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Freedom of Expression, Democratic Norms, and Internet Governance

Dawn C. Nunziato
George Washington University Law School, dnunziato@law.gwu.edu

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Dawn C. Nunziato*

I. INTRODUCTION

Within a decade, the Internet has transformed from an obscure medium for the exchange of military and scientific data to a global medium of mass communication and expression of all kinds. As speech on the Internet has become increasingly important, a number of governments have made well-publicized and widely criticized attempts to control it. Not as well-publicized or as well-analyzed are the speech-regarding policies of the Internet Corporation for Assigned Names and Numbers or ICANN, the body that has been governing the Internet's infrastructure for the last five years. In the agreement under which it gained its current powers, ICANN assured the United States that it would govern the Internet's infrastructure democratically and would implement governance structures to take into account the interests of affected Internet users around the world. In particular, ICANN promised to conduct worldwide elections of representatives to its

*Associate Professor, The George Washington University Law School. B.A., M.A. (Philosophy), J.D., University of Virginia. I have benefited greatly from presenting earlier drafts of this Article at the Conference on New Technologies and International Governance sponsored by the Paul H. Nitze School of Advanced International Relations (SAIS), the Wharton Legal Studies Research Colloquium, and The George Washington University Law School Works-in-Progress series. I am also very grateful for the assistance of Robert Brauneis, Todd Peterson, Richard Pierce, Roger Schechter, Michael Selmi, Robert Tuttle, and the library and research assistance of Leonard Klein, Kiyoshi Tsuru, and Stephen Soltanzadeh. All web sites referenced herein were last visited November 1, 2002.

decision-making bodies and to embody deliberative and representative democratic structures. While ICANN has acknowledged the importance of implementing such *procedural* democratic norms, it has failed to acknowledge that the ideals of democratic governance encompass *substantive* norms, such as protection for freedom of expression. Nor has ICANN acknowledged that any of its policies implicate free speech.

In this Article, I challenge both components of the prevailing ideology -- that ICANN's governance of the Internet's infrastructure does not threaten free speech and (relatedly) that ICANN's governance of the Internet need not embody special protections for free speech. I argue that ICANN's decision-making authority over the Internet's infrastructure indeed encompasses the power to enact regulations affecting speech within the most powerful forum for expression ever developed. Specifically, current ICANN policies restrict the ability to engage in *anonymous speech* and *critical speech* on the Internet. I claim that ICANN cannot remain true to the democratic norms it was designed to embody unless it adopts policies to protect *substantive* values integral to democracy – including protections for freedom of expression.

This inquiry into ICANN's governance structure, and the values such structure should embody, is particularly timely. The United States government is in the midst of evaluating how well ICANN has lived up to its initial commitments to embody democratic decision-making structures as it considers whether to renew its agreement with ICANN to permit ICANN to continue its role in governing the Internet's infrastructure. At the same time, ICANN has been engaged in a process of internal scrutiny and self-evaluation and has proposed to reform its governance structure as it attempts to learn from its experience in developing a global representative decision-making body responsible for governing the Internet's infrastructure. Although ICANN's impetus for self-evaluation and reform is commendable, after analyzing these proposed reforms, I conclude that the reforms of its governance structure proposed by ICANN will render it less able to embody the norms of liberal democracy and less capable of protecting individuals' fundamental rights. I contend that unless

ICANN reforms its governance structure to render it consistent with the procedural *and* substantive norms of democracy articulated herein, ICANN should be stripped of its decision-making authority over the Internet's infrastructure.

It is now well understood that the Internet constitutes a forum for free expression of unprecedented scope and breadth. As I briefly set forth in Part II(A), the low barriers to this market for speech and its global reach render the Internet the most powerful vehicle for expression ever developed. When *governments* seek to control speech within this forum, the global Internet community has viewed such attempts with justified suspicion and scrutiny. Less well-understood and less carefully scrutinized are the measures that ICANN has undertaken that implicate expression on the Internet. Because ICANN's policy-making, both actual and potential, implicating the right to free speech on the Internet is not readily apparent, in Part II(B) I review ICANN's control over the Internet's infrastructure and explore two significant ways in which ICANN is responsible for developing speech-regarding policies for the Internet. First, ICANN has exercised its authority over the Internet's infrastructure to establish a (mandatory) policy that essentially prohibits websites from being maintained anonymously. This policy erects substantial barriers to individuals' ability to engage in anonymous speech on the Internet, which is a significant component of the right to freedom of expression. Second, ICANN has established a (mandatory) policy for adjudicating disputes between intellectual property owners and domain name holders that restricts Internet users' ability to engage in critical speech on the Internet. Each of these policies impacts Internet users' right to free speech in subtle but significant ways. In so regulating speech within this important expressive forum, ICANN serves a significant public ordering function with respect to speech on the Internet. As the functional equivalent of a public actor, ICANN should be held to the normative ideals of democracy – both procedural *and* substantive -- that we generally require only of governments.

In Part III, I set forth my conception of the normative ideals of liberal democracy with an eye toward how these ideals should be implemented in the context of Internet governance.

While democracy simpliciter requires political equality among citizens (generally implemented in large-scale democracies through the device of representation), *liberal* democracy requires in addition that certain *substantive* protections be implemented within the government's structure to protect individuals' fundamental rights. Such substantive protections are typically enshrined through mechanisms of higher-order law-making like constitutions, along with their requisite enforcement mechanisms, like independent judicial review. Thus, while liberal democracies incorporate processes to reflect the will of the people and to render them accountable to the people, they also implement meaningful protections for certain substantive rights. As I explain in Part III(B), procedural democratic theorists are generally loathe to enshrine protections for *substantive* rights or to prescribe the outcomes of well-designed democratic processes. Yet, even procedurally-inclined theorists acknowledge that certain substantive rights – including the right to freedom of expression – must be accorded special protections within democratic societies because such rights are integral to the process of self-government itself.

In Part IV, I examine the essential features of ICANN's (initial and revised) governance structure in order to assess the extent to which this structure embodies the normative ideals of liberal democracy. I contend that while ICANN's framers initially (dimly) appreciated the important public ordering role it would come to serve in regulating certain Internet conduct, they went only part of the way toward embodying the requisite normative ideals of liberal democracy within ICANN's governance structure. Although ICANN's framers committed ICANN to procedural democratic norms by essentially designing ICANN as a representative democratic institution, they failed to understand or predict the significant public ordering role ICANN would serve in regulating speech on the Internet. As a result, they failed to commit ICANN to substantive normative ideals integral to liberal democracy -- most importantly, the protection of freedom of expression. ICANN has recently undertaken the revision of its initial governance structure in an attempt to learn from its experience over the past five years. These revisions, however,

mark a retreat from its initial commitment to embody the *procedural* ideals of liberal democracy. In particular, these proposed revisions to ICANN's governance structure (1) abandon ICANN's earlier commitment to direct elections by Internet users of ICANN's governing body, and (2) render essentially meaningless ICANN's earlier commitment to independent review of its decision-making. Furthermore, such revisions in no way incorporate *substantive* ideals of liberal democracy – such as special protection for freedom of expression -- within ICANN's governance structure. As such, ICANN's proposed reforms of its governance structure represent a step in the wrong direction.

In Part V, I provide concrete recommendations for ICANN to implement meaningful protections for freedom of expression. In so doing, I look for guidance to the general themes and principles embodied within the United States' First Amendment jurisprudence. Although I do not claim that ICANN is technically a "state actor" for purposes of First Amendment jurisprudence, nor that ICANN should necessarily embody the substantive democratic norm of freedom of expression in the same fashion as the United States does, I do claim that important themes can be elicited from the United States' experience of protecting freedom of expression within a liberal democracy.

First, the United States' experience teaches that special protections for free speech beyond those embodied within procedural democratic norms themselves are necessary, and that merely embodying procedural democratic norms of ensuring political equality will not necessarily suffice to secure this fundamental right. Second, the United States experience teaches that, in order to be meaningful, protection for free speech must ultimately be reposited in an independent judicial body. Third, First Amendment jurisprudence teaches that governments must ensure that any policies restricting speech advance important, articulated purposes in the least speech-restrictive manner possible. Finally, First Amendment jurisprudence accords special protections for certain types of speech that are particularly vulnerable within democracies – namely *countermajoritarian* speech or speech embodying characteristics that render it otherwise vulnerable within a democracy that merely reflects the

will of the majority. The United States protects countermajoritarian speech in two ways that are relevant for ICANN. First Amendment jurisprudence grants special protections for *anonymous speech* and *critical speech*, each of which serves as an important vehicle for the expression of unpopular or dissident ideas and viewpoints. The First Amendment extends protections for such speech even within the context of competing claims by intellectual property holders that such speech infringes their intellectual property rights. An important function of intellectual property law within liberal democracies is to prevent intellectual property owners from exercising unlimited monopoly control over components of the common language or culture. Accordingly, U.S. intellectual property law reflects a nuanced working out of the ways in which to protect free speech values against overreaching by intellectual property owners. Although I do not claim that free speech values must be protected on the Internet by ICANN in precisely the same way that they are protected by United States courts, I contend that these First Amendment themes and principles are illuminative for ICANN as it goes about revising its policies to incorporate the liberal democratic norm of freedom of expression.

Toward this end, I propose several ways in which ICANN should revise its policies to accord meaningful protection for freedom of expression. First, ICANN should revise its policies requiring the disclosure and publication of Internet users' personal information, including name and address, as a prerequisite for maintaining a website. Second, ICANN should revise its policy applying to the resolution of disputes between trademark owners and domain name holders to incorporate meaningful protections for the right to engage in critical speech. Finally, in order to hold in check ICANN's power to enact policies that are insufficiently protective of free speech, ICANN should render meaningful its initial promise to constitute an Independent Review Panel responsible for evaluating ICANN policy-making for adherence to the procedural and substantive commitments articulated in its foundational documents.

II. THE INTERNET CORPORATION FOR ASSIGNED

NAMES AND NUMBERS (ICANN) AND ITS DECISION-MAKING AFFECTING FREE SPEECH

Five years ago, the United States ceded responsibility for regulating key elements of the Internet's infrastructure to ICANN – a private entity essentially unaffiliated[1] with any pre-existing territorial government or international governance entity, yet one essentially designed to perform certain of the functions of (democratic) government. In particular, ICANN's governance structure was designed to reflect and account for the preferences of Internet users throughout the world in developing policies that would affect the interests of Internet users worldwide.[2] When ceding this control, the United States and other framers of ICANN did not realize (or acknowledge) that ICANN's control over the Internet's infrastructure would extend to controlling speech on the Internet. Accordingly, they did not require special protections for freedom of expression as a condition for transferring control over the Internet's infrastructure to ICANN. Today, however, it is becoming increasingly apparent that ICANN's control over the

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[1] Of course, as discussed *infra*, ICANN was summoned into being by and received its authority from the United States government. Further, its continued exercise of this authority is subject to the approval of the U.S. government. *See* A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 20 (2000). And, ICANN was technically formed as a non-profit corporation under the laws of the State of California and is therefore subject to this state's laws. *Id.* Despite these formal affiliations, ICANN was fundamentally designed to be a global decision-making entity operating independently of existing territorial sovereigns, as I explain *infra*. *See* text accompanying notes 178-219.

[2] *See*, *e.g.*, Jonathan Weinberg, *ICANN and The Problem of Legitimacy*, 50 DUKE L. J. 187, 215-16 (2000) (describing ICANN as a "private entity seeking to play the sort of role more commonly played in our society by public entities, [i.e.,] setting rules for an international communications medium of surpassing importance, [which] has historically been performed at the behest of the U.S. government and had been conducted in an explicitly public-regarding manner.")

Internet's infrastructure encompasses the power to enact policies affecting speech.

Within the past decade, speakers and listeners throughout the world have begun to appreciate the value of the Internet as a forum for free expression. Once the limitations on the permissible uses of the Internet were lifted and the Internet was opened up as a forum for expression of all kinds,[3] speakers and publishers from all walks of life from every corner of the world flocked to the Internet.[4] Governments, recognizing the Internet's potential as a lens through which putative speech harms could be magnified, have undertaken extensive measures to censor and control speech over the Internet.[5] While such governmental attempts to restrict the free flow of expression have been roundly criticized,[6] the speech-restrictive policies of ICANN have largely escaped notice and criticism.

ICANN regulates speech on the Internet in two subtle but significant ways. First, ICANN enjoys the power to establish rules governing the registration of domain names -- the names assigned to computers that form part of the Internet, such as AMAZON.COM,[7] FUCKGENERALMOTORS.COM,[8] ABORTIONISMURDER.COM,[9] and HATEISNOTAFAMILYVALUE.COM.[10] This power to establish prerequisites for the registration of domain names translates into the power to establish prerequisites for maintaining websites. ICANN has exercised this power in such a way as to prohibit Internet users from maintaining websites

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[3] *See* MANAGEMENT OF INTERNET NAMES AND ADDRESSES, 63 Fed. Reg. 31,741 n.5 (1998), available at http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm (explaining that in 1992, the United States Congress granted the National Science Foundation the statutory authority to allow commercial activity on what was to become the Internet).

[4] *See, e.g.,* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 117 S.Ct. 2329 (1997).

[5] *See* text accompanying notes 18-21.

[6] *See* text accompanying notes 22-23.

[7] *See* http://www.amazon.com.

[8] *See* http://www.fuckgeneralmotors.com.

[9] *See* http:/www.abortionismurder.com.

[10] *See* http://www.hateisnotafamilyvalue.com.

anonymously or pseudonymously. According to ICANN policy, in order to register a domain name and maintain a website, individuals must reveal their name, address, and other personal contact information to their domain name registrar.[11] ICANN further requires that domain name registrars make such information about the identity of domain name holders publicly available, thereby restricting the opportunity to engage in anonymous speech on the Internet. Second, ICANN has enacted a mandatory policy – the Uniform Dispute Resolution Policy – that enables trademark owners to compel domain name holders to surrender domain names critical of trademark owners. This policy takes into account both the expressive content embodied within the domain name itself (such as GWBUSHSUCKS.COM and TOYOTASUCKS.COM) and the content made available on the website maintained under that domain name. In this Part, I first briefly review the Internet's development into an important forum for free expression. I then set forth the basis and scope of ICANN's power to regulate speech on the Internet. Finally, I explore how ICANN has exercised this power in ways that implicate free speech on the Internet.

A. *Free Speech as a Constitutive Good of the Internet*

It is now widely recognized that the Internet constitutes a uniquely valuable forum for individuals to express themselves and communicate with one another on a global scale. As one court explained, "It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country – and indeed the world – has yet seen."[12] Several features constitutive of today's Internet[13] render it a uniquely powerful vehicle for speakers and

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[11] *See* text accompanying notes 49-60.

[12] *See* ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996), *aff'd,* 117 S.Ct. 2329 (1997).

[13] This is not to say that the *inherent* nature of the Internet presumes such features. *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) (arguing against an essentialist conception of the Internet's "nature").

publishers to express themselves to worldwide audiences at very low cost.[14] For the (very low) cost of establishing a website, an individual can express herself in the context of a whole host of mediums -- text, images, audio, video – to a virtually unlimited array of listeners. The barriers to entry that exist in other media, such as traditional print publication and broadcast media, are drastically reduced in the context of the Internet. The ability to speak or publish via the Internet is not accompanied by enormous barriers to entry that are present in connection with expressing oneself via traditional print media, such as newspapers or periodicals.[15] In contrast to traditional broadcast media, where the ability to express oneself widely is constrained by substantial licensing requirements and associated fees, the Internet is not shackled by spectrum scarcity, by the onerous licensing requirements or fees necessitated by a limited broadcast spectrum, nor by the high cost of entry into this marketplace for expression. As a result, the Internet – to a much greater extent than traditional mediums of expression – facilitates a true marketplace of ideas, one that is not dominated by the few wealthy voices who are able to express themselves effectively via traditional print or broadcast media.[16] Because of the Internet's combination of such speech-friendly features:

> Individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional

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[14] *See* 929 F. Supp. at 877 (explaining that as a result of the Internet's "very low barriers to entry," "astoundingly diverse content is available on the Internet," which now constitutes "a unique and wholly new medium of worldwide human communication.")

[15] *Id.*

[16] *Id.* at 880.

> perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen.[17]

Recognizing the Internet's unprecedented capacity as a forum for expression, many entities have attempted to censor Internet speech that they view as dangerous. Governments throughout the world have sought to control speech on the Internet that they believe may harm their citizens. Liberal Western democracies have attempted, with limited success,[18] to censor speech that they believe to be harmful to children,[19] obscene as to minors, or hateful to particular groups.[20] Eastern regimes have attempted to restrict the flow of expression that challenges their way of governing or their way of life.[21] These governmental

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[17] *Id.* at 881.

[18] *See* Global Internet Liberty Campaign, *Protecting the Human Right to Freedom of Expression on the Global Internet,* at http://www.gilc.org (detailing means by which Western democracies have attempted to censor speech on the Internet, including by criminalizing certain types of speech on the Internet, imposing content-based licensing restrictions on Internet Service Providers, and compelling the use of filtering, rating, or content labeling tools).

[19] The United States, for example, has repeatedly sought to regulate pornographic and child pornographic content on the Internet, with little success. *See*, *e.g.*, Reno v. American Civil Liberties Union, 117 S.Ct. 2329 (1997) (striking down portions of Communications Decency Act of 1995); Ashcroft v. Free Speech Coalition, ___ U.S. ___ (2002) (striking down Child Pornography Prevention Act of 1996).

[20] France, for example, has attempted to regulate the display of Nazi memorabilia on the Internet, including in cases where such content is hosted by servers located outside of France. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 145 F. Supp. 2d 1168 (N. D. Cal. 2001).

[21] China, for example, blocks access to foreign sites (such as The Washington Post and The New York Times) that it believes threaten its way of life, and has recently begun blocking access to certain popular search engines (such as Google and Altavista). *See* Peter S. Goodman & Mike Musgrove, *China Blocks Web Search Engines*, The Washington Post, September 12, 2002, at E1.

attempts to control and censor Internet expression have been the subject of widespread global criticism and rebuke.[22] Emerging from our collective experience with confronting attempts at Internet censorship is the widely-shared democratic value that expression on the Internet should be "uninhibited, robust, and wide-open"[23] and that protecting freedom of expression on the Internet is of pre-eminent importance.

While *governmental* attempts to restrict Internet expression have properly been subject to intense scrutiny by the Internet community at large,[24] similar efforts by non-governmental actors or non-traditional government actors – such as ICANN's subtler efforts to restrict Internet expression – have received little attention or scrutiny. In Parts II(C) and (D), I articulate the ways in which ICANN's policies restrict expression on the Internet. In Part II(B), I examine ICANN's power over the Internet's infrastructure and how such power has translated into the limited power to control expression on the Internet.

B. *The Basis and Scope of ICANN's Power to Regulate Speech on the Internet*

ICANN's power to enact policies affecting speech on the

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[22] *See* Global Internet Liberty Campaign, *Protecting the Human Right to Freedom of Expression on the Global Internet,* at http://www.gilc.org (contending that "attempts to suppress information and communication on the Internet violate various international human rights laws," including the Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; European Convention of Human Rights; Declaration on the Freedom of Expression and Information; Charter of Paris for a New Europe; American Declaration of the Rights and Duties of Man & the American Convention on Human Rights; and the African Charter on Human and Peoples' Rights.)

[23] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[24] *See, e.g.,* Global Internet Liberty Campaign, *Protecting the Human Right to Freedom of Expression on the Global Internet,* at http://www.gilc.org (documenting widespread international criticism of governmental attempts to suppress expression on the Internet).

Internet is grounded in its power over the Domain Name System. Domain names are the familiar and easily-remembered addresses for computers that form part of the Internet (such as TRAVELOCITY.COM,[25] BOBDYLAN.COM,[26] and PROCHOICE.COM[27]). Domain names, in turn, map to Internet Protocol (IP) numbers, which serve as routing addresses for computers on the Internet. The Domain Name System is the system that manages the allocation of domain names and that translates domain names into IP numbers so as to make possible the transmission of information across the Internet.[28]

When the United States ceded control over the Internet's infrastructure to ICANN,[29] one of the most important functions it transferred was control over the Domain Name System. ICANN's control over the Domain Name System, in turn, encompasses the ability to enact policies regulating the acquisition and maintenance of domain names and hence regulating of the acquisition and maintenance of websites. Accordingly, such control over the Domain Name System translates into control over speech on the Internet.

ICANN's power to regulate speech on the Internet in this way is not derived from a statutory or treaty-based exclusive right to administer the Domain Name System,[30] but rather from its control over the set of computers that form the core of the Domain Name System as we know it. The set of computers that ICANN controls are known as the "root server" and consist of a number of

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[25] *See* http://www.travelocity.com.

[26] *See* http://www.bobdylan.com.

[27] *See* http:/www.prochoice.com.

[28] *See* MANAGEMENT OF INTERNET NAMES AND ADDRESSES, 63 Fed. Reg. 31,741 (1998), available at http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm [hereinafter WHITE PAPER].

[29] *See* text accompanying notes 165-92.

[30] Indeed, as I discuss *infra* at text accompanying notes 42-44, there are several other organizations – although insignificant in comparison to ICANN -- that run domain name systems and assign domain names. *See, e.g.,* AlterNIC, Inc., at http://alternic.net; The Internet Namespace Cooperative, at http://www.tinc-org.com; New.net, at http://www.new.-net; and Newroot, at http://www.newroot.com.

computers with identical contents spread over several continents.[31] The United States Department of Commerce, which itself acquired control of the root server from the Department of Defense as part of the transformation of the Internet from a military network to a civilian one, granted ICANN control over the root server[32] in 1998 via a Memorandum of Understanding that it entered into with ICANN.[33] In Part IV, I explore the circumstances under which the United States agreed to transfer such control to ICANN. In this Part, I focus on the contours of the control that was transferred and the ways in which ICANN's technical control over the root server and the Domain Name System has transformed into control over expression on the Internet.

As its name suggests, the Internet Corporation for Assigned Names and Numbers assigns not only names – domain names, like ASHCROFTLIED.COM[34] and FUCKOSAMA.COM[35] – but also numbers – Internet Protocol (IP) addresses, like 128.164.132.16.[36] IP addresses form the primary address system

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[31] There are currently 13 root servers. *See* http://www.icann.org/committees/dns-root/y2k-statement.htm. Technical guidelines for operation of the root servers may be found in RFC 2870. *See* http://www.icann.org/committees/dns-root/rfc2870.txt.

[32] "Control" is simply physical control of the computers, as enforced by the law of trespass and by federal laws against computer fraud and hacking. For example, when Eugene Kashpureff, the founder of AlterNIC, hacked into the website of Network Solutions, Inc., which was then operating the root server, and diverted traffic from its website to AlterNIC's for several days in June 1997, he was extradited from Canada and pled guilty to violations of a federal computer fraud law. *See Domain Name Guerilla Kashpureff Gets Off Lightly*, NETWORK WEEK, August 7, 1998, at http://www.newslinx.com/News/August/cg-080798c.html.

[33] *See* MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF COMMERCE AND INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (Nov. 25, 1998), at http://www.icann.org/general/icann-mou-25nov98.htm [hereinafter MEMORANDUM OF UNDERSTANDING].

[34] *See* http://www.ashcroftlied.com.

[35] *See* http://www.fuckosama.com.

[36] ICANN delegates the responsibility of assigning IP addresses to three

of the Internet, which enable information to be routed from one computer to another across many intermediate computers and the links between them. Each computer linked to the (public) Internet must have a unique IP address in order for information to be routed correctly between computers.[37] Although the Internet could, as a technical matter, function with numerical IP addresses alone, there are certain advantages to layering a name system on top of the numbering system. First, human beings can use and remember letters and words (like STOPTHEWAR.COM) more easily than long strings of numbers (like the IP addresses that correspond to these domain names, such as 128.164.132.16).[38] The Domain

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regional registries: the Asia Pacific Network Information Centre (APNIC), http://www.apnic.net; the American Registry for Internet Numbers (ARIN), http://www.arin.net; and the Réseaux IP Européens Network Coordination Centre (RIPE NCC), http://www.ripe.net. Those regional registries in turn assign numbers to entities that can demonstrate a need for a large block of numbers, such as commercial Internet Service Providers or large companies.

[37] To be precise, first, it is each "interface" that must have a unique IP address. Internet "host" computers (computers that run the applications that make the Internet useful to end-users, like web browsers and servers and e-mail clients and servers) need only one interface, as they are the sources or final destinations of Internet transmissions. Routers and switches (computers that route information between host computers) need more than one interface, and hence need more than one IP address. Second, host computers can have "dynamic" IP addresses, which are assigned only for a temporary period, such as a single session using a dial-up modem to connect to an Internet Service Provider, as well as "static" IP addresses, which are assigned for a longer period. Third, many computers on a local network can share a single connection to the public Internet, as methods are available for keeping each local computer's use of the shared connection distinct. That said, it is still the case that, at any one time, a computer using the Internet needs to be using some unique IP address to ensure correct routing.

[38] In addition, since many more trademarks are made up of words and other combinations of letters than of numbers, the branding of Internet destinations is easier with a word-based system. Finally, a dual address system allows websites to keep the same names even if their IP addresses change (or even if the entire IP numbering system changes), which

Name System now administered by ICANN and coordinated at a technical level through its root server is the primary system for providing a name-based addressing system that makes possible the transmission of information across the network of computers that make up the Internet.

