

THE ICANN EXPERIMENT

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The Internet Corporation for Assigned Names and Numbers (ICANN) is a private California not-for-profit corporation that has taken responsibility for allocating domain names and IP addresses. In October 2002, at its meeting in Shanghai, the ICANN Board of Directors voted to adopt bylaws that allow the Board to create policy for the generic top level domains (.com, .net, .org, .biz, and others). How can we best understand ICANN? What is the theory that allows ICANN to tell actors in the domain name system (registries, registrars, and registrants) what to do, and persuades governments to defer to its decisions? Three familiar models of governance are frequently used in describing ICANN: (1) ICANN can be understood as a forum for decision-making about public resources, and can be legitimate only if both the public is suitably represented in ICANN's structure and it operates transparently and accountably (the "democracy" story); (2) ICANN is a central body of experts that can be relied on to make good decisions in the interests of the global Internet community after that community has commented (the "Administrative Procedure Act" story); and (3) ICANN is a narrowly confined technical coordinator whose legitimacy depends on its staying within this role (the "expert coordination" story).

Each of these rationales is flawed. The "democracy" story does not make sense for ICANN because it requires that democratic theory be divorced from its necessary framework. Democratic theories focus on limitations on governmental power in a context in which a "citizenship" of those participating in a particular regime is clearly determined by boundaries. Here, ICANN is purporting to make rules about a global online community that has no boundaries or limitations. The "Administrative Procedure Act" story has defects as well. ICANN has not been delegated specific administrative power and its decisions are unreviewable. Finally, the "expert coordination" story is clearly incomplete because it does not fit what ICANN actually has done and intends to do.

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Although none of the three stories articulated above fits ICANN, there is a story of ICANN that better reflects ICANN's history and the world within which ICANN operates: ICANN can best be understood as an organization whose authority to make rules has been (and should continue to be, in contrast to the Board's assertion of power in Shanghai) based on contracts that require compliance with future rules only when those rules are based on the demonstrated consensus of those who have chosen to participate in its forums and are affected by its policies. Consensus, as defined in the contracts ICANN has already signed with registries and registrars, meets the core goals of the democratic heuristic in the global context of the Internet.

The ICANN experiment raises fundamental questions about the basis for rulemaking in any online community, and the means by which governments can be persuaded to defer to (or enforce) those rules. If taken seriously, this experiment presents the opportunity to create an optimal structure for determining who decides the rules operating online.

The ICANN reliance on "consensus" has deeply rooted and interesting links to the early history of the common law in the United States. Some have argued that in the early nineteenth century U.S. judges did not view themselves as "making law" in the commercial arena, but rather viewed themselves as upholding and vindicating legitimate private expectations.² In order to avoid the defeat of these expectations, judges recognized commercial practices and customs that had emerged as consensus rules as a result of multiple, autonomous, private interactions.³ There is nothing novel about the ICANN consensus model.

Although ICANN is merely a California not-for-profit corporation, the Department of Commerce defers to its recommendations with respect to new additions to the "root" - the database of top level domains like .com and .info. ICANN has thus been able to condition entry into the root on agreement to its policies, with very little oversight by the U.S. government. These ICANN policies touch on issues that are the subject of great current contro-

² RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM* 90 (1977) (arguing that *Swift v. Tyson*'s focus on general rather than local practices helped preserve the expectations of commercial actors) [hereinafter BRIDWELL & WHITTEN].

³ *Id.*

versy - including privacy (how much information must a registrant make available as a condition of registering a domain name?), intellectual property infringement (should a registrant have to automatically give up a name if he/she is found to be a “cybersquatter?”), and business model mandates (should only registrars “accredited” by ICANN be allowed to register names? Should registries be allowed to register names themselves?). Fundamentally, ICANN is in a position to provide a chokepoint: a single lever by which identity on the Internet can be turned on or off. ICANN has the power to exercise the online equivalent of force, and its legitimacy in exercising this power is a current question.

Part I of this essay briefly describes the background of ICANN’s contractual agreements with generic top level domain (gTLD) registries and registrars, and the central role of the “consensus policy” regime set forth in those agreements. Part II reviews and criticizes the various models of ICANN articulated in connection with ICANN’s reform efforts in 2002. Part III discusses the background for the consensus-based model of ICANN decision-making and its links to the origin of the common law in the United States. Part IV speculates whether the consensus theory of governance may make more sense than the “democratic” model in online spaces.

I. BACKGROUND

A. *From Postel to NSI*

In the early days, when the Internet was a United States-based research medium, Dr. Jon Postel (under contract with the U.S. government) maintained lists of assigned Internet “host” numbers (a host is a computer with a connection to the Internet) and published technical parameters for use on the Internet.⁴ These functions have become known as the Internet Assigned Numbers Authority, or IANA. Every host has a unique Internet Protocol (IP) number, and IANA coordinated this system by allocating blocks of numerical addresses to regional IP registries. Decisions about the domain name system were made by consensus as detected and articulated

⁴ ICANN’s history is described in detail in MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE (MIT Press, 2002) [hereinafter MUELLER], and in Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA & the Constitution*, 50 DUKE L.J. 17 (2000) [hereinafter Froomkin]. The background provided here is for the convenience of the reader who has not read these excellent treatments.

by Postel. Memoranda called Requests for Comments (or RFCs) on engineering, technical, and other protocols were circulated to bring about discussion and lead to agreement. In what became a famous slogan adopted by the Internet Engineering Task Force (the group responsible for generating Internet protocols), these early technicians believed in “rough consensus and running code.”⁵ Unanimity was not required for a proposal to be adopted. However, a proposal would not be approved if it was not accompanied by a demonstration that most of the members of the relevant working group thought it was the right thing to do.

In the mid-1980s, IANA announced an approach by which human-understandable names would be associated with IP addresses; thus the domain name system (DNS) began.⁶ The DNS distributes the maintenance of names-to-addresses tables through hierarchical delegation. In 1991-92, the National Science Foundation took responsibility for coordinating and funding the management of the Internet infrastructure, and at the beginning of 1993, NSF signed a five-year agreement with Network Solutions, Inc. (NSI) (now part of VeriSign, Inc.) for providing domain name registration services in the .com, .net and .org domains.⁷

By 1998, although global use of the Internet was growing quickly, the domain name system was still subject to agreements with the U.S. government. The Clinton Administration, in an effort headed by Ira Magaziner and Becky Burr, issued a June 1998 White Paper calling for the creation of a private-sector group to establish policy for the domain name system based on principles of stability, competition, private bottom-up coordination, and representation.⁸ By “bottom-up coordination,” the White Paper stated that it meant a process that would, “as far as possible, reflect the bottom-up governance that has characterized development of the

⁵ See <http://www.sindominio.net/biblioweb/telematica/open-sources-html/node40.html>.

⁶ The development of the DNS is described in detail in Weinberg, *ICANN and the Problem of Legitimacy*, *infra* note 56.

⁷ .com and .net are “top level domains,” or TLDs. The list of “generic TLDs,” or gTLDs, includes com, net, org, info, biz, pro, and name. There are three “sponsored TLDs,” or sTLDs: museum, aero, and coop. Country code TLDs (such as .uk and .de) are called ccTLDs. A registry has authority over the names-to-addresses table for a particular top level domain, such as .com; registrars, under the current system, are the customer-facing entities authorized by ICANN to enter into contracts with registrants for second-level domain names like ibm.com. ICANN has contracts with gTLD and sTLD registries and gTLD registrars.

⁸ See http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm.

Internet to date” and would be coordinated by responsible private-sector action.⁹ This new private-sector actor took on four functions: (1) to set policy for and direct the allocation of IP number blocks; (2) to oversee the operation of the Internet root server system (the thirteen mirrored computers at the top of the hierarchy of names-to-addresses tables); (3) to oversee policy for determining the circumstances under which new top level domains would be added to the root system; and (4) to coordinate the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet.¹⁰

In October 1998, ICANN was established by Postel and others, and in November of that year the Department of Commerce entered into a Memorandum of Understanding under which ICANN would assist in transferring domain name system management responsibilities to the private sector.¹¹ The stated plan was that ICANN was to provide a proof of concept of the “steps necessary to transition management responsibility for DNS functions now performed by, or on behalf of, the U.S. government to a private-sector not-for-profit entity.”¹²

The Department of Commerce and NSI made a deal in October 1998.¹³ In Amendment 11 to its Cooperative Agreement, NSI agreed to create a shared registry system that would allow other entities (registrars) to provide domain names to the public.¹⁴ NSI also agreed to “recognize NewCo [the placeholder name for what became ICANN] pursuant to a contract between NSI and NewCo.”¹⁵ For almost a year, NSI withheld its recognition of ICANN and its agreement to a contract with the new entity.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>.

¹² *Id.* Some have argued that ICANN is a quasi-governmental institution because of the existence of this agreement. See, e.g., Henry H. Perritt, Jr., *The Internet & Public International Law: The Internet is Changing the Public International Legal System*, 88 KY. L.J. 885, 941 (1999). Others have pointed out that the Department of Commerce could not have legally have delegated governmental power to ICANN. See, e.g., Froomkin, *supra* note 4.

¹³ The dramatic political wrangling that took place between 1995 and 1998 is described in MUELLER, *supra* note 4.

¹⁴ See <http://www.ntia.doc.gov/ntiahome/domainname/proposals/docnsi100698.htm>

¹⁵ *Id.*

B. *NSI's 1999 "Consensus Policy" Contract with ICANN*

In late September 1999, a web of contracts was concluded between and among NSI, ICANN and the Department of Commerce. NSI agreed with the Department of Commerce that NSI would enter into a contract with ICANN to perform as a registry, and agreed to have NSI's registrar function accredited by ICANN. In exchange, NSI was allowed to continue operating the .com, .net and .org registries (for \$6 per name), and it was able to ensure that the Department of Commerce would have continuing control over ICANN's operations. The key provision of NSI's contract with ICANN established a consensus policy regime to determine when NSI would be bound by future rules that ICANN might make.

