited Jan. 21, 2009).

[66] Letter from Tom Lowenhaupt, http://beyondvoting.wikia.com/wiki/Letter (last visited Jan. 21, 2009).

software includes a module for straw polls of the group. To encourage good decisions, Unchat provides for easy integrated linking to outside sources of information. Unfortunately, in its current form the program works only for small groups of up to fifty or so.

Proposals exist to allow citizens direct input into municipal decisions. A city might, for example, give every taxpayer a fixed number of electronic ballots per year that could be 'spent' on a web-based map. When a pothole accreted enough votes, a crew could be dispatched to fix it. Or, citizens could put questions to city bureaucrats who would have an obligation to reply to them on a public web site. Both these proposals, and others like them, require an ability to securely identify an online participant as being the person they claim to be. The lack of a secure and widely deployed public key infrastructure or equivalent means of securely authenticating identities has slowed the deployment of applications that rely on counting votes or otherwise weighing public opinion as an element of government decision-making. The costs of deployment and the possibly pernicious effect on personal privacy, means Public Key Infrastructure (PKI) systems may be long in coming. In the meantime, many municipalities and government organizations invite citizen input online,[67] but this is far from giving citizens real direct control.

At present, therefore, the most significant impact from social software on decision-making and self-governance is probably the facilitation of in-person meetings.[68] "Meetup does the hardest work of modern collective action problem-solving for you– it finds the location for you, sets the date, and requires no initial contact with a leader. What we learned on the Dean campaign is that simply bringing 10 to 30 people together in a room with a shared purpose, leaders would

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[67] *See, e.g.*, Cape Coral Florida, Citizen's Input Form,
http://www.capecoral.net/Government/MayorandCouncil/CitizensInputForm/tabid/483/
Default.aspx (last visited Jan. 21, 2009); Town of Frisco, Colorado, Frisco launches online
program to gather citizen input,
http://www.townoffrisco.com/news/story.html?id=2339&title=Frisco%20launches%20on
line%20program%20to%20gather%20citizen%20input&date=6/15/2007%2012:06:10%2
0PM; Kate Bucklin, *City creates online tool for easier citizen input*, THE FORECASTER, Sept.
11, 2008, http://www.theforecaster.net/story.php?storyid=16113 (describing Portland's
new "Constituent Tracking System" designed to residents with complaints, suggestions, or
comments to communicate with city government via web forms).

[68] Internet fund raising and voter organization are increasingly important phenomena, but
to date have been organized in a traditional top down fashion run by a central campaign
organization.

emerge."[69] Even here, however, the groups that form are small and local. No good tool yet exists to help these grow or even to federate groups on a national scale without a substantial amount of human intervention. The 2004 Dean for President campaign learned this lesson too, to its detriment.[70]

IV. SOLUTIONS FROM THE TOP: HOW GOVERNMENT CAN HELP

In a perfect world, self-organization of groups would be a spontaneous bottom up phenomenon, one that required no central assistance. There is indeed something ironic, even illogical, about wanting large national institutions[71] to act to stimulate bottom up group formation. It may be even more unreasonable to expect top down control institutions such as governments to nurture self-governing institutions that may in time grow to become rival power centers. Economics, and economists, teach us that we live in a world that is far from perfect. Citizens in liberal democracies traditionally look to their governments to serve ameliorative functions. Other institutions, such as churches, charities and other NGOs, also play important roles in fixing market failure and failures caused by the markets. Thus, despite the irony, it seems plausible to ask what governments and other large established institutions can do to induce more groups to form and to help them engage in workable self-governance. The Internet makes this challenge more interesting, and perhaps more feasible, because it presents a plethora of new opportunities for self-organization of groups and deliberation. Governments should seize the opportunity.

But how? Demos's report recommended targeted subsidies:

> The government should launch a . . . fellowship programme, investing small sums in community [leaders]. This might be modelled on localised versions of the National Endowment for Science Technology and the Arts, which provide

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[69] Zephyr Teachout, *Come Together Right Now: The Internet's Unlit Fuse*, PERSONAL DEMOCRACY FORUM, Nov. 17, 2004, http://personaldemocracy.com/node/152.

