The Global Governance of the Internet: Bringing the State Back In

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The accelerating pace of economic globalization has generated a lot of bad international relations theory. The loudest theoretical response to this phenomenon predicts a race to the bottom in wages, regulatory standards, and social protections.[1] Although popular with antiglobalization protestors, the race to the bottom theory has the tragic flaws of dubious theoretical presumptions and meager empirical support.[2] Another strand looks at the empowerment of nonstate actors, such as multinational corporations, nongovernmental organizations (NGOs), and transnational activist networks.[3] Another segment of the literature debates the ability of international institutions to supply effective global governance.[4] All of these strands focus on the decline of state autonomy relative to other forces in world politics. These "islands of theory" focus on small parts of the larger question of how globalization affects governance; as a result, this work fails to see the forest for the trees.

[1] Richard Falk, "State of Seige: Will Globalization Win Out?" *International Affairs* 73 (January 1997): 123–136; Arthur Schlesinger, Jr., "Has Democracy a Future?" *Foreign Affairs* (September/October 1997): 7–8; Alan Tonelson, *The Race to the Bottom* (Boulder, CO: Westview Press, 2000).

[2] Daniel W. Drezner, "Bottom Feeders," *Foreign Policy* 121 (November/December 2000): 64–70.

[3] Ronnie Lipschutz, "Reconstructing World Politics: The Emergence of a Global Civil Society," *Millennium* 21 (Spring 1992): 389–420; Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996); Jessica Matthews, "Power Shift," *Foreign Affairs* 76 (January–February 1997): 50–66; Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca, NY: Cornell University Press, 1998).

[4] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Cambridge, MA: Harvard University Press, 1995); Kenneth Waltz, "Globalization and Governance," *PS: Political Science and Politics* 32 (December 1999): 693–700.

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The scholarly research on the Internet encapsulates all of the theoretical problems with the globalization literature, only in a more concentrated form. For international relations theorists, the defining feature of the Internet is that it "overcomes all barriers of territorial distance and borders."[5] Because the transaction costs of communication are so low on the Internet, nonstate actors can coordinate their activities to a much more sophisticated degree than in the past. Internet sites can be located anywhere on the globe, making it possible for businesses and individuals to bypass any set of state regulations. It becomes increasingly difficult to reconcile state regulations with the decentralized structure of the computer network.[6] In place of the state, cyberanalysts posit a governance structure with more emphasis on direct democracy and open debate, guided by an epistemic community of cyberenthusiasts who embrace the libertarian creed of no state interference.[7] If globalization has altered international relations, its effects are most pronounced in the regulation of the Internet.

Do globalization and the Internet weaken the ability of states to regulate the global economy? This paper argues that the consensus summarized in the previous paragraph is largely wrong. States, particularly the great powers, remain the primary actors for handling the social and political externalities created by globalization and the Internet. As the primary actors, the great powers are the most consistently successful in achieving their preferences relative to other actors. Powerful states will use a range of foreign policy substitutes, such as coercion, inducements, delegation, and forum shopping across different international institutions to advance their desired preferences into desired outcomes. Nonstate actors can still influence outcomes on the margins, but their interactions with states are more nuanced than the globalization literature suggests.

The substitutability principle is essential to understanding how globalization affects global governance.[8] States can and will substitute different governance structures, and different policy tools to create those structures, depending on the constellation of state interests. Great-power options include delegating regime management to nonstate actors, creating international regimes with strong enforcement capabilities, generating competing regimes to protect material interests, and tolerating the absence of effective cooperation because of divergent state preferences. Because globalization scholars fail to consider the delegation strategy as a conscious state choice, they have misinterpreted the state's role in global governance.

The international regulation of the Internet provides a fertile testing ground for these arguments. Prior analysis on the Internet has been fuzzy, due in part to the assumption that all Internet-related activity can be defined along

[5] Jan Aart Scholte, *Globalization: A Critical Introduction* (New York: St. Martin's Press, 2000), 75.

[6] Virginia Haufler, *A Public Role for the Private Sector* (Washington, DC: Carnegie Endowment for International Peace, 2001), 82.

[7] John Perry Barlow, "A Declaration of the Independence of Cyberspace," 2 September 1996, accessed at http://www.islandone.org/Politics/DeclarationOfIndependance.html, 29 May 2002.

[8] Benjamin Most and Harvey Starr, "International Relations Theory, Foreign Policy Substitutability, and 'Nice' Laws," *World Politics* 36 (April 1984): 383–406.

a single policy dimension. In fact, the Internet has generated multiple areas of governance, including the development of technical protocols, censorship, e-taxation, intellectual property, and privacy rights. For many of these issue areas, states express divergent interests, halt cross-border Internet transactions that contradict their preferences, and use international governmental organizations (IGOs) and treaties to advance their preferences. Even on issues in which there are large zones of agreement, such as the standardization of technical protocols, the great powers will manipulate private forms of authority to achieve their desired ends.

The implications for scholars of international relations and globalization are significant. The Internet could be safely described as a tough test for state-centric theories of international relations, and an easy test for global civil society arguments.[9] If states are found to be the key actors for Internet-related issues, the globalization literature will need to reconsider the relationship between states and nonstate actors. The evidence presented here suggests that both IGOs and NGOs have roles to play in global governance. At times they can act as independent agenda setters, but more often they act as the agents of state interests. Only by understanding these actors as governance substitutes in the global Internet regime can one acquire a greater understanding of global governance in an era of economic globalization.

The rest of this paper is divided into five sections. The next section reviews the existing arguments on the Internet and international relations. The third section presents a model of global regulation based on the distribution of state power and interest, and examines how this model explains various regulatory dimensions of the Internet. The fourth section briefly surveys Internet issues over which states have strong disagreements—content regulation, intellectual property rights (IPR), and privacy rights—and finds that states have acted decisively to lock in their preferences in those issue areas. The fifth section reviews the international regimes regulating the technical protocols that form the backbone of the Internet. This section confirms that when states are largely in agreement about regulatory outcomes, great powers will prefer to delegate regime management to nonstate actors, but their influence still dominates the outcome. The final section considers the ramifications of the study of globalization and global governance.

