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The Empire Strikes Back

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THE EMPIRE STRIKES BACK

A. MICHAEL FROOMKIN*

There is a great deal to admire in all three of the papers presented in this session. This is hardly surprising as each of the presenters is in his own way an important pioneer in the emerging, if perhaps soon evanescent,¹ field of Internet Law; our host, Dean Perritt, has been pioneering computer law longer than most of today's Internet lawyers have been members of the bar. It happens, however, that I see the commentator's role as being more about noting points of disagreement than nodding contentedly—especially when asked to deliver a paper to a live audience which cannot politely turn the page or click on another window.

To avoid boring agreement, I will concentrate on the one theme found in each of the papers: the relationship of the Internet to the causes and consequences of the rise of supra-nationalism. Parts I and II summarize and occasionally quibble with the portions of the three papers relevant to my theme. Despite my desire to be provocative, I am forced to confess that all three papers are talking about the right questions, and more often than not, are on target about the causes of the developments they are examining. I will, however, take on the role of devil's advocate in Part III, which explains why there is a risk that the tensions discussed in all three papers may exacerbate the worst aspects of this particular form of globalization. Indeed, when one considers the reactions already brewing against border-subverting aspects of the Internet, the medium-term effects of the communications revolution may be somewhat more nasty and anti-democratic than anyone imagined.

It may seem odd that three papers in a symposium devoted to the "new paradigms" relating to the Internet are directed, in whole or

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1. See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207. My own view is that most of what currently passes for Internet Law will become sub-fields of other subjects—eventually.

in part, to one of the hoariest of legal topics, the governance of nations. Thus, for example, the Post and Johnson thought experiment is at a sufficiently high level of generality that it concentrates on asking questions about the role of law in society in general in the hopes of generating answers applicable to the Internet.² Similarly, the Perritt paper looks at the effect of the Internet on the functioning of foreign ministries and the international state system in general, and finds a number of incremental improvements rather than new paradigms,³ while the Burk paper finds more of the same old rent-seeking and strategic behavior.⁴

This focus on the state is not a coincidence or an error. It reflects something real about the world we still live in: few if any nation-states are in any hurry to relinquish their freedom of maneuver (read “control” or “power”) to decentralizing, democratizing, even anarchistic forces such as the Internet—at least not without a fight. And, as I shall argue in Part III, the remedy that states find comes most easily to hand is such strong medicine that it may be worse than the disease.

I. THE INTERNET CHALLENGE TO LAW—AND TO THE STATE

Dan Burk’s paper provides a useful prism through which to organize one’s thinking about all three papers. Burk’s motivating observation appears forthrightly at the start: the “technological underpinnings of the network violate the assumptions embedded in many current legal doctrines.”⁵ He draws his main example from intellectual property (“IP”) law where the challenges of cheap speech and regulatory arbitrage upset the traditional, sometimes cozy, ways of doing things enjoyed by those firms who find themselves being regulated by obsolescing rules. These developments have similarly destabilizing effects on the various law-generating institutions, mostly nation-states and their political subdivisions, that are participants in the “market” for legal systems. Legal scholarship, Burk implicitly asserts, must take up the challenge of revising rules and counseling rulemakers in the face of these new challenges.

2. See David G. Post & David R. Johnson, “Chaos Prevailing on Every Continent”: *Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055 (1998).

3. See Henry H. Perritt, Jr., *The Internet is Changing International Law*, 73 CHI.-KENT L. REV. 997 (1998).

4. See Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943 (1998).

5. *Id.* at 943.

Similarly, Dean Perritt describes the blurring effects he sees the Internet having on categories of international law. He suggests that by and large the proper response to these changes is to celebrate them.⁶ Post and Johnson also see the violation of traditional assumptions noted by Burk as a challenge; their admirably ambitious response is no less than to call for, and attempt to initiate, a search for new fundamental organizing ideas about the role of law. Their paper presents a thought experiment that involves taking the “death of distance” seriously and trying to model its consequences. They note that new technology creates new “spillover effects” across federal lines.⁷ As a result, in a federal world we all enjoy or suffer much greater “non-congruence,” in which the consequences of our actions are increasingly unrelated to where we happen to be and in which states increasingly lack jurisdiction over those creating effects felt on their territory.⁸ In a world in which human interaction is free of (or has greatly reduced) physical constraints, the authors ask what role law plays in producing order and raising social welfare.

Burk suggests that actors in legal systems, like organisms in an ecosystem, exhibit two basic responses to challenges such as the Internet: voice or exit, “fight or flight.”⁹ (One might, however, adapt the Post and Johnson metaphor of gardening and suggest that regardless of what individuals do, a systemic perspective offers a third possibility, one in which some organisms evolve to suit the changed conditions; this is hard on individual organisms, but it can be good for the ecosystem.)