[70] *Id.*

[71] Or, in the case of the EU, supra-national institutions.

fellowships for innovators, and be funded by the Big Lottery
Fund.[72]

Demos proposed this not only to encourage and reward group
formation, but because it believed that encouraging Pro-Ams is good
for the economy.[73]

Direct subsidies may make sense as a stimulant to the production
of industrial capital by infant industries, but it is a bad policy as
regards the production of social capital.[74] Although self-organized
groups are not necessarily political, some will be; others may in time
take on a political tinge as the members find themselves already
organized should they become politicized. Still other groups may
never be overtly political, but may nonetheless have political side-
effects by their very existence as training grounds in communal
relations. Given these roles, it is unwise to encourage governments to
pick winners and create losers. Doing so invites governments into
considering the content of projects. In the U.S. at least, it is now
widely agreed that this is not an appropriate role for government— a
sea change from thirty years ago when the question was hotly
debated.[75]

Today far fewer in the U.S. argue for active government
intervention to promote diverse speech—much less for some

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[72] Demos, *supra* note 4, at 58.

[73] No government has yet designed a policy to support open source models of technology
development. Most major Pro-Am and open source developments—such as Linux and
Apache software—have come from informal groups of Pro-Ams banding together, often
based around a university, such as Berkeley near San Francisco. Open source initiatives
such as Linux provide a vital alternative to an incumbent proprietary supplier such as
Microsoft. An innovation policy to deliberately fund open source communities as
competitors to incumbents would look quite different from one modeled on the Silicon
Valley venture capital approach to exploiting intellectual capital. Demos, *supra* note 4, at
65.

[74] Note that the claim in the text is limited to subsidies for group formation and related
types of social capital. It does not imply a view about subsidies to support the production
of other forms of *cultural* capital, such as the arts and sciences.

[75] In the 1970s when *Red Lion* still seemed like good law, and even until the Fairness
Doctrine expired in the 1980s, the idea that the government should actively regulate to
ensure better discourse (for example, by ensuring a diversity of viewpoints in scarcity
media) had many adherents. *E.g.,* Owen M. Fiss, *Why the State?,* 100 HARV. L. REV. 781,
792 (1987); Owen M. Fiss, *Free Speech and Social Structure,* 71 IOWA L. REV. 1405, 1416
(1986) (arguing that government intervention is needed "to safeguard the conditions for
true and free collective self-determination").

intervention in favor of any particular concept of quality speech—both because what constitutes good speech is contested and because no branch of government seems at all interested in pursuing the idea. Indeed, today arguably all three branches of government are actively hostile to the idea of active intervention to promote diversity in speech. The government retains a regulatory role in some areas, such as the public forum doctrine, but it remains unclear to what extent any of these doctrines translate neatly to computer-mediated communications[76] or even remain relevant in an era of private malls and security-conscious public spaces. Similarly, although state and local governments could play an enormous role in the creation of good habits of discourse via their ability to influence curriculum in state schools,[77] the chances of this seem remote at best.

As Clay Shirky says, "Social Software encodes political bargains."[78] Software helps make difficult things easy, but too often at the cost of defining roles. Thus, for the same sorts of reasons that it would be undesirable for governments to subsidize some community leaders, it would be preferable if governments did not try to pick a narrow group of winners among the types of software that structure conversations or helped groups reach decisions or govern themselves. Given the diversity of organizations and objectives, software that defines a "chair" or a "board" or even "moderators" would be a Procrustean solution for too many groups.

The government's role should be facilitative yet entirely content-neutral. Even ostensibly non-political rules such as one that limited subsidies to non-political activities should be avoided. Human time and energy is limited. Thus, even if one could craft a program that had no class-based discrimination, any rule subsidizing gardening but not community organizing would inevitably cause a shift of time and energy away from politics towards the subsidized activities. If, as Habermas persuasively argues, public engagement is already too weak, then it makes no sense to discriminate against it. Here, then, are eight ideas on what government could to help groups form online—and off.

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[76] *See generally* Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1 (2003).

[77] *Cf.* AMY GUTMANN, DEMOCRATIC EDUCATION (Princeton University Press 1988).

[78] Clay Shirky, *Social Software and the Politics of Groups* (Networks, Economics, and Culture mailing list), March 9, 2003, http://shirky.com/writings/group_politics.html.

