

**COMPARATIVE INSTITUTIONAL ANALYSIS
IN CYBERSPACE: THE CASE OF INTERMEDIARY
LIABILITY FOR DEFAMATION**

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I. INTRODUCTION

As legal conflicts in cyberspace proliferate, analysts argue over which institution — the legislature, the courts or the market — should be used to resolve them.¹ Yet more often than not, such arguments are motivated by strategic positions rather than impartial analysis. Those who feel they would benefit from a new federal law argue that Congress is well-suited to act, and those who oppose the law include institutional concerns in their arsenal of arguments.² Even if advocates ground their institutional arguments, they often make broad and undifferentiated claims. In other words, they assert that Congress should always defer to the market rather than regulate cyberspace, without evaluating which contexts are not well suited for market resolution. Or they impugn courts' ability to make needed legal changes, without considering what factors affect courts' competence.

In this Article, I seek to deepen the institutional analysis of cyberspace legal changes. I promote an approach that identifies which institution would best resolve a particular legal conflict by evaluating the context in which the conflict occurs.³ I advocate the

1. See, e.g., *The Electronic Signatures in Global and National Commerce Act: Hearings on H.R. 1714 before the Subcomm. on Finance and Hazardous Materials of the House Comm. on Commerce*, 106th Cong. 3 (1999) (statement of Hon. Tom Bliley, Chairman, House Comm. on Commerce) (stating that technological decisions about electronic signatures should be left to the marketplace, not Congress); Expert Report of Prof. Lawrence Lessig pursuant to FED. R. CIV. P. 26(a)(2)(B) at 44, *A&M Records, Inc. v. Napster, Inc.*, 2000 WL 1170106 (N.D. Cal. Aug. 10, 2000) (arguing that "where the net benefit to society of a new technology is uncertain, and where a balance among competing interests must therefore be struck," Congress rather than courts should conduct the balancing); FED. TRADE COMM'N, *PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE* (2000), at <http://www.ftc.gov/os/2000/05/testimonyprivacy.htm> (last visited May 6, 2001) (concluding that Congress, not market forces, should protect online privacy).

2. See, e.g., *Online Entertainment: Coming Soon to a Digital Device Near You: Hearings before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Hank Barry, Interim Chief Executive Officer of Napster, Inc.) (advocating that Congress follow tradition and legislate compulsory licenses due to the difficulties of negotiating); *Copyright Issues and Digital Music on the Internet: Hearings before the Senate Comm. on the Judiciary*, 106th Cong. (2000) (statement of Hank Barry, Chief Executive Officer of Napster, Inc.) (advocating a market-based solution to issues of online music distribution and expressing concern that legislation will unduly favor the interests of copyright owners to the detriment of Napster, Inc.).

3. Legal change through contracts differs from that produced by either courts or Congress. Nonetheless, parties do shape their legal relationships through their contracts. In that sense, contracts can resolve legal conflicts and create legal change. See generally Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257 (1998) (discussing both legal and non-legal rulemaking on the Internet).

use of comparative institutional analysis, an approach representing an amalgam of different methodologies such as public choice theory, transaction cost economics, and even legal process.⁴ My analysis draws significantly on an analytical framework developed by Neil Komesar in his book *Imperfect Alternatives*.⁵ I add to Komesar's participation-centered model and apply this enhanced approach to a case study of cyberspace legal change. Specifically, I use comparative institutional analysis to determine which institution — the Congress, the courts, or the market — should determine the liability level cyberspace intermediaries⁶ should face for their users' defamatory communications.⁷

The case study recounts a history of institutional failure, from the perspective of comparative institutional analysis. To start with, Congress erred when it granted immunity from defamation liability to cyberspace intermediaries in a 1996 statute.⁸ It acted even though the courts were better situated to resolve the legal question, and the law it passed evinced concern for intermediaries but ignored the needs of potential victims of online defamation. In effect, Congress wrote half a statute, one that granted intermediaries some vague rights, but failed to clearly impose any countervailing responsibilities on them. The courts interpreted the provision broadly to grant total immunity to intermediaries from their users' defamation. Strikingly, they seemed to view themselves as the enforcers of Congress's one-sided deal. Both the courts and Congress unduly credited the market's ability to resolve online defamation through contracts. Moreover, total immunity grants intermediaries excessive freedom; they face no

4. See Howard S. Erlanger & Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 966 (1997); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1406–07 (1996). Professor Rubin has lauded comparative institutional analysis as providing “a new synthesis of scholarly discourse” that furnishes a crucial framework for comprehensive normative debate. *Id.* at 1403–04, 1436; see also David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 663–64 (1997) (describing comparative institutional analysis as the “next wave” of public choice scholarship).

5. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994).

6. See *infra* Part III.A for a definition of “cyberspace intermediaries.”

7. For example, this analysis considers America Online's legal responsibilities, if any, when a user posts a defamatory message on that service.

8. 47 U.S.C. § 230 (Supp. IV 1998) (added to Title II of the Communications Act of 1934, 47 U.S.C. §§ 201–29, by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 509). The extent of the immunity that Congress intended is unclear and will be discussed further *infra* Part VI.

liability for failing to stem online defamation, even if they knew about the defamatory postings and could easily remove them. Furthermore, total immunity denies legal remedy to those victims who cannot identify their defamers.

Exploration of the case study yields at least three ways that comparative institutional analysis may improve development of cyberspace law. First, policy proponents who conduct the analysis before Congress has acted can use their insights to remedy any institutional infirmities in congressional action. For example, when the analysis suggests that Congress would not be as well-suited to resolve a legal conflict as the courts, policy proponents can try to persuade legislators either to refrain from acting or to incorporate into their statutes a significant role for judicial resolution of the question.⁹ Second, comparative institutional analysis can inform how courts exercise their interpretative function. For example, when asked to interpret an ambiguous statute produced by a Congress hampered by institutional bias, courts can take a more activist approach to statutory construction.¹⁰ Finally, comparative institutional analysis can be used to evaluate calls for market resolution of cyberspace legal conflicts. Many champion the notion of a free market in cyberspace, but comparative institutional analysis reveals that in many contexts, contracts cannot effectively achieve the desired social policy goals.¹¹

Through its focus on a single legal question, this case study illustrates a point of wide application. It shows the ways in which failure to use the insights of comparative institutional analysis can significantly degrade public policy outcomes. To put it positively, comparative institutional analysis can generate better legal results and improved public policy, particularly in the context of cyberspace and the myriad opportunities it presents for legal change.

This Article establishes the importance of using comparative institutional analysis in setting the legal framework for cyberspace defamation. Part II briefly sets out the participation-centered model and reviews why cyberspace questions particularly warrant comparative institutional analysis. Part III defines terms and describes the state of intermediary liability law prior to Congress's action and then recounts the passage of the statutory immunity provision, including its broad interpretation by the courts. Part IV applies the participation-centered model to the case study and

9. See *infra* Part VII.A.

10. See discussion *infra* Part VII.B.

11. See *infra* Parts II.A and IV.A.1 for a complete discussion of the role of social policy goal choice in comparative institutional analysis.

concludes that the courts, not Congress, would have been the least imperfect institution to determine intermediary liability for defamation.¹² Having shown the participation-centered approach in action, the discussion then reviews how it surmounts many of the critiques of the interest group branch of public choice analysis upon which it is based. For it to be a truly useful tool of public policy analysis, however, the approach must go beyond identifying the preferred institution and generate insights about what should happen when, as in the case study, another institution has chosen to act instead. The remainder of the Article extends the approach in several ways. As a preliminary matter, Part V directly considers the best legal rule to address intermediary liability for defamation. It selects an intermediate choice corresponding to distributor liability¹³ and defends that choice against challenges based on concerns about judicial competence. In Part VI, after elaborating on how Congress's own misguided actions support the predictions of the participation-centered approach, the discussion evaluates how courts compounded the error through their broad interpretation. Part VII suggests several ways in which the legislative process would be improved if both legislators and their constituents had more understanding of comparative institutional analysis. It then proposes that courts use comparative institutional analysis insights to construe narrowly ambiguous statutes produced by a biased Congress.¹⁴ The Article concludes that, though they may bristle at the suggestion, courts must play an active role in bringing comparative institutional analysis to bear on cyberspace legal questions.

12. Komesar considers which institution is the least imperfect choice rather than the best choice in order to recognize that there is often no really good choice. See KOMESAR, *supra* note 5, at 5, 45. I consider here only the traditional three institutions that Komesar considers and omit detailed consideration of either administrative agencies or non-traditional institutions. Komesar collapses consideration of the administrative process into the political process, but I consider only the legislative part of the political process. See *id.* at 9. For a discussion of non-traditional institutions in cyberspace, see Joseph P. Liu, *Legitimacy and Authority in Internet Coordination, A Domain Name Case Study*, 74 IND. L.J. 587 (1999).

13. Distributor liability means roughly that intermediaries will be liable only if they fail to act after receiving notice of defamation on their systems. See discussion *infra* Part V.B.

14. See *infra* Part IV.A.4 for a discussion of what it means for Congress to be biased in this context.

II. THE COMPARATIVE INSTITUTIONAL APPROACH

Comparative institutional analysis provides both a positive and a normative structural approach to considerations of legal change. As a positive matter, the analysis predicts the different outcomes that will arise in various institutional settings based on the actors' incentives in each setting.¹⁵ As a normative matter, comparative institutional analysis chooses the best institution by determining the outcome that best furthers a particular social policy goal.¹⁶ The analyst assumes the social policy goal at the outset in order to use it to assess comparative institutional performance. That goal could be economic efficiency, but the analyst could choose from a wide range of goals, including, for example, the equitable distribution of resources.¹⁷

While other scholars have promoted the use of comparative institutional analysis in law,¹⁸ Neil Komesar's work has been truly path-breaking.¹⁹ In his participation-centered approach, Komesar provides a framework for conducting comparative institutional analysis with an eye toward making significant contributions to public policy debates.²⁰ In order to compare institutions consistently across different settings, the participation-centered approach identifies the factors that best account for variations in institutional competence. The approach focuses on the actions of those people who generate legal change through their activities in each institution, whether as

15. See NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST MODERNISM* 122–23 (1997).

16. See KOMESAR, *supra* note 5, at 28 (claiming that both positive and normative legal analysis require comparative institutional analysis).

17. See MERCURO & MEDEMA, *supra* note 15, at 122–23; see also KOMESAR, *supra* note 5, at 33, 50 (recognizing justice, fairness, autonomy, or equality of opportunity as possible social policy goals); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 69 (1991) (listing economic efficiency, environmentalism, racial equality and redistribution of income as possible governmental goals).

18. See MERCURO & MEDEMA, *supra* note 15, at 200 n.21; KOMESAR, *supra* note 5, at 11–13 (describing prior contributions and distinguishing his approach).

19. Komesar elaborated his approach to comparative institutional analysis in a recent book. See generally KOMESAR, *supra* note 5. See *infra* Part IV.B for a discussion of the unique contributions of Komesar's approach.

20. See, e.g., Erlanger & Merrill, *supra* note 4, at 966 ("Komesar should be required reading for anyone who seeks to venture forth into the world of normative legal analysis"); Larry I. Palmer, *Life, Death and Public Policy*, 81 CORNELL L. REV. 161, 162 (1995) (reviewing NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* (1994)) ("Komesar has provided scholars and institutional players with a profound method for approaching . . . difficult questions of public policy"); Richard J. Pierce, Jr., *A Comment on Imperfect Alternatives*, 83 CAL. L. REV. 941, 941 (1995) ("Komesar's book has the potential to enhance both the quality and the utility of legal scholarship in all fields").

litigants, voters and lobbyists, or consumers and producers.²¹ It turns out that differences in those actors' distribution of stakes in the outcome, costs of information, and costs of organizing lead to consistent differences in institutional performance.

A. The Participation-Centered Model

The central tenet of the participation-centered approach is that legal change will not happen without interested parties who push for it. Interested parties can urge the legislature to make changes by voting for politicians who share their views or, more aggressively, by lobbying and attempting to educate legislators and other voters with propaganda.²² They can advocate for change in the court system by bringing cases, and they can create change in the marketplace by transacting in ways that achieve it.²³ Participation, however, will not occur in any forum unless the benefits of participation outweigh its costs. The benefits from participating directly relate to a party's stake in the outcome.²⁴ The more the party has at stake, the more change in the favored direction will benefit that party. On the other hand, the costs of participation stem from the costs of acquiring information about the current legal rule and the path towards change, as well as the costs of organization.²⁵

Some characteristics of participation costs and benefits are true across all institutions. In general, the more diffusely an interest is spread over a group of people, the lower each person's stake in the outcome and the more likely that small increases in the costs of participation will inhibit any call for change to promote that interest. At the same time, costs of organization are greater for interests that are diffusely spread because it is harder to identify those with shared interests and to prevent free-riding on the activities of others. Costs of

21. See KOMESAR, *supra* note 5, at 7.

22. See *id.* at 63-64.

23. Note that the actors in both courts and the political process must be aware of the legal change they are seeking, while market actors can achieve change merely through inadvertent transactions. See *id.* at 98.

24. I use "stake" as a shorthand for what Komesar discusses as either an impact from an injury or a stake in its prevention. Komesar uses stakes and impacts interchangeably. See *id.* at 161.

25. See *id.* at 8, 71. Komesar breaks down participation costs more finely into "the complexity or difficulty of understanding the issue in question, the numbers of people on one side or the other of the interest in question, and the formal barriers to access associated with institutional rules and procedures." *Id.* at 8.

participation also increase when the interest is complex or highly technical as it takes time and energy to understand the information.²⁶

In addition, institutions themselves create their own costs that affect whether a given institution will adequately take account of all interests. For example, the adjudicative process, with its formal rules and its limited scale, likely poses the highest costs to participation for a diffusely spread interest. The costs of access to the political process can also be high, particularly if expensive lobbying campaigns are required to achieve results. However, other methods of participation in the political process are not as expensive, such as informing the general public, including legislators, and voting for legislators with sympathetic views. The ability of market transactions to resolve conflicts involving diffuse interests depends on whether the transaction costs involved exceed the benefits. Those benefits correspond to the participants' stakes in the outcome.²⁷

To apply the model in real world settings, the comparative institutional analyst first chooses the social policy goal to be promoted.²⁸ Then, the analyst determines which groups would be most affected by a legal change and considers how the costs of participation inherent in each institution compare with the expected benefits of using the institution. Under the participation-centered approach, actors' collective willingness to participate in a given institution determines that institution's competence.

While the important question is how each institution compares to the others for a given legal question,²⁹ some general observations about relative institutional competence can be made. For each of the three institutions, the approach assumes a particular normative vision of good performance. That is most easily seen with reference to Congress, which represents a poor institutional choice when it is

26. See *id.* at 68–75. Komesar's analysis draws heavily on the interest group theory of public choice scholarship for this analysis. See, e.g., FARBER & FRICKEY, *supra* note 17, at 12–37 (reviewing literature and insights of interest group theory); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35–43 (1991) (same); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971) (laying out the foundation for the approach). See *infra* Parts IV.B and VII.B.2 for a discussion of the ways Komesar's approach differs from interest group theory.

27. See KOMESAR, *supra* note 5, at 125–28.

28. See Erlanger & Merrill, *supra* note 4, at 972–73.

29. For example, Komesar uses his model to demonstrate that tort reform efforts are misplaced in the context of product liability injuries because the courts are actually better situated, or at least less imperfectly situated, than Congress or the market to resolve such cases in ways that promote the pertinent social goal. See KOMESAR, *supra* note 5, at 153–95.

subject to the over-representation of one group and the under-representation of another. When one group has concentrated and high-stakes interests as compared to its opponents, Congress will be subject to a distorting minoritarian bias.³⁰ Legislators will hear much more from the first group and will likely give short shrift to the needs of the group with the diffuse interests. According to the participation-centered approach, one evaluates whether one group has disproportionate influence with reference to the social policy goal, such as resource allocation efficiency. In other words, if a group's influence leads to a law that accords it more benefits than are efficient for society, it has exercised disproportionate influence.³¹ Other social policy goals would lead to similar analyses.

Transaction costs are the primary inhibitor of market performance. When transaction costs swamp the gains from contracting, the market will not be well-suited to make a legal change.³² Instead, transactions that are favorable in terms of their ability to further the social policy goal will be avoided. Under the participation-centered approach, market competence requires transactions to take place, and it seems to require also that contracts reflect real bargaining by informed parties.³³

The participation-centered approach handles court performance in a manner parallel to its treatment of the other branches. The courts will operate well only if parties actually use them to sue. If parties choose not to sue, probably because the costs of suit exceed the expected benefits, then courts are not the appropriate institution to give content to a legal rule and effectuate appropriate legal change. In such an event, if courts are selected as the institution to decide the

30. See *id.* at 56, 76, 173, 192. Under Komesar's model, minoritarian bias does not always lead to distorted legislation. It depends on whether there is a countervailing majoritarian bias. See *id.* at 65–67. Komesar refines the interest group theory by devising a "two-force" model, in which both minorities and majorities can exercise improper sway. See *id.* at 54, 65–75. Only the undue influence of minority groups is relevant to the case study.

31. See *id.* at 56 n.5, 76; Erlanger & Merrill, *supra* note 4, at 989–90. Part VII.B.2, *infra*, defends leaving the notion of improper influence qualitative and relatively fuzzy.

32. See KOMESAR, *supra* note 5, at 111–12, 171. This analysis draws heavily on the work of transaction cost economists. See, e.g., Oliver E. Williamson, Book Review, 77 CAL. L. REV. 223 (1989) (reviewing R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988)) (describing transaction cost economists' agenda); Oliver E. Williamson, *Transaction Cost Economics*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 135 (Richard Schmalensee & Robert D. Willig eds., 1989); Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

33. See KOMESAR, *supra* note 5, at 116–21 (describing misled consumers with relatively low stakes as victims of market rent-seeking).

question, the legal rule may fail to change as needed, or it may be decided on the basis of the one case that by happenstance does go to court. Another factor relating to courts' competence is whether the legal rules they generate will impact behavior outside the courtroom. In other words, if the parties whose behavior the courts are trying to affect have diffuse interests with each member having correspondingly small stakes, these parties may be unwilling to invest in following courts' actions and they may ignore any resulting rules.³⁴ Thus it is important to consider not just courts' ability to generate signals about appropriate behavior, but also whether those signals will be heard by the relevant parties.

In sum, the participation-centered approach involves positive analysis: identification of the different groups interested in a particular legal rule and of the costs and benefits to each group of participation in any of the three institutions. In order to focus on comparative institutional analysis, the approach assumes a social policy goal and then evaluates the comparative abilities of each institution to achieve that social policy goal given the likely participation level of each group. The approach also embodies normative visions of what it means for each institution to function properly.

B. Institutional Choice in Cyberspace

The tools of comparative institutional analysis are designed to be used across legal contexts to provide a means for evaluating proposals for legal change that transcend debates over the proper social policy goal. They offer an entrée into the debate about legal change to those who are not parties in interest, but rather parties interested in the best legal rules. Because the cyberspace context has raised so many questions of legal change in such a short period, it represents a particularly fertile area for the use of comparative institutional analysis.

In recent years, judges have devised new legal tests for cyber-contexts,³⁵ and have recognized the need to take careful account of the

34. This is true for car accident injuries. A tort rule that imposes liability on careless drivers may have little impact on the potential injurer class, which includes all drivers. Drivers may not view themselves as future accident causers and so may fail to take the liability rule to heart. *See id.* at 168–77.

35. *See, e.g., Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (adopting jurisdictional test that relates to the nature and quality of Internet commercial activity).

peculiarities of cyberspace when applying precedents established for pre-cyberspace media.³⁶ Congress, meanwhile, has passed numerous laws tailored specifically for the new medium,³⁷ and its committees hold frequent hearings to determine whether other new laws are advisable.³⁸ Federal agencies regularly issue reports on whether or not legislative action is required for cyberspace questions, often recommending that some new laws be enacted.³⁹

But agreement on the need for change does not mean agreement on the nature of the changes needed. For each proposal that the law change in a particular way to respond to cyberspace, counterproposals advocate legal change that achieves the opposite goal. Those debates reflect different underlying preferences or values about law. Debates over whether intellectual property rights should strongly favor the creator or instead leave room for a vibrant public domain find expression in arguments over how to accommodate digital reproduction.⁴⁰ Free speech absolutists clash with those concerned

36. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 868–71 (1997) (concluding that the Internet should not be treated the same as the broadcast medium to which it had been analogized). Cf. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999) (arguing that cyberspace raises unique legal questions relating to how computer code regulates).

37. See, e.g., Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998); Communications Decency Act of 1996, 47 U.S.C. § 223, 110 Stat. 133 (1998); Electronic Signatures in Global and Electronic Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000); Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, Div. B., § 1000(a)(9), 113 Stat. 1536 (1999) (codified at 15 U.S.C.A. § 1125(d) (West Supp. 2000)) (tackling “cyberpiracy” of Internet domain names).

38. See, e.g., *Collections of Information Antipiracy Act; Vessel Hull Design Protection Act; Trade Dress Protection Act; and Internet Domain Name Trademark Protection: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. of the Judiciary*, 105th Cong. 123 (1999) [hereinafter *Domain Name Hearings*]; *The Internet and Federal Courts: Issues and Obstacles: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. of the Judiciary*, 106th Cong. (2000) [hereinafter *Internet Issues Hearings*]; *Wireless Internet Technologies: Hearings Before the Subcomm. on Technology of the House Comm. on Science*, 106th Cong. (2000).

39. See, e.g., FED. TRADE COMM’N, *supra* note 1, at iii–iv, 36–38 (recommending legislation to address online privacy violations); LARA S. UNGER, SEC. AND EXCH. COMM’N, *ONLINE BROKERAGE: KEEPING A PACE OF CYBERSPACE* (1999) (exploring how online brokering practices impact securities regulation).

40. Compare Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998) (viewing contract doctrine as superior to copyright law), and Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217 (advocating strong intellectual property rights entitlements in cyberspace), with Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998) (expressing

about the harms from speech about whether online indecency needs legislative deterrence or a hands-off approach.⁴¹ Those advocating enhanced law enforcement powers clash with advocates of strong online privacy rights about the rules governing police access to private electronic correspondence.⁴² In each of these debates, the participants seek to achieve different social policy goals. Not surprisingly, people cannot agree about what a new law should say when they cannot agree about what that law should achieve for society.

The fight over social policy goal choice often leads analysts to neglect to consider which institution is best situated to realize a particular social policy goal.⁴³ Much cyberspace legal scholarship ignores the institutional mechanism by which particular legal changes should be made.⁴⁴ Once the author has described how the new cyberspace technologies affect operation of the law in practice and has advocated the legal changes required to marry the ideals of the law with the reality of cyberspace, he or she usually leaves unspecified how the change should come about or else assumes without discussion that Congress could and should make the change.⁴⁵

But ignoring institutional choice often means creating inferior public policy. In fact, because the different institutions vary so significantly in their ability to resolve legal conflicts, when a less preferred institution decides a legal question, the results can be

concern over the contracting public domain in cyberspace), and Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19 (1996) (same).

41. Compare JONATHAN WALLACE & MARK MANGAN, *SEX, LAWS AND CYBERSPACE* 254 (1997) (concluding that "[i]ndecency regulation has no place on the Net"), with Robert W. Peters, *There is a Need to Regulate Indecency on the Internet*, 6 CORNELL J. L. & PUB. POL'Y 363 (1997).