Specifically, NSI agreed to comply only with ICANN policies that were specifically set forth in the contract or that related to "issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, technical reliability and/or stable operation of the Internet or domain-name system."¹⁶ More importantly, policies on these subjects had to be the result of consensus demonstrated by a written report documenting (a) the extent of agreement among affected groups, (b) the outreach process used to obtain the views of groups likely to be affected, and (c) the nature and intensity of reasoned support and opposition to the proposed policy. In addition, policies had to be recommended by at least a two-thirds vote of the council of the ICANN Supporting Organization addressing the issue.¹⁷ Only then could the ICANN Board of Directors adopt the policy. If NSI disputed the presence of such a consensus, the issue would be reviewed by an Independent Review Panel established under ICANN's bylaws.¹⁸

¹⁶ See ICANN-NSI Registry Agreement, Sec. 3(A)(ii)(b) (Nov. 10, 1999), available at <http://www.icann.org/nsi/nsi-registry-agreement-04nov99.htm>. Some other specific subject matters on which rules might be made were also set forth.

¹⁷ *Id.*, at Definitions(1). Between 1999 and the end of 2002, when the reform effort described in the next section was implemented, ICANN's Supporting Organizations were each focused on different parts of ICANN's mandate: addressing through the Address Supporting Organization; domain names through the Domain Name Supporting Organization, and protocols through the Protocol Support Organization. Almost all of the energy and controversy in the ICANN context during 1998-2002 took place in the Domain Name Supporting Organization (DNSO). Within the DNSO, there were constituencies established in ICANN's bylaws: registries for generic names, or "gTLDs," registrars, intellectual property groups, business, registries for ccTLDs. There is also a "Names Council" made up of delegates from these constituencies.

¹⁸ *Id.*

In 2001-2002, ICANN executed contracts with seven additional registry operators (for .info, .biz, .name, .pro, .aero, .museum, and .coop). Each of these registry agreements included the consensus policy regime, as did ICANN's agreements with registrars accredited to sell names in these TLDs.

C. Reform Efforts

In February 2002, Stuart Lynn, ICANN's President, announced that ICANN was broken and would have to be fixed before it could continue its work.¹⁹ ICANN's Memorandum of Understanding with the Department of Commerce was due for renewal at the end of September 2002, and ICANN had not accomplished many of the tasks set forth in that agreement.²⁰ Lynn proposed to reform ICANN by adding 50 percent more staff (from 20 to 30) and substantially increasing ICANN's budget.²¹ He also wanted to change ICANN's organizational structure by revising its Supporting Organizations and by dropping an earlier effort to elect at-large board members from the Internet community.²² Finally, he proposed that the ICANN Board should be able to create global rules on its own, without waiting for consensus:

"I have come to the conclusion that the original concept of a purely private sector body, based on consensus and consent, has been shown to be impractical . . . The current ICANN concept is based on the notion of 'bottom-up' policy development, with the Supporting Organizations responsible for the development of policy and the Board theoretically just the implementing device for those policies. In hindsight, the notion of truly 'bottom-up' consensus decision-making simply has not proven workable, partly because the process is too exposed to capture by special interests and partly because ICANN relies entirely on volun-

¹⁹ See <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm>

²⁰ Among other things, the Memorandum of Understanding required ICANN to reach agreements with the Regional Internet Registries (RIRs); to continue to develop and test the ICANN Independent Review process to address claims by members of the Internet community that they have been adversely affected by decisions in conflict with ICANN's by-laws or contractual obligations; to report on ICANN's experience with the fully implemented independent review process; to reach agreements with the thirteen root-server operators; and to reach agreements with the ccTLDs. As of February 2004, ICANN had accomplished none of these tasks. It had no agreements with the RIRs, it had not created or implemented the Independent Review Panel; it had no agreements with the root-server operators, and it had not made much progress on reaching agreements with the ccTLDs.

²¹ *Id.*

²² *Id.*

teers to do all the work . . . To be effective, the ICANN Board of Trustees has to be clearly empowered to make decisions even if there is no clear consensus, to the extent they see it necessary to carry out the ICANN mission.”²³

Lynn offered his proposal “with the caveat that we do not have time for an extended debate; ICANN will, in my opinion, either be reformed or irrelevant within the next several months.”²⁴

In response to the February 2002 Lynn paper, and to the work papers and committee reports issued by ICANN in the months that followed, adherents of one or more of the three models of ICANN made public comments. The next Part discusses and analyzes these models.

II. THREE MODELS OF ICANN

A. *The “Democratic” Story*

The “democratic” story of ICANN posits that, to the extent ICANN engages in decision-making that has broad impact on the general public, ICANN’s legitimacy depends on its (a) having some “public voice” as an important part of the structure of its decision-making, (b) being subjected to declarations of user rights, and (c) being subjected to mechanisms for improving the accountability and transparency of the ICANN Board (including election of Board members by those affected by ICANN’s rules).²⁵ A key paper from the “democracy” point of view states:

“Participation and representation are governance values that are now globally accepted. They are based upon the concept that those who are affected by decisions or policies initiated by the relevant bodies should participate or be represented in the policy making processes. Participation creates empowerment and empowerment yields a sense of collaboration. The more comprehensive the level of participation, or the more inclusive the level of representation, the less likely that those subject to a resulting policy will consider that policy unfair or illegitimate.

²³ *Id.*

²⁴ *Id.*

²⁵ See, e.g., NAIS Project Final Report (Aug. 2001), at <http://www.naisproject.org/report/final/1.1.shtml>; Davidson testimony, *infra* note 34; Civil Society Democracy Project, Cyber-Federalist No. 14, *Creating the Illusion of Legitimacy*, (August 8, 2002), available at http://cpsr.org/internetdemocracy/cyber-fed/Number_14.html.

This holds especially true for such a globally pervasive medium as the Internet.”²⁶

This story is flawed because it proceeds from the assumption that, absent these “democratic” limitations, ICANN has the power to do whatever it likes with respect to its management of the root.²⁷ Adherents to this model seek to impose limitations of participation, transparency, and accountability in order to ensure that such overarching power is not abused. They assume that ICANN is, or should be, a body entrusted with regulatory power because it is operated democratically.

Without delving into the intricacies of “democratic theory,” we can discuss key elements of this model. Democracy is government of the people, by the people, and for the people.²⁸ Most people, when they think of a democracy, believe that it has power only over the people who make up its electorate, and that the key goal of democracies is to ensure that “citizens” of a “state,” who are subject to the rules made by that state, play a role in making the rules and selecting those who make the rules. Again, using “democracy” as a heuristic, the core value of this model can be called “consent of the governed.” In the broadest sense of this model, democracies are legitimate because, when all the citizens of a state play a role in making all the rules by which they all must live, they can all tell each other what to do. This preserves the “congruence” between those for whose benefit rules are made and those who must obey and are affected by such rules.²⁹ In the democracy model, the people are sovereign; the power of government is lim-

²⁶ NAIS Project Report, Section 1.1 (Aug. 2001), at <http://www.naisproject.org/report/final/1.1.shtml>.

²⁷ The “root” is the shorthand designation for ICANN’s power to recommend new additions to the authoritative list of TLDs that is deferred to by most Internet service providers around the world and thus visible to end-users. See MUELLER, *supra* note 4.

²⁸ See President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (“[W]e here highly resolve that these dead shall not have died in vain, that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth”).

²⁹ For this reason, and speaking only very generally, democracies are characterized by majority voting rules, declarations of rights that protect the individual against the tyranny of the majority, legislators who are supposed to represent the body of people affected by their decisions, one-person-one-vote rules, and attempts to ensure that the group of those with a right to vote largely overlaps the group of those required to comply with the resulting rules. Because majority voting ignores the interests of minorities (and representative bodies might be captured by factions), the founding fathers of the American form of democracy went to great lengths to set up checks and balances, to establish courts and basic constitutional rights as against the government, and to arrange for deliberative legislatures.

ited by law; people exercise their authority directly through voting; and people exercise their authority indirectly through elected representatives.

The “democracy” model appears to depend on boundaries that give sovereigns the ability to assess (even inaccurately) the size of their electorate. These boundaries provide several important functions, including: (1) line-drawing around the group with respect to which the sovereign has the strongest enforcement power; (2) ability to assess the effects of any particular policy (a feedback mechanism); (3) legitimacy based on a credible assertion of “representativeness” with respect to the electorate, even if a large portion of the electorate chooses not to vote; and (4) notice to the potential electorate that they are now in a “place” whose laws they can play a role in shaping, however indirectly.

The fundamental problem with applying a democratic model to ICANN decision making, and using “democratic” representativeness as a basis for ICANN’s legitimacy, is that the credibility of any kind of representativeness or “public participation” in ICANN vitally depends on knowledge of who ICANN’s “citizens” are. But we cannot even take a census of the online participants who might be affected by ICANN policies. This “citizenry” could include anyone who had considered registering a domain name but decided not to because of some element of the ICANN-required registration scheme. It could include anyone who had ever used WHOIS information, or indeed had ever gone online. How could one-person-one-vote rules ever be policed online, in a world in which it is very difficult to tell with whom you are dealing (or even whether the “whom” is a machine or a person)?

Without this information, and without an electorate, how could anyone claim to be “representative” of that citizenry, or some portion of it? How could anyone decide what a “majority” position was?³⁰

Again, these are broad generalizations. Governments frequently act in ways that affect people who are not citizens.

³⁰ In 2000, ICANN did hold online “At Large” elections. Some still argue these were successful and should be repeated. ICANN’s supporting organizations also elect board members. But even if ICANN’s Board was elected by the people who “showed up” to participate in these elections, the Board could not plausibly claim to represent the global Internet community - at least in the sense of having been delegated by that community to make policy.

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In the global sphere in which the “democracy” modelists assume ICANN has power, no such boundaries exist. Analysis of each of the elements of the “democratic” story reveals the assumptions of bounded nation-state democratic power that underlie this model.

