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## Internet Governance 2.0.1.4: The internet balkanization fragmentation

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**Internet Governance 2.0.1.4: The Internet Balkanization Fragmentation**

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## INTERNET GOVERNANCE 2.0.1.4: THE INTERNET BALKANIZATION FRAGMENTATION

### **Abstract**

The text addresses some of the definitions and origins of the term "Internet Balkanization." Drawing upon U.S. constitutional law and interstate commerce regulations, it argues that the term also carries strong connotations on the realms of jurisdiction and commerce. The text adds examples of how this effect affects the businesses of creative companies that are exploring innovative markets in the United States, and suggests that the term "Internet Balkanization" should not be used in the context of international negotiations of Internet Governance, due to its pejorative connotations and misleading implications.

*Keywords:* internet balkanization, internet governance, balkanization, privacy, fragmentation, cybersecurity, international telecommunication union, sharing economy, netmundial, data localization

## Internet Governance 2.0.1.4: The Internet Balkanization Fragmentation

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### I. Introduction – Internet balkanization for all

Many readers engaged in the Internet governance (IG) conjuncture (Alves Jr, 2013) might have come across recent references to Internet balkanization. There are several recurring examples of international actors who would be threatening the unity of the web:

- International Telecommunication Union's (ITU) (ITU, 2014a) manifold government-led conferences;
- Dilma Rousseff's (Miller, 2014) calls for mandatory data localization (Boadle, 2014) (ultimately dropped (Barabas, 2014) from *Marco Civil da Internet*) and deployment of emancipatory undersea cables (Graham & Sabbata, 2014) from Brazil to Europe

and Africa (Emmott, 2014) (the latter, now dropped by Telebras (Telebras, 2014), but still being pursued by Angola Cables (BNAmericas, 2014));

- Angela Merkel and Neelie Kroes' (Brandon, 2014) too-high-to-beat data privacy standards pushing for a pan-European cloud (Blau, 2014);
- Russia's (Sugarman, 2014) ever increasing restrictions to Internet access;
- India's (Arora, 2013) proposal for a United Nations body to coordinate Internet governance matters;
- China's (Toor, 2013) Great Firewall;
- Iran's (Carrington, 2013) halal Internet;
- Turkey's (Tuysuz & Watson, 2014) social media crackdown.

The diversity of the group suggests these players cannot be acting in a strictly coordinated fashion. Even though they might contribute to the same final resultant, they must be doing different things.

Some of these statements call for isolation of national content; some call for protection of data privacy and are reactions to U.S. mass surveillance; some merely enforce national laws which are not particularly related to the Internet; some call for increased international cooperation to ensure that national laws are respected (including data privacy) and no one country has a dominant role in Internet governance.<sup>1</sup>

After presenting some concepts of Internet balkanization and drawing upon the historical use of the term "balkanization" in the U.S. legal system, the text addresses how this effect takes place in American (cyber) lands and impacts the national businesses of tech companies exploring

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<sup>1</sup> The author thanks Richard Hill for suggesting this categorization.

markets as innovative and diverse as person-to-person (P2P) ridesharing, P2P lending, P2P lodging, online gambling, and direct sales of electric cars. At least in the following cases, Internet balkanization has nothing to do with global cybersecurity or exogenous decisions of foreign players, it is an unexceptional matter of concurring norms and economic policies among federated states within the United States itself. In this sense, a balkanized web does not sound all that awkward.

## II. Fragmenting a concept

The short explanation of the term Internet balkanization is pretty straightforward: it is a modern metaphor for the geopolitical process that took place in the Balkan Peninsula (Balkanization, 2014), in the context of the collapse of the Ottoman Empire during the 19th and early 20th centuries, leading to the *fragmentation* of that region into smaller non-cooperative states. The original term “balkanization” was allegedly coined in a New York Times interview with German politician Walther Rathenau, in 1918 (Todorova, 2009)

Internet balkanization has been announced as one great threat to the global Internet as idealized by pioneers like Tim Berners-Lee (Clark, 2014), Vint Cerf and Bob Kahn (Markoff, 2013). Google’s Eric Schmidt and Jared Cohen (Larson, 2014) have also shared their concern about this development in their book “*The New Digital Age*” (Schmidt & Cohen, 2013). As Evgeny Morozov (2014) points out, whereas European telcos are actually using politics as leverage to compete with the U.S. Internet industry, American technology companies raise the loudest voices about how the web can fragment into multiple networks, operating under different subsets of rules and standards, due to bad tech and policy decision-making.