42. See, e.g., Susan Freiwald, *Uncertain Privacy: Communication Attributes after the Digital Telephony Act*, 69 S. CAL. L. REV. 949 (1996) (discussing conflict between privacy advocates and law enforcement proponents); Michael Adler, Note, *Cyberspace, General Searches, and Digital Contraband, The Fourth Amendment and the Net-Wide Search*, 105 YALE L.J. 1093 (1996).

43. As Komesar observes, most analyses concentrate on the debate over social policy goals, and often assume without discussion that an appropriate institution will implement the necessary choices. See KOMESAR, *supra* note 5, at 35.

44. Cf. *id.* at 46 ("[M]ost analysts omit any explicit consideration of institutional choice, treat it as intuitively obvious, or deal with it as an afterthought.").

45. Authors do occasionally voice institutional concerns in cyberspace legal scholarship. See, e.g., Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1752-53 (1995) (recommending that cyberspace constitutional questions be decided by lower court judges who can "give the law the material with which to understand this new realm"). Many discussions, however, fall prey to what Komesar describes as "single institutionalism." See, e.g., *infra* Part IV.B.1 (discussing the single institutionalism of cyberlibertarians).

disastrous.⁴⁶ For example, not only may Congress be ill-suited to make a change, but, once it does, that decision may compromise the ability of other institutions to solve the problem. The case study tells such a story of institutional failure and the deplorable intermediary immunity from defamation liability that resulted.

III. THE CASE STUDY: INTERMEDIARY LIABILITY FOR DEFAMATION

This Part applies the participation-centered model to the case study. It begins by defining terms and giving a brief overview of the three types of liability available for cyberspace intermediaries for defamation by their users. It then details the history of the immunity provision, from the decisions that inspired it to those that interpreted it.

A. Serious Online Defamation and Intermediaries

Defamation actions compensate the victims of injurious false statements. Defamation victims suffer wrongful injury to their good reputation, which degrades their dignity and worth.⁴⁷ To win a defamation suit, a plaintiff generally must demonstrate that the defendant's false statement harmed his reputation, that it was published to a third party, and that the defendant acted with some degree of fault.⁴⁸ Defamation includes both spoken word defamation (slander) and written word defamation (libel).⁴⁹ Given that

46. See KOMESAR, *supra* note 5, at 11 ("[A]ny attempt to sidestep comparative institutional analysis leaves the resulting analysis (whatever its genre) profoundly vulnerable."); see also *id.* at 42 ("[T]he character of the institutions that will define and apply these goals becomes an essential — perhaps *the* essential — component in the realization of a just society.").

47. See *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966); RESTATEMENT (SECOND) OF TORTS § 559 (1976) [hereinafter TORTS RESTATEMENT].

48. See TORTS RESTATEMENT, *supra* note 47, §§ 558–559. Of course, each of these elements involves tremendous complexity. For example, while the plaintiff generally shoulders the burden of establishing the falsity of the statement, there may remain cases in which the defendant must instead establish its truth as an affirmative defense. See RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 5:9–:19 (2d ed. 2000). Also, in many libel cases, damage to reputation may be presumed rather than proven. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 116A, at 843 (5th ed. 1984). The fault requirement may be the most complex element as it varies depending on the status of both the plaintiff and the defendant. See *infra* notes 52–54 and accompanying text.

49. See TORTS RESTATEMENT, *supra* note 47, § 568. The distinction is actually more complicated than the text conveys, but not in ways that affect the analysis of this case

cyberspace is still mostly text-based, I will focus here on online libel found in online documents or postings.⁵⁰

Even though the falsity requirement implies that an actionable communication lacks social value, rules permitting plaintiffs to recover large sums from defamation authors create a substantial risk of inhibiting communication. The threat of costly litigation and liability for defamation casts a shadow over the expression of controversial content, however true it may be.⁵¹ Rules imposing liability on those who publish or otherwise disseminate the defamatory statements of third parties particularly risk inhibiting socially valuable discourse; entities might decide to refrain from publishing or disseminating statements that could subject them to defamation claims, whatever the merit in the claims.

In recognition of the risks to non-defamatory speech posed by defamation liability, the Supreme Court has erected First Amendment-based hurdles to defamation claims. Those hurdles attempt to balance the need to afford redress to defamation victims against the need for robust social discourse, particularly that facilitated by a free press.⁵² The Court has set up a complicated web of fault requirements that vary according to the status of the plaintiff and the subject matter of the defamation.⁵³ In brief, public figures and public officials cannot recover for defamation except by showing actual malice, which means that the defendant published the statement with either knowledge of its falsity or reckless disregard for its truth.⁵⁴ Other plaintiffs must establish that the defendant acted at least negligently. The law remains open, though, as to whether purely private plaintiffs who sue private defendants for statements about private matters may win without demonstrating fault at all.⁵⁵

study. *See id.* § 568 cmt. d.

50. It is likely that under current precedents, even words spoken online will be considered to be libel instead of slander. *See id.* § 568.

51. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *Spence v. Flynt*, 647 F. Supp. 1266, 1272 (D. Wyo. 1986).

52. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *see also N.Y. Times*, 376 U.S. at 279–80 (setting constitutional limitations on defamation actions brought by public officials).

53. *See generally* KEETON ET AL., *supra* note 48, § 113 (5th ed. 1984 & Supp. 1988); MARC A. FRANKLIN ET AL., *MASS MEDIA LAW* 340–55 (6th ed. 2000); SMOLLA, *supra* note 48, at 3:4–37. Note that because defamation arises from common law, states are free to erect higher barriers to recovery, as some do. *See FRANKLIN ET AL.*, *supra*, at 351.

54. *See New York Times*, 376 U.S. at 280, 283; KEETON ET AL., *supra* note 48, at 805–06; SMOLLA, *supra* note 48, at §3:3.

55. *See generally Gertz*, 418 U.S. at 347; *see* KEETON ET AL., *supra* note 48, §113, at 805–06; SMOLLA, *supra* note 48, at §§ 3:5–6, :27–31. The American Law Institute

This case study focuses on harmful defamation that significantly injures the actual victim. That injury translates into a large impact on victims, measured in terms of the damages that would be recoverable in a successful lawsuit under common law and constitutional principles.⁵⁶ Defamation damages cover the plaintiff's actual injuries, which courts generally interpret to mean compensation for any out-of-pocket losses, injury to reputation and community standing, personal humiliation, and mental anguish and suffering.⁵⁷ In addition, punitive and presumed damages may be available, but to obtain them a plaintiff will often need to demonstrate actual malice.⁵⁸ That defamation damages are comprehensive in nature helps to justify a focus on only serious online defamation because, once all the damages elements are aggregated, many defamation awards are likely to qualify as serious.⁵⁹

Other aspects of online defamation further justify the focus on serious defamation. Most importantly, serious online defamation presents more than just an academic question and its incidence will likely accelerate as cyberspace communications become even more widespread.⁶⁰ Because it substantially harms its victims, serious online defamation presents a significant public policy problem. On the other hand, merely low-level defamation, whatever its incidence, can and should be handled outside the three institutions considered by this case study. Victims of merely low-level defamation would be unlikely to seek redress in the courts, since the costs of suit would quickly swamp its expected gains.⁶¹ Also, those worried about being victims of low-level defamation would not likely make it the subject of their contracts nor petition Congress for statutory protection.⁶² In

predicts that eventually the negligence standard will clearly extend to protect all defendants. See KEETON ET AL., *supra* note 48, at 808; TORTS RESTATEMENT, *supra* note 47, § 580B & cmts. d-f.

56. In other words, I am considering those cases in which the plaintiff would be entitled to a substantial remedy were it not for the operation of the statutory immunity provision. See *infra* Part III.D.

57. See *Gertz*, 418 U.S. at 349-50.

58. Presumed damages represent those damages that would normally be assumed to result from defamation of the type at issue. See TORTS RESTATEMENT, *supra* note 47, § 621 cmt. a.

59. See C. Thomas Dienes, *Libel Reform: An Appraisal*, 23 U. MICH. J.L. REF. 1, 13 & n.45 (1989) (citing studies done in the 1980s that estimated average defamation verdicts as between \$100,000 and \$150,000).

60. See *infra* text accompanying notes 73-78.

61. Libel can incur criminal as well as civil penalties. See KEETON ET AL., *supra* note 48, §112, at 785. Constrained prosecutorial resources would undoubtedly limit criminal prosecutions to serious defamation cases, however.

62. Rather, victims of low-level defamation will likely either shrug it off once they

short, low-level defamation does not raise the same questions of institutional choice presented by serious online defamation.⁶³

This case study focuses not on claims against the original author of the defamation, but rather on claims against those cyberspace actors who facilitate online defamation by making it available for others to read. I use the term "cyberspace intermediaries," or just "intermediaries," to refer to those online entities who have some ability to prevent or at least stem serious online defamation injury. While such entities could author their own defamatory communications, I focus on their liability for the defamation written by others.⁶⁴ Such large online service providers as America Online ("AOL") and the Microsoft Network would clearly be on the list of intermediaries, as well as other service providers that offer users the means to effectuate serious online defamation. For example, a large portal such as Yahoo! should be included, as well as large university networks that host their own electronic discussions.⁶⁵ What distinguishes the cyberspace intermediaries at issue here is that they make online defamatory statements of third parties available to others to read and they can effectively remove such statements from view. In contrast, entities that merely pass information from computer to computer on the Internet without a meaningful opportunity to check or change the data should not be considered intermediaries, even though they are technically situated in the middle of the transmission process.⁶⁶

learn of it or else respond in kind. Hence, the common occurrence of online "flame wars," where people exchange insults and attacks. See, e.g., Lilian Edwards, *Defamation and the Internet*, in *LAW & THE INTERNET* 183, 187 (Lilian Edwards & Charlotte Waelde eds., 1997); Terri A. Cutrera, *Computer Networks, Libel and the First Amendment*, 11 *COMPUTER/L.J.* 555, 559-60 (1992).

63. While problematic, low-level defamation does not represent a pressing public policy concern.

64. Vicarious liability, which the case study does not consider, may be imposed on an intermediary whose employee's conduct may be attributed to it under agency principles. See SMOLLA, *supra* note 48, §§ 3:113-:118; TORTS RESTATEMENT, *supra* note 47, § 577 cmt. f; KEETON ET AL., *supra* note 48, at 810. Of course, it is not always straightforward to tell when someone is acting on behalf of an intermediary but that question is beyond the scope of this paper. See *infra* note 295 (discussing a case raising this issue).

65. Admittedly, the definition of intermediaries used here is mostly suggestive. Further discussion will likely clarify who should and should not be included.

66. See Henry H. Perritt, Jr., *Cyberliability*, in *LITIGATING LIBEL AND PRIVACY SUITS*, at 173, 175 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. 446, 1996) (describing the role of many online entities in transmitting data from place to place). The definitions in the Digital Millennium Copyright Act of 1998 are instructive here. See 17 U.S.C.A. §§ 512(a)-(b) (West Supp. 2000) (effectively immunizing service providers engaged only in routing, connection, and

Victims of serious online defamation injury would have several incentives to seek redress from cyberspace intermediaries, the most obvious being the greater likelihood that a viable Internet company will be able to pay a judgment than an individual defamation author.⁶⁷ Similarly, the defamation perpetrator may be out of reach of the victim's jurisdiction, whereas the intermediary would most likely not be.⁶⁸ In addition, identifying the cyberspace intermediary will often be much easier than identifying the perpetrator. For-profit intermediaries have an obvious incentive to make themselves publicly accessible; otherwise, prospective customers would not know how to reach them. Further, new digital copyright laws require all intermediaries to publicize their agent for service of process on the World Wide Web.⁶⁹ By contrast, in several of the cases so far brought against intermediaries for online defamation of others, the plaintiff could not identify the original author.⁷⁰ Even the intermediaries who host them may not know their posters' true identities.⁷¹ No current legal rule prevents an individual from operating under an untraceable pseudonym, nor can one necessarily force disclosure of a defamation perpetrator's identity by an intermediary who knows it.⁷² Thus, if a

system caching and instead obligating those service providers able to modify online content). The DMCA provisions relating to intermediary liability will be taken up in some detail shortly. *See infra* Part V.B.1.

67. *See* I. Trotter Hardy, *The Proper Legal Regime for Cyberspace*, 55 U. PITT. L. REV. 993, 1042-43 (1994). Given the focus on liability rules that govern litigation, it seems safe to assume that the intermediaries considered in this case study will be limited to those entities with pockets deep enough to make them attractive litigation targets. *See id.* at 1045 (doubting that small intermediaries would be sued or that defamation on their systems would cause much damage).

68. *See* Perritt, *supra* note 66, at 176.

69. The 1998 Digital Millennium Copyright Act mandates that Internet service providers register an agent for service of process and publish a means to contact him or her on the World Wide Web. *See* 17 U.S.C.A. § 512(c)(2).

70. *See, e.g.,* Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997); Lunney v. Prodigy Servs. Co., 723 N.E.2d 539 (N.Y. 1999); Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

71. *See, e.g.,* Courtney Macavinta, *Yahoo Message Board Users Sued*, CNET NEWS.COM (Sept. 9, 1998), *at* <http://news.cnet.com/news/0-1005-200-332980.html> (describing company's defamation suit against 100 "John Does" and doubting the company's ability to discover the defendants' true identities).

72. *See, e.g.,* Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999) (imposing high hurdles on plaintiff seeking to have intermediary disclose identity of accused trademark violator). In fact, intermediaries who voluntarily disclose user identities may even subject themselves to suit for invasion of privacy. *See* Verno Kopytoff, *Yahoo Sued for Providing User's Name*, S.F. CHRON., May 13, 2000, at B1. However, the rules permitting free online anonymity and pseudonymity may soon change. *See, e.g.,* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 49-53 (1999)

victim of online defamation cannot recover from the intermediary who carried the posting, she may well not be able to recover at all.

The question of who faces liability for online defamation has serious consequences. Although it is difficult, if not impossible, to measure the extent of online defamation injury directly, significant indirect evidence suggests that it presents a problem of real social import.⁷³ As others have discussed in detail, cyberspace technologies permit cheaper, faster, farther reaching, anonymous postings,⁷⁴ thereby facilitating serious online defamation and exacerbating its damage.⁷⁵ In particular, since cyberspace permits everybody to be a publisher at little to no cost, it should not be surprising that some or even many of the newly coined "publishers" will not be as conscious of either the legal rules of defamation or the requirements of polite social discourse.⁷⁶ Not only do cyberspace technologies permit cheap and easy publication but, through intermediaries, they also make online statements accessible to a huge worldwide audience. This means that for victims of those statements that are found to be defamatory, or would be if adjudicated, the injury can be extremely

(proposing ways that government may someday require identification in cyberspace); A. Michael Froomkin, *Legal Issues in Anonymity and Pseudonymity*, 15 INFO. SOC'Y 113 (1999) (same); Child Protection and Sexual Predator Punishment Act, Pub. L. No. 105-314, Title VI, § 604(a), 112 Stat. 2983 (1998) (codified as amended at 42 U.S.C.A. § 13032(b) (West Supp. 2000)) (requiring that service providers report evidence of suspected online child predators to law enforcement).

73. Because defamation represents a legal construct, one cannot really measure its occurrence without reference to successfully litigated cases. Any rule, however, that protects a class of defendants from suit, such as the congressional immunity provision at issue in the case study, increases the extent to which actual injuries go unlitigated and unremedied. In addition, several factors discourage would-be plaintiffs from suing, such as costs in time and money to sue, lack of access to legal advice, and distaste for litigation. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (canvassing reasons people fail to litigate even what would likely be meritorious claims).

74. See, e.g., Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639 (1995); A. Michael Froomkin, *Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395 (1996); Noah Levine, Note, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526 (1996). Cf. Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace*, 28 CONN. L. REV. 981 (1996) (advocating the preservation of anonymous reading in cyberspace).

75. See, e.g., Edwards, *supra* note 62, at 184-88 (explaining why the Internet constitutes a "defamation prone zone"). Anonymous and pseudonymous statements may be less likely to be believed, and therefore less harmful. Still, one could provide enough information about another to be credible and damaging without divulging one's identity. See *supra* note 70 (collecting cases).

76. See *supra* note 62 (describing the prevalence of online flame wars).

large in terms of how many people viewed the defamation and likely responded to it by reducing their opinion of the victim.⁷⁷ Finally, the lack of accountability for cyberspace authors resulting from both anonymity and jurisdictional ambiguity supports the intuition that, all else being equal, there will be more instances of harmful speech in cyberspace than in a medium where retribution is more likely.⁷⁸ Serious online defamation thus poses a significant threat to social welfare that requires appropriate legal rules for redress.

B. Pre-Cyberspace Liability Categories

As mentioned above, the common law has permitted defamation victims to hold others accountable besides the original author of the defamation. In other words, a victim of a defamatory newspaper article could seek to hold the journalist author liable, as well as both the newspaper publisher and, in some cases, a newspaper distributor such as a newsstand vendor. This section considers the way the common law has grouped third parties who contribute to but do not author defamation, and the differing liability standards applied to each.

Traditionally, those who publicized another's libel fell into one of three categories. First, there were the primary publishers, such as book publishing and newspaper companies. Common law cases regarded them as at least as culpable as their individual authors for defamation in their pages. Because primary publishers could readily avert the harm caused by defamation, they had a duty to do so. Book publishing and newspaper companies, for example, could avoid the harm from defamation by carefully supervising authors. Neglecting to do so not only failed to prevent the harm, but also magnified it by vastly expanding the author's audience and the resulting injury.⁷⁹

Primary publishers have been subject to the same liability as the original authors. Historically, the common law imposed a strict liability standard. As discussed, First Amendment considerations have since raised the standard by requiring the plaintiff generally to establish either the defendant's negligence or actual malice. This

77. See TORTS RESTATEMENT, *supra* note 47, §§ 559, 621.

78. See, e.g., Jonathan Zittrain, *The Rise and Fall of Sysopdom*, 10 HARV. J.L. & TECH. 495, 503-07 (1997); Eric Schlachter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87, 93-95 (1993).

79. See KEETON ET AL., *supra* note 48, § 113, at 803; Perritt, *supra* note 66, at 181; see also *Misut v. Mooney*, 475 N.Y.S.2d 233, 234-35 (N.Y. Sup. Ct. 1984) (reviewing the history of publisher liability under common law).

heightened proof is now required for primary publisher defendants as well.⁸⁰ In practice, this means that a primary publisher will not face liability unless those employees who decided to publish the defamation acted with some real fault in making the publication decision; no liability will attach to "innocent" publications.⁸¹

While common law cases tended to group primary publishers into established categories, courts have imposed primary publisher liability on new media after determining that they shared the same editing functions and control as the established entities. For example, the Restatement (Second) of Torts justifies primary publisher liability for radio and television broadcasters because they "initiate, select and put upon the air their own programs; or by contract they permit others to make use of their facilities to do so, and they cooperate actively in the publication."⁸²

Mere conduits, such as the telephone company, belong at the other end of the liability spectrum, in terms of their culpability in facilitating the libel.⁸³ The telephone company is clearly the but-for cause of the harm of any publication that takes place over its phone lines.⁸⁴ Nonetheless, courts have confirmed the intuition that telephone companies, and others who simply provide communications equipment, maintain too tenuous a connection to the harmful conduct to be swept into the liability net.⁸⁵ Certainly as compared to primary publishers, such entities have no opportunity to prevent the publication through their normal business practices. In fact, as common carriers, telephone companies must provide service to all payers, and so they cannot even try to filter out messages based on their content.⁸⁶

80. See KEETON ET AL., *supra* note 48, § 113, at 810.

81. See *Spence v. Flynt*, 647 F. Supp. 1266, 1274 (D. Wyo. 1986) (noting that "[t]his was simply not a case of an innocent magazine seller unwittingly disseminating allegedly libelous material"); see also *id.* at 1271 (requiring proof that "high level employees" either knew of defamation or had duty to investigate).

82. TORTS RESTATEMENT, *supra* note 47, § 581(2) cmt. g.

83. See *id.* § 581 cmt. b. Note that the cases do not use these terms consistently. Some use "conduit" in the sense I do, while others use it to refer to distributors, which I discuss next. See, e.g., *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (using "conduit liability" to mean distributor liability).

84. Defamation law uses "publication" as a term of art for the act of conveying the libel to third parties. See TORTS RESTATEMENT, *supra* note 47, § 577.

85. KEETON ET AL., *supra* note 48, § 113, at 804; TORTS RESTATEMENT, *supra* note 47, § 581 cmt. b.

86. See *Anderson v. N.Y. Tel. Co.*, 320 N.E.2d 647 (N.Y. 1974) (immunizing a telephone company from defamation liability for information delivered across telephone lines).

Distributors fall in between the prior two categories, both in terms of their role in dissemination, and in terms of their common law liability. Such entities as booksellers, libraries and news distributors can prevent defamation injury by refusing to stock or sell offending publications. However, since they do not review the actual content of their publications in the normal course of their business, they would generally have no basis for determining on their own that a publication was defamatory. Common law courts have been hesitant to impose upon these entities a liability rule that would force them to review publications as a matter of course, reflecting concern that distributors would unduly limit their publications out of fear of liability and to avoid the burden of reviewing them. Courts have drawn upon First Amendment precedents from the obscenity area⁸⁷ in their development of an intermediate standard of liability for these entities, whom the leading treatise writer refers to as "secondary publishers or disseminators."⁸⁸ For clarity and consistency, this discussion will refer to this intermediate standard of liability as "distributor liability." Such secondary publishers, or distributors, are liable in the same way as primary publishers, but only if they either know or have reason to know of the defamatory nature of their publications.⁸⁹ In effect, plaintiffs suing secondary publishers have an additional hurdle beyond the fault requirements: they have to prove that the secondary publisher had knowledge or reason to know it was disseminating defamation.⁹⁰ Failing that, such publishers enjoy the same immunity as mere conduits.

"Reason to know" has historically arisen, for example, when a disseminator was about to distribute the work of an author who was notorious for scandalous writing.⁹¹ In that case, the disseminator

87. See *Smith v. California*, 361 U.S. 147 (1959) (striking down a strict liability criminal obscenity statute for booksellers on First Amendment grounds).

88. See KEETON ET AL., *supra* note 48, at 803.

89. See TORTS RESTATEMENT, *supra* note 47, § 581(1) & cmts. d-e; *Spence v. Flynt*, 647 F. Supp. 1266, 1272 (D. Wyo. 1986); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984).

90. See, e.g., *Spence*, 647 F. Supp. at 1273 (describing elements of distributor liability). For those plaintiffs subject to the actual malice standard, the additional scienter requirement for distributors will not add protection. However, the scienter requirement is more onerous than a negligence standard and certainly more protective than the strict liability standard that may still apply for some private plaintiffs. Plaintiffs subject to less than the actual malice test will therefore find it harder to recover from distributors than from the original author, for the same defamatory statement. See SMOLLA, *supra* note 48, §§ 3:87.50-:110, at 3-120 to 3-140, § 4:92, at 4-141; see also *supra* notes 52-55 and accompanying text (reviewing fault requirements).

91. See TORTS RESTATEMENT, *supra* note 47, § 581 cmts. d-e.

faced a burden of checking the new work, rather than putting its proverbial head in the sand. The reason-to-know standard has not required pre-publication review; the essence of treating distributors differently from primary publishers is that they are not obligated to review publications prior to distributing them, absent extraordinary circumstances.⁹²

The important question is: what liability level should online intermediaries face for the defamation of their users? Should it be primary publisher liability that makes them as liable as the original author, or should they be as immune as pure conduits? Alternatively, should they face distributor liability, a standard that does not require them to review materials prior to disseminating them, but that does require them to take action once they know or have reason to know that they are disseminating defamatory material?

