10-1-2008

States, Markets, and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization

Christopher M. Bruner

University of Georgia School of Law, christopher.bruner@uga.edu

Repository Citation
Christopher M. Bruner, States, Markets, and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization, 30 MICH. J. INT'L L. 125 (2008), Available at: https://digitalcommons.law.uga.edu/fac_artchop/1139
This Article illuminates the spectrum of international economic regimes through discussion of an under-theorized regulatory structure in which traditional distinctions between State and market, public and private power, hard and soft law, and international and domestic policy realms, essentially collapse—the "public-private gatekeeper."

Specifically, I examine striking similarities between global bond markets and e-commerce markets through comparison of entities regulating admission to them—the dominant credit rating agencies (Standard & Poor's and Moody's), and the Internet Corporation for Assigned Names and Numbers (ICANN). Following an examination of the
development of these markets and the global regulatory power exercised by these private-sector entities as a result of their unusual positions under U.S. law, the Article considers the challenge that they pose to prevailing theoretical perspectives on the regulation of the global economy.

I argue that these public-private gatekeepers reflect two forms of theoretical tension. The first is that between state-based and market-based forms of authority—the former built on a foundation of political legitimacy and the latter built on reputational legitimacy. The second form of tension, which I argue gives rise to the first, is the United States' simultaneous pursuit of two very different conceptions of sovereignty—Westphalian sovereignty emphasizing the centrality and autonomy of the State, and an increasingly prevalent competing conception of sovereignty emphasizing cooperation and compromise in the face of economic globalization.

Through these entities, the U.S. government has sought to preserve centralized power while cultivating the perception of market-based private ordering. This, I argue, represents an unstable conflation of divergent views on how the global economy ought to be managed.

I. THE SPECTRUM OF INTERNATIONAL ECONOMIC REGIMES: STATES, MARKETS, AND THE RISE OF PUBLIC-PRIVATE GATEKEEPERS

As those new to international law and relations quickly learn, the defining characteristic of the international legal system—that is, what most distinguishes it from domestic law—is the absence of any centralized government possessing top-down enforcement capabilities. The international legal sphere, as traditionally conceived, represents a "horizontal" system populated by nominally equal sovereign States. The decentralized nature of this domain renders the line between international law, on the one hand, and international relations, on the other, relatively blurry, as they both, in effect, represent forms of coordination among sovereign entities enjoying equivalent status as international actors—an ontological reality reflected in the word "inter-national" itself, which encodes a preoccupation with relationships among territorially and legally discrete nation-states.


Following the Peace of Westphalia, the monopoly on international legal personality enjoyed by States remained relatively secure for at least three centuries. This is reflected in the fundamental sources of international law, including customary law derived principally from practices of States accepted as binding, and treaties, which can be crudely characterized as contractual relationships among States (if often tackling subject matter addressed through statutes at the domestic level). More tangibly, however, it is reflected in the fact that “the principle of the sovereign equality of [States]” is explicitly incorporated as the bedrock norm of the United Nations. At the international level, we find “not world government” but rather—as Robert Keohane and Joseph Nye aptly phrase it—discrete “islands of governance,” wherever States can reach agreement, amidst a larger sea of cross-border activity.

What is true of international law generally is true of international economic regulation specifically; we have historically conceptualized the global economy in terms of “national market[s] defined, as is the sovereign [S]tate, in terms of mutually exclusive geographic jurisdiction.” Even today, at the heart of international economic regulation stand treaty-based organizations consisting of States—notably, the World Trade Organization (WTO); the International Monetary Fund (IMF), which facilitates trade by stabilizing the international monetary system and helping to resolve balance of payments problems; the Organization for Economic Co-operation and Development (OECD), which likewise promotes trade and investment liberalization through a wide range of initiatives; and the European Union, which—although a regional organization—has been at the forefront of the effort to codify liberal trade and investment regimes globally.

3. See MALANCZUK, supra note 1, at 1; Rodney Bruce Hall & Thomas J. Biersteker, The Emergence of Private Authority in the International System, in The Emergence of Private Authority in Global Governance, supra note 2, at 3, 3.
5. U.N. Charter art. 2, para. 1.
7. Kobrin, supra note 2, at 43.
The rise of multilateral treaty-based organizations since the mid-twentieth century has been accompanied, however, by the rise of a wide range of non-state actors, as international law has expanded in subject matter and sub-state actors have found new incentives and new ways to coordinate their actions across borders.\(^9\) That the proliferation of state-based international organizations has been paralleled by the rise of non-state international actors reflects the growing challenge that States face in controlling international activity—particularly in the economic realm. Arguably, Westphalian sovereignty is simply "becoming more and more antiquated in view of the globalization of the economy and increasing interdependence of [S]tates."\(^10\) Westphalian sovereignty flounders in the face of what Anne-Marie Slaughter has called the "ineffectiveness challenge"; control over a discrete territory no longer permits effective economic governance once the domestic economy is substantially linked to foreign markets.\(^11\) As Stephen Kobrin has observed, the "emerging global economy" exceeds the grasp of any single State because technological developments have pushed "minimum effective market size" beyond what any single national market can accommodate—a development exacerbated by the Internet, which tends to dis-embed transactions from territorial space.\(^12\)

That expansion of economic activity beyond the purview of any single State tends to place raw power in the hands of private actors has not been lost on scholars of international law and relations. Over the last two decades, in fact, a growing body of literature has sought to describe the theoretical consequences of this shift.\(^13\) The challenge presented is very real, notably because the core theoretical concept of "authority" has been so heavily associated with the public realm of the State. Indeed, historically we have "tend[ed] to define the concept in ways that automatically imply the instrumentality of a [S]tate or government,"\(^14\) suggesting that the rise of private actors in the global economy requires a careful re-

---

9. MALANCZUK, supra note 1, at 1.
13. See generally THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE, supra note 2; PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler et al. eds., 1999).
conceptualization of core concepts of law and politics. Put differently, we must develop a means of “theorizing about international governance in the absence of government.”

Articulating a more embracing conception of “authority” in international economic governance has required broadening underlying concepts of order and legitimacy. As Hall and Biersteker observe, recent scholarship reflects “a growing recognition of degrees of order and institutionalized, patterned interaction within the international system”—a development reflecting the proliferation of non-state actors that “appear to have taken on authoritative roles and functions,” including private standard-setting institutions, non-governmental organizations (NGOs), and, more abstractly, “global market forces” themselves. The “authority” that such actors wield, like that of any State, is built on the legitimacy of their claims to power, understood broadly to require “some form of normative, uncoerced consent or recognition of authority on the part of the regulated or governed.”

Grappling with private authority is a relatively simpler matter where the scope of regulation is narrow. For example, Wal-Mart’s sourcing practices in developing countries have been described as reflecting a closed, voluntary, private regulatory system in which permissible practices are regulated through patterned interactions of a corporate entity, NGOs, the media, consumers, and investors. Considerably greater theoretical difficulty arises, however, when private-sector entities are found to be more broadly “functioning like governments.” To the degree that public legitimacy rests on political accountability, the mechanism for private legitimacy remains less than clear. One promising approach has been the extension of “regime” theory—historically applied to States—to encompass non-state actors as well. Starting with the broad concept of “implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of

15. A. Claire Cutler et al., The Contours and Significance of Private Authority in International Affairs, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS, supra note 13, at 333, 365.
18. A. Claire Cutler, Private International Regimes and Interfirm Cooperation, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE, supra note 2, at 23, 32.
19. Id.; see also Cutler et al., supra note 15, at 357.
international relations,"\(^2\) and recognizing that the concept of "authority" possesses "both analytical and normative dimensions," it becomes a less daunting leap to envision legitimate private authority.\(^2\) To the extent that "the respect accorded 'an authority,'" for example, can be construed as a source of reputational legitimacy, one can readily imagine various types of experts possessing forms of influence and power that we can be reasonably comfortable calling "authority." This form of authority "derives from specialized knowledge and practices that render such knowledge acceptable, and appropriate"\(^3\)—essentially what has been called "epistemic" authority in the context of policy development.\(^4\) This form of authority has particular salience in a globalizing world ever more heavily invested in discerning valuable information, yet increasingly awash in valueless information.\(^5\)

Even if one accepts extension of the concept of authority to embrace private expressions of power, however, thorny questions regarding the residual role and motivations of the State remain. Hall and Biersteker, for example, ask whether the private discharge of functions previously held by the State suggests that the State is itself somehow "complicit in the devolution of its authority to private actors," and, if yes, why a State might do this.\(^6\) As an initial matter, it should be borne in mind that "[S]tates have had to become deeply involved in the implementation of the global economic system," at least to the degree necessary to facilitate the emergence of high-level service centers providing "the top-level financial, legal, accounting, managerial, executive, and planning functions" required by global businesses.\(^7\) However, as John Ruggie has observed, the "rubric of privatization" is too often invoked in a knee-jerk manner to explain the emergence of private power.\(^8\) In fact, in numerous

\(^21\) Cutler, *supra* note 18, at 27 (quoting Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variable, in International Regimes 1, 2* (Stephen D. Krasner ed., 1983)).

\(^22\) Id.; see also Keohane & Nye, *supra* note 6, at 12 (articulating a similarly broad conception of "governance" to embrace "law, norms, markets, and architecture," following Lawrence Lessig).

\(^23\) Cutler, *supra* note 18, at 28.


\(^25\) See, e.g., Robert O. Keohane & Joseph S. Nye, Jr., *Power and Interdependence in the Information Age, 77 Foreign Aff.* 81, 84–89 (1998) (arguing that as the Internet grows, the need to discern the "quality of information" will enhance the power of "[e]ditors, filters, interpreters, and cue-givers," among whom "credibility is the crucial resource").

\(^26\) Hall & Biersteker, *supra* note 3, at 8.

\(^27\) Saskia Sassen, *The State and Globalization, in The Emergence of Private Authority in Global Governance, supra* note 2, at 91, 100–03.

instances, "firms have created a new transnational world of transaction flows that did not exist previously, and they have developed and instituted novel management systems for themselves." 29 In other words, the causal arrow is often reversed; in such instances, private authority results not from public action, but from private action—to which States must react.

One might imagine States facing new forms of private transactions thinking in binary terms—"to regulate or not to regulate." In reality, however, the choice is considerably more complex, not simply because a given activity may or may not be amenable to regulation, but because "to regulate" could mean any of a number of things in a given circumstance. Indeed, the State's choice may be driven by motivations extrinsic to traditional policy concerns. For example, States might instrumentalize private actors to obscure the government's own responsibility for adverse outcomes, shifting blame onto the private sector. As Louis Pauly observes, "that actual governments routinely obfuscate their final authority in financial markets is no accident." 30

The U.S. government, as I will argue below, has become quite adept at this—as evidenced by its strategic use of private-sector entities to regulate indirectly both the bond markets and the Internet. By incorporating private-sector rating agencies into its regulation of credit risk, and by incorporating a non-profit corporation into its regulation of the Internet's naming and addressing system—in each case preserving substantial centralized power by retaining the ability to remove them—the U.S. government has created a unique, and theoretically problematic, form of authority. Although private-sector entities, they nevertheless enjoy the imprimatur of the State, although arising out of de-centralized and informal modes of decision-making in the marketplace, they nevertheless have come to represent a form of centralized power over their respective domains; although claiming reputational legitimacy rooted in expert knowledge, their power today ultimately derives more substantially from state endorsement of their decisions; and although their authority is rooted in U.S. laws and regulations, their power is projected abroad, and felt acutely by other sovereigns.

29. Id. at 503; see also ABDELAL, supra note 8, at 174; Thomas J. Biersteker & Rodney Bruce Hall, Private Authority as Global Governance, in The Emergence of Private Authority in Global Governance, supra note 2, at 203, 209.

30. See Louis W. Pauly, Global Finance, Political Authority, and the Problem of Legitimacy, in The Emergence of Private Authority in Global Governance, supra note 2, at 76, 77; see also Hall & Biersteker, supra note 3, at 10-11. Pauly and many others have argued that the demise of the State has been greatly exaggerated. See, e.g., Bederman, supra note 10, at 171-74, 184-85; Biersteker & Hall, supra note 29, at 215; Keohane & Nye, supra note 25, at 82-85; Pauly, supra, at 82-86.
Recent theoretical work broadening the scope of core concepts like "authority" and "governance" has advanced the ball substantially in comprehending the exercise of power by private-sector actors, but even these expanded concepts cannot compellingly describe "hybrid" forms of authority defying categorization by strict state or market paradigms. While the fact that private entities often exercise something akin to public regulatory power is increasingly widely recognized, the practical and theoretical consequences of conflating public and private paradigms within a single entity—and the nature and consequences of the relationships between such entities and States—have been less thoroughly explored.

In this Article, I will argue that the public and private forms of authority and sources of legitimacy associated with what I term "public-private gatekeepers"—of which the rating agencies and ICANN are exemplars—not only fail to reinforce one another, but, in fact, are mutually negating. Put differently, the sources of legitimacy underwriting the "public" and "private" forms of power exercised by these entities cannot sustainably co-exist within the same entity because each undercut the other. To the extent that their legitimacy derives from disciplinary effects of the market, it is undercut by the imprimatur of the State, which tends to insulate them from reputational effects in the relevant marketplace. To the extent that their legitimacy derives from disciplinary effects of democratic politics, it is undercut by their private legal status, which tends to dissociate them from any particular polity.

