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Konstantinos Komaitis
University of Strathclyde in Glasgow, Scotland

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Aristotle, Europe and Internet Governance

*Konstantinos Komaitis**

I. INTRODUCTION

How would Klemens von Metternich,¹ the 19th-century Austrian Chancellor, react to the problem of Internet governance? As part of his diplomatic mandate, he was the brain who orchestrated the “Concert of Europe”—a system by which four or five big powers ensured stability in what was then Europe and managed the affairs of smaller states.

Now, the strains of a similar performance are reverberating in the heads of governments and policy-making initiators. This time the players come from the whole world, and there is a change in tune. Metternich’s concert defended imperial regimes from liberals; the new music’s motif is that all regimes are required to find a mutual ground of coordination, policy-setting and cooperation. Such cooperation will aim at fostering a new structure for the Internet and will be termed “Enhanced Cooperation.”

Such talk reflects the frustration of various states over the totalitarian control of the Internet by the United States, and the inability of existing groups, such as the United Nations (UN) and the Internet Corporation for Assigned Names and Numbers (ICANN) to do their assigned jobs. Whether this is due to unwieldy rules or because of conflicting interests, the current array of international institutions seems to not be able to resolve the issue of how the Internet should be governed. At its most utopian, “Enhanced Cooperation” would be an institution to trump all institutions: a global club, not monopolized by America, that would set a regulatory and policy framework for the Internet. Some countries oppose it,¹ while others take a more reluctant approach and seem to be willing to wait for the mechanism to prove itself.²

Designing an uncontroversial framework for Internet Governance is a difficult task. Realistically, there will always be states that are more developed than others; states that are more influential and possess the means to enforce their will. And, because the Internet needs technical infrastructure for its operation and the private sector for its evolution, states that can support such infrastructure and encourage innovation will inevitably prevail. No matter how plausible it is for the Internet to continue to expand its capabilities, its global nature and application creates a public demand that everyone, anywhere in the world should be able to use and take advantage of its potential. Developing and small countries begin to

* Konstantinos Komaitis is a lecturer at the Law School at the University of Strathclyde in Glasgow, Scotland.

1. Countries such as China and the United States have expressed their opposition to the European Proposal.

2. Developing countries seem to be welcoming this idea, but with some reservations.

demand their lion's share on the Internet; they seek ways to become more involved and make their voices heard. The question is how this can be achieved. If indeed the conclusion of the World Summits on Information Society (WSIS) is that governmental intervention is necessary for policy-setting, it would be naïve to expect all governments to agree on how to regulate aspects of the Internet.

Cultures will clash and extreme political views will influence the negotiation process. Concerns over human and civil rights, religion, feminism and discrimination will hinder any attempt to consolidate the political views of the states of the world. What the WSIS and the subsequent Internet Governance Forum (IGF) have made clear is that the participating actors are willing to discuss, but not necessarily compromise, and that all affected parties want to advance their own agendas. However, ICANN's contract with the U.S. Department of Commerce is about to expire³ and there seems to be hesitation for its renewal. The WSIS set in motion an irreversible chain of public and private relations and distributed the roles to the appropriate players: the private sector to support the evolution and expansion of the Internet, and the governments make policy decisions. Civil society will provide the required balance and prevent the political exploitation of the Internet, while ICANN will remain as the medium's technical coordinator. One way for governments to achieve a degree of cooperation, communication and participation in this policy-setting is through the process of "Enhanced Cooperation."

II. THE ISSUE OF INTERNET GOVERNANCE

Internet Governance is the most debatable issue of recent times. The issue emerged as soon as it was realized that the Internet is able to offer global skills of communication and options for free trade. Up to this point, the Internet was unregulated, ungoverned and anarchic; however, bizarrely enough it was working well. However, electronic commerce and property rights created the need for some sort of regulation that would be able to guarantee a democratic process based on rules and principles by which interested parties would have to abide.

At this point, it is essential to separate the concept of governance *of* the Internet and governance *on* the Internet. This division is based on the presumption that the Internet by nature depends upon two different facts: the technical features of its administration and the policy-making aspect. This partition also allows simplification of the impact of the Internet to cover issues of content—governance *on* the Internet—and infrastructure—governance *of* the Internet. Both concepts of governance create problems for traditional interpretations of International Relations. Social aspects of global communication are

3. "This Agreement will become effective upon signature of ICANN and the Department, and will terminate on September 30, 2009". For more information, see NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (NTIA), JOINT PROJECT AGREEMENT, Sept. 29, 2006, available at http://www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/ICANNJPA_09292006.htm.

raised by the infrastructure of the Internet, and economic aspects of global electronic commerce bring to light issues of content on the Internet.⁴ This definitional duality enables people from different conceptual backgrounds to understand the functionality of the medium.

The Internet's features challenge traditional patterns of authority in the Information Age. These features can be simply defined as connectivity, interactivity and hypertextuality. The combination of these three features is what makes the Internet a unique medium, which goes beyond the grasp of what humans have experienced or anticipated, and has the potential to redefine international affairs. For example, "netizens" can interact globally, in a very fast way, disregarding the boundaries valued by states. Communication is not simply a material good; instead, it is the essence of every democracy and a feature that the Internet is able to offer in abundance.⁵

Unlike governance, Internet Governance is a more complicated issue. It shares the characteristics applied by governments, but the effects of these characteristics have dimensional repercussions. They affect both citizens and "netizens" and are most of the time predetermined. For example, when ICANN was being created and its bylaws being drafted, the people most affected by the new scheme were never consulted. Internet users found themselves in a position where, in order to exist on the Internet, they were forced to comply with a set of rules and procedures whose necessity and legitimacy could not be determined. Internet Governance flourished out of the anarchy that existed, in an effort to establish the principles that would ensure a more democratic framework. However, the outcome of the World Summits insinuated that the current model of Internet governance centers around a framework that seems to combine the elements of monarchy, oligarchy and plutocracy—rather than those of the much desired democracy.

III. THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)

The privatization of the Internet in 1998 was supposed to terminate the political influence of the United States over the medium. Its global application was obvious amongst foreign governments, which seized the opportunity to challenge America's authority over an international tool of information and commerce. The debate resulted in a consensus-based, middle-ground solution—the Internet Corporation of Assigned Names and Numbers (ICANN).⁶ This 'gentlemen's agreement' that the United States managed to secure from the international community was that the United States would initially oversee and

4. Jamal Shahin, *The Internet: A Case Study for Global Governance*, SWISS POL. SCI. REV., at 120 (1999).

5. *Id.*

6. For more information on the organization, its mandate and activities see <http://www.icann.org>.

support the corporation through the U.S. Department of Commerce, while seeking consultation and advice from foreign governments.

With the debate on Internet Governance still in progress, one cannot help but wonder whether all the failures that have been attributed to ICANN are unfair, because the question of Internet Governance is simply not a straightforward one. Essentially, ICANN was assigned the task of creating a 'community' where the States would open up their cultures to each other without losing their own identities. ICANN was expected to administer the Internet and provide political consolidation between the divergent approaches of all States. At the same time, ICANN was expected to expand the Internet and introduce it as a tool to developing countries. These are functions that are part of a governance structure and necessitate an appropriate framework for decision-making, but ICANN never had such a structure and was never meant to be involved in decision-making.⁷

However, ICANN has been severely criticized⁸ for many of its functions, mostly involving policy-making decisions. Among other things, ICANN's mistakes represent that the corporation is unable to resist the strong political pressures that influence the Internet. Some examples are the promulgation of the Uniform Domain Name Dispute Resolution Policy (UDRP), the addition of new generic top-level domains (gTLDs) and the fate of the .xxx gTLD. This is troublesome, considering that pressure is coming from the private sector as well, which assists in creating a split environment on the Internet and reinforces a sense of political conflict. Most of all, these mistakes demonstrate that the stakes are too high for ICANN to be solely responsible for the Internet. The evolution of the medium opened the gates to a tidal wave of political, cultural, legal and sociological issues that cannot be addressed by ICANN alone.

For this reason, Internet Governance has gone beyond ICANN and its ability to administer the Internet. Governments must be convinced that compromise does not necessitate loss of sovereignty. Key goals are setting policy, structuring a coherent framework and shaping the rules and norms for a community. ICANN can play its role as a technical authority and become subject to the new structure. In 2003, the 'Internet Governance brief' was opened, and it has resulted—for the time being—in a suggested framework of "Enhanced Cooperation."

7. "The White Paper articulates no Internet Governance role for ICANN, and the Initial Board shares that (negative) view. Therefore, ICANN does not 'aspire to address' any Internet Governance issues; in effect, it governs the plumbing, not the people. It has a very limited mandate to administer certain (largely technical) aspects of the Internet infrastructure in general and the Domain Name System in particular". Letter from Esther Dyson, Interim Chair of ICANN, to Ralph Nader, Founder of the Centre for Study of Responsive Law and James Love, Director of the Consumer Project on Technology, June 15, 1999, available at <http://www.icann.org/chairman-response.htm> (last visited May 3, 2007). See also, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, Nov. 25, 1998, available at <http://www.icann.org/general/icann-mou-25nov98.htm>.

8. For more on ICANN's criticisms, see Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000). See also, Milton Mueller, "ICANN and Internet Governance: Sorting through the debris of self-regulation" 1 INFO 477-500 (Dec. 1999).

IV. THE WORLD SUMMITS ON INFORMATION SOCIETY (WSIS)

Affirming the need for an Internet Governance structure at an international level, the formation of the WSIS was only the beginning of a dialogue that would ideally lead to a centralized, structured and coherent framework of Internet governance and structure.

The beginning was made in 2003, when the Geneva Summit committed: “*to strengthening cooperation to seek common responses to the challenges and to the implementation of the Plan of Action, which will realise the vision of an inclusive Information Society*”.⁹ The Geneva phase closed its doors with the promise that the next step would be devoted to the pivotal issue of Internet Governance and the efforts of the key actors to find ways to ensure the stability, evolution and security of the Internet.

In 2005, the Tunis Summit unraveled the areas that participants had to agree upon before proceeding to the resolution of more specific and central issues. First, the Summit provided a working definition of what Internet Governance entails, and reads as follows:

“Internet Governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet”.¹⁰

This definition acknowledges that the development and future of the Internet lies in the collective efforts of a divergent group of participants; however, each group should really be devoted to their own and unique role. The Tunis Summit also recognized the dynamic character of the Internet, and expressed the need to create a framework and mechanisms to deal with emerging issues of Internet Governance and the need to follow the exponential growth of the medium.¹¹ Moreover, the participants at the Summit recognized that Internet Governance is not limited to Internet naming and addressing—namely ICANN—and that the status of ICANN is only a small fraction of a much bigger issue. If the Internet is indeed a virtual place offering and allowing its users a range of activities, then it includes other issues with policy implications, such as security of communications, the development of Internet resources and the education of its users.¹²

In 2005, it became clear that the issues surrounding the debate on Internet governance would not be resolved unless an appropriate, transparent and

9. WORLD SUMMIT ON THE INFORMATION SOCIETY, DECLARATION OF PRINCIPLES: BUILDING THE INFORMATION SOCIETY: A GLOBAL CHALLENGE IN THE NEW MILLENNIUM, WSIS-03/GENEVA/DOC/4-E, Dec. 12, 2003, *available at* <http://www.itu.int/wsis/docs/geneva/official/dop.html>.

10. Tunis Agenda for the Information Society, WSIS-05/TUNIS/DOC/6(Rev.1)-E, ¶ 34, *available at* <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>.

11. *Id.* at ¶ 56.

