March, 2001

Towards a Hybrid Regulatory Scheme for the Internet

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Private regulation of the internet enjoys important advantages over traditional public regulation. Significant among them is reducing uncertainty regarding jurisdiction and choice of law for internet disputes that cross national boundaries. But private regulation also involves important disadvantages—failure to respect deeply held local or national values, insufficient protection of consumers, tendency to encourage havens for conduct reprehensible to political entities, and imposition of rules that are arbitrary or which inappropriately limit competition. Hybrid regulation—the combination of broad public law frameworks within which private regulatory regimes work out the details—is a promising way to realize the advantages of private regulation while mitigating the disadvantages.

It is time to synthesize from prototypes of hybrid regulation, such as the Internet Corporation For Assigned Names and Numbers ("ICANN"), credit card chargebacks, the European Commission/United States Privacy Safe Harbor Principles, and the Children's Online Privacy Protection Act of 1998 ("COPPA"), some general concepts for the relationship between public law frameworks and private regulatory regimes. Especially important are mechanisms for assuring accountability of private rulemaking in contexts where technology makes the rules self-enforcing.

In developing these concepts, one should distinguish among four situations in which private rulemaking and dispute resolution occur: situations in which public institutions delegate or defer to private institutions; situations in which all parties actually

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consent and waive their power to resort to public institutions; situations in which affected parties are so satisfied with private rules and their applications, after the fact, that they do not seek involvement by public institutions; and situations in which private institutions control important assets.

In three of these situations, the public law framework to guide private regulation already exists. Delegating or deferring agencies can condition delegation or deferral on certain behavior by private entities. Consenting parties can channel private regulation through contract law. Parties acquiescing after the fact can withhold their acquiescence. The foremost challenge relates to the situation in which private entities have the power to make and enforce rules because they control important assets. Here the linkage between public and private law is obscure, but the arguments in favor of governmental abstention over private exercise of property rights are strongest. The law needs mechanisms of accountability to protect access to important resources, while also limiting intrusion into property owner prerogatives.

Criteria for private governance must include standards for determining real consent—and thus activating a contractual matrix for private regulation. When consent is not the legitimating engine of private governance, public legal institutions must specify criteria entitling private regulatory regimes to deference or immunity, and conversely apply standards for civil liability. For private regulatory regimes with direct effect—exercise of private power to exclude persons from desirable resources—private rights of action must allow challenges to impermissible private regulatory decisions. The content of these rights of action should reflect public concerns.

This Article reviews, in Part I, the advantages of private regulation; considers the growing literature that raises questions about conflicts between private regulation and democratic values; suggests that private regulation occupies four distinct positions vis-à-vis overarching legal systems; and explores how overarching legal systems can limit private regulation, potentially making it more accountable, in conjunction with private rulemaking, adjudication, and enforcement. Then, in Part II, the Article examines private rights of action that might enable persons injured by private regulatory activity to obtain review in the courts, and considers the standards of accountability that those courts might impose on private regulators.

The Article concludes that the greatest need for new legal doctrine to assure accountability of private regulators exists when the power to regulate privately arises from control of valuable resources, especially when private regulators use computer code to block access to major segments of the internet. In that situation, neither administrative law nor contract law provides a clear pathway to judicial review. An extension of traditional tort theories of public nuisance, intentional interference with contractual relations, or a relaxation of some of the limitations on antitrust scrutiny are necessary to assure accountability of private regulation in this context.

I. PRIVATE REGULATION OF THE INTERNET ENJOYS SOME IMPORTANT ADVANTAGES AND DISADVANTAGES OVER TRADITIONAL REGULATION BY PUBLIC AGENCIES

A. Benefits of Private Regulation

The advantages of private regulation of the internet have been reviewed in the literature.[1] David Post expresses enthusiasm for private regulation thus:

> Fundamental values are indeed at stake in the construction of [c]yberspace, but those values can best be protected by allowing the widest possible scope for uncoordinated and uncoerced individual choice among different values and among different embodiments of those values. We

[1] See, for example, Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 Berkeley Tech L J 413, 420–24 (1997) (noting that private regulation of the internet is desirable because self governance may be more efficient, networks need different rules and procedures, open networks escape enforcement of conventional rules, and self governance promotes voluntary compliance); David G. Post, *What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace*, 52 Stan L Rev 1439, 1458 (2000) (noting that some policies "best emerge not through politics and political processes, but as the aggregate outcome of uncoerced individual decisions"); David R. Johnson and David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan L Rev 1367, 1367 (1996) (arguing that cyberspace needs its own law and legal institutions and that "established territorial authorities" may defer to the "self-regulatory efforts of Cyberspace participants" whose rules will "play the role of law by defining legal personhood and property, resolving disputes, and crystallizing a collective conversation about online participants core values"); Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and their Constitutionality*, 16 Hastings Const L Q 165, 196 n 70 (1989) (noting that private regulation may enable more democratic decisionmaking than comparable action by public regulators; private regulation may provide greater opportunity for affected parties to participate; private regulation enables Congress to expand resources for regulation; private regulation may enable "interim" regulation of aspects of the marketplace when insufficient consensus exists for public regulation).

> don't need "a plan" but a multitude of plans from among which individuals can choose, and "the market," and not action by the global collective, is most likely to bring that plenitude to us.[2]

Post and his sometime collaborator David R. Johnson are the most prominent advocates of self regulation.[3] But other advocates exist as well. The former Chairman of the Federal Trade Commission, Robert Pitofsky, enumerated the following benefits of industry self regulation in 1998: self-regulatory groups may establish product standards that assure safety; private standard setting can lower the cost of production; private regulation helps consumers evaluate products and services; self regulation may deter conduct that is universally considered undesirable but outside the purview of civil or criminal law; self regulation is more prompt, flexible and effective than government regulation.[4]

Neil Weinstock Netanel has classified the arguments for self regulation.[5] He explains that the arguments by supporters of private regulation fall into three categories: Cyberpopulism, Cybersyndicalism, and Cyberanarchy. Cyberpopulists argue that self governance through the internet more fully realizes the ide-

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[2] Post, 52 Stan L Rev at 1440 (cited in note 1).

[3] See Johnson and Post, 48 Stan L Rev at 1397 (cited in note 1) ("Cyberspace may be an important forum for the development of new connections between individuals and mechanisms of self governance by which individuals attain a sense of community."). See also David R. Johnson and David G. Post, *"Chaos Prevailing on Every Continent": Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 Chi Kent L Rev 1055, 1087 (1998) (suggesting that the internet calls for deference to rulemaking within "a-geographical, decentralized, voluntary associations").

[4] Robert Pitofsky, *Self Regulation and Antitrust*, remarks prepared for Washington D.C. Bar Association Symposium (Feb 18, 1998), available online at <http://www.ftc.gov/opa/1998/9802/selfreg.htm> (visited Oct 30, 2001). And former General Counsel of the Federal Trade Commission, Debra A. Valentine, extolled self regulation as often being quicker, more flexible, less adversarial and therefore less burdensome than governmental regulation, enabling government to devote scarce resources to higher priority matters, capable of achieving rapidly a high degree of compliance because of the power of self-regulatory bodies to repudiate and reward, and the possibility of addressing a problem more capably than could a government agency because of "hands on" experience by self regulators. See Debra A. Valentine, *Industry Self Regulation and Antitrust Enforcement: An Evolving Relationship*, remarks prepared for the Arison School of Business and the Israeli Antitrust Authority Seminar on New Developments in Antitrust § II (May 24, 1998), available online at <http://www.ftc.gov/speeches/other/dvisraelspeech.htm> (visited Feb 3, 2001) [all internet materials cited in this note on file with U Chi Legal F].

[5] Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 Cal L Rev 395, 497–98 (2000).

als of liberal democracy than traditional government.[6] Cybersyndicalists argue that internet-based groups are more effective than public institutions in determining and applying norms of those affected by their application.[7] Cyberanarchists argue that traditional public institutions cannot be effective in regulating cyberspace.[8]

Important among the practical advantages of private regulation is reduced uncertainty regarding jurisdiction and choice of law for internet disputes that cross national boundaries. Conflict of law rules for contract disputes long have recognized that participants in a contractual relationship can anticipate and resolve jurisdictional issues through choice of law and forum selection clauses.[9] Thus, when consent forms the foundation of self regula-

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[6] See id at 414 (noting that cyberpopulists consider representative government a "second-rate democracy," and that internet users "are able to gain a far more informed understanding").

[7] See id at 428 (noting that cybersyndicalists see the "local cultures" of the internet—epitomized by chat room and Usenet groups—as the "site of a political order highly reflective of consensual governance and individual liberty").

[8] See id at 443 (pointing out that there "is little room for state created law" in cyberspace, where users can "determine and modify entitlements to suit their local needs").

[9] See Restatement (Second) of Conflict of Laws § 186 (1971) ("Applicable Law"). See also id at § 187 ("Law of the State Chosen by the Parties"); id at § 188 ("Law Governing in Absence of Effective Choice by Parties"); 1980 Rome Convention on the Law Applicable to Contractual Obligations (consolidated version), 498Y0126(03), Official Journal C 027 at 34–46 (Jan 1, 1998), available online at <http://europa.eu.int/eur-lex/en/lif/dat/1998/en_498Y0126_03.html> (visited Feb 3, 2001) [on file with the U Chi Legal F] (European Union convention providing choice of law rules for contract disputes and preferring party choice-of-law clauses); Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Rome Convention Art II(2) ("Rome Convention") (Oct 26, 1961), available online at <http://www.wipo.org/treaties/ip/rome/rome.html> (visited Feb 23, 2001) [on file with the U Chi Legal F]:

> 2. (1) If broadcasting was consented to by the performers, it shall be a matter for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes. (2) The terms and conditions governing the use by broadcasting organisations of fixations made for broadcasting purposes shall be determined in accordance with the domestic law of the Contracting State where protection is claimed. (3) However, the domestic law referred to in sub-paragraphs (1) and (2) of this paragraph shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organisations.

See also European Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Brussels Convention"), 1972 OJ (L 229) 32, reprinted in 8 ILM 229 (1968), amended at 1990 OJ (C 189) 1, reprinted in 29 ILM 1413 (1990). The Brussels Convention binds the members of the European Union to rules for jurisdiction and enforcement of judgments. See Henry H. Perritt, Jr., *Will the Judgment-Proof Own Cyberspace?*, 32 Intl Law 1121, 1129 n 30 (1998), citing Paul R. Beaumont, *Anton & Beaumont's Civil Jurisdiction in Scotland* 90–94 (1995).

tion, the consenting participants in the self-regulatory regime can choose their own forums, including forums of their own creation, and can prescribe their own law, including law developed by the private regulatory regime.[10]

Public institutions can anticipate and resolve jurisdictional problems by delegating power and deferring to private institutions. They do this all the time in America. Deferral and delegation to private institutions is the centerpiece of American labor law.[11] Delegation and deferral to self-regulatory organizations constituting stock exchanges is the centerpiece of American securities regulation.[12] When public institutions from different countries agree to delegate and defer to the same private institutions, they solve transnational jurisdictional problems. This is what happened with the European Commission/United States Department of Commerce Privacy Safe Harbor Agreement. American firms using data originating in Europe were potentially subject to the jurisdiction of European administrative agencies. By negotiating an agreement allowing compliance with private standards to substitute for direct compliance with European governmental standards, the jurisdictional problem was alleviated.

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[10] The permissible scope of choice of law clauses in contracts is traditionally more limited than the text suggests. Some commentators and courts would permit the parties to choose the law only of states that have a connection with their relationship. See Restatement (Second) of Conflict of Laws § 187(2)(a) & comment f (1971). Other commentators and courts would allow the choice of any state, but not of private sources of law. See id at § 187(1). Others would allow the choice of private rules as well as those entitled to the status of "law." See id at comments c, e.

[11] "Deferral" refers to the practice of the National Labor Relations Board of refraining from deciding unfair labor practice charges that could be or have been resolved by collectively bargained arbitration. For a general discussion, see Calvin William Sharpe, *NLRB Deferral to Grievance Arbitration: A General Theory*, 48 Ohio St L J 595 (1987) (reviewing recent cases and recommending revisions in NLRB deferral policy). Labor law delegates at two levels. Congress delegates certain matters to the National Labor Relations Board. See *Country Ford Trucks, Inc v NLRB*, 229 F3d 1184, 1189 (DC Cir 2000) (characterizing relationship between board and statute in determining appropriate unit). Although not usually discussed as part of the "nondelegation doctrine," the national labor policy also delegates to the negotiators in a collective bargaining process the power to determine specific terms and conditions of employment. See *New York Shipping Association, Inc v FMC*, 854 F2d 1338, 1373 (DC Cir 1988) (discussing importance of courts and agencies allowing parties to reach their own agreement in collective bargaining process).

[12] See generally *Mitchell v Forsyth*, 472 US 511, 553 n 8 (1985) (noting good faith immunity for self-regulatory organizations in 15 USC § 78 III(b)); *Sparta Surgical Corp v National Association of Securities Dealers, Inc*, 159 F3d 1209, 1212 (9th Cir 1998) (explaining that SROs must issue rules and bylaws in conformance with statute, subject to approval by SEC, and must comply with association rules); *Donald & Co v American United Energy Corp*, 746 F2d 666, 670 (10th Cir 1984) (referring to presumptions in favor of arbitration in disputes between members of self-regulatory organizations despite assertion of securities law violations).

When private institutions control important assets, such as internet domain names, they easily can make and enforce rules across national boundaries because they do not need to rely on geographically defined state-based institutions to enforce their decisions.

Thus, private regulation represents one interesting solution to jurisdictional problems presented by the internet's indifference to geographic boundaries that historically have determined adjudicatory and prescriptive jurisdiction. It may be more efficient; it may promote compliance; it may adapt better to changing technologies and business practices.

B. Dangers of Private Regulation

But private regulation also involves important disadvantages. Many of its advantages are based on false premises. It can fail to protect democratic values; it can neglect important local values; it is usually less accountable than traditional government regulation. It is increasingly imposed through computer code, which bypasses political and legal institutions that protect due process and democratic values.

Netanel explains that private self-governance claims track associational self-governance claims that long have been made and that "hit a fault line in liberal democratic theory and practice."[13] At best, Netanel observes, "American law has been generally unaccommodating to strong self-rule claims."[14] Thus, "arguments for cyberspace self-governance fall closer to the category of weak self-rule claims," because citizens of cyberspace are also citizens of the real world.[15]

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[13] See Netanel, 88 Cal L Rev at 447 (cited in note 5).

[14] Id at 448.

[15] Id (noting that "cyberians," as citizens in the real world, spend only a small fraction of their time online and therefore seek "autonomy for particular, discreet association, for rules governing the part of their lives and activity that concerns that association"). For a similar rationale see Lawrence Lessig, *Code and Other Laws of Cyberspace* 219–20 (Basic Books 1999) (acknowledging that Americans are skeptical of government but noting the necessity of making fundamental choices about what "life will be like in [cyber]space, and therefore life in real space" and that Americans may be "antigovernment, but for the most part [ ] believe that there are collective values that ought to regulate private action").

1. False premises.

Several of the Cyberpopulist arguments are based on assumed ease of exit, but exit is not always easy.[16] "For the vast majority of us, in the vast majority of cases, user input will consist entirely of consumer purchasing behavior."[17] Meaningful choice probably is thin. Like Netanel, I have almost never chosen one web site over another because I preferred the former's conditions of use over the latter's.[18] Internet users, like participants in the traditional world, face significant information and collective action costs in responding to producers' standard terms by switching service providers.[19]

It is not only feelings of social attachment and fear of loneliness that represent barriers to exit in cyberspace. Indeed, now that the internet is relatively more important as a market than as a place for chatting, other switching costs are more relevant. Often, one's internet service provider owns one's domain name. To switch to another ISP would mean getting a new domain name and building public awareness of that domain name. Most e-mail addresses are linked to the domain name of the e-mail service provider. Switching means getting a completely new e-mail address, and there is no common practice to leave a forwarding address with the e-mail service provider unless one continues to pay for the abandoned service. Moreover, ease of exit is a mixed blessing. As game theory suggests, virtual communities are likely to unravel due to the ease of exit and entrance.[20]

2. Tyranny by the majority.

Cyberpopulism gives inadequate attention to possible tyranny by the majority.[21] A pure form of cyberanarchy would allow unhindered discrimination based on race, gender, sexual orientation, and other immutable personal characteristics.[22] Even if popular will is the correct measure, internet plebiscites are not

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16 Netanel, 88 Cal L Rev at 429 (cited in note 5) ("Virtual communities, with their relative ease of exit (and, in many cases, entrance) present classic counter examples to the types of territoriality bound close-knit groups in which rule by social norms is possible.").

17 Id at 434.

18 Compare id at 435 (offering a similar confession).

19 See id at 437.

20 Netanel, 88 Cal L Rev at 437 (cited in note 5).

21 See id at 425 (arguing that exit is "far from costless" where users have developed "deep feelings of attachment and loyalty to virtual communities").

22 See id at 415 ("Cyberpopulism fails to provide a workable mechanism for protecting the liberties of minorities and dissenters."). See also id at 444–45.

necessarily certain to reflect the popular will. Further, they do not necessarily promote civil discourse, which is a collective good.[23] To the extent that consumers rely on Cyberagents or intermediaries, they are not in fact exercising individual consent.[24] In addition, important economies of scale and scope provide centralization forces.[25]

3. Why rediscover the liberal state?

Netanel also is skeptical about the institutionalization of internet regulatory authority and a new Cyberregulatory authority:

> From the viewpoint of the liberal state, there would be no advantage—and considerable disadvantage—in delegating authority to a cyberconstitutional authority to interpret and enforce liberal metanorms in cyberspace. The liberal state has existed for over 200 years. It has an established tradition of defining and applying liberal principles. The state's hallucination elucidation of those principles thus has considerable power in shaping social understandings and norms. State-centered law—both legislation and constitutional adjudication—carries considerable weight in legitimizing certain beliefs and practices and delegitimizing others. . . . A cyberauthority, in contrast, would have to start from scratch.[26]

4. Lack of accountability.

Professor Michael Froomkin has sharply criticized domain name regulation under ICANN as insufficiently accountable.[27] Even though Froomkin's target is ICANN, which exists in a hy-

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[23] See id at 430.

[24] Netanel, 88 Cal L Rev at 440 (cited in note 5) (noting that many unsophisticated consumers must rely on sophisticated internet users as their "agents").

[25] See id at 440–41 (arguing that the diversity of cyberspace is threatened by the concentration of service providers that follows from technology induced economies of scale and that, in this environment, the threat of "oligopolistic constraints on competition" is particularly troublesome).

[26] Id at 484.

[27] A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 Duke L J 17, 26–27 (2000) (noting that the authority that ICANN has violates "fundamental U.S. policies that are designed to ensure democratic control over the use of government power").

brid framework, his claims of insufficient accountability would apply a fortiori if ICANN were completely private.

His most basic objection is to the privatization of important policy decisions. While he acknowledges that the government's interest in domain name regulation is shaky,[28] the fact that it holds control over the domain name system "imposes legal obligations on the United States which it cannot evade . . . . [T]he government should not be allowed to bob and weave around the Constitution's imposition of duties of due process and equal protection through the creation of formally private intermediaries for policy making."[29]

5. Local values.

In addition to the tension between the way private regulation really works and democratic political values, explored by Netanel, critics of private regulation also express concern that its global character is likely to ignore deeply held local or national values.[30] They worry that most private regulatory regimes ignore asymmetries in information and bargaining power and thus fail to protect the interest of consumers.[31] This is at the heart of the debate between Europeans and Americans over special adjudicative jurisdiction rules in the Hague Judgments Convention allowing consumers to sue at home.

6. Havens for misconduct.

Concerns also exist that private regulation, at least in some areas such as gambling and indecent content, is likely to encour-

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[28] Id at 165 (arguing that government's interest is not easily described as either a property interest or an intellectual property interest, but, rather, that its main legal interest may be as beneficiary of contracts with NSI and others who manage DNS).

[29] Id at 166.

[30] For example, the National Research Council ("NRC") will convene two international symposia as part of their project, "Global Networks and Local Values." The stated goals of the project are to "discuss the tensions between (a) the global expansion of the Internet and other communications networks and services that traverse borders seamlessly and in many ways uncontrollably, and (b) the desires of nations and communities to protect indigenous values through policies that apply within their borders." See generally <http://www4.nas.edu/webcr.nsf/ProjectScopeDisplay/CSTB-L-97-06-A> (visited Feb 5, 2001) [on file with U Chi Legal F].

[31] See Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 Colum L Rev 1549, 1564 n 51 (1989) (arguing that information asymmetry justifies mandatory regulation).

age havens for conduct reprehensible to democratic political entities who will have difficulty erecting border controls.[32]

7. Tyranny of code.

In his important book, *Code and Other Laws of Cyberspace*, Larry Lessig explains that rules amounting to de facto law can be embodied in computer code.[33] When that occurs, persons affected by the code are compelled to comply with this "law" more completely than traditional enforcers like sheriffs might ever compel them to comply with conventional legal rules.[34]

The rules embedded in code are developed not by politically accountable public officials, but by private persons, usually far removed from public scrutiny. Lessig raises, in general terms, the question of whether a shift of regulatory power to such a private, self-enforcing regime may undermine important constitutional values.[35] Ultimately, he implies, conventional states are the best regulatory mechanism for the internet.[36]

Saying that the state must "back" regulation of the internet, however, does not mean that state institutions must regulate the internet directly. Netanel, for example, leaves room for hybrid regulation. If one accepts some or all of Netanel's critique and advocacy of a role for public institutions, the question remains: How should mutual roles for governmental and private regulation be structured?

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[32] See Joel Michael Schwarz, *The Internet Gambling Fallacy Craps Out*, 14 Berkley Tech L J 1021, 1023–26 (1999) (reviewing concerns about offshore internet gambling havens); Keith J. Epstein and Bill Tancer, *Enforcement of Use Limitations by Internet Service Providers: How to Stop that Hacker, Cracker, Spammer, Spoofer, Flamer, Bomber*, 19 Hastings Commun & Enter L J 661, 679 (1997) (referring to concern that internet is becoming haven for stalkers, child molesters, and pornographers).

[33] Lessig, *Code* at 6 (cited in note 15).

[34] Id at 89–99 (suggesting that code acts as inherent regulator and enforcer).

[35] Id at 206–07 (questioning whether the shift from lawmakers to code writers should proceed "unchecked").

[36] Id at 488:

> First, the liberal state would likely be a more effective guarantor of liberal rights, both online and off, than would a new, independent cyberspace authority. Second, cyberconstitutionalism would likely resemble the "top-down" rule and interest group politics of the territorial liberal state, not the "bottom-up" ordering cyberians envision. Third, given insurmountable collective action problems, a cyberauthority is highly unlikely to emerge without the backing of the territorial liberal state.

8. Limitations of the critiques.

Most of the critiques of private regulation expose its shortcomings, especially its lack of accountability, and challenge many of the assumptions on which its defenders premise their advocacy. But the critiques do not offer much in the way of new mechanisms of accountability. Implicitly, any criticism of private regulation suggests that regulation by public entities would be better. Regulation by public entities makes its easier to hold the decision makers politically accountable through the traditional techniques of administrative and constitutional law. But criticisms of public agency regulation abound as well. There is nothing about the internet that makes it more suitable for traditional regulation than airlines, railroads, motor carriage, occupational health and safety, or television broadcasting, all of which are subject to persistent calls for deregulation.

So the hard question is whether regulatory mechanisms for the internet can be constructed that offer some of the advantages of both private and public regulation. Moreover, the respective roles of nation states and other, more private, institutions in shaping and applying law are evolving.[37] Developing appropriate hybrid regulatory mechanisms for the internet is a part of this phenomenon.

C. Categories of Private Regulation and Mechanisms of Accountability

The introduction explained that private regulation occurs in four basic situations: when (i) public institutions delegate some of their rulemaking and adjudication authority to private institutions or defer after the fact to private decisions; (ii) those subject to private regulation consent in advance to the private regulatory regime; (iii) private decisions are sufficiently acceptable to those affected by them that they acquiesce after the fact rather than pursuing their disputes before public institutions; or (iv) persons or entities in control of valuable resources issue rules and enforce them by threatening denial of access to the valuable right. The fourth situation presents greater challenges for structuring hy-

[37] For a general discussion, see Henry H. Perritt, Jr., *The Internet is Changing the Public International Legal System*, 88 Ky L J 885, 893–94 (2000) (explaining and citing other authorities on the increasing role of nongovernmental organizations in making law, sometimes at the expense of the nation state).

brid regulation because it lacks the enforcement and judicial-review connections inherent in the first three situations.

Dean Abramson identifies three basic categories of private regulation: private regulation resulting from formal government delegation, private regulation involving no formal connection between government and private regulators, and private regulation involving formal connections between government and private regulators.[38] Abramson's third category ("Category B") includes advisory committees, rule negotiation groups, arbitrators and issuers of private voluntary standards when standards are incorporated into public law.[39] Abramson's first category obviously corresponds to the first situation suggested above, although he does not include deferral. His second category encompasses the other situations suggested above. His third category includes elements of several of the situations.

As with almost any taxonomy, practical examples may implicate more than one category. ICANN—the private regulatory regime for administering the internet's addressing and domain name system—is a good example. The analysis that follows explains that certain parts of ICANN relate to the delegation category; other parts are nominally contractual; and in important respects the effectiveness of ICANN depends on its self enforcing power over valuable resources—access to the internet.

1. Public law delegation and deferral—"delegation."

The nondelegation doctrine questions the loss of accountability resulting when public institutions performing legislative functions delegate their authority to private decision makers.[40] Dele-

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[38] Abramson, 16 Hastings Const L Q at 169 (cited in note 1).

[39] See id at 171–72 (describing the connection between government and private regulators).

[40] See *ALA Schechter Poultry Corp v United States*, 295 US 495, 537 (1935) (holding that Congress cannot delegate its legislative authority to private trade or industrial associations because such delegation is inconsistent with the "constitutional prerogatives and duties of Congress"). See also *Panama Refining Co v Ryan*, 293 US 388, 430 (1935) (recognizing immutable constitutional limitations on Congress's power to delegate legislative functions to the executive branch or to administrative agencies); Froomkin, 50 Duke L J at 94 (cited in note 27) (arguing that ICANN's affects on the legal rights of third parties are so sweeping that DoC has effectively "outsourced policymaking" to the corporation and that such outsourcing may violate the nondelegation doctrine); Henry H. Perritt, Jr., *International Administrative Law for the Internet: Mechanisms of Accountability*, 51 Admin L Rev 871, 896–97 (1999) (discussing the implications of the nondelegation doctrine for the structure of an international internet agency). Dean Krent offers a working definition of delegation: "any congressional act which empowers those outside Congress to enforce or implement a legislative objective and backs those efforts with the coercive force of the

gation of rulemaking power, however, is commonplace in the modern regulatory state, including federal delegation to states,[41] delegation of authority to set standards for health care to the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"),[42] delegation of authority to approve minimum price orders to agricultural cooperatives,[43] delegation of rules and enforcement of airport security arrangements under the Federal Aviation Act ("FAA"),[44] and delegation of authority over railroad trucking rates to Rate Bureaus.[45] Newer examples include the 1994 Fraud and Abuse delegation to Securities Exchanges,[46] the COPPA Safe Harbor Statutory Provisions,[47] ICANN, and the U.S./EU Privacy Safe Harbor Agreement.[48]

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federal government." Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw U L Rev 62, 67 (1990).

[41] Krent, 86 Nw U L Rev at 80–84 (cited in note 40).

[42] See id at 85–86. See also Jody Freeman, *The Private Role in Public Governance*, 75 NYU L Rev 543, 610–13 (2000) (describing the crucial function the JCAHO, a private organization of professional associations, plays in certifying health care institutions for compliance with federal regulations); id at 600 n 232, citing U.S. Department of Health and Human Services, Office of the Inspector General, *The External Review of Hospital Quality: A Call for Greater Accountability* 1–2 (July 1999), available online at <http://www.dhhs.gov/progorg/oei/reports/a381.pdf> (visited Feb 4, 2001), and U.S. Department of Health and Human Services, Office of the Inspector General, *The External Review of Hospital Quality: The Role of Accreditation*, 6–7 (July 1999) available online at <http://www.dhhs.gov/progorg/oei/reports/a382.pdf> (visited Feb 4, 2001) (discussing government-issued reports that examine the role played by JCAHO in reviewing hospitals); [all internet materials cited in this note on file with U Chi Legal F].

[43] Krent, 86 Nw U L Rev at 86–87 (cited in note 40) (describing the Agricultural Marketing Agreement Act of 1937).

[44] Federal Aviation Act of 1958, codified at 49 USC §§ 40101–28 (1994). See also Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 Georgetown L J 1625, 1667 (1986) (noting that section 601(a)(5) of the FAA requires the Administrator to promulgate rules governing the maximum hours for periods of service for "airmen and other employees of air carriers").

[45] *Square D Co v Niagara Frontier Tariff Bureau, Inc*, 476 US 409, 413–14 (1986) (referring to Reed-Bulwinkle Act authorizing FCC to grant approval to rate bureau agreements for setting rates collectively); *Georgia v Pennsylvania Railroad Co*, 324 US 439, 459 (1945) (reviewing role of rate bureaus and railroad rate setting).

