

SPONTANEOUS DISORDER: THE PROTECTED SPHERE AND THE COMING WEB 3.0 AGE

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INTRODUCTION

This is a note about the Boaty McBoatfacing of America and why the Hayekian free market is ill-equipped to stop it. *Weird start*. Let me explain.

In 2016, the UK's National Environment Research Council was on the verge of christening a new polar research vessel — a fifteen-thousand-ton behemoth costing some two hundred million euros to construct.¹ Significant though the occasion was, however, the NERC decided to relinquish a sliver of its bureaucratic control. In a rare hiatus from central planning — and in admirable deference to the spontaneous order of the Brittanian masses — the Council announced that the ship's name would be decided by an internet poll.

After one day of voting, the eminently respectable "*RRS Sir David Attenborough*" stood atop the leaderboard in fitting tribute to a great British naturalist. But then a local radio host made a less reverent suggestion: the "*RRS Boaty McBoatface*." It was a joke, inspired by an obscure internet meme; three days later, it won in a 125,000 vote landslide. Comedic variants occupied the second and third positions; Sir David came in fourth.

The story has a happy ending; the NERC named the vessel after Attenborough anyway, but compromised by printing *Boaty McBoatface* on one of the ship's four miniature submarines. The remainder of 2016 was less quaint; three months later came Brexit, seven months later came President Trump, and years of unceasing hysteria followed. Offense became an industry; political discourse became either a shouting match or a carefully scripted corporate mating dance. Salt in a pandemic to further isolate and divide, and groups of live action roleplayers suddenly obtained the power to create a sovereign nation in the heart of Seattle and overtake the US Capitol. After a half-decade news cycle that could, itself, have been generated by internet poll, the New York Times saw fit to describe the foregoing era as "*The Boaty McBoatfacing of America*."² The joke wasn't funny anymore.

Florida and Texas have stopped laughing and started legislating, enacting novel state laws to wrest the Web. 2.0 internet from the private sphere and impose speech restriction via centrally-planned decrees. The present circuit split over these laws will invariably compel the Supreme

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¹ See '*Boaty McBoatface*' Polar Ship Named After Attenborough, BBC, (May 6, 2019), <https://www.bbc.com/news/uk-36225652>.

² See Jennifer Finney Boylan, *Trump and the Boaty McBoatfacing of America*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/28/opinion/trump-boaty-mcboatface.html>.

Court to consider positive arguments on the subject.³ This note will hew to some normative ones: that the internet age has created a world of “instant custom”; that said world is nihilistic, unsustainable and morally bankrupt; and that it erodes the conditions precedent for Hayekian deference to the spontaneous order over central planning. In so arguing, I’ll first pinpoint what these conditions are; I’ll then explain how the Web 2.0 internet impacts them. Finally, I’ll close with an eye towards the impending “Web 3.0” Metaverse and broadly sketch how our law must adapt to the closing of this next American frontier.

I. CONDITIONS PRECEDENT: THE HAYEKIAN PREMISES

The spontaneous order, coined and best articulated by economist F.A. Hayek, develops from a process of Darwinian natural selection — the best ideas persist, the others are outcompeted. But what conditions must be present before we can trust natural selection to outperform central planning? Hayek contemplates three such tacit conditions: that the competition be existential, that it occur organically without manipulation, and that it unfold gradually across generations. I will take these premises in turn, unpacking what they mean and explaining why each is logically necessary to the conclusion that the naturally selected custom will generally be more effective towards human flourishing than will centrally planned decrees.

First, for natural selection to produce effective results, the underlying competition must have existential stakes. It is not enough that custom be the “hard-earned result of trial and error”⁴; “error” must be sufficiently serious as to jeopardize a group’s survival.⁵ Absent such severity, evolutionary competition won’t be as fierce and mediocre strategies will have a greater chance of proving good enough for “persistence.”⁶ A Darwinian mechanism that allows persistence of mediocrity is a problem for Hayek, for, in his deference to tradition, he equates longevity with *effectiveness* — while natural selection, in the abstract, can only equate longevity with *success*. Hayek must provide the missing link between evolutionary success and objective effectiveness; if the stakes are low enough that what succeeds is not necessarily what’s most effective, he can’t. Tradition thus begins to seem less sculpted and more arbitrary, and “naturally selected” becomes more a description of custom than an advantage over central planning.