Having the participation of the “public voice” as a substantial part of ICANN’s decision-making is clearly a worthwhile value. As the White Paper put it:

“The development of sound, fair, and widely accepted policies for the management of DNS will depend on input from the broad and growing community of Internet users. Management structures should reflect the functional and geographic diversity of the Internet and its users. Mechanisms should be established to ensure international participation in decision-making.”³¹

It is true that broad participation and public involvement in ICANN decision-making will go a long way to address ICANN’s perceived bias toward insiders and large corporations. Broad participation is not, however, by itself a sound basis for ICANN’s legitimacy to tell others what to do. There can be no assurance that those who have chosen to participate are in any sense designated to represent all the parties affected by ICANN’s rules. Nor can ICANN point to any historic event (or cultural tradition) by means of which a “citizenry” might arguably have entered into a “social

³¹ White Paper, at http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm. The method by which the global Internet community should participate in ICANN has been the subject of contentious debate for several years. Even the minor step of creating a constituency for individual domain name holders within the DNSO has generated years of controversy. In 2000, ICANN’s Board adopted what it characterized as “a compromise interim solution: the direct selection of five ICANN directors by a self-selected At-Large constituency, combined with the continued service of four of the original ICANN directors (for a period not to exceed two years) to ensure that there would remain nine At-Large ‘slots’ on the ICANN Board until (at a minimum) the results of [a study commissioned by ICANN] were implemented.” Call for Public Input: At Large Study (Nov. 27, 2000), posted by ICANN, at <http://www.icann.org/committees/at-large/study-comments.htm>. The Lynn paper called for the elimination of At Large directors: “Three years of effort have proven that a global online election of ICANN Board members by an entirely unknown and self-selected membership is not a workable solution to this problem . . . It is simply unrealistic to expect ICANN - thinly-staffed, underfunded, technically-oriented ICANN - to be able to achieve what no other global institution has: a global electorate expressing its will through stable representative institutions.” Lynn proposed that foreign governments select directors in place of any global election, and later ICANN decided that the seats on ICANN’s Board once reserved for the At-Large would be filled by a Nominating Committee selected by ICANN’s Board. See Article VII of the new bylaws adopted at the Shanghai meeting in October 2002, at <http://www.icann.org/minutes/minutes-appa-31oct02.htm#VI>.

contract” on which legitimate rulemaking sovereignty might be based.³²

The request of the democracy modelists for ICANN to supply a declaration of users’ rights is a clear appeal to a “government” that already has the power to make decisions about those users:

“As an affirmative check on overreaching actions by the Board, ICANN should enact a formal declaration of rights reserved for ICANN stakeholders and Internet users. These reserved powers and rights should generally guarantee individuals and organizations around the world the protection of their individual liberties (of the sort contemplated by the UN Universal Declaration of Human Rights), their property, their expectation to be treated fairly and with due process.”³³

Limiting ICANN’s “mission” is a worthwhile effort. ICANN staff has used ICANN’s control over entry into the root to require new TLD registries to agree to detailed, “regulatory” controls in their contracts as a condition of doing business.³⁴ ICANN’s Board has controlled the release of new services by registries, and conditioned these services on requirements it considers to be protective of consumers’ interests.³⁵ It has stated on many occasions that it views itself as an antitrust enforcer - a task usually reserved for

³² The At Large Membership Study Committee, created by ICANN in early 2001 to find “an effective means by which the diverse global Internet communities and stakeholders may participate in ICANN’s policy development, deliberations, and actions,” found it extremely difficult to spark public interest in ICANN’s work.

“[D]espite extensive outreach efforts and notices to the ICANN’s 143,789 registrants for the At-Large election, the 5000 member ICANN announce list, and regular notices to the ALSC’s announce list (which included 5985 subscribers as of October 31), participation and input was low. The average attendance at the ALSC’s outreach meetings was approximately 45 people and our on-line forum received posts from 100 people as of October 27 (and over half of the 1163 posts were from 6 people).”

ICANN At-Large Membership Study Committee Final Report (Nov. 5, 2001), at http://www.atlargestudy.org/final_report.shtml.

³³ Final NAIS Project Report, at <http://www.naisproject.org/report/final/3.6.1.2.shtml>.

³⁴ See Limited Powers, Improved Accountability: Saving the ICANN Experiment: Before the Senate Commerce, Science, and Transportation Committee Subcommittee on Science, Technology, and Space (June 12, 2002) (testimony of Alan B. Davidson, Associate Director for Center For Democracy and Technology), available at <http://www.cdt.org/testimony/020612davidson.shtml> [hereinafter Davidson testimony]. This tendency continues unabated. As this article was submitted for publication in February 2004, ICANN staff members were driving toward adoption of a process for prior ICANN review of changes to a gTLD’s architecture or operation. See <http://www.icann.org/gnso/issue-reports/registry-svcs-report-19nov03.htm>. Will this mean that every decision to hire additional staff or change the identity of servers will require ICANN approval?

³⁵ WLS final report, at <http://www.icann.org/minutes/prelim-report-23aug02.htm>.

national governments.³⁶ Stuart Lynn has said that “it is impossible to enter a new top level domain (TLD) into the root without answering serious policy questions: what name, who gets to operate it, for how long, under what conditions, and so forth. And how to reflect public interest concerns such as fair competition, privacy, intellectual property, and diversity?”

Lynn also has suggested: “If not ICANN . . . then who would perform these policy functions?”³⁷ Moreover, some have already called for ICANN to have a greater role promoting goals such as consumer protection online, assistance collecting Internet taxes, or regulation of content.³⁸ It is clear that ICANN’s actions and announced plans raise questions about “mission creep.”³⁹ ICANN has stated that its mission is to “[c]oordinate[] policy development

³⁶ See, e.g., Esther Dyson, Statement at June 2, 2001 Meeting in Stockholm, at <http://cyber.law.harvard.edu/icann/stockholm/archive/scribe-ga-060201.html>.

³⁷ See Testimony of M. Stuart Lynn, Before the Senate Commerce, Science, and Transportation Committee Subcommittee on Science, Technology, and Space (June 12, 2002), available at <http://www.icann.org/correspondence/lynn-testimony-12jun02.htm>.

³⁸ See Davidson testimony, *supra* note 34.

³⁹ The May 6, 2002 Working Paper on ICANN Mission and Core Values, on which ICANN’s reform committee initially relied, stated:

“Insertion of a new TLD into the root or redelegation of an old TLD necessarily involves answers to the questions of what TLDs, who should operate the associated registries, what restrictions if any should be placed on those TLDs and registries, when and for how long should the right to operate be delegated, who should have the authority to determine when change should or should not occur, how should technical and other performance criteria be assessed, etc. And cutting across these questions is what should be predefined, what should be left to the marketplace, and what degree of decision enforcement is required. All of this takes place within the framework of preserving the stability of the Internet, and also is related to other core ICANN values such as competition and internationalization.”

See <http://www.icann.org/committees/evol-reform/working-paper-mission-06may02.htm>. The paper asserts the “core value” that ICANN should “[r]espect the creativity and innovation made possible by the Internet by limiting ICANN’s activities to those matters within ICANN’s mission requiring or *significantly benefiting from* global coordination.” (emphasis supplied). *Id.* Since what “benefits from” global coordination is to be left up to ICANN, its mission is potentially unlimited. *Id.* In its new bylaws adopted in Shanghai, ICANN broadened its mission even further, stating that: “The mission of ICANN is to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems. In particular, ICANN: 1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are (a.) Domain names (forming a system referred to as “DNS”); (b) Internet protocol (IP) addresses and autonomous system (AS) numbers; and (c) Protocol port and parameter numbers. 2. Coordinates the operation and evolution of the DNS root name server system. 3. Coordinates policy-development *reasonably and appropriately related* to these technical functions.” See <http://www.icann.org/minutes/minutes-appa-31oct02.htm#I>.

reasonably and appropriately related to [its] technical functions,” which leaves ICANN with a great deal of discretion.⁴⁰

Refining ICANN’s mission through the use of a “bill of rights,” however, would not, standing by itself, help us understand why ICANN has the authority to tell others what to do. As with the “broad public participation” value, the “limitation on mission” or “bill of rights,” democratic value is a constitutional principle that depends on having the legitimacy to make decisions in the first place.⁴¹ A statement of what a “government” (whether public or private) *cannot* do implies that in the absence of that statement the government has potentially unrestricted justification to act against its citizens. The U.S. Bill of Rights was created for just this reason.⁴² A government of limited powers, whether public or private, is still a “government” that is assumed to have dominion over its citizenry.⁴³ The necessary context for a bill of rights is a governing entity that has a bounded electorate.⁴⁴ In exchange for their participation (direct or indirect) in making rules, the electorate agrees to be bound by those rules - but only if the rules themselves are subject to the limitation of individual rights. There has never been, and there might never be, occasion for this bargain to be struck between ICANN and the global Internet community, and, separated from this context (and with no broad social contract to which to point), the notion of a bill of rights provides no support for understanding ICANN’s ability to tell other people what to do.

⁴⁰ *Id.*

⁴¹ The U.S. Constitution itself, for example, is a higher law that authorizes a government of limited powers. The Preamble to the U.S. Constitution states the purposes of government — to form a more perfect union, establish justice, provide for the common defense, and promote the general welfare. *See* U.S. CONST., Preamble.

⁴² The Anti-Federalists, who feared a strong central government, refused to support the Constitution without one. In the end, Jefferson persuaded the Federalists to support such a declaration: “[A] bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse.” Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *available at* <http://teachingamericanhistory.org/library/index.asp?document=306>.

⁴³ A second problem with reliance on a narrowly defined mission as a source of legitimacy is that any description of ICANN’s role is certain to over- or under-describe what ICANN does. ICANN pushed for a broad mission, appealing to the need to address emergencies and stability issues that cannot be anticipated. Those adhering to the “technical coordination” theory of ICANN legitimacy, discussed in II(C) below, pushed for a narrow technical description of ICANN’s function that does not match the reality of what ICANN has already done. Neither description is useful as a limiting document.

⁴⁴ “Sovereign” non-state actors, such as corporations, may also be granted legitimacy and power in exchange (in part) for providing protection of shareholder benefits.

Finally, although it would be a good idea to improve the accountability and transparency of ICANN Board decision-making, such improvements themselves would not help us understand ICANN's authority. Let us assume that accountability is the duty of officials to tell citizens what they are doing, and the right of the citizens to take action when unsatisfactory conduct has occurred. Again, as with "public voice" and "bill of rights" concerns, the context for accountability is a bounded electorate whose interests representative officials are obliged to keep in mind. The idea is that the more officials that are accountable to those citizens, and the more it is possible for citizens to understand and challenge official action, the more these officials will keep citizens' interests at the forefront of their consciousness - and thus maintain the "democratic model" ideal of "congruence."⁴⁵

Taking accountability out of this "democratic story" context renders it meaningless as a source of authority. In the world of ICANN, in which democratic "representativeness" is impossible, and Board members are not directly elected by those they purport to govern, no theory of accountability by itself will support ICANN's right to tell others what to do.⁴⁶

Similarly, "transparency" incorporates the same assumption of power. If we assume that "transparency" means citizen access to government information so as to allow citizens to challenge governmental actions, the context for this key "democratic model" concept is a bounded electorate to which officials owe their representative election and delegation of power. In the United States, those officials are assumed to have the authority to make many kinds of decisions about citizens, but are kept in check by Federal Freedom of Information, Sunshine in Government, Advisory Committee, Ethics in Government, and Whistleblower Protection Acts (and their state statutory counterparts).⁴⁷ Transparency does not

⁴⁵ "[T]he concentration of power and the subjection of individuals will increase amongst democratic nations . . . in the same proportion as their ignorance." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Part II, Book IV (1834).

