Federalism Project Roundtable on Internet Privacy Regulation
American Enterprise Institute
January 30, 2001

Welcome and Introduction, Michael Greve *Director, Federalism Project* *John G. Searle Scholar, AEI*	1-3
"A State Recipe for Cookies: State Regulation of Consumer Marketing Information" Professors Bruce Kobayashi and Larry Ribstein *George Mason University School of Law*	4-17
Response Professor Eugene Volokh UCLA School of Law	16-28
General Discussion	28-76

PROCEEDINGS

MR. MICHAEL GREVE: I want to welcome all of you to what I'm sure will be a stimulating and exciting discussion about Internet privacy and state regulation. We will discuss a paper authored by Bruce Kobayashi and Larry Ribstein.

Before we get started, I want to say something briefly about the purpose of the Federalism Project and these roundtables. What we mean by federalism is something like interstate or jurisdictional competition. The advantages are fairly well understood both by ordinary citizens and by economists.

When we buy a house, none of us think that we buy just a pile of bricks--we buy a stream of services and obligations. Those regulatory packages differ from jurisdiction to jurisdiction, and it matters that there is diversity, thus giving us choice, and it matters that there is competition.

People similarly understand that it's good that capital and labor are highly mobile internationally, and that while you need some trade agreements to prevent tariffs, that the last thing we need to improve the global economy is a United Nations with teeth.

What I don't think is very well understood is the politics of competitive or market-preserving federal arrangements. They seem to be highly unstable, and for the past 70 years in America, we've trampled a lot of them underground and covered them with uniform federal, national rules. And that naturally leads to the question: What does it take to restore competitive arrangements, at least in some sectors of the economy and in social and political life?

It seems to me you need three things. The first is you need a Supreme Court that's willing to tell the national government to cut it out. You need five Clarence Thomas'. I'm sure somebody at AEI is working on that. The second thing you have to work on is encouraging political constituencies that have an interest and will actually support competitive arrangements. This is not some abstract principle. People don't get engaged in politics on behalf of abstract principles. And the third thing is to specify the range of

application of the competitive principle and the rules under which it's going to operate. Everybody agrees that the range of competition cannot be limitless. You cannot let states impose tariffs or have their own currencies. And the rules of the game are of some importance. If you let tort lawyers select the state where they will rob corporations, you're going to have a problem. You'll have to specify rules that will, in fact, allow sensible competition.

That's what these roundtables are supposed to do. We'll examine in a series of events discrete issues where it's possible, we think, to specify competitive rules that are superior to central organization and regulation, or, for that matter, to a totally anarchic, libertarian world of freedom of contract. And in picking these issues, we've selected those where the politics give you at least some chance and maybe some hope. High tech is very high on that agenda because it's one of the few industries, such as ethanol, that federal regulators are actually in favor of. Because the political environment is somewhat fluid, it's not that everybody is entrenched in a regulatory regime that's been around for 60 or 70 years.

We'll have a brief presentation by Bruce and Larry. Both teach at George Mason University Law School. Both have written extensively on choice of law, both on the Internet and elsewhere. We'll have brief comments by Eugene Volokh, who teaches at UCLA Law and has written more on First Amendment subjects alone than I've read in my life. I'll moderate the discussion, but basically it will be free flowing.

MR. LARRY RIBSTEIN: Thank you, Michael. It's good to be here. A word about the title. Eugene says we have to be careful that we don't make it look like a stale recipe. In fact, it is, I think, a fresh recipe.

I think this is a good area to think about state law in, because so far it is largely unregulated, at least in this country, and so we are writing on a fresh slate. However, there seems to be a freight train moving towards federal law. Congress is gearing up. So now is the time to think about state law and whether state law can work. And we think it can, and we want to emphasize how and why it should.

Now, maybe the best way to start is by looking at the big problem with federal law when it comes to privacy regulation. There are a lot of questions, a lot of issues, and a lot of potential solutions, but with federal law you just get one answer.

As you can see from our article, we're focusing on a particular problem here, which is the cookies problem, that is, consumer marketing information issues. There's a question at the outset about who owns this information. The standard economic concept here is that the consumers *don't* own this information, although you see a kind of assumption in the literature that consumers do, and so it's presumptively wrong for merchants to use this information without permission. Bruce is going to follow up on that.

There's a question about whether you need any kind of regulation here. Regardless of whom we think of as being the owner, why not have contracts work out the details? We talk in the paper about two kinds of problems. First, the lemons problem. Consumers will be so afraid of having their information used and, not being able to distinguish between the good merchants and the bad merchants, they'll just stay off the Internet completely. You see this argument made again and again in the literature, that we need a strong federal law so that consumers are not afraid to use the Internet. And then there's the lambs problem. The lambs problem is that consumers go out into the Internet, get shorn of their information without getting paid for it, and, again, they're helpless, only this time it's the consumers that get hurt and not the merchants.

And then even assuming that we're going to have some kind of regulation, there are a million different alternatives in the rules. And since we only have ten minutes, I provide a little chart. This is a very partial list of some of the regulatory issues that you would face if you were going to regulate consumer marketing information. And the point is that a federal law is going to provide only one answer to all of these questions. The advantage of state law is that you get a multiplicity of answers, and, actually, there are some specific advantages of state law that we discuss in our paper.

For example, whatever answers emerge from state law emerge from a competitive process. So we see a state competition in rules related to consumer marketing information. You also get different rules for different

kinds of information for different contexts. That chart of regulatory alternatives indicates that there are a lot of different contexts here; one rule just isn't going to cover all the contexts very well.

Even without active competition among jurisdictions, you get an experimental evolutionary process where if you have a bunch of states throwing out their various regulatory alternatives, some of them are going to work, some of them aren't, but it's that kind of laboratory that is going to produce good results, probably better than trying to hit the bull's eye with a federal law at a fairly early stage of the process.

Another problem that you see with federal law is that it is almost inevitably going to interact with state law in each state. You could try to preempt state law, but chances are you're not going to preempt all tort remedies, all fraud remedies, and so forth. So you've got a very complicated process of interacting federal law and state law that is going to result from any kind of federal regulation.

One of the big objections to state law is based on what we call Version 1.0 of state law, which is a Web site that appears on millions of computers all over the country. Every single state gets its chance to regulate that Web site operator. So the Web sites are subject to a multiplicity of state laws, which presents an intractable problem for Web site operators. And that's really what you might call the Johnson and Post story of regulating the Internet--

that it just can't be done because they're appearing all over the country at the same time.

Now, Jack Goldsmith has a response to that which I like to refer to as Version 1.5, which is that the problem isn't that intractable; there are restrictions on jurisdiction and the extent to which states could exercise jurisdiction over Web sites. In fact, the choice of law problem isn't completely unconstrained, that even default conflict of laws rules actually narrow the choice down to a few jurisdictions.

The problem with even Version 1.5 of state law from our perspective, though, is that the Web site operator doesn't necessarily know what law is going to apply at the time of the relevant conduct, that is, at the time of programming the Web site and putting it out there. The Goldsmith answer kind of makes the choice of law problem tractable at the time of litigation but not necessarily at the time of the relevant conduct.

Our response, alternatively, is based on contractual choice of law, which is something that we've discussed in several previous articles, including one related to the Internet that we think has good application here. And that is a process of contracting for, through the Web site, the applicable law, the applicable forum, providing for jurisdiction in the chosen forum, and possibly for an adjudicator, that is, for arbitration. This way, the Web site operator knows what laws are going to apply at the time of the relevant conduct.

There are various ways to make this contract, but we envision a clause that the consumer in some way is presented with at the time of signing on to the Web site. I've given a couple of alternatives in my paper. Here is what I would consider a relatively bad agreement--the Napster agreement, taken from the Napster Web site. But I have a little bit of a problem with this language because it's not really couched in contractual choice of law terms. This language is drawn from the *Lieschke v. RealNetworks* case (2000), decided fairly recently and which may become federal law. But this actually refers to a contract, and this is the kind of language we're envisioning here.

Now, the problem is, How do you get from here to a contractual choice of law regime? I think to start out with, you need some states that are willing to offer the right kind of regulation that's going to be worth choosing in the contract. Maybe a Delaware-type regime.

Interestingly, in our own home state of Virginia, a State Senate bill and a State House bill came out about a year ago where the explicit intention was to make Virginia the Delaware of the Internet. The idea was that Web sites would be domesticated in Virginia, and that in return for that domestication, you would get a regulatory regime that was favorable to the Web site operator.

I don't really know what's happened to that bill. It stopped in the last session, and I don't know what's happening to it this session. It's listed as

failed legislation. But, anyway, it's a theoretical possibility that a bunch of legislators actually put out there, and that's the kind of thing that may happen.

You might say, well, it hasn't happened yet, why not? Perhaps the reason is that you have federal regulation moving forward, casting its big shadow on anything the states are going to do.

But one big problem here is that after the Web site operator chooses the state law, the question is: What's going to be the fate of that choice in all the other states that could get jurisdiction over any cases that arise out of the use of the Web site? And we present in the article a scenario for possible--in part through contractual choice of forum, in part through the Web site operator's ability to avoid overregulating states--whereby the states in which the Web site appears ultimately refrain from imposing their own inconsistent regulation and apply the chosen regulation. And that's a scenario that we present in more detail in the paper.

Now, the question is--well, actually, there's another set of questions, and Bruce is going to follow up on that a little bit. The “race to the bottom question”: Suppose that Web site operators are actually able to choose their site. Just like corporations now can choose their state of incorporation, you might get the same kinds of arguments that have been applied to corporations. We're going to have a race to the bottom of Internet law, that Virginia is going to be legislating to attract Web site operators, is not going

to think about the consumers out there that are going to be subject to this law. And we have an analysis in the paper about why this race to the bottom won't actually occur. And it's based on some of the insights that tell us that maybe strong regulation itself isn't needed, but in addition, I think choice of state law is probably going to present less of a problem than choice of contractual clause, that you're going to get more discipline out there out of choice of law than you would get from choice of contractual clauses.

Finally, if there is going to be some federal regulation in light of all the advantages of state law and the state law possibility that I've been presenting, what should it look like? You've got a many different versions of federal law that one might think about. One is a federal law that does regulate some but that specifically allows itself to be subject to some state law, that doesn't try to preempt all the state law that's out there.

