

# Self-Regulatory Trajectories in the Shadow of Public Power: Resolving Digital Dilemmas in Europe and the United States

ABRAHAM L. NEWMAN\* AND DAVID BACH\*\*

*Although industry self-regulation has developed into a preferred regulatory strategy for the digital economy, self-regulatory solutions adopted in the U.S. and the European Union differ considerably. We argue that variation in the shadow of public power—the public sector tools employed to induce industry collective action—sets the two on distinct self-regulatory trajectories. Legalistic self-regulation dominates in the U.S. and coordinated self-regulation in Europe. Expectations derived from the model are evaluated in case studies of online content regulation and personal data privacy protection.*

## INTRODUCTION

On both sides of the Atlantic, industry self-regulation has developed into a prominent regulatory strategy for the digital economy.<sup>1</sup> In an environment still characterized by rapidly changing business models, market structures and technological advances, private sector self-regulation carves out a regulatory middle ground between government intervention and pure market mechanisms. Self-regulatory systems are often more flexible and less intrusive than formal regulation by governments; at the same time, they reduce uncertainty and enhance consumer confidence beyond levels attainable by the market alone.<sup>2</sup> Despite a common commitment to self-regulation based on this shared insight, much is made of the differences between regulatory solutions for “digital dilemmas” adopted in Europe and the U.S. Business practitioners, industry observers and policy makers in the U.S. have charged Europeans with heavy-handed government intervention that stifles innovation and distorts nascent e-commerce markets. Many Europeans, in turn, criticize America’s naïve faith in the market and unwillingness to protect common goods in the face of digital challenges.

We show in this article that Europe and the U.S. indeed put much faith in e-commerce self-regulation. Yet the logic and character of self-regulation in Europe is very different from that in the U.S. Self-regulation

\*University of California, Berkeley

\*\*University of California, Berkeley, and Instituto de Empresa, Madrid

is not a simple, single-equilibrium story about the private sector policing itself. Rather, it is a story about the relationship between the public and private sectors, and specifically about the ability of the former to induce collective action within the latter. Meaningful industry self-regulation only happens when firms agree that it is in their self-interest to cooperate with their competitors, and the public sector plays a critical role in altering firms' cost-benefit analysis. The tools the public sector can employ to encourage self-regulation are rooted in political economic institutions and vary across polities. We argue that self-regulatory solutions adopted on opposite sides of the Atlantic must necessarily have distinct logics owing to the different institutional environments in which they are embedded.

This study extends institutionalist analysis of comparative political economy to the study of e-commerce self-regulation. We examine how public power, and specifically distinct configurations of public sector capacities, shape private sector incentives for collective action. Our comparative institutional analysis of self-regulation highlights two features of the public-sector/private-sector relationship that shape the character of self-regulation: carrot capacity and stick capacity. Variation along these dimensions determines how the shadow of public power is cast and consequently what set of incentives and constraints firms face.

In the U.S., the government induces self-regulation largely through the threat of stringent formal rules and costly litigation should industry fail to deliver socially desired outcomes. Industry thus views self-regulation as a preemptive effort to avoid government involvement. The relationship between the public and private sector is spotty, formal and frequently adversarial. We label the ideal-typical U.S. model *legalistic self-regulation*. In Europe, public sector representatives meet with industry and agree on a joint course of action. Here, private and public sectors view each other as partners in an often-informal self-regulatory process. *Coordinated self-regulation* is the term we use to describe the European ideal-typical model.

The centrality of the public sector's role in bringing about, sustaining and shaping industry self-regulation requires "the state" to feature prominently in investigations of the changing terms of market competition in a digital age. The rise of digital network technologies has not rendered states powerless or of secondary importance as some have predicted.<sup>3</sup> Analytically, we contend, understanding the role of public power matters even more when self-regulation is pervasive. Conventional government enforcement strategies tend to be overt, and differences across countries can consequently be identified in a straightforward manner. Because the state's role in the self-regulatory process, in contrast, is both subtler and more nuanced, the sources and influence of public power must be disaggregated.

An additional goal of the study is to contribute to an ongoing debate on the role of the European Union (EU) as a political actor, particularly

in the area of the “New Economy” (Hooghe and Marks 1999; Risse; Ruggie; Stone Sweet, Sandholtz, and Fligstein). Empirically, we focus on Europe and specifically the EU rather than any particular member state for a comparison with the U.S. Our findings mirror those of others’ studies who have drawn attention to crucial differences between U.S. and EU approaches to e-commerce regulation (Marsden; Swire and Litan). This contrast has also received by far the greatest media attention (Andrews; Hargreaves and Leffall; de Jonquie’res; Waldmeir; Mitchener). Variation in e-commerce policy among the EU’s member states we argue has been of secondary concern because many of the crucial decisions have been taken in Brussels. Analytically, a U.S./EU comparison raises concerns about comparing apples and oranges, as the former is a state and the latter is not. What matters most for the case of e-commerce self-regulation, however, is public power, and the EU has plenty of it in this substantive policy domain. As the U.S. federal government draws power from state courts, so too may the European Commission in Brussels leverage existing institutional capacities of the member states. In this respect, we compare processes that—while distinct—can be treated as analytic equivalents, provided the comparison is appropriately contextualized (Locke and Thelen). In short, a transatlantic comparison of e-commerce self-regulatory strategies is appropriately pitched at the EU level from an empirical point of view, and a carefully derived institutional framework can adequately address the theoretical challenges this pitch poses.

The article is organized in four sections. The following section defines and locates the concept of industry self-regulation. We then develop a comparative institutional model of self-regulation in a digital age that we subsequently evaluate in the context of hotly debated e-commerce policy issues: online content regulation and data privacy. We conclude by assessing some implications of distinct self-regulatory trajectories in European and U.S. e-commerce governance, the theoretical relevance of the findings, as well as some avenues for future research.

## SELF-REGULATORY STRATEGIES

When it comes to regulating new industries, political battles frequently erupt about whether government intervention is necessary, or whether the market should be allowed to run its course. The rise of e-commerce has been no different in this respect. Much academic theorizing, particularly among legal scholars and economists, focuses on the costs and benefits of government intervention, assessed against the backdrop of laissez-faire policies. As a result, comparatively little attention is paid to a third regulatory strategy—industry self-regulation. Self-regulation is derived, yet distinct, from market and government modes of regulation. We follow Neil Gunningham and Joseph Rees and define self-regulation as “a regulatory process whereby an industry-level (as opposed to a governmental or firm-level) organization sets rules and standards (codes

TABLE 1  
**Situating Self-Regulation**

Mode of Regulation	Regulatory Goals and Principles Set by	Rules and Standards . . .	
		. . . set by	. . . enforced by
Government intervention	Government	Government	Courts, agencies
Self-regulation	Government, industry	Industry	Courts, agencies, industry associations, markets
Market regulation	Consumer demand	Firms	Markets

of practice) relating to the conduct of firms in the industry. This definition implies that industry self-regulation requires firms in the industry to decide to cooperate with each other" (Gunningham and Rees, 365). While governments frequently intervene to motivate and steer industry self-regulation, private institutions are the principal agents that monitor firm-level activity and act as clearinghouses for consumer concerns. And in contrast to the market mode of regulation, firms participating in industry self-regulation are seen as deliberately and purposefully cooperating with one another. Table 1 situates self-regulation vis-à-vis the government intervention and market alternatives.

Self-regulatory systems vary widely, as indicated in Table 1. The most common form, industry codes of conduct, focuses largely on rule and standard setting by industry, largely enforced by the market or—in some instances—by public bodies. Some self-regulatory solutions, however, also feature rule enforcement by industry, frequently through Alternative Dispute Resolution (ADR) systems run by industry associations, fines imposed by such associations or the threat of exclusion from them. In contrast to formal government regulation, industries develop their own set of rules and implementation processes to achieve socially desirable ends. The focus on industry-level rules and self-policing differs from the market mode of regulation, where rules are supplied on the level of the firm and enforced solely through market competition.

