Regulatory Regimes in a Trans-National World: Why is there no "Delaware Effect" on the Internet?

Roy Suddaby*
Alberta School of Business
&

Rajshree Prakash
Lancaster University Management School

*corresponding author
Department of Strategic Management & Organization
Alberta School of Business
2-32E Business Building
University of Alberta
Edmonton, CANADA T6G 2R6
Phone: 780-492-2386
e-mail: roy.suddaby@ualberta.ca

Abstract

.

INTRODUCTION

Has globalization diminished the power of the nation-state to regulate international transactions? Globalization theory offers contradictory answers to this question. One view is that globalization will produce global regulatory institutions that administer a common legal regime. Globalization, in this view, creates the conditions for the emergence of global authority structures with powers that supersede those of the nation state. Advocates of this 'world society' perspective point to the emergence of supra-state regulatory authorities such as the World Intellectual Property Organization or the International Maritime Organization as nascent examples of an emerging global governance system (Held & McGrew, 2006). According to this view, over time, all international commerce will be regulated by a common legal scheme administered by global institutions.

A related view is that globalization has severely compromised, but has not displaced, the power of domestic governments to regulate commerce. As commercial transactions increasingly span traditional geographic jurisdictions, actors are increasingly given the opportunity to choose which geographic jurisdiction will regulate their exchange. This effectively reduces traditional domestic regulation to a consumer choice model in which regulatory regimes compete with each other to provide the most attractive rule system for trans-national commerce. Such competition ultimately, according to this view, encourages less stringent and less interventionist regulation, which cynics have described as a regulatory "race to the bottom".

A competing view is that increasing global economic integration will reinforce the power of a few nation states. In this view, globalization will produce policy convergence between domestic regulators, but, the increasingly trans-jurisdictional nature of commerce

will force the isomorphic adoption of extant models of regulation. Most jurisdictions will adopt regulatory models borrowed from those states that are perceived as dominant (Krasner, 1982). In this emerging "great powers" theory (Drezner, 2007), state and national governments that already oversee large internal markets will continue to be the most influential actors in creating rules and regulations that dominate the global economy because their regulatory systems will be the template for adoption by other jurisdictions. Such regulatory mimicry, according to this view, encourages more stringent regulation which might be described as a "race to the top".

A fourth view is that globalization will actually reinforce the regulatory power of *all* domestic or local regulators. According to this view, regulation has historically evolved in a path dependant way, from a local and diffused state to a more global and integrated state. A somewhat contradictory effect of globalization is to restructure the institutions of space and time to heighten the importance of local communities and cultures while, simultaneously, integrating and connecting them at a global level (Giddens, 1990). The term "glocalization" has come to refer to the phenomenon in which global compression has elevated the cultural importance of the city-state, region or personal sphere as a direct result of enhanced global communication and connectivity (Robertson, 1992). In terms of regulation, this line of argument suggests that globalization will shift legitimate authority to regulate away from both national and global regulatory structures and enhance the authority and legitimacy of local regulation.

The four alternative models of regulation hold broader theoretical significance. Social theorists have a long-standing interest in understanding the isomorphic diffusion of social structures and forms (Strang & Meyer, 1993; DiMaggio & Powell, 1983), with a particular interest in the spread of political ideologies globally (Hall & Ikenberry, 1989; Meyer, 2002).

Less well understood, however, is the process by which actors sort through the competing models and templates available for adoption and their underlying motivations for adopting or rejecting (DiMaggio & Powell, 1983). The four models of regulation described here present a continuum of variation of 'theorization', a construct deemed central to the process of diffusion (Strang & Meyer, 1993). Theorization refers to the degree to which idiosyncratic practices and localized templates are abstracted and dis-embedded from their social context, thereby creating templates that are more portable through time and space.

The first model of global regulation, in which a new global regulatory order is constructed, describes the highest degree of theorization because it implies the creation of an abstract model of regulation that is sufficiently generic that it can be applied to transactions in any nation state. The second model of global regulation, the "race to the bottom" also describes a high degree of theorization because it requires not only the abstraction of a generic model of regulation, but involves the additional step of theorizing the adopters within the system as consumers of global regulation. The third model, the "race to the top" still involves significant theorization in which dominant models of regulation (i.e. from the UK or the USA) are abstracted for diffusion, but does not involve the additional stage of theorizing adopters as consumers within an emerging new logic of regulation. The last model, the "shift to the local", reflects the lowest level of theorization and describes a scenario of "primordial" adoption in which actors occupy "formally differentiated positions within a hierarchical global political structure" (Strang and Meyer, 1993: 491).

We propose to 'test' these four alternative models of global regulation through an examination of the emerging regulatory structures in electronic commerce. We analyze the 'choice of law' provisions of trans-national corporations that sell products and services on the internet. Because cyberspace defies traditional notions of physical jurisdiction, electronic

retailers are permitted to choose both the forum and type of law they would prefer to govern their transaction. Within the realm of choices available to them, electronic retailers can choose to apply local, national or supra-national laws and, similarly, can choose local, national or supra-national forums to interpret those laws. Because of the range of options available, and because the internet is, itself, a causal element in the dynamic of globalization which has, to date, resisted traditional forms of regulation, the analysis of choice of law provisions provides a useful natural experiment within which we can examine the evolution of commercial regulation in a global context.