Burk takes intellectual property law as his example, noting that the almost costless copying and delivery of digitized goods and the easy movement of (re)producers to any hospitable jurisdiction risks a race to the bottom: without some means of protecting their creations

6. See Perritt, *supra* note 3, at 1049-53.

7. See Post & Johnson, *supra* note 2, at 1085.

8. See *id.* at 1085-86.

9. See Burk, *supra* note 4, at 944. Although it is not central to his main points, Burk adopts the standard descriptions of voice and exit as applied to individuals. See *id.* I have some doubts whether these descriptions work as well as they used to in a world of computerized profiling and tracking. Profiling makes consumer exit difficult, since your reputation and actions follow you perhaps forever; similarly, accounts of the reduced cost of voice may neglect the very real silencing effect of knowing that your words may follow you forever and everywhere. It may be that consumers will vote with their keyboards and create a new horde of virtual personae to prevent this profiling. See generally A. Michael Froomkin, *Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395 (1996) (describing use, consequences, and potential regulation of anonymous identities on-line). Consumer inertia suggests not, however.

from pirates, the producers of digitizable intellectual property will have a sub-optimal financial incentive to produce their wares.¹⁰ More generally, Burk suggests that the competition among jurisdictions for highly mobile intellectual property producing businesses enables a classic race to the bottom among regulators, particularly in the “market” for intellectual property law.¹¹

Burk suggests that both the political/legal system and the market system respond when faced with a technological development that threatens established market relationships, indeed threatens market failure.¹² Individual firms can react by exiting the market or can exercise “voice,” which essentially means either moaning loudly or attempting to persuade others that their complaints are justified. Governments do not so easily have the option of exit, and voice—whatever that means at the national level—is also not likely to be enormously effective on its own against regulatory arbitrage or competing regulators.

Thus, the key point: Burk suggests that a government which finds itself in a regulatory race to the bottom because its attractiveness is being undermined by new technology is likely to respond to this *n*-player Prisoner’s Dilemma by a special type of “fight.”¹³ Governments threatened with regulatory arbitrage will club together to form mutually binding international agreements designed to stop inter-jurisdictional regulatory competition.¹⁴ In short, new information technology encourages internationalization, a supra-national response designed to keep the status quo in place or restore the status quo ante.

Burk opines that this flight to supra-national agreement is easily overdone, noting that recent international agreements on intellectual property topics have results that threaten to be sub-optimal, perhaps because of capture or rent-seeking by organized interest groups.¹⁵ These agreements do put a floor on any race to the bottom, but they also create an artificial ceiling on any struggle to the top. Worse, given the wealth effects of any given distribution of property rights, the strong tendency is towards agreements that either freeze the status quo ante, or favor the existing rights-holders because they are

10. See Burk, *supra* note 4, at 957-58.

11. See *id.* at 969-70.

12. See *id.* at 970.

13. See *id.* at 972-73.

14. See *id.*

15. See *id.* at 976-77.

the parties with both the means and the incentive to lobby for the agreements at the national and international level.

In contrast, Perritt seems considerably more optimistic about the causes and probable consequences of the rise of supra-nationality. He sees supra-nationality as part of “the movement of the international community toward rule-based behavior through the rule of law strand of democracy, its movement to rationalize free trade, and its movement to give effect to arms control” rather than a result of grubby rent-seeking.¹⁶

Falling somewhere between Burk and Perritt, Post and Johnson model a world of adaptive walks in “patched”¹⁷ systems that is evocative of “muddling through” under federalism.¹⁸ Their “Gardener’s Dilemma” model suggests that when wealth maximizing decisions are taken on a state-by-state basis, but the effects of those actions spill across borders (i.e., “congruence”¹⁹ is low), social welfare is lower than a system where all variables are internalized.²⁰ This is a result not unlike what one would expect from the predictions of neo-classical economic theory, and indeed the policy problem posed by the Gardener’s Dilemma model is very similar to the intellectual property regulation problem described by Burk: how can politicians, legal theorists, or other designers of rules compensate for the decoupling of geography and the effective reach of many rules.²¹ In earlier articles, Post and Johnson propose an answer, in which some parties form what one might call a non-geographical “patch”—in effect create a new jurisdiction called “cyberspace.”²²

The concept of non-jurisdictional patching is not inherently implausible or impossible. In Israel, for example, the relevant “patch”

16. See Perritt, *supra* note 3, at 1032.

17. See Post & Johnson, *supra* note 2, at 1076-78. The authors define a patch as an arbitrary (think, “geographical”) subset of the total set of elements. See *id.* at 1076. Individual elements will be permitted to move from one state to another if, but only if, the effect of the move on the aggregate fitness of the members of *its patch* is a positive one. See *id.* at 1076-77. Effects on elements outside the patch are ignored. See *id.* at 1078.