GLOBALIZATION AND THE INTERNET: THE ACCEPTED WISDOM

Over the past decade, there has been an energetic debate about how globalization alters governance. From this debate, one can distill two clear hypotheses about the effects of globalization on the management of the global political economy. In the first, globalization undercuts state sovereignty, weakening

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[9] On case selection, see Harry Eckstein, "Case Study and Theory in Political Science" in Fred Greenstein and Nelson Polsby, eds., *Handbook of Political Science*, vol. 7 (Reading, MA: Addison-Wesley, 1975).

governments' ability to effectively regulate their domestic affairs. Global market forces are both powerful and uncontrollable, stripping governments of their agency. As Thomas Friedman phrases it, globalization forces states into the "Golden Straitjacket," in which they must choose between "free market vanilla and North Korea."[10] A number of international relations scholars have argued that globalization drastically reduces the state's ability to govern.[11]

The second hypothesis is that as state power has waned, globalization has simultaneously enhanced the power of nonstate actors via the reduction of transaction costs across borders. The characterization of these nonstate actors varies from author to author. Peter Haas argues that when communities of technical experts reach a consensus on a particular policy issue, governments will follow their lead.[12] Paul Wapner posits that the growth of NGOs amounts to the creation of a global civic society that is too powerful for states to ignore.[13] Virginia Haufler observes that multinational corporations often create their own governance structures to compensate for the retreating state, leading to new "private authority" structures.[14]

International relations theorists and cyberenthusiasts agree that the Internet greatly enhances both of these effects of globalization. Regarding state power, Frances Cairncross notes, "Government jurisdictions are geographic. The Internet knows few boundaries. The clash between the two will reduce what individual countries can do. Government sovereignty, already eroded by forces such as trade liberalization, will diminish further. . . . One result: no longer will governments be able to set the tax rates or other standards they want."[15] Viktor Mayer-Schönberger and Deborah Hurley observe, "Governance based on geographic proximity, territorial location and exclusivity of membership to such physical communities will be fundamentally challenged by the advent of numerous non–proximity-based, overlapping virtual communities."[16] Cyberguru John Perry Barlow opined that "By creating a seamless global economic zone, borderless and unregulatable, the Internet calls into question the very idea of the nation-state."[17]

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[10] Thomas Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Strauss, & Giroux, 1999), 86.

[11] Strange, *Retreat of the State.* Dani Rodrik, *Has Globalization Gone Too Far?* (Washington, DC: Institute for International Economics, 1997); Ian Clark, *Globalization and International Relations Theory* (Oxford: Oxford University Press, 1999); Richard Rosecrance, *The Rise of the Virtual State* (New York: Basic Books, 1999).

[12] Peter Haas, "Introduction: Epistemic Communities and International Policy Coordination," *International Organization* 46 (Spring 1992): 1–35.

[13] Paul Wapner, "Politics Beyond the State: Environmental Activism and World Civic Politics," *World Politics* 47 (April 1995): 311–340.

[14] Haufler, *A Public Role for the Private Sector.*

[15] Frances Cairncross, *The Death of Distance*, 2nd ed. (Cambridge, MA: Harvard Business School Press, 2000), 177.

[16] Viktor Mayer-Schönberger and Deborah Hurley, "Globalization of Communication" in Joseph S. Nye, ed., *Governance in a Globalizing World* (Washington, DC: Brookings Institution, 2000), 23.

[17] John Perry Barlow, "Thinking Locally, Acting Globally," *Time*, 15 January 1996, 76.

There is also general agreement that the Internet enhances the power of nonstate actors, permitting them to network at an ever-increasing level of sophistication. Stephen Kobrin asserts that because NGOs coordinated their strategies and actions over the Internet, they were able to derail the efforts of the developed countries to fashion a Multilateral Agreement on Investment (MAI).[18] Ronald Deibert concurs, arguing: "What the Internet has generated is indeed a new 'species'—a cross-national network of citizen activists linked by electronic mailing lists and World-Wide Web home pages that vibrate with activity, monitoring the global political economy like a virtual watchdog."[19] The increased coordination of protests at venues such as Seattle, Washington, Genoa, and other ports of call speaks to the sophistication of nonstate actors in the Internet age.

Following these arguments to their logical conclusion, the issue area in which the effects of globalization should be at their most concentrated is the regulation of the Internet itself. Internet governance should see states at their most enfeebled and nonstate actors at their most powerful. This is certainly the conclusion of most international relations scholars who study the Internet. Deborah Spar observes, "International organizations lack the power to police cyberspace; national governments lack the authority; and the slow pace of in- terstate agreement is no match for the rapid-fire rate of technological change."[20] Haufler concurs, noting, "The decentralized, open, global character of . . . the Internet makes it difficult to design and implement effective regulations through top-down, government-by-government approaches."[21]

Cyberenthusiasts concur with this assessment. Nicholas Negroponte, the cofounder of MIT's Media Lab, states: "The Internet cannot be regulated. It's not that laws aren't relevant, it's that the nation-state is not relevant."[22] A cur- sory review of the nonstate actors involved in the regulation of the Internet— the Global Business Dialogue on e-commerce (GBDe), the Internet Engi- neering Task Force (IETF), the Internet Society (ISOC), and the Internet Consortium for Assigned Names and Numbers (ICANN)—suggests the exis- tence of a strong, coherent, epistemic community on these issues. Examining Internet regulation is a tough test for any theory of global governance that gives pride of place to nation-states.

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[18] Stephen M. Kobrin, "The MAI and the Clash of Globalizations," *Foreign Policy* 111 (Fall 1998): 97–109.

[19] Ronald Deibert, "International Plug 'n Play? Citizen Activism, the Internet, and Global Public Policy," *International Studies Perspectives* 1 (July 2000): 264.

[20] Deborah Spar, "Lost in (Cyber)space: The Private Rules of Online Commerce" in Claire Culter, Tony Porter, and Virginia Haufler, eds., *Private Authority and International Affairs* (Albany: SUNY Press, 1999), 47. Spar refined this view in *Ruling The Waves* (New York: Harcourt Brace, 2001).

[21] Haufler, *A Public Role for the Private Sector*, 82.

[22] Andrew Higgins and Azeem Azhar, "China Begins to Erect Second Great Wall in Cyberspace," *The Guardian*, 5 February 1996.

A Theory of Global Governance

The theory proposed here assumes that states remain the primary actors in world politics.[23] Their preferences on regulatory issues have their origins in domestic politics. The logic behind this assumption is simple: most social issues originated as domestic problems before globalization made them international issues. Governments will naturally prefer that global regulations mirror their own national standards. This reduces the adjustment costs of any requisite legislative or regulatory changes for governments, as well as the costs for national firms to adhere to a new standard. State power is defined as the size of a state's internal market; the larger the market, the more powerful the state. States with significant internal markets are less dependent on international exchange as a source of goods and capital.

Regulatory coordination can lead to welfare gains for governments, through the reduction of transaction costs for international business and the reduction of social externalities for citizens. At the same time, such coordination can redistribute benefits toward states with domestic standards close to the agreed-upon international standard.[24] If the benefits are significant and the divergence of preferences among the great powers is small, then a sizeable bargaining "core" exists, making successful coordination a likely outcome. If the public benefits of coordination are minor and the divergence of preferences among the great powers is large, then a core will not exist, and the relevant actors will have no incentive to cooperate.

While the perceived size of the public good and the divergence of great-power preferences are the main causal variables, there is one important intervening variable: the preferences of the lesser powers, or peripheral states. These countries' preferences do not affect whether coordination will occur, but they do affect the bargaining process, and therefore, great-power strategies. If peripheral states oppose certain regulatory arrangements, they can effectively block such arrangements in universal membership IGOs that rely on one country, one vote. Therefore, great powers must take the preferences of smaller states into account when they select both the type of bargaining fora and the type of strategies to foster a consensus.

Table 1 displays the typology of governance structures generated from the distribution of state preferences. The key variable determining whether there will be *effective* coordination is the size of the bargaining core among the great powers.

