

Multistakeholder Regulation and the Future of the Internet

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I. INTRODUCTION

International organizations are a mainstay of contemporary international law. Rare a century ago, today there are thousands of such organizations, ranging from the United Nations to the International Bureau of Weights and Measures.¹ International organizations can be bilateral, such as the International Joint Commission governing the North American Great Lakes, or trilateral, such as the North American Commission on Environmental Cooperation.² But the vast majority are multilateral, and often comprise a very large number of parties. Some, such as the International Telecommunications Union, date back to the 19th century.³ Yet, as a tool of multilateral cooperation, international organizations became especially prominent in the years after the Second World War, when major organizations such as the World Bank, the International Monetary Fund, and the UN were established via multilateral treaties.⁴

There is a vibrant debate among international lawyers and political scientists about why governments create and use international organizations. A central part of this debate concerns the important role of delegation. As Joel Trachtman writes: “the essence of an international organization is the delegation of decision-making authority from individual states to the organization.”⁵ Delegation is, in a sense, essential to a functioning international organization. States are the primary units of the international legal system, and international organizations are created by states. To perform its functions and achieve its purpose, the powers of an international organization must come from the states who create it. Indeed, a systematic empirical study of international legal agreements found, unsurprisingly, that “delegation is widespread.”⁶

1. See *Yearbook of International Organizations 2022-2023*, UNION OF INT’L ASSOCS. (2022) (updated annually), for recent data on international organizations. For political, legal, and historical overviews of the growth and role of international organizations, see GLOBAL GOVERNANCE IN A WORLD OF CHANGE (Michael N. Barnett et al. eds., 2021); MICHAEL N. BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS (2004); JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2006); AKIRA IRIYE, GLOBAL COMMUNITY: THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE MAKING OF THE CONTEMPORARY WORLD (2002).

2. *History of the IJC*, INT’L JOINT COMM’N, <https://www.ijc.org/en/who/history> [<https://perma.cc/8NRH-9TJV>] (last visited June 27, 2022); COMM’N FOR ENV’T COOP., STRATEGIC PLAN 2021-2025: RENEWING OUR TRILATERAL COMMITMENT AND IMPLEMENTING THE NEW FREE TRADE AGREEMENT AND ITS SUPPORTING ENVIRONMENTAL COOPERATION AGREEMENT 4 (2020), http://www.cec.org/files/documents/strategic_plans/cec-strategic-plan-2021-2025.pdf [<https://perma.cc/JZ4E-JMJQ>].

3. *Discover ITU’s History*, ITU, <https://www.itu.int/en/history/Pages/DiscoverITUsHistory.aspx> [<https://perma.cc/W4MG-V9NB>].

4. See generally Michael Barnett et al. eds., *supra* note 1, at 1-47.

5. Joel P. Trachtman, *The Economic Structure of the Law of International Organizations*, 15 CHI. J. INT’L L. 162, 164 (2014).

6. Barbara Koremenos, *When, What, and Why Do States Choose to Delegate?*, L. & CONTEMP. PROBS., Winter 2008, at 151.

One prominent strand of research on international organizations emphasizes theories of principal-agent relationships in explaining the existing patterns of delegation of law-making and regulatory powers.⁷ This approach draws on literature regarding domestic administrative agencies, in which Congress delegates powers to an agency to regulate, say, environmental protection. As applied to the international level, governments (principals) delegate power and authority to international organizations (agents) in order to more effectively cooperate with other states and manage global challenges.

From the perspective of American law, an international delegation “is the transfer of constitutionally assigned federal powers—treaty-making, legislative, executive, and judicial powers—to an international organization.”⁸ Governments may delegate regulatory authority to international organizations for a number of reasons: to better manage policy externalities; to gain from specialization and expertise; to facilitate collective decision-making; and to enhance policy credibility.⁹ At the core of these theories of delegation to international organizations is the notion that principals ultimately control agents. Every act of delegation involves “a contingent grant of authority.”¹⁰ Agents may enjoy some degree of discretion, but as a conceptual matter, what defines principals as principals is that they

7. See generally Darren G. Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 3, 3 (David G. Hawkins et al. eds., 2006); Tana Johnson & Johannes Urpelainen, *International Bureaucrats and the Formation of Intergovernmental Organizations: Institutional Design Discretion Sweetens the Pot*, 68 INT’L ORG. 177 (2014). For a similar application to non-binding legal bodies, see Laurence Helfer & Timothy Meyer, *The Evolution of Codification: A Principal-Agent Theory of the International Law Commission’s Influence*, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 305, 305 (Curtis Bradley ed., 2016); Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, LAW & CONTEMP. PROBS., Winter 2008, at 1; Oona A. Hathaway, *International Delegation and State Sovereignty*, LAW & CONTEMP. PROBS., Winter 2008, at 115; Neal S. Siegel, *International Delegations and the Values of Federalism*, LAW & CONTEMP. PROBS., Winter 2008, at 93; Kenneth W. Abbott et al., *Two Logics of Indirect Governance: Delegation and Orchestration*, 46 BRIT. J. POL. SCI. 719 (2016); Roland Vaubel, *Principal-Agent Problems in International Organizations*, 1 REV. INT’L ORGS. 125, 125-26 (2006); Jon C.W. Pevehouse & Inka von Borzyskowski, *International Organizations in World Politics*, in THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 3, 9-10 (Jacob Katz Cogan et al. eds., 2016); Jan Klabbers, *The EJIL Foreword: The Transformation of International Organizations Law*, 26 EUR. J. INT’L L. 9, 24-26 (2015); Koremenos, *supra* note 6.

8. Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 72 (2000); see generally Lori Fisler Damrosch, *Sovereignty and International Organizations*, 3 U.C. DAVIS J. INT’L L. & POL’Y 159 (1997).

9. Hawkins et al., *supra* note 7; see also Pevehouse & von Borzyskowski, *supra* note 7, at 10; Bradley & Kelley, *supra* note 7.

10. David Lake & Mathew McCubbins, *The Logic of Delegation to International Organizations*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 341 *passim* (David G. Hawkins et al. eds., 2006).

retain final control over the terms of their delegation to agents.¹¹ In short, delegation of authority, it is said, is not the abdication of authority.¹²

This Article considers when governments in fact choose abdication over delegation in the international context. To do so, this Article examines an unusual case, one that despite being increasingly prominent has received relatively little attention from scholars of international law and organization: the regulation of key aspects of the Internet. Over the last several decades, the Internet has transformed economic, social, and political life around the globe. The U.S. has played a central role in this process. California is the birthplace of the Internet¹³ and home to many of the most powerful technology firms.¹⁴ The federal government has long had an outsized role in both the creation of the Internet and its governance.¹⁵ Originally a Defense Department-funded project known as the Arpanet, for many years the entire Internet resided within the continental U.S.¹⁶ This history gave the federal government enormous control over many aspects of the Internet, including the central issue of the naming and numbering system that ensures the Internet works as a means of communication. The regulation of names and numbers is at the core of Internet governance; for decades the federal government—or its delegates—regulated this key feature.¹⁷

In 2016, nearly a half century after the Internet's birth, then-President Barack Obama controversially ended the last vestige of formal federal

11. See generally D. RODERICK KIEWEIT & MATHEW MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (Benjamin I. Page ed., 1991).

12. See, e.g., *id.* at 3.

13. JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* 27 (2008) (describing how the first message sent over the Internet was between two California universities: “The UCLA programmers typed “log” to begin logging in to the Stanford computer. The Stanford computer crashed after the second letter, making “Lo” the first Internet message.”).

14. Apple, Google (Alphabet), Facebook (Meta), Intel, Cisco, and many other leading technology firms are all based in Northern California. See generally MARGARET O'MARA, *THE CODE: SILICON VALLEY AND THE REMAKING OF AMERICA* (2019).

15. Adam Segal, *When China Rules the Web: Technology in Service of the State*, FOREIGN AFFS. (Sept./Oct. 2018), <https://www.foreignaffairs.com/articles/china/2018-08-13/when-china-rules-web> [<https://perma.cc/LDZ3-HFDA>] (“For almost five decades the United States has guided the growth of the Internet.”).

16. See, e.g., MILTON L. MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* 74-75 (2004) (providing a broad history of the Internet); see JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD* 23 (2006).

17. See *infra* Part II.

government control over the naming and numbering system.¹⁸ As *The Economist* wrote at the time,

Barring any last-minute hiccups, something remarkable will happen on October 1st. Nearly two decades after it created the Internet Corporation for Assigned Names and Numbers, the body which oversees the internet's address system, America's government will let lapse a contract that gives it control over part of ICANN. This means that a crucial global resource will henceforth be managed by an organisation that is largely independent of national governments.¹⁹

As *The Economist* predicted, the U.S. successfully ceded its authority over the naming and numbering system that lies at the core of the Internet to the organization known as Internet Corporation for Assigned Names and Numbers ("ICANN").²⁰ Why did the Obama administration choose to do this? That is the central question this Article addresses. ICANN, a non-profit incorporated under California law, was initially delegated regulatory authority over Internet naming and numbering in 1998.²¹ This was structured under a contract with the U.S. Commerce Department, and that contract was periodically renewed, with minor changes, until 2016.²² President Obama's decision terminated that contractual relationship and freed ICANN to regulate in its traditional areas of Internet governance without any direct federal oversight.²³

ICANN's distinguishing features are its high level of technocratic expertise and its "multistakeholder" governance model; that is, state actors do not dominate ICANN's governance. ICANN instead employs a complex structure in which both state and private actors jointly play key decision-making roles.²⁴ The multistakeholder approach reflects the complex history

18. See, e.g., L. Gordon Crovitz, *The Battle over Obama's Internet Surrender*, WALL ST. J. (June 13, 2016, 10:08 AM), <https://www.wsj.com/articles/the-battle-over-obamas-internet-surrender-1465770111> [<https://perma.cc/Z7GA-HB77>]; Press Release, Ted Cruz, Senator, Don't Let Obama Give Away the Internet (Aug. 30, 2016), https://www.cruz.senate.gov/?p=press_release&id=2782 [<https://perma.cc/2LC3-TY2F>]; L.S., *Why Is America Giving up Control of ICANN?*, ECONOMIST (Sept. 30, 2016), <https://www.economist.com/the-economist-explains/2016/09/29/why-is-america-giving-up-control-of-icann> [<https://perma.cc/N6ZE-MYBZ>]; Dave Lee, *Has the US Just Given Away the Internet?*, BBC NEWS (Oct. 1, 2016), <https://www.bbc.com/news/technology-37527719> [<https://perma.cc/3RMK-Q863>].

19. L.S., *supra* note 18.

20. See Lee, *supra* note 18.

21. *Bylaws for Internet Corporation for Assigned Names and Numbers—A California Nonprofit Public-Benefit Corporation*, ICANN, at Art. 4 [hereinafter *ICANN Bylaws*], <https://www.icann.org/resources/pages/governance/bylaws-en/#article2> [<https://perma.cc/4HAJ-8FWP>] (last amended June 2, 2022).

22. See generally ICANN, www.icann.org [<https://perma.cc/KP4S-88RQ>] (last visited June 27, 2022); Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187 (2004); Peter K. Yu, *The Origins of ccTLD Policymaking*, 12 CARDOZO J. INT'L & COMPAR. L. 387 (2004).