The paper is structured in five parts. In the first part we elaborate our theoretical description of the different approaches to globalization and the implications of each approach for commercial regulation. As a point of comparison, we also describe the more traditional pattern of choice of jurisdiction for incorporation and develop explicit hypotheses for the choice of law on the internet. In the second part we describe the empirical context within which we collect and analyze the data. Third, we describe our methodology. In part four we present our results and in part five we discuss and interpret our observations.

THEORY & PREDICTIONS

Diffusion theorists observe that ideas travel across different cultural contexts more rapidly when they are highly abstract (Strang & Meyer, 1993; Sahlin-Andersson, 1996). Theorization refers to the process by which traditional and localized practices are converted to abstract categories and rational routines (Strang & Meyer, 1993: 493). So, for example, approaches to education, business models and health care have all been subject to routines of theorization in which disparate local approaches become reduced to schemas, scripts or 'best practices' which then are communicated to broader audiences and which, as a result,

contribute to the homogenization of both actors and actions on a global basis. For institutional theorists, theorization is a core mechanism for isomorphism in organizations and organizational routines particularly amongst those who observe the emergence of a "world society" premised on shared understandings and practices that move, relatively seamlessly, across national cultures (Meyer, Boli, Thomas & Ramirez, 1997).

The "world society" perspective is consistent with one strand of globalization theory that envisions an emerging network of global institutions that transcend the nation state. This view of globalization describes an evolving convergence of political, economic and regulatory coordination underpinned by a network of global institutions (Cable, 1999). Much of the institutional infrastructure for such convergence is already in place. The United Nations, for example, represents a potential point of convergence for global politics. International capital markets already appear to be on the verge of global convergence with the existence of the International Organization of Securities Commissions (IOSCO) and the recent announcement that the International Capital Market Association (ICMA), the International Swaps and Derivatives Association (ISDA) and The Bond Market Association (TBMA) have agreed to act as the vehicle to create a Global Markets Board (SIFMA, 2006) and with substantial political support from members of the G-Seven countries. And a variety of global regulatory structures already exist in such diverse areas as intellectual property, governed by the World Intellectual Property Organization (WIPO), maritime law controlled by the International Maritime Organization (IMO) or aviation law, administered by the International Civil Aviation Organization (ICAO). The key argument in this approach to globalization is that, over time and given a choice, economic actors who regularly engage in transactions that span the boundaries of two or more nation states will prefer to adopt a

regulatory framework that transcends the geographic and jurisdictional restrictions of the nation state.

The creation of the Internet is not only consistent with this view of globalization, but, according to some, is a causal factor in creating the need for a regulatory system that transcends geography. Kobrin (2001: 688), for example, argues that the internet, "cyberspace and electronic commerce are inherently international. Any successful governance regime will involve significant and substantial international cooperation." Most existing regulatory regimes are premised on territorial jurisdiction. That is, there is an inherent assumption that economic exchange occurs at a specific location and, therefore, the rules that govern that transaction will be based in the legal system of that location. Internet transactions, however, lack the physicality necessary to assign them to a specific location. An IP address, for example, is only relatively associated with a physical location. The actual communication between vendor and seller may occur at any one of thousands of potential locations within a network of computers (National Academy of Sciences, 2000) and, in many cases, not only are the buyer and vendor interacting in digital rather than physical space, but increasingly, the product itself, be it software, images or music, also lacks physicality. It therefore becomes very difficult to locate internet transactions in a given physical location. As a result, it also becomes very difficult to determine which law will apply to these transactions. Not only does the Internet eliminate borders, it creates a world, "cyberspace", which transcends physicality, territory and, thus, legal jurisdiction (Goolsbee, 2000).

If the 'world society' view of globalization is correct, given the extra-territorial nature of the internet, there are two possible regulatory options for internet e-commerce. The first is that internet retailers will adopt the regulatory standard of those institutions that transcend the nation state. One such regulatory standard already exists. In the mid-1980s, the United

States adopted the United Nations Convention on Contracts for the International Sale of Goods (The Convention). The Convention reflects more than forty years of international negotiation among sixty-two nation states and was formally adopted by the United Nations General Assembly in Vienna in 1980 (Rosett, 1984). Similar to the US Uniform Commercial Code, the Convention represents an effort to 'theorize' or create a common system of commercial law that abstracts the traditional and local laws of its sixty two component jurisdictions. While it reserves a number of issues for local jurisdiction and attempts to preserve the rights of contracting parties to privately agree on an appropriate system of law, it is designed to provide a common system to be applied to international exchanges of goods and services between parties who reside in different legal jurisdictions. As such, it represents an effort to produce a fully theorized and global alternative to local law.