[46] See generally Ross P. Buckley, *The Role and Potential of Self Regulatory Organizations: The Emerging Markets Traders Association from 1990–2000*, 6 Stan J L, Bus & Fin 135 (2000) (reviewing operation of new self-regulatory organization). The 1994 Telemarketing and Consumer Fraud and Abuse Protection Act, Pub L No 103-297, 108 Stat 1545 (1994), codified at 15 USC §§ 6101–04 (1994), required the SEC and self-regulatory organizations to promulgate rules to prohibit deceptive or other abusive telemarketing acts in the sale of securities.

[47] See discussion of COPPA in text accompanying note 73.

[48] See Part I A.

Under the 1994 Telemarketing and Consumer Fraud and Prevention Abuse Act ("the 1994 Act"),[49] for example, the Securities and Exchange Commission reiterated its commitment to hybrid regulation long used to regulate securities exchanges. Declining to promulgate its own rules to implement the statute, it found that existing self-regulatory organization (exchange) rules were sufficient to realize the goals and enforce the duties expressed by the statute.[50] Notably, however, this SEC conclusion has been criticized because there apparently is no private right of action to enforce SRO rules.[51]

Deferral to private decisions is a slightly different concept. Public adjudicatory institutions have the power to decide disputes, but they abstain from deciding them in favor of private decisions when certain criteria are met. NLRB deferral to collectively bargained arbitration,[52] suspension of judicial litigation in favor of private arbitration,[53] eventual enforcement of private arbitration awards under the Federal Arbitration Act and the New York Convention,[54] and abstention by courts in cases involving private association decisions[55] all are examples.

As noted in the introduction to this Part, ICANN illustrates several different categories of private regulation. In important respects, it illustrates delegation of governmental power. In this context for private regulation, the inherent power of the public rulemaking and adjudicatory institutions represent the public law framework, while the exercise of delegated power and the making of decisions to which public institutions will defer represent the private activity within the framework.

In theory, this context provides robust criteria for making private decisionmaking accountable. The nondelegation doctrine in administrative law requires "channeling" of private decision-

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49 15 USC §§ 6101 et seq (1994).

50 See SEC Release No 34-38480 (Apr 7, 1997); 62 Fed Reg 698917 (Nov 12, 1997) (notice of accelerated approval of marketed exchange rules).

51 Terrance S. DeWald and Amy B. Blumenthal, *Telemarketing and Consumer Fraud and Abuse Prevention Act: Did Congress Create a Private Right of Action for Violation of SRO Rules?*, 1062 PLI/Corp 241 (1998).

52 See generally Michael K. Northrop, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U Miami L Rev 341 (1989).

53 9 USC § 3 (2000) (providing for stay pending arbitration).

54 9 USC § 9 (2000); id at § 201 (enforcement of New York Convention).

55 See *Austin v American Association of Neurological Surgeons*, 120 F Supp 2d 1151, 1152–53, 1155 (N D Ill 2000) (rejecting claim against private association for suspension; stating rules for deference under Illinois law).

making by limiting the scope of the subject matter of the private actors, and by assuring judicial review of their decisions.[56]

ICANN issues rules for issuance and retention of domain names and for adjudication of trademark/domain name controversies.[57] New dispute resolution intermediaries, such as administrative panels under the World Intellectual Property Organization ("WIPO") dispute resolution rules,[58] adjudicate these controversies under the ICANN rules. Other intermediaries—domain name registrars—enforce administrative panel decisions by revoking or transferring domain names.[59]

The public law framework for ICANN takes the form of a "memorandum of understanding" entered into between ICANN and the United States Department of Commerce ("DoC").[60] Among other things, the memorandum commits ICANN to design, develop, and test a process "for affected parties to participate in the formulation of policies and procedures that address the technical management of the Internet . . . includ[ing] methods for soliciting, evaluating and responding to comments in the adoption of policies and procedures."[61] The ICANN MOU obligates ICANN to afford participation to affected parties and to develop a membership mechanism that fosters accountability and representation of global and functional diversity.

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[56] *Whitman v American Trucking Association*, 121 S Ct 903, 912 (2001) (restating elements of the nondelegation doctrine).

[57] See *Internet Corporation for Unassigned Names and Numbers Uniform Domain Name Dispute Resolution* ("ICANN UDRP"), available online at <http://www.icann.org/udrp/udrp.htm> (visited Feb 5, 2001) [on file with U Chi Legal F].

[58] See *World Intellectual Property Organization Supplemental Rules for Uniform Domain Name Dispute Resolution Policy* ("Supplemental Rules") (effective as of Dec 1, 1999), available online at <http://arbiter.wipo.int/domains/rules/supplemental.html> (visited Feb 5, 2001) [on file with U Chi Legal F].

[59] See, for example, *ICANN Registrar Accreditation Agreement* § II(K) (Nov 4, 1999), available online at <http://www.icann.org/nsi/icann-raa-04nov99.htm> (visited Feb 5, 2001) [on file with U Chi Legal F]:

> K. Domain-Name Dispute Resolution. During the term of this Agreement, Registrar shall have in place a policy and procedure for resolution of disputes concerning SLD names. In the event that ICANN adopts a policy or procedure for resolution of disputes concerning SLD names that by its terms applies to Registrar, Registrar shall adhere to the policy or procedure.

For clarification, see id at § I(K) ("An 'SLD' is a second-level domain of the DNS.").

[60] See *Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers* § 5(C)(6) ("ICANN MOU") (Nov 25, 1998), available online at <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm> (visited Feb 5, 2001) [on file with U Chi Legal F].

[61] Id.

Professor Froomkin traces ICANN's power to DoC's control over the domain name system ("DNS") root server,[62] a control which the U.S. Government has not given up. He also concludes that DoC holds an effective veto over ICANN's policies, a veto of which ICANN is well aware.[63] But, despite these formal links to governmental power, Professor Froomkin finds the hybrid umbrella for ICANN ineffective:

> The specter of a series of ICANN clones in the United States or in cyberspace should give one pause, because ICANN is a very bad model, one that undermines the procedural values that motivate both the APA and the Due Process Clause of the Constitution. DoC's reliance on ICANN has (1) reduced public participation in decisionmaking over public issues, (2) vested key decisionmaking power in an essentially unaccountable private body that many feel has already abused its authority in at least small ways and is indisputably capable of abusing it in big ways, and (3) nearly (but . . . not quite) eliminated the possibilities for judicial review of critical decisions regarding the DNS. So far, ICANN appears to be accountable to no one except DoC itself, a department with a strong vested interest in declaring its DNS "privatization" policy to be a success.[64]

The "safe harbor" agreement between the European Commission and the DoC, allowing U.S. entities to exchange personal data with European entities as long as they participate in private regulatory regimes meeting certain criteria to protect privacy, is an international example of delegation and deferral.[65] When more than one national sovereign delegates governmental power, the

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[62] See Froomkin, 50 Duke L J at 106 (cited in note 27) ("Certainly, until ICANN came along, the U.S. government's de facto control over the root was clear, if not often exercised."). Professor Froomkin does not make it entirely clear whether the root server is government property, or an asset or operation as to which Congress has asserted legislative power.

[63] Id at 106–13 (discussing ICANN's position that it only regulates because the government "makes ICANN do it").

[64] Id at 29.

[65] The EU/U.S. safe harbor is considered in greater detail in Perritt, 88 Ky L J 885 (cited in note 37); Henry H. Perritt, Jr. & Margaret G. Stewart, *False Alarm*, 51 Fed Commun L J 811 (1999); Henry H. Perritt, Jr., *Law and the Information Superhighway* 176–85 (Aspen 2d ed 2001); Joel Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 Stan L Rev 1315 (2000).

techniques employed by the nondelegation doctrine to assure accountability must be adapted to the international context.[66]

The core value embedded in the nondelegation doctrine is political accountability. Rules should be made only by those who are accountable to the people and—equally important—rules that engender sufficient public opposition should be amenable to change. The ultimate protection of the people is that rules made by a regulatory agency are subject to legislative nullification. Congress can enact legislation amending or repealing earlier legislation and, through that process, abolish an administrative agency outright. If rules promulgated by an internet regulatory agency are sufficiently controversial, Congress can hold hearings on them. If there is sufficient opposition, Congress could enact a statute overturning the rules.[67]

Some nondelegation doctrine cases can be read to suggest that an absolute requirement of delegation is the availability of judicial review in an Article III court.[68] But none of the controlling cases say that explicitly, and a more reasonable interpretation of the doctrine is that the functional equivalent of judicial review in an Article III court is required. That is, someone objecting to a rule adopted by the agency must have the right to present the objections to an institution that uses adjudicatory procedure and allows a fair opportunity to consider the challenged rule in light of the limitations imposed on the agency by its organic instrument. And as long as the adjudicatory review and decisionmakers are reasonably independent of the same political influences that control the agency, the judicial review requirement should be satisfied.

Dean Krent, Professor Froomkin, and others have expressed concern over evasion of the traditional nondelegation doctrine controls (ascertainable statutory standards channelizing the delegated authority combined with judicial review) when the government delegates rulemaking or adjudicatory power to private

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[66] See Perritt, 51 Admin L Rev at 896–97 (cited in note 40).

[67] See *INS v Chadha*, 462 US 919, 953 n 16 (1983) (stating that when "[e]xecutive action under legislatively delegated authority . . . is exceeded," it is not inherently invalid, but rather, "open to judicial review as well as the power of Congress to modify or revoke the authority entirely").

[68] See *Lujan v Defenders of Wildlife*, 504 US 555, 605 (1992) (Blackmun dissenting) ("[I]ronically, this court has previously justified a relaxed review of congressional delegation to the executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review."); *Touby v United States*, 500 US 160, 170 (1991) (Marshall concurring) (suggesting that judicial review must be implied in order to save delegated lawmaking).

organizations.[69] Nevertheless, accountability mechanisms do exist, including self-interest of sovereign governmental entities other than the federal executive branch, self-interest of particular industry representatives, judicial review and market forces.[70] Indeed, Krent notes, enhanced participation through private entities might adequately compensate for a reduced role for elected public officials in superintending regulation.[71]

But he cautions:

> the participatory explanation cannot justify congressional delegations outside the federal government in several contexts. Most notably, it cannot account for delegations to private experts who represent no constituency. Furthermore, delegations to private individuals serving in government agencies, such as the FOMC, cannot be explained as well. Delegations to *qui tam* relators are also difficult to justify, since no one has elected the relators to help govern everyone else. . . . Only Congress has determined whether or not a group is sufficiently representative to bind individuals within that group, and it is by no means clear that the groups selected are truly representative of those affected by governmental regulation. Instead, Congress has delegated authority to concerned special interest groups. Although the participation may, to a certain extent, reflect republican values, it is an inegalitarian republicanism at best.[72]

Krent's analysis suggests that delegation to private bodies regulating the internet would be appropriate only upon assurances that the private regulatory body represents relevant constituencies and that it do so through reasonably democratic means.

Sometimes, the strings attached to private regulation when public institutions delegate governmental power may be too tight. The Children's Online Privacy Protection Act ("COPPA")[73] may be

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[69] See Krent, 85 Nw U L Rev at 95 (cited in note 40) ("Prior delegations of authority outside federal government coexist with understanding of separation of powers uneasily at best."); Froomkin, 50 Duke L J at 143 (cited in note 27) (noting that the "usual" delegation to a private person originates in a statute, but in the case of ICANN, the delegation results from a contract between the Department of Commerce and a private firm).

[70] Krent, Nw U L Rev at 102 (cited in note 40).

[71] See id at 106.

[72] Id at 109–10.

[73] Children's Online Privacy and Protection Act of 1998 ("COPPA"), 15 USC § 6501 et seq (2000).

an example. COPPA provides a two-level public law framework for private regulation by content providers. The statute empowers the Federal Trade Commission ("FTC") to promulgate rules for protecting children's privacy in web sites aimed at children through the regular Administrative Procedure Act process.[74] It also defers to private regulatory regimes that have been accredited by the FTC as meeting minimum standards. The FTC has begun to review private applications for safe harbor treatment under the Act.[75]

The hybrid character of this approach is obvious: a federal statute, supplemented by federal agency accreditation of private regulatory regimes, represents the public law framework. The private regimes applying for accreditation represent the private working out of details.

While it is too early to draw firm conclusions about the COPPA framework, COPPA may illustrate a danger that hybrid regulatory regimes should avoid: making the public law framework too "tight" to allow incentives for participation in the private regulatory regimes authorized by the public law framework. The statutory criteria for safe harbor treatment of private regulation may be so specific as to foreclose attractive private alternatives. Willingness to participate in private regulatory arrangements involve a form of negotiation between both the private interests involved in the private regulatory regime, and between those private interests and the public institution providing the public law framework. Successful negotiation depends upon an assessment by participants of whether the negotiated outcome will produce a more attractive result than alternatives to a negotiated outcome.[76] If the public law framework overly circumscribes the possible outcomes of the negotiated private regime, potential participants in the private regime have no incentive to prefer the private regime to direct application of public law rules.

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[74] Id. See also Federal Trade Commission, Children's Online Privacy Protection Rule, 16 CFR Part 312 (1999) (noting that the Federal Trade Commission is authorized to promulgate rules under COPPA).

[75] See Federal Trade Commission, *Safe Harbor Program Application Review for Compliance with COPPA*, available online at <http://www.ftc.gov/privacy/safeharbor/shp.htm> (visited Feb 6, 2001) [on file with U Chi Legal F] (posting applications and soliciting public comments regarding safe harbor treatment of self-regulatory guidelines under COPPA).

[76] See Perritt, 74 Georgetown L J at 1635 (cited in note 44) (discussing BATNA).

2. Consent and waiver—"contract."

Most private regulation occurs within a contractual framework, in which those bound by private regulatory decisions agree in advance to be bound. Private associations such as the Boy Scouts,[77] churches, condominium associations, AOL, and Microsoft Network all are examples. In this form of private regulation, contract identifies the legislators, judges, and sheriffs, and also defines subject matter and the processes for making, applying, and enforcing rules. The parties bound by private regulatory decisions are congruent with the parties to the contract.

Many private privacy regulatory regimes depend upon intermediaries to revoke membership or seals that immunize members or holders from direct action by public authorities.[78] In these circumstances, also, the legal framework is contractual.

ICANN, exemplifying the delegation category, also has attributes of the contract category. ICANN's rules are implemented through contracts entered into between domain name registrars and domain name registrants. In theory, domain name registrants agree to the terms of the contract, such as the term, explored in the voteauction.com case discussed in Part I C 4 b, that the domain name not be used for illegal purposes. But as Professor Dinwoodie points out, the contract basis for these rules is a fiction—or at least farfetched. Whoever wants an internet domain name must agree to the contractual terms decided upon by ICANN.

While consent-based private regulatory regimes may appear purely private, they are not. Contract law developed and applied by public institutions provides a public law framework within which the private regimes operate. While usually denominated "private law" rather than "public law," the frameworks nevertheless represent judgments by public institutions as to the permissible scope of private regulation.

Controversies over this kind of private regulation of the internet center on the meaning of "consent." Often, the terms of the contractual framework are determined not through negotia-

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[77] See, for example, *Boy Scouts of America v Dale*, 530 US 640, 656 (2000) (holding that admission of a homosexual scout master would significantly affect the Boy Scouts's right to associate with whomever it deems meets the standards of the organization).

[78] See, for example, <http://www.truste.org/users/users_how.html> (visited Feb 4, 2001) [on file with U Chi Legal F] (describing Truste, a private online organization that monitors the information gathered by companies about their customers and gives the Truste seal to companies that meet certain privacy standards set and enforced by Truste).

tion among all affected parties, but by unilateral decision of one party. The law must specify what kind of conduct by the other parties represents assent to the unilaterally developed terms. Whether subjecting oneself to the private regime represents legally effective consent turns on adequate notice of the terms, and on the availability of alternatives to a particular regime. This, in turn, invites evaluation of the "switching costs" for leaving one regime in favor of another.[79]

3. "Acquiescence."

Regardless of the construction of public law frameworks, some private regulation will occur in circumstances where participants voluntarily accept it after the fact.

The effect of private decisionmaking often depends not on explicit delegation by public institutions or on before-the-fact consent to the private regulatory regime, but on the practical acceptability of the private decisions. Employees denied promotions or dismissed often accept the original decision or the result of employer-provided grievance mechanisms rather than suing in court or filing charges with the National Labor Relations Board or the Equal Opportunity Commission. More than a thousand domain name disputes have been decided by the WIPO dispute resolution process, discussed in Part I C 1, but almost no lawsuits in the national courts have been filed over these disputes, even though such national court litigation is permissible under the ICANN UDRP. That is a strong example of acquiescence. Private litigants often accept the result of advisory arbitration or other dispute resolution mechanisms rather than pressing for a decision by a jury or judge.

In the credit card chargeback regime, credit card issuers are intermediaries charged with adjusting disputes between merchants and consumers, declining to credit merchants who fail to deliver promised merchandise or services, and ultimately revoking credit from consumers who refuse to pay for merchandise or services delivered pursuant to agreement.[80] While the credit card chargeback regime is hybrid in that Regulation Z provides the public law framework within which private rules, adjudication,

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[79] See Netanel, 88 Cal L Rev at 426–27 (cited in note 5) (discussing problems with the theory that user-exit from internet-based communities is easy and costless).

[80] Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace; Demand for New Forms of ADR*, 15 Ohio St J on Disp Resol 675, 689–94 (2000) (discussing the credit card chargeback system).

and enforcement occur pursuant to cardholder and merchant agreements, the public law framework is thin in practice. Rarely, if ever, does the Federal Reserve System get involved in determining whether the details of a chargeback regime meet the requirements of the statute, or otherwise satisfy democratic and due process values. The credit card chargeback system is best understood as an example of "acquiescence."

Most parties to credit card disputes apparently accept the result of the chargeback process rather than suing in court.[81] Surely far more disputes over e-commerce and other internet conduct exist than result in lawsuits. In that subset of controversies that do not turn into litigation, it is reasonable to characterize the disappointed party as having acquiesced in whatever form of dispute resolution was available.

This category of private regulation definitionally assures accountability because those adversely affected by private decisions can take their dispute to another level, eventually ending up before a public institution.

4. "Self-enforcing power" stemming from the direct deprivation of a valuable right.

The fourth category of private regulation presents the greatest accountability challenges. In this context, the power of private decision makers stems not from explicit or easily implied consent by those subject to the private governance, nor from explicit delegation of legal authority possessed by public institutions, but from the de facto control over a valuable resource by private persons or entities. Self-help repossession of tangible chattels and private control of range land[82] are pre-internet examples.

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[81] A Westlaw search on March 11, 2001 for state or federal cases with the term "credit card" and the term chargeback or "charge back" in the same paragraph in the syllabus or headnotes or the opinion produced only 27 cases. That is a miniscule number, considering the number of cardholders and merchants accepting credit cards. See generally *Satellite Receivers, Ltd v Household Bank*, 49 F Supp 2d 1083 (E D Wis 1999) (issuer's agreement with merchant allowed chargeback for amounts paid for unusable satellite dishes); *Exxon Corp v Butler*, 325 SE2d 806 (Ga App 1984) (affirming judgment for service station operator invalidating oil company's right to chargeback for incompletely filled out charge slips). The other reported cases mostly involved bankruptcy or other controversies between issuers and persons other than merchants or cardholders.

[82] Terry L. Anderson and J. Bishop Grewell, *Property Rights Solutions for the Global Commons: Bottom-Up or Top-Down?*, 10 Duke Envir L & Pol F 73, 80–83 (1999) (describing control of common cattle range land).

In *Flagg Brothers, Inc v Brooks*,[83] the Supreme Court rejected the idea that self-help repossession represented state action, entitling the adversely affected party to the protections of the due process clause of the Fourteenth Amendment.[84] The Court referred to the "essential dichotomy between public and private acts,"[85] and went on to state that "while as a factual matter any person with sufficient physical power may deprive a person of his property, only a State, or a private person whose action may be fairly treated as that of the State itself, may deprive him of an interest encompassed within the Fourteenth Amendment's protection."[86] The "total absence of overt official involvement plainly distinguishe[d]" *Flagg Brothers* from "earlier decisions imposing procedural restrictions on creditors' remedies."[87] The Court rejected the argument that state action was involved because the state had delegated a function exclusively belonging to the state to a private party,[88] illogically referring to the adversely affected party's option of replevying the goods before self-help was exercised, or seeking damages after the fact for wrongful use of self-help remedies.[89]

Domain name regulation, regulation by private internet and service content providers, and the "Mail Abuse Prevention System" ("MAPS")[90] are examples of private regulatory mechanisms that enforce their authority through the deprivation of a valuable right. The authority of ICANN and of domain name registrars derives not so much from the ICANN MOU as from the de facto control over the databases that translate domain names into IP addresses. By refusing to list a domain name in authoritative domain name servers, ICANN and domain name registrars can deprive those subject to their regulatory authority of access to the internet.[91] AOL and Microsoft Network can exclude subscribers

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83 436 US 149 (1978).

84 Id at 153 (rejecting the claim that a statutorily authorized sale of a debtor's goods held by a creditor constitutes "state action" for purposes of Fourteenth Amendment analysis).

85 Id at 165 (internal citations and quotations omitted).

86 Id at 157 (internal citations and quotations omitted).

87 *Flagg Brothers*, 436 US at 157.

88 See id at 159–60.

89 See id at 160 (holding that the assumption underlying these remedies is a recognition of the "traditional place of private arrangements in ordering relationships in the commercial world," and thus could "hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign").

90 See Part I C 4 c.

91 In reviewing an earlier draft of this article, David R. Johnson pointed out that denial of a domain name does not necessarily prevent access to the internet. One can

from access to their other subscribers under rules developed privately by the service providers.

MAPS represents an extension of this category of private regulation. MAPS maintains a list of IP addresses, known as the "Realtime Blackhole List" ("RBL"). The RBL is machinery for blocking access to the internet. It was created by private unilateral action. It is a valuable resource in the negative sense that one can use the internet only by not being listed in the RBL.

The spread of peer to peer networking architectures will make the fourth category of private regulation relatively more important with respect to the other three categories. Peer to peer networking relies on Larry Lessig's "code"—computer protocols that allow participants to discover resources maintained on other participants' computers. While one could categorize self-enforcing rules embedded in peer to peer networking protocols as contractually based (assent occurring when a participant uses the rule-including protocol), the actual affect of any rule on those excluded from resources results from the aggregate phenomenon of thousands or millions of protocol users interacting with a rule unilaterally adopted by the code writer. This looks much more like a single legislator (the code writer) prescribing law for a community defined by technology than a web of contractual parties negotiating rules for their partnership or joint endeavor.

Still, this category of private regulation overlaps the "contract" category to some extent. One can argue that "self-enforcing power" is not distinct from the "contract" category because electing to use the private resource represents legal consent to the private regulatory regime associated with the private resource. Indirectly, one also can argue that those internet hosts subscribing to MAPS's RBL are simply incorporating by reference the rules set associated with the RBL. Persons seeking to access the network resources provided by the subscribers are consenting to MAPS rules. But this is an attenuated form of consent. Because the resource is valuable, switching costs may be so high as to be infinite. The consent question resolves into a switching cost question, which, in turn, resolves into questions whether the resource to which access potentially is denied can easily be duplicated by others.[92]

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obtain a third level domain, and of course, one can rely on search engines' picking up pointers to an IP address.

[92] The feasibility of switching in this context is analogous to one of the elements of the "essential facility" doctrine under the antitrust laws. See *MCI Communications Corp v American Telephone & Telegraph Co*, 708 F2d 1081, 1132–33 (7th Cir 1983) (describing

The central question with respect to this category of private regulation is what form the public law framework should take. That depends, in turn, on the existence of a private right of action to challenge decisions by this category of private regulator, and on the criteria that would entitle the private regulator to a privilege or immunity. These issues are discussed in Part II. These questions cannot be resolved without also considering the appropriate prerogatives of those who control private property.

The special problems of self enforcing private regulation that relies on denial of access to a valuable resource are illustrated by three examples, one from more than one hundred years ago, and the other two in the internet context.

a) Cattle ranges and roundups. In the Wild West (the original one; not the "Wild West" of the internet), cattlemen blacklisted new entrants to grazing ranges when they concluded, privately, that the range had absorbed all the cattle it could handle. The blacklist barred new entrants from roundups and any other facilities of the enforcing cattlemen's association. The system broke down with the arrival of sheep, who did not require the mechanism of a roundup to be brought to market.[93] "Thus, roundups lost their effectiveness as an exclusion mechanism, and range wars sometimes resulted."[94]

The issue was, thus, one of sovereignty, where:

> sovereignty determines the ultimate authority to exclude others. The cattlemen's associations were sovereign with respect to the customary grazing rights until homesteaders and sheepherders challenged that sovereignty. The latter won the challenge by turning to the national sovereign with its power to force cattlemen off their customary ranges. In this sense, bottom-up property rights begin to blur with top-down property rights because both depend on having the coercive power to exclude.[95]

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the four elements necessary to establish liability under the essential facilities doctrine as "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility").

[93] See Anderson and Grewell, 10 Duke Envir L & Pol F at 80–82 (cited in note 82).

[94] Id at 82.

[95] Id at 83.

b) Voteauction.com. In October 2000, the Chicago Board of Election Commissioners became concerned that a web site operated in Austria, voteauction.com, had the potential to corrupt or, at least, to undermine confidence in the general election subsequently held on November 7, 2000 in Chicago and elsewhere in the United States.[96] Voteauction.com solicited voters in the then forthcoming election to offer to sell their votes, and also solicited persons interested in buying those votes. The web site was constructed so that offers to sell and offers to buy were made by filling out a form that included the address, with a pull down list including Illinois as an option. Moreover, the web site also included a summary of outstanding offers with Illinois as a specific listing.[97] There was, thus, little difficulty in concluding that Illinois courts could exercise jurisdiction over the web site under the *Zippo* continuum[98] and the targeting concept of *Millennium Enterprises*.[99] Accordingly, the Board of Election Commissioners filed a civil lawsuit in the Circuit Court of Cook County against voteauction.com and its individual organizers and managers.

But the existence of theoretical jurisdiction was not enough. Any judgment would need to be enforced, and the procedures for transnational enforcement of judgments were not only uncertain but would take months. The election was scheduled in weeks.

So, the Election Commissioners thought about practicable enforcement measures that might be taken against property located in the jurisdiction, or at least in the United States. One

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[96] See Preliminary Injunction Order ("voteauction.com Preliminary Injunction Order"), *Board of Election of Chicago v Hans Bernhard*, No 00 CE 031, 2 (Ill Cir Ct Oct 18, 2000) [on file with the U Chi Legal F]:

> Plaintiffs have demonstrated a likelihood of success on the merits . . . that Defendants . . . have violated the election laws of the State of Illinois and of the United States by using and operating a web site known as "voteauction.com" as an auction forum for the purpose of encouraging, soliciting and allowing residents of Illinois to sell their votes to be cast at the November 7, 2000 General Election and encouraging, soliciting, and allowing individuals and corporations to "bid" on and buy such votes.

[97] See id.

[98] See *Zippo Manufacturing Co v Zippo Dot Com, Inc*, 952 F Supp 1119, 1124 (W D Pa 1997) (holding that in internet cases, "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet").

[99] See *Millennium Enterprises, Inc v Millennium Music, LP*, 33 F Supp 2d 907, 922 (D Or 1997) (holding that personal jurisdiction did not lie where the plaintiff offered "no evidence that defendants targeted Oregon residents with the intent or knowledge that plaintiff could be harmed through their Web site"). The *Millennium Enterprises* opinion asks more to support jurisdiction than the interactivity demanded by *Zippo*. It seeks evidence of "targeting."

possibility was to target the domain name, "voteauction.com."[100] The offending domain name was present in Illinois and in hundreds or thousands of domain name servers supporting hundreds or thousands of internet service providers in the vicinity of Chicago.[101] But a litigation strategy against all those ISPs quickly was ruled out. Instead, voteauction.com's domain name registry, Domain Bank, was named as a defendant in the lawsuit, and the draft injunction attached to the complaint included a paragraph ordering that the domain name be withdrawn or canceled. On October 18, Circuit Court of Cook County Illinois Judge Murphy signed the injunction after a hearing.[102]

Domain Bank had been notified of the lawsuit, and had engaged in extensive telephonic discussions with counsel for the Election Commissioners. Domain Bank had, in its standard domain name registration agreement, a provision prohibiting the use of domain names for "illegal purposes." After the injunction was issued, signifying a judicial determination that the domain name was being used illegally, Domain Bank canceled the voteauction.com domain name, shutting down voteauction.com all over the world.[103]

But celebrations of victory in Chicago were tentative, and, sure enough, about a week later voteauction.com opened up under a new domain name, "vote-auction.com." This domain name was registered in Switzerland with the Swiss CORE Internet Council of Registrars ("CORE"). But CORE had a similar prohibition against illegal use in its standard domain name registration agreement. After extensive telephonic and e-mail discussions between counsel for the Election Commissioners and counsel for CORE, CORE also canceled the vote-auction.com domain name, once again shutting the site down. Subsequently, voteauction.com

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[100] Such an approach had been suggested by the author of this Article in Perritt, 32 Intl Law at 1138–40 (cited in note 9) (discussing domain names as a new target for judgment execution).

