

ICANN AND THE CONCEPT OF DEMOCRATIC DEFICIT

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ABSTRACT

The Internet Corporation for Assigned Names and Numbers (ICANN) is an institution besieged. It has endeavored to be democratic but its attempts to do so have been disastrous. The typical explanation for this is that the problem is with ICANN: it fails to meet its democratic obligations. My view is that the problem is with our understanding of “democracy.” Democracy is an empty concept that fails to describe few, if any, of our genuine political commitments. In the real world, the failings inherent in “democracy” have been papered over by some unusual characteristics of the physical political process. However, in online trans-national institutions like ICANN, democracy is exposed as a poor substitute for a number of other conceptions of our political commitments.

This Article seeks to articulate these political commitments and to explain why democracy and ICANN are such a poor mix. It begins by charting the rise of ICANN and its attempts to be democratic. It then explains why democracy is an empty shell of a concept. It then explores some features of democracy and ICANN, explaining why the online world exposes limitations in implications

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of democracy such as the nature of the demos, the idea of constituencies, direct democracy, voting, and the like. It concludes that ICANN's example demonstrates that democracy is in fact anything but a coherent general theory of political action. We need to consider, then, whether we should continue to berate ICANN for its undemocratic actions.

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*Railing away at ICANN because it does not meet some ideal model of democracy is likely to be about as effective as complaining that the U.S. Congress is too dominated by the money of those who finance political campaigns.*¹

I. INTRODUCTION

Any number of idealized conceptions of democracy have been projected onto cyberspace. Direct democracy advocates have suggested that cyberspace reduces political transaction costs to zero, and thus we can at last have genuine self-government with everyone voting on every issue all the time. Deliberative democracy theorists embrace the Internet because it offers the opportunity to engage the demos, informing each and every one of them, providing them with a costless way of debating and deliberating. Other examples abound. Participatory democracy advocates envision a vast sea of committed, electronically connected citizens directly engaging with their government—indeed, like the ancient Greek ideal, actually supplanting government and becoming it. It seems that cyberspace is like Coke: any democratic theory goes better with it.

Unfortunately, theory and practice are slightly different. Indeed, the gap between theory and practice is larger in practice than it is in theory. In this Article I argue that there is a vast gap between theoretical conceptions of democracy and the reality that operates within online institutions. The particular institution at issue here is ICANN. This body is unusual, but, I think, characteristic of the types of online institutions we will see emerge as cyberspace matures. It is not tied to any specific physical place or jurisdiction, and so cannot rely on geographical partitions of the demos. Its constituents come from multiple arenas with divergent policy interests, so it cannot rely on homogeneity of interests as a means of generating political outcomes. Pretty much everything it does is published online, analyzed in detail, and criticized endlessly. As such, ICANN is an excellent case study in whether genuine, as

1. Computer Professionals for Social Responsibility, Comments on the Civil Society Statement, at http://www.cpsr.org/internetdemocracy/Statement_July-13_Comments.html (last visited September 1, 2002) (quoting Michael Roberts, CEO of ICANN).

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opposed to toy, or lab-constructed, online institutions can meet our expectations of democracy.

ICANN has endeavored to be democratic, in some limited senses, but its attempts to institute typical democratic mechanisms have been utterly disastrous. It has representatives drawn from constituencies which, under traditional democratic theories would be largely unobjectionable, but in practice have displayed all the worst features of regulatory capture. It has run an insanely costly election where all Internet users were entitled to vote, and a vanishingly small percentage of them actually did. It has suggested that it should look to elected national governments as a proxy for direct representation by the people, and has been greeted with howls of derision; not to mention being accused of everything from bias, through self-service, to out-and-out conspiracy. ICANN's demos is characterized by a remarkable combination of vocal opposition and unresponsive constituency action. In Part I below, I sketch the structural features of ICANN, and explain the attempts to be democratic, and why they failed.

There are two possible views why online democracy and ICANN have been such a disastrous mix. The received wisdom—no doubt the view held by the majority of participants in this Symposium—is that the problem is with ICANN: through ineptitude, foolishness, or rampant power-mongering by its administrators, it is to blame for failing to meet its democratic obligations. My view is that the problem is with our understanding of “democracy.” Democracy is an empty concept that fails to describe few, if any, of our genuine political commitments. In the real world, the failings inherent in democracy have been papered over by some unusual characteristics of the physical political process. However, in genuine cyberspace environments, democracy is exposed as a poor substitute for a number of other conceptions of our political commitments.

In Part II below, I examine the contested and contestable features of democracy. I begin by focusing on the embedded implications of the word “democracy,” and how this gives rise to a series of arguments against the nature of modern politics and the rise

of the administrative state. Following from Rubin,² I argue that this focus distorts the account of the way that modern political institutions relate to their citizens. Instead, I suggest that we look at how and whether institutions, most notably the government, actually meet the political commitments that we consider important. These political commitments, securing liberty, avoiding oppression, reducing civil strife, etc., are meaningful in a way that the loaded term democracy is not.

Part III then examines the nature of democracy and political commitments in online institutions. Within the context of ICANN, I examine whether and how these political commitments are met, and conclude that they may be met, even if we would consider the process to be anti-democratic. I examine whether our political commitments can be, and have been, met by online institutions such as ICANN. Then, I conclude that, if they have not been met to date, then it has been as a result of deferring to the impoverished idea of democracy, not because of some systemic problem with online political institutions.

II. ICANN AND REPRESENTATIVE DEMOCRACY

ICANN is an institution besieged. Having moved beyond its initial technical mandate into policy setting, it is surrounded on all sides by outraged political actors and activists who routinely accuse it of lacking legitimacy, acting improperly, and behaving arbitrarily.³ The basis for much of the criticism is that ICANN fails to meet the most fundamental test of political institutions: that it is, in short, undemocratic. In order to understand this, one has to understand the nature of ICANN, its structure, and some aspects of its history.

ICANN came into being in 1998 as a result of a number of events, most notable of which was the U.S. government's policy document officially titled the Management of Internet Names and

2. See Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 747 (2001).

3. The best place to view these accusations is the ICANNWatch Web site, which contains an amazing corpus of material on ICANN. See ICANN Watch, at <http://www.icannwatch.org> (last visited Sept. 1, 2002). Criticisms of every single stripe may be found there in the articles and, more particularly, in the (often anonymous) postings in comment to the articles.

Addresses,⁴ but which is always called the “White Paper.” The White Paper outlined the U.S. government’s attitude towards governance of these issues; rather than continue to be the de jure and de facto controller of names and addresses on the Internet, the United States wanted a private entity to take over control.⁵ Within a remarkably short time (four months) ICANN was formed, and began accreting the powers necessary to undertake this job.⁶

Formed as a non-profit corporation, it has a typical corporate form: a CEO, a board of directors, various lower-level workers with responsibility for certain parts of the business, and so forth.⁷ Given that its ostensible mandate is to oversee the domain name space and Internet protocol addresses, there is nothing odd in it being a corporation. Many standards-setting and technical administration organizations operate in corporate form. However, unlike a corporation, ICANN undertakes significant regulatory functions, which make it look much more like a governmental actor of some form or another. For example, any changes to the Domain Name System (DNS) involve some effect upon business interests that have congealed around domain names. Thus, the addition of new namespaces, or the creation of a mechanism to resolve disputes between trademark holders and domain name holders, involve making decisions that most people would understand as both regulatory and political.

Therefore, the U.S. government and others almost immediately saw that ICANN could not operate just as a typical corporate animal, and that ICANN needed some concession (real or imagined) to democracy. Thus, ICANN has a large Board of Directors which initially was to be constituted from various interested constituencies. These constituencies (domain name registrars, other Internet bodies concerned with technical matters such as protocols and addresses, and so on) were represented at the Board level, and also within their own lower-level advisory groups called “supporting organizations”

4. See Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998).

5. See *id.*

6. See JONATHAN WEINBERG, GEEKS AND GREEKS 1 (2001), available at <http://www.law.wayne.edu/weinberg/geeksandgreeks.pdf>.