12. *Id.* at ¶ 58.

democratic process was in place, with the participation of a divergent group of actors, governments, private sector, civil society and international organizations, each offering their experience and playing their unique role.¹³ The principle is that any attempt to structure successful governance should be “inclusive” and “responsive”, with the aim to create the appropriate circumstances for competition and innovation to flourish.¹⁴

Perhaps the most crucial recognition of the Summit can be seen in the acknowledgement that all governments should have an equally active role and responsibility for international governance,¹⁵ a premise which might pose problems to the current governance status, if we accept that ICANN is accountable to the United States Department of Commerce, which would automatically place the United States Government in charge of the Internet. Such a major task will be clothed under the notion of “Enhanced Cooperation,” a popular idea within the European Union. According to the wording of the Tunis agenda:

“We further recognise the need for “Enhanced Cooperation” in the future, to enable governments, on an equal footing, to carry out their roles and responsibilities, in international public policy issues pertaining to the Internet, but not in the day-to-day technical and operational matters, that do not impact on international public policy issues”.¹⁶

Despite agreement on important aspects, following the Tunis Summit there was still no consensus on the model that should finally be adopted, with cultures clashing and various interests playing a pivotal role during the negotiations. For this reason, it was decided that the debate will continue in the form of Internet Governance Forums, and that the WSIS would only be the beginning to a long and difficult process. The first IGF took place in Athens at the end of October 2006, and succeeded the promising Joint Project Agreement (JPA)¹⁷ between the United States Government and ICANN, which mentioned the ‘independence’ of ICANN in 2009. At the same time, Europe was promoting the “Enhanced Cooperation” action plan and was seeking allies. However, what does Europe

13. *Id.* at ¶61. According to the agenda, “*this process could envisage creation of a suitable framework or mechanisms, where justified, thus spurring the ongoing and active evolution of the current arrangements in order to synergise the efforts in this regard.*”

14. *Id.* at ¶ 62.

15. *Id.* at ¶ 68. In the same paragraph it was recognized that there is a “*need for development of public policy by governments in consultation with all stakeholders.*”

16. *Id.* at ¶ 69.

17. JOINT PROJECT AGREEMENT, *supra* note 3. However, according to Mueller, the JPA is a ‘cosmetic’ response to the comments that were received by NTIA that any form of governance on the Internet should be free of any governmental dominance. And, even though the JPA provides the perception that ICANN is independent, Mueller believes that the relationship between the two bodies remains fundamentally unchanged; he also asserts that the agreement has actually increased U.S. intervention. For Mueller’s analysis on the JPA, see http://www.internetgovernance.org/news.html#ICANNoldwine_093006, (last visited Jan. 11, 2007).

mean by “Enhanced Cooperation,” and how feasible is its application in the Internet Governance context?

V. EUROPE’S “ENHANCED COOPERATION”

The current status of Europe is shaped in a cultural manifestation, which expresses a way of government (democracy) and a way of life (liberty). The ancient Greek values of equal rights of birth (isogonia), before the law (isopoliteia), in the body politic (isonomia) and to freedom of speech (isegonia), underlie the virtue of Europe’s today: the democratic processes established through dialogue, collaboration, justice and respect of human rights.

The European Union inaugurates in history a multi-ethnic, multi-stake unity of equals that is not the result of the conquering successes of one of its members. We can safely argue that the EU is an entity that is multinational and geographically continuous, which is the outcome not of war, but of the aspiration to sustain peace and exercise good governance by consolidating and mincing divergent models of rule-making. Initially, this premise was met through economic arrangements, but currently it expands to other facets of governance, politics, law and culture.

Although the ‘unity dogma’ is widespread and constitutes the underlying principle behind any structural or decision-making policy within the Union, the differentiation between Member States is a taken-for-granted reality, which can potentially lead to diversity within the structure of the EU. Keeping this in mind, the European Union has accepted that Member States share different aspirations, and for this reason a certain degree of flexibility is required—a risky approach unseen in other multi-cultural and politically divergent alliances. This differentiation is prompted by different concerns and can acquire various forms. In its basic definitional approach, differentiation accepts the multi-ethnicity of the Union’s participants and respects their cultures. This task, albeit ambitious, is achieved through the appreciation that each Member State has a distinctive and indivisible nature, which should be valued. This *laissez faire* principle that Member States enjoy is widespread within the EU and constitutes the dogma behind the EU’s political deliberation. At the same time, it creates a certain degree of autonomy, which allows the EU and its members to collaborate towards achieving the ultimate goals of integration and uniformity.

In 1992, in light of the realization that the inevitable integration process would make unanimity possibly chimerical, the European Union changed its *modus operandi* and allowed a system with ‘ins’ and ‘outs’. Under this status, Member States had the opportunity to participate in specific policy objectives; nevertheless, Member States were given the option to ‘opt-out’ of such objectives with their voting rights being suspended, where these objectives were the issue. One example of this unique device is the political abstention of the United Kingdom and Denmark from joining the third phase of the monetary union, irrespective of the convergence criteria applicable to all Member States; this

asymmetric political decision did not alter the success of the third phase, and at the same time it allowed some Member States to act independently. However, it was the evolved principle of “Enhanced Cooperation,” which was first agreed upon in Amsterdam,¹⁸ reformed substantially in Nice¹⁹ and has now been codified in Articles I/44, III/416-423 CT,²⁰ that has permitted Member States an elastic approach that does not oppose the uniformity of the European Union.

The expansion of the European Union signaled the need for ‘reinforced cooperation’ between Member States as an initial step to secure Europe’s smooth and constant development. France and Germany took the lead in proclaiming that a system of “Enhanced Cooperation” would create the desire between Member States to collaborate and promote various agendas like environmental protection, the fight against crime, the development of common immigration and asylum policies and the war against terrorism.²¹

In a fashion denoting clear signs of institutionalization, “Enhanced Cooperation” creates a ‘center of gravity’ within the European Union, whereby States will be able to proceed to a new European framework Treaty, establish their own institutions and form a unique social being that speaks with one voice. The idea is to use this ‘center of gravity’ as the foundation to achieve the ultimate cornerstone of political integration, which over the past few years has raised concerns over its feasibility. The expansion of the EU has manifested a divergence of interests amongst Member States and has caused problems in certain fields of EU policy. To this end, “Enhanced Cooperation” is meant to work as a magnet for various policy-setting agendas and encourage a collaborative spirit between states and other participating actors. Moreover, it also achieves two goals indirectly; first, it uses policy-making decisions as pilot schemes for further negotiation and development, and provides other Member States the incentive to participate in order not to feel excluded from the “foreseeable functional and political benefits.”²²

18. The Treaty of Amsterdam, signed Oct. 2, 1997, entered into force on May 1, 1999. It amended and renumbered the EU and EC Treaties. Consolidated versions of the EU and EC Treaties are attached to it. The Treaty of Amsterdam changed the articles of the Treaty on European Union, identified by letters A to S, into numerical form. See Treaty of Amsterdam amending the Treaty on the European Union, the Treaties Establishing the European Communities, 1997 O.J. C340/1, available at <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html>.