23. Lee, *supra* note 18.

24. See generally ICANN, *supra* note 22.

of the Internet, in which universities and other private actors played key early roles.²⁵ Many of these private actors have traditionally favored the freedom and openness that has characterized the Internet since its birth.²⁶ While the mythology of cyberspace as a sovereignty-free zone is highly misleading, it is true that from its origins through the present day many of the actors most engaged with the Internet have preferred a generally light regulatory hand with limited state intervention.²⁷ ICANN is also not a typical international organization: it is a nonprofit public benefit corporation established under California law.²⁸

The initial choice by the federal government to delegate aspects of Internet regulation to ICANN is, as this Article will detail below, readily explained via existing principal-agent theories. ICANN possesses substantial technical expertise; delegating certain regulatory tasks to it made sense both in terms of policy and politics. But why would a government with jurisdiction over a valuable global resource choose to then irrevocably cede control over that resource to a non-state entity? And what significance does this choice of abdication of authority have for theories of international law and global governance generally?

This Article first provides a brief overview of Internet governance.²⁹ Much of this governance is technical; for example, IP addresses and domain names, such as .edu or .com, must be standardized and uniform to work effectively as a means of communication. Control over these processes, while complex, has important legal and political implications. This Article then describes multistakeholder governance and argues that the decision of the U.S. to grant full control over the naming and numbering, or “IANA,” function to ICANN was a deliberate strategy to help ensure that the contemporary Internet did not fall under the sway of multilateral organizations such as the ITU and remained relatively open and free of government control and censorship.

25. See MUELLER, *supra* note 16, at 74-75.

26. See *id.*

27. See ZITTRAIN, *supra* note 13, at 97-99; GOLDSMITH & WU, *supra* note 16, at 23. See generally Mark Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001); Tim Wu, *Cyberspace Sovereignty?—The Internet and the International System*, 10 HARV. J.L. & TECH. 647 (1997); David Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

28. *ICANN History Project*, ICANN, <https://www.icann.org/history> [<https://perma.cc/7Q35-M3PR>] (last visited June 27, 2022); Paul Rosenzweig, *On the Issue of “Jurisdiction” over ICANN*, LAWFARE (Apr. 8, 2015, 9:56 AM), <https://www.lawfareblog.com/issue-jurisdiction-over-icann> [<https://perma.cc/VT89-748S%5d>].

29. Internet governance has many characteristics of what social scientists term a “regime complex.” See JOSEPH S. NYE, JR., GLOB. COMM’N OF INTERNET GOVERNANCE, THE REGIME COMPLEX FOR MANAGING CYBER ACTIVITIES 7 (2014), https://www.cigionline.org/sites/default/files/gcig_paper_no1.pdf [<https://perma.cc/8W28-VWKB%5d>]; Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 277 (2004) (introducing the original concept of regime complex). Because ICANN’s governance role is critical and receives a significant amount of political attention, I focus on it here.

This struggle between multilateralism and multistakeholderism has long historical roots. From the Internet's initial boom in the 1990s, it grew increasingly dominated by private firms and commercial interests, a shift the U.S. supported. Yet, the Internet also grew far more global in the 2000s.³⁰ There were soon increasingly insistent efforts to assert multilateral control over Internet governance as more governments began to appreciate the new technology's economic, social, and political impacts.³¹ This push for multilateralism was at odds with the multistakeholder traditions of the Internet. Faced with growing global efforts to multilateralize Internet governance, often led by authoritarian governments, the U.S. chose instead to devolve power to a body in which governments by design had only a limited role and private actors a large voice. In short, the Obama administration's decision favored *multistakeholder* governance over *multilateral* governance.

This Article considers this decision through the lens of principal-agent theory and argues that U.S. strategy toward the Internet was designed to better entrench long-term American interests. But it was a strategy more consistent with concepts of trusteeship than with conventional principal-agent theory.³² ICANN today is more like a trustee—a body deliberately granted independent authority to use professional judgment—than an agent under the control of a principal.

The decision to cede authority to ICANN muted pressures to multilateralize Internet governance by removing the hand of the federal government from direct control. ICANN was a trusted organization that would, in the American view, preserve the fundamental values of the Internet. A more open, multistakeholder Internet also benefited American firms and American actors, who tended to dominate the digital space, especially as Google, Facebook, Amazon, and others grew enormously powerful around the world. In short, and paradoxically, by ceding *power* the U.S. better preserved its *preferences*.

Part I of this Article introduces the foundational issues. Part II offers a brief history of the Internet and ICANN to ground the inquiry and explores theories of international organization and multistakeholder governance. Part III explains the threat posed by multilateral governance of the Internet. Part

30. See Max Roser et al., *Internet, OUR WORLD IN DATA* (2015), <https://ourworldindata.org/internet> [<https://perma.cc/SP39-QRGM>].

31. See generally Wu, *supra* note 27.

32. Karen Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L RELS. 33, 35 (2008) (explaining the broad concept of trusteeship, one common in international law); see, e.g., Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315, 325 (2011) (“[S]tates are recognized . . . as trustees for the people committed to their care.”); see also Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 308 (2013). Madison in *The Federalist Papers* likewise noted that “the federal and State governments are in fact but different agents and trustees of the people.” THE FEDERALIST NO. 46 (James Madison). In the law of trusts, conventional legal definitions focus much more narrowly on property entrusted to a trustee. See, e.g., Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 41, 41 (Evan J. Criddle et al. eds., 2019) (“A trust . . . is a fiduciary relationship with respect to property . . . subjecting the [trustee] to duties to deal with it for the benefit of charity of one or more persons.” (quoting RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. L. INST. 2003))).

IV explains the decision to relinquish authority over the IANA function through theories of delegation and theories of trusteeship and explores the implications for multistakeholder governance in international law more broadly. Part V concludes.

II. THE RISE OF THE INTERNET

A. *A Brief History of the Internet*

The Internet began during the Cold War as an effort by the federal government to link together a few mainframe computers. Initiated by the [Defense] Advanced Research Projects Agency (“ARPA” or “DARPA”), a then-newly created arm of the Department of Defense (“DoD”), this was the genesis of the original “Arpanet.”³³ The first Arpanet communication was sent on October 29, 1969, from UCLA to Stanford University.³⁴ That history is significant because virtually every major aspect of the next fifty years of the Internet is linked to the U.S., and indeed ICANN, and many of the top technology firms, are still today headquartered in California.

The early Internet was tiny and dominated by a small tribe of computer scientists and engineers, many based at American universities. As computing technology expanded rapidly, however, so too did the reach of the DARPA/Internet.³⁵ In 1972, email was first developed, and the Internet’s utility as a communications platform came into sharper focus.³⁶ The DoD had the Arpanet but also, later, the Military Network (“MILNET”).³⁷ As this suggests, the practice for much of the 1970s and 1980s was not a single comprehensive network, but instead a series of distinct, purposive networks that comprised like-minded users. Nearly all such users were at large institutions, often universities and research labs, since the personal computer, such as the Apple 1, was only first developed in the mid-1970s.

The National Science Foundation’s (“NSF”) 1985 network program (“NSFNET”) was the first to explicitly endeavor to link the entire academic community in a single network.³⁸ DARPA and NSF ensured that their respective networks were interoperable.³⁹ The Internet as we now know it was beginning to form, and the complexities of governance were growing.⁴⁰ Politics, property rights, and commercialization were not high priorities in this era. Governance was informal and, until it became apparent that website

33. Mitch Waldrop, *DARPA and the Internet Revolution*, in DEF. ADVANCED RSCH. PROJECTS AGENCY, *DARPA: 50 YEARS OF BRIDGING THE GAP* 78, 78 (2008).

34. ZITTRAIN, *supra* note 13, at 27.

35. See MUELLER, *supra* note 16, at 74-75.

36. BARRY LEINER ET AL., *INTERNET SOC’Y, BRIEF HISTORY OF THE INTERNET* 4 (1997), https://www.internetsociety.org/wp-content/uploads/2017/09/ISOC-History-of-the-Internet_1997.pdf [<https://perma.cc/PPN2-QR9B>].

37. *Id.*

38. *Id.*

39. *Id.*

40. The ARPANET itself was decommissioned in 1990. ROBERT E. KAHN & VINTON G. CERF, *INTERNET POL’Y INST., WHAT IS THE INTERNET (AND WHAT MAKES IT WORK)* 9 (1999), <http://www.policyscience.net/cerf.pdf> [<https://perma.cc/9P5X-5UHX>].

names (e.g., “amazon.com”) had real value, relatively uncontested. The primary focus of Internet governance was on developing interoperable technical standards that allowed for larger communication networks and choosing among competing visions for solutions to technical problems. In short, technical people largely treated Internet governance as a technical problem.

The Internet, however, was rapidly outgrowing this technically-minded community. In the early 1990s, the U.S. created the Federal Networking Council to better coordinate its Internet activities.⁴¹ In the same period, the non-governmental Internet Engineering Task Force, founded in 1986, and the Internet Society, founded in 1992, emerged.⁴² These new bodies reflected the growing value of the Internet, as competing interests organized and jockeyed for position and power. (The locus of activity, however, remained largely in the United States.)⁴³

Still, the Internet retained a surprisingly small-town feel for a long time. Indeed, until the late 1990s, the work of awarding domain names and IP addresses—what is known as the IANA function, for “Internet Assigned Numbers Authority”—was largely handled by one person: Jon Postel, a computer scientist first based at UCLA and then later at USC.⁴⁴ Postel was so central to the Internet’s early functioning that *The Economist* declared in 1997 that if “the Net does have a god, he is probably Jon Postel.”⁴⁵ The IANA function is critical because it is what ensures that the Internet actually works as intended; that when you type in www.google.com your browser actually goes to Google’s site. It is also what allows us to type in “google” rather than a string of numbers. Domain names have an important communications function but also a political aspect. Powerful governments have interests in promoting, or suppressing, certain domain names. To see this, consider the political implications of .crimea, .catalonia, or even .xxx.

Internet growth exploded during the 1990s. This was the period in which the World Wide Web was invented, which, coupled to the home computer revolution, made the Internet accessible to ordinary people.⁴⁶ In 1994, *Today Show* host Bryant Gumbel could ask on live television, “what is the Internet, anyway?”⁴⁷ (After debating the meaning of the @ symbol, he asked “what, do you write to it like mail?” An offscreen producer offered up:

41. Barry M. Leiner et al., *Introduction to BRIEF HISTORY OF THE INTERNET*, *supra* note 36, at 2.

42. *Introduction to the IETF, INTERNET ENG’G TASK FORCE*, <https://www.ietf.org/about/introduction/> [<https://perma.cc/587T-DM7N>] (last visited Nov. 12, 2022); *Our History, INTERNET SOC’Y*, <https://www.internetsociety.org/history/> [<https://perma.cc/4Y72-8KWX>] (last visited Nov. 12, 2022).

43. See Leiner et al., *supra* note 41, at 2.

44. U.S. GOV’T ACCOUNTABILITY OFF., OGC-00-33R, DEPARTMENT OF COMMERCE: RELATIONSHIP WITH THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS 3 (2000), <http://www.gao.gov/assets/90/89949.pdf> [<https://perma.cc/6E3P-FLXR>].

45. *Postel Disputes*, *ECONOMIST*, Feb. 8, 1997, at 116.

46. *A Short History of the Web*, CERN, <https://home.cern/science/computing/birth-web/short-history-web> [<https://perma.cc/JY9W-7T95>].

47. The Today Show, *What Is the Internet, Anyway?*, YOUTUBE (Jan. 28, 2015), https://www.youtube.com/watch?v=UIJku_CSyNg [<https://perma.cc/G3MM-EL6P>].