Second, the spontaneous order must develop organically — that is, the selection must actually be natural.⁷ Indeed, Hayek emphasizes the human mind as predominantly the product, and not

³ Compare *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1201 (11th Cir. 2022) with *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 491 (5th Cir. 2022). Judge Kevin Newsom, writing for the Eleventh Circuit, rejected arguments that Web 2.0 social media companies were “common carriers” in the vein of telecom services and thus ruled Florida’s law unconstitutional. Judge Andrew Oldham, writing for the Fifth Circuit, took the opposite position and upheld the Texas law. Beyond these positive law positions lies a normative policy debate about market efficacy.

⁴ FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 118 (University of Chicago Press 1960).

⁵ See FRIEDRICH HAYEK, *LAW, LEGISLATION AND LIBERTY* 18 (University of Chicago Press 1983) (“learning from experience’ . . . is a process of the . . . development of practices which have prevailed because they were successful . . . because they increased the chances of *survival* of the group to which [man] belonged.” (emphasis added)).

⁶ *Id.* at 18 (“What we call understanding is in the last resort [man’s] capacity to respond to his environment with a pattern of actions that helps him to persist.”).

⁷ See HAYEK, *supra* note 4, at 111 (quoting J.L. Talmon for the proposition that the British tradition of Hume, as compared with the French Rationalist tradition of Montesquieu, “stands for organic, slow, half-conscious growth.”).

the progenitor, of the social order around it.⁸ He constantly criticizes “plans men consciously contrive,”⁹ and dismisses centrally planned moral schemes as “synthetic.”¹⁰ Finding the natural selection method itself to be contrived or synthetic, then, would present yet another problem for Hayek; selection cannot be called natural where there is a breeder, lest socialism itself be considered a true Darwinian mechanism. This is, after all, why Hayek insists that care be taken in laying down generally applicable rules of conduct; the law necessarily tips the evolutionary balance by limiting the options that can be tried.¹¹ Such influence is to be expected from government and can be managed by checking ambition against ambition.¹² But when influence emerges from within the private sphere itself, Hayek can no longer assure the purity of the customs produced therein — nor can he explain why centralized influence by elected officials is worse in kind than influence by unelected private actors roaming free in the marketplace.

Lastly, the spontaneous order must develop slowly.¹³ Hayek often speaks of tradition as a process “gradually evolved”¹⁴ and handed down “from generation to generation.”¹⁵ A time horizon ranging “throughout the ages”¹⁶ is necessary to Hayekian deference because evolutionary flukes are possible; an ineffective custom can prevail by chance in a given generation — or even across a few — if circumstances are irregular or if alternative options are particularly weak. A nascent custom might actually be the product of less foresight than a carefully crafted central plan, and thus Hayek’s arguments lose force if longevity is not present.

II. CONDITIONS DECEDENT: HAYEK’S PREMISES IN THE WEB 2.0 ERA

The three premises underlying deference to natural selection — existential stakes, organic development, and gradual evolution — are under siege today. Two culprits — the internet and general complacency — account for this erosion and thus call modern custom into question. I will examine the decay of each condition precedent in turn — but first, a brief overview of the current landscape.

A. Overview

We are living in the “Web 2.0” era of the internet — distinguishable from “Web 1.0” in that more content is generated on the consumer end via social networking than on the producer end via web publishing.¹⁷ Twitter, Facebook, TikTok and the rest form an information ecosystem where everyone in the world may speak at once; ideas, like genetic mutations, are incubated, revised, and applied at historically unprecedented speeds. But the Web 2.0 ecosystem doesn’t

⁸ See HAYEK, *supra* note 5, at 45 (“[The] mind is as much the product of the social environment in which it has grown up — and which it has not made — as [it is] something that, in turn, has acted upon and altered these institutions.”).

⁹ F.A. HAYEK, *THE FATAL CONCEIT* 8 (W. W. Bartley III ed., University of Chicago Press 1991).

¹⁰ HAYEK, *supra* note 4, at 126.

¹¹ See HAYEK, *supra* note 4, at 315 (discussing the necessity of the private sphere).

¹² See generally F.A. HAYEK, *THE ROAD TO SERFDOM* 112-23 (1944).

¹³ See *supra* note 8.

¹⁴ HAYEK, *supra* note 4, at 128.

¹⁵ *Id.* at 121.

¹⁶ *Id.*

¹⁷ For reference, the Web 2.0 era began in roughly 2006 with the popularity of Facebook. See William L. Hosch, *Web 2.0*, *ENCYCLOPÆDIA BRITANNICA* (Sep. 7, 2017), <https://www.britannica.com/topic/Web-20> [<https://perma.cc/2SUJ-35WE>].

merely present ideas en masse — the content is too sprawling to fit on one screen. Rather, social networking platforms have to decide what to display, who to display it to, and when. They do so in two ways: aggregation and compartmentalization.