The Convention, however, contemplates that parties may first opt to apply private law to govern their transaction. That is, in many international exchanges parties will agree to avoid the complexities of conflict of laws and will choose to have any disputes between them resolved by a private international commercial arbitrator. In fact, international commercial arbitration is one of the fastest growing areas of legal practice (Dezalay & Garth, 1995). The growth of private commercial arbitration for international transactions is an extension of the 'world society' view of globalization. Globalization experts have observed that an important side effect of the evolving convergence of global political, market and regulatory institutions is an increasing "privatization" of law. That is, as global institutions emerge there appears to be "a redrawing of the boundaries between public authority and private power" (Held & McGrew, 2006). Private agencies and non-governmental organizations are increasingly important in the creation and enforcement of global standards and rules.

Based on this line of reasoning, one prediction is that electronic retailers will choose to adopt a regulatory standard that transcends the geographic jurisdiction of both the local and the nation state and will adopt either a global regulatory standard, such as the Convention, or a private regulatory standard, such as a private commercial arbitrator.

Hypothesis 1: Organizations engaging in E-commerce will adopt a global regulatory standard established by

(a) Supra national regulatory institutions.

(b) Private law

Other globalization theorists have criticized the idea of convergence on supra-national institutions of governance as naïve and simplistic. They are particularly critical of the notion that globalization will have the effect of reducing the power of the nation state. While recognizing the emergence of supra-national institutions of governance, this alternative view of globalization argues that the strength of such institutions is critically dependent upon the support and cooperation of nation states. Global regulation, thus, is based on a patchwork of multiple layers of structure that encompass suprastate institutions, such as the United Nations, regional cooperatives, like the European Union, nation states and sub-states, such as provinces, regions or cities (Held & McGrew, 2006).

This version of global regulation adopts a modified view of theorization. That is, it assumes that the mechanism of law that is most likely to be adopted (or diffuse successfully) is one in which the degree of abstraction is only partial. Scandinavian institutional theorists have used the term "translation" to capture the notion that successful diffusion depends upon the ability of abstract ideas and categories to be adapted to local conditions (Sahlin-Andersson, 1996).

If this more limited view of globalization is correct, then e-commerce actors will be more likely to adopt a pre-existing regulatory standard, existing at the level of the nation-

state or local state, rather than a world-society standard. The question remains, however, which type of state-based standard is most likely to be adopted. We identify two possibilities.

The first possibility is that e-commerce retailers will adopt what is perceived to be the least intrusive regulatory standard. Economists have described this as a regulatory "race to the bottom". A race to the bottom refers to the possibility of policy arbitrage that can occur when economic actors have the capacity to choose between competing regulatory jurisdictions and the jurisdictions vary sufficiently to offer an incentive for actors to choose between them (Kahler, 2006). The most often cited illustration of a race to the bottom is the observation that since the mid-1960's most US public companies have chosen to incorporate in the state of Delaware, ostensibly because of the relatively managerial friendly corporate laws in that state (Carey, 1974). Today more than half of all US public companies are incorporated in Delaware and an even bigger proportion of large multi-national companies are incorporated there (Subramanian, 2002). Recent empirical analyses suggest that the companies that select to incorporate in Delaware enjoy a slight competitive advantage over non-Delaware companies. Daines (2001), for example, found that Delaware firms are generally worth more than firms incorporated elsewhere and are more likely to attract takeover bids than firms incorporated elsewhere.

In the context of e-commerce, we might expect that, absent additional information, when choosing the law and forum for retail transactions, corporations will simply mimic what is perceived to be the regulatory regime that is the most favourable to management. That is, we predict that most companies will choose to apply the law of the state of Delaware.

> ***Hypothesis 2: Organizations engaging in E-commerce will adopt a state-based regulatory standard by mimicking states perceived as favouring management ideology. [Regulatory efficiency model]***

A second possibility is that e-commerce retailers will adopt what is perceived to be the *highest* regulatory standard. A number of researchers have criticized the use of the term "race to the bottom" to describe regulatory or jurisdictional competition in part because it conflates both positive (less intrusive regulation) and normative (less desirable regulation) elements (Swire, 1996). Others point out that while Delaware may have initially been an attractive destination for incorporation because of its lax regulation, today it is an attractive destination for incorporation because of the accumulated expertise and sophistication in its judiciary and legal institutions (get cite). Rather than representing a race to the bottom, the fact that Delaware is a jurisdiction of choice for most large companies of choice may, in fact, represent a "race to the top".

Theory offers two distinct explanations for how a particular jurisdiction may become a magnet for regulatory arbitrage based on its perceived leadership in regulatory standards. Institutional theory suggests that actors, practices and routines become targets for mimicry based on their perception of technical expertise and advantage. Thus Haveman (1993) observed that deregulated savings and loans simply imitated the practices of successful banks because of their perceived expertise and success in high-risk derivates and options trading. Haveman used the phrase "follow the leader" to capture the observation that, in situations of ambiguous information, the prime target for imitation are those actors perceived to be successful.