19. The Treaty of Nice was signed on Feb. 26, 2001 and entered into force on Feb. 1, 2003. It dealt mostly with reforming the institutions so that the Union could function efficiently after its enlargement to 25 Member States. The Treaty of Nice, the former Treaty of the EU and the Treaty of the EC have been merged into one consolidated version. See European Commission, Treaty of Nice, Feb. 26, 2001 2001 O.J. (C 80) 1.

20. Treaty establishing a Constitution for Europe (CT), Protocol No.13, art. 9: “The UK may notify the Council at any time of its intention to adopt the Euro.”

21. Eric Philippart, *A New Mechanism of Enhanced Co-operation for the Enlarged European Union*, RESEARCH AND EUROPEAN ISSUES, No.22 (Mar. 2003).

22. Timo Tohidipur, *Expansion of Closer Cooperation as Contra-Indication to the Idea of European Integration: A Critique of Joschka Fischer’s Speech and Guliano Amato’s Comment Thereon*, GERMAN L. J., Vol. 2, No. 14 (Sept. 2001).

This ‘Copernican Revolution’²³ in Europe manifests the multi-faceted personality of the Union. The system creates a paradox for a Union where uniformity is paramount. Nevertheless, the EU realized that the effort to deal with specific issues in specific situations, while meeting the objectives of the Union is a difficult task, and one where “Enhanced Cooperation” could provide a vital solution. Therefore, aside from substituting unanimity, the mechanism can work as a tool that takes account of objective differences, even if they are temporary. The second important element introduced via “Enhanced Cooperation” is that of competence. The exercise of the formula should not undermine the internal market or the economic and social cohesion; and, should not affect trade between Member States or distort competition. In a similar vein, “Enhanced Cooperation” should not be used unconditionally; fundamentally, it should respect the *acquis communautaire*²⁴ and aim to further the objectives of the Union and the process of integration.

From its early days, “Enhanced Cooperation” has shared a fair amount of praise and criticism regarding its ability to promote European integration. First of all, it can be argued that the concept of “Enhanced Cooperation” strengthens the Union from within. It appears as a pragmatic new institution, which permits limited asymmetrical progress in specific-content situations, especially where the Member States cannot agree on a uniform action plan. The principle allows flexibility where political diversity is an issue, always ensuring though that the main and principal objectives of the European Union are maintained.²⁵

One thing that should be kept in mind is that the European Union and the characteristics that justify its unique nature are a creation of law; accordingly, its foundation is based upon a combination of equality and neutrality—two key factors that have contributed to overcoming national differences between Member States and integrating them into the supranational legal order. At the same time, the Treaties set the boundaries of the effectiveness, enforceability and applicability of any action that takes place within the space of the European Union—the underlying principle is that there should not be asymmetry as dictated by the Treaty and the objectives of the EU. In line with this rationale, “Enhanced Cooperation” lies in between the ‘*hard federalist core*’ and the ‘*a la carte*’ logic. Under this logic, “Enhanced Cooperation” is characterized by geographic and thematic openness, while its application is *a priori* not limited to specific fields; this model is meant to provide abstract solutions of political action.²⁶

23. The Copernican Revolution refers to the paradigm shift away from the Ptolemaic model of the heavens, which placed Earth at the center of the Solar system. It was one of the starting points for the Scientific Revolution of the 17th Century.

24. The term *acquis communautaire*, or EU *acquis*, is used in European Union law to refer to the total body of EU law accumulated thus far.

25. Joachim Ahrens, “Enhanced Cooperation” in an Enlarged EU, Centre for Globalization and Europeanization of the Economy, University of Goettingen (Germany) (Centre for Globalization and Europeanization of the Economy (CeGE) Discussion Papers, No. 53, 2006).

26. Daniel Thym, *United in Diversity—The Integration of “Enhanced Cooperation” Into the European Constitutional Order*, 6 GERMAN L. J. 1731, 1732 (2005).

The system of “Enhanced Cooperation” is a notable achievement in the history of the European Union. It is conceived as an instrument of progressive integration open to all participants. It encourages and enables a group of actors to cooperate within the boundaries of set objectives rather than outside of them; and these actors enjoy the benefits of any existing infrastructure, while similarly, their citizens enjoy parliamentary and judicial guarantees. At the same time, non-participants are assured that their interests, and subsequently those of the Union as a whole will be protected, and the objectives of the Union safeguarded.²⁷

However, “Enhanced Cooperation” can create substantial obstacles and cause disruption if it does not remain within the limits of the powers of the Union and respect the competence, rights and obligations of those non-participating Member States. One of the drawbacks of “Enhanced Cooperation” is that the mechanism has not yet been suitable for major policy areas—only for specific acts. This issue is rather important, given that “Enhanced Cooperation” seems to be facing difficulties when it comes to performance control as to the respect of all Member States in major policy areas. Such performance control is obvious in the lack of mutual confidence in areas of police cooperation, or in the mutual appreciation of the stability criteria.²⁸

In a study compiled from expert opinions at parliamentary and official levels, Christian Deubner identified two dominant schools of thought. The first includes Member States “*who wanted to open the institutional framework for their own “Enhanced Cooperation” initiatives, thereby increasing their integration potential for all*”.²⁹ The second includes Member States who “*wanted to prevent future initiators of cooperation ventures from realising them outside the community*”.³⁰ According to Deubner, France and Germany fall into the first category and they are identified as “*makers rather than takers of integration, confident that they would always participate in the important groups of “Enhanced Cooperation” and have a decisive say in their creation*”.³¹ In the second category, Deubner places states with limited political influence, like the Netherlands, which view “Enhanced Cooperation” as a platform to air their own agendas, since “*because of their inferior weight and political means, or ability, could not hope to initiate such projects themselves and . . . wanted to gain a voice in defining the kind of initiative, which they have to follow*”.³² Finally, Deubner also identifies another category which includes countries like Spain and

27. Hungdah Su, *Politics of Differentiation: “Enhanced Cooperation” in the EU and the Pathfinder in APEC*, 5 ASIA EUROPE JOURNAL 51, 57 (Mar. 2007).