Ultimately, I argue that this uneasy conflation of public and private characteristics in each case reflects an attempt by the U.S. government to maintain centralized power over a core regulatory function of the given marketplace—an active posture rooted in the Westphalian conception of sovereignty—while cultivating the perception of market-based private ordering—a more hands-off posture reflecting the shift away from autonomous action by States in the face of economic globalization. This, I contend, reflects an unstable and unsustainable conflation of divergent

31. As discussed below, the relationship between such private entities and the State is often described in rather vague terms. See, e.g., Cutler et al., supra note 14, at 18 (characterizing such authority as "merg[ing] into" public authority); Cutler et al., supra note 15, at 368 (referring to "a hybrid of both public and private authority relations"); Keohane & Nye, supra note 6, at 24 (characterizing ICANN as a government-related entity that "supplements" the market).

32. As discussed below, while the term "gatekeeper" has been more broadly employed to describe a wide variety of "reputational intermediaries" (particularly in securities markets), I argue that the rating agencies and ICANN are gatekeepers in a more specific and more literal sense, in that they literally regulate admission to their respective domains, and possess power to articulate the terms of public policy associated with those domains. See infra notes 243–251 and accompanying text.
conceptions of the role of the State in the governance of the global economy.

II. Bond Markets and the Standards of Credit Risk

A credit rating represents a rating agency's opinion regarding the creditworthiness of a borrower, either with respect to a particular debt obligation (an issue rating) or in general (an issuer rating). Ratings products further distinguish between local currency and foreign currency debts, as well as between long-term and short-term obligations. The ratings—which take the form of letter grades, not unlike a student's school marks—are intended to convey the relative likelihood that borrowers will perform on their promises to make principal and interest payments as they come due. Thus a long-term issuer rating of "AAA" from Standard & Poor's (S&P), for example, reflects "extremely strong" capacity to repay. S&P's long-term issuer ratings range from "AAA" down to "D" for default, with ratings of "BBB-" and above referred to generally as "investment grade," and ratings of "BB" and below referred to generally as "speculative grade" or "junk." Other agencies' ratings scales are broadly similar.33

Although there are well over 100 credit rating agencies around the world, the industry is in fact dominated by the "Big Two," S&P and Moody's.34 Based in New York, with global branch offices, each rates trillions of dollars worth of securities, including debt obligations of corporations, municipalities, and sovereign governments. As of the late 1990s, these two agencies were thought to account for ninety percent of sovereign ratings, which, for reasons explored below, impact all other


35. Standard & Poor's Ratings Services is a division of Standard & Poor's, the "brand" for the Financial Services division of McGraw-Hill Companies, Inc. See STANDARD & POOR'S RATINGS SERV., Exhibit 4, in APPLICATION FOR REGISTRATION AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION (NRSRO), supra note 33, at 6. Moody's Investors Service is a part of Moody's Corporation. See MOODY'S INVESTORS SERV., Exhibit 4, in APPLICATION FOR REGISTRATION AS A NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION (NRSRO) 6 (2007).
forms of ratings. In this Part, I explore the origin and nature of the rating agencies’ power—focusing on sovereign ratings, which raise particularly illuminating practical and theoretical challenges—and discuss the agencies’ relationship to public regulators of credit risk.

A. Intermediaries and Information: A Brief History of Bond Markets

Although built on nineteenth-century journalistic foundations, actual credit ratings arose in the early twentieth century in response to the enormous and capital-intensive enterprises of America’s industrial age. Specifically, the railroads catalyzed the development of America’s bond market, and the predecessors of today’s Moody’s and S&P both made their start rating the bonds of railroad companies (in 1909 and 1916, respectively). Over the last century, the rating agencies’ fortunes have generally tracked those of capital markets; the agencies grew dramatically in the early decades of the twentieth century, as the U.S. market expanded to include a broad range of debt issuers, and then again starting in the 1970s, with the global expansion of bond markets. The rise of rating agencies has also been associated with financial “disintermediation”—that is, the removal of banks from the equation as investors increasingly lend directly to borrowers—and the resulting need for an informational intermediary to play the credit assessment role that banks historically played.

During their early period, the agencies’ business model reflected their roots in financial journalism. The agencies sold their ratings to subscribers and enjoyed prosperity proportionate to the reputations they earned for quality work-product. Today, however, agency revenues come in the form of fees paid by the very issuers that they rate—creating an obvious conflict of interest and raising questions about what the agencies in fact sell. The agencies claim that issuer fees—which issuers generally agree to pay in order to have some input—are a necessary re-

36. Abdelal & Bruner, supra note 33, at 8.
38. Id. at 33–35; see also JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 292–95 (2006).
sponse to the fact that ratings are a form of economic "public good"; anyone can use a rating once it is made public, yet cannot be forced to help pay the costs of producing it.41 Issuer fees, on the other hand, can be passed along from the issuer to a broad investor base.42 Critics, however, have observed that the switch to this new model corresponds closely with the rise of ratings-dependent regulation in the 1970s, suggesting that issuer fees may in fact represent payment for what Frank Partnoy has called "regulatory licenses,"43 as discussed below.

Although sovereign ratings date back to the 1920s, as recently as the 1970s the sovereign ratings market was essentially non-existent. S&P, for example, all but suspended sovereign ratings in the late 1960s following the imposition of the Interest Equalization Tax in the United States—a tax on foreign investment—and, as of 1974 (following repeal of the tax), rated only the United States and Canada.44 Since then, however, the sovereign rating business has exploded. S&P rated thirty-one sovereigns by 1990—almost all investment grade—and as of February 2007, it rated 113 sovereigns across the ratings spectrum, a development reflecting the growing preference among emerging market sovereigns for alternatives to bank debt.45 The experience has been broadly similar for Moody's, which reached its hundredth sovereign in 2002.46 As S&P analysts David Beers and Marie Cavanaugh put it, before the 1990s, sovereigns with ratings "formed an exclusive club of the world's most creditworthy governments," but now "the sovereign sector is far more heterogeneous."47

A sovereign's local currency ratings will often be higher than its foreign currency ratings. The reason is that a sovereign's capacity to repay local currency denominated debt is "supported by its taxation powers and its ability to control the domestic monetary and financial systems"—providing flexibility not present in the case of foreign currency debts, for which a government must acquire the relevant currency in the marketplace.48 The primacy of a sovereign's claim on available foreign currency

41. Sylla, supra note 37, at 38.
42. See Abdelal & Bruner, supra note 33, at 2–3.
43. See generally Partnoy, supra note 40; see also Sylla, supra note 37, at 36.
45. Id. at 1–2.
47. David T. Beers & Marie Cavanaugh, Sovereign Credit Ratings: A Primer 17 (Standard & Poor's 2006).
48. Id. at 6, 16; see also Pierre Cailleteau, A Guide to Moody's Sovereign Ratings 5 (Moody's Investors Serv. 2006).
results in the so-called "sovereign ceiling," or "country ceiling," effect—the general trend (though not universal rule) that sub-sovereign entities within a given country will have lower foreign currency ratings than the sovereign. As a consequence, "sovereign ratings indirectly affect every other bond rating in the world." Accordingly, even in the absence of sovereign debt issuances, sovereigns have sought foreign currency ratings to "facilitate access for major corporations, banks, public utilities or sub-sovereign governments domiciled in these countries," and "as a means to attract foreign direct investment."

B. Sovereign Ratings: Process and Product

From a procedural perspective, sovereign rating is unremarkable. Essentially, a team of analysts visits the country in question—meeting with various governmental and non-governmental parties—and then produces a report, including a suggested rating and rationale. A committee meets to consider the report and votes on the rating. The sovereign is notified of the rating, and then the rating is made public (with some limited capacity for sovereigns to "appeal" in light of new information).

Considerably more interesting—and controversial—are the substantive dimensions of sovereign rating. S&P explains that sovereign rating involves "both quantitative and qualitative" factors—the latter "due to the importance of political and policy developments." More specifically, S&P ranks the sovereign according to a number of factors representative of "economic risk," meaning the sovereign's "ability to repay," and "political risk," meaning the sovereign's "willingness to re-

51. Levey & Kolmanovskaya, supra note 46, at 125.
52. Standard & Poor's, Ratings: Sovereigns, http://www2.standardandpoors.com/portal/site/sp/en/us/page-topic/ratings Sov/2,1,8,0,0,0,0,0,0,0,0,0,0,0,0,0,0.html (last visited Sept. 28, 2008).
54. BEERS & CAVANAUGH, supra note 47, at 3.
In terms of overarching analysis, however, the process is literally a black box; S&P emphasizes that there is "no exact formula" and that "weights are not fixed" in synthesizing the analytical factors, and Moody's declares that it "will not disclose to third parties (including issuers) information regarding the [rating committee's] process." As one scholar has put it, "the analytical process that bond rating firms conduct to arrive at their judgments" is "the most secretive aspect of the bond rating business."

The indeterminacy of this process—given the apparent lack of objective metrics of creditworthiness—inevitably results in ideologically driven ratings decisions. While the agencies "disavow any ideological content" in their ratings, this is implausible—particularly in light of the evaluation of economic policy that lies at the heart of sovereign rating. Indeed, adherence to the agencies' conception of "orthodox" economic policy—and the avoidance of "policy errors" associated with deviating from it—appears to be central to the agencies' rating actions. S&P's methodological statements, for example, are replete with references to the effect of a sovereign's policy errors upon its ratings. In general, "policy mistakes made in a difficult external environment can lead to a sharp deterioration in a sovereign's capacity to pay its debt." Defaults, S&P further explains, reflect various factors including "lax fiscal and monetary policies." Likewise, a government refusing to repay "is usually pursuing economic policies that weaken its ability to do so." Accordingly, when problems arise, "a robust policy response is crucial for strengthening both the economic environment and sovereign creditworthiness." And so on.

S&P's vision of good policy clearly reflects the Western liberalist orientation that one might expect, given its roots in New York's financial community. In its sovereign ratings "primer," for example, S&P

55. Id. at 3–4; see also CAILLETEAU, supra note 48, at 4; STANDARD & POOR'S, Exhibit 2, supra note 53.
56. BEERS & CAVANAUGH, supra note 47, at 3.
57. ZARIN, supra note 53, at 2.
60. See Bruner & Abdelal, supra note 50, at 198–200; see also Abdelal, supra note 8, at 177–81.
61. CHAMBERS ET AL., supra note 44, at 7.
62. BEERS & CAVANAUGH, supra note 47, at 3.
63. Id. at 4.
64. Id. at 17.
65. Cf. Timothy J. Sinclair, Bond-Rating Agencies and Coordination in the Global Political Economy, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS, supra note 13, at
explains that given “its decentralized decisionmaking processes, a market economy with legally enforceable property rights tends to be less prone to policy error.” As Marie Cavanaugh, an S&P analyst, explains, S&P’s sovereign analysts subscribe to “basic economic orthodoxy,” the content of which takes somewhat clearer form in S&P’s description of “characteristics” of sovereigns at various rating levels (penned by Cavanaugh). Sovereigns in the higher ratings categories demonstrate “[o]penness to trade and integration into the global financial system.” Indeed, the implicit test for ability and willingness to repay debts sufficient to warrant investment-grade status appears to be that “orthodox market-oriented economic programs are generally well established.” At lower rating levels, on the other hand, “[o]rthodox economic policies are usually not well established,” and trade and investment policy may reflect “more restrictions than at higher rating levels.”

While these general principles may enjoy wide adherence around the world, the “implied litmus test” remains troubling. Operationalizing this method of evaluating creditworthiness naturally requires more than accepting basic tenets of liberalism—it requires knowing “policy errors” when one sees them. And, on this point, the agencies have endured substantial criticism over the last two decades. The empirical literature, for example, tends to suggest that sovereign ratings may simply lag the market, reinforcing “boom-bust” cycles both on the way up and on the way down—thus amplifying crises like the one that hit East Asia in the late 1990s. And, where the agencies do react to a government’s policy action—for example, downgrading Malaysia following its imposition of capital controls in the midst of the East Asian financial crisis—the effects of that action on the sovereign’s cost of borrowing will follow, regardless of the validity of the agencies’ policy judgments.

153, 155 [hereinafter Sinclair, Bond-Rating Agencies and Coordination] (observing that “New York remains the analytical core, where rating expertise is defined and reinforced”).

67. Abdelal & Bruner, supra note 33, at 7 (quoting Marie Cavanaugh, Managing Dir. of Sovereign Ratings, Standard & Poor’s).
68. Marie Cavanaugh, Sovereign Credit Characteristics by Rating Category 1–2 (Standard & Poor’s 2003).
69. Id. at 2.
70. Id. at 3.
71. Id.
72. See Bruner & Abdelal, supra note 50, at 199–201 (describing the empirical literature and discussing Malaysia’s experience, including the agencies’ later revision of their judgments on the propriety of capital controls); see also Abdelal, supra note 8, at 181–89, 204–08 (analyzing reports back to 1981 reflecting S&P’s evolving views on the propriety of capital controls, including analysis of Malaysia’s experience).
C. Law, Policy, and Market Access

An inevitable consequence of the post-War economic liberalization project has been the blurring of the distinction between domestic and international policy realms—for the simple reason that the removal of border impediments to free trade and investment renders a country's domestic economic policies more relevant to actors abroad. The judgment of domestic economic policies by rating agencies represents a very acute reflection of this larger dynamic.

