

# ARTICLE

## SURFING THE SENTO

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#### I. INTRODUCTION

During the 1996 election campaign, candidates and their parties were working overtime on on-line Internet information systems. The Republicans and Democrats added position papers, policies, and promises almost by the hour, the better to reach voters directly. The Internet was their way to circumvent the filtering of the national news media. But the cyberspace campaign in America was only half the story.

Across the ocean in Japan, another Fall referendum was taking place—the first one under the nation’s new election and campaign law. At stake was control of the House of Representatives, the more powerful of the two chambers of the Diet,<sup>1</sup> and with it control of the government and the Prime Ministership. Most of the political parties had started Internet home pages several months before.<sup>2</sup> This was to be the first general election in which computerized communication could be a factor.

And so, the parties were understandably busy, but in a different way from their American counterparts. Japanese party workers were put to work purging their home pages of anything remotely related to the ballot.

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1. The House of Representatives has the right to receive the budget from the Cabinet prior to the House of Councilors, to overrule the House of Councilors on budget and other matters, to have the final say on appointment of a Prime Minister, and to dissolve the Cabinet. See HITUSHI ABE ET AL., *THE GOVERNMENT AND POLITICS OF JAPAN* 16 (James W. White trans. 1994).

2. *Politics Logs on to Internet*, ASAHI EVENING NEWS, Jan. 3, 1996, at 4.

Japan's election laws control everything from the size and placement of campaign posters to the number of postcards a candidate can dispense to supporters.<sup>3</sup> The Internet, however, was not on the minds of regulators when they drafted the new legislation.<sup>4</sup> Articles 142 and 143, which specify the appropriate use of words and pictures in a campaign, define the kind of media in which they might be displayed. About computer-linked communication, there is not one word.

Unsure what the government might say about a law that had not been written, the Japanese political parties opted to exit the Information Superhighway. The dominant Liberal Democratic Party (*Jiminto*), the New Frontier Party (*Shinshintō*), and the Pioneers (New Party *Sakigake*) all scrubbed their home pages of any reference to candidates by name. "It was a tedious work," said Okamoto Kenji<sup>5</sup> of the Pioneers. "I went through each and every page going as far back as entries made half a year ago."<sup>6</sup>

This little story speaks volumes about the legal culture of Japan and its difference from that of the United States. The American attitude is: that which is not specifically prohibited is allowed. The Japanese approach is: that which is not specifically allowed is prohibited. There are at least as many other examples of legal cultural differences as there are nations of the world. Thus, the question becomes, in an Internet-linked world, where messages are simultaneously created, sent, and stored wherever phone lines can carry them, whose law and whose society will rule?

To date, most debate over regulation of the Internet has centered around the United States—its place of birth. Even the slightest suggestion of government oversight brings out flame-throwers from seemingly every modem-equipped log cabin in the country. The past year's adoption of the Telecommunications Act<sup>7</sup> constituted an Armageddon to some<sup>8</sup> because of its criminalization of sending sexual

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3. See generally Dan Rosen, *Speaking for Democracy: Japan's New Campaign-and-Election Law System*, THE JAPAN FOUND. NEWSL., Mar. 1996, at 10; Masahiro Usaki, *Restrictions on Political Campaigns in Japan*, 53 LAW & CONTEMP. PROB. 133 (1990).

4. Public Officials Election Law, Law No. 105 of November 25, 1994.

5. In this essay, I have followed the Japanese practice of placing the family name first, followed by the given name, unless an author's name has been listed otherwise in an article or book.

6. Atsushi Koderu, *Candidates Miss Cyber-Campaign Opportunities Due to Obscure Law*, DAILY YOMIURI, Oct. 15, 1996, at 10. One party, the Democratic Party of Japan (*Minshuto*), was somewhat less timid. It opted to maintain the names and photos of its candidates on its home page but removed any information about the districts from which they were running. *Id.*

7. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) [hereinafter Telecommunications Act]. The act amends the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

8. See, e.g., Barbara Dority & John Perry Barlow, *A Declaration of the Independence of Cyberspace*, THE HUMANIST, May, 1996, at 16:

materials to minors via computer, or displaying such materials in a manner available to minors.<sup>9</sup>

At the Digital Content conference at UC-Berkeley, discussion focused primarily on how to enforce existing rights such as trademark and copyright in the digital environment and how to make better business use of cyberspace.<sup>10</sup> The unspoken assumption was that the Net is there to be used, even exploited, but not restricted.

The most pure, if not the most popular, expression of this idea came from John Perry Barlow of the Electronic Frontier Foundation. Barlow's position is something akin to the absolutism of Justice Hugo Black toward the First Amendment to the Constitution:<sup>11</sup> "no law" means *no law*.<sup>12</sup>

In the United States, you have today created a law, the Telecommunications Reform Act, which repudiates your own Constitution and insults the dreams of Jefferson, Washington, Mill, Madison, de Tocqueville, and Brandeis. These dreams must now be born anew in us.

You are terrified of your own children, since they are natives in a world where you will always be immigrants. Because you fear them, you entrust your bureaucracies with the parental responsibilities you are too cowardly to confront yourselves. In our world, all the sentiments and expressions of humanity—from the debasing to the angelic—are parts of a seamless whole, the global conversation of bits. We cannot separate the air that chokes from the air upon which wings beat.

9. (d) Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

Telecommunications Act, *supra* note 7, § 502.

10. For example, panelists in the first session on The Advertising Model talked about how to get the attention of users of the Net. Nat Goldhaber of CyberGold, Inc., called the current era The Attention Society, and said that in such a society attention is the principal measure of power. His company pays consumers to look at ads it creates for various advertisers. Curt Blake of Starwave discussed the importance of brand names, such as ESPN, in attracting the attention of users.

