Jefferson Rebuffed - The United States and the Future of Internet Governance

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When after years of preparation and consultations, the World Summit on the Information Society (WSIS)[1] concluded in Tunis with the adoption of the Tunis Commitment[2] and the Tunis Agenda[3] on November 18, 2005, the nearly fifty heads of state, vice –presidents, and almost 200 cabinet level government officials[4] from around the world hailed it as a great achievement. For many of the 19,000 participants in the three-day meeting, which ended a multi-year process that had officially begun with the first WSIS meeting in Geneva in December 2003[5], the relief was palpable. Tense negotiations, public diplomacy, and a momentous switch of key players in the months leading up the Tunis event had at times put the prospect of a successful conclusion of the WSIS process in doubt.

In the end, though, it seemed that everybody had gotten something. The Tunis Agenda (Agenda) and the Tunis Commitment put forward an ambitious vision of overcoming the global digital divide and of facilitating economic and social development through the use of

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[1] *See* G.A. Res. 56/183, U.N. Doc. A/RES/56/183 (Jan. 31, 2002); Int'l Telecomm. Union [ITU], *World Summit on the Information Society*, ITU Plenipotentiary Conference (Minneapolis 1998) Res. 73, http://www.itu.int/council/wsis/R73.html (last visited Apr. 7, 2006). For a comprehensive online documentation, see World Summit for the Information Society, http://www.itu.int/wsis/ (last visited Apr. 7, 2006).

[2] U.N. World Summit on the Information Society [WSIS], Tunis Commitment, Doc. WSIS-05/TUNIS/DOC/7-E (Nov. 18, 2005), *available at* http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=2266|2267 [hereinafter *Tunis Commitment*].

[3] WSIS, *Tunis Agenda for the Information Society*, Doc. WSIS-05/TUNIS/DOC/6(Rev.1)-E (Nov. 18, 2005), *available at* http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=2266|2267 [hereinafter *Tunis Agenda*].

[4] *See* WSIS Newsroom, http://www.itu.int/wsis/tunis/newsroom/index.html (last visited Apr. 7, 2006).

[5] *See generally* WSIS First Phase: Geneva, http://www.itu.int/wsis/index-p1.html (last visited Apr. 7, 2006).

information and communication technologies, yet stayed clear of mandating massive financial commitments to achieve the envisioned goals. Perhaps more importantly, the Agenda set out the medium-term future of global Internet governance, thus seemingly ending years of intense battles that had pitted the United States as the operator of the Internet's naming and numbering frameworks – through ICANN[6] – against other nations and organizations that demanded a more international governance mechanism for the core of the global information and communication network.

The United States had strongly opposed any internationalization of the process,[7] while China among many others demanded a bigger say.[8] The Europeans initially chose to keep a lower profile[9], but in September of 2005 they had a change of heart, formally proposing a

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[6] Internet Corporation for Assigned Names and Numbers [ICANN], http://icann.org/ (last visited Apr. 7, 2006). *See generally* Milton L. Mueller, RULING THE ROOT 163-226 (2002) [hereinafter *Mueller, Ruling the Root*]; Michael Hutter, *Global Regulation of the Internet Domain Name System: Five Lessons from the ICANN Case*, *in* INNOVATIONSOFFENE REGULIERUNG DES INTERNET 39 (Karl-Heinz Ladeur ed., 2003); Tamar Frankel, *The Managing Lawmaker in Cyberspace: A Power* Model, 27 BROOKLYN J. INT'L L. 859 (2002); Tamar Frankel, *Governing by Negotiation: The Internet Naming System*, 12 CARDOZO J. INT'L & COMP. L. 449 (2004) (analyzing ICANN as an example of an incoherent governance system) [hereinafter *Frankel, Internet Naming System*]; Stefan Bechtold, *ICANN Governance: Governance in Namespaces*, 36 LOY. L. REV. 1239 (2003). Most authors take a rather critical stance on ICANN. *See, e.g.*, *Jonathan* Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L. J. 187 (2000) (pointing to the absence of judicial review of ICANN decisions, the inadequate representation of the heterogeneous Internet community, and the lack of procedures to recognize consensus); Milton Mueller, *ICANN and Internet Governance. Sorting Through the Debris of 'Self-Regulation'*, 1 INFO 497 (1999) [hereinafter *Mueller, Self-Regulation*] (arguing that the rhetoric around "self-regulation" only served to obscure the real policy and legal issues of Internet governance); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 47-8 (2000) (arguing that the Department of Commerce's use of ICANN to regulate violates fundamental democratic values and bypasses either the APA or the Constitution) [hereinafter *Froomkin, Wrong Turn in Cyberspace*]. For an examination of ICANN's experiment in basic democracy see John Palfrey, *The End of the Experiment: How Icann's Foray into Global Internet Democracy Failed*, 17 HARV. J. L. & TECH. 409 (2004); Emmanuel A. Caral, *Lessons form ICANN: Is Self-Regulation of the Internet Fundamentally Flawed?*, 12 INT. J.L. & INF. TECH. 1 (2004).

[7] *See* U.S. National Telecommunications and Information Administration [NTIA], *U.S. Principles on the Internet's Domain Name and Addressing System*, http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.htm (last visited Apr. 14, 2006) [hereinafter *USDNS Principles*].

[8] *See, e.g.*, Kenneth Neil Cukier, *Who Will Control the Internet?*, 84 FOREIGN AFFAIRS 7, 7 (2005); *see also* Tom Wright, *EU Tries to Unblock Internet Impasse*, INT'L HERALD TRIB., Sept. 30, 2005, *available at* http://www.nytimes.com/iht/2005/09/30/business/IHT-30net.html (citing a statement by the Brazilian delegation: "On Internet governance, three words tend to come to mind: lack of legitimacy. In our digital world, only one nation decides for all of us.").

[9] *See, e.g.,* Wright, *supra* note 8.

more international and intergovernmental framework for Internet naming and numbering.[10] Such a switch by the Europeans prompted angry reactions from the US government.[11] As it approached the brink of failure, the WSIS process was saved in the nick of time by the Solomonic solution of creating an international Internet Governance Forum (IGF)[12] under the auspices of the United Nations.

To placate the US, it was agreed upon that the IGF would advise the US-based ICANN without any actual power to control its action.[13] In particular, developing nations were willing to agree to the compromise in order to facilitate the acceptance of the digital divide agenda – more important from their perspective.[14] Those that had advocated for more international oversight of ICANN, too, could call the creation of IGF a victory of sorts, while US officials assured its constituencies that the IGF was a powerless body and ICANN would be able to continue to operate unconstrained.[15] So goes the story reported in the media and editorialized on- and offline.[16]

There is, however, another mostly untold story about the WSIS negotiations and the subsequent outcome. It focuses on the sudden change in the European position. It is the

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[10] *See* European Union (UK), *Proposal for Addition to Chair's Paper Sub-Com A Internet Governance on Paragraph 5 "Follow-up and Possible Arrangements"*, Doc. WSIS-II/PC-3/DT/21-E (Sept. 30, 2005), *available at* http://www.itu.int/wsis/docs2/pc3/working/dt21.pdf [hereinafter *EU Proposal*].

[11] *See* Wright, *supra* note 8; Frederick Kempe, *How the Web Was Run*, WALL ST. J. ONLINE, Oct. 25, 2005, http://online.wsj.com/public/article/SB113016040615477507-h59KwScGodjqLoWWHD8YlNKiDZI_20051031.html?mod=blogs; *see also* Kieren McCarthy, *Read the Letter That Won the Internet Governance Battle*, THE REGISTER, Dec. 2, 2005, http://www.theregister.co.uk/2005/12/02/rice_eu_letter (reprinting the letter U.S. Secretary of State Condoleeza Rice sent to U.K. Foreign Minister Jack Straw in response to the European proposal) [hereinafter *Letter from Condoleeza Rice*].

[12] *See* Section 72 and 73 of the Tunis Agenda, *supra* note 3, at 11-2 ("We ask the UN Secretary-General, in an open and inclusive process, to convene, by the second quarter of 2006, a meeting of the new forum for multi-stakeholder policy dialogue—called the Internet Governance Forum (IGF).").

[13] The mandate as put forward in Section 72(a)-(l) of the Agenda includes only soft powers such as "discuss", "facilitate", "interface", "advise", "promote" or "help."

[14] *See, e.g.*, WSIS, *Accra Commitments for WSIS Tunis 2005*, Feb. 4, 2005, http://www.itu.int/wsis/docs2/regional/outcome-accra.pdf (last visited Apr. 7, 2006), 2-3.

[15] *See* A Peace of Sorts, ECONOMIST (U.S. Edition), Nov. 19, 2005.

[16] *See id.*; Wright, *supra* note 8; Kempe, *supra* note 11.

story of a missed opportunity for what could have become a "constitutional moment"[17] in international Internet governance.

With its Constitution arguably being the oldest and most enduring worldwide, the United States traditionally has been at the forefront of fostering and advancing constitutional governance structures at times even through the use of force.[18] Why, then, has the United States vigorously opposed and fought the concept of self-constrained governance in the important context of global information flows? The aim of this article is to offer an answer.

In Part I we briefly recount the current structure of naming and numbering governance on the Internet through ICANN. In Part II we describe the main elements of the European proposal. Part III analyzes why and to what extent the proposal would have enabled a unique "constitutional moment" for Internet governance. Part IV explores why the proposal failed to persuade the United States government despite its own constitutional history. Examining four sets of potential reasons – federalism, individual rights, public choice, and international law – we find that a combination of differently aligned economic interests and a reluctance to delegate even self-constrained power to an international regime explains why 2005 will not be remembered as the Internet's 1789.

I. ICANN and Internet Governance

Nobody owns the Internet. No government has sole power over the Net, as its components fall under numerous national and state jurisdictions that may set forth constraints on what can be communicated over it.[19] Due to the way the Internet works, there exists no central technical control nor is there a need for it.. Packets of information are able to find their own

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[17] *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); WE, THE PEOPLE: FOUNDATIONS (1991); WE, THE PEOPLE: TRANSFORMATIONS (1998). For the rich secondary literature on Ackerman's idea, see, e.g., Special Issue, *Constitutional Change and the Politics of History*, 108 YALE L.J. (1999).

[18] *See, e.g.,* Francis Fukuyama, AMERICA AT THE CROSSROADS 14-47 (2006) (giving a critical account of the history of the so-called Neoconservatives and their policy to reach out with military force to promote democracy); *see also* William P. Alford, *Exporting "the Pursuit of Happiness,"* 113 HARV. L. REV. 1677, 1711 (2000) (reviewing Thomas Carothers, Aiding Democracy Abroad: The Learning Curve (1999)); John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429 (2003); James A. Gardner, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980); Viktor Mayer-Schönberger*, Into the Heart of the State: Intervention through Constitution-Making*, 8 TEMPLE INTERNATIONAL AND COMPARATIVE LAW JOURNAL 315 (1994).

[19] *See, e.g.*, Ed Krol, THE WHOLE INTERNET 13-4 (1992).

way from sender to recipient.[20] Some say this is one of the secrets of the Net's success.[21] Consequently, the Internet does not need and does not have a central governing and coordinating core, except for three specific functions that have to do with addressing devices, mostly computers, connected to the Net.[22]

These functions cover (a) the policy for allocating blocks of Internet addresses, (b) the operation of the root servers that make it possible for devices on the network to find each other and for packets of information to travel from senders to recipients across the network, and (c) setting and enforcing the policies for the creation and administration of top level domains ("TLDs"), the suffixes of Internet domain names.[23] While managing domain names as well as routing packets are largely decentralized, these three functions are not only centralized, but also currently performed together by one single organizational entity, called the Internet Corporation for Assigned Names and Numbers (ICANN).[24]

ICANN was incorporated as a non-profit corporation governed by California law in 1998[25] and operates based on a Memorandum of Understanding (MoU) with the US Department of Commerce,[26] which had previously held jurisdiction over Internet naming and numbering.[27]

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[20] For a summary of the packet switching process via TCP/IP, see id. at 19-25.