Aggregation begins with the broader universe of content; each tweet, video, image and the like — earmarked, of course, with hashtags for proper sorting — enters the ecosystem and receives interaction from users. Various metrics, from the number of likes on a picture to the amount of time for which a user watches a video, assess whether a piece of content performs well. Well-performing content gets shown to more users; poorly performing content is left to obscurity.

Compartmentalization operates from the user end. TikTok keeps track not just of your likes and shares but of which videos you watch all the way through and even of how long you hover over video thumbnails; it uses this data to create a feed consisting of only content that the user wants to engage with.¹⁸ Web 2.0 thus tends to silo individuals into informational echo chambers based on detected proclivities — chambers popularly referred to as “the Daily Me.”¹⁹ Note that some compartmentalization occurs before the user even creates an account as institutional guidelines and review boards on the platforms themselves discretionarily screen certain content out of the pool to begin with.²⁰

B. Analysis

The foregoing ecosystem has proven a fertile breeding ground not only for content but for custom. A spontaneous order unto itself, the social network continues to influence online and offline communications alike; cancel culture and hyperpartisanship have been two ubiquitous results.²¹ The internet is unquestionably a breeding ground for custom — but one distinct from the Hayekian model.

Hayek’s first premise — that competition be existential — is dubiously met in the Internet age. This problem takes root not in the internet but rather in national complacency: the average American, even in times of trouble, is still safer than the generations that developed our national traditions. Natural selection propagates whatever the successful group can get away with; it grades by curve, not rubric.²² In this way, a decadent Roman empire can decline for half a

¹⁸ See Shayna Hodkin, *The Internet of Me: Creating a Personalized Web Experience*, WIRED (last visited Apr. 7, 2023), <https://www.wired.com/insights/2014/11/the-internet-of-me/> [https://perma.cc/5R3E-EU7U].

¹⁹ As early as 1995 — the heyday of Web 1.0 — technology specialist Nicholas Negroponte prophetically referred to this proclivity for algorithmic siloing as “the Daily Me.” Cass Sunstein brought the term to legal popularity in 2002, wielding it as a premise for his assertion that “unanticipated, unchosen encounters and a range of shared experiences” are necessary for free expression. See Cass R. Sunstein, *The ‘Daily Me’*, N.Y. REV. (Apr. 25, 2002), <https://www.nybooks.com/articles/2002/04/25/the-daily-me/> [https://perma.cc/U3FE-QYXQ].

²⁰ Such internal rule systems — namely the Twitter rules and Facebook guidelines — have been the subject of controversy and litigation following the removal of many noted conservatives from major internet platforms. Of particular note is the ongoing litigation over a Florida bill aimed at penalizing partisan deplatformings. See *generally* NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021).

²¹ The term “cancel” itself began life as an internet meme — but sprouted legs as it became intertwined with viral partisan movements. See Christopher Brito, “Cancel Culture” Seems to Have Started as an Internet Joke. Now it’s Anything But., CBS NEWS (Apr. 5, 2021, 12:15 PM), <https://www.cbsnews.com/news/cancel-culture-internet-joke-anything-but/> [https://perma.cc/V84Y-QSXF].

²² This becomes particularly worrisome in the sphere of morality, which the Hume tradition is content to reduce, along with all other custom, to “the artifice and contrivance of man.” DAVID HUME, A TREATISE OF HUMAN NATURE 542 (Penguin Classics 1986).

millennium under a regime of subjective success before objective reality, at the tip of a Visigoth axe, lands the fatal blow.²³

Of course, the internet is an aggravating factor as Web 2.0 simultaneously facilitates an unprecedented compartmentalization of evolutionary competition. Communication via algorithm upends the long-standing customs that guided face-to-face human interaction during the six million year runup to Twitter; the “Daily Me” has engineered a world in which customs compete not in a general pool but in partitioned alcoves for tailored audiences. In a complacent nation lacking existential pressure on behavior, the average user has no urgent need to depart the warm bathwater of an echo chamber. Consequently, thousands of alcoves composed of similar Daily Me’s can form, each breeding its own bespoke set of customs insulated from competition with the rest.²⁴

Some of these alcoves will be radically political; they will go by QAnon and Antifa and manifest siloed groupthink into real-world harms. Others will simply be McBoatface-ish and silly; others merely strange, still others perverse.²⁵ “Success” in one alcove of Daily Me’s might resemble uncompromising rhetoric; in another it might be shock-value circus freakery.²⁶ While these alcoves surely existed in the past, the internet has given members unprecedented ability to meet one another, to isolate themselves from other alcoves, and to make a sustainable living catering specifically to their alcove.²⁷ The footnotes illustrate the breadth of moral and lifestyle decisions that can *persist* in the Daily Me economy; can we honestly call a process that admits all applicants “natural selection”?

