

**Trade 2.0**  
**Anupam Chander<sup>†</sup>**

I.	INTRODUCTION.....	281
II.	TRADE 2.0’S CHALLENGE TO LAW.....	286
A.	<i>Gambling in Antigua</i> (United States—Gambling).....	287
B.	<i>Boston Brahmins and Bangalore Doctors</i> .....	291
C.	<i>Yahoo in France</i> (LICRA v. Yahoo).....	293
D.	<i>Yahoo in China</i> (Wang v. Yahoo).....	297
III.	FREEING TRADE, WHILE PROTECTING LAW.....	299
A.	<i>Freeing Trade</i> .....	300
1.	<i>Technological Neutrality</i> .....	302
2.	<i>Dematerialized Architecture</i> .....	305
B.	<i>Protecting Law</i> .....	309
1.	<i>Glocalization</i> .....	311
2.	<i>Harmonization</i> .....	318
3.	<i>Do No Evil</i> .....	326
IV.	CONCLUSION.....	330

I. INTRODUCTION

The Silk Road linking the ancient world’s civilizations wound through deserts and mountain passes, traversed by caravans laden with the world’s treasures. The modern Silk Road winds its way through undersea fiber optic cables and satellite links, ferrying electrons brimming with information. This electronic Silk Road makes possible trade in services heretofore impossible in human history. Radiologists, accountants, engineers, lawyers, musicians, filmmakers, and reporters now offer their services to the world, without boarding a plane (or passing a customs checkpoint). Like the ancient Silk Road,

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<sup>†</sup> Visiting Professor, The University of Chicago Law School; Professor, University of California, Davis. Yale Law School, J.D. 1992; Harvard College, B.A. 1989. I am grateful to Susan Crawford, Tino Cuéllar, Harold Koh, Mark Lemley, Daniel Markovits, Adam Muchmore, Michael Reisman, Alec Stone Sweet, Madhavi Sunder, and commentators at the Berkman Center Cyberlaw Retreat, the Law and Globalization Seminar at Yale Law School, the Law, Science, and Technology Program at Stanford Law School, the Harvard-MIT-Yale Cyberscholar Workshop, and faculty workshops at the University of Connecticut, Emory University, Florida State University, Northwestern University, University of Oregon, UC Davis, UCLA, the University of Chicago, and Washington University (St. Louis) law schools. Thanks also to excellent research assistants Audrey Goodwater, Jessica Karbowski, Kathryn Lee, and Janice Ta, and needle-in-a-haystack librarian Erin Murphy. Special thanks to Connie Chan and Stratos Pahis for extraordinary editing.

which transformed the lands that it connected, this new trade route promises to remake the world.

This radical shift in the provision of services<sup>1</sup> becomes possible because of advances in telecommunications technologies. This is the rapidly growing phenomenon I call *net-work*—information services delivered remotely through electronic communications systems. Net-work encompasses not just the services outsourced to Accra, Bangalore or Manila, but also the online services supplied by Silicon Valley to the world. Apple, eBay, and Yahoo too are exporters of information services, revealing the Internet to be a global trading platform. Silicon Valley enterprises serve as the world's retailers, librarians, advertising agencies, television producers, auctioneers, and even romance matchmakers. These enterprises seek to become middlemen to the world. Half of Google's earnings are now generated overseas.<sup>2</sup> Once theorized as nontradable,<sup>3</sup> services now join goods in the global marketplace, allowing workers in developing countries to participate in lucrative Western markets despite immigration barriers and allowing Western enterprises to reach a global audience, often free of tariffs.

But the existing infrastructure of trade, developed over the centuries for a paradigm of goods, proves inadequate either to enable or to regulate this emerging Trade, version 2.0. The World Trade Organization (WTO) and regional arrangements such as the European Union, NAFTA, and Association of Southeast Asian Nations (ASEAN) commit nations to liberalize barriers to trade in services, but these broad mandates have found little elaboration to date. Net-work companies, lacking legal precedents or authoritative guidance, must innovate not only technological methods and business models, but also legal structures that span the globe. Net-work trade has yet to develop counterparts to the *lex mercatoria*, bills of lading, and conventions on contracting which emerged over centuries of experience with trade in goods.

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1. *The Economist* famously offers a quip, in lieu of a definition, for services, describing them as “[p]roducts of economic activity that you can’t drop on your foot.” *Economics A-Z*, ECONOMIST, <http://www.economist.com/research/Economics/alphabetic.cfm?letter=S#services> (last visited Apr. 18, 2009) (quoting MATTHEW BISHOP, *ESSENTIAL ECONOMICS* 239 (2004)). International trade agreements, including the General Agreement on Trade in Services (GATS) and the North American Free Trade Agreement (NAFTA), eschew a definition of services, and I will follow suit because a precise definition proves elusive. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 350 (3d ed. 2005) (noting a lack of “consensus within the economic literature” on the definition of services). Consider, for example, the issue of whether magazines are a good or a service—a question raised in a recent World Trade Organization dispute. Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, 17, WT/DS31/AB/R (June 30, 1997) (“[A] periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product—the periodical itself.”).

2. GOOGLE INC., 2008 ANNUAL REPORT 21 (2009) (“International revenues accounted for approximately 51% of our total revenues in 2008.”).

3. This view of services as not transmissible over long distances remained popular into the 1970s. See Jagdish Bhagwati, *International Trade in Services and Its Relevance for Economic Development*, in *THE EMERGING SERVICES ECONOMY* 3, 3 (Orio Giarini ed., 1987) (critiquing “haircuts view of services,” meaning services that “cannot be had long distance”).

Yet, the pressure on law from cyberspace trade is clear. Consider some recent transnational flashpoints: Antigua's WTO challenge to U.S. rules barring online gambling; the outsourcing of radiology to India; Brazil's demands to Google to identify perpetrators of hate speech; and an Alien Torts Statute suit charging Yahoo with abetting torture in China. Most recently, the United States complained to the WTO that Chinese state media controls on foreign movies, music (such as iTunes), and financial information violate free trade commitments.<sup>4</sup> These cases reveal the unsettled legal issues at stake in cyber-trade, from jurisdiction to protectionism, from consumer protection to human rights.

Ricardo's theory of comparative advantage applies, of course, to all trade, whether trade in goods or trade in information.<sup>5</sup> Services constitute an increasing bulk of human economic activity.<sup>6</sup> By 2007, the value of trade in commercial services was close to *three trillion dollars*, some one-fifth of all world trade.<sup>7</sup> Yet, for much of its history, the legal regime governing international trade neglected services in favor of liberalizing commerce in goods. But as Western economies became increasingly service-oriented, they began to recognize the opportunities for export in telecommunications, media, financial, and other services.<sup>8</sup> Their efforts in the Uruguay Round of trade negotiations

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4. See Request for Consultations by the United States, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1 (Apr. 16, 2007). The European Union, Australia, Japan, Korea, and Taiwan have reserved their rights in the dispute, and the WTO constituted a panel on March 27, 2008. Summary of the Dispute, WT/DS363, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds363\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm) (last visited Apr. 18, 2009). The United States and the European Union have also brought complaints against Chinese financial information regulations. Request for Consultations by the United States, *China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS373/1 (Mar. 5, 2008); Request for Consultations by the European Communities, *China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS372/1 (Mar. 5, 2008).

5. Jagdish Bhagwati, Arvind Panagariya & T.N. Srinivasan, *The Muddles over Outsourcing*, J. ECON. PERSP., Fall 2004, at 93, 112 (concluding that outsourcing, defined as services traded internationally at arm's length, has "effects that are not qualitatively different from those of conventional trade in goods" and "leads to gains from trade and increases in national income, with the caveats that are standard in this literature"). *But compare* Paul A. Samuelson, *Where Ricardo and Mill Rebut and Confirm Arguments of Mainstream Economists Supporting Globalization*, J. ECON. PERSP., Summer 2004, at 135 (arguing that changing terms of trade over the long term might result in real per capita income loss for a country like the United States), *with* Arvind Panagariya, *Why the Recent Samuelson Article Is NOT About Offshore Outsourcing*, [http://www.columbia.edu/~ap2231/Policy%20Papers/Samuelson%20JEP%20\(Summer%202004\)\\_Not%20on%20Outsourcing.htm](http://www.columbia.edu/~ap2231/Policy%20Papers/Samuelson%20JEP%20(Summer%202004)_Not%20on%20Outsourcing.htm) (last visited Apr. 18, 2009) (arguing that Samuelson misapplies changing terms of trade model to outsourcing).

6. WORLD BANK, WORLD BANK ATLAS 36 (2004) ("The service sector now accounts for two-thirds of global economic output.").

7. WORLD TRADE ORG., WORLD TRADE ORGANIZATION ANNUAL REPORT 2007, at 6 (2007).

8. Businessmen from three proudly "American" corporations—American Insurance Group, American Express, and PanAm—propelled the U.S. government in the 1970s to seek to liberalize

resulted—over developing country opposition—in the GATS, forming one pillar of the WTO established in 1995. GATS subjected services for the first time to the international trade regime’s far-reaching disciplines.<sup>9</sup> Regional arrangements go further still. The European Union has ambitiously declared a Single European Market, seeking “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.”<sup>10</sup> Both NAFTA<sup>11</sup> and the Central American Free Trade Agreement (CAFTA-DR)<sup>12</sup> require national treatment and market access for service providers across their respective regions. America’s new bilateral free trade agreements with Australia, Bahrain, Chile, Morocco, Oman, and Singapore all include broad obligations to liberalize services.<sup>13</sup> Southeast Asian nations have promised to create a free trade zone including services by 2012.<sup>14</sup>

The coming of international trade disciplines to services is fiercely contested. Some worry that liberalization will erode the wages or threaten the livelihoods of workers now forced to compete on a global stage.<sup>15</sup> Others see a gathering threat to law itself.<sup>16</sup> Will work be outsourced to jurisdictions without adequate legal protections? While there have been earlier eras of globalization, characterized by global flows of people, goods, and capital,<sup>17</sup> the globalization of services today poses a unique challenge to regulation: when individuals migrated to provide services, they could be expected to conform to the laws of their new home; but net-work enables individuals to provide services around the world without leaving their home jurisdiction. In such an environment, can nations still regulate services?

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trade in services. GEZA FEKETEKUTY, *INTERNATIONAL TRADE IN SERVICES: AN OVERVIEW AND BLUEPRINT FOR NEGOTIATIONS* 299-308 (1988).

9. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M. 1125, 1167 [hereinafter GATS].

10. Treaty Establishing the European Community art. 14, Nov. 10, 1997, 1997 O.J. (C 340) 3.

11. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1202, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

12. Dominican Republic-Central America-United States Free Trade Agreement, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar., arts. 3.2, 10, 11.1, 12.2, 12.3, 12.9(1), Aug. 5, 2004, 43 I.L.M. 514, available at [http://www.ustr.gov/Trade\\_Agreements/Regional/CAFTA/CAFTA\\_DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/CAFTA_DR_Final_Texts/Section_Index.html) [hereinafter CAFTA-DR].

13. See *infra* note 112 and accompanying text.

14. Associated Press, *Asean, U.S. Sign Agreement To Expand Trade and Investment*, Aug. 25, 2006, available at <http://www.trade.hochiminhcity.gov.vn/data/ttth/2006/20060830-nw-in-usaasian.htm> [hereinafter *Asean*].

15. See Jeff Fleischer, *Exporting America: An Interview With Lou Dobbs*, MOTHER JONES, Feb. 7, 2005, <http://www.motherjones.com/politics/2005/02/exporting-america-interview-lou-dobbs>.

16. See Public Citizen, *Offshoring and Privacy Protection*, <http://www.citizen.org/trade/offshoring/privacy> (last visited Apr. 18, 2009) (describing threats to privacy of Americans).

17. See generally Niall Ferguson, *Sinking Globalization*, FOREIGN AFF., Mar.-Apr. 2005, at 64 (2005) (describing “mobility of commodities, capital, and labor” at the turn of the twentieth century).

The critics' concerns cannot be dismissed as merely protectionism in disguise. The jurisdiction-hopping implicit in net-work carries serious risks. Consider Kazaa, the leading peer-to-peer file trading system, founded in the Netherlands by a Swede and a Dane, but programmed from Estonia, and now run from Australia and incorporated in the South Pacific nation of Vanuatu.<sup>18</sup> Or the online gambling site PartyGaming, which, from its headquarters in Gibraltar, manages computer servers on a Mohawk Indian reserve in Canada, a London marketing office, and a workforce based mainly in Hyderabad, India.<sup>19</sup> Of course, where regulation is oppressive and contrary to human rights, such evasion should be encouraged, not condemned. But for liberal democratic states, the ability to exploit the net to perform an end run around local law is deeply troubling. Left unattended, footloose net-work might imperil domestic laws, replacing local law with the regulation, if any, of the net-work provider's home state. I will argue that *the importing of services should not require us to import law as well*.

This Article proceeds as follows. Part II reviews recent flashpoints in cyber-trade, which demonstrate both the need to remove legal obstacles to cyber-trade and the need to protect the capacity of states to regulate themselves. Part III offers principles that seek to achieve this balance. Freeing cyber-trade will require a commitment to two principles: (1) a *technological neutrality* principle that rejects attempts to bar net-work simply on the grounds that it might allow some violations of local norms; and (2) a *dematerialization* principle by which states undertake to dematerialize the services infrastructure—that is, to make physical presence unnecessary for authentication, notification, certification, inspection, and even dispute resolution.

But the footloose nature of cyber-trade raises the specter of two races to the bottom: a deregulated world where service providers decamp to minimally regulated jurisdictions from which they supply the world; and an overly regulated world where some service providers eager to maximize revenues become complicit in state repression. To curtail the race to the deregulated bottom, I argue for legal *glocalization*—requiring a global service to conform to local rules when both the rules and their application to a particular transaction are consistent with international legal norms. Glocalization rejects protectionism, yet maintains local safeguards over culture and security; it helps resolve the dilemma of net-work, navigating between the Scylla of protectionism and the Charybdis of laissez faire. But will this assertion of local law tear apart the global web into local fiefdoms? International and domestic law constrain excessive extraterritoriality while international trade law counsels us to work towards global standards. Harmonization of standards will prove essential to advancing trade in cyberspace. To disrupt the race to the oppressive bottom, I argue that cyber-traders should establish ground rules to, at a minimum, *do no evil*. Given that authoritarian regimes function by

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18. See Todd Woody, *The Race To Kill Kazaa*, WIRED, Feb. 2003, at 104, available at <http://www.wired.com/wired/archive/11.02/kazaa.html>; Anupam Chander, *Next Stop, Kazaakhstan? The Legal Globe-trotting of Kazaa, the Post-Napster File Sharing Company*, FINDLAW'S WRIT, Oct. 24, 2002, [http://writ.news.findlaw.com/commentary/20021024\\_chander.html](http://writ.news.findlaw.com/commentary/20021024_chander.html).

19. Nils Pratley, *The Porn Princess, the Indian Computer Whizz and the Poker Bet That Made \$10bn*, GUARDIAN (London), June 3, 2005, at 3, available at <http://business.guardian.co.uk/story/0,,1498266,00.html>.

repressing information, information service providers will always be the locus of such repression—and the potential route for subversion.

## II. TRADE 2.0'S CHALLENGE TO LAW

Through the Khyber Pass or around the Cape of Good Hope, merchants have long made arduous journeys laden with the world's treasures. Trade law developed with such merchants in mind. Law accommodated trade conducted over the high seas, the Silk Road, and the Grand Trunk Road, not through undersea fiber or via satellite links. Trade depends on the legal environment in two crucial ways: first, the law must *dismantle protectionist legal barriers* erected through history (this is the standard focus of teaching and writing in international trade law); second, the law can facilitate cross-border trade by *erecting a legal infrastructure to reduce uncertainty* in international transactions (this is the standard focus of teaching and writing on international business transactions).<sup>20</sup> Let us label both features of the legal environment, taken together, the "Trade Plus" regime.

Both aspects of the Trade Plus regime need to be reevaluated in light of the burgeoning trade in services delivered through the ether.

Four recent controversies in cyber-trade help make plain the legal issues at stake in net-work trade. We consider here the following disputes: (1) the supply of gambling from Antigua to the United States; (2) the outsourcing of radiological services to India; (3) Yahoo's encounter with French laws barring Nazi memorabilia; and (4) an Alien Torts Statute suit charging Yahoo with complicity in Chinese political repression.

These case studies are instructive as to possible differences between Trade 1.0 and Trade 2.0.<sup>21</sup> The first conflict, over gambling from Antigua, reveals four points of pressure: (1) services may be more likely than goods to implicate local cultural norms; (2) "services . . . may be more footloose than relocated manufacturing activities because

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20. In his classic study, Douglass North suggests that "[t]he major role of institutions in a society is to reduce uncertainty." DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 6 (1990).

21. For alternative characterizations of the differences between trade in goods and trade in services, see MIROSLAV N. JOVANOVIĆ, THE ECONOMICS OF EUROPEAN INTEGRATION: LIMITS AND PROSPECTS 410-11 (2005), which described technical and social differences between trade in goods and trade in services, including the fact that women make up a higher percentage of the European workforce in services than in manufacturing; Jagdish N. Bhagwati, *Splintering and Disembodiment of Services and Developing Nations*, 7 WORLD ECON. 133 (1984), which outlines economic differences between trade in goods and trade in services; and Drusilla K. Brown, Alan V. Deardorff & Robert M. Stern, *Modelling Multilateral Trade Liberalization in Services* (Univ. of Mich. Sch. of Pub. Policy, Discussion Paper No. 378, 1995), available at <http://www.fordschool.umich.edu/rsie/workingpapers/Papers376-400/r378.pdf>, which identifies differences such as "the movement of factors internationally to permit onsite production of services, the perishability of services, the distinctive nature and size of transport costs in services, the role of traditional comparative advantage in determining patterns of services trade, and the embodiment and disembodiment of services into and out of goods."

of lower capital-intensity and sunk costs”;<sup>22</sup> (3) unlike goods, electronic services are difficult to control at border checkpoints; and (4) consumers now personally engage in direct cross-border trade in services more than they have in the past with respect to goods. The second case study, of radiology from Bangalore, raises yet more concerns: (1) outsourced services often involve the transfer of sensitive personal data; (2) the measure of the quality of a service often involves not just the appraisal of the outcome, but also the appraisal of the process by which the service was produced;<sup>23</sup> and (3) we lack experience in identifying and restraining tariff and nontariff barriers to trade in services; and (4) services employ white-collar professionals who have historically not faced widespread international competition. Yahoo’s conflicts with foreign hate-speech codes raise the question of whether a net-work provider need comply with the rules of all of the jurisdictions in which it operates, and whether the home jurisdiction should assist foreign jurisdictions in this task. Yahoo’s retreat from China shows how cross-border net-work providers’ enormous role in disseminating information can leave them vulnerable to demands to censor and surveil dissidents.