⁴⁶ ICANN's reform efforts included a great deal of emphasis on accountability and transparency. This "Administrative Procedure Act" approach to ICANN's legitimacy is discussed below in Section II(B). Providing more accountability to a third party (for example, the Department of Commerce) rather than to a citizenry obviously does not confer legitimate power to set rules for such citizens. Nor does "legal accountability" (or willingness to be sued) confer such power.

⁴⁷ Another required component is the ability of the governed to react to the information discovered and to take steps to change the rules or the rulemakers.

itself convey authority to the institution making rules. A wide-open door on a meeting of self-appointed decision-makers does not change the legitimacy of the decisions made by the group seen through that door.

B. *The “APA” Story*

The “APA” model of ICANN’s legitimacy, often presented by ICANN itself, asserts that ICANN’s Board is a group of wise individuals who can be relied on to listen carefully to comments and make the best central decisions on behalf of the global Internet community. At a June 2002 Senate hearing, ICANN President Lynn testified that it was ICANN’s role “to ensure that certain essential technical tasks are effectively performed for the benefit of the global Internet,” and went on to assert that “what is needed [for the DNS] is thoughtful, reasoned human judgment, bounded by clear, predictable and transparent rules, and informed by broad public consultation and input.”⁴⁸

The Board’s Evolution and Reform Committee relied heavily on this understanding of ICANN:

“Because of the global nature of ICANN and because of the considerable interest in its decisions evidenced by so many individuals, organizations, businesses, and governments it is also critical that ICANN have and be seen to have a Board of Directors composed of individuals of the highest caliber, expertise, and integrity, acting cohesively as a group, able to act promptly and effectively as necessary . . .

The ICANN Board of Directors is ICANN’s ultimate decision-making body. It and it alone has the legal responsibility to make and be legally accountable for all policy and other decisions. It is ultimately responsible for the management of the policy development process. Therefore, while it is highly desirable to seek and wherever possible find consensus, it does not follow that even proposals that enjoy consensus support should receive uncritical Board approval. The Board has a fiduciary responsibility to make decisions on the basis of good faith judgment in furthering the public interest . . . A bottom-up, consensus-driven approach to policy development is preferable wherever such approaches do not prevent the Board from carrying out its [sic] ultimate responsibility for ensuring policies are developed, ap-

⁴⁸ See Testimony of M. Stuart Lynn, *supra* note 37.

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proved, and implemented as necessary to accomplish ICANN's mission."⁴⁹

This theory of ICANN's role played out through the reform process, which focused largely on questions of Board selection and time deadlines for submission of reports to the Board that would enable the Board to make "effective" final decisions.⁵⁰

In the past, the Department of Commerce had taken the position that its relationship with ICANN is "a normal relationship it might have with any contractor," and ICANN had argued that it neither regulates nor makes policy.⁵¹ Lynn's comments and papers published by the Board's Evolution and Reform Committee during the reform period made clear that this was no longer ICANN's view. Viewed from ICANN's perspective on its role in the world, in which a wise Board would make policy decisions on behalf of the global Internet, reform was needed in order to provide better inputs for Board decision-making and a speedier process for getting those inputs submitted.⁵²

The problem with the "Administrative Procedure Act" model is that the ability of the Board to listen does not, by itself, give ICANN the right to make decisions or be deferred to by governments, for a very simple reason: No one gave ICANN the power to make rules in the first place. While it is perfectly true that the

⁴⁹ ICANN: A Blueprint for Reform (June 20, 2002), available at <http://www.icann.org/committees/evol-reform/blueprint-20jun02.htm>.

⁵⁰ See, e.g., Names Policy Development Process Assistance Group: Recommendation (Aug. 21, 2002), at <http://www.icann.org/committees/evol-reform/npdpag-report-21aug02.htm> (proposing detailed framework for a "policy development process"); Accountability Framework Assistance Project: Recommendations Regarding Accountability (Aug. 23, 2002), at <http://www.icann.org/committees/evol-reform/afap-report-23aug02.htm> (proposing ombudsman, reconsideration, and arbitration mechanisms). The word "effective" became ICANN's rallying cry throughout the reform process. It appears nine times in Stuart Lynn's ten-page Senate testimony of June 12, 2002. See Testimony of M. Stuart Lynn, *supra* note 37. The end result of this emphasis on process was adoption by the Board of bylaws that provide for an elaborate "Policy Development Process" that can be trumped by a Board vote. See <http://www.icann.org/minutes/minutes-appa-annexa-31oct02.htm>, Sec. 13.

⁵¹ Froomkin, *supra* note 4. DOC has called ICANN's work "coordination." White Paper, *supra* note 31 ("[U]nder the Green Paper proposal, the U.S. Government would gradually transfer these coordination functions to the new corporation . . . with the goal of having the new corporation carry out operational responsibility by October 1998").

⁵² The Committee on Evolution and Reform stated that the goals of reform should include "an ICANN that is: [(1)] More effective in fulfilling its mission; [(2)] Constrained by streamlined processes that encourage full participation by the community yet unburdened by time-consuming procedures that impede effectiveness; . . . [(3)] Able to act appropriately even when widespread consensus is not forthcoming." ICANN: A Blueprint for Reform, *supra* note 49.

Board of Directors of ICANN has the responsibility to act on behalf of ICANN as a corporation, and it is also true that ICANN has established an elaborate “policy development process” in order to gather comments on noticed rules from interested people, the idea of APA-like notice and comment rulemaking depends on a delegation of authority from a responsible body, including clear standards that limit the scope of agency discretion.⁵³ The APA heuristic is best understood as a process for resolving delegated power.

The “APA model,” broadly understood, assumes delegation by Congress to an agency of detailed decisions based on Congress’s legitimate lawmaking authority. The APA provides the possibility of judicial review of whether the agency went outside the authority granted to it, as well as whether it followed proper procedures in reaching its decision (considering all comments and giving a rational explanation of its decision). The reason for the transparency and due process requirements set forth in the APA is to ensure that all persons who have an interest in, or are affected by, a proposed rule or other agency action can make their interests known. Even notice and comment rulemaking in agencies is often criticized as illegitimate, as compared with decisions by democratically elected officials, but at least such rulemaking starts with a bounded delegation of power.

Here, in support of its “APA” vision of itself, ICANN has done a great deal of work on the procedures it will follow in reaching its decisions, while maintaining its ability to act effectively.⁵⁴ ICANN has, however, not been delegated power. Nor, under its reform proposals, will its exercise of power be subjected to rigorous review. First, a delegation of regulatory power from the Department of Commerce to ICANN (a private party) would violate the non-delegation doctrine and raise substantial due process concerns.⁵⁵ No other government agency or international treaty or-

⁵³ 5 U.S.C. §§ 551—706 (Supp. 1993). The Administrative Procedure Act added procedural requirements to ensure due process and public participation in rulemaking. Rules issued by agencies cannot be enforced if they are not published in the Federal Register, and agencies must give notice of proposed rules and take public comments to which they respond in the final rule.

⁵⁴ See, e.g., Names Policy Development Process Assistance Group: Recommendation, (Aug. 21, 2002) at <http://www.icann.org/committees/evol-reform/npdpag-report-21aug02.htm> (proposing detailed framework for a “policy development process”).

⁵⁵ Michael Froomkin has persuasively argued that the *Carter Coal* doctrine of nondelegation to private parties is or should remain vital, particularly with respect to due process concerns, and that this doctrine is peculiarly apt in the ICANN situation. Froomkin, *supra*

ganization has delegated any power to ICANN. Second, ICANN has eliminated the Independent Review Panel contemplated by its contracts, and even the Department of Commerce has not, in fact, reviewed decisions of ICANN.⁵⁶

The “APA” model of ICANN is flawed and incomplete because it does not include a source for ICANN’s rulemaking power. ICANN’s Board has promised to listen attentively to those that speak to it, and has undertaken to provide reasons for its decisions in a transparent way. However, this undertaking is not enough to give this Board the right to tell others what to do. Any illegitimate group could promise to listen and explain its reasons. There is no “consent of the governed” in Stuart Lynn’s reform plan, and the “APA story” does not help us understand ICANN.

C. The “Expert Coordination” Model

The third story of ICANN, the “expert coordination” narrative, was set forth in an August 2002 communication from the operators of the three largest TLD registries: VeriSign (.com, .net, .org), Nominet (.uk), and DENIC (.de):

note 4, at 130-155. Professor Froomkin has also pointed out that if ICANN has not been delegated power, DOC’s approval and acquiescence to ICANN’s actions constitute regulatory actions that must conform to the APA. *See, e.g.,* A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 93, 96 (2002). I am not taking on Prof. Froomkin’s legal arguments about ICANN’s formation and control by the Department of Commerce; indeed, I assume that these points are correct, and I am looking beyond them to strong theoretical arguments that support ICANN’s legitimacy to continue its work during the time before any international treaty can come into force with respect to domain name management - which may be a very long time indeed.

⁵⁶ *See* MUELLER, *supra* note 4. For the story of ICANN’s elimination of the IRP, see Professor Ethan Katsh’s Reconsideration Request, at <http://www.icann.org/committees/reconsideration/katsh-request-12apr02.htm>. ICANN’s Board rejected this request on August 23, 2002, *see* <http://www.icann.org/minutes/prelim-report-23aug02.htm>; <http://www.icann.org/committees/reconsideration/rc02-4.htm>. *See also* Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187 (2000) (“[ICANN] has invoked what one might call the techniques of administrative law: it has, in important respects, structured itself so that it looks like a classic U.S. administrative agency, using and purportedly bound by the tools of bureaucratic rationality. Yet the techniques of administrative law are inadequate in this context, for they do not provide meaningful constraint in the absence of judicial review”). Weinberg argues that any reliance on “consensus” as the basis of ICANN’s legitimacy is misplaced because the issues over which ICANN seeks to exercise authority cannot be resolved through consensus. This, however, is a feature, not a bug, of the consensus process — ICANN should be making only those few global coordination decisions that most involved have agreed to, and everything else should be left to local decisionmaking. *See infra* Part III.