If a large core exists, peripheral state preferences determine the process through which regulatory harmonization takes place. When peripheral states oppose the agreed-upon standard, big states will prefer to employ IGOs with

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[23] For a lengthier treatment, see Daniel W. Drezner, "Who Rules? State Power and the Structure of Global Regulation." Paper presented at the American Political Science Association annual meeting, Boston, MA, August 29–September 1, 2002.

[24] Stephen D. Krasner, "Global Communications and National Power: Life on the Pareto Frontier," *World Politics* 43 (April 1991): 336–366.

TABLE 1

A Typology of Internet Governance Issues

Great Power Distribution	North/South Distribution of Preferences	
of Preferences	High Conflict	Low Conflict
High Conflict	*Sham standards* (Censorship)	*Rival standards* (Consumer privacy)
Low Conflict	*Club standards* (Intellectual property)	*Harmonized standards* (Technical protocols)

strong sanctioning mechanisms. This makes it easier for the major powers to use joint inducements and sanctions to cajole other actors into compliance.[25] If developing states form blocking coalitions within large IGOs, great powers will rely on club-based IGOs, such as the Organization for Economic Cooperation and Development (OECD) or the G-7, to form "coalitions of the willing" as a coercion mechanism.

When there is minimal divergence of preferences among states, great powers can be more confident in relying on universal-membership IGOs, such as the United Nations, for global governance. Universal IGOs can bring added legitimacy to an agreement. At the same time, however, great powers prefer to delegate the actual implementation of the regulatory regime to nongovernmental actors rather than IGOs. This is partly for functional reasons; NGOs plugged into public policy networks can have a comparative advantage in gathering information and harnessing the requisite technical expertise.[26] More importantly, the delegation to private actors also provides great powers a less-public and more-effective pathway of ensuring control over the regime's governance structure. Delegation eliminates the transaction costs that are inherent in a universal-membership IGO, particularly one that operates on a one-nation, one-vote principle. Governments can act like a board of directors: states devolve regime management to nonstate actors, while still ensuring that they can influence any renegotiation of the rules of the game.

If the bargaining core between the great powers is small to nonexistent, then global regulatory coordination is far less likely, and the enforcement regime for any proposed global standard will be nonexistent. The preferences of the peripheral states, however, help to determine the tactics of great powers, IGOs, and NGOs. If the peripheral states have moderate preferences, that is, within the zone of great-power preferences, then powerful states have an incentive to attract as many allies as possible as a way to enhance the legitimacy of their own standards. This could be accomplished in a number of ways. One op-

[25] Lisa L. Martin, *Coercive Cooperation* (Princeton, NJ: Princeton University Press, 1992); Daniel W. Drezner, "Bargaining, Enforcement, and Multilateral Economic Sanctions: When is Cooperation Counterproductive?" *International Organization* 54 (Winter 2000): 73–102.

[26] Ronald Mitchell, "Sources of Transparency: Information Systems in International Regimes," *International Studies Quarterly* 42 (March 1998): 109–131.

tion would be to bring the issue to international bargaining fora in which the membership and the governance structure benefit their position. Another possibility is for great powers to apply their laws extraterritorially, coercing states to adopt their position. Regardless of the chosen strategy, the outcome is one of rival standards. Different fora or alliances will generate alternative sets of regulatory standards, with no clear standard accepted as international law. Nonstate actors may try to advocate for one set of global principles over another, but the divergence of great-power preferences will make such lobbying a largely futile exercise. Any international agreements that do emerge are unstable equilibria. Enforcing such standards on recalcitrant great powers will be next to impossible.

If peripheral states have immoderate preferences, then great powers will lack even the ability to attract natural allies from the periphery, reducing the number of possible bargaining arenas. One possible outcome in this distribution of preferences is the creation of "sham" standards. Governments agree to a notional set of standards with weak or nonexistent monitoring or enforcement schemes. Sham standards permit governments to claim the de jure existence of global regulatory coordination, even in the absence of effective enforcement. Another possible outcome is simple noncooperation, with states enforcing their own national standards. The great powers will try to propagate their preferred set of standards, but their influence will be limited to small, dependent allies.

In the absence of a bargaining core among great powers, NGOs that prefer to see more stringent global regulations can pursue three strategies. First, they can try to enhance the legitimacy of sham standards by engaging in enforcement activities, such as consumer boycotts or "naming and shaming" exercises against actors that violate standards. If this strategy is successful, states and/or firms pay a political price for violating these standards. Second, in the absence of genuine coordination, NGOs can generate their own "voluntary" codes and standards and apply consumer pressure on multinational corporations to adhere to them. If efforts at enforcement fail, they can at least act as monitors of corporate and state behavior.[27] Third, NGOs can act as lobbyists, cajoling core states into narrowing their set of preferences. These efforts can alter the behavior of marginal actors, but are unlikely to be a source of effective governance.

This model suggests that nonstate actors can play important roles in supplying global governance, but only under certain constellations of state interests. The effectiveness of IGOs declines as great power disagreements rise. The role and influence of nonstate actors vary widely from quadrant to quadrant. The salience of great-power preferences remains constant. The presence of a bargaining core among the great powers is a necessary condition for effective global governance.[28] If these states can reach a bargain, the outcome is effective

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[27] Gary Gereffi, Ronie Garcia-Johnson, and Erika Sasser, "The NGO-Industrial Complex," *Foreign Policy* 125 (July/August 2001): 56–65.

[28] On the distinction between necessary and sufficient conditions in substitutability theory, see Gary Goertz, "Monitoring and Sanctioning in International Institutions: Nonsubstitutability and the Production of International Collective Goods." Paper presented at the workshop on Substitutability and World Politics, Penn State University, State College, PA, June 2002.

TABLE 2

Possible Case Structures and Outcomes

Standards Situation	Prominent Role for Great Powers?	Prominent IGO Role?	Prominent NGO Role?	Stable Coordination?
Harmonized	No	No	Yes	Yes
Harmonized	No	Yes	Yes	Yes
Club	Yes	Yes	No	Yes
Club	Yes	Yes	Yes	Yes
Rival	Yes	Yes	Yes	No
Rival	Yes	No	Yes	No
Sham	No	Yes	Yes	No
Sham	Yes	No	Yes	No

policy coordination, regardless of the preferences or strategies of other actors. If these states have divergent preferences, then global governance is highly unlikely.

Employing Benjamin Most and Harvey Starr's concept of substitutability also makes it easier to understand why little progress has been made on this subject. The existing literature commits a number of methodological errors. First, those focusing on IGOs tend to treat all such organizations as the same type of actor. This overlooks the extent to which IGOs differ by membership and organizational structure. Great powers will engage in forum shopping to select the optimal IGO to advance their preferences. Second, those focusing on nonstate actors tend to confuse visibility with effectiveness. Activity by nonstate actors may be relevant to the regulatory outcome, or it may be epiphenomenal.

The failure to recognize the substitutability of governance structures and the presence of a bargaining core among the great powers as a necessary condition for regulatory coordination to take place also explains the murky empirical work on global governance. Table 2 shows a variety of possible case structures consistent with the model developed here. If a researcher is only interested in IGO or NGO activity, it is possible to show instances in which these actors are effective and instances in which they are not. This is also true of those trying to demonstrate the significance of great powers. Unless the distribution of interests and the substitutability of governance structures are taken into account, it is impossible to develop a model that garners significant empirical support.