A big problem with that approach is that it may well make things worse. You're laying down federal law on top of state law. In fact, what you might end up doing is, in effect, providing a state law remedy for violations of federal law or federal law remedies for violations of state law. So you're just layering on law with this kind of approach.

Another approach that some have recommended in other areas is a federal contractual choice of law statute. That is not federal law of the subject, but a federal kind of law confirming that the choice of law contract will be

enforced. And a big problem with that, from our perspective is: what's this choice of law statute going to look like? Is it going to be subject to all kinds of exceptions? I did a study a few years of state choice of law statutes, and what you see is a bunch of statutes riddled with exceptions about when the choice of law contract applies. And I think you could expect to see that if the Feds regulate this.

So even better, I think, would be what I'm calling for purposes of this talk Version 4.0, which is a federal choice of forum statute that doesn't necessarily involve the kinds of policy choices that you would see in a federal contractual choice of law statute, but only legislates forum. You're not talking about enforcing this law but not that one, or enforcing this kind of contract but not that one.

So if you're going to have federal law, maybe that's the way to go, but I think our paper presents a scenario that makes federal law unnecessary and counterproductive. Not to say that state law is perfect, but you have to think about the problems of eliminating the variations and experimentation by just heavy-handedly laying down a single federal statute.

MR. BRUCE KOBAYASHI: I wanted to pick up on a few points that Larry mentioned I would address. One is the nature of the privacy right to information. The point we want to impress on you is that we don't have the hubris to say that we know what it is. So let me tell you what it's not.

What it's not--and this is basically agreed upon by most experts--is an intellectual property right like a copyright. This is consumer factual data. That's not something that (a) is protected, or (b) from an economic analysis of intellectual property, you would want to protect. The facts are in the public domain. Protecting them probably raises the cost of use of those factors more than it elicits the existence of the facts in the first place. And if you look through the recent Stanford Symposium, a lot of people have argued that it's information and we may want property rights applied and enforced. But whatever the property rights are, they're not going to be intellectual property rights. If anything, the intellectual property rights will be given to those who make novel or original uses of factual data.

Setting default rules in either contract or tort for when and under what circumstances you can further disseminate consumer data is where the action really is. And the reason that this is most important for our purposes is that what we are looking at are contract or tort rules or implied contract rules. These are traditional state issues. States probably have an absolute and comparative advantage in dealing with these issues, and as Larry noted, you won't have sort of these overlap coordination problems with federal law if you leave them now or for a long time at the state level.

Then there is the question of what rule is efficient in any given transaction. It's likely to depend on the nature of the transaction, for example, the consumer's expectation of privacy, and the effect it will have on incentives to produce valuable information. The bottom line is that any single rule is

unlikely to be appropriate for the vast majority of transactions. In fact, if you plop down a federal rule, it's likely to be inappropriate for the vast majority of transactions. The nature of the problem suggests default rules at the state level and a variety of rules until people can work out which rules should be applied and come up with an appropriate default that will do what an applied contract analysis tells you to do, namely, to maximize the benefits of the transaction.

Let's look at the existing state law proposals, none of which have been enacted. There's an Arizona statute, which distinguishes between consumer and sensitive information. The bill is not passed. The Arizona State Legislature says, look, a lot of people are concerned about identity theft. And so for sensitive information like Social Security numbers, bank accounts, and financial information, we're going to have basically an opt-in, very stringent notice. For consumer information, they recognize that that information is collected and used to produce new and useful information, and so they have a different approach—i.e., opt out--within the same statute. You don't see anything like this approach in any of the federal bills that were put forth in the last session. And this is just Arizona. Our basic point is: we really do want to let this percolate for a while before you stop the evolution or commit to one approach through federal law.

Now, what about the race to the bottom? I guess the way to couch this question is: Will merchants flock to states with no privacy protection? Our basic response is, we don't expect to find jurisdictions where there are zero

taxes and zero services. If people can effectively exit, people will choose the appropriate mix of taxation and services. And we expect the same thing in terms of state laws regulating privacy. The requirement that the choice regime is a choice of state law requires some states to balance off the interests of consumers with those in the interest groups wanting privacy regulations to pass such laws. So, in fact, you are going to have some state-level interest group dynamics that would prevent or at least limit the ability to have an outlaw state, which has no privacy regulations.

A lot of the criticism suggests that Web sites and Internet firms will impose unconscionable or other unfavorable terms on consumers. If we think about the informed consumer, this certainly is not going to be the case. There have been lots of episodes in which Web sites and ISPs have been forced to alter or withdraw products because of public protest over privacy. But, more generally, you do have watchdog firms that go out and test privacy policies. And why is that important? Well, one, if there's perfect information, and it seems that consumers are informed, consumers aren't going to have these terms imposed on them. They'll be priced, and so if you want to extract a term which says we get to use your data whenever we want and wherever we want and sell it to whomever we want, that's going to reduce the price the person's willing to pay for the good or service offered by the Web site. And you wouldn't expect in those cases to have those terms imposed on consumers because it's going to reduce profits if the value of the service does not outweigh the cost to the consumer.

The objections you do see are sort of a second-generation objection, that there's asymmetric information. As Larry said, maybe the Internet is a lemons market because consumers can't tell--somebody has a privacy policy, but it's not going to be enforced, or it's going to be cheated on. Or maybe the Internet is a lambs market, in which you have myopic consumers who give away their valuable data for much less than it's worth. You may have problems of network externality.

Well, a lot of these critiques are based on what I think is a fallacy, that we could certainly think of some uninformed consumers who would give information away or some myopic consumers who will be shorn of their information without adequate compensation. But that ignores pressure created by other consumers. There could certainly be efficiencies without all consumers being informed, all you need is the marginal number of consumers to be informed, and they drive the market, they drive the terms. If there are non-discriminatory terms, those persons protect the less informed.

The problem in the network externalities context is that somehow an inefficient norm will get locked in, and somebody comes up with the more efficient norm or some type of privacy norm. But they can't get consumers to adopt it until enough Web sites adopt it, and they can't get Web sites to adopt it until enough consumers adopt it. These kinds of arguments aren't new. They, for example, prove that the automobile never existed because there would be no gas stations.

But in this context we do see firms that have an incentive to internalize these network effects, so they're not externalities. They are things that firms will internalize. For example, they will internalize the benefits of having a standard and having everybody use your standard. In fact, you can go and ask the outgoing Antitrust Division about this incentive practiced partly by Microsoft.

So it seems, in sum, that what we see are market-based solutions that really don't lead firms, in conjunction with consumers, to want zero-privacy states. In fact, what they are going to do is contract for optimal law, and this will give you a derived demand for state law that protect consumers' privacy.

MR. EUGENE VOLOKH: I feel that the part demanded of me here is that of the loyal opposition. I want to stress I am loyal, even though I am in some measure opposed.

Let me first acknowledge the three very important points that Bruce and Larry raise that I think all of us should keep in mind. The first is that in policy analysis, the question is always: Compared to what? You might say: State law is messy and there could be uncertainties, so state law is bad and we should have federal law instead. But what you're doing is comparing the kind of the warts that you've identified, perhaps correctly, in state law against some hypothetical perfect, well-designed, well-enforced federal law.

That's a mistake. We always have to ask: What are the possible problems in the alternative system?

So one might say that state law might have some uncertainties and problems, but it's better than the federal system. That's a very important point that they raise, and what I'm about to say is in some measure a criticism of the state system. Still, I think you should keep in mind that ultimately the balance still weighs in favor of the state law-focused proposal, because maybe the interest group problems or other problems at the federal level are enough to justify sticking with the state approach.

The second point that they raise, which I think is a very good point, is that one way in which people err in comparing a state system to a federal system is by assuming that the federal law will be the right law -- not just in contravention to the political reality that it's being made by people who we might think are not right-thinking people, but also in contravention of kind of the pragmatic reality that we might not know what the right law is. Even the best people might not get the right answer. It may be better to have some competition, some various answers proposed at the state level, rather than waiting some number of years while we see if perhaps the best one has emerged. We might implement at the federal level, or we might decide the states are doing a good enough job of following this best answer.

The third point is that there are different ways of setting up state law systems. A lot of the criticism of state law approaches to Internet regulation

is focused on state law that is applicable to any regulation of transactions that originate from a state or that involve a person in the state. That obviously causes very serious problems because Web sites are visible to and will be used by people everywhere.

So that has led people to dislike the state law model, and what Bruce and Larry remind us about is that there is an alternative state law model, a model by which what law applies could be really quite clear because it shows in a contract. I think that's a very important thing to keep in mind, that there might be some flaws with a state law model but there needn't be the confusion over which state law would apply. This is because the contract might provide a solution to that, as contract does to very many things. So these are three very important things to carry away from the paper.

Let me identify three areas of concern, two substantive ones and one perhaps just rhetorical.

The first one is that this proposal is not fully responsive to the arguments of the privacy advocates. And I'm not just talking about the most radical ones. My claim is that this proposal will not really satisfy them, and from their perspective should not satisfy them.

What do privacy advocates worry about? Let's look at just some relatively reasonable ones. Somebody says, so I went to this Web site, and I ordered some stuff, and now it turns out that people know what I've ordered, or not

even just what I've ordered but what Web pages I visited, what I did, what other Web sites I might have gone to before I went to this Web site, and that bothers me. It bothers me for several reasons. One is I have a right to keep this information private. I have a right that people not learn about me.

I personally don't buy this right. I don't believe that we do have a right to stop people from talking about us or from learning things about us. In certain variations--in fact, I've written that certain versions of this right to privacy argument actually violate First Amendment because they do involve the claimed right to stop people from talking about us. But there are people who do feel this, and they are part of what's driving the demands for privacy legislation.

Another argument, which actually I sympathize with, is what you might call a contract argument. Here one might say: I expected these people wouldn't reveal this information about me. Either I read the contract and the privacy policy and it looked like they were promising to keep it private, or even I might not have read it, it's an implied contract. This is like when you go to a doctor or a lawyer and feel there's an implied contract that they not reveal information about you. So I think if I go to a legal or medical Web site, there's also such an implied contract. Or even not just to those types of site, but maybe to any Web site.

Now, some people disagree by saying, I don't think that there's such an implicit promise. One of the problems with implied contract law is it's so

hard to figure out what we should infer from people's conduct. At the same time, most people agree that there is such a thing as an implied contract, and it's not implausible for some people to feel, at least in many contexts, that this revelation of information about them has breached this implied contract.