There are some other pretty elaborated and comprehensive academic sources to Internet balkanization.

In a 1997 study on social implications of greater Internet connectivity, MIT researchers Marshall Van Alstyne and Erik Brynjolfsson adverted that the growth of a global information infrastructure would not necessarily lead to the emergence of an Internet global village, it could also fragment society and balkanize interactions in the virtual space (“cyberbalkanization”).

In their research, the key asset at stake is the voluntary and selective satisfaction of preferences facilitated by the evolution of information technologies. As they describe, “[v]eto power at a destination can balkanize communities despite preferences for diversity at a source” (Alstyne & Brynjolfsson, 1997).

In 1998, Rob Frieden, professor of telecommunications, observed the evolving dynamics of hierarchical and discriminatory interconnection arrangements among Internet service providers (ISPs). He argued that the clustering of ISPs to mitigate congestion, enhance quality of service, and solve cost allocation problems could balkanize the Internet, due to the varying degrees of accessibility to other players’ networks (Frieden, 1998).

Frieden was particularly worried that these agreements and the lack of regulatory obligations for ISPs to promote universal services would lead to higher costs for Internet provision in rural areas. To some extent, Frieden anticipated particular concerns that the next author would include in the telecom infrastructural layer of the net neutrality debate.

Ten years ago, law professor Tim Wu (2004) shared some uncompromising thoughts about Internet balkanization on Lawrence Lessig’s blog. He suggested that Internet users were not visiting other countries’ websites very often, that big Internet sites like Google were going

national (abroad) with the help of geolocalization software, and that local traffic was growing amazingly fast inside China in comparison to traffic exchanged through its international routes (Wu, 2004).

Wu seemed interested in how censorship and regulatory burdens could fragment the web, possibly reflecting on the sort of cultural and political implications he would raise on “*Who Controls the Internet? Illusions of a Borderless World*”, with Jack Goldsmith, a couple of years later (Wu & Goldsmith, 2006). With some attention to online multilingualism (Icann, 2007), he would ask whether the readers were using online translation services, such as long gone AltaVista.

Finally, Jonah Hill’s 2012 report on Internet fragmentation, which is probably the work that best structures the international policy debate from the American standpoint. His theory of Internet fragmentation is inspired by Tim Berners-Lee’s argument that the same laws of the Internet should apply everywhere, “like the laws of physics” (Hill, 2012).

Hill (2012) creates a spectrum of Internet fragmentation, uses a layered approach to locate fragmentation and classifies actors and forces causing fragmentation to organize a diplomatic agenda. The toolkit identifies six areas of greatest concern to U.S. policymakers: the threat to the Domain Name System (DNS); the piecemeal transition from IPv4 to IPv6; Internet censorship, blocking and filtering; the breakdown of peering and transit agreements/net neutrality; the collapse of the Internet standards process; and local privacy regimes.

These studies demonstrate that Internet balkanization is a serious concern, but they also reveal that the Internet vernacular might be playing some tricks on us again (Blind men and an elephant, 2007). The same term can be used to describe different facts and different versions of the same fact, giving birth to both inadvertent and intentional confusion.



### **III. Balkanization as a barrier to commerce under U.S. constitutional law**

What the previous authors have not highlighted is that this concept has implications for the realms of commerce and jurisdiction. And in this matter, the U.S. constitutional law is paramount to further understand the meaning and origins of balkanization as the argument that is being brought into the global Internet political agenda.