A. INFRASTRUCTURE

The state's most important role is in creating a climate in which groups can form, and in ensuring the provision of resources that they can use to organize themselves, govern themselves, and achieve their aims. Given the speed at which communities such as Slashdot (with more than a million members) and the so-called blogosphere are forming, much may be achievable with little in the way of direct state intervention. There are, nonetheless, some areas where government action would be helpful and appropriate.

Rather than subsidize individual participants in groups, governments should seek to subsidize facilitative technologies. The importance of this element cannot be overstated. For starters, because of their characteristic as public goods, and because the providers are mostly in the regulated industries of telecommunications and cable, the government has an inevitable role in ensuring the provision of the infrastructures needed to make Internet communication easy and cheap.[79] The Internet works only for those able to get Internet access. Governments can and should pursue a strategy of democratizing access to communications. Subject to a need for basic literacy, online participation is something that can be done from the home or library (although, at present, library users seem to be severely rationed) and thus potentially becomes available to as wide a group of participants as anything else on offer at present. Although the 'Digital Divide'[80] is at least temporarily real, there are an

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[79] *See, e.g.*, Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005); Brett Frischmann, *Privatization and Commercialization of the Internet Infrastructure: Rethinking Market Intervention into Government and Government Intervention into the Market*, 2 COLUM. SCI. & TECH. L. REV. 1 (June 8, 2001).

[80] "'[T]he digital divide" means that between countries and between different groups of people within countries, there is a wide division between those who have real access to information and communications technology and are using it effectively, and those who don't. Since information and communications technologies (ICTs) are increasingly becoming a foundation of our societies and economies, the digital divide means that the 'information have-nots' are denied the option to participate in new ICT jobs, in e-government, in ICTs im-proved healthcare, and in ICT enhanced education. More often than not, the 'information have-nots' are in developing countries, and in dis-advantaged groups within countries."

What is the Digital Divide?, BRIDGES.ORG, Jan. 4, 2006, http://web.archive.org/web/20060104130810/http://www.bridges.org/digitaldivide/index.html.

impressive number of community-based projects in the U.S. seeking to provide a free or low-cost infrastructure for Internet access. Some are FreeNets—free Internet Service Providers[81]—while others are ambitious projects to provide free wireless Internet connections to neighborhoods and even cities.[82] Even with free bandwidth, one still needs a device that can access the Internet: governments should ensure that public access is widely available in libraries, schools, and public kiosks.

Political and social programs based on information technologies are particularly open to criticism given the class-based differences in access to the technologies. Data suggest that wealthier and more educated people are more likely to make use of the Internet. A similar problem besets participation in community activities. As Demos put it:

> Affluent people are more likely to participate in Pro-Am activities than those on low incomes. Incomes may in part reflect differences in educational qualifications . . . . Men are more likely to be Pro-Am than women, especially women with children. When women do participate they tend to engage in home-based activities that can be scheduled flexibly to fit in with childcare. Men are far more likely to engage in Pro-Am activities that involve a commitment to clubs and activities that take them away from home. . . . To the extent that these 'social' Pro-Am activities bring additional benefits—access to networks, social contacts and support—women are doubly disadvantaged. The group most likely to engage in and organize Pro-Am activities comprises well-educated, relatively affluent men. The group least

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[81] *See, e.g.*, Community Computer Networks, Free-Nets and City-Regional Guides, http://victoria.tc.ca/Resources/freenets.html (last visited Nov. 19, 2009); Freenets & Community Networks, http://www.lights.ca/freenet (last visited Nov. 19, 2009); PersonalTelco, Wireless Communities, http://www.personaltelco.net/index.cgi/WirelessCommunities (last visited Nov. 19, 2008).

[82] *See generally* ROB FLICKENGER, BUILDING WIRELESS COMMUNITY NETWORKS (O'Reilly 2002); *see also* Rob Flickenger, *Antenna on the Cheap(er, Chip)*, O'REILLY NETWORKS, July 5, 2001, http://www.oreillynet.com/lpt/wlg/448 (describing use of tools such as empty Pringles cans for antennas).

likely to be Pro-Ams comprises low-income women, with children and few educational qualifications.[83]

Unfortunately, in the U.S. currently there are a number of state and national legislative proposals that prevent localities from providing free DSL or WiFi services either free[84] or on terms similar to municipal water, sewer or electricity.[85] These measures are often justified on the theory that in a capitalist economy the state should not enter markets that could be served by private firms.[86] There are, however, a number of potential advantages to municipal provision of a communications infrastructure, including lower subscriber costs and wider availability of the services, especially in poorer communities, and localities should be allowed, even encouraged, to embrace them.