There are other kinds of arguments, like trespass arguments: I'm outraged that these people put a cookie on my computer without warning me about it. There are eavesdropping arguments saying: In public I recognize that if I go and buy something in a store, the store clerk might gossip to a friend about it. But I don't expect that people stand in the aisles looking over my shoulder as I'm leafing through a magazine. If that happened in public, I'd walk away. And if they did enough of that, then they might be liable for some kind of tort possibly, such as intrusion upon seclusion.

And what's happening here is the same thing. Companies are not just recording those things that are available in public. They're recording every single page I visit on the site. It's like they're looking over my shoulder. That's not good. And that's what the privacy advocates complain about.

One possible answer is, well, you have no grounds for complaint at all on this. None of this stuff that you are alleging is happening is wrong at all. I'm not sure that's fully right because at least some of the implied contract arguments are sensible in a kind of libertarian model.

But there's another argument which I think is a very powerful argument, saying, look, the right solution for you isn't a new regime out there. It is technological self-help coupled with the enforcement of basic contract law, and possibly some other existing tort law in certain contexts. But basically let's say contract law. I think that's actually a very powerful argument. That's why I don't buy what the privacy advocates generally say.

And if one accepts this argument that “self-help plus contract” is enough, then the right solution is no new law. Not state law, not federal law. No new law.

Now, I take it from Bruce and Larry's proposal that they may actually sympathize with the “contract plus self-help is enough” position, but I think that they want to go a little beyond that. They want to say, Even if the privacy advocates are right that we need something beyond contract and self-help, there are disparities of bargaining. I think that's a silly argument. Maybe "silly" is the wrong term, but at least an incorrect argument. I've never quite understood what “disparity of bargaining power” means. I'm not sure it's a well-defined concept. And I don't quite buy the argument that people might undervalue their personal information. I think that they may undervalue it, but, again, compared to what are we measuring their capacity to value? Maybe they don't do a great job of valuing their own information. Why should we think that we would do a better job of valuing their information?

But there are other arguments that I think the privacy advocates might give in response to this “contract plus self-help is enough” model that people are ill-informed about certain things. They may not fully understand the privacy policy. And given the amount of time that a rational person would spend trying to find a privacy policy, interpret it, or hire a lawyer to interpret it, it's rational for them not to fully understand these things. Therefore, they need protection.

So I take it Bruce and Larry are saying the following: Fair enough, privacy advocates, we'll give you some protection at the state level. I think, though, that their proposals will not give the protection that privacy advocates think is necessary. Maybe the privacy advocates are just plain wrong, in which case you shouldn't have even state regulation. But if they are right in some measure, I don't think that this is responsive to their concerns, because I do think this “race to the bottom” argument is ultimately more dispositive than some might think.

What do I mean by that? Well, let's say that we do have this contractual choice of law regime under which privacy policy per se would be back to whatever a state law is that the site chooses.

The problem with 50 states is that at least one of them probably will say, Why don't we set up a really pro-Web site hosting, pro-Web operator, pro-merchant regime? Next, they have to have some contact with that state in order for the choice of law contract to be enforced. They're going to move

to this state where the extra economic presence is needed. But, that will give fair warning to consumers. If this state is South Dakota, consumers will see South Dakota and think: Better stay away. South Dakota's one of those anti-privacy states.

The problem is that if you buy the privacy advocates' argument that consumers don't really know a lot about privacy rules, that they don't think very far in advance about how privacy may be compromised, and that they don't go to the Web site to check the privacy policies, and so on and so forth, then it seems to me that state identification will be confusing to them. Even if North Dakota, to promote itself, blows the lid off South Dakota, Wyoming might jump into the fray. And by the time that people think about Wyoming they will have forgotten about South Dakota and may become confused – I don't remember, is it South Dakota or North Dakota?

The problem is, I think, that consumers are not going to be much alerted by this, especially if the choice of law rule announcement is buried somewhere in the Web site. Some people might know that it's a South Dakota Web site. A lot of people may not know that South Dakota is not a very privacy-protective state. Even those who do know about South Dakota probably won't know about the several other states that are jumping on the South Dakota bandwagon, so that won't protect consumers.

One other argument that Bruce made is: But wouldn't South Dakota's Legislature be constrained by their desire to protect South Dakotans? After

all, there are two different interest groups pressing on the South Dakota Legislature. One is made up of the Web site operators plus their employees, plus the people who want to bring them to the state. The other is made up of South Dakota consumers who want privacy protection.

But look at it from the South Dakota Legislature's perspective. If South Dakota does try to protect its consumers by implementing this privacy protection legislation, that's probably going to be mostly a futile gesture, because what will happen is Wyoming will set itself up as a pro-merchant state, and South Dakota consumers will still be shorn of their data at sites hosted in Wyoming. So, ultimately, it's not going to help them to protect their consumers unless they are sure that all the other states are going to do the same. They can't really protect their consumers because the sites have just moved to states that don't protect South Dakota consumers alongside other consumers. But it can get something really good out of diminishing privacy protection. They can bring Web-hosting companies into the state, so I do think there's going to be this problem.

Again, you might say it's not a problem because all that it will do is leave people in a position where there is really no extra legal protection in addition to “contract plus self-help,” and that's the right rule. The right rule should be “contract plus self-help.” And it's a good thing that South Dakota recognizes that it's the right rule.

But, again, that's just saying the privacy advocates got it wrong. And if that's so, that isn't the solution. Maybe it’s no state or federal regulation.

So I think ultimately this will not satisfy the privacy advocates. Ultimately it will reduce, through this race to the bottom--or we can call it the race to the top, but it's going to be a race someplace--protection for consumers as under the current regime of self-help plus contract protection. That's my first objection, and I think even if one isn't a privacy advocate, one has to deal with the possibility that this is going to happen.

The second one is somewhat briefer, and the third one is briefest still. What happens if you go to a Web site but you don't sign a privacy policy or check the privacy policy? What's the rule that applies then? One possible answer is that if the Web sites want the protection offered by our proposal, why should they have to require consumers to check a policy box before entering the site. You know, a lot of Web sites would be quite reluctant to do that because every time you ask a consumer to check a box, there's a chance that they're going to say, “I'm too busy to read this thing,” or “I've just been distracted.” Web sites want you to be there, in one click, to be seduced by their content.

The Web sites would like some mechanism--in fact, I think for the Internet really to operate effectively from the merchant's perspective, there's got to be some mechanism for choosing this law without having this intrusive prompt at the start. Maybe the person can just instruct his computer,

instruct his Web browser, that he should accept all offers of privacy protection contracts under the laws of the States of California, New York, and Pennsylvania. I as the consumer am going to tell you, my agent, my computer, to just kind of agree behind my back, but pursuant to my authorization, to agree with all of those contracts.

That sounds good, and I do think it will solve part of the problem. But what happens to this wholesome, if illusory, competition we hope will happen? So let's say consumers configure their browsers to accept California, New York, and Pennsylvania. Maybe even the browser company has a deal worked out with us, and it's a deal that they think consumers aren't going to balk at because all of the privacy advocates say, yes, California, New York, and Pennsylvania law are good, buy the new version of Netscape, it will automatically accept these things.

Along comes Ohio with what is a very credible proposal. It's not just a minimum protection for privacy buffs proposal. It's a credible proposal. Well, how will it be able to get this proposal in this evolutionary marketplace? The trouble is that consumers have told their browsers to accept all deals from California and New York and Pennsylvania. Now along comes this site that's hosted in Ohio, and it's got to, before it takes advantage of Larry and Bruce's proposal, actually prompt the user for agreement because it hasn't yet been approved by the user's browser. A lot of users will say, “Wait a minute, I usually don't see this prompt whenever I

get to a Web site. Most Web sites I don't have to bother with this red tape. What does it mean? I might as well skip this site."

I do think that while you have this kind of first-mover advantage that may not be bad in some abstract sense, if your goal is to maximize evolutionary competition, I don't think that you'd be able to do so vis-à-vis the sites that I've just described. I don't think that the evolutionary process would work effectively, again, because either it would require every site to prompt the user to agree to a privacy policy before you get in it--in which many users would just balk--or users say, okay, I'm going to agree up front to sites that accept these particular states' privacy policies. That solution will essentially block the adoption of new state privacy policies because nobody would want to be one of the few sites that actually require this up-front agreement. So that's a much narrower reaction to those sites where you don't have a contract. After all, if there was a contract online, if you bought something at the site, eventually you would have to sign a contract. So that contract would have choice of law terms. But up front, when they're gathering information before you've signed on to anything, the problem that I've identified exists.

Finally, I think that there are a lot of really interesting, creative, and possibly persuasive economic arguments as to why the privacy advocates are wrong. I'm persuaded by many of them. But, a lot of consumers are not persuaded by these abstract arguments, and a lot of policymakers aren't either. What they think about is the concrete horror stories they hear. Some

companies, like Lexis, put out Social Security numbers. Other companies breach their privacy agreements. Other companies claim to protect privacy but in reality they do horrible things. Some of these horror stories may not be factually accurate. Some of them may be unrepresentative. But I think that in order to make the argument work, one has to be as concrete as possible.

To their credit, I think Bruce and Larry do make some concrete points. I feel there should be more focus on the concrete. Not just the theories that show the market works, but also the facts that show the market works. Give us all these supposed horror stories, and explain if they didn't actually happen that way. Or, if they did happen that way, explain how they are probably cured by the market, or dismiss them as unrepresentative. Give us the stories that illustrate how the marginal consumer makes things more private and safer for all of us.

Again, they do this in some measure. I would suggest that they do it more. Any of us who is arguing on the privacy front should stick with the concrete wedded to the theoretical, not just the anecdotes and not just the theory. Ultimately, I think the public is not that persuaded by the theory alone. They want to know that the market, in fact, is working for them and not just in theory.

MR. GREVE: I want to ask Bruce and Larry whether it's possible to respond in three minutes.

MR. RIBSTEIN: I'll do it in one minute. The market has been remarkably resilient. We have a lot of examples of it in the paper. Just this morning, for instance, I got a message from Q-Pass. I don't even know what it is, but apparently I'm on it. Even without any laws to speak of, there has been a lot of responsiveness by Web operators. The message said, "We've changed our privacy policy--look at it," and then laid it out in a lot of detail. So, the Internet market has been extremely resilient.

MR. KOBAYASHI: Okay. I'll run through three points.