Courts and legislators have struggled to fine-tune the balance of powers between federal and state governments since the establishment of the American Constitution, with the Articles of Confederation of 1781 and the subsequent U.S. Constitution of 1787. This constant exercise of constitutional interpretation allows for the co-existence of distinctive regulatory models within the same country, with states taking different approaches to the same issue (or at least different approaches to different sides of the same issue).

The dual sovereignty that arises from American federalism solved many and created other challenges for the economic integration of the country. In order to secure a unified nation, states face limitations to control their domestic affairs and rely on the federal government to regulate interstate commerce (Abernathy, 2006).

The Commerce Clause of the U.S. Constitution determines that the Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” (Commerce Clause, 2014). It also implies that states cannot pass legislation that excessively burdens or discriminates against interstate commerce in the country (the “Dormant” Commerce Clause). The federal power to regulate interstate commerce is the most relevant for the purposes of this text.

The U.S. Supreme Court built a long legacy of interpreting this clause, swinging from the centralization to the decentralization conceptions of federalism, accordingly to American policy debate and historic constitutional dialogue. In the early 1940s the Supreme Court was already employing the word “balkanization” as an analogy to barrier to interstate commerce (Scheiberhttp, 1996).

A. *Duckworth v. Arkansas*, 314 U.S. 390 (U.S. 1941)

In *Duckworth*, the U.S. Supreme Court held that a statute of Arkansas that required a permit for the transportation of intoxicating liquor through the state did not violate the Commerce Clause. The application required the identification of those engaged in the transportation, their routes, points of destination, and payment of a nominal fee. It registers the first reference to “balkanization” by the Supreme Court:

*The extent to which state legislation may be allowed to affect the conduct of interstate business in the absence of Congressional action on the subject has long been a vexatious problem. Recently the tendency has been to abandon the earlier limitations and to sustain more freely such state laws on the ground that Congress has power to supersede them with regulation of its own. It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters. **The practical result is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry.***  
(emphasis added)

B. *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525 (U.S. 1949)

In *H. P. Hood & Sons*, petitioner, a distributor of milk in Massachusetts operated three receiving plants licensed under the Agriculture & Markets Law of New York and applied to for a license for another fourth plant. The New York Commissioner, who stated that the facilities would reduce the supply of milk for local markets and result in destructive competition in the

market, denied the license. The Court held that the New York law violated the Commerce Clause. It evoked the *Duckworth* decision and allocated the legal reasoning behind balkanization in the semantic field of libertarianism:

*The philosophy of [the] Duckworth concurring opinion which the Court rejected, can alone support the holding and opinion today. That philosophy commends itself to many thoughtful people. Some people believe in this philosophy because of fear that judicial toleration of any state regulations of local phases of commerce will bring about what they call “Balkanization” of trade in the United States — trade barriers so high between the states that the stream of interstate commerce cannot flow over them. Other people believe in this philosophy because of an instinctive hostility to any governmental regulation of “free enterprise”; this group prefers a laissez faire economy. To them the spectre of “Bureaucracy” is more frightening than “Balkanization.”* (emphasis added)

*C. Hughes v. Oklahoma*, 441 U.S. 322 (1979)

In *Hughes*, the Appellant was licensed to operate a commercial minnow business in Texas. After transporting a load of fish acquired from a dealer licensed to do business in Oklahoma, it was charged with violating the latter state’s statute that prohibits transporting out of Oklahoma for sale natural minnows originating from waters within the state. The Court held that the Oklahoma statute violated the Commerce Clause, and summarized a goal of the Constitution:

*The few simple words of the Commerce Clause -- “The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .” — reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that, in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.* (emphasis added)

The U.S. Supreme Court expressed its concerns with balkanization in almost thirty cases since 1941 (Alves Jr, 2014). In most occasions, balkanization was essentially a matter of economic policy (Alves Jr, 2014; Gerrymandering, 2014).<sup>2</sup>

#### **IV. Cyberhomeland balkanization**

It is understandable that a startup in Austin or the Silicon Valley, which is struggling with day-to-day business management and protecting its intellectual property assets, is not really attentive to the narrower issues of Internet governance (Kurbalija, 2012). Depending on the company's business, it might never care at all, regardless of its size. Unless it offers very niche or a really large range of online services, it has several incentives to free ride on the international agendas of the American government and technology juggernauts.