The ICANN-run Domain Name System thus consists of a set of computers for storing top-level domain name information, as well as a protocol for translating (or "resolving") domain names to IP addresses. Every time an Internet user requests a website or sends an e-mail using a domain name, the first step her computer takes is to send a message requesting the IP address corresponding to that domain name. Only after obtaining the IP address does the computer actually retrieve the page or send the e-mail, marking its destination with the IP address.

The ICANN root servers are at the core of the Domain Name System run by ICANN. Although the root servers do not themselves store all of the domain name/IP address matches, they keep track of other computers that do, and route requests for IP address matches onto those computers. Thus, if ICANN wishes to terminate or reassign a domain name, it simply changes the information on its own computers, or requires others who own computers with that information to change it, upon threat of ceasing to route IP address requests to those computers. The ICANN-run Domain Name System currently encompasses about 245 "top-level domains,"[39] including 13 "generic top-level

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provides useful stability for the Internet's end-users.

[39] Each one of these top-level domains is administered by a separate organization, and ICANN exercises varying degrees of control over the policies of these organizations. Generally, the most closely controlled of these organizations are those administering the nine generic top-level domains subject to registrar competition, namely, .COM, .NET, .ORG, .INFO, .BIZ., .AERO, .MUSEUM, .COOP, and .NAME. These are soon to be joined by .PRO. *See* http://www.iana.org/gtld/gtld.htm. The top-level domains that are not generally open to the public and are not subject to registrar competition are .EDU, .MIL, .GOV, and .INT. *See id.* ICANN has entered into detailed registry agreements with each of these organizations. *See*, *e.g.*, .COM Registry Agreement Between ICANN and Verisign, Inc., at http://www.icann.org/tlds/agreements/verisign/-com-

domains" (gTLDs), such as .COM, .ORG, .EDU, .INFO, and .AERO,[40] and about 230 "country-code top-level domains" (ccTLDs), such as .UK (United Kingdom) and .TV (Tuvalu).[41] In other words, the ICANN root servers will route requests for IP addresses corresponding to any domain name ending in one of these top-level domains.

ICANN has no legal monopoly on running the Domain Name System, and several other organizations have in fact set up alternative domain name systems, running on alternative name server computers.[42] If and to the extent that competitor domain name systems are able to make inroads into ICANN's market, such competition in the market for domain name related policies will render the policy choices made by ICANN less significant. On the Internet as in real space, meaningful competition with respect to policy choices arguably provides some protection for individual rights, since individuals to some extent can protect their rights via the mechanism of exit.[43] At present, however, the

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index.htm. In addition, ICANN has accredited other companies as independent registrars for these top-level domains, and has entered into registrar accreditation agreements with each of them. The current list of ICANN-accredited registrars is available at http://www.icann.org/-registrars/accredited-list.html. The current Registrar Accreditation Agreement is available at http://www.icann.org/registrars/ra-agreement-17may01.htm. These are also the most popular top-level domains. ICANN exercises somewhat looser control over the country-code top-level domains (ccTLDs), in part out of deference to local cultures and governments. Nonetheless, many ccTLD administrators voluntarily adhere to ICANN policies, including the Uniform Dispute Resolution Policy, discussed *infra* in Part II(C).

[40] The current list of generic top level domains is available at http://www.iana.org/gtld/gtld.htm.

[41] The current list of country code top level domains is available at http://www.iana.org/cctld/cctld-whois.htm.

[42] *See*, *e.g.*, A. Michael Froomkin, *ICANN's Uniform Dispute Resolution Policy – Causes and (Partial) Cures*, 67 BROOK. L. REV. 605 n.34 (2002) (describing alternate domain name servers and ability to access alternate top level domains).

[43] David Johnson and David Post, for example, contend that:

> The separation of subsidiary "territories" or spheres of activity

alternative domain name systems and the alternative Top Level Domains (TLDs) they administer cannot be said to constitute meaningful competition for ICANN, and such systems are unlikely to gain appreciable market share in the near term. Virtually all Internet Service Providers provide domain name service that is part of the ICANN-run system. Every computer configured to connect to the Internet through one of those services is initially set up to use the ICANN-controlled Domain Name System. To surf the web using alternative top-level domains (such as .free or .ltd), one must reset one's network settings or modify one's browser software, and must be willing to trust name server computers that are not nearly as well-established or numerous as those within the ICANN-run system. Very few Internet users are willing (or able) to take these steps. As Michael Froomkin explains:

> within Cyberspace ... allow[s] for the development of distinct rule sets and for the divergence of those rule sets over time .... Content or conduct acceptable in one "area" of the Net may be banned in another . . . . [As compared to real space, in cyberspace] any given user has a more accessible exit option, in terms of moving from one virtual environment's rule set to another's . . . .

David R. Johnson and David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1397 (1996). Johnson and Post contend that top-down regulation to protect individuals' rights is unnecessary within such a model of cyberspace because different market actors will tend to produce a wide and divergent range of policy- or rule-sets, embodying different value choices (some consistent with the First Amendment, for example, others not). Such divergent policy-sets will provide users the freedom to choose which policy-set best accords with their preferences and values. I have elsewhere questioned Johnson and Post's implicit contention that fundamental individual rights can be adequately protected merely by virtue of a "market" in policy-sets. *See* Dawn C. Nunziato, *Exit, Voice, and Values on the 'Net*, 15 BERK. TECH. L. J. 753 (2000). Because in any case no meaningful competition to ICANN's domain name policy-making exists, an inquiry into how well ICANN's policy-making protects fundamental individual rights is warranted.

> Although there is no technical obstacle to anyone maintaining a TLD that is not listed in [ICANN's root server or the "legacy root"], these "alternate" TLDs can only be resolved by users whose machines, or Internet service providers (ISPs) as the case may be, use a domain name server that includes this additional data or knows where to find it. A combination of consensus, lack of knowledge, and inertia among the people running the machines that administer domain name lookups means that domain names in TLDs outside the legacy root . . . cannot be accessed by the large majority of people who use the Internet, unless they do some tinkering with obscure parts of their browser settings.[44]

As a result, anyone who wishes to communicate broadly on the Internet using a domain name, whether by establishing or accessing a website or by obtaining or using an e-mail address, will likely be hesitant to use an alternative top-level domain not supported by the ICANN Domain Name System. Because the ICANN-run Domain Name System is likely to dominate in the foreseeable future,[45] an inquiry into ICANN's policy choices affecting Internet users' rights is warranted.

C. ICANN's Decision-Making Implicating Anonymous Speech on the Internet

When the United States transferred control over the Domain Name System to ICANN, it also conveyed to ICANN the concomitant power to enact regulations affecting the registration and maintenance of domain names. ICANN's power over the registration and maintenance of domain names has transformed

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[44] Froomkin, *supra* note 1, at 42. *See also* Weinberg, *supra* note 2, at 198 ("Very few Internet users . . . look to alternative root servers. The vast majority rely on the single set of [ICANN-controlled] authoritative root servers . . . that have achieved canonical status.)

[45] For its part, ICANN formally opposes the creation of alternative domain name systems, citing the benefits of "universal resolvability." *See* http://www.internic.net/faqs/authoritative-dns.html.

into the power to enact regulations affecting the registration and maintenance of websites. As part of ICANN's power to regulate the Domain Name System, ICANN has established a set of foundational requirements that must be adhered to by anyone wishing to register and maintain a domain name. Because registering a domain name is a prerequisite to establishing a website, the preconditions ICANN establishes for registering a domain name translate into preconditions for obtaining and maintaining an Internet website. Maintaining an Internet website, in turn, is one of the most powerful vehicles of expression on the Internet, and indeed is becoming one of the most powerful vehicles of expression available within any forum.[46] Accordingly, ICANN's power to establish preconditions for registering domain names – and hence for websites -- translates into the power to establish prerequisites for engaging in an important form of expression. And, as I discuss *infra*, no meaningful checks exist on ICANN's power to establish such mandatory pre-requisites.[47]

In exercising this power thus far, ICANN has established a set of foundational requirements that prohibit domain names from being registered -- and hence websites from being maintained -- anonymously (or pseudonymously). While participation in many types of Internet communications and transactions – such as email, online discussion groups, chat rooms, etc. – can take place anonymously (or pseudonymously),[48] dissemination of content via a website cannot. This is because ICANN has established a policy mandating that anyone wishing to register a domain name first must provide, for public consumption,[49] certain personal contact

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[46] *See* Part II(A) *supra*.

[47] *See* text accompanying notes 220-27.

[48] For example, Microsoft's e-mail (Hotmail) and messenger (MSN Messenger) services allow their users to remain anonymous or pseudonymous. *See* MSN Statement of Privacy, at http://privacy.msn.com/default.asp#MSNGR. MSN will only disclose a user's identity if ordered to do so by law. *See id.* America Online's Instant Messenger™ privacy policy provides similar safeguards for the privacy of Internet users' identities. *See* Privacy Policy, at http://www.aol.com/info/privacy.html.

[49] *See* text accompanying notes 58-60.

information. At the behest of interested intellectual property owners,[50] who were concerned about their ability to police infringing content on the Internet, ICANN enacted a policy that requires those registering and maintaining a website to disclose to the public their name, address, and other contact information. This mandatory ICANN policy, which ICANN implements through its contracts with domain name registries and registrars,[51] requires that anyone wishing to acquire the right to use a domain name – which, in turn, is the prerequisite to publishing content on the Internet[52] – first provide truthful and accurate contact information to her domain name registrar, including her full name and mailing address.[53] Thus, for example, one wishing to establish the domain

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[50] The Intellectual Property Constituency, an interest group constituency within ICANN's Domain Name Supporting Organization, has consistently maintained that intellectual property owners must have access to domain name registrants' personal contact information in order to police infringement of their intellectual property. *See*, *e.g.*, Matters Related to WHOIS, DNSO Intellectual Property Constituency, at http://ipc.songbird.com/ whois_paper.html.

[51] For a list of the current ICANN-Registrar agreements, *see* http://www.icann.org/registrars/accredited-list.html. All such registrars (approximately 160 as of this writing) are contractually obligated to collect and publish personal data of their registrants. *See*, *e.g.*, November 1999 Registrar Accreditation Agreement (which applies to registrars accredited in the top-level domains .COM, .NET, and .ORG), at http://www.icann.org/registrars/ra-agreement-10nov99.htm. *See also* May 2001 Registrar Accreditation Agreement (which applies to registrars in .BIZ, .INFO, and .NAME top-level domains), at http://www.icann.org/registrars/ra-agreement-17may01.htm.

[52] There are, of course, other ways to communicate on the Internet other than by maintaining a web site, such as by electronic mail and messengering systems.

[53] *See* ICANN's current Registrar Accreditation Agreement (May 17, 2001), at http://www.icann.org/registrars/ra-agreement-17may01.htm,, which provides:

> *Public Access to Data on Registered Names*. During the Term of this Agreement:
>
> 3.3.1 At its expense, Registrar shall provide an interactive web page and a port 43 Whois service *providing free public query-*

name GEORGEWBUSH-IS-A-MURDERER.COM in order to maintain a website critical of the President's foreign policy is first required to disclose her full name, address, and other contact information to her domain name registrar. Although one of the important functions of ICANN has been to bring about choice and competition among domain name registrars, on policies like this one no divergence or competition is possible. Each domain name registrar is obligated, in accordance with its contractual arrangements with ICANN, to adhere to this mandatory ICANN policy.[54] And, just as domain name registrars are contractually obligated to adhere to this disclosure policy by virtue of their contracts with ICANN,[55] domain name holders are required to assent to this disclosure policy by virtue of their contracts with

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> *based access to up-to-date (i.e., updated at least daily) data concerning all active Registered Names* sponsored by Registrar for each TLD [Top Level Domain] in which it is accredited. The data accessible shall consist of elements that are designated from time to time according to an ICANN adopted specification or policy. Until ICANN otherwise specifies by means of an ICANN adopted specification or policy, *this data shall consist of the following elements as contained in Registrar's database*:
> 3.3.1.1 *The name of the Registered Name*;
> 3.3.1.2 The names of the primary nameserver and secondary nameserver(s) for the Registered Name;
> 3.3.1.3 The identity of Registrar (which may be provided through Registrar's website);
> 3.3.1.4 The original creation date of the registration;
> 3.3.1.5 The expiration date of the registration;
> 3.3.1.6 *The name and postal address of the Registered Name Holder;*
> 3.3.1.7 *The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the technical contact for the Registered Name*; and
> 3.3.1.8 *The name, postal address, e-mail address, voice telephone number, and (where available) fax number of the administrative contact for the Registered Name*.

(Emphasis added).

[54] *See id.*

[55] *Id.*

their domain name registrar.[56] Accordingly, a domain name holder's failure to initially provide, or to maintain on an ongoing basis, accurate personal contact information is grounds for cancellation of her domain name.[57] Attempts to speak or publish anonymously via a website are thus subject to the penalty that one's website will be taken down.

Furthermore, mandatory ICANN policy obliges domain name registrars to maintain such contact information about all domain name holders in a publicly available and searchable form. Thus, anyone interested in learning the identity of the person responsible for registering and maintaining the website BUSHLIED.COM[58] or FUCKSADDAM.COM[59] would simply need to conduct a search at one of the many locations available on the Internet for searching the "WHOIS" database – i.e., the database of domain name holders' contact information.[60]

In short, ICANN, by virtue of its control over the Domain Name System, enjoys the power to establish prerequisites for obtaining a domain name, which translates into the power to establish prerequisites for maintaining a website. Because the

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[56] *See*, *e.g.*, VeriSign Service Agreement Version Number 6.4., Par. 4, at http://www.netsol.com/en_US/legal/static-service-agreement.jhtml (requiring domain name registrants to: "(1) provide certain true, current, complete and accurate information about you as required by the application process; and (2) maintain and update according to our modification procedures the information you provided to us when purchasing our services as needed to keep it current, complete and accurate.").

[57] *See, e.g., id.* Failure to provide accurate contact information is also a factor militating against a domain name holder's ability to maintain ownership of the domain name in a dispute between a trademark owner and a domain name holder under ICANN's Uniform Dispute Resolution Policy, *see* text accompanying notes 66-67, as well as under the recently-enacted Anticybersquatting Consumer Protection Act, *see* 17 U.S.C. § 1125(d).

[58] *See* http://www.bushlied.com.

[59] *See* http://www.fucksaddam.com.

[60] *See* Verisign's website for searching WHOIS records, at http:/www.netsol.com/cgi-bin/whois/whois.

ability to express oneself via a website constitutes one of the most powerful vehicles for expression available today, ICANN's control over the Domain Name System translates into control over this form of expression on the Internet. ICANN's policy prohibiting domain names (and hence websites) from being maintained anonymously has a substantial impact on individuals' ability to express themselves anonymously (or pseudonymously) via the Internet.

D. ICANN's Decision-Making Implicating Critical Speech on the Internet

ICANN's control over the Domain Name System also encompasses the power to establish policies for resolving disputes between intellectual property owners and domain name holders in ways that affect speech on the Internet. As one of its most significant exercises of policy-making authority, ICANN enacted a policy for resolving disputes between trademark owners and domain name holders that impacts the free speech rights of Internet users. When the United States ceded control over the Domain Name System to ICANN, it charged ICANN with developing a policy for resolving disputes between trademark owners and domain name holders over the entitlement to use a domain name.[61] When ceding this control over the Domain Name System and related policy-making to ICANN, the United States and other framers of ICANN were primarily concerned with the problem of bad faith "cybersquatting"[62] -- the phenomenon of registering as domain names variants of famous trademarks (such as MCDONALDS.COM and CANDYLAND.COM[63]) by an entity other than

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[61] *See* WHITE PAPER, *supra* note 28, at 31,747.

[62] *See id.* at 31,746.

[63] In one of the earliest cases of cybersquatting, the domain name MCDONALDS.COM was registered by journalist Joshua Quittner in 1994, in an attempt to bring attention to the growing importance of the Internet. McDonalds attempted to win the domain name in court, but was unsuccessful and thus had to reach an out-of-court settlement with Quittner. *See* Michael Leventhal, *Who Can Stake A Claim in Cyberspace?* WIREDLAW, Nov. 6, 1995, at http://technoculture.mira.net.au/hypermail/0001.html. *See also* Joshua

the trademark owner in order to sell back such a domain name to the trademark owner for profit. At the time, courts in the United States and other countries were becoming overwhelmed with handling such cases of cybersquatting, while trademark owners were clamoring for more powerful causes of action and jurisdictional tools to pursue bad faith cybersquatters. Reacting to these concerns, the United States and other framers of ICANN believed that ICANN could implement a policy regarding cybersquatting that would enable the efficient resolution of such disputes via online, extrajudicial mechanisms, in a manner that would not impact Internet users' substantive rights. Accordingly, soon after its formation, ICANN exercised the policy-making authority specifically conferred upon it[64] and adopted its Uniform

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Quittner, *Billions Registered -- Right Now, There Are No Rules To Keep You From Owning a Bitchin' Corporate Name as Your Own Internet Address*, WIRED, October 1994, at http://www.wired.com/wired/-archive/2.10/mcdonalds.html. *See also* Hasbro, Inc. v. Internet Entertainment Group, Ltd., No. C96-130WD, 1996 WL 84853 (W.D. Wash. Feb. 9, 1996), available at http://www.jmls.edu/cyber/-cases/candy.txt (Hasbro, owner of the mark "Candy Land" for the popular children's board game, successfully sought preliminary injunction against website's use of CANDYLAND.COM in connection with pornographic website).

[64] The manner in which ICANN exercised this policy-making authority is detailed with great care by Laurence R. Helfer and Graeme B. Dinwoodie. *See* Laurence R. Helfer and Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141 (2001). In short, in the White Paper, the Department of Commerce specified that recommendations regarding a trademark/domain name dispute resolution policy be initially developed by the World Intellectual Property Organization, a specialized agency of the United Nations charged with promoting the protection of intellectual property throughout the world. The Department of Commerce recommended that WIPO conduct an international consultation on the subject. Although WIPO apparently attempted to fulfill its advisory charge in this policy development process in such a way as to maximize opportunities for broad based global input and comment, *see id.* at 166-67, the consultative process suffered from a number of flaws, notably (and unsurprisingly) the

Dispute Resolution Policy (the UDRP).[65] This Policy allocates rights between trademark owners and domain name holders in a manner favorable to trademark owners relative to pre-existing trademark law. It empowers the owner of a trademark (or of some other recognized right in a name[66]) to have a domain name

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domination by commercial and intellectual property interests. *See id.* at 169; A. Michael Froomkin, *Of Governments and Governance*, 14 BERK. TECH. L. J. 617 (1999); A. Michael Froomkin, *A Commentary on WIPO's Management of Internet Names and Addresses* (May 1999), available at http://www.law.miami.edu/~amf/commentary.htm. Although the White Paper specified that WIPO's policy development role was to be purely advisory, in actuality its recommendations were treated as presumptively valid by the relevant ICANN decision-makers. *See* Helfer & Dinwoodie, *supra*, at 177-78 & n.124. Shortly after WIPO submitted its domain name dispute policy recommendations to ICANN, in April 1999 ICANN's (interim) board of directors referred the report to its Domain Name Supporting Organization – the lower level ICANN organization charged with developing policy on domain name matters. The DNSO's Names Council formed a working group to study the WIPO recommendations. Although this working group was supposed to represent the views of various Internet stakeholders, in fact it failed to include a representative of the Noncommercial Domain Name Holders Constituency, which was to represent noncommercial organizations concerned with freedom of expression. *See id.* at 181 & n.143. After adopting the working group's report (with minor modifications), the Names Council submitted this report to the ICANN Board. Shortly thereafter, the ICANN Board convened a small drafting committee to finalize the domain name dispute resolution policy. On October 24, 1999, the ICANN Board approved the final Uniform Domain Name Dispute Resolution Policy, as well as the Rules for the Uniform Domain Name Dispute Resolution Policy. *See id.* at 178-79.

[65] *See* ICANN's Uniform Domain Name Dispute Resolution Policy, at http://www.icann.org/dndr/udrp/policy.htm [hereinafter UDRP].

[66] Although the text of the UDRP limits its scope to trademarks and service marks, UDRP panels have ordered the transfer of domain names involving common law marks, company names, trade names, and personal names. *See*, *e.g.*, Julia Fiona Roberts v. Russell Boyd WIPO Case No. D2000-0210 (May 29, 2000), available at http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0210.html (personal name); Realmark Cape Harbour L.L.C. v. Lawrence S. Lewis,

removed from a domain name holder by establishing: (1) that the domain name is identical or "confusingly similar" to the trademark at issue; (2) that the domain name holder has no "rights or legitimate interests" regarding the domain name; and (3) that the domain name was registered and is being used in "bad faith."[67] In determining whether to remove the domain name from a holder, the administrative panelist charged with such decision-making[68] is required to take into account the nature of the expressive content provided on the domain name holder's website, as well as the expressive nature of the disputed domain name itself (such as BURLINGTONMURDERFACTORY.COM). The Policy therefore requires the decision-maker to weigh competing intellectual property and free speech claims of trademark owners and domain name holders. Decisions reached under the Policy essentially have the effect of law because all domain name registrars are required to comply with them pursuant to their contracts with ICANN,[69] and all domain name holders are required to comply with them by virtue of their contracts with their domain name registrars.[70] Because, as I discuss below, this dispute resolution policy implicates domain name holders' free speech rights – with respect to the expression embodied within domain names themselves and

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WIPO Case No. D2000-1435 (December 11, 2000), available at http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1435.html (common law trademark). *See generally* Annette Kur, UDRP, Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law, at http://www.intellecprop.mpg.de/Online-Publikationen/2002/UDRP-study-final-02.pdf.

[67] *See* UDRP, *supra* note 65, at 4(a).

[68] Decisions under the UDRP are made by Administrative Panels from one of four ICANN-approved Dispute Resolution Providers. *See* UDRP, *supra* note 65, at Par. 1. A list of such Providers is available at www.icann.org/udrp/approved-providers.htm.

[69] *See* text accompanying note 55.

[70] *See, e.g.,* VeriSign Service Agreement Version Number 6.4., Par. 5, at http://www.netsol.com/en_US/legal/static-service-agreement.jhtml ("If you registered a domain name through us, you agree to be bound by our current domain name dispute policy that is incorporated herein and made a part of this Agreement by reference [i.e., the UDRP]").

with respect to the expressive content available on the websites at issue – the Policy represents another important example of ICANN decision-making affecting speech on the Internet.

The Uniform Dispute Resolution Policy was designed to facilitate the rapid, online resolution of global disputes between trademark owners and domain name holders over the entitlement to use a particular domain name.[71] Because the Policy provides for the online, extra-judicial resolution of disputes in a timeframe of unprecedented speed and low cost,[72] it is very attractive to trademark owners compared to litigation (whether under traditional trademark infringement,[73] trademark dilution,[74] the recently-enacted Anticybersquatting Consumer Protection Act,[75] or other causes of action available under national law). Proceedings under the Policy are decided by private arbitrators from one of four dispute resolution providers selected by ICANN.[76] Since the Policy became effective in 1999, it has been

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[71] The Policy provides for evidence on the entitlement to use the domain name to be presented electronically and for decisions to be reached within 60 days of an action being filed. *See* UDRP, *supra* note 65, Pars. 2, 15.

[72] The UDRP Rules require parties to submit evidence in electronic form and to communicate with the Dispute Resolution Provider in the same manner. *See* UDRP, *supra* note 65, at Par. 2.

[73] *See* 15 U.S.C. § 1125(a).

[74] *See* 15 U.S.C. § 1125(c).

[75] *See* 15 U.S.C. § 1125(d).

[76] The four approved dispute resolution providers that are currently operating are the Asian Domain Name Dispute Resolution Centre; the CPR Institute for Dispute Resolution; the National Arbitration Forum; and the World Intellectual Property Organization. *See* ICANN, Approved Providers for Uniform Domain-Name Dispute-Resolution Policy, at http://www.icann.org/dndr/udrp/approved-providers.htm. Under the Policy, the Complainant is required to pay the costs of arbitration and is entitled, in the first instance, to select which arbitration provider's panelist will handle the dispute, see UDRP, *supra* note 65, at Par. 4(d). The Respondent domain name holder, however, may opt to augment the arbitration panel from one to three members (in which case the Respondent is entitled to designate three candidates drawn from any ICANN-approved Provider's list of panelists to serve as an additional

invoked by trademark owners in more than 6,000 cases involving over 10,000 domain names.[77]

An examination of several decisions reached under the Policy elucidates the ways in which this Policy implicates Internet users' free speech rights. Although I do not attempt to conduct a comprehensive analysis of the thousands of cases decided under the UDRP, I focus instead on a disturbing trend – a line of cases that, according to Milton Mueller's comprehensive analysis of the 6,000+ UDRP decisions rendered, poses "a significant threat to free and robust expression on the Internet."[78] As Mueller explains, these decisions make clear that "numerous complainants have used domain name challenges as part of an attempt to silence critics."[79] Below I examine several representative UDRP cases that implicate Internet users' right to free expression in subtle but nonetheless significant ways.

In one such case, Burlington Coat Factory brought an action against the holder of various domain names incorporating the "Burlington" trademark challenging the latter's registration of the domain names BURLINGTONMURDERFACTORY.COM, BURLINGTONKILLFACTORY.COM, BURLINGTONDEATHFACTORY.COM, BURLINGTONBLOOD-FACTORY.COM, and BURLINGTONHOLOCAUST.-COM.[80] As is typical of the circumstances of many such actions, in the Burlington case the domain name holder (one Martin Bender), an outspoken

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panelist), in which case the Respondent must share the costs of the arbitration. For a persuasive argument that the current system facilitates forum-shopping on the part of Complainants that undermines the fairness of ICANN's UDRP, *see* Michael Geist, *Fair.com?: An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903 (2002).