18. See *id.* at 1090.

19. Congruence is a measure of the extent to which the state of elements in this patch affect the well-being of elements in other patches (“spillover”). See *id.* at 1080. High congruence means that members of this patch do not tend to affect elements in other patches (think, “autarky”); low congruence means that the state of elements in this patch has a high affect abroad (think “Internet”). See *id.* at 1080-81.

20. See *id.* at 1086.

21. See Burk, *supra* note 4, at 961; Post & Johnson, *supra* note 2, at 1086.

22. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); David R. Johnson & David G. Post, *The New “Civic Virtue” of the Internet*, in THE EMERGING INTERNET 25 (1998).

for matters of status and family is religion, and these matters are largely regulated by separate confessional authorities and adjudicated by separate religious courts.²³ In the Ottoman Empire, the legal system established a confessional divide that granted limited privileges to confessional courts over penal matters involving members of their communities, especially matters involving violations of religious law.²⁴ Under various treaties imposed on the Ottoman Empire from the sixteenth century onward, all civil and criminal cases between foreign non-Muslims of the same nationality were tried before that state's ambassador or consul under the foreign state's law; criminal charges against a non-Muslim foreigner arising from an offense against an Ottoman subject were referred to special courts.²⁵ Just because it is possible, however, does not make it desirable; the victory of the English King's courts over the concurrent ecclesiastical jurisdiction is still seen as a healthy victory in many quarters despite leaving one open to the charge of a Whiggish reading of history. Post and Johnson's suggestion elsewhere that "cyberspace" can usefully be thought of as a new jurisdiction has been justly criticized.²⁶ Even if it were desirable, there is no particular reason to expect that existing geographically oriented and often federal systems will choose to recognize a cyber-jurisdiction. If nothing else, we can be grateful that this resistance to change will spare Internet lawyers from having to take yet another bar exam.

The juxtaposition of the Post and Johnson paper's top-down search for general theoretical principles with Burk's build-up approach from very concrete examples raises questions for both: to what extent are the developments Burk describes in IP law representative of more general trends in the effects of the Internet on markets and the legal system? By using IP has Burk (and for that matter Post and Johnson²⁷) focused on a special, perhaps extreme, case? Simi-

23. See RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 321 (5th ed. 1988).

24. See URIEL HEYD, *STUDIES IN OLD OTTOMAN CRIMINAL LAW* 222-23 (V.L. Ménage ed., 1973).

25. See *id.* at 223-24.

26. See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998). It seems quite odd to me to want to subject transactions that happen to use a computer to a unique legal system inapplicable to transactions that use telephones, fax machines, vehicular transport, or even shoe leather. We do not find concepts such as "telephonespace" or "autospace" helpful, and for good reason; cyberspace too is not a place, but only a metaphor—often an unhelpful one. Not only would such a rule likely be inequitable, since computer use is correlated with income, but those with the option of using a computer could manipulate the law applicable to a given transaction.

27. See Post & Johnson, *supra* note 2, at 1064-68.

larly, are Post and Johnson right that the acknowledged problems of cyberspace governance raise fundamental issues, or is their model really applicable only, or even mostly, to information and service goods since they are the only ones for which distance is dead?

There is certainly a case to be made that Burk has chosen a uniquely convenient example for his thesis. As I have argued elsewhere, information is a special good.²⁸ It, and services such as filmmaking or legal advice which can be embodied in information, ships invisibly²⁹ and (today at least) at a very low marginal cost. Other goods do not work that way: shipping is not invisible but instead rather easy to monitor, track, and even tax. And shipping is anything but free.

On the other hand, there is also a strong case that IP law is reasonably representative of a more general phenomenon. The rise of the information and service economy suggests that the knowledge industries are the ones which matter most, at least in the richest nations. IP law is not in any way unique when it comes to the ability of nations and interest groups to band together internationally to compensate for the destabilizing effects of the jurisdictional spill-over caused by cheap and easy communication technology. A similar story can be, and indeed has been, told about international tax³⁰ and international money laundering rules,³¹ and no doubt will be told about many other areas of law such as banking, securities, and consumer

28. See A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, in BORDERS IN CYBERSPACE 129 (Brian Kahin & Charles Nesson eds., 1997), available on-line (visited Aug. 28, 1998) <<http://www.law.miami.edu/~froomkin/articles/arbitr.htm>>.