C. Pre-1996 Court Decisions

Courts considered how to fit the new cyberspace intermediaries into the traditional categories in two cases decided prior to Congress's 1996 immunity provision. In both cases, the courts struggled to determine whether a pre-Internet online service that published allegedly defamatory user postings should shoulder either the primary publisher liability of newspapers and book publishers or the distributor liability of news vendors and libraries. While the two courts made different choices, neither appeared even to consider the possibility that cyberspace intermediaries should escape liability altogether.

In 1991, the District Court for the Southern District of New York selected distributor liability for the CompuServe service in *Cubby, Inc. v. CompuServe, Inc.*⁹³ The court viewed CompuServe as most closely analogous to a news distributor in the form of an electronic, for-profit library by focusing on the fact that the company had contracted with a third party to manage the electronic forum on which the statements were made and that third party contracted with yet another party to supply the actual contents. As a result, CompuServe had little, if any, editorial control over the offending publication. The court concluded that CompuServe had no opportunity to review the publication contents before they were loaded onto its computer for display to subscribers. Any legal rule that imposed on CompuServe a

92. See *Spence*, 647 F. Supp. at 1273-74 (finding special circumstances when distributor had detailed knowledge of bitter dispute and failed to investigate complaint).

93. 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991).

duty to review would therefore be an impermissible burden under the First Amendment.⁹⁴ Because the plaintiff could not prove that CompuServe either knew or had reason to know the nature of the allegedly defamatory postings, the court granted CompuServe's motion for summary judgment.⁹⁵ Had it been able to demonstrate such actual or constructive knowledge, the plaintiff, in order to prevail, would have then had to establish the remaining defamation elements, including either negligence or actual malice on the part of the responsible CompuServe employees.

In 1995, almost four years later, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,⁹⁶ a New York trial court reaffirmed the logic of the *Cubby* decision but distinguished the case at bar. The court agreed with *Cubby* that computer bulletin boards, the early forms of cyberspace intermediaries, "should generally be regarded in the same context as bookstores, libraries and network affiliates," all of whom were treated as secondary publishers or distributors in precedents.⁹⁷ Nonetheless, the court found that certain of Prodigy's "own policies, technology and staffing decisions . . . [had] altered the scenario and mandated the finding that it is a publisher" rather than a distributor.⁹⁸ By labeling Prodigy a "publisher," the court clearly intended that the company bear the same primary publisher liability as newspapers and book publishers.⁹⁹ Although the case settled before it was resolved,¹⁰⁰ in order to prevail, the plaintiff would have had to establish the defamation elements and the requisite level of fault, either negligence or actual malice, on the part of the responsible Prodigy employees.

In choosing primary publisher liability, the *Stratton* court found it particularly significant that Prodigy represented itself as controlling the content of its service, apparently in order to appeal to those subscribers interested in a more family-oriented service. The court found that Prodigy had exercised editorial control by using an automatic software program to pre-screen postings for offensive content.¹⁰¹ Additionally, Prodigy had exercised control by

94. *See id.*

95. *See id.* at 141.

96. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

97. *Id.* at *5 ("Let it be clear that this Court is in full agreement with *Cubby*.").

98. *Id.* at *5.

99. *Id.* at *3-*4 (contrasting "publisher" with "distributor" liability and noting that publishers have the same responsibilities and liability as newspapers).

100. Although *Stratton* had sued for \$200 million in damages, they ultimately settled for an apology from Prodigy and agreed to dismiss the case. *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 62 & n.49 (1996).

101. *See Stratton*, 1995 WL 323710 at *4.

promulgating content guidelines for its agents to enforce,¹⁰² which included notifying users that Prodigy would remove insulting postings when it learned of them.¹⁰³ In short, the court concluded that "Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice."¹⁰⁴

The *Stratton* result was not particularly surprising; several commentators had predicted that Prodigy's own practices would lead to its treatment as a primary publisher.¹⁰⁵ The problem with *Stratton* was that it left intermediaries without a clear sense of which practices would expose them to publisher liability and which would permit them to live under the *Cubby* rule of liability. Commentators raised the policy concern that in *Stratton*'s wake, intermediaries would choose either to be treated as primary publishers and vastly increase their monitoring to avoid liability, or they would opt for a totally hands-off approach in the hopes of avoiding being considered primary publishers.¹⁰⁶ In other words, if monitoring could lead to publisher liability, then intermediaries would have to do a very good job of monitoring out all defamatory speech to avoid being held liable.¹⁰⁷ Or they could choose to do no monitoring at all to ensure the imposition of distributor liability instead. The former choice would unduly stifle online speech, while the latter would unduly constrain an intermediary's business prerogatives and likely degrade the quality of online discourse.

102. Though not the stated basis, it was undoubtedly significant to the holding of *Stratton* that the court viewed the individual charged with controlling the content of the publication as Prodigy's agent, in contrast to the *Cubby* court's finding that the company controlling the content was not CompuServe's agent. Compare *id.* at *6-*7, with *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 142-43 (S.D.N.Y. 1991).

103. *Stratton*, 1995 WL 323710 at *4.

104. *Id.* at *4-5.

105. See, e.g., Cutrera, *supra* note 62, at 569-72 (forecasting that Prodigy, rather than "hav[ing] its cake and eat[ing] it too," would be held to publisher liability); Michael I. Meyerson, *Virtual Constitutions: The Creation of Rules for Governing Private Networks*, 8 HARV. J.L. & TECH. 129, 143-45 (1994) (predicting that Prodigy would be treated as a primary publisher due to its extensive exercise of editorial discretion).

106. See, e.g., Matthew C. Siderits, *Defamation In Cyberspace: Reconciling Cubby, Inc. v. CompuServe, Inc. and Stratton Oakmont v. Prodigy Services Co.*, 79 MARQ. L. REV. 1065, 1079-80 (1996); Kean J. DeCarlo, *Tilting at Windmills: Defamation and the Private Person in Cyberspace*, 13 GA. ST. U. L. REV. 547, 569-71 (1997).

107. Recall, though, that even under a publisher liability regime, plaintiffs would likely need to prove either negligence or actual malice on the part of the responsible intermediary employees under the constitutional requirements. See *supra* note 81 and accompanying text.

D. The Congressional Immunity Provision

In the wake of the *Stratton* decision, affected intermediaries complained to Congress that huge liability would attend any attempts to monitor their services, and they petitioned for relief. Instead of endeavoring to clean up their services, service providers seemed poised to take the relatively safe path of avoiding all monitoring. They threatened Congress that they would adopt an "anything goes" approach, foregoing all monitoring of online content, to ensure that courts would consider them to be distributors rather than publishers, which would in turn furnish them greater protection from suit.¹⁰⁸ The prospect of the free-wheeling Internet that would result from cessation of all content-monitoring doubtlessly appealed to many veteran users of cyberspace, a group characterized as predominantly young and iconoclastic.¹⁰⁹ It did not appeal to federal legislators, who were growing increasingly concerned about the unsavory content of Internet communications.¹¹⁰ The federal statutory provision immunizing service providers from at least primary publisher liability for defamation by others grew out of those concerns.¹¹¹ It provided:

Treatment of publisher or speaker. No provider or user of an interactive computer service¹¹² shall be treated as

108. See, e.g., Letter to New York Members of Congress Dated July 26th, 1995 (July 26, 1995), at http://www.vtw.org/archive/950726_111111.html (posted by Voters Telecommunications Watch); Cannon, *supra* note 100, at 62; see also *id.* at 59 n.35 (describing complaints from intermediaries about impossibility of monitoring); WALLACE & MANGAN, *supra* note 41, at 93-94 (recounting how Prodigy took that position in a litigation filing); *Interactive Group Intervenes in Prodigy Libel Case*, NEWSBYTESNEWS NETWORK, Sept. 1, 1995, available at 1995 WL 9986718 (describing amicus brief that took that position).

109. See, e.g., DAVID SHENK, DATA SMOG: SURVIVING THE INFORMATION GLUT 173-77 (1997) (describing preference among Internet users for minimal government regulation).

110. See, e.g., WALLACE & MANGAN, *supra* note 41, at 173-88; KARA SWISHER, AOL.COM 229-43 (1999); Cannon, *supra* note 100, at 53-57; see generally *Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearings on S. 892 Before the Senate Subcomm. on the Judiciary*, 104th Cong. 169 (1995) (demonstrating widespread concern about online pornography).

111. See, e.g., 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statements of Rep. Cox and Rep. Wyden, the bill's co-sponsors); *id.* at H8471 (statement of Rep. Goodlatte).

112. "Interactive computer service" is defined as "any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service that provides access to the Internet and such systems operated or services offered by libraries and educational institutions." 47 U.S.C. § 230(e)(2) (1997).

the publisher or speaker of any information provided by any other information content provider.¹¹³

Just two months after the *Stratton* decision, two Congressmen had proposed the immunity provision as an amendment to the pending telecommunications reform bill.¹¹⁴ A more controversial amendment at the time, the Communications Decency Act, was designed to press intermediaries into active service by requiring them to screen their service for pornography or face serious criminal penalties.¹¹⁵ By contrast, the drafters of the immunity provision sought to free intermediaries to make their own choices about monitoring. During the brief floor debate, the bill's sponsors expressed their desire to remove the specter of publisher liability from intermediaries in order to encourage, rather than inhibit, monitoring designed to root out online obscenity and indecency. They apparently credited intermediaries' claims that they would be unwilling to conduct any monitoring if doing so would subject them to publisher liability. The sponsors named the two goals of the provision as (1) protecting online service providers from the liability they faced in *Stratton*, which was primary publisher liability, and (2) establishing a United States policy that the federal government should not regulate the content of the Internet.¹¹⁶

Although the immunity provision was apparently designed as an alternative to the Communications Decency Act, it was incorporated into the latter and passed as part of the Telecommunications Act of

113. *Id.* § 230(c). "Information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(e)(3).

114. Representatives Cox and Wyden presented the amendment as the "Online Family Empowerment Act" to the House of Representatives on August 4, 1995. See 141 CONG. REC. H8468 (daily ed. Aug. 4, 1995). It received 420 votes in favor to 4 votes opposed. See 141 CONG. REC. H8478–H8479 (daily ed. Aug. 4, 1995). The amendment closely tracks a bill that Representative Cox had previously introduced on June 30, 1995, entitled the "Internet Freedom and Family Empowerment Act," H.R. 1978, 104th Cong. (1st Sess. 1995).

115. See S. 314, 104th Cong. (1st Sess. 1995); The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified at 42 U.S.C. §§ 223(a)–(h) (1998)). While pornography is not a precise legal category, the law itself was vague in its designation of the indecency it targeted. See *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down the Communications Decency Act as vague and overbroad).

116. See, e.g., 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statements of Rep. Cox and Rep. Wyden, the bill's co-sponsors); *id.* at H8471 (statement of Rep. Goodlatte). The immunity provision was apparently designed to be a complete alternative to the burdensome Communications Decency Act. But somewhat surprisingly, both provisions passed. See *Reno v. ACLU*, 521 U.S. 844, 858 n.24 (1997); Cannon, *supra* note 100, at 66–69.

1996.¹¹⁷ The extremely short section of the committee report pertaining to the immunity provision indicates a clear congressional intent to overrule *Stratton*, but nothing more.¹¹⁸ The provision thus clearly prohibits imposing primary publisher liability on intermediaries. But it says nothing about distributor liability. Whether or not intermediaries could be held to be distributors became a matter for resolution by the courts that later interpreted the provision.

As Part VI will explore in detail, courts construed the immunity provision to immunize intermediaries from both publisher and distributor liability, which effectively provided the intermediaries with complete protection from third party suits. That interpretation can be faulted from a number of perspectives. Most importantly, courts exacerbated rather than ameliorated the problems posed by Congress's passage of the immunity provision. In doing so, the courts used an approach exactly opposite to one guided by the insights of comparative institutional analysis. The next Parts develop those insights.

IV. PARTICIPATION-CENTERED ANALYSIS OF THE CASE STUDY

A. Comparative Institutional Analysis of Intermediary Liability

1. Social Policy Goal: Cost-Effective Defamation Reduction

Recall that to conduct comparative institutional analysis, one must first choose a social policy goal so that the various institutions can be evaluated with reference to their ability to further that goal. That choice may not be straightforward, though, because many public policy questions involve pursuit of several social policy goals, and selection of a single social policy goal may be deeply contested.¹¹⁹ To

117. Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 137 (1998) (codified at 47 U.S.C. § 230(c)(1) (1998)). *Reno v. ACLU* held the indecency provisions of the Communications Decency Act unconstitutional, but left the immunity provision intact. See *Reno v. ACLU*, 521 U.S. 844 (1997).

118. See H.R. CONF. REP. NO. 104-458, at 194 (1996) ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy*. . . ."); Cannon, *supra* note 100, at 62-63, 68.

119. Selection of a different social policy goal would likely lead to a different comparative institutional analysis. See Erlanger & Merrill, *supra* note 4, at 988. It is beyond the scope of this Article to incorporate different social policy goals into the analysis.

consider institutional choice in depth, however, one must simplify the social policy goal discussion by assuming the goal rather than providing a detailed proof. In making explicit the choice of social policy goal, the approach avoids the criticism that it misleads by pretending that normative choices do not have to be made.¹²⁰

For this case study, I will assume a social policy goal of cost-effective defamation reduction.¹²¹ This goal reflects the fact that defamation, wherever it occurs, represents social harm. Because they are false and injurious, defamatory communications serve no useful social function. If online defamation could be costlessly eliminated, society would benefit. However, even reducing online defamation would impose costs on society. Such costs include those of administering the legal system's response as well as the costs that authors and their publishers face in preventing defamatory communications. For example, journalists incur costs in checking sources to confirm truth and avoid defamation. Publishers and distributors incur the costs of either pre-publication review or post-notification actions to stop the distribution, depending on what the legal rules require of them.

Having cost-effective defamation reduction as the social policy goal means that steps to reduce defamation should be taken so long as those steps generate more social benefits than costs. Social benefit may be measured by the harm avoided, which in turn is roughly the extent of the damages that would have resulted if the avoided defamation had been committed and successfully prosecuted.¹²² Costs reflect both the costs to speech and the financial costs that arise from steps to reduce defamation. The latter include both the actual expenses of reducing defamation and the opportunity costs of such actions.¹²³

The costs to speech involve the negative impact that steps to reduce online defamation will have on freedom of speech.

120. See Elhauge, *supra* note 26, at 48–59 (criticizing public choice theorists on this ground); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991) (same).

121. Komesar's case study of product liability adopts the similar social policy goal of cost-effective accident reduction. See KOMESAR, *supra* note 5, at 156.

122. Damages are only a proxy for harm; even a legal rule that attempts to compensate a victim fully and make her whole often falls short due to problems of measurement and proof. Furthermore, using damages assumes that victims of online defamation can bring suit successfully, but several things may prevent such suits, including the legal rule that this case study considers.

123. Because defamation is a tort and, as such, a wrongful act, it would not make sense to include in the calculus the reduction in pleasure that those who would enjoy defaming others would experience if they had to reduce their defamatory communications.

Defamation law has long struggled with the fact that it has a spillover effect on non-defamatory speech; the threat of liability can lead to over-deterrence, with speakers and their publishers being overly cautious in order to avoid the costs of defending against suits.¹²⁴ While the constitutional tests are designed to balance speech interests against the need to prevent defamation victimization, they also reflect the risk that defamation liability can pose to First Amendment values. And the cyberspace context makes First Amendment concerns particularly compelling.¹²⁵ Those concerns should inspire caution about championing legal rules that inhibit online speech, and they counsel frequent reconsideration of legal rules, new and old, in light of their implications for cyberspace dialogue.

Though it is important to take account of the impact of defamation-reducing steps on speech, doing so is remarkably complex. For example, some forms of liability may lead intermediaries to curtail the type of speech they permit in the first place or to act impulsively by removing postings whenever an accusation of defamation is made.¹²⁶ Those steps would create speech costs to both the would-be author and the would-be recipients of such speech. On the other hand, rules that impose no constraints on intermediary behavior may create their own speech costs. To the extent that such rules lead to rampant online defamation,¹²⁷ would-be authors might curtail their own speech in the hopes of escaping the attention that could become abuse. Those who are more averse to the risk of defamation, such as those who work in industries where reputation matters, would be particularly likely to refrain from online dialogue where the risk of defamatory responses runs high. In short, the various ways that defamation rules both impinge upon and promote free speech values must be part of the cost-benefit analysis.¹²⁸

124. Defamation law will overdeter nondefamatory speech if innocent speakers are punished due to high error rates and the costs of defense are high. On the other hand, if would-be meritorious plaintiffs avoid litigating due to costs of suit or underenforcement, then defamatory speech may be underdeterred.

125. Much cyberspace scholarship is devoted to the relationship between cyberspace law and free speech. See, e.g., Symposium, *The Marketplace of Ideas in Cyberspace*, 51 MERCER L. REV. 817 (2000); Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361 (1996); Symposium, *Emerging Media Technology and the First Amendment*, 104 YALE L.J. 1613 (1995).

126. See *infra* text accompanying notes 211–213.

127. The difficulties in bringing the original author to justice, discussed *supra* Part III.A, support that prediction.

128. See, e.g., Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 188–89 (1998) (canvassing arguments that defamation protections promote speech); Cass R. Sunstein, *The First*

While cost-effective defamation reduction should appeal as a social policy goal, its contours are not well-defined. But the participation-centered approach does not require that specification of the social policy goal be mathematically precise. Because the approach focuses on comparing the performance of each institution based on the features of the participation-centered model, it does not require any absolute measure of the extent to which any institution achieves the social policy goal. So long as the model can evaluate how one institution fares as compared to the other two, it has achieved its analytical goal.

I consider here the case of online defamation liability for intermediaries at a particular point in time. As discussed in Part III above, in 1995, the legal question arose as to whether intermediaries should be treated as publishers, distributors, or conduits for their users' defamatory acts. The participation-centered approach considers the costs and benefits to participating in each institution at that point in time. It then chooses which institution should have been the battleground for the conflict over the liability rule. It evaluates which institution should have given legal content to the question by resolving the liability rule in one direction or another. An institution is the preferred institution when its resolution of the legal conflict is most likely to achieve, or likely to achieve more of, the social policy goal. In other words, the institutions will be evaluated according to their ability to generate a legal rule that would have reduced online defamation injury in a relatively cost-effective manner.

Recall that the market will not likely achieve the social policy goal if no contracts concerning online defamation are negotiated, the courts will not achieve it if no lawsuits are brought concerning online defamation, and Congress will be poorly suited if it is subject to bias, or one group's disproportionate influence. The next sections consider the comparative ability of each of these institutions to achieve cost-effective defamation reduction.

2. Distribution of Stakes

	Potential (Pre-Injury)	Actual (Post-Injury)
Victims	Low	High
Intermediary Injurers	High	High

Grid 1. Distribution of Stakes in the
Serious Online Defamation Setting

Grid 1 graphically represents the distribution of stakes in the serious online defamation setting. Even assuming that serious online defamation creates too much injury, the class of actual victims and the class of actual intermediary injurers are both relatively small, with each member having a high stake. The potential injurer class, comprising all cyberspace intermediaries as defined above, also seems to be relatively concentrated, populated by those entities large enough to face a real risk of being sued.¹²⁹ Like actual injurers, potential intermediary injurers have a high stake in the outcome, since they face not only a high risk of being an actual injurer but significant financial exposure if they are found liable for serious defamation injury.

Designating intermediaries as injurers does not mean that they have the same moral culpability as the original authors of the defamation. It merely reflects the fact that they are able, through their own actions, to reduce defamation injury. In light of the social policy goal of cost-effective defamation reduction, intermediaries should act to reduce defamation if the benefits to society from their actions exceed the costs. That calculation is premature at this point;¹³⁰ we are merely considering which institution should be the one to conduct the cost-benefit calculation.

In contrast to the relatively small number of potential injurers, the number of potential victims of even serious online defamation must include anyone capable of being significantly injured by a defamatory

129. See, e.g., Geoff Nairn, *Industry's Transformation Poses Tough Challenges: Internet Service Providers*, FIN. TIMES, Mar. 15, 2000, at 9 (reporting substantial consolidation among Internet service providers).

130. See *infra* Part V.B.1 for a detailed discussion of the proper legal rule for intermediaries.

posting in cyberspace. In fact, since online defamation can injure even a subject who never reads the statement himself, the universe of potential victims extends well beyond cyberspace users.¹³¹ Anyone can be defamed in cyberspace, as long as there are readers of the defamatory posting who recognize the individual named and in whose eyes the posting is damaging.¹³²

That anyone could suffer a serious defamation injury online does not mean that any individual is likely to be so injured. Even assuming that serious online defamation occurs often, the risk of those occurrences must be spread over a huge potential victim class. In other words, the risk of injury to potential victims is quite diffuse. That means that each potential victim's interest in preventing defamation is low indeed. That small stake translates into a small benefit to be realized from actions taken to reduce online defamation.

3. The Market: Transaction Costs Inhibit Contracts

The diffusion of potential victims' interests implies that the market would not generate sufficient defamation-reducing transactions to achieve the social policy goal. The transaction costs involved in a potential victim's negotiations with intermediaries to reduce defamation injury would likely swamp any individual's stake in the outcome.¹³³ In other words, it would not be worthwhile to potential victims to negotiate for greater protection because the costs of negotiating would exceed the benefits.¹³⁴ Additionally, potential victims face the information costs associated with appreciating the threat of injury as they may never have thought about their

131. That is one of the reasons I take issue with the cyberlibertarian analysis that would limit legal rules to those made and enforced by netizens. See, e.g., David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996), reprinted in *BORDERS IN CYBERSPACE 3* (Brian Kahin & Charles Nesson eds., 1997). It minimizes or even ignores the impact of cyberspace activities on those who do not participate in cyberspace. See Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 CHI-KENT L. REV. 1119, 1119-22 (1998); see also sources cited *infra* note 172 (critiquing the cyberlibertarian position).

132. Defamation must be viewed by its recipients as referring to the plaintiff. See KEETON ET AL., *supra* note 48, at 783. The class of potential victims does not include those who are libel-proof by virtue of having such a bad reputation it is beyond injury. See FRANKLIN ET AL., *supra* note 53, at 410-11 (describing the doctrine of the libel-proof plaintiff).

133. See Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 152-59 (1999) (arguing that transaction costs from searching and bargaining are quite high in cyberspace).

134. See KOMESAR, *supra* note 5, at 101 (discussing such contracting costs); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15-19 (1960) (same).

vulnerability.¹³⁵ Intermediaries' complex technology exacerbates the potential victims' information costs: they probably have no idea what steps an intermediary could take to prevent or reduce defamation injury so that, even if they knew of the risk and were willing to negotiate, they would not know what to demand.¹³⁶ Even those who are sophisticated users of Internet technologies would probably have little knowledge about the inner workings of intermediaries.¹³⁷ Finally, any negotiated solution would likely involve an intermediary reducing defamation for all potential victims, not just the contracting party. That further inhibits transactions by encouraging free-riding, with potential victims hoping to benefit from other contracts, while avoiding the costs themselves.¹³⁸

Some have argued in the somewhat analogous privacy setting that the market can overcome the apparent problems caused by transaction costs without the need for individual transactions. Given that potential online privacy victims' stakes are likely as small as those of potential online defamation victims, any market solution that encourages intermediaries to sufficiently protect online privacy would also likely work for defamation.¹³⁹ To respond to individuals' concerns about online privacy, the argument goes, intermediaries will compete with each other to adopt the best practices and the market advantages available will encourage advertising of such features. Companies will invest in developing a reputation for being protective of privacy, absent the pressure of individual negotiations, because of the pressure of the invisible hand.¹⁴⁰

135. In fact, a user of an intermediary service may well regard himself as more likely a perpetrator of defamation than a victim of it, particularly since victims do not have to be users of a service, but posters likely do. *See infra* text accompanying notes 140–43.