“Internet is the massive computer network—the one that’s becoming really big now.”⁴⁸ In the years that followed, millions of Americans (and increasing numbers of non-Americans) obtained email addresses and dial-up modems.⁴⁹ By 2000, the first big dot com crash had occurred and nearly every American had heard of the Internet.⁵⁰ In short, in the late 1990s the Internet as we know it was born. And as the public began to merge en masse onto the information superhighway, so too did commercial actors. This began a critical change in the politics of the Internet—one reflective of the federal government’s policy preferences. As two key players recounted:

For a long time, the federal government did not allow organizations to connect to the Internet to carry out commercial activities [but eventually] Congress passed legislation allowing NSF to open the NSFNET to commercial usage. Shortly thereafter, NSF determined that its support for NSFNET might not be required in the longer term and, in April 1995, NSF ceased its support for the NSFNET. By that time, many commercial networks were in operation and provided alternatives to NSFNET for national level network services.⁵¹

The Internet’s character transformed in this era; in simple terms, from science to commerce and from specialists to the general public. The Clinton Administration supported this change, increasingly viewing the Internet as a new and valuable economic resource.⁵² But this raised novel challenges. As more commercial actors moved online, for instance, it became clear that website names could be a valuable form of property. Myriad ownership disputes ensued. These “included not only questions of who owned a given domain name, but also—and most importantly—who controlled the right to award names.”⁵³ In other words, the IANA function began to seem like a critical economic and legal regulator and a growing source of valuable property rights.

Yet the Internet had evolved organically, with little thought that it could become largely commercial and implicate fundamental concepts of property. As a result, basic questions of ownership were unclear. Indeed, in response to a 1995 Internet Society proposal to revamp the domain name process, a U.S. official asked, “Is [the Internet Society] claiming that it has jurisdiction and overall responsibility for the top-level address and name space? If yes, how did [it] obtain this responsibility; *if no, then who does own it?*”⁵⁴

48. *See id.*

49. Roser et al., *supra* note 30.

50. *See generally* JOHN CASSIDY, *DOT.CON: THE GREATEST STORY EVER SOLD* (2002).

51. KAHN & CERF, *supra* note 40, at 10.

52. *See, e.g.*, Ira Magaziner, *Creating a Framework for Global Electronic Commerce*, 6 FUTURE INSIGHTS no. 1, July 1999.

53. Kal Raustiala, *Governing the Internet*, 110 AM. J. INT’L L. 491, 492 (2016). For brevity, I leave out the role of Network Solutions, LLC.

54. MUELLER, *supra* note 16, at 136 (emphasis added).

That U.S. officials could ask these basic questions in the 1990s underscored how novel a resource the Internet was. In 1995, NSF called a conference to try to clarify ownership and control.⁵⁵ The assembled stakeholders had wildly divergent views. The Pentagon, however, made clear its view: DoD had funded the creation of the Arpanet and still funded the work of Jon Postel; therefore DoD owned the IANA function.⁵⁶ Indeed, U.S. officials in this period, concerned to keep control, warned that “any attempt to manipulate the root without the U.S. government’s permission would be prosecuted as a criminal offense.”⁵⁷ (The “root” is, in essence, the top-level domain name system.) Underlying all these claims “was a belief that, in the end, the United States government and no one else possessed ultimate authority over the Internet’s deep structure, including naming and numbering authority.”⁵⁸

Yet, what was the basis of this asserted authority? Though plainly a funder and progenitor of the early Internet, the federal government did not appear to possess legal title over the Internet. Much of the infrastructure was private—and increasingly global.⁵⁹ This uncertain legal foundation became even more significant later, as the Internet became a central focus of many governments around the globe.

Still, the federal government in the 1990s acted as if it possessed ownership and control, and this made some sense. The Internet began as a DARPA project; much of it was administered from California; key firms were nearly all American; and many of the root servers were physically based in the U.S.⁶⁰ The U.S.’ “position at the center of the global Internet brought it major economic, military, and intelligence benefits.”⁶¹ But the claim to “own” the Internet was not actually well-grounded. Too many private actors, universities, and other non-state entities owned or controlled the hardware, software, and other components that the Internet comprised. Moreover, in this period, the tension between the appearance of American control and the reality that the Internet was increasingly global became more acute. Consequently, for the U.S. to act as the *primus inter pares* with regard to other states was unlikely to be accepted for long—not least because other governments’ preferences over the kind of Internet they wanted were beginning to diverge, often radically, from those of the U.S. and its chief allies. Governing the Internet was no longer just the domain of engineers and technicians but, increasingly, was imbued with deep political overtones.

In short, by the end of the 1990s, the contemporary Internet—mass use, largely for personal and commercial purposes, and global—had supplanted the early research-based networks of the past. The Internet’s increasingly private orientation was no accident: as political scientists Jonathan Aronson

55. *See generally id.*

56. *See generally id.*

57. *Id.* at 162.

58. GOLDSMITH & WU, *supra* note 16, at 41.

59. ZITTRAIN, *supra* note 13, at 27.

60. *Root Servers*, IANA, <https://www.iana.org/domains/root/servers> [https://perma.cc/UCS3-LEQU] (last visited Oct. 31, 2022).

61. Segal, *supra* note 15.

and Peter Cowhey argued, “the Internet’s ultimate commercial triumph was . . . a product of the specific political economy context of the United States government.”⁶² The Internet grew rapidly in this new guise. Indeed, by 1999 there were roughly 200 million users—a huge change from a decade earlier, but a number soon to be an order of magnitude higher.⁶³ In this new world, novel regulatory and legal approaches were required.

B. International Organizations and Multistakeholder Global Governance

International organizations are today central to international law. Writing some two decades ago, Julian Ku argued that “the new international law has been developed in large part by the rise of a new legal creature: the international organization. These organizations have varying levels of authority, ranging from technical administrative coordination to regulation of political interaction among states.”⁶⁴ While international organizations date to the 19th century, the rise of these organizations as key features of the international legal system began with the end of the Second World War and accelerated thereafter.⁶⁵ In the seventy-five years since the war ended, international organizations have proliferated, ranging from the United Nations and the World Bank to the Asian Infrastructure Investment Bank and the League of Arab States.⁶⁶ Indeed, “in the early 21st century, it is difficult to think of international law and the governance of international affairs in isolation from international organizations.”⁶⁷

Central to the study of international organizations is why they exist and what specific functions they serve. Joel Trachtman, for example, has asked “why are formal international organizations created, and why is formal legal power delegated from states to international organizations?”⁶⁸ Andrew Guzman argues that “States create [international organizations] with the hope of enhancing international cooperation beyond what can be achieved by states alone.”⁶⁹ This argument—that international organizations are created and delegated power by states in order to facilitate and further cooperation—is common to both the international law and international relations traditions.⁷⁰

Jose Alvarez defines international organizations as organizations established by agreements between states, having at least one organ capable

62. PETER F. COWHEY & JONATHAN D. ARONSON, *TRANSFORMING GLOBAL INFORMATION AND COMMUNICATION MARKETS: THE POLITICAL ECONOMY OF INNOVATION* 209 (2009).

63. Roser et al., *supra* note 30.

64. Ku, *supra* note 8, at 83.

65. See Barnett et al. eds., *supra* note 1, at 1.

66. See Mark Copelovitch & Jon C.W. Pevehouse, *International Organizations in a New Era of Populist Nationalism*, 14 *REV. INT’L ORGS.* 169, 170 (2019); see generally ALVAREZ, *supra* note 1 (providing history).

67. Klabbers, *supra* note 7, at 15.

68. Trachtman, *supra* note 5, at 172.

69. Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 *EUR. J. INT’L L.* 999, 1000 (2013).

70. See, e.g., Pevehouse & von Borzyskowski, *supra* note 7, at 7; Klabbers, *supra* note 7, at 17-18.

of operating separately from member states, and operating under international law.⁷¹ By this definition, ICANN is not a classic international organization; indeed under the traditional terms of international law, it is not an international organization at all but rather a non-profit corporation created pursuant to U.S. domestic law.⁷² This legal status has been at times controversial and the subject of debate over whether ICANN's location should be altered.⁷³ Yet, ICANN's role and structure are similar to many features of international organizations: it has many states as members; it regulates a global resource of shared interest to many nations; and it holds regular conferences and meetings around the globe. As one scholar of ICANN notes, while ICANN is not technically an international organization, "it is international in the sense that its Articles of Incorporation and Bylaws mandate cooperation with organizations and persons in many countries as well as governments."⁷⁴ For these reasons, many of the arguments about the role of delegation to international organizations can be fruitfully applied to ICANN.

ICANN's signature feature is its multistakeholder structure. Multistakeholderism is not unique to the governance of the Internet.⁷⁵ But neither is it widely used in international law. Multistakeholder governance has been defined by Mark Raymond and Laura DeNardis "as two or more classes of actors engaged in a common governance enterprise concerning issues they regard as public in nature, and characterized by polyarchic authority relations constituted by procedural rules."⁷⁶ In simple terms, it

71. ALVAREZ, *supra* note 1, at 1.

72. *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, ICANN (Oct. 3, 2016), <https://www.icann.org/resources/pages/governance/articles-en> [<https://perma.cc/S8FS-PNZP>]; *Getting to Know the Internet Corporation for Assigned Names and Numbers (ICANN)*, ICANN, <https://www.icann.org/en/system/files/files/quick-look-icann-01nov13-en.pdf> [<https://perma.cc/D3FF-AB48>] (last visited June 6, 2022).

73. See, e.g., Milton Mueller, *What "Jurisdiction" Does ICANN Belong To?*, INTERNET GOVERNANCE PROJECT (Nov. 7, 2017), <https://www.internetgovernance.org/2017/11/07/jurisdiction-icann-belong/> [<https://perma.cc/FE2M-33V4>]; ICANN, CCWG-ACCOUNTABILITY WS2 JURISDICTION SUBGROUP DRAFT RECOMMENDATIONS OCTOBER 2017 (2017), <https://community.icann.org/display/WEIA/Jurisdiction?preview=/59643282/71602752/CCWG-Accountability-WS2-Jurisdiction-Report%20to%20Plenary%20v1.0.docx> [<https://perma.cc/LS4B-4XDA>].

74. Emily M. Weitzenboeck, *Hybrid Net: The Regulatory Framework of ICANN and the DNS*, 22 INT'L J.L. & INFO. TECH. 49, 50 (2014).

75. For example, COVAX is a multistakeholder group established to be the vaccine distribution arm of another multistakeholder body called the Access to Covid-19 Tools Accelerator (ACT). See HARRIS GLECKMAN, TRANSNAT'L INST. & FRIENDS OF THE EARTH INT'L, COVAX: A GLOBAL MULTISTAKEHOLDER GROUP THAT POSES POLITICAL AND HEALTH RISKS TO DEVELOPING COUNTRIES AND MULTILATERALISM (Gonzalo Berrón & Leticia Paranhos M. de Oliveira eds., 2021), https://longreads.tni.org/wp-content/uploads/2021/03/COVAX_EN_WEB_NEW.pdf [<https://perma.cc/5PST-7HJ4>].