First, we're not advocating new law. Maybe it's the choice of law in a state which has actually no specific Internet policy, which the court could think consistent with the concrete examples. But the question is: What are the interest group dynamics at the federal level? What's going to happen there?

As far as the privacy advocates, two points. One, certainly people could be concerned and maybe our normative solution is to have them do self-help. Eugene said two things that struck me. One is that a lot of people don't want to bother. When it comes down to just exercising a click to opt-in or opt-out, people prefer ease over privacy. So my argument is that laws should allow them to get privacy whether or not they want privacy.

On the "race to the bottom," with respect to the example of Ohio law, you could have differential pricing. If you allow consumers electronically to

click on the contract, to cross out standard terms, then the Web sites have higher transaction costs, and you might expect that they're not going to get the same price as people who accept the terms.

MR. GREVE: The floor is open.

AUDIENCE MEMBER: Following up on Eugene's comments, check me off under "the loyal opposition" and perhaps increasingly disloyal. I think the concern is not the "race to the bottom" but perhaps a "race to the top." One of the issues, as each of you has addressed is the following: Is there, in fact, a privacy problem that requires a legislative solution? And if so, what's the best solution?

The fear that I have of the state-based approach is that you'll have 51 solutions, at least 50 and a half of which may be pernicious. The fact of the matter is that right now, as Eugene indicated, privacy policy is being developed on the basis of abstract states of mind that consumers seem to be concerned about in the absence of concrete problems. There's one very, very serious problem, identity theft, which is, in fact, already the subject of federal legislation and state legislation. In other words, it is illegal and the problem is an enforcement problem rather than a prescriptive or normative problem. And the rest of the issues are not necessarily well suited for legislative solutions.

If you adopt a state-based approach, you're going to get legislative solutions. Many of them are going to be undesirable. And if we believe that contractual choice of law provisions will survive state courts in California, for example, which have rejected Internet choice of law, jurisdictional, and arbitration provisions based on the public policy of the state, where they will find a certain provision unconscionable and in conflict with that state's public policy, it's just not going to happen.

It probably won't happen in a private action brought by a consumer against the privacy-infringing far-flung company. It certainly won't happen in an action brought by the state attorneys general, who are highly active in this field, who will not--he may, kicking and screaming, especially under the supremacy clause, if he has no choice, yield to federal legislation. But they're certainly not going to yield to another state's legislation, which may or may not even be different or weaker or inferior--just different. So the state attorney general pursuing a consumer protection action is not going to have his or her state law defer to another state law. An approach (like the Telemarketing Act) which sets federal standards with state enforcement by the attorneys general is much more, I think, realistic.

A question that I have is about flocking. What does it mean to flock on the Internet? Companies are going to move one server or something like that to a state? What state would have an incentive, really? Virginia, perhaps unique in this regard; maybe California, although the state propensities might be otherwise. How are they possibly going to attract business? That

state would get one server or one computer or one Internet account. I'm not sure that the notion of business flocking in order to subscribe to a particular state's privacy policy is realistic. It could be the worst of all worlds to adopt a state approach. At the federal level, one might have the best chance of exposing the fallacies of the privacy problem and focusing instead on the real privacy issues, which are sensitive data-related and identity theft-related.

MR. GREVE: The way I would like to do this is to collect comments, unless there's something you want to respond to immediately.

MR. RIBSTEIN: There's a lot that I could say here. We didn't talk about the state attorney general problem in the paper, and maybe others wanted to raise that. And let me just say that I wonder what federal law is going to do about the state attorneys general, that mostly the state attorneys general actions that I've seen have been enforcing fraud and consumer deception statutes. Those things are going to still be out there unless you get incredibly strong federal preemption. I doubt that anything is going to put them out of business.

Plus, I know that this may be hard to believe in view of some of the things that the state attorneys general have done, but there are political constraints there that at least don't apply to plaintiffs' lawyers, if you want to compare the two groups. And so, yes, there have been some state attorneys general, like Michigan’s, in particular, that have been very active. For the very

reason that they've been public, I think that there is a constraint there. They are elected officials. That was just one point that we didn't discuss in the paper that probably we should have.

MR. KOBAYASHI: Here's the Virginia approach on the screen. It is much like Delaware's. Why would a state do it? Because they get fees, and also there has to be a registered agent. They don't actually have to specifically move. In Delaware you don't actually have to move your principal place of business. So we don't see what the difference is, as opposed to whether or not--

AUDIENCE MEMBER: Corporate law does not involve consumers, though.

MR. KOBAYASHI: My second point is that we do have a model which does involve--and would look like--an adhesion contract, and choice of forum will be enforced.

AUDIENCE MEMBER: I've spent an awful lot of my life sitting in meetings where we never decide what it is we're talking about, sustainable development, precautionary principle, now privacy. We need a working definition of what we mean by privacy, because it somehow means something, that it really regards what set of rules should be--what set of rules we think are appropriate regarding information sharing, what rights do people have to collect, under what conditions and so forth, rather than--the

term "privacy." It's not a very precise term. It seems to me it's the rules of information sharing, and the problem we face in this area or the reason we're talking about it today is that the transaction costs of acquiring information in this new world are very much different. And a lot of the things that we never thought about, as Gene mentioned earlier, the observant shopkeeper who knew their customers so well that they knew they really liked the new bread, the magazines on the top shelf and so on, were okay because we thought they were rare, but now the new electronic observant shopkeeper who can somehow scrutinize us electro-effectively is somehow bad. And we're learning to live with these lower transaction costs. But it seems to me the whole issue we're talking about in privacy is the following: What rules, if any, should politicians use in determining what the permissible levels of information sharing are. Can people make it purely voluntarily? Is there information that cannot be voluntarily contracted away? And does government have some preeminent right to acquire information differentially than the private sector? Is that a definition of privacy that makes sense?

MR. RIBSTEIN: Well, just one brief comment. This is really important. That is to say, we don't try to deal with privacy as an overarching subject because it's a bunch of different subjects; privacy has been turned into one subject by advocacy groups with mission creep, basically. And that's the only way it gets to be one subject. So we cut off a piece, and I think that's an approach that's appropriate for the whole area -- cutting off pieces of separate problems.

AUDIENCE MEMBER: Essentially, I don't think sets of rules are acceptable. We don't know what the rules are. I think Larry clarified that at the beginning when he said the Federal Government would just provide us with one set but if we had 50 states competing, then we might be able to get to the answer. Competition actually produces the answer. We know that's true in the market.

But if that's true, then why just limit it to 50? Why not have hundreds or thousands of potential rule sets? Why not have private rule sets? I noticed the Q-Pass message that Bruce put up said, "We follow the BBB online privacy code."

As it stands now there have not emerged one set of standards or two or three or four, but that will happen. We have more of a chance for those standards to emerge if we don't advocate that the states ought to get into the act or that the Feds ought to get into the act.

While in general I subscribe to Federalism principles, I'm not completely sanguine on the ability of states and even local governments to come up with the answers to very difficult public policy problems. All you have to do is look at education. There we have hundreds and thousands of school districts essentially competing, trying to come up with the answer on how to educate kids better. And they don't seem to be able to do it because there

are political constraints. I don't think those political constraints would operate at the private level.

So I'm not sure you really addressed this question: Why can't Underwriters' Laboratory or BBB online set the standards, and as soon as I see a seal from one of these privacy groups that I can relate to, I'll use that site.

MR. VOLOKH: The conventional wisdom out there among the relatively small set of those consumers paying attention, is that trustees and other such things have not worked, that they do not police their members well enough.

One possible answer is that that's overstated. Another possible answer is even if it hasn't worked so far, they will work better. This is where I think concreteness is really important. I think if you can persuade the public that those supposed examples have been actually mis-described or are glitches, that is powerful. But a lot of people in the public, whatever the theory, don't buy the practical reality of that.

AUDIENCE MEMBER: Eugene, you may be right about that, but just one thing. I don't think a trustee should do the policing. If a Web site adopts a policy, a privacy policy, and says here it is, we won't use this information in this way or that way, and then it does, then there ought to be sanctions against that firm. Sanctions ought to come from the law, one way or another.

Now, whether it should be state law or federal law, it is a fraud statute. And I think in the one case that did involve trustees, that did happen. But I think it's the early days. My only point is that discussions--that perhaps discussions like this--can distract us from getting to an answer Anyway, I'd love to hear your response.

MR. GREVE: Let me sharpen this point for just one second. I don't think that Bruce and Larry are going to say that they would want to foreclose private monitoring or, you know, arrangements of the kinds you describe. What I want the question to be is: What is the case for territorial regulation at all, as distinct from purely contractual arrangements and monitoring of the kind [AUDIENCE MEMBER] described?

MR. RIBSTEIN: That's what I was going to address. I've discussed this with David Post, who has a long description of private remedies and private regimes for regulating the Internet, and he had the exact same point that you did. And we do address this a little bit in the article.

The point is that you've got to get the states to enforce the private regime, so eventually it's going to come up to a state to decide whether to apply their own law or to apply the selected private regime. And what we present in the paper is a mechanism for getting enforcement of whatever you want, whether it's a private regime or a state regime, but going through the choice of law mechanism. So what you would do is choose a forum, choose a law, that if you want a private regime that's going to enforce and recognize the

private regime. But, otherwise, you're going to be left with the problem of persuading the states to enforce the private regime, private regulatory efforts, rather than their own law. And the question is: How do you get from here to there? And our paper presents a possible scenario for how you get from here to there.

MR. GREVE: Was your comment in this direction?

AUDIENCE MEMBER: Well, I was going to comment on that point as well as the presentation itself.

I agree completely that the European phenomenon [discussed by a previous audience member but inaudible] was not only a "race to the top," but I would say a race to over the top, so that many of the countries concerned can't even translate the European directive into national law because it's just too rigid, too sweeping, it attempts too much, it defines too little. And the net result has been kind of a nightmare that is an example of the federal law that the presenters are talking about which would be a nightmare for this country, too.

Having said that, I don't think that (a) you're likely to get a federal law like that in the United States; and (b) I also have grave doubts that the state approach would be very helpful. First of all, as you pointed out, companies won't like this. Why won't they like this? They won't like it for the reasons that lawyers will love it. There will be 50 different jurisdictions. There will

be arguments. No matter how much you try to do some of the things to take the edges off that have been suggested in the paper, the fact of the matter is that companies will look out there and see 50 different rules, and pick one state to hunker down in.