7. See ICANN, BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (2002) [hereinafter ICANN, BYLAWS], available at <http://www.icann.org/general/bylaws.htm>.

or “advisory committees.”⁸ There was also specific consideration given to the interests of sovereign countries, which was recognized as important given that ICANN has responsibility for country code top-level domains (ccTLDs) like .au for Australia, .se for Sweden, and .cc for the Cocos Islands.⁹

What was not initially anticipated was the idea that any part of ICANN should be accountable to the Internet community as a whole. That is, the idea of popularly elected representatives within ICANN was initially ignored, and then resisted. However, the pressures in favor of popularly elected representatives were too great, and eventually ICANN blinked. Nine¹⁰ of the nineteen directors were to be elected from the Internet community “at large.”¹¹ These positions have been a source of consternation ever since, both for those within ICANN who oppose populist elections and the specific results of the elections, and those outside ICANN who argue that the power of the people has been watered down to the point of being purely symbolic. Two of the directors were elected on a platform that promised constant criticism and oversight of the Board,¹² and have made good on the promise ever since. ICANN now presents the unedifying spectacle of a house divided against itself, with increasingly rancorous exchanges between the directors played out on a global

8. There are currently three supporting organizations: the Address Supporting Organization, the Protocol Supporting Organization, and the Domain Name Supporting Organization; as well as a number of advisory committees, including the Technical Advisory Committee, Government Advisory Committee, and so on. See WEINBERG, *supra* note 6, at 6 (2001).

9. The sovereign countries’ interests are provided for within an advisory body called the Government Advisory Committee.

10. Although these nine positions began, effectively, as internal appointments, ICANN was forced to introduce elections for five of the positions. See *infra* text accompanying notes 111–15.

11. See Preliminary Report, Meeting of the ICANN Board in Yokohama (July 16, 2000) [hereinafter Preliminary Report], available at www.icann.org/minutes/prelim-report-16jul00.htm (describing the various positions of the ICANN Board and the implications of the election).

12. See Karl Auerbach Platform, available at <http://www.cavebear.com/icann-board/platform.htm> (last visited Feb. 22, 2002). Andy Mueller-Maguhn, the European director, was seen as holding the same views as Auerbach, but proved to be quite a quiet director. See Gary Chapman, *Stirring the “Dot-Whatever” Pot*, L.A. TIMES, Oct. 16, 2000, available at <http://www.educyberpg.com/Internet/DOMAIN%20NAME/garychapman.html>.

stage. Recently one of the directors took ICANN to court in order to force disclosure of documents.¹³

These internal structural features aside, other aspects of ICANN attract fire. Most notable has been the creation of the UDRP, a private adjudication mechanism that seeks to resolve some types of disputes between real-world trademark owners and online domain name registrants. The introduction of the UDRP was controversial in part because it was seen as bypassing national court systems. More importantly, the UDRP privileged trademark owners over domain name owners under most conditions. Since then, the UDRP has become more controversial as it is seen as being biased against domain name holders, who win only a tiny percentage of the actions brought against them.

ICANN has since wallowed in the mire of its own creation, with its decisions attracting ongoing criticism, and its decision-making processes bogging down in the mud of accountability and transparency concerns. In order to forestall inevitable U.S. governmental intervention,¹⁴ ICANN recently announced a structural reform process.¹⁵ The reform proposals include removal of the at-large directors, changes in oversight processes, and suggestions to use national governments as proxies for popular representation.¹⁶ Since many of the reforms seek to facilitate decision-making, and consequently involve a reduction in direct accountability to an electorate and the removal of some oversight controls, the suggestions have stoked the already-glowing fires of criticism. ICANN's apostate director, Karl Auerbach, who perhaps best represents the critical view of the reform process, said: "This

13. See ICANN, ADVISORY, COURT RULING IN AUERBACH V. ICANN LAWSUIT, (2002), at <http://www.icann.org/announcements/advisory-29jul02.htm>.

14. ICANN still operates pursuant to an agreement with the U.S. Department of Commerce. This agreement is up for re-negotiation this year.

15. See M. STUART LYNN, PRESIDENT'S REPORT: ICANN—THE CASE FOR REFORM (Feb. 24, 2002), at <http://www.icann.org/general/lynn-reform-proposal-24feb02-hm>.

16. See *id.*

morning ICANN killed the concept of public participation in ICANN and established in its stead a paternalistic oligarchy.”¹⁷

For all the criticism, ICANN is not a remarkably secretive or tyrannical organization. It shares many of the features of democratically constituted institutions existing in the real world. Its decisions are announced after notice is given of proposals, and time for comment is allowed (though this period is regrettably short).¹⁸ It runs discussion lists for interested parties to have a say in both the process and outcome of its decision-making. It has formal representation for the community at large. Its decision-making is, at least in principle, based on the notion of consensus, an entirely unobjectionable (if unworkable) democratic principle. The dispute resolution mechanism which it created abides by all of the formal requirements for both the rule of law and natural justice—stated laws, neutral arbiters, opportunity for pleading one’s case, and so on. It may be argued that the outcomes of this process are structurally biased against one set of interests, and indeed there is equivocal evidence of this,¹⁹ but this is the same criticism that is regularly

17. E-mail from Karl Auerbach, karl@cavebear.com (Mar. 14, 2002), to politech@politechbot.com, at <http://www.politechbot.com/p-03267.html> (on file with the *Loyola of Los Angeles Law Review*).

18. See ICANN, BYLAWS, *supra* note 7, art. III, § 3.

19. See, e.g., MICHAEL GEIST, FAIR.COM?: AN EXAMINATION OF THE ALLEGATIONS OF SYSTEMIC UNFAIRNESS IN THE ICANN UDRP, *available at* <http://aix1.utottawa.ca/geist/geistudrp.pdf> (last visited Feb. 22, 2003); MICHAEL GEIST, FUNDAMENTALLY FAIR.COM?: AN UPDATE ON BIAS ALLEGATIONS AND THE ICANN UDRP, *available at* <http://aix1.uottawa.ca/geist/fairupdate.pdf> (last visited Feb. 22, 2003); MILTON MUELLER, ROUGH JUSTICE: AN ANALYSIS OF ICANN’S DISPUTE RESOLUTION POLICY, *available at* <http://www.acm.org/usacm/IG/roughjustice.pdf> (last visited Jan. 10, 2003). Cf. INTERNATIONAL TRADEMARK ASSOCIATION, THE UDRP BY ALL ACCOUNTS WORKS EFFECTIVELY REBUTTAL TO ANALYSIS AND CONCLUSIONS OF PROFESSOR MICHAEL GEIST IN “FAIR.COM?” AND “FUNDAMENTALLY FAIR.COM?” (May 6, 2002), *available at* http://www.inta.org/downloads/tap_udrp_2paper2002.pdf (rebuttal to Geist’s argument that ICANN favors complainant trademark owners); INTERNATIONAL TRADEMARK ASSOCIATION, UDRP—A SUCCESS STORY: A REBUTTAL TO THE ANALYSIS AND CONCLUSIONS OF PROFESSOR MILTON MUELLER IN “ROUGH JUSTICE” (May 6, 2002), *available at* www.inta.org/downloads/tap_udrp_1paper2002.pdf (concluding that Mueller’s article is based on faulty premises and a misinterpretations of data); ANNETTE KUR, UDRP: A STUDY BY THE MAX-PLANCK-INSTITUTE FOR FOREIGN AND INTERNATIONAL PATENT, COPYRIGHT AND COMPETITION LAW, *available at*

made of national laws and courts which conform to our expectations of democracy.