Hayek’s second premise — that the selection process be organic — is also lacking in our current landscape. Artificial selection pervades the process, namely by artificial intelligence; indeed, the Daily Me is generated in cold, Kubrickian fashion by algorithms that influence the data points the user may consider and thereby limit the range of ideas that may compete for the user’s adherence. To be sure, any process of natural selection will be prone to some amount of compartmentalization — geography and distance can silo groups off as well but still be called organic.²⁸ But social network compartmentalization is different in kind as it partitions ideas not

²³ See Edward J. Watts, *Complacency—Not Hubris—Is What Killed the Roman Republic*, ZOCALO (Feb. 26, 2019), <https://www.zocalopublicsquare.org/2019/02/26/complacency-not-hubris-killed> [<https://perma.cc/8CXL-GTZW>].

²⁴ Hayek might rebut that these alcoves are merely akin to what he called “the horde, the tribe, or the clan,” which must necessarily be centrally governed. HAYEK, *supra* note 5, at 45. However, the “hordes” Hayek refers to differ from “Daily Me” alcoves in that the survival of a primitive horde was day-to-day — the competition it faced was fierce and existential. Today, the Daily Me alcove can avoid competition with other groups altogether. Whereas the horde was constantly self-analyzing under the pressure of domination, the alcove is self-validating in a vacuum.

²⁵ View at your own peril: <https://www.webmd.com/sex/what-is-furry-sex#> [<https://perma.cc/N5GM-UTQJ>].

²⁶ View only after eating: <https://www.youtube.com/channel/UCDwzLWgGft47x>. “Mukbang,” a viral Youtube genre featuring bouts of binge eating and regarded as a “fetish” by an internet community of several million users.

²⁷ Sometimes “sustainable” understates things; the mukbanger cited above makes \$420,000 a year from his content. That’s nearly double the salary of a tenured professor at Harvard Law School.

²⁸ These more organic sources of compartmentalization also limit the ranges of ideas those groups are exposed to and lead to lopsided clashes when a highly competitive ecosystem encounters the one that is not so. Economists Daron Acemoglu and James R. Robinson assess the geographic factors that contribute to evolutionary competitiveness, using the progress gap between the Renaissance Europeans and the indigenous Americans as a primary case study. See generally DARON ACEMOGLU & JAMES ROBINSON, *WHY NATIONS FAIL* (2012).

by random chance but rather deliberately, thus leaving the selection prone to the same cognitive blindness that might befall a central planner.

Eerie as algorithms are, however, it's perhaps more unsettling that social networks resort to flesh-and-blood central planning as well — and it's straight out of a Philip Hamburger nightmare.²⁹ Twitter, for example, has its own quasi-constitution — the Twitter Rules — which is fast outpacing the First Amendment as the most pertinent speech law in America. Twitter even apes the American system of government; when Donald Trump was removed from the platform in 2021, a “review board” released an opinion justifying the holding — citing to the Twitter rules just as a court would cite to statute. Of course, who comprises these review boards is anybody's guess; the Twitter rules mention no separation of powers. And even if Parag Agrawal had codified a Cokeian set of reforms a few months ago that purged the specter of arbitrariness from Twitter's administration, of what use would that be today with Elon Musk at the helm asserting a new prerogative? In the social media giants, the private sphere has produced its own tyrants — unelected ones at that — and their inorganic tampering has replaced the force of necessity as the crucible for new custom.³⁰

Hayek's final premise — that the selection process be gradual — is eviscerated by the internet age. Never before the Web 2.0 era has custom moved at such a rapid pace; views which fifteen years ago were mainstream have today fired workers from jobs, precluded candidates from office, and driven citizens from the graces of polite society. A cursory review of corporate solidarity tweets will reveal a ubiquitous speech code developed in under a decade.³¹ A touchstone event can affect a cultural shift overnight; tradition ignites at a single spark. This is far from the generational metamorphosis Hayek contemplated when he wrote that “moral rules for collective action are developed only with great difficulty and very slowly.”³²

Web 2.0 has made American custom vastly more reactionary,³³ such that norms can change before the majority of society has had the chance to adapt — which is problematic when the “consequences of collective decisions . . . will be beneficial only if they are all in conformity with common principles.”³⁴ Principles take time to become common. Hastily made principles are common only among the in-groups that generate them; everyone else plays catch-up. Rapid custom thus sketches a new set of boundaries within the private sphere — clear to some, hazy to others. This is especially pernicious given that the allocation of in-groups and out-groups is, itself, rapidly shifting; various alcoves of Daily Me's get to be “king for a day.” Here, central planning

²⁹ See PHILLIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 324-27 (The University of Chicago Press 2014).