However, even if a company does not care which body sets Internet technical standards, where foreign data are stored, what international route they take, or where in the planet government officials meet for coffee, it is still being affected by national regulations that lead to fragmentation at the content layer.

Internet companies are experiencing a balkanized Internet in the United States that resembles the constitutional "economic balkanization" debate. Their online business is impacted by different state regulations adopted throughout the country, particularly those concerning interstate commerce and taxation. To some extent, their challenges resemble the net neutrality

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<sup>2</sup> The second most common use of the term refers to "racial gerrymandering", which concerns the deliberate manipulation of district boundaries to favor one political party and the consequent risk of "balkanizing" the population into competing racial factions. This strategy directly conflicts with the goals of the American political system and the Fourteenth and Fifteenth Amendments of the U.S. Constitution. Ibid. *Gerrymandering*, Wikipedia, <http://en.wikipedia.org/wiki/Gerrymandering> (last visited Jun. 27, 2014)

format: the incumbent company of a highly regulated industry challenged by the disruptive Internet entrant, with some sort of regulatory authority in the middle. Including those exploiting the sharing economy (Sharing economy, 2014), they often escape not only the regulator, but they also eliminate intermediaries in the business chain, relying on technology and direct P2P service delivery.

The next paragraphs provide examples of some challenges that innovative industries face in the United States and how the federal model leads to a balkanized Internet, frustrating the idea of one unified web. They often have to adapt their service provision to comply with local jurisdiction; in a few cases, they are basically banned.<sup>3</sup>

#### A. P2P ridesharing

Lyft, Uber and Sidecar are transportation network startups that offer P2P ridesharing services by connecting drivers and passenger through online applications. Many passengers see them as cost effective alternatives (Fowler, 2014) to traditional taxi and limousine rides, while unprofessional drivers are able to collect some extra revenue.

Popular among tech-savvy communities, these young San Francisco-based companies are facing problems in challenging the highly regulated taxi industry, whose complaints focus on safety and unlawful competition from drivers who do not carry medallions. Neither the ridesharing startups' arguments that they are providing needed transportation alternatives to a taxi industry that has not evolved in decades (Wilson, 2014) nor their recent carrying of commercial liability insurance (Badger, 2014) precluded cities like Seattle (Wilson, 2014), Minneapolis (Perry, 2014), Chicago (Yousef, 2014), New Orleans (Waller, 2014), Saint Louis

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<sup>3</sup> The study of the forthcoming cases was interrupted by May, 2014. Because most of them carry so many lively issues, there might be new regulatory developments since then, particularly concerning P2P ridesharing and lodging.

(Pistor, 2014), and others (Brooks, 2014) from limiting or banning these companies from operating under their jurisdiction. Users interested in trying their services can try Houston (Ryan, 2014) and San Francisco (Sabatini, 2014), where they still run under quasi-stable grounds and inspire other creative spin-off businesses (Said, 2014).

## B. P2P lending

Prosper and LendingClub are the two major for-profit peer-to-peer lending platforms operating online in the United States, since 2005 and 2007, respectively. From their headquarters in San Francisco, these companies allow for lenders to choose and fund loans to borrowers whose profiles are published on their websites. After periods of steady growth, Prosper and LendingClub had their services suspended for some months around 2008 to register with the Securities Exchange Commission and continue to flourish ever since. Both companies state that they are able to offer higher return rates to lenders and lower interest rates to borrowers (United States Government Accountability Office, 2011), when compared to the traditional sources of credit available.