28. Christian Deubner, *Closer Cooperation in Tomorrow's European Union* (UCLA International Institute, UCLA Centre for European and Eurasian Studies, Occasional Lecture Series, Paper No. 7, 2006).

29. Christian Deubner, *Harnessing Differentiation in the EU: Flexibility after Amsterdam, A Report on Hearings with Parliamentarians and Officials in Seven European Capitals*, at 66 (July 1999). [Stiftung Wissenschaft und Politik, Forschungsinstitut für Internationale Politik und Sicherheit].

30. *Id.*

31. *Id.*

32. *Id.*

in which there is concern that “Enhanced Cooperation” could become a “*risk than an opportunity*” and could potentially lead to an abuse of discretionary powers.³³

Moreover, in a Memorandum to the House of Lords Report on the 2000 IGF, professor Helen Wallace characterized “Enhanced Cooperation” as a “poisoned chalice” and identified the possible dangers of incorporating it in the Treaty:

“One danger is that flexibility becomes a vehicle for extensive opting-out of collective regimes by one government after another. Thus a reform ostensibly designed to facilitate initiatives might turn out to be the driver of a large wedge between the real insiders and the rest. The UK has no interest in the development of mechanisms that create first and second class members of the EU. The second danger is that flexibility is used as a tool to deny the new Member States a real voice in the EU process. This is not a good basis on which to accept new Member States unaccustomed to the give-and-take of constructive consensus-building.”³⁴

Wallace’s concerns should not be taken light-heartedly. Indeed, if “Enhanced Cooperation” fails to be seen as a device that aims to strengthen integration, then the political and social structures of the current EU regime are at stake. Kerstin Junge remarks that “Enhanced Cooperation” would create a ‘disintegrative’ effect and concludes:

“... it is also clear that closer cooperation in its present form can only mark the beginning to the institutionalisation of differentiation in the Treaties”. Given the increasing tension between deepening and widening, differentiation will gain in importance in the European integration process. In order to be able to fulfill its’ increasingly important role closer cooperation will have to be reformed, perhaps in the direction of flexible integration. While the disintegrative forces of a less restrictive flexibility clause are obvious, it will become necessary at least to abandon the majority requirement and the national veto. This will make closer cooperation much easier to apply and thus create a basis on which the instrument can fully develop its advantages over uniform integration.

33. “A widely shared concern common here [i.e. among supporter of integration] and also among the principal opponents of “Enhanced Cooperation” is the fear of destroying traditional power balances in EU policy-making, of an unacceptable reduction of their negotiating clout in the EU, where opposition to initiatives is often a means for states to get their own favored policies accepted in exchange for agreeing to the wishes of initiators, or of being absent from decisions—or opinion—making circles, the decisions of which might affect their interests”. *Id.*

34. Helen Wallace, House of Lord Select Committee on the European Union, *The 2000 Inter-Governmental Conference*, 118 July 2000, HL 92, at 33.

In the longer run a clearer definition of the common base and an extension of areas of application will be required.³⁵

Other critics, like Ben Hall, argue that the EU's pace towards integration calls for a system like "Enhanced Cooperation" to be in place. "*. . . it is easy to exaggerate the need for flexibility. What is remarkable is the degree of consensus amongst the member states about the EU's common projects. And the applicant countries are, by and large interested in signing up to the whole acquis, as much for the benefits it would bring as for the need to comply with the entry criteria. The extent of closer cooperation will depend on whether countries such as France and Germany attempt to use it, not so much because they have no alternative, but because they prefer doing business that way*".³⁶

However, Hall is also rather suspicious of how a system that promotes cooperation between a certain number of actors will merge the bigger players to push forward their own agendas. His concerns target France and Germany as he states:

"For those countries keenest on further and faster integration, flexibility is as much a symbol of their ambitions as a route to fulfilling them. For some, ambitious rhetoric is more important than the reality of implementation. Ironically, the French and German governments, which are most determined not to be held back by their more cautious partners, are hardly at the vanguard of closer integration at the 2000 IGF. France opposes [. . . Qualified Majority Voting] QMV to trade policy, asylum and immigration. The German government is still haggling with the Laender about how much more power for the EU they are prepared to concede.

The debate on flexibility tells us much about how certain countries, especially France, perceive their influence in Europe, as about how to improve policy-making in an EU of two dozen members. The original six members of the Union share a certain nostalgia for the way things used to be run. But decision-making is now more open and alliances more fluid. In particular, the influence of the Franco-German axis has been diluted. This trend is likely to continue, as the boundaries of the European Union are extended eastward. France and Germany wish to put

35. "If reforms in this direction are successfully introduced the new flexibility clauses will become a viable instrument to counter the disintegrative forces of the ever greater political heterogeneity of the EU and to ensure that the progression towards an even closer union of at least a few number states to be possible." KERSTIN JUNG, FLEXIBILITY, "ENHANCED COOPERATION" AND THE TREATY OF AMSTERDAM 60 (Kogan Page 1999).

36. Ben Hall, "How Flexible should Europe Be?" Centre for European Reform Working Paper, Oct. 2000, available at <http://www.cer.org.uk/pdf/cerwp7.pdf>.

themselves at the centre of a smaller, elite group where their relative influence will be greater.”³⁷

VI. ARISTOCRACY AND INTERNET GOVERNANCE

The effort to structure the best possible regime for governing the Internet begs an answer to the question of which is the best possible regime. “Enhanced Cooperation” encourages a certain number of States to promote their ideals; under this *status quo*, the few have the power to push forward various agendas without the necessity of the majority. But, is this aristocratic vision the answer to the debate surrounding Internet Governance?

