Routledge Handbook of Internet Politics

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Contents

List of figures ix
List of tables x
List of contributors xii
Acknowledgments xvi

1 Introduction: new directions in internet politics research 1
   Andrew Chadwick and Philip N. Howard

Part I: Institutions 11

2 The internet in U.S. election campaigns 13
   Richard Davis, Jody C Baungartner, Peter L. Francia, and Jonathan S. Morris

3 European political organizations and the internet: mobilization, participation, and change 25
   Stephen Ward and Rachel Gibson

4 Electoral web production practices in cross-national perspective: the relative influence of national development, political culture, and web genre 40
   Kirsten A. Foot, Michael Xenos, Steven M. Schneider, Randolph Kluver, and Nicholas W. Jankowski

5 Parties, election campaigning, and the internet: toward a comparative institutional approach 56
   Nick Anstead and Andrew Chadwick

6 Technological change and the shifting nature of political organization 72
   Bruce Bimber, Cynthia Stohl, and Andrew J. Flanagin
CONTENTS

7 Making parliamentary democracy visible: speaking to, with, and for the public in the age of interactive technology 86
   Stephen Coleman

8 Bureaucratic reform and e-government in the United States: an institutional perspective 99
   Jane E. Fountain

9 Public management change and e-government: the emergence of digital-era governance 114
   Helen Margetts

Part 2: Behavior 129

10 Wired to fact: the role of the internet in identifying deception during the 2004 U.S. presidential campaign 131
   Bruce W. Hardy, Kathleen Hall Jamieson, and Kenneth Winneg

11 Political engagement online: do the information rich get richer and the like-minded more similar? 144
   Jennifer Brundidge and Ronald E. Rice

12 Information, the internet and direct democracy 157
   Justin Reedy and Chris Wells

13 Toward digital citizenship: addressing inequality in the information age 173
   Karen Mossberger

14 Online news creation and consumption: implications for modern democracies 186
   David Tewksbury and Jason Rittenberg

15 Web 2.0 and the transformation of news and journalism 200
   James Stanyer

Part 3: Identities 215

16 The internet and the changing global media environment 217
   Brian McNair

17 The virtual sphere 2.0: the internet, the public sphere, and beyond 230
   Zizi Papacharissi
18 Identity, technology, and narratives: transnational activism and social networks
   W. Lance Bennett and Amoshaun Toft

19 Theorizing gender and the internet: past, present, and future
   Niels van Doorn and Liesbet van Zoonen

20 New immigrants, the internet, and civic society
   Yong-Chan Kim and Sandra J. Ball-Rokeach

21 One Europe, digitally divided
   Jan A. G. M. van Dijk

22 Working around the state: internet use and political identity in the Arab world
   Deborah L. Wheeler

Part 4: Law and policy

23 The geopolitics of internet control: censorship, sovereignty, and cyberspace
   Ronald J. Deibert

24 Locational surveillance: embracing the patterns of our lives
   David J. Phillips

25 Metaphoric reinforcement of the virtual fence: factors shaping the political economy of property in cyberspace
   Oscar H. Gandy, Jr. and Kenneth Neil Farrall

26 Globalizing the logic of openness: open source software and the global governance of intellectual property
   Christopher May

27 Exclusionary rules? The politics of protocols
   Greg Elmer

28 The new politics of the internet: multi-stakeholder policy-making and the internet technocracy
   William H. Dutton and Malcolm Peltu

29 Enabling effective multi-stakeholder participation in global internet governance through accessible cyber-infrastructure
   Derrick L. Cogburn
CONTENTS

30 Internet diffusion and the digital divide: the role of policy-making and political institutions 415

   Kenneth S. Rogerson and Daniel Milton

31 Conclusion: political omnivores and wired states 424

   Philip N. Howard and Andrew Chadwick

   Bibliography 435
   Index 487
Metaphoric reinforcement of the virtual fence

Factors shaping the political economy of property in cyberspace

Oscar H. Gandy, Jr. and Kenneth Neil Farrall

Understanding the political economy of the internet requires a comprehensive assessment of the strategic resources that interested actors bring to bear at critical points of engagement with those institutions that identify, assign, and enforce the rights and responsibilities that define it. This chapter is focused on the role of the U.S. Supreme Court and the appellate courts that help to set its agenda in defining the nature of property in cyberspace. An analysis of the strategic use of metaphor by justices, judges, plaintiffs, defendants, and a rapidly growing pool of “friends of the court,” reveals the ways in which boundaries are drawn, fences are raised, and rules regarding their height, density, and inviolability are set into place. While legal scholars assume that some logic governs the use of particular metaphors, such as those that reflect an internal or users’ perspective rather than an external or engineering orientation, the fact is that it is strategic impact, rather than logic or allegiance to a particular community of interest, that governs their use. Although continuing tension between property and liberty interests has marked the development of cyberspace, appellate courts have tended to use a broad array of metaphoric constructions to justify reinforcing limits on access to virtual property. The future of cyberspace will be shaped, explained, and justified through the strategic use of metaphors and analogies. The challenge will be to understand how their use reflects and reinforces existing distributions of power.

Fences are both a technical and a symbolic force when marshaled by those who seek to announce and defend their property interests. Fences are also seen as a constraint on the freedom of others to make use of public or collective resources. Although the ultimate status of a particular bit of fence was often determined through the use of deadly force (Anderson and Hill, 1975), the resolution of these conflicts at a more general level came to depend upon the establishment, interpretation, and enforcement of the rule of law (McFerrin and Wills, 2007).

Laws defending the use of barbed wire in the American West had much in common with Section 1201 of the Digital Millennium Copyright Act (Herman and Gandy, 2006). Each served to reinforce the claims of property rights holders who were engaged in the development of new frontiers.

The power of law is magical. It has the ability to establish as fact, things that we know in our hearts are not so (Madison, 2005). As Balkin (2003: 8) puts it, law “is a form of cultural software that shapes the way we think about and apprehend the
world.” Legal doctrines establish facts as well as systems of rights and responsibilities associated with the social actors and objects that are created along with those facts (Tiller and Cross, 2005). Development and change in the nature of what we treat as right or wrong is the product of a complex interaction of socio-technical factors that include the strategic efforts of social actors seeking to maintain or establish power or advantage over others (Etzioni, 1988). These actors bring a variety of resources to bear in their attempts to shape the law and its influence over behavior. We have chosen to focus on the use of metaphor and analogy as resources in the discursive construction of the regime of rights and responsibilities that helps to determine the character of cyberspace.

**Political economy and the transformation of cyberspace**

Cyberspace is more than the internet, although its infrastructure provides the matrix within which its countless transactions and interactions take place. The number and variety of communicative interactions that determine the character of cyberspace continue to expand as a function of socio-technical factors (Garrie, 2005) that both shape, and are shaped by, transformations in the global economy (Spar, 2001).

Although there are ongoing debates about whether the emergence of global markets for information goods and services represents a fundamental change in the nature of the market system (Webster, 2002), there is little doubt that the commodification of information has been a driving force in its transformation.

This process of commodification has been especially troubled, however, by the immaterial nature of information, and the associated difficulties of establishing and defending property interests in these intangible goods. A substantial increase in legislative and judicial activity has been a largely ineffective response to this growing uncertainty (Landes and Posner, 2004).

We focus our attention in this chapter on the ways in which conflicts between property and liberty interests in cyberspace have been pursued within the U.S. appellate court system. The appellate courts serve as the final authority on the meaning of legislative acts designed to establish rights as well as to control the behavior of cyberspace residents and guests. And, although the production of influence within the appellate court system differs in important ways from its production within the legislative arena (Baumgartner and Jones, 1993), the pursuit of group interests in both venues shares much in common.

Although judicial decisions are constrained to a certain extent by professional norms and expectations regarding the influence of legal doctrine and precedent, we are also mindful of the fact that jurists’ interpretations of the law will be shaped to some degree by their own moral, ethical, and ideological commitments (Balkin, 1991).

**The metaphoric construction of cyberspace**

In 1690 philosopher John Locke wrote the following about metaphor:

… all the art of rhetoric, besides order and clearness; all the artificial and figurative application of words eloquence hath invented, are for nothing else but to insinuate wrong ideas, move the passions, and thereby mislead the judgment; … And therefore, however laudable or allowable oratory may render them in harangues and popular addresses,
they are certainly, in all discourses that pretend to inform or instruct, wholly to be avoided…

(Locke, 1959: 146)

Locke’s concern about the misleading aspects of metaphor has been particularly salient within legal discourse. Susan Tiefenbrun (1986: 118–19) notes “Students of law are taught early in law school to avoid the use of emotive or metaphoric language in legal brief writing. Despite the generally held belief in this convention, however, metaphors are commonly found in cases.” Further, as Haig Bosmajian (1992) demonstrates, it is the metaphors (or “tropological passages”) in court opinions that are likely to be quoted in subsequent decisions.

That metaphors may, in fact, play a critical role in legal discourse where clear logical thinking is paramount, should no longer come as a surprise given recent work in the philosophy of language. Certainly, George Lakoff and Mark Johnson’s (2003) seminal work, *Metaphors We Live By*, helped scholars across academic discourses gain a greater appreciation for the vital, central role of metaphor in human cognition and communication.

In Lakoff and Johnson’s framework, metaphor is constructed of a source and target domain. The source domain is one in which the communicating agents are assumed to be familiar (or at least to share knowledge of certain relative characteristics) while the target domain is the less familiar area, where understanding can be increased via association with the source domain. The act of communicating in metaphor is an invitation to the receiver to consider the less familiar in terms of the more familiar. The familiar aspects of the source domain are its entailments. The entailments inherent in metaphoric expressions mean that certain aspects of the target domain are highlighted while others are hidden.

To say that the internet is a library or a town square are metaphorical constructions that involve key entailments of a source domain (library, town square) that the receiver of the message can then map on to the target domain (the internet). In the case of cyberspace, the entailments of this source domain, other than that it is some form of space, do not emerge from common experience. People derive their sense of the meaning of cyberspace from its usage in popular culture, mass media, and other extant discourses.

The cyberspace metaphor has had a tortuous history. While the word as first used was associated with freedom, independence, and new frontiers (Barlow, 1996; Post and Johnson, 2006), its overt spatial entailments came to be seen as playing into the hands of established interests and the march of global capitalism (Cohen, 2007). Far too often, from the perspective of some, courts have tended to oppose the treatment of cyberspace locales as equivalent to spaces in the material world, in part because it might subject service providers to additional burdens under equal accommodations laws (*Access Now v. Southwest Airlines*, 2002). Today, the term seems to have lost much of its power (both positive and negative) and is instead just one of the words one might pull from a thesaurus to avoid the stylistic faux pas of repeating the word internet or network one too many times.

*Metaphor as a twin-edged sword*

There is considerable disagreement in the legal literature as to the specific role of metaphor in the development of cyberspace. Hunter (2001) suggests that metaphor, when used to understand the internet, often clouds and constrains the thinking of the court. McGowan (2005), however, through careful readings of the cyber-trespass case law, makes a compelling
counter-argument that judges are more sophisticated in their reasoning than the metaphoric blinding’s criticism suggests. Further, as McGowan (2005: 4) points out, focusing exclusively on metaphorical constraint “trivializes judicial opinions without engaging them.”

While McGowan is persuasive, Balganesh (2006) shows us that jurists can still be led astray. This can happen when a chain of case decisions, beginning with instrumental, rather than truly conceptual uses of metaphor, becomes locked into a conceptual path that ends up corrupting the core concepts along the way. Deference to precedents activated by familiar metaphors means that discursive course corrections become more and more difficult. This outcome is quite clear in the case of decisions regarding the definition of property and trespass as they relate to intangibles (Balganesh, 2006: 316).

The troubles, according to Balganesh (2006: 282–3), began in earnest when a court needed to provide a rationale to justify its attempt to curb the actions of spammers. The CompuServe court reasoned that electronic interference with a server could be equated with a tangible invasion, and thus it was appropriate to apply the doctrine of trespass to transactions in cyberspace. The rhetorical stance selected by the court was not without consequence for subsequent cases involving troublesome access and use of internet resources. In his view, the “doctrinal ambiguities and inconsistencies” that have followed the CompuServe decision (Balganesh, 2006: 267) may make recovering from its discursive mis-steps exceedingly difficult due to the nature of associated path dependencies.

Metaphoric dominance and distortion

The fact that metaphors both highlight and hide has led to much criticism of particularly dominant legal metaphors such as the “marketplace of ideas” (Ingber, 1984). The phrase, first coined by Justice Holmes in his dissenting opinion in the 1919 case Abrams v. United States, has become the dominant metaphor in free speech cases. On the other hand, although the importance of the marketplace of ideas metaphor is beyond debate, its actual impact on legal discourse is harder to gauge. Cass Sunstein (1993) has criticized the metaphor for what it hides, for obscuring important aspects of free speech in a democracy. In his view, “Aggregative or marketplace notions disregard the extent to which political outcomes are supposed to depend on discussion and debate, or a commitment to political equality, and on the reasons offered for or against alternatives” (Sunstein, 1993: 249).

Philip Napoli’s (1999) examination of the use of the marketplace metaphor in the Federal Communications Commision (FCC) policy discourse over a period of 33 years showed that it had been used with two very distinct sets of entailments in mind: the economic dimension, which Sunstein criticizes above, and the democratic theory dimension, which is much more focused on the role of free speech in democratic self-government.

Napoli’s analysis suggests that the FCC has not consistently associated specific kinds of regulatory policy-making with particular interpretations of the marketplace of ideas concept. Thus, although this metaphor typically has been used to justify deregulation of the communications industry, these decisions have been predicated almost as much upon democratic theory principles as they have upon the goal of promoting economic efficiency and consumer satisfaction (Napoli, 1999:164).

Napoli’s observations help to underscore a number of key issues that arise in the study of metaphor and legal discourse.
How does metaphor affect legal reasoning? What motivates its use? How does metaphor help jurists to understand new and unfamiliar legal contexts? In what cases can metaphor constrain reasoning in ways that negatively impact the public interest?

The strategic use of metaphor

In order to answer these questions, we must first recognize that metaphors are instrumental resources, used strategically by plaintiffs, defendants, and a host of interested parties in an effort to influence the outcome of a court’s deliberation. These discursive resources are deployed at critical moments through well-established channels and means that include briefs, direct testimony, and the majority and dissenting opinions of the court.

Courts (and judges) issue finely crafted opinions that are woven throughout with analogies and metaphors that have been selected because of their likely effect in making judicial reasoning available to others as both justification and guidance (Berger, 2002). When, as is quite likely in the case of cyberspace transgressions, there are competing doctrines that are arguably relevant to the facts at hand, opinions are likely to make use of a metaphor that foregrounds a particular doctrine that supports a preferred behavioral or policy outcome (Cass, 1995). A carefully constructed opinion that uses a familiar, or an especially powerful, metaphor to justify a particular doctrinal choice allows the court to appear principled, when it may in fact be pursuing a political end (Tiller and Cross, 2005).

Friends of the court (amici) are active, and increasingly important, participants in appellate decision-making (Kearney and Merrill, 2000). Their involvement is limited primarily to the provision of formal arguments, or amicus briefs. The nature of the interests that amici might pursue are quite varied, but they include the defense of institutional interests, such as those represented by members of some professional group such as librarians or engineers. On occasion, members of Congress or representatives of administrative agencies offer briefs in support of prior decisions that have been challenged.