Remarks at the Digital Content conference, University of California at Berkeley, Nov. 8, 1996.

11. "Congress shall make no law... abridging the freedom of speech, or of the press..." U.S. CONST. amend. I.

12. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring); *Barenblatt v. United States*, 360 U.S. 109, 141 (1959) (Black, J., dissenting). See generally Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962). Except for periodic sympathetic utterances by

Barlow would practically exempt the Internet from the application of copyright law, the better to empower ordinary citizens to acquire and exchange information without restraint.<sup>13</sup>

The purpose of this essay is not to contest the views of Mr. Barlow or any other of the speakers at the conference. Rather, my primary intent is to show that much of the debate surrounding cyberspace and the Internet is an outgrowth of American society, and, moreover, a particular strand of American society. The values that underlie this ideology are by no means universal. If the battles to be fought in the U.S. are difficult, they are well-nigh impossible overseas. My example is Japan because, like the U.S., it is an information-rich society, but unlike the U.S., it has never accepted the notion that the marketplace of ideas should be wholly unchanneled.

## II. CYBER LIBERTARIANS AND THE AMERICAN FRONTIER

David Hudson, writing in the San Francisco Bay Guardian, calls the advocates of laissez-faire Internetism "right-wing libertarian[s]," and a kind of "techno-elite."<sup>14</sup> If they are the founding fathers of a new cybernation (and, according to Hudson, they are mostly fathers—"well-educated white men with an interest in high technology"<sup>15</sup>), then *Wired* magazine is their Federalist Papers. Their philosophy, argues Hudson, transcends computer issues.

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Justices Douglas and Brennan, however, Justice Black was alone on the Court in this belief. See generally WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT* 8-25 (2d ed. 1995).

13. John Perry Barlow, remarks at the Digital Content conference, University of California at Berkeley, Nov. 8, 1996. Barlow would not, however, allow fans of the Grateful Dead—for which he wrote songs—to enter their concerts and hear his music for free. Neither would he object, seemingly, to being paid royalties based on purchases of recordings of his songs or their performance on the radio and in other domains. Barlow's theory is that because copies do not deprive authors of their originals, they should be as free as the air. (He and the Grateful Dead did not prevent fans from taping their concerts.)

However, relationships—by his view—can properly involve an exchange of money. A consumer may download copyrighted software for free in his world, but then be called upon to pay for the advice of the company on how to use it. This is either a "paradigm shift" or it is wrong. Ordinarily, people operate in the opposite way. I expect to pay for my computer software, but if it does not work, I do not expect to have to pay to consult the company and find out why. Indeed, I am currently vexed by the worst of both the ordinary and Barlowian worlds. I write with WordPerfect software purchased at the discounted academic price. For the discounted price, I am not entitled to call the company's helpline; thus, I have paid for the product but apparently not a direct relationship. "Technical support is limited on online support such as the Corel Bulletin Board Service (BBS), the World Wide Web and FTP Internet Sites, CompuServe® and the Corel Fax on Demand service. No telephone or other support will be included for the Corel® WordPerfect® Suite—Academic Edition." Corel® WordPerfect® 3.5 For Macintosh® box (1996).

14. David Hudson, *Digital Dark Ages*, S.F. BAY GUARDIAN, Nov. 6, 1996, at 26, 27.

15. *Id.* at 26.

Libertarianism is grounded in a basic distrust of government, a mindset shared by many heavy users of the Net and solitary arms collectors living alone in the woods. The government is out to take my guns, my tax money, my modem—these are essentially the same arguments. One could call this school of libertarianism “the conspiratorial strain.”

There is another school of libertarianism, however: one that sees the free market as liberator. This view holds that to the degree that government is involved, the perfect state of nature is diminished. Such a view was very popular in the United States until the Great Depression.<sup>16</sup> Several generations have passed since that time, when scores of Americans leaped to their deaths over their debts. Cyber-libertarians paint a much more attractive face on the philosophy. To them, it is all about choice and empowerment, until the Savings & Loans in which they have deposited their retirement accounts fail, at which time most adherents fall in line with everyone else to get their money back from the Federal Deposit Insurance Corporation.

Whether it springs from the fear of government or hope for the wisdom of humankind, the cyberlibertarian ideology seeks a revolution. For example, the founder of *Wired*, Louis Rossetto, is quoted as saying:

There are really only two alternatives: trust the universe, or trust the politicians and bureaucrats. Right now, most people have been educated to believe that governments are necessary, and that electoral politics is the highest form of democracy.... People believe electoral politics is democracy because they have been brainwashed, period. Children are collected in public schools and taught history, which means basically they are taught the history of the state, or rather the history of a particular way of looking at their state, and that idea is continually reinforced by mass media and the structure of the game. Democracy in America? It's quadrennial Kabuki paid for with tax dollars administered by politicians and bureaucrats ultimately for their benefit, and for the benefit of the economic interests that influence them.<sup>17</sup>

Leaving aside the likelihood that the economic interests will not go away even if the politicians and bureaucrats do (economic interests are likely to trust in the universe even more if there is no government to stand in their way), Rossetto's views spring, perhaps unconsciously, from three very American traditions: (1) if you don't like the government, move away; (2) if you just don't like government at all, move farther away; (3)

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16. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (government limitation of working hours of bakers is unconstitutional interference with liberty and freedom of contract). But see *Nebbia v. New York*, 291 U.S. 502 (1934) (government can regulate economic policy).

17. David Hudson, *There's No Government Like No Government*, S.F. BAY GUARDIAN, Nov. 6, 1996, at 30, 33 (interview with Louis Rossetto).

if you want to make a buck, make the move and wait for everyone else to follow.