29. Post and Johnson suggest that the locations of individuals using the Internet are not readily apparent or even easily determined either *ex ante* or *ex post*. See Post & Johnson, *supra* note 2, at 1058 & n.4. I think, however, this oversimplifies, as it depends on who is doing the looking. The parties to a transaction each know where they themselves are. They are capable of negotiating for relevant details about each other, and for satisfactory authenticating details or testimonials. Third parties may not know where the two parties are, but that is a rather different problem.

30. See, e.g., Jeffrey Owens, *Electronic Commerce: The Challenges to Tax Authorities and Taxpayers*, Paper Delivered at University of Miami School of Law, Third Annual International Tax Institute (Feb. 21, 1998).

31. See, e.g., OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFORMATION TECHNOLOGIES FOR THE CONTROL OF MONEY LAUNDERING 113 (1995) (OTA-ITC-630); Christopher D. Hoffman, Note, *Encrypted Digital Cash Transfers: Why Traditional Money Laundering Controls May Fail Without Uniform Cryptography Regulations*, 21 FORDHAM INT'L L.J. 799 (1998); Scott E. Mortman, Note, *Putting Starch in European Efforts to Combat Money Laundering*, 60 FORDHAM L. REV. S429 (1992) (discussing European Commission's directive on money laundering); Phyllis Solomon, Note, *Are Money Launderers All Washed Up in the Western Hemisphere? The OAS Model Regulations*, 17 HASTINGS INT'L & COMP. L. REV. 433 (1994) (discussing money laundering provisions of Inter-American Drug Abuse Control Commission's Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses).

law in the future. Indeed, short of the expensive strategy of outright suppression of the Internet and related technologies,³² international or supra-national cooperation appear to be the only strategies likely to allow interests harmed by new technology to replicate a substantial part of the status quo ante. Alas, there is little reason to suspect that IP law is unique as to the public choice (i.e., “rent-seeking”) dynamic that may drive national policies. Established interests that profit from a given legal regime will ordinarily be the ones with the most cash to spend on lobbying and other activities designed to lock in their advantages or to head off upstart competitors using upstart technologies.

It seems reasonable therefore to accept the IP example as representative of something more general, at least to see where it takes us—even if it takes us as far as Post and Johnson. If IP is typical we can expect that the laws and rules relating to the economic and legal regimes most affected by the Internet will be a leading part of the complex set of phenomena known as globalization. If states are not going to quietly wither away, either in whole or part, the question then becomes how exactly states will go about the common task of accomplishing what Post and Johnson would call re-coupling.³³ Perritt and Burk suggest in different ways that supra-national re-coupling is the most likely possibility.³⁴ Even though the absence of significant relevant international agreements outside the area of cooperative law enforcement requires that one reserve judgment, there seems to be no reason to believe that there is anything unique about the unhappy welfare effects of international agreements designed to prevent regulatory arbitrage in IP. The prospect of a series of international agreements designed to freeze existing law in place for the benefit of entrenched interests is not heartening.³⁵

32. Whether or not suppression is expensive in terms of expenditures, it is likely to be very expensive in terms of opportunity costs. Among the losses are lost gains to research from easy international collaboration, lost ability to lower transaction costs for searching and selling via e-commerce, and lost efficiencies in the labor market from international competition and domestic tele-commuting.

33. See Post & Johnson, *supra* note 2, at 1088 n.68.

34. See Burk, *supra* note 4, at 985; Perritt, *supra* note 3, at 1051-53. Imperialism and conquest are other logical possibilities with undesirable properties.

35. Burk himself appears more sanguine about this than I, at least in the context of international trademark law. See Dan L. Burk, *Trademark Doctrines for Global Electronic Commerce*, 49 S.C. L. REV. 695 (1998).

II. THE GLOBALIZING INTERNET

This discussion of international processes brings us to Perritt's discussion of the globalizing effects of the Internet. Contrary to the pessimism above, Dean Perritt finds generally happy consequences for international society in general and international lawmaking processes in particular. Perritt notes cheerfully that the Internet is likely to increase "cultural diffusion."³⁶ Although this fits my intuition, one can see countervailing trends. Diasporic groups which might otherwise homogenize into dominant local cultures may find it much easier to preserve their traditional language, culture, and identity when it is cheap and easy to communicate with other far-flung members of the linguistic and cultural group. Even if one accepts the forecast of a global cultural melting pot, one must ask how many people outside the culture(s) likely to dominate—read "the U.S. and maybe Europe"—may experience this as the ultimate assault of U.S. cultural imperialism.