WHEN STATES DISAGREE ABOUT THE INTERNET

The best example of a club standards outcome for Internet issues concerns IPR. Developed and developing countries have divergent preferences on this issue. Because most goods and services produced for the Internet are created in the advanced industrialized states, these countries have an incentive to enforce IPR. Developing countries prefer lax standards as a way of accelerating the transfer of technology and lowering the cost of acquiring new innovations and ideas.[29]

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[29] Susan Sell, *Power and Ideas: North–South Politics of Intellectual Property and Antitrust* (Albany, NY: SUNY Press, 1998).

The emerging international regulatory regime on this issue mirrors great-power preferences. In 1996, the World Intellectual Property Organization (WIPO) negotiated two treaties—one on copyrights and one on performances and phonograms—to cover online IPR. Experts agree that these treaties provide "strong" IPR protection.[30] These efforts came in the wake of American and European efforts to apply economic sanctions against countries with lax IPR regimes.[31] Furthermore, the key negotiating parties behind the Uruguay round of the GATT—the "quad" of the United States, Japan, Canada, and the European Union—strengthened the IPR regime by permitting member countries to use the WTO enforcement mechanism to enforce trade-related intellectual property (TRIP).[32] Statistical analyses demonstrate that the threat of WTO sanctions had a significant effect on copyright enforcement. Between 1995 and 2000, software piracy declined by nearly 20 percent in developing countries.[33] The WTO, reflecting great-power preferences, has made it clear that the growth of the Internet will not alter its enforcement of IPR: "The basic notions and principles of intellectual property have survived over a century of rapid economic, social, and technological change. The traditional objectives of the system as reflected in the current international norms are valid even in 'cyberspace.'"[34]

The regulation of data privacy is a good example of the rival-standards outcome. As more commerce is transacted over the Internet, there is increased concern about firms or governments taking advantage of the personal information of online consumers. Opinion polls show that privacy is the biggest concern of Internet users.[35] The European Union and the United States adopted different stances on the issue. The U.S. attitude toward privacy rights is based on freedom from state intervention; in Europe, privacy is considered a fundamental right to be protected by the state. As a result, there was no push in the United States for comprehensive regulation of data privacy. President Clinton's principal advisor for e-commerce, Ira Magaziner, stated his preference that "if the privacy protections by the private sector can be spread internationally, that will become the de facto way privacy is protected."[36]

In contrast, in 1995, the EU passed a sweeping Data Protection Directive that set clear guidance and enforcement mechanisms for European firms. The

[30] Catherine Mann, Sue Eckert, and Sarah Cleeland Knight, *Global Electronic Commerce: A Policy Primer* (Washington, DC: Institute for International Economics, 2000), 118.

[31] Sell, *Power and Ideas*, chapter 6.

[32] Jeffrey Schott, *The Uruguay Round: An Assessment* (Washington, DC: Institute for International Economics, 1994), 115.

[33] Kenneth Shadlen, Andrew Schrank, and Marcus Kurtz, "The Political Economy of Intellectual Property Protection." Paper presented at the American Political Science Association annual meeting, Boston, MA, August 29–September 1, 2002.

[34] WTO Secretariat, *Electronic Commerce and the Role of the WTO* (Geneva: World Trade Organization, 1998), 61.

[35] Haufler, *A Public Role for the Private Sector*, 84.

[36] Henry Farrell, "Constructing the International Foundations of E-Commerce." *International Organization* 57 (Spring 2003): 277–306.

directive was to take effect in late 1998, and to ensure that firms did not evade the law by carrying out operations beyond the EU jurisdiction, the export of EU citizens' personal data to third countries with inadequate protection was banned.[37] This threat proved sufficiently potent for Australia, Canada, and Eastern European countries to revise their own laws in an attempt to comply with EU preferences.

Several nonstate actors tried to mediate a solution on the issue, with no success. Human rights groups lobbied the U.S. government to accept the EU regulatory position because it represented more-stringent protection of consumers.[38] A transnational business group, the GBDe, attempted to develop a common voluntary framework on data privacy. This effort failed miserably, with both U.S. and EU officials criticizing the final product.[39] Instead, the U.S. response was to encourage American multinationals to establish self-regulatory mechanisms that would meet EU standards. Sets of voluntary principles, such as those provided by TRUSTe and BBBOnline, were developed. At the same time, American and European negotiators agreed to a "safe harbor" compromise. The EU would not impose sanctions against U.S. firms that adhered to a voluntary standard consistent with the Data Protection Directive.

The safe harbor compromise went into effect in November 2000, but the EU (state-directed) and U.S. (self-regulation) approaches remain rival standards. Both TRUSTe and BBBOnline have taken steps to become transnational certifiers. At the same time, U.S. compliance with the EU directive remains uncertain. Few companies registered for the safe harbor in the year after the agreement went into effect. Furthermore, Federal Trade Commission studies show that U.S. firms do not enforce their own privacy principles.[40] In late 2001, one think tank concluded: "Although Safe Harbor is still in its infancy, its survival is already in doubt."[41] Henry Farrell's assessment of the situation perfectly characterizes the rival-standards outcome: "Both the US and EU sought to preserve and extend their domestic systems of privacy protection. Each sought, in effect, to dictate the terms under which privacy would be protected in the burgeoning sphere of international e-commerce."[42]

[37] William J. Long and Marc Pang Quek, "Personal Data Privacy Protection in an Age of Globalization: The U.S.-EU Safe Harbor Compromise." Paper presented at the International Studies Association annual meeting, New Orleans, LA, March 2002.

[38] Gregory Shaffer, "Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards," *Yale Journal of International Law* 25 (Winter 2000): 1–88.

[39] Maria Green Cowles, "Who Writes the Rules of E-Commerce?" AICGS Policy Paper #14, Johns Hopkins University, Baltimore, MD, 2001, 24.

[40] Marcus Franda, *Governing the Internet* (Boulder, CO: Lynne Reinner, 2001), 159.

[41] Aaron Lukas, "Safe Harbor or Stormy Waters? Living with the EU Data Protection Directive." Trade Policy Analysis No. 16, Cato Institute, Washington, DC, October 2001, 2. For a contrary view, see Dorothee Heisenberg and Marie-Helene Fandel, "Projecting EU Regimes Abroad: The EU Data Protection Directive as Global Standard." Paper presented at the annual meeting of the American Political Science Association, Boston, MA, August 29–September 1, 2002.

[42] Farrell, "Constructing the International Foundations of E-Commerce," 19.

The regulation of Internet content—that is, censorship—neatly fits the outcome of sham standards. Governments have wildly divergent preferences regarding the extent to which Internet content should be regulated. Totalitarian governments such as Cuba or Saudi Arabia want absolute control over citizen access to the Internet. Authoritarian governments such as Singapore or China want to exploit the Internet's commercial opportunities while restricting the use of the Internet for political criticism. Liberal democracies also wish to place restrictions on offensive forms of content. These countries' definitions of objectionable content range from child pornography (the United States) to Nazi memorabilia (France). For this issue, there is no bargaining core among nation-states. The predicted outcome would be sham standards and the unilateral use of national regulation to bar undesired content.