These characteristics raise pressing legal questions, some new to Trade 2.0 and some familiar to Trade 1.0. For example: How can we protect consumer privacy amid a worldwide dataflow among information processors? Can intellectual property be secured as it traverses the globe? If the outsourced process fails, who will be liable? Will the liberalization of trade in services require the dismantling of local certification and licensing requirements in favor of distant or global norms? Will the consumers of network have to rely entirely on whatever legal protections they might find across the globe in the home jurisdiction of net-work providers? More directly put, will Americans be left to the mercy of Antiguan law?

#### A. *Gambling in Antigua* (United States—Gambling)

There was a time when American adventurers booked passage to Havana to place a bet. Recognizing that it might offer betting without the tribulations of a Caribbean journey, Antigua set out a decade ago to “become the Las Vegas and Atlantic City of Internet gambling.”<sup>24</sup> Quickly, this island of seven working stoplights became the principal haven for computer servers offering gambling to Americans.<sup>25</sup> Other jurisdictions followed suit soon after. Spurred by an American entrepreneur, a Mohawk Indian community in Quebec set up computer servers on the banks of the St. Lawrence

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22. UNITED NATIONS, WORLD INVESTMENT REPORT 2004: THE SHIFT TOWARD SERVICES, at xxv (2004).

23. Cf. Kalypso Nicolaïdis & Susanne K. Schmidt, *Mutual Recognition “On Trial”: The Long Road to Services Liberalization*, 14 J. EUR. PUB. POL’Y 717, 719 (2007) (“[F]or services almost all regulations have to do with processes . . .”). For a typology of services by availability of metric for measuring performance, see Ravi Aron & Jitendra V. Singh, *Getting Offshoring Right*, HARV. BUS. REV., Dec. 2005, at 139.

24. Don Yaeger, *Bucking the Odds*, SPORTS ILLUSTRATED, Jan. 8, 2001, at R1.

25. *Id.* (“[A]n estimated 80% of all gaming URLs on the Web can be traced back to servers on the 108-square-mile island.”).

River—close to the American market and atop a “major fibre optic corridor.”<sup>26</sup> Its principal client was online gambling provider PartyGaming, established by an American lawyer and an Indian expatriate programmer and incorporated in the British overseas territory of Gibraltar.<sup>27</sup> PartyGaming grew into a multinational corporation listed on the London Stock Exchange once valued at two billion dollars.<sup>28</sup> In 2005, almost ninety percent of PartyGaming’s customers were in the United States, a country whose authorities “maintained that such gambling is illegal.”<sup>29</sup>

But these moneymaking paradises would not remain undisturbed for long. Relying upon a law enacted in 1961 to dismantle gambling operations run by organized crime, American prosecutors issued arrest warrants for online gambling operators. Then-Attorney General Janet Reno warned: “You can’t go offshore and hide. You can’t go online and hide . . . .”<sup>30</sup> One American expatriate entrepreneur, confident that because he ran his business from Antigua, where online gambling was legal, “[n]o judge is going to let [an arrest warrant against him] stand,” returned to the mainland to defend himself.<sup>31</sup> Jay Cohen would spend a year and a half in prison, perhaps ruining his bad bet.<sup>32</sup> For its part, PartyGaming would lose billions of dollars in market value when the United States enacted the Unlawful Internet Gambling Enforcement Act in 2006.<sup>33</sup>

Antigua responded to U.S. enforcement efforts like any country that found its exports hampered by legal restrictions elsewhere: it filed a claim against the United States before the WTO. Antigua’s claim, however, was novel: it was the first brought under GATS,<sup>34</sup> and the first to challenge barriers to trade via the Internet. Antigua argued that the requirement of physical establishment in certain specified zones in the United

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26. John Greenwood, *Billion\$ and Billion\$ Served*, FIN. POST BUS., Oct. 7, 2005, at 67.

27. Pratley, *supra* note 19.

28. Kurt Eichenwald, *At PartyGaming, Everything’s Wild*, N.Y. TIMES, June 26, 2005, § 3 (Sunday Business), at 1; Yahoo Finance, PartyGaming Stock Quote Summary, <http://uk.finance.yahoo.com/q?s=PRTY.L> (reporting market capitalization for PartyGaming as £971 million as of March 7, 2008). With the loss of the United States market after the Unlawful Internet Gambling Enforcement Act (UIGEA) in September 2006, the stock collapsed. Yahoo Finance, PartyGaming Share Price Chart, <http://uk.finance.yahoo.com/echarts?s=PRTY.L> (last visited Apr. 19, 2009) (showing precipitous drop in stock price upon passage of UIGEA).

29. Eichenwald, *supra* note 28.

30. Paul Blustein, *Against All Odds*, WASH. POST, Aug. 4, 2006, at D1.

31. *See id.*; Rebecca Leung, *Any Given Sunday*, CBS NEWS, Sept. 7, 2003, <http://www.cbsnews.com/stories/2003/09/04/60minutes/main571621.shtml>.

32. *United States v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001) (affirming conviction of Cohen for violating Wire Act by facilitating sports betting over the Internet). Fearing that a similar fate would befall her son should he return to the United States, the mother of Cohen’s business partner did not tell her son of his father’s death. *Life Online Means Being on the Lam*, DAILY NEWS (N.Y.), Mar. 26, 2000, at 102.

33. *See* 31 U.S.C.A. §§ 5361-5367 (Supp. 2007). Since the passage of the Act, PartyGaming has sought to bar American users. PARTYGAMING, 2005 ANNUAL REPORT 10 (2006). American authorities also arrested a number of online gambling executives from the United Kingdom who made the mistake of transiting through the United States. Carrie Johnson, *Crashing the Party*, WASH. POST, Feb. 3, 2007, at D1.

34. *See infra* note 113.



States ran afoul of the national treatment obligation by disadvantaging foreign providers.<sup>35</sup> Antigua further argued that the United States violated its commitment to provide market access to trade in “other recreational services.”<sup>36</sup> The United States protested that it never agreed to open up trade in gambling services, specifically excluding “sporting” from its liberalization commitment.<sup>37</sup> Canvassing a number of sources, the Appellate Body concluded that the United States had indeed committed to open up gambling services.<sup>38</sup> Controversy over whether a country committed to liberalize a particular service might seem awkward; after all, should not the parties to the trade agreement know what economic activities each side has agreed to liberalize? But because it is often possible to characterize a particular service in multiple ways, some liberalized and some not, this most basic of disputes (is there a liberalization commitment?) will prove a consistent thorn in the side of net-work. More importantly, changes in tradability make possible cross-border competition in services that nation-states may not have anticipated when they committed to liberalization.

The United States argued that, even if it had committed to liberalize gambling, it had met its obligations. After all, Antiguan corporations were welcome—like any American national—to provide gambling to Americans, as long as they set up shop in Las Vegas or another permissive American jurisdiction.<sup>39</sup> The United States also insisted that, because of their differing consumer experiences and regulatory risks, offline gambling and online gambling were two distinct services, and thus opening up one and not the other did not effectively deny national treatment. Moreover, the market access requirement, the United States argued, did not bar a *total* prohibition on a particular service.

Seized of the dispute, the WTO’s Appellate Body confined its analysis to the market access complaint, finding it unnecessary to resolve the national treatment complaint. The United States argued that its rules against online gambling were merely rules regulating the form or manner in which services are delivered, not quantitative constraints on services or suppliers.<sup>40</sup> Under this reasoning, the United States would meet

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35. See Appellate Body Report, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004) [hereinafter *Mexico—Telecommunications Services*].

36. See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 5, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *United States—Gambling*].

37. *Id.* ¶ 14.

38. *Id.* ¶ 373.

39. Executive Summary of the Second Written Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 26, WT/DS285 (Jan. 16, 2004), available at [http://www.antiguawto.com/wto/22\\_US\\_Exec\\_sum\\_2nd\\_Written\\_Sub\\_16Jan04.pdf](http://www.antiguawto.com/wto/22_US_Exec_sum_2nd_Written_Sub_16Jan04.pdf) (“Antigua has not offered evidence of any restriction that would stop its suppliers from supplying their services by the same non-remote means available to domestic suppliers. Hence there is no national treatment violation.”).

40. Executive Summary of the Appellant Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 21, WT/DS285 (Jan. 14, 2005), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file656\\_5581.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file656_5581.pdf).

its market access commitment for a service even if it barred the provision of that service online entirely. The Appellate Body, however, held that a blanket prohibition operated as a “zero quota,” and thus presented a quantitative restraint prohibited by the market access commitment.<sup>41</sup>

GATS, however, permits derogation where “necessary to protect public morals or to maintain public order.”<sup>42</sup> This clause serves as a crucial regulatory safety valve, ensuring that liberalizing commitments do not unintentionally jeopardize important local public policies. The Appellate Body accepted the American contention that the restraints on online gambling were necessary to protect concerns related to “(1) organized crime; (2) money laundering; (3) fraud; (4) risks to youth, including underage gambling; and (5) public health.”<sup>43</sup> Gambling via the Internet posed special concerns: “(i) the volume, speed and international reach of remote gambling transactions; (ii) the virtual anonymity of such transactions; (iii) low barriers to entry in the context of the remote supply of gambling and betting services; and the (iv) isolated and anonymous environment in which such gambling takes place.”<sup>44</sup> The Appellate Body agreed that the “distinctive characteristics of the remote supply of gambling services may call for distinctive regulatory methods.”<sup>45</sup> But the United States stumbled on an inconsistency: U.S. law “authorizes *domestic* service suppliers, but not *foreign* service suppliers, to offer remote betting services in relation to certain horse races.”<sup>46</sup> With the United States stubborn in its resistance to resolving this inconsistency, the WTO granted Antigua the right to retaliate by suspending Antigua’s TRIPS obligation to respect U.S. intellectual property rights in an amount corresponding to the estimated lost revenues from online horse-racing.<sup>47</sup> Antigua can now truly become a Pirate of the Caribbean.

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41. *United States—Gambling*, *supra* note 36, ¶¶ 251-52.

42. GATS, *supra* note 9, art. XIV(a) (making an exception for measures “necessary to protect public morals or to maintain public order”); *id.* art. XIV(b) (making an exception for measures “necessary to protect human, animal or plant life or health”).

43. *United States—Gambling*, *supra* note 36, ¶¶ 283, 323-27.

44. *Id.* ¶ 323 (internal quotations omitted).

45. *Id.* ¶ 347.

46. *Id.* ¶¶ 361, 364, 371.

47. Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 4.118-4.119, WT/DS285/ARB (Dec. 21, 2007); *see also* Gary Rivlin, *Gambling Dispute With a Tiny Country Puts U.S. in a Bind*, N.Y. TIMES, Aug. 23, 2007, at C1. Antigua sought a far greater amount as a sanction—equaling the lost revenues from the entire online gambling sector, not just the small fraction of it devoted to horse racing. Indeed, it remains unclear whether the United States could have complied with the WTO appellate body decision by simply inviting Antiguan companies to supply online horserace gambling services. I would argue that that would have been insufficient unless the United States could have shown that online gambling with respect to horseracing was somehow far less prone to the vulnerabilities allegedly afflicting other forms of online gambling.

B. *Boston Brahmins and Bangalore Doctors*

In hospitals around the country, yesterday's photographic film is giving way to today's digital imaging.<sup>48</sup> Digitization of medical images facilitates review, reproduction, archiving, and error checking, while enabling computer enhancement and speeding retrieval.<sup>49</sup> Digitization also permits radiology, once confined to review of films slapped atop lit boards in medical offices, to be conducted from a computer in the home or across the world—"anywhere with broadband access."<sup>50</sup> Crucial to this possibility is the standardization of communications and semantic protocols, which enable digital images produced on one system to be accurately stored, communicated and interpreted across different hardware platforms.<sup>51</sup> Indeed, manufacturers, professional societies and other interested parties have developed the Digital Imaging and Communications in Medicine standard (DICOM) for radiological data. One radiologist who supplies his services to the United States from Bangalore, reports: "You can't reach over and slap [the radiologist] on the back, but every other aspect of the interaction is preserved."<sup>52</sup>

Hospitals now regularly outsource their nightshift radiology across the world "to be read by doctors in the light of day."<sup>53</sup> New firms have sprung up, responding to a "shortage of U.S. radiologists and an exploding demand for more sophisticated scans to diagnose scores of ailments."<sup>54</sup> One firm established in Idaho in 2001, listed its stock on Nasdaq in 2006 and now has a market capitalization of some eighty million dollars.<sup>55</sup> This firm, NightHawk Radiology, sends images from United States hospitals to be read by physicians, principally to Sydney. Another leading provider, Teleradiology Solutions, transmits images from United States hospitals to be read by physicians principally in Bangalore.

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48. See James H. Thrall, *Reinventing Radiology in the Digital Age: Part I. The All-Digital Department*, 236 *RADIOLOGY* 382 (2005).

49. Emma Wilkinson, *X-ray Technology in the 21st Century*, BBC NEWS, May 30, 2007, <http://news.bbc.co.uk/2/hi/health/6700847.stm>.

50. James Brice, *Globalization Comes to Radiology*, *DIAGNOSTIC IMAGING*, Nov. 1, 2003, at 70.

51. See NIGHTHAWK RADIOLOGY HOLDINGS INC., 2005 ANNUAL REPORT 5 (2006) ("The advent of the Digital Imaging and Communications in Medicine, or DICOM, standard for transferring images and associated information, high-speed broadband internet connections, digitization and picture archival and communication systems, or PACS, has contributed to increased utilization of diagnostic imaging technologies by permitting radiologists to practice remotely.").

52. *International Teleradiology*, 354 *NEW ENG. J. MED.* 662, 662 (2006) (quoting Dr. Arjun Kalyanpur of Teleradiology Solutions).

53. Dawn Fallik, *The Doctor Is In—But Not in U.S.*, *PHILA. INQUIRER*, Oct. 12, 2004, at A1.

54. Lindsey Tanner, Associated Press, *U.S. Doctors Turn to Outsourcing To Help Diagnose Ills*, *SEATTLE TIMES*, Dec. 6, 2004, at A1, available at [http://seattletimes.nwsources.com/html/health/2002110413\\_outsource06.html](http://seattletimes.nwsources.com/html/health/2002110413_outsource06.html).

55. Yahoo Finance, Nighthawk Radiations Holdings, Inc., <http://finance.yahoo.com/q?s=nhwk> (last visited Apr. 16, 2009) (revealing a market capitalization of \$81 million).

But can a patient trust a doctor who lives in a different hemisphere? As one reporter asks, “Will a radiologist on another continent be as easily held liable?”<sup>56</sup> Can private medical records be protected as they travel around the world? How can the patient be assured that the foreign radiologist is adequately trained? The major providers of such services have sought to allay some of these concerns. They hire only radiologists certified by the American Board of Radiology and licensed to practice in the United States.<sup>57</sup>

It was precisely the absence of such qualifications that foiled the most technologically sophisticated version of cross-border teleradiology, a service offered by the Indian outsourcing giant Wipro. Wipro brought its considerable computing talents to the project, going far beyond the simple transmission of images and the return transmission of a report. That service, tested in collaboration with Massachusetts General Hospital, permitted Wipro’s Bangalore radiologists not just access to the images of the patient taken that day or night,<sup>58</sup> but the ability to “download prior studies, reports, and patient history with as much ease as if they were working in an MGH reading room in Boston.”<sup>59</sup> But Wipro failed to attract U.S.-licensed radiologists to Bangalore, and thus its radiologists were not certified to read patient images. Furthermore, Medicare and certain state Medicaid programs only reimburse radiology interpretation services performed within the United States. Wipro thus restricted its experiment to collaboration between Indian and U.S. radiologists where the U.S. radiologist would perform the final interpretation.<sup>60</sup> But even this collaboration drew public furor, and Wipro retreated.<sup>61</sup>

Neither restricting the supply of radiological services to U.S.-*licensed* providers, nor requiring review by U.S.-*based* radiologists resolves all concerns about fraud, privacy, and the quality of care.<sup>62</sup> Both the Nighthawk Radiology and the Wipro models need a legal framework that simultaneously avoids “Buy American” government procurement constraints, protects privacy across borders, and puts doctors and companies on the hook for malpractice even to patients in other hemispheres—in other words, a legal framework that both liberalizes trade and protects consumers.

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56. Rob Stein, *Hospital Services Performed Overseas: Training, Licensing Questioned*, WASH. POST., Apr. 24, 2005, at A1.

57. See, e.g., Teleradiology Solutions, Legal/Licensing, <http://www.telradol.com/legal.html> (last visited Apr. 18, 2009) (indicating “[A]ll interpreting staff for US hospitals are ABR-certified radiologists”); Nighthawk Radiology Services, <http://www.nighthawkrad.net> (last visited Apr. 18, 2009) (repeatedly stating that its staff consists of “U.S. board-certified, state-licensed, and hospital-privileged physicians”).

58. The norm in teleradiology is that the teleradiologist lacks prior patient data. Robert Steinbrook, *The Age of Teleradiology*, 357 NEW ENG. J. MED. 5, 7 (2007) (“A teleradiologist will often have no information about the patient beyond that contained in the study requisition.”).

59. Brice, *supra* note 50.

60. Andrew Pollack, *Who’s Reading Your X-Ray?*, N.Y. TIMES, Nov. 16, 2003, § 3 (Sunday Business), at 1.

61. See Stein, *supra* note 56.

62. In Part III, I suggest that we might borrow from European approaches to privacy protection and introduce cyber-tribunals to resolve any disputes that may arise.

C. *Yahoo in France* (LICRA v. Yahoo)

Companies like Yahoo and Google provide platforms for people to communicate, whether for discussing politics or sports, selling goods or services, or, on occasion, facilitating crime. The fact that both of these companies are based in the United States, where freedom of speech is especially broad, has sometimes caused them to test—and cross—the limits of speech in other jurisdictions, which might more broadly proscribe certain speech categories. The next two cases I describe—Yahoo in France and Yahoo in China—help demonstrate the conflicts of law that can arise in net-work.