In the empirical context of e-commerce, a race to the top based on expert knowledge and sophistication suggests that corporate retailers will want to apply the laws of a jurisdiction with the highest degree of expertise in technology. More specifically, we predict that corporations will choose to adopt the laws of the State of California. Not only is this jurisdiction the global center of technological innovation (Porter, 2000) it is also becoming

recognized as the nexus of leading expertise in technology law (Suchman, 2000). We, therefore, offer the competing prediction that corporations will engage in a race to the top, based on expertise, in choosing the appropriate law to govern the electronic exchanges.

Hypothesis 3: Organizations engaging in E-commerce will adopt a state-based regulatory standard by mimicking states perceived as having:

(a) unique expertise in technology [Regulatory expertise model]

A competing interpretation of the "follow the leader" phenomenon is that in ambiguous circumstances actors mimic power rather than expertise. This variation of the 'race to the top' comes from globalization theory in which there is a growing consensus that jurisdictional competition among states will generate a trend in which actors will move to adopt the regulatory regime of the most dominant economy. This is the view of Drezner (2001; 2005), for example, who argues that regulatory policies will converge around "great powers" – "defined as those governments that possess large internal markets" (Drezner, 2005: 842). Drezner (2005) demonstrates this argument empirically in studies of regulatory convergence in the areas of money laundering and genetically modified organisms.

In the context of e-commerce, the great powers theory offers some slightly different predictions about a regulatory race to the top from the regulatory expertise model described above. For US firms, California might still be predicted to be a jurisdiction of choice because it not only provides regulatory expertise in technology, but it also represents the largest economy in the US. It was the first state to reach a trillion dollar economy and, were it treated as an independent country, it would rank 7th in the world in Gross Domestic Product.

Notwithstanding this, if the decision to choose a legal jurisdiction is based on economic power rather than regulatory expertise, we might also expect both the State of New York and the State of Texas to be a popular choice of jurisdiction. Although Texas has

a growing presence in technology, it is not yet recognized as having any specific judicial or legal expertise in this area. Texas is, however, a significant economic jurisdiction in the US ranking second in size to the State of California. The State of New York ranks third in terms of size of its economy in the US.

Based on these observations we offer an alternative prediction; that in addition to the State of California, the State of Texas and the State of California will also be attractive jurisdictions for choice of law provisions for e-commerce retailers. For European based retailers, again based on the size of their economies, the great powers theory would predict that the UK and Germany would be the preferred jurisdictions for e-commerce retailers.

(b) a dominant economy [Great states model]

A final theoretical perspective suggests that globalization will *not* produce any policy convergence. In this view, the constituent elements of globalization create conditions that emphatically favour the diffraction of regulatory regimes to favour *local* laws. This argument derives, in part, from social scientists who view the essential driver of globalization as deriving from social and cultural exchange rather than economic exchange. More specifically, writers such as Giddens (1990) and Castells (1996) view globalization as being driven largely by the integration of communication capabilities, rather than the integration of economic and political institutions.

The key distinction between these two approaches is that, while the latter perspective implies greater convergence in policy matters, including regulation, the former, cultural communications approach, suggests that enhanced global communication capabilities results in an enhanced role for localized actors. As communication technologies such as the internet increasingly connect disparate individuals around the world, the resulting compression of

space and time (or distanciation) leads to greater diffusion of authority rather than convergence. Giddens (Rantanen, 2005: 73) describes the process as:

> "[C]ommunications has become the driving force of successive waves of transformation of human society. So, yes, the simplest meaning of globalization is interdependence. We have started to be much more dependent on other people than ever before, and part of the reason is that we are constantly in communication with them all. There is constant communication across the world, in the sense of instantaneousness, of jumps from everywhere to everywhere. And this does not produce a seamless world that is everywhere similar; it does not produce a global village – I think McCluhan's metaphor is not an appropriate one really. In many ways it produces a more fractured world."

Other social theorists, most notably Robertson (1995) and Swyngedouw (2004), have popularized the term "glocalization" to capture the idea that, as the world becomes more interconnected globally, local tastes and preferences have become more important, producing the somewhat ironic consequence of increasing cultural fragmentation as the world becomes more economically and politically convergent.

The notion that globalization actually heightens the ideological significance of the local is supported by observations of the dominant institutional logic of the internet. A number of writers have observed that the core institutional logic of influential internet entrepreneurs is to defiantly resist regulatory oversight. The "techno-libertarian" ideology of internet retailers is best expressed by the often cited Declaration of Independence of Cyberspace (Barlow, 1996) which states, in part, "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty as we gather". This anti-regulatory stance was supported by government policy during critical phases of development of the Internet when the Clinton Administration developed a policy framework for global electronic commerce in which it supported the notion that e-commerce would be free of government taxation and regulation

and promoted the notion that the internet become a self-regulating institution (Clinton & Gore, 1997). The result is the now largely taken for granted assumption that the Internet is incapable of external regulation (Kobrin, 2001) and the concomitant logic that, given a choice, e-commerce retailers will support localized regulation (Borsook, 2000).

It is important to observe that this rejection of convergent regulatory policy reflects a rejection of theorization or what Strang & Meyer (1993) describe as a "primitive" degree of theorization. That is, the rejection of convergent regulatory regimes or abstract rational models of governance is akin to primordial societies in which localized religion and ethnic tribalism provide the dominant institutional logic. The notion, thus, that e-commerce actors will select local regulatory regimes to govern their transactions sits at the opposite end of the theorization continuum from the convergent policy possibilities described in earlier hypotheses.