Most companies don't understand their own privacy rules. They don't understand their implications, which, frankly, leads me to believe that it's going to be very difficult for consumers to do so.

Last year there were several thousand bills on privacy entered into state legislatures. Three hundred of them passed. They weren't all directly on privacy, but they addressed different things like junk mail and things that get caught up in privacy. State attorneys general last summer said this was a top priority, and in their annual meeting they said this was the issue that concerned them the most. And the reason is that they're against federal pre-emption because they want stronger laws.

Can the market work? Well, I think it can in some respects, and I'm supporting companies that are using this as a competitive tool, and there are, in fact, companies whose entire purpose is to provide privacy for consumers. But the trouble is that it places a massive burden on the consumer. That's why the companies are coming out. And maybe they'll be the answer, but consumers themselves don't understand. Is the consumer going to understand all the issues on that chart? And what if there are 50 different solutions? They're not going to be able to understand that.

So I do believe that there is unequal bargaining in the market on issues of such complexity.

Let me finally just say on the issue of the federal versus the state, I thought most of the arguments against the federal rule would, frankly, apply to any state trying to tackle this issue. And all of the arguments on how difficult it would be for the federal government to come up with a good law I think apply doubly for the states because they have fewer resources.

I think there are federal laws that deal with issues that are far more complex than privacy -- environment being one of them, taxation being another. Now, maybe we don't do a very good job on either one of them, but it doesn't mean it can't be done.

So what is the best way to deal with this issue? I don't think it is to have different states come up with their own laws. You're going to have a blue sky situation in privacy like you do in the financial sector, which is, again, a lawyers' relief act.

Secondly, I think that what you need are different rules for different sectors of the economy. This is the big nightmare we had in negotiating with the Europeans. They had no concept of this. The financial sector is different. The health sector is different. The consumer retail sector is different. There are all these different areas, and you have to be sensitive.

I think that the solution of the base broad principles, backed by self-regulation, is the best concept. I'm gratified to see that some countries, such as Australia, are providing a very good model of how to go forward with that. And I think you're going to see that around the world. It's going to be easier for American companies and the American legislatures to look abroad and see what's good and what's bad than it will be to let the states loose on this issue.

Finally, the likelihood is that what you're going to end up with is the worst of both worlds--some very basic general federal law, and then state law, which will be on top of federal law, which is exactly the way the health rules read. And, of course, it's also the way most of the environmental law has read. My feeling is that we will be far better off with a very general, very broad federal law, backed up by self-regulation for different industry sectors trying to implement different principles rather than trying having detailed federal law or a morass of state laws.

MR. RIBSTEIN: I'll respond to both sets of points. I agree completely with what [AUDIENCE MEMBER] said. We do present a public choice, a story in the paper, and part of it is that you've got all these global threats to trade regulation. They've got Europe together. Now they're trying to keep the U.S. out. Take Yahoo, for instance. What the global companies can do now, obviously, is either try to comply with the European regulation, which a lot of them are doing, and which puts them at an unequal bargaining plate

with respect to the non-global companies that they're competing with in the U.S., or get the U.S. to get on the same standard as the rest of the world. And that's part of the big pressure for U.S. federal regulation now, and I think that's why now is the time to try to present an alternative story, which is what we're trying to do in this paper, of what the U.S. can do that's different from the rest of the world, and I think better.

Part of the problem here is that you have all these state rules, and as I said, you're not going to get rid of them. You're just going to dump this big federal law on top of it. And the example about blue sky laws was an interesting example, because we do have U.S. federal securities laws. We've had it for 70 years. And yet we still have state laws on top of that, and I think that's likely to happen here.

The final point that I want to make right now is when you get a federal law, it's not necessarily going to be the law that you want. In other words, the precise law that's going to maximize everybody's utility, and so forth. And that's the problem. The question is not this perfect world of a perfect federal law as distinguished from the chaos of state laws, but the federal law that you're likely to end up with from this soup of interest groups versus the equilibrium that we think you might end up with through state competition. And that comparison is a lot closer than the comparison with an ideal law.

MR. GREVE: I want to get back to the lineup. Just two brief remarks. One is that I've actually tried to read the health privacy regulations, and they're

over 100 pages in the Federal Register that are completely incomprehensible. The only conceivably good thing that might be said about them is that they preempt absolutely everything. Now I've learned from [AUDIENCE MEMBER] that not even that is true, and the more basic point here is whether or not simplicity and transparency of the rules themselves is one of the dimensions along which you expect state competition to work better than federal regulation. Or is there some reason to believe that that would not be the case?

The other thing I want to say is at some point I do want to come back to the point [AUDIENCE MEMBER] made at the beginning--that is, the choice of law process itself. At some point, [AUDIENCE MEMBER], I'll get around to that. [AUDIENCE MEMBER] was next in line.

AUDIENCE MEMBER: You've touched on this and [AUDIENCE MEMBER] had raised this point initially. I think what a lot of the Internet industry is looking for in the federal government is predictability and uniformity, and that's why there's obviously this desire, just like with the Chamber of Commerce, for various federal solutions over other regulatory schemes.

I think yours is an interesting solution to try to bring predictability and uniformity to the industry, but I'm not sure that it's going to deal with much of the problem because of the attorneys general enforcing various consumer protection acts and, as the [AUDIENCE MEMBER] was talking about, the

actions of various states in direct regulation of industry over which they can get jurisdiction. I don't think eBay, for instance, is going to be able to opt out if California enacts some wacky direct regulatory scheme, that they can just opt out of doing business at all, disallowing any consumer from California to do any business on eBay.

So while it's interesting, I don't know that this is going to be responsive to that constituency at all, and that they're probably going to keep pushing for federal intervention, and then you're going to get to the problem that Michael has dealt with so well in his book, where you end up with a federal floor and you still get the state regulatory schemes that still are conflicting and overlapping and you end up having this race to the evil top.

It might be helpful to deal with the different forms of interaction that individuals have with Web sites and Web vendors. The paradigm in the paper seems to be that of the consumer actually purchasing something from a Web site, but there are many privacy implications that come up from simply touching various Web sites that mine you for data as soon as you hit the home page. And I think that's one of the things that concerns people a great deal, that various Web sites are able to slurp down from your computer the information on every Web site you've ever visited, before you've even had an interaction and an option to see what state they might have opted into and do any conflict of law selection there. So I just wanted to raise those points.

MR. RIBSTEIN: Part of this is that I think privacy advocates have done maybe too good a job for their own good, which is to say that they've made all of us super-aware of the problems. And that's sort of an overriding point that I've made, that just about everybody knows, that there's this problem and there are all kinds of devices by which, if you really care about privacy, you can keep firms from planting cookies and you can make it pretty effective. It's going to impose some inconvenience on you, which is what people hope.

You learn about what you need to learn--you learn about what's important to you. I think people are aware that there is a problem out there of privacy, of computers planting these things. When you sign on to Amazon and Amazon says, “Hello, Larry, how are you today?”, do you think that there's somebody in the computer who's generating this message?

It’s true that people just don't generally know exactly what's happening to the information, but they're alerted to a general problem. And then if they think that it's really a problem, then they have many different ways to pursue it very easily, as this Q-Pass disclosure indicates. I didn't even know what Q-Pass was, but they threw this message on to my e-mail and said, “Look at our privacy policy,” and so I did because I was going to be giving a talk on it in a couple hours. But I know about it, and it was pretty easy to pursue.

You asked about choice of forum. The way we envisioned this happening is that the consumer sues in whatever state, he can get jurisdiction wherever he is, maybe it's where he lives, and what we're thinking is that--and we have a lot to back this up, too, in terms of case law--those states in which consumers sue are going to be more prone to enforcing a choice of forum clause in the contract, but it doesn't force them to apply some foreign law from some other state that just says, wait a minute, the consumer agreed to litigating in South Dakota, for example, and that's the forum that's going to apply to the contract. We don't have to decide in this court whether South Dakota law is better than California law.

The point is that you end up in a forum that's going to enforce the contractual choice. So, in other words, choice of forum is a way to get you to enforcement of contractual choice when, without contractual choice of forum, the Web site operator might end up in a hostile court in a state that doesn't enforce contractual choice.

Then you ask what the difference is between the Internet and everything else. I'm not one of these people who thinks that the Internet changes everything. There are a lot of people out there who think that there's something special and, true, information costs are lower, and, in fact, there's been some recent data produced in business-to-business contexts and so forth that shows actual effects of lower transaction information costs. But it's a difference in degree rather than a qualitative difference. So, yes, of course, our theory would have application to other areas.

MR. KOBAYASHI: Choice of forum is the way for BBB to get in court, to get out of California. Then they look at it through contract law, and they determine there's not an implied but explicit agreement, or a sense to the terms which include BBB's industry standard. That's going to enforce the contract rather than California, which is going to apply all these interests and public policy exceptions.

With respect to the marginal consumer issue, as [AUDIENCE MEMBER] suggested, maybe terms are more problematic than prices, although I don't see why. If there is a problem, if there are discriminatory terms, than that is sort of the efficiency of form. And so if we start seeing targeting terms, then the marginal consumers will be discriminated against, perhaps in a pernicious way. So that's an interesting problem, which we haven't seen. What you do see if you sample extensively are forms, and a lot of the criticisms are based on the content of the forms. But to the extent that there are discriminatory forms, then the [AUDIENCE MEMBER's] solution doesn't work.

MR. VOLOKH: One of the things computers do is they increase reliance on form.

MR. KOBAYASHI: Which is good or bad? It allows you as a consumer better tailoring. On the other hand, it basically allows lower transaction

costs. A lot of it may be price discrimination, which already supposedly is here with Amazon.

Price discrimination isn't necessarily or largely inefficient. And it's obviously ubiquitous. A lot of people conceive of discrimination in terms which will eviscerate the protection of the uninformed. With price discrimination, the uninformed, the very informed, and the frequent users will all be the victim of the higher prices.

MR. GREVE: Any further discussion on this point in particular?

AUDIENCE MEMBER: I have a couple of quick questions for you. One is a public choice question. Do you think that state governments or the federal government are more likely to sign on or defer to market-based solutions? That is, at which level of government do you think that's more likely to work?

Second, if you view state rules as default rules, regarding privacy, then whose law determines when you get to default out of the default rule? So, in other words, if Arizona has its rule, but then it has a separate set of rules about what circumstances are necessary in order for choice of law clauses to be enforced, do you go with that rule because it says how strong its default rule is, or do you go with the chosen state? And if you're going to go with the chosen state, then are you undermining the default law concept here?