In short, ICANN is a reasonably open and responsive organization. It is more transparent and accountable than, say, the vast majority of non-profit organizations, publicly traded corporations, universities (whether public or private), or indeed almost any other type of private organization that one can imagine. Why then is it accused of being such an intolerable organization? Many people, indeed ICANN itself, see the body as a governmental actor, and moreover they see it as a governmental actor which has a commitment to direct democracy. The problems with ICANN then have something to do with its strange quasi-corporate, quasi-government nature and the high-handed character of its actions, but perhaps more interestingly have a great deal to do with our lack of understanding of what it means to be an online democratic institution.

In Part III, I explain the reasons why non-idealized online institutions like ICANN cannot be democratic in the way usually assumed by critics. The reason for this has nothing to do with ICANN's failings but is based on our understanding of the concept of democracy. Therefore, Part III is given over to explaining the general problem with democracy, and the specific problem of online democracy.

III. GETTING PAST DEMOCRACY

ICANN is routinely accused of lacking legitimacy and behaving without a mandate from its constituents, among other criticisms. Modern Western conceptions of political legitimacy are, of course, grounded in expectations that derive from our understanding of democracy. Hence, direct democracy advocates favor direct mandates from the demos on issues of varying generality, generated through plebiscites or referenda. Madisonian representative democracy relies on elected representatives who are responsible to their constituents.²⁰ And the modern theories of deliberative democracy focus on the legitimacy gained by inclusive, rational

<http://www.intellectprop.mpg.de/Online-Publikationen/2002/UDRP-study-final-02.pdf> (last visited Jan. 10, 2003) (evaluating how the UDRP functions).

20. See JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION* 16–17, 44 (1991).

debate on political issues.²¹ Whatever your favorite flavor of democracy, our conception of the modern Western state relies in large part on the assumption of democracy for its legitimacy. As a result, criticisms of ICANN's legitimacy stem essentially from assumptions about the nature of democracy within our political system.

This seems to be a reasonable approach, and one might first consider that it is a bad thing that ICANN is "undemocratic." However, an examination of the nature of the modern Western state reveals that it too suffers from a series of "democratic deficits" that call into question either the nature of the state or the nature of our understanding of the concept of democracy. In keeping with a number of others, most notably Ed Rubin, I suggest that the problem is not with the political components of the modern state, but rather with the concept of democracy.

A. Aristotle's Dead Hand

Aristotle's original conception of a democracy was of a direct democracy, with the by-now familiar requirement that all citizens vote on all substantive issues and all citizens would be obliged to serve within the Athenian Senate.²² The notion of rule by assembly was common to many city states, and it was particularly pronounced within Athens.²³ With the translation of his *Politics*, Aristotle's views on the nature of democracy became a model for democratic thinking from the thirteenth to the eighteenth century.²⁴ However, as Rubin notes, the problem with direct democracy, and certainly the version preferred by the Athenians, is that we have never seen it in any Western political system since the Classical period.²⁵ Though some other medieval political systems like the Italian city-states or the Swiss cantons bore a superficial similarity to this type of organization, they turned out to be a dead end of Western political development.²⁶

21. See Rubin, *supra* note 2, at 747–55.

22. See *id.* at 715–17, 716–17 n.15.

23. See RAPHAEL SEALEY, *THE ATHENIAN REPUBLIC* 92–96 (1987) (describing the nature of ancient Greek assemblies).

24. See Rubin, *supra* note 2, at 715–17.

25. See *id.* at 717.

26. See *id.*

Democratic thinking abandoned its assumption of direct voting and revolving assemblies and turned instead to the concept of representation. The development of representative democracy as the dominant form of Western political systems was not due to the imposition of a theory of democracy, but reflected the rise of collective organizations such as guilds, the Church, and universities, among others. The two characteristic features of representative democracy—the view that “what affects all in like fashion should be approved by all”²⁷ and the idea that another could act in one’s stead²⁸—owe nothing to initial conceptions of democracy and everything to the emergence of medieval corporate entities.²⁹

More recent has been the emergence of “deliberative democracy” as the preeminent theory of democracy.³⁰ This theory’s central claim is that democracy is defined by the existence of a “free, inclusive, rational debate by citizens that determines the basic thrust of public policy.”³¹ On this view, democracy, therefore, requires an

27. “[Q]uod omnes similiter tangit, ab omnibus comprobetur . . .” Gaines Post, *A Roman Legal Theory of Consent, Quod Omnes Tangit, in Medieval Representation*, 1950 WIS. L. REV. 66, 68.

28. See GAINES POST, *STUDIES IN MEDIEVAL LEGAL THOUGHT* 91–238 (1964) (discussing the rise of representation, medieval assemblies, and parliaments).

29. See Rubin, *supra* note 2, at 718–19; see also ARTHUR P. MONAHAN, *CONSENT, COERCION AND LIMIT: THE MEDIEVAL ORIGINS OF PARLIAMENTARY DEMOCRACY* 97–133 (1987) (discussing the development of legal concepts in the thirteenth century, particularly in England, France, and northern Italy).

30. Although “deliberative democracy” seems to be the *nom-du-jour*, similar theories have gone by other names. See BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984) (“strong democracy”); JOHN S. DRYZEK, *DISCURSIVE DEMOCRACY: POLITICS, POLICY, AND POLITICAL SCIENCE* (1990) (“discursive democracy”); JANE MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980) (“unitary democracy”).

31. Rubin, *supra* note 2, at 747; see also BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) (explaining various principles of liberal democracy and social justice); JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 1–5 (Benjamin I. Page ed., 1994) (explaining the American history of deliberative democracy); JOHN S. DRYZEK, *DISCURSIVE DEMOCRACY: POLITICS, POLICY, AND POLITICAL SCIENCE* (1990) (exploring a classical Aristotelian model of politics, participatory democracy, communicative action, practical reason, and critical theory); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)

open exchange of views and informed debate in order for political and social consensus to emerge.³² As we shall see shortly, this theory works tolerably well as an idealized normative account of how a costless political system might work, but is hopelessly incapable of describing any meaningful features of our actual political system.

The purpose of this overview is not to provide simply an historical account of the development of democratic thinking and theorizing. Instead, its purpose is to articulate the assumptions that are built into our understanding of the term democracy. Rubin suggests that these assumptions are “sedimented” into all theories which characterize themselves as concerning democracy, and indeed these assumptions live within the very term “democracy”:

We may think that we have appropriated the term for our own uses, exercising control over its meaning, but the term is more likely to exercise control over us, challenging us with questions from our vaguely recollected past such as: “Shouldn’t all your decisions be made by an assembly of

(discussing the dichotomy of constitutional legislative interpretation); JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991) (exploring how to reconcile democracy and deliberation by bringing power to the people under conditions where the people can think about the power they exercise); JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995) (exploring whether people can take an active role in creating their voice and determining what information they will need to deliberate and then speak); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (illustrating the kind of moral disagreement that fuels the evolution of deliberative democracy); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996) (emphasizing the role of public discourse in democracy); JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (exploring how deeply opposed though reasonable comprehensive doctrines may exist together and affirm the political conception of a constitutional regime); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993) (proposing a reassessment of the appropriate role of the First Amendment and free expression in the democratic process); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (examining the First Amendment and concluding that deregulated economic markets are neither sufficient nor necessary for a system of free expression); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY* 67 (James Bohman & William Rehg eds., 1997) (discussing deliberative democracy as a fundamental political ideal).