Hypothesis 4: Organizations engaging in E-commerce will adopt a regulatory standard based on the local state in which they were founded [Primitive theorization model].

EMPIRICAL CONTEXT

The emergence of e-commerce (or 'e-tailing') is an ideal context to examine models of global regulation. Most commercial law is based on physical location, either of the transacting parties or the goods or services exchanged. Jurisdiction is determined by national or state boundaries making traditional commercial law highly dependant upon where one is located in time or space. Internet transactions, by contrast, defy traditional notions of time and space. The internet is not a physical location but exists as a result of the interconnection between multiple telecommunications devices that allow a user in one space to communicate with another user in another space. The *situs* of their interaction, however, occurs in

"cyberspace", a term designed to capture the understanding that the actual communicative interaction does not have a physical location.

The overriding logic of electronic commerce has been based on neo-liberal assumptions of open markets that are relatively unencumbered by government intervention (Borsook, 2000). This lasses-faire philosophy is generally consistent with the long standing philosophy of international private law in both common and civil law jurisdictions in which it is generally assumed that parties should be free to choose the applicable law (Schu, 1998?). The freedom of parties in a private contract to choose applicable law has been enshrined in international conventions, (i.e., Rome Convention (Article 3(1); Article 17 of the Hague Convention), US law (Second Restatement §187(2) and § 1-105(1) of the Uniform Commercial Code) and the law of the European Community. The general principal is usually only limited by consumer protection laws which curbs contractual freedom in instances of fraudulent misrepresentation and allows consumers to rely upon local consumer protection legislation. As a result, most legal jurisdictions support the notion that an electronic retailer can choose the type of law and the forum by which an Internet based transaction will be governed.

Electronic retailers, therefore, are given the option to choose both the type of law that will apply to transactions initiated on the website as well as the forum or court system that will interpret the law. This means that, for example, a book retailer like Amazon.com could choose to have the laws of Ontario applied to each transaction and have those laws interpreted by the courts of California. The observation that electronic retailers are given such freedom to select the legal jurisdiction that will govern consumer contracts gives us a unique opportunity to study the patterns of choice of governance in an emerging economic

sphere. That is, it offers a useful natural experiment to test the three different scenarios of regulatory regimes described in the preceding section.

DATA & METHODS

We examined the websites of three different categories of electronic retailers; Fortune 500 corporations, FTSE 1000 corporations and the Top 40 Electronic Commerce Retailers. We chose to examine Fortune 500 companies for two reasons. First, they represent the core constituency of multi-national corporations. They all tend to be multi-national organizations and are very large in size. Moreover, they tend to be early adopters of various changes in organizational form, structure and governance (Fligstein, 1997). Fortune 500 firms were, thus, early adopters of Delaware as the preferred jurisdiction of incorporation and continue to display an overwhelming preference for Delaware. We, therefore, would expect that if any discernable pattern of forum selection was developing amongst multinational corporations, this group of organizations would demonstrate the pattern first.

We chose to examine FTSE 1000 companies because they more strongly represent large European multi-nationals. Because European corporate laws are different from North America and because Europe has adopted political structures of trans-national governance (i.e. the European Economic Community) earlier than other parts of the world, we expect that FTSE companies might display a different pattern of regulatory convergence than among Fortune 500 companies.

Finally, we chose to examine the Top 40 Electronic Commerce Retailers as compiled by *Internet Retailer*, a leading trade publication (Freed, 2006) because these firms reflect 'pure play' e-tail corporations and might, therefore, adopt a more sophisticated approach to choice of law provisions. That is, because these companies represent the cutting edge of electronic commerce, we think they might be better equipped to anticipate the idiosyncratic

governance and regulatory issues of web based economic exchange and, as a result, generate a pattern of adoption that is significantly different from the other two categories of organizations.

Because of time pressures and because we wanted to produce relatively similar sample sizes, we confined our sample selection to the 40 largest firms in each category (the last category only identifies 40 firms, thus setting an upper cap on our sample). We identified the central web site of each firm and, on each site, located the choice of law provisions and choice of forum provisions. The data was compiled in a spread sheet along with relevant background information for each firm including; SIC code, and location of incorporation.

RESULTS

Table 1 shows the compiled results of our analysis of the choice of law provisions on the websites of Fortune 500 corporations, the world's largest e-commerce retailers and the FTSE 1000 corporations. We discuss, in turn, the degree of support our results offers for each of the hypotheses.

Hypothesis 1 – A Global Regulatory Standard? Our first hypothesis suggested that there will be convergence on a global regulatory standard. Two possibilities were suggested; a global *public* standard such as the Geneva Convention on Contracts for the International Sale of Goods or a global *private* standard such as the designation of a private international commercial arbitrator.