76. Mark Raymond & Laura DeNardis, *Multistakeholderism: Anatomy of an Inchoate Global Institution*, 7 INT'L THEORY 21, at 572-73 (2015); see also PETER F. COWHEY & JONATHAN D. ARONSON, DIGITAL DNA: DISRUPTION AND THE CHALLENGES FOR GLOBAL GOVERNANCE (2017); Joe Waz & Phil Weiser, *Internet Governance: The Role of Multistakeholder Organizations*, 10 J. TELECOMM. TECH. L. 331 (2012).

means lawmaking via a mix of government actors, firms, interested non-governmental organizations, indigenous peoples, and even individuals. The core idea is for all the relevant stakeholders in a given issue-area to have a say and a role, even if some may have greater power or play different regulatory roles than others. Multistakeholder approaches vary in scale, scope, and approach but can be found in global health (e.g., The Global Fund to Fight AIDS, Malaria, and Tuberculosis⁷⁷); the UNAIDS program;⁷⁸ sustainable development;⁷⁹ and even small arms regulation.⁸⁰ Aronson and Cowhey argue that multistakeholder governance is particularly useful for international cooperation to regulate technology, where private sector expertise is high and technical knowledge important.⁸¹

The line between inclusive forms of multilateral cooperation and full multistakeholder cooperation can be blurry. The key dimension is the character of state power: whether governments are ultimately in control (multilateral) or whether nonstate actors share power in broadly equal ways (multistakeholder). For example, many multilateral treaties within the international legal system have moved to include greater numbers of non-state actors.⁸² The International Telecommunications Union, for example, has 193 member governments and some 900 non-voting “sector members” drawn from academia, industry, and the like.⁸³ Within the United Nations, NGOs can obtain consultative status through the Economic and Social Council that allows them access to many meetings, treaty processes, and the like.⁸⁴ Still, however active non-state actors may be in multilateral settings, governments remain in control of these processes and often meter participation by nonstate

77. THE GLOBAL FUND, COUNTRY COORDINATING MECHANISMS: GOVERNANCE AND CIVIL SOCIETY PARTICIPATION (2008), https://web.archive.org/web/20220414133731/https://www.theglobalfund.org/media/5472/ccm_2008thematiccivilsocietyparticipation_report_en.pdf [<https://perma.cc/EXQ2-46Z9>].

78. *About: Governance*, UNAIDS, <https://www.unaids.org/en/whoware/governance> [<https://perma.cc/NWY6-7TM6>] (last visited June 24, 2022).

79. See generally Karin Bäckstrand, *Multi-Stakeholder Partnerships for Sustainable Development: Rethinking Legitimacy, Accountability and Effectiveness*, 16 EUR. ENV'T 290, (2006); MINU HEMMATI, *MULTI-STAKEHOLDER PROCESSES FOR GOVERNANCE AND SUSTAINABILITY: BEYOND DEADLOCK AND CONFLICT* (2002).

80. See generally Deborah Avant, *Netting the Empire: US Roles Governing Small Arms and Military and Security Services*, in *THE NEW POWER POLITICS: NETWORKS AND TRANSNATIONAL SECURITY GOVERNANCE* 103 (Deborah Avant & Oliver Westerwinter eds., 2016).

81. COWHEY & ARONSON, *supra* note 62, at 2.

82. See generally, JONAS TALLBERG ET AL., *THE OPENING UP OF INTERNATIONAL ORGANIZATIONS: TRANSNATIONAL ACCESS IN GLOBAL GOVERNANCE* (2013).

83. *About International Telecommunication Union (ITU)*, ITU, <https://www.itu.int/en/about/Pages/default.aspx> [<https://perma.cc/ZQ6E-X4ZD>] (last visited June 24, 2022).

84. U.N. Charter art. 71; see also *Consultative Status with ECOSOC and Other Accredited Organizations*, U.N. DEP'T OF ECON. & SOC. AFFS., NGO BRANCH, <https://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=false> [<https://perma.cc/TCZ3-65AS>] (last visited Dec. 20, 2022).

actors as they see fit.⁸⁵ Multistakeholder governance systems, by contrast, do not give any one group control or the power to exclude.

ICANN's governance structure deeply reflects multistakeholder principles. It has a government advisory council composed of state representatives.⁸⁶ Yet governments have no veto powers over ICANN generally and cannot control or direct decisions even if they can find consensus on a particular position.⁸⁷ Indeed, the government advisory council is just one of several councils representing stakeholder groups, each of which feeds input up to the ICANN board of directors, the ultimate decisionmaker.⁸⁸ This system reflects the long history of non-state actors in the informal governance processes of the past, but also the desire on the part of many interested parties to ensure that governments do not seize control of a system that has long been marked by an ethos of openness and freedom

To be sure, multistakeholder governance has a buzzy quality today. As Raymond and DeNardis rightly note, "Actors seem eager both to talk about engaging in multistakeholderism and to engage in it—whether by speaking about it or in other ways."⁸⁹ The use of the term "multistakeholder" is itself relatively novel. Based on Google Ngram data, in English the term first appears in the 1970s—about the same time the Internet was effectively launched.⁹⁰ By 1988 multistakeholder was used in .0000000460% of sources.⁹¹ Twenty years later usage had increased 10,000%.⁹² "Multilateral" exhibits a quite different pattern. Common even in the 1940s, by the 1970s—multistakeholder first appears in the Ngram search in 1976—for every one use of multistakeholder, multilateral was used 107,000 times.⁹³ Three decades later the situation was markedly different; there were now only eighty usages of multilateral for each mention of multistakeholder.⁹⁴ To provide context, consider the term "global governance." As the graph below shows, it is (unsurprisingly) used far more frequently than "multistakeholder" but also shows a marked upward shift starting in the 1990s.

85. Kal Raustiala, *The Role of NGOs in Treaty-Making*, in *THE OXFORD GUIDE TO TREATIES* 173, 192 (Duncan Hollis ed., 2012); Kal Raustiala, *States, NGOs, and International Environmental Institutions*, 41 *INT'L STUD. Q.* 719, 720 (1997).

86. *ICANN Bylaws*, *supra* note 21, at Art. 4.

87. *Bylaws for Internet Corporation for Assigned Names and Numbers*, ICANN (last amended June 2, 2022), <https://www.icann.org/resources/pages/governance/bylaws-en> [<https://perma.cc/ZHK4-ZH7E>].

88. *Getting to Know the ICANN Board of Directors*, ICANN, <https://www.icann.org/resources/pages/chart-2012-02-11-en> [<https://perma.cc/468U-L7PL>] (last visited Dec. 20, 2022).

89. Raymond & DeNardis, *supra* note 76, at 21.

90. *Infra* Figure 1.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

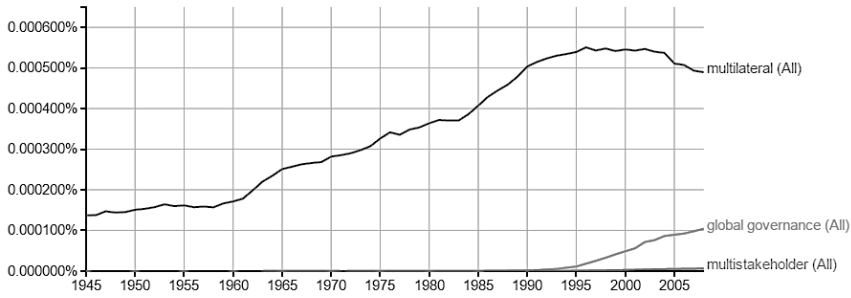


Figure 1. Changes in Nomenclature Over Time

It is hard to draw precise inferences from this data. The relationship between discussions of multistakeholder governance and its actual political significance is uncertain. But it is clear that the way actors talk about global governance has changed, plausibly reflecting some combination of legitimacy concerns and shifting ideas about effective governance. Terms like “stakeholder” and “governance” are inclusive, process-oriented, and seem to elide the role of power. “Multistakeholder governance” is friendly, open, and maybe messy; “multilateral negotiations” have a harder, more competitive edge. This dynamic characterizes the regulation of the Internet, where insiders have long been proponents of multistakeholderism and quite wary of multilateralism. But whatever the rhetorical implications, the appeal of multistakeholderism to the U.S government was largely grounded in more concrete concerns.

III. THE POLITICS OF INTERNET GOVERNANCE

A. *The Threat of Multilateralism*

The Internet rapidly expanded across the world in the 1990s. As it did, the notion that such a significant global resource would be subject to control by a single state, especially a state that was widely viewed in this era as not just a superpower but a “hyperpower,” struck many other governments as increasingly problematic.⁹⁵ This led to various efforts to assert multilateral control—many of which emanated from agencies of the UN. Most notable was the International Telecommunications Union. Founded in 1865, and a United Nations specialized agency since 1947, the ITU has long had a central role in global communications law and policy.⁹⁶ Because the ITU operates on a one-nation one-vote system, and because so many governments in the world prefer to control communication extensively, the organization has often been at odds with liberal democracies.

The ITU saw the Internet as a logical extension of its traditional ambit over communication. And the ITU was critical of what it believed was the

95. SAMANTHA BRADSHAW ET AL., GLOB. COMM’N OF INTERNET GOVERNANCE, THE EMERGENCE OF CONTENTION IN GLOBAL INTERNET GOVERNANCE 10 (2015).

96. Peter F. Cowhey, *The International Telecommunications Regime: The Political Roots of Regimes for High Technology*, 44 INT’L ORG. 169, 169 (1990).

Internet's informal approach to regulation.⁹⁷ But as Milton Mueller explains in his authoritative history of the Internet:

A deeper agenda underlay the ITU's interest in domain name issues. As the intergovernmental organization that had presided for decades over a regime of state-owned telephone monopolies, the ITU was uncertain of its role and status in a new, liberalized order. With the Internet on the rise, private-sector-led standards forums proliferating, and the days of traditional, circuit-switched telephone service seemingly numbered, the ITU needed to assert a role for itself in internet governance The governance debates presented it with an opportunity to establish itself as an actor in that arena.⁹⁸

There were strong pressures within the ITU to both assert authority over its putative regulatory domain and to ensure that ITU member governments retained (or reasserted) maximal state control over national telecommunications markets. While telecommunications firms had often been nationalized, the Internet had created a new communications ecosystem. The leading digital firms were American. Many governments saw the potential for political disruption in the Internet, but also for greater American control of communication both globally and locally. Neither was appealing. In short, the communications revolution wrought by the Internet had deep political as well as economic ramifications. Multilateral control via the ITU provided an attractive way to rein in the Internet—and American power over it.

On the other side was the informal multistakeholder tradition that had in practice, and without much in the way of explicit decision, managed the Internet since its birth. Proponents of multistakeholderism believed knowledgeable parties, generally understood as engineers and other insiders, should govern the Internet collectively. And rather than formal rules and procedures, they preferred inclusive deliberation and rough consensus. While these loose methods had worked acceptably well in the past, the Internet had, by the mid-1990s, long since become a different and far more global and diverse entity. In 1996 a group of non-state actors—including the Internet Society, the World Intellectual Property Organization (WIPO), and the ITU—tried to create an encompassing framework that would rationalize governance of the Internet. These various groups negotiated an international agreement on “generic Top Level Domains,” such as .com or .edu. The agreement was known as the “gTLD-Memorandum of Understanding.”⁹⁹

As Daniel Drezner has argued, the gTLD accord “proposed assigning governance functions to an entity housed in the ITU.”¹⁰⁰ Though legally non-

97. See Pekka Tarjanne, ITU Sec'y-Gen., ITU, Keynote Address on Internet Governance: Towards Voluntary Multilateralism (Apr. 29, 1997).