32. See Rubin, *supra* note 2, at 747–49.

the entire populace? Shouldn't public officials be selected by lot, so that each of you may rule and then be ruled in turn?"³³

Rubin's argument is that the pre-modern conceptions of democracy infect any theory or argument which uses democracy as a normative standard against which an institution is judged. The worst thing that one can say of a government or its institutions is that it is "undemocratic." But the term carries with it a series of implications from the pre-modern, simpler era, and so modern political institutions cannot help but be found wanting. Rubin's focus is on criticisms made of the rise of the vast, credentialed, undemocratic administrative arm of Western political systems (specifically the executive in the U.S. system). He suggests that the focus on the concept of democracy makes us "overlook or underestimate features that are central to that government's operation and to imagine or overemphasize other features that are of minimal importance."³⁴

The obvious example is the extended attack on judicial review by the Legal Process School.³⁵ This School characterized judicial review, specifically the role of the Supreme Court during its opposition to the New Deal legislation, as anti-democratic.³⁶ Subsequently, the same charges have been leveled at the emergence of a vast executive within U.S. government that has been lambasted as the fourth branch of government. This fourth branch was never mentioned in the Constitution and is therefore presumptively invalid as a consequence. The rise of the administrative state, with its reliance on a non-elected bureaucracy, has been cause for much gnashing of teeth and casting of allegations of a democratic deficit at

33. *Id.* at 725.

34. *Id.*

35. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16, 19 (Yale Univ. Press, 2d ed. 1986) (1962) (suggesting that the electoral process is the supreme embodiment of democracy, and that judicial review undermines this process); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 10 (1980) (characterizing judicial review as contrary to majority rule, which is described as the fundamental principle of democracy); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4-5 (1980) (arguing that the unelected and politically non-responsible judiciary should not be free to stop the elected representatives from governing as they like).

36. See Rubin, *supra* note 2, at 711-12.

the heart of the modern U.S. political system.³⁷ The same criticism is reflected perhaps more strongly with discussions and criticisms of online democracy, and specifically within the analysis made of ICANN. ICANN is routinely accused of failing to be democratic.³⁸ In Part IV, I suggest that these accusations are unhelpful, for as Rubin suggests, to label something “undemocratic” is not a valid criticism of institutions within modern Western political systems.³⁹

Rubin’s account is tremendously helpful at explaining that there is a problem with our understanding of democracy, which in turn leads to unhelpful criticisms of modern political institutions. However, if democracy is not a good description of them, then the issue arises as to what political commitments we hold. Rubin’s method is to follow on from Habermas and use micro-analysis, the positive analysis of the political institution at the level of the interaction between citizen and organization.⁴⁰ The idea is, simply, that individuals create social systems.⁴¹ In describing the social system we should, therefore, focus first on the aggregate of individual interactions in order to understand the higher level process that emerges.⁴² For example, consider elections. According to many democratic theories, voting holds the preeminent role in the political system. However, in micro-analysis, voting is merely a political signal that is controlled by the government: in terms of timing, choice, capacity of persons, information granted about the parties, and so forth.⁴³ Thus, elections are not an autonomous signal from the individual, but rather a government-generated signal that generates a response from a government-generated populace.⁴⁴ Therefore, the invocation of a “fair and free” election is largely rhetoric and does not of itself reflect a political commitment. Why then have elections? Rubin suggests that we have elections to deal with our commitments to ensure a stable succession in government

37. *See id.* at 711–13.

38. Indeed, one of the more trenchant critics, Jonathan Weinberg, explicitly adopts an Aristotelean concept of democracy with which to lambast ICANN. *See WEINBERG, supra* note 6, at 11.

39. *See Rubin, supra* note 2, at 714–15.

40. *See id.* at 752–55.

41. *See id.* at 755.

42. *See id.* at 755–56.

43. *See id.* at 756–57.

44. *See id.*

(one without bloodshed or intractable rivalry), a periodic opportunity to review competence of government members, and to ensure some (though not absolute) responsiveness of the representatives.⁴⁵ Focusing at this level, therefore, provides a better definition of the commitments we hold than the notion of democracy.

For the purposes of this Article, there are a number of difficulties with applying this approach. Not only is micro-analysis a positive methodology without external normative grounding, it also has only really been applied to real-world political activities. Moreover, it can be seen as generating a series of conclusions (such as elections are to handle succession) which are as susceptible to criticism as the concept of democracy. Finally, democracy has a wonderful concreteness and solidity as a concept that appears to be invariant across times and cultures. Micro-analysis, being descriptive, is necessarily a partial account dependent on the individuals being examined at any one point.

I am going to leave these concerns aside for the purposes of this Article. I do not defend this decision, except to say that this Article seeks to remove democracy as the basis of analysis of electronically constituted organizations. In the end we may come back to democracy as the only appropriate way of understanding and critiquing online institutions, but for my purposes it is enough to show how an exclusive focus on democracy is damaging.

Before providing evidence of this within ICANN, let me provide a high-profile online example as a warning of the dangers that unthinking acceptance of democracy poses to an analysis of what actually occurs within the Internet public sphere. In the Section that follows, I show how adherence to the ideals of deliberative democracy can translate to untenable conclusions when examining the online environment. After this, I turn in Part IV to how we see other problems which emerge when we apply a naïve view of democracy to ICANN.

B. Philippic.com

Recently, Cass Sunstein, the eminent University of Chicago Law School professor, constitutional commentator, and democracy theorist, published a broad philippic against the anti-democratic

45. *See id.* at 758–59.

features of the Internet, entitled *Republic.com*.⁴⁶ It begins with a short sketch of the near future, where Sunstein suggests that we will soon have perfect filtering, so that we will see, read, or hear only that which we want to see, read, or hear; and will never be confronted with anything that we do not want.⁴⁷ We will go through our lives cosseted in a warm technological blanket that will reinforce those voices which agree with us, and will preclude any different voices in our lives.

This prospect troubles Sunstein deeply. He sees the effects of perfect filtering as pernicious, and inimical to democratic ideals.⁴⁸ For a start, it removes the public forum where we are confronted by others speaking freely.⁴⁹ Sunstein, in keeping with other deliberative democracy scholars, argues that our democratic society relies on a citizenry exposed to many viewpoints and a polity which is characterized by reflection and debate.⁵⁰ Online perfect filtering, argues Sunstein, destroys this hitherto-assumed feature of our democratic system.⁵¹ There “can be no assurance of freedom in a system committed to the ‘Daily Me.’”⁵²

To support this argument, Sunstein applies the findings from studies in social psychology.⁵³ Though *Republic.com* recognizes that online fora may provide important outlets for self-expression, Sunstein outlines a terrifying danger. Special interest sites, he argues, will fracture the community into small pockets of special

46. CASS R. SUNSTEIN, *REPUBLIC.COM* (2001).

47. *See id.* at 3–5.

48. *See id.* at 7–10, 17–22.

49. *See id.* at 27–37.

50. *See id.* at 38. Deliberative democracy is a component of Pettit’s conception of republicanism and can be seen in part as a response to an alternate democratic theory—that of direct democracy. *See* PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNANCE* 129–34 (1997). A number of theories of Internet governance stress the benefits of some features of Internet direct democracy. *See, e.g.*, Dick Morris, *Direct Democracy and the Internet*, 34 *LOY. L.A. L. REV.* 1033 (2001). Others, most notably Neil Weinstock Netanel, suggest that Internet direct democracy has significant theoretical problems. *See* Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 *CAL. L. REV.* 395 (2000) (arguing against cyberspace self-governance from the position of democratic theory).

51. *See* SUNSTEIN, *supra* note 46, at 49–50.

52. *Id.* at 50.