Internet enthusiasts have long dismissed the ability of states to take this action. In 1993, John Gilmore, a cofounder of the Electronic Frontier Foundation, famously concluded: "The Net interprets censorship as damage and routes around it." However, the evidence strongly suggests that states can regulate Internet content when they so desire. Such efforts are never 100 percent effective, but that is a goal that few regulatory efforts achieve. As Jack Goldsmith observes: "If governments can raise the cost of Net transactions, they can regulate Net transactions."[43] In particular, governments have discovered that by pressuring Internet service providers, they can exercise significant control over access to content.

The result has been unilateral but successful examples of government regulation of Internet content. For totalitarian states, the modes of regulation have been crude but effective. Cuba simply outlaws the sale of personal computers to individuals; Myanmar outlaws personal ownership of modems.[44] Saudi Arabia censors the Internet by requiring all Web access to be routed through a proxy server that the government edits for content, blocking access to pornographic, religious, and politically sensitive material.[45] A recent assessment of the Saudi filtering system concluded that substantial amounts of Web content are "effectively inaccessible" from Saudi Arabia.[46]

Authoritarian states have succeeded in restricting political content on the Internet without sacrificing its commercial possibilities. Singapore regulates the Internet in the same way that it regulates print or broadcast media, effectively deleting what the government considers to be offensive or subversive mate-

[43] Jack Goldsmith, "Regulation of the Internet: Three Persistent Fallacies," *Chicago-Kent Law Review* 73 (December 1998): 1123.

[44] Robert Lebowitz, "Cuba Prohibits Computer Sales," Digital Freedom Network, 26 March 2002, accessed at http://dfn.org/news/somalia/sparse-internet.htm, 28 May 2002. Associated Press, "Internet Remains Prohibited in Myanmar," 3 May 2000, accessed at http://www.nua.com/surveys/?f=VS&art_id=905355752rel=true, 28 May 2002.

[45] Khalid Al-Tawil, "The Internet in Saudi Arabia," *Telecommunications Policy* 25 (September 2001): 625–632.

[46] Jonathan Zittrain and Benjamin Edelman, "Documentation of Internet Filtering in Saudi Arabia," Berkmen Center for Internet and Society, Harvard University, July 2002, accessed at http://cyber.law.harvard.edu/filtering/saudiarabia/, 4 September 2002.

rial.[47] Singapore's approach has been the model for many East Asian governments, including China.[48] In July 2002, China was able to persuade more than 300 Internet service providers and web portals, including Yahoo!, to sign a voluntary pledge refraining from "producing, posting, or disseminating pernicious information that may jeopardize state security and disrupt social stability."[49]

As for the developed democracies, a French court succeeded in a legal effort to get Yahoo! to drop Nazi paraphernalia from its auction site. Because of the number of "mirror" servers that target Web sites to particular geographic areas, governments have the means to censor the national content of the Web without globally censoring the distribution of information. Unilateral content regulation has succeeded despite the strong normative consensus among Internet enthusiasts against such regulation.[50] The September 11 terrorist attacks and the terrorists' use of the Internet to communicate with each other have only accelerated the pace of content regulation in the developed world. In September 2002, one advocacy group concerned with press freedom noted, "The United States, Britain, France, Germany, Spain, Italy, Denmark, the European Parliament, the Council of Europe and the G8 nations have all challenged cyber-freedoms over the past year."[51]

Human rights NGOs have protested these disparate national efforts to curb Internet content, but this has not led to the creation of any effective system of global governance on the matter. IGOs have been largely hamstrung by the extreme distribution of state preferences over content regulation. This was reflected in the first meeting of the World Summit on the Information Society (WSIS), held in December 2003. One of the key sticking points at this meeting was the language regarding the extent to which any agreement would affect the regulation of speech on the Internet. China, in particular, protested the U.S.-inspired language regarding press freedoms. As a result, although language was inserted into the Declaration of Principles that specifically addressed press freedoms, it was heavily watered down, and language reaffirming state sovereignty was also added.[52] Outside observers agreed that the language papered over irreconcilable differences about content regulation, and that the plan of action provides little guidance for the future.[53]

[47] Garry Rodan, "The Internet and Political Control in Singapore," *Political Science Quarterly* 113 (Spring 1998): 63–89.

[48] Georgette Wang, "Regulating Network Communication in Asia," *Telecommunications Policy* 23 (April 1999): 277–287; Shanthi Kalathil, "China's Dot-Communism," *Foreign Policy* 122 (January/February 2001): 74–75.

[49] Christopher Bodeen, "Web Portals Sign China Content Pact," Associated Press, 15 July 2002.

[50] Human Rights Watch, "Free Expression on the Internet," accessed at http://www.hrw.org/advocacy/internet/, 25 May 2002.

[51] Reporters Without Borders, "The Internet on Probation," September 2002, accessed at http://www.rsf.fr/IMG/doc-1274.pdf, 6 September 2002.

[52] World Summit on the Information Society Declaration of Principles, Document WSIS-03/GENEVA/DOC/4-E, 12 December 2003, paragraph 18. The document can be accessed at http://www.itu.int/wsis/; Kieren McCarthy, "Internet Showdown Side-stepped in Geneva," *The Register Newsletter*, 8 December 2003.

[53] David Souter, "The View from the Summit: A Report on the Outcomes of the World Summit on the Information Society," *Info* 6 (January/February 2004): 6–11.

For each of the issue areas in question, governments have divergent preferences regarding the content of Internet regulation. The resulting global governance structures vary in effectiveness, depending on the distribution of state power. The enforcement of IPR on the Internet has succeeded because the great powers have similar preferences and have been willing to coerce recalcitrant states into compliance. When great powers disagree—over privacy rights—the outcome is the absence of a stable international regime. When all states have divergent preferences, as in the censorship case, the result is effective unilateral steps to regulate access to the Internet. Two facts about these issues are particularly salient. First, nonstate actors have been unable to influence government preferences on these issues. Second, when necessary, governments of every stripe have been willing to disrupt or sever Internet traffic in order to ensure that their ends are achieved.

GLOBAL GOVERNANCE OF INTERNET TECHNICAL PROTOCOLS

The economics of technical standards on the Internet are a classic example of network externalities at work, in that a standard's utility corresponds directly to the number of consumers using it. For the Internet to be useful for informational and commercial purposes, producers need to agree on the technical protocols that permit users to successfully transmit and access data. Although common protocols create obvious public goods, such standards can also reap disproportionate benefits for actors that either own the standards in a proprietary fashion or have first-mover advantages in exploiting those standards.[54] Because of the huge network externalities that are evident in the Internet, however, we would expect a large bargaining core among states, leading to a harmonized standards outcome.