136. *See* KOMESAR, *supra* note 5, at 56, 101 (discussing such information costs). In litigation, online companies have claimed that they cannot take steps to reduce problems when, in reality, they can take them but at a cost. *See, e.g.,* United States v. Thomas, 74 F.3d 701, 711 (6th Cir. 1996) (finding that defendants could determine the jurisdiction of their users with some effort); A&M Records v. Napster, Inc., 2000 WL 1009483, at *6 (N.D. Cal. July 26, 2000) (doubting defendants' claims that they could not devise software program to protect plaintiffs' intellectual property rights).

137. *See* KOMESAR, *supra* note 5, at 171.

138. *See id.* at 102. An intermediary's defamation-reducing steps, to the extent that they benefit people other than the contracting party, create positive externalities (those effects that are external to cost-benefit calculations). *See also* Burk, *supra* note 133, at 144–45 (discussing positive externalities relating to cyberspace copyrights).

139. I consider the privacy setting analogous because while each potential victim's stake is small, the social problem of inadequate privacy looms large. *See* Freiwald, *supra* note 42 (discussing information costs to potential privacy victims); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998).

140. *See* David R. Johnson & Kevin A. Marks, *Mapping Electronic Data*

Several factors impugn that analysis, at least in the defamation context.¹⁴¹ Most importantly, the argument ignores the fact that online defamation can injure anyone, whether or not that person is in a contractual relationship with the intermediary.¹⁴² I may subscribe to the Microsoft Network and use its browser but America Online, with whom I have no contractual relationship, may permit rampant defamation that injures me.¹⁴³ Or I may not use an online service and still be injured. To the extent that the intermediary with whom a user contracts presents only a fraction of the defamation risk to that user, potential victims may not much value that intermediary's defamation reduction policy, even if it is publicized. If intermediaries cannot gain from distinguishing themselves as more defamation-free than their competitors, they will have little reason to become so.

Further, the information costs identified above suggest that potential victims may neither recognize their vulnerability nor have any idea that intermediaries can take steps to reduce it. In that case, intermediaries likely have much more to lose by alerting people to their risks of injury than they would gain from adopting better practices than their competitors.¹⁴⁴ Also, the argument ignores the fact that there are several other features, such as price and accessibility, that users of intermediary services care more about than defamation injury. In addition, users have limited attention spans. Again, while the overall problem of serious online defamation persists on an aggregated basis, each potential victim faces such a low risk of

Communications Onto Existing Legal Metaphors: Should We Let Our Conscience (and Our Contracts) Be Our Guide?, 38 VILL. L. REV. 487, 489 (1993); see also Kang, *supra* note 139, at 1255.

141. I examine and find lacking the empirical support for the claim. See *infra* Part VI.A.2. Others have criticized the argument in the privacy context. See, e.g., Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1396–1401; Kang, *supra* note 139, at 1255–56.

142. See Thomas D. Brooks, Note, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation of Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461, 480 (1995); Hardy, *supra* note 67, at 1042; Johnson & Marks, *supra* note 140, at 513 n.104.

143. In fact, in at least one of the cases brought against America Online for intermediary liability, the plaintiff victim was not an America Online subscriber. See *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1127 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (4th Cir. 1997). Cf. SWISHER, *supra* note 110, at 216–35 (chronicling AOL's decisions to permit all kinds of unsavory behavior in order to maximize revenues).

144. Similarly, companies generally do not compete on the grounds that they offer better network security, likely because they think shareholders and clients will react negatively to reminders that the company is vulnerable to hackers. See Michael Lee et al., *Electronic Commerce, Hackers, and the Search for Legitimacy: A Regulatory Proposal*, 14 BERKELEY TECH. L.J. 839, 844–45 (1999) (describing vast underreporting of computer intrusions as reflecting a fear of negative publicity).

injury that it should be understandable that they would focus on other features in selecting an intermediary.

4. The Political Process: Intermediaries Over-Represented

Though the market seems unable to achieve the social policy goal, the political process fares as badly or worse. As discussed, the potential injurer class of intermediaries is relatively concentrated, with each intermediary having high stakes. The potential victim class's interests are diffuse and small as compared to the concentrated potential injurer class's high stakes, which creates a skewed distribution of stakes.¹⁴⁵ That skewed distribution creates disparate incentives to invest in efforts to influence legislators to pass favorable rules, since each intermediary has a much greater benefit to reap from successful efforts than each potential victim.¹⁴⁶ Each intermediary would bear a significant financial risk under a rule that permitted intermediary liability, so each has a significant incentive to petition Congress to avoid liability. Their large per capita risk makes them much more inclined to bear the costs of participation in the political process than any of the members of the large, but dispersed, class of potential victims.¹⁴⁷

Breaking down the costs of participation more finely highlights the advantages the intermediary injurer class enjoys in the legislative arena. The costs of organizing their efforts should be insignificant, since most of the intermediaries are big companies with sufficient assets to make them a potent force in Congress, all on their own.¹⁴⁸ In

145. See KOMESAR, *supra* note 5, at 130–34 (introducing the notion of the “skewed distribution”).

146. See, e.g., *id.* at 63–64 (listing “propaganda, replacement (by election) and inducement (bribes, contributions, and so forth)” as ways in which interest groups influence legislators); FARBER & FRICKEY, *supra* note 17, at 23 (including among tools for influencing legislators: financial backing, publicity and endorsements); Elhauge, *supra* note 26, at 35–36 (adding: volunteering for campaigns, hiring as future employees, engaging as paid speakers, pressuring regarding administrative appointments, and influencing information).

147. This analysis assumes that potential victims do not get together to pool their interests, which is a defensible assumption for large and dispersed groups. See KOMESAR, *supra* note 5, at 69–72 (describing classic collective action problem resulting from free riding as increasing with group size); Elhauge, *supra* note 26, at 36–40. Legal academics can act as group catalysts and organizers and should do in so some circumstances. See *infra* Part VII.A.2.

148. See, e.g., KOMESAR, *supra* note 5, at 72 n.36 (discussing decreased start-up lobbying costs for corporations). As mentioned, very small intermediaries are unlikely to be targeted for litigation by plaintiffs as deep pockets, under any liability rule. See *supra* note 67.

fact, large intermediaries probably have enough contact with the legislative process in Washington to enable them to spread the costs of maintaining a presence over the variety of issues they consider important.¹⁴⁹ In addition, the numerous trade groups that have sprung up in the last few years offer even smaller companies relatively cheap access to legislators.¹⁵⁰

By contrast, potential victims bear huge organizational costs relative to their small stakes. As discussed, many of them do not even perceive their status as potential future online defamation victims, particularly those who do not spend an appreciable amount of time online.¹⁵¹ Even for those who correctly perceive their status, their individual risk is quite low, which means that while they remain potential rather than actual victims, any benefit to them from imposing liability on intermediaries is low indeed.¹⁵² This situation means that even small costs arising from lobbying and related efforts would soon exceed expected benefits and, therefore, that incurring the costs would be irrational for potential victims.¹⁵³

In fact, it seems likely that any efforts to lobby Congress regarding the defamation liability of intermediaries would be organizationally expensive. Congress's own discussions about online defamation, even immediately before passage of the immunity

149. See FARBER & FRICKEY, *supra* note 17, at 18–19.

150. At the time that the immunity provision was passed, intermediary representatives met frequently to strategize about the Communications Decency Act. See SWISHER, *supra* note 110, at 232, 238. Since then, well-organized trade groups have formed. See, e.g., *Internet Service Providers' Consortium Formed* (June 10, 1996), available at <http://www.ispc.org/press/19960610.shtml> (describing a lobbying group formed in mid-1996 to "educate legislators and voice [ISP's] opinions on critical laws emerging"); *Leading Internet Companies Joining Forces to Engage Policymakers* (July 12, 1999), available at <http://www.netcoalition.com/news/06121999.shtml> (announcing the formation of NetCoalition.com, a group dedicated to "active dialogue with policymakers" that "promote[s] responsible market-driven solutions to challenges").

151. In fact, potential victims may even support rules that disfavor them because they misperceive their interests. See KOMESAR, *supra* note 5, at 68. The plaintiffs' bar may counteract these difficulties, but Komesar believes that the effect will not be significant because it has different interests from victims. See *id.* at 173 n.36. But see Pierce, *supra* note 20, at 949 (arguing that Komesar overly discounts the effectiveness of the plaintiffs' bar in countering the minoritarian bias of tort legislation).

152. The same free-rider problems arise here also. Each victim has an incentive to free ride on the efforts of other victims because any imposition of liability will benefit all potential victims. See *supra* note 147 (analyzing collective action problem).

153. It is not impossible, just unlikely, assuming rational behavior. But note that this is a broad and intuitive notion of rationality and there is not much evidence contradicting it. See generally Amartya Sen, *Rational Fools: A Critique of Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 322–26 (1977) (evaluating the economic concept of rationality as pursuing self-interest and critiquing its narrowness).

provision, were minimal, without many representatives taking a public stand on it one way or another.¹⁵⁴ That means few if any opportunities to contact interested staff members, let alone to testify at hearings. The failure of representatives to identify their position on the issue has also thwarted the cheapest form of participation: voting for those with compatible positions. As in the case of contracting, even if representatives had identified their positions on the issue, potential victims would more likely have focused on more salient aspects of a representative's platform.¹⁵⁵ Forms of participation that are more expensive than voting, such as lobbying or engaging in propaganda, would undoubtedly be too costly for potential victims.¹⁵⁶

In addition to the costs of organizing, information costs loom much larger for potential victims than for intermediaries. Intermediaries are aware of the various options for technical and human-powered attempts to reduce the occurrence of defamation online, having undoubtedly considered different approaches in their research and development endeavors. They can use that information in discussions with legislators to argue about which, if any, measures are feasible. Users, on the other hand, largely have to shoot in the dark when they claim that intermediaries could design systems and practices to reduce defamation injury. As if Internet technologies were not already complex enough, constant innovation makes the cost of keeping informed even more daunting. Information costs render potential online defamation victims unable to petition Congress effectively, even if they surmount the organization costs that dissuade them from trying. Intermediaries, by contrast, will not only have access to legislators, but their lobbying can be much more targeted and informed. If intermediaries claim that they are unable to reduce online defamation injury and should be spared from even trying, such claims are likely to be practically irrefutable.

Later discussion will demonstrate that what actually happened in Congress accorded with the predictions of the participation-centered model; intermediaries were vastly over-represented in Congress as compared to potential defamation victims. In the meantime, the

154. See WALLACE & MANGAN, *supra* note 41, at 189.

155. This is known as the single issue voting problem. See Elhauge, *supra* note 26, at 41 & n.41.

156. The same analysis would apply *a fortiori* to illegal forms of influence such as bribery and graft, which are more expensive because of the need to pay more and bear the risk of prosecution. Note that this argument assumes limited collective action by potential victims. See sources cited *supra* note 147.

model itself establishes that the political process is not well-suited to reducing defamation cost-effectively.

5. Conclusion: Courts as the Least Imperfect Institution

The question is not how badly would the market or the political process function in this case, but how would they perform relative to the alternative. Application of the model reveals that litigation stands as a relatively attractive alternative to the problematic market and legislative arenas. That actual victims participate in litigation rather than the potential victims makes all the difference. The actual victim class does not suffer from the same diffusion of stakes as the potential victim class. By definition, actual victims of serious defamation have the incentive to bear the cost of litigation in order to obtain compensation for their serious injuries.

Actual victims, who have concentrated stakes, would be unlikely to participate in the political process to offset the disproportionate influence of intermediaries. Any change in the liability rule they could achieve in Congress would likely come too late to help them, and any legislative benefit would be spread over the entire victim class.¹⁵⁷ By contrast, a win in court would directly compensate the victim, who would be entitled to the entire damages verdict.¹⁵⁸ Similarly, actual victims would be unlikely to contract with intermediaries to take steps to reduce defamation because those steps would come too late to help.

On the other hand, actual victims *are* likely to sue if they have a sufficient chance of winning, which they could have if the legal rules permitted intermediary liability for defamation injury.¹⁵⁹ In turn, any victim's success in court would send a strong deterring signal to both the actual intermediary injurer and other intermediaries, all of whom

157. In other words, lobbying presents free-rider problems not present in the litigation context. See sources cited *supra* note 147. Any laws would likely be made proactive rather than retroactive. See KOMESAR, *supra* note 5, at 182 (calling potential rather than actual victims and injurers the relevant parties in the political process). *But cf.* Zeran v. Am. Online, Inc., 129 F.3d 327, 334–35 (4th Cir. 1997) (finding that immunity provision barred actions brought after its effective date, even though they pertained to conduct that occurred before the effective date, because the provision affected only access to courts and did not regulate conduct).

158. Of course, damages verdicts would have to cover attorneys' fees.

159. They will be likely to sue if the available damages verdict, discounted by their likelihood of prevailing, exceeds the costs of suit. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.5 (4th ed. 1992); see also Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59 (1997) (reviewing models of trial and settlement behavior that account for litigation costs).

would perceive themselves as the next likely target if they failed to take required action.¹⁶⁰ So long as the liability rule the courts imposed encouraged cost-effective steps to reduce defamation injury, it would more effectively achieve the social policy goal than rules and practices arising from the other two institutions.

Thus, comparative institutional analysis selects courts as the preferred institution to determine the liability of intermediaries for serious defamation on their systems. Transaction costs in excess of potential victims' interest substantially inhibit, if not rule out, market achievement of defamation reduction. Minoritarian bias, or the disproportionate influence of intermediaries in Congress, prevents the political process from effectively realizing the social policy goal. The judicial solution would be more effective than the other two alternatives at deterring serious defamation online because the focus is on actual victims, who have a large stake in the outcome of any suit.

B. Advantages of the Participation-Centered Model

From its application to this case study, it should be clear that the participation-centered approach draws upon several strands of legal theory, including public choice theory,¹⁶¹ transaction cost economics,¹⁶² and positive political theory.¹⁶³ In doing so, it avoids some of the pitfalls of the interest group branch of public choice analysis, upon which it is most closely based. This section first elaborates on how the approach makes a significant contribution to

160. In other words, the model predicts both specific deterrence, because the actual injurer will take steps not to let the injury happen again, and general deterrence, because potential injurers will endeavor to avoid being actual injurers in the future.

161. See sources cited *supra* note 26. One scholar has characterized Komesar's approach as being a modern form of the legal process school. See Edward L. Rubin, *Institutional Analysis and the New Legal Process*, 1995 WIS. L. REV. 463 (reviewing NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* (1994)).

162. See sources cited *supra* note 32. Komesar distinguishes his approach on the basis of his consideration of transaction benefits, which correspond to stakes in the outcome, and transaction costs. See KOMESAR, *supra* note 5, at 106–07.

163. See, e.g., Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 43–51 (1994) (overviewing themes of positive political theory); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27 (1994) (positing that government institutions interact with each other to produce a stable equilibrium over time); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997) (incorporating physics concepts into equilibrium theory to account for patterns of legal change among institutions and to make recommendations about judicial review of legislation).

the literature. The section next describes several ways in which the approach could be fruitfully extended.

1. Institutional Comparisons

As mentioned previously, one of the crucial contributions of the approach is that it permits a comparison of the relevant institutions based on factors that are common to each. In doing so, the approach transcends a frequent criticism of the interest group theory of public choice: that it focuses almost exclusively on defects in the political process, without adequately accounting for defects in either the courts or the market. In fact, some have accused public choice theorists of having blind faith in the market's ability to resolve conflicts, a view that perhaps follows from the conservative political perspective of its proponents.¹⁶⁴ Additionally, some have used interest group theory to promote aggressive judicial review of statutes, without adequately explaining why the courts are not subject to similar infirmities.¹⁶⁵ The participation-centered model, on the other hand, has no predisposition towards any institution; rather it attempts to assess objectively which institution will be the best situated to resolve a problem by weighing the costs and benefits of participation.

Komesar's approach to comparative institutionalism distinguishes him from many respected theorists. For example, he demonstrates that Richard Posner engages in single institutionalism. In his discussion of the efficiency of the common law, Posner considers the way market performance varies as transaction costs vary. As transaction costs rise and market performance deteriorates, Posner views courts as better decision-makers than the market.¹⁶⁶ Komesar labels such analysis "single institutional" because it chooses between institutions based on variations in the performance of only one institution, the market.¹⁶⁷ Komesar demonstrates that the factors that degrade market performance can have a similar impact on courts' competence, so it could easily be that the courts would never do as well as the market for some questions.¹⁶⁸ Single-institutional analysis goes awry in its claim that a situation, such as high transaction costs,

164. See Rubin, *supra* note 120, at 10–11 & n.36 (describing public choice scholars as tending to be politically conservative and anti-regulatory).

165. See *infra* Part VII.B for an analysis of those recommendations.

166. See KOMESAR, *supra* note 5, at 6, 17–20; POSNER, *supra* note 159, § 3.8.

167. See KOMESAR, *supra* note 5, at 20–21, 104.

168. See *id.* at 22–26 ("[T]he same factors that change the ability of one institution across two situations very often change the ability of its alternative (or alternatives) in the same direction.").

that makes the market perform worse means that in such situations the courts should be used instead. The relevant question is whether across the different settings considered, the market performs relatively better or worse than the courts (or any other available institution) perform.¹⁶⁹

Similarly, in the cyberspace context, several cyberlibertarians claim to be performing comparative institutional analysis, when, in reality, their analysis is single-institutional. For example, several scholars have advocated a market resolution to the question of intermediary liability for online defamation without addressing the factors that inhibit contracting.¹⁷⁰ In addition to whitewashing the problems of transaction costs, many cyberlibertarian analyses simply ignore the relative abilities of other institutions to achieve the relevant social policy goal. Such analyses often extol the market on single-institutional grounds, calling it the only legitimate institution to decide cyberspace matters.¹⁷¹ As in the case of some public choice theorists, faith in the market stands in for reasoned analysis.¹⁷²

2. Comprehensive Rationality of Legislators

In addition to providing a detailed treatment of all three relevant institutions, the participation-centered approach adopts a sophisticated vision of the individual decision-makers within those institutions. The model thereby avoids another criticism of the interest group

169. See *id.* at 22.

170. See, e.g., Cutrera, *supra* note 62, at 582–83; Henry H. Perritt, Jr., *Dispute Resolution*, 38 VILL. L. REV. 349, 396–97 (1993); Johnson & Marks, *supra* note 140, at 512–14. But see Schlachter, *supra* note 78, at 148 n.324 (criticizing contractual arguments as unrealistic).

171. See David G. Post & David R. Johnson, "Chaos Prevailing on Every Continent": Towards A New Theory of Decentralized Decision-Making in Complex Systems, 73 CHI.-KENT. L. REV. 1055 (1998); Johnson & Post, *supra* note 131; John Perry Barlow, *A Cyberspace Independence Declaration* (Feb. 9, 1996), at <http://www.eff.org/barlow>.

172. In addition to ignoring comparative institutional concerns, cyberlibertarians seem to view market determination as the social policy goal. Other scholars have ably criticized the cyberlibertarian position on other grounds. See, e.g., Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); Lemley, *supra* note 3; Neil W. Netanel, *Cyberspace Self-Governance: A Skeptical View From Liberal Democratic Theory*, 88 CAL. L. REV. 395 (2000); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT. L. REV. 1295 (1998). Cf. Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462 (1998) (criticizing cybereconomists who advocate freedom of contract over regulation).

model: that it inadequately accounts for what motivates legislators and judges.

In brief, interest group theory paints a pessimistic picture of legislators who act according to a narrowly defined interest in re-election to pass legislation that serves special interest groups. On the other hand, it generally considers courts to be able to withstand special interest pressure. As Edward Rubin points out, that approach assumes that legislators have fundamentally different characters from judges, a claim that is hard to defend.¹⁷³ Additionally, empirical data shows that several other factors, such as ideologies and conceptions of the public interest influence legislators' behavior, in addition to their interest in re-election.¹⁷⁴

The participation-centered approach avoids both pitfalls by permitting a host of factors to influence legislators' behavior, including ideology. This approach merely recognizes that even to appeal to a legislator's interest in promoting the public interest, one has to educate that legislator as to what the public interest is, which imposes participation costs on interested parties. While Komesar claims to view legislator motivation as largely irrelevant, his approach comes closer to using the comprehensive rationality model that Rubin advocates, rather than the narrow self-serving image adopted by public choice theorists.¹⁷⁵

Similarly, the participation-centered approach does not conceive of legislators as having fundamentally different characters than judges. Each institutional actor responds in a reasonable manner: judges adjudicate the cases brought before them as best they can, legislators listen to the constituents who lobby them, and market actors transact in their economic best interests. In the participation-centered model, institutional actors are neither angels nor demons, but reasonable actors doing their best.¹⁷⁶

173. See Rubin, *supra* note 120, at 49–52.

174. See, e.g., FARBER & FRICKEY, *supra* note 17, at 20–33 (canvassing proof that legislators vote for many reasons and criticizing the simplified public choice view that legislation reflects merely the desires of powerful interest groups in obtaining windfalls); Rubin, *supra* note 120, at 31–35 (surveying literature on legislators' motivations).

175. See Rubin, *supra* note 120, at 30–45; KOMESAR, *supra* note 5, at 58–65 (discussing legislators' motivations).

176. See Erlanger & Merrill, *supra* note 4, at 963 (criticizing public choice theory for viewing political institutions, but not the market or courts, as vulnerable to interest group domination and crediting Komesar with the "profound insight" that all three institutions respond to "a unitary logic of collective action").

3. Intuitive Approach to Institutional Performance

While the participation-centered approach uses analytical rigor to generate conclusions about institutional performance, aspects of the approach remain intuitive and flexible. Although the social policy goal must be specified, one does not have to precisely measure achievement of it by each of the institutions to generate useful conclusions about relative institutional competence. That flexibility obviates the need for detailed empirical inquiries, which can be difficult to design and conduct.

By the same token, the approach embodies an intuitive notion of institutional competence, and treats it as directly related to meaningful participation by interested parties. For market performance, the vision matches those of transaction cost economists, who regard as market failures those contexts in which efficient transactions should occur but do not.¹⁷⁷ Relatedly, courts must be engaged and respected to resolve legal conflicts well. Parties must make it into courts and give judges a chance to resolve their problems, and those not before the court who are affected by judicial rules must have an incentive to follow the rulings.

The participation-centered model's vision of what good performance in the political process means may be its least developed feature. Komesar indicates that disproportionate influence in the political process must be evaluated with reference to the social policy goal, but he does not detail what that means.¹⁷⁸ One way to enhance the concept of good performance in Congress is to use the insights of civic republicans, who argue that Congress must carefully consider the impact of its laws on all affected groups, rather than respond unthinkingly to a group with disparate access and influence.¹⁷⁹ Though Komesar does not make the link explicit, the participation-centered approach, through its concern about active participation, shares the concerns of the civic republicans. Both assume that Congress can perform relatively well only when it hears from and considers all interested groups. Rather than define disproportionate influence, one can observe its presence when, instead of deliberating, Congress merely promotes the interests of a group exerting pressure.