[21] *See, e.g.*, Letter from Condoleeza Rice, *supra* note 11 (writing that "[t]he success of the Internet lies in its inherently decentralized nature").

[22] *See* Cukier, *supra* note 8, at 8-9; *see also* Mueller, *Ruling the* Root, supra note 6, at 31-56.

[23] *See* ICANN, *ICANN Information,* http://www.icann.org/general/ (last visited Apr. 26, 2006) ("ICANN is responsible for coordinating the management of the technical elements of the DNS to ensure universal resolvability so that all users of the Internet can find all valid addresses. It does this by overseeing the distribution of unique technical identifiers used in the Internet's operations, and delegation of Top-Level Domain names (such as .com, .info, etc."); *see also* Cukier, *supra* note 8, at 8-9.

[24] *See* Mueller, *Ruling the Root*, *supra* note 6, at 211-26. It is debatable whether all three functions ICANN performs need to be centralized. There is certainly no inherent necessity to have them bundled in one single organization, but that is the way ICANN was set up and has been operating since.

[25] *See* Hutter, *supra* note 6, at 47.

[26] Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, Nov. 25, 1998, *available at* http://www.icann.org/general/icann-mou-25nov98.htm [hereinafter *Memorandum*].

[27] *See* Mueller, *Ruling the Root*, *supra* note 6, at 156-8.

As the organization controlling the fundamentals of Internet naming and numbering, ICANN is capable of, in essence, deciding which devices can connect to the Internet and with which names. Frequently, ICANN exercises its power following broad consensus, for example when creating new top level domains or reassigning the power to register domain names for certain geographic areas,[28] although at times this process has taken longer than expected.[29]

At least once in recent times, however, ICANN's actions could be interpreted as influenced more directly by US domestic concerns. In August 2005, ICANN was supposed to decide on a Florida entrepreneur's proposal to approve the new .xxx top-level domain for adult Internet sites, but postponed its decision several times because of formal protest by the US government, which has veto power over the Internet addressing system.[30]

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[28] ICANN redelegated control over ccTLDs for a number of countries, such as Australia (.au), Japan (.jp), Burundi (.bi), Malawi (.mw), or the Pitcairn Islands (.pn). *See* Kim G. v. Arx & Gregory R. Hagen, *Sovereign Domains: A Declaration of Independence of ccTLDs from Foreign Control*, 9 RICH. J.L. & TECH. (2002), *available at* http://www.law.richmond.edu/jolt/v9i1/article4.html; Frankel, *Internet Naming System*, *supra* note 6, at 470. See Froomkin, *Wrong Turn in Cyberspace*, *supra* note 6, at 47-8 for a brief account of the steps taken by the Palestinians to register the .ps domain.

[29] For example, the negotiations over the .eu top-level domain lasted more than 5 years before ICANN finally agreed to create it. *See, e.g.*, Robin O'Brien Lynch, *Europe's Internet Domain Finally Gets Green Light*, IRISH TIMES, Apr. 1, 2005, at 7 (describing ICANN as an organization "which is also not renowned for its swiftness of action"). For a different view, see Kieren McCarthy, *EU Domain Jumps Final Hurdle*, THE REGISTER, Mar. 19, 2005, *available at* http://www.theregister.co.uk/2005/03/19/eu_domain_jumps_final_hurdle/ (arguing that the delays were mainly a result of the EU bureaucracy).

[30] Only recently, the ICANN Board of Directors decided to reject the application for the .xxx domain. ICANN, *Announcement: ICANN Board Votes Against .XXX Sponsored Top Level Domain Agreement*, May, 10, 2006, http://www.icann.org/announcements/announcement-10may06.htm. The plans had already been shelved at the New Zealand meeting in late March 2006 "with the US once again understood to have lodged its opposition to the idea". Richard Waters, *Plans for .xxx Porn Website Domain Shelved*, FIN. TIMES (London), Apr. 1, 2006, at 6. As to earlier interventions see Chris Nuttall, *Sex Net Domain Arouses Wrath of Religious Right*, FIN. TIMES (London), Aug. 17, 2005, at 4 (citing a letter by Michael Gallagher, assistant secretary at the US Commerce Department, to Vint Cerf, chairman of ICANN, that states: "Given the extent of the negative reaction, I request that the board will provide a proper process and adequate additional time for these concerns to be voiced."); *Feds Urge Delay for .XXX Domain*, WIRED NEWS, Aug. 16, 2005, http://www.wired.com/news/infostructure/0,1377,68545,00.html; Kieren McCarthy, *ICANN Kills .xxx Porn Domain*, THE REGISTER, Dec. 1, 2005, available at http://www.theregister.co.uk/2005/12/01/icann_kills_xxx/ (speculating on the causes for the delay and concluding that it is more likely that "the US government intervened but is desperate to avoid being seen to do so because of the ongoing Internet governance conflict"); Jascha Hoffman, *Porn Suffix, The*, N.Y. TIMES (Magazine), Dec. 11, 2005, at 86. Another case in which ICANN's policy has provoked an international policy discussion is the reassignment of Iraq's top-level domain ".iq". *See* Farah Stockman, *At Last, Iraq Finds a Web Designation*, THE BOSTON GLOBE, Nov. 24, 2005, at A36;

ICANN has caused further debate internationally through its attempts to harmonize the process of resolving disputes over domain names. It has created a specific dispute resolution process, the Uniform Domain-Name Dispute-Resolution Policy (UDRP) that it attempts to require domain name registrars to abide by when they are confronted with a disputed claim over a domain name.[31] The UDRP, which is based on the concept of US trademark law, works relatively well for disputes among US-based claimants. It also works well for domain names registered in the United States by non-US parties, as the registrants are contractually accepting US law when resolving disputes by signing up for a domain name from an American registrar. US trademark law and the related UDRP process may not be familiar to such registrants, but at least they have arguably voluntarily availed themselves of US jurisdiction and legal principles.[32]

Bartle Breese Bull, *The .iq Debacle*, FOREIGN AFFAIRS, Sept./Oct. 2005, *available at* http://www.foreignpolicy.com/story/cms.php?story_id=3207. Originally, ICANN had granted control over the domain to a Texas-based Palestinian, Bayan Elashi, but resumed control after Elashi had been sent to prison for funding a terrorist organization in 2002. *See* Bull, *supra.* Following the US invasion in 2003, Paul Bremer, the US administrator in Iraq, asked ICANN to assign the domain to the incoming Iraqi government, but ICANN refused, arguing Iraq was not yet stable enough. *See* Stockman, *supra* (citing a former American adviser to the Iraqi government who said that "ICANN made it clear it would not accept a request by an occupying authority"). Only in November 2005 were Iraqi officials able to announce the launch of .iq on the web.

[31] Uniform Domain Name Dispute Resolution Policy [UDRP], http://www.icann.org/dndr/udrp/policy.htm (last visited Apr. 14, 2006); *see* A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOKLYN L. REV. 605 (2002) (examining the UDRP's procedural provisions and criticizing the basic unfairness in the current regime); Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP,* 27 BROOKLYN J. INT'L L. 903 (2002) (examining the development of UDRP policies and finding forum-shopping and bias issues that require continuous reform); Jay P. Kesan & Andres A. Gallo, *The Market for Private Dispute Resolution Services – An Empirical Re-Assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. TECH. L. REV. 285 (2005) (conducting an empirical analysis of fairness in decisions under UDRP); Mueller, *Ruling the* Root, *supra* note 6, at 192-4; Edward C. Anderson, Esq. & Timothy S. Cole, Esq., *The UDRP – A Model for Dispute Resolution in E-Commerce?*, 6 J. SMALL & EMERGING BUS. L. 235 (2002) (examining UDRP's potential as an alternative to traditional dispute resolution offline); Holger P. Hestermayer, *The Invalidity of ICANN's UDRP Under National Law*, 3 MINN. INTELL. PROP. REV. 1 (2002) (pointing to the problem that the official text of the UDRP is in English, which runs counter to consumer protection laws in many countries that requiring require consumer contracts to be in local language).

[32] *See* UDRP, *supra* note 31, at sect. 4(a) (requiring accredited registrars to include the UDRP in the contract between registrar and registrant); *see also* Hestermayer, *supra* note 31, at 25-6; Laurence R. Helfer, *Whither the UDRP: Autonomous, Americanized, or Cosmopolitan?*, 12 CARDOZO J. INT'L & COMP. L. 493, 496-504 (2004) (arguing that "thus far, American laws and legal structures predominate" over the UDRP).

The situation differs, though, for disputes over domain names between two non-US claimants before a non-US registrar. In such circumstances, it is very likely that non-US law will apply and the disputing parties may have claims that differ greatly from those that may arise under US trademark law. Moreover, domain name registrars in non-US jurisdictions will likely have to follow the legal processes dictated by the jurisdiction they operate in. Not surprisingly therefore non-US registrars as well as managers of country-code top-level domains (ccTLDs)[33] have resisted to adhere to the UDRP, especially if following the policy would force them to violate the laws of their home jurisdiction.

Instead of accepting a range of policies in line with various jurisdictions, ICANN, at least initially, attempted to strong-arm managers of ccTLDs and non-US registrars to accept the UDRP by suggesting that ccTLDs could be reassigned if TLD managers and registrars failed to abide by the policy.[34] ICANN's maneuver only increased the perception that it desires to dominate the process of settling domain name disputes.

Despite its global reach, ICANN is a largely US construct. Bound by California law and based in the US, ICANN is politically if not legally dependent on the delegation of powers from the US Department of Commerce through the MoU.[35] ICANN is governed by a board of 14 directors, which is currently chaired by Internet pioneer Vinton G. Cerf.[36] Initially, five members of ICANN's board were to represent users in specific geographic regions and to be selected through Internet-wide elections.[37] In 2002, though, ICANN reorganized by

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[33] Country-code top-level domains (ccTLDs) are two-letter domains like .uk (United Kingdom) or .de (Germany) that correspond to a country, territory, or other geographic location. *See* ICANN, *ICANN Glossary*, http://icann.org/general/glossary.htm#C (last visited May 11, 2006); *see also* Internet Assigned Numbers Authority [IANA], *Country-Code Top-Level Domains (ccTLDs)*, http://www.iana.org/cctld/cctld.htm (last visited May 11, 2006) (describing the procedure for registering ccTLDs).

[34] Registrars of generic domain names like .com, .net, and .org are required to adopt the UDRP in order to be accredited by ICANN. *See* Section II(K) of ICANN's Registrar Accreditation Agreement, http://www.icann.org/nsi/icann-raa-04nov99.htm (last visited Apr. 7, 2006). However, URDP has not yet been adopted by all country code administrators. *See* Milton Mueller, *Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy*, at 5, *available at* http://dcc.syr.edu/miscarticles/roughjustice.pdf.

[35] *See* Memorandum, *supra* note 26.

[36] *See* ICANN, *ICANN Info: Board of Directors*, http://icann.org/general/board.html (last visited May 11, 2006).