98. MUELLER, *supra* note 16, at 138.

99. Tarjanne, *supra* note 97.

100. Daniel Drezner, *The Global Governance of the Internet: Bringing the State Back In*, 119 POL. SCI. Q. 477, 494 (2003).

binding, the ITU “arranged a ‘formal’ signing ceremony in Geneva in March 1997 to give the agreement the trappings of an international treaty.”¹⁰¹ At the signing ceremony, the ITU Secretary-General hailed the accord, stating that the current Internet:

. . . is too dependent on the goodwill of a small group of people who are doing the job largely by historical accident, because they were in the right place at the right time; the most popular gTLDs are handled by an organization which holds a monopoly over the registration and award of those domain name *The current system is dominated by actors in just one country, the United States, to the exclusion of others*; It does not give adequate attention to the protection of trademarks and other intellectual property; It lacks formal structure and legitimization.¹⁰²

The ITU effort came as an unhappy surprise to the United States. Then-Secretary of State Madeline Albright blasted the ITU “for acting ‘without authorization of member governments’ to hold a ‘global meeting involving an unauthorized expenditure of resources and concluding with a quote international agreement unquote.’”¹⁰³

The ITU’s effort nonetheless signaled an important step in the global regulation of the Internet. Rival governments and multilateral organizations were jockeying for position and seeking greater control. The U.S. understood that attempts at greater multilateral regulation were not blips but instead an ongoing—and likely growing—threat to an open Internet. Moreover, this threat was rising just as the Internet was becoming more commercial in nature. For the Clinton Administration, it appeared the bright future of the Internet as a social and economic platform could be squelched by these moves toward greater multilateral governance.

The U.S. thus faced a crucial choice: It could accede to the growing global demands for multilateralism, or it could embrace even more firmly the existing tradition of multistakeholderism—which, not coincidentally, was dominated by American actors. The choice was easy. As a White House official stated at the time: “As the Internet grows up and becomes more international, these technical management questions should be privatized, and there should be a *stakeholder-based, private international organization* set up for that technical management.”¹⁰⁴ What the U.S. sought to create, in sum, was a more formalized version of the existing system of multistakeholderism.

Less than four months after the ITU’s attempt to gain greater control of key aspects of Internet governance, President Clinton directed the Commerce Department to spin off the management of the naming and numbering

101. *Id.*

102. Tarjanne, *supra* note 97 (emphasis added).

103. Milton Mueller, *ICANN and Internet Governance: Sorting Through the Debris of “Self-Regulation”*, 1 INFO 497, 502 n.17 (1999) (quoting Memorandum from the Madeleine Albright, U.S. Sec’y of State, to the ITU (April 23, 1997)).

104. Magaziner, *supra* note 52 (emphasis added).

system.¹⁰⁵ The federal White Paper on the proposal noted that the Internet had become far more commercial: “as Internet names increasingly have commercial value, the decision to add new top-level domains cannot be made on an ad hoc basis by entities or individuals that are not formally accountable to the Internet community.”¹⁰⁶ Most significantly, however, the White Paper expressly rejected multilateralism as an appropriate form of governance:

While IOs may provide specific expertise or act as advisors to the new corporation, the U.S. continues to believe, as do most commenters, that *neither national governments acting as sovereigns nor intergovernmental organizations acting as representatives of governments should participate in management of Internet names and addresses.*¹⁰⁷

B. The Creation of ICANN

After a call for proposals issued by the U.S. Commerce Department, in 1998, ICANN was selected, created, and finally delegated authority over the naming and numbering system.¹⁰⁸ ICANN is an unusual hybrid of non-governmental organization and an international organization. There is no treaty creating it, it enjoys no host agreement with the US (as does, for instance, the United Nations), and its staff lacks diplomatic immunities. It is legally a 501(c)(3) organization, incorporated under California law¹⁰⁹. Still, ICANN has many features of an international organization. It governs a global resource, generates new rules and policies, has governments as members, and has an international ambit.

ICANN initially operated pursuant to a contract issued by the U.S. Department of Commerce.¹¹⁰ This contract directly delegated to ICANN the ability to generate and assign new top-level domain names and the power to designate who adjudicates disputes over website names.¹¹¹ This latter power reflected the increasing value of domain names and websites, both in their own right and as they relate to trademarks and other forms of intellectual

105. See generally Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (June 10, 1998).

106. NTIA, *Statement of Policy on the Management of Internet Names and Addresses*, Dkt. No. 980212036-8146-02 (June 5, 1998), <https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses> [<https://perma.cc/P6L7-NF45>].

107. *Id.* (emphasis added).

108. *ICANN History Project*, *supra* note 28.

109. See generally Waldrop, *supra* note 33.

110. NTIA, *Contract Between the U.S. Dep't of Commerce and ICANN*, Cont. No. SA1301-12-CN-0035 (Oct. 1, 2012), https://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf [<https://perma.cc/8JT8-CCRB>].

111. See *id.*

property.¹¹² The legal basis of the relationship between ICANN and the U.S. government rested on three agreements: *The Memorandum of Understanding Between the US Department of Commerce and [ICANN]*, ICANN's *Cooperative Research and Development Agreement*, and a contract governing the naming and numbering function and assignment of IP numbers.¹¹³

As explained above, ICANN has a highly-articulated system of multistakeholder governance, in which non-state actors are numerous and policy proposals are open for public comment. ICANN's governance structure does not mean that governments lack any control over the Internet—as many governments around the world have demonstrated. ICANN's powers are limited. But while access to websites can be blocked within certain states, as China does with the so-called “Great Firewall,” and India did recently with regard to Kashmir, without “control over the global assigning of names and numbers, comprehensive censorship of the Internet as a whole is inhibited.”¹¹⁴ What occurs elsewhere on the Internet can still have powerful effects, and technical workarounds, from virtual private networks to satellite-based systems, offer entry points from the larger world that are difficult to block. This gives ICANN an important degree of power that makes it a source of irritation for some governments and continues to spur efforts to shift regulatory authority to multilateral settings such as the ITU.¹¹⁵

As the Internet grew ever more global in the 2000s, the pressure to multilateralize Internet governance continued. In 2009, the federal government and ICANN reset their delegation arrangement via an agreement they termed an “Affirmation of Commitments.” In it, ICANN pledged to maintain “robust mechanisms for public input, accountability”—and also to remain headquartered in the U.S.¹¹⁶ This final requirement reflects efforts on ICANN's part to explore a change in its legal basis. A 2007 internal ICANN report considered whether the organization was limited by “its legal personality being based in a specific jurisdiction.”¹¹⁷ As Michael Froomkin explained, “from ICANN's viewpoint, the prospect of international status

112. See, e.g., Laurence Helfer, *International Dispute Settlement at the Trademark-Domain Name Interface*, 29 PEPP. L. REV. 87 (2001); David Simon, *An Empirical Analysis of Fair-Use Decisions Under the Uniform Domain-Name Dispute Resolution Policy*, 53 B.C. L. REV. 65 (2012).

113. A. Michael Froomkin, *Almost Free: An Analysis of ICANN's 'Affirmation of Commitments'*, J. ON TELECOMM. & HIGH TECH. L. 192, 192 (2011).

114. Raustiala, *supra* note 53, at 492. A split or splintered Internet is possible and maybe even probable—but would defeat much of what makes the Internet, the Internet. Rose Wong, *There May Soon Be Three Internets. America's Won't Necessarily Be the Best*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/opinion/internet-google-china-balkanization.html> [<https://perma.cc/P6GE-UJX8>]; Sean McDonald & An Xiao Mina, *The War-Torn Web*, FOREIGN POL'Y (Dec. 19, 2018), <https://foreignpolicy.com/2018/12/19/the-war-torn-web-internet-warring-states-cyber-espionage/> [<https://perma.cc/JAN8-TX4U>].

115. *About International Telecommunication Union (ITU)*, *supra* note 83.

116. *Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers*, ICANN (Sept. 30, 2009) [hereinafter *Affirmation of Commitments*], <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en> [<https://perma.cc/8EVG-H75N>]. Froomkin argues this is not a contract due to lack of consideration. Froomkin, *supra* note 113.

117. Froomkin, *supra* note 113.

certainly seemed to offer everything ICANN's critics feared ICANN most wanted: immunity from suit in the U.S., international stature, a lack of outside supervision and control, no need to have a 'membership' or file California and U.S. tax returns"¹¹⁸ ICANN in the end did not pursue this option, and the Affirmation of Commitments with the federal government pledged that it would stay within the territorial jurisdiction of the U.S.¹¹⁹

Then, in 2014, the federal government announced a major policy change: it would cede control to ICANN permanently.¹²⁰ In doing so, the U.S. shed the last vestige of the American role as the key regulator of the core of the Internet. As with the decision to create ICANN in 1998, this was a juncture in which the federal government decisively moved Internet governance in its preferred direction. The Obama Administration stated its "intent to support and enhance the multistakeholder model . . . and maintain the openness of the Internet."¹²¹ There was one central criterion, however: The U.S. "will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution."¹²²

C. *Two Visions of the Internet*

A critical factor in the U.S. decision to relinquish control was the growing divergence in global views about regulation of the Internet. The federal government's preferences over Internet governance—and for outcomes such as general openness, few barriers to digital flows, and limited censorship—were broadly shared by most American allies.¹²³ But many other governments, most notably China and its authoritarian partners, had different views. This divide on what kind of Internet was desirable was summed up in a memorable phrase from French President Macron. Speaking in 2018, Macron said, "To be very politically incorrect,"

118. *Id.*

119. *Affirmation of Commitments*, *supra* note 116.

120. Craig Timberg, *U.S. to Relinquish Remaining Control over the Internet*, WASH. POST (Mar. 14, 2014), https://www.washingtonpost.com/business/technology/us-to-relinquish-remaining-control-over-the-internet/2014/03/14/0c7472d0-abb5-11e3-adbc-888c8010c799_story.html [<https://perma.cc/M4RA-PAVM>].

121. Press Release, NTIA, *NTIA Announces Intent to Transition Key Internet Domain Name Functions* (Apr. 2, 2014), <https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions> [<https://perma.cc/T676-2ZDG>].

122. *Id.*

123. Karen Kornbluh, *The Internet's Lost Promise – And How America Can Restore It*, FOREIGN AFFS., Sept./Oct. 2018.

we are seeing two types of Internet emerge . . . *there is a Californian form of Internet, and a Chinese Internet.* The first is the dominant possibility, that of an Internet driven by strong, dominant, global private players, that have been impressive stakeholders in this development, that have great qualities and with which we work, but which at the end of the day are not democratically elected On the other side, there is a system where governments have a strong role, but this is the Chinese-style Internet: an Internet where the government drives innovations and control And so in that Internet, the state has found its place, but it is hegemonic.¹²⁴

In the 1990s, President Clinton had famously lampooned Chinese efforts to regulate digital flows, reflecting the then-widely held view in the West. “We know how much the Internet has changed America,” said President Clinton in a speech in 2000.¹²⁵ “Imagine how much it could change China. Now there's no question China has been trying to crack down on the Internet. Good luck! That's sort of like trying to nail Jell-O to the wall.”¹²⁶ Yet, President Clinton was wrong; China proved very adept at regulating the Internet. And while it was not the only state interested in securing that control, it was certainly the most powerful. Authoritarian governments’ interest in the Internet accelerated rapidly in the 21st century. As populations around the world moved online and began using digital means to share information and organize politically, many governments sought ever harder to multilateralize and thus better control the Internet. (And along the way, cabin perceived American power.) Existing international organizations such as the ITU provided a seemingly-neutral platform for which to pursue this goal. The 1997 “g-TLD” effort at creating a non-legally-binding accord over domain names, while doomed, was indeed a harbinger of the future.