[77] *See* Milton Mueller, *Success by Default: A New Profile of Domain Name/Trademark Disputes under ICANN's UDRP*, at http://dcc.syr.edu/markle/markle-report-final.pdf.

[78] *Id.* at 27.

[79] *Id.* at 23.

[80] Burlington Coat Factory Warehouse Corporation v. Smartsoft, L.L.C. c/o Jan Knepper, WIPO Case No. D2001-1792 (March 1, 2001), at http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1792.html.

animal rights activist, was using the domain names themselves, as well as the speech made available at the websites under such domain names, to criticize the trademark owner. The challenged websites criticized Burlington Coat Factory's animal treatment practices and contained, for example, pictures of animals allegedly mistreated by Burlington in its manufacturing process (including pictures of allegedly skinned dogs).[81] Burlington alleged that the above domain names were "confusingly similar" to its Burlington mark and claimed that Internet users would be confused as to whether Burlington had endorsed or sponsored such marks.

Despite the fact that the domain names themselves embodied bona fide criticism of Burlington, the UDRP panelist deciding the case concluded that the domain names were confusingly similar to the Burlington trademark, that Bender had no rights or legitimate interests in the domain names at issue, and that the domain names were acquired and used in "bad faith." Accordingly, the panelist ordered the challenged domain names removed from Bender and transferred to Burlington. First, the panelist held that in order to find that the domain names at issue were not confusingly similar to the trademarks at issue, the use of the domain names "must be genuine protest or criticism, and must not be commercial."[82] The panelist went on to inquire into the nature and content available at the challenged websites and to hold that because the websites at issue contained commercial advertisements, they could not be considered genuine protest or criticism sites, despite the fact that the commercial (banner) advertisements they contained were not in any way related to the Burlington mark nor to Burlington's products. On the second element – the domain name holder's legitimate rights or interests in the domain names at issue – once again the panelist adverted to the commercial nature of the advertisements available on the challenged website and found that because the websites available under these domain names included a modicum of commercial content -- viz., commercial advertisements for unrelated Internet services – Bender could not be found to be making "fair use for a

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[81] *See* http://www.skinnedpuppy.com.

[82] WIPO Case No. D2001-1792.

non-commercial purpose" under the Policy and therefore could not be said to have "rights or legitimate interests" in the disputed domain names.[83] Finally, on the issue of bad faith, the panelist again found that the presence of commercial content on the website at issue was dispositive against the domain name holder.[84]

In short, in the Burlington case, an inquiry into the nature of the content available at the challenged websites – and particularly the presence of advertisements on the Burlington protest website that were wholly unrelated to the Burlington mark or products -- led the panelist to conclude that the challenged domain names were not protected under the Policy and must be transferred to Burlington, despite the fact that both the domain names themselves and the content of the web sites available under such domain names were devoted to legitimate expression critical of the trademark owner.

In many other cases, the Uniform Dispute Resolution Policy has been interpreted in a manner implicating Internet users' free speech rights and, in particular, their right to engage in critical speech. For example, in the case involving the domain name LAKAIXA.COM,[85] a well-known Spanish bank and owner of the registered trademark "La Caixa" brought an action seeking to prevent the use of this domain name.[86] The domain name holder in that case registered this domain name -- in which the "C" in "La Caixa" mark was switched to a "K" -- in order to use the domain name itself, and the content available on the website, to convey "political and cultural criticism of La Caixa's banking activity, international banks, and capitalism in general."[87] Toward that end, the domain name holder provided content on his site that was "critical of capitalism, the international banking system, and La

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[83] *Id.*
[84] *Id.*
[85] *See* Caixa d'Estalvis y Pensions de Barcelona ("La Caixa") v. Namezero.com, WIPO Case No. D2001-0360 (May 3, 2001), at http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0360.html.
[86] *Id.*
[87] *Id.*

Caixa."[88] Once again, despite the bona fide critical expression provided at the challenged website and embodied within the challenged domain name itself, the trademark owner claimed that LAKAIXA.COM was confusingly similar to its mark, that the domain name holder had no rights or legitimate interests in the name, and that the name was registered and used in bad faith.

The LAKAIXA.COM panelist acknowledged that the domain name holder was using the content available at the site -- and the domain name itself -- to criticize the trademark owner's banking practices and to protest its policies, but nonetheless found in favor of the trademark owner on grounds similar to those found in the Burlington proceeding. While acknowledging that "it has become common to substitute the letter 'K' for the letter 'C' in order to express a left-wing or anarchist protest,"[89] and that the LAKAIXA.COM website itself "made quite a liberal use of the letter 'K' in the above counterculture sense,"[90] the panelist nevertheless ordered that the domain name be removed from the critic and transferred to the trademark owner. Finding that the "counterculture meaning of political criticism embodied in converting 'Cs' to 'Ks' would likely be understood only by a minority of Internet users," and adverting to the fact that one of the links on the website at issue was to an (unrelated) commercial service, the panelist found that the domain name was confusingly similar to the trademark, that the domain name holder had no rights or legitimate interests in the domain name, and that the domain name was registered and used in bad faith.[91]

The Uniform Dispute Resolution Policy has also been invoked in disputes involving domain names of the "[company]sucks" variety, such as the dispute involving the

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[88] *Id.*

[89] The panelist acknowledged that "in the slang of a certain juvenile counterculture, spellings such as 'kommunist,' 'komrade,' and so on are quite common, originating in an old expression of political science, 'factor K' (from 'Kremlin'), in order to indicate the geopolitical significance of Soviet Russia." *Id.*

[90] *Id.*

[91] *Id.*

domain name VIVENDIUNIVERSALSUCKS.COM, used by the domain name holder to criticize the practices of Vivendi Universal, a global entertainment conglomerate and parent of Universal City Studios.[92] In that dispute, the panelist found that, because non-English speakers might be unfamiliar with the negative connotations of the term "sucks," it was reasonable to conclude that VIVENDIUNIVERSALSUCKS.COM was confusingly similar to the trademark owner's mark "Vivendi Universal."[93] The panelist also found that the domain name holder's "supposedly free speech use of the disputed domain name" was illegitimate and insufficient to establish his "rights or legitimate interests" in the domain name, and that the domain name was registered and used in bad faith, and accordingly ordered the domain name removed from the domain name holder.[94] Among the 6,000 plus decisions that have been handed down applying the Uniform Dispute Resolution Policy to over 10,000 domain names, many similar cases[95] implicate Internet

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[92] Vivendi Universal v. Mr. Jay David Sallen and GO247.COM, INC., WIPO Case No. D2001-1121 (November 7, 2001), at http://arbiter.wipo.int/ domains/decisions/html/2001/d2001-1121.html.

[93] *Id.*

[94] *Id.*

[95] *See*, *e.g.*, Wal-Mart Stores, Inc. v. Walsucks and Walmarket Puerto Rico, WIPO Case No. D2000-0477 (July 20, 2000), at http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0477.html; Direct Line Group Ltd., Direct Line Insurance plc, Direct Line Financial Services Ltd , Direct Line Life Insurance Company Ltd, Direct Line Unit Trusts Ltd, Direct Line Group Services Ltd v. Purge I.T., Purge I.T. Ltd, WIPO Case No. D 2000-0583 (August 13, 2000), at http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0583.html; Dixons Group PLC v. Purge I.T. and Purge I.T. Ltd, WIPO Case No. D 2000-0584 (August 13, 2000), at http://arbiter.wipo.int/domains/ decisions/html/2000/d2000-0584.html; Freeserve PLC v. Purge I.T. and Purge I.T. Ltd, WIPO Case No. D 2000-0585 (August 13, 2000), at http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0585.html; National Westminster Bank PLC v. Purge I.T. and Purge I.T. Ltd, WIPO Case No. D2000–0636 (August 13, 2000), at http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0636.html; Standard Chartered PLC v. Purge I.T., WIPO Case No. D2000-0681

users' right to maintain a website critical of a trademark owner. Indeed, Dr. Mueller's comprehensive analysis of the 6,000+ domain name proceedings reported thus far demonstrates that in cases where domain name holders used their domain names to criticize or comment upon complainants' mark or business, complainants successfully invoked the Policy to silence such criticism or commentary in 67% of the cases.[96] This analysis demonstrates that the UDRP has had a significant impact on Internet users' ability to engage in critical speech.

It might be objected that the Uniform Dispute Resolution Policy does not substantially affect Internet users' right to free speech because and to the extent that users can ultimately vindicate their free speech rights within their own national courts. Although the Policy was intended to provide a global forum for the resolution of international trademark/domain name disputes in the first instance, in theory the Policy does not wholly supplant national trademark or free speech protections.[97] It is unclear, however, whether a domain name holder whose domain name is removed from her under a UDRP action will be able effectively to invoke her own country's substantive trademark or free speech

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(August 13, 2000), at http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0681.html; Cabela's Incorporated v. Cupcake Patrol, NAF Case No. FA95080 (August 29, 2001), at http://www.arbitration-forum.com/domains/decisions/95080.htm; Wal-Mart Stores, Inc. v. Richard MacLeod d/b/a For Sale, WIPO Case No. D2000-0662 (September 19, 2000), at http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0662.html; Société Accor contre M. Philippe Hartmann, WIPO Case No. D2001-0007 (March 13, 2001), at http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0007.html; ADT Services AG v. ADT Sucks.com, WIPO Case No. D2001-0213 (April 23, 2001), at http://arbiter.wipo.int/domains/decisions/html/2001/d2001-0213.html; Bloomberg L.P. v. Secaucus Group, NAF Case No. 97077, at http://www.arb-forum.com/domains/decisions/97077.htm (June 7, 2001). *See also* Mueller, *supra* note 77.

[96] Mueller, *supra* note 77, at 11.

[97] *See* UDRP, *supra* note 65, at 4(k).

protections to overturn the result reached under the UDRP.[98]

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[98] It is debatable, for example, whether a disappointed U.S. domain name holder will be able effectively to assert a First Amendment defense in federal court against (1) a trademark holder who brought a successful UDRP action against her, (2) a UDRP panel, or (3) ICANN itself. First, although UDRP procedures are not binding on U.S. courts per se, it may be difficult for a defeated domain name holder to convince a U.S. court to consider an "appeal" of an unfavorable UDRP decision. Unless a disappointed domain name registrant brings a challenge in court within 10 days of the UDRP decision, the UDRP decision is deemed final and binding upon the domain name registrar (and registrant). *See* UDRP, *supra* note 65, at 4(k). This short window itself, coupled with the difficulty and expense of hiring an attorney within this 10-day window to represent oneself in court, is a powerful disincentive to seeking review by a U.S. court. *See*, *e.g.*, Helfer & Dinwoodie, *supra* note 64, at 203-4 (explaining that the "extremely short ten-day window within which respondents must file such a proceeding is likely to exert a significant deterrent effect on national court review.")

Furthermore, it is doubtful whether a defeated domain name holder would be able to sue ICANN or a UDRP arbitration panel directly in a federal court for infringing the domain name holder's free speech rights based on the former's adoption of the UDRP or the latter's implementation thereof. Because ICANN and the UDRP panel may not be considered state actors under the First Amendment's state action doctrine, *see* Froomkin, *supra* note 1, at 113, a defeated domain name holder may be unable to sue ICANN or a UDRP panel for violating her First Amendment rights.

Finally, a U.S. (or other national) court considering an "appeal" of a UDRP decision in which a defeated domain name holder sues the trademark owner may conclude that it does not have subject matter jurisdiction over such a dispute because no state action was involved or because the dispute presents no case or controversy under U.S. law. *See* Helfer & Dinwoodie, *supra*, at 205 ("It is unclear whether respondents who do muster the resources to appeal panel decisions in fact possess a cause of action against a trademark owner under national laws seeking retention of the domain name.")

The arbitration and litigation over the domain name "CORINTHIANS.COM" is illustrative in this regard. In that case, Corinthians Licenciamentos LTDA, an entity that held the Brazilian trademark rights to the mark "Corinthians" for a Brazilian soccer team,

It might be further objected that the UDRP has built-in checks to prevent its abusive use by trademark owners. Indeed, the UDRP was intended to apply only to clear cases of bad faith cybersquatting and was not intended to apply to cases where domain name holders enjoyed legitimate rights and interests in their domain names. Toward that end, the UDRP discourages bad faith complaints by trademark owners by empowering panelists to label bad faith or abusive complaints as "reverse domain name hijacking."[99] However, beyond being labeled a "reverse domain

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brought a UDRP proceeding against the domain name registrant of "CORINTHIANS.COM," who had used this website, at least in part, to offer biblical quotes from the Book of Corinthians. The UDRP panel considering the dispute ordered the transfer of "CORINTHIANS.COM" to the Brazilian trademark owner. *See* Corinthians Licenciamentos LTDA v. David Sallen, WIPO Case No. D2000-0461 (July 17, 2000). The domain name holder challenged this decision in U.S. district court, seeking a declaratory judgment that his use of the domain name did not violate the Brazilian entity's trademark rights. The Brazilian trademark owner, in its motion to dismiss, contended that it had no intention of bringing a lawsuit against the domain name holder under U.S. (or any other countries') trademark law, and that therefore the U.S. district court did not enjoy subject matter jurisdiction over the dispute. *See* Sallen v. Corinthians Licenciamentos Ltda., CV-00-11555-WGY and CV-00-12011-WGY (D. Mass. Dec. 19, 2000). The district court agreed, finding that there was no case or controversy for it to adjudicate, and dismissed plaintiff's declaratory judgment action. *Id.* While the First Circuit reversed and held that U.S. trademark law provided it with subject matter jurisdiction over the dispute, *see* Sallen v. Corinthians Licenciamentos Ltda., 273 F.3d 14 (1st Cir. 2001), this issue is still one of first impression within other U.S. circuit courts and has not been resolved definitively within other nations' courts.

In short, it is fair to conclude that "national courts are unlikely to exercise significant de facto external checks on abuses of authority by UDRP panelists . . . ." Helfer & Dinwoodie, *supra*, at 210.

[99] *See* UDRP, *supra* note 65, Rule 15(e) ("If after considering the submissions the Panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the Panel shall declare in its decision that the complaint was brought in bad faith and

name hijacker," there are no sanctions for such bad faith behavior on the part of trademark owners and the UDRP currently provides no meaningful disincentives to trademark owners' engaging in such overreaching.

It might be further objected that, at the end of the day, ICANN merely enjoys the power to remove a domain name from a domain name holder or to prevent an entity from registering a domain name in the first place, and that, given this limited power, ICANN's speech-regarding policies do not justify an in-depth inquiry into ICANN's policies and governance structure. While this argument has some merit, I contend that, first, a governing entity such as ICANN that functions as a public actor regulating a forum of expression need not enjoy a monopoly on the use of force (or otherwise satisfy the traditional requirements of a "state") to justify such an inquiry.[100] Second, even though ICANN's authority is *currently* limited, some have called for ICANN's power to be expanded in the future,[101] while others have held out ICANN as a model for international policy-making and dispute resolution involving a broader class of Internet-related issues.[102] If we conceptualize ICANN as ICANN Version 1.x or as a dry run for an international policy-making body of broader powers over the Internet, it becomes important at this early stage to undertake an inquiry into how to incorporate liberal democratic norms within such a decision-making body in order to render such decision-making morally legitimate.

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constitutes an abuse of the administrative proceeding.")

[100] *See, e.g.,* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 107 (1989) (explaining that an organization need not constitute a state in the usual sense of a coercive order in order for us meaningfully to inquire into the democratic legitimacy of its decision-making processes).

[101] WIPO, for example, has suggested that the scope of the UDRP be expanded. *See* World Intellectual Property Organization, *The Recognition of Rights and the Use of Names in the Internet Domain Name System*, at http://wipo2.wipo.int/process2/report/html/-executivesummary.html.

[102] *See* Froomkin, *supra* note 1, at n.36 (quoting United States and other officials' calls for ICANN to serve as a "model for global rule-making in the Twenty-First Century.").

In short, ICANN today serves a subtle but significant role in regulating Internet speech. ICANN enjoys the power to establish prerequisites for registering domain names, which translates into the power to establish prerequisites for maintaining websites, and thus for engaging in an important form of expression. In exercising this authority to date, ICANN has established a policy prohibiting the anonymous registration of domain names, and hence prohibiting Internet users from engaging in anonymous or pseudonymous speech via their websites. Furthermore, ICANN has exercised its authority over the Domain Name System to implement a policy for resolving disputes between trademark owners and domain name holders. This policy involves consideration of the nature and content of speech embodied within domain names and contained within websites, and implicates Internet users' ability to engage in critical expression. Because ICANN enjoys the power to enact binding policies affecting speech within this important forum for expression, ICANN serves a significant public ordering function[103] – the power to allocate rights in ways that implicate freedom of speech. Given its performance of this function, ICANN's governance structure should embody the normative ideals – both procedural and substantive – of liberal democracy. In particular, as I explain below, given ICANN's power to implement regulations affecting speech, it does not suffice for ICANN merely to embody the *procedural* democratic norm of political equality by embodying representative decision-making structures; rather, ICANN must also embody substantive democratic norms, and accord special protections for the fundamental individual rights that are integral to liberal democracy, including the right of freedom of expression.

III. NORMATIVE IDEALS OF LIBERAL DEMOCRACY AND THE PROTECTION OF FUNDAMENTAL INDIVIDUAL RIGHTS

When the United States ceded control over the Domain Name System and other elements of the Internet's infrastructure to

[103] *See, e.g.,* Weinberg, *supra* note 2, at 215-16.

ICANN, it sought assurances from ICANN that it would embody certain norms of democratic decision-making within its governance structure. As I explain in Part IV, ICANN's framers sought to ensure that ICANN's decision-making would reflect and account for the views of those affected by its decision-making, by incorporating representative decision-making structures and by conducting direct elections of representatives by Internet users worldwide. ICANN's framers, however, were unconcerned with the issue of whether and how ICANN's form of government would secure individuals' fundamental rights, including the right to free speech. As a result, while ICANN's framers were clearly concerned with the extent to which ICANN would embody *procedural* democratic norms, they were insufficiently concerned with how well ICANN would embody the *substantive* norms integral to *liberal democracy*. In this Part, I consider the procedural and substantive normative ideals that are integral to liberal democracy and that should therefore be embodied within ICANN's governance structure.

The concept of liberal democracy, like the concept of democracy itself, means many things to many people.[104] Yet shared among these divergent conceptions of liberal democracy is a core of normative ideals, including both procedural and substantive normative ideals. In this Part, I elucidate the essential contours of these core normative ideals, focusing in particular on certain shared normative ideals of liberal democracy that are integral to large-scale governments and implicated by ICANN's governance of the Internet's infrastructure. I then discuss in Parts IV and V how these procedural and substantive normative ideals can be implemented within the context of ICANN's governance structure.

While the primary purpose of all democratic systems of government is to effectuate the will of the people, the goal of

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[104] *See* Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 407 (2000) (quoting Don Herzog's comment that "liberalism is a tradition, not a single view, and like any other tradition it is best conceived of as a family of disagreements.")

liberal democratic systems is to effectuate the will of the people within a framework of protections for individual rights and freedoms.[105] Liberal democracy thus requires that persons affected by collective democratic decision-making be accorded certain fundamental rights, and that these fundamental rights be protected from infringement by the democratic process itself.[106] Thus, while liberal democracies have in place procedural mechanisms to advance the democratic norms of political participation and political equality and to ensure that each citizen's vote is counted fairly and equally, they also provide frameworks for protecting fundamental individual rights from infringement by democratic decision-making processes.[107]

While liberal democratic theorists are united in their commitment to protecting fundamental individual rights and freedoms, they differ in their understanding of how such rights are best protected. "Procedural" democratic theorists generally claim that individual rights will be adequately protected by procedural mechanisms alone – i.e., by essentially democratic *processes* designed with an eye toward protecting against abridgements of fundamental rights.[108] Procedural democratic theorists thus contend that carefully-designed representative systems of government over large-scale democratic units will adequately protect individuals' fundamental rights, and will best advance (what they consider to be) the pre-eminent individual right – the right to self-governance. "Substantive" democratic theorists, on

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[105] *See*, *e.g.*, ROBERT DAHL, DEMOCRACY AND ITS CRITICS 154 (1989); WILLIAM GALSTON, LIBERAL PURPOSES (1991); JOHN RAWLS, POLITICAL LIBERALISM (1993).

[106] *See*, *e.g.*, Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry into International Law*, 87 GEO. L. J. 707 (1999) (defining liberal democracy as "a political system with governments elicited by popular majority, and with the rule of law enshrined to protect those not in the majority.")

[107] *See*, *e.g.*, Netanel, *supra* note 104, at 408 (explaining that "while democracy aims to actualize the popular will, liberalism gives primacy to individual liberty.")

[108] *See*, *e.g.*, DAHL, *supra* note 105, at 163-92; JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

the other hand, remain skeptical about the capacity of thorough-going democratic processes to protect fundamental individual rights, and contend that other mechanisms beyond essentially democratic processes are necessary to protect such rights – for example, constitutionally-enshrined fundamental rights and systems of (non-democratic) judicial review of democratic decision-making to protect such rights.[109] While both schools of liberal democratic theory begin with the premise that governments should reflect the will of the people while protecting individuals' fundamental rights, they embody different conceptions as to how to best protect such rights within an essentially democratic form of government.

A. Procedural Norms of Liberal Democracy: Political Equality and Representation

A fundamental component of liberal democracy is the norm of political equality, which requires, at a minimum, that each citizen's views are counted equally on matters within the scope of the government's decision-making.[110] The norm of political equality presupposes, at the very least, a system of fair voting within a context of broad suffrage.[111] Within this essential framework of political equality, the past several centuries have brought about a dramatic transformation in the way in which the norm of political equality is implemented within democratic systems. In particular, as the size of democratic units expanded, the character of democratic government transformed from direct or plebiscitary democracy to indirect, representative democracy.[112] Within small-scale democratic systems (such as ancient Greek city-states), the fundamental normative ideal of political equality was implemented in the form of direct democracy, in which all citizens could physically assemble in one place to deliberate and

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[109] *See* text accompanying notes 138-62.

[110] *See*, *e.g.*, JAMES FISHKIN, DEMOCRACY AND DELIBERATION 14-20 (1991); Netanel, *supra* note 104, at 408 (observing that most liberals place civic equality "squarely within the pantheon of liberal rights.")

[111] *See* FISHKIN, *supra* note 110, at 22; DAHL, *supra* note 105, at 130-31.

[112] *See*, *e.g.*, *id.* at 13-23.

vote upon matters put to collective decision-making.[113] As the size and scope of democratic units expanded, the normative ideal of political equality of necessity became implemented in a different manner, via indirect, representative systems. Systems of representative democratic decision-making thus brought with them the ability to implement indirect systems of democracy over units of ever-increasing size and scale. In translating the logic of political equality from small-scale to large-scale democratic units, the direct democracy of citizen assemblies was thus replaced by indirect, representative forms of government. As this transition was effected, the upper limits on the size of a democratic unit – which had previously been set by the practical limits of such an assembly -- were eliminated, with the consequence that no citizen body was too large to enjoy a democratic form of government.[114] The representative form of government thus became integral to translating the quintessential democratic norm of political equality within large-scale democratic units.

While essentially necessitated by the change in the size and scale of a democratic unit, the move from direct to representative democracy is also accompanied by an increased capacity of such systems to protect individuals' fundamental rights, according to procedural democratic theorists.[115] Such theorists contend that representative democratic systems are inherently more conducive, as compared to direct democratic systems, to advancing the values of liberal democracy, in that they are more conducive than direct democracies to protecting individuals' fundamental rights. First, representative democracies are more conducive than direct democracies to *deliberative* decision-making, which in itself is an important safeguard for individual rights.[116] Second, systems of representation for large-scale democratic units are less prone to *factional* decision-

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[113] *Id.*
[114] *Id.* at 217.
[115] *See*, *e.g.*, FISHKIN, *supra* note 110, at 16.
[116] *See generally id.;* JOHN DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND (2002).

making.[117] According to procedural democratic theorists, these features of representative decision-making within large-scale democratic units serve as important safeguards for fundamental individual rights that are essential to liberal democracy.

1. Representation and Deliberation

For procedural democratic theorists, two important moves for protecting fundamental individual rights within a democracy are the move from direct democracy to a representative democracy and the move from representative democracy over a limited sphere to representative democracy over an extended sphere.[118] Within direct democracies (of necessarily smaller scale), it is more likely that a majority will be motivated by a desire to invade the fundamental rights of some members of the minority, while a *representative* democracy serves as a potential antidote to such tendencies.[119] Although the interposition of representatives into the majoritarian democratic process cannot fully *eliminate* the possibility that collective decisions will invade individuals' fundamental rights, it can substantially neutralize such potential.[120] First, the interposition of representatives facilitates the introduction of *deliberation, perspective*, and *public-mindedness* into the decision-making process. By filtering individuals' immediate passions and interests through the lens of representatives, a representative government tends to "refine" those passions and interests, channel them toward the public good, and concomitantly reduce the likelihood that collective decisions

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[117] *See*, *e.g.*, DAHL, *supra* note 105, at 218.