MR. RIBSTEIN: Well, I have two quick responses. One is that obviously it's inherent in our proposal that states compete, and so, therefore, because you have the exit options more available with states, the interest groups are going to be less socially inefficient at the state level over time because of the competitive process.

And the other thing is the technical question about conflict of law's default rules. That's where I think choice of forum really comes in, because you're choosing various states' propensities to enforce contractual choice of law. Yes, there are different kinds of rules about when the choice of law clause applies, but you can control that to some extent, to the extent that courts enforce choice of forum clauses.

MR. GREVE: The next person on the list is [AUDIENCE MEMBER].

[AUDIENCE MEMBER]: Going back to something that [AUDIENCE MEMBER] said that concerns me a little bit: Do we have a solution in search of a problem? We talked a lot about what laws we can enact, whether it should be state or federal. But have we defined exactly what it is we're concerned about?

You mentioned the issue of Clickstream data in your article, which is certainly one facet of the privacy debate, but there are all kinds of others--there's health care, etc. As we craft a solution, as we talk to people who are going to create these solutions and write these solutions, we need to force

them to tell us what the problem is before they start writing, because I'm not entirely sure what the problem is. [AUDIENCE MEMBER] referred to identity theft. That is a clear problem that exists where personal data is somehow compromised. Where data is used for purely marketing purposes, what's the issue? You're not denying credit on the basis of marketing information--at least you shouldn't be. That's governed by the Fair Credit Reporting Act. You're not in any way discriminating against somebody unless you claim that receiving an L.L. Bean ad versus a Land's End ad is somehow discrimination.

I think industry self-regulation and consumer education shouldn't be given up too quickly. I think they're underestimated as solutions for technology that's still admittedly nascent. Any rush to regulate, whether at the state or federal level, has the potential of unintended consequences way beyond what we suspect they might be right now. And I think we have to give consideration to the examples that have been made of double-click and real networks with respect to the punishment, so to speak, that they've received in the market. We rush to either a state or a federal regime and sort of give up the ghost.

MR. KOBAYASHI: I don't think we're rushing to any particular legislation. The problem with the terms "race to the top" and "race to the bottom" is everybody uses them differently than the normative way that I would use those terms. But we're not saying that a state has to enact a particular

privacy policy that regulates in a certain way. It could be that the state just decides to enforce contracts differently.

We're attempting to carve out issues like medical privacy. If you go back to state court rules, these are the cases where you would find a fiduciary duty. And this is all within existing state law and in other contexts besides Web sites. I don't think we're pushing a rush for states to enact particular types of Internet-specific laws regarding disclosure or dissemination or anything like that. That's not the message we're giving here. The message we're giving here is that federal law ought to hold off and people should be able to choose what rules may be applicable among the 51 jurisdictions. That may be no rules at all. And that may be the "race to the top."

MR. RIBSTEIN: I'm going to add to that, that we have a general approach about state law and how state law could work, which we apply to a very specific problem, which is consumer marketing information. So the question then for a policymaker would be: If you're moving to a different area like health care information or financial information, is there any reason why our approach wouldn't--or couldn't--be extended to that?

AUDIENCE MEMBER: Financial information is marketing information, from time to time, so that's where I'm saying that we need to define what it is.

MR. KOBAYASHI: One approach is to promote Arizona's legislation, which differentiates between the identity theft problem and the market-

sharing problem. People do realize that there is the identity theft problem. Marketing information -- those are just facts -- and it's useful for them to be in the public domain.

MR. GREVE: I have about a dozen participants on my list. I have a suggestion to make. We'll hear from [AUDIENCE MEMBER] and [AUDIENCE MEMBER]. We'll just briefly break to pick up some lunch. Nobody's obligated to stay, but we'll all sit down and continue the discussion.

[AUDIENCE MEMBER]: Let me draw some general conclusions on public choice that bear on several of your comments. One is that the value of the federal system is a function of competition within the states. The value of the federal system is reduced by competition between the states and the federal government. There is a worse alternative than to have a single-monopoly federal law, and that is competition between the states and the federal government for the same activity.

Every time we open up the federal Constitution to allow the Feds to get into an area they were previously excluded from, what you have is an explosion of the activity on one side and an increase in the relative amount of that activity by the Feds. That's true in government spending when we basically forgot about enumerated powers. You had an explosion of government spending, with most of that increase at the federal level. It's true when we opened up the federal authority to get into criminal law. We had an

explosion of the federal criminal law in parallel with state and local criminal law and an increase in the relative number of people who were arrested and incarcerated under federal law.

If you allow the states and the Federal Government to both operate as privacy regulators, you're going to have what we've had in the other areas. In the spending area, federal and state politicians say, “I care more than you do, I'll show you how much I care, but I'll outbid you.” In the criminal law, “I'm tougher than you are, and I'll outbid you in terms of how tough you are in your penalties.” And that's been the case.

In the privacy area, you'll have federal and state lawyers saying, “I'll protect your privacy better than this other guy,” and you'll have the two things that have happened everywhere the federal Constitution applies. You'll have an explosion of the activity, much more than any kind of equilibrium going on the part of either the Feds or the states, and you'll have an increase in the relative federal role of the states.

That leads me to conclude that the most important issue to sort out here is to keep the Feds out of this entirely. And under that circumstance, you at least ought to give the priority to the states, because if you allow this continued competition between the states and the Feds, you've lost the game from the beginning.

AUDIENCE MEMBER: Could I question one point? When you were looking at banking regulation, bank issues, where we had the competing regulatory structures, the Fed Reserve System and the independent banking system, that provided one bureaucracy model. Is that different than the other examples, or do you think that was a mistake too?

AUDIENCE MEMBER: I haven't thought through that issue. On the spending issue and on the criminal law issue the picture is absolutely clear. I haven't thought through the banking issue.

AUDIENCE MEMBER: I agree.

.

MR. GREVE: [AUDIENCE MEMBER]?

[AUDIENCE MEMBER]: Just a quick point on this question about how the states are going to compete, because getting a server, or a state agent, based in your state does not seem to be a big incentive. It's clear that the competition would be for law firms. Believe me, whole neighborhoods in Northwest Washington, D.C., have been revitalized after the FCC was located at 1919 M Street. I hear business is not so good since the FCC moved down to Southwest last year.

[AUDIENCE MEMBER]: This is obviously what they compete for, and I think that that brings up a challenge that I think we should issue to both Larry and Bruce, and that is the pledge not to do any consulting in this area

in the 50 states that they advocate should start legislating here, and only then can we be sure that their motives are pure in all of this and it's not just to maximize the litigation costs.

The point I want to make in principle was the red herring thing about the individuals having this trouble differentiating the policies and so forth. It's a red herring in the argument, and although it's brought up all the time, you're quite correct. It's a red herring in the sense that there's a lot of stuff we transact for that we as individuals don't know anything about. Investors take their best shot, but there's a lot that they rely on. There's a lot that they rely on in terms of market mechanisms, and you know what I'm talking about. I'm being a little flip. But the fact is that the idea that you *can't* figure out the contract. Everybody in this town is still trying to figure out what the Telecommunications Act of 1996 says.

What the real question is then is choice of intermediary. Who is going to be the agent for the customer? And as I see it, it basically breaks down into four choices, not mutually exclusive. You have the Feds, you have the states, you've self-policing (which is sort of a brand name capital competition of Amazon.com versus other Web sites), and then you have the software (e-commerce intermediaries, the trustee and so forth).

It's obviously an argument that can be made, that if the Feds do it or the states do it, the individual customer has a worse time figuring out what the policy is and how it relates to them and how they can change the policy

through the democratic process. There's actually more of a gap in there. And certainly we can say a lot about federal control. I don't know if we're so clear on what the competition in the states has implied, but you can get the Fed control, you know how the regulations are going to go. They're going to overemphasize type one air, which is one of the horror stories Eugene talked about, real or unreal. They'll go after that. Then the protectionist element will come in, and there'll be all kinds of unexploited opportunities that will be eliminated by regulation. The incumbents in the market will think that's a good idea and want to get rid of more of that. So there will be all these costs that are not going to be accounted for very well, and special interest control of the rules.

It seems that self-policing is doing a fairly good job right now, because I make all kinds of terrible decisions on the Internet, and I think probably everyone at this table has done the same thing to some degree. And it seems that the costs of that are low, and that's probably why the e-commerce security service vendors are having a little bit of a problem, the competition between the Web sites is fairly limited here. And so maybe some of the call to step back from the regulatory approach (to try to place a higher burden on the advocates of regulation), might be advice well taken. Although, there may be these sort of targeted areas where there's some legislation at the state or federal level. I'll let you argue about that. If there are all these sorts of slurping things -- where you don't have any real market mechanism apparently in place or it looks like you don't have a market mechanism and the information goes away -- there’s no intermediary to help the customer.

And then, of course, there are enforcement problems, and it seems to me that, in terms of bang for the buck, maybe that's really where people ought to be looking now. These enforcement problems may intensify when you've got dotcoms out there selling for 26 cents a share, the incentives to take a flyer on some kind of implied contract might prove overwhelming. They've got an option on the high end, and they can't lose much.

You might want to just push that choice of intermediaries a little more and try to move out this terribly distracting discussion as to how impotent customers are. They're not impotent in this market versus any other market. In fact, you could easily say that the customer has all this opportunity to get all these extra services and extra goods for his business. It's really empowering. That's actually the other story of the Internet, which I think is a much more powerful metaphor and really should be reflected in front and center in this whole thing.

MR. GREVE: I think two points emerged here that I'd like you to quickly address, if it's possible. One is it seems to me all the discussion went this way, which is that the argument tends to collapse into one extreme or the other. Deploy arguments against federal regulation. The question is: Is there some reason why the argument has a stopping point at state regulation rather than a wholly private arrangement? And then, similarly, you push the argument the other way and say, “People feel uncomfortable with contractual agreements, and maybe they're not as efficient as they might seem.” Doesn't that push you all the way to federal regulation and

monopolistic regulation so that you don't have this vertical competition problem that [AUDIENCE MEMBER] talked about? So I wonder whether there's some equilibrium point in between.