In 2003, for instance, the ITU held the first “World Summit on the Information Society,” or WSIS. WSIS resulted in the creation of a follow-on Working Group on Internet Governance, as well as a later “WSIS+10” process in 2015.¹²⁷ The “Tunis Agenda” that emerged from WSIS decisively favored the Chinese vision over the Californian, declaring that:

124. Emmanuel Macron, President, Fr., Speech at the 2018 Internet Governance Forum (Nov. 12, 2018), <https://www.intgovforum.org/multilingual/content/igf-2018-speech-by-french-president-emmanuel-macron> [<https://perma.cc/Y32D-D5W2>] (emphases added); see also Eric Rosenbach & Shu Min Chong, *Governing Cyberspace: State Control vs. the Multistakeholder Model*, BELFER CTR. FOR SCI. & INT’L AFFS. (2019), <https://www.belfercenter.org/publication/governing-cyberspace-state-control-vs-multistakeholder-model> [<https://perma.cc/W58C-K2LJ>].

125. *Clinton’s Words on China: Trade Is the Smart Thing*, N.Y. TIMES, Mar. 9, 2000, at A10.

126. *Id.*

127. INTERNET SOC’Y, UNDERSTANDING THE WSIS+10 REVIEW PROCESS (2015), <https://www.internetsociety.org/wp-content/uploads/2017/08/WSISplus10-Overview.pdf> [<https://perma.cc/ZR6M-T7GL>].

[t]he Internet has evolved into a global facility available to the public and its governance should constitute a core issue of the Information Society agenda. The international management of the Internet should be multilateral, transparent and democratic *Policy authority for Internet-related public policy issues is the sovereign right of States.*¹²⁸

This same document led to the creation of a UN-led Internet Governance Forum, or IGF.¹²⁹ The IGF has little operational control over the Internet, but it does provide an alternative, more state-centric platform for debating Internet policy.

Adding to global pressure, the period from WSIS to WSIS+10 was one in which American firms, such as Facebook, Google, and Twitter, began to dominate the Internet even more. In short, in the years leading up to the decision to cede greater authority to ICANN, the Internet was in some respects becoming ever more American, even as the user base became increasingly global. These twin developments increased tensions and rising calls for greater state control—either at the national level or via multilateral arrangements—naturally followed.

In the fall of 2011, for example, the government of India issued a call to “place Internet governance under the auspices of the UN, or, as some have characterized it, ‘in a box with a UN label stamped on the side.’”¹³⁰ Shortly after, the Organization for Economic Cooperation and Development (“OECD”), composed mainly of Western industrialized democracies, countered with a *Communique on Principles of Internet Policy-Making* that endorsed multistakeholderism: “due to the rapidly changing technological, economic and social environment within which new policy challenges emerge,” the OECD statement declared, “multi-stakeholder processes have been shown to provide the flexibility and global scalability required to address Internet policy challenges.”¹³¹

The battle between multilateralism and multistakeholderism reached a peak at the 2012 World Conference on International Telecommunications, again convened by the ITU.¹³² Authoritarian governments, led by Russia and China, sought an agreement that would decisively strengthen multilateral

128. World Summit on Info. Soc’y, *Tunis Agenda for the Information Society*, WSIS-05/TUNIS/DOC/6 (Rev. 1)-E (Nov. 18, 2005), <https://www.itu.int/net/wsis/docs2/tunis/off/6rev1.html> [<https://perma.cc/2MRD-Z77S>] (italicized text bolded in original source).

129. *Id.*

130. Waz & Weiser, *supra* note 76, at 332.

131. OECD, COMMUNIQUÉ ON PRINCIPLES FOR INTERNET POLICY-MAKING 4 (2011), <https://www.oecd.org/digital/ieconomy/48387430.pdf> [<https://perma.cc/5B9R-LJ84>].

132. *World Conference on International Telecommunications (WCIT-12)*, ITU, <https://www.itu.int/en/wcit-12/Pages/default.aspx> [<https://perma.cc/9WAD-2J4P>] (last visited Nov. 12, 2022).

regulation.¹³³ Republican members of Congress in particular spoke out strongly in favor of ICANN despite—or perhaps because—of its vaguely countercultural-sounding “multistakeholder model.”¹³⁴ Some seemed to view the existing multistakeholder approach as desirable precisely *because* the government role was cabined. For example, Representative Greg Walden, a Republican, noted that the Internet “has prospered under a multistakeholder model absent the heavy-hand of government regulation.”¹³⁵ “If we are not vigilant,” he declared, the “[UN forum] just might break the Internet by subjecting it to an international regulatory regime designed for old-fashioned telephone service.”¹³⁶ Views from the private sector were similar. Vinton Cerf, one of the most influential early creators of the Internet, declared the prospect of multilateral ITU control over Internet governance “potentially disastrous.”¹³⁷ As leader of its delegation to the World Conference on International Telecommunications, the U.S. chose not a State Department or Commerce official, but Terry Kramer, an executive at Vodaphone with extensive experience in the telecommunications business.¹³⁸

The U.S., Australia, India, Israel, Japan, and most of Europe refused to sign an agreement at the conference.¹³⁹ The U.S. declared that it would not support a treaty “that is not supportive of the multistakeholder model.”¹⁴⁰ Two years later, the U.S. reiterated that it was “crystal clear we would not accept a replacement that would be government-led or be an intergovernmental organization.”¹⁴¹ Nonetheless, the pressure for change continued from other governments. This was fueled in part by the incendiary revelations about NSA

133. Violet Blue, *WCIT-12 Leak Shows Russia, China, Others Seek to Define ‘Government-Controlled Internet’*, ZDNET, <https://www.zdnet.com/article/wcit-12-leak-shows-russia-china-others-seek-to-define-government-controlled-internet/> [<https://perma.cc/J6R9-WRQB>].

134. Multistakeholderism in this domain tapped interestingly into the preferences of both parties. Republicans liked the private sector orientation, and often saw it as an attractive alternative to government regulation. Democrats saw multistakeholderism as progressive, incorporating all (or most) effected interests and featuring extensive public input. Both liked that American companies were highly dominant worldwide.

135. *International Proposals to Regulate the Internet: Hearing Before the Subcomm. on Commc’ns & Tech. of the H. Comm. on Energy & Commerce*, 112th Cong. 1-4 (2012) (statement of Greg Walden, Chair, Subcomm. on Commc’ns & Tech.).

136. *Id.*

137. *Id.* at 78 (statement of Vinton Cerf, Vice President & Chief Internet Evangelist, Google, Inc.).

138. ITU, *ITU Interview @ WCIT – 12: H.E Terry Kramer, Ambassador, Department of State, USA*, YOUTUBE (Dec. 9, 2012), <https://www.youtube.com/watch?v=HXWvISbGRE4> [<https://perma.cc/NZ4Z-WQPF>].

139. See *World Conference on International Telecommunications (WCIT-12)*, *supra* note 138.

140. Eric Pfanner, *U.S. Rejects Telecommunications Treaty*, N.Y. TIMES (Dec. 13, 2012), <https://www.nytimes.com/2012/12/14/technology/14iht-treaty14.html> [<https://perma.cc/ER7D-29B8>].

141. *Future of Internet Governance*, C-SPAN (Apr. 4, 2014), <http://www.c-span.org/video/?318699-1/internet-governance&start=239> [<https://perma.cc/ZRV6-RBPT>] (recording of panel held at the Hudson Institute in Washington, D.C.).

spying by Edward Snowden in 2013.¹⁴² NSA espionage had no direct connection to Internet governance, but Snowden's disclosures raised hard questions about how much foreigners could trust the U.S. The Snowden affair nudged the U.S. to diminish its overt role in Internet governance still further.¹⁴³

Meanwhile, China continued to lead efforts for greater global focus on "cyber sovereignty."¹⁴⁴ At the Chinese-organized World Internet Conference in 2015, Xi Jinping stated that "There should be no unilateralism" with regard to the Internet.¹⁴⁵ In a barely-veiled swipe at the U.S., he declared, "decisions should not be made with one party calling the shots or only a few parties discussing among themselves."¹⁴⁶ (China's World Internet Conference, considered at first a sideshow, has only grown in significance, with tech luminaries such as Tim Cook of Apple and Sundar Pinchai of Google attending over the years.)¹⁴⁷ This was a precis of Macron's "Chinese Internet"—substantial sovereign control with, if necessary, international coordination occurring via traditional state-centered multilateralism.

This jockeying reflected a conceptual divide between the U.S. and China. To American officials, ICANN's rule-making processes were properly reflective of the views of myriad stakeholders, especially from the private sector. To China and its allies, the fact that so many ICANN participants were tied to the U.S. and that ICANN was located in California meant that ICANN's supposed multistakeholderism was simply a mask for U.S. power. This view was especially prevalent because to many Chinese observers, the line between public and private is far blurrier than it appears from the vantage point of Washington, D.C. And indeed, the preferences of the U.S.—an open Internet, with powerful private firms, and disproportionately American players—were largely supported by multistakeholderism, since so many of the participants share these preferences. The only realistic alternative to multistakeholderism, *The Economist* argued, was one China enthusiastically endorsed: "governments bringing the Internet under their control."¹⁴⁸

142. Tim Walker, *NSA Whistleblower's Leaks Prompt US to Make Control of Internet Truly Worldwide*, INDEPENDENT (March 19, 2014, 2:01 AM), <https://www.independent.co.uk/tech/edward-snowden-nsa-whistleblower-s-leaks-prompt-us-to-make-control-of-internet-truly-worldwide-9200578.html> [<https://perma.cc/XQ2T-SFPX>]; BRADSHAW ET AL., *supra* note 95, at 3; Jack Goldsmith, *The Tricky Issue of Severing US "Control" over ICANN*, HOOVER INST. (Feb. 24, 2015), <https://www.hoover.org/research/tricky-issue-severing-us-control-over-icann> [<https://perma.cc/Z8AN-RLRB>].

143. Walker, *supra* note 142; BRADSHAW ET AL., *supra* note 95, at 3; Goldsmith, *supra* note 148.

144. *China Internet: Xi Jinping Calls For 'Cyber Sovereignty'*, BBC NEWS (Dec. 15, 2015), <https://www.bbc.com/news/world-asia-china-35109453> [<https://perma.cc/2U97-KWJA>].

145. *Id.*

146. *Id.*

147. Segal, *supra* note 15, at 17.

148. *In Praise of Chaos: Governments' Attempts to Control the Internet Should Be Resisted*, ECONOMIST (Oct. 1, 2011), <https://www.economist.com/leaders/2011/10/01/in-praise-of-chaos> [<https://perma.cc/PE74-AJP8>].