[118] *See* text accompanying notes 129-37.

[119] As James Madison claimed in Federalist 10, in contrast to a representative democracy, "a pure [direct] democracy . . . can admit of no cure for the mischiefs of faction [because] a common passion or interest will in almost every case be felt by a majority of the whole . . . and there will be nothing to check [such tendencies.]" THE FEDERALIST No. 10 (James Madison). Interposing representatives within a large-scale democracy, according to Madison, "promises the cure for which we are seeking." *Id.*

[120] FISHKIN, *supra* note 110, at 14-25.

will be made in derogation of fundamental individual rights.[121] Introducing representatives who enjoy the opportunity and inclination to deliberate toward achieving the overall public good and are less inclined to act out of partial or impassioned motives brings us closer the goal of implementing a liberal democratic government that secures individuals' fundamental rights and freedoms. Representative democracy thus constitutes a significant step beyond direct democracy in its power to discern the considered, deliberative voice of the people and to hold in check the potential of collective decision-making to invade individuals' fundamental rights. The facilitation of *deliberation* in the collective decision-making process enables the decision-makers to "arrive at the cool and deliberate sense of the community,"[122] as a means of protecting citizens "against their own temporary errors and delusions."[123]

Because the *deliberative* nature of the representative democratic process carries so much theoretical weight for the procedural democratic theorist in protecting individuals' rights and freedoms, it becomes crucial to articulate a meaningful and robust definition of deliberation. Modern procedural democratic theorists have devoted substantial efforts to articulating an ideal of deliberation within a system of representative democracy that aims to fulfill this important theoretical role.[124] James Fishkin, among the pre-eminent modern theorists of deliberative democracy, articulates an ideal of deliberation that is characterized by "free and equal discussion, unlimited in its duration, constrained only by the consensus which would be arrived at by the force of the better argument,"[125] in which every argument thought to be relevant by anyone would be given as extensive a hearing as anyone wanted.[126] In a similar vein, theorist David Braybrooke articulates the deliberative ideal of the "logically complete

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[121] *Id.*
[122] THE FEDERALIST No. 63 (James Madison).
[123] *Id.*
[124] *See*, *e.g.*, FISHKIN, *supra* note 110.
[125] *Id.* at 35-41.
[126] *Id.*

debate," which enjoys similarities to philosopher Jurgen Habermas's "ideal speech situation."[127] Within the logically complete debate,

> [T]he participants, turn by turn, raise proposals and invoke arguments for them; and the other participants deal with all the proposals and answer all the arguments not their own . . . Thus when the issue is resolved, say by a majority voting to adopt a certain set of proposals, every participant, whether in the majority or in the minority, will have the same complete information about the track that the debate has taken.[128]

Such deliberation among decision-makers, and presumably also among citizens affected by such decision-making, serves to ensure that all reasonable arguments in favor of and against a particular act of collective decision-making are heard, and that the decision-makers have before them complete information about the effects of their proposed decision-making. Facilitating such robust deliberation within a government's decision-making helps to ensure that such decision-making will not invade individuals' fundamental rights.

In short, procedural democratic theorists claim that representative democratic systems are more conducive than direct democracies to protecting individuals' fundamental rights because and to the extent that they facilitate an abstraction from individuals' "temporary errors and delusions," elicit the "cool and deliberate sense of the community," and facilitate deliberative, impartial, and logically complete decision-making.

2. Extending the Sphere of the Democratic Unit

Beyond the values of perspective, impartiality, and deliberation that representative democratic systems presumably bring to bear on collective decision-making, the size, scope, and

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[127] *See* DAVID BRAYBROOKE, CHANGES OF RULES, ISSUE-CIRCUMSPECTION AND ISSUE PROCESSING 13 (1998).
[128] *Id.*

complexity of interests at play within *large-scale* democratic systems also play an important role in protecting individuals' fundamental rights, according to procedural liberal democratic theorists.[129] Within a small-scale democratic unit, so the theory goes, citizens are more likely to be homogenous, to readily form effective factions adverse to the fundamental rights of members of the minority, and to reach and implement collective decisions (whether directly or through their representatives) that threaten such rights. As the sphere is expanded, a greater diversity and multiplicity of interests is comprehended, serving to neutralize the potential for factional decision-making adverse to fundamental rights.

The salutary consequences of extending the sphere of the democratic unit for the protection of individual rights are powerfully drawn out by James Madison in The Federalist Papers. Building upon the political theory of philosopher David Hume,[130] Madison contends in Federalist 10 that within a representative democracy, as you "extend the sphere and you take in a greater variety of parties and interests, you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."[131] Expanding upon this argument in Federalist 51, Madison explains that:

> It is of great importance in a [representative democracy] . . . to guard one part of society against the injustice of the other part . . . . [The method of providing against this evil within a representative democracy is by] comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. [In this way,] the

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[129] *See* text accompanying notes 130-37.

[130] In his *Essays Moral, Political, and Literary*, Hume claimed that "[i]n a large government . . . the parts are so distant and remote, that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest." *See* DAVID EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 101-2 (1984).

[131] THE FEDERALIST No. 10 (James Madison).

> society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals or of the minority will be in little danger of interested combinations of the majority. *In a free government the security for civil rights . . . consists . . . in the multiplicity of interests. The degree of security . . . will depend upon the number of interests . . . . and this may be presumed to depend on the extent of the country and the number of people comprehended under the same government. . . . [T]he larger the society, provided it be within a practical sphere, the more duly capable it will be of self-government.*[132]

According to this theory, within any given small-scale (and likely homogenous) democratic unit, it is not unlikely that a particular interest adverse to the rights of some members of the minority (think Socrates in ancient Greece[133]) will dominate. But, as the scope of the democratic unit as a whole – and of each representative's districts – is expanded to encompass a multiplicity of interests, it becomes less likely that any one such potentially factional interest will be able to capture any one representative, and more importantly, less likely that any one interest will be able to dominate the ultimate decision-making body. Extending the sphere of a representative democracy thus renders it more likely that representatives will be elected free of factional concerns and of interests that would otherwise potentially threaten individuals'

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[132] THE FEDERALIST No. 51 (James Madison) (emphasis added).

[133] As James Madison observed:

> What bitter anguish would not the people of Athens have often escaped, if their government had contained so provident a safeguard against the tyranny of their own passions [i.e., representatives interposed between the direct will of the people and the decision-making of the government]? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens, the hemlock on one day, and statues on the next.

THE FEDERALIST No. 63 (James Madison).

fundamental rights and freedoms.[134]

Modern advocates of procedural democratic theory contend that extending the sphere of a republic correlates with incorporating a multiplicity of interests among citizens that holds in check the potential for factional decision-making for two reasons: first, because of the likelihood that citizens' interests would be *multidimensional,* and second, because citizens would need to become part of *shifting coalitions* to advance and protect these interests.[135] According to this theory, these shifting coalitions of interest groups will then serve to hold in check the potential for democratic systems to engage in decision-making adverse to fundamental individual rights. The multiplicity of interests that is presumed to be coextensive with an extended sphere serves as a check on the formation and efficacy of majority factions that would act in disregard of individuals' fundamental rights. A large-scale democratic unit would likely incorporate such a heterogeneity of interests that no single faction could (permanently) oppress the rest of the republic because this multiplicity of interests would lead to constantly shifting coalitions.[136] Within an extended republic, members of an electorate with complex and diverse interests would be less likely

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[134] As political historian Garry Wills expounds upon this theory, in a larger republic:

> [A]s local influence is escaped the vote becomes free to seek out virtue . . . . The whole point of representation is to refine and enlarge the public views by choosing men 'whose wisdom may best discern the true interest of their country.' . . . These representatives turn their gaze from the partial and private interest to the public and common one. The interests are to be mutually checked, mutually neutralized so that something quite different – public right – may prevail. . . . If multiplicity and interplay of interests is encouraged, it is to block them all, so that, above their self-defeating squabble, the true interest of the entire body of the people may shine clear . . . .

GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 205 (1981).

[135] *See*, *e.g.*, ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 43 (1980).

[136] *See*, *e.g.*, EPSTEIN, *supra* note 130, at 99-107.

to form permanent effective factional coalitions because of the likelihood that members of one coalition will over time need the support of members of other coalitions on subsequent (or concurrent) issues of importance to them. As Robert Dahl describes this "hypothesis of overlapping memberships":

> If most individuals in the society identify themselves with more than one group, then there is some positive probability that any majority contains individuals who identify themselves for certain purposes with the threatened minority. Members of the threatened minority who strongly prefer their alternative will make their feelings known to these members of the tentative majority who also, at some psychological level, identify themselves with the minority. Some of these sympathizers will shift their support away from the majority alternative and the majority will crumble.[137]

In short, procedural democratic theorists contend that the extension of the sphere of a (representative) democracy itself is an important means of protecting individuals' fundamental rights because extending the sphere enables the comprehension of a dynamic multiplicity of interests within the democratic unit, which serves to hold in check the power of any one factional interest adverse to the fundamental rights of individuals to dominate. Together with the values that the representative form of government itself brings to bear on collective decision-making, systems of representation over the large scale embody meaningful safeguards for individuals' fundamental rights, according to procedural democratic theorists.

B. Substantive Norms of Liberal Democracy and the Protection of Freedom of Expression

While procedural democratic theorists contend that the embodiment of procedural normative ideals -- such as deliberative, representative decision-making over the large scale – provides

[137] DAHL, *supra* note 135, at 104-5.

meaningful protections for individuals' fundamental rights, substantive democratic theorists contend that democratic processes alone cannot secure individuals' fundamental rights against the potential for adverse decision-making. These theorists contend that individuals cannot and should not simply commit themselves to whatever the outcome of the democratic process happens to be, however procedurally shored up to attempt to protect individuals' fundamental rights. Substantive democratic theorists thus "give priority to the justice or rightness of the substantive outcomes of decisions rather than to the process by which the decisions are reached,"[138] and believe that "because the liberty [such fundamental rights] make possible is potentially threatened by the democratic process, to preserve fundamental rights and liberties we must protect them from infringement even by means of the democratic process itself."[139] As democratic theorist James Fishkin puts it, "even when votes are counted equally or viewpoints are equally voiced . . . , there remains the possibility that majorities can do bad things, that they can commit sufficiently flagrant injustices upon some of their number that any normative claim of democracy would be undermined."[140] Thus, unless one takes the position that democracy is an end in itself irrespective of the substance of the decisions it produces, in designing a democratic system, it will be important to embody substantive protections for certain fundamental individual rights within the democracy's governance structure.[141]

Substantive democratic theorists contend that, no matter how extensively and deeply a representative decision-making body deliberates, the possibility still exists that it would choose to act in such a way as to infringe fundamental individual rights. Such theorists claim that it is therefore necessary to embody certain substantive normative ideals within a democratic government, substantive means by which to evaluate the decisions of the

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[138] DAHL, *supra* note 105, at 169.
[139] *Id.*
[140] JAMES FISHKIN, TYRANNY AND LEGITIMACY: A CRITIQUE OF POLITICAL THEORIES 5-6 (1979).
[141] *See* JAMES FISHKIN, DEMOCRACY AND DELIBERATION 35 (1991).

democratic government (and to invalidate such decisions), to ensure that such decisions do not invade individuals' fundamental rights. As democratic theorist Robert Dahl characterizes this issue, "special procedures . . . do not solve the problem with which we began: how to protect fundamental rights and interests from violation by the democratic process if those rights or interests are invaded by means of the democratic process."[142] Substantive democratic theorists thus contend that democratic systems, to be legitimate, must incorporate substantive checks on the power of the people to effectuate their will. Encompassed within such substantive checks is the articulation of fundamental rights within a constitution or some other embodiment of higher-order democratic decision-making that cannot be abridged by ordinary democratic decision-making processes, matters affecting which are effectively removed from the purview of such collective decision-making.

The articulation and imposition of substantive checks on democracies present several formidable problems. First, proponents of substantive checks need to justify some means by which to discern those rights that are so fundamental as to be protected from democratic decision-making. If such rights are to be protected from the purview of ordinary democratic decision-making, then some process other than democratic decision-making itself is needed to articulate such rights. Relatedly, such theorists need to confront and respond to the "countermajoritarian difficulty,"[143] to provide a coherent theoretical justification for overruling the will of (the majority of) the people in order to protect fundamental individual rights (of the minority), to provide a justification for pre-empting the moral authority of the people to self-governance in the name of (what substantive democratic theorists claim to be) fundamental individual rights.

Substantive democratic theorists have long struggled with the theoretical issues associated with the protection of fundamental individual rights, such as freedom of speech, articulated in documents such as the United States Bill of Rights and the

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[142] *See* DAHL, *supra* note 105, at 186.

[143] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

European Convention on Human Rights.[144] How one approaches the protection of fundamental rights within democracies in turn depends on one's overarching notion of democracy itself. If one begins from the premise that the most important right to advance within liberal democracies is the right to self-governance itself, then one will be reticent to champion special protections for any particular substantive rights, or will be willing to grant special protections only for those substantive rights and freedoms that are themselves integral to self-governance.[145] If, on the other hand, one's version of liberal democracy entails a theory of prior rights – of rights such as freedom of conscience or freedom of expression that are prior to the right to self-governance and possess a moral standing independent of the right to self-governance – then the right to self-governance may justifiably be limited where necessary to protect such prior, independent rights. In what follows, I explore the justifications for protecting fundamental individual rights within liberal democracies, with a focus on protection for freedom of expression.

1. Process-Based Justifications for Protecting Freedom of Expression

As we saw above, procedural democratic theorists generally claim that carefully-designed democratic processes will provide meaningful safeguards for fundamental individual rights, and are reticent to prescribe or evaluate substantive outcomes of such democratic processes. Yet even theorists who would rely primarily on democratic *processes* to protect fundamental individual rights acknowledge that certain substantive rights are so integral to the democratic process itself that they must be accorded special protection. Because of the essential role that such substantive rights serve within the democratic process, and because of the potential that an unrestrained democracy might infringe such rights, even procedurally-oriented democratic theorists advocate (or at least tolerate) special protections for such rights. Robert Dahl's explication of the importance of protecting

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[144] *See* text accompanying notes 146-62.

[145] *See*, *e.g.*, DAHL, *supra* note 105, at 163-75.

certain substantive rights within democratic systems is representative of this approach:

> The right to self-government through the democratic process is itself one of the most fundamental rights a person can possess. . . . But if people are entitled to govern themselves, then they are also entitled to all of the rights that are necessary in order for them to govern themselves, that is, all the rights that are essential to the democratic process. On this reasoning, a set of basic political rights can be derived from one of the most fundamental of all the rights to which human beings are entitled: the right to self-government through the democratic process. . . . This general moral right translates into an array of moral and legal rights [that are] integral to the democratic process. They aren't ontologically separate from – or prior to or superior to – the democratic process. To the extent that the democratic process exists in a political system, all of these rights must also exist. . . . *The right to the democratic process is [therefore] a claim to all the general and specific rights – moral, legal, and constitutional – that are necessary to it, including freedom of speech, press, assembly, and association.* . . . The democratic process is not only essential to one of the most important of all political goods – the right of people to govern themselves – but is itself a rich bundle of substantive rights.[146]

According to such theorists, certain fundamental rights – including the right to free speech, press, assembly, and association -- are so integral to the democratic process that they must be accorded special protections within the democratic process – and if necessary, *against* the democratic process -- on the grounds that they are necessary to the effective functioning of the democratic process itself.

John Hart Ely[147] and Alexander Meiklejohn[148] advance

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[146] *Id.* at 169-70.

[147] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

similar instrumentalist theories for according special protections for the right to free speech within a democratic society, and if necessary, against the democratic process itself. Ely, for example, claims that according special protections for certain substantive rights – protections against ordinary majoritarian democratic decision-making processes -- is necessary and justified to the extent that such protections are integral to the effective functioning of the democratic process itself. He claims that because freedom of expression, in particular, is necessary to "make our governmental processes work, to ensure the open and informed discussion of political issues, and to check government when it gets out of bounds," according special protections for freedom of expression is justified on instrumentalist grounds.[149] Similarly, Meiklejohn claims that because citizens of a democratic state are required to govern themselves, they must be accorded the right to express themselves and to have full access to relevant information in order to perform their duties as self-governing citizens.[150] Such process-based accounts share the feature of justifying protection for freedom of expression not on the grounds that this right is intrinsically valuable, but rather on the instrumentalist grounds that protecting freedom of expression is integral to the functioning of a democratic system. Accordingly, although process-oriented democratic theorists generally rely upon procedural democratic

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[148] *See generally* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOMS (1960).

[149] *See* ELY, *supra* note 108, at 93-94, 101-102. It is worth noting that Ely distinguishes other First Amendment protections -- including those granted in the Religion Clauses – as not justified on his representation-reinforcing theory. Rather, Ely claims that these values, such as freedom of conscience, are purely substantive values that the Framers sought to place beyond the reach of legislators.

[150] *See* MEIKLEJOHN, *supra* note 148, at 29. *See also* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Netanel, *supra* note 104, at 468 (explaining that liberal democratic theory places a primacy on free speech values to ensure that citizens are "exposed to a wide variety of information and opinion on matters of public import in order to make critical judgments about government policy and elected officials.")

norms, such as representation and deliberation, to safeguard individuals' fundamental rights, because of the important role freedom of expression serves within the process of self-governance, such theorists acknowledge the necessity of according special protections for freedom of expression – even against the democratic process, if necessary.

2. Foundationalist Justifications for Protecting Freedom of Expression

A separate strain of liberal democratic theory justifies protecting substantive rights, such as freedom of expression, within democratic governments on the ground that such rights possess a moral standing independent of and prior to the democratic process. Such foundationalist accounts of protecting free expression do not appeal to the function that free speech serves in advancing the democratic process itself. Rather, foundationalist accounts justify protecting freedom of expression on the grounds that such protection is essential in order to regard citizens as equal, autonomous, rational agents, each of whom is sovereign in deciding for himself or herself what to believe and on what basis to believe it.[151] Under such accounts, which find their roots in the philosophy of Immanuel Kant,[152] for citizens to recognize a democratic government as legitimate, they must be able to regard themselves – and require that their government regard them – as equal, autonomous, rational agents with the right to receive and share information to enable them to make up their minds on all manner of issues. Therefore, in order for the authority of a democratic government to be considered morally legitimate, such authority cannot encompass the power to restrict the liberty of citizens by controlling their sources of information or the expression of information that is integral to citizens' autonomous decision-making.[153]

Philosopher John Rawls advances a similar account of the

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[151] *See*, *e.g.*, SCANLON, *supra* note 150, at 215.

[152] *See*, *e.g.*, IMMANUEL KANT, THE GROUNDWORK OF THE METAPHYSICS OF MORALS 30-31 (H.J. Paton trans. 1949).

[153] *See*, *e.g.*, SCANLON, *supra* note 150, at 221-22.

importance of protecting freedom of expression within democratic systems of government. In brief, Rawls sets forth in *Political Liberalism* a framework for the protection of political and personal liberties within a democratic society. He begins by developing a conception of justice from the perspective of persons as free and equal, and argues that individuals' freedom consists in their possession of two moral powers: a capacity for a sense of justice and for a conception of the good.[154] Rawls then derives a scheme of equal basic liberties that are "essential social conditions for the adequate development and full exercise of the two powers of moral personality over a complete life."[155] Included among these equal basic liberties are freedom of thought, freedom of association, liberty of conscience, and political liberties – including representative democratic institutions, freedom of speech and the press, and freedom of assembly.[156] According to these foundationalist accounts, freedom of speech is granted special primacy and must be granted special protection within democratic institutions because such freedom is essential for citizens to realize their potential as rational, autonomous, equal individuals with a capacity for a conception of the good and for a sense of justice.

Having argued in favor of granting special protection for the right to freedom of expression within democratic systems – whether on instrumentalist or foundationalist grounds -- it then becomes necessary to consider the means by which such protection can be meaningfully implemented. One familiar form of protection is to articulate such fundamental rights in a constitution or bill of rights[157] and then to commit the protection of such rights to extra-democratic guardians not subject to democratic decision-making processes themselves – such as within a system of independent judicial review. Although democratic theorists espouse widely divergent views of the legitimacy of such democracy-checking institutions,[158] even procedurally-inclined

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[154] *See* JOHN RAWLS, POLITICAL LIBERALISM 19 (1993).
[155] *Id.* at 291.
[156] *Id.* at 291, 311.
[157] *See* DAHL, *supra* note 105, at 176-92.
[158] *See id.* at 358-9; ELY, *supra* note 108, at 114.

democratic theorists acknowledge the important role served by such democracy-checking institutions in protecting certain fundamental rights.[159] Thus, procedural democratic theorists such as Robert Dahl[160] and John Hart Ely[161] acknowledge that where a system of judicial review is limited to invalidating laws that infringe upon those individual rights and freedoms that are integral to the democratic process itself – including the right to freedom of expression -- such a system would be instrumental to and consistent with (what they take to be) the pre-eminent liberal democratic value – viz., the right to self-governance through the democratic process. Substantive democratic theorists, of course, look more favorably upon the role of democracy-checking institutions like judicial review and claim that such institutions are integral to granting meaningful protections for individuals' (intrinsically valuable) fundamental rights.[162]

In short, liberal democracies accord protections not only for the procedural value of political equality advanced through carefully-designed representative governments, but also for certain substantive values, such as freedom of expression. In general, such substantive values are justified by procedural democratic theorists on the grounds that they are integral to the democratic process itself and by substantive democratic theorists on the grounds that they are intrinsically valuable and necessary for citizens to be regarded as equal, autonomous, and rational agents. Whether justified on instrumentalist grounds or foundationalist grounds, the right to freedom of expression is an essential component of liberal democratic systems, as are requisite institutions – such as the institution of independent judicial review – that are empowered to protect such rights.

IV. ICANN'S GOVERNANCE STRUCTURE AND ITS

[159] *See* text accompanying notes 146-50.
[160] *See*, *e.g.*, DAHL, *supra* note 105, at 163-92.
[161] *See* ELY, *supra* note 108, at 1-81.
[162] *See*, *e.g.*, Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 78-81 (1989).

COMMITMENTS TO THE NORMATIVE IDEALS OF LIBERAL DEMOCRACY

A. *Introduction*

When the United States ceded control over key elements of the Internet's infrastructure to ICANN, it recognized that ICANN, in exercising its substantial policy-making authority with respect to issues of intellectual property and domain names, would have the power to affect Internet users' rights and interests worldwide. In view of the substantial policy-making control over Internet conduct that it was vesting in this new entity, the United States sought assurances from ICANN that it would embody important procedural norms of democracy within its governance structure. In particular, as I discuss in this Part, the United States required – and ICANN promised – that ICANN would embody norms of deliberative and representative decision-making (over an extended sphere) that would enable it to take into account the preferences of Internet users worldwide while attempting to constrain the potential for factional decision-making. In five years since ICANN has assumed this power, ICANN's powers have expanded beyond those initially contemplated and ICANN revisited its commitment to embodying such procedural democratic norms within its governance structure. First, ICANN's decision-making authority has extended to encompass the authority to regulate speech on the Internet.[163] Second, after a period of self-evaluation, ICANN is now retreating from its initial commitments to embodying procedural norms of liberal democracy within its governance structure. In this Part, I examine ICANN's initial commitments to embodying *procedural* norms of liberal democracy within its governance structure, as well as ICANN's recent retreat from these commitments. In the next Part, I contend that because ICANN has the authority to enact policies affecting speech, ICANN's governance structure should be revised to incorporate meaningful protections for the *substantive* democratic norm of freedom of expression.

In the early days of the formation of (what was to become)

[163] *See* text accompanying notes 46-103.

ICANN, several of the ICANN "framers" believed that, in exercising its responsibility over key elements of the Internet's infrastructure, ICANN could and should limit itself to technical issues, and therefore need not – and indeed should not -- be designed as a democratic institution of governance that accounted for the preferences of those affected by its decision-making.[164] Other framers insisted that ICANN would inevitably be drawn into policy-making, including policy-making affecting Internet users' substantive rights, and that ICANN – in order to exercise its authority legitimately -- must incorporate norms of democratic decision-making within its governance structure. The United States government – which because of its historical role in managing the Domain Name System was deeply involved in the formation and structuring of ICANN[165] -- (correctly) predicted that governance of the Internet infrastructure would likely involve both issues of a technical nature[166] *and* matters of substantive policy-formation. Recognizing the dual nature of the responsibility for governing the Internet's infrastructure that it was about to commit to this sui generis entity, the U.S. government sought to bring into being an institution that included a role both for technical expertise and a role for essentially democratic decision-making – complete with mechanisms designed to secure ICANN's embodiment of globally representative and deliberative decision-making structures. In designing the technical standard-setting component of this entity, the U.S. government drew on pre-existing groups of experts that had largely been responsible for coordinating technical

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[164] And indeed throughout its history, commentators have called for a "thinner" ICANN that would confine its powers to technical standard-setting and decision-making and would therefore not need to incorporate norms of democratic decision-making in order to exercise its powers legitimately. *See*, *e.g.*, WHITE PAPER, *supra* note 28.

[165] *See* WHITE PAPER, *supra* note 28, at 31,743-31,744.

[166] *See id.* at 31,744. The technical component primarily concerns assigning numerical addresses and IP blocks, protocol assignments, and root server management.