Popular and scholarly histories of the Internet argue that the technical protocols were created by an epistemic community of computer experts who belonged to the IETF, and that no government could thwart this outcome.[55] A closer look at the origins of these protocols and the regimes for managing them suggests a rather different picture. At two crucial junctures in the growth of the Internet—the acceptance of the Transmission Control Protocol/Internet Protocol (TCP/IP) for exchanging information across disparate computer networks, and the creation of the ICANN regime for governing the Internet Domain Name System (DNS)—governments took active steps to ensure that the outcome serviced their interests and that the management regime remained private but amenable to state interests. In the first episode, governments acted in concert to prevent computer firms from acquiring too much influence over the setting of standards; in the second episode, they acted to prevent particular NGOs and IGOs from acquiring too much influence.

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[54] Carl Shapiro and Hal Varian, *Information Rules* (Cambridge, MA: Harvard Business School Press, 1999), 174.

[55] Katie Hafner and Matthew Lyon, *Where Wizards Stay Up Late* (New York: Simon & Schuster, 1996); Mayer-Schönberger and Hurley, "Globalization of Communication," 135–154.

TCP/IP was developed between 1973 and 1978 by members of the Advanced Research Projects Agency Network (ARPANET), the Defense Department's network that connected civilian and military research complexes. The protocols were designed so as to permit interoperability between disparate hardware systems. TCP is responsible for packing and unpacking data such that they can be transferred from one computer to another; IP is responsible for ensuring that data are routed to the appropriate recipients. To use a postal analogy, TCP is the functional equivalent of the envelope, and IP is the functional equivalent of the address/ZIP code on the envelope.

TCP/IP placed minimal code demands on new entrants to the network, which was consistent with the research community's norm of open access.[56] However, this was also consistent with U.S. government preferences as well. According to Marcus Franda, the Defense Department embraced TCP/IP because "it lengthened the odds that when networks were less reliable (under conditions of war, for example), they might still be functional using TCP/IP."[57]

Although Defense Department and ARPANET constituents favored the TCP/IP protocol, other networks did not rely on it. The actors behind these alternative networks had different motivations. Companies with investments in computer networks preferred developing their own proprietary standards, so as to reap the pecuniary rewards of managing their own networks.[58] By the mid-seventies, Xerox was pushing Xerox Network Systems (XNS), Digital was marketing Digital Equipment Corporation's Digital Network Architecture (DEC-NET), and IBM was promoting its System Network Architecture (SNA) to its government buyers. As Ben Segal describes the environment, "The variety of different techniques, media and protocols was staggering; open warfare existed between many manufacturers' proprietary systems, various home-made systems, and the then rudimentary efforts at defining open or international standards."[59] In other words, TCP/IP was far from the de facto standard when the standards debate of the 1970s started, and it faced strong opposition from corporate actors.

The major economic powers feared the prospect of being held hostage to a firm's ownership of the dominant network protocol. This was particularly true for states with government monopolies of the telecommunications sector. This concern was not unfounded. In 1975, IBM refused a Canadian government request to develop a protocol that could interface with non-IBM hardware systems. Instead, the corporation urged Canada to accept IBM's proprietary SNA network protocol. In 1978, the French government issued a report warning other European governments: "If IBM became master of the network market, it would have a share—willingly or unwillingly—of the world power structure."[60]

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[56] Will Foster, Anthony Rutkowski, and Seymour Goodman, "Who Governs the Internet?" *Communications of the ACM* 40 (August 1997), 17–18.

[57] Franda, *Governing the Internet*, 23.

[58] Ibid., 24; David Passmore, "The Networking Standards Collision," *Datamation* 31 (February 1985): 105.

[59] Ben Segal, "A Short History of Internet Protocols at CERN," April 1995, accessed at http://wwwinfo.cern.ch/pdp/ns/ben/TCPHIST.html, 2 May 2002.

[60] Janet Abbate, *Inventing the Internet* (Cambridge, MA: MIT Press, 1999), 153, 172.

There were two international responses to this threat. The first was a concerted effort by Canada, Britain, and France to develop a nonproprietary standard, called Recommendation X.25, for the Consultative Committee on International Telegraphy and Telephony (CCITT) of the International Telecommunications Union (ITU), a universal-membership IGO. Created in less than six months, X.25 was designed as a public standard freely available to all private firms. The ITU approved the standard in 1976; the French, Japanese, and British governments immediately adopted X.25 as the standard for their government networks. Because of the significance of these markets for producers, IBM, Digital, and Honeywell reluctantly agreed to offer X.25-compatible software on their computers in addition to their own proprietary standards. As Janet Abbate concludes: "X.25 was explicitly designed to alter the balance of power . . . and in this it succeeded. Public data networks did not have to depend on proprietary network systems from IBM or any other company."[61]

The CCITT initiative was a successful holding action that prevented the emergence of a norm for proprietary standards. The second and more significant initiative was the push by the United States, the UK, France, Canada, and Japan to have the International Organization for Standardization (ISO)—an NGO of technical standard setters—develop compatible network standards for both private and public uses. This push was unusual, in that ordinarily the ISO declared an official standard only after there was a rough consensus among producers. In advocating a role for the ISO at an earlier stage, the major economic powers were clearly trying to accelerate the creation of an international regime consistent with their preferences.

This initiative resulted in the 1978 creation of the Open Systems Interconnection (OSI) model. OSI is not so much a standard as a metastandard, a minimal architecture through which disparate network protocols can communicate with one another. Abbate summarizes OSI's qualities and purpose: "The OSI standards would be publicly specified and nonproprietary, so that anyone would be free to use them; the system would be designed to work with generic components, rather than a specific manufacturer's products; and changes to the standards would be made by a public standards organization, not by a private company."[62]

The creation of OSI had two significant effects on the development of common standards. First, because of the wide ISO membership and the rapid acceptance of its standards, it became prohibitively expensive for any state or firm to create a protocol that was incompatible with OSI. The great powers were particularly enthusiastic about OSI. European governments liked it because it gave their computer producers a chance to compete with IBM, Digital, and other American producers.[63] The U.S. government liked OSI because it was consistent with its preferences for nonproprietary, open source coding.[64]

[61] Ibid., 166–167.

[62] Janet Abbate, "Government, Business, and the Making of the Internet," *Business History Review* 75 (Spring 2001): 163.

[63] Franda, *Governing the Internet*, 39.

[64] Hafner and Lyon, *Where Wizards Stay Up Late*, 236–237.

Second, because OSI stressed openness and accessibility, the TCP/IP code fit more seamlessly with the OSI framework than with other proposed protocols, including X.25. Furthermore, with the ISO as the location for managing network standards, the U.S. government strongly encouraged ARPANET participants to actively participate in ISO committees and meetings, in order to get the TCP/IP protocol accepted as consistent with the OSI framework.[65] By 1984, the ISO had officially recognized TCP/IP as consistent with OSI principles. Because TCP/IP was already widely used in the United States and considered reliable, it became the de facto standard as the Internet grew in size, a classic example of historical "lock-in."[66]

Members of the Internet community often argue that the failure of X.25 or OSI to replace TCP/IP is an example of states being unable to regulate cyberspace.[67] This argument is factually correct but misses the primary motivation of both ventures. The chief concern of both the ITU and ISO initiatives was not to replace TCP/IP but to ward off corporate attempts to lock in a dominant proprietary standard for network protocols. If governments had not intervened, the probable outcome would have been a system of proprietary network protocols. The actual outcome reflected the preferences of governments. Furthermore, consistent with the model presented here, states relied on a universal-membership IGO to boost legitimacy and delegated a nonstate actor to manage the actual standards.