A complex array of federal and states securities, financial, and consumer regulations prevents these companies from doing business across the nation. Prosper is currently open (Cunningham, 2013) to investors from 30 states and borrowers from 47 states; while LendingClub, to 26 and 45, respectively. This scenario is mainly due to the varying rigidity of state laws, which take different approaches to the risks lenders and borrowers face in the P2P online model. In the meantime, as Prosper crosses the barrier of one billion dollar issued loans (Cunningham, 2014a). Wells Fargo struggles with managing internal policies that banned staff from investing in the platforms (Alloway, 2014). For some, it is a sign that banks do care (Cunningham, 2014b) about P2P lending.

### C. P2P lodging

Airbnb is a trusted community marketplace where users book different sorts of accommodations (rooms and entire places) across the world directly from other online users. The San Francisco-based startup became an important competitor of the world hoteling industry, which is fighting back against the company's peer-to-peer model.

The most notable opposition in U.S. comes from New York public authorities and hotel lobbying, which argue that two-thirds of the sublets listed on the platform in the city are illegal (Kurane & Warrier, 2014). They evoke local legislation that prohibits turning short-term rentals into hotel-like businesses (Love, 2013). When the New York Attorney General went to court seeking the data of thousands of local users hosts (Chaban, 2013), Airbnb proposed its local hosts collect hotel occupancy taxes (Lawler, 2014), but still has to manage opposition from NY affordable housing groups (Kami, 2014) who fear rental increases (Monroe, 2014). Although Airbnb is still available in NY, incremental regulatory costs (Hantman, 2014) could make it just expensive enough to turn it into an unattractive option to clients and hosts in the city.

### D. Online gambling

The Interstate Wire Act of 1961 (Federal Wire Act, 2014) has been historically interpreted as prohibiting online gambling. The statute determined that wire communication could not be used for the transmission in interstate commerce of bets or information assisting in placing bets. Violators should be fined or imprisoned. In 2011, the U.S. Department of Justice opinioned that the law still applied to sports events, but left an open door to online gambling (Wyatt, 2011). Since then, Delaware, Nevada and New Jersey (Ruddock, 2013a) passed legislation authorizing online betting, with the former now hosting the most developed market.

The authorized websites, such as Delaware Park Online Casino, Dover Downs Casino Online, and Harrington Gaming Online Casino in Delaware (Smith, 2013a), Real Gaming, UltimatePoker and WSOP.com in Nevada (Smith, 2014), Virgin Casino, Borgata Casino, Caesars Casino, 888Casino and Betfair Casino in New Jersey (Smith, 2013b), offer restricted services for players physically present in those states only, usually with geo-location software checking for the accuracy (Ruddock, 2013b) of the information. Although there are signs that other states could follow suit (Gruetze, 2014), this expansionist movement does not come without opposition. Casino magnate Sheldon G. Adelson is sponsoring a bill (Confessore & Lipton, 2014) and the new Coalition to Stop Internet Gambling (Gruetze, 2014) to rival the Coalition for Consumer & Online Protection (Coalition for Consumer and Online Protection, 2014), organized by representatives from the casino industry who are for its legalization. While these disputes prevent companies like Californian Zynga from offering the sort of real-money casino it runs abroad (Lunden, 2014), out-of-state aficionados can still travel to those insulated territories and connect to a hotel Wi-Fi network for some dedicated online gaming.

#### E. Online direct sales of electric cars

Tesla Motors is a manufacturer of electric cars and electric vehicles components founded in 2003 in Palo Alto. Under the leadership of entrepreneur Elon Musk (the same founder of PayPal and SpaceX), the company is innovating both the electric car industry and the general automobile business model. Instead of relying on traditional car dealership representatives, Tesla operates its own stores and galleries to sell luxury vehicles directly to customers, who enjoy a product with unique characteristics (Gordon-Bloomfield, 2013) of desirability, high performance and the most refined battery technology in the market.