Internet infrastructure issues.[167] In contemplating the requirements for the substantive policy-making component of this entity, the framers of ICANN had a more difficult task. They could not rely upon the carefully-designed, pre-existing structures of representative government embodied within the United States government, because of course they were attempting to create a *globally* representative entity to establish policies governing Internet conduct the effects of which transcended the boundaries of territorial sovereigns. And, the framers chose not to work within the framework of any pre-existing international entities committed to policy-making on such matters (like a branch of the United Nations such as the International Telecommunications Union or the World Intellectual Property Organization),[168] because of the concern that such international governance entities would be unable to respond quickly and efficiently to the fast-paced nature of Internet-related developments.[169] Instead, ICANN's framers chose to embark upon an unprecedented project of designing specifications for a new type of global democratic decision-making entity that was to be essentially unaffiliated with any pre-existing governmental entity, and yet representative of and accountable to those affected by its decision-making.

The United States, acting through the Department of Commerce,[170] first set out its understanding of and requirements for the governance structure of (what was to become) ICANN in its Domain Name System White Paper of 1998.[171] Shortly thereafter, ICANN was formed as a non-profit corporation with the hopes of satisfying the specifications set forth in the White Paper and being chosen for the role of governing the Domain Name System. ICANN then promulgated its Articles of Incorporation and Bylaws in accordance with the requirements set forth in the

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[167] *See id.* at 31,743-31,744. *See also* MILTON MUELLER, RULING THE ROOT 42 (2002).

[168] *See* WHITE PAPER, *supra* note 28, at 31,743.

[169] *Id.*

[170] *Id.* at 31,751.

[171] *Id.*

White Paper. ICANN was then chosen by the United States to take over governance of the Domain Name System and other aspects of the Internet's infrastructure,[172] and accordingly, the Department of Commerce and ICANN entered into a Memorandum of Understanding which set forth further requirements that ICANN's governance structure was to meet in order to assume this governance role.[173]

Over the past five years, as ICANN has exercised its power to regulate aspects of Internet conduct in ways that affect the rights of Internet users worldwide, ICANN has been the subject of substantial scrutiny.[174] As the scope of its power becomes more widely understood, ICANN must be called upon to embody more effectively the procedural norms of liberal democracy that it initially committed to, as well as to embody the substantive democratic norm of protecting freedom of expression. In Part V, I consider the ways in which ICANN should encompass protections for freedom of expression. In this Part, I analyze the extent to which the procedural ideals of liberal democracy are embodied within (1) the original understanding of and specifications for the design of ICANN's governance structure, as set forth by its framers in the White Paper and the Memorandum of Understanding between Department of Commerce and ICANN; (2) ICANN's initial governance structure, as embodied in its initial Bylaws and other constitutive documents; and (3) ICANN's reformed governance structure, as set forth in the Committee on ICANN Evolution and Reform's October 2002 Final Implementation Report and Recommendations.[175]

B. *The Original Understanding of and Specifications for ICANN's Governance Structure*

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[172] *See* MEMORANDUM OF UNDERSTANDING, *supra* note 33, at 2.
[173] *Id.*
[174] *See*, *e.g.*, Froomkin, *supra* note 1; Weinberg, *supra* note 2; Mueller, *supra* note 77; ICANN WATCH WEBSITE, at http://www.icannwatch.org.
[175] Committee on ICANN Evolution and Reform, Final Implementation Report and Recommendations (October 2, 2002), at http://www.icann.-org/committees/evol-reform/final-implementation-report-02oct02.htm.

In 1997, in response to calls from industry for Internet self-regulation and to calls from international entities for reducing U.S. control over the Internet, then-President Clinton charged the Department of Commerce with the responsibility of divesting the U.S. government of control over key elements of the Internet's infrastructure and with privatizing the Domain Name System.[176] After consulting extensively with various parties that would be affected by such privatization and receiving comments on a draft statement of policy,[177] in 1998 the Department of Commerce set forth a Statement of Policy, known as the Domain Name System White Paper. In the White Paper, the Department of Commerce set forth requirements for the entity that would govern these key elements of the Internet's infrastructure and the requisite characteristics of this entity's governance structure. The White Paper sets forth four key principles based on which the U.S. Government was prepared to transfer governance of the Domain Name System to a private entity: (1) maintaining stability of the Internet in the transition process; (2) enabling competition within the Domain Name System; (3) effectuating private, bottom-up coordination of the Domain Name System in lieu of any form of (traditional) top-down governmental control (whether national or international); and (4) *representation of the interests of Internet users worldwide in developing policies regarding the Internet's infrastructure*.[178]

In setting forth the United States' understanding of and specifications for this new institution, the White Paper placed particularly strong emphasis on the role that representation would

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[176] *See* WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (1997), available at http://www.iitf.nist.gov/eleccomm/ecomm.htm.

[177] *See* DEPARTMENT OF COMMERCE, PROPOSAL TO IMPROVE TECHNICAL MANAGEMENT OF INTERNET NAMES AND ADDRESSES (January 30, 1998), at http://www.ntia.doc.gov/ntiahome/domainname/dnsdrft.htm. *See also* REQUEST FOR COMMENTS ON THE REGISTRATION AND ADMINISTRATION OF INTERNET DOMAIN NAMES, 62 Fed. Reg. 35,896, 35,896 (1997).

[178] *See* WHITE PAPER, *supra* note 28, at 31,750.

play in securing democratic legitimacy for this new entity. Although the White Paper does not refer to norms of democratic government explicitly, it does commit this entity to embodying representative decision-making structures to take into account the diversity of interests of Internet users worldwide.[179] Specifically, the White Paper asserted that this new governance entity must embody structures designed to "reflect the functional and geographic diversity of the Internet and its users,"[180] and articulated several specific types of Internet-related interests and functions that should be represented.[181] The White Paper stated further that "since these constituencies are international, we would expect the [new entity's decision-making body] to be broadly representative of the global Internet community."[182] On the subject of representation within this entity's ultimate decision-making body -- the Board of Directors -- the White Paper committed the entity to "establishing a system for electing a Board of Directors that reflected the geographical and functional diversity of the Internet, [which] preserves as much as possible the tradition of bottom-up governance of the Internet, and [through which] Board members are elected [to] ensure broad representation and participation in the election process."[183] Consistent with its focus on the importance of broad suffrage and representation of Internet users' interests, the White Paper was also concerned to limit the possibility of factional decision-making by self-interested parties, which it hoped to reduce through open, transparent, and representative decision-making. The White Paper states, for example, that the entity's organizing documents should ensure that it will be "governed on the basis of a sound and transparent

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[179] *Id.*
[180] *Id.*
[181] *Id.* The White Paper's list of Internet-related interests and functions specifically included "the interests of IP number registries, domain name registries, domain name registrars, the technical community, ISPs, and Internet users (commercial, not-for-profit, and individuals) from around the world"). *Id.*
[182] *Id.* at 31,749.
[183] *Id.*

decision-making process, which protects against capture by a self-interested faction," and that its "processes should be fair, open, and pro-competitive, protecting against capture by a narrow group of stakeholders."[184]

Regarding the embodiment of substantive democratic norms, such as freedom of expression, within this new entity's foundational documents, at the time the White Paper was drafted, the United States and other ICANN framers failed to appreciate or anticipate the ways in which governance of the Internet's infrastructure would implicate such substantive rights. Accordingly, the White Paper failed to provide for the embodiment of such substantive democratic norms within ICANN's foundational documents. Several commentators on the Department of Commerce's earlier, draft statement of policy contended that ICANN's decision-making would affect speech and that therefore its foundational documents should embody explicit protections for freedom of expression. In response, the White Paper observed (ironically, in light of the countermajoritarian[185] function of protections for freedom of expression) that such free speech concerns were raised only by a minority of commentators and concluded summarily that "free speech protections will not be disturbed [by ICANN's Internet governance] and, therefore, need not be specifically included with its core principles."[186]

Similarly, on the issue of whether domain name registrars should maintain a publicly-available database correlating domain names with the names and addresses of individuals who registered such domain names, the White Paper dismissed the free speech and informational privacy concerns of a (small) number of commenters. Observing that "commentators largely agreed that domain name registries should maintain up-to-date, readily searchable domain name databases that contain the information necessary to locate a domain name holder so as to better track cases of intellectual property infringement,"[187] while only "a few

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[184] *Id.*
[185] *See* text accompanying notes 249-89.
[186] *See* WHITE PAPER, *supra* note 28, at 31,743-44.
[187] *Id.*

commentators noted that privacy and free speech issues should be considered in this context,"[188] the White Paper once again dismissed this "minority" position, and encouraged ICANN to require individuals to disclose their identity as a prerequisite for registering a domain name (and hence for maintaining a web site).[189]

Finally, the White Paper, while committing ICANN to developing a mandatory dispute resolution policy for resolving disputes between trademark owners and domain name holders, predicted (naively) that such a policy could be limited to disposing of cases of uncontroversial bad faith cybersquatting, that such a policy would not extend to disputes involving "legitimate competing rights" between trademark owners and domain name holders, and therefore that such a policy would not implicate domain name holders' free speech rights.[190] In short, the White Paper (naively, at least in retrospect) predicted that ICANN could exercise its control over the Internet's infrastructure in such a way as to not implicate Internet users' free speech (or other important) substantive rights, and therefore concluded that ICANN's governance structure need not embody any special protections for such rights. Rather, it insisted that ICANN's normative obligations would be exhausted by embodying the procedural norms of liberal democracy, such as deliberation and representation over an extended sphere.

After setting forth the processes and principles under which this new entity should govern and outlining the policies that this entity would be charged with implementing, the White Paper concluded that "the U.S. Government is prepared to recognize, by entering into agreements with and to seek international support for, a new not-for-profit corporation formed by private sector Internet stakeholders to administer policy for the Internet name and address system."[191] As to how such an entity would come into existence, the White Paper invited "Internet stakeholders . . . to work together

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[188] *Id.* at 31,748.
[189] *Id.*
[190] *Id.*
[191] *Id.* at 31,749.

to form a new, private, not-for-profit corporation to manage Domain Name System functions"[192] in accordance with the principles and policies set forth in the White Paper.

C. The Memorandum of Understanding and ICANN's Initial Governance Structure

Several months after the White Paper was released, a group of Internet experts established a private, not-for-profit corporation -- the Internet Corporation for Assigned Names and Numbers -- as a candidate for assuming the responsibility of governing the Domain Name System and other key elements of the Internet's infrastructure.[193] Within a short period of time, the Department of Commerce concluded that ICANN was "the organization that best demonstrated that it can accommodate the broad and diverse interest groups that make up the Internet community."[194] Thereafter, the Department of Commerce entered into a Memorandum of Understanding with ICANN, under which the two entities agreed to work together to "jointly design, develop, and test the mechanisms, methods, and procedures that should be in place, and the steps necessary to transition management responsibility for DNS functions now performed by, or on behalf of, the U.S. Government"[195] to ICANN.

In this Memorandum of Understanding (MoU), the Department of Commerce and ICANN reiterated and expanded upon the commitments regarding ICANN's governance structure that were earlier articulated in the White Paper. The MoU, like the White Paper, emphasized the importance of ICANN's developing processes of representative decision-making and committed the parties to "collaborate on the design, development, and testing of appropriate membership mechanisms that foster accountability to and representation of the global and functional diversity of the Internet and its users."[196] The MoU, however, went beyond the

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[192] *Id.*
[193] *See* MEMORANDUM OF UNDERSTANDING, *supra* note 33, at II(B).
[194] *Id.* at II(C)(4).
[195] *Id.* at V(C)(2).
[196] *Id.*

White Paper by including an important check on the scope of ICANN's power, by requiring *independent review* of ICANN decision-making. Specifically, the MoU committed the parties to "collaborate on the design, development, and testing of procedures by which members of the Internet community adversely affected by decisions that are in conflict with the bylaws of the organization can seek external review of such decisions by a neutral third party."[197]

The Memorandum of Understanding also incorporated by reference ICANN's initial Bylaws[198] and Articles of Incorporation,[199] in which ICANN further elaborated its commitments to embodying certain procedural norms of democratic decision-making. In particular, ICANN's initial Bylaws embodied its commitment to effectuating (1) a robust system of representation, whereby half of the members of its Board of Directors[200] -- the At Large Directors -- would be directly elected by Internet users, while other Board Members would represent a pre-determined set of Internet-related functions and interests[201]; (2) open forums for meaningful deliberation regarding policy matters committed to ICANN; and (3) a mechanism for adversely affected individuals to seek independent review by a quasi-judicial body of ICANN decisions that were allegedly reached in violation of ICANN's Bylaws. Within the manifestation of ICANN's governance structure reflected in ICANN's Bylaws, ICANN thus committed itself to embodying several important procedural democratic norms, which I consider in greater detail below.

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[197] *Id.*

[198] *See* BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (Nov. 6, 1998), at http://www.icann.org/general/ archive-bylaws/bylaws-06nov98.htm [hereinafter BYLAWS].

[199] *See* ARTICLES OF INCORPORATION FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (Nov. 21, 1998), at http://www.icann.-org/general/articles.htm.

[200] *See* BYLAWS, *supra* note 198, Art. V, Sec. 1.

[201] *Id.*

1. Commitments to Representation within ICANN's Initial Governance Structure

ICANN's initial Bylaws incorporate a commitment to embodying the democratic norm of political equality, achieved both through direct election of representatives by Internet users worldwide and through the selection of representatives tied to Internet-related interests and functions. As set forth in these Bylaws, ICANN's ultimate decision-making body, the Board of Directors, is comprised both of "At Large" representatives -- who are to be directly elected by Internet users worldwide -- and representatives selected to represent particular Internet-related interests.[202] First, ICANN's initial Bylaws commit it to developing a system for the direct election by Internet users worldwide of a substantial subset (initially half[203]) of the Members of its Board of Directors.[204] In effectuating this commitment, after an extensive process of evaluating methods and procedures for global Internet elections,[205] three years ago ICANN conducted an election in which Internet users worldwide were able to vote and which resulted in the election of five At Large Directors to ICANN's Board.[206] Second, ICANN's initial Bylaws provide for a second subset of the Members of its Board to be directly elected by three lower level councils or Supporting Organizations, each of which is devoted to a different component of ICANN's policy-making. In particular, three Board Members are selected by its Domain Name Supporting Organization,[207] three by its Address Supporting Organization,[208] and three by its Protocol Supporting

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[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *See* ICANN AT-LARGE MEMBERSHIP STUDY COMMITTEE, FINAL REPORT ON ICANN AT-LARGE MEMBERSHIP (November 5, 2001), at http://www.atlargestudy.org/final_report.shtml.
[206] For the results of this election, *see* ELECTION.COM, ICANN BOARD OF DIRECTORS -- RESULTS OF THE 2000 AT LARGE MEMBERSHIP VOTE, at http://www.election.com/us/icann/icannresult.html.
[207] *See* BYLAWS, *supra* note 198, Art. V, Sec. 4(ii).
[208] *See id.*, Art. V, Sec. 4(i).

Organization.[209]

Each of these lower level Supporting Organizations was charged with initially developing substantive or technical policy within its subject area, and with forwarding its policy recommendations to the Board of Directors, which enjoys ultimate decision-making authority.[210] The Protocol and Address Supporting Organizations were charged with technical matters that do not involve determinations of substantive policy, and as such, their management structures are not designed to be broadly representative. By contrast, the Domain Name Supporting Organization was charged with responsibility for establishing policy on a variety of domain name matters implicating speech. In recognition of the important policy-making role it would come to serve, the Domain Name Supporting Organization was itself designed to be broadly representative along both functional and interest group lines. The Domain Name Supporting Organization Names Council, which was responsible for initially developing policies concerning the Domain Name System, was elected by members of seven pre-determined interest group constituencies[211]: (1) commercial and business interests; (2) trademark and other intellectual property and other counterfeiting interests; (3) non-commercial domain name holders; (4) Internet service providers and connectivity providers; (5) registrars; (6) global top level domain registries; and (7) country code top level domain registries. The DNSO also included a General Assembly, which was a forum for representation of domain name holders generally that was "open to all who are willing to contribute effort to the work of the DNSO."[212]

Thus, the Domain Name Supporting Organization, which was initially responsible for developing domain name policy, was designed to be representative of Internet users along functional and interest group lines. In turn, the Board of Directors, which is

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[209] *See id.,* Art. V, Sec. 4(iii).
[210] *See id.,* Art. VI, Sec. 2.
[211] *See id.,* Art. VI-B, Sec. 1(b).
[212] *See* Domain Name Supporting Organization Home Page, at http://www.dnso.org/dnso/aboutdnso.html.

ultimately responsible for developing and implementing all policies within ICANN's decision-making purview, was to be comprised both of representatives directly elected by Internet users worldwide and by Directors selected to represent specific, pre-determined Internet-related interests and functions.

2. Opportunities for Deliberation within ICANN's Initial Governance Structure

ICANN's initial Bylaws also commit it to providing substantial opportunities for deliberation and public participation on decision-making matters within its purview, both within the Board of Directors and within its lower level councils. These Bylaws commit the Board of Directors to providing members of the public affected by the Board's decision-making with reasonable notice of and opportunity to comment on its adoption of proposed policies, to see and reply to comments of others, and to providing a public forum at which proposed policies are openly discussed.[213] The Bylaws also provide opportunities for deliberation on matters of policy development when they are initially formulated within its Supporting Organizations. For example, the Domain Name Supporting Organization's Names Council, which is responsible for initially developing domain name policy, is charged with providing "appropriate means for input and such participation as is practicable under the circumstances by other interested parties."[214] In formulating its decisions, the Names Council is also required to give the public an opportunity to review and comment upon all relevant documents,"[215] and to ensure that all responsible views have been heard and considered prior to a decision by the Names Council."[216] Additionally, the Domain Name Supporting Organization General Assembly is designed to be an "open forum for participation in the work of the DNSO, and open to all who are willing to contribute

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[213] *See* BYLAWS, *supra* note 198, Art. III, Sec. 4(b).
[214] *Id.*
[215] *Id.*
[216] *Id.,* Art. VI, Sec. 2.

effort to the work of the DNSO."[217] Furthermore, all Supporting Organizations make extensive use of electronic listservs, which provide a forum for interested and affected Internet users to voice their concerns on and contribute extensively to policy matters under consideration.

3. Commitments to Independent Review of ICANN Decision-Making Within ICANN's Initial Governance Structure

ICANN's initial Bylaws also commit it to implementing a system of independent, quasi-judicial review of its decision-making in the form of an Independent Review Panel, which would be responsible for reviewing policies adopted by the ICANN Board to determine whether the Board acted in conformance with the Bylaws in adopting such policies.[218] Specifically, ICANN's initial Bylaws require the Board of Directors to "adopt policies and procedures for independent third party review of Board actions alleged by an affected party to have violated [ICANN's] Articles of Incorporation or its Bylaws."[219]

ICANN has undertaken steps to constitute an Independent Review Panel, but to date, has not actually constituted such a Panel. A Commission appointed by the Board to constitute an Independent Review Panel concluded that insurmountable obstacles existed that would prevent it from fulfilling its charge,[220] and no forum as yet exists for affected Internet users to seek independent review of decisions by ICANN that implicate such users' rights and interests.

In sum, ICANN's initial governance structure was characterized by a partially-fulfilled commitment to representative and deliberative decision-making and an unfulfilled commitment to independent review of ICANN decision-making. Representation of Internet users' interests was to be achieved via two mechanisms – first, through Internet users' direct elections of

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[217] *Id.*
[218] *Id.,* Art. III.
[219] *Id.*
[220] *See* ICANN, INDEPENDENT REVIEW, at http://www.icann.org/committees/indreview/index.html.

members to the ICANN Board, and second, through representation of certain *pre-determined* interests groups and ICANN functions.

Achieving meaningful representation via the mechanism of direct election of representatives is surely fraught with many difficulties, as the inquiries of ICANN's At Large Study Committee and the research into Internet elections in general have established.[221] Yet, at first blush, it would appear that meaningful representation of Internet users' interests could in theory be secured via the mechanism of direct elections in which affected Internet users across an extended sphere could have a voice.

As discussed above, ICANN's initial governance structure arguably incorporates some of the mechanisms designed to protect individual rights and to check faction that are advanced by procedural democratic theorists.[222] ICANN was initially designed as a representative democratic government (of sorts) that enjoyed an extended sphere and that facilitated deliberation within its decision-making processes.[223] Despite these initial appearances, however, the underlying predicates for the effective implementation of these checks on faction do not obtain within the ICANN realm.

Procedural democratic theorists of the Madisonian strain contend that extending the sphere of a republic makes it less likely that a majority with factional or tyrannous motives will in fact exist and that even if such a majority did in fact exist, it would be less likely to act as a unity.[224] One might therefore conclude that extending a republic's sphere to incorporate the world over, while employing technological advances to render representation feasible, would advance the Madisonian desideratum of checking factional decision-making (or decision-making violative of individuals' fundamental rights). Yet, these claims are based on two assumptions that do not necessarily obtain within the ICANN sphere: first, that potentially factional interests are correlated with

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[221] *See*, *e.g.*, the Brookings Institute's series of articles on Internet voting, at http://www.brook.edu/dybdocroot/gs/projects/iVoting.htm.
[222] *See* text accompanying notes 110-37.
[223] *See* text accompanying notes 176-217.
[224] *See* text accompanying notes 129-37.

geography, such that extending the sphere necessarily entails multiplying interests, and second, that the government at issue has the power to act so as to implicate a *multiplicity* of interests.

First, procedural democratic theorists of the Madisonian strain assume that the way to encompass a multiplicity of interests – in order ultimately to have these interests hold one another in check – is to expand the geographic scope of the government. This in turn is premised upon the assumption that interests are correlated with geography. The relevant diversity of interests with respect to regulation of Internet-related conduct, however – and within the modern economy generally – does not neatly correlate with diversity of geographic locale. Thus, an extended geographic sphere by itself cannot ensure the requisite multiplicity of interests, and some other method must be implemented in order to achieve the desideratum of a multiplicity of interests. Second, although there no doubt exists a multiplicity of interests among individuals with respect to the regulation of Internet conduct, only a small subset of such interests is *implicated* or put into play by ICANN decision-making. Internet users throughout the world surely enjoy a multiplicity of interests with respect to the regulation of Internet-related conduct generally – interests in expanding the e-commerce infrastructure, in providing greater Internet access and connectivity to poorly served communities, protecting content from unauthorized copying, securing protection for trademark and other business interests, ensuring privacy of electronic communications, protecting the free flow of information, etc. If a global, representative government were to encompass and implicate such a multiplicity of Internet-related interests, it might well suffice to rely upon the mechanisms of representation and deliberation to constrain the factional potential of such a government's decision-making. ICANN, however, is a government of quite limited scope. Broad enough to implicate free speech and intellectual property rights, to be sure, but not broad enough as it is currently configured to encompass a multiplicity of interests sufficient to drive the system of checks on faction contemplated by procedural democratic theorists to protect individuals' fundamental rights. ICANN's decision-making power extends only to a narrow range of issues. With respect to ICANN decision-making regarding the

resolution of trademark/domain name disputes, for example, the array of interests is generally unidimensional on the intellectual property–free speech axis.[225]

The application of the extension of the sphere component of this proceduralist check on faction thus requires a reconsideration of the mechanism by which to render this check meaningful. First, extending the sphere, for procedural democratic theorists, serves as a proxy for encompassing a citizen body with a multiplicity of interests, and in particular, a *dynamic* multiplicity of interests. Second, this check functions effectively with respect to a government of broad jurisdiction that enjoys the power to enact policies implicating not just one but several of a citizen's potential interests. But we have also seen that, because interests do not necessarily correlate with geography in the Internet sphere, the extension of the sphere in the Internet realm does not necessarily bring with it the requisite complexity of interests, especially given the narrow band of ICANN's decision-making power. The question becomes, are there other ways to achieve within ICANN the proceduralist desideratum of a dynamic complexity of interests so as to effectively implement this procedural check on faction?

The framers of ICANN attempted to encompass and represent a diverse set of interests on matters implicated by ICANN decision-making in part by *pre-determining* these implicated interest groups or constituencies. For example, ICANN's Domain Name Supporting Organization Names Council[226] is elected by members of seven pre-determined interest group constituencies: (1) commercial and business interests; (2) trademark and other intellectual property and other counterfeiting interests; (3) non-commercial domain name holders; (4) Internet service providers and connectivity providers; (5) registrars; (6)

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[225] *See* EPSTEIN, *supra* note 130, at 104 (discussing slavery as an example of an issue with respect to which there existed a duality of interests and for which the Madisonian theory of checks on faction would be ineffective).

[226] *See* ICANN's Domain Name Supporting Organization (DNSO) site, at http://www.icann.org/dnso/dnso.htm.

global top level domain registries; and (7) country code top level domain registries.[227] Although these pre-determined interest groups or constituencies were intended to ensure representation for the variety and complexity of interests encompassed within each such group, the *pre-determined* nature of such interests groups means that members of such groups are less likely to be able to dynamically array themselves into different interest groups and are less likely to form shifting coalitions to protect against faction. From the procedural democratic perspective, such pre-determined interest groups may bind representatives elected by such groups too closely to the partial interests of the pre-determined interest groups that elected them into office and frustrate their ability to transcend factional interests.