This is based on simple American history. The colonists were the malcontents of their time. Some wanted to change British society but could not, so they opted out. Others wanted just to be left alone. The problem was not so much with the king; it was with any government that restrained their freedom of choice. So they headed for the Colonies. And finally there were those who raced across the ocean and, later, out West to snatch up free resources (land, minerals, animals) so they could sell them back to those who were not as quick. Along the way, all three groups happened to interfere with a goodly number of Native Americans, who trusted completely in the universe. Luckily for the settlers, there were few politicians or bureaucrats to get in their way.

When the colonists finished up their manifest destiny, they needed a new project. So, they set about building a railroad to make it easier for others to see the Pacific Ocean. Once people got rich from that project (it was fine for the government to help obtain the right-of-way for the tracks, but presumably unconscionable to set a minimum wage for the laborers who laid them), they decided to build highways from Disneyland to Disneyworld to make it even easier to span the nation (oops, again with some of that tainted government money). After that, they constructed airports. And finally, when all it took to get to the Golden Gate Bridge from the Brooklyn Bridge was a *See America* ticket on Greyhound, they had nowhere else to escape.<sup>18</sup>

As luck and the universe would have it, it was around that time that a bunch of scientists put together a rag-tag linkage of computers so they could talk to one another. They did it with money from the Pentagon, the National Science Foundation, and other government entities. It became the Information Superhighway, the "promised land," the new manifest destiny with no bounds, and it was there that the Cyberlibertarians embarked on the new Gold Rush. It is surely not coincidental that one of the leading companies making money from the Net is called CyberGold.

The story is indisputably American, combining the realizable dream of a new frontier<sup>19</sup> with a self-help mentality that conveniently filters out any recollection of the government aid that made it all possible. It has been a fascinating adventure, but now that the Net has gone global, can it

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18. The analogy could be extended by adding the development of telegraph, radio, television, and telephone systems, but enough has been said—I trust—to make the point.

19. See generally HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* (1993) (describing the growth of Computer Mediated Communications).

be exported? Or is it a uniquely American adventure, against which people in other places will rebel? This brings us to Japan.

### III. THE WEB OF JAPANESE SOCIETY

The idea that Japan tends to be a group-oriented society, and America an individualist one, is the most timeworn of all clichés about Asia. That does not make it any less true. From the moment of birth, children in Japan are taught that safety is found within the circle; first the circle of family, then school, and later employer. Unlike the Dick and Jane readers of the American baby boomers' past, Japanese elementary school textbooks inevitably show pictures of children working together with their classmates to accomplish goals, even when the book (ostensibly) is not about civics at all.<sup>20</sup>

Japan is not at all unique in identifying the locus of identity in the society rather than in the individual. The tendency is common throughout Asia, dating back at least as far as Confucius. Confucian philosophy is all about relationships: subject and ruler, parent and child, older and younger sibling, and the like. In the course of a day, each person passes through numerous relationships; sometimes he is the superior, sometimes the inferior. The inferior has a duty to follow the direction of the superior, while the superior has a duty to act benevolently toward the inferior. In this way, all are thought to work for the common good: a harmonious society.<sup>21</sup> Thus, not only is the individual's identity tied up with that of the group, his role within the group depends on his position in the vertical hierarchy.

To date, the American attitude toward the Internet has been to break down hierarchical barriers, to separate oneself from the control of institutions (be they the news media, corporations, or the government), and to enter and exit relationships whenever the whim strikes. This

20. Dick and Jane are enjoying a revival, fueled by a PBS documentary, a museum exhibit, and a book—all exploring the America depicted in the series, which taught 85 million Americans to read between the 1930s and the 1960s. CAROLE KISMARIC & MARVIN HEIFERMAN, *GROWING UP WITH DICK AND JANE: LEARNING AND LIVING THE AMERICAN DREAM* (1996). In general, Dick and Jane and the other characters were depicted as autonomous nouns individually acting upon their world through verbs. "Look Dick, look. See Spot run." In Japanese children's texts, however, characters are frequently seen as acting together. For example, a first grade arts and crafts book features photos of children in groups making mudpies, constructing a huge paper sculpture of Gulliver, building a sandcastle, parading in a festival, and drawing a gigantic chalk fish on the schoolgrounds. In all these pictures, each child is doing his own small part to contribute to the creation of a whole. Many of the projects are far too large for any one child to execute alone. Some, like the festival parade, by necessity involve the group. The unstated but (at least to outside eyes) clear message is that for society—the whole—to prosper, everyone must work together. NIHON JIDOU BIJUTUSU KENKYUUKAI [JAPAN CHILDREN'S ART RESEARCH CENTER], *ZUGA KOUSAKU 1* [DRAWING, PAINTING, AND HANDICRAFTS, FIRST GRADE] (1991).

21. See generally *THE ANALECTS OF CONFUCIUS* (Mei Renyi trans. 1992).

ideology is as foreign to Japan and other Confucian-based nations as sashimi might be to the Nebraska Association of Cattle Ranchers.

Murai Jun is a Japanese advocate of the Internet. He is an important member of the WIDE Project, which stands for Widely Integrated Distributed Environment Project, a group that aims to extend the reach of the Net within Japan.<sup>22</sup> Yet even a true believer such as Murai has concerns. In his book *Intanetto (The Internet)*,<sup>23</sup> he foresees conflict because American ideas toward the Net are based on individualism, but European and Asian users are accustomed to knowledge and information systems centered around authority and control.<sup>24</sup> Though this may cause significant upheaval outside of the U.S., Murai is ultimately optimistic about the outcome, hopeful that the American model will influence Japanese citizens to rethink their notions of the proper life.

The story recounted at the beginning of this essay suggests otherwise. Even with the technology available to reach thousands of voters and no law explicitly standing in the way, Japanese political parties were afraid to make use of the technology without direct approval from an authority figure—in this case the Home Affairs Ministry.