53. *See id.* at 56–80.

interest that divide along race, gender, political, or other lines.⁵⁴ In Sunstein's view, this will lead to terrifying group polarization.⁵⁵ This is the name given to one type of effect on people's viewpoints that occurs when they deliberate.⁵⁶ In numerous studies it has been shown that after deliberation people generally move towards more extreme viewpoints in the direction to which the group's members were initially inclined.⁵⁷ Thus, in group deliberation settings, French students become more critical of the United States, moderately pro-feminist women become more critical of men, and whites predisposed to racial prejudice express more racist sentiments, and so forth. Sunstein argues that this group polarization effect has tremendous importance to our conception of the benefits and detriments of the Internet as a communications medium.⁵⁸ As interests are segmented into, and addressed by, individual Web sites, a segmented communications environment will emerge. As perfect filtering becomes a reality, people will only hear from a small group of like-minded people. Since they will increasingly talk only to each other, group polarization will occur, leading to more extreme viewpoints than that which any of the members of that group initially held. Extremism will feed on extremism in this balkanized environment, driving people further apart, fracturing our society, and causing hatred, violence, and a loss of community identity.⁵⁹

Republic.com is a very good example of democracy theorists' approach to online political theory. The deliberative democracy ideal here is combined with some social psychology, and the result is a terrifying, dystopian vision of the Internet's effect on our society. The problem, however, is that this vision is completely wrong. As I have argued at quite ridiculous length elsewhere,⁶⁰ Sunstein's view is unsupported either by the technology, the social science, or empirical

54. See Dan Hunter, *Philippic.com*, 90 CAL. L. REV. 611, 619–20 (2002).

55. See *id.* at 620.

56. See SUNSTEIN, *supra* note 46, at 65.

57. See *id.* at 67–68.

58. See *id.*

59. See *id.* at 80–84. In a related aspect of his argument, Sunstein discusses “disinformation cascades” which play a similar, or perhaps reinforcing role, to group polarization. *Id.* For the sake of brevity in this account, I focus here only on group polarization which is central to Sunstein's concern.

60. See Hunter, *supra* note 54. I should note that while the length of the article is ridiculous, the content is, of course, wonderful.

analysis of the nature of our political system. Perfect filtering is essentially science fiction; it is a vision of the future owing more to the hype of MIT's Media Lab and NASDAQ companies than any realistic assessment of how filtering can work. In any event, even if perfect filtering were possible, it would be little different from media filtering which we currently enjoy and which has not lead to a terrifying rise in extremism. Moreover, the social psychology research on which Sunstein relies does not support his extreme conclusion. He fails to give due regard to the fact that, at times, groups actually de-polarize and move to less extreme positions, or they move to extreme positions that are actually moderate. He also notably fails to establish that the conditions for group polarization are actually present in the Internet entities, which he identifies as so troubling to democracy.

Finally, Sunstein's adherence to deliberative democracy causes him to make assumptions about how democracy should operate online.⁶¹ Sunstein has indicated that his intention was to get hold of "some neglected requirements of democratic self-government."⁶² It is not hard to see the importance of deliberative democracy to *Republic.com*'s specific thesis that we need more and better forms of Internet communication in order that our democracy be rendered meaningful. The fear of group polarization and fragmentation of the communications infrastructure poses a huge concern to anyone committed to deliberation as the core of democratic engagement.

Rubin's account of the pre-modern implications built into the concept of democracy are extremely helpful in an assessment of the validity of this aspect of Sunstein's argument. This cashes out in two specific ways. First is the deliberative democracy theorist's views about the nature of deliberation in a modern society. Deliberation assumes an intensive interchange of ideas in a context where the speakers are in direct contact and can accept or reject the other's arguments.⁶³ With a small number of people involved, such as in the ancient Athenian assembly,⁶⁴ the concept of deliberation within the

61. See SUNSTEIN, *supra* note 46, at 65–68.

62. *Id.* at 192.

63. See Rubin, *supra* note 2, at 749.

64. See *id.* "The metaphor of deliberation among the members of civil society in general seems inspired by an ancient Greek assembly, where all the

political process is an accurate description. In the modern state with hundreds of institutional agencies and where citizens are engaged with these agencies rather than each other, the notion of deliberation is empirically implausible.⁶⁵ Under these conditions, “deliberation” is not an accurate description; it is a trope. And it is a trope that masks the reality of the political process; “the cost of indulging in this enticing metaphor . . . is that one underemphasizes or ignores the more subtle gradations of contemporary politics.”⁶⁶ Sunstein’s worry over the effects of group polarization is a worry that deliberation cannot operate as idealized in the deliberative democratic account. His delight at the results of the (idealized and artificial) deliberative polls of Fishkin⁶⁷ is a delight at centerpiece of deliberative democracy being demonstrated. However, both the worry and delight evaporate if, as Rubin suggests, these features of deliberation are simply not found in the modern Western state, whose political commitments we are happy with.⁶⁸ If deliberation is not central to our political process, then there is little to fear even if we accept Sunstein’s charge that the Internet reduces deliberation.

The second problem for Sunstein’s fears for the Internet is deliberative democracy’s assumption that the deliberation must be rational.⁶⁹ This particular assumption is at the core of *Republic.com*’s concern with group polarization effects on people’s

citizens meet to debate and decide ‘all causes, or at any rate . . . the most important.’” *Id.*

65.

In a modern state, particularly an administrative state with its hundreds of operational agencies, citizens and citizen groups are more likely to be engaged in intensive interactions with a particular agency than they are with each other. Bankers, factory managers, and large-scale farmers do not interact with members of the other groups very much, but they may talk to their own regulatory agencies more often than they talk to anyone outside their immediate families and colleagues.

Id.

66. *Id.*

67. See JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE* (1995); James S. Fishkin & Robert C. Luskin, *Bring Deliberation to the Democratic Dialogue*, in *THE POLL WITH A HUMAN FACE* 3, 23 (Maxwell McCombs & Amy Reynolds eds., 1999).

68. See Rubin, *supra* note 2, at 748–49.

69. See *id.* at 749–50.

thoughts,⁷⁰ which lead to irrational deliberation. As Rubin demonstrates, contemporary political and social debate are anything but rational.⁷¹ Modern political life is characterized by widespread irrationality.⁷² Within our political process, appeals to emotion or personal interest are the norm. Measured, reflective discussion and analysis of the merits and demerits of the argument—such as one finds within Fishkin’s deliberative polls—are atypical.⁷³ Unlike Sunstein,⁷⁴ Rubin does not decry this as a failing of our polity. Instead, he suggests that it is a feature of our modern political system.⁷⁵ Peoples’ lives are affected by politics: their salary is reduced or increased by political choices, their liberty is threatened, their children’s opportunity is reduced or improved, and so on. We should not be surprised that the modern arena of political debate is shot through with emotionalism. Calls for rational deliberation within our democracy may make the commentator feel better, but they are likely to lead nowhere, and perhaps more important, do not reflect our genuinely held political commitments.⁷⁶ If this is so, then we should not be troubled even if we accept Sunstein’s argument that the Internet creates group polarization on the basis of appeals to peoples’ emotional, rather than rational, side. The modern state will not fall apart if emotions are tweaked. In fact, the modern state relies on these emotions being tweaked.

Rubin’s account is valuable here for a number of reasons. First, it allows us to recognize that tagging something as “undemocratic” means little when the word “democratic” is not a good descriptor of the modern political system with which we are currently quite happy. Even if we accept Sunstein’s implicit claim that the Internet is a

70. See SUNSTEIN, *supra* note 46, at 5–9.

71. See Rubin, *supra* note 2, at 750.

72. See *id.* “Contemporary political debate obviously fails to achieve this standard, something one can readily confirm by spending a few minutes listening to political talk radio.” *Id.*

73. See Fishkin & Luskin, *supra* note 67, at 3–7.

74. See SUNSTEIN, *supra* note 46, at 84–87. *Republic.com* is an attempt to explain how certain irrational communication features of the Internet pose problems for democracy.

75. See Rubin, *supra* note 2, at 751.

76. See *id.* at 751–53. Rubin explains that this is not a concern, since the political process does manage to serve our needs perfectly well. See *id.* It is just that focusing on the requirement of rational deliberation is to focus on the wrong thing.

danger to our democracy, little follows from it. Second, the specific challenges to deliberative democracy have serious purchase in any analysis of *Republic.com*. These challenges demonstrate that the fears of group polarization, even if real, do not threaten our central political commitments.

I suggest, therefore, that the invocation of the concept of democracy can have corrosive effects on our ability to understand (and criticize) the online environment. Within the criticisms of ICANN this problem is particularly pronounced.