[37] *See* Mueller, *Ruling the Root*, *supra* note 6, at 198-201.

abolishing these *At Large* board members and replacing them with an almost entirely internal selection process, with certain rules requiring geographic diversity.[38]

In viewing the combination of ICANN's power with the actual as well as perceived US domestic influence on its decision-making, governments around the world that are sometimes at odds with the United States on various issues, such as France, Russia, China, and Brazil, have noted ICANN's willingness to exercise its own power. These governments and many others have repeatedly called on the US government to internationalize policymaking over naming and numbering, pointing to the obviously global character and reach of the Internet.[39]

The Clinton administration defended ICANN by pointing to its technical nature and what it saw as a bottom up decision-making process, epitomized by the (now abolished) directly elected At Large board members.[40] Until 2000, the US mantra was that the Internet was too dynamic and too important to be placed under bureaucratic control, be it domestic or international.[41] The Bush administration has offered a somewhat different policy stance, allowing ICANN to replace At large board members with an equally international group of stakeholder representatives. As a result, ICANN may have arguably become less democratically legitimate, while at the same time keeping its international representation. At the same token, the Bush administration has realized the importance of the smooth operation of the Internet for the functioning of an ever increasing information-based US economy, and has thus become extremely reluctant to let others have a say in its governance. The Bush Administration fears that an intergovernmental process would not only lack the

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[38] *See* ICANN BYLAWS (effective Dec. 15, 2002), http://www.icann.org/general/archive-bylaws/bylaws-15dec02.htm (last visited Apr. 7, 2006) (Arts. VI-X stipulate the new procedures for selecting board members).

[39] *See* Mueller, *Ruling the Root*, *supra* note 6, at 150-2; Cukier, *supra* note 8, at 7.

[40] *See, e.g.,* U.S. Department of Commerce, *Management of Internet Names and Addresses (White Paper*), http://www.icann.org/general/white-paper-05jun98.htm (last visited May 11, 2006) ("Nominations to the Board of Directors should preserve, as much as possible, the tradition of bottom-up governance of the Internet, and Board Members should be elected from membership or other associations open to all or through other mechanisms that ensure broad representation and participation in the election process.").

[41] *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, DEPARTMENT OF COMMERCE: RELATIONSHIP WITH THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (2000).

ability to act swiftly and with flexibility but also expose the Internet to potential, and unnecessary, security and stability risks.[42]

In an attempt to facilitate the continued global spread of the Internet, ensure the smooth functioning of the network in general, and discuss the difference of opinions over policy-setting on Internet naming and numbering, the International Telecommunication Union (ITU) passed a resolution in 1998 to propose the idea of a World Summit on the Information Society (WSIS) under the auspices of the United Nations.[43] In 1999, the United Nations Secretary General began preparatory work on the issue, and in December 2001 the United Nations General Assembly adopted a resolution endorsing a multi-year two-phase WSIS process.[44]

The objective of the first phase ("Geneva Phase") was "to develop and foster a clear statement of political will and take concrete steps to establish the foundations for an Information Society for all."[45] The deliberations after two general preparatory committee meetings (PrepComs) and regional conferences culminated in the Geneva conference in December 2003, and resulted in the Geneva Declaration of Principles[46] and the Geneva Plan of Action.[47] The second phase ("Tunis Phase") was "to put Geneva's Plan of Action into motion as well as to find solutions and reach agreements in the fields of Internet governance […]"[48] – the latter a hold-over from the first phase. Two PrepComs, regional conferences,

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[42] *Cf.* USDNS Principles, *supra* note 7.

[43] *See* ITU, *supra* note 1.

[44] The process was envisioned to have two phases: while the first phase took place in Geneva and focused on developing an agenda of political goals for the Information Society, the second phase took place in Tunis and aimed at putting the Geneva Plan of Action into motion and reaching agreement on further issues, such as Internet governance or financing mechanisms. Each phase was preceded by a number of preparatory meetings (PrepComs) that led up to final statements and agendas. *See* WSIS, *Basic Information: About WSIS*, http://www.itu.int/wsis/basic/about.html (last visited May 11, 2006) [hereinafter *WSIS Info*].

[45] *Id.*

[46] WSIS, *Geneva Declaration of Principles*, Doc. WSIS-03/GENEVA/DOC/4-E, Dec. 12, 2003, *available at* http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf [hereinafter *Geneva Declaration of Principles*]

[47] WSIS, *Geneva Plan of Action*, Doc. WSIS-03/GENEVA/DOC/5-E, Dec. 12, 2003, *available at* http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!PDF-E.pdf [hereinafter *Geneva Plan of Action*].

[48] WSIS Info, *supra* note 44.

and WSIS working group meetings were intended to plan the Tunis meeting that took place in November 2005 and resulted in the Tunis Agenda[49] and the Tunis Commitment[50] that left untouched ICANN's policy making powers. ICANN therefore continues to hold the power to regulate Internet naming and numbering despite continuing international debate.

II. The European Proposal

The European Union proposal was formally submitted to the WSIS process relatively late — during the third preparatory conference (PrepCom 3) on September 30, 2005, when the United Kingdom, holding the rotating presidency of the European Union at that time, formally put it forward.[51] This section describes the central elements of the proposal and analyzes its unique feature: substantive self-constraint of governance preserving the Internet's fundamental values.

The European proposal is short, taking up less than a page and a half. It builds on a proposal by the chair of the Internet Governance sub-committee of the WSIS process[52] and offers two modifications to the institutional arrangement for Internet governance that the chair's proposal had outlined.[53]

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[49] *See* Tunis Agenda, *supra* note 3.

[50] *See* Tunis Commitment, *supra* note 2.

[51] *See* EU Proposal, *supra* note 10.

[52] The Chair's original proposal avoided any concrete language and merely provided a rough outline for section 62:

> **62.** In reviewing the adequacy of existing institutional arrangements for Internet Governance and for policy debate, we agree that some adjustments need to be made to bring these into line with the "Geneva principles". Accordingly, we propose:
>
> - *Approach: evolutionary; incremental*
> - *Framework for interface between existing and future arrangements*
>   - *Governance/oversight function: (models)*
>   - *Recommended mandate and structure, subject to agreement on the interface.*
> - *Possible forum*

WSIS, *Chair of the Sub-Committee A (Internet Governance), Chapter Three: Internet Governance*, Doc. WSIS-II/PC-3/DT/10-E, Sep. 23, 2005, at 4, *available at* http://www.itu.int/wsis/docs2/pc3/working/dt-10.pdf [hereinafter *Chair Proposal*] (emphasis in original). Further drafts can be found at http://www.itu.int/wsis/documents/listing-all.asp?lang=en&c_event=pc2|3&c_type=all| (last visited Apr. 14, 2006).

[53] The main points are introduced in sections 63 and 64:

> **63. Principles**

First, the European proposal explicitly includes policy-setting of Internet naming and numbering under the auspices of an international governance body. It does not foresee that ICANN will be replaced in performing its naming and numbering functions, nor does it necessarily suggest that ITU or any other existing international body be given the power to set policies. Instead, it envisions a new international institution for Internet governance that will set policies that ICANN would have to follow in performing its functions.[54] In essence, the proposal suggests allowing ICANN to run the day-to-day operations necessary for the Internet to function, but moving the policy making function of ICANN's Board of Directors to a new international institutional arrangement.[55] To complement this international structure of institutional oversight, the proposal also suggests the creation of an advisory forum to discuss other Internet governance matters.[56]

> The new model for international cooperation stated in paragraph [49] should adhere, besides the Geneva principles, to the following guiding principles:
> - it should not replace existing mechanisms or institutions, but should build on the existing structures of Internet Governance, with a special emphasis on the complementarity between all the actors involved in this process, including governments, the private sector, civil society and international organisations each of them in its field of competence;
> - this new public-private co-operation model should contribute to the sustainable stability and robustness of the Internet by addressing appropriately public policy issues related to key elements of Internet Governance;
> - the role of governments in the new cooperation model should be mainly focused on principle issues of public policy, excluding any involvement in the day-to-day operations;
> - the importance of respecting the architectural principles of the Internet, including the interoperability, openness and the end-to-end principle.
>
> **64. Essential tasks**
>
> The new cooperation model should include the development and application of globally applicable public policy principles and provide an international government involvement at the level of principles over the following naming, numbering and addressing-related matters:
> a. Provision for a global allocation system of IP number blocks, which is equitable and efficient;
> b. Procedures for changing the root zone file, specifically for the insertion of new top level domains in the root system and changes of ccTLD managers;
> c. Establishment of contingency plans to ensure the continuity of crucial DNS functions;
> d. Establishment of an arbitration and dispute resolution mechanism based on international law in case of disputes;
> e. Rules applicable to DNS system.

EU Proposal, *supra* note 10, at 1.

[54] *See* EU Proposal, *supra* note 10, at sect. 63-5.

[55] *See* EU Proposal, *supra* note 10, at sect. 63, 65.

[56] *See* EU Proposal, *supra* note 10, at sect. 65.

Second, the EU proposal mandates that any decision-making on Internet governance by the new institutional body adhere to a set of very general principles (the "Geneva principles"[57]) agreed upon at the end of the first phase of the WSIS process as well as to an additional set of four specific principles.[58] The first three of these additional principles focus on the mechanism of governance. They stress structural complementarity (avoiding duplication of processes and mechanisms),[59] sustainable stability and robustness of the Internet,[60] and a focus on long-term policy issues, not day-to-day operations.[61] Taken together, these principles can be seen as assurances to ICANN and its supporters that shifting policymaking to an international body would not impede on ICANN's routine operations.

The fourth specific principle, however, addresses the substance as opposed to the mechanism of governance. It stipulates that international governance oversight must adhere to "the architectural principles of the Internet, including the interoperability, openness and the end-to-end principle."[62] While the proposal does not define any of these architectural principles, doing so may not in fact be necessary. Although it states it is "in no way intended to be a formal or invariant reference model"[63] and "does not specify an Internet standard of any kind,"[64] RFC 1958, a document of the Internet Architecture Board's (IAB) Network Working Group entitled "Architectural Principles of the Internet,"[65] does suggest that there are in fact certain shared beliefs in the Net's architectural design. It describes in detail, for example, why it is important that devices on the Internet are able to interconnect and how

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[57] WSIS, *Geneva Declaration of Principles*, Doc. WSIS-03/GENEVA/DOC/4-E, Dec. 12, 2003, *available at* http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf [hereinafter *Geneva Declaration of Principles*].

[58] *See* EU Proposal, *supra* note 10, at sect. 63.

[59] *See* EU Proposal, *supra* note 10, at sect. 63, bullet point 1.

[60] *See* EU Proposal, *supra* note 10, at sect. 63, bullet point 2.

[61] *See* EU Proposal, *supra* note 10, at sect. 63, bullet point 3.

[62] EU Proposal, *supra* note 10, at sect. 63, bullet point 4.

[63] *Id.* at "Abstract".

[64] *Id.* at "Status of this Memo"

[65] RFC 1958 "Architectural Principles of the Internet," http://www.ietf.org/rfc/rfc1958.txt (last visited Mar. 21, 2006) [hereinafter *RFC 1958*]. RFC 3439 "Some Internet Architectural Guidelines and Philosophy", December 2002, http://www.ietf.org/rfc/rfc3439.txt (last visited Mar. 21, 2006) [hereinafter *RFC 3439*] "extends RFC 1958", but does not supersede RFC 1958. In particular, it adds more detail to the existing principles and elevates the "keep it simple" rule of thumb to a formal "Simplicity Principle", but leaves the general "beliefs" unchanged.

this is achieved through an open universal protocol and related standards.[66] Echoing the European proposal's principles of "openness" and "Interoperability," RFC 1958 states that the Internet community's belief is "that the goal is connectivity, the tool is the Internet Protocol, and the intelligence is end to end rather than hidden in the network."[67]

This last part is often referred to as the end-to-end principle (e2e). Also explicitly referred to as one of the architectural principles of the Internet in the EU proposal, the end-to-end principle was first suggested in a paper by Saltzer, Reed, and Clark.[68] Promulgated by several of the lead authors of the Internet's fundamental protocols, the e2e principle is deeply embedded in the Net's current structure and it is often seen as the most fundamental architectural principle of the Internet. In its most technical form it stipulates "certain required end-to-end functions can only be performed correctly by the end-systems themselves."[69] RFC 1958 offers a simpler (and broader) version: "The network's job is to transmit datagrams as efficiently and flexibly as possible. Everything else should be done at the fringes."[70]

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[66] *See* RFC 1958, *supra* note 65, at 2-3.