Proponents of self-regulation hail it as more flexible, adaptive, and less intrusive than formal government regulation, while delivering many of the same benefits. Achieving successful self-regulation in practice, however, poses many challenges. Often lamented as a face saving tool for industry, a common concern is that self-regulation benefits firm image while actually permitting the wolf to guard the sheep. Furthermore, industry newcomers might view self-regulation as a cartel-like effort by dominant players to erect barriers to market entry. Even assuming

participants have good intentions, the constant threat of defection frequently undermines necessary collective action, as Mancur Olson has famously shown (Olson). Collectively rational behavior becomes individually irrational and the public good is undersupplied. Reaching back at least to the work of Ronald Coase, researchers have attempted to identify preconditions for successful collective action in market regulation (Coase). Self-regulation is most likely to produce desired results when companies agree that cooperation is in their mutual interest, a large share of companies in the industry are willing to comply with the standards, and robust monitoring and credible enforcement systems exist which enable identification and punishment of free-riders and defectors (Ostrom).

Following Coase, Olson, Fritz Scharpf, and others, we contend that successful industry collective action takes place “in the shadow of hierarchy,” in our case, in the shadow of public power (Mayntz and Scharpf; Scharpf 1993, 145; 1997, 197–205). Industry collective action becomes more robust and the joint provision of a regulatory system more attractive when there is the threat of government intervention, statutory standards, or litigation. The critical question is *how* the public sector affects the self-regulatory process. Which tools can it deploy? In other words, *how* is the shadow of public power cast, *how* does it shape the public/private relationship, and *how* does it affect the dynamics of intra-industry cooperation? In order to understand cross-national differences in self-regulatory behavior we must disaggregate the concept of public sector capacity and allow for institutionally determined variation of the shadow of public power.

#### A COMPARATIVE MODEL OF SELF-REGULATION IN THE DIGITAL AGE

This section puts forth a comparative model of industry self-regulation, taking seriously the claim that the public sector plays a critical role inducing private sector collective action. To investigate systematically how public sector capacity might vary across political economies and how such variation could be expected to affect the character of industry self-regulation, we call upon three literatures equally important for transatlantic comparisons of market regulation, yet unfortunately rarely brought together: work in comparative politics under the label of “varieties of capitalism”;<sup>4</sup> studies of distinct national styles of regulation, rooted largely in the fields of public law and administration (e.g., Kagan 1997, 2000; Vogel 1986); and examinations of the EU’s peculiar policy-making process (e.g., Hooghe; Knill 2001; Majone; Scharpf 1994; Wallace and Wallace). The analysis reveals, in short, that the public sector in the U.S. seems best suited to induce private sector collective action through the latent threat of intervention and the possibility of unfavorable regulatory terms should industry fail to deliver. In Europe, conversely, the public sector is better equipped to engage the private sector proactively rather than relying on the threat of reactive sanctions. To address these differences systematically, this section proceeds by first delineating the concept of public sector

capacity and next accounting for institutional variation between the U.S. and Europe. It then elaborates how such variation can be expected to shape the character of self-regulation on opposite sides of the Atlantic. Specifically, we suggest that distinct public sector capacities give rise to a system of *legalistic self-regulation* in the U.S. and *coordinated self-regulation* in Europe.

### Public Sector Capacity—Carrot and Stick

The literature on state capacity has traditionally distinguished strong states (those with high capacity) and weak states (those with low capacity) in unidimensional fashion (e.g., Migdal; Skocpol). To such considerations of the mere *extent* of resources, we add a layer of depth to better capture the *character* of public sector capacity. For analytic clarity, we separate “carrot capacity,” the public sector’s ability to reward individual and collective social actors in exchange for particular behavior, from “stick capacity,” its ability to make actors worse off if a particular behavior is not adopted. In short, our main interest is *how* public sector capacity is distributed, not simply what it amounts to in the aggregate.

Carrot capacity can manifest itself in numerous ways. Toward the lower end of an imagined scale ranks public actors’ ability to confer status and recognition in return for actors’ participation in certain public policy dialogue. The public sector has greater carrot capacity if it can offer financial and logistical incentives to bring about sustained participation of organized private interests in the regulatory process. Toward the high end of a scale is its ability to formally delegate regulatory authority to organized private interests and/or to make industry rules enforceable in the courts, an arrangement Wolfgang Streeck and Philippe C. Schmitter have aptly called “private interest government” (Streeck and Schmitter).

Public sector carrot capacity is a critical institutional ingredient for a system of coordinated capitalism. Much attention has been paid in recent years to variation in the extent of business coordination across political economies. The Rhineish and Scandinavian economies, for example, are said to be characterized by a high degree of noncompetitive interactions among formal competitors within an industry (Hall and Gingerich; Soskice). In addition to the recent analytic focus on this microlevel of coordination, the public sector’s complementary capacities should not be overlooked. Peak-level wage coordination, for example, frequently occurs in the context of tripartite bargaining among organized business, organized labor, and the state (e.g., Iversen, Pontusson, and Soskice); technical standards developed by industry associations more easily reach critical mass if the state mandates them for public procurement or makes them legally binding within its jurisdiction (Bach); and the state’s role as midwife to private sector R&D, lastly, has been noted frequently in studies of national innovation systems (Evans; Lundvall). In short, the public

sector's ability to contribute its share has been shown to matter a great deal for private sector cooperation and coordination in numerous policy areas, suggesting it should influence the character of industry self-regulation in the area of e-commerce as well.

Just as carrot capacity should not be thought of as a binary variable, stick capacity takes on multiple forms with varying degrees of intensity. For our immediate purpose, stick capacity can be considered higher the easier it is for the public sector to regulate an industry without regard for organized private interests. The greater the number of public entities that can unilaterally alter the regulatory status quo within a polity, the greater the public sector's overall stick capacity and its ability to incentivize private actors through the threat of sanctions to participate in industry collective action.

Several factors determine a political economy's overall stick capacity, including the extent to which political authority is centralized, the role of the judiciary in the regulatory process, and the power of administrative agencies. Federal systems that award considerable autonomy to policy making on the local or regional level, for example, contain many more points from which rules and regulations can emanate as compared with centralized polities.<sup>5</sup> The ability to leverage the prospect of regulatory fragmentation is a powerful tool to shape dynamics within a business community that tends to dread regulatory uncertainty and heterogeneous rules.<sup>6</sup>

The role and strength of the judicial branch in the regulatory process are additional critical determinants of stick capacity. Both macroinstitutional factors, that is, the positioning of the judicial branch vis-à-vis other pillars of state and society, and microinstitutional factors, that is, the administrative rules, procedures and norms governing the internal workings of the judicial branch, must be considered (Kagan 2001). In general, the more pervasive the courts' ability to engage in judicial review, the greater the judicial branch's ability to autonomously shape an industry's regulatory framework. Strong administrative courts, surely, enhance the judiciary's overall influence on regulation, particularly in the area of implementation; they do not, however, constitute the same kind of latent interventionist threat as courts empowered to engage in autonomous judicial review.

Last but not least, independent administrative agencies with sufficient resources, expertise and institutional empowerment to make and enforce rules are a potent source of a political economy's stick capacity.

This section has unpacked the concept of public sector capacity, and has introduced the idea of carrot capacity and stick capacity to better capture the *character* of public sector capacity. Having also delineated some institutional sources for each, we now explore the extent of these in the American and European polities. Whereas the public sector in the U.S. appears better endowed with stick capacity than with carrot capacity, the opposite is true for Europe.

## United States

Despite their focus on different sets of variables, the literatures on “varieties of capitalism” and comparative systems of regulation essentially concur in their assessment of the character of U.S. public sector capacity. Both find the public sector in the U.S. institutionally limited in its ability to proactively engage industry by offering rewards, yet comparatively strong in threatening sanctions.

While presidential summits and congressional hearings can certainly confer status and recognition on business leaders, such occurrences alone are unlikely to enable significant public sector influence over industry. Financial and logistical support for sustained industry organization on behalf of the public interest is not easily provided in a system of divided government and deliberate fragmentation of power. Federal R&D budgets are not centrally administered and can thus not easily be deployed in support of clearly defined public policy and regulatory objectives. Rather than relying on explicit subsidies or specific R&D payments, the U.S. executive branch frequently employs the purchasing power of the federal government to prop up markets for goods deemed in the public interest, such as recycled paper or fuel-efficient cars. However, this particular type of carrot capacity is frequently hampered by conflicts between the executive and legislative branches, and diverging interests at the federal and state levels.