[101] The internet's domain name system is a hierarchical distributed database. When a user enters a domain name in a web browser, a designated domain name server maintained by that user's ISP looks up the domain name, seeking to translate it into an IP address. If that domain name server does not already know the IP address for the designated domain name, it sends a message to other domain name servers higher up the hierarchy asking them for it. Eventually, the IP address for the domain name is returned to the original domain name server, whereupon it caches it (stores it for a period of time in its own memory). This process of look up and caching causes any domain name used with any frequency to reside on multiple domain name servers throughout the internet.

[102] See voteauction.com Preliminary Injunction Order at 1 (cited in note 96).

[103] The author served as a consultant to counsel for the plaintiff and provides these facts from his own personal knowledge.

sought to publicize its IP address, the use of which would avoid the domain name system all together, but by then, the election had already occurred.

Voteauction.com illustrates the interplay between public and private regulation. The lawsuit and the injunction obviously were traditional adjudicatory processes by a court, a paradigmatic public institution. But an important part of the overall result turned on the private rule, promulgated by a private institution—the domain name registrars—that prohibited illegal use of the domain name. Based on the determination of illegality by the public institution, the private institution used its power over an asset, the domain name, to achieve the result desired by the complainant. Voteauction.com can be understood as an interesting case about judicial jurisdiction, but it also is about enforcement of a very broad rule by a private intermediary.

Voteauction.com involved the inverse of the usual relationship between public and private institutions. In voteauction.com, Illinois's public courts performed the adjudicatory function, and the private domain name registrars decided whether to enforce the judicial decision. Because no injunction clearly supported by personal jurisdiction bound either of the domain name registrars, their actions in revoking voteauction's domain name privileges is best understood as purely private action, informed by the public determination by the Circuit Court of Cook County.

The most important thing about voteauction.com was that once the decision of illegality was made, a private government took over and made the decision a reality by self enforcement: denying access to a valuable resource, the internet.

Voteauction.com also shows the importance and practicability in working out the boundary between public and private regulation. In some theoretical sense, it would have been better to have enforced the injunction against domain name translation in or near Chicago. That would have kept the enforcement action within the sovereign whose laws were being enforced. It also would have comported more comfortably with geographic limits on the jurisdiction of the court issuing the injunction. But doing that was impracticable, given the large number of ISPs and uncertain patterns of use. It was much easier under tight time deadlines, imposed by the proximity of the election, to focus enforcement efforts on a single intermediary—the first located in another state but within the United States, and the second located in a foreign country. The theoretical jurisdictional grounds were

shakier, but enforcement was practicable and was practically achieved.

c) The MAPS controversy. Controversy over the "Mail Abuse Prevention System" ("MAPS") illustrates relatively pure private regulation outside a public law framework. It clearly illustrates the self enforcing category, in which regulation began, not with a public body or with a contract, but with an idea in the mind of an individual who took on governmental functions.

MAPS is a nonprofit California corporation that allows ISPs and e-mail service providers to exclude unsolicited commercial email ("UCE")[104] from their systems.[105] MAPS maintains a list of IP addresses in the form of its RBL and permits MAPS subscribers automatically to exclude from their systems any e-mail message originating from one of the listed IP addresses. Some twenty thousand ISPs, corporations, government agencies and individuals, comprising some 40 percent of the internet, subscribe to MAPS.[106]

MAPS has published rules, known as "Basic Mailing List Management Principles for Preventing Abuse" ("BMLMPPA"),[107] which purport to state internet standards and best current practices for proper mailing list management. Among other things the rules require use of a double opt-in procedure[108] before mail can

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[104] Sometimes pejoratively called "spam." Spam is unsolicited e-mail broadcast to hundreds or thousands of e-mail addresses.

[105] See <http://mail-abuse.org//> (visited Feb 6, 2001) [on file with U Chi Legal F]:

> Welcome to the Mail Abuse Prevention System LLC (MAPS). We are a not-for-profit California organization whose mission is to defend the internet's e-mail system from abuse by spammers. Our principal means of accomplishing this mission is by educating and encouraging ISP's to enforce strong terms and conditions prohibiting their customers from engaging in abusive e-mail practices.

[106] See *Harris Interactive, Inc v Mail Abuse Prevention System*, No 00-CV-6364L(F), Plaintiff's Amended Complaint ¶ 50 ("Harris Complaint") (W D NY filed Aug 9, 2000), available online at <http://www.mail-abuse.com/cgi-bin/read.cgi?pagenum=13> (visited Feb 6, 2001) (complaint dismissed Aug 22, 2000). MAPS subscribers include Microsoft, BellSouth, Qwest, Micron, and AltaVista. See id at ¶ 62.

[107] See MAPS Basic Mailing List Management Guidelines for Preventing Abuse ("MAPS MLMGPA"), available online at <http://www.mail-abuse.com/manage.html> (visited Feb 6, 2001) [on file with U Chi Legal F] (stating that the MAPS MLMGPA are "intended to assist list administrators in establishing basic list management procedures that should help them avoid the most common pitfalls" associated with electronic mail list abuses). See also Harris Complaint at Appendix (cited in note 106).

[108] The double opt-in procedure requires a recipient to indicate affirmatively that it wishes to be on a mailing list and then to respond affirmatively to an e-mail message sent to confirm the subscription. See MAPS MLMPGPA Guideline "Permission of new subscribers must be fully verified before mailings commence," available online at <http://

be sent to a particular addressee. Complaints about mailers not complying with the rules result in the mailer being put on the RBL,[109] and owners of IP addresses on the RBL can be removed only by satisfying MAPS that they will comply in the future.[110]

MAPS illustrates the fourth type of private regulation identified in Part I C, regulation enabled by control of a valuable private resource. And MAPS does not start with ownership of the valuable private resources by the regulator; the resources are owned by thousands of private internet service providers. MAPS uses technology, "code" in Professor Lessig's parlance, to extend its private decisions into control of resources owned by others.

In August 2000, Harris Interactive, Inc. a public opinion survey organization, sued MAPS and a number of its subscribers in federal district court.[111] The complaint alleged tortious interference with business and contractual relations,[112] commercial disparagement,[113] negligent breach of a duty to administer the RBL in a fair and evenhanded manner,[114] violation of New York general business law prohibiting deceptive and confusing consumer communications,[115] defamation per se,[116] conspiracy to interfere tortiously with plaintiff's business,[117] federal antitrust violations for concerted refusal to deal,[118] attempted monopolization,[119] monopolization,[120] conspiracy to monopolize by refusal to deal,[121] forming and operating a trade association that unreasonably restricts competition,[122] and violation of the New York "Donnelly Act."[123] The suit requested compensatory damages in excess of fifty million dollars and punitive damages.

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www.mail-abuse.com/manage.html> (visited Feb 6, 2001) [on file with U Chi Legal F]. See also Harris Complaint at ¶ 42 (cited in note 106).

109 See Harris Complaint at ¶ 49 (cited in note 106).

110 Id at ¶ 51.

111 Id at ¶ 1.

112 See id at ¶¶ 77–82 ("First Cause of Action"); id at ¶¶ 114–19 ("Seventh Cause of Action"); id at ¶¶ 130–35 ("Tenth Cause of Action").

113 See Harris Complaint at ¶¶ 83–88 (cited in note 106) ("Second Cause of Action"); id at ¶¶ 120–24 ("Eighth Cause of Action").

114 See id at ¶¶ 89–93 ("Third Cause of Action").

115 See id at ¶¶ 94–98 ("Fourth Cause of Action").

116 Id at ¶¶ 99–105 ("Fifth Cause of Action"); id at ¶¶ 125–29 ("Ninth Cause of Action").

117 Harris Complaint at ¶¶ 106–13 (cited in note 106) ("Sixth Cause of Action").

118 Id at ¶¶ 136–42 ("Eleventh Cause of Action").

119 Id at ¶¶ 143–46 ("Twelfth Cause of Action").

120 Id at ¶¶ 147–49 ("Thirteenth Cause of Action").

121 Harris Complaint at ¶¶ 150–52 (cited in note 106) ("Fourteenth Cause of Action").

122 Id at ¶¶ 153–57 ("Fifteenth Cause of Action").

123 Id at ¶¶ 158–59 ("Sixteenth Cause of Action").

The Harris lawsuit reveals the dangers faced by a private regulator and the challenges presented to traditional legal institutions asked to develop a public law framework to assure accountability. The lawsuit alleged that MAPS placed Harris on the RBL without good cause[124] and without reasonably investigating facts or giving Harris an opportunity to be heard,[125] that it promulgated standards that interfered with legitimate communications,[126] and that it imposed conditions for removal from the RBL that were arbitrary and unreasonable.[127] The suit thus challenged the content of the private rules, and claimed absence of due process in applying them and illegality in the sanctions imposed for violating the rules.

On November 15, 2000, Exactis.com, Inc. sued MAPS in the United States District Court for the District of Colorado,[128] alleging claims under the Colorado Wiretapping Act, blocking communications in violation of state law,[129] the Colorado Organized Crime Control Act,[130] the Sherman Act,[131] the Colorado Unfair Trade Practices Act,[132] intentional interference with contractual relations,[133] intentional and negligent misrepresentation and extortion,[134] trade disparagement, and unfair competition. Exactis alleged that among the services blocked by MAPS were requested confirmations of brokerage transactions by Charles Schwab.[135] The complaint alleges a disagreement over the specific procedures to be used to ensure that a recipient wishes to receive e-mail transmitted through Exactis's service—MAPS insisting on double opt-in, Exactis utilizing measures "different from, but not less effective than" double opt-in.[136]

The example of cattle range regulation nicely parallels MAPS. Private rules restricting access to a valuable common re-

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124 See id at ¶ 92(4).

125 Harris Complaint at ¶ 60 (cited in note 106).

126 Id at ¶ 91.

127 Id at ¶ 64.

128 Motion and Memorandum of Plaintiff in Support of Temporary Restraining Order and Preliminary Injunction ("Exactis.com Complaint"), *Exactis.com, Inc v Mail Abuse Prevention System, LLC*, No 00-K-2250 (D Colo filed Nov 15, 2000) available online at <http://mail-abuse.org/lawsuit/exactis1.html> (visited Feb 6, 2001) [on file with U Chi Legal F].

129 Id at ¶¶ 65–72.

130 Id at ¶¶ 73–88.

131 Id at ¶¶ 89–101.

132 Exactis.com Complaint at ¶¶ 49–56 (cited in note 128).

133 Id at ¶¶ 38–48.

134 Id at ¶¶ 57–64.

135 Id at ¶ 16.

136 Exactis.com Complaint at ¶ 31 (cited in note 128).

source are made and enforced without intervention of regular legal institutions. Whether this kind of regulation in cyberspace will break down as it did on cattle ranges is an open question.

One can only speculate as to possible outcomes of the Exactis litigation had it not settled.[137] One obvious possibility is that the MAPS regulatory regime may be allowed to continue according to the desires of its owners and subscribers. Another possibility is that the regime will be shut down under an injunction or because of the magnitude of damages imposed or sought. Or, the courts might impose conditions on continued operation of the regulatory regime, analogous to those imposed in the past on private standard-setting organizations,[138] requiring substantive support for the content of rules and due process in their application and enforcement. Finally, the controversy, and others like it, may stimulate legislative action to channel such private self-regulatory activities.

The MAPS form of private regulation easily could be extended to other areas. Religious conservatives could organize a blacklist for ISPs that handle material that undermines family values—as defined by the authors of the list. The intellectual property community could organize a blacklist for ISPs that do not have sufficiently stringent policies to discourage infringement. Consumer groups could organize blacklists for ISPs that allow online merchants to operate without appropriate return and refund policies.

The spread of peer to peer networking will increase the number of MAPS imitators. Peer to peer networking depends on thousands or millions of users implementing networking protocols developed by third parties. Unlike the situation with AOL or MSN, the desired resources are not present on the property of the rule maker. Instead, the rule maker controls access to resources owned by others.

Rule makers who write peer to peer networking codes will no doubt come under pressure, not only from intellectual property owners, but from others, to exclude those who do not follow certain rules with respect either to their acquisition and use of networked resources or their offering of them to others.

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[137] The parties reached a settlement in the Exactis case on Oct 3, 2001. See "Exactis Suit Against Maps Dismissed," MAPS, available online at <http://mail-abuse.org/pressreleases/2001-10-03.html> (visited Oct 13, 2001) [on file with the U Chi Legal F].

[138] See, for example, *Radiant Burners, Inc v Peoples Gas Light & Coke Co*, 364 US 656, 658 (1961) (holding that the refusal of a standard-setting association to approve a competitor's design violated the Sherman Act).

In all of these cases, ISPs could be coerced into "subscribing" to the blacklist by threats that any non-subscribing ISP will be treated like an ISP that handles offending material. Confronted with the threat of being blacklisted, most ISPs would prefer to subscribe and thus become a part of an ever-expanding governance regime, adopting the rules unilaterally determined by the organizer of the blacklist.

Now David Post thinks all of this is just fine.[139] For Post, it is sufficient that the government does not administer the RBL; a private entity does. Post's preference for private ordering over what he calls "collective" regulation apparently is premised on the possibility of internet participants freely choosing which regulatory regime they prefer. It is not clear how this process of choice is supposed to work with MAPS. Presumably, Post would say that ISPs are free to subscribe to MAPS or not. That freedom may be illusory if MAPS itself or a future elaboration of MAPS were to blacklist any ISP who does not subscribe.

Moreover, an interest conflict exists between subscribing ISPs and ISPs handling unsolicited commercial e-mail ("UCE"). The former want to eliminate the costs of handling certain types of inbound e-mail; the latter want to use the internet as a unified whole, any part of which is reachable from any other part. Why should one side of the value argument get to make the decision because it is in a position to use code to enforce its decision? If the UCE handlers develop code that will circumvent the RBL, should that reverse the value decision? That apparently is the world that Post would prefer.

II. DESIGN OF PUBLIC LAW FRAMEWORKS: GIVING MEANING TO THE "HYBRID"

It is time to attempt to synthesize from these experiments some general concepts for the relationship between public law frameworks and private regulatory regimes.

All modern legal systems proceed from the foundational premise that only entities possessing sovereignty can make, ap-

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[139] See Post, 52 Stan L Rev at 1441–42 (cited in note 1):

> The MAPS "vigilantes" (bad) can just as easily be characterized as "activists" (good), and the kind of "bottom-up," uncoordinated, decentralized process of which the RBL is a part strikes me as a perfectly reasonable way to make "network policy" and to "answer fundamental policy questions about how the Net will work."

ply, and enforce law.[140] Despite the association of sovereignty with national governments, the reality of governance is dispersed among a rich variety of public and private institutions. Most people in industrialized society work for employers who administer private systems of workplace governance. Most money moves in complex clearinghouse systems set up and administered by private banks. Most industrial production and commerce takes place in private contractual webs. Much social and religious life transpires in private associations. The increased importance of international human rights, trade, and environmental law has drawn upon the energy and expertise of thousands of non-governmental organizations ("NGOs"), such as Amnesty International and Greenpeace, to provide information and analysis to treaty based institutions.

In theory, however, these private governments derive their power from the regular sovereigns and are subject always to the sovereign imposing new regulations and enforcing them.[141] The relationship between private governments and traditional sovereigns is determined by regular laws or regulations enacted by regular sovereigns, by constitutions defining the power of regular sovereigns, or by international treaty or customary law.

Ultimately, the relationships between any governments regardless of their character is determined by the practical ability to assert coercive power and by the willingness to do so, usually limited by conceptions of legitimacy. If a domain name server is located in Country X, the governmental regime applicable to that name server ultimately will be determined by the practical ability of Country X to have its police or army seize the domain name server and by the willingness of the police or army to do that under the rule of law they obey.

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[140] This section draws heavily on Perritt, 12 Berkeley Tech L J at 425–26 (cited in note 1).

[141] David Johnson, in reviewing an earlier draft of this article, objected to its implied embrace of hierarchy. While he accepts the need for governments and laws to enforce congruence, (see Part II F 6), he thinks that we are moving over the long term from hierarchical legal topologies to networked ones, citing the shift from monarchy and other absolutist forms of political rule to parliamentary democracy. He also could have cited the modern drift from traditional sovereignty to a "civil society" in which NGOs and other private organizations play roles formerly reserved to public authorities. See Perritt, 88 Ky L J at 900–03 (cited in note 37) (reviewing role of NGOs). It may be that the only way to control physical murder is to rely on state coercion, but when the threat is undesirable electronic messages, a richer set of horizontal and vertical relationships may be more effective and more just. There is no inherent reason that traditional governments are always more just than private ordering mechanisms.

Hybrid regulation signifies regulatory regimes in which broad public law frameworks allow private regulatory regimes to work out the details. Within this conceptual framework, Klaus Grewlich says that self regulation can be realized in three forms:

1. Partial (selective) immunity of enforcement powers of traditional legal institutions;
2. Immunity from the imposition of neighboring standards of behavior; or
3. Recognition of rule-based adjudicatory acts of the autonomous community.[142]

Hybrid regulation and other contractual solutions to jurisdictional uncertainty rely on intermediaries to develop and enforce rules.[143] Private regulatory regimes are a form of government. As such, they must have legislators, judges, and sheriffs.[144] Private legislators make the rules, private judges apply them to concrete situations, and private sheriffs enforce the rules against violators. Each type of institution, in the private regulatory regime as a whole, must be accountable. Hybrid regulation can be understood as providing public law frameworks to assure accountability.[145]

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[142] See Klaus W. Grewlich, *Governance in "Cyberspace": Access and Public Interest in Global Communications* 323 (Klewer Law Intl 1999).

[143] In the tax area, governments often use financial intermediaries—employers, banks, and retailers—to collect taxes.

[144] See Perritt, 12 Berkeley Tech L J at 426 (cited in note 1) ("The crucial elements of a self governing community are completeness, the availability of coercive power to enforce community decisions, and a contractual framework expressing the norms, procedures, and institutional competencies."). Part II B of this Article explores the three functions of government more fully.

[145] Accountability is a central feature of rule of law and democracy. See Jacques DeLile, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U Pa J Intl Econ L 179, 186–87 (1999) (citing examples of insistence on accountability of governments receiving U.S. aid); Jane S. Schacter, *MetaDemocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv L Rev 593, 594 (1995) ("Fidelity to the legislature is thought to satisfy the demands of democratic theory by allowing popularly elected officials, presumed to be accountable to their constituents, to make policy decisions."); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U Chi L Rev 689, 789 (1995) (exploring mechanisms for accountability of judges, consistent with traditions of Democracy and constitutionalism); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 Cal L Rev 535, 560 (1999) ("[I]n the first instance, the responsibility for developing effective governmental programs should almost always devolve on politically accountable institutions."); Froomkin, 50 Duke L J at 28 (cited in note 27) (noting that the purpose of shackling private parties through administrative procedure is to assure accountability); Netanel, 88 Cal L Rev at 451 (cited in note 5) ("social accountability" is part of the foundation of democratic culture); A. Michael Froomkin, *Of Governments and Gov-*

In evaluating the possibilities, the rest of this Article often uses the nomenclature and many concepts from administrative law, even though administrative law usually is thought of as focusing exclusively on public institutions. The justification for using administrative law as a source of concepts for making private regulation accountable also is that administrative law is concerned with protecting those regulated from arbitrary or procedurally irregular actions by regulators. That precise concern is the concern of this Article.

A. The Imprecise Boundary between Public and Private Regulation

In any legal system, the formal sovereign on occasion grants (delegates) governmental power to nominally private entities,[146] the sovereign limits what a private actor may do with her own or another's property, and the sovereign decides what contracts to enforce.

These interactions between the public realm and the private realm illustrate the influence of public law on private law and vice versa; the boundary always has been permeable.[147] According

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ernance, 14 Berkeley Tech L J 617, 628–29 (1999) (entrusting major aspects of policymaking to elected officials ensures some form of accountability to the public at large); Perritt, *International Administrative Law*, 51 Admin L Rev at 896–900 (cited in note 40) (explaining how mechanisms of accountability in American administrative law can be extended conceptually to internet regulatory agencies that operate in the international arena).

[146] See, for example, Joseph Story, *Familiar Exposition of the Constitution of the United States* §§ 10–13, 17–19 at 33–38 (Regnery 1986) (enumerating three types of American colony—provincial, proprietary, and compact—each involving governmental power delegated from the King).

[147] Regarding the terms "public" and "private" law, a leading commentator has stated that they are:

> common in a variety of contexts and have also carried a variety of other meanings. Because the public/private distinction emerged from the notion that there is a separate and distinct private order, private law can be understood as protecting pre-political rights. Private law, then, was that part of the legal system protecting the private ordering; public law consisted of government compulsions restricting private freedom. Under that definition, property law, tort law, and contract law may be considered examples of private law, and labor law and constitutional law public law.

Lan Cao, *Looking at Communities and Markets*, 74 Notre Dame L Rev 841, 924 (1999), citing Daniel A. Farber and Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 Mich L Rev 875, 886 (1991).

Legal reform for transitional societies focuses on private law in the sense that it emphasizes developing the law of property, of contracts, of corporations, and of financial markets. See Paul H. Brietzke, *Designing the Legal Framework for Markets in Eastern Europe*, 7 Transnatl Law 35, 41–51 (1994) (noting that neoclassical economists of the Chicago school generally believe that appropriate reforms for Eastern European govern-

to Philip Frickey and Daniel Farber, traditional conceptions hold that private law is that part of the legal system that protects private ordering, while public law consists of governmental compulsions restricting private freedom.[148] Now, they suggest, the distinction between public and private law has been blurred; private law reflects public policy choices, and public law tends to grant new individual rights.[149] "All conflict of laws rules allocate power to government."[150] And, public interests in a market economy include private interests.[151]

Most apparently private regulation is hybrid. The challenge is not to define an impermeable boundary between public and private spheres. While the public law framework for private regulation must recognize the historic difference between the law's treatment of the public and private spheres, it must include criteria or rules of thumb to constrain private decisionmaking, thus encompassing the three major functions of government: rulemaking, adjudication, and enforcement.

Rulemaking, as its name suggests, is the adoption of new rules or norms to guide behavior.[152] Adjudication is the application of rules to particular persons, entities, and events. Adjudica-

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ments should focus on adoption of "an *idealized* U.S. private law of property, contracts, corporations, bankruptcy and securities regulation").

148 Daniel A. Farber and Philip P. Frickey, *In the Shadow of the Legislature: the Common Law in the Age of the New Public Law*, 89 Mich L Rev 875, 886 (1991).

149 Joel Trachtman has observed that "private law is an oxymoron." Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 Vand J Transnatl L 975, 984 (1994). For additional sources of the distinction between public and private law, see id at 1035 n 245. In fact, he points out, conflict of laws—the traditional category of private international law—relates to public law. See id at 985.

150 Id at 985. Trachtman proposes allocation of prescriptive jurisdiction to government(s) whose constituents are affected by the subject matter, pro rata in proportion to the relative magnitude of such effects, as accurately as is merited given transaction costs in allocation of prescriptive jurisdiction. See id at 987.

151 See id at 997 (discussing whether conflict of laws address the state or the "private person"). Dean Krent and Professor Freeman reinforce this insight, pushing for a more sophisticated understanding of a regulatory state that enlists a variety of public and private actors in the governance enterprise. See Krent, 85 Nw U L Rev at 62 (cited in note 40); Freeman, 75 NYU L Rev at 543 (cited in note 42).

152 The rules may be technical: if a domain name server does not have a domain name in its look-up table, it must refer the domain-name-resolution request to another server, defined for a higher level domain. Rules may directly regulate behavior and define the consequences of disobeying a rule: one who uses the trademark of another, creating the likelihood of consumer confusion, must pay damages to the owner of the trademark. *Interstellar Starship Services v EPIX, Inc*, 125 F Supp 2d 1269, 1272 (D Or 2001) (stating the general rule that once trademark infringement is shown, plaintiff has only a minimal burden to recover damages). Rules may define governmental power: America Online may deny access to any subscriber who violates its "rules of the road." See, for example, *AOL Anywhere Terms and Conditions of Use*, available online at <http://www.aol.com/copyright.html> (visited June 20, 2001) [on file with U Chi Legal F].

tion may be highly formal, as in an American jury trial, or it may be very informal as when a graduate school dean decides whether a faculty member has met the criteria for tenure. All adjudicators must have mechanisms for deciding what rules to apply, for identifying the cases and persons they have power over, and for resolving disagreements about the facts. Adjudicators also must know what they should do with other adjudicatory decisions—are they bound by them or should they decide for themselves, essentially ignoring the other adjudicatory decisions?

Ultimately, rules, applied through adjudicatory decisions, must be enforced. In the public sphere, if someone thumbs his nose at an adjudicatory decision applying a rule to him, the state takes his property or puts him in jail. Both the taking of the property and the incarceration are acts of enforcement. Enforcers must know what rules and what adjudicatory decisions they are permitted and obligated to enforce (do NATO troops enforce arrest warrants from the Hague Tribunal?). And they also must know the extent of their enforcement powers (may an American drug enforcement agent arrest a Mexican citizen located in Mexico?). All three functions must be implemented through mechanisms that link private decisionmaking to public law.

It is not clear that David Post would agree with this proposition. For him, the distinction between public and private is much clearer, and important to preserve. He purports to agree with Lessig that fundamental values are at stake in the further construction of cyberspace[153] and that the threat to be resisted by law is the "'threat to liberty.'"[154] But he wants policy to be made by the market—the private sphere—rather than in the public sphere. For Post, the crucial salvation for MAPS and RBL is that it "is not government-based or government-endorsed in any way."[155]

But why should this matter so much? If I am mugged by a private individual rather than by a cop, I am not indifferent to my concussion or the loss of my wallet because the actor was private. If my employer wants to control my lifestyle in detail, I am no more free because I work for private enterprise rather than the state. If I must buy my groceries at the company store, and the company police suppress my criticism, I am not "free" because the store and the police force are not operated by the government.

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153 Post, 52 Stan L Rev at 1440 (cited in note 1).

154 Id at 1448, quoting Lessig, *Code* at 85 (cited in note 15).

155 Post, 52 Stan L Rev at 1450 (cited in note 1).

Post, having agreed that a threat exists, erects a Maginot line along the English Channel against (English) government participation in regulation, while neglecting the possibility that liberty will be attacked by Germany through the low countries. MAPS is a German blitz through Belgium. The English are unlikely to attack across the Channel. The law protected against private abuse and exploitation even before it protected against public-sector abuse. Wanting to keep the government in check is no argument for abandoning a rule of law with respect to private power.

Jody Freeman criticizes administrative law for its preoccupation with protecting the public realm against intrusions by private actors. She proposes instead a deeper analysis of the reality that most governance is a "set of negotiated relationships" between public and private actors.[156] She explains that the sharp distinction between public and private realms is misleading,[157] and that administrative law is wrong to focus only on accountability in the public realm.[158] She offers a rich set of examples of commingling of public and private decisionmaking, including incorporation of privately formulated rules into public agency rules, deputization of private enforcers of public rules, and privatization of public functions,[159] using healthcare[160] and prison administration[161] as paradigms. In all the examples of mixed regulation, the greater private role presents special problems of accountability.[162]

She offers little hope, however, that traditional mechanisms of accountability, such as judicial review of state action,[163] application of the nondelegation doctrine,[164] or extension of administrative law,[165] can address the realities of modern regulation adequately, given the reluctance of courts to expand these doctrines. She holds somewhat more hope for private law such as contract, tort and property, although she also is skeptical that courts will

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156 Freeman, 75 NYU L Rev at 547–49 (cited in note 42).

157 See id at 564–66 (discussing the "illusion of a public realm").

158 See id at 546–47 (noting that viewing administrative law as a set of negotiated relationships "invites a reconsideration of the agency of the primary unit of analysis in the field").

159 Id at 547.

160 See Freeman, 75 NYU L Rev at 594–625 (cited in note 42) (discussing the complex intermingling of public and private functions in the health care field).

161 Id at 625–36.

162 Id at 574 (arguing that private actors "exacerbate" the concerns that make agency discretion problematic).

163 Id at 575–80.

164 See Freeman, 75 NYU L Rev at 580–86 (cited in note 42).

165 Id at 586–88.

be willing to make the necessary expansions of current doctrine.[166]

She urges a "deeper analysis" of the realities of public/private governance to seek new methods of assuring accountability, including the need for rationality and public orientation.[167] Professor Freeman suggests that a public orientation might include values such as expertise, rationality, and disinterest, and consideration of non-economic factors and the protection of diffused, unorganized interests.[168]

B. Accountability Must Encompass the Three Major Functions of Government

Regulators—public or private—make, apply, and enforce rules. Any complete mechanism to make private regulation of the internet accountable must address these three major functions of government: rulemaking, adjudication, and enforcement.