What, precisely, is the source of this authority to judge? Observers have often ascribed to the rating agencies' forms of private market power that can easily be squared with the broadened conception of legitimate authority described above. "Epistemic" authority, associated with "recognized expertise and competence in a particular domain," giving rise to "an authoritative claim to policy-relevant knowledge within that domain or issue-area," has been employed to explain the ascendance of rating agencies in capital market-based finance. Description of rating agencies as "coordination service firms"—that is, firms that coordinate the activity of other private firms—essentially builds on the epistemic concept.

As noted above, the epistemic explanation for the rating agencies' authority is broadly consistent with their origins in financial journalism. However, the agencies—or at least the Big Two—today enjoy a form and degree of raw power inconsistent with this narrative due principally to the use of ratings as a method of regulating exposure to credit risk—particularly in the United States. The U.S. Securities and Exchange Commission (SEC), which regulates securities markets and intermediaries, has, since 1975, incorporated the ratings of a set of designated agencies—so-called Nationally Recognized Statistical Rating Organizations (NRSROs)—into a wide range of securities regulations, and a


75. Haas, supra note 24, at 3.


77. See, e.g., Sinclair, Bond-Rating Agencies and Coordination, supra note 65, at 161; see also Cutler, supra note 18, at 28.
number of other regulators have followed their lead.\textsuperscript{78} An investment company’s status as a “money market” fund, for example, turns generally on limiting its investments to short-term securities rated in the highest two ratings categories by NRSROs.\textsuperscript{79} California’s Insurance Code likewise limits “excess funds investments” to those rated in the highest three ratings categories by an NRSRO.\textsuperscript{80} The major agencies’ ratings are similarly incorporated into the investment policies of large pensions such as the California Public Employees’ Retirement System (CalPERS), the largest public pension in the United States with an investment portfolio exceeding $240 billion,\textsuperscript{81} which specifies required sovereign ratings thresholds from S&P, Moody’s, or Fitch as a component of “prudent and careful action while managing the Program.”\textsuperscript{82} The use of credit ratings as a tool for the regulation of credit risk has in fact gone global, particularly through the incorporation of credit ratings into the “Basel II” standards for bank capital adequacy issued by the Basel Committee on Banking Supervision.\textsuperscript{83} These are just a handful of the many examples that might be provided,\textsuperscript{84} and, collectively, they substantially augment demand for ratings from those agencies empowered to grant such regulatory approvals.

While the power of the Big Two undoubtedly derives, to some degree, from their reputations for valuable expertise in the evaluation of credit risk—or at least from a residual first-mover advantage from their early days, in which they clearly relied on such reputations—S&P and Moody’s today derive enormous power from the use of their ratings in regulation. Moody’s has conceded that regulatory use of ratings boosts demand.\textsuperscript{85} And although S&P has denied this, Cavanaugh has characterized the agency’s reception on arriving in a country as a “high-profile”

\textsuperscript{78} See Abdelal & Bruner, supra note 33, at 8–9.
\textsuperscript{79} 17 C.F.R. § 270.2a-7 (2002).
\textsuperscript{80} CAL. INS. CODE § 1192.10 (West 2007).
\textsuperscript{84} For additional examples of ratings-dependent regulations in the United States, see Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, 72 Fed. Reg. 33,564 n.1 (proposed June 18, 2007); Sinclair, The New Masters of Capital, supra note 39, at 43–44. For additional examples of ratings dependent regulation outside the United States, see Sinclair, The New Masters of Capital, supra note 39, at 47–49.
\textsuperscript{85} See Abdelal, supra note 8, at 172.
States, Markets, and Gatekeepers

Fall 2008

event, and U.S.-based agency representatives have even been mistaken for foreign government officials. The error is understandable, as the agencies' evaluations of economic policy can be enormously consequential for governments around the world.

Mexico provides an illuminating example of the benefits of compliance with the agencies' prevailing conception of good policy. For years, Mexico strived to please the agencies, and finally achieved the coveted investment grade status in the early years of this decade (in 2000 from Moody's, and in 2002 from S&P). For S&P, this recognition reflected, among other things, Mexico's "tighter fiscal policy" and "deeper integration with the [United States]" under NAFTA, and the rewards for pursuing the right policies were very real. Described by one commentator as "a milestone in the country's dogged drive for economic respectability," the upgrade reduced Mexico's cost of borrowing, and permitted a broader range of institutions to invest in Mexican debt—benefits redounding not only to the Mexican government, but also to sub-sovereign borrowers enjoying a higher sovereign ceiling.

Malaysia, by contrast, provides an example of the dire consequences that follow when a government flouts the agencies' prevailing conception of acceptable policy. When Malaysia adopted capital controls in the face of the East Asian financial crisis—a move clearly flying in the face of the agencies' preference for openness—the consequences likewise were very real. Notwithstanding the lack of consensus among macroeconomists regarding whether this constituted policy error under the circumstances, and even though the agencies would substantially soften their claims regarding the benefits of capital mobility following the crisis, the agencies' downgrades increased Malaysia's cost of borrowing on global markets at a very difficult time.

It has been argued—quite plausibly—that "the spread of rating and ranking" methodologies reflecting Western liberalist views is a natural product of increasing investment by developed countries in

86. Abdelal & Bruner, supra note 33, at 1, 9 (quoting Marie Cavanaugh, Managing Dir. of Sovereign Ratings, Standard & Poor's).
87. See, e.g., Sinclair, Global Monitor, supra note 58, at 154 (observing that "Japanese media—like some [U.S.] Congressmen—initially described the rating firms as public-sector agencies").
89. See Case, supra note 88, at 1D; McCosh, supra note 88; Geri Smith, Bracing For a Wave of Foreign Investment, BusinessWeek, Feb. 25, 2002, at 34.
90. See Abdelal, supra note 8, at 185–89, 204–08.
less-well-understood emerging markets. However, the agencies' dictates are by no means limited to developing countries. S&P's "primer" on sovereign ratings includes instructions for rich countries as well:

Pension obligations represent a fiscal pressure of growing significance for countries with rapidly aging populations. Standard & Poor's believes that the credit ratings of some highly rated sovereigns could begin to come under downward pressure over the medium term if there is no further fiscal consolidation and structural reform to counter the financial problems of aging societies.

A rough translation might go something like: "Substantially restructure your pension schemes or we will downgrade your bonds." This is absolutely a warning—concerning a domestic political matter that cuts to the very heart of the social contract—and is intended to be taken as such.

The agencies' extraordinary power has naturally led observers to ask what forms of accountability they face when they get it wrong—as one would expect to occur, given the difficulty of assessing something as abstract as credit risk. As Rawi Abdelal has observed, it is even more complex than assessing the policies and politics of a given country; in an "age of credibility," the agencies must also assess how markets will react to a given policy. Building on John Maynard Keynes' likening of financial markets to a beauty contest in which "each competitor has to pick, not those faces which he himself finds prettiest, but those which he thinks likeliest to catch the fancy of the other competitors, all of whom are looking at the problem from the same point of view," Abdelal observes that the rating agencies must account for an additional variable—their own status in the market. He observes, "Moody's and S&P must

---

91. See Löwenheim, supra note 74, at 265-66; cf. Sassen, supra note 27, at 99 ("The fact of shared Western standards and norms ... in combination with enormous economic weight has facilitated the circulation and imposition of [U.S.] and European standards and rules on transactions involving firms from other parts of the world.").

92. Beers & Cavanaugh, supra note 47, at 10. For other examples, see Sinclair, The New Masters of Capital, supra note 39, at 140-44 (describing ratings experiences of Australia, Canada, and Japan).

93. In Europe and Asia, antipathy toward the agencies is enhanced by the perception that they not only enforce Western liberalism, but advance a distinctly U.S.-centric set of views and standards. See, e.g., Sinclair, The New Masters of Capital, supra note 39, at 68-71, 128-36; Bruner & Abdelal, supra note 50, at 203-05 (describing "the agencies' perceived lack of cultural awareness" and resulting criticisms in Europe and Asia); Sinclair, Global Monitor, supra note 58, at 151-55 (discussing Japanese frustration with the agencies' perceived home-country bias and judgment of domestic policies).

94. Abdelal, supra note 8, at 163.

95. Id. at 164 (quoting John Maynard Keynes, The General Theory of Employment, Interest, and Money (1936)).

96. Id.
interpret the signals sent by governments' policies and guess what the markets will infer as well, taking into account, of course, that their own rating changes will influence market sentiment.97

So, when things go wrong with ratings—as they apparently did in the emerging market crises of the 1990s, the Enron and WorldCom bankruptcies,98 and more recently, the subprime mortgage crisis99—who pays the price? At times like this, the agencies' description of their ratings as mere "opinions" comes front and center. By characterizing their ratings as opinions rather than investment advice, the agencies preserve potent defenses to civil liability and direct regulation under U.S. law. First, this characterization of their ratings products permits the agencies to style themselves as financial "journalists" entitled to the speech protections of the First Amendment to the U.S. Constitution.100 As a consequence, agencies have faced little in the way of civil liability exposure, although the greater an agency's direct involvement with the issuer, the more its characterization as a journalist may be called into question.101 Second, characterizing their work product as mere opinions preserves an exemption from the definition of "investment adviser," ensuring that the

97. Id.
agencies will not be directly regulated under the Investment Advisers Act of 1940, or under state law.\textsuperscript{102}

In response to the agencies’ problems, Congress and the SEC have adopted some tentative measures, but to date have not taken serious steps to abandon ratings-dependent regulation. Observing that the Big Two “serve the vast majority of the market, and additional competition is in the public interest,”\textsuperscript{103} the Credit Rating Agency Reform Act of 2006 aimed to boost competition and to increase transparency in designating NRSROs by mandating a formal application and reporting process, and by requiring the SEC to report to Congress annually “on the state of competition, transparency, and conflicts of interest” in the credit rating industry.\textsuperscript{104} Under the new Section 15E of the Securities Exchange Act of 1934, rating agencies now have to apply to the SEC for NRSRO status and furnish annual amendments to their registrations.\textsuperscript{105} NRSROs are also required to implement policies to prevent insider trading and manage conflicts of interest, and are prohibited from engaging in “unfair, coercive, or abusive” practices (such as conditioning a rating on the purchase of additional services).\textsuperscript{106} At the same time, however, the new statute emphasizes that “neither the [SEC] nor any [s]tate . . . may regulate the substance of credit ratings or the procedures and methodologies by which any [NRSRO] determines credit ratings.”\textsuperscript{107} Moreover, no private rights of action are created,\textsuperscript{108} and NRSROs are explicitly exempted from any state registration requirements.\textsuperscript{109} The new statute in no way


\textsuperscript{104} Credit Rating Agency Reform Act §§ 4–6; see Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, 72 Fed. Reg. at 33,564 (replacing the prior practice of recognizing NRSROs through informal SEC “no-action” letters with the new application process).

\textsuperscript{105} 15 U.S.C.A. §§ 78oo–7(a)–(b) (LexisNexis 2008).

\textsuperscript{106} Id. § 78oo–7(g)–(i); see also 17 C.F.R. §§ 240.17g-1–240.17g-6 (2008) (implementing the statute).

\textsuperscript{107} 15 U.S.C.A. § 780–7(c)(2).

\textsuperscript{108} 15 U.S.C.A. § 780–7(m).

\textsuperscript{109} 15 U.S.C.A. § 780–7(o). SEC Chairman Christopher Cox has indicated that the SEC likely lacks authority to revoke NRSRO registration for ratings failures, in that this would amount to government regulation of the substance of ratings. See Malina Manickavasagam,
alters the ratings-dependent regulatory approach. And, while ten NRSROs have been designated under the new approach, it is not expected substantially to improve the competitive landscape for the credit rating industry any time soon.

More recently, following the subprime mortgage crisis, there has been a renewed push for substantive regulation—particularly with respect to so-called “structured finance” ratings. Structured finance involves the issuance of securities backed by a pool of assets, notably residential mortgages. Credit ratings, permitting investors to assess the risks involved, are critical to the marketing of such complex securities—particularly those backed by so-called “subprime” mortgage loans made to borrowers with weak credit histories. Relative to other forms of ratings, these structured finance ratings are heavily driven by quantitative models offering predictions of expected loss under various stress scenarios in the housing market. When losses following the 2006 housing downturn exceeded those predicted, however, numerous structured finance ratings were substantially downgraded, hurting investor confidence and contributing to “broader dislocation in the credit markets.”

These events have resulted in renewed scrutiny by Congress and the SEC, but the rule changes proposed by the SEC in the wake of the crisis


110. _See_ Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, 72 Fed. Reg. at 33,575 (concluding that the new statute would not require revision of any of its rules incorporating the NRSRO concept).


112. _See_ Coffee Senate Testimony, _supra_ note 101, at 3–4. Note that NRSRO status continues to turn on market recognition of the agencies’ ratings—a criterion criticized as a barrier to entry in that the use of an agency’s ratings is itself driven by prior regulatory recognition. See 15 U.S.C.A. § 78o-7(a)(1)(C); Kerwer, _supra_ note 103, at 45; Lawrence J. White, _The Credit Rating Industry: An Industrial Organization Analysis_, in _RATINGS, RATING AGENCIES AND THE GLOBAL FINANCIAL SYSTEM, supra_ note 37, at 41, 54.


114. _Id._ at 7 n.15.

115. _Id._ at 12–14.