In short, the specter of growing state control over the Internet formed a critical underpinning to the decision by the U.S. to hand full authority over the naming and numbering function to ICANN. To be sure, this decision was not without domestic political controversy. Indeed, it was denounced by some Republicans as a giveaway akin to the transfer of the Panama Canal under President Carter.¹⁴⁹ These politicians preferred that the U.S. retain unilateral control as much as possible. Senator Ted Cruz of Texas declared that “since the internet’s inception, the United States government has stood guard over critical internet functions.”¹⁵⁰ Legal efforts to halt the transfer of power to ICANN ensued—none were successful.¹⁵¹ ICANN became fully autonomous on October 1, 2016.¹⁵²

IV. DELEGATION AND TRUSTEESHIP

A. *Explaining the Transfer of Authority to ICANN*

What led the United States to relinquish its unique position over the Internet, cease contracting with ICANN, and transfer important powers—permanently? To reverse a famous locution about delegation theory, why did the U.S. choose to abdicate, not delegate?¹⁵³

The dominant approach to the delegation of authority to international organizations builds off of principal-agent theories. These theories, widely deployed to explain legislative delegation to bureaucracies, also have been deployed to understand the relationship between governments and international organizations.¹⁵⁴ But because they generally rest on the assumption that every act of delegation involves a “contingent grant of authority” from principal to agent, their fit for transfers of power that are permanent is uncertain.¹⁵⁵

As applied in the international context, principal-agent theory treats governments as principals who, in order to better manage policy externalities, facilitate law-making, and enhance policy credibility, delegate defined powers to international organizations (agents). Agents in turn enjoy varying

149. Jonathan Zittrain, *No, Barack Obama Isn’t Handing Control of the Internet over to China*, NEW REPUBLIC (March 24, 2014), <https://newrepublic.com/article/117093/us-withdraws-icann-why-its-no-big-deal> [<https://perma.cc/S34Q-R9M4>].

150. Cecilia Kang & Jennifer Steinhauer, *Ted Cruz Fights Internet Directory’s Transfer; Techies Say He Just Doesn’t Get It*, N.Y. TIMES (Sept. 15, 2016), <https://www.nytimes.com/2016/09/16/us/politics/ted-cruz-internet-domain-names-funding.html> [<https://perma.cc/MC9V-98JK>].

151. See DOTCOM Act of 2014, H.R. 4342, 113th Cong. (2014).

152. *Stewardship of IANA Functions Transitions to Global Internet Community as Contract with U.S. Government Ends*, ICANN (Oct. 1, 2016), <https://www.icann.org/en/announcements/details/stewardship-of-iana-functions-transitions-to-global-internet-community-as-contract-with-us-government-ends-1-10-2016-en> [<https://perma.cc/56SJ-42C2>].

153. See generally KIEWEIT & MCCUBBINS, *supra* note 11.

154. Hawkins et al., *supra* note 7; Alter, *supra* note 32; Johnson & Urpelainen, *supra* note 7.

155. See generally LAKE & MCCUBBINS, *supra* note 11.

degrees of autonomy and “slack.”¹⁵⁶ The degree to which agents exercise autonomy is a point of contestation in the scholarly literature. But all students of international organizations agree they enjoy *some* autonomy—indeed, the logic of creating them often rests on this fact, else they are simply (and sometimes costly and epiphenomenal) extensions of state power and their usefulness limited.

Many scholars have made the case that governments do not fully control the international organizations they create. Michael Barnett and Martha Finnemore, for example, claim that “the rational-legal authority that [international organizations] embody gives them power independent of the governments that created them and channels that power in particular directions.”¹⁵⁷ Moreover, they argue, international organizations “are constrained by governments, but the notion that they are passive mechanisms with no independent agendas of their own is not borne out by any detailed empirical study of an IO that we have found.”¹⁵⁸ Roland Vaubel, using a different nomenclature and approach, asserts a similar position: “the principal-agent problem is due to the fact that the IO has vested interests which differ from the preferences of the voters and that the voters cannot effectively control the IO because they are rationally ignorant of most of its activities and/or lack the power to impose their will.”¹⁵⁹

Principal-agent theory examines the structure and strategy inherent in the ways that governments and international organizations interact. The type of delegation, or the powers delegated, can include legislative, adjudicative, enforcement, and regulatory delegation. At the highest level of abstraction, the claim is that there are systematic ways that principals control agents; while autonomy exists, it is generally cabined even if the precise mechanisms by which the principal exercises control are obscured to the ordinary observer. As a leading work in this strand of research defines the relationship between principals and agents:

Delegation is a conditional grant of authority from a Principal to an Agent in which the latter is empowered to act on behalf of the former. This grant of authority is limited in time or scope and must be revocable by the Principal. Principals and agents are, in the language of constructivism, mutually-constitutive . . . the actors are defined by their relationship to each other.¹⁶⁰

The creation of ICANN in 1998 was clearly an act of delegation consistent with this theoretical approach. ICANN was directly delegated powers to regulate key aspects of the governance of the Internet. Whereas

156. See generally Mathew McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. LAW, ECON., & ORG. 243 (1987).

157. See generally Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT’L ORG. 699 (1999).

158. See *id.*

159. Vaubel, *supra* note 5, at 126.

160. Hawkins et al., *supra* note 7, at 7; see generally Liesbet Hooghe & Gary Marks, *Delegation and Pooling in International Organizations*, 10 REV. INT’L ORGS. 305 (2014).

many agents in international relations have only metaphoric contracts and amorphous principals, ICANN had a literal contract from a well-defined and powerful principal, the U.S. federal government. And while ICANN is technically not an international organization, it in many respects performs the functions of one. The contract with ICANN was renewable and revocable. And the U.S. did, over time, adjust the contract, through such measures as the 2009 “Affirmations of Commitments,”¹⁶¹ in ways that seemed aimed at minimizing or forestalling certain forms of autonomous behavior (such as moving out of American territory). The creation of ICANN in 1998 is, as a result, broadly consistent with principal-agent accounts of delegation.¹⁶² The U.S. sought to delegate a residual power it held, or plausibly held, over a central aspect of the regulation of the Internet to a third-party actor.¹⁶³ The Commerce Department elicited bids from putative agents who would carry out the desired work and subject its chosen agent to a contract that specified performance.¹⁶⁴

From the perspective of the U.S., this act of delegation had several benefits. It removed the federal government from the direct supervision of the Internet and allowed for an easier incorporation of private actors into the governance process. For example, had the U.S. sought to create an equivalent multistakeholder process via an existing federal agency, perhaps in the Commerce Department, many statutory and administrative rules and procedures governing lobbying, notice and comment, and the Administrative Procedures Act would have kicked in.¹⁶⁵ These procedures are important but time-consuming, cumbersome, and at times politically unpredictable. The creation of and delegation to ICANN streamlined that process, allowing a swift transfer by the Clinton Administration of a crucial regulatory function.

Moreover, transferring authority to ICANN was politically beneficial; it rewarded American technology and telecommunications firms, which were ascendant in the U.S. economy, and was consistent with President Clinton’s broad “third way” commitment to privatization more generally. Indeed, as early as 1994 the federal government’s commitment to privatizing the Internet was widely discussed. While ICANN was not yet in existence (or even contemplated) in 1994, contemporaneous press reports noted that, “[h]aving succeeded beyond its wildest dreams in nurturing the Internet computer web into a vital national communications system, the Federal Government has begun turning over to the private sector the job of operating and maintaining the network’s major arteries.”¹⁶⁶ By involving private firms in the day-to-day operation of the Internet, the federal government began creating the Internet

161. *Affirmation of Commitments*, *supra* note 116.

162. Hawkins et al., *supra* note 7, at 7; *see generally* Hooghe & Marks, *supra* note 160.

163. I say residual because, as discussed above, in practice Jon Postel and his team was carrying out the IANA function, but the U.S. government claimed—and plausibly held—the power to revoke that any time.

164. *See* preceding paragraph.

165. *See generally* Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, (2010).

166. Peter H. Lewis, *US Begins Privatizing Internet’s Operations*, N.Y. TIMES, Oct. 24, 1994, at D1.

as we know it today. The creation of ICANN was the next logical step in this evolution.

In sum, the initial creation of ICANN and the early dynamic between the U.S. and ICANN fit well within received ideas about principal-agent theory in the international domain. As with many administrative agencies, delegation was a rational choice that enhanced policymaking and maximized expertise. The Obama Administration's decision two decades later to fully hand over power to ICANN, however, is less easily reconciled with delegation theory.

While the original ICANN contract was revocable and adjustable over time, its termination is not. It is an elementary principle of contract theory that contracts are valid only when willingly entered into by the parties.¹⁶⁷ Once a contract ends, any future contract requires the consent of all parties. The termination of the contract with ICANN is, thus, a legally irrevocable act by the U.S., violating one of the core strands of a principal-agent relationship. Consequently, the federal government today has limited regulatory jurisdiction over ICANN, which remains a California-incorporated non-profit corporation subject to the full protections of California law.¹⁶⁸ This is perhaps one reason the U.S. insisted that ICANN remain sited within American territory—though ICANN, possibly with this eventuality in mind, has set up smaller satellite offices in Istanbul, Singapore, Montevideo, and Brussels.¹⁶⁹ Putting extreme and arguably fanciful scenarios to one side, the revocation of the prior Commerce Department contract means ICANN is effectively no longer an agent and the U.S. no longer its principal.

The U.S. decision to grant ICANN full autonomy is, thus, at best an uneasy fit for conventional models of principal-agent theory. Is ICANN instead more like a trustee? Karen Alter has argued that principal-agent theory can be fruitfully extended by understanding that some putative agents are in fact not best understood as agents, but rather as trustees.¹⁷⁰ Unlike agents, trustees are deliberately intended to be highly independent of the principal's specific wishes. In Alter's terms:

167. See e.g. E. ALLAN FARNSWORTH & ZACHARY WOLFE, FARNSWORTH ON CONTRACTS, § 3.01 (4th ed. 2019) (“What requirements must the bargaining process meet if it is to result in a contract? . . . The first requirement that of assent, follows from the premise that contractual liability is consensual.”).

168. I stress *limited* because, while extreme, the U.S. could conceivably reassert some limited forms of control over ICANN and its regulatory function through, say, a declaration of national emergency or invocation of the International Emergency Economic Powers Act. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977).

169. *ICANN's Global Expansion*, ICANN, <https://www.icann.org/en/history/global-expansion> [<https://perma.cc/4B8M-YT4H>], (last visited Nov. 13, 2022).

170. Alter, *supra* note 32, at 35.

Trustees are (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions according to their best judgment or professional criteria, and (3) empowered to act on behalf of a beneficiary.¹⁷¹

The purpose of delegation to a trustee, in this account, is to “harness the authority of the Trustee so as to enhance the legitimacy of political decision-making.”¹⁷² While a principal-trustee relationship shares similarities with a principal-agent relationship, the core distinction is that trustees are intended to have greater autonomy and, typically, have built-in protections against short-term control by principals.¹⁷³

Judicial institutions are the paradigmatic example of trustees. Most courts are intended—perhaps required—to have a meaningful degree of independence and autonomy. Courts, however, do face political control, even if that control is designed to be attenuated and to operate at a temporal distance. For example, the U.S. judicial system is widely seen as independent and legitimate. Independence largely flows from the fact that federal judges have life tenure; yet they are subject to both *ex ante* and *ex post* forms of political control. Presidential nomination and Senate confirmation serve as *ex ante* controls; impeachment as an *ex post* control.¹⁷⁴ Moreover, Congress possesses plenary power over the federal courts’ jurisdiction, a rarely-exercised power that allows Congress both to create (or terminate) all courts inferior to the Supreme Court and to curtail jurisdiction subject to the Exceptions Clause.¹⁷⁵ In practice, however, these controls have limited impact. This gives federal judges substantial, almost untrammelled, autonomy on individuals decisions, even if, ultimately, they remain subject to *ex ante* approval and *ex post* recall by their political masters. In all these ways, political procedures over the judiciary allow the political branches some measure of control, but that control is so limited and distinctive as to merit a different nomenclature: trustee rather than agent.