Similarly, the government's regulatory power should not be used to block the deployment of technologies such as GNU radio,[87] which has been described as "a steppingstone to the ultimate hybrid device: a handheld PC that can be converted into a walkie-talkie one minute and an HDTV the next."[88] Similarly, Participatory Culture already distributes Miro, an open source Bittorrent-based player for internet TV, a software package that will allow users to subscribe to channels and will allow organizations to provide new sources of channels to

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[83] Demos, *supra* note 4, at 60–61.

[84] *E.g.*, David Bollier, *Minneapolis Goes Wireless*, ONTHECOMMONS.ORG, April 13, 2005, http://web.archive.org/web/20071215163452/http://onthecommons.org/node/543 (free WiFi in city of Minneapolis). On the social benefits of municipal WiFi, see generally WILLIAM J. MITCHELL, WIRELESS SPACE AND PUBLIC DISCOURSE, http://islandia.law.yale.edu/isp/democracy_conference_papers.pdf.

[85] *See generally* Jim Hu and Marguerite Reardon, *Cities Brace for Broadband War*, CNET NEWS, May 2, 2005, http://news.com.com/Cities+brace+for+broadband+war/2009-1034_3-5680305.html.

[86] *See* Ramsey F. Kawar, *Competing With City Hall: Local Government Entry Into The Telecommunications Marketplace*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J. 169 (2000) (surveying ideological arguments over municipal broadband).

[87] The latest version of GNU Radio, version 3.1.3, became available on August, 23 2008. *See* GNU Radio, Welcome to GNU Radio!, http://gnuradio.org/trac/wiki (last visited Jan. 21, 2009).

[88] Sam Williams, *Radio Free Software*, SALON.COM, Dec. 18, 2002, http://www.salon.com/tech/feature/2002/12/18/gnu_radio.

2009] FROOMKIN their fans with no bandwidth costs.[89] Even more unfortunately, copy-protection requirements threaten to make stillborn a whole class of tools which would ease participation by those whose education or impairments make them uncomfortable reading or writing.[90]

And, last but not least, the government has a role in regulating how infrastructure providers—and perhaps also the providers of key types of social software—collect and manage the information that they collect about users. Participants in Internet-based discursive communities, not to mention online activists, may find their speech and participation chilled by the knowledge that others are keeping extensive records of their activities. At the very least, the government should mandate transparency about record-keeping policies. But, more is likely to be required, as a world in which every email and Meetup invitation acceptance is recorded is one in which some participants will feel pressure to self-censor while others will drop out altogether.[91]

B. Ensuring a Hospitable Legal Climate

The state has a role in protecting the participants in online activities from lawsuits designed to chill their participation—especially since it is law, a governmental action, which creates the danger in the first place. SLAPP suits—Strategic Lawsuits Against Public Participation[92]—are a danger to any participant in group that

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[89] *See* http://www.getmiro.com (last visited Jan. 21, 2009) and
http://www.participatoryculture.org (last visited Jan. 21, 2009).

[90] *See* American Library Association, *Digital Rights Management and Accessibility*,
http://www.ala.org/ala/aboutala/offices/oitp/emailtutorials/accessibilitya/10.cfm (last
visited Feb. 2, 2009) (noting that "Digital Rights Management (DRM) poses particular
problems for individuals with print and visual disabilities who use screen readers or other
print to speech or print to Braille devices to access content").

[91] A third likely response among some is the deployment of anonymizing tools. These
impose a number of costs on participation. They may be costly and cumbersome to use.
The effect of anonymity on disclosure is a complex question. Some may find it
empowering; others may be empowered into mischief. Recipients of may mistrust
anonymous communication. Strong anonymity also makes it far more complex to
establish the sort of persistent identities that one ordinarily needs to establish the sort of
discourse beloved by democratic theorists.