Private interest government has never taken hold in the U.S., at least in part because of insufficient public sector carrot capacity. Analysts point to historical and institutional factors to explain the prevalence of business coordination through markets rather than networks and associations in the U.S.<sup>7</sup> America, for example, never had a guild system comparable to that of continental Europe, where business organization predated the industrial revolution and the formation of nation states. Just as importantly, however, strong antitrust provisions and a public distrust of not only Big Government but also Big Business have rendered formal peak-level bargaining among authoritative representatives of the state and industry virtually impossible (Kagan 2001). The nondelegation clause in the U.S. Constitution, moreover, prohibits formal delegation of regulatory authority to the private sector, depriving the American public sector of the most potent source of carrot capacity.<sup>8</sup>

In sharp contrast to its limited public sector carrot capacity, the U.S. system has a potent stick capacity. Strong federalism, an influential and entrepreneurial judiciary, and powerful regulatory agencies combine for a persistent threat of regulatory intervention by a multitude of public actors. Unless federal officials can show that interstate commerce necessitates federal action, much industry regulation occurs on the state level. The American judicial system is characterized by judges that are politically selected, less bureaucratically oriented, and consequently “more venturesome in reinterpreting legal rules and making new law” than their

colleagues abroad (Kagan 2000, 13). Common law and sweeping powers of judicial review in multiple jurisdictions award the judiciary ample policy-making powers, evidenced for example by the politicking that often accompanies appointments to the bench. Lastly, originally invented as part of the New Deal, powerful administrative agencies have become a pivotal component of industry regulation in the U.S., particularly since the expansion of federal powers as part of Lyndon Johnson's Great Society program. However, distrustful of the executive's willingness to enforce the law according to its intentions, Congress has established detailed administrative rule-making procedures and the right to sue regulatory agencies. The resultant legal disputes further regulatory uncertainty. Industry regulation in such a system of "adversarial legalism," as Robert Kagan calls it, thus frequently consists of agency decrees, subsequent legal challenges by regulated interests, and a judiciary that is called upon to arbitrate between government and business.<sup>9</sup>

### European Union

Neither a state, nor merely a free trade area among sovereign states, the EU is an uncommon political entity (Ruggie). EU public sector capacity is neither the sum, nor the average of its member states' capacities, whichever way one might compute these. The EU is a polity in its own right, a stage on which industry rules and regulations are increasingly formulated, including many of those for e-commerce. On balance, we find the EU comparatively better equipped to influence business by offering rewards, rather than threatening sanctions.

Charged with the administration of existing EU policies as well as the sole right to propose new legislation, the European Commission in particular commands extensive carrot capacity. Europe's techno-bureaucratic executive serves as a single locus for informational summits, lobbying, and hearings on the content of regulation pertaining to the Single Market. The Commission is also the sole administrator of the EU's vast R&D funds. It commonly employs control over these funds to forge transnational industry networks, to position itself close to such networks, and to rally support for its policy goals (Sandholtz 1992, 1993). Furthermore, delegation of regulatory authority to private bodies and state sanctioning of industry standards has long been part of the political economy in many member states, and has also become part of the EU's regulatory toolbox since the adoption of the so-called "New Approach" in 1985.<sup>10</sup> Although the EU has limited ability to spawn autonomous self-regulatory networks, by relying on existing member state business networks the Commission can motivate national self-regulatory action.<sup>11</sup>

On the member state level, the "varieties of capitalism" literature has emphasized the high degree of nonmarket coordination within many countries on the continent in particular, and how such business coordination capacity can be employed to achieve public policy objectives.

While these findings do not easily translate to the EU level, authors such as Wayne Sandholtz, Christoph Knill and Dirk Lehmkuhl, and others have called attention to the coordination functions of pan-European stakeholder networks in the Information and Communications Technology (ICT) field in particular (Knill 2000; Knill and Lehmkuhl 2002a). These networks not only help EU public officials formulate and implement EU-wide policies, they also provide them with access to business coordination mechanisms on the member state level.

Well equipped to hand out carrots to organized business interests through the European Commission, the European polity as a whole is comparatively weaker in its ability to influence business behavior through the threat of sanctions. The EU has no independent regulatory agencies for the Internal Market with authority resembling that of the Securities and Exchange Commission (SEC), Federal Communications Commission (FCC), or Federal Trade Commission (FTC) in the U.S.<sup>12</sup> Europe certainly has powerful and influential courts. The European Court of Justice (ECJ), for example, has been a pivotal, at times even autonomous driver of the integration process (e.g., Alter; Burley and Mattli). Administrative courts on the member state level are similarly influential in the area of industry regulation, evidenced for example by domestic regulators in France and Germany in particular who frequently seek to anticipate court rulings when making their decisions.<sup>13</sup> Yet despite the ECJ's influence and the pervasiveness of administrative law and courts in several continental European countries, the judiciary contributes comparatively little to Europe's stick capacity in the area of industry regulation. For one, the ECJ—as the EU's only court—focuses on treaty interpretation, the adjudication of disputes among member states, and the clarification of conflicts between domestic and EU law. As a result, the Court is not involved in resolving everyday regulatory disputes as is true for parts of the U.S. judiciary. Secondly, while certainly influential, continental European administrative courts do not possess the same kind of powers of judicial review as their U.S. counterparts. The prevalence of civil law on the continent makes it very difficult for judges, particularly those not on supreme or constitutional courts, to actually make law and thus substantively affect regulation.

If agencies and courts are relatively weak sources of stick capacity in Europe, multilevel governance—akin to federalism in the U.S.—provides a considerable reservoir of stick capacity (Hooghe and Marks 2000; Marks, Hooghe, and Blanck). Businesses dread regulatory uncertainty as well as costs arising from heterogeneous rules within an emerging single European market. EU public officials' stick capacity exists in their ability to leverage the threat of regulatory fragmentation, that is, linking industry's failure to adopt a certain behavior with the prospect of costly disparate rules across the member states. Whether or not this reservoir can be tapped in a given policy area, however, naturally depends on the ability of EU officials to get member states to defer to Brussels. The

TABLE 2  
Sources and Extent of Public Sector Capacity

	Source	Extent	
		U.S.	EU
Carrot capacity	Conferral of status	Medium	Medium
	Financial and logistical resources	Weak	Strong
Stick capacity	Ability to delegate	Weak	Strong
	Agencies	Strong	Weak
	Courts/judicial review	Strong	Medium
	Federalism/multilevel governance	Strong	Strong
Resulting form of self-regulation		Legalistic	Coordinated

often-ambiguous relationship of national and EU-level decision making thus introduces an element of uncertainty for the business community that skillful public officials can seek to exploit in efforts to steer industry collective action.

Table 2 summarizes the findings. Based on the preceding analysis, it codes the extent of various sources of carrot and stick capacity in the U.S. and EU in terms of strong, medium, or weak. The sharp contrast between the respective public sector capacities on opposite sides of the Atlantic is apparent. In the U.S., the public sector's limited ability to offer rewards and its comparative strength in threatening sanctions implies that the shadow of public power is cast predominantly by the instruments of institutionalized legalism. The public sector in the EU, in contrast, is comparatively better equipped to influence industry collective action through the prospect of substantial rewards, rather than the credible threat of sanctions. While multilevel governance provides a reservoir of stick capacity via the potential costs of regulatory fragmentation, its effectiveness depends on Brussels' ability to wrestle policy authority from the member states.

## Two Self-Regulatory Trajectories

This section briefly elaborates how such transatlantic institutional differences in public sector capacity lead to two distinct self-regulatory trajectories—*legalistic self-regulation* in the U.S. and *coordinated self-regulation* in the EU—and derives expectations that can be evaluated in the context of actual e-commerce self-regulation.<sup>14</sup>

We expect the instruments of institutionalized legalism to shape the dynamics of self-regulation in the U.S. Industry thus largely conceives of

self-regulation as preemptive regulation, that is, regulation *before* the government gets involved. Relations among firms as well as between industry and the organs of the state are likely to be formal, spotty, and frequently adversarial. The government is unlikely to actively induce and steer collective action within the business community. The impetus for industry-wide collective action will instead come from the credible threat of unfavorable regulatory terms, supplied either by Congress or—more likely—as a result of agency decrees, court rulings, and out-of-court settlements. The more credible the threat, the more likely business will engage in meaningful, preemptive self-regulation. When self-regulation occurs, it will be up to the business community to create and maintain intermediary institutions that develop, enforce, and adjudicate industry codes of conduct. In this environment, splits within the business community and competition among rival self-regulatory initiatives should not be a surprise. Government attempts to leverage its buying power to create markets for public goods may even enhance competition among self-regulatory alternatives. We expect the government to be limited in its ability to intervene and reconcile different initiatives in such instances.