“ICANN [sic] function is to act as a central depository for information about, and provide coordination among those who operate, the technical infrastructure of the Internet, most notably in the domain name and IP numbering systems. The function of regulation remains within governmental prerogatives, whether it be of prices, services, business practices, or open competition in general.

ICANN’s function is also that of a facilitator and educator, having regard to the global internet community and specifically industry self-regulations in gTLD space. It should provide a voluntary forum for exchanges of information between domain name service providers and others with interest in the DNS, as well as a forum for the development of [presumably voluntary] industry ‘best practices.’

. . . ICANN functions to oversee the development and implementation of policy relative to the mandatory UDRP, WHOIS and data escrow policies for gTLD operators, and provides oversight for the introduction of new gTLDs. ICANN should also act as a resource to assist ccTLDs in the development of voluntary dispute resolution, WHOIS, and data escrow policies that reflect the unique circumstances of ccTLD operators. Adoption by ccTLDs should be on a voluntary basis, in line with national laws and in consultation with their respective local Internet communities, including governments.”

There is a great deal of history behind this statement that is beyond the scope of this Article.⁵⁷ In sum, this statement represented a harkening back to the origins of ICANN and the White Paper.

⁵⁷ For example, .uk and .de are ccTLDs, not gTLDs. Starting in 1985, Jon Postel had assigned country-code top level domains to applicants. He used a first-come-first-served rule for these applicants as long as basic criteria he had established were met: the applicant had to be “a responsible person,” and the administrative contact had to be in the territory symbolized by the code. This method of allocation often ignored governments and telecommunications ministries in favor of university departments and research firms, and did not provide a process for resolving disputes about control of the country-codes. Most critically for ICANN’s success as a global organization, the country codes did not need permission from a governmental contracting partner (much less ICANN) to exist or to continue in existence. No contract controlled their operations, and as a result the ccTLDs were not obligated to pay dues to ICANN, and instead made voluntary contributions to ICANN’s coffers. ICANN’s ability to claim that it was “coordinating the global Internet” was deeply undercut by the ccTLDs’ absence as contractual partners with ICANN, and ICANN’s inability to reach contractual agreements with the ccTLDs was a prime driver for its reform efforts in 2002. Stuart Lynn’s February 2002 report stated: “An ICANN process without the full participation of the 243 ccTLDs cannot accomplish its core objectives of privatization and internationalization.” This statement by the two largest ccTLDs was designed to signal to ICANN that it should not plan to be anything other than a resource for ccTLDs, helping them craft their own voluntary dispute resolution

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In the White Paper, ICANN was tasked with four functions: (1) to set policy for and direct the allocation of IP number blocks; (2) to oversee the operation of the Internet root server system (the thirteen computers at the top of the hierarchy of names-to-addresses tables); (3) to oversee policy for determining the circumstances under which new top level domains would be added to the root system; and (4) to coordinate the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet. During the period after June 1998, when the White Paper was published, ICANN had signed contracts with VeriSign and other operators of new TLDs that included many “regulatory” elements not facially required by the White Paper mandate (including the consensus policy structure discussed in Part II(D) below). In a sense, VeriSign’s statement was a radical backing away from the contracts it had signed with ICANN, and was portrayed by ICANN as such.⁵⁸

The “expert coordination” model postulates two things: first, that technically expert bodies will be able to cope with new technologies and modern “technical” problems better than other entities; second, that ICANN in particular should focus on “coordination” rather than “policymaking.”⁵⁹ Neither is persuasive as a source of understanding in this context.

The “expertise” story resonates with the Progressive Era faith in administrative experts and the science of government:

“[T]here arise problems which require peculiar and expert handling; a striking example is that of railway regulation. The popular will cannot be expressed by Congress, because the popular will does not discover a method. A result is wanted - better service and rates, freedom from discrimination and tyranny. No general body can reach that result: it takes an expert economist

processes and WHOIS and escrow policies. The ccTLD statement was also focused on cabining ICANN’s ability to make decisions about the “redelegation” (or reassignment) of ccTLD registry administration: ICANN should not be permitted to do anything more than implement a country’s authoritative request for redelegation, and only under certain conditions (e.g., where an incumbent had failed to operate the service continuously).

⁵⁸ See Washington Internet Daily, August 2, 2002. VeriSign, which agreed to be accountable [to ICANN] in return for the right to continue to run [.com, .net., and .org], now wants to ‘wriggle out of’ an agreement it helped negotiate. “Experience has shown that monopolies don’t want to be accountable to anyone,” [ICANN general counsel Louis] Touton said. *Id.*

⁵⁹ Similarly, the Center for Democracy and Technology has raised concerns about ICANN’s ability to venture into content regulation. See Davidson testimony, *supra* note 34.

to formulate a rule. Accordingly, we must construct a special administrative body - a commission, like the Interstate Commerce Commission - and charge this body with the duty of investigating the problem and of laying down the rule which will reach the given result.”⁶⁰

Early models of rulemaking processes emphasized the value of administrators as “practitioners of the science of administration.”⁶¹ But the “science of administration” model is particularly unhelpful in the ICANN context, given the incompatible values that are likely to affect issues with which ICANN is confronted (even within the narrow list of issues over which ICANN is “allowed” to have dominion by the VeriSign/ DENIC/Nominet statement).

For example, the VeriSign/DENIC/Nominet list includes “oversight for the introduction of new gTLDs.” ICANN views this task as necessarily including many policy questions:

“Insertion of a new TLD into the root or redelegation of an old TLD necessarily involves answers to the questions of what TLDs, who should operate the associated registries, what restrictions if any should be placed on those TLDs and registries, when and for how long should the right to operate be delegated, who should have the authority to determine when change should or should not occur, how should technical and other performance criteria be assessed, etc. And cutting across these questions is what should be predefined, what should be left to the marketplace, and what degree of decision enforcement is required. All of this takes place within the framework of preserving the stability of the Internet, and also is related to other core ICANN values such as competition and internationalization.”⁶²

⁶⁰ A.A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 439 (1917).

⁶¹ David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 412 (1997) (describing criticism of this model, including the limits on human cognition and decision-making ability, and contextual constraints).

⁶² Working Paper on ICANN Mission and Core Values, *supra* note 39. ICANN’s introduction of seven new gTLDs during 2001-2002 engendered tremendous controversy, both for its glacial pace and the Board’s apparently subjective and impulsive selection decisions. One diarist of the Board selection process in November 2000 said: “The funniest event of the evening (if your taste runs to the tragicomic) was the beauty pageant of the 44 new-TLD applicants, at 3 minutes each + questions from the Board. With the prize for best entertainment probably going to the one who spent his 3 minutes railing at the unfairness of the process for selection, and hearing Esther Dyson’s dry “Thank you for wasting your time.” “. . . The Open Board meeting is one of the stranger spectacles I’ve seen. Here you have the 19 board members sitting on the dais, discussing matters ranging from budgets to .biz. You have the room full of people, listening, wandering in and out, sometimes laugh-

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Viewed from ICANN's perspective, each of these questions involves political infighting (e.g., between the intellectual property community, which would like to sharply limit the number of TLDs, and the operators of the new TLDs), semantic assessments (e.g., which new domains are unacceptably "close" to existing domains), business plan evaluations (e.g., which registry operator is "sounder" than another), competition considerations (e.g., whether "incumbent" registry operators should be permitted to operate additional domains), and a host of other issues. Conflicting values are at stake. "Expertise," taken by itself, will not permit ICANN legitimately to choose among these conflicting, subjective values.⁶³

Second, ICANN has already gone far beyond mere "coordination" in its activities, and is likely to maintain or increase its scope of work; any story of ICANN that does not encompass this scope of work will not fit reality. Even the VeriSign/DENIC/Nominet statement recognizes this issue: "ICANN functions to oversee the development and implementation of policy relative to the mandatory UDRP, WHOIS and data escrow policies for gTLD operators."⁶⁴ Translated: ICANN works on issues related to (a) mandatory dispute resolution for claims of cybersquatting; (b) whether registration data of registrants (particularly individual domain name registrants) should be made publicly available; and whether and under what conditions registry operators should put a copy of all of their registration data in a safe place, so that the registry can be quickly recreated in the event of an emergency or

ing, never allowed to participate. And you have the decisions. It was quite plain from the discussion that the board had not made up its mind before the meeting. Opinions were stated, refuted, retracted, reflected and refined. Criteria were proposed, evaluated, applied, changed and retracted. And through it all, you could hear the undercurrent: "we are getting somewhere at last . . . web was removed from considerations because the best-liked applicant had changed its approach after submission. .coop was liked because it was clear that the guys applying had self-interest in policing its criteria. .geo died because it was unclear why it needed to be in the root, and because several questions about the technology ideas appeared to be not sufficiently worked out. The application for 'either .air or .aero' got pointed at '.aero' because the board members felt that '.air' was related to stuff we breathe, and not particularly to large metal objects moving through it. And so it went." Harald Tviet Alvestrand, Trip Report, at http://www.alvestrand.no/reiser/ICANN_LA_2000.html.

⁶³ VeriSign/DENIC/Nominet might respond that they are not interested in having ICANN do more than run a lottery for new domains, based on applicants meeting minimum financial and technical requirements. This response is not, however, apparent from the face of their statement (and it may be, in fact, that as incumbent registries themselves *they do not favor entry into the root of many domains*).

⁶⁴ See VeriSign/DENIC/Nominet statement, *supra* Part II.C.

transition.⁶⁵ If “coordination” means “avoiding conflicting names and addresses, and allocating name and address responsibility,” ICANN can no longer be described as a “coordinator.”

III. THE CONSENSUS STORY OF ICANN’S AUTHORITY

Although each of the three narratives examined above is flawed, the “consensus model” understanding of ICANN supports ICANN’s legitimacy, is deeply rooted in ICANN’s history and existing contractual agreements, and serves key “democratic model” ideals of congruence, transparency, and accountability. Part I(A) described the origins of the consensus model in the 1999 NSI agreements with ICANN. This Part discusses the theoretical basis for the consensus approach.