[92] The California anti-SLAPP project defines a SLAPP suit as:

Civil complaints or counterclaims (against either an individual or an
organization) in which the alleged injury was the result of petitioning or free
speech activities protected by the First Amendment of the U.S. Constitution.

engages a public issue in writing, and the more so if the writing appears virtually in a form, or forum, that can be ready by anyone. So-called "cyber-SLAPP" suits target those who host allegedly libelous anonymous comments made by others.[93]   These lawsuits are an example of a collective action problem: the victims are alone, often lacking in resources to defend themselves. Effective silencing of just a few voices can, however, have substantial externalities when the example is not lost on others.

Several U.S. states have anti-SLAPP laws[94] which seek to protect public discussions against those who would shut them down because they are being criticized. These laws allow defendants to stop SLAPP suits at an early stage in the proceeding. Jurisdictions that lack such protections, or which do not extend them to cyber-SLAPP cases, should be encouraged to offer legal safe harbors, at least for public criticism of politicians and corporations and public figures if not necessarily for attacks on private citizens. Alternately, if too many states do not act, there may be a role for federal legislation.

SLAPPs are often brought by corporations, real estate developers, or government officials and entities against individuals who oppose them on public issues. Typically, SLAPPs are based on ordinary civil tort claims such as defamation, conspiracy, and interference with prospective economic advantage.

While most SLAPPs are legally meritless, they effectively achieve their principal purpose: to chill public debate on specific issues. Defending a SLAPP requires substantial money, time, and legal resources and thus diverts the defendant's attention away from the public issue. Equally important, however, a SLAPP also sends a message to others: you, too, can be sued if you speak up.

Every year thousands of people are hit with SLAPPs for such activities as writing a letter to a newspaper, reporting misconduct by public officials, speaking at public meetings, filing complaints with officials over violations of labor laws or health and safety laws, 'whistleblowing' in corporations, or organizing tenants.

What are SLAPPs, California Anti-SLAPP Project,
http://www.casp.net/slapps/mengen.html (last visited Jan. 21, 2009).

[93] See CyberSLAPPs: Company lawsuits against anonymous Internet Posters, California Anti-SLAPP Project, http://www.casp.net/slapps/cyberslapp.html (last visited Jan. 21, 2009).

[94] See Other states: statutes and cases, California Anti-SLAPP Project, http://www.casp.net/statutes/menstate.html for a list (last visited Jan. 21, 2009).

C. POLICING THE MARKET

The state has an active role to play in policing markets for communications technologies to prevent anti-competitive and predatory behavior. Anti-trust vigilance is essential to ensure that no software or hardware maker can exert control over citizens' means of communications to ensure that citizens enjoy the full benefit of the network effects of these new technologies. If group-formation and self-governance is going to be enhanced by access to information and to communicative tools, then attention needs to be paid to the nature of the markets for those products. Unfortunately, there are powerful tendencies in both software and hardware markets towards winner-take-all outcomes that can create monopolies over tools needed for communication. [95] The government can, both by regulatory and purchasing choices, ensure that it does not encourage these tendencies. Similarly, the state should encourage the production of information in the open source and creative commons[96] models rather than continue to strengthen intellectual property rights. [97] Encouraging people to put their works wholly or partly into the public domain enriches discourse. Too much intellectual property protection can stifle discourse.[98] (At some point, too little intellectual property protection is also harmful, but we are nowhere near there at present.)

D. THE STATE AS HONEST (DATA) BROKER

The state has an essential role to play as provider of reliable data about the national condition and the world, and as honest archivist. The Library of Congress, a digital National Archive, and every bureau

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[95] Copyright is also a form of monopoly. While copyright extensions clearly do not serve the course of encouraging discourse, given the excessive length of the original term, it is not likely that the recent extensions upheld in *Eldred v. Ashcroft*, substantially increase the already great burden. 537 U.S. 186 (2003).

[96] *See* Creative Commons, http://creativecommons.org (last visited Jan. 21, 2009).

[97] *See* Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 112 YALE L.J. 369, 445–46 (2002).