The second government intervention over technical protocols came two decades later. As the commercial possibilities of the Internet and World Wide Web emerged in the early nineties, all of the relevant actors recognized the need to create a more robust regime to manage the DNS for unique Internet addresses. The DNS is responsible for creating unique identifiers for each individual Internet address. This includes, among others, the valued general Top Level Domains (gTLDs), such as .com, .org, or .edu, as well as the country code Top Level Domains (ccTLDs), such as .de or .uk.

There were three reasons for concern about DNS management. First, Internet commentators agreed that the DNS system represented an excellent focal point through which an actor could control access to the Internet.[68] Second, actors with valued trademarks were concerned about the possibility of "cybersquatters" acquiring valuable addresses, such as www.burgerking.com or www.nike.com. Third, there were significant commercial opportunities in managing the DNS system. Between 1994 and 1998, the U.S. government contracted the DNS registry to Network Solutions Incorporated (NSI). That monopoly was estimated in 1996 to be worth $1 billion to NSI.[69]

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[65] Abbate, *Inventing the Internet*, 174–178.

[66] W. Brian Arthur, "Competing Technologies, Increasing Returns, and Lock-In By Historical Events," *Economic Journal* 99 (March 1989): 116–131.

[67] Martin Libicki et al., *Scaffolding the New Web: Standards and Standards Policy for the Digital Economy* (Arlington, VA: RAND Corporation, 2000).

[68] Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

[69] Franda, *Governing the Internet*, 49.

The first efforts to develop an international regime to reform the DNS system came from nonstate actors, particularly the ISOC, a network of researchers responsible for developing and managing the original ARPANET. After repeated false starts, ISOC formed the International Ad Hoc Committee (IAHC) to develop a proposal to manage domain names in lieu of NSI. The IAHC was an eminent persons group, with representatives from ISOC, the International Trademark Association, WIPO, and the ITU. The ITU was particularly eager to be involved, and viewed itself as the natural location for an international regime to manage these issues.[70]

The result of this process was a memorandum of understanding (MOU) among the IAHC parties on gTLDs (gTLD-MOU). The gTLD-MOU proposed assigning governance functions to an entity housed in the ITU, with representation from business interests, IGOs, and ISOC. The ITU arranged a "formal" signing ceremony in Geneva in March 1997 to give the agreement the trappings of an international treaty. This process neatly fits the definition of an epistemic community.[71] Furthermore, the actors involved in the creation of the gTLD-MOU—IGOs, business constituencies, and technical experts—are precisely the actors emphasized in the globalization literature on how the Internet would affect global governance.

The gTLD-MOU immediately ran into opposition from two groups. Governments strongly protested the agreement. The U.S. secretary of state wrote a memo blasting the ITU secretariat for acting "without authorization of member governments" and "concluding with a quote international agreement unquote."[72] European Union governments opposed the agreement because it was deemed too U.S.-centric. The proposal also ran into opposition from a significant fraction of Internet enthusiasts. They criticized the proposed governance structure as lacking in democratic accountability and as too solicitous of corporate concerns.

The IAHC proposal spurred President Clinton to issue a July 1, 1997 executive order authorizing the commerce secretary to "support efforts to make the governance of the domain name system private and competitive."[73] Presidential advisor Ira Magaziner was put in charge of the initiative, underscoring the high priority the United States gave to settling the issue. U.S. preferences on the issue were clear: to have a nonstate actor—rather than a universal-membership IGO such as the ITU—manage the DNS regime. Magaziner stated publicly: "As the Internet grows up and becomes more international, these technical management questions should be privatized, and there should be a stakeholder-based, *private international organization* set up for that technical management. In the allocation of domain names, we should, where it is possible, create a competitive marketplace to replace the monopoly that now exists."[74]

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[70] Milton Mueller, "ICANN and Internet Governance," *Info* 1 (December 1999): 501.

[71] Renee Marlin-Bennett, "ICANN and the Global Digital Divide." Paper presented at the International Studies Association annual meeting, Chicago, IL, February 2001, 4.

[72] Quoted in Mueller, "ICANN and Internet Governance," 502.

[73] Ibid.

[74] Ira Magaziner, "Creating a Framework for Global Electronic Commerce," July 1999, accessed at http://www.pff.org/ira_magaziner.htm, 10 June 2002 (my italics).

Given the ITU's one-nation, one-vote structure, and the secretariat's eagerness to independently manage the issue area, it is not surprising that the United States wanted to switch fora. Historically, the United States has shifted governance of new issue areas away from the ITU in order to lock in its own preferences.[75] Magaziner made the U.S. opposition to an ITU role quite explicit when he stated, "Technical management certainly should not be controlled by an intergovernmental organization or international telecommunications union."[76]

The European Union also wanted three significant changes to the IAHC proposal. The EU commission insisted that the WIPO be involved in any governance structure. This was a hedge against U.S. trademark law being imposed by fiat. The Europeans agreed with the U.S. government that the NSI monopoly of the gTLD registries had to be broken up. The European motivation for this, however, was preventing total U.S. dominance of the Internet. Finally, there was a desire for a formal governmental channel between any private order and governments. This was considered especially relevant to the management of the ccTLDs. The United States was sensitive to these concerns, and promised that there would be a significant number of Europeans on any Internet governance board.[77]

In June 1998, the Commerce Department issued a white paper that officially rejected the gTLD-MOU process and advocated privatization of the DNS system based on four principles: stability, competition, private bottom-up coordination, and representation.[78] There were two reactions to the white paper. Among Internet enthusiasts, a series of self-organized conferences, called the International Forum on the White Paper (IFWP) was held, with the idea of providing citizen feedback to the U.S. proposal.[79] Many people dubbed the IFWP an "Internet constitutional convention." Although U.S. government representatives attended IFWP meetings, there is considerable evidence demonstrating that the IFWP process had no effect on the policy outcome.[80] This was because ISOC, American, and European Union officials were simultaneously negotiating the exact contours of what a private Internet regime would look like.

The result was ICANN. While ICANN was incorporated by key members of ISOC, the resulting governance structure accommodated both U.S. and European concerns. A government advisory committee was created to act as a conduit for government concerns. The NSI monopoly of gTLDs was broken, and the ITU was given only a peripheral role in the new regime. A significant fraction of ICANN's governing board consisted of non-Americans. Renee Marlin-Bennett summarizes the outcome in the following way: "In the creation of ICANN, the United States government clearly indicated that it did not wish

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[75] Krasner, "Global Communications and National Power."

[76] Magaziner, "Creating a Framework," 13.

[77] Mueller, "ICANN and Internet Governance," 505.

[78] "Management of Internet Names and Addresses (White Paper)," *Federal Register* 111, no. 63, accessed at http://www.ntia.gov/ntiahome/domainname/6_5_98dns.htm, 20 May 2002.