[67] *Id.* at 2.

[68] Jerome H. Saltzer, David P. Reed & David D. Clark, *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUTER SYS. 277 (1984), *available at* http://www.reed.com/Papers/EndtoEnd.html. From the literature embracing the end-to-end principle more or less emphatically see Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783 (2002) (arguing that end-to-end builds a commons essential for cultural innovation); Mark Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001) (arguing that the end-to-end principle "should guide the government in evaluating changes to the Internet"); Paul A. David, The Beginnings and Prospective Ending of "End-to-End": An Evolutionary Perspective on the Internet's Architecture 26, Stanford Econ. Dept., Working Paper No. 01-012, 2001, *available at* http://wwwecon.stanford.edu/faculty/workp/swp01012.pdf (regarding the end-to-end design of the Internet as "public good", proposing a more comprehensive and interdisciplinary assessment of changes to architecture); Marjory S. Blumenthal, *End-To-End and Subsequent Paradigms*, LAW REV. MICH. ST. U.-DETROIT C.L. 709, 717 (2002) (describing end-to-end as an "essential technology of the Internet"); David D. Clark & Marjory S. Blumenthal, *Rethinking the Design of the Internet: The End to End Arguments vs. the Brave New World,* Stanford Program in Law, Sci. & Tech., Conference Paper, The Policy Implications of End-to-End, 2000, *available at* http://cyberlaw.stanford.edu/e2e/papers/TPRC-Clark-Blumenthal.pdf (describing the tensions between the original end-to-end Internet and novel security concerns). *But see* Jonathan Zittrain, *The Generative Internet*, 119 HARV. L.R. 1974, 2029-32 (2006) (arguing that a narrow focus on the end-to-end principle neglects the complex interplay between the PC and the network as a "generative grid").

[69] Saltzer et al., *supra* note 68, at 2.3.

[70] *Id.* at 2. 3.

The e2e principle assumes that the network itself performs no function beyond transmitting data packets efficiently. All additional functionality, from authentication to processing is to be done by the end points, i.e. the devices that connect to the network. This differs fundamentally from other communication networks, such as that of the telephone, where the network performs most functions while the telephones remain relatively "stupid" at the end-points.[71]

In suggesting that the role of the network is simply to transport data packets on their way from sender to recipient, the e2e principle also implicitly restricts the functions of the network. The network, for example, is not supposed to filter certain data packets based on their content, nor is it supposed to authenticate them, track them, or alter them. It only ought to pass them on.

While the European proposal does not explicitly link to or cite RFC 1958, evidence indicates that the Europeans intended to incorporate its ideology and that of similar writings of the Internet community. For example, a French government document from January 2005 very similarly maps out what it calls "principles and values" of the Internet: openness, interoperability, network neutrality, and innovation, citing RFCs and IETF documents as well as works on the domain name system.[72] In June 2005, an informal paper entitled "Internet Architecture: The Stakes of the End to End Principle" circulated among the European delegates,[73] approvingly cites work advocating "network neutrality"[74] and warns in stark terms of the risks of fragmentation of the Internet if the end-to-end principle is not heeded to in the regulatory arena and vertical integration and network service differentiation are allowed to develop.[75]

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[71] David Isenberg has called this famously the "rise of the stupid network." *See* David S. Isenberg, *The Rise of the Stupid Network*, http://en.wikisource.org/wiki/The_Rise_of_the_Stupid_Network (last visited Apr. 14, 2006).

[72] French Government, *General Principles of Internet Governance: Proposal of the French Government*, Jan. 3, 2005 (on file with authors) [hereinafter *French Government, General Principles*].

[73] French Government, *Internet Architecture: The Stakes of the End to End Principle*, June 6, 2005 (on file with authors) [hereinafter *French Government, Internet Architecture*].

[74] *Id.* at 2 (citing among others Ross Rader, *Internet to ITU: Stay Away from my Network*, CIRCLEID, Dec. 21, 2004, http://www.circleid.com/posts/internet_to_itu_stay_away_from_my_network/ in footnote 6); French Government, *General Principles*, *supra* note 72, at 2.

[75] French Government, *Internet Architecture*, *supra* note 73, at 2-3.

The European proposal does not suggest that only technical matters should be solved in reference to these technical Internet principles. Instead, the language of the proposal as well as that of the preparatory documents makes clear that the Europeans, like many in the Internet community, attach value to these architectural principles that goes beyond the purely technical. RFC 1958 refers to the principles as reflections of broader "beliefs," which are further detailed in a subsequent RFC.[76] Similarly, in the June 2005 document circulating among the European delegates, its author suggests a broader interpretation of these architectural principles to reflect individual freedom to express oneself, to communicate, and to build upon the work of others.[77]

In sum, the Europeans proposed delegating Internet naming and numbering policy-making to a new international body that would be mandated to adhere to the fundamental principles of the Internet community in setting policies.

III. The Unique Nature of the Proposal

The WSIS process was a reaction to concerns of the international community that too much of the policy making power over the global information and communication infrastructure that we call the Internet was held by too few players. Internationalization was seen as the obvious path leading to more inclusive governance, better insulated from domestic politics and short-term domestic political pressures, particularly those of the US.

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[76] *See* RFC 3439, *supra* note 65.

[77] *See* French Government, *General Principles*, *supra* note 72, at 5. This broad interpretation of the end-to-end principle also ties in with the findings of the Working Group of Internet Governance (WGIG), a separate group of about 40 members from governments, private sector, and civil society who met during the Geneva phase and specifically focused on Internet governance. *See* Geneva Declaration of Principles, *supra* note 57, par. 48-50; Working Group on Internet Governance [WGIG], http://www.wgig.org/ (last visited Apr. 14, 2006). In its report, WGIG provided a working definition of Internet governance as "the development and application by Governments, the private sector and civil society, in their respective roles, of shared *principles*, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet" (emphasis added). WGIG, *Report from the Working Group on Internet Governance*, Doc. WSIS-II/PC-3/DOC/5-E, Aug. 2, 2005, http://www.itu.int/wsis/documents/doc_multi.asp?lang=en&id=1695|0,par. 10. According to the background report, these "principles define what a given governance mechanism is about and, at the highest level, is intended to promote." *See* WGIG, *Background Report*, June 2005, http://www.itu.int/wsis/wgig/docs/wgig-background-report.pdf, par. 47. Although the end-to-end principle is first cited as an example of the former function, i.e. a statement of fundamental facts rather than of normative advice, the background report states that the two functions "can blend into one another at times." *Id.*

The United States government offered two reasons against such a delegation of its powers to an international body. First, it suggested that if empowered to set policies, a bureaucratic institution like the ITU would ruin the Net, as it fails to understand and appreciate its fundamental values and principles.[78] Second, the US maintains that even if international bureaucracy would not kill the Internet, internationalization would give nations like China that lack an appreciation for freedom of ideas and open communication a say in Internet policy setting.[79] Within WSIS, it seemed that one was stuck between the Scylla of United States unilateralism and the Charybdis of international bureaucracy influenced by non-democratic regimes.

The European proposal intended to break out of this binary choice by suggesting that the transfer of concrete policy-making power from ICANN to an international institution be linked to specific constraints that incorporate the values of the Internet community.[80] It could have shifted the entire negotiation dynamic at WSIS: had the United States joined the European proposal, the West would have been united again on its principles, while China and others intent on ensuring the capacity for information control and censorship would have been forced to choose between an international governance regime founded on values they dislike, and the continuation of the status quo with the US at the levers of power.

Yet, the European proposal offers more than a purely tactical move. It represents a legal construct of constitutionality, self-constraint, and liberalism for Internet governance, which we explore in the following.

A. The Constitutional Moment

The European proposal connects the delegation of policy-making power to two sets of constraints. The first of these, the Geneva principles, as well as the three additional specific ones – complementarity, sustainable stability and long-term policy focus – refer to the role

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[78] *See* Kempe, *supra* note 11; Mark A. Shiffrin & Avi Silberschatz, *Op-Ed: Web of the Free*, N.Y. TIMES, Oct. 23, 2005, at 13. *Cf.* Letter from Condoleeza Rice, *supra* note 11 ("Burdensome, bureaucratic oversight is out of place in an Internet structure that has worked so well for many around the globe.").

[79] After states like Cuba, Iran, China, and Saudi Arabia applauded the EU proposal, Ambassador David A. Gross, who led the negotiations for the US, is cited saying: "Seeing who was supporting [the EU] was a good market-based test for what was going on." *See* Kempe, *supra* note 11.

[80] *See* EU Proposal, *supra* note 10.

of internationalized Internet governance relative to existing governance institutions like ICANN as well as the process of governance. In laying out the competencies along with the fundamentals of the structure and process of governance, the proposal offers the prospect for a "constitutional moment."[81]

To be sure, any binding of a governing body to constrain its freedom of action by appealing to higher values or fundamental principles laid out in a defining document is a *constitutional* exercise. It establishes principles and rules — structures and processes through which an organization or institution governs and is being governed. Most governing institutions are constrained procedurally by rules and principles encoded in their constitutional document. This is what the Geneva and three additional principles seek to do as well. They stipulate the boundaries of what an intergovernmental organization entrusted with Internet governance may impose, either in a structural sense, that is in relation to other governance institutions, or in a procedural sense, that is with respect to the procedural steps necessary to impose rules. Therefore, the European proposal goes beyond merely delegating power to an international body —it prescribes how this power is to be used and situated.

B. Substantive Constraints

By proposing "architectural principles of the Internet" that policymakers have to adhere to, the proposal adds another type of constraint. Unlike procedural restrictions, this is a substantive one, restricting not *through what process* or *by whom*, but *according to what values* the Internet can be governed. It differs from simple limitations of competences found in all constitutional documents by drawing a substantive line of permissible conduct by those that govern.

Such substantive constraints are less frequently found in constitutional documents of organizations than structural or procedural constraints, and with good reason. When circumstances change, substantive constraints may turn into a hindrance to the adaptation of governance. Constitutional drafters resort to substantive constraints only when they desire to preserve fundamental values. Catalogs of fundamental rights, like the Bill of Rights of the US Constitution, are examples of such fundamental substantive limitations of governance.[82]

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[81] *See supra* note 17.

[82] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 8-9 (3d ed. 2000) [hereinafter *Tribe, Constitutional Law*].

The most familiar kind of substantive constraints in Constitutions takes the form of rights guaranteed to individuals. Positivists and natural law proponents may disagree as to whether a nation's Constitution confers these rights upon the people[83] or whether it simply guarantees the natural rights already possessed by them.[84] The practical result, however, is the same: individuals have constitutionally guaranteed rights. Such rights are enforceable through the judicial branch.

In contrast, the European proposal does not constrain governance through the guarantee of individual rights that can be enforced through a court of law. In fact, the European proposal does not foresee any conflict resolution or enforcement mechanisms. Instead, it requires that the governing institution itself exercise constraint.[85] In this sense, it suggests a mechanism of substantive self-constraint.

C. Reference to Principles of Architecture

This self-constraint is further defined by reference to "architectural principles of the Internet." Principles of technical design seem to be elevated to fundamental values informing policymaking. This reference is not meant to limit its application to the narrow confines of technical matters nor is it made without a deep understanding of its consequences and implications. The European authors and proponents of the proposal very much understood, and admired, these principles as reflections of fundamental values held by the Internet community.[86] Openness, interoperability, and lack of central control were seen

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[83] *See* John Finnis, *The Truth in Legal Positivism*, *in* THE AUTONOMY OF LAW 195-214 (Robert P. George ed. 1996); John Austin, The Province of Jurisprudence Determined (2000).