[98] *See generally* Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUMB. L. REV. 257 (2006); Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, http://www.wired.com/wired/archive/4.01/white.paper_pr.html (explaining that an increase in copyright protection, such as greater publisher control over Internet sources, is not sound public policy because the increased protection will stifle public access to knowledge and public discourse about important events).

of statistics are critical support institutions for an engaged citizenry. To be relevant and useful, political discourse needs facts about what governments are doing, what they have done, and as much reliable information as possible about the rest of the world. The government can serve as honest purveyor of raw data, and as reliable archive of information– an especially important role given the ease of digital forgery. Furthermore, the government's ability to set reporting standards takes on added importance in this connection because a common data format enables a world of easy comparisons that would otherwise be much more difficult. Food labeling regulations that require packed foods to report ingredients, fat, calories, and other dietary information in a standard format provides a model of this type of standardization.[99] By setting standards for the presentation of data, and in some cases collecting and reporting reliable data, the state can set the stage for informed debate on what the data tells us, rather than on what the data might be.

One problem, however, is that the temptation for governments to become propagandists seems almost irresistible. In the U.S., the government has been caught producing fake news videos.[100] In Europe, the European Commission has not sunk quite that low, but its recent campaign to 'educate' citizens as to the benefits of the European constitution was certainly one-sided.[101] Government has a role in providing information for the public, especially reliable statistical data. But the task of fairly setting out all the different possible sides is one that government will find hard to do; even if it is done well, it will be criticized by those who think their side is entitled to pride of place.

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[99] See Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990), and implementing rules at 21 C.F.R. § 101 et seq. Of course for a standard to work it has to identify meaningful data, and it has to be observed. There are accounting standards that define reporting requirements for listed companies, but that has not stopped a succession of major companies from cooking their books.

[100] See, e.g., Ceci Connolly, Drug Control Office Faulted for Issuing Fake News Tapes, WASH. POST, Jan. 7, 2005, A17, available at http://www.washingtonpost.com/wp-dyn/articles/A54651-2005Jan6.html.

[101] The Commission recently issued a White Paper on European Governance, available at http://europa.eu.int/comm/governance/white_paper/index_en.html. For a scathing critique of the paper, describing "the invocation of a European public space . . . [as] a conspicuous ruse in its attempt to enhance its own position in a specific institutional setting," see Alexander Somek, Democratic Minimalism: Turning the Clock Back from Democracy to Democratization (Jan. 2005), U. Iowa Legal Studies Research Paper No. 05-10, available at http://ssrn.com/abstract=672224.

E. FIGHTING DISCURSIVE SABOTAGE

The state may have a role in helping people fight spam and other forms of discursive sabotage. Online communications in general continue to be burdened with high levels of spam; meanwhile, unless they are designed with community moderation in mind, virtual communities frequently find that they are vulnerable to other forms of discursive sabotage. Spam has now reached epidemic proportions and is causing a significant fraction of users to rely less on email. According to a survey by the Pew Internet and American Life Project, 18% of email users say that spam has reduced their overall use of email, and a large fraction of email users say spam has made being online unpleasant or annoying. (Interestingly, these numbers have tended gently downward over a three-year period).[102] One does not know, however, if this means the problem is cumulating or ameliorating.) If the exponential growth of email spam continues, email may no longer be a useful tool. Meanwhile, spammers have aimed their messages at blogs, wikis, slash servers and other community software. It would be disastrous to give governments the power to directly censor content, but governments may have a role in providing users with tools that they can use to defend themselves against spam.

F. CREATING LOCALIZED VIRTUAL PUBLIC FORA

Governments may have a special role in creating a market for certain kinds of software and in very special cases perhaps even hosting the software on government computers. Governments should recognize that Meetup-style services are essential to group formation. If the industry moves towards a charging model, governments should investigate the elasticity of demand for meeting-creation services. If demand is elastic (is sensitive to price), then governments should offer the service for free, or encourage the provision of free private Meetup services. Given the evidence noted above that there is a "virtuous circle between ICT use and more traditional neighbourly relations,"[103] governments might also wish to encourage the development of highly

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[102] In the most recent survey, 19% of users said spam has reduced their overall use of email, down from 22% in 2005, 29% in 2004, and 25% in 2003. Deborah Fallows, *Adjusting to a Diet of Spam*, PEW RESEARCH (Pew Internet and American Life Project), May 23, 2007, http://pewresearch.org/pubs/487/spam.

[103] *See supra* text accompanying note 45.

localized versions of Friendster that could be marketed as social icebreakers rather than as romance sites.[104]

Similarly, in an effort to encourage local government to use social software to involve citizens in decision-making, the state and federal governments could subsidize its production or purchase it in bulk and then give it to interested localities. Government demand for open-source decision-enabling tools could create a paying market that would stimulate open source software designers to improve their products.