On the European side, we expect self-regulation to have a corporatist twist. Here, the public sector is generally accepted as a *participant* in the self-regulatory process, albeit mostly as a facilitator. The European Commission will make use of its control over R&D funds to sponsor self-regulatory initiatives and to foster the growth of transnational industry networks. The executive branch is also likely to play a role in the creation of intermediary institutions should business alone fail. It will thus play a catalytic role in the process of self-regulation, a stark contrast to the much more hands-off U.S. executive. The judiciary, by contrast, should not play as significant a role in Europe, particularly on the EU level. Yet the more active the courts, agencies, and legislatures on the member state level are, the more credible the threat of regulatory fragmentation and hence the stronger the incentives for close cooperation between transnationally organized businesses and the Commission in the joint pursuit of coordinated self-regulation. To what extent such a coalition of public and private interests on the EU level is successful, however, will depend in part on the member states, who are not likely to be enthusiastic about a greater role for the Commission and business to the detriment of national autonomy.

To what extent do these expectations materialize in actual e-commerce regulation in Europe and the U.S.? How much analytic leverage does the ideal-typical comparison of *legalistic self-regulation* versus *coordinated self-regulation* offer for assessments of e-commerce policy development? The following section explicates the self-regulatory trajectories in the context of two hotly debated policy issues: content regulation and data privacy.

## E-COMMERCE SELF-REGULATION IN PRACTICE

Two policy areas where the general commitment to self-regulation has been most clearly implemented are the regulation of online content and the protection of data privacy. In both cases, after considerable policy experimentation, stakeholders have settled on industry self-regulation as a middle ground between overly broad government intervention and insufficient reliance on market mechanisms. The shadow of public power has changed noncompliance costs for business. Yet differences in the way the shadow is cast have led to widely divergent outcomes, as the primary characteristics of the legalistic and coordinated approaches assert themselves.

### **Free Speech and Harmful Content**

Digital network technologies have posed a twofold challenge to existing regulation of speech: “cyber-reach” and liability. Cyber-reach describes the Internet’s ability to extend the impact of one’s words beyond typical real space limits (Harvard Law Review, 1610). Individuals disseminate information to a wide potential audience with relatively low transaction costs and consumers can access this information in real time virtually free of charge. This astonishing feature of the Internet, unfortunately, provides those wishing to disseminate illegal and harmful speech the same platform that it provides socially responsible members of the cyber-community.<sup>15</sup> As a result, speech that is banned in one country (e.g., Nazi propaganda in France or Germany) is now easily accessible through sites hosted in countries where such speech is not illegal. This undermines some states’ ability to effectively enforce national laws.

A second but related concern is the ambiguity of liability in the new medium. Who is the editor responsible for content distributed over the Internet? Liability issues are closely wound up with the Internet’s ability to simultaneously serve different communication functions. The same technology can be configured to be print media (publishing websites), personal communication (e-mail), broadcasting (digital video), or community forum (chat rooms). Soon after the commercialization of the web, policy makers, law enforcement communities, and those concerned about the effects of harmful speech thus began contemplating ways to limit the power of cyber-reach and to determine liability for online content.

### **Internet Service Provider (ISP) Coordination and the Platform for Internet Content Controls (PICS) in Europe**

The European content debate began in November 1995 when Bavarian police searched the offices of CompuServe, a leading ISP, looking for evidence that the company had violated German obscenity law. The state government objected to chat sites through which pornography was

distributed and demanded them blocked under threat of prosecution. In December 1995, CompuServe, unable to selectively block websites, banned access to approximately 200 chat groups (all sites with "alt.sex" in their title) for all of their four million subscribers worldwide. Ignoring CompuServe's claim that they could not be held responsible for third-party postings on their servers and despite the company's banning of the sites, the Bavarian government prosecuted the executive director of CompuServe Deutschland, Felix Somm. He was subsequently sentenced to two years probation and a 100,000 D-Mark fine for distributing illegal pornography.

Seizing the prospect of multiple, potentially incompatible frameworks regulating speech disseminated over European data networks, the European Commission quickly prepared a report to the Parliament and the member states on *Illegal and Harmful Content on the Internet* (Commission of the European Communities 1996). Published in 1996, it stressed the potential of the Internet for Europe's economy and the destructive impact of stringent, uncoordinated national regulation. Furthermore, seeking to wrestle policy authority in this domain away from the member states, the Commission argued that the pan-European nature of the technology and its implications for the EU's single market clearly gave it authority to harmonize online content control. To this end, the Commission proposed a two-pronged response. First, the Commission called for the creation of EU-wide standards to help consumers filter out undesired speech. With an eye on technological solutions like the PICS,<sup>16</sup> the Commission called for self-regulatory technological solutions that empower consumers. Second, the report asked national governments to move away from ISP liability legislation and toward the establishment of hotline/watchdog organizations. Hoping to take advantage of diverse national capacities ranging from neocorporatist institutions in continental Europe to vibrant nongovernmental organization (NGO) communities in Anglo-Saxon countries, the Commission supported the establishment of content monitors at the national level to prevent Bavarian-esque solutions to content problems.

EU institutions have since actively supported this two-pronged strategy to avoid further delays in e-commerce penetration. *The Multiannual Community Action Plan on promoting safer use of the Internet*, known as *Safer Internet*, supports public awareness through a network of information centers, encourages self-regulation, provides research grants for filter systems, and includes project monies for the creation of national hotlines (European Communities). Between 1999 and 2004, the EU has spent nearly 40 million euros to support these efforts (Commission of the European Communities 2003a). The Commission catalyzed the creation and provided funding for the Internet Hotline Providers in Europe (INHOPE) as a coordination mechanism for filtering and rating solutions. It is also a strong financial backer of the Internet Content Rating Association (ICRA), which facilitates rating via PICS. In promoting filters like PICS, the

Commission has sought to bolster and focus market interest on a single technological solution, thereby undercutting interest in uncoordinated national responses (Commission of the European Communities 2000).

The European Commission has clearly played the role of facilitator in a system of coordinated self-regulation. It has successfully leveraged the unappealing prospect of regulatory fragmentation to provide incentives to European business to cooperate in the development of pan-European codes of conduct and self-monitoring schemes. In doing so, it drew on existing business networks as well as catalyzing new ones. As our framework suggests, EU public sector stick capacity is largely constituted by the threat of regulatory fragmentation within the EU. The Commission has used financial and logistical support as well as the prospect of a greater responsibility for the private sector as important carrots to promote national watchdog organizations and common filtering technology throughout the EU.

### **Competing Filters and the Separation of Government in the U.S.**

The American functional equivalent to Bavaria's police action against CompuServe was *U.S. vs. Thomas*, the prosecution in 1994 of a California couple that ran an adult Internet bulletin board (74 F.3d 701 [6th Cir. 1996]). Congress quickly stepped into the legal uncertainty created by *Thomas* and passed the Communications Decency Act (CDA), which came into force in January 1996. Demonstrating Congress' long-standing concern with obscenity, the bill passed the Senate in a bipartisan vote 84 to 16 (Hentoff; Schwartz). The Act criminalized the distribution of obscene and indecent speech on the Internet to those under eighteen. The American Civil Liberties Union (ACLU) quickly brought the law before a federal court in Philadelphia, however, and the justices placed it under a preliminary injunction. In 1997, the Supreme Court struck down the CDA in *ACLU vs. Reno* because of its overly broad indecency clause, vigorously defended the Internet, and warned against overly restrictive government intervention in this "exciting new world of possibility."<sup>17</sup> During this year and a half of regulatory uncertainty, industry mobilized several self-regulatory alternatives to show good faith and dampen future regulatory efforts (Swisher).