177. See sources cited *supra* note 32.

178. See KOMESAR, *supra* note 5, at 56 n.5, 76.

179. See, e.g., Cass R. Sunstein, *Interpreting Statutes in a Regulatory State*, 103 HARV. L. REV. 405, 457-59, 467, 471 (1989) [hereinafter Sunstein, *Interpreting Statutes*]; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

With that gloss, the model's intuitive approach permits the analyst to evaluate institutional performance without specifying an exact measure for either the appropriate or disproportionate influence of a particular group.¹⁸⁰ Some may continue to view the failure to specify a measure of appropriate influence as a limitation of the model.¹⁸¹ For now, suffice it to say that to the extent that the participation-centered model is consistent with intuitive notions of good performance, it can generate persuasive conclusions without getting bogged down in empirical studies. Nonetheless, some of the positive features of the participation-centered model come with costs attached. The next Part discusses some of those costs and ways to extend the model to ameliorate them.

V. EXTENDING THE ANALYSIS

A. Necessary Extensions of the Approach

1. Getting from Description to Prescription

As the last Part demonstrated, the participation-centered model of comparative institutional analysis generates useful insights about the varying competencies of the three traditional institutions to resolve legal conflicts. But the analysis requires that each institution be considered in isolation and then compared to the others at a particular point in time, during which the relevant law itself is static. The factors of the participation-centered model are evaluated to generate a conclusion about the institution best situated to change the legal rule to achieve the chosen social policy goal.

Translating the description of the preferred institution into a prescription for good public policy requires applying it, a problem that the participation-centered approach fails to address. The participation-centered approach seems to assume the existence of a meta-institutional decision-maker that could consider the results of comparative institutional analysis and appropriately allocate institutional responsibility. Unfortunately, our system has no meta-

180. One commentator criticizes the civic republican model for its similarly intuitive but ultimately indeterminate discussion of what constitutes a normatively appealing deliberative political process. See Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685 (1988). However, despite its limitations, the intuitive approach yields useful insights. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1493, 1550 (1988) ("The antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups."); see also discussion *infra* Part VII.

181. See discussion *infra* Part VII.B.2 (reviewing Einer Elhauge's critique).

institutional decision-maker, as critics of the participation-centered approach have pointed out.¹⁸² The structure of our legal system precludes a centralized body that allocates legal decision-making among the various institutions. Instead, to develop prescriptive recommendations based on the participation-centered model, analysts must determine how comparative institutional analysis can be used to improve the operation of the three institutions themselves. In Part VII, I extend the participation-centered approach by discussing ways analysts can use comparative institutional analysis in arguments to Congress and to the courts. My recommendations concern not only this case study but questions of legal change more generally.

2. Taking Account of Iterations

Besides recognizing the absence of a meta-institutional decision-maker, one must recognize that institutions do not operate in vacuums. Instead, the development of the law in any area reflects an iterative process in which Congress drafts laws, courts interpret them, and private parties make contracts that reflect and perhaps override the background rules provided by the public institutions. To adequately take account of comparative institutional analysis, then, one must consider how to use its insights not only at the point of imminent change before any institution has acted, but also after one or more institutions has acted, perhaps inappropriately from a comparative institutional perspective. The participation-centered approach does not address what should happen when a less-preferred institution has acted.¹⁸³

In this Article, I extend the participation-centered approach to contend with these iterations. By providing a complete history of the case study, I examine not only Congress's ill-advised statutory immunity provision, but also how the passage of the provision compromised the response of the courts. Although courts would be the preferred institution under my comparative institutional analysis if Congress had not yet passed the immunity provision, Congress's inappropriate action has precluded courts from determining the

182. See, e.g., Rubin, *supra* note 161, at 477; Erlanger & Merrill, *supra* note 4, at 964, 990-95.

183. See Erlanger & Merrill, *supra* note 4, at 969, 979-80. Komesar suggests that courts might take a hard look at congressional statutes that reflect minoritarian bias, but he does not develop that suggestion. See KOMESAR, *supra* note 5, at 193, 194 n.77 (leaving "to another day or, hopefully, another author, the task of thoroughly developing a comparative institutional analysis of statutory interpretation").

question themselves and led courts to exacerbate the situation by mishandling their task of statutory interpretation.¹⁸⁴

To put it more positively, by extending the approach to take account of the ways the institutions react to each other, I can offer prescriptions to those institutions that review the output of the others.¹⁸⁵ In Part VII, I argue that courts should have strictly construed the immunity provision, based on comparative institutional concerns, and I also defend a general approach to statutory construction that incorporates those insights.

3. Contending with Legal Rule Choice

The participation-centered approach focuses on institutional choice rather than the selection of particular legal rules.¹⁸⁶ When Komesar analyzes which institution is best situated to handle tort reform, for example, he intentionally omits discussion of standards of negligence, levels of punitive damages, availability of attorneys' fees, and the like.¹⁸⁷ Similarly, so far I have approached the defamation liability question without specifying the best legal rule to resolve the conflict. The participation-centered approach omits legal rule specification, just as it simplifies social policy goal choice to focus thinking on the much neglected but highly important issue of variations in institutional competence.

While that approach makes sense as an academic matter, it leaves a bit to be desired as a practical approach. Prescriptively, it may be hard to advocate the resolution of a legal conflict by a particular institution without some sense of the likely direction that institution would take to resolve the legal conflict. One can do it, but the approach seems uncomfortably similar to single institutionalism. It may appear to be based on blind faith in institutional competence rather than on a complete and reasoned analysis. Or it may subject the analyst to the accusation that she is trying to bury her preferred

184. See discussion *infra* Part VI.B.

185. See Marilyn F. Drees, *Do State Legislatures Have a Role in Resolving the "Just Compensation" Dilemma? Some Lessons from Public Choice and Positive Political Theory*, 66 *FORDHAM L. REV.* 787, 809–13 (1997) (using "complementary institutional analysis" and positive political theory to consider comparative institutional inquiry in light of interaction between legislatures and courts).

186. The first stage is the selection of the social policy goal, and the second stage is selection of the appropriate institution. See KOMESAR, *supra* note 5, at 35. Though Komesar does not designate it as such, the third stage would seem to be the preferred institution's selection of the appropriate legal rule. See *id.* at 48 ("a large range of legal outcomes can be seen as consistent with [a] proposed social goal").

187. See *id.* at 153–95.

legal rule choice in the putatively objective approach of comparative institutional analysis.

Thus, for any particular case study, it makes sense to add to the comparative institutional approach by evaluating the legal rule choice independently, from an explicitly normative perspective.¹⁸⁸ The preferred institution from a comparative institutional perspective can then be evaluated with regard to the likelihood that it would have generated or perhaps still could generate that preferred result. To the extent that the comparative institutional analysis is consistent with the analyst's normative choice, the results should be more persuasive. To the extent that they diverge, the audience can choose which approach is more persuasive, without feeling like the analyst has hidden the ball.

To that end, in the next section I consider from a directly normative perspective what legal rule should govern intermediary liability for defamation by users. After selecting distributor liability as the preferred legal rule, I consider whether courts would likely have generated that legal rule if they had continued to act without Congress's intervention in the form of its statutory immunity provision.

B. Legal Rule Choice: Normative Discussion

1. Defending Distributor Liability

Perhaps the best argument in favor of distributor liability is a functional one. Like traditional distributors, upon whom imposition of distributor liability has received explicit and implicit sanction for years,¹⁸⁹ intermediaries disseminate third-party information to others. When that information is true it can be quite useful, but when it is false and damaging, intermediaries intensify social harm. The intermediate level of liability for traditional information disseminators strikes a compromise position between onerous publisher liability, which would pressure disseminators to engage in pre-publication review of their third-party information, and conduit liability, which

188. See, e.g., Skeel, *supra* note 4, at 699 (advocating an approach that uses both descriptive institutional analysis and explicit normative analysis, and using institutional insights to frame the proposal most likely to succeed).

189. Of course, some believe that even the pre-cyberspace defamation law accorded too much weight to victims' rights and insufficient weight to free speech. See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 488 n.3 (1991) (listing sources). For them, any defamation liability would be a mistake, whether online or offline.

would completely exonerate them from responsibility.¹⁹⁰ Instead, intermediate liability merely requires that once a distributor has actual knowledge or reason to believe that it is disseminating defamation, it should take action to stop the harm. To the extent that intermediaries can be fairly analogized to non-cyberspace distributors, it would seem fair to impose the same level of liability upon them.

It could be argued that translating cyberentities into their pre-cyber analogues is deceptively simple. Cyberspace technologies create hybrid entities that incorporate different features of their pre-cyberspace counterparts. For instance, in 1995, one court described a computerized bulletin board service as simultaneously an online library, bookseller, letters-to-the-editor-column, and talk show.¹⁹¹ Although the court's description may have more accurately captured the complexity of the online service than if it had selected a smaller number of pre-cyber analogues, the court's analogy complicates the legal analysis because each entity faces different treatment under defamation law.¹⁹² The difficulty of drawing a single line back from a cyberentity to a traditional precursor had led several commentators to observe that when attempting to translate pre-cyberspace rules to new cyberspace contexts, resort to first principles will lead to better results than rote application of analogic reasoning.¹⁹³

The first principle here would seem to be the social policy goal of cost-effective reduction of defamation injury. Distributor liability for intermediaries for online defamation seems the most likely rule to achieve that goal. As many commentators have recognized, common application of primary publisher liability to intermediaries would undoubtedly increase time and effort expended to prevent defamation beyond the benefits in reduced injury.¹⁹⁴ The required monitoring

190. See *Spence v. Flynt*, 647 F. Supp. 1266, 1272 (D. Wyo. 1986); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984).

191. See *Stern v. Delphi Internet Servs.*, 626 N.Y.S.2d 694 (N.Y. Sup. Ct. 1995).

192. Of course, all of the entities face some type of liability. Libraries and booksellers have been accorded distributor liability, while newspaper publishers and both radio and television broadcasters have faced primary publisher liability. See TORTS RESTATEMENT, *supra* note 47, § 581.

193. See Hardy, *supra* note 67, at 1003-05 (discussing the difficulty of analogizing intermediaries to bookstores); Lawrence Lessig, *Constitution and Code*, 27 CUMB. L. REV. 1 (1997).

194. See, e.g., Edward A. Cavazos, *Computer Bulletin Board Systems and the Right of Reply*, 12 REV. LITIG. 231, 246-48 (1992); David P. Miranda, *Defamation in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Services Co.*, 5 ALB. L. J. SCI. & TECH. 229, 236-37 (1996); David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 175 (1997).

would place an undue burden on intermediaries, since it would be difficult to ensure that defamatory speech would not bypass whatever monitoring procedures were used. It would also likely lead to a substantial decrease in online speech. The volume of online speech and the speed of its dissemination would seem to require a lesser form of liability for online intermediaries than that imposed on traditional newspapers and book publishers. In general, the assumption of time and incentive to check material before publication seems much more justified for traditional publishers than online intermediaries.

On the other hand, it does not make sense to insulate intermediaries from all liability, especially in cases where they utterly fail to respond to reports that their systems displayed serious defamation that could have been easily removed.¹⁹⁵ In fact, such a scenario would likely cost society more in defamation injury than the cost that distributor liability would impose on intermediaries.

Grounding arguments for complete intermediary immunity in First Amendment concerns does not make them any more persuasive.¹⁹⁶ Rather, advocates of a rule that would accord little or no weight to defamation victims' interest should bear a heavy burden of persuasion. Claims that cyberspace technologies create unique opportunities for free social discourse must be balanced against the reality that those technologies can also encourage defamation, exacerbate its harm, and insulate its original author from suit.¹⁹⁷

195. See, e.g., Michelle J. Kane, *Internet Service Provider Liability: Blumenthal v. Drudge*, 14 BERKELEY TECH. L.J. 483, 495–96 (1999); Suman Mirmira, *Internet Service Provider Liability: Lunney v. Prodigy Services Co.*, 15 BERKELEY TECH. L.J. 437, 452–53 (2000); Andrew J. Slitt, *The Anonymous Publisher: Defamation on the Internet After Reno v. American Civil Liberties Union and Zeran v. America Online*, 31 CONN. L. REV. 389, 420 (1998); Zittrain, *supra* note 78, at 511–12. But see Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647 (2000) (advocating complete immunity).

196. While the courts construing the immunity provisions have made this argument, see discussion *infra* Part VI.B, few commentators have argued that free speech would be unduly threatened by any intermediary liability. But see Meyerson, *supra* note 105, at 140–48 (expressing concern that distributor liability will lead to censorship by intermediaries); Friedman & Buono, *supra* note 195 (agreeing with the courts who construed the immunity provision broadly).

197. Of course, cyberspace speech, by its nature, may also create less harm if its readers learn to discount it as compared to speech made offline. See Zittrain, *supra* note 78, at 508–09. But see ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 133–41 (1999) (discussing the risk that readers will not be able to gauge reliability of online information).

Moreover, because intermediaries' interests do not necessarily align with free speech values, recognizing that defamation law impacts free speech does not require accepting that intermediaries should be free from regulation. As private actors, intermediaries may choose policies and practices that substantially inhibit speech, unconstrained by the First Amendment.¹⁹⁸ Nothing besides market pressure stops intermediary executives from deciding that they will not permit certain kinds of speech online based on its content or even viewpoint. In fact, market pressures may tend to undermine the speech of disfavored minorities, such as homosexuals.¹⁹⁹ Provisions in currently operative terms of service agreements between intermediaries and users accord much power and little responsibility to intermediaries to tolerate types of speech they do not like.²⁰⁰ For instance, America Online has historically pursued a "policy" of never printing retractions for defamation on its system.²⁰¹ Not only does that "policy" conflict with several state laws that require retractions to be published when requested,²⁰² but it also seems indicative of intermediaries' tendency to pursue "policies" that are convenient or

198. Courts have so far refused to find intermediaries to be state actors, despite their critical role in providing access to the Internet. See *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996) (rejecting the argument that America Online provides an essential service); see also Edward J. Naughton, Note, *Is Cyberspace A Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 435 (1992) (agreeing that as of 1992, intermediaries should not be subject to the First Amendment, but suggesting that if the industry becomes concentrated, a constitutional right of access should be enforced).

199. See Tom Stein, *Gay Groups Accuse AOL of Prejudice*, S.F. CHRON., Oct. 21, 1999, at C1 (reporting that AOL permits members to include gay-bashing comments in their personal profiles but does not permit them to include information suggestive of homosexuality).

200. See, e.g., America Online Member Agreement § 3, at <http://legal.web.aol.com/aol/aolpol/memagree.html> (last visited Mar. 9, 2001) ("AOL does not assume any responsibility or liability for content that is provided by others. AOL does reserve the right to remove content, that, in AOL's judgment, does not meet its standards or comply with AOL's current Community Guidelines. . . ."); America Online Community Guidelines, Appropriate Online Content, at <http://legal.web.aol.com/aol/aolpol/comguide.html> (last visited Mar. 9, 2001) (disallowing crude language, hate speech, slang, and any implication that illegal drug use is acceptable); Yahoo! Terms of Service § 6 at <http://docs.yahoo.com/info/terms/> (last visited Mar. 9, 2001) (granting Yahoo! the right but not responsibility to remove any "objectionable" content).

201. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997). But note that AOL applied the "policy" inconsistently, abandoning it and posting a retraction in *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 (D.D.C. 1998), after receiving a letter from plaintiff's counsel.

202. See, e.g., *It's In the Cards, Inc. v. Fuschetto*, 535 N.W.2d 11, 12 n.1, 14 (Wis. Ct. App. 1995) (applying a state statute requiring plaintiffs to request retractions before proceeding, and requiring periodicals to provide retractions upon request).

cost-saving rather than those that promote free speech values. In general, there is no reason to assume that market forces will push in the same direction as free speech advocates would.²⁰³

In sum, a distributor liability rule that encouraged some response by intermediaries would be socially efficient: the benefits from reduced defamation injury would likely greatly exceed the cost of response by intermediaries. Such liability seems particularly critical in online defamation cases, given those factors of cyberspace communication that both encourage production of serious defamation and limit a victim's ability to bring original authors to account.²⁰⁴ Not surprisingly, many commentators have agreed that an intermediate form of liability for intermediaries would make the most sense. In fact, almost all of those who commented on *Cubby* viewed its imposition of distributor liability as the correct legal rule choice.²⁰⁵

Several aspects of the distributor liability rule would need to be tailored for intermediaries. Perhaps the most important consideration is what actions would constitute "reason to know" of defamatory content of user postings. If the reason-to-know standard is applied too broadly, intermediaries could be presumed to know that all their postings have the potential of being defamatory, particularly in light of the prevalence of harsh language online. Instead, a rule that limited reason to know to cases in which the intermediary was consciously avoiding actual knowledge would be consistent with the standard's historical roots and more appropriate for the cyberspace context. The easiest way to administer the system might be to limit liability to cases in which intermediaries receive either actual knowledge of defamation or have reason to know of defamation through notification by an alleged victim.²⁰⁶ Such a defamation rule would not impinge on an

203. See SWISHER, *supra* note 110, at 233–34, 253 (recounting how America Online did not view itself as fully aligned with the ACLU and other free speech advocates during the debate over the Communications Decency Act).

204. See *supra* notes 73–78 and accompanying text.

205. See, e.g., Giorgio Bovenzi, *Liabilities of System Operators on the Internet*, 11 BERKELEY TECH. L.J. 93, 139–40 (1996); Kane, *supra* note 195; Douglas Luftman, Note, *Defamation Liability for On-Line Services: The Sky is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1089–93 (1997); Naughton, *supra* note 198, at 438–40; see also Eugene Volokh, *Freedom of Speech in Cyberspace From the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377, 403 n.89 (advocating distributor liability).

206. Note that this would be more protective of intermediaries than the analogous provision in the Digital Millennium Copyright Act, which imposes a duty to respond on intermediaries who have either actual knowledge of copyright infringement, or are "aware of facts or circumstances from which infringing activity is apparent." 17 U.S.C.A. § 512(c)(1)(A)(ii) (West Supp. 2000).

intermediary's incentive to monitor, the choice of which may promote other socially valuable goals.²⁰⁷

Some might claim that a utilitarian imposition of distributor liability on intermediaries confuses the fact that they *can* stem defamation injury with an argument that they *should* do so. Since the issue is intermediary responsibility for the defamation of others, not their own defamation, those who are concerned that liability should follow fault may question distributor liability. However, the actual knowledge or reason-to-know hurdle imputes fault to intermediaries; failure to act to stop a known harm renders intermediaries culpable, particularly when they are benefitting from the dissemination rather than acting as innocent bystanders.²⁰⁸ These principles have been established in the offline arena, and they seem to translate easily into the cyberspace context.

Other countries have imposed distributor-type liability on intermediaries. For example, under a German Internet law enacted in 1997, service provider intermediaries face liability for third-party defamation on their systems when they are aware of the substance of the communication and it is possible and "acceptable" for them to prevent the publication or distribution of the communication on the Internet. In determining what is acceptable for a service provider to remove, the courts consider "the relevance of the incident, the costs of blocking a single file and the impact on other parts of an online service."²⁰⁹ English law uses a similar knowledge or reason-to-know standard for intermediary liability.²¹⁰ In fact, the European Community recently adopted a directive that imposes liability on those online intermediaries who either know of defamation or are aware of facts or circumstances making it apparent, unless they expeditiously act to remove or disable access to the information.²¹¹

207. Or it may not. See LESSIG, *supra* note 72, at 142–56 (discussing harms to society from intrusive monitoring by intermediaries).

208. I am assuming that intermediaries benefit because they make it their business to disseminate the information of others, whether or not that business is for profit. See SWISHER, *supra* note 110, at 220–28 (reporting that AOL attracted more users and increased its revenues by permitting all types of speech, even unlawful speech); *see also* A&M Records v. Napster, Inc., 114 F. Supp. 2d 896, 921–22 (N.D. Cal. 2000) (listing precedents in which companies were found to receive a "direct financial benefit" from user activities because they had "economic incentives for tolerating unlawful behavior").

209. Lothar Determann, *The New German Internet Law*, 22 HASTINGS INT'L & COMP. L. REV. 113, 152 (1998).

210. See Edwards, *supra* note 62, at 193–95 (describing Section 1(1) of the Defamation Act 1996); Friedman & Buono, *supra* note 195, at 660 n.82.

211. See Lothar Determann, *Case Update: German CompuServe Director Acquitted on Appeal*, 23 HASTINGS INT'L & COMP. L. REV. 109, 119–22 (1999). Member States

Although a rule that required intermediaries to remove defamatory postings of which they knew or should have known would not be cost-free, it does not need to be so to justify its adoption. Beyond the costs of removing postings, which should not be high, intermediaries would need procedures for responding to alleged victims' complaints. The easiest response might be to remove any posting about which someone lodged a complaint, but it seems likely that publicity and market pressure would reward intermediaries who made some real attempt to distinguish frivolous claims from others. An intermediary would likely face negative publicity from posters angered by the knee-jerk removal of their postings in response to complaints.²¹² Victims of overly aggressive removal practices may appear quite sympathetic to their online community members, particularly if they have developed good reputations. Those whose reputations have been smeared by postings, whether defamatory or not, are unlikely to generate the same sympathy.²¹³ Nonetheless, a legal rule imposing liability should require reasonable, though limited, investigation on the part of intermediaries before they take action. In addition, because victims of merely trivial defamation would be unlikely to sue intermediaries, the latter could safely pursue a course of responding only to apparently serious claims.

In the somewhat analogous copyright context, the law has affirmatively required intermediaries to bear some costs of preventing injury. Recognizing that an online intermediary is often in a much better position to prevent or decrease copyright infringement injury than the innocent victim, Clinton administration policy analysts recommended that intermediaries be required by law to take effective steps to respond to complaints.²¹⁴ Accordingly, the 1998 Digital Millennium Copyright Act protects intermediaries from liability only if they expend resources evaluating copyright infringement

must ensure that their laws conform to this directive within 18 months of its final passage, by the end of 2001. *See id.* at 119.

212. *See* Sheridan, *supra* note 194, at 176–77 (positing that intermediaries who remove postings without investigating will develop bad reputations). *Cf.* Naughton, *supra* note 198, at 409–10 (describing user “rebellion” that followed Prodigy’s attempt to squelch online discussion of its monthly fee increase).

213. *See, e.g.,* Zeran v. Am. Online, Inc., 958 F. Supp. 1124, 1127 (E.D. Va. 1997), *aff’d*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (apparently innocent defamation victim received numerous death threats from those who believed the defamatory posts).

214. INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 116–24 (1995).

complaints and responding appropriately.²¹⁵ Under the Act, if a copyright owner presents a properly documented claim of copyright infringement to an intermediary, the intermediary must remove or block access to the posting and notify the offending poster. If the offending poster demonstrates that its post was improperly removed, the intermediary must reinstate the posting.²¹⁶ The different factors of the participation-centered model suggest why Congress was more responsive to online copyright owners' needs than to the needs of future defamation victims.²¹⁷ The point remains that the threat of liability has been used in other areas of the law to require online intermediaries to curtail victims' injuries at the hands of third parties.

2. Linking the Analyses: The Role of the Courts

My comparative institutional analysis selected courts as the preferred institution to determine the proper liability rule for intermediaries, but did not specify what that rule should be. The last section argued that the proper rule would be a form of distributor liability tailored to the cyberspace context. This section will show that of the three traditional institutions, courts would have been the most likely to select that rule in the absence of congressional action.