Any of these functions may be performed by regular government institutions, or they may be performed by private actors. Legislatures may perform the rulemaking function, but so also may a corporate board of directors. The Circuit Court of DuPage County, Illinois, may perform the adjudicatory function, but so also may a private arbitrator or a WIPO dispute resolution panel when it orders a domain name registrar to revoke a domain name because it violates ICANN policy (a system of rules). Enforcement may be the province of the Sheriff of Tuscaloosa County, Alabama, but it also may be performed by American Express when it cancels credit card privileges.

1. Primacy of enforcement.

Enforcement is the ultimate governmental decision. Dean Krent refers to backing private regulatory efforts with "coercive force."[169] Klaus Grewlich observes:

> Legal theory proceeds from the basic premise that ultimately only sovereign entities endowed with coercive

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166 Id at 588–92 (noting that the protections courts afford those affected by private decisions remains minimal, as does the scope of judicial review).

167 Id at 674–75.

168 See Freeman, 75 NYU L Rev at 558 n 52 (cited in note 42).

169 Krent, 85 Nw U L Rev at 67 (cited in note 40) (referring to the scope of delegated power as any which "empowers those outside Congress" to implement a legislative objective and "backs those efforts with the coercive force of the federal government").

> power can make, apply and enforce legal norms, i.e. law. Hans Kelsen defines "law" a coercive order. It provides for socially organized sanctions, and these can be clearly distinguished from a religious order on the one hand and a merely moral order on the other hand. As a coercive order, the law is that specific social technique which consists in the attempt to bring about the desired social conduct of men through the threat of a measure of coercion which is to be taken in case of . . . legally wrong conduct.[170]

Although Professor Grewlich refers to coercive power to make, apply, and enforce, coercion actually comes into play only in the enforcement function. The state does not really enjoy a monopoly on rulemaking; private property owners often make rules that condition their consent for others to be on the property. Violation of the rules makes the violator a trespasser. The state also does not really enjoy a monopoly on adjudication; disputes often are submitted to private arbitration or other forms of private dispute resolution.

Indeed, the state does not enjoy a complete monopoly over enforcement. Creditors may use self-help repossession,[171] and property owners may expel trespassers so long as a breach of the peace does not result.[172] It is more correct to say that the state has a monopoly over coercive enforcement. Sovereignty is associated with nation-states that have practical ability to assert physical power to coerce compliance with their law within defined borders and with respect to a defined class of persons.[173]

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170 Grewlich, *Governance in "Cyberspace"* at 323 (cited in note 142) (citations omitted).

171 See *Flagg Brothers*, 436 US at 165 (noting that § 7-210 of the New York Uniform Commercial Code "permits but does not compel a private party to sell the goods of another party . . . in order to satisfy a debt owed"); UCC § 9-503 (1999) (defining a secured party's right to take possession after default).

172 See, for example, Restatement (Second) of Torts § 185 (1979) (entry by landlord onto land to oust trespassers); id at § 187 (entry by landlord to demand rent); id at §§ 198–99 (allowing entry onto land to reclaim goods to remove trespassing goods); id at § 201 (allowing entry onto land to abate private nuisance at reasonable time and in reasonable manner); id at § 203 (allowing abatement of public nuisance by private person threatened with special harm); id at § 272 (recapture of chattel); § 273 (distraint of chattels); § 260 (removal of trespassing chattels); William Blackstone, 3 *Commentaries on the Laws of England* 4–6 (Clarendon 1768) (describing as permissible recaption or reprisal of chattels, entry onto land to end trespass, abatement of nuisances, and distraint of chattels as remedy for nonpayment of rent or to end trespass, and noting that the only condition attached to these self-help remedies was that they could not result in a breach of the peace).

173 New nations, such as Bosnia-Herzegovina, are defined, and old nations, such as the Soviet Union, disappear, but the coming into being of a sovereign state is a momentous occasion in diplomacy and international law.

Enforcement ripens legal issues that may exist with respect to the other two functions. Suppose you have software that permits you to eavesdrop on a neighbor's cable modem communication. Various public or private institutions may make "rules" that purport to prohibit your possession or use of the software. If, say, the Internet Law and Policy Forum or the American Bar Association adopts a resolution prohibiting the use of such software, you are unlikely to pay much attention. If the Russian Duma adopts a statute outlawing the software, you will not be moved (assuming your conduct occurs entirely in the United States). Even if a tribunal associated with one of these institutions applies the "rule" to you after an adversarial trial, you still will not change your conduct, unless you believe the decision will be enforced. In other words, what matters to you is the enforcement decision, which necessarily embodies the antecedent rule and adjudicatory decisions. You don't really pay attention to the acts of governance until you think someone is going to come and seize your software, fine you, or put you in jail.

Most, but not all, private regulatory decisions rely on the possibility of enforcement actions in the public courts. In any governance system, there will be some people who break the rules, and who will not comply voluntarily with decisions of adjudicatory bodies prescribing penalties or other remedial action. To those people, there must be some means of coercive enforcement. That may be kicking them out of, or excluding them from, the community—for example through an action for trespass.[174] It may be taking their property. It may be incarcerating them. In virtually every legal system, the state has a monopoly on incarceration and legally taking property. When coercive enforcement is necessary, state enforcers must be willing to enforce decisions of private institutions.

To be sure, you may anticipate enforcement of the hypothetical rule against "sniffer" software. Most people change their conduct to conform to new rules adopted by legislative institutions with undisputed authority. They do that because they anticipate

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[174] See, for example, *America Online, Inc v IMS*, 24 F Supp 2d 548, 550 (E D Va 1998) (holding that the sending of more than sixty million unsolicited e-mails ("spam") to America Online subscribers was an actionable trespass to chattels under Virginia common law); *CompuServe Inc v Cyber Promotions, Inc*, 962 F Supp 1015, 1022 (S D Ohio 1997) (holding that the sending of bulk e-mails by a promoter through Compuserve equipment "diminished" the value of the equipment to Compuserve and was a trespass to chattels warranting imposition of a temporary injunction). For a general discussion, see Dan L. Burk, *The Trouble with Trespass*, 4 J Small & Emerging Bus L 27, 39–43 (2000) (discussing trespass in cyberspace).

that adjudicatory institutions will apply the rule to their nonconforming conduct, and that enforcement officers such as the sheriff will enforce the decisions of adjudicatory institutions. Most people pay civil judgments because they anticipate that the sheriff will enforce the judgments by seizing and selling their property. But they comply voluntarily because they know that coercive enforcement is a realistic possibility.[175]

Because enforcement is the function that embodies the coercive power of the state, accountability most often focuses on enforcement. In administrative law, for example, pre-enforcement judicial review of agency rules is limited: an adversely affected party ordinarily must wait until the agency takes some coercive action, usually through the courts.[176] When one seeks to challenge the constitutionality of a statute, one usually must wait until the statute is enforced.[177]

Thus, when private rulemaking depends for its effect on adjudication and enforcement by public institutions,[178] or when private adjudication depends on enforcement by public institutions,[179] the involvement of public institutions provides some lev-

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[175] See Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 NYU J Intl L & Polit 219, 222–24 (1996) (arguing that the threat of enforcement often is ineffective because of low probability of apprehension and sanctions; in other cases, higher probability makes coercive threat more effective; voluntary cooperation depends as much on creating culture that promotes compliance, and that depends on morality and legitimacy).

[176] See *Abbott Laboratories v Gardner*, 387 US 136, 148–49 (1967):

> Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and *its effects felt in a concrete way* by the challenging parties.

Id (emphasis added).

[177] Until a statute is enforced, potential plaintiffs lack standing unless they can demonstrate that the statute facially deters their constitutionally protected activity. *Application of Martin*, 447 A2d 1290, 1296 (NJ 1982). "A litigant may not . . . challenge the constitutionality of a state criminal statute merely because he desires to wipe it off the books or even because he may someday wish to act in a fashion that violates it." *Kvue, Inc v Moore*, 709 F2d 922, 928 (5th Cir 1983), citing *Younger v Harris*, 401 US 37, 42 (1971).

[178] An example would be application and enforcement of private "trade practice" in courts constituted by federal or state government.

[179] An example would be judicial enforcement of an arbitration award under the New York Convention. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art III ("New York Convention"), 1970 21 UST 2519, TIAS No 6997 (1958) ("Each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following Articles."). See also Federal

erage to assure accountability by the private rulemakers or adjudicators.

But suppose the state never has occasion to assert its coercive power? Suppose a private entity or system possesses the practical power to enforce its own decisions? Seizure, expulsion or exclusion are remedies that may not require reliance on coercive measures as to which the state has a monopoly. This is the case with self-help repossession of chattels, as in *Flagg Brothers*,[180] with excluding new ranchers from the roundup on the cattle range in the Wild West, and with blacklisting ISPs on RBL when they handle UCE not conforming to MAPS rules.

To the extent that internet governance is adequately backed up by the power of expulsion or exclusion,[181] its private governance institutions do not need the enforcement assistance of the state.[182] Then, the only public mechanism for assuring accountability by private rulemakers, adjudicators, and enforcers is a civil action that might produce an injunction or damages award against the private actors.[183]

2. Rules.

Anyone can make rules. The question is whether anyone else will obey them. The English King Canute issued rules prohibiting the surf from wetting his ankles, but the water did not obey him.[184] Conversely, some rules are obeyed as a matter of social convention. No legislature adopted, no court applies, and no sheriff enforces, the widely observed rule to go to the back of a queue.

Often, however, mere social convention is not enough and the law must reinforce rule compliance. When that is necessary, the efficacy of rules depends on whether they are (a) applied by adjudicatory institutions and (b) enforced by someone with coercive power.

Arbitration Act, 9 USC § 3 (1994) (requiring judicial deference to pre-established arbitration arrangements).

180 See discussion of *Flagg Brothers* in Part I C 4.

181 ICANN and MAPS are strong examples. Denial of a domain name, or placement on the blacklist, excludes the target from all or a significant part of the internet without reliance on any order from a court.

182 Of course, the power of expulsion may be limited in its coercive effect because someone may be expelled from one part of the internet only to be allowed into another. That is why the MAPS blacklist is so powerful; it reinforces the power of expulsion by making it potentially internet-wide.

183 Part II D 4 considers legal theories to support such civil actions.

184 See William J. Bennett, ed, *The Book of Virtues: A Treasury of Great Moral Stories* (Simon & Schuster 1993).

3. Adjudicatory decisions.

The first obligation for rule efficacy is that adjudicatory institutions apply the body of rules adopted by the rulemaker. This obligation implicates concurrent jurisdiction in the vertical sense. Obviously, some adjudicatory institutions might have this obligation with respect to some rules, while others do not. For example, the Federal Communications Commission ("FCC") administrative law judges are obligated to apply FCC rules, but Department of Transportation administrative law judges are not obligated to apply FCC rules.[185] The rulemaker has broader scope of influence if tribunals and other legal systems must apply its rules. Thus, rule effectiveness depends in the first instance on whether adjudicatory institutions with personal jurisdiction over a rule violator recognize the rules asserted to bind the violator.

Recognition, in turn, depends on the prescriptive jurisdiction of the rulemaker and the application of the adjudicator's choice-of-law standard.[186] For example, an American court may or may not apply rules adopted by the Russian Parliament with respect to ownership of copyright.[187] Eventually, a body chartered by the internet community to make rules might produce a body of rules that courts in all countries throughout the world undertake to apply, but no such possibility exists now.

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[185] See *F. Kralicek v Apfel*, 229 F3d 1164 (10th Cir 2000) (holding that it is impermissible for an ALJ to draw a different conclusion from another agency's determination, which was based on different rules not binding on the ALJ's agency); *Jenkins v Chater*, 76 F3d 231, 233 (8th Cir 1996) (holding that a VA determination of eligibility for disability benefits does not bind a social security ALJ because the regulations are different). Some agencies instruct their ALJs that they must follow agencies rules even when they conflict with circuit law developed by a United States Court of Appeals. See *NLRB v Blackstone Co*, 685 F2d 102, 106 (3d Cir 1982) (referring to NLRB's instructions to ALJs not to follow Third Circuit law to be "completely improper and reflective of a bureaucratic arrogance which will not be tolerated"), vacated on other grounds, 462 US 1127 (1983). It would not be "arrogant" for an agency to order its ALJs not to follow the rules of another agency.

[186] Prescriptive jurisdiction and choice of law are intertwined. Suppose a dispute that touches states A and B is litigated in B. Suppose further that the substantive law of both A and B is subject to interpretations that could cause either to apply to the dispute. Application of A's choice of law rule represents a sovereign judgment by A as to whether its own law should be interpreted to apply to the dispute, in light of the interpretation that B would give to its own law with respect to the dispute. In that respect, the choice of law rules of both jurisdictions are expressions of their legislative conclusions as to the extent of their prescriptive jurisdiction.

[187] See, for example, *Itar-Tass Russian News Agency v Russian Kurier, Inc*, 153 F3d 82, 88–89 (2d Cir 1997) (applying Russian law to a copyright infringement suit brought by a Russian news conglomerate against a United States publisher of Russian news, but noting that "[c]hoice of law issues in international copyright cases have been largely ignored," and that some courts apply United States law "without discussing the conflicts issue").

The relation between adjudicatory bodies and rulemakers also depends on a hierarchy of rules. When both a federal statute and a state statute govern the same conduct, the Supremacy Clause[188] requires that the adjudicator apply the federal rather than the state rule, if they conflict. If both a statute and a contract express rules governing the same conduct, an adjudicator must apply the statute, if the rules conflict. If the common law of tort and rules made by a private entity conflict, a court must apply the common law and disregard the private rules. Thus, the Supremacy Clause and preemption are both choice of law rules.

When private rules are made within a contractual framework, the status of private rules in other, public, adjudicatory and rulemaking forums are likely to be determined by the rules for enforcing contracts. There is a doctrine in the contract law of most legal systems that precludes enforcement of contracts that "violate public policy."[189] There also is a doctrine that limits the enforceability of certain unconscionable "contracts of adhesion."[190] These doctrines may be used to ensure that only those private rules fairly arrived at between parties with reasonable equal bargaining power may be given legal effect by regular legal institutions.

When rules are made by a private entity exercising control over a valuable resource, the bases for a public institution such as a court to impose public policy requirements overriding or limiting the private rules depend on the existence of a private right of action to implicate the power of the public institution.

Horizontal concurrent jurisdiction may exist with respect to the adjudicatory function. If a private adjudicator and a national court decide the same case the same way, there is little likelihood of concern. But they may decide the same case differently, and the possibility of conflict means that the adjudicator with superior power will predominate.

Resolving conflicts among adjudicatory decisions involves four doctrines of recognition: deferral, res judicata, collateral estoppel, and stare decisis. Deferral means that a state institution, when presented with a case, will refuse to decide it until it has been decided by another, private, institution.[191] The criteria that justify deferral are the same ones that justify res judicata, al-

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188 US Const Art VI, cl 2.

189 See, for example, 17A Am Jur 2d Contracts § 257 (1991).

190 See id.

191 See, for example, *Black's Law Dictionary* 432 (West 7th ed 1999).

though the deferral doctrine is more flexible. Deferral allows the deferring institution to revisit a matter once the deferral institution has decided it and possibly to reach a different decision.

Res judicata obligates the second institution presented with a matter to forebear. The Latin phrase translates as "the thing decided."[192] It signifies that once a thing (a controversy) is decided by one adjudicatory institution, it is decided once and for all, and is then beyond the power of other adjudicatory institutions to decide for themselves. Collateral estoppel applies to particular fact or law issues in a case, while res judicata applies to a decision on the entire case.

Deferral and res judicata apply to particular disputes between particular parties. A trademark dispute decided by an arbitrator would be res judicata, and the losing party could not obtain a different outcome by suing in court over the same dispute. Stare decisis is a broader doctrine. It signifies that the rule of decision emerging from one case must be applied to other similar cases.[193] Thus, suppose a private dispute resolution panel decides that a domain name may not be issued when it is similar to an established trademark. In a system in which stare decisis applies, that decision would be applied to a subsequent trademark/domain name conflict involving different parties and a different trademark and domain name. Stare decisis is usually thought of as an aspect of adjudication, but it also is a source of rulemaking. The first decision gives rise to a rule which is applied in subsequent decisions.

One can conceive of a legal system, or parallel legal systems, in which none of these four doctrines apply. A private internet governance system might authorize adjudicatory decisionmaking, while externally, the regular national courts would ignore decisions made by the private institutions. In such a system, the losing party in the private system always would have an incentive to take another bite of the apple in another forum (assuming a private right of action exists) in the hope of getting a different result. While economic considerations might mitigate the incidence of relitigation (this would be an example of acquiescence), the absence of deferral, res judicata, collateral estoppel, and stare decisis would limit the effect of the private system.

Defining the boundary between public and private spheres is much easier for adjudicatory private regulation than for prescrip-

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[192] See, for example, id at 1312.

[193] See, for example, id at 1414.

tive private regulation. The Restatement of Judgments sets forth criteria for private adjudicatory decisions before they can be treated like judicial judgments for recognition and enforcement purposes.[194] The New York Convention[195] and the Federal Arbitration Act[196] similarly express long-accepted principles for judicial deferral to private arbitration. Typical taxonomies of procedural due process focus on adjudication.[197] The harder problem relates to defining boundaries for prescriptive private regulation and rulemaking.

4. Deference and immunities.

Accountability of private regulatory decisions depends on the degree of deference that public adjudicatory and enforcement institutions give to private decisions, and the immunities enjoyed by private decisionmakers when they are sued in the regular courts for their private enforcement action.

Public institutions may defer to private regulatory decisions. They may defer when either vertical or horizontal concurrent jurisdiction exists. Deference is most common in the arbitration context, when one of the parties to an arbitration agreement seeks to avoid the private adjudicatory system represented by arbitration by filing suit in the regular courts, or by commencing a proceeding before an administrative agency. In many such cases, the public institution refuses to decide the case on the merits, but defers to the private decisionmaker.[198] This is an instance of the public institution declining horizontal concurrent jurisdiction. Even when the public institution does not defer altogether,

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194 Restatement (Second) of Judgments § 84 (1982) (granting res judicata effect to arbitration awards meeting certain criteria).

195 See note 179.

196 See id.

197 See Henry J. Friendly, *Some Kind of Hearing*, 123 U Pa L Rev 1267, 1279–95 (1975) (enumerating eleven elements of procedural due process applicable to adjudicative procedures); Perritt, 15 Oh St J on Disp Resol at 675 (cited in note 80) (applying Friendly's elements of due process to private adjudication in cyberspace).

198 See Federal Arbitration Act, 9 USC § 3 (1994):

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

it may admit the private decision into evidence and give it "great weight."[199]

Deference also may occur in the vertical concurrent jurisdiction context. Suppose an internet service provider seeks an injunction or damages in the regular courts against an actor who violates private rules adopted by the service provider and applied through the service provider's adjudicatory mechanisms.[200] The court may defer to the private decisions, or it may decide the propriety of excluding the rule violator de novo.

Whether private regulation equipped with its own enforcement measures is accountable under public law depends on the justiciability of the private conduct. Those enforcing private rules may be unaccountable because the private enforcers enjoy immunity.[201]

Immunities for certain kinds of private regulation are well known to American law. For example, regulation of religious controversies by church institutions is immune from civil liability in many states.[202] Immunity shields a wider variety of private regu-

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[199] *Alexander v Gardner Denver Co*, 415 US 36, 59 (1974) (allowing court hearing a statutory discrimination claim to give "great weight" to arbitration award that fully considered claim). Whether an administrative decision under the ICANN UDRP is entitled to such weight in proceedings in the regular courts is uncertain. See ICANN UDRP (cited in note 57). Section 4(k) of the ICANN UDRP preserves the rights of domain name disputants to take their controversies to court, but is silent on the judicial effect to be given to a related administrative decision, presumably because this is a matter to be determined under the rules of evidence of the particular national court. See id.

[200] See *Cyber Promotions, Inc v America Online, Inc*, 948 F Supp 436, 437 (E D Pa 1996) (recognizing the action of trespass to chattels when defendant sent mass e-mails to AOL's subscribers); Burk, 4 J Small & Emerging Bus L at 27 (cited in note 174) (noting that courts have used trespass to chattels, an "obscure nineteenth century claim[,] to exclude unsolicited bulk e-mail or 'spam' first from the computer systems of Internet subscription services, and more recently from corporate computer systems"). But compare *Parisi v Netlearning, Inc*, 139 F Supp 2d 745, 751–52 (E D Va 2001) (declining to treat ICANN UDRP as arbitration for deferral purposes).

[201] "Immunity" is used in a broad—and perhaps, loose—sense in this section, to encompass the absence of a cause of action, and the existence of a privilege, as well as immunity from suit, in the formal sense. See Restatement (Second) of Torts 392, Introductory Note to ch 45A (1979) (defining immunity as "avoid[ing] liability in tort under all circumstances . . . because of the status or position of the favored defendant or his relationship with others").

[202] In *Williams v Gleason*, 26 SW3d 54 (Tex App 2000), church members filed claims against individual church officers on defamation and prima facie tort theories, claiming failure to follow the church's constitutional rules in a church trial, refusing copies of trial evidence and transcripts, denying rights of cross examination, presentation of witnesses, and recording of the trial. Id at 58. Based on ecclesiastical immunity rooted in First Amendment doctrine, the Texas appellate court dismissed the lawsuit. Id at 59 (noting that "the Constitution forbids the government from interfering with the right of hierarchical religious bodies to establish their own internal rules and regulations and to create tribunals for adjudicating disputes over religious matters").

latory activities,[203] including presentation of evidence and resolution of controversies in arbitration.[204] Despite the apparent complexity of the current legal framework to make regulation accountable, the immunity doctrine essentially boils down to the willingness of the sheriff to enforce rules and adjudicatory decisions, shaped in turn by the possibility that the sheriff may be personally liable for his coercive enforcement actions.[205] At the time of the American Revolution, the common law assured accountable government mainly through application of various privileges and immunities for governmental actors. For example, the British soldiers involved in the Boston Massacre were tried in common law courts and acquitted because they were found to enjoy governmental immunity.[206] A public official who seized and sold private property or who arrested a private actor was answerable for trespass or false imprisonment, unless he could establish either the privilege of authority of law[207] or that he was immune from suit because of his official capacity.[208]

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[203] See *Weight-Rite Golf Corp v United States Golf Association*, 766 F Supp 1104, 1112 (M D Fla 1991) (holding that a golf association officer's statement was qualifiedly privileged and therefore not defamatory because it was made between two parties who both had an interest or duty relating to its subject matter), affd, 953 F2d 651, 651 (11th Cir 1992).

[204] See *New England Cleaning Services, Inc v American Arbitration Association*, 199 F3d 542, 545–46 (1st Cir 1999) (recognizing immunity for organizations sponsoring arbitration).

[205] For example, the structure of judicial review of governmental action under the Administrative Procedure Act ("APA"), and under constitutional tort theories, involves the interplay between a cause of action against a government actor and immunity for that actor. Causes of action—and thus limitation of immunity—exist under 5 USC § 701(a)(1) (1994) (providing judicial review except where precluded by a statute or agency discretion); or under *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388, 292 (1971) ("[A]s our cases make clear, the Fourth Amendment operates as a limitation upon the exercises of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen."); or under 42 USC § 1983 (1994) (providing a civil action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws") with the availability of sovereign immunity under 5 USC § 702 (1994) (allowing for a waiver of sovereign immunity in a case that does not involve money damages).

[206] Hiller B. Zobel, *The Boston Massacre* 132–44 (1970) (reviewing the relationship between British soldiers in Boston and the law); id at 241–94 (describing the trial of the soldiers).

[207] Restatement (Second) of Torts § 121 (1979) (giving privileges incident to arrest by peace officer "acting within the limits of his appointment"); Blackstone, 3 *Commentaries* at 127–28 (cited in note 172) (acting outside authority gives rise to liability for false imprisonment, including executing warrant at the wrong time).

[208] See Blackstone, *Commentaries* (cited in note 172); Restatement (Second) of Torts § 895D comment g (1999) (when officer exceeds official authority he had no more immunity than private citizen. "It is as if a police officer of one state makes an arrest in another state where he has no authority.").

Private regulators of the internet exercising coercive enforcement power similarly are answerable in the regular courts, unless the law grants them an immunity[209] or privilege. Moderating immunity is as important in ensuring accountability of private regulation as is finding a legal theory to support a cause of action. Indeed, shaping immunities and privileges is the principal way to give meaning to the elements of "public regardedness."[210]

C. A Common Law Approach

The internet needs not a grand theory of accountability, but rather a way for the common law to begin to work on the problem. Policymakers and professors are unlikely to develop a grand theory of accountability for private regulation of the internet within the foreseeable future. Even development of ground rules for regulation of the internet by traditional legal institutions is daunting. Goldsmith, Johnson, Post, Stein (Rutgers), Netanel, Dinwoodie, and others disagree on whether the basic approach to internet jurisdiction should be traditional or should embrace new ideas of a special role for cyberspace.

But the absence of a grand theory does not mean that there is no work to be done. Public institutions are grappling with internet regulatory issues every day, even as private regulatory institutions are springing up, making rules, and enforcing them. Courts and legislatures will be presented with controversies like voteauction.com and MAPS. What should they do about them? They need some rough, practical benchmarks to decide where private regulation should stop and public regulation begin. They need to be able to define the boundaries, at least rough boundaries, between the public and private spheres.

Part II D explores various legal theories for controlling private regulation. It does not matter if one cannot formulate a perfect cause of action under these theories. The mere possibility of liability under one or more of the legal theories can be enough to alter the conduct of private regulators. Fearing liability at some substantial level of probability, they will take precautions, justifying the rationality of their decisions, opening up their deliberations to public scrutiny and participation, avoiding the risks of overreaching. Private regulators will make themselves more ac-

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209 Unlikely, unless they exercise formal power delegated by a state institution.

210 The elements of "public regardedness" are considered in Part II F.

countable in the shadow of the law without waiting for the certainty of clear legal mandates.[211]

MAPS illustrates both the need for common law scrutiny of private regulation and the incremental nature of developing accountability when nondelegation doctrine, contract enforcement, and statutory remedies are unavailing. Major questions exist as to whether any of the legal theories explored in Part II D 4 would result in liability for MAPS. Antitrust is problematic because of the difficulty in finding either monopoly or agreements to restrain competition. Prima facie tort is problematic because of the reluctance of state courts to accept the theory. Intentional interference with contractual relations is problematic because of the uncertainty of the "impropriety" element and the difficulty of identifying specific contractual relations interfered with. Public nuisance is problematic because of its historical association with the use and enjoyment of land. Nevertheless, the possibility of liability under one or more of these theories and the proliferation of lawsuits over MAPS blacklists should exert some chilling effect on the willingness of MAPS itself and of imitators to engage in arbitrary private regulation.

What remains is to identify some common law causes of action that may bring private regulators to the bar of justice. It is not necessary to say what standards should be imposed on them when they get to court.[212] Common law causes of action such as

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[211] Any experienced employment lawyer is familiar with the phenomenon. Even though the employment at will rule continues to govern most private sector employment, employers—especially large employers with sophisticated human relations departments—unilaterally adopt procedures to ensure objective rationality and due process in adverse employment decisions. See generally Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* 371–414, 379 (Wiley 4th ed 1997) ("Some form of self-imposed substantive fairness criterion is common. *Substantive fairness* means that action is taken against employees only for certain reasons that bear a legitimate relationship to the employer's business requirements. *Procedural fairness* means that the employer follows procedures that develop the facts respecting any adverse action reliably.").

[212] As a student of administrative law, the author is tempted to offer administrative law doctrines for general application across all four categories of private regulation. Administrative law, after all, focuses on making regulators accountable, and even though its roots are in justifying a regulatory role for new institutions that derive power from traditional, politically accountable, branches of government, the rules of accountability may work for regulators who arise without any grant of power from the government.

Several considerations counsel caution in such an approach, however. First, the idea that private entities should be treated by the law as administrative agencies is startling, and potentially distracting. See *Demasse v ITT Corp*, 984 P2d 1138, 1149, 1158 (Ariz 1999) (discussing in majority and dissenting opinions this author's "administrative-law" model for modifications in employee handbooks). Second, the benchmarks worked out in administrative law may not be the right ones. It is premature to write a statute, or, to write a restatement for case law that has not been created yet. What is needed is a

those reviewed in the following Part II D 4, with their general standards of "impropriety," "lack of justification," "balance of the interests," and the prospect that something may not look so good to a jury applying such a standard is exactly the kind of environment in which some new ideas can emerge.

The regular courts did a good job of working out touchstones for internet jurisdiction.[213] They can do the same with respect to touchstones for accountable private regulation of the internet.[214]

D. Mechanisms and Theories

Dean Abramson identifies the extensive mechanisms of accountability for delegated private regulation, including the nondelegation doctrine, and clear judicial review. He identifies in summary fashion some of the mechanisms reviewed in this Article for imposing accountability on purely private regulators. He discusses market forces and the possibility of direct government intervention.[215] Professor Froomkin urges more rigorous applica-

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mechanism for traditional legal institutions to begin to work out tools of accountability for private regulation of the internet.