In Book VII of the *Politics*, Aristotle figuratively explains that the best regime is the result of a combination of various features. Aristotle believes that the structure of the best regime necessitates the “[. . .] study not only [of] the best regime, but also the regime that is [the best] possible, and similarly also the regime that is easier and more attainable for all”.³⁸

Aristotle describes aristocracy as one of his ‘right’ constitutions and asserts that if exercised properly, it can produce efficient results. Aristocracy is essentially the regime whereby only a few are able to rule and do so for the communal good.³⁹ According to Aristotle there are two essential elements that need to apply in order for aristocracy to perform its intended function: initially, only the best persons should be able to rule⁴⁰ and, secondly, those who rule should act “with a view to what is best for the city and for those who participate in it”.⁴¹ Therefore, if a State decides to organize itself using the principles of aristocracy, it needs to ensure that the power is distributed to the best persons, who will have the ability to consequently produce just rules. But who are considered the best persons and which characteristics does a just rule entail? Aristotle argues that a just rule is one that is enforced for the common advantage, and that best persons are those who are virtuous and aim at fostering the communal good.⁴²

The proposed framework of “Enhanced Cooperation” resembles the Aristotelian notion of aristocracy. Just like the few in the Aristotelian state would be responsible for governing the State, “Enhanced Cooperation” essentially encourages the collaboration between a specific number of States in various areas of policy. However, can we safely argue that “Enhanced Cooperation”, apart from the rule of the few, shares any other characteristics with aristocracy? If we can ascertain that any alliance formed under “Enhanced Cooperation” will be

37. *Id.* at 21.

38. Aristotle, *Politics*, Book VII, 1288b37.

39. Aristotle, *Politics*, Book III, 3.7:1279a34-37.

40. *Id.* at 3.7:1279a35.

41. *Id.* at 3.7:1279a36.

42. *Id.* at 3.12:1282b16-17.

comprised of the 'best' few, then potentially "Enhanced Cooperation" might be the solution for Internet Governance. On the contrary, if "Enhanced Cooperation" fails to adhere to the original notion of aristocracy, the possibility of having a system that will diversify and split the needs of the Internet community is imminent.

Europe's proposal for "Enhanced Cooperation" can be characterized as a 'Constitutional moment.'⁴³ Aristotle asserts that in aristocracy, as in any other form of 'correct' governance, an ideal constitution should exist in order to set the basic and foundational principles by which the rulers will abide, and which will essentially describe the objectives that must be achieved. This ideal constitution must be comprised of a clear goal, and should instruct the correct way of attaining that goal. Aristotle realizes the difficulties in having an ideal constitution, and for that reason he argues that a combination of basic elements can allow its construction, something that, in turn, will allow a functioning city. These basic elements can be summarized into "arms", "wealth" and justice. "Arms" must be at the disposal of the members of the ruling class for internal government in the event of civil disobedience and to prevent outside aggression. "Wealth" is a prerequisite for both war and the city's internal health, and, finally, the method of *justice* needs to be an integral part of any regime, since it paves the way to arriving at decisions, concerning both policy and matters of wrong and right.⁴⁴

The European proposal⁴⁵ views an institutional change in policy-making decision; it strongly purports that the new model should adhere to the Geneva principles,⁴⁶ while reflecting on the current governance structure and its institutions, such as ICANN. Insisting on the belief of cooperation, Europe's proposal was indeed a 'constitutional moment.' Any proposal that suggests a framework whereby the governing body is restrained in its actions and sets basic rules and principles is highly constitutional in nature. The Geneva principles achieve this end, as they provide the basic framework of what the new governance structure should seek to achieve.⁴⁷

In essence, the European proposal suggests that any policy-making decisions should adhere to and take into consideration the current architecture of the Internet.⁴⁸ This 'architecture' operates as a self-constraint⁴⁹ tool for the new

43. Viktor Mayer-Schoenberger & Malte Ziewitz, *Jefferson Rebuffed—The United States and the Future of Internet Governance* (Kennedy School of Government Working Paper No. RWP06-018 May 2006).

44. Aristotle, *Politics*, Books VII & VIII, where he theorizes upon what the Ideal Political State would be and through what means it could be obtained.

45. WORLD SUMMIT ON THE INFORMATION SOCIETY, *European Union*, WSIS-II/PC-3/DT/21-E, Sept. 30, 2005. See sections 63 and 64 for introductions of main points.

46. WORLD SUMMIT ON THE INFORMATION SOCIETY, *Geneva Declaration of Principles*, WSIS-03/GENEVA/DOC/4-E, Dec. 12, 2003, available at http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC0004!!PDF-E.pdf.

47. See *id.*

48. Internet Architecture Board, "Architectural Principles of the Internet," Requests for Comment:

institution and guarantees that governments will act within a very precise and permissible scope. Openness, interoperability, lack of central control and the end-to-end principle should constitute the ultimate goal under the new regime. Therefore, is the European proposal encompassing the elements that would allow Aristotle to concede to this constitutional structure?

The nature of the Internet calls for a “Constitution” that will encourage and ensure a regulatory framework (the arms that allowed ancient Greek states to control disobedience are the legal tools that would ensure Internet obedience), a framework supporting technological innovation (wealth—the Internet needs financial support for its sustainability and evolution), and, finally, a framework established according to principles of justice (justice always provides the correct way of arriving into more balanced decisions). The European proposal encourages both the creation of a regulatory framework and the importance of the principles of technical design and their ability to influence the way policies will be made. However, there is no mention as to the way this unique cooperation will be achieved, meaning that the proposal fails to illustrate which principles of justice should be in place in order to secure the success of this goal.

If we accept that “Enhanced Cooperation” is promoting an aristocratic merit of few decision-makers, then it is vital to ensure that it shares a similar interpretation to the Aristotelian one. For Aristotle, aristocracy can evolve into the best regime because it is the only form of government that takes into consideration merit as opposed to wealth. Even though Aristotle does not provide the criteria that would guarantee the merit of the participating actors, a possible interpretation is that these were distilled to virtue as well as mental and physical education.⁵⁰ However, over the years new criteria has defined aristocracy. The French Revolution attacked aristocrats as people of a certain status that was derived from birth and not from merit.⁵¹ In the United States, aristocracy has been interpreted more stylistically; nevertheless, it was still highly associated with wealth rather than merit.⁵² Therefore, the notion of having a few make decisions, if not based on the Aristotelian interpretation, might be responsible for creating

1958 (RFC 1958), <http://www.ietf.org/rfc/rfc1958.txt>. RFC 3439; see also “Some Internet Architectural Guidelines and Philosophy,” <http://www.ietf.org/rfc/rfc3439.txt>, which “extends RFC 1958”, but does not supersede it. In particular, it adds more detail to the existing principles and elevates the “keep it simple” approach to a formal “Simplicity Principle,” but leaves the general “beliefs” unchanged.