[84] From the literature on natural law, see A. P. D'Entreves, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY (2d ed. 1970); M. J. Detmold, THE UNITY OF LAW AND MORALITY: A REFUTATION OF LEGAL POSITIVISM (1984); Lon L. Fuller, THE MORALITY OF LAW (1964); Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Jean Dabin, *General Theory of Law*, in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN (Ass'n of Am. Law Sch. ed. & Kurt Wilk trans., 1950); John Finnis, NATURAL LAW AND NATURAL RIGHTS (1980); Edward S. Corvin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928-29).

[85] Such a self-constraint therefore works into two directions. As a "negative" constraint, it simply cuts certain options out of the decision spectrum. As a "positive" constraint, it mandates that, when confronted with two admissible options, the decision maker choose the one which gives greater effect to the principle.

[86] *See supra* Part II.

as embodiments of core liberal (if not libertarian) Western values and ideas.[87] The proposal thus is intended less to incorporate underlying technical design choices than the common beliefs and understandings of the community of Internet users.[88]

The incorporation of these beliefs has important implications. A central concern put forward against the internationalization of Net governance is that an international intergovernmental body would not represent the Internet community and thus lack legitimacy.[89] The European proposal, by forcing international governance to adhere to the fundamental principles of the community it governs, addresses at least to an extent this concern of legitimacy.

Moreover, the European proposal's legitimacy may be comparable to or even superior to the status quo of ICANN's current policymaking. ICANN's legitimacy is founded on the selection process of its board members, who ought to represent the various stakeholders of the Internet community. Its legitimacy thus rests on procedural and structural grounds – how and by whom its decisions are made. What, however, would happen when powerful stakeholders band together and abandon the community's principles to advance their own gains? ICANN is structurally vulnerable to such "issue capture."[90] In contrast, in the European proposal, legitimacy rests on the mandate to adhere to the principles of the Internet community – and is therefore more insulated from such capture.

The European proposal thus envisions international governance of Internet naming and numbering tethered by substantive self-constraints that embody the fundamental values and principles of the community it intends to govern. The proposal avoids many of the shortcomings of either the continuation of the status quo or unconstrained (and potentially illegitimate) international power and comes closer to the idea of legitimate (and legitimized) self-government that underlies the liberal, democratic conception of public decision-making.

IV. The US Rejection: Why Jefferson's 1787 Compromise Failed to Convince in 2005

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[87] *Id.*

[88] *Id.*

[89] *See, e.g.,* Wright, *supra* note 8 (citing the State Department's David Gross: "The EU's proposal seems to represent an historic shift in the regulatory approach to the Internet from one that is based on private sector leadership to a government, top-down control of the Internet.").

[90] *See generally* George J. Stigler, *Theory of Economic Regulation*, 2 BELL J. ECON. MGMT. SCI. 3-21 (1971).

In this part we suggest that two specific reasons – one tactical, one historical – should have appealed to the United States. In this sense, the prompt rejection of the European proposal by the US requires closer examination. We examine four possible reasons for rejection, and conclude that two of them – a lack of domestic support combined with an ideological dislike of formalized international cooperation – explain the behavior of the United States government.

A. The Potential Appeal of the Proposal to the US

The proposal, had it been adopted, would have in effect bound a small but significant portion of Internet governance to abide by and uphold beliefs the Internet community through its own decision-making process termed its own.[91] In large part these reflect fundamentally Western, liberal values. Given the United States' long tradition of embedding of liberal values into constitutional documents of national and international character,[92] the US should have welcomed the proposal. It would also have been in alignment with its current policy of spreading freedom and democracy around the world.[93] Had the US accepted the European proposal, the dynamic at WSIS may have in fact shifted by uniting the West and putting pressure on nations like China to choose between internationalized governance embodying liberal values or a continuation of US control over Internet naming and numbering. Confronting China, Iran, and other nations engaging in Internet censorship with such a choice would arguably already have been a tactical victory.

The European proposal failed almost immediately after it was proposed — when the United States declared its opposition to it, thereby sparing the Chinese and other delegations from having to respond to it in earnest. When WSIS concluded, the outcome – a watered down *pro forma* internationalization without any substantive constraints[94] – did little to solve the

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[91] These beliefs are described in RFC 1958 and RFC 3439, documents that were collaboratively drafted and agreed upon by the very processes the original Internet community had put in place to elicit common understanding. To be sure, whether these beliefs continue to represent the heterogeneous community of about one billion Internet users worldwide, of which 35.6% are in Asia, and only 22.2% are in North America is an open question. *See* Internet World Stats, *Internet Usage Statistics – The Big Picture*, http://www.internetworldstats.com/stats.htm (last visited May 11, 2006).

[92] *See* Mayer-Schönberger, *supra* note 18, at 317-23.

[93] *See, e.g.*, Glenn Kessler & Robin Wright, *Rice Describes Plans to Spread Democracy*, WASH. POST, Mar. 26, 2005, at A01.

[94] Section 69 of the Tunis Agenda recognizes "the need for enhanced cooperation in the future, to enable governments, on equal footing, to carry out their roles and responsibilities, in international

issue. Many around the world will continue to accuse the United States of unilateralism.[95] The US must realize that as the Internet community becomes less dominated by Western users, the pressure to internationalize governance will grow, thereby potentially tipping the US into a defensive posture without prospects of victory.

Yet, the US rejection of the European proposal is baffling not only on a tactical level. It seems even more inexplicable in light of the United States' own constitutional history. After all, at least some of the states forming the initial Union did decide to delegate power away from themselves and to a new federal body in exchange for the first ten Amendments, i.e. substantive constraints on such federal power not just vis-à-vis the states but vis-à-vis the citizens.[96] It was Jefferson among others who prominently suggested coupling power with constraint that made the US constitutional moment possible and provided the structural foundation for the nation's rise.[97]

Already in 1784, when Jefferson served as a minister to France for the newly independent United States, he complained in a letter to James Madison about the lack of a Bill of Rights: "I have a right to nothing, which another has a right to take away."[98] After the Framers decided against including substantive rights in their proposal of a Constitution, the Anti-Federalists took up that fact as one of their main arguments against ratification in the state conventions.[99] They pointed out that the Constitution offered few explicit constraints on central government power.[100]

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public policy issues pertaining to the Internet", but in practice does not go beyond the installation of the Internet Governance Forum. *See* Tunis Agenda, *supra* note 3, at sect. 69 and 72-3.

95 *See, e.g.,* Elly Plooij-van Gorsel, Will Nations Resist Superpower Pressure and Pass the .XXX Test?, FIN. TIMES (London), Mar. 25, 2006, at 10 (stating in the context of the .xxx domain that "the issue of whether US politics will dictate development of the net's core functions has resurfaced").

96 *See* Daniel A. Farber & Suzanna Sherry, A HISTORY OF THE AMERICAN CONSTITUTION 175-80 (1990); Richard B. Bernstein & Jerome Agel, *Guaranteeing Civil Liberties in the First Amendment*, *in* THE CREATION OF THE U.S. CONSTITUTION 123-30 (Loreta M. Medina ed., 2003); Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1227-36 (1990); Loreta M. Medina, *Introduction: Consensus and Conflict in the Framing of the Constitution*, *in* THE CREATION OF THE U.S. CONSTITUTION 11-24 (Loreta M. Medina ed., 2003).

97 *See* Letter from Thomas Jefferson to James Madison, 1784 1997, in LETTERS OF A NATION 75, 76-7 (ANDREW CARROLL ED., 1997) [hereinafter *Letter from Jefferson*].

98 *Id.* at 77.

99 *See* Bernstein & Agel, *supra* note 96, at 124-25.

100 *See* Bernstein & Agel, *supra* note 96, at 124. The fear of an unconstrained central government power became a major theme in the writings of many Anti-Federalists. For example, "Brutus" who is

The Anti-Federalists managed to negotiate what came to be known as the "Massachusetts Compromise."[101] Thanks to the fierce resistance of John Adams and John Hancock, two Anti-Federalists in the Massachusetts state convention, the delegates agreed to vote for the Constitution together with "recommendations" for amendments to be considered by the new Congress should the Constitution in fact be ratified.[102] In the wake of this compromise, four of the five states yet to ratify the Constitution included similar recommendations.[103] At the Virginia ratifying convention, for example, it was Madison himself who made a public commitment to work to amend the constitution.[104] On March 1, 1792, the new Secretary of State, Thomas Jefferson, certified that the Bill of Rights had become part of the US Constitution.[105]

In a number of ways, the European proposal offered a similar compromise. In both cases, power was to be delegated to a central body of governance. While in 1787-89, the states of the Union faced a significant loss of competences to the new federal government, in 2005, the United States was asked to give up its de facto regulatory power over Internet naming and numbering. In order to mitigate the tensions between Federalists and Anti-Federalists, the Massachusetts compromise foresaw substantive constraints to make sure that the delegated power would not be used arbitrarily.[106] By the same token, the European proposal limited the power to be delegated to the "new cooperative model" by including certain procedural and architectural principles as safeguards.[107] Against the backdrop of the United States' own constitutional history, the fundamental conception underlying the European

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assumed to be Robert Yates stated in an article which came to be known as the "Anti-Federalist Paper No. 84": "Ought not a government, vested with such extensive and indefinite authority, to have been restricted by a declaration of rights? It certainly ought." Brutus, *On the Lack of a Bill of Rights*, New York Journal, Nov. 1, 1787, *reprinted in* FEDERALISTS AND ANTIFEDERALISTS 159, 164 (John P. Kaminski & Richard Leffler eds., 2d ed., 1998).

[101] *See* FARBER & SHEERY, *supra* note 96, at 177; *see also* Bernstein & Agel, *supra* note 96, at 125.

[102] *See* FARBER & SHERRY, *supra* note 96, at 177.

[103] *See* FARBER & SHEERY, *supra* note 96, at 177.

[104] *See* Steven R. Boyd, *Antifederalists and the Acceptance of the Constitution: Pennsylvania, 1787-1792*, in THE FORMATION AND RATIFICATION OF THE CONSTITUTION 123, 136 (Kermit L. Hall ed., 1987).

[105] *See* Bernstein & Agel, *supra* note 96, at 129.

[106] *See* FARBER & SHEERY, *supra* note 96, at 177.

[107] *See* EU Proposal, *supra* note 10, at sect. 63.

proposal should therefore have resonated well with the US audience. Yet, in the WSIS context, the US appeared to have rejected the essence of its own constitutional past.

B. Evaluating Reasons for Failure

In the following section, we examine four potential arguments that may explain the US rejection of the European proposal: the delegation of power, objective rights, public choice, and the de-legitimization of international law. These arguments cover different dimensions of the issue - legal, political and economic. Articulating and analyzing them may aid in understanding not just why WSIS did not culminate in a constitutional moment of Internet governance due to the US rejection of the European proposal, but it also may suggest circumstances that stand to change the US position in the future.

1. The Delegation of Power Argument

Entrusting an international institution to decide on Internet governance issues signifies a transfer of power currently held by ICANN to a new international body. This would indeed result in a net loss of power for ICANN, and by extension the US government, and a net gain of power for all other nations represented in the envisioned international (and likely intergovernmental) Internet governance body.