Aside from the expected competition in the car industry, Tesla faces strong regulatory burdens over its business model, once several states (Jones, 2014), such as Arizona, Texas, Virginia, Ohio, New Jersey, have laws that restrict or make it illegal for manufacturers to sell cars to retail consumers. In some of them, Tesla can only display the cars at its showrooms, and prospective clients have to check for the prices online and eventually order it through the web, a transaction that legally takes place in California. In 2013, though, North Carolina almost took these restrictions to a whole new level, when state senators proposed a bill to ban direct online sales of cars in that state (Oremus, 2013), which, according to Tesla, would ultimately circumvent Internet-based communications with the company (Associated Press, 2013). The proposed bill was eventually dropped (Curry, 2013), but it signals the sort of protective regulatory measure against the web that is considered by states that are highly dependent on traditional middleman business models.

## **V. Introduction – Unification and inductive reasoning**

Internet balkanization is one of the catchiest expressions in the ongoing global Internet policy disputes. It means, among other things: ways of segregating people online according to one's preferences; different levels of infrastructure interconnection to the Internet; fragments resulting from regulatory and cultural forces; a diplomatic agenda; and a matter of commerce and jurisdiction. It can occur due to the action of foreign players and within a sole sovereign national territory.

In the present media and diplomatic context, Internet balkanization is not exclusively an analogous effect to the “geopolitical balkanization”, as occurred in the Balkans, but also to

“economic balkanization”, as discussed in the interpretation of the Commerce Clause of the U.S. Constitution.

Building ways to fight censorship and promote trust in the distributed nature of the Internet should be premises of the transition of the Internet Assigned Numbers Authority (IANA) functions to the multistakeholder community (Icann, 2014a; National Telecommunications and Information Administration, 2014); the implementation of the NETmundial Multistakeholder Statement, which approved a set of IG Principles and a Roadmap for the Future Evolution of the Internet Governance in Sao Paulo last April (NETmundial, 2014); the final report of the High-Level Panel on Global Internet Cooperation and Governance Mechanisms published in May (Icann, 2014b); the emerging NETmundial Initiative by the World Economic Forum, which held its inaugural meeting in August (Malcolm, 2014); ITU’s Plenipotentiary Conference 2014 (PP-14) in South Korea in October (ITU, 2014b); and the review of the World Summit on the Information Society in 2015 (WSIS+10) (ITU, 2014c).

In order to contribute to this effort, the polysemous term “Internet balkanization” should not be employed as a mere rhetorical argument. Some of its origins can imply that the solution to the problem it is to oppose is calling a global Constitutional Convention, comparable to what the Framers of the American Constitution once did. In this scenario, sovereign States would have to face limitations to control their domestic affairs and rely on a supreme central order to regulate cross-border transactions and other common Internet & jurisdiction matters (The Internet & Jurisdiction Project, 2014). As Bertrand de la Chapelle (La Chapele, 2012) and others (Cerf, Ryan & Senges, 2013) point out, this is an outdated paradigm dating back to the Peace of Westphalia treaties from 1648 that hardly fits modern regulation of the Internet. It is probably not the goal of most of its arguers either (Bureau of Economic and Business Affairs, 2014), who

advocate that the multistakeholder process is capable of providing an innovative and reliable IG framework beyond the management level of the DNS root zone (DNS root zone, 2013). These are all meaningful moves for the future of the global web.

Lastly, another noble reason to abandon this expression in Internet governance negotiations: “balkanization” is a pejorative term, regardless of all derivative uses it has morphed into over the past century. Bulgarian historian Maria Todorova (Todorova, 2009; Todorova, 1997) from University of Illinois, is a specialist in the history of the Balkans and denounces why:

*“Balkanization” not only had come to denote the parcelization of large and viable political units but also had become a synonym for a reversion to the tribal, the backward, the primitive, the barbarian. In its latest hypostasis, particularly in American academe, it has been completely decontextualized and paradigmatically related to a variety of problems. That the Balkans have been described as the “other” of Europe does not need special proof. What has been emphasized about the Balkans is that its inhabitants do not care to conform to the standards of behavior devised as normative by and for the civilized world. As with any generalization, this one is based on reductionism, but the reductionism and stereotyping of the Balkans has been of such degree and intensity that the discourse merits and requires special analysis.* (emphasis added)

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