Our analysis reveals that neither hypothesis is supported. None of the firms in our data set selected a global public or private regulatory standard. Somewhat surprisingly, a few firms took the unusual step of explicitly exempting their transactions from the application of a global public standard. So, for example, Proctor & Gamble, a large diversified and

multinational consumer goods manufacturer based in Ohio makes the following statement in its choice of law provision on its website: "Your use of this site shall be governed in all respects by the laws of the State of Ohio, USA, without regard to choice of law provisions, *and not by the 1980 UN Convention on Contracts for the International Sale of Goods* (Procter and Gamble Website, emphasis added).

Hypothesis 2 – Is there a Delaware Effect? Our second hypothesis predicted that in choosing law, firms will mimic the trend of incorporation and will adopt the laws of the jurisdiction perceived as being friendly to management. That is, this hypothesis predicted a recurrence of the "Delaware effect" for Internet transactions.

Yet again, our analysis did not support this prediction. Figure 1A charts both the choice of law for incorporation and the choice of law for internet transactions for Fortune 500 corporations. Figure 1B charts the choice of law for incorporation and the choice of law for internet transactions for the world's largest e-commerce retailers. While nearly 70% of the Fortune 500 companies are incorporated in Delaware, none of the companies selected Delaware as their choice of law for internet transactions. Similarly, for the world's largest e-commerce retailers, 52% selected Delaware as their state of incorporation, but only 9% used Delaware as their choice of internet law. Firms, thus, do not appear to be simply mimicking the adoption of the most popular site for incorporation when choosing an appropriate law for electronic commerce. We can, therefore, conclude that there is no specific "Delaware effect" on the Internet.

Hypotheses 3 – Is there a California effect or a Texas/New York effect? The third hypothesis suggested that, while we may not see regulatory convergence on Delaware, we might see regulatory convergence on other states. One part of this hypothesis based its prediction on technical expertise and suggested that we will observe regulatory convergence on California

because of the sophisticated knowledge base of its legal institutions. A second part of this hypothesis agreed that we will see convergence on California, but also that we will see convergence on Texas and New York, not because of the technical expertise of its legal institutions but, rather, because they represent dominant economic jurisdictions.

Again, referring to Figures 1A and 1B, the results of our analysis show mixed support for both a California effect and for a Great Powers effect. Within the Fortune 500 companies (Figure 1A), a significant proportion (17%) adopt California law. An even greater proportion (24%), adopt New York law. Both results indicate some degree of convergence on dominant economies. To fully support the "great powers" hypothesis, however, we would expect to see Texas represented and we would also expect to see the relative position of the states reversed – i.e. more adopting California than New York. The results, thus, offer only partial support for the "great powers" theory.

Within the world's largest e-commerce companies (Figure 1B), most (32%) converge on California. Texas is the third most popular choice (9%), and Washington State is second (12%). New York does not appear as a significant jurisdiction in this category. We interpret these results as offering limited support for the 'expertise' argument. If the 'great powers' influence was at play here, we would expect all three of the largest state economies to be represented here. The absence of New York is striking. Moreover, one could argue that all three states represented here (California, Washington and Texas) have substantial high technology centers that might create the conditions for a higher degree of technical sophistication in legal institutions.

When we combine the two categories (Figure 1C), the results offer slightly stronger support for both the "great powers" argument and the "expertise" theory. California is the clear convergent choice, attracting 30% of the corporations in the combined data set. New

York is second (19%), Washington third (13%) and Texas fourth (9%). But for the strong position taken by Washington state and the relatively weak position taken by Texas, these results would seem to support the great powers notion. The fact that Texas is a fourth choice behind Washington State, however, suggests that the choice of law might be influenced by perceptions of sophistication and expertise in the legal institutions of the chosen jurisdiction.

Hypothesis 4 – A local effect? The last hypothesis argued for a 'local' effect. This argument adopts the view that the technological and communicative elements of globalization have made convergence unnecessary and enhanced the attractiveness of local phenomena, including local regulation. This hypothesis predicts that organizations engaged in internet exchanges will not opt toward convergent regulatory regimes but will choose local regulations, defined either as explicitly choosing "local" courts or, alternatively, selecting the laws of the same jurisdiction in which the corporation bases its primary operations.

The results (Table 1D) show strong support for the "local" argument. Of the Fortune 500 companies 57% opted for laws from the same jurisdiction in which their primary operations were based. An additional 5% specifically designated "local laws" as their choice of jurisdiction. For the world's largest e-commerce retailers, 51% chose laws from the same jurisdiction in which their primary operations were based. The results, thus, seem to offer strong support for a highly localized explanation for choice of law.

DISCUSSION & CONCLUSION

[To Come]

REFERENCES

Borsook, 2000. Cyberselfish: A critical romp through the terribly libertarian culture of High Tech. New York: Perseus Books.

Cable, V. 1999. *Globalization and Global Governance*. London: Royal Institute of International Affairs.

Carey, W. 1974. Federalism and corporate law. *Yale Law Journal*, 83: 663-705.

Castells, M. 1996. *The Rise of the Network Society* (Vol. 1). Oxford, UK: Blackwells.