Paul Collins (2006) suggests that the arguments presented by pressure groups have had a measurable impact on the policy decisions reported by the Supreme Court. Amici play a role in the courts similar to that played by lobbyists seeking to influence the legislature—they provide information, including information about the preferences of other interested parties and the public more generally (Spriggs and Wahlbeck, 1997). While the informational component of amicus briefs often contains “alternative and reframed legal arguments,” what Collins (2006: 11) sees as particularly important is the way these arguments are used to illustrate the “broader social ramifications of the case.”

While the influence of amicus briefs is difficult to determine precisely, in part as a function of the nature of the dependent measures chosen by analysts (Songer and Sheehan, 1993), as well as by a rather dramatic increase in the number of amicus briefs being submitted, most observers conclude that the ideological bias of the courts determines the extent to which a court will highlight arguments drawn from an amicus brief (Kearney and Merrill, 2000). Indeed, legal scholars suggest that when a court is politically unified, even established legal doctrine will be ignored if it is in conflict with the policy preferences of the court’s majority (Tiller and Cross, 2005).

Property versus liberty interests

Among the more troublesome issues in the development of cyberspace law and policy is the nature of property, and the
meaning of property rights as they relate to theft, unauthorized access, or trespass (Loughlan, 2006). Conflicts over objects and interactions in cyberspace tend to arise as individuals and institutions seeking to protect their interests come to define those interests in terms of property (Radin, 2006).

In order to convince the courts that property rights in information, or in the infrastructures that enable the exploitation of those rights have been abridged, plaintiffs have to establish parallels between crimes against property in the material world and crimes against property in cyberspace (Lipton, 2004).

A difficult problem of representation emerges in those cases where the theft or misappropriation of property is based on unauthorized access to some facility. Here, the challenge is to describe this property in such a way as to make the law of trespass seem appropriate. Within the common law in the United States, important distinctions have been made between trespass to real property and trespass to chattels (McGowan, 2005).

Often in cases in which the nature of the link between tangible property and theft is difficult to establish, petitioners will deploy metaphors that they hope will influence the characterization of those charged with misbehavior. Persons who derive benefit from the creative labor of others are compared with those who would “reap without sowing.” Such a construction is less menacing than the image of lawless and dangerous criminals that is evoked by reference to pirates (Loughlan, 2006: 218). Nissenbaum (2004: 199) identifies recent decisions by the courts as contributing to the characterization of hackers as the “white-collar criminals and terrorists of the Information Age.” Because they have been constructed rhetorically as criminals, it is difficult for the uninvolved and uninformed to treat cases of hactivism as being similar to other forms of civil disobedience (Kreimer, 2001), or to accept well-publicized hacks of supposedly secure systems as a form of whistle-blowing (Jordan and Taylor, 1998: 773).

Another difficulty in cases involving crimes against property is the demonstration and assessment of the harm caused to the plaintiff or the plaintiff’s interests. The problems involved in this determination are quite substantial when the property is intangible, or the harm or loss is speculative or potential, rather than documented. Still, we find courts willing to grant that a plaintiff has met the requisite demonstration of harm even when the burden is as insignificant as an increase in the number of electrons flowing through a system, some temporary loss of the full functionality of a server, or the distraction of otherwise productive workers by unauthorized e-mail (Intel Corp. v. Hamidi, 2003). The courts’ assessments of these burdens are rarely based upon any readily agreeable standard of measure; instead they reflect the courts’ evaluation of the relative worth of an imagined class of victims and the agents who might cause them harm. Well-chosen metaphors help to establish and reinforce the impressions that their sponsors desire.

The tyranny of perspective: internal versus external

The ways in which a court might interpret the facts of a particular cyberspace case may depend upon whether the discourse focuses on the ways in which users perceive their interactions or transactions, or on the ways in which an engineer might describe them. A users’ perspective might reflect a kind of virtual reality that can be readily distinguished from the physical reality of computers, peripherals, and network infrastructure. Orin Kerr (2003: 357) labels these two perspectives internal and external, and he suggests:
“many of the disputes within the field of ‘cyberlaw’ boil down to clashes between internal and external perspectives.”

As Kerr (2003) observes, judges and other participants move easily between internal and external perspectives, depending upon the nature of the argument they seek to make. He suggests that in our efforts to apply the laws of the physical world to those of the virtual world we tend to look for analogies or metaphors that support the application of particular doctrines. On the other hand, those who oppose constraints on the imagined freedoms of cyberspace challenge the appropriateness of those metaphors (Froomkin, 1995). Legal scholars, such as Lawrence Lessig, who frequently intervene as friends of the court, often reveal well-established preferences for one perspective over another. Kerr (2003: 374) identifies Lessig’s famous declaration that “Code is law” as the basis for his belief that “because external code is internal law, we should regulate external code from an internal perspective.”

We are not in a position to suggest which perspectives should determine the outcome of cases and the future of cyberspace; instead we seek to characterize the ways in which these perspectives, inherent in the metaphors chosen to convey them, have been used strategically by the competing interests that come before the court.

**Central cases and their metaphors**

We have identified three cases that we believe mark critically important turning points in the path-dependent development of cyberspace. We have also been attracted to these cases because of the ways in which the deployment of metaphors reflects fundamental tensions between property and liberty interests.

The judges who decide these cases arguably seek to achieve an appropriate balance between the interests of property holders and a host of other interests and values that are placed at risk as property rights are extended or reinforced. We understand many of these risks as threats to freedom and autonomy. We see the search for a morally and politically defensible balance between property and liberty interests as being at the heart of the judicial construction of cyberspace. We review these cases in chronological order because each provides a framework against which the subsequent cases are likely to be compared.

**Universal City Studios v. Reimerdes: hyperlinks as the ties that bind**

We examined the case of *Universal City Studios v. Reimerdes* (2000) because of the ways in which a fundamental feature of cyberspace navigation was explicitly challenged. The U.S. Court of Appeals affirmed the decision of a lower court that barred the publication of a computer program, or the provision of hypertext links to other websites publishing the program because of its likely use for copyright infringement.

The *Reimerdes* (later Corley) case attracted a large number of amici representing both property and liberty interests (*Universal City Studios v. Corley*, 2001). First Amendment interests were involved because the defendant, Eric Corley, was a publisher whose website often contained material related to stories printed in his magazine. In this particular case, the site included a copy of the decryption program, DeCSS, so named because it was routinely used to circumvent CSS, the software that the motion picture industry was using to prevent unauthorized viewing and copying of its films. Corley’s site also included links to other websites that...
had posted the program. Following a decision by the District Court in NY to grant an injunction against Corley, he appealed to the 2nd Circuit. Although the Court explicitly recognized the complex policy concerns that required the balancing of access and fair use aspects of communications and technology policy against copyright interests, they chose to sidestep these issues and define the provision of hyperlinks as the equivalent of trafficking in dangerous contraband.

There were two ways in which hyperlinks were discussed within the courts. One, which we would characterize as an internal construction, emphasized the transportation of the user to some place; the other, which was also presented from the users’ (internal) perspective, emphasized the transportation of text, or image, or in this case a computer program, to the user. External constructions focused on the actions of users, and the technology involved in the transfer. In noting the distinction, the Circuit Court revisited the explanation offered by the District Court judge:

In applying the DMCA to linking (via hyperlinks), Judge Kaplan recognized, as he had with DeCSS code, that a hyperlink has both a speech and a nonspeech component. It conveys information, the internet address of the linked web page, and has the functional capacity to bring the content of the linked web page to the user’s computer screen (or, as Judge Kaplan put it, “take one almost instantaneously to the desired location”).

(Universal City Studios v. Corley, 2001: 455–6)

The American Civil Liberties Union (ACLU) and its colleagues offered an extended metaphor describing the internet as “a vast library” where “links serve as both its card catalog and its digital footnotes” (ACLU et al., 2001: 21–2). The brief also suggested “linking effectively ties the entire web together into a single interconnected body of knowledge made up of all individually published web pages of different users around the world.” Like many of the participating computer scientists, these amici sought to challenge the court’s arguments regarding functionality by suggesting that if an annotated bible and Thomas Acquinas’ commentaries were shelved near each other on a library’s shelves, this enhanced access should somehow lessen the constitutional protection that those commentaries would ordinarily have enjoyed (ACLU et al., 2001: 22–4). They also challenged the court’s assertion that linking to a site with the DeCSS program was the “functional equivalent” of providing the program more directly.

The U.S. government also saw this case as being of particular importance, and participated as an intervenor in support of copyright interests. The government’s brief repeated the district court’s evocation of an internally oriented transportation metaphor to characterize the function of hyperlinks as a way to “transfer the user to another web page.” In the government’s view, the “sole function of a link is to ‘take one almost instantaneously to the desired destination (on the internet) with the mere click of an electronic mouse’” (United States, 2001: 60–1).

On the other hand, the government rejected the characterization of code as speech, suggesting instead that hyperlinks are “the technological bridges that connect different internet websites for myriad purposes.” Further they argued that for “those who use internet links to join with others who share their beliefs, the act of linking might be said to constitute association in cyberspace” (United States, 2001: 64). By emphasizing the associative function of hyperlinks, the government sought to invoke the application of First
Amendment principles that relate to associational contact, rather than speech and the press. Arguably this was because associations whose purpose is unlawful would not enjoy the same level of constitutional protection as the speech of those whose views are merely unpopular.

The Court noted that the defendants and their allies focused on speech, while assiduously avoiding consideration of the functional aspects of hyperlinks. In discussing this transparently strategic use of metaphor and analogy, the Court noted that the:

Appellants’ supplemental papers enthusiastically embraced the arguable analogy between printing bookstore addresses and displaying on a web page links to websites at which DeCSS may be accessed. ... Like many analogies posited to illuminate legal issues, the bookstore analogy is helpful primarily in identifying characteristics that distinguish it from the context of the pending dispute (Universal City Studios v. Corley, 2001: 457)

For the Court, the distinction that mattered was that the “digital world” ensured that “the materials are available for instantaneous worldwide distribution before any preventive measures can be effectively taken” (Universal City Studios v. Corley, 2001: 457).

Despite its implications for First Amendment interests and concerns, this Court acted to defend copyright interests against what it came to see as a never-ending series of technologically enabled threats.

**United States v. American Libraries Association: filtering the public sphere**

The second case we have selected differs in critical ways from the other two because its fundamental conflict over cyberspace technology pits public libraries against the federal government, and does not directly involve a struggle over exploitative rights.

In its long-term struggle to erect fences or technological barriers that would prevent children from gaining access to pornography or other dangerous content, the U.S. Congress sought to require libraries to install filters that would screen out objectionable material with the Children’s Internet Protection Act 2000 (CIPA). The American Library Association (ALA) argued that the imposition of a filtering requirement was an unconstitutional limit on the rights of adult users of the library. While the ALA had been successful in convincing a District Court that internet access in a library was a public forum, and therefore entitled to substantial First Amendment protections, the Supreme Court majority was not so easily persuaded.

The metaphoric struggles in this case were focused on the characterization of a public library’s activities with regard to the internet. The first, and perhaps most important, issue was the extent to which the provision of internet access for its clients was the same as, or equivalent to, the establishment of a public forum. The second issue was related to a comparison of filtering with other routine decisions about which books and periodicals the library would acquire for the benefit of its clients.

The majority argued that the provision of internet access did not create a designated public forum because libraries did not introduce internet terminals to “create a public forum for web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak” or to “encourage a diversity of views from private speakers.” They agreed with Congress that the internet was “no more than a technological extension of the book stack” (U.S. v. ALA, 2003: 206–7).

With regard to petitioner’s arguments about the lack of discretion over which
websites would be blocked or screened out, the majority focused on the rapidly evolving character of the internet, and the virtual impossibility of librarians making informed decisions about which content to block. What really mattered to the majority, however, was whether the use of blocking software could be equated with other decisions that libraries made about their collections. The majority held that “a library’s decision to use filtering software is a collection decision, not a restraint on private speech” (U.S. v. ALA, 2003: 209).

In their dissents, Justices Souter and Ginsburg engaged the distinction between decisions about which materials to acquire, and the blocking of content from all of the library’s public terminals. Their rejection of equivalence is explicit and extensive:

At every significant point, however, the internet blocking here defies comparison to the process of acquisition. … deciding against buying a book means there is no book … but blocking the internet is merely blocking access purchased in its entirety … The proper analogy therefore is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable “purpose,” or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults. (U.S. v. ALA, 2003: 236–7).

Although neither Souter nor Ginsburg credit any of the amici for the metaphors they use in their dissent, the core of their argument can be found in the brief submitted by the American Publishers Association:

CIPA takes such decisions away from libraries and delegates them to software filtering companies whose proprietary criteria for blocking material are completely hidden from public scrutiny. This is in no way analogous to a decision by libraries to acquire a book on Mark Twain rather than one on rap music, for example. It is, instead, analogous to the scissors by a government contractor of important articles from a magazine to which the library subscribes and to which library patrons expect full access. (APA, 2003: 3)

The majority appears to have been convinced, or at least supported by the metaphoric constructions included in the brief submitted by the state of Texas, and from a group of legislators who had sponsored the original legislation.

As a counter to the criticism of the imprecision of available filters, the legislative supporters of CIPA suggested that: “The fundamental question presented, then, is whether public libraries, merely by providing internet access, are constitutionally required to relinquish all editorial discretion over what is permitted in the library … simply because current technology does not permit them to exclude such material with mathematical precision” (Lott et al., 2003: 4).

The court majority based its rejection of the public forum designation on an assumption about the kinds of discretion that librarians, like public broadcasters, have to exercise over what to acquire and make available to the public. The fact that requiring librarians to delegate that responsibility to third-party vendors of blocking software would have the same effect apparently did not give the majority pause. The majority also rejected the public forum designation because the internet, as a novel resource, could not be equated with public parks and sidewalks because “the doctrines surrounding traditional public forums may not be extended
to situations where such history is lacking” (U.S. v. ALA, 2003: 206).

The majority also appeared concerned that there was some risk involved in their application of the public forum doctrine to the internet so early in its development, because of the implications of such a doctrinal shift for future decisions. They expressed this concern early in the process through a series of pointed questions about other settings in which the public forum designation might or might not be applied. The response of the ALA’s representative, while on point, was apparently not sufficient to satisfy the court’s majority:

Well, Your Honor, if you allow the Government to define its forum as all content under the sun … ever invented by mankind except the piece that they don’t like, then I submit that … will be the end of the public forum doctrine because there will never be any situation in which the Government will be constrained in any way to censor out a particular piece of content … from the public forum.

(Smith, 2003: 35–6)

The metaphors and analogies that dominated the discussion in the U.S. v. ALA case were almost entirely internal, reflecting the views of internet users. Although there was some attention paid to the mechanics of blocking, the fact that this technology was proprietary served to limit discussion to the consequences, rather than the details of its use, and the fact that no one had “presented any clearly superior or better fitting alternative” (U.S. v. ALA, 2003: 219).

**MGM v. Grokster: safe havens and the engineer’s crystal ball**

This final case involved a set of decisions with the potential to shape the future of network technology. The U.S. Supreme Court rejected the decision of a lower court and created great uncertainty about the extent to which software distributors could be held liable for contributory infringement, despite the fact that their network resources could be used for substantial and socially important non-infringing uses (MGM v. Grokster, 2005). The case was seen as challenging an earlier and more liberal doctrine established by the Sony court (Sony v. Universal City, 1984). Without the benefit of the doubt previously granted to new information technology by Sony, many saw the future for technological innovation as far more unsettled and uncertain.

Of all the cases we examined, this intellectual property case drew the highest level of involvement by friends of the court. Fifty-five amicus briefs were filed, and the greatest proportion of these briefs (47.2 percent) supported the respondents (Grokster et al.) or the lower court’s favorable decision rejecting the charge of contributory infringement.