[213] David R. Johnson strongly disagrees with this observation. He argues that the *Zippo* case only works domestically because the United States has a Supremacy Clause and a dormant Commerce Clause. While the textual observation may be too positive, it is undeniable that the *Zippo* continuum, elaborated by the targeting concept from *Millennium Enterprises*, certainly avoids the horror scenarios that some feared in the mid 1990s, in which any web site would be subject to jurisdiction wherever it was visible. See *Bensusan Restaurant Corp v King*, 126 F3d 25 (2d Cir 1997) (rejecting possibility).

[214] Assigning the task of strengthening accountability to the "regular courts" assumes that accountability comes through national (largely, American) court actions. That is not entirely true. For one thing, persons aggrieved by private regulatory decisions can sue in the courts of other countries, and that surely creates the potential for transnational conflict that hybrid regulation was seeking to avoid in the first place, as discussed in Part I A. Eventually, new kinds of international institutions may acquire sufficient legitimacy to take on the task of making other private institutions accountable. See generally 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) (discussing "a national" lawmaking institution). See also Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 Minn L Rev 71 (2000) (proposing a framework for analyzing U.S. constitutional issues raised by relationships between United States and international organizations, and concluding that delegations to international bodies are problematic because they strain ideals of political accountability, and international organizations lack independent sources of political legitimacy); Perritt, *International Administrative Law*, 51 Admin L Rev at 896–900 (cited in note 40) (explaining how constitutional nondelegation doctrine requirements can be satisfied by certain international regulatory structures). In addition, as Dean Krent and Professor Freeman observe, accountability depends not only on "hard" mechanisms of judicial review, but also on a variety of "softer" forces, including professional norms internalized by decisionmakers and acquiescence. See Helfer and Dinwoodie's "internal checking functions" (cited in note 214).

[215] See Abramson, 16 Hastings Const L Q at 186 (cited in note 1):

tion of the nondelegation doctrine, or direct application of administrative law norms.[216] These suggestions work for the first situation in which private regulation occurs—that in which public institutions delegate power to or defer to decisions of private entities. They do not work conceptually in the other three situations, in which private regulation originates not in delegation of originally governmental power, but in private consent, or in de facto control over private resources. (As Part I C 3 explained, acquiescence carries its own assurance of accountability.)

1. Delegation.

When public institutions delegate governmental power to make or apply rules, accountability of private decisionmakers is ensured in several ways. The public institution may revoke the delegation. Constitutional restrictions on delegation of legislative or adjudicatory power require channeling of the delegated power and judicial review of private decisions in the regular courts.[217]

Delegation in the internet context often takes the form of safe harbors, as explained in Part I C 1. There, the criteria for safe harbor treatment provide for accountability.

2. Contract enforcement—bylaws.

Private rulemaking in the second situation, involving contractual relations between a regulator and a regulated party, can be policed through actions for breach of contract. Contract law imposes limitations on the conduct of the contracting parties. They are subject to a covenant of good faith and fair dealing.[218]

If a private regulator performs poorly, for example if the Better Business Bureau does not enforce its code of ethics, a more effective competitor might emerge. Ultimately, the new competitor could put the BBB out of business. Moreover, if an ineffective private regulator comes to the attention of public officials, they might impose specific accountability obligations on the private regulator or assume the responsibilities of the private regulator.

[216] See Froomkin, 50 Duke L J at 184 (cited in note 27) ("So long as ICANN is making policy decisions, however, DoC's arrangement with ICANN either violates the APA, for ICANN is making rules without APA rulemaking, or it violates the nondelegation to private parties doctrine set out in *Carter Coal*.").

[217] See generally id at 141–53 (discussing relevant constitutional issues and noting that "the private nondelegation doctrine focuses on the dangers of arbitrariness, lack of due process, and self-dealing when private parties are given the use of public power without being subjected to the shackles of proper administrative procedure").

[218] See UCC § 2-609 n 6 (1998) (explaining that "good faith is a part of the obligation of the contract and not subject to modification by agreement and includes, in the case of a

They may be subject to legally implied due process requirements.[219] Contract-based self-help remedies also may be limited by statutory law.[220]

3. Making self enforcement accountable through statute.

The self enforcement category of private regulation could be made accountable either through enactment of a new statutory framework or change in common law. Enacting a statute would be the easiest way to provide a public law framework to assure accountability of private regulation in the self-enforcement category, but the issues are not mature enough yet to enable political action. Moreover near-term adoption of national statutes would exacerbate the transnational jurisdiction problem. It would be better to work on some rules of thumb under common law theories, dealing with the transnational problems as they arise,[221] un-

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merchant, the reasonable observance of commercial standards of fair dealing in the trade").

[219] See *Cotran v Rollins Hudig Hall International, Inc*, 69 Cal Rptr 2d 900, 910 (1998) (finding that, in the context of implied employment contracts, "good cause" requires "fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious . . . or pretextual"). In *Thompson v Associated Potato Growers, Inc*, 610 NW2d 53 (ND 2000), the North Dakota Supreme Court followed *Cotran*, holding that the factfinder in a case alleging violation of a written contract for employment for a fixed term should decide whether the employer determined just cause for termination under an objective good faith standard. See id at 59.

[220] For example, the Uniform Computer Information Transactions Act ("UCITA"), 7(II) Uniform Laws Annotated ("ULA") 6 (Supp 2001), allows a licensor to prevent continued exercise of contractual and information rights without judicial process, but only if that can be done without breach of the peace, without foreseeable risk of personal injury or significant physical damage to information or property other than the licensed information, and in conformity to specific procedures. See id at § 815, 7(II) ULA 178–79 (Supp 2001). The UCITA provides specific procedures: a separate agreement permitting electronic self-help. See id at § 816(c), 7(II) ULA 180 (Supp 2001). If such an agreement exists, the licensor may exercise self-help only after giving:

> notice in a record to the person designated by the licensee stating:
>
> (1) that the licensor intends to resort to electronic self-help as a remedy on or after 15 days following receipt by the licensee of the notice;
>
> (2) the nature of the claimed breach that entitles the licensor to resort to self-help; and
>
> (3) the name, title, and address, including direct telephone number, facsimile number, or e-mail address to which the licensee may communicate concerning the claimed breach.

Id at § 816(d), 7(II) ULA 180 (Supp 2001).

[221] See, for example, *LICRA et UEJF v Yahoo! Inc and Yahoo France*, Sup Ct Paris (2000), available online at <http://www.gyoza.com/lapres/html/yahen.html> (visited Feb 2, 2001) [on file with U Chi Legal F] (ordering Yahoo.com and fr.yahoo.com "to take any and all measures of such kind as to dissuade and make impossible any consultations by surfers

til possibilities for harmonization and the benefits and costs of different approaches have crystallized to enable more complete assessment of appropriate legislative or treaty-based action.

Some existing statutes, however, suggest possibilities for assuring accountability of some kinds of private regulation. The Computer Fraud and Abuse Act ("CFAA")[222] makes it a crime and a tort to access a computer used in interstate commerce without authorization and to alter, damage, or destroy information or to prevent authorized use of any information or computer services causing more than minimum economic injury.[223] Thus, a private regulator who implements rules or decisions by implanting code in computing or networking facilities belonging to another would violate the CFAA unless the owner of the facilities authorizes the implantation.

The Electronic Communications Privacy Act makes it a crime and a statutory tort to intercept electronic communications, to disclose intercepted communication, or to use intercepted communications.[224] It also makes it a crime and a tort to engage in unauthorized access to stored electronic communications or to prevent access to an electronic communication while it is being stored in a public electronic communications facility.[225] A final provision prohibits the use of pen register and trap and trace devices[226] except for operational management of communications systems or under court order.[227] It is possible to argue that private enforcement techniques relying on the interception and blockage of IP packets violate these statutory provisions, depend-

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calling from France to its sites and services in dispute the title and/or contents of which infringe upon the internal public order of France, especially the site selling Nazi objects").

222 18 USC § 1030 (1994).

223 18 USC § 1030 (a)(5)–(6).

224 See 18 USC § 2510 (1994) (defining, inter alia, "wire communication," "oral communication," and "intercept"); id at § 2511 (deeming interception, use, and disclosure of such communications unlawful).

225 Id at §§ 2701–10.

226 A pen register is a device for recording telephone numbers dialed by the telephone to which it is connected. A trap and trace device determines the telephones numbers of incoming calls to the line to which it is connected. The analog to these methods of electronic surveillance involve intercepting addressing and routing information in the internet, but not the content of associated messages. See generally Stephen P. Smith, et al, *Independent Review of the Carnivore System, Final Report* (Dec 8, 2000), available online at <http://www.usdoj.gov/jmd/publications/carniv_final.pdf> (visited June 20, 2001) [on file with U Chi Legal F]. The author was one of the investigators of the Carnivore electronic eavesdropping system.

227 See 18 USC § 3121 (1994) (prohibiting the installation of pen registers and trap and trace devices in the absence of a court order, but providing an exception for their use by an electronic or wire communication service provider).

ing on interpretation of the statutory definitions of electronic communication, trap and trace device, and stored communication. The strongest arguments would be that any code that blocks traffic from particular IP addresses either represents the interception of an electronic communication, or that it employs trap and trace functionality, depending on whether the IP address of the sender is construed to represent content or to be analogous to a calling telephone number. The strongest defense would be that any blockage occurs with the consent of the facility where the blocking occurs and is done for network management purposes, and therefore falls within the privileges granted network service providers under the statute.

The Communications Act of 1934 contains a provision, discussed in Part II D 4 b in conjunction with preemption of public nuisance actions, that prohibits malicious interference with radio communications.[228] The language of the statute is limited explicitly to radio communications licensed or approved by the FCC.[229] It cannot be stretched to include wire based IP traffic. There are, however, a number of state statutes that prohibit interfering with communication services that might provide a basis for litigating the permissibility of specific self enforcing private regulation.[230]

Section 5 of the Federal Trade Commission Act authorizes the Federal Trade Commission to investigate trade practices that harm the public interest. While this authority often is associated with conduct that violates the Sherman Act, the FTC need not establish a Sherman Act violation in order to have authority to oppose conduct under Section 5.[231]

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[228] 47 USC § 333 (1994).

[229] See id ("No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this chapter or operated by the United States Government.").

[230] See, for example, Wash Rev Code § 9A.48.070(1)(b) (2000) (making criminal the act of maliciously causing interruption or impairment of service rendered by mode of public communication); Alaska Stat § 42.20.030 (Lexis 2000) (imposing civil liability on one who intentionally interferes with transmission of service over a utility line); Cal Penal Code § 591 (West 1999) (making a crime the act of obstructing "any line of telegraph, telephone, or cable television, or any other line used to conduct electricity or appurtenances or apparatus connected therewith"); Neb Rev Stat § 86-304 (1994) (criminalizing interrupting or interfering with the transmission of telecommunications messages); SD Cod Laws § 49-32-2 (Michie 1993) (criminalizing maliciously interfering in any manner with telecommunications facilities).

[231] *FTC v Indiana Federation of Dentists*, 476 US 447, 460–61 (1986) (finding that "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition," and therefore proving such effects, like an output reduction, was sufficient to "obviate the need for an inquiry into market power").

4. Common-law causes of action.

Accountability of private regulation requires institutional oversight. As the preceding sections explain, mechanisms for institutional enforcement accountability exist in the delegation and contract categories of private regulation. But statutory and constitutional bases for enforcing accountability are thin with respect to the self-enforcement category. That leaves the common law.[232]

The problematic case arises when private entities exercise rulemaking and enforcement power because they control a valuable resource. In this situation, another institution does not necessarily exist with legal power to insist on mechanisms of accountability. Accountability can be assured only if those subject to the private rules have enforceable legal rights against the rule maker. The rule maker must have legally enforceable duties to honor the mechanisms.

A number of plausible legal theories exist representing potential sources of these rights and duties. Yet none of them is certain to be available in all relevant situations of private rulemaking unless common law courts are willing to expand the boundaries of traditional theories. The nub of the problem is in determining whether the interests involved in using the internet are legally protected,[233] and thus whether private regulatory acts interfering with those interests are actionable.

a) Relaxation of state action requirement. Professor Lessig observes that new institutions in cyberspace perform functions historically performed by governmental institutions, yet lie

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232 Professor Freeman holds somewhat more hope for private law such as contract, tort, and property as mechanisms of accountability than for judicial review of state action, application of the nondelegation doctrine, or extension of administrative law, although she also is skeptical that courts will be willing to make the necessary expansions of current doctrine. See Freeman, 75 NYU L Rev at 588–92 (cited in note 42) (noting that "the common law offers ample precedent for imposing procedural requirements on private parties under certain circumstances, but warning that "relying solely on private law to cabin private discretion seems overly optimistic," as "[t]he protection courts afford those affected by private decisions, and the scope of judicial review they provide, remain minimal").

233 The Restatement distinguishes between "harm" and "injury." See Restatement (Second) of Torts § 870 comment e (1979). Harm is a "loss or detriment in fact of any kind," while injury is "the invasion of any legally protected interests of another." Id. Certain types of harm are recognized as constituting injury when they fall within the scope of existing torts, such as battery or false imprisonment; otherwise, demarcating harm from injury is ambiguous enough to necessitate the use of a balancing test. See id. "Recovery is thus limited to those cases in which the plaintiff's harm is of such a nature and seriousness that legal redress is appropriate." Id.

"wholly outside the democratic process."[234] The value choices affecting important rights recognized in the United States Constitution still are made by someone, but, given the requirement for state action before constitutional rights can be enforced, officials accountable to the public—such as legislators and judges—do not make them.[235] The formalism that puts private governance structures beyond judicial review is a "pathology" that "inhibits choice" and is "deadly for action."[236] Professor Lessig does not explain exactly how the formalism of the state action requirement might be relaxed; figuring out how is the central challenge addressed by this Article.

The formalism that Professor Lessig complains of derives from the "state action requirement."[237] The state action requirement embodies the distinction between the public and private spheres, considered in Part I. State action can be found not only when the state or other governmental entity is the nominal actor, but also when an apparently private entity performs public functions or has a *symbiotic* relationship with the state and is the employer. The symbiotic relationship test is closely associated with a nexus test. Under the public function test, the act of a private entity constitutes state action when the entity performs a function traditionally associated with the sovereign. This test originated in the case of *Marsh v Alabama*[238] but has been circumscribed in recent cases.[239]

The symbiotic relationship and nexus approaches to finding state action in the activities of an otherwise private entity focus

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234 Lessig, *Code* at 217 (cited in note 15) (noting that ICANN does what the government is supposed to do, but that it operates outside of any democratic confines).

235 See id at 217–18 (noting that "it will take a revolution in American constitutional law for the Court, self-consciously at least, to move beyond the limits of state action," and that therefore "the scope of their constitutional review has been narrowed . . . to exclude the most important aspect of cyberspace's law—code").

236 Id at 221.

237 See generally Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to 'Private' Regulation*, 71 U Colo L Rev 1263, 1269 (2000) (arguing that constitutional adjudication regarding traditionally private activities can "foster constructive societal debate about social and political issues" arising from new challenges to political values).

238 326 US 501 (1946) (noting that prosecution for distribution of handbills on sidewalk in company town was state action).

239 Id at 509. See *Flagg Brothers*, 436 US at 164 (holding that self-help disposal of goods under the UCC is not a public function, as "even if [the court] were inclined to extend the sovereign-function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it"); *Hudgens v NLRB*, 424 US 507, 520 (1976) (holding that the operation of shopping centers and malls is not a public function).

on the degree of involvement by the state in the activities of the defendant entity. Thus, in *Burton v Wilmington Parking Authority*,[240] the Court found so much state entanglement in the operations of the defendant as to amount to "that degree of state participation and involvement . . . which it was the design of the Fourteenth Amendment to condemn."[241] Emphasizing that the state regulatory body overseeing the utility had not ordered the challenged practice, in *Jackson v Metropolitan Edison Co*[242] the Court held that termination of service by a public utility was not state action.[243] The Court offered what has come to be called the *nexus* test: "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[244]

Efforts to characterize actions of entities that control access to important cyberspace resources as "state action" have not faired well. In *Cyber Promotions, Inc v America Online, Inc*,[245] the district court rejected First Amendment claims against an e-mail service provider by a UCE service.[246] Rejecting the public function argument, the court held that:

> AOL exercises absolutely no powers which are in any way the prerogative, let alone the exclusive prerogative of the state. . . . By providing its members with access to the Internet through its e-mail system so that its members can exchange information with those members of the public who are also connected to the Internet, AOL is not exercising *any* of the municipal powers or public services traditionally exercised by the state as did the private company in *Marsh*. Although AOL has technically opened its e-mail system to the public by connecting with the Inter-

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240 365 US 715 (1961).

241 Id at 724.

242 419 US 345 (1974).

243 Id at 358–59 (concluding that Pennsylvania was "not sufficiently connected" to the termination so as to make the terminator's "conduct in so doing attributable to the State for purposes of the Fourteenth Amendment").

244 Id at 351. See *Pinhas v Summit Health, Ltd*, 894 F2d 1024, 1034 (9th Cir 1989) (holding that state-required peer review activity does not meet the symbiotic relationship test, referring to *Jackson* for the rule that "[s]tate regulation of a private entity . . . is not enough to support a finding of state action"), affd, 500 US 322 (1991) (finding federal antitrust jurisdiction on the basis of a sufficient connection between the alleged anticompetitive actions and interstate commerce).

245 948 F Supp 436 (E D Pa 1996).

246 See id at 445.

> net, AOL has not opened its property to the public by performing any municipal power or essential public service and, therefore, does not stand in the shoes of the state. *Marsh* is simply inapposite to the facts of case *sub judice*.[247]

In part, this decision turned on the availability of alternative avenues for sending the band communications, both through the internet and otherwise.[248] Finding that the other two tests overlap each other,[249] the court held that because there had been no government involvement in AOL's business decisions to block the plaintiff's e-mail traffic, the first prong of the joint participation test could not be satisfied.[250] The court also rejected the argument that institution of civil litigation against the plaintiff constituted state action.[251] Other courts have rejected arguments that internet service providers are state actors.[252]

Professor Berman observes that academic opinion since at least 1927 has criticized the state action requirement as representing an artificial distinction between public and private action.[253] He suggests, embracing arguments put forth by Professors Radin and Wagner,[254] that the distinction between bottom-up and top-down ordering is incoherent because private ordering in cy-

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247 Id at 441–42.

248 See *Cyber Promotions*, 948 F Supp at 443–44.

249 See id at 444.

250 See id.

251 Id at 444–45.

252 See *Howard v America Online, Inc*, 208 F3d 741, 754 (9th Cir 2000) (holding that there was no basis for finding America Online to be a state actor in conjunction with a billing dispute); *Island Online, Inc v Network Solutions, Inc*, 119 F Supp 2d 289, 306 (E D NY 2000) (holding that a coordinator of domain name registrations is not a state actor because registration of domain names had never been an exclusively public function).

253 See Berman, 71 U Colo L Rev at 1278 (cited in note 237) ("Academic opinion overwhelmingly has rejected the idea that legal doctrine should rest on a distinction between public and private action."). See also id at 1268, citing Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L Q 8, 11 (1927) (characterizing problems in the private industrial economy as "abuses which the Supreme Court does not allow the state to remove directly" because "[t]here can be no doubt that our property laws do confer sovereign power on our captains of industry and even more so on our captains of finance"). Professor Berman lists a host of scholars who have grappled with the state action doctrine, among them Erwin Chemerinsky in *Rethinking State Action*, 80 Nw U L Rev 503, 504–05 (1985). See Berman, 71 U Colo L Rev at 1310 n 16. Professor Chemerinsky argues that the discussion of the doctrine had quieted by the mid-1980s because "earlier commentators were so successful in demonstrating [its] incoherence," and calls for the academy "to begin rethinking state action." Chemerinsky, 80 Nw U L Rev at 504-05 (cited in note 253).

254 Berman, 71 U Colo L Rev at 1282 (cited in note 237), citing Margaret Jane Radin and R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 Chi Kent L Rev 1295 (1998).

berspace depends on rules of property and contract and thus relies upon norms created and enforced by the state.[255] Berman argues that the symbolic value of constitutional litigation suggests that extending constitutional values to cyberspace can help articulate and shape societal discourse on divisive issues.[256] He urges relaxation of the state action requirement to permit constitutional litigation over the extension of constitutional norms of fair process and judicial review to private action such as that engaged in by ICANN.[257]

Professor Froomkin argues that *American Manufacturers Mutual Insurance Co v Sullivan*[258] provides some hope for declaring private regulators such as ICANN to be state actors, subject to due process obligations.[259] *Sullivan* involved a challenge to a Pennsylvania statute that allowed workers' compensation insurers to deny health care payments until a private "utilization review organization" determined the payments were for medically necessary treatment.[260] The Supreme Court framed the question as "whether a private insurer's decision to withhold payment for disputed medical treatment may be fairly attributable to the State . . . ."[261] The Supreme Court concluded that the state had not mandated or encouraged the withholding of benefits.[262] The court reaffirmed *Flagg Brothers*, noting that merely authorizing the insurers to use the dispute resolution services of utilization review organizations ("UROs") did not constitute state action.[263] The Court also, without much analysis, declined to find "joint

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255 Berman, 71 U Colo L Rev at 1282–83 (cited in note 237).

256 See id at 1292–93 ("[L]aw has enormous potential as a creative and transformative discourse in our society.").

257 Id at 1307–08 ("[A] broader view of the Constitution's scope would reach the private standard-setting bodies—which now function so powerfully (yet so invisibly) to establish the code that regulates cyberspace—and subject them to constitutional norms of fair process and judicial review.").

258 526 US 40 (1999).

259 Given that DoC called for an ICANN to exist, clothed it with authority, persuaded other government contractors to enter into agreements with it (including the one with NSI that provides the bulk of ICANN's revenue), and has close and continuing contacts with ICANN, a strong, but not unassailable, case can be made that ICANN is a state actor. Froomkin, 50 Duke L J at 113–14 (cited in note 27).

260 *Sullivan*, 526 US at 46–48 (describing the challenged system).

261 Id at 51.

262 See id at 52–54 (analyzing the facts under the standard delineated in *Jackson*, 419 US at 350 (holding that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment").

263 See id at 57 ("That Pennsylvania first recognized an insurer's traditionally private prerogative to withhold payment, then restricted it, and now (in one limited respect) has restored it, cannot constitute the delegation of a traditionally exclusive public function.").

participation" by the state.[264] The Court did, however, say that the decision of the URO, "like that of any judicial official, may properly be considered state action,"[265] even though UROs are "private organizations."[266] Thus, as Justice Stevens noted in dissent,[267] the Court picked the wrong actor—the moving party insurer—rather than the adjudicator, the URO, which allegedly failed to provide the plaintiff with due process.

According to Professor Froomkin, ICANN leaves domain name registrars no choice, unlike the Pennsylvania state legislature, which allowed insurers to decide whether to suspend payments pending URO review.[268] Of course that assumes that the registrars are the relevant actors and not the complaining trademark holders, which may be a reasonable assumption since it is the registrars who ultimately enforce decisions—by revoking domain names. In *Sullivan* the insurers were in that position, by denying immediate payment of benefits.

Froomkin draws from *Edmonson v Leesville Concrete Co*[269] three factors to be weighed in determining whether state action exists:[270] (1) the extent to which the actor relies on governmental assistance and benefits;[271] (2) whether the actor is performing a

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[264] *Sullivan*, 526 US at 57–58. The Court distinguished *Burton*, 365 US 715, stating that while *Burton* announced a notably vague "joint participation" test, later courts have refined it to mean that extensively regulated private services that a state would not necessarily provide itself fall outside the reach of that test. *Sullivan*, 526 US at 57–58. Similarly, the Court distinguished *Lugar v Edmonson Oil Co*, 457 US 922, 942 (1982), on the grounds that the "joint participation" in *Lugar* that constituted state action involved seizing private property through an ex parte application to the state, an element not present in *Sullivan*.

[265] Id at 54 ("While the decision of a URO, like that of any judicial official, may properly be considered state action, a private party's mere use of the State's dispute resolution machinery, without the 'overt, significant assistance of state officials,' cannot."), citing *Tulsa Professional Collection Services, Inc v Pope*, 485 US 478, 486 (1988).

[266] *Sullivan*, 526 US at 46 ("UROs are private organizations consisting of health care providers who are 'licensed in the same profession and hav[e] the same or similar specialty as that of the provider of the treatment under review.'") (citation omitted).

[267] See id at 63, 65 (Stevens concurring in part and dissenting in part) ("The relevant state actors, rather than the particular parties to the payment disputes, are the state-appointed decisionmakers who implement the exclusive procedure that the State has created to protect respondents' rights.").

[268] Froomkin, 50 Duke L J at 116–17 (cited in note 27). The State had amended the statute, 77 Pa Stat Ann §§ 531(1)(i), (5) (1998), to mitigate the due process challenge to the UROs.

[269] 500 US 614, 628 (1991) (finding race-based peremptory challenge to juror in civil case to be state action).

[270] Froomkin, 50 Duke L J at 117 (cited in note 27).

[271] The Court held that the actor did make such a reliance: "a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court." *Edmonson*, 500 US at 624.

traditional governmental function;[272] and (3) whether the injury caused is aggravated in a unique way by the incidents of governmental authority.[273] The case also requires application of a prior factor, "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority."[274]

Absent the elements of overt state sponsorship of ICANN that Froomkin identifies, however, the first element of *Edmonson* may provide no force for a finding of state action. Whether the function performed is traditionally governmental depends substantially on whether this factor is applied to the underlying operational activity (for example, providing fire protection services or running a domain name system) or applied to rulemaking, adjudication and enforcement with respect to those benefiting from the activity.[275] What the third factor means is not altogether clear in the internet regulatory context.[276] *Edmonson* is of limited help at best in moving the state action boundary to include private regulation of the internet. First, one must find deprivation of a benefit originating with the government, apparently requiring a conclusion that use of the internet is a government-conferred benefit. Second, one must find that the government was intertwined in the decisionmaking, and one must find some sort of symbolic exacerbation tantamount to the courthouse locus for the decision in *Edmonson*. These requirements have no force at all in the context of a private regulator in the fourth situation, unless use of the internet is a benefit that originates with the government.

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272 The Court held that the actor was performing such a function because it was exercising "the power to choose government's employees or officials." Id at 625, 628 (distinguishing this power from the government's power from decisions whether to sue at all, decisions regarding selection of counsel and from decisions regarding choices in discovery).

273 Id at 622.

274 Id at 620. The three factors cited by Froomkin are part of the question "whether a private litigant in all fairness must be deemed a government actor." Id at 621.

275 Froomkin argues that the focus should be on the regulating conduct rather than on the underlying activity. 50 Duke L J at 120–22 (cited in note 27) (applying this to his analysis of ICANN, Froomkin argues that "[t]he case for ICANN being a state actor turns on the degree of instruction, and perhaps even continuing coordination, from DoC," and "not only is there substantial evidence that ICANN is making policy and regulating, there is also substantial evidence that ICANN is doing so at the behest, tacit or overt, of the Department of Commerce," such that "[w]hat matters most is the high degree of control and direction exercised over ICANN by DoC").

276 Apparently the Court meant that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom." *Edmonson*, 500 US at 628.

Ultimately, Froomkin's argument for accountability of ICANN boils down to this:

> If DoC does no review, the case for calling ICANN a state actor is strong, since the body uses its control over a federal resource to affect the legal rights of citizens. On the other hand, if DoC does conduct a meaningful review, then its decisions to adopt or to allow ICANN's decisions and pronouncements to take legal effect are decisions subject to the APA.[277]

Overt relaxation of the state action requirement is all the more difficult because of the tendency of recent Supreme Court jurisprudence to counterpose First Amendment associational rights against state regulation of arguably private conduct.[278]

Lessig did not call only for relaxation of the state action requirement in direct constitutional litigation, as other commentators have done; he called for relaxation of formalism, for application of constitutional values in regulation of the internet. Adaptation of traditional legal categories to encompass new threats to fundamental interests is the genius of the common law. The common law can translate important values and principles, whether founded on the Constitution or otherwise, into rules defining legally enforceable rights and duties. A number of traditional causes of action represent potential starting points for this common law development: antitrust, intentional interference with contractual relations, public nuisance, and various theories from the realm of water rights.

b) Nuisance and disturbance. The concept of nuisance permits someone whose enjoyment of resources is injured by another's actions to recover damages or obtain an injunction. Private nuisance is not particularly useful in the internet context. It vindicates only interference with the enjoyment of land.[279] Public nuisance, on the other hand, is not limited to protecting enjoyment of land.[280] The problem with public nuisance is that private

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277 Froomkin, 50 Duke L J at 125 (cited in note 27).

278 See *California Democratic Party v Jones*, 530 US 567, 586 (2000) (holding that a state's requirement for blanket primary violated a political party's First Amendment right of association).

279 See Restatement (Second) of Torts § 821D (1979) (defining "private nuisance" as "a nontrespassory invasion of another's interest in the private use and enjoyment of land").