Even though the CDA was struck down it had several important implications for the nascent regulatory regime. First, it signaled a volatile regulatory environment for online content in the U.S. Feeling the political pressure surrounding the delicate issue of online obscenity, members from both parties showed continuing strong resolve vis-à-vis indecent content. Congress passed the Child Online Protection Act (COPA) in October 1998 and then, two years later, the Children's Internet Protection Act (CIPA). Both laws attempt to regulate Internet content while recognizing the constitutional concerns of the court. The former forced websites to collect proof of age before granting users access to material

deemed harmful to minors and the latter required schools and libraries receiving federal funding to install content filters on their computers. While the Supreme Court's most recent decision concerning the COPA confirmed the federal government's authority to regulate content, the ongoing conflict between the branches of government over the extent of free speech protection demonstrates the regulatory uncertainty in the policy area resulting from divided government and a strict separation of powers (Lane).

Secondly, at the same time that Congress tried to tighten content controls, other parts of the U.S. government carved out support for self-regulatory initiatives. In striking down the CDA, the Supreme Court called for less restrictive and interventionist means of regulation and pointed to filtering (Lane). *ACLU vs. Reno* thus sent a strong signal to the business community to develop self-regulatory solutions to avoid government intervention (Lessig). The court ruling called on business to act or to face future regulation. Following the CDA's failure, the executive branch sought to facilitate the development of filtering technology and business solutions. President Clinton invited representatives from major Internet firms to the White House to discuss voluntary restraint options and received a commitment from business to work on providing concerned consumers viable options (Dart). At the Internet Content Summit, held in 1997 between government officials and business leaders, industry announced a list of policies to help the development and promotion of filtering systems: Microsoft and Netscape agreed to integrate PICS into their browsers, IBM gave a grant to the Recreational Software Advisory Council (RSAC), the predecessor of the ICRA, to help the promotion of its rating system, and four search engines agreed to work on rating sites (Beesom and Hansen).

While the executive branch has thus clearly taken on a limited role as facilitator of self-regulation, its inability to use carrots to force convergence around a single standard means that several commercial solutions are competing in the market for content control. The ongoing conflict between the judicial and legislative branches over the limits of free speech and the political need to regulate obscenity drives regulatory uncertainty fostering private sector action. Adversity to the uncertainty created by the wrangling of the various branches of government has been a critical incentive for private sector filtering innovation in the legalistic self-regulatory system.

## **Data Privacy**

Privacy protection has arguably been the most prominent public policy issue of the information age, as digital technologies challenge existing notions of privacy and reopen debates about appropriate regulation (Newman and Bach). Digital data collection technologies reshape monitoring capacities in at least three critical ways. First, while the public

sector remains a principal agent of privacy intrusion, evidenced powerfully by new law enforcement monitoring powers in the aftermath of the terrorist attacks on the U.S. of September 11, 2001, the private sector has quickly emerged as an equally potent intruder. Second, the quantity of information that one can accumulate and analyze is rapidly increasing. Web trails, credit card records, and club cards generate growing amounts of personal data. Expanded data storage capacity and faster processing imply that staggering amounts of information can be stored and dissected into refined profiles of individual behavior. Third, data gathering from diverse sources changes the quality of collected information. As the capacity of data monitoring improves, new areas of human behavior fall under public scrutiny. Digital information technologies thus challenge preexisting public and private boundaries, and conflicts emerge over appropriate levels of privacy protection (Schauer).

### **Data Authorities and Privacy Enhancing Technologies (PETs) in Europe**

In 1970, the West German state of Hesse passed the world's first data protection act. Thirteen European countries followed over the next twenty years. These laws are grounded in a common set of Fair Information Practice Principles (FIPPs),<sup>18</sup> while adopting nationally specific implementation mechanisms.<sup>19</sup>

Realizing that data flows among private entities are an essential component of a modern information economy and democratic society, the European Commission began seriously discussing improved and harmonized data protection legislation in 1990. Supported by national bureaucracies frustrated by the lack of regulation in several member states, the EU adopted the Data Privacy Directive in 1995 (Swire and Litan). The Directive requires all member states to create independent authorities that monitor the implementation of FIPP-inspired data protection legislation. The Directive was an amalgam of existing national data protection regimes. The German and French commission model was adopted with a variety of implementation mechanisms including codes of conduct popular in the Netherlands and U.K. (Simitis).

The proliferation of decentralized data collection by many private actors makes privacy protection through pure reliance on formal government regulation practically impossible. Substantial market asymmetry between data users and data subjects, on the other hand, leads to market failures and renders market mechanisms alone insufficient. The EU has therefore opted for increased reliance on self-regulation, while utilizing technology, public data commissioners, and market mechanisms to implement industry codes of conduct (Bolkestein).

The EU is simultaneously funding research into technological solutions that strengthen personal data privacy. Privacy Enhancing Technologies (PETs), including efforts to boost anonymity and secrecy, were promoted

in the Commission's Fifth Framework Research Program. In the Commission's recent Sixth Framework Research Program, this effort has continued with 55 million euros allocated to research concerning privacy and security technology (Commission of the European Communities 2003b). In addition, the Commission has been an important financial supporter of the World Wide Web Consortium's efforts to develop the Platform for Privacy Preferences (P3P), a filtering standard.

The push by national data commissioners to emphasize self-protection in implementation legislation denotes the shift from imposed regulatory solutions to coordinated self-regulation. According to this strategy, individuals must take responsibility for their information and work with data protection agencies and industry associations to identify breaches (European Information Service). Using carrots to encourage the development of PETs, the EU is developing a complementary implementation strategy that combines institutional monitoring capacity with individual enforcement tools.

### **The Federal Trade Commission and NGOs in the U.S.**

The Watergate scandal heightened policy makers' awareness of information security and data privacy, providing the impetus for the Privacy Act of 1974. The Act limited the government's ability to disseminate and use stored information and, in most respects, implemented the FIPPs in the public sphere (Regan). Yet divided government prevented comprehensive statutory attempts to regulate data use in the private sector, resulting in a patchwork of industry rules.<sup>20</sup>

Increasing public concern since the commercialization of the Internet highlighted the inadequacy of the existing regulatory regime (Lohr). The Clinton administration affirmed its unwillingness to seek broad privacy legislation in its 1997 *Framework for Global Electronic Commerce*, calling instead for self-regulatory solutions (Clinton and Gore). In annual testimony from 1998 and 1999, the FTC concluded that little effort had been made by industry to develop coherent and comprehensive privacy protection.<sup>21</sup> Thus in May 2000, the FTC reversed its support for a hands-off policy and called for government intervention to properly protect personal data privacy (Federal Trade Commission 2000). Although several sectors have recently been subjected to statutory regulation,<sup>22</sup> attempts to adopt comprehensive legislation have failed. This has resulted in two dynamics, consistent with the notion of legalistic self-regulation: first, agency-induced lawsuits and second, regulatory uncertainty motivating private sector response. The DoubleClick case brought before the FTC represents the most glaring example of the first trend. Attempting to further expand its information capital, DoubleClick, a leading online marketing firm, bought Abacus Direct, one of the largest brick-and-mortar direct marketing firms, and began merging the two companies' databases. Amidst massive public outcry, an FTC fair trade practices investigation,

and a state attorney general-led class action law suit, DoubleClick committed publicly not to merge the databases (Goodison). Severely limited in its ability to manage business privacy practices proactively, the FTC's mostly reactive strategy is designed to produce large costs for firms that take the wrong step.

No central monitoring organization exists to oversee and coordinate industry self-regulation. The failure of the 1974 Privacy Act to create a central coordination body has led to institutional fragmentation with the FTC, Office of Management and Budget (OMB), and the Department of Commerce claiming responsibility for data protection. In contrast to government efforts in Europe to coordinate industry responses, growing concern over data privacy violations in the U.S. prompted NGOs to offer monitoring and compliance systems. FTC investigations over the last three years no doubt have motivated businesses to join NGO-led self-regulatory schemes. The best known are TRUSTe and BBBOn-line, which offer seals demonstrating website compliance with the FIPPs.<sup>23</sup> These organizations also offer dispute resolution mechanism for privacy violations and conduct periodic privacy audits of member sites. Some skepticism surrounds these particular seal programs because they are financed by the entities they oversee.<sup>24</sup> Nevertheless, these private-sector schemes provide incentives to member firms to proactively manage privacy.

Consistent with our expectations, we see a fragmented government response to growing data privacy concerns. Congress has not been able to enact comprehensive legislation and has let countless draft bills die. Instead, federal agencies, most notably the FTC, check gross privacy abuses through adversarial investigations. Simultaneously, private entities compete to offer companies a shield against continued agency pressure, and to help them gain and retain the trust of consumers.