Briefs were presented by coalitions of academics, representing a variety of disciplines from intellectual property law to media studies and computer science. Briefs were also presented by coalitions of authors, music publishers, broadcasters, motion picture studios, as well as venture capitalists, and telecommunications service firms. Public interest organizations on the right and the left formed a loose coalition in support of the respondents, while the U.S. government submitted a brief in support of MGM. A coalition of 39 state governments, excluding California, also supported the copyright interests. They were joined by a group of high-profile economists including Kenneth Arrow, Gary Becker, William Landes, and Steven Levitt who charged the lower courts with encouraging inefficiency in markets (Arrow et al., 2005: 7–8).

Information service providers used a variety of metaphors to describe the status...
of a market in which a cloud of uncertainty hung over its participants. Where advocates of free speech were likely to talk about the chilling effect of a court’s decision, investors and venture capitalists tended to talk about the risky and dangerous environment for entrepreneurs. Representatives of the copyright industries offered similarly gloomy images of the economic landscape they would face in the future without a favorable decision by the court.

Grokster amici frequently challenged the accuracy of the doomsday scenarios offered by their opponents. In its brief, the National Venture Capitalist Association (NVCA) accused the entertainment industry of “crying wolf for a century, ever since John Philip Sousa claimed that the player piano spelled the end of music in America” (NVCA, 2005: 11). They suggest that the industry is “like the drunk searching for his key under the street lamp because the light is there” when they “focus their attacks on the inventors, investors, and entrepreneurs who create the technologies that make the many acts of infringement so easy to commit rather than on those who actually infringe (NVCA, 2005:14).

Because the Grokster case was so fundamentally concerned about the making of unauthorized copies, it was in the interest of those seeking to avoid restrictions on the use peer-to-peer (P2P) technology to underscore the fact that digital technology in general, and the internet in particular functioned by making copies. They relied upon metaphors and analogies based on an external perspective in order to inform the court about how this technology actually worked. They argued that the current operation of the internet could not be imagined without widespread copying.

The brief from the Intel Corporation reminded the court that “to access information from a book, one opens the book. But information stored digitally can be accessed only by copying it from stored memory …” (Intel Corp., 2005: 22). In the oral arguments phase of the case, Grokster’s representative, Richard Taranto, suggested that nearly every component of the infrastructure, and nearly every participant in the process of internet communication make digital copies. He concluded that the challenge for the court was determining just “which pieces, if any, and under what standard, get singled out for a judicially fashioned secondary copyright liability doctrine” (Taranto, 2005: 36).

The proposed tests that would determine whether a new technology was capable of substantial non-infringing uses came in for numerous pointed critiques. Intel suggested that the test would “require an innovator to have a crystal ball” because it would “require innovators to anticipate often unforeseeable infringing uses to which their inventions … might be put” (Intel Corp., 2005: 16–17).

The antidote to uncertainty among innovators and entrepreneurs was thought to reside in the safe harbor that Sony, “the ‘Magna Carta’ of the information technology industry” had established (Intellectual Property Professors, 2005: 10). Although the motion picture and copyright industry petitioners argued for a revision of the Sony safe harbor, with a standard more in line with that established by the Digital Millennium Copyright Act (DMCA) (MGM Reply Brief, 2005: 12), the Court was not yet ready to take that step. Although Justices Ginsburg and Breyer joined their colleagues in reversing the lower court’s decision on the basis of evident criminal intent, they divided their colleagues with regard to the nature of the evidence that there was, or could be substantial non-infringing usage of P2P technology. Justices Breyer, Stevens, and O’Connor expressed support for the more forward looking meaning of “capable,” while the conservative majority
seemed ready to condemn the technology on the basis of its early troublesome use (*MGM v. Grokster*, 2005).

**Conclusion**

In 1997, the Supreme Court rejected the Communications Decency Act as a tenable solution of the problem of children gaining access to pornography (*Reno v. ACLU*, 1997) in part because its survival also depended upon compelling demonstrations of awareness and intent on the part of likely defendants. More critically, the barriers to access that it would establish threatened the future of cyberspace. Indeed, the court expressed the belief that if the CDA were allowed to stand, they would be doing more than “burning the house to roast the pig”; their inaction would threaten to “torch a large segment of the internet community” (*Reno v. ACLU*, 1997: 882). The internet was too new, and potentially too important to the emerging information economy for the Court to allow it to be placed at risk in this way.

In 2003, however, the court approved the government’s alternative (CIPA), despite the obvious flaws in its technology. They did so in part because of the identity and character of its behavioral target: the nation’s public librarians. Despite charges of imprecision by amici and dissenting justices, the majority offered a tortured definition of informed choice to justify the installation of a technological fence. In claiming that a decision to use filtering technology was a collection decision, the court majority engaged in strategic misdirection: first by ignoring the fact that the use of filters was a requirement of funding, and a delegation of decision-making to the providers of filtering software, and second, by limiting the definition of speech to expression, ignoring the public’s interest in access to information.

We observed greater consistency in the appellate courts when the contending interests could be defined more clearly. The battle of good against evil set the copyright industry against pirates and those who would assist them. In its defense of copyright interests, the Court of Appeals upheld a lower court’s decision to ban the direct and indirect provision of software that could be used to gain unauthorized access to commercial media content. While there was considerable academic interest surrounding the extent to which computer software was speech, and therefore entitled to greater protection, the courts’ decisions were primarily based on the ways in which this speech actually functioned in cyberspace.

The courts’ commitment to defending copyright interests, however, would not be well served by an emphasis on an engineer’s understanding of hypertext. Instead, the Court of Appeals focused on the ways in which either users, or the content of interest to users, could be transported around the globe well before the publishers or legitimate content distributors could act to defend their property interests. In the *Reimerdes* case, the courts were little swayed by the efforts of amici to define the court’s ruling as imprecise, and a threat to the future of cyberspace. The court was willing to risk weakening the central infrastructure of global network in order to reinforce the links in copyrights’ virtual fence.

In the *Grokster* case, the determination of the court to defend copyright interests against the threat of cyberspace technology led them not only to overturn the decision of a lower court, but also to invite a frontal assault on established precedent at the highest level. In one sense, we might understand the driving force behind the challenge to P2P technology as an attempt to mine the safe harbor for innovators that *Sony* had provided.
Rather than rejecting Sony directly, however, the Grokster court argued that the lower court misunderstood its meaning. Future courts will determine the meaning of Sony’s safe harbor unless a revision of the DMCA by the legislature provides a more agreeable solution to the conflict between the copyright industries and the developers of cyberspace.

On the horizon, battles over the commoditization of personal, especially transaction-generated, information will be fought using some of the metaphors that have been field tested in the cases we have reviewed in this chapter. More will be required.

Given the role of the legal fiction of property in protecting personal privacy in the course of U.S. history, it is still worth attending to the concept of property in the hopes of affecting some form of course correction within the courts. Approaches to privacy that construct it as an ongoing process of boundary negotiation rather than a stable condition or social good to be conserved (Margulis, 2003) have not gained much traction within political economy or surveillance studies. At the same time as communication and social practice increasingly shift to the electronic, networked world, people lose both the legal and physical affordances of privacy that have been associated with real property. Yet, as Balganesh (2006) has shown, the courts have been reluctant to create any new doctrines of online territoriality that would extend the concept of real property and the private spaces it affords to the internet.

It will not be easy to construct a new language of the online boundary, yet we cannot ignore a growing sense that we have somehow lost our ability to negotiate our personal boundaries. The resources we once had, in particular the walls, windows, doors, and fences of our private spaces, no longer hold sway, as it were, in cyberspace. This is a problem desperately in need of scholarly attention.

**Guide to further reading**

For those interested in further exploring the nature of metaphor and analogy from a range of disciplinary perspectives, Ortony’s (1993) edited book is a good start. Within cognitive science, Fauconnier and Turner’s (2003) work on conceptual blending offers a rigorous theoretical model that explains how the juxtaposition of dissimilar concepts can generate powerful insights and fuel the evolution of language.

Blavin and Cohen (2002) provide a useful chronological overview of three dominant internet metaphors: information superhighway, internet as novel space (cyberspace), and internet as real space. Work by Hunter (2003) and Lemley (2003) provide important and oft-cited critiques of the use of spatial metaphors in internet law, in particular how the cyber-space as place metaphor and its application to trespass to chattels doctrine has enabled a second enclosure movement, a period of expanding property interests that Heller (1988) has called an “anti-commons.” Benoliel (2005) takes a different approach to the issue of space and property online, suggesting the construction of online locales as a legal fiction could more easily facilitate the translation of territorial privacy rights to the internet. Cohen (2007) moves beyond the debates about what cyberspace is, and instead focuses on the social construction of the term and the emergent, contested relationship between embodied space and networked space.

Lessig’s (1999, 2001, 2004) series of books provides the most thorough introduction to the dangers of the copyright regime and the increasing propertization and commoditization of information, in particular its negative impact on creativity,
innovation, and culture. Benkler (2006) offers a detailed picture of the emerging structure of the “networked information economy” and demonstrates how its productivity and value can and does flourish without proprietary rights in the information it produces. While technically not a metaphor, Zittrain’s (2006) new turn of phrase, the “generative internet,” is rife with linguistic entailments that challenge well-established assumptions about the open architecture of the internet and its support for the production and diffusion of innovations.
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463


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Abdullah, King of Jordan 311
about this book 1–2; approach 2; collective intelligence 5; consumerism, political engagement through 6–7; critique and creativity, internet as combination of 428; democratic experimentalism 6; diversity of methodologies and evidence 427–28; findings in this collection 424–26; growth of field 2–3; informational value 6; interactivity 7–8; multiple domains of inquiry 426–27; negative roles of internet 425–26; omniverous news habits 430–32; online video 7–8; outline 8–9; panoramic perspective 9; platform for discourse, internet as 4–5; political content propagation 6–7; political omnivores, rise of 428–32; positive roles of internet 424–25; research directions 3–4; studying internet politics 426–28; surprising roles of internet 426; Web 2.0 4–8; wired states and political parties, rise of 432–33
Abrahamson, J.B. et al. 234, 235
Abrams v. United States (1919) 352
absent ties in social activism 253–54
Accenture 116, 126
access: and ability, variability in 181–82, 184; in Europe 289–300, 303–4; to information online 234–35, 236; maps, access to 345; material and physical access in Europe 291–94; physical access, emphasis on 301–2; policy solutions beyond limited access 182–83; skills access 294–97, 303; solution to access problem, policies for 300–303, 304; usage access 297–99, 303; World Information Access Project 40, 432–33
Access Denied (Deibert, R.J. et al.) 335n2
accountability in global media environment 229
Acevedo, M. and Krueger, J.I. 74
ACLU et al. 356
activism: activist networks, technology and 249–50, 258; fall in Europe 26; relationships within 247; see also social activism
Adam, A. 266
Adamic, L. and Glance, N. 150
Adams, J. 335
Adams, P.C. and Rina, G. 281, 282
Adkins, R.E. and Dowdle, A.J. 66
advertising online 19–20
agenda building online 194
agonism, pluralistic 239–41
Agre, P.E. 243
Aguirre, B.E. and Saenz, R. 283
Algers, D. 201, 206, 209, 211, 213
Ahrens, F. 22
Akdeniz, Y. 235
Akrich, M. 268, 270
Al-Jazeera TV 207; global media environment 217, 218, 221, 224, 227, 228; new immigrants and civic society 285
Alba, R.D. and Logan, J.R. 283
Albrecht, S. 98
Aldrich, J.H. 73
Alexander, Lamar 14
Algeria 306, 307, 308, 319
Allan, S. 204, 205, 213
Allen, A. 266
Allen, George 22, 60, 69
Allen, K. 209
Altermann, J.B. 309, 310
alternative media online 240
Alternative Press Center 205
alternative sources of news 207–8
Althaus, S.L. 144
Althaus, S.L. and Tewksbury, D. 135, 192, 194, 234, 430
Altintas, K. 335
Alvarez, R.M. and Hall, T.E. 175
Alvarez, R.M. and Nagler, J. 176
American Legion 80
American Library Association 182
government, development of 102; Weberian bureaucracy and American state 101–2
Burke, A.t al. 266
Burkhalert, S.t al. 170
Burnett, R.nd Marshall, P.D. 44
Burnham, D. 116
Burt, E.nd Taylor, J. 31
Burt, R.S. 100
Burton, C. 420
Burton, J.nd Williams, F. 420
Bush, George H.W. 14, 21
Bush, J. 167
Bushell-Embling, D. 340
business bias on internet 134
business lines, building shared services 108–9
Butler, D. and Ranney, A. 172
Butler, David 172
Butler, J. 264
Button, M. and Ryfe, D. 414
Buxton, N. 30
Cairo internet café, observation from 317–18
Cameron, David 8, 61, 70
Cammaerts, B. and Carpentier, N. 388, 389, 400n6
Campaign for Freedom of Information (CFOI) 89
Campaigns: communications in US 15–17; finance in elections 66–68, 70; operations in US 15; are also election campaigns in US; parties and election campaigns; social activism
Campbell, A.A. et al. 175, 176
Campbell, J. 135
Campbell, J.E. 274
Can, F. 262
candidates: and campaigns in US 13–14; election of, direct democracy and 161–62; recruitment and selection of 65–66
Cappella, J. et al. 167, 170
Cappella, J.N. and Jamieson, K.H. 132, 136, 142, 148, 233
Cardoso, Fernando Henrique 388, 414
Carey, J. 232
Carlaw, K. et al. 374
Cass, R.A. 353
Cassidy, W.P. 188, 189
Castells, M. 73, 277, 282
Castells, M. and Himanen, P. 423
Castles, S. and Davison, A. 282, 286
Cave, J. et al. 385
CDHS (California Department of Health Services) 110
Ceasar, J.W. and Busch, A.E. 18
censorship: Chinese censorship 224; globalization of online censorship 327–28; methods of investigating 326–27; Russian censorship 224–25; Saudi censorship 224; sophistication of censorship 328–30
Center for Communication and Civic Engagement 250
Cerf, Vint 383n2
Ceruzzi, P. 368
Chadwick, A. and May, C. 117, 174
Chadwick, Andrew 1–9, 24, 55, 56–71, 76, 212, 250, 383n1, 399, 424–34, 426, 432, xii
Chaffee, S.H. 191
Chaffee, S.H. and Frank, S. 133, 140
Chaffee, S.H. and Kanihan, S.F. 146
Chaffee, S.H. and Metzger, M.J. 187, 424
Chaffee, S.H. and Schleuder, J. 431
Chaffee, S.H. et al. 151
Chaffee, S.H., Zhao, X. and Leshner, G. 133
Chalaby, J.K. 221
Chan, B. 280, 282
Chan, J.K.C. and Leung, L. 189
Chang, J. 418–19
Charles II 220
Chen, P. 88
Cheney, Dick 133
Children’s Internet Protection Act (CIPA, 2000) 357, 358, 361, 421
China: blocking of internet 329; censorship in 224
Chirac, Jacques 157
Cho, J. et al. 299
Choi, J.H. et al. 191
ChoicePoint 341
Chung, D.S. 210–11
Churchill, Winston S. 220
CIA World Factbook Online 49, 417
Citizens as Legislators (Bowler, S., Donovan, T. and Tolbert, C.) 172
Clark, J. 32, 252
Clark, J. and Themudo, N. 29
Clash of Civilisations (Huntington, S.) 227
class and internet use 283
classification of internet governance issues 395–96
Clayton, R. et al. 331
Clinger-Cohen Act (1996) 105
Clinton, Hillary 13, 21, 23, 61
Clinton, William J. 13, 14, 220, 420, 422; administration of 105, 107, 112; administration of, “reinvention of government” 102–4; Clinton-Gore re-election campaign 14
closed circuit TV systems 339