Yahoo's encounter with French laws barring Nazi paraphernalia produced perhaps the most elaborate judicial consideration to date of the potential conflicts of law arising from net-work. Yahoo's efforts to provide information services to France *from the United States* produced a clash of two legal cultures—one cherishing free speech and the other protecting against racist and anti-Semitic speech. The conflict drew a sharp response from both sides of the Atlantic. The French judge in the case declared Yahoo “the largest vehicle in existence for the promotion [of] Nazism.”<sup>63</sup> Yahoo's lawyer decried what he perceived to be the “French imperialism” implicit in a Parisian court order against Yahoo's California-based enterprise,<sup>64</sup> and some federal judges in the United States would declare efforts to enforce that order as unwarranted extraterritorial intrusions of French law into the United States.<sup>65</sup>

Yahoo, of course, operates from a country with broad constitutional protections against state infringement of speech. The terrifying histories of other lands, however, have led them to bar certain types of speech.<sup>66</sup> Like many countries across Europe, French laws bar speech invoking or glorifying Nazism.<sup>67</sup> More specifically, the French

63. This is Judge Ferguson's translation of “la plus grande entreprise de banalisation du nazisme qui soit” in Judge Gomez's May 22, 2000 order. *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 1199, 1227 (9th Cir. 2006) (Ferguson, J., concurring) (quoting *Union des Etudiants Juifs de France & Ligue Contre le Racisme et L'Antisemitisme v. Yahoo! Inc. & Yahoo France*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000 (Fr.) [hereinafter *LICRA-May*], available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>, available in English at <http://www.lapres.net/yahen.html>).

64. Before the French court, Yahoo's lawyer declared that any attempt of the French court to regulate the American enterprise's U.S.-based .com website would amount to “French imperialism.” Greg Wrenn, *Yahoo! v. Licra*, COMM. LAW., Fall 2006, 5, 6 (2006), available at [http://www.abanet.org/forums/communication/CommLawyv24\\_3.pdf](http://www.abanet.org/forums/communication/CommLawyv24_3.pdf).

65. See *Yahoo! Inc.*, 433 F.3d at 1234-35 (Fisher, J., concurring in part and dissenting in part).

66. “The display . . . of NAZI objects . . . constitutes an offense to the collective memory of the country profoundly damaged by the atrocities committed by and in the name of the Nazi criminal enterprise against French citizens and above all against citizens of the Jewish faith.” *LICRA-May*, *supra* note 63.

67. German laws criminalize insults against members of groups persecuted by Nazis or other totalitarian systems. ERIC M. BARENDT, FREEDOM OF SPEECH 180 (2005).

Penal Code “declares it a crime to exhibit or display Nazi emblems.”<sup>68</sup> Yahoo provides a number of services that potentially run afoul of this law: its search engine services allow people to locate the websites of Holocaust deniers; its Geocities webpage service allowed someone to post *Mein Kampf* and the *Protocols of the Elders of Zion*; and its auction services, which match buyers and sellers around the world, permit the traffic of material glorifying Nazism. In April 2000, the International League Against Racism and Anti-Semitism (LICRA) filed a complaint in a Parisian court seeking to enjoin Yahoo from hosting auctions featuring Nazi material.

In May 2000, Judge Gomez of the Paris *Tribunal de grande instance* offered his first interim ruling, ordering Yahoo to “take all measures to dissuade and make impossible any access by a surfer calling *from France*” through Yahoo.com to the disputed sites and services.<sup>69</sup> Yahoo insisted that this was technically impossible because the nature of the Internet left it unable to deny access to French citizens without simultaneously denying access to Americans. Yahoo sought, undoubtedly, to place itself within an earlier precedent, a case in which a French Superior Court judge had ruled that “since it was technically impossible to block or filter foreign-based Internet sites, the nine ISPs could not be held criminally or civilly liable for objectionable United States-based content accessed by French citizens.”<sup>70</sup> Responding to Yahoo’s claim of technical incapacity, Judge Gomez appointed an international expert panel to determine whether Yahoo could identify French web users in order to deny them certain content. The panel concluded that technological means known as “geolocation” allowed “over 70% of the IP addresses of surfers residing in French territory [to] be identified as being French,” and two of the three panelists suggested that asking surfers to declare their nationality would raise the success rate of identifying French residents to approximately 90%,<sup>71</sup> (though this latter opinion seems more appropriate for sociologists than computer experts to make).

This was sufficient for Judge Gomez, who ruled that “effective filtering methods” were available to Yahoo.<sup>72</sup> Note that Judge Gomez did not rule that French law required Yahoo to desist from making Nazi material available to French persons regardless of the effect on United States users. He first established (at least to his own satisfaction) that Yahoo could specifically deny French residents access to the material without removing it more generally. Of course, Judge Gomez believed that a “moral imperative” should

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68. *Yahoo! Inc.*, 433 F.3d at 1219.

69. *Id.* (citing *LICRA-May*, *supra* note 63).

70. Lyombe Eko, *New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet*, 28 LOY. L.A. INT’L & COMP. L. REV. 69, 72 (2006).

71. *Ligue Contre le Racisme et l’Antisémitisme & Union des Etudiants Juifs de France v. Yahoo! Inc. & Yahoo France*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000 (Fr.) [hereinafter *LICRA-November*], available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>, available in English at [http://www.eff.org/legal/Jurisdiction\\_and\\_sovereignty/LICRA\\_v\\_Yahoo/20001120\\_fr\\_int\\_ruling.en.pdf](http://www.eff.org/legal/Jurisdiction_and_sovereignty/LICRA_v_Yahoo/20001120_fr_int_ruling.en.pdf).

72. *Id.*

motivate Yahoo to remove this material universally, but he did not order this.<sup>73</sup> Rather, his order was carefully drawn to deny access only to those within France. Judge Gomez's approach thus reflects the international law principle of comity—here, specifically, respect for the wide ambit given to speech within the United States. As we will see in Subsection III.B.1, the practicalities of the order might well compromise speech in the United States, but the court took some pains to satisfy itself that this was not the likely result.

Not only did Yahoo face an injunction and a penalty of, at first, €100,000 (later reduced to 100,000 francs) per day, but both the company and its American CEO also faced criminal charges. In 2001, prosecutors, acting on a complaint by groups concerned about racism and anti-Semitism,<sup>74</sup> brought charges against Yahoo and its CEO Tim Koogle for “justifying a crime against humanity” and “exhibiting a uniform, insignia or emblem of a person guilty of crimes against humanity,”<sup>75</sup> crimes punishable by up to five years in jail for Koogle and fines of €45,735.<sup>76</sup> The charges arose from the same facts underlying the earlier civil action. In 2003, in the criminal case, the Court held that it had jurisdiction in this criminal case, but acquitted the defendants based on a lack of evidence that the defendants had praised Nazi atrocities.<sup>77</sup> Koogle's acquittal was upheld on appeal in 2005 on the ground that “the simple act of hosting auctions of Nazi memorabilia from a Web site based in the United States did not meet the tight standards French courts have previously used when ruling in Holocaust negation cases.”<sup>78</sup>

After losing in the Parisian civil case, Yahoo retreated to its home jurisdiction, where it sought protection by way of a declaratory judgment that the French orders were unenforceable in the United States. Yahoo had, in the interim, slightly modified its policies (not in response to the French ruling but sua sponte, Yahoo insisted) to bar the sale of items promoting hate, but the policies made an exception for books and films and did not affect Yahoo's search engine services, which still allowed users to search for Holocaust denier material.<sup>79</sup> Yahoo said that its noncompliance with the French orders

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73. *Id.* (“[A]n initiative [to ban Nazi materials on Yahoo websites] would . . . have the merit of satisfying an ethical and moral imperative shared by all democratic societies . . .”).

74. *Yahoo Facing French Criminal Charges for Web Sites that Auction Nazi Memorabilia*, 7 Electronic Com. & L. Rep. (BNA) 221 (Mar. 6, 2002).

75. *Yahoo Boss Cleared over Nazi Sales*, BBC NEWS, Feb. 11, 2003, <http://news.bbc.co.uk/2/hi/europe/2750573.stm> (internal quotation marks omitted).

76. *French Court Ruling Ends Long-Term Saga over Nazi Memorabilia Auctions on Yahoo!*, 8 Electronic Com. & L. Rep. (BNA) 176 (Feb. 19, 2003).

77. *Amicale des Déportés d'Auschwitz et des Camps de Haute Silésie, Mrap v. Timothy Koogle, Yahoo Inc., Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris*, Feb. 11, 2003 (Fr.), available at <http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=>

decisions/responsabilite/jug\_tgi-paris\_110203.htm; see also *Ex-Yahoo Chief Acquitted over Nazi Sites*, CNN.COM, Feb. 11, 2003, <http://www.cnn.com/2003/TECH/biztech/02/11/france.yahoo.reut>.

78. Lawrence J. Speer, *French Court Exonerates Yahoo! Site, and Ex-CEO, in Auctions of Nazi Memorabilia*, 10 Electronic Com. & L. Rep. (BNA) 384 (Apr. 13, 2005).

79. Brief of Plaintiff-Appellee at 14-15, *Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc) (No. 01-17424).

subjected it to the “Damocles sword” of the enforcement of penalties for this failure.<sup>80</sup> Finding a genuine case or controversy, District Judge Fogel ruled on the merits that the French orders were unenforceable by a United States court because they violated public policy embedded in the First Amendment.<sup>81</sup> LICRA appealed, and a divided Ninth Circuit panel dismissed the case for lack of personal jurisdiction over the French defendants.<sup>82</sup>

Emphasizing the critical issues at stake, the Ninth Circuit reheard the case en banc. In a set of six heavily divided opinions, the court dismissed the case, but did so without a rationale that drew majority support. Three judges voted to dismiss for lack of ripeness, and three others voted to dismiss for lack of personal jurisdiction, a sufficient majority on an eleven person en banc panel to dismiss the case.<sup>83</sup> The dissenting judges would have reached the merits. Judge Fisher, writing for himself and four other judges, would have held that the French order imposed a prior restraint on Yahoo and did so in an overly vague and broad manner—and thus was repugnant under the First Amendment.<sup>84</sup> However, Judge Fletcher, writing for himself and two other judges, was not so certain. He distinguished between two forms in which the First Amendment repugnancy claim could arise: (1) the French court might require Yahoo to take additional steps that did not restrict access to users in the United States; or (2) the French court might require Yahoo to take additional steps that had the necessary consequence of restricting access by users in the United States.<sup>85</sup> In suggesting that “the answers are likely to be different” to the questions of whether each of the two forms is constitutional,<sup>86</sup> Judge Fletcher seemed to suggest that the first form might not be repugnant under the First Amendment, while the second form might well be. Yahoo, for its part, would have declared even the first fact scenario to present an unconstitutional intrusion, asking rhetorically “whether foreign nations can enlist our citizens and courts as reluctant policemen to insure that their own citizens are not exposed to ideas the foreign governments consider offensive.”<sup>87</sup> Judge Fisher agreed, and would have declared the order constitutionally repugnant because it required Yahoo “to guess what has to be censored on its Internet services here in the United States . . . even if limited to France-based users.”<sup>88</sup>

These problems are not unique to Yahoo or to France. Google faced a similar difficulty in Brazil, where its social networking service Orkut was being used in part for child pornography, incitements to commit crime, neo-Nazism, cruelty to animals, racism,

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80. 433 F.3d at 1218; Brief of Plaintiff-Appellee, *supra* note 79, at 50, 52.

81. *Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001).

82. *Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004).

83. *Yahoo! Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc).

84. *Id.* at 1234 (Fisher, J., concurring in part and dissenting in part).

85. *Id.* at 1217-18 (majority opinion).

86. *Id.* at 1218.

87. Appellee’s Answering Brief at 2, 433 F.3d 1199 (No. 01-17424).

88. 433 F.3d at 1235-36 (Fisher, J., concurring in part and dissenting in part).



religious intolerance, homophobia, and xenophobia.<sup>89</sup> Brazilian law declares such activities illegal. When the Brazilian prosecutors sought Google's Brazilian subsidiary's assistance in identifying the participants in Orkut groups devoted to such banned activities, that subsidiary professed a lack of control over the information demanded. The information, the subsidiary reported, resided on the parent company's servers in the United States. Unhappy with this answer, a Brazilian judge reproached Google for evincing a "profound disrespect for national sovereignty."<sup>90</sup> Brazilian authorities readdressed the subpoena to Google's Silicon Valley headquarters, and Google promptly complied.<sup>91</sup>

Google reportedly maintains a "policy of keeping data in the US to protect it from disclosure to foreign governments."<sup>92</sup> Call this the *Safe Server Strategy*—locating a server in a jurisdiction where constitutional guarantees of human rights will prevent that jurisdiction's courts from enforcing an order supporting state suppression of information. Google might well have developed that strategy based on Yahoo's experience in France. One might speculate that Google complied with the Brazilian subpoena because it had learned from Yahoo's experience that it was better not to resist hate speech regulations in democratic countries, at least where they did not require compromising the service worldwide.<sup>93</sup>

#### D. *Yahoo in China* (Wang v. Yahoo)

In August 2007, Yu Ling filed suit under the Alien Torts Statute and the Torture Victims Protection Act, alleging that Yahoo and its subsidiaries had violated international law by helping the Chinese government uncover the identity of her husband, Wang Xiaoning, a political dissident. Using a Yahoo email account and a Yahoo Group, Wang Xiaoning had distributed political writings anonymously from his home in Beijing for years. When the authorities discovered Wang's identity, they detained and, according to the lawsuit, tortured him. According to the suit, the authorities beat and kicked him, forcing him to confess to engaging in "anti-state" activities.<sup>94</sup> The Beijing Higher People's Court held him guilty of sedition; it reported, "Wang had edited, published and contributed articles to 42 issues of two political e-journals, advocating for open elections,

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89. Ação Civil Pública com Pedido de Antecipação de Tutela [Public Civil Action with Request for Protective Order] at 16, T.J.S.P.-17, Ap. Civ. No. 2006.61.00.018332-8, filed 22.8.2006 (Brazil), available at <http://www.prsp.mpf.gov.br/cidadania/dhumInt/ACP%20Google%20Brasil.pdf>.

90. Andrew Downie, *Google and the Pedophiles*, TIME, Sept. 6, 2006, <http://www.time.com/time/nation/article/0,8599,1531986,00.html>.

91. *Id.*

92. Richard Waters, *Brazil Lawyers Lean on Google*, FIN. TIMES, Aug. 24, 2006, at 23. *But see infra* note 252 and accompanying text (noting Google's approach to China).

93. Some suggest that U.S. courts might be more inclined to grant comity with respect to rulings from liberal foreign regimes. *See, e.g.,* Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

94. Dawn C. Chmielewski, *Yahoo Sued over Data on Chinese Dissidents*, L.A. TIMES, Apr. 19, 2007, at C1.

a multi-party system and separation of powers in the government.”<sup>95</sup> Wang now sits in Beijing Prison No. 2, serving a ten-year sentence for “incitement to subvert state power.”<sup>96</sup> “Yahoo betrayed my husband,” Yu says, arguing that Yahoo facilitated her husband’s arrest and conviction.<sup>97</sup> The Chinese court’s opinion reveals at least some level of involvement by Yahoo in the case. A human rights group noted that the evidence against Wang “included information provided by Yahoo Holdings (Hong Kong) Ltd. stating that Wang’s ‘aaabbbccc’ Yahoo! Group was set up through the mainland China-based email address bxoguh@yahoo.com.cn.”<sup>98</sup>

Yahoo argues that its Chinese operations must comply with lawful official requests for information, and that it does not know how that information will be used: “Yahoo China will not know whether the demand for information is for a legitimate criminal investigation or is going to be used to prosecute political dissidents.”<sup>99</sup>

Yahoo’s foray into China raises a central issue for net-work: how can a company supplying services around the globe comport with the laws of repressive regimes without fouling human rights? The issue is especially salient for net-work providers as they traffic in information—precisely the target of repressive regimes. Human Rights Watch identifies a “race to the bottom” where Western corporations seek to outdo each other in assisting Chinese political repression.<sup>100</sup> Yahoo has, for the moment, chosen to withdraw, at least behind a minority shareholding, transferring its Chinese assets to mainland corporation Alibaba in return for an ownership stake.<sup>101</sup> Yahoo insists that the onus must be on the U.S. government to put pressure on the Chinese government to free Wang and other dissidents.<sup>102</sup> At the end of 2007, Yahoo settled with the dissident families.<sup>103</sup>

95. Luke O’Brien, *Yahoo Betrayed My Husband*, WIRED, Mar. 15, 2007, <http://www.wired.com/politics/onlinerights/news/2007/03/72972> (quoting the court’s written ruling).

96. Ariana Eunjung Cha & Sam Diaz, *Advocates Sue Yahoo in Chinese Torture Cases*, WASH. POST, Apr. 19, 2007, at D1; see also Victoria Kwan, *Prisoner Profile: Wang Xiaoning*, CHINA RTS. F., Oct. 2006, at 126, available at [http://hrichina.org/public/PDFs/CRF.3.2006/CRF-2006-3\\_Wang\\_Xiaoning.pdf](http://hrichina.org/public/PDFs/CRF.3.2006/CRF-2006-3_Wang_Xiaoning.pdf).

97. O’Brien, *supra* note 95.

98. Kwan, *supra* note 96; see also O’Brien, *supra* note 95.

99. Miguel Helft, *Chinese Political Prisoner Sues in U.S. Court, Saying Yahoo Helped Identify Dissidents*, N.Y. TIMES, Apr. 19, 2007, at C4 (quoting Yahoo spokesman Jim Cullinan).

100. HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM”: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP (2006), available at <http://www.hrw.org/sites/default/files/reports/china0806webwcover.pdf>.

101. Keith Regan, *Yahoo Investing \$1 Billion in Chinese Internet Company*, E-COM. TIMES, Aug. 11, 2005, <http://www.ecommercetimes.com/story/45411.html>.

102. See Chmielewski, *supra* note 94; Verne Kopytoff, *Yahoo Pleads for Chinese Dissidents*, S.F. CHRON., Feb. 22, 2008, at C1.

103. Catherine Rampell, *Yahoo Settles with Chinese Families*, WASH. POST, Nov. 14, 2007, at D4.

### III. FREEING TRADE, WHILE PROTECTING LAW

At the core of each of the cyber-trade controversies described above is a service provider supplying a service to consumers in a foreign jurisdiction where there may be a conflict of laws between the home jurisdiction of the service provider and the home jurisdiction of the consumer. In each case also, the service provider, lacking legal precedents or authoritative guidance, must innovate not only technological methods and business models, but also legal structures. Three distinctive legal challenges of Trade 2.0 become apparent: (1) the lack of adequate legal infrastructure, as compared to trade in traditional goods, necessary to liberalize trade; (2) the threat to law itself posed by the footloose nature of net-work and the uncertainty of whose law should govern net-work transactions—that of the exporting nation or that of the importing nation; and (3) the danger that local control of net-work might lead to either *Balkanization*—the disintegration of the World Wide Web into local arenas—or *Stalinization*—the repression of political dissidents, identified through their online activity by compliant net-work service providers.