G. MINI-AGORAS: NEW STRUCTURES FOR VIRTUAL WORKERS

Just as the state regulated labor relations by defining the role of unions in the centralized workplace, so too the state may have a role in creating new unions, or substitutes for unions, in the new decentralized workplace. A digital workers rights policy should include a component that encourages digital or even physical meetings at which workers could socialize, network, share skills– and foster their solidarity.

As work moves into the virtual realm, both the union hall and the workplace centered unionization campaign will become anachronisms for an increasing fraction of the workforce. If we believe that unions are a valuable social institution for knowledge workers as well as traditional skilled and unskilled trades, then it is likely that some mechanism will be needed to encourage those affiliations to form. Mancur Olson's work reminds us that they will not form easily on their own. And whether or not it takes the form of a union, if work is increasingly something that is outsourced to the home rather than taking place in the office, there will be an increased need for institutions that get people out of the house or else the social capital of the groups organized around the workplace will be at risk.

Realistically, developments of this sort are more likely in Europe, where there is a tradition of co-determination and worker participation, than in the U.S. where most businesses are quite happy to be rid of their unions. But even if the new bodies are not unions but just bowling leagues, book clubs or group fitness sessions, there may be a role for government in creating structures—literally, in the form

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[104] Cf. Demos, *supra* note 4, at 64, 67 ("A new project for the open source software movement would be to create a version of the Friendster social networking website as a way of helping people to link up with others with similar interests in their neighbourhoods.").

of meeting rooms, gymnasia, and meeting halls—that would be available for everyone's use.

H. LEVERAGING THE EMPOWERMENT OF THE STANDARD FORM

Last, but not least, while it would be impossible to craft a one-size-fits-all solution to the internal governance needs of what are currently an extraordinarily heterogeneous variety of virtual fora, it is not too soon to try to craft solutions to specific and observable problems. Rather than try to craft model constitutions or bylaws for groups that will be as variable as the human imagination, running from lightweight mailing lists to complex virtual worlds, it would be better to offer services that designers of virtual spaces and participants in those spaces could avail themselves of when they need them.

One possibility might be to attempt to design circuit breakers for familiar discursive pathologies. For example, one problem that seems to crop up time and again in fora as disparate as mailing lists and virtual worlds is the absence of a dispute settlement mechanism. Virtual communities often have very lightweight governance structures. Even those which are somewhat more thought-out are of necessity new or old forms adapted to new circumstances. Inevitably unprecedented disputes occur, ambiguities are found or the collective finds that it needs a way to prevent part of the group from out-shouting the rest. Mailing lists are notoriously vulnerable to 'flame wars' or find that their community is being distracted by procedural wrangles, most often over what ground rules should govern posting rights to the list.[105] Advising the community to migrate to a new list if it is unhappy with some of the participants in the old is not much of a solution if the troublemakers follow along, especially if they use pseudonyms.

Disputes of these sorts are ill-suited for traditional terrestrial courts. The non-commercial issues at stake—how a virtual community should be governed—do not involve the type of issues that courts are likely to think they have jurisdiction over. Venue questions will be far more complex than a small-dollar-value matter justifies. Nor, for that matter, would many courts know much about how to resolve them. There is no traditional property at stake (and often no intellectual property as such), and to the extent that it would find "property" in the right to a list's name, it belongs to whoever runs the

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[105] Note that some virtual communities deal with this problem by encoding norms of community moderation into the environment. *See supra* text at page 151.

machine or owns the account that hosts the software. If the question is who owns the clubhouse for a club that meets in a virtual world, a court is likely to apply rules that will feel and in fact be arbitrary to many of the participants. If there are written, oral or even implied contracts, they will likely be silent on the issues at stake; in any case many disputes of this type may require the application of equity or at least of a law sensitive to the evolving customs and folkways of the Internet generally, of the type of virtual community and software at issue, not to mention sensitivity to the legal and cultural expectations of participants who will in some cases be geographically concentrated but at other times will be internationally diverse.