## CONCLUSION

Disaggregating the concept of public sector capacity provides substantial analytic leverage over developments in two crucial e-commerce regulatory areas. But what are the real-world consequences of distinct self-regulatory trajectories for e-commerce and, more broadly, for what has been called the emerging "E-economy" (Cohen, DeLong, and Zysman)? One consequence of self-regulatory trajectories has guided this project from the outset: at a minimum, self-regulation on either side of the Atlantic does, and will continue to, look different. Self-regulation in the shadow of American public power features a more active judiciary and regular involvement by quasi-autonomous regulatory agencies. An engaged, facilitative executive and occasional formal legislation, by contrast, characterize comparable industry self-regulation in the EU. This legislation is commonly constructed to encourage and even require self-regulatory structures for implementation. The potential for transatlantic

misunderstanding is high. Data privacy offers the best example. Although players on both sides of the Atlantic agree that the FIPPs should be upheld, different implementation mechanisms for industry self-regulation produce tension. Both sides can legitimately claim to engage in self-regulation. Yet the dynamics are such that Europeans might interpret American reliance on the instruments of legalism as *laissez-faire*, whereas Americans have reason to view European-style industry coordination as outright government intervention. Rather than engaging in finger pointing, U.S. and European policy makers should realize their shared commitment to self-regulation and work on common interfaces to reconcile regulatory regimes. The transatlantic Safe Harbor agreement on data privacy appears to be just such a step (Farrell 2001, 2003).

Not only are self-regulatory regimes in Europe and the U.S. certain to look different, but they may also shape the logic of the respective digital marketplaces. Legalistic self-regulation has already created market competition among self-regulatory systems in the U.S., creating for example multiple free speech filtering systems and privacy-enhancing technologies. This competition of rival technologies may foster innovation and reduce the likelihood of technological lock-in. Coordinated self-regulation appears more prone to yield single self-regulatory standards, such as the focus on P3P or PICS in Europe. For markets characterized by network effects the benefits of single standards are often vast (Shapiro and Varian). Could we soon witness transatlantic competition of standardization philosophies play out in e-commerce consumer protection systems the way it did in digital wireless technology in the 1990s (Glimstedt)?

Despite these important insights, this study has several limitations. It examines the effects of public sector capacities on the character of industry self-regulation in only two cases and for only two polities. In the E-conomy alone, self-regulatory solutions are currently considered in areas such as digital security and authentication, universal access, royalty management for protected works and Alternative Dispute Resolution for retail e-commerce. Evaluating our claims about two distinct self-regulatory trajectories in Europe and the U.S. for these and other cases would surely move us beyond the empirical "plausibility probe" undertaken in this study (George). Furthermore, this analysis may be extended to possible variation among EU member states. We would expect less variation due to the relative similarity of regulatory styles and public sector capacities in many European countries along with the important role played by EU institutions in this substantive domain. Similarly, the question remains how the framework applies to other industrialized countries. While we do not expect the two self-regulatory images to map easily onto policy environments in Asia, examining the dynamics in countries such as Japan or South Korea would further sharpen our understanding of the effects of public sector capacities on industry self-regulation. Additionally, evaluating the argument for non-E-conomy domains where self-regulation is

prevalent is necessary to reach more robust conclusions about the public sector's role in private sector governance.

Furthermore, in considering only the effects of public sector capacities on private sector self-regulation this study is analytically biased. The efficacy and efficiency of self-regulation in a given policy domain is likely to vary significantly with industry structure. How homogenous are stakeholder interests? How influential are existing industry associations? How easily can intermediary institutions be created if such institutions are lacking or insufficient? These variables determine what kind of public sector capacity—or what mix of capacities—is best suited to provide incentives for business to engage in self-regulation. Following Olson, collective action should become more difficult as the number of relevant stakeholders increases and their interests diverge. Fewer players should have a stake in wireless communications standards than is probably the case for personal data privacy on the Internet. Does a large, heterogeneous group of stakeholders require greater external hierarchy to trigger self-organization or is instead a facilitative public sector called for to lay the groundwork for collective action? In either case, private sector capacity could be as important as public sector capacity to achieve successful self-regulation. And private sector institutional variables, in turn, shape at least partially the development of public sector capacities (Knill and Lehmkuhl 2000b).

In the end, how far-reaching are the implications of distinct self-regulatory trajectories in Europe and the U.S. for the emerging E-economy? Will there be one E-economy with slightly different self-regulatory regimes, or will the differences give rise to distinct, regional E-economies? Our analysis suggests that Europe and the U.S. are already well on their way toward the latter. Digital technologies are no doubt changing the way firms do business, altering the terms of competition in many industries, and reopening many policy debates (The BRIE-IGCC E-economy Project). Yet they have not wiped away deeply rooted differences among various forms of capitalism. Remarkably, even when political economies adopt the same regulatory strategy—reliance on industry self-regulation to the greatest possible extent—institutional legacies powerfully shape the respective regional implementation. These institutional legacies may very well turn out to be important determinants of comparative institutional advantage in a digital age.

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## NOTES

1. In their 1997 *Framework for Global Electronic Commerce*, President Clinton and Vice-President Gore affirmed that "the Administration [. . .] will encourage the creation of private fora to take the lead in areas requiring self-regulation such as privacy, content ratings, and consumer protection and in areas such as standards development, commercial code, and fostering interoperability" In response, Europe's then-Commissioner for Telecommunications, Martin Bangemann, suggested that business should take the lead in developing an "International Charter for Electronic Commerce" that would rely heavily on "market-led, industry-driven self-regulatory models." See Clinton and Gore, and Commission of the European Communities 1998.
2. The logic is well captured by Robert Verrue, the European Commission's Director General for the Information Society, who maintains that "[a]ny detailed regulations are rapidly overtaken by events and can often easily be circumvented. . . . More and more we are exploring, together with industry and user communities, the possibilities afforded by self-regulation and codes of conduct." See Verrue.
3. As epitomized by John Gilmore's famous claim that "the Net interprets censorship as damage and routes around it," many techno-anarchists viewed cyberspace as beyond the reach of territory-bound states. See John Gilmore as quoted in Lewis. See also John Perry Barlow's equally famous *A Declaration of the Independence of Cyberspace*, February 8, 1996, available at <http://www.eff.org/~barlow/Declaration-Final.html>. A more sophisticated argument about dwindling state power in the face of the rise of complex networks is Castells'.
4. We mean the label "varieties of capitalism" to not only refer to the recent volume edited by Hall and Soskice, but also to include previous work that focused on more macroinstitutional variation among political economies in areas such as financial systems, wage bargaining, and corporate governance. For a useful review, see Hall 1999.
5. Federalism is one key reason why Reagan's "revolution" in the U.S. was not nearly as far-reaching as Thatcher's in Great Britain during the same time. See Levy, Kagan, and Zysman.
6. Vogel, for example, shows that businesses are frequently not averse to tough environmental standards, provided they provided some long-term planning certainty. See Vogel 1995.
7. Industry associations in the U.S., while plentiful, have traditionally been mostly vehicles for lobbying, not building blocks of "private interest government." For the prevalence of market coordination in the U.S., see Hall and Soskice.
8. For a discussion of the nondelegation clause in the context of Internet regulation, see Froomkin.
9. See, for example, Badaracco's excellent analysis of health and safety regulation in the chemical industry. More recently, the Microsoft antitrust suit nicely illustrates stick capacity resulting from federalism, courts, and powerful agencies. The Department of Justice's antitrust division along with 20 states sued Microsoft for its violation of a previous settlement. The trial judge initially ordered the company broken up, a decision that was later overturned on appeal. Nine states subsequently refused to join a new settlement, however, continuing the legal uncertainty surrounding the future regulation of the market for computer operating systems and other software. Similarly, even when the powerful federal SEC decided not to pursue improper sharing of information among investment and research divisions in several Wall Street banks, the bankers got to feel the stick of