Clinton W.J. & A. Gore Jr. 1997. A Framework for Global Electronic Commerce. http://www.iitf.nist.gov/eleccomm/ecomm.htm

Daines, R. 2001. Does Delaware law improve firm value? *Journal of Financial Economics* 62: 559-571.

Dezalay, Y. & G. Bryant. 1995. Merchants of law as moral entrepreneurs: Constructing international justice from the competition for transnational business disputes. *Law & Society Review*, 19: 27-65.

DiMaggio, P.J. and W.W. Powell. 1983. The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields, *American Sociological Review*, 48, 2: 147-160.

Drezner, D. 2001. Globalization and policy convergence. *International Studies Review* 3: 53-78.

Drezner, D. 2005. Globalization, harmonization and competition: The different pathways to policy convergence. Journal of European Public Policy, 12: 841-859.

Drezner, D. 2007. *All politics is global: Explaining International Regulatory Regimes*. Princeton, NJ: Princeton University Press.

Fligstein, N. 1997. Social skill and institutional theory . American Behavioral Scientist 40, 397-405.

Freed, L. 2006. Satisfying the browser. *Internet Retailer,* June 2006, p. 1.

Giddens, A. 1990. *The consequences of modernity*. Cambridge: Polity.

Goolsbee, A. 2000. In a world without borders: The impact of taxes on Internet commerce. *The Quarterly Journal of Economics*, 115: 561-76.

Hall, J., and J. Ikenberry. 1989. The State. Open University Press.

Haveman, H. 1996. Follow the leader: Mimetic isomorphism and entry into new markets. *Administrative Science Quarterly*, 38: 20-50.

Held, D. & A. McGrew. 2006. Introduction. Pp. 1-21 in D. Held & A. McGrew (Eds.) Governing Globalization, Cambridge, UK: Polity.

Kahler, 2006. Modeling Races to the Bottom. Working Paper – University of California, San Diego.

Kobrin, S.J. 2001. Territoriality and the governance of cyberspace. *Journal of International Business Studies*, 32: 687-704.

Krasner, S.D. 1982. Structural causes and regime consequences: Regimes as intervening variables. *International Organization*, 36: 185-205.

Meyer, J.W., J. Boli, G.M. Thomas & F.O. Ramirez. 1997. World Society and the Nation State. *American Journal of Sociology*, 103: 144-181.

National Academy of Sciences. 2000. The Internet's coming of age. Washington, DC: National Academy Press.

Porter, M. 2000. Locations, Clusters and Company Strategy. *The Oxford Handbook of Economic Geography*: 253-254.

Rhantenen, T. 2005. Giddens and the 'g' word. Global Media and Communication, 1: 63-77.

Robertson, R. 1992. *Globalization: Social theory and global culture*. London: Sage.

Rosett, A. 1984. Critical reflections on the United Nations Convention on Contracts for the International Sale of Goods, *Ohio State Law Journal*, 1984: 265-305.

Sahlin-Andersson, K. (1996). "Imitation by editing success: the construction of organizational fields." In Czarniawska, B. and G. Sevon (eds.), *Translating Organizational Change*. Berlin: De Gruyter.

Schu, 1998 [page 15]

Strang, D. & J.W. Meyer. 1993. Institutional conditions for diffusion. *Theory and Society*, 22: 487-511.

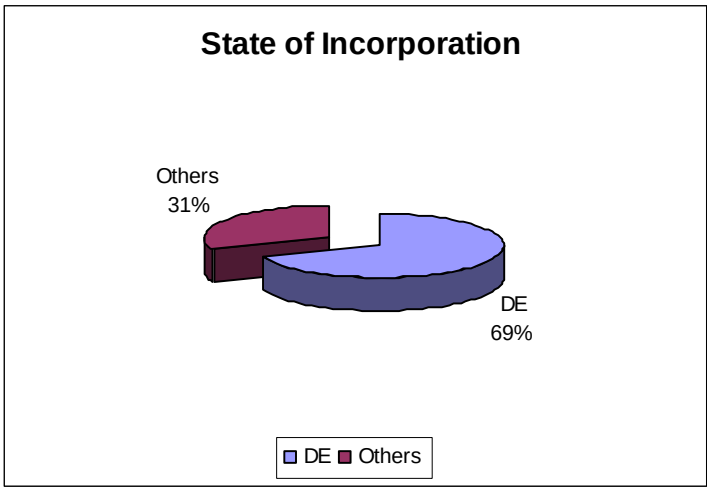
Subramanian, G. 2002. The influence of anti-takeover statues on incorporation choice: evidence on the 'race' debate and anti-takeover overarching, *University of Pennsylvania Law Review* 150: 1795-1873.

Suchman, Mark C. 2000. "Dealmakers and Counselors: Law Firms as Intermediaries in the Development of Silicon Valley." In *Understanding Silicon Valley*, edited by Martin Kenney, 71-97. Stanford: Stanford University Press.

Swire, P.P. 1996. The race to laxity and the race to undesirability: Explaining failures in competition among jurisdictions in environmental law. *Yale Law & Policy Review* 14: 67-110.