The other point is the point [AUDIENCE MEMBER] brought up at the very beginning, which is the choice of law problem and whether that's a stable solution. I'm not a corporate representative, but if I were, I'd be very nervous about actually making states stop at their state lines. There are lots of areas that you can think of where choice of law has not been a rousing success, spontaneous choice of law problems, because, of course, AGs and state courts have an incentive to expand and extend their rules beyond their state boundaries. And it seems to me that temptation is particularly dramatic in areas where the case for territorial jurisdiction is somewhat weaker than in other areas

If you could address those two points briefly and say whatever else you wish to say something about, and then we'll adjourn for lunch, return, and continue this in a more informal setting.

MR. RIBSTEIN: As I understand, the question is where do pro- and anti-contracting stop, and that's one point. And I think one general thing that one could say about our paper is that we present kind of a midpoint solution; that is, it's somewhere in between just enforcing every contract that comes out there, and no regulation whatsoever, and allowing a choice of state regulatory approaches. The latter is not going to please, as Eugene

pointed out, the hard-core advocates of heavy regulation. And the idea of having state regulators out there is not going to please the total free market advocates. But, for the reasons stated in our paper, we think it has a chance of succeeding.

The second point is that there has been a lot of skepticism about our contractual choice of law approach, and all I can say is, we've presented this idea in several other contexts, and we've seen it work in several other kinds of contexts. In another paper we talked about franchise regulation where it may not seem like it's worked, but it has worked. There has been a deregulation equilibrium there that's gotten past the horror stories of state regulation and also the horror stories of oppression and unconscionable acts by franchisers.

Yes, there are areas in which it hasn't worked, and maybe this is one of those areas where eventually it won't work. But the question is: What's the alternative? I think that the idea of federally regulating now is potentially horrendous. And I agree with [AUDIENCE MEMBER's] points. If I could rephrase it a little bit, you're going to start with some federal regulation, and it's going to creep into something really major. You can look at what's happened already with just the minor tiny little federal statutes that exist that relate to Internet privacy, and you already see lawsuits all over the country stretching these statutes--these are 30-year-old statutes--into something that fits. I could just imagine if you add plaintiffs' lawyers to the mix what could happen with any federal efforts right now.

So that's the choice between a possibly imperfect choice of law system that we present some evidence has worked in other contexts and an overarching federal solution that has a chance of metastasizing beyond anything its creators thought of when they put the statute into place and at least the state solution is worth trying.

MR. KOBAYASHI: I think the basic point is, to be more concrete. We do know what's coming when we look at these looming federal laws. And a lot of states aren't going to do anything. If you don't want private ordering and front and center, I think you do want to go with the states, because the federal government is not going to stand by and just let companies, in all probability, engage in private ordering without any regulation.

MR. GREVE: We'll continue this very informally now. I just want to say one brief thing. On the way out during the break, [AUDIENCE MEMBER] reminded me of this. One of the problems with competitive federal solutions is always that they're second-best only. For every libertarian who favors no regulation at all, there's somebody else who favors preemption of everything. That's before you let the privacy advocates into the room. And it seems to me that one of the real difficulties of the political process is that it's almost never the case that competitive solutions are arrived at as a second-best compromise. Compromise always takes the form of some compromise between various monopolistic solutions.

One of the things that we haven't very much talked about prospectively is that, what a federal statute would do is create an awful lot of discretion simply because, effectively, you require super-majorities in Congress to get anything done. You get a chance every 20 years. Everyone knows *ex ante* that you'll have a regime that will have to last 20 years and be implemented by regulatory agencies and courts. You don't know what exactly it is you're consenting to, and one of the interesting political economy point that I'm interested in is this: Can you envision circumstances under which competitive solutions emerge not because everybody agrees that they're the optimal solutions, but because that's the compromise, because it's good second-best for a whole lot of constituencies that would prefer to do something else?

[AUDIENCE MEMBER]: Just a couple of comments. One point is that in a case I handled where I represented a trustee we had both federal and state law enforcement agencies participating in that litigation, which is an example of each relying on either the Federal Trade Act or their state consumer protection act. So we had an instance there of overlapping jurisdiction. And each Internet law that Congress has passed has provided in some way for a shared jurisdiction among the federal government and states, carving out certain things for each one. So you might consider some of the models there.

I consider myself a fairly informed surfer. I always check the cookies and that sort of thing. I opt out of e-mail, but I still get an awful lot of

unsolicited advertising e-mail, which suggests to me that there's a market failure going on somewhere, because I'm not getting my preferences honored throughout.

We had some discussion about the marginal consumer, and I think Bruce made the observation that the marginal consumer will set the rule in the event there's no discrimination taking place. I would suggest, though, that there is discrimination occurring here. When you register for a Web site, you can choose whether you want to receive any e-mails from that site. You can choose whether you want to receive any e-mails from third parties. And so a site will collect data and basically set up their database so that the consumers are divided into a lot of different sets, and each set is going to receive a different level of treatment of their information.

In light of that, then, I would suggest that the default rule makes a huge difference, whether the defaults are knocked in or knocked out for any use of information. This governs the fate of the marginal consumer and so you actually get a real substantive difference in sites' ability to discriminate.

A tactical problem that I don't think has a theoretical issue is the fact that multiple companies can collect information about you at a single Web site, and you may have a situation where each company -- whether it's DoubleClick or Engage or the host site itself -- is choosing a different state for its laws. I haven't thought through well enough whether that causes a

problem, but it certainly complicates the choice facing the consumer when you have that, and perhaps there's a technological solution to that.

And my final comment is sort of a slippery slope one. If we're going to trust the states to set the rules for privacy, why not let them set the rules for tax? You know, some of the folks who advocate states setting rules for privacy would take a different view, I think, when it comes to taxation of Internet sales.

MR. RIBSTEIN: You mentioned, first of all, the federal laws that usually allow some sort of state role, and I've done a little bit of research here. What I've seen is kind of an example of the nightmare that might occur if we had more federal law. For instance, you have the Gramm-Leach-Bliley Act (1999), which allows state preemption, but it says subject to the Fair Credit Reporting Act, which doesn't allow state preemption. It's contradictory. And that's even without any kind of broad regulation. And, of course, there are market failures. You just need to compare what's going on under different regimes.

I thought your example about multiple collectors from a given Web site was an interesting question that I'll have to think about technically.

Finally, state tax: I'm not wedded to the idea--I think that the same kinds of solutions could be applied to state taxation..

MR. KOBAYASHI: I think discrimination is ubiquitous. I think the concern is when you have different people facing different forums. One person wants knocked in, the other one wants knocked out. The mere fact that you have different choices is not discrimination. That's choice, and that's actually helping people align their preferences.

You do see a lot of different approaches with respect to opting-in and opting-out. Arizona, of course, has an opt-in for what they call sensitive data and an opt-out for what they call normal data. A lot of the existing approaches -- and I'm not saying whether these are optimal -- do differentiate, by the nature of the transaction, and you would expect that that would be the case.

Is it harder or easier to stop junk mail? Junk mail is fairly easy to block. I don't think that really is the whole ball of wax. The question is what else are they doing. And you may want to have laws that deal with that.

[AUDIENCE MEMBER]: At the outset, Bruce and Larry, you said that there's a relative paucity of law in this area, and I thought that assumption is true vis-à-vis consumers' internet transactions. But, I think we have an enormous wealth of federal law in the area of privacy, and I'm curious what your thoughts may be, because that seems to me to be an indicia of consumer demand for some level of protection.

The number of laws being introduced suggests that there's a demand for some level of protection. What that protection is I think we're not sure, but certainly there's a great public interest in that. That was one issue I had about whether there was really a demand vis-à-vis the argument that, if people aren't using a trustee, maybe there's not enough demand for it as a mechanism.

The second thing is that what I saw really the purpose of the paper being--and you should be commended for this--is the notion that what we're really trying to decide, we're looking at this mountain that we're going to climb, and we're looking at how are we going to get to the top of Matterhorn. What's the best route? And your suggestion is that a state system is advantageous because the competitive process is the best way to ensure that the optimal baseline protection emerges. And if that's true, I think that's a great idea.

I saw a number of issues with the competitive process in this market, and I was hoping that you might address them. The first is this sort of network effect problem. It seems to me that the more data we collect, the more valuable it becomes to entrench the status quo where we don't have baseline protection, because parties' interest in preserving that status quo continues to grow. And it would seem to me there's a problem that faulty standards could emerge in terms of baseline protection that will remain because it's too costly to change.

The second problem was the asymmetrical information problem. I'm curious whether consumers really can bargain and whether it's meaningful, because it seems to me a lot of the state law competition argument rests on this principle that people can exit. And I was hoping that you might discuss how the ability of individual consumers to exit works in this model, given the kinds of transactions that we see. People vote with their feet and they go somewhere else. But I'm not sure how that works in this market with this technology, and I was hoping you might address that.

And the third is a more pragmatic question. You suggest that we have competition, and that seems to me implicit in the notion that consumers and businesses bargain. And I wonder whether that really takes place, because in reading the paper, one of the things that I sort of took away--and you even suggest -- is that people really bargain. I would ask the question in a little different way. Why is it better for the default rule to be bad -- the Web site, the business service provider picks the forum -- as opposed to the existing system being what most likely the consumer is able to pick, vis-à-vis all of these other state-level situations?

And, finally, why is the state the optimum unit of competition for the model versus these various locales?

MR. RIBSTEIN: I probably overly minimized the existence of other federal laws. They are, of course, sector specific laws dealing with specific kinds of information that we don't deal with in the paper. What I was referring to

was the coming wave of broad Internet privacy regulation that's going to transcend, if it happens, the sector-specific rules.

With respect to your two kinds of market failure arguments, network externalities and exit. On network externalities, there's all sorts of evidence that it is possible for the market to overcome the network externalities problems. I don't know in how much detail we would want to get into it right now. But it's almost like the presumption is the other way -- that is, that the market's going to be able to overcome lock-in. We do talk about consumer exit. You have these kinds of negotiating devices, these BOTs and so forth, that can be used right now. Maybe we don't see it as much now in practice as is technologically possible, but that's just the question of market demand. These devices are definitely technologically feasible, and so the question is, Why don't we see them? Maybe the answer is that the market doesn't insist on it.