A. Background

NSI’s 1999 contract (and the contracts of later gTLD registries and registrars executed with ICANN between 1999 and the end of 2002) contained a consensus policy regime, under which these businesses committed to comply with future policies (policies that did not exist at the time they signed their contracts) mandating or prohibiting particular actions by these businesses if such policies were actually the product of a documented outreach process and enjoyed documented support by parties that were substantially affected by the policy.⁶⁶ There are three elements to the consensus

⁶⁵ Each of these items has a rich history that is beyond the scope of this Article. For discussions of the UDRP, see MUELLER, *supra* note 4; A. Michael Froomkin, *ICANN’s “Uniform Dispute Resolution Policy” — Causes and (Partial) Cures*, 67 BROOK. L. REV. 605 (2002), available at <http://personal.law.miami.edu/~froomkin/articles/udrp.pdf>; Michael Geist, *Fair.com?*, at <http://aix1.uottawa.ca/~geist/geistudrp.pdf>. For discussion of whois policy, see .name’s proposal to change its whois practices (<http://www.icann.org/correspondence/burr-letter-to-touton-09nov02.htm>); *cf.* the draft Fraudulent Online Identity Sanctions Act (FOISA) introduced at a House subcommittee meeting on February 4, 2004 (imposing heightened penalties for providing false whois data). For discussion of escrow, required by ICANN’s contracts with registries and registrars, see Karl Auerbach July 31, 2003 Senate testimony: “However, while ICANN has in fact built a highly intensive business regulatory structure, one of the most important components of value to the DNS name users is still weak. That part that is still incompletely fulfilled is the escrow of all DNS registration data so that the customer base of a failed . . . DNS provider can be recovered, and service restored.” See <http://www.cavebear.com/rw/senate-july-31-2003.htm>.

⁶⁶ This consensus policy process did not apply to all activities of ICANN. When the Board made administrative decisions about how many staff to pay for, for example, or even how many TLDs to open up, it could act without documented consensus. Also, the Board could adopt a temporary specification or policy mandating (or prohibiting) particu-

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policy structure as set forth in ICANN's contracts with gTLD registries and registrars: first, ICANN is supposed to make policies only about a particular set of subjects (a subject matter boundary that has been nicknamed the "picket fence");⁶⁷ second, an actual consensus must be *demonstrated* by documentary evidence; and third, there must be a forum for challenges to the presence of consensus.⁶⁸ In the absence of a consensus policy to the contrary, a registry or registrar was free to innovate and run its business as it saw fit.

Even before the 1999 web of contracts was implemented, the ICANN community had an example of how the consensus policy process could work. The Uniform Dispute Resolution Policy (UDRP), for which implementation documents were adopted in late October 1999, is the closest thing that ICANN has had to a consensus policy.⁶⁹ The report that accompanied the proposed UDRP reflected an extensive series of discussions among those affected by the proposal, documented arguments for and against the proposal, and provided related background information. The decision of the Board to adopt it was based on the fact that intense discussions among strong proponents of differing viewpoints had yielded a document that no substantially affected party vigorously opposed. It is true that both substantive and procedural mistakes were made with respect to the resulting policy. But the UDRP was not adopted until there was a widely shared view that going forward with the proposal was better than not having any standardized policy on the issue.

The UDRP can be viewed as an outgrowth of negotiated consent procedures that have been used to decide on Internet proto-

lar action by a registry or registrar in an emergency (when "the Board reasonably determines that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the operational stability of Registry Services, the DNS or the Internet") without documented consensus. And the Board could amend its contracts without consensus (and provide approvals for action under these contracts without consensus). ICANN was required to document the existence of consensus only when it was imposing a non-emergency, mandatory, generally applicable policy on a registry or registrar.

⁶⁷ The picket fence itself is not a product of, or subject to, consensus, which may pose problems for this theory.

⁶⁸ As part of its campaign to eliminate the consensus policy regime, ICANN has eliminated the idea of review of the presence of consensus.

⁶⁹ For registrar/registry accreditation contracts dated after November 1999 it is deemed to be a consensus policy (absent change by further consensus). See Registrar Accreditation Agreement Section I.B.5.

cols and technical standards.⁷⁰ As Michael Froomkin has described it, the Internet Engineering Task Force (IETF), created in 1986, has been the main forum in which technical standards for the Internet have been proposed, tested, and debated, with “unlimited grassroots participation.”⁷¹ New standards begin with a “Proposed Standard,” which can be proposed by anyone. The Internet Engineering Steering Group (IESG) then drafts a charter for a “working group” within the IETF and picks a working group chair.⁷² These working groups traditionally reach a “rough consensus.”⁷³

“At base, the keys to a working group’s operation are that it reach a “rough” consensus about decisions and that it make those decisions in a manner which maintains forward progress towards the goals stated in the charter. When the working group agrees that it has a stable specification which satisfies appropriate technical requirements, it submits it to the IESG for approval. A brief, public review permits final expression and evaluation of concerns about technical content or working group process.”⁷⁴

Once a proposed standard has been implemented in at least two working products, it can be promoted by the IESG to a “Draft Standard.”⁷⁵ When a Draft Standard has been in place for at least four months, it can become an Internet Standard (and be published as a “Request for Comments” or RFC).⁷⁶

In a 1993 paper, David Crocker explained that “rough consensus” may not only be the secret to the IETF’s success, but may also explain why IETF standards have been more acceptable to the marketplace than standards created by the member bodies of the International Standards Organization and the International Telecommunication Union (ITU):

“[S]uccessful IETF working groups are driven by near-term needs and consequently try to produce designs that remove as much as possible . . . The trick in the process appears to be the

⁷⁰ See Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 *HARV. L. REV.* 749, 783-93 (2003).

⁷¹ *Id.*

⁷² See IETF Secretariat et al., *The Tao of IETF 3* (Network Working Group, Request for Comments No. 1718, Nov. 1994), available at <http://www.ietf.org/rfc/rfc1718.txt>, at 16.

⁷³ Making Standards the IETF Way, D. Crocker / Brandenburg Consulting <dcrocker@mordor.stanford.edu>, at <http://www.isoc.org/internet/standards/papers/crocker-on-standards.shtml>

⁷⁴ *Id.*

⁷⁵ *Id.* at 26.

⁷⁶ *Id.*

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group consensus requirement. As one would expect, each participant contributes their list of desired features, but the short time-frame on the work requires that the group reach consensus quickly. This can only be done by removing features, since only a small core of features will be clearly acceptable to most participants. (The alternative approach of including all of everyone's preferences requires too much group debate and results in a design that is too obviously unacceptable.)⁷⁷

Crocker favorably compared the IETF "rough consensus" approach to the OSI process, which he believed attempted to take into account and accommodate all interests (and reflected a desire to "include[] as much as possible in a design").⁷⁸ The need to log-roll and compromise (and "remove" elements) within a relatively short period of time leads to "rough consensus" in the IETF process, which means something less than full unanimity, but more than a simple majority of those present.⁷⁹

In the UDRP-creation process, similar logrolling and compromising occurred under the pressure of time. The White Paper called for the UN's World Intellectual Property Organization (WIPO) to provide an advisory report about cybersquatting. WIPO's report was referred by ICANN to a "working group," and the ICANN Board addressed the issue. Meanwhile, a group of registrars who wished to be accredited by ICANN drafted their own model cybersquatting proposal to which the then-unique gTLD registry, Network Solutions, agreed. The Board then convened a committee that was tasked with hammering out final unresolved issues in advance of the creation of the November 1999 web of contracts.⁸⁰

⁷⁷ Making Standards the IETF Way; D. Crocker / Brandenburg Consulting <dcrocker@mordor.stanford.edu> 1993, Association for Computing Machinery (Reprinted from StandardView, Vol 1, No. 1, 1993(1)).

⁷⁸ *Id.*

⁷⁹ *Id.* See also J. Zittrain, *ICANN: Between the Public and the Private*, 14 BERKELEY TECH. L.J. 1071, 1078 (1999) (IETF consensus process works because people involved come from similar backgrounds and have little patience for formalized structures).

⁸⁰ See Note, *Trademarks and Service Marks and Internet Domain Names: Giving ICANN Deference*, 33 ARIZ. ST. L.J. 637, 639 (2001) (arguing that courts should give substantial deference to UDRP decisions because "ICANN provides an international solution to a global problem").

B. *The Consensus Model*

The consensus policy theory of legitimacy, as implemented in the ICANN context, is that if most of those affected by a rule agree that it will improve a given community or set of interactions, and intense opposition is absent, irrational, or limited to those who do not bear the costs of the policy in question, then those who will need to implement the rule have agreed in advance, by contract, to do so. This model for understanding ICANN, unlike the others discussed above, provides a concrete answer to the following question: "Who gave ICANN the right to tell me what to do?" In a sense, the consensus policy theory provides a real "social contract" and contractually binding "consent of the governed." The ICANN consensus contract asks each potential participant whether they will agree contractually to implement and abide by a future rule, sight unseen, provided that most people support it and those parties substantially affected by the policy do not vigorously oppose it (or their objection is unreasonable).

This contract supports ICANN's legitimacy (and helps in understanding ICANN) because it provides a demonstration that each participant in the ICANN regime has affirmatively agreed to ICANN's jurisdiction for the limited purpose of making global rules with which most affected participants agree to go along. It is intentionally designed to produce only those rules that most people agree should be global - and very few rules will fall into this category. Everything that is not the subject of a global consensus agreement will be left to local decision-making. The consensus policy theory provides subjective balancing between necessary global rules and local rules that no amount of expertise can pretend to provide.

This actual consent of the governed should be helpful in persuading governments to defer to ICANN's rules. In a recent article, Paul Schiff Berman suggested that assertions of jurisdiction should be reconceptualized as "the rhetorical site for discussions of multiple overlapping and shifting conceptions of community."⁸¹ Berman argues that no jurisdictional scheme is more "natural" than any other, and that the "tie between boundaries, community, identity, and sovereignty is problematic, contingent, socially constructed, and contested." Berman goes on to posit that because

⁸¹ Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 325 (Dec. 2002).

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communities are no longer fixed in place, there is no reason to privilege nation-states in their assertions of dominion over parties or disputes, and that “communities” (defined as any group that decides it is a group, whether state or non-state, and including multiple attachments across time and space) are able to claim jurisdiction themselves. Whether such an assertion of jurisdiction will be enforced or deferred to is the important and interesting question, in Berman’s view:

“Jurisdiction becomes the terrain of engagement for debates about the appropriate definition of community and the articulation of norms. Jurisdiction must be based on whether the parties before the court are appropriately conceptualized as members of the same community however that community is defined. And a court subsequently being asked to enforce a judgment would need to address in a more nuanced way both the question of whether the assertion of jurisdiction that led to the judgment was legitimate and whether the substantive norms announced by the prior court should be deemed enforceable.”⁸²

Drawing on the work of Robert Cover, Berman points out that states do not have a monopoly on law, and that “jurisdiction” (literally, “juris-diction,” the power to speak as a community) can be asserted as either “resistance to Kings” (which is risky and contingent because it is not clear, in the absence of a King, who will enforce the community’s judgment), or “articulation of alternative norms” (which will require convincing other norm-generating communities of the acceptability of the normative world the new jurisdictional assertion suggests in order for enforcement to occur). Enforcement of either of these assertions will depend in important part on the community’s ability to persuade others that it is indeed a community that rightly had dominion over the action and actor about which it is complaining.