490
CNN 60; global media environment 217, 221, 222, 224, 225, 228; public spaces online 237; Web 2.0 203, 204, 206, 208, 209
coalitions in networks 253–54, 258
Cobb, R.W. and Elder, C.D. 177
Cockburn, C. 268
Cockburn, C. and Fürst-Dilić 270
Cockburn, C. and Ormmond, S. 268, 274
Cogburn, Derrick L. 9, 401–14, 425, xii
Cogburn, D.L., Johnsen, J.F. and Battacharrya, S. 410
Cohen, E.A. 335
Cohen, E.L. 188
Cohen, J. 170
Cohen, J.E. 351, 362
Cohen, R. and Rai, S. 252
Coleman, S. and Blumler, J. 97, 98
Coleman, S. and Hall, N. 56
Coleman, S. and Ross, K. 97
Coleman, S. et al. 88
Coleman, Stephen 8, 26, 38, 86–98, 237, 241, 425, xii
collective action 72–73, 74–76
collective action space 82
collective identification 252–53
collective intelligence from political web use 4, 5
Collins, P.M. 353
commercial filtering technologies 330–31
commercialization of public spaces online 234, 235–36, 242–43
communication environment: new immigrants and civic society 285–86; parties and election campaigns 68–70
Communications Decency Act (CDA, 1996) 361, 421
Community Technology Centers: digital citizenship 177, 183, 420; new immigrants and civic society 280
Compaine, B.M. 179
A Comparative Study of Referendums (Qvortrup, M.) 172
ComScore 203, 212
Conboy, M. 217
connectedness: and electoral web production practices 43, 48; and internet use 284–85
Connecting Parliament with the Public (House of Commons Select Committee on Modernization) 91
Consalvo, M. 265
Consalvo, M. and Paasonen, S. 273
content analysis 325
content filtering: commercial filtering technologies 330–31; geopolitics of internet control 325, 326–27, 328–30, 331, 332, 334, 335
convergence of locational surveillance 340–41
Converse, P.E. 134, 144, 197
Cooke, L. 189
Copesy, N. 33, 34
Copyright Act (US, 1980) 367
Cornell University Survey Research Institute 155n1, 427
Cornfield, M. 14, 16, 18, 19, 21, 239
Cornfield, M. and Rainie, L. 147
Cornfield, M. et al. 239
Corrado, A. 187
Corrupt and Illegal Practices Act (1883) 68
COTELCO (Center for Research on Collaboratories and technology Enhanced Learning Communities) 409
Cowhey, P.F. 414
creation of online news 188–89
Cronin, B. and Davenport, E. 265, 266, 267
cross-agency initiatives in bureaucratic reform 106–7
cross-agency relationships and e-government 111–12
cross-agency web portals 102–3
cross-services integration and public management 122–23
cross-subsidy on Web 2.0 209–10
Crowley, J.E. and Skocpol, T. 73, 74
Crowston, K. and Williams, M. 44
Cukier, Ken 408
Cultural Citizenship (Miller, T.) 245
cultural diversity, stimulation of 303
Cultural Globalization 227–28
Curtis, Adam 227
Cutting Code (MacKenzie, A.) 383
cyber-infrastructure, potential of 412–13
cybergrrls 267
cyberspace: experimentation in 263–65; metaphoric construction of 350–55; see also property in cyberspace
cyborg theory 263
cynicism 131, 132, 136, 137, 140, 142, 148, 233; corrosive cynicism 226; political cynicism 139
Dacin, T. et al. 100
Dahl, R.A. 134, 144, 152, 154–55
Dahlberg, L. 236
Dahlgren, P. 170, 234, 239
Dahlgren, P. and Gurevitch, M. 203
Daily Express 210
Daily Kos 7, 20, 205
Daily Telegraph 211
DailyMotion, Tunisian blocking of 323–24
Dalton, R.J. 26, 27
Dalton, R.J. and Wattenberg, M.P. 33
Danet, B. 263
Danziger, J. 102
data: data flow, petabytes of 221–22, 223; importance of 4, 6; protection of, in EU 342–43, 346
Davidow, W.H. and Malone, M.S. 81
INDEX

Davis, G.F. 24, 188, 200
Davis, G.F. et al. 72, 85
Davis, R. et al. 8, 39, 61, 425
Davis, Richard 13–24, 58, 71, 135, 236, 240, 425, xiii
Davis, S. et al. 24, 231
Davison, R.M., Martinsons, M.G. and Kock, N. 402
de Vreese, C.H. and Semetko, H.A. 158, 161, 162, 66, 68, 71
decentralization 33, 35, 37, 198
decision, role of internet in identification of 131–43; Annenberg Public Policy Center 131, 133, 137, 143n3; "business bias" 134; civic consequences of internet use, past research on 135–36; cynicism 132; Dirty Politics: deception, distraction and democracy (Jameson, K.) 133; distribution of political information 134; experts, tyranny of 134; FactCheck 137; false claims, differentiation of 142; further reading guide 142; information, role in democratic society 134–35; National Annenberg Election Survey (2004) 137–42; National Annenberg Election Survey (2004), statistical analysis and results 139–42; presidential campaign, 2004 US 131–43; press, information and democratic society 133–37, 142; press fact and fiction 132; traditional news as custodian of fact 136–37; YouTube.com 131
defence: global media environment 220; parliamentary democracy, visibility of 95–96
DEG ("digital-era governance") 114, 117, 120, 126
Deibert, R.J. and Rohozinski, R. 244, 355
Deibert, R.J. and Villeneuve, N. 325
Deibert, Ronald J. 9, 323–36, 425, xiii
deliberative impact of internet 156, 159–70
della Porta, D. 252, 253, 259
della Porta, D. and Tarrow, S. 252
Delli Carpini, M.X. and Keeter, S. 134, 144
Delli Carpini, M.X. and Williams, B.A. 148
Delli Carpini, M.X. et al. 170
demand-based online operations 90
Demanding Choices (Bowler, S. and Donovan, T.) 172
Democracy Index 47, 49–50, 52
democratic benefits of internet use 174–75
democratic experimentalism on Web 2.0 4, 6
democratic governments, bridging the divide 416
democratic institutions and internet policy 421–22
democratization: demos, democratic process and judgements of the 144; narcissism, effect of 238–39; ongoing process of 218–19, 229; potential of online media for 231
denning, D. 335
der Derian, J. 335
Derrida, J. 233
design of online news 189–90
dessauer, C. 188, 189, 200
deuze, M. 187–88, 188, 189, 201, 205, 210, 211, 213
devereaux, Zach 383n1
DeWolfe, Chris 22–23
D’Haenens, L. 284
D’Haenens, L., Jankowski, N. and Heuvelman, A. 193
D’Haenens, L., Koeman, J. and Saeyes, F. 282, 287
Dia, X. and Norton, P. 88
Diani, M. 30, 253
Diani, M. and Donati, P. 27
The Diffusion of Innovations (Rogers, E.) 422
digital changes in public management 123–25
digital citizenship 173–85; access and ability, variability in 181–82, 184; broadband opportunities, comprehensive approaches to 183; Community Technology Centers 177, 183, 420; democratic benefits of internet use 174–75; digital divide, definition of 177–79; digital inequality, evolution of research on 177–78; digital inequality, factors driving 178–79; digital inequality, reduction of disparities 179; educational inequality, necessity of 183; frequency of use and activities online 181; further reading guide 184–85; information literacy 181–82; involvement in politics and government online 175–77, 183–84; Latinos, language and education problems of 180–81; minorities and technology 179–80; municipal broadband, potential for 182–83; National Telecommunications and Information Administration (NTIA) 177–78, 180, 182, 303; policy solutions beyond limited access 182–83; political disparities, internet and magnification of 176–77; politics and government online, growth and impact of 174–75, 183–84; poverty and segregation 180; race and ethnicity, role of 179–81; reading skills, critical nature of 182; segregation and concentrated poverty 180; technical skills 181–82; young, internet and promise of engagement of 175
Digital City (Amsterdam) 268–69
digital deceit 331–33
digital divide, definition of 177–79
digital divide, internet diffusion and 415–23; Brazil 417, 418–19; country profiles 416–21; democratic governments, bridging the divide 416; democratic institutions and internet policy 421–22; economic development 415; Estonia 417, 419–20; further reading guide 422–23; interaction, mediation and 422; political factors 416; Singapore 417–18, 420; societal change 415–16; technical knowledge 415–16; United States 417, 418, 420–21
digital divide, potential for widening of 144–45
Digital Divide (Norris, P.) 184

digital division in Europe 288–304; access in Europe 289–300, 303–4; cultural diversity, stimulation of 303; digital literacy 303; disenfranchisement 303–4; electronic voting 304; further reading guide 304; inclusion, policy areas for 302–3; information society for all 302–3; interactivity 300; material and physical access 291–94; motivation for internet connection 289–91, 302–3; narrowband versus broadband 299–300; physical access, emphasis on 301–2; skills access 294–97, 303; social and cultural differences 300; solution to access problem, policies for 300–303, 304; usage access 297–99, 303

digital enablement of Parliamentary communications 96–97
digital-era governance, emergence of 119–25
digital inequality: evolution of research on 177–78; factors driving 178–79; reduction of disparities 179
digital literacy 303
Digital Millennium Copyright Act (US, DMCA) 368
Digital Solidarity Fund 387
digital technologies and intellectual property 368–70
DiMaggio, P. and Celeste, C. 181
DiMaggio, P. and Powell, W. 76, 84, 100, 107
DiMaggio, P.J. 100
Dimmick, J. et al. 190
direct democracy: contexts of, variation within 5 European political organizations 52; mechanisms of 159–60; parliamentary democracy, visibility of 94–95; problems and prospects for 160–63, 171–72; processes of 157–58
Dirty Politics: deception, distraction and democracy (Jamieson, K.) 133
disaggregation 118
discovery in election campaigns in US 14–15
discussion forums online 149–50
disenfranchisement in Europe 303–4
disintermediation 124; and democratic erosion 32
dissident action in Arab world 310
distribution of political information 134
diversity: in online news 208–9, 212; in social activism 252–53
The Divided West (Habermas, J.) 244
El-Diwany, S. 313
DNS tampering 333–34
Doerschler, P. 283
Doherty, B. 27, 28, 32, 33
Dole, Bob 14
Donohue, G. et al. 146
Donovan, Todd 172
Doppelt, J. and Shearer, E. 430

Dougherty, M. and Foot, K. 46
Dourish, P. 347, 348
Dowell, W.T. 327, 335
Downing, J.D.H. 152, 212
Downs, A. 74, 146
Drake, W.J. 399
Drew, D. and Weaver, D. 335
Driscoll, C. 267
DRM ("digital rights management") 368, 369, 371, 374
Drucker, P.F. 81
Dubai Internet City project 311
Dunleavy, P. and Margetts, H. 116, 118, 122, 123, 124, 126
Dunleavy, P. et al. 112, 117, 118, 120, 127
Dutta-Bergman, M.J. 190, 198
Dutton, William H. 9, 384–400, 425, xii
Duverger, M. 63
Dworkin, Andrea 266
Dwyer, P. et al. 60, 66
dynamics: of change in global internet governance 404–5; of multi-stakeholder decision-making 395–97
e-government: definition of 114; future prospects for research 111–12; research on 115–17
e-Government News 183
e-mail communications in US elections 16–17
Ebbinghaus, B. and Visser, J. 26
Economic and Social Commission for Western Asia 312
Economist 167, 408
Edmiston, K.D. 110, 111
education: inequality in 183; and internet use 283
Edwards, John 20, 23, 65, 133
Edwards, L. 170
Egypt: Arab world, internet use and political identity 306, 307, 308, 310, 311–12, 314; Cairo internet café, observation from 317–18
Ehrlich, E. 13
Eickelman, D.F. and Anderson, J.W. 310
Eid, G. 305
Elcat (Kyrgyz ISP) 333
Eldersveld, Samuel J. 62, 71
election campaigns in United States 13–24; advertising online 19–20; blogs 17, 20–21; campaign communications 15–17; campaign operations 15; candidates and campaigns 13–14; discovery 14–15; e-mail communications 16–17; experimentation 14–15; exploration 14–15; fund-raising 18–19; further reading guide 23–24; home pages 16; internet, advent and popularization of 13; internet campaigning, history of 14; maturation 15–19; media-controlled
online communication 19–21; mobilization 17–18; post-maturation, beyond candidate website 19–23; social networking 22; support networking 23; user-controlled online communication 21–23; video recording 21–22; volunteer recruitment 17–18; websites 16

electoral web production practices 40–55; connecting 43, 48; Democracy Index 47, 49–50, 52; Engagement Index 47, 50, 52; Freedom House 49, 50; further reading guide 54–55; genre effects 52, 54; HDI (Human Development Index) 47, 49, 52; human development 49, 52; ICTs 41–42; informing 42–43, 46; inter-rater reliability 45–46; Internet and Elections Project 42, 44–45, 45–54; involving 43, 46–47; measurement of 45–51; mobilizing 43, 48–49; national developments, comparison of 49–50; New Media Index 47, 51, 52; Participation Index 47, 50, 52; political culture 44, 50, 51–52, 54; political development 43–44, 47, 49–50, 52; 54; political practices and cultures 41, 53–54; producer types 44–45, 51; site producer types 51, 52; spheres analyzed 55n2; technological development 49, 52; transnational technology diffusion 40; web practices, comparison of 46–49; web sphere, structures of 41; web spheres, power of genre in 51–52; World Values Survey (WVS) 50

electronic voting 304
elite demagoguery 154
Elmer, Greg 9, 376–83, 425–26, xiii
empowerment, Web of 266–68
engagement: technological change and 80–82; see also political engagement online
Engagement Index 47, 50, 52
Engaging the Electronic Electorate (E4) Project 143n3
Engel, M. 218
Entman, R. 148, 248
EPG (Electronic Publishing Group) 88–89
Epstein, L.D. 62, 63
ERS (Emergency Response System) 337–39
ESD (Electronic Services Delivery) 123–24
Estonia: digital divide, internet diffusion and 417, 419–20; Ministry of Economic Affairs and Communications 419–20
Etzioni, A. 144, 350
Eurobarometer 167, 168, 291, 428
European Commission 301–2, 346, 347, 348
European direct democracy 160
European political organizations 25–39; activism, fall in 26; decentralization of control and authority 33; direct democracy 32; disintermediation and democratic erosion 32; equalization 32–33; further reading guide 38–39; geographical reach, extension of 28–29; hierarchies, flattening of 31; horizontal dimension 31; ICTs (Information and Communication Technologies) 25–26, 32, 33; individuals within organizations, role of 27; internal democracy 27; internet as activist tool 29–30; internet as democratic tool 31; internet as outsiders’ medium 32–33; internet as recruitment tool 28–29; interorganizational change 32–34, 38; intraorganizational change 28–31, 37–38; normalization 33–34; opportunity structures, categories of 35–36; organizational capacity 36; organizational links, strengthening of 30; organizational reach, extension of 28–29; participation, decline in levels of 26–27; passivity, internet and 30; political participation and organizational change 26–28, 37–38; politics as usual 33–34; representative democracy, decline and crisis? 26–28, 37; strategies and activity online, framework development 34–37; supporter engagement, deepening of 29–30; systemic and technological opportunity structures 35–36; vertical dimension 31; virtual sphere, recruitment through 29; Web 2.0 30
European referendums and online politics 166–67
European Union (EU) 302–3, 342, 343, 346, 348
Eurostat 290, 291, 292, 293, 294, 295, 296, 298, 299, 428
Evens, Karen 107
Eveland Jr, W.P. 146, 187
Eveland Jr, W.P. and Dunwoody, S. 186–87, 189, 191, 193, 199
Eveland Jr, W.P. et al. 146, 190, 193
Evolution of media environment 217–21
exclusion filtering 325
experimentation, election campaigns in US 14–15
experts, tyranny of 134
Eyerman, R. and Jamieson, A. 253, 259
Facebook 5, 21; gender, internet and theorizing on 270, 271; global media environment 221; parties and election campaigns 61; technological change and political organization 81; Web 2.0 202
FactCheck.org 137, 143n1, 428
fair trade campaigning 247–48, 255–56, 259
Fairlie, R. 178, 180
Fallows, J. 179, 226, 233, 430
Fars, R. and Villeneuve, N. 328, 332
Farrall, Kenneth Neil 9, 349
Farrall, Kenneth Neil 9, 349–63, 426, xiii
Farrell, D. 59, 69
Farrell, D. et al. 59, 69
Fauconnier, G. and Turner, M. 362
FEAP (Federal Enterprise Architecture Programs) 121
Fearon, J.D. 147
FedBizOpps.gov 106
Federal Communication Commission 342
Federal Election Campaign Act (1971) 67
INDEX