Another writer, Nishigaki Toru, puts the question a different way.<sup>25</sup> Multimedia culture is indisputably based on an American worldview, he says. Realistically, the amount of information from America is bound to outstrip that based in Japan. However, the question should not be how this will change Japanese society, but rather how it *should* change Japanese society.<sup>26</sup>

Nishigaki's concern is that, confronted with such a technological assault on tradition, Japanese society may embark on a futile mission to avoid lagging behind America.<sup>27</sup> This would not be the first time such a thing has happened. In the mid-nineteenth century, Japan was faced with another invasion of technology from the outside: the black ships of Commodore Perry. Perry, on behalf of the United States, demanded that

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22. See Kiyohara Keiko, *Books in Japanese*, JAPAN FOUND. NEWSL., Mar. 1996, at 15, 17.

23. MURAI JUN, *INTANETTO [THE INTERNET]* (1995).

24. Kiyohara, *supra* note 22, at 17.

25. NISHIGAKI TORU, *MARUCHIMEDIA [MULTIMEDIA]* (1994); see also NISHIGAKI TORU, *SEINARU VACHARU RIARITI JOHO SISUTEMU SHAKAIRON [SACRED VIRTUAL REALITY: THEORIES OF THE INFORMATION SOCIETY]* (1995).

26. Kiyohara, *supra* note 22, at 16.

27. Maeno Kazuhisa, late professor of Information Studies at Gunma University, worried about the consequences of Japan *not* trying to follow America's lead. He wrote, "Will multimedia bring us closer to the information society, shattering Japan's old ways of thinking in the process? Or conversely, will traditional ways of thinking obstruct multimedia's progress and cause Japan to fall behind the current of world history?" Maeno Kazuhisa, *Multimedia Society and Japan*, JAPAN FOUND. NEWSL., Mar. 1996, at 1, 9 [hereinafter Kazuhisa, *Multimedia Society and Japan*]; see also MAENO KAZUHISA, *JOHO SHAKAI, KORE KARA DO HARU [THE FUTURE OF THE INFORMATION SOCIETY]* (1991).

Japan open its ports to foreign trade. He backed up his demand with superior armaments and an impressive armada. Confronted with strength it could not resist, Japan succumbed.<sup>28</sup> Then, paradoxically, it began a frantic quest to catch up. Suddenly, anything foreign was the rage.<sup>29</sup> Gentlemen appeared in photos with Western-style frock coats. Companies scrambled to import Western industrialization. The military adopted the command structure of the German army.<sup>30</sup> Even Western law experts were imported to create a modern (read: Western) legal system.<sup>31</sup>

Along the way, Japan also noticed that the great powers exerted their power around the world through military adventures, territorial "acquisitions," and imperialistic aggression. Consumed with the fever to become accepted as a full partner in the community of influential nations, and fresh from its victory in the Russo-Japanese War, Japan set out to establish its credentials. This led to the cataclysmic *denouement* of World War II.<sup>32</sup> Cyberlibertarians who desire to remake the world should be careful what they wish for; they may get it.

No wonder Mr. Nishigaki is concerned. John Perry Barlow should be too.

I am not in any way predicting Digital War I (although it certainly would make an exciting plot for a novel.) My point is only that any society that finds fundamental change forced upon it is likely to react in unpredictable ways. Rapid Western-style industrialization of Iran begat a return to a fundamentalist theocracy. Demographic shifts in contemporary America have ushered in an era of restricted immigration and English-only advocacy. The reactions are sometimes good, sometimes bad, and sometimes different in the short and long run.

28. See generally EDWIN O. REISCHAUER & ALBERT M. CRAIG, *JAPAN: TRADITION AND TRANSFORMATION* 118-22 (2d ed. 1989).

29. Even the idea of a consciousness of culture was in some ways a Western import. See Tessa Morris Suzuki, *The Invention and Reinvention of "Japanese Culture,"* 54 *J. ASIAN STUD.* 759, 761-763 (1995); see also W.G. BEASLEY, *JAPAN ENCOUNTERS THE BARBARIAN* (1995) (describing Japanese sent abroad in the mid-nineteenth century to acquire foreign knowledge).

30. REISCHAUER & CRAIG, *supra* note 28, at 145-89.

31. See generally Y. NODA, *INTRODUCTION TO JAPANESE LAW* 41-62 (Anthony H. Angelo trans. 1976). Still older examples include the reception of Ch'an Buddhism from China in the twelfth and thirteenth centuries, which became Japanese Zen; tea drinking from China, which was stripped to bare essentials by the Japanese priest Sen Rikyu and transformed into the Japanese tea ceremony; and certain pottery-making techniques from Korea. See, e.g., SOSHITSU SEN XV, *TEA LIFE, TEA MIND* 12-14 (1979); DAISETSU SUZUKI, *ZEN AND JAPANESE CULTURE* 50 (1970). See generally Dan Rosen, *The Koan of Law in Japan*, 18 *N. KY. L. REV.* 367, 370-75 (1991). Cf. J. MARK RAMSEYER & FRANCES M. ROSENBLUTH, *THE POLITICS OF OLIGARCHY: INSTITUTIONAL CHOICE IN IMPERIAL JAPAN* (1995) (ultimate failure of Meiji era leaders to construct government structures that would preserve their power).

32. See generally EDWARD BEHR, *HIROHITO: BEHIND THE MYTH* (1989); JOHN TOLAND, *THE RISING SUN: THE DECLINE AND FALL OF THE JAPANESE EMPIRE* (1970).