In this Part, I develop a set of framework principles simultaneously to liberalize and to regulate Trade 2.0. These principles help ameliorate the difficulties identified above. To liberalize trade (the first challenge), I introduce two principles: technological neutrality and dematerialization. *Technological neutrality* would require that online versions of a service be tested under the same legal regime as the offline version of that service. *Dematerialization* would require governments and services-standards bodies to replace physical in-person requirements with online substitutes wherever possible. To respond to the risk to law of footloose net-work trade (the second challenge), I argue for *glocalization*—abiding by the local law of the jurisdiction in which a service is consumed, where that law does not conflict with international law. But the assertion of local law invites the unwelcome consequences of Balkanization and Stalinization. To respond to the problem of Balkanization, I argue that countries will need to reinvigorate efforts to harmonize laws. To respond to the problem of Stalinization, I argue that companies themselves must adopt policies to “do no evil” and comport with human rights law.

The principles I offer remain in a productive tension with one another. Consider three tensions. First, the trade liberalization envisioned by both net-work parity and dematerialization stands in contrast to glocalization, which poses legal hurdles to net-work trade. Yet, I suggest that abiding by the demands of local law will often staunch a protectionist backlash against foreign service providers; the disclosure of the abuse of information by foreign service providers with no legal recourse available to local citizens could justify strong import restraints. It is the dictates of democracy, however, and not these tactical benefits, that compel glocalization. Second, glocalization, in one sense, is the antithesis of harmonization, with local regulation leading to the Balkanization of the Internet, causing some to experience the dreaded “This material is not available in your country” warning. Yet neither glocalization nor harmonization represents the mere automatic capitulation to a foreign law entailed by the country of origin principle. Third, a deregulated cyberspace (or one functioning under a country of origin rule) might be ideal for dissidents within repressive regimes, who would now be able to access this information space without fear of being turned over to the authorities. Thus, the respect

for local law entailed by glocalization might run counter to the “do no evil” principle I describe; however, because glocalization turns on popular sovereignty and is limited by international law, including human rights law, it cannot justify comporting with demands for political repression.

I first discuss below legal reform projects to accommodate Trade 2.0—how we can *free trade*. I then turn to the steps we can take to ameliorate the threat to domestic regulation posed by Trade 2.0—how we can *protect law*.

### A. *Freeing Trade*

Unlike trade in goods, the regulation of services occurs not at customs houses on dry docks at border ports, but rather in administrative offices scattered inland. It consists, for example, in certification and licensing rules, rules about government procurement, geographical and quantitative restrictions, and rules for membership in private associations.<sup>104</sup> International trade law has long recognized that internal regulations, not just border rules, might serve as barriers to trade in goods,<sup>105</sup> but the even more extensive diffusion of regulatory authority over services heightens the challenge for discerning protectionist from other regulatory objects in services. Dispersing regulatory authority through city and county halls, the chambers of self-regulatory associations, and state and federal administrative and legislative units renders the task of liberalizing trade in services particularly difficult.

The infancy of such efforts poses yet another challenge. Where liberalization of trade in goods has a long, rich history, the global effort to dismantle barriers to trade in services is barely a decade old. GATS introduced services to the binding agenda of global trade liberalization in 1995. GATS, however, is far less demanding than its older cousin, the General Agreement on Tariffs and Trade (GATT), which was born from the ashes of a world war. Where GATT requires national treatment for suppliers of goods unless an exception has been carved out, GATS requires only the inverse: it permits discrimination against foreign service providers, except in those few sectors specifically designated by a state party for liberalization.<sup>106</sup> Increasingly, regional trade arrangements offer stronger liberalization mandates. Europe’s ambition to create a Single European Market remains the leading effort to dismantle barriers to trade in services between countries (I discuss aspects of the EU’s free trade regime for services in Subsection III.B.1 below). Free trade in services is also one of the pillars of NAFTA<sup>107</sup> and CAFTA-DR,<sup>108</sup> as well as a goal of

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104. Cf. Org. for Econ. Co-operation and Dev. [OECD], *Barriers to Trade in Services in South Eastern European (SEE) Countries—How Much Do They Matter?*, at 5, OECD Doc. CCNM/TD/SEE(2003)4/FINAL (Oct. 29, 2003) (identifying nontariff barriers often imposed on services as including “quantitative restrictions, price based instruments, licensing or certification requirements, discriminatory access to distribution, and communication systems”).

105. General Agreement on Tariffs and Trade art. III.1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (“contracting parties recognize that internal . . . regulations . . . should not be applied to imported or domestic products so as to afford protection to domestic production”).

106. GATS, *supra* note 9, art. XVI (market access obligations for scheduled services only); *id.* art. XVII(1) (national treatment obligation for scheduled services only).

107. NAFTA, *supra* note 11.

regional arrangements from ASEAN<sup>109</sup> to the African Economic Community<sup>110</sup> to Mercosur.<sup>111</sup> All of the bilateral Free Trade Agreements ratified recently by the United States—with Australia, Bahrain, Chile, Morocco, Oman, and Singapore—include broad obligations to liberalize services. Unlike GATS, these bilateral agreements adopt a positive list approach to the sectoral commitments to liberalize trade in services, assuming that all services are covered except those that are specifically excluded.<sup>112</sup> Their reach accordingly will likely prove especially broad.

Perhaps unsurprisingly, the first WTO dispute squarely involving services, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (United*

108. CAFTA-DR, *supra* note 12. The Free Trade Area of the Americas Agreement would envision a hemispheric free trade zone in goods and services. Free Trade Area of the Americas Third Draft Agreement ch. XIII, arts. 3.1, 3.2, ch. XIV, arts. 2.1, 2.4, ch. XVI, arts. 2.1, 2.2, 3.1-3.3, Nov. 21, 2003, *available at* [http://www.ftaa-alca.org/FTAADraft03/Index\\_e.asp](http://www.ftaa-alca.org/FTAADraft03/Index_e.asp).

109. *See Asean, supra* note 14; text accompanying note 14.

110. Treaty Establishing the African Economic Community art. 4(2)(i), June 3, 1991, 30 I.L.M. 1241 (setting out the objective of “[t]he gradual removal, among Member States, of obstacles to the free movement of persons, goods, services and capital”).

111. Gabriel Gari, *Free Circulation of Services in Mercosur: A Pending Task*, 10 LAW & BUS. REV. AM. 545, 553-57 (2004) (describing the Montevideo Protocol’s approach, yet to be broadly implemented, to liberalization in services).

112. Agreement Between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, U.S.-Oman, arts. 2.1-2.3(2), 3.2(1), 4.1, 9.1(1)-(4), 11.1, Jan. 19, 2006, 120 Stat. 1191, *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Oman\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html); United States-Peru Trade Promotion Agreement, U.S.-Peru, arts. 2.1-2.2, 2.3(2), 3.3, 7.2, 9.1(1)-(6), 9.2(1)-(2), 9.2(6), 10.8, 11.1, 16.1(11), Apr. 12, 2005, 121 Stat. 1455, *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html); Agreement Between the Government of the United States of America and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Area, U.S.-Bahr., arts. 1.3, 2.1-2.2, 3.2(1), 7.1, 9.1(1)-(3), 10.1, 12.1, 17.6, Sept. 14, 2004, 119 Stat. 3581, *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Bahrain\\_FTA/final\\_texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html); United States-Morocco Free Trade Agreement, U.S.-Morocco, arts. 2.1-2.2, 7.1, 9.1, 10.3-10.4, 10.7, 10.12, 11.1, 11.6, 20.2, June 15, 2004, 118 Stat. 1103, *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Morocco\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html); United States-Australia Free Trade Agreement, U.S.-Austl., arts. 2.1-2.2, 8.1, 10.1, 17.9(1)-(3), 21.2, May 18, 2004, 118 Stat. 919, *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Australia\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html); United States-Chile Free Trade Agreement, U.S.-Chile, arts. 3.1-3.2, 3.20(1), 7.1, 9.1(1)-(2), 11.1, 11.6, July 6, 2003, 117 Stat. 909, *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Chile\\_FTA/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Section_Index.html); United States-Singapore Free Trade Agreement, U.S.-Sing., arts. 8.2, 8.7, 9.1(1)-(2), 11.2, 13.2 (1)-(3), May 6, 2003, 117 Stat. 948, *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Singapore\\_FTA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html). The agreements currently being negotiated or awaiting ratification do the same. *See, e.g.*, United States-Colombia Trade Promotion Agreement, U.S.-Colom., arts. 2.1-2.2, 3.3(1), 7.2, 9.1(1)-(5), 10.8, 11.1-11.3, 11.6, 12.2-12.3, 12.9, 16.1(8)-(10), 16.13, 19.6, May 8, 2006 (draft), *available at* [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Colombia\\_FTA/Draft\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Draft_Text/Section_Index.html)

*States—Gambling*), centered on the Internet.<sup>113</sup> I show below that this decision lays the groundwork for extensive liberalization of net-work trade. I then elaborate some reforms to the legal infrastructure to accommodate net-work.

### 1. *Technological Neutrality*

Net-work providers share an Achilles's Heel: because their services are not delivered face-to-face, the authentication clues available through in-person presentation are unavailable. Their remote nature thus leads to concern about fraud by suppliers (either in representing their credentials or in failing to perform the service as promised) or potential anonymity among consumers (leading to concerns about underage or otherwise inappropriate consumption). Can a state simply assert these concerns to protect its local suppliers, who after all can provide services face-to-face with greater ease than foreign suppliers? If so, this would mark the death knell of cross-border net-work.

At first glance, *United States—Gambling* poses exactly this roadblock to net-work. After all, the Appellate Body held that the risks particular to electronically mediated services might justify ignoring a country's free trade commitments (so long, that is, as the country bars all electronically mediated services, not just those provided by foreigners).<sup>114</sup> The WTO upheld a state's banning of online suppliers (both domestic and foreign) because of the risks of underage and pathological gambling, fraud, and money laundering.

But even in largely dismissing Antiguan claims for access to the U.S. market, the decision laid the groundwork for a substantial erosion of barriers to net-work. The chapeau to GATS Article XIV permits a public order-based violation of trade commitments only if it is not in fact a "disguised restriction" on trade in services.<sup>115</sup> A country may not maintain an infringing trade barrier if a "reasonably available alternative" exists—one that "preserve[s] for the responding Member its right to achieve its desired level of protection with respect to" its public order or public morality

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113. Earlier cases, such as *Canada—Periodicals*, *EC—Bananas*, and *Canada—Automobile Industry*, had raised GATS issues, but as supplements to GATT claims related to goods. See Appellate Body Report, *Canada—Certain Measures Concerning Periodicals*, *supra* note 1; Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R (May 31, 2000); Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997); Mitsuo Matsushita, *Appellate Body Jurisprudence on the GATS and TRIPS Agreements*, in *THE WTO DISPUTE SETTLEMENT SYSTEM, 1995-2003*, at 455 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004). A United States claim against Mexico considered services more directly, but required the interpretation of a special telecommunications side-agreement, rather than basic GATS obligations. *Mexico—Telecommunications Services*, *supra* note 35.

114. The Appellate Body upheld the Panel's finding that concerns underlying the U.S. statutes barring remote gambling fell within the scope of "public morals" and/or "public order." See *United States—Gambling*, *supra* note 36, ¶ 373(D)(iii); *supra* notes 43-47 and accompanying text.

115. GATS, *supra* note 9, art. XIV (requiring that "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services").

objectives.<sup>116</sup> But Antigua did not show that Antiguan gambling operators could alleviate the American concerns through technical or other means. Rather, Antigua simply relied on America's stubborn refusal to discuss alternative means to achieving its regulatory goals. Antigua might have instead demonstrated practical alternatives to the American prohibition to achieve the desired regulatory goals. Antigua could have shown that it had redoubled its financial crime efforts, strictly enforcing international anti-money laundering principles, such as the international standards offered by the Financial Action Task Force.<sup>117</sup> Antigua could have required independent auditors from large international firms to audit compliance by Antiguan gambling operations, helping assure users that the computer systems and financial payouts were sound.<sup>118</sup> Antigua could have shown that the steps it requires to add money to a gambling account (such as bank wire transfers) would prove nearly insurmountable for youth. And it could have required that gambling providers make available services for gambling addicts, including mechanisms for allowing people to limit losses or to lock themselves out.<sup>119</sup>

Perhaps the strongest rebuttal to the American argument in *United States—Gambling* comes from the Supreme Court of the United States. The dormant Commerce Clause creates a free trade area *within* the United States. In the recent case of *Granholm v. Heald*, the Supreme Court considered a dormant Commerce Clause-based challenge to Michigan and New York regulations barring out of state wineries from selling directly to Michigan and New York residents.<sup>120</sup> While *Granholm* involved trade in goods, not trade in net-work services, both involve trade mediated largely by the Internet. In *Granholm*, as in *United States—Gambling*, the defenders of trading restraints argued that they were necessary to preserve local values. New York insisted that its rules were “essential” to promoting no less a value than “temperance,” as well as the more mundane goal of “collecting taxes.”<sup>121</sup> Requiring alcohol to pass through state sanctioned distribution channels, New York argued, allows it “to effectively monitor alcohol distribution and enforce its liquor laws.”<sup>122</sup>

The Supreme Court was not persuaded. New York and Michigan “provide[d] little evidence for their claim that purchasing wine over the Internet by minors is a problem.”<sup>123</sup> The states could have “minimize[d] any risk with less restrictive steps . . . [such as] requir[ing] an adult signature on delivery.”<sup>124</sup> The Court held that New York's

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116. *United States—Gambling*, *supra* note 36, ¶ 308.

117. See FIN. ACTION TASK FORCE, HANDBOOK FOR COUNTRIES AND ASSESSORS (2007), available at <http://www.fatf-gafi.org/dataoecd/5/59/38893482.pdf>.

118. In the GATT context, the WTO has examined whether a trade restrictive measure was necessary to protect against fraud. See Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 177-80, WT/DS161/AB/R (Dec. 11, 2000).

119. Party Poker: Responsible Gaming, [http://www.partypoker.com/responsible\\_gaming/](http://www.partypoker.com/responsible_gaming/) (last visited Apr. 1, 2009) (offering self-imposed deposit limits and “the self-exclusion tool,” which gives the customer the ability to bar him or herself from the website for specified period).

120. 544 U.S. 460 (2005).

121. Brief for State of New York Respondents at 11, *Swedenburg v. Kelly*, 543 U.S. 954 (2004) (No. 03-1274).

122. *Id.*

123. *Granholm*, 544 U.S. at 490.

124. *Id.* at 490-91.

“regulatory objectives [could] be achieved without discriminating against interstate commerce, *e.g.*, by requiring a permit as a condition of direct shipping.”<sup>125</sup> The states’ “other rationales, such as facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability . . . [could] also be achieved through the alternative of an evenhanded licensing requirement.”<sup>126</sup> The fundamental question, the Court asked, is whether a State’s discriminatory regime “advance[d] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>127</sup> The Supreme Court’s “reasonable nondiscriminatory alternatives” formulation comes strikingly close to the WTO’s “reasonably available alternative”;<sup>128</sup> both give the tribunal the ability to strike regulations that unnecessarily restrain competition from outside producers. The similarity in the Supreme Court and WTO formulations is not a coincidence: though poles apart in their history and status, both institutions promote commerce among jurisdictions while protecting the power of those jurisdictions to regulate themselves.

Of course, even the most robust alternative for achieving the regulatory objectives may not prevent all potential wrongdoing. But neither would a flat prohibition of online gambling accomplish perfectly the regulatory goals. After all, underage persons can sneak their way into casinos; gambling addiction predated the Internet; cash in casinos can be more anonymous than an offshore bank account, which requires extensive security measures; and organized crime is not entirely unknown in American gambling history. The question is whether the proposed alternative achieves the “desired level of protection,”<sup>129</sup> not whether it promises one hundred percent compliance. In the *U.S.—Shrimp* dispute, the WTO Appellate Body held that an importing nation’s insistence on a “single, rigid, and unbending requirement” would constitute “arbitrary discrimination” within the meaning of the GATT Article XX chapeau.<sup>130</sup> Contrast District Judge Marilyn Hall Patel’s standard for Napster, where she required the online service to remove one hundred percent of copyright infringing material, a standard that Napster rightly insisted was impossible to satisfy and that was not met even by offline distribution systems.<sup>131</sup> The appropriate standard should be one where the online service should be required to achieve the regulatory goals at rates roughly equivalent to those achieved by offline versions of the service. This is a principle of *technological neutrality*.

Such steps would likely raise the costs of doing business electronically as well as the costs for governments of enforcing compliance. Quite often, perhaps, the costs today may be so high as to make net-work economically infeasible. Perhaps governments might be willing to reduce compliance rates in some cases in view of the liberating and economizing possibilities of the electronic medium.

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125. *Id.* at 491.

126. *Id.* at 492.

127. *Id.* at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

128. See *Asean*, *supra* note 14; text accompanying note 14.

129. See *United States—Gambling*, *supra* note 36, ¶ 308.

130. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 177, WT/DS58/AB/R (Oct. 12, 1998).

131. John Borland, *Napster Blasts Court’s Technical Meddling*, CNET NEWS, Aug. 9, 2001, [http://news.com.com/Napster+blasts+courts+technical+meddling/2100-1023\\_3-271351.html](http://news.com.com/Napster+blasts+courts+technical+meddling/2100-1023_3-271351.html).



GATS does allow countries to prefer certain modes of delivery of a foreign service over others. The principle of technological neutrality that I assay here would only come into play when a country has committed to liberalizing a particular service with respect to mode 1, cross-border trade. In such a case, to demand higher standards for electronically provided services than services delivered in person is to engage in clear discrimination. Such discrimination would likely violate the GATS national treatment commitment<sup>132</sup> because foreign suppliers would be at a natural disadvantage in supplying face-to-face services since they are less likely to have representatives on the ground. Where the discrimination against the online service acts as an effective barrier to online supply, it could, as in *United States—Gambling*, violate the GATS market access requirement.

This is an especially grave threat to net-work. After all, due to the non-face-to-face nature of the medium, it is easy to challenge net-work as potentially promoting fraud. But to insist on the complete absence of fraud on Internet-mediated services would be to conjure a preexisting world of face-to-face transactions devoid of fraud. Fraud and other regulatory leakages are a persistent fact of commerce and are not unique to Internet commerce. Trade law should not allow countries to insist on a regulatory nirvana in cyberspace unmatched in real space. Such discrimination against the electronic medium will likely disadvantage foreign suppliers, who are less likely to have the resources to deploy service providers on the ground.

## 2. *Dematerialized Architecture*

Even were legal restraints on cross-border net-work entirely eliminated, local service providers would still retain a natural advantage. Local persons are more likely to have obtained any certifications and licenses necessary to provide a service in the jurisdiction. They are also more likely to have access to regulations governing the service. Equally important, the architecture of real-world transactions helps promote security, privacy, monitoring, trust, and enforceability between parties, which in turn fosters marketplace contracts with strangers. Handshakes, ink signatures, demeanor evidence, reputation circulated by word of mouth, cultural and language affinities, and comfort with the process for seeking legal redress against a local service provider (or customer) may make local interactions more attractive than those conducted remotely, especially cross-border.