IV. ICANN AND ELECTRONIC DEMOCRACY

In this Part, I explain how the pre-modern implications inherent in democracy theories are applied to new entities like ICANN. Here, I endeavor to demonstrate how reliance on democracy to criticize online institutions is a counter-productive way of criticizing these institutions. If we are concerned about changing these organizations to reflect our genuine political commitments, then we need a better understanding of these commitments. ICANN deserves condemnation if it fails to meet genuinely held political commitments. It does not deserve to be criticized for being undemocratic when that term embodies political commitments that are unrealistic, not held by relevant constituencies, or irrelevant.

A. Of Hippogriffs, Shareholders, and Citizens

ICANN is a curious institution. One is tempted to characterize it as neither fish nor fowl. But perhaps it is better to suggest that, like medieval monsters such as the griffin or the more outlandish hippogriff, it is a curious grafting of multiple animal parts: head and claws of an eagle, body of a lion, back legs of a horse. The grafting in ICANN's case is between a corporate entity operating within the purview of a sovereign government and a trans-national governmental entity that can be considered autonomous. ICANN is a private, non-profit California corporation and subject to the usual strictures of corporate entities.⁷⁷ However, one of its fundamental functions is that of trans-national regulator, and in this sense, it appears much more like an executive agency.

77. See Edward Brunet, *Defending Commerce's Contract Delegation of Power to ICANN*, 6 J. SMALL & EMERGING BUS. L. 1, 8–9 (2002).

The reason for building a quasi-governmental corporate hippogriff is, by now, well-known. By the mid-nineties the United States realized it was faced with an international diplomatic problem and a regulatory nightmare.⁷⁸ It effectively owned the Internet, by virtue of the Department of Commerce's control over IP address and domain name allocation.⁷⁹ This included effective control over the allocation of registry functions within ccTLDs such as .fr (France), .it (Italy), .za (South Africa), and so forth. Though Internet take-up in other countries was, at the time, sketchy, it was not hard to foresee a period when diplomatic issues would emerge over U.S. control of the namespaces of other sovereign countries.⁸⁰ There was also the pesky problem that the "netizens" of the day were broadly libertarian and committed to running the Internet as it had been run to date. Since the status quo involved self-governance based on "rough consensus and running code"⁸¹—the early governance of the Internet being primarily about technical issues—overt imposition of regulatory power was not going to go over well. For these reasons and others, the United States wanted an entity interposed between itself and the day-to-day decision-making over addresses and namespaces. Its hand was forced by the actions of Jon Postel, the creator and "real" owner of the DNS, who conjured ICANN out of whole cloth and anointed it as ruler.⁸² Though the process may have occurred in a way not envisaged by them, the creation of ICANN was in keeping with the aims of the U.S. government, and U.S. regulators were no doubt relieved that it did not have to intervene directly.

78. See Angela Proffitt, *Drop the Government, Keep the Law: New International Body for Domain Name Assignment Can Learn from United States Trademark Experience*, 19 LOY. L.A. ENT. L. REV. 601, 604–06 (1999) (explaining the past management of the DNS).

79. See *id.* at 607.

80. See *id.* at 607–08 (1999) (noting the worry of the European Union, Australia, and others that the U.S. had excessive control over the DNS).

81. JOSEPH REAGLE, WHY THE INTERNET IS GOOD: COMMUNITY GOVERNANCE THAT WORKS WELL 11 (1998), at <http://cyber.law.harvard.edu/people/reagle/regulation-19990326.html> (quoting Internet Engineering Task Force (IETF) member David Clark's comment in a 1992 IETF meeting: "We reject kings, presidents, and voting. We believe in rough consensus and running code.").

82. See Proffitt, *supra* note 78, at 609.

ICANN's combination of corporate and governmental features is interesting for a number of reasons. Like the hippogriff and unlike, say, a mule, ICANN does not combine the characteristics of its parents uniformly. Whole body parts of one animal are grafted onto parts of other animals. Some parts of ICANN operate like a corporation, while others are much more like governmental instrumentalities. For example, in dealing with disclosure of some sorts of information it resolutely maintains that it is a corporation and sees no need to engage in the kind of disclosure requirements assumed by agencies.⁸³ In relation to determining the appropriate relationship between intellectual property interests that arise online and offline, it operates like a government agency. Not only did it convene hearings on the appropriate balance to strike, it received a report from a prominent international body, the World Intellectual Property Organization, promulgated a law as a consequence of the report, and created an entire adjudication system to deal with disputes pursuant to this new law.⁸⁴

This is unusual, perhaps unprecedented, in an agency/corporate organization. However, more extraordinary than this is that the hippogriff thinks it is a horse. ICANN often suggests that it is a private corporation that only needs to comply with the usual obligations of such a body.⁸⁵ Yet at other times it seems to recognize that it holds a particular regulatory function, and as a result, it needs to find an appropriate ground of legitimacy.⁸⁶ Appeals for legitimacy are, of course, foreign to corporations. They are constituted to make profits, or to do good, or whatever. But one hardly ever sees a concern in corporate governance to find a warrant for what they do, outside that which is imposed by the market. So ICANN, as well as other governmental organizations, does recognize

83. See ICANN, BYLAWS, *supra* note 7, art. II, § 1.

84. See KUR, *supra* note 19, at 4.

85. See *infra* Part IV.A.3 (discussing Tamar Frankel's report on ICANN as a corporation).

86. It is suggested that ICANN's attempt to look like a U.S. federal regulatory agency is a search for legitimacy. See Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187 (2000); TAMAR FRANKEL, ACCOUNTABILITY AND OVERSIGHT OF THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN), REPORT TO THE MARKLE FOUNDATION 1 (July 12, 2002), at http://www.markle.org/news/ICANN_fin1_9.pdf; discussion *infra* Part IV.A.1.

that it needs a warrant for the actions it takes from time to time. When it does so, however, it justifies its actions based on the idea of “consensus” as the touchstone of legitimacy. ICANN is often criticized for not actually meeting its commitment to consensus. But even leaving this aside, there is a serious question to be answered as to how any significant political institution could ever meet the claim that it governs by consensus. Moreover, as explored below, the idea of consensus is really a modified form of direct democracy, a theory which we have earlier seen is an incoherent description of modern political institutions.

The dual character of ICANN leads to alternative views of the kinds of political commitments we should expect. One view, most recently expressed by Tamar Frankel, is that ICANN needs to conform with corporate governance expectations.⁸⁷ The other approach, most obviously identified with Michael Fromkin⁸⁸ and Jonathan Weinberg,⁸⁹ is to demand that ICANN comply with the usual democratic expectations we have for governmental institutions. Models stemming from corporate governance and democratic theory are not irreconcilable,⁹⁰ but they do tend to focus on different features of an institution. Corporate governance models are concerned with responsible management and disclosure of meaningfully relevant material to stakeholders.⁹¹ Political democracy models look to the features discussed above: voice, citizenship, representation, control over representative by constituents, etc. In essence, these models advance differing political commitments, and an examination of the requirements of these models casts useful light on the question of ICANN’s democratic legitimacy.

87. See FRANKEL, *supra* note 86.

88. See A. Michael Fromkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000).

89. See Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187 (2000).

90. For example, expectations within democracy are increasingly being placed upon corporate entities, particularly in relation to workers rights to have a say in the administration of the corporation. See, e.g., ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985).