- the state, this time in form of New York State's Attorney General Elliot Spitzer.
10. See Majone for a comprehensive discussion of the "New Approach."
  11. We thank an anonymous reviewer for clarification on this point.
  12. While the Commission's competition Directorate General has played an increasingly central role as "single market enforcer" under Commissioners van Miert and Monti, its ability to intervene autonomously is largely limited to instances of anticompetitive behavior and mergers.
  13. We thank an anonymous reviewer for clarification on this point.
  14. Our goal is to describe patterns of self-regulation derived from institutional differences in the two polities. This transatlantic comparison naturally simplifies the regulatory processes occurring within either polity and ignores the political battles that may unfold in any particular issue area. We focus on broad contrasts and thus naturally pay less attention to the immense complexity and nuances of regulatory systems in Europe and the U.S.
  15. The content addressed is not new to the Internet. Historically, the primary concern of U.S. content regulation has dealt with obscenity. Many European governments also ban hate speech, such as the criminalization of the *Auschwitzlüge* in Germany, for example. These government-supplied, existing "offline" rules and regulation thus constitute the principles that demarcate the policy space for industry self-regulation.
  16. PICS has three components. The most basic feature is a list of descriptors used to label sites. Once sites are labeled they become tagged and easily sorted. Third parties then construct the second feature of the system, templates. Competing firms produce software, using templates that are able to block sites based on differing combinations of descriptors. See <http://www.w3.org/PICS/>.
  17. See U.S. 138 L Ed 2d 877–891.
  18. The FIPPs include Notice, Consent, Security, Access, and Accountability. For elaboration, see OECD.
  19. These laws vary on two fronts. Substantively, some focus on the public sector (e.g., Germany) while others only deal with digital data, not manual files (e.g., the U.K.). On a procedural level, implementation mechanisms differ widely as France requires licenses from data users while Germany's data commissioners serve only in an advisory position. See Bennett.
  20. On the legislative side, seven separate acts cover privacy issues in areas as diverse as education, video rentals, cable communications, and financial services.
  21. A 1999 FTC study found, for example, that only 10 percent of popular sites had disclosure policies consistent with basic fair information practice standards. Among the 100 most visited sites only 20 percent disclosed comprehensive privacy policies. See Federal Trade Commission 1999.
  22. Examples are the Gramm-Leach-Bliley Act covering financial services, new federal Medical Privacy Rules, and the Children's Online Privacy Act.
  23. TRUSTe was founded by the Electronic Frontier Foundation, CommerceNet, and the Boston Consulting Group. BBBOn-line is run by the Better Business Bureau. As of 2002, over 1,500 companies had been certified by TRUSTe.
  24. TRUSTe, for example, has been blamed for not following up a claim against Microsoft, one of TRUSTe's largest financial supporters.

## REFERENCES

- Alter, Karen J. 1996. The European Court's Political Power: The Emergence of the European Court as an Influential Actor in Europe. *West European Politics* 19: 458–487.

- Andrews, Edmund L. 1999. U.S.-European Union Talks on Privacy Are Sputtering. *The New York Times*, May 27, C6.
- Bach, David. 2000. *International Cooperation and the Logic of Networks: Europe and the Global System of Mobile Communications (GSM)*. BRIE Working Paper 139.
- Badaracco, Joseph L. Jr. 1985. *Loading the Dice*. Boston: Harvard Business School Press.
- Beesom, Ann, and Chris Hansen. 1997. *Fahrenheit 451.2: Is Cyberspace Burning?* Wye Mills, MD: American Civil Liberties Union.
- Bennett, Colin J. 1992. *Regulating Privacy: Data Protection and Public Policy in Europe and the United States*. Ithaca, NY: Cornell University Press.
- Bolkestein, Frits. 2002. Closing Remarks. Presented at the European Commission Conference on Data Protection, Brussels, October 1.
- Burley, Anne-Marie, and Walter Mattli. 1993. Europe Before the Court: A Political Theory of Legal Integration. *International Organization* 1:41-76.
- Castells, Manuel. 1996. *The Rise of the Network Society*. Cambridge, MA: Blackwell Publishers.
- Clinton, William J., and Albert Gore. 1997. *A Framework for Global Electronic Commerce*. Washington, DC.
- Coase, Ronald. 1960. The Problem of Social Cost. *The Journal of Law and Economics* 1:1-44.
- Cohen, Stephen S., J. Bradford DeLong, and John Zysman. 2000. *Tools for Thought: What Is New and Important about the "E-economy."* Berkeley: BRIE, University of California, Berkeley.
- Commission of the European Communities. 1996. *Illegal and Harmful Content on the Internet*. Brussels: European Communities.
- . 1998. *Globalization and the Information Society: The Need for Strengthened International Co-ordination*. Brussels: European Communities.
- . 2000. Commission Issues Reports on Parental Control Technology Aimed at Enhancing Safety of Internet. *RAPID*, June 15.
- . 2003a. *Safer Internet*. Luxembourg: European Communities. Available online at [http://europa.eu.int/information\\_society/programmes/iap/index\\_en.htm](http://europa.eu.int/information_society/programmes/iap/index_en.htm).
- . 2003b. *Information Society Technologies*. Luxembourg: European Communities.
- Dart, Bob. 1997. Summit Aims to Make Internet Safe for Kids. *The Atlanta Journal and Constitution*, November 30, C3.
- de Jonquie' res, Guy. 1998. Rifts Remain on Internet Rules. *The Financial Times*, October 12, 4.
- European Communities. 1999. Decision No. 276/1999/EC of the European Parliament and of the Council of 25 January 1999 Adopting a Multiannual Community Action Plan on Promoting Safer Use of the Internet by Combating Illegal and Harmful Content on Global Networks.
- European Information Service. 1998. Data Protection: No EU Plan to Impose upon Non-Community Countries. *European Report*, March 7.
- Evans, Peter B. 1995. *Embedded Autonomy: States and Industrial Transformation*. Princeton, NJ: Princeton University Press.
- Farrell, Henry. 2001. Negotiating Privacy Across Arenas: The EU-US "Safe Harbor" Discussions. In Adrienne Héritier, ed., *The Provision of Common Goods: Governance across Multiple Arenas*, pp. 101-123. Boulder, CO: Rowman & Littlefield.
- . 2003. Constructing the International Foundations of E-commerce: The EU-US Safe Harbor Arrangement. *International Organization* 2:277-306.
- Federal Trade Commission. 1999. *Self-Regulation and Privacy Online: A Report to Congress*. Washington, DC: Federal Trade Commission.

- . 2000. *Privacy Online: Fair Information Practices in the Electronic Marketplace: A Federal Trade Commission Report to Congress*. Washington, DC: Federal Trade Commission.
- Froomkin, A. Michael. 2000. Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution. *Duke Law Journal* 17–184.
- George, Alexander L. 1979. Case Studies and Theory Development: The Method of Structured, Focused Comparison. In Paul Gordon Lauren, ed., *Diplomacy: New Approaches in History, Theory, and Policy*, pp. 43–68. New York: Free Press.
- Glimstedt, Hendrik. 2001. Competitive Dynamics of Technological Standardization: The Case of Third Generation Cellular Communications. *Industry and Innovation* 1:49–78.
- Goodison, Donna. 2002. Web Ad Service Ends Privacy Flak; DoubleClick Settlement Changes Policy. *The Boston Herald*, August 27, 33.
- Gunningham, Neil, and Joseph Rees. 1997. Industry Self-Regulation: An Institutional Perspective. *Law & Policy* 4:363–414.
- Hall, Peter A. 1999. The Political Economy of Europe in an Era of Interdependence. In Herbert Kitschelt, Peter Lange, Gary Marks, and John D. Stephens, eds., *Continuity and Change in Contemporary Capitalism*, pp. 135–156. Cambridge, U.K.: Cambridge University Press.
- Hall, Peter A., and Daniel W. Gingerich. 2001. Varieties of Capitalism and Institutional Complementarities in the Macroeconomy: An Empirical Analysis. Presented at the Annual Meeting of the American Political Science Association, San Francisco, CA.
- Hall, Peter A., and David Soskice. 2001. An Introduction to Varieties of Capitalism. In Peter A. Hall and David Soskice, eds., *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, pp. 1–68. Oxford: Oxford University Press.
- Hargreaves, Deborah, and J. Leffall. 2000. Brussels in Push for VAT on Internet Sales. *The Financial Times*, June 5, 9.
- Harvard Law Review. 1999. Developments—The Law of Cyberspace. *Harvard Law Review*: 1574–1704.
- Hentoff, Nat. 1995. Senate's Cybercensors. *Washington Post*, July 1, A27.
- Hooghe, Liesbet. 2001. *The European Commission and the Integration of Europe: Images of Governance*. Cambridge, U.K.: Cambridge University Press.
- Hooghe, Liesbet, and Gary Marks. 1999. The Making of a Polity: The Struggle over European Integration. In Herbert Kitschelt, Peter Lange, Gary Marks, and John D. Stephens, eds., *Continuity and change in contemporary capitalism*, pp. 70–100. Cambridge, U.K.: Cambridge University Press.
- . 2000. *Multi-level Governance and European Integration*. Lanham, MD: Rowman & Littlefield.
- Iversen, Torben, Jonas Pontusson, and David W. Soskice, eds. 2000. *Unions, Employers, and Central Banks: Macroeconomic Coordination and Institutional Change in Social Market Economies*. Cambridge, U.K.: Cambridge University Press.
- Kagan, Robert A. 1997. Should Europe Worry about Adversarial Legalism. *Oxford Journal of Legal Studies* 2:165–184.
- . 2000. How Much Do National Styles of Law Matter? In Robert A. Kagan and Lee Axelrad, eds., *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism*, pp. 1–32. Berkeley: University of California Press.
- . 2001. *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard University Press.
- Knill, Christoph. 2000. *Private Governance Across Multiple Arenas: European Interest Associations as Interface Actors*. Bonn: Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter.