Information flow could be just as challenging as political restructuring; perhaps it is even more so. If this is true in Japan, it is certainly true of other Asian countries, most notably China, where users of the Internet must have a registration form on file with the police department.<sup>33</sup> Of course, in China there is no tradition of private broadcasting. To the contrary, the tradition involves control of mass communication by the government, both pre-and post-1949. Unfettered and uncontrolled use of the Internet is simply not going to happen in the foreseeable future. Pushing too hard for too much too soon may have the opposite effect, as recent history has demonstrated. On the other hand, as today's American software and record companies can attest, China has a long history of not letting private "ownership" rights interfere with citizens' ability to copy whatever they want.<sup>34</sup> Perhaps it is a few hundred years ahead of the wave.

Monroe Price has observed "[a]s new forms of communication . . . transcend existing political boundaries, they call into question historic political ties and threaten to destabilize existing national and multinational regimes."<sup>35</sup> Change will undoubtedly occur, but it may not be the change that advocates of Internet libertarianism expect.<sup>36</sup>

Unlike the hierarchical structure of Confucianism, which continues to influence Asia, decentralization is basic to the American ideal of the Internet. Federalism has been a way of life since the Articles of Confederation. Dispersion of authority remains one of the major political values in the United States of today. There is great enthusiasm for getting the government out of the capital, getting the companies out of the cities, and getting the workers out of the workplace. Silicon Valley is a village of men and women who founded their companies at the workbench in their garage, or who now work for the industrial giants that have been formed

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33. No one really knows the number of Internet users in China, but most 1996 estimates place it at fewer than 100,000. *See, e.g., China, Wired*, TIME, Apr. 22, 1996, at 73 (40,000); *Estimated 60,000 mainland Chinese in cyberspace*, REUTERS, Mar. 28, 1996; Renee Schoof, *China Says Censorship Laws Apply to the Internet*, AUSTIN AMERICAN-STATESMAN, Apr. 15, 1996, at D1 (100,000); *But see Steve Higgins, Why Internet Curbs in China May Not Hurt U.S. Business*, INVESTOR'S BUS. DAILY, Apr. 16, 1996, at A10 (200,000).

34. *See generally* WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* (1995).

35. Monroe Price, *Electronic Media and the Global Competition for Allegiances*, 104 YALE L.J. 667, 668 (1994).

36. Price notes that governments have various ways to regulate media: they can subsidize, censor, or speak themselves. *Id.* at 677-81. America is unusual in the world in its almost complete reliance on commercial broadcasting. *See, e.g., Dan Rosen, Broadcasting in the Public Interest: Lessons from Japan*, 7 CONST. COMM. 35 (1990). Only recently, for example, did Austria gain its first private radio station. Most countries have at least one publicly-supported television and radio service, and often only that (with perhaps several different channels). Other countries, such as Japan, Britain, and Canada, have created broadcasting corporations free of direct government control but funded through listeners' fees imposed by law.

out of those workbenches (and who not-so-secretly aspire to go off on their own and find their own way to success).

Even before the Internet, America encouraged a multiplicity of voices. Mass media regulation worked toward the proliferation of as many television and radio stations as possible, with as many different owners. In major markets such as New York or Los Angeles, 50 different radio signals may be available to listeners. Even in medium-size cities like New Orleans, they number around 30. Cable television, after some early growing pains, now reaches a majority of Americans with a multiplicity of channels.<sup>37</sup> For those who cannot be satisfied with fewer than 100 video options, satellite dishes now exist, allowing users to receive an even greater number of specialized services. Not so far in the future: video on demand, the home electronics equivalent of the Blockbuster Video shop in your neighborhood.

Japan is a very different story. The biggest cities, Tokyo (population approximately 7.9 million) and Osaka (population approximately 2.5 million), have fewer than a dozen radio stations, and far fewer television stations.<sup>38</sup> Only 6.3% of Japanese households have cable television.<sup>39</sup> There is essentially one local phone company for the entire nation: Nippon Telephone and Telegraph. Under just a few years ago, there also was only one long-distance company: NTT. Now there are additional competitors, still, however, dwarfed in size by NTT.<sup>40</sup> International telephone service has been a bit more deregulated. KDD—the NTT of the international calling sector—retains the lion's share of the business, but at least two other companies are making significant inroads with discount pricing.<sup>41</sup>

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37. The Neilson rating service estimates cable penetration at 69.1% in the U.S. See Joanne Ostrow, *Cable's Future Depends on Whose Crystal Ball You See*, DENV. POST, Oct. 31, 1996, at F1.

38. For a comparative analysis of regulation of broadcasting in Japan and the United States, see generally Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 BUFF. L. REV. 615 (1991). For an overview of the origins of broadcasting and its regulation in Japan, see NIPPON HOSO KYOKAI (NHK), FIFTY YEARS OF JAPANESE BROADCASTING (1977).

39. See Eri Kim, *Digital Sats Target Japan*, VARIETY, Sept. 16, 1996, at 58. The figures, as of March 1995, mean that the number of subscribers is about 2.2 million.

40. NTT has more than 93% of the local telephone business and 70% of the long-distance market. ASAHI SHIMBUN, JAPAN ALMANAC 180 (1996); see Jonathan Watts, *Japan: Where the Phones are Highly Regulated—and Highly Priced*, THE OBSERVER, Nov. 10, 1996, at 6.

41. KDD retains almost 70% of the international calling market from Japan. See ASAHI SHIMBUN, *supra* note 40. Callback services, by which the customer calls a computer in the U.S. for one ring, hangs up, and waits for the computer to call him back with a dial tone (and a cheaper international rate based on the cost of an American phone line) have gained some popularity among expatriates and their businesses, including your author. Japanese consumers, on the other hand, remain wary.