49. Such a self-constraint has a double effect: ‘negative’ constraint, which simply disallows certain options from the decision-making process; ‘positive’ constraint, it mandates that, when confronted with two admissible alternatives, the decision-maker will opt for the one which gives greater effect to the principle.

50. ARISTOTLE, NICHOMACHEAN ETHICS, Book V.

51. The medieval feudal system that recognized three distinct classes or estates (clergy, aristocracy and commoners) still existed in eighteenth century France. The clergy and aristocracy were exempt from paying taxes and provided advisors to the monarch. The aristocracy gave free military aid to the king. The third estate, the ordinary people as they were known, were the workers who paid taxes. Not only did they pay taxes to their government, but they were forced to support their local church and lord as well.

52. Once again, in the United States aristocracy was associated with a certain status of wealth within the society and was targeted as promoting discrimination within the American society.

groups and alliances that will be based on wealth and which will be able to form their own coalitions and promote their own 'aristocratic' visions.

No matter how possible such a scenario is, it can be suggested that in order to discourage the 'new' aristocrats from strengthening their political influence, a system founded upon the model of "Enhanced Cooperation" should comply with the principle of distributive justice.⁵³ "Enhanced Cooperation" provides equal opportunities to all participating actors to assemble groups. In his thesis, *A Theory of Justice*, Rawls argues that justice consists mainly of two principles: the first is that each person engaged in an institution or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all. The second is that inequalities, as defined by the institutional structure or fostered by it, are arbitrary unless it is reasonable to expect that they exist to function to everyone's advantage, and provided that opportunities furnished are open to all. These principles regulate the distributive aspects of institutions by controlling the assignment of rights and duties throughout the whole social structure, beginning with the formation of a political framework in accordance with which they are then to be applied to legislation. The justice of distributive shares depends upon finding and formulating a correct social structure, in which the fundamental system of rights and duties will be applied.⁵⁴

The two principles of justice apply in the first instance to the main institutions of the social system, their arrangement and how they are combined. Therefore, this structure includes the political framework and the principal economic and social institutions, which, if combined, define a person's liberties and rights and influence her life prospects- what she may expect to be and her status. The intuitive idea is that the life-prospects of people vary according to their position in society; under this perception, society favors certain social structures over others, and these are the basic inequalities that affect life-prospects. It is these inequalities—presumably inevitable in every society—which these principles seek to cure.⁵⁵

Rawls argues that inequalities are likely to be afforded only if there is reason to believe that the institution affording these inequalities will operate to the advantage of every person engaged in it. In the case of the basic structure, this means that all inequalities which affect life-prospects (for example the ones of income and wealth distribution), must be to the advantage of everyone. Since the principle applies to institutions it should be interpreted to mean that any existing inequalities must be to the advantage of the representative man for each relevant

53. EUROPEAN PARLIAMENT REPORT ON NON-DISCRIMINATION AND EQUAL OPPORTUNITIES FOR ALL: A FRAMEWORK STRATEGY (2005/2191(INI)); see also Committee on Civil Liberties, Justice and Home Affairs, Rule 47, "... if blatant inequalities of an 'endemic,' 'structural or even cultural' nature are to be remedied and a seriously compromised balance is thus to be restored, it may be necessary in certain cases for a temporary exception to be made to the concept of equality based on the individual in favour of group-based 'distributive justice' through the adoption of 'positive' measures."

54. JOHN RAWLS, *A THEORY OF JUSTICE* 60 (Oxford University Press 1971).

55. *Id.* at 64.

social position; they should improve each man's expectations. As Rawls phrased it:

"All social values—liberty and opportunity, income and wealth and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage. Injustice, then, is simply inequalities that are not to the benefit of all".⁵⁶

Even though the application of the first principle is straightforward since a constitutional character can be attributed to a right to the most extensive liberty, the main issue concerns the way that the second principle will be interpreted. In trying to find a way to interpret the second principle, Rawls assumes that the first principle requires an equal liberty for all, and that the resulting political system, when circumstances permit it, is that of a constitutional democracy of some form. There must be a liberty of the individual and political equality as well as the ability of freedom of thought and speech. It also requires equality of opportunity and a fair competition for the available positions on the basis of reasonable qualifications. However, Rawls acknowledges the fact that given this background, differences are inevitable, and they amount to economic and social inequalities. These inequalities are related to the distribution of wealth and income and to the distinctions in social prestige and status. This is the basic idea behind the application of the second principle, which Rawls names the "difference principle." According to this principle these inequalities are just, only when they are part of a larger scheme and they work to the advantage of the most unfortunate man.⁵⁷

The idea is to design a system where the resulting distribution, which is the result of those engaged in cooperation and elicited by their legitimate expectations, is just. Procedural justice will determine the distribution of rights. Consider the simplest example of fair division. A number of individuals are to divide a cake: taking into consideration that a fair division is an equal one, which procedure will ensure the outcome? The obvious solution is the individual who cuts the cake to have the last piece. She will divide it equally, because by doing this she will ensure that she will get the same amount as the rest of the group. The problem is to devise a procedure for dividing the cake, which will ensure this outcome.

"Enhanced Cooperation" is meant to serve as the procedure for the fair division of the cake. It allows only a specific number of States to determine how

56. *Id.* at 75.

57. Rawls thinks of the difference principle in the comparison of democratic equality. Justice under this principle is defined so that it is consistent with efficiency, at least in the case that the principle of efficiency contributes to achieve democratic equality. Naturally, if the basic structure is unjust, these principles will authorize changes that will only contribute to 'someone's advantage'; therefore, the democratic conception is not consistent with the principle of efficiency, if this principle is thought to mean that the changes allowed will only work to 'someone's advantage.' *Id.* at 140.

the cake will be distributed and the pieces allocated. However, it can be argued that in reality, “Enhanced Cooperation” fails to respect the “difference principle” of distributive justice. Although the mechanism allows all States the same possibility of composing alliances, the potential effects of such alliances might be detrimental to the non-participating actors, either by excluding them, directly or indirectly, or opposing their sense of governance and policy-making initiatives.