With respect to consumer bargaining. Yes, these are definitely adhesion contracts. Long live adhesion contracts. You don't get individualized bargaining, which would be far too costly in this situation. You get take-it-or-leave-it kinds of mechanisms. The real question is: Are there enough choices out there in the marketplace to really make this kind of bargaining enough protection for the consumer? And that relates to all the arguments that have been made all morning long. If you think the consumers are just fundamentally uninformed and cannot be sufficiently informed and so, therefore, they're going to get stuck with the wrong kinds of adhesion

contracts, then you would want to say: Don't enforce the choice of forum and choice of law clauses. Let's just keep it with the default rules that we have now. So it really is a question about how well markets work, including markets for information.

MR. VOLOKH: I never bought the argument that in order to have a contract or in order to have competition, you have to have bargaining. I get pretty good prices at my supermarket. If I'm going to go in and bargain about the price--I'm not sure they'd laugh at me, but they'd say: We're not authorized to do this. And it makes perfect sense they wouldn't be authorized to do this, because the agency costs and transaction costs of bargaining are so high it doesn't make sense. Still, there's plenty of competition. They know that I can go to Ralph's instead of to Vaughn's. And, in fact, actually, I do think this operates pretty well in the cyberspace context, because it's even easier for me to go to Ralphs.com instead of Vaughns.com online. I don't have to drive anywhere.

The real problem, though--and I think that we shouldn't underestimate it--is the real cost, especially as a proportion of the time spent online, that it would take for people to really figure out a lot about these policies. It's easy to say, "You must not really care about your privacy if you don't just check into the privacy policy." The whole point of the Internet is it should be as easy as possible for you to go from one site to another. If you visit dozens of sites every day, to go through and find the privacy policies, try to understand them, try to think about ways in which they may have been

worded (in ways that literally allow the merchant to do whatever they please, but present themselves in ways that are at least marginally deceptive to consumers), is a very serious problem.

So I think we have to confront the fact that a lot of people do feel that they have the data being taken away through underhanded mechanisms, through not being fully informed, through a lack of disclosure, which is why there are some proposals aimed at the disclosure requirements.

So I think that it's neither as simple as the idea that if there's no bargaining, the consumer's the loser. Nor do I think it's as simple as if the consumer could find out without much difficulty and they don't find out, that's their problem. Because it turns out that the difficulty in finding out is very great once you aggregate it over all of the sites.

MR. RIBSTEIN: Well, let's face it. If we get a federal law on this, what's going to happen is we're going to get buried in an avalanche of legalese. It will not simplify the world. I think you realize that. We're going to get lengthy disclosures and massively hedged. If you're talking about getting to a simpler world, if that's really what you want out of this, then I would say mandate a set of uniform privacy policies. Let's not have opting in or opting out. Let's not have disclosure or anything like that. We're just going to give everybody the same set of privacy policies. That's what would make the world simpler. But I don't see the benefit in that respect that we're going to

get from a federal law that demands lengthy disclosures and lengthy hedging.

AUDIENCE MEMBER: If all that's true, why would all the larger market players then seem to be more in favor of uniformity, which they accept at the risk of legalese and the complications as a trade-off for not having to deal with 50 competing legal systems. This really goes back, I think, to my key question relating to what Eugene said, which is the case needs to be made stronger as to why state competition will work. Or put another way, let's assume that state competition is better, but it takes 50 years to get to the baseline optimal level of privacy law. What will we do between now and then? That's what the legislator's going to ask. How do I protect my constituents?

MR. VOLOKH: I think the implication of your question, Why do the larger players all like the federal rule?, is that it's efficient to do one-stop shopping. Because there's an alternative explanation. It's anti-competitive against the smaller entrants and potential entrants that will come over time. You actually would like to look at infrastructure providers rather than the Web sites themselves, I think, and get a better metric on this. I don't know if they're involved in this. You know more about it than I do.

MR. RIBSTEIN: As we discuss in the article, if you look at the October 3rd McCain committee hearing, you could see that various segments of the industry were represented there, and AOL is going for fairly strong

preemption. However, there was a group, the name of which I can't remember right now, that was representing smaller players in the industry. And one problem here in terms of the public choice story is that potential entrants, of course, aren't represented by anybody.

AUDIENCE MEMBER: That's your job?

MR. RIBSTEIN: That's our job, right. That's whom we're representing.

AUDIENCE MEMBER: You're not nobody.

MR. RIBSTEIN: I think entry barriers are a big explanation for that.

AUDIENCE MEMBER: One thing is the burden of getting into the right screen and so on. The Justice Department raised a big bill about how complicated it was to get to that first screen. I think the term "self-regulation" doesn't do us any service if we're trying to create a more balanced debate on this topic. We're not talking about self-regulation most of the time. We're talking about whether the regulation should be market-mediated or whether it should be politically-mediated, and self-regulation is when you do it because it's basically competitive. So I think market regulation would be a better term.

MR. RIBSTEIN: It sounds like regulation of markets, though.

AUDIENCE MEMBER: There are two ways, though, that can be construed. To use the bad term, self-regulation, that is, individual firms do it because it's in their interest. The other one is the trustee or whatever, who are the market intermediaries that you hire as your agents.

AUDIENCE MEMBER: Every time I'm in a debate where the term self-regulation is used, our side loses and the other side gains. It could be a neutral term in politics, but it's not. The point I thought that was in your favor was very interesting--and I think we're jumping too quickly to endorse it. You argued both that we shouldn't know in advance how information's going to be used, and then again in your discussions you argued that information has different flavors, and some information should be treated more sensitively than others. We should have different policies for different flavors, lock up information in different boxes.

I don't think we necessarily should jump into that so quickly. There's an interesting example where financial data has turned out to be useful for determining the risk status in an auto insurance case: if it turns out you can balance your checkbook, you also drive better. Orderly habits go from one area to the other.

It may well be that medical records have a tremendous amount of information, and they are using this information already, as in Iceland, where you're getting both information about individuals in a financial sense and in a DNA sense. It's not that all people want to Balkanize data yet. But

it may well happen that individuals would be much safer in a world where all information is democratized and homogenized, with maybe protections around it, but not based on what type of information it is rather than what kind of informational sharing arrangements I'm willing to indulge in.

MR. RIBSTEIN: That's what I started my remarks about -- by suggesting the basic economic intuition here is that information should be free. That's Poster's point. And so obviously there's a lot of support for it.

MR. KOBAYASHI: We have an analogy in the paper, the *Moore v. University of California* case. The doctor at UCLA Medical Center patented a very valuable cell line. It's not really the focus of our paper, but it shows that the real question is whether they should have disclosed the reason they wanted the blood. It wasn't for the treatment, but for research. And the question is, well, maybe you don't want to actually have Mr. Moore hold up this valuable research because now you're dealing with the incentives to produce valuable information. So even with disclosure, it isn't clear.

AUDIENCE MEMBER: One follow-up to that. It may turn that we'll get beyond the FDA ("you have to know everything before you allow anything") model of drug regulation, to an Internet-driven concept where basically disease groups would organize themselves, create databases about themselves, employ researchers and so on, and obtain feedback information. It may well happen that the model of the future for medical research is

going to depend dramatically on the ability to have widespread sharing of very, very sensitive information under conditions that are determined by the Internet user group. My user group will decide what information sharing I have because it's in my group's interest to have the fastest possible knowledge about me. And that might be inhibited by these Balkanization rules we're talking about.

MR. KOBAYASHI: Well, the Balkanization rule there would be more traditional in intellectual property.

AUDIENCE MEMBER: I'm not talking about intellectual property. I'm talking about the presumption that the rules governing medical data sharing should be different than the rules for consumer data sharing.

MR. RIBSTEIN: I think that's a powerful argument against having medical data rules that permit no sharing, no how, no way, no opt in or out, you just can't release this data at all. That's a powerful argument against that. But the arguments that are being made are that the rules for medical sharing should be opt in with very thorough disclosure, never mind the fact that people might have to see a whole bunch of screens, because this is really important stuff and they should check a lot of boxes before waiving it. Whereas, for other things, the rules should be much more limited.

AUDIENCE MEMBER: I'm not saying that necessarily the Balkanized rules are sound, but I don't think that they're unsound for the reason you're identifying.

AUDIENCE MEMBER: Disclosure and informed consent are very, very risky concepts. Take informed consent. There was a big series in the Washington Post in which every drug company in the world was demonized on the grounds that basically they were trying to develop information without informed consent. Your point is well taken, but I'd rather err on the side of information being freer than not.

MR. RIBSTEIN: I just want to emphasize one thing, and that is that we don't take a bottom-line position on this issue. Our point is that we don't know what the rules should be, whether they should be Balkanized or not. In fact, the way to develop this is not to dump on this set of federal rules -- before we really know nearly enough to regulate -- but rather to let it evolve through the states.

And let me also point out that the Balkanization that you see now in regulation is to some extent a federal development, because we have a federal law in health care information, a federal law in financial information, and if that's not the way to go, then the way we don't want to go is federal law.

MR. RIBSTEIN: My answer to that is we don't really know enough about this area to decide to regulate federally and that all these things ought to percolate through the states.

This is a good example of what happens when you get federal law, because here we have not only one federal law but two federal laws that, as I mentioned a little while ago, seem to be at war with each other. You still have the states trying to impose these obligations on you, and a lot of that's coming under consumer fraud statutes and so forth, and the question is: Are the Feds ever going to be able to get rid of the concept of consumer fraud? What's going to happen? One thing that might happen is that federal law will require detailed disclosures of how the information's going to be used and so forth. So the Web sites that have been reluctant to post really detailed disclosure policies in the past will be required to post these policies. That gives more language to potentially violate in the future, which could be the subject of consumer fraud litigation in the states.

So one possible scenario is that not only do you *not* get rid of conflicting state regulation by adopting the Feds, but you actually create a new state cause of action by adopting federal regulation. And I don't think that that's an unlikely horror story. I think that that's probably the most likely thing that will happen for the vast majority of these federal laws that are being proposed right now.

I sympathize with the problem, but I just don't think that federal law is the answer to the problem. When you adopt the federal law, you're going to get state groups like NAAG who are going to be arguing very hard against preemption. And chances are you're not going to get the kind of blanket preemption that would put the states out of business.

In other words, federal law isn't necessarily the answer to that problem. We, on the other hand, have a system that, if actually adopted or enforced--and we present a scenario in the paper as to how that might happen--does provide relief for multiple state regulators where you'll effectively be able to choose one regulator. Or maybe that won't work. Maybe that's pie in the sky. But federal law hasn't been the answer to your prayers. I don't hear you saying that federal law has answered your prayers so far.

MR. GREVE: Thanks very much.