I have doubts too about Perritt's assertion that the Internet significantly facilitates legal harmonization.³⁷ One can imagine three types of harmonization. De facto, or bottom-up, harmonization occurs when individuals engage in regulatory arbitrage and find that, like it or not, their rules are determined by foreigners.³⁸ While I think this likely in some cases, this is certainly not what Perritt has in mind. The second type, top-down harmonization, occurs via international agreement, or supra-national regulation such as found in the European Union. Perritt predicts and celebrates the third type, true horizontal harmonization.³⁹ In this model, states adopt best practices of regulation from each other as one good example begets another. Perritt is surely right that one of the standard arguments used by regulatory reformers and rent-seekers alike is that "foreigners do it better."⁴⁰ It is also certainly true that national law is increasingly easily found on-line; it seems plausible that easy access will cause some slight increase in the propensity to agitate for the adoption of foreign rules.⁴¹ It is less than obvious, however, whether rules transplanted

36. See Perritt, *supra* note 3, at 1035-36.

37. See *id.* at 1040-42.

38. See Froomkin, *supra* note 28, at 142, 151.

39. See Perritt, *supra* note 3, at 1040, 1050.

40. See *id.* at 1040.

41. For a short description of an attempt to enable a related phenomenon—allowing foreigners to comment on draft domestic rules before they are enacted—see European Commission, *Information Society: Transparency Directive Adopted* (last modified July 29, 1998)

from the original regulatory contexts are likely to produce the same results as in their original legal environment, or instead more likely to cause facile misunderstandings based on quotations out of context.⁴² A rule often depends on context for efficacy;⁴³ removed from the environment in which it evolved and from the various checks and balances that surround it, a transplanted rule may have effects as benign as the first rabbits in Australia.

Perritt also foresees optimistic consequences for the rule of law in the international arena. He adopts the perspective of "regime theory"⁴⁴ that "democratization increases the potency of international law" because "international law as rhetoric influences masses more than it influences leadership cadres."⁴⁵ In this view, for example, the East Block lost the Cold War because it was undermined by frustrated domestic consumer demand.⁴⁶ Regime theory has become fashionable in international relations departments, but I nonetheless would proceed with some caution. Even if one accepts, as the evidence demonstrates, that there is a correlation between deployment of the Internet and democracy,⁴⁷ this does not tell us which is cause and which is effect. Nor does it necessarily follow that adherence to the rule of law at the international level is a consequence of democracy. One need only contemplate a few unhappy incidents in U.S. history to be reminded of this uncomfortable truth.

As the access to the Internet increases, so too, Perritt posits, will

<<http://europa.eu.int/comm/dg15/en/media/info/transp.htm>> (describing adoption of Directive on transparency mechanism for "Information Society services," which will require that draft national rules that concern Information Society services be notified to the Commission and then held for a three-month "standstill" period of comment by all interested parties).

42. For an argument that misunderstandings are common, see Caroline Bradley, *Transatlantic Misunderstandings: Corporate Law and Societies*, 53 U. MIAMI L. REV. (forthcoming Mar. 1999).

43. See *id.*

44. "[R]egime theory assumes rational self-interest on the part of *states*. In other words, regime theory presumes that *governments* have interests and preferences independent of the personal interests of the interest groups, politicians, and bureaucrats who determine governmental policy." Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 930-31 (1996). Recently, however, some regime theorists have argued for increasing attention to interest groups within the state. See, e.g., Richard Sinnott, *Integration Theory, Subsidiarity and the Internationalization of Issues: The Implication for Legitimacy* (visited Nov. 5, 1998) <<http://www.ecsanet.org/conferences/3rsinnot.htm>>.

45. Perritt, *supra* note 3, at 998, 1037.

46. See *id.* at 1035-36.

47. See Christopher Kedzie, *International Implications for Global Democratization*, in UNIVERSAL ACCESS TO E-MAIL: FEASIBILITY AND SOCIETAL IMPLICATIONS 151 (1995), available on-line (visited Aug. 28, 1998) <<http://www.rand.org/publications/MR/MR650/mr650.ch6/ch6.html>>.

access to global norms⁴⁸ and, as a result, existing institutions that form part of the global norm-forming process will tend to work better. Perritt sees part of this benefit as deriving from the spread of information about treaty obligations: “[M]ost people conduct their affairs so as to comply with legal norms they know about. Making it easier for them to know the norms either directly or through their counsel increases the likelihood of compliance.”⁴⁹ I confess, I find this unpersuasive: I do not get the impression that the challenge to the rule of law in international affairs is caused by ignorance of private parties as to treaties. For one thing, relatively few treaties affect private parties directly; most concern public rather than private international law, and even fewer are self-executing. Most at least require implementing legislation or regulation at the national level, and I doubt that ignorance of national law is a significant source of international lawlessness.