³⁰ Another key example is YouTube, which abruptly removed the “dislike” feature from its platform in January. Users and creators alike complained that the decision removed a core metric for assessing the popularity and merit of content. The decision was permanent, unappealable, and altered the way the platform had functioned for nearly two decades. See Ben Kew, *YouTube's Removal of 'Dislike' Count is All About Protecting the Powerful*, EL AMERICAN (Dec. 3, 2021), <https://elamerican.com/youtubes-removal-of-dislike-button-is-all-about-protecting-the-powerful/> [https://perma.cc/MY5Z-EY6M].

³¹ See generally Jeff Beer, *Brands Have Something to Say About Racism. Why Does It All Look the Same?*, FAST CO. (June 2, 2020), <https://www.fastcompany.com/90511799/brands-have-something-to-say> [https://perma.cc/785X-F9RV].

³² HAYEK, *supra* note 5, at 129.

³³ One notorious example: <https://twitter.com/kamalaharris/status/1090361495119187969?lang=en> [https://perma.cc/4UZL-YLWG].

³⁴ HAYEK, *supra* note 5, at 129.

seems a desirable alternative; if there must be despots, we'd at least like to know who they are and how long we're stuck with them.

III. INTO THE METAVERSE: SOCIALISTS AND THE STATUS QUO AT THE NEW FRONTIER

"It would only be a slight exaggeration to say that, in the view of those British philosophers, man was by nature lazy and indolent, improvident and wasteful, and that it was only by the force of circumstances that he could be made to behave economically or would learn carefully to adjust his means to his ends."³⁵ For the sake of our country, we should pray that either those British philosophers were wrong or that Hayek's exaggeration is more than slight. I'm concerned that "circumstance," in our age, has lost a good amount of force. Middling ideas won't kill you — and neither will receiving a steady diet of them, selected rapidly by algorithm or central planner at the expense of any cogent dissent.

A principled Hayekian could rebut my arguments so far. For instance, I might be overstating the internet's influence; brainless zombified masses are for the movies — normal, working people remain as present in the real world as they've ever been. And insofar as the internet introduces trends, images, and ideas into the market that are genuinely harmful, why not let generally applicable criminal laws dispatch them? If all that remains after such a criminal purge is merely oddity, well, that's the price we pay for freedom — and, if relegated to specific alcoves, these oddities can hardly shape mainstream custom. I would give these rebuttals more credit if I didn't think that, in my lifetime, the root problems are going to get much worse. *Enter Web 3.0.*

Web 3.0 is essentially Web 2.0 but with instant blockchain transactions which will allow individual users to directly monetize their content as "non-fungible tokens."³⁶ An NFT is essentially a string of random letters and numbers that marks a piece of content as originally yours; blockchain will attach an automatically enforcing contract to that string and it will trigger each time a downstream user co-opts the piece of content the string is associated with. Middlemen depart the picture and peer-to-peer transaction costs decrease to the point that avatars in an online video game can profit among other avatars from their in-game likenesses and accomplishments.

At a glance, Web 3.0 sounds quite democratic. Indeed, blockchain would even allow users to convert their private data into NFT's — the very private data Facebook and Co. currently own and wield to create the Daily Me. This could, in theory, reinstate the "organic" premise to Hayek's equation and even boost competition as web users would be drawn into more diverse and direct interactions. However, Web 3.0 has to run through *some* platform; enter the Metaverse — an immersive, three-dimensional version of the Web 2.0 internet that essentially grafts internet infrastructure and economy onto an open-world video game with pleasant graphics. Mark Zuckerberg is already betting the lion share of his chips on his Metaverse being the Google of Web 3.0 — that is, the baseline interface by which these blockchain transactions will take place. As with Web 2.0, there's no way to make the Metaverse "video game" presentation sprawling

³⁵ HAYEK, *supra* note 4, at 121.

³⁶ See Henrique Centieiro, *The Insane Future of Web 3.0 and the Metaverse*, MEDIUM: DATADRIVENINVESTOR (Jan. 23, 2022), <https://medium.datadriveninvestor.com/the-insane-future-of-web-3-0-and-the-metaverse> [https://perma.cc/QDW7-48SY].

enough to display all data at once. Thus, as with Web 2.0, someone still must decide who sees what when — and Zuckerberg has just the fellow in mind.