116. _Id._ at 20–25. In addition to residential mortgage-backed securities (RMBS) backed by mortgage loans, collateralized debt obligations (CDOs) are themselves backed by debt securities, including not only RMBS, but also securities issued by other CDOs—so-called “CDOs-squared.” _See_ _id._ at 3–4, 11–12. A full discussion of the subprime mortgage crisis and methods of securitization fueling it is beyond the scope of this Article, but for a concise general overview, see Roger Lowenstein, _Triple-A Failure_, N.Y. TIMES, Apr. 27, 2008, at MM36, available at http://www.nytimes.com/2008/04/27/magazine/27Credit-t.html?_r=1&pagewanted=print&oref=slogin.
have, to date, been justly criticized as falling far short of fundamental reform. An initial package of proposed reforms focused largely on enhancing disclosure, improving internal policies, and addressing heightened conflicts of interest thought to arise in this area\(^{117}\)—retaining the "disclosure-oriented" approach permitting the SEC to avoid engaging in direct regulation of credit risk.\(^{118}\) Another package of rule proposals specifically addressed the use of NRSRO ratings in regulation, but ratings were not abandoned as a means of assessing credit risk exposure for purposes of regulatory compliance.\(^{119}\) Having found forty-four SEC rules and forms incorporating ratings, the SEC proposed to eliminate such references in eleven of them, and to substitute an alternative standard in twenty-seven of them.\(^{120}\) In two important areas, however—the rules pertaining to money market fund investments and calculation of required net capital for broker-dealers\(^{121}\)—the SEC clearly envisioned continuing to permit the use of ratings as a means of satisfying subjectively phrased credit risk standards employed in the proposed rules.\(^{122}\)

\(^{117}\) See generally SEC Proposed Rules, supra note 113. Such conflicts include the desire to please the investment bank arranging a securitization in order to be tapped to rate future deals, and the fact that rating agencies arguably become involved in structuring the investment as adjustments are made to achieve a desired rating, putting the agencies in the position of "evaluating their own work." Id. at 26.


\(^{122}\) See References to Ratings of Nationally Recognized Statistical Rating Organizations, 73 Fed. Reg. 40,124 (proposed July 11, 2008) (proposing to permit use of credit ratings
While some characterized the proposal to reduce explicit references to ratings in such rules as a "blow" to the major agencies,\textsuperscript{123} others characterized the overall package of reforms as mere "tinkering"\textsuperscript{124} and "nibbling around the periphery" of the problem—not least because the proposed changes would have no effect whatsoever on the use of credit ratings in myriad state and federal rules outside the securities context.\textsuperscript{125} As one observer advocating total elimination of ratings-dependent regulation remarked, "there is still another conflict of interest keeping the government from going this route: Except in crisis times like these, ratings agencies make the regulators' jobs much easier."\textsuperscript{126} Accordingly, it

\begin{footnotesize}
\begin{enumerate}
\item<sup>123</sup> See, e.g., Ackerman, supra note 122 (internal quotation marks omitted); Helen Power, \textit{SEC Plans Rule Change that will Curb Agency Power}, \textit{DAILY TELEGRAPH} (London), June 25, 2008, at 6 (internal quotation marks omitted).
\item<sup>124</sup> Michael Sisk, \textit{A "Radical" Answer to Credit-Ratings Conflict}, \textit{US BANKER}, July 1, 2008, at 48 (advocating elimination of all ratings-dependent regulation); see also Hoffman, supra note 118 (reporting that the proposed reforms "don't go far enough, according to industry critics").
\item<sup>126</sup> Sisk, supra note 124.
\end{enumerate}
\end{footnotesize}
remains far from obvious that any rule changes arising out of the sub-
prime mortgage crisis would in fact amount to fundamental reform or
meaningfully reduce the major agencies’ dominance.127

At the end of the day, then, the situation remains that rating agencies
enjoy the benefits of regulatory use of their ratings—particularly in the
United States—while facing no current danger of substantial civil liabil-
ity or substantive regulation. Frank Partnoy has persuasively argued
that—unlike in their early days—the Big Two depend only secondarily
on their reputations for the provision of useful information, relying pri-
marily on regulatory use of their ratings to generate revenue. According
to his “regulatory license” hypothesis, the true significance of a rating is
that it “entitles the issuer (and the investors in a particular issue) to cer-
tain advantages related to regulation.”128

This regulatory structure gives rise to an extraordinary though pecu-
liar form of power, arising out of the confluence of epistemic and legal
authority. As Dieter Kerwer has observed, agencies characterize their
products as voluntary “standards depend[ing] on the legitimacy of the
underlying expertise,” yet their regulatory enforcement by government
gives these purported standards the hard edge of binding rules.129 And, in
this shift from private, market-oriented epistemic authority to public,
government-oriented legal authority, an “accountability gap” opens up.130
The agencies enjoy enhanced demand for their products, while avoiding
accountability by clinging to the characterization of their ratings as
“opinions.” The U.S. government, for its part, enjoys a convenient regu-
laratory tool, while avoiding accountability for the ill effects, which can
always be blamed on the “experts” responsible for getting the ratings
right. This situation amounts to a “quid pro quo [hinging] on the disso-
ciation of power and accountability, and the dissociation of reputation
and market demand.”131

127. Some, like Frank Partnoy, have long advocated abandoning ratings-dependent regu-
lation altogether in favor of market-based measures. See Partnoy, supra note 40, at 704–09;
Partnoy, supra note 101, at 91–94. While the possibility of such a move has received recent
attention, see, e.g., Credit and Blame, ECONOMIST, Sept. 8, 2007, at 34, SEC Chairman Chris-
topher Cox expressed trepidation in light of the fact that the consequences “are only partly
appreciated,” see Rachel McTague, Credit Rating Agencies: Cox Says SEC Might Direct Staff
to Rework Agency Rules Using Credit Ratings, SEC. L. DAILY, Feb. 15, 2008; see also Man-
ickavasagam, supra note 109.
128. Partnoy, supra note 40, at 681; see also Coffee, supra note 38, at 288–92; White,
 supra note 112, at 50–51.
129. Kerwer, supra note 103, at 45.
130. Id.
131. Bruner & Abdelal, supra note 50, at 211; see also Partnoy, supra note 40, at 711
(arguing that “credit rating agencies should not have their cake and eat it too”); Partnoy, supra
note 101, at 89 (suggesting that, although desirable, abandoning ratings-dependent regulation
is “politically unlikely” because it would force regulators to take direct responsibility for fi-
As I will explore more fully in the final Part of this Article, the confluence of epistemic and legal authority gives rise to a particularly potent form of regulatory power that is, in fact, synonymous with neither, and deeply problematic in accountability terms. However, it is a form of regulatory power that is by no means unique to bond markets.

III. CYBERSPACE AND THE STANDARDS OF NAMING AND ADDRESSING

The Internet is widely thought to be a wholly decentralized medium, defying effective governmental regulation because it defies the territorial compartmentalization typically associated with the exertion of state power.\(^{132}\) However, while this may to some degree be true of commerce conducted through this medium, it is emphatically not true of the medium itself—that is, the online marketplace. In fact, the core technology permitting the Internet to function at all renders it quintessentially amenable to centralized control.\(^{133}\)

Although this network infrastructure ostensibly bears no direct relation to global bond markets, on close inspection, the Internet exhibits a strikingly similar form of regulation raising theoretical and practical problems strongly reminiscent of those associated with the rating agencies.

A. Packets and Protocols: A Brief History of Cyberspace

Today's Internet traces its origins to 1960s-era “packet switching” research funded by the U.S. Department of Defense (DOD).\(^{134}\) In contrast with “circuit switching,” which requires use of a single connection to communicate information in “continuous streams of bits,” packet switching permits a network to “share out the available bandwidth to several communications simultaneously,” enhancing efficiency as each packet...
follows the lowest-traffic route available at that moment. As several founders of the early Internet would later describe it, the core idea was to develop “open-architecture networking” in which “individual networks may be separately designed and developed” to suit the users’ particular needs—with “no constraints on the types of network that can be included or on their geographic scope.” DOD’s Cold War-era interest lay in creating a technology permitting “the exchange of scientific and military information” through a “system impervious to nuclear attacks or natural disasters.” The first such network—called ARPANET—went live in 1969, connecting nodes at four universities (UCLA, Stanford University, University of California, Santa Barbara, and the University of Utah).

The communications protocols enabling today’s Internet came to be called “TCP/IP,” and in the technical community the term “Internet” is essentially defined by reference to the use of these protocols. TCP stands for Transmission Control Protocol, the software dividing a transmission into packets and then putting them back together at the destination. IP, then, stands for Internet Protocol, the software handling delivery to the destination (in which light one might more accurately—though less succinctly—describe the process as TCP/IP/TCP).

IP addresses, by which packets find their destinations, consist of lengthy numbers that are assigned to each computer and attached to each transmission. The Domain Name System (DNS) today handles the process of translating back and forth between these numbers and the letter-based domain names familiar to users, and organizes the rapidly proliferating number of computers—or “domains”—that participate in the global Internet. Domain names are hierarchically organized, with the suffix representing the applicable “top-level domain” (TLD) (e.g., .com,

135. SEAN GEER, POCKET INTERNET 153 (The Economist Books 2000) (emphasis omitted).
137. Spar, supra note 132, at 33.
138. LEINER ET AL., Origins of the Internet, supra note 134. ARPANET derived its name from the Advanced Research Projects Agency (ARPA), now the Defense Advanced Research Projects Agency (DARPA). Id. n.4.
140. See GEER, supra note 135, at 182.
141. See id. at 109.
The components of the address appearing before it represent so-called “second-level domains,” “third-level domains,” and so on. To find a given address, a computer queries up from the bottom of the hierarchy, starting with the server managing the second- or third-level domain at the bottom of the hierarchy, and then works its way up as needed. The authoritative list of TLDs—the “root zone file”—is stored on thirteen “root servers,” which respond to “millions of DNS queries a day,” and which are keyed to a hidden server operated under contract with the U.S. government. The root server at the top of the hierarchy directs the query to the required TLD, where the appropriate second-level domain can be found, and so on, until the query is “resolved.” Today there are literally hundreds of TLDs—mainly “country-code TLDs” (ccTLDs) representing States around the world. As described below, the ability to regulate the content of the root zone file is enormously consequential, because it literally bestows power to determine whether a particular terrain within cyberspace can be found through the Internet; put differently, the ability to regulate the DNS amounts to the ability to regulate admission to cyberspace itself.

142. See id. at 81-82; Froomkin, supra note 133, at 37-38.


144. Froomkin, supra note 133, at 38-39.


146. Froomkin, supra note 133, at 43; Sonbuchner, supra note 143, at 186.

147. See Internet Assigned Numbers Authority [IANA], Root Zone Database, http://www.iana.org/domains/root/db/ (last visited Oct. 5, 2008). In June 2008, ICANN approved an expansion of the TLD space under which “any company, organization or country” could apply for its own TLD. See Doreen Carvajal & Brad Stone, New Flavors for Addresses on the Web Are on the Way, N.Y. TIMES, June 27, 2008, at C5, available at http://www.nytimes.com/2008/06/27/technology/27icann.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1214576054-sw50qjFipOa3jaWqYXjg. Applications would remain subject, however, to “an independent review process,” including susceptibility to challenge based on alleged threats to “morality and public order,” and “companies will have the first priority when it comes to claiming their brand names.” Id. Conflicting claims to a given TLD would “be settled through auctions.” Id. ICANN anticipated “a public review process that could last at least a year,” and “estimated that prices would start in the low six figures.” Id.; see also ICANN, Biggest Expansion in gTLDs Approved for Implementation (June 26, 2008), available at http://www.icann.org/en/announcements/announcement-4-26jun08-en.htm.

148. See Froomkin, supra note 133, at 46-48. This power gives ICANN enormous contractual leverage over the terms of the domain name registration process. See, e.g., id. at 21, 24-25, 49, 90; Tamar Frankel, Governing by Negotiation: The Internet Naming System, 12 CARDOZO J. INT’L & COMP. L. 449, 458-59 (2004). The registration process is handled by “registrars,” which handle the business of making entries in a database called a “registry.”
Although initially confined to a handful of researchers, use of the Internet has expanded enormously since the 1980s—notably, for commercial purposes—due to advances in personal computing and software. The advent of personal computers (PCs) in the 1980s and the World Wide Web (WWW) in the 1990s revolutionized this new medium. By 1993, 500 web servers accounted for just one percent of Internet use, but by 1995 there were approximately 10,000 websites, and by 1999 there were already about 4.5 million. With this kind of growth, the naming and addressing function naturally became a crucial element of the Internet’s architecture.