Federal Election Commission 67
female sexuality, resignification of 267
feminine discourse 262; see also gender
Ferber, B. et al. 88
Ferdinand, P. 75, 423
Ferguson, R. 340
Festinger, L. 150, 151
Fielding, S. 26
filtering the public sphere 357–59; see also content filtering
Finkelmaier, P. 88
Finn, P. 419
Finnegan, M. 22
Fisher, D. et al. 88
Ferdinand, P. 75, 423
Ferguson, R. 340
Festinger, L. 150, 151
Fielding, S. 26
filtering the public sphere 357–59; see also content filtering
Finkelmaier, P. 88
Finn, P. 419
Finnegan, M. 22
Fisher, D. et al. 88
Ferdinand, P. 75, 423
Ferguson, R. 340
Festinger, L. 150, 151
Fielding, S. 26
filtering the public sphere 357–59; see also content filtering
Finkelmaier, P. 88
Finn, P. 419
Finnegan, M. 22
Fisher, D. et al. 88
For the Many or the Few (Matsusaka, J.G.) 172
Forbes, Steve 14
Ford, Harold 21
form and content of online news 187–90
formal institutions 100
Forman, Mark 107
FOSS (“free and open-source software”) 370, 371–73
Fountain, Jane E. 99–113, 117, 127, 426, xiii
Fountain, J.E. and Osorio-Urzua, C. 113
Fox, Michael J. 21
Fox, S. 181
Fox, S. and Livingstone, G. 177, 180, 181
Fox News 207
fragmentation of online news 196, 199
Francia, Peter L. 13–24, xiii
Francia, P.L. and Hernson, P.S. 15
Franda, M. 320
Frank, D. 108
Franklin, B. 69
Franklin, M.I. 404
Franzen, A. 276
Fraser, N. 234, 316
Freedman, D. 206, 209, 213
Freedom Forum 428
Freedom House 218; Arab world, internet use and political identity 313; electoral web production practices 49, 50
Frey, D. 150
Friedlos, D. 340
Friere, P. 402
Frissen, P. 88
Froehling, O. 281
Froomkin, A.M. 355
Fulk, J. 81
Fulk, J. et al. 85
Fuller, J.E. 175
Fuller, M. 383
fund-raising in US election campaigns 18–19
further reading guide: Arab world, internet use and political identity 319–20; bureaucratic reform and e-government in US 112–13; deception, role of internet in identification of 142; digital citizenship 184–85; digital divide, internet diffusion and 422–23; digital division in Europe 304; election campaigns in United States 23–24; electoral web production practices 54–55; European political organizations 38–39; gender, internet and theorizing on 273–74; global internet governance, multi-stakeholder participation in 413–14; global media environment 229; information and direct democracy 172; locational surveillance 348; new immigrants and civic society 286–87; online news 199–200; openness, globalizing the logic of 375; parliamentary democracy, visibility of 98; parties and election campaigns 71; political engagement online 155; politics of protocols 383; politics of the internet, multi-stakeholder policy making 399; property in cyberspace, political economy of 362–63; public management change and e-government 127; public spaces online 244–45; social activism 259–60; technological change and political organization 85; Web 2.0 213
Galaskiewics, J. and Wasserman, S. 253
Galbraith, J.R. and Kazanjian, R.K. 81
Gallagher, Michael 172
Galloway, A. 377, 383
Galston, W.A. 145
Galusky, W. 30
Gandy, Jr., Oscar H. 9, 349–63, 426, xiii
Gans, Herbert J. 134
Garnham, N. 231
Garrett, K.R. 150, 151, 152
Garrido, M. and Halavais, A. 252, 253
Garrie, D.B. 350
Garrison, B. 188
Garud, R. et al. 100
Gasco, M. 102
Gastil, J. 170
Gastil, J. and Crosby, N. 170
Gastil, J. et al. 145, 162
Gates Foundation 182
Geens, S. 323
Gelman, A. and King, G. 135
gender: as identity 264; and internet use 283; relationships in CMC 262, 264–65
gender, internet and theorizing on 261–74; “cybergrrls” 267; cyberspace experimentation
INDEX

263–65; cyborg theory 263; Digital City (Amsterdam) 268–69; embodied experience, importance of 264; empowerment, Web of 266–68; Facebook 270, 271; female sexuality, resignification of 267; feminine discourse 262; further reading guide 273–74; gender as identity 264; gender as social structure 271–72; gender bending 264; gender differences online 261–63; gender relationships in CMC 262, 264–65; ICTs 269, 270, 271; identity, gender as 261–65, 273; IRC ("internet relay chat") 263; Life on the Screen (Turkle, S.) 263; male domination 262; marketing "the feminine" online 265; MUDs (Multi User Dungeons) 262, 263; multidisciplinarity, need for 261; MySpace 270, 271, 272; pornography 265–66; situated practices and spaces 268–70; social structure, gender as 265–70, 273; techno-social spaces, uses of 268–69, 270–72; Web 2.0 270–72, 273; Web 2.0, new questions and outcomes? 270–72, 273; World Conference on Women (1995) 267; YouTube 270, 271, 272
genre effects 52, 54
geographical reach 28–29
gene-politics of internet control 323–36; censorship, methods of investigating 326–27; Chinese blocking 329; commercial filtering technologies 330–31; computer network attack, blocking by 333–34, 334–35; content analysis 325; content filtering 325, 326–27, 328–30, 331, 332, 334, 335; DailyMotion, Tunisian blocking of 323–24; digital deceit 331–33; DNS tampering 333–34; exclusion filtering 325; globalization of online censorship 327–28; Google Earth 326; inclusion filtering 325; infrastructure of internet 324–26; internet connections, beneath the surface of 324–26; internet security companies 331; IXPs (internet exchange points) 324; localization filtering 329; OpenNet Initiative (ONI) 323–24, 326, 327, 329, 333, 335, 335n2; routers 325; sophistication of censorship 328–30; states, internet challenges to 323–24, 334; Tunisia 323–24; VOIP ("voice over internet protocol") services 328–29
Geras, Norman 226
Gerber, E.R., 158, 171
Gershon, P. 121, 122
GESIS 291, 304
Ghareeb, E. 306
Ghoshal S. and Bartlett, C. 73
Gibbs, J. et al. 284
Gibson, O. 211
Gibson, Rachel 25–39, 426, xiii
Gibson, R.K. and Rommele, A. 35, 55
Gibson, R.K. and Ward, S.J. 31, 55
Gibson, R.K. et al. 29, 35, 39, 41–42, 55, 57, 61, 276
Giddens, A. 73, 223, 241, 251, 259, 277, 286
Giddings, P.J. 98
Gitlin, T. 148, 237
Global Deliberative Dialogue on Internet Governance 428
global governance of IP 365–68
global internet governance, multi-stakeholder participation in 401–14; application sharing 412; cyber-infrastructure, potential of 412–13; digital repositories 411; dynamics of change 404–5; emergent participatory practices 409–10; further reading guide 413–14; ICANN 406; IGF 408; international regimes, knowledge and networks 402–3; internet governance 403–5; multi-stakeholder participation, enablement of 410–13; participation, enablement of 405–6; presence awareness 411; research questions, theoretical framework and 401–3; transnational policy networks 413; UN Global Alliance for ICTs and Development 408–9; UN World Summit on the Information Society 403–4; web-conferencing 412; WGG 407–8; WSIS 406–7, 413
global media environment 217–29; acceleration of information flow 222–23, 228; accountability 229; Al Jazeera TV 217, 218, 221, 224, 227, 228; BBC News 24 218, 221, 224; Bebo 221; blogs 226; chaos rather than control 223–25, 228–29; Chinese censorship 224; CNN 217, 221, 222, 224, 225, 228; cultural globalization 227–28; data flow, petabytes of 221–22, 223; deference 220; democratization, ongoing process of 218–19, 229; evolution of media environment 217–21; expansion of information flow 221–22, 228; Facebook 221; further reading guide 229; globalized public sphere, evaluation of 225–27; interactivity, rise of 223; mass participation, rise of 223; MySpace 221, 223; Netscape Mosaic 221; online environment, complexity of 226; politics and internet 225, 228–29; The Power of Nightmares (Adam Curtis documentary) 227; real-time news 222; Russian censorship 224–25; Saudi censorship 224; top-down media apparatus 219–21; YouTube 221, 223
Goffman, E. 238
Goldfarb, J.C. 315–16
Goldfarb, Z.A. 64
Goldsmith, J. 335
Goldsmith, J. and Wu, T. 335, 414
Goldstein, B. 78, 335
Google 345; Google Earth 326; Google News 205, 206; politics of protocols 377–78, 379; public spaces online 242, 243; symbiotic business model 380–82, 382–83
Gorbachev, Mikhail 225
Gore, Al 15–16, 17, 59, 103, 306
Gore-Lieberman site 15
Gore Report on Reinventing Government (Gore, A.) 103
Governance 117
government-citizen interaction 115, 123–25
Government Performance and Results Act (GPRA, 1993) 103, 105
government-to-government projects 106–7
GPL (General Public License) 369–70
Graber, D.A. 13, 151, 186
Graf, J. and Darr, C. 175
Graf, J. et al. 18, 19, 68
Gramm, Phil 14
Granick, J. 335
Granovetter, M.S. 152, 253, 254, 260
Grant, A. 68
Gray, M. and Caul, M. 26
Gray, V. and Lowery, D. 78
Green, D.P. and Shapiro, I. 76
Green, N. and Smith, S. 342–43
Greene, A.M. et al. 31, 39
Greenwood, R. and Hinings, C.R. 100
Greenwood, R. et al. 100
Greer, J. and LaPointe, M. 59
Greer, J.D. and Mensing, D. 201, 202, 203
Grignou, B. and Patou, C. 31
Grossman, L.K. 24, 234, 235
Guardian 204, 207, 226
Guarnizo, L.E. et al. 283, 284, 285, 287
Guerrilla News Network 205
guide to further reading see further reading guide
Güllén, M. and Suárez, S. 416
Gunkel, D. 288, 289
Gunkel, D.J. and Gunkel, A.H. 231
Gunter, B. 201, 206, 213
Gurak, L.J. 73
Gustafson, K.E. 265
GWACS (Government-Wide Acquisition Contracts) 121, 122
Habermas, J. 82, 145, 155, 231, 232, 234, 235, 236, 239, 240, 244, 414
Hachigan, N. 335
Hacker, J.S. et al. 180
Hacker, K.L. and van Dijk, J. 423
Hackett, Paul 66
Haddon, L. 270
Hafkin, N. and Taggart, N. 309
Hafler, K. and Lyon, M. 399
Haggerty, K.D. and Ericson, R.V. 347, 348
Hajnal, P.I. 423
Halbert, D. 367, 375
Hall, S. 276, 286
Hammer, M. and Champy, J. 103
Hampton, K.N. and Wellman, B. 276, 279
Hanafi, S. 281
Hands, J. 243
Hansard 88, 89, 90
Hansard Society 92
Harding, S.G. 268
Hardy, Bruce W. 131–43, 425, xiii
Hardy, B.W. and Scheufele, D.A. 135, 145, 149, 194
Hardy, B.W. et al. 8, 425, 428
Hargadon, A. and Douglas, Y. 100
Hargittai, E. 191, 297
Hargittai, E. and Shafer, S. 182
Hargreaves, I. and Thomas, J. 202
Harmel, R. and Janda, K. 62
Harper, C. 136
Harraway, D. 262–63
Harris Interactive 346
Harrison, T. and Falvey, L. 144
Hart, R.P. 233, 235, 237
Hartley, J. 217
Hauffer, V. 403
Havick, J. 187
Hawk, B., Rieder, D.M. and Oviedo, O. 383
Hayden, C. and Ball-Rokeach, S.J. 280, 286, 287
HDI (Human Development Index) 47, 49, 52, 428
Healy, A. and McNamara, D. 175
Hechter, M. and Okamoto, D. 283
Hecksher, C.C. and Donellon, A. 73, 81
Heeks, R. and Bailur, S. 102
Heilman, R. 66
Heing, J.P. 78
Heller, M. 362
Hersklev, J.D. et al. 411
Herbst, S. 233
Herman, B. and Gandy, O. 349
Herring, S.C. 261–62
Herring, S.C. et al. 237, 262
Hersch, Seymour 228
Hersh, S. 220
Heydermann, S. 314
Hick, S.F. and McNutt, J.G. 423
Hickson, D. et al. 76
Hill, K.A. and Hughes, J.E. 234, 235, 276
Hiller, H.H. and Franz, T.M. 284
Hindman, M. 5, 60, 68
Hirji, F. 277
HM Revenue and Customs 121
Ho, K.C. et al. 41
Hobolt, S.B. 157, 158, 159, 160, 161, 163, 169, 172
Hodkinson, S. 29
Hoff, J. 88
Hoff, J. et al. 38, 39
Hoffman, A. 100
Hoffman, D.L. et al. 178
Hoffman, L.H. 136, 141, 189, 198
Holbrook, T.M. 135
Holmes, D. 275
Hood, C. and Margetts, H. 127
Hood, C. et al. 122
Hoogvelt, A. 282
INDEX