The courts' pre-1996 decisions support the prediction that they would have preferred some sort of distributor liability standard over a primary publisher liability standard, largely due to free speech concerns. In fact, the *Stratton* court appeared to view its imposition of primary publisher liability as aberrational; it stated clearly that the general rule should be the *Cubby* standard of distributor liability, and it went to great lengths to distinguish *Stratton* from the general rule.²¹⁸ In fact, those concerned about the implications of intermediary liability for online free speech should be comforted by the fact that

215. Digital Millennium Copyright Act (hereinafter "DMCA"), 17 U.S.C.A. §§ 512(c)–(d) (West Supp. 2000).

216. *Id.* at §§ 512(c)(3), (g) (West Supp. 2000). The DMCA also requires intermediaries to implement a policy of terminating the accounts of repeat infringers in appropriate circumstances. *Id.* at § 512(i)(1)(A).

217. In other words, copyright owners are much better represented in Congress than ordinary users. See Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 311–17 (1989); see also Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369 (1997).

218. *Stratton Oakmont, Inc. v. Prodigy Servs., Co.*, 1995 WL 323710, at *4–*5 (N.Y. Sup. Ct. May 24, 1995). The court also distinguished an analogous broadcasting case in which a television news program had been held to only distributor liability in a case involving its failure to prevent the airing of an allegedly defamatory investigative report. See *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928 (E.D. Wash. 1992).

speech concerns clearly motivated the *Stratton* court's reasoning. The *Stratton* court agreed that the mere opportunity to censor should not trigger the duty to censor, for fear that companies would be forced to exercise their censorial power at the expense of their time and money as well as the public's freedom of speech.²¹⁹ But the *Stratton* court characterized Prodigy's own practices, rather than excessive tort regulation, as the real threat to free speech online.²²⁰ It described Prodigy as having already chosen to be a censor, having "uniquely arrogated to itself the role of determining what is proper for its members to read," and it expressed concern that Prodigy's practices would have a "chilling effect on freedom of communication in cyberspace."²²¹ In imposing publisher liability, the court found that Prodigy could not reap the financial benefits of censorship designed to create a family-oriented environment while refusing to accept "the legal liability that attaches to such censorship."²²² If anything, the *Stratton* court seemed interested in discouraging Prodigy's intrusive practices and encouraging a more open online discussion.²²³ While the court did not adequately consider the impact its decision might have on intermediaries, its comments do indicate substantial concern over whether particular intermediary practices unduly inhibit online discourse.

The courts' response in analogous online cases does not generally confirm commentators' fears following *Stratton* that the judiciary would be insufficiently sensitive to concerns about free speech in cyberspace. Rather, many courts have seemed duly impressed by both the benefits of online speech and the burdens posed by broad speech regulations.²²⁴ The Supreme Court struck down the indecency

219. See *Stratton*, 1995 WL 323710, at *4-*5; see also *Auvil*, 800 F. Supp. at 931-32 (finding that the power to censor should not trigger the duty to censor).

220. Later cases have found that intermediaries like Prodigy are not state actors, and thus their own practices are not subject to constitutional challenge. See *supra* note 198.

221. *Stratton*, 1995 WL 323710, at *4-*5. The court did opine, however, that notwithstanding the imposition of publisher liability on Prodigy, the market would lead to a diversity of fora, including those like Prodigy. See *id.*; see also Schlachter, *supra* note 78, at 137-38 (agreeing that the market will provide a diversity of monitoring choices).

222. *Stratton*, 1995 WL 323710, at *5. The court exhibited antipathy towards Prodigy's litigation strategy of trying to avoid responsibility for its actions. Not only did Prodigy claim that it should not bear the burden of controlling content, but it claimed to have stopped controlling content, without providing any proof of a change in practices. See *id.* at *2-*3.

223. See Volokh, *supra* note 205, at 405 ("The [*Stratton*] court seemed to be exacting greater liability as the price for bad, or at least suspect, behavior.").

224. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (refusing to qualify level of First Amendment scrutiny of Internet, based on its "relatively unlimited, low-cost

provisions of the 1996 Communications Decency Act ("CDA"), in part because they would have imposed a burden on service providers to monitor and respond to offending postings.²²⁵ That concern also animated the Third Circuit's recent decision to strike down the successor federal indecency statute.²²⁶ Other cyberspace decisions have taken quite seriously the risk to online speech that cyber-regulation can pose and have struck down various statutes viewed as overly speech-restrictive.²²⁷ These precedents suggest that courts would not have imposed the onerous obligations of primary publisher liability on intermediaries because they would have appreciated the threat to free speech that commentators identified as flowing from that rule.²²⁸

Furthermore, other precedents strongly suggest that courts would not have chosen the other extreme of absolving intermediaries of all responsibility for their users' actions by granting them immunity from suit. Despite grand claims in Congress and elsewhere about the benefits of cyberspace technology, courts have not generally immunized cyberspace companies from liability in the name of promoting their growth.²²⁹ For example, courts have held that cyberspace companies are subject to personal jurisdiction when they benefit from Internet technology's wide reach to do business in new states.²³⁰ They have explicitly rejected companies' claims that it would be too burdensome to determine the location of their customers

capacity for communication of all kinds"); *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J., concurring) ("As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.").

225. See *Reno*, 521 U.S. at 881–83. In fact, in overturning the CDA, the Supreme Court chided Congress for its insensitivity to speech concerns. See *Id.* at 879 ("Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.").

226. See *ACLU v. Reno*, 217 F.3d 162, 175–76 (3d Cir. 2000) (finding the Child Online Protection Act to violate the First Amendment).

227. See, e.g., *Am. Libraries Ass'n. v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (striking down a New York online indecency statute); *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (striking down a Georgia indecency statute). But see *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc) (upholding a Virginia statute that restricted state employees' access to sexually explicit materials online against a First Amendment challenge).

228. See Kane, *supra* note 195, at 493–94 (predicting that if Congress had not acted, courts would have imposed distributor liability rather than primary publisher liability on intermediaries).

229. See *infra* Part VI.A.2 for a discussion of Congress's rhetoric and the supreme importance it places on the growth of e-commerce.

230. See, e.g., *Maritz, Inc. v. Cybergold*, 947 F. Supp. 1328 (E.D. Mo. 1996).

in order to decide whether to do business with them.²³¹ Similarly, they have held purveyors of explicit online videos and pictures to the community standards of the purchaser, rejecting claims that sellers should not be responsible for determining the buyers' locations.²³² In these and similar cases, courts have imposed some reasonable burdens to accompany the many benefits of e-commerce.²³³ When applied to the case study, the courts' reasoning suggests that they would have imposed some liability on intermediaries to encourage them to take cost-effective steps to reduce the occurrence of online defamation.²³⁴ Even after Congress acted, one court suggested that if not for the immunity provision and its interpretation by other courts, it would have likely imposed at least distributor liability on an intermediary who exercised some editorial control over the author of an allegedly defamatory posting.²³⁵

I have claimed that courts would be the most likely institution to choose a distributor liability standard for intermediaries, which requires that I address whether the other two institutions would adopt the same standard. When I revisit the statutory immunity provision in the next Part, I will claim that although Congress had the chance to impose distributor liability when it addressed the issue in 1996, it failed to do so with any clarity. After courts interpreted the provision to grant total immunity to intermediaries, Congress took no action to correct them.²³⁶ While not conclusive, such legislative inertia

231. See, e.g., *Playboy Enters. v. Chuckleberry Publ'g Co.*, 939 F. Supp. 1032 (S.D.N.Y. 1996).

232. See, e.g., *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996).

233. In the recent litigation involving claims that Napster, an online music swapping service, violated record company music copyrights, the court's final injunction required Napster to develop computer programs that would limit music swapping to files that do not infringe copyrights, even though such programs would be costly and substantially reduce the scope of Napster's offerings. See *A&M Records v. Napster, Inc.*, 114 F. Supp. 2d 896, 902-03, 922, 925-26, *aff'd in part rev'd in part*, 239 F.3d 1004 (9th Cir. 2001), *remanded to* 2001 WL 227083 (N.D. Cal. Mar. 05, 2001).

234. See *Religious Tech. Ctr. v. Netcom On-Line Communication Serv., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (permitting contributory infringement claim against intermediary, under which liability is found if the intermediary knew or should have known of the infringement, and rejecting the argument that intermediaries should be free of liability due to First Amendment concerns). The House Report accompanying the DMCA called the *Netcom* decision "the leading and most thoughtful judicial decision to date." H.R. REP. NO. 105-551 (I), at 11 (1998).

235. See *Blumenthal v. Drudge*, 992 F. Supp. 44, 51 (D.D.C. 1998). The intermediary was quite involved in the control and promotion of the defendant gossip columnist. Thus the court's contemplation of imposing primary publisher liability does not suggest that courts generally would have pursued that course. See *id.*

236. One cannot read too much into legislative inertia because of the difficulty of passing legislation. See WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY*

certainly does not provide evidence that legislators regarded distributor liability as a better rule for intermediaries than total immunity. The evidence suggests then, that courts, if left to themselves, would have been more likely than Congress to choose distributor liability.

As for the market, Part VII will examine the nature of the contracts that intermediaries make with users. For now, it suffices to say that such contracts do not currently suggest that, in the absence of legal compulsion, intermediaries would have voluntarily contracted for rules that required them to act after receiving notice of defamation on their systems.

C. Institutional Concerns About Judicial Determination

Recall that comparative institutional analysis does not require the selection of the perfect institution because there is none. The argument that courts would be a good choice to resolve the liability rule, whether based on comparative institutional or directly normative grounds, does not deny that there may be drawbacks to that choice. As a threshold problem, courts are expensive and therefore harder to access than the other two branches.²³⁷ On the other hand, the availability of contingency fee lawyers and the promise of generous recovery under a more favorable liability rule would likely allow at least some cases to make it through litigation.²³⁸ Additionally, the high stakes for all intermediaries as potential injurers mean that any lawsuits that did impose liability on them would likely generate significant deterrent effects, which would encourage them to avoid future liability by reducing defamation injuries.²³⁹ Any such steps would obviously redound to the benefit of all potential victims.

1. Legitimacy

Legitimacy and consistency are two salient and persistent problems. Considering legitimacy first, courts have suggested that judicial activism in cyberspace legal conflicts is inappropriate. Many

INTERPRETATION 279 (2000).

237. See KOMESAR, *supra* note 5, at 125–28 (describing costs of access to courts); Galanter, *supra* note 73, at 119–22, 136; Mike Godwin, *The First Amendment in Cyberspace*, 4 TEMP. POL. & CIV. RTS. L. REV. 1, 7–8 (1992) (claiming that few private online defamation victims will sue due to the expense).

238. In fact, one reviewer faults Komesar's approach for taking inadequate account of the role of trial lawyers. See Pierce, *supra* note 20, at 949.

239. See *supra* text accompanying note 160.

courts have opined that interpreting pre-cyberspace statutes in new cyberspace contexts constitutes an illegitimate judicial activity and have hesitated to "stretch" a statutory provision in favor of awaiting a legislative resolution. Such courts have made the institutional argument that adapting law to cyberspace remains a legislative prerogative.²⁴⁰

Given the fact that courts will sometimes appear to be the preferred institution for cyberspace legal conflicts, their reluctance to act is particularly problematic. To the extent that courts' reticence reflects an intentional choice, it appears misguided. Courts' inappropriate deference to legislatures will likely cause a significant degradation in the quality of resulting legal rules. The uncertain and rapid changes of cyberspace challenge each institution, not just courts, and accelerated technological changes increase the costs to all institutions by making it more difficult for institutional actors both to understand the current state of the world and to predict its future direction. Congress must work harder to understand the subject of its regulation and avoid passing outdated laws; courts must develop an expertise in new technologies to adjudicate knowledgeably; and market actors find it difficult to plan for the long range amid ever-changing background rules. The rapid changes of cyberspace technology require rapid adaptive responses from all institutions.

Further, courts cannot choose to avoid having an impact by not acting. Whenever parties decide to litigate a legal conflict, the presiding court must decide in favor of one of the parties. Much as she might want to, a judge cannot send the parties packing and ask them to wait for Congress to give guidance. The court must resolve the legal conflict, using the legal tools at its disposal.²⁴¹ The common law of cyberspace may just have to develop quickly to match the changes in technology.

As Lawrence Lessig has persuasively shown, courts' hesitation can have particularly pernicious effects in cyberspace. Lessig warns that as traditional legal institutions find it difficult to keep up with the cyberspace changes, the character of cyberspace experience, including the nature of online speech, will become increasingly hard-wired into

240. See, e.g., *It's In the Cards, Inc. v. Fuschetto*, 535 N.W.2d 11, 15 (Wis. Ct. App. 1995) ("It is the responsibility of the legislature to manage this [computer network] technology and to change or amend the statutes as needed"); see also *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994) (refusing to extend criminal law to cover defendant's pirate bulletin board on the grounds that Congress should define crimes).

241. Cf. Radin & Wagner, *supra* note 172 (criticizing vision of cyberspace operating through "private ordering" without legal backdrop and predicting that territorial sovereigns will not cede jurisdiction to online self-regulation).

the software and hardware that run electronic systems.²⁴² Computer code created by high technology companies has begun to take the place of traditional decision-makers in determining and implementing social policy goals. Lessig argues that traditional legal institutions should not cede control to code. There is no reason to suspect that code writers will be better situated than traditional institutions to engage in the balancing necessary to devise good public policy, and many reasons to think they will be worse situated.²⁴³

Rather than deferring to computer code and treating it as a constant, courts should sometimes demand that the code change if the law requires it. For example, both courts and Congress should have adopted a more skeptical approach to intermediaries' claims that reducing defamation through technological means would be impossible. If a legal rule demanded it, companies would likely invest in code that made it feasible.²⁴⁴ The plasticity of code is yet another reason for courts to dig into cyberspace questions and stake an aggressive claim as decision-makers. Proactive decision-making may well be even more legitimate online than offline.

2. Consistency

The consistency problem plagues all court determinations, but takes on special significance for cyberspace rules. The general difficulty is that court-determined rules are necessarily piecemeal, applying only in the deciding court's jurisdiction. The global nature of cyberspace makes this procedural approach particularly problematic; as communications easily and seamlessly travel across jurisdictional boundaries, intermediaries could find it overwhelming to contend with different rules for each jurisdiction in which they transact.

The potentially inconsistent nature of cyberspace court decisions presents a real problem that cannot be ignored.²⁴⁵ Obviously, the

242. See LESSIG, *supra* note 72; see also Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998) (considering implications of regulation by communications technologies).

243. See *id.* at 222-34; see also Lessig, *supra* note 36, at 514-20.

244. See, e.g., *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1135 n.24 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (4th Cir. 1997) ("[H]olding interactive computer service providers strictly liable for the content of their systems would likely lead to rapid development of mechanisms by which to block objectionable material."); Reidenberg, *supra* note 242, at 583-85, 590 (observing that network liability rules could influence "the development of Lex Informatica").

245. See *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000) (striking down a cyberspace indecency statute on the ground that required compliance with varying community

resulting uncertainty imposes costs that a uniform national rule would not.²⁴⁶ On the other hand, our legal system tolerates uncertainty in many fora when its benefits have exceeded its costs. Commentators have recognized the benefits of common law experimentation and have lauded the common law method.²⁴⁷ When approaching online defamation, various courts could experiment with different ways of tailoring a distributor liability standard. Just as in the offline world, where defamation law reflects different approaches in different states, some online intermediary rules could require that victims be given a right to reply to offending postings, while others could impose different requirements based on the developing technology.²⁴⁸ Even more preferably, courts faced with claims against intermediaries could follow the example of German law and tailor the liability standard to impose appropriate burdens based on each intermediary's costs and capabilities.²⁴⁹ Again, while rule variations could increase compliance costs, they might also lead to innovative and just approaches.

Uncertainty that has been tolerated offline does not become intolerable online simply because of the "borderless" nature of cyberspace.²⁵⁰ Although a defense of this proposition is beyond the scope of this Article, a partial response may be found in the reasoning of those courts that have rejected arguments against imposing some burdens on cyberspace actors to determine with whom they are transacting and to take responsibility for those transactions.²⁵¹ In fact, rapidly changing technology may make cyberzoning, or the use of

standards of decency represents an impermissible burden on cyberspace speech); Zittrain, *supra* note 78, at 507–08 (decrying the burden on system operators of familiarizing themselves with different laws). The same considerations counsel against state statutory treatment. See *Am. Libraries Assoc. v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (striking down a state indecency statute as violating the dormant commerce clause).

246. Of course national rules may be interpreted differently in different jurisdictions.

247. See, e.g., POSNER, *supra* note 159, §§ 8.1–.3; Lessig, *supra* note 45; Schlachter, *supra* note 78, at 127–29.

248. See, e.g., DeCarlo, *supra* note 106, at 572–80 (recommending "heightened distributor standard" and the use of Learned Hand's formula to tailor liability); Finley P. Maxson, Note, *A Pothole on the Information Superhighway: BBS Operator Liability for Defamatory Statements*, 75 WASH. U. L.Q. 673, 692 (1997). For articles recommending a right of reply, see Cavazos, *supra* note 194; Godwin, *supra* note 237, at 7; Hardy, *supra* note 67, at 1041–42. But see Robert M. O'Neill, *The Drudge Case: A Look at Issues in Cyberspace Defamation*, 73 WASH. L. REV. 623, 632–33 (1998) (doubting the efficacy of online reply for defamation victims).

249. See *supra* note 209 and accompanying text (describing the German law's use of court balancing to determine whether an intermediary should have removed a posting).

250. See Goldsmith, *supra* note 172. But see Johnson & Post, *supra* note 131.

251. See *supra* text accompanying notes 229–35.

technology to create virtual borders in cyberspace, cheaper rather than more expensive.²⁵² Such technology would likely be forthcoming if legal rules required Internet actors to expend some resources on developing it.²⁵³

Indeed, courts are not alone in confronting the difficulties of conflicting local laws online; legislatures face an identical problem when writing national laws to govern an international network. Because cyberspace is borderless, national laws will often conflict with the laws of other countries; this is exactly the same problem to which critics have objected in the context of state laws. To be consistent, one must argue that only internationally agreed-upon rules will suffice for cyberspace.²⁵⁴ Unfortunately, we live in a world of second-best alternatives. We cannot simply wait indefinitely until international agreement arises.²⁵⁵ In the meantime, conflicting local rules may be preferable to uniformly bad national rules.

Turning to a uniformly bad rule, the next section reconsiders Congress's passage of the intermediary immunity provision in 1996 and the courts' subsequent interpretation of it.

VI. THE CONGRESSIONAL IMMUNITY PROVISION AND INSTITUTIONAL ERRORS

A. Congressional Errors

From a comparative institutional perspective, Congress erred by legislating on the question of intermediary liability at all. Comparative institutional analysis predicted that the legislative process would be subject to a minoritarian bias — the overrepresentation of intermediaries' interests and the underrepresentation of potential defamation victims' interests — that would

252. Cyberzoning has been suggested as a means to cordon off adult-only parts of the Internet to permit indecency there while not permitting it in the greater Internet. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 889–90 (1997) (O'Connor, J., concurring) (citing Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 886–90 (1996) with approval and forecasting greater cyberzoning in the future).

253. See Lessig, *supra* note 36 (considering whether technology should respond to law or vice versa).

254. Cf. Goldsmith, *supra* note 131, at 1122–27 (arguing that nations can regulate the Internet and critiquing the opposite view among Net scholars).

255. In fact, international rule-making may be subject to even greater distortions than rule-making at the national level. See J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 110–13 (1997) (discussing intellectual property rights owners' attempts to use international treaties to get stronger protection than they could obtain from Congress).

compromise its ability to create balanced and reasoned legal rules. While the available legislative history only indirectly suggests such a minoritarian bias,²⁵⁶ the resulting statute confirms the one-sided nature of the deal.

1. An Incomplete Statute Reflecting a One-Sided Deal

In the abstract, Congress would have been well-advised to clarify that monitoring by intermediaries should not make them responsible as primary publishers. Considering the volume of online postings and their instantaneous nature, the differences between intermediaries and traditional primary publishers, such as newspapers and book publishers, are significant enough to make primary publisher liability seem inappropriate.²⁵⁷ As much as the *Stratton* court may have been motivated by its distaste for Prodigy's censorship and its disdain for the company's litigation posture, its animosity did not justify the formulation of a dubious legal rule. Despite its attempts to cabin its holding to Prodigy specifically and advocate a distributor liability standard generally, the *Stratton* court likely went too far in imposing primary publisher liability on Prodigy.

Nonetheless, Congress's immunity provision was a woefully incomplete response to the *Stratton* decision.²⁵⁸ Even though the drafters made statements in Congress about the *Cubby* case, and about the difference between publisher and distributor liability,²⁵⁹ the

256. See, e.g., SWISHER, *supra* note 110, at 229–63 (describing concerted efforts by intermediaries to oppose the Communications Decency Act in Congress); Kara Swisher, *Ban on On-Line Smut Opposed; High-Tech Coalition Pushes Software Allowing Parents to Decide*, WASH. POST, July 18, 1995, at D3; see also sources cited *supra* note 108 (describing intermediaries' complaints to Congress about publisher liability).

257. See discussion *supra* Part V.B.1.

258. Recall that the provision states: "Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by any other information content provider." 47 U.S.C. § 230(c) (1998).

259. Representative Cox, one of two sponsors of the immunity provision, characterized the imposition of distributor liability in *Cubby* as holding that CompuServe "was not the publisher or editor" of the material. He clearly used the term "publisher" to *exclude* parties held to the distributor liability standard applied to CompuServe in that case. 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The provision's sponsors summarized both the *Cubby* and *Stratton* decisions, and then repeatedly discussed the need to overrule *Stratton*, without again mentioning *Cubby*. See *supra* note 116 (listing cites); see also 141 CONG. REC. S8345 (daily ed. June 14, 1995) (statements of Sen. Coats) (distinguishing between publisher and distributor liability and noting that the Communications Decency Act was designed not to hold intermediaries to publisher liability).

provision gave no indication of the level of liability to which intermediaries should be held.²⁶⁰ Nothing in the legislative history gave a hint as to whether the immunity provision protected intermediaries from primary publisher liability alone while leaving distributor liability intact, or whether the provision immunized intermediaries from third-party defamation liability altogether.²⁶¹ Nor did Congress delegate to courts the responsibility for determining the standard of liability.²⁶²

The immunity provision does address a major concern of intermediaries that if they monitor their services for offensive conduct, they risk being held to a higher level of liability for online defamation. The provision removes that concern with one fell swoop. There can be little question that the provision immunizes intermediaries from primary publisher status, no matter what monitoring scheme they implement. Once Congress had addressed the intermediaries' concern about liability due to monitoring, the more significant question for potential defamation victims — namely, the level of liability for intermediaries — was left entirely unanswered. The provision makes no attempt to resolve a glaring legal question of considerable import: what are intermediaries' responsibilities, if any, to reduce online defamation injury? The immunity provision does nothing to address the concerns of future defamation victims; their interests have been completely ignored.

It is not clear whether Congress's neglect of future defamation victims' interests was benign or intentional. It should be clear, however, that consistent with the predictions of comparative institutional analysis, the voices of those future victims did not register loudly in Congress's ear. As a result, the final statute left ambiguous an important question of cyberspace policy: the actual liability level of intermediaries for defamation by their users. As section B of this Part will elaborate, courts exacerbated Congress's institutional weakness when they interpreted the immunity provision to protect intermediaries from both publisher and distributor liability.