In its early days, “Internet governance” essentially consisted of the informal process by which authoritative protocols were developed. Founders of the Internet recall that a series of memoranda called Requests for Comments (RFCs) evolved as “an informal fast distribution way to share ideas with other network researchers.” Rough ideas, circulated through email and otherwise, would eventually coalesce into an identifiable “consensus,” at which point “a draft document” was “distributed as an RFC”—an informal means of organization reflecting the
fact that the "early ARPANET researchers worked as a close-knit community."\textsuperscript{155} By the late 1970s, however, it had already become apparent that "the growth of the Internet was accompanied by a growth in the size of the interested research community," giving rise to "an increased need for coordination mechanisms."\textsuperscript{156} By the 1980s, funding of the Internet extended beyond the defense establishment to other U.S. government agencies—notably the National Science Foundation (NSF)—and commercial interest in the Internet was growing. The "proliferation of stakeholders" would give rise to conflicting interests, including with respect to "control of the domain name space,"\textsuperscript{157} and "[i]ncreased attention was paid to making the [standards] process open and fair."\textsuperscript{158}

Governance of the Internet's naming and addressing system has followed a similar trajectory—and, given the stakes involved, has indeed given rise to substantial conflict. With only a small number of users in the Internet's infancy, "it was feasible to maintain a single table of all the hosts and their associated names and addresses," which could simply be distributed to each computer on the network.\textsuperscript{159} Over time, however, as the number of users and discrete networks participating in the Internet proliferated, "a single table of hosts was no longer feasible."\textsuperscript{160} The DNS, "a scalable distributed mechanism for resolving hierarchical host names," was developed to solve this dilemma.\textsuperscript{161}

Initially, the system was managed by one man, Jon Postel, who by and large created naming and addressing policies unilaterally—a practice reflecting not raw power, but rather the lower stakes, and the homogeneity of the technical community and its interests, at the time.\textsuperscript{162} In the 1990s, however, by which point the range of Internet stakeholders had broadened substantially, governance of the DNS had become more complex and controversial. In 1990, primary responsibility for the DNS shifted from the DOD to the NSF (reflecting increasing use of the Internet beyond the military), and by 1993 management of the DNS had been


\textsuperscript{156} LEINER ET AL., Formation of the Broad Community, supra note 155.

\textsuperscript{157} LEINER ET AL., History of the Future, supra note 139.

\textsuperscript{158} LEINER ET AL., Formation of the Broad Community, supra note 155; see also Spar, supra note 132, at 34.

\textsuperscript{159} LEINER ET AL., Proving the Ideas, supra note 149.

\textsuperscript{160} Id.

\textsuperscript{161} Id.

\textsuperscript{162} See Froomkin, supra note 133, at 52–55; cf. LEINER ET AL., Formation of the Broad Community, supra note 155; LEINER ET AL., Proving the Ideas, supra note 149.
delegated to a private entity, Network Solutions, Inc. (NSI). When NSF voiced its intention to withdraw from oversight of NSI in 1997, the question of how the root zone file ought to be governed loomed large—particularly in light of the fact that control appeared then to sit entirely in the hands of a private, for-profit entity. Additionally, conflicts had arisen between those who favored augmenting the virtual terrain through creation of additional TLDs, and trademark interests who feared dilution of the value of their marks. When the technical community—working with a U.N. agency—attempted to reclaim control over the DNS, however, they ran into opposition from the U.S. government, which itself asserted control over the DNS as the Internet’s grant funder. The Clinton administration directed that the U.S. Department of Commerce (DOC) “privatize” the DNS, and issued a policy statement inviting proposals to accomplish this—an invitation that Jon Postel accepted, bringing with him the considerable prestige of an Internet legend. Postel created the non-profit Internet Corporation for Assigned Names and Numbers (ICANN), which entered into a Memorandum of Understanding with the DOC in 1998 to accomplish the privatization of the DNS.

B. Today’s Internet: ICANN and the Domain Name System

As it now stands, day-to-day control over the DNS resides with ICANN, a California non-profit corporation with an explicit mandate in its Articles of Incorporation to “operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international con-

163. See Sonbuchner, supra note 143, at 188–90; see also Froomkin, supra note 133, at 55–57; Leiner et al., History of the Future, supra note 139.
164. See Froomkin, supra note 133, at 70; Sonbuchner, supra note 143, at 189–90.
165. See Froomkin, supra note 133, at 59–60, 180–81.
166. See Sonbuchner, supra note 143, at 190–91; see also Froomkin, supra note 133, at 62 & n.163.
168. See Froomkin, supra note 133, at 50–93 (providing an in-depth description of the complex and convoluted history of DNS governance from its origin in the 1970s through the establishment of ICANN and its entry into the Memorandum of Understanding (MOU) with the U.S. Department of Commerce (DOC) in 1998); Sonbuchner, supra note 143, at 188–93. On the prestige and influence of Jon Postel, who died in late 1998, within the Internet’s technical community, see Froomkin, supra note 133, at 70, 82 (observing that “[w]ithout Jon Postel, no one would ever have paid any attention to anything ICANN said”); Information Sciences Institute, Univ. S. Cal. Viterbi Sch. of Engineering, Jon Postel—Internet Pioneer (Dec. 7, 2005), available at http://www.postel.org/postel.html.
ventions and local law.” Additionally, “to the extent appropriate,” ICANN is to operate “through open and transparent processes that enable competition and open entry in Internet-related markets.” ICANN’s Bylaws elaborate that in addition to maintaining “the operational stability, reliability, security, and global interoperability of the Internet,” ICANN’s “core values” include “open and transparent policy development mechanisms”; “[r]emaining accountable to the Internet community”; and “recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.”

ICANN has been strongly criticized for failing to achieve open and transparent governance of the DNS, however, and even a brief perusal of its lengthy and “Byzantine” Bylaws lends support to these criticisms. Decisions are made through a highly complex board structure, replete with “advisory” and “supporting” committees possessing varying levels of influence and power over DNS policy. Ultimately, however, notwithstanding ICANN’s non-profit legal status, one essentially finds an all-powerful board dominated by commercial interests. The Bylaws state that, in general, all powers are vested in a board consisting of fifteen voting members. The board’s voting members include ICANN’s president, two members from each of three supporting organizations, and then eight members—i.e., the majority—selected by the Nominating Committee. The Nominating Committee’s power is enhanced by the

---


170. Id.


172. Cf. Froomkin, supra note 133, at 71 (observing that, by 1999, “ICANN had adopted a Byzantine structure that privileged some interests, primarily corporate and commercial”); Solum, supra note 149 (observing that “ICANN has an organizational structure that is almost baroque in its complexity”).

173. Cf. Froomkin, supra note 133, at 24. Froomkin observes that the “profusion of constituencies, working groups, ad hoc committees, and the like” inevitably favors those capable of devoting substantial resources to the process—that is, “commercial interests.” Id. at 160. In its short life, numerous clashes have arisen over whose interests ICANN should represent, and how ICANN should represent those interests. Some advocate a “trusteeship” governance model, and others advocate a “multistakeholder” model. Ultimately, the concept of at-large elections was abolished in 2002, and, since then, governance of ICANN has become increasingly centralized. See generally Slavka Antonova, Deconstructing an Experiment in Global Internet Governance: The ICANN Case, 12 INT’L J. COM. L. & POL’Y 1 (2008); see also Viktor Mayer-Schönberger & Malte Ziewitz, Jefferson Rebuffed: The United States and the Future of Internet Governance, 8 COLUM. SCI. & TECH. L. REV. 188, 196 (2007).

174. ICANN Bylaws, supra note 171, arts. II:1, VI:1.

175. Id. art. VI:2.
fact that its nominees are staggered into three classes elected in successive years, as well as by its involvement in the "councils" of two of the three supporting organizations, which councils are responsible for selecting the board members representing those supporting organizations.\textsuperscript{176} The Nominating Committee itself, then, includes seventeen voting members, among which various commercial interests are strongly represented (although the Bylaws do reserve a spot for an "entity designated by the Board to represent academic and similar organizations" and another for "[c]onsumer and civil society groups").\textsuperscript{177}

Government officials, meanwhile, are explicitly barred from board membership.\textsuperscript{178} The Bylaws do create a Governmental Advisory Committee (GAC), the policy advice of which "shall be duly taken into account" by the board, and the board must state its rationale for acting contrary to the GAC's views. However, the GAC's representation on the board is limited to a non-voting liaison, and the Bylaws state that the GAC (like other advisory committees) possesses "no legal authority to act for ICANN."\textsuperscript{179}

As with the rating agencies in bond markets, ICANN's role in the regulation of the Internet's architecture remains intimately bound up with the U.S. government, and U.S. power. Although the ultimate aim has remained to privatize governance of the DNS, to this day ICANN's power remains derivative of the U.S. government's own authority, pursuant to the Memorandum of Understanding (MOU) that ICANN entered into with DOC in 1998. The MOU itself explains that President Clinton "directed the Secretary of Commerce to privatize the management of the [DNS] in a manner that increases competition and facilitates international participation in its management," but adds that before the full transition can take place, "DOC requires assurances that the private sector has the capability and resources to assume the important responsibilities" of DNS management.\textsuperscript{180} Put differently, privatization of the DNS may be envisioned at some future time, but remains unaccom-

\begin{itemize}
  \item \textsuperscript{176} Id. arts. VI:8, IX:3(1), IX:3(9), X:3(1), X:3(6).
  \item \textsuperscript{177} Id. art. VII:2(6)-(8) (emphasis added).
  \item \textsuperscript{178} Id. art. VI:4(1).
  \item \textsuperscript{179} Id. art. XI:1; see also id. arts. VI:9(1), XI:1–2(1).
  \item \textsuperscript{180} Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, § II.A–B (Nov. 25, 1998), available at http://www.icann.org/en/general/icann-mou-25nov98.htm [hereinafter MOU]. As to its own authority to enter the MOU, in addition to Presidential authorization, DOC points to its (somewhat amorphous) statutory "joint project" authority, its authority to promote commerce, and authorization of the National Telecommunications and Information Administration "to coordinate the telecommunications activities of the Executive Branch." Id. § III.A; see also Froomkin, supra note 133, at 50 ("The ICANN story lacks a statute. At no time has Congress ever authorized ICANN or the 'privatization' of the DNS.").
\end{itemize}
plished—which by implication maintains DOC's position atop the DNS power structure.

Whereas the MOU initially was to terminate on September 30, 2000, it has been extended through several amendments and currently takes the form of a Joint Project Agreement (JPA) through September 30, 2009. The JPA reiterates the "policy goal" of privatization and confirms that DOC will "[c]ontinue to monitor the performance of the activities conducted pursuant to this Agreement." The JPA also sets forth an "Affirmation of Responsibilities" for ICANN that, as discussed below, reflects the many concerns and criticisms that have been raised regarding ICANN's performance and the potential for true privatization of the DNS. Perhaps most significantly, however, the JPA maintains DOC's power—reserved throughout the life of its agreement with ICANN—to terminate the arrangement without cause, and, presumably, to replace ICANN with some other entity or arrangement as it sees fit.

It is this termination provision that most clearly reflects the U.S. government's assertion of regulatory power over the DNS, and, through it, the Internet.

C. Law, Policy, and Technical Standards

Just as the rating agencies' relationship with the U.S. government imbues them with extraordinary power to articulate and enforce the terms of acceptable economic policy around the world, so ICANN's relationship with the U.S. government imbues it with extraordinary power to articulate and enforce the terms of acceptable domain name policy around the world.

Technical management of the Internet has proven to be inextricable from the articulation and enforcement of Internet public policy, which has given rise to substantial conflict over governance of the Internet's core technologies, and, notably, what the role of governments ought to be. The global nature of these tensions became eminently clear at the

---

181. MOU, supra note 180, § VII (as initially agreed in 1998).
182. Joint Project Agreement Between the U.S. Department of Commerce and the Internet Corporation for Assigned Names and Numbers, § III (Sept. 29, 2006) [hereinafter JPA] (amending § VII of the MOU).
183. Id. § I (amending § V.B of the MOU).
184. Id. § II, Annex A (amending § V.C of the MOU).
185. Id. § III (amending § VII of the MOU).
186. See Froomkin, supra note 133, at 71 (arguing, in light of DOC's ability to terminate the MOU, that DOC "is the 'but for' cause of ICANN's relevance, indeed its very existence, and the fundamental source of ICANN's powers").
187. See, e.g., Antonova, supra note 173, at 3, 13–15. ICANN has historically claimed that its work is merely "technical," not "policy"-related. See, e.g., Froomkin, supra note 133,
World Summit on the Information Society (WSIS), a United Nations initiative aiming, among other things, to spur talks on the future of Internet governance through meetings held in Geneva in 2003 and Tunis in 2005. The Tunis Commitment, adopted in connection with the 2005 meeting, explicitly focused on “Internet governance and related issues” and emphasized “the key role and responsibilities of governments in the WSIS process.” The accompanying Tunis Agenda, then, includes a substantial section devoted to “Internet Governance.” Among other things, the Tunis Agenda asserts that “management of the Internet encompasses both technical and public policy issues”; asserts that “international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments,” among other stakeholders; and affirms that “authority for Internet-related public policy issues is the sovereign right of States.” While the “private sector has had, and should continue to have, an important role . . . in the technical and economic fields,” the implication is that private entities do not properly involve themselves in the development of public policy related to the Internet.

Pointedly, the Tunis Agenda makes no explicit reference to ICANN. The document does make a nod to “existing arrangements for Internet governance,” which “have worked effectively to make the Internet the highly robust, dynamic and geographically diverse medium that it is today, with the private sector taking the lead in day-to-day operations.” However, the document adds that “there are many cross-cutting international public policy issues that require attention and are not adequately addressed by the current mechanisms,” and that “there is a need to initiate, and reinforce, as appropriate, a transparent, democratic, and multilateral process, with the participation of governments,” among other stakeholders. The obvious point here is that ICANN achieves none of this. Additionally, “[c]ountries should not be involved in deci-

---

189. Tunis Commitment, World Summit on the Information Society, ¶¶ 7–8, WSIS-05/TUNIS/DOC/7-E (Nov. 18, 2005).
190. See Tunis Agenda for the Information Society, World Summit on the Information Society, ¶¶ 29–82, WSIS-05/TUNIS/DOC/6(Rev.1)-E (Nov. 18, 2005).
191. Id. ¶¶ 29, 35.
192. Id. ¶ 35.
193. Id. ¶ 55.
194. Id. ¶¶ 60–61.
sions regarding another country’s country-code Top-Level Domain (ccTLD),” a clear shot at the dominant position of the United States in governance of the DNS and an indication of the tensions that have arisen over the effective inability of other governments to regulate their own domain name spaces.