280 See id at § 821B(1) (defining public nuisance as "an unreasonable interference with a right common to the general public").

persons may not recover for injuries resulting from public nuisance of the same quality as that suffered by the public at large.[281] But when a private person suffers injury different in kind from that suffered by the general public, a private right of action under this legal theory is available.[282]

An eighteenth-century cause of action known as "disturbance" fits the circumstances of self-enforcing private regulation of the internet even better than nuisance. Disturbance involved hindering enjoyment of an incorporeal hereditament.[283] One who fenced or enclosed a commons, or who blocked a way, was liable for disturbance.[284] This definition fits the facts of MAPS closely: MAPS is fencing a commons—the internet—and blocking ways into parts of it.

In *Planned Parenthood League v Bell*,[285] the Massachusetts Supreme Judicial Court allowed a public nuisance action by an abortion clinic on behalf of its patients obstructed and harassed by an abortion protester.[286] The court found that the patients of the clinic had been caused special injury by the conduct, which interfered with the exercise of their right to obtain an abortion.[287]

Several illustrations from the Restatement (Second) of Torts are helpful in the cyberspace context. If someone blocks a public road and also blocks a private driveway connecting to the public road, the person whose access to the public road depends on the driveway may recover.[288] Or, if someone blocks a public road that is the only means of access for a person, that person also may recover for public nuisance.[289]

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281 See id at § 821C (specifying who can recover for public nuisance).

282 Id at § 821C(1) (specifying that to recover for a public nuisance, "one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference").

283 See Blackstone, 3 *Commentaries on the Laws of England* 236–40 (cited in note 172) (defining "disturbance" as "usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it," and noting that the injury protects against disturbances of franchise, common, ways, tenure, and patronage).

284 Blackstone, 3 *Commentaries* at 240 (cited in note 172).

285 677 NE2d 204 (Mass 1997).

286 Id at 208–09.

287 See id at 208 (reasoning that because "a private plaintiff may maintain a public nuisance action if the public nuisance has caused the plaintiff some special injury of a direct and substantial character other than that borne by the general public," the claim is permissible because it alleges "conduct constitut[ing] a public nuisance which has caused its patients special injury by interfering with the exercise of their right to obtain an abortion").

288 Restatement (Second) of Torts § 821C illus 4–6 (1979).

289 Id at § 821C illus 7.

By analogy to these illustrations, the internet—or at least certain routes through it—is equivalent to a public highway. If someone, like MAPS, blocks access to the internet by targeting specific individuals or entities, those individuals or entities should be able to show the qualitatively different harm necessary to recover for public nuisance. Those targeted suffer an injury different in kind from ordinary users of the internet. But courts must be willing to draw this analogy before the public nuisance cause of action can be a basis for assuring accountability by private rulemakers.

Persons claiming radio interference regularly sue under public nuisance theories, but uniformly are rebuffed based on federal preemption by the Federal Communications Act.[290] There would be no federal preemption of a public nuisance claim based on blocking access to the internet under present law, because 47 USC § 333 is limited to radio interference.[291] Nevertheless, the radio interference cases are not terribly helpful because the finding of federal preemption prevents any significant judicial analysis of public nuisance elements in the radio interference context.[292] *Planned Parenthood*, the abortion protester case, however, is helpful because it reinforces the Restatement's view that a private plaintiff may sue on a public nuisance theory for special harm, intentionally caused, and illustrates the kind of interfer-

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290 See *Broyde v Gotham Tower, Inc*, 13 F3d 994, 997–98 (6th Cir 1994) (affirming dismissal of nuisance claim against radio transmitter alleging interference with plaintiff's electronic equipment as preempted by the FCA, noting the district court's finding that all other courts that have considered the question of its preemption have come to the same conclusion). See also *Monfort v Larson*, 693 NYS2d 286, 288 (App Div 1999) (affirming the dismissal on preemption grounds of a suit brought by a radio station alleging frequency interference by another, noting that "[t]he radio signal interference at issue *sub judice* falls within the FCC's technical domain"); *Fetterman v Green*, 689 A2d 289, 294 (Pa Super 1997) (grounding its dismissal of a private nuisance claim brought by a radio frequency licensee against another licenses sharing the same frequency on the preemptive force of the Federal Communications Act (FCA), 47 USC § 333 (1994), which states that "no person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this chapter or adopted by the United States Government," finding that "through the FCA's enactment, Congress has impliedly preempted state law in the area of interference with radio signal transmissions").

291 See note 290 (quoting the language of 47 USC § 333).

292 See, for example, *Broyde*, 13 F3d at 997 (stepping over the factual issues relating to public nuisance to underscore the fact that "[r]esolution of this matter . . . turns on a single issue: the existence of an irreconcilable conflict between the FCC's exercise of exclusive jurisdiction over the regulation of radio frequency interference and the imposition of common law standards in a damages action"); *Fetterman*, 689 A2d at 292 ("Although couched in a myriad of colorful fashions, the gravamen of appellant's complaint is that appellee improperly interfered with appellant's use of their shared frequency. Therefore, we must begin our analysis with a careful reading and interpretation of 47 USC § 333.").

ence with the exercise of lawful rights that can support recovery on that theory.[293] Thus, someone excluded from important internet resources by private regulatory action would claim that its conduct was not illegal, just as seeking an abortion is not illegal, and that interfering with access constitutes a public nuisance for which private recovery is available.

c) Prima facie tort. Prima facie tort allows one to recover damages or obtain an injunction against an actor who intentionally harms legally recognized interests without justification.[294]

Section 870 of the Restatement (Second) of Torts[295] recognizes prima facie tort. Section 870 permits imposition of liability for any unjustified intentional infliction of injury.[296] This underlying theory of intentional tort liability is labeled the prima facie tort in New York and a few other jurisdictions.[297] Prima facie tort originally referred to the broad concept embodied in § 870, but the "prima facie" label has come to be associated with the requirements that the actor be motivated by specific intent to cause harm (malice) and that the plaintiff prove special damages.[298]

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293 See *Planned Parenthood*, 677 NE2d at 206, 208–09 (holding that, because the ability to end a pregnancy through a legal abortion is a substantive right, actions of an abortion protestor that included harassing patients trying to enter the clinic by blocking their path arose to the level of public nuisance).

294 Restatement (Second) of Torts § 870 comment a (1979) (recognizing the concept and noting that it is also referred to as "an innominate form of the action of trespass on the case").

295 See id at § 870.

296 Id ("One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances.").

297 Id at § 870 comment a (characterizing New York prima facie tort requirements as more rigid than § 870). South Carolina apparently recognizes a variant of this tort that its courts call "economic duress." See *Troutman v Facetglas, Inc*, 316 SE2d 424, 426–27 (SC App 1984) (stating that "[t]he duress doctrine is intended to prevent a stronger party from presenting an unreasonable choice of alternatives to a weaker party in a bargain situation" and noting that "[t]he duty (in an analysis as a tort) which arises, therefore, is an obligation not to exercise superior bargaining power unreasonably," then affirming nonsuit because employee failed to show that the breach of contract suit would provide him with an inadequate remedy).

298 See Morris D. Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 Cornell L Q 465, 475 (1957) (comparing the general doctrine with the more restrictive New York version). "Special damages," as distinguished from "general damages," are actual damages that must be pleaded and proved by the plaintiff. General damages can be presumed to result from the tort complained of. See Douglas Laycock, *Modern American Remedies* 60–61 (Little, Brown 2d ed 1996) (noting the indeterminacy surrounding the terms "general" and "specific" damages and reluctantly concluding that "'general damages' should refer to the value of what plaintiff lost from the initial impact of defendant's wrongdoing," while special, or consequential, damages "should refer to everything that happens to plaintiff as a consequence of this initial loss").

These restrictions have been criticized by commentators and by some courts.[299]

Prima facie tort provides a perfect legal framework to enlist the authority of courts to ensure accountability of private rule-making. Application of a private rule represents the intentional injury of those accused of violating the rule. All that remains is the determination that the interests affected by application of the private rule are legally recognized, and that the content of the private rule or its application is not legally justified. When the effect of the private rule is to prevent use of the internet, it should not be difficult to reach the conclusion that use of the internet is a legally protected interest, perhaps by reference to the concept of public nuisance. The internet is meant to be a public resource—a kind of commons. Use of it confers important economic and political benefits, including freedom of expression and freedom of association. Whether rule content and application are legally justified implicates the suggested mechanisms of accountability.

The problem with the prima facie tort theory is that it is not widely recognized by state courts, New York representing a notable exception.[300] Moreover, prima facie tort is subject to a number of stringent restrictions, such as a requirement that prima facie tort is actionable only when the challenged conduct gives rise to no other tort.[301] Nevertheless, a New Mexico property owner recovered on a prima facie tort theory against a bank that commenced foreclosure proceedings against his property in *Schmitz v Smentowski*.[302] The court accepted the prima facie tort theory,[303]

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299 See *Nees v Hocks*, 536 P2d 512, 514, 516 (Or 1975) (criticizing New York's conceptualization of a "prima facie tort" that "transformed a broad basis for liability into a specific tort" and permitting tort recovery for an employee's dismissal in retaliation for jury service); Jack E. Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 Nw U L Rev 563, 574 (1960) (noting that "[o]nly recently, when the principle [of prima facie tort] seemed destined to win even wider favor and to flower as a comprehensive theory of liability, it was cut down to the size of merely another cause of action for purely malicious conduct and subjected to choking regulatory rules").

300 As the analysis in this subsection indicates, it is not clear that the prima facie tort is recognized outside of New York, Missouri, and New Mexico.

301 See *Thomas v Special Olympics Missouri, Inc*, 31 SW3d 442, 450 (Mo App 2000) (affirming summary judgment for Special Olympics organization sued by excluded competitor; prima facie tort not available because facts supported allegation of intentional infliction of emotional distress, even though that tort could not be established either).

302 785 P2d 726, 739 (NM 1990).

303 See id at 734 (holding that the theory "accords with our recent tort jurisprudence, and, if properly used, provides a remedy for plaintiffs who have been harmed by a defendant's intentional and malicious acts that fall outside of the rigid traditional intentional tort categories").

theretofore recognized only in New York and Missouri.[304] It rejected the special requirements under New York and Missouri law, and adopted the balancing approach sanctioned by the Restatement.[305] Because the bank had no legitimate interest in the note supporting the mortgage foreclosure, and accepted it merely to mislead bank examiners, and because it knew its foreclosure action was thus legally questionable and likely to harm the plaintiffs, it was liable for prima facie tort.[306] Subsequently, in *Beavers v Johnson Controls World Services, Inc*,[307] the New Mexico Court of Appeals allowed prima facie tort recovery against an employer, based on deliberate harassment of the plaintiff.[308]

d) Antitrust. Under Section 1 of the Sherman Act, "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[309] Section 2 provides, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony . . . ."[310]

A variety of judicially developed limitations have prevented the explicit statutory language from being a greater disruption to commerce than the practices the statute seeks to control. The problem with literal application of the language is that every contract restrains trade to some extent because it obligates the parties to do business with each other rather than constantly considering the possibility of doing business with somebody else. Thus every contract has some market foreclosure effect—it forecloses market opportunities for those not parties to the contract who are otherwise in a position to trade with one of the contracting par-

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304 Id at 733–34.

305 See id at 735 ("The factors we consider are: (1) the nature and seriousness of the harm to the injured party; (2) the interests promoted by the actor's conduct; (3) the character of the means employed by the actor, and (4) the actor's motives."), citing both the Restatement (Second) of Torts § 870 comments f, g, h & i (1977), and *Lundberg v Prudential Insurance Co of America*, 661 SW2d 667, 671 (Mo App 1983) ("The judicial responsibility of a 'balancing of interests' advocated in the official comment to § 870, Restatement (Second) of Torts . . . must be undertaken to determine whether defendant's conduct was tortuous.").

306 Id at 739.

307 901 P2d 761 (NM App 1995).

308 Id at 766–67 (applying the balancing test outlined in *Schmitz*, and noting that such an approach "is necessary because not every intentionally caused harm gives rise to an actionable tort").

309 Sherman Antitrust Act, 15 USC § 1 (1994).

310 15 USC § 2 (1994).

ties. So the antitrust laws have been interpreted to limit literal application of the statutory language to protect certain kinds of contracts, which can promote competition, from others whose anticompetitive affect outweighs any procompetitive affect.[311]

Three basic limitations have arisen that are important in considering the antitrust laws as a source of accountability for private regulators in the internet context. First, horizontal agreements (agreements among competitors) are scrutinized much more closely under Section 1 than are vertical agreements (agreements between makers of complementary goods or services). This is so because vertical agreements often have procompetitive as well as anticompetitive effects. They often enhance inter-brand competition, such as when Coca-Cola enters into a vertical agreement that assures Coca-Cola a prominent place on the shelves of a retailer. Vertical agreements enhance interbrand competition even while limiting intrabrand competition. Second, only those directly injured by anticompetitive contracts may recover civilly. Third, only certain injuries are cognizable by the antitrust laws.

The antitrust decisions involving private standard setting organizations do not give clear guidance as to what qualifies as permissible rulemaking by such organizations, but they have suggested the kinds of activities that may result in antitrust liability. *Allied Tube & Conduit Corp v Indian Head, Inc*[312] rejected the argument that a private standard's exclusion of a certain kind of pipe from the market should be immunized from antitrust scrutiny by the "Noerr Pennington doctrine" as aimed at influencing legislative action.[313]

Rather, the validity of efforts to influence the private code "must, despite their political impact, be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process."[314] Mere compliance with rules of a private organization cannot immunize private lobbying.[315] The court noted:

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311 The most obvious example of such a limitation is the "rule of reason" test, but others operate as well, such as requirements for antitrust injury, more favorable treatment for vertical agreements than horizontal ones, and strict application of the elements of the essential facilities doctrine.

312 486 US 492 (1988).

313 See id at 509–10. This doctrine holds that concerted attempts to influence the legislative process do not violate antitrust laws. See id.

314 See id at 509.

315 See id:

> Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no Noerr immunity for any antitrust liability flowing from the effect the standard has of its own force in the marketplace.[316]

The Court did note, however, that giving a competitor a veto over changes in the private code would militate toward antitrust liability.[317] It suggested that standard setting associations comprising members with expertise but no economic interest in suppressing competition would fare better,[318] and that an entity with an economic interest can avoid antitrust liability by "presenting and vigorously arguing accurate scientific evidence before a partisan private standard setting body."[319]

Justice White's dissent expressed concerns that the Court's decision would have the effect of excluding robust participation in private standard setting by those who know the most about the standards—participants in the market to which the standards would apply.[320] This would be so, argued the dissenters, because virtually any meaningful standard tends to have an adverse effect on some competitors in the marketplace.

> The antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules of the Association, for the hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition.

316 *Allied Tube*, 486 US at 509–10.

317 See id at 509 n 12 ("Even petitioner's counsel concedes, for example, that Noerr would not apply if the Association had a rule giving the steel conduit manufacturers a veto over changes in the Code.").

318 See id at 510–11 (suggesting that "[t]o the extent state and local governments are more difficult to persuade through these other avenues, that no doubt reflects their preference for and confidence in the nonpartisan consensus process that petitioner has undermined," and thus "[w]hat petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition").

319 Id at 510.

320 *Allied Tube*, 486 US at 511, 514–15 (White dissenting) (arguing that "[t]here is no doubt that the work of these private organizations contributes enormously to the public interest and that participation in their work by those who have the technical competence and experience to do so should not be discouraged," which the majority opinion would do).

In *Radiant Burners, Inc v Peoples Light Gas & Coke Co*,[321] the Supreme Court reviewed a claim by manufacturers who alleged that they were excluded from a private association's seal of approval by tests not based on objective standards, but made arbitrarily and capriciously by the manufacturer's competitors.[322] The Court held that the manufacturer had stated a cognizable antitrust claim.[323]

Some commentators have suggested that the antitrust case law involving private standard setting organizations will make it difficult for any internet self-regulatory mechanism to function free of antitrust liability.[324] But these contributions to the literature do not explore the suggestion in *Allied Tube* and *Radiant Burner* that appropriate procedures and objective justification for private standards may protect such mechanisms from antitrust liability.[325]

In *Consolidated Medical Products, Inc v American Petroleum Institute*,[326] the Fifth Circuit rejected an antitrust claim based on exclusion of a product by the standards adopted by a standard-setting organization.[327] The center of gravity of its decision was a conclusion that the voluntary standards involved in the case had no more than a persuasive effect in the marketplace, and thus did not directly exclude the plaintiff's product.[328] But the court also reviewed features of the product standard setting process that militated against an inference of an anticompetitive purpose.[329] Among other things, the user committee which rejected the plain-

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321 364 US 656 (1961).

322 See id at 658 (characterizing allegations and complaint).

323 See id.

324 See David A. Gottardo, *Commercialism and the Downfall of Internet Self Governance: An Application of Antitrust Law*, 16 John Marshall J Computer & Info L 125, 129 (1997) (emphasizing anticompetitive effect of internet self governance involving competitors of the injured party).

325 See *Allied Tube*, 486 US at 501 (noting that when "private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages"); *Radiant Burner*, 364 US at 658 (holding that petitioner had submitted a claim for which relief could be granted and citing petitioner's allegations that respondents' "seal of approval" tests "are not based on 'objective standards,' but are influenced by respondents, some of whom are in competition with petitioner, and thus its determinations can be made 'arbitrarily and capriciously'").

326 846 F2d 284 (5th Cir 1988).

327 See id at 297.

328 See id at 296–97 (noting that if market found the standards not to be helpful it would cease to rely on them).

329 See id at 294–95 (reviewing those features and finding "no indications that approval was delayed in bad faith").

tiff's rod design was composed not of the plaintiff's competitors but of buyers of rods, who could have no motive for driving the plaintiff from the market.[330] Further, in processing the plaintiff's application for certification, the trade association followed its normal procedure for analysis of a new product.[331] In addition, the standards for product approval "reflected a sensible concern for users of the equipment," supported by diagrams and engineering specifications that were not vague, judgmental, or imprecise.[332] The Court distinguished *American Society of Mechanical Engineers*,[333] where the private codes had a more powerful influence because of their incorporation into state law.[334] So the *Consolidated Medical Products* decision suggests that neutrality of the decisionmaker, compliance with reasonable procedures, and objective rationality, are important touchstones of private rulemaking if it is to escape antitrust liability.

Clamp-All Corp v Cast Iron Soil Pipe Institute[335] involved a private trade association's promulgation of a standard for cast iron soil pipes that adversely affected the plaintiff's sales.[336] The First Circuit found that the challenged standard was procompetitive because it reduced information costs for consumers.[337] But, the court said that defense would apply only to "legitimate standard setting activity."[338] A legitimate standard setting activity would not exist if a plaintiff could show that the standard served no legitimate purpose or was unnecessarily harmful.[339] The Court noted the absence of evidence as in *Indian Head* that the defendant "packed" the meeting in which the standard was approved.[340] *Clamp-All* reinforces the need for objective rationality and neutral decisionmaking.

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330 See *Consolidated Medical Products*, 846 F2d at 295.

331 See id at 294.

332 See id.

333 456 US 556, 559 (1982).

334 *Consolidated Medical Products*, 846 F2d at 296 n 43 (distinguishing *American Society of Mechanical Engineers* on the grounds that "*ASME* involved both regulations that have the force of law and a direct conspiracy between the ASME staff and the plaintiff's competitors," factors absent in the case at hand).

335 851 F2d 478 (1st Cir 1988) (Breyer).

336 See id at 481.

337 See id at 487 ("The standard, in specifying what counts as a CISPI coupling, provides a relatively cheap and effective way for a manufacturer or a buyer to determine whether a particular coupling is, in fact, (generically considered) a CISPI coupling.").

338 Id.

339 *Clamp-All Corp*, 851 F2d at 487.

340 Id at 489.

But another First Circuit case raises doubt about whether procedural irregularities and arbitrary decisionmaking can produce antitrust liability without an additional showing of anticompetitive purpose.[341] *M & H Tire Co v Hoosier Racing Tire Corp*[342] involved a suit by a tire manufacturer that was disadvantaged by a tire racing association's selection of another supplier as the sole supplier for auto racing at four tracks in the Northeast.[343] The district court found antitrust liability,[344] but the court of appeals reversed.[345]

In particular, the court of appeals rejected the district court's conclusion that sports regulations must be promulgated by independent organizations interested in the sport as a whole,[346] and also rejected the lower court's conclusion that procedural unfairness in adopting the challenged standard foreclosed rule of reason analysis.[347] The court of appeals argued that the test procedures themselves were "hit or miss, failed to account for relevant variables, and were not adequately recorded."[348] The court of appeals recognized "that one of the evils of group boycott activity is that a private group may arrogate to itself quasi-judicial powers—a normally public function"—and "[i]n those situations where private groups are permitted to exercise such public powers, they may be required to afford fair and appropriate procedures."[349] But in the absence of any indication of bad faith or anticompetitive purpose, especially when the decision is one of business judgment

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341 To succeed under the "essential facilities doctrine" one must show "(1) control of the essential facility by a monopolist; (2) the competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *Cyber Promotions, Inc v America Online, Inc* 948 F Supp 436, 461–63 (E D Pa 1996), citing *Ideal Dairy Farms, Inc v John Labatt, Ltd*, 90 F3d 737, 748 (3d Cir 1996)) (rejecting antitrust claims, including those made under the essential facilities doctrine, and noting that "[e]ven if Cyber could prove AOL is a monopolist in the relevant market, there is little likelihood that Cyber could prove that AOL monopolizes an 'essential facility,'" as alternative channels were available).

342 733 F2d 973 (1st Cir 1984).

343 See id at 976.

344 See id (summarizing the district court's opinion).

345 See id at 789.

346 See *M & H Tire Co*, 733 F2d at 982–83 (noting that such an assumption "seems extreme").

347 See id at 983.

348 Id.

349 Id at 983–84. In reaching its decision, the court in *M & H Tire Co* examined *Silver v New York Stock Exchange*. 373 US 341, 363 (1963) (requiring basic procedural safeguards for discipline and expulsion of exchange members, a requirement that "not only will substantively encourage the lessening of anticompetitive behavior outlawed by the Sherman Act but will allow the antitrust court to perform its function effectively") (internal citations omitted).

involving user preference rather than penalties, discipline, or suspension, the only necessary procedures are those that will help assure that a decision is made "non collusively and with equal consideration" among contending products or standards.[350] Thus the court concluded:

> We discern no duty to provide an absolutely objective or scientific basis for decision. In the present case, the evidence is clear that defendants solicited and received tires from all interested companies for testing, and that, in good faith they conducted a form of testing. As a result, they selected a tire which in good faith they felt was best for their particular purposes.[351]

It takes considerable synthesis to infer procedural or substantive requirements for private rules from these cases. It is reasonable to conclude that the following factors are important:

1. The greater the degree of competitor influence and decision making, the more vulnerable the rule; and
2. The less notice to persons adversely affected by the rule, the greater the vulnerability; and
3. The less objective factual support for the rule, the more vulnerable the rule; and
4. The less opportunity for persons adversely affected by the rule to participate in decisionmaking or in offering arguments and evidence to influence decision makers, the more vulnerable the rule.

The Sherman Act and section 5 of the Federal Trade Commission Act were intended to protect market competition. But their language, read literally, would authorize judicial and administrative interference with a variety of legitimate business practices. From the earliest days of the rule of reason in Sherman Act case law, the courts, commentators, and the FTC have recognized that business, to be successful, must engage in various kinds of self-interested behavior that limits opportunities for competing firms. Thus, most exclusive contracts with suppliers or customers are permissible even though they restrain trade in some sense. Vertical agreements are viewed more sympatheti-

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350 *M & H Tire Co*, 733 F2d at 984.

351 Id.

cally under section 1 than horizontal agreements because they often have pro-competitive as well as anti-competitive effects. Firms with substantial market share ordinarily are entitled to make their own economic decisions as to with whom they will deal, even though that deprives others of opportunities for their business. Past cases involve this kind of balancing of legitimate business decisionmaking against anticompetitive effect.

No case like the MAPS case had arisen before because the technology did not exist to permit an individual to interfere with dealing between strangers. Now the technology does permit such interference, and, as deployed by MAPS, it results in firms being deprived of access to more than 40 percent of the market; not because their competitors are pursing their own economic interests, but because someone outside the market has appointed himself the arbiter of fair business practices.

There is no need to balance MAPS' economic interests against those of the blacklisted firms; MAPS is not motivated by economic interests. It is acting as a private government by exercising technologically enabled market power. As long as the literal requirements of the Sherman Act can be satisfied, MAPS should be vulnerable to antitrust scrutiny as inimical to the policy interests motivating enactment of both statutes.

e) Intentional interference with contractual relations. The tort of intentional interference with contractual relations, called by many different names,[352] protects contracting parties' interests in economic expectations arising out of contractual relations between the parties.[353] Essentially, it protects the same interest that contract law protects. The conduct prohibited by this tort is conduct directed at inducing a breach of someone else's contract,[354] or under a variation, inducing someone not to enter into a

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[352] *Roy v Woonsocket Institute for Savings*, 525 A2d 915, 919 (RI 1987) (involving a claim for "tortious interference with prospective contractual relations" in a case stemming from the termination of an at-will bank executive); *Ellett v Giant Food, Inc*, 505 A2d 888, 894 (Md App 1986) (allowing claim for "interference with prospective advantage" by a party arguing entitlement to unemployment compensation).

[353] See Restatement (Second) of Torts § 766 (1979):

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

[354] See id (referring to the tort as "Intentional Interference with Performance of Contract by Third Person").

contract.[355] "Also included is interference with a continuing business or other customary relationship not amounting to a formal contract."[356]

This tort has been recognized for more than one hundred years[357] and presently is treated in §§ 766 through 767 of the Restatement (Second) of Torts.[358] To be liable, the defendant must have acted with knowledge of the (potential) contract[359] and for the primary purpose of interfering with it.[360]

Courts developing the common law of intentional inference should recognize that code can be a contract. When one sends IP packets to a host on the internet, the effect may be the same as sending a written offer of a contract through the mail, or communicating an offer orally. Reaching out to make a contract involves a legally protected interest under the tort of intentional interference. It should be so treated when the acts of reaching out are electronic, and when the relationships sought are electronic relationships.

The Restatement makes clear that the essence of this basis for tort recovery is that the interference be "improper," a term meant to embody the same interest-balancing process as is required under § 870.[361] The Iowa Supreme Court articulated a

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355 See id at § 766B (referring to the tort as "Intentional Interference with Prospective Contractual Relation").

356 Id at § 766B comment c.

357 See Restatement (Second) of Torts § 766 comment c (1979) (tracing the historical development of "liability for tortuous interference with advantageous economic relations"); Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 Harv L Rev 1510, 1510 (1980) (arguing that "the interference tort is best understood in the context of three stages of nineteenth century legal thought," the first stage being the period prior to 1850).

358 Section 766 deals with the general rule. Section 766A treats interference with another's performance of his own contract. Section 766B treats interference with prospective contractual relations. Section 767 addresses the factors to be considered in determining whether the interference was "improper."

359 See Restatement (Second) of Torts § 766 comment i (1979) ("To be subject to liability . . . the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract.").

360 Id at § 766 comment j (noting that the rule also applies "to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action"). See also *Lewis v Oregon Beauty Supply Co*, 733 P2d 430, 436 (Or 1987) (holding there could be no recovery on an intentional interference theory where there was insufficient proof of the defendant's knowledge of verbal intimidation by another employee such that a jury could find intent).

361 Restatement (Second) of Torts, Introductory Note to ch 37 at 7 (1979) (noting that "the determination of whether an interference is improper depends upon a comparative appraisal" of a number of factors). See *Hanrahan v Nashua Corp*, 752 SW2d 878, 882 (Mo App 1988) (affirming dismissal of intentional interference claim because no pleaded facts showed that the employer's conduct was unjustified); *Gordon v Lancaster Osteopathic*

sound and useful framework in approving jury instructions that interference is improper if (1) the defendant does not act to protect the defendant's own financial interest *or* (2) if the defendant uses improper means.[362] Under this formulation, whether the means are improper depends on the interests with which the defendants interfered, the social interests in protecting the freedom of action of the defendant,[363] and the contractual interests of the plaintiff.[364] Generally, maintaining an effective business operation is a legitimate objective.[365]

The Restatement identifies a number of factors a court may consider in determining impropriety:

1. The nature of the actor's conduct; and
2. The actor's motive; and
3. The interests of the other with which the actor's conduct interferes; and
4. Social and contractual interests; and
5. The interests sought to be advanced by the actor; and
6. The relations between the parties.[366]

The intentional interference tort is used often in boycott cases. *Odom v Fairbanks Memorial Hospital*[367] involved an anes-

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Hospital Association, 489 A2d 1364, 1370 (Pa Super 1985) (holding that the allegation of lack of justification was enough for a trial on an intentional interference claim when plaintiff pathologist presented letters from medical staff asking board to terminate his privileges); *Harman v LaCrosse Tribune*, 344 NW2d 536, 541 (Wis App 1984) (holding that a newspaper's inducement of a law firm representing it to dismiss a lawyer who attacked the paper in a press release was not wrongful, as the lawyer-plaintiff violated his duty of loyalty to his client). The party alleging intentional interference is required to prove impropriety as an element of the cause of action. See *Sharon Steel Corp v V.J.R. Co*, 604 F Supp 420, 421 (W D Pa 1985) (dismissing a counterclaim for intentional interference filed by a dismissed employee for failure to plead "absence of privilege").