260. See, e.g., Volokh, *supra* note 205, at 406–07 (discussing provision's ambiguity but forecasting that it retained all but primary publisher liability).

261. See, e.g., H.R. REP. NO. 104-458, at 194 (1996) (failing to mention distributor liability); see also *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1131 n.14 (E.D. Va.), *aff'd*, 129 F.3d 327 (4th Cir. 1997) (noting that the immunity provision does not provide “a comprehensive federal scheme”).

262. That is another approach that could be suggested to Congress as a way to deal with minoritarian bias. See *infra* text accompanying note 308.

First, though, the discussion turns to the other mistake Congress made: it relied too much on the market.

2. Empty and Misleading Market Rhetoric

The findings accompanying the immunity provision indicate that Congress viewed the market as an important determinant of Internet regulation. They heartily praise interactive computer systems, which had "flourished, to the benefit of all Americans, with a minimum of government regulation," and pledge to promote their continued development.²⁶³ Additionally, they announce a congressional commitment to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."²⁶⁴ This rhetoric echoes administration policy statements lauding the value of an Internet freed from regulatory constraints and operating according to the dictates of an uninhibited market.²⁶⁵

If Congress's statements reflected a view that common law unhindered by statutes would be superior to Congress's own biased attempts to legislate, then its insights would be well-taken. Unfortunately, the statements appear instead to reflect Congress's mistaken notion that the market can achieve our preferred social goals when the market may be the institution least able to achieve those goals.²⁶⁶ As discussed above, comparative institutional analysis demonstrates the misguided nature of any attempt to allocate decisions about defamation liability of intermediaries to the market. Because potential victims' individual stakes are so much lower than the relevant transaction costs, one would expect few, if any, transactions between potential victims and intermediaries designed to allocate the risk of defamation injury or encourage service providers to reduce its occurrence.

263. 47 U.S.C. §§ 230 (a)(4), (b)(1) (1998).

264. *Id.* §§ 230 (a)–(b).

265. *See, e.g.*, THE WHITE HOUSE, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (July 1, 1997), available at <http://www.ecommerce.gov/framework.htm>; U.S. GOVERNMENT WORKING GROUP ON ELECTRONIC COMMERCE, FIRST ANNUAL REPORT (Nov. 1998).

266. To be fair, much of the rhetoric in the immunity provision seemed directed at the onerous provisions of the Communications Decency Act rather than at the notion of regulating defamation through lawsuits. *See* 141 CONG.REC.H8470; Cannon, *supra* note 100, at 68–69. But nothing in the statements made on the House floor or in the provision itself suggested that the market might handle some conflicts better than others. The rhetoric painted the picture in broad strokes, suggesting that Congress should "trust the market and keep all government regulation out of the Internet."

An examination of actual contracts between intermediaries and their users tends to confirm the theory advanced by comparative institutional analysis. While intermediaries do tend to form contractual agreements with their users, such agreements are notably one-sided in favor of intermediaries.²⁶⁷ With reference to defamation, the agreements tend to disclaim all liability on the part of intermediaries for defamatory or other harmful postings.²⁶⁸ Not only do the agreements disclaim any duty of intermediaries to take proactive steps to reduce defamation, but they assert that no duty arises even after intermediaries are informed that defamatory material resides on their systems. There is no evidence that intermediaries are contracting for more liability than the legal rules impose.

In fact, even though the agreements frequently grant intermediaries the right to terminate a user's account for misconduct such as defamation, the agreements rarely impose upon them a responsibility to do so. Intermediaries generally retain the right to take no action, and they do not obligate themselves even to aid a victim of defamation in identifying the poster. Given the prevalent use of aliases such as screen names, this posture increases the likelihood that a defamation victim may never learn the identity of the author. Finally, the agreements generally require that users indemnify intermediaries against any third-party claims arising out of the user's actions.²⁶⁹ This indemnification provides yet another way to insulate intermediaries from potential victims' claims, and thereby eliminates any incentives to reduce the occurrence of defamation. It also provides yet another indication that potential victims have not taken advantage of market-based transactions to reduce their exposure to defamation injuries.

In sum, although user agreements might have developed differently in the absence of the immunity provision and the decisions interpreting it, they currently appear to bear out the predictions of comparative institutional analysis. They are also consistent with the predictions of Margaret Jane Radin and R. Polk Wagner that intermediaries will tend to standardize take-it-or-leave-it terms to which users will have little choice but to agree.²⁷⁰ They do not

267. See, e.g., Yahoo! Terms of Service, *supra* note 200, §§ 9 (Indemnity), 13 (Termination), 17 (Disclaimer of Warranties), 18 (Limitation of Liability); Netanel, *supra* note 172, at 433–34; see also sources *supra* note 200 (granting intermediaries broad rights to remove content but no responsibilities to do so).

268. See, e.g., America Online Member Agreement, *supra* note 200; Yahoo! Terms of Service, *supra* note 200.

269. See, e.g., Friedman & Buono, *supra* note 195, at 648 n.9.

270. See Radin & Wagner, *supra* note 172, at 1312; see also Niva Elkin-Korin,

support the predictions of cyberlibertarians such as David Post and David Johnson that intermediaries will compete with each other to provide the most user-satisfying set of rules.²⁷¹ It would be hard to imagine that users would be particularly satisfied with provisions that grant virtually unlimited power and no responsibility to intermediaries, as many user agreements currently do.²⁷²

In its rhetoric surrounding the immunity provision, Congress congratulated itself for having the restraint necessary to design a "market solution" to the problem of Internet defamation.²⁷³ Yet, the available evidence confirms that Congress's solution has not led to market transactions allocating the costs of online defamation injury reduction between intermediaries and victims. Instead, under the immunity provision, the burden has fallen squarely and solely on victims' shoulders.

Although the final immunity provision did not formally bar intermediaries and their users from negotiating different liability arrangements, prohibitively high transaction costs effectively preclude any market-based alteration of the existing rules. Since the transaction costs are generally much greater than the individual interests of potential defamation victims, the immunity provision — whatever Congress intended it to mean — left no role for private parties to alter the rules.²⁷⁴ Despite its rhetoric, the immunity provision does not reflect restraint in recognition of the value of free market regulation. If Congress had really wanted the market to resolve the liability issue, it should have imposed liability on intermediaries and permitted contracting around that background

Copyrights in Cyberspace — Rights Without Laws?, 73 CHI.-KENT L. REV. 1155 (1998) (arguing that online consumers are disadvantaged in their contracts with big companies). Some have argued that similar contracts, negotiated between users and providers of intellectual property in cyberspace, because of their wide-scale use, represent a type of private legislation. See, e.g., Cohen, *supra* note 172, at 479–80, 484 n.79; Robert P. Merges, *The End of Friction?, Property Rights and Contract in the "Newtonian" World of On-line Commerce*, 12 BERKELEY TECH. L.J. 115, 126 (1997).

271. See Post & Johnson, *supra* note 171, at 1312.

272. Two authors supported their claim that intermediaries monitor their services aggressively to protect users from defamation with the fact that America Online's terms of service *permitted* it to do so. See Friedman & Buono, *supra* note 195, at 664.

273. The legislative language supports the view that Congress dresses up its handouts in public interest rhetoric. See, e.g., Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 232–36 (1986) (calling special interest statutes that masquerade as serving the public interest "hidden-implicit legislation").

274. Note that Ronald Coase's claim that any clear entitlement will lead to efficient liability rules requires the setting of a world without transaction costs, which is a far cry from the case study. See Coase, *supra* note 134; KOMESAR, *supra* note 5, at 29.

rule.²⁷⁵ Intermediaries would then have had an incentive to bargain towards an acceptable middle ground that reasonably allocated the costs of reducing injury between themselves and users.²⁷⁶

Since the immunity provision gives intermediaries what they want, it obviates the need for them to strike any bargains with potential victims. Of course, given the incomplete and ambiguous nature of the immunity offered by the provision, intermediaries could not really know whether they had completely prevailed until the courts interpreted the provision. The next section discusses how, in stark contrast to the course that comparative institutional analysis would counsel, courts interpreted the provision broadly in favor of intermediaries.

B. Courts Exacerbate the Congressional Errors

In the first decision to consider the immunity provision, *Zeran v. America Online, Inc.*, the court refused to permit a claim against America Online ("AOL") based on distributor liability.²⁷⁷ The case arose when an unidentified AOL user maliciously posted tasteless ads for tee-shirts and paraphernalia making light of the then-recent tragic Oklahoma City bombing.²⁷⁸ For unknown reasons, the poster listed Ken Zeran's name and telephone number as the contact person, and threatening calls subsequently deluged Zeran's phone lines.²⁷⁹ As an apparently innocent victim of a hoax, Zeran notified AOL of the

275. See, e.g., William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203 (1998) (recommending background rules that encourage transactions as well as limits on the permissible scope of contracts); Hardy, *supra* note 67, at 1044-48 (recommending strict liability for intermediaries, with contracting around that rule, but recognizing constitutional impediments). Of course, without regulatory oversight of the contracting process, which Fisher recommends, and in the face of tremendous intermediary bargaining advantage, the market result may not be socially optimal even in that case. See KOMESAR, *supra* note 5, at 115 (observing that adequacy of market resolution depends on the prior delineation of property rights); FARBER & FRICKEY, *supra* note 17, at 34-35.

276. See Burk, *supra* note 133, at 137-38 (arguing that when transaction costs are high, entitlement stays with the initial rights holder, regardless of efficiency).

277. 958 F. Supp. 1124 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (4th Cir. 1997).

278. For example, postings included the following slogans: "McVeigh for President 1996" and "Finally a day care center that keeps the kids quiet — Oklahoma 1995." See *Zeran*, 958 F. Supp. at 1127 nn.3, 5. Timothy McVeigh was a suspect in the bombing, which killed 168 people, including many children in a day care center, just one week before the postings appeared.

279. The ads were posted on AOL's electronic bulletin board service. Some of the calls were death threats. Zeran could not change his phone number because he depended on it to run a business out of his house. See *Zeran*, 958 F. Supp. at 1127 n.4.

problem, although he was not a subscriber. AOL removed some ads but let others stay online for some period.²⁸⁰ When Zeran sued for negligent dissemination of defamatory material, AOL defended itself based on the immunity provision.²⁸¹

The district court granted AOL's motion to dismiss on the pleadings, holding that the immunity provision shielded AOL from suits based on both publisher and distributor liability. It determined that treating AOL as a distributor of the statements — and subjecting it to the knowledge or reason-to-know standard — would be tantamount to treating it as a "publisher or speaker" of third-party information. Since distributors can be held liable for information they "publish" when they have knowledge or reason to know of its defamatory nature, the court determined that distributors are "publishers" encompassed by the immunity provision.²⁸²

It should be immediately clear that the court confused the common law use of "publication" as a required element of all defamation actions with the term "publisher," which is short for "primary publisher."²⁸³ While plaintiffs cannot prove defamation without showing that the statement was "published" to someone other than themselves, just as they must also show it to be false and defamatory, the finding of "publication" does not elide the historical difference between the use of the words "publisher" and "distributor."²⁸⁴ In the *Cubby* and *Stratton* cases, as well as their precedents and progeny, courts used "publisher" to mean primary publishers such as newspapers and book publishers, and used "distributor" to mean those with secondary liability such as news vendors and libraries.

280. See *id.*, 958 F. Supp. at 1131 (describing the plaintiff's claim as based on allowing the communications to reappear and remain); see also *Zeran*, 129 F.3d at 327 (describing "unreasonable delay" in removing notices). Note that the postings remained online for at least one week. See *Zeran v. Diamond Broad., Inc.*, 203 F.3d 714, 717 (10th Cir. 2000).

281. *Zeran*, 958 F. Supp. at 1131. Zeran did not sue the poster, instead claiming that AOL's inadequate records made it impossible to identify him or her. See *Zeran*, 129 F.3d at 329 & n.1.

282. See *Zeran*, 958 F. Supp. at 1133.

283. The court relied for support on the Restatement provision that elaborates what constitutes "publication." See TORTS RESTATEMENT, *supra* note 47, at § 577 & cmt. a; which is an essential element of all defamation actions, rather than any sources that called distributors "publishers." See *Zeran*, 958 F. Supp. at 1133; see also *Sheridan*, *supra* note 194, at 170–71 (describing the *Zeran* court as conflating disparate defamation elements).

284. See generally *Doe v. Am. Online*, No. SC94355, 2001 Fla. LEXIS 449, *27–*50 (Mar. 8, 2001) (Lewis, J., dissenting) (criticizing the *Zeran* court's reasoning on this ground).

Perhaps knowing that its supposed "plain language" approach stood on shaky ground but not admitting it, the district court added a congressional purpose argument to its reasons for construing the immunity provision to bar actions based on distributor liability as well as publisher liability. Noting the clear congressional purpose to overrule *Stratton* in order to remove disincentives to monitor, the court mischaracterized the *Stratton* decision as holding Prodigy liable as a publisher "in part because [it] had voluntarily engaged in some content screening and therefore knew or should have known of the statements."²⁸⁵ The *Stratton* court held Prodigy liable as a primary publisher, *independent* of its knowledge of the alleged defamation.²⁸⁶ While Congress clearly intended to protect intermediaries such as Prodigy from being treated as primary publishers based on their monitoring efforts, it was silent on the separate question of whether treating them as distributors was permissible.²⁸⁷

Departing wholly from the provision's language, the district court went on to describe distributor liability as contrary to Congress's purpose of encouraging monitoring by intermediaries. The court considered the possibility that an intermediary who monitors postings might learn that certain subscribers notoriously persist in posting scandalous items, and thereby subject itself to suit under distributor liability principles if it failed to act. Concluding that even distributor liability would discourage intermediaries from efforts to review online content and delete objectionable material, the court found it inconsistent with Congress's purpose.²⁸⁸

The district court's statutory interpretation reveals a deep problem. The court's approach immunized intermediaries from even distributor liability without any consideration of the social costs of such an approach. Ironically, the court describes Congress as having balanced "the competing objectives of encouraging the growth of the Internet on one hand, and minimizing the possibility of harm from the abuse of that technology on the other."²⁸⁹ But the court sanctioned a

285. *Zeran*, 958 F. Supp. at 1134.

286. See *Stratton Oakmont, Inc. v. Prodigy Servs., Co.*, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995) (holding Prodigy to be a publisher due to its exercise of editorial control despite the fact "[t]hat such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made").

287. In fact, one canon of statutory construction holds that courts should not interpret statutes to derogate common law causes of action unless they do so explicitly. See *United States v. Texas*, 507 U.S. 529, 534 (1993). But see Sunstein, *Interpreting Statutes*, *supra* note 179, at 444, 506 (criticizing this canon of construction as promoting an obsolete preference for private ordering over regulation).

288. See *Zeran*, 958 F. Supp. at 1134–35.

289. *Id.* at 1135 n.24.

balancing process that included weight for only one side. It reported that Congress balanced the two interests by “electing to immunize Internet providers from forms of liability that discourage those providers from acquiring information about and control over content on their systems,” but failed to consider whether Congress had weighed the impact on victims of such immunity.²⁹⁰ The court thereby sanctioned the one-sided bargain that permitted intermediaries to learn of egregious defamation on their systems but take no action. Under the court’s formulation, intermediaries can ignore with impunity all calls for help from victims of defamation, no matter how easily the damage could be stopped and the harm prevented.

The district court in *Zeran* effectuated the one-sided balancing in which Congress engaged when it passed the immunity provision. The court granted intermediaries’ desires without recognizing any countervailing concerns. By going beyond what the provision’s language required, it exacerbated the institutional bias that seemed to plague Congress. As the next Part explains, the court missed an opportunity to improve public policy by ameliorating the institutional bias because it fundamentally misperceived its role.

The Fourth Circuit affirmed the district court in *Zeran* and followed its reasoning closely. Its “plain language” analysis yielded the conclusion that the immunity provision precludes any cause of action against an intermediary based on third-party content. The court’s opinion repeated the lower court’s deep confusion, finding that “[t]he simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law.”²⁹¹ The court ignored the argument that when a distributor has notice of defamation, its refusal to cease distribution justifies according it the same level of responsibility as a primary publisher. By choosing to “publish” the information rather than cease distributing it, such entities incur liability. The Fourth Circuit misconstrued notice; it does not transform a distributor into a publisher, but rather subjects a distributor to liability appropriate to its knowledge if it fails to respond to complaints.

The appellate court’s congressional purpose analysis also echoed the district court’s reasoning that even notice-based liability would

290. *Id.* Note that the court projected that Congress would likely need to revisit the balance in the future. *See id.*

291. *Zeran*, 129 F.3d at 332. While the Fourth Circuit purported to know the difference between publisher and distributor liability, it repeated the district court’s confusion of publisher status with the publication requirement. Since distributors must publish, they are actually publishers, according to the Fourth Circuit. *See id.* at 332–33.

discourage intermediary monitoring. The court added a First Amendment gloss, deciding that intermediaries given notice of claimed defamation would find it easier just to remove the posting rather than investigate.²⁹² That in turn would reduce online speech, a result the court found inconsistent with the immunity provision's effusive praise for intermediaries and the speech they permit.²⁹³

A subsequent case to *Zeran* made clear what was implicit in the *Zeran* reasoning: that courts interpreting the immunity provision recognized their own role in exacerbating the effects of Congress's minoritarian bias. In *Blumenthal v. Drudge*, White House advisor Sidney Blumenthal sued online gossip columnist Matt Drudge over claims in his online newsletter that the former had a "spousal abuse past."²⁹⁴ Blumenthal also sued AOL, which had reprinted Drudge's newsletter on its electronic service pursuant to a license agreement.²⁹⁵ The District Court for the District of Columbia granted AOL's summary judgment motion, rejecting Blumenthal's claim that AOL should shoulder some liability. It is unclear whether Blumenthal claimed that AOL should be treated as a publisher or a distributor, but the court's finding that the immunity provision precluded both forms of liability obviated the need for clarification.

In finding that the immunity provision precluded even distributor liability, the *Drudge* court quoted extensively from the *Zeran* decision as well as from the congressional findings that lauded the role of intermediaries. Significantly, the court agreed with the *Zeran* court's unsupported empirical claim that notice-based liability would subject intermediaries to the choice of suppressing controversial speech or

292. See *id.* at 333. The question of the likely response to a defamation complaint boils down to an empirical one, albeit a difficult one to measure. But note that the court adduced no evidence in support of its claim. I mostly disagree with it, see *supra* text accompanying note 215. Cf. Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 520-21 (1996) (noting a similar need for empirical evidence in assessing the impact of cyberspace on copyright).

293. See Todd G. Hartman, *The Marketplace v. The Ideas: The First Amendment Challenges to Internet Commerce*, 12 HARV. J.L. & TECH. 419, 445-48 (1999) (arguing that the *Zeran* court's extension of the immunity provision to distributor liability ran counter to both the plain language and Congress's intent, and that it was motivated by concerns about free speech online).

294. *Blumenthal v. Drudge*, 992 F. Supp. 44, 46-47 (D.D.C. 1998).

295. This case raised the important question of whether AOL should be held vicariously liable for Drudge's alleged defamation. The court answered in the negative on the ground that AOL had no role in creating or developing any of the information in Drudge's column. See *id.*, 992 F. Supp. at 50-52; Sarah B. Boehm, Note, *A Brave New World of Free Speech: Should Interactive Computer Service Providers Be Held Liable for the Material They Disseminate?*, 5 RICH. J.L. & TECH. 7 (1998) (arguing that the *Drudge* court should have imposed vicarious liability).

sustaining prohibitive liability, which in turn would deter monitoring.²⁹⁶

What is truly surprising about the *Drudge* decision, however, is that the court admitted that it was perpetuating Congress's bias, and that "[i]f it were writing on a clean slate, [it] would agree with plaintiffs."²⁹⁷ The court conceded that AOL could not properly be analogized to a passive conduit, and that its right to exercise editorial control over its licensees like Drudge meant that "it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, . . ., to the liability standards applied to a distributor."²⁹⁸ Nonetheless, the court followed the Fourth Circuit in *Zeran*, which it was not bound to do, reasoning that "[i]n some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted." The court thereby provided a vivid description of Congress's one-sided deal under which intermediaries got what they wanted while future defamation victims received nothing.²⁹⁹

It is surprising that courts would recognize the biased nature of the deal struck in Congress but continue to effectuate that deal. The courts that have interpreted the immunity provision have clearly missed the opportunity offered by the statute's ambiguity to incorporate comparative institutional analysis into their reasoning.³⁰⁰ However, the next Part offers suggestions for judicial adoption of such analysis.

296. See *Drudge*, 992 F. Supp. at 52.

297. *Id.* at 51–52.

298. *Id.* at 51.

299. Of course, monitoring for obscene or indecent speech would not necessarily benefit defamation victims. Nonetheless, the point remains that the court sanctioned a deal that gave intermediaries what they wanted while providing nothing for defamation victims.

300. In a subsequent case interpreting the immunity provision and following *Zeran*, the court found that the immunity provision should shield service providers from bearing all but *de minimus* discovery. See *Ezra v. Am. Online, Inc.*, 206 F.3d 980, 986–87 (10th Cir. 2000). This holding certainly coheres with the prior rulings; if the provision protects service providers from any and all liability from suit, they should be protected from discovery to support a suit that stands no chance. But a rule precluding discovery prevents a victim from arguing that facts have changed so as to warrant reconsideration of the rule. Moreover, it further reduces victims' access to information about intermediaries.

VII. USING COMPARATIVE INSTITUTIONAL ANALYSIS TO IMPROVE PUBLIC POLICY

In the previous Part, I presented the history of the congressional immunity provision as a story of comparative institutional failure. Congress failed to recognize that courts were the preferred institution to devise a liability rule for intermediaries. Not surprisingly, it misstepped by passing an incomplete immunity provision meeting the concerns of the over-represented minority while leaving the under-represented majority with nothing. It further failed by including false rhetoric about the regulatory power of the market. That rhetoric might have seemed harmless, but it actually may have encouraged courts to over-accommodate the needs of intermediaries.³⁰¹ Perhaps most egregiously, courts saw their role in interpreting the provision as effectuating the one-sided balance produced by Congress's institutional infirmities. This Part suggests ways to harness the insights of comparative institutional analysis to prevent such failures in the future.

In the absence of a meta-institutional decision-maker, arguments must be addressed to the institutions themselves. The discussion will not consider arguments made to the market because it has no central consciousness. This Part will begin by considering ways to use the insights of comparative institutional analysis to improve the political process.

A. To Improve the Political Process

1. Pressure Congress to Abdicate or Defer

Comparative institutional analysis furnishes arguments for use by policy proponents, whether legal academics or other activists, to discourage Congress from acting when it is a disfavored institution.³⁰² In cases where either the courts or the market appears better situated to handle a legal conflict that Congress is considering, comparative institutional analysis can be used to discourage ineffective and even

301. See discussion *supra* Part VLB (reporting courts' reliance on the free market rhetoric in their interpretation of the immunity provision).

302. Congress often takes testimony from qualified experts and has heard from cyberspace experts and other legal academics when considering cyberspace legislation. For example, in a recent hearing concerning whether Congress should act in the area of cyberspace civil procedures, a committee heard from three professors of cyberspace law. See *Internet Issues Hearings*, *supra* note 38, at 5–10 (listing witnesses including Professors Dan L. Burk, Henry H. Perritt, Jr. and Jonathan Zittrain).

damaging legislative action.³⁰³ Congress's consideration of the immunity provision presented just such an opportunity.³⁰⁴ If Congress had been persuaded not to act in 1996, then courts would have been left to themselves to decide the intermediary liability question. I claim that they would likely have settled on a better approach than that which emerged from their interpretation of Congress's immunity provision.