It is readily comprehensible that the United States’ unilateral control over the DNS would raise sovereignty—indeed, even security—concerns for other countries. That a country cannot change its ccTLD registry, or achieve recognition of a new ccTLD, without ICANN’s—and, indirectly, DOC’s—approval clearly illustrates the unique position of power occupied by the U.S. government, and the relatively limited scope of other countries’ sovereign powers in this arena.

An even starker—and considerably more worrying—reflection of this, however, is the unique capacity of the United States literally to turn off the Internet in any given country, simply by removing its ccTLD from the root zone file. Unlikely as such a move may seem in practical terms, the theoretical possibility is understandably unnerving in light of the social and economic turmoil that would surely follow. Indeed, the ability and willingness of the United States to intervene directly in ICANN’s decision-making processes was confirmed when the U.S. government, prompted by domestic political pressure, effectively vetoed ICANN’s approval of a “.xxx” TLD for adult Internet content—a move

195. Id. ¶ 63.

196. In the early days of the Internet—long before the Internet’s significance was fully appreciated—administration of ccTLDs was delegated by Jon Postel “to the first responsible person who came looking for the job,” which often turned out to be a party other than the given country’s public telecommunications authority. Sonbuchner, supra note 143, at 189. By 2004, however, “almost every country [had] asserted some form of control over its domain name.” Frankel, supra note 148, at 471. Regulating the domain name registries in question is relatively straightforward, “so long as the registries are within [the country’s] physical jurisdiction,” but “when governments wish to change the identity of the registries and substitute one registry for another, ICANN, or rather the [United States], has the upper hand.” Id. at 476.

197. See, e.g., Frankel, supra note 148, at 479–82; Froomkin, supra note 133, at 46–50; Sonbuchner, supra note 143, at 196–98, 201–03.

198. See Froomkin, supra note 133, at 49 (arguing that such a move “would work at most once, because, were the [United States] to use the root for strategic advantage, all root servers located abroad would undoubtedly stop mirroring the data served from the [United States] immediately, even if it split the root”).

199. Consider, for example, the extraordinary economic and social disruptions that reportedly resulted from damage to an undersea cable in the Mediterranean caused by a ship’s anchor. CNN reported that whole swathes of Asia, the Middle East, and North Africa had their high-technology services “crippled . . . following a widespread Internet failure which brought many businesses to a standstill and left others struggling to cope.” In Dubai, for example, the failure “led to a rapid collapse of a wide range of public services” and “crippled its business section, which is heavily reliant on electronic means for billions of dollars’ worth of transactions daily.” See Elham Nakhlawai & Mustafa Al Arab, Internet Failure Hits Two Continents, CNN.com, Jan. 31, 2008, available at http://www.cnn.com/2008/ WORLD/meast/01/31/dubai.outage/index.html.
roundly criticized by governmental and non-governmental entities from around the world.  

The Tunis Agenda called for the creation of an Internet Governance Forum (IGF), a “multilateral, multi-stakeholder, democratic and transparent” endeavor with a mandate, among other things, to “[p]romote and assess . . . the embodiment of WSIS principles in Internet governance processes.” Yet, the IGF “would have no oversight function” and “would be constituted as a neutral, non-duplicative and non-binding process.” That the IGF possesses no real authority quite clearly reflects the United States’ refusal to relinquish unilateral control over the DNS. Indeed, the European Union explicitly proposed internationalizing DNS governance at the WSIS in light of which the non-binding IGF that resulted from the process has been characterized as classic diplomatic doublespeak: “Those that had advocated for more international oversight of ICANN could call the creation of IGF a victory of sorts, while U.S. officials assured their constituencies that the IGF was a powerless body and that ICANN would continue to operate unconstrained.” Indeed, in June 2005, the National Telecommunications and Information Administration (NTIA), a branch of DOC, put forth a policy statement on Internet domain names, making eminently clear that the United States would not be relinquishing unilateral control. The document “recognizes that governments have legitimate public policy and sovereignty concerns with respect to the management of their ccTLD,” yet confirms that in light of concerns for “the effective and efficient operation of the DNS,” the United States would “maintain its historic role in authorizing

200. *See, e.g.*, Press Release, European Union, Internet Governance: Commission Welcomes Moves Towards Full Private-Sector Management by 2009, IP/06/1297 (Oct. 2, 2006); Comments from the Center for Democracy and Technology, to the National Telecommunications and Information Administration, Regarding the Continued Transition of the Technical Coordination and Management of the Internet’s Domain Name and Addressing System: Mid-term Review of the Joint Project Agreement, at 2 (Jan. 25, 2008) [hereinafter Center for Democracy and Technology]; Mayer-Schönberger & Ziewitz, supra note 173, at 194; Sonnleitner, *supra* note 143, at 200–01; *cf*. Froomkin, *supra* note 133, at 171 (arguing that deciding whether a particular TLD ought to be created “is a question of social and political import only,” not a technical one).


202. *Id.*, ¶ 77.


changes or modifications to the authoritative root zone file” and “con- 
tinue to provide oversight” of ICANN.

The JPA between ICANN and DOC provides for “a midterm review of progress achieved,” which took place in early 2008. The idea was to assess ICANN’s progress toward the revised goals set out in the JPA, and, as discussed below, the comments submitted by various stakeholders clearly identify the substantial range of problems that remain to be addressed. The JPA sets out a laundry list of goals for ICANN, which, among other things, include improving transparency and accountability, enhancing “the global participation of all stakeholders,” and working with the GAC “to facilitate effective consideration of GAC advice on the public policy aspects” of the DNS. In connection with its midterm review, then, the NTIA requested comments on ICANN’s progress. Comments were submitted by 169 parties, and the diversity of views and depth of concerns expressed underscore that ICANN’s work remains very controversial and that the theoretical underpinnings of this mode of private-sector governance remain far from established.

Even among those who want the U.S. government to remove itself from regulation of the Internet, significant doubts linger regarding how precisely this would work—notably with respect to alternative sources of legitimacy. The Internet Society (ISOC), an organizational umbrella for the Internet’s standard-setting groups, favors privatization, but “continues to be concerned by the question of whether the current governance model is appropriate to address the full range of responsibilities undertaken by ICANN.” ISOC advocates “careful steps to ensure the appropriate inclusion of all stakeholders perspectives” and includes a “note” indicating that “this will likely require changes to its consultation and decision-making model.” ISOC further advocates “developing, consulting on, and articulating an organizational and governance model

206. Id.
207. JPA, supra note 182, § III (amending § VII of the MOU).
208. Id. § II, Annex A (amending § V.C of the MOU).
212. Id.
for ICANN after the JPA."\textsuperscript{213} The clear implication is that the present ICANN model could not function in a post-JPA world.

The Internet Governance Project (IGP), "an international alliance of academics," for its part, similarly supports privatization yet believes that ICANN will require "new forms of oversight rooted in the global Internet community"—\emph{i.e.}, the Internet Governance Forum—and that the JPA should not be terminated until the problem of accountability has been adequately addressed.\textsuperscript{214} Much like the "accountability gap" of the rating agencies discussed above, IGP observes of ICANN that it "has quasi-governmental powers over Internet identifiers," yet remains unconstrained by the political and judicial accountability mechanisms that normally limit executive power—an "accountability deficit" arising from the grant of exclusive "taxing and policy authority" to a private-sector entity with no substantive public accountability.\textsuperscript{215} IGP charges that most board members are "anointed by a Nominating Committee whose composition . . . is also influenced by the existing Board and staff," through a "diffuse, opaque and indirect process."\textsuperscript{216} Additionally, while agreeing that eventually terminating the JPA would "remove[] the U.S. from the business of specifying particular policies and practices, which is a good thing," IGP points out that DOC technically delegates the power to make updates to the root zone file itself under a separate contract, the "IANA contract," which is "the real source of ICANN's authority over the DNS," and which would presumably remain unaffected by termination of the JPA.\textsuperscript{217}

\begin{footnotes}
\item[213] Id.
\item[214] Internet Governance Project [IGP], Comments of the Internet Governance Project on the Continued Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System: Midterm Review of the Joint Project Agreement (Feb. 15, 2008).
\item[215] Id.
\item[216] Id. To enhance accountability, IGP advocates creating a "vote of no confidence" mechanism to replace board members and the chief executive officer. Id.; see also Froomkin, supra note 133, at 31 (identifying an "accountability gap" in that DOC has no incentive to intervene "so long as ICANN is executing the instructions set out in the White Paper").
\item[217] See IGP, supra note 214. The Internet Assigned Numbers Authority (IANA) is described as "one of the Internet's oldest institutions, with its activities dating back to the 1970s." IANA, About IANA, http://www.iana.org/about/ (last visited Sept. 30, 2008). Today, however, IANA in fact constitutes a function of ICANN. See id. Under a separate contract with DOC, ICANN agreed, among other things, to perform "facilitation and coordination of the root zone of the domain name system," including "receiving requests for and making routine updates of the country code top level domain (ccTLD) contact . . . and name server information," as well as "receiving delegation and redelegation requests, investigating the circumstances pertinent to those requests, and making recommendations and reporting actions undertaken in connection with processing such requests." Internet Corporation for Assigned Names and Numbers—U.S. Department of Commerce Contract for Performance of the IANA Function, § C.2.2.1.2 (Aug. 14, 2006) (emphasis added). The contract also requires that within thirty days of a request to modify the root zone file, ICANN "shall complete all processing
For some commenters, the problem raised by the prospect of severing ties with the U.S. government is an ontological one: What exactly would a post-JPA ICANN actually be? Outspoken critic, Karl Auerbach, similarly charges that ICANN "has imposed involuntary fees and payments that are the private equivalent of [I]nternet taxes" in connection with domain registrations, and argues that the JPA represents a check on this.218 Like the IGP, Auerbach characterizes ICANN as "captured by a few incumbent and privileged 'stakeholders'"—and, more specifically, as "a servant of the intellectual property and domain name registry interests."219 But, for Auerbach, the continued presence of the U.S. government in the Internet governance equation remains critical because ICANN, no longer tethered to the JPA, appears theoretically and legally unmoored. He states, "The JPA represents one of the few 'chains of title' that ICANN has for its authority. In the absence of the JPA real questions can be raised about ICANN's legitimacy .... If the JPA were to vanish would that authority also vanish? If not, why not?"220

This uncertainty about the nature and legitimacy of a post-JPA ICANN similarly confounds others. The Center for Democracy and Technology also wants the U.S. government out of Internet regulation, yet fears that an ICANN operating without the U.S. government behind it would be susceptible to capture by other governments.221 The Center argues that "[t]o eliminate the U.S. [g]overnment's role as a backstop in the ICANN process without a clear understanding of the repercussions of such a move would subject the stability and security of DNS to an unacceptable level of risk."222 The government of Canada likewise suggests that, while discussion of the process for achieving privatization of

and issue a report with a recommendation to [DOC] regarding whether the proposed changes should be authorized.” Id. app. A. According to IGP, such responsibilities “are crucial to the operation of the Internet, and their delegation to ICANN by the [U.S.] government is what gives ICANN all of its policy leverage over the Internet.” Milton Mueller, Iain’t a Giving Up IANA, IGP (Aug. 22 2006), available at http://blog.internetgovernance.org/blog/_archives/2006/8/22/3340286.html.


219. Id. cmt. 3.

220. Id. cmt. 5.

221. Id. cmt. 6.

222. See Center for Democracy and Technology, supra note 200, at 8.

223. Id.; see also Letter from Emily Hackett, Executive Director, Internet Alliance, to Suzanne R. Senne, Office of Int’l Aff., NTIA (Feb. 6, 2008), available at http://www.ntia.doc.gov/ntiahome/domainname/jpacomment_029 (reflecting concerns of the on-line business community that ICANN “has not yet identified a way to ensure long-term procedural transparency or protect against undue commercial or governmental interference”).
ICANN should be pursued, there first would be required “an understanding of, and buy-in for, how ICANN is to operate and evolve in the absence of the current form of U.S. government oversight”—that is, a “clearer vision . . . of what ICANN will look like and how it will work.”

In the face of all of this, ICANN itself emphasized the apparent consensus “to see the process of transition proceed,” and that “the majority of people are still seeking the transition . . . and looking for a debate on how to get there.” ICANN also observes that “[o]ver 100 separate submissions clearly request the conclusion of the JPA or assume its conclusion within its term in September 2009.” The NTIA, however, while recognizing that “ICANN has made significant progress,” found that the majority of commenters “agree that important work remains to increase institutional confidence” by boosting “accountability” and “stakeholder participation.”

Aptly characterized by one observer as “a so-so assessment of ICANN’s performance,” the NTIA indicated that it “remains fully committed to the 2005 U.S. Principles on the Internet’s Domain Name and Addressing System.”

It thus appears that the U.S. government’s unilateral control over the DNS will remain the defining reality of Internet governance for the foreseeable future.