362 See *Wolfe v Graether*, 389 NW2d 643, 658–59 (Iowa 1986) (affirming refusal of directed verdict against physician who induced medical practice to terminate business manager).

363 For a case in which these interests were unusually low, see *Wagenseller v Scottsdale Memorial Hospital*, 710 P2d 1025, 1044 (Ariz 1985) (proof that supervisor caused plaintiff's termination for refusing to engage in indecent behavior on an off-duty rafting trip entitled plaintiff to go to jury).

364 See *Wolfe*, 389 NW2d at 659 (finding that the failure to consider these factors led to improper jury instructions that had a material affect on the privilege claim).

365 See *Bump v Stewart, Wimer & Bump PC*, 336 NW2d 731, 737 (Iowa 1983) (holding that individual members of a law firm would have been justified in terminating lawyer's employment contract on evidence that the lawyer's relationship with other lawyers was detrimental to the practice).

366 Restatement (Second) of Torts § 767 (1979).

367 999 P2d 123 (Alaska 2000).

thesiologist excluded from practice privileges at the dominant hospital in his practice area.[368] He sued among other things for intentional interference with prospective economic advantage. A prospective business relationship existed between him and the new surgical center he proposed to open, the defendant knew of that relationship, and the plaintiff was not able to open the new center because he was "financially devastated when his staff privileges [with the defendant] were terminated."[369] The court did not engage in analysis of the privilege or justification element of the tort, simply holding that the defendant's conduct "was not privileged or justified."[370]

The intentional interference tort often lies when antitrust claims fail. That occurred in *In Re Baseball Bat Antitrust Litigation*,[371] where the plaintiff claimed that the defendants wrongfully excluded his wooden baseball bats from significant parts of the market.[372] The court found that the plaintiff had failed to allege "antitrust injury," dooming his antitrust claim.[373] The court allowed him, however, leave to amend his intentional interference claim to allege more particularly expectations of business relationships with which the defendants' conduct interfered.[374] Among other things, the intentional interference complaint alleged irregularities in the defendants' internal procedures.[375]

Bruce Church, Inc v United Farm Workers of America[376] involved an intentional interference claim against a union for organizing a lettuce boycott.[377] While the appellate court remanded for a new trial, it accepted the proposition that the evidence of a secondary boycott supported a claim for intentional interference.[378] It did not engage in any extensive analysis of the impropriety of the boycott under the tort theory.

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368 See id at 127.

369 Id.

370 Id.

371 75 F Supp 2d 1189 (D Kan 1999).

372 See id at 1192.

373 Id at 1195–96.

374 Id at 1203–04.

375 *In re Baseball Bat*, 75 F Supp at 1204–05 (noting that the procedural irregularities were alleged to have resulted in the dissemination of false information interfering with potential sales of plaintiff's wooden bats).

376 816 P2d 919 (Ariz App 1991).

377 See id at 921.

378 Id at 930–31 ("We specifically find that the record contains sufficient evidence to justify an instruction on this tort claim, when all of the multistate conduct of the union is considered.").

In the internet context, an intentional interference plaintiff would establish with requisite concreteness the existence of existing or prospective economic relationships with which the private regulatory entity interfered. The plaintiff would further argue that, because the rule or adjudicatory decision complained of was not arrived at under accountable procedures and/or was not justified by a sufficiently close linkage with legitimate interests of the regulating entity, the interference was improper.

The intentional interference tort has a requirement that is useful in constraining judicial review. The tort exists only with respect to *third party interference* with contractual relations, not to one's interference with her own contract. Thus in the first private regulatory situation described in Part I C, in which the regulator and the complaining party have a contractual relationship, complaints against regulator decisionmaking may be cognizable in a breach of contract action but not in an intentional-interference action. Control over one's own resources thus would be outside the scope of intentional interference liability. Intentional interference claims would permit judicial review only of efforts to control access to someone else's resources, as in the case of MAPS.

E. International Considerations

Part of the problem that hybrid regulation seeks to solve is constructing public law institutions that function internationally. Absent an international public law framework, persons dissatisfied with the results of private rulemaking, adjudication and enforcement will seek relief in national courts, vitiating the transnational benefit of private regulation. National court litigation over hybrid regulation raises the same issues of prescriptive and adjudicative jurisdiction that justified interest in private regulation in the first place.

One possibility is to harmonize transnational jurisdiction through a treaty, but Hague Conference discussions over a new treaty addressing matters related to jurisdiction are not promising.[379] The Conference is considering a comprehensive treaty for

[379] The Hague Conference on Private International Law has one hundred years of experience in facilitating multilateral agreement among states on public law frameworks for private law. See Future Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters ("International Jurisdiction Convention") (adopted by the Special Commission Oct 30, 1999), available online at <http://www.hcch.net/e/workprog/jdgm.html> (visited Feb 2, 2001). See also Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (concluded Mar 18, 1970), available

judicial jurisdiction and enforcement of foreign civil judgments.[380] The Conference has an opportunity to work out basic ground rules for localizing conduct in internet markets.[381] It also has an opportunity to define the relationship between private regulation and public enforcement.[382]

Modeled closely on the European Brussels and Lugano Conventions, the Hague draft convention[383] applies to civil and commercial matters, excluding revenue, customs, or administrative matters.[384] It also excludes arbitration and revised related proceedings,[385] admiralty and maritime,[386] and insolvency, composi-

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online at <http://www.hcch.net/e/conventions/text20e.html> (visited Feb 2, 2001); Convention on the Choice of Court (concluded Nov 25, 1965), available online at <http://www.hcch.net/e/conventions/text15e.html> (visited Feb 2, 2001); Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (concluded Nov 15, 1965), available online at <http://www.hcch.net/e/conventions/text14e.html> (visited Feb 2, 2001); Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (concluded Nov 15, 1965), available online at <http://www.hcch.net/e/conventions/text13e.html> (visited Feb 2, 2001); Convention on Recognition of the Legal Personality of Foreign Companies, Associations and Foundations (concluded June 1, 1956), available online at <http://www.hcch.net/f/conventions/text07f.html> (visited Feb 2, 2001); Convention on Conflicts between the Law of Nationality and the Law of Domicile (concluded June 15, 1955), available online at <http://www.hcch.net/f/conventions/text06f.html> (visited Feb 2, 2001); Convention on Civil Procedure (concluded Mar 1, 1954), available online at <http://www.hcch.net/f/conventions/text02f.html> (visited Feb 2, 2001); [all internet materials cited in this note on file with U Chi Legal F].

380 See International Jurisdiction Convention (cited in note 379) (containing draft convention and association analyses).

381 See International Jurisdiction and Judgments Project, available online at <http://www.ali.org/ali/Intl_Juris_Proj.htm> (visited Feb 2, 2001) [on file with U Chi Legal F] (containing analyses of Hague Conference efforts of the ALI).

382 In an experts' conference convened by the Hague Conference in Ottawa in 2000, the author suggested that the draft convention exception for choice of forum clauses enforceability for consumer contracts could be conditioned on the consumers not having available to them an acceptable private dispute resolution alternative.

383 The discussion in this section refers to the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission on October 30, 1999. See Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters ("Preliminary Draft Jurisdiction Convention"), available online at <http://www.hcch.net/e/conventions/draft36e.html> (visited Feb 2, 2001) [on file with U Chi Legal F].

384 Id at Art 1(1) ("The Convention applies to civil and commercial matters. It shall not extend in particular to revenue, customs or administrative matters.").

385 See id at ch I Art 1(2)(g) ("The Convention does not apply to arbitration and proceedings related thereto.") The exclusion of arbitration is problematic, because it makes the drafters reluctant to solve disagreements over certain jurisdiction rules—particularly the rule allowing consumers to sue in the courts of their own jurisdiction—by preconditioning the exercise of such jurisdiction on exhaustion of certain privately provided remedies.

386 See id at ch I Art 1(2)(h) ("The Convention does not apply to admiralty or maritime matters.").

tion or analogous proceedings.[387] The convention limits jurisdiction[388] as well as mandating enforcement of foreign judgments.[389] Accordingly, only those judgments supported by jurisdiction under the convention are entitled to enforcement.

Forum selection clauses are effective with only procedural preconditions.[390] General jurisdiction exists in places designated by the parties in a forum selection clause,[391] and also when a defendant waives jurisdictional protests by "proceeding on the merits without contesting jurisdiction."[392] Forum selection clauses may point either to the courts of contracting states or to the courts of non-contracting states.[393] Objections to jurisdiction are waivable.[394]

Special rules apply to consumer contracts.[395] Consumers may bring suit in their home states when sellers from other states target their home states,[396] and may be sued only in their home

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387 See Preliminary Draft Jurisdiction Convention at ch I Art 1(2)(e) (cited in note 383) ("The Convention does not apply to insolvency, composition or analogous proceedings.").

388 See id at ch II (containing provisions related to jurisdiction, beginning with the general statement that "a defendant may be sued in the courts of the State where that defendant is habitually resident").

389 See id at ch III (containing provisions discussing the recognition enforcement of judgments, including the general rule that "[a] judgment based on a ground of jurisdiction provided for in [Chapter II], or which is consistent with any such ground, shall be recognised or enforced under this Chapter").

390 See id at ch II Art 4(2) (requiring, for example, that the agreement be in writing and "in accordance with a usage which is regularly observed by the parties").

391 See Preliminary Draft Jurisdiction Convention at ch II Art 4(1) (cited in note 383):

> If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise.

392 See id at ch II Art 5(1).

393 See id at ch II Art 4(1) (allowing forum selection clauses to point to the Contracting state or, "[w]here an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction").

394 See id at Art 5.

395 See Preliminary Draft Jurisdiction Convention at ch II Art 5(1) (cited in note 383) ("[A] court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.").

396 Id at ch II Arts 7(1)(a)–(b) (allowing jurisdiction over contractual disputes where the claim "is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and the consumer has taken the steps necessary for the conclusion of the contract in that State").

courts.[397] Specific jurisdiction against defendants with branches, agencies, or other establishments may be brought wherever the branch, agency, or other establishment is located, or where the defendant has carried on regular commercial activity by other means.[398]

Intellectual property that must be registered or deposited can be litigated only in the place of deposit or registration.[399] This source of jurisdiction does not apply to copyright even though registration or deposit is involved.[400] Exclusive jurisdiction over registerable intellectual property, except for copyrights, is vested in the courts of the place of registration.[401] The draft convention prohibits certain grounds of jurisdiction, including in rem jurisdiction, except for claims specifically related to (i) the seized property;[402] (ii) nationality of the plaintiff or defendant;[403] (iii) "the domicile, habitual, or temporary residence or presence of the plaintiff;"[404] (iv) general doing business jurisdiction;[405] (v) tax ju-

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397 See id at ch II Art 7(2) ("A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.").

398 See id at ch II Art 9:

> A plaintiff may bring an action in the courts of a State in which a branch, agency, or any other establishment of the defendant is situated, [or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or establishment [or to that regular commercial activity].

(brackets in original).

399 See Preliminary Draft Jurisdiction Convention at ch II Art 12(4) (cited in note 383):

> In proceedings which have as their object the registration, validity, [or] nullity[, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction.

400 See id at ch II Art 12(4) ("This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.").

401 See id.

402 Preliminary Draft Jurisdiction Convention at ch II Art 18(2)(a) (cited in note 383) (disallowing jurisdiction of a Contracting State on the sole basis of "the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property").

403 See id at Art 18(2)(b) & (c).

404 See id at Art 18(2)(d).

405 See id at Art 18(2)(e).

risdiction,[406] and (vi) signing a contract related to the dispute in a state.[407] Signatories may provide for other grounds of jurisdiction under national law,[408] but those grounds do not support recognition and enforcement under the treaty.[409]

The main controversies preventing agreement on the draft convention currently involve U.S. objections to limitations on general doing business jurisdiction, U.S. objections to extension of tort jurisdiction to the place of injury without regard to the purposefulness test of *World-Wide Volkswagen*,[410] and the exclusion of consumer and employment contracts from choice of forum clauses. Additionally, intellectual property interests are having difficulty understanding why intellectual property disputes ever should be litigated anywhere other than in forums of the place where the intellectual property arises.[411]

Even if the Hague Conference efforts were entirely successful, they would not come close to resolving the difficulties in designing an accountability system for private regulation of the inherently international internet. It is, for example, entirely possible under the Hague Convention as drafted for courts in multiple states to have jurisdiction over the same conduct. This possibility raises the specter of multiple, conflicting judicial decisions resulting from the application of the causes of action and standards of review suggested in this Article.

All of those judgments would be entitled to transnational enforcement against the assets of defendants, wherever found. In this sense, the Hague Judgments Convention would worsen the problem of transnational conflict. Currently, an internet defendant without assets in the forum state can more or less safely ignore litigation there, but if the Hague Convention were

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406 See Preliminary Draft Jurisdiction Convention at ch II Art 18(2)(f) (cited in note 383) (disallowing jurisdiction of a Contracting State on the sole basis of "the service of a writ upon the defendant in that State").

407 Id at Art 18 (2)(j).

408 See id at ch II Art 7.

409 Id at Art 17 (authorizing non-prohibited assertion of rules of jurisdiction under national law). See also id at ch II Art 24 (excluding Article 17 judgments from mandatory recognition and enforcement).

410 *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 295 (1980) (finding "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction," as the foreseeability of contacts with the forum state, which must be purposeful, were insufficient to support personal jurisdiction).

411 The author participated in a special conference convened by the World Intellectual Property Organization in January 2001, at which these concerns were manifest.

adopted, the defendant's assets would be put at risk even though the assets are not located in the forum state.[412]

But some conflicting judgments may not be all bad at this stage of development of hybrid regulatory mechanisms. The French Yahoo! case helps Yahoo! and other internet service providers realize that they are unlikely to avoid the application of regular, geographically-based law, and therefore they should participate more actively in developing overarching mechanisms to make first-level decision makers accountable—regardless of whether those decision makers are private or state-based.

F. Criteria and Rules of Thumb: What Should "Publicly Regarding" Mean?

Assuming a legal theory can be found to support judicial review of private rulemaking, considered in Part II D, one must then identify the standards to be applied by a court or by a jury. The challenge is to probe the meaning of "public interest" as the term is used by Professor Freeman,[413] of "public regardedness," as the term is used by Dean Krent,[414] and of "legitimacy" as the term is used by Professor Dinwoodie.[415]

In his comments on an earlier draft of this article, David R. Johnson expressed discomfort with presenting accountability in terms of vertical relationships between private decisionmakers and traditional governments. He suggested an alternative understanding based on congruence. The congruence idea is developed more fully in Part II F 6.

Consistent with the suggestion in Part II C that the common law should be allowed time to develop some ideas in the context of concrete disputes, one can envision a legal environment in

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412 Professor Dinwoodie suggests, however, that adoption and implementation of the Hague Judgments Convention could lead to convergence of national laws, at least with respect to intellectual property, which would reduce the strains on private bodies addressing the same questions across national boundaries. Helfer and Dinwoodie, 43 Wm & Mary L Rev at 271–73 (cited in note 214).

413 See Freeman, 75 NYU L Rev at 558 (cited in note 42) (noting that "[i]n a public interest model, the agency is obligated to exercise its discretion in implementing statutes with a view to the national interest or general welfare, rather than yielding to factional pressure at the behest of one or another powerful interest group").

414 See Krent, 85 Nw U L Rev at 105 (cited in note 40) (explaining that "[b]ecause only Congress (subject to Presidential veto and congressional override) has determined that the delegation is consistent with its responsibility to protect the public, the ultimate content and public regardedness of the delegated authority are open to doubt").

415 See Helfer and Dinwoodie, 43 Wm & Mary L Rev at 244–45 (cited in note 214) (explaining how lack of legitimacy will undermine effectiveness of private regulatory institutions).

which persons sufficiently aggrieved by private regulatory action to commit the resources to litigate would eventually reach a jury. A jury then would be charged with deciding whether the actions of the private regulator were "justified," or "proper," or reflected the right balance of interests. Or, a jury might be charged to consider whether the private regulator's decisions sufficiently respected the "public interest."

What might counsel in their closing arguments invite the jury to consider in applying the general standard of propriety or public interest? This Article now discusses characteristics of accountability that might be taken into account by judges as they develop the common law.

Grewlich suggests the following elements for hybrid regulation:[416]

1. existence of representative entities
2. principles, codes of conduct or guidelines allowing for rule-based behavior (respecting fundamental rights and the principle of proportionality)
3. independent self-regulatory bodies, including representatives from industry and users to administer the codes or guidelines
4. assurance that hybrid regulation not lead to anticompetitive behavior or restrictive business practices and will not affect the freedom to provide new services
5. availability of downstream self regulation in the form of appropriate technical solutions to supplement self regulation.[417]

More generally, he suggests that hybrid regulatory regimes respect principles of subsidiarity[418] and proportionality.[419]

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[416] Professor Grewlich calls it "a co-operative system of self regulation." Grewlich, *Governance in Cyberspace* at 294–95 (cited in note 142).

[417] Id.

[418] Subsidiarity assigns policymaking and implementation to the lowest practicable level of authority—to actors as close as possible to where action occurs, thus constituting a "bottom-up" approach to organization. Subsidiarity and competition are the pillars of "ordoliberalism." Id at 331, citing David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 Am J Comp L 25, 25 (1994) (discussing the ordo-liberal, or Freiburg School, whose thinkers believed that the "competitive economic system . . . necessary for a prosperous, free and equitable society" could only come about "where the market was imbedded in a 'constitutional' framework").

[419] Proportionality embodies the same idea as "narrowly tailored": neither over- nor underinclusive. See Grewlich, *Governance in Cyberspace* at 329–33 (cited in note 142)

Professor Freeman suggests that accountability mechanisms must protect both "rationality" and "public orientation."[420] Public orientation might include values such as expertise, rationality, and disinterest, and consideration of non-economic factors and the protection of diffuse, unorganized interests.[421] She urges a "deeper analysis" of the realities of public/private governance to seek new methods of assuring accountability.[422]

Professor Dinwoodie offers three types of "checking functions."[423] *Creational* checking functions circumscribe private decisionmaking in advance, when the documents authorizing private decisionmaking are drafted. *External* checking functions involve review of first-instance decisions by appellate bodies, judicial or otherwise. *Internal* checking functions flow from self-restraint and the culture of decisionmakers. Dinwoodie does not draw a strong distinction between rationality and fair procedure, but these two elements are implicit in much of his discussion of the three types of checking function.

A synthesis of commentator suggestions includes two basic elements of accountability: rationality and fair process. One obvious possibility for mandating these two elements is to impose the basic requirements of administrative agency rulemaking under the Administrative Procedure Act.[424] Thus, a private rulemaker would be required to publish proposed rules, receive comments on the proposed rules from any interested party, and then offer a rationale for the final rules in light of the scope of rulemaking power asserted, the need for the rules, and the comments received. Borrowing rulemaking standards from administrative law has a number of advantages. The requirements are flexible, both procedurally and substantively. They allow the rulemaking deci-

("The consistent application of the principles of subsidiarity and proportionality might have the virtue of limiting a tendency to add rules to areas currently not subject to regulation.").

420 Freeman, 75 NYU L Rev at 548–49 (cited in note 42) (proposing that "both critical legal studies and public choice theory are correct: There is no purely private realm and no purely public one," and proposing that "[i]n light of public/private interdependence . . . we think in terms of 'aggregate' accountability: a mix of formal and informal mechanisms, emanating not just from government supervision, but from independent third parties and regulated entities themselves").

421 Id at 558 n 52.

422 See id at 674 ("The inquiry into public/private interdependence undertaken here—the description of different governance arrangements, the analysis of their strengths and weaknesses, and the identification of mechanisms for rendering them accountable—is an effort to rethink governance by engaging in a form of microinstitutional analysis.").

423 Helfer and Dinwoodie, 43 Wm & Mary L Rev at 199–213 (cited in note 214).

424 5 USC § 553 (1994).

sion maker to take the initiative and offer its own rationale, without being bound by a formal adjudicatory record. They allow the private decisionmaker to change the rules simply by giving new notice, receiving new comments, and offering a new rationale.[425]

But there also are disadvantages. Private rulemaking lacks the statutory framework that governs agency rulemaking; it is not clear how a private rule would be determined to be *ultra vires*, because there is no statutory grant of authority in the private rulemaking context. Moreover, even though the APA rulemaking procedures were originally conceived to be informal and flexible,[426] more than fifty years of judicial interpretation has imposed a number of obligations on agencies that they find cumbersome.[427]

A second possibility is to apply the requirements imposed on private standard-setting organizations: objective rationality and a neutral decision maker. There also are hints in some of the cases that some sort of process permitting participation by interested parties is necessary.[428] This approach is not materially different in basic concept from the APA approach, but its requirements are more basic and therefore may allow greater flexibility for differing circumstances confronting private rule makers. The relatively few cases interpreting these requirements, compared to the large number of cases interpreting APA requirements, may be an advantage in this regard. On the other hand, the requirement for a neutral decisionmaker makes sense when the harm at issue involves decisions made by competitors that exclude the interested party from the market. This requirement is logically less appropriate if the cause of action warranting judicial review

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425 See *Motor Vehicle Manufacturers Assn of the United States, Inc v State Farm Mutual Automobile Ins Co*, 463 US 29, 57 (1983) (holding that an agency must provide "reasoned analysis" for changing rules).

426 See generally *American Hospital Association v Bowen*, 834 F2d 1037, 1045 (DC Cir 1987) (holding that Congress enacted the exceptions to § 533 of the APA "as an attempt to preserve agency flexibility in dealing with limited situations where substantive rights are not at stake").

427 See generally *Hecklen v Chaney*, 470 US 821, 831 (1985) (conceding that when considering a decision of an agency under the APA, "recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement").

428 Compare *M & H Tire Co*, 733 F2d at 983 (1st Cir 1984) (rejecting district court's conclusion of procedural unfairness because of inadequacy of notice given to tire manufacturers of certain tests conducted before the standard was adopted), with *Clamp-All Corp*, 851 F2d at 489 (1st Cir 1988) (absence of evidence that defendant "packed" meeting in which standard was approved indicates legitimacy of proceedings).

does not require that the challenger be a competitor of the decisionmaker.

A third possibility is to follow the case law applied to private associations, precluding expulsion of members without due process.[429] Yet another possibility is to allow private rule makers to avoid review of the substantive justification for a rule if they use certain processes affording participation opportunities to affected parties—either directly or through representatives. This is the basic approach used for ICANN and also is embedded in the idea for negotiated rulemaking in the administrative procedure context. Negotiated rulemaking is not a completely appropriate model, however, because negotiated rulemaking is only used to develop a proposed rule which then is subject to the regular APA rulemaking requirements, and subject to judicial review on substance as well as procedure. But, as Part II C explained, the challenge is not to develop a grand theory, but only to develop some rough benchmarks for reviewing courts to use. At this point, it probably is enough to suggest that a challenged rule be reviewed under each of the suggested alternatives, with the proponent of the rule allowed to demonstrate how it passes muster under at least one of the approaches.

The following benchmarks represent an effort to adapt the requirements for rulemaking in the APA and other models.

1. October recommendations.

On October 8, 1997, a number of internet stakeholders met in Washington to define the boundary between internet self-governance and the governments of sovereign countries. This author convened the meeting in response to declarations by the United States and European governments that called for private sector leadership and self regulation of the internet. Participants recognized that no system of self-governance can exist independently of national systems of law and that the degree of connection between private regulatory bodies and traditional legal institutions varies by issue. In any system of self regulation, it is necessary to ask what can be done to heighten confidence that a par-

[429] See *Austin v American Association of Neurological Surgeons*, 47 F Supp 2d 941, 942 (N D Ill 1999) (holding that private associations must afford due process and follow bylaws); *Normali v Cleveland Association of Life Underwriters*, 315 NE2d 482, 484–85 (Ohio App 1974) ("a member of a private association may not be expelled without due process. This right is derived not from the constitution but rather from a theory of natural justice;" due process includes absence of bad faith, compliance with constitution and bylaws of association and natural justice).

ticular issue will be handled in a way that will be fair, legitimate, and efficient.

Self-regulatory systems meeting certain criteria can inspire that confidence. The participants in the October 8 meeting reached agreement in principle on five such criteria, set forth fully elsewhere.[430] The criteria included transparency;[431] due process;[432] accountability;[433] openness;[434] and protection of public policy.[435] Not every participant on October 8 agreed with every word of the principles and the explanatory notes, but the published statement fairly reflected the judgment of the group taken as a whole.[436]

These criteria were intended for use by the designers of self-regulatory systems, by government policymakers, and by judges who must determine the degree of deference to accord the decisions of private self-regulatory bodies for the internet. When a self-regulatory system meets all the criteria, its private decisions made consistent with its constitutional documents are entitled to judicial deference and to some insulation from antitrust and tort law.

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[430] Perritt, 12 Berkeley Tech L J at 479–82 (cited in note 1) (setting forth in full in appendix the Criteria for Autonomy guidelines agreed to in the meeting of October 8, 1997).

[431] Rules and agreements should be disseminated and published widely on the internet, in an understandable and complete form. The process for amending and setting rules should be fully disclosed. Rules should be able to be created and changed only after an adequate notice period. Initiation and results of adjudications should be fully disclosed, including the factual and legal basis for the decision. Enforcement procedures and decisions should be fully disclosed. Who is making decisions and how they were selected should be publicly disclosed. See id at 479–80.

[432] Decisions on rules and adjudication should be preceded by notice. Adjudicatory decisions should be preceded by some form of hearing appropriate to the factual issues and to the magnitude of the interest at stake. Decisions should be expressed in writing, including electronic formats. Review of private decisions should be available, but should be confined to whether due process occurred; not to the correctness of the decision on the merits, although merits-based review was contemplated by the public policy criterion. See id at 480.

[433] The accountability criterion relied to a considerable extent on market forces, and incentives for internet participants to cooperate with each other, as occurs with the basic standards and protocols. The accountability criterion also contemplated, however, governmental control over certain locally-associated activities, and constitution of nonprofit corporate entities to provide a mechanism for representative accountability. See id at 480–81.

[434] Private governance mechanisms should be open to participation at several levels. Any intergovernmental agreement should be open to any nation state. Policy oversight entities should not exclude particular groups or views. Registrars should enjoy freedom of entry. Consumers should have choice, including portability and variety.

[435] Acceptable criteria must exist to avoid contract overreaching and for intellectual property protection and protection of the interests of third parties.

[436] See Perritt, 12 Berkeley Tech L J at 481–82 (cited in note 1).

The participants in the October 8 discussions were focused on domain name regulation. At the time, major questions existed as to whether domain name regulation was most appropriately understood as a governmental or a private function. Early disputes over trademark and domain name conflicts had muddled the authority over the domain name system,[437] and three months before the October 8 conference, the Department of Commerce had issued a request for comments pertinent to privatizing the DNS.[438] Significantly, this period of uncertainty included a unilateral step by Jon Postel[439] to redirect the DNS system to a purely private "Root B."[440] But the language of the October 8 statement makes it clear that the focus was on private systems.[441] Also, the language of the October 8 statement extended beyond domain name administration.[442] Interestingly, the October 8 statement has a procedural emphasis. Rules must be created and changed only after adequate notice. Review should be confined to whether due process was made available, "not to the correctness of the decision on its merits."[443] Anyone meeting the stated qualifications must be allowed to participate. Despite the procedural emphasis, substantive review of private decisions should be available[444] "to avoid contract overreaching and for intellectual property protection and protection of the interests of third parties."[445]

The language of the October 8 statement is constitutional in its generality; it hardly provides a specific template for common law doctrine, let alone a statute or regulation. Nevertheless, it makes somewhat more concrete the idea of "accountability" or "public relatedness." And, it comes from representatives of the internet community rather than from purely academic students of administrative or constitutional law.

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437 See Froomkin, 50 Duke L J at 61–62 (cited in note 27) (explaining the controversy).

438 See id at 62–63 (reviewing history of governmental review).

439 The late Jon Postel, a computer scientist at USC, exercised de facto control over the development of internet protocols and the management of internet name space. He exercised personally the powers that, after his death, were exercised by ICANN. See generally Froomkin, 50 Duke L J at 53 (cited in note 27) (explaining evolution of Jon Postel's role; "by all accounts Jon Postel and his colleague Joyce Reynolds were not only socket czars, but Internet names and numbers czars").

440 Id at 64–65. The "root" is the basic list of top-level domain names within the DNS.

441 See, for example, Perritt, 12 Berkeley Tech L J at 479–80 (cited in note 1) (criterion A, stating that "any *private* system . . . must be transparent").

442 See id ("and any other aspects of self-regulation . . . .").

443 Id at 480 (criterion B).

444 See id (criterion B, stating that "review of self government decisions should be available" and that exceptions to limitation on review of correctness of decision should be reserved to cases implicating protective principles).