An advisory committee to the Posts and Telecommunications Ministry<sup>42</sup> has supported the breakup of NTT into three separate companies to encourage competition.<sup>43</sup> However, so far that proposal has remained stalled.<sup>44</sup> The success of the conservative party, the Liberal Democratic Party, in the 1996 elections is thought to make any radical restructuring of the telephone industry unlikely.

The differences in telecommunication regulation between Japan and the U.S. are not accidental.<sup>45</sup> As a matter of policy, the Japanese government believes that the public is better served by a few strong competitors, confident of their position, than a free-for-all.<sup>46</sup> This attitude is not restricted to the media business. Automobiles, banking, insurance, and even lawyering reflect it. The passage rate on the Japanese Bar Exam, for example, is three percent. As in other industries, this ensures high quality, and it also serves to guarantee most of the country's 15,000 attorneys a livable income.<sup>47</sup>

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42. The Ministry's web site includes information on Japanese telecommunications regulation and policy. See Advisory Committee to the Posts and Telecommunications Industry (visited Apr. 18, 1997) <<http://www.mpt.go.jp/>> .

43. *Id.* The United States, of course, is itself going through this painful process. See generally Lawrence A. Sullivan, *Elusive Goals Under the Telecommunications Act: Preserving Long Distance Competition Upon Baby Bell Entry and Attaining Local Exchange Competition: We'll Not Preserve the One Unless We Attain the Other*, 25 SW. U. L. REV. 487 (1996).

44. *Compare DDI Calls for Splitting Up NTT's Operations*, JAPAN ECON. NEWSWIRE, Nov. 13, 1996, with *NTT Head Opposes Split Due to Global Competition*, JAPAN ECON. NEWSWIRE, Nov. 13, 1996. DDI is one of the companies competing with NTT. Ironically, both sides are looking to government regulators to make regulations favorable to their interest. Neither is interested in complete deregulation. NTT wants the government to preserve its dominance of the local phone network and discourage access to its networks by competitors. On the other hand, it wants the freedom to participate in the market for international transmissions. The President of NTT, Miyazu Junichiro, has said rather than competing for international voice telephone business, "[w]hat we are interested in is offering data communications and other multimedia-related services through our networks. And it is inevitable that we offer international services if our multimedia services require a network with international communications capability." Joshua Ogawa, *Company's Leader Takes a Global Line*, NIKKEI WKLY. (Japan), Oct. 28, 1996, at 9. Thus, NTT is presumably enthusiastic about one recommendation of another government advisory group, The Economic Council, that it be allowed to compete in the international market, but less so about the Council's other suggestion to allow greater competition in city calls and increased access to NTT's grid. See *Panel Urges Reform of Financial, Labor, Telecom Markets*, MAINICHI DAILY NEWS (Japan), Oct. 18, 1996, at 7.

45. A recent Japanese government report, for example, spoke proudly of the creation of a total of five new community broadcasting stations in the entire country. MINISTRY OF POSTS AND TELECOMMUNICATIONS, WHITE PAPER: COMMUNICATIONS IN JAPAN 17 (1994).

46. Stories of how Japanese companies' market shares remain relatively stable (where winners tend to continue winning) are recounted in JAMES C. ABEGGLEN & GEORGE STALK, JR., KAISHA: THE JAPANESE CORPORATION 42-66 (1985).

47. Hideo Fuji, *The Role of Lawyers in Japanese Society*, in UNITED STATES/JAPAN COMMERCIAL LAW AND TRADE (Valerie Kusuda-Smick ed. 1990). Access to the Bar is even more tightly controlled in Korea, where the passage rate is "less than a few percent" and the total number of active lawyers less than 3,000. Kyong Whan Ahn, *The Growth of the Bar and the Changes in the Lawyer's Role: Korea's Dilemma*, in LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY 119, 120 (Philip S.C. Lewis ed. 1994).

In stark contrast is the United States. The Telecommunications Act of 1996—despite all the attention its indecency sections<sup>48</sup> received—is in fact a radical deregulatory statute. Telephone companies are free to compete with cable companies and offer video;<sup>49</sup> cable companies can provide telephone service;<sup>50</sup> local phone companies can offer long-distance;<sup>51</sup> long-distance companies can compete in the local market.<sup>52</sup> Everyone is in everyone else's business, and the assumption is, that's good.

From Japan, however, the Act looks like unbridled chaos.

Professor Matsui Shigenori has written that “[l]aissez-faire capitalism has never been a part of Japanese ideology.”<sup>53</sup> Government, far from being the enemy of business, has been viewed since the Meiji era (1868-1912) as being committed to promoting industry and protecting it against foreign competitors. Matsui goes on to say that regulation in the U.S. tends to be deemed justified only when there is market failure, but in Japan it is thought to be justified even in the absence of failure or malfunction of the market.<sup>54</sup>

As a result, free competition is often regarded as threatening to the harmony of society. It is true that many Japanese companies are engaged in fierce competition and that this is apparently one of the major reasons for rapid economic growth. It cannot be denied, however, that such competition is allowed only with the boundaries set by bureaucrats. Indeed competition is always controlled and coordinated by bureaucrats in Japan. Such control and coordination become especially prominent when the industry faces economic trouble. But there are also many anti-competitive protectionist entry restrictions to prevent a fragile industry from falling into economic trouble. Moreover, even in healthy industries, small and medium size companies and stores are often protected against competition by various regulations. All such regulations are justified in the name of the necessity of maintaining the orderly development of the economy.<sup>55</sup>

Matsui is critical of this Japanese legal tradition, and his description makes the difference between Internet cultures clear. America in general, and the Internet community in particular, believe in discontinuous, market-driven, spontaneous, unpredictable progress. The corpses of

48. Communications Decency Act, Telecommunications Act, *supra* note 7, Title V (codified as amended at 47 U.S.C. § 223 (1996)).