Of course, mail order contracts became increasingly commonplace in the last half century,<sup>133</sup> demonstrating that face-to-face transactions are not entirely indispensable for large scale commerce. Even more dramatically, global supply chains now dominate the production of goods, proving the possibility of commerce across national borders, time zones, and oceans. Yet, undergirding these global supply chains are developments in the legal infrastructure, both between states and within states. Bills of lading and procedures for documentary credits established a framework for shipping a good and receiving

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132. GATS, *supra* note 9, art. XVII.

133. *Quill Corp. v. North Dakota*, 504 U.S. 298, 316 (1992) (noting “the mail-order industry’s dramatic growth over the last quarter century”).

payment. The International Chamber of Commerce (ICC) helped standardize shipping terms through “Incoterms.”<sup>134</sup> The United Nations Commission on International Trade Law (UNCITRAL) promoted “uniform rules which govern contracts for the international sale of goods” through the Convention on the International Sale of Goods (CISG), regulating the formation of a contract, the obligations owed by buyers and sellers, the passing of risk of the good during transit, and remedies for breach.<sup>135</sup>

Many of these standards and rules cannot be applied to services: the CISG is, by its terms, the Convention on the International Sale of *Goods*; shipping terms referring to risk passing at the ship’s rail have little meaning in cyberspace; documents evidencing the loading of a truck or ship cannot be easily adapted to products delivered electronically.<sup>136</sup> The principal promoters of the international legal framework for goods, UNCITRAL and the ICC, have accordingly extended their work to electronic commerce and services. UNCITRAL promoted an e-signature initiative that served as a model law for the United States and other nations, helping validate contracts made electronically.<sup>137</sup>

Trade 2.0 will require electronic substitutes, where possible, not only for signatures, but also for handshakes, facial identification, bureaucratic offices, education, testing, and even administrative and judicial hearings. This is the *dematerialization* of the services infrastructure, the systems and practices that foster trust, promote social goals, and resolve disputes.

Net-work will flourish as the need for physical presence in order to provide a service recedes. Regulated professions require the service provider to obtain educational credentials, pass an examination, conform the service to certain rules, or some combination of the above. GATS hopes to make obsolete the ritual pilgrimage to numerous governmental offices to obtain rules and applications applicable to a particular service. WTO member states must publish regulations governing any service covered by their specific commitments<sup>138</sup> and establish enquiry points where foreign service providers can obtain information about such regulations.<sup>139</sup> Canada helpfully posts this information online,<sup>140</sup> and many other countries provide an email contact point.<sup>141</sup>

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134. William V. Roth, Jr. & William V. Roth III, *Incoterms: Facilitating Trade in the Asian Pacific*, 18 U. PA. J. INT’L ECON. L. 731, 732-33 (1997).

135. United Nations Convention on Contracts for the International Sale of Goods pmbl., Apr. 10, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668.

136. Certain other aspects of the legal infrastructure, such as letters of credit, arbitration, and anticorruption laws, can be extended to net-work.

137. Model Law on Electronic Commerce, G.A. Res. 51/162, U.N. Doc. A/RES/51/162 (Jan. 30, 1997) (amended in June 1998 to add to article 5); *see also* Electronic Signatures in Global and National Commerce (E-Sign) Act, 15 U.S.C. §§ 7001-31 (2000). In 2005, UNCITRAL promulgated a treaty to promote cross-border electronic contracting, though no country has ratified it thus far. United Nations Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, Annex, U.N. Doc. A/RES/60/21 (Dec. 9, 2005).

138. GATS, *supra* note 9, art. III(3).

139. *Id.* art. III(4).

140. Foreign Affairs and Int’l Trade Canada, Trade Negotiations and Agreements, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/index.aspx> (last visited Apr. 19, 2009).

Through this transparency requirement, GATS will foster trade by enabling foreign service providers to develop the ability to conform to local rules.

The European Union's Services Directive goes substantially further. It not only mandates that information on service regulation be supplied electronically,<sup>142</sup> it also requires member states to "ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, through the relevant point of single contact and with the relevant competent authorities."<sup>143</sup> With this mandate, the European Union will lead the way towards dematerialization, in the process establishing standards that the rest of the world will likely use as models.

Where a service is licensed, governments should consider whether a foreign credential should be recognized as a substantial equivalent—thus eliminating the need for the service provider to obtain the necessary license through physical presence in a foreign country. Certain educational processes may be harder to mimic. The magic of walking the corridors of a law school may be difficult to recreate virtually.<sup>144</sup> Thus far, the American Bar Association has not accredited any online law schools, though graduates of online law schools may sit for the California Bar (and have done so, with a first time pass rate to date of 40.5%).<sup>145</sup>

Even largely unregulated services will benefit from the creation of a trust infrastructure in cyberspace, enhancing consumer confidence in the service. Systems for providing authentication, security, and privacy will alleviate consumer concerns about online activity. Private reputation systems have developed to allow individuals to engage in significant trades across long distances.

Allowing aggrieved parties to an international transaction to settle disputes via the Internet would substantially reduce impediments to trade. The WIPO-initiated domain name dispute resolution system demonstrates the possibility of a cyber-tribunal that efficiently processes international disputes, while dispensing with physical presentations

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141. The WTO Committee on Technical Barriers to Trade makes enquiry points, including email addresses, available online at World Trade Org., Technical Barriers to Trade—National Enquiry Points, [http://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_enquiry\\_points\\_e.htm](http://www.wto.org/english/tratop_e/tbt_e/tbt_enquiry_points_e.htm) (last visited Apr. 22, 2009), and publishes them periodically under document code G/TBT/ENQ/\*. See, e.g., Comm. on Technical Barriers to Trade, *Note by the Secretariat: National Enquiry Points*, G/TBT/ENQ/35 (Mar. 2, 2009).

142. Council Directive 2006/123/EC, art. 7(3), 2006 O.J. (L 376) 36, 53 (EC) [hereinafter *Services Directive*].

143. *Id.* art. 8(1), at 54.

144. Cf. Harvard Law Sch. & Harvard Extension Sch., *CyberOne: Law in the Court of Public Opinion*, <http://cyber.law.harvard.edu/cyberone/videos/CyberOne.mp4> (Fall 2006) (showing Harvard Law Professor Charles Nesson walking into a virtual re-creation of Austin Hall).

145. Michael Ravnitzky, *Online Law School's First Grads*, NAT'L L.J., Jan. 8, 2003, available at <http://www.law.com/jsp/article.jsp?id=1039054542141>; Concord Law School, *Passing the California Bar Examination*, [http://about.concordlawschool.edu/Pages/Bar\\_Exam.aspx](http://about.concordlawschool.edu/Pages/Bar_Exam.aspx) (last visited Apr. 1, 2009).

or evidence.<sup>146</sup> India recently established the Cyber Regulations Appellate Tribunal,<sup>147</sup> and empowered the Tribunal to regulate its own procedures, dispensing with the national code of civil procedure.<sup>148</sup> While this is promising, the procedures put into place require each person seeking redress to submit “six complete sets [of the complaint] in a paper-book form, along with one empty file size envelope bearing full address of the respondent.”<sup>149</sup> Service providers themselves may demand global electronic dispute resolution regimes—bonding themselves to accessible and reliable dispute resolution schemes in order to increase the confidence of potential clients, and thus justifying a higher price. Because many disputes arising out of these arrangements might arise out of a contractual relation, such regimes might be established by contract. However, where those contracts are form contracts provided, for example, on a website, there are reasons to be cautious about ready enforcement of the private ordering.<sup>150</sup>

Dematerialization does not require automation; human beings would still need, for example, to conduct conformity assessments with the regulatory standard.<sup>151</sup> Dematerialization might also be approximated by enabling foreign service providers to meet requirements through geographically proximate processes. Certification tests can be administered in a variety of secure locations around the world.<sup>152</sup>

As *United States—Gambling* demonstrates, regulations that require a physical presence by a foreign service provider might be subject to GATS challenge (at least where the regulating country has committed to liberalize mode 1 trade in that service). A country seeking to supply a service via net-work might, like Antigua, offer two claims: (1) a violation of the national treatment obligation because a physical presence requirement advantages local providers; and (2) a violation of the market access commitment if a country has committed to liberalize mode 1, cross-border trade. Again, as *United States—Gambling* reveals, the nation insisting on physical presence can plead

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146. Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141 (2001).

147. Information Technology Act, 2000, § 58, No. 21, Acts of Parliament, 2000 (India).

148. *Id.*

149. Ministry of Comm'ns & Info. Tech., Dep't of Info. Tech., Cyber Regulations Appellate Tribunal (Procedure) Rules, 2000, <http://www.mit.gov.in/default.aspx?id=311> (India) (last visited Apr. 18, 2009); see also Moumita Bakshi Chatterjee, *Cyber Tribunal May Be Expanded*, HINDU BUS. LINE, Dec. 27, 2005, <http://www.blonnet.com/2005/12/27/stories/2005122703020400.htm>.

150. See Margaret Jane Radin, Commentary, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006); Margaret Jane Radin, Lecture, *Regime Change in Intellectual Property Law: Superseding the Law of the State with the “Law” of the Firm*, 1 U. OTTAWA L. & TECH. J. 173 (2004); Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125 (2002); Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125 (2000).

151. *But cf.* JAMES E. BYRNE & DAN TAYLOR, ICC GUIDE TO THE EUCP: UNDERSTANDING THE ELECTRONIC SUPPLEMENT TO THE UCP 500, at 14-15 (2002) (observing the possibility of automated compliance checking for electronic letters of credit).

152. The Law School Admissions Test, for example, can be taken in twenty-nine foreign countries, including Australia, China, Egypt, and Spain. LAW SCH. ADMISSIONS COUNCIL, REGULAR ADMINISTRATION TEST CENTER CODES (2007).

the need to protect public morals, maintain public order, or protect life, but that plea can be tested for a “reasonably available alternative.”<sup>153</sup> As the legal and technical infrastructure of net-work grows through increased dematerialization, a physical presence requirement will be harder to defend.

### B. *Protecting Law*

The footloose nature of net-work increases the likelihood that a service provider might relocate to take advantage of regulatory environments it finds favorable.<sup>154</sup> The fear is that this might lead to a race to the bottom, as providers search out the jurisdiction with minimal or even no regulation. Will net-work in regulated industries now find refuge in offshore havens?

The bottom of such a race might well be found in the self-declared principality of Sealand. Established on a floating platform used for British air defense during World War II, Sealand provides “the world’s first truly offshore, almost-anything-goes electronic data haven.”<sup>155</sup> Through its web hosting company, forthrightly named “HavenCo,” Sealand offers “the ‘freedom’ to store and move data without answering to anybody, including competitors, regulators, and lawyers.”<sup>156</sup> *Free, as in without regulation.*

Does Sealand and its ilk spell the death of law? Thus far, with few exceptions such as online gaming, net-work has not migrated en masse to offshore havens.<sup>157</sup> Where earlier scholars saw regulatory competition as inexorably resulting in calamitous deregulation, today’s scholars have identified potential virtues in the process. Rather than a race to the bottom, they predict a race to the top or, alternatively, a race to the global

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153. *See supra* note 116 and accompanying text.

154. Others have described the regulatory arbitrage made possible by the Internet. *See A. Michael Froomkin, The Internet as a Source of Regulatory Arbitrage, in BORDERS IN CYBERSPACE 129* (Brian Kahin & Charles Nesson eds., 1997). Cross-border relocation to avoid regulation is a well-worn tactic. The history of Hollywood can be traced in part to regulatory evasion, as moviemakers such as Fox and Paramount sought to elude Thomas Edison’s patent monopolies based in New Jersey by decamping to the other end of the continent. LAWRENCE LESSIG, *FREE CULTURE* 53-54 (2004) (“The film industry of Hollywood was built by fleeing pirates. . . . California was remote enough from Edison’s reach that film-makers there could pirate his inventions without fear of the law.”).

155. Simson Garfinkel, *Welcome to Sealand. Now Bugger Off*, WIRED, July 2000, at 230, available at <http://www.wired.com/wired/archive/8.07/haven.html>.

156. *Id.* Even HavenCo has its limits, prohibiting “spamming, obscenity, and child pornography,” Declan McCullagh, *HavenCo: Come to Data*, WIRED, June 5, 2000, available at <http://www.wired.com/politics/law/news/2000/06/36756>, and activities “against international law, linked with terrorism, or contrary to international custom and practice,” Declan McCullagh, *Has ‘Haven’ for Questionable Sites Sunk?*, CNET NEWS, Aug. 4, 2003, [http://news.cnet.com/Has-haven-for-questionable-sites-sunk/2100-1028\\_3-5059676.html](http://news.cnet.com/Has-haven-for-questionable-sites-sunk/2100-1028_3-5059676.html).

157. Sealand’s web-hosting is foundering, suffering its latest blow in the form of a fire. Principality of Sealand, *Principality Notice* (June 28, 2006), <http://www.sealandgov.org/notices/pn03106.html>.

welfare-maximizing ideal.<sup>158</sup> Regulatory competition might pressure regulators to bring regulation to global standards or allow private parties to locate the most well-tailored rules to govern a particular transaction. Competition might lead to the optimal regulation,<sup>159</sup> where optimality is defined as the minimum regulation necessary to correct market failure. Regulatory competition “has the potential to discourage harmful regulatory laxity as well as extreme regulatory rigor.”<sup>160</sup> But what we find is the possibility of widespread regulatory evasion, not regulatory competition.

Furthermore, a race to the optimum is likely only where a company will internalize the costs of regulation or deregulation.<sup>161</sup> Many argue that this is the case with respect to the choice of corporate charter, where managers’ choices of regulatory regime will be subject to the discipline of shareholders.<sup>162</sup> But this happy scenario will not always obtain with respect to services regulation. Take for example government protections for personal information collected by corporations: because of problems of bounded rationality (*viz.*, limitations and biases in human cognition) and collective action problems (*viz.*, concentrated benefits, but dispersed costs), we should not expect private markets to achieve efficient practices regarding the use and disclosure of customer information.<sup>163</sup> Companies may not fully internalize the costs of their information use and disclosure practices and might thus choose a regulatory regime that had little or no privacy protections. This same defect may exist with respect to a wide swath of services regulation.

Such a race to the bottom arises because of overly *liberal* regimes, lacking consumer and other protections. There is a second potential race to the bottom in net-

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158. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that jurisdictional competition to attract residents on the basis of differing tax and benefits would produce a Pareto-superior outcome).

159. Mahmood Bagheri & Chizu Nakajima, *Optimal Level of Financial Regulation Under the GATS: A Regulatory Competition and Cooperation Framework for Capital Adequacy and Disclosure of Information*, 5 J. INT’L ECON. L. 507, 511 (2002).

160. *Id.* at 521 (citing J.D. Cox, *Regulatory Competition in Securities Markets: An Approach Reconciling Japanese and United States Disclosure Philosophies*, 16 HASTINGS INT’L & COMP. L. REV. 149, 157 (1993)).

161. Esty and Geradin identify a set of variables that affect whether regulatory competition is likely to prove virtuous or malign. The variables include: “the scope of uninternalized externalities; whether the information base of the particular ‘market’ is sufficient for competition . . . ; [and] the capacity of citizens and companies to obtain and to understand information that is relevant to their choices and options.” Daniel C. Esty & Damien Geradin, *Introduction to REGULATORY COMPETITION AND ECONOMIC INTEGRATION*, at xix, xxv (Daniel C. Esty & Damien Geradin eds., 2001).

162. ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993); Ralph K. Winter, *The “Race for the Top” Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526 (1989); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

163. Edward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy and the Limits of Default Rules*, 86 MINN. L. REV. 1219, 1240-43 (2002) (discussing lemons equilibrium in market-regulated privacy); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2076-84 (2004).

work, this one arising out of overly *repressive* regimes. Companies may submit to the repressive demands of totalitarian regimes in order to supply services to their populations. In the competition to supply such markets, companies might “race to the bottom” by censoring the information they supply and even spying on the local population in order to win governmental acquiescence. To disrupt these races to the bottom, I offer two principles: *glocalization* counters the race to the deregulated bottom, while “do no evil” counters the race to the oppressive bottom.

### 1. *Glocalization*

Globalization, the worry goes, will sweep away local culture in favor of a mass commercialized, homogenized world. Sociologists offer *glocalization* as an antidote—a way to embrace globalization without shedding local differences.<sup>164</sup> *Glocalization*, a portmanteau rooted in the seeming opposites “global” and “local,” refers to “the simultaneity, or co-presence, of both universalizing and particularizing tendencies.”<sup>165</sup> I use it here with reference to *law*. Globalization of services threatens to sweep aside local law through the use of offshore regulatory havens. Legal *glocalization* would require the creation or distribution of products or services intended for a global market, but customized to conform to local laws within the bounds of international law.<sup>166</sup>

While the concept of insisting on local law may seem anodyne, the streets of Strasbourg and Berlin swelled recently to defend this principle.<sup>167</sup> As originally drafted, the European Union’s proposed Services Directive would have mandated a “country of origin” rule within the Union, under which a European could supply her services to any country within the European Union under the rules of her home, not host, country, at least

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164. See, e.g., Roland Robertson, *Comments on the “Global Triad” and “Glocalization,”* in GLOBALIZATION AND INDIGENOUS CULTURE (Inoue Nobutaka ed., 1997), available at <http://www2.kokugakuin.ac.jp/ijcc/wp/global/15robertson.html>.

165. *Id.*

166. My definition differs from that offered by Thomas Friedman, who defines *glocalization* as “the ability of a culture, when it encounters other strong cultures, to absorb influences that naturally fit into and can enrich that culture, to resist those things that are truly alien and to compartmentalize those things that, while different, can nevertheless be enjoyed and celebrated as different.” THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* 282 (1999); see also THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 325 (2005) [hereinafter FRIEDMAN, *THE WORLD IS FLAT*] (“The more you have a culture that naturally *glocalizes*—that is, the more your own culture easily absorbs foreign ideas and best practices and melds those with its own traditions—the greater advantage you will have in a flat world.”).