IV. PUBLIC-PRIVATE GATEKEEPERS AS GLOBAL REGULATORS: LEGITIMACY AND ACCOUNTABILITY

Bond markets and the Internet would appear at first blush to have little to do with one another from a regulatory perspective. Yet, close examination of the private entities discussed above reveals striking similarities that have much to say about the nature of these global

226. Id. at 3.
227. Id.
230. NTIA, supra note 228.
marketplaces, as well as the motivations and interests of the U.S. government.

The foregoing discussion has already revealed several similarities, both in terms of market structure and in terms of regulatory use of private entities. Both the major bond rating agencies and ICANN represent pre-existing private modes of ordering that were later incorporated into public regulatory structures. Both possess power to define the terms of acceptable public policy, which power is effectively delegated to them by a public regulatory authority. As a result, each stands as a form of "gatekeeper" to a substantial global marketplace. Yet, both remain answerable to the public authority granting such power, insofar as those authorities have each reserved the ability to withdraw it. Understandably, each of these regimes has given rise to concerns regarding the legitimacy and accountability of the entities so empowered, as well as objections to the exercise of such power by private actors vis-à-vis sovereign governments.

Setting aside for the moment the nagging theoretical questions of legitimacy and accountability, it is worth pausing to consider how it is that these U.S.-based actors have such global impact. After all, they are not formally given power to create global public policy; the ambit of their legal power presumably cannot exceed that of the government agencies to which they are linked. The answer to this question lies, first, in the fact that, in each case, the subject of regulation represents a form of "chokepoint" within the given market. This is more clearly the case with ICANN, which controls the structural mechanism ensuring that each Internet name and address in the world is unique—a function that quite straightforwardly requires a single global authority. But, in a sense, credit ratings, though fundamentally informational, actually perform a similar structural function in bond markets. David Beers of S&P, for example, has observed that bond markets have been built to some degree on a "common language of credit risk that we at S&P helped to invent." But, in a sense, credit ratings, though fundamentally informational, actually perform a similar structural function in bond markets. David Beers of S&P, for example, has observed that bond markets have been built to some degree on a "common language of credit risk that we at S&P helped to invent." This may not be a literal requirement for bond markets to

231. Although the rating agencies and ICANN might be distinguished in that the agencies are for-profit entities while ICANN is a non-profit entity, the distinction is more apparent than real. As observed above, ICANN is, in fact, dominated by for-profit commercial interests. Similarly, they might be distinguished in that there are multiple rating agencies, giving rise to the potential for competition, whereas ICANN holds monopoly power over the DNS. Again, however, their circumstances are not really so different. In light of market demand for two ratings, the Big Two are considered a "dual monopoly." See Abdelal, supra note 8, at 170 (internal quotation marks omitted); see also Coffee, supra note 38, at 35, 286–87; Kerwer, supra note 103, at 44.

232. Froomkin has used this term to describe the DNS. Froomkin, supra note 133, at 21. 233. See id. at 20–21.

function in the way that some form of DNS is literally required for the Internet to function, but nevertheless "a common language of credit risk" greatly facilitates bond trading by permitting simplified apples-to-apples comparisons.235 In each case, as a matter of history, these were the systems that evolved first to regulate these chokepoints—Big-Two credit ratings for the bond markets, and the DNS for the Internet.

Second, it should be observed that, in each case, a certain critical mass of the "global" market arguably exists within the United States, which reinforces the salience of U.S. regulation around the world. According to McKinsey, the United States remains "the major hub in global capital markets," with financial assets of $56.1 trillion in 2006, accounting alone for "nearly one-third of the global total."236 And, likewise, of the Internet's thirteen root servers, eight of them are located solely within the United States,237 and Internet usage rates remain higher in North America than elsewhere.238

There is obviously no legal impediment to bond issuers—including sovereigns—systematically writing off U.S. investors, but doing so would mean ignoring a large chunk of the global market. And, of course, the effects of U.S. reliance on ratings-dependent regulation are felt elsewhere as well, due principally to the dominance of the U.S. rating agencies over their much more recently created competitors in other countries.239 Likewise there is no legal impediment to creating a new Internet with its own naming and addressing system not bound to ICANN's DNS—or, for that matter, "splitting the root," as would occur if one or more of the thirteen root servers in the existing Internet were simply to split off and stop tracking the primary server under U.S. control. However, there is naturally a very strong aversion to taking such a step, which would cut off those departing from access to the rest of the

235. Cf. Abdelal, supra note 8, at 171 (observing "the expectation that every security issued will come with two ratings, one as a sort of reality check for the other"); see also Abdelal & Bruner, supra note 33, at 6 (noting that, according to S&P's Marie Cavanaugh, "part of S&P's 'value-added is that an A is an A is an A' across sectors and regions").


239. See, e.g., King & Sinclair, supra note 83, at 357 (observing that expansion of ratings-dependent regulation through the Basel II capital adequacy standards for banks is good for the incumbent U.S. agencies because "few actors are in a position to provide this service in a timely fashion other than the major [U.S.] rating agencies"); Sinclair, Global Monitor, supra note 58, at 148 (observing that the "New York-based rating agencies have grown rapidly to meet demand from . . . newly disintermediating capital markets" in Europe and Asia).
existing Internet, and which would greatly diminish the network externalities that make the Internet so valuable as a truly global resource.  

It is indeed difficult to describe the relationship of such entities to their sponsoring government—and the legal consequences of that relationship—in a satisfying way, due to the fact that the form of authority that they represent comfortably fits neither the conception of the “State” nor the conception of the “market” described at the outset of this Article. 240 Our unease in describing these entities often expresses itself in the use of imprecise relational terms, such as when we describe them as “merging into” public authority, or “hybridizing” public and private authority, or “supplementing” them, 241 or even when—as I have done here—we describe them as “gatekeepers” to a marketplace. To clarify, I do not use the term “gatekeeper” in the broader sense in which it is often used. John Coffee, for example, uses the term in the securities context to describe “professionals on whom investors necessarily depend to provide certification and verification services,” including auditors, analysts, investment bankers, corporate attorneys, and credit rating agencies. 242 In this respect, each represents a form of “reputational intermediary ... lending or ‘pledging’ its reputational capital” to those seeking access to capital markets. 243

Notwithstanding this broader use of the term, however, Coffee rightly observes that there is something very different about this particular type of gatekeeper; given the agencies’ role in regulation, “an NRSRO can sell its services to issuers, even if the market distrusts the accuracy of its ratings,” because the agencies are in fact selling

---

240. See Frankel, supra note 148, at 453–56; Froomkin, supra note 133, at 45–46, 181–82; Sonbuchner, supra note 143, at 203–04; see also Geer, supra note 135, at 142–43 (observing that the “network externality” effect—that is, the added value redounding to existing members of a network as new members join—“has been the driving force behind the Internet, which has become more and more useful as the number of people connecting to it has grown”); Froomkin, supra note 133, at 39 (observing the existence of “a large number of ‘alternate’ TLDs that are not acknowledged by the majority of domain name servers,” and thus visible only to those capable of reconfiguring their own computers to find them); Solum, supra note 149, at 26 (“Given any arbitrary number of users, root service is more valuable if all of the users patronize the same root, and as a consequence, root service is less valuable if the same users divide their patronage among two or more competing roots.”).

241. See supra Part I.

242. See, e.g., Cutler et al., supra note 14, at 18 (characterizing such authority as “merg[ing] into” public authority); Cutler et al., supra note 15, at 368 (referring to “a hybrid of both public and private authority relations”); Keohane & Nye, supra note 6, at 24 (characterizing ICANN as a government-related entity that “supplements” the market).


compliance with regulation.245 "This is a power," Coffee concludes, "that no other gatekeeper possesses."246 Indeed, while auditors and stock exchanges similarly play regulatory roles in the securities markets, it is critical to observe that the SEC has been given explicit statutory authority and responsibility to regulate the substantive methods and rules according to which they do their work,247 introducing a measure of public accountability. This stands in stark contrast to the rating agencies, for which Congress has explicitly denied the SEC such authority.248 Frank Partnoy has similarly emphasized the agencies' special regulatory status (in his "regulatory license" hypothesis), adding that, financially speaking, "the credit rating agencies and other gatekeepers have been moving in opposite directions," and that the rating agencies possess a First Amendment defense unavailable to "other gatekeepers."249 This, again, stands in stark contrast to auditors, who have historically faced substantial accountability through the courts.250

As I use the term, rating agencies are "gatekeepers" in that—unlike auditors, analysts, investment bankers, corporate attorneys, stock exchanges, and others—they literally regulate admission to bond markets, and possess the power to articulate public policy in so doing, with no straightforward form of accountability to constrain them. Similarly, ICANN can be described as a "gatekeeper"—in the more specific sense in which I use the term—in that it literally regulates admission to cyber-

245. See Coffee Senate Testimony, supra note 101, at 8.
246. Id.; see also COFFEE, supra note 38, at 104, 284, 326–27; Bruner & Abdelal, supra note 50, at 192; Partnoy, supra note 40, at 698 (characterizing the agencies, in light of ratings-dependent regulation, as "the gatekeepers to the bond markets" (emphasis added)).
247. See 15 U.S.C.A. §§ 77s(a)–(b), 77m(b) (West 2008) (giving the SEC authority to prescribe accounting methods); 15 U.S.C.A. § 78s(b)–(c) (West 2008) (giving the SEC authority to approve and amend rules of self-regulatory organizations, including stock exchanges). Although the SEC has historically recognized accounting standards established by the Financial Accounting Standards Board as "generally accepted" for securities law purposes, this recognition does not limit the SEC's statutory authority. Sec. & Exch. Comm'n [SEC], Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Release Nos. 33-8221, 34-47743, IC-26028, FR-70, n. 5 (Apr. 25, 2003); see also COFFEE, supra note 38, at 134. For a discussion of the "self-regulation" concept and the relationship between stock exchanges and the SEC, see generally Onnig H. Dombalagian, Self and Self-Regulation: Resolving the SRO Identity Crisis, 1 BROOK. J. CORP. FIN. & COM. L. 317 (2007). Dombalagian observes that "the concept has endured because lawmakers have generally regarded self-regulation to be a practical and efficient way to outsource the burdens of regulation to the private sector," but that "Congress and the Commission have reacted to public lapses in confidence by expanding the scope of self-regulatory responsibility and the Commission's oversight over SROs." Id. at 323 (emphasis added).
249. Partnoy, supra note 101, at 66, 81.
250. See COFFEE, supra note 38, at 152–56, 302–03.
space, likewise possessing the power to articulate public policy in so doing, and likewise facing no straightforward form of accountability.251

In fact, the rating agencies and ICANN possess what can only be described as a third category of power that is synonymous with neither state power nor with market power. Perhaps paradoxically, they cannot properly be categorized as possessing “soft power” operating through persuasion,252 or as inhabiting a mere “soft law” regime,253 because they are not directly subject to market discipline when their reputations falter; the objects of regulation themselves are subject to a form of binding legal compulsion. Yet, by the same token, the agencies and ICANN themselves cannot properly be said to possess “hard power” to compel,254 or to possess a true public mandate rooted in “hard law,” because in each case their judgments are transmuted into rules by a distinct and separate public authority that—at least in theory—could cease to recognize them at any time. Ironically, these entities inhabit an environment in which they can rest assured that their decisions will have automatic, binding effect through no direct agency of their own.255 To the extent that they rely on any external assessment of their performance, it is that of the State, not the market—but of course the State may assess their regulatory utility by criteria extrinsic to the true quality of their performance, as suggested above and explored more fully in the final Part of this Article.

State authority and market authority, as described at the outset, are animated by very different sources of legitimacy—the potential for political discipline on the one hand, and the potential for reputational discipline on the other. It is critical to observe, however, that for the agencies and ICANN, combining attributes of the State and the market has not resulted in a combination of sources of legitimacy somehow greater than the sum of the parts. In fact, as the foregoing analyses demonstrate, the result has been quite the opposite; state-based and market-based forms of legitimacy mingled in the same entity not only fail to reinforce one another, but actually undercut one another. In each case, an

---

251. See Froomkin, supra note 133, at 20–23.
252. See Keohane & Nye, supra note 25, at 86.
254. See Keohane & Nye, supra note 25, at 86.
255. See Bruner & Abdelal, supra note 50, at 208 (observing that rating changes and methodological changes are “essentially given automatic effect through pre-existing regulatory recognition”); Frankel, supra note 148, at 457–59 (arguing that ICANN resembles neither the State nor the market, and observing that ICANN’s contracts “include a provision that requires parties to a contract with ICANN to comply with ICANN’s future policies”); Froomkin, supra note 133, at 95 (observing that ICANN denies possessing regulatory power because “root servers not run by or under contract to the U.S. government could at any time choose to point to a different root”).
ostensibly private entity’s ability to claim the endorsement or reputa-
tional mandate of the relevant market is undercut by the fact that its
decisions take automatic, binding legal effect over that marketplace.
And, likewise, its ability to claim the legitimacy of a political mandate is
undercut by the sponsoring government’s effort to characterize the regu-
latory regime as a creature of a wholly distinct and separate private
sector.  

V. HEGEMONY AND SOVEREIGNTY

Apparent paradoxes often have more to tell us about the limitations
of our interpretive and perceptual frameworks than about the actual real-
ity of the situation we observe. In the case of these public-private
gatekeepers, I believe that the key to understanding their nature and role
lies in close examination of the sponsoring government—that of the
United States.