The “difference principle” instructs that a set of values, such as liberty, political equality, freedom of thought and fair competition, need to be respected within any given sociopolitical structure. By creating a generic rule for allowing various States to seek allies in order to promote various regulatory and policy-making issues, “Enhanced Cooperation” affords all participants equal opportunities and complies with the notion of distributive justice. However, distributive justice cannot possibly serve its intended purpose if the outcome of these opportunities can potentially be responsible for the proliferation of inequalities in the wider context of Internet Governance. And, there is a potential danger that such a situation might arise.

The main issue concerns the highly diversified “internet status” of various States around the world. Some countries—mainly Western liberal states—are more advanced than others, such as African and some Asian countries. Furthermore, some countries, such as China, which are expanding economically and influencing international politics and relations, will demand their own share in the decision-making process. This can cause heterogeneity within the new structure, and ultimately the aim of sustaining a smooth operation for the Internet will fail to succeed. At this stage it can be suggested that any policy-making decision should aim to achieve an appropriate balance between the participating states. For some countries, the Internet is still an undiscovered territory, and we need to ensure that the new structure will not support this state of affairs. “Enhanced Cooperation” can promote differentiation and inequalities if it is not used appropriately. It can encourage forms of alliances in which not all states would be able to participate even if they wished to in the future.

Finally, Europe’s proposal is destined to fail to provide a viable solution, because history over the past few years has proven that it is very difficult to design an international framework based on cooperation. The current international law structure is going through a big challenge and it becomes more difficult over the years to achieve multilateralism. Examples include the Kyoto Protocol⁵⁸ and the invasion in Iraq, acting against the mandate of the United Nations Security Council, a possible violation of the United Nations Charter.⁵⁹ Using international law might impede any progress achieved so far, since it has

58. UNITED NATIONS, KYOTO PROTOCOL TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (Dec. 11, 1997), available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

59. See Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173 (2004); see also, Henry H. Perritt, Jr., *Iraq and the Future of the United States Foreign Policy: Failures of Legitimacy*, 31 SYRACUSE J. INT’L L. & COM. 149 (2004).

recently failed to restrain the discretionary powers of states in an efficient manner. Michael Glennon argues that “*excessive violation of a rule, whether embodied in custom or treaty, causes the rule to be replaced by another rule that permits unrestricted freedom of action*”.⁶⁰ John R. Bolton shares a similar view, asking the question as to whether “global governance” is even an issue that we need to deliberate upon.⁶¹

Therefore, the challenge of the Internet Governance debate is how to convince governments to find balanced and appropriate solutions. “Enhanced Cooperation” offers a possible alternative, still its use though can encourage results with negative repercussions. The proposal has gaps, such as that it does not foresee any sanctions for those cases where alliances are formed that negate the participation of the other States and impede on the social and political evolution of the Internet. But, it is the issues of the potential unfairness that should raise suspicion as to whether and by what means the mechanism will ensure that no State will be placed in an unequal or disadvantageous place. The mechanism should be inclusive for all States, irrespective of economic, cultural and/or political differences.

VII. SUGGESTIONS

A. Principles

The new model for international cooperation started in paragraph [49] should adhere, besides the Geneva principles, to the following guiding principles:

- It should not replace existing mechanisms or institutions, but should build on the existing structure of Internet Governance, with a special emphasis on the potential to complement all the actors involved in this process, including governments, the private sector, civil society and international organization each of them in its field of competence;
- This new public-private co-operation model should contribute to the sustainable stability and robustness of the Internet by addressing appropriately public policy issues related to key elements of Internet Governance;

60. Michael J. Glennon, *How International Rules Die*, 93 GEO. L. J. 939 (2005).

61. John R. Bolton, *Unsign That Treaty*, WASH. POST, Jan. 4, 2001, at A21 (“*President Clinton's last-minute decision to authorise U.S. signing of the treaty creating an International Criminal Court (ICC) is as injurious as it is disingenuous.*”)

- The role of governments in the new cooperation model should be mainly focused on principle issues of public policy, excluding any involvement in the day-to-day operations;
- The importance of respecting the architectural principles of the Internet, including the interoperability, openness and the end-to-end principle.

B. Essential Tasks

The new cooperation model should include the development and application of globally applicable public policy principles and provide an international government involvement at the level of principles over the following naming, numbering and addressing-related matters:

- a. Provision for a global allocation system of IP number blocks, which is equitable and efficient;
- b. Procedures for changing the root zone file, specifically for the insertion of new top level domains in the root system and changes of ccTLD managers;
- c. Establishment of contingency plans to ensure the continuity of crucial DNS functions;
- d. Establishment of an arbitration and dispute resolution mechanism based on international law in case of disputes;
- e. Rules applicable to DNS system.

VIII. CONCLUSION

Aristotle has warned us: *“While straight systems of government are concerned with the common advantage according to what is quite simply just, diverging forms of governance are those that in error serve the interest of the ruler(s). Diverging forms of government tend to have an element of despotism . . .”*.⁶²

Even though “Enhanced Cooperation” appears to provide more room for governments to proceed in policy-making decisions, it can also lead to promoting certain interests at the expense of the real needs of the Internet. If the model remains so abstract and ambiguous, it will most likely fail to work. What the Internet needs is a vision and a clear target; a constitution of the values and the ideals that we seek to secure. Political reality coincides with legal realism. Creating a system that is perfect and pleasing to participating actors is difficult, if

62. Aristotle, *supra* note 30, at 1279a:17-21.

not unfeasible. Compromise and vision are necessary to achieve a great good—the design of a community that will define globalization and will permit the peaceful interaction between cultural divergent groups.

Although its future seems quite uncertain within the European Union framework,⁶³ Europe's "Enhanced Cooperation" is—at least—an inclusive proposal for framing the new structure of Internet Governance; nevertheless, the proposal poses a lot of questions with no answers. The main question concerns its ability to maintain a level of justice between the participating actors and manage to consolidate any conflicting interests that currently exist. At the same time, issues like sanctions and enforcement mechanisms should be in place in order to ensure that economic and political means will not invite the creation of specific aristocratic alliances associated with wealth and power.

63. Jo Shaw, *Europe's Constitutional Future*, PUBLIC LAW, Spring 2005, at 132.

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