The consensus contract provides the key missing link, the essential evidence that makes ICANN’s assertion of jurisdiction legitimate. ICANN can demonstrate that there was general agreement to a particular global norm, that opposition to that norm or rule present when the norm was adopted was properly overridden because it was irrational, that violation of that norm is not condoned, and that the violator’s actions are properly within the dominion of ICANN. Governments can decide on this basis whether ICANN’s

⁸² *Id.*

assertion of jurisdiction was legitimate, and can enforce (or defer to) ICANN's edict.

C. *Strengths of the Consensus Theory*

The consensus theory addresses many of the key goals of the "democracy model," including congruence, consent of the governed, scope of enforcement power, a way to deal with "subsidiarity" concerns (conflicts between local and global rules), transparency, and accountability.

First, the dependence of the democratic story on a bounded electorate can be met by ICANN's agreements with those who participate in its processes - registries, registrars, businesses, registrants, and any other people or entities who "show up" as part of the ICANN process. The contours of this group will change constantly, of course, but ICANN will be able know roughly who it is talking to and who has agreed to be bound by ICANN determinations.

The idea that "who shows up" may be taken as a representative sample of the rest of the world is part of ICANN's history (and that of other more technical groups such as the IETF). ICANN has established constituencies within the DNSO for business, IP, registries, non-commercial entities, and others. Because it is impossible to get a cross-section of (for example) every non-commercial Internet user, the ICANN system treats the Non-Commercial Domain Name Holders Constituency (that is, the people who "show up") as the representative constituency. This is a practical approach that can be implemented with a simple contractual agreement to participate, pay minor dues, and adhere to consensus policies (to the extent applicable).⁸³

With this contractual framework in place, ICANN's ability to operate with "congruence" - to be able to say that those bound by its rules are mostly the same groups whose welfare was considered when making them - becomes possible. In creating consensus-based policies, ICANN will be required to keep in mind the interests of all those who have signed contracts with it, and all of its contractual partners will have a voice (whether they choose to ex-

⁸³ Those who "show up" and are affected by a particular proposed consensus policy can prevent the finding of a consensus. Thus, even if the vote of those who "show up" cannot create a legitimate representative "democracy," it will still be true that ICANN will not be able to impose rules on people against their expressed will.

ercise it or not) in the resulting documented demonstration of consensus. If particular groups are particularly worried about ICANN policies, they can “show up” and participate in the documentation process - and they will have to be listened to. A related benefit of the consensus model is that it allows a line to be drawn around those who are subject to the resulting policies. Only those who have entered the regime through voluntary contracts (including registrants) are bound to obey ICANN’s policy decisions.

To be sure, ICANN’s assertion of jurisdiction through these consensus contracts will produce spillover effects, because its rules will affect the actions and behavior of those with whom it currently has no direct contractual relationship - including, but not limited to, people who wish to register domain names, other governments, and businesses who have not involved themselves with ICANN’s processes. But every system of “extraterritorial” jurisdiction has spillover effects.⁸⁴ The price of eliminating these effects - by abolishing any global rulemaking in the area of domain names and addresses - is too high. The strength of the consensus model is that all global consensus policies, in order to be enforceable, must have been the subject of demonstrated efforts to take into account the interests of those affected. Thus, the risk of friction created by inevitable spillover effects will be mitigated by the congruence with which this model is designed to operate. Neither vote counting (as in the democracy model) nor rulemaking (as in the APA model) will necessarily achieve this demonstrative power.⁸⁵ Indeed, it should take far less energy to voice an objection to a consensus policy (and thus derail it) than to muster representative “votes” against it.

The consensus theory, implemented through actual contracts with participants in the ICANN process, also solves the “subsidiarity” problem that requires a creation of a hierarchy among actors generating particular sets of rules. As a matter of contract, no creator of “local” rules will be allowed to interfere with consen-

⁸⁴ Jack Goldsmith has identified spillover effects as “the central problem of modern conflict of laws.” Jack Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1212 (1998).

⁸⁵ Additionally, effects on individuals and groups who do not have contracts with ICANN are likely to be attenuated. Even though anyone can be affected by lawful private action, private actors do not and need not give everyone the right to participate in making such private decisions. To be sure, private actors are subject to external regulation, but so is ICANN. It cannot violate antitrust laws, and cannot (by fiat) make something “legal” that is illegal in a particular country.

sus-based “global” rules concerned with interoperability. If the “local” rule-creator does so interfere, the ICANN regime will have the authority to enforce its rules against this actor.⁸⁶ Correspondingly, the central decision maker will only be able to treat a particular issue as global if those affected agree that it should be so treated.⁸⁷

A significant strength of the consensus policy theory is that, if implemented appropriately, it permits continuous feedback concerning the effects of policies on those who are subject to them - like polls and voting in a democracy, policy-development ebbs and flows constantly, informing everyone how (or whether) the line between “what global rules are needed” and “what is purely a matter of local concern” is moving.

This feedback should also operate at the margin, where ICANN will need to continuously attract new registrants, registries, and registrars by “marketing” its rules (and changing those rules in reaction to customer dismay). ICANN survives only through the deference and cooperation of the ISPs, who collectively determine what names are visible on the public Internet - and if the ISPs’ customers no longer want to be “ruled” by ICANN, the ISPs will presumably look elsewhere for their authoritative list of name servers. The “democracy” model also theoretically includes this crucial feedback element, for no democracy will survive if all its citizens flee.

The “democratic model” values of “involvement of the public voice,” “transparency,” and “accountability” are all facilitated through consensus development, which relies on the involvement of “who shows up” for its legitimacy, requires documentation of real agreements (or at least of the absence of strong disagreements), and mandates visible accountability. It is, again, a system that is designed to produce very few rules, and to leave most questions to local decision-making.

⁸⁶ The consensus theory is designed to protect minorities, by providing that substantially affected minorities can prevent consensus (as long as their dissent is rational).

⁸⁷ Other private ordering mechanisms have similar solutions to subsidiarity (e.g., the Presbyterians, who establish governing bodies (Session, Presbytery, Synod, General Assembly) and ensure that each higher governing body has the right of review and control over a lower one and has power to determine matters of controversy upon reference, complaint or appeal).

D. *Problems With the Consensus Theory*

Given the theoretical strength of the consensus policy idea as a basis for ICANN's legitimacy to tell others what to do (and to have these rules deferred to by others), why has ICANN sought to eliminate it in favor of the "APA model"? This section describes three frequently heard objections to the consensus policy model.

1. *It Won't Work*

In its reform process, ICANN specifically targeted the consensus theory for destruction. Recall Stuart Lynn's report, in which he stated: "I have come to the conclusion that the original concept of a purely private sector body, based on consensus and consent, has been shown to be impractical" The "impractical" argument against the consensus policy process is supported by the fact that since the NSI registry contract was executed in late 1999, no consensus policies have been created or adopted by ICANN.⁸⁸

There are several reasons for this phenomenon. First, ICANN staff, who played a crucial role in facilitating the deal-making and consensus building that led to adoption of the UDRP, had not publicly exerted leadership in calling for the creation of consensus policies and running the process. Second, the development and structure of the constituency system within the DNSO, and the work of the Names Council have blocked any work toward true community consensus along the lines followed by those who worked on the UDRP. Each constituency has viewed itself as a group of "representatives" who would work to further the perceived goals of their constituents, and the Names Council (which was supposed to facilitate the development of consensus) viewed itself as a legislature. This "legislature" view produced a flurry of seat-claiming and report-controlling but very little substantive work.⁸⁹ It also had the effect of alienating the very registries and

⁸⁸ Similarly, in *RULING THE ROOT*, *supra* note 4, Milton Mueller has argued that determining which party is affected by a particular rule, and the strength or weakness of their opposition to that rule, is too subjective to be practical.

⁸⁹ Perhaps the ultimate expression of ICANN's embrace of such seat-claiming is found in the Second Report of ICANN's Evolution and Reform Committee: "We believe that the Nominating Committee [to be responsible for selecting a majority of the Board members, members of the GNSO Council, the ccNSO Council, the Technical Advisory Committee, and the At Large Advisory Committee] is one of the most important parts of a reformed ICANN. It must function effectively, or ICANN itself will not function effectively." Committee on ICANN Evolution and Reform Second Interim Implementation Report (Sept. 2, 2002), at <http://www.icann.org/committees/evol-reform/second-implem>

registrars who logically would otherwise have been defenders of the consensus regime as a source of protection against arbitrary Board action. Most fundamentally, ICANN staff worried that consensus could never work because companies would refuse to “come to the table” for selfish reasons. As a paper published at the time of ICANN’s June 2002 meeting stated:

“The ERC blueprint suggests that the consensus process is unworkable because there will be holdouts who rationally, but for selfish reasons, will refuse to support any proposals that might prevent them from conducting their business as they see fit, even where that course of action imposes serious costs on the global internet community.”⁹⁰

The Evolution and Reform Committee had ignored the ability to override dissent (if irrational or wrongful) that is implicit in the concept of consensus.

2. *ICANN’s Contracts are Not Voluntary*

Another objection to the consensus model in the ICANN context is that ICANN’s ability to impose policies on others has been expanded by its monopoly control over a desirable resource: entry into the root. Based on this control, ICANN has been able to extract contracts from registry operators that include elaborate “regulatory” requirements to which the registry operator would have preferred not to agree. These contractual provisions have not themselves been subject to any “consensus” process, and would not be in a world in which the initial contract was a voluntary agreement to the framework of policies that had already been established (and to future policies that were created through consensus).