Thus, the Web 3.0/Metaverse hybrid puts us in the same Hayekian jam as did Web 2.0 — but the scale will be larger. Indeed, Zuckerberg has gone on record that the Metaverse will be the “workplace of the future.”³⁷ Anyone who scoffs at the idea clearly didn’t conduct his entire 1L year over Zoom. And while the cartoonish graphics have gotten the Metaverse off to a lampoonably gimmicky start, there’s a reason America’s largest companies are flocking to purchase virtual real estate.³⁸ The graphics will get better; in twenty years when Musk unveils the Neuralink brain chip, they may just be staggering.³⁹

The Metaverse represents a virgin space with liberal property rights and a yet-unsettled hierarchy. Hayek’s writings don’t dwell much on these kinds of spaces — but his ideological opponents do. Herbert Croly — a founding father of American progressivism who was to the New Deal what Buckley was to the Reagan Revolution — called such spaces *frontiers*, and it was against their backdrop that he articulated perhaps the most cogent rebuttal to Hayek’s rule of law tradition. Written before Hayek in 1909 and presaging the legal crits, Croly’s *The Promise of American Life* was adamant that neutral, generally applicable rules were not neutral at all but rather implicitly biased in favor whichever groups were successful under the status quo.⁴⁰

Croly saw the world in black and white; each generation had a random allotment of weak and strong members.⁴¹ At the end of any given lifespan, the strong would always accumulate more resources than the weak and then inbreed so as to further concentrate the winnings. The weak would thus begin subsequent generations at a disadvantage and, so long as the laws are not specifically crafted to help the weak at the expense of the strong, that disadvantage would grow continually more insurmountable. But, to Croly, the weak can find rebirth at a frontier — a sparsely populated new territory wherein competition is either nonexistent or significantly less stiff than in the current setting. Thus, as the Europeans rushed to the newly discovered Americas and the Americans rushed to the newly acquired Louisiana territory, the comparatively weak of one place immigrate to another and reset the game.⁴² This, to Croly, is the sole condition precedent for Hayekian deference to custom and the rule of generally applicable laws; so long as the weak can move, the game is fair.

³⁷ See Mike Elgan, *Are We Destined to Work in the Metaverse?*, COMPUTERWORLD (Mar. 17, 2022, 3:00 AM), <https://www.computerworld.com/article/3653632/are-we-destined-to-work-in-the-metaverse.html> [https://perma.cc/9A4Y-FMGU].

³⁸ Disney, Warner Music, Bumble and others have already shifted assets into Metaverse planning. See *Companies Want to Build a Virtual Realm to Copy the Real World*, ECONOMIST (Nov. 13, 2021), <https://www.economist.com/business/2021/11/13/companies-want-to-build-a-virtual-realm-to-copy-the-real-world> [https://perma.cc/VR9W-M5B2].

³⁹ See Rupert Neate, *Elon Musk’s Brain Chip Firm Neuralink Lines Up Clinical Trials in Humans*, GUARDIAN (Jan. 20, 2022, 12:01 AM), <https://www.theguardian.com/technology/2022/jan/20/elon-musk-brain-chip-firm-neuralink-lines-up-clinical-trials-in-humans> [https://perma.cc/2NVT-34Q7].

⁴⁰ See HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 18 (where Croly uses the term “wilderness” interchangeably with the concept of “frontier.”).

⁴¹ Croly’s ideological compatriot Woodrow Wilson, of course, *literally* saw the world in black and white when it came to strength and weakness. But Croly, to his credit, was silent on race; thus, so as not to strawman the early socialists, we will stipulate on Croly’s behalf that “strong” and “weak” attributes bear no statistical correlations to superficial biology.

⁴² See CROLY, *supra* note 40, at 19.

But then a cataclysmic event occurs: the frontier dwellers hit a coastline.⁴³ Croly calls this the closing of a frontier; the weak have no place to go, and there's no more restarting the game. Now, presuming silent or generally applicable laws, the strongest players at the frontier will establish dominance and then reinforce it in perpetuity. Croly articulated these concepts at the fruition of the industrial revolution; factories rose, farms were increasingly corporatized, and the weak were captured in spirals of generational servitude.