In sum, the extension of the sphere component of the proceduralist check on faction serves as a proxy for incorporating a dynamic complexity of interests among citizens, which in turn serves to check faction in a representative government of sufficiently broad powers. Because ICANN's powers are *limited*, however, the relevant interests of members of ICANN's electorate may be unidimensional, not complex. And, because ICANN's governance structure, in an attempt to incorporate a variety of interests, partially pre-determined and crystallized this array of interests, the relevant interests of members of ICANN's electorate may be static, not dynamic. Lacking the requisite complexity of implicated interests among those affected by its decision-making, and lacking a *dynamic* complexity of interests, ICANN's (initial) system of representation is insufficient to impose meaningful checks on factional decision-making or decision-making adverse to fundamental individual rights. In order to embody meaningful protections for fundamental individual rights within ICANN's governance structure, either a dynamic multiplicity of interests needs to be implicated by ICANN's decision-making to render proceduralist checks meaningful, or ICANN must embody meaningful substantive constraints on its decision-making power to constrain its ability to implicate fundamental individual rights.

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[227] *See* BYLAWS, *supra* note 198, Art. VI-B.

D. *ICANN's Proposed Reform of Its Governance Structure*

Over the past five years, ICANN's governance structure has been the subject of substantial analysis and scrutiny, both internal and external. First, as required by its initial Bylaws, ICANN appointed an At Large Study Committee to evaluate how best to conduct a system of global Internet elections of At Large representatives to its Board of Directors. Second, and as also required by its Bylaws, ICANN appointed an Independent Review Commission to evaluate how to constitute an Independent Review Panel responsible for reviewing ICANN policy decisions that allegedly violated ICANN's commitments made within its foundational documents.[228] Finally, and most significantly, in February 2002 ICANN's President released a report calling for sweeping reforms of ICANN's governance structure,[229] in which he called for, among other things, an end to direct elections by Internet users of representatives to the Board of Directors[230] and an abandonment of ICANN's commitment to constitute an Independent Review Panel responsible for reviewing ICANN policy decisions.[231] The President's calls for these sweeping reforms in turn led to the appointment of an internal Committee on ICANN Evolution and Reform.[232] The Committee, building upon

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[228] *See* text accompanying notes 218-20.

[229] M. Stuart Lynn, *President's Report: ICANN – The Case for Reform* (Feb. 24, 2002), at http://www.icann.org/general/lynn-reform-proposal-24feb02.htm.

[230] *See id.* at 13-15 ("I have come to the conclusion that the concept of At Large membership elections from a self-selected pool of unknown voters is not just flawed, but fatally flawed, and that continued devotion of ICANN's very finite energy and resources down this path will very likely prevent the creation of an effective and viable institution.")

[231] *Id.* ("The incipient Independent Review Panel has all the hallmarks of adding to this waste.")

[232] *See* ICANN, Committee on ICANN Evolution and Reform, at http://www.icann.org/committees/evol-reform/. *See also* ICANN, *Preliminary Report Third Annual Meeting of the ICANN Board in Marina del Rey* (Nov. 15, 2001), at http://www.icann.org/minutes/prelim-report-15nov01.htm#01.132. The Committee was initially charged with the issuance of recommendations regarding the

the recommendations of ICANN's President, released its Final Implementation Report and Recommendations in October 2002, which was adopted by ICANN at its last meeting.[233] During this same period, ICANN's governance structure and policy-making has come under scrutiny from Congress and the Department of Commerce as ICANN's continued authority over the Internet's infrastructure was under consideration.[234] An in-depth inquiry into ICANN's governance structure is therefore particularly timely as ICANN's governance structure is currently the focus of intense scrutiny from many quarters.

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following topics:

> First and foremost, a list of essential functions of ICANN, and a proposed mission statement for ICANN; ensuring that ICANN decision-making takes proper account of the public interest in its activities; meaningful participation and input from informed Internet users participating through an At Large mechanism; the structured participation of all stakeholders in the organization's deliberations and decision-making, and in providing input for policy that guides the decisions; the ways the different components of any proposed structure will function together and interact; the system of checks and balances that will ensure both the effectiveness and the openness of the organization; the ways in and conditions under which essential components of any proposed structure that may not be able to be fully incorporated at the start of the reform process will be included when appropriate; and a description of a proposed transition process from the current structure to any recommended new structure, including a description of how the present components of ICANN relate to the new proposed structure, and the anticipated timetable for that transition.

See id.

[233] *See* ICANN Preliminary Report, Meeting in Shanghai, 31 October 2002, at http://www.icann.org/minutes/prelim-report-31oct02.-htm#EvolutionandReform.

[234] ICANN Officers, Directors and other ICANN officials have been called to testify before Congress several times, most recently, on June 12, 2002. *See U.S. Senate Committee on Commerce, Science & Transportation, Hearing Statements -- Hearing on ICANN Governance*, at http://commerce.senate.gov/hearings/hearings0202.htm.

1. *Reforms Proposed Within The October 2002 Final Implementation Report and Recommendations*

ICANN's proposed reforms call for sweeping changes to ICANN's governance structure that substantially undermine its commitment to embodying certain procedural norms of liberal democracy and that fail in any way to embody the substantive norms of liberal democracy. Because these reforms represent a step in the wrong direction for ICANN, Congress and the Department of Commerce should look with a critical eye upon such proposed reforms, should insist that ICANN recommit itself to embodying the procedural norms of liberal democracy, and moreover, should require that ICANN's governance structure embody certain substantive norms of liberal democracy as a precondition to ICANN's continuing in its important public ordering role.

A. *Abandonment of Commitment to Direct Election of Representatives to ICANN's Board of Directors*

The Committee on ICANN Evolution and Reform's Final Implementation Report wholly abandons ICANN's commitment to global direct elections by Internet users of the majority of representatives to the Board of Directors. In place of direct elections, the Report proposes a "Nominating Committee" responsible for selecting eight of the 15 members to the Board.[235] Second, the Report substantially weakens ICANN's earlier commitment to establish an Independent Review Panel that would be responsible for reviewing challenged ICANN decisions to determine whether they are in conformance with its Bylaws.[236]

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[235] The Nominating Committee is discussed in greater detail below. The Board would also be composed of two directors selected by each of the three new Supporting Organizations and the President of ICANN as an ex officio Director. *See* Proposed New Bylaws Recommended by the Committee on ICANN Evolution and Reform, at http://www.icann.org/committees/evol-reform/proposed-bylaws-02oct02.htm [hereinafter PROPOSED BYLAWS], Art. VI.

[236] *See* PROPOSED BYLAWS, *supra* note 235, Art. IV, Section 3, Pars. 2 and 3.

The use of a Nominating Committee to select the majority of Board members – in lieu of having such Board members be directly elected by Internet users – seriously erodes ICANN's commitment to being representative of and accountable to Internet users worldwide. Under the proposed new Bylaws, the Nominating Committee would be composed of a group of delegates with eighteen voting and four non-voting members from various "constituencies."[237] Five of the voting delegates would be selected by the newly-established At Large Advisory Committee, while others would be appointed by constituencies such as a "small business users' constituency"; a "large business users' constituency"; an "intellectual property constituency"; etc.[238] The proposed Bylaws essentially leave unclear how any given constituency would be formed and recognized, as well as how such constituencies would select their delegate to the Nominating Committee (not to mention how the Nominating Committee would go about selecting members of the Board).

The Report attempts to encompass and represent a diverse set of interests on matters implicated by ICANN decision-making by pre-determining these implicated constituencies. While, as before, it might be argued that this pre-determination of interest groups is necessary to allow ICANN to encompass the multiplicity of interests necessary to impose meaningful checks on factional decision-making, by *pre-determining* such interests, this proposed structure makes it more difficult for affected interest groups to form the shifting coalitions necessary to protect effectively against faction.[239] From a procedural democratic perspective, such pre-

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[237] The Blueprint states that "the Nom Com would initially be a 19-member body composed of delegates (not representatives) appointed by the following constituencies: gTLD registries; gTLD registrars; ccTLD registries; Address registries; Internet service providers; Large business users; Small business users; IP organizations; Academic and other public entities; Consumer and civil society groups; Individual domain name holders; IAB/IETF; TAC; GAC; Unaffiliated public interest persons." In addition, there would be a Chair appointed by the Board and two non-voting liaisons. *Id.* at 13.

[238] *See* PROPOSED BYLAWS, *supra* note 235, Art. VII, Section 2.

[239] *See* text accompanying notes 135-37.

determined interest groups may bind the members of the Board elected by such groups too closely to the partial interests of the pre-determined interest groups that elected them.

Second, the Report fails to include a vehicle for meaningful independent review of the ICANN Board's decision-making. In form, the Report improves upon the President's recommendations by providing for an Independent Review Panel to check the Board's decision-making against the Bylaws, while the President's recommendations and the Interim Report abandoned the commitment to independent review. The Proposed New Bylaws provide that, in addition to a reconsideration process through which the Board can be requested to reconsider its own decisions, affected persons can seek review of ICANN Board Decisions by an Independent Review Panel.[240] There are several problems with the contemplated review process. First, the Bylaws contemplate that the Independent Review Panel will be operated by "an international arbitration provider appointed from time to time by ICANN . . . ."[241] ICANN's Board thus has the incentive to choose in the first instance an international arbitration provider (such as the World Intellectual Property Organization) that will be reticent to overrule the Board. Second, ICANN will have an incentive to remove or decline to reappoint any such international arbitration provider that overrules a decision of the ICANN Board. Because such providers are to be appointed by ICANN "from time to time," there appear to be no obstacles to ICANN's removing a provider at will. Third, the Bylaws provide that independent review by such an international arbitration provider shall be on a loser pays basis.[242] While such fee-shifting systems arguably have merit in proceedings in which monetary relief is reasonably anticipated, such systems unreasonably skew litigants' incentives when the only relief available is injunctive, as here.[243] Since the costs

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[240] *See* PROPOSED BYLAWS, *supra* note 235, Art. IV, Section 3, Pars. 2 and 3.

[241] *See id.*, Art. IV, Section 3, Par. 4.

[242] *Id.*

[243] The Bylaws grant the IRP the authority to "declare whether an action or inaction of the Board was inconsistent with the Articles of

associated with an international arbitration panel may be quite high, this loser pays system will likely impose a substantial disincentive to bringing challenges to ICANN's decision-making.

In short, ICANN's initial and fundamental commitment to take into account the preferences of Internet users affected by its decision-making is seriously eroded by the Final Report's recommendation to abandon direct elections by Internet users of Board members and replace this system with the selection of those Board members by an unelected Nominating Committee that predetermines a set of interest groups in a manner that will likely be ineffective in checking factional decision-making. Furthermore, the method by which the proposed new Bylaws would implement a system of independent review of ICANN's decision-making seriously undermines ICANN's earlier commitment to meaningful independent review of its decision-making. The Report therefore marks a substantial retreat from ICANN's initial commitments to embodying the procedural normative ideals of liberal democracy and reflects a step in the wrong direction for ICANN's governance structure. Moreover, the Report fails in any way to embody the *substantive* norms of liberal democracy, the most relevant of which, for our purposes, is freedom of expression. The Internet community and the Department of Commerce should reject the proposals embodied in the Report that weaken ICANN's commitment to the procedural ideals of liberal democracy and should insist that ICANN recommit meaningfully to embodying such procedural norms. Furthermore, ICANN should be required to embody the substantive democratic norm of freedom of expression within its foundational documents.

Even if ICANN were perfectly to embody the procedural democratic norms of political equality, representation, and deliberation, the embodiment of such procedural democratic norms would not exhaust ICANN's normative obligations. In order to

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Incorporation or the Bylaws," *see* PROPOSED BYLAWS, *supra* note 235, Art. V, Sec. 3, Par. 8b, but the IRP apparently does not have the authority to grant any monetary relief to one challenging ICANN's policy-making.

protect Internet users' fundamental individual rights – most importantly, the right of freedom of expression – ICANN's governance structure must be reformed to incorporate meaningful protections for Internet users' right to freedom of expression. As we have seen,[244] even a democratic system that perfectly embodied the procedural norms of liberal democracy would still need to secure special protections for fundamental rights such as freedom of speech. Toward that end, in the next Part, I explain how ICANN's governance structure should be revised to incorporate special protections for the fundamental right of freedom of expression.

V. REVISING ICANN'S GOVERNANCE STRUCTURE TO INCORPORATE THE SUBSTANTIVE LIBERAL DEMOCRATIC NORM OF FREEDOM OF EXPRESSION

ICANN's governance structure, while subject to substantial revision, at best has reflected only the procedural norms of liberal democracy – namely political equality, representation over an extended sphere, and deliberation within its decision-making. While ICANN should be called upon to recommit its governance structure to embodying these procedural democratic norms,[245] such a recommitment is necessary but not sufficient to protecting Internet users' fundamental rights. Because ICANN enjoys the power to enact policies affecting speech within the most important public forum for expression ever created, ICANN must be held not only to the procedural norms of liberal democracy, but also to the substantive norms of liberal democracy. Specifically, ICANN must be called upon to embody the substantive democratic norm of freedom of expression within its governance structure and policy-making. In according special protection for freedom of expression, ICANN should learn from the ways in which the United States -- a liberal democracy with a long-term commitment to protecting freedom of expression – has implemented this commitment.

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[244] *See* text accompanying notes 146-50.

[245] *See supra* Part IV(D).

A. Implementing Special Protections for Freedom of Expression within ICANN's Foundational Documents Secured by Independent Judicial Review

The United States experience teaches that merely embodying the procedural democratic norm of political equality may not suffice to secure freedom of expression, and that therefore special protections for free speech are necessary. Such protections should be embodied within a government's foundational documents and secured by independent review of legislation affecting speech. ICANN's original foundational documents, as examined above, embody a commitment to the procedural democratic norms of representation and deliberation. Its Bylaws commit ICANN to representation of Internet users affected by its decision-making along both functional and geographic lines and to facilitating meaningful deliberation and public participation within its decision-making. ICANN's founders, however, failed to incorporate within its foundational documents any commitments to the substantive democratic norms integral to liberal democracy, most importantly, the substantive democratic norm of freedom of expression. Because ICANN has the power to enact regulations affecting speech, ICANN's foundational documents should be amended to embody an explicit commitment to protecting the substantive democratic norm of freedom of expression. Specifically, the enumeration of ICANN's general powers and limitations on ICANN's powers set forth within ICANN's Bylaws should commit ICANN to refrain from acting in such a way so as to abridge Internet users' freedom of expression. A provision should be added to the section of ICANN's Bylaws setting forth limitations on its powers,[246] with language to the following effect:

> ICANN, in developing and applying its standards, policies, procedures, or practices, should not act in such a way as to abridge Internet users' freedom of expression.

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[246] *See* BYLAWS, *supra* note 198, Art. IV(1)(B),(C) (setting forth limitations on ICANN's powers).

In order to render meaningful this commitment to protecting freedom of expression – along with its commitments to procedural democratic norms embodied within its foundational documents – ICANN should make good on its promise to constitute meaningful independent review by an Independent Review Panel.[247] The Independent Review Panel should be appointed and serve in a manner that is independent of ICANN's Board of Directors -- rather than being appointed by and serving solely at the pleasure of the ICANN Board.

Upon incorporating special protection for freedom of expression within its foundational documents and securing enforcement of such protections via a meaningful independent review process, ICANN's appropriate policy-making bodies should revise its speech-regarding policies to render them protective of Internet users' freedom of expression. In so doing, ICANN should conform its policy-making to the general principle of First Amendment jurisprudence that any regulation that restricts speech must serve an articulated and important purpose and must advance this purpose in such a way as to restrict the least speech possible.[248] Furthermore, ICANN should accord meaningful protection for two types of countermajoritarian speech that would otherwise be rendered particularly vulnerable within democracies -- anonymous speech and critical speech. In particular, ICANN should revise its policy prohibiting the anonymous registration and maintenance of websites, which restricts individuals' right to engage in anonymous speech on the Internet, to render this policy narrowly tailored to an important, articulated ICANN interest. ICANN should also revise its policy for resolving disputes between trademark owners and domain name holders, which restricts individuals' right to engage in critical expression on the Internet, to render this policy narrowly tailored to an important, articulated ICANN interest.

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[247] *See supra* Part IV(C)(3).

[248] *See*, *e.g.*, Reno v. American Civil Liberties Union, 117 S.Ct. 2329 (1997).

B. Embodying the Right to Freedom of Expression within ICANN's Policy-Making: Lessons from First Amendment Protections for Anonymous Speech

As discussed above, ICANN presently has in effect a mandatory policy that prohibits Internet users from anonymously registering and maintaining a website.[249] As a prerequisite for registering and maintaining a domain name -- and a website available at that domain name -- an individual must reveal to her domain name registrar her name and mailing address, as well as a host of other contact information, and must also consent to the publication of such personal information. ICANN requires all domain name registrars to collect and publicize the names, addresses, and other contact information of everyone who maintains a website. This policy restricts Internet users' free speech rights by imposing substantial burdens on their ability to speak and to publish anonymously on the Internet. A consideration of the United States' anonymous speech jurisprudence illuminates the importance of protecting speakers' anonymity, which is an integral component of the right to free speech.

Protecting the right to express oneself anonymously[250] has been an important component of American free speech jurisprudence since the founding. Throughout the history of the United States[251] -- and indeed critical to its formation and

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[249] *See* text accompanying notes 46-60.

[250] My use of the term "anonymous" includes not only speech with no attribution of authorship, but also speech with a pseudonymous attribution of authorship (such as THE FEDERALIST PAPERS, which the true authors -- Alexander Hamilton, James Madison, and John Jay – chose to publish pseudonymously under the name of "Publius," a pseudonym that referred to Publius Valerius Publicola, a defender of the ancient Roman Republic. *See*, *e.g.*, MARTIN DIAMOND, THE FEDERALISTS, in HISTORY OF POLITICAL PHILOSOPHY 573 (Leo Strauss & Joseph Cropsey, eds., 1963)).

[251] Justice Clarence Thomas summarizes relevant aspects of this history in his concurrence in *McIntyre v. Ohio Elections Commission*:

> There is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist

development as a liberal democracy -- the right of publishers and authors to remain anonymous has served as an important component of the First Amendment right to freedom of speech and of the press.[252] Protecting the anonymity of publishers and authors serves two fundamental speech-protective purposes: First, protecting speakers' anonymity allows the content of a speaker's

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> Papers, published under the pseudonym of Publius, are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution. . . . The earliest and most famous American experience with freedom of the press, the 1735 Zenger trial, centered around anonymous political pamphlets. The case involved a printer, John Peter Zenger, who refused to reveal the anonymous authors of published attacks on the Crown governor of New York. When the governor and his council could not discover the identity of the authors, they prosecuted Zenger himself for seditious libel. *See* J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 9-19 (S. Katz ed. 1972). The case . . . signified at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind.
>
> During the Revolutionary and Ratification periods, the Framers' understanding of the relationship between anonymity and freedom of the press became more explicit. In 1779, for example, the Continental Congress attempted to discover the identity of an anonymous article in the Pennsylvania Packet signed by the name Leonidas. Leonidas, who actually was Dr. Benjamin Rush, had attacked the members of Congress for causing inflation throughout the States and for engaging in embezzlement and fraud. 13 LETTERS OF DELEGATES TO CONGRESS 1774-1789, at 141 n. 1 (G. Gawalt & R. Gephart eds. 1986). Elbridge Gerry, a delegate from Massachusetts, moved to haul the printer of the newspaper before Congress to answer questions concerning Leonidas. Several members of Congress then rose to oppose Gerry's motion on the ground that it invaded the freedom of the press. D. Teeter, *Press Freedom and the Public Printing: Pennsylvania*, 1775-83, 45 JOURNALISM Q. 445, 451 (1968).

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 350 (1995).

[252] *See* text accompanying notes 253-73.

message to be evaluated on its merits instead of in the context of the identity or reputation of the author.[253] Second, and concomitantly, protecting speakers' anonymity allows proponents of unpopular positions or causes to express their views without fear of personal reprisal.[254] As such, the protection of anonymous speech is critical to fulfilling the countermajoritarian function of the First Amendment by insulating speakers of unpopular messages from the potential threat of reprisal. As the Supreme Court explained in *McIntyre v. Ohio Elections Commission*,[255] drawing from the theory of free speech protection set forth by John Stuart Mill in ON LIBERTY[256]:

> Anonymous speech is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society.[257]

If a speaker's anonymity were not protected, advocates of unpopular ideas would often be dissuaded from speaking, thereby impoverishing the marketplace of ideas. As Justice Hugo Black explained *Talley v. California*,[258] "persecuted groups and sects from time to time throughout history have been able to criticize

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[253] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) ("Anonymity provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."); Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and The Internet*, 75 OR. L. REV. 117, 144 (1996).

[254] *See McIntyre*, 514 U.S. at 374; Talley v. California, 362 U.S. 60, 64 (1960); Tien, *supra* note 253, at 144 (observing that "one obvious cost of regulating anonymity is potential retaliation against the speaker.")

[255] 514 U.S. 334 (1995).

[256] JOHN STUART MILL, ON LIBERTY (1859).

[257] 514 U.S. at 347.

[258] 362 U.S. 60 (1960).

oppressive practices and laws either anonymously or not at all."[259] The protection for anonymous speech is thus a critical component of an expressive public forum in which individuals can share their opinions with others free of personal reprisal, and have their opinions be evaluated on their own merits. As Robert Post contends, First Amendment jurisprudence reflects an affirmative preference for anonymous speech in the public sphere, to allow speakers to "divorce their speech from the social contextualization that knowledge of their identities would necessarily create in the minds of their audience."[260]

Although the justifications for protecting anonymous speech are arguably strongest with respect to political speech, the First Amendment's protections for anonymous speech extend beyond highly-valued political speech to other types of speech as well. As the Supreme Court explained in *McIntyre*:

> Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. . . . The author's decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech

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[259] 362 U.S. at 64. *See* Tien, *supra* note 253, at 128-29 (explaining that *McIntyre* is about "fear of viewpoint discrimination, because anonymity is historically tied to the ability of the unpopular and persecuted to criticize oppressive practices and laws.")

[260] *See* Robert C. Post, *The Constitutional Concept of Public Discourse*, 103 HARV. L. REV. 603 (1990). *See also* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991).

protected by the First Amendment.[261]

Anonymity thus protects an author's prerogative in defining how to present her ideas to the world. As such, anonymity "safeguards the ability independently to define one's identity that is central to any concept of liberty."[262]

Notwithstanding the importance of protecting anonymous expression, legislatures over the centuries have attempted to erode this protection and compel the disclosure of the speakers' and publishers' identities in the name of various countervailing interests.[263] For example, in *McIntyre*, the legislature sought to justify a prohibition on the anonymous distribution of campaign literature on the grounds, inter alia, that compelling disclosure of speakers' identities was necessary to prevent fraud and libel.[264] While recognizing the importance of such state interests, the Supreme Court found that the state had sufficient means of *directly* protecting against fraud and libel in the relevant contexts, and that the state's ban on anonymous campaign literature was an indirect and insufficiently narrowly tailored means of advancing these important state interests.[265] While the state's interest in preventing fraud and libel might justify a more limited disclosure requirement,[266] the Supreme Court found that State's total ban on anonymous pamphleteering was unjustified.[267]

Similarly, in the recently-decided case of *Watchtower Bible and Tract Society of New York v. Village of Stratton*,[268] the Supreme Court rejected the locality's justification for mandating disclosure of the identity and affiliation of door-to-door canvassers. In *Watchtower*, the Village of Stratton, Ohio, attempted to justify this disclosure requirement, inter alia, on the

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[261] 514 U.S. at 340.
[262] Tien, *supra* note 253, at 123.
[263] *See* text accompanying notes 264-69.
[264] *Id.* at 342.
[265] *Id.* at 344.
[266] *Id.*
[267] *Id.*
[268] No. 00-1737, ___ S.Ct. ___ (2002).

grounds of preventing fraud and crime. The Supreme Court found that the complete ban on anonymous door-to-door canvassing that the regulation effected – which applied not only to commercial transactions and to the solicitation of funds, but also to religious and political canvassers and others seeking to enlist support for their causes – was insufficiently narrowly tailored to advance the locality's important interests. Accordingly, the locality's total ban on anonymous door-to-door canvassing was found to be unjustified and its mandatory disclosure requirement for door-to-door canvassers was invalidated.[269]

The First Amendment right to speak anonymously has also been specifically recognized in the context of Internet communications.[270] In a case that involved the right to speak anonymously in the specific context of Internet communications, the State of Georgia was found to have run afoul of the First Amendment in attempting to prohibit all anonymous and pseudonymous Internet communications. In *Zell v. Miller*,[271] Georgia made it a crime falsely to identify one's name (and hence to communicate pseudonymously or anonymously) for the purpose of electronically transmitting data, such as via email. Relying upon *McIntyre*, the court struck down this statute, holding that it impermissibly burdened the constitutional "right to communicate anonymously and pseudonymously over the Internet."[272] While crediting the state's compelling interest in preventing fraud in

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[269] *Id.*

[270] *See* Zell v. Miller, 977 F. Supp. 1228 (N. D. Ga. 1997); American Civil Liberties Union v. Reno, 929 F. Supp. 824, 831 (1996) (recognizing importance of online anonymity to speakers who seek access to sensitive information), *aff'd*, 117 S.Ct. 2329 (1997). *See also* Anne W. Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639 (1995); A. Michael Froomkin, *Anonymity and Its Enmities*, 1995 J. ONLINE L. art. 4 (1995); George P. Long III, Comment, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177 (1994); David Post, *Pooling Intellectual Capital: Anonymity, Pseudonymity, and Contingent Identity in Cyberspace*, 1996 U. CHI. LEGAL F. 139.

[271] 977 F. Supp. 1228 (N. D. Ga. 1997).