Hopkins, H. 206
Hopkins, K. and Matheson, D.M. 198
Horrigan, J. 146, 178, 179
Horrigan, J. and Rainie, L. 190, 300
Horrigan, J. et al. 170
Houston, F. 188
Howard, Philip N. 1–9, 15, 18, 40, 44, 53, 55, 61, 69, 145, 148, 152, 154, 243, 383n1, 424–34, xiii
Howard, P.N. et al. 154, 181, 276, 277, 299
Howe, M. 277
Huang, Z. 110
Huckfeldt, R. and Sprague, J. 145, 150
Huckfeldt, R., Johnson, P.E. and Sprague, J. 149, 155
Hug, Simon 172
Humes, E. 189
Hunter, D. 351, 362
Huntington, Samuel 227
Hussein, Saddam 226
Hutton Enquiry 222
i2 Inc 340
ICANN (Internet Corporation for Assigned Numbers) 383n2, 386–87, 391, 396, 397, 403, 404–5, 406, 412–13
ICTs (Information and Communication Technologies) 384, 386, 394; bureaucratic reform and e-government in US 99, 100, 101–2, 105; electoral web production practices 41–42; European political organizations 25–26, 32, 33; gender, internet and theorizing on 269, 270, 271; ICT4D (ICT for Development) 386, 387, 393; parliamentary democracy, visibility of 87–88, 91
identity: gender as 261–65, 273; narratives and network dynamics 250–54, 258; negotiation of, new immigrants and 276
IGF (Internet Governance Forum) 387, 390, 392, 393, 394, 395, 398, 399, 405, 408, 412
Imfeld, C. and Scott, G.W. 188
immigration: policies of host society 285; reasons for and internet use 283–84; see also new immigrants and civic society incentivization 118–19
inclusion, policy areas for 302–3
inclusion filtering 325
inclusiveness in social activism 252–53
independence of audiences of online news 187
indirect engagement 145
indirect representation 94–95
individual-level influences: analysis of 152–54; measures of 152; results of analysis 152–54
Indymedia: public spaces online 240; Web 2.0 205
information: access to online 234–35, 236; democratization of 197–98, 199; in electoral web production 42–43, 46; role in democratic society 134–35
information and direct democracy 157–72; AR (“argument repertoire”) 170; ballot measures, knowledge of 168–69, 171; ballot measures, online news consumption and 169; candidate elections and direct democracy 161–62; case studies 163–67; choices, complexity facing voters 161–62; deliberative impact of internet 159, 169–70; direct democracy, mechanisms of 159–60; direct democracy, problems and prospects for 160–63, 171–72; direct democracy processes 157–58; direct democratic contexts, variation within 162–63; endorsements, knowledge of 169; European direct democracy 160; European referendums and online politics 166–67; further reading guide 172; informational impact of internet 159, 168–71; Initiative and Referendum Institute, USC 165, 172; internet and direct democracy 167–71, 172; organizational impact of internet 159, 171; presidential election 2004, direct democracy and internet use 165–66; US direct democracy 159–60; Washington State, state-wide initiatives 163–65; world stage, direct democracy and 158
information flow: acceleration of 222–23, 228; expansion of 221–22, 228
information literacy 181–82
information networks in social activism 246–47
Information Polity 98
information richness 145–49, 154
information society: for all in Europe 302
information: access to online 234–35, 236; democratization of 197–98, 199; in electoral web production 42–43, 46; role in democratic society 134–35
information and direct democracy 157–72; AR (“argument repertoire”) 170; ballot measures, knowledge of 168–69, 171; ballot measures, online news consumption and 169; candidate elections and direct democracy 161–62; case studies 163–67; choices, complexity facing voters 161–62; deliberative impact of internet 159, 169–70; direct democracy, mechanisms of 159–60; direct democracy, problems and prospects for 160–63, 171–72; direct democracy processes 157–58; direct democratic contexts, variation within 162–63; endorsements, knowledge of 169; European direct democracy 160; European referendums and online politics 166–67; further reading guide 172; informational impact of internet 159, 168–71; Initiative and Referendum Institute, USC 165, 172; internet and direct democracy 167–71, 172; organizational impact of internet 159, 171; presidential election 2004, direct democracy and internet use 165–66; US direct democracy 159–60; Washington State, state-wide initiatives 163–65; world stage, direct democracy and 158
information flow: acceleration of 222–23, 228; expansion of 221–22, 228
information literacy 181–82
information networks in social activism 246–47
Information Polity 98
information richness 145–49, 154
information society: for all in Europe 302–3; information capitalism and 375
information tracking 96–97
infrastructure: change in locational surveillance 346; of internet 324–26
Ingber, S. 352
Inglehart, R. and Welzel, C. 237, 240, 245
Initiative and Referendum Institute, USC 165, 172
INPHO (Information Network for Public Health Officials) 104
institutions: bureaucratic reform and e-government in US 100–101; institutional engagement 80–81; institutional research dimensions 111–12; relationship between 58–59; secrecy of, democratic visibility and 86–87
Institutions of American Democracy (Annenberg Democracy Project) 143
Intel Corp. 360
INDEX

inter-rater reliability 45–46
interaction: interactive news 190; mediation and 422; technological change and political organization 79–80
interactivity: digital division in Europe 300; rise of 223
interest group mobilization 77–78
internal democracy 27
internal perspectives, property in cyberspace 354–55
International Organization 414
international regimes, knowledge and networks 402–3
International Telecommunication Union 47, 49, 52, 56, 387, 427
internet: as activist tool 29–30; advent and popularization of 13; affordances of 83–84; café users in Arab world 309, 316–19; campaigning, history of 14; connections, beneath the surface of 324–26; consultation on Parliament’s use of 91–94; contextual factors in internet use 285–86; contingent model, immigrants’ use for civic engagement 277–82; deliberative impact of internet 159, 169–70; democratic benefits of internet use 174–75; democratic institutions and internet policy 421–22; as democratic tool 31; diffusion in context 306–10, 319; and direct democracy 167–71, 172; dynamics of 82–83; education and use of 283; election campaigns, catalysts and anti-catalysts for 62–70; filtering of 335–36n4; flexibility of 82–83; gender and use of 283; generation and use of 284; governance of 397–98, 403–5; governance of, phases of 390–93; hubs and online news 192, 197; individual-level factors in use of 283–85, 286; informational impact of 159, 168–71; infrastructure of 324–26; integration of content, role in 431; interaction and engagement 82–84; and meanings, top-down approach 311–14; motivation for internet connection 289–91, 302–3; as outsiders’ medium 32–33; passivity and 30; as platform for political discourse 4–5; policy-making, changing politics of 384–86, 397–98; political disparities, internet and magnification of 176–77; as recruitment tool 28–29; religion and use of 284; replication of content, role in 431; security companies 331; societal uses 102–3; top-down approach to 311–14, 319; use and constructions of meaning 314–19; young, promise of engagement of 175
Internet and Elections Project: electoral web production practices 42, 44–45, 45–54; parties and election campaigns 57
Internet Corporation for Assigned Names and Numbers (ICANN) 383n2, 386–87, 391, 396, 397, 403, 404–5, 406, 412–13
Internet Engineering Taskforce 377, 378, 382, 390
Internet Governance Project 409
Internet Society 377, 382, 390
Internet Systems Consortium 136
Internet World Stats 306, 307, 417
interorganizational change in Europe 32–34, 38
intraorganizational change in Europe 28–31, 37–38
Introna, L. and Nissembaum, H. 379
involvement: electoral web production and 43, 46–47; in politics and government online 175–77, 183–84
IPRs (Intellectual Property Rights) 364–68, 370–71, 373–75, 394
Iran 314
Iraq 307, 308
IRC (“internet relay chat”) 263
Irigary, Luce 263
IXPs (internet exchange points) 324
Iyengar, S. 148, 155
Jackson, B. and Jamison, K. 132
Jackson, Brooks 143
Jackson, N. 61
Jacobs, L.R. and Skocpol, T. 184
Jacobs, N. 374, 375
Jaffe, J.M., et al. 262
Jalonick, M.C. 22
Jamieson, K. and Hardy, B. 132, 133, 136, 137, 142
Jamieson, K. and Waldman, P. 132, 136
Jamison, Kathleen Hall 131–43, 143, xiii
Jamieson, K.H. et al. 143
Janda, K. 63, 71
Jankowski, Nicholas W. 40–55, xiii
Jankowski, N.W. and van Selm, M. 235
Janssen, D. and Kies, R. 170
Jefferson, Thomas 133
Jenkins, G.S. 17
Jennings, M.K. and Zeitner, V. 77, 135
Jensen, J.L. 170, 239
Jensen, M.J. et al. 240
Johnson, P.E. 80
Johnson, T.J. and Kaye, B.K. 136, 137, 190, 191, 231, 276, 277
Johnson, T.J. et al. 192
Johnston, P. 342
Johnston, R., Hagen, M.G. and Jamieson, K.H. 135
Jones, B.D. 177
Jones, B.D. and Baumgartner, F.R. 177
Jones, S.G. 234, 235
Jones-Correa, M. 283
Jordan, T. and Taylor, P. 354
Jordan Times 314

INDEX

Lane, F. 265
Lane, G. and Thelwall, S. 347
Langlois, Ganaele 383n1
Langman, L. 240
Lappin, T. 344
LaRose, R. and Eastin, M.S. 191
Lasch, C. 230, 231, 237, 238
Latinos, language and education problems of 180–81
Latour, B. 250, 270, 377
Launching into Cyberspace (Franda, M.) 320
Lawson-Borders, G. and Kirk, R. 188, 194
Lazer, D. and Mayer-Schönberger, V. 113
Leadbeater, C. and Mulgan, G. 32
Leake, C. 340
learning effects: experiment-based studies 192–93; survey-based studies 192
Lebanon 306, 307, 308
Lebert, J. 33, 34
Leblebici, H. et al. 100
LeDuc, L. 160, 162, 172
Lee, E. 29
legislative process, digital media and 88
Leib, E.J. 161
Leiner, B.M. et al. 384, 391
Lemley, M.A. 362
Lenhart, A. 212
Lerner, D. 422
Lessig, L. 236, 362, 380
Leston-Bandeira, C. 88
Levitt, Steven 359
Lewin, K. 402
Lewinsky, Monica 228
Lewis, H. 335
Li, C. 327, 335
Li, Q. 262
Li, X. 189, 201, 213
Libicki, M.C. 335
Libya 307, 308
Liebman, Joseph 5, 21, 60
Life on the Screen (Turkle, S.) 263
Liff, S. 399n1
Lijphart, A. 62
like-mindedness, unity in 149–52, 154–55
Lillie, J.J.M. 265, 266
Lim, J. 188
Lin, N. 77, 276
Lincoln-Douglas 243
LINUX 372, 374
Lippmann, W. 186, 219
Lipton, J. 354
Lizza, R. 18, 22
Lloyd, J. 226
local and state e-government 109–11
local websites 204
localization filtering 329
locational surveillance 337–48; closed circuit TV systems 339; control and normalization of 347; convergence 340–41; data protection in EU 342–43, 346; emergency response system (ERS) 337–39; further reading guide 348; infrastructural change in 346; labor law and workplace regulation 344–45; location-based services 337–39; maps, access to 345; mobile phones 337–39; privacy law in US 343–44; privacy paradigm, dominance of 346; radio frequency identification (RFID) 339–40, 347; regulatory responses 346–47; security paradigm, dominance of 346; social activities “contextual integrity” of 347; social movements 345–46; surveillance, structuring order of 341–46; surveillance and control in public management 116; techniques and practices of 337–41; Urban tapestries project 347; workplace regulation 344–45
Locke, John 350–51
London, S. 152
Long, N.E. 399
long tail, theory of 4–5
Los Angeles Times 20
Lott, Trent 194, 229
Loughlan, P. 354
Lowrey, W. 194
Lowrey, W. and Anderson, W. 188, 210, 211, 212, 213
Lowry, R. 18
Lula da Silva, Luiz Inacio 418, 422
Lupia, A. 158, 159, 161
Lupia, A. and Matsusaka, J.G. 158, 160
Lupia, A. and McCubbins, M.D. 134
Lupia, L. and Sin, G. 76, 85
Luskin, R.C. et al. 170
Lusoli, W. and Ward, S.J. 29, 30, 39
Lynch, M. 188, 309–10
Lyon, D. 347
Lyotard, J.F. 233
MacAskill, E. 66
McCain, John 16, 18, 19, 21, 59, 65, 66, 229
McCarthy, J. and Zald, M. 253
McCaskill, Claire 22
McCaughey, M. and Ayers, M.D. 39, 75
McChesney, R. 208, 213, 236, 242, 243
McCombs, M.E. et al. 147
McFarland, A. 184
McFerrin, R. and Wills, D. 349
McGowan, D. 351, 352, 354
MacGregor, P. 209, 212
MacIntosh, A. et al. 88
McKay, D. 65
MacKenzie, A. 383
MacKinnon, Catherine 266
INDEX

MacLean, D. 406
McLeod, J.M. and McDonald, D.G. 146
McLeod, J.M. et al. 147
McNair, Brian 9, 217–29, 219, 220, 266, 424, xiv
Madden, M. 202
Madison, M.J. 349
Magid, L. 339, 340
Maguire, S. et al. 100
Mahmud, Abdul-Moneim 314
Mair, P. and Von Biezen, I. 26
Malbin, M.J. and Cain, C.A. 66
male domination 262
Malina, A. 234
Maltby, S. and Keeble, R. 229
Manjoo, F. 17
Manovitch, L. 189
data access to 345
Marcella, R. et al. 239
March, J.G. and Olsen, J.P. 57
March, L. 35
Margetts, H. and Yared, H. 125
Margetts, Helen 8, 27, 425, xiv
Margolis, M. and Resnick, D. 7, 24, 34, 38, 58, 71, 135, 236
Margolis, M., Resnick, D. and Levy, J. 13
market leaders on Web 2.0 205–8
Martin, C.H. and Stronach, B. 42
Marvin, C. 231
Marwell, G. and Oliver, P. 85, 254
data participation, rise of 223
Massey, B.L. and Luo, W. 189
Massey, D.S. and Denton, N.A. 180
Matei, S. and Ball-Rokeach, S.J. 276, 277, 280, 286, 287
material and physical access 291–94
Matusaka, J.G. 158, 160, 161, 172
maturation, election campaigns in US 15–19
May, C. and Sell, S. 366, 367, 375
May, Christopher 9, 364–75, 426, xiv
Mayo, E. and Steinberg, T. 90
Mayor’s Advisory Council, Chicago 183
media-controlled online communication 19–21
media sectors, Web 2.0 and convergence of 204
MeetUp 73, 81, 83
Melucci, A. 85, 246, 253, 259
Menjivar, C. 284
Merrill, J.C. and Lowenstein, R.L. 187, 195, 196
Metamorphosis Project (USC) 280, 428
metaphor: dominance and distortion through 352–53; strategic use of 353; as twin-edged sword 351–52
Metaphors We Live By (Lakoff, G. and Johnson, M.) 351
Meyer, J.W. and Rowan, B. 100
MFN (“most-favored nation”) treatment 366
Miami Herald 207
michelinmedia.com 340
Michels, R. 28, 397
Middle East Journal 320
MIIS (Multi-level Integrated Information System) 101
Milbank, D. and Van de Hei, J. 132
Miliband, David 61
Mill, J.S. 145, 155
Miller, T. 108, 245
Miller, W.E. and Shanks, J.M. 144
Milner, H.V. 422
Milton, Daniel 9, 415–23, 425, xiv
minorities and technology 179–80
MissyUSA.com 279
Mitra, A. 235, 279, 287
Mobbs, P. 33
mobile phones 337–39
mobilization: election campaigns in US 15–18; in electoral web production 43, 48–49; online 241; tactics of elites 154–55
Modernization, House of Commons Select Committee on 91
Monge, P.R. and Contractor, N.S. 81
Monge, P.R. et al. 85
Monge P.R. and Fulk, J. 73
Moody, G. 374, 375
Moon, M. 117
MORI 61
Morley, D. and Robins, K. 275, 286
Morocco 306, 307, 308
Morris, D. 13, 24, 32, 59, 71
Morris, Jonathan S. 13–24, xiv
Mosquera, M. 422
Mossberger, K. et al. 77, 173, 174, 175, 176, 178, 179, 180, 181, 182, 184, 304
Mossberger, Karen 8, 173–85, 425, xiv
Mouffe, C. 233, 241
MoveOn 7, 60–61, 68, 69, 250
Moy, P. et al. 135, 234
Mouynihan, Daniel Patrick 133
MpuURL Membersnet 61, 63, 64, 69
MSNBC 203, 206, 209
Mubarak, Hosni 310, 311–12
Much More Could Have Been Achieved (WSIS Civil Society) 387
MUdS (Multi User Dungeons) 262, 263
Mueller, M. 376–77, 403, 414
Mulgan, G. 26
multi-stakeholder: approach of WSIS, success or failure? 388–90, 398; origins of WSIS 387–88; participation, enablement of 410–13; perspective, implications of 393–94
multiaxial information environment 148
multidisciplinarity, need for 261
municipal broadband, potential for 182–83