Rather than being a problem of ignorance, the problem of *private* violation of obligations to foreigners, or of obligations arising under extra-territorial application of foreign law, is, I would submit, more one of conscious choice, of clashing calculations of efficient breach or of what one can get away with. Furthermore, the infractions most likely to have widespread and serious consequences are not of private international law, but of public international law. In this realm, it is governments, not private citizens, who are the likely violators, and they tend to be quite fully aware of international treaties and other obligations; if they are not, the Internet is not going to educate them.

Perritt seems on stronger ground on the issue of compliance with *public* international law when he endorses Harold Koh’s suggestion⁵⁰ that voluntary compliance of *nations* with international norms will increase as international elites and domestic constituencies internalize international norms.⁵¹ Global cultural homogenization, plus the ease with which populations can communicate directly, may well increase the pressure on governments to comply with international norms, and

48. See Perritt, *supra* note 3, at 1038-39. Perritt does not tell us how he expects existing norms to spill over to the new medium, or for that matter how new norms might be expected to form. For example, Perritt notes that there is now an international norm that postal mail will not be inspected outside the country of origin, *see id.* at 1020-21, but does not explain—because it is no part of his agenda in this paper—how or whether one might fit e-mail into this norm.

49. Perritt, *supra* note 3, at 1039; *see also id.* at 1042-44.

50. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645-50 (1997).

51. See Perritt, *supra* note 3, at 1036-37.

the Internet may make demonizing some opponents more difficult.

I would even be willing to take the point a step further and argue that in the case of domestic law regulating conduct with potential extraterritorial effects such as the regulation of financial services, domestic interest groups often will have a strong incentive to urge their governments to comply with selected international norms. Sometimes this may be due to fear of foreign-sponsored retaliation such as government or even private boycotts and blacklists. More frequently, I would argue, it will arise from the competitive features of a world of easy mobility of capital, businesses, and customers in which communications give even immobile customers a worldwide choice of suppliers of information and financial services. If interest groups in some, perhaps many, jurisdictions will not push their governments to struggle to the "top" of regulation, they will at least seek a sufficiently high plateau to avoid the bad reputation that they fear attaches to notorious violators. I found it striking to behold bankers and regulators in Caribbean tax shelters preaching the gospel of cooperation with international anti-money laundering efforts because "bad money drives out good."⁵²

Perritt also predicts that new types of sanctions and adjudication will arise to "enforce international norms against violators."⁵³ Alas, the new forms turn out to be e-mailing the old forms,⁵⁴ the rather unfrequented virtual magistrate,⁵⁵ and cyber-settlement of specifically Internet-related issues such as domain name disputes. The new sanctions are little more than the familiar tools of boycott and bad publicity, albeit energized by new communications technology. Taken as a group, it is all a little underwhelming.

This quibbling pales, however, in the face of one trend that Perritt rightly suggests is potentially transformative. If the rule of law must struggle along as it always has, the same cannot be said of non-governmental organizations ("NGOs"). Already of increasing

52. This comment was related to me by a banker in the Cayman Islands and echoed by several others during a visit in 1998. I heard similar comments in a visit to Anguilla in 1997.

53. Perritt, *supra* note 3, at 1044.

54. *See id.*

55. For an account of the virtual magistrate by one of the founder-members, see Robert Gellman, *A Brief History of the Virtual Magistrate Project: The Early Months*, 44 LA. B.J. 430 (1997). The virtual magistrate has heard only one case to date, the *Tierney* case, *see Tierney v. EMail America, Corp.* (visited July 7, 1998) <<http://vmag.vcillp.org/cases/decided.html>>, and that was a matter brought by a participant and decided in a default judgement. *Cf.* Alejandro E. Almaguer & Roland W. Baggott III, Note, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 730 (1998) ("The *Tierney* case is riddled with problems that reflect on the credibility and the efficacy of the Virtual Magistrate Project.").

importance in international affairs, they are the big winners from the Internet and other communications technologies. When the cost of organizing disparate groups and communicating directly with populations without (and despite) governments is drastically reduced, NGOs find their effectiveness increased. Churches, human rights groups, professional and scientific associations, and international activists of every stripe are empowered as never before. Perritt is surely correct to draw attention to this phenomenon.⁵⁶

Thus, one can agree with Perritt's assertion that the Internet accelerates the move away from the state-centric tradition without agreeing with every part of his account of how this happens. Even if one agrees that private international law norms increasingly will be drawn from the global commons,⁵⁷ or even that some quasi-public norms relating to environmental law or human rights will increasingly resemble a form of private international law enforced by private institutions, one need not go so far as to predict the death of public international law.⁵⁸ While it is true that states increasingly rely on NGOs to alleviate the human suffering caused by wars, famine, and various policy failures, that does not mean that NGOs will expand to a point where they are able to prevent serious state- (or proto-state-) sponsored human rights breaches such as civil war in the former Yugoslavia, collapse of civil society in Haiti, or genocide in Rwanda—problems that both existing private organizations and the current state system seem to find overwhelming.