167. See Graham Bowley, *EU Lowers Barriers to Moves by Companies But Amendments Weaken Services Law, Setting Off Protests*, INT’L HERALD TRIB., Feb. 17, 2006, at 1. The previous year had also seen massive demonstrations in Brussels. *Demonstrators March Against EU Labor Reforms*, DEUTSCHE WELLE, Mar. 20, 2005, <http://www.dw-world.de/dw/article/0,1564,1523785,00.html>.

in the absence of compelling public health or security rationales to the contrary.<sup>168</sup> Thus, a French service provider would be governed ordinarily by French law, even while supplying services in Germany. This would apply equally to Polish plumbers and English e-commerce providers. The head of the European Trade Union Confederation charged that this directive would “fire the starting gun on a race to the bottom.”<sup>169</sup> He worried that a country of origin rule would create “flags of convenience,” as European corporations would reincorporate in states with relatively lax regulation.<sup>170</sup> Such complaints had resonance: opposition to the country of origin principle helped derail the EU Constitution in 2005,<sup>171</sup> and later led to that principle’s retreat within the European Union.<sup>172</sup>

Even before the Services Directive, the European Court of Justice had argued that requiring local certification of foreign suppliers would be unduly burdensome, as such suppliers would have to satisfy multiple authorities. The Court has repeatedly held that member states should accept the sufficiency of the services regulation of other member states, but generally allowed them nonetheless to derogate from this requirement based on public interest.<sup>173</sup> In electronic commerce, the European Union has made plain its preference for home country regulation, requiring countries to defer to a foreign service

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168. *Commission Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market*, at 4-5, COM (2004) 2 final (Mar. 5, 2004); see also Nicolaïdis & Schmidt, *supra* note 23, at 722-23 (characterizing the draft proposal as “bold” and “sweeping”).

169. ‘Frankenstein’ Directive Resurrects EU Divisions, FIN. WK., Apr. 13, 2005, <http://www.financeweek.co.uk/item/1190> [hereinafter ‘Frankenstein’ Directive]. Another union official opined: “The idea somehow there’s a license for companies not to observe the laws of the country in which they are trading, that’s a step too far and I think it’s anti-democratic.” *MEPs Debate New Law on Services*, BBC NEWS, Feb. 15, 2006, <http://news.bbc.co.uk/2/hi/europe/4711086.stm>.

170. ‘Frankenstein’ Directive, *supra* note 169.

171. *Opposition to ‘Frankenstein’ Law Leads to Backlash Against EU Treaty*, IRISH TIMES, Mar. 23, 2005, at 10.

172. Services Directive, *supra* note 142, art. 10 (allowing member states to require authorizations of foreign services provider as long as, inter alia, such authorization is “justified by an overriding reason related to the public interest” and “proportionate to that public interest objective”).

173. See Case C-243/01, *Tribunale di Ascoli Piceno (Italy) v. Gambelli*, 2003 E.C.R. I-13031 (Italian prosecution of English company for providing gambling service via Internet to Italians without an Italian license violated freedom of services, but might be justified by imperative reasons of public interest); Case C-384/93, *Alpine Invs. BV v. Minister van Financiën*, 1995 E.C.R. I-1141 (Dutch ban on cold-calling violated the freedom to provide services, but might be justified by “imperative reasons of public interest”); Case C-76-90, *Säger v. Dennemeyer & Co. Ltd.*, 1991 E.C.R. I-4221, ¶ 18 (striking down German requirements that only a German registered patent agent can provide patent renewal services because such services are of a “straightforward nature and do not call for specific professional aptitudes” and thus German registration is unnecessary to protect persons against bad advice). See generally Editorial Comments, *The Services Directive Proposal: Striking a Balance Between the Promotion of the Internal Market and Preserving the European Social Model?*, 43 COMMON MKT. L. REV. 307, 309 (2006) (“[T]he case law of the Court of Justice takes the country of origin principle as its starting point when assessing the application of the justification for restrictions on the free movement.”).



provider's home regulation except where necessary and proportionate to protect the public interest.<sup>174</sup> Such country of origin rules might be easier to adopt in the European Union, where supranational directives have laid the groundwork for widespread legal harmonization. GATS, however, eschews this interpretative approach, explicitly "[r]ecognizing the right of members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives,"<sup>175</sup> and requiring nations to accept foreign credentials only voluntarily.<sup>176</sup>

Proponents of a country of origin principle often analogize the receipt of a cross-border net-worked service to travel to a foreign land. This raises a metaphysical question: *where does an event in cyberspace occur?*<sup>177</sup> Is the service provider traveling (virtually) across borders into the country of the consumer? Or is the consumer of net-work traveling (virtually) to the country of the service provider, like a tourist boarding a cruise ship? If the metaphor of the virtual tourist holds, then that person should expect that service to be governed by the provider's home.<sup>178</sup> After all, states do not typically interfere with a person's consumption while abroad.<sup>179</sup> This question of cross-border delivery versus virtual tourism corresponds to a GATS typology: in GATS, if a service provider delivers a service from one country into another country, the service is classified as mode 1; if the recipient travels to consume the service abroad, it is mode 2. In the case of *United States—Gambling*, the WTO's Appellate Body presumed without discussion that offering online gambling entails mode 1, cross-border trade.<sup>180</sup> This seems wise: characterizing cross-border net-work as consumption abroad allows consumers to opt out of local mandatory law with the click of a mouse (rather than the more onerous boarding of a vessel), or worse, subjects them to foreign law without the notice of entry into a foreign jurisdiction that would normally attend foreign travel. Situating net-work firmly in mode 1 supports the argument for glocalization—requiring the foreign service provider to comply with local law—rather than requiring the consumer's home jurisdiction to relent in favor of the consumer's purported choice of (virtual) foreign travel.

Local law, after all, reflects local mores (however imprecisely given defects in the political process). Allowing services to be provided according to the law of the home jurisdiction of the service provider would displace the local law of the service consumer,

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174. Council Directive 2000/31/EC, On Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), art. 3, 2000 O.J. (L 178) 1.

175. GATS, *supra* note 9, pmbl.

176. *Id.* art. VII.

177. Compare the "metaphysical" question of where an intangible such as a debt is sited, or whether it is sited anywhere at all. Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 297 (1983).

178. See David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1369-70 (1996).

179. In certain narrow domains, such as sex tourism, countries have sought to limit consumption abroad by their citizens. See, e.g., End Demand for Sex Trafficking Act, H.R. 2012, 109th Cong. (2005) (declaring goal of barring sex tourism).

180. See *United States—Gambling*, *supra* note 36, ¶¶ 251-52 (holding that barring the supply of services cross-border amounts to a "zero quota" in violation of the United States' mode 1 trade commitments).

subjecting that consumer to a foreign rule. Of course, where a particular local rule is merely a default rule, subject to change contractually, there is nothing offensive *per se* in the choice of a foreign rule. But with respect to mandatory law, *democracy demands glocalization*, at least until “We the People” elect to subject ourselves to foreign rules.<sup>181</sup>

Consider the effort to recast a country of origin principle as a “freedom to receive services” principle—allowing one to receive services from whomever one chooses, under the provider’s foreign rules. This is certainly an appealing recharacterization of international trade in services, focusing attention on how liberalized trade empowers consumer choice. But while globalization heightens consumer choice, it may at the same time make the consumer vulnerable to exploitation. This is because it is nation-states, their laws, and their courts—not nongovernmental, supranational organizations, or even private associations—that serve as the principal protectors of consumers in today’s world.<sup>182</sup> To displace national sovereignty with consumer sovereignty would be to eliminate consumer protections in favor of “buyer beware.” Some netizens would prefer the benevolence of system operators and businesses to national governments—but this is likely to result in either a technocracy—rule by system operators—or a plutocracy—rule by corporations.

Glocalization’s assertion of municipal law in the face of global information flows stands in contrast to the world envisioned by cyberspace enthusiasts, who would deny the applicability of local law to a universal cyberspace.<sup>183</sup> Glocalization simultaneously

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181. In a recent book, Jack Goldsmith and Tim Wu also argue in favor of national regulation of cyberspace, but they do so principally because they believe that the state holds the monopoly on legitimate physical coercion. They preface their book by arguing that “even for the most revolutionary global communication technologies, geography and governmental coercion retain fundamental importance.” JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* viii (2006). Their final chapter, titled “Globalization Meets Governmental Coercion,” concludes: “[P]hysical coercion by government . . . remains far more important than anyone expected . . . . Yet at a fundamental level, it’s the most important thing missing from most predictions of where globalization will lead, and the most significant gap in predictions about the future shape of the Internet.” *Id.* at 180. But as Lessig taught us, West Coast Code can be as effective a regulator as East Coast Code. See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 221 (1999). Microsoft, Cisco, and Google might well have more power than many medium-sized countries to effect a norm in cyberspace. The question is not who can most effectively enforce a regulation, but who can *most legitimately* do so. I bottom my claim for glocalization not on the need for coercive authority, but on the need to sustain democratic rule in a net-worked world.

182. *Cf.* MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, AND SPECIES MEMBERSHIP* 257 (2006) (observing that the nation-state “is the largest and most foundational unit that still has any chance of being decently accountable to the people who live there”).

183. See Johnson & Post, *supra* note 178, at 1367, 1371; David G. Post, *Against “Against Cyberanarchy,”* 17 BERKELEY TECH. L.J. 1365, 1384-86 (2002); John Perry Barlow, *A Declaration of Independence for Cyberspace* (Feb. 8, 1996), <http://homes.eff.org/~barlow/Declaration-Final.html> (“Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind . . . . You are not welcome among us.

confounds the desires of globe-trotting corporations, which seek to extend their markets without the troublesome impediments of local law.<sup>184</sup> The cosmopolitan, borderless world promised by both business strategists and cyber-utopians seems yet remote—at least when such a world would defeat local law. The flat world of global business<sup>185</sup> and the self-regulated world of cyberspace remain distant ideals.

Yet, reasserting national sovereignty in the face of net-work need not stymie globalization. Indeed, it will strengthen globalization against a retrenching backlash.<sup>186</sup> If cross-border flows of information undermine our privacy, security, or the standards of locally delivered services, they will not long be tolerated. Even the promise of more efficient production and its concomitant cost savings might not rebuff protectionist impulses bolstered by the emergence of well-publicized examples of cross-border network abuses. Some smaller states may well have conceded their own powerlessness in the face of cyberspace. Taiwan, for example, has apparently brought no cases against foreign corporations or individuals for activities (such as intellectual property infringement) in cyberspace. The principle of glocalization would perhaps strengthen the resolve of small states to assert their own law in cyberspace. Glocalization will also spur workers worldwide to train according to the requirements of the world's most demanding jurisdictions. This may spur human capital investment throughout the world, and raise standards worldwide.

Whether a network provider will respond to glocalization efforts by offering a generalized service acceptable to all (a “one-size-fits-all” service), or a service tailored to each regulatory regime (a “bespoke” service), will depend largely on the economics of delivering variations of that service. In some cases, a net-work supplier will conclude that a bespoke service is warranted because a tailored service supplies profits in excess of the additional costs of tailoring. Indeed, it may be that it is often easier and cheaper to tailor a service than a good. In some cases, however, a service provider may decide that it is not cost-effective to do so; for example, an American digital bookseller might remove *Lady Chatterley's Lover* from its offerings worldwide rather than implement technology to block its transfer to jurisdictions that label the book indecent. This would indeed be unfortunate, though we might note that cyberspace is filled with those who would make less craven decisions, willing to risk the wrath of repressive regimes to disseminate information.<sup>187</sup>

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You have no sovereignty where we gather.”). The classic response is Jack Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998).

184. See, e.g., KENICHI OHMAE, *THE NEXT GLOBAL STAGE: THE CHALLENGES AND OPPORTUNITIES IN OUR BORDERLESS WORLD* 21 (2005).

185. See FRIEDMAN, *THE WORLD IS FLAT*, *supra* note 166.

186. See Aaditya Mattoo & Sacha Wunsch-Vincent, *Pre-empting Protectionism in Services: The GATS and Outsourcing*, 7 J. INT'L ECON. L. 765, 772 (2004) (describing “political opposition in importing countries and pressure for trade barriers” against cross-border outsourcing of services); Nat'l Conference of State Legislatures, 2006 Outsourcing Bills (Oct. 2006), <http://www.ncsl.org/programs/employ/outsourcing06.htm> (collecting legislative efforts across the United States to stymie cross-border services outsourcing).

187. *Bank Julius Baer & Co. v. Wikileaks*, 535 F. Supp. 2d 980 (N.D. Cal. 2008) (denying preliminary injunction motion of a Swiss bank in a suit against a foreign website dedicated to disclosing “leaks”).

In resisting the French order in the case described in Section II.C, Yahoo argued that that order represented French efforts to impose its law on the world; “French imperialism,” its lawyer decried.<sup>188</sup> Yahoo worried that tolerating the French imposition would cause other states to follow suit, whittling down the World Wide Web into a small, rump set of material that was acceptable to states from China, to France, to Singapore, to North Korea. The most free information medium in the world would rapidly become its most heavily regulated. The French court, however, satisfied itself that this was not inevitable; that technology would permit Yahoo to offer a conforming service to French citizens yet simultaneously offer a nonconforming service to others, with a certain margin of error.<sup>189</sup> An international law rule described in Subsection III.B.2 below shows that France may only rightfully insist on applying its hate speech regulations to Yahoo’s foreign operations where they pose a *substantial* harm in France.

If France believes that the effects are substantial, what responsibility do U.S. courts have to enforce the French rule? Should a net-work provider’s home jurisdiction act as an auxiliary of the foreign jurisdiction? As in the *Yahoo* case, the issue is especially difficult if the local supplier has not done anything wrong under its home jurisdiction’s law. In the United States, where the First Amendment bars state suppression of speech, courts should be especially wary of enforcing a foreign order sanctioning speech. This is especially so because enforcing that rule may cause it to spill over into the domestic arena. The imperfection of geolocation technology means that not only will some people on French soil receive the forbidden material after having been mistakenly identified as not French,<sup>190</sup> but also that some Americans will be denied it after having been mistakenly identified as French.

The general rule, however, should be one where states seek to assist foreign states in enforcing their laws. The U.S. approach to recognition and enforcement is particularly instructive. In the classic case of *Hilton v. Guyot*, a French person sought to recover through U.S. courts a French judgment against U.S. parties arising out of a commercial dispute.<sup>191</sup> In a classic trade in goods dispute, an Irish immigrant to the United States who had initially set up business importing Irish lace found himself at odds with the Parisian makers of the leather gloves he imported.<sup>192</sup> The Supreme Court held that a U.S. court could enforce the foreign money judgment as a matter of comity, which the Court described as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” Procedural differences between the two

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188. Wrenn, *supra* note 64, at 6.

189. *LICRA-May*, *supra* note 63.

190. The French court concluded, based on a report by an expert panel, that Yahoo could geolocate—identify the geographical location of the user—with seventy to ninety percent accuracy, thus leaving the remaining ten percent of French users who would still be able to obtain the illicit material from the Yahoo site. *LICRA-November*, *supra* note 71.

191. *Hilton v. Guyot*, 159 U.S. 113 (1895); *see also* Anupam Chander, *Homeward Bound*, 81 N.Y.U. L. REV. 60, 87-88 (2006).

192. Louise Ellen Teitz, *The Story of Hilton: From Gloves to Globalization*, in *CIVIL PROCEDURE STORIES* 427, 449 (Kevin Clermont ed., 2d ed. 2004).

jurisdictions would not be enough to deny recognition, as long as the foreign jurisdiction had subject-matter jurisdiction and offered an opportunity for a full and fair trial in an impartial process. The Court insisted that recognition was only due when the foreign nation whose acts were at issue offered reciprocal treatment for American acts. The reciprocity requirement has largely fallen out of favor in U.S. jurisprudence, though courts have refused to recognize a foreign judgment where it would be inconsistent with local public policy.<sup>193</sup>

This Trade 1.0 case remains instructive with respect to Trade 2.0 as well: states should assist foreign states as a matter of comity or in the hope of inducing reciprocity in the future, but only where such assistance would not run afoul of local public policy. The new Hague Convention on Choice of Court Agreements, for example, would enforce non-consumer contractual choices of one nation's courts to hear disputes arising out of the contract exclusively.<sup>194</sup> At the time of writing, however, only Mexico had acceded to the Convention. A web of states enforcing each other's rules where consistent with local policy will reduce the jurisdictional evasion made possible by the Internet.

Many have argued that the application of local law to cyberspace is futile.<sup>195</sup> Electrons, after all, are hard to corral. Efforts to stamp out information in cyberspace can lead, against determined parties, to a global version of the arcade game Whack-A-Mole.<sup>196</sup> Yet, governments have an array of techniques to assert control over cyberspace, even if the control is imperfect.<sup>197</sup> How might a nation seek to ensure that its laws are observed with respect to cyberspace communications available to its citizens? Intermediaries will play an important role for this regulation,<sup>198</sup> though intermediaries will often have a dangerous incentive to disable access to a wider array of material than legally required.<sup>199</sup> Points of control include search engines, website hosts, Internet routers, financial intermediaries, advertisers, Internet service providers, and the domain name system,<sup>200</sup> along with the net-work provider (who may have assets in a jurisdiction

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193. 3 VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* § 20:6 (2d ed. 2009).

194. Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98).

195. See, e.g., Johnson & Post, *supra* note 178.

196. When Wikileaks temporarily lost its “.org” domain name due to a U.S. court order, it immediately found mirror sites around the world from which to post its information, including Wikileaks.be, Wikileaks.in, and The Pirate Bay; it also could be accessed directly through the IP address of its Swedish web server, an address helpfully publicized by news accounts, including in the *New York Times*. Declan McCullagh, *Wikileaks Domain Name Yanked in Spat over Leaked Documents*, NEWS.COM, Feb. 19, 2008, [http://www.news.com/8301-13578\\_3-9874167-38.html](http://www.news.com/8301-13578_3-9874167-38.html).

197. See GOLDSMITH & WU, *supra* note 181, at 66-68.

198. *Id.* at 68; see also Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003 (2001); Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239 (2005).

199. See Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006).

200. The decision to locate the “.com” registry in Virginia facilitates the enforcement of U.S. judgments related to such domain names—effectively making a choice to have a “.com” domain name, in the words of one federal court, akin to “play[ing] Internet ball in American cyberspace.”

that will enforce orders of that court) and local consumers. Efforts to utilize various control points to regulate information flow across the world will not prove uniformly successful. Determined web surfers may yet find ways to access forbidden information. Furthermore, the capacity of any country to regulate offerings from abroad will vary widely, depending for example on whether some of the intermediaries identified above have local assets, or assets in other jurisdictions likely to enforce that jurisdiction's rulings. Few, at least, will rival the United States's capacity in this regard, including its final control over the ".com" domain space housed on a Virginia computer.<sup>201</sup> It is not a coincidence that the Eastern District of Virginia and the federal appeals court therefrom have hosted and resolved with finality many transnational domain name disputes.<sup>202</sup>

The European Union offers a model of how to leverage control over domestic entities to control of information processing elsewhere. Recognizing that European privacy laws are often significantly more protective than those elsewhere and recognizing the usefulness of the outsourcing of data processing, the EU has sought to regulate the processing of data about Europeans by service providers *outside* Europe. Data collectors within Europe may send data to foreign processors only if (1) the outsourcer is in a country that the EU recognizes as providing sufficient privacy and security safeguards (currently, Argentina, Canada, Switzerland, and, under a weak Safe Harbor, the United States)<sup>203</sup>; or (2) the outsourcer accepts a model contract protecting privacy.<sup>204</sup> The model contract requires the outsourcer to permit third party audits of its facilities and data, to submit to European law as governing its privacy practices with respect to the information, and to respect any related ruling of the courts of the data exporter's home jurisdiction.<sup>205</sup>

## 2. *Harmonization*

Glocalization raises the specter of breaking cyberspace apart into multiple legal fragments or, worse, yoking foreign service providers into abetting local authoritarian rule. We might label the first pressure *Balkanization*—the creation of borders in cyberspace, thereby risking the advantages of global information and services sharing.