502
Murdoch, Rupert 225
Murphy, E. 320
Murray, S. 60
Mutz, D.C. 155
Mutz, D.C. and Martin, P.S. 150
Myers, D. 276, 278
MySociety 90–91
MySpace.com 5, 21; gender, internet and theorizing on 270, 271, 272; global media environment 221, 223; parties and election campaigns 61; public spaces online 242; technological change and political organization 73, 81; Web 2.0 202

Naficy, H. 282
Nagel, J. 73
Nahapetian, J. and Ghoshal, S. 100
Naples, P.M. 352
Nagel, J. 73, 81; Web 2.0 202

Necroponte, N. 187, 203, 231, 373
Negrine, R. and Papathanassopoulos, S. 59
Neelis, B., McKnight, L. and Solomon, R. 421
Neustadt, R.E. 136

new immigrants and civic society 275–87; Al-Jazeera TV 285; Al-Jazeera TV 286; assimilation internet use, connecting to “here” 278, 279–80; civic engagement and internet use 276–77, 286; civic engagement relationship, internet use type and 282–86; class and internet use 283; communication environment 285–86; Community Technology Centers 280; connectedness and internet use 284–85; contextual factors in internet use 285–86; contingent model, immigrants’ use of internet for civic engagement 277–82; education and internet use 283; emigrant policies of home countries 285; further reading guide 286–87; gender and internet use 283; generation and internet use 284; host society, political environment of 285; hybrid internet use 278, 282; identity, negotiation of 276; immigration, reasons for and internet use 283–84; immigration policies of host society 285; individual-level factors in internet use 283–85, 286; Metamorphosis Project (USC) 280; MissyUSA.com 279; Netville digital neighborhood 279; PALESA (Palestinian Scientists and Technologists Abroad) 281; religion and internet use 284; residence duration and internet use 284; socio-economic differences 285; Telemundo 286; transnational internet use, connecting to “there” 278, 280–81; typology of immigrant internet usage 282–86; virtual internet use 278, 281–82

New Media Index 47, 51, 52
The New Media Reader (Wardrip-Fruin, N. and Montfort, N.) 383
The New Politics of Surveillance and Visibility (Haggerty, K.D. and Ericson, R.V., Eds.) 348
Newell, J. 57
Newhagen, J.E. and Rafaeli, S. 236

news: consumption of, political effects of 195–98; media use, political engagement online 145–47; niche news providers 204–5, 212; reconfiguration of news markets 203–5, 212–13; and Web 2.0 202–3
Nie, N.H. 135
Nie, N.H. and Erbring, L. 30, 135, 178, 277
Nielsen/NetRatings 210
Nissenbaum, H. 347, 354
Nixon, P.G. et al. 39n2
Noam, E.M. 243
Noguchi, Y. 22
Nohria, N. and Berkley, J.D. 81
NOI 60, 69

INDEX
Nokia 341
Noland, M. 305
non-hierarchical networks 76–77
normalization: European political organizations 33–34; normalizers and optimists, debate between 58–59
Norris, C. and Armstrong, G. 348
Norris, D.F. and Moon, M.J. 111, 117, 127, 174
Norris, P. 26, 29, 34, 35, 41, 42, 43, 49, 55, 144, 145, 151, 184, 190, 277, 415, 423, 432
Northwest Social Forum (NWSF) 248, 256–58
Norton, P. 88, 98, 99
Norton, A.R. 310, 315, 319
Norton, J.S. and Owens, W.A. 335
Obama, Barack 22, 23, 61, 64, 65, 66
OECD (Organization for Economic Cooperation and Development) 179
open source software in Africa 370–73
OpenNet Initiative (ONI) 323–24, 326, 327, 329, 338, 339, 335n2, 428
OpenStreetMap 345
O’Reilly, Tim 4, 6, 9n1
organization: capacity for, European political organizations 36; of membership of parties 63–65, 70; organizational fecundity 73, 74–78, 84; organizing and 78–79; structures of 73, 76–77 organizations: impact of internet on 159, 171; incentives for European political organizations 36–37; links between, strengthening of 30; organizational reach, extension of 28–29
Ortony, A. 362
Ostergaard-Nielsen, E. 280, 283, 285, 286, 287
Ostrom, E. 402
O’Toole, L. 266, 274
Overholser, Geneva 143
Oye, K.A. 402
Padovani, C. and Tuzzi, A. 389
Page, B.I. 170
PALESA (Palestinian Scientists and Technologists Abroad) 281
Palestine 307, 308
Palfrey, John G. 335n2
Palmer, C. and Tuzzi, A. 389
Palestine 307, 308
Page, B.I. 170
PALESA (Palestinian Scientists and Technologists Abroad) 281
Palestine 307, 308
Palfrey, John G. 335n2
Palmer, C. and Tuzzi, A. 389
Page, B.I. 170
PALESA (Palestinian Scientists and Technologists Abroad) 281
Palestine 307, 308
Palfrey, John G. 335n2
Palmer, C. and Tuzzi, A. 389
Page, B.I. 170
PALESA (Palestinian Scientists and Technologists Abroad) 281
Palestine 307, 308
Palfrey, John G. 335n2
Palmer, C. and Tuzzi, A. 389
Page, B.I. 170
parliamentary democracy, visibility of 86–98; Participation Index 47, 50, 52; Parliamentary Affairs 98; Parliamentary A...
richness 145–49, 154; knowledge gap hypothesis 146; like-mindedness, unity in 149–52, 154–55; mobilization tactics of elites 154–55; multiaxial information environment 148; news media use 145–47; political discussion 147; political participation 147–49; public and private spheres, porous boundaries between 151–52, 154; reinvigoration of, internet and 144; selective exposure 150–51, 152; social boundaries, weakening of 151–52; sophistication and "enlarged mentality" 145; subdety in engagement 145
political factors in digital divide 416
political participation: online 147–49; and organizational change in Europe 26–28, 37–38
Political Parties, Elections and Referendum Act (PPERA, 2000) 68
political potential of online news media 231
political practices and cultures 41, 53–54
political uses of digital media 239–40
politics: and government online, growth and impact of 174–75, 183–84; and internet in global media environment 225, 228–29; reinvigoration of, internet and 144; as usual in European political organizations 33–34
Politics and Technology (Street, J.) 423
Politics as Usual (Margolis, M. and Resnick, D.) 58
The Politics of Direct Democracy (LeDuc, L.) 172
Politics of Small Things (Goldfarb, J.C.) 315–16
Polletta, F. 251, 259
Pollit, C. 120
Pollitt, C. and Boukha er, G. 117
Polyarchy Dataset 55n6
Popkin, Samuel L. 134
Ponocpoia (O’Toole, L.) 274
pornography 265–66
Porter, D. 144
Portes, A. and Sensenbrenner, J. 280
Portes, A. and Zhou, M. 283
Post, D. and Johnson, D.R. 351
Postel, Jon 391
Postelnicu, M. et al. 17, 18
Poster, M. 235, 273
postmodern society and public sphere 233, 237
Potter, W.J. and Levine-Donnerstein, D. 45
poverty and segregation 180
Powell, W. 81
The Power of Nightmares (Adam Curtis documentary) 227
PQMedia 19
Preece, J. 276
presence awareness 411
President, US Executive Office of the 105–6; President’s Management Agenda 105–6, 108
presidential campaign, 2004 US 131–43; direct democracy and internet use 165–66
press: fact and fiction 132; information and democratic society 133–37, 142; traditional news as custodian of fact 136–37
The Press Effect (Jamieson, K.H. and Waldman, P.) 143
Press Think (Jay Rosen blog) 137
Price, V. and Cappella, J.N. 147, 151
Price, V., Cappella, J.N. and Nir, L. 145
Price, V. et al. 147, 149
Prime Minister’s Strategy Unit, UK 183
Prior, M. 140, 190, 192
privacy law in US 343–44
privacy paradigm, dominance of 346
private sphere 244
producer types 44–45, 51
professional journalists, Web 2.0 impact on 211
INDEX


protests and campaigns 247

Protocol (Galloway, A.) 383

psychology of learning online 193

public: communication by, tracking flow of 97; distrust of Parliament by 86–87; Parliamentary visibility of 91–94, 98; and private opinion, narratives of 231–32; and private spheres, porous boundaries between 151–52, 154

Public Administration Review 117

public management change and e-government 114–27; Accenture 116, 126; competition changes 118; cross-service integration 122–23; DEG (“digital-era governance”) 114, 117, 120, 126; digital-era governance, emergence of 119–25; digitization changes 123–25; disaggregation 118; disintermediation 124; e-government, definition of 114; e-government research 115–17; ESD (Electronic Services Delivery) 123–24; FEAP (Federal Enterprise Architecture Programs) 121; further reading guide 127; future for governance and research 126–27; government–citizen interaction 115, 123–25; GWACS (Government–Wide Acquisition Contracts) 121, 122; hyper-modernism 115–16; incentivization 118–19; needs-based holism 122–23; network simplification 122; NPM (New Public Management) reforms 114, 118, 119, 120, 121, 122, 123, 126; one-stop provision 123; political agenda, IT policies and 115, 117; public management before e-government 117–19; reintegration 120–22; segmentation by customer 124–25; surveillance and control 116; UNPAN (UN Public Administration Network) 116; ZTT (“zero touch technology”) 124

Public Management Reform (Pollitt, C. and Bouckaert, G.) 117

Public Opinion (Lippmann, W.) 219

public spaces online 230–45; alternative media online, importance for political transition 240; anti-globalization websites 240; AOL 242; atomized uses of online media 239; AT&T 242; blogs 237, 238; civic engagement 233–34; civic narcissism, benefits of 236–39; CNN 237; commercialization 234, 235–36; commercially public spaces 242–43; democratizing effect of narcissism 238–39; democratizing potential of online media 231; direct engagement, confusion in 240–41; exclusion from public sphere 234; further reading guide 244–45; Google 242, 243; hybrid influence 242–43; Indymedia 240; information, access to 234–35, 236; mobilization online 241; MySpace.com 242; pluralistic agonism 239–41; political potential of online news media 231; political uses of digital media 239–40; postmodern society and public sphere 233, 237; private sphere 244; public and private opinion, narratives of 231–32; public sphere, premise of 232–34, 243–44; reciprocity 234, 235, 236; self-expression, emphasis on 237; state and public sphere 232–33; subversion and direct representation 239–41; subversion online 241; video blogs (vlogs) 238; virtual sphere 2.0 234–36; virtual sphere 2.0 236–43; YouTube.com 242, 243

Putin, Vladimir 218

Putman, R.D. 77

Putnam, R.D., Feldstein, L. and Cohen, D. 77

Putnam, R.D. 24, 26, 27, 30, 73, 100, 151, 155, 157, 182, 200, 232, 237, 251, 277, 280, 285

Putnam Commission on the Communication of Parliamentary Democracy 91

Pye, L.W. 53

Qatar 307, 308, 313

Quicksilver initiative 106–7

Qvortrup, M. 158, 162, 172

race and ethnicity 179–81

Radin, M.J. 354

Rainie, L. and Horrigan, J. 174, 176, 206, 207, 212

Rainie, L. and Kohut, A. 276

Rainie, L. et al. 131–32, 147, 151

Ranney, Austin 172

Rappoport, P.N. and Alleman, J. 190

Rash, W. 234, 235

Rathman, T.A. 190

Rattray, G.J. 335

Ray, A. 267, 271

Ray, A. 267, 271

REACH initiative in Jordan 314

reading: online news 191–92; skills, critical nature of 182

Reagan, Ronald 21

real-time news 222

reciprocity, public spaces online 234, 235, 236

Reedy, Justin 8, 157–72, 425, xiv

Reese, S.D. et al. 194

The Referendum Experience in Europe (Gallagher, M. and Uleri, P.V.) 172

Referendums Around the World (Butler, D. and Ranney, A.) 172

507
regulatory responses to locational surveillance 346–47
Reid, E.M. 263
reintegration in public management 120–22
reinvigoration of politics, internet and 144
Reith, John 87
religion and internet use 284
Rennie, D. 167
Reinvention of Politics, Internet and 144
Rennie, D. 167
Reno v. ACLU (1997) 361
Reporters Without Borders 312, 313, 323
representation: concept of 96; representative government 94–95; speaking for... 94–97, 98
The Concept of Representation (Pitkin, H.) 96
representative democracy: decline and crisis? 26–28, 37; optimism for 59
Resnick, D. 33
Resnick, P. and Shah, V. 411
RFID (Radio Frequency Identification) 339–40, 347
Rhee, J.W. and Cappella, J.N. 146
Rheingold, H. 32, 135, 144, 171, 281
Rhine, R.J. 151
Rice, Ronald E. 8, 144–56, 425, xiv
Richard, M. 191
Richardson, J.E. and Franklin, B. 210
Riga Declaration (EC, 2006) 302
Rittenberg, Jason 8, 186–200, 425, xiv
Rivera, R. 342
robots.txt exclusion commands 377, 378, 379–80
Rochidi, N. 309
Rockwell, S. and Singleton, L. 291
Rodan, G. 335, 418
Rodgers, J. 28–29
Rodgers, S. and Harris, M.A. 265
Roe Smith, M. 59
Rogers, E.M. 40, 179, 254, 422
Rogers, R. 251, 260
Rogerson, Kenneth S. 9, 415–23, 425, xiv
Rohozinski, Rafal 335n2
Rommes, E. 268–69
Romney, George 21
Romney, Mitt 22
Roosevelt, Franklin D. 102
Rosen, Jay 137
Rosenau, J.N. and Czempiel, E.O. 402
Rosenthal, L.E. 311
Rousseau, Jean Jacques 95
routers 325
Ruggie, J. 413
Rugh, W. 309
Russian censorship 224–25
Rutenberg, J. 137
Sabato, L.J. 21
al-Saggaf, Yeslam 317
Sakkas, L. 14
Salaverría, R. 188
Salter, L. 236
Sanchez-Franco, M.J. and Roldan, J.L. 191
Sassi, S. 234
satellite TV 309
Saudi Arabia 307, 308, 314; censorship in 224
Savicki, V. et al. 262
Savin, R. 343
El-Sayed, H. and Westrup, C. 314
Scammell, M. 238
Schaap, F. 274
Schauer, T. 266
Schement, J. and Curtis, T. 235
Schement, J.R. and Scott, S.C. 183
Scheufele, D.A. 153, 155n1
Scheufele, D.A. and Nisbet, M.C. 145, 147, 192, 236
Scheufele, D.A. et al. 145
Schifflauer, W. 281
Schiller, D. 236, 422
Schmitt, M. 68
Schmitz, J. 235
Schneider, Steven M. 40–55, xiv
Schoenbach, K. et al. 194, 198
Schoenleitner, G. 256
Schudson, M. 186, 234, 237, 240
Schuler, D. and Day, P. 422, 423
Schumpeter, Joseph 95
Schwab, K. 313
Schwartz, A. et al. 343
Science of Collaboratories 410
Scioli, E. 157
Scotfield, John 108
Scott, A. and Street, J. 33
Scott, B. 34, 201, 204, 205, 209, 210, 211, 213
Scott, J.253
Scott, W.R. 76, 82, 100
Scott, W.R. and Christensen, S. 82
Scott, W.R. and Meyer, J.W. 76, 82
SCP (Social and Cultural Planning, Netherlands) 298
Sears, D. and Chaffee, S. 140
Sears, D.O. and Freedman, J.L. 151
Seattle “Battle” of 75–76, 205
Seattle Post Intelligencer 207
security paradigm, dominance of 346
Selbyr, J. 270
segmentation: of audiences for online news 187; by customer 124–25; online news 196, 199
segregation and concentrated poverty 180
Seifert, J.W. and McLoughlin, G.J. 109, 110
selective exposure 150–51, 152
self-expression 237
Sell, S. 366, 367
Semetko, H.A. and Krasnoyoka, N. 240
separation of powers 63
Servaes, J. and Carpentier, N. 398
INDEX