Thus, with the "reset" button deactivated and the sole condition of customary deference severed, Croly railed against the rule of neutral, generally-applicable laws as a road to oligopoly, feudalism and, to borrow a phrase, serfdom.⁴⁴ To Croly, the Hayek and Hume tradition is short-sighted in that it is descriptively correct regarding a relatively short span of human existence — namely that between the discovery of the new world and the industrialization of America, likely the most consequential string of frontiers in world history. He would insist that this timeframe, while superficially long and immensely prosperous, is in fact an aberration in world history unlikely to repeat until, perhaps, Musk puts a man on Mars. For the rest of history, when frontiers are absent, the rule of law is, at the very least, a value judgment in favor of the current social order.

The Web 3.0 Metaverse has the makings of a Crolyan frontier — a nascent content market where new players, outcompeted in the brick-and-mortar world, can have a new lease on economic life. However, the Metaverse differs from gold rush era California in a salient way: the old-world strong are already there. Indeed, just as the spontaneous order generated a content oligopoly in Web 2.0, it's poised to allow an even greater consolidation of power in the potentially more omnipresent Metaverse — a gateway to sprawling private governance. Thus, this new frontier comes pre-closed; the same regimes that silo users into Daily Me alcoves and undermine the conditions precedent for a beneficial spontaneous order will come baked into the most omnipresent web space yet devised. Pre-parceled and pre-owned, it would be the first Crolyan frontier of its kind; at the current rate, generally applicable laws will give a handful of executives and their algorithms unprecedented control over a generation's lives.

IV. CONCLUSION: BETWEEN TWO SERFDOMS

I invoke the internet not as a means to cast aside Hayek and I invoke Croly not as a paean for a socialist utopia. Nothing in this paper has attempted to claim that the fatal conceit is neither conceited nor fatal; to be sure, central planners like Zuckerberg and Bezos have demonstrated a fair bit of that conceit themselves.⁴⁵ Rather, it's meant to show that the private sphere can lead to serfdom too — and appears to be doing so now. We must guide our ship between these two polar serfdoms by constantly asking a question that Hayek takes somewhat for granted: are we going to name the research vessel *Boaty McBoatface*? That is, is today's custom *good*?

⁴³ See CROLY, *supra* note 40, at 100.

⁴⁴ History tends to support this conception. Indeed, pre-Columbian Europe was uniformly feudal, and nobility persisted in England even as Magna Carta and rule of law tradition liberated the private sphere. The current American wealth gap is yet another data point that might give the pure Hayekian pause.

⁴⁵ See Douglas Blair, *Welcome to Mark Zuckerberg's New Dystopia: the Metaverse*, DAILY SIGNAL (Dec. 1, 2021), <https://www.dailysignal.com/2021/12/01/welcome> [<https://perma.cc/HUQ7-M3BN>] (one of many pieces to lambast the Facebook titan's pension for crafting well-intentioned dystopias).

This is a moral question — and the morals must be objective. “Moral” cannot simply mean “the code of conduct evolved back when the three natural selection premises were met.” Hayek claims that “norms cannot be judged according to whether they fit with other norms in isolation from facts because whether the actions which they permit are mutually compatible or not depends on facts.”⁴⁶ But this entails that yesterday’s morals were built on yesterday’s facts — and that if our group is still surviving amidst today’s facts, our current morals are demonstrably sufficient and beyond reproach. Insofar as this formulation circularly justifies whichever customs might predominate today, morality must refer to something more permanent.

And so the question stands: do we like the spontaneous order as it stands today? To conclude with only a hint of melodrama, I don’t just dislike it — I worry about bringing a child into it. It’s key to point out that all the problems discussed so far in this paper have dealt with internet custom among adults. But the internet is creating alcoves for any child whose parents happen to give them an iPad — and content creators have taken note. What trends with barely-conscious toddlers today isn’t Sesame Street; it’s videos like *this*⁴⁷ and *this*⁴⁸ — collections of deeply unsettling images designed to glue children’s eyes to the screen long enough for the autoplay function to queue the next video.⁴⁹ A generation of Americans has spent the better part of the last few years locked in their homes with this kind of content as an outlet⁵⁰; fears of the pandemic’s malsocializing effects are already widespread.⁵¹ People who discount the Web 3.0 Metaverse as a gimmick fail to realize that these children are the target demographic — and they’ve practically been living in it already.⁵²

I assert that Hayek didn’t foresee this world, and that I don’t think his worldview can handle it. The private sphere is producing bizarre, nihilistic, and morally bankrupt customs that cannot sustain human flourishing. The best case scenario Hayek can offer is that these customs eventually erode America and other nations similarly plagued so that an example may finally be

⁴⁶ HAYEK, *supra* note 5, at 101 (emphasis added).