While calls for restraint may not carry much weight on their own, they may dovetail with some legislators' other goals and provide enough impact to sway those at the margin. Though one must be skeptical about their likely impact, comparative institutional arguments will carry no weight if they are never made. At the least, when commentators use comparative institutional analysis in their consideration of cyberspace legal changes, they can refrain from recommending legislative solutions to those questions for which Congress appears ill-suited to act.³⁰⁵

When legislators feel compelled to act on a particular issue for which they are the disfavored institution, they may still be convinced to codify common law precedents rather than legislate out of whole cloth. Congress has already done this in other areas of the law.³⁰⁶ In the context of the case study, given the wide acclaim for the reasoning of the *Cubby* case, a strong argument could have been made in Congress that it should codify *Cubby's* approach and hold intermediaries to distributor liability.³⁰⁷ If Congress had responded to

303. See *supra* note 30 (discussing both minoritarian and majoritarian biases that compromise Congress's ability to legislate well).

304. Some commentators have argued, but not on comparative institutional grounds, that Congress should have refrained from determining the liability of intermediaries for defamation. See, e.g., Perritt, *supra* note 66, at 199–200 (recommending that Congress wait to legislate questions of intermediary liability and give case law a chance); Johnson & Marks, *supra* note 140, at 505–06 (recommending that legislators wait to regulate based on analogy between electronic commerce and the trucking industry); Kane, *supra* note 195, at 493–94 (positing that a better rule would have resulted if Congress had waited).

305. See Neil K. Komesar, *Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465, 473–74 (issuing a call to action to legal academics to conduct comparative institutional analysis); see also *supra* text at note 45 (discussing the tendency of legal academics to suggest legislative solutions whenever they favor cyberspace legal change).

306. See, e.g., *Peacock v. Thomas*, 516 U.S. 349, 354 n.5 (1996) (calling supplemental jurisdiction rules of civil procedure a codification of common law principles); Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 415, 479 (1999) (describing codification of common law of privilege).

307. Recall that even the *Stratton* court recognized the wisdom of the *Cubby* court. See *Stratton Oakmont, Inc. v. Prodigy Servs., Co.*, 1995 WL 323710, at *5 (N.Y. Sup. Ct.

such arguments, the resulting provision would have gone further to address the needs of future defamation victims as well as intermediaries.

As an alternative to pressuring Congress to codify past precedents when courts are the preferred institution, policy proponents could attempt to persuade legislators to incorporate into their laws a substantial role for judicial resolution of issues.³⁰⁸ In the case study context, Congress could have drafted a law that required interpreting courts to balance the interests of the various actors. An approach akin to that taken in the German Internet law, which required courts to consider a set of factors to determine the reasonable response to defamation in the case of each intermediary, would have been preferable to the immunity provision.³⁰⁹

Finally, when the market emerges as the appropriate institution to give content to a legal rule, appropriate arguments should be made to Congress. Although the case study does not involve one of them, there will surely be those contexts in which the market would be the preferred forum for allocating risks and responsibilities between affected parties.³¹⁰ In those contexts, arguments for congressional restraint or at least deference to market mechanisms would be warranted.

2. Redress Bias and Overreliance on the Market

One should not be unduly optimistic that Congress will respond to any of the arguments just suggested.³¹¹ In particular, no matter how compelling the arguments that Congress refrain from regulating in a particular area, if enough legislators have decided to do so, they are unlikely to be persuaded otherwise.³¹²

May 24, 1995).

308. See, e.g., Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533 (1983) (distinguishing statutory provisions that fail to address a question from those that direct courts to fill in their meaning).

309. A statute could have added real value by defining "intermediary" and resolving questions of choice of law, for example. See, e.g., S. 254, 106th Cong. § 1604(e) (1999) (conditionally requiring filtering or blocking software on "internet service provider[s]," which are defined as having more than 50,000 subscribers); see also *supra* text accompanying note 209 (discussing German law).

310. Such cases would include those in which each group's interests are larger than the relevant transaction costs. See KOMESAR, *supra* note 5, at 111.

311. One's optimism undoubtedly relates to what one believes will motivate legislators. See discussion *supra* Part IV.B.2.

312. See Rubin, *supra* note 161, at 477 ("It is genuinely difficult to determine . . . the extent to which scholars can usefully, or meaningfully, address rational recommendations

Fortunately, comparative institutional analysis can improve the process in other ways as well. Legal academics and other policy activists who identify information problems and diffuse interests can use the Internet's communicative power to educate the disparate majority about their true interests. Education efforts can reduce a diffuse majority's information costs, and thereby offset the imbalance of the skewed distribution. In a process Komesar colorfully labels "waking the dormant majority," a small group, or even an energetic individual, can catalyze the energy of the disparate majority and show them the need for action.³¹³ Such activism could increase majority pressure on Congress to do the proper balancing with which it is charged. Even without pressure from individual victims, policy advocates can threaten legislators with the bad press that would accompany charges that they were too beholden to concentrated special interests. In that way, journalists can provide relatively cheap information to majority members that increases their chances of taking action.

In fact, there are reasons to be optimistic about the positive impact of cyberspace technology on this process of increased political participation.³¹⁴ Much public information has been made available on the Internet, and it is now common for decision-making bodies to solicit public input online, particularly for issues concerning the Internet. As cyberspace communication channels provide cheap and readily accessible information, they increase the prospect of alerting the diffuse majority to its true interests.³¹⁵

In addition to offsetting the biases that plague Congress, comparative institutional analysis can alert policy proponents to the need to counteract Congress's undue faith in the market. By neglecting to adequately account for the inhibiting effect of transaction costs, many cyberlibertarians presume a functioning

to [governmental] agents.").

313. KOMESAR, *supra* note 5, at 70–74 & n.32, 82–84. The majority in the case study was a large class of potential victims, whose aggregate interest in imposing some liability exceeded the minority intermediaries' aggregate interest in avoiding it.

314. See generally KEVIN A. HILL & JOHN E. HUGHES, *CYBERPOLITICS: CITIZEN ACTIVISM IN THE AGE OF THE INTERNET* (1998) (reviewing both utopian and dystopian visions of the Internet's impact on politics, and concluding with cautious optimism); see, e.g., Cannon, *supra* note 100, at 70 (commending the use of cyberspace technologies by opponents of indecency regulation in 1995 and 1996).

315. See SHAPIRO, *supra* note 197, at 49–51 (discussing use of Internet to inform public about threats to online privacy and speech); KOMESAR, *supra* note 5, at 73, 79 (discussing how cheaply available information can alert the dormant majority to its interests).

market in contexts that are unlikely to support market deals.³¹⁶ When appropriate, academics should question cyberlibertarian claims that market transactions can resolve particular legal conflicts well. As I have shown, such rhetoric can make its way into law with pernicious effects.

B. To Improve the Judicial Process

Courts are not the meta-institutional decision-maker ideally required by comparative institutional analysis. They are limited in the scope of their activities and cannot simply allocate decision-making authority among the various institutions. But their relative independence and self-awareness make them the closest approximation our system has. The market's invisible hand does not respond to the analytical proposition but merely to its own tastes and preferences. Similarly, Congress never acts with one mind, and its irrationalities have been exhaustively documented.³¹⁷ Arguments that incorporate the insights of comparative institutional analysis would be best made to judges because they are the most likely to respond intelligently to them.

Those features of independence and cognition that make judges attractive targets of comparative institutional arguments also constrain their time and ability to conduct the analysis on their own.³¹⁸ Thus, academics must play a crucial role in ensuring that comparative institutional insights permeate the judicial process. Whether through amicus briefs, law review articles, or other means, academics interested in improving judicial decision-making and public policy generally have a real opportunity — particularly in the field of cyberspace law, where the current frequency with which judges are asked to resolve legal conflicts has increased the stakes significantly.

316. See, e.g., KOMESAR, *supra* note 5, at 29–30, 110–12.

317. See KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46–60 (2d ed. 1963) (laying out his impossibility theorem that proves irrationality of legislative outcomes); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988) (using social choice theory to demonstrate arbitrariness of majority rule); see also FARBER & FRICKEY, *supra* note 17, at 38–42, 47–62 (reviewing and critiquing literature of legislative incoherence).

318. See KOMESAR, *supra* note 5, at 125, 141–49. It is beyond the scope of this Article to consider judicial competence in more detail. For an interesting comparison of the relative competence of the judiciary and the legislature to handle the fact-finding required for cyberspace speech questions, see Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 58–61 MICH. L. REV. (forthcoming 2001).

The next section details the type of argument that should be made to courts.

1. Inform Statutory Interpretation

Courts should have been encouraged to construe the intermediary immunity provision narrowly by holding that it preserved distributor liability. Had they done so, AOL would have needed to petition Congress again to obtain more than the current legislation's explicit protection from publisher liability. If AOL and the other intermediaries had had to go back to Congress openly to request total immunity, the legislative process might have been less biased the second time around. It would have been costly for intermediaries to lodge an additional campaign in Congress. Also, as a result of either press or even academic coverage, potential defamation victims might have begun to appreciate their interest in preventing intermediaries from insulating themselves totally from lawsuits. Policy proponents might have alerted Congress to the propriety of including defamation victims' interests in their calculus, and individual legislators might have begun to fear the negative repercussions of offering legislative handouts to powerful intermediaries.

More generally, judges should use the insights of comparative institutional analysis when they interpret statutes, particularly those that are cyberspace-oriented. When minoritarian bias likely infects the legislative process, as in the case study, interpreting courts should approach the resulting statute skeptically. Specifically, they should interpret ambiguous or incomplete provisions strictly, against the interests of the over-represented group. Just as courts construe an ambiguous contract against its drafter,³¹⁹ they should view over-represented minorities as the legislation's drafters.³²⁰ In those cases in which Congress has not spoken clearly, the benefit of the doubt should be given to the under-represented group. Such an approach would force Congress to be explicit if it wants to make one-sided deals with over-represented groups. Courts would cease to see their

319. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981); E. ALLAN FARNSWORTH, CONTRACTS § 7.11, at 518–19 (2d ed. 1990).

320. Some view legislative history as the product of special interest groups and question its merit on that ground. See FARBER & FRICKEY, *supra* note 17, at 95–102 (describing and critiquing Justice Scalia's attack on use of legislative history). Others have described the actual process of statutory language drafting as one in which the interested parties duke it out. See, e.g., Litman, *supra* note 217. When only one party is at the bargaining table, it does not seem far-fetched to treat that party as the drafter of the statute.

role as effectuating such deals, and they would cease to exacerbate Congress's institutional infirmities, at least in cases in which Congress has drafted ambiguous or incomplete statutes.³²¹

On the other hand, courts should approach a piece of cyber-oriented legislation with much greater deference when comparative institutional analysis suggests that the legislative process is well-suited to resolving the issue at hand. In those cases, courts should use their other tools of statutory interpretation, without the additional comparative institutional gloss. Those rules generally promote straightforward implementation of clear provisions and an attempt to discern the legislative intent behind ambiguous text.³²² While discerning such intent is difficult, courts can have greater faith in those contexts that effectuating the goals of the statute will yield the best public policy. In summary, judges could and should make use of comparative institutional analysis to adjust the deference level of their statutory interpretation.³²³

2. Responding to Critiques

The suggestion that courts evaluate the decision-making process of the enacting Congress in their interpretation of resulting statutes is not new. In a series of articles in the 1980s, several scholars made similar suggestions based on the insights of the interest group theory of public choice. For example, Frank Easterbrook proposed that in interpreting "private-interest" rather than "general-interest" statutes, courts should hold Congress to the explicit terms of interest group bargains and narrowly construe ambiguous provisions against powerful interest groups.³²⁴ Jonathan Macey countered that, to

321. Courts have much less authority to stray from statutory text that is clear. See Sunstein, *Interpreting Statutes*, *supra* note 179, at 415 (labeling the view that courts should function as agents of the legislature when they interpret statutes as "the prominent conception").

322. See generally *id.* (cataloguing and critiquing tools of statutory interpretation).

323. A similar approach could be used when interpreting the work product of the market. In other words, a court faced with an institutional context characterized by high transaction costs and a diffusely spread interest ought to approach a negotiated solution with more skepticism than one agreed to in a setting that more closely matches the paradigm contracting case of arms-length negotiations between roughly equally matched parties. It is beyond the scope of this discussion to advance either a way to distinguish between those two cases or to discuss what tools courts might use in a skeptical contract review. See generally, Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111 (1999) (reviewing ways to read electronic contracts carefully in light of pending passage of the Uniform Commercial Information Transactions Act).

324. See Easterbrook, *supra* note 308, at 544-47; Frank H. Easterbrook, *Foreword:*

promote better public policy, courts should interpret statutes consistently with their stated public interest justification. Rather than having courts effectuate implicit concessions to special interests, Macey's approach would force Congress to be explicit about any such deals, which would likely discourage them.³²⁵ Finally, William Eskridge proposed grouping statutes into four categories based on the concentrations of those upon whom the legislation imposed costs and provided benefits. For those statutes that benefited a small group but imposed costs on a large group, Eskridge proposed strict statutory construction by courts.³²⁶

That the interest group theorists' proposals cohere with the above discussion reflects the debt that comparative institutional analysis owes to their insights. Nonetheless, as discussed in Part IV.B, the participation-centered approach transcends many of the limitations of the interest group model. Similarly, the extended model that I propose avoids many of the criticisms that have been lodged against the claim that courts should grant a greater role to interest group theory in their statutory construction.

Einer Elhauge presents the most thorough such critique in an article entitled, *Does Interest Group Theory Justify More Intrusive Judicial Review?*³²⁷ Elhauge makes three arguments relevant to this discussion: (1) that the proposal to enhance statutory review rests on a normative critique that interest group theorists do not admit, (2) that interest group theory adds nothing to what the normative critique counsels, and (3) that interest group theory provides no principled basis for determining when it is appropriate for judges to be aggressive in their statutory interpretation.³²⁸

Taking the first and second arguments together, Elhauge complains that interest group theory is based on normative assumptions that go unacknowledged. Specifically, he claims that

The Supreme Court, 1983 Term: The Court and the Economic System, 98 HARV. L. REV. 4, 15-19, 44-51 (1984).

325. See Macey, *supra* note 273.

326. See William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988). For scholars who praise Eskridge's approach, see, e.g., Rubin, *supra* note 120, at 58-61; Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 158 (1989).

327. See Elhauge, *supra* note 26. Others also critique the use of interest group theory in statutory interpretation. See JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 87-96 (1997); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995).

328. See Elhauge, *supra* note 26.

most interest group theorists view some kind of economic efficiency as the social policy goal, and that they criticize inefficient outcomes but celebrate efficient ones. They use interest group analysis, Elhauge complains, to dress up their efficiency arguments in seemingly non-normative descriptions of legislative bias, without making clear that a biased legislature is an inefficient one.³²⁹ Elhauge suggests that once the normative choice of economic efficiency is disclosed, one can evaluate the legislature's output without contending with interest group representation, if one merely considers the efficiency of the resulting statute. Moreover, he asserts that the language of interest group theory can mislead those who do not highly value efficiency into promoting it because they think that they are promoting the more neutral principle of fair representation.³³⁰

The extended approach to comparative institutional analysis I have advocated does not fall into the same trap that Elhauge identifies for interest group theory. I have made the normative choice underlying the analysis explicit in the selection of a social policy goal. Admittedly, I have used an approach based on efficiency-type concerns, but I could have chosen another social policy goal with which to consider institutional concerns. In any case, I did not hide the social policy goal in the comparative institutional analysis, so there is little danger of misleading the unsuspecting reader.

Comparative institutional analysis enhances the approach of interest group theory by considering how to achieve good policy in a new way. I have suggested that a complete analysis of a legal question will include both directly normative and comparative institutional analyses. But comparative institutional analysis generates insights about which institution will best achieve either the social policy goal, abstractly stated, or the legal rule, if that can be specified. Either way, one cannot say that merely determining the normative goal yields as much information as conducting the comparative institutional analysis. The question is not just whether Congress's final product is consistent with the normative goal, but rather whether another institution would have done a better job achieving that goal. The answer to that question can be provided only by comparative institutional analysis.

Elhauge's third criticism refers to the problem of judging institutional performance, particularly that of Congress. As discussed above in Part IV.B.3, comparative institutional analysis embodies a flexible and intuitive approach to institutional performance, based on

329. *See id.* at 49–59.

330. *See id.* at 53–55.

a normative vision of what it means for Congress to function well. According to the model, as I have elaborated it, improper influence refers to the level of influence that inhibits Congress's exercise of its civic republican role, according to which Congress ought to deliberate thoughtfully and take account of all relevant interests.³³¹ Comparative institutional analysis does not require absolute specifications of improper influence because, unlike interest group theory, it does not need to determine whether Congress has departed from an ideal in its deliberation. Instead, it must determine whether representational imbalances, intuitively measured, lead Congress to be more poorly situated than the other two institutions for resolving a question. Of course, sometimes the representational imbalances must be tolerated when the other two institutions seem even less able to resolve the question.³³² But when one institution, such as the courts in my case study, appears relatively unaffected by institutional infirmities, then it should be chosen over a Congress that exhibits a discernable bias. By asking relative rather than absolute questions, comparative institutional analysis can justify a more intuitive definition of legislative bias.³³³

Elhauge questions whether courts would be any better situated to resolve a legal question involving a skewed distribution, where a group with diffuse interests battles a group with concentrated interests.³³⁴ But Elhauge's concern frames the question the wrong way. For some legal questions, courts do not face the same distribution of interests as Congress does. For example, recall that the question of intermediary defamation liability will be litigated by intermediaries and actual rather than potential victims, and that actual victims, unlike potential victims, each have a high stake in the outcome. Although the analysis must be more intuitive than empirical, a court unimpeded by a mismatch in interests would seem to perform better than a Congress subject to a minoritarian bias.

In short, comparative institutional analysis avoids Elhauge's criticisms of interest group theory because of its nuanced discussion of normative goals and its analytically rigorous consideration of

331. See sources cited *supra* note 179.

332. See KOMESAR, *supra* note 5, at 174–75 (analyzing an environmental pollution case as one in which the diffuse class of both potential and actual victims suggests that the political process would fare better than litigation).

333. See Daniel A. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1565, 1579–80 (1995) (disagreeing with Elhauge's view that courts should not take a statute's special interest aspects into account).

334. Elhauge, *supra* note 26, at 66–83.

which groups participate in which institutions. While the analysis must retain an intuitive flavor, and while it should be used to supplement rather than totally displace explicit normative consideration of the issue, it is well worth doing. Its insights should be considered by any court faced with interpreting an ambiguous statute.

C. Courts and Legitimacy Revisited

There remain two aspects of legitimacy that need to be considered in light of the foregoing analysis. The first is that granting courts the power to be more aggressive in their consideration of statutes that emanate from a biased Congress could be taken to upset the constitutional separation of powers. The second is that for courts to conduct the comparative institutional analysis that should precede their aggressive statutory review, they will need to determine the social policy goal, a practice which could be viewed as providing courts too much discretion.

The answer to the first concern lies in the fact that the proposal is limited to courts' interpretation of ambiguous statutes. For those statutes whose language is clear, courts need not displace legislative judgment in the name of comparative institutional analysis. But when the statute is unclear, courts have no choice but to go beyond their role as mere agents of the legislature.³³⁵ There can be much disagreement about which tools of interpretation should be used, but all agree that interpretive techniques are necessary. Comparative institutional insights should be one of those interpretive techniques.

The second concern should give us more pause. Courts should not use comparative institutional analysis to justify their own policy-based usurpation of the legislative function. They may try to do just that by claiming as the social policy goal something controversial and then shaping their statutory interpretation to achieve it. In fact, one might characterize the *Zeran* decisions that way: the courts were concerned with the free speech harms from distributor liability and they construed the statute accordingly to rule it out.

The response is that the courts interpreting the immunity provision were not engaging in comparative institutional analysis. They justified their decisions on the basis of plain language and congressional purpose, not on the ground that they should be free to interpret an ambiguous statute in a way that minimized the gains made

335. See Sunstein, *Interpreting Statutes*, *supra* note 179, at 415-19.

by the over-represented group. In fact, any choice of social policy goal, even one that took explicit account of First Amendment concerns, would not likely change the fact that future defamation victims were poorly represented in Congress compared to intermediaries. Although it is not hard to imagine a court using concerns about free speech to immunize intermediaries from all liability, it is hard to imagine them doing so consistently with the approach advocated above. Comparative institutional analysis would require strictly construing the statute to limit intermediaries' gains, not effectuating a part of the deal that Congress did not enact in the statute.

Use of comparative institutional analysis in statutory interpretation is clearly less controversial in those cases in which the statute itself is ambiguous and the social policy goal relatively well-established. Those who mistrust judges may remain unwilling to recommend anything that give judge's greater freedom. The fact of judicial freedom is indisputable, however, and, judicial consideration of comparative institutional analysis could significantly improve law and public policy.³³⁶ Nonetheless, it should be clear that comparative institutional analysis should not be the only tool of interpretation that is used. It should be a technique considered by courts; policy analysts should therefore consider it in their recommendations.

VIII. CONCLUSION

In this Article, I have argued that comparative institutional analysis offers important insights for cyberspace legal policy. Using the determination of the defamation liability of intermediaries as a case study, I have demonstrated that Congress erred in deciding the issue itself, incompletely, while claiming to entrust the decision to the market, and that courts erred in exacerbating the minoritarian bias rather than counteracting it. The resulting legal rule of total immunity for intermediaries rather than distributor liability represents a failure of public policy and the poor resolution of a legal conflict.

I have further claimed that had the relevant institutional actors paid attention to comparative institutional analysis, they might have avoided some missteps. I have suggested ways for policy proponents to use comparative institutional analysis in the future to improve public policy. In particular, proponents can pressure Congress either

336. See KOMESAR, *supra* note 5, at 149 (calling upon courts to conduct comparative institutional analysis before deciding issues).

to refrain from acting or to codify a rule that defers to court or market resolution of an issue when appropriate. Proponents can try to minimize the distorting impact of bias in Congress by lowering the information costs to disfavored groups, and they can try to encourage Congress to take a realistic view of the market alternative. Additionally, proponents can urge courts to use comparative institutional analysis in their approach to statutory interpretation and, in appropriate cases, to increase their level of activism.

Courts are likely to resist calls for enhanced vigilance, particularly in the cyberspace arena, where they feel most at sea. Indeed, later courts that voluntarily adopted the faulty reasoning of the *Zeran* district court may have done so out of fear of using their own reasoning in the tricky area of cyberspace law.³³⁷ But the rapid changes of cyberspace technology, which accelerate the need for legal change, require that courts overcome their inhibitions and play an active role.

337. Recall that the *Zeran* appellate decision and the District of Columbia district court adopted the *Zeran* trial court's odd "plain language" interpretation of the statute, despite the fact that they had no obligation to defer to that court's legal conclusions. See discussion *supra* Part VLB; see also *Doe v. Am. Online*, No. SC94355, 2001 Fla. LEXIS 449, *45-46 (Mar. 8, 2001) (Lewis, J., dissenting) (accusing the courts that followed the *Zeran* court's reasoning of falling victim to the "Pied Piper effect").