[272] *Id.* at 1232.

Internet communications,[273] the court nevertheless found that the statute's blanket prohibition on anonymous and pseudonymous Internet communications was not narrowly tailored to advance this compelling state interest.

Because of the important role anonymous speech serves within expressive forums – which in turn are integral to democratic governments -- ICANN should, in re-evaluating its policies to accord meaningful protection for freedom of expression, revise its policy requiring domain name holders publicly to disclose their names and addresses. While protecting anonymous Internet speech is clearly an important component of free speech within the United States, it is arguably even more important for ICANN to protect the identity of speakers from countries that are more inclined to retaliate against speakers based on the ideas they express. In its brief history, the Internet's role in facilitating anonymous speech, through the use of encryption and related technologies, has been critical to enabling speakers from foreign countries to express themselves without fear of reprisal.[274] In embodying meaningful protection for the substantive democratic value of freedom of expression while advancing its other important interests, ICANN should accord as much protection as possible for anonymous Internet speech. In reformulating its WHOIS policy, ICANN should conform its policymaking to the general principle of First Amendment jurisprudence requiring it to articulate an important interest that it seeks to advance by this policy and formulate the policy such that it restricts the least amount of speech possible consistent with the advancement of this interest.[275] Below I provide some suggestions as to how ICANN could conform its policymaking to this general First Amendment principle.

As is typical of efforts to compel disclosure of speakers'

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[273] *Id.*

[274] *See, e.g.*, Geoffrey Gordon, Note, *Breaking the Code: What Encryption Means for the First Amendment and Human Rights*, 32 COLUM. HUM. RTS. L. REV. 477 (2001).

[275] *See* text accompanying notes 280-89.

identities,[276] ICANN's mandatory disclosure requirement flows out of legitimate (and perhaps even compelling) interests – the interest in facilitating intellectual property owners' policing of infringing use of their intellectual property on the Internet.[277] Intellectual property owners lobbied, and have continued to lobby, for a mandatory policy requiring disclosure and publication of website owners' names, addresses, and other personal contact information because such disclosure and publication would facilitate the policing and apprehension of alleged infringers.[278] If a copyright or trademark owner believes that a website infringes her content, for example, under ICANN's current policy, she can simply query the WHOIS database to discern the name and address of the individual responsible for such content,[279] and commence steps to seek a judicial order requiring such infringing content to be removed. Yet, as with other efforts to require disclosure of the identity of speakers that are motivated by important interests, ICANN's policy is insufficiently protective of Internet users' free speech rights and should be revised to render it more carefully tailored to advancing the important interest of facilitating the policing of infringing conduct while restricting the least amount of speech possible.

There are several ways in which ICANN could render its WHOIS policy more speech-protective while still advancing the interest of policing infringing content on the Internet. First, ICANN could require that those interested in registering a domain name and maintaining a website merely provide their e-mail address – instead of their name and (physical) address – to their

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[276] *See* text accompanying notes 264-73.

[277] *See* WHITE PAPER, *supra* note 28, at 31,744. ICANN's Domain Name Supporting Organization's Intellectual Property Constituency, for example, has forcefully argued that intellectual property owners must have access to domain name registrants' contact information in order to police infringement of their intellectual property. *See*, *e.g.*, Matters Related to WHOIS, DNSO Intellectual Property Constituency, at http://ipc.songbird.com/whois_paper.html.

[278] *See*, *e.g.*, Matters Related to WHOIS, DNSO Intellectual Property Constituency, at http://ipc.songbird.com/whois_paper.html.

[279] *See* text accompanying note 60.

domain name registrar. The registrant's email address would provide a pseudonymous form behind which the speaker could shield her identity if she so chose, but would still provide a point of contact for each domain name registrant. Thus, instead of requiring the domain name registrant of GEORGEWBUSH-IS-A-MURDERER.COM or SADDAM-IS-A-MURDERER.COM to reveal to the public his or her true identity, ICANN could merely require that the domain name registrant provide a valid email address by way of contact information. Requiring only an e-mail address as contact information would serve the purpose of enabling intellectual property owners (or others who believe their rights were infringed) to contact the domain name registrant and undertake initial steps (such as sending a cease and desist notice) to inform the registrant of the allegation of infringement.[280]

Under this email-only scenario, if a rights holder alleged that his or her intellectual property rights were being infringed by a domain name holder -- about which the only information readily available was an email address -- the rights holder would still have several powerful remedies readily available to her. A copyright owner who claims that her rights were infringed by the content on a particular website could bring an action under Section 512 of the Copyright Act,[281] through which she could essentially compel the

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[280] Email addresses would also serve as sufficient contact information for other purposes, such as if the domain name registrar needed to inform the domain name registrant of a proposed change in the terms of the agreement, or if another individual or entity interested in purchasing the rights to the domain name wished to contact the domain name holder.

[281] 17 U.S.C. § 512. Section 512's notice and take down provisions allow an owner of a copyrighted work who believes her work is infringed by the content on a website to request the Internet Service Provider (ISP) hosting the website to take down the material. The ISP must take down the allegedly infringing material in order to avoid being held directly, contributorily or vicariously liable for copyright infringement based on hosting (or linking to) the allegedly infringing content. When complaining of the infringement to the ISP, the copyright owner need not identify the infringing party. Rather, it suffices under the statutory scheme for her to "identify the material that is claimed to be infringing or to be the subject of infringing activity and that is to be

Internet Service Provider hosting the allegedly infringing content to take it down – without needing to know the identity of the alleged infringer.[282] Similarly, a trademark owner who alleges that a domain name holder is infringing her trademark could bring an action under ICANN's Uniform Dispute Resolution Policy[283] or under the in rem provisions of the Anticybersquatting Consumer Protection Act[284] to have the allegedly infringing domain name cancelled or transferred, again without needing to know the true identity of the domain name registrant.

It might be objected that access to mere email addresses insufficiently accommodates the intellectual property owner or other rights holder who wishes to sue a domain name holder for violating her intellectual property or other rights, and that ICANN's current policy requiring public access to domain name holders' names and addresses is necessary to facilitate such interests. There are, however, several possibilities short of ICANN's current mandatory disclosure and publication policy that would accommodate the interests of rights holders while still being more protective of free speech. ICANN could, for example, require that domain name registrants provide to their domain name registrar their email address as well as their name and physical address, but only allow (or require) registrars to *publish* the domain name holders' email address. Under this scenario, the domain name registrar would maintain (1) a publicly searchable database correlating domain names with email addresses of domain name holders, and (2) a confidential database correlating domain names with names and addresses of domain name holders that would only be accessible upon a heightened showing. Upon a

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removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material." 17 U.S.C. § 512(c)(3)(A)(iii). Section 512 also provides a mechanism for the copyright owner to secure a subpoena to order the ISP to disclose the identity of the alleged direct infringer. *See* § 512(i).

[282] *See*, *e.g.*, A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001).

[283] *See supra* Part II(C).

[284] *See* 15 U.S.C. § 1125(d)(2)(A) (setting forth circumstances under which a trademark owner can bring an in rem action against a domain name itself).

proper heightened showing by a rights holder – such as, at a minimum, filing a legitimate complaint against a domain name holder and providing a copy of the same to the domain name registrar – the domain name registrar could then be required to reveal the identity of the domain name registrant to the rights holder for purposes of the latter's prosecuting the lawsuit only.

United States courts' recent efforts to balance Internet users' right to communicate anonymously against other individuals' property, reputational, and privacy rights are instructive for ICANN in reworking this policy to achieve a balance between the rights of Internet users to speak and publish anonymously and other rights holders' interests. In a series of recent cases in which plaintiffs alleged that they were defamed by anonymous postings to web-based forums and sought to discover the identities of the individuals responsible for such postings from the relevant Internet Service Providers, courts have imposed stringent requirements on plaintiffs' efforts to discover the identities of such individuals. For example, in *Doe v. 2TheMart.com*,[285] the plaintiff, who claimed that she was defamed by an anonymous post, sought to discover from the ISP the identity of an alleged defamatory poster. The court looked critically at plaintiff's allegations of defamation and imposed stringent standards on plaintiff's ability to discover the poster's identity, in order to protect the poster's right to engage in anonymous speech. Holding that "discovery requests seeking to identify anonymous Internet users must be subject to careful scrutiny by the courts,"[286] the court set forth a multifactor test[287] for evaluating whether plaintiff's need for such information outweighed the poster's right

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[285] 140 F. Supp. 2d 1088 (W.D. Wash. 2001),

[286] *Id.* at 1092.

[287] *Id.* Under this four part test, the court will inquire into the following factors in considering whether a subpoena for the identity of non-party Internet speakers should be upheld: "(1) Was the subpoena brought in good faith? (2) Does the information relate to a core claim or defense? (3) Is the identifying information directly and materially relevant to that claim or defense? (4) Is the information available from other sources?" *Id.* at 1092.

to speak anonymously. Only upon satisfying this heightened showing would plaintiff's right to access such information in order to prosecute her defamation action be found to outweigh defendant's right to speak anonymously.[288] Courts have imposed close scrutiny in several other recent cases on requests to discover the identity of individuals who allegedly violated plaintiffs' rights.[289]

In short, American free speech jurisprudence has for centuries recognized the importance of protecting speakers' anonymity as an integral component of the right to freedom of expression. Such jurisprudence is illuminative for ICANN in revising its policies for acquiring domain names (and hence websites) to render them less restrictive of speech, while still advancing ICANN's interest in facilitating the policing of infringement.

C. Embodying the Right to Freedom of Expression within ICANN's Policy-Making: Lessons from First Amendment Protections for Critical Speech

American First Amendment jurisprudence also provides helpful guidance for ICANN regarding the protection of critical speech within the context of intellectual property law. An important function of intellectual property law in liberal democracies is to prevent intellectual property owners from exercising full monopoly control over components of the common language or culture, in particular in cases of criticism leveled against such intellectual property owners.[290] The United States government has long wrestled not only with protection for free expression in general but also with such protection within the context of intellectual property law -- and as against competing claims by intellectual property owners. Accordingly, United

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[288] *Id.*

[289] *See, e.g.*, Dendrite Int'l Inc. v. Doe, 342 N.J. Super 134 (App. Div. 2001); Global Telemedia Int'l v. Doe, 132 F. Supp. 2d 1261 (C. D. Cal. 2001).

[290] *See, e.g.*, Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000).

States intellectual property law reflects a nuanced working out of the ways in which free speech values are protected against overreaching by intellectual property owners.

Several important branches of intellectual property law, including copyright law[291] and trademark law,[292] impose substantial limitations on intellectual property owners' exclusive monopoly rights in their intellectual property in order to advance free speech values.[293] Recognizing the dangers to free speech implicit in granting intellectual property owners unlimited monopoly rights over components of our shared language and culture, U.S. copyright and trademark law reflects a balance of competing intellectual property rights and free speech rights. Indeed, both the federal copyright and trademark statutes provide explicit exceptions to their coverage for uses of copyrighted works and trademarks that are in the nature of criticism, commentary, and other bona fide expression.[294] Because ICANN's policy-making primarily affects trademark and cognate branches of intellectual property, I focus below on guidance that United States trademark jurisprudence provides in according special protections for freedom of expression.

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[291] *See*, *e.g.*, Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) (copyright law's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts [and ideas] while still protecting an author's expression."); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

[292] *See* text accompanying notes 303-85.

[293] *See*, *e.g.*, Michael K. Cantwell, *Confusion, Dilution, and Speech: First Amendment Limitations on the Trademark Estate*, 87 TRADEMARK REP. 48 (1997) (comparing First Amendment limitations on copyright and trademark holders' rights).

[294] *See* 15 U.S.C. § 1125(c)(4)(c) (providing exception from coverage of federal trademark causes of action for "all forms of news reporting and commentary"); 17 U.S.C. § 107 (including "criticism" and "comment" among purposes tending to establish fair use of another's copyrighted work).

U.S. trademark law, codified in the Lanham Act[295] and under various state statutes,[296] provides trademark owners with the limited exclusive right to use their marks (such as "McDonalds" or "Barbie") in commerce to designate the source or origin of their products or services. The Lanham Act, along with various state statutes, provide trademark owners with a cause of action for trademark *infringement* against one who uses their trademark in commerce to designate source or origin or where such use is likely to cause confusion, mistake, or to deceive as to affiliation or sponsorship.[297] The Federal Trademark Dilution Act,[298] as well as various state anti-dilution statutes,[299] further provide to owners of marks the right to prevent the *dilution* of their marks – i.e., the reduction of their marks' capacity to identify and distinguish their goods or services – via tarnishment[300] or blurring[301] (such as the use of the mark "Barbie" in connection with a pornographic website). Finally, the recently-enacted Anticybersquatting Consumer Protection Act[302] provides to owners of marks the right to prevent the bad faith use of a domain name that is identical to, confusingly similar to, or dilutive of the owner's mark.

The First Amendment requires that trademark owners' rights in their marks not extend to silence others' speech that is expressive,[303] so long as such speech is not likely to cause confusion as to source and is not dilutive of the mark's identificatory power. In many cases in which trademark interests have been pitted against free speech interests, courts have properly held that the extension of trademark infringement and/or dilution law to silence use of a trademark for expressive or communicative purposes such as criticism, commentary, parody, or satire, is

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[295] 15 U.S.C. § 1125.

[296] *See*, *e.g.*, J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION (1984) [hereinafter MCCARTHY ON TRADEMARKS].

[297] *See* 15 U.S.C. § 1125(a).

[298] 15 U.S.C. § 1125(d).

[299] *See*, *e.g.*, MCCARTHY ON TRADEMARKS, *supra* note 296.

[300] *See id.* at 419.

[301] *Id.*

[302] 15 U.S.C. § 1125(d).

[303] *See* text accompanying notes 308-53.

violative of the right to free speech embodied in the First Amendment.[304] Furthermore, in the Anticybersquatting Consumer Protection Act – which was enacted to address the same conflicts between trademark owners and domain name owners as ICANN's Uniform Dispute Resolution Policy – Congress and the courts clearly recognized that Internet users' free speech rights impose significant limitations on overreaching by trademark owners in this context.[305] Over the years, as trademark owners have sought to wield their trademarks to silence criticism directed at them or other unwelcome use of their marks, courts have construed the First Amendment to protect such speech against trademark infringement, dilution, and cybersquatting claims.[306] Although free speech interests have not always prevailed over trademark interests in such cases,[307] the First Amendment has nonetheless served as a powerful check on trademark owners' monopoly rights over expressive speech incorporating their marks.

The cause of action for trademark infringement per se, as distinct from trademark dilution, has often been unavailing to trademark owners in their attempts to silence expressive uses of their marks. Where another entity makes use of a plaintiff's trademark for truly expressive or communicative purposes, plaintiffs have had difficulty establishing a key element of trademark infringement -- the likelihood of confusion as to plaintiff's sponsorship or endorsement of such speech.[308] In many cases in which defendants used plaintiffs' marks to communicate a message – including but not limited to messages that are critical of plaintiffs – courts have held that the trademark owner failed to meet its burden of establishing likelihood of confusion,[309] and have

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[304] *Id.*

[305] *See* text accompanying notes 364-66.

[306] *See* text accompanying notes 308-85.

[307] *See infra*.

[308] *See* Cantwell, *supra* note 293, at 57 (observing that "a separate First Amendment defense to an infringement claim will generally not be necessary to protect expressive speech so long as courts objectively analyze the likelihood of confusion issues.")

[309] *See* text accompanying notes 311-15.

accordingly found it unnecessary to rely upon the First Amendment in order to protect defendants' expressive use.[310] The *Reddy Kilowatt*[311] case is instructive on this point. In that case, the trademark owner of the cartoon character Reddy Kilowatt, which was used as a promotional device for electrical utilities, sued an environmental organization that had fashioned a mocking caricature of the cartoon character in order to criticize the electrical utilities' policies in its mailings. Upon holding that there was no likelihood of confusion between defendant's use and plaintiff, the court threw out plaintiff's trademark infringement action. Because plaintiff could not show likelihood of confusion, defendant's First Amendment defense to trademark infringement was irrelevant.[312] The court's analysis of defendant's First Amendment defense was therefore unnecessary, because no likelihood of confusion was found in the first place.[313] In a similar case, a court held that the United States government's exclusive rights in the name and character "Smokey Bear" must yield to permit an environmental group to sponsor an advertisement involving the use of Smokey to criticize the U.S. Forest Service's

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[310] *See generally* Cantwell, *supra* note 293, at 49 ("In theory, limiting recovery to confusing uses of a trademark would seem to adequately protect free speech interests, for the First Amendment has no stake in the spread of misleading information."); Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 165 (where defendant's use of plaintiff's trademark is deceptive or misleading, First Amendment provides no defense to claim of trademark infringement and accordingly "traditional trademark theory, with is reliance on the confusion rationale, poses no threat to freedom of expression.")

[311] Reddy Communications, Inc. v. Environmental Action Foundation, 477 F. Supp. 936 (D.D.C. 1979).

[312] The *Reddy* court in fact looked unfavorably upon defendant's First Amendment defense, finding that defendant had adequate alternative means to convey its message criticizing plaintiff other than by using plaintiff's mark. 477 F. Supp. at 938. *See* text accompanying notes 316-23.

[313] *Id.* at 939.

logging policies.[314] The advertisement, in which Smokey appeared trying to hide a chainsaw behind his back, was captioned "Say it ain't so, Smokey." The court held that the use of Smokey Bear in this critical context would be unlikely to cause confusion, and constituted "a form of criticism of government policies on the highest rung of the hierarchy of First Amendment values."[315] Accordingly, the court found that the statute granting the United States government the exclusive right to use the name and character of Smokey Bear was unconstitutional as applied to enjoin the environmental organization's noncommercial use of Smokey Bear.

In both the *Reddy Kilowatt* and *Smokey Bear* cases, plaintiffs were unable to prevail in trademark infringement and cognate actions against defendants who used their marks to criticize plaintiffs because the use of plaintiffs' mark in these cases was a uniquely powerful vehicle for criticizing plaintiffs. Furthermore, the critical nature of such use served to dispel confusion as to whether plaintiff sponsored such use. Where defendants have sought to use plaintiffs' marks for expressive purposes *unrelated* to criticizing plaintiffs, courts have been less sympathetic to defendants' free speech claims. For example, in the *Mutant of Omaha* case, defendant sought to use the above variation of plaintiff's mark "Mutual of Omaha" on T-shirts and other products to express his views about nuclear weapons. The court held that defendant enjoyed no First Amendment right to enlist plaintiff's trademark in the service of his opposition to nuclear weapons, explaining that defendant enjoyed adequate alternative means (beyond using plaintiff's trademark) of conveying his message.[316]

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[314] Lighthawk Envir. Air Force v. Robertson, 812 F. Supp. 1095 (W.D. Wash. 1993). This case, however, involved not the Lanham Act but a federal statute granting the United States government the exclusive right to use the name and character of Smokey Bear. The court found that the statute was unconstitutional as applied to enjoin the environmental organization's noncommercial use of Smokey Bear.

[315] *Id.*

[316] *See* Mutual of Omaha Ins. Co. v. Novak, 648 F. Supp. 905, *aff'd*, 836

This adequate alternative means of communication test, borrowed from cases involving real property/free speech conflicts,[317] has been employed by the *Mutant of Omaha* and other courts in evaluating plaintiffs' trademark interests against defendants' free speech interests in a way that has generally favored trademark interests.[318] It is hard for a defendant to establish that no adequate alternative means exist to express his message other than by using plaintiff's trademark in general, but especially in cases where defendant is not using plaintiff's mark to express an opinion about plaintiff but is rather co-opting the expressive power of plaintiff's mark to express views on an unrelated matter. The underprotective nature of this test has led some courts, including the Second Circuit, to abandon its use in adjudicating trademark/free speech conflicts, and to adopt more speech-friendly balancing tests.[319] For example, in *Rogers v. Grimaldi*, discussed in greater detail *infra*,[320] Ginger Rogers sued to enjoin the use of her name in the title of Federico Fellini's film "Ginger and Fred."[321] Rogers argued that because Fellini had adequate alternative means to express his artistic message other than using Rogers' name within his film title, Fellini's First Amendment defense to her trademark infringement claim should fail. The Second Circuit took this opportunity to reject the adequate alternative avenues of expression test (which it had earlier adopted), explaining that "the 'no alternative avenues' test does not sufficiently accommodate the public's interest in free expression."[322] In its stead, the court adopted a balancing test

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F.2d 397 (8th Cir. 1987).

[317] *See* Lloyd v. Tanner, 407 U.S. 551 (1972) (holding that individuals did not enjoy a First Amendment right to engage in political expression within privately-owned shopping mall, because these speakers enjoyed adequate alternative avenues for communicating their message).

[318] *See*, *e.g.*, Cantwell, *supra* note 293, at 56 (criticizing adequate alternative means of communication test as insufficiently protective of free speech).

[319] *See* Cantwell, *supra* note 293, at 62 & n.70.

[320] *See* text accompanying notes 374-79.

[321] Rogers v. Grimaldi, 875 F.2d at 999.

[322] *Id.*

whereby plaintiff's trademark interest would prevail "only where the public interest in avoiding commercial confusion outweighs the public interest in free expression."[323]

The recently federally enshrined cause of action for trademark *dilution* has strengthened trademark owners' rights against those using their marks for expressive purposes, because no showing of likelihood of confusion is necessary under a dilution cause of action.[324] Well over half the states provide anti-dilution statutes,[325] and with the passage of the Federal Trademark Dilution Act in 1995,[326] trademark owners were granted additional rights under the Lanham Act, including the right to protect their famous marks against another's use that tarnishes or dilutes the ability of the mark to identify and distinguish plaintiff's goods and services.[327] With protection against trademark dilution comes the increased opportunity for trademark owners to wield their trademark rights in ways that would impact free speech interests. In particular, trademark owners have sought to establish that the critical or otherwise unwelcome use of their marks tarnishes the value of their marks and thereby constitutes actionable dilution. As Roger Denicola explains, the tarnishment prong of trademark dilution constitutes "an open-ended invitation to restrict any use that undermines the commercial value or appeal of the trademark" and therefore more severely threatens free speech values.[328]

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[323] *Id.*

[324] *See* Denicola, *supra* note 310, at 200.

[325] *See* MCCARTHY ON TRADEMARKS, *supra* note 296, §24.14[2], at 24-125.

[326] *See* 15 U.S.C. § 1125(c).

[327] Specifically, the Federal Trademark Dilution Act (FTDA) grants owners of famous marks the right to enjoin another's "commercial use in commerce of their mark," where such use causes dilution of the distinctive quality of the mark. *Id.* Three types of uses, however, were carved out as non-actionable under the Act: (1) the fair use of the famous mark in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark; (2) noncommercial uses of the mark; (3) all forms of news reporting and commentary. *Id.*

[328] *See* Denicola, *supra* note 310, at 200.

In the eight years since the Federal Trademark Dilution Act has been passed, courts have struggled with how to balance trademark owners' additional anti-dilution rights against the free speech interests of those using their marks for expressive purposes. Although free speech interests fare less well in trademark dilution causes of action than in trademark infringement causes of action,[329] the First Amendment nonetheless imposes substantial limitations on trademark owners' anti-dilution rights.

The case of *L.L. Bean v. Drake Publishers*[330] is illustrative of a trademark owner's attempts to wield infringement and dilution causes of action to silence expressive speech incorporating its trademark. In that case, High Society, a commercial, adult-oriented magazine, published an article parodying the popular L.L. Bean sportswear catalog, under the title "L.L. Beam's Back-to-School-Sex-Catalog." The content of the article, like the article's title, included variations on L.L. Bean's trademarks and featured pictures of nude models in sexually explicit positions using products similar to those offered in L.L. Bean catalogs and described in a "crudely humorous fashion."[331] L.L. Bean, not amused, sued the publisher of High Society for trademark infringement and dilution. Consistent with the above analysis of trademark infringement, the district court readily found that the article engendered no real likelihood of confusion, and dismissed Bean's cause of action for trademark infringement.[332] The district court, however, sustained Bean's cause of action for trademark dilution, finding that High Society's parodic use of the L.L. Bean mark within this context diluted the mark's distinctive qualities,[333] and accordingly enjoined publication of the article.[334]

High Society appealed, claiming that the district court's order enjoining publication of the article violated its right to

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[329] *See* Denicola, *supra* note 310; Cantwell, *supra* note 293.
[330] L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987).
[331] *Id.* at 28.
[332] *See* L.L. Bean, Inc. v. Drake Publishers, Inc., 625 F. Supp. 1531 (D. Maine 1986), *rev'd*, 811 F.2d 26 (1st Cir. 1987).
[333] *Id.*
[334] *Id.*

freedom of expression. The First Circuit agreed, explaining that:

> Trademarks, and in particular famous trademarks, offer a particularly powerful means of conjuring up the image of their owners, and thus become an important, perhaps at times indispensable, part of the public vocabulary. Rules restricting the use of well-known trademarks may therefore restrict the communication of ideas . . . . The constitutional implications of extending the trademark infringement, misappropriation or tarnishment rationales to cases in which defendant's speech is particularly unflattering may often be intolerable. *Since a trademark may frequently be the most effective means of focusing attention on the trademark owner or its product, the recognition of exclusive rights encompassing such use would permit the stifling of unwelcome discussion.*[335]

The First Circuit concluded that while the Constitution tolerates incidental impacts on free speech where necessary to prevent a defendant from merchandising its products by using another's mark, the First Amendment prohibits the extension of a trademark owner's monopoly to enjoin the non-confusing, expressive – albeit critical -- use of another's trademark, whether under trademark infringement or dilution causes of action.