⁴⁷ <https://www.youtube.com/watch?v=EGsnR4sKLN8> (there are thousands of “finger family” videos that teach children the vital skill of how to refer to each of their fingers. Many of these videos have amassed *billions* of views, and their motifs range from harmless and annoying to bizarre and off-putting — this link leads to the latter).

⁴⁸ <https://www.youtube.com/watch?v=-yKdVBOJxhg> (wouldn’t recommend clicking — just trust me, it’s *odd*).

⁴⁹ Infant children with iPad access can spend entire days watching autoplay videos. This TED talk from researcher James Bridle (my source for the videos above) describes the sort of content these autoplay algorithms prioritize — showing an audience how a wholesome video about a counting train can lead to a video entitled “Masturbating Mickey Mouse” in under ten autoplay cycles. See James Bridle, *The Nightmare of Childrens’ YouTube—and What’s Wrong with the Internet Today*, YOUTUBE (July 13, 2018), <https://www.youtube.com/watch?v=v9EKV2nSU8w>.

⁵⁰ During the pandemic, the average child between 4 and 8 spent at least 17% of his day watching Youtube; the platform is uniquely successful at attracting young viewers. See Brenna Hassinger-Das et al., *Children’s Reality Status Judgements of Digital Media: Implications for a COVID-19 World and Beyond*, 11 FRONTIERS PSYCH., Nov. 2020, at 2, <https://www.frontiersin.org/articles/10.3389/fpsyg.2020.570068/full> [<https://perma.cc/T8ZT-GFKY>].

⁵¹ See Katie Whitney, *A Different Struggle: What the Pandemic Is Doing to Kids and Teens*, MED. MICH. (Nov. 25, 2020), https://www.michiganmedicine.org/medicine-michigan/different-struggle-what-pandemic-doing-kids-and-teens?mc_cid=6f31deabe7&mc_eid=bfce8c5304 [<https://perma.cc/8742-QFZH>].

⁵² Fortnite, a third-person, avatar-based video game, has been considered an aesthetic forerunner to the coming Metaverse and is wildly popular among children. The game is a miracle of property law; practically all major film and TV characters — as well as celebrities generally — are playable avatars. Live events have also taken place in the game; a virtual avatar of rapper Travis Scott performed to an audience of over *twelve million* players during the pandemic — a promising sign for Metaverse entertainment. See Andrew Webster, *Travis Scott’s First Fortnite Concert was Surreal and Spectacular*, VERGE (Apr. 23, 2020, 8:17 PM), <https://www.theverge.com/2020/4/23/21233637/> [<https://perma.cc/M4SP-QKJT>].

made of these tendencies. That's *best case* — but the Web 3.0 problem will be *global*, such that there's a real chance that the status quo herein described becomes the standard of competition the world over. That's the real nightmare; frankly, I'd rather have America fall to the Chinese tomorrow than to have *this* be the equal footing on which the world stands.

Our government needs to start making some rules here and, if the status quo I've been describing sounds unpalatable, the rules can't apply equally to Mark Zuckerberg and my child alike. Rather, it must adopt a semblance of political morality that can stand apart from the tradition we're currently steeped in. While that morality is hotly debated at the margins, I think men know its general contours. Maybe they know it from generations of natural selection in a more competitive world; maybe they know it from someplace deeper. But they know it, and it's needed — otherwise I fear the current trajectory of our private sphere will yield McBoatface all the way down. *Netchoice* gives the Supreme Court the opportunity to find such saving power in our positive law as written; but, if the plain text won't bear the weight, amendments and additions to said text must promptly be made. There have been a few crossroads moments in our nation's history so vital to maintaining the republic that they have earned the title *new American founding*.⁵³ The dawn of Web 3.0 should be one of them.

To sum up, I think John Wayne said it best; the film is *Chisum*, Wayne is the titular cattleman, and he's addressing his compatriot James Pepper. "You know, there's an old saying," says Pepper, "there's no law west of Dodge, and no God west of the Pecos — right, Mr. Chisum?"

"Wrong, Mr. Pepper," Wayne replies, "because no matter where people go, sooner or later, there's the law. And, sooner or later, they find that God's already been there."

⁵³ The Reconstruction Era has frequently and deservedly been granted this title. See generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (W.W. Norton & Company 2020). Some scholars have approached the line of declaring the dawn of the Administrative State, occurring uncoincidentally during the closure of American Frontier, a *Third American Founding*. See generally CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (The Belknap Press of Harvard University Press 2020).