49. *See* Telecommunications Act, *supra* note 7, Title III (codified as amended at scattered sections of 47 U.S.C. §§ 522-613 (1996)).

50. *Id.* at Title II (codified as amended at 47 U.S.C. §§ 251-261 (1996)).

51. *Id.* at Title III (codified as amended at 47 U.S.C. § 271 (1996)).

52. *Id.* at Title II (codified as amended at 47 U.S.C. §§ 251-261 (1996)).

53. Shigenori Matsui, *Lochner v. New York in Japan*, in *LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY*, *supra* note 47, at 199, 237.

54. *Id.* at 229.

55. *Id.*

failed companies and disappointed consumers is just the cost that must be paid for moving forward. Japan, on the other hand, seeks to avoid the bloodshed if at all possible. Decisionmaking must be coordinated so that all, or most, march in the same direction.<sup>56</sup> The market wars of the 1970s and early 80s between VHS and Beta video formats were the nightmare of industrial regulators. The agreed-upon standard for the new generation digital video disk of the late 1990s is their dream. Hitachi, Sony, and Toshiba, along with seven other companies from Japan, the U.S., and Europe, have settled upon a single format for the disks, resolving a contest between incompatible designs.<sup>57</sup> A subsequent agreement on encryption, in order to preserve copyright, made it possible for some manufacturers to plan market launches by the end of 1996.<sup>58</sup>

The Supreme Court of Japan routinely upholds government legislation designed to limit competition, under the theory that "excessive competition" is unhealthy.<sup>59</sup> In *Marushin Industries, Inc. v. Japan*,<sup>60</sup> the court upheld zoning restrictions on commercial projects designed to avoid excessive competition. The restrictions required a distance of 700 meters between retail store buildings. Similarly, in three cases involving public baths (*sentō*),<sup>61</sup> the court ruled against entrepreneurs who wanted to open baths within close proximity to existing establishments. The court said, in the Second Public Bath Act case, "To prevent public baths from closure or change of business because of the economic trouble and to take various legislative measures to secure its healthy and stable management do contribute to the maintenance of health and welfare of the citizen and thus conform with the public welfare."<sup>62</sup> Although the subject was hot water, not websites, these cases illustrate the ability of the government to limit competition. In that sense, they are decisions that affect broadcast

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56. It should not be thought that such decisions all come from the top down. As a matter of fact, the consensus-based *ringi* system of decisionmaking favored in Japan often requires broad-based support from the principal participants. Decisions tend to be slower in coming, but once achieved can be implemented with lightning speed. Professor John Haley, in his close analysis of administrative behavior in Japan, has concluded that the authority of Japanese bureaucrats is extensive, but their power to implement their decisions in isolation is quite limited. JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 200 (1991).

57. See *More Electronics Firms Join DVD Standardization Efforts*, DAILY YOMIURI (Japan), July 26, 1996, at 14.

58. See *Industry Hopes for Swift Growth After DVD's Troubled Birth*, FIN. TIMES, Oct. 31, 1996, at 23.

59. See Shigenori Matsui, *supra* note 53, at 229.

60. Judgment of November 22, 1972, Supreme Court, Grand Bench, 26 KEISHU 586, translated in THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, at 183 (Lawrence W. Beer & Hiroshi Itoh eds. 1996).

61. Judgment of January 26, 1955, Supreme Court, Grand Bench, 9 KEISHU 89; Judgment of January 20, 1989, Supreme Court, 2d Petty Bench, 43 KEISHU 1; Judgment of March 7, 1989, Supreme Court, 3d Petty Bench, 1308 HANREIJIHO 111.

62. Judgment of January 20, 1989, Supreme Court, 2d Petty Bench, 43 KEISHU 1, 3, translated in Shigenori Matsui, *supra* note 53, at 220.

stations, telephone companies, and home pages no less than the *sento* (which, by the way, served as the Internet of its time—the place where people gathered to exchange information.)

Those who advance the free market argument that existing forms of media are dinosaurs that will be buried by the eruption of the Internet may be sobered by the court's concern over the public bath industry. By the 1980s, it was in a serious decline, which continues to this day. In the 90s, most people now have baths in their own homes and need not go down the street to get in the steamy water. Yet the court said:

It was true at the time of enactment of this Act and is still true today that the public bath is an essential institution in the daily life of residents. It is necessary to maintain and preserve the public bath in order to serve the needs of residents dependent upon it. It is even more so today because the public bath business is facing economic trouble.<sup>63</sup>

Substitute the words "radio and television stations" or "telephone company" or "newspapers" for "public bath" and you have a tailor-made argument for regulation and limitation of the growth of the Internet in Japan.

Therefore, what is likely to happen in Japan is not a wholesale rejection of the Net, but rather a slower, more sustained development. The culture of the Net may be set in America, but like American baseball<sup>64</sup> and other cultural exports, it will surely be changed by its interaction with Japanese society and people. That, in my opinion, is a good thing; the Net does not belong to a few people in Berkeley and Boston, but rather to everyone who uses it, in his or her own way.

Providing a contrarian view, the late Professor Maeno Kazuhisa, predicts that rather than being shaped by Japan's bureaucracy, the Internet will cause a fundamental revolution in bureaucracy:

The present regulatory regime was built around the needs of the agricultural/industrial model. As such, its proper fate is not modification, through deregulation and similar means, but abolition. Today's bureaucrats carry out their duties by working to determine whether a precedent exists. Such a standard, however, has been rendered utterly irrelevant by a neo-Copernican shift from an agricultural/industrial society to an information society. Going forward, the bureaucracy will face a range of phenomena entirely without precedent. A new decision-making standard will be required, one that simply asks whether a given phenomenon actually benefits the Japanese people.<sup>65</sup>

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63. *Id.*

64. For the story of the transformation of American baseball into Japanese baseball, see ROBERT WHITING, *THE CHRYSANTHEMUM AND THE BAT* (1977); ROBERT WHITING, *YOU GOTTA HAVE WA* (1989).