A. International Law, Domestic Law, and Hegemonic Power

As Peter Malanczuk observes, the idea of sovereignty first arose “as
an attempt to [analyze] the internal structure of a [S]tate.” The sover-
eign was conceptualized as a possessor of “supreme power” who “was
not himself bound by the laws which he made.” Today, of course, as
used in international law, the term means little more than that a given
State is “not a dependency of some other [S]tate.” But the more in-

256. Cf. Frankel, supra note 148, at 459 (arguing that ICANN’s ability to enact binding
rules is problematic because “ICANN is not constituted like the Congress, and is subject to far
fewer accountability measures than either a private sector or a public sector corporation”); Kerwer,
supra note 103, at 45–46 (arguing that when “third party enforcement is . . . justified
by the legitimacy of expertise,” as with the rating agencies, “the standard setter acquires power
by third-party enforcement, which is not checked by corresponding accountability”); From-
kin, supra note 133, at 29–30, 142, 159 (“In addition to avoiding governmental accountability
mechanisms, ICANN lacks much of the accountability normally found in corporations and
nonprofits.”); Ruth W. Grant & Robert O. Keohane, Accountability and Abuses of Power in
pation” model of authority, in which performance is judged “by those who are affected by
their actions,” and the “delegation” model, judged “by those entrusting them with powers,”
and observing that these models “lead to different strategies and mechanisms for accountabil-
ity, because they are grounded in different notions of legitimacy”).

257. See, e.g., OXFORD ENGLISH DICTIONARY ONLINE, paradox, n. and adj., 2.a (Draft
parently absurd or self-contradictory statement or proposition, or a strongly counter-intuitive
one, which investigation, analysis, or explanation may nevertheless prove to be well-founded
or true.”).

258. Malanczuk, supra note 1, at 17.

259. Id.

260. Id.
wardly focused association of statehood with unbridled power that the term connoted in earlier times remains evocative today in discussing the role of hegemonic powers.

Regime theorists posit that States enter cooperative arrangements with other States when they expect to be “better off with the regime than without it.” The push for cooperative regimes has been particularly strong in the economic arena, where Dani Rodrik has identified a “political trilemma of the world economy”:

If we want true international economic integration, we have to go either with the nation-state, in which case the domain of national politics will have to be significantly restricted, or else with mass politics, in which case we will have to give up the nation-state in favor of global federalism.

To be clear, Rodrik does not posit that the options are in fact so limited; the crucial point is the sacrifice of autonomy that economic globalization generally requires. To the extent that “the rules of the game are set by the requirements of the global economy, the ability of mobilized popular groups to gain access to and influence national economic policymaking has to be restricted.”

The corollary of the claim that States will cooperate when it benefits them, however, is that they will not cooperate when they believe that it will not benefit them—a situation that one might expect to arise with greater frequency in the case of powerful States. Indeed, as Grant and Keohane observe in their study of modes of accountability in global politics, the “most complex issues arise with respect to very powerful [S]tates,” as “there is no strong international legal structure governing their actions,” and they “often resist international legal accountability.”

In this light, the role of the rating agencies and ICANN in the global economy is perhaps best understood as an expression of the deep ambivalence of a hegemonic power—the United States—with respect to both international economic integration, and international law more generally. Nico Krisch has observed that international law has always been

261. See, e.g., Keohane, supra note 20, at 336.
262. Rodrik, supra note 73, at 352–53 (emphasis omitted).
263. Id. at 353–54.
265. Andrew Guzman’s rational choice model of international law, though primarily aimed at explaining compliance with existing obligations in the absence of enforcement, similarly suggests that “[S]tates will only enter into agreements when doing so makes them (or, at least, their policymakers) better off.” See GUZMAN, supra note 2, at 121; see also id. at 8, 165. Although Guzman focuses on the benefits of maintaining a “reputation for compliance” with existing obligations, i.e., the ability “to make and elicit credible commitments,” he acknowledges that a “[S]tate may want a reputation for . . . any number of other things,” id. at 115,
double-edged from the perspective of hegemonic powers, for which the benefits of lending legitimacy and stability to a preferred vision of the international order come at the cost of constraining the hegemon's autonomy. The consequence, Krisch argues, is that "dominant [S]tates' policies towards international law will oscillate between two poles: instrumentalization of and withdrawal from international law." One expression of this ambivalence is the "push for greater hierarchy" in international institutions—such as the Security Council structure in the United Nations, and weighted voting in multilateral financial institutions—which permits powerful States "to make law merely for others, without being bound themselves." A similar trend emerges in the proliferation of "soft law" standards—like those promulgated by the OECD and the Basel Committee on Banking Supervision—in which well-endowed governments like the United States loom large. Rawi Abdelal has similarly observed the difference between the United States' preference for "ad hoc" globalization and the European preference for "managed" globalization—the former leaving the United States unconstrained by binding multilateral rules. As Abdelal points out, both are perfectly rational preferences for their adherents. "Ad hoc globalization," however, is the approach that "befits the United States' hyperpower and its narrow economic ambitions."

Importantly, however, the hegemon's preference for hierarchy and autonomy expresses itself not only through its level of engagement with international law, as such, but also through strategic use of domestic law. Krisch observes that the domestic law of a hegemonic State can gain traction outside its borders where there is "political or economic dependence," in which case "other [S]tates de facto have no choice but to follow it." For the United States, one notable example would be placing con-

which might reasonably include a reputation for engaging in cooperative approaches to transnational regulatory problems by entering mutually beneficial agreements. In this light, the U.S. effort to preserve centralized power while cultivating the perception of market-based private ordering that I identify in its regulatory use of the rating agencies and ICANN may reflect an effort to maintain unilateral power while minimizing damage to its reputation for engaging in cooperative regulatory efforts.

267. Id. at 379.
268. Id. at 398.
269. Id. at 398–99.
271. See id.
272. Id. at 220.
273. Krisch, supra note 266, at 400.
ditions on “market access.” Krisch additionally observes the role of private actors in disseminating U.S.-centric standards and practices abroad, identifying both the rating agencies and ICANN as examples. Krisch describes these entities as instances of the “privatization of international rule”—a characterization that, as described above, points the causal arrow in the wrong direction—and does not address the nature of their positions under U.S. law in any detail. But, in any event, Krisch rightly observes that the United States’ use of conditions to market access amplifies the effects of its domestic law globally.

In this light, I believe that the rating agencies and ICANN—understood through the lens of their roles under U.S. domestic law—can usefully be conceptualized as another expression of the United States’ preference for preserving hierarchy and autonomy in an environment of economic globalization. As Oded Löwenheim has argued in the ratings context, the incorporation of private-sector ratings by powerful States into their own decisionmaking permits those States “not only to shape the conduct of the examined States, but also to [legitimize] this effort by referring to allegedly objective and technical benchmarks and evaluations.” This permits indirect regulation—or regulation “at a distance,” as Löwenheim puts it, obscuring the hegemon’s power by permitting it to issue instructions to less powerful States “without being responsible for them.” ICANN, likewise, reflects a desire to rule “at a distance.” As Tamar Frankel has observed, ICANN’s ambiguous legal status and relationship with the U.S. government reflect the combination of external pressure on the United States to “internationalize” the DNS and its simultaneous desire to preserve its own power over the Internet.

274. Id. at 402; see also Sinclair, Between State and Market, supra note 39, at 461 (speculating that as issuers access U.S. bond markets, “hegemonic norms and values” congenial to the United States would spread globally via rating agency judgments). On controversies surrounding the extraterritorial application of domestic law more generally, see Bederman, supra note 10, at 191–94.


276. Id. at 407.

277. Cf. Abdelal, supra note 8, at 9 (“The dominance of S&P and Moody’s epitomized this ad hoc globalization, an internationalized finance without multilateral rules.”).

278. Löwenheim, supra note 74, at 266.

279. Id. at 267–68; see also Sinclair, The New Masters of Capital, supra note 39, at 147 (arguing that rating represents “a feature of developed country ‘government-at-a-distance’ over developing countries’); Bruner & Abdelal, supra note 50, at 208–09 (observing that the rating agencies are “in a position to tell other governments what to do and how to conduct their economic policies in a blunt vocabulary unavailable to the U.S. government”).

280. See Frankel, supra note 148, at 453, 481; see also Froomkin, supra note 133, at 105–06, 120–25, 168–69 (arguing that through ICANN, DOC has attempted to “quasi-privatize the DNS in a manner that allows the United States to retain ultimate control of the root zone file but achieve deniability about everything that its agent or delegate does with day-to-day control”).
B. Bond Markets and the Internet in the Twenty-First Century

This depiction of the power of public-private gatekeepers and the regulatory posture of the United States ought to give pause to U.S. policymakers, because the conditions ultimately giving rise to this form of power are not entirely under U.S. control. While a critical mass of each marketplace—the bond markets and the Internet, respectively—may reside within the United States today, there is no reason to think this will always be so.

Even though Internet usage rates are thought to be considerably higher in North America as a percentage of population, growth rates are believed to be considerably higher elsewhere; the world growth rate in Internet usage is reportedly more than double that in North America. 281 This suggests that the United States may not long possess the clout that it currently does in Internet regulation. Indeed, Viktor Mayer-Schönberger and Malte Ziewitz have argued that the United States was too hasty in rejecting the European Union’s proposal at the 2005 WSIS to internationalize Internet governance. 282 As they point out, the European Union essentially proposed an international organization built on "fundamentally Western, liberal values," which would have had the effect of "uniting the West and putting pressure on nations like China to choose between internationalized governance embodying liberal values or a continuation of U.S. control." 283 Such a "constitutional moment" should not have been squandered, they argue, given that "[a]s the Internet community becomes less dominated by Western users, the pressure to internationalize governance will grow, thereby potentially tipping the United States into a defensive posture without prospects of victory." 284

The situation is similar with the rating agencies, which have been the subject of growing impatience around the world. Just as Internet usage is growing in leaps and bounds outside the United States, so are capital markets. While U.S. financial assets represented almost one-third of the global total in 2006, according to McKinsey, the combined capital markets of the Eurozone, the United Kingdom, and other countries in Western Europe are "nearly equal," and their "combined financial market depth is increasing faster." 285 Various "financial hubs" are also gaining momentum across East Asia, and London now vies with New York as the

281. See INTERNET WORLD STATS, supra note 238.
283. Id.
284. Id.
285. FARRELL ET AL., supra note 236, at 29. McKinsey notes that the Eurozone’s "corporate debt market is growing rapidly, and government debt has remained steady or even decreased in some countries." Id.
principal global financial center.\textsuperscript{286} To date, there has been no serious effort to force the United States' hand in terms of the regulation of credit rating agencies, although this may be changing. Other governments have vocally taken issue with the perceived U.S.-centric views of the agencies, and the International Organization of Securities Commissions (IOSCO) has issued a voluntary code of conduct for the agencies.\textsuperscript{287} The European Union, for its part, appears poised, as of this writing, to push beyond voluntary self-regulation. The E.U. Commissioner for Internal Market and Services, Charlie McCreevy, characterized the IOSCO code as "a toothless wonder" and stated that "meaningful but targeted regulatory measures are now necessary for rating agencies operating in the structured credit markets in Europe, including registration, external oversight and much better internal governance."\textsuperscript{288}

Arguably, the United States would do best to negotiate a consistent multilateral approach to such issues while it possesses considerable leverage—for the simple reason that deferring too long would seem to increase the risk of a long-term regime less amenable to U.S. interests. In explaining why the United States declined to take advantage of the "constitutional moment" offered by the European Union in the Internet realm, however, Mayer-Schönberger and Ziewitz identified the defining political challenge that the United States faces in dealing with the future of these markets. In particular, they attribute the U.S. veto of the European Union's plan not only to opposition by organized domestic


constituencies (U.S. law enforcement, "domain name stakeholders," and telecommunications companies), but also to the fact that the European Union’s proposal arose “at a time when the United States [was] reevaluating its commitment to international law in particular and intergovernmentalism in general.”\textsuperscript{289} Considered amidst U.S. rejection of a number of other multilateral initiatives, \textit{e.g.}, the Kyoto Protocol and the International Criminal Court, these authors concluded that “conservative voices” in the United States “have succeeded in undermining the stature of international law in the public discourse, even among elites.”\textsuperscript{290}

In this light, it remains exceedingly difficult to predict how long public-private gatekeepers like ICANN and the rating agencies might persist; their fortunes are bound up not only with the future of economic globalization, but also with changing currents in American politics and foreign policy.\textsuperscript{291} However, of two things we can be certain. Given the practical and theoretical problems associated with them, “public-private gatekeepers” of the sort described in this Article represent inherently unstable—and unsustainable—modes of governance. And, given apparent trends in the relevant global marketplaces, deferring the development of long-term governance regimes for what have become global markets means—by hypothesis—that those regimes will be designed at a point in time when the United States possesses less leverage than it does today.

\begin{flushright}
\textsuperscript{289} Mayer-Schönberger & Ziewitz, \textit{supra} note 173, at 217–21.
\textsuperscript{290} \textit{Id.} at 220–27.
\textsuperscript{291} See Adrian Wooldridge, \textit{A Special Report on America and the World: After Bush}, \textit{Economist}, Mar. 29, 2008, at 3 (identifying “two Americas” in terms of foreign policy generally, one relatively unilateralist and the other relatively multilateralist).
\end{flushright}