445 Perritt, 12 Berkeley Tech L J at 482 (cited in note 1) (criterion E).

2. Basis in constitutional values.

Part IV D 4 a argues that constitutional values can inform common law litigation so as to assure accountability of private regulation. The specific criteria or touchstones for private regulation, discussed throughout Part II F, can be linked to fundamental constitutional values. In understanding these constitutional values, one must recognize that not every constitutional value must be applied in common law litigation. A process of selective incorporation, roughly analogous to that utilized in giving content to the Fourteenth Amendment equal protection obligation of states, is appropriate.

Put in the most general terms, constitutional values of procedural due process and substantive due process are appropriate starting points for private regulatory accountability. Procedural due process requires, at a minimum, that persons affected by a decision be given notice of a proposed decision before it is made and also given an opportunity to be heard.[446] Judge Henry J. Friendly deconstructed procedural due process into some eleven elements of procedure that can be imposed depending on their utility and on the nature of the interests involved.[447] Procedural due process requirements have been codified for rulemaking[448] and adjudication[449] by federal administrative agencies in the Administrative Procedure Act.[450]

Substantive due process requires rational decisionmaking and obligates decisionmakers to justify their decisions by refer-

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446 Procedural due process requirements for legislative decisionmaking are considerably different from procedural due process requirements for adjudicative decisionmaking. "The due process clause sets a significantly lower bar for legislative functions." *New York State Terry Foods, Inc v Northeast Terry Compact Commission*, 198 F3d 1, 13 (1st Cir 1999) (rejecting challenge to decision to set minimum milk prices, and finding no violation of due process because decisionmaker board provided for industry representation); *National Small Shipment Traffic Conference, Inc v Interstate Commerce Commission*, 725 F2d 1442, 1447–48 (DC Cir 1984) (notice and comment procedures rather than adversarial hearing well suited for legislative-type decisionmaking; context was administrative law rather than constitutional due process).

447 See Perritt, 15 Ohio St J on Disp Resol at 677–78 (cited in note 80) (noting that Friendly's "list of procedural elements represents a kind of menu," and that "[a]s one moves down the list, more formality and more fairness are present, albeit at increased cost").

448 5 USC § 553 (2000) (requiring, for example, general notice of all rulemaking in the Federal Register in the absence of actual notice to those subject to such rules, and that "[e]ach agency shall give an interested party the right to petition for the issuance, amendment, or repeal of a rule").

449 See id at §§ 554–59 (discussing opportunities for and requirements of agency hearings).

450 See id at §§ 551–706.

ence to objective facts and legitimate interests within their competence. Substantive due process is codified for decisions by federal administrative agencies in the "arbitrary and capricious" and "abuse of discretion" standards for judicial review of such decisions.[451] These standards apply both to rulemaking[452] and adjudicatory[453] decisions.

Both of these values should inform scrutiny of private regulatory decisions relating to the internet. Other constitutional values, such as freedom of expression, freedom of association, and the right to be free from unreasonable searches and seizures are likely to implicate sharper conflicts between competing interests of the actor and the aggrieved party. Therefore, they should be used more sparingly.[454]

3. Subject matter competence.

Few rulemaking institutions have unlimited subject matter competence. Congress must act within powers conferred by the United State Constitution. State legislatures must act within the limits of state constitutions and so as not to conflict with federal law or impede interstate commerce. Administrative agencies must act only with respect to subject matter defined by statute, which must be expressed in a manner consistent with the nondelegation doctrine. The ICANN MOU limits ICANN rulemaking power to "technical matters" relating to administration of the domain name system.[455]

Some hints of limitations on subject matter competence are visible in intentional interference cases in which interference

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451 Id at § 706(2)(A).

452 See *Motor Vehicle Manufacturers Assn of the United States, Inc v State Farm Mutual Automobile Ins Co*, 463 US 29, 41 (1983) (holding that actions of an agency "under the informal rulemaking procedures of § 553 . . . may be set aside if found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'"), citing 5 USC § 706(2)(A).

453 See *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 413–14 (1971), overruled on other grounds by *Califano v Sanders*, 430 US 99 (1977) (holding that "in all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements"), citing 5 USC §§ 706(2) (A), (B), (C), (D).

454 See *Turner Broadcasting System, Inc v FCC*, 520 US 180, 192–93, 217–18 (1997) (reviewing the competing First Amendment expressive interests of those wanting access to communications channels and those controlling such channels); *Skinner v Railway Labor Executives' Association*, 489 US 602, 619 (1989) (discussing the competing interests of employers and employees when employers conduct employee searches that implicate the Fourth Amendment interests of employees).

455 See ICANN MOU at III B (cited in note 60).

with contractual relations is found to be improper or to abuse a conditional privilege because the motives are "extraneous" to the matters legitimate to the relationship.[456] This means that judges applying the common law to internet-related private governance decisions should view the decisions of an entity that has narrowly defined regulatory competence more sympathetically than those of an entity that can range broadly into various subject matters. This makes sense because a decisionmaker knowing she has narrow boundaries for legitimate action is more likely to restrain herself.[457] Dinwoodie makes much of narrowing decisionmaking authority as a mechanism for improving legitimacy.[458]

4. Rationality.

Freeman says that rules should be "rational."[459] The APA requires that they not be "arbitrary or capricious."[460] Substantive due process and equal protection require that, at a minimum, rules have a "rational basis."[461] Antitrust law requires that private standards be justified by objective rationality.[462]

One can infer from these requirements a deep sense in the legal tradition that accountability requires rationality. The problems in implementing the value of rationality include allocating decisional responsibility between the first instance decisionmaker—a legislature, agency or private regulator—and the reviewer, usually a court. Further, the legal system must determine what interests are legitimate bases for a rule, and which interests may not be considered. It must determine how close the nexus

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[456] *Schwanbeck v Federal-Mogul Corp*, 578 NE2d 789, 803 (Mass App 1991) (stating that improper conduct, which may include ulterior motive or wrongful means, is an element of intentional interference with contractual relations), revd on other grounds, 592 NE2d 1289 (Mass 1992).

[457] This pertains to Dinwoodie's "internal checking functions." See Helfer and Dinwoodie, 43 Wm & Mary L Rev at 210–13 (cited in note 214).

[458] See id at § II (B)(1)(c) (reviewing narrowing of scope of eligible disputes during pre-ICANN discussions); § II (B)(3)(c) (ICANN's narrowing the scope of eligible disputes).

[459] Freeman, NYU L Rev at 598 (cited in note 42) (need for devices to assure rationality).

[460] 5 USC § 706(2)(A).

[461] See *People of State of California v FCC*, 905 F2d 1217, 1238 (9th Cir 1990) ("'[A]rbitrary and capricious' review under the APA does not permit us to impute reasons to the agency and uphold its action if it has any conceivable rational basis.").

[462] See, for example, *Allied Tube*, 486 US at 500–01 (noting that although "private standard-setting associations have traditionally been objects of antitrust scrutiny," if "private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages") (internal citations omitted).

between the rule and the underlying interest must be, how free the rulemaker is to choose among alternative approaches to protect the interest,[463] and how logically and persuasively the rulemaker must articulate the connection.

Rationality as a criterion for rulemaking works regardless of the rulemaking situation. It can be applied to those in control of a valuable resource, to those contractually enabled to make rules, or to those rulemakers whose power stems from being delegated by a public institution.

5. Scope of regulatory authority in terms of persons and entities bound.

Legislative power, known in private international law as "prescriptive jurisdiction," does not extend to the whole world. Traditionally limited by geographic boundaries of a state,[464] it also can be limited to members of a "bargaining unit," in labor law, to the members of a private association,[465] or to subscribers of an internet service provider.[466] The challenge in hybrid regulation is to define "citizen" of a private community in advance. Is it anyone who crosses the "border?" What does "border" mean? Does conduct, as in using a securities exchange or sending e-mail to the subscribers of a particular service, work?

Determining the persons or entities bound by privately made rules is especially problematic only in the fourth regulatory situa-

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463 Herein lie the seeds of a requirement to show that a rule represents the least restrictive among a set of alternatives. An element of rationality is to adopt means narrowly tailored to accomplish ends. Constitutional law scrutinizes state action that burdens fundamental rights or suspect classifications for overbreadth, and prefers narrowly tailored means for pursuing legitimate state interests. The common law of intentional interference with contractual relations scrutinizes means to make sure they are appropriately related to legitimate interests. Common law review of private regulatory decisions should seek the same congruence between means and legitimate ends.

464 See Restatement (Third) of Foreign Relations Law, Introductory Note to Part IV, ch 1 at 237 (1987) (noting that "[t]erritoriality and nationality remain the principal bases of jurisdiction to prescribe"). See also id at §§ 402–03 (proscribing and circumscribing such jurisdictional bases).

465 See *Dallas County Medical Society v Ubinas-Brache*, 2001 Tex App Lexis 818, *8–14 (reviewing basic criteria for judicial oversight of private association decisions; linking applicability of private rules to membership); *Malia v RCA Corp*, 794 F2d 909, 912–13 (3d Cir 1986) (holding that a collective bargaining agreement does not apply to management position outside bargaining unit).

466 See *America Online, Inc v IMS*, 24 F Supp 2d 548, 550 (E D Va 1998) (affirming summary judgment for AOL against defendant who sent bulk e-mail to AOL's subscribers); *Cyber Promotions, Inc v America Online, Inc*, 948 F Supp 436, 437 (E D Pa 1996) (holding that "in the absence of State action, the private online service has the right to prevent unsolicited e-mail solicitations from reaching its subscribers over the Internet").

tion, where the regulatory authority arises from control of a valuable resource. When the basis for regulatory authority arises from delegation by public institutions, the delegation can define the universe of persons or entities to be regulated. Indeed, such a definition is conceptually part of the "channelizing" necessary to satisfy the nondelegation doctrine.[467] When contract is the basis, the universe of those regulated is defined by the universe of those party to the contract. When acquiescence is the basis, the regulated universe is determined by those acquiescing.

When regulatory authority is premised instead on control of a valuable resource, the scope of the regulated population is as broad as the universe of those using the resource. When the resource is traditional private property—a particular piece of computer hardware, for example—the owner may condition use on compliance with a set of rules, and those electing to use the resource under those conditions have implicitly consented to be subject to the rulemaking authority of the owner.

But when the resource is common, as is the internet in the aggregate, this property-based mechanism for defining the universe of the regulated is less satisfying. The commons belongs as much to the user as to the regulator, and there is no obvious reason why the user should be subject to the will of the regulator. This is the situation with MAPS and its likely imitators.

6. Congruence.

Congruence exists when policies, and their application or enforcement, result from actions and decisions by a group substantially the same as the group that bears the impacts—at least the negative impacts—of those policies.[468] When the regulated population makes the rules, either directly or through fairly elected representatives, congruence is realized. Notwithstanding Netanel's arguments, developed in Part I B, private ordering often produces more congruence than state-based decisions. Indeed,

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[467] See *Yakus v United States*, 321 US 414, 424–25 (1944) (noting that the nondelegation doctrine is satisfied "when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective," and therefore "[i]t is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework").

[468] David R. Johnson suggested congruence as an important value in his comments on an earlier version of this article.

that may be why the subsidiarity principle so often is honored by allowing private groups to make decisions while traditional government authorities abstain.

ICANN can produce congruence, if its election and representation mechanisms can be perfected. Indeed, the desire for congruence is why so much controversy exists over development of those mechanisms. On the other hand, MAPS is not congruent because its proprietors decide what the rules are and cut off anyone else who will not follow their rules. Those potentially burdened are completely different from the decisionmaker.

Markets do not necessarily assure congruence. Various asymmetries may allow one side of a reciprocal relationship to impose self-interested rules on the other side. On the other hand, governments do not always produce congruence either. The tyranny of the majority[469] also exists in public institutions, and even when institutional mechanisms exist to protect minorities, transaction costs may prevent them asserting their interests. Devolving regulatory power to lower, private levels may produce better congruence. Public policy aimed at improving congruence can focus on reducing choke points rather than on enforcing accountability rules.

Choke points may be governmental as well as private. Accordingly, the public policy key to eliminate choke points may focus on switching costs associated with abandoning one's sovereign's law in preference for another sovereign. This possibility is enshrined in private international law as a longstanding willingness to honor party choice of substantive law when it does not conflict with important public policies.[470]

7. Rulemaking process.

Procedural due process, notice-and-comment rulemaking under the APA, requirements for private standard setting organizations derived from the antitrust laws, and norms for rulemaking by private associations exhibit similarities. Persons likely to be affected by rules are entitled to notice of the proposed rule and an opportunity to comment on it.[471] The rulemaker must take the

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469 See Part I B 2; *Romer v Evans*, 517 US 620 (1996).

470 See Restatement (Second) of Conflict of Laws § 187 (1971).

471 See 5 USC § 706(2)(A) (1994). Private associations must afford their members due process and must follow their own bylaws. *Austin v American Association of Neurological Surgeons*, 47 F Supp 2d 941, 942 (N D Ill 1999) (denying summary judgment so evidence can be presented on compliance with due process and bylaws in suit against private physicians' association; applying Illinois law).

comments into account in making a final decision to promulgate rules, and (sometimes) must articulate the factual and legal basis for the rule. Labor law is less demanding, although the duty of fair representation in the bargaining context requires procedural fairness in setting the bargaining agenda and reaching a final negotiated compromise between employer and union positions.[472] COPPA borrows APA rulemaking concepts by requiring that a private arrangement for protecting children's privacy be published in the Federal Register and subject to review by the FTC, in light of comments received in response to the notice.[473]

What purpose do these procedural requirements serve? Can that purpose be served by imposing procedural requirements on private rulemaking? One purpose of the APA notice and comment requirements is to generate a record for judicial review. Unless a path to judicial review of the merits of a decision exists, this purpose is nullified. Two other purposes exist, however: enhancing rational decisionmaking, and testing for political consensus.

Netanel suggests that liberal democracy seeks to identify consent and collective choice as foundations of legitimacy.[474] Although Netanel did not probe the relationship of procedure to this aspect of liberal democracy, notice and comment rulemaking relates to consent and to collective choice in the following ways. First, it ascertains collective choice in a rough way. The aggregate of comments on a proposed rule manifest the collective will of those commenting. Together with the content of the proposed rule and the silence of those not commenting, the comments comprise a rulemaking record that expresses the collective choice of those affected by the rule. From a consent perspective, silence in a face of the proposed rule indicates consent that it be promulgated. Commenting indicates consent that a rule, altered to accommodate the comments, be promulgated.

The set of those entitled to participate in the rulemaking process is linked conceptually to the set of those bound by the

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[472] *White v White Rose Food*, 237 F3d 174, 183 (2d Cir 2001) (explaining relaxed standards for the duty of fair representation in connection with negotiating new collective bargaining agreements or amendments).

[473] See 15 USC § 6502.

[474] Netanel, 88 Cal L Rev at 407–10 (cited in note 5):

> Individuals decide, or rational individuals would decide, to establish a state to serve their private ends. The state thus arises from, and its legitimacy depends upon, the express or tacit consent of individuals. The state, in turn, may rightfully exercise its authority only in accordance with the terms of that "social contract."

rule. In small associations, it is common, though not legally required, for all members to participate in formulating rules through discussions at meetings such as annual conventions. Everyone potentially bound by the rule is entitled to participate. In larger associations, everyone potentially bound by a rule is entitled to vote in electing representatives, who determine rules directly. The larger and more diffuse the population affected by rules, the greater the difficulty in designing a participatory process for deliberating over rules. One of the problems with ICANN has been the difficulty in defining populations entitled to vote for representatives on the board of directors empowered to adopt rules. When negotiated rulemaking supplements traditional agency rulemaking, emphasis is placed on constructing a rule negotiation committee that includes representatives of the major affected interests.[475]

But despite these conceptual and practical difficulties with process requirements, notice and comment rulemaking, whether conducted by a public or a private entity, tests for consensus.[476] The consensus may be more relevant when it can be determined for a pre-defined community, and when that community is coterminous with the community being regulated.

As with any consensus-based regulation, rebels, who are often also innovators, are problematic. Rebels are prepared to defy consensus, and the law must determine whether they must conform. But this is no different for private than for public regulation. The rulemaking "record" will not necessarily be different for a record developed through notice and comment rulemaking conducted by a public agency than it will be with a record developed by a private entity using essentially the same process, assuming the notice is equally effective in both cases. This is assuming that interested parties take the possibility of a private rule as seriously as they would take the possibility of a public rule.[477]

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[475] See Negotiated Rulemaking Procedure, 5 USC § 561 et seq (1994) (noting that the purpose of the enacted procedure is to "establish a framework for the conduct of negotiated rulemaking").

[476] Accord Helfer and Dinwoodie, 43 Wm & Mary L Rev at 253–55 (cited in note 214) (urging improved direct representation and voting structures for ICANN, even while expressing skepticism that ICANN can overcome past criticisms of inadequate representation procedures to underpin rulemaking).

[477] A health care professional (Mitchell T. Bergmann) consulted by the author regarding the procedures used by the Joint Commission on Accreditation of Hospitals and Health Care Organizations ("JCAHO") was puzzled why anyone would be interested in having the standards made by a governmental agency rather than by the JCAHO, which relies on consensus within the covered health care professions.

Suppose the law obligates MAPS or a similar organization to follow notice and comment rulemaking. Apart from the difficulty of defining the universe of those entitled to notice and allowed to submit comments, what purpose is served? Suppose the proprietor of MAPS is determined to adopt a double opt-in rule for UCE. Suppose further that those handling UCE oppose the rule. How are their interests protected more if they are given notice of the double opt-in rule and allowed to submit comments opposing it, than if the proprietor of MAPS issues the final rule as soon as he thinks of it? Shall MAPS be forbidden to adopt the rule if all the comments oppose it? That would protect the interests of the objecting parties, but also would go beyond requirements imposed on administrative agencies. And it would turn notice and comment rulemaking into a kind of plebiscite. In the face of overwhelming comments opposing the proposed rule, may the MAPS proprietor nevertheless adopt a double opt-in rule if he sufficiently justifies it and rebuts the arguments made by commenters? Such a requirement draws rulemaking procedure closer to the rationality requirement—not necessarily a bad result, but one which blurs the two criteria, and diminishes the power of requiring certain rulemaking procedures as opposed to requiring rationality alone.

Thomas Grey says that the purpose of procedural requirements is to promote good decisionmaking.[478] That is a different justification from consensus testing. Majorities, even unanimous ones, can make irrational decisions. Objectively rational decisions may not command a consensus. But notice and comment rulemaking may promote better, more rational decisionmaking.[479] Even if a decision maker is not bound in any formal legal sense by the "record" generated through the notice and comment process, she will be embarrassed if she makes a decision obviously inconsistent with that record unless she persuasively explains why a deviant decision is appropriate. Often it will be easier to conform the decision to the record than to explain why it differs.

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[478] Thomas C. Grey, *Procedural Fairness and Substantive Rights*, in J. Roland Pennock and John W. Chapman, eds, *Nomos XVIII: Due Process* 182, 184 (1977):

> The rules and principles of procedural fairness (in the narrow sense) all are designed to promote the correct decision of disputes. All of them tend to ensure that facts will be found more accurately or that evaluations will be made more reasonably and impartially than would be the case if they were not in force.

[479] Id.

Why do legislatures use notice and comment procedures, usually giving notice of proposed legislation by introducing a bill, and then holding hearings to receive comments on the proposal? It is not because they are constitutionally obligated to follow those procedures, or that they fear being forced by a court to use them. One reason for the prevalence of such procedures is that they allow elected officials to test the political wind. If a representative is elected on an anti-abortion platform, he may have little idea about the views of his constituency on internet privacy. He may stumble into a political buzz-saw unless legislative hearings provide a way to smoke out public opinion.

But notice and comment processes in legislatures serve another purpose. Sometimes, the ideas embodied in introduced bills seem sensible, but are really stupid, when considered in the context of a deeper understanding of the problem. Public notice of proposed legislation and hearings on the proposals help to distinguish the wise from the foolish proposals, to enhance rational decisionmaking. This is so not because any court threatened to imprison legislators for contempt if they do not engage in the notice and comment process; it is so because the populace generally understands the substantive benefits of notice and comment in the legislative process, and because notice and comment have come to be the norm.

What's good enough for the goose (public legislature) should be good enough for the gander (private legislature). Transparent process is expected of elected legislatures, even though their members could say, "We stood for election; we got elected; we owe you no other explanation." That it is expected and honored evidences the utility in promoting accountability. It is similarly valuable whether the "legislators" are public or private.

8. Review by independent entity.

Access to the courts to prevent—or to recover damages for—unlawful interference with legally recognized interests is fundamental to the rule of law.[480] When the sovereign is the actor, access to the courts takes the form of judicial review. But, as Dean Krent has explained, judicial review is not the only mechanism to assure accountability; other public institutions can exercise over-

[480] *Abdul-Akbar v McKelvie*, 239 F3d 307, 326 (3d Cir 2000) ("[T]he court has repeatedly recognized the fundamental importance of the right of access to courts."). Judicial review is a paradigm of Dinwoodie's external checking function. Helfer and Dinwoodie, 43 Wm & Mary L Rev at 201–10 (cited in note 214) (explaining external checking function).

sight as well.[481] At its most basic level, accountability exists as long as a legislature has power to enact a statute that divests a private regulator of authority or that limits exercise of authority. But legislative action requires mobilization of significant political will, and the theoretical possibility of legislative response if the exercise of private regulatory power exceeds acceptable limits may be a thin reed.

Far more satisfactory for those adversely affected by private regulatory action is the possibility of a lawsuit to test compliance with other touchstones of accountability. In the first two private regulatory situations, judicial review of agency action[482] and actions for breach of contract provide pathways to the courts. It is in the fourth situation where access to the courts may be problematic. This is the subject of Part II D 4, analyzing possible causes of action to obtain review of private rulemaking.

But there is a problem with review of private regulatory action in the regular national courts: it tends to vitiate the benefits of private regulation as a way of dealing with transnational jurisdictional problems.[483] It is far from clear what international institutions might be constructed to provide independent review of private regulatory decisions, mitigating the need for review in national courts if there is to be any review at all.[484] But when

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[481] See Krent, 85 Nw U L Rev at 101 (cited in note 40) (discussing not only the ways in which the executive branch can exercise accountability, but also pointing to "possible substitutes for the public accountability that executive branch control ensures," external checks like "the self-interest of a different sovereign governmental entity, the self-interest of a particular industry, judicial review, or market forces").

[482] But see Froomkin, 50 Duke L J at 27 (cited in note 27) (noting that the DoC-ICANN relationship eliminates "the prospect of any meaningful judicial review").

[483] See Perritt, 88 Ky L J at 921 (cited in note 37) (discussing the problem of jurisdiction as it relates to the internet, noting that the internet "encourage[s] greater reliance on private ordering as part of the international legal system" because "people have been thinking seriously about whether traditional jurisdictional rules are adequate for the Internet or whether new approaches are necessary"); Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U Pa J Intl Econ Law 563, 574 (2000) ("[J]urisdictional uncertainties associated with transnational commerce on the Internet can be reduced when rules are made and enforced by private rather than public institutions.").

[484] The U.S./EU Safe Harbor Privacy Principles provides for transnational review of private regulatory decisions by setting minimum standards for private rules and providing backup enforcement in national institutions. Safe Harbor Privacy Principles, issued by the U.S. Department of Commerce (July 21, 2000), available online at <http://www.export.gov/safeharbor/SHPRINCIPLESFINAL.htm> (visited Feb 2, 2001) [on file with U Chi Legal F].

Of course international review bodies may present their own problems of accountability. See Perritt, 51 Admin L Rev 871 (cited in note 40) (exploring constitutionality of international regulatory agencies for the internet).

such institutions exist, the need for probing review in national courts is reduced.

9. Relationships among variables—tighter control for broader authority.

The criteria for rulemaking accountability are not orthogonal; they are interdependent. Notice and comment rulemaking enables more robust judicial review, and reinforces the rationality requirements. All the other criteria are severely weakened in the absence of judicial review.

Professor Freeman argues that "aggregate accountability" is what matters.[485] Thus, a private rulemaker subject to demonstrated contractual constraints might plausibly have more flexibility with respect to rationality and procedural regularity. One that employs disinterested expert decisionmakers with lots of legislative "due process" might be subjected to only loose judicial review. But a decisionmaker free of these controls might be subject to much more searching judicial review, and much more rigorous rationality standards, including a requirement to show that any restriction adopted is the least restrictive among a set of alternatives.

10. Avoidance of common carrier obligation: preserving the rights of proprietorship.

Any rules of thumb for improving accountability of private rulemaking must avoid overreaching. One of the difficulties in developing legal theories for judicial review of private rulemaking is that the theories intrude upon the prerogatives of the operators of private networks. Millions of autonomous networks are connected to the internet, and any legal theory that would subject all of their acceptable use policies to judicial scrutiny would be both undesirable and unenforceable. Merely connecting to the internet and opening one's network to internet traffic should not make one a common carrier. How can individual ISPs, content providers, employers and indeed individuals organizing discussion groups or publishing web pages avoid being treated as common carriers? Surely not every autonomous network connected to the internet

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[485] Freeman, 75 NYU L Rev at 664 (cited in note 42) ("Even in the absence of tight government control, a public/private regime characterized by multiple and overlapping checks might produce enough aggregate accountability to assure us of its legitimacy.") She includes internal private procedural rules, responsiveness to market pressures, and informal norms of compliance.

should be obligated to justify its terms of service and acceptable use policies.

The nature of the internet means that any network operator that makes rules for use of its own network facilities almost certainly will exclude some uses technically possible through the internet. The operator may exclude some incoming mail, some types of access by internal network users to external web pages, and some types of discussion involving both internal and external users. So there is a need for further rules of thumb that would distinguish entities whose rules are subject to judicial scrutiny from those internet participants who are not.

The first such rule of thumb distinguishes entities whose rules are subject to judicial scrutiny from common carriers. The scope of judicial scrutiny does not include a duty to build out network facilities to accommodate all those requesting service.

Second, this Article does not suggest a duty to accept everyone; only a duty to be rational and to use reasonable process. The distinction between someone subject to these duties and a common carrier is analogous to the distinction between an employer obligated to dismiss employees only for good cause as that might be defined by law, and an employer obligated to use reasonable procedures to resolve disputed factual issues incident to a dismissal from employment.[486]

A third rule of thumb would distinguish autonomous networks from entities exercising rulemaking power with broader scope. For example, one possibility is to subject to judicial review only rules that affect more than one autonomous network. This would exempt employers and individual retail ISPs. This rule of thumb would distinguish between rules aimed only at those with an affiliation with the rulemaking entity from rules aimed at those lacking an affiliation. Thus, theories other than contract would protect strangers, while the flexibility of contract regimes would protect both the service provider and customers of that service provider. In less formal language, this rule of thumb would say, "you can make rules for your own property but if you make rules for other peoples' property you must justify the rules and use fair process in making them."

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[486] *Cotran v Rollins Hudig Hall International, Inc*, 69 Cal Rptr 2d 900, 910 (1998) (holding that an employer must conduct an adequate investigation in determining whether good cause for employment termination exists).

A fourth distinction, analogous to the public-use inquiry in First Amendment law,[487] would distinguish entities that make rules only for the use of private spaces by a defined class of persons engaged in regular activities there from spaces that have been opened up to the public. Even as to spaces that have been opened up to a public, the sponsor should be able to impose reasonable restrictions as to subject matter, civility, and charges for access. The justification, impropriety, and rule of reason inquiries in prima facie tort, intentional interference, and antitrust law[488] provide ample analytical frameworks for assessing these possibilities.

The rule of thumb immunizing autonomous network Acceptable Use Policies would not exempt backbone providers. But emerging controversies over peering arrangements by large backbone providers may well result in some measure of regulatory or judicial oversight anyway, and the benchmarks for rulemaking suggested in this Article are completely compatible with the possibility of such oversight.

CONCLUSION

Even as the benefits of private regulation of the internet have been recognized more broadly, concerns have increased that purely private regulation may undermine democratic values and the rule of law. The best way to achieve the benefits of private regulation while also assuring public accountability traditionally associated with regulation by traditional governmental entities is to develop hybrid systems of regulation in which public law provides broad frameworks within which private regulation can work out the details. The most ambitious hybrid regulatory framework is ICANN, which has come under increasing criticism for insufficient accountability.

But a greater threat exists. Private regulation can occur through the development of blacklists or filters embodied in computer code that enforces privately developed rules by blocking significant parts of the internet. There, traditional legal regimes to police delegated governmental power or to assure against abuse of contractual relationships does not exist. The law must evolve traditional tort theories of intentional interference with contractual relations and public nuisance and relax some of the

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[487] *Cornelius v NAACP Legal Defense & Educational Fund, Inc*, 473 US 788, 801 (1985).

[488] See Part II D 4.

limitations imposed on antitrust liability to assure that these private rule makers are accountable to basic principles of democracy and rule of law. Despite the criticism of ICANN, at least ICANN attempts to provide a mechanism for representation of affected interests in making and revising its rules. Early deployment of private filters and blacklists involve no such attempt.

No one knows enough yet to write a good statute to assure accountability across such a broad spectrum of private regulatory action. Until everyone gains more experience, the common law can crystallize the issues and the alternatives. It should provide a more sympathetic safe harbor for private regulatory regimes that include assurances of rationality and fair process and scrutinize more closely those that lack such assurances.