Any such shift of regulatory competences from one institution to another will cause debate and likely opposition from those whose power is being reduced. Debates over the issue of power and delegation are much older than the current debate over ICANN. They permeate discussions over the creation of almost every governance body, including not surprisingly those over the ratification of the United States Constitution. For example, the fifth letter from the "Federal Farmer," an Anti-Federalist polemic, warns of the potential consequences of a delegation of power away from states: "Instead of seeing powers cautiously lodged in the hands of numerous legislators, and many magistrates, we see all important power collecting in one centre, where a few men will possess them almost at discretion."[108]

Such Anti-Federalist sentiment has been voiced many times since, within the United States as well as other federal nations. It is also not restricted to debates over federalism, but

[108] Letter from the "Federal Farmer", Oct. 13, 1787, in THE ORIGINS OF THE AMERICAN CONSTITUTION 295, 295 (Michael Kammen ed., 1986).

present in all cases where decision-making power is being reallocated. In the late eighteenth century, commentators in the United States feared the negative consequences of shifting power from states to the federal level.[109] In the twentieth century, many federal legislators in the United States similarly cautioned against delegating power to international regimes and thus away from the federal government.[110] Such a reflex is not solely present in the United States. In the European Union, for instance, national legislators have frequently criticized and even voted against a delegation of power away from them toward European Union institutions negotiated by national governments.[111]

Of course, one could argue, the US government would not lose power through the European proposal, as that power is already held not by the US government, but by ICANN's board, the majority of which is already international. The delegation of power away from the US government, one could suggest, has already taken place by setting up ICANN. Thus, one international decision-making body, ICANN's board, may have to transfer power to another international body, the new institution envisioned by the European proposal, but doing so would not diminish powers held by the US government. In this case, US opposition could therefore not be explained by a perceived fear of power loss.

There is a difference, though, between ICANN and a truly international body. Currently, the federal government retains formal oversight over ICANN through the contractual relationship between the Department of Commerce and ICANN as spelled out in the Memorandum of Understanding.[112] Congress could, if it desired, reassert regulatory control over naming and numbering, either by mandating that ICANN adhere to certain specific policies or by taking the power over naming and numbering away from ICANN altogether.[113]

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[109] *Id.*

[110] *See, e.g.,* David P. Forsythe, THE POLITICS OF INTERNATIONAL LAW 3 (1990) (arguing that already the two Reagan administrations "treated international law mostly as a self-serving afterthought to policy decisions"); Natalie Hevener Kaufman, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION (1990) (arguing that the Senate's opposition to human rights treaties is a legacy of the 1950s).

[111] One of the most recent examples is the rejection of the Treaty Establishing a Constitution for Europe by referenda in France and the Netherlands at least partly on the grounds that the nation states are ceding too much power to the EU. *See* BBC News, *Q&A: EU Constitution's Future*, http://news.bbc.co.uk/1/hi/world/europe/4596005.stm (last visited Apr. 21, 2006).

[112] *See* Memorandum, *supra* note 26.

[113] *See* Memorandum, *supra* note 26; Mueller, *Ruling the Root*, *supra* note 6, at 197.

Reasserting national control would be much more difficult once naming and numbering had been delegated to an international body. It would require that the United States break or leave an international regime. To be sure, such a move is not without precedent in recent history,[114] but it comes at a cost.[115] In relative terms and from the vantage point of the US government, it is therefore preferable to avoid formal delegation in the first place.

The problem with this argument is, however, that even under the current regime, any attempt by the US government to influence policy-making at ICANN causes significant negative international public opinion and fuels those voices that call for a complete internationalization of Internet governance. Thus, even if the US may prefer to retain formal control over ICANN, in practice, it may find itself in the role of Dicken's Gulliver — powerful in theory, but bound in practice.[116]

There is another dimension of the delegation of power argument that is arguably more powerful and goes beyond the debate about relative losses and gains of power. It focuses on the conditions that need to accompany a delegation of power for it to be perceived as appropriate, even perhaps by those that lose power in relative terms. In a democratic republic, the people initially hold all of the power. Government is a delegation of power by the people to an institution set up to govern. Elections and related mechanisms ensure participation by those that are governed in the exercise of power, thereby legitimizing the power delegation implicit in the election of governing institutions.

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[114] On June 13, 2002, the Bush administration withdrew from the Anti-Ballistic Missile (ABM) Treaty, an international agreement with Russia that had been in force for thirty years. *See* David A. Sanger & Michael Wines, *With a Shrug, a Monument to Cold War Fades Away*, N.Y. TIMES, June 14, 2002, at 11.

[115] For example, surveys show that public support for U.S. foreign policy has dropped dramatically since the last invasion of Iraq. *See* Pew Research Center for the People & the Press, *America's Image Further Erodes, Europeans Want Weaker Ties*, Mar. 18, 2003 (stating that positive views of the U.S. have fallen from nearly 80% in Oct. 2002 to 50% in Mar. 2003 in Poland, or from 70% to 24% in Italy over the same period). *See also* Transatlantic Trends, *Keyfindings 2005*, at 7, *available at* http://www.transatlantictrends.org/doc/TTKeyFindings2005.pdf ("Despite major diplomatic efforts to mend transatlantic relations, there has been little change in European public opinion toward the United States.").

[116] *See* STANLEY HOFFMANN, GULLIVER UNBOUND: THE IMPERIAL TEMPTATION AND THE WAR IN IRAQ (2004).

In the context of Internet governance, the European proposal, one may therefore argue, is suspect not because it shifts power from the US to an international body, but because it shifts power from ICANN, which has significant representation by the Internet community in its policy-making Board, to an intergovernmental body that fails to represent the global Internet community. The institution the Europeans wanted to empower is simply not legitimized enough through community participation to hold such power.

This line of reasoning represents an important argument. It overlooks, however, that the European proposal combined internationalization with substantive constraints, thus binding international governance to adhere to what are in essence the values and principles of the Internet community.[117] The power transfer envisioned by the Europeans is legitimized not by those that participate in international decision-making, but by the community principles such decision-making will have to adhere to.

In the United States constitutional context, Jefferson understood this already in 1784, when he wrote to Madison from Paris about the need to simultaneously create and constrain central power.[118] Central power needs to be created through clear delegation of competences from states. At the same time, central power has to be restricted in how these powers may be exercised. The restrictions that Madison and Jefferson among others suggested were to come in the form of individual rights amending the constitutional text, leading to the "Massachusetts Compromise"[119] and the resulting successful ratification of the US Constitution. In 1787, states were willing to delegate power to a central, federal government, which had powers far beyond the Confederation it succeeded, as long as the central government was bound to adhere to substantive constraints.

The European proposal would have reduced the formal power of the US government to oversee Internet naming and numbering policies. Yet, as we have explained, exercise of this power is already constrained in practice.[120] The US delegation may have seen the European proposal as problematic because it shifts power away from ICANN's Board and the Internet community it supposedly represents. But by linking international decision making with adherence to fundamental values of the Internet community, the European proposal does in

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[117] *See* EU Proposal, *supra* note 10, at sect. 63.

[118] *See* Letter from Jefferson, *supra* note 97, at 76-77.

[119] *See supra* text accompanying note 101.

[120] *See supra* text accompanying note 116.

fact address this issue[121] – at least to an extent. The delegation of power argument alone thus fails to explain US rejection of the European proposal.

2. The Objective Rights Argument

The European proposal envisioned international Internet governance over naming and numbering as constrained by specific principles, in particular by what it called the architectural principles of the Internet. The EU proposal foresaw no judicial mechanism to ensure that the international body entrusted with these Internet governance competencies abides by the principles outside of the international body itself. This body was envisioned to be self-controlling, i.e. to guarantee that it follows its own principles.

Such a mechanism is different from the United States Constitution with its combination of guaranteed individual rights and an independent judiciary, where citizens hold the power to control government by having courts invalidate legislative actions that encroach on guaranteed individual rights. In the US context, the people are individually tasked with defending their rights and freedoms with the help of independent courts, thereby establishing a forceful counterweight to the power of legislative or executive policy-makers. In the United States constitutional rhetoric, this process is often subsumed under the rubric of checks and balances.[122]

The European proposal neither included individual rights guaranteed to the Internet users nor an independent adjudicative institution these users could appeal to in case of an alleged violation of these rights by policy-makers. Such a setup must have sounded alien to US delegates. When one has completely internalized a system that controls by balancing power among multiple institutions checking each other, it is hard to envision, let alone appreciate, other alternatives.

Yet, as German Constitutional scholar Dieter Grimm has pointed out, all fundamental principles in constitutions constrain a state's freedom of action, regardless of whether they are defined as individual rights that people possess and can have courts protect, or as - what he calls in reference to Carl Friedrich Gerber - "objective rights," principles that constrain

[121] *See* EU Proposal, *supra* note 10, at sect. 63.

[122] *See* TRIBE, CONSTITUTIONAL LAW, *supra* note 82, at 1293-94.

the state without giving individuals a cause of action.[123] By constraining the power of the state, even objective rights protect the freedoms of the people. The difference between objective rights and individual rights is not one of substance, but instead one of agency and enforcement.

John Ely's process perfectionism can be interpreted as introducing such arguments to the United States context.[124] Ely suggested that the task of individual rights guaranteed by the first ten Amendments is to facilitate a fair and democratic process of government in the United States.[125] The Bill of Rights for Ely is not an afterthought, an addition of individual liberties or a necessary compromise to facilitate the ratification of the Constitution in the thirteen founding states. Rather, Ely characterizes these rights as in line with the Constitution itself, and its potent underlying theme of ensuring a democratic process. Seen through such a conceptual lens, the democratic principle of the United States Constitution is manifest in its provisions and fundamental concepts, whether or not they are embodied in individual rights. Ely's view has been criticized as too limited.[126] But for our purposes, it is sufficient to note that even in the United States' context, the concept of fundamental principles – as envisioned by the European proposal – is not necessarily alien.

Of course, the above does not fully address the central critique against objective rights — the lack of a suitable enforcement mechanism — put forward by those that have internalized the current US setup. Can, to put it bluntly, a governance body truly constrain itself?

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123 *See* Dieter Grimm, RECHT UND STAAT DER BÜRGERLICHEN GESELLSCHAFT 326-29 (1987) (referring to Carl Friedrich Gerber, ÜBER ÖFFENTLICHE RECHTE (1852)).

124 *See* John H. Ely, DEMOCRACY AND DISTRUST (1980) (arguing that courts should perfect the processes of representative democracy rather than impose substantive fundamental values). For a discussion of this idea, see Symposium, *Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 131 (1981); Richard D. Parker, *The Past of Constitutional Theory -- And Its Future*, 42 OHIO ST. L.J. 223, 223 (1981).

125 *See* ELY, *supra* note 124*,* at 93-101.

126 *See*, e.g., Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (arguing that many of the provisions of the Constitution are substantive, and that even those that are explicitly procedural cannot be separated from their substantive roots); *see also* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 9-10 (1985); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 502-10 (1981) (arguing that judges cannot decide without making substantive political decisions); Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004) (criticizing Ely's normative equation of majoritarianism with democracy); PAUL CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA 100-6 (1990).

Frederick Schauer has argued in essence that it in fact can with regard to rules.[127] Every rule he suggests "instructs" a decision-maker to consider or not consider certain facts, reasons, and arguments by a system of rewards and punishment, "including praise and criticism."[128] In this regard, a rule is jurisdictional in the sense that it determines who should be considering what and thus becomes a tool for the allocation of power.[129] This fundamental feature of rules plays out in the European proposal in which architectural principles affect the allocation of power between ICANN and the US as well as between ICANN and a new multilateral governance body.

A further unease with objective rights may rest on an implicit misconception of the applicable decision-making process. Some may argue that an independent enforcement mechanism is of particular import when the state makes policies by majority.[130] A minority fearing that policy may violate a fundamental right could get the courts to review and possibly strike it down on the grounds of unconstitutionality. This protects minorities from majority fiat.[131] In contrast, one may argue, why should the majority of an international Internet governance body ever constrain itself?

The European proposal does not prescribe the decision-making processes of the envisioned international body; neither does the WSIS draft the European proposal was proposed to alter.[132] In the absence of a concrete process of decision-making, the default process requirement in international law is consensus. The consequence of a consensus regime is that any representative in the governance body fearing that a policy measure may violate the constraints placed on the body by the constitutional document can block the measure. To be sure, this is not equivalent to having citizens police the constitutionality of government action, but it is significantly better than merely having a majority of policy-makers in an international body certify that their majority decisions adhere to fundamental principles.