91. See FRANKEL, *supra* note 86.

1. ICANN as executive agency

As discussed previously, ICANN is routinely accused of lacking democratic legitimacy.⁹² This view of legitimacy assumes that ICANN is some sort of governmental actor, though accounts differ as to what government we might be talking about here, and what type of actor within that government ICANN might be. Michael Froomkin, perhaps ICANN's most plangent and well-informed critic, assumes that the government in issue is that of the United States, and ICANN is in fact assuming the mantle of one of the administrative agencies.⁹³ Since ICANN is not a formally constituted executive agency, he argues that it falls foul of both U.S. administrative law and the U.S. Constitution.⁹⁴ Specifically, he suggests that the Department of Commerce's use of ICANN to make rules violates requirements for notice and comment in rulemaking and judicial review, pursuant to the Administrative Procedures Act, or that it violates the Constitution's non-delegation doctrine.⁹⁵ "In either case, the relationship violates basic [U.S.] norms of due process and public policy designed to ensure that federal power is exercised responsibly."⁹⁶

92. "[The U.S. Department of Commerce's] relationship with ICANN violates fundamental U.S. policies that are designed to ensure democratic control over the use of government power." Froomkin, *supra* note 88, at 27. Even those who make the case for ICANN as a more efficient method of domain name allocation and dispute resolution note that it cannot (or perhaps should not) be resolving issues in distributive justice which more properly are handled democratically. See Gillian K. Hadfield, *Privatizing Commercial Law: Lessons from ICANN*, 6 J. SMALL & EMERGING BUS. L. 257, 286-88 (2002).

93. See Froomkin, *supra* note 88, at 20.

94. See *id.*

95. See *id.*

96. *Id.*; see also A. Michael Froomkin, *Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 93 (2002). Cf. Edward Brunet, *Defending Commerce's Contract Delegation of Power to ICANN*, 6 J. SMALL & EMERGING BUS. L. 1 (2002) (arguing ICANN is based on proper legal foundation because of the statutory authority of government to contract with private entities); Joe Sims & Cynthia L. Bauerly, *A Reply to Professor Froomkin's Form and Substance in Cyberspace*, 6 J. SMALL & EMERGING BUS. L. 125 (2002) (arguing that since ICANN is a revolutionary experiment it would be impractical to apply rules of the past to the structures of the future); Joe Sims & Cynthia L. Bauerly, *A Response to Professor Froomkin: Why ICANN Does Not Violate the APA of the Constitution*, 6 J. SMALL & EMERGING BUS. L. 65 (2002) (contending that ICANN does not violate the

While these may be relevant considerations within a U.S. constitutional environment, it is hard to see any broader political commitment that is implicated by ICANN's actions. Indeed, Froomkin has noted that this was not a criticism of ICANN, but rather of the federal government's end run around their obligations.⁹⁷

As other commentators have noted, ICANN itself avoids the explicit connection with the U.S. government, and instead sees itself (at times) as trans-national and trans-governmental. However, it still adopts features of certain types of actors within Western governmental structures, especially actors within the U.S. system. As Jonathan Weinberg demonstrates, ICANN has appropriated features of both unrepresentative executive agencies and representative legislatures.⁹⁸ Thus, ICANN adopts administrative features such as notices of proposed rulemakings and comment periods for interested parties,⁹⁹ reconsideration processes for parties affected by rulemakings,¹⁰⁰ the existence of an external review mechanism for decisions,¹⁰¹ and so on.¹⁰² As Weinberg notes, even the specifics of these features mimic U.S. administrative laws: who is an affected party, timeliness of the reconsideration application, exhaustion of rights, the concepts of interim relief, and pleading are all familiar to the laws regulating U.S. executive agencies.¹⁰³

The issue that emerges here is whether there are political commitments which are implicated in agencies of this sort, and which might be applied to ICANN. Indeed, since the rise of administrative agencies within the United States was the basis for much of the democratic deficit concerns during the last century, ICANN's self-conscious invocation of U.S. administrative approaches is interesting here. The criticisms of ICANN as an administrative agency focus on features such as: "[t]he public's right

Constitution because it is not a state actor, and as a private actor, ICANN's actions do not violate the non-delegation doctrine since it does not have authority over the Internet and does not exercise governmental power).

97. See Froomkin, *supra* note 96, at 98 n.22.

98. See Weinberg, *supra* note 89, at 225–57.

99. See ICANN, BYLAWS, *supra* note 7, art. III, § 6.

100. See *id.* art. IV.

101. See ICANN, INDEPENDENT REVIEW POLICY, available at <http://www.icann.org/committees/indreview/policy.htm> (last visited Sept. 1, 2002).

102. See Weinberg, *supra* note 89, at 228.

103. See *id.*

to notice and meaningful comment; to accountable decisionmaking; to due process; and to protection against arbitrary and capricious policy choices, self-dealing, or ex parte proceedings are all attenuated or eliminated; so, too, is the prospect of any meaningful judicial review.”¹⁰⁴

Weinberg adopts similar concerns. We might consider each of these to be relevant and appropriate political commitments, but in fact they are little more than invocations of democracy once removed. As Weinberg indicates elsewhere, the reason we care about these issues is to reconcile administrative decision-making with the “agencies’ insulation from direct democratic control.”¹⁰⁵ He goes so far as to say that any of ICANN’s processes will be adjudged legitimate only to the extent that it constrains itself, just like a federal agency.¹⁰⁶ As a result, ICANN can only become legitimate if it becomes democratic, and we are back to where we started.

2. ICANN as legislature

At other times and places ICANN specifically invokes features, such as legislatures, that are more common in democratic institutions. Various aspects of ICANN’s structure and operational methods have been created with an implicit democratic model. For example, a number of committees and “supporting organizations” have been created to influence the overall direction of the organization.¹⁰⁷ Not only are these committees and supporting organizations usually structured as representative democratic institutions, but they also often contain explicit geographical representation requirements.¹⁰⁸ There are problems with these organizations, notably that they are not representative in the typical one-person, one-vote sense, and also that they display some elements of regulatory capture.¹⁰⁹ However, these concerns pale in comparison to the nature of the Board.

It is at the highest level that ICANN’s reliance on representative democracy ideals has caused the most problems. ICANN’s Board of

104. Froomkin, *supra* note 88, at 27.

105. Weinberg, *supra* note 89, at 219.

106. *See id.* at 225.

107. *See id.* at 235.

108. *See id.* at 236.

109. *See id.* at 239–42.

Directors is constituted as a form of representative institution. There are nineteen seats which are divided up so that certain constituencies are represented: the CEO gets one spot, but three seats each are given over to sub-groups of ICANN called the Domain Name Supporting Organization (DNSO), the Address Supporting Organization (ASO), and the Protocol Supporting Organization (PSO).¹¹⁰ These bodies may be seen as primarily technical groups with responsibilities for various engineering aspects, but they include members who are closely aligned with trademark owners, commercial operators of domain name registries, and others whose interest is primarily commercial.

The remaining nine seats are given over to the “at-large” directors, who are supposed to represent the Internet community at-large.¹¹¹ Here, things get really hairy. Initially these positions were, effectively, internal appointments.¹¹² ICANN was forced to introduce elections for five of the positions,¹¹³ and has had a storied relationship with them ever since. The seats were divided into geographical regions,¹¹⁴ and an election was held. The election was a disaster, on almost any metric of the effectiveness of representative elections. The constituency for each was huge, but unresponsive. Of the hundreds of millions of people who might have voted for their one representative, fewer than one thousand votes was enough to secure the win for some representatives.¹¹⁵ This extraordinarily low

110. *See id.* at 235–36.

111. *See id.* at 237.

112. *See id.* at 245 (explaining that directors were selected by a majority vote of the initial Board).

113. *See* Letter from J. Beckwith Burr, Acting Associate Administrator, National Telecommunications and Information Administration, to Herb Schorr, Executive Director, Information Sciences Institute, University of Southern California (Oct. 20, 1998), available at <http://www.ntia.doc.gov/ntiahome/press/icann102098.htm>. Originally, Board members argued that there was no need for explicit public involvement. *See* E-mail from Joe Sims to comment-bylaws@icann.org, at <http://www.icann.org/comments-mail/comment-bylaws/msg00025.html> (Oct. 23, 1999) (Response to Froomkin). For an account of the political influence brought to bear on this issue, see Weinberg, *supra* note 89, at 245–46.

114. *See* Preliminary Report, *supra* note 11; *see also* Weinberg, *supra* note 89, at 246 (explaining that the five new directors were to be elected from North America, Central and South America, Europe, Africa, and Asia).