Swyngedouw, E. (2004) *Glocalisations*. Temple University Press, Philadelphia, PA.

Figure 1A
Choice of Law of Incorporation for Fortune 500 companies



Choice of Law for Internet Transactions for Fortune 500 companies

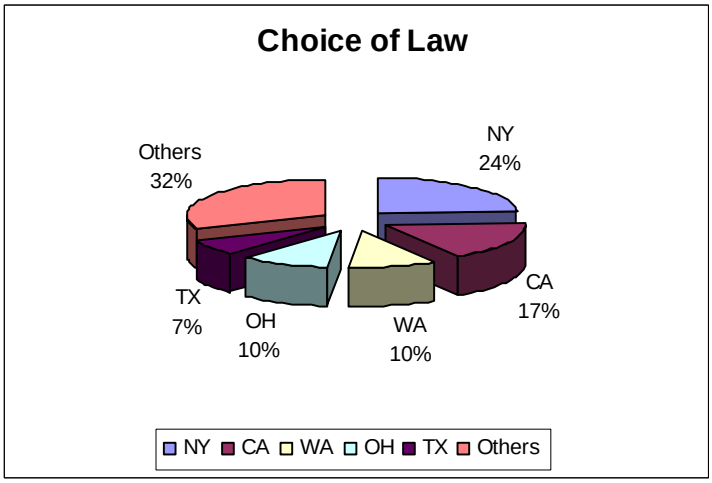
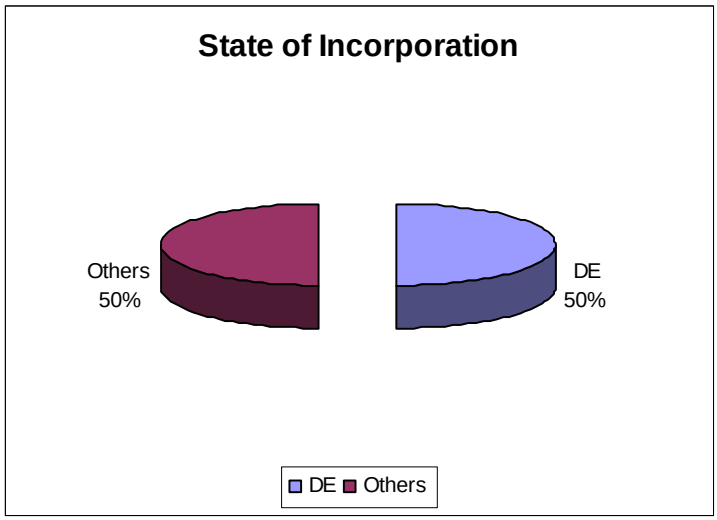


Figure 1B

Choice of Law for Incorporation for World's Largest E-tailers



Choice of Law for Internet Transactions for World's Largest E-tailers

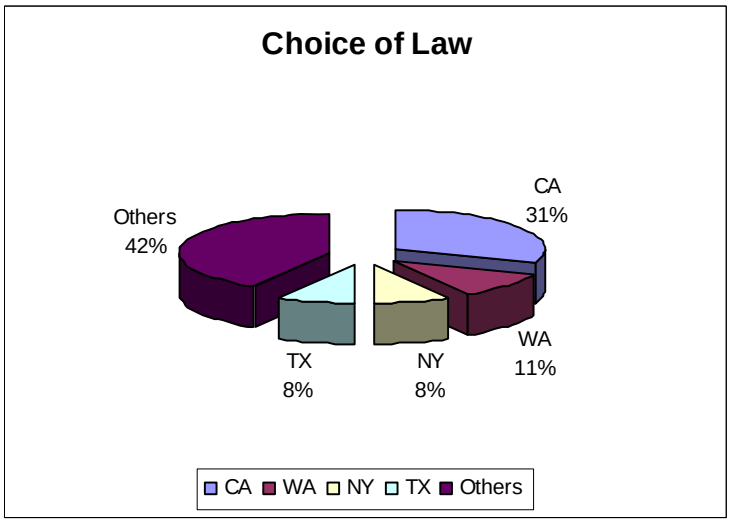
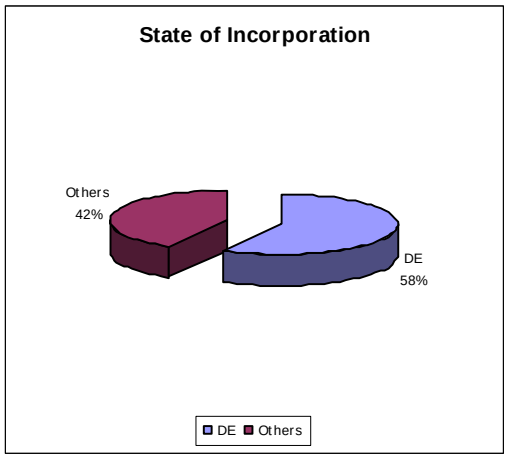


Figure 1C
Choice of Law for Incorporation for Fortune 500 & World's Largest E-tailers



Choice of Law for Internet Transactions for Fortune 500 & World's Largest E-tailers