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127 *See* Frederick Schauer, PLAYING BY THE RULES 158-62 (1991).

128 *See id.* n.21.

129 *Id.* at 159.

130 *See, e.g.*, Alexander Bickel, THE LEAST DANGEROUS BRANCH 16-7 (2d ed. 1986) (introducing the concept of "counter-majoritarian difficulty" which designates the tension between judicial review and majoritarian government); *see also* Symposium*, The Counter-Majoritarian Difficulty,* 95 NW. U. L. REV. 843 (2001).

131 *Id.*

132 *See* EU Proposal, *supra* note 10; Chair Proposal, *supra* note 52.

The United States delegates to WSIS may have thus viscerally opposed the European proposal because they thought that objective rights provide no credible constraint over policy-making power. But they may have been unduly influenced in their analysis by assuming that the United States setup of individual rights paired with an independent judiciary is necessarily the best, or even the only possible, effective constraint mechanism.

C. The Public Choice Argument

The United States delegates to WSIS may have had another reason to object to the European proposal. This reason is not grounded in legal but instead in political science theory.

Public choice theory applies economic analysis to political decision making, assuming that human beings – policy-makers as well as voters – act rationally by desiring to maximize their gains.[133] Accordingly, policy makers desire to be reelected, and voters want to maximize the benefits they receive. As individual votes are unlikely to change the result of an election, voters desiring to shape policy outcomes are much better off influencing politicians through financial contributions than by actually voting in the elections.[134]

Utilizing public choice theory, the opposition of the US delegates to the European proposal can be seen as the result of domestic political dynamics. Accepting the European proposal would have caused consequences domestically. First, it would have made it harder for federal government agencies to mandate control mechanisms of information and communication flows in the name of the war on terrorism and homeland security. International Internet

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[133] *See, e.g.*, Dennis C. Mueller, PUBLIC CHOICE II 1 (1989) (defining public choice "as the economic study of nonmarket decision making, or simply the application of economics to politicaql science") [hereinafter *Mueller, Public Choice II*]; James M. Buchanan & Gordon Tullock, THE CALCULUS OF CONSENT, LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); Mancur Olson, THE LOGIC OF COLLECTIVE ACTION (1971); Kenneth Arrow, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951). For the integration of public choice theory into legal scholarship, see, e.g., Daniel A. Farber & Philip P. Frickey, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Neil K. Komesar, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); Symposium on the Theory of Public Choice, 74 VA. L. REV. 167 (1988); Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161 (1989); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989).

[134] *See* FARBER & FRICKEY, *supra* note 133, at 133-5; Nicholas Mercuro & Steven G. Medema, ECONOMICS AND THE LAW – WROM POSNER TO POST-MODERNISM (1997) 92.

governance would have possibly constrained what a United States government could have imposed domestically. Considering the Bush administration's stance that in times of global terrorism, the federal government need retain as much power to enact security and counter-terrorism measures as possible,[135] any constraint (whether internal or external) on domestic policy making in this context must have been viewed as unwelcome.

In addition, at the time of the conclusion of the WSIS process Congress was preparing a major rewrite of the Federal Telecommunications Act.[136] The desire of the few remaining large telecom providers, especially AT&T and Verizon, to offer tiered Internet services to different groups of customers prompted a debate on Capitol Hill as to whether or not such tiered services should be permissible.[137] This debate was framed under the heading of network neutrality, suggesting that tiered services would violate the e2e principle.[138] Regardless of whether this is the appropriate conceptual lens to analyze tiered services or not, accepting the European proposal might have preempted a congressional decision and alienated very powerful vested interests – two consequences the Bush administration wanted very much to avoid.

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[135] *See, e.g.*, Rita Shulman, *Note: USA Patriot Act: Granting the U.S. Government the Unprecedented Power to Circumvent American Civil Liberties in the Name of National Security*, 80 U. DET. MERCY L. REV. 427, 427-8 (2003) (analyzing the "numerous unprecedented powers that are conferred on the federal government through the expansion of search and surveillance authority"); Susan N. Herman, Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror, 41 WILLAMETTE L. REV. 941 (2005) (discussing the practical utility of federalism as a political rather than a judicial doctrine).

[136] *See* Declan McCullagh, *Net Neutrality Fans Lose on Capital Hill*, CNET NEWS.COM, Mar. 27, 2006, http://news.com.com/2100-1036_3-6054567.html (providing an account of the recent debate in the House and Senate). *See generally* Barbara van Schewick, Towards an Economic Framework for Network Neutrality Regulation, Sept. 20, 2005, *available at* http://ssrn.com/abstract=812991 (analyzing the potential for discrimination form the perspective of economic theory); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 JOURNAL OF TELECOMMUNICATIONS AND HIGH TECHNOLOGY LAW 141 (2005) (arguing for "a broadband discrimination regime as an alternative to the structural remedy of open access to achieve the goal of network neutrality"); Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help or Hurt Competition? A Comment on the End-To-End Debate*, 3 J. ON TELECOMM. & HIGH TECH. L. 23 (2004) (arguing that network neutrality risks reducing consumer choice and may even stifle competition in the last-mile).

[137] *See* Christopher Stern, *The Coming Tug of War over the Internet,* WASH. POST, Jan. 22, 2006, at B01; Anne Broache, *Politicos Divided on Need for 'Net Neutrality' Mandate*, CNET NEWS, Feb. 7, 2006, http://news.zdnet.com/2100-9595_22-6036231.html.

[138] *See, e.g.*, Network Neutrality: Hearing Before the Sen. Comm. on Commerce, Science & Transportation, 109th Cong. (2006), *available at* http://commerce.senate.gov/hearings/witnesslist.cfm?id=170 (statement of Lawrence Lessig, Professor of Law, Stanford Law School).

With domestic law enforcement agencies and influential telecom providers in likely opposition to the potential consequences of the European proposal, it would have required equally powerful US constituencies to change the outcome of the Tunis deliberations.

But these constituencies were nowhere to be found. For example, network equipment manufacturers will likely sell more of their products capable of controlling information flows to government agencies and concerned corporate interests at home and abroad if the e2e principle is let to wither away. Computer manufacturers and software companies, offering products for the edges of the network, have benefited from the e2e principle, as users require powerful machines and sophisticated software to connect to the Internet and battle spam, spyware, worms, and viruses they receive. Yet, these investments, at least in the United States, have largely been made, thus reducing the interest of these companies to fight for the e2e principle and by extension the European proposal. Finally, Internet users, are torn at best. Network neutrality has exposed them to the malware pitfalls of the modern Internet as much as it has assured them access to the raw Internet information streams.[139] Users of the libertarian ilk may desire network neutrality to stay, but many others would probably not mind a bit more central control if that translated into less daily hassle with nuisances such as spam.[140] The issue of network neutrality is simply not prominent enough to inspire or mobilize a large portion of the user population on either side. Taken together, such a scenario results in what we have indeed witnessed: the United States opposition to the European proposal.

At least two fundamental criticisms can be advanced against the public choice argument suggested above. First, one may argue that public choice theory itself is disputed, and thus may not offer an accurate picture of the domestic political landscape.[141] This may be true

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[139] *See* Clark & Blumenthal, *supra* note 68, at 8; Zittrain, *supra* note 68, at 2003.

[140] *See generally* Derek E. Bambauer, *Solving the Inbox Paradox: An Information-Based Policy Approach to Unsolicited E-mail Advertising*, 10 VA. J.L. & TECH. 1 (2005) (proposing an information-based framework for understanding the spam problem and discussing policy options).

[141] *See, e.g.*, Donald P. Green & Ian Shapiro, PATHOLOGIES OF RATIONAL CHOICE THEORY (1994); Robert P. Abelson, *The Secret Existence of Expressive Behavior*, in THE RATIONAL CHOICE CONTROVERSY 25-36 (Jeffrey Friedman ed., 1996) (challenging the ignorance of rational choice theory vis-à-vis psychological research such as expressive motives); Michael Taylor, *When Rationality Fails*, in THE RATIONAL CHOICE CONTROVERSY 223-34 (Jeffrey Friedman ed., 1996) (arguing that some forms of behavior cannot be treated as instrumental); Robert E. Lane, *What Rational Choice Explains*, in THE RATIONAL CHOICE CONTROVERSY 107-26 (Jeffrey Friedman ed., 1996) (arguing that "[r]ational choice theories have been falsified by experimental tests of economic behavior").

for the finer points of the theory. Yet, at the general level, we suggest the public choice aspect of domestic politics has been widely accepted.[142]

The second criticism focuses on the nexus between international relations and domestic politics. Based on an initial analysis of data, political scientists suggested that international relations are far enough removed from domestic politics such that governments can be much less concerned about voter sentiment in their international decisions than in their domestic ones.[143] Consequently, one nation's behavior in international relations may not be easily predictable by domestic public sentiment. Recent studies, however, have reevaluated this evidence and found that domestic politics do in fact influence international behavior when domestic constituencies see their vested interest endangered by specific international policy options.[144] This may arguably be the case with the European proposal. Given the pressure on the Bush administration at the time, it seems plausible that domestic considerations have at least played a role in opposing the European proposal.

D. The International Regimes Argument

United States revisionism vis-à-vis international regimes in particular and international law in general may offer a fourth element of explanation.

The European proposal is not simply creating another layer of power delegation *within* a given national legal framework, but instead it envisions a new governing body situated internationally. Not domestic but international law would provide the context in which such governance would take place. Thus, accepting Europe's international governance proposal would have required the United States to accept the context of international law and international cooperation in which such an Internet governance body would have been situated.

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142 *See* MERCURO & MEDEMA, *supra*, note 134, 182.

143 For a review of the relevant literature see Joel E. Brooks, *The Opinion-Policy Nexus in Germany*, 54 PUB. OPINION Q. 508 (1990).

144 *See* Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 175 (1983)*;* James A. Stimson, *Opinion and Representation*, 89 AM. POL. SCI. REV. 89 (1995) 179; James A. Stimson, Michael B. MacKuen & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 5430 (1995); *see also* Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 503 (2004) (arguing that "governments adopt international laws, like domestic laws, to maximize political support").

This comes at a time when the United States is moving away from its commitment to international law and international cooperation. Since coming to power, the Bush administration has ended the ABM treaty,[145] ridiculed the Kyoto agreement,[146] and "unsigned" the treaty establishing a permanent international criminal court,[147] an idea the United States itself helped beget by insisting on the Nuremberg Trials[148] and further through its facilitation of the creation of the International Criminal Tribunal for Rwanda[149] and the International Criminal Tribunal for the former Yugoslavia.[150] It has pressured Eastern European countries to sign bilateral agreements with the United States that would exempt U.S. citizens from the reach of the International Criminal Court, thereby undermining the court's authority.[151] In the spring of 2003, the United States invaded Iraq despite the failure to receive authorization from the United Nations Security Council, a

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145 *See* Press Release, *Office of the Press Secretary, President Discusses National Missile Defense* (Dec. 13, 2001), http://www.whitehouse.gov/news/releases/2001/12/print/20011213-4.html; Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T 3435; *see also* Emily K. Penney, *Comment: Is that Legal?: The United States' Unilateral Withdrawal from the Anti-Ballistic Missile Treaty*, 51 CATH. U.L. REV. 1287 (2002) (analyzing the legality of the withdrawal); David E. Sanger & Elisabeth Bumiller, *U.S. to Pull Out of ABM Treaty, Clearing Path for Antimissile Tests*, N.Y. TIMES, Dec. 12, 2001, at 1; Sanger & Wines, *supra* note 114.