Likewise, international courts can be understood as trustees subject to a host of political controls; in many respects these controls are more powerful than those domestic courts face. Governments create international courts via treaty-making. Judges are chosen for specific periods (not for life, as in the federal courts) and international courts’ jurisdiction is subject to state consent, which can be revoked *ex post*.¹⁷⁶ Governments can also withdraw altogether from the underlying treaty, as the U.S. recently did, in the wake of an adverse International Court of Justice (ICJ) ruling, with regard to the 1955 Treaty of

171. *Id.*

172. *Id.*

173. *Id.*

174. U.S. CONST. art. III.

175. See generally Christopher Jon Sprigman, *Congress’s Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020).

176. As the U.S. did for the International Court of Justice. See generally Keith Highet, Note, *Litigation Implications of the US Withdrawal from the Nicaragua Case*, 79 AM. J. INT’L L. 992 (1985).

Amity with Iran.¹⁷⁷ International judges are meant to be independent of their national governments but often are not. On the ICJ, the judges are colloquially referred to by their national origin (e.g., “the British judge”), and empirical studies of ICJ voting records show they act accordingly. In short, even for the paradigmatic example of a trustee, there is substantial—though deliberately limited—*ex post* levers political actors possess.

None of this is true for ICANN. ICANN’s CEO and board members were and are not subject to *ex ante* approval by the U.S. or other governments either, nor can they be removed or their decisions reversed *ex post*.¹⁷⁸ In these respects, ICANN is more independent than most courts, the core of the concept of trusteeship.

As a result, ceding authority to ICANN for Internet governance is more akin to a trustee relationship than a delegation. ICANN, which has long comprised many technical expert groups, has authority rooted in highly specialized knowledge—a characteristic emphasized by both principal-agent theory and trusteeship theory.¹⁷⁹ The multistakeholder model also has procedural legitimacy rooted in its encompassing governance process and inclusive approach. NGOs, firms, and other non-state actors are today a central feature in global governance not because they have risen in power vis-à-vis governments, but for the advantages they bring to governments in the act of governing.¹⁸⁰ These include legitimation (albeit contested) but also the very concrete informational and political resources they possess.

Seen in this light, ICANN shares some important features with conventional trustees. In short, the core question animating this Article—why a dominant state like the U.S. would cede governance authority permanently to an organization such as ICANN—requires attention not only to the logic of delegation, but also to the distinctive nature of the politics of multilateralism in the digital domain. Faced with extensive and rising international demands for multilateral control over a critically-important global resource, the U.S. faced two choices. It could continue to retain residual control over its agent, or it could cede full authority in key governance areas to that agent. The first strategy preserved national control but was brittle. Greater control by the ITU or some third actor or agent was not impossible—indeed it had already been attempted by the ITU—and the preservation of a global Internet required that there be only one source of naming and numbering. Because that threat was credible, the status quo—standard delegation—was, over the long term, unattractive to American decisionmakers.

The second option of ceding the IANA function irrevocably would not in fact block the multilateralization of Internet governance, but it would blunt much of the force of calls for multilateralization because the U.S. would no longer hold residual control over a key feature of Internet governance.

177. *US to End Treaty of Amity with Iran After ICJ Ruling*, BBC NEWS (Oct. 4, 2018), <https://www.bbc.com/news/world-middle-east-45741270> [<https://perma.cc/W42Y-JHQF>].

178. *ICANN Bylaws*, *supra* note 21, at Art. 4.

179. See generally Hawkins et al., *supra* note 7; Alter, *supra* note 32, at 39.

180. See generally *States, NGOs, and International Environmental Institutions*, *supra* note 85; see generally *The Role of NGOs in Treaty-Making*, *supra* note 85.

ICANN's multistakeholder model entailed a major role for a wide array of governments as well as non-state actors, and while many were U.S. based, they were not under the direct control of the U.S. The rising normative appeal of multistakeholderism, moreover, made political attacks on ICANN's governance model less palatable to many governments. For the U.S., the fact that American firms and actors remained so critical to the operation of the Internet, and generally shared so many core values and preferences over Internet governance, meant that granting ICANN greater power did not necessarily diminish the realization of American preferences; indeed, it generally supported them. The basic preference structure remained intact even as the key actors shifted. This is the paradox at the heart of the ICANN case. Much as in Giuseppe Tomasi di Lampedusa's classic novel of 19th century Italian political change, *The Leopard*, "for things to remain as they are, things [had] to change."¹⁸¹

In sum, while theories of delegation in international relations provide plausible accounts of some aspects of the global governance of the Internet, none adequately explains American behavior in relinquishing control to ICANN. Ceding its residual power in an irrevocable way to an international organization is distinctive and perhaps even novel. The approach taken by the U.S. was one of preferences realized through the relinquishment of power to an entity designed to be relatively insulated from political pressure. The Obama Administration chose and supported not an obedient agent, but a more legitimate and independent trustee.

That the U.S. could do this at all reflected its dominance in the arena of Internet governance. In this regard, multistakeholder governance over the Internet has triumphed in large part because it reflects American power, not in spite of it.

B. Multistakeholderism and International Law: Implications from the ICANN Experience

Does the story of ICANN have broader significance for theories of international law and organization? Multistakeholder governance in international law remains rare, but it appears to be on the rise.¹⁸² While the particularities of the ICANN case are unusual and perhaps unique, the general pattern of increasing use of multistakeholder models may not be. Is there a logic to the "choice for multistakeholderism?"¹⁸³ Consider, for instance, the creation of the Global Fund to Fight AIDS, Tuberculosis, and Malaria. The World Health Organization (WHO) has been the dominant actor in global health governance for decades.¹⁸⁴ But in the 1990s, there was concern, particularly among Western powers, that the WHO was becoming unduly

181. GIUSEPPE TOMASI DI LAMPEDUSA, *THE LEOPARD* 28 (Pantheon Books 2007) (1958).

182. Raymond & DeNardis, *supra* note 76.

183. See, e.g., Helen V. Milner & Dustin Tingley, *The Choice for Multilateralism: Foreign Aid and American Foreign Policy*, 8 REV. INT'L ORGS. 313 (2013).

184. *About WHO*, WHO, <https://www.who.int/about> [<https://perma.cc/K2G8-8SUL>] (last visited Dec. 21, 2022).

politicized, state-centric, and bureaucratic.¹⁸⁵ The Global Fund was created after a G8 announcement in 2001 to provide an alternative for critical infectious diseases.¹⁸⁶

From its inception, the Global Fund has had a multistakeholder structure, reflecting both the powerful role played by various NGOs but also the outsized influence of a then-new actor on the global health scene: the Bill and Melinda Gates Foundation.¹⁸⁷ But it also was emblematic of a new politics that not all were keen on. As Suerie Moon writes:

For some, the rise of “multistakeholderism” was seen as a Trojan horse for industries and foundations not only to exert more control over global health initiatives, but also to counteract the numerical advantage that developing countries had in the WHO and other UN forums. From this perspective, the shift away from WHO at the turn of the millennium could be seen, not as a rejection of bureaucratic inefficiency, but as a shift to create new organizations where Northern governments and donors would have more sway.¹⁸⁸

Multistakeholderism has normative appeal for many actors in international law precisely because it allows a wide range of actors into the circle of influence and decision making. But as with ICANN, the creation of the Global Fund underscored a growing concern on the part of some governments with traditional multilateral approaches to international law. One can plausibly explain the creation of these two governance bodies as arising from a belief that the policy preferences of powerful governments—in particular, the advanced industrial democracies that are also the home of many well-resourced firms and NGOs—might be best realized indirectly through greater incorporation of a wide variety of private sector actors, rather than directly through traditional state-centric international law models.

And as political power increasingly disperses in the world, the appeal of traditional multilateralism is likely to diminish for the U.S. In some settings, such as the United Nations Security Council, entrenched rules continue to favor traditional great powers.¹⁸⁹ But many international legal bodies operate on a one nation-one vote system and are subject to increasing demands for inclusive leadership.¹⁹⁰ As noted above, the greater inclusion of NGOs in international organizations is less a sign of governments ceding power than a sign that NGOs bring valuable resources to the table. But in the

185. Suerie Moon, *Global Health: A Centralized Network Searching (in Vain) for Hierarchy*, in *GLOBAL GOVERNANCE IN A WORLD OF CHANGE* 234, 238 (Michael N. Barnett et al. eds., 2021).

186. *History of the Global Fund*, GLOB. FUND, <https://www.theglobalfund.org/en/about-the-global-fund/history-of-the-global-fund/> [<https://perma.cc/TA8J-PX7L>] (last visited Nov. 13, 2022).

187. See generally Moon, *supra* note 185.

188. *Id.* at 253.

189. Compare U.N. Charter arts. 39-51 (Chapter VII), with U.N. Charter arts. 9-22 (Chapter IV).

190. See generally Moon, *supra* 185.

vast majority of settings, NGO participation is limited to voice but not decisions. What distinguishes multistakeholderism, and perhaps makes it increasingly appealing to powerful Western governments who foresee greater power dispersion, is precisely that it goes much further.

In this sense we can trace a broad arc from the great power-centric approach of the 19th and early 20th centuries to the liberal multilateral order of the postwar era that was far more inclusive of weak governments, to a 21st century embrace of state as well as nonstate actors in international law. Some have interpreted this as a radical diminishment of state authority. As Miles Kahler and David Lake describe this view:

The state's monopoly of familiar governance functions is ending as governance migrates down to newly empowered regions, provinces, and municipalities; up to supranational organizations; and laterally to such private actors as multinational firms and transnational [NGOs] that acquire previously "public" responsibilities.¹⁹¹

This view identifies some important developments but partly misstates (or may be misinterpreted with regard to) their significance and cause. It is not the weakness of governments, nor the power of nonstate actors, that solely explains these trends. It is more likely a combination of greater specialization in international cooperation combined with a political logic that recognizes—often—the utility of ceding greater power to others who share preferences over outcomes and procedures. This more indirect mode of governance is by no means new, but its significance for international law has not fully been appreciated.

V. CONCLUSION

The United States created the Internet. From its early Defense Department origins, through its National Science Foundation support, university framework, and technology firm dominance, the Internet and its key applications have been America's gift to the world. And by creating ICANN in 1998, the U.S. gave the rapidly-growing Internet both a formal structure for key elements of governance and more autonomy for regulatory processes. In the two decades that followed, the Internet became the most significant mode of communications in human history and the backbone of political, economic, and social activity for billions around the globe.

Why did the U.S. ultimately choose to relinquish an important aspect of authority and control over this unwieldy, but enormously valuable, global resource? The initial choice to delegate important regulatory functions to ICANN was a paradigmatic example of the gains from delegation in international law and organization. Less readily explained, however, was the decision to cede power permanently in 2016. Yet, diminishing its most visible

191. Miles Kahler & David Lake, *Globalization and Governance*, in GOVERNANCE IN A GLOBAL ECONOMY 1, 1 (Miles Kahler & David Lake eds., 2003).

role in the regulation of the Internet even further by ceding power to a trustee was, perhaps paradoxically, a rational strategy for the federal government. By the late 2000s, the threat of greater multilateral regulation of the Internet was clear and growing. By freeing ICANN and entrusting it with (limited) power, the U.S. blunted a more overt multilateral challenge to the basic model of an open Internet. Control over resources does not equal control over outcomes. Indeed, as the case of global governance of the Internet suggests, sometimes the opposite is true.