The case of *Mattel v. MCA Records*[336] further illuminates the contours of First Amendment protection for speech that incorporates another's trademark as against claims of trademark infringement and dilution. In that case, Mattel, the owner of the famous mark "Barbie," brought a trademark dilution action against the music group Acqua to enjoin the release of the song *Barbie Girl*, which referred to Barbie as a "blond bimbo girl" who "loves to party" and whose "life is plastic."[337] Mattel claimed both that Acqua's use of the song title "Barbie Girl" and associated lyrics incorporating its famous mark constituted trademark infringement by creating a likelihood of confusion as to Mattel's sponsorship of

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[335] 811 F.2d at 29 (emphasis added) (internal quotation marks omitted).
[336] Mattel, Inc. v. MCA Records, Inc., 28 F. Supp. 2d 1120 (C.D.Cal. 1998).
[337] *Id.* at 1124.

the song, and that such use constituted actionable trademark dilution under the Federal Trademark Dilution Act because it disparaged Barbie's otherwise wholesome image. In ruling on plaintiff's trademark infringement and dilution causes of action, the *Mattel* court found that the First Amendment provided a defense to both, and refused to enjoin the song's release.[338]

The *Mattel* court first explained that a trademark owner's rights are limited to the use of its mark "for the identification of the manufacturer or sponsor of a good or the provider or a service."[339] Trademark rights, being limited property rights in particular words, phrases, or symbols, "do not allow trademark holders to censor or silence all discussion of their products that they find annoying or offensive."[340] Observing that plaintiff's attempt to wield its trademark rights to enjoin the expressive use of its mark would implicate the right to freedom of expression, the court concluded that "to deny the opportunity to poke fun at the symbols and names which have become woven into the fabric of our daily life would constitute a serious curtailment of a protected form of expression."[341] The court considered plaintiff's evidence of likelihood of confusion, but concluded that "the First Amendment interests at stake outweigh the possibility that some people might not interpret the song's lighthearted lyrics as a comment or spoof on the popular Mattel product and might be confused as to whether Mattel put out or authorized the song."[342]

Turning to plaintiff's trademark dilution claim, the *Mattel* court held that even if the song could be said to tarnish or dilute the Barbie mark and even though the song was commercially released for profit, defendant's use of plaintiff's mark was "non-commercial" and therefore protected under the "noncommercial use of a mark"[343] exception to the Federal Trademark Dilution Act. Even though defendant's use of the mark was in the larger context

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[338] *Id.* at 1126.
[339] *Id.* at 1127.
[340] *Id.*
[341] *Id.* at 1126.
[342] *Id.*
[343] *Id.* at 1124.

of a commercial, for-profit work, because the specific context in which the use was made was expressive, it was nonetheless protected speech under the Federal Trademark Dilution Act. The *Mattel* court's analysis demonstrates the important distinction drawn by the FTDA between noncommercial uses of another's mark, which are not actionable under the FTDA, and commercial uses of another's mark, which are actionable under the FTDA.

In conclusion, the *Mattel* court refused to "apply anti-dilution statutes to permit a trademark owner to enjoin the use of his mark . . . simply because [he or she] finds such use negative or offensive. *[Otherwise], a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct, with detrimental consequences to free speech in this society."*[344]

To be sure, courts have not unilaterally ruled in favor of free speech interests in every case in which such interests are pitted against trademark holders' anti-dilution rights, whether under state or federal statutes.[345] And because federal protection against dilution is less than one decade old, courts have not yet had a full opportunity to develop a thoughtful balancing of free speech interests against such trademark interests. A mature trademark dilution jurisprudence would accord trademark owners meaningful rights against dilution of their marks while restricting the least amount of bona fide expression possible. While the First Amendment should not be understood to serve as a trump card for defendants in trademark dilution causes of action, it has and should continue to impose on courts the duty to grant meaningful consideration to defendants' assertions that their expression incorporating plaintiffs' marks, even if critical of plaintiffs, is worthy of protection.

Along with emphasizing the importance of imposing free speech limitations on trademark owners' anti-dilution rights, the

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[344] *Id.* (emphasis added).

[345] *See generally* MCCARTHY ON TRADEMARKS, *supra* note 269, at § 31:144 – 148 (citing dilution cases in which trademark owners prevailed over defendants who claimed to be making expressive use of their marks).

Mattel and *L.L. Bean* cases also demonstrate that the commercial or for-profit character or context of speech is not a bar to a holding that such speech is protected under the First Amendment. In the *L.L. Bean* case, for example, the court emphasized that, despite the fact that defendant engaged in its speech for profit in the context of a commercial periodical, "such speech nonetheless constitutes [protected] editorial or artistic, rather than a commercial, use of plaintiff's mark, [because defendant] did not use Bean's mark to identify or promote goods or services to consumers."[346] Despite the fact that the defendant in *L.L. Bean* engaged in use of plaintiff's mark in the larger context of a commercial enterprise, defendant's speech in that case was expressive and therefore protected by the First Amendment.[347] Similarly, the *Mattel* court held that the overall commercial context in which defendant embedded its expressive use of plaintiff's mark did not reduce the protection accorded to such use, because the specific context in which the use was made was itself expressive.[348] As the court explained, "the fact that defendants' product makes a profit or is successful . . . does not affect the protections afforded to it by the First Amendment."[349] The court went on to emphasize that speech engaged in for profit is nonetheless protected by the First Amendment: "The fact that expressive materials are sold neither renders the speech unprotected nor alters the level of protection under the First Amendment."[350] Significantly, free speech is accorded its strongest protection when applied to such expressive works as newspapers and periodicals, which are generally sold for profit and contain commercial advertisements.[351] The commercial content of such materials in no way reduces the level of protection accorded them, nor by itself moves them into the lower category of "commercial speech" as that term is used within First Amendment

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[346] 811 F.2d 26 (1st Cir. 1987).
[347] *Id.*
[348] 28 F. Supp. 2d at 1124.
[349] *Id.* at 1125.
[350] 28 F. Supp. 2d at 1129.
[351] *See*, *e.g.*, KATHLEEN SULLIVAN AND GERALD GUNTHER, FIRST AMENDMENT LAW (1999).

jurisprudence.[352]

In short, under U.S. First Amendment and trademark jurisprudence, the use of another's trademark for expressive purposes is protected by the right to freedom of expression even where such use is engaged in for-profit or is part of a larger commercial enterprise,[353] so long as defendant does not use plaintiff's mark as a source identifier in a manner that is likely to cause confusion or that causes dilution of another's mark.

The First Amendment right to freedom of expression also specifically extends to the use of another's trademark in the context of domain names. Because domain names themselves, like titles of traditional expressive works, can serve powerful expressive functions, they constitute speech protectible by the First Amendment. Indeed, Congress and the courts have expressly recognized that domain names can constitute First Amendment protected speech.[354] In cases where trademark owners have attempted to wield their intellectual property rights to enjoin the expressive use of their marks within the context of domain names, courts have recognized that domain names themselves can constitute protected speech. Although, as above, defendants' free speech interests have not prevailed in every case,[355] the First Amendment imposes limitations on trademark owners' rights against domain name holders. For example, in the case of *Bally Total Fitness Holdings v. Faber*,[356] the court held that the First Amendment protected the expressive use of a plaintiff's trademark incorporated in a domain name criticizing plaintiff.[357] The domain

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[352] *Id.*

[353] *See* Arlen W. Langvardt, *Protected Marks and Protected Speech: Establishing the First Amendment Boundaries in Trademark Parody Cases*, 36 VILL. L. REV. 1 (1991) (explaining that "if the presence of a profit motive were by itself sufficient to make speech commercial in nature, there would be little meaningful First Amendment protection for the press, book publishers, and similar entities.").

[354] *See* text accompanying notes 356-66.

[355] *See, e.g.,* Planned Parenthood Federation of America v. Bucci, 1997 WL 133313 (S.D.N.Y. 1997).

[356] 29 F. Supp. 2d 1161 (C.D.Cal. 1998).

[357] *Id.*

name holder in that case, Andrew Faber, devoted a section of his website – which he entitled "Bally Sucks" and which included "Ballysucks" as part of its domain name – to criticizing the practices of the popular Bally health club business.[358] The "Bally Sucks" section of the website contained the Bally logo and mark with the word "sucks" printed across it and offered visitors the opportunity to access (and contribute to) complaints about Bally's business.[359] Bally sued for trademark infringement and dilution based on Faber's incorporation of its mark within his domain name and within the content offered on the website itself. Faber asserted a First Amendment right to express himself using plaintiff's mark.[360]

In ruling on Bally's causes of action, the court first explained on the trademark infringement claim that given the clearly critical nature of the content on defendant's website, there was little likelihood of consumer confusion because "no reasonably prudent Internet user would believe that a site emblazoned with 'Bally Sucks' would be sponsored by or affiliated with Bally."[361] Turning to Bally's claim that defendant's use of the phrase "Bally sucks" constituted dilution actionable under the Federal Trademark Dilution Act,[362] the court refused to

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[358] *Id.* at 1162.
[359] *Id.*
[360] *Id.*
[361] *Id.* at 1163.
[362] In particular, despite the fact that defendant's website contained speech of a commercial character, the court held that defendant's speech did not constitute "commercial use in commerce" of plaintiff's mark within the meaning of the Federal Trademark Dilution Act, and instead constituted "non-commercial use" of plaintiff's mark within the meaning of the Act. Specifically, plaintiff directed the court to look to other components of defendant's website – including his offering of sexually-themed photographs for sale and advertisement of his web design services – to support the conclusion that plaintiff had made the required showing under the FTDA that defendant's use was a "commercial use in commerce" that tarnished plaintiff's mark which did not fall within the "noncommercial use" exception to the FTDA. The court, however, made clear that, in assessing the commercial nature of defendant's use of

interpret the Act to allow plaintiff to enjoin critical use of its mark, explaining that trademark owners may not invoke dilution law to "quash unauthorized use of their mark by a person expressing a point of view."[363]

Similarly, courts weighing trademark owners' intellectual property rights and Internet users' free speech rights in the context of claims brought under the Anticybersquatting Consumer Protection Act have recognized that domain names can constitute speech protected under the First Amendment. Consider, for example, the *Lucentsucks* case, in which Lucent Technologies brought an action under the Anticybersquatting Consumer Protection Act challenging the domain name LUCENTSUCKS.COM.[364] While holding that the trademark owner failed to satisfy certain jurisdictional prerequisites, the court explained that Lucent "could not make out a violation of trademark rights [based on the registration and use of the domain name LUCENTSUCKS.COM] without infringing defendant's free speech rights," and noted that "a successful showing that LUCENTSUCKS.COM is effective parody and/or a site for critical commentary would seriously undermine the required elements for the cause of action at issue in this case."[365] Other courts construing the Anticybersquatting Consumer Protection Act in cases where defendants asserted First Amendment rights have reasoned that in order to secure protection under the First Amendment, defendant's domain name itself – and not merely the speech available on the web site at issue – must be used for

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plaintiff's mark, it would not look to the diverse components and features of defendant's website, but would focus specifically on the narrow context of defendant's use of plaintiff's trademark. Within this specific context, the court held that defendant's use of plaintiff's mark was noncommercial and fell within the noncommercial use exception to the FTDA because such use was limited to defendant's non-commercial expressive criticism of the Bally health club business. *Id.* at 1164.

[363] *Id.*

[364] Lucent Technologies, Inc. v. Lucentsucks.com, 95 F. Supp. 2d 528, 535 (E.D. Va. 2000).

[365] *Id.* at 537.

expressive and not misleading purposes.[366]

Bally and similar cases[367] therefore establish that domain names, like other concise expressive phrases, can constitute speech protected by the First Amendment. It is well-established as a matter of First Amendment jurisprudence that brief phrases and slogans used for expressive purposes – such as "Live Free or Die,"[368] "Fuck the Draft,"[369] etc. – can constitute expressive speech for purposes of First Amendment protection. Indeed, such phrases and slogans may be all the more potent forms of expression because of their concentrated nature. It is also well-established that the expressive use of another's trademark within the context of such brief phrases constitutes protected speech as against trademark owner's claims of infringement or dilution.[370] Notably, many trademark cases involve successful First Amendment defenses for the use of concise terms or expressions analogous to domain names, such as those discussed above involving protection for the song title "Barbie Girl" and the article title "L.L. Beam's Back to School Sex Catalog."[371]

The protection accorded to titles of expressive works has received nuanced treatment under the United States' free speech jurisprudence that is illuminative for the treatment of domain names, which serve roles analogous to titles. In interpreting the First Amendment as against conflicting claims by trademark owners, courts have recognized that titles of expressive works, like domain names, often serve the dual function of being expressive themselves and serving the purpose of commercial promotion.[372] Courts have held that the commercial component of such speech, however, does not reduce the protection accorded them under the

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[366] *See* People for the Ethical Treatment of Animals v. Doughney, 263 F.3d 359 (4th Cir. 2001).
[367] *See* text accompanying notes 364-66.
[368] *See* Wooley v. Maynard, 430 U.S. 705 (1977).
[369] *See* Cohen v. California, 403 U.S. 15 (1971).
[370] *See* text accompanying notes 330-34.
[371] *See id.*
[372] *See* text accompanying notes 374-80.

First Amendment.[373]

The Second Circuit's decision in the case of *Rogers v. Grimaldi*[374] helps to illuminate the hybrid nature of titles, and, by analogy, of domain names. In that case, legendary dancer Ginger Rogers claimed that Italian filmmaker Federico Fellini's use of the title "Ginger and Fred" created a likelihood of confusion as to Ginger Rogers' affiliation with the film, diluted the distinctive character of her name, and thus constituted actionable trademark infringement and dilution.[375] Fellini asserted a First Amendment defense, claiming that his use of this film title served expressive purposes that outweighed any possible likelihood of confusion.[376] In rejecting Rogers' trademark claims, the Second Circuit found that titles of expressive works are of a "hybrid nature," in that they can "combine artistic expression and commercial promotion."[377] The court explained that "although First Amendment concerns do not insulate titles from Lanham Act claims, [First Amendment] concerns must nonetheless inform our consideration of the scope of the Lanham Act as applied to claims involving such titles."[378] Concomitantly, the court held that *consumers* of such expressive works have dual interests: "an interest in not being misled and an interest in enjoying the results of such expression. For all these reasons, the expressive element of titles requires substantial protection under the First Amendment."[379] Following the Second Circuit's analysis in *Rogers v. Grimaldi*, other courts, such as the *Mattel* court,[380] have recognized the important expressive role served by titles, and have held that the First Amendment protects defendants' expressive use of trademarks within the title of defendants' work.

Like titles, domain names can serve both expressive and

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[373] *See* text accompanying note 377.
[374] 875 F.2d 994 (2nd Cir. 1989).
[375] *Id.* at 995.
[376] *Id.* at 996.
[377] *Id.*
[378] *Id.*
[379] *Id.* at 999.
[380] *See* 28 F. Supp. 2d 1120 (C.D. Cal. 1998).

commercial promotion purposes that advance both the domain name holders' interest in free expression as well as Internet users' interests in enjoying the results of such expression. When a domain name incorporates another's trademark solely for the purpose of (misleading) commercial promotion, such use is properly held to be unprotected by the First Amendment. Yet when a domain name incorporates another's trademark for an expressive purpose, as in the *Bally* and *Lucent* cases discussed above, such use is properly held to be protected by the First Amendment. The case of *Planned Parenthood v. Bucci*[381] is illustrative of the first type of use of another's trademark within a domain name – use for the purpose of misleading promotion -- which does not merit protection under the First Amendment. In that case, an individual opposed to contraceptive and abortion rights was the first to register the domain name PLANNEDPARENTHOOD.COM. Upon visiting the home page of this PLANNEDPARENTHOOD.COM site, visitors were greeted with the message "Welcome to Planned Parenthood's Home Page."[382] In ruling on Planned Parenthood Foundation of America's trademark infringement cause of action challenging defendant's use of this domain name, the court held that such use of plaintiff's trademark as defendant's domain name was not expressive, but was instead for the purpose of trading on plaintiff's mark to misleadingly identify the web page at issue as originating from Planned Parenthood. The court explained that defendant's use of the domain name PLANNEDPARENTHOOD.COM was unprotected by the First Amendment because it "had no [expressive] implications, and was being used to attract consumers by misleading them as to the website's source or content."[383] If the defendant in Planned Parenthood had chosen a domain name that was expressive, but not misleading as to source, such as CHOOSELIFE.COM, STOPABORTION.COM, ABORTIONKILLS.COM, or even PLANNEDPARENTHOODKILLS.COM, he would have had a far stronger argument that such a domain name itself was intended to

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[381] 1997 WL 133313 (S.D.N.Y. 1997).
[382] *Id.*
[383] *Id.*

communicate a message or idea and was therefore protected by the First Amendment.[384]

In contrast to the *Planned Parenthood* case, the *Bally* case discussed above exemplifies defendant's use of plaintiff's trademark – viz., "Bally sucks" as part of defendant's domain name -- in a manner that is protected by the First Amendment.[385] Because defendant's use of this domain name served an expressive purpose, and because no reasonably prudent person could be confused by defendant's use of "Bally sucks" within his domain name, his use of plaintiff's mark in the context of his domain name constituted speech protected by the First Amendment.

In short, domain names – despite their concise nature – are protectible speech under the First Amendment. The use of another's trademark within a domain name constitutes speech protected by the First Amendment where such use is for expressive purposes and is not confusing or dilutive of another's mark. The First Amendment plays a significant role in limiting trademark owners' monopoly over the words and symbols that make up their marks and in protecting speech that incorporates others' trademarks for expressive purposes. In the face of trademark owners' attempts to wield their rights under trademark infringement, dilution, and now anticybersquatting law to silence bona fide critical and other expressive uses of their marks, the First Amendment imposes important protection against such overreaching.

No similar checks exist on ICANN decision-making or on

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[384] *See* National A-1 Advertising, Inc. v. Network Solutions, Inc., 121 F. Supp. 2d 156, 162 (D.N.H. 2000) ("Had the defendant in Planned Parenthood used a domain name such as "chooselife.com" or "stopabortion.com," he would have had a stronger claim that his domain name was meant to communicate an arguably protected message or idea."). *See also* People for the Ethical Treatment of Animals v. Doughney, 263 F. 3d 359 (4th Cir. 2001) (in an ACPA action brought by People for the Ethical Treatment of Animals against PETA.ORG -- which had established the website "People Eating Tasty Animals" -- the court rejected PETA.ORG's First Amendment defense, finding that the domain name itself was insufficiently expressive and was confusing).

[385] 29 F. Supp. 2d 1161 (C.D.Cal. 1998).

analogous ICANN policies. Neither ICANN's foundational documents, nor its Uniform Dispute Resolution Policy, accord any special weight to freedom of expression. Because of the public ordering role ICANN serves in regulating speech within this important expressive forum, ICANN must be called upon to incorporate special protections for freedom of expression within its foundational documents and to revise its Uniform Dispute Resolution Policy to ensure that it restricts the least amount of speech possible while protecting trademark owners against the confusing or dilutive use of their marks.

First, the Policy should be revised to incorporate a more careful assessment of the commercial nature of the expression available on challenged websites. In many disputes under the Policy involving a domain name holder's critical use of another's mark – such as the disputes involving BURLINGTON-MURDERFACTORY.COM[386] and LAKAIXA.COM[387] – the mere presence of *some* commercial content on the challenged website effectively defeated the domain name holder's claim that he or she enjoyed "rights or legitimate interests" in the domain name, and constituted grounds for removal of the domain name. In order to establish rights or legitimate interests in a domain name, the Policy requires that the domain name holder is "making a legitimate noncommercial or fair use of the domain name, without intent *for commercial gain* to misleadingly divert consumers or to tarnish the trademark or service mark at issue."[388] Thus, even if the use of the domain name could be considered "fair use" – whatever that is held to mean in this context -- a showing that the domain name holder has the intent "for commercial gain . . . to tarnish the [mark] at issue" is fatal to the domain name holder's ability to establish her rights and legitimate interests in the mark. Because many websites critical of trademark owners can be said to "tarnish the mark at issue" and because many such websites include or link to *some* commercial content on their site, the Policy – as written and as applied – is insufficiently protective of domain name holders'

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[386] *See* text accompanying notes 80-84.
[387] *See* text accompanying notes 85-91.
[388] *See* UDRP, *supra* note 65, at Par. 4(c).

right to engage in critical speech.

In particular, holding that the inclusion of *some* commercial content (such as an advertisement for unrelated goods or services) renders a domain name holder's critical speech unprotected burdens more speech than is necessary to advance ICANN's interests. As we have seen, free speech protection for artistic, literary, and editorial works such as newspapers or periodicals is rendered no less strong by the economic motive of the speaker/publisher or the presence of advertisements contained within such expressive works.[389] Similarly, the mere presence of an advertisement, commercial content, or economic motive should not render a domain name holder's critical use of another's trademark unprotected under the Policy. Despite the fact that such advertisements provide revenue to the speaker involved, such advertisements do not render the expressive content any less expressive and should not render such content any less protected. Accordingly, the presence of (or link to) commercial content on a website should not reduce the protection accorded to a domain name holder under the Policy. Rather, the appropriate inquiry regarding domain name holders' rights and legitimate interests should be into whether the domain name holder is using the mark at issue – in the context of the domain name and in the context of the website generally – (1) for the purpose of confusing and misleading consumers as to source or diluting the mark, or (2) for the purpose of expressing her views, ideas or opinions, including in a manner that is critical of the mark. If it is established that the domain name holder is using the mark for expressive purposes – as, for example, in the BURLINGTONMURDERFACTORY.COM case[390] – such use should be protected under the Policy, notwithstanding the presence of any commercial content on the website. Just as the commercial nature of or content contained within the magazine in the *L.L. Bean* case[391] did not mitigate the level of protection available for the publishers with respect to the critical use of L.L. Bean's mark, so too the presence of commercial content in

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[389] *See*, *e.g.*, Langvardt, *supra* note 353.
[390] *See* text accompanying notes 80-84.
[391] *See* text accompanying notes 330-35.

conjunction with an expressive use of a trademark should not reduce the free speech protections accorded to such use under the Policy.[392]

Second, the Uniform Dispute Resolution Policy should be revised to provide meaningful sanctions for the misuse of this process by trademark owners. The UDRP, by its terms, was intended to apply only to those disputes involving bad faith cybersquatting in which domain name holders did not enjoy any rights or legitimate interests in the domain name at issue.[393] As shown above, however, trademark owners have extended the UDRP well beyond this scope and have misused the process by bringing UDRP actions against domain name holders in cases in which domain name holders enjoyed rights and legitimate interests in their domain names. The UDRP attempts to discourage such bad faith complaints by empowering UDRP panelists to label such conduct "reverse domain name hijacking."[394] However, the Policy fails to attach any sanction whatsoever to such conduct and therefore fails to disincent such conduct. In order to meaningfully discourage bringing such bad faith complaints, the Policy should be revised to attach meaningful monetary or legal consequences – such as paying the domain name holders' fees (if any)[395] – to such acts of domain name "hijacking."

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[392] *See* Cantwell, *supra* note 293, at 76 ("The public interest in preventing dilution of a mark is outweighed by the public interest in being exposed to new ideas brought about through defendant's expressive use of plaintiff's trademark.")

[393] *See* text accompanying note 190.

[394] *See* UDRP, *supra* note 65, Rule 15(e) ("If after considering the submissions the Panel finds that the complaint was brought in bad faith, for example in an attempt at Reverse Domain Name Hijacking or was brought primarily to harass the domain-name holder, the Panel shall declare in its decision that the complaint was brought in bad faith and constitutes an abuse of the administrative proceeding.")

[395] The complainant is responsible in any case for paying fees charged by the dispute resolution provider, except in cases where the domain name holder opts to expand the panel from one to three panelists, in which case the fees are split evenly between the parties. *See* UDRP, *supra* note 65, § 4(9).

In short, in revising its domain name policies to accord meaningful protection for the fundamental right of freedom of expression, ICANN should extend greater protections to Internet users' right to engage in anonymous and critical speech.

VI. CONCLUSION

Over the past five years, ICANN has engaged in an unprecedented experiment in global democratic decision-making affecting the rights of Internet users worldwide. When it ceded control over key elements of the Internet's infrastructure to ICANN, the United States was correct to insist that ICANN commit to embodying the procedural normative ideals of liberal democracy by incorporating representative decision-making structures over an extended sphere and by facilitating deliberation within its decision-making. ICANN should be held to these normative commitments and should not be permitted to revise its governance structure to retreat from these commitments.

Because it has become clear over the past five years that ICANN's decision-making affects speech within the most powerful forum for expression ever created, however, it is not sufficient for ICANN to embody the *procedural* norms of liberal democracy. Rather, ICANN's governance structure must be revised to accord meaningful protections for the *substantive* norms of liberal democracy – most importantly, protections for freedom of expression. Freedom of expression – whether justified on the foundationalist grounds that it is intrinsically valuable or on the instrumentalist grounds that it is necessary to a well-functioning democratic system – is an essential component of liberal democracies. ICANN's governance structure should therefore be revised to incorporate meaningful protections for freedom of expression. In particular, ICANN should revise its speech-regarding policies to accord meaningful protection for Internet users' right to engage in anonymous speech and their right to engage in critical speech.