If the Internet accelerates the move away from our state-centric tradition, the question becomes what will fill the void. At one point, Perritt suggests that subsidiarity, the devolution of responsibility to smaller political units in the context of a federal system, will do it: "The greater visibility of higher levels of government encourages reliance on those higher levels to help solve problems. The Internet changes that."⁵⁹ At other times, Perritt seems to agree with the implications of the Burk and Post and Johnson papers when he admits that

56. See Perritt, *supra* note 3, at 1046-49.

57. One could ask how much of this is new in light of the long tradition of *lex mercatoria*, but that is a different debate. Cf. Bernardo M. Cremades, *The Impact of International Arbitration on the Development of Business Law*, 31 AM. J. COMP. L. 526 (1983) (discussing *lex mercatoria*); Hans-Joachim Mertens, *Lex Mercatoria: A Self-Applying System Beyond National Law?*, in GLOBAL LAW WITHOUT A STATE 31 (Gunther Teubner ed., 1997) (same); Gunther Teubner, "Global Bukowina": *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE, *supra*, at 3 (describing role of *lex mercatoria* and advocating greater use).

58. See Perritt, *supra* note 3, at 1050.

59. *Id.* at 1051.

to date power seems to be shifting not down, but upwards to international organizations.⁶⁰

III. THE GREAT LOOMING INTERNET IRONY

Collectively, and I think unintentionally, these papers suggest the existence of a great looming Internet irony: what was intended and promoted as the great anarchistic, liberating, democratizing technology may in fact spur a reaction so strong as to make the world significantly less democratic. If indeed governments and vested interests conclude that the only way in which they can maintain their position is to band together with like-minded counterparts in other countries to enact multi-lateral treaties or vest increasing power in supra-national organizations, the power of existing democratic institutions will be reduced worldwide.

This outcome is of course far from certain. For if the supra-national reaction to the threat of international regulatory arbitrage is to be effective, the very large majority of the nations in the world will have to agree to participate in the multi-lateral treaties or the supra-national bodies. If even a few economically significant nations with good connectivity decide to remain aloof, the others will have to decide whether they are able to retaliate and whether they wish to. Possible forms of retaliation include cutting telecommunications links and expelling the offender nation from international financial clearing systems—both options I have heard openly discussed by senior international bureaucrats, at least in the context of international offensives against tax havens and jurisdictions that enable money laundering. Once the OECD nations agree to a policy among themselves, there are few other nations which would choose to stand up to such pressure.

Once enacted, treaties are hard to amend; the votes of the citizens of one party are by definition insufficient to affect them. Supra-national bodies also tend to have a “democratic deficit.”⁶¹ Most

60. *See id.* at 1042-44.

61. “Democratic deficit” originally referred to the lack of democratic accountability in the political structure of the European Community/European Union and the relatively weak powers of the democratically elected European Parliament as compared to other unelected institutions such as the Commission, the Council, the Court, and now the Bank. *See, e.g.,* IAN WARD, A CRITICAL INTRODUCTION TO EUROPEAN LAW 48-51 (1996); Kevin Featherstone, *Jean Monnet and the ‘Democratic Deficit’ in the European Union*, 32 J. COMMON MKT. STUD. 149 (1994); Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, 12 PRAXIS INT’L 1, 7-13 (1992).

commonly national governments appoint delegates to international bodies.⁶² Thus, in even the most democratic countries, a delegate to an international body is twice removed from the people, being only a representative of elected representatives much like the U.S. Senate before the Seventeenth Amendment.⁶³ When the international body's decisions are collective and delegates from undemocratic regimes sit side by side with those from democratic states, the body as a whole is even less democratic, and the power of citizens around the world is further reduced.

The possibility of a reaction to the liberal and centrifugal tendencies of the Internet with such potentially anti-democratic results reinforces the need for "new paradigms" regarding the effect of cheap communication on domestic and international society. The three papers in this session tend more towards something akin to Thomas Kuhn's concept of normal science, that is "research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice."⁶⁴ Burk accepts the familiar information-producers-need-incentives model that drives much contemporary legal and economic writing about intellectual property as one of his premises.⁶⁵ Perritt sees information technology providing new ways of doing familiar law-jobs in the foreign offices and legal departments of the world, but the actual work being done in those offices is essentially unchanged.⁶⁶ Post and Johnson are suitably bold in their desire for "new ways of thinking about existing theories," but admit that they have found no escaping the old problems of

62. The European Parliament is an exception. Its members are directly elected by the voters of member states of the European Union. The Parliament is, however, one of the weakest elements of the EU's governance structure. See WARD, *supra* note 61, at 18-19, 32, 39 (describing weaknesses of European Parliament relative to Council of Ministers, Commission, and European Court of Justice).