If the setting of initial conditions (in registry contracts, or in the scope of the “picket fence”) is not subject to consensus, and if businesses that want to be part of the DNS are forced to sign contracts that contain these initial conditions, then the “voluntary” agreement of these businesses to ICANN’s normative jurisdiction is inherently suspect.⁹¹

ation-report-02sep02.htm. The Nominating Committee is required by ICANN to pick only Board members who are “committ[ed] to the success of ICANN in carrying out its mission” - something of a loyalty oath. *Id.* at 10.

⁹⁰ Johnson, Crawford & Burr, *Legitimacy and Effectiveness Through Consensus*, at icannwatch.org.

⁹¹ This illegitimate abuse of power by ICANN staff should not itself give ICANN the right to make new rules.

One answer to this objection is to embrace it, and to require as a condition of ICANN's continuance that it reduce its contracts to "thin" agreements with respect to necessary interoperability rules.

3. *Someone Needs To Make the Rules*

ICANN has been able to persuade entities with consensus policy contracts to dislike the consensus policy process, even though those entities are protected against arbitrary Board action by the consensus policy clauses in their agreements. These entities (particularly registries) have been subject to great delays in bringing forward new products. ICANN has blamed these delays on the consensus policy process, and service providers have come to believe that "consensus" is synonymous with "holdup."⁹² The desires of companies and individuals for certainty and identifiable sources of authority have prompted abandonment of the notion that authority within the ICANN structure is emergent and dynamic. Once the idea that "the ICANN Board [or staff] makes the rules" was dogmatically accepted and repeated (particularly by the registries), the consensus explanation for how rules get made was relegated to the status of an over-intellectualized conception that had nothing to do with reality. In the absence of a faction ready to support the consensus policy model, it has been relatively simple for ICANN to ignore this story of itself. A change in ICANN staff, together with an educational focus on the importance of the consensus policy theory to ICANN's legitimacy, may remedy this situation.

E. *A Common Law Analogy*

Bridwell and Whitten have argued that between 1789 and 1860 in the United States, Federal judges hearing commercial diversity cases considered their role to be limited to recognizing custom created by a "vast and unpredictable universe of private activity."⁹³ In Bridwell's and Whitten's words:

⁹² See, e.g., Department of Commerce Statement on ICANN MOU, at 8 (Sept. 20, 2002): "It is the Department's view that ICANN must improve its processes for transparency and accountability in its decision-making. For example, a number of service providers have expressed concerns about the length of time the ICANN policy development process takes and the delays it causes in bringing new products and services to markets." *Id.*

⁹³ BRIDWELL & WHITTEN, *supra* note 2.

“What we see [in these early decisions] is a legal system in which the activities of government — particularly the judicial branch — operated against a complex background of privately produced and continuously changing rules of conduct, which were produced independently of any governmental action and which in their operation shaped the judicial practices of the time, rather than the other way around.”⁹⁴

They argue that the function of the common law system during this period was to provide a decisional process that would vindicate the “legitimate and discernable” expectations of the parties based on established commercial custom. “The common law tends toward efficiency because the underlying social norms tend toward efficiency.”⁹⁵ For this reason, these diversity judges were not “making law,” and, indeed, would have viewed such an activity as a violation of the separation of powers.⁹⁶

What steps did these Federal judges, sitting in diversity, take? Their primary task was to find reliable evidence of commercial customary behavior - “regular and continued practice and acceptance by individuals.” Such practice might have evolved very slowly. This practice itself would have been considered “law,” and the common law decisions embodying this practice would have been considered evidence of what the law was (rather than law itself). The primary source of law was “still the establishment of customary norms through the autonomous activities of individuals,” and the judge’s role was to recognize these norms and support parties’ expectations that had been based on these norms. “Custom, or autonomous and regular party behavior, could become a governing rule of decision by meeting standards of general acceptance, continuity, and certainty.”⁹⁷ In other words, common law notions required consent of the governed (rather than statutory embodiment) before they could become rules:

⁹⁴ *Id.*

⁹⁵ Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694 (1996).

⁹⁶ The notion that law is not made, but rather, is extracted, has been argued to be a value as old as our Nation itself. The United States Constitution was comprised of “settled rights and expectations” which had their “roots in common law, colonial charters, and long-standing practice both in Britain and in America.” Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 175 (1998). McConnell argues that Constitutional principles were “sufficiently old that they could be considered ‘ancient’ and could be seen as the product of the Nation, rather than as identifiable acts of the sovereign.” *Id.*

⁹⁷ BRIDWELL & WHITTEN, *supra* note 2, at 26.

“The pursuit of an efficient and predictable common medium of commercial intercourse between persons of different states or nations depends necessarily for its success upon a consensus among such persons rather than upon the state as such. That evidence of such a consensus - for example, in the commercial law - is in many instances embodied in formal judicial statements has generally obscured the origin of the rules themselves and has tended, especially in modern times, to represent the general observance of common standards as a response to a sovereign command. The reverse would, however, be much nearer to the historical truth. The sovereign did serve the definitional or recording function embodied in the nineteenth century private international law system, through judicial pursuit of ‘settled principles’ of a customary origin. But the significance of the distinction between ‘precedent’ and ‘law’ under such a system was obvious. . . . It was the pursuit of the evidentiary function of identifying autonomous standards of personal conduct that the judicial role in the private law area maintained the level of governmental intervention at a minimum.”⁹⁸

Bridwell and Whitten read *Swift v. Tyson* as embodying precisely this kind of judicial consensus-recognition and constrained decision-making. They argue that the *Erie* Court misread (or ignored) all of this history: “*Erie* articulated as novel functions that were actually inherent in the *Swift* system and set up a model that was less efficient and worse.”⁹⁹

In the early 19th century, judges appear to have believed in spontaneous, emergent order that it was their task to support. These judges did not see their role as “making law” on behalf of either party or on behalf of society in general. Rather, their decision-making process followed a progression, from enunciating clear principles that they believed governed the controversy (in particularly mature areas of the common law), through analogous principles which by analogy ought to govern it, to natural justice - all informed and structured by their knowledge of existing custom:

“The judicial institution was to serve and reflect autonomous party behavior rather than mold it or otherwise control it. Law in the sense of a sovereign directive was simply not thought of as being as important and significant in the solution of problems as were the people to whom the rules were ultimately to apply and

⁹⁸ *Id.* at 48.

⁹⁹ *Id.* at 97.

from whose orderly behavior, unmotivated by legislation or judicial compulsion, the rules initially came.”¹⁰⁰

Belief in self-ordering, as in the IETF model, and as embodied in the ICANN model, is not a novel concept. But, like the *Erie* Court, participants in ICANN have intellectually abandoned a truly private, emergent, self-ordered source of rules, and have become fascinated with the role of the central authority - in ICANN's case, the ICANN Board itself.

IV. SPECULATION

As discussed above, the “consensus process” for mandating globally applicable rules was a basic premise underlying ICANN's establishment. Because ICANN was not established by the U.S. government (or any other government), had no statutory authority, and could not claim to be a representative democracy, ICANN had no power to enforce its rules other than by means of its contracts with registries and registrars. No self-respecting business would sign up for open-ended policymaking by ICANN's Board of Directors, given the complete uncertainty such a scheme would pose to investors. Thus, as had been the case since the earliest days of the Internet, any mandatory naming policies needed to be supported by a consensus that emerged from bottom-up processes involving all affected parties.

It is clear that ICANN must be restructured so as to work toward consensus more effectively, and that the 2002 spasm of reform has been utterly ineffective in this respect. ICANN's goal should be to make it possible for stakeholders to decide collectively when global, mandatory rules are necessary and legitimate. Seizing more power to make that decision centrally does not serve ICANN's core mission (as set forth in its Memorandum of Understanding with the Department of Commerce) of preserving decentralized decision-making.

Does the ICANN example provide a model for other online regimes? Perhaps, if it operates as it was designed.

The question of “governance” arrived in our consciousness the first time one person tried to tell another what to do. The first solution was to have the stronger person prevail. Subsequently, we have tried theories of religion, expertise, and democracy. Within democratic sovereign nations, we allow the sovereign people to de-

¹⁰⁰ *Id.*

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cide which representatives speak on their behalf to make the rules that tell other people what to do.

In a context in which democratic representation is impossible, the virtue of consensus is that it can support those few uniform solutions that have widespread (if not complete) support and no substantial opposition, thereby allocating decisions efficiently among levels of policy-makers, and facilitating constructive deliberation. It may be that the consensus theory provides for free, in a networked context, what all theories of legitimacy strive for: a demonstration of voluntary agreement to resulting rules.¹⁰¹

At an even higher layer of abstraction, the ICANN experiment may signal a phase change of sorts. Everyday transactions in the real world are (mostly) national and physical. In the online world, in addition to a higher proportion of transnational transactions, we are faced with an ever-higher proportion of transactions whose context is information-based, and for which reputation-based, contextual information becomes more and more important (and for which mapping to terrestrial rules becomes ever more difficult). New regimes will need to operate in a networked environment, and deference to their decisions will depend on the congruence they can demonstrate with respect to the particular online community they govern rather than the ability of these regimes to raise armies or otherwise wield force. ICANN-like regimes (or successful versions of ICANN-like regimes) will fit this world better than attempts at democracy.¹⁰²

It appears that ICANN has brought us an actual “social contract.” This contract is not dependent on its private context - it could be a public contract. Nor is it dependent on its “technical” context. Now the challenge is to take the consensus theory seri-

¹⁰¹ Cf. Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1980) (describing four different attempts to defend corporations and administrative agencies, and explaining why none of these theories can overcome the problems of managerial domination and personal alienation that exist in hierarchic organization). “The very project of bureaucratic legitimation limits our ability to envision alternative, participatory forms of social organization, forms more consistent with the ideals of a democratic nation.” *Id.*

¹⁰² The UN’s December 2003 World Summit on Information Society meeting resulted in a compromise: the question of “who should run the internet,” which had been raised by developing nations prompted by the ITU (a regulatory body of the UN), was temporarily put off. “[T]he UN will set up a working party that will report back to the 2005 Tunisia Summit.” EurActiv.com, Media & eCommerce, *Decision Not To Decide Saves Information Society Summit* (Dec. 9, 2003), at <http://www.euractiv.com/cgi-bin/cgint.exe?204&OIDN=1506808&-tt=me>.

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ously. Many say ICANN is a failure. But it may be an enormous theoretical success that has failed to thrive - largely for political reasons driven by the personalities involved. If we can learn to live without a visible controlling source of rules, if we can believe in emergent, collective order (as did the judges of the early 19th century) and act with courage to implement structures that facilitate consensus, then the ICANN experiment may yet meet its goals.