146 *See* Katty Kay, *'Toxic Texan' Has Poor Green Record*, TIMES (London), Aug. 23, 2002, at 19 (citing George Bush with the statement "I know that human beings and fish can coexist peacefully"); *see also* John F. Temple, *NOTE: The Kyoto Protocol: Will it Sneak up on the U.S.?*, 28 BROOKLYN J. INT'L L. 213 (2002); Greg Kahn, *The Fate of the Kyoto Protocol Under the Bush Administration*, 21 BERKELEY J. INT'L L. 548 (2003) (criticizing the portrayal of the U.S. stance on the Kyoto protocol as unilateral).

147 The United States has opposed the Rome Statute, establishing the International Criminal Court. *See also* Samantha V. Ettari, *Note: A Foundation of Granite or Sand? The International Criminal Court and United States Bilateral Immunity Agreements*, 30 BROOKLYN J. INT'L L. 205 (2004) (arguing that "United States' bilateral immunity agreements restricting the authority of the ICC contravene the United States' duty to the international community and hence are illegal under jus cogens"); Warren Hoge, *U.S. Lobbies U.N. on Darfur And International Court*, N.Y, TIMES, Jan. 29, 2005, at 8 (reporting that despite pushing for action against Sudan's government, the Bush administration is lobbying the UN against assigning the case of judging the atrocities committed in Darfur to the ICC).

148 *See* Steven Vogelson, *Note: The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 834-45 (1990).

149 *See generally* Samantha Power, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 290-1, 484-6 (2002). *But see* Rosemary Bennett & Carola Hoyos, *US Launches Campaign to Close UN Criminal Tribunals,* FIN. TIMES (London), Mar. 1, 2002), at 10 (reporting on a recent US campaign to close the tribunals in Rwanda and former Yugoslavia).

150 *See* POWER, *supra* note 149, at 482.

151 *See* Guy Dinmore, *Military Aid Frozen for Allies Refusing ICC Deal*, FIN. TIMES (London), July 2, 2003, at 9.

possible violation of the United Nations Charter.[152] It has since argued that the Geneva Convention does not apply to the large number of non-US prisoners it holds in Guantanamo.[153] It is true that President Bush has famously called upon the world to come together and join forces with the United States in the wake of September 11, 2001.[154] Yet, his administration undermined international law and international institutions whenever they were not closely aligned with the administration's policy objectives.

The backlash against international law and international regimes has not solely been limited to the Bush administration. As part of a larger conservative sentiment, academics have launched a forceful attack. For example, Michael Glennon has suggested that international law has failed in its primary mission - to constrain nations' behavior in the use force.[155] It would therefore be detrimental to the United States if it continued to be constrained by international law.[156] John R. Bolton has echoed his thoughts,, questioning whether "global

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[152] *See* Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004) (arguing that "that the legal theory actually deployed by the United States is not persuasive"); Henry H. Perritt, Jr., *Iraq and the Future of United States Foreign Policy: Failures of Legitimacy*, 31 SYRACUSE J. INT'L L. & COM. 149 (2004) (arguing that "that the Iraq intervention has distracted attention from more important foreign policy objectives […] while working through multilateral frameworks"); Ronald J. Rychlak, *Just War Theory, International Law, and the War in Iraq*, 2 AVE MARIA L. REV. 1 (2004) (arguing from the perspective of just war theory that the final decision to go to war best rests with national sovereigns and that many factors have to be weighed and considered in making that decision); *see also* Anne-Marie Slaughter, *The Clear, Cruel Lessons of Iraq*, FIN. TIMES (London), Apr. 8, 2004, at 19 (arguing that the invasion of Iraq was both illegal and illegitimate).

[153] For an analysis of the legal status of the people detained at Guantanamo, see Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1 (2004); Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004); Tung Yin, *Ending the War on Terrorism Bone Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Giuantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149 (2005); Mark A. Drumbl, *Guantanamo, Rasul and the Twilight of Law*, Washington & Lee Legal Studies Paper No. 05-04, *available at* http://ssrn.com/abstract=685624*; see also* Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at 1.

[154] *See* George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html ("This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight." "We ask every nation to join us. We will ask, and we will need, the help of police forces, intelligence services, and banking systems around the world.").

[155] Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 VA. J. INT'L L. 91, 94-100 (2003) [hereinafter *Glennon, UN Security Council*]; *see also* Michael Glennon, LIMITS OF LAW, PREROGATIVES OF POWER (2001); Michael Glennon, *How International Rules Die*, 93 Geo. L.J. 939 (2005) (arguing that "excessive violation of a rule, whether embodied in custom or treaty, causes the rule to be replaced by another rule that permits unrestricted freedom of action").

[156] *See* Glennon, *UN Security Council, supra* note 155, at 100.

governance" is even an issue worth discussing.[157] If taken seriously, these views threaten, as Wade Mansell has suggested, "the very bases of international law."[158]

Glennon and Bolton may be seen as holding relatively extreme views, but their basic premise is shared by a new cadre of conservative international law scholars writing and teaching at the US's most prestigious law schools. In 2005, for example, Harvard Law School's Jack Goldsmith and Chicago Law School's Eric Posner co-authored a revisionist theory of international law, arguing that nation states haven't internalized or complied with international law, but instead "act out of self-interest."[159] For them, international law is a set of rules that can be utilized when convenient, and disregarded or even disassembled when inopportune. In essence, they argue for a legal pendant to President Bush's "coalition of the willing".[160]

In 2006, Jack Goldsmith joined forces with Tim Wu and applied his theory of international law to the domain of Internet governance.[161] Unsurprisingly, Goldsmith and Wu suggest that the Internet is shaped by national laws, dispelling myths of a lawless and borderless cyberpace[162] and arguing that the paucity of international agreements on Internet

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[157] Bolton subsequently was chosen by the Bush administration to be the United States ambassador to the United Nations, where his opinions and his negotiation tactics maximizing United States short-term gains have made him few friends. *See, e.g.*, John R. Bolton, *Unsign that Treaty*, WASHINGTON POST, Jan. 4, 2001, at A21 ("President Clinton's last-minute decision to authorize U.S. signing of the treaty creating an International Criminal Court (ICC) is as injurious as it is disingenuous.").

[158] S*ee* Wade Mansell, *Goodbye to All That? The Rule of Law, International Law, the United States, and the Use of Force*, 31 J.L. & SOC. 433, 439 (2004); *see also* Wade Mansell & Emily Haslam, *John Bolton and The United States' Retreat from International Law*, 14 SOC. & LEGAL STUD. 459 (2005) (analyzing the writings of John R. Bolton).

[159] *See* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 225-26 (2005).

[160] The term "coalition of the willing" has been used by the Bush administration to denote those nations who support the US in the war in Iraq. *See, e.g.,* Steve Schifferes, *US Names "Coalition of the Willing"*, BBC NEWS ONLINE, Mar. 18, 2003, http://news.bbc.co.uk/2/hi/americas/2862343.stm (last visited May 11, 2006) (citing former US Secretary of State Colin Powell: "We now have a coalition of the willing that includes some 30 nations.").

[161] *See* JACK L. GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? 179-84 (2006) (arguing that nation states use their coercive powers to shape the Internet in their favor resulting in a "technological version of the cold war").

[162] For Goldsmith's earlier work, see Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) (concluding that "[t]here is no general normative argument that supports the immunization of cyberspace activities from territorial regulation"); Jack L. Goldsmith, *The Internet and the Abiding Significance of territorial Sovereignty*, 5 IND. J. GLOBAL LEG. STUD. 475 (1998)

governance reflects the weakness and inability of international law to offer effective solutions.[163]

One may be tempted to characterize these works as a realist conception of the world. But some go further, suggesting that the reluctance vis-à-vis international law and international regimes is rooted in the values of the United States.[164] Accepting international governance would therefore require subjugation or abandonment of these treasured values. From the beginning of the republic, they suggest, the United States was founded on the freedom of its people, including the freedom from external constraints.[165]

Many of the traditional international legal as well as constitutional scholars in the United States may disagree.[166] They may point to historical evidence, including Article VI of the Constitution itself that affords international law – a very young and revolutionary concept in 1789 – the same power and privilege as federal law;[167] they may argue that the revisionists relentlessly mangle historical facts to conform to their world view, much like the Bush administration's desire to "create" rather than accept reality.[168]

(arguing that territorial regulation on the Internet is messy, but will remain a central component); Jack L. Goldsmith, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001) (developing a theoretical framework for analyzing dormant Commerce Clause challenges to state Internet regulations); Jack L. Goldsmith, *The Internet and the Legitimacy of Remote Cross-Border Searches*, 2001 U. CHI. LEGAL F. 103 (arguing that remote cross-border searches and seizures are consistent with international principles of enforcement jurisdiction).

[163] *See* GOLDSMITH & WU, *supra* note 161, at 65-85.

[164] *See* GOLDSMITH & POSNER, *supra* note 159, at 205-24 (arguing that cosmopolitanism cannot be easily reconciled with a strong commitment to liberal democracy); Michael J. Glennon, *International Law under Fire: Self-Determination and Cultural Diversity*, 27 FLETCHER F. WORLD AFF. 75, 78 (2003) (discussing critically the concept of self-determination with regard to international law).

[165] *See id.*

[166] *See, e.g.*, Oona A. Hathaway & Ariel N. Lavinbuk, Book Review, Rationalism and Revisionism in International Law, 119 HARV. L. REV. 1404 (2006); David Sloss, Book Review, *Do International Norms Influence State Behavior?*, 38 Geo. Wash. Int'l L. Rev. 159 (2006).

[167] *See, e.g.*, JOHN F. MURPHY, THE US AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 75, 76 (2004).

[168] *See* Ron Suskind, *Faith, Certainty and the Presidency of George W. Bush*, N.Y. TIMES MAG., Oct. 17, 2004, *available at* http://www.nytimes.com/2004/10/17/magazine/17BUSH.html?pagewanted=6&ei=5090&en=890a96189e162076&ex=1255665600.

Yet, these conservative voices have succeeded in undermining the stature of international law in the public discourse, even among elites. It is not considered impolitic anymore to openly question the validity of international law, and with it any external constraints placed on national behavior – in particular when one is convinced that one is advancing the superior set of values.[169] The ends seem to justify the means.

The European proposal therefore was likely impossible for the United States to accept because of its domestic dynamic of an ongoing de-legitimization of international regimes. Accepting internationalized governance for naming and numbering would have been contradictory to one of the central philosophical tenants of the current conservative US political climate.

Conclusions

Over the last several years, many have called for an internationalization of Internet governance in general, and Internet naming and numbering in particular. The multi-year WSIS process that culminated in November 2005 was intended to create momentum in such direction. The United States has long resisted such internationalization, fearing in particular the growing influence of China and similar nations.

The proposal put forward by the European Union in September 2005 would have offered a constitutional moment for Internet governance by suggesting internationalization based on fundamental values of the Internet community. The swift rejection of the proposal by the US was surprising, both from a tactical as well as – in light of its own constitutional history – a substantive viewpoint.

In this article we have described the main features of the European proposal and what it might have created. We evaluated four possible arguments explaining US rejection: delegation of power, objective rights, public choice, and de-legitimization of international regimes.

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[169] *See, e.g.,* PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR (2005); *see also* Brian Urquhart, *The Outlaw World*, N.Y. REV. OF BOOKS, May 11, 2006, at 25-28 (book review). *See generally* Stanley Hoffman, AMERICA GOES BACKWARD (2004).

We conclude that a combination of domestic pressures and aversion of international regimes caused the US government delegation to reject the proposal. As a result, WSIS concluded without a constitutional moment for Internet governance. It may turn out, though, to be a Pyrrhic victory for the United States. The calls for internationalization of Internet governance will not subside and the US will have to continue to fend off demands for a transfer of power. The opportunity for Internet governance to be based on the values of the Internet community, however, will likely not return.