63. See U.S. CONST. amend. XVII (providing for direct election of Senators who had formerly been chosen by state legislators pursuant to U.S. CONST. art. I, § 3, cl. 1).

64. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10 (2d ed. 1970). Kuhn himself limited his purview to physical sciences; I am aware that there is a debate as to whether it is appropriate to use his ideas, even metaphorically, for social sciences.

65. See Burk, *supra* note 4, at 956-57. But see Ira V. Heffan, Note, *Copyleft: Licensing Collaborative Works in the Digital Age*, 49 STAN. L. REV. 1487 (1997) (describing GNU General Public License, "which prevents users from establishing proprietary rights in either the works themselves or subsequent versions thereof"). See generally *GNU General Public License* (visited Aug. 28, 1998) <<http://www.fsf.org/copyleft/gpl.html>> (official text of public license); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989) (discussing moral and economic foundations of copyright protection).

66. See Perritt, *supra* note 3, at 1039, 1044.

interpersonal utility comparison and the difficulties of modeling complex dynamic systems.⁶⁷ I take all this normalcy as a sign that Internet Law has come of age—perhaps too soon.

I have carefully managed to exhaust my allotment of space and time without giving much hint of what these new paradigms might look like, and the reader's suspicions about this strategy are probably justified. One might attempt to reconstitute the assumptions underlying IP law on a different economic model, or different assumptions about human nature. Perhaps Burk's mention of the economic importance of "pocket parts" such as updates, bugfixes, patches, and new OS compatibility is only the tip of the iceberg. For example, some software companies sell their wares (or a basic version of their wares) for very little, and seem to think that they will make their profits selling upgrades, help desk services, or other ancillary services, or collecting information about their customers and selling that. Perhaps more attention needs to be paid to non-economic forms of status as an incentive to produce valuable information. The alternate incentive could be something as traditional as the British system of knighthoods, lordships, and other non-monetary honors, as modern as informal anointment as a net.deity, or as orthogonal as a partial return to gift-exchange.⁶⁸

An even more fruitful area of research might be the relationship between Internet governance and other models of social order. I think Post and Johnson are right to try to build models, although the stark simplicity of their model and the very counter-factual assumptions on which it is built make me uncomfortable with this as anything but the first step the authors carefully say it is. The reality with which I am familiar is not one in which gardeners or anyone else sow their

67. See Post & Johnson, *supra* note 2, at 1070-72.

68. See John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 128 (arguing "information wants to be free" and hence intellectual property law is increasingly anachronistic); Dan L. Burk, *Muddy Rules for Cyberspace* (TPRC Working Paper, 1997), available on-line (visited Feb. 22, 1999) <<http://149.150.190.246/shla/professor/FILES/Dan%20Burk/Scholarship/MUDDY1.WPD>> (suggesting that "informal transactions or 'self-help' may be the most efficient means for provision of digital works" rather than bright-line legal rules); Esther Dyson, *Intellectual Value*, WIRED, July 1995, at 136 (arguing that the Internet causes "intellectual assets and property [to] depreciate while intellectual processes and services appreciate"); cf. GEORGE A. AKERLOF, *Labor Contracts as Partial Gift Exchange*, in AN ECONOMIC THEORIST'S BOOK OF TALES 145 (1984) (economic analysis of functioning of gift-exchange markets). But see Julie E. Cohen, Lochner in *Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462 (1998) (attacking property rights-based approaches to cyberspace regulation); Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 520-22 (1996) (warning that move to some versions of gift-exchange model may have unexpected and undesirable consequences).

seed randomly. We are all—even players on the Internet—inheritors of very significant amounts of history, cultural conventions, social memes, and various formal and informal standards. Indeed, one impressionistic reading of the Post and Johnson results suggests that even their simple model reflects this reality. If patching algorithms find it difficult to go from “fairly good” to “best” results, does this perhaps reflect the grubby reality of rent-seeking, lobbying, and first-mover advantages in which entrenched interests in a functioning present sometimes stand as an impediment to a better and closer-to-optimum future?

The welfare maximization game we play, and which governments either play or regulate, very rarely starts with a blank slate. The Internet, alas, is no exception to this very fundamental principle.