- . 2001. *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence*. Cambridge, U.K.: Cambridge University Press.
- Knill, Christoph, and Dirk Lehmkuhl. 2002a. Private Actors and the State: Internationalization and Changing Patterns of Governance. *Governance* 1:41–63.
- . 2002b. Governance and Globalization: Conceptualizing the Role of Public and Private Actors. In Adrienne Héritier, ed., *Common Goods: Reinventing European and International Governance*, pp. 85–104. Lanham, MD: Rowman & Littlefield.
- Lane, Charles. 2002. Justices Partially Back Cyber Pornography Law. *Washington Post*, May 14, A3.
- Lessig, Lawrence. 1998. What Things Regulate Speech: CDA 2.0 vs. Filtering. *Jurimetrics Journal* 629–670.
- Levy, Jonah D., Robert Kagan, and John Zysman. 1997. The Twin Restorations: The Political Economy of the Reagan and Thatcher 'Revolutions.' In Lee-Jay Cho and Yoon Hyung Kim, eds., *Ten Paradigms of Market Economies*, pp. 3–58. Seoul: Korea Research Institute for Human Settlements.
- Lewis, Peter H. 1996. Limiting a Medium Without Boundaries: How Do You Let the Good Fish Through the Net While Blocking the Bad? *The New York Times*, January 15.
- Locke, Richard, and Kathleen Thelen. 1998. Problems of Equivalence in Comparative Politics: Apples and Oranges, Again. *APSA-CP Newsletter* 1:9–12.
- Lohr, Steve. 2000. Survey Shows Few Trust Promises on Online Privacy. *The New York Times*, April 17.
- Lundvall, Bengt-Åke, ed. 1992. *National Systems of Innovation: Towards a Theory of Innovation and Interactive Learning*. New York: St. Martin's Press.
- Majone, Giandomenico. 1996. *Regulating Europe*. New York: Routledge.
- Marks, Gary, Liesbet Hooghe, and Kermit Blanck. 1996. European Integration from the 1980s: State-Centric vs. Multi-Level Governance. *Journal of Common Market Studies* 3:341–378.
- Marsden, Christopher T., ed. 2000. *Regulating the Global Information Society*. New York: Routledge.
- Mayntz, Renate, and Fritz W. Scharpf, eds. 1995. *Gesellschaftliche Selbstregulierung und Politische Steuerung* [Societal Self-Regulation and Political Governance.]. Frankfurt am Main: Campus.
- Migdal, Joel S. 1988. *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World*. Princeton, NJ: Princeton University Press.
- Mitchener, Brandon. 2002. Increasingly, Rules of Global Economy Are Set in Brussels. *The Wall Street Journal*, April 23, A1.
- Newman, Abraham L., and David Bach. 2003. Privacy and Regulation in a Digital Age. In Harry Bouwman, Brigitte Preissl, and Charles Steinfield, eds., *E-Life after the Dot.Com Bust*, pp. 249–270. Berlin: Springer Verlag.
- Organisation for Economic Co-operation and Development (OECD). 1980. *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. Paris: Organisation for Economic Co-operation and Development.
- Olson, Mancur. 1965. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, MA: Harvard University Press.
- Ostrom, Elinor. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge, U.K.: Cambridge University Press.
- Regan, Priscilla. 1995. *Legislating Privacy*. Chapel Hill: University of North Carolina Press.
- Risse, Thomas. 1996. Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union. *Journal of Common Market Studies* 1:53–80.
- Ruggie, John Gerard. 1993. Territoriality and Beyond: Problematizing Modernity in International Relations. *International Organization* 1:139–174.

- Sandholtz, Wayne. 1992. *High-Tech Europe: The Politics of International Cooperation*. Berkeley: University of California Press.
- . 1993. Institutions and Collective Action: The New Telecommunications in Western Europe. *World Politics* 2:242–270.
- Scharpf, Fritz W., ed. 1993. *Games in Hierarchies and Networks: Analytical and Empirical Approaches to the Study of Governance Institutions*. Boulder, CO: Westview Press.
- . 1994. Community and Autonomy: Multi-Level Policy Making in the European Union. *Journal of European Public Policy* 2:219–242.
- . 1997. *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research*. Boulder, CO: Westview Press.
- Schauer, Frederick. 1998. Internet Privacy and The Public-Private Distinction. *Jurimetrics* 4:555–564.
- Schwartz, John. 1995. On-line Obscenity Bill Gains in Senate; Panel Backs Legislation; Critics See Threat to First Amendment. *Washington Post*, March 24, A1.
- Shapiro, Carl, and Hal R. Varian. 1999. *Information Rules: A Strategic Guide to the Network Economy*. Boston: Harvard Business School Press.
- Simitis, Spiros. 1995. From the Market to the Polis: The EU Directive on the Protection of Personal Data. *Iowa Law Review* 445+.
- Skocpol, Theda. 1979. *States and Social Revolutions*. Cambridge, U.K.: Cambridge University Press.
- Soskice, David. 1999. Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980s and 1990s. In Herbert Kitschelt, Peter Lange, Gary Marks, and John D. Stephens, eds., *Continuity and Change in Contemporary Capitalism*, pp. 101–134. Cambridge, U.K.: Cambridge University Press.
- Stone Sweet, Alec, Wayne Sandholtz, and Neil Fligstein. 2001. *The Institutionalization of Europe*. Oxford: Oxford University Press.
- Streeck, Wolfgang, and Philippe C. Schmitter, eds. 1985. *Private Interest Government: Beyond Market and State*. Beverly Hills, CA: Sage Publications.
- Swire, Peter P., and Robert E. Litan. 1998. *None of Your Business: World Data Flows, Electronic Commerce, and the European Privacy Directive*. Washington, DC: Brookings Institution.
- Swisher, Kara. 1995. Ban on On-Line Smut Opposed: High-Tech Coalition Pushes Software Allowing Parents to Decide. *Washington Post*, July 18, D3.
- The BRIE-IGCC E-economy Project, ed. 2001. *Tracking a Transformation: E-Commerce and the Terms of Competition in Industries*. Washington, DC: Brookings Institution.
- Verrue, Robert. 1999. Electronic Commerce in Europe: The Present Situation. Presented at the Seminar on Electronic Commerce, Kangaroo Group—European Parliament, Brussels, January 20.
- Vogel, David. 1986. *National Styles of Regulation: Environmental Policy in Britain and the United States*. Ithaca, NY: Cornell University Press.
- . 1995. *Trading Up: Consumer and Environmental Regulation in a Global Economy*. Cambridge, MA: Harvard University Press.
- Waldmeir, Patti. 2001. Good Intentions that Could Kill E-Commerce: A Treaty to Enforce Laws in Cross-Border Disputes Threatens an Unwieldy Solution to a Manageable Problem. *The Financial Times*, May 31, 16.
- Wallace, Helen, and William Wallace. 2000. *Policy-Making in the European Union*, 4th ed. Oxford: Oxford University Press.