Disputes about the nature and practice of self-government of online communities call out for a new type of neutral and external referee– a light-weight online arbitration, the cyber equivalent of a court, or perhaps rather of a small-claims court, but one empowered to primarily do equity rather than law.[106] Quality arbitration costs, and the expense of bringing problems of this nature to a traditional arbitrator, would be prohibitive for most virtual communities which, after all, may not have legal personality, a clearly defined membership or a bank account. Just as states staff and subsidize their courts in the interest of providing a trusted and neutral means for citizens to resolve their disputes, so too might governments establish an Office of the Referee to arbitrate online disputes about the governance of virtual spaces.

Like an arbitrator, an online Referee could offer binding opinions when the parties agreed in advance to be bound. Unlike a court, the Referee would have no power to compel participation– a concept of dubious applicability in disputes where the parties may be international, or may have masked their identities behind digital persona. And unlike both arbitrators and courts, the Referee might also be allowed to educate participants and the public by giving advisory opinions when invoked by fewer than all the parties to a dispute. Like a court, the Referee could charge a small filing fee to discourage frivolous requests, but the state would both select the Referee and subsidize her operations. The creation of a publicly

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[106] This skates perilously close to the idea that cyberspace should be treated as a jurisdiction of its own, *cf.* David Post & David R. Johnson, *Law and Borders: The Rise of Law in Cyberspace*, 48 STANFORD L. REV. 1367 (1996), but does not, I think, cross over to it, as the relevant rules should be informed by the expectations of the participants, which will in ordinary cases be drawn not just from internet folkways but from the legal systems with which they are familiar. Thus, decisions will vary not just with the type of virtual environment, but with the type of participants.

financed institution to arbitrate and educate is a Habermasian solution to the goal of nurturing self-governance of virtual groups and indeed might be extended to physical ones as well. So long as participation is voluntary, and no one is coerced, the settlement of otherwise intractable disputes by third parties is a shortcut fully consistent with discourse ethics. And, again, if participation is not voluntary and the Referee's decision is only advisory—educative—that too is fully consistent with the Habermasian vision.

V. CODA

Whether it is the first President Bush's "thousand points of light" or then-Candidate Obama's paean to the transformative power of the ordinary citizen rising to extraordinary challenges, we are regularly treated to exhortations from on high about the value of citizen activism and small-bore collective action. This essay has explored whether there is more that governments might do than pay lip service to group formation while still not becoming so heavy handed as to risk undermining the virtues of collective self-organization.

Thus Demos's challenge in *The Pro-Am Revolution*: can governmental power be enlisted to aid decentralized self-organizing and self-governing groups? The difficulty, of course, is that existing governments are the institutions that in the long run have the most to lose from the growth of rivals who might claim to have greater legitimacy. In the short run, however, governments have much to gain, as do we all. Involvement and participation in all kinds of groups, including those with no political objective, can benefit both individuals and communities. Even if governments are willing to act, the economic obstacles to group formation remain formidable. There is also a danger that any governmental policy that sought to 'pick winners' would be smothering.

If we will not follow Demos down the road of direct subsidy, can indirect policies also serve? A better policy would be for the government to create a legal climate in which groups can flourish both on and off line, and to provide generally facilitative, supportive, often non-financial resources. Below, I identify eight specific governmental policies that could usefully be adopted in any relatively wealthy liberal democracy to promote the formation of groups and assist them once they are formed:

- Democratize access to communication by ensuring that the communications infrastructure is widely deployed, inexpensive, and of suitable quality.

- Enact legal reform (if not already in place) to prevent cyber-SLAPP lawsuits.

- Apply competition law aggressively to markets for communications technologies in order to ensure that no software or hardware maker can exert control over citizens' means of communication.

- Provide reliable data, and act as honest archivist.

- Assist those who desire aid (but only them) to fight spam and other forms of discursive sabotage.

- Ensure that Meetup-like services are available at low (or no) cost (if demand for these key services proves to be elastic as to price) and subsidize facilitative technologies, such as group decision-making software.

- Enact a digital workers rights policy including a component that encourages digital or even physical meetings.

- Provide a corps of subsidized online neutrals to settle non-commercial disputes among members of virtual communities.

Of course, there is only so much that communications technology can do alone, even with government assistance. Encouraging group formation will not by itself end poverty, raise standards of education, equalize gender roles, solve the health care crisis, nor ensure a supply of reliable and affordable childcare. Good software can help make good relationships, yet cannot wholly transcend the problems that define the society in which it is deployed. But it's a start.