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Am. Online, Inc. v. AOL.org, 259 F. Supp. 2d 449, 457 (E.D. Va. 2003) (suit by American corporation against Korean registrant of "AOL.org"). Many newer Top Level Domains, however, are run through registries outside the United States. For example, ".info" is now run by the Dublin-based company Afilias, though one suspects that U.S. courts would hesitate before describing the choice of a ".info" site as akin to playing Internet ball in Irish space.

201. Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 758 (2003).

202. *See, e.g.*, Cable News Network L.P. v. CNNNews.com, 162 F. Supp. 2d 484 (E.D. Va. 2001) (ordering, on trademark infringement grounds, Chinese news company to surrender "cnnews.com" domain name to American news company).

203. Council Directive 95/46, art. 25(6), 1995 O.J. (L281) 31; European Comm'n, Commission Decisions on the Adequacy of the Protection of Personal Data in Third Countries, [http://ec.europa.eu/justice\\_home/fsj/privacy/thridcountries/index\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/thridcountries/index_en.htm) (last visited Apr. 1, 2009).

204. Commission Decision 2004/915, 2004 O.J. (L385) 74.

205. *Id.* at Annex, cls. II(g), IV, V(c) ("Standard Contractual Clauses for the transfer of personal data from the Community to third countries").

We might label the second pressure *Stalinization*—the imposition of the world’s most repressive rules on cyberspace through compliant intermediaries. Balkanization itself raises further concerns, including the following: *incursions upon sovereignty*, as efforts to regulate foreign service providers lead to extraterritorial assertions of prescriptive and adjudicative power; *futility*—the difficulty of stamping out undesired information in cyberspace described above; and *increasing costs* of compliance with multifarious and potentially conflicting local laws. In this section, I offer a principle to lessen the risk of Balkanization, and in the next section I turn to the problem of Stalinization. Both Balkanization and Stalinization counsel substantial limits on the glocalization principle, but they do not undermine its central *raison d’être*: preserving the possibility of self-regulation in a net-worked world.

To alleviate the harms of Balkanization, countries will have to engage in *harmonization* in varying degrees and in various areas, and I describe this necessity in this Subsection. This Subsection begins by describing the restraints available under existing law on the assertion of local authority and counsels forbearance when local policy concerns are minimally affected. Forbearance, I note, functions as a kind of weak, ad hoc harmonization—allowing one law to regulate a multijurisdictional transaction. More explicit and prospective harmonization efforts are also necessary to reduce the sometimes unnecessary complications of legal variation, and this Subsection describes this route as well, relating it to GATS.

Both international law and U.S. law<sup>206</sup> establish significant metes and bounds for glocalization. Common perception notwithstanding, neither jurisprudence authorizes extraterritorial jurisdiction on the basis of effects alone. International law typically limits state exercise of prescriptive (the right to legislate) and adjudicative (the right to resolve disputes) authority over conduct outside its territory only where the effect on its own territory is “substantial.”<sup>207</sup> As legal scholar W. Michael Reisman describes, international law seeks “to resolve systematically” conflicts of laws “by allocating to particular states the competence to make or apply law to particular persons, things or events that are simultaneously” subject to “the control of two or more states.”<sup>208</sup> In related fashion, the

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206. I focus here on U.S. law rather than on other foreign law for two reasons: (1) U.S. law has extensive experience dealing with the problems of globalization; and, (2) it is the jurisprudence with which I am most familiar. I hope that other scholars will test the arguments presented here in other legal contexts.

207. RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 18, 403 (1987). U.S. courts have adopted this approach in interpreting U.S. statutes. *See, e.g., F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 159 (2004) (limiting applications of Sherman Act abroad to cases where there is “direct, substantial, and reasonably foreseeable effect” on domestic commerce); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (applying Sherman Act to foreign conduct “that was meant to produce and did in fact produce some substantial effect in the United States”); *Atlantic Richfield Co. v. Arco Globus Int’l*, 150 F.3d 189, 194 (2d Cir. 1998) (refusing to apply U.S. trademark law against foreign activity in absence of “substantial effect” on U.S. commerce).

208. W. Michael Reisman, *Introduction to JURISDICTION IN INTERNATIONAL LAW*, at xi, xi (W. Michael Reisman ed., 1999).

American Law Institute's principles for transnational intellectual property disputes counsel judicial coordination of related disputes in multiple fora.<sup>209</sup>

In the United States, the Due Process Clause of the Fourteenth Amendment restrains judicial power, limiting a state's extraterritorial reach even in the face—quite literally—of an explosion on that state's soil. In the classic case of *Worldwide Volkswagen v. Woodson*, involving a car that caught fire in Oklahoma, the United States Supreme Court denied an Oklahoma court jurisdiction over that car's New York distributor because that distributor lacked sufficient other ties to Oklahoma.<sup>210</sup> Even though the distributor could have foreseen that the car might cause injury in Oklahoma (or anywhere in the continental United States), the Supreme Court declared the distributor off limits to Oklahoma courts in the absence of more concerted ties to that state. The Court declared, "Every seller of chattels [does not] in effect appoint the chattel his agent for service of process."<sup>211</sup> We can recast this maxim for the digital age: every net-work provider does not appoint electrons as her agent for service of process. (In recent cases involving the Internet, United States circuit courts allow a state to assert jurisdiction over a foreign person only if there is "something more" than effects alone, typically some kind of known targeting of someone in that state.<sup>212</sup>) A tragic motorcycle accident in California led the Court to revisit the *Worldwide Volkswagen* issue in the case of *Asahi Metal Industry Co. v. Superior Court of California*, now in the context of a suit between a Taiwanese tire manufacturer and a Japanese tire valve manufacturer. The Supreme Court again repudiated the assertion of state court jurisdiction, this time because the California court failed, inter alia, to "consider the procedural and substantive policies of other nations."<sup>213</sup> As we move from *Worldwide Volkswagen* to the World Wide Web, we may do well to remember the lessons learned from earlier globalizations.

The Supreme Court has observed that technological progress has spurred interstate (and international) commerce, necessitating expansion of jurisdictional grounds: "As technological progress has increased the flow of commerce between the

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209. INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES § 221 (Am. Law Inst. 2008).

210. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

211. *Id.* at 296.

212. *Yahoo Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc) (permitting jurisdiction only where defendant "expressly aimed at the forum state" and knew that harm "is likely to be suffered" in that state); *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (noting that jurisdiction requires "[s]omething more than posting and accessibility," and stating that jurisdiction is appropriate only where defendants "manifest an intent to target and focus on" state residents); *Revell v. Lidov*, 317 F.3d 467, 475 (5th Cir. 2002) (requiring defendant to have "knowledge of the forum at which his conduct is directed" before assertion of personal jurisdiction); *ALS Scan, Inc. v. Digital Service*, 293 F.3d 707, 712 (4th Cir. 2002) (noting that "because the Internet is omnipresent," jurisdiction based on access to information placed on the Web would eliminate geographic limits on judicial power); *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) ("[T]he requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.").

213. *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 115 (1987) (alteration in original).



States, the need for jurisdiction over nonresidents has undergone a similar increase.”<sup>214</sup> Yet, the Court has refused to abandon limits on personal jurisdiction entirely: “it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.”<sup>215</sup>

Some scholars have argued that Congress can extend federal jurisdiction extraterritorially without requiring purposeful availment.<sup>216</sup> The Supreme Court itself has been reluctant to dispense with purposeful availment on its own with respect to defendants outside the United States.<sup>217</sup> Restraining assertions of jurisdiction in cyberspace will prove crucial for reducing Balkanization or for avoiding chilling speech.

Antitrust law too has grappled with the globalization of production. The early jurisprudential attitude was to deny any extraterritorial reach of U.S. antitrust law. When asked to hear a case alleging an attempt to monopolize banana exports in Costa Rica, Justice Holmes wrote in the 1909 case of *American Banana Co. v. United Fruit Co.* that “[i]t is surprising to hear it argued that” acts outside the jurisdiction of the United States “were governed by the act of Congress.”<sup>218</sup> To apply U.S. law, he continued, would be “contrary to the comity of nations.”<sup>219</sup> But the courts and Congress came to recognize that refusing to apply American antitrust law abroad could dramatically undermine that law at home, as foreign anti-competitive practices would spill over into the United States. As Harvard professor Kingman Brewster pointed out in an influential book, antitrust law author Senator Sherman himself worried about “jurisdiction-hopping and evasion,” advising that such problems could be met by attaching the putative evader’s property in the United States.<sup>220</sup> In *Timberlane Lumber Co. v. Bank of America*, a federal court of appeals famously offered a test that sought to balance the competing interests of various states in determining whether to assert both prescriptive and adjudicative jurisdiction over alleged foreign anti-competitive acts. American lumber company Timberlane sued Bank of America and others for actions abroad that allegedly harmed Timberlane’s efforts to export lumber from Honduras to the United States. Judge Choy articulated a “jurisdictional rule of reason”<sup>221</sup> that required the court to consider seven factors before asserting extraterritorial jurisdiction: (1) “the degree of conflict with foreign law or policy”; (2) “the nationality or allegiance of the parties and the locations or principal places of business of corporations”; (3) “the extent to which enforcement by either state can be expected to achieve compliance”; (4) “the relative significance of effects on the United States as compared with those elsewhere”; (5) “the extent to which there is

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214. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958).

215. *Id.*

216. See, e.g., Wendy Perdue, *Aliens, The Internet, and “Purposeful Availment”: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455 (2004). But see Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992).

217. *Asahi*, 480 U.S. at 108-13 (plurality opinion); *id.* at 113-14 (majority opinion).

218. 213 U.S. 347, 355 (1909).

219. *Id.* at 356.

220. KINGMAN BREWSTER, JR., *ANTITRUST AND AMERICAN BUSINESS ABROAD* 20 (1958).

221. *Timberlane Lumber Co. v. Bank of Am., N.T. and S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (quoting BREWSTER, *supra* note 220, at 446).

explicit purpose to harm or affect American commerce”; (6) “the foreseeability of such effect”; and (7) “the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.”<sup>222</sup> The American Law Institute largely adopted this list of factors in its influential *Restatement (Third) of Foreign Relations Law*, but made a crucial addition: “the importance of the regulation to the international political, legal, or economic system.”<sup>223</sup> Thus, as markets widened across the globe, it became necessary to extend U.S. antitrust law overseas in order to protect Americans—but to do so in a way consistent with the needs and rights of the international community.

These cases show how the law has responded to the globalization of the production of goods. In the cases described above, covering the diverse range of goods subject to international trade, from automobiles and motorcycles to bananas and lumber, the United States Supreme Court did not insist on local adjudication or local law, even where there was harm ultimately felt within the United States. In these cases, at least, the courts have largely avoided provincialism, favoring instead due consideration of foreign and international interests.

This willingness to forbear in the interests of comity and the international order will prove essential with respect to services as well. The risks of Balkanization, the incursions upon foreign sovereignty, and the costs of compliance with multifarious and potentially conflicting municipal laws all counsel restraint. An early U.S. governmental study warned of the dangers of over-regulation, worried that unnecessary content regulation of the Internet by states “could cripple the growth and diversity of the Internet.”<sup>224</sup> We will need an extraterritoriality jurisprudence for Trade 2.0 modeled on *Timberlane* and its progeny. Of course, a multifactor standard such as the one in *Timberlane* does not promise the predictability of sharp rules. Yet, such a common law approach may be the most suited to navigating the uncertain waters that trade in networked services will bring. As Judge Choy noted in *Timberlane*, “[A]t some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.”<sup>225</sup> Common law courts seem far better suited to determine these points on an ex post basis than legislatures demarcating sharp rules on an ex ante basis. A case-by-case analysis can more readily implement the international version of the golden rule (or the Kantian categorical imperative) applied to extraterritorial jurisdiction: a nation-state should assert jurisdiction only when such an assertion is universalizable, that is, when it would feel comfortable with other nation-states also asserting jurisdiction in similar cases.

I have assumed here that applying domestic law to foreign service providers supplying services via the Web to domestic consumers is an *extraterritorial* assertion of law. But should not efforts to regulate transmissions as they cross into this country be seen as an uncontroversial exercise of *intra-territorial* authority? The difficulty is that the persons who must modify their behavior are abroad; thus, the enforcement of a national rule against such persons will require an extraterritorial change of behavior. (This would

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222. *Id.* at 614.

223. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(2)(e) (1986).

224. WHITE HOUSE, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 18 (1997), available at <http://clinton4.nara.gov/WH/New/Commerce/read.html>.

225. 549 F.2d at 609.

not be the case if the regulation were effected only through domestic intermediaries such as ISPs or through targeting domestic users of the foreign service, and no liability attached to the foreign provider.) Given the direct demand to a foreign service provider, concerns about extraterritorial application of both U.S. law and U.S. judicial power appear relevant. Cyberspace does not allow clean demarcations of political boundaries, with an American space here, a Brazilian space there, etc. Requiring a foreign network provider to comply with local law necessarily entails a command to a party outside one's borders. In this sense, then, such regulation has an extraterritorial component.<sup>226</sup>

However, courts should not require a clear legislative statement of extraterritorial intent before applying a rule to network sourced from outside the country. Because most U.S. law does not have an explicit extraterritorial application mandate, requiring clear legislative statements would simply serve to allow service providers (and perhaps consumers) to avoid the bulk of U.S. law.

Just as U.S. law should not be asserted carelessly against foreign service providers on behalf of domestic parties, U.S. law should not be available to foreigners without a substantial U.S. nexus. Here an antitrust case again offers guidance. In *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, the Supreme Court said that efforts to extend U.S. antitrust protections to foreigners smacked of “legal imperialism.”<sup>227</sup> “[I]f America’s antitrust policies could not win their own way in the international marketplace for such ideas,” the Court reasoned, we should not impose these policies on foreign countries nonetheless.<sup>228</sup> The Court accordingly refused to hear the claims of foreign plaintiffs where their foreign injuries are “independent of any adverse domestic effect.”<sup>229</sup> Of course, if international law declares the defendant’s actions illegal, then allowing a suit to proceed (for example through an Alien Torts Statute claim) would further the international order, not undermine it.

Choice of law also restrains excessive assertions of local law—and thus excessive parochialism. The *lex fori*—the law of the forum—need not have a stranglehold on the judicial imagination. Conflict of law rules empower courts to select a foreign rule depending on the relative interests at stake of each jurisdiction.<sup>230</sup> The intensity of multijurisdictional transactions arising out of Trade 2.0 will require states to fortify such efforts, rather than obstreperously insisting on the local rule. States must forgo an insistence on local law where the local interest is dwarfed by the foreign interest or is otherwise minimal. Such forbearance might be likely to attract reciprocity from sister states. Moreover, it is necessary to alleviate the international conflicts that cyberspace trade will generate. As with the jurisdictional calculus, courts must be sensitive to the “needs of the interstate and international system.”<sup>231</sup>

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226. As Dean Kramer writes, the term “extraterritorial” has been “used in different ways at different times and in different contexts.” Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 181 n.9.

227. 542 U.S. 155, 169 (2004).

228. *Id.*

229. *Id.* at 164.

230. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b)-(c) (1971).

231. *Id.* § 6(2)(a); *cf.* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 616 (1963); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining*

Sufficiently noxious assertions of extraterritorial jurisdiction will be met with blocking statutes and other retaliatory measures by sister states. Extravagant actions against foreigners have at times drawn legal responses from the home countries of those persons.

Forbearance acts as a weak form of harmonization. By not asserting jurisdiction, the locality is essentially yielding to a foreign law, and in that sense allowing that this conduct can be properly governed by that law. (This assumes, as is true of the bulk of cases, that foreign courts seized of the issue will likely apply their own law.) Efforts to harmonize laws across nations and standards among professional associations will prove essential to preserve a global cyberspace in the face of national regulation. Glocalization becomes less necessary where a state has accepted a foreign regime as satisfactory for local purposes (this is *recognition*, which functions as a medium level of harmonization because it sanctions alternative governing rules, at least for the recognized entity) or agreed upon an international standard (this is what we might call *strong harmonization*).<sup>232</sup>

Harmonization of services regulation is one of the goals of recent trade agreements. GATS permits members to “recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country.”<sup>233</sup> It goes further to mandate that states agree on disciplines to ensure that licensing and technical standards are “based on objective and transparent criteria” and are not unduly “burdensome.”<sup>234</sup> NAFTA similarly acknowledges the possibility that a party might recognize, “unilaterally or by agreement, education, experience, licenses or certifications obtained in the territory of another Party or of a non-Party.”<sup>235</sup> ASEAN has recently adopted mutual recognition arrangements with respect to nursing and engineering.<sup>236</sup> Regional recognition arrangements might pave the way for recognition of the law or licensing of countries outside the region.<sup>237</sup> With respect to harmonization, NAFTA also

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*Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1881 (2005) (focusing on “community affiliation and the functional needs of the transnational system,” not just parochial interests, in determining rule to be applied).

232. Reisman observes that the international community can “transcend” the challenge of multijurisdictional competence by (1) “creating vastly expanded sectors of substantive international law”; (2) “establishing networks of international tribunals” with exclusive competence; and (3) “establishing private international law conventions that would allocate competences on the basis of a specific code.” Reisman, *supra* note 208, at xix.

233. GATS, *supra* note 9, art. VII(1). See generally Kalypso Nicolaïdis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 LAW & CONTEMP. PROBS. 263 (2005).

234. GATS, *supra* note 9, art. VI(4).

235. NAFTA, *supra* note 11, art. 1210(2).

236. See Association of Southeast Asian Nations, Agreements and Declarations, <http://www.aseansec.org/19087.htm> (last visited Apr. 1, 2009).