509

Setala, M. and Gronlund, K. 88, 98
Sey, A. and Castells, M. 145–46
Shade, L.R. 265, 267, 273
Shah, D., Kwak, N. and Holbert, R. 77, 276
Shah, D.V. et al. 135, 147, 149, 151, 188, 189, 198, 234, 240
Shah, D.V., McLeod, J.M. and Yoon, S.H. 277
Shahin, J. and Neuhold, C. 88, 98
Shannon, V. 342
shared services 106–7, 108–9
Shifman, L. et al. 38
Shoemaker, P.J. and Reese, S.D. 148
Siapera, E. 280
Sierra Club 80
Sikkink, K. 259
Silvester, C. 220
Simone, M. 240
Simonelis, A. 390
Singapore 417–18, 420; Ministry of Finance 420
Singer, J.B. 188, 189, 210, 213
Singer, J.B. and Gonzalez-Valez, M. 189
site maps 380–82
site producer types 51, 52
6, Perri 120
6, Perri, et al. 120, 122
skills access 294–97, 303
Skowronek, S. 101
Slackman, M. 310
small-scale forms of political engagement 4, 6–7
Small Tech (Hawk, B., Rieder, D.M. and Oviedo, O.) 383
Smith, C. 267
Smith, M.A. 168
Smith, P. 359
Snow, D. and Benford, R. 251, 259
Snow, D. et al. 259
social activities “contextual integrity” of 347
social and cultural differences 300
social boundaries, weakening of 151–52
social capital 77
social mobilization 77
social movements 345–46
social networking: election campaigns in United States 22; parliamentary democracy, visibility of 90
social research, information society and 398–99
social structure, gender as 265–70, 273
societal change, digital divide and 415–16
societal internet uses 102–3
sociological determinism 58
Soner, D. and Sheehan, R. 353
Sorauf, F.J. 67
Spar, D.L. 350
Sparks, C. 201, 204, 206, 208
Spotila, John 108
Spriggs, J.F. and Wahlbeck, P. 353
Stanley, L. 179
Stanyer, James 7, 8–9, 201–13, 426, xv
Staples, B. 158
Star Tribune 207
Starr, P. 100, 217
Stern, C. 393
Stewart, A. 227
Steyaert, J. 294
Stinchcombe, A.L. 77
Stohl, Cynthia 72–85, xv
StopBadware.org 400n11
Strangelove, M. 375
Street, J. 423
Stromer-Galley, J. 6, 17, 152
subversion: and direct representation 239–41; public spaces online 241
Suleiman, Abdel Kareem Nabil 315
Sullivan, Andrew 221
Sum, N.-L. 372
Sun 211
Sundar, S.S. 190, 193
Sundar, S.S. and Nass, C. 191
Sundar, S.S. et al. 189
Sunday Telegraph 211
Sunstein, C.R. 24, 34, 135, 145, 151, 155, 169–70, 187, 197, 199, 200, 203, 352
surveillance see locational surveillance
Swanson, D. 239
Swartz, N. 419
Swedberg, C. 340
Syria 306, 307, 308, 314, 319
Tampa Tribune 211
Tanner, E. 170
Taranto, Richard 360
Tarde, G. 147
Tarrow, S. 74, 283
INDEX

Taylor, P. 21
technical knowledge, digital divide and 415–16
technical skills, digital citizenship and 181–82
techno-governmentality 376
techno-social spaces, uses of 268–69, 270–72
TechnoFeminism (Wajcman, J.) 274
technological change and political organization 72–85; affordances of internet 83–84; American Legion 80; Amnesty International 80; anti-Iraqi war marches 76; collective action 72–73, 74–76; collective action space 82; engagement 80–82; Facebook 81; flexibility of internet 82–83; further reading guide 85; institutional engagement 80–81; interaction 79–80; interest group mobilization 77–78; internet, interaction and engagement 82–84; internet dynamics 82–83; MeetUp 73, 81, 83; MySpace 73, 81; non-hierarchical networks 76–77; NRA (National Rifle Association) 81; online civic association 73–74; organizational fecundity 73, 74–78, 84; organizational structures 73, 76–77; organizing and organization 78–79; Seattle, “Battle” of 75–76; Sierra Club 80; social capital 77; social mobilization 77; theoretical integration across perspectives 78–84, 84–85

technological determinism 58, 59
technological development, web production 49, 52

Tekwani, S. 281

Telemundo 286

TeleNav Inc. 338–39

Tewksbury, D. and Althaus, S.L. 150, 191, 192

Tewksbury, D. and Maddex, B. 197

Tewksbury, D. et al. 192

Tewksbury, David 8, 186–200, 425, xv

Thalheimer, M. 429

TheyWorkForYou 90

Thierer, A.D. 179

Thomas, J.C. and Streib, G. 175

Thompson, J.B. 87, 282

Thurman, N. 207, 212, 213

Thurmond, Storm 194

Tiefenbrun, S.W. 351

Tiller, E.H. and Cross, F. 350, 353

Tilly, C. 27, 253

Timeto

Time 270

Times of London 207

Tkach-Kawasaki, L.M. 55, 57

Toennies, F. 82

Toft, A. et al. 248

Toft, Amoshaun 9, 246–60, 425, xv

Tolbert, C. and McNeal, R. 175, 194

Tolbert, C. and Mossberger, K. 175
top-down approach to internet 311–14, 319
top-down media apparatus 219–21

Torvalds, Linus 374

Townsend, A.M. and Bennett, J.T. 344

Trade and Industry, UK Dept of 183

trade justice campaign 248, 255–56, 259

Trammell, K.D. 17

transnational advocacy 246–47

transnational internet use 278, 280–81

transnational policy networks 413

transnational technology diffusion 40

Tremane, M. 189, 237

Tremane, M. and Dunwoody, S. 193

Tremane, M. et al. 150

Trend, D. 273

Treschel, A. and Kriesi, H. 160

Trippi, J. 13, 17, 59, 60, 71

TRIPS (Trade Related Aspects of Intellectual Property Rights) agreement 365–67, 371

Tuchman, G. 148


Turk, Michael 17

Turkey: Arab world, internet use and political identity 306

Turkle, S. 263, 264, 281

Twist, J. 210

UAE Yearbook 311

UCLA 290, 296, 299, 300

UK Election Commission 67

Uleri, Pier Vincenzo 172

United Arab Emirates (UAE) 306, 307, 308, 311, 313

United Nations 387; Development Program 313; Global Alliance for ICTs and Development 408–9; Human Development Index 47, 49, 52, 428; UNCTAD 369, 372, 373; UNESCO 371, 387; UNPAN (UN Public Administration Network) 116; World Summit on the Information Society (WSIS) 403–4

United States: Agriculture Dept. 340; and Britain, comparisons between 70–71; Defense Dept. 333; digital divide, internet diffusion and 417, 418, 420–21; direct democracy 159–60; news consumption 429–31


Unspun (Jamieson, K.H. and Jackson, B.) 143

Urban Tapestries project 347

USA Today 207

usage access 297–99, 303

user-controlled online communication 21–23

user experience, richness in 4, 7

user-generated news sites 203

Usdaner, E.M. 235, 276

Valentino, N.A. et al. 55

van Aelst, P. and Walgrave, S. 240

van de Donk, W. et al. 32, 39, 116

van der Wurff, R. 1210
INDEX

van Dijk, J. et al. 296
van Dijk, J., Hanenburg, M. and Pieterson, W. 290
van Dijk, Jan A.G.M. 9, 43, 179, 181, 185, 288–304, 425, xv
van Doorn, N. et al. 264, 272
van Doorn, Niels 9, 261–74, 426, xv
Van Hannen’s democracy rankings 428
van Doorn, Niels 9, 261–74, 426, xv
van Doorn, Niels 9, 261–74, 426, xv
Van Doorn, Niels 9, 261–74, 426, xv
Vanden Berg, Jessica 69
van Slyke, C. et al. 44
Ventura, Jesse 15, 16, 59
Verba, S. et al. 53, 146, 147, 155, 176, 184
Vertovec, S. 285, 287
Vice President, Office of the US 103
video blogs (vlogs) 238
video recording election campaigns 21–22
Villanueva, Edgar 372
Villeneuve, N. 335
Virilio, P. 227
virtual internet use 278, 281–82
virtual sphere 1.0 234–36
virtual sphere 2.0 236–43
Voices of Europe (Hug, S.) 172
VOIP ("voice over internet protocol") services 328–29
volunteer recruitment 17–18
von Hippel, E. 373, 375

W3 (World Wide Web Consortium) 377, 401
Wade, R.H. 371
Wajcman, J. 263, 264, 268, 274
Waldman, Paul 143
Walgrave, S. and Rucht, D. 255
Walgrave, Stefan 260
Walker, J.L. 78, 80
Wall, D. 27
Wall, M. 194
Wall Street Journal 207, 218
Wanta, W. 148
Ward, S. and Lusoli, W. 88
Ward, S.J. and Francoli, M. 61
Ward, S.J. and Gibson, R.K. 31
Ward, S.J. and Vedel, T. 34, 39n1
Ward, S.J. and Voerman, G. 55
Ward, S.J. et al. 33, 34, 39n2
Ward, Stephen 25–39, 56, 71, 426, xv
Wardrip-Fruin, N. and Montfort, N. 383
Ware, A. 63, 66, 71
Warf, B. and Vincent, P. 328
Warschauer, M. 181, 182, 185, 303, 304, 306
Washbourne, N. 31
Washington Post 207, 379
Washington State, state-wide initiatives 163–65
Waskul, D.D. 266, 274
Watts, D. 222
Weare, C. and Lin, W. 136
Web 2.0 201–13; Alternative Press Center 205;
alternative sources of news, use of 207–8; AOL
News 205, 208, 209; audience input 210–11,
212; BBC News Online 157, 204, 207, 209,
210, 221; blogs 204–5; CNN 203, 204, 206,
208, 209; collective intelligence from political
web use 4, 5; cross-subsidy 209–10; data,
importance of 4, 6; democratic experimentalism
4, 6; diversity in online news 208–9, 212;
European political organizations 30; Facebook
202; financial uncertainty and cross-subsidy
209–10; further reading guide 213; gender,
internet and theorizing on 270–72, 273; Google
News 205, 206; Guerilla News Network 205;
Indymedia 205; internet as platform for political
discourse 4–5; Journalism, Project for Excellence
in 202–11, 213; limitations on audience input
210–11, 212; local websites 204; long tail, theory
of 4–5; market leaders 205–8; media sectors,
convergence of 204; MSNBC 203, 206, 209;
MySpace 202; new questions and outcomes?
270–72, 273; news and 202–3; niche news
providers 204–5, 212; online news aggregators
205; open-source news 212; parties and election
campaigns 65; place blogs 204; principles of 4;
professional journalists, impact on 211;
propagation of content over multiple applications
4, 6–7; reconfiguration of news markets 203–5,
212–13; Seattle, “Battle” of 205; small-scale
forms of political engagement 4, 6–7; user
experience, richness in 4, 7; user-generated news
sites 203; website ownership and diversity in
online news 208–9, 212; Yahoo! 205, 206;
YouTube 202
Webb, Jim 22, 60, 69
Webb, P. 64, 66
Webcameron.org 8, 61, 70
Webcrawler (AOL) 378
Weber, S. 5, 375
Websense 331
Webster, F. 350
Webster, J.G. and Lin, S.F. 39, 191
Webster, J.G. and Phalen, P.F. 196, 199
Weinberger, D. 5
Welch, E.W. et al. 175
Wellman, B. and Gulia, M. 276
Wellman, B. et al. 282
Wells, Chris 8, 157–72, 425, xv
West, D.M. 109, 110, 112, 117, 127, 174, 175, 182
Westerdal, J. 405
WGIG (Working Group on Internet Governance)
387, 407–8
Wheeler, Deborah L. 9, 305–20, 425, xv
INDEX

Whitaker, C. 253
White, D.M. 188
White House robots.txt files 379–80, 382
Whitehouse, A. 265
Wiklund, H. 102
Wilding, F. 267
Wilhelm, A.G. 24, 175, 304
Williams, A. 23
Williams, A.P. and Tedesco, J.C. 24, 55
Williams, F. 234
Williams, F. and Pavlik, J.V. 234
Williams, H. 393, 395
Wilson, E.J. 40, 53, 55, 416, 421, 422, 423
Wilson, E.J. and Wong, K.R. 423
Wilson, Harold 220
Winer, Dave 4
Winneg, K. and Stroud, T. 132, 135, 141
Winneg, Kenneth 131–43, xv
Winston, B. 368, 375
WIPO (World Intellectual Property Organization) 366, 367
Wise, C.R. 121
Witmer, D.F. and Katzman, S.L. 262
Wol, R. and Rosenstone, S.J. 175, 176
Wolinsky, H. 346
workplace regulation 344–45
World Bank 427
World Competitiveness Report 313
World Conference on Women (1995) 267
World Information Access Project 40, 432–33
World Internet Project 400n10
World Internet Usage and Population Statistics 231
“World says No War” 247, 254–55
World Values Survey (WVS) 47, 50, 52, 55, 428
Wright, T. et al. 264
Wring, D. and Horrocks, I. 32
WTO (World Trade Organization) 366–67, 371
Wu, H.D. and Bechtel, A. 191
Wu, T. 335
Wulf, W.A. 410
Xenos, M. and Foot, K.A. 44
Xenos, Michael 40–55, xv
Yahoo! 205, 206
Yan, W. 418
Yates, J. and Orlikowski, W.J. 44
Yemen 307, 308
Yervasi, G. 267
YouTube.com 5, 7, 8, 21, 22, 60; deception, role of internet in identification of 131; gender, internet and theorizing on 270, 271, 272; global media environment 221, 223; public spaces online 242, 243; Web 2.0 202
Yuan, Y. et al. 85
Yun, H.K. 420
Zaller, J.R. 151, 155
Zayani, M. 224
Zewail, A. 314
Zhou, M. and Cai, G. 276, 287
Zhou, Y. and Moy, P. 188
Zittel, T. 35, 38, 57, 88
Zittrain, J.L. 335n2, 363, 385
ZTT ("zero touch technology") 124
Zukin, C. and Snyder, R. 192
The politics of the internet has entered the social science mainstream. From debates about its impact on parties and election campaigns following momentous presidential contests in the United States, to concerns over international security, privacy, and surveillance in the post-9/11, post-7/7 environment; from the rise of blogging as a threat to the traditional model of journalism, to controversies at the international level over how and if the internet should be governed by an entity such as the United Nations; from the new repertoires of collective action open to citizens, to the massive programs of public management reform taking place in the name of e-government, internet politics and policy are continually in the headlines.

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