[79] Available at http://www.domainhandbook.com/ifwp.html, accessed 7 June 2002.

[80] Mueller, "ICANN and Internet Governance," 506–508; Franda, *Governing the Internet*, 53–55.

the International Telecommunications Union to be that source of governance. But neither did the U.S. government take responsibility for it itself. What resulted was a particularly unusual international organization: a private entity designed to make rules for a global Internet."[81]

While ISOC's wish to manage the DNS system was granted, after a fashion, the negotiating history of ICANN shows that the key actors were states.[82] It was the U.S. government that rejected the IAHC process, shut out the ITU from the process, and ensured the creation of a private order to manage the policy issue.[83] European, Japanese, and Australian governments ensured that the eventual regime would not be dominated by the United States. The key governments vetted the initial roster of ICANN's governing board. In contrast, elements of global civil society were largely shut out of the process. Milton Mueller concludes, "The process of forming ICANN has been mired in so much factionalism and political controversy that references to 'consensus-based' self-regulation are laughable."[84]

ICANN's history since its 1998 creation only underscores these conclusions. Nonstate actors out of the ISOC loop have vigorously protested ICANN's governance structure and lack of openness to outside input. In contrast to claims that the Internet would foster greater democratic participation, many individuals have protested at the travel costs of attending ICANN's meetings. Meetings are not widely available on the Web. More generally, its detractors label ICANN as undemocratic and unresponsive, and a threat to the more-decentralized culture of the Internet.[85]

Key governments have been consistent in ensuring their influence and in preferring stability over representation. A year after granting DNS governance to ICANN, the U.S. government publicly stated: "The Department of Commerce has no plans to transfer to any entity its policy authority to direct the authoritative root server."[86] In April 2002, a Commerce official explained the U.S. government's influence over ICANN in this way: "We do have a contractual relationship with them, which we have the ability to modify, or, if we want, terminate. That is how our input comes into the process."[87]

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[81] Marlin-Bennett, "ICANN and the Global Digital Divide," 5.

[82] One question is why ISOC members were given such a prominent role in the ICANN regime, given their prominence in the gTLD-MOU fiasco. One answer is that Magaziner respected ISOC and IETF's prior background in developing technical standards. Between ISOC's proven ability to develop successful standards and ISOC's critics, who had no such experience, Magaziner went with ISOC. See Farrell, "Constructing the International Foundations of E-Commerce," 14–15.

[83] A. Michael Froomkin, "Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution," *Duke Law Journal* 50 (2000): 17–184.

[84] Mueller, "ICANN and Internet Governance," 498.

[85] See www.ICANNwatch.org for a web site devoted to these criticisms.

[86] Quoted in Mueller, "ICANN and Internet Governance," 515.

[87] Quoted in Susan Stellen, "Plan to Change Internet Group is Criticized as Inadequate," *New York Times*, 1 April 2002.

At the same time, U.S. and European preferences on the matter have been carried out. Since ICANN's creation, competition to provide domain name services has increased, prices have fallen, and trademark disputes have been settled more quickly.[88] ICANN's own governing body has also indicated its eagerness to cater more to government preferences. ICANN currently lists as one of its core values: "Act with sensitivity to the public interest and related governmental concerns, so that *the need for direct governmental action is minimized.*"[89] In February 2002, ICANN's president, Stuart Lynn, proposed reforming its structure by having national governments explicitly nominate five members of ICANN's governing board. In defending the proposal against charges from critics, Lynn commented, "Our mission is not to run an exercise in global democracy. I happen to think we need to be a private organization."[90] Most of Lynn's proposals were approved in June 2002.[91]

Had the great powers not intervened, the outcome in this case would have been significantly different from ICANN. The ISOC initially wanted to expand the number of gTLDs to fifty. The management of the DNS system would have been housed in the one-country, one-vote ITU, rather than in a private, non-profit organization. The percentage of Americans running the regime would have been larger. This case demonstrates that nonstate actors have agenda-setting powers. However, once an issue comes to the attention of states, the outcome will reflect great-power preferences.

In both the protocol wars of the 1970s and the creation of ICANN in the 1990s, government preferences were consistent. The great powers repeatedly acted to ensure that the Internet would be governed so as to maximize efficiency without giving monopoly power to any one actor, be it a multinational firm, a nonstate organization, or an IGO secretariat. In the 1970s, governments acted with Internet enthusiasts to ensure that multinational firms would not develop their own proprietary network protocols. In the 1990s, governments acted in concert with multinational firms to prevent NGOs and IGOs from overstepping their policy authority. In both instances, governments delegated regime management to nongovernmental international organizations—ISO and ICANN—to ensure efficient outcomes and to retain their influence over future policy shifts.

Rethinking Globalization and Global Governance

The globalization literature argues that the lowering of traditional barriers to exchange, the exponential growth of the Internet, and the rise of networked nonstate actors conspire to weaken the state's role in global governance. The

[88] Lisa M. Bowman, "ICANN Comes Under Fire—Again." Cnet News.com, 1 April 2002, accessed at http://news.zdnet.co.uk, 2 April 2002.

[89] Committee on ICANN Evolution and Reform, "ICANN: A Blueprint for Reform," 20 June 2002, accessed at http://www.icann.org/committees/evol-reform/blueprint-20jun02.htm, 10 September 2002 (my italics).

[90] Quoted in Bowman, "ICANN Comes Under Fire—Again."

[91] Susan Stellin, "Internet Address Group Approves Overhaul," *New York Times*, 29 June 2002, C4.

globalization literature is wrong; states are still the primary actors. Further-more, in focusing on the binary question of state power versus nonstate power, these scholars have glossed over the diversity of relationships that can exist be-tween heterogeneous actors in world politics. A recognition of the substitut-ability of global governance structures gives us a more powerful lens with which to observe the ramifications of globalization. A review of Internet governance demonstrates that even when states prefer to let private actors take the gover-nance lead, they will intervene to advance their desired ends.

States may be the primary actors, but they are not the only actors. The case studies clearly show that nonstate actors can affect outcomes through their technical expertise and agenda-setting abilities. However, only by giving the great powers pride of place is it possible to set the conditions under which non-state actors will exercise their influence. This finding is consistent with previous work that suggests that the provision of collective goods at the national or local level involves a complex distribution of governance functions among actors representing the state, the market, and civil society.[92]

By failing to recognize that states can substitute unilateral measures, inter-governmental accords, and delegation to nonstate actors, scholars of global governance have unnecessarily restricted their analyses to simple comparisons of direct state involvement versus the role of nonstate actors. This is particu-larly true of the delegation option. Unless delegation is recognized as a conscious state choice, researchers inevitably miscode such variables as state power. The value-added of the substitutability concept is that it permits the development of more generalizable theories. As Benjamin Most and Harvey Starr point out, "If scholars are genuinely interested in understanding why states do what they do, they need to move beyond efforts to focus separately on particular concrete behaviors. Rather than asking middle-range questions about specific empiri-cal phenomena, they should begin with the initial 'grand' question with which they were allegedly concerned in the first place."[93] Ironically, globalization scholars have erred not in thinking too grandly about global governance, but in not thinking grandly enough.*