237. The United States has recently begun to recognize an international accounting standard without requiring foreign companies to reconcile their accounts to American accounting standards. However, one major recognition scheme, the Multijurisdictional Jurisdiction Disclosure System between Canada and the United States, introduced in 1991, has been an experiment that the U.S. Securities and Exchange Commission has not yet extended to other

encourages the parties to “develop mutually acceptable standards and criteria for licensing and certification of professional service providers.”<sup>238</sup>

This will require harmonization projects, not only for the procedural aspects of transnational net-work described in connection with the dematerialization described above, but also in substantive areas as well. A dramatic recent example of a harmonization project shows the possibilities: the SEC recently permitted certain foreign issuers of securities in the U.S. markets to use International Financial Reporting Standards (IFRS) accounting standards without reconciling them to the Generally Accepted Accounting Standards widely utilized in the United States.<sup>239</sup> The SEC now proposes to require certain American companies to use IFRS as well domestically. This move to harmonize our rules seems a natural result of recognition because it would otherwise give a foreign company the option to choose between two different standards (the American standard or the recognized foreign or international standard), leaving an American company in a disadvantageous position of having only one choice (the American standard). U.S. recognition of foreign judgments jurisprudence is similarly permissive, allowing recognition even where a foreign court’s procedures differ from ours.<sup>240</sup> This recognition jurisprudence, of course, applies to foreign judicial judgments, not foreign certifications and standards.

Moving towards international standards for certain services may involve deference to the results of technocratic legal processes. Some have critiqued such transnational processes as undemocratic, but I have argued elsewhere that the voluntary nature of national acquiescence to such processes makes them compatible with democracy.<sup>241</sup>

Trade 1.0, too, has involved extensive efforts to harmonize national standards. The WTO’s Agreement on Technical Barriers to Trade (TBT) urges states to use international standards where consistent with regulatory aims, obliging states to give “positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that

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countries, not even the United Kingdom. Hal S. Scott, *Internationalization of Primary Public Securities Markets*, 63 LAW & CONTEMP. PROBS. 71, 80-86 (2000).

238. NAFTA, *supra* note 11, Annex 1210.5, § A.2 (“Professional Services”).

239. Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Securities Act Release No. 8879, Exchange Act Release No. 57,026, 73 Fed. Reg. 986 (Jan. 4, 2008). For a list of countries adopting IFRS, see Deloitte Touche Tohmatsu, Use of IFRS by Jurisdiction, <http://www.iasplus.com/country/useias.htm> (last visited Apr. 1, 2009).

240. *See* *Hilton v. Guyot*, 159 U.S. 113 (1895); *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) (holding that foreign judicial procedures need only be fair in a broad international sense).

241. *Compare* Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT’L L. 237, 238 (2000) (“The investment of lawmaking authority in multilateral international bodies . . . shrinks the realm of democratic public decision-making . . .”), *with* Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1196 (2005) (rebutting claims that there exists a “democratic deficit at the international level”).

these regulations adequately fulfill the objectives of their own regulations.”<sup>242</sup> But these obligations are restricted to goods; the TBT explicitly excludes services from its ambit.<sup>243</sup> WTO negotiators should seek to expand the TBT to cover services.

Even with the glocalization I describe, the Internet shall offer the world’s most important platform for regulatory competition. In the face of this competition, states may modify their own laws, finding that their laws are unnecessary, ineffective, or otherwise inferior to foreign laws. Services regulations are especially likely to undergo rationalization, as they have never before faced foreign competition. Industry and consumer groups will establish sets of best practices and global standards in certain services, and governments may defer to such standards. Governments will find it in their own interests to seek international coordination because of the difficulty of finding national solutions to global problems.<sup>244</sup> Equally important, private parties are seeking to establish transnational rules and standards that will govern parts of Trade 2.0.<sup>245</sup> We are likely to witness the emergence, in certain domains, of a new *lex mercatoria*, cobbled together through the common law, private coordination, statutory convergence, and treaty harmonization, thereby reducing Balkanization, incursions on sovereignty, and costs of global legal compliance. In yet other domains, there is likely to exist a preference for legal diversity, or at least disagreement on where to find legal harmony.

Is harmonization simply a concession to the unruly, unregulable global Internet? Is it the polar opposite of glocalization—the abandoning of local law in favor of foreign rules (including foreign anything goes absence of rules)? No, harmonization requires the deliberate decision of a polity or of the appropriate standards bodies.

Much of the jurisprudence I have surveyed is American. But the demonstration of forbearance by even the mightiest country in the world should stand as example for the rest of the world. The United States will also have to set an example by engaging vigorously in harmonization projects.

### 3. *Do No Evil*

Because foreign net-work providers lie beyond the easy reach of totalitarian governments, they can provide a crucial channel to disseminate suppressed information. Yet, in the wrong hands, the Internet can bring the specter of a pernicious Big Brother closer than ever possible in Orwell’s time.<sup>246</sup> Dissident pamphleteers who might have hid behind the anonymity of discreetly placed writings may find their tracks harder to hide in cyberspace. When allied with willing Internet service providers, websites, software

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242. Agreement on Technical Barriers to Trade art. 2.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1868 U.N.T.S. 120, 122.

243. *Id.*, annex 1, pmbl. (“[S]ervices are excluded from the coverage of this Agreement.”).

244. *Cf.* Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1357 (2003) (“[A]s capital markets and currency markets have become more globalized, the ability of regulators in a particular country to regulate domestic firms has declined significantly.”).

245. Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL’Y 627 (2006).

246. *See* GEORGE ORWELL, 1984 (1949).

providers, and financial intermediaries, a government can gain an omniscience heretofore unknown.<sup>247</sup> Foreign service providers might yield to political and economic pressure from the government and, instead of providing channels for communicating suppressed information, assist the state in rooting out dissidents. China, for example, has relied in part on evidence gleaned from online activities to identify and jail political dissidents.

Glocalization does not justify the extension of oppressive laws to foreign service providers. Glocalization's premise, after all, is that people should be able to choose their own law through their duly elected national organs, not the preferences of distant service providers. It thus does not support a requirement to tailor one's service to the demands of an unelected, totalitarian state.

But when a totalitarian state has the wherewithal to insist on its repressive rule, even against a foreign net-work supplier, must that foreign supplier simply withdraw? While allowing one to claim an ethical high ground, a policy requiring disengagement carries certain risks. If corporations from countries with strong human rights standards walk away from oppressive states, corporations with fewer ethical constraints may step into the breach. According to a recent account, "[i]n Internet search, for example, Baidu openly embraces the Chinese government's regulation of free speech on China-hosted Web sites, while Google and others have struggled to balance those rules with Western opposition to censorship."<sup>248</sup> Furthermore, because computer censors are both imperfect and prone to countermeasures, Chinese individuals can still use them to garner and communicate information subject to repression. At the same time, however, given the fact that China may now have more Internet users than any other country in the world, the economic pressures to capitulate to repressive demands are enormous.<sup>249</sup>

Perhaps it is possible to be engaged yet not advance the cause of state repression. One minimal principle that net-work providers should adopt is "Do no evil." Google has famously adopted a variant of imperative as a corporate principle (though some have charged that it has failed to live up to it in connection with China).<sup>250</sup> (For its part, Yahoo has adopted the inverse, more demanding, formulation: "Yahoo For Good."<sup>251</sup>)

But what does it mean to not do evil?

Consider Google's own actions in China. In 2006, Google launched a Chinese language version of its site that would, unlike its previous Chinese language version, be hosted from servers in China itself. Access to Google's servers outside China had been uncertain and slow, due in part or whole to Chinese blocking, and this move would allow

247. There is a horrifying information technology precedent: In 2001, a Roma group sued IBM, claiming that IBM custom-designed punchcard machines and forms that assisted in Nazi genocide. IBM argued that its German subsidiary had been taken over by the Nazis, and in 2006, a Geneva Court rejected the case for exceeding the statute of limitations. Associated Press, *Swiss High Court Rejects Holocaust Suit vs. IBM*, GRAND RAPIDS PRESS, Aug. 20, 2006, at E2.

248. Loretta Chao & Ethan Smith, *New Tune: Google Aims To Crack China With Music Push*, WALL ST. J., Feb. 6, 2008, at A1.

249. *China Tops World in Internet Users*, CNN.COM, Jan. 14, 2009, <http://e.a.cnn.net/2009/TECH/01/14/china.internet/index.html>.

250. Google Inc., *Our Philosophy*, <http://www.google.com/intl/en/corporate/tenthings.html> (last visited Apr. 1, 2009) (listing as one of ten corporate principles, "You can make money without doing evil.").

251. Yahoo! for Good, <http://forgood.yahoo.com> (last visited Apr. 1, 2009).

Google to expand its presence in China. In moving its servers to China, Google abandoned its Safe Server Strategy,<sup>252</sup> presumably for economic advantage. With servers now on Chinese soil, Google must follow Chinese governmental mandates for censoring results. Google, however, took a number of steps to lessen the risk of doing evil: (1) it informed Chinese users of Google.cn when their search results were censored; (2) it continued to offer its uncensored services through the Google.com site, whose servers are located outside China; and (3) it did not offer services through its Chinese Google site that allowed users to create content, such as blogs and email.<sup>253</sup> The last condition suggests that Google structured its direct Chinese presence to avoid learning information about dissident activity, information that it might, under Chinese law, be required to divulge to authorities. Chinese bloggers and other Chinese content providers would have to use Google's foreign servers, which helpfully allow that data some protection through the Safe Server Strategy. It thus tried to avoid falling into the trap into which Yahoo fell, and which subjected Yahoo to the lawsuit it faced in a San Francisco federal court.

But what if Google's Mountain View headquarters received an order from China to turn over incriminating information about a political dissident held on Google's computer servers in California? Liberal countries wishing to strengthen the Safe Server Strategy might require that companies not turn over personal identifying information to foreign authorities where that information might be used for political, religious, or social persecution in violation of universal human rights norms.<sup>254</sup>

We might understand "do no evil" as a kind of Pareto principle, where the provider must make no one *worse off* by its action.<sup>255</sup> According to this measure, Google's strategy seems largely non-evil, at least on its face. After all, Google's delivery of censored information on Google.cn does not reduce the information that individuals

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252. See *supra* note 92 and accompanying text. A bill in Congress would bar exactly this. Jim Hopkins, *Bill Would Keep Servers Out of China*, USA TODAY, Feb. 12, 2006, at B3.

253. David P. Baron, Case, *Google in China*, HARV. BUS. PUBL'G, Nov. 15, 2006, available at <http://harvardbusinessonline.hbsp.harvard.edu/relay.jhtml?name=itemdetail&id=P54>; Frank Dai, *Google's China Problem*, GLOBAL VOICES ONLINE, June 10, 2006, <http://www.globalvoicesonline.org/2006/06/10/china-googles-china-problem>.

254. The Global Online Freedom Act of 2007, currently under consideration in Congress, adopts a different approach. It would: (1) prevent U.S. companies from locating servers in China if the servers collected any personally identifying information (§ 201); (2) require the U.S. Department of Justice to determine whether a foreign request for personal information should be honored (§ 202); and (3) require U.S. companies to inform the U.S. State Department the details of all foreign censorship (§§ 203-04). Global Online Freedom Act, H.R. 275, 110th Cong. (2007). The ban on locating servers in China would leave an opening for Chinese and other corporations to fill the void; such corporations may have fewer qualms about assisting state repression. The requirement to inform the U.S. government of foreign censorship rules would seem unlikely to produce useful information—and would instead make it easy for a foreign government to cast American corporations as "CIA spies."

255. Worse off, here, would be defined in terms of human rights, not utility. Otherwise there could be no possibility of a Pareto improvement from Google's actions as Google's increase in market share would come at the expense of other suppliers, whose utility would be thereby reduced.



might have otherwise obtained.<sup>256</sup> At least one worrying possibility remains, however: Google China might be required to disclose the search terms that Chinese citizens use, and such search trails might help incriminate these citizens in dissident activity. Yet another problem exists, more clearly in violation of a Pareto interpretation of the “do no evil” mandate: Google invests in Chinese media companies that do allow user-generated content and which presumably follow governmental mandates to disclose information about the source of such content. Investments from companies such as Google help provide capital for such enterprises. Can corporations escape evil by becoming shareholders in controversial enterprises rather than supplying the service directly?

Not doing evil does not mean that one is doing good, and thus is not in itself a sufficient criterion for corporate action. Yet, it does offer a minimum criterion for appraisal, more so when interpreted through a more definitive interpretation like the Pareto principle.

Stung by criticism for their involvement in Chinese censorship, Yahoo, Google, and Microsoft are collaborating with Human Rights Watch and other nongovernmental and educational organizations to develop a set of principles to respond to “government pressure to comply with domestic laws and policies in ways that may conflict with the internationally recognized human rights of freedom of expression and privacy.”<sup>257</sup> Such principles might well give further precision to the obligation to do no evil.

Once we recognize Google as a service provider engaged in an information service export, yet another option appears: a WTO claim to dismantle impediments to the services of Google and other similar suppliers. The WTO system does not currently seem to permit the WTO to order a local regulation dismantled because it runs afoul of human rights law.<sup>258</sup> However, a review of China’s GATS accession schedule reveals a broad array of commitments to liberalize mode 1, cross-border trade, including in professional services.<sup>259</sup> China promises both market access and national treatment for many services delivered cross-border. However, the schedule limits liberalization of “on-line information and database retrieval services” to joint ventures, with a maximum foreign participation of thirty percent.<sup>260</sup> A note requires “[a]ll international telecommunications services . . . [to] go through gateways established with the approval of China’s telecommunications authorities.”<sup>261</sup> The requirement that such services must go through approved gateways cannot, however, camouflage discriminatory measures or even impediments to market access. Such gateways function like customs houses: insufficient

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256. Moreover, the censorship is imperfect. See Jonathan Zittrain & Benjamin Edelman, *Empirical Analysis of Internet Filtering in China* (Mar. 20, 2003), <http://cyber.law.harvard.edu/filtering/china>.

257. Global Network Initiative, <http://www.globalnetworkinitiative.org> (last visited Apr. 18, 2009).

258. Joost Pauwelyn, *Human Rights in WTO Dispute Settlement*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE* 205, 206 (Thomas Cottier et al. eds., 2005) (“[I]t is . . . out of the question that within the present system a WTO panel would examine, say, a claim of violation under the UN Covenant on Civil and Political Rights.”).

259. See Working Party Report, *On the Accession of China—Schedule of Specific Commitments on Services*, WT/ACC/CHN/49/Add.2 (Oct. 1, 2001).

260. *Id.* at 17.

261. *Id.*

staffing at a customs house could be grounds for a WTO claim. Because they rely on highly subjective and inconsistent judgments, Chinese actions regulating information might also run afoul of the GATS transparency obligation.<sup>262</sup> It is difficult to know whether Google or another entity would win a GATS claim against Chinese actions that interfered with cross-border supply of net-work, but it is important to recognize the possibility of such a claim. Such claims may soon be tested: the United States has charged China with failing to live up to its GATS obligations by requiring content review and other administrative hurdles before permitting the downloading of music (and other audiovisual material) from Apple's iTunes store and similar services.<sup>263</sup> The European Union and the United States have filed requests for consultations with respect to Chinese state media controls on the dissemination of financial information.<sup>264</sup> Because GATS deals with impediments to information services, it will, somewhat unexpectedly, impact Chinese state media controls.

Whatever the outcome of the GATS complaints against China, we must seek to nurture a corporate consciousness among information service providers of their role in facilitating either liberation or oppression. Goods manufacturers have at times adopted corporate codes of responsibility, appointed corporate responsibility officers, and bonded themselves through independent monitors. Similarly, corporate counsel to international services providers must include human rights in their bailiwick, if not to avoid doing evil, at least to avoid being subject to suit or consumer or shareholder boycott. Yahoo has established a "cyber dissident fund" administered by prominent Chinese dissident Henry Wu to aid people jailed there for their political cyber-activities.<sup>265</sup> Without proper preparation, information services providers will find themselves always at risk of being yoked into the service of regimes that both repress information and gather information in the cause of repression. Alongside mergers and acquisitions counsel and privacy lawyers, Silicon Valley and Bangalore companies should add human rights lawyers and trade counsel.

#### IV. CONCLUSION

A new generation of traders has arrived on the wings of the Internet. These diverse traders include multinational corporations and individuals working from their kitchen table. They bring together Old and New Worlds, metropole and periphery, in ways never before imaginable. Via electronic networks, Indians tutor Koreans to speak English,<sup>266</sup> Koreans draw cartoons for Japanese animation studios, and Ghanaians process

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262. Working Party Report, *On the Accession of China*, ¶ 306, WT/ACC/CHN/49 (Oct. 1, 2001).

263. See *supra* note 4 and accompanying text; Bradley S. Klapper, Associated Press, *US Targets Chinese Cinema, Music Download Rules at WTO*, INT'L HERALD TRIB., July 18, 2007.

264. See *supra* note 4.

265. *Yahoo Creates Fund for Chinese "Cyber Dissidents,"* FRANCE24.COM, Apr. 3, 2008, <http://www.france24.com/en/20080403-yahoo-fund-cyber-dissident-internet-china>.

266. Cho Jin-seo, *Indians To Teach English via Internet*, KOREA TIMES, Aug. 3, 2007, [http://www.koreatimes.co.kr/www/news/biz/2007/08/123\\_7682.html](http://www.koreatimes.co.kr/www/news/biz/2007/08/123_7682.html).

citations for quality of life offenses in New York City.<sup>267</sup> For their part, Silicon Valley firms seek to become the intermediaries for the world. A Londoner might download a Nigerian novel from Amazon.com, write reports using Microsoft's online enterprise software, further customer relationships via Salesforce.com, and manage London stocks investments via Fidelity.com. A resident of Shanghai might learn about Chinese history through Yahoo, organize a party via Evite, keep in touch with friends via Facebook, purchase tickets for a local concert on Tickets.com, find a date on Match.com, participate in the user-created world of Second Life, store emails and photos on Google's servers and health records on Microsoft's HealthVault, all the while humming along to the latest iTunes by a U.S. pop star. Law should facilitate such global interactions, but it should do so without jeopardizing the capacity of peoples to govern themselves.

Like all new forms of trade before it, cyber-trade will have profound effects on lifestyles, livelihoods, and relationships; improving the efficiency of production; transmitting the latest technologies and practices; and increasing human fellowship and understanding. At the same time, this net-worked world poses risks for cultural norms, privacy, security, and even human rights. Because of the global nature of cyber-transactions, normative conflicts are likely to arise between democratic and authoritarian regimes, but also between democratic ones *inter se*. We must protect local control of global Internet trade without jeopardizing either human rights or the World-Wide nature of the Web. Globalization with a human face will require us to manage cyber-trade to allow us to engage with the world, yet at the same time not to feel that we are at the world's mercy.

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267. Robert F. Worth, *In New York Tickets, Ghana Sees Orderly City*, N.Y. TIMES, July 22, 2002, at A1 (quoting Ghanaian employee reviewing citations for New York City municipal code violations: "I am very used to the rules and regulations of New York now . . . . So I think I can live there").