115. *See* Election.com, ICANN@Large Membership: Vote for Region 3 Director—Latin America and Caribbean, at <http://www.election.com/us/icann/>

voter turnout can be attributed to a number of factors: most of the world does not have access to the Internet, those who do have access do not know about ICANN, and those who do know about ICANN do not care about how it is run. However, another disincentive to vote was the sheer difficulty of doing so. Although ICANN is the online institution *par excellence*, much of the election took place offline for security reasons, showing we are still dependent on physical indicators of the reality of the elector.¹¹⁶ So an elaborate and expensive physical mailing took place, posting user identification numbers and passwords to those who had initially registered online.¹¹⁷ Only then, armed with the physical slip of paper, was the elector allowed to vote online.

Apart from the practical problems with running an election of this sort, a number of obvious questions emerge. Weinberg suggests two: first, what does it mean to “‘represent’ any community as ill-defined as the Internet community,” and second, should a technical body like ICANN be representative at all?¹¹⁸ Other questions might be added: first, why should a geographical distribution of regions be a meaningful division of the online demos, and second, why have representation at all?

In short, we are once again confronted with the question of whether the problems with ICANN’s democratic approach—in this case, its attempt at representation—are meaningful. The idea of representation itself does not appear, to me at least, as any kind of political commitment of any online community. And particularly within the kind of body that ICANN is, representation makes little sense at all.

region3.html (last visited Feb. 11, 2003) (illustrating that Ivan Moura Campos needed only 946 votes to win the Region Three election).

116. See THE PRACTICAL NOMAD, WHY I COULDN’T VOTE IN THE ICANN AT-LARGE ELECTION, available at <http://hasbrouck.org/icann/p-stage.htm> (last visited Feb. 11, 2003) (explaining in e-mail correspondence that ICANN mailed PIN letters to at-large members and that ICANN lacked funding to send anymore letters).

117. See *id.*

118. Weinberg, *supra* note 89, at 248.

3. ICANN as corporation

The recent report by Tamar Frankel on behalf of the Markle Foundation advances a model of ICANN as corporate entity.¹¹⁹ For example, the emphasis is placed upon management and the Board as the relevant actors within the institution, extensive reference is made to literature on the management and strategy of corporations, and so on.¹²⁰ From this starting assumption, the report notes a legitimacy problem for the corporation stemming not so much from democratic deficits, but rather from poor management.¹²¹ Examples of this mismanagement include overbroad definitions of the functions of the corporation, mission creep, uncontrolled staff expansion, and poor performance evaluation.¹²²

The report, therefore, seeks to present ways of addressing this legitimacy concern by applying corporate governance understandings of “accountability and oversight.”¹²³ So, for example, the requirement of accountability involves undertaking performance evaluations, public disclosure of evaluations, publication of budgets and operational plans, and other metrics of responsible corporate governance.¹²⁴ Oversight requires some deference to external reviewers and the like.¹²⁵

This approach has much in common with the view of ICANN as federal agency, inasmuch as external review and disclosures are also remedies to democratic deficits presented there. However, since the emphasis is on good management rather than on democracy for its own sake, I have less concern about implicitly introducing pre-modern conceptions of direct democracy here. In fact, the metaphor of corporate governance seems somehow suitable to the obligations we expect of institutions.

119. See FRANKEL, *supra* note 86. Frankel does suggest that ICANN might be viewed as a legislative entity, but the emphasis is clearly upon the corporate governance issues that ICANN presents.

120. See *id.* at 1–36 nn.49, 52, 56, 60–61, 64, 77–78, 87, 108, 118.

121. See *id.* at 1–3.

122. See *id.* at 1–2.

123. *Id.* at 1.

124. See *id.* at 7.

125. See *id.* at 17–18.

B. On Voting, Democracy, and Constituencies

Much of the discussion above has endeavored to articulate some views of those critical of ICANN. Much of this criticism, I argue, has to do with assumptions about democracy, especially direct democracy within online institutions. We see similar problems emerge not just from critics of ICANN, but those inside it as well. One of the basic problems with ICANN is, I think, its allegedly core political commitment.¹²⁶ It adheres to “consensus” as the basis of its legitimacy and as justification for the actions it undertakes. This idea of consensus is never very well articulated, and many times it is simply ignored. Let me bracket the issue of whether ICANN does, in fact, engage in consensus, for the theoretical nature of consensus is more interesting. The idea stems from ICANN’s technical background, and it involves the idea that a like-minded group of individuals can agree on the best solution to technical, or political, issues. To the extent that “consensus” is defined at all, it seems to involve ideas of “widespread community support”¹²⁷ with “no strong or reasoned opposition”¹²⁸ that propagates from the community members at the bottom, up to the decision-makers. Some have concluded that consensus does not work in practice, since it demands extremely costly mechanisms for input of views, and because political decisions involve deciding to privilege one set of values or one party’s interests over another.¹²⁹

As a political theory, “consensus” is very closely allied with the Libertarian view of bottom-up ordering presented by Hayek and

126. I say “allegedly” here because ICANN professes this as the basis of its actions but rarely consults and has few if any mechanisms to gauge consensus. See David R. Johnson & Susan P. Crawford, *Why Consensus Matters: The Theory Underlying ICANN’s Mandate to Set Policy Standards for the Domain Name System*, at http://www.icannwatch.org/archive/why_consensus_matters.htm (posted Aug. 23, 2000) [hereinafter Johnson & Crawford, *Why Consensus Matters*]; David Post, *ICANN and the Consensus of the Internet Community*, at http://www.icannwatch.org/archive/icann_and_the_consensus_of_the_community.htm (Aug. 20, 1999); David Post et al., *Elusive Consensus*, at http://www.icannwatch.org/archive/elusive_consensus.htm (July 21, 1999).

127. David R. Johnson & Susan P. Crawford, *What’s Wrong with ICANN—and How to Fix It*, at http://www.icannwatch.org/archive/whats_wrong_with_icann.htm (last visited Jan. 10, 2003).

128. Johnson & Crawford, *Why Consensus Matters*, *supra* note 126.

129. See Weinberg, *supra* note 89, at 252.

others.¹³⁰ The idea carries with it implications of direct and deliberative democracy theories. Consensus emerges where all interested persons within the demos are able to engage in debate on a given topic and have the right to vote on it. Direct democracy appears to be extremely well-suited to the Internet, but does not really reflect our political commitments as I have argued previously. It is merely a nostalgic reference to a political system that never was, and never could be.

The deliberative democracy features of consensus are problematic for the reasons expressed when discussing Sunstein's concerns about the Internet.¹³¹ There is little to suggest that deliberative democracy translated online could ever reflect anything other than an idealized version of a lab experiment. Real-life political interactions do not seem to fit within the model of deliberative democracy, so ICANN's reliance on this approach is problematic.

V. CONCLUSIONS

In this Article, I have asked whether our political commitments can be, and have been, met by online institutions such as ICANN. I think that if they have not been up to date, then it has been as a result of deferring to the impoverished idea of democracy, not because of some systemic problem with the form of online political institutions we have seen to date.

To say that democracy is an inadequate grounding for criticisms of online institutions, however, is not to say that these institutions should be immune from criticism. It has not been possible here to establish a normative theory of how best to meet our online political commitments or even to explore more fully what those commitments would look like. The task here has been simply to make democracy seem less like an answer and more like a question.

There is clearly significant work which must be done here: more and more trans-national and cyberspace political actors like ICANN are likely to emerge as the current geo-political system is found unequal to online challenges. We must then start to define

130. See FRIEDRICH A. HAYEK, *LAW LEGISLATION AND LIBERTY: RULES AND ORDER* 35–54 (1973).

131. See SUNSTEIN, *supra* note 46, at 7–10.

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what amounts to appropriate political concerns and what amounts to mere vestigial appendages of a political system that never really existed. Cyberspace should not be ruled like the Athenian Senate. And neither should ICANN. But how it should be ruled is an open question.