65. Kazuhisa, *Multimedia Society and Japan*, *supra* note 27, at 5.

This prediction might be correct, but Japan has seen some revolutionary changes since the opening of the country in 1868. The change from agricultural to industrial was itself Copernican at the time. And yet, the nation has held fast to the notion that some direction, some leadership, some coordination (usually by the bureaucracy) is in the best interest of the people. In the end, it seems that even Professor Maeno does not doubt the continued role of government decisionmaking—even in the information industry. The issue he raises is not whether bureaucrats will continue to decide, but rather what criteria will they use to decide.

So far, the revolution has been slow in coming. Early in 1996, Japan accounted for only two percent of the world's users of the Internet. The number of host computers connected to the Net in Japan was 160,000, far fewer than in the U.S., of course, but also less than countries with populations smaller than Japan's 125 million: Germany, the U.K., Canada, and Australia.<sup>66</sup> This is in marked contrast to the use of other forms of media in Japan. Japanese newspaper circulation is almost 72 million, greater than that of the United States and even China—both of whose populations far exceed that of Japan.<sup>67</sup> Weekly magazine circulation is 1.9 billion per year; for monthlies it is 2.8 billion.<sup>68</sup>

One impediment to the growth of the Internet in Japan is the small installed base of personal computers, which is still far less than in the United States. College students in Japan, a prime market in America, remain heavily dependent on dedicated word processors with built in thermal printers rather than PCs. It is the exception, rather than the rule, for a company employee to have a PC in front of him at his desk. All the workers in a particular department may share access to one machine. Thus, the structure of the workplace also does not yet encourage the kind of individual relationship with a computer that Americans take for granted. "One person, one computer" may be the credo in the United States, but not in the offices of Japanese corporations (even those that manufacture the hardware.)

Then there is the matter of language. English is the *de facto lingua franca* of the Net. The number of Japanese who can read and write fluently in English is not large, and those who will be motivated enough to make the effort to use a foreign language on a computer even smaller. Smaller still is the number of people outside of Japan who can read and write Japanese. Computer software that can flawlessly translate the two

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66. *Japan's Internet Connection—Who's Who, What's What*, FOCUS JAPAN, Jan./Feb. 1996, at 1. Asia in general is far behind the United States and Europe in the number of Internet host computers. See William McGurn, *Net Assets*, FAR EASTERN ECON. REV., July 27, 1995, at 68, 69.

67. FOREIGN PRESS CENTER/JAPAN, JAPAN'S MASS MEDIA 15 (1994).

68. *Id.* at 73.

languages is still far away. Thus, to the extent that much of what appears on the Net is in English, the momentum for logging on in Japan will be diminished.<sup>69</sup>

And finally, we return to what is probably the most important point of all. Even without any government interference, Japanese are just less likely than Americans to become enthusiastic about isolating themselves from face-to-face contact in the name of "progress." In Japan, "skinship" matters almost as much as "kinship." The number of public baths (*sento*) may be declining, but no Japanese resort would dare be without a big bath to offer its customers. It is a place where everyone is equal, the water is hot, and the conversation is loose.

Japan will surely adapt to the Internet, but in its own way and in its own time. One scenario is for groups of people to gather around single computers, turning Net surfing into a communal activity. Another possibility is that existing media companies will gradually shift their output online, leading customers to the Net rather than following behind them, just as the three major newspapers did in creating television networks.<sup>70</sup> Japanese television viewers have yet to march on the Posts and Telecommunications Ministry, demanding the mega-channel options available in the U.S. They apparently remain content with the offerings of the principal commercial networks.<sup>71</sup> Thus, rather than shaking off the shackles of major media conglomerates, consumers seem more likely to follow these companies to the digital domain.<sup>72</sup>

As Japan adapts to the Internet, it will adapt the Internet to itself. This will be yet another story of the reception of outside culture and technology, modified to fit local preferences. It is likely to be a future different from the one envisioned by the American theoreticians of the Internet, but not so different as to be unrecognizable. If the mandarins of cyberspace can accept the possibility of different digital cultures in

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69. Domestic use of the Net within Japan, of course, is another matter. The craze for cellular telephones, handy phones, and *pokeberu* (pagers) may indicate substantial growth potential for the Internet. However, the use of these other electronic technologies is a matter of convenience or amusement, as with the games that young people play making homonym number messages on their friends' pagers (Example: 3 is pronounced *san* or *sa*; another pronunciation of 3 is *mitsu* or *mi*; 4 is *shi*; 1 is *ichi* or *i*. So, 3-3-4-1 is *samishii*, which means "I'm lonely.") See William Marsh, *A phone in the hand*, MANGAJIN, Nov. 1996, at 92. When extolling the liberatory virtues of the Internet, its advocates presumably have something more in mind.

70. Each of Japan's largest newspapers, the *Asahi*, *Mainichi*, and *Yomiuri*, has its own television network. The Fuji Sankei group, the owner of another network, also operates newspapers, but their circulation is much smaller than the big three.

71. The first digital satellite television service in Japan was scheduled to begin in late 1996, offering 70 channels to subscribers. Eri Kim, *supra* note 39.

72. On the other hand, the number of specialized magazines published in Japan is astronomical. Were I a salesman for a service depending on extensive consumer choice on the Internet, I would point to the magazine industry as evidence that Japan is not immune to this sort of individualization.

different places, rather than insisting on one world order, the Net